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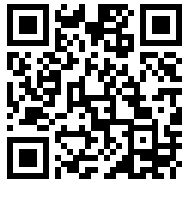

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# A TREATISE

ON THE

# CONFLICT OF LAWS,

OR

# PRIVATE INTERNATIONAL LAW.

BY

FRANCIS WHARTON, LL. D.,

MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW,

AUTHOR OF TREATISES ON CRIMINAL LAW, ON EVIDENCE, ON NEGLIGENCE, AND ON AGENCY.

*SECOND EDITION.*

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# PREFACE.

SINCE the publication of the first edition of this book the literature on the topic has more than doubled. In the United States we have as many rulings bearing on private international law since 1870 as were reported prior to that period. But the reports form but a small portion of the material which a student in this department is obliged to consult. His duty is to discover not merely the local law in his own country, but the local law in all other countries; not merely the arguments by which we defend our own present conclusions, but the arguments by which the systems of other countries and eras are defended; not merely the national, but the cosmopolitan, phase of jurisprudence. We must consider, therefore, not only the reports of our own courts and of the courts of England, but the reports of the courts of the leading states of the continent of Europe. But so far as concerns the continent of Europe this forms but a small part of our task. In Germany, France, Belgium, and Italy, the jurists mould the courts, not the courts the jurists. The judges do not pretend, as do our judges, to give opinions by which their decisions are fitted into a symmetrical system of law, and by which the precedent made to-day sub ordinates itself to the past and dominates the future. This work is left to the jurists; the courts do little more than register the decisions in each particular case. It is by jurists, and not by judges or practising lawyers, that codes are framed; it is by jurists, and not by judges, that a common law is built up. Now it so happens that on this topic of private international law some



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of the most eminent jurists of Europe have been in the last few years engaged. We have one journal of marked ability devoted exclusively to the topic, — the Journal du droit international privé, — published in Paris. We have another, — the Revue de droit international, — published in Ghent, whose object is to discuss international law as a whole. The Institute of International Law has for eight years been occupied with questions of private international law; and among the colleagues with whom I have the honor to be associated in this Institute are some of the ablest public men in Europe. To the archives of the Institute have been contributed many valuable papers; and in addition to these we have had numerous independent treatises bearing on the topic as a whole. To the United States the points discussed by these writers are of peculiar interest. If questions of international litigation are important in Europe, much more are they so with us, who, from the union under our federal system of forty sovereignties, have five times as much international boundary as all Europe together. Europe, again, is made up of nationalized territories; we are made up of territorialized nationalities. Into some of our new states these nationalities have poured in vast streams, forming a preponderance of the settlers; in all of our new states the settlers come from states, either domestic or foreign, with jurisprudences more or less distinct from that of the state which they unite in occupying. It is impossible for us to conduct any wide-spread business without taking into account one or more foreign jurisprudences; and in some of our states there are few marriages in which the international *status* of one of the parties is not of moment, few successions in which a foreign law of distribution does not have to be considered. Other nations may pretend to regard with apathy the progress of international jurisprudence. We cannot. This progress must carry us along, willing or unwilling. In the long run logic must get the better of techni-



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cal law; and the courts, no matter how reluctantly, will have to give up precedent to conclusions made requisite by a sound reason acting on the conditions of the pertinent period. From a mere local stand-point, this cannot be learned. It can be best learned by studying the works of eminent contemporaneous authorities who, from various stand-points, are endeavoring to form a system which will be suited to the immediate conditions on which we are pondering ourselves. And in no country is there so great reason to study such works as there is in the United States.

Fortunately, when we engage in this task, the material before us is abundant. From this country we have a new and enlarged edition of President Woolsey's Introduction to International Law;[1] an annotated international code by Mr. D. D. Field, which has gone through two editions;[2] a treatise on maritime international law by Admiral Dahlgren;[3] a treatise on extradition by Dr. Spear;[4] a treatise on American inter-state law by Mr. Rorer;[5] and four volumes by Mr. Lawrence, in French, of Commentaries on Wheaton, the third and fourth of which volumes are occupied with private international law.[6]

From England we have, by Professor Holland, a treatise on the elements of jurisprudence, in which private international law is conspicuously discussed;[7] a series of lectures on international

[1] Introduction to the Study of International Law. By Theodore D. Woolsey. N. Y. 1879.

[2] Draft Outlines of an International Code. By David Dudley Field. N. Y. 1872. 2d ed. N. Y. 1876.

[3] Maritime International Law. By John A. Dahlgren, late Rear-Admiral U. S. Navy. Boston, 1877.

[4] A Treatise on Extradition. By Samuel S. Spear, D. D. Albany, Weed, Parsons & Co. 1878.

[5] American Inter-state Law. By David Rorer. Chicago, Callaghan & Co. 1879.

[6] Commentaire sur les éléments du droit international de Henry Wheaton. Par William Beach Lawrence, Ancien ministre des États-Unis à Londres; Membre de l'institut de droit international. Vols. i.–iv. Leipzig, 1880.

[7] De l'application de la loi. Par M. T. E. Holland, Professeur de droit int. a l'université d'Oxford. Revue de droit int. vol. xii. (1880), p. 565. This is substantially a translation of



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law by Mr. Amos;[1] a second, and, in part, a third edition of Phillimore's international law, private as well as public;[2] a treatise by Mr. Piggott on foreign judgments;[3] an annotated edition, by Dr. Abdy, of Kent's chapters on international law;[4] a treatise by Mr. Foote on private international law;[5] a scheme bearing on the whole question by Professor Lorimer;[6] a new edition of Mr. Clarke's treatise on extradition;[7] an annotated edition by Sir Sherston Baker of Halleck's international law;[8] a treatise on the law of domicil by Mr. Dicey;[9] a work on private international law by Mr. Westlake, which is rather a new treatise than a new edition,[10] and an independent paper on domicil by the same author; and works by Sir E. S. Creasy,[11] and Mr. Hall,[12] on international law as a whole.

From Scotland we have a new edition by Mr. Guthrie of his annotated translation of Savigny;[13] and a new edition by Mr.

the last chapter of Mr. Holland's work on The Elements of Jurisprudence. Oxford and London, Macmillan, 1880.

[1] Lectures on International Law. By Sheldon Amos. London, Stevens & Sons, 1874.

[2] Commentaries upon International Law. By Sir Robert Phillimore, D. C. L. 2d ed. 1871–1874; 3d ed. (vol. i.) 1880.

[3] Foreign Judgments: Their Effect in the English Courts. By Francis Taylor Piggott. London, 1879.

[4] Kent's Commentary on International Law. Edited by J. T. Abdy, LL. D. 2d ed. London, 1878.

[5] A Concise Treatise on Private International Jurisprudence, based on the Decisions in the English Courts. By John Alderson Foote. London, Stevens & Haynes, 1878.

[6] Prolégomènes d'un systeme raisonné du droit international. Par J. Lorimer. Revue de droit int. x. (1878) 339.

[7] A Treatise on The Law of Extradition. By Edward Clarke. 2d ed. London, Stevens & Haynes, 1874.

[8] Halleck's International Law, a new edition, with Notes and Cases. By Sir Sherston Baker. 2 vols. Kegan, Paul & Co. London, 1878.

[9] A Treatise on the Law of Domicil in England. By A. O. Dicey. London, 1879.

[10] A Treatise on Private International Law, with principal reference to its practice in England, being in lieu of a second edition of the work published in 1858. By John Westlake, Q. C.; Hon. LL. D. Edinburgh; Member of the Institute of International Law. London, 1880.

[11] First Platform of International Law. By Sir Edward S. Creasy. London, 1876.

[12] International Law. By W. E. Hall, Barrister-at-law. Oxford, Clarendon Press, 1880.

[13] A Treatise on the Conflict of Laws. By F. C. von Savigny. Trans-



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Fraser of his work on husband and wife, in which the conflict of laws in this relation is elaborately considered.[1]

Belgium, besides being the seat of the publication of the Revue de droit international, has given us, in addition to several less bulky treatises, four volumes of a comprehensive work on private international law by M. Laurent, professor at the University of Ghent.[2]

In the domain of private international law, France, since the Franco-German War, has been marked by peculiar fertility, and Germany by comparative barrenness. To M. Demangeat, a master as well as a leader in this line, we owe the institution, in part, of the Journal du droit international privé, as well as several valuable articles appearing in that periodical.[3] M. Renault has published on succession by strangers in France,[4] and on political crimes in connection with extradition;[5] M. Mallet on maritime hypothecation;[6] M. Lyon-Caen on private international maritime law;[7] M. Vazelhes on extradition;[8] M. Rivier on the elements of private international law;[9] M. Massé on commercial law in the same relation;[10] M. Asser on the systematization of

lated with notes by William Guthrie. 2d edition. Edinburgh, 1880.

[1] A Treatise on the Law of Husband and Wife. By Patrick Fraser, LL. D. 2d ed. Edinburgh, 1876.

[2] Droit civil international. Par F. Laurent, Professeur a l'université de Gand. I.–IV. Bruxelles, Paris, 1880.

[3] See, particularly, articles entitled: Force Obligatoire du droit int. Par Ch. Demangeat. Jour. du droit int. privé, i. (1874) 7; De la compétence des tribunaux français dans les contestations entre étrangers. Par Ch. Demangeat. Jour. du droit int. privé, iv. (1877) 109.

[4] De la succession des étrangers en France. Par L. Renault. Jour. du droit int. privé, ii. (1875) 330; iii. (1876) 17.

[5] Des crimes politiques en matière d'extradition. Par Louis Renault, Professeur de droit international a l'école des sciences politiques. Paris, 1880.

[6] L'hypothèque maritime au point de vue théorique et practique. Par E. Mallet. Paris, 1877.

[7] Etudes de droit int. privé maritime. Par Lyon-Caen. Jour. du droit int. privé, iv. (1877) 479.

[8] Etude sur l'extradition. Par Et. de Vazelhes. 2 vols. Paris, 1877.

[9] Introduction a l'étude du droit int. Par A. Rivier. Paris, 1879.

[10] Le droit commercial dans ses rapports avec le droit des gens et le droit civil. Par M. G. Massé, Conseiller a la Cour de Cassation. Troisième édition, revue et augmentée. Paris, Guillamin, 1874.



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private international law;[1] M. Arntz on the immutability of the conjugal régime;[2] M. Thomas on international bankruptcy;[3] M. de Folleville on naturalization;[4] M. Glasson on marriage and divorce.[5] From M. Goirand we have an English treatise on the French Code of Commerce;[6] from M. Clunet an essay on the international trade-mark relations of the United States;[7] and from M. Calvo a third edition of his standard work on international law, touching many questions discussed in the following pages.[8] In the French language, though issued from Ghent, are the annual publications of the Institute of International Law.[9]

From Germany we have a new edition of Dr. Bluntschli's Völkerrecht,[10] as well as a contribution by the same author to the controversy in the de Bauffremont case;[11] a treatise on international law by Professor Bulmerincq;[12] a treatise on international criminal law by Dr. Rohland;[13] an article on extradition by Professor von Bar, as well as a paper on criminal jurisdiction by the same author;[14] outlines of international law by Dr. Neu-

[1] Droit international privé et droit uniforme. Par M. T. M. C. Asser. Revue de droit int. vol. xii. (1880) No. 1, p. 5.

[2] Observations sur la question de l'immutabilité du régime conjugal en cas de changement de domicile des époux. Par M. Arntz. Revue de droit int. vol. xii. (1880) 323.

[3] Etudes sur le faillite: de la faillite dans le droit français et dans le droit étrangère. Par Léonce Thomas, Avocat. Paris, Larose, 1880.

[4] Traité de la naturalisation. Par D. de Folleville. Paris, 1880.

[5] Mariage civil et divorce. Par E. Glasson. Paris, 1880. Infra, § 205.

[6] The French Code of Commerce, with a practical Commentary. By L. Goirand. London, Stevens & Sons, 1880.

[7] De l'état actuel des relations internationales avec les États-Unis en matière de marques de commerce. Par M. Edouard Clunet. Paris, 1880.

[8] Droit int. théorique et practique. Par Ch. Calvo. 3d ed. Paris, 1880.

[9] Annuaire de l'institut de droit international. Gand, 1877–1880.

[10] Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt. Von Dr. J. C. Bluntschli. Nördlingen, 1872. 3 Auf. 1878.

[11] Infra, § 210.

[12] Praxis, Theorie, und Codification des Völkerrechts. Von A. Bulmerincq. Leipzig, 1874.

[13] Internationales Strafrecht. Von Dr. Rohland. Leipzig, 1877.

[14] Interprétations divergentes du traité d'extradition de 1842 entre l'Angleterre et les États-Unis. Par Dr. von Bar. Revue de droit int. ix. 5. Ueber die internationale Anwen-



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mann,[1] and Dr. Schultze;[2] a treatise on German maritime law by Dr. Lewis;[3] and a scheme of international arbitration by Dr. Goldschmidt.[4] It is an interesting mark of a revival of German literary interest on this topic that a journal mainly devoted to its discussion has been lately started in Leipzig.[5]

Switzerland has given us some valuable contributions. M. Soldan has published on domicil;[6] M. Hornung on international offences;[7] Dr. Teichmann on change of conjugal domicil;[8] and M. Brocher, not only on the topic before us in its general bearings, but on several special questions.[9]

From Spain we have a work by M. Negrin on international maritime law.[10]

To Italy, as befits the country which has recently taken the lead in inaugurating a new school in this department, we are indebted for a series of important publications. The most striking of these emanate from M. Mancini, no less distinguished as one

dung des Strafgesetzes. Von Dr. von Bar. 28 Gerichtssaal.

[1] Grundriss des heutigen europäischen Völkerrechts. Von Dr. L. Neumann. Wien, 1877.

[2] Grundriss zu Vorlesungen über Völkerrecht. Von Dr. Schultze. Heidelberg, 1880.

[3] Das deutsche Seerecht. Von Dr. William Lewis. 2 vols. Leipzig, 1878.

[4] Projet de règlement pour tribunaux arbitraux internationaux. Par le Dr. Goldschmidt. 1878.

[5] Zeitschrift für vergleichende Rechtswissenschaft. Von Dr. Franz Bernhardt. Bd. 1, Stuttgart, 1877.

[6] 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. Par C. Soldan. Lausanne, 1877.

[7] Note sur la répression des délits contre les droits des gens. Par M. Hornung, Professeur à l'université de Genève. Revue de droit int. vol. xii. (1880) p. 104.

[8] Ueber Wandelbarkeit und Unwandelbarkeit des gesetzlichen ehelichen Güterrechts bei Wohnsitzwechsel. Von Dr. Albert Teichmann. Basel, 1879.

[9] Etude sur les conflits de législation en matière de droit pénal. Par Charles Brocher. Revue de droit int. vii. (1875) 22, 169.

Etudes sur la lettre de change dans ses rapports avec le droit international privé. Par Charles Brocher, Genève. Revue de droit international, vi. (1874), pp. 5, 196.

Nouveau traité de droit international privé. Par Charles Brocher, Genève. Paris, 1876. This work was partially published in advance in the Revue de droit int., vols. iv. v.

[10] Tratado elemental de derecho internacional maritimo. Madrid, 1873.



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of the leaders in the struggle for Italian unification and independence than as a jurist.[1] We have, in addition, from M. Fiore, treatises on private international law,[2] on public international law;[3] and on penal law and extradition.[4] Italian private international law has been distinctively treated by M. Esperson,[5] who has also given us a work on international maritime jurisprudence.[6] The Italian system has also been discussed by M. Norsa,[7] and by Professor Pertile,[8] and international bankruptcy by M. Carle.[9]

From Russia we have an essay on the municipal relations of international law by Count Kamarowsky,[10] a work on the consular system in the East by M. Martens,[11] as well as an expo-

[1] Droit international public. Par P. S. Mancini. Naples, 1871. With this are to be considered the papers devoted peculiarly to private international law published by M. Mancini in the Jour. du droit int. privé, vols. i. ii.

[2] Droit international privé ou principes pour résoudre les conflits entre les législations diverses, en matière de droit civil et commercial. Par P. Fiore, Professeur, etc., traduit de l'Italien, annoté et suivi d'un appendice de l'auteur, comprenant le dernier état de la législation, et de la jurisprudence; par P. Pradier-Fodéré, Professeur á l'école des sciences politiques et administratives de Lima, Pérou. Paris, 1875.

[3] Trattato di diritto internazionale pubblico. Par Pasquale Fiore. 2d ed. Turin, 1879. In this edition extradition and diplomatic extra-territoriality are copiously discussed.

[4] Traité de droit pénal int. et de l'extradition. Par P. Fiore, trad. par Ch. Antoine. Paris, 1880.

[5] Le droit int. privé dans la législation Italienne. Par P. Esperson, Professeur à la université de Pavie. Jour. du droit int. privé (1880), 245.

[6] De la juridiction internationale maritime. Par Pietro Esperson, Professeur de droit int. à l'université de Pavie. 1877.

[7] Revue de la jurisprudence Italienne en matière de droit int. privé. Par Cesar Norsa, Milan. Revue de droit int. ix. (1878) 207.

[8] Elementi di diritto internazionale moderno. By Professor Pertile. Padua, 1877.

[9] La faillite dans le droit int. privé. By M. Guiseppe Carle, Professeur extraordinaire de l'université de Turin, traduit par M. Ernest Dubois. Paris, 1876.

[10] Quelques réflexions sur les relations entre le droit international et les différentes branches de la jurisprudence. Par le Comte Kamarowsky, Moscou. Revue de droit int. vii. (1875) 5.

[11] Das Consular-wesen und die Consular-jurisdiction im Orient. Von F. Martens, Professor des Völkerrechts, St. Petersburg. Berlin, 1874.



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sition of Russian diplomatic history by the latter author.[1] From Egypt we have a paper on the local judicial system by Dr. Dutrieux;[2] from Buenos Ayres a commentary by Dr. Rivadavia,[3] and a course of lectures by Dr. Alcorta;[4] from Peru the annotations by Professor Pradier-Fodéré, already noticed; from Japan an article on the mixed tribunals of the East.[5]

With this mass of recent literature before me, when undertaking the revision of my first edition, and in view of the great accumulation of relevant American adjudications, I felt that I was either to expand the work into two volumes, or remodel it by reducing that portion of it which gave the views of the older jurists, so as to leave room for the necessary additions. The latter course I have preferred, though it has involved much labor, and has led to such a change in the structure of the work as to leave unaltered but little of the former material. In making this change, my object has been to exhibit private international law as it now is. At the same time, while giving what I believe to be a just exposition of conclusions reached in other countries, I felt it to be a principal duty to vindicate the distinctively American tenets on this important topic. I have done this copiously, and I have made it the most conspicuous feature of my book. The question that primarily emerges is, What determines personal *status?* The law of nationality, so answer distinguished leaders of the new school now dominant in Italy, in France, and in Belgium; but, while they say this, they admit as exceptions all cases involving local policy and

[1] Recueil des traités, etc. St. Petersbourg, 1874.

[2] La question judiciaire en Égypte. Par le Dr. Dutrieux (du Caire). Revue de droit int. viii. (1876) 573.

[3] Derecho internacional. Por Luis Pintos y Joaquin Rivadavia. Buenos Ayres, 1874.

[4] Derecho internacional privado. Curso de 1878, dictado por el Doctor A. Alcorta, 144 pp. Buenos Ayres. This is an analysis of the lectures of Dr. Alcorta, and not an expanded treatise.

[5] L'exterritorialité et les tribunaux mixts dans l'extrème Orient. Yokohama, Japan, 1875. Jour. du droit int. privé, ii. (1875) 168, 249.



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good morals. The difference between my learned colleagues and myself in this relation is, that their exceptions I regard as the principle; their principle as the exception. National policy, I hold, determines personal capacity; and in this country national policy prescribes that no home restrictions of capacity shall be regarded as clinging to foreigners when they marry or do business on our shores.[1] It is here we encounter what may be called the distinctive jurisprudence of the United States. In other respects, we adopt the rules held now, not only in France and Italy but in Germany and England, that succession is governed as to movables by the *lex domicilii;* that movables as well as immovables are governed, in transactions *inter vivos*, by the *lex situs;* that contracts are governed by the law of the place in which they have their distinctive seat; that each sovereign has internationally jurisdiction to punish, if the offenders are found on his territory, offences against his essential prerogatives. On these points of agreement, as well as on the question of personal capacity, on which we have the misfortune to disagree with our foreign critics, there are now a vast number of decisions by our American courts. These decisions I have sought to collate and systematize. I have compared the results freely with the contemporaneous conclusions in England, France, Belgium, Switzerland, Germany, and Italy. The law in those countries I have endeavored faithfully to give, since that law comes constantly up in issues litigated before our courts. But my main object has been to exhibit the law which, if not actually at this moment prevailing as a system in the United States, is the law to which our adjudications as well as our traditions tend.

F. W.

*February* 12, 1881.

[1] See infra, §§ 102 *et seq.*



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# ANALYSIS.

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V. Forms of Suit and Process, § 747.
VI. Attorneys and Proctors, § 751.
VII. Evidence, § 752.
VIII. Lis Pendens, § 783.
IX. Set-off, § 788.
X. Execution, § 790.

CHAPTER XII.

BANKRUPTCY, § 794.

CHAPTER XIII.

CRIMINAL JURISDICTION, § 810.

CHAPTER XIV.

EXTRADITION, § 835.



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# ERRATA AND ADDENDA.

Page 1. Line 6, for "parts" read "points."
Page 9. Section 4, line 2, for "several" read "two."
Page 32. Second column of note, first paragraph, add "Minter *v.* Shirley, 45 Miss. 376."
Page 33. First column of note, after "Reynolds, ex parte," add "5 Dill. 394."
Page 35. First column of note, end of third line, add "Infra, § 252."
Page 43. After "United States," at end of text, add "See treaty negotiated in 1880–1, limiting Chinese emigration."
Page 49. End of first paragraph of note, add "See for criminal trials infra, § 814.'
Page 62. Add as note, "See fully infra, § 810."
Page 67. First column of note, ninth line, for "Winnick" read "Minnick."
Page 96. Note 6, for "Jepp" read "Jopp."
Page 125. End of note 2, add "See on same principle, Kintzing *v.* Hutchinson, 7 Weekly Notes, 226."
Page 160. *Dele* "has" in last line of notes.
Page 295. Note, second column, sixth line from end, after "reached" insert, "The Court of Appeals, at Brussels, however, subsequently held that Madame de Bauffremont's second marriage was invalid, she having no right to acquire a foreign naturalization. Jour. du droit int. privé, 1880, 508."
Page 304. After the references to "Harvey *v.* Farnie," first column of note, add "Affirmed on appeal, 1881, 23 Alb. L. J. 86."
Page 311. Make similar addition to ninth line of second column of note.
Page 332. After "Loud *v.* Loud," add "129 Mass. 15."
Page 353. Second column of note, end of first paragraph, add "Morgan's Ancient Society, 1877, p. 80."
Page 513. Second column of note, end of first paragraph, add "See Whitcomb *v.* Ins. Co. 8 Ins. Law J. 629."
Page 548. At end of note 1, add "S. P., Goodsell *v.* Benson, Sup. Ct. Rh. Island, Feb. 1881."
Page 594. At end of note 1, add "Willard *v.* Hammond, 21 N. H. 382; Fay *v.* Haven, 3 Met. Mass. 109."
Page 594. Note 2, add "Wilkins *v.* Ellett, 9 Wal. 740."
Page 650. Note 8, for "Eslaro" read "Eslava."
Page 668. Note 4, change "§ 583" to "§ 753–4."



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# CONFLICT OF LAWS.

## CHAPTER I.

### PRELIMINARY PRINCIPLES.


Private international law part of the common law, § 1.
Not the creature of comity, § 1 *a*.
Nor of convention, § 2.
Nor of reciprocity, § 3.
Penal laws not extra-territorial, § 4.
Expatriation now internationally conceded, and naturalization sanctioned, § 5.
Temporary return to native land does not revive allegiance, § 6.
Political conditions in Italy, Belgium, and France, favoring the unification of jurisprudence at home and recognition of foreign personal laws, nationality being the test, § 7.
Political conditions in the United States favoring unity in international relations and particularism in inter-state relations, domicil being the test, § 8.
Indian tribes constitute a distinct nationality, § 9.
All persons born in a state are citizens, when internationally subject to its jurisdiction, § 10.
Consent necessary to change of nationality, § 10 *a*.
A married woman partakes of her husband's nationality, § 11.
Chinese in the United States not naturalized or domiciled, § 12.
Naturalization implied in annexation, § 13.
Naturalization affects only political *status*, and does not touch penal disabilities, § 14.
Jurisdiction exercised by civilized in imperfectly civilized states, § 15.
Extra-territoriality of diplomatic residences — Asylum, § 16.
Aliens entitled to equal civil rights with citizens, § 17.
Jurisdiction over crime is objective, § 18.


§ 1. PRIVATE International Law is that branch of the law of a country which relates to cases more or less subject to the law of other countries. It is a law, and hence binding; but it is binding, so far as concerns England and the United States, not because it has been enacted as a code, nor because all its parts have been definitely settled by prior decisions, but because, like other parts of the common law, it is ascertained as a logical inference from the conditions of each case.[1] Even in the earlier periods of English litigation

Private International Law part of the common law.

[1] Crookenden *v.* Fuller, 1 Sw. & Tr. 441; Lacroix, in re, L. R. 2 P. D. 94. That a foreign law, when governing a case, is to be accepted, not as a matter of comity, but as part of the case which it rules as a matter of right, is held by Sir William Scott in Dalrymple *v.* Dalrymple, 2 Hag. 59;



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it was found necessary, in order to do justice in cases subject to two or more jurisprudences, to study these jurisprudences for the purpose of extracting from them rules of general recognition. The ecclesiastical courts, whose system was that of the Roman and canon law, were the first to recognize such rules as determining questions of marriage and of succession. The law merchant, as it was called, was drawn in a large measure from the jurisprudence of the continent of Europe; yet there is no question that the law merchant is part of the common law of Eng-

and by Turner, V. C., in Caldwell *v.* Vanvlissinger, 9 Hare, 425.

Christiancy, J., in Thompson *v.* Waters, 25 Mich. 214, said: "But upon the principle of comity, *which is part of the law of nations, recognized, to a greater or less extent, by all civilized governments*, effect is frequently given in one state or country to the laws of another, in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with or depending upon such foreign laws, without which commercial and business intercourse between different states and countries could scarcely exist." Waiving the question whether the term "comity" can be applied to a system of law, binding on the courts, we have here the assertion that private international law is recognized as more or less authoritative by all civilized governments. To the same effect is the following, from Denio, J., in Moultrie *v.* Hunt, 23 N. Y. 394: "All civilized nations agree, as a general rule, to recognize title to movable property created in other states or countries in pursuance of the laws existing there, and by parties domiciled in such states or countries. *This law of comity is parcel of the municipal law of the respective countries in which it is recognized.*"

In Rawls *v.* Deshler, 3 Keyes, 572, it was held that a statute under which a contract is made will be regarded in a foreign state as actually incorporated in the contract, and this is affirmed in Comer *v.* Cunningham, 77 N. Y. 391. That duty and not comity is the basis on which foreign judgments rest is ruled in Meyer *v.* Ralli, L. R. 1 C. P. D. 369, cited infra, § 647. But if judgments, why not the law which these judgments formulate?

The ambiguity of the term "law," and the fallacies to which its use in a double sense leads, have been elsewhere noticed. Whart. on Ev. § 1239. Pregnant illustrations of these fallacies may be found in the topic immediately before us. Thus the term "law" is sometimes confined to codes, or to rules definitely settled by the courts of a particular state for the control of cases subject to such state; and as under this head the principles of private international law are not embraced, the principles of private international law are held not to be a part of the law of the land. On the other hand, if we hold that each case is to be governed by the law to which it is distinctively subject, in default of positive legislation to the contrary, and that this principle is binding on judges as part of the law of the land, then private international law is part of the law of the land. This view is substantially taken by Mr. Westlake (Priv. Int. Law, 1880, p. 4), where he says: "The place of private international law is in the division of national law."



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land.[1] Nor can it be objected that because private international law is as yet in some relations unsettled, it cannot be regarded as part of the common law. The law of negligence was, until a few years ago, unsettled, yet no court on that account hesitates to determine at common law a question of negligence. Public international law is unquestionably part of the common law of the land, yet what can be more unsettled than some of the leading questions of public international law? Few offences, for instance, demand more peremptorily a definition than does piracy; yet not only do our American statutes leave the offence undefined, but the English Commissioners, appointed in 1878 to revise the English Criminal Code, expressly declined to give the term a definition, preferring, they said, that the matter should remain as it is by the law of nations, which is part of the English common law.[2] To constitute piracy, must it be *lucri causa?* In other words, is it piracy to destroy a vessel merely to annoy or hurt an enemy, and not to benefit the assailant? Is it piracy to carry off by force ship's stores left in custody of a guard on a desert island? Is privateering piracy when the privateers convert the property seized by them to their private use? These are questions of great importance, and as yet unsettled. They are questions determinable by the principles (supposing there be no statute) of public international law. And this is done, in each case of piracy that arises in England or the United States, by English or by United States judges, on the ground that in such matters they are bound by the law of nations, which is part of the common law of the land. And if this is so as to public international law, *a fortiori* must such be the rule in cases

[1] "In mercantile questions, such as bills of exchange and the like; in all marine causes relative to freight, average, demurrage, insurance, bottomry, and others of a similar nature, the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So, too, in disputes relating to prizes, to ship-owners, to hostages, and ransom bills, *there is no rule of decision but this great universal law*, collected from history and usage, and from such writers of all nations and languages as are generally approved and allowed of." Black. Com. iv. 67, 68.

"Dans le cas du droit international privé, de même que dans celui du droit international public, les cours des justice sont tenues d'observer le droit des gens comme rentrant dans le droit commun du pays." Lawrence, Comment. sur Wheat. iii. 64.

[2] See Whart. Crim. Law, 8th ed §§ 1860 *et seq.*; Lord Tenterden in Novello *v.* Toogood, infra, § 16.



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of private international law, in which parties themselves unite in subordinating their acts to particular jurisprudences. The fact that there is no precedent in the old books for any particular rule of private international law which it is necessary to invoke in order to do justice, is no reason why such rule should not be applied. There is no precedent, for instance, in the old books, for the position that the mode of performing a contract is to be determined by the law of the place of performance. The rule is one which is in one sense distinctively of private international law. Yet there is no question, on the other hand, that it is a part of Anglo-American common law. And as part of the Anglo-American common law, we are also to reckon all rules of private international law which are essential to the due distribution of justice among litigants. This might be doubted, perhaps, if we followed the practice of France, and other European states, of refusing to take cognizance of suits between foreigners. But we do not so refuse. All litigants, whatever may be their nationality, are entitled to equal justice in our courts.[1] And in each case we apply the law to which it is distinctively subject.[2]

[1] Infra, § 17.

[2] It may be objected that the title, "Conflict of Laws," is inconsistent with the position in the text, that there is a private international law, as part of the common law. But we have as much right to speak of a conflict of laws, when the question is which of two territorial laws rules a particular case, as we have to speak of a conflict of laws in cases where the question is whether the old common law holds, or whether that law has been extinguished by a statute. There is a conflict of laws, in fact, in every case that is brought into court; and the fact that a conflict exists is no more fatal to a consistent international jurisprudence than it is to a consistent municipal jurisprudence.

The position in the text is not to be confounded with that of Fœlix, chap. iii. Nos. 9–11, who holds that the recognition of foreign laws, as affecting a litigated case, depends upon consent, either express or implied, manifested either by statute or treaty, or by judicial authority. In one sense this is true, but only in the sense that our own laws depend for recognition on legislative or judicial consent. We no more require a treaty, or even a prior judicial decision, in order to apply the rule *locus regit actum* to an act done abroad, than we require such authority to apply the same rule to an act done at home. To this effect see Fiore, Droit int. privé, by Fodéré, 1875, § 37.

Mancini, Jour. du dr. int. privé, 1874, p. 287, urges the importance of an international code of private international law on the ground of the unsatisfactoriness of all the solutions proposed of the vexed question of the proper law relating to contracts. After pointing to the objections which apply to the other theories, he takes up that of Savigny, who maintains,



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§ 1 *a*. In one sense comity may be properly accepted as the basis on which a foreign law will be recognized as governing a case our tribunals are called upon to adjudicate. Treaties are entered into in part from comity, as a matter of mutual accommodation to the parties; and comity, or its synonym courtesy, is often stated in the preamble of treaties as the ground for their negotiation. It is natural, also, for a judge, in giving an opinion admitting a foreign law as binding, to say, that there is a "comity" between civilized states which leads them reciprocally to adopt each other's rulings on points distinctively subject to such rulings. But when we ask why is this "comity" regarded as ruling a case in an English or American court, the answer is, "because this is required by the common law;" and if we ask why it is required by the common law, the answer is, that the law of nations is part of the common law, and private international law is part of the law of na-

Does not depend on comity.

as we will see, that the place which is to supply the law governing a right is the place of the seat of such right. He argues that this definition is on its face imperfect. He assumes the case of a person whose right to make a contract as to certain goods is contested: (1.) because of his nationality; (2.) because the contract was made in B., a foreign land; and (3.) because the goods were at the time situate in C., another foreign land. Which of these states is the "seat" of the contract? The very idea of conflict in such cases involves a seat in each of the conflicting jurisdictions; and Savigny, it is urged by Mancini, gives us no test to decide the conflict. But this is a mistake. Savigny gives us a test when he tells us that the *lex fori* is to decide which is the applicatory law. And this test is virtually adopted by the Italian Code, of which Mancini was the distinguished originator, and which reserves to the *lex fori* to exclude the operation of foreign laws in all cases involving domestic order and good morals, leaving it to the *lex fori* to decide what these terms include. Even if there are treaties, the *lex fori* would have to decide to what cases the treaties apply.

Savigny's theory of a community of law between civilized nations, by virtue of which community each act is to be governed, no matter what may be the locality of the court by which it is adjudicated, by the particular law to which by private international law it is subject, is also criticised by Laurent, Droit civil int. (1880), ii. p. 363. The exceptions, it is argued by Laurent, destroy the rule. Savigny excepts all laws which are positive and coercive. To this Laurent replies that all laws are positive and coercive. But acute as is this criticism in a state where the law is embodied exclusively in a code, it does not apply to states such as England and the United States, where the great mass of cases are governed by a common law, of which the law of nations is part. In this respect, private international law is governed by the same rule as public international law.



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tions. And this is consistent with Savigny's position, that since by private international law a juridical act is governed by the law in which that act has its seat, we must, in order to find out what the act really is, inquire what is the law to which it is subject. When we have determined what that law is, we find what the common law is as to the particular issue. If we understand by "comity" simply politeness, meted out either at the caprice of the judge, or granted in consideration of similar concessions by the state whose law is for the particular case accepted, then "comity" is not the true foundation on which our acceptance of the rules of private international law rests. For when a foreign law binds a particular case, then it becomes part of our common law, and the parties are entitled of right to have it applied. This right, however, is not a purely natural right, based on the principle that as all men are equal, each man has a right to be judged according to his own law, wherever he is. On the contrary, the right in question is strictly a juridical right, which exists, so far as we are concerned, because our common law incorporates private international law in all cases to which that law applies.[1]

[1] To make the dispensation of right a matter of politeness or of comity is an idea, argues Brocher, which must inspire us with greater or less repulsion. It rests on old errors, already abundantly refuted. At the same time the system has in it a certain element of truth. A practitioner must necessarily, in a pending case, inquire as to the law existing in the place where the case is to be tried. A judge is bound to take primarily into consideration the law he is charged to apply. Merely theoretical considerations cannot overrule positive precepts; but such considerations cannot, as a general rule, be set aside. To see in private international law only an *ensemble* of usages, without the influence of regulative principles, is to abandon the best means of illustrating even a question of positive law. The authorities have their history to explain them, on which their sense is dependent. And this history was not solely developed under the influence of reciprocal comity. There is a definite system of private international law to be applied to each case. Of this system the constituents are: (1.) the special legislation in force in each locality; (2.) certain international customs based on common ideas or interests; (3.) certain applicable treaties and diplomatic conventions; (4.) right reason operating through free logic. Brocher's Droit int. privé, pp. 10–13. To same effect see Hooker Ecc. Pol. book i., where it is maintained that fact and reason are the two coördinate factors of law.

It is hard to understand, says Fiore, how comity can decide questions of right. Either the individual in question has certain rights, in his juridical capacity, which rights are recognized



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§ 2. Convention has been sometimes mingled with courtesy as a basis for private international law; but they are in their nature distinct. A conventional right rests, if not on treaty, at least on a mutual understanding between two

Nor of convention.

extra-territorially, as a matter of law, and not of comity, or he has no rights, and depends solely on comity, in which case we have to deal exclusively with the arbitrary and the indeterminate. Fiore, Droit int. privé, 1875, § 33.

Mr. Westlake, in a letter to Mr. Lawrence (Lawrence, Commentaire sur Wheaton, iii. 58), says that he agrees with Mr. Lawrence in substituting the word "justice" for "comity." Mr. Lawrence, after quoting this letter, adds, "Les expressions 'Collision' et 'Conflit des Lois' présupposent que les lois de différents pays sont toujour en conflit l'une avec l'autre, quand leur application à un cas particulier est mise en question; tandis qu'il est bien possible qu'elles, s'harmonisent toutes parfaitement et que toutes laissent la decision à la même loi et au même tribunal." Mr. Lawrence properly asks how an idea vague and flexible as that of comity could be taken as a rule of right. It should be added that the difference is really, in most cases, only verbal. Thus in Milliken *v.* Pratt, 125 Mass. 374, quoted infra, § 101, Chief Justice Gray speaks of comity as the ground for the recognition of foreign law. When we look, however, at the way in which this comity is applied by this learned judge, we find that it is subject as much to fixed and consistent rules as is any other branch of jurisprudence. It is not meant, therefore, that it is a matter of comity, to be discussed *de novo* in each particular case, whether we will interpret a contract according to the *lex loci celebrationis*, or whether we will apply to the practical working of a contract the *lex loci solutionis*, or whether as to extrinsic forms the rule *locus regit actum* is to prevail. These points are considered in the jurisprudence of Massachusetts, as well as in the jurisprudence of the rest of our states, to be as well settled as any rules establishing principles of domestic law. What "comity," therefore, means in the sense in which it is used in opinions such as we have just cited is, not that each case as it arises depends upon "comity" for its decision, but that the intercourse between sovereign states finds its original sanction in "comity." This is merely an application to states of the social contract theory of Locke. It may be unphilosophical. But limited to mere speculation, it does no practical mischief. It is consistent with the recognition of private international law as a component part of our jurisprudence.

Mancini, in a criticism in the Journal du droit int. privé for 1874, concedes that the doctrine of comity has the support not only of Huber and Voet, but of Story, Rocco, Wheaton, Fœlix, and Phillimore. He holds, however, that this is attributable to the fact that these eminent writers have fallen into the error of confounding the absolute legislative power of each state with the unjust exercise of that power, and consequently of confounding that which is done with that which ought to be done. This false idea of a concession free, and not morally obligatory, on the part of each sovereign, by which a foreign applicatory law is recognized, he considers the principal obstacle in the way of



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nations. It cannot, in cases in which it is due, be denied, nor, if granted, is it granted as a matter of grace. But, as is argued by an eminent Italian professor and jurist,[1] this theory does not settle the question, but only pushes the inquiry, in all cases where a tacit understanding is set up, a step further back. What is the law which was presumed to be accepted by the parties? This involves a series of new questions for the *lex fori* to determine. And the assumption that law owes its origin to convention is untrue as an absolute principle. We can undoubtedly expatriate ourselves. But while we remain in a country we are subject to its laws, no matter how much we may dissent from them. The law is accepted because it has to be obeyed; it is not obeyed because it is accepted. And the assumption that law is originally started by consent is equally false. Consent to obey law presupposes a law under which the consent is made.

Nor of reciprocity.

§ 3. Reciprocity has been adopted by the codes of several states (*e. g.* France) as the basis of international law, the test being that we are to grant to the subjects of a foreign state only such privileges as the foreign state in question grants to the subjects of our own state. The system has been elaborately defended by eminent French and Italian jurists,[2] and has been worked into several of our American treaties. Un-

forming a scientific system of private international law. Two consequences, he argues, follow from this hypothesis of comity: first, the sovereign, from whom the concession emanates, feels himself entitled, at his good pleasure, to limit and modify from time to time the concession; and, secondly, in a matter purely discretionary, it is not necessary to search for the rational principles of private international law. The science is thus reduced to a study of comparative legislation. He goes on to say, that more recently the doctrine of comity has not only lost its ancient favor, but has been logically overthrown. He invokes the great name of Savigny, who maintains that the rules established in each civilized state for the settlement of litigation involving foreign law are not to be regarded as mere courteous concessions, dependent upon caprice, but are a distinctive development of jurisprudence, following the same progress as is observed in the particular statutes of the same state. Savigny, vol. viii. p. 31. He adds, that all the members of the Commission appointed by the Institute on this topic, consisting of Messrs. Bluntschli, Hefter, Lawrence, Massé, and Westlake, concur in the same conclusion. The report of M. Mancini, as given to the Institute at its session in Geneva, in 1874, will be found in the Revue de droit int. 1875, pp. 329 *et seq.*

[1] Fiore, Droit int. privé, trad. par Pradier-Fodéré, 1875, § 34.

[2] Rocco, Diritto civile internazionale; Aubry et Rau, 3d ed. i. p. 261.



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doubtedly reciprocity may be a good basis for a diplomatic arrangement by which two or more states enter into a specific compact for the settlement of certain disputed issues. But if it be offered as a reason why a foreigner, coming before our courts, should have justice granted or refused to him, it is open to serious objections. (1.) It destroys all consistency in our rulings in international litigation, — a litigation involving vast interests, and affecting many important titles. (2.) It makes civil justice a matter of diplomatic reprisal, authorizing the courts, at their discretion, to seize on and confiscate foreign rights, a function belonging not to the judicial, but to the legislative and executive departments. (3.) It leaves us without any mode of determining cases where the parties interested in presenting a claim belong to distinct nations, one extending, the other refusing, reciprocity. (4.) It is in conflict with the primary principle that to all persons equal justice should be given, without fear, favor, or affection.

Penal laws are not extra-territorial.

§ 4. To the rule that the law to which a case is from its nature subject is to govern it everywhere, there are several marked exceptions. The first is that such law must not infringe the distinctive policy of the forum.[1] The second is that one state will not execute the penal laws of another. This, so far as concerns the penalties imposed on crimes, will be hereafter fully illustrated.[2] But the rule also applies to civil suits for penalties.[3] And it is frequently invoked when the question of the application of foreign revenue laws comes up.[4]

[1] See infra, §§ 104, 490.

[2] See infra, § 108.

[3] Ogden *v.* Folliott, 3 T. R. 720; Wolf *v.* Oxholm, 6 M. & S. 99; De Wolf *v.* Johnson, 10 Wheat. 367; Lindsay *v.* Hill, 66 Me. 212; Slack *v.* Gibbs, 14 Vt. 357; Halsey *v.* McLean, 12 Allen, 438; Gale *v.* Eastman, 7 Met. 14; Scoville *v.* Canfield, 14 Johns. 338; Winter *v.* Baker, 50 Barb. 482; Price *v.* Wilson, 67 Barb. 9; Willis *v.* Cameron, 12 Abb. Pr. 245; Derrickson *v.* Smith, 3 Dutch. 166; Richardson *v.* Burlington, 33 N. J. L. 190; First Nat. Bank of Plymouth *v.* Price, 33 Md. 487; Barnes *v.* Whitaker, 22 Ill. 606. Thus the bastardy statutes of one state will not be enforced as imposing penalties in another. Graham *v.* Monsergh, 22 Vt. 545; Richardson *v.* Burlington, 33 N. J. L. 192; Indiana *v.* Helmer, 21 Iowa, 370. As to laws interdicting such inquiries see infra, § 494; though the liability of a father to support an illegitimate child is a police question, not conditioned by the conception or birth of the child in another state. Duffies *v.* State, 7 Wis. 672; Kolbe *v.* People, 85 Ill. 336. Infra, § 257.

[4] Infra, § 384.



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§ 5. An important modification of the old law of allegiance is to be found in the now almost unanimous recognition of the right of expatriation. For many years the indissolubility of native allegiance was recognized by the courts of the United States,[1] as well as by those of Europe. It is true that the consequent difficulties belong rather to the public than the private side of international law; yet even in the latter sphere, the embarrassments were not inconsiderable. Men were held, and that till very recently, to bear so close a relation to the country of their birth, that no matter how solemn and persistent might be their self-expatriation, they were bound by that country's personal laws. They were subject to

Expatriation now internationally conceded.

[1] "In the United States, the inclination of the judiciary had been to follow the rule of the English common law, and to hold that neither a native nor a naturalized citizen can throw off his allegiance without consent of the state. Kent's Com. ii. 49; Story on the Constitution, iii. 3, n. 1; Wharton's State Trials, 654; 8 Opinions of Attorneys General, 157. But the legislative and executive departments have acted upon the principle that actual expatriation and new naturalization, when the act and the intent combine, not only deprive the citizen of all claim upon the protection of his original country, but deprive that country of claims upon its former citizen against the will of the country of his adoption. But no man can renounce allegiance to a country in which he continues to reside, whatever forms he may go through. Daly on Naturalization, 26. And if a naturalized citizen returns to the country of his birth, the United States has not interfered to protect him against the claims of that country for duties actually due from him as a subject before his naturalization. But it asserts a right to protect him against claims not ascertained and perfected before that time. For instance, if a foreign subject has been completely enlisted into the military service by conscription before expatriation, and voluntarily returns, the United States does not protect him against the obligation to perform the military duty; but if, at the time of expatriation, his obligation was that of a general liability of a class, which had not been ascertained and fixed upon him personally, the United States does interfere for his protection. Mr. Cass, in a letter to the United States minister at Berlin, of July 8, 1859, says: 'The right of expatriation cannot at this day be doubted or denied in the United States. The idea has been repudiated, ever since the origin of our government, that a man is bound to remain forever in the country of his birth. . . . . The doctrine of perpetual allegiance is a relic of barbarism, which has been disappearing from Christendom during the last century.'" Dana's Wheaton, p. 143, note. See Juando *v.* Taylor, 2 Paine, 652.

An able and exhaustive treatise on Naturalization and Expatriation, by Mr. Lawrence, is to be found in the appendix to his edition of Wheaton. See, also, Lord Chief Justice Cockburn's treatise on Nationality, London, 1869; Hall on Int. Law, pp. 177, 189.



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its taxes. They could be found guilty of treason, even though they had been domiciled in a foreign land from infancy; and it was with strange inconsistency argued by some of the older English jurists, that this liability attached to the children and grandchildren of English subjects, who for two generations had been born and lived abroad. Certain it is that only a few years since it was judicially declared in England that the personal stamp of nativity was indelible, even to the extent of determining under what limitations property was to be held, or marriage contracted, or legitimacy acquired. In 1868, however, the question was settled in the United States by the Act of July 27, 1868, which provides that "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to public peace that this claim of perpetual allegiance should be promptly and finally disavowed; therefore, *be it enacted* that any declaration, instruction, opinion, order, or decision, of any officers of this government, which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."[1] Treaties recognizing the right of expatriation were executed, with various modifications in detail, with the North German Confederacy, on February 22, 1868;[2] with Bavaria, on May 26, 1868; with Baden, on July 19, 1868; with Würtemberg, on July 27, 1868; with Belgium, on November 16, 1868; with Hesse, on July 23, 1869; and with Austria, on September 20, 1870. With England, the negotiations were more protracted, but were at last closed by the adoption by the Imperial Parliament, on May 14, 1870, of an act by which it is declared that "any British subject who has at any time before, or may at any time after, the passing of this act,

[1] See infra, § 75. For comments on this act see Cockburn, *ut supra*, p. 103.

[2] For the debate in the Imperial Diet on the acceptance of this treaty, see U. S. Diplomatic Correspondence for 1868, ii. p. 50.



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when in any foreign state, and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his having become naturalized in such foreign state be deemed to have ceased to be a British subject and be regarded as an alien." [1] The same act confirms the provisions of treaties

[1] See, for other provisions of this act, infra, §§ 6, 36.

The naturalization convention with England, and the act of parliament that preceded it, were the result of a long negotiation, which will be found in the published reports of the state department of the United States government. Among the papers which may be particularly referred to, for their historical interest, may be mentioned the following: —

Mr. Adams to Mr. Seward, Dec. 11, 1867, to which is annexed a letter from "Historicus" (Mr. Vernon Harcourt) on expatriation, U. S. Diplomatic Corr. 1868, pt. i. p. 38; Same to Same, Jan. 8, 1868, annexing article in London Times, p. 134; Same to Same, Jan. 11, 1868, annexing second letter from "Historicus," p. 137; Proceedings of the Law Amendment Society, Jan. 13, 1868, containing addresses from Mr. Westlake and Sir R. Phillimore on expatriation, p. 147; Debate in House of Commons on same, p. 176. See, also, infra, § 40, and notes thereto, for the prior views of English jurists. The negotiations which preceded the act are noticed, from the English stand-point, in the following passage from the London Law Magazine (vol. xxv. p. 133): —

"The principle thus arrived at is that of free change of nationality at the will of the individual, — a principle of the most ancient Roman law, and considered by Cicero as essential to civil liberty, — 'ne quis in civitate maneat invitus,' — and adopted in the Code Napoleon, — 'la qualité de Français se perdra par la naturalisation acquise en pays étranger' (art. xvii.). The British government has also, during the recent American war, given its adhesion to the same principle, by refusing to interfere for their protection against compulsory military service, in favor of those who had even manifested a desire to expatriate themselves. And this point was reached by steps which seem to show that the question was well considered, and that the government became increasingly awake to the necessity of limiting, as far as possible, the tie between it and its emigrated subjects. When the first military draft was proposed, in August, 1862, Mr. Seward informed Mr. Stuart, then in charge of the British legation at Washington, that all foreign-born persons would be exempt who had not been naturalized, or who were born in the United States of foreign parents who had not become citizens, and who had not voted or attempted to vote in any state or territory of the United States; also all persons who had not taken out their first papers. Lawrence's Wheaton, *ut supra*, p. 903. At this time Mr. Anderson, a member of the British legation, was sent by Mr. Stuart into the Western States to arrange with the governors the necessary details of procedure for the enjoyment by British subjects of their exemption; and in a report which he made under date September 28, 1862, Mr. Anderson, while accepting the exemption for those who had only taken out their first papers, further contended that it ought not to be lost even by having voted in those states



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by which aliens, naturalized in England, may divest themselves of their acquired, and resume their native, allegiance; and it au-

where the franchise can be exercised by aliens. Papers Relating to North America, No. 1, 1863, p. 27. But ultimately the British government declined to interfere in favor of any who had either declared their intentions to become citizens of the United States, or who had exercised the right of franchise anywhere in the United States. This is a fact of great importance. If any Irishman, who fell within either of these categories, should be put on his trial for acts done in the United States, it would be difficult to justify the attempt to exercise control where protection was refused."

The report of the English Commission on Naturalization will be found in the U. S. Foreign Relations, 1873–74, vol. ii. p. 1233. The subject of expatriation and of change of allegiance is discussed in U. S. Foreign Relations, 1873–4, vol. ii. pp. 1185 *et seq.*

Expatriation cannot be exercised by a person while continuing to reside in the country he proposes to renounce, nor, as a general rule, while that country is engaged in a foreign war of such a character that expatriation is equivalent to desertion. Foreign Rel. U. S. 1873–4, vol. ii. p. 1187.

It is argued by Mr. Fish (U. S. Foreign Relations, 1873–4, vol. ii. p. 1189), that if a person "permanently withdraws himself and his property, and places both where neither can be made to contribute to the national necessities, acquires a political domicil in a foreign country, and avows his purpose not to return, he has placed himself in the position where his country has the right to presume that he has made his election of expatriation." See same volume, p. 1196.

Lord Brougham, in 1848, when applying for naturalization in France, took the ground that such naturalization would not be inconsistent with his continued allegiance, when in England, to the British crown. That there could be such double nationality was denied by M. Crémieux, French minister of justice, and this, says Mr. Lawrence, "montre la différence qui existe sur ce point entre la jurisprudence française et la jurisprudence anglaise." Lawrence, Com. sur Wheat. iii. 209. Heffter states that double nationality has been tolerated in a large part of Europe, though proscribed by some legislations. Heffter, cited by Lawrence, *ut supra.*

Judge Black, when attorney general of the United States (9 Op. of Atty. Gen. 358), took the ground that a naturalized citizen can, in times of peace, when by so doing he violates no duty to his adopted country, renounce his allegiance to that country, and this without following any prescribed form.

Lord Palmerston maintained that natural subjects of Great Britain who had been naturalized in a foreign country, but who returned to the United Kingdom, were subjected to the same extent as other subjects to British law, and that the maxim *ignorantia legis non excusat* applied to them as much as to other subjects. Cong. Doc. 36 Cong. 1st Ses. Senate Ex. Doc. No. 38, p. 167.

The German Imperial Code confines the term naturalization to the case of a person not a German naturalized in a state of the empire. The term *Aufnahme* is applied to the case of a German of one state of the empire changing his political allegiance to another state of the empire. Lawrence, Com.



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thorizes any person born in her majesty's dominions, who is also at the time of his birth a subject of a foreign state, when he arrives at full age, to elect his allegiance. A convention, applying this act to the diplomatic relations between England and the United States, was concluded on May 13, 1870.

Temporary return to native land does not revive allegiance.

§ 6. It may still be an open question whether original allegiance revives, upon a return of the expatriated subject to the country of such allegiance. The government of the United States for many years conceded that allegiance was thus revived; and this view was adopted by Mr. Marcy, Mr. Webster, and Mr. Wheaton;[1] though in Koszta's case[2] Mr. Marcy argued that a person who has declared the intention to become a citizen, but who has not been yet naturalized, is entitled to the privileges of citizenship.[3] Mr. Cass and

sur Wheaton, iv. 359. Nationality in a state of the empire can be acquired only in one of the following ways: (1.) Filiation (art. iii.); (2.) legitimation (art. iv.); (3.) marriage (art. v.); (4.) by a German, through Aufnahme (admission) (art. vi.); (5.) by a non-German through naturalization (art. viii.). Adoption does not by itself transfer nationality.

The indissolubility of allegiance is still maintained in Italy; Foreign Relations U. S. 1878, pp. 458, 459, 460, 461; and in Switzerland (Ibid. 841), though in Switzerland American naturalization, preceded by an accepted renunciation of Swiss citizenship, will be recognized. Foreign Relations U. S. 1879, p. 973.

By the French Code, naturalization of a Frenchman in a foreign country is a surrender of his French nationality. He who acquires full political and civil rights in a foreign land, and who is assimilated thereby generally and irrevocably to the native citizens of such land, cannot be regarded as continuing to be a member of the nation in which he was born. But a concession limited to civil rights, without any oath of allegiance or of subjection, has not the quality of naturalization. Jour. du droit int. privé, 1875, p. 439. This rule was applied by the French Court of Cassation, in 1875, to a Frenchman who, wishing to hold real estate in Ireland, obtained special permission to this effect under the English statute of 1844.

[1] See 1 Halleck's Int. Law (Baker's ed.), 356, and "Historicus" in U. S. Diplom. Corr. 1868, pt. i. p. 140.

[2] Woolsey Int. Law, § 81.

[3] Koszta was one of the Hungarian refugees who came to the United States in 1849, declaring at the time his intention to become a citizen, without perfecting his naturalization. He "went to Smyrna, where he was seized by some persons in the pay of the Austrian consulate; he was by them taken out into the harbor and thrown overboard; he was picked up by an Austrian man of war, and held as prisoner; the United States consul remonstrated with the commander, and on the latter's refusal to surrender Koszta, the captain of a United States ship of war demanded his release, and threatened, if necessary, to resort to force. The matter was finally compromised, and Koszta was released



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Mr. Seward, however, as well as Mr. Bancroft in his negotiations of 1849 with Lord Palmerston, took ground that there could be no such revival of allegiance, and that where a naturalized citizen of the United States returns to his native country, he is on the same footing as an American citizen by birth. General Halleck, however, questions this position, on the ground that "while we have a perfect right, *within our jurisdiction*, to disregard the dogma of universal allegiance incorporated in the laws of other states, *they* have an equally incontestible right, *within their jurisdiction*, to assume that *our* municipal regulations on the subject of naturalization do not cancel their statutes enjoining the charges and obligations, military or otherwise, embodied in their laws." The same view is vigorously maintained in a speech by Mr. W. E. Forster, in the House of Commons, on March 20, 1868.[1]

and shipped to the United States, the Austrians formally reserving the empty right of proceeding against him if he should return to Turkey." Infra, § 40; 18 Am. L. Reg. 599. For review of this case see Hall's Int. Law, p. 200.

Mr. Marcy's position, that a "declaration of intention" gives a political *status* which entitles the person making it to protection from the United States, has been much criticised; Cockburn on Nat. 122; nor has it been persisted in by the United States government. In several subsequent treaties it has been recited that alienship is to continue until final reception to citizenship, and it has been declared judicially not to extinguish native allegiance. Baird *v.* Byrne, 3 Wal. Jr. 1; Heinrich's case, 14 Op. Atty. Gen. 154. At the same time, in several of our states declaration of intent is made one of the qualifications of release from the common incapacity of aliens to hold land.

[1] U. S. Diplomatic Correspondence, 1868, pt. i. p. 178; Halleck, *ut supra*, p. 356.

The convention between the United States and the North German Confederation, executed February 22, 1868, provides that when a German naturalized in America settles in North Germany without the intention to return to America, he is to be viewed as surrendering his naturalization in the United States; and that a renunciation of naturalization is to be assumed from a residence of two years in the country of native allegiance. For an exposition of this, see debate in the Imperial Diet, in U. S. Diplomatic Correspondence for 1868, ii. p. 50. The German government took the ground in 1877–8 that they were justified internationally in banishing native Germans who, after naturalization in the United States, returned to their native land. Foreign Relations U. S. 1878, pp. 210–216.

This provision is vehemently attacked by Dr. F. W. Wedekind, in a pamphlet entitled "Der Amerikanish-Nord-deutsche Verkehr," Stuttgart, 1868, in which it is argued most earnestly that the limitation subjects Americo-Germans to the control of the Prussian government when they return to their native land. The Eng-



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§ 7. The establishment of Belgium and of Italy as independent states was vindicated on the ground that the Belgian and Italian nationalities were homogeneous, and were, in respect to language and history, distinct from the states to which they had been subjected. Belgium, it was argued, has little in common with Holland, Italy little in common with Austria; on the other hand, the Belgian people, and the Italian people, form nationalities complete in themselves; and on the ground of this solidarity should have restored to them the territories to which they are bound by community of national tradition, national pride, and national aspirations. It would have been inconsistent with this position to have said, "While we are one nationality, we claim to have several jurisprudences." A nation, so under such conditions it is urged, must have not only its distinctive jurisprudence, but it must have but one jurisprudence controlling all its subjects, for were it otherwise it could not set up its claim to solidarity. On the other hand, as it claims to have a distinctive jurisprudence for itself, it must concede a distinctive jurisprudence to the subjects of other states who may visit its shores. The consequences of this position have been very important. (1.) Nationality, and not domicil, is regarded as the test of capacity. If domicil were the test of capacity,

Political conditions in Italy, Belgium, and France favoring unification of jurisprudences at home and recognition of foreign personal laws.

lish Naturalization Act of 1870 contains no such provision. It simply enables (§ 8) "a natural born British subject, who has become an alien," "on performing the same conditions, and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality," to obtain from the secretary of state "a certificate of readmission to British nationality, readmitting him to the *status* of a British subject." Nothing is said in the act subjecting "statutory aliens," as they are thus called, on their return to their native land, to an involuntary resumption of their national allegiance. Nor does the convention with England, as given above, recognize such an involuntary resumption of original allegiance. The "repatriation" provided for by the convention must be on the "application" of the party concerned. See, also, debate in House of Commons on expatriation, U. S. Diplom. Corr. 1868, pt. i. p. 176. As to involuntary revival of domicil, see infra, §§ 59, 60. As to revival of original disabilities, §§ 75–78.

By recent naturalization treaties, residence for two years in the country of nativity is regarded as evidence of an intention to abandon the country of naturalization. U. S. Foreign Relations, 1873–4, vol. ii. 1189.

The conditions of naturalization are discussed infra, §§ 10–14.



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then, instead of the jurisprudence of a state being uniform throughout its whole population, there would be as many jurisprudences as there are customary local laws. This, however, must be abolished, not merely as an unnecessary inconvenience, but as inconsistent with the claim to unity, on which alone national independence can be based. (2.) The rights claimed for the home nationality must be conceded to foreign nationalities. Hence, the second distinctive characteristic of the Italian school, as it is now called, but which is represented with great ability in Belgium and France, is the doctrine of the ubiquity of national *status*. The personal capacity impressed on a man by his nation is to be recognized as accompanying him wherever he may go.[1]

[1] Belgium sought a separation from Holland on the ground that the Belgian and the Dutch nationalities were so distinct that the one could not with justice be subordinated to the other; and this distinctiveness of nationality was appealed to by Thiers, by Guizot, and by Lord Palmerston, to sustain the armed intervention by England and France, by which the independence of Belgium was to be secured. It was on the ground that the several Italian states were of one nationality, and should therefore be united under a common government, that Cavour based the hostile action of Sardinia, by which Italy was forcibly wrested from Austria; and the solidarity of nationalities was the maxim on which Louis Napoleon lent his aid to Sardinia, and under which the new kingdom of Italy was finally established. Laurent touches the spring of the Italian advocacy of nationality, when he says that if Savigny had lived to see the unification of Germany, nationality and not domicil would have been the test he would have applied for the determination of *status*; and there can be no question that the tendency of a homogeneous nation with a uniform jurisprudence is not only to set up its own national law as determining the *status* of its subjects when travelling abroad, but to seek to determine the *status* of foreigners visiting its shores solely by their national law. Nor are either Belgium or Italy likely to feel any business embarrassments from the adoption of this test. Their shores are not thronged by masses of emigrants from countries holding antagonistic jurisprudences. Foreigners visiting Belgium and Italy are mostly tourists, coming in small parties, for short periods, not for business but for pleasure, and giving notice to all who deal with them of the nationality to which they belong. The case is widely different with the United States. Vast multitudes from Europe, Africa, and Asia, representing every stage of civilization, are poured on our shores. Emigrants from Europe in most cases come with the intention of accepting our nationality; but there have been marked exceptions in which the members of German religious communities have occupied entire townships with the intention of preserving their German nationality. The large population that we receive from China persistently maintains its nationality. No Chinese would, even if he could,



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§ 8. The political system which emerged in the United States from the late civil war and its attendant reconstruction is, as was well stated by Chief Justice Chase, that of an indestructible union of indestructible states. An eminent Belgian jurist[1] has imputed this apparently incongruous union of unity and of particularism to feudal traditions; but it is more properly both the necessity of our political position, and the great safeguard of our liberties. It has been truly said that the Constitution

Political conditions in the United States favoring unity in international relations and particularism in inter-state relations.

become a naturalized citizen of the United States (infra, § 12); there is no Chinese who does not hope to return to China; and even when a Chinese dies in America his bones are to be returned to his home from what he and his people consider an alien land. Yet how would it be possible for us, in receiving this race on our shores, to receive them as stamped with the immunities and incapacities of their nationality? No Chinese, by Chinese law, who has a father, can, unless emancipated, make a contract without his father's consent. Are we to hold void all contracts made with Chinese who have fathers? No Chinese wife, it is held in China, has any civil rights as against her husband. Are we to treat Chinese women as under this subjection? Marriage, in China, is not monogamous. Are we to permit Chinese in this country to have a plurality of wives? In China property ascends to parents. Are we in this way to distribute the estate of a Chinese who dies in this country? It is possible to hold that Chinese, when they settle among us permanently, are domiciled among us, and thus to subject them to our laws; but it would not be possible to hold that they are naturalized among us when they have never been and cannot be naturalized. And beside there is a radical distinction in origin between our political institutions and those of Belgium and Italy. The revolt of Belgium rested on the principle that an independent nationality should possess an independent territory; and so was it with Italy. The revolt of the North American colonies rested on the principle that an independent territory should have an independent nationality. But while unity of jurisprudence is an essential element of the Belgian and Italian conception of nationality, to our conception of nationality a union of states with diverse jurisprudences is, as we will presently see, in like manner essential.

In a notice of Montesquieu, at the close of a series of sketches of the older publicists in the appendix to the first edition of this work, I said: "Each independent state whose polity is that of constitutional liberty, subjects to its particular laws all persons and things in its territory. It may admit, as is the case with succession, and with certain phases of obligations, a foreign law as ruling a litigated case; *but this is only a voluntary concession, granted because the exclusion of such foreign law would work greater injuries to the business and juridical interests of the state than would its adoption.* And in no case will such state recognize the international validity of any foreign law, either creating personal disabilities beyond those

[1] Laurent, Le droit civil int. 1880.



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of the United States is not the creature of political speculations, but is the condition of political necessities. The same criticism may be applied, so far as the questions now before us are concerned, to the reconstruction measures which followed the war. The Union has been consolidated as indestructible; but the States have been again recognized as indestructible. Amendments have been made abolishing slavery, and legislation has ensued rendering nugatory state laws discriminating against the African race; but this very legislation, on the principle *expressio unius est exclusio alterius*, adds an additional sanction to the constitutional principle that all rights not expressly granted to the federal government are reserved to the states. Hence it is that we have, in almost all questions that arise in private international law, as many jurisprudences as we have states. Were this the proper place for such a task, it might be readily shown

which the law of nature establishes, or disturbing those great principles as to marriage and family which Christianity has inaugurated, and on which the welfare of civilized society depends. Nor can this be justly regarded as selfish. It tends, no doubt, to national aggrandizement. But it does more than this. It affords an inviolable asylum to those principles of personal equality and family integrity which Christian liberal governments hold in trust for all mankind." The italicized portions of the above I desire to qualify. The admission of foreign law, within the limitations above stated, is not a mere "concession," or "courtesy" on our part. When a contract is executed under a foreign law, such foreign law, by the rules of our own common law, is part of the contract, and is to be applied, not as a matter of concession, but as a right. The same rule is to be applied to the adoption, in cases of succession, of the law of the last domicil of the deceased. But foreign incapacities imposed by a foreign law we will not enforce, even when the party on whom the incapacity is to be imposed, while resident within our jurisdiction, is the subject of the state applying the incapacity. If a colony of German Dunkers or Mennonites, for instance, settle among us, we will not say: "We will regard your young men as incapable of executing contracts until they are twenty-six, and you shall not marry without parental consent." We will not say to the Coolies and Chinese apprentices who come to our land: "Because you have no civil rights in your own land, you shall have no civil rights with us." If we did we would be perpetuating in the new world the disfranchisements and oppressions of the old. And there is nothing "egoistic," as Laurent, in his criticism on this passage charges, in the position that we will apply to foreigners on our shores our distinctive principles of personal capacity so far as those principles are promotive of liberty. Whatever tends to remove from business undue artificial restraints is beneficial, not merely to the nation adopting the disfranchisement, but to the whole family of nations. See infra, § 101.



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that this combination of unity in federal jurisprudence with particularism in state jurisprudence is far more conducive both to liberty and to stability than would be the destruction of our state governments, and the submission of our whole population to a common ubiquitous jurisprudence, and to a government in which would be vested the exclusive control of matters state as well as federal. No federal legislature, it might well be argued, would have time, capacity, and information enough for such a task. No administration, depending on popular election, could be burdened with such a load of patronage without risk of occasional popular convulsion and the certainty of permanent political corruption. No jurisprudence could be constructed which would be equally adapted to all sections of a territory so vast, and populated by people with diverse traditions and diverse customary laws. All this might well be said in response to the charges of feudalism made by our Italian and Belgian critics; and it might be added, that in the long run a system combining imperialism in matters national with particularism as to state jurisprudence is likely to be both more liberal and more stable than one in which absolute power is vested in a single central government. This question, however, is beyond the limits of our present study. It is sufficient at present to say that we must continue to take domicil and not nationality as the standard of personal law for the following reasons: —

(1.) Nationality leaves the question still open in the United States, and in the British and German empires, where there are several territorial jurisprudences established under the same national head. To the United States this union of sovereign jurisprudences under a federal nationality is established by the most solemn constitutional enactments, as well as by the result of the late civil war. Each state of the North American Union has its own distinctive law of legitimacy, of marriage, of divorce, of succession, of guardianship, whether for infants, lunatics, or spendthrifts. Each state, in matters within its orbit, is supreme, so far as concerns foreign states, in respect to judgments rendered by its courts. Each state is supreme in its control over business transactions within its borders, provided by its legislation it does not impair the obligation of contracts. It is true that the federal government alone is competent to establish a bankrupt law, but



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the several states have power to pass insolvent laws, determining at least the terms on which debts can be collected, and statutes of limitation, determining at what time debts are to be regarded as outlawed. Each state has its own homestead law, and its own laws prescribing what property shall be reserved from executions for the debts both of the living and the dead. If the *status* of a citizen of the United States, therefore, is in litigation abroad, it would be idle to appeal to his nationality. His nationality would determine nothing. His only nationality is that of the United States; [1] and the United States government, while

[1] The position in the text is in no wise inconsistent with the recognition of a citizenship in a state in addition to that of a citizenship in the United States. That citizenship in the United States does not involve citizenship in a state, and that citizenship in a state does not involve citizenship in the United State, is plain. Citizens of territories, citizens of the District of Columbia, are not citizens of states, yet they are citizens of the United States. This, in fact, is the construction given by the Supreme Court to the fourteenth amendment to the Constitution. "It is quite clear," said Miller, J., in giving the opinion of the court in the Slaughter-House cases (16 Wall. 36), "that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics and circumstances in the individual." It is also clear, as will be hereafter seen (infra, § 13), that persons may be made citizens of the United States by other processes than naturalization and birth, specified in the fourteenth amendment; *e. g.* by annexation of their country. There may also be citizens of a state who are not citizens of the United States. Thus in Dred Scott *v.* Sandford, 19 How. 393, Taney, C. J., said: "Previous to the adoption of the Constitution of the United States, every state had the undoubted right to confer, on whomsoever it pleased, the character of citizen, and to endow him with all its rights. But this character was confined, of course, to the boundaries of the state, and gave him no rights or privileges in other states, beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons."

This privilege has been repeatedly exercised by statutes of particular states, making non-naturalized foreigners citizens of the state adopting the statute. See summary in article by Dr. Spear in 15 Alb. Law Jour. p. 485, and in Van Valkenburgh *v.* Brown, 43 Cal. 43. The inhabitants, also, of districts within a state ceded to the United States are citizens of the United States, but not of the ceding state. Com. *v.* Clary, 8 Mass. 72; Sinks *v.* Reese, 19 Oh. St. 306.

This distinction is affirmed in U. S. *v.* Cruikshank, 92 U. S. 542, where Waite, C. J., says: "We have in our political system a government of the United States and a government of



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determining his political *status*, does not determine his personal *status*. To get at that *status* we have to inquire in what state

each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other. Slaughter-House Cases, 16 Wall. 74.

"Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government the people may confer upon it such powers as they choose. The government when so formed may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction, but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose."

It should, however, be remembered that there is authority for holding that naturalization, under the federal laws, is the only mode by which foreigners, subjects of a foreign state, may be made citizens of a state, though without naturalization they may be admitted to vote. Thus in Lane *v.* Randall, 4 Dill. 425, the plaintiff was a subject of a foreign state, but had resided in Minnesota some fifteen years. Under the Constitution of Minnesota the elective franchise is conferred upon white persons of foreign birth who shall have declared their intention to become citizens under the federal naturalization laws. Plaintiff had made such declaration but had never become naturalized, but had voted at several elections. After the commencement of the action in a court of the State of Minnesota he procured its removal to the federal Circuit Court, under the provision of the Act of Congress of March 3, 1875, which authorizes the removal of "a controversy between citizens of a state and foreign states, citizens or subjects." Upon a motion by defendant, who was a citizen of Minnesota, to remand the case to the state court, the Circuit Court denied the motion, holding that citizenship and the right to vote are neither identical nor inseparable, and that the provision in the Constitution of Minnesota mentioned did not make unnaturalized foreigners citizens of the state, although it conferred upon them the right to vote and hold office. The court said that by the provision of the federal Constitution (article 1, § 8), which confers upon Congress the power "to establish a uniform rule of naturalization," it is designed that the rule, when established, shall be the only rule by which a citizen or subject of a foreign government can become a citizen of one of the States of the Union, and thereby owe allegiance to such state. That there is no necessary connection between citizenship and voting, it was said, is shown by the circumstance that about five sixths of those who are citizens, such as infants and females, have no right to vote.



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he is domiciled. Here, then, we find ourselves in direct opposition to the new Italian school. The function of Italy, as reconstructed, is to fit a territory to a compact and homogeneous nation. Ours has been to adapt a nation, composed of various elements, to a territory containing almost every variety of soil, of climate, of traditions, of capacities for cultivation. Nationality, therefore, in Italy, means uniformity of jurisprudence, and to

But however this may be, there is no question that there is a citizenship in a state as well as a citizenship in the United States, and that the two citizenships are not identical. There is also no question that, so far as concerns our relation to foreign powers, we have but one nationality, — that of the United States. "Although citizens of the United States," says Judge Cooley (4th ed. Story on Const. § 1937), "are commonly citizens of the individual states, this is not invariably the case; and if it were, the privileges which pertain to citizenship under the general government are as different in their nature from those that belong to citizenship in a state as the functions of the one government are different from those of the other. Indeed, it is a consideration of the sphere of the governments respectively which suggests the rights and privileges as citizens of those entitled to their protection. *A citizen of the United States, as such, has the right to demand protection against the wrongful action of foreign authorities; to have the benefit of passports for travel in other countries;* to make use, in common with all others, of the navigable waters of the United States; to participate with others in the benefits of the postal laws, and the like. It would be useless to attempt a general enumeration; but these few may suffice as illustrations, and will suggest others. Such rights and privileges the general government must allow and insure, and such the several states must not abridge or obstruct; but the duty of protection to a citizen of a state in his privileges and immunities as such is not by this clause devolved upon the general government, but remains with the state itself where it naturally and properly belongs."

If a citizen of a state desire a passport or safe-conduct to travel in a foreign state he can only receive it as a citizen of the United States; if he desire consular protection abroad, it can only be as a citizen of the United States; if he seek for a sovereign to redress injuries sustained by him abroad, to the United States he must look. No state can issue extradition process to arrest abroad a person who has committed a crime on one of its subjects; the process must issue from the United States. No state can impose regulations on foreign commerce; internationally, this can only be done by the United States. Nor can the nationality of any particular state be recognized in any way by a foreign sovereign; internationally, our only nationality is that of the United States, our only sovereign its government. And by no one has this position been more unhesitatingly maintained than by Mr. Jefferson, when Genet attempted to appeal to the state governments against the Washington administration. Yet, in municipal matters, Mr. Jefferson took what is now held the highest view of the exclusiveness of state sovereignty.



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know what is the personal law of an Italian we have simply to inquire what is the jurisprudence of Italy. But nationality in the United States determines, with the single exception of bankruptcy, only political *status;* and to ascertain what is the civil *status* of a citizen of the United States we have to inquire in what state he is domiciled. And the remaining point of apparent antagonism between our system and that of the jurists of the new school of Italy and Belgium, and in part, of France, is a correlative of that already stated. Nationality not being the standard of personal law among ourselves, we do not make it the standard of the personal law of foreigners who visit our shores. We inquire what is their domicil, and by their domicil their personal law is determined. Yet even to domiciliary personal *status* we do not allow the unlimited ubiquity claimed by the more ardent jurists of the new school. It is true that if we take the rule announced by them in a large sense, their system may be reconciled with ours. The French, Belgian, and Italian codes tell us in substance that the personal capacity of a foreigner will be recognized only when the recognition is consistent with "public order" and "good morals."[1] There is no one of our states whose distinctive laws of personal capacity may not be considered as part of "public order" if not of "good morals."[2] Most of our states possess territory so vast and capabilities so various and immense, that the increase of families is to them a great benefit, instead of being, as it is in most countries of Europe, a peril. *Their* fear is overstocking; *we* cannot be overstocked. It is a settled tradition with us, also, as well as a principle sustained by a wide induction, that as a rule early marriages are greatly conducive to private morality as well as to public prosperity; that no man works so well, and employs the vigor of his youth so effectively and wisely, as he who in early life has a wife and children to support; that children are apt to be better cared for and advanced when they have until their maturity parental care; that women are in their proper sphere when acting as wives and mothers; that the rash adventurousness of early youth, which is the terror of old countries, is one of the chief vivifying powers of new countries; that young men, whose restless energy make them agents of destruction in Europe, become the most efficient

[1] See infra, § 104 *a*.

[2] See infra, § 104 *b*.



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and orderly pioneers in our far West. It may be part of "public order" and public "good morals" in the old world to shackle young men by a prolonged extension of minority, and to restrain marriage by requiring the consent of parents and guardians and the sanction of officers of the state. The imposition of such limitations, however, is part neither of our public order nor our public morals; and even on the tests of the new European codes, we could not be expected to hold that when an Italian or a Belgian young man of twenty-one years of age marries in New York or Nevada without his parents' or guardians' consent, or without authority from his sovereign, this marriage is void. The same reasoning applies to the restrictions of business capacity. It is part of our public order and public morals that young men of twenty-one should be capable of making contracts that will bind them to others and bind others to them. If our right to apply our own laws of business capacity to foreigners visiting our shores is recognized by the jurists of the new school as part of our "public order," then between them and us there is no antagonism. But if they reject this view, and hold that a Belgian or an Italian of twenty-one, doing business on our soil, is to be regarded as a minor by us because he is a minor in his own state, or that a Belgian or an Italian, marrying an American woman, in one of our States, is to be regarded by us as incapable of matrimony because his parents or his sovereign did not consent to the marriage, then the antagonism between the two jurisprudences is in this respect radical.

(2.) The distinctive political conditions of the United States, to sum up the positions taken in the last paragraph, make nationality not only an inadequate, but an unfair standard of personal law. We have next to observe that so far from nationality being more easily ascertainable than domicil, it is exposed, at least in federal systems, to difficulties far greater than those to which domicil is exposed.[1]

(*a.*) What is the domicil of a person residing in one of the United States can be readily determined; but if nationality is to be treated as convertible with distinctive jurisprudence, the determination of nationality will be beset with the greatest constitutional conflicts. (*b.*) A large proportion of our population

[1] The relations of domicil to nationality are discussed infra, § 40.



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consists of persons from foreign lands who have declared their intention to be naturalized, but whose naturalization cannot be consummated until five years after this declaration.[1] These persons, as we have seen, are not technically citizens of the United States. Are they still members of their old nationality? This is a question beset with many embarrassing complications, and very difficult of decision. But the question of their domicil is not difficult of decision. They are plainly domiciled in the state where they take up their permanent abode. In Austria, Baden, Bavaria, England, Germany, Hesse, Mexico, Sweden and Norway, and Würtemberg, the same question arises, since in each of these states there is a similar probation of suspended nationality. (*c.*) Whether a man can have a double nationality is at least as difficult a question as whether a man can have a double domicil. (*d.*) The question whether a woman can acquire an independent nationality from her husband is as much controverted as is the question whether she can acquire an independent domicil.[2] (*e.*) The same remark, *mutatis mutandis*, applies to the condition of the children born in the United States of foreign parents.[3] (*f.*) Whether naturalized citizens of the United States lose their nationality on revisiting their native country is much discussed. But in such cases, if the visit be transient, there could be no question as to domicil.[4] The elected domicil in the United States would continue.

(3.) The test of nationality gives a far greater opportunity for fraud than that of domicil. We have abundant illustrations of this in those of our own states which have substituted residence for domicil, as a test of jurisdiction in divorce. If the nationality theory is sound, and if a person acquiring a new nationality acquires at the same time the *status* of the members of such nationality, then marriage would be internationally dissoluble at the will of either party who chooses for this purpose to transfer his allegiance to another state. It is for this reason that our most authoritative American courts hold that a divorce based upon the mere residence, or even the mere state citizenship, of the complainant, without domicil, is void. Residence or state citizenship can be acquired as a mere pretext, temporarily adopted in fraud of home law; domicil cannot, as it involves an

[1] See infra, § 34.
[2] See infra, §§ 43–46.
[3] Infra, § 10.
[4] Supra, § 5.



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entire abandonment of and change of home. That this same objection applies in Europe is illustrated in the De Bauffremont case,[1] in which, in 1877, a French lady of rank and wealth, judicially separated, though not divorced from her husband, obtained naturalization in a German state where divorces of the class in question are treated as absolute, and then contracted a second marriage in Berlin, alleging that by naturalization, suddenly consummated, she was instantaneously relieved from the marriage tie. If nationality arbitrarily imposes personal *status*, then, to obtain a new personal *status*, and to be relieved of the incapacities of the old *status*, all that would be necessary would be to pay a visit, intended to be transient, to a new state, whose personal laws would be sufficiently favorable. A party, if this view be correct, by obtaining naturalization in a foreign state, could repudiate the obligations he assumed on the basis of his old *status*, and return to dwell in the country of that *status* in defiance of its laws. Domicil, as a test, is open to objections, but to no such objections as these. Domicil will not be regarded as established, without proof of an intention to remain permanently in the place where the domicil is claimed. If a party should go from us to a foreign state, and return in a few months, and say, "I was domiciled in that state, and acquired its *status*, and then obtained a bankrupt discharge, and have been divorced from my wife, and am come back free from debts and family;" we would say, "This is simply absurd. You had no domicil in the country to which you went, because domicil requires an abode, with the intention of permanent residence." No such reply, on the theory here contested, could be made to the party naturalized abroad. If naturalization changes *status*, then *status* can be changed simply by dipping into a state, obtaining naturalization papers, and then returning to the old home freed from its obligations. Numerous recent cases (1880), in which this fraud has been attempted, illustrate not only the ease by which it can be effected, but the deleterious consequences which would ensue were naturalization to be regarded as changing *status* when there is no intention of remaining in the country of naturalization.[2]

[1] Infra, § 209.

[2] The extent to which naturalization in the United States is secured by Germans for the mere object of escaping their German duties, while continuing to reside in Germany, is illustrated in a letter from Mr. Bayard Taylor to Mr. Evarts, dated



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§ 9. The policy of the United States has been to allot to the Indian tribes, who were the original occupants of our soil, separate territories in which they are to enjoy a modified sovereignty. To subject them, while retaining their tribal organizations, to such laws as are passed for our territories would be cruel and absurd. When thus

Indian tribes constitute a distinct nationality.

at Berlin, Oct. 1, 1878. "When the sons of German families here," he says, "unblushingly come to the American legation to inquire if exactly five years' residence in America will secure to them protection as American citizens *here* during the remainder of their lives, and their children after them, it will be easy to understand that naturalization in form is not always naturalization in fact." Foreign Relations U. S. 1878, p. 233. See, for other illustrations, same volume, 216, 229. That naturalization is used to give a fraudulent personal *status* to adventurers in South America is stated in a letter of Mr. Logan in Foreign Relations U. S. 1879, p. 143.

Mr. Fish, American minister at Berne, Switzerland, in a letter to Mr. Evarts, dated March 13, 1879 (Foreign Relations U. S. 1879, p. 968), after noticing a case where a Mr. Dietze obtained naturalization in the United States merely to evade German law, adds, "I regret to say that my experience here leads me to believe that at Basle and Zurich, both in the proximity of Germany, there are large numbers of natives of that country whose claims to our nationality are similar to that of Mr. Dietze, and the merits of whose claims are in all probability but little better than his." Mr. Byers, U. S. Consul at Zurich, writes at Zurich, on March 10, 1870, to Mr. Fish, saying that Dietze's case "is one of very many in this city, of persons who have for years been registered on the books of the police as American citizens, and who have studiously kept all knowledge of their citizenship from the consulate until forced to make it known by some unexpected action of the police; of course, as is well known, they escape by this course all burdens of citizenship that may be due either to Switzerland or to the United States." To same effect see Hall's Int. Law, p. 200.

Cases of contested resumption of nationality will be found in Foreign Relations U. S. for 1879, p. 368.

The leadership in the exposition of nationality, as a standard of personal law, was taken by Mancini, in 1851, in his address on "Della nazionalita come fondamento del diritto della genti." The idea, as is remarked by Holtzendorff (Revue du droit int. 1870, p. 96), which previously existed as a vague aspiration with "la jeunesse italienne," found here for the first time a logical and legal formularization. In the address delivered by him in 1874, as President of the Institute of International Law, and reprinted with some modifications in the Journal de droit int. privé for 1874, the theory is defended with clearness and force. Compare Esperson, Il principia di nazionalita, Pavia, 1868. Of the enthusiasm with which the topic is treated by Italian jurists, the following from Esperson, an author by no means distinguished for rhetorical expansion, is an illustration: "Italy, which sanctions the divine idea of human fraternity, which largely recognizes the personality of foreigners by giving



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grouped in tribes, they are incapable of working courts of record similar to those we find necessary to the maintenance of jus-

them the full and unconditional enjoyment of civil rights, could not do otherwise than render a solemn homage to the principle of nationality, *from which she draws her political existence*, for which she has made noble and heroic sacrifices, — Italians thus proposing to complete the unity of their country and to make it respected by all." Il principia di nazionalita, No. 16.

By an eminent Swiss critic and judge (Brocher, Droit int. privé, 1876, p. 57) it is pertinently observed that, even on the Italian showing, territoriality predominates almost absolutely in all that relates to penal law and to procedure, as subjects related to public law. It rules, also, he goes on to say, the exterior form of acts, and often determines the sense and the effect of these acts. He asks, also, whether it does not in a great preponderance of cases determine the juridical consequences of acts proved? Is not the nationality of the parties, in the vast majority of cases, without the slightest influence on the merits?

In the inaugural address of Mancini, already noticed, the theory of nationality is thus stated: In private law, in the internal relations of the state, the principle of liberty, protecting the legitimate and inviolable autonomy of the individual, places a limit on the executive and legislative power of the government, just as the principle of nationality places an analogous limit on personal rights. The reason is to be found in an autonomy which is individual and reciprocal; which is legitimate and inviolable. And as the right (droit) of nationality, which belongs to a people in a body, is not different from the right of liberty, which belongs to individuals, it follows that an individual can demand from nations and foreign states, in the name of the principle of nationality, the same respect for his patrimony of private right, as he can demand from his own state. But it is well pointed out by Brocher, in reply, that without territoriality, nationality is a spirit without a body. How can nationality act but through a territorial government; how can there be a territorial government that is not limited, so far as concerns the efficacy of its laws, within territorial bounds?

By Fiore (Droit int. privé, traduit par Pradier-Fodéré, Paris, 1875, §§ 23 *et seq.*), the following positions are laid down as the basis of private international law: —

(1.) States and nations should coexist in juridical harmony, as members of a common family.

(2.) Each state is bound to guard and preserve right (le droit) within its bounds.

(3.) The laws of a state are only to apply to the subjects for which they are made. A nation, he declares (§ 25), is an agglomeration of people who speak the same language, who occupy the same country, who have the same inclinations and the same tendencies and affinities, the same conditions of race, of climate, of geographical and ethnographical position, of physical and moral aptitudes, and of all the elements which historically constitute the life of a people, and not only contribute to the formation of this organism, but exercise a powerful influence on the development of the special life of every nation. Every distinct legislation bears the impress of the usages, the traditions, and the civilization of the people; and since it is founded on the natural relations



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tice among ourselves; property as something susceptible of hypothecation and open to execution for debt they know nothing of; the marriage relation, as we hold it, as monogamous and indissoluble, and vesting the parties with specific rights in each other's property, is an institution which, in their present state of civilization, could not be forced on them. Beside this, their subjugation and absorption as a mass has never been attempted; their tribes continue independent; those belonging to such tribes are not, in the proper sense, citizens of the United States. Hence it is that treaties innumerable have been negotiated with them as with independent sovereignties; and though when mingling in the population of a state they are subject to state law, they are regarded, when living on their own reservations, as subject, under certain limitations, to their distinctive jurisprudence, civil and criminal. They are, in Chief Justice Marshall's language, "domestic dependent nations." When retaining their tribal relations they are not citizens of the United States, nor are

of persons and of things, it can only equitably apply to those belonging to the same body politic.

(4.) Every sovereignty should exercise its exclusive authority within its proper territory, provided that in so doing it does not invade the rights of other sovereigns. And one sovereign, he argues, can exercise his authority over his subjects abroad, provided that in so doing he does not offend the rights of other sovereigns.

(5.) The exercise of the rights of sovereignty ceases to be inoffensive, in the latter sense, when it assails the principles of public order, or of the economical, political, moral, or religious interests of another state.

(6.) It is for the courts of such country, in such cases, to determine if a foreign law is repugnant to the principles of the public order of the state.

Mr. Dicey, in his treatise on Domicil (London, 1879), p. 362, thinks "that allegiance or nationality is, where it is applicable, a sounder criterion of civil rights than domicil, but that there are cases in which a person's rights cannot be determined simply by reference to his nationality or allegiance; and that in such cases (in which he includes Great Britain and the United States), assuming that one test only is to be applied, no better criterion than domicil can be found." To this, however, it may be replied as follows: (1.) No rule can be regarded as settled in private international law from which England, the United States, and Germany, dissent. (2.) That nationality is more easily ascertained than domicil is shown in preceding notes to be based on an imperfect induction.

Mr. Westlake (1880), p. 6, thus speaks: "Of course, as between two or more national jurisdictions comprised in one state, such as England, Scotland, and the province of Quebec, such a substitution (that of nationality for domicil) is not possible, and there, at least, the *lex domicilii* must maintain its ground."



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they citizens of any particular state, unless made so by its distinctive laws.[1] Certain federal legislation, however, they are subjected to, even when grouped in tribes. Thus, in 1868, Congress extended its laws imposing taxes on distilled spirits, fermented liquors, tobacco, and cigars to the territory occupied by the Indians; and the Supreme Court held that this legislation was a constitutional exercise of the power vested in Congress, and gave effect to the statute, notwithstanding it came in conflict with the tenth article of the treaty of 1866, between the United States and the Cherokee Indians.[2] And section 2145 of the Revised Statutes applies to the Indian country the laws of the United States as to crimes committed in any place "within the sole and exclusive jurisdiction of the United States," with the limitation made in the next section that this jurisdiction shall not be construed to extend to "crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively." Yet, notwithstanding this subordination in these specified relations, Indians belonging to tribal organizations, so far from being citizens of the states in which they may be resident, are members of alien nationalities. If the doctrine of the ubiquity of national *status* be accepted, they carry the privileges as well as the disabilities of their *status* wherever they go. To accept that doctrine in this case would sustain not merely on Indian reserves, where by treaty Indian domestic law is supreme, but throughout the land, the civil irresponsibility of Indians. They are irresponsible by their own laws; they would continue irresponsible when they leave their reserves, wherever they might wander. The answer to this is, that artificial limitations of capacity are not extra-territorial, and that no state will recognize foreign incapacities inconsistent with its particular policy.[3]

[1] This position is ably supported by General Walker, late U. S. Indian Commissioner, in the International Review for May, 1874, pp. 321-2.

[2] The Cherokee Tobacco Case, 11 Wall. 616.

[3] Infra, §§ 101–104.

The Act of Congress of June 30, 1834, recognized the two systems —



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§ 10. By the fourteenth amendment to the Constitution of the United States it is provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." If a child is born in the United States of French parents temporarily resident but not domiciled in the place of birth, is such a

All persons born in a state are citizens when internationally subject to its jurisdiction.

Anglo-American and Indian — as coexisting in the same territorial bounds, precisely as did formerly, as described by Savigny, the Roman and Germanic peoples. "So much of the laws of the United States," so speaks the twenty-fifth section of that act, "as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian.*" See Worcester *v.* Georgia, 6 Pet. 515. Under this system, the Indians are governed by Indian law; the whites, in one and the same territory, by the laws of the United States.

Hence, Indians within a state, not on an independent reservation, and not members of recognized tribes, are subject to state jurisdiction (State *v.* Doxtater, 47 Wis. 278; Whart. Crim. Law, 8th ed. § 282 *a*), enjoying the privileges of protection of person and property as such. Story Const. 4th ed. § 1993; Cooley's Prin. of Const. 243. It is otherwise as to Indians belonging to tribes of independent political allegiance, though resident within the boundaries of particular states. Rubideaux *v.* Vallie, 12 Kan. 28.

Such Indians may be liable to prosecution in state courts for injuries inflicted by them on citizens. But they are not in other respects subject to municipal law. To the same general effect see Cherokee Nation *v.* Georgia, 5 Pet. 1; Worcester *v.* Georgia, 6 Pet. 515; The Kansas Indians, 5 Wall. 737; U. S. *v.* Cisna, 1 McLean, 254; McKay *v.* Campbell, 2 Saw. 118; U. S. *v.* Yellow Sun, 1 Dill. 271; U. S. *v.* Sacoodacot, 1 Abb. U. S. 177; State *v.* Tachonatah, 64 N. C. 614; Caldwell *v.* State, 1 St. & P. 327; Hunt *v.* State, 4 Kan. 60; Hicks *v.* Ew-har-ta-nah, 21 Ark. 106.

Mr. Cushing, in an opinion dated July 5, 1856 (7 Op. Atty. Gen. 749), argues that Indians, though subjects of the United States, are not, by birth, citizens. By certain Indian treaties, however, provision is made by which heads of Indian families can become citizens. 7 U. S. Stat. at Large, 335; Lawrence sur Wheat. iii. 194.

The policy adopted by Mr. Monroe, under the immediate guidance of Mr. Calhoun, at the time secretary of war, included, according to General Walker (Int. Rev. May, 1874, p. 308), the following features: "First, the removal of the tribes beyond the limits of settlement; second, the assignment to them, in perpetuity, *under solemn treaty sanctions*, of land sufficient to enable them to subsist by fishing and hunting, by stock-raising, or by agriculture, according to their habits and proclivities; third, *their seclusion from the whites by stringent laws forbidding intercourse;* fourth, the government of the Indians through their own tribal organizations, and according to their own customs and



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child a citizen of the United States, by force of the amendment just stated? This depends upon the question whether the child

laws. This policy," adds General Walker, "the character and relations of the two races being taken into account, we must pronounce one of sound and far-reaching statesmanship."

The competency of Indian tribes to make treaties with the United States was ratified by continuous legislation until 1871, when a statute was passed by Congress providing that such recognition should be terminated, without impairing the validity of prior treaties. The legislation prior to December, 1873, will be found in title xxviii. of the Revised Statutes of the United States. In title xxiii. of the same statutes, containing the laws that relate to organized territories, it is declared "nothing in this title shall be construed to impair the rights of person or property pertaining to the Indian tribes in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular territory."

A condensation of these statutes, by Dr. Spear, will be found in the Independent of July 1, 1880, p. 5.

In Reynolds, ex parte, 18 Alb. L. J. 8, before the U. S. Dist. Ct. for the District of Arkansas, it was held that while Indians maintaining their tribal relations are treated by our government as sovereign communities, possessing and exercising the right of free deliberation and action, but in consideration of protection owing a qualified subjection to the United States, yet when members of a tribe scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and equally with the citizens thereof subject to the jurisdiction of the courts thereof.

It was also held that the condition of the offspring of a union between a citizen of the United States and one who is not a citizen, *e. g.* an Indian living with his people in a tribal relation, is that of the father.

Parker, J., in the course of an instructive opinion, said: "In the case of Jackson *v.* Goodall, 20 Johns. 693, the court, Mr. Justice Kent delivering the opinion, says: 'In my view they (the Indians) have never been regarded as citizens or members of our body politic.' . . . . Again: 'Still they are permitted to exist as distinct nations.' . . . . 'The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes.' 'In the treaties made with them we have the forms and requisites peculiar to the intercourse between friendly and independent states, and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty.'

"In 1831, in The Cherokee Nation *v.* The State of Georgia, 5 Pet. 1, Chief Justice Marshall, among other things, says: 'Is the Cherokee Na-



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at its birth is "subject to the jurisdiction of the United States." In one sense it undoubtedly is. All foreigners are bound to a

tion a foreign state in the sense in which that term is used in the Constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. *So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful.* They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their poli ical character for any violations of their engagements, or for any aggressions committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of the government plainly recognize the Cherokee Nation *as a state*, and the courts are bound by those acts.'

. . . . . .

"Mr. Justice Johnston, who delivered a separate opinion in this case, states the condition of the Indian tribes:—

"'Their right to personal self-government has never been taken from them, and such a form of government may exist, though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them, and such they certainly do possess. It has never been questioned.' . . . .

"In Worcester *v.* The State of Georgia, 6 Pet. 515, Chief Justice Marshall again reviewed the relations existing between our government and the Indian tribes. In speaking of the relations of the Cherokee Nation to the United States under the treaties made with them, he says: '*This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master.*' . . . .

"Again, in the case of The Kansas Indians, 5 Wall. 737, the Supreme Court of the United States hold: 'If the tribal organization of Indian bands is recognized by the political department of the national government as existing; that is to say, if the national government makes treaties with and puts its Indian agents among them, paying subsidies and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites, in the midst of whom, by the advance of civilization, they have come to find themselves, does not authorize a state government to regard the tribal organization as gone, and the Indians as citizens of the state where they are, and subject to its laws.'"

In determining who is an Indian, the maxim of the old jurists, *partus sequitur ventrem*, applied by them to similar questions under the old system of personal law, has been adopted. U. S. *v.* Sanders, Hemp. 483. But the old right of adoption has been refused. A white citizen, though adopted by an Indian tribe, and there domiciled, is nevertheless subject to the laws of the United States. U. S. *v.*



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local allegiance to the state in which they sojourn.[1] Yet the term "subject to the jurisdiction," as above used, must be construed in the sense in which the term is used in international law as accepted in the United States as well as in Europe. And by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final.[2] The same conditions apply to children born of foreigners in the United States.

Ragsdale, Ibid. 497; U. S. *v.* Rogers, 4 Howard U. S. 567; 2 Op. Atty Gen. 483.

In McKay *v.* Campbell, 2 Saw. 119, it appeared that the plaintiff was born in 1823, at a time when the Chinook Indians were an independent political community, inhabiting the Oregon Territory, at and near the mouth of the Columbia River. The place of his birth was Fort George (now Astoria). His father was an alien and a British subject, and his mother a Chinook Indian. It was held, that the plaintiff was either to be deemed to follow the condition of his father, and considered a British subject, or that of his mother, and considered a Chinook Indian, but that in either case he was not born a citizen of the United States.

[1] See Whart. Crim. Law, 8th ed. § 281.

[2] Ludlam *v.* Ludlam, 26 N. Y. 356; McKay *v.* Campbell, 2 Sawy. 118. Compare Letter from Mr. Seward to Mr. Stilwell, Dip. Corr. 1868, part ii. p. 935.

By the Act of Congress of Feb. 10, 1855, c. 71, a person born out of the jurisdiction of the United States is a citizen of the United States when his father at the time of his birth is a citizen of the United States. Oldtown *v.* Bangor, 58 Me. 353; State *v.* Adams, 45 Iowa, 99. To this point see 13 Op. Atty. Gen. 89; 15 Ib. 15.

Mr. Marcy, in a letter of March 6, 1854, takes the ground that all persons born in the United States are citizens of the United States. Lawrence Com. sur Wheat. iii. 199.

Mr. Fish, in a letter to the President of Aug. 25, 1873, maintains that "the child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father." Of children born of American parentage abroad he says: "Such children are born to a double character; the citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country; but the child, from the circumstances of his birth, may acquire rights and owe another fealty besides that which attaches to the father." For. Rel. U. S. 1873–4, vol. ii. p. 1192. An analogous position is taken by the English Commissioners of 1869, Ibid. 1238.

For cases bearing on double nationality of this class see U. S. Foreign Rel. 1873–4, vol. iii. 15 *et seq.*

It has been held in Michigan (Crane *v.* Reeder, 25 Mich. 303), that under the Act of Congress of April 14, 1802, (2 Stat. at L. 155, § 4), which provides that "the children of persons duly naturalized under any of the laws of the United States, being under the



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§ 10 *a.* As to a change of nationality the following general rules may be stated.

Consent necessary to change of nationality.

(1.) Nationality cannot be modified without the consent of the person interested. From this it follows that a child's nationality cannot be arbitrarily changed by

age of twenty-one years at the time of their parents being so naturalized, &c., shall, if dwelling in the United States, be considered as citizens of the United States," — the minor child of one who became a citizen under Jay's treaty, if residing in the United States at the time, would thereby become a citizen; a treaty being a "law of the United States."

At common law the children born abroad of British subjects, not ambassadors or British soldiers or sailors, are not British subjects. The Act 4 Geo. 2, c. 21, extends the allegiance to all children born abroad whose fathers were natural-born subjects of Great Britain. Westlake, 1880, §§ 264–6.

The English Naturalization Act of 1870 provides that the child born abroad of English parentage shall be regarded as English. It further provides that "when the father, being a British subject, or the mother, being a British subject, or widow, becomes an alien in pursuance of this act, every child of such father or mother who, during infancy, has become resident in the country where the father or mother has been naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed a subject of the state of which the father or mother has become a subject, and not a British subject. Where the father, or the mother, being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who, during infancy, has become resident in the British dominions with such father or mother, shall be deemed to have retained the position of a British subject to all intents. Where the father, or the mother, being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who, during infancy, has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject." See Foreign Relations, Report of State Department, 1870, p. 434.

According to the French Code, the children of Frenchmen, wherever they are born, are members of the state to which their parents belong at the time of their birth; with the right, however, to elect the nationality of the place of their birth. A child born of foreign parents in France may, within one year after he has attained majority, claim to be a Frenchman; and, if then a non-resident, he must declare his intention to elect France as his domicil, and must fix his abode in France within one year after such declaration. Code Civil, art. 8.

Mr. Lawrence, after noticing the fact that the British government holds that the children born abroad, of British subjects, subject themselves, by continued residence, to the laws of their residence, adds that from this it is to be inferred that the rights of children born abroad to British subjects, to be recognized themselves as British subjects, does not interfere with their obligations to the state of their residence. Lawrence Com. sur Wheaton, iii. 208.

In France it has been judicially



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the mere naturalization of his parents. This conclusion, however, has been much contested. In France it was at one time

held that where a natural child, whose parents are of different nationalities, has been recognized by its father, it takes its father's nationality. Zamitt *v.* Ricordeau, Court of Cass. 1874; Jour. du droit int. privé, 1875, p. 433. The jurists differ on this point. In the affirmative are cited Aubry et Rau, 4th ed. p. 234; Valette, Cours de C. Civ. i. p. 45; Fœlix et Demangeat, i. No. 28; Pasqual-Fiore et Pradier-Fodéré, p. 124. In the negative, Duranton, i. 123–6; Richelot, i. 66; Laurent, i. p. 436.

By the French statute of Feb. 7, 1851, children born in France of foreign parents are to be deemed French, unless within a year after majority they make claim to their parents' nationality by a declaration either before the local municipal authority, or before the diplomatic representative of the state to which they elect to belong. By the statute of Dec. 16, 1874, such declaration must be attested in due form by the proper authorities of the foreign state. The declaration may be made by special proclamation. Unless these proceedings are complied with, the persons born in France of foreign parents are French subjects, and liable to military conscription and other civic duties. A discussion of these statutes will be found in the Journal du droit int. privé for Jan. 1875, p. 11 *et seq.*; Ibid. 1874, p. 127. See, also, Lawrence Comment. sur Wheaton, iii. c. 2, p. 208.

The French law does not permit an infant born in France to be expatriated by his father's act alone, — the father being a foreigner. In order to inherit his father's nationality he must, if he remain in France, formally elect that nationality, in the terms presented by the statute. Jour. du droit int. privé, 1877, p. 9. See same Jour. for 1876, pp. 354, 355.

It was held by the Court of Cassation, in 1879, that when a child born of French parentage in a foreign land has not taken up his abode with the intention of permanently remaining in such land, he retains his French nationality notwithstanding circumstances subsequently occurring by which his father's French nationality was lost. Jour. du droit int. privé, 1879, p. 176.

Bluntschli, in an article in the Revue de droit int. for 1870, p. 107, lays down the following positions: —

"(1.) *Legitimate children acquire by their birth the nationality of their fathers; nor does it matter whether they were born at home or abroad.* This is the statutory rule in most states on the continent of Europe; and was adopted in England by the Act of April 15, 1812. It is, however, still maintained in England that children born in England of foreign parents are English. And even where the doctrine of nationality is the most strongly maintained, it is admitted that the child born of a foreigner, *e. g.* in France, may, on coming of age, claim to be a citizen of the state of his birth.

"(2.) *Illegitimate children acquire by birth the nationality of their mother, no matter where they were born, reserving the right, when permitted by local legislation, to subsequently acquire the nationality of the father.*

"(3.) The nationality of a foundling is that of the place where he was born."

The following ruling was made by the Trib. corr. Seine, 9e ch. 21, février 1879: —

L'enfant né dans le royaume d'Italie



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held that the naturalization of a foreigner involves the naturalization of his wife and his infant children.[1] But this view, as

d'un étranger qui y a établi sa résidence depuis dix années sans interruption doit être réputé Italien, alors d'ailleurs que cet étranger n'a conservé nulle part áilleurs le siége de ses affaires et de ses intérêts. Jour. du droit int. privé, 1879, 284.

In the Court of Cassation, Req. 7 janvier, 1879, the following ruling was made: —

L'enfant né en pays étranger d'un Français qui ne s'est pas fixé à l'étranger sans esprit de retour est Français et conserve sa nationalité malgré les événements ultérieurs qui peuvent enlever à son père la qualité de Français. Jour. du droit int. privé, 1879, p. 176.

In Steinkauler's case, 15 Op. Atty. Gen. 15 (12 Alb. L. J. 23), in an opinion by Mr. Pierrepont, Attorney General of the U. S., we have the following: —

"Young Steinkauler" (who was born in St. Louis after his father had been naturalized in the United States, the father subsequently returning to Germany, and taking the boy with him) "is a native-born American citizen. There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United States; but the father, in accordance with the treaty and the laws, has renounced his American citizenship and his American allegiance, and has acquired for himself and his son German citizenship and the rights which it carries, and he must take the burdens as well as the advantages. The son being domiciled with the father, and subject to him under the law during his minority, and receiving the German protection where he has an acquired nationality, and declining to give any assurance of his intention of ever returning to the United States and claiming his American nationality by residence here, I am of opinion that he cannot rightfully invoke the aid of the government of the United States to relieve him from military duty in Germany during his minority; but I am of opinion that when he reaches the age of twenty-one years he can elect whether he will return and take the nationality of his birth, with its duties and privileges, or retain the nationality acquired by the act of his father. This seems to me to be 'right reason,' and I think it is law."

That a double nationality as well as a double domicil may be set up is illustrated by a case decided in Geneva, in December, 1879, and reported in the Revue de droit int. for 1880, p. 313. I., born in Bordeaux of a Genevese father, regarding himself as a Frenchman, was registered on the French electoral list, became mayor of a commune, and a member of the national guard of Paris. His wife, who was a native of Bordeaux, in marrying him, supposed him to be a Frenchman. Difficulties arising between them, he instituted an action of divorce against her in Geneva, taking the ground that by Genevese law Genevese nationality was indelible. The petition was granted, due cause being shown, and I.'s Genevese nationality being, in the opinion of the court, established. It was not proved, it was held, that I. had ever acquired

[1] Fœlix, Droit int. privé, p. 462.



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has been just seen, is now repudiated. Nationality, it is now held, is a birthright of a child; and such being the case, it cannot be divested without the consent of the party enjoying it. As has been noticed, this is the rule imposed by the French statute of 1851. To the same effect are numerous French adjudications. In Germany, Italy, and Switzerland, on the other hand, the naturalization of a husband and father involves by statute the naturalization of his wife and children.

(2.) As a party cannot surrender his nationality by birth without being of full capacity, the change cannot be made by a guardian.[1] And it has been held in France, that even though a minor is aided in this respect by his parents and a family council, he is not competent to make such a surrender. Nor can a Frenchman ordinarily renounce his nationality while in military service.

(3.) The option exercised by a minor when arriving at full age to be valid must be independent and free.[2]

French nationality. Exercise of political rights does not necessarily involve political *status*. His father being Genevese, he was Genevese by birth; and he was never naturalized in France. Geneva, on the other hand, holds to perpetual allegiance; and a Genevese nationality cannot be renounced. On this Prof. Lehr, of Lausanne, by whom the case is reported, remarks that supposing I. to have been naturalized in France, the case would have been one of double nationality. The Genevese court took the ground that in such a case, while double *political* rights could not be exercised simultaneously, it is otherwise with regard to *civil* rights. From this last position, however, Lehr dissents. He argues with great force that naturalization in one land is a surrender of a prior nationality in another. But be this as it may, we have a ruling of a Swiss court showing that nationality taken as a standard of personal law is open to at least as many difficulties as is domicil. Indeed, in view of the fact that in the United States there is a constant factor amounting to an average of half a million of persons who are not as yet naturalized, and whose allegiance of birth, even on the most lenient view, cannot be considered as absolutely dissolved, the cases where double nationality can be set up are far more numerous than those where double domicil could be pretended. In few of such cases could there be a double domicil, since there are few where there is the intention of resuming the native domicil. But in none of them can the claims of national sovereignty be said to be absolutely surrendered by the original sovereign.

[1] See infra, §§ 41, 42.

[2] The above points are ably sustained in the Jour. du droit int. privé for 1878, p. 622. A naturalized citizen may divest himself of his new nationality to the same effect as may a citizen by birth. Jour. du droit int. privé, 1874, p. 307. Articles on nationality will be found in the Jour.



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A married woman partakes of her husband's nationality.

§ 11. A married woman ordinarily partakes of her husband's nationality.[1] To this, however, there are two important qualifications. The first is, that as the wife can acquire, according to our law, at least for divorce purposes, an independent domicil,[2] she may, at least for di-

du droit int. privé, 1877, p. 13, and in 18 Am. Law Reg. p. 593.

[1] Infra, § 43; Knickerbocker Ins. Co. *v.* Gorbach, 76 Penn. St. 150. See 12 Op. Atty. Gen. 7; 13 Ibid. 128. Whether a married woman can be naturalized in a foreign country is discussed by Holtzendorff, in the Jour. du droit int. privé for 1876, 5. By the English naturalization statute of May 2, 1870, "a married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject;" and "a widow, being a natural-born British subject, who has become an alien, by or in consequence of her marriage, shall be deemed a statutory alien, and may, as such, at any time during widowhood, obtain a certificate of readmission to British nationality in manner provided for by this act." This, however, only controls British subjects, and does not touch such questions as that of an Irishman returning from this country to Ireland and leaving his wife behind. That a wife's refusal to follow her husband to a new domicil is desertion on her part, affording ground for divorce, see Angier *v.* Angier, 7 Phila. 305.

Bluntschli, in the Revue de droit int. for 1870, p. 107, lays down the following rules: A woman acquires by marriage her husband's nationality. This is the rule on the continent of Europe. In England, however, an English woman is held not to lose her nationality on marrying a foreigner; though, somewhat illogically, a foreign woman marrying an Englishman is held to become English. The wife and legitimate children of an emigrant, who continue to live with him, acquire with him his new nationality. But the authorities of the country of origin may take measures to protect the interests of members of the family whose rights may be thus impaired. Fiore (Op. cit. §§ 66 *et seq.*) argues with much ingenuity that a woman marrying a foreigner does not lose her nationality if she does not follow him. This view, though established by the French Code, is rejected by that of Italy. See *contra*, Fœlix, No. 40. Whether a wife can be compelled to abandon her nationality and follow her husband to a foreign state has been much discussed. Pothier argues in the negative (Puissance Maritale, No. 1); and Fiore (Op. cit. § 66) holds that while a woman owes duties to her husband, she also owes duties to her country; and that a court asked to intervene to compel her to follow her husband should determine the question, not as of absolute right, but as dependent on the circumstances of the case. "Quant à la femme, on admet assez généralement qu'elle ne peut être privée de sa nationalité française qu'autant qu'elle y a consenti." M. Brocher (Brocher, Droit int. privé, p. 197), however, doubts this conclusion, except in cases where fraud is shown; and Fœlix denies it *in toto*. Revue Etrangère, vol. x. To the same effect is Massé, i. No. 998. It has been ruled in France that while

[2] Infra, § 224.



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vorce purposes, acquire an independent nationality. The second is, that when the husband cannot compel the wife to follow him to a new country, she does not, while remaining at her old home, lose her old nationality.

Chinese in the U. S. not naturalized or domiciled.

§ 12. By the fourteenth amendment to the Constitution of the United States, which has been already cited, "all persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States, and of states wherein they reside." Are Chinese born in the United States citizens within the above clause? If the reasoning above given, to the effect that the children born in the United States of a foreigner are not internationally subject to the jurisdiction of the United States, be correct, then Chinese born of Chinese non-naturalized parents, such parents not being here domiciled, are not citizens of the United States. Nor are Chinese comprehended within the federal naturalization statutes. By the naturalization statute of 1804, only *whites* can be naturalized. When it was determined, during the late civil war, to confer full political privileges on the African race, a bill was introduced by Mr. Sumner, striking out the qualification "white." This, however, excited the opposition of the Pacific States, who were determined to resist the naturalization of the Chinese. To exclude them, the statute was finally shaped so as to confine the privilege of naturalization to "aliens being free white persons, and to aliens of African nativity, and to persons of African descent."[1] The fifteenth amend-

a French woman who marries a foreigner loses her nationality in his, she recovers her French nationality on his death, she residing at the time in France. Jour. du droit int. privé, 1874, pp. 243–5.

[1] Revised Stat. 1875, § 2169, as amended by Supple. Act, p. 1435. See, also, Lawrence Com. sur Wheat. 203.

In the matter of Ah Yup, 5 Sawyer, 155 (1878), it was held by Sawyer, J., that a native of China, of the Mongolian race, is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875. Rev. Stat. § 2169; Amendment, R. S. p. 1435. It was further held that a Mongolian is not a "white person" within the meaning of the term as used in the naturalization laws of the United States.

In Ah Fong, in re, 3 Sawyer, 144, it was held that a statute of California prohibiting Chinese emigrants of certain classes from landing, until bonds were given, was in conflict with the Constitution and statutes of the United States.

The census of 1880 gives the total population of San Francisco as 233,000, of which 21,000 are Chinese.



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ment applies only to citizens of the United States, and does not, therefore, touch the Chinese. That the Chinese are not, taking them as a population, domiciled in the United States, is plain. They do not expect to remain permanently in this country; all of them look forward to a return, sooner or later, to China. If the rules of private international law are applicable in such cases, their domicil continues in China.[1] By the fifth article of

The House Report of 1878, cited infra, estimates the aggregate of Chinese in the Pacific States at 150,000, the average annual Chinese immigration from 1871 to 1874 being 13,000.

[1] See infra, §§ 100–104, 128–131.

By the Chinese Penal Code, all persons renouncing their country are beheaded, their property confiscated, and their immediate relatives banished. The mere attempt to renounce allegiance is punished by strangling. 14 West. Jur. 440 (Oct. 1880). This may explain the unwillingness of Chinese to surrender their nationality. The penalty on themselves they could escape, but they could not avert the penalty from their relatives.

Laurent, commenting on the positions taken, in this connection, in the first edition of this work, says (Laurent, Droit int. privé, ii. 169): "Il y a un autre malentendu dans le reproche que Wharton fait au statut personnel, c'est que ce statut est hors de cause quand il s'agit de lois étrangères qui sont contraires à la morale et à la liberté. Qui a jamais dit que la personalité des statuts permet a des étrangèrs qui sont contraires à la morale et à la liberté." But if the "personality of statutes" does not permit polygamy, how can it be construed to establish the civil incapacity of a Chinese son as long as his father lives? Is it consistent with "public order and good morals" to treat the Chinese population of our Pacific coast as permanently subject to the disabilities of Chinese law? These questions are discussed in a note to § 7, supra.

In a report made to the House of Representatives on February 25, 1878, by the unanimous vote of the Committee on Education and Labor (House Reports, 1877–8, No. 240), it is agreed that the claim of the Chinese "to be protected in the full enjoyment of all the rights and privileges which they have acquired under the treaty cannot be justly denied." It is stated, also, that as "the great majority of the immigrants embark from the port of Hong Kong, a British colony," "a change or abrogation of our present treaty with China will not check the evil." But it is proposed to open negotiations with England and China for a revision of the whole topic, and this for reasons bearing strongly on the question of national policy, a question, as we have seen, to be considered by the courts when determining how far a foreign personal *status* is to be accepted as bringing its prerogatives to our shores. The reasons given by the Committee may be thus analyzed: —

(1.) The Chinese have no homes. "They bring with them neither wives, families, nor children. One hundred Chinese will occupy a room which, if subdivided, would not accommodate five American workingmen with their families. . . . . Here they both sleep, eat, and cook." "No material advantages, however great, arising from Chinese frugality and industry, can compensate for the loss of the homes"



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the Burlingame treaty (ratified Nov. 28, 1868), it is provided that "the United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, *or as permanent residents.*" It is further provided that citizens of the United States, visiting or residing in China, shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. *But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.*" The Chinese in the United States, therefore, while not capable of naturalization, and while not accepting a

essential to the moral and political security of the nation.

(2.) "The crowded condition in which the Chinese live renders the observance of hygienic laws and sanitary regulations almost an impossibility," by which pestilence is engendered.

(3.) With them infanticide, so far as concerns female children, is, in many cases, meritorious. Women are slaves, and are sold by their fathers and husbands.

(4.) "Respectable persons are deterred both by law and prejudice, and as a rule only the most indigent and desperate characters consent to leave their native country. The female immigrants are bought and sold like chattels, and practise the most revolting vices." Imprisonment is not regarded with dread, as it is rather an amelioration of their condition, and the only punishments they fear are those which in this country we refuse to inflict as barbarous.

(5.) The Chinese remain "a distinct and alien element." "They have been in this country over a quarter of a century. Their employment as house servants and laborers has brought them into close and immediate contact with our people, but no change in them has been produced. What they were when they came here they are to-day, — the same in dress, the same in disposition, the same in language, the same in religion, the same in political feeling. They indicate no desire, either by word or action, to become identified with us. To make money was their sole object. When they have accomplished this they do not invest their earnings in land or homesteads, but return with them to their native clime. They come with no desire to make this their permanent home." "They remain a quiet, united class, distinct from us in color, in size, in features, in dress, in language, in customs, in habits, and in social peculiarities."



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domicil, are yet entitled to the same rights in the United States as are citizens of European nations who may be temporarily resident on our soil. The treaty giving them this right, as long as it continues in force, is the supreme law of the land, which cannot be overridden by state legislation.[1] But while this is the case it is important to keep in mind the bearing of this peculiar condition on the doctrine of the ubiquity of personal laws, as already stated. To apply that doctrine to the Chinese in the United States, retaining as they do their Chinese nationality, would make the question of the personal capacity, as to business as well as to marriage, of a considerable section of our Pacific population, determined, not by our own law, but by the law of China. The objections to this have been already stated.

Naturalization implied in annexation.

§ 13. Whether the separation of a territory from one state, and its annexation to another state, naturalizes the subjects of the annexed territory in the state to which it is annexed, depends in a large measure on the terms of annexation. Mere military occupation does not work such naturalization; though it is otherwise when the annexation is brought about by treaty, or is finally established by the consent of the annexed state. In the French-German treaty of 1871, the inhabitants of Alsace, who elected to remain in that country after a definite period subsequent to the treaty of peace, became German subjects. After the annexation of Algeria to France, when Algeria became French territory, Algerians were held to be French subjects. By the treaty of 1860, providing for the cession of Savoy to France, all inhabitants of Savoy, who did not transfer their domicil to Italy within a year after the ratification, were held to be French subjects. In the United States, this kind of naturalization was recognized in the treaty of 1803 with France for the cession of Louisiana, in that of 1819 with Spain for the cession of Florida, and in that of 1866 with Russia for the cession of Alaska. And after the annexation of Texas, by a joint resolution of Congress in 1845, Texas assenting to the annexation, all citizens of Texas became citizens of the

[1] A bill to abrogate the treaty passed Congress in 1879, but was vetoed by President Hayes, March 1, 1879, and then failed for want of the requisite majority. The veto was based on the position that the question was executive, not legislative.



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United States. The same result was reached by the treaty of Guadalupe Hidalgo in 1848, and the Gadsden treaty in 1854.[1]

§ 14. Naturalization, not only under the Constitution of the United States, but under the statutes of most European states, is limited to the establishment of the citizenship of the person naturalized in the naturalizing state. It does not confer any special civil *status;* nor, while removing disabilities arising from foreign birth, does it remove those arising from conviction of crime.[2]

Naturalization affects only political *status*, and does not touch penal disabilities.

§ 15. The commercial settlements made in Asia and Africa by European traders were necessarily subject to the laws of the countries from which the traders came. There being no local courts competent to decide questions in litigation in such settlements, these questions were determined sometimes by arbitration, sometimes by tribunals established by the settlers themselves; but generally, and ultimately almost universally, by consular courts appointed by the state by whose subjects the settlement was established. "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 intermisceat undam.*"[3] Hence, under such circumstances, the law is personal, not territorial.[4] As Mr. Lawrence has well ob-

Jurisdiction exercised by civilized in imperfectly civilized states.

[1] See Minor *v.* Happersett, 21 Wall. 162; Brown *v.* U. S. 5 Ct. of Cl. 576.

In Harrold, in re, 1 Penn. L. J. Rep. 214, the rule was applied to the transfer of possession of Detroit under Jay's treaty.

A British subject who resided at Detroit before, and at the time of, the evacuation of the territory of Michigan, under the provisions of Jay's treaty, and who continued to reside there afterwards, without, at any time prior to June 1, 1797, declaring his intention to remain a British subject, became, *ipso facto*, for all purposes, an American citizen. 1872, Crane *v.* Reader, 25 Mich. 303.

[2] Viviani's case, Court of Cass. Paris, 1874, Jour. du droit int. privé, p. 439. It was held in a judgment of the French Court of Cassation, that while the terms of naturalization are settled by the country which the emigrant enters, the terms of expatriation are settled by the country which he leaves. Jour. du droit int. privé, 1877, p. 9. The effect of the imposition on a French subject of nationality by a foreign state is discussed in the Jour. du droit int. privé for 1875, p. 180. As to change of nationality, see articles in 40 Am. Law Rev. p. 447; Jour. du droit int. privé, 1877, p. 389.

[3] Indian Chief, 3 Robin. Ad. 29.

[4] That no domicil is acquired by merchants settling in barbarous lands



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served,[1] the states of Spanish America, exposed as they have been to constant revolutionary movements, occupy in this respect an

see infra, § 71. In Dainese *v.* Hale, 91 U. S. 13, the following points were ruled: (1.) Judicial powers are not necessarily incident to the office of consul, although usually conferred upon consuls of Christian nations in Pagan and Mahometan countries, for the decision of controversies between their fellow-citizens or subjects residing or commorant there, and for the punishment of crimes committed by them. (2.) The existence and extent of such powers depend on the treaties and positive laws of the nations concerned. In Turkey, for example, the judicial powers of consuls depend on the treaty stipulations conceded by the government of that country, and on the laws of the several states appointing the consuls. (3.) The treaty between the United States and Turkey, made in 1862 (if not that made in 1830), has the effect of conceding to the United States the same privilege in respect of consular courts and jurisdiction which are enjoyed by other Christian nations, including civil as well as criminal jurisdiction; and the Act of Congress of June 22, 1860, established the necessary regulations for carrying this jurisdiction into effect. (4.) But as this jurisdiction is, in terms only, such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, those laws or usages must be shown in order to know the precise extent of the jurisdiction.

A commission was organized in 1874 by the Institute of International Law, to determine how far the law of nations is applicable to Oriental States. The commission consisted of Messrs. Asser, Field, Holtzendorff, Lorimer, Martens, Rivier, and Sir Travers Twiss. A report by Mr. Field, discussing the question with great ability, will be found in the Revue de droit int. for 1875. pp. 657 *et seq.* This report gives the following conclusions: (1.) Oriental, or more strictly speaking, non-Christian nations, are to be admitted to the enjoyment of the rights, and subjected to the performance of the duties, attached to Eastern, or in other words, Christian nations, as such rights and duties are defined by international law, with the single exception: (2.) Until a more complete assimilation is established between the judicial institutions of Eastern and of Western nations, it is desirable that courts of this class should be internationally recognized by the great powers.

In a report by Sir Travers Twiss, presented to the Institute for International Law in 1879, the international relations of the Oriental States are further considered. Mahometan countries, it is maintained, stand in peculiar seclusion, from the fact that by their religion they are forbidden to have dealings, national or personal, with persons not Mahometans. The systems of Confucius, and of the Buddhists, are inert and tolerant, all they ask is equality of rights. It is otherwise with Mahometanism, which refuses to concede, not only political, but personal rights to those whom it regards as infidels, when living under Mahometan sway. And though in 1856 an edict was issued by the Sultan granting equal rights to all his subjects, this decree, so far as it permits Christians to be examined as witnesses in suits before the Turk-

[1] Comment. sur Wheaton, iii. 139.



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intermediary position between Turkey, China, and other semi-barbarous states, on the one side, and Christian states, where life

ish tribunals, is regarded by the Turkish courts as a nullity, not having been confirmed by the ecclesiastical authorities of the state.

That such consular jurisdiction is provisional, appears from Mahoney *v.* U. S. 10 Wall. 62, where it was held by the Supreme Court of the United States, that when Algeria became a French province, the functions of an American consul, there resident, were essentially modified, and that the extra-territorial authority previously exercised by the consul would cease.

Whether the penal systems of China, and other Asiatic states, are sufficiently humane to justify the withdrawal from those states of the consular jurisdiction exercised in them by the European powers, and by the United States, was discussed in 1879, in London, by the Association for the Reform of the Laws of Nations, and in Brussels by the Institut de Droit International. Sir Travers Twiss, in his report to the latter body, said, that so far as concerns the Oriental states, all European experts with whom he had conferred agreed that the time had not yet arrived when European states could dispense with this mode of protecting their interests. On the other hand, Mr. Robert Hart, inspector general of the Chinese customs, and organizer of the Chinese department at the French Exposition of 1878, in a memorandum to the English government on the convention of Che-Foo, argues that the practice of the Chinese courts is sufficiently humane and the laws sufficiently just to permit England to renounce those clauses in its treaties with China which give the English consuls extra-territorial jurisdiction. But facts stated in the controversy which followed show that Mr. Hart's idea of "humanity" and "justice" was drawn from Chinese rather than English traditions. A correspondent of the Times (September 13, 1879), narrates a case in which a political offender was not only sentenced to capital execution, but of his numerous children and grandchildren several were put to cruel deaths, while of the remainder the girls were sold as slaves and the boys were castrated. Jour. du droit int. privé, 1879, p. 409.

The following are extracts from a pamphlet by Mr. David Dudley Field, on the "Applicability of International Law to Oriental Nations," published in New York in 1875: —

"Among the published opinions of the Attorneys General of the United States is one on the functions of consuls (vol. vii. pp. 348, 349), in which are these passages: —

"In our relations with nations out of the pale of Christendom, we must and shall retain for our citizens and consuls, though we cannot concede to theirs, the right of extra-teritrorial-ity." . . . .

"Notwithstanding these and similar authorities, there are instances in which the local laws of Eastern countries have been applied to dealings between their people and citizens of the United States. Thus in the case of Consequa *v.* Fanning (3 John. Ch. 587), Chancellor Kent decided that the Chinese law, in respect to the interest of money, should be taken as the rule of decision by our courts.

"How shall they be dealt with? So long as the judicial institutions of Oriental states remain as they are, it is impossible to subject Americans and Europeans to their jurisdiction. No one accustomed to the judicial proce-



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and liberty are secure, on the other side. The right of the United States, for instance, to intervene for the protection or indemnity

dure of the West would ever willingly be subject to the procedure of the East. There torture is in constant use, oaths are rarely administered, advocates are unknown, and, instead of fixed rules of decision according to law, the caprice of the judge or a vague notion of justice control the decision. I have myself seen accused persons brought up for trial before a Chinese judge. Each one was brought in with a chain around his neck, the end of which was fastened to a heavy stone that he was obliged to lift when he moved; on entering the judge's presence he sank upon his hands and feet, and remained so during the trial, scarcely daring to look up; a crowd of retainers surrounded the judge and took part in the trial, interrupting him, suggesting questions, and making statements; and when the poor creature dared to deny the charge, he was instantly put to the torture by men in waiting, who seemed as much part of the court as the judge himself. The punishments inflicted in all Oriental nations are strange and cruel, — crucifixion being often among them. It would be revolting to subject our countrymen to such an ordeal, and the chance of such a punishment."

In China, as appears from a letter from Mr. Bailey, the United States consul-general at Shanghai, dated Shanghai, September 15, 1879, "Civil cases by the Chinese against our people have been tried in the court for this consular district, the consul-general sitting alone as judge. Similar cases by our people against Chinese subjects have been tried in the mixed courts of the foreign settlements, presided over by the Chinese magistrate, Chow-Fu-Shlin, and the United States interpreter acting as American assessor." For. Relat. U. S. 1879, p. 229.

A statement of the mode of executing judgments in Shanghai is given in a letter from Mr. Bailey, consul-general of the United States at that place, in Foreign Relations U. S. 1879, p. 235.

Mr. Fairman, American consul in Egypt, in a letter to Mr. Evarts, dated Cairo, April 5, 1878 (Foreign Relations U. S. p. 917), says: "Extra-territorial rights are admitted and enjoyed in Egypt to their fullest extent. Foreigners are sometimes arrested by the local authorities, but they are immediately delivered to the consuls of their respective countries. The number of criminal cases brought before the consular courts is very large. I was informed a few days since by an official of the Italian consulate, that within eight months they had examined fifty-two criminal cases, and sent forty-two accused persons to Italy for judgment." As to Egyptian scheme, see same volume, p. 926.

A statement of the character and working of the international court of Egypt will be found in Foreign Relations U. S. 1879, pp. 231 *et seq.* See, also, articles in Appletons' Journal for September and October, 1880.

That an appeal lies in England from a consular court see Pitts *v.* La Fontaine, L. R. 5 Ap. Cas. 564.

The structure of the consular courts in Egypt is discussed elaborately in a correspondence published by the state department in Foreign Relations U. S. 1879, pp. 988–9 *et seq.* It is stated by Mr. Evarts, July 22, 1879, that "the United States consular courts in Egypt retain jurisdiction to try and punish citizens of the United States for offences (crimes) which they have



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of its citizens in the South American States is claimed in cases where such citizens are exposed to injuries in the states of their sojourn in violation of treaty obligation.[1]

Extra-territoriality of diplomatic residences: Asylum.

§ 16. The residence of a foreign minister is regarded as part of the territory of the state from which he is sent; and not only his diplomatic attendants, but his family and servants, are exempt from the jurisdiction of the state to which he is accredited.[2] It is, however, open

committed in the dominion of the Khedive, as conferred by the fourth article of the treaty of 1800 between the United States and the Ottoman empire, and prescribed by the Act of Congress of the 22d of June, 1860."

An interesting article on the jurisdiction of mixed tribunals in Japan will be found in the Jour. du droit int. privé, 1875, pp. 169–249.

The subject of consular jurisdiction is elaborately discussed by Mr. W. B. Lawrence, in the Revue de droit int. for 1879, p. 45, and in the 4th volume of his Commentaire sur Wheaton (1880), pp. 105 *et seq.* Comp. 1 Halleck Int. Law, Baker's ed. 333–4.

It was held by the German Supreme Tribunal of Commerce, in 1871, at Leipzig, that a partner in a house of business established at Hong Kong, China, summoned before the German court of his own domicil, is entitled to invoke the English laws in force at Hong Kong, on condition of proving them before the judge.

[1] Ibid.

[2] That such is the case with diplomatic officers of a legation, see Cabrera, ex parte, 1 Wash. C. C. 232; U. S. *v.* Benner, Bald. 234; U. S. *v.* Lafontaine, 4 Cranch, 173. That interference with foreign ministers is indictable, see Whart. Crim. L. 8th ed. § 1899.

A foreign minister does not lose his privilege by engaging in trade. Taylor *v.* Best, 14 C. B. 487. But see infra.

The statute of 7 Anne, c. 19, which declares "null and void" all "writs and processes sued forth against the person of any public minister of a foreign state, or of any domestic servant of such minister," is said by Lord Tenterden to be "only declaratory and in confirmation of the common law. It must, therefore, be construed according to the common law, of which the law of nations must be deemed a part." Novello *v.* Toogood, 1 B. & C. 554; S. P., Magdalena Nav. Co. *v.* Martin, 2 E. & E. 94. The service, however, must be *bonâ fide*, for a party claiming to be a servant to avail himself of the privilege. Heathfield *v.* Chilton, 4 Burr. 2016. Infra, § 720.

The authorities are thus grouped in Foreign Relations U. S. 1879, pp. 375 *et seq.*

Wheaton's International Law, 8th edition, 1866:—

§ 224. From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction both civil and criminal.

§ 225. This immunity extends not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.

§ 226. The wife and family, servants, and suite of the minister par-



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to doubt whether a foreign minister, by taking into service sub-

ticipate in the inviolability attached to his public character.

§ 241. The privilege of extra-territoriality consists in the right of the diplomatic agent to be exempt from all dependence on the sovereign power of the country near the government to which he is accredited.

Phillimore's International Law, 2d edition, 1871, vol. ii. p. 193:—

§ 153. Thirdly, the right of inviolability applies to whatever is necessary for the discharge of ambassadorial functions, "Nam omnis coactio abesse a legato debet, tam quae res ei necessarias, quam quae personam tangit, quo plena ei sit securitas." Grotius ii. c. xviii. § iv.

§ 186, p. 218. With these exceptions all civilized nations unanimously accord to ambassadors complete exemption from the civil jurisdiction of the country in which they reside. These extra-territorial privileges are also extended by positive international law, as much as the rights of inviolability to the family, and especially to the wife of the ambassador; his suite and train (*comites*) are also entitled to these privileges, a violation of which in their persons affects the honor, though in a less degree, of their chief.

§ 188. . . . . Difficulties have arisen from persons perhaps not subjects of the state from which the embassy is sent, claiming without sufficient warranty to belong to it. It has therefore been enacted by the municipal laws of some countries, and it ought to be the usage of all, to require a list of the persons composing the suite to be delivered to the minister for foreign affairs, or other proper officers.

Bluntschli, Das modern Volkerrecht der civilizunten Staaten, 3 edition, 1878:—

§ 145. The exemption from local state authority extends also to the family officials, suite, and servants of the extra-territorial personage.

§ 212. Immunity from the penal authority of the state to which the minister is accredited, and subjection to the penal authority of the accrediting state, extends also to *such servants of foreign ministers as are subjects of the former state.*

Alt, Handbuch des europäischen Gesandtschaftsrecht, &c., Berlin, 1870:—

§ 130. To the private servants, who may be divided into three classes, belong, firstly, the minister's own private physician, his private secretary, his house teachers, then his house officers (*officiers de la maison*), and finally his liveried servants (*gens à livrée*). By the term house officials are meant butlers, stable-masters, cellar-masters, equerries, valets, swiss; and among liveried servants are reckoned runners, cooks, coachmen, postilions, stablemen, chasseurs, lackeys, *heiducken. All these stand, as already mentioned, under the particular protection of international law and enjoy the privilege of extra-territoriality.*

Mirus, Das europäische Gesandtschaftsrecht, Leipsic, 1847:—

§ 239, p. 264. All persons in the private service of a minister, including liveried servants, &c., stand like the rest of the suite under the particular protection of international law, and are not subject to the authority of the state in which the minister is accredited.

Vattel, Droit des Gens (ed. Pradier-Fodéré, Paris, 1863), vol. iii. livre iv. chapter ix:—

§ 120. De la suite de l'Ambassadeur. La inviolabilité de l'Ambassadeur se communique aux gens de sa



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jects of a state to which he is accredited, can exempt such subjects from the operation of the laws of the latter state.[1]

To give to a foreign minister unlimited prerogatives of asylum would enable him not only to make his residence an inviolable refuge for offenders of all classes, but to constitute it the base of political revolt.[2]

suite, et son independence s'etend à tout ce qui forme sa maison. Toutes ces personnes lui sont tellement attachées qu'elles suivent son sort. Elles dépendent de lui seul immediatement et sont exemptes de la juridiction du pays où elles ne se trouvent qu'avec cette reserve l'Ambassadeur doit les protéger et on ne peut les insulter sans l'insulter lui-même.

Si les domestiques et toute la maison d'un ministre étranger ne dependaient pas de lui uniquement, on sent avec quelle facilité il pourrait être molesté, inquiété et troublé dans l'exercice de ces fonctions. Ces maximes sont reconnues partout aujourdhui, et confirmées par l'usage. See infra, § 720. Mr. Hall (Int. Law, 1880, § 31) says that "in England this extent of immunity is not recognized."

[1] This question is discussed at length on a claim of the U. S. legation at Berlin to exempt a German, whom it employed as a servant, from military jurisdiction. U. S. For. Rel. 1879, pp. 373 *et seq.* As to service of suit on consuls, see infra, § 720.

In the Parliament Belge, 40 L. T. N. S. 231 (1879), cited infra, § 358 *a*, Sir R. Phillimore said: "The analogy between the immunity of the ambassador and the ship of war is obvious. It has been holden by high authorities, both in this and other countries, that an ambassador may lose his privileges by engaging in commerce. Indeed, Lord Campbell was of opinion that in such a case 'all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment.' The Magdalena Steam Navigation Company *v.* Martin, 2 E. & E. 94, 114, cited in The Charkieh, *ubi supra*. 'A distinction,' says Story, J., 'has been often taken by writers on public law as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious, and public purposes, things *extra commercium et quorum non est commercium*. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronae*, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce.' U. S. *v.* Wilder, 3 Sumner (U. S.) Rep. 308;" also cited in The Charkieh, *ubi supra*.

Sir R. Phillimore's judgment, as to the extra-territoriality of the Parliament Belge, was reversed on appeal. S. C., 42 L. T. N. S. 273. In the judgment of Brett, L. J., in which James, L. J., and Baggally, J., concurred (infra, § 124 *a*, 358 *a*), it is stated that the "immunity of an ambassador from the jurisdiction of the country to which he is credited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him on the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority which he represents would be."

[2] The objections to the continued



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§ 17. So far as concerns the enjoyment of civil rights, alien friends, visiting a country, should be put on the same basis as citizens. In England and this country this is granted so far as concerns the right to resort freely to courts of justice for the settlement of litigated issues.[1] This equality, however, while conceded in Italy, has not yet obtained acceptance in France, where aliens cannot ordinarily refer their litigations to civil courts, and where their capacity to hold property is determined by reciprocity.[2]

Aliens entitled to equal civil rights with citizens.

existence of the right of asylum, as operating to encourage revolt, and to assure immunity for crime, are forcibly stated by Mr. Langston in a letter from Hayti, dated April 24, 1878, in the Report on the Foreign Relations of the United States, 1878, p. 443. See, for cases of refusal of asylum, Foreign Relations U. S. 1876, pp. 17, 181, 321, 338, 344. Compare Hall, Int. Law, 1880, § 52.

[1] Infra, §§ 705, 743 *et seq.*

[2] See infra, § 745.

Laurent, in the second volume of his Droit civil international, p. 13, shows that both Phillimore and Bar are in error in stating that the Code Napoleon assigns to the foreigner equal rights with the citizen. The distinctive French legislation in this respect is discussed in future paragraphs in the present section.

According to Laurent, the French nation, which undertook a revolution to establish the equality of man, has adopted a code by which this equality is repudiated. By enacting that there shall be no civil rights afforded to foreigners without reciprocity, it enacts that foreigners have no rights in France unless protected by treaty. Austria and Holland take a more liberal view, providing that there shall be equality in privileges in all cases in which inequality is not expressly commanded. Italy has adopted what Laurent considers the right rule, of holding that foreigners should enjoy in Italy full civic rights. As to the limitations of Germany, see infra, § 744.

England, we are told by Laurent, is still feudal; and the common law, impregnated with feudalism, has passed, he informs us, to the United States, putting the American democracy under laws dating from the Norman Conquest. The Wager of Battle, he seems to think, still continues; and with this he couples other traditions equally odious.

The law (droit) of the United States, he tells us, is as narrow and barbarous as that of England, for which he says he has American diplomatic authority (aussi étroit, aussi barbare, le mot est d'un diplomate Americain, que celui de Angleterre). As sustaining this position he confines himself to referring to the statements in the text on the limits imposed by some of our states on the acquisition of real estate by foreigners. It is enough to say that such limitations are in most states nominal (*e. g.* Pennsylvania, where the limitation is five thousand acres), and that in other states they have ceased to exist. In no other respects, so far as concerns property not covered by the navigation act, is a foreigner in the United States refused rights which are enjoyed by citizens. See article in Jour. du droit int. privé for 1858, p. 309.

By the present Italian Code, the



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By the English common law, although technically an alien's real estate escheats, this is only on office found; and unless such proceedings are perfected, the alien may both possess and convey land *inter vivos*.[1] But an alien has been held to have no capacity for transmitting by descent; and on his death, his land vests in the crown by mere operation of law, without office found.[2] This taint is now eradicated from English legislation.[3] In this country, so far as concerns lands held by the federal government, aliens are not excluded from taking by purchase or succession;[4] but, as to property under state jurisdiction, each state (unless overriden by federal treaties) is supreme. The legislation that has ensued is very diversified, and is modified from year to year, though at present the states may be divided into two general groups, — those which have removed all restrictions on alien land proprietorship, and those which make such proprietorship dependent on residence, allowing, at the same time, to aliens taking by descent a reasonable time to dispose of their estates.[5] Nor

equality of foreigner and of citizen is made the basis of private international law; and by the Code the foreigner is entitled to equal civil rights with the citizen. It is not necessary, in order to enable him to claim such rights, that the foreigner should be a resident in Italy. See summary by Professor Esperson, of Pavia, in Journal du droit int. privé, 1879, p. 329.

The true position to be assumed in this relation is exhibited with much ability by M. Charles Brocher, professor of civil law in Geneva, in a series of articles in the Revue de droit int. et de légis. comparée, vol. iii. pp. 412, 540; vol. iv. p. 189; vol. v. pp. 137, 390. He starts with the following principles: (1.) Every man is entitled to enjoy civil rights, whether at home or abroad. (2.) Every man is entitled to know by what laws his person, his conduct, and his property, will be judged. (3.) This should be determined in a way to preserve vested rights. And he quotes the following striking remark from Neckar: "The government which would discourage foreigners from visiting our realm, and there exchanging their gold for the productions of our industry, acts as irrationally as the government which would pass a law directly forbidding the exportation of such productions." Jour. du droit int. privé, 1874, p. 113.

[1] Com. Dig. Alien, C. (3); Co. Litt. 2 b; Craig *v.* Radford, 3 Wheat. 594; Gouveneur *v.* Robertson, 11 Wheat. 332; Cross *v.* De Valle, 1 Wal. 5; Phillips *v.* Moore, 100 U. S. 208; Munro *v.* Merchant, 28 N. Y. 9. See Barrow *v.* Wadkin, 24 Beav. 1.

[2] Com. Dig. Alien, C. (3).

[3] See infra, § 332.

[4] See Brightly's Dig. title Land, Preëmption. See, also, Lawrence Com. sur Wheat. iii. 89. Infra, § 582.

[5] States which apply no restrictions to the acquisition by aliens of land: — Alabama, Code, 1876, §§ 2860–1; Colorado, Stat. 1880; Florida, Stat. 1880; Illinois, Rev. Stat. 1880, c. 6, § 1; Iowa, Code, 1873, § 1908; Kansas, Gen. Stat. 1860, p. 40; Maine, Rev.



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would it be just to impute this limitation to feudal traditions or to provincial prejudices. The states adopting it have been

Stat. 1857, p. 449; Massachusetts, Rev. Stat. 1873, c. 91; Michigan, Compiled Laws. 1871, p. 79; Minnesota, Gen. Stat. 1873, § 22; Mississippi, Rev. Code, 1880, § 1230; Missouri, Rev. Stat. 1879, § 325; Ohio, Rev. Stat. 1880, § 4173; Nebraska, Rev. Stat. 1873, p. 53; New Hampshire, Rev. Stat. 1867, 253; New Jersey, Rev. of 1877, pp. 6, 296; South Carolina, Rev. Stat. 1873, pp. 440–537; Wisconsin, Rev. Stat. 1878, § 2200.

States which make the permanent holding of land by aliens dependent upon residentship, or upon a declaration of intended naturalization, but which give to aliens inheriting land a term varying from three to nine years to dispose of the title: —

Arkansas, Code, 1874, § 2167; California, Code, 1876, pp. 6, 404; Connecticut, Stat. 1866, p. 137; Delaware, Rev. Code, 1874, p. 493; Indiana, Rev. of 1876, c. 11; Kentucky, Gen. Stat. 1873, p. 191; Maryland, Code, 1860, p. 18; New York, Fay's Dig. 1876, pp. 552–3; Tennessee, Th. & St. Stat. 1871, p. 953; Virginia, Code, 1873, p. 130; Texas, rights conditioned either on (1.) reciprocity; or (2.) declaration of intended citizenship. Rev. Stat. 1879, §§ 9, 1658.

In Georgia, by the Code of 1873, § 2676, title is conditioned on improvements being made, and limited to 160 acres. In Pennsylvania, alien absentee proprietorship is limited to 5,000 acres for each holder. Bright. Purd. 67.

As to Texas, see Sattegart *v.* Schrimpff, 35 Tex. 323.

As to New York, see infra, § 582; Heeney *v.* Brooklyn, 33 Barb. 360; Goodrich *v.* Russell, 42 N. Y. 177; Ettenbeimer *v.* Hellman, 66 Barb. 374, where it was held that aliens cannot take land as successors in intestacy. Compare Lawrence Com. sur Wheat. iii. 89.

As to Kentucky, see Yeaker *v.* Yeaker, 4 Metc. 33; Eastlake *v.* Rodaquest, 11 Bush, 42. As to Iowa, Purczell *v.* Smidt, 21 Iowa, 540; Greenhold *v.* Stanforth, 21 Iowa, 595. As to Michigan, Crane *v.* Reader, 21 Mich. 24. As to Nevada mining claims, Golden Fleece *v.* Cable Co. 12 Nev. 312.

As to acquiring property by purchase, see §§ 296, 332, and by succession, § 581; as to rights in litigation, §§ 732–738; as to patent rights, § 325; copyrights, § 327.

The common law has been held to obtain in Rhode Island, notwithstanding a statute making such right dependent on a license from the state. Cross *v.* De Valle, 1 Wall. 5. This was also the old Mexican law, in force in California. Merle *v.* Matthews, 26 Cal. 455. In Kentucky, while aliens formerly could not inherit land, an alien friend, residing in that state for two years, is entitled, after that period, to receive and pass title. Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33.

Not only by the common law, but by the old Mexican law, an alien may hold real estate against every one, and even against the government, until office found. Hammekin *v.* Clayton, 2 Woods, 336; Phillips *v.* Moore, 100 U. S. 208. See Merle *v.* Matthews, 26 Cal. 455.

In Texas an alien has nine years to dispose of real estate he has acquired. Barclay *v.* Cameron, 25 Tex. 232. See Osterman *v.* Baldwin, 6 Wal. 216; Phillips *v.* Moore, 100 U. S. 208.



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the foremost to welcome immigrants. They hold, however, as a matter of policy, that it is better that their soil should be occupied and tilled by *bonâ fide* settlers, than that it should be held unoccupied and untilled, in large blocks, by foreign capitalists. And however mistaken this may be, the issue between resident proprietorship and absentee proprietorship is one as to which liberal statesmen may be allowed to differ, and which can properly be remitted to local policy to determine.

For some time it was an open question whether the federal government, by treaties with foreign states, could override state laws limiting the capacity of aliens to hold real estate.[1] It is now finally settled that treaties executed by the federal government with foreign states giving the citizens of such states power to hold lands are part of the local law of each state.[2]

On the acquisition by aliens of personal property the English common law places no restriction. "An alien friend may, by the common law, have, acquire, and get within the realm, by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as well as any Englishman, and may maintain an action for the same."[3] Such has always been accepted as the common law in the United States, subject, however, to such restrictions as local policy may impose upon the right of holding and transferring interests in those public institutions or engines of trade whose existence is politically associated with that of the state. A conspicuous illustration of this exception is found in the navigation acts of England and of the United States, by which, under a policy which, however mistaken, is undoubtedly within the exercise of constitutional administrative prerogative,

[1] See Ware *v.* Hylton, 3 Dal. 242; Fairfax *v.* Hunter, 7 Cranch, 627; 8 Op. Atty. Gen. 415; Halleck Int. Law, 157; 4 Kent Com. 420; 3 Jeff. Works, 365; Dana's Wheat. p. 139, note.

In Lawrence Com. sur Wheat. iii. 86 is given a summary of the treaties of the United States with other powers which give subjects of such powers the right, if incapacitated by a state law, from inheriting real estate or disposing of it within a reasonable time. The constitutionality, so far as concerns the states, of these treaties, is discussed by the same learned author. Ibid. pp. 88, 89.

[2] Hauerstein *v.* Lynham, 100 U. S. 483.

In Smith *v.* Mulligan, 11 Abb. (N. Y.) Pr. N. S. 438, it is held that the fact of the alienage of the father will not impede the descent of real property from one brother to another, both being citizens.

[3] Lord Coke, in Calvin's case, 7 Co. R. 17 *a*.



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none but subjects or citizens can be owners of registered ships, entitled to the protection of the national flag. This restriction, it is argued, is necessary, not merely to ascertain and protect maritime ownership,[1] but to prevent an essential branch of national industry and wealth passing into foreign hands. The same reasoning also applies to restrictions by which the control of our great railroad and banking corporations is placed under territorial check.[2]

When war exists between states, however, these reciprocal rights of their subjects cease. Contracts with an alien enemy are void; nor can he maintain suit during war, nor even after peace as to a cause of action arising during war.[3]

Aliens, in the United States, may take out patents,[4] but not copyrights, which are restricted to citizens or residents.[5] But no vessel can be registered as of the United States, unless wholly owned by a citizen, and commanded by a citizen.[6]

In Canada, Nova Scotia, British Columbia, New South Wales, Greenland, New Zealand, India, and, in fact, the English dependencies in general, aliens have the same rights as subjects as to holding or devising lands.[7]

Holland adopts the test of reciprocity, but subjects non-domiciled aliens to several onerous restrictions in matters of process. They are liable to arrest on mesne as well as on penal process, and are excluded from the benefits of bankruptcy.[8] Domicil may be obtained by special license, or by continuous residence for six years, accompanied by an announcement to the government of the *animus manendi*.[9]

Prussia imposes no restrictions on the capacity of individual aliens to acquire, hold, or alienate any species of property. Foreign corporations, however, and other artificial persons cannot, without license, either take under wills or hold immovable property. The relations of aliens, so far as concerns business capacity, are governed by the principles of reciprocity. Unnaturalized foreigners, however, by the law of October 28, 1867, can-

[1] Maclachlan on Merchant Shipping, p. 27, n. 1.

[2] See infra, §§ 305 *et seq.*

[3] Infra, §§ 497, 737.

[4] Infra, § 325; Rev. Stat. U. S. § 4887.

[5] Infra, § 327; Rev. Stat. U. S. § 4971.

[6] Rev. Stat. U. S. § 4133.

[7] Cockburn on Nationality, p. 176.

[8] Code, §§ 710, 769, 770.

[9] Ibid. § 8.



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not adopt, when owners of merchant ships, the North German flag and nationality; nor can foreign companies, for insurance or emigration, by the Act of May 14, 1853, do business without special license; nor, without such license, in default of treaty sanctions, can foreign houses establish permanent business agencies in Prussia.

In Austria, no foreigner can act as advocate, broker, or notary; nor can he, without license, exercise a public trade. In other respects reciprocity is the test.[1]

Bavaria, by the Trade Law of 1868, establishes restrictions similar to those of Prussia. By the law of January 30, 1869, the permanent residence of aliens, under the age of thirty-eight, as unnaturalized foreigners, is prohibited.

In Saxony, to adopt Lord Chief Justice Cockburn's summary,[2] "every foreigner who desires to become possessed of landed property in town or country, *with personal residence*, must first be naturalized; but naturalization is not required, (1.) For such as hold landed property in Saxony on which they are not domiciled, and which is under foreign management; (2.) For foreigners who acquire landed property in Saxony with habitual residence, but who usually reside abroad, so long as they continue abroad; (3.) When a wholesale business or manufacture is established in the country by a foreigner residing abroad. In the two latter cases there is a condition that the obligations of citizenship which attach to a property or undertaking shall be fulfilled by a proper native representative.

In Würtemberg an alien is entitled to the same civil rights as a subject, "if a similar liberty be granted to Würtemberg subjects by the country of the alien."[3]

In Russia, since 1860, aliens may hold landed as well as other property and engage in trade.[4]

In Norway and Sweden, the doctrine of reciprocity is maintained; aliens being entitled to the same civil rights in those countries as are granted to subjects of Norway and Sweden in the countries to which such aliens belong.[5]

[1] Code, p. 136; Jour du droit int. privé, 1880, p. 329.

[2] P. 167.

[3] Appendix to Report of Eng. Roy. Com. on Naturalization, p. 136. See, as to treaty between United States and Würtemberg, infra, § 644.

[4] Rep. of Eng. Roy. Com. of 1868, Appendix, p. 128; Cockburn, p. 171.

[5] Cockburn, p. 172.



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The right to exclude or banish aliens was assumed by the United States in the alien and sedition acts,[1] and by England at the time of the Fenian insurrections in Ireland, as well as at many prior periods.[2] By the states of the continent of Europe this power is regarded as one of police regulation inherent in the very nature of sovereignty.[3] Subject to this qualification, and to those already stated, aliens, according to a settled principle of present international law, have the same capacity for rights as subjects.[4]

[1] See Rev. Stat. U. S. § 4067.

[2] McCarthy's Own Times (1880), c. 53.

[3] See Cockburn on Nationality, London, 1869, p. 99; U. S. Diplo. Corr. 1868, pt. i.

[4] This is one of those general maxims which jurists of all schools unite in accepting. It was announced in the Middle Ages as one of the necessary consequences of the doctrine of the unity of all nations under Pope and Emperor, which was then assumed (see Baldus in L. Si non speciali 9, num. ii. C. de test.; Barthol. de Saliceto in L. Cunetos C. de S. Trin. num. 8); and though this ideal unity has long since been abandoned, the maxim, that both as to civil and penal law the alien visitor is to have the same rights as the subject, has been maintained even by the jurists of countries where the practical discriminations between subject and alien are most numerous. Thus, for instance, we find this maxim supported alike by Blackstone, i. 372; Burge, i. p. 669; Stephen, i. p. 453; Bluntschli, Völker. §§ 360–381; Mittermaier, D. Privatr. 6 Aufl. § 109; Feuerbach, Themis, p. 325; Köstlin, § 23; and Mevius, in Jus. Lub. Proleg. qu. 4, § 37. Only in France has the maxim failed in support. *Droits naturels*, it is true, French jurists concede to belong to aliens visiting France, but not *droits civils*, which belong exclusively to French subjects. Massé, ii. p. 22. But, as Bar (p. 65) well says, this distinction is absurd. The rights secured to aliens by treaty, for instance, cannot be called *droits naturels*. They are the creations of positive artificial law, often securing privileges which no one could view as natural rights. Yet, while this is the case, no French jurist disputes that aliens in France are entitled to the rights secured to them by such treaties.

But however untenable is the theory just stated (see Savigny, Syst. ii. p. 154, and Gand, No. 135), the French Code has made it the basis of much legislation as to aliens. By art. 13 (Infra, § 77), only such strangers as have acquired a domicil with the sovereign's permission can enjoy *droits civils*; though what *droits civils* are is not defined. Mailber de Chassat, as cited by Bar (p. 66), rejects the distinction, viewing only such rights as are strictly political as the exclusive prerogatives of Frenchmen. To foreigners he would concede all the civil rights of the subject, with the exception of such as it is necessary to modify in consequence of the foreigner's peculiar facility in the escape of process. So, also, Demangeat (note to Fœlix, i. p. 87) adopts Gand's statement: "Pour nous l'étranger à la jouissance de tous les droits civils qui appartiennent au Français à l'ex-



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§ 18. The old law, in regarding crime as an incident of the person, treated the place where the alleged offender was at the time of the commission of the crime as the place by whose authorities the crime was cognizable. Several conditions, however, have recently interposed to make the adoption of this as an absolute rule impracticable. (1.) Men no longer act on each other within arm's length. Cannon are constructed which can send balls from nine to ten miles, so that on the *subjective* theory (*i. e.* that of the locality of the

Objective as well as subjective jurisdiction over crime.

ception de ceux, qui lui sont positivement déniés." The French courts, however, have felt themselves bound to carry out the distinctions of the Code, and have gone so far as to hold that a foreigner, not being entitled to *droits civils*, could not be adopted by a French subject; a decision, as Bar (p. 67) justly remarks, not very consistent with the liberality which permits foreigners to organize large factories in France, placing under their control and influence great multitudes of Frenchmen. So, according to Massé (ii. p. 32), no foreigner can be an attesting witness to a French instrument, — a disqualification which only can injure Frenchmen interested in the maintenance of such contracts or wills as foreigners may have inadvertently attested. Infra, § 588.

Vattel introduces an eccentric exception to the general rule of the equality of foreigners with subjects as to the capacity for rights. He declares (ii. § 88) that the title to all waifs, and things without rightful owner, belongs to the inhabitant of the soil; and that, therefore, no foreigner has a right to hunt or fish even where hunting and fishing are free, and that, unlike an inhabitant of the country, a foreigner has no title to treasure-trove. But the very idea of a waif or thing without owner excludes this common proprietary ownership which Vattel here assumes. There are, however, many instances in which certain rights of piscary or venery (see Blackstone, bk. ii. c. 27; Hollinshed, Descrip. of England, ii. c. 19) were in England reserved by custom to particular villages in common, and in this case an alien, by force of this custom, was excluded. But this was not the case of ownerless things. There were owners, and these the villagers in common.

Retortion is adduced as another limitation of that equality between subjects and aliens of which the text speaks. Retortion is the retaliation on a foreigner of such disabilities as are inflicted by the foreigner's sovereign on the subjects of the retaliating state. It is essential, however, to the equity of retortion, that the disabilities retaliated should have been imposed by the foreign sovereign on aliens as aliens. If these disabilities are imposed alike on subject and alien, then other states have no right to complain. Retortion, as is shown by Heffter (Völkerr. p. 199; and see Lawrence's Wheaton, p. 505), is only justifiable when its object is to remove unfair discriminations against our own citizens; nor can it properly be employed in order to coerce other states to the adoption of our jurisprudence. And it is clear that retortion is a high governmental prerogative, to be applied by executive and legislature, and not by the judiciary.



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perpetrator of the crime), instead of the *objective* (that of the locality of the crime itself), freebooters might plant themselves on the other side of the boundary between the United States and Mexico;[1] and might with impunity desolate our country nine miles deep. On the subjective theory, we could not ask for them extradition, since we had no jurisdiction of the crime, nor could we even punish them should they subsequently visit our land. Nor is this all. Destructive agencies can be sent by mail or by express thousands of miles; and conspiracies, by means not merely of the mail, but by the telegraph, can be so operated as to bring to bear at a particular centre forces organized in countries widely apart. (2.) The new phase assumed in more recent times of offences against government add additional force to the objective theory. Forgeries of government securities could be consummated with comparative immunity if the counterfeiter could escape punishment by conducting his operations in a foreign land. The great increase of foreign travel, and the conveniences of European life, have led many citizens of the United States to take up their residence in Europe, and special statutes have been passed authorizing them to perform certain official acts before consuls abroad; but these acts might be impugned, and gross wrongs perpetrated, if persons of this class were not justiciable, when returning to their own land, for forgeries or false oaths consummated before such consuls. The same observation applies to false affidavits made before foreign consuls as to goods to be sent to the United States. (3.) Another objection to the subjective theory may be drawn from the extension of mercantile adventure on the sea and in barbarous lands. For a long while the high seas were considered as beyond the jurisdiction of any English common law court. Buccaneers of all classes were permitted to range the ocean unmolested, so far as any show of penal jurisdiction was concerned; and as late as the days of Queen Elizabeth, privateers brought unchallenged into English

[1] "The United States," says Mr. Evarts, in a letter dated Aug. 13, 1878, to Mr. Foster, American minister at Mexico (Foreign Relations U. S. for 1878, p. 575), "have not sought the unpleasant duty forced on them of pursuing offenders who, under ordinary usages of municipal and international law, ought to be pursued and arrested in Mexico. Whenever Mexico will assume and effectively exercise that responsibility, the United States will be very glad to be relieved from it."



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ports spoils which they had wrung in times of peace from foreign ships. The attempts made to punish on land offences committed on shipboard were but slight. The admiralty, it is true, claimed authority; but the high admiral administered, according to forms which were at once odious, capricious, and inadequate, only a *quasi* court-martial jurisdiction belonging to him as head of the fleet. The appeals to this jurisdiction, however, were rare. The usual remedy for unsuccessful revolt was summary punishment on shipboard; and as to this the officers exercised despotic sway. When revolt was successful, all that was necessary was for the culprits to take refuge in a foreign port, and there triumphantly to defy pursuit. Nor was it any better in settlements made in barbarous or desert lands. The flag, it used to be thought, would punish for itself. Wrongs inflicted on other Englishmen, the head of the expedition, if not the wronged party, would avenge; for wrongs inflicted on the savage there was no avenger. The consequences were disastrous. Men left England to plunder on the high seas or in the Indies, and came back to enjoy their plunder in conspicuous but undisturbed repose. If only the place where the offender stood at the time of the offence has jurisdiction, then of offences of this class there is no court of any country that has jurisdiction. The difficulty, however, is met by the adoption of the objective theory, — the theory that the country in which the crime takes effect has jurisdiction to punish the offender. A crime, therefore, that is committed on a United States ship on the high seas, the ship being part of the dominion of the United States, is cognizable in a United States court. And as all civilized nations have a common right to the high seas, piracy on the high seas is cognizable in the courts of all civilized nations.[1] (4.) The subjective theory rests on a *petitio principii*.

[1] It may be said that the principle advocated in the text militates with the provision in the Constitution of the United States that a criminal trial shall be "in the state or district wherein the crime shall have been committed." If so, all prosecutions in federal courts for offences on the high seas, and for counterfeiting in foreign countries, militate against this section. But the true meaning of the section is that the trial must be, not where the offender was at the time of the offence, but where the crime itself was committed; *i. e.* consummated. See fully Whart. Crim. Law, 8th ed. §§ 271 *et seq.*

I have discussed the topic in the text at large in an article in the Criminal Law Magazine for November, 1880, pp. 689 *et seq.*



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"This place," such is the assumption, "has jurisdiction because the defendant was in it at the time of the commission of the crime." It makes, therefore, jurisdiction dependent upon the guilt of a party whose guilt is not proved.

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# CHAPTER II.

## DOMICIL.


I. Definition.

Domicil determines personal capacity and liability, § 20.

Domicil is a residence acquired as a final abode, § 21.

By Savigny it is defined as a place voluntarily selected as a centre of business, § 22.

By Vattel as a residence adopted with the intention of always staying, § 23.

II. Historical Development.

By old Roman law membership of urban community was by "*origo*" or "*domicilium*," § 24.

Under "*origo*" was included, birth, adoption, manumission, and enfranchisement, § 25.

By subsequent laws citizenship was generally conferred, § 26.

"Domicilium" was the result of choice, § 27.

In such case *animus manendi* must be shown, § 28.

Domicils might be plural, and there might be persons without domicil, § 29.

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Impracticability of other tests of personal law, § 33.

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And so as to nationality, § 36.

Illegitimate children take mother's domicil, § 37.

Legitimated children take father's domicil, § 38.

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2. *Infants.*

Infant's domicil changes with that of father, not necessarily with that of mother, § 41.

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3. *Married Women.*

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4. *Servants.*

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Lunatic's domicil to be fixed by court, § 52.

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## I. DEFINITION.

Domicil determines personal capacity and liability.

§ 20. Assuming, in conformity with the conclusions which have been just stated, that domicil, not nationality, is the arbiter of personal law, the importance of determining in what domicil consists becomes manifest. By the law of domicil, capacity, if not absolutely and ubiquitously determined, is primarily defined. By the law of domicil state taxation is adjusted. By the last domicil of a decedent is the succession of his personal estate shaped. By matrimonial domicil is the condition of the matrimonial estate prescribed. Domicil is the international standard by which jurisdiction in divorce suits is adjudged. The domicil of debtors, of factors, of contractors of all kinds, may become an important ingredient in the engagements they undertake. As preliminary, therefore, to a more minute discussion of the points to which the law of domicil is applicable, let us inquire in what domicil consists.



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§ 21. Domicil is a residence acquired as a final abode. To constitute it there must be: (1.) residence, actual or inchoate; (2.) the non-existence of any intention to make a domicil elsewhere.[1]

Domicil is a residence acquired as a final abode.

[1] Sir R. Phillimore (iv. p. 43), after showing the inadequacy of prior definitions, proceeds as follows: "Perhaps, however, the American judges have been most successful in their attempts, and from a combination of their *dicta* upon different occasions, we may arrive at a tolerably accurate definition in designating it 'a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.'" To this he cites Guier *v.* Daniel, 1 Binn. R. 349, note, giving as definition "a residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time." See, also, Laneuville *v.* Anderson, 22 Eng. Law & Eq. 642; 9 Moore P. C. 325; Greene *v.* Windham, 13 Me. 225; Putnam *v.* Johnson, 10 Mass. 488; Daniel *v.* Sullivan, 46 Ga. 277. But as all proof is now understood to be "presumptive," *i. e.* inferential or circumstantial, it is hard to see in what "positive," in this definition, differs from "presumptive." And in any view the terms are redundant as here used.

Mr. Dicey, in his work on Domicil, p. 42, says that "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." For the statement, that "domicil means permanent home," he cites Lord Cranworth, Whicker *v.* Hume, 28 L. J. (Ch.) 396, 400; Attorney General *v.* Rowe, 31 L. J. (Ex.) 314, 320. I prefer the term "final" to "permanent." I may abandon my home in my present domicil, and may expect to be absent for years; yet if I intend to return and resume my home in this domicil, it continues my domicil. Compare article in London Law Mag. for 1873.

"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, and 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." Hodgson *v.* De Beauchesne, 12 Moore, P. C. 285. *Per curiam.*

It is impossible to get at the true idea of domicil unless we take into consideration the fact, that it is the family relation which it is the dominant policy of the state to preserve.



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§ 22. Savigny's definition declares domicil to be that place which an individual has voluntarily selected as a permanent residence, and as the centre of his legal relations and his business; such residence excluding neither transient absences nor future change, the right to make which is from the nature of things reserved.[1] This definition, however, is open to two serious objections:

By Savigny it is a place voluntarily selected as a centre of business.

Hence it is that private international law envelops a man in the jurisprudence to which his home is subject. The jurisprudence in which he places this home is that in which he himself is placed. He may be absent for a series of years in a foreign land, yet by the law of his home is he governed, and not by the law of his foreign residence. He is taxed by his home law. His relations as to the three great decisive epochs of life — birth, marriage, and death — are determined by his home law. The home of his family determines the law regulating his personal *status*, though he may be born when his parents are far distant from that home. His home determines the legal duties and privileges of his marriage, though he may be married in a foreign land. His home gives the law by which his property is to be distributed on his death, no matter how remote from home may be the place in which he dies. It would seem as if the law of nations, in its tenderness for humanity, had summoned, as man's attendant in the most critical junctures of his life, the genius of home, and had given to that genius supreme judicial control. What the *lex domicilii*, or the law of home, decrees at these junctures, is the law that is final. The reason of this is plain. It is the family that is to be preserved, for the sake both of the man himself and of the state. The man will be a vagrant, the state will be dissolved, unless the family be preserved; and this preservation of the family is the first duty of the law. And the application is obvious. The sanction which civilized nations have agreed to impose, we, as a nation peculiarly dependent on family purity and integrity for our well-being, must hold sacred. In treating judicially of the law of domicil, we must in no case forget that, by reason as well as by authority, the law of domicil is the law of home.

An expansion of the same thought is found in the celebrated Roman definitions: "Eam domum unicuique nostrum debere existimari ubi quisque sedes et tabulas haberet suarumque rerum constitutionem fecisset." L. 239, § 2, de v. s. "Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde quum profectus est, peregrinare videtur, quo si rediit, peregrinari jam destitit." L. 7, c. de in colis 10, 39. This is illustrated infra, § 67.

Residence may be treated as convertible with domicil when required by the terms of a statute. Thus where a statute requires that a person, in order to be entitled to sue for

[1] This last expression may be viewed as corresponding to the "floating intention to return at some future period," which Judge Story regards as consistent with a domicil by choice. See infra, §§ 23, 46.



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(1.) It does not apply to domicil by birth. (2.) It sinks the home in the business centre, whereas the present rule is to sink the business centre in the home. No matter where a man's business is centred, still, as we shall soon see more fully, it is the home, and not the business site, that determines his personal relations.

§ 23. The definition of Vattel is "a fixed residence in any place, with an intention of always staying there."[1] Judge Story, in commenting on this, justly remarks:[2] "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 fixed, without any present intention of removing therefrom."[3] Another objection to Vattel's definition is that he makes "an intention of

By Vattel it is a residence adopted with the intention of always staying.

a divorce, should be the *resident* of a state, this is interpreted to mean domicil, *e. g.* residence as in a final home; since the legislature could not have meant to base such jurisdiction on a flying visit, when the party's established home is elsewhere. See Hinds *v.* Hinds, 1 Iowa, 36; State *v.* Winnick, 15 Iowa, 128. Infra, § 223.

As is well said by Mr. Lawrence, Com. sur Wheat. iii. 98, the recognition of a possible change of abode is not inconsistent with the idea of domicil.

[1] B. i. c. 19, § 22.

[2] § 43.

[3] The same eminent commentator afterwards states that a domicil may be obtained by removal, with an intention of remaining for an indefinite time, notwithstanding the party "may entertain a floating intention to return at some future period." § 46, citing Sears *v.* Boston, 1 Met. 250; Thorndike *v.* Boston, 1 Met. 242. See, also, the comments on this expression of Judge Story, in Mr. Guthrie's learned note, in his translation of Savigny, p. 62.

In Hindman's Appeal, 85 Penn. St. 466, Mercur, J., said: "Vattel defined domicil as a fixed place of residence, with an intention of always staying there. This definition is too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of any domicil. The better definition is, that place in which a person has fixed his habitation without any present intention of removing therefrom." . . . . "A mere intention to remove permanently, without an actual removal, works no change of domicil; nor does a mere removal from the state without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the state in which he had lived, takes his movable property with him, and establishes his home in another state, such acts *primâ facie* prove a change of domicil. Vague and uncertain evidence cannot remove the legal presumption thus created. Story on Confl. of Laws, § 46; Wilbraham *v.* Ludlow, 99 Mass. 587; Harris *v.* Firth, 4 Cranch C. C. 710."

That intended occasional absences do not interfere with the adoption of a particular place as a domicil, see Anderson *v.* Anderson, 43 Vt. 350; Wilbraham *v.* Ludlow, 99 Mass. 587.



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always staying" a condition of domicil; whereas the intention may be to make the place selected a home from which many and long excursions may be taken. This will constitute domicil if the intention be to make the place a final home.

## II. HISTORICAL DEVELOPMENT.

### 1. *Roman Law.*

§ 24. In the view of the earlier Roman jurists, as we learn from Savigny, whose masterly treatise will be frequently appealed to in the present discussion,[1] all Italy, outside of the city of Rome, consisted of an aggregation of urban communities, to which were generally assigned the titles of *municipia* or *coloniae*, each of which had its own special magistrates, jurisdiction, and municipal legislature. Every inhabitant of Italy belonged either to Rome or to one or more of those urban communities. In contemplation of law, if not in practical completeness, this system, at the time when the great jurists wrote, was so far extended over the whole empire, that each subject of the emperor was assigned to one or the other of these localities. According to the jurists, membership in these urban communities was acquired in two distinct ways: (*a.*) by citizenship, "*origo*;" and (*b.*) by domicil, "*domicilium.*"

By old Roman law, membership of urban community was by "*origo*" or "*domicilium.*"

§ 25. (*a.*) *Origo.* — Under this title, citizenship was said to accrue through Birth, Adoption, Manumission, or Enfranchisement.[2]

Under "*origo*" was included Birth, Adoption, Manumission, and Enfranchisement.

*Birth.* — This, as the most common method of acquiring citizenship, is frequently (*origo*, *nativitas*) employed to describe this form of citizenship in general. It was constituted by birth, in a legal marriage, when the father was himself a citizen.[3] Illegitimate children acquired citizenship in the native place of the mother.[4]

*Adoption.* — The adopted child took, in addition to his own civic right (Bürger-recht), that conferred on him by his adopt-

[1] Op. cit. viii. § 351.

[2] L. 1, pr. ad mun. (50, 1): Municipem aut nativitas facit, aut manumissio, aut adoptio; L. 7, C. de incolis (10, 39); Cives quidem origo, manumissis, allectio, vel adoptio, incolas vero, domicilium facit.

[3] L. 1, § 2; L. 6, § 1, ad mun. (50, 1); L. 3, C. de munic. (10, 38).

[4] L. 1, § 2; L. 9, ad mun. (50, 1).



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ing parent; and this double citizenship descended to his children.[1] By emancipation or release, however, of the adopted child, this civic effect of adoption was destroyed.

*Manumission.* — The manumitted slave, who, as a slave, had previously no civic rights, acquired such, as an inheritable quality, in his patron's native town.[2]

*Enfranchisement.* — (Allection, or election, *Allectio.*) This came when citizenship was conferred on an individual by the gift of the municipality.

The civic *status* constituted by either of these four processes could not be surrendered by the citizen's individual act without the consent of the municipalities. It will be seen, by an examination of the processes themselves, that citizenship by birth, by adoption, and by enfranchisement, were cumulative, and might each unite in the same person; and that such was the case with the manumitted slave, who might, by manumission, or adoption, or enfranchisement, be brought into several communities. One citizen might, therefore, have civic rights, and be subject to civic burdens, in a series of such communities. And such, we learn from the jurists, was often practically the case.[3]

§ 26. A marked extension of civic rights took place first by the Lex Julia, which imparted to all Italy the rights of citizenship; and afterwards by a decree of Caracalla, which conferred the same privileges on the provinces as a mass. A double municipal subjection was thereby frequently conferred.[4] Yet it by no means follows that all free inhabitants of the Roman Empire were citizens of Rome, in the sense of *cives Romani.* For even after the decree of Caracalla there were numbers of persons who entered the lower class of freedmen, sometimes through imperfect manumission, and some-

By subsequent laws citizenship was generally conferred.

[1] L. 1, § 2; L. 9, ad mun. (50, 1).

[2] L. 6, § 3; L. 7; L. 22 pr.; L. 37, § 1 ad mun. (50, 1); L. 2, C. de munic. (10, 38); Savigny, Vermischte Schriften, iii. 245.

[3] L. 6, § 3; L. 7; L. 22 pr.; L. 27 pr.; L. 37, § 1, ad mun. (50, 1); L. 3, § 8, de munic. (50, 4); L. 2, C. de munic. (10, 38).

[4] Cicero de legibus, ii. 2. "Omnibus municipibus duas esse censeo patrias, unam naturae, alteram civitatis, . . . . habuit alteram loci patriam, alteram juris." L. 33, ad mun. (50, 1). Modestinus: "Roma communis nostra patria est." "Cicero," says Savigny, "speaks only of citizens from Italy (municipes); Modestin speaks generally: each speaking for the law of his day."



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times through emigration, who were not immediately invested with citizenship. It was, therefore, possible for persons to be free inhabitants of the empire without being citizens; though such cases were too rare and too obscure to materially affect the jurisprudence of the times.[1]

"*Domicilium*" was the result of choice.

§ 27. (*b.*) *Domicilium.* — This was the second method by which an individual could be attached to a municipal community. Domicilium (in English, Domicil; in German, Wohnsitz) is defined by Savigny, as has been seen, to be that place which an individual has voluntarily selected as a permanent residence, and as the centre of his legal relations and of his business.[2] "Permanent residence," however, excludes neither transient absences nor the possibility of a future change; all that is excluded in this respect is the idea of present transientness. There must be the intention to select the spot as a permanent abode.

*Domicilium*, as well as *origo*, founded the citizens' subjection to a specific municipality. It assumed, therefore, a fixed territorial limit, and embraced not merely the inhabitants of the city proper but those of its outlying dependencies.[3]

In such case *animus manendi* must be shown.

§ 28. As an illustration of the strictness with which the requisite of intentional permanency was maintained by the ancient Roman law may be mentioned the fact that the residence of a student at an educational institution was at first held to confer no domicil, no matter for how long a time such residence continued; and the only relaxation that was granted to this was by a decree of Hadrian, that domicil might be thus acquired when the residence reached ten years. And even in this case the reason seems to have been that, from so long a stay, an intention to remain might be pre-

[1] Savigny, viii. §§ 351, 352.

[2] Bar, in his learned work on Private International Law, — a work which will be constantly referred to in the following pages, — accepts Savigny's definition; showing (p. 77), however, that there are several cases of domicil that it does not comprehend. He mentions among these, married women, who follow their husband's; children, who take their parents' domicil; manumitted slaves, exiles, and officers; in which two last cases, domicil, being compelled by government orders, can scarcely be regarded as accepted by choice. See, also, Liv. xxxv. 7; Gaj. i. § 22.

[3] Savigny, viii. 353.



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sumed.[1] The *animus manendi* was to be proved as a free, determinate, sincere act. It could not be established by formalities alone: "Domicilium re et facto transfertur, non nuda contestatione: sicut in his exigitur, qui negant se posse ad munera, ut incolas, vocari."[2] So strenuous was the old Roman law in insisting on this freedom, that it treated as void conditions in wills requiring a change of domicil.[3] But it was otherwise with general public statutes. By these, domicil could be arbitrarily established. Thus, a soldier was domiciled at his place of service;[4] and an exile at the place of his banishment.[5] The holding of real estate in a particular municipality did not by itself confer domicil therein, nor was it necessary to domicil when otherwise constituted.[6]

§ 29. It was possible for a Roman citizen to have several domicils, when his residence was divided among several homes, in each of which he conducted business or maintained legal and social relations.[7] So it was also possible, though unusual, for persons to be without a domicil, in the restricted sense of the term. This could happen in the following cases: —

Domicils might be plural, and there might be persons without domicil.

(*a.*) When a domicil is surrendered, and another sought, but not yet determined on.

(*b.*) When the business of a travelling agent is adopted, without any settled home.

(*c.*) In the case of vagrants or tramps.[8]

### 2. *Modern Law.*

§ 30. In the law as it now prevails, not merely so much of the old Roman law as relates to *origo* has become obsolete, but that which relates to *domicilium* has been placed on a deep and permanent foundation, and endowed with almost universal range. It is true that there are some exceptions to this rule. In several cantons of Switzerland, for in-

The Roman *origo* no longer exists.

[1] L. 5, § 5, de injur. (47, 10); L. 23, C. de incolis (10, 39); Lauterbach de domicilio, § 27. See infra, § 48.

[2] L. 20, ad mun. (50, 1).

[3] L. 31, ad mun. (50, 1); L. 71, § 2, de cond. (35, 1).

[4] L. 23, § 1, ad mun. (50, 1).

[5] L. 22, § 3, ad mun. (50, 1).

[6] L. 17, § 13; L. 22, § 7, ad mun. (50, 1); L. 4, C. de incolis (10, 39).

[7] L. 5; L. 6, § 2; L. 27, § 2, ad mun. (50, 1); C. 2 pr. de sepult. in vi. (3, 12).

[8] Land-Streichern; Savigny, Röm. Recht. viii. § 354.



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stance, birth in a particular community, and consequent legal subjection to the same, follows the citizen through all changes of domicil; and by this law of nativity (Heimath-recht), he continues, according to the Swiss law, to be bound, wherever he may wander. By this, and not by the law of subsequent domicil, he is governed, in the matters of marriage, guardianship, succession, and paternal power.[1] In Italy still remain faint traces of the old Roman municipalities; and in New England traces still fainter are to be observed in the original constitution of the towns, which the Puritan settlers, bringing with them no small knowledge of civil and canon law, sketched after the model of the Roman urban communities. But those traces have vanished, or are rapidly vanishing; and so far as concerns the question as to what territorial laws attach to a person, which is at the basis of the present treatise, the doctrine of subjection through birth to a municipality no longer exists. We may consider, therefore, all that relates, in the Roman law, to *origo*, as cancelled from our modern jurisprudence.[2]

§ 31. But how is it with *domicilium?* Now, in applying to our own times the Roman law as to domicil, the following qualifications are to be observed: —

Domicil no longer involves subjection to an urban community.

(*a.*) Domicil is to be detached from the idea of subjection to an urban community, with the peculiar jurisdiction recognized by the Romans.

(*b.*) The jurisdiction of the domicil (*forum domicilii*) not only remains to us, but occupies a far more exclusive and commanding position than with the Romans. With them *origo* also attached jurisdiction. With us, domicil confers the distinctive forum to which every man is primarily subject.

(*c.*) But the law which adheres to the domicil has with us a very different compass and extent than it had at Rome. At Rome it was exactly and necessarily coincident with the limits of an urban precinct, or town, as it would be called in New England. With us, the law of the domicil no longer has this necessary coincidence, but accepts that of a state or nation, which

[1] Offizielle Sammlung der das Schweizerische Staatsrecht betreffende Actenstücke, ii. 34. See Reinhold Schmid (1863), *in loco.*

[2] Lauterbach, de domicilio, §§ 13, 14, etc.; Savigny, viii. § 358.



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each town, in rare instances, may constitute, but of which, in the vast majority of cases, it forms but part. It is no longer, in other words, the law of the urban community or town that attaches itself to the domicil, but the law of the distinctive territory (Gerichts-sprengel), with its several gradations, as with us, of town, county, state, and general government, in which such domicil exists.

§ 32. In several important relations, therefore, as is well shown by Savigny, domicil determines the particular territorial jurisprudence to which every individual is subjected.[1] It is true that, at the first view, this feature of domicil may be said to apply with peculiar exclusiveness to the several states of a common empire, in their relations to each other; as in the case of the states of the North German Confederacy, of the American Union, and of the British Empire. No one can doubt that, from the reason of the thing, as well as from the force of precedent, when a dispute arises between a subject of one of these particular states and a subject of another, it is the law of particular domicil that is to settle the legal character of each. In relation to all other jurisdictions in the United States, for instance, a person domiciled in Massachusetts is to be viewed as clothed with the incidents with which the Massachusetts law invests individuals. His will must be executed according to Massachusetts formalities. His goods descend according to the Massachusetts law of intestacy. His personal rights are, with certain restrictions, to be defined by Massachusetts jurisprudence. His *nationality* is that of the United States, and by the laws of the United States he is bound in all matters in which the United States are sovereign. But in all matters in which the states are sovereign, his domicil is in his particular state; and the same distinction applies to the citizens of other federative empires.[2]

Domicil determines applicatory territorial jurisprudence.

§ 33. However artificial may be the idea of domicil, it is a necessity of civilized life. The problem is, what is the law by which a particular individual is to be generally bound? Where is his personal tax to be paid? And although the notion that his personal *status* is determined by domicil is now, as will be seen,[3] very much modified,

Impracticability of other tests of personal law.

[1] Savigny, viii. 359.
[2] Supra, § 8.
[3] Infra, §§ 88–101.



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the important inquiry still remains: What law is to regulate the succession of his estate after his death?

It may be said, "The law of the territory in which, for the time being, he sojourns." But this might work great injustice. The person in question may have been only accidentally and momentarily on the soil; and his training, his character, his future, belong to another land; or he may be a traveller, passing rapidly from land to land, and then the absurdity follows, that as he travels his legal character shifts, so that, as the train carries him over a boundary line, he becomes liable to a new order of taxes; becomes, perhaps, illegitimate from being legitimate; becomes, according to some views, capable or incapable of business, from being previously the reverse; and acquires in each country a new set of heirs. A principle so destructive of international intercourse cannot be maintained by international law.

Or it may be said, "Let birth determine." But men, in vast multitudes, desert the country of their birth; and it would produce the grossest confusion to invest them with the law of such country in the land of their future residence. If, for instance, each person in the United States is governed by the law of the place of his birth, — if such law alone determines when he is of age, how he is to marry, and how his property is to descend, — the result would be practical anarchy. Under such a system of law, reciprocal confidence, arising from a confidence in mutual responsibility, would be at an end.[1]

§ 34. Nationality is the only remaining criterion to be considered; and as we have already seen,[2] nationality cannot be accepted for the following reasons: —

Nationality cannot be taken as a substitute.

(1.) Nationality does not apply to federal systems, such as Great Britain, Germany, and the United States, where there are a series of states, with different jurisprudences, confederated under a common nationality.

(2.) Nationality is far less easily ascertainable, for reasons already stated,[3] than domicil.

(3.) The establishment of domicil as the test in all the States of the American Union, and in the British Empire, makes a change impracticable unless by legislation, which, considering the

[1] See Dr. Lieber in Encyc. Amer., tit. "Domicil."

[2] Supra, § 8.

[3] Supra, § 8.



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great number of states whose concurrence would be required, it is impossible to expect.[1]

(4.) To apply nationality would be, in innumerable cases, to defeat the intention of parties, and to envelop them in an alien law they have abandoned. It has been already noticed that in Austria, England, Germany, and the United States, immigration and settlement, even accompanied by a declaration of intention, does not change nationality until the probation (usually five years) is expired, and naturalization is consummated. In the United States we have probably half a million of persons who, if the test of domicil be taken, would be subject to the law of the state which they have elected as their residence, but who, if the test of nationality be taken, would be subject to the law of the country they have abjured, and to which they never expect to return. To Europe the change from domicil to nationality would be of comparatively slight moment, so far as this consideration goes. In 1873, Mr. Marsh reports the average number of American travellers in Italy to be between 3,000 and 4,000; while the number of Americans resident in Italy was not over 400. The number of Americans resident in 1871 in Germany is reported by Mr. Bancroft to be 10,672, and of these none are reported as having given up either their nationality or their prior domicil. In France, between 1851 and 1861, only ninety-two Englishmen obtained a registration of domicil, and only four were naturalized. The conflicts in Europe, between nationality and domicil, therefore, are comparatively rare. But in this country a large proportion of our population, while domiciled among us, still retains its European nationality. To substitute for this portion of our population nationality instead of domicil as the arbiter would be to submit ourselves *pro tanto* to a foreign jurisprudence, and to destroy that business confidence which is dependent upon the consciousness of mutual responsibility to a common law.[2]

[1] That nationality and domicil are not convertible, see supra, § 8; infra, § 64.

[2] See this question discussed, supra, § 8.



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### III. PARTICULAR RELATIONS.

#### 1. *Domicil of Birth.*

§ 35. (*a.*) *Legitimate Children.* — These, by the Roman law, have the same domicil as their father. It was open to them, however, subsequently to elect another domicil, upon which the first ceased to exist. But until they were competent to execute such choice, and actually executed it, their domicil followed that of their father in whatever changes he might make, provided they remained members of his household.[1] The modern law differs from the Roman, in this respect, as follows: *Origo*, in the old Roman sense, is now obsolete.[2] The modern idea of *origo* simply conveys the legal fiction that a child is domiciled at his birth in the place of his father's domicil. This form of *origo* (descent, Herkunft) fixes alike the jurisdiction that attaches to the child and the legal relations with which he is invested. To this state several modern civilians have applied the term *domicilium originis*;[3] and although this expression involves an absurdity according to the Roman law, it rests upon a natural hypothesis in our own. It simply means, "This was a domicil acquired, not by choice, but by birth."[4] In England and the United States there can be no question that a legitimate child takes at its birth its father's domicil.[5]

Legitimate children have same domicil with father.

§ 36. The nationality of legitimate children has been already discussed, and it has been seen that internationally the children of persons travelling in a foreign land partake of their parents' nationality, subject to the right to elect, when they arrive at twenty-one years, their nationality of birth.[6]

And so as to nationality.

[1] L. 3; L. 4; L. 6, § 1; L. 17, § 11, ad mun. (50, 1).

[2] Supra, § 30.

[3] Lauterbach, de domicilio, § 13.

[4] See Vattel, i. c. 19, §§ 212, 215; Heffter, pp. 108–9; Fœlix, p. 53; Story, § 46; Dr. Lieber on Domicil, Encyc. Americ.

[5] See cases cited supra, § 10; Somerville *v.* Somerville, 5 Vesey, 786–7; Udny *v.* Udny, L. R. 1 Sc. Ap. 441; Dalhousie *v.* M'Douall, 7 Cl. & F. 817. Mr. Westlake, 1858 (§ 35), thinks that posthumous children take their mother's domicil; but it is hard to see the reason for this. To admit the position would be to permit a wife on her husband's death, and before the birth of a posthumous child, to change the law of succession as to such child. See infra, § 41.

[6] Supra, § 10.

As to the question whether it is the law of nationality or the law of domi-



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§ 37. (*b.*) *Illegitimate Children.* — According to the old jurists, illegitimate children take the mother's domicil.[1] And such, according to high authority, is the prevalent modern law.[2] Bluntschli[3] thus states the law: "Illegitimate (uneheliche) children, when not taken by an adoptive father, accept the mother's home-rights, but do not follow her in other territorial relations, should she subsequently, through marriage, make such change." But there is a growing tendency, which Bluntschli, who may be viewed as the leader of the liberal jurists of Germany, represents, to regard the father who acknowledges his illegitimate children, or who is adjudged to be such by the law, as imparting his domicil to such children.

Illegitimate children take the mother's domicil.

§ 38. (*c.*) *Legitimated Children.* — The domicil of a legitimated child, as soon as he is legitimated, follows that of the father.[4] It is a more difficult question, however, whether such legitimation can take place, so as to work a change of domicil, without the consent of the court

Legitimated children take the father's domicil.

eil that impresses its characteristics on the child, Fiore (Op. cit. § 82), in this as well as in other matters of capacity, argues for nationality. See supra, §§ 7, 8. No matter, he insists, what may be the place where the marriage was celebrated, or the place where the husband was domiciled at the time when the ceremony took place, it is certain that, as the husband is the member of a particular nation, the new family which he forms must belong to this nation, since the law to regulate the marriage should be that of the nation of the husband, under the protection of which the new family exists, and to which its members belong. This is well enough if we regard nationality as convertible with domicil. But suppose, as is the case with many European marriages, the ceremony takes place on the eve of emigration to the United States? And suppose, as is the case with all marriages in the United States, the nationality has no distinctive municipal system of laws, but embraces a confederation of numerous sovereign states, each with its peculiar law in respect to marriage? To say that the nationality of the husband, he being a citizen of the United States, decides, is to say that the question is to be left undecided. He may be a citizen of Louisiana, which adopts the Roman law. He may be a citizen of Delaware, which retains the old English common law. He may be a citizen of a New England state, which places the wife in the same *status*, so far as concerns business capacity, with the husband. Nationality would leave the question still open. Domicil is the only test that enables us to get at the law to which legitimacy is distinctively subjected.

[1] Savigny, viii. § 353.

[2] Phil. iv. p. 90; Story Confl. of Laws, § 46; Wright's Trusts, 2 K. & J. 595. Hall's Int. Law (1880), § 69.

[3] Das Moderne Völkerrecht, § 366.

[4] Legitimation is considered, infra,



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having jurisdiction of such child. Bar argues that it cannot; and this view is supported by the fact that until the period of such legitimation the father is in the eye of the law a stranger; and consequently cannot, by his own single action, effect so serious a change in the destinies of the child. For this purpose is needed the consent of the court having jurisdiction of the guardianship of the child.

The question as to what law determines the legitimation of children born illegitimate will be hereafter treated.[1]

Foundlings are domiciled in place where found.

§ 39. (*d.*) *Foundlings.* — The place where foundlings are discovered is held to be their domicil, with the qualification that removal to a place of education, or adoption in a private family, carries domicil with it.[2]

§ 40. As we have already seen,[3] nationality and domicil are

§§ 240 *et seq.* Mr. Dicey (Domicil, p. 69) says, that "in the case of a legitimated person, the domicil of origin is the domicil which his father had at the time of such person's birth." To this he cites Udny *v.* Udny, L. R. 1 Sc. Ap. 441; Dalhousie *v.* M'Douall, 7 Cl. & F. 817; Munro *v.* Munro, Ibid. 842; Wright's Trusts, 2 K. & J. 595. In Munro *v.* Munro, 7 Cl. & F. 881, Lord Cottenham expressly places the case on the ground that the child, "being the child of a domiciled Scotchman, had, *at the moment of birth*, a capacity for being legitimated by the subsequent marriage of parents."

But while in England it is undoubtedly the law that the law of the father's domicil *at the time of the child's birth* is in such cases to prevail, it by no means follows that should the father remove to a state whose laws permit such legitimation, and there marry the mother of the child, the courts of the latter state would not hold the legitimation as operating. And in cases where the mother's domicil is in a state allowing such legitimation, why does not the child receive, as do illegitimate children generally, the qualities of the mother's domicil? See 2 Kent, 12th ed. p. 430, note *c.*

In any view, the law of the place where the marriage is solemnized does not affect the question of legitimation. Munro *v.* Munro, 7 Cl. & F. 842.

In the French Court of Cassation, in 1877, the following rulings were made: —

(1.) L'enfant naturel d'un étranger devenu Français par l'effet d'un traité international et devenu étranger par son établissement en pays étranger suit la nationalité de son père quand il joint à une possession d'état constante le bénéfice d'une reconnaissance résultant du testament de son père.

(2.) D'après la loi espagnole, la reconnaissance d'un enfant peut entrainer sa légitimation, alors même qu'elle est postérieure au mariage du père avec la mère. Jour. du droit int. privé, 1879, p. 176.

[1] Infra, §§ 240–247.

[2] Linde, Lehrbuch, § 89; Savigny, Röm. Recht. viii. § 359; Vattel, i. ch. 19, §§ 212, 215; Heffter, pp. 108, 109; Fœlix, p. 53.

[3] Supra, § 8.



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far from being convertible. (1.) An emigrant may become domiciled in this country as soon as he puts his foot on its shores; but his nationality as a citizen of the United States will not be perfected until he is naturalized. (2.) Multitudes of persons are domiciled in foreign countries without any intention of being naturalized, or taking the nationality of such country. (3.) In federative systems there is a plurality of domicils to one nationality.[1]

Nationality distinguishable from domicil.

[1] In Udny *v.* Udny, L. R. 1. S. & D. Ap. 441, before the Naturalization Act of 1870, the following points were made: —

Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political *status*, and becomes subject to the law of the domicil which determines his civil *status*.

Per Lord Westbury: To suppose that, for a change of domicil, there must be a change of natural allegiance, is to confound the political and civil *status*, and to destroy the distinction between *patria* and *domicilium*.

Per the Lord Chancellor: A man may change his domicil as often as he pleases, but not his allegiance. *Exuere patriam* is beyond his power. Dictum of Lord Kingsdown, in Moorhouse *v.* Lord (10 Ho. Lords Cas. 272), qualified.

Per Lord Westbury: It is a settled principle that no man shall be without a domicil, and to secure this end 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 the child be illegitimate. This is called the domicil of origin, and is involuntary. It is the creation of law, not of the party. It 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 will and act of the party. Domicil of choice is the creation of the party. When a domicil of choice is acquired, the domicil of origin is in abeyance, but it is not absolutely extinguished or obliterated.

When a domicil of choice is abandoned, the domicil of origin revives; a special intention to revert to it being unnecessary.

Per Lord Chelmsford: Story says that the moment a foreign domicil is abandoned, the native domicil is reacquired. The word "reacquired" is an inaccurate expression. The meaning is, that the abandonment of an acquired domicil *ipso facto* restores the domicil of origin.

If, after having acquired a domicil of choice, a man abandons it, and travels in search of another domicil of choice, the domicil of origin comes instantly into action, and continues until a second domicil of choice has been acquired.

Per Lord Westbury: A natural-born Englishman may domicil himself in Holland; but if he breaks up his establishment there and quits Holland, declaring that he will never return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere.

Heffter (§ 59), who is usually so accurate as well as authoritative, assumes that internationally a perma-



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## 2. *Domicil of Infants.*

§ 41. Domicil, in relation to birth and nationality, is considered under prior heads. The infant's domicil, as a rule, follows that of the parent from whom it derives its domicil of origin. When the parent's domicil shifts,

Infant's domicil changes with that of father,

nent domicil involves nationality. But Bluntschli (Völkerrecht, § 357) calls attention to the fact that, in many civilized states, foreign merchants and manufacturers acquire a domicil while they retain their original nationality. To this it may be added that most governments impose conditions on naturalization much stricter than those imposed by international law on domicil, so that the latter can readily happen without the former. See, also, Goldschmidt, Handbuch des Handelrechts, 1862, p. 275. The Code Civil (§ 17) declares expressly that, in cases of doubt, a mercantile settlement in a foreign land is not to be viewed as emigration. It is not "*sans esprit de retour.*" At the same time Bluntschli (§ 369) is clearly right when he argues that, in default of other titles to nationality, that of domicil, or even of a long residence, should be admitted. Goldschmidt (p. 274) points out an inconsistency in the French and Austrian Codes, in that they make nationality the test of the capacity of their own subjects, but domicil that of the subjects of other lands. See Demangeat on Fœlix, i. p. 57; Unger, Oesterr. Privatrecht, i. § 23. See infra, §§ 75, 93; Hall's Int. Law (1880), § 172.

That domicil and citizenship are distinguishable, and that domicil in a foreign country does not preclude citizenship in this, see Brown *v.* U. S. 5 Ct. of Cl. 571; Van Glahn *v.* Varrenne, 1 Dill. 515.

That domicil and residence are not convertible, see Briggs *v.* Rochester, 16 Gray, 337; Alston *v.* Newcomer, 42 Miss. 186. That the term "residence," when used in a statute as describing political subjection, is equivalent to domicil, see supra, § 21; Hinds *v.* Hinds, 1 Iowa, 36; State *v.* Minnick, 15 Iowa, 123.

The fact that I have become domiciled in a foreign country without partaking of its nationality does not relieve me from being considered a subject of such country in spoliation issues. Thus it was held by the commission nominated under the Convention of 1853, between the United States and Great Britain, to liquidate the claims between the two powers, that English subjects by birth, who had been established in 1829 as merchants in Mexico, where they continued to reside, could not make claim as British subjects as against the United States, for goods confiscated as Mexican property by the United States army at the taking of Mexico in 1847. And the English Commission, under the treaty of Paris of 1814, decided that a foreigner domiciled in England (he being a French emigrant) could claim against France as a British subject. Lawrence sur Wheat. iii. 127. To same effect ruled the joint commission of 1872–3 to adjust claims arising during the American civil war. U. S. Foreign Relations, 1873–4, vol. i. pt. iii. Infra, § 73.

In Koszta's case, Mr. Marcy took the ground that every state has by international law the right to protect its domiciled residents, though they be



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that of the minor child follows the change.[1] But this rests on the assumption that the child remains one of the parent's household. If he has been emancipated, and by any process has acquired a domicil of his own, the rule does not apply.

and cannot be changed by mother, after father's death, unless reasonably and in good faith.

not naturalized. Cong. Doc. 33 Cong. 1 Sess. H. R. Ex. Doc. No. 91. And Mr. Webster, in 1850, declined to intervene in favor of native citizens of the United States who, after taking out letters of domicil in Cuba, mixed up in the Lopez insurrection. Cong. Doc. 32 Cong. 1st Sess. H. R. Ex. Doc. No. 10; Lawrence sur Wheat. iii. 138. Supra, § 5.

[French law as to authorization of domicil.]

While some French courts have held that the domicil of a deceased person cannot be regarded as French unless such domicil was authorized specifically by the state, the weight of authority among the jurists is that domicil for the purposes of succession is to be defined in conformity with the law of nations. And it has been held by the Commercial Court of Marseilles that a foreigner who remains in France for a long period of years, engaged in business, and paying his taxes in France, may be assimilated to a foreigner who is authorized under the Code to have his domicil in France. Jour. du droit int. privé, 1874, p. 123. Infra, § 77.

It is true that the Tribunal de Bordeaux, in August, 1870, went so far as to hold that no domicil could be acquired in France by a stranger without the sanction of the government. Jour. du droit int. privé, 1874, p. 180. But such rulings cannot affect the international definition of domicil. If A., an American citizen, should take up his abode in France with the intention of permanently remaining there, he would be regarded in this country, as well as in England and in Germany, as domiciled in France, though the contrary should be declared by the whole French judiciary. It is consequently well stated by Brocher that although a foreigner cannot acquire a perfect domicil in France except by the authorization specified by article 13 of the Code, he can, without such authorization, acquire a residence sufficiently stable to bring with it the effects usual to domicil. Brocher, Droit int. privé, p. 203. "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 nor provided for in the Code, but a natural and national (international?) right, against which there is no interdiction or prohibition." Bacon, V. C., Hamilton *v.* Dallas, L. R. 1 Ch. Div. 257. But see infra, § 77.

[1] Westlake, art. 36; Phil. iv. 73; Sharpe *v.* Crispen, L. R. 1. P. & D. 611 (1869); Somerville *v.* Somerville, 5 Vesey, 787; Jopp *v.* Wood, 4 De G., J. & S. 616; Wheeler *v.* Burrow, 18 Ind. 14; Guier *v.* O'Daniel, 1 Binn. 349, n.; Kennedy *v.* Ryall, 67 N. Y. 379; State *v.* Adams, 45 Iowa, 99; Fœlix, i. p. 94; Bar, § 31. As to change of domicil of lunatic child by father, see infra, § 53. The domicil of an illegitimate child, according to the text, follows the mother, as that of the legitimate child follows the father. Potinger *v.* Wightman, 3 Mer. 67; Forbes *v.* Forbes, 23 L. J.



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The appointment by a father, domiciled in Connecticut, of a New York testamentary guardian for his daughter, with other circumstances indicating a desire that the daughter should reside with such guardian, followed by the daughter's removal to New York, was held in New York, in 1868, to constitute a change of the daughter's domicil to New York.[1]

Whether, on the father's death, the mother or the guardian can change the minor's domicil has been much discussed. It has been held in this country that a mother cannot, without order of the proper court, change the domicil of the minor children of her first marriage by taking them into another state subsequent to her second marriage, so as to make their estate subject to the laws of succession and distribution of the state into which she has removed them.[2] By European jurists it is generally held that the minor's domicil is fixed by the father's death, and cannot be changed, during minority, by the mother or guardian, except by act of law.[3] But the preponderating opinion in England and America is that such change by a surviving parent will be sustained by the courts, when it is made reasonably and in good faith.[4] The views thus expressed are sustained by the high authority of Pothier: "Les enfans suivent le domicile que leur mère s'établit sans fraude, lorsque ce domicile lui est propre et que demeurant en viduité elle conserve la qualité du chef de

(Ch.) 724; 1 Kay, 64; Dicey on Domicil (1879), 97.

Brocher (Droit int. privé, p. 152) notices, as an additional reason for the right of the father to change his child's *status*, the inconvenience that would flow from a different rule. Four children, for instance, might be born in different stages of their father's history, each at a distinct domicil. Unless they each have their father's domicil, the household would be governed by four distinct sets of personal laws.

In Prussia, nationality, under the statute of December 31, 1842, is extended from the father only to such children as are under the father's power. Bar, § 31.

[1] White *v.* Howard, 52 Barb. 294.

[2] Mears *v.* Sinclair, 1 West Va. 185. See Kennedy *v.* Ryall, 67 N. Y. 380; Johnson *v.* Copeland, 35 Ala. 521; Freetown *v.* Taunton, 16 Mass. 51. See infra, § 256.

[3] Denisart, Domicile, § 2; Bouhier, ch. 21, No. 3; ch. 22, No. 164; Fœlix, i. pp. 54, 55, 94; Bar, § 31. In Saxony there is an express law to this effect. Bar, § 31, n. 12.

[4] Phil. iv. 74; Kent's Com. ii. p. 224, § 30, n.; Story Confl. of Laws, § 506; Potinger *v.* Wightman, 3 Meri. 67; Holyoke *v.* Haskins, 5 Pick. 20; School Directors *v.* James, 2 Watts & S. 568; Carlisle *v.* Tuttle, 31 Ala. 613.



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famille: mais lorsqu'elle se remarie quoiqu'elle acquière le domicile du second mari, en la famille duquel elle passe, ce domicile de son second mari ne sera pas de ses enfans, qui ne passent pas comme elle en la famille de son beau-père: c'est pourquoi ils sont censés continuer d'avoir leur domicile au lieu où l'avoit leur mère, avant que de se remarier, comme ils seroient censés le conserver, si elle étoit morte."[1] The domicil of an infant living with its mother when a widow will be that of the mother rather than of the guardian.[2] But its domicil is not changed by the mother's marriage.[3]

§ 42. A guardian, by the Code Napoleon,[4] and by the Civil Code of Louisiana,[5] imparts his own domicil to his ward if the guardianship be duly established by the proper court. He is regarded as an officer of the court, and, as such, has the right to change the minor's domicil.[6] Under the English common law, it would seem that the guardian cannot make such change, except by leave of court.[7] As the law of succession varies so much in passing from state to state, the power of arbitrarily changing succession, by changing the minor's domicil, is one which no guardian ought to possess.[8] This is clearly the law in Scotland.[9] In the Roman law, the abode and education of the minor could be determined only by the Praetor.[10] It should be kept particularly in mind that the differences of opinion which have been noticed as to the domicil of minors relate mainly to the question of *succession*. The

Guardian cannot change ward's domicil except by leave of court.

[1] Int. aux Coutumes, p. 7, § 19.

[2] Ryall *v.* Kennedy, 40 N. Y. Sup. Ct. 347.

[3] Ibid. aff. in Kennedy *v.* Ryall, 67 N. Y. 380.

[4] Liv. I. i. t. iii. c. 108.

[5] Art. 48.

[6] Merlin, Répertoire de Jurisprudence, viii. Domicile, § 3.

[7] See Bartlett, ex parte, 4 Bradf. N. Y. 224; School Directors *v.* James, 2 Watts & Serg. 568; Hiestand *v.* Kuns, 8 Blackf. 345; Mears *v.* Sinclair, 1 W. Va. 185; Trammell *v.* Trammell, 20 Tex. 406. Otherwise when the change is *bonâ fide* and to ward's interests. Pedan *v.* Robb, 8 Ohio, 227; Townsend *v.* Kendall, 4 Minn. 412; Wheeler *v.* Hollis, 33 Tex. 512. See infra, § 52.

[8] In Potinger *v.* Wightman, 3 Meri. 67, as noticed by Mr. Dicey (Op. cit. 100), the mother was the guardian. In Douglas *v.* Douglas, L. R. 12 Eq. 625, Wickens, V. C., doubted whether a guardian can make the change.

[9] Robertson's Personal Succession, p. 275.

[10] "Solet Praetor frequentissime adiri, ut constituat, ubi filii, vel alantur vel morentur, non tantum in postumis, verum omnino in pueris." L. 1, D. xxvii. 2.



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technical forum of the minor is always and unquestionably that of the parent or guardian.[1]

A person of unsound mind, incapable of deciding for himself, and under guardianship, is under the same conditions as to domicil as an infant.[2]

### 3. *Of Wife.*

Wife's domicil is that of her husband.

§ 43. By the Roman law, women assumed on marriage the domicil of their husbands,[3] though neither a mere contract or engagement of marriage, nor an invalid marriage, conferred this domicil.[4] It remained, however, with the widow, until she married again, or in some other way voluntarily and intentionally made a change.[5] Such is the law now universally accepted by European jurists. Bluntschli[6] thus writes: "The husband and father, as head of the house, unites all his household, his wife and children, to the state of which he is a member. This is supposing the marriage be regarded as valid by the state."[7]

English and American courts are equally explicit in declaring that, on marriage, the wife's domicil merges in that of the husband.[8] And this merger continues, even when the husband has been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights.[9] Nor is it affected by the fact that the husband and wife live separately, and in different states.[10] Whether a judicial separation from

[1] Phil. iv. 2d ed. ch. ix.

[2] Infra, § 52.

[3] L. 5, de ritu nupt. (23. 2); L. 65, de jud. (5. 1); L. 38, § 3, ad mun. (50. 1); L. 9, c. de incolis (10. 38); L. 13, c. de dignit. (12. 1).

[4] L. 37, § 2; L. 32, ad mun. (50).

[5] L. 22, § 1, ad mun. (50. 1).

[6] 1868.

[7] Das moderne Völkerrecht, 212. See, also, Fœlix, i. p. 93; Story, § 46; Bar, § 31; Demangeat, i. p. 82; Dr. Lieber, art. "Domicil," Encyc. Americ.

[8] Bremer *v.* Freeman, 1 Deane, 212; Yelverton *v.* Yelverton, 1 Sw. & Trist. 574; Dalhousie *v.* McDouall, 7 Cl. & Fin. 817; Trimble *v.* Dzieduzyki, 37 How. Pr. 208; Hackettstown Bank *v.* Mitchell, 4 Dutch. 516; Angier *v.* Angier, 7 Phila. 305; Smith *v.* Moorhead, 6 Jones Eq. (N. C.) 366; McAfee *v.* Kentucky University, 7 Bush, 135; Williams *v.* Saunders, 5 Cold. 60; Sanderson *v.* Ralston, 20 La. An. 312; Dow *v.* Gould, 31 Cal. 629; Phil. iv. p. 60; Westlake, art. 42; Guthrie's Savigny, p. 60, n. E. See this question discussed as to the site of the matrimonial relation, infra, § 189.

[9] Yelverton *v.* Yelverton, 1 Sw. & Trist. 574.

[10] Warrender *v.* Warrender, 2 Cl. & F. 488; Dolphin *v.* Robins, 7 H. of L. Cas. 390; Hick *v.* Hick, 5 Bush, 670; Maguire *v.* Maguire, 7 Dana,



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bed and board entitles the wife to form a new domicil is to be hereafter discussed.[1]

The wife is entitled, on the ground of her domicil being that of her husband, to avail herself of the homestead law of the particular state in which her husband was domiciled, though she herself never resided in such state.[2] But to confer the domicil the marriage must be valid.

To say that the wife's domicil is lost in that of the husband is a *petitio principii* in those cases in which the question is whether the wife, for reason of want of mental power, was capable of entering into the marriage contract.[3] If the marriage is null, it does not affect domicil.

Compulsory domicil of husband does not extend to wife.

§ 44. When, however, the husband is confined in a penitentiary, on conviction for crime, his actual domicil ceases to be constructively his wife's;[4] and the same rule extends to cases where the husband is transported, or under restraint for lunacy.[5]

Wife's domicil changes with her husband's.

§ 45. Should the husband, after marriage, emigrate to a country other than that of the matrimonial domicil, it has been questioned whether such domicil is lost to the wife. By Fœlix the affirmative is maintained; by Demangeat, following other French authors, the negative.[6] Should she emigrate with him, or agree to follow him, there can be no question that she acquires his domicil. There is also no question that if she refuse to follow him, this is a desertion on her part, which may be the basis of proceedings instituted by him against her for divorce.[7] How far the wife's nationality is merged in her husband's has been already considered.[8]

§ 46. Separations effected by law sever the joint domicil, and

181. See Yelverton *v.* Yelverton, 1 Sw. & Trist. 574. Infra, §§ 222, 224, 230.

[1] Infra, § 46.

[2] Christie's Succession, 20 La. An. 629. Infra, §§ 571, 576, 791.

[3] Brocher, Droit int. privé, p. 140.

[4] McPherson *v.* Housel, 2 Beasley (N. J.), 35.

[5] Phil. iv. p. 63.

[6] Fœlix, i. p. 93. See infra, § 189.

[7] The husband has a right to select his domicil, and it is the duty of the wife to go with him; and if she refuses, he is not bound to support her at the place of her separate abode. Babbitt *v.* Babbitt, 69 Ill. 277. The fact that the husband is domiciled in Wisconsin does not, in the law of that state, enable the wife to sue there, if she never has resided there. Dutcher *v.* Dutcher, 39 Wis. 651.

[8] Supra, § 11.



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leave each party at liberty to elect a domicil at pleasure. This is the case with divorces *a mensa et toro* in France,[1] though it is an open question whether such divorces have this effect in England.[2] Final separations by divorce undoubtedly leave the wife at liberty to take a new domicil. But the tendency of authority is strong to the effect that mere voluntary separations, no matter how solemn, do not confer on the wife the right to form an independent domicil of her own.[3] By marriage, her maiden domicil was lost in her husband's; and as long as the marriage continues, his domicil, as a general rule, is hers.[4]

Separations effected by law sever domicil.

It is, however, to be observed that the rule is now conceded on all sides not to apply to cases "when the wife," to use the language of an authoritative judgment in Massachusetts,[5] "claims to act, and by law, to a certain extent and in certain cases, is allowed to act, adversely to her husband." But as this question belongs peculiarly to the law of divorce, it is remanded to that head.[6]

[1] Phil. iv. 62; infra, §§ 225, 226; Arrêt du 23 Nov. 1843: Dolloz, Ann. 1849, ii. 9; Pothier, Introd. aux Coutumes, p. 4. But see discussion infra, § 209.

[2] Dolphin *v.* Robins, 7 H. L. C. 396; Le Sueur *v.* Le Sueur, L. R. 1 P. D. 139; 2 P. D. 79.

Mr. Westlake (1880, § 241, p. 273) inclines to hold that, in England, a wife judicially separated *a mensa et toro* from her husband may acquire an independent domicil. It is so in the United States. Barber *v.* Barber, 22 How. 582. That the Princess Bibesco had the right to acquire a new nationality after a judicial separation from her husband was denied by the French courts, but affirmed by those of Belgium. This case is discussed infra, § 209.

It was ruled by the Venetian Court of Appeals, in 1876, that "Une femme mariée peut avoir un autre domicile, et, par suite, une autre nationalité que son mari. Il en est ainsi lorsque les époux, sujets autrichiens, habitaient le pays vénitien, que la femme a été abandonnée par son mari avant l'annexion du pays à l'Italie et qu'elle a continué à y résider, tandis que son mari s'était établi dans une autre province autrichienne. Le mari est resté autrichien, mais le femme est devenue italienne." Jour. du droit int. privé, 1879, p. 298. From this ruling, however, the editor dissents in an elaborate note.

[3] Supra, § 43; infra, §§ 225, 226.

[4] Daly's Settlement, in re, 22 Eng. Jur. 525, n.; Donnegall *v.* Donnegall, 1 Add. Ecc. 5, 19; Dolphin *v.* Robbins, 3 Macq. 563; Warrender *v.* Warrender, 2 Cl. & Fin. 523; Barber *v.* Barber, 21 How. U. S. 582. See Greene *v.* Greene, 11 Pick. 411; Harding *v.* Alden, 9 Greenl. R. 140; Bishop on Marriage & Divorce, § 728; Fraser Confl. of Laws in Div. p. 58.

[5] Harteau *v.* Harteau, 14 Pick. 181.

[6] Infra, §§ 222, 224, 225, 230.



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### 4. *Of Servants.*

§ 47. The analogies of the old Roman law, as established in cases of freedmen, would give not merely to farm servants, working for wages, but to home servants and apprentices, the domicil of their master or employer.[1] The domestic servant, according to the old European idea, abandons his own domicil without any intention of returning to it, and accepts in place of it his master's. John Voet discourses, with copious wisdom, on the loyal permanency of such an arrangement, not conceiving it possible that a servant could enter on so serious an engagement except for a final settlement.[2]

Servant's domicil depends upon permanence of service.

But at present the presumption of permanency is but slight. Is the servant a mere wanderer? Has it been his habit to pass lightly, not merely from service to service, but from place to place? If so, the place of final voluntary settlement may be regarded as the domicil.[3]

But there is another class, comprising those who have some selected home, where their savings are deposited, and to which they hope to finally return. They may enter into service in various places, and with various masters, and may return to this "home" very rarely; but the fact that it is here that their savings are kept, and here that they ultimately expect to settle, makes it their domicil.

A third class may be noticed, as comprising servants who live with a series of masters, travelling with those masters from spot to spot, as the exigencies of their service require. Here no domicil can be acquired with the master; and so, in the case of Nicholas Sauterau, who acted as steward (*régisseur*) to a series of masters, executing their orders in different places, it was decided by five advocates, whose opinion is given by Denisart.[4] "He lived," they said, "by his masters' wages, was subject to their wills, and was under the necessity of following them whithersoever they went." His actual domicil, therefore, was declared to be in Burgundy, the place of his birth.

[1] Savigny, viii. § 353.

[2] J. Voet, i. t. v. § 96.

[3] See Moreland *v.* Davidson, 71 Penn. St. 371.

[4] Collect. de Decisions, Domicile, § 11, cited by Phil. iv. 95.



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Fourthly, comes the settled house servant, who devotes himself to the service of a particular family, expecting and expected to live and die with them. His domicil of origin is lost in their actual domicil, which becomes his. The Code Civil declares that this shall be the case with all servants of full age who reside permanently in their master's house.[1] The Prussian law extends the rule to house servants and day laborers who remain in a particular estate (*auf einem bestimmten Landgute bleibend arbeiten den Tageslöhnern*); and to apprentices to a settled master (*bei einem bestimmten Handwerksmeister arbeitenden Gesellen*).

### 5. *Students.*

Student's domicil is his home.

§ 48. The Roman law, as has been already seen,[2] viewed the student as retaining his domicil of origin until such a period as would suffice to enable him to complete his studies. His residence at school or at the university was considered special and transitory. It was not a place where he was supposed to establish his permanent abode. The element of indefinite stay, essential to constitute domicil, did not, in his case, exist. Ten years was regarded as the maximum of such special stay. If he remained beyond this period, he was presumed to make his permanent abode at the place of study, and could then, if the other tests continued, acquire there a domicil. "Nec ipsi qui studiorum causâ aliquo loco morantur domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes sibi constituerint, secundum epistolam Divi Adriani nec pater qui propter filium studentem frequentius ad eum commeat."[3] This same principle has been applied, in Massachusetts, to college students.[4] Should the contrary view be held, the estate of a student dying at a foreign university would be thrown into a foreign channel of distribution, and great inconvenience, as well as gross injustice, be wrought.[5]

Of course, domicil and the right to vote are not to be confounded. In the United States, in particular, the tendency is to facilitate suffrage, by permitting its exercise at merely transient

[1] Art. 109.
[2] Supra, § 28.
[3] C. x. t. 39, § 2. See supra, § 27.
[4] Granby *v.* Amherst, 7 Mass. 1.
[5] See, also, Wallace's case, Robertson on Succession, p. 201; Phil. iv. 90; Westlake, art. 51; The Benedict, Spinks, 314.



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residences. In the case of students, this has been effected sometimes by statute, sometimes by judicial decision.[1]

### 6. *Corporations.*

§ 48 *a*. A corporation is deemed to have its local residence (or domicil, if that term can be used with respect to a body purely artificial) in the place where its business is centred, and within the jurisdiction by which it is created.[2] If we are to be governed in this respect by the rule applicable to living persons, a corporation can have but one domicil, and such has been the view expressed by Lord Cranworth and Lord Brougham.[3] On the other hand, Lord St. Leonards, in the same case, said that a corporation "may, for the purposes of jurisdiction, be deemed to have two domicils." But the office of a mere selling agent is no domicil, when such agent is in no way concerned in the direction of the affairs of the company.[4] Nor is the place where its goods are prepared for the market.[5] But a permanent general agency established by a foreign insurance company in New York, under which such insurance company conducts its organization in the same manner as a domestic corporation, will be regarded as creating for the company an independent domicil in New York, with all the obligations attached thereto.[6]

Corporation's domicil is its centre of business in the place of its creation.

[1] Putnam *v.* Johnson, 10 Mass. 492; Fry's case, 71 Penn. St. 302.

[2] Calcutta Jute Co. *v.* Nicholson, L. R. 1 Ex. D. 428; Adams *v.* R. R. 6 H. & N. 404.

[3] Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416; Same case, under name of Maclaren *v.* Stainton, 16 Beav. 279.

[4] Ibid.

[5] Lindley on Part. 4th Eng. ed. 1481–1485.

[6] Martine *v.* Int. Life Ins. Co. 53 N. Y. 339. See New York Life Ins. Co. *v.* Best, 23 Oh. St. 105.

A foreign corporation, it has been frequently held in the United States, is entitled to do business extra-territorially only as a matter of comity. See infra, § 105. As is well said by Savigny (Op. cit. viii. 354), the rules adapted to the domicil of persons cannot be applied to corporations, or persons who are the mere artificial creatures of the law. For this reason, the law, in creating a corporation, often assigns to it its domicil. But in default of such appointment, the place of existence is the necessary domicil, at which such corporation is be taxed and sued. This is easily determined in ordinary cases, such as cities and towns, schools, hospitals, churches, &c. In the case of railroads and similar corporations, where the business is carried on, and agencies instituted, in a series of states, there, by the modern Roman law, the courts



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### 7. *Ambassadors and Consuls.*

§ 49. The house of an ambassador, or minister extraordinary, is regarded as part of the territory which he represents.[1] No matter how long he may stay, therefore, in the country to which he is accredited, his domicil is unchanged.[2] But the fact that a foreigner, who is domiciled abroad, accepts the post, in the country of his domicil, of attaché to the embassy of his native land, does not destroy his elective domicil.[3] When consuls also are sent from the state of their domicil to represent such country in a foreign land, their continuous residence in such land does not involve a domicil. But if one already domiciled accepts the office of consular agent of another country, this does not destroy such domicil.[4] Engaging in trade, by a consul, divests him of his official prerogatives in this respect, and places his domicil at the spot where he resides and his business is conducted.[5] The question of diplomatic immunity from arrest has been already considered.[6]

Domicil of diplomatic officers is their home country.

### 8. *Public Officers.*

§ 50. By the Roman law, a soldier had a domicil at the place of his service.[7] It is otherwise, however, by the English common law, so far as concerns change of domicil produced by entering into a new field of service in the common nationality. Thus, in a recent case in England, it was ruled that a domiciled Irishman, by enlisting in a regiment the headquarters of which are in England, does not thereby acquire an English domicil.[8] But this rule does not necessarily obtain

Soldier's domicil is his home.

will select the central office as the true point of domicil. A corporation's domicil is not necessarily the same with that of the persons composing it. Calcutta Jute Co. *v.* Nicholson, L. R. 1 Ex. D. 428.

[1] Supra, § 16.

[2] Alt's Europaisches Gesandschaft's Recht (1870); Phil. iv. 119; Petreis *v.* Tondear, 1 Consist. R. 139.

[3] Atty. Gen. *v.* Kent, 1 Hurl. & Colt. 12; Heath *v.* Samson, 14 Beav. 441.

[4] Udny *v.* Udny, L. R. 1 Sc. Ap. 441; Sharp *v.* Crispin, L. R. 1 P. & D. 611; Niboyet *v.* Niboyet, L. R. 4 P. D. 1.

[5] Indian Chief, 3 Rob. Adm. 29; Maltass *v.* Maltass, 1 Roberts. Rep. 79; Phil. iv. 125.

[6] Supra, § 16.

[7] L. 23, § 1, ad mun. (50, 1).

[8] Yelverton *v.* Yelverton, 1 Sw. & Trist. 453. See Dalhousie *v.* McDouall, 7 Cl. & F. 817; Steer, in re, 28 L. J. (Ex.) 25.



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when there is a change of nationality. "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."[1] Of course, as has just been noticed, when the country of such allegiance contains several subordinate jurisdictions, that which is primarily adopted is not divested by detachment to other jurisdictions of the same state. An officer in such case, whether naval or military, changes his residence under superior command; and unless there be made out a clear case of the election and establishment of a domicil at one of these subsequent stations, the domicil held when the service was entered into will be presumed to continue.[2] The same rule applies to officers in the naval service.[3] A soldier may abandon his domicil in the same way and to the same effect as may other persons.[4]

Removal to place of permanent office may constitute domicil.

§ 51. Acceptance of a permanent office, whose duties require constant local attendance, accompanied by a change of family residence to such place, constitutes a change of domicil, unless it be shown that the intention of the party was to make the move only tentatively.[5] If the latter alternative be true, or if there be evidence that a home was retained in the domicil of origin, a new domicil will not be established in the place of the official duties.[6] On the other hand,

[1] Westlake (1857), art. 44; Phil. iv. p. 111.

[2] Phipps, in re, 2 Curt. Ecc. R. 368; White *v.* Repton, 3 Curt. 368; Yelverton *v.* Yelverton, *ut supra;* Brown *v.* Smith, 15 Beav. 444, 448, Atty. Gen. *v.* Napier, 6 Ex. 217. The cases on this subject are discussed fully and ably in Phil. iv. p. 111, *ff.* See, also, 1 Burge Com. 417; Guthrie's Savigny, note D, p. 59.

[3] Phil. iv. 118.

[4] Ames *v.* Duryea, 6 Lans. 155.

[5] Merlin, Rép. Dom. § 117; Smith in re, 2 Roberts. 230; Wood *v.* Fitzgerald, 3 Oregon, 568; compare judgment of Lord Jeffrey, in Arnott *v.* Groom, 9 D. 142.

[6] In 1856, R., whose domicil of origin was in England, was appointed Chief Justice of Ceylon, during the pleasure of the crown; and he resided with his family there, in the exercise of his official duties, until his death in 1860. He left a library and other effects in England, and he invested large sums of money on mortgages in Ceylon. It was held that, in the absence of any intention to acquire a domicil in Ceylon, R. retained his domicil of origin. Atty. Gen. *v.* Rowe, 1 Hurl. & C. 31.



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where permanent duties were required, and the evidence shows that the intention was to accept the place of office as such a final residence, then a domicil in such place will be acquired. Thus the policy of the East Indian Company being that its officers should permanently attach themselves to the soil to which they are sent, and specific conditions to this effect being inserted in the company's commissions, the English courts have in several cases given effect to these provisions, by deciding that Indian officers accepting such commissions, and entering on their duties in India, have an Indian domicil, even though they should die in England, if it should appear that they were liable to be recalled to India, and unless the establishing of a new domicil in England be clearly made out.[1]

Ecclesiastics who, under the French law, were compelled to reside within their dioceses or cures, were held to be domiciled at such residences; nor could this domicil be divested by absence.[2] But no such intendment can be made in England or America from the occupation of an ecclesiastical cure. In England, residence is not required. In the United States, as in the case of clergymen officiating in New York, the domicil may be, for motives of economy, in another state from that of the official residence. It is clear that attendance on the legislative body of a nation, no matter how continuous, or occupancy of an official station of any kind, either at the pleasure of the appointing power or for a term of years, confers no new domicil, without the clear intention and arrangement of the officer himself.[3]

[1] Bruce's case, 6 Brown's Cas. 566; 2 Bos. & Pul. 230; Munroe *v.* Douglass, 5 Madd. C. R. 379; Cragie *v.* Lewin, 3 Curteis Ecc. R. 435; Forbes *v.* Forbes, 1 Kay, 64. As to the anomalous character of "Anglo-Indian" domicil, see Dicey, 141; and cases there cited.

[2] Merlin, Rép. de Juris. Domicile, iii. 6; Denisart, Domicile, iv. c. ii. § 6.

[3] Somerville *v.* Somerville, 5 Ves. 750.

It has been held in Massachusetts, that the fact that a police officer of the town of N., sometimes while on duty slept in the police station there; that he had a room in N. where he sometimes slept, and also another room there at the house of his brother where he kept his clothes, and that he claimed to be an inhabitant of N., is sufficient to warrant a jury in finding that he was an inhabitant of that town, although he worked and boarded in the town of W. and was also a police officer of that town. Com. *v.* Kelleher, 115 Mass. 103.



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### 9. *Lunatics.*

§ 52. Whether a domicil acquired when sane can be divested by a guardian of the ward after the latter has become insane may be doubted. It has been denied in Maine,[1] but affirmed in Vermont and Massachusetts.[2] The course, however, in order to work a change of domicil, is for the guardian to obtain an order of the proper court approving of it. Unless this be done, it should require strong proof of the expediency and *bona fides* of the change to subsequently sustain it.[3] It is true that by the French law the domicil of the *tuteur* determines that of the lunatic;[4] and Sir R. Phillimore thinks that the same rule exists in England.[5] But Mr. Westlake justly remarks in reply:[6] "The latter is indeed the modern French rule, because the uniformity of law in France has deprived the domicil of its effect on the distribution of property on death; but the old rule of that country, when its local customs varied as the laws of the component portions of the British empire do now, justly forbade the succession of a lunatic to be affected by any removal which might have taken place during the lunacy, and therefore without his will." This reasoning applies equally to the United States.[7] And the better view is, that a person under guardianship for lunacy is entitled to the same rights as to domicil as is an infant.[8]

Lunatic's domicil to be fixed by court.

§ 53. Where an infant is of unsound mind, and remains continuously so, the incapacity of minority continues, so as to confer on the father the right of choice in the matter of the domicil of the son; and the father's change of domicil works a change in the son's domicil.[9]

Father may change domicil of insane child.

[1] Pittsfield *v.* Detroit, 53 Me. 442.

[2] Anderson *v.* Anderson, 42 Vt. 350; Holyoke *v.* Haskins, 5 Pick. 20. See Cutts *v.* Haskins, 9 Mass. 543; Upton *v.* Northbridge, 15 Mass. 237.

[3] See Hepburn *v.* Skirving, 9 W. R. 764.

[4] Code Civil, art. 108; Merlin, Rép. Dom. § v. No. iv.

[5] IV. 91.

[6] Ed. of 1857, art. 52.

[7] See supra, § 42.

[8] Sharpe *v.* Crispin, L. R. 1 P. & M. 611. That the domicil of a lunatic, becoming such after reaching full age, is changed by a change of the residence of his guardian, is denied by Westlake, relying on Lord Penzance's expressions in Sharpe *v.* Crispin, L. R. 1 P. & M. 618. Westlake (1880), 239; Dicey holds to the contrary, p. 132.

[9] Sharpe *v.* Crispin, 1 P. & M. 611. See supra, § 41.



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### 10. *Prisoners and Exiles.*

Imprisonment and exile do not involve change of domicil.

§ 54. By the Roman law, a perpetual exile transferred his domicil to the place to which he was banished.[1] It was otherwise when the banishment was temporary, in which case he retained his former domicil.[2] There can be little doubt that such is the present law as to transported convicts.[3]

A prisoner, who is carried to his prison and detained there for a term of years against his will acquires no domicil in his prison.[4] He is presumed, during his imprisonment, to look constantly forward to his return to his home.[5] But it is otherwise with an imprisonment for life.

Following the analogy of a lunatic, as to whom there is always some prospect of recovery, and who does not lose his domicil, as has been seen, when removed to an asylum, the prospect of returning home may be the test as to prisoners.[6]

The same test is applicable to exiles and refugees.[7] If they nourish the hope of returning, their domicil remains at their homes.[8] Boullenois gives a striking illustration in the case of the fugitives who accompanied James II. to France, and whom the French jurists treated as retaining their English domicil.[9] But if the refugee continues to dwell in the place of his retreat when his disabilities are removed, making there his permanent abode, he acquires in such place a domicil.[10] And such is the case where he takes up a permanent abode in the place of his refuge,[11] or settles there definitely after his restoration has become possible.[12]

[1] L. 22, § 3, ad mun. (50, 1).

[2] L. 27, § 3; Phil. iv. 128.

[3] Merlin, Rép. de Jur. Dom. iv.; Phil. iv. 130; Westlake, art. 53; Dicey, 129, citing Udny *v.* Udny, L. R. 1 Sc. Ap. 458.

[4] Burton *v.* Fisher, 1 Milwood, (Irish), 183.

[5] Denisart, Domicile, 3. See Phil. iv. 128; Bempde *v.* Johnstone, 3 Vesey, 198; Grant *v.* Dalliber, 11 Conn. 234; Danville *v.* Putney, 6 Vt. 512; Woodstock *v.* Hartland, 21 Vt. 563.

[6] Supra, § 52.

[7] See infra, § 56 *a*.

[8] Duchess of Orleans' case, 1 Sw. & Tr. 253; De Bonneval *v.* De Bonneval, 1 Curteis, 856.

[9] Traité de la Realité et Personalité des Statuts, t. i. tit. ii. c. 3.

[10] Infra, §§ 55, 65; De Bonneval *v.* De Bonneval, 1 Curteis, 856.

[11] Stanley *v.* Bernes, 3 Hagg. Ecc. 438; Heath *v.* Samson, 14 Beav. 441.

[12] Collier *v.* Rivaz, 2 Curteis, 858.



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## IV. CHANGE OF DOMICIL.

§ 55. "With regard to the domicil of birth," said Lord Cairns, "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] The same rule may be applied, generally, to domicil by election or operation of law.[2] Mere absence can never by itself divest domicil, no matter how long such absence may continue. The absentee, whether he wander from place to place for pleasure or on business, may continue this absence for years; but until a new domicil is acquired, the old remains,[3] and this is, from the nature of things, the case with seafaring men, and with persons whose habits are necessarily roving.[4] In such case the burden of proof is on the party who impugns the established domicil.[5] "The *animus* to abandon one domicil for another," said Lord Curriehill, in a Scotch case,[6] "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." Eminently is this the case when the change is to a foreign land

Old domicil presumed to continue until new be assumed.

[1] By Lord Cairns, Bell *v.* Kennedy, L. Rep. 1 Sc. Ap. 307. See, also, Shaw *v.* Shaw, 98 Mass. 158. Supra, § 40.

[2] Church *v.* Rowell, 49 Me. 367; Littlefield *v.* Brooks, 50 Me. 475; Wilson *v.* Terry, 11 Allen (Mass.), 206; Mills *v.* Alexander, 21 Tex. 154.

[3] Aikman *v.* Aikman, 3 Macq. 854; Desmare *v.* U. S. 93 U. S. 605; Littlefield *v.* Brooks, 50 Me. 475; Gilman *v.* Gilman, 52 Me. 165; Monson *v.* Fairfield, 55 Me. 117; Abington *v.* North Bridgewater, 23 Pick. 170; Colton *v.* Longmeadow, 12 Allen, 598; Walbridge *v.* Banks, 15 Ohio, 68; Alter *v.* Waddell, 20 La. Ann. 246; Sanderson *v.* Ralston, 20 La. Ann. 312.

[4] Bruce *v.* Bruce, 2 Bos. & P. 229, note; Hallett *v.* Bassett, 100 Mass. 167.

[5] Crockenden *v.* Fuller, 1 Sw. & Trist. 442; Douglas *v.* Douglas, L. R. 12 Eq. 645; 41 L. J. Chan. 74.

[6] Donaldson *v.* McClure, 20 D. 307, cited Guthrie's Savigny, p. 61.



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from the domicil of origin.[1] But if the intention to change the domicil is proved, it is immaterial whether the party was conscious of the consequences of the change.[2]

Burden on party asserting residence is not domicil.

§ 55 *a*. Where a party is shown to have been in a particular place on a particular moment, and this is all that is known of him, the burden is on those who dispute the fact that such place is his domicil.[3] This is eminently the case with the place of death.[4] And it has been held in England that when a person dies abroad, the burden of proof is on the party seeking to prove that his domicil was English.[5]

Change must be in intention and fact.

§ 56. Change of residence alone, however long and continued, does not effect a change of domicil. There must be an intention to change the domicil as well as residence.[6] No matter how long a residence in a particular place may be it does not confer domicil, unless there be an intention to remain in such place permanently.[7] Thus a Scotch domicil has been held to be retained in the face of an eight years' residence in London, there being no intention to change the Scotch domicil.[8] An absence of an intention to remove from a residence ac-

[1] See remarks of Lord Cranworth, in Whicker *v.* Hume, 7 H. of L. 124; and cases cited by Mr. Guthrie in his translation of Savigny, p. 61; and also supra, § 40.

[2] It is true that in Moorhouse *v.* Lord, 10 H. of L. C. 272, Lords Cranworth and Kingsdown threw out intimations to the contrary; but this limitation can only be applied in cases in which the change is made for the purpose of effecting some specific legal purpose. To say that change of domicil is conditioned on the knowledge of the consequences, is to say that there can be no change of domicil, since there is no one who can tell to what consequences a change of domicil may lead. See infra, § 61.

[3] Guier *v.* O'Daniel, 1 Bin. 349, approved Dicey, p. 117. See Bruce *v.* Bruce, 2 B. & P. 229; Hindman's App. 85 Penn. St. 466.

[4] Ibid.

[5] President of the United States *v.* Drummond, 33 L. J. Ch. 501; Anderson *v.* Laneuville, 9 Moo. P. C. 325.

[6] Moorhouse *v.* Lord, 10 H. of L. C. 272; Jepp *v.* Wood, 4 De G., J. & S. 616; Parsons *v.* Bangor, 61 Me. 457; Stockton *v.* Staples, 66 Me. 197; Ensor *v.* Graff, 43 Md. 391; Wilkins *v.* Marshall, 80 Ill. 74; Harkins *v.* Arnold, 46 Ga. 656.

[7] Bell *v.* Kennedy, L. R. 1 Sc. Ap. 307; Walker *v.* Walker, 1 Mo. Ap. 404. See Fish *v.* R. R. 53 Barb. 472, for a case in which this was pushed to its farthest limits.

[8] Munro *v.* Munro, 7 Cl. & Fin. 842. "There must be the act, and there must be the intention." Cockrell *v.* Cockrell, 25 L. J. Ch. 731; Kindersley, V. C.



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cepted as a home is equivalent to an intention to remain.[1] Mere floating ideas of moving, however, even when followed by a change, do not constitute the requisite intent. "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 intention prevented a man from having a fixed domicil, no man would ever have a domicil at all except his domicil of origin."[2] The intention which is a necessary constituent of the change must be to abandon the old domicil,[3] and to accept the new residence as a final abode.[4] But domicil may be as effectually abandoned by an intention adopted not to return when absent as it would be if the intention not to return was coincident with the leaving.[5]

[1] Story, § 43; Atty. Gen. *v.* Pottinger, 30 L. J. (Ex.) 284; 6 H. & N. 733.

[2] Bramwell, J., Atty. Gen. *v.* Pottinger, supra.

[3] Lyon *v.* Paton, 25 L. J. (Ch.) 476.

[4] Supra, § 21. That the intention must be to take up the new residence as a permanent home for an indefinite period, see Jopp *v.* Wood, 4 De G., J. & S. 616. That an intention to remain indefinitely is enough, see Sleeper *v.* Paige, 15 Gray, 349; Whitney *v.* Sherborn, 12 Allen, 111; Wilbraham *v.* Ludlow, 99 Mass. 587.

Intent and fact are necessary to establish domicil for one who moves from place to place working for wages. Moreland *v.* Davidson, 71 Penn. St. 371; Reed's App. 71 Penn. St. 378.

A foreigner continuously employed in the vessels of a nation may, without having a residence on shore, acquire a domicil in such nation. Bye, in re, 2 Daly, N. Y. 525.

[5] Hampden *v.* Levant, 59 Me. 557. "The domicil of a person is that place in which he has fixed his habitation, without any present intention of removing therefrom. Bouv. L. Dict. vol. i. 489; Story Confl. of Laws, § 43. Two things must concur to constitute domicil. First. Residence. Secondly. The intention of making the place of residence the home of the party. There must be both fact and intent. Ibid. § 44. So though the residence be taken for a temporary purpose, intention may change its character to a domicil, but *primâ facie* the place of residence is the domicil until other facts establish the contrary. Even a recent establishment was held to constitute a domicil where the intention of making it a personal residence was proved upon the party. Phil. Law of Dom. § 215. This rule applies not only in our inter-state habitation but also where a citizen removes to a foreign country. As where a citizen of Pennsylvania removed to Cuba, settled there and engaged in trade; it was held, that the presumption in favor of the domicil of origin no longer existed, and that the burden of disproving the domicil of choice lay upon him who denied it. Hood's Est. 9 Har. 106. *A fortiori* would this presumption arise in favor of the domicil of choice, in the case of a citizen removing from one state to another, for he is a citizen of the United States, and the whole land is his com-



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§ 57. Domicil may be established in a new residence which is permanent, and marked by settled business engagements in the new site, when there is no expressed intention to return. Thus, where a Portuguese came to England in 1818, as the agent of a wine company, in which capacity he was employed until 1833, after which he continued to reside in England, and in 1857 was appointed attaché to the Portuguese embassy, which office he held until his death in 1860; and there was no evidence that he visited Portugal, or communicated with any one there, after he came to England; it was held that he had an English domicil, notwithstanding in his will he had stated that he was a Portuguese subject, and an attaché, and not liable to legacy duty.[1]

Permanent residence and settled business duties may constitute change.

§ 58. When an old domicil is definitely abandoned, and a new one selected and entered upon, "length of time is not important; one day will be sufficient, provided the *animus* exists."[2] 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.[3] Thus a constructive residence is sufficient to

A new domicil may be immediately acquired.

mon country." Gordon, J., Carey's App. 75 Penn. St. 201.

That the time when a party decides to make his domicil in a particular place is to be determined by induction from all the facts, and not exclusively from his own subsequent recollection, see Bell *v.* Kennedy, L. R. 1 Sc. Ap. 307.

Domicil does not attach on an intention to remain only in case of finding employment. Ross *v.* Ross, 103 Mass. 575.

In Martini *v.* Schliewinski, Sup. Com. Court of Germany, 1874 (Jour. du droit int. privé, 1875, p. 368), it was ruled that to establish a new domicil the old domicil must be finally abandoned, and the new accepted with the intention of remaining. A mere declaration, made to the authorities of the new site, is not sufficient, without an actual change of residence. To sustain this is cited the German Code, Allg. Gerichtsordn. § 16, and the rule of the Roman law, *Domicilium re et facto transfertur, non nuda contestatione.* L. 20, Dig. ad munic. 50, 1. The recent French adjudications take the same line; and it has been held that a double declaration made to the mayor of the former residence and to the mayor of the new residence is insufficient to change domicil unless followed by an actual change of habitation. Jour. du droit int. privé, 1875, p. 369.

[1] Atty. Gen. *v.* Kent, 1 Hurl. & C. 12. See Mitchell *v.* U. S. 21 Wal. 350.

[2] Cragie *v.* Lewin, 3 Curteis, 448. *Uno solo die constituitur domicilium si de voluntate appareat.* Bell *v.* Kennedy, L. R. 1 Sc. Ap. 319, per Lord Chelmsford. Infra, § 66.

[3] Sir J. Leach, in Munroe *v.* Doug-



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give domicil, though an actual residence may not have begun. Settlement, however, whether actual or constructive, is necessary to domicil.[1] And though constructive residence, accompanied by proof of the proper intent, is sufficient to establish *matrimonial* domicil, as well as domicil for settlement purposes,[2] there is a growing tendency, at least in England, to hold that residence must in other cases be actual in order to constitute the change.[3]

Original domicil does not revive on abandonment of elective.

§ 59. It is an interesting question whether, when an elective domicil has been abandoned, that which was original revives. That it does, was Judge Story's opinion.[4] Of this exception Mr. Westlake (1857) says:[5] "It is commonly, though somewhat improperly, cited by the phrase 'native allegiance easily reverts,' and its chief application has been in the prize courts. The liability of private property to warlike capture at sea has always depended not merely on the nationality, but also on the domicil, of the owner; or, it may be said that, for this purpose, domicil is the criterion of nationality. The motive doubtless lay in the assumption that the benefit of trade mainly accrues to that country from the ports of which it is carried on; whence only an actually subsisting residence for commercial objects could afford protection to

lass, 5 Madd. 405; Forbes *v.* Forbes, Kay, 354.

Mr. Westlake (1880), § 244, holds that "if the person (one changing a domicil of origin) dies at sea, or otherwise *in itinere* between the old country and the new, his last domicil is that of origin." He adds, that he does not know that the case has arisen, but he is convinced that it would be so decided. I do not agree to this. 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.

[1] Munro *v.* Munro, 7 Cl. & Fin. 877; Still *v.* Woodville, 38 Miss. 746; Blumer, ex parte, 27 Texas, 734.

[2] Williams *v.* Roxbury, 12 Gray, 21. See infra, § 190.

[3] See Dicey on Domicil, 1879, p. 84; Raffenel, in re, 32 L. J. P. & M. 203; 3 S. & T. 49; though compare Munroe *v.* Douglas, 5 Madd. 502, as cited infra, § 60.

[4] Confl. of Laws, § 48. And to the same effect is the decision of a Scotch court; Colville *v.* Lauder, Morison, 14963, App; 5 Madd. 384.

[5] Int. Law, art. 40. See Abdy's Kent, p. 217.

It was said, also, by Lord Hatherley, that a man may not only change his domicil, but may abandon each successive domicil *simpliciter*, so that the original domicil *simpliciter* reverts. Udny *v.* Udny, L. R. 1 H. L. Sc. 460; approved by Sir G. Jessel in King *v.* Fortwell, L. R. 1 Ch. D. 518.



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the owner's property as against his nationality, for when such residence was discontinued, nothing remains to take the case out of the general principle which exposed enemy's property, as such, to capture. With these considerations were combined the respect paid to the place of birth by the feudal principle of allegiance, and the recognized rule of international law, that a state to which allegiance has been transferred has not the right to protect the citizen against his former government, if by his voluntary act he again places himself within its power."

But whatever may be the reasons for the adoption of this doctrine of the revival of original domicil, when an elective domicil has been abandoned,[1] it is inconsistent with the great body of the cases which place the adhesiveness of the elective domicil on the same basis as that of the original. It has been repeatedly decided that when an elective domicil is actually acquired, it continues until a new domicil is definitely assumed. In a case already cited, Sir John Leach tells us that the same evidence is required to prove the resumption of the old domicil as the acquisition of one that is new;[2] and however that may be, we have an express decision of the Connecticut Court of Errors, that the abandonment of the elective domicil has no effect in reviving the original.[3]

§ 60. The consequences in the United States would be serious

[1] Lord Chelmsford, in Udny *v.* Udny, L. R. 1 Sc. Ap. 454, no doubt takes strong ground in favor of such revival. "The domicil of origin," he says, "always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist." This view is adopted by Mr. Dicey, Domicil (1879), p. 93. But the reasoning on which this rests does not apply to cases where a European nationality is abandoned for that of the United States; and where to resuscitate the domicil of origin of a naturalized American leaving one of our Eastern States to seek an abode as yet undesignated in the West, would be to revive in him a foreign *status* which he had finally, and as he supposed, irrevocably cast off.

Mr. Westlake (1880), § 244, makes a distinction between change of country of origin, and change of country of choice. When death occurs *in itinere* from the first, he holds the domicil of origin remains unchanged; when death occurs *in itinere* from one domicil of choice to another, then the last domicil is that to which the party is travelling. To this he cites Leach, V. C., in Munroe *v.* Douglass, 5 Madd. 502; approved by Wood, V. C., in Forbes *v.* Forbes, Kay, 354.

[2] Munroe *v.* Douglas, 5 Madd. 405.

[3] First Nat. Bank *v.* Balcom, 35 Conn. 351; S. P., Hicks *v.* Skinner, 72 N. C. 1.



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should the affirmative of this question 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,[1] and so *a fortiori* may an abandonment with an intention to return to such original domicil.[2]

Such revival inconsistent with American policy.

§ 61. While a party, if otherwise competent, may undoubtedly prove on the witness stand his intention as to domicil,[3] we must remember that intention, in this as well as in all other cases, is to be established by inductive proof.[4] We are sometimes, indeed, told, that "direct" proof in this re-

Intention to be inductively proved.

[1] Kellar *v.* Baird, 5 Heisk. 39.

[2] Reed's App. 71 Penn. St. 378.

[3] Whart. on Ev. § 483; Maxwell *v.* McClure, 3 Macq. 852; Wilson *v.* Wilson, L. R. 2 P. & M. 435; Fisk *v.* Chester, 8 Gray, 506; Kennedy *v.* Ryall, 67 N. Y. 380.

[4] Whart. on Ev. §§ 1261, *et seq.* That intent in such cases is for jury, see Mooar *v.* Harvey, 128 Mass. 219. Removal of the remains of deceased children to a new residence gives a strong inference of an intention to remain. Haldane *v.* Eckford, L. R. 8 Eq. 642. Intention to adopt a particular domicil may be inferred from the doing certain solemn acts (*e. g.* marriage or will making), which would be valid only in case such domicil be adopted. Doucet *v.* Geohegan, L. R. 9 Ch. 441. The selection in a will of trustees for the management of children's estate is a fact from which an intention as to domicil may be inferred. Drevon *v.* Drevon, 34 L. J. (N. S.) Ch. 139; Atty. Gen. *v.* Wahlstatt, 3 H. & C. 387. See White *v.* Howard, 52 Barb. 294. Supra, § 41.



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spect is weightier than "indirect" or "circumstantial." But so far from a party's statement on the witness stand of his prior intention being "express" or "direct" proof of change of domicil, it is worthless unless supported by proof of actual change. Intention, also, we should remember, is ascertainable at least as much by reference to a man's environments and conduct as it is by his words. What circumstances pressed him, imparting to him their mould? Possession of a large estate, for instance, carefully invested in a particular country, and long acquaintance with the laws and modes of business established in that country, make it improbable that a person whose traditions are identified with that country would intend to leave it finally, even though, for purposes of health, he should establish what might appear to be a permanent home in another land. Yet even here the question of probability is largely affected by the conditions of the two lands. We would say that it is very improbable that a Philadelphian, for instance, while retaining his Philadelphia investments, would intend, even in taking up a permanent residence at Havana, to adopt Cuban law for the distribution of his estate. If the removal, however, were to New York, the improbability of intention to change domicil would be far less. In other words, one of the chief factors in determining what a reasonable man intends is his environment at the time. It is not likely that a reasonable man, attached to his family, would intend that his death should tear his estate from the investments in which he had carefully placed it, and from a system of distribution he had innumerable opportunities of watching, in order to turn it into new channels of which he knows nothing. But this improbability greatly diminishes when the change is to a state known to possess a kindred jurisprudence.[1] In this respect, the later English cases differ from the older in treating the intention of change as an intention to change not merely personal residence but the centre of family relations.

Recitals in documents admissible.

§ 61 *a*. A recital of domicil, in a deed or will, is admissible in cases of succession, and in other cases when not self-serving, to show intent.[2] Such recitals, however, are

[1] See this distinction taken in Moorhouse *v.* Lord, 10 H. of L. 272; Westlake, 1880, § 229 A; Whart. on Ev. § 1285.

[2] Whart. on Ev. §§ 1039–1042; Dupuy *v.* Seymour, 64 Barb. 156.



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not conclusive, but may be rebutted by proof that the actual domicil was elsewhere.[1] The statement of domicil, in fact, is often inserted by a conveyancer according to his own notions, or according to what may suit a passing whim of the party. In addition to this, persons having several residences are apt, in deeds relating to either, to have the local domicil recited. The party's actual domicil, however, can only be in one of these residences, and it may perhaps be in none of them. Sometimes, also, such recitals are necessary by local law. Thus Sir Herbert Jenner, in the Marquis de Bonneville's case, said: "I am not inclined to pay much attention to the descriptions of the deceased in the legal proceedings in France, for it may have been necessary, as the proceedings related to real property, that he should describe himself as of some place in that kingdom."[2] On the other hand, the French courts seem to attach much weight to this species of evidence.[3] It should be noticed, however, that the recitals appealed to in the French cases are principally those which occur in notarial acts, dictated by the party himself, and often verified by his oath.

§ 62. Declarations, to adopt the distinction taken in another work, may be either direct, when made with the specific intent of effecting a particular purpose, or casual, when incidental to action taken for other purposes.[4] A man, for instance, may state directly, for the purpose of determining the question, "B. is my domicil;" or he may make declarations preparatory to naturalization, which will be regarded as being virtually an announcement of domicil. But it is equally admissible to put in evidence his casual statements, made without any intention of determining his legal *status;* as when he says, "I expect to remain permanently at B.;" or, "I shall not return to C.;" or, "I intend soon to return to C. for good;" or, "I regard B. as my home."[5] But an expression of

Declarations admissible to prove intent.

[1] Somerville, in re, 5 Vesey, 750; Att. Gen. *v.* Kent, 1 Hurl. & Colt. 12; Curling *v.* Thornton, Addams Rep. 19; Gilman *v.* Gilman, 52 Me. 165.

[2] 1 Curteis Ecc. R. 856.

[3] Phil. iv. 174, and cases there cited.

[4] Whart. on Ev. § 1082.

[5] Brodie *v.* Brodie, 1 Sw. & T. 90; Hamilton *v.* Dallas, 1 Ch. D. 257; Udny *v.* Udny, L. R. 1 Sc. Ap. 441; Thorndike *v.* Boston, 1 Met. (Mass.) 242; Killburn *v.* Bennett, 3 Ibid. 199; Kennedy *v.* Ryall, 67 N. Y. 380; Burgess *v.* Clark, 3 Ind. 250.



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intention, not accompanied by proof of an overt act of removal, is irrelevant.[1] And mere vague expressions of satisfaction with a place, and intention to remain in it, are entitled to little weight.[2] It is otherwise as to deliberate statement of a party that he is a mere sojourner for temporary purposes in the place where he resides.[3]

The French Code[4] provides for an express declaration of an intent to change domicil; such declaration to be made either in the municipality abandoned, or in that which is sought; and such declaration is regarded as the highest species of proof.

Exercise of political rights at a particular place not conclusive proof of domicil.

§ 63. The Roman law attached great consequence to the spot which a person elected as the site of his political rights: "Dictae expressae declarationi domicilii constituendi equipollet illa, si quis in civitate aliqua jus civitatis (*das Bürger-recht*) impetraverit et ibi habitaverit, vulgo *da eine verbürgerte oder Erbschuldigung geleistet haüslich und beständig gessesen ist.* Requiritur autem copulativè, ut quis ibidem non solum jus illud impetraverit, sed etiam actualiter habitet."[5] So on the continent of Europe, under the old systems, in which political privileges were rare, and mostly had a feudal relation, the acquisition or acceptance of such privileges was viewed as connecting their possessor with a special terri-

[1] Bangor *v.* Brewer, 47 Me. 97; Moke *v.* Fellman, 17 Tex. 367.

[2] Phil. iv. 156; Somerville's case, 5 Ves. 750; Anderson *v.* Laneuville, 9 Moore P. C. 325; Doucet *v.* Geohegan, 9 Ch. D. 441; The Venus, 8 Cranch, 253; Hallowell *v.* Saco, 5 Greenl. 143; Harvard College *v.* Gore, 5 Pick. 370. Declarations of domicil, it should be also remembered, may be by conduct as well as by words. Whart. on Ev. § 1081.

That a wife's declarations in such respect cannot be received to affect her husband, see Parsons *v.* Bangor, 61 Me. 457.

[3] Moorhouse *v.* Lord, 10 H. of L. 272.

[4] T. iii. Domicile. See rulings on this clause given supra, § 41.

[5] Tractatio de Domicilio (1663), p. 27, cited by Phillimore, iv. § 283. Menochius writes, after quoting other civilians, "Et idem ego ipse respondi, *in cons.* 390, &c. dixi civem hunc non sustinentem onera esse impropriè civem et secundum quid;" and he adds the authority of other civilians, and the decisions in the *Rota Romana*, "Qui scripserunt civem originarium aliquem non esse, nisi parentes ibi domicilium contraxerint et civitatis munera subierint; ita et olim apud Romanos civis Romanos dicebatur is, qui etsi natus esset Romae attamen domicilium Romae in ipsâ urbe contraxisset ac qui tribum et bonorum potestatem adoptus esset." Lib. vi. Presump. xxx. s. xxiv. p. 1037; Phil. *ut supra.*



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tory. The serf, of course, had his domicil in the soil to which he was attached; the lord in that of which he was suzerain.

But when political privileges became more common, and when they were attached rather to the person than the soil, then the connection between domicil and privilege was less necessary. A man could have but one domicil, yet in England, and in some parts of the continent, he might vote at several polls. So, as suffrage is extended, and property qualification lessened, it comes to be regarded, as it is in the United States, as a personal right, which may be exercised in any particular state of a general federation, only a few weeks' or months' special residence being required. In correspondence with this extension of suffrage, the presumption that the place of suffrage is the place of domicil has lost strength. Thus Sir Herbert Jenner, in the case of the Marquis de Bonneval, who possessed a house in London, and an estate in France, said: "I am inclined to pay very little attention to the statement as to his exercise of political rights in France, or to his being registered as a voter here; *being* a housekeeper, he was registered as a matter of course."[1] And in the United States, where, to a citizen of the United States, the right to vote is granted on brief and transient residence, the presumption arising from voting is regarded as even less weighty, and is easily rebutted by proof of actual domicil elsewhere.[2] But the exercise of political rights is always admissible as cumulative proof.[3]

§ 64. Yet this is not to be confounded with that deliberate surrender of one nationality and acceptance of another, which is marked by expatriation and naturalization. As the presumption of permanent residence to be made from voting is but slight, that to be drawn from expatriation and naturalization is peculiarly strong. Even before expatriation was legalized by the government of Great

Naturalization in another country strong proof of domicil in such country.

[1] De Bonneval *v.* De Bonneval, 1 Curteis Ecc. R. 856.

[2] Shelton *v.* Tiffin, 6 Howard, 163; Guier *v.* O'Daniel, 1 Binney, 349, note; Easterly *v.* Goodwin, 35 Conn. 279; Hayes *v.* Hayes, 74 Ill. 312; Kellogg *v.* Oshkosh, 14 Wis. 623; State *v.* Hallett, 8 Ala. 159; Mandeville *v.* Huston, 15 La. Ann. 281; Folger *v.* Slaughter, 19 La. Ann. 323.

[3] Brunel *v.* Brunel, L. R. 12 Eq. 298; Drevon *v.* Drevon, 34 L. J. N. S. 137; Maxwell *v.* McClure, 3 Macq. 859.



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Britain (as it has been by the statute of May 12, 1870),[1] naturalization in another country was viewed in the English courts as very strong proof of transfer of domicil.[2] Now, however, such expatriation and naturalization must be viewed as establishing a case which it would require distinct and emphatic proof of an intended continuous English domicil to overcome. It must, however, be remembered that nationality and domicil are not convertible;[3] and that domicil may be acquired in a new country without an abandonment of the prior nationality and allegiance.[4]

Payment of personal taxes is cumulative proof.

§ 65. The payment of personal or poll-tax in a particular place is a fact from which, in all cases in which such taxes are imposed on domiciled residents, it may be inferred that the party considered himself domiciled in such place. The non-payment of taxes, however, is no negation of domicil. "Taxes," said President Rush, in a case already cited, "may not always be demanded;"[5] and however unlikely this may be in a country whose debt is heavy, and whose revenue officers are active, it is not uncommon in lands which are newly settled, and yet in which persons may come in crowds in search of domicil. And when property taxes are laid irrespective of domicil, the payment of such taxes has no logical bearing on the issue. It is otherwise, however, with personal and income taxes. If these are of any amount, there is a natural unwillingness to pay them, except in the place where they are actually due, and this is the party's domicil.[6] Yet here must be kept in mind the distinction already noticed. In a federal government, such as the United States, where an income tax is payable to the federal treasury, it may be a matter of indifference to a person taxed whether he pay in New Hampshire or in Florida; and after he has changed his domicil from the one state to the other, he may continue, through his agent or otherwise, to pay such tax in the abandoned state. But it is different when the tax is payable to the state treasury. It is not likely he would

[1] Supra, § 5.

[2] See Phil. iv. 176, 177; Moore v. Darral, 4 Hagg. 353.

[3] Supra, §§ 5, 8, 13, 14, 34; infra, § 75.

[4] Brunel v. Brunel, L. R. 12 Eq. 298; Douglas v. Douglas, L. R. 12 Eq. 617. See supra, §§ 7, 8, 34.

[5] Guier v. O'Daniel, 1 Binney, 349, note. See infra, § 80.

[6] Thomson v. Advocate General, 12 Cl. & Fin. 1.



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continue to pay this tax when no longer liable to do so. The payment of the tax, therefore, in such case, would lead to the conclusion that the party did not consider his domicil to have been changed.

§ 66. Lord Stowell, in a judgment which has been often quoted, said, "Time is the grand ingredient of domicil."[1] But it should be remembered that this eminent judge was then speaking of that commercial domicil which it was the policy of the prize courts to rest on mere residence, even when there was an *animus revertendi*. The true rule may be collected from two propositions: *First*. No matter how long residence may be, it does not constitute domicil in the highest sense, unless there be an intention to stay for an indefinite period.[2] *Second*. If there be a settlement in a specific country, with an intention, solemnly and deliberately made, and adequately evidenced, to remain there permanently, domicil may be constituted by the stay of a single day.[3]

Domicil not dependent upon time.

[1] The Harmony, 2 Rob. Ad. 322–324. See Cockerell *v.* Cockerell, 25 Law J. Ch. 730.

[2] Supra, §§ 56, 58; Maltass *v.* Maltass, 1 Rob. 75; Moorhouse *v.* Lord, 10 H. of L. Cas. 272.

[3] Supra, § 65.

R. E., a Scotchman by birth, resided in Jersey for twenty-four years preceding his decease. He took occasional excursions to his native place in Scotland, and elsewhere. Two of his children had died in France, and he caused their remains to be disinterred and buried in Jersey. It was proved that he contemplated being buried there himself. He had been in India in early life in the service of the East India Company. He went to Scotland a short time previous to his death, but there was no proof of any intention to return and reside there. It was held, under these circumstances, and particularly from the length of his residence in Jersey previously to his death, that he had obtained a domicil in Jersey. Haldane *v.* Eckford, 21 L. T. (N. S.) Ch. 87; L. R. 8 Eq. 642.

"Length of time is [to be] 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. . . . . Some foreign jurists have suggested, if they have not actually laid it down, that a period of ten years' residence 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 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 period of 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



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### V. CONFLICT OF RESIDENCES.

§ 67. Questions of conflict between two residences have been already incidentally noticed. The following tests may be here specifically mentioned.

Home preferred to place of business.

In questions of succession, the *home* (*i. e.* the place where the family reside) is to be viewed as the domicil, in preference to the place of business occupied by a party as such.[1] A man, for instance, settles his family in the neighborhood of New York, in a New Jersey town, where he has a permanent home to which he proposes to adapt himself, and which he plans from time to time to extend. In the community in which he thus establishes himself he takes root, familiarizing himself with its habits and acquainting himself with its laws. He does business, however, in New York, but here his relations are neither social nor domestic. If, on his death, his domicil is to be determined, there can be no doubt that such domicil would be held to be in New Jersey. Yet, if he has a home in New York, where he has a second residence, and if the question is whether he took New York as a business centre, his commercial domicil might be held to be in New York.[2] We should at the same time remember that the terms "home" and "abode" include not merely physical but civil and social surroundings. It may well happen that a man may have no expectation of ever leaving a particular spot in which he resides, yet may be very far from becoming a member of its social system. His environments may continue those of his old home. His important pa-

there for ten years is a very strong indication of his intention to establish his home and his domicil in that place." Cockrell *v.* Cockrell, 25 L. J. Ch. 730, Kindersley, V. C., adopted in Dicey on Domicil, 124.

[1] Phil. iv. 160–166; Bempde *v.* Johnson, 3 Vesey, 201; Somerville *v.* Somerville, 5 Vesey, 750; Aitchison *v.* Dixon, Law Rep. 10 Eq. 589; Parsonfield *v.* Perkins, 2 Greenl. 414; Bump *v.* Smith, 11 N. H. 48; Fisk *v.* R. R. 53 Barb. 472; Blucher *v.* Milsted, 31 Tex. 621. See Haldane *v.* Eckford, L. R. 8 Eq. 631; Douglas *v.* Douglas, L. R. 12 Eq. 617; Catlin *v.* Gladding, 4 Mason, 308. See supra, §§ 21, 57, that it is *home* that is the basis of the modern idea of domicil.

[2] But see Fisk *v.* R. R. 53 Barb. 472. Family residence is none the less decisive test of domicil in cases in which the residence was chosen by the wife and supported by her fortune. Aitchison *v.* Dixon, L. R. 10 Eq. 589. But a change of the wife's domicil does not involve a change of the husband's. Porterfield *v.* Augusta, 67 Me. 556; Scholes *v.* Iron Works, 44 Iowa, 190.



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pers may be deposited there, all that he does may be in view of its laws. He may even fall into the category described by Sir J. Wickens, in 1871,[1] 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." If so, provided he does not move his family with him to the new residence for their final abode, his domicil does not change. Domicil is tested by family residence; if the family be not moved, or not moved with the intention of taking up a final abode in the new residence, then the fact that the head of the family does not expect to get away from this new residence does not make it his domicil in the teeth of his own family arrangements and of his own desires and plans for the devolution of his estate.

Otherwise as to men without families.

§ 68. A man without a family, however, may be regarded as having his domicil in his place of business, if he sleep there, and not with his relatives in another place, whom he occasionally visits. "If a man is unmarried," says Judge Story,[2] "that is generally deemed the place of his domicil where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges." Yet at the same time, "this," this learned author goes on to say, "is subject to some qualifications;" and he judicially held, in a case tried before him in the Circuit Court, that a young unmarried man who had resided with his mother in Providence, but who at the service of the writ was engaged as a clerk in his brother's store in Connecticut, making frequent visits to his mother at Providence, was domiciled at Providence.[3]

Permanent preferred to occasional residence.

§ 69. A residence which is fit for permanent use may, in cases where the question is in other respects doubtful, be regarded as that which the party adopts as his domicil. Yet here there are numerous qualifications to be considered. A residence, for instance, may be selected, by a person holding public office, in the city of Washington, where he might be able to reside during the whole year, and he may retain at his old domicil only a house suitable chiefly for summer use, yet,

[1] Douglas *v.* Douglas, L. R. 12 Eq. 644.

[2] Confl. of Laws, § 47.

[3] Catlin *v.* Gledding, 4 Mason, 308.



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in the face of an intention to retain his old domicil, this inadequacy of accommodations retained in that domicil would be entitled to no weight. The habits of a country, also, are to be taken into consideration. In England, the landed proprietor's country house is said to have preference over his town house.[1] But this rule, even in England, is open to some exceptions. If the family reside principally in the town house, the presumption shifts; and so if the country house is only fitted for brief and occasional occupation.[2] And another distinction is very forcibly put by Sir W. P. Wood in the case just cited: "If a party select two residences, in one of which he can reside all the year, whilst in the other his health will not permit him to do so; and he must from the first be aware that, should his health fail him, his days must be passed where alone he can constantly reside; there is an additional reason for concluding that he regards such place from the first as that which must be his home, — a conclusion greatly fortified by his chief establishment being fixed there." But facts of this kind afford no legal presumption. They are to be considered merely as part of the material from which the party's intent (supposing there is no charge of bad faith) is to be inferred.

When the proofs on either side are balanced, and the burden is on the party setting up the change, the claim of the earlier residence to be the domicil should prevail.[3]

[1] Westlake, art. 48; Phil. iv. 169; 5 Vesey, 789; Warrender *v.* Warrender, 2 Cl. & Fin. 520; Munro *v.* Munro, 7 Cl. & Fin. 881.

[2] Forbes *v.* Forbes, Kay, 341.

[3] Supra, §§ 41, 55; Gilman *v.* Gilman, 52 Me. 165.

In a suit before Vice-Chancellor James, in 1870, A., a Scotchman, having his domicil in Scotland, and being a landed proprietor and banker there, married an Englishwoman, with whom he resided for some years in Scotland. He then, on account of health, left Scotland, and for ten years resided in England. After this he returned to Scotland, and remained there for a few months, for business purposes, but was again compelled by ill health to go to England, where, for nearly two years, he was confined in an asylum. He then spent five years in travelling on the continent and in England. At the end of that time he settled at Brighton, and remained there, with his wife, for ten years, till his death. His domicil was ruled to be in England. Aitchison *v.* Dixon, L. R. 10 Eq. 589; S. C., 39 Law J. (N. S.) pt. i. 705. Nor, it seems, does the fact that a Scotch residence should be retained make any difference, if the conjugal residence, and the permanent seat of the family, is in England. Forbes *v.* Forbes, Kay, 341.



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§ 69 *a*. Cognate to the last distinction is that between a residence for restoration of health, and a residence in which the home interests are permanently gathered. A person whose lungs are affected, for instance, goes to Colorado or to Algiers. He may have little hope of returning; he may die in the place he thus seeks; before he dies he may say despairingly, "I will never return;" but this does not divest him of his prior domicil. The question is, which did he regard as his home? To which system did he desire to subordinate himself and his estate? Unless it appear that his family settlement in his new residence was meant to be permanent, and that he adjusted himself and his family plans to it as a finality, then it would not only pervert the law but defeat his intentions to subject him to the personal law of the country where the new residence is, and to distribute his property according to its laws. And so has it been repeatedly held.[1] On the other hand, a person may move his whole family to a foreign country for a per-

And so to place for restoration of health.

But even to this there is an exception put with great weight by Sir W. P. Wood, Vice-Chancellor, afterwards Lord Chancellor: "If some particular state of health required the wife to reside in a warm 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." Forbes *v.* Forbes, Kay, 341. See Exchange Bank *v.* Cooper, 40 Mo. 169.

In Dupuy *v.* Wurtz, 53 N. Y. 556, the testatrix, domiciled in New York, went abroad with her husband in 1859, on account of her health, spending her winters at Nice, occupying rooms at a hotel; she spent the summers in travelling. She made her will at Nice in 1868, executed in accordance with the laws of New York, but not according to the requirements of the French law. Up to that time she kept her house in New York city unoccupied, intending and expecting to return as soon as her health would admit. About that time she began to abandon the hope of restored health and of a return, still claiming, however, in her letters and in her will, her residence in New York. Afterward she rented her house in New York, retaining one room to store some of her effects, and declared in letters and orally that she did not expect to return to her home in New York. In other respects she continued to live as before. She retained her investments in New York, and made none abroad. It was held that there was no proof of an intention to adopt a foreign domicil; and it not appearing that the testatrix had acquired a new domicil as respected her succession, she did not lose, by her relinquishment of her plan of return, her domicil in New York, and that the will was valid.

[1] Ibid.; Moorhouse *v.* Lord, 10 H. L. C. 272; Johnstone *v.* Beattie, 10 Cl. & F. 42, Forbes *v.* Kay, cited supra, § 69.



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manent residence, or, being without a family, he may seek such country for his final abode; and if so, it is hard to see how he can be prevented from acquiring a new domicil in such country by the fact that he was influenced in the movement by considerations of health.[1] But this reasoning cannot be extended to cases where the invalid's family remains, in part, in the old home, and that home is kept up.

Commercial domicil may be obtained in foreign civilized land.

§ 70. A person who goes to a foreign civilized country to engage permanently in trade, and becomes a merchant in such country, acquires there, for commercial purposes, a domicil, though his family may remain behind, and he may return to pay them occasional visits.[2] It should be observed, however, to adopt the language of Sir R. Phillimore,[3] that the cases "which contain the enunciation of this doctrine were indeed cases recurring in time of war, and at a time when it was often a matter of great difficulty to discover the trader in the enemy's commerce, who sought to disguise himself under the garb of a neutral, or to retain his native character. They were cases of commercial domicil; and, in the first place, it must be recollected that there may be transactions so radically national as to impress the national character, independently of the local residence of the parties. But, as has been already observed, further evidence of the *animus manendi* will generally be required to fix a testamentary domicil in time of peace."[4] But in any view, trade or mercantile domicil, in time of war, is so different from personal domicil, that the distinctions applicable to the one are not applicable to the other. A man may so immerse his business in that of a belligerent country as to be infected, so far as concerns the goods he there places, with the belligerency of the country, without, so far as concerns his *status* in other respects, subjecting himself to its laws.[5]

[1] See Haskins *v.* Matthews, 8 De G., M. & G. 28.

[2] The Indian Chief, 3 Robins. 18; The Matchless, 1 Haggard, 103; The Rendsburg, 4 Robins. 139; The President, 5 Robins. 279; The Diana, 5 Robins. 168; The Venus, 8 Cranch, 279.

[3] IV. p. 169. Infra, § 73.

[4] Sir R. Phillimore cites to this last point, 1 Wheaton Int. Law, p. 159.

[5] See Hodgson *v.* De Beauchesne, 12 Moore P. C. 313; Westlake (1880), § 262, Report of Commission on British Claims; U. S. Foreign Relations, 1873–4, vol. i. part 3.

Mr. Dicey (Op. cit. p. 343) notices the following differences between civil



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§ 71. It should also be observed that what has been said with regard to commercial residence in civilized foreign lands does not apply to such residence in lands which are heathen or uncivilized.[1] "Wherever," said Lord Stow- Otherwise as to barbarous lands.

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 *primâ facie* evidence of a person having there his civil domicil, but it is only *primâ 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 *primâ 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, and cannot by residence in one country, *e. g.* France, get rid of a domicil in another, *e. g.*

[1] See this question discussed, supra, § 15.



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ell,[1] "a mere factory is founded in the Eastern parts of the world, European persons trading under the shelter and protection of their establishments are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying particularly to those countries, and is different from what prevails ordinarily in Europe and the Western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habits of the countries. 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 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 mass of the society of the nation; they continue strangers and sojourners, as all their fathers were. . . . . 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."[2] And it is now settled law in England, as well as in the United States, that a civilized mercantile or missionary community, settled in a barbarous land, retains its own nationality.[3] In civilized states, it should be remembered,

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 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."

[1] The Indian Chief, 3 Robins. Adm. R. 18. See supra, § 15.

[2] See Maltass v. Maltass, 1 Robertson Ecc. p. 73; and particularly Phil. iv. 199.

[3] Adv. Gen. (Bengal) v. Ranee Surnomoye Dossee, 9 Moore App. 387; 2 Moore P. C. C. (N. S.) 22.



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domicil is incidental to territory; in uncivilized states, domicil is incidental to race. In England, such domicil must be English; in New York, it must be that of New York. But there is no territorial domicil in China as such. In Shanghai, there may be domicil with the American race, or with the English race, or with the Chinese race; and these domicils may coexist on the same soil. So in India, there may be an Anglo-Indian domicil and an Indian domicil.[1] And in the United States, the defective civilization of the aboriginal Indian tribes takes them out of the category of communities where domicil is coextensive with territory. Wherever a tribe may wander, its domiciliary law is the same. It is unpermeated by the civilized territorial law of the state where its residence may be permitted. On the other hand, the territorial law is in nowise permeated by it.

§ 72. According to Savigny, a person may municipally have distinct domicils in places in which his residence is equally established, using each as a centre of his business and legal relations, and, when needed, actually dwelling in each.[2] Undoubtedly this was the case, by the Roman law, so far as the abstract question of subjection was concerned, and so far as related to municipal burdens and local jurisdiction. It was otherwise, however, as this great author subsequently shows, when the question arose as to what jurisdiction should impress upon the individual his peculiar legal type. A., B., and C., for instance, have conflicting laws in reference to succession. Titus has a domicil in A., B., and C. By the laws of which is his legal *status* to be determined?

Only one domicil for *status* and succession.

According to the Roman law, *domicilium* yielded precedence, in this respect, to *origo* (*municipal citizenship*, *Bürgerrecht*); and

[1] Westlake (1880), § 249, speaking of the tendency of the English courts to impute an Anglo-Indian domicil, even in cases where there was an intention to return after a fortune is made, says: "It must be admitted that there are strong reasons of convenience in favor of the Anglo-Indian domicil in such cases. Since the Anglo-Indian law is nearly the same as that of England or Ireland, the decision in its favor makes little or no difference if the domicil of origin was in England or Ireland, except so far as to exempt the person's succession from the home duty." And he points out peculiar reasons why a Scotch domicil should be held to merge in an Anglo-Indian domicil. Supra, § 34.

[2] Röm. Recht, viii. § 354.



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when there were several titles of the latter class, the earliest prevailed.[1]

According to the analogies of the modern law, when there are conflicting domicils, that which was first acquired is that, in the opinion of Savigny, which should prevail.[2]

In a well-known judgment by Chief Justice Shaw,[3] that learned judge said: "The supposition that a man can have two domicils would lead to the absurdest consequences. If he had two domicils within the limits of sovereign states, in case of war, what would be an act of imperative duty to one would make him a traitor to the other." The difficulty in the whole of the able argument of which this is part is, that it not only blends domicil with allegiance, but overlooks the fact that domicil, in the view of those who hold that it may be cumulative, is capable of several degrees. In order to determine *status*, and eminently for the purposes of succession, it is agreed on all sides that a man can have but one domicil.[4] When he dies, the courts must decide between his several residences, and select one, and one alone, as that which gives to his estate its type.[5] He can, for this purpose, have but one domicil, just as, in the argument of Chief Justice Shaw, he can have but one allegiance.

Otherwise as to mats political, commercial, and matrimonial.

§ 73. Conflicts less easy of settlement may arise in cases where political or commercial domicil are in litigation.[6] No one who studies the reports of commissions appointed to determine upon the domicil (or allegiance, as the case may be) of persons claiming to have suffered from spoliation, when resident temporarily in a state involved in war, can avoid seeing how many cases there are in which two domicils (or, it may be, two nationalities) appear established, and in which the preponderance of proof for one or the other domicil is extremely slight.[7] The same observation may be

[1] Savigny, viii. §§ 356, 357.

[2] Ibid. § 359; Meier, de Conflictu Legum, p. 16. The same point is taken in Gilman *v.* Gilman, 52 Maine, 165.

[3] Abington *v.* North Bridgewater, 23 Pick. 170.

[4] Udny *v.* Udny, L. R. 1 Sc. Ap. 441.

[5] Ibid.; approved in Hindman's Appeal, 85 Penn. St. 466.

[6] This was asserted as to political domicil by Pollock, C. B., to be the case with Scotch peers who have estates and residences in both Scotland and England. Capdevielle, 33 L. J. (Ex.) 316; 3 H. & C. 985.

[7] See Report of Commission to ad-



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made in reference to matrimonial domicil.[1] Lord Stowell held more than once that a commercial domicil, under the prize law, could be acquired in a foreign land, when the original political domicil remained unchanged.[2] And we have been told by the Judicial Committee of the Privy Council, that there is "a wide difference in applying the law of domicil to contracts and to wills."[3] Sir R. Phillimore well says:[4] "It might, perhaps, have been more correct to have limited the use of the term domicil to that which was the *principal domicil*, and to have designated simply as *residences* the other kinds of domicil; but a contrary practice has prevailed, and the neglect to distinguish between the different subjects to which the law of domicil is applicable has been the chief source of the errors which have occasionally prevailed on this subject."[5] Even Chancellor Kent[6] held that while there "is a political, a civil, and a forensic domicil," "a man can have but one domicil for the purpose of succession."[7] Yet the difficulties encountered in this line of cases can be solved without resorting to so forced an hypothesis as that of double domicil. A defendant is sued under a law which authorizes process to be served on a party at his domicil; and when service is proved at his place of business, this is held to be regular, the presumption of *bona fides* and of business regularity here coming in. Or a woman deserted by her husband sues in the place of her independent residence, and this residence is held to be her domicil, the case being otherwise in equilibrium, on the ground that when a wrong is done, the burden of avoidance, if redress be sought, is on the wrong-doer. And in cases of alleged double political dom-

just British Claims arising from U. S. Civil War; U. S. Foreign Relations, 1873–4, vol. i. part 3. Supra, §§ 40, 70.

[1] Matrimonial domicil, also, may continue as to the matrimonial estate after the parties have changed their personal domicil. Infra, §§ 189, *et seq.* As to divorce domicil, see Yelverton *v.* Yelverton, 1 Sw. & Tr. 574.

[2] The Ann, Dodson's Adm. Rep. 223; Phil. iv. 51; Wheaton's Int. Law, 159.

[3] Croker *v.* Hertford (Marquis of), 4 Moore P. C. 339. See, also, Thorndike *v.* Boston, 1 Met. 242; Greene *v.* Greene, 11 Pick. 410; Putnam *v.* Johnson, 10 Mass. 488; Somerville *v.* Somerville, 5 Ves. 750.

[4] IV. 48.

[5] See Capdevielle, re, 33 L. J. (Ex.) 306; 2 H. & C. 985.

[6] Lect. 37, § 4, note.

[7] See, also, Maltass *v.* Maltass, 1 Robertson's Ecc. R. 75; Robertson on Personal Succession, p. 142; Thomson *v.* Advocate Gen. 12 Cl. & Fin. 1.



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icil, or nationality, it must be recollected that this duplicity is in most cases artfully got up by the parties themselves, who seek in this way to keep in with both sides, or at least to have a claim for protection and indemnity from the party that may ultimately win.

One domicil only for poll and succession taxes.

§ 74. Taxation presents many complicated questions whose discussion is out of the range of the present volume. For poll-taxes it is plain that there can be but one domicil; and in such cases domicil, not nationality, is to determine.[1] The same rule applies to legacy duties, and taxes on collateral inheritances.[2] The question of the jurisdiction in taxation is hereafter considered.[3]

### VI. POLITICAL CONSEQUENCES.

Domicil does not include political rights.

§ 75. The right to acquire a domicil in an adopted country may be regarded as one of the most valuable additions to modern international law.[4] The consequence of the acquisition of such a domicil is the loss by the abandoned country of all title to tax personally, or to exact either civil or military obedience. But this change of relations cannot be effected, as Bar justly argues,[5] by the emigrant's single will. He must be accepted as a resident by the country in which he settles. He must acquire not merely a domicil (Wohnsitz), but be granted an asylum (Wohnrecht), in such country. When these two qualities meet in his person, the parent country ceases, on a just and liberal view of international law, to have on him any claim.

But such a domicil, though associated with an asylum, by no means involves the enjoyment of political rights. The Prussian statute of December 31, 1842, is emphatic to this effect in declaring that in that country the acquisition of domicil does not involve the acquisition of the character of a Prussian subject. Such is also the almost universal practice among civilized na-

[1] State *v.* Bordentown, 3 Vroom, 192.

[2] Thomson *v.* Advocate General, 12 Cl. & Fin. 1. That legacy duty is not due upon legacy or annuity charged on foreign land, or on the proceeds of such land directed to be converted, see Att. Gen. *v.* Napier, 6 Ex. 620.

[3] Infra, § 81.

[4] See particularly Pözl, in Bluntschli's Staats Wörterbuch, i. p. 580.

[5] § 30.



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tions. An asylum is granted to emigrants, and domicil permitted, before they are so far naturalized as to be entitled to vote or to exercise any political franchise.[1]

We have already seen that voting in a particular place is not conclusive proof of the adoption of such place as a domicil.[2]

Domicil, as has also been seen, is not convertible with nationality. There may be domicil without nationality, and nationality without domicil.[3] At the same time the adoption of a foreign domicil, with an entire surrender of interest in the nation of origin, may constitute an abandonment of allegiance to such nation.[4]

§ 76. By the recognition of the principle thus stated, that it is necessary for an emigrant in a foreign land to acquire an asylum as well as a residence, in order to attach to him the laws of such land, the apparent difficulties arising from settlements in barbarous countries are removed. There may be permanent residence in such countries (*e. g.* China), but no asylum may be granted by them, and sometimes such asylum is expressly refused. Consequently, as has been seen, commercial settlers in such countries do not become subjects, — do not receive, for the purposes of succession, the type of the local law, and are not liable to personal taxation.[5]

Asylum as well as residence required.

§ 77. The French Code, on its face, establishes for foreigners domiciled in France principles different from those which it imposes on Frenchmen domiciled abroad. By art. 3, § 3, "Les lois concernant l'état et la capacité des personnes régissent les Français même résidant en pays étranger." Art. 13 provides that, "L'étranger qui aura été admis, par l'autorisation de l'Empéreur, à établir son domicile en France, y jouira tous les droits civils tant qu'il continuera d'y résider.'' But the Frenchmen residing abroad, according to art. 17, are those only, as Bar well states,[6] who nourish an expectation of return to their native land, and who are, consequently, not actually domiciled abroad. On the other hand, foreigners residing in France require official permission to enable them to obtain a

Distinctive French rule.

[1] See supra, §§ 7, 8, 40.
[2] Supra, § 63.
[3] Supra, §§ 8, 34, 64.
[4] See discussion in U. S. Foreign Relations for 1873–4, vol. i. pt. ii. pp. 1186 *et seq.*
[5] Supra, §§ 15, 71.
[6] § 30.



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French domicil; in other words, they must have had not merely domicil but asylum. By the law of December 3, 1849, this asylum is only provisional, and can at any time be terminated by an order from the Foreign Office directing an ejection from France.[1] And this limitation, it has been argued in New York, prevents a testamentary domicil from being acquired in France without authorization.[2] But this, as will be presently seen, is not correct.[3]

Domicil not internationally affected by local statutes.

§ 77 *a*. Domicil, being a question of international law, is not to be determined by the statutes of any particular state. Thus an Englishman, who by the law of nations is domiciled in France, is held in England to be so domiciled, though he has not complied with the French conditions of domicil.[4] It is also clear that a statute of Massachusetts, which provides that persons resident in particular towns in the state on a particular day are to be regarded as there domiciled, does not affect citizens of other states residing in particular towns on the days specified.

### VII. WANT OF DOMICIL.

When other conditions fail, residence may be the test.

§ 78. A person may be without domicil, according to Savigny, in the following instances: —

(*a*.) When a prior domicil has been abandoned, and a new one is sought, but not yet determined on as a residence.

(*b*.) When the business of life is travelling (*e. g.* commercial agencies), there being no home as a central point of return.

(*c*.) In the case of vagrants, or tramps, who wander from land to land, without any definite purpose or settled means of support.[5]

But when there is no present or recent domicil, which has been voluntarily adopted, the courts will attach to the party the domicil acquired by him at birth.[6] When this cannot be ascer-

[1] Gand, 144, 145. See, also, supra, § 40 *a*.

[2] Dupuy *v.* Wurtz, 53 N. Y. 556. See *contra*, Hamilton *v.* Dallas, L. R. 1 Ch. D. 157, cited in § 77 *a*.

[3] See supra, § 34, as to the small number of persons availing themselves of the French provision to this effect; and see supra, § 41, note, where the French law is more fully noticed.

[4] Hamilton *v.* Dallas, L. R. 1 Ch. D. 157. Supra, § 41.

[5] Röm. Recht, viii. 354.

[6] Ibid.; Voet, v. 1, § 92; Meier, de



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tained, or should it appear to have been deliberately abandoned, then the only course, in case of a person dying whose succession it is desirable to fix, is to assume residence to be domicil.[1] In all ordinary cases, however, the original domicil is presumed to be retained until a new one has been actually acquired.[2] But when the old domicil has been finally abandoned, without any proof of the adoption of a new one, residence is the only test.[3]

### VIII. TAXATION.

§ 79. Under the term *munera*, in this connection, the Roman jurists comprehended the burdens which were imposed on an individual as a member of an urban community.[4] Sometimes the *munera* were classified as *publica* and *privata*, the latter of which do not fall under the present head. It did not follow that these burdens were imposed for the benefit of the municipality alone. On the contrary, it was the habit of the empire, as is the case with many modern governments, to use the municipalities as agents for the collection of its own taxes and dues; and hence many of the most oppressive burdens laid by the municipalities were for the benefit of the imperial treasury.[5] All members of a municipality, whether attached to it by citizenship (*Bürgerrecht*, *Origo*), or by domicil, were alike responsible to it for these burdens. Hence it was that when a person, whether by citizenship or domicil, became a member of several municipalities, his burdens were proportionally increased. There are indications, however, that lead us to infer that, while local and municipal taxes were assessed on him in each municipality of which he was thus a member, his general taxes for the empire were assessed singly, and in a specific jurisdiction.[6] To mitigate these harships, and

Taxation by Roman law generally through municipalities.

Confl. Legum, p. 14. Approved in Hicks *v.* Skinner, 72 N. C. 1.

[1] See Bruce *v.* Bruce, 6 Bro. P. C. 566; 2 B. & P. 230, note.

[2] Story, § 47; Jennison *v.* Hapgood, 10 Pick. 77; Moore *v.* Wilkins, 10 N. H. 452. Supra, § 55 *a*.

[3] Hicks *v.* Skinner, 72 N. C. 1. See North Yarmouth *v.* West Gardiner, 58 Me. 207. That no man can be without a domicil, see Udny *v.* Udny, L. R. 1 Sc. Ap. 457, by Lord Westbury; Ibid. p. 447, by Lord Westbury; Ibid. p. 453 by Lord Chelmsford, cited in Dicey, p. 59.

[4] L. 239, § 3, de V. S. (50, 16); L. 18, § 28, de mun. (50, 4).

[5] Savigny, Röm. R. viii. § 355.

[6] L. 22, § 2; L. 29, ad mun. (50, 1); L. 6, § 5; L. 18, § 22, ad mun.



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also to protect particular meritorious classes and interests, special exemptions from taxation were granted under the terms *vacatio*, *excusatio*, or *immunitas*.[1]

Personal taxes governed by personal law: real taxes by *lex rei sitae*.

§ 80. As we have already seen, the modern law, both in Europe and the United States, recognizes the liability of a domiciled alien to taxation by the state in which he is domiciled.[2] Whether a state can tax its subjects, not denationalized, but domiciled in another land, depends upon the question already abundantly discussed, whether nationality or domicil is the standard of personal law.[3] But even if domicil be the standard, a nation, it is argued by Bluntschli, may exceptionally call for specific taxes (*e. g.* poor rates) from its citizens domiciled abroad. The country of domicil, however, is not in such cases bound to enforce the claims of the country of nationality.[4] But in any view, persons are bound to pay poll and personal taxes according to their personal law, as determined by the jurisprudence to which they are distinctively subject.[5] On the other hand, a transient resident, not domiciled (or, in states making nationality the test, not naturalized), is not liable for ordinary governmental or municipal taxes. He may be compelled, however, to pay taxes imposed on special temporary residence, as is the case in some of the German states; and there can be no question that he is liable equally with domiciled subjects for government fees, and for excise and tariff imposts. Of course any property he may hold in such country, whether real or personal, is liable for the local property tax.[6] As a general rule, we may hold that a personal tax cannot be assessed against one not a domiciled citizen.[7]

When we come to taxes levied on the personal property of parties domiciled in a state, such property being elsewhere situated, difficult questions present themselves. Can A., domiciled in Massachusetts, be taxed on mortgages or railroad securities

(50, 4); L. 1 C. de munic. (10, 38); L. 4, § 6, C. de incolis (10, 39); L. 239, § 2, de V. S. (50, 16).

[1] L. 5; L. 6; Cod. x. 144–64.

[2] Supra, § 74; Thompson *v.* Advocate Gen. 2 Cl. & Fin. 1; State *v.* Borde town, 3 Vroom (N. J.), 192; Bluntschli, Völkerrecht, § 376.

[3] Supra, §§ 7, 8.

[4] Bluntschli, Op. cit. § 376.

[5] Supra, § 74.

[6] Bluntschli, Op. cit. § 389.

[7] Cooley on Taxation, 14; citing Heinman *v.* Stover, 43 Me. 497; Dow *v.* Sudbury, 5 Met. 73; People *v.* Chenango, 11 N. Y. 563.



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held by him in Iowa, in which state he has to pay taxes on the same property? Supposing that the land incumbered is a mere security for the debt, then, in conformity with cases hereafter noticed, we must hold that the *situs* of the security is the creditor's domicil.[1] And so it has been held by several state courts.[2]

The question has been put to rest by a decision of the Supreme Court of the United States in 1879,[3] that it is within the constitutional power of a state to determine on what property its domiciled citizens are to be taxed. And it was held also, — though this may be regarded as a point not necessary to the discussion of the issue as ultimately determined, — that a debt due a domiciled citizen of Connecticut from a resident of Illinoi , such debt being secured by bond and mortgage on Illinois real estate, is taxable in Connecticut.[4]

[1] Infra, §§ 276 *a*, 368.

[2] Appeal Tax Court *v.* Patterson, 50 Md. 354; Foresman *v.* Byrns, 68 Ind. 247; Davenport *v.* R. R. 12 Iowa, 539; People *v.* Eastman, 25 Cal. 603; Hayne *v.* Delieselline, 3 McCord, 374; Augusta *v.* Dunbar, 50 Ga. 587; Klein *v.* French, 57 Miss. 668. See State Tax on Foreign-held Bonds, 15 Wal. 300. To this effect see Burroughs on Taxation, § 41. The fact, that the object of a change of domicil is to diminish the amount of taxes, does not affect the change if actually made with the intention of final residence. Draper *v.* Hatfield, 124 Mass. 53; Thayer *v.* Boston, 124 Mass. 132. Infra, § 695.

[3] Kirtland *v.* Hotchkiss, 100 U. S. 491.

[4] "The question," said Harlan, J., "does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wal. 320. It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys.

"The debt in question, although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicil of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is at best only evidence of the debt, not the debt itself. The bond may be destroyed, but the debt — the right to demand the repayment of the money loaned, with the stipulated interest — remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and as held by this court in 15 Wal. 323, already cited, the right of the creditor 'to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . . has no locality independent of the party in whom it resides. It may undoubt-



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This ruling, however, does not preclude the state wherein real estate so mortgaged is situated from taxing it;[1] and on principle it is there that it ought to be taxed. All that is absolutely determined by the Supreme Court is that a state is at liberty to decide what taxes its domiciled subjects shall pay to it. And this ruling sanctions state legislation by which persons domiciled in a state are required to pay taxes in the places in which they are resident in particular periods of the year. Such legislation, however, only applies to domiciled citizens. It cannot affect persons domiciled in other states.[2]

edly be taxed by the state when held by a resident therein,' &c. Cooley on Taxation, 15, 63, 134, and 270. The debt in question, then, having its *situs* at the creditor's residence, and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the state. It is, consequently, for the state to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard is beyond the power of the federal government, in any of its departments, to supervise or control, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exertion by Congress of the power to regulate commerce among the several states. 8 How. 80; Cooley on Taxation, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizens of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each state shall be entitled to all privileges of citizens in the several states.

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes in return for the protection it affords them, by the value of the credits, choses in action, bonds or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that state, and with which the federal government cannot rightfully interfere."

[1] Susquehanna Canal Co. *v.* Com. 72 Penn. St. 72.

[2] Supra, § 77 *a*. That mortgages and other securities are not taxable at the residence of the debtor, see Cleveland, &c. R. R. *v.* Pennsylvania, 15 Wal. 262; Murray *v.* Charlestown, 96 U. S. 432; Davenport *v.* R. R. 12 Iowa, 539. In several states, under local statutes, such property has been taxed, though this is not only in contravention of the principle that the site of the debt is the creditor's domicil, but is open to the objection of being double taxation. As cases sustaining such taxation, see Catlin *v.* Hall, 21 Vt. 152; People *v.* Ogdensburg, 48 N. Y. 390; Susquehanna Canal Co. *v.* Com. 72 Penn. St. 72. Cf. Wilcox *v.*



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§ 80 *a*. Under the English statutes legacy duty is charged on all the movables, wherever situated, of a person dying domiciled in the United Kingdom,[1] but not on movables, though situated in the United Kingdom, of a person elsewhere domiciled.[2] Succession duty is also charged on all the personal property, no matter where situated, of a person dying domiciled in the United Kingdom.[3] Where a person dies domiciled out of the United Kingdom, a successor is liable to succession duty when he claims under English trusts or settlements,[4] but not otherwise.[5] It is difficult to understand these rulings on any other ground than that which gives to a state, in the exercise of its sovereignty, the right to tax all property which either belongs to a domiciled resident, or which

Succession taxes governed by the *lex domicilii*.

Ellis, 14 Kan. 588; St. Louis Co. *v.* Taylor, 47 Mo. 594. The cases are well grouped in Burroughs on Taxation, § 42. Not merely real estate, but personal property (*e. g.* horses, cattle, furniture), is taxable at the *situs*, irrespective of the domicil of the owner. Cleveland, &c. R. R. *v.* Pennsylvania, 15 Wall. 300; Hartland *v.* Church, 47 Me. 169; Blackstone Man. Co. *v.* Blackstone, 13 Gray, 488; Steere *v.* Welling, 7 R. I. 317; People *v.* Commis. 23 N. Y. 224; Hood's Estate, 21 Penn. St. 106, 114; Maltby *v.* R. R. 52 Penn. St. 140; Mills *v.* Thornton, 26 Ill. 300. See other cases cited in Burroughs on Taxation, § 40; Cooley on Taxation, 43. I do *not* agree with Judge Cooley, however, in holding that "when a person is resident within a state, his personal property, in contemplation of law, accompanies him, and he may be required to pay taxes upon it wherever it is situate." I think this holds good only as to *debts*, not as to chattels. Bood *v.* Sayre, 11 Vt. 609; Blackstone Man. Co. *v.* Blackstone, 13 Gray, 488; Hoyt *v.* Commis. 23 N. Y. 224; State *v.* Ross, 3 Zab. 517; Carrier *v.* Gordon, 21 Oh. N. S. 605. Wells Rep. on Taxation, p. 18. That for taxation purposes an old domicil continues till a new domicil is obtained, see Kellogg *v.* Winnebago, 42 Wis. 97.

[1] Erwin, in re, 1 C. & J. 151; Attorney Gen. *v.* Napier, 6 Ex. 217.

[2] Thomson *v.* Advocate General, 12 Cl. & F. 1.

[3] Wallace *v.* Attorney General, L. R. 1 Ch. 1. See Lyall *v.* Lyall, L. R. 15 Eq. 1.

[4] Wallop's Trusts, 1 De G., J. & S. 656; Cigala's Settlement, 7 Ch. D. 351; Lyall *v.* Lyall, L. R. 15 Eq. 1. See Lovelace's Settlement, 28 L. J. Ch. 489; Attorney Gen. *v.* Campbell, L. R. 5 H. L. 524.

[5] Wallace *v.* Attorney General, L. R. 1 Ch. 1; a case where a testator domiciled in Natal, entitled under the will of G. also domiciled in Natal, to certain stocks in England, devised all her property to W. It was held that the stock was not liable to succession duty. See other cases discussed in Hanson on Legacy and Succession Duty, 3d ed. 15 *et seq.*; Dicey, Op. cit. 318 *et seq.*



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cannot be realized without the action of the courts of the state imposing the tax.[1]

### IX. JURISDICTION (*Forum*) ATTACHED BY DOMICIL.

Defendant's domicil in Roman law may fix forum.

§ 81. According to the Roman law, as recapitulated by Savigny,[2] the *forum*, or jurisdiction (*Gerichtstand*), of every litigation was to be placed at the residence, not of the plaintiff, but of the defendant; and such a forum, in reference to the defendant, was to be found in every municipality to which he was subject. This subjection, as will be remembered, might be through either *origo* (*Bürgerrecht*) or *Domicil;* and hence the defendant might be sued in any municipality to which he was thus attached. "Incola et his magistratibus parere debet, apud quos incola est, et illis, apud quos cives erit; nec tantum municipali jurisdictioni in utroque municipio subjectus est, verum etiam omnibus publicis muneribus fungi debet."[3] This striking passage from Gaius is decisive, both as to the reason and the consequence. Municipal allegiance rose from municipal subjection; and from municipal allegiance

[1] "If a man dies domiciled abroad, possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicil, and that on the principle of *mobilia sequuntur personam*. His domicil sets up the forum of administration. Now, apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country and investing it here in consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality. That settlement so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. This, therefore, is a description of ownership which falls immediately within the provisions of the succession act." Lord Westbury, Att. Gen. *v.* Campbell, L. R. 5 H. L. 529.

[2] Röm. Recht, viii. § 355; Geschichte des R. R. im Mittelalter, ii. § 23. Infra, § 396.

[3] L. 29, ad mun. (50, 1).



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sprang both taxes and forum. The plaintiff could, therefore, sue the defendant in any town in which the defendant had such a forum, and in this town the defendant was obliged to respond, should he be duly served therein. The practice, it is true, in this respect, was, at the time of the earlier jurists, checked or qualified by local usages or exemptions. But under the emperors it became finally settled as the uniform rule for the whole imperial domain.

§ 82. In the modern Roman law, the principle that domicil fixes jurisdiction (*forum*) as well as legal *status* is inapplicable to cases where persons have no domicil at all. Where the defendant has several domicils, the plaintiff, as in the ancient law, has an election to sue in either. Where he has no present domicil, nor has at any time previously established a domicil, then he is to be viewed as having the domicil of the place in which he was born.

So in modern Roman law.

The discussion of this topic, in relation to modern practice, is reserved for a future head.[1]

[1] Infra, §§ 396, 704 *et seq.*

In Louisiana a party cannot be compelled to appear and answer to a suit brought against him in any other court than that including the parish of his domicil. Nelson *v.* Fournet, 30 La. An. 1103. As to Georgia, see Daniel *v.* Sullivan, 46 Ga. 277.



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# CHAPTER III.

## PERSONAL CAPACITY.


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## I. GENERAL PRINCIPLES AS TO PERSONS.

§ 84. *Status* is "the legal position of a party in or with regard to the rest of a community."[1] The *status* of a person domiciled in a country is, so far as concerns that country, determined by its laws. But when he travels abroad, and resides temporarily in a foreign land, without acquiring a domicil in such land, does the *status* impressed on him by the laws of his actual domicil continue? If he is a minor in his domicil, is he a minor, by force of such law, in a foreign land in which he may be resident, although, by the law of such land, persons of his age have arrived at majority? If, in his domicil, he has no capacity whatever for legal rights, does this incapacity, by force of this law, adhere to him in foreign lands in which no such restrictions exist? In other words, do statutes which determine personal *status* have extra-territorial force? Upon no question in international law do the jurists of the continent of Europe, on the one side, come in more constant conflict with the courts of England and of the United States, on the other side; upon no question in international law have, even among jurists schooled in the Roman law, greater variations of opinion been expressed.[2] It is proposed in this chapter to con-

Ubiquity of personal *status* much controverted.

[1] Brett, J., Niboyet *v.* Niboyet, L. R. 4 P. D. 11.

[2] Mancini, distinguished not only as an author on private international law, but as a member of the Italian parliament, published in the Jour. du droit int. privé for 1874, p. 221, a valuable article on the importance of establishing by treaty a uniform system for the settling of international conflicts of laws, civil as well as criminal. See 6 South. Law Rev. 694.



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sider some of the more prominent solutions of this problem, and then, in view of the conflicting character of these solutions, to inquire if there is any common principle on which they can be reconciled.

Old solution based on distinguishing personal from real statutes; personal statutes being ubiqitous, real being local.

§ 85. It should be at the outset observed that *statutes*, in this sense, include, not simply legislative enactments, but general principles of jurisprudence, as developed in the opinions of jurists and the decisions of courts. The historical antecedents of this famous distinction have been already traced. It acquired definiteness and authoritativeness towards the end of the sixteenth century.[1]

*Personal statutes*, to adopt Savigny's definition, are laws which, in the main, have as subject the person and its attributes, although incidentally they touch matters of property.

*Real statutes* are laws which, in the main, relate to things immovable, though incidentally such laws touch the person.

*Mixed statutes* are by some authors defined to be laws which relate mainly neither to persons nor things, but are confined to transactions;[2] while by other authors they are defined to be laws which embrace persons and things jointly.

This distinction is applied to the adjudication of the question before us as follows: —

The *personal statutes* of a domicil attach themselves to each person therein domiciled; and, wherever he goes, these laws adhere to him, and are to be applied to him by every foreign tribunal, until such domicil is lost by him, and a new one acquired, which new one then applies itself to him by the same process.

*Real statutes* apply themselves to all immovable things existing in the jurisdiction in which these laws have force; and these laws are to be treated by foreign judges, in all other jurisdictions, as governing such immovables.

*Mixed statutes* adhere to all transactions occurring in the juris-

Whether a personal incapacity can be waived is discussed by Laurent in his Droit civil int. ii. 521 *et seq.*

The topic is also discussed in a paper read by Mr. Westlake before the Social Science Association at Edinburgh, 1880. See criticism in the Southern Law Review for January, 1881; 6 South. Law Rev. 694 *et seq.*

[1] Argentræus, Num. 5, 6; J. Voet, §§ 2–4.

[2] So J. Voet, § 4.



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diction in which such laws have force; and are to be regarded as governing such transactions by foreign judges.[1]

§ 86. There can be no question that the distinction between personal and real statutes was founded on the necessity of the case. Men are migratory, yet, divided as they are into nations and communities, they must each be impressed by the law to which they are subject with certain characteristics which they carry with them wherever they go. It would be absurd as well as unjust to say of a traveller who is here to-day and gone to-morrow, "We will overhaul all his past life and that of his ancestors; we will not regard him as legitimate unless legitimate according to our laws, or married unless married according to the form we prescribe." To a certain extent, therefore, we must regard laws determining personal *status* as ubiquitous; and this quality of ubiquity we must also concede to laws affecting such property as is naturally attached to the owner's person. On the other hand, we cannot, from the nature of things, regard property whose situation is necessarily in one state as in any way subject to the laws of another state. The distinction, therefore, between statutes real and statutes personal is satisfactory as far as it goes, but it does not go far enough. For to say that personal laws are those which go with the person into foreign jurisdictions, where he may be temporarily residing, settles nothing, because we then need to know what are the laws which assign this personal quality, and what is the permanency of the personal quality assigned; and for this purpose further definitions are required. So, also, mixed statutes, if liberally

Distinction is by itself insufficient.

[1] The French Court of Cassation adopts the old distinction between statutes real and personal. "Le statut est personnel lorsqu'il règle, directement et principalement, la capacité ou l'incapacité des personnes pour contracter: il est réel, lorsqu'il a principalement pour objet la prohibition de disposer d'une espèce particulière de biens et leur conservation." Brocher, Droit int. privé (1878), p. 180. To the same effect is cited Demolombe, i. Nos. 75 *et seq.*; Dalloz, v. Loi, Nos. 386 *et seq.*

A remarkable ruling was made by the same court, in 1872, when determining the *status* of certain Israelite inhabitants of Algeria who did not claim, under the statute of July 14, 1865, the quality of French citizens. These Israelites, it was held, were to be considered "comme soumis à la loi française quant aux statuts réels, et à la loi mosaique pour les statuts personnels." Dalloz, 72, 1, 313; Fiore, Op. cit. App. p. 631.



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construed, would absorb the other two, and the doctrine, so far as concerned statutes mixed and statutes real, would contain two contradictory opposites. At the same time, it is important here to record this distinction, not merely as a part of the history of the law, but as explanatory of many propositions of the old writers that would otherwise be obscure.[1]

Nationality not the necessary criterion.

§ 87. Two conflicting theories, as we have already seen, present themselves to us in solving the question as to what is the personal law by which we are individually bound. These theories are, Nationality and Domicil. In one sense, undoubtedly, we must hold to both. In a great number of cases a man's nationality is that of his domicil, and in such cases the law of his nationality must necessarily be his personal law. Political *status*, also, is necessarily conditioned and limited by nationality. On the other hand, to recapitulate, there are serious objections to taking nationality as ubiquitously determining civil *status*. These objections are as follows: —

(1.) Nationality as a test is impracticable in all federative empires, in which (as with Great Britain, Germany, and the United States) there is one nationality with a plurality of component states each with its distinctive jurisprudence. To say that a person whose *status* is in litigation is a subject of Great Britain, or of Germany, or of the United States, would settle nothing, for

[1] As authors which give this distinction a sort of customary force, see Thibaut, Pandecten, § 38; Kierulff, pp. 75–82. For a discussion of the law as to statutes real and personal, see an article by Laurent, in Revue de droit international (1869), vol. i. p. 244. Judge Story says, speaking of the Roman jurists: "By the *personality* of laws, foreign jurists generally meant all laws which concern the condition, state, and capacity of persons; by the *reality* of laws, all laws which concern property or things; *quae ad rem spectant*. Whenever they wish to express that the operation of a law is universal, they compendiously announce that it is a personal statute; and whenever, on the other hand, they wish to express that its operation is confined to the country of its origin, they simply declare it to be a real statute." Confl. of Laws, § 16. More properly personal laws are those which attach to the subject, wherever he may be. Real laws are those which attach to things, and are limited by the jurisdictions in which these things exist. Judge Story, in a note to the above passage, says: "Mr. Livermore, in his dissertation, used the words *personality* and *reality;* Mr. Henry, in his work, the words *personalty* and *realty*. I have preferred the former, as least likely to lead to mistakes, as 'personalty' in our law is confined to personal estate, and 'realty' to real estate."



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neither Great Britain, nor Germany, nor the United States, have a system of *status* ubiquitous with allegiance.[1]

(2.) Nationality, as we have seen, involves many complex questions (*e. g.* in federative states, and in cases of double allegiance) which are apt to arise in the very issues in which personal capacity is litigated.[2]

(3.) Domicil, and not nationality, had until recently the almost unbroken assent of international jurists, and is now the only criterion which it is possible for jurists of all countries to adopt. It will be easy for Italy and Belgium to give up nationality for domicil; it will be impossible for Great Britain, Germany, and the United States, without introducing a centralization of jurisprudence inconsistent with liberty and good government, to give up domicil for nationality.

(4.) Domicil can be changed far less arbitrarily and capriciously than nationality.[3]

§ 88. It may be said that the increased facilities of modern travel make it still more important that personal *status* should be ubiquitous. It is easier now to travel round the world than it was in the Middle Ages to go from London to Alexandria. There are more passengers now on a single ocean steamer than in the Middle Ages would cross the British Channel in a whole year for purposes of trade. It took Charles V. twice as long to transport troops from Flan-

Ubiquity of *status* not required by increase of travel.

[1] See supra, §§ 7, 8, 34.

[2] Supra, §§ 10, 10 *a*, 11, 34.

[3] See fully discussion supra, §§ 7, 8, 34.

That a committee of the Institute of International Law, at its session at Oxford, in 1880, should have determined in favor of nationality as a criterion is undoubtedly a fact to be gravely considered. There was, however, no representation from the United States on this committee; and Mr. Westlake, in a paper subsequently published (October, 1880), considers the change at present impracticable, so far as Great Britain is concerned. He proposes to lessen the conflict, in cases of succession, by the adoption of statutes prescribing that movable succession shall be governed by the law of the state of which the decedent is a citizen, "except so far as it may still be necessary to refer to domicil in consequence of the coexistence of different civil laws in one state," an exception which, in federative countries, is as large as the rule. He also proposes that domicil for succession should not be acquired until after a residence of one year, accompanied by the deposit of a written declaration of desire for such domicil. That a nationality cannot be adopted as the criterion of personal capacity is conceded by Mr. Westlake. See 6 South. Law Rev. 697.



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ders to Germany as it took the English government, in 1878, to transport troops from India to Europe. In old times a journey from one state to another was a great event. The habits and dress of nations were so different that a traveller had to make careful preparation to adapt himself to the country he expected to visit, and even when he was not betrayed by his dress and manner, he was betrayed by his tongue. Not only, in the insulation of those times, did each nation have its language, but each neighborhood had its dialect, so that a stranger could at once be detected. Then, again, strangers dropped in but occasionally, and when they came they excited curiosity; whereas now, in the United States, whole communities are made up of strangers having too much to do to be surprised at each other. The consequence is that many of the notes which in old time marked foreigners are not now discernible. In many cases we have no means of determining whether a particular person is of foreign birth, or, if he be of foreign birth, whether he has been naturalized. And the masses of population which emigration throws upon us would require us, if we recognize foreign *status*, to admit it, not as a rare and insignificant exception, but as a principle dominating the land. So far, therefore, from the increase of travel prompting to a more general recognition of personal law, it prompts to a non-recognition of that law unless coincident with the law of the state. Gliding as men now do without sign from land to land, coming in dense masses so as to often form communities by themselves; to concede to them the personal *status* of their home, and particularly to concede to them the personal *status* of their nationality, would not merely destroy business confidence by making it difficult for us to know whom to trust, but would establish, in numerous sections, a foreign uncongenial jurisprudence.

In some states domicil is convertible with nationality.

§ 89. In states, however, with a homogenous jurisprudence, we must remember that domicil is convertible with nationality, and that in such states allegiance to a common sovereign brings with it uniformity of personal capacity. In such cases domiciliary law may be regarded as impressed, not by the law of nations, but by the law of the particular state. And in this respect the theory of na-



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tionality brings us back to the old view that "domicil" is the creature not of tribe but of territory.[1]

§ 90. Yet, whatever might be regarded as the source of personal law, whether traceable to tribe, or territory, or allegiance; to personal law, as establishing more or less absolutely personal *status*, extra-territoriality was by the old jurists everywhere assigned. "If I admit a foreigner on my shores," so a sovereign is supposed to necessarily argue, "I receive him as he comes, with the *status* of his domicil inwrought." "Statuta in personas directa quaeque certam iis qualitatem affigunt, transeunt cum personis extra territorium statuentium, ut persona ubique sit uniformis ejusque unus status."[2]

Ubiquity is by old jurists the attribute of personal law.

§ 91. But however harmonious were these jurists in assigning ubiquity to personal law, they were far from harmonizing in their ideas of what constitutes the personal capacity which is to be thus ubiquitous. By some it is held that where a statute of domicil confers, abridges, or destroys capacity, whether this capacity be generally for the possession of rights, or specially for the exercise of business, then such statute attaches to the subject wherever he may go, and is to be regarded as conclusive by all foreign courts.[3]

Their difference as to what personal capacity consists in.

Argentræus,[4] feeling that however comprehensive such a classification might be, in practice it is often inconvenient, if not impossible (*e. g.* when a foreign noble claims prerogatives for which

[1] As exponents of this view, see Mascardus, in his Conclusiones ad generalem statutorum interpretationem, Conc. 6, No. 14, Frank. 1609; also Baldus. Ubaldus, in his Comment. in Codicem, L. i. C. de S. T. Nos. 58, 78.

As Germans inclining to nationality, see Eichhorn, § 35; Schäffner, § 33; Heffter, § 38. The last-named eminent jurist, however, concedes to a foreign sovereign the right to establish an absolute and unvarying *status* for all residents, the law of personal domicil only obtaining in default of such enactment. See, also, Mittermaier, § 31; Merlin, Rép. Testament, Lect. 1, § 5, art. i.; Rodenburg, i. 3, §§ 4–6; Bouhier, ch. 24, Nos. 1, 9; Boullenois, i. p. 48; Huber, de Conflict. Lib. i. tit. 3; Savigny, viii. p. 134; Wächter, ii. p. 172.

[2] Stockmanns, Decisiones Brabantinæ, 1665, Dec. 125, No. 8. This view has been frequently expressed under the general doctrine of the indelibility of nationality, by English judges when treating of domicil. See, also, Christianæus, vol. ii. Dec. 3, No. 3.

[3] Boullenois, i. p. 26; Merlin, Rép. Test. Lect. i. § 5; Rodenburg, i. 3, §§ 4–6; ii. 1; Bouhier, ch. 24, Nos. 1–19; Mevius, in Jus. Lub. proleg. qu. 4, § 25.

[4] Nos. 16–18.



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the domestic law gives no machinery), maintained that while general character is to be determined by domicil, capacity to deal specially with property is to be determined by the *lex rei sitae*. In this he has been followed by others of more recent date;[1] though, as Bar[2] justly remarks, there is no general rule as to *status* which may not, on being reduced to practice, be turned into a rule as to property.

Burgundus[3] struck out a new modification, declaring that, in all matters of contract, the *lex domicilii* was to prevail; in all matters of sale, the *lex rei sitae;* and this distinction is spoken of not disapprovingly by Judge Story.[4] Yet, though there may be many cases of contracts without sales, it is hard to conceive of a sale without a contract. Paul Voet accepted this, so far as concerns the sale of immovables;[5] but, as that learned jurist, with so many of his day, considered that "mobilia sequuntur personam," he held that sales of movables were to be subjected to the law of the owner's domicil. It is unnecessary to pause here to exhibit at large the absurdity of this position in cases where there are two or more owners with different domicils, or where the question at issue is who the owner really is.

In addition to the difficulty thus exhibited of bringing into practical operation this maxim of the subjection of *status* to domicil, the authority, in this respect, of the jurists thus quoted, is much weakened by the fact that the reasoning adopted by these learned writers is tinged with the notion of the unity of Europe under the Germanic emperor. The world, they held, is a unit. It was proper that the *status* impressed on a man by his personal law should be imputed to him everywhere. It was forgotten that the very object for which this ubiquity of *status* was claimed showed that the hypothesis on which it was claimed was untrue. To neutralize inequalities arising from the world being divided into independent sovereignties, it was claimed that the world was not divided into independent sovereignties. The fact was denied as a means of counteracting the fact.

§ 92. The principle, that domicil determines *status*, has been incorporated, with more or less distinctness, in several European

[1] See Boullenois, i. p. 48.
[2] § 43.
[3] I. § 3; ii. § 5.
[4] § 431.
[5] Cap. 2, § 4, No. 6.



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codes. The Prussian Code expressly applies this rule to strangers who transact business in Prussia, with some modifications, however, in favor of Prussian subjects.[1] A foreigner's contract made in Prussia is good, if either his personal law, or the Prussian, give him capacity.[2] Austria,[3] the Canton of Berne,[4] Canton Freiburg,[5] enact specifically that business capacity (*Handlungsfähigkeit*), both as to subjects abroad and strangers in the home country, is to be determined according to the *lex domicilii*.[6] Yet, while this is the case, neither Austria nor Prussia, as we will see, recognizes as operative within its borders prerogatives of foreigners which interfere with its own policy or interests.

Domicil the statutory test in German states.

§ 93. The Code Civil of France is open to more doubt. On the one side it contains the famous provision, redolent of the arrogance of the First Napoleon: "Les lois concernant l'état et la capacité des personnes régissent les Français même residant en pays etranger." If by this it is meant simply to declare that a Frenchman, in all matters to be adjudicated by French courts, is to be gauged, as to his *status*, by French law, the proposition can easily be maintained. But if it be meant to assert, as Napoleon I. construed it during the maintenance of the French continental system, that France requires foreign countries to apply to Frenchmen travelling in such countries, not the law of the *situs*, but the law of France, the demand was incompatible with international independence, and explicable only on the hypothesis that the French emperor, as the successor of the emperors of Rome, exercised universal imperial sway. On the other side, the Code Civil includes no provision that the *status* of foreigners resident in France is to be determined by the law of their domicil. This omission,

French Code ambiguous. Rule in Holland, Belgium, and Baden.

[1] Einleitung des allgem. Preuss. Landr. §§ 23, 34, 35; Preuss. Gerichts. Ord. i. tit. i. §§ 5, 6. See Savigny, viii. p. 141; Phil. iv. p. 248; Bar, § 45. note 8.

The Prussian Code, in cases where there is a double domicil, or the *lex loci contractus* and the *lex domicilii* clash as to capacity, adopts the law most favorable to the validity of the transaction in question. The same rule is adopted in Austria. Westlake (1880), p. 29.

[2] Ibid.

[3] G. B. §§ 4, 34; Bar, § 45, note 8; Püttlingen, § 47; Phil. iv. 247; Savigny, p. 145; Bavaria Codex, Maxim. civ. i. 2, § 17.

[4] Gesetzb. art. 4.

[5] Gesetzb. arts. 1 and 3.

[6] See Bar, § 45, note 8.



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however, has been supplied by a series of decisions which declare that as Frenchmen carry the laws of their domicil abroad, so foreigners, in matters not conflicting with French policy or interest, bring the law of their domicil to France.[1] Holland[2] and Russia[3] claim for subjects, when abroad, the home *status;* but, notwithstanding this, provide that foreigners, when resident in their respective domains, shall be governed by the law of the *situs*.[4] Belgium, and the cantons of Geneva and Vaud, adopt the French Code.[5] Baden adopts the French Code, with the proviso that the rule shall not affect contracts, — a proviso which deprives the rule of all practical business operation.

By Savigny domiciliary capacity for rights and business is ubiquitous unless inconsist nt with civilization.

§ 94. The most philosophic and consistent vindication of the supremacy of domicil in determining *status* is to be found in Savigny.[6] He rests the universal applicability of the law of domicil, in this respect, on the assumption that the several conditions which determine capacity for rights and business (Rechts und Handlungsfähigkeit) can only be satisfied by an application of that local law to which the person, by his domicil, is subject. He rejects with emphasis the qualification of Wächter[7] (afterwards enforced with energy by Bar),[8] that while the general capacity of a foreigner, so far as such capacity is common to the forum of litigation, is to be determined by the law of his domicil, the practical working of this capacity is to be determined by the law of the place where the thing is done. But he admits of certain large exceptions, which, if liberally construed, may leave but little to the rule beyond a name. He declares that

[1] Fœlix, p. 64. Fiore, while showing that by the Belgian and Italian law nationality is the test, concedes that the French Code leaves the question, as between domicil and nationality, open, by studiously employing equivocal terms. Fiore, Op. cit. § 51.

Fœlix inclines to accept the law of origin or of nationality, which may or may not be that of domicil. He thus speaks (Op. cit. § 27): "La loi personelle de chaque individu, la loi dont il est sujet, quant à sa personne et celle de la nation dont il est membre . . . . la loi de cette nation est sa loi personelle depuis le premier moment de son existence physique." Demangeat, however, in his notes to Fœlix, expressly limits the doctrine to domicil.

[2] Nied. Gesetz. arts. 3, 9.

[3] Code, art. 6.

[4] Bar, § 45, note 8.

[5] Phil. iv. p. 246.

[6] Op. cit. p. 64.

[7] Op. ii. p. 172.

[8] Infra, § 98.



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institutions which are unrecognized by modern civilized nations, taking them as a whole, have no extra-territorial force. He instances, it is true, chiefly religious restrictions and immoral privileges; though if we take the general position that nothing which is not received by the entire community of nations has extra-territorial force, we do little more than declare that no law obtains within a country except that which that country itself ordains.

Story advocates domiciliary *status* unless inconsistent with domestic policy.

§ 95. Judge Story, in his elaborate chapter on this topic, quotes with his usual copious learning from the older jurists, striving to reconcile the general opinion expressed by them as to the impress given by domicil to personal character, with the decisions of the English and American courts. The discussion is not a little embarrassed by his treating under the same head, and as governed by the same principles, family *status* and personal *status*, which, as will hereafter be seen, are subject to different considerations. So far as concerns the particular question of personal *status*, he labors under the disadvantage of writing without information of the views of Wächter, Savigny, and Fœlix, by whom so much has been done to reduce the modern doctrine to a systematic shape. Striking from the discussion, however, the portions that relate to marriage and legitimacy, which are reserved for future consideration, and regarding simply the conclusions that he reaches as to the capacity to enjoy and exercise legal rights, we find that the opinions expressed by him are not widely different from those so ably maintained by Savigny. He declares his personal preference for the law of domicil, as defining such capacity. He holds, at the same time, that the disabilities of slavery, of religious proscription, and of social caste, have no extra-territorial force.[1] He asserts that domestic policy, when positive, overrides, in all cases, foreign enactments.[2] He admits that the tendency of American and English authorities, so far as concerns contracts, is to make the *lex loci contractus* supreme,[3] and he even subordinates to this the law of infancy.[4] And even this is qualified by the general statement: "The truth seems to be that there are, properly speaking, no universal rules, by which nations are, or ought to be, morally or politically bound to each

[1] Confl. of Laws, §§ 94, 95, 96.
[2] Ibid. § 70.
[3] Ibid. § 102.
[4] Ibid.



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other on this subject. Each nation may well adopt for itself such modifications of the general doctrine as it deems most convenient and most in harmony with its own institutions, and interests, and policy."

Westlake excludes foreign *status* in cases having an English seat.

§ 96. Mr. Westlake tells us (1858), art. 402, that, "while the English law remains as it is, it must, on principle, be taken as excluding, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of *status* or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." He also states that "the validity of a contract made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the *lex loci contractus*." And in a paper read by him in October, 1880, he declares that to attempt to determine *status* by nationality would be futile, since "there is a notorious want of agreement as to the cases to which a rule founded on either should be applied."

Phillimore inclines to a larger recognition.

§ 97. The inclination of Sir R. Phillimore is towards the universal application of the law of domicil, but he admits that between England and America on the one side, and the continent of Europe on the other, there is a conflict which is still unadjusted. "The state of jurisprudence presented by the practice of the English and American tribunals upon the question of the personal *status* of foreigners," he says,[1] "will be found very unsatisfactory, whether it be considered with reference to comity, as being at variance with the law of the rest of the Christian world, or with reference to its own domestic jurisprudence, being marked by painful and clumsy inconsistencies."

Distinction between capacity for rights and that for business.

§ 98. We have already noticed a distinction taken by Wächter between capacity for rights (Rechtsfähigkeit) and business capacity (Handlungsfähigkeit). This distinction has been more recently (1862) developed and enforced with much power by Bar. He shows that the apparent universality of the *lex domicilii*, as expressed by the earlier jurists, is only illusory; and that those of them who treat the subject practically introduce so many qualifica-

[1] Op. cit. p. 250.



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tions as to withdraw from the rule any arbitrary and absolute authority. He calls attention to the fact that a maxim, based on the subordination of all Christendom to the emperor, is not necessarily a part of the policy of independent states. He points out that personal capacity, as the term is generally used, contains two very distinct elements: first, a capacity for rights (*Rechtsfähigkeit*), and secondly, a capacity for business (*Handlungsfähigkeit*), which are subject to very different considerations. Laws extinguishing capacity for rights — such as slavery, — notoriously affect the *status*, and yet, with equal notoriety, have no extra-territorial force. With regard to capacity for business there is a subordinate distinction. Special incapacities (*e. g.* those prohibiting nobles from trade) have no extra-territorial force. But it is otherwise with general incapacities, based on conditions of tutelage. It must be admitted, argues this learned and acute author,[1] that the simple application of the *lex loci actus* is practically preferable to that of the *lex domicilii*, when the question relates, not to business capacity in its general sense, but to what are called the special business capacities. The application of the law of domicil to the latter would impose an intolerable burden. It would require that the inhabitants of every land, when entering into a contract, should observe the formalities required by the domicil of any foreigners who may be parties, — formalities which may not only be extraordinary, but, to those unused to them, absurd. It would require the maintenance of special rules for special classes of foreigners, — classes of which at home there is no conception, because at home they do not exist. It is otherwise with business capacity, in the sense in which the term is here used. The law on this topic, *because it rests on natural properties of the persons concerned*, exists in one or another form in every land. A person of this class, when travelling in a foreign land, notifies, by his very condition, the inhabitants of such foreign land that at home he labors under disabilities. In addition to this, persons of this class, from the very fact that they have no power over their estate, have no means to carry on permanent business abroad. A prudent man of business will not be readily induced to engage with them in important undertakings. And he who gives credit to unknown

[1] Op. cit. § 48, p. 160.



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persons deserves no greater legal protection, in those cases where his money is lost through the want of capacity of the parties whom he trusts, than in those cases where it is lost through their insolvency. By Bar, therefore, the incapacities of minority and coverture are regarded as determined by the law of domicil. But this, as will hereafter be seen, is with many qualifications; and he holds that when a person is of full age by the *lex loci actus*, a *bonâ fide* transaction with him will be sustained.[1]

By Bluntschli and Schmid ubiquity is refused to artificial incapacities.

§ 99. Bluntschli, in his work on International Law, — a work as distinguished for the spirit of constitutional liberty with which it is instinct, as for its vigor of style, — states forcibly the liberal view of this vexed topic. He admits that a local legislature may determine to what extent, for the guidance of its own tribunals, its private laws are to affect its subjects living abroad. But he asserts that, as a rule, civil legislation is effective only as to the subject territory. In other words, the territorial principle is that which must control. The personal principle, on the other hand (the *lex domicilii* of the older jurists), has its particular sphere in the family relations, such as the conditions of marriage, of guardian-

[1] § 45, p. 156.

Fiore (Op. cit. § 48) argues with much force against the separation of *status* from its incidents. How, he asks, can it be said that a man's *status* is determined by his personal law, when all that he does, in the exercise of this *status*, is determined by the place where the act is done? When the law, as he insists, declares a person to be a minor, then he is to be clothed with the incapacities of a minor; he cannot be in theory a minor and yet practically of full age.

On the other hand, Mr. Dicey (Op. cit. p. 166), when speaking of the rule propounded by him that the application of a foreign *status* be discretionary on the courts (see infra, § 104 *b*), says: "This principle comes very near to the opinion of some jurists that a distinction ought to be made between the existence of a *status* — for example, infancy — and the legal results or effects of it; and that while the existence of the *status* ought to be determined wholly by the law of a person's domicil, the extent to which effect should be given in other countries to the results of such *status*, *e. g.* to the infant's incapacity to contract, depends upon other laws, as, for example, the *lex loci contractus*, or the law of the place where the contract is made. As a speculative view, this opinion is obviously open to criticism; but it represents in a theoretical form the difficulty which the law courts of any country are certain to feel in practice, of either referring questions of *status* wholly to the *lex domicilii*, or on the other hand entirely refusing recognition to personal conditions imposed by the law of a person's domicil." See on this topic infra, § 330.



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ship, and of successions.[1] To extend it further would be to make private international law simply a chain of reciprocal despotic proscriptions. And such, also, is the general drift of the argument of Reinhold Schmid, professor of law at Berne, in a learned publication on the local sovereignty of law.[2]

By Ware, restrictions of freedom held not extra-territorial.

§ 100. In a celebrated judgment, by the late Judge Ware, the non-extra-territoriality of statutes restricting freedom is defended with much felicity.[3] "No nation, it is believed," so he wrote, "ever gave it" (the maxim of the ubiquity of domiciliary *status*) "effect in its practical jurisprudence, in its whole extent. Among these personal statutes for which this ubiquity is claimed are those which formerly, over the whole of Europe, and still over a large part of it, divide the people into different castes, as nobles and plebeians, clergy and laity. The favored classes were entitled to many personal privileges and immunities, particularly beneficial and honorable to themselves. It cannot be supposed that those immunities would be allowed in a country which admitted of no such distinctions in its domestic policy. In like manner the disqualifications and incapacities by which persons may be affected by the municipal institutions of their own country will not be recognized against them in countries by whose laws no such disqualifications are acknowledged." It was consequently held that a person who, by the laws of Guadaloupe, could not bring suit on account of servitude, labored under no such incapacity in Boston.

Better solution is that statutes artificially restricting capacity are not ubiquitous.

§ 101. Taking into consideration the limitations which have been assigned to the ubiquity of personal law, even by the most uncompromising advocates of that ubiquity, and applying these limitations to the United States, a country whose distinctive policy requires the encouraging of early marriages, and the utilization of immigrants by relieving them from any artificial disabilities to which they may be subject at home, we are led to refuse extra-territorial operation to foreign laws so far as they impose on persons marrying or doing business within our territory restrictions which we deem artificial and impolitic. In other words, we regard all persons of full age, taking full age in the sense in which

[1] Moderne Völkerrecht, § 379.

[2] Op. cit. June, 1863, pp. 30–34.

[3] Polydore *v.* Prince, 1 Ware R. 413. See 6 South. Law Rev. 694.



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our own laws, based on national policy, define it, as entitled, when forming part of our community, to equal civil rights; and we will not refuse to the foreigner, who visits our shores, the civil rights in this respect which we award to our own citizens.[1] On the other hand, we may regard as ubiquitous foreign statutes which limit capacity for protective purposes. Hence, we may properly recognize as authoritative on our own shores the decrees of a foreign state pronouncing a person domiciled in such state to be insane, and we also resort to the *lex domicilii* for the purpose of determining the testamentary capacity of a foreigner dying on our soil.[2]

[1] As to minority, see infra, § 113.

[2] So far as concerns social incapacities, we must distinguish between such as are derived from natural causes, or causes admitted by common right (le droit commun), and those which rest on considerations which are special, and more or less contrary to principles generally accepted. The first, as a rule, should be recognized by foreign states. The effects of the latter, on the other hand, seem properly limited to the country from which they emanate. Brocher, Droit int. privé, pp. 90–1.

Mr. Schouler, Domest. Rel. p. 526, lays down the following rules: *First*, that the actual domicil will be preferred to the domicil of birth. *Secondly*, that the law of situation of real property must prevail over that of domicil. *Thirdly*, that the law of the place where a contract is made must prevail over that of domicil. To the last points he cites, among other cases, Huey's App. 1 Grant, Penn. 51; Hiersland *v.* Kuns, 8 Blackf. 345.

In Milliken *v.* Pratt, 125 Mass. 374, the conclusion reached by the court was that a married woman, who had "always resided" in Massachusetts, and who was there domiciled, and who by the Massachusetts law was incapable of making the contract in litigation, would nevertheless be held in Massachusetts to be capable of making such a contract, if the place of its performance was to be Maine, and if by the Maine law she could make the contract. In the opinion of Chief Justice Gray is given the following exposition of the law, which fully sustains the results reached in the text: —

"It has been often stated by commentators that the law of the domicil, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinions of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicil, be deemed capable of making it.

"Two cases in the time of Lord Hardwicke have been sometime supposed to sustain the opposite view. The first is Ex parte Lewis, 1 Ves. Sen. 298, decided in the Court of



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§ 102. Glimpses of this distinction are to be found in the classification, by some of the older jurists, of statutes as *Privilegia odiosa* and *Privilegia favorabilia*.

This distinction recognized by older jurists.

*Privilegia odiosa* are those which deprive certain classes, or castes, of rights, in order to build up other

Chancery in 1749, in which a petition under the statute of 4 George 2, c. 10, that a lunatic heir of a mortgagee might be directed to convey to the mortgagor, was granted by Lord Hardwicke, on the ground of 'there having been a proceeding before a proper jurisdiction, the senate of Hamburg, where he resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, which proceeding the court was obliged to take notice of.' But the foreign adjudication was thus taken notice of as competent evidence of the lunacy only; and that the authority of the foreign guardian was not recognized as extending to England is evident from the fact that the conveyance prayed for and ordered was from the lunatic himself. The other is Morrison's case, in the House of Lords, in 1750, for a long time principally known in England and America by the imperfect and conflicting statements of counsel *arguendo* in Sill *v.* Worswick, 1 H. Bl. 677, 682; but in which, as the Scotch books of reports show, the decision really was that a committee, appointed in England, of a lunatic residing there, could not sue in Scotland upon a debt due him, but that, upon obtaining a power of attorney from the lunatic, they might maintain a suit in Scotland in his name; and Lord Hardwicke said that the law would be the same in England — evidently meaning, as appears by his own statement afterward, that the same rule would prevail in England in the case of a foreigner who had been declared a lunatic, and as such put under guardianship in the country of his domicil. Morrison's Dict. Dec. 4595; 1 Cr. & Stew. 454, 459; Thorne *v.* Watkins, 2 Ves. Sen. 35, 37. Both those cases, therefore, rightly understood, are in exact accordance with the later decisions, by which it is now settled in Great Britain and in the United States, that the appointment of a guardian of an infant or lunatic in one state or country gives him no authority and has no effect in another, except so far as it may influence the discretion of the courts of the latter, in the exercise of their own independent jurisdiction, to appoint the same person guardian, or to decree the custody of the ward to him. Ex parte Watkins, 2 Ves. Sen. 470; In re Houstoun, 1 Russ. 312; Johnstone *v.* Beattie, 10 Cl. & Fin. 42; Stuart *v.* Bute, 9 H. L. Cas. 440; S. C., 4 Macq. 1; Nugent *v.* Vetzera, L. R. 2 Eq. 704; Woodworth *v.* Spring, 4 Allen, 321; Story's Confl. § 490.

"Lord Eldon, when chief justice of the Common Pleas, and Chief Justice Kent and his associates in the Supreme Court of New York, held that the question whether an infant was liable to an action in the courts of his domicil, upon a contract made by him in a foreign country, depended upon the question whether, by the law of that country, such a contract bound an infant. Male *v.* Roberts, 3 Esp. 163; Thompson *v.* Ketcham, 8 Johns. 189; 5 Am. Dec. 329.

"Mr. Westlake, who wrote in 1858, after citing the decision of Lord Eldon, well observed, 'That there is



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classes, or castes. *Privilegia favorabilia* are those which, in order to protect from damage persons supposed to be incapable

not more authority on the subject may be referred to its not having been questioned;' and summed up the law of England thus: 'While the English law remains as it is, it must, on principle, be taken as excluding, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of *status* or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent.' 'The validity of a contract made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the *lex loci contractus;* that is, not to its particular provisions on the capacity of its domiciled subjects, but in this sense, that, if good where made, the contract will be held good here, and conversely.' Westlake's Private International Law, §§ 401, 402, 404.

"In a recent case Lord Romilly, M. R., held that a legacy bequeathed by one domiciled in England to a boy domiciled with his father in Hamburg, by the law of which boys do not become of age until twenty-two, and the father is entitled as guardian to receive a legacy bequeathed to an infant, might be paid to the boy at his coming of age by the law of England, although still a minor by the law of his domicil, and in the mean while must be dealt with as an infant's legacy. In re Hellman's Will, L. R. 2 Eq. 363.

"The Supreme Court of Louisiana, in two cases which have long been considered leading authorities, strongly asserted the doctrine that a person was bound by a contract which he was capable by the law of the place, though not by the law of his own domicil, of making; as, for instance, in the case of a contract made by a person over twenty-one and under twenty-five years of age, in a state whose laws authorized contracts to be made at twenty-one, whereas by the laws of his domicil he was incapable of contracting under twenty-five. Baldwin *v.* Gray, 16 Mart. 192, 193; Saul *v.* His Creditors, 17 Ibid. 569, 597. The same doctrine was recognized as well settled in Andrews *v.* His Creditors, 11 La. 464, 476.

"In other cases of less note in that state, the question of personal capacity was indeed spoken of as governed by the law of the domicil. Le Breton *v.* Nouchet, 3 Mart. 60, 70; 5 Am. Dec. 736; Barrera *v.* Alpuente, 18 Ibid. 69, 70; Garnier *v.* Poydras, 13 La. 177, 182. But in none of them was the statement necessary to the decision. In Le Breton *v.* Nouchet, the point adjudged was, that where a man and woman, domiciled in Louisiana (by the law of which the wife retains her separate property), were married, with the intention of returning to Louisiana, in the Mississippi territory (where the rule of the common law prevailed, where the wife's property became her husband's), the law of Louisiana, in which the parties intended to continue to reside, governed their rights in the wife's property; and the further expression of an opinion that the rule would be the same if the parties intended to remain in the Mississippi territory was purely *obiter dictum*, and can hardly be reconciled with later decisions of the same court. Gale *v.* Davis, 4 Mart. 645; Saul *v.* His Creditors, 17 Ibid. 569. See, also, Read *v.* Earle, 12 Gray, 423. In Barrera *v.* Alpuente, the case was discussed in the opinion upon the hy-



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of business, restrain them, either temporarily or permanently, from the exercise of certain business functions. Of course this

pothesis that the capacity to receive a legacy was governed by the law of the domicil; but the same result would have followed from holding that it was governed by the law of the place where the right was accrued and was sought to be enforced. In Garnier *v.* Poydras, the decision turned on the validity of a power of attorney executed and a judicial authorization given in France, where the husband and wife had always resided.

"In Greenwood *v.* Curtis, Chief Justice Parsons said: 'By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this state; although such contract may not be valid by our laws, or even may be prohibited to our citizens;' and that the chief justice considered this rule as extending to questions of capacity is evident from his subsequent illustration of a marriage contracted abroad between persons prohibited to intermarry by the law of their domicil. 6 Mass. 377, 379. The validity of such marriages (except in case of polygamy, or of marriages incestuous according to the general opinion of Christendom) has been repeatedly affirmed in this commonwealth. Medway *v.* Needham, 16 Mass. 157; Am. Dec. 131; Sutton *v.* Warren, 10 Met. 451; Commonwealth *v.* Lane, 113 Mass. 458.

"The recent decision in Sottomayor *v.* De Barros, 3 P. D. 1, by which Lords Justices James, Baggallay, and Cotton, without referring to any of the cases we have cited, and reversing the judgment of Sir Robert Phillimore, in 2 P. D. 81, held that a marriage in England between first cousins, Portuguese subjects, resident in England, who by the law of Portugal were incapable of intermarrying except by a papal dispensation, was therefore null and void in England, is utterly opposed to our law; and, consequently, the *dictum* of Lord Justice Cotton: '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,' is entitled to little weight here.

"It is true that there are reasons of public policy for upholding the validity of marriages, that are not applicable to ordinary contracts; but a greater disregard of the *lex domicilii* can hardly be suggested than in the recognition of the validity of a marriage contracted in another state, which is not authorized by the law of the domicil, and which permanently affects the relations and the rights of two citizens and of others to be born.

"Mr. Justice Story, in his Commentaries on the Conflict of Laws, after elaborate consideration of the authorities, arrives at the conclusion, that 'in regard to questions of minority and majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern, but the *lex loci contractus aut actus*, — the law of place where the contract is made or the act done;' or as he elsewhere sums it up, 'Although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to gov-



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latter form of restraint may be instituted in various ways. It may be by the judicial appointment of a tutor or guardian, after

ern.' Story's Confl. §§ 103, 241. So Chancellor Kent, although in some passages of the text of his Commentaries he seems to incline to the doctrine of the civilians, yet in the notes afterward added unequivocally concurs in the conclusion of Mr. Justice Story. 2 Kent's Com. 233, note, 458, 459 and note.

"In Pearl *v.* Hansborough, 9 Humph. 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting, the contract of purchase was void and could not be enforced in Tennessee. Some authorities, on the other hand, would uphold a contract made by a party capable by the law of his domicil, though incapable by the law of the place of the contract. In re Hellman's Will and Saul *v.* His Creditors, above cited. But that alternative is not here presented. In Hill *v.* Pine River Bank, 45 N. H. 300, the contract was made in the state of the woman's domicil, so that the question before us did not arise, and was not considered.

"The principal reasons upon which continental jurists have maintained that personal laws of the domicil affecting the *status* and capacity of all inhabitants of a particular class bind them wherever they may go, appear to have been that each state has the rightful power of regulating the *status* and condition of its subjects, and, being best acquainted with the circumstances of climate, race, character, manners, and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized states recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicil of the person, the protection extends.

"On the other hand, it is only by the comity of other states that laws can operate beyond the limit of the state that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.

"As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its opera-



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due examination by a proper court. It may be by the very fact of marriage, which, to preserve a woman's estate from her husband's depredations, as well as to secure her attention to the family sphere, deprives her of the right to alienate her property, except with certain peculiar solemnities, and relieves her from responsibility for debts incurred. Or it may be, as in the case of infants, by a law of nature, patent, up to a certain age, to all men. Then the modes by which the restraint is applied are various. The Roman law, where property has been wrung from a person thus protected, gives the *In integrum restitutio*.[1] The English common law avoids all contracts made by such persons,

tion and enforcement here may be restricted by positive prohibition of statute. A state may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws. Under the French Code, for instance, which enacts that the law regulating the *status* and capacity of persons shall bind French subjects, even when living in a foreign country, a French court cannot enforce a contract made by a Frenchman abroad, which he is incapable of making by the law of France. See Westlake, §§ 399, 400.

"It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.

"But it is not true at the present day that all civilized states recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many states they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business, and earnings; and before the beginning of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action."

The position in the text is criticised as unphilosophical in the London Law Magazine for August, 1879, and in 21 Albany Law Journal, 407; and it is asked why, if artificial restraints on capacity are not extra-territorial, the restraints of infancy and of coverture should be ubiquitous. The answer is that the restraints of infancy are *natural*, not *artificial*; and the restraints of coverture, so far as they are artificial and without notice, are not extra-territorial. See Milliken *v.* Pratt, *supra*.

[1] Savigny, Syst. vii. p. 100.



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except for necessaries. But however such restraints may be instituted, or by whatever process they may be enforced, their principle is common to all civilized lands. Their object is, not to extinguish capacity, but to nurture and protect it. The persons to whom they relate are not a class politically and socially depressed, but a class whom the state regards as the subjects of its tenderest care, and whom, in the case of minors or married women, it would so cherish, that they, in their turn, may be the guardians and artificers of its own future greatness and strength. No state regardful of its future interests would leave young children without parental or tutelary restraint, and expose married women, when under their husband's control, to responsibilities by which the wife's private estate would be imperilled, and her capacity for domestic usefulness impaired. Hence protective laws of this order may be considered as adhering to the person of the subject, in whatever lands he may travel. When needed for his protection, his home tutelage will be recognized abroad. A learned German author[1] has approached this same line, in the distinction he vindicates between natural and positive incapacities, the first of which he holds to have extra-territorial force, the second not. He fails, however, to define "natural" and "positive." Bartolus, in his remarkable commentary, already cited, thus speaks: "A *statutum* which prohibits an individual from doing certain things follows him into a foreign state, when it is *favorabile* (*i. e.* made for the advantage of the individual); but not when it is *odiosum;* for instance, a *statutum* that a daughter shall not inherit does not extend to property in a foreign state."[2] And the same distinction is thrown out by Judge Ware in the very able opinion already cited.[3] "Besides these personal laws determining the state and condition of individuals, which are founded on natural relations and qualities, and such as are universally recognized among civilized communities, as those of parent and child, those resulting from marriage, from intellectual imbecility, and the like, they (sovereigns) may, and in point of fact do, establish distinctions which are not founded in nature, but relate only to the

[1] Günther, Weiske's Rechts-Lex. iv. 726.

[2] Phil. iv. p. 235.

[3] Polydore *v.* Prince, 1 Ware, 413. Mr. Field (Int. Code, § 542) speaks of this as "the American rule."



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peculiarities of their own social organization, to their own municipal laws, and to the artificial forms of society which are established among themselves. . . . . But it is by no means clear that these personal distinctions which are not founded in nature, and are the result of mere civil institutions, can be allowed to accompany them (persons), and give them personal immunities, or affect them with personal incapacities, in other countries in which they may be temporarily resident, or transiently passing, whose laws acknowledge no such distinctions."

This view conducive to fair dealing.

§ 103. Another reason for the distinction, in this respect, between these two kinds of disability, is to be found in the position, already mentioned as having been incidentally taken by Bar,[1] that those subject to disabilities of the first class bear on their persons nothing which is necessarily notice of such disabilities, while those subject to disabilities of the second class, from the very constitution of things, give such notice. A noble, for instance, is by the law of his domicil prohibited from entering into trade; but, when travelling in the United States, becomes engaged in a commercial adventure. Or a farmer, by the law of his domicil, is prohibited from negotiating commercial paper, and, when travelling in the United States, draws a bill of exchange. Or a person who, by the law of his domicil, is under religious disability, or is *civiliter mortuus*, when travelling in the United States, buys stock on credit. In such cases there is no notice of disability necessarily given to the creditor; nor is there anything to put the creditor on his guard to search for any foreign disabling law. It is otherwise, however, with children, lunatics, and married women, when their condition gives notice of disability. And with this is to be considered the additional fact, noticed by Bar, that the dependent condition of those subject to the last-mentioned disabilities deprives them of that command of property which in itself is an implication of responsibility. It is otherwise with those travelling *sui juris*, with an unrestrained control of their means.

And also to equalization of civil rights.

§ 104. A third reason for this distinction is to be found in the principle, already discussed, of the parity, in international law, of the foreign visitor with the domiciled citizen. A country which does not impose caste re-

[1] Supra, § 98.



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strictions on its own subjects will not impose such restrictions on visitors from other lands. To stretch international law further would be to engraft on free countries the paralyzing restrictions of despotisms. It would be, in addition, a heavy check on the progress of constitutional liberty. Nor would the complexity of such a system be less oppressive than its absolutism. Business and domestic relations would be fettered by a comity of reciprocal absolutisms and barbarisms, which would be all the more onerous from the fact that in many cases we would know nothing of them until they were sprung upon us by the discovery that persons with whom we were innocently dealing, forming large sections of the community, were irresponsible by force of laws we had no means of ascertaining. Each country would be obliged to maintain as many castes within its borders as there are castes in the aggregate of all other civilized lands. Each of these castes would have its distinct code of personal responsibility, and these codes would be often unintelligible and always oppressive. Under such a system, national independence, national freedom, and national prosperity would be imperilled.[1] From these and other difficulties involved in the doctrine of the universality of the law of domicil, the escape is natural by means of the position here advanced, — that statutes which destroy capacity have no extra-territorial force, while those which protect capacity are entitled to reciprocal international support.[2]

[1] See supra, § 8.

[2] The present law of England practically allows the distinction stated in the text. See Caldwell *v.* Vanvlissengen, 9 Hare, 425; 16 Jur. 115; 21 L. J. Chanc. 97; Fenton *v.* Livingston, 3 Macq. 497.

The position in the text is the subject of an extended adverse criticism by Laurent, an eminent Belgian jurist, in the second volume of his Droit civil international, published in Brussels in 1880. He declares (p. 163) that I have confounded the "personality" of the barbarian laws with the personal statutes; and in the first volume of the same work he has given much space to the exposition of the difference between the two institutions. I am far from dissenting from the main positions of my critic. Undoubtedly the personal laws of the barbarians included penal as well as civil statutes. All I desire to maintain is that in rejecting territoriality the two systems have a common ground of agreement; that the maintenance of the supremacy of territorial law is an essential of modern culture; and that to maintain the universal supremacy of personal statutes, in *pro tanto* vacating territorial supremacy, is hostile to this culture, and is an adoption in this respect of the polity of barbarism as distinguished from the polity of civilization. I am glad to have in this



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§ 104 *a*. It may be also maintained that the reservations in the French and Italian codes bring the rule prescribed by them in accord with that here advocated. Even according to Laurent, the sturdiest of all recent advocates of the exclusive authority of the law of nationality, "Les lois relatives aux droits de la société reçoivent leur application, quelle que soit la nationalité des parties intéresées, quelle que soit la nature des biens et quelque soit le lieu du contrat."[1] By the French Code, the distinctive law of France is to govern French courts in all cases involving *l'ordre public et les bonnes moeurs*. The Italian Code makes the same exceptions. It is not strange that Laurent, after declaring that the Italian rule is in advance of all others in liberality, and contrasts favorably with that accepted in the United States, should say that the limitation just stated is "tres-vague." The exception, in fact, puts the jurisprudence of France and Italy on the same basis as that of the United States, whose narrowness is deplored by our eminent Belgian and Italian critics. We say we will not recognize the restrictions imposed by foreign states on business capacity and marriage when such restrictions are hostile to our system. We say that when a German of twenty-four years comes to our shores and contracts a debt we will hold him bound for the debt, and when he sells goods, we will hold him entitled to sue for the goods, notwithstanding that by his national law he will not be *capax negotii* for a year or two. We say that when a Frenchman of twenty-four years solemnizes, when among us, a marriage lawful by our laws, we will not hold his marriage illicit and his children illegitimate, because by the French law he could not marry without first convening, at the place of the intended marriage, a family council. We base our conclusions in this respect on "public order and good morals." What can be more essential to public order than that responsibility should be made coextensive with activity? What more essential to good morals than the maintenance of family ties? If foreign restrictions on capacity are ubiquitous, members of

French and Italian reservations of "public order and good morals" lead to same conclusions.

position the support of so valuable a work as Schmid's Herrschaft der Gesetze nach ihren raumlichen Gränzen.

[1] Laurent, Droit civil int. privé, 1880, ii. p. 347.



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that large section of our population whose naturalization has not yet been perfected would be in many cases incapable of making valid contracts, while their marriages within our territory in such period would be void, and the offspring of such marriages illegitimate.[1]

[1] That "public order" and "good morals" are construed by French and Italian courts as convertible with "national policy" we have already seen. Another illustration may be found in the fact that it has been ruled in France that a person who, at home a minor, makes a promissory note in a country where he is of full age, cannot set up his minority in the latter country. And it is further held that a member of a foreign royal family, prohibited from making such paper at home, will be bound in France by paper which he there makes. Fiore, Op. cit. § 344. It has also been held in France that a person who assumes in a foreign country the name of a French family, even with the sanction of such foreign country, is not entitled to assume such name in France, the reason given being that "la législation sur les noms intéresse l'ordre public et touche à l'organization sociale: la volonté privée ne peut modifier la désignation d'une famille." For other illustrations see infra, § 113.

We have also a ruling of a Milanese court in 1866, to the effect that when the local law assigns certain capacities to a foreigner, his personal law is to yield to such local law. This ruling Fiore, firm as is his adherence to the test of nationality, records (Op. cit. App. p. 632) without dissent. But if we admit this exception, what is there of national capacity that would survive transportation to a foreign state? Our statutes, for instance, fix majority at twenty-one. If we adopt the Milanese rule, would not every foreigner over twenty-one become of full age when he steps on our shores?

In a series of propositions presented by Mancini and Asser to the International Institute in 1874 (Jour. de droit int. 1874, p. 583), we find the following: *Status* (l'etat), personal capacity, family relations, and the rights and obligations dependent thereon, are to be determined in conformity with national law. Subsidiary to this are to be regarded the laws of domicil, when different civil legislations coexist in the same state, or when the question relates to persons without any nationality, or with double nationality. But the personal laws of a foreigner are not to be recognized in a territory when in opposition to its public right and public order.

As to the above it is to be noticed: (1.) that the exception, in states where *status* is a matter of public order, renders nugatory the rule; (2.) that in countries such as the United States, where there is a federation of states under one nationality, domicil is not a subsidiary but the principal standard.

The solution given by Mancini may be briefly sketched as follows: Juridical order consists in the unison of private and individual liberty with the social power; of the law of the state with the prerogatives of the individual. The state, therefore, cannot without injustice invade the field of inoffensive liberty (*liberté inoffensive*).

The exercise of this "inoffensive liberty" by the various persons constituting a nation results in a manifestation of certain constant and spon-



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§ 104 *b*. The exception which the French and Italian codes establish is one, in fact, of universal recognition.[1] "It is the prerogative," so has the rule been well stated in Mississippi, "of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to

In matters of national policy distinctive local law maintained.

taneous qualities, customs, and manners. It is this which constitutes the specific character which distinguishes one nation from another.

Just as the individuals living in a state are not subjected to an unjust limitation of their rights by the recognition of the rights of other individuals living in the same state, so the rights of the same individuals are not impaired by the recognition of analogous rights of individual members of other states. These rights belong to men as men, and not to men as members of a particular political society. We cannot claim these rights for ourselves, without conceding them to members of other nationalities. We cannot claim a liberty as to national characteristics for ourselves, without conceding the same liberty as to national characteristics to other states. National climate and capacity, soil for cultivation, national traditions as to manner, have much to do with the precocity of moral and physical development, with family organization, and with the mode of business. We cannot overlook these essential differences without injustice.

It is, therefore, argues Mancini, not a mere comity, but an act of justice, that a foreigner visiting our shores should be permitted to retain his personal *status* and his juridical capacity of origin, — *sa capacité juridique d'origine*. Thus a person coming from a cold climate, where the moral and physical development is slow, is, under a system produced by these conditions, held to be longer in reaching his majority than the native of a warm climate. We are bound, he argues, to hold that a person leaving the north and going south is divested of the physical and moral properties which produce earlier maturity in the south. A person, he holds, is entitled to claim, on account of his nationality, from a foreign state, the protection of his *status* internationally, to the same effect that he is entitled to municipal protection among his fellow-citizens of the same state.

A distinction, however, is taken by Mancini between what he calls *necessary* and *voluntary* laws. *Necessary* law is that which governs the personal state, order, and relations of the family. These conditions cannot be voluntarily altered. Personal and family relations constitute an *ensemble* of attributes which do not belong to every human being, but to individuals as belonging to a specific nationality. When we attribute to a particular person a nationality either Italian, or French, or German, we envelop such person with the personal and family rights of the nationality to which he thus belongs. A man can change his nationality, but he cannot, while belonging to a nationality, change its conditions. As laws which are thus necessary, and cling to a person wherever he goes, Mancini includes those touching the order of succession of decedents' estates.

[1] See supra, § 8; infra, §§ 112, 113, 490.



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capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not in the forum of his domicil, as they may infringe or not its interests, laws, and policies."[1] The only question, then, is, what statutes regulating capacity are to be regarded as the products of national policy? This question, which has been already incidentally noticed, will be further discussed when we consider statutory incapacities in the concrete.[2]

On the other hand, it is argued that laws concerning the enjoyment of goods and the formation of contracts may be called *voluntary*. In these matters the individual may conform or not as he thinks best to the national law; and he may incorporate provisions in his contracts modifying the national law, provided that in doing so he does not invade the public policy of the state. Hence, while an individual when away from his country is entitled to obtain in foreign states a recognition of his private international rights, the sovereign of each state is entitled to interdict all infraction of public rights and of public order. And every state is to be regarded as having power to protect its public policy against all foreign laws. As thus invading public order Mancini instances slavery and polygamy. In other words, "le droit civil privé" is personal and national, and accompanies a person wherever he goes; while "le droit public" is territorial, and applies to all persons inhabiting the soil, whether subjects or aliens. The legislator, it is concluded, does homage to the principle of nationality when he recognizes the validity on his soil of the laws which govern the person, the family, and succession, so far as they do not touch the political constitution of the state. But he does homage, also, to territoriality when he makes the territorial law supreme in matters of public order and good morals. Here, again, we find, after a general statement of the universality of nationality, an exception which subordinates nationality to territorial policy.

[1] Bank of La. *v.* Williams, 46 Miss. 621.

[2] In De Boimont *v.* Penniman, 10 Blatch. 436, the exception was applied under the following facts: The French Code provides that a father-in-law and mother-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage is living. A son-in-law, a domiciled French citizen, obtained a decree in the French courts for an allowance against his father-in-law and mother-in-law, who were domiciled American citizens; all the parties then residing in France. The son-in-law subsequently brought an action of debt on the decree in the courts of the United States, to recover the amount of the decreed payment which had not been paid. It was held that the suit could not be maintained. The laws of France, upon which such decree was made, it was argued, are local in their nature and operation, their object being to regulate the domestic relations of those who reside there, and to protect the public against pauperism. Hence they were held to have no extra-territorial effect. They were likened to orders of filiation, and orders made, under local statutes, to guard against pauperism, and in the



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## II. CORPORATIONS.

§ 105. That a corporation has its domicil in the state establishing it we have already seen.[1] It now remains to be stated, that out of that state it has no necessary legal existence. The reasoning which leads to this conclusion is based, as is the case generally in respect to *status*, on

Corporation has no necessary extra-territorial *status*.

nature of local police regulations. See infra, § 168.

That foreign laws conflicting with home policy are invalid, see The Antelope, 10 Wheat. 66; Scoville *v.* Canfield, 14 John. 338; Woodward *v.* Roane, 23 Ark. 523.

Mr. Dicey (p. 166), after referring (1.) to the view that personal *status* is ubiquitous, and (2.) to the view that it is to have no extra-territorial force, gives the following: —

"*Third View.* — The existence at any rate of a *status* imposed by the law of a person's domicil, ought in general to be recognized in other countries, though the courts of such countries may exercise their discretion in giving operation to the results or effects of such *status*.

"This is the principle (if so it can be called) which is meant to be stated in the rule under consideration, and which, it is conceived, most nearly corresponds with the actual practice of our courts. It constitutes a kind of practical compromise between the first and the second view, and enables the courts to recognize the existence of a *status* acquired under the law of a person's domicil, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place."

The objection to the above statement is that it leaves the application of foreign *status* to the discretion of the courts. But a court enforces a rule of law which is a matter of national policy not as a matter of discretion but of duty. Supra, § 1.

Laurent, i., 546, objects to what he calls the "Anglo-American" rule of excepting from the operation of personal law, whatever conflicts with home policy, that it is destructive of any consistent system of private international law. The objection, we have just seen, is equally applicable to the Italian Code, of which Laurent is so zealous an advocate. But on principle the objection cannot be sustained. So far from concession of local option to component jurisdictions on certain reserved topics being inconsistent with a comprehensive and wise system, there can be no comprehensive and wise system that does not admit such local option. The government of the United States, covering as it does so large a territory, joining such various local traditions and interests, could not be carried on unless by the reservation of all matters not distinctively federal to state legislation. The British crown could not govern its American and Australian dependencies except by leaving all local matters to the local legislatures; and if in India a local legislature is dispensed with, it is because the Indian population is of a lower grade of civilization than the populations of Canada and Australia. Even when we take such

[1] Supra, § 48 *a*.



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state policy.[1] Now, it is within the range of a constitutional domestic policy for a state to say, "A foreign corporation I will not admit unless under specific restrictions." For the restrictions to be placed on corporations are eminently matters of local policy. By some states the position is taken that no charters should be granted except for a business which individuals cannot conduct without a charter. By others, individual liability of stockholders is maintained. By others, capital is restricted. By others, certain pledges of good conduct are required, in the shape of deposits with the state. Now, it would be unreasonable to maintain that restrictions of these kinds, essential, as they may be well believed to be, to the health of the body politic, can be defied and swept away by foreign corporations to whom a foreign state may have chosen to have given unlimited power. And it would be equally unreasonable, in view of the fact that courts cannot exercise jurisdiction over foreign corporations,[2] to admit such corporations without requiring them to put themselves under the local law. Hence it has been held, with great uniformity, that a corporation has no legal *status* outside of the state by which it is created.[3]

compact territories as our particular American states, we find that exceptions of this class, allowed in general legislation, increase in proportion as civilization becomes more complex. It is easy enough to say to a people perfectly homogeneous, with the same religion, the same degree of cultivation, the same ethical standards, the same tastes, "You shall be all governed by the same personal law." But it is absurd to say this to a population comprising local interests, each requiring a distinctive legislation. Our state laws give innumerable illustrations of exceptions of this class. They say that road laws shall not apply to cities, and that laws prescribing the lighting of city streets shall not apply to the country. They say that quarantines and boards of health shall be provided for some sections, but not for others. They give municipal governments the power to legislate on municipal matters. In many states they give to certain municipalities the power to determine whether or no spirituous liquors shall be sold within their limits. Now it certainly will not be maintained that legislation giving to subordinate jurisdictions autonomy on a specific range of topics is not both more comprehensive, more scientific, and more liberal, than legislation which does not recognize such autonomy. And, so a system of private international law which recognizes the autonomy of states in matters belonging to their distinctive policy is both more comprehensive, more scientific, and more liberal than a system of private international law which does not recognize such autonomy. See supra, §§ 7, 8.

[1] See supra, § 104 *b*.

[2] Infra, § 105 *c*.

[3] Bank of Augusta *v.* Earle, 13 Pet.



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§ 105 *a*. What has just been said applies to cases of foreign corporations undertaking to exercise powers not granted to domestic corporations. The reason for exclusion fails when applied to matters of mere ordinary business, such

But in ordinary business is protected.

519; Runyan *v.* Coster, 14 Pet. 122; Paul *v.* Virginia, 8 Wal. 168; British Amer. Land Co. *v.* Ames, 6 Met. (Mass.) 391; Hahnemannian Life Ins. *v.* Beebe, 48 Ill. 87; Ducat *v.* Chicago, 48 Ill. 172; 10 Wal. 410; Balt. & Ohio R. R. *v.* Glenn, 28 Md. 288; Slaughter *v.* Com. 13 Grat. 767; State *v.* Fosdick, 21 La. An. 434. See, for French law, Jour. du droit int. privé, 1875, pp. 1, 345.

In Green's Brice's Ultra Vires (1880), p. 4, note *a*, the following positions are taken:—

(1.) Corporations have no *status* in other states as citizens of the state creating them. Bank of Augusta *v.* Earle, 13 Pet. 519; Myers *v.* Bank, 20 Ohio, 283. "They are creatures of local law, and have not even an absolute right of recognition in other states, but depend for that and for the enforcement of their contracts upon the assent of such states, which may be given in such terms as the states may respectively prescribe." (2.) "A corporation which has a legal existence in any one state can sue in the federal courts of any other state." (3.) "The rights of a corporation created in one state to transact corporate business and make contracts in another state is a right based upon the comity between the states; but when contrary to the local policy of the state, or forbidden by local law, or prejudicial to the interests of the state, the comity ceases to be obligatory. Ducat *v.* Chicago, 48 Ill. 472; Paul *v.* Virginia, 8 Wal. 168; Baltimore & Ohio R. R. *v.* Glenn, 48 Md. 287; Williams *v.* Creswell, 51 Miss. 817; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Hadley *v.* Freedman's Co. 2 Tenn. Ch. 122; Carroll *v.* East St. Louis, 67 Ill. 568. The comity involved in this question is the comity of the states and not of the courts; and the judiciary must be guided in deciding the question by the principle and policy adopted by the legislature; not only by the express provisions made by the legislature and the natural implication from them, but also by their silence; for, if they have made no provision at all upon the particular subject, or branch of the subject, or question involved, it may reasonably be inferred that they intended to adopt the generally received principles of comity, and to that extent to recognize the rights dependent upon the foreign laws. Thompson *v.* Waters, 25 Mich. 214."

In Strache *v.* Ins. Co. (Va. 1880) it was held that an insurance company incorporated by the laws of New York, having its principal place of business in that state, which had complied with the laws of Virginia in relation to foreign insurance companies doing business in Virginia, by making the deposit, and appointing a citizen of Virginia an agent, by power of attorney, &c., as required by the statute of Virginia, is *not a resident* of the State of Virginia, within the meaning of its foreign attachment laws, and that the property of said insurance company is liable to such attachment as a *non-resident*. It was further held that whilst a corporation may, by its agents, transact business anywhere, unless prohibited by its charter, or prevented by local laws, it can have no residence or citizenship except



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as any natural foreign person may conduct. Hence, unless specially restricted by statute, foreign corporations may have places

where it is located by or under the authority of its charter. The court quoted the language of Taney, C. J., in Bank of Augusta *v.* Earle, 13 Pet. 519: "It exists by force of the law (creating it), and where that ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." Reference was also made to the language of Waite, C. J., in Ex parte Schollenberger, 96 U. S. 369: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter, but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws."

In Walker *v.* Springfield, Sup. Ct. Ind. 1880 (10 Rep. 458), it was held that the taxation of the net receipts of foreign insurance companies doing business in the state to the same effect as other personal property, and the imposition of analogous taxes by a municipal government under charter provisions, is not double taxation, and does not violate the constitutional rule of uniformity in taxation, as such requirement is not a tax, or in the nature of a tax, but is the sum or fee paid for a license.

"In the case of People *v.* Thurbee, 13 Ill. 554," said Walker, C. J., "the same question was before the court, and it was held not to be a tax, but a sum paid by foreign insurance companies for a license or privilege of doing an insurance business in the state. In that case, as in this, it was urged that the authority to levy three per cent. on the amount of the premiums charged by the agent violated the constitutional rule of uniformity in taxation. But it was held not to be a tax, but a sum paid for a license to transact the business of these foreign corporations in the state; that it was a license, although no written permit or license was required to be issued; and it was held, as it was not a tax, that the law in nowise infringed the Constitution. To the same effect is the case of Ill. Mut. Fire Ins. Co. *v.* City of Peoria, 29 Ill. 180; and the case of East St. Louis *v.* Wehrung, 46 Ibid. 392, holds that the sum paid for a license is not a tax, and is not subject to the rule of uniformity. The same doctrine was held in the case of Ducat *v.* City of Chicago, 61 Ill. 172. These cases, we think, fully settle the doctrine that this burden is not a tax, and is not governed by the rules of taxation. We are, therefore, clearly of the opinion that the charter, the thirtieth section of the insurance law, and the city ordinance, are constitutional, and conferred on the city the power to sue for and recover the penalty. This is the view presented by the case of Hughes *v.* City of Cairo (unreported, June 3, 1879), and the judgment of the appellate court must be affirmed."

Since a corporation has its site in the state of its existence, subscriptions to its capital stock are to be determined by the law of the latter state. Penobscot R. R. *v.* Bartlett, 12 Gray, 244.

"Doubts have from time to time been expressed as to whether the English courts at all, and if at all, how far, can recognize foreign corporations and their incidents. Some of these doubts may remain, but in so far as relates to legal proceedings, it is since the judicature act has quite settled



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of business in which their agents may be consulted, and are entitled to the same right of protection from forgery of trade-marks as are foreign natural persons.[1] And while a corporation cannot transfer its franchises into a state other than that of its creation,

that foreign corporations, even though not incorporated according to English law, may sue and be sued in English courts to judgment, whether resident in England or not." Green's Brice's Ultra Vires, p. 4, citing Scott *v.* Royal Wax Candle Co. 1 Q. B. D. 404.

That a foreign manufacturing corporation may have an agency in England, and there do business, binding itself by contracts on which it can be sued, is agreed in Newby *v.* Van Oppen & Colt's Patent Fire Arms Co. L. R. 7 Q. B. 293. *Contra* in Canada. See cases cited in Westlake (1880), § 287.

As to judgments against foreign corporation where defendant does not appear, see Gibbs *v.* Insurance Co. 63 N. Y. 114; infra, §§ 649, 714.

As to power of foreign corporations to sue, see Westlake (1880), §§ 282 *et seq.*; Field on Corp. §§ 363 *et seq.*

As to service on such corporation, see Westlake (1880), §§ 289, 290. Infra, §§ 713, 714.

A foreign corporation, though chartered for the express purpose of holding real estate, will not be permitted to exercise this right in a state with whose policy in respect to perpetuities its object conflicts. Carroll *v.* East St. Louis, 67 Ill. 568. See U. S. Trust Co. *v.* Lee, 73 Ill. 142.

And as a general rule the *lex situs* determines how far a foreign corporation may hold land. Runyan *v.* Coster, 14 Pet. 122; Claremont Bridge *v.* Royce, 42 Vt. 730; Riley *v.* Rochester City, 9 N. Y. 64; Morris Canal Co. *v.* Townsend, 24 Barb. 658; Townsend, in re, 39 N. Y. 171; Ross *v.* Adams, 1 Vroom, 505; Starkweather *v.* Am. Bible Society, 72 Ill. 50; Thompson *v.* Waters, 25 Mich. 214.

In Christian Union *v.* Yount, 101 U. S. 352, it was held by the Supreme Court of the United States that there is nothing in the Constitution and statutes of Illinois which forbids one of her citizens to convey real estate in that state to a benevolent or religious corporation of another state for the furtherance of its corporate purposes. Neither Starkweather *v.* Bible Society, nor Carroll *v.* East St. Louis (*ut supra*), "warrants," it was said by Harlan, J., 101 U. S. 359, "the conclusion that, at the date of the deed to the appellant, a benevolent, religious, or missionary corporation of another state having authority under its own charter to take lands, in limited quantities, for the purposes of its incorporation, was forbidden, by the statutes or public policy of Illinois, from taking title, *for such purposes*, to real property in that state, under a conveyance from one of its citizens, duly executed and recorded as required by its laws."

Whether, when a corporation holds land in two states, an execution can touch its extra-territorial land, is hereafter discussed. Infra, § 292 *a*.

A state, however, under our federal system, cannot impose on a foreign corporation terms incompatible with the federal Constitution. Doyle *v.* Ins. Co. 94 U. S. 535; Stevens *v.* Ins. Co. 41 N. Y. 149; Holden *v.* Ins. Co. 46 N. Y. 1. See State *v.* Doyle, 40 Wis. 175.

[1] Collins Co. *v.* Brown, 3 K. & J. 423; Collins Co. *v.* Reeves, 4 Jur. N. S. 865. Cited Westlake (1880), § 288.



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it may, through agents, do such acts of ordinary business in another state as are not inconsistent with the distinctive policy of such state.[1]

Liability of stockholders to creditors of foreign corporation determined by law of corporate site.

§ 105 *b*. The liability of a stockholder to the creditors of a foreign corporation is determined by the law of the place of the existence of the corporation, supposing that the action of the corporation, in admitting stockholders in the state of the stockholders' domicil, was not prohibited by the latter state.[2] When the members of a corporation are not individually liable in the place of its creation, they are not liable in the place where it does business.[3] On such principles the limited liability of stockholders and officers to creditors of a foreign corporation will be determined.[4] Extra-territorial laws, however, cannot sustain suits for a penalty.[5] And it has been held in Massachusetts that suits of this class will not be sustained when the effect would be to impose on

[1] Schollenberger, ex parte, 96 U. S. 369; Mutual Fire Ins. Co. *v.* Sturgis, 13 Gray, 177; Newbury Co. *v.* Weare, 27 Oh. St. 343; Hadley *v.* Freedman's Sav. Bk. 2 Tenn. Ch. 122; Home Ins. Co. *v.* Davis, 29 Mich. 238; Farmers' Ins. Co. *v.* Harrah, 47 Ind. 236; Conn. Mut. Ins. Co. *v.* Cross, 18 Wis. 109; Williams *v.* Creswell, 51 Miss. 817.

"There are some kinds of business essentially of an international character, such as that of a common carrier between two countries; and it would not be possible universally to refuse to a railway or steamboat company, incorporated in one of those countries for such a purpose, the right to have an office in the other country, and to contract there with reference to the purpose of its existence. In states where the government is intrusted with a discretion as to granting or refusing to foreign corporations the right to act within the territory, such right might in certain cases be refused even to a company desiring to act as a common carrier between that territory and another. But where, as in England, the government has no such discretion, the courts of law can only act on general rules, and there would be extreme inconvenience in their laying down a general rule of exclusion for the case of trades which necessarily involve two countries in the sphere of their operations." Westlake (1880), § 287. See Schollenberger, ex parte, 96 U. S. 369.

[2] Seymour *v.* Sturgess, 26 N. Y. 134; Merrick *v.* Van Santvoord, 34 N. Y. 208. See Payson *v.* Withen, 5 Biss. 269; Healy *v.* Root, 11 Pick. 389; Smith *v.* Ins. Co. 14 Allen, 336.

[3] General Steam Nav. Co. *v.* Guillou, 11 M. & W. 877.

[4] Ibid.; Sackett Harbor Bank *v.* Blake, 3 Rich. Eq. 225. See Thompson's Liability of Stockholders, § 85.

[5] Halsey *v.* McLean, 12 Allen, 438; Bird *v.* Hayden, 1 Rob. (N. Y.) 383; Derrickson *v.* Smith, 27 N. J. L. 166; First Nat. Bk. *v.* Price, 33 Md. 487; Lawler *v.* Burt, 7 Oh. St. 341; Cable *v.* McCune, 26 Mo. 371. Supra, § 4.



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the Massachusetts stockholder liabilities greater than those imposed in the state of the site of the corporation.[1]

§ 105 *c*. When personal property is left to a foreign corporation, the reasons above mentioned do not apply to prevent the execution of the intent. Hence it has been held that in such cases the court disposing of the property will, if there be no local rule of policy in the way, direct it to be paid over to the foreign corporation designated, to be applied according to the laws to which the corporation is subject.[2] But such jurisdiction will not be asserted when it involves a continuous superintendence of the affairs of the foreign corporation.[3]

When property is left to foreign corporation, the *judex situs* will not undertake to direct the trust.

§ 105 *d*. A foreign corporation doing business in any shape within state limits is subject to the municipal and other laws of the state. Thus, a foreign railroad company is bound to fence its lands conformably to state law, or to suffer the penalties imposed for neglecting to do so.[4] And a foreign corporation, as to mode of service, is subjected to the *lex fori*.[5]

Subject to local municipal law.

### III. PARTICULAR RELATIONS.

#### 1. *Slavery and Serfdom.*

§ 106. All authorities unite in holding that a slave, on touching a land where slavery is not recognized, becomes free.[6] It has been largely discussed, however, whether a slave who thus has acquired freedom lapses again into slavery on returning to the land where he was formerly

Slavery not extraterritorially recognized.

[1] Erickson *v.* Nesmith, 15 Gray, 221; 4 Allen, 233. But see Thompson's Liability of Stockholders, § 85; Hadley *v.* Russell, 40 N. H. 109.

[2] Westlake (1880), § 282, citing, with other cases, Emery *v.* Hill, 1 Russ. 112; Atty. Gen. *v.* Sturge, 19 Beav. 594; New *v.* Bonaker, L. R. 4 Eq. 655.

[3] Ibid.

[4] Purdy *v.* R. R. 61 N. Y. 353.

[5] Railroad *v.* Harris, 12 Wall. 65; Schollenberger, ex parte, 96 U. S. 369; Brownell *v.* R. R. 10 Reporter, 621; Sturgess *v.* Vanderbilt, 73 N. Y. 384. Infra, § 747.

[6] Grotius de J. B. ii. ch. 22, § 11; Puffendorf, de Jure Nat. iii. c. 2, §§ 1, 2; vi. c. 3, § 2; J. Voet, Comment. in Dig. 1, 5, § 3; Wächter, ii. p. 172; Savigny, pp. 37, 46; Schæffner, p. 45; Story, § 96; Somerset's case, Lofft R. 1; S. C., Hargrave St. Tr. 340; Forbes *v.* Cochrane, 2 Barn. & C. 448; The Amedie, 1 Dodson R. 210; The Slave Grace, 2 Hagg. Adm. 94; Butler *v.* Hopper, 1 Wash. C. C. R. 499; Polydore *v.* Prince, 1 Ware



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enslaved. It is certainly clear that when a slave has acquired a domicil in a free state, an attempt by his former sovereign to reduce him again to slavery, should he return to such sovereign's territory, would be a violation of international law.[1] On the other hand, the doctrine seems to be, that when a person who is under apprenticeship, or other temporary obligations of service, in his domicil, and, after leaving such domicil, and sojourning in a free country, without acquiring a domicil in such latter country voluntarily returns to such original domicil, then such disabilities or servitude revive.[2]

R. 413; Com. *v.* Aves, 18 Pick. 198; Butler *v.* Delaplaine, 7 Serg. & R. 378; Com. *v.* Holloway, 6 Binney, 213.

[1] Bar, § 47; Story, § 96. Bluntschli (Das Moderne Völkerrecht, Nordlingen, 1868, § 360), sustains the position of the text. After declaring that internationally there can be no property of man in man, and that every man is by nature a being capable of right, and endowed with rights, he proceeds to say that this maxim of natural law, which was recognized by the Roman jurists, has been for centuries misunderstood and misstated by the great mass of nations against their better conscience. In earlier days, in order to justify slavery, the old practice of nations, the *jus gentium*, was invoked. Slowly and gradually has European civilization discarded that shameful misuse of the power of the ruling over the serving classes which was called property, and was placed on a level with property in beasts of service; and slowly and gradually have the natural rights of the person been recognized. After this system was abandoned in Italy, in England, and in France, it still lingered in some German states; and was only recently abandoned in Russia. Thus slowly grew up as a European principle the rule that slavery cannot exist in Europe, but that personal freedom is a right of man. When the United States of America took ground against slavery, and forced the insurgent states within their national bounds to concede personal freedom and civil rights to the black race, this same principle pervaded America, and *now has reached a general recognition in the juridical consciousness of the Christian world.* The sovereignty of states cannot now be invoked to invalidate the higher and more general rights of humanity, for states are human organisms, and are bound to respect what is recognized as a universal right of man.

[2] The Slave Grace, 2 Hagg. Adm. 94; Hunter *v.* Fulcher, 1 Leigh, 172; Haynes *v.* Forno, 8 La. Ann. 35; Story, § 96. As to revival of allegiance, see supra, § 6.



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## 2. *Civil Death.*

§ 107. An almost equal unanimity, even among those who maintain the universality of the personal law, exists as to the position that civil death will not be regarded as of extra-territorial acceptance.[1] It has also been questioned whether an ecclesiastic who has made a vow of poverty, which vow the law of his domicil regards as binding and operative, is capable of inheritance in a foreign land. Eminent German jurists hold that when this vow is voluntary the incapacity is extra-territorial.[2] But while the courts of his domicil might enjoin him from accepting such inheritance, his incapacity in this respect would not be recognized in countries where this form of civil death is not sanctioned.[3]

Nor civil death, nor disabilities attached to ecclesiastics.

[1] Mittermaier, i. § 30, note 13; Wächter, ii. p. 184; Black. Com. i. 132; iii. 101; iv. 54, 319; Story, § 92. "*Si alicui interdictum est arte vel negotiatione sententia non valebit extra territorium principis.*" P. Voet, de Stat. iv. 3, § 19. Civil death (la mort civil), says Brocher (Droit int. privé, 103), raises a feeling of repulsion, whether the incapacity is presented singly or as a consequent of another punishment. It is a barbarism condemned by justice, by reason, and by morality. The states which have abolished it cannot be held to accept it from the hands of a foreign legislature.

[2] Savigny, p. 161, note *a*; Bar, § 48.

[3] It is maintained by Savigny, however, that a monk who is restrained by the law of his domicil from inheriting property carries this disability into Prussia, although no local law to that effect there obtains. He treats this restriction, though somewhat inconsistently, as adhering to the person, the reason given being that it relates to the ordinary capacity to act, and rests on the free choice of the individual, — *als zur gewöhnlichen Handlungsfähigkeit gehörend, auch auf dem freien Willen der Person beruhend.* Savigny, Röm. Recht, viii. § 365, note *a*. He cites to the same effect, Hert. § 13; Bornemann Preuss. Recht. b. 1, p. 53, note 1. Such a view, however, would not hold good in England or in the United States, and in Prussia it may be more properly ascribed, not to the general principles Savigny mentions, which might apply to all other foreign restrictions on acquisition, but to the peculiar policy of reciprocal recognition which the Prussian monarchy has sought to enforce on the great religious communions which occupy its territory.

That a foreign law prescribing that the property of a person becoming a monk should devolve on his heirs, would be recognized in England so far as concerns property in such foreign state, is argued by Mr. Dicey (Domicil, 161), citing Santos *v.* Illidge, 8 C. B. N. S. 861.

A Jesuit, of French nationality, according to the nationality theory, is incapable, under the French legislation of 1880, of exercising the office of a teacher. Would it be pretended that this limitation is to adhere to him wherever he goes? Incapacity attached to entrance into certain re-



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Nor judicial declaration of death.

§ 107 *a*. By the jurisprudence of several European states, the courts, after due proof that a person has been unheard of for a designated period, are authorized to enter a judicial declaration of death. Fiore, after noticing the conflicting peculiarities of local legislations in this relation, argues that to avoid the contradictions that would arise from the application of the *lex rei sitae*, the proper course is to apply the personal law of the person supposed to be dead. Every sovereign, he insists, has the right to protect the interests of his subjects and their families, even in respect to the goods they possess in a foreign land, in all cases when such action would not encroach on the rights of the territorial sovereign.[1] But in case of a person judicially declared to be dead turning out to be alive, no foreign decree of death should be regarded as operative. And in any view, such decree is only entitled to the force attached to letters of administration in our own courts, which may be collaterally impeached.[2]

### 3. *Attainder and Infamy.*

Nor attainder and infamy.

§ 108. Here we enter on a subject of greater difficulty. It was natural for the older jurists, shackled as they were by the fiction of the union of Christendom under the Roman imperial crown, to hold that the disabilities produced in one land by conviction of an infamous crime would be enforced in all other lands.[3] Even by writers of the present day, when this fiction is exploded, the doctrine of the international recognition of infamy is accepted.[4] But, so far as England is concerned, while her shores have been the refuge of multitudes of persons who have been attainted and consigned to infamy by their respective sovereigns, there is no case recorded where such disabilities have been enforced by English courts.[5]

ligious orders is generally recognized in Europe. Savigny, viii. § 365; Bar, § 48; Fœlix, i. p. 198; Brocher, p. 353. Would any one pretend that such incapacity would be recognized as limiting such persons when travelling in the United States?

[1] Fiore, Op. cit. § 77. Infra, § 133.

[2] Wharton on Ev. § 1278.

[3] Burgundus, iii. 12; Bouhier, ch. 24, No. 134; Boullenois, ii. p. 19.

[4] Mittermaier, § 30; Thöl, Einleitung, § 78; Bar, § 49.

[5] See Westlake (1857), art. 403: "By attainder for treason or for felony, the blood of the person so attainted is so corrupted as to be rendered no longer inheritable." Black.



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As to the United States, Judge Story properly remarks,[1] that "an American court would deem them (such incapacities) as purely local, and incapable of being enforced here. Even the conviction of a crime in a foreign country, which makes the party infamous there, and incapable of being a witness in their own courts, has been held not to produce a like effect here. The capacity or incapacity of any persons to do acts in their own country would, under such circumstances, be judged by their own laws; but not their capacity or incapacity to do the like acts in any foreign territory where different laws prevail." And, as a general rule, it is fully settled that penal laws have no extra-territorial effect.[2]

The question of the effect of a foreign conviction upon the admissibility of a witness will be discussed under its appropriate head.[3]

### 4. *Distinctions of Creed or Caste.*

§ 109. So far as concerns England and the United States, this question does not admit of discussion. No foreign distinctions, arising from either creed or caste, are viewed, in either of these countries, as having any extra-territorial force.[4] On the continent of Europe the same rule

Nor distinctions of creed or caste.

Com. b. ii. c. 15. The idea is local. And so in Shakespeare:—

"Was not thy father, Richard, Earl of Cambridge,
For treason executed in our late king's days?
And by his treason stand'st not thou attainted,
Corrupted and exempt from ancient gentry?"
Part I. Hen. VI. act vi. sc. 4.

Of a similar character is the civil death of the French and Russian codes. See supra, § 107. A person to whom such disability has attached at his domicil is relieved from this disability when he places himself under another sovereignty. Wächter, vol. ii. p. 172; Bar, § 51; *contra*, Schäffner, § 35. And the reason is, (1.) that these are penal laws, which foreign countries are not called upon to execute; and, (2.) that in point of fact the disabilities so incurred are merely special and temporary, being the subjects of constant relief by executive clemency, and hence rather suspend than destroy capacity. See, as affirming the principle in the text, Ogden *v.* Folliott, 3 T. R. 733; Folliott *v.* Ogden, 1 H. Bl. 135; Wolff *v.* Oxholm, 6 M. & S. 92; Lynch *v.* Gov. of Paraguay, L. R. 2 P. & M. 268; Com. *v.* Green, 17 Mass. 540.

[1] § 92.

[2] Supra, § 4.

[3] See fully Whart. Crim. Ev. § 363, note.

[4] Story, §§ 91–93. Supra, §§ 98–103.



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is now universally applied to incapacities on account of creed.[1] So far as concerns the privileges of nobility, however, very minute distinctions are made by the older jurists. It is enough now to say that, in a country which recognizes the nobility as a distinct caste, the privileges of this caste will be at least tacitly assigned to foreign nobles.[2]

### 5. *Incapacity as to Negotiable Paper.*

Artificial limitations on negotiable paper do not follow the person.

§ 110. The right to make negotiable paper has been subject, in Germany, to various limitations. In some states it has been viewed as a prerogative, to be limited to certain favored classes,[3] in the same way as in England and the United States the issue of bank notes is limited to certain chartered institutions. In other states, whole classes, such as farmers, nobles, traders below a certain limit, are prohibited from the exercise of this function. Were this to be regarded, as it is sometimes claimed to be, as a protective measure, it might be subject, on the principle above stated, to

[1] Bar, § 50; Savigny, pp. 36, 160. As to disabilities attached to ecclesiastics, see supra, § 107.

[2] Thöl, § 78; J. Voet, 1, 5, § 3: "*A l'egard des étrangers de race leur noblesse est un droit de sang qui les suit partout.*" Duplessis, ii. p. 456; Boullenois, i. p. 67; Bouhier, ch. 24, No. 134. The subdistinction between the "Erbadel" (nobles by birth) and the "Briefadel" (nobles by creation), momentous as it is in German social life, is now generally agreed to be out of the range of judicial cognizance.

[3] According to the Prussian law, for instance, which was in force down to 1849, the right to enter into such contracts was confined to (*a.*) *Rittergut besitzer* (owners of manorial estates); (*b.*) *Domänenpächter* (lessees of demesne lands); (*c.*) licensed merchants or traders; and (*d.*) those having granted to them by their personal judge the special right to make such paper. All others, embracing the vast majority of the population, were prohibited from making such contracts. It is true that by the *Wechselordnung* of February 1, 1849 (Preussische Gesetzsammlung 1849, p. 51), these prohibitions were removed by a general legislative act. Traces of them, however, based on the principle that the making of commercial paper is too powerful an engine to place in any but intelligent and experienced hands, still linger in the jurisprudence of other lands; and the question, therefore, may still emerge, how far a person, who by the law of his domicil is thus restricted, is capable of binding himself in those countries where such restrictions do not exist; and how far, on the other hand, a person, who by his domicil is free in this respect, is restricted in countries where these limitations are in force. An article on the capacity of women in Germany to bind themselves by commercial paper will be found in the Revue de droit int. for 1879, p. 147.



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the law of domicil, and the restriction might follow the person. But it can hardly be regarded as protective. In the first place, it bears on its face the mark of the old mediæval system of guilds, which are confessedly institutions of local policy, and have no extra-territorial effect. In the second place, the parties thus restricted are left at liberty to embarrass their estates by business expedients equally hazardous; and they cannot be considered, therefore, in any sense, as the wards of the local law. And thirdly, no persons are to be considered as, by the law of nations, subject to tutelage, except those who bear on their face notice sufficient to put persons dealing with them on inquiry, which is not the case with the persons in question. Hence these restrictions do not bind domiciled subjects of such laws out of their home territory. In this conclusion, though not in this course of reasoning, coincide the great body of modern European jurists.[1] Savigny, on the other hand, lends his great name to the opposite view. He declares that, by the common law of Europe, the capacity of the maker of such paper is to be determined by the place of his domicil, no matter what may be the territory in which he may contract. He urges that though difficulties may spring up from this view, these difficulties are more apparent than real, for the reason that law is only meant for the provident; that no provident business man buys or indorses paper without first acquainting himself with the responsibility of the leading names attached to it; and that it is better for business in general that such caution should be required and stimulated by the law. But, as will be in a moment seen, this view is in practice abandoned. Not merely are these restrictions no longer recognized by the great commercial powers of Christendom, but they would be held, where they are still retained by minor states, as of no extra-territorial force.[2]

§ 111. A distinction is made by the same high authority between a positive prohibition by a particular country of all forms of commercial paper, and a limitation by a particular country of the right to execute such paper to particular persons, as was for-

[1] Massé, No. 64; Pardessus, No. 1483; Oppenheimer, p. 404; Bar, § 55, p. 182.

[2] See Dr. Endemann's excellent treatise on Das Wechselrecht, in Holtzendorff's Encyclopädie, Leipzic, 1870.



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merly the case in Prussia. In the first country, — that in which all commercial paper whatsoever is prohibited, — it is maintained that no action whatever against any one lies on such paper, because this is a matter of procedure in which the law of the forum controls. This is not because the liability of the party is extinguished, but because, in that particular locality, it cannot be enforced. In the second case, however, — that in which the law restricts the right to draw bills to certain parties, — persons who, in their own domicil are entitled to draw bills, may be sued on such bills in the country where the restriction exists, for in such cases, as has been seen, the law of the domicil obtains.[1] But, as has been stated, these questions have been put to rest, so far as concerns Germany, by the *Allgemeine Deutsche Wechselordnung* (General Law of Negotiable Paper), now in force in all the German states. This closes, in fact, the claims of such restrictions even to any international recognition. "It would be intolerable," very justly speaks Bar,[2] "if a person residing in a land where no such restrictions are known were permitted to escape liability on bills drawn by him by appealing to restrictions of this class in his domicil." Such would unquestionably be the view of English or American courts, should they be called upon to adjudicate this point.[3]

*Lex fori* may in such cases prevail, but not to enforce foreign restriction.

### 6. *Infancy.*

§ 112. On the principles already stated, an infant, as an infant, is entitled to the protection, in a foreign land, of his domiciliary law. Two reasons combine to require this. In the first place, as a child, he is the ward of Christendom. On his face he shows this and makes this claim. In the second place, he is a traveller. If he be with his guardians, it is a gross infraction of natural law to deal with him without their privity and consent. If separated from them, the proper office of humanity is to return him to their care, or, at all events, to obtain for him the protection of the proper local court. His age is notice to all parties that the

Guardianship of infants determined primarily by their personal law.

[1] Savigny, viii. p. 149.

[2] § 55, p. 183.

[3] The general law as to commercial paper will be considered under a future head, §§ 447–452. See, also, Goldschmidt, Handbuch des Handelrechts, Erlangen, 1864, p. 454.



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country of his domicil will only hold him or his estate responsible so far as its own laws permit; and as he is to return to that country, to its laws the question of his responsibility is to be remanded. Hence it is that many eminent jurists have agreed, though for various reasons, in holding that the *status* of infants is to be determined by the law of their domicil.[1] Indeed, in respect to infancy by natural law, the question does not admit of doubt, though it is different, as we will presently see, when infancy approaches that period as to which particular countries, following climate or tradition, have attached various bounds. But so far as concerns persons incapable of self-government, whatever may be the cause, our courts, in appointing a local guardian, will have regard to the action of the *judex domicilii*.[2]

§ 113. We must, however, remember, that minority and infancy are by no means convertible, and that the period at which a state fixes the majority of its subjects is determined largely by national policy. An over-populated state, where it is not desirable to increase the number of persons in business life, for whose distinctive industries long apprenticeships are desirable, whose climate and traditions do not stimulate early development, naturally fixes majority at a more advanced period of life than a state whose soil and industries call for large additions of young, active, and adventurous laborers, and whose climate and traditions lead to the assumption of responsibility at an early age.[3] Hence we can well understand how a state of the first class should say:

The term of minority is a matter of distinctive national policy.

[1] Molinæus, in L. i. c. de S. Trin.; Huber, § 12; Rodenburg, ii. 1, §§ 1–2; Bouhier, ch. 25, No. 1; Boullenois, i. pp. 53, 54; Merlin, Rép. Majorité, § 5; Wheaton, i. p. 111; Thöl, §§ 81, 87; Schäffner, pp. 47, 48; Savigny, pp. 134, 135: Fœlix, i. No. 33; Massé, ii. p. 84; Story, § 46.

[2] Infra, § 259.

[3] Twenty-one years is the period of majority in France (art. 488), in Italy (art. 323), in Bavaria (statute of Oct. 26, 1813), in Russia (art. 169); twenty-two in Hesse (statute of Sept. 13, 1831); twenty-three in Holland (art. 385); twenty-four in Austria (art. 21), and Prussia (i. (1) § 26); twenty-five in Würtemberg (stat. of May 21, 1828), in Hanover (stat. of Ap. 14, 1815, § 24), in Denmark (1, 3, tit. 17), in Spain (Sala, liv. tit. 8), in Portugal, Mexico, and Norway (Fiore, Op. cit. § 173).

In the United States, majority, for civil purposes, is determined by state law. For men the period fixed by all the states is twenty-one years, and in most states the same limit applies to women. In some states, however, the period for women is reduced to eighteen years. 8 Op. Atty. Gen. 65; Lawrence Com. sur. Wheat. iii. 195.



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"Twenty-five years is the period of majority that our national policy requires; you cannot subvert this policy by coming to us either singly or in crowds and undertaking duties and exercising privileges we do not hold you competent to undertake and exercise." And a state of the second class, fixing majority at twenty-one, may, on the same reasoning, properly say: "If you come here to do business, you must do so subject to the responsibilities which our distinctive policy assigns to persons of your age."[1] The conclusion is that laws establishing the term of majority are laws of national policy which each state imposes on its residents, no matter what may be their allegiance or their domicil. It is true that the enthusiastic advocates of the ubiquity of national *status* insist that one who is either a major or a minor by his domicil must be regarded as a major or minor throughout the civilized world.[2] Yet, as we have seen, these are the speculative views of theorists, not the practical conclusions of the courts.[3] In France, for instance, where we have been told by writers of high standing that foreign minority is to be regarded as ubiquitous,[4] it is now settled that the courts will not recognize the incapacity of foreign minority in cases where the French party negotiating with the foreigner was without fault in the transaction, and was led by the latter's conduct to believe him of full age.[5] And it was expressly ruled by the Court of Cassation, in 1861, that a foreign minor cannot set up his minority in defence to a claim contracted with him in good faith by a party in France who believed him to be of full age, he having reached the French term of majority.[6] It has been further ruled that, though a foreign minor may set up his minority as a defence to a suit brought against him on bills accepted by him in France, in cases in which the party suing was in a position to take notice of such minority, it is otherwise as to persons who had no such opportunity, — *e. g.* his remote indorsees on negotiable paper.[7] It is true that

[1] See supra, § 101.

[2] See Fiore, Op. cit. § 173. Supra, § 101; 6 South. Law Rev. 694.

[3] Supra, § 104 *a*.

[4] See Du Chassat, Traité des Statuts, No. 237; Valette sur Proudhon, Etat des personnes, i. p. 85.

[5] Jour. du droit int. privé, 1878, p. 502; Fiore, Droit int. privé, trad. Pradier-Fodéré, Nos. 167 *et seq.* See, also, supra, § 104 *a*, n.

[6] Fiore, Op. cit. p. 661.

[7] See decisions to this effect in Jour. du droit int. privé, 1879, p. 488.



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these rulings have been severely censured by the exponents of the theory of the ubiquity of national *status*,[1] but they exhibit what is unquestionably settled French law. And this law, as we have seen, is more consistent with high civilization, with business security, and with settled liberty, than is that of the ubiquity of national disabilities.[2]

Foreign statutes not permitted to override such policy.

§ 114. Here it is that we encounter a decision of the Supreme Court of Louisiana, which has met with a degree of celebrity allotted to few other American adjudications. "The writers on this subject," said the court, "agree that the laws or statutes which regulate minority and majority, and those which fix the state or 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, perhaps, be made to the rule just stated. And it may be, and, we believe, would be true, that a contract made here between the two periods already mentioned would bind him. But, reverse the facts of the 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 in which 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 to protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge? Most assuredly it would not."[3]

To this opinion Mr. Livermore takes grave exception,[4] in which he is followed by Judge Story,[5] who declares that the difficulty is in seeing "how a court, without any such positive (enabling) legislation, could arrive at both conclusions," which he holds "to stand upon mere arbitrary legislation, and positive

[1] See Laurent, Droit civil int. ii. 535.

[2] See supra, §§ 7, 8, 101, 104 *et seq.*

[3] Saul *v.* His Creditors, 17 Martin R. 596. The same point was made in Baldwin *v.* Gray, 16 Mart. 192.

[4] Dissert. § 17.

[5] § 76.



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law, and not upon principle." Sir R. Phillimore is still more sweeping in his denunciation.[1] The case he calls "celebrated and leading," but the conclusion he pronounces to be "monstrous." On the other hand, this same principle, namely, that when there are two conflicting domicils as to capacity, that will be selected which most favors a contract entered into by the person whose capacity is disputed, has been incorporated into the Prussian Code,[2] and, on an analogous question, has been lately sustained in England.[3] Bar[4] gives to this conclusion his entire approval. Independently of the ground just stated, that the courts will sustain that construction which most favors capacity, he insists that foreigners, in such cases of conflict, when competent at the place of transaction, are to be regarded by all courts, except those of their domicil and of countries with similar codes, as competent to do the particular act. For, as he argues, it is not to be supposed that a government would exercise a greater tenderness over foreigners than over its own subjects; and if it presumes its subjects to be capable of being relieved from the incapacities of minority at a particular age, it will not undertake to intrude this shelter upon foreigners after such a period. At the same time following the line of the Supreme Court of Louisiana, he maintains that a foreign *major* does not lose his majority on visiting a country in which by the local law he is still a minor. "Indeed," as he remarks, "this would not be possible without appointing a special guardian for such adult;" and he adds that the position is one universally denounced. In other words, he who is capable of business in his domicil is capable of it everywhere. And such is the drift of the argument of Reinhold Schmid, the learned professor of law at Berne, in his recent interesting tract on this topic.[5] "So far as concerns foreigners," he declares, "whose business capacity comes into question before our courts, on the one side, there is no reason to give them a wider protection than

[1] IV. p. 252.

[2] A. L. R. § 35. See Savigny, p. 145. Infra, § 429.

[3] An English legacy to an infant domiciled abroad may be paid when the infant comes of age, either by the law of England, or the law of domicil, whichever occurs first. Hellman, in re, L. R. 2 Eq. 363.

[4] § 45, p. 156, note 5.

[5] Die Herrschaft der Gesetze, etc., p. 43, Jena, 1863.



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their home laws secure; and, on the other side, it would be repugnant to equity if, by extending to them their foreign protection, they should be more favored than our own citizens. This leads us to the conclusions: (*a.*) that a foreigner who is capable of business at his domicil must be recognized as so capable by our laws, even though if domiciled among us he would be incapable; and (*b.*) foreigners who are incapable by their own laws must be treated by us as capable, when our laws so regard them." The first position, he goes on to say, is generally recognized in all cases where capacity is dependent on age. The second, he admits, is contested, but he proceeds to ask whether, if the limitations of business capacity are to be viewed as a favor to the persons so guarded, it is to be presumed that our law should have a tenderer regard for foreigners, in this respect, than for ourselves. And he points out the disturbance to trade, and the medley which would thus be introduced into jurisprudence, if this sentimental enthusiasm for nationality be yielded to.[1] And whatever may be the strength of the position that the law most favoring local business capacity will be preferred, there can be no question that neither in England nor in the United States will home statutes, based, as that of minority is, on national policy, be subordinated to foreign statutes based on an antagonistic policy.[2] Hence we have several emphatic rulings to the effect that when the law says that twenty-one years shall be

[1] The distinction in the text is further extended by Bar, in a review of the first edition of this work. No state, he argues, can impose the disabilities of minority upon a person who is not subject to such disabilities by the laws of his home. It is otherwise, however, when by the laws of a place where a business transaction is performed a party is of full age, though a minor at his home. It is true, adds this able commentator, that there may be a conflict in such cases, since the *judex domicilii* would probably hold that the person in question, if incapable of business at home, was incapable abroad, while the *judex loci actus* would decide the other way. But this very conflict would subserve material justice. The plaintiff would probably select the state in which the defendant had property by which the claim might be satisfied. If this be the state of the litigated transaction, the defendant, who placed it there, could not complain. If, however, the defendant is sued at his own home, a person pursuing him in such home, having trusted him on account of property possessed by him in such home, is open to criticism if he did not, at the time of the transaction, inquire as to the personal relations of the person thus trusted.

[2] See supra, §§ 101 *et seq.*, 113. See 6 South. Law Rev. (Jan. 1881) 696.



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the period of majority in a particular state, all men of twenty-one resident in such state shall be regarded as no longer minors.[1] On the other hand, a state which fixes upon a specific age as essential to business capacity will not permit this limitation to be annulled by exceptional foreign legislation by which a particular individual under such age has such capacity specially and arbitrarily assigned to him.[2]

Injustice worked by importation of foreign artificial incapacity.

§ 115. To treat a foreigner of twenty-one, when in the United States, as a minor, because he is a minor in his own land, would not only be a fraud on all who deal with him in ignorance of the incapacity, but would inflict a cruel disability on himself. He would be incapable of drawing a valid bill, or of negotiating a letter of

[1] In Male *v.* Roberts, 3 Esp. 163, it was held by Lord Eldon that the capacity of an infant to contract for certain debts must be determined by the *lex loci contractus*.

Mr. Dicey (Domicil, 178) lays down the following rule: "D., a man of twenty-two, is domiciled in a country where majority is fixed at twenty-five. He cannot, it would seem, on the ground of infancy, escape liability in England for a debt contracted in England."

As sustaining this position may be further cited Thompson *v.* Ketcham, 8 Johns. 189; Bank of La. *v.* Williams, 46 Miss. 624.

A foreigner doing business in a country where he is a major may become a bankrupt in such country, his personal property there situate passing to his assignee, though he is a minor by the law of his domicil. Stephens *v.* McFarlane, 8 Ir. Eq. 444.

Mr. Foote (Priv. Int. Jur. p. 261), while affirming that a foreigner, a minor by the law of his domicil, doing business in England, where he is of full age, will be regarded in England as *capax negotii*, supposes the case of "two Englishmen transiently present in a country whose law regards them as infants, and there entering into a contract in ignorance or in contempt of the provisions of the *lex loci*." In such case, he says, it is "difficult to think that it (a plea of infancy) would be allowed to prevail."

[2] To this effect is the ruling of the Supreme Court of Missouri, in the case of Gilbreath *v.* Bunce, 65 Mo. 349. In this case a probate court of Arkansas, acting under the authority of a statute of that state, ordered that the disability of nonage of G. be removed, "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the State of Missouri, in the hands of his curator or any other person, and to execute releases therefor in the same manner as if he was of full age." In a suit brought by G., in Missouri, against his curator, Sherwood, C. J., giving the opinion of the court, said: —

"The legislature of Arkansas did not possess the power to pass a law to override and control our laws; no more could it authorize the Probate Court of Washington County to do this. Smith *v.* McCutchen, 38 Mo. 415; Story Confl. Laws, §§ 539, 18, 103. Our own statutes (1 W. S. p. 672, § 1, and p. 681, § 48) provide



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credit, or of entering into the simplest transaction in the way of trade. His very attempting to do so would be a fraud for which he could be criminally punished. Certainly statutes of infancy were never meant to bring such consequences as these. When they conflict, the proper standard is that presented by the distinctive policy of the state in which the litigated contract had its seat.[1] And, in all cases, such statutes should cease to bind internationally when they cease to be protective.[2]

§ 116. Remembering, once more, that infancy is to be distinguished from minority in this, that the first is a natural inca-

when infants shall attain their majority, and they must be our guides, and not the laws which emanate from a foreign jurisdiction."

[1] Supra, § 113.

[2] The following is from Parsons on Contracts, 5th ed. vol. 3, p. 575: "If a woman, at the age of nineteen, whose domicil was in Massachusetts, having gone into Vermont (where women are so far of age at eighteen that they may bind themselves at that age for things not necessary), there bought non-necessaries, and gave her note for the price, and while she was there the note was put in suit against her, we do not think she could interpose the law of Massachusetts in her defence. And if a woman of that age, whose domicil was in Vermont, came into Massachusetts, and there bought non-necessaries, and was sued for the price, we think she could interpose the defence of infancy." Certainly if the Massachusetts woman of nineteen is permitted by the law of her domicil to do business in Vermont without a guardian, and if there is nothing in her appearance or otherwise to notify the Vermont vendors that she is irresponsible, it would be a hard measure, and would be at variance with the views expressed in the text, to declare that her Massachusetts infancy is a defence to her Vermont obligations. But, on the other hand, to sustain the plea of infancy, in the second case, would be no particular kindness to the Vermont woman under discussion. In the first place, it would expose her to a criminal charge of false pretences in Massachusetts, for assuming a local *status* she did not possess. In the second place, she would be still open to a suit for the same debt in Vermont, where it is clear her infancy could not be pleaded.

A thoughtful contemporaneous Swiss writer (Brocher, Droit int. privé, p. 93) solves the question by the test of the party's intention. It is not probable a party who is of full age would remit himself back to infancy. We think that in cases of doubt the ancient rule should be maintained. That rule sustains the acquisition of rights; it does not suppose them to be renounced. A preëxisting majority will be maintained in the new country.

According to Fiore, the extent and duration of paternal power depends on the national law of the family (Fiore, Op. cit. § 156); and this view is shared by other jurists of the same school, and is sanctioned by the French, Italian, and Belgian codes. This, however, even supposing personal law be the criterion, does not hold in those states in which domicil determines personal law. Supra, §§ 7, 8.



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pacity, patent to all men, while the second is an artificial incapacity, fixed arbitrarily by each state in accordance with its particular policy, we must also hold that, while each state will recognize the natural guardianship of foreign parent over infant child, and, to a certain extent, of foreign guardian over infant ward, it will not invest such foreign parent or guardian with powers which the home law does not grant to home parents or guardians.[1] "If a Roman father," argues Judge Ware on this point,[2] "or a father from any country which had adopted the Roman law of paternal power, were travelling in this country with a minor child, *we should acknowledge the relation of father and child, but we should admit, I presume, as a general rule, the exercise of paternal power no further than as it is authorized by our own law.*"[3] The same view is taken by eminent German authorities, and also by the Civil Senat at Celle, in a case decided on September 21, 1846,[4] who maintain, generally, that even where the fact of infancy is determined by the law of domicil, the way in which it may be taken advantage of is to be prescribed by the *lex loci actus*.[5] This Savigny stoutly assails, but on grounds principally derived from the homogeneousness of the institutions of countries subject to the modern Roman law.[6] But when the question relates to systems so distinct as those of the English common law and the modern Roman law, the attempt

Foreign parents or guardians not permitted to exercise powers not granted to home parent or guardian.

[1] Infra, §§ 253, 259.

This is conceded in France, where it is held that the question of paternal power depends upon the nationality of the parties only so far as is consistent with French public order. Jour. du droit int. privé, 1874, p. 32.

[2] Polydore *v.* Prince, 1 Ware R. 413.

[3] S. P., Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 114. Infra, § 253. See cases cited by C. J. Gray, Milliken *v.* Pratt, supra, § 101. "The authority so recognized," that of a father, "is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than in this country, is it supposed that a father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of a parent of a foreign child living in England by the laws of England, and not by the law of the country to which the child belongs." Johnstone *v.* Beattie, 10 Cl. & F. 114. See infra, § 253.

[4] Bar, § 43, note 11, *a*; Wächter, ii. pp. 163, 175; Mittermaier, Deut. R. § 301. See infra, § 253.

[5] § 362.

[6] See, also, Bar, § 43.



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to interchange remedies must be abandoned. No English court, for instance, could lend to infancy the remedy of *In integrum restitutio*, by which spoliations of an infant's property are, by the Roman law, so effectively redressed. Yet, on the other hand, when the institutions are analogous, the foreign practice may be applied. Thus a foreign father's domicil, as will be shown,[1] determines the interest he is to have in his child's property in domestic funds.[2] This distinction is also recognized by Bar.[3]

§ 117. How infancy, as a natural *status*, is to be proved, is discussed in another work.[4] It is sufficient now to say that while the decree of a foreign court may be regarded as establishing the minority in the country of such court, of a subject of such country, it does not, as we will hereafter see, invest, by its own action, the guardian of such minor, when abroad, with the powers over the ward which the guardian may have in the jurisdiction in which he is appointed.[5] "It is now settled in England and in the United States that the appointment of a guardian of an infant or lunatic in one state or country gives him no authority and has no effect in another, except so far as it may influence the courts of the latter, in the exercise of their independent discretion, to appoint the same person guardian, or to decree the custody of the ward to him."[6]

Foreign guardian not permitted to act except when authorized by home court.

### 7. *Marriage.*

§ 118. So far as concerns the fact of marriage, a person pronounced by his personal law to be married is to be regarded everywhere as married, subject to the general

Married woman incompetent

[1] Infra, § 255.

[2] Gambier *v.* Gambier, 7 Sim. 263. Infra, §§ 260 *et seq.*

[3] §§ 43, 44. It should be remembered, however, that by the weight of European authority the distinction between the *status* and its legal incidents is not admitted. Argentræus, No. 47, 48, 49; Rodenburg, t. 1, c. 3, §§ 4–10; Boullenois, t. 1, pp. 145–198; Huber, § 12; Fœlix, p. 126; Savigny, Röm. Recht, viii. § 362; Brocher, pp. 88, 89.

[4] Whart. on Ev. § 347.

[5] Infra, §§ 259, 260, 263 *et seq.*; Johnstone *v.* Beattie, 10 Cl. & F. 42; Stuart *v.* Bute, 9 H. L. C. 440; Nugent *v.* Vetzera, L. R. 2 Eq. 704; Woodworth *v.* Spring, 4 Allen, 321. See Gorrison's Succession, 15 La. An. 27.

[6] Gray, C. J., Milliken *v.* Pratt, 125 Mass. 374, quoted supra, § 101.

The injustice worked by conceding extra-territoriality to foreign guardianship, will be seen infra, § 122.



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to contract by her personal law may make a valid contract in a state imposing no such disability.

rule, to be hereafter more fully discussed, that the law of the place of solemnization determines as to the forms of a marriage.[1] It is, however, a much controverted question whether the disabilities imposed by the English common law on married women adhere to women subject to that law in states where no such disabilities are imposed. On the one side it is argued that such disabilities are the incidents of Christian civilization, and that he who deals with a married woman does so at his own risk.[2]

[1] Infra, §§ 169 *et seq.*

[2] The argument is thus stated in the first edition of this work: —

Throughout Christendom, the position of a married woman is one of business dependence. See Dr. Behrend, "Das Eherecht," in Holtzendorff's Encyclopædie, Leipzig, 1870, p. 352. One cause of this may be found in the natural division of labor which arises when two persons have charge of a common interest; and when, with husband and wife, such a division is made, labor inside of the home, as a rule, is that most suited to the wife, labor outside of the home to the husband. With this harmonizes the Christian principle of the subjection of the wife to the husband; a principle wrought into the marriage solemnities of almost every Christian communion. Nor is the assertion of this principle in any way derogatory to the woman. In no countries have a woman's personal dignity and honor been held so high as in those in which her business irresponsibility, when married, has been most strictly guarded. To herself, the maintenance of this principle is, upon the whole, a great benefit. In the great majority of cases, the law, throwing on the husband the business support of the family, braces him to the full exertion of his robuster frame, and his more hardy courage. In those savage nations in which this idea does not obtain, it is the husband that is the home idler, while the wife, with physical powers unequal to the task, is the field drudge; and this exists in Christian countries just in proportion as the husband's sole responsibility for family debt is weakened. Even should the wife have separate property of her own, there are reasons common to all nations why control over such property should not be granted to her without check. Experience shows that there are few cases in which a woman, when she has unrestrained dominion over her private estate, can withstand her husband's influence; and the boon of capacity, in this respect, therefore, is often a disastrous gift. The laws, universal in Christendom, which, in greater or less degree, attach business incapacity to coverture, have, therefore, not merely unbroken international consent, but strong economical as well as religious sanction; and whoever deals with a married woman, no matter what may be her domicil, has enough notice in the fact of her marriage, to put him on the inquiry whether she has her husband or guardian's assent to her engagements, and to what extent, by the law of her domicil, she can be made individually responsible. If he chooses to trust her, without such inquiry or sanction, it is at his own risk. In other words, the law of disability, in such case, is a protective law, and as such is inter-



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On the other hand it is insisted that on the continent of Europe these restrictions have never been held to impose absolute business incapacity; that the common law of England recognizes as valid local customs by which married women can do business on their own account; that in England statutes have been adopted greatly reducing these restrictions; that similar statutes have been adopted in some of our own states, while in others of our states these restrictions have been entirely removed. It has been further urged that coverture, unlike infancy, does not bear on its face notice of disability; that in dealing with a woman we do not necessarily know whether she is or is not married; that even if we know her to be married, there may be nothing to tell us that she belongs to a foreign state which imposes restrictions more cogent than those of our own state, in which the transaction takes place; that even if we know this, we are not expected to know the law of such foreign state. It has been consequently held, in this country, that a woman, incapable by her personal law of contracting, may bind herself by a contract which is subject to the law of a state in which no such restriction exists.[1]

nationally binding. Nor can wrong be inflicted by this. If a married woman retains her married address, this is notice to persons dealing with her to look to her husband. If she assumes the style of a single woman, and thus obtains goods, she exposes herself to a criminal prosecution.

[1] Halley *v.* Ball, 66 Ill. 250; Musson *v.* Trigg, 51 Miss. 172. An article by Mr. Westlake, on the English Married Woman's Act, will be found in the Revue de droit int. 1871, p. 195.

In Pearl *v.* Hansborough, 9 Humph. 53, it was held that where a married woman was incompetent to contract by the law of the place of contract, the contract would be held invalid, though she could have legally made it in her domicil.

In Bell *v.* Packard, 69 Me. 105, the plaintiff, a resident of Skowhegan, Me., holding an overdue note against Alvin Packard, the husband of the defendant, Harriet A. Packard, then a domiciled resident of Cambridge, Mass., wrote the note in suit at Skowhegan, dating the same at Skowhegan, and inclosed the same in a letter directed to said Alvin Packard at Cambridge, and there received by him, agreeing in this letter to surrender the old note upon the delivery of the new one signed by him with a good surety. The new note was duly signed by Alvin Packard and the defendant, at Cambridge, and there mailed to and was received by the plaintiff at Skowhegan. The plaintiff thereupon mailed, at Skowhegan, the old note to Alvin Packard, at Cambridge, who duly received the same. The defendant signed the note as surety for Alvin Packard, her husband, without any consideration received by her, or any benefit



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§ 119. The advocates of the ubiquitous operation of personal law, however, reject the conclusion just stated.[1] According to Fiore,[2] the national law of the parties is to determine the civil effects of the marriage, the exercise of marital power, and the reciprocal rights and duties of the parties and their children. Nevertheless, he adds, all laws intended to further morality and family discipline, and to determine the exercise of domestic power, are as applicable to resident foreigners as to subjects. A French decision is quoted by Merlin,[3] where it was held that certain French customs, giving

This conclusion denied by advocates of ubiquity of personal law.

to her separate estate. At the time the note was signed, a married woman could not bind herself in such a way in Massachusetts, but she could in Maine. The defendant, Mrs. Packard, being sued in Maine, was held liable in that state.

Virgin, J., in delivering the opinion of the court, said: "Upon these facts the principal question for determination is, Where was the note in suit made or to be paid? For although the personal incompetency of the defendant to contract as surety for her husband in Massachusetts will, so far as all such contracts made there are concerned, follow her everywhere, still it will not be regarded as to such contracts made or to be performed here, where no such disqualification is acknowledged. . . . . But if the note was made in Massachusetts, and intended to be payable there, then it was illegal and void, and an intended fraud by the makers, since they must be presumed to have known the law of their domicil; whereas, if made or intended to be paid in this state, it would be legal and valid. It should, therefore, in the absence of any legal principle forbidding it, be considered as intended by the parties to have been made with reference to the law of the place where legal."

In Milliken *v.* Pratt, 125 Mass. 374, quoted at large, supra, § 101, it was held that a contract made in another state (Maine) by a married woman residing in Massachusetts, which contract a married woman is allowed by the laws of Maine to make, but is not, under the laws of Massachusetts, capable of making, will sustain an action against her in the courts of Massachusetts, although the contract was made by letter sent from her in Massachusetts to the other party in Maine. But where a state prohibits a suit against a married woman, she cannot be sued in such state. Infra, § 121.

A married woman, domiciled in France, has been held in England capable of making a contract in England, of which she was incapable by the English law, but capable by the French law (Guépratte *v.* Young, 4 De G. & S. 217); but this may be supported on the grounds: (1.) that the contract was to be performed in France; and (2.) that in cases of conflict, the law most favorable to capacity will be preferred.

An exposition of the various legislations as to the capacity of married women will be found in Lawrence Com. sur Wheat. iii. 449.

[1] Boullenois, i. pp. 437–439; Fœlix, i. No. 89, p. 188; Savigny, pp. 137, 138; Pothier, Traité des Oblig. par. 2, c. vi. § 3; Phil. iv. 318; Story, § 136.

[2] Op. cit. §§ 105 *et seq.*

[3] Rép. Vo. Autorisation Maritale.



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the wife power to contract only with her husband's consent, when in force in the wife's domicil, followed her wherever she goes. To the same effect is a decision of the Supreme Court of New Hampshire, that the capacity of a married woman to conduct business in a foreign state is determined by the law of her domicil, in all cases in which the contract is subject to the law of that domicil.[1] If entitled, on this ground, to do business at her residence, she is on the same reasoning entitled to sue.[2]

Personal marital power not ubiquitous.

§ 120. Whatever we hold as to the last point, it must be agreed that marital power is a matter of domestic policy, to be determined by the *lex loci actus*. "If a Turkish or Hindoo husband," said Judge Ware, in a case already noticed, "were travelling in this country with his wife, or were temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal preëminence of the husband as to acts done here would be admitted only to the extent to which the marital rights are recognized by our laws, and not as they are recognized by the law of his domicil."[3] There is, it is true, a *dictum* of Chief Justice Ruffin, of North Carolina, "that if a Turk with two wives should come here, we would administer to them the justice due to the relations contracted by them at home;"[4] but the "justice due" in such a case can only be that which is consistent with the territorial jurisprudence of the state into which the two wives are brought. The true principle, as will hereafter be seen more fully, is that a person domiciled in a country where polygamy is allowed cannot import with him this institution into a Christian land.[5] Marriage, as an exclusive union for life,

[1] Hill *v.* Pine Bank, 45 N. H. 300.

[2] Cosio *v.* De Bernales, 1 C. & P. 266; Ry. & Mood. 102.

It was held by the Tribunal de la Seine, in 1878 (Meux *v.* Evick), that a married woman, when a foreigner, retains her national personal *status*, and is not affected by the French law relative to marital authorization, and that an English woman whose husband has been found by an inquisition insane, and who has been allowed an income for her own proper use, could be treated, in conformity with English law, as relieved from marital authority, and could sue and be sued as to property thus secured to her. Jour. du droit int. privé, 1879, p. 62.

[3] Polydore *v.* Prince, 1 Ware R. 413. Infra, §§ 166, 167.

[4] Williams *v.* Oates, 5 Ired. 535.

[5] Savigny, §§ 349, 365. This was determined in Italy in the case of a member of the harem brought by the khedive of Egypt to Naples. Daily News, March 13, 1880; Jour. du droit int. privé, 1880, p. 338.



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is a cardinal institution of the state; and no body of men can be permitted to revolutionize it, on the plea of either creed or domiciliary rights.[1] And physical power given to a husband over a wife by his personal law will not, if conflicting with the policy of a state in which they are resident, be tolerated in the latter state.[2]

The *lex fori*, when the defendant is duly served, has been held to supply the suitable remedy in an application for a restitution of conjugal rights;[3] though in such case it is proper on principle that the law of domicil should determine.[4]

§ 121. The mode in which a married woman is to be sued is to be determined by the *lex fori*.[5] There is high authority for

[1] See infra, §§ 128–132.

[2] Whart. Crim. Law, 8th ed. § 1563. Supra, § 116.

[3] Herbert *v.* Herbert, 2 Hagg. Cons. 263.

[4] In England the jurisdiction over procedure to obtain restitution of conjugal rights is said by Westlake (1880 p. 78) to depend "on the same circumstances as its jurisdiction to grant a divorce." See as to test of residence, infra, § 166; and cases cited, § 120. Compare Yelverton *v.* Yelverton, 1 Sw. & T. 574; Firebrace *v.* Firebrace, L. R. 4 P. D. 63.

[5] In Hayden *v.* Stone, 13 R. I. 91, the defendant and his wife made and delivered their negotiable promissory note to the plaintiff. The note was made in Massachusetts where the parties resided, and was valid there. Suit on this note was brought in Rhode Island, the writ being served on the husband by attaching his interest in the realty of his wife, on the wife by attaching her realty, and on both by attaching the wife's share of an intestate estate in the hands of an administrator. Pending the suit the husband was adjudged a bankrupt, and subsequently died. It was ruled, that as in Rhode Island the husband must be made co-defendant with the wife, and there was in this case no service of the writ on the husband, the action was fatally defective. S. P., Bank of Louisiana *v.* Williams, 46 Miss. 618.

Hayden *v.* Stone is distinguishable from Milliken *v.* Pratt, 125 Mass. 374, cited supra, § 101, by the fact that in Massachusetts by a statute passed subsequently to the transaction (a statute, however, affecting the remedy), married women could be individually sued. In Hayden *v.* Stone, Judge Potter, giving the opinion, said: "As a general rule the validity of a contract is to be determined by the law of the place of contract. Story's Confl. of Laws, §§ 242, 280; Whart. Confl. of Laws, §§ 401, 419; Andrews *v.* Pond, 13 Pet. 65. So with the forms of execution and solemnization. Whart. Confl. of Laws, §§ 401, 606, 676. See, also, Savigny and Fœlix, quoted by Lawrence, Commentaires, tome iii. 265. But there is much contrariety of decision and many exceptions made by the cases, the courts generally trying to carry into effect the intention of the parties, and sometimes to protect their own citizens from imposition, especially in the case of married women and persons under age." "Every state has full control



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the position that the forms of contract a foreign married woman must use are to be determined by the *lex loci actus*,[1] though it would be better and safer for her to add to these the forms of her domicil.[2] Thus by the modern Roman law, a woman's contract of surety is not valid unless preceded by special instruction by a jurist as to the nature of the act; and when the suretyship is for her husband, this instruction must be in his absence, and in some cases must be by a judge.[3] There is much conflict of opinion among Roman jurists as to whether this provision is governed by the *lex domicilii* or the *lex loci actus*;[4] and in view of this it would be better, when the wife's domicil is in a country subject to this law, that she should observe it when contracting in foreign lands. The same view applies to American women travelling abroad, as to the restrictions applied by their American domiciliary law.[5]

Mode of suit determined by *lex fori*, forms of contract by *lex loci actus*, forms of conveyance by *lex rei sitae*.

As we shall hereafter see more fully, the law which regulates the assignment of movables is the *lex situs*.[6] Whether capacity

over property within it and over the process of its courts. It has the right to regulate the transfer of real property, stocks, and personal property within its limits; and it will not permit a foreign law to be intruded or to interfere with its own laws on those subjects. See Whart. Confl. of Laws, §§ 278, 297, 304, 334–5, 339, 353. And a contract valid by the laws of one state cannot be enforced in another, unless such a contract made between its own citizens could be enforced there; or, in other words, it depends on the *lex fori*. On any other doctrine we should have a confusion of laws in the community, some persons and acts being regulated by the local laws and some by the laws of foreign states; and we should be in the situation of some countries in the Middle Ages, where different nationalities had been intermingled by immigration, or oftener by conquest, each retaining its ancient laws." "It may further illustrate the case to inquire whether she, remaining married, could, either while resident abroad or on coming here, sue in this state. Evidently not except in the cases where our law allows it. She can have no greater right in this state than a married woman residing here, and our law has provided no remedies, nor mode of suing or being sued, for foreigners, different from those applicable to our own citizens in similar cases."

[1] Bar, § 53; Wächter, ii. p. 180. See Ilderton *v.* Ilderton, 2 H. Bl. 145. These points were decided in harmony with the text by the Cour Royale of Paris, March 15, 1831. Sirey, 33, i. p. 665.

[2] See infra, §§ 676–684.

[3] Puchta, Pandekten, § 407.

[4] See Bar, § 55, p. 180. Infra, §§ 676–684.

[5] See supra, § 119 *a*.

[6] Infra, §§ 297 *et seq.*



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to dispose, *inter vivos*, of movables depends upon the *lex situs*, has been the subject of much conflict of opinion. But there can be no question that the right to dispose of immovables is so conditioned.[1] The rule in respect to forms of contract will be hereafter discussed.[2]

As to conveyances capacity depends on *situs*.

### 8. *Lunatics and Spendthrifts.*

§ 122. Patent lunacy is a notice to all parties of irresponsibility; and hence those dealing with a foreign lunatic are bound to inquire whether by the law of his domicil he is responsible. At the same time, it is questionable how far, when the law of domicil permits a lunatic, subject to it, to travel without a curator in foreign lands, that law can be a defence in cases where persons trust such lunatic, he being apparently sane, and without a guardian to notify strangers of his irresponsibility. The same distinction applies to cases arising under a provision peculiar to the Roman law, by which a spendthrift may be judicially declared incapable of conducting business, and personally irresponsible for debts.[3] It is true that modern European jurists almost unanimously concur in the position that this disability is one which adheres to a person under this judicial restriction, wherever he may travel.[4] But to this is applicable with increased strength the observation made as to lunatics. A decree of lunacy, when entered by a foreign court, is from the nature of things open to impeachment for want of jurisdiction, for fraud, or for gross irregularity in the procedure.[5] A foreign guardian or tutor, also, can only exercise the power permitted to him by the court of the place where the alleged lunatic resides; nor does it make any difference that the lunacy proceedings were taken in a state in which the party was

Lunacy and spendthrift decrees not extra-territorially binding.

[1] Sell *v.* Miller, 11 Oh. St. 331; Frierson *v.* Williams, 57 Miss. 451.

In Louisiana, it is held that the capacity of a wife to take real estate by grant from her husband is to be determined by the law of their domicil. Kelly *v.* Davis, 28 La. An. 773. Infra, §§ 676 *et seq.*

[2] Infra, §§ 121, 670 *et seq.*

[3] See infra, § 269.

[4] Argent. No. 7; Burgundus, iii. 2; Rodenburg, ii. 1, § 4; P. Voet, iv. 3, No. 17; D'Aguesseau, Oeuvres, iv. p. 638; Massé, ii. p. 87; Fœlix, i. p. 188; Bar, § 54, p. 175.

[5] Whart. on Ev. §§ 403, 812, 1254; Houston, in re, 1 Russ. R. 312.



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at the time domiciled.[1] And a foreign decree of business incapacity, based on the assumption that the party is a "Verschwender," or spendthrift, is entitled to no extra-territorial effect.[2]

[1] Supra, § 117.

In Garnier, in re, L. R. 13 Eq. 532, an Englishman domiciled in France was decreed a lunatic by the proper French court. His French curator applied to the Court of Chancery to have paid him a fund in court to which the lunatic was entitled. The court held that only the dividends of the fund should be paid to the curator.

It has been held in England that the Scotch curator of D., a Scotch lunatic, can sue in England for money due to D., and give a good discharge for it. Scott *v.* Bentley, 1 K. & J. 281. "In Newton *v.* Manning, 1 Man. & G. 362," said Page Wood, V. C., "Lord Cottenham is reported to have said, that if a person invest himself abroad with full right to receive the property of a person found lunatic there, when he applies to the jurisdiction of this country, he may obtain the lunatic's property.

"As a party abroad can assign his rights, I do not see why a court of competent jurisdiction should not transfer them when he becomes a lunatic."

"This decision," says Mr. Dicey (Op. cit. p. 197), "may appear inconsistent with the general principle that a foreign curator has not, as such, authority in this country. His right to sue, and his want of authority as curator may, perhaps, be reconciled in the following manner: The *status* of a foreign curator is not recognized as giving him, from the mere fact of his being curator, control over a lunatic, or his property, in England. But the curator having, by his appointment in a foreign country, become, under the foreign law, the owner for certain purposes of the lunatic's property, may enforce his rights with respect to it in an English court, just as he might if he had purchased the property, or were an assignee in bankruptcy. The right is one, in fact, acquired by a transaction taking place wholly under the law of a foreign country, and, as such, enforcible here. Vanquelin *v.* Bouard, 15 C. B. N. S. 341.

"It must, however, be admitted that the right of the foreign curator to sue for debts due to the lunatic is not thoroughly well established, and, perhaps, not at bottom consistent with the theory that he has no authority in England. On the other hand, it must always be kept in mind that our courts have in recent times shown a disposition to deviate from this theory, and to recognize the authority of curators or guardians appointed under the law of a foreign country."

[2] A French subject who has been placed under a conseil de famille, a proceeding of the French law under which, in cases of profligacy, a conseil judiciare is appointed, without whose concurrence a profligate cannot plead in a suit, or alienate or incumber his property, is not incapacited from suing in an English court. Worms *v.* De Valdor, 41 L. T. N. S. 791.

A foreign decree divesting a particular subject of such state of business capacity will not be regarded as operative in France. In this case a ukase of the emperor of Russia, dated July 15, 1845, interdicted the Count Micasles Potocki from disposing of his property to the detriment of his wife and his eldest son. It was held by the Trib. Seine, 1re ch. May 7, 1873, that this decree would not be enforced in



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The same rule is applicable to foreign bankrupt decrees divesting the bankrupt of business capacity.[1]

France. Jour de droit int. privé, Jan. 1875, p. 20.

The following is an extract from a letter from Mr. Byers, U. S. consul at Zurich, Oct. 11, 1879, to Mr. Fish (Foreign Relations, 1879, p. 975):—

"The law permits the appointment of a guardian for adults by the local authorities in various cases, and especially in cases where the person has given signs of extravagance. I may add that the going to America is one of these extravagances. . . . .

"In short, under past rulings, a naturalized Swiss in America, who has inherited property in his native land, might almost give up all hopes of ever securing it, so many are the obstacles put in the way, principal of which are the informalities of his renunciation of citizenship, or rather the impossibility of obtaining acceptance of the renunciation in case the applicant is one of the hundreds of thousands who happen to have had a guardian.

"As a case in point, I inclose an extract from a letter written to me by the cantonal government, in the case of Jacob Strehler, in which the doctrine is repeated, that any Swiss naturalized in America, without his renunciation of citizenship being *accepted*, will be, should he happen to return here, *treated as a Swiss*.

"In Strehler's case, as in almost hundreds of others of which I know personally, the injustice is simply outrageous. Strehler had been many years an American citizen, and had been allowed and encouraged by his guardian to go to the United States. But when his father died and left him a large property, the collection of it was interfered with and prevented by the guardian and local authorities, on the ground that he was possibly not capable of doing business in America, being still inflicted with a guardian at home, and on the further ground that the local authorities, quite naturally, had never granted his renunciation of citizenship. I petitioned for Strehler myself, that this renunciation, properly offered, should be accepted. I was (of course) refused, and the cantonal authorities to whom I appealed justified the refusal to turn the property of Strehler over to me, though I was properly empowered to receive it for him.

"Strehler's case, however, is only one of hundreds of the kind, where the principle is maintained, that *once a Swiss, always a Swiss*, unless the guardian and authorities here see fit to accept renunciation, and I have pointed out that usually they will not accept it.

"The result of this action on the part of the local authorities of this canton, and of the cantonal government which upholds them in it, is—

"1st. A virtual confiscation of estates inherited here by Swiss naturalized in the United States, especially if they have once been under guardianship here.

"2d. A deprivation for such persons of the rights of American citizenship. They cannot collect their property, and should they happen to come here, on a visit even, they are liable to be seized upon and treated as Swiss, not as American citizens.

". . . . I believe there are to-day

[1] Infra, § 794.



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### 9. *Civil Rights.*

§ 123. Alien friends are entitled, on a right theory of international law, to the same civil privileges as are citizens. The restraints imposed on the exercise of such privileges have been already discussed.[1] It should be added, that while in England all civil rights enjoyed by subjects, except those existing under the navigation acts, are given to aliens, and while in the United States a similar rule exists (with the exception of the few states which still put restriction on the acquisition by aliens of real estate), in several European states a limitation is placed on the rights of aliens to litigate before the national courts,[2] and in other respects privileges to aliens are granted only on the condition of reciprocity.

Civil rights generally conceded to foreigners.

That the civil rights legislation of the United States does not extend to Chinese has been already seen.[3]

### 10. *Legitimacy.*

§ 124. The *status* of legitimacy, viewed internationally, will be hereafter discussed.[4]

### 11. *Foreign Sovereigns.*

§ 124 *a*. We have already considered how far diplomatic residences possess the privilege of extra-territoriality;[5] and we will hereafter see that a vessel employed by a foreign sovereign in what he considers a public service is not liable to process *in rem*.[6] We have now to notice that a foreign sovereign is exempt from process, direct or indirect.[7] So far as concerns the Amer-

in this consular district a million francs belonging to citizens of the United States, not one penny of which can be collected, for the reason that the claimants, though supposing themselves to be American citizens, are here declared to be still *Swiss* citizens, and under guardianship at that."

[1] Supra, § 17. See infra, §§ 705–732.

[2] Supra, § 17; infra, § 706.

[3] Supra, § 10.

[4] Infra, §§ 240–9.

[5] Supra, § 16.

[6] Infra, § 358 *a*.

[7] "The exemption," says Brett, L. J., in 1880 (Parlement Belge, 42 L. T. N. S. 280), "of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any court of some property of every sovereign is admitted to be a part of the law of nations." He proceeds as follows: —

"'The world,' says Wheaton, adopt-



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ican Union, it is settled that no state can be sued in a federal court, unless by its own consent,[1] though a state officer may be enjoined in such court from executing an unconstitutional law.[2]

### IV. ACTS DONE IN EXERCISE OF PERSONAL CAPACITY.

Acts done in country of personal law valid everywhere.

§ 125. It is agreed that an act valid when done by a person in his own country is to be regarded as valid in foreign countries, even though in such foreign countries he is treated as incapable of performing such act.[3] A person between twenty-one and twenty-five, domiciled in England, who would be a minor if in Prussia, is regarded by the Prussian law as competent to perform in England all the acts dependent on majority.[4] Even of statutes of servitude, it is

ing the words of the judgment in the case of The Exchange (7 Cranch, Amer. Rep. 116), 'being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation. One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why has the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.' By dignity is obviously here meant his independence of any superior authority. So Vattel (liv. 14, c. 7, s. 108), speaking of sovereigns, says: 'S'il est venu en voyageur, sa dignite seule, et ce qui est dù à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute jurisdiction.' In the case of The Duke of Brunswick *v.* The King of Hanover, 6 Beav. 1, the suit was against the king. There was a demurrer to the jurisdiction. Lord Langdale, in an elaborate judgment, allowed the demurrer. He rejected the alleged doctrine of a fictitious ex-territoriality. He admitted that there are some reasons which might justify the exemption of ambassadors which do not necessarily apply to a sovereign; but he nevertheless adopted an analogy between the cases of the ambassadors and the sovereign, and allowed the demurrer, on the ground that the sovereign character is superior to all jurisdiction." To the same effect is De Haber *v.* Queen of Portugal, 17 Q. B. 171.

[1] Briscoe *v.* Bank, 11 Pet. 257; Beers *v.* Arkansas, 20 How. 527; Bank of Washington *v.* Arkansas, 20 How. 530.

[2] Davis *v.* Gray, 16 Wal. 203.

[3] Folger, J., King *v.* Sarria, 69 N. Y. 31.

[4] Boullenois, 6; Bar, § 45; Story,



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truly said by Judge Ware,[1] that "their validity will be admitted, and they will be enforced by the tribunals of other countries, as to acts which are done, and rights which are acquired, within the territorial limits of the community where these laws are established." At the same time, a *status* held by the *lex fori* to be immoral, or to contravene public policy, will not be enforced, although established by a foreign state in conformity with its own jurisprudence.[2]

§§ 64, 101; Polydore *v.* Prince, 1 Ware R. 413; Male *v.* Roberts, 3 Esp. R. 163; Thompson *v.* Ketcham, 8 Johns. R. 189.

[1] 1 Ware R. 413.

[2] Supra, §§ 101, 104, 116; infra, §§ 130, 131. As to judgments, see infra, § 656.



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# CHAPTER IV.

## MARRIAGE.


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In Pennsylvania the forum is the matrimonial domicil, § 239.
Judgment may dissolve marriage and yet not affect property, § 239 *a*.

## I. GENERAL PRINCIPLES.

§ 126. MARRIAGE is often spoken of as a contract, and this is so far true that without an agreement between the parties a legal marriage cannot be instituted. But between a marriage and an ordinary contract there are the following important points of difference: —

Marriage is not a mere contract but an institution.

(1.) Marriage cannot be shaped or modified at the will of the parties. It is a conjugal union for life. If a conjugal union for a less period be agreed upon by parties, no matter how capable of contracting, that union is not marriage. If a conjugal union for life be agreed upon, and thus a valid marriage is established, but upon this marriage are grafted conditions which change its character, these conditions are void. Parties, also, cannot make, no matter how solemn may be the contract, a marriage other than monogamous. If the contract be that the husband may take a plurality of wives, or that the wife may take a plurality of husbands, this contract does not constitute a marriage. If, when a marriage is duly instituted, there is a qualification annexed, authorizing such plurality, then the qualification simply is void, and the marriage continues intact. Of contracts it is an essential feature that their conditions should be moulded by the parties. But of marriage, the conditions cannot be moulded by the parties, and therefore marriage is not simply a contract.

(2.) For injuries received in the discharge of contractual relations one party may recover damages from the other. But no suit for damages lies by one party to a marriage against the other.

(3.) Another essential feature of contracts is, that they can be dissolved at the will of the parties. There is no contract that



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cannot be dissolved by the consent of those by whose consent it was instituted. It is not so with marriage. The knot is tied by consent, but cannot be untied by consent. Marriage, therefore, is wanting in another feature essential to contracts.

(4.) A fourth point of difference is to be found in the supremacy of marriage in respect to the state. Contracts are subordinated to the state; but the state is subordinated to marriage. The state may pass statutes of limitations, providing that contracts shall lose their force after a certain lapse of time; and it may pass bankruptcy statutes, discharging the bankrupt's indebtedness; and these statutes may be internationally enforced. A contract barred by the statute of limitations, when such statute goes to the essence of the contract in the state to which it is subject, is barred everywhere. A contract discharged by a bankrupt act of the state to which it is subject is discharged everywhere. A contract defeasible by the law of the state to which it is subject is defeasible everywhere. It is not so with marriage. A statute limiting the term of marriage, or declaring marriage dissoluble at will, would be held to have no extra-territorial force. A statute authorizing polygamous marriages will be no defence, in foreign states, to the subjects of the state enacting the statute, should they be indicted for adultery; nor will the children of such polygamous unions be regarded, if born extra-territorially, as extra-territorially legitimate. The state is above contracts, but marriage is above the state. Marriage, in fact, in its essential features, belongs to a sphere whose primary laws the state has no power to disturb. No matter what laws a state should pass varying the essential features of marriage, these features, out of the territory of the sovereign attempting to vary them, would remain unchanged.[1]

Marriage, therefore, though entered into by contract, not being a mere contract, and not being internationally subject to

[1] See, as sustaining the view taken in the text, Savigny, Röm. Recht, i. § 53; Story Confl. of Laws, § 108; Bishop Mar. & Div. § 357; Hyde *v.* Hyde, L. R. 1 P. & D. 133; Starr *v.* Hamilton, Deady, 268; Rugh *v.* Ottenheimer, 6 Oreg. 231; Frasher *v.* State, 3 Tex. Ap. 263.

"Le mariage est une institution du droit naturel et du droit des gens." Trib. civ. Seine, 1878, cited Jour. du droit int. privé, 1879, p. 66.

Mr. Lawrence (Com. sur Wheaton, iii. 270) defines marriage as "l'union voluntaire et pour la vie d'un homme avec une femme."



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state variation in its essential features, the question is, what are these essential features? And the answer is, —

I. There must be competent parties.

II. The union must be exclusive, or, in other words, monogamous.

III. It must be for life.

§ 127. But while marriage is an international institution, there are wide differences of policy between ourselves and the states of Europe, as to the capacity of parties to solemnize it and the mode in which it is to be solemnized. It is the policy of old and thickly settled countries to discourage marriages until the parties are able to establish independent homes;[1] and for this purpose the consent of parents and guardians is required, and in some jurisdictions the consent of the state.[2] In other countries notice of intended marriage is to be publicly given in such a way that the state or relatives may have the opportunity to intervene. In some Roman Catholic countries (*e. g.* Portugal), the impediments of consanguinity are extended so as to embrace cousins, though the impediment may be removed by a dispensation from the Pope. In England, until the present date (1880), the marriage of a man with his deceased wife's sister is void. In all European states marriages are invalid, unless solemnized by a form prescribed by the state. These limitations have been frequently held to be matters of national policy, which a state will not permit, if it adopts them, to be set at naught by a foreign sovereign. On the other hand it is equally a matter of national policy in the United States to encourage matrimony. Early marriages we have found greatly conducive not only to national growth but to national morals. They are peculiarly suitable to the conditions of a country such as ours which needs that young, active, and adventurous element which in the old world is often looked on with such distrust. The multiplication of new homes, centrifugal as this multiplication may be, we hold to be an advantage with territories to occupy so vast and diversified as are those be-

By the distinctive policy of the United States marriages are encouraged, and extra-territorial artificial limitations of such marriages are disregarded.

[1] Supra, § 7.

[2] See Mill Polit. Econ. book i. c. 10, § 3, as vindicating this policy in Norway and Switzerland, on account of density of population and peculiar distribution of land.



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longing to us. Illegitimate children, with their heritage of desolation, of destitution, of desperation, are found in comparatively rare numbers in states in which early marriages are encouraged, while they abound in other states in proportion as restrictions on marriage are imposed; so that to give sanction to statutes restricting marriage is to stimulate illegitimate births.[1] Early households we hold to be promotive of early and earnest work; and many a life which might otherwise be spent in frivolity or revolt or despair has been turned, so we may argue, to useful and honorable labor by this incentive.[2] Nor should it be forgotten, when the question of paternal authority and filial obedience comes up, that education is likely to be more provident and thorough when the father sees his children grow to maturity, while he is able to guide them, than when, as in the case of marriages long delayed, he is likely to die during their infancy. Parental consent is undoubtedly desirable when minors are to be married; but it is held that to enforce this principle by making it an offence for an officer or clergyman to solemnize the marriage of minors without such consent is far wiser and more humane than to declare a marriage without such consent to be a nullity. These are rules brought with them by the colonists who founded the jurisprudence and social economy of our country, and these rules have always been parts of the national policy of the United States. Assuming that in matters of national policy the laws of each country, as is conceded even by jurists of the modern

[1] The proportion of illegitimate children to legitimate in those parts of Germany in which the impediments to matrimony are the greatest is estimated at from 1 to 5 to 1 to 7. In Massachusetts, in 1876, it is registered at 15 to 1,000.

[2] Supra, § 7.

The distinctive policy of this country as to marriage exhibits itself not only in its non-adoption of the restrictions of the old world, but in specific legislative encouragement. The statutes giving tracts of public land to settlers are conditioned on the building of homesteads on the land occupied. Homesteads, to certain limits, are exempted from execution. A widow has special reservations in cases of her husband's estate being insolvent.

That the policy of a country such as ours, with an abundant supply of fertile land, is to encourage early marriage, is maintained by Dr. Franklin and Mr. Jefferson. See 6 South. Law Rev. 696.

Mr. Mill, following Mr. Wakefield, recommends that in colonial emigration preference be given to young couples, or, when these cannot be obtained, to families with children nearly grown up. Polit. Econ. book ii. c. 13, § 4.



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schools of France and Italy,[1] is to be supreme, then two conclusions must follow: (1.) When foreigners marry on our shores fully capable, according to our laws, of marriage, but incapable according to their personal laws, we will hold their marriage not invalidated by such incapacity. (2.) When our own citizens, capable of marriage by our laws, marry abroad in a foreign country where they would be incapable of marriage if subjects, we will hold that such incapacity will not prevent us from recognizing their marriage as valid.

Union must be for life.

§ 128. A conjugal union for a limited period, with the condition that the union is to close when the term is over, will not be recognized as constituting a valid marriage, even though such union continue until death.[2]

Must be exclusive.

§ 129. Nor will recognition be given to a marriage, contracted with the understanding that it is not to be exclusive, but that the man is at liberty to take subsequent wives.

Indian polygamous marriages invalid.

§ 130. In Missouri, in a case involving the legitimacy of the children of an Indian marriage, — the father having, when in Missouri, recognized such legitimacy, — the marriage was, after much hesitation, validated. There was no positive evidence, however, to show that the marriage was, in its terms, polygamous.[3] So we have a remark by Chief

[1] Supra, §§ 104 *a*, 104 *b*.

[2] Letters *v.* Cady, 10 Cal. 533. See Jewell *v.* Jewell, 1 How. U. S. 219; Randall's case, 5 N. Y. City Hall Recorder, 141; Barnett *v.* Kimmell, 35 Penn. St. 13; Harrod *v.* Harrod, 1 Kay & Johns. 16; State *v.* Tachanatah, 64 N. C. 514. By the canon law, a condition that, on a certain contingency, a marriage shall cease, is void. Walter, Kirchenr. 11 Aufl. § 539; Permaneder, Kirch. § 692. On the other hand, a marriage, to be dependent upon a future contingency ("si pater ejus suum praestaret assensum"), is a nullity. Qualifications of this kind contradict the very nature of marriage, according to the Decretals. Cap. 3, 5, x. de conditionibus oppositis, 4, 51. Such a contract is a mere betrothal. Very curious learning on this topic is to be found in Stahl's treatise De matrimonio ob errorem rescindendo commentatio, Berlin, 1841. The Protestant jurists declare with equal positiveness that marriage is to be a permanent institution, which no special contract of the parties can modify. As an example of this, is cited the Genevese Ordinance of 1541, "Que on ne tienne point pour promesse de mariage le propos, qui auroit esté sous condition." Goeschen, Doctrina de matrimonio, note 8.

[3] Johnson *v.* Johnson, 30 Mo. 72. See 6 South. Law Rev. (1881) 696. As to slave marriages, see Minor *v.* Jones, 2 Redf. 289.



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Justice Ruffin, already cited,[1] that "if a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home." But, independently of the question as to what the "justice" here spoken of involves, this is a mere *dictum*, and is in conflict with the result at which the court arrived, namely, that the recognition of polygamy in North Carolina by domiciled citizens would be intolerable as a scandal and breach of public morals.[2] The utmost that can be said on this point is that a Turk, when in *transit*, would be permitted to pursue his journey without interference in his domestic concerns. But even this may be doubted; nor is it probable that, on a petition for a *habeas corpus* by the second or third wife of a Turk travelling in America, the petitioner would be remanded, on the ground that, by Turkish law, she was under her husband's control.[3]

On the other hand, the issue directly arose in a trial in Indiana, where it was held that a polygamous marriage with an Indian, according to Indian usage, is not a valid marriage.[4] "Marriage," said Judge Perkins, "is the union of one man and one woman, so long as they both shall live, to the exclusion of all others, by an obligation which the parties cannot of their own volition and act dissolve, but which can be dissolved only by authority of the state.[5]

§ 131. In 1866, the question of Mormon marriages came before the English Court of Probate and Divorce in the following form: A young man named Hyde (afterwards "Elder" Hyde) became, in 1847, when in England, engaged to a Miss Hawkins, both being Mormons. In 1853 the parties were married, according to Mormon rites, at Salt Lake, to which place they had emigrated, and where they

And so of Mormon marriages.

[1] Williams *v.* Oates, 5 Ired. 535. See supra, § 120.

[2] See infra, § 135.

[3] As to the *status* of polygamy among foreigners resident in a Christian state, see Phil. iv. 329. The French law, according to Merlin, would permit a Mussulman's polygamy with his own countrywomen, but not with French women. Questions de droit, Divorce, xiii. p. 370. Demangeat is quoted by Phillimore as holding that, *in France*, polygamous marriages of Mussulmen with women of their own race would be held illegal. See supra, § 125, note.

[4] Roche *v.* Washington, 19 Ind. 53.

[5] Ibid. But see, *contra*, Conolly *v.* Woolrich, 11 Low. Can. J. 197; Clarke's Cr. Law of Can. 167.



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were apparently domiciled. In 1856, Hyde went to the Sandwich Islands, where he renounced the Mormon faith. In 1856, he was excommunicated at Utah, and his wife declared free to marry again. In 1857, he urged her, in writing, to abandon the Mormon faith, and return to him, which she refused. In the same year he resumed his domicil in England, when he became a dissenting minister. In 1859, the wife married again, according to the Mormon form, and the husband petitioned the English Court of Probate for a divorce. On the trial, evidence was given by "a counsellor of the Supreme Court of the United States," "that a marriage by Brigham Young, at Utah, would be recognized as valid by the Supreme Court of the United States, provided the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage." The petition was dismissed, on the ground that the court did not regard the Mormon ceremony as establishing the marital relations, though it was admitted that it would have been regarded as valid in the United States.[1] The hypothesis that such a marriage would have been valid in the United States was erroneous; but that, in face of such an hypothesis, the marriage should have been held invalid in England, makes the decision directly in point to the position that to give a marriage extra-territorial force, it should be the union of one man and one woman, to the exclusion of others, for life. The same view is taken by an eminent Swiss jurist, Dr. Reinhold Schmid, to be hereafter cited.[2]

By the second section of the Act of Congress of July 1, 1862,[3] it is enacted that all acts passed by the legislature of Utah, "which shall establish, support, maintain, shield, or countenance polygamy, be, and the same hereby are, disapproved and annulled." This statute, and those making bigamy in Utah indictable, have been held constitutional by the Supreme Court of the United States; and to indictments for bigamy based on this legislation, religious privilege is no defence.[4]

[1] Hyde *v.* Hyde, L. R. 1 P. & D. 131. Supra, § 127, note.

[2] As to Prussian Code, see infra, §§ 155 *a*, 179 *a*.

[3] 12 St. at Large, 50.

[4] Reynolds *v.* U. S. 98 U. S. 145; Whart. Crim. Law, 8th ed. §§ 1682, 1715, 1727.



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II. INCAPACITIES.

§ 132. A prior existing marriage renders all subsequent marriages a nullity. This the canon law expressly announces as *divino jure*, and of perpetual, universal obligation.[1] Such, also, is the view of the Protestant German jurists.[2] It is true that the Papal See allowed dispensations for such second marriages, in at least two specified cases, one as late as 1804, in Switzerland,[3] and that Luther apparently sanctioned a qualified divorce of Philip of Hesse, and a second marriage by the latter during his first wife's life; but such action, in both cases, so far as it went to approve double marriages, or bigamy, has been expressly repudiated and denounced by the canon lawyers of both communions.[4] It may be accepted as a fundamental principle of the law of all Christian states, that a second marriage, the first remaining undissolved, is void, and will be so treated, no matter where contracted. When a marriage will be considered "dissolved" will be discussed under another head.[5] It is sufficient now to say that while we recognize the power of foreign states to divorce their subjects, and also recognize as valid the remarriage of one of such divorced subjects to a third party, we do not hold a divorce by a foreign state as valid when neither of the parties to the marriage was distinctively subject to its law.[6]

Party already married incompetent to marry again.

It may be added, that the fact that a state does not itself authorize divorces is no bar to a marriage in such state of persons divorced in another state to whose law they are subject.[7] And although the point was once contested in France, it is now ruled by the Court of Cassation that a divorce pronounced by the *judex domicilii* abroad will entitle the divorced person to contract a second marriage in France, notwithstanding that the marriage was in France, and in France divorces are prohibited.[8]

[1] Cap. 8, x. de divortiis, 4, 19; Conc. Trid. sess. 24, can. 2, de sacr. matrim.

[2] Goeschen, Doctrina de matrimonio.

[3] Weise, *Exemplum bigamiae per dispensationem Rom. Pontif. admissae*, Lips. 1824.

[4] Permaneder, Kirchenr. § 392; Uhrig, Eherecht, § 73; Richter, Kirch. § 255.

[5] Infra, §§ 209–239.

[6] Infra, § 231.

[7] Infra, §§ 204–214.

[8] Jour. du droit int. privé, 1875, p. 122; Demolombe, vol. i. p. 101. See



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§ 133. By the canon law, death of the first husband or wife must be judicially proved. No absence, no matter how long or how unexplained, will be regarded as affording a presumption of death.[1] This, however, has been greatly modified by subsequent legislation. In Germany the practice is, after an unexplained absence for a specific period, — varying in particular states, — to permit the party who has disappeared to be publicly cited by order of court; and should he not appear, for permission to be issued for a second marriage. There is, however, an important distinction to be kept in mind. In Roman Catholic countries generally, should the first husband appear after the second marriage, the latter is regarded as a nullity, and the decree on which it was based, being founded on a mistake, is vacated.[2] On the other hand, in Prussia, and in other Protestant lands, the judicial declaration of the first husband's death (Todes-Erklärung) is regarded as final, and as working a dissolution of the first marriage.[3] Should a collision occur in this respect, the question should be determined by the actual character of this decree. If it operates to annul the marriage, and if it is issued by a competent jurisdiction, on regular procedure, it should, according to the rules of international law,[4] be regarded as having this effect in other countries, even where such decrees have no such operation.

Supposed but not actual death of a party does not dissolve a marriage.

In the United States, one state will presume another to have adopted the English common law, validating second marriages when one of the parties to the first has been absent, unheard from, for seven years; and on this reasoning, it was held by the Supreme Court of Georgia, in 1866, that where a man had deserted his wife in North Carolina, and lived apart from her, unheard of, for ten years, when the wife married a second husband in North Carolina, the children of such second marriage were legitimate.[5]

fully authorities cited infra, §§ 209, 214. The German rule is given infra, § 214.

[1] Cap. 19, x. de sponsalibus, 4, 1; cap. 2, x. de secundis nuptiis, 4, 21.

[2] Eichhorn, Kirchenr. Th. 2, s. 460–473; Permaneder, §§ 332, 333; Walter, § 316, note 13, § 323, note 12.

[3] Eichhorn, Kirchenr. Th. 2, s. 473, note 39.

[4] See infra, § 231.

[5] Eubanks v. Banks, 34 Ga. 407. See 2 Whart. Crim. Law, 8th ed. § 1672.



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§ 134. Cases may arise when a second marriage is contracted on the *bonâ fide* belief that the first was dissolved by death, though the legal period required to establish a formal presumption to this effect had not been reached. In such case the canon law conceded to the second marriage the rights of validity so far as to prescribe that the offspring of such marriage, during the period of such *bonâ fide* belief, were legitimate.[1] This view has been accepted in several of our states by statute, and in Louisiana at common law.[2] The extra-territorial recognition of such legitimacy depends upon whether it was decreed by the state to which the parties were subject.

In some states legitimacy assigned to children of second *bonâ fide* marriage in such case.

§ 135. We have just seen that even in states where divorces are forbidden, as against the public policy, persons divorced abroad by a court to which they were subject are entitled to marry again.[3] Suppose, however, the decree of divorce, in compliance with a general statute, provides that one of the parties shall not marry again. No doubt this decree binds such party, if remaining within the state where the decree is entered, he being subject to its laws. But, suppose he goes into another state where divorces are not subject to such restrictions, and marries a second time in such state, is such second marriage valid? In Massachusetts, a marriage under such circumstances was adjudged valid by the Supreme Court;[4] though by a subsequent statute[5] this decision was corrected, and all marriages, by residents of Massachusetts, in violation of Massachusetts statutes, when the marriage is performed in another state, with the purpose of evading

Party divorced may marry again; but doubts as to restricted divorce.

[1] Burge, i. 152.

[2] Hiram *v.* Pierce, 45 Me. 367; Lincecum *v.* Lincecum, 3 Mo. 441; Hatwell *v.* Jackson, 7 Tex. 576; Graham *v.* Bennett, 2 Cal. 503; Clendenning *v.* Clendenning, 15 Mart. 438. See, also, as to common law of Spain, in force in Texas and Louisiana, Smith *v.* Smith, 1 Tex. 621; Lee *v.* Smith, 18 Tex. 141; Bishop Mar. & Div. § 301. But see Whart. Cr. L. 8th ed. §§ 1693, 1705

[3] Supra, § 132; infra, §§ 204–234. But if a divorce is not internationally valid, the parties are incompetent to marry a second time, and the children of such second marriage will be illegitimate. Wilson, in re, L. R. 1 Eq. 247; Shaw *v.* Gould, L. R. 3 E. & I. A. 55.

[4] Putnam *v.* Putnam, 8 Pick. 433.

[5] Rev. Stat. c. 75, § 6.



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the Massachusetts statute, are declared void. But, unless there be such fraud, marriages of this class are valid in that state.[1]

After a divorce for adultery, in Kentucky, the woman, who was the offending party, removed to Tennessee, and there married again, her former husband still living. By the law of Kentucky such second marriage was invalid. By the law of Tennessee it was legal. The marriage was held valid by the Supreme Court of Tennessee. But it should be remembered that in this case there was a *bonâ fide* removal to Tennessee, and hence there was no question of fraud; and that the decision was pronounced by a Tennessee court, bound by the law of its own state.[2]

In North Carolina, when a woman, after being divorced on the ground of adultery, — which divorce, by North Carolina law, incapacitated her for remarriage, — went to South Carolina, and married a second husband, such marriage being lawful in South Carolina, it was held by the Supreme Court that the second marriage was void. "If a person," said Chief Justice Ruffin, "contract marriage here, and, leaving the other party, he goes to Turkey, and marries half a dozen wives, contrary to the law of the state, it would be impossible that we could give up our whole policy regulating marriages and inheritances, and allow all these women and children to come in here as wives and heirs, with the only true wife and heirs according to our law. And it would be yet more clear if two persons were to go from this country to Turkey merely for the sake of getting married in a country where polygamy is lawful, and then coming back to the place where it is not lawful."[3]

In New York it has been held that a party for whose adultery a divorce is decreed may, after establishing a *bonâ fide* domicil in another state, marry in such state, though he could not have married in New York; and that on returning to New York, after such marriage, and dying there, his estate would descend, under the New York statutes, to his successors under such marriage.[4] But, subsequently, it was held by the Supreme Court that where the party prohibited from a second marriage in New York went to another state for the express purpose of marrying again, in

[1] Com. *v.* Lane, 113 Mass. 458.

[2] Dickson *v.* Dickson, 1 Yerger, 110. But see Stevenson *v.* Gray, 17 B. Mon. 193.

[3] Williams *v.* Oates, 5 Ired. 585. See a discussion of this question in 21 Alb. L. J. 486. For foreign law, see infra, § 214.

[4] Webb's Est. 1 Tuck. 372.



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fraud of the New York statute, the second marriage would be void in New York.[1] On the other hand, it has been held in Pennsylvania, that the provision in the New York statute forbidding persons against whom a divorce is decreed to marry again, does not prevent a wife who, at the time when a New York decree of divorce was entered against her, was resident in Pennsylvania, from marrying again.[2]

But would such a second marriage, after such a divorce, be polygamous by the common law of Christendom, apart from the question discussed in the last case, of fraud on a particular state? In other words, is a second marriage by the offending party in adultery, after divorce, in itself a gross immorality, and hence to be everywhere condemned? This question was often discussed in the English parliament prior to the passage of the late divorce bill; but the position of Lord Palmerston, that the guilty party, after divorce, was preserved from ruin by such a marriage, was sustained by the House of Commons, and the clause forbidding such remarriages was stricken out. The argument thus successfully pressed, coupled with the fact that in England, Germany, and a majority of the American States, such remarriages are permitted, make it difficult to establish such a general consent in favor of the illegality of such marriage as to constitute a common law international rule; and so it has been held by the Circuit Court of the United States in New York.[3]

At the same time we cannot be insensible to the force of the argument that in such cases the decree entered against the condemned party is not one of divorce from the bonds of matrimony. Such party is not by such decree permitted to marry again. His *status* remains that of a person incapable of matrimony, so long as he is domiciled in the state making the decree; and there is strong ground, therefore, in such case, for the courts of such state to hold that if he goes to another state merely to avoid the home law, marries in such state, and then immediately resumes his old domicil, the marriage will be held void in such state. On

[1] Marshall *v.* Marshall, 2 Hun, 238.

[2] Van Storch *v.* Griffin, 71 Penn. St. 240.

[3] Ponsford *v.* Johnson, 2 Blatch. 51. See, also, Phil. iv. p. 328, to the same effect. See an interesting discussion of this question in Mr. Hugh Davey Evans's work on the Christian Doctrine of Marriage, pp. 237, 238, and in President Woolsey's Treatise on Divorce; and see infra, §§ 154, 214.



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the other hand, if he moves into another state, and there becomes domiciled, then he is subject to the laws of such state; and if by the laws of such state he is entitled to marry again, then he may marry again, and his marriage would be internationally valid. In any view, such a limitation cannot, as we have seen, affect a defendant who at the time was domiciled in another state.[1]

By policy of canon law impediments from consanguinity were widely extended.

§ 136. By the Roman law natural relationship in the direct line, ascending or descending, whether it be legitimate or illegitimate, is an absolute, perpetual, and universal bar to marriage.[2] By the same law, lateral relationship is a bar only between brothers and sisters, and the lineal representatives of brothers and sisters: *e. g.* the children or grandchildren of brothers or sisters.[3] The canon law, adopting the Levitical Code,[4] first, in the eighth century, declared all "kinship" a bar;[5] but proceeded to pronounce this kinship to cease at the seventh degree. But a peculiar system of calculation is adopted in applying this principle. Brothers and sisters are of kin in the first degree; uncle and niece in the second degree; the children of brothers and sisters (*consobrini*) in second degree; the grandchildren of brothers and sisters (*sobrini*) in third degree, &c. This, however, was relaxed by Innocent III. in 1215,[6] by placing the limit at the *fourth* degree. The dispensatory rights, however, assumed by the Papal See, have still further enlarged the limits, so that in indirect relationships of the second degree, such as that of uncle and niece, — *in secundo gradu consanguinitatis attingente pri-*

[1] Van Storch *v.* Griffin, 71 Penn. St. 240. Westlake (1880, p. 83) argues that although a man is not entitled to marry again by the terms of a divorce, the incapacity may be removed on his acquiring a domicil in a country which permits such marriages. But he holds that this rule does not apply to women, who cannot change their personal law unless by a divorce giving them this power. Whether this position is good in the United States as to restricted divorces is discussed in the text. The position that a woman cannot change her domicil except after an absolute divorce is, as we will see, not accepted in the United States. Infra, § 224.

[2] § 10, J. de nuptiis 1, 10. The reader will find an interesting discussion of the question in the text in Jeremy Taylor's Doctor Dubitantium, book ii. chap. x. § 30.

[3] §§ 2, 3, 5, J. de nuptiis 1, 10.

[4] Levit. xviii. 6.

[5] Concil. Rom. 721; Eichhorn, Kirchenr. ii. 387.

[6] Cap. 8, x. de consanguinitate et affinitate, 4, 14.



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*mum*, — dispensations may be obtained.[1] The restrictions which we have just noticed, however, are to be regarded, not as the inexorable rules of moral law, but as tutelary prescriptions, to be applied, modified, or withdrawn at his discretion by the Pope as the guardian of Roman Catholic Christendom. They are to be treated, therefore, not as rules of international law, universally applicable, but as disciplinary prescriptions of the Roman Catholic Church, based on policy, and claiming no secular obedience unless adopted by the statutes of a particular state.[2]

§ 137. We have already noticed[3] that it is part of the national policy of this country to encourage marriage, and to reject any restrictions on marriage which are arbitrary and artificial. It is not strange, therefore, that at no time in our national existence, and in no section of our country, should we have recognized restrictions on matrimony based on lateral consanguinity beyond the first degree. Hence it follows that, though such marriages by subjects of other states might be incestuous if solemnized in such states, these marriages, if solemnized in one of our states, we would hold valid.[4] Nor would we hold that such a marriage between two citizens of the United States, solemnized in a foreign state which treats such marriages as null, is invalid in the United States.[5] In England, marriage within the

In this country national policy limits restrictions to those of ascent and descent, and laterally in first degree.

[1] Permaneder, Kirch. p. 734.

[2] This is the case in Portugal. Sottomayer *v.* De Barros, L. R. 3 P. D. 5. Infra, § 160.

According to the present law of Germany, a positive bar exists in cases of kinship in the direct line of ascent and descent; and in lateral kinship in the first degree. Such marriages are prohibited by a law which is declared by the jurists to be moral, universal, and perpetual. As to all other kinships, dispensations may be allowed. See Göschen, notes 107, 116.

[3] Supra, § 127.

[4] This is in opposition to the ruling in Sottomayer *v.* De Barros, L. R. 3 P. D. 5, to be hereafter criticised. Infra, § 160.

[5] Infra, § 160.

In the United States, as a general rule, at common law, the marriage of an uncle and a niece is voidable, not void, and cannot be impugned after the death of either party. Parker's Appeal, 44 Penn. St. R. 309; Bowers *v.* Bowers, 10 Rich. Eq. (S. Car.) 551. But in several of the states statutes exist making such marriages void. Bishop Mar. & Div. § 320. See Bonham *v.* Badgely, 2 Gilm. 622.

In Maryland it is provided by the Act of 1777 that the marriage of an uncle and niece, as well as of other persons of the same blood, "shall be void." It is declared by the same act that persons going out of the state and there marrying contrary to the



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prohibited degrees is null, though one of the parties be illegitimate.[1] But illicit intercourse with a mother does not render void a subsequent marriage with the daughter.[2]

By policy of canon law restrictions based on affinity were multiplied.

§ 138. It is not strange that the canon law should have extended to affinity the marital restrictions it imposed on consanguinity. The church, we must remember, exercised a paternal care over its members. Sociology, as we now call it, as well as ethics, fell, therefore, within the jurisdiction of the church. Population, in many portions of the church's domain, was dense. It was, as it still is, the usage of the married members of a family to occupy, at least during the lifetime of a common parent, the same roof. Was it desirable that persons so living should intermarry? Would it not be better for the common welfare, taking it in the long run, if not only near relatives from blood, but near connections by marriage, should be prohibited from intermarriage, unless when specially permitted by the head of the church? This is the stand taken by the canon law. It was, under the circumstances, a stand both wise and politic, but it was the creature of the circumstances by which it was caused; and as in the formation of our jurisprudence these circumstances did not

act, shall be liable to the same penalties; and by a subsequent section, the general court is authorized to hear and determine the validity of any marriage, and to declare marriages contrary to the act null and void. An act passed in 1860 prov ded that all marria es of the degree of affinity in question, made in or out of the state, should be deemed valid from the time of their celebration. It was held that a marriage celebrated in 1851, in the District of Columbia, between a man and his niece, both being residents of Maryland, was not *ipso facto* invalid until invalidated by the proper court; and not having been so invalidated, was confirmed by the Act of 1860. Harrison *v.* State, 22 Md. 468.

[1] R. *v.* Brighton, 1 E., B. & S. 107.

[2] Wing *v.* Taylor, 2 Sw. & Tr. 278. That a state will not tolerate incestuous unions, no matter where contracted, see Greenwood *v.* Curtis, 6 Mass. 358; Sutton *v.* Warren, 10 Met. 451; Sneed *v.* Ewing, 5 J. J. Mar. 460.

In Switzerland marriage between a grand-uncle and grand-niece is not interdicted. Jour. du droit int. privé, 1876, p. 514.

In Crampton *v.* Crampton, 2 Fed. Rep. 417; 20 Alb. L. J. 403 (Wallace, J.), it was held that although in New York a marriage between nephew and aunt may not be voidable, no action can be maintained in New York for a breach of agreement to solemnize such a marriage when the parties at the time of the agreement were domiciled in a state where such marriage is incestuous and invalid, and where the parties intended after marriage to live in the latter state.



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exist, — as our population was sparse, leading to the early separation of homes, — this portion of the canon law was rejected by us.[1]

§ 139. In England, the statute prohibiting the marriage of a man with the sister of his deceased wife has been held to be a rule of national policy, adhering to British subjects wherever they go. In 1857, a case arose before Vice-Chancellor Stuart and Mr. Justice Cresswell, in which it was decided that a marriage entered into during a temporary residence in Denmark between an Englishman and his deceased wife's sister was invalid

In England statute prohibiting marriage of a man with sister-in-law a rule of local policy.

[1] By the Roman law, marriage by a husband with his deceased wife's descendants in a direct line (*i. e.* his *step*-descendants), and also with his deceased wife's sister, is forbidden; and so also, *mutatis mutandis*, as to the wife. L. 4, § 5; L. 10 pr. D. de gradibus et affinibus, 38, 10. This is construed to include what is called *quasi affinitas*, which forbids the marriage of a step-father with a surviving wife of a step-son. L. 15 D. de ritu nuptiarum, 23, 2. So a father was interdicted from marrying a son's widow, and a mother, a daughter's widower. L. 12, §§ 1, 2; L. 14, § ultim. D. de ritu nuptiarum, 23, 2. The canon law, when legislating on this topic, placed itself boldly on the fiction that husband and wife are of one blood, and that, consequently, the husband's relations are the wife's, and the wife's, the husband's, in equal degree. C. 14; c. 35, qu. 2, 3. As this principle was based on sexual union, it was held that where this union was illegitimate the same consequences ensued. It will be recollected that such alleged intercourse with a sister was one of the reasons hinted, if not proclaimed, as grounds for nullifying the marriage of Henry VIII. with Anne Boleyn. But this position received a series of modifications, until, in the time of Innocent III. affinity, after the first degree, became no longer a bar. Thus the marriage of a step-father with the widow of a step-son, forbidden by the Roman law, was no longer unlawful. So the Council of Trent has declared that the bar arising from illegitimate connection is to cease at the second degree, and that of quasi affinity at the first degree laterally. Trident. Conc. sess. 24, etc. In the Protestant states of the continent, the tendency, first, was to adopt the common Roman law, in its original strictness, as a matter, however, not of moral, but of municipal appointment. In later years, however, the common law in this respect has been much relaxed; and now, affinity, except in the direct line, is no bar; or, if such, may be relieved by dispensation. In Prussia, the General Code expressly authorizes the marriage of brother-in-law with sister-in-law. Richter, Kirchen. 4 Aufl. s. 258. In general, we may state as the law accepted by the continent of Europe, that lineal relationship in all degrees, and collateral in the first degree, are regarded as an absolute, universal, and perpetual bar; and all other cases of relationship, as well as all cases of affinity, form either no bar at all, or a bar that can be avoided by dispensation.



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in England, though valid in Denmark. In the course of his opinion, Cresswell, J., said: "I have come to the conclusion that a marriage contracted by the subjects of a country in which they are domiciled, in another country, is not to be held valid, if, by contracting it, the laws of their country are violated;" an opinion which the same judge afterwards modified by saying that he meant to do no more than affirm the proposition that the court of the domicil had a right to recognize incapacities affixed by the law of the domicil as invalidating a contract entered into in another country between parties belonging to that domicil; and that nothing he said affected the question whether the court of the place of contract ought to recognize the incapacities established by the law of domicil. By Vice-Chancellor Stuart the decision was put on the ground that a marriage with a deceased wife's sister was *contra bonos mores*, and that consequently the law respecting it was not local, but was a law of the domicil which attached itself to the person of the subject wherever he should go.[1] After elaborate argument, the decision was affirmed by the House of Lords,[2] and may now be viewed as the settled law of England.[3]

In the United States such statute would not be regarded as following British subjects to this country.

§ 140. Since the statute just noticed is a product of distinctively British policy, caused by distinctively British conditions, it does not, so it may be well argued, follow British subjects when, in the United States, under an opposite policy, and widely different conditions, they solemnize marriages interdicted by the statute.[4] And so, in analogous cases, it has been held in Kentucky.[5]

[1] Brook *v.* Brook, 3 Sm. & Gif. 48.

[2] 9 H. of L. Cas. 193.

[3] A marriage celebrated in England, both parties being French, and the woman being the sister-in-law of the man, will be treated as null in France, when not preceded by an authorization from the French government. Ruffier *v.* Ruffier, Trib. Seine, 1re Cham. 1873; Jour. du droit int. privé, Jan. 1875, p. 21.

[4] See, to this effect, in Canada, Hodgins *v.* McNeil, 9 Grant (Canada), 305; 9 Up. Can. L. J. 126.

[5] Stevenson *v.* Gray, 17 B. Mon. 193; Danelli *v.* Danelli, infra.

See, further, Newbury *v.* Brunswick, 2 Vt. 151; True *v.* Ranney, 1 Foster, 55; Sutton *v.* Warren, 10 Met. 451; Bonham *v.* Badgley, 2 Gilm. 622.

The laws in Prussia and France, establishing international reciprocity in such cases, will be hereafter referred to. Infra, § 451.

The marriage in Switzerland of a man with his brother's widow, they being domiciled at the time in Italy,



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§ 141. We have already noticed[1] the difficulties that arise when a party incapacitated from marrying by his personal law marries in a state where such marriage is permitted. In issues of incest we have just seen that the *judex domicilii* will, in England, enforce the statute under such circumstances.[2] The question is, is the prohibition a distinctive rule of state policy? If so, we may hold it to follow subjects of the state, so far as concerns the courts of that state, wherever they go. On the other hand, while the courts of the state adopting the policy would enforce it, the courts of the state where the marriage takes place, where no such policy exists, would hold the marriage valid.[3]

By *judex domicilii*, however, such restrictions may be enforced, though the marriage be in another state where it is valid.

§ 142. Suppose a foreign state should declare that the marriage of a lunatic is void, and should decree a particular subject of that state to be a lunatic? Would we hold that if such person, coming to this country, should here marry, his marriage would be void? Although the point has not been expressly decided, a negative answer may be given for the following reasons: (1.) A foreign decree of lunacy is impeachable.[4] (2.) In any view the marriage of a lunatic is only voidable, not void.[5]

Incapacity of lunacy determinable by place of residence.

§ 143. The principle that force vitiates a marriage that it compels, being universally recognized, there can be no question that a state would regard as voidable a marriage one of its subjects was coerced into making in a foreign land.[6] To make out, however, a case of invalidity the force must either be physical, or accompanied with such threats of imminent and great evil as make the danger actual, real, and great. Hence the *metus reverentialis*, or the awe of parents, constitutes no such hindrance.[7] But where *physical* force is

Marriages by force everywhere voidable.

where such marriage was illegal, was held in Kentucky, in 1868, to be valid, there being no adequate proof that such marriage was illegal in Switzerland. Danelli *v.* Danelli, 4 Bush, 51.

[1] Supra, § 135.

[2] See supra, § 140; compare Stevenson *v.* Gray, 17 B. Mon. 193.

[3] See infra, §§ 180, 181.

[4] Supra, § 122.

[5] See Bishop on Mar. & Div. c. viii.; Wh. & St. Med. Jur. § 3; True *v.* Ranney, 1 Foster, 55; Wiser *v.* Lockwood, 42 Vt. 720.

[6] See Harford *v.* Morris, 2 Hagg. Con. 423.

[7] Cap. 14, 15, 28, x. de sponsalibus, 4, 1; cap. 2, x. de eo qui duxit, 4, 7.



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used by parents, this is an avoidance.[1] It is, however, to be observed that such marriages are voidable, not void; in other words, the parties compelled may subsequently, when free will accrues, ratify them, and this either expressly or by implication. Subsequent cohabitation accepted voluntarily is such implied ratification.[2]

The Roman law, in its zeal to suppress abductions, declared that all marriages which followed an abduction by force, the force being directed against parents and guardians, are void, even though the party abducted should consent. The abduction itself constituted a *publicum impedimentum*, which made the marriage null; and neither the consent of the abducted party, as has been stated, nor the subsequent ratification of parents and guardians, could give the marriage validity. This, however, is a provision of public policy, special to the states which observe the Roman law, and having no force beyond their bounds.[3]

But may be validated by subsequent consent.

§ 144. The canon law, on the contrary, held that abduction, like other forms of force, could be cured by the subsequent consent of the party abducted; and this was one of the rules of the Council of Trent.[4] So, also, speaks the English common law.[5] The incapacity wrought by force being thus local, special, and transient, is governed, not by the law of the party's domicil, but by that of the court from whom redress is sought.

Error may invalidate.

§ 145. Subject to the same distinctions as force may be mentioned error. The Roman law held void marriages made under mistake of person,[6] and the early canon law takes the same ground.[7] The later canon law, as adopted by the Roman Catholic Church, introduces other errors (*e. g.* mistakes as to legal rank) as causes for annulling mar-

[1] Goeschen, doctrina de matrim. notes 71, 77.

[2] Richter, Kirchenrecht, § 252, note 4.

[3] L. univ. § 1, C. de raptu virginum, 9, 13.

[4] Trident. Concil. cap. 6, de reform. mat.

[5] Bishop Mar. & Div. §§ 165–205, 210–213.

[6] Stahl, De matrimonio ob errorem rescindendo, Berol. 1841; Eichhorn, Kirchenrecht, Th. 2, s. 352.

[7] Cap. 2, 4, x. de conjugio servorum. This, however, was when a slave was married, under the false impression he was free.



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riages.[1] And the present Prussian Code takes the broad ground that a marriage will be made null when consent has been given on a mistake as to identity of person, or as to what may be regarded as necessary prerequisites to matrimony.[2] But because, first, this defect is cured by subsequent cohabitation, after the error is discovered, and, second, the marriage is *primâ facie* valid until annulled, such incapacity cannot be called moral and universal, but is rather transient and local. It is not a law which follows the person. It is simply a local law, binding the courts to which it applies. It is, in other words, to adopt the language of the canonists, not one of the *public impediments* (*publica impedimenta*) which obtain over all Christendom, but belongs to the *private impediments* (*privata impedimenta*) which are local, and may be subsequently removed by consent of parties, when capable, or by action of the appropriate courts.[3] Mr. Bishop[4] states the English common law to be, that "inasmuch as there must be a consent in order to constitute marriage, if there be such a mistake in one or both of the parties that the formal consent given does not apply to the person with whom the formal marriage is celebrated, then the marriage is a mere nullity; but if it does apply, then the marriage is good unless fraud has entered into the matter of mistake in such a way as to render it invalid on this ground."[5] Whether there was such a mistake, the court whose process is invoked must necessarily decide by its own law.[6] But to make its action, in annulling a marriage, internationally final, it must have jurisdiction, and it must follow the rules of international law applicable to cases of divorce.[7]

§ 146. In respect to fraud, the later canonists introduced a series of refinements based on the *reservatio mentalis*, which entitled a party to use his own fraud, in the suppression of material facts, to subsequently avoid the contract. These subtleties of the casuists, however, never took practical

So as to fraud.

[1] Walter, Kirchenrecht, § 308, note 7.

[2] Landrecht, Th. ii. tit. i. § 40.

[3] Trid. Concil. Declar. No. 122, sess. xxiv. de reform. mat.; Eichhorn, Kirchenrecht, Bd. 2, s. 427, note 1.

[4] Mar. & Div. § 206.

[5] He cites to this 2 Kent Com. 77; Stayte *v.* Farquharson, 3 Add. Ecc. 252.

[6] A court of equity may annul a marriage entered into by the parties in jest. McClurg *v.* Terry, 21 N. J. Eq. 424.

[7] See infra, §§ 209, 239.



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effect in the codes of either church or state; and they are justly denounced as destructive of all principles of fair dealing.[1] By the authoritative jurists, both of the Roman and the Protestant churches, these refinements are repudiated, and fraud has been held to vitiate a marriage only when it led the defrauded party into an error as to an essential fact.[2] This, however, is not a personal disqualification for marriage, adhering to the individual wherever he goes, but simply a ground for annulling the marriage, to be determined by the court having jurisdiction, in accordance with the usual procedure in divorce.

Minority a question of state policy excluding foreign laws.

§ 147. We have already seen[3] that even in France, Belgium, and Italy, where the theory of the ubiquity of personal law is pushed to its extremest limit, it is provided by Code that no foreign personal law is to be recognized when it militates against "public order" or "good morals." We have also seen,[4] that to encourage early marriages is as much part of the distinctive policy of the United States as to discourage such marriages is part of the distinctive policy of Europe. From this two conclusions flow. In the first place, if a foreigner, incapable from minority of marrying in his own land, but of full matrimonial age in one of our states, marries in such state, we will hold the marriage valid. In the second place, if two of our citizens, of full matrimonial age in their own state, marry abroad in a state where they are not of full age, their marriage will be held valid in the courts of their state when they resume in it their residence.[5]

[1] Canon Law, cap. 26, x. de sponsalibus, 4, 1. Savigny's comments are justly indignant. Röm. Recht, iii. § 259, note a.

[2] Permaneder, Handb. d. Katholischen Kirchenr. 2 Aufl. 1853, § 689, note 12; Savigny, Röm. Recht, ii. § 117, note *f*; Eichhorn, Kirchenr. Th. 2, s. 355; Bishop Mar. & Div. c. xi.; Portsmouth *v.* Portsmouth, 1 Hagg. Ec. 575; Clark *v.* Field, 13 Vt. 460; Keyes *v.* Keyes, 2 Fost. (N. H.) 553; Scott *v.* Shufeldt, 5 Paige, 43; Sloan *v.* Kane, 10 How. N. Y. Prac. 66; Benton *v.* Benton, 1 Day, 111; Reynolds *v.* Reynolds, 3 Allen, 605.

[3] Supra, § 104 *a*, 104 *b*.

[4] Supra, § 127.

[5] See cases cited infra, §§ 150, 165. By the Roman law, women under twelve, and men under fourteen, are incapable of matrimony, and this without respect to their physical qualifications. L. 3, C. quando tutores, 5, 60. By the canon law, a betrothal, with parental consent, before these ages, is retrospectively validated as a marriage by subsequent cohabitation. Cap. 8, x. de desponsatione impuberum, 4, 2. The Council of Trent prohibited this, and revived the Roman law. But particular coun-



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§ 148. Incurable impotency, by the canon law, renders a marriage null; but if known before marriage to the other party, such party cannot seek after marriage for a divorce on this ground.[1] Before, however, this nullity will be proclaimed, an interval of from one to three years, in which the parties shall live together, is required,[2] unless

Impotency a cause of nullity determinable by *judex domicilii.*

tries have adopted special laws as to puberty. In Austria, fourteen years are necessary to both sexes when the consent of parents is obtained. Permaneder, Kirch. s. 693, note 11. In Prussia, with the same condition, the man must have completed eighteen years, and the woman fourteen. The English common law follows the Roman law, in assigning fourteen to males and twelve to females, as the age necessary to consent; though in several of the United States other periods have been enacted. Bishop Mar. & Div. § 148. As such laws, however, are the offspring of local policy, they are not binding extra-territorially. Hence, in such respects, the *lex fori* is to decide whether a marriage is valid. To adopt the *lex loci contractus* for this purpose would be productive of great hardships. If persons domiciled in, and natives of Italy, where the age of consent in women is twelve, and men fourteen, and where the climate leads to early puberty, should be married when travelling, in a northern state where the minimum is fixed at eighteen, would the courts of any third state hold, in case of either party's being under the age of consent by the *lex loci contractus*, that such party could afterwards avoid the contract? In other words, while each country applies to its own subjects its own rules of capacity, is it bound to give extra-territorial effect to the laws of other countries, based on peculiarities of race or climate? The negative is held by the canon law, which may in this respect be treated as part of the common law of Christendom. Cap. 8, x. de desponsatione impuberum; Ayl. Parer. 241; 1 Fraser's Dom. Rel. 43. It says: "We establish fourteen for men and twelve for females as a standard; but we will go behind this when on one side there is clear incapacity at this age, or, on the other side, capacity exists at a prior age, and an earlier marriage takes place with consent of parents. With us the question is whether the parties are *habiles ad matrimonium.* If so, time is merely a matter of form."

See, generally, Reeve Dom. Rel. 237; Shaffer *v.* State, 20 Ohio, 1, and authorities cited infra, § 165.

By all codes a marriage, when either party is under seven years, is a nullity. 2 Burn Ecc. Law, 434; Bishop, *ut supra;* Swinb. Spous. 34.

Under the Ohio law, which permits a man when eighteen years of age to disaffirm a prior marriage, a man so disaffirming such marriage is held to be freed from the tie of the marriage everywhere; and the Illinois courts, in an action of ejectment subsequently brought to determine the title to his real estate, will hold that the children of the first marriage are not entitled to take as his heirs. McDeed *v.* McDeed, 67 Ill. 545.

In Jeremy Taylor's Doctor Dubitantum, book ii. chap. ii. will be found numerous classical and ecclesiastical citations bearing on the questions in the text.

[1] Cap. 2, 3, 4, x. de frigidis, 4, 15.

[2] Ibid.



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there should be indisputable evidence by experts of positive sexual incapacity.[1] Competency to dissolve marriages on the ground of impotency belongs exclusively, it may be well argued, to the *judex domicilii*.[2]

But mere barrenness does not annul.

§ 149. The law of England is, that incapability of procreation, when there is no incapacity for sexual intercourse, does not found a decree for nullity.[3] The Scotch law seems to make mere barrenness adequate for such a decree.[4] But these distinctions have a merely territorial scope. The primary international question is, What does the common law, which existed at the settlement of America, and prior to the Council of Trent, provide? Now, the assumption of several eminent text-writers, that this common law, as expressed in the canon law, made incurable barrenness, at the time of marriage, a ground of nullity, goes too far. Undoubtedly such marriages, in certain cases, were declared null by papal decree; but this was by special and extraordinary act. The practice was to regard such marriages as valid, until after probation, and even permanently, unless some strong domestic circumstances required the interposition of the papal prerogative. Barrenness, it was frequently said, arose from causes too manifold and various to be treated as an arbitrary bar. Incapacity for *copula* is such a bar, however, and wherever it exists, by the common law of Christendom, it is to be regarded as working nullity, no matter where the marriage was celebrated. But such incapacity must have existed at the time of marriage, and must be capable of clear and unquestionable proof.[5] Nor can such a plea be set up when the party complained of is accepted as a consort at an advanced age.[6]

[1] Canon Law, cap. 4, 14, x. de probationibus, 2, 19; cap. 5, 6, 7, x. de frigidis, 4, 15; Resolutio, 96, sess. 24, Trid. Conc.; Richter, s. 258; Goeschen, doctrina de matrimonio, note 6, 102 a, 106; Eichhorn, Kirchenrecht, Bd. 2, s. 348, note 38; Walter, Kirchenrecht, 11 Aufl. § 305, note 23; Permaneder, Kirchenrecht, s. 697. The Roman law invalidating the marriage of *castrati* is to be found in L. 39, § 1, D. de jure dotium, 23, 3. Pope Sextus V. in 1589, issued a bull prohibiting the marriages of persons of this class.

[2] See infra, §§ 210, 231.

[3] Deane *v.* Aveling, 1 Roberts. 279; B. *v.* B. 1 Spinks, 248; Bishop Mar. & Div. 325.

[4] 1 Fras. Dom. Rel. 33.

[5] Devanbagh *v.* Devanbagh, 5 Paige, 554.

[6] Briggs *v.* Morgan, 2 Hagg. Con. 324; Brown *v.* Brown, 1 Hagg. Ec. 523.



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§ 150. We have already observed,[1] that laws fixing the age of matrimonial capacity vary according to the policy of particular states, and that consequently no one state, even if we accept the most advanced conception of the ubiquity of personal laws, is called upon to enforce the limitations in this respect of other states when they conflict with its own. The distinctive policy of the United States, as we have also seen,[2] is, while imposing penalties on clergymen and others officiating at marriages of minors without parental consent, to hold such marriages valid when the parties are otherwise capable of marriage. The conclusions here, also, are: (1.) that if foreigners marry on our shores without parental consent, we will hold such marriages valid, though they would have been invalid if contracted in the place of the party's domicil;[3] and (2.) that we will hold valid the marriages abroad of citizens of our states capable of marrying by the law of their domicil, though no such consent is given as is required by the law of the place of celebration.[4]

Laws requiring consent of parents or of state matters of national policy.

[1] Supra, § 147.

[2] Supra, § 127.

[3] See infra, §§ 151 *et seq.*

[4] Infra, §§ 165 *et seq.*

According to the Roman law, the power of restricting marriage, in such cases, was limited to the person in whose paternal power the party in question was. Want of consent in such a case was classed with the private impediments (*privata impedimenta*), which could be relieved by subsequent cohabitation or consent. Pr. J. de nuptiis, L. 10; L. 2, D. de ritu nuptiarum xxiii. 2, 1, 5; C. de nuptiis, v. 4. Here exhibits itself the element of paternal authority and of family restraint, which it was one of the prime features of the Roman policy to build up; and also that of the encouragement of marriage, subject to such family restraint, which was also a chief ingredient in this policy. Under the old German law it was the *guardian* who was to give consent; and this guardian was not necessarily the father, but whatever appropriate person the state might appoint. Herzog, Encyc. tit. Ehe, citing Kraut, Vormundschaft, ii. s. 604.

The limitations of the French Code will be found infra, § 184. Nor are German restrictions less artificial and less repugnant to our policy. "No young man of any class can take a wife till his three years' military service is over, and then, if he belongs to the 'upper five hundred thousand,' and is also, as is usually the case, in the army, a *caution*, as it is termed, of 15,000 thalers (2,250*l.*) must be deposited in the government funds, so as to provide for the lady in case of his death — this being a device to save pensions." London Quarterly Rev. Oct. 1880, 530. Should a German officer who has declared his intention to be naturalized in this country, but who had not yet perfected his intention, marry here without



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§ 151. The distinctive law of the United States, that the impediment of non-consent of parents or guardians does not invalidate a marriage, is not the product merely of our own policy, as a country encouraging early marriages, and with whose traditions and conditions an early emancipation from parental control is consistent. By the canon law clandestine marriages, as they are called, however open to censure, have been always valid. And this was the law that the settlers of this country, Roman Catholic as well as Protestant, brought to our shores.[1]

By canon law marriages without such consent valid.

§ 152. In France, as we have seen, it has been held that the provisions of the Code in respect to consent of parents or guardians, and in respect to publication, follow French citizens wherever they go; though there are recent rulings to the effect that marriages made in a foreign country, in good faith, and without the intention to evade French law, will be sustained by French courts.[2] On the other hand, there can be no question that marriages by French citizens in this country, if according to our laws, would be sustained in such cases by our courts.[3]

In France restrictions of this class follow subjects wherever they go.

complying with these conditions, would it be seriously maintained that our courts ought to hold such marriage void?

[1] Infra, § 171.

[2] The limitations of the Code are given infra, § 184.

[3] By the 170th article of the Code Napoleon, "Le mariage contracté en pays étranger entre Français, et entre Francais et étrangers, sera valable, s'il ait été célébré dans les formes usitées dans le pays, *pourvu qu'il ait été précédé des publications prescrites par l'art.* 63, *au titre des actes de l'état civil, et que le Français n'ait point contravenu aux dispositions contenues au chapitre précédent.*" The last-named chapter defines the limits as to relationship, age, and guardianship. A Frenchman, therefore, marrying abroad, must adhere to these forms, in order to contract a marriage valid in France.

The marriage of Jerome Bonaparte, in Baltimore, on December 24, 1803, with Miss Patterson, was celebrated by a Roman Catholic priest according to the local forms, Jerome being but nineteen years of age. By the Code Napoleon, which had a few months before been enacted, certain publications were required, and the consent of parents for minors made essential; neither of which conditions were complied with. Notice of these laws was given in October, 1803, prior to the marriage, by the French minister, to the parents of Miss Patterson. Napoleon I. shortly afterwards issued a decree, annulling the marriage. The Pope refused to declare the marriage void.

"The civil marriage could be an-



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§ 153. In England the statutes as to banns and as to parental consent are held to be purely local and intra-territorial; and hence the English courts recognize as valid the marriages in Scotland, where these checks were set

In England marriage of subjects abroad

nulled without much difficulty, but the religious tie existed, and it required ecclesiastical authority to dissolve that. It soon presented itself in the form of a request, which Napoleon made on him (the Pope) to cancel Jerome's marriage with Miss Patterson. Napoleon did not hesitate to ask the Pope for this dissolution, persuaded that he could not refuse that slight service after all the concession he had made. The court of Rome had in reality often shown, especially in affairs of this kind, how easily she could accommodate her maxims to circumstances, and authorize exceptions to her best established rules, when an advantage was to be obtained by doing so. In this case not so much was asked of her, for Napoleon had joined to his demand a copy of the opinion of most eminent casuists, and even of the Pope's theologian himself, proving that by the decisions of ecclesiastical law this marriage was void. But to his great surprise and irritation he met with an invincible resistance from the meek Pius VII. The pontiff wrote the emperor a letter, full of the most tender protestations of friendship. *He clearly recognized that the secrecy of the marriage constituted a canonical cause of nullity according to a special decree of the Council of Trent. Unhappily the closest and most minute investigations had failed to prove that this decree was ever published in the town of Baltimore.* He was grieved not to be able to pronounce the dissolution of the marriage. If he were to do so, 'he would render himself guilty of an abominable abuse before the tribunal of God.'" 2 Lanfrey's Hist. Nap. 534, citing Pius VII. to Napoleon, June 5, 1805. Compare Lawrence's Wheaton, 182.

The question of Jerome's Baltimore marriage was reopened in Paris in 1860, 1861, in the litigation as to the successions of Cardinal Fesch, and of Jerome himself. It was finally held that though the marriage was valid according to the local law, it was invalid in France, in consequence of non-compliance with the French Code. Lawrence Com. sur Wheat. iii. 396; Thiers Consulat et Empire, viii. 28.

"Si le Français pourait s'y soustraire (the restrictive statute), en allant se marier en Angleterre, l'incapacité dont la loi le frappe serait dérisoire, parce que rien ne serait plus facile que d'echapper en allant contracter mariage à l'etranger." Portalis, quoted by Laurent, Droit civil int. 536. The harshness of the rule has in some cases been modified by decisions that when there is no clandestinity about such marriages, and when they are solemnized in good faith, without the intention of evading the law, they will be sustained in France. See cases cited in Brocher, Droit int. privé, 192; Dalloz, 1856, cited Westlake, 1st ed. § 341. Voluntary clandestinity, however (clandestinité voluntaire), in a marriage by a French citizen abroad, invalidates the marriage, though if there be no clandestinity it is otherwise. Jour. du droit int. privé, 1875, pp. 190, 273; 1878, p. 43; 1879, pp. 281, 487; Tirveillot *v.* Tirveillot, Trib. civ. Seine, 1878; Jour. du droit int. privé, 1878, p. 609.



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valid, though without statutory requisites.

at naught, of persons domiciled in England, though the journey to Scotland was made for the express purpose of evading the English laws.[1] It is doubted by Mr.

"D'après une jurisprudence constante, le défaut de publication et l'absence de consentement des ascendants ne constituent pas une nullité d'ordre public; la nullité du mariage ne peut être prononcée qu'autant que les publications ont été omises ou que les actes respectueux n'ont pas été faits dans le but de faire fraude à la loi ou de dissimuler l'existence du mariage aux parties intéressées." Jour. du droit int. privé, 1879, 281. The same view is expressed by Pasquale Fiore, Droit int. tr. Pradier-Fodéré, No. 102; Jour. du droit int. privé, 1878, p. 273.

In Dussance *v.* Dussance, decided in Paris in 1873, the evidence was that E. H. Dussance, a French subject, was married on Nov. 13, 1858, in Stephenstown, N. Y., by a Presbyterian minister, by a form proved to be valid in the State of New York, to Anne Eliza Hicks, and that the parties afterwards cohabited as man and wife. The marriage was held valid in France, though without the preliminaries required by the French law, there being no proof of an intention to fraudulently evade the law. To the same effect is cited Demangeat, s. Fœlix, vol. ii. p. 379; Jour. du droit int. privé, 1874, p. 243.

In Labellot *v.* Boursier, Trib. civ. Seine, 1877, it was held that the marriage of a Frenchman and a Frenchwoman before a Brazilian priest, at Rio de Janeiro, is void when "clandestinity" (clandestinité) is shown by the facts that there was no publication of banns in France, that the consent of parents was not asked, and that the families of the parties were not informed that the marriage was intended. Whether there was "clandestinity" is held to be a matter for the court. Jour. du droit int. privé, 1878, p. 164.

In the London Law Times of April 21, 1880, is reported a case in which an English marriage of the above class was annulled in France under circumstances of extreme hardship.

The Swedish law is said to be the same in this respect as that of France. Jour. du droit int. privé, 1875, p. 240.

In respect to the annulling of marriages on account of their non-conformity with the law of the place of celebration, Fiore (Op. cit. § 93) lays down the following rules: —

(1.) A marriage should be annulled only when this is expressly required by the law to which the marriage is subject; in cases of doubt, the presumption is always for validity.

(2.) Only such persons as the law specifies can proceed for a judicial declaration of nullity.

(3.) The law to determine such procedures must be internationally competent.

(4.) The tribunal determining the question is not to give effect to a foreign law which contravenes principles of public order which are sanctioned by the *lex fori*.

On the first point he remarks that it does not follow that a marriage is invalid because it was celebrated in the face of impediments established by the local law. He distinguishes

[1] Compton *v.* Bearcroft, 2 Hagg. Const. R. 444, note; Dalrymple *v.* Dalrymple, Ibid. 54. Infra, § 183.



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Westlake, however, whether these decisions are not shaken, if not reversed, by the case of Brook *v.* Brook, already referred to. But a subsequent case makes it clear that when the incapacity is not moral but formal, — *e. g.* want of consent of parents, — and a marriage contracted subject to it is capable of subsequent validation, such restraints have no extra-territorial effect.[1] Cer-

*prohibitive* from *invalidating* impediments; and he holds that a marriage in a foreign land ought not to be annulled by the home authorities simply because it is in violation of prohibitions of the home law. A note, however, from Pradier-Fodéré, the French editor, dissents in this respect from the views above stated, maintaining, in conformity with rulings elsewhere cited, that when a Frenchman goes to another country to be married, *in fraud of the French law*, and marries in defiance of the French prohibitions, the French courts will pronounce the marriage invalid.

Banns, as is remarked by Fiore (Op. cit. § 101), are intended ordinarily to give local notice, and hence are only locally obligatory. Some codes, however, impose on subjects marrying in a foreign land the duty of making publication in their own country. To this effect is the Code Napoleon, article 170; the Italian Code, article 100; the Austrian Code, article 4; that of Holland, article 158; as well as the codes of other states. The French and Italian codes also prescribe the registry, by subjects marrying abroad, in the proper home office of the marriage. See infra, § 184. The juridical consequences of omissions in this respect are to be determined, according to Fiore, by the law of the country to which the parties belong. Whether an omission of the publication required by the French Code invalidates such marriage in France, has been the subject of much difference of opinion in France. That it works such invalidity was decided by the Court of Cassation in 1831 and 1837. On the other hand, other rulings of the Court of Cassation, and of several imperial courts, adopting the opinion of Merlin, of Dalloz, and other authoritative jurists, take the position that as non-publication does not invalidate a marriage in France, it cannot invalidate the marriages of Frenchmen abroad. The more recent conclusion of the French courts, according to Fiore, is that whether or no such default of publication invalidates, depends on the circumstances of each case. To this effect are cited Demolombe, Mariage, No. 225; Fœlix, Des mariages contractés en pays étranger, No. 2. Pradier-Fodéré, on commenting on this passage, laments the contradictory rulings of the French courts on this point. He says, that "dans l'affaire d'Elizabeth Patterson" (Madame Jerome Bonaparte), in 1861 the Court of Paris held that a marriage by a French subject abroad was invalidated by the omission of publications; while a contrary view was taken, in another case in the same year, by the Court of Cassation, and a number of decrees were subsequently made validating similar marriages in cases where fraud and clandestinity were not proved. And this he declares to be the present (1875) rule in France. The French prescriptions are given in detail infra, § 184.

[1] Simonton *v.* Mallac, 2 Sw. & Tr. 67.



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tainly the English courts have been emphatic in their recognition of the principle, that by the old common law of England, which, in this respect, was the canon law, the marriage of minors of the age of puberty, without the consent of parents, was good.[1] This was the law in England when America was settled, and was consequently the law the settlers brought with them.[2]

Prohibitions on marriage of ecclesiastics not of extra-territorial force.

§ 154. In some European states ecclesiastics, as a matter of state policy, are precluded from marriage. There can be no question, however, that if an ecclesiastic, forbidden to marry by his personal law, should marry in this country, we would hold the marriage valid. And there could be little doubt, also, that if an ecclesiastic who by his personal law in this country is capable of marrying should marry in Europe, in a country forbidding such marriage, we would, on his return, hold his marriage valid.[3]

[1] R. *v.* Hodnett, 1 T. R. 96; Priestly *v.* Hughes, 11 East, 1. Infra, § 172.

[2] White *v.* Henry, 24 Me. 531; Pool *v.* Pratt, 1 Chip. 252; Jones *v.* Tevis, 4 Litt. 25; Governor *v.* Rector, 10 Humph. 57; Hargraves *v.* Thompson, 31 Miss. 211.

In the Irish case of Steele *v.* Braddell (Milw. Ir. Ecc. Rep. 1), it was held that parties, domiciled in Ireland, who, under the Irish Marriage Act, were incapable, being under twenty-one, of contracting a valid marriage in Ireland, without consent of parents, might, without such consent, contract a valid marriage in Scotland. This case was approved by Lord Campbell in Brook *v.* Brook, 9 H. L. C. 216, on the ground that the disability was not moral, "contrary to the law of God," but technical.

By 19 & 20 Vict. c. 96, s. 1, it is enacted that "No irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage." In a case before the Court of Probate and Divorce in 1878, it appeared that J. D. and A. L., being both domiciled in England, left London for Scotland on the evening of the 30th June, 1870, for the purpose of contracting a clandestine marriage. They arrived at Edinburgh between five and six on the following morning, July 1, and lived in Scotland until the 21st July, when they contracted an irregular marriage before the registrar at Edinburgh about 11.30 on the morning of that day. It was held by the court (Sir J. Hannen), that, according to the mode of computing time by Scotch law, the parties had not lived the prescribed time in Scotland, and that therefore the marriage was invalid under the above statute. Lawford *v.* Davies, 39 L. T. N. S. 111. See Kent *v.* Burgess, 1 Sim. 161. Infra, § 169.

[3] See supra, §§ 107–9.

Whether a priest can contract in Italy a marriage civilly valid has been held an open question under the Code of the new kingdom. The



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§ 155. The same distinction applies to the efficacy of religious vows. These, according to the canon law, are twofold. One, the *votum solenne*, rests upon priestly ordination, or entrance into one of the great religious societies established by the Pope. The other, the *votum simplex*, is a personal vow of chastity, with which, it seems, the Church can dispense. Even where such vows are sanctioned by the civil authorities, they would be regarded, being mere matters of social policy, as no bar in other lands, and as not affecting our own citizens, subject to

So as to vows.

weight of authority is in favor of such validity. See a learned discussion in the Journal du droit int. privé for 1880, pp. 120 *et seq.*, where it is said that a decision of the Court of Cassation, in 1878, held, "l'engagement dans les ordres sacrés, non seulement comme un empêchement prohibitif, mais encore comme un empêchement diriment." It has, however, been ruled that such marriages cannot be attacked collaterally. And jurists of high authority have contested the conclusion of the Court of Cassation that the impediment is "diriment." The article above cited in the Journal du droit int. privé thus concludes: —

"Nous croyons que, dans notre loi telle qu'elle existe, l'engagement dans les ordres sacrés ne constitue aucune espèce d'empêchement au mariage, pas même un empêchement simplement prohibitif. V. en ce sens Valette sur Proudhon, t. i. p. 415, et Cours, t. i. p. 190; Demolombe, Mariage, t. i. nos 131 et 431 bis et les Observations de M. Labbé, Sir. 78, 1, 241–244.

"En 1877, M. Raspail a soumis à la Chambre des députés une proposition de loi d'après laquelle 'une amende de 300 à 1,000 francs et un emprisonnement d'un an à six mois' devraient être prononcés contre tout officier de l'état civil 'qui refuserait de célébrer un mariage, sous prétexte que l'un des futurs serait ou aurait été engagé dans les ordres sacrés.' Journal officiel du 11 février 1877, p. 1076.

"Plus récemment, M. Saint-Martin a reproduit la même pensée, en termes plus généraux: 'il n'est admis d'autres prohibitions au mariage que celles portées par le présent Code et qui sont limitatives, ou par les lois militaires.' Journal officiel du 27 mars 1879, p. 25272; annexe no 1222, séance du 10 mars 1879."

Mr. Westlake (1880, p. 55) justifies the position that foreign matrimonial restrictions on ecclesiastics will not be recognized in England, on the ground that "no principle of English policy can be deemed more stringent than that which would refuse to exclude a whole class of the population from the possibility of marriage." If this is applicable to a class so small as foreign ecclesiastics visiting England, it is *a fortiori* applicable to the large number of Americans who are constantly travelling in Europe, whose marriages abroad would be invalid if the *lex loci actus* is to prevail, and to the still greater number of Europeans and Asiatics visiting the United States without intending domicil, whose marriages would be invalid if the *lex domicilii* is to prevail.



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such vows, should they marry on a transient visit to a country where such vows are a bar.[1]

So as to prohibition of marriages with Jews or infidels.

§ 156. In several European states limitations are imposed on marriages between Christians and Jews. An interesting case of this kind was decided by the Supreme Court of Vienna in 1878.[2] The Austrian and Hungarian laws prescribe that marriages between Christians and non-Christians shall be void. The Prussian law no longer retains this restriction. In the case before the court, the plaintiff, who sought a decree of nullity, was a Prussian and a Christian, the defendant a Hungarian and a Jew. The marriage was celebrated at Berlin. The civil tribunal of Prague rejected the petition on the ground that the Prussian law governed the case. This was reversed by the appellate court of Bohemia, and the action of this court finally affirmed by the Supreme Court of Vienna, on the ground that the defendant, according to his personal law, could not contract a valid marriage anywhere with a Christian, and that as he was not bound by the marriage, the marriage was invalid.[3] Were such a case to come up in this country, the conclusion would be the reverse of that just stated. If a Jew from Austria should marry a Christian in one of our states, we would hold that the fact that his personal law was Austrian would not invalidate the marriage.[4]

§ 157. Although marriages between Roman Catholics and Protestants have been always discountenanced by the Roman Catholic Church, they have never, on account of this difference

[1] See Richter, Kirchenr. § 262. Supra, §§ 107–9.

[2] Jur. Blätt. 1878, No. 27; Jour. du droit int. privé, 1879, p. 500.

[3] The editor of the Jour. du droit int. privé adds the following: —

"L'arrêt de la Cour suprême de Vienne est tout à fait conforme aux principes généraux du droit international privé. Il s'agissait dans l'espèce d'une question de capacité; c'est donc à tort que le jugement de première instance avait invoqué l'article 37 du Code civil autrichien. Cet article dit sans doute que les actes passés à l'étranger entre étrangers ou entre étrangers et autrichiens sont régis par la loi du pays où ils ont été faits. Mais il ne s'agit dans cet article que de déterminer quelles clauses peuvent ou non être insérées dans les contrats passés à l'étranger et nullement des questions de capacité que résout l'article 34. Autrement il dépendrait des personnes soumises au Code civil autrichien et incapables, en vertu de ses dispositions, de se rendre dans un pays étranger, dont la loi n'admet pas la cause d'incapacité dont elles sont frappées, pour y agir valablement."

[4] Supra, § 127; infra, §§ 160 *et seq.*



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of religion, been held void by that church; nor is there any state in which they are invalidated by secular legislation.[1] An interesting question, however, may arise as to the Prussian law, which attaches to such marriages the condition that the children shall be all educated in the religion of the father.[2] This law, however, is clearly of a police and municipal character, and hence cannot be regarded as having extra-territorial force.

So of marriages between Protestants and Roman Catholics.

§ 158. By the Act of 12 Geo. III. c. 11, s. 1, "no descendant of the body of his late majesty King George II." &c. "shall be capable of contracting matrimony without the previous consent" of the reigning sovereign. This has been held to render invalid, in England, marriages by the persons so prohibited, although such marriages were celebrated on the continent, where no such impediments existed.[3] Analogous restrictions exist in several German states. It is scarcely necessary to say that such limitations would be regarded in foreign countries — *e. g.* the United States — as purely political, and as having no force except in the country that imposes them.

So of marriages locally prohibited on account of inequality of rank.

§ 159. In several of the United States statutes exist forbidding the marriage of whites with negroes, and of whites with Indians. Of course, in the state where such a prohibition exists, the *lex fori* prevails, supposing the marriage to take place in the state, and the parties to be subject to its law. But when persons domiciled in a state where these prohibitions are in force are married without domicil, in violation of such prohibitions, in a state where there is no opposing legislation, the parties visiting the latter state for this purpose, will the former state recognize the validity of the marriage? The first point for the court of such a state to determine, on such an issue, is whether the prohibition of such marriages is part of the distinctive policy of the state. If so, the court, acting on the reasoning already given,[4] must hold that persons domiciled in such state cannot evade its laws by going to another state and then returning to live in the home state in a

So of marriages locally prohibited on ground of distinction of race.

[1] Walter, Kirchenr. 11 Aufl. § 300.
[2] Landr. Thl. 2, tit. ii. § 78.
[3] Sussex Peerage case, 11 Cl. & Fin. 152. Infra, § 173.
[4] Supra, §§ 104 *a*, 104 *b*, 127.



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union that state condemns. And so it has been ruled on several occasions.[1] On the other hand, where in Massachusetts a law existed prohibiting the marriage of whites and negroes, and where parties incapacitated for marriage by this law went to Rhode Island, where no such law existed, and were there married, the Supreme Court of Massachusetts held that the marriage was valid, though in fraud of the Massachusetts statute.[2] The decision was put simply on the ground of the supremacy, in marriage contracts, of the *lex loci contractus*. Another phase presents itself when the parties (one or both of whom previously resided in a state forbidding the marriage) move for the purposes of permanent residence into a state where such marriages are lawful, and there, after acquiring a domicil, marry, and then return into

[1] Kinney *v.* Com. 30 Grat. 858; Williams *v.* Oates, 5 Ired. 538; State *v.* Kennedy, 76 N. C. 251; Scott *v.* State, 39 Ga. 321; Dupre *v.* Boulard, 10 La. An. 411.

That statutes of this class are not unconstitutional under the 14th amendment, see Hobbs, ex parte, 1 Woods C. C. 537; State *v.* Gibson, 36 Ind. 389.

[2] Medway *v.* Needham, 16 Mass. 157. See, on the question of voidability of marriages, Stevenson *v.* Gray, 17 B. Mon. 193.

In Brook *v.* Brook, 9 H. L. C. 193, the lord chancellor, commenting on Medway *v.* Needham, said: —

"I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and the country of domicil were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and, immediately returning to their own state, to insist on their marriage being recognized as lawful."

Lord Cranworth, referring to the same case, said: "I also concur entirely with my noble and learned friend, that the American decision of Medway *v.* Needham cannot be treated as proceeding on sound principles of law. The province or state of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman, and on the grounds pointed out by Mr. Story, such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful."



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the former state. In such cases the latter state, so it is held in North Carolina, will hold the marriage valid.[1]

### III. THEORIES AS TO MATRIMONIAL CAPACITY.

§ 160. From what has already been said, it will appear that there are three distinct theories as to the law which is to determine the question of matrimonial capacity.

Theory that the law of the place of solemnization decides.

§ 161. (1.) The first is that matrimonial capacity is determined by the law of the place of solemnization; this view being maintained by Judge Story,[2] and Mr. Bishop,[3] and by a long series of English and American judges. This theory has the advantage of simplicity. The place where a marriage is solemnized is always ascertainable; and if the law of this place is everywhere to prevail in determining marital capacity, we would have at least uniformity of rulings in all countries as to any particular question of capacity.

Objections to this view.

§ 162. But to this view it must be objected, first, that it is admitted to be subject to exceptions which destroy its applicability to the majority of litigated cases. Thus marriages, which by our law are incestuous, are not validated by being performed in another land, where they

[1] State *v.* Ross, 76 N. C. 242. But see *contra*, Dupre *v.* Boulard, 10 La. An. 411; 15 Ibid. 342.

In State *v.* Ross the court said: —

"We are compelled to say that this marriage, being valid in the state where the parties were *bonâ fide* domiciled at the time of the contract, must be regarded as subsisting after their immigration here. The inconveniences which may arise from this view of the law are less than those which would result from a different one.

"The children of such a marriage, if born in South Carolina, could migrate here and would be considered legitimate. The only evil which could be avoided by the contrary conclusion is that the people of this state might be spared the bad example of an unnatural and immoral, but lawful, cohabitation. The inconveniences on the other side are numerous, and are forcibly stated in Scrimshire *v.* Scrimshire, 2 Hagg. Consist. R. 417, and in Story, § 121: 'And, therefore, all nations have consented, or are presumed to consent, for the common benefit and advantages, that such marriages shall be good or not, according to the law of the country where they are celebrated.'"

That statutes to this effect are statutes of state policy which will be enforced irrespective of the privileges of domicil, see Kinney *v.* Com. 30 Grat. 858; Green *v.* State, 58 Ala. 190.

[2] §§ 110, 112. See, also, Ponsford *v.* Johnson, 2 Blatch. 51.

[3] Mar. & Div. § 390.



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would be lawful,[1] and so the converse is true, that the marriage, in England, of an American with his deceased wife's sister, would be recognized as valid in such of our states as hold such a marriage to be legal. Nor, notwithstanding the observations frequently thrown out that a marriage bad by the *lex loci contractus* is bad everywhere, is it believed that an American court will ever hold a marriage of American citizens solemnized abroad to be illegal, simply because the consent of parents was withheld,[2] or because one of the parties, though of age at home, was a minor at the place of celebration.[3] The same conflict, as has been already seen, is likely to exist when persons domiciled in one of our states where marriages of persons of a particular class are forbidden, go abroad to evade the law, marry in a country where the marriage is lawful, and then return home.[4] A second objection to this view is the risk to which it exposes the marriages, now not infrequent, of persons travelling abroad. Some defect in the observance of local law, of which the parties had no thought, would, if this view obtain, invalidate the marriage, and illegitimatize the offspring.[5] But a more serious objection would be the validity which would be thus given to Chinese and Indian polygamy. To maintain the authoritativeness of the *lex loci celebrationis* in this respect would be to license polygamy wherever Chinese and Indians migrate. And to make the *lex loci celebrationis* supreme enables parties to acquire for themselves any kind of marital capacity they want, — all that will be needed for this purpose is to have the marriage solemnized in a state where this kind of marital capacity is sanctioned by law.[6]

[1] Supra, § 136.

[2] Supra, §§ 127, 150.

[3] Ibid.

[4] Supra, § 159.

[5] Supra, § 150.

[6] Notwithstanding these arguments, says Brocher, after stating the reasons for the adoption, as to the conditions of marriage, of the law of the place of celebration, it would be better to abandon this rule, in view of the grave conflicts which its general application excites. It tends to a collision between the states immediately interested, the state where the marriage is celebrated, and the state to whose laws the parties are subject. Between these influences neutral states will hesitate. . . . . All the considerations in favor of applying the personal *status* of parties extra-territorially are in force here. . . . . It should be added, that if the parties are free to choose the place of the celebration, they will be able to impose upon themselves any conditions



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§ 163. (2.) A second theory of matrimonial capacity is that it is determined by the *lex domicilii*. Mr. Wheaton[1] says: "In general, the laws of the state, applicable to the civil condition and personal capacity of its citizens, operate upon them even when resident in a foreign country." . . . . "*The personal capacity to contract a marriage, as to age, consent of parties, &c., is regulated by the laws of the state of which the party is a subject;* but the effects of a nuptial contract upon real property (*immobilia*), in another state, are determined by the *lex loci rei sitae*." Sir R. Phillimore, in his treatise on International Law,[2] declares that the *lex domicilii*, in all questions of personal capacity, is now, even in England, to be regarded as decisive. Lord Brougham, in a celebrated case,[3] said: "The marriage contract is emphatically one which parties make with an immediate view to the usual place of their residence." The parties to a contract like this, he insisted, must be held to enter into it with a reference to their own domicil and its laws.[4]

Theory of *lex domicilii*.

they desire. The prescriptions of public policy as to marriage would be in this way completely eluded. If, on the other hand, the selection of the place of marriage is fortuitous, we must remember the incertitudes and dangers which result from such collisions. Strangers who happen to be temporarily sojourning in a city cannot be expected to know its laws.

Two valuable and instructive articles on marriage by Mr. Wm. Beach Lawrence will be found in the Revue du droit int. for 1870, pp. 53, 243.

[1] Int. Law, Lawrence's ed. 172.

[2] IV. 284, &c.

[3] Warrender *v.* Warrender, 2 Cl. & F. 488; 9 Bligh, 89.

[4] Lord Campbell, in Brook *v.* Brook, 9 H. of L. Cases, 193; 7 Jur. (N. S.) 422, after conceding that the law of domicil did not extend to the direction of the ceremonial part of the marriage rite, went on to say that "the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." To which Judge Redfield, in a note to Judge Story's treatise, adds: "Hence if the incapacity of the parties is such that no marriage could be solemnized between them, or not without the consent or agency of other parties, as that of parents and guardians, and the parties without changing, or intending to change, their domicil, go into some other country, where no such restriction or limitation exists, and there enter into the formal relation, with a view to return and dwell in the country where such marriage is prohibited by positive law, it is but fair to say, that a proper self-respect would seem to require that the attempted evasion should not be allowed to prevail. . . . . And unless this qualification is allowed, there is produced a state of anarchy and confusion upon the subject of this fundamental relation of society, whereby any state may be compelled to recognize the perfect validity and binding



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§ 164. There are, however, two serious objections to the adoption in the United States of the *lex domicilii*, as determining matrimonial capacity. The first is, it would

Objections.

force of polygamous marriages." Story, Confl. of L. ed. 1865, § 124 *b*. It has also been held in England that an alien, domiciled in England, is incapable, when out of England, of contracting a marriage which would have been void if contracted by a natural born subject, although valid by the law of his domicil of origin and by the *lex loci contractus*. Mette *v.* Mette, 28 L. J. (Prob.) 117.

"It is," says Lord Penzance (Wilson *v.* Wilson, L. R. 2 P. & M. 442), "the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."

"It seems," says Lord Justice Brett, "that the only court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the *status* of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the court must be a court of the country in which the husband is at the time domiciled, because it is incontestable that the domicil of the wife, so long as she is a wife, is the domicil which her husband selects for himself, and at the commencement of the suit she is, *ex hypothesi*, still a wife." Niboyet *v.* Niboyet, L. R. 4 P. D. 13.

In 1877, the question in the text was elaborately considered, first by Sir R. Phillimore (Sottomayer *v.* De Barros, 36 L. T. Rep. N. S. 746), and then in 1879 by the probate and divorce division of the Court of Appeal (Sottomayer *v.* De Barros, L. R. 3 P. D. 1; 41 L. T. 281.) The judgment of the latter court (James, Baggallay, and Cotton, L. J.), was delivered by Cotton, L. J., who, in the course of his opinion, said:—

"As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil, and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized."

He added, however: "*Our opinion*



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make the validity of the marriages, in the United States, of natives of other countries, depend upon the question whether such

*on this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage.* All persons are legally bound to take notice of the laws of the country where they are domiciled. *No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country.*"

"It only remains to consider the case of Simonin *v.* Mallac. The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage, and the decision in Simonin *v.* Mallac does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void."

The case was then remitted to the court below to ascertain the real facts, and the issues of fact were tried before the president, without a jury, on the 25th and 26th June, and the 1st July, 1879.

The president, Sir James Hannen, on August 5, 1879, delivered a judgment in which he held that the respondent's domicil was at the time of the marriage English.

Mr. Dicey, in criticising the opinion of Cotton, L. J. (Dicey, Op. cit. 221), says that the introduction of the proposed limitation is not necessitated by any decided cases, is illogical, and does away with the great advantage derived from basing the validity of a marriage on a broad and clear ground. On the other hand, Gray, C. J., in Milliken *v.* Pratt, 125 Mass. 374, rejects the test of domicil, as given by Cotton, L. J., *in toto*, and says the opinion in Sottomayer *v.* De Barros "is entitled to little weight here." See opinion in full, supra, § 101.

Simonin *v.* Mallac is reconciled by Westlake (1880), p. 56, with Sottomayer *v.* De Barros, L. R. 3 P. D. 1, on the ground that in the former case the parties by their personal law could "in some form or other marry without the consent of parents or guardians."

As has already been seen, the French law, in all essential matters relating to the capacity of the parties, makes the law of domicil bind all French subjects, wherever they may reside, though the omission of the requisite publications and consent only nullifies the marriage of a Frenchman abroad when it takes place *dans un but de clandestinité et afin de se soustraire aux exigènces de la loi Française.* Supra, § 152; infra, § 184.

According to Savigny, all questions of capacity are to be determined by the husband's domicil, which, as the true seat of the marriage, absorbs that of the wife. VIII. § 379. He insists that the place in which the marriage is solemnized is, in this view, immaterial. If the intention is to fix the domicil at the place of marriage, it would be otherwise; on the principle



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persons had acquired a domicil in the United States; for if they had not, they would be governed by the laws of their foreign domicil, with which, especially in the case of minors, the difficulties in the way of a compliance would be almost insuperable. The mischief wrought by the adoption of such a principle would be very great. Few aliens, who marry in this country, could be sure that they were legally married; few descendants of such aliens could be sure of their legitimacy.[1] Nor is this all. An Austrian Jew, if the law of domicil is the criterion, is incapable of marrying a Christian in the United States, and if he should so marry, we would be obliged to declare his marriage a nullity, and his children illegitimate;[2] and the same rule would have to be applied to the marriages of foreign ecclesiastics. On the other hand, we would be obliged, if we accepted the rule of domicil without limitation, to sustain the polygamous marriages of Chinese. If the test of nationality is taken, as is urged by those who assume the ubiquity of personal law, the consequences would be still more serious. A large proportion of our population consists of foreigners who have not yet perfected their naturalization, and who, therefore, in conformity with rulings already given, have not yet become citizens of the United States. If we are to hold the ubiquity of national law in this relation, we impugn all marriages solemnized in this country by persons of this class coming from the continent of Europe.

Theory that marriage capacity is to

§ 165. (3.) A third theory, which has been already partially exhibited,[3] is that matrimonial capacity is a matter of distinctive national policy, as to which judges are obliged to enforce the views of the state of which they

that it is the husband's domicil that is the place for the performance of the contract, and the law of which should prevail. VIII. 379. In the general view, that as to the capacity of the parties the law of the husband's domicil prevails, Wächter (ii. p. 185) and Schæffner (§§ 102, 103) coincide. By the Italian Code of 1868, the capacity of a foreigner to marry is to be determined by the law of the country to which he belongs, subject to certain limitations as to parental consent. But such foreigner, if desiring to marry in Italy, must present at the bureau of civil affairs a certificate from the authorities of the country to which he belongs, to prove that the law of such country opposes no obstacle to the marriage. Act. 102, Code (Huc et Orsier), t. 1, p. 28. Infra, § 186.

[1] Supra, §§ 127, 147.

[2] Supra, §§ 127, 152, 156.

[3] Supra, §§ 104 *a*, 104 *b*, 127, 147.



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are the officers. So far as concerns the United States, 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.[1] This is no novelty, for it is based on the common law of Christendom, which was brought to this country by its settlers; nor is it a mere *doctrinaire* scheme, since its maintenance is inwrought both with our national growth and our national integrity and morality.[2] Nor is this rule inconsistent with the positions laid down as to *status*, even by its earnest advocates in France, Italy, and Belgium. By the codes of their states the personal law of foreigners does not operate when conflicting with territorial public order and good morals.[3] And nothing so closely concerns public order and good morals as the conditions of the marriage tie.[4]

be determined by national policy.

[1] See argument, supra, §§ 127, 137.
[2] Ibid.; 6 South. Law Rev. 696.
[3] Supra, § 104 *a*, 104 *b*.
[4] Supra, §§ 127, 137.

A distinguished critic (M. Brocher, professor in the University of Geneva, and president of the Court of Cassation in the same city) speaks of the position in the text, which he cites at large, as "fort remarquable," but expresses his doubts whether it can be accepted as a solution of the problem. "Nous ne croyons pas," he adds, "qu'une doctrine aussi extraordinaire ait bien deschanees de se faire généralement accepter. Il serait d'ailleurs difficile de se rendre compte des éléments d'unité qu'on pourrait y trouver." He adds that a non-recognition of the peculiarities of the legislation, in this respect, of foreign states, renders *pro tanto* any international rule impossible. I think, however, that M. Brocher misunderstands the position of the text. I do not say that when a marriage contracted in a foreign state is void by the legislation of such state it should be held valid elsewhere. On the contrary, I hold that a marriage void in the place of its celebration, when the parties are domiciled in such state, is void everywhere. All that I argue is that restrictive legislation of foreign states should not invalidate marriages of our domiciled citizens solemnized in such states, or marriages of their domiciled citizens solemnized in one of our states. This view is sustained by Esperson, Jour. du droit int. privé, 1880, 337.

Does the wife, by the fact of marriage, lose her distinctive *status* in her husband's? If capable of contracting marriage, marriage certainly effects this change. But whether she is capable depends, it is argued, upon her own personal law. If, for instance, a woman by the law of her country cannot marry, without certain preliminary conditions, until she is of a certain age, this restriction, it is insisted, adheres to her when travelling in a foreign land where no such restrictions are applied. Fiore, Op. cit. §§ 87, 88. This, however, is subject to the qualification that the application of the foreign standard of capacity does not conflict with the "public order" or "good morals" of the country in which the application is sought.



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IV. HOW FAR THE PERSONAL RIGHTS OF PARTIES ARE AFFECTED BY CHANGE OF RESIDENCE AFTER MARRIAGE.

§ 166. So far as concerns questions of property, this topic will be presently discussed at large.[1]

Marital control regulated by place of residence.

Interesting points are likely to arise, as to the effect of a change of domicil on the personal rights of husband and wife. Does the authority given to the husband by the law of the matrimonial domicil prevail in all other places to which the parties may remove? The better opinion certainly is that this is regulated by the local law. "If a man in this country," said a Scotch judge, "were to confine his wife in an iron cage, or beat her with a rod of the thickness of the judge's finger, would it be any justification in any court to allege that these were powers which the law of England conferred on a husband, and that he was entitled to exercise them, because his marriage had been celebrated in that country?"[2] "The question," says Sir R. Phillimore, "of whether any, and if any, what amount of force, control, or chastisement may be exercised by a husband to a wife, must be under the cognizance of the law of the place of *residence*. So, too, it would seem, must be complaints as to the violation of the conditions of the marriage bond. For instance, if the husband deserts his wife, refuses her maintenance, or ill-treats her by violence, she has a right *jure gentium* to redress in the tribunals of the place where they reside."[3] Domicil, however, is the proper criterion of jurisdiction in suits for the restitution of conjugal rights, though there is authority to the effect that the place of common residence has jurisdiction.[4]

[1] Infra, §§ 187–199.

[2] Lord Robertson, Ferguson on Mar. & D v. 398. Supra, § 120.

[3] Phil. Int. Law, iv. 320. See, also, supra, § 120; Whart. Crim. Law, 8th ed. §§ 1563–7.

[4] Supra, § 120; Connelly *v.* Connelly, 7 Moore P. C. 438; Lindo *v.* Belisario, 1 Cons. R. 216; D'Aguilar *v.* D'Aguilar, 1 Hagg. 293. But see, to the effect that a wife's residence is not sufficient, Yelverton *v.* Yelverton, 1 Sw. & T. 574; Firebrace *v.* Firebrace, L. R. 4 P. D. 63, cited infra, § 226.

The French courts have jurisdiction to enforce a suit for the restitution of conjugal rights brought by a foreign woman against her husband, both residents of Paris. "L'obligation de cohabitation et d'assistance imposée aux conjoints *est une mesure d'ordre public a laquelle se trouvant soumis tous les époux quelle que soit leur nationalité.*" Jour. du droit int. privé,



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The question of conflicting domicils of husband and wife has been discussed in a previous chapter.[1]

How far the incapacity of married persons to make gifts to each other continues after a change of domicil, is noticed hereafter.[2]

§ 167. So with the rights of married women, varying as they do as we pass from state to state. So far as they touch questions of property, they are elsewhere discussed.[3] But when they are purely personal, and confine themselves to questions of individual liberty and power, they are matters of police, to be regulated, as to its subjects, whether foreigners or citizens, exclusively by each particular state.[4]

So as to wife's personal rights.

§ 168. The law defining the personal duty of a mother to support children has been the subject of some discussion. A remarkable Scotch case, bearing on this point, is quoted by Sir R. Phillimore. The Court of Sessions was applied to, in 1846, to compel an English mother to *aliment* a child born in Scotland. The Lord President said: "I have great difficulty, moreover, in holding that her liability is to be determined by the law of Scotland; and I am rather inclined to the opinion that she has the *status* of an English woman, and that it is the law of the country of her domicil that must determine her obligations now." Lord Mackenzie declared: "If an English couple were to come here and acquire a Scotch domicil, they would not import the English law of *status* with them, with the view of excepting them from the obligation to aliment children, imposed upon parents by the law of Scotland." Lord Fullerton concurred in the same view, holding that it made no difference that the child was born in Scotland; the mother having afterwards made her domicil in England. And Lord Jeffrey added: "The whole duties and liabilities of personal *status* are undeniably changed according to the law of every new domicil."[5] But the better opinion is that the duty of parents to children, so

So as to duty of parent to child.

1880, p. 67; citing Pasq. Fiore, Droit int. privé, trad. Pradier-Fodéré, No. 109.

[1] Supra, §§ 43–46.

[2] Infra, § 202.

[3] Supra, § 121.

[4] See Whart. Crim. Law, 8th ed. §§ 933, 1563. Supra, § 120.

[5] Macdonald *v.* Macdonald, 8 Bell & Murray, 2d series, 331–334; Phil. Int. Law, iv. 316.



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far as concerns personal support, is determined by the place of residence.[1]

V. MODE OF CELEBRATION.

Prevalent opinion is that the law of the place of celebration rules forms.

§ 169. The principle announced by most jurists, as to the mode of celebration, is, that *locus regit actum*, and that hence, in this respect, the law of the place of celebration prevails.[2] In one respect Savigny qualifies this. He says that it is no doubt true that the inhabitants of countries where no ecclesiastical rite is necessary to the ceremony can validly bind themselves, according to their domestic laws, by a marriage entered into abroad. But he thinks it is otherwise where the laws of a country require such ecclesiastical sanction. This, he argues, is an absolute, coercive law; and he advises that it be complied with, when the parties return home; in which case the ecclesiastical ceremony relates back to the legal contract.[3] Without any reservation does Sir R. Phillimore (1861) give his assent to the general position, that the law of the place of celebration should, as to matters of form, prevail. "Just considerations of the immense importance attaching to the validity of that contract which is the foundation of the state and the nursery of the commonwealth, have induced all civilized nations to recognize universally the principle *locus regit actum*."[4] Mr. Westlake (1859) expresses the same view.[5] To the same effect writes Fœlix, the highest French authority on this topic;[6] and Judge Story.[7] These eminent writers cite, as of their opinion, several of the older civilians, though, as will be seen, not always accurately.[8]

[1] Whart. Crim. Law, 8th ed. §§ 351, 1563; De Boimont *v.* Penniman, 10 Blatch. 436. Supra, § 104 *b*.

[2] Hertius, § 10; Schæffner, § 100; Story, § 121.

[3] Savigny, viii. § 381.

[4] Phil. Int. Law, iv. p. 260.

[5] Int. Law, § 344.

[6] Revue Étrangêre, 1841, t. viii. p. 433.

[7] Confl. of Laws, §§ 80, 81, c. v.

[8] In particular, the Jesuit Sanchez, de Matr. lib. iii. dis. 18, s. 10; P. Voet, de Statut. n. s. 9, c. ii.; J. Voet, ad Pandectas, l. xxiii. tit. ii. § 4. As to J. Voet, this citation seems erroneous. Of this writer Westlake says: "John Voet decides a particular case on principles which would always require the solemnities of the domicil, and which leave it uncertain whether he would not also have demanded any further ones imposed by the *lex loci contractus*." As to Paul Voet, he makes the following exception, which shows that his adhesion to this view is very qualified: "Nisi quis, quo in loco domicilii evi-



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§ 170. Yet notwithstanding the great deference due to the high authorities which have been just quoted, I cannot but think that both the history and the policy of the law require that the rule should be stated as follows: —

Modifications suggested to this view.

*First, by the distinctive policy of the United States,*[1] *adopting in this respect the old common law of Christendom, the consent of competent parties is sufficient to constitute a valid marriage, though the solemnization be without authorization from either church or state.*

*Second, consensual marriages abroad, by domiciled citizens of states holding such marriages to be valid, will not be invalidated because the forms prescribed in the state of celebration were not adopted, supposing* (1.) *it was impossible to use such forms, or*

taret molestam aliquam vel sumptuosam solemnitatem, adeoque in fraudem statuti sin, nulla necessitate cogente alio profiscitur, et mox ad domicilium, gesto alibi negotio, revertatur." As to Sanchez, his authority goes to sustain, not the position that the law of the place of contract is always to prevail, but that a contract of marriage, *bonâ fide* entered into by competent parties, is ecclesiastically valid, *though neither the law of the church, nor that of the domicil, nor that of the place of contract, is observed.* Sanchez, in fact, expresses no dissent from the older canon law, which will presently be stated. See, also, Mr. Lawrence's learned note to Wheaton, part ii. c. ii. § 7.

It has been held in England that where the *lex loci* requires a residence of six months to validate a marriage, a marriage in such country by British subjects within such period is invalid. Kent *v.* Burgess, 11 Sim. 361. See Lawford *v.* Davies, 39 L. T. N. S. 111. Supra, § 153.

So far from compliance with the law of the place of solemnization validating the marriage, there is no European continental state that does not hold that the marriages of its subjects abroad, though in conformity with the law of the place of solemnization, will not be valid unless the provisions of its own law are complied with. Fœlix, ii. 385; Lawrence, Com. sur Wheat. iii. 350.

[1] It may be said that in taking the distinctive policy of the United States as a standard in this respect, I contradict the position heretofore announced, that domicil in this country must be in a state, because a state alone has a distinctive system of municipal law. The latter position is undoubtedly true; yet it is no less true that there are certain features of juridical policy which belong in common to all the states.

The rule that since by the common law of Christendom consensual marriages are valid, a state will not permit its policy in adopting this rule to be invalid, so far as concerns its subjects marrying abroad, by restrictions of the *lex loci*, wa approved by Sir George Hay in Harford *v.* Morris, 2 Hagg. Con. 423.



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2.) *they were repugnant to the religious convictions of the parties, or* (3.) *they were not imposed on foreigners by the state prescribing them.*

By canon law consensual marriages are valid.

§ 171. To reach the common law brought with them to this country by its first European settlers, we must disincumber the question of those local statutes by which, in comparatively recent times, particular states have sought, in this respect, to carry out their distinctive national policy. When we have done this, we will find that prior to these statutes, and continuing to exist wherever they do not apply, is to be found the common principle of international jurisprudence that a marriage between competent parties is validated by consent. For the primary codification of this principle, we must go back to the canon law, at the period when its enactments were accepted by all portions of Christendom alike. The councils by which this canon law was established were, in many respects, international congresses. They were the only bodies of this class that have ever dealt with private as distinguished from public law; and for this office they were, from their structure, eminently fitted. They represented every nation in Europe; and these nations voted as nations, a mere majority of members being insufficient to carry a measure unless there should be a majority of states. Nor were the delegates solely or principally ecclesiastics. Each secular prince was present in person or by deputy. The universities sent their delegates. The bishops, at least outside of Italy, were more subject to national than to papal influence. It is true it was otherwise at the Council of Trent. There, only a section of the secular authorities of Europe were represented, and these but feebly; while the actual power was in the hands of ecclesiastics who spoke for but a portion of the dismembered church. When that council passed canons, which required the sanction of the parochial clergy to the validity of a marriage, this could easily be explained as an ecclesiastical device, whose object was to suppress dissent and compel submission to the Papal See. But no merely ecclesiastical motive can be attributed to the pre-Tridentine councils. They were not, in this respect, bodies working in the interest of any particular school in the church. They were assemblies of delegates from the several nations of Christendom, who, impressed with the im-



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portance of having a uniform Christian law of marriage, — seeing the scandal and the wrong which would ensue if marriages valid in one country should be invalid in another, — met to prevent such scandal and wrong, and to establish such uniform law. Nor was this all. To enable a canon to have the effect of a law in a particular state, it must have been ratified by the secular sovereign of such state. This was the case in every Christian land as to the canons of marriage prior to the Council of Trent. They were ratified, in turn, by every European sovereign. They became, therefore, a part of the common law of all Christendom. Let us inquire, then, what, as to the form of marriage, the canon law ordained.

The answer is clear and definite. The canon law declared that a valid marriage existed when competent parties should covenant, "ego te accipio in meam;" and "ego te accipio in meum."[1] This form, it is true, was not prescribed, for there was no prescribed form; but it is given as the essential meaning of a contract which might be even silently expressed, and yet perfectly valid.[2] When a marriage was judicially contested, the question that arose was whether matrimonial consent had been duly interchanged; and this was to be proved, as would be any other kind of consent, by implication as well as by direct proof.[3] Now it is no answer to this, that the canon law recommended an ecclesiastical benediction of marriage, — *benedictio sacerdotalis in ecclesia*,[4] — and provided that the banns should be published, so that if any impediments were known, they should be proclaimed.[5] The error of some modern writers has been to suppose that these forms were a condition precedent to a valid marriage, without which such marriage could not exist. But such was not the case. The canon law expressly excludes such an idea. It takes up the case of marriages which were contracted without the forms which it itself, with the cooperation of the civil authorities, has prescribed. It speaks of a

[1] Cap. 31, x. de sponsalibus et matrimoniis, 4; cap. 3, x. de sponsa duorum, 4, 4.

[2] Cap. 25, x. de sponsalibus et matrimoniis, 4, 1.

[3] Cap. 9, x. de sponsalibus et matrimoniis, 4, 1; cap. 2, x. de clandestina desponsatione, 4, 3.

[4] Cap. 2, 3, 4, 5, 6; c. 30, qu. 5.

[5] Cap. 27, x. de sponsalibus et mat. 4, 1, i.; cap. 3 (Innocent III.), x. de clandestina desponsatione, 4, 3.



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marriage of this kind as *clandestina desponsatio*, *matrimonium clandestinum*, — secret or clandestine marriage, — *Winkelheirath*. It particularly notices the lowest form of them, — that of a mere private consent, — although it applies those general titles to all marriages entered into without the prescribed public form.[1] It highly censures such marriages, in part because they exhibit a contempt for ecclesiastical sanction, but chiefly because from their secrecy they are able to evade both parental authority and that public scrutiny by which impediments can be best disclosed. But such marriages are nevertheless viewed as juridically valid, even though in the face of parental opposition ; and it is worthy of notice that the canon law, when legislating on this point, takes the attitude, not of establishing a new rule, but simply of reënacting that which was already settled by common law. And it goes so far as to declare that marriages which were in the extremest sense clandestine and secret, — marriages of which none but the parties were cognizant, — when followed by conjugal cohabitation, are binding and valid, and create all the incidents of marriage, both as to property and offspring.[2]

[1] Cap. 3, x. de clandestina desponsatione, 4, 3. See Herzog's Real Encyc. tit. Ehe; Böhrner, jus ecclesiasticum protest. iii. 1282; Eichhorn (Roman Catholic), Kirchenrecht, Thl. ii. s. 312.

[2] Cap. 30, x. de sponsalibus et matrimoniis, 4, 1. The schoolmen, who were the jurists of those days, strongly defended these views. "The essence of the sacrament of matrimony," declared Peter Lombard, "is not the performance of marriage by the priest, but the *consensus* of husband and wife." Dist. xxvii. C. "The scholastics generally held, that the will of the contracting parties constitutes the marriage; they complete the sacrament. Secret marriages, though forbidden, are valid. *In none of the ancient rituals is there a sacramental form of marriage to be spoken by the priests.*" Hagenbach's Hist. of Doct. by Smith, ii. § 201.

Nor can it be said that the canon law, in this recognition of the validity of consensual marriages, stood alone. The Roman law, viewed as a distinct system, was to the same effect. "By the Roman law," says Lord Mackenzie, in his excellent treatise, "marriage was contracted by the simple consent of the parties. As a general rule, no writing of any kind was necessary; but, where the spouses were of unequal condition, it became necessary to draw up a marriage contract, in order to rebut the presumption of concubinage. At first, Justinian dispensed with any written contract as unnecessary; but he afterwards required this form to be observed in the marriages of the great dignitaries of the empire and persons of illustrious rank. N. 74, ch. 4; N. 117, ch. 4. According to the general opinion, marriage is completed by assent alone, — *consensus facit nuptias;* but some



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§ 172. So spoke the canon law, and this at a time when it was the common law of Christendom, not merely from its enactment by general councils, which were international congresses, but from its ratification by the several sovereigns of Europe.[1] In England, consensual marriages, as they were sometimes called, — *i. e.* marriages resting simply on consent, *per verba de praesenti*, — were valid, even when clandestine, until Lord Hardwicke's Act, in the 26th year of George III.[2] In Scotland, in which country no statutory limitations

So by common law of England, and the continent of Europe.

writers, such as Ortolan, think the marriage is not perfected till after the wife has been delivered over to the husband, which is usually manifested by the *deductio in domum mariti*. According to this theory, marriage is viewed as a real contract completed by tradition." Mackenzie's Roman Law, 99.

On this whole topic, I cannot too highly recommend the authoritative work of Friedberg, Das Recht der Eheschliessung (The Law of the Marriage Ceremonial), Leipzig, 1865, pp. 826, a treatise as remarkable for its wonderful historical research, as for its minute accuracy and its attractive style. Its object is to prove, which it does most thoroughly, the proposition of the text, that, by the common law of Christendom, marriages of competent parties by consent alone are valid. See extracts in Appendix B, 1st ed. of this work.

"The Christian Church recognized from the beginning the fundamental principle of the Roman law, which declares that marriage results from the consent of the parties even without any formalities. In the apostolical constitutions there is no nuptial benediction, though all other forms of prayer are spoken of. It is from the Council of Trent (1545 to 1563) that we are to date the religious marriage; and although the Council pronounced anathemas against every one who denied that marriage was one of the evangelical sacraments, it was not willing to declare invalid marriages contracted without the ecclesiastical benediction, and it even exposed to excommunication those who should maintain that the marriage of the children of a family contracted without the consent of the parents was null.

"At the epoch of the edict of Trent it was universally acknowledged by the common law of Europe that the mutual consent of the parties made a valid marriage. The decree was not, and never has been acknowledged as obligatory except for Roman Catholics, and by them only as matter of religion, and even, according to the Papal bulls, the church held for valid a clandestine marriage of a Protestant with a Catholic, although it considered it a sin." Mr. W. B. Lawrence in 11 Alb. L. J. p. 33.

[1] This point is ably elucidated by Richter, Kirchenr. § 268, note 9, 4th Aufl.; and by Puchta, in Richter's Zeitschrift f. Recht u. Politik, Heft i. p. 113; Heft ii. p. 190.

[2] With the assertion in the text, R. *v.* Millis, 10 Cl. & F. 534, may seem to conflict; and it is necessary, therefore, to give that extraordinary case a special notice. The defendant, Millis, was a member of the Established Church, and was married in Ireland to a woman who appears to have been



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have been made, they are still valid.[1] In France they were valid long after the Council of Trent, and consequently long after the

a dissenter, by a Presbyterian minister, according to the form used by the Presbyterian Church. The parties cohabited for two years, when they separatsd, and the husband married in England another woman. He was indicted in Ireland for bigamy; and the question was whether the marriage was good at common law, as containing an agreement to marry *per verba de praesenti*, or whether, to such marriage, the coöperation of a priest of the establishment was necessary. On this point the Irish judges differed, though, to enable the case to go to the House of Lords, they gave *pro forma* judgment against the marriage. The House of Lords, before whom the case came in 1844, consulted the common law judges, who unanimously advised the affirmance of the judgment; omitting, however, through some inadvertence, to consult the ecclesiastical judges, to whose province this branch of law peculiarly belongs. In the House of Lords the vote was equal; Lords Brougham, Denman, and Campbell, holding to the validity of the first marriage; the Lord Chancellor (Lyndhurst), and Lords Cottenham and Abinger, maintaining that it was invalid. It is clear that a decision balanced, as was this, could have but slight authority in the United States, against the mass of our own decisions, which give a contrary interpretation to the English common law. But even in England it seems to have had but little practical weight. In the Consistory Court of London, in 1847, on a divorce suit for adultery, Dr. Lushington ruled that a contract *per verba de praesenti*, before a Presbyterian minister in New South Wales, was a sufficient foundation for a divorce. "Until I am controlled by a superior authority," said that eminent judge, "for no further examination of the question will induce me to change my opinion, *most unquestionably I shall hold in this and all other similar cases, that where there has been a fact of consent between two parties to become man and wife, such is a sufficient marriage to enable me to pronounce, when necessary, a decree of separation.*" Catterall *v.* Catterall, 1 Robertson, 580. See, also, Catterall *v.* Sweetman, 1 Robertson, 304.

In Canada, R. *v.* Millis has been viewed as leaving the question still open. Breakey *v.* Breakey, 2 U. C. Q. B. 349. See, also, Bishop Mar. & Div. §§ 278–282.

The most complete exposition of the historical errors of Lord C. J. Tindal, in R. *v.* Millis is to be found in Friedberg (*ut supra*), who devotes to this task the most exhaustive research.

It is needless to say, remarks Mr. Lawrence (Com. sur Wheat. iii. 323), that the judgment in R. *v.* Millis exercises no influence on the interpretation in the United States of the common law brought over by the colonists. Mr. Lawrence concurs in holding as erroneous the conclusions of the majority of the judges in R. *v.* Millis.

In Philadelphia *v.* Williamson, 30 Leg. Int. 45; 10 Phil. (Penn.) 176, it was held that a marriage in Ireland, after May 1, 1746, though it may have been void in England, would not be held void in Pennsylvania.

Sir R. Palmer, in a lucid speech before the House of Commons, in

[1] Bishop Mar. & Div. § 233; Friedberg, p. 57.



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period in which the common law of Christendom took, in this respect, its final shape. The same remark is applicable to the Netherlands;[1] to Spain and Portugal,[2] and to Germany.[3]

§ 173. By the common law accepted by most of the States of the American Union, a consensual marriage, without the interposition of an officer either civil or ecclesiastical, is valid.[4] It is true that in inquiring whether

So in the United States.

August, 1869, showed how purely arbitrary, artificial, and local were some of the limitations of the Hardwicke Act. Celebration in a place not duly consecrated, — registry in a locality other than that of the publication of the banns, — innocent errors under certain circumstances, — avoid marriages otherwise legal. London Times, August 7, 1869. Viewing marriage, however, when established by consent, as internationally valid, such restrictions have no extra-territorial force. See, also, Edinburgh Review, July, 1869. To the same effect is the criticism of Mr. Weightman, Law of Mar. & Div. p. 50.

That clandestine marriages were good in England by the old common law is curiously illustrated in Jeaffreson's Brides & Bridals, London, 1872, vol. 2, p. 104.

Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395 (1752), ruled that a marriage invalid at the place of solemnization was invalid in England. A contrary ruling, it is true, was made in 1776, in Harford *v.* Morris, 2 Hagg. Cons. 423. On the other hand, the rule in Scrimshire *v.* Scrimshire was affirmed in Middleton *v.* Janverin, 2 Hagg. Cons. 437. The later English cases may be explained by the fact that the impediments which were held in them to be fatal to the litigated marriages were the same as would have been fatal to the marriages had they taken place in England. The foreign statutes, therefore, could not be said to have militated against English policy, and therefore to have failed to follow persons subject to them to England. In the United States, we may logically say, "We will not allow foreign states to impose on the matrimonial capacity of our citizens restrictions which are contrary to our policy;" and this would lead to the non-recognition of European restrictions on marriages of our citizens we would otherwise hold valid. But no such position can be taken in England, which adopts the same policy of restriction.

The rule *locus regit actum* has been held to sustain, in France, a marriage in Pennsylvania, proved only by reputation based on cohabitation. See decisions of Court of Cassation in 1857 and 1873, cited in Fiore, Op. cit. App. p. 648.

[1] Friedberg, p. 65.

[2] Ibid. p. 71.

[3] Ibid. p. 78.

[4] Patterson *v.* Gaines, 6 How. U. S. 550; Blackburn *v.* Crawford, 3 Wal. 175; Londonderry *v.* Chester, 2 N. H. 268; Northfield *v.* Vershire, 33 Vt. 110; Fenton *v.* Reed, 4 Johns. 52; Jackson *v.* Winne, 7 Wend. 47: Clayton *v.* Wardell, 4 Comst. 230; O Gara *v.* Eisenlohr, 38 N. Y. 296; Bissel *v.* Bissel, 55 Barb. 325; Davis *v.* Davis, 7 Daly, 308; Brinkley *v.* Brinkley, 50 N. Y. 184; Hantz *v.* Sealy, 6 Binn. 405; Com. *v.* Stump, 53 Penn. St. 132; Guardians of the Poor *v.* Nathans, 2 Brewst. 149; Duncan *v.* Dun-



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a particular marriage in a particular state is valid, the test is the law in such state, not the law generally in the United States. But with a very few exceptions the law in the several states is as above stated.[1]

can, 10 Ohio St. 181; Carmichael *v.* State, 12 Ohio St. 553; Port *v.* Port, 70 Ill. 484; Hutchins *v.* Kimmell, 31 Mich. 127; State *v.* Patterson, 2 Ired. 346; Potier *v.* Barclay, 15 Ala. 439; Campbell *v.* Gullatt, 43 Ala. 57; Patton *v.* Philadelphia, 1 La. An. 98; Blasini *v.* Blasini, 30 La. An. 1388; Dickenson *v.* Brown, 49 Miss. 357; Rundle *v.* Pegram, 49 Miss. 751; Floyd *v.* Calvert, 53 Miss. 37; Dyer *v.* Brannock, 66 Mo. 391; Grisham *v.* State, 2 Yerg. 177; Case *v.* Case, 17 Cal. 598; Beverson's Est. 47 Cal. 621; McCausland's Est. 52 Cal. 568.

[1] Ibid. But see, as to Massachusetts, Com. *v.* Munson, 127 Mass. 460, cited infra; as to Maryland, Denison *v.* Denison, 35 Md. 361; Redgrave *v.* Redgrave, 38 Md. 94; and as to Oregon, Holmes *v.* Holmes, 1 Abb. U. S. 525. The presumptions in favor of marriage are discussed in Whart. Crim. Law, 8th ed. §§ 1696, 1700; Whart. Crim. Ev. §§ 624–633.

As to the effect of a constitution validating "irregular marriages" when there were two prior "irregular marriages," see Rice *v.* Rice, 31 Tex. 177, and cases cited infra, § 249.

The Alabama Ordinance of 1867, § 1, recognized as married all freedmen and freedwomen who had previously been living together as man and wife; and the Act of 1868 permitted such parties to dissolve the marriage by mutual consent. McConico *v.* State, 49 Ala. 6. "Marriages" and "divorces" such as these have extra-territorial effect. Infra, § 249.

In Hutchins *v.* Kimmell, 31 Mich. 127, it was said by Cooley, J.: —

"A formal ceremony of marriage, whether in due form or not, must be assumed to be by consent, and therefore *primâ facie* a contract of marriage *per verba de praesenti*. Fleming *v.* People, 27 N. Y. 329. And where the local law is not shown, the argument in its favor is that marriage between parties capable of contracting it is of common right, and valid by a common law prevailing throughout Christendom. Regulations restrictive of this right, or imposing conditions upon it, are exceptions; they depend on local statutes, and as in other cases of exceptions, if one claims that a case falls within them, the burden is upon him to show the fact. *Primâ facie*, a good marriage is shown when the contract is proved with cohabitation following it, and we cannot assume that there are regulations restrictive of the common right until they are shown. Whart. Confl. L. §§ 170–173; Bish. Mar. & Div. §§ 521–528, 4th ed. Upon this question it has been said by Chief Justice Parker, of Massachusetts, that a marriage *de facto* being proved, it is but reasonable that it should be presumed to be according to the law. 'As if a marriage were proved to have taken place in France, for instance, it should seem fit to require the party who denies the marriage to prove its invalidity.' Raynham *v.* Canton, 3 Pick. 297. And in the case of People *v.* Calder, decided at the last July term of this court, it was said of a marriage contracted in another state: 'When the evidence shows that the parties appeared at a church, and that the officiating minister then publicly, and in the presence of other persons in attendance, per-



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§ 174. The Council of Trent, as has been seen, in its determination to compel a reunion of recusants with the Church, required that no marriage should be valid unless it was declared before the competent parish priest, in the pres- Limitations of Council of Trent not

formed a ceremony of marriage between such parties, and further, that the parties appeared to regard themselves as then married, it is fairly to be presumed, in the absence of anything to the contrary, that the ceremony was regular and legal, although the evidence fails to show what words were used by the parties or the minister, or the particulars of the ceremony, or what specific kind of ceremony was, or would be, according to the forms, usages, or customs of such church.' This is likewise the doctrine of Steadman *v.* Powell, 1 Add. 58, where the proof of an Irish marriage did not go beyond that which may be made in this case, and did not negative the fact that the celebration might have been by a popish priest, which, by the local law, would have rendered it invalid. It has been held in this state that the common law, as it exists among us, will be presumed to prevail in a foreign country, in the absence of proof to the contrary. High, Appellant, 2 Doug. (Mich.) 515; Crane *v.* Hardy, 1 Mich. 56. And though it may be questionable if this doctrine is to be applied universally, it cannot be disputed that the reason of it is applicable to all marriages celebrated in Christian countries, in which it may properly be assumed that a general common law on the subject of marriage still prevails. Whart. Confl. L. § 171. And as has been well said, the inconvenience of adhering to more rigid rules in the proof of foreign marriages would, in a country so largely populated by immigrants as is ours, be peculiarly great, and put courts and litigants to useless trouble and expense in every instance. Bish. Mar. & Div. § 528, 4th ed. Polygamous and incestuous marriages, celebrated in countries where they are permitted, are nevertheless treated as invalid here, because they are condemned by the common voice of civilized nations, which establishes a common law forbidding them; and the same reasoning which condemns them must sustain the marriages by mere consent, which the same common law presents and sanctions. Whart. Confl. L. § 180. And especially should this be the case where the parties, after taking such steps abroad to constitute a marriage as would be sufficient under our laws, remove afterwards to this country, and, in apparent reliance upon the marriage and the protection our laws would give it, continue for many years to live together as husband and wife, recognizing, as there is every reason to believe they did, the validity and binding obligation of the marriage for all purposes. If these views are correct, proof of the ceremony of marriage did *primâ facie* establish it, and the court did not err in holding that it was not necessary to prove the foreign law before putting the certificates in evidence."

In Meister *v.* Moore, 96 U. S. 76, Strong, J., said:—

"We do not propose to examine in detail the numerous decisions that have been made by the state courts. In many of the states enactments exist very similar to the Michigan statute, but their object has manifestly been not to declare what shall be



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binding even in Roman Catholic states when not published.

ence of two or three witnesses: "Qui aliter quam praesente parocho vel alio sacerdote de ipsius parochi seu ordinarii licentia et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta synodus ad sic

requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages and evidence by which marriages may be proved, for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry. In a small number of the states, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina, and in Tennessee, where the statute of North Carolina was in force. But the statute contained a provision declaring null and void all marriages solemnized as directed without a license first had. So in Massachusetts it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner directed by the written law. Milford *v.* Worcester, 7 Mass. 48. It may well be doubted, however, whether such is now the law of that state. In Parton *v.* Hervey, 1 Gray, 119, where the question was whether a marriage of a girl only thirteen years old, married without parental consent, was a valid marriage (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen without the consent of parents or guardians), the court held it good and binding, notwithstanding the statute. . . . .

"The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf: 'Though in most, if not all, the United States there are statutes regulating the celebration of marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage, regularly made according to the common law, without observing the statute regulations, would still be a valid marriage.' "

Hence the burden is on the party undertaking to show that a foreign consensual marriage was not in conformity with the law of the place of solemnization. Meister *v.* Moore, supra; Hutchins *v.* Kimmell, supra; Com. *v.* Kenney, 120 Mass. 387; Redgrave *v.* Redgrave, 38 Md. 93.

The proof of consensual marriages is discussed at large in Whart. on Ev. §§ 83, 84 *et seq.*; Whart. on Crim. Ev. §§ 170–246, 827.

In Hebblethwaithe *v.* Hepworth, Illinois Supreme Court, Sept. 25, 1880, 13 Chic. Leg. News, 19, the court said: "By the common law, if the contract be made *per verba de praesenti* it is sufficient evidence of marriage, or if made *per verba de futuro cum copula*, the *copula* would be presumed to have been allowed on the marriage promise, so that at the time of the *copula* the parties accepted each other as husband



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contrahendum omnino inhabiles reddit et hujusmodi contractus viritos et nullos esse decernit, prout eos praesenti decreto irritos

and wife. On this subject the maxim of the law is inexorable, that it is the consent of parties and not their concubinage that constitutes valid marriage. The well-being of society demands a strict adherence to this principle."

In Hynes *v.* McDermott, N. Y. Ct. of App. 1880, 22 Alb. L. J. 367, the plaintiff's case rested on an alleged marriage between herself and the defendant, which marriage, it was claimed, was agreed to by the parties, first in England, though not in a form that would make it valid if the parties were English, then on a ship crossing the British channel, and then in France. The validity of the marriage, so far as concerns the agreement on the ship, was sustained; and it was further held that as there was no proof that the French law was different in this respect from our own, the agreement in France would constitute a marriage.

"Enough," said Folger, C. J., "took place at those times, if it had been done in the territory of this state, to have made a valid contract of marriage. Enough took place afterward to furnish a presumption, under the laws of this state, of a prior legally formed and subsisting marriage relation. By the law of this state a man and a woman who are competent to marry each other, without going before a minister or magistrate, without the presence of any person as a witness, with no previous public notice given, with no form or ceremony, civil or religious, and with no record or written evidence of the act kept, and merely by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves, to the state, and to society as such; and if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was in the beginning an actual and *bonâ fide* marriage. Brinkley *v.* Brinkley, 50 N. Y. 184, and cases there cited.

"But what passed between the intestate and the adult plaintiff took place out of the territory of this state. Part of it took place upon English soil, and it is conceded that it did not make a lawful marriage according to the laws of England. Part of it took place upon the sea, in a vessel coming from an English port and crossing the channel to a French port. Part of it took place in France.

"In some states of the case here might come in the question, whether, if the acts which would make a valid marriage when done in this state are done outside its bounds, and not in accordance with the law of the place where done, they will make a relation which will be upheld as a valid marriage by the laws of this state.

"But this question we need not decide. There is no proof of what is the law of marriage in France, and we will not presume that it is different from that of this state. Monroe *v.* Douglas, 5 N. Y. 447; Savage *v.* O'Neill, 44 Ibid. 298. There is no proof of the nationality of the vessel in which the parties crossed the channel, and we will not presume that it was that of a country whose law of marriage has been proved in this case to be different from that of this state,



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facit et annullat."[1] Analogous statutes were adopted in England, and in several German Protestant states, partly from retaliatory feeling, partly to suppress dissent from the established churches. Yet these statutes, like all others abridging common law rights, have been strictly construed.[2] Thus, taking advantage of the proviso that the decree on matrimony is made dependent on the

even if we are required to hold that a vessel on the seas has with it the law of marriage of the nation whose flag it flies. There was enough in the testimony of what took place between the parties at sea and between them, their friends, acquaintances, and the public, while they were in France, to sustain the verdict of the jury, that they were husband and wife in accordance with the law of this state. U. S. Trust Co. *v.* Harris, 2 Bosw. 75.

"Though they cohabited in England before crossing the channel, the testimony, while it does not prove a marriage in accord with English law, shows enough for a jury to find therefrom that there was the purpose and form of marriage, that there was a refusal on the part of the woman to commence a meretricious cohabitation, and yielding on the part of the intestate to her demand for marriage before cohabitation should be had."

In Massachusetts, under local statutes, another rule is imposed. In Commonwealth *v.* Munson, 127 Mass. 459, the defendant, at a public religious meeting called by him, at a chapel, in Worcester, Mass., at which no magistrate nor clergyman was present, gave out a text, talked awhile about "repentance," read Matt. xx. 1–5; then a woman came forward and read from the 6th to the 10th verse of the same chapter; they then joined hands and the defendant said: "In the presence of God and of these witnesses, I now take this woman whom I hold by the right hand to be my lawful wedded wife, to love, to cherish, till the coming of our Lord Jesus Christ, or till death do us part." The woman then said: "And I now take this man to be my lawfully wedded husband, to love, reverence, and obey him until the Lord himself shall descend from heaven with a shout and the voice of the archangel and with the trump of God, or till death shall us sever;" and the parties then bowed, and the defendant offered prayer. Neither party was a Friend or Quaker, and the ceremony was not conformable to the usage of any religious sect; but the rite was performed in good faith and followed by cohabitation. The usual license as required by statute had been taken out of the clerk's office, and after the ceremony was duly returned. It was held that this was not a valid marriage. "In Massachusetts," said Gray, C. J., "from very early times, the requisites of a valid marriage have been regulated by statutes of the colony, province, and commonwealth; the canon law was never adopted, and it was never received here as common law, that parties could by their own contract, without the presence of an officiating clergyman or magistrate, take each other as husband and wife, and so marry themselves." Gray, C. J., Com. *v.* Munson, 127 Mass. 460. The case of Quakers is excepted by statute. The Rhode Island statute is of similar structure with that of Massachusetts.

[1] Trid. Con. sess. 24, cap. i. de reform. matr.

[2] See Bishop Mar. & Div. § 284.



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publication of the proceedings of the Council, Roman Catholic jurists have declared that this decree is not binding on even Roman Catholics in those countries in which the proceedings of the Council are not technically "published." [1] Hence Protestant countries are exempted, even as to their Roman Catholic subjects, from its effect. And hence, even in France, the ordinances of the Council, as to marriage, from want of publication, never had any territorial force. For states unaffected by the Council of Trent, the highest German authorities on ecclesiastical law

[1] The decree of the Council of Trent, in respect to marriage, we are told by Pothier, was a clerical usurpation, which never had any authority in France. Traité de Mariage, part 4, c. i. § 4; Friedberg, p. 65. The same view is expressed, as to Italy, in a report made to the Italian Senate, on the late legalization of civil marriages in that kingdom. Lawrence, Étude, etc. sur le Mariage, p. 10, citing Huc et Orsier, le Code Civil Italien, t. i. p. 53.

In Louisiana, the decrees of the Council of Trent have been declared by the Supreme Court never to have been in force, even if technically published in the mother country. Patton *v.* Philadelphia, 1 La. An. 96; Holmes *v.* Holmes, 6 La. 465; Hallet *v.* Collins, 10 How. U. S. 174.

So the decrees of the Council of Trent, even in the view of the Church of Rome, bind only those who are in obedience to the Papal See. This was testified to by Cardinal Wiseman, in his evidence before the House of Lords, in 1844, in the Sussex Peerage case. On this Lord Campbell said: "The evidence that has been given to us of the Roman law, uncontradicted as it is, would prove that a marriage at *Rome* of *English* Protestants, contracted according to the laws of their own church, would be recognized as a marriage by the Roman law, and therefore would be a marriage all over the world." "I own that that evidence surprised me. I had imagined that it was impossible there could be a valid marriage at Rome, between Protestants, by a Protestant clergyman, such as the Roman law would recognize. As the evidence stands at your lordship's bar, it would appear, however, that the Roman law . . . . would treat it as a marriage valid by the universal law of the Church before the date of the decree of the Council; and it would appear that the decree of the Council of Trent respecting marriages was not meant to apply to Protestants, who could not conform to it." Sussex Peerage case, 11 Cl. & Fin. 152.

It was stated by the Irish Bishops in 1866, in a paper laid before the Royal Commission on the Laws of Marriage (App. pp. 2, &c.), that the decree of the Council of Trent, according to the bull of Pius VI. issued on March 7, 1785, touches only the Catholic Church, and does not therefore invalidate clandestine marriages, or marriages without the forms prescribed by the Council, when contracted between a Catholic and a Protestant.



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now unite in saying that at common law there is no form of marriage established.[1]

State limitations not obligatory on foreigners when impracticable.

§ 175. It has already been observed, that so far as concerns marriages solemnized abroad, the general rule is that the law of the place of solemnization determines as to form. The first exception to this rule is that where a marriage is solemnized abroad under circumstances which make it impossible for the parties to comply with the local law, then the courts of the domicil of such parties will not hold the marriage thereby invalidated.[2] The rule as stated by Lord Eldon is as follows: "When persons [are] married abroad, it is necessary to show that they were married according to the *lex loci*, or that they could not avail themselves of the *lex loci*, or that there was no *lex loci*."[3] Lord Stowell, in treating of English marriages celebrated abroad, said: "It is true that English decisions have established the rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else; but they have not *è converso* established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is therefore certainly to be advised, that the

[1] Goeschen, Doctrina de matr. note 162, 190; Friedberg (Das Recht der Eheschliessung), already cited, shows this abundantly.

[2] Lautour *v.* Teasdale, 8 Taunt. 830. See Templeton *v.* Tyree, L. R. 2 P. & D. 420; Greaves *v.* Greaves, L. R. 2 P. & D. 423; Loring *v.* Thorndike, 5 Allen, 268.

[3] Eldon, C. J.; Cruise on Dignities, 276; adopted in D cey, Op. cit. 210. Judge Story argues strongly to the same effect. Confl. of L. § 118.

Fiore (Op. cit. § 98), while admitting the rule that the forms of a marriage must conform to the law established in the place of celebration, says that the rule is subject to exception; as where the forms prescribed by the local law are contrary to the religious convictions of the parties; or where the marriage is celebrated according to the law of the country of the contracting parties, either during a military occupation or before a consular or diplomatic representative of their country.

It would in most cases be impossible for foreigners to comply with the French law. The Code, for instance, requires a prior continued residence of six months in the same *commune*. The consent of parents is required, and a publication in the domicil of each of the parties. A registry is to be made, presupposing a prior registry of the birth of the parties, and the marriage of their parents, though it would be out of the power of most citizens of the United States to appeal to such a registry. See Lawrence Com. sur. Wheat. iii. 346.



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safest course is always to be married according to the law of the country; for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. *And even in those cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice had been sanctioned by long acquiescence and acceptance of the one country that has silently permitted such marriages, and of the other that has silently accepted them, the courts of this country, I presume, would not incline to stake their validity upon these large and general theories, encountered as they are by numerous exceptions in the practice of nations.*"[1] In this case an English marriage at the Cape of Good Hope was held valid, although directly violating the local law.

This, also, accords with the view of an eminent Swiss jurist, Dr. Reinhold Schmid.[2] "When persons married abroad," so he speaks, "take up their residence with us, it is agreed on all sides that the marriage, so far as its formal requisites are concerned, cannot be impeached, if it corresponds either with the laws of the place where the married pair had their domicil, or with those where the marriage was celebrated. *But we must not construe this as implying that the juridical validity of the marriage depends absolutely on the laws of the place under whose dominion it was constituted; for the fact that a marriage was void by the laws of a prior domicil is no reason why we should declare it void if it united all the requisites of a lawful marriage as they are imposed by our laws. So far as concerns the material conditions of the contracting of marriage, we must distinguish between such hin rances as would have impeded marriage, but cannot dissolve it when already concluded* (impedimenta impedientia tantum), *and such as would actually dissolve a marriage, if celebrated in the face of them* (impedimenta dirimentia). A matrimonial relation that in the last sense is prohibited by our laws cannot be tolerated in our territory, though it was entered into by foreigners before they visited us. We will, therefore, tolerate no polygamous or incestuous unions of foreigners settling within our limits." This

[1] Ruding *v.* Smith, 2 Hagg. 390.

[2] Die Herrschaft der Gesetze, etc., Jena, 1863, p. 79.



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view is substantially that which is expressed in the preceding pages.

By the Italian Code (art 102), the capacity of foreigners to marry is determined by the law of the country to which they belong. But with a strange inconsistency an exception is made providing that the consent of parents or guardians must be obtained according to the Code. It is further provided that a foreigner desiring to marry in Italy must file a declaration of the competent authority of the country to which he belongs to the effect that according to the law of that country there is no impediment to the projected marriage. In Prussia similar restrictions exist, though there is a right of dispensation in favor of English and American subjects.[1]

If we hold rigorously to the rule that the ceremonial of the place of celebration is to be followed where the parties are foreigners, few marriages of Americans, under such legislation, would be valid. A citizen of New York, for instance, marries in Italy: who is the competent authority of his country to whom he is to apply for a certificate that there is no impediment in the way? Waiving the question whether his "country," in this respect, is the United States or New York, — as to which question much might be said on both sides, — what official, either of the United States or of New York, is competent to give such a certificate? And if competent, how could such a certificate be given without prior notice by publication to contesting parties to come in?[2]

Nor when violating conscience.

§ 176. Nor will the home state hold that the marriages of its subjects abroad are invalid when such marriages were not according to forms which the parties could not conscientiously adopt. Of this an illustration is given

[1] Lawrence Com. iii. 347.

[2] See Correspondence in For. Rela. U. S. for 1875, pp. 442, 447, 755, 761. Mr. Marsh, on Nov. 1, 1877, when American minister at Rome, writing to Mr. Evarts on the subject of American marriages in Italy (Foreign Relations, 1878, p. 465), after saying that he advises conformity with the prescriptions of the Italian law, adds: "It is always difficult, and sometimes impossible, to follow either branch of this advice, and the parties not unfrequently choose to run the risk of the illegality of the marriage rather than attempt to conform to the provisions of the *code civile*, and they content themselves with a marriage ceremony performed by an American or other clergyman in the presence of a consular officer of the United States." Esperson, a distinguished Italian



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in a case already cited before Lord Eldon, to the effect that a marriage between Protestants at Rome, solemnized by a Protestant clergyman, was valid, though the ceremony was assumed to be in flagrant violation of the *lex loci*,[1] and the same is expressly affirmed of marriages of English parties, by a Protestant minister, at Calais.[2] Hence a marriage in New South Wales by a Presbyterian clergyman, where neither of the parties was a Presbyterian, was held valid in England, though violating a local act of New South Wales.[3]

Brocher[4] accepts the exception above stated. He urges that what are called formalities are often matters of high principle. A state, for instance, prescribes a specific religious service. To this service foreigners about to be married in such state may entertain insuperable conscientious objections. To the same effect speaks Judge Story.[5]

Somewhat in the same spirit are the remarks of Lord Stowell, in a case already cited: "What is the law of marriage in all foreign establishments settled in countries professing a religion essentially different? In the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in the factories in the East, — Smyrna, Aleppo, and others? In all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek Church, but to the rubric of the Church of England, when he contracts a marriage with an English woman. Nobody can suppose that, while the Mogul empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connection can be ascribed, a

jurist and professor, adopts the view of the text. Jour. du droit int. privé, 1880, p. 363.

[1] Cruise on Dignities, 276.

[2] Harford *v.* Morris, 2 Hagg. Consist. R. 430. See, also, Newbury *v.* Brunswick, 2 Vt. 151; Loring *v.* Thorndike, 5 Allen, 257; Fraser's Hus. & Wife, 2d ed. pp. 70, 446.

Savigny expressly holds that foreigners marrying in a country where only civil marriages are valid may solemnize marriages internationally valid by adopting the forms of their own country and church. Savigny, viii. 345–355.

[3] Catterall *v.* Catterall, 1 Roberts. 580; 11 Jurist, 914; S. C., 9 Jurist, 951; 1 Roberts. 304.

[4] Droit int. privé, 142.

[5] Confl. of L. § 177.



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respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey is left to depend, I presume, on their own canons, without any reference to Mahometan ceremonies. There is a *jus gentium*, upon this matter, a comity, which treats with tenderness, or at least with toleration, the opinion and usages of a distinct people, in this transaction of marriage."[1] In other words, the *jus gentium*, which Lord Stowell invokes, is not that of the place of marriage as controlling the ceremony, but that which concedes to travellers, and to residents not domiciled, the right to solemnize their marriages according to their own religious faith. But it does not follow that these rites should be, in all respects, those obtaining at the place of the parties' domicil. In but few of the cases of English marriages celebrated abroad, cited by Lord Stowell, could the English law, as to license and banns, have been complied with. It was held enough that the marriage consent should have been explicitly and formally given, though neither the Anglican rubrics, nor the English marriage statutes, were expressly complied with. And this, again, brings us back to the position of the text, that local prescriptions as to the ceremony have no extra-territorial force, when a marriage has been solemnized by competent parties.

Nor when in barbarous, or semi-civilized states.

§ 177. According to Judge Story, the rule does not apply to persons residing in foreign factories, in conquered places, and in desert or barbarous places.[2]

[1] Ruding *v.* Smith, 2 Hagg. 385.

[2] Confl. of Laws, § 118. To this effect is Ruding *v.* Smith, 2 Hagg. 385.

In an opinion given November 4, 1854, Mr. Cushing stated generally that marriages valid by the *lex loci contractus* would be valid in the United States, and the converse. But he went on to say, that "seeing that by the common law of marriage, as now received in all or nearly all of the States of the Union, marriage is a civil contract, to the validity of which clerical intervention is not necessary, it would seem to follow, at least as to all those countries, barbaric or other, in which there is in fact no *lex loci*, or those Mahometan or pagan countries in which, though a local law exists, yet Americans are not subject to it, *that there the personal statute accompanies them, and the contract of marriage, like any other contract, may be certified and authenticated by a consul of the United States.*" He added that this did not apply to European states or colonies where the rule of *locus regit actum* was in full force. Op. of Atty. Gen. viii. p. 22.

A singular and questionable exception to the rule in the text is to be found in Alison's Trusts, L. R. 8 Ch. D. 1; 30 L. T. 638, where a marriage,



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§ 178. It by no means follows that because a state prescribes a certain form of solemnization for marriages of its subjects, it prescribes this form for the marriages of foreigners solemnized within its borders. On the contrary, in those states which hold that the duty of obedience to the matrimonial regulations of the home sovereign follows citizens wherever they go, the inference is that these are personal laws, binding only citizens of the state by whom they are prescribed.[1] In accordance with this view it has been held in France that a marriage by Israelite inhabitants of Algeria is governed by the Mosaic and not by the French law; and in Italy that a marriage contracted by an Italian in Egypt under the French protectorate is governed by Italian and not by French law.[2] In a Saxon case, also, cited by Savigny, the Court of Appeals, at Dresden, held that where the parties observed the forms of their domicil, a marriage celebrated abroad was *ipso facto* valid; the rule, *locus regit actum*, being only intra-territorial and facultative, not absolute and universal.[3]

Nor when not imposed on foreigners.

which took place in Persia, was held invalid on the ground that the woman, though she would have been competent to marry in England, was incompetent by Persian law. In this case the man was a British subject and the woman an Armenian.

[1] Mr. Dicey (Op. cit. 205) says: "All that is essential is that it (the marriage) should be contracted in a form which, according to the law of the country where the marriage takes place, is sufficient under the circumstances of the particular case to constitute a valid marriage. *Suppose, for example, that the laws of France were that marriages between British subjects might be validly contracted in France if celebrated in accordance with the rites of the Church of England without further ceremony. Then a marriage at Paris between D. and M., British subjects, would be valid here as being celebrated according to the form required by the lex loci contractus.*" Or, to put the question more broadly, the law of France is that in marriage, family consent and state sanction, are decided by the *lex domicilii*. If so, the marriages in France of New York domiciled citizens are governed in this respect by New York law.

[2] Fiore, Op. cit. App. p. 645.

[3] Savigny, viii. § 381.

Mr. Marsh, in a letter to Mr. Evarts, dated at Rome, November 1, 1875 (Foreign Rel. 1878, p. 465), says: "I have been told, indeed, by eminent Italian jurists, that any marriage regarded as valid by the laws of the party's country would be considered as valid here, so far as the risks and liabilities of such party were concerned. But this is merely a professional opinion, not founded, so far as I know, on legal enactment or judicial decision, and, besides, it by no means covers the whole ground. It seems desirable that a remedy be provided for these difficulties, but whether that is possible otherwise than by



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§ 179. It is within the power of any state to prescribe that it will regard as valid any marriages solemnized by its own domiciled subjects in its embassies abroad. England has done so, in respect to its own embassies; and Massachusetts has done so, in respect to the em-

Exception as to ambassadors' and consuls' houses.

treaty stipulation between the two governments, it is not for me to say."

See, further, expressions to this effect, infra, § 179; and article by Esperson, Jour. du droit int. privé, 1880, p. 342.

The French and Italian decisions on the topic in the text, however, are conflicting.

In Filippi *v.* Lepori, it was ruled in 1874, by the Tribunal Civil de Viterbe, Italy, that a marriage by a foreigner in Italy, whether with another foreigner or with an Italian, must, so far as concerns Italy, be celebrated by the forms prescribed by the Italian law. The forms prescribed by the national law of the foreign party or parties will not be sufficient. At the same time it was held that such a marriage would be sustained, after the death of one of the parties, if made in good faith, which good faith and ignorance of the law must be substantively proved. Jour. du droit int. privé, Jan. 1875, p. 44. The application of the last qualification, however, is disputed in a note in the same journal (pp. 45, 46).

Fiore (Op. cit. § 90) argues that it is the duty of every state to require that no marriage of foreigners should be solemnized within its borders without a certificate furnished by the proper authorities of the state to which the parties belong, averring that in that state there is no obstacle to the marriage. He proceeds to state that this provision has been sanctioned in Italy by the 103d article of the Civil Code; in France by the circular of March 4, 1831; in Austria by a decree of chancery of September 22, 1814; in Prussia by an order of council of April 28, 1845. And he argues that if every civilized state should accept this principle, it would avoid the "inconvénient pratique" of permitting certain unions which will be annulled in the country to which the parties belong; certain countries, such as Bavaria and Würtemberg, going so far as to prohibit their subjects from marrying abroad without permission of the home government. The rule proposed by this distinguished author, however, rests on two assumptions that do not hold good in the United States. The first of these is that it is the policy of a largely populated state to check early and improvident marriages; whereas in the United States early marriages have in the main been peculiarly conducive to public prosperity, and marriages improvident in the European sense are often, in our sense, the most provident. See supra, §§ 127, 137. The second assumption is that marriage, to be valid, should, on general principles, be according to a form prescribed by the state. So far from this being the case in the United States, we have accepted almost without dissent not only as reasonable and conducive to our interests, but as sanctioned by our old common law, the rule that a consensual marriage requires for its validity the coöperation of neither civil nor ecclesiastical authority. If this be part of the policy of our country, — if it be part of our "public order," — it cannot, even on the showing of the eminent Italian and French advo-



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bassies of the United States abroad.[1] A statute validating marriages before consuls has been adopted by Congress; but as marriage is a municipal institution, under the control, so far as concerns domiciled citizens of the states, of the states to which they belong, this statute can only be regarded as operative in respect to citizens of the District of Columbia and of the territories. But supposing a statute, duly enacted, validates such marriages so far as concerns the subjects of the enacting state, the question remains to be considered whether such marriages are internationally binding. Can the fiction of extra-territoriality be pressed so far as to convert all marriages in an ambassador's chapel into marriages made on the soil of the state the ambassador represents? We have already seen that such extra-territoriality, even in its widest interpretation, is limited to the families of ambassadors.[2] It cannot, therefore, cover strangers, or even guests, visiting the embassy in order to be married.

cates of the ubiquity of nationalism, be made to yield to the prohibitions of foreign states. If nationality is to be thus ubiquitously dominant, why not the nationality of citizens of our American States in respect to matters which those states hold to involve in the highest sense both public order and good morals? See supra, § 127.

On the question in the text, conflicting testimony of French experts was taken in Este *v.* Smyth, 18 Beav. 112; and the validity of the marriage was sustained by Lord Romilly.

[1] Mass. Gen. Stat. c. 106, § 23.

[2] Supra, § 16.

The act of Congress referred to in the text is that of June 22, 1860, § 31 (U. S. Stat. at Large, 1860, § 31), which authorizes all consuls or consular agents in foreign countries, to validate marriages solemnized in their presence by any "persons who would be authorized to marry, if residing in the District of Columbia."

On August 15, 1874, instructions were issued from the state department, which, as revised and published in December, 1874, directed foreign ministers, in case of an application to have a marriage performed in the legation, or before a diplomatic agent, "to inform the parties making the application that it is the opinion of the department that a ceremony of marriage, performed within the precincts of a legation, may, nevertheless, be deemed to be performed in the country within which the legation is situated, and, therefore, ought in all respects to comply with the requirements of the laws of that country, in order to insure its validity. Whenever any application is made for the use of the legation for such a purpose, it will be the duty of the principal diplomatic representative to inquire whether the parties may lawfully marry according to the laws of the country in which the legation is situated; and whether the proper steps have been taken to enable the marriage ceremony to be legally performed according to such laws. If either of these inquiries should be answered in the negative, it will be his duty to in-



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§ 180. We have already had occasion to notice numerous cases in which states have established conditions of matrimony binding on their subjects abroad. France, as has been seen, requires her citizens to comply with all the provisions of her Code as to consent of parents and

When prescribed forms are obligatory on subjects abroad.

form the applicants that he cannot permit the ceremony to be performed in the legation, and to explain to them that there might be grave doubts respecting its validity, even though it should be performed within the precincts of the legation."

The circular, after referring to the statute, which provides for the authentication of marriages before American consuls, "between persons who would be authorized to marry if residing in the District of Columbia," adds: "But if the applicant may lawfully marry according to the laws of the country, and if the proper steps have been taken to enable the ceremony to be legally performed, then the diplomatic representative should inform them that if they desire to have the ceremony performed also under the laws of the United States, it would be necessary to have the principal consular officer of the United States present, and he should give them an opportunity to have such officer present, if they desire it."

The accuracy of the last statement, however, may be doubted, except so far as concerns citizens of the territories and of the District of Columbia. It is beyond the power of the federal government to determine the conditions of the marriage ceremony so far as concerns the citizens of the particular states. Hopkins *v.* Hopkins, 3 Mass. 158.

The position of the instructions, discountenancing marriages in diplomatic residences, met with vigorous protests from the American ministers in Paris and in Rome. Mr. Hoffman, of the American legation in Paris, in a letter dated Paris, August 31, 1874 (Foreign Relations U. S. 1875, pp. 442 *et seq.*), says: —

"During the seven years I have been secretary of this legation, one hundred and fifty marriages have been celebrated here, probably more than in all the other legations of the United States in Europe during the same period. The importance of the subject, and my natural desire to protect my countrywomen from the sad consequences of an illegal marriage, have induced me to give to this subject exceptional attention. You will, therefore, excuse me if I venture to offer some observations upon the proposed instruction in this matter.

"I may perhaps remark, in the first place, that the legality of these marriages has been the object of serious consideration by the able and conscientious men who have represented the United States in France. The volume of certificates which I have before me runs back to 1858. Mr. Mason, Mr. Faulkner, Mr. Dayton, Mr. Bigelow, Mr. Dix, and Mr. Washburne, after full examination of the subject, were of opinion that such marriages were perfectly legal, and acted accordingly. The subject seems naturally to divide itself into three points of view: the legality of these marriages under French law, under United States law, and under state law.

"When I came here as secretary of legation with General Dix, 1866, being impressed with the importance of the subject, I applied, with his assent, to Mr. Moreau, the eminent



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as to publication; though this rule has been relaxed in cases where forms are omitted from necessity, and without any inten-

counsel of the United States in the Armand suits, for his opinion upon the subject of the legality of such marriages under French law. His opinion lies before me. I translate a portion of it: —

"'The undersigned, counsellor at law at the imperial court of Paris, having been consulted as to the validity of a marriage contracted between Americans before the minister of the United States, and at the hotel of the legation, is of opinion that such marriage is valid in the eyes of the French law.'

"Mr. Moreau then proceeds to give his reasons for this opinion.

"'Under this head I will add that, in two instances in which marriages between an American man and a French woman, and between an Englishman and a French woman, celebrated at their respective embassies, have been annulled by the French courts, it was upon the ground that the woman was French; and it was implied that had she been American or English, as the case might be, the marriage would have been held valid.'"

To this dispatch, Mr. Fish, secretary of state, replies in a letter dated November 14, 1874, addressed to Mr. Washburne, minister at Paris. From Mr. Fish's letter the following passages are extracted: —

"The question, no less from the intrinsic importance which attaches to a contract of so serious a nature, than in view of the grave consequences which may result, not only to the parties themselves, but to their offspring, from a misapprehension of the law governing such contracts, has been one of no little solicitude to the department. It may be stated as a general rule, subject to few and rarely-occurring exceptions, that a marriage, solemnized according to the laws of the country in which it is celebrated, will be recognized as valid and binding under the laws of all other civilized or Christian nations; hence, while it was deemed proper to gratify the natural wish of American citizens to have a contract of such interest to them solemnized under the flag of their own country, and that the hospitality of the legation should be extended to them for that purpose, the department at the same time considered it only safe and prudent to advise them 'that a ceremony of marriage performed within the precincts of a legation may nevertheless be deemed to be performed in the country within which the legation is situated, and therefore ought, in all respects, to comply with the requirements of the laws of that country, in order to insure its validity.' The wisdom of this precautionary measure with regard to the marriage of American citizens at the United States legation in Paris is at once evident from the two cases which Mr. Hoffman instances, in which marriages, solemnized in each case at the respective embassy of one of the contracting parties, were both subsequently annulled by a French judicial tribunal. These two cases suggest a rather awkward commentary on the opinion of Mr. Moreau, adduced by Mr. Hoffman, in support of his own criticism of the views of the department. Mr. Moreau's opinion is to the effect 'that a marriage contracted between Americans before the minister of the United States, and at the hotel of the legation, is valid in the eyes of French law.'



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tion of evading the home rule.[1] Great Britain, as was seen in the last section, has provided a series of rules by which British

"In both of the cases in which the marriages were held void by the French court the women were French, and it was upon this ground, as Mr. Hoffman states, that the contracts were held invalid, but the consequences were no less unfortunate on that account; rights of property acquired by the husbands or wives, either in consequence of or during coverture, were more or less affected by the decrees annulling the marriages. There may have been children of those marriages, and the consequences to them would be of a still more serious character. And if, in the case of a marriage solemnized at the legation between Americans, who might from any cause be incompetent to enter into such contract under the laws of France, its validity should be brought in question before a French tribunal, it is to be feared that even the opinion of the learned counsel in question would be found insufficient to secure the sanction of the court to its validity. It was in view of such considerations as these, and admonished by the frequent recurrence of questions growing out of the subject, that the department deemed it advisable to instruct the diplomatic representatives of the United States, when application might be made for the use of the legation for such a purpose, to satisfy themselves by inquiry whether the parties might lawfully marry according to the laws of the country in which the legation is situated, and in case they were found incompetent thus to marry, to inform them that the ceremony could not be permitted to be performed in the legation. There is, moreover, a manifest impropriety in thus using the privileges of the legation to give even an implied sanction to the completion of a contract which may be held by the tribunals of the country in which the legation is situated to be in contravention of the laws of that country."

Mr. Fish goes on to say: —

"Marriages of American citizens abroad, celebrated according to the requirements of the Act of Congress of the 22d of June, 1860, are recognized as valid by the department. But while thus confining its own action within the prescribed limits of the statute, the department carefully avoids the expression of an opinion in regard to the validity or non-validity of the marriage of citizens celebrated abroad in any other manner than in conformity with the statute requirements. The forms and modes which may attend the performance of that interesting ceremony, as well as the particular place in which it shall be celebrated, are properly left to the determination of the parties themselves; while the legal consequences of the adoption or omission of the observances prescribed by the act of Congress rest with the judicial tribunals of the country, whose exclusive province it is to decide upon such questions, when, in the course of legal proceedings, such decision may become necessary. The aim of the department, in the instruction which it has issued, has been one of precaution and admonition, prescribing only what was clearly within the statutory enactments, cautioning against what is uncertain or doubtful, and with-

[1] See supra, §§ 152, 175.



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subjects may solemnize their marriages in foreign states. In several German states the same rules are imposed as in France.[1]

holding the use of the legation in cases where the possibilities of a decision adverse to the legality of a marriage celebrated within it seem to approach to a certainty, or, at least, are potential."

Mr. Marsh, minister at Rome, in a letter dated Rome, October 12, 1874 (Foreign Relations U. S. 1875, pp. 755 *et seq.*), writes to Mr. Fish, to the effect that the statute of June 22, 1880, had been regarded by him as an enabling act, and that it had been acted on accordingly.

To this letter Mr. Fish, on January 19, 1875, replies (Foreign Relations U. S. 1875, p. 760) in a letter, from which the following is extracted: —

"You are believed to be mistaken in saying that the 48th section of the new instructions of the department expresses doubt as to whether marriage can be legally celebrated at all between citizens of the United States in a foreign country, unless it be solemnized in conformity with the laws of such country. Your mistake upon this point will, it is believed, be clear to you upon a further examination of the paragraph referred to. The department has been careful not to express an opinion as to the validity of any marriage under particular circumstances. . . . .

"Marriage at legations without regard to the law of the country, on the ground of extraterritoriality, as it is called, is at best a questionable proceeding, which, it may be apprehended, would scarcely be sanctioned by the courts of the nation where they were solemnized. The tendency of opinion is believed to be towards narrowing the immunities of diplomatic officers and their places of abode to those limits only which may be indispensable to enable them to discharge their official duties without molestation or restraint.

"The use of the legation for the marriage of persons, even of the nationality of the country to which it belongs, cannot be said to be necessary or even convenient for diplomatic purposes."

Mr. Marsh, in a letter dated at Rome, Nov. 1, 1877, to Mr. Evarts (Foreign Relations U. S. 1878, p. 466), when speaking of marriages before consuls, says: "As a matter of taste, and from religious feeling, a clergyman is usually invited to perform the ceremony when American Protestants are married before a consul in Italy; but the local civil authorities alone are authorized by Italian law to celebrate marriages, and that only when all the requisites of the Civil Code are fulfilled. *Of course the cases are rare when a consul can truly certify that the ceremony was performed by a person authorized by the laws of Italy to celebrate it.*"

That the solemnization of marriages in diplomatic residences in France is considered as not satisfying the provisions of the French Code, so far as concerns French citizens, and that the marriage of a French citizen to an American, at a diplomatic residence, will not be considered valid in France unless the provisions of the Code are independently complied with, may be inferred from a series of cases given by Mr. Lawrence, in his Etude de legislation sur le mariage, of which a

[1] Supra, §§ 150 *et seq.* 163.



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The better view is, so far as concerns principle, that when the restrictions concern mere matters of form, a compliance with

translation is given in the first edition of this work, p. 183. Mr. Lawrence discusses the question, also, in his Com. sur Wheat. vol. iii. pp. 357, *et seq.*, and in a letter to M. Rolin Jacquemyns, dated August 15, 1874, published in the Albany Law Journal volume 11, pp. 28 *et seq.* In addition to the authorities cited by Mr. Lawrence, and in the first edition of this book, it may be noticed that it was judicially ruled in Paris, in 1872–3, that a marriage celebrated in Paris at the English embassy or at the American legation, according to the forms in use in those countries, between a French woman and a native of one of those countries, is void, as not having been celebrated before the officer of the civil state. Code Civil, article 165. It was declared that an ambassador's house does not enjoy the fiction of being situated in the country from which the ambassador is accredited with regard to acts affecting the inhabitants of the country to which he is accredited. Tribunal of the Seine, First Chamber, 2d July, 1872, and 21st June, 1873; Jour. du droit int. privé, 1874.

By a letter of the minister of foreign affairs, dated Sept. 16, 1878, it is announced that marriages between a foreigner and a French citizen, solemnized by a diplomatic agent or a consul, are void. This is based on a decree of the Court of Cassation of August 19, 1819. Jour. du droit int. privé, 1879, p. 410.

On the other hand, there is every reason to believe that marriages solemnized before an American legation, or, in fact, in any mode that would be held valid by the *lex domicilii* of the parties, will be held valid in France, when neither of the parties is a French citizen. Supra, § 178.

Marriages before diplomatic agents are expressly authorized by the Swiss Confederacy so far as concerns Swiss parties; Brocher, Droit int. privé, 143; and so as to France. Ibid. 144. M. Brocher urges the diplomatic settlement of the question by adopting the rule that the celebration of a marriage in a foreign state by an officer competent as to either of the parties should be judged valid everywhere.

"The statutes 4 Geo. 4, c. 91, and 12 & 13 Vict. c. 68, provide modes in which (independently of the *lex loci*) a British subject may contract a valid marriage in a country not forming part of the British dominions. Marriages valid under act of parliament are for all purposes good in England. The result is, that where one of the parties is a British subject, the following marriages celebrated abroad, though not according to the *lex loci*, are valid, namely:—

"(1.) A marriage solemnized by a *minister of the Church of England*, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited.

"(2.) A marriage solemnized by a *minister of the Church of England*, in the chapel belonging to any British factory, or in the house of any British subject, residing at such factory.

"(3.) A marriage solemnized within the British lines by a *chaplain* or *officer*, or *person officiating under the orders of the commanding officer* of a British army serving abroad.

"(4.) A marriage solemnized *by, or in presence of, a British consul*, in accordance with the provisions of 12 & 13 Vict. c. 68.



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them is unnecessary, as was formerly the case in England with respect to Gretna Green marriages; but that it is otherwise when they concern matters of morals or distinctive state policy.[1] To the same effect may be cited a decision of the High Federal Council of Switzerland, as to the validity of the marriage of a Swiss woman, in 1855, at Philadelphia, to an American citizen. The marriage, if in Switzerland, would have been invalid for want of banns and of the assent of the authorities. The marriage, however, was validated by the Council, though it does not seem to have been doubted that the woman, down to the marriage, was regarded as a domiciled Swiss.[2]

When foreign law is sought in fraud of home law.

§ 181. It is not to be expected that a state, when it adopts a specific matrimonial policy, and in pursuance thereof imposes certain restrictions, should permit this policy to be defeated by citizens stepping over the line between itself and a state where no such policy is established, marrying in such state, and then returning to their home

"Two observations may be made as to marriages within sub-clause (v.):

"*First.* The validity of marriages within it is independent of the *lex loci.* A marriage by a British subject in France, with a domiciled French woman, if made in accordance with either 4 Geo. 4, c. 91, or 12 & 13 Vict. c. 68, is valid in England, whether or not it be held valid by French law.

"*Secondly.* It is not certain that the English courts would hold the marriage of a foreigner in England valid, simply because it was valid by a law of the foreigner's country, similar to 12 & 13 Vict. c. 68. Suppose, for example, that D., an American citizen, married M., an English subject, before the American consul in London, in accordance with the provisions of an act of Congress. It is extremely doubtful whether English courts would treat such a marriage as valid." Dicey on Domicil, 211–2.

Mr. Westlake (1880), pp. 58 *et seq.*, discusses the same statutes, and after noticing the doubts of Sir W. Scott (Petreis *v.* Tondear, 1 Hagg. Cons. 136), whether extra-territoriality can be predicated in such cases of ambassadors' chapels, states that the question is still open to doubt when only one of the parties is British. He adds, however, in his table of errata, p. xxvi. that "it has been decided that the enactment applies where only one of the parties to the ambassadorial marriage is British." Lloyd *v.* Petitjean, 2 Cur. 251.

That to validate a foreign marriage under the British statute the statute must be followed, see Alison's Trusts, L. R. 8 Ch. D. 1. Otherwise the law of the place of celebration prevails. Ibid.

[1] Supra, §§ 135, 137, 139, 140, 147, 153, 159, 165, 175. That the Italian law as to solemnization does not bind Italians in Turkey, see Fiore, Op. cit. p. 649.

[2] Dip. Cor. U. S. 1868, p. 189. This conclusion is approved by Fiore, Op. cit. § 317, citing Zachariæ, § 31, No. 5; Demolombe, i. No. 106.



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to defy the home law by the daily exhibition of a condition that that law condemns. Hence it is that we have frequent illustrations of cases in which states have held such marriages void, as in fraud of their laws.[1] On the other hand, a different state of things presents itself when a person who finds the law of his state oppressive in this relation goes to another state where a laxer policy obtains, and there acquires a *bonâ fide* domicil. Not merely from the rulings in cases of marriages after restricted divorces,[2] and of marriages of persons of different races,[3] but from the rule adopted in respect to jurisdiction in divorce, we are entitled to hold that when a party obtains a *bonâ fide* domicil in a state in which he is entitled to marry, and there marries, his marriage will be internationally valid, although in his domicil of origin he was incapable of such marriage.[4] So far as concerns matters of form, the better opinion is, that even though the intention in going abroad was to evade the home law, this will not invalidate the marriage.[5]

Difficulties attending test of fraud.

§ 182. The test of domicil, as just stated, is applied with comparative ease. It is otherwise, however, as to the test of fraud. A marriage abroad, it is alleged, would be a nullity, if in fraud of the home law; but valid, if not in fraud of such law. But how is the question whether the fraud existed to be tried; and by what rules? Who is to decide whether A. and B., in going abroad, were chiefly or only incidentally governed by the desire to be married by a foreign rather than a domestic ceremony? If we survey the cases, for instance, of domiciled Englishmen going to France, and then, in Paris, afterwards marrying, — is it possible, in any one of such cases, to say, that the going abroad with the expectation of escaping the social and pecuniary burdens of English life, and with the mere undeveloped contingency of matrimony in view, is a fraud? And between such cases and what Lord Mansfield called "stolen"

[1] Supra, §§ 135, 138, 139.

[2] Supra, § 135.

[3] Supra, § 159.

[4] See supra, §§ 135, 137, 140, 147, 153, 157.

[5] Compton *v.* Bearcroft, Bull. N. P. 114; Harford *v.* Morris, 2 Hagg. Con. R. 429; Steele *v.* Braddell, 1 Milw. Cons. R. 1; Warrender *v.* Warrender, 9 Bligh, 129. The question is fairly put in an able note to 2 Roper Husb. & Wife, by Jacob, p. 495, and in Story, § 124, note 5. The rule in France is given in other sections. Supra, § 152; infra, § 184.



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marriages at Gretna Green or at Boulogne, who is to decide when the fraud reaches such a degree as to work a nullity? What might appear to one tribunal a fraud might appear otherwise to another tribunal; and there would be no marriage solemnized abroad which could confidently be affirmed to be valid, or the issue of which might not be judged at any time to be illegitimate.[1]

### VI. LOCAL LAWS OF FOREIGN STATES.

Local prescriptions of England.

§ 183. We have already had occasion to incidentally notice the restrictions on consensual marriages imposed by Lord Hardwicke's Act, and by subsequent English legislation. By Lord Hardwicke's Act, passed in 1754, marriages are to be celebrated in the proper parish church, after publication of banns, on pain of nullity. This statute, however, applied only to England. By subsequent statutes the right to solemnize civil marriages before a registrar was granted; and the registrar is entitled to dispense with banns and other publications, on one of the parties making oath that he knows of no impediment, that he has resided in the parish at least fifteen days, and that, if a minor, he has obtained the proper consent. A person marrying after twenty-one is not required to obtain parental consent.[2]

[1] See French rulings, supra, § 152; infra, § 184.

[2] It scarcely becomes an English critic to complain of the harshness in this respect of French laws. The restraints of Lord Hardwicke's Act were as effective in annulling informal marriages, so far as concerns English ceremonial, as are those of the French Code. And in Great Britain we have the additional difficulty arising from conflicting jurisprudences. Of this the Yelverton case is a striking illustration. In 1857, Major Yelverton married in Edinburgh, by *sponsalia de praesenti*, Miss Longworth. This union was not followed by cohabitation. In 1858 they were married by a Catholic priest in Ireland, which marriage was consummated. As he repudiated the marriage, she applied to the Divorce Court in England for restitution of conjugal rights. This was refused on the ground that he was domiciled in Scotland. In 1861 he was sued in Ireland for the payment of her debts, and judgment was entered against him on the ground that they were duly married. She then applied to the proper Scotch court for a declaration of marriage. The Lord Ordinary decided against her, but was reversed on an appeal to the Court of Sessions. But the decision of the Court of Sessions was reversed by the House of Lords, Lords Wensleydale, Chelmsford, and Kingsdown holding the Scotch mar-



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§ 184. We have had occasion to notice the severity with which the French restrictions of matrimony follow French citizens abroad.[1] It remains to notice these restrictions in detail. Under the Code a man cannot marry till he has attained the age of eighteen, nor can a woman till she is fifteen. Dispensation respecting age, however, in certain peculiar cases may be obtained from the government. The consent of both father and mother is required by a son under twenty-five years of age, and by a daughter under twenty-one. If the parents disagree as to the consent, that of the father suffices. If the father or mother is dead, or cannot give consent, the consent of one is sufficient. If both are dead, then the grandfather and grandmother take the place of the parents. If the grandfather and grandmother of the same line disagree, the consent of the grandfather suffices; dissent between the two lines works consent. When the man has attained his twenty-fifth year and the woman her twenty-first, both are still bound to ask, by a formal notification, the consent of their parents, and until the man has attained his thirtieth year and the woman her twenty-fifth, this formal act must be repeated twice, from one month to another, and one month after the third application it is lawful for the parties to marry with or without consent. After the age of thirty it is lawful to marry, in default of consent, a month after one formal notice has been given, which notice must be served upon the father and mother or grandfather by two notaries, or by one notary and two witnesses. In the event of the parents or ancestors to whom these notifications should be made being absent, a copy of the judgment declaring the absence must be produced, or, in default of it, an *acte de notorieté*, drawn up, on the declaration of four witnesses, by the justice of the peace.

Local prescriptions of France.

If the registrar neglects to state in the marriage certificate that the consent of the parents has been obtained, he is liable to a fine of three hundred francs and six months' imprisonment, and when the prescribed notices are not carried out, to a fine of three hundred francs and one month's imprisonment. Marriages

riage to be invalid. From this, however, the Lord Chancellor dissented, and with him, it was said, Lord Brougham concurred. Yelverton *v.* Yelverton, 4 Macqueen H. L. R. 747.

[1] Supra, §§ 152, 164, 174, 175.



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are prohibited between brother-in-law and sister-in-law, between uncle and niece, and between aunt and nephew.

The same formalities are required for illegitimate children when affiliated. If not affiliated, marriage cannot take place before the party is twenty-one years of age without the consent of a special guardian appointed for the purpose. If neither parents nor grandparents are alive, the consent of the family council is required.

Marriage is a civil ceremony in France, and must be celebrated publicly before the registrar of the parish where one of the contracting parties has resided six months. If the parties have not resided six months, the banns must be published at the parish of their former residence. If the contracting parties, or one of them, cannot marry without the consent of another person, the banns must also be published in the parish where such person resides. In no case, not even that of the extreme illness of one of the parties, can banns be dispensed with.

A marriage contracted in a foreign country between a French man and a French woman and between a French person and a foreigner is valid in France, if celebrated according to the forms of the country, provided it has been preceded by the publication of banns and with the consent of parents. If the parties return to France, the certificate of marriage must be registered, within three months after returning, at the place of their abode.

A marriage contracted without the consent of the parents or the consent of those persons already mentioned, if such consent is required, can only be impugned by those whose consent was required by law, or by one of the married persons who had not obtained the specified consent; but, after the married persons have lived together one year, the suit is not maintainable. All marriages contracted under the prescribed age, or under the other disabilities previously stated, may be impugned either by the married parties or by those legally interested, or by the public prosecutor; but marriages by minors cannot be set aside if they have lived together six months after they have attained full age, or if the woman be pregnant before the lapse of six months. In all cases a suit for nullity of marriage may be obtained by those who have a legal interest in the marriage, but not by collateral



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relations nor by children of another marriage, unless they have a direct interest in it.

The civil marriage is obligatory, and must precede the religious service, if the latter be desired; and a clergyman undertaking such services before the civil ceremony has been performed commits an indictable offence.[1]

Local prescriptions of Germany and Austria.

§ 185. Since the first edition of this work, the German law of marriage has been materially modified. The struggle between the empire and the papacy has led to the establishment, as a peremptory rule, of civil marriage. The conduct of the church, so argued Falk, when introducing the statute, made this course obligatory on the government. Civil marriage, it was urged, does not exclude a separate religious service; and, in support of this position, it was stated that such service, in those states where civil marriage was already obligatory, took place in a very great majority of cases. The two houses concurred in the government project of taking from the clergy the duties of registrars, throwing the office of officially solemnizing marriages exclusively on civil officials. The law, as applying to the Prussian monarchy, was published on March 9, 1874. In Prussia, as well as France, the civil must precede the religious ceremony. In 1875 a bill was introduced to extend this measure to the entire empire; and after a vehement opposition from Roman Catholic deputies, was adopted, and was published on February 6, 1875. In the statute as passed, the old ceremony of betrothal is shorn of its obligatory character. The age of consent is fixed for men at twenty, and for women at sixteen. When the parties are legitimate, the consent of the father is requisite, up to the age of twenty-five with men, and twenty-four with women. The mother's consent is not necessary if the father is living; and if the child is a minor, and the father dead, the consent of the guardian must be obtained in addition. After majority is reached (twenty-one years), there can be an appeal

[1] The above statement of the French law is taken, with some slight modifications, from letters of the French correspondent of the London Times in August, 1880, verified and supplemented by M. Glasson's recapitulation in Le mariage civil et le divorce dans les principaux pays de l'Europe, Paris, 1879. Compare ruling of French Court in Desainté's case as given in the London Law Times of April 21, 1880.



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from the father's refusal to the courts. Natural children are subject to the same conditions as legitimate children who have lost their father. When the father and mother are dead, or are unable, from absence or otherwise, to express their wishes, a major can marry without consent, but a minor must obtain the consent of his guardian. Marriages of lineal relations, and also of brother and sister, are absolutely prohibited, but not so marriages between uncle and niece, and brother-in-law and sister-in-law. A guardian cannot marry a ward.

After the dissolution or annulling of a prior marriage, a woman cannot, without special dispensation, marry for ten months.

Disabilities based on disparity of rank are abrogated, but, as we have seen, army officers cannot marry without a deposit of money proportionate to probable pension.

The civil marriage must be preceded by certain formalities. There must be one prior publication of banns by the official having jurisdiction, and even this publication can be dispensed with in cases of extreme illness. The records of the births of the parties, and of the consent of parents, must be duly filed, though these may in proper cases be dispensed with.

The consequences, it is enacted, of marriages contracted in contravention of the prohibitions of the statute, are to be determined by the legislatures of the particular states. By the legislation of all the German states, deficiency in age, relationship, prior marriage, make marriages merely voidable. Want of parental consent works in some states a nullity.

The Austrian legislation in respect to marriage has been marked by many changes. In 1868 the liberal party succeeded in carrying a statute which establishes civil marriage (Nothcivilehe) in cases where the priest of the parish, or other proper minister, refuses to act. In 1870 a statute was passed extending civil marriage to dissenters from either of the recognized churches. The prohibitions of marriages between Christians and non-Christians are modified. The rule as to parental consent and as to banns is similar to that of France.[1]

§ 186. The Italian Code, as now (1880) established, permits the religious services to be had either before or after the civil rite. Whether a religious without a civil cere- Local prescriptions of Italy.

[1] Glasson, *ut supra*, pp. 104 *et seq.*, 168 *et seq.*; and see supra, §§ 164, 174–178.



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mony will establish a marriage has been doubted, and there are some recent decisions in the negative.[1] Restrictions as to consent go to the voidablity, not to the invalidity, of marriage.[2]

VII. CONFLICTS AS TO MATRIMONIAL PROPERTY.

English common law conflicts in this respect with recent statutes.

§ 187. By the English common law, while the wife's dower attaches to all real estate of which her husband was seised during coverture, she has no analogous right to his personal property. The husband takes title to all movables belonging to his wife at the marriage, except her *paraphernalia*, and to all her *choses in action* which he has reduced into possession. These provisions have been more or less modified in England and in most of our states. Statutes have been passed enabling the wife to release her dower, and, in some jurisdictions, doing away with dower entirely, while her interest as a successor to her husband's personalty is variously assessed. In this way we have collisions between states retaining the English common law and states modifying or abandoning it.[3]

Law of community conflicting with English common law.

§ 188. Conflicts, also, arise between the English common law, or the statutory modifications of that law, just noticed, and the law of community (*communauté*), as accepted in France, and in French-settled states. This community is a species of partnership, and extends to all movables possessed or acquired by husband and wife, and to all immovables purchased during marriage, but not to such as were held by either of them before marriage, or came to either of them subsequently by succession or gift. The husband is the sole manager of the common estate, which he may pledge or sell, but not (except in peculiar cases) give away, without his wife's consent. In case of death, the survivor takes one half of the estate, the other half going to the heirs. In case of absolute *séparation de corps et de biens*, the wife is remanded to a free control of her movables.[4] She can make a will, and if a recog-

[1] Jour du droit int. privé, 1876, p. 141; Ibid. 1880, pp. 330 *et seq.*

[2] Glasson, *ut supra*, p. 68 *et seq.*; supra, §§ 152, 164, 174–78.

[3] See Glenn *v.* Glenn, 47 Ala. 204. The Scotch law is given by Mr. Van Winkle, in 22 Alb. L. J. 269. See Fraser Hus. & Wife, 2d ed. 649, 1319 *et seq.*

[4] Code Civil, arts. 1309, 1408, 1497.



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nized trader, may bind the joint estate, in all that concerns her business; though, with this exception, she cannot, without her husband's consent, acquire, sell, or pledge property.

In most parts of Germany, the law of matrimonial community prevails; though in some provinces the Roman Dotal Régime still exists, and in others, to a qualified extent, is recognized.[1]

In Louisiana, the system of community, established by the French settlers, obtains. In the remaining states of the Union, the English common law is the basis of legislation on this topic; but it has been so modified as to remove many of the points of original conflict between it and the French law.

§ 189. Statutes have been passed in many states exempting, in cases of insolvency, certain articles or items of property for a widow's benefit. When these are to be awarded to her on a settlement of her husband's estate, the law of her husband's last domicil must prevail. But when the object of the law is to prevent local destitution, and to afford relief to residents, then a widow is on principle entitled to avail herself of such a law if in force in the place of her residence, though her husband may have been domiciled in another state.[2] The *lex rei sitae* will award such relief, so far as concerns specific articles of property, irrespective of the question of domicil.[3]

Exemption statutes of residence conflicting with law of domicil.

§ 190. Savigny unhesitatingly says that the matrimonial domicil, or, as he terms it, the seat of the marital relation, must be assumed to be the domicil of the husband, who is the true head of the family. The wife's domicil at once merges in that of the husband.[4] Judge Story puts the question: "Suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is,

Site of matrimonial domicil is intended permanent residence.

[1] See at large Dr. Behrend's excellent treatise on the Law of Familie-Recht, in his Deutsche Privatrecht, Holtzendorff's Encyclopædie, Leipzig, 1870, p. 400. Compare McKenna's Succession, 23 La. An. 369; Robinson's Succession, 23 La. An. 174.

That the question of community is determined by the law of the matrimonial domicil and not by the *lex situs*, see Conner *v.* Elliott, 18 How. 591.

A full exposition of the French law of community, by Mr. Van Winkle, will be found in 22 Alb. L. J. pp. 266 *et seq.*

[2] Odiorne's App. 54 Penn. St. 178; Hettrick *v.* Hettrick, 55 Penn. St. 292; Platt's Appeal, 80 Penn. St. 501.

[3] Infra, §§ 571, 576, 598, 791.

[4] See supra, § 43; Fraser Hus. & Wife, 2d ed. 1319.



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then, to be deemed the matrimonial domicil?" And he answers: "Foreign jurists would answer, that it is the domicil of the husband, if the intention of the parties is to fix themselves there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicil is in New York." He then cites several of the older jurists to this effect.[1] And so has it been ruled, where parties married in one state intend forthwith to move their domicil to another state, which intention is carried out.[2] Mr. Parsons, in his work on Contracts, declares the rule to be that "the rights of the parties, as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be, domiciled."[3] But in case of a conflict between the domicil at the time of marriage, and that which the parties intend to permanently adopt, and in which they take up their residence, the latter should prevail.[4] Where there is no intention to remove to another domicil, the husband's domicil at the time of the marriage gives the prevailing law.[5]

Law of that domicil controls movables.

§ 191. When there is no express marriage settlement, the Roman law is distinct on this point: "Dic indistincte quod ad effectum et decisionem jurium matrimonii, ubi non fuit specificatum nec facta relatio ad alium certum, inspiciatur locus domicilii habitationis viri destinatae tempore matrimonii."[6] Mr. Westlake (1857), on this point, thus speaks: "It is universally allowed that, when a marriage takes place without settlement, the mutual rights of the husband and wife in each other's movable property are to be regulated by the law of the matrimonial domicil as long as that remains

[1] Confl. of Laws, § 194.

[2] Ford *v.* Ford, 14 Mart. 574; State *v.* Barrow, 14 Texas, 187; Laud *v.* Laud, 14 Sm. & M. 99; Carroll *v.* Renich, 7 Sm. & M. 798; Kneeland *v.* Ensley, Meigs, 620. Supra, § 43.

[3] To this he cites Le Breton *v.* Nouchet, 3 Mart. La. 60; Ford *v.* Ford, *ut supra;* Allen *v.* Allen, 6 Rob. (La.) 104; Doe *v.* Vardill, 5 B. & C. 104.

[4] To this effect, in addition to the cases already given, may be cited Collis *v.* Hector, L. R. 19 Eq. 334; Davenport *v.* Karnes, 70 Ill. 465; Glenn *v.* Glenn, 47 Ala. 204; and cases cited infra, § 199. See McKenna's Succession, 23 La. An. 369.

[5] Layne *v.* Pardee, 2 Swan, 232.

[6] L. 1, c. de Summa Trin. tit. Concl. de Stat. cited Phil. iv. 292.



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unchanged."[1] New acquisitions, however, are governed by the law of the actual domicil.[2]

At the outset arises the question whether the law of matrimonial domicil, as thus determined, applies to foreign real estate. It is argued by Savigny, sustained by the highest authorities, German and French, that it does.[3] He places it on the ground that by marriage both parties agree to submit themselves to the law of the husband's domicil, where they propose to take up their abode. It is highly improbable, he declares, that either party would make their pecuniary arrangements to depend upon the fortuitous existence of a certain portion of their estate in a foreign land. Great perplexities would thus arise; and this could not be their design.[4] On the other hand, the English and American authorities except foreign real estate from the operation of this principle.[5] "The position of these two great jurists," says Mr. Westlake, speaking of Dumoulin and Savigny, "appears to me to be unassailable, but its consequence as to

[1] Westlake Priv. Int. Law (1857), §§ 361, 366.

To this effect see Dues *v.* Smith, Jacob, 544; McCormick *v.* Garnett, 5 D., M. & G. 278; De Serra *v.* Clarke, L. R. 18 Eq. 587. See Watts *v.* Shrimpton, 21 Beav. 97; Mason *v.* Fuller, 36 Conn. 160; Besse *v.* Pollochoux, 73 Ill. 285.

"La loi ainsi tacitement adoptée devait ressortir les mêmes effets qu'un contrat exprés; il en résultait des droits définitivement acquis et généraux, quelle que fût la variété des coutumes sur le territoire desquelles les biens pourvaient se trouver, quels que fussent les changements qui devaient y intervenir." Brocher, Droit int. privé, p. 225. M. Brocher, however, questions whether such a law can properly be said to be accepted by the parties to a marriage (Ibid.), and whether, if so, there is proper notice of the fact to third parties. He argues (p. 226) that, in absence of a contract, the proper law is "la loi personelle de l'epoux au moment du mariage." See Savigny, viii. 379; Wächter, ii. p. 49; Fœlix, ed. Demangeat, i. 88; Layne *v.* Pardee, 2 Swan, 232. Supra, § 189; infra, § 200.

[2] Infra, § 196.

[3] Savigny, viii. 379; Hertius, § 46; Wächter, ii. p. 48; Fœlix, ed. Demangeat, i. 188. To the same effect is the Prussian Code, ii. 1, §§ 365, 369.

[4] The same view is taken generally by Dumoulin (t. 2, p. 963; t. 3, p. 555), and by Pothier, Traité de la Communauté, art. Prél. n. 10.

[5] Story, §§ 159, 186, 483; Redfield on Wills, iii. 426; Burge, i. 618.

When real estate of a wife in another state is sold by husband and wife, the proceeds when received are relieved from the wife's interests imposed by the *lex situs* of the real estate, and become the wife's property according to the law of her domicil. Castleman *v.* Jeffries, 60 Ala. 380.



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land cannot be admitted in England, partly from the strict forms of conveyance to which we tie the acquisition, not only of the full property in land, but even of any vested interest in it; and partly from the discrepancy between the nature of those limited estates which our system of real estate recognizes, and those interests which would be created under most continental marriage laws." [1] To the same effect are the opinions of the Supreme Courts of Illinois and Louisiana.[2]

Law of place of marriage not decisive.

§ 192. Judge Story starts at this point a new distinction. He declares, that "perhaps the most simple and satisfactory exposition of the subject, or, at least, that which best harmonizes with the analogies of the common" (English) "law, is, that in case of a marriage, where there is no special nuptial contract, and there has been no change of domicil, *the law of the place of the celebration of the marriage* ought to govern the rights of the parties in respect to all personal or movable property, wherever that is acquired, and wherever it may be situate; but real or immovable property ought to be left to be adjudged by the *lex rei sitae*, as not within the reach of any extra-territorial law." [3] But the theory that the place of the celebration of the marriage applies its law to determine the capacity and relations of the parties is now, as has been seen,[4] abandoned. This place, when it is not that of the domicil, is one that is selected fortuitously, and often ignorantly, as when travellers pass rapidly over a line on one side of which the wife has the power of a *feme sole*, on the other side of which she has no power at all. And such place of celebration is not necessarily the place of the *performance* of the marriage, which later jurists have agreed is its true legal site. This place of performance is the matrimonial domicil, to which husband and wife jointly propose to repair.[5] And the qualification thus introduced by Judge Story, that the place of contract is to govern as to personal or movable property, is surrendered by the learned editor of the sixth edition (1865) of the Conflict of Laws. Judge Redfield

[1] Priv. Int. Law, 1st ed. art. 369.

[2] Besse *v.* Pollochoux, 73 Ill. 285; Saul *v.* His Creditors, 17 Mart. 569.

[3] Confl. of Laws, § 159.

[4] Supra, §§ 160–165.

[5] See, as to this point, Sawer *v.* Shute, 1 Anst. R. 63; Warrender *v.* Warrender, 2 Cl. & Fin. 488, 489; 9 Bligh, 89; Christie's Succession, 20 La. Ann. 629. Supra, §§ 44, 189.



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here [1] argues that a "proper appreciation of the true principles involved in the nature of the married relation, and of the extent to which its rights and duties enter into all social and civil rights and duties in the state, could not fail to convince every thoughtful and dispassionate mind of the indispensable importance, and almost necessity, of regarding the law of the place of actual domicil as the controlling law, in regard to all the rights and duties, for the time being, springing from the relation." If by *actual* domicil is here meant a domicil other than that which existed at the time of marriage, there is here a divergence from the great body of recent authorities; but be this as it may, it is clear that the idea of the place of celebration, as generally determining the marriage relation, must be considered as now no longer tenable.[2] The English law seems now well settled, that where the matrimonial domicil is to be in England the effect of the marriage is to assign to the husband the wife's personalty, wherever it is situated; and this without regard to the place where the marriage was solemnized.[3] That the law of matrimonial domicil is in all cases to prevail over that of the place of ceremony was ruled emphatically by the Supreme Court of Louisiana, in a case to be hereafter noticed more fully.[4]

§ 193. When, however, the personal estate of either husband or wife is to be distributed upon intestacy, the intestate laws of the place of the last domicil must prevail.[5] The right of either widow or of surviving husband is governed, as to personalty, by the law of such last domicil of the deceased.[6] Where this law gives certain exemptions, in case of insolvency, to the widow, she is entitled to enjoy such, though she has never herself resided in the state.[7] But as to real estate,

In succession last domicil determines.

[1] § 171 *b*.

[2] As sustaining the position of the text, that the law of matrimonial domicil is to prevail, may be cited Bonati *v.* Welsch, 24 N. Y. App. R. 157, to be hereafter more fully noticed, and also Townes *v.* Durbin, 3 Metc. (Ky.) 352.

[3] Phil. iv. pp. 311, 312.

[4] Le Breton *v.* Nouchet, 3 Mart. R. 60. Infra, § 196. See, also, Townes *v.* Durbin, 3 Metc. (Ky.) 352.

[5] Infra, § 576; Bishop on Mar. Wom. §§ 170–182; Redfield on Wills, iii. p. 426; Story, §§ 483, 484; Westlake, art. 372; Savigny, viii. p. 336.

[6] See Slaughter *v.* Garland, 40 Miss. 172; Cameron *v.* Watson, Ibid. 191.

[7] Christie's Succession, 20 La. An. 383. But see Cooper's Succession, 18 La. An. 36, where it was held that such exemptions only applied to those domiciled in the state; and see infra, § 791; supra, § 189.



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the *lex rei sitae* necessarily decides. Where that law gives dower to the wife or curtesy to the husband, such provision overrides the law of the last domicil; and the converse is true, when the law of the last domicil gives dower or curtesy, and the *lex rei sitae* community.[1] It should, however, be kept in mind, as a key to some of the cases hereafter given on marriage settlements, that real estate, purchased with the wife's personalty, is stamped with the impress of personalty, and is frequently treated as such.

When domicil is changed high authorities hold that first domicil controls.

§ 194. When the matrimonial domicil has been changed for another with a distinct jurisprudence, it becomes often a question of great interest whether the matrimonial estate, and the respective interests of husband and wife, are modified so as to accord with the new jurisprudence. Two distinct opinions have been held in this connection. The first is that the law of the intended matrimonial domicil extends itself permanently over the whole marriage relation. It is assumed that by a tacit contract the parties agree to submit themselves to the control of that law. To this effect are the judgments of several German courts,[2] and the opinions of P. Voet,[3] J. Voet,[4] Hertius,[5] Fœlix,[6] and Savigny.[7] In defence of this view, it is maintained by Savigny that when the marriage was entered into, it was at the wife's option either to abandon it altogether, or to couple it with positive business settlements. When she determines not to make such stipulations, she accepts the limits that the law of domicil prescribes for the matrimonial estate, naturally viewing it as having a continuous effect. If the husband arbitrarily changes his domicil, this, on the opposite theory, would subject the matrimonial property to a law different from that to which the marriage contract submitted it. If the wife agrees to this change, this on the principle of the modern Roman law, by which she is competent to give such consent, settles the question; for then, the law which was originally accepted by agreement is now

[1] Story, § 454; Fuss *v.* Fuss, 24 Wis. 256; supra, § 190 *a*; infra, § 294; Jephson *v.* Riera, 3 Knapp, 130, 149.

[2] Seuffert, Archiv. i. n. 152.

[3] Sect. 9, c. 2, § 7.

[4] In Pandect. xxiii. 2, § 87.

[5] §§ 48, 49.

[6] Pp. 130–132, ed. Demangeat, i. 195.

[7] VIII. § 379.



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changed by agreement. But a different question arises when the change is disadvantageous to the wife and is not accepted by her. In order to prevent such an arbitrary exercise of power on the part of the husband, the advocates of the first opinion have adopted the theory of a tacit contract. But this theory, to which exception may be taken, is not essential to the conclusion. For, however it may be as to a contract, either express or implied, between the parties to a marriage to submit themselves to a particular law, it is clear, as a matter of fact, that what the woman does, on marriage, is to accept the intended matrimonial domicil. From the law of this domicil, thus adopted by her, she cannot, in this view, be detached except with her free consent. And this consent she cannot, after coverture, so it is argued, give.

Mr. Westlake[1] (1880), after saying that there is no English case determining the rule when there has been a change of domicil subsequent to marriage, adds: "Much is not probably adventured in predicting that, when cases arise on which the point can be tried, the law of the domicil referred to will be declared to be that of the matrimonial domicil, even although another domicil may have been adopted between the date of the marriage and that when the property was acquired." He adopts, in this respect, the reasoning of Savigny.

§ 195. It is further urged by Savigny that the intention of the law-maker is pointed at marriages within his own particular dominions and not those contracted elsewhere. He says: "You are about to marry here; you must accept certain laws as applicatory to your estate." He certainly does not mean to interfere with the vested interests of those married elsewhere. If the wife's matrimonial rights to her husband's estate have thus vested in the place of their matrimonial domicil, it cannot be presumed to be the intention of the legislature to subsequently strip her of her property against her protest. And yet this must be assumed if the position here advocated be not sustained. In conformity with this view, the Court of Paris, in 1849, and the Court of Cassation, in 1854, decided that when, on marriage, the law of the domicil once attached, it could not be displaced or altered, by a change either

Intention of parties supposed to point to this result.

[1] P. 64.



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of national *status*, or of domicil, on part of the husband.[1] Consequently it was ruled that when parties married in England, which was their domicil, and afterwards removed to France, where the husband was naturalized, and where he afterwards purchased, conjointly with his wife, immovable property, this enured solely to himself, this being the English law, which was that of the matrimonial domicil. And Sir R. Phillimore,[2] speaking of this case, says, "A stronger instance of what appears to the writer of these pages to be a sound maxim of the *jus gentium* cannot be well imagined." And the same learned writer subsequently says, that "As to property accruing before the marriage, it must obviously be considered that the wife's rights have vested, and cannot be affected by any subsequent conduct or acts of the husband; and that the same principles will, on examination, be found applicable to property accruing after the marriage; in other words, that the reasoning of Savigny, and the jurists who agree with him, is both superior to that of Story, and more in harmony with the English decisions which have been just mentioned."[3] As a marked authority to the same effect may be cited a decision of the Court of Appeals in New York,[4] and a case in Kentucky, where the Louisiana law, giving a lien to a wife on her husband's estate, was enforced, in 1866, in Kentucky, against a husband who was domiciled in Louisiana at the time of his marriage. "By the law of Louisiana," said Robertson, J., "the matrimonial domicil of John R. Leary and his first wife, her property was secured to her as a dotal portion by a legal lien on his estate, and all his future acquisitions; and by the acknowledged law of comity, that paraphernal right and lien to protect it were as ubiquitous as the persons themselves, and followed them wherever they might afterward settle.[5]

[1] Fœlix, p. 91.

[2] Int. Law, iv. 294.

[3] Ibid. 314; citing Watts *v.* Schrimpton, 21 Beavan, 97; Wright's Trusts, 2 Kay & J. 595; De Gex, M. & G. 278; where it was held that marriage in England, by persons there domiciled, was an assignment of all the wife's personalty, operating, without regard to territory, all the world over.

[4] Bonati *v.* Welsch, 24 N. Y. 157.

[5] Kendall *v.* Coons, 1 Bush (Ky.), 530. See, also, Smith *v.* McAtee, 27 Md. 421.

That the parties to a marriage contract cannot arbitrarily select the law by which it is to be governed is to be inferred, so argues Fiore (Op. cit. § 325), from the scope of the contract, which determines not only the domestic economy of the parties and



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§ 196. When, however, the matrimonial domicil has been abandoned and a new domicil is accepted, acquisitions subsequent to the change are governed by the law of the new domicil. This view has been accepted by high German authorities,[1] as well as by several American courts.[2] Nor can it be denied that there is much strength in this position. A husband and wife, for instance, whose matrimonial domicil is in a state subject to the English common law, move into a state where a woman is entitled to hold as separate property money given to or made by her. It would be a hard thing if, when domiciled in the latter state, she should be excluded from the privileges the local law gives to all subject to it; nor is it likely that any court would hold that

Acquisitions subsequent to change governed by new domicil.

of their children, but their relations to the state. This is all very true. The same reasoning, however, may be used to assail the position taken by Fiore, that it is the law of the husband's nationality that is to prevail. There are multitudes of persons who marry in Europe on the eve, and in view, of an intended settlement in the United States. The husband's nationality, at the time of the marriage, is utterly distinct from the nationality in which he expects to establish his home. If the importance, public and private, of the interests involved in marriage is a reason against governing it by a jurisprudence they select, it is a still stronger reason against forcing on them a jurisprudence which they do not select, which they repudiate, and which is incompatible with the new conditions of life in which they expect to engage. See infra, § 198.

[1] See Puchta, Pandekten, § 113.

[2] See Davis *v.* Zimmermann, 67 Penn. St. 70; Smith *v.* McAtee, 27 Md. 421; Kneeland *v.* Ensley, Meigs, 620; Doss *v.* Campbell, 10 Ala. 590; Clanton *v.* Barnes, 50 Ala. 260; Le Breton *v.* Nouchet, 3 Mart. 60; Gale *v.* Davis, 4 Mart. 645; Bruneau *v.* Bruneau, 9 Mart. 217; Lyon *v.* Knott, 26 Miss. 458; Castro *v.* Ilies, 22 Tex. 479; Fuss *v.* Fuss, 24 Wis. 256; Baubichon's Est. 49 Cal. 19. Story concurs in this view, § 187.

Mr. Burge, i. pt. i. c. 7, § 8, takes the same view, saying: "If the law of community be a real law, its power as to personal property cannot be more extensive than as to real property. As it affects only such real property as is actually situated in the country where it is established, *so it affects personal property only when its owner is actually domiciled in the country where such law is established, because the place of his domicil is the situs in fictione juris of his movable property.* The real law as to personal property is that which prevails in the place of the owner's actual domicil. He acquires and holds it according to the disposition of that law, and it depends upon that law whether he and his wife acquire it for their joint benefit, or for his sole benefit." See, as tending in the same direction, Ware *v.* Devens, 42 Ala. 212, where it was held that the law that governs dower is not that in force at the time of the marriage, but that in force at the time of the husband's death.



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what she made or what she received in such a jurisdiction was not her own.[1] On the other hand, if the matrimonial domicil was in a state where the wife had a community of property with her husband, and they should change their domicil to a state where the English common law obtains, it is not to be expected that a court of the latter state would undertake, with no adequate machinery for the purpose, to apply to the parties the law of community. As we have already argued in cases of *status*,[2] and as we shall hereafter argue in cases of divorce,[3] when a married person *bonâ fide* changes his domicil, the law of the new domicil is the law by which he is controlled.

But vested rights are not thereby divested.

§ 197. But even if we hold that with a change of domicil there is a change of matrimonial relations as to subsequently acquired property, it is plain that by such change property already vested in either husband or wife is not disturbed. Thus a husband's ownership of his wife's goods, under the common law, will not be divested by their removal into a state where the common law does not exist.[4] And a married woman's personal property, bought by her in Indiana, will be presumed in Illinois, there being no proof of Indiana law to the contrary, to have been vested in her husband according to the common law.[5]

§ 198. It has been urged by jurists of the Italian and Belgian

[1] Glenn *v.* Glenn, 47 Ala. 204.

[2] Supra, §§ 135, 138, 159.

[3] Infra, § 228.

[4] Bond *v.* Cummings, 70 Me. 125; Lichtenberger *v.* Graham, 50 Ind. 288; Kraemer *v.* Kraemer, 52 Cal. 302. See Mason *v.* Fuller, 36 Conn. 160.

[5] Tinkler *v.* Cox, 68 Ill. 422.

It has been held in Alabama, that where after a marriage in South Carolina, where the wife was domiciled, and a removal of husband and wife to Alabama, as their matrimonial domicil, that being the husband's domicil, the husband takes possession of the wife's property given to her in South Carolina, and converts the same into money by a sale, and afterwards brings the money thus obtained to Alabama, investing it in the latter state in the purchase of lands, taking the title in his own name, a trust results to the wife in the lands so purchased under the Alabama statute of 1848, which trust will be enforced at the suit of the wife against the husband in a Court of Chancery, to the extent of the wife's money so invested, and interest thereon, if the husband makes no objection as to the interest. Glenn *v.* Glenn, 47 Ala. 204, citing Robison *v.* Robison, 44 Ala. 227. But in this case there was no change of matrimonial domicil. That domicil continued throughout in Alabama.



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schools that nationality and not domicil should afford the law by which matrimonial estates should be determined. To this it may be enough to say, (1.) that nationality cannot be accepted as determining a law where, as in England and the United States, there is a plurality of jurisprudences under one nationality; and (2.) nationality can be assumed, as an instrument of fraud, far more readily than can domicil.[1] It may be added that even by so earnest an advocate as Fiore, it is admitted that the great weight of authority on the continent of Europe goes to establish domicil and not nationality as giving the law by which matrimonial estates are to be determined. Thus in a case in 1856, before the Court of Paris, cited by him,[2] a Sardinian citizen, who married in France, where he had been for some time domiciled, though without the authorization of the government, was decided, in default of a marriage settlement, to hold his estate "sous le régime de la communauté universelle," though the Sardinian Code does not admit such community, unless expressly stipulated. As the parties intended to make France their home, this ruling is consistent with the position in the text, that the law of the matrimonial domicil should prevail, though in conflict with the rule proposed by Fiore, that nationality should control. And that the domicil which the parties intend to adopt and continue in should give the applicatory law is held, as Fiore admits, by Dumoulin, Voet, Le Brun, Pothier, Troplong, Rocco, as well as by the French Court of Cassation.[3]

Nationality not an adequate test.

[1] See discussion supra, §§ 8 *et seq.* To same effect see Jour. du droit int. privé, 1876, p. 182.

[2] Op. cit. § 331.

[3] Dumoulin, Comm. ad Cod. i. tit. i.; P. Voet, De Stat. § 9; c. 9; J. Voet, Ad. Pand. tit. de ritu nuptiarum, No. 85; Le Brun, De la communauté, i. ch. ii. No. 38; Pothier, De la communauté, i. No. 40; Troplong, Mariage, No. 21; Rocco, pt. iii. No. 21; Cass. Franc. 25 Juin, 1816; Sirey, 1817, i. 292; Ibid. 7 Feb. 1843; Ibid. 1843, i. 282; Ibid. 1856; Ibid. 1857, i. 247.

It is held in Italy that a woman married abroad has a lien (hypothèque légale) on her husband's property situate in Italy. Jour. du droit int. privé, 1878, p. 54. It is argued, however, that this right should be limited by the law of the nationality of the wife. Ibid. p. 56.



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VIII. CONFLICTS AS TO MARRIAGE SETTLEMENTS.

Marriage settlements governed by law of matrimonial domicil.

§ 199. In England, by the statute 27 Henry VIII., "where purchases or conveyances had been or should be made of any lands, tenements, or hereditaments, by or to the use of the husband and wife in tail, &c., or for their lives, or the life of the wife, for her jointure, every woman married, having such jointure made, should not claim nor have any title to dower to the residue," &c., of her husband's land. The courts have construed this statute so as to require that the jointure should be as beneficial to the wife as would have been the dower. This statute is now extended to all alien women married to natural born or naturalized subjects.[1] The English courts are explicit in declaring that such settlements are to be construed by the law of the matrimonial domicil. Thus Lord Brougham, in 1834, held that where parties, domiciled in Scotland, made in that country a marriage settlement, such settlement was to be construed, by an English court, according to Scotch law.[2] Where the parties were domiciled in England, but the marriage was solemnized in France, it was held, in 1854, that the settlement was to be construed according to English law.[3] A change of domicil, it has been held, both in England and the United States, does not work any change of law; the law to be applied is still that of the matrimonial domicil.[4] And a marriage settlement — such is the general rule — will be interpreted, so far as concerns the mode of performance, in harmony with the law of the matrimonial domicil.[5]

[1] 7 & 8 Vict. c. 66.

[2] Anstruther *v.* Adair, 2 Mylne & K. 513; Wright's Trusts, 2 Kay & Johnson, 595; Duncan *v.* Cannon, 18 Beavan, 128. See Byam *v.* Byam, 19 Beavan, 62.

[3] Este *v.* Smyth, 18 Beavan, 112.

[4] Ibid.; Phil. Int. Law, iv. 311; De Lane *v.* Moore, 14 How. U. S. 253; Le Breton *v.* Miles, 8 Paige, 261; Besse *v.* Pollochoux, 73 Ill. 285; Adams *v.* Hayes, 2 Ired. 361; Smith *v.* Morehead, 6 Jones Eq. 360; Hicks *v.* Skinner, 71 N. C. 539; Glenn *v.* Glenn, 47 Ala. 204; Murphy *v.* Murphy, 5 Mart. 83; Saul *v.* His Creditors, 17 Mart. 605; McLeod *v.* Board, 30 Tex. 238.

[5] Lansdowne *v.* Lansdowne, 2 Bligh, 60; Anstruther *v.* Adair, 2 M. & K. 513; Young *v.* Templeman, 4 La. An. 254. See Duncan *v.* Cannon, 18 Beav. 128; 7 D., M. & G. 78.

In a case decided by the Supreme Court of Louisiana in 1870, it appeared that the husband, at the time of the marriage, was domiciled in Louisiana, and the wife in Mississippi,



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It is true that Chancellor Kent and Judge Story hold that the rights depend upon antenuptial contracts, and are to be governed by the *lex loci contractus*.[1] But in the case before Chancellor Kent the place of contract was that of the matrimonial domicil; and the reasoning goes to show that if there be a conflict between the two, that of the matrimonial domicil, so far as concerns the mode of performance, would prevail. To this effect is a decision of the Supreme Court of the United States that an antenuptial contract, duly made and recorded in the state of the parties' matrimonial domicil, where the property then was, binds such property as against creditors and purchasers, though it had been removed to another state.[2] It is clear that subsequent creditors of the husband, in one state, cannot attach property settled on the wife by antenuptial contract valid in the matrimonial domicil.[3]

where the wedding took place, and where an antenuptial marriage settlement was executed. The parties immediately after the marriage moved to Louisiana, where they resided until the husband's death. It was held that the question of the capacity of the wife and the form of the contract were to be governed by the *lex loci actus*, but its effect by the law of Louisiana, which was the intended place of the matrimonial domicil. Wilder, Succession of, 22 La. An. 256.

[1] De Couche *v.* Savatier, 3 Johns. C. R. 211; Story, § 376.

[2] De Lane *v.* Moore, 14 How. U. S. 253. See Hicks *v.* Skinner, 71 N. C. 555.

To enforce in all cases the law of the place of celebration would be to impose an arbitrary and sometimes utterly incongruous and subversive test, since marriages are often solemnized in places whose laws the parties have no idea of accepting as their own — laws which may seriously conflict with other arrangements made by the parties. Supra, § 192. The same objection, though perhaps in a less degree, applies to Mr. Westlake's test, — the law of the husband's domicil. However it may be in England, it is often the case in the United States that marriage is the epoch which the husband selects for a change of his domicil. In the majority of cases, it is true, the husband's domicil, at the time the marriage is solemnized, is that to which the parties propose in future to submit themselves, and in these cases Mr. Westlake's test is just. But where the parties intend to abandon this domicil for another immediately after the marriage, the domicil thus intended must determine the mode of performance.

[3] Bank U. S. *v.* Lee, 13 Pet. 107.

That real estate, when put in trust for matrimonial purposes, must be governed in accordance with the laws of the matrimonial domicil, see Besse *v.* Pollochoux, 73 Ill. 285. See Fuss *v.* Fuss, 24 Wis. 256.

It has been held in California, in the case of an antenuptial marriage contract made in France, where the parties were domiciled, in which the



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Personal property not included in the settlement, nor subsequently acquired, is governed by the law of matrimonial domicil.[1]

Where the parties intend to adopt a new domicil after the marriage, we may hold, in view of what has been stated, to the following conclusions: —

(1.) The verbal interpretation of the contract, so far as concerns ambiguities, is to be governed by the law the parties had in mind and were familiar with, which is usually that of their residence at the time.

(2.) The rule *locus regit actum* determines the mode of solemnizing the contract.

(3.) The mode of performance is regulated by the law of the intended matrimonial domicil.[2]

husband and wife agreed that the survivor should hold all the property which the one first dying should leave, except what the law gives to the children of the marriage, and the survivor died in California, being domiciled there, that the estate would be distributed in accordance with the law of California. Baubichon's Est. 49 Cal. 19.

[1] Story, § 185; Watts *v.* Shrimpton, 21 Beav. 97; Ordronaux *v.* Rey, 2 Sandf. Ch. 45. Supra, § 196.

[2] Collis *v.* Hector, L. R. 19 Eq. 334, may seem to conflict with the conclusion. In this case the husband's domicil was Turkey, while the marriage settlement was English, and the wife was an English woman. But in this case (aside from the barbarous character of the procedure by which the English settlement had been annulled by the Turkish court without notice to the wife), it was made plain that the wife was made to believe, at the time of the marriage, that the husband intended to make his domicil in England, and that such was at the time his expressed intent. England, therefore, may have been properly held to be the matrimonial domicil; and the case, therefore, sustains the distinction taken in the text. See, also, Van Grutten *v.* Digby, 31 Beav. 561. As sustaining the text may be cited Davenport *v.* Karns, 70 Ill. 465, a case of parol settlement, and authorities cited supra, § 194. To same effect is argument of Lord Brougham in Anstruther *v.* Adair, 2 My. & K. 513.

Both in France and Germany the matrimonial estate, so far as concerns the moneyed relations of husband and wife, is determined finally by the law of the matrimonial domicil; nor is there any change in these relations effected by a subsequent change of domicil. The domicil is not necessarily that of the place of marriage. It is the place which the parties at the time of the marriage select as the seat of their married life, and at which, after their marriage, they take up their abode. Jour. du droit int. privé, 1875, p. 281, and cases there cited.

That as to formalities of execution of a marriage contract the rule *locus regit actum* prevails is illustrated in Hicks *v.* Skinner, 71 N. C. 539, where an antenuptial contract en-



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§ 200. Whether when there is a provision in a marriage contract that the contract shall be construed by a foreign law, and not that of the matrimonial domicil, such a provision is valid, is doubtful. In England the validity of such a provision has been affirmed.[1] In Louisiana it has been denied.[2] And this is the better rule, unless (1.) the law designated is that of the matrimonial domicil; or, (2.) that of the place where property designated is situated.

Limitations under which foreign law can be applied.

§ 201. Limitations in a marriage settlement, contravening the policy of the state in which the parties are resident, or in which the property to be affected is placed, will not be enforced.[3]

Limitations will not be enforced when contrary to the policy of the law.

### IX. GIFTS BETWEEN HUSBAND AND WIFE.

§ 202. By the Roman law all gifts from husband to wife, and from wife to husband, are forbidden. This is a matter of local policy, which is still maintained in several European states; and, from its nature, is to be subject to the laws of the domicil of the parties at the time of the proposed gift.[4] The reason given for this prohibition is the importance of maintaining the unselfishness and purity of the marriage relation; and even those jurists who most insist upon the maintenance of this policy regard it, nevertheless, as only na-

By Roman law, gifts between husband and wife invalid.

tered into in New York, and there registered, between a husband domiciled in North Carolina, and a wife domiciled in New York, was held good against the husband's creditors, though the assignment was not registered in North Carolina, to which place the property was moved after the marriage. To the same effect is Wilder, Succession of, 22 La. An. 219.

Whether, after marriage, a marriage contract can be changed or amended by the consent of the parties, is a matter as to which the law of the actual domicil must decide. The French law forbids this. "Toutes conventions matrimoniales seront rédigées avant le mariage par acte devant notaire." "Elles ne peuvent recevoir aucun changement après la célébration du mariage." Code Civil, arts. 1394, 1395; but see a judgment of the Court of Appeals at Limoges, August 8, 1809, given in Sirey, 9, 2, p. 386. By the English common law, a married woman is incapable of thus modifying or surrendering her estate. See Fuss *v.* Fuss, 24 Wis. 256.

[1] Este *v.* Smyth, 18 Beavan, 112.

[2] Bourcier *v.* Lane se, 3 Martin, 587.

[3] Infra, § 490; Fergusson on Mar. & Div. 358.

[4] Bar, § 97; Savigny, viii. p. 335; Bouhier, ch. 12, No. 95; Demangeat, note to Fœlix, i. p. 228.



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tional or local, and agree that it is not to be enforced on subjects who are temporarily residing within the bounds of a state in which no such law obtains.[1] Hence it is held that if a husband domiciled in Vienna, where no such prohibition exists, should, while in Vienna, give to his wife land situated in Hanover, where the prohibition is in force, the gift is valid.[2] As the topic has been much discussed, and as it is likely to arise in America, in any case where German husbands, who have acquired domicil among us, should convey to their wives their German real estate, it may not be out of place to notice the question at issue a little more fully. The present rule in Germany seems to be that restrictive laws of this kind do not bind even the immovable property of persons who are domiciled in another land, though such immovable property lies in the land where the restriction is imposed. To this effect speak Savigny,[3] Rodenburg,[4] Demangeat,[5] and Wächter.[6] A judgment in the Imperial Court of Paris, on February 6, 1856, is expressly to this point. A foreigner domiciled in France made a gift to his wife in conformity with the 1096th article of the Code Napoléon. The court held the gift valid, although prohibited by the *lex rei sitae*.[7] The question on both sides is one of state policy. "Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est ne mutato amore invicem spoliarentur, donationibus non temperantes, et profusâ erga se facilitate." But this does not apply to the immovable property of foreigners, though such property be situated within the territory. Nor do persons whose matrimonial domicil is under this law continue to be subject to it when they acquire a matrimonial domicil elsewhere.

So by English common law.

§ 203. By the English common law, the wife, after marriage, has no independent legal existence, and hence can neither make gifts to her husband, nor, except as to *paraphernalia*, receive gifts from him. In cases of change of domicil, however, from a state where the common law

[1] Burgundus, i. 38; Bartol, in L. 1, c. de S. Trin. No. 32; Wächter, ii. p. 199; Bar, § 97.
[2] Bar, § 97.
[3] VIII. p. 335.
[4] Tit. 2, c. 5, § 1.
[5] On Fœlix, i. p. 109.
[6] II. p. 199.
[7] Ibid. i. p. 228.



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exists to a state where the wife has an independent business existence, the law of the latter state prevails.[1]

## X. DIVORCE.

### 1. *Foreign Divorces to be viewed with Disfavor.*

§ 204. By the common law of Christendom, as has already been seen, marriage is the union of two persons, capable of intermarrying, for life, to the exclusion of all others.[2] This was the law adopted, prior to the settlement of this country, by the then powers of Christendom meeting in councils, which were in this relation international congresses.[3]

Marriage to be for life.

§ 205. Waiving the question how far divorces with the right to remarry have the authority of Holy Scriptures, and how far they are supported by ecclesiastical sanction, there can be no question that by present international law a sovereign state has the power to divorce its domiciled subjects. This holds as to the several states of the American Union even under the federal Constitution, which forbids a state from passing any law impairing the obligation of contracts. And it is also conceded by those European states which do not in their own legislation permit divorces.[4] But while we must

Power of divorce an attribute of sovereignty.

[1] It should be added that even by the common law a husband may convey to trustees property for his wife's benefit. See 6 South L. J. (1881) 641.

[2] Supra, § 128.

[3] Supra, § 171.

[4] Supra, §§ 132, *et seq.* The authorities are collected infra, § 209.

*That a state has power to divorce its domiciled subjects*, see supra, § 88. Strader *v.* Graham, 10 How. U. S. 82, 93; Sewall *v.* Sewall, 122 Mass. 156, and cases cited infra.

*Whether nationality can be substituted for domicil*, see supra, §§ 87, 165; infra, § 209.

*That divorce of citizens of states is exclusively under state control*, see Hopkins *v.* Hopkins, 3 Mass. 158.

*That state divorces do not conflict with the Constitution of the United States*, see Cheever *v.* Wilson, 9 Wal. 123.

*A state can divorce by legislative act, unless the procedure be given by the Constitution to the judiciary.* This is an inherent incident of sovereignty exercised repeatedly in England and in this country. See Maguire *v.* Maguire, 7 Dana (Ky.), 183; Rugh *v.* Ottenheimer, 6 Oreg. 231. It is otherwise when the function is given by the Constitution to the judiciary. 2 Story Const. Law, 259; Adams *v.* Palmer, 51 Me. 480; Clark *v.* Clark, 10 N. H. 385; White *v.* White, 105 Mass. 325; Cronise *v.* Cronise, 54 Penn. St. 255; Carson *v.* Carson, 40 Miss. 349. As to unconstitutionality and invalidity of special legislative divorces, see Simonds *v.* Simonds, 103 Mass. 572; Richeson *v.* Simmons, 47 Mo. 20.

*For Roman law* see Glasson's Mariage Civil, Paris, 1879, London Law



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concede this to be a doctrine of private international law, it is also a part of private international law that a divorce, to be

Magazine, Feb. 1879, p. 161, and article by Mr. Van Winkle, 16 Alb. L. J. 305.

*Colonial American law.* A curious collection of colonial divorces in New England before the Revolution will be found in 16 Alb. L. J. 111.

*That states not themselves granting divorces will recognize the validity of foreign divorces when granted by a court having jurisdiction*, see infra, § 209.

*The ecclesiastical issues involved in questions of divorce* are elaborately treated by President Woolsey, of Yale College, and by the late Mr. Hugh Davey Evans, of Baltimore. (Essay on Divorce and Divorce Legislation, with special reference to the United States, by Theodore D. Woolsey, D. D., LL. D. New York: Scribner, 1869. A Treatise on the Christian Doctrine of Marriage, by Hugh Davey Evans, LL. D. New York: Hurd & Houghton, 1870).

As asserting the right of divorce, after wilful desertion, may be cited Matt. Henry, Com. 1 Cor. vii. 10–15. The same view is taken by Grotius, by Luther, by Melancthon, and by Calvin.

The Protestant Episcopal Church in the United States prohibits its ministers from officiating at the marriage of divorced persons except those of the innocent party in cases of adultery.

Although the Roman Catholic Church condemns divorces of all classes, it annuls marriages for grounds so numerous as to make marriages, in communities closely related, and marriages between Christians and non-Christians, always open to revision. And there is a peculiar objection to the annulling of marriage from the fact that, unlike divorce, it bastardizes the issue.

The Quinisextine Synod, held under Justinian II., in A. D. 692, at Constantinople, a synod accepted by Hefele (Concilien Geschichte, iii. 329) as authoritative, adopted the following as the seventy-second canon: —

"Marriages between the orthodox and heretics are forbidden under pain of excommunication, and must be dissolved."

The position of the several states of Europe in respect to divorce may be taken from the following table drawn mainly from Glasson's Mariage Civil, Paris, 1879: —

I. Where only divorce (*a vinculo matrimonii*) exists: Roumania, Switzerland, Germany, Sweden, Norway, Denmark, Russia, Montenegro, Servia.

II. Where only *séparation de corps perpetuelle* (divorce *a mensa et toro*) exists, and this for determinate causes: France, Civil Code, modified by Law of May 8, 1816 (see, for French law, infra, § 209; Fiore, p. 653); Spain, Law of June 18, 1870; Portugal, Code of 1867.

III. Where *séparation de corps perpetuelle* exists, only for determinate causes, or by mutual consent: Italy, Code of 1866.

[The Italian courts assume the jurisdiction of determining not only procedures for the "séparation du corps" of foreigners resident in Italy, but also of procedures for "séparation de biens," although no such procedures are recognized by the states to which such foreigners belong. The French courts, on the other hand, do not exercise the jurisdiction over foreigners



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extra-territorially valid, should have been granted on a regular procedure, by a court having jurisdiction.

as to "séparation de biens." Fiore, Op. cit. App. p. 654. It is hard to see how the Italian rulings are consistent with the Italian maxim that nationality determines *status*.]

IV. Where only divorce (*a vinculo matrimonii*) exists for determinate causes: Switzerland, Federal Law, 1874; Bavaria, Imperial Law of 1875; Brunswick; Frankfort on the Main; Hanover; Saxony, Imperial Law of 1875; Würtemberg, Imperial Law of 1875; Sweden, Code of 1734; Russia; Servia, Code of 1844; Montenegro.

V. Where such divorce only exists, either for determinate causes, or by mutual consent: Roumania, Code of 1865; Bavaria; Denmark; Norway; Prussia, Landrecht and Imperial Law of 1875.

VI. Where both *séparation de corps* and divorce *a vinculo* exist, but only for determinate causes: England, Act of 1857.

VII. Where *séparation de corps* exists for determinate causes, and divorce either for determinate causes or by mutual consent: Belgium.

VIII. Where divorce exists for determinate causes, and *séparation de corps* for either determinate causes or mutual consent: Holland.

IX. Where both *séparation de corps* and divorce, for determinate causes, are permitted, subject to the religion of the parties: Russian Poland.

X. Where *séparation de corps* for determinate causes, or mutual consent, exists only for Catholics; while non-Catholics may be divorced either in accordance with the laws of their religious communion, or by consent, on the ground of mere incompatibility: Austria.

In Austria divorces, though prohibited in cases where the parties are Catholics, are permitted for adultery, cruelty, and desertion, where the parties are Protestants. For Jews the only sufficient cause (unless there be consent) is adultery. It has been the habit of persons who in the eye of the law are Catholics, and who desire a divorce, to resort to Transylvania (where there are Protestant ecclesiastical tribunals competent to decree divorces), profess conversion to Protestantism, and then be divorced. The extra-territorial validity of these divorces is discussed in the Jour. du droit int. privé for 1880, p. 268.

The conflict between European codes may be illustrated as follows: —

In France and Italy divorces *a vinculo matrimonii* for any cause are prohibited. The Prussian Code admits any one of the following causes as sufficient to sustain a divorce: (1.) Adultery; (2.) Legitimate suspicion of adultery; (3.) Desertion; (4.) Unnatural vices; (5.) Refusal of wife to follow husband to a new domicil chosen by him; (6.) Refusal to perform conjugal duties; (7.) Impotency; (8.) Insanity, lasting for a year without hope of recovery; (9.) Cruelty; (10.) Conviction of infamous crime; (11.) Dissipation and prodigality; (12.) Refusal of husband to support wife; (13.) Change of religion by either party; (14.) Mutual consent when there are no children, and in certain cases where there are children.

According to Fiore (Op. cit. § 132), if parties, married in a country where divorce is prohibited, are afterwards naturalized in a country where it is permitted, they are governed, as to divorce, by the laws of the latter country. He holds, however, that this



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Foreign divorces should be closely scrutinized on account of looseness of procedure.

§ 206. In view, however, of the important interests at stake, it is proper, when a foreign divorce is set up, that it should be subjected to a close scrutiny; and this scrutiny is the more essential from the carelessness and arbitrariness with which in some jurisdictions divorces are granted, and from the usually *ex parte* character of the procedure. To accept unquestioningly the decrees of foreign states dissolving marriages would be to reduce marriage to a mere sexual union, to be terminated at will. Such is the theory of marriage in non-Christian countries, whose aid, if it were likely to be successful, a short journey might readily secure, in order to vacate a tie from which either party might desire to be relieved. No doubt in such a case an American or English court would say, "We will allow to such a barbarous decree no extra-territorial force." But unfortunately, divorces, in some of our American States, are obtained by a procedure almost equally obnoxious. The domicil of the party petitioning, even when such domicil is required, is often illusory. The proceedings are secret and lax, and the records, if kept at all, are kept with a slovenliness which often defies subsequent explorations.[1] The court is sometimes satisfied with a notice to the defendant by publication, which in most cases in which there is no collusion is no notice at all. Foreign judgments, as hereafter will be seen, which are granted with such carelessness, would be regarded as having no extra-territorial force.[2] If such be the rule with regard to judgments affecting mere private and individual rights, much more rigorously should such safeguards be invoked when the evil is one which touches, not merely the pri-

rule only applies where the wife follows her husband, and that it does not apply when she does not follow him, but retains her old nationality. He adds, dissenting in this respect from Merlin, that such question should be based on facts anterior to the naturalization. See supra, §§ 132–135.

The peculiar jurisprudence in this respect of France is detailed infra, § 209.

[1] President Woolsey, p. 271, gives the following statement from a "legal gentleman in Indiana:" "It frequently happens that the petition, which is not sworn to, contains several statutory cases, and perhaps also states facts which could only be the basis of a divorce under the seventh clause; *and as the evidence is heard orally, and no record is kept of it, probably in not one in five of the records of divorces can the real ground of divorce be obtained from the paper with certainty.*"

[2] Infra, §§ 646 *et seq.*



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vate interests of the parties, but the most sacred rights of innocent offspring, and the most essential sanctions of the community at large.

§ 207. As is elsewhere fully shown it is a fundamental principle of international law that each state, in all matters of morals and national policy, is bound to regard its own legislation as supreme.[1] Even in so slight a matter as a single foreign judgment based on a principle at variance with a domestic police law is this principle invoked.[2] But to a state retaining the essential principles of the common law of Christendom so far as to regard the marriage tie as on principle indissoluble, a lax system of foreign divorce presents itself with aspects far more threatening than could any single judgment militating against some local ordinance of police. The interest assailed is one that is essential not only to the welfare of the state, but to the peace of every household. And the aggressor is not a foreign judge, saying, "One of your marriages I dissolve;" but a foreign sovereign, saying, "Your whole social system I revolutionize." So numerous are the divorces granted in some of the American States, so freely are these divorces dispensed, so convenient is it for dissatisfied parties to have recourse to them, that to allow them to their full limit is to grant to foreign sovereigns the control of our most vital social ordinance.[3]

And also from the fact that marriage is governed by distinctive national policy.

[1] Supra, §§ 127, 140, 165. Savigny (viii. p. 337), Schæffner (124), and Wächter (ii. p. 184), adopt this view. Savigny says that divorce is peculiar in this respect, from the reason that the laws relating to it are of a distinctively positive character, and each judge must follow the laws of his own land. To the same general effect are the remarks of Judge Sewell, in Barber *v.* Root, 10 Mass. 265, to be hereafter quoted. And so also Mr. Burge, 1 Col. & For. Laws, 618.

[2] Infra, § 656. See Fenton *v.* Livingstone, 3 Macq. H. L. Cases, 497.

[3] Suppose the question to be, for instance, as to accepting as internationally binding the divorce legislation of Connecticut or Indiana. It will be worth while to remember, in such an issue, that in Connecticut, according to President Woolsey, the rate of divorce for a series of years has been to that of marriage as one to ten (Divorce, &c. pp. 222, 223); and that by the same able and careful writer an estimate is given (Ibid. p. 227), by which the annual divorces in Indiana are rated at two thousand; making a still greater proportion. "It is not a very pleasant thought," says Mr. Mansfield, of Ohio, as quoted by President Woolsey, "that when we look upon twenty-six couples of young married people, we know that



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§ 208. It is here that the first principles of sovereignty require that a firm position of independence should be taken. And this position is simply this: "To entitle you to grant a decree of divorce, you must have domiciliary jurisdiction over the parties, and the proceedings must be in accordance with the rules of international law. In other words, there must be an intelligent record; there must, when practicable, have been due notice to the defendant; there must have been a formal submission of testimony; and there must have been no collusion." How far these views have been adopted by the several powers of Christendom will now be seen.

Domiciliary jurisdiction and regular procedure essential.

2. *How Foreign Divorces are regarded on the Continent of Europe.*

No one who examines the opinions of continental jurists in this relation can do otherwise than unite with Savigny in remarking the extraordinary variations of reasoning which these opinions unfold. At the same time, from among these variations, we may be able to extract the following fixed practical results.

§ 209. The court of actual domicil alone has jurisdiction to pronounce a valid divorce; and a voluntary submission by the parties to any other tribunal is inoperative. This opinion is maintained by Bar,[1] and by Savigny,[2] and is no doubt that of present German jurists generally. It is sustained by several decisions of French courts.[3] Hence a divorce pronounced in a state in which the

Domicil alone or *bonâ fide* nationality essential to jurisdiction.

one of those couples must be divorced." According to a writer on the condition of Germany, in the London Quarterly Review, for October, 1880, there are some German states in which the proportion of marriages divorced to those undivorced, is one to ten, and in which by a tacit understanding marriages are determinable at will.

[1] § 92.

[2] VIII. p. 337.

[3] Gand, Code des Étrangeres ou état civil et politique des étrangeres en France, No. 390; Judgment of the C. de Cass. 14 Avril, 1818 (Sirey, 19, i. p. 193); 27 Novb. 1822 (Sirey, 24, i. pp. 48–52); C. Royale de Paris, 26 Avril, 1823 (Sirey, 24, ii. p. 65); C. Royale de Metz, 25 Août, 1825 (Sirey, 27, ii. p. 192). By the Bavarian Code (L. R. § 234), matrimonial questions between foreigners cannot be heard before the Bavarian courts, unless they have taken up their domicil, with the permission of the government, in Bavaria. Even when the wife has her domicil in Bavaria, this does not vest jurisdiction in the Bavarian courts, unless the husband consents, with the permission of his home government, to submit to such jurisdiction.



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parties are not domiciled is regarded by other states as invalid.[1] To this effect is a judgment of the Paris Court of Appeals, in February, 1808,[2] and of the Court of Cassation, of November, 1822.[3] It is true that by Italian and Belgian jurists it is agreed that nationality is the criterion. But (apart from the objections to nationality already given) we must hold that unless nationality amounts to domicil in the forum, it does not give a party applying for a divorce such a *status* as invests that forum with international jurisdiction.[4]

[1] Schæffner, p. 160; Bar, § 92.

[2] Sirey, 8, ii. p. 86.

[3] Sirey, 24, i. p. 48.

[4] Esperson, a distinguished Italian professor and jurist, takes the ground that in Italy, as marriages are indissoluble, the divorce of Italians, married at home, when domiciled in a foreign land, will not be regarded as valid. On the other hand, divorces of persons of foreign nationality by their national courts will be regarded as valid in Italy. Undoubtedly, he says, divorce belongs to the domain of "good morals" and "public order." But internationally it cannot be held that divorce, as an institution, contravenes "public order" and "good morals," since it is permitted by some of the most civilized nations, and since "the countries in which divorce is permitted (England, Holland, some of the German states, Switzerland, the United States) are, in respect to morality, superior to almost all the Latin races where marriage is indissoluble." In this respect, as well as in all others, "public order" and "good morals," he argues, are to be determined from the national stand-point. Jour. du droit int. privé, 1880, p. 345.

*Distinctive French Law.* — Notwithstanding divorces are prohibited in France, the French courts hold that after a divorce of persons of foreign nationality in courts having jurisdiction, such parties will be regarded in France as regularly divorced. This was ruled by the Cour de Cassation in Bulkey's case, Dalloz, 1860, p. 57. To same effect see Fiore, § 133; Fœlix et Demangeat, i. p. 68; Brocher, Droit int. privé, p. 351. See supra, § 132.

Fiore follows the preponderating opinion of French jurists to the effect that parties legally divorced in their own country will be held free to marry in countries where divorce is prohibited. An officer of the Italian civil service, he argues, cannot refuse to assist at the marriage of parties validly divorced in their own land. Fiore, Op. cit. § 134. But see Jour. du droit int. privé, 1877, p. 39.

In Stramal *v.* Mairesse, it was held by the Tribunal civ. de la Seine, in 1876, that a foreign court is incompetent to annul a marriage contracted by a Frenchman in the land of the divorce, according to the law of that land. Jour. du droit int. privé, 1877, p. 147. The ground of this ruling, however, is justly criticised by the editor of the Journal. The reason given by the court is that a Frenchman's *status* is to be regulated wherever he is by French law. But, as the editor remarks, if the French law recognizes marriages as valid when valid according to the laws of the state of celebration, it follows that it should recognize as valid dissolutions of the tie when decreed by the same state. This,



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§ 210. Cruelty, or other misconduct, gives jurisdiction, for police purposes, to the courts of the place where such misconduct takes place, and where the offender may be cited, though he be not there domiciled; but without such domicil the court, while it will interpose for the

Place of misconduct does not give jurisdiction.

however, is inconsistent with the view maintained in the text. According to that view, a divorce, to be valid, must be decreed by a court of a state in which at least one of the parties is domiciled. If this be correct, it makes no matter where the marriage was celebrated.

The fact that the husband is a citizen of a state (France) where divorce is not permitted does not preclude the wife from obtaining a divorce from the *judex domicilii*. Gaston *v.* Gaston, Cour d'appel des Deux-Points, 1870; Jour. du droit int. privé, 1875, p. 120.

The effect of naturalization establishing a domicil for divorce purposes is considered in the Jour. du droit int. privé, for 1877, p. 114.

An article on the effect of foreign divorces will be found in the Jour. du droit int. privé, 1877, p. 14. The writer, M. Labbé, contends that a foreign divorce cannot dissolve a marriage contracted by French subjects in France as long as the defendant maintains his French nationality. "He cannot," so it is argued, "be deprived of the advantages given him by French law, French civilization, French morality." The same view is taken by Merlin, Questions, Divorce, § xi.

M. Labbé adopts as correct § 214 of the first edition of this work.

It has been held in France that a French subject cannot, by naturalization in a foreign land, obtain such a *status* in such land as will sustain, in France, a divorce from a French citizen, in cases in which the naturalization was undertaken in fraud of French law. Vidal's case, Cour de Paris, 1877; Jour. du droit int. privé, 1878, p. 268. And it was held in 1878, by the Trib. civ. de la Seine, that this second marriage would be dissolved on the application of the public minister — le ministere public. Jour. du droit int. privé, 1878, p. 603. See Bibesco case, infra.

In Plaquet *v.* The Mayor of Lille, Court of Amiens, Ap. 1880, it was held that a foreigner legally divorced in his own country could afterwards marry in France a French woman, although the first marriage was contracted in France with a French woman living in the same city with the second wife. Jour. du droit int. privé, 1880, p. 298.

The French courts have jurisdiction to decree the nullity of a marriage contracted in a foreign land between a man who is a foreigner and a woman who is a French minor. Jour. du droit int. privé for 1880, p. 300.

Whether the French courts have jurisdiction to decree a "séparation de corps" between foreigners not domiciled but resident in France has been much doubted. But in cases where no objection is taken to the competency of the court, there is a growing tendency to maintain jurisdiction in such cases. Jour. du droit int. privé, 1876, p. 222; 1877, p. 145; Fœlix et Demangeat, i. No. 158; Aubry et Rau, vi. § 748. This jurisdiction is maintained in Switzerland. Jour. du droit int. privé, 1876, p. 227. But see Jour. du droit int. privé, 1876, p. 362.



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protection of the injured party, and for a provisional separation, can grant no permanent dissolution of the marriage tie.[1]

In any view the French courts will, in cases where such a course is required as a matter of family peace and comfort, give provisional alimony to the wife on due cause shown, and take measures for her protection and that of her children. Jour. du droit int. privé, 1878, p. 45. See same Journal, 1876, p. 362.

And the French courts have jurisdiction, on application of a woman of foreign nationality, who was married in France, to decree a *séparation de biens* from her husband. Jour. du droit int. privé, 1874, p. 127.

The following interesting Swiss case is given in the Jour. du droit int. privé for 1879, p. 526:—

J., born at Bordeaux, his father being Genevese, was married to a French woman in France. On July 14, 1869, a decree pronounced a "séparation de corps" between himself and his wife. Wishing to obtain a divorce, he cited his wife to appear before the Geneva court, Geneva being his domicil of origin, in conformity with the Swiss law. His wife pleaded in bar of jurisdiction that her husband was French; that he had filled in France a municipal office; that he had served in the French national guard; that he had exercised in France his electoral rights; and that in consequence he could not fall back on his paternal domicil, but must be held to have adopted that of France. The court, however, overruled the plea on the ground that the quality of Genevese nationality, having been fixed on J. by virtue of his parentage, was by the Genevese constitution indelible; that he could not therefore lose it by acquiring a distinct nationality; and that consequently the Genevese court had jurisdiction to grant the divorce on his petition. This decision is elaborately discussed in the Jour. du droit int. privé for 1879, p. 528, and it is there correctly argued that if J., on arriving at his majority, had elected to surrender his Genevese paternal nationality and accept that of France, he would have been subject to the French and not to the Genevese law of divorce.

The de Bauffremont (Bibesco) case was discussed by me at large in 19 Alb. L. J. pp. 250 *et seq.*, pp. 269 *et seq.*

The question at issue was whether a domiciled French woman (of Belgian birth), who has been in France *séparée de corps* from her husband, (1.) could become naturalized in a foreign state without her husband's consent; and (2.) if so naturalized, was so far subject to the jurisprudence of that state as to become absolutely divorced a *vinculo matrimonii* from her husband, such state treating all *séparations de corps* as divorces *a vinculo matrimonii*. In Paris, where the case was first litigated, the last point was decided in the negative, and the second marriage of the Princess de Bauffremont (solemnized after her alleged first divorce) was declared invalid. In Belgium a contrary conclusion was subsequently reached. Numerous pamphlets were published on the subject, and opinions of eminent jurists were given for and against the validity of the marriage, in the Revue Pratique de droit

[1] Bar, § 92. This question is discussed more fully infra, § 232.



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Nor does the place of the celebration of the marriage.

§ 211. The place where a marriage is celebrated has not, from the fact of such celebration, jurisdiction over procedure for its dissolution. The right to a divorce is not a part of the contract of marriage. That contract is indissoluble, and contemplates perpetuity. Divorce is a penalty, imposed by the court of domicil.[1] Marriage is founded on the *Jus publicum*, and the parties are therefore unconditionally subjected to the *Jus publicum* of the place where they are domiciled.[2]

Wife may retain matrimonial

§ 212. As an ordinary rule, the wife's domicil is that of her husband.[3] Should the husband, however, after the cause for divorce has been given, abandon this domicil,

François, 1876, in the Jour. du droit int. privé, 1876–7, and in the Revue de droit int. for 1876. These publications are reviewed by me in 19 Alb. L. J. 2 0.

The decision of the French Court of Cassation, invalidating the second marriage of the Princess de Bauffremont to Prince Bibesco, will be found in the Jour. du droit int. privé for 1878, p. 505.

The French law, we may hold, in summing up this discussion, agrees with our own in the following positions: —

(1.) Subjects of a state, which prohibits them from marrying, cannot evade this prohibition by taking up, *in fraudem legis*, their residence in a foreign state, where such marriage is lawful. Should they return to their native land, after such illusory residence, their marriage will be declared void by home tribunals.

(2.) But where both parties acquire a *bonâ fide* domicil in a foreign state, abandoning in reality the expectation of returning to their native land, then their divorce by the sovereign of their domicil will be considered as valid everywhere. In France, indeed, this conclusion is embarrassed by the statute providing that French nationality shall be considered as continuing until nationality is acquired in a foreign state, and that while nationality lasts, obedience to the law is required, even by subjects residing abroad. So it would seem that in France a foreign divorce of a native Frenchman will not be respected unless he be naturalized as well as domiciled in the state granting the divorce.

(3.) The French law, however, differs from that obtaining in most American states in this: with us, by the prevalent opinion, the wife can obtain, for divorce purposes, a domicil other than that of her husband; and this without his consent. In France it is doubtful whether a French woman, even though *séparée de corps*, can obtain such independent domicil. And aside from this question of domicil, it is held in France that if either party remains on French soil, as a French subject, such party cannot be affected by a divorce abroad obtained by the other party, though such other party was naturalized and domiciled in the state granting the divorce.

As to whether the wife can acquire a separate domicil, see infra, § 212.

[1] Pütter, Rechtsfälle, iii. Th. i. p. 80.

[2] Bar, § 92.

[3] Supra, §§ 43–46. See this dis-



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the wife may nevertheless proceed in the courts of such domicil, provided she has not followed him, *animo manendi*, to his new domicil. Were not this right given to the wife, the husband who absconds to a remote, or unknown land, might, by thus aggravating his desertion, destroy the wife's remedy.[1]

domicil for divorce purposes.

§ 213. The same general principles apply to processes to declare marriages null.[2] There must be domiciliary jurisdiction, and the proceedings must be regular.

Nullity procedure governed by same rules.

§ 214. On the question of the competency of divorced persons to marry again, the French courts have frequently determined that this is a personal question, to be adjudicated, not by the law of the place of the divorce, but by that of actual domicil.[3] And as to this a subordinate point has arisen: Is it enough if A., the divorced person, is en-

Right to remarry determined by law of domicil.

cussed fully in the de Bauffremont case, reported supra, § 209 note.

[1] Infra, § 224; Bar, § 92. See Fœlix, i. p. 337. The question how far the French courts regard naturalization by a woman judicially separated *de corps* from her husband as a basis of divorce is discussed supra, §§ 205, 209.

The rule that the wife, for divorce purposes, can acquire a domicil independent of her husband, is approved by Prof. Bar, in a review of the first edition of this work published in 1873.

For divorce purposes, the wife, in Italy, can obtain a separate domicil from her husband. Decision of Venetian Court of Appeals, 1876, cited in Jour. du droit int. privé, 1879, p. 299. In a note to this case, the editor dissents from the position that when the husband's domicil is known, the wife can obtain an independent domicil. To this, however, it is added: —

"Si le domicile du mari hors de l'Italie eût été connu, c'est assurément à ce domicile que la demande aurait dû être portée; mais en fait son domicile et même sa résidence étaient inconnus. Dès lors le tribunal de la résidence de la femme, bien que cette femme fût étrangère et fût légalement domiciliée dans le domicile inconnu de son mari, devait être tenu pour compétent. Décider autrement, c'est blesser la conscience autant que la raison et le droit, car c'est décider qu'une femme, abandonnée par un mari qui dispartait de telle façon qu'il est impossible de savoir où il se trouve, ne peut ni rompre les liens dans lesquels elle est engagée, si elle appartient à un pays où le divorce est admis, ni même parvenir à faire relâcher ces liens par la séparation de corps légale, et cela, quelque juste et évidente que soit sa demande, et uniquement parce qu'il n'y aurait pas, dans tout le monde, de juges compétents pour en connaitre." For a fuller discussion of this point, see the de Bauffremont case, note to § 209.

[2] See Demangeat, note to Fœlix, i. p. 337.

[3] Fœlix, i. p. 66.



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titled by the law of his domicil to marry; or is it also necessary for B., who is to marry A., to be entitled to do so by the law of B.'s domicil? In other words, must the laws of both domicils permit such marriage, to make it valid; or is it enough that the law of the domicil of the divorced person should do so? The Cour Royale of Paris held, in 1824, that the laws of both domicils should sustain the right;[1] the Cour Royale of Nancy, in 1826, held that it was sufficient if the marriage was permitted by the laws of the domicil of the divorced person alone.[2] There has been a similar conflict among French jurists. Merlin earnestly argues that an English woman, divorced in her own country, can lawfully marry in France a Frenchman, during the lifetime of her former husband.[3] On the other hand, Demangeat declares the law to be clear that a foreigner, divorced in his own country, cannot marry in France, during the lifetime of his wife.[4] So far as concerns French divorces, these being prohibited by the law of May 8, 1816, all marriages by divorced Frenchmen in France are invalid by the French law. According to Merlin, French subjects who become naturalized in a foreign country may be legally divorced in such country; but to effect this, both parties must become so naturalized, — if one remains in France the divorce is illegal.[5]

In Germany, it is held by Bar to be enough if the divorced party is entitled to such remarriage by the law of the court of divorce. And the reason given is, that in recognizing the competency of a foreign court to divorce, we recognize the practical consequences of such divorce, if they be such, in the right to contract new marriages. But, at the same time, if such right is not recognized in the place of divorce, but is recognized in a subsequent domicil of the divorced party, the latter law entitles him to marry.[6]

The English and American law on this topic has been already noticed.[7]

[1] Sirey, 25, ii. p. 203; Merlin, Quest. de Droit, xiii. See supra, § 135; and as to distinctive French law, supra, § 209, note.

[2] Bar, § 92; Fœlix, i. p. 66.

[3] Merlin, Qu. de Droit, xiii.

[4] Revue Pratique de Dr. Tr. t. i. p. 57.

[5] Ques. de Droit, Divorce, xi.

[6] Bar, § 92.

[7] Supra, §§ 132, 135, 154.



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### 3. *How Foreign Divorces are regarded in Scotland.*

§ 215. The Scotch law contains a provision to the effect that a foreigner may be cited as defendant in a divorce suit as soon as he personally appears in the kingdom; and after a forty days' residence, a citation may be legally served on his dwelling place.[1] The Scotch courts go so far as to hold that divorce being a matter of *status*, it is to be decided irrespective of the *lex loci contractus*, or domicil, or allegiance, simply on grounds of public welfare and order. Hence, Scotch divorces have been decreed in cases where the parties, who were foreigners, entered Scotland for the purpose of defeating in this respect the laws of their own domicil.[2] And hence, foreign divorces granted under similar circumstances are recognized as valid in Scotland.[3] But this laxity of the Scotch law is not only deserving of severe reprehension on ground of principle, but has led to great practical confusion and disaster. Scotch divorces may be binding in Scotland, and yet without force in the remaining portions of Christendom; and Scotland is resorted to, as are some of our own states, to obtain dissolutions of the marriage tie which are often double frauds. They are frauds on the party innocently divorced, who is at least plunged into distress, and is compelled to resort, for vindication, to litigation, whose consequences, if not precarious, are at least one-sided. And they are

Jurisdiction based on local policy.

[1] Utterton *v.* Tewsch, Fergus. Cons. R. 23; Geils *v.* Geils, 1 Macq. 275; Phil. iv. 325.

[2] See Phil. iv. 334; Bishop Mar. & Div. ii. § 150; Warrender *v.* Warrender, 2 Cl. & Fin. 561; Conway *v.* Beasley, 3 Hagg. 646.

[3] Phil. iv. 335.

"The Scotch courts, adopting in the main the 'penal' theory of divorce (see pp. 350, 351, ante Utterton *v.* Tewsch, Ferg. Div. Cases 23), have never admitted that the fact of a marriage being celebrated in England, or of its being in strictness an English marriage, deprives them of jurisdiction to grant a divorce. 2 Fraser, Treatise on Husband & Wife (2d ed.), pp. 1286–1294; Warrender *v.* Warrender, 2 Cl. & F. 488. They have further maintained that jurisdiction is given by (I.) the commission in Scotland of a divorce offence (*locus delicti*) and the personal citation of the defendant (2 Fraser, 2d ed. 1288, 1289); or, (II.) the residence of the parties (*i. e.* in effect of the husband) in Scotland for a period of forty days (see Ringer *v.* Churchhill, 2 D. 307; Jack *v.* Jack, 24 D. 467); or, (III.) the *bonâ fide* domicil of the parties in Scotland. The English courts have never conceded the validity of the claims put forward by Scotch tribunals." Dicey, *ut supra*, 354.



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frauds on parties subsequently marrying in reliance on the divorce record.

### 4. *How Foreign Divorces are regarded in England.*

§ 216. Until 1858, when the act establishing the divorce court was passed, no judicial divorces were granted in England,[1] though proceedings before ecclesiastical courts to annul marriages were frequent.

Until 1858 no judicial divorces.

§ 217. Before the Act of 1858, the courts were inclined to apply to foreign divorces the principle of marriage indissolubility, which was then a recognized doctrine of English jurisprudence; and hence, to sustain this principle, reasons were from time to time thrown out which, since 1858, it will be difficult to maintain.[2] At one time it was said that a marriage solemnized in England could be dissolved in no other land;[3] at another, that divorces being *contra bonos mores* could under no circumstances be recognized in England, — an idea now exploded by the statute of 1858.[4] For these and other reasons, it was held that when a husband went to Scotland, was divorced, and married again, he was

At one time held that no foreign state could dissolve an English marriage.

[1] Mr. Bishop states, it is true, that "anciently in England judicial divorces for adultery were probably from the bond of matrimony." He goes on to say, that "in 1601 a contrary rule was in the Court of Star Chamber established, by Whitgift, Archbishop of Canterbury, assisted by other eminent divines and civilians;" and he cites to this effect Foljambe's case (3 Salk. 137), where he says that the decision is through mistake attributed to Archbishop Bancroft. President Woolsey, on the other hand (p. 290), argues that Salkeld not only errs as to the judge presiding, but as to the point decided. In the report by Moore, it appears that the divorce in Foljambe's case was only a *mensa et thoro*, and not *a vinculo matrimonii*, and that his subsequent marriage was void. It was as to this point "that John Whitgift, then Archbishop of Canterbury" (not Bancroft, as Salkeld states), "said that he had called to himself at Lambeth the most sage divines and civilians, and that they had all agreed thereon." An examination of the record in the Chapter House shows the correctness of Moore's report. See Woolsey, p. 291. Of course there were in those days numerous decrees that marriages, for causes specified in the canon law, should be annulled. But there is not a single case reported (if we except Foljambe's) of a judicial divorce (distinguishing divorce from decrees of nullity) prior to the Divorce Act of 1858.

[2] See supra, § 204.

[3] Macarthey *v.* Decaix, 2 Rus. & M. 614.

[4] Phil. iv. 350.



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guilty of bigamy, irrespective of the question of domicil;[1] and that where the husband, a Dane by birth and domicil, married in England an English wife, and the parties then became domiciled in Denmark, where they were divorced, the divorce was invalid.[2]

In 1860, the Court of Probate (Cresswell, J., Channell, B., and Keating, J.,) carried the doctrine that the *lex loci contractus* determines the quality of a marriage to its furthest extreme.[3] In that case it appeared that C. and D., being native and domiciled subjects of France, came to London in June, 1854, and were married by license, according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect to the marriage of its own subjects in foreign countries, which formalities it was their object to avoid. C. and D. returned to France, and the husband having refused to celebrate the marriage according to the French law, and the marriage not having been consummated, the wife instituted a suit for nullity in the French courts, which the husband did not defend, and in December, 1854, the wife obtained a decree of nullity. The wife afterwards became a resident of England, and petitioned for a decree of nullity in the Court of Probate; and personal service of the citation was made at Naples on the husband, who, however, did not appear. It was held that the fact of the marriage having been celebrated in England gave the court jurisdiction, and that, as the marriage was contracted in England, it could not be dissolved by a French divorce.

In a subsequent case, in the same court, the evidence showed that A., an English woman, and B., a Belgian, were married in Scotland, and subsequently in Belgium, according to the usage of the latter country. After cohabitation in Belgium, a competent Belgian tribunal, on the ground of mutual consent, dissolved the Belgian marriage, not touching the Scotch. The Court of Probate and Divorce, in 1868, held the divorce, so far as concerned the Scotch marriage, was a nullity.[4]

[1] R. *v.* Lolley, 1 R. & R. C. C. 237.

[2] Macarthey *v.* Decaix, 2 Rus. & M. 614. See, also, Warrender *v.* Warrender, 2 Cl. & F. 488; 2 S. & McL. 154; Fraser's Contl. of Laws in Div. Edin. 1860; Fraser's Husb. & Wife, 2d ed. 1277 *et seq.*

[3] Laneuville *v.* Anderson, 2 Sw. & Tr. 24.

[4] Birt *v.* Boutinez, L. R. 1 P. & M. 487. See 11 Cent. L. J. 201.



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§ 218. But in 1868 this extreme theory was repudiated in the House of Lords on the following facts. After an English marriage by two persons domiciled in England, who, however, never lived together, the marriage never having been consummated, the husband committed adultery; and, some years afterwards, he, living in adultery, consented to go to Scotland to found jurisdiction against himself. He never, however, obtained a domicil there, though his residence was sufficient, according to the Scotch law, to give the Scotch courts jurisdiction. A divorce was duly had in Scotland, on proof of his adultery, and the wife married again. It was held by the whole court, Lords Cranworth, Chelmsford, Westbury, and Colonsay, that the Scotch divorce did not operate to dissolve the English marriage, and that therefore the children of the wife's second marriage were not legitimate in England. But the judges were very positive in distinguishing the case before them from what it would have been if the husband had been domiciled, on the principles of international law, in Scotland. Lord Cranworth, in speaking of Doe *v.* Vardill, said "that the opinion 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, the law of the domicil would decide the question of *status*." Lord Chelmsford throughout his opinion implied that a *bonâ fide* domicil would have given jurisdiction to the Scotch courts. Lord Westbury rested his argument on the position that the husband's Scotch residence was illusory. "If the court of a foreign country," he said with much force, "permits the subjects of a bordering nation to resort to it for the purpose only of getting rid of the personal *status* and obligations of husband and wife, which release they cannot obtain in the courts of their own country, it is plain that such foreign country is, in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another country who still retain, and, as soon as the purpose is answered, intend to return to their native country and resume their original position." "But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the Vice-Chancellor in his judgment, namely, that where, by the *lex loci*

This view no longer held.



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*contractus*, the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence: that is to say, with those rules which, for the sake of general convenience, and by tacit consent, are received by Christian nations and observed in their tribunals. *One of these rules certainly is that questions of personal status depend on the law of the actual domicil.*" He then proceeded to show, from an examination of the previous cases, that the sole test is that of the law of domicil, and that to adopt, as ruling such matters, the *lex loci contractus*, is absurd. And Lord Colonsay went even further: "What is meant by domicil? I observe that it is designated sometimes as a *bonâ fide* domicil, sometimes as a *complete* domicil, sometimes as a domicil *for all purposes*. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress matrimonial wrongs, including the granting of a divorce *à vinculo*, depends upon their being a *domicil* such as seems to be implied in some of these expressions." "If you put the case of parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicil for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the court of Scotland, where the witnesses reside, and where his own duties detain him, and he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognized in most other countries, I am slow to think that it would be ignored in England because it had not been pronounced by the court of divorce here."[1]

[1] Shaw *v.* Gould, 3 H. of Lords, 56. See, to the same effect, Robins *v.* Dolphin, 1 Swaby & Tr. 37; aff. in H. of Lords, 7 H. of L. Cases, 390. In Robins *v.* Dolphin, A., a domiciled English man, married B., an English woman, in England. They subsequently separated by consent, and A. went to Scotland, where he remained six months, though without giving proof of an intention to make his domicil in that country. While there, he was cited by his wife before the Lords of Sessions for adultery, and a decree was passed dissolving the marriage. It was held by Sir C. Creswell that the Scotch divorce did not dissolve the English marriage. See, also, Tollemache *v.* Tollemache, 1 Swaby & Trist. 586.



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§ 219. Whatever may be said as to other points, it is clear that the English courts will not recognize as valid the dissolution of an English marriage by a foreign court

Petitioner's mere residence

"In none of these cases (Lolley's case, Dolphin *v.* Robins, Shaw *v.* Atty. Gen.), however, has it been decided that an English marriage cannot be dissolved by a foreign tribunal, where the parties are, at the time of the divorce, *bonâ fide* domiciled in a foreign state. Macarthey *v.* Decaix (2 R. & M. 614) was certainly a decision to this effect, but considerable doubt has been thrown upon the principle by more recent *dicta*, and neither in the argument nor in the judgment does any attention seem to have been paid to the fact that the domicil of the husband in that case (where a Danish divorce was held incompetent to affect an English marriage) was Danish throughout." Foote's Priv. Int. Jur. (1878) 60.

Collis *v.* Hector, L. R. 19 Eq. 334, did not touch the question of the effect of a foreign divorce in dissolving the tie of a marriage contracted in England. It simply held that a marriage settlement made in England, the place of marriage, between an English woman and a domiciled Turk, was not affected by a Turkish divorce.

In Harvey *v.* Farnie, L. R. 5 P. D. 153; 42 L. T. R. 482 (1880), cited infra, § 221, Sir J. Hannen said:—

"Then comes the question whether we are bound to recognize this decree of the Scotch court dissolving this marriage, which was celebrated in England. But it follows from what I have said that we really have nothing to do with the respondent and his wife from the time they left this country. Their connection with this country was entirely at an end, and while they remained in the country of the respondent's domicil, they were only subject to the law of that country. That being so, the sentence of the court of domicil, the only jurisdiction to which they could be subject, and the only jurisdiction before which the question of dissolving the marriage could be brought, is a binding decree. It is like a judgment *in rem*, and not merely a decision *inter partes*. It altered the *status* of the respondent to that of an unmarried man, and that *status* he carries with him into whatever country he goes. It is clear that these are the general principles that govern this case, and that I must follow them unless there be some decision of the municipal law of England which may compel me to decide the case upon some special ground applicable to England alone. That there is nothing in statutory law on the subject is clear, and the only case which has been referred to as having this effect is Lolley's case. [Having pointed out that the judgment in Lolley's case, which was carefully worded, had relation to the marriage of two English people who had not changed their domicil at the time when the Scotch court was invited to dissolve the marriage, and referred to the cases cited in argument, dwelling especially on the case of Maghee *v.* McAllister, in which it was held by the Irish Court of Chancery that a marriage celebrated in England between a native and a domiciled Scotchman and an Irish woman might be dissolved by a decree for a divorce pronounced by the Court of Sessions in Scotland, the learned president concluded]: For these reasons I am of opinion that Lolley's case is only applicable to cases where the circumstances are



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when that court's jurisdiction rests on the mere residence, without domicil, of the petitioner.[1]

in divorcing state not enough.

similar to those in that case, namely, where the parties were domiciled in England; and that it does not apply to a case where the parties are domiciled Scotch, or where the husband is a domiciled Scotchman, and when he returns to the place of his domicil his marriage is dissolved there. In my judgment that is a good divorce everywhere."

[1] That residence cannot be an international basis of jurisdiction, see infra, § 223.

In July, 1870, the question of the validity of an American divorce, based on residence, when the parties had been married in England, came up before Lord Penzance. The petitioner, Mrs. Betty Shaw, prayed for a decree, under the legitimacy declaration act, that her marriage with William Shaw, celebrated on the 22d of September, 1859, at Rock Island, in the State of Illinois, should be declared valid. It appeared that the petitioner was born in England; and on the 26th of August, 1851, was married to William Suthers, in England. They cohabited in England until 1853, when they went to America. They returned to England in 1855, and cohabited until March, 1856, when Suthers deserted his wife, and went back to America. In 1857, the petitioner followed him, but made no attempt to discover him. She remained for six months in Massachusetts, and then went to Iowa, where she lived upwards of two years, supporting herself as a seamstress. In 1859, while resident in Iowa, she presented a petition to the district court of Scott County, in that state, praying a divorce from Suthers, on the ground of his adultery, coupled with desertion. Suthers never resided in Iowa, and his whereabouts not being known, the citation was served on him by advertisement. No appearance was entered on his behalf. On the 12th of September, 1859, the District Court pronounced a decree dissolving the marriage, and on the 22d of the same month the petitioner was married to William Shaw, at Rock Island, in the State of Illinois. Mr. Shaw and the petitioner afterwards went to England, where Mr. Shaw died, leaving the petitioner a life interest in his property. Suthers, her first husband, never abandoned his English domicil, and was alive when his wife married Shaw. At the hearing, "Mr. De Tracey Gould, an American advocate, proved that, by the law of the State of Iowa, the residence of the petitioner for six months in the state was sufficient to found the jurisdiction of the District Court. The decree of divorce was valid, according to the law of the state, and would be recognized by the courts of all the States of America. He also proved that the marriage of the petitioner with William Shaw, in the State of Illinois, was valid according to the law of the state, and would be recognized in the other States of America." How far this statement was accurate will be hereafter discussed. Infra, §§ 231, 232. Lord Penzance, after recapitulating the facts, said: "The principles upon which this question must be decided have been so recently discussed in several cases of the court of ultimate appeal, that it is not necessary to enter upon the question at large on the present occasion. It may be sufficient to observe, firstly, that Lolley's case has never been overruled; secondly,



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§ 220. What has been said of the petitioner applies equally to the defendant. The fact that the defendant is a mere undomiciled resident in a foreign state does not, on the grounds just noticed, give that state the right

Nor is mere residence of defendant.

*that in no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by the tribunals of which the divorce was granted.* Whether, if so domiciled, the English courts would recognize and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognized as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my own 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 tribunal exercising jurisdiction over the new community, of which, by their change of domicil, they have become a party, rather than that they should be forced back for relief on the tribunal of the country which they have abandoned. But the inquiry is needless in this case, because it seems to me to be neither just nor expedient that a woman whose domicil is English, and whose husband's domicil is English, should, while living separate from him in a foreign state in which he has never, up to the time of the divorce, set his foot, be permitted to resort to the local tribunal, and without any notice to her husband, except an advertisement which he never saw, and was never likely to see, obtain a divorce from him behind his back." Shaw *v.* Atty. Gen. L. R. 2 P. & M. 161, 162; 39 L. J. Rep. (N. S.) 81.

It will be seen that Lord Penzance rests the case on Mrs. Shaw not being domiciled in Iowa at the time of the divorce. What he may be viewed, therefore, as deciding, is that a foreign divorce, granted in a state in which neither of the parties were domiciled, and in which the defendant was served only by publication, with no proof of notice, will not be regarded in England as valid.

The Royal Commissioners on the Laws of Marriage, in their Report of 1868, say (p. 26): "It is a settled point in the law of Scotland, that a sentence of dissolution of marriage (on proof of facts constituting sufficient ground for dissolution of marriage according to that law, which allows of more latitude in this respect than the law of England) may competently be pronounced by a Scottish court between persons having their legal and matrimonial domicil and ordinary residence in England or in any other country, who have only resided in Scotland for a very short time, who have resorted thither (perhaps by mutual arrangement) for the express purpose of obtaining such a sentence, and who have no intention of remaining there after their divorce has been obtained.

"The English courts, on the other hand (with which, as we apprehend, the Irish courts agree), refuse, under such circumstances, to acknowledge the validity of such a Scottish sentence; they treat a marriage subsequently contracted in England by either of the parties so divorced as



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to dissolve a marriage entered into in England.[1] And an English divorce, based on residence without domicil, would not be extra-territorially valid.[2]

bigamous, and the issue of such subsequent marriage as illegitimate.

"If, indeed, the suit was *bonâ fide*, and the legal domicil of the husband Scotch at the time of the divorce, although the marriage might have been originally English, the English courts, according to the more recent authorities, might regard the marriage as effectually dissolved by a Scotch sentence; but it may be considered still an unsettled point whether they would recognize a *bonâ fide* temporary residence of both parties in Scotland, unconnected with any purpose of obtaining a divorce (but without a legal domicil in that country), as sufficient to enable English persons, when divorced by a Scotch sentence, to marry again in each other's lifetime." Cited Guthrie's Savigny, p. 250. "It is the strong inclination of my own opinion, that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled." Lord Penzance, in Wilson *v.* Wilson, L. R. 2 P. & M. 441, cited infra, § 221. See, to same effect, Burton *v.* Burton, 21 W. R. 648; Manning *v.* Manning, L. R. 2 P. & M. 223; Niboyet *v.* Niboyet, L. R. 4 P. D. 1.

[1] See infra, § 223.

Mr. Westlake (1880, p. 75) states that "when the husband, being either petitioner or respondent, though not domiciled in England, is resident there, not on a visit or as a traveller, and not having taken up that residence for the purpose of obtaining or facilitating a divorce, the court has authority to grant a divorce, wherever the adultery was committed, or if the husband be respondent, wherever the adultery and cruelty or desertion were committed." To this he cites Brodie *v.* Brodie, 2 Sw. & T. 259; Niboyet *v.* Niboyet, L. R. 4 P. D. 1 (1878). But Lord Penzance, in Manning *v.* Manning, L. R. 2 P. & M. 223 (1871), takes strong ground in favor of making domicil the exclusive test, and this view is affirmed by Brett, L. J. in Niboyet *v.* Niboyet, L. R. 4 P. D. 1 (1878), and by Sir R. Phillimore, S. C., L. R. 3 P. D. 52. We have, in this last case (see next section), the authority of James and Cotton, L. JJ., for extending the jurisdiction to residence, as against Lord Penzance, Brett, L. J., and Sir R. Phillimore.

[2] Infra, § 223.

"I adopt the language of Lord Westbury, in the case of Udny *v.* Udny (Law Rep. 1 Sc. Ap. p. 458): '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 gen-



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§ 221. The test of jurisdiction adopted by the cases now (1880) authoritative is the husband's domicil. That domicil is in point of law the matrimonial domicil; it is that of wife as well as husband; and it is therefore that which is to determine their marriage *status*.[1]

Husband's domicil the test.

eral 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.'" Lord Penzance, in Wilson *v.* Wilson, infra.

[1] In Manning *v.* Manning (1871), L. R. 2 P. & M. 223, the husband, whose domicil of origin was Irish, having presented a petition for judicial separation, on the ground of desertion, the wife appeared under protest, and pleaded to the jurisdiction. The husband filed an affidavit to the effect that he was permanently settled in England, and had no intention of returning to Ireland, yet even this affidavit was held not to prove an English domicil. On the other hand, it was proved that he retained a house in Dublin, where he kept his clothes, and that his place of business in Bayswater, England, consisted of a single room. The court held that the petitioner was not domiciled in England; that there was nothing permanent in his arrangements to stay there; that his affidavit failed from its deficiency in particularity; and that generally, to give jurisdiction, domicil must be *bonâ fide*. Compare Burton *v.* Burton, 21 W. R. 648. Even when the marriage was in Scotland, and the parties were then domiciled in Scotland, where the wife continued to reside, a subsequently acquired domicil of the husband in England gives the English court jurisdiction of a divorce on the husband's suit. Wilson *v.* Wilson, L. R. 2 P. & M. 435.

Firebrace *v.* Firebrace (1878), 26 W. R. 617; L. R. 4 P. D. 63, was a suit for the restitution of conjugal rights, the suit being brought by the wife, who had been for some time resident in England, and whose domicil of origin was English. The court held that the defendant's domicil being proved to be in Australia, the petitioner could only have redress in that country, saying substantially, as quoted by Sir R. Phillimore, that "the domicil of the wife is that of her husband, and that her remedy for matrimonial wrongs must, *as a general rule*, be sought in the place of that domicil." To this, however, is added the significant qualification: "It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country where she is resident, though not domiciled;" but it is then said that restitution for conjugal rights does not form such an exception. Firebrace *v.* Firebrace, therefore, is not authority for the position that the wife cannot sue for divorce in any place but that of her husband's domicil.

In Niboyet *v.* Niboyet (1878), L. R. 3 P. D. 52, it was ruled by Sir R. Phillimore that even for divorce purposes the wife cannot, by mere residence, acquire a domicil which will sustain proceedings on her part when the husband is domiciled in another state. In this memorable case (Niboyet *v.* Niboyet, L. R. 3 P. D. 52), the petitioner, Caroline Prudence Niboyet, alleged that in 1856 she was married in Gibraltar, under English sovereignty, to Jean Niboyet, the defendant; that they lived together in various European countries; that her



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§ 222. There is, nevertheless, a tendency in England to admit a right of a deserted wife to sue in the old matrimonial domicil. Not only is this view the only rational

Tendency to allow wife inde-

domicil of origin was English; that from April, 1859, at which time he deserted her, she had resided in England; that his residence, for several years prior to the petition, had been in England; and that in England the acts of adultery complained of (the petition being based on adultery as well as desertion) had been committed. On the other hand, the defendant filed an affidavit to the effect that his permanent place of abode was Paris; and that though for two years he had resided in England, this was in a consular capacity, he representing the French government as acting French consul at Newcastle. It is clear, therefore, that his domicil was French, but it is equally clear that the wife's domicil, if our American rule be good, was English. Her domicil of origin was English; and in England she had resided, deserted by her husband, for nearly twenty years. But the court held that the petitioner had no such domicil as would give the court jurisdiction, and it was broadly announced, quoting from the as then unreported case of Firebrace *v.* Firebrace (cited above), that "the domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must usually be sought in the place of that domicil."

Sir R. Phillimore's decision having been appealed from, the case was heard at length before the Court of Appeal on July 16 and 19, 1878; and a ruling was made on November 18, 1878, reversing the ruling of the court below. Written judgments were given by James, Brett, and Cotton, L. JJ. Niboyet *v.* Niboyet, 39 L. T. (N. S.) 486; L. R. 4 P. D. 1. The majority of the court (James and Cotton, L. JJ.) placed the reversal on grounds so extraordinary that a brief review of their reasoning is indispensable. In the opinion of James, L. J., we find jurisdiction claimed over all cases where there is matrimonial residence: —

"If I were asked to define, and it were necessary to define, what in the particular case of matrimonial infidelity constituted a matter matrimonial in England at the time when the act was passed, I should define it to be a case of infidelity where the matrimonial home was in England, — namely, the matrimonial home in which the offended husband ought to be no longer bound to entertain the unchaste wife, or in which the chaste and offended wife ought to be no longer bound to share the bed and board of the polluted husband, — the matrimonial home, the purity of which was under the watch and ward of the church there. I will give two illustrations of my meaning. It appears to me impossible to suppose that an English court would lose its jurisdiction or not have jurisdiction because the guilty party consorted with his or her paramour outside the territorial limits of the diocese or on a journey. And, on the other hand, I do not think that an English court ought to have exercised, or would have exercised, jurisdiction in the case of a French matrimonial home, by reason of an act of infidelity done through a visit or transit to or through the English diocese. The proper court in that case would have been a French court."

The American rule, that domicil of the petitioning party gives jurisdiction, is thus repudiated: —



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pendent domicil.

basis on which recent cases can be harmonized, but it is the only theory consistent with the rule deter-

"I am unable more especially to imply any limitation of the authority of the court by reference to the principles of law which were at the passing of the act in the course of development in the American courts, where it is now settled that the jurisdiction is to be determined by the domicil of the complaining party at the time of the complaint brought. *No such principle had then been established or recognized in any court of this kingdom;* and on the contrary, in one very important decision of the realm (Scotland), the Scotch courts had exercised jurisdiction in entire disregard of any such principle."

The inconvenience of the conclusion at which the court arrives is thus candidly admitted: —

"It is very inconvenient and very distressing that two persons should be husband and wife in one country, and not husband and wife in another; that their marriage should be a lawful marriage in one and bigamous in another; that they should be compelled by the laws of one Christian country to a cohabitation, which by the laws of another Christian country would be adulterous intercourse; *and if we could find in the general application of the law as laid down by the American authorities a satisfactory escape from that difficulty, we would be sorely tempted to strain the construction of the English statute to bring it into harmony with that law.* But I do not find any such satisfactory solution in that law."

The objections to the American rule are rested on the two following grounds: —

"In the first place, it appears to me to be a violation of every principle to make the dissolubility of a marriage depend upon the mere will and pleasure of the husband, *and domicil is entirely a matter of his will and pleasure.*"

But domicil is not "entirely a matter of will and pleasure" of any one. I may desire to change my present domicil, for instance, but if my object is simply to evade the duties it imposes on me, I cannot make the change until I make a *bonâ fide* settlement, with the intention of permanent residence, in the place to which I remove. And so far as concerns the marital domicil, the American rule to which Lord Justice James excepts, as making the husband's will supreme, so far from carrying with it this consequence, permits the wife, as he himself states in a prior part of the same opinion, to acquire for divorce purposes a separate domicil of her own.

Equally futile is the remaining objection: —

"Moreover, a dissolution of the marriage for adultery is only one of the modes by which the *status* or alleged *status* of husband and wife is judicially determined; a decree of nullity of a pretended marriage is quite as much a decree *in rem*, and has all the consequences. How could it be possible to make domicil the test of jurisdiction in such a case? Suppose the alleged wife were the complainant; her domicil would depend upon the very matter in controversy."

In other words, the argument would be a vicious circle; being tantamount to this: "The court has jurisdiction because the marriage is lawful, and the marriage is lawful because the court has jurisdiction." The assumption that the court has jurisdiction is based on the assumption that the marriage is lawful, which is the very question in dispute.



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mining the continuance of matrimonial domicil in other respects.[1]

Effective would this argument indeed be did the American rule, against which it is directed, make the marital domicil the basis of jurisdiction. But the American rule does no such thing; and Lord Justice James forgets, when he makes this objection, that only a few sentences back he stated the American rule to be that the "jurisdiction is to be determined by the domicil *of the complaining party* at the time of the complaint brought." "*Of the complaining party*" is the test; and when the wife is the complaining party, she may acquire an independent domicil. There is no *petitio principii* in this. The woman thus suing, says: "You have jurisdiction whether I am married or not. For I am here domiciled, and my domicil gives you jurisdiction over my suit." See review by me in 19 Alb. L. J. 147, 148, from which the above is reduced. Niboyet *v.* Niboyet is discussed in the London Law Magazine for May, 1878, pp. 326 *et seq.*

In Harvey *v.* Farnie (April, 1880), before the Divorce Division (Sir J. Hannen), 42 L. T. N. S. 482; L. R. 5 P. D. 153; supra, § 218, a domiciled Scotchman, after marrying an English woman in England, retained his Scotch domicil, and continued to reside in that country with his wife for about two years, when she obtained a divorce from him before the Scotch Court of Session, on the ground of his adultery only. Subsequently he came to reside in England, where he married for the second time. The second wife sought to have her marriage declared null and void, on the

[1] See supra, §§ 194, 221 *et seq.* According to a decision of the divorce court (Yelverton *v.* Yelverton, 1 Sw. & Tr. 591), the residence of the wife alone is insufficient to found jurisdiction in a suit against a husband who has not been and is not residing within the limits of the state to which the court belongs.

For a further discussion of this case in other relations, see supra, §§ 43, 73, 120, 183.

Sir R. Phillimore, in commenting afterwards on Yelverton *v.* Yelverton (Phil. iv. 326), while admitting that the husband's domicil is generally that of the wife, goes on to argue "that if the husband commits such an offence against the marriage state as renders her cohabitation morally and perhaps physically impossible, *he has destroyed the basis upon which the general doctrine rests, and has entitled, or rather compelled, her to establish, for the purposes of obtaining justice against him, at least, if not a separate domicil, in the full sense of the term, a separate forensic domicil;* otherwise the husband may easily take, what all sound jurisprudence abhors, advantage of his own wrong."

Under the law constituting the English court of divorce, Ireland and Scotland are foreign countries; and persons domiciled in such countries cannot apply to such court for relief. Yelverton *v.* Yelverton, *ut supra.*

That the personal capacity of a married woman is determined by the law of her domicil, see supra, § 118. That a married woman's domicil ordinarily changes with that of her husband, see supra, § 45. How far this is generally affected by legal separations, see supra, § 46; Infra, § 225.

In Deck *v.* Deck, 2 Sw. & Tr. 90, after an English marriage, the husband acquired an American domicil.



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### 5. *How Foreign Divorces are regarded in the United States.*

§ 223. That the sovereign of the place of domicil, and not

ground that the Scotch divorce was inoperative, at any rate in England, and that therefore the respondent had a wife living at the time of such marriage. It was held by Sir J. Hannen that the first marriage was properly dissolved by the Scotch divorce. See opinion cited supra, § 218.

In Briggs *v.* Briggs (May, 1880), L. R. 5 P. D. 163; 42 L. T. R. 662, after a marriage of two domiciled English subjects in England, the husband went to the United States, and took up his residence, without acquiring internationally a domicil, in Kansas. After a year's residence in Kansas he presented a petition to the courts of that state for and obtained a divorce on the ground of his wife's desertion. He then married again. The wife had received no notice of the petition. It was held by Sir J. Hannen, that his domicil at the time of the divorce was English, and consequently that the American divorce was invalid, and that he had committed bigamy. It was doubted whether the domicil of the wife follows the domicil of the husband so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicil. "This view of the facts," he said, "renders it unnecessary for me to determine whether I ought to act upon the doubt

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Notwithstanding this domicil it was held that the English divorce court had jurisdiction of a suit brought against him for divorce. On international principles this can only be sustained on the ground that the wife had acquired an independent domicil. The court, however, rested its jurisdiction on the peculiar phraseology of the statute (20 & 21 Vict. c. 85, s. 27), which, it was held, covered the case of all natural-born British subjects. In Caldwell *v.* Caldwell, 3 Sw. & Tr. 259, the husband's domicil was not in England, nor had the marriage been solemnized in England. This, however, seems to have been regarded as cured by the appearance and submission of the wife, who did not raise the question of jurisdiction.

That a wife, for divorce purposes, may acquire an independent domicil, see Santo Teodoro *v.* Santo Teodoro, L. R. 5 P. D. 79. To the same effect is the argument of Brett, L. J., in Niboyet *v.* Niboyet, L. R. 4 P. D. 19, as discussed supra, § 221.

Mr. Westlake (1880, p. 79) maintains that "not even where the husband had deserted the wife, or so conducted himself that she was justified in living apart from him, will a divorce obtained by her in a country which was not that of his actual domicil be treated as valid in England." The correctness of this inference from the later English rulings I doubt, holding, for reasons above given, that they may be best explained and harmonized by assuming that the wife may for divorce purposes acquire an independent domicil. Otherwise the aggravation of a crime would be its exoneration. The husband, by covering up the traces of his flight, could make it remediless. The very act which perfects the wife's desolateness would preclude her from redress. See infra, § 224.



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the sovereign of residence as distinguished from domicil, determines the marriage *status*, has been already abundantly shown.[1] To divorce this principle is peculiarly applicable. If a mere residence gave the sovereign of the residence jurisdiction to grant divorce, marriage would be a *status*, not for life, but at will; since all that would be necessary for a party desiring a divorce would be for him to visit a state where divorces are granted on *ex parte* statements of incompatibility, and there present his petition. So disastrous would be the consequences, that there is a concurrence of opinion among civilized states that residence by itself of the petitioner, or even of both parties, in a country, is not sufficient to give to the sovereign of that country divorce jurisdiction.[2] That nationality presents difficulties almost equally serious has been already seen;[3] and nationality cannot be the test in the United States, not only because here we have one nationality with forty jurisprudences,[4] but because we number among our population nearly five hundred thousand persons, domiciled among us, who owing to the probation of our naturalization statutes, are still national-

Domicil, not residence or nationality, the test of jurisdiction.

expressed by Lord Westbury in Pitt *v.* Pitt, 4 Macq. 256, 'whether the domicil of the husband is to be regarded in law as the domicil of the wife, either by construction or obstruction, so as to compel the wife to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicil' — a doubt, however, which Lord Kingsdown stated he did not share." The question, it should be remembered, arose in a petition from Mrs. Briggs for divorce on the ground of her husband's bigamy.

Mr. Dicey (Op. cit. 234) gives the following rule: "Subject to the exceptions hereinafter mentioned, the divorce court of a foreign country has jurisdiction to dissolve the marriage of any persons domiciled in such country at the commencement of proceedings for divorce, and a divorce by such a court of such parties is valid." The exceptions are: (1.) Cases in fraud of English law, where the domicil was illusory. Shaw *v.* Gould, L. R. 3 H. L. 55. (2.) Cases where the proceedings were contrary to natural justice. Ibid. p. 87. (3.) Cases where the cause was one for which a divorce could not be obtained in England; which last point, however, he queries, but cites Shaw *v.* Attorney General, L. R. 2 P. & M. 156.

That domicil is the test, is argued by Mr. Foote in the London Law Magazine for May, 1878, pp. 326 *et seq.*

[1] Supra, §§ 190, 209.

[2] See, for English law, supra, § 219. Scotland is the sole European exception. Supra, § 215.

[3] See supra, § 209.

[4] See §§ 7, 8, 34. That domicil, not allegiance, is the test, see Niboyet *v.* Niboyet, 4 P. D. 1.



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ized in Europe, whose marriages would, upon this hypothesis, be subject to the caprice of sovereignties essentially foreign, in some of which divorces are granted on mere *ex parte* petitions. The only remaining test is domicil, and it is a right test, since it assumes not merely residence, but an intention to remain permanently in the territory of the state asserting jurisdiction. When the record of a foreign divorce is presented to us, therefore, the first question is, was there a domicil of at least one of the parties in the divorcing state. Supposing the record merely avers "residence," the term "residence" being ambiguous, it is competent to show that there was no domicil. Supposing the record to aver "domicil," it is competent, as we will hereafter see, collaterally to dispute this averment.[1] Domicil being a prerequisite to jurisdiction, it is a *petitio principii* to prove domicil by averring domicil. It is no reply to this position that the state granting the divorce makes "residence" and not "domicil" the test. Independently of the position, already taken, that "residence," in statutes to this effect, is to be treated as convertible with "domicil,"[2] we must remember that no state can, so far as concerns others, change the standard of jurisdiction.[3] A state may say, "I will divorce persons on the mere residence of the petitioner;" but a decree of divorce, based solely on such residence, though binding in the state granting it, will not be regarded as binding by states making domicil the test. So far as this country is concerned, it is generally settled that residence without domicil will not entitle a party to sue for a divorce that will bind extra-territorially.[4] There must be a real domicil;

[1] See infra, § 230.

[2] Supra, § 21; infra, § 229.

[3] See supra, §§ 77 *a*, 215.

[4] Winship *v.* Winship, 1 Green (N. J.), 107; Brown *v.* Brown, 1 McCarter (N. J.), 78. See Cooley Const. Lim. 400; Bishop Mar. & Div. ii. § 121; Leith *v.* Leith, 39 N. H. 20; Ditson *v.* Ditson, 4 R. I. 87; Johnson *v.* Johnson, 4 Paige, 460; Greene *v.* Greene, 11 Pick. 410; Hanover *v.* Turner, 14 Mass. 227; Chase *v.* Chase, 6 Gray, 157; Shannon *v.* Shannon, 4 Allen, 134; Coddington *v.* Coddington, 20 N. J. Eq. 263; Smith *v.* Smith, 4 Greene (Iowa), 266; People *v.* Dawell, 25 Mich. 247; Thompson *v.* State, 28 Ala. 12. See cases cited infra, § 228.

"To each state belongs the exclusive right and power of determining upon the *status* of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce; and no other state, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects,



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that is to say, the domicil must be adopted as a permanency;[1] though the fact that the object was to acquire the benefit of a more favorable type of jurisprudence does not prevent a domicil from vesting.[2]

Wife may acquire independent domicil.

§ 224. Domicil being the test, the question next comes up, whose domicil? In England, as we have seen, the prevailing opinion has been, the husband's domicil.[3] But in the United States, from our peculiar position as a confederation of independent sovereignties, contiguous, but each with its distinctive municipal law of divorce, the difficulties of the rule soon became manifest. A man might give his wife cause for divorce and then defy her and defy the law, by putting it out of her power to avail herself of this cause. That which is an aggravation of the offence would become its shield. Deserting her, he might take up his home in a remote state, where she could only pursue him at great expense, encountering a jurisprudence selected by him as the most unfavorable to her claims. Or he might drive her, by his cruelty, to another state, compelling her, if she sue him, to sue as an alien, with the burdens attending one instituting proceedings in a foreign land. Or, what would be still more oppressive, he might steal a march on her and proceed to a jurisdiction with lax laws of divorce, and

when neither of them has become *bonâ fide* domiciled within its limits, and any judgment rendered by any such tribunal under any such circumstances is an absolute nullity. Ditson *v.* Ditson, 4 R. I. 87; Cooley on Const. Lim. 400, and notes cited; Kerr *v.* Kerr, 41 N. Y. 272; Hoffman *v.* Hoffman, 46 N. Y. 80; Hanover *v.* Turner, 14 Mass. 227." Cornell, J., State *v.* Armington, 25 Minn. 29.

[1] See infra, § 228.

[2] Supra, §§ 28, 56, 135.

As to the Massachusetts statute, see infra, § 229; Chase *v.* Chase, 6 Gray, 157; Smith *v.* Smith, 13 Gray, 209.

As holding that mere residence of the complainant is sufficient when it comes up to the statutory limit, see Babbitt *v.* Babbitt, 69 Ill. 277; Dutcher *v.* Dutcher, 39 Wis. 651. But such residence, without domicil, will not bind extra-territorially; and it has been expressly held in Iowa that residence in that state, for the mere purpose of bringing a divorce suit, does not give jurisdiction, though continued for the length of time required by statute. Whitcomb *v.* Whitcomb, 46 Iowa, 437.

That it is sufficient for one party to be domiciled in the jurisdiction will be seen from the cases in the next section. This is denied by Judge Redfield, who claims that the common domicil alone is sufficient. For a learned examination of the question see Am. Law Reg. Feb. 1877, p. 69.

[3] Supra, § 221.



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sue her in that jurisdiction, that being constructively her domicil, though within its bounds she had never set foot, and yet whose laws would be treated as binding her absolutely. So iniquitous is this, that in Massachusetts, in a celebrated case,[1] it was ruled that for divorce purposes a woman can adopt her permanent residence as her domicil, and in this sue, or, if sued, set up its laws as those to which she is subject. This case has been followed in most of the States of the American Union. In Pennsylvania, however, as will be soon more fully seen,[2] a distinct mode of removing the objections to the old rule has been taken, it being held in that state that the injured party must seek redress in the forum of the defendant, unless when the defendant had removed from the common domicil, in which case the suit may be brought in the domicil of the injured party at the time of injury. Passing, however, this last distinction, we may now hold as the prevailing American doctrine, that for the purposes of divorce either party may acquire an independent domicil. The husband is in any view entitled to do so at any time. The wife can do so, under the new rule, for the purpose of suing the defendant, as otherwise, in a process in which their advantages should be equal, great disadvantage would be heaped on her. It should be remembered that when the allegation of the alleged wife is that the marriage was null, she can sue irrespective of the defendant's domicil, since it would be a *petitio principii* to assume a marriage when the marriage is in dispute.[3]

[1] Harteau *v.* Harteau, 14 Pick. 181.

[2] See infra, § 239, note.

[3] See Doughty *v.* Doughty, 27 N. J. Eq. 315. Supra, § 221.

"The law," said Chief Justice Shaw (Harteau *v.* Harteau, *ut supra*), "will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of the 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." And by the Supreme Court of the United States it has been decided that a wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil, and in such a domicil, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicil nor the domicil of the parties at the time of the marriage or of the offence. Cheever *v.* Wilson, 9 Wal. 107. To



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§ 225. A separation judicially granted *a mensa et toro* by itself entitles a woman to establish an independent domicil.[1] It has been ruled differently, however, in France.[2]

And so may wife after judicial separation.

same effect are Harding *v.* Alden, 9 Greenl. 140; Frary *v.* Frary, 10 N. H. 61; Brett *v.* Brett, 5 Met. 233; Sawtell *v.* Sawtell, 17 Conn. 284; Jenness *v.* Jenness, 24 Ind. 355; Tolen *v.* Tolen, 2 Blackf. 407; Fishli *v.* Fishli, 2 Litt. 337; Moffatt *v.* Moffatt, 5 Cal. 280; Craven *v.* Craven, 27 Wis. 418; Schreck *v.* Schreck, 32 Tex. 579.

Since a wife may acquire an independent domicil for divorce cases, it follows that when a wife, after matrimonial difficulties, returns to her domicil of origin, she may sue for a divorce in the courts of such origin. Thus, domicil for the purpose of divorce, it was held in Massachusetts, in 1867, might be retained by the wife in that state, although she had left it with her husband some months before with the intention of permanently settling in Colorado; she having returned to Massachusetts, after the journey had commenced, in consequence of her husband's cruelty to her in Philadelphia. Shaw *v.* Shaw, 98 Mass. 158. So, where husband and wife were domiciled and married in New York, in 1856, and before 1861 moved to North Carolina, and the wife in 1864 returned to New York, where she was divorced, and then married a second time, it was held in North Carolina, in 1868, that the divorce and second marriage were valid. State *v.* Schlachter, Phillips N. Car. R. 520.

A divorce procedure instituted by the husband in the place of his domicil is no bar to a divorce procedure instituted by the wife in the place of her domicil. Wright *v.* Wright, 24 Mich. 180.

The Massachusetts cases are thus recapitulated by Gray, C. J. in Burlen *v.* Shannon, 115 Mass. 438: —

"In Harteau *v.* Harteau, 14 Pick. 181, the parties were married in this state, lived here several years, and then removed into the State of New York, and took up their residence there. The wife, on the ground of the husband's desertion and cruel neglect to support her in that state, returned to Massachusetts, and took up her abode here, and applied for a divorce here for the causes alleged to have occurred in New York, the husband continuing to have his domicil in New York. The court was of opinion that if the wife had always continued to reside in this commonwealth, she might have maintained a libel here, even for a cause which occurred in another state, and after the husband had acquired a domicil there; and dismissed the libel, because both parties having renounced their domicil here, the return of the wife to this state would not give the court jurisdiction over the husband under the statutes then in force.

"The later statutes provide that a libellant who has resided in this state for five years, and did not remove into this state for the purpose of procuring a divorce, may obtain a di-

[1] Barber *v.* Barber, 21 How. U. S. 582; Vischer *v.* Vischer, 12 Barb. 640. See supra, § 46.

[2] See the de Bauffremont case, cited supra, § 209, note, and also supra, § 212.



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§ 226. When the parties are separated by voluntary agreement, the wife's domicil, as a rule, continues that of the husband.[1] The theory of such voluntary separation excludes the idea of hostile action; and hence it has been said that during such a separation the wife cannot acquire an independent domicil.[2] In Indiana, however, it has been ruled that in case of final separation between husband and wife, and their actual permanent residence in different states, the domicil of the husband does not fix that of the wife so as to determine the question of jurisdiction in divorce.[3]

Wife cannot acquire new domicil on voluntary separation.

§ 227. A wife cannot obtain an independent domicil by her own wrong. Hence, in proceedings against her for divorce, though she may have separated from her husband, and be living in a different state, her domicil is presumed to be the same as his.[4] It may be said that this is a *petitio principii*, assuming the very point of wrongful separation which, at least in cases of desertion, divorce proceedings are instituted to test. But it must be remembered that the wife's domicil is the husband's, even on the system of jurisprudence now before us, and that the burden is on her,

If wife wrongfully separates from her husband, she may be sued in his domicil.

vorce for any cause allowed by law, whether it occurred in this commonwealth or elsewhere, and that in no other case shall a divorce be decreed for any cause arising out of this state, unless the parties had previously lived together as husband and wife in this state, and one of them lived in this state when the cause occurred. Gen. Sts. c. 107, §§ 11, 12. In Shaw *v.* Shaw, 98 Mass. 158, the husband and wife, having been married and resided together here, left this commonwealth to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme cruelty, and she left him and returned to this state, and continued to reside here. It was held, that she might maintain a libel here for a divorce for the cause occurring in Pennsylvania, although the husband, before it occurred, had left this state with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in this commonwealth."

[1] Supra, § 46.

[2] Supra, § 46; Hood *v.* Hood, 11 Allen (Mass.), 196; Warrender *v.* Warrender, 2 Cl. & Fin. 488; Bishop Mar. & Div. i. § 634; ii. § 129.

[3] Jenness *v.* Jenness, 24 Ind. 355. See Deck *v.* Deck, 2 Swab. & Tr. 90.

[4] See Bishop Mar. & Div. ii. § 126; citing Warrender *v.* Warrender, 2 Cl. & Fin. 488; Tovey *v.* Linsay, 1 Dow, 117, 138, 139. But see Borden *v.* Fitch, 15 Johns. 121; Greene *v.* Greene, 11 Pick. 410; Hull *v.* Hull, 2 Strob. Eq. 174; Harrison *v.* Harrison, 19 Ala. 499.



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therefore, in cases where an independent domicil can be obtained when necessary, to show that such necessity existed.[1]

Domicil of petitioner must be real.

§ 228. We have already seen [2] that a residence to constitute a domicil must be adopted as a final abode. A mere temporary residence, therefore, simply for the purpose of obtaining a divorce under a supposed favorable jurisprudence, is not such a domicil as will be internationally regarded as giving jurisdiction to the courts of such residence.[3] On the other hand, a real domicil obtained by the petitioner in a state other than that in which the marriage was celebrated will give the courts of the forum jurisdiction.[4]

[1] See infra, § 238.

How the service is to be made in such cases is afterwards considered. Infra, § 236.

[2] Supra, §§ 21, 56, 223.

[3] See authorities given supra, § 223.

[4] See cases cited supra, §§ 223, 224; Hood *v.* Hood, 11 Allen, 196; Burlen *v.* Shannon, 115 Mass. 438; Whitcomb *v.* Whitcomb, 46 Iowa, 437; State *v.* Armington, 25 Minn. 29. See a learned review of the cases in Am. Law Reg. for Feb. 1877, pp. 71 *et seq.*

The distinctive jurisprudence of Pennsylvania is noticed infra, § 239.

In Burlen *v.* Shannon, 115 Mass. 438, Gray, C. J. said: "In Hood *v.* Hood, 11 Allen, 196, the parties together removed from this state to Illinois, and resided there some years. The wife then deserted the husband and returned to Massachusetts, and ever after resided here, and the husband entered into an agreement for her separate maintenance. He afterwards applied in Illinois for, and after notice to her by publication in that state obtained, a decree of divorce from the bond of matrimony for her desertion. This court held that as the husband's domicil was in Illinois, and his domicil was in law the domicil of the wife, the decree of divorce there obtained by him was valid and conclusive against her. And it has since been decided that that decree, being conclusive between the parties upon the subject whether the marriage between them was dissolved, was equally conclusive upon that subject in an action between any persons whatever. Hood *v.* Hood, 110 Mass. 463.

"The case at bar is not distinguishable from that of Hood *v.* Hood. At the time of Mr. Shannon's removal (from Massachusetts, the place of matrimonial domicil), to the State of Indiana, his wife was living apart from him, and, as the jury have found, without justifiable cause. Such being the fact, the new domicil acquired by him in that state was in law her domicil, and the courts of that state had jurisdiction of the cause and both the parties; and the divorce there obtained must, by the express terms of the Gen. Sts. c. 107, § 55, be held valid and effectual in this commonwealth."

In Hood *v.* Hood, 56 Ind. 263, it was held that a divorce granted in Utah, when the petitioner was not at the time it was obtained, and for years previously had not been, within the Territory of Utah, and the defendant in the divorce suit was never within



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§ 229. In Massachusetts it is provided by statute that "when an inhabitant of this state goes into another state or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state." It has been ruled that this statute has no application to cases where the parties move to another state for other purposes, and when five years afterwards the husband commences proceedings for divorce, though the wife

In Massachusetts by statute a foreign divorce granted in fraud of home law is invalid.

that territory, was void, and that the defendant was guilty of bigamy in contracting a subsequent marriage in Indiana. The court held, also, that the provision in the statute of Utah which authorizes its courts to grant divorces to citizens of foreign states and nations who are not, but merely desire to become, residents of Utah, is *ultra vires* and void. S. P., People *v.* Smith, 20 N. Y. Sup. Ct. 414; Litowich *v.* Litowich, 19 Kan. 151.

In Foss *v.* Foss, Sup. Ct. N. H. 1878, it was said by Allen, J.: "To entitle the court to take jurisdiction of a cause of divorce, the libellant must have an actual *bonâ fide* residence in the state. Fellows *v.* Fellows, 8 N. H. 160; Greenlaw *v.* Greenlaw, 12 Ibid. 202; Batchelder *v.* Batchelder, 14 Ibid. 380; Payson *v.* Payson, 34 Ibid. 520. And the cause of divorce, if arising out of the state, must have been at a time when the domicil of the libellant was in the state. Clark *v.* Clark, 8 N. H. 21; Frary *v.* Frary, 10 N. H. 61; Smith *v.* Smith, 12 Ibid. 80; Kimball *v.* Kimball, 13 Ibid. 225; Hopkins *v.* Hopkins, 35 Ibid. 474; Leith *v.* Leith, 39 Ibid. 20, 32, 33. If the domicil of the libellant, at the time the alleged causes of divorce took place, was in New Hampshire, as he claims, the court has jurisdiction of the cause; otherwise, not. The place of one's domicil is the place of his home. Phil. Law of Dom. 11. In the ordinary acceptation, it is where he lives and has his home. Story Confl. of Laws, 41. It 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 which the fact and the intent, combining with one another, gravitate to and centre in as the home. 2 Bishop Mar. & Div. 118. To acquire a domicil, residence and the intention to make it the home must concur. Once acquired, actual residence is not indispensable for its retention; it may be retained by an intention not to change it. Hart *v.* Lindsey, 17 N. H. 235; Leach *v.* Pillsbury, 15 Ibid. 138. An existing domicil is not changed or lost by a departure from it for a temporary purpose, or with an intention of returning. Bump *v.* Smith, 11 N. H. 48."

Jurisdiction, when acquired, is not divested by removal. Bailey *v.* Schrader, 34 Ind. 260.

In New York, however, there is a tendency to hold that residence of the petitioner, followed by an appearance of the defendant, when there is no collusion, may sustain jurisdiction. Vischer *v.* Vischer, 12 Barb. 640. But see Hunt *v.* Hunt, 72 N. Y. 217, cited infra, § 237.



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had intermediately returned, and become domiciled again in Massachusetts.[1]

Internationally, the statute can only affect persons domiciled in Massachusetts.[2] But in all cases where the record of a foreign divorce is offered in evidence in Massachusetts, it is admissible to show that the party obtaining it, when domiciled in Massachusetts, in evasion of its laws went into the state granting the divorce to obtain a divorce for a cause not recognized by the laws of Massachusetts; and if this be proved, the divorce will be a nullity.[3]

Record must aver necessary facts, and these facts may be collaterally disputed.

§ 230. The record must aver the facts necessary to give jurisdiction;[4] and these facts (*e. g.* the allegation of domicil) may be collaterally disputed.[5] But when the construction of the laws of the divorcing state is concerned, the judgment of the courts of that state is conclusive.[6]

[1] Hood *v.* Hood, 11 Allen, 196. See Shannon *v.* Shannon, 4 Allen, 134, where a fraudulent divorce, granted in another state, was held invalid.

[2] The statute requiring that the parties should "have lived together as man and wife" in the state, is construed to mean that they must have had a domicil in the state. Schrow *v.* Schrow, 103 Mass. 574; Ross *v.* Ross, 103 Mass. 575. See supra, § 21.

[3] Hanover *v.* Turner, 14 Mass. 227; Clark *v.* Clark, 8 Cush. 385; Lyon *v.* Lyon, 2 Gray, 367; Chase *v.* Chase, 6 Gray, 157; Smith *v.* Smith, 13 Gray, 209; Sewall *v.* Sewall, 122 Mass. 156.

[4] Cole *v.* Cole, 3 Mo. Ap. 571; Hood *v.* Hood, 56 Ind. 263.

[5] Thompson *v.* Whitman, 18 Wal. 457; Leith *v.* Leith, 39 N. H. 20; Adams *v.* Adams, 51 N. H. 388; Carleton *v.* Bickford, 13 Gray, 591; Folger *v.* Ins. Co. 99 Mass. 267; Edson *v.* Edson, 108 Mass. 590; Sewall *v.* Sewall, 122 Mass. 156; Hoffman *v.* Hoffman, 46 N. Y. 30; Doughty *v.* Doughty, 28 N. J. Eq. 581; Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194; Reed *v.* Elder, 62 Penn. St. 308; Cox *v.* Cox, 19 Oh. 502; People *v.* Dowell, 25 Mich. 247; Litowich *v.* Litowich, 19 Kan. 151; State *v.* Armington, 25 Minn. 29.

In Cheever *v.* Wilson, 9 Wal. 123, Judge Swayne reserved the question whether the averment of domicil in the record of the divorce was conclusive. "It is said," so he speaks, "that the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicil. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only *primâ facie* sufficient, is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient unless over-

[6] Hunt *v.* Hunt, 72 N. Y. 217.



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§ 231. In Pennsylvania, Chief Justice Gibson, in a case of much celebrity, took the position that jurisdiction depends upon the real domicil of the parties *at the time of the offence*.[1] An act was passed in 1850 to remove this limitation, but the Supreme Court, in 1858, ruled that the act did not give jurisdiction in cases where the offence was committed outside of the United States.[2] And the view of Gibson, C. J., as just stated, has been countenanced by cases in New Hampshire,[3] and in Louisiana.[4] But the weight of authority is that the suit may be brought in any state where either party is domiciled at the time of suit, irrespective of the place of the domicil of the parties at the time of the offence.[5]

Domicil at time of offence immaterial.

§ 232. Nor is it material where the offence was committed. If it were, justice would in many cases be denied. The place of the commission of an offence is one of accident. (1.) A man may desert his wife when travelling, or commit adultery when away from his own technical domicil; and, in fact, it is worthy of notice that in a very large proportion of the cases of meritorious divorces, the offences proved are committed away from home. (2.) No sovereign, without surrendering control over his municipal system, could delegate the determination of divorce cases among his subjects to the sovereigns of foreign countries in which those subjects might happen to be at the time of an alleged offence against the marriage relation. (3.) The establishment of such a rule would virtually make the marriage relation terminable at the will of the parties, since all that would be requisite to produce such a termination would be for the parties to resort to the place where a particular offence is ground for divorce, and there commit this particular offence. For these and other reasons it is generally agreed that to give jurisdiction to the *locus delicti* in such cases would be absurd;

And so is place of offence.

come by adverse testimony. Nothing adequate to the result is found in the record. Giving to what there is the fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting." See supra, § 223.

[1] Dorsey *v.* Dorsey, 7 Watts, 350; S. P., McDermott's App. 8 W. & S. 256.

[2] Bishop *v.* Bishop, 30 Penn. St. 416.

[3] Leith *v.* Leith, 39 N. H. 20.

[4] Edwards *v.* Green, 9 La. An. 317.

[5] Supra, §§ 223 *et seq.*; Bishop Mar. & Div. ii. § 172, and cases there cited; Cheever *v.* Wilson, 9 Wallace U. S. 123.



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and this is the conclusion adopted by the German and French jurists,[1] as well as by the courts of England and the United States.[2] And so has it been decided in the Supreme Court of the United States.[3]

Nor is place of marriage solemnization.

§ 233. The theory that the sovereign of the place of the solemnization of the marriage has the sole jurisdiction of divorce is open to serious objections. (1.) The place where a marriage is solemnized has not any necessary connection with its essential terms. Ordinarily we may say that when we solemnize a contract in a particular place, to be performed in such place, we incorporate in the contract the law of that place. The contract, being a business transaction, is usually solemnized in the place of business. It is otherwise, however, with marriage. It is not ordinarily solemnized in the place of business of the parties, and indeed it is only in rare instances that one of them, the woman, has any place of business. In most instances the woman's home is the place of solemnization, though it is to the husband's home that she is generally taken, and it is the jurisprudence of that home that encompasses and qualifies the marriage relation. But it is not always that marriages are solemnized at even the woman's home. Sometimes the solemnization may take place when the parties are travelling; and even when it takes place at the common home of both parties, it is a home which they may soon after desert. With the essence of the institution, therefore, the law of the place of solemnization has no logical connection. (2.) To hold that the law of the place of solemnization ubiquitously qualifies a marriage so as to give the sovereign of that place the right at any subsequent time to dissolve it, would be to recognize in a foreign sovereign power of interference that would be intolerable. No state could with safety leave the settlement of the

[1] Supra, § 210.

[2] See cases cited §§ 205 *et seq.*

[3] Cheever *v.* Wilson, 9 Wallace, 123. See, to same effect, a learned argument in the Am. Law Reg. for Feb. 1877, p. 71.

In Holmes *v.* Holmes, 4 Lans. 388, it was held that a state has no jurisdiction to grant a divorce for transgressions committed before the parties were domiciled within its borders. But see reversal in S. C. 57 Barb. 305.

In Kentucky abandonment, to be a cause of divorce, must have been a cause in the state of abandonment. Hick *v.* Hick, 5 Bush, 670.



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marriage relations of its subjects to another state. And, what is more, no state could leave to a foreign state the determination of its own municipal law of marriage. Yet this would be the case if the law of the place where a marriage is solemnized were to accompany and qualify that marriage in all countries in which the parties were subsequently to be domiciled. For if a marriage with the privilege of divorce on consent could be contracted in a particular territory (*e. g.* Utah, which grants divorces on consent), then all persons would resort to that territory if they desired to enter into a marriage with the privilege of divorce on consent. The consequence would be that portions of the community could at will emancipate themselves from the law which requires marriages to be indissoluble, and this emancipation would be by the action of a foreign sovereign.[1]

Fraud vitiates.

§ 234. It is unnecessary to do more than state that the position that all judgments are avoided by fraud applies to judgments in cases of divorce.[2] Were fraudulent divorces permitted, marriage would be reduced to a mere union at will. So detrimental would this be to the best interests of society, that no foreign divorce will be recognized in which the judgment is based on mere consent, no due cause being proved on record, and the court not having jurisdiction of both parties.[3] But it would seem that where the wife appeared by counsel in a divorce suit in Indiana, and received alimony in pursuance of the decree of divorce, she cannot subsequently in another state impeach the divorce on the ground that it was obtained by fraud.[4] And a judgment will not be avoided, when due cause appears on the record, by the fact that the defendant having

[1] As establishing the conclusion in the text, see Cheever *v.* Wilson, 9 Wallace U. S. 123; Standridge *v.* Standridge, 31 Ga. 223; White *v.* White, 5 N. H. 476; State *v.* Fry, 4 Mo. 120; Dorsey *v.* Dorsey, 7 Watts, 349; Tolen *v.* Tolen, 2 Blackf. 407; Harteau *v.* Harteau, 14 Pick. 181; and the multitude of cases under which divorces have been granted without question when the marriage was contracted in a foreign state. See, also, Story, § 23; Bishop on Mar. & Div. § 180. The English cases will be found supra, § 218.

[2] Adams *v.* Adams, 51 N. H. 388; Edson *v.* Edson, 108 Mass. 590; Stanton *v.* Crosby, 2 Hun, 370; True *v.* True, 6 Minn. 458.

[3] Adams *v.* Adams, 51 N. H. 388; Baker's Will, 2 Redf. (N. Y.) 179; Jackson *v.* Jackson, 1 Johns. 424; Hanover *v.* Turner, 14 Mass. 227.

[4] Kirrigan *v.* Kirrigan, 2 McCarter (N. J.), 146. See Cole *v.* Cole, 3 Mo. Ap. 571.



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appeared, declined to defend, and permitted judgment to go by default.[1]

Procedure must be internationally regular.

§ 235. As has been already remarked, whatever safeguards have been judged necessary to prevent an invasion of the rights of property by irregular foreign judgments should be applied in the fullest measure to foreign divorces, which touch not merely property, but the rights and *status* of parents and children, and the integrity of the whole body politic. Whether a service by publication is good when the defendant is not domiciled in the divorcing state will be presently discussed.[2] The law of international process in general is considered in a distinct chapter.[3]

Extra-territorial service not usually adequate.

§ 236. On the subject of extra-territorial service private international law is in a state of transition.[4] Twenty years ago such service was unauthorized either in England or in the United States. Although by the Roman law, which rests upon the assumption of a cosmopolitan jurisprudence extending over Christendom, the extra-territorial force of monitions is recognized for international ends, such is not the case with the English common law. By that law a defendant must be served within the jurisdiction of the sovereign of the forum, or he cannot be served at all. In a suit brought in England, for instance, there can by common law be no service on the defendant in France. But by a statute passed in England in 1852, provision was made for the summons abroad of parties to contracts over which the English courts have jurisdiction, such summons to be made by the service of a notice of the writ upon the defendant. In most of the States of the American Union similar provisions have been enacted. It is true that when a judgment in a matter belonging to private municipal, as distinguished from international law, is obtained by such a process against a defendant domiciled abroad, the sovereign of the defendant's domicil will not recognize the binding force of such judgment. "You must come and sue my subject in my own state," is the attitude, "if you wish to obtain a judgment against him which I will recognize as binding." But divorce is

[1] Infra, § 238.

[2] Infra, § 236. See Doughty *v.* Doughty, 28 N. J. Eq. 581.

[3] Infra, §§ 649 *et seq.*

[4] Infra, §§ 646 *et seq.*



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not a matter of merely municipal concern. As is marriage, so is divorce, an international *status*. As married persons carry their immunities wherever they go, it is fitting they should carry their liabilities wherever they go. They claim their marital rights in foreign lands; it is but fair that a foreign land, when it acquires jurisdiction by being the domicil of either party, should be entitled to require the attendance of the other party at a matrimonial suit. And there is less ground to complain of such jurisdiction being assumed, since almost without exception the nations of Christendom authorize extra-territorial citations. That the rules of private international law can be so altered there can be no question. At one time divorces of all kinds were considered invalid by private international law, as the great majority of civilized nations repudiated divorces of any kind. Now, however, divorces, when the sovereign granting them has jurisdiction, are good by private international law, since all civilized nations sustain such divorces. It is hard to see how a state which authorizes extra-territorial service in suits brought in its own court can refuse to recognize such service when duly made in suits in courts of other states. On the other hand, a state which does not permit such service will not sustain a divorce based on such service.[1] And in divorce suits, as we will presently see, there is peculiar reason for this reciprocal recognition. Were extra-territorial service, or service by publication, not allowed in cases where a defendant leaves the jurisdiction, the law would be defied in the very class of cases in which its interposition is most required, and relief would be prevented in the cases where it is most needed. The aggravation of the wrong would secure its immunity.

Summons by publication will not be regarded as internationally conferring jurisdiction

§ 237. Service by publication in divorce cases is by most states authorized by statute. The cases in this view may be divided in four classes. The first is where the defendant lives abroad, and the statutes of the state of procedure provide for extra-territorial service. In such case, if the petitioner knew the defendant's extra-territorial residence, and neglected to have him served, a judgment

[1] See Ralston's Appeal, cited in next section. As to service in Louisiana, see Holbrook *v.* Bronson, 25 La. An. 51.



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entered on mere publication, for default of appearance, will be open to extra-territorial impeachment. when in fraud of defendant's rights.

The second class is where the defendant is domiciled and resides in the home jurisdiction, and is not served; in which case it stands to reason that the judgment against him is improvidently entered; though it may be argued that if entered by a court of his domicil his duty is to apply to that court for redress, and that he is bound by that court, subject to appeal to the supreme appellate court of the state.

The third class is where the defendant is domiciled and resides out of the state of procedure, but there is no statute in that state authorizing extra-territorial service. Even in this case, though the publication was duly made, yet if the defendant is not personally notified, when he readily could be, his residence being known to the petitioner, there is high authority to the effect that the courts of his domicil will treat the divorce as invalid, if the case was one of surprise and wrong.

A fourth class is where both parties are domiciled within the state granting the divorce, but the defendant is at the time absent, in which case notice by publication, if in conformity with local law, will be sufficient.[1]

[1] It has been held in Massachusetts that there is no presumption of the jurisdiction of a court of record of another state over a non-resident libellee in divorce, whose citation does not appear by the record. Com. *v.* Blood, 97 Mass. 538. See Platt's Est. 80 Penn. St. 501; Irby *v.* Wilson, 1 Dev. & Bat. 568; State *v.* Schlachter, Phillips N. Car. R. 520. See Atkins *v.* Atkins, 9 Neb. 191.

A divorce for desertion obtained in Illinois, by a husband from his wife, upon due notice to her in the newspapers, *both parties being domiciled in Illinois at the time of the libel*, was held in 1865, in Massachusetts (Hood *v.* Hood, 11 Allen, 196), to be valid, though she was then living in Massachusetts, under an agreement by which he was to pay her a certain weekly sum "so long as she shall remain single," and though she had no notice of the proceedings; and it was ruled incompetent for her, in Massachusetts, to show that the Illinois divorce was obtained by fraud, and upon facts that would not entitle the husband to a divorce in Massachusetts. It should be observed, however, that the decision in this case was put by the court exclusively on the ground that as both parties were domiciled in Illinois they were bound by the laws of that state, which permitted divorces on such process; and the case, therefore, has no bearing on the question now under discussion, how far notice by publication alone is sufficient when the defendant is domiciled in another state, and receives no personal notification.

In Burlen *v.* Shannon, 115 Mass. 438, it was held by the Supreme Court



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The ground on which notice by mere publication is regarded

of Massachusetts, that where a husband, whose wife is living apart from him without justifiable cause, removes from Massachusetts to another state, and acquires a domicil there, without the purpose of obtaining a divorce, and afterwards obtains a decree of divorce in that state, according to the laws thereof, and after notice to her, by leaving a summons at her abode in Massachusetts, and by publication in a newspaper in that state, the courts of that state have jurisdiction of the suit and of both parties, and the divorce is valid in Massachusetts as to all persons; although the wife was never in the divorcing state, had no settlement there derived from her parents or ancestors, never appeared in the suit there, had no knowledge or information that he contemplated going to that state, or that he had left Massachusetts, till after he had filed his libel for divorce, and was never provided by him with a home or support in the divorcing state, or was furnished with means by him to go to that state, and was without such means. See opinion supra, §§ 224, 228.

In New York the question arose for the first time in 1818 (Borden *v.* Fitch, 15 Johns. 121); when the Supreme Court was called upon to pronounce on the validity of a Vermont divorce, granted on the husband's petition, the wife being at the time a resident of Connecticut, and having no notice of the procedure. "The final question," said Chief Justice Thompson, "is, whether such proceedings in Vermont were not absolutely void. To sanction and give validity and effect to such a divorce appears to me contrary to the first principles of justice. To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the subject matter, and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced; or, when any benefit is claimed under it, the want of jurisdiction makes it utterly void and unavailable for any purpose." In 1851, in a case before the Supreme Court sitting at Schenectady (Vischer *v.* Vischer, 12 Barbour, 640), the evidence was that the husband and wife, at the time of marriage, were domiciled in New York, where the marriage took place; and that subsequently the husband removed to Michigan where he obtained a decree of divorce, the wife not appearing, and having no notice except by publication. It was held by the court that the divorce was a nullity. "It is invalid," said Judge Hand, "for want of jurisdiction, because there was no service of process upon or appearance of the wife." "No process was served upon or notice given to the wife, except by publication in a local newspaper." "Whatever may be the rule in respect to divorces granted in other countries, I am inclined to the opinion that a divorce granted by the courts of one of our sister states, after appearance, or, if the parties are domiciled there, after personal service, there being no fraud or collusion, would be conclusive here. And it may be doubted, in case of an appearance and litigation on the merits, whether proof of the domicil of the parties, or the *lex loci contractus*, or the *locus delicti*, would affect the decree. However, the decree of divorce in Michigan is invalid, on the ground just suggested." The same doctrine was reaffirmed by the Supreme Court in 1859 (McGifford *v.* McGifford, 31 Barbour, 70), and in 1869. Hoffman *v.* Hoffman, 58 Barbour, 269. In



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in some cases as sufficient is, that otherwise, where a defendant

1869, in a case before the New York Court of Appeals, on an application by Jane F. Kerr, claiming to be the widow of Richard E. Kerr, it appeared that Richard E. Kerr, the husband, from 1862 to his death in 1867, was a citizen and resident of New York; that in 1866, on a complaint stating that he was then, and for more than a year past had been, a *bonâ fide* citizen of Indiana, he had been divorced in Indiana from his said wife; and that the laws of Indiana require, to give jurisdiction, that the plaintiff should be a *bonâ fide* resident of the state for one year previous to filing the bill for divorce. The record did not show any service of process on the wife, or notice of the proceeding to her; but it did show that a firm, H. & W., describing themselves as attorneys, of which there was no proof, did appear and answer for her. There was, however, positive evidence that no process or notice had been served on her, that she had no knowledge of the suit, and gave no authority to H. & W. to appear for her. The court held the divorce void. Judge James put the decision on the ground of "want of jurisdiction in the court to entertain the proceeding and render judgment." Judge Grover added that "the appearance was not only a fraud upon the respondent, but also upon the court in Indiana, and the laws of that state. The judgment was therefore void as to the respondent." Kerr *v.* Kerr, 41 N. Y. (2 Hand) 272. In 1870 (Holmes *v.* Holmes, 57 Barbour, 305), it is true a broader view was expressed by Judge Boardman, at the Chenango special term; but the most advanced position of this learned judge is, "that by implication nearly all the cases hold that such service (personal service out of the jurisdiction) is sufficient;" and all that was expressly decided is that a decree of divorce obtained by the husband in Iowa, upon personal service of process upon the wife in New York, is valid and effectual, *so far as concerns the plaintiff.*"

In Hunt *v.* Hunt, 72 N. Y. 217, both parties were domiciled in Louisiana, but before the proceedings commenced the defendant (the wife) left the state. She had actual notice of all the proceedings, and was advised throughout by eminent counsel. No process was served on her; but the court appointed for her a *curator ad hoc;* which, by proof before the New York court, appears to be, by the laws of Louisiana, a valid substitute for a personal service of protest in the case of a domiciled defendant in a suit for divorce, who is absent from the state when the suit is commenced. Folger, J., in delivering the opinion of the court, said: —

"There are numerous authorities to the effect that a judgment of another state got against a resident of this state, and who has never been a citizen of that, without personal service of process or voluntary appearance, is not a valid judgment, and may be inquired into in our courts, and on such facts appearing may be disregarded as having been rendered without jurisdiction. Kerr *v.* Kerr, 41 N. Y. 272; Hoffman *v.* Hoffman, 46 Ibid. 30, and others.

"We have not seen a decision which so holds, where the defendant was a citizen of the other state, and the court proceeded upon a substituted service in accordance with the laws of that state. Borden *v.* Fitch, 15 Johns. 121, which is perhaps the leading case in this state, rests upon the fact that the defendant, in the judgment there impugned, had never been domiciled



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has absconded, justice would be defeated. Undoubtedly this

in the state in which the judgment was rendered." "I think that the result of the decisions of this state at this time is this: that when courts of another state have jurisdiction of the subject matter and of the person, they are to be credited collaterally; that jurisdiction of the subject matter is to be tested by the powers conferred by the Constitution and laws of the other state (Kinnier *v.* Kinnier, 45 N. Y. 535); and that as to jurisdiction of the person, they go no farther against it, than that if the defendant is a domiciled citizen of this state, jurisdiction of him by the courts of another state is not acquired save by personal service of process or his voluntary appearance. When the word 'resident' is used in them, it must be taken as synonymous with domiciled person, as in Vischer *v.* Vischer, 12 Barb. 640. We know of no case in this state that has held that in a suit for divorce, jurisdiction of the person of a domiciled citizen of a state may not be acquired by the courts of that state by a substituted service of process, though at the time he be in fact abiding in another state." Hence, by this ruling, "a substituted service of process" on a defendant not domiciled in the divorcing state is not good.

To same effect see Stanton *v.* Crosby, 2 Hun, 370; Love *v.* Love, 10 Phila. (Penn.) 453.

In People *v.* Baker, 76 N. Y. 78, the Court of Appeals had to consider an Ohio divorce granted on the petition of the wife, domiciled in Ohio, where the only notice on the defendant, domiciled in New York, was by publication. The court held that the divorce was invalid. Folger, J., giving the opinion of the court, said: —

"It is said that a judicial proceeding to touch the matrimonial relation of a citizen of a state, whether the other party to that relation is or is not also a citizen, is a proceeding *in rem*, or, as it was more gingerly put, *quasi in rem*. But it was never heard that the courts in one state can affect in another state the *rem* there, not subjected to their process, and over the person of the owner of which no jurisdiction has been got. Now if the matrimonial relation of the one party is the *res* in one state, is not the matrimonial relation of the other party a *res* in another state?"

The case was distinguished from Hunt *v.* Hunt, above cited as follows:

"That case was close. It went upon the ground, built up with elaboration, that both parties to the judgment were domiciled in Louisiana when the judicial proceedings were there begun and continued and the judgment was rendered, and were subject to its laws, including those for the substituted service of process. We meant to keep the reach of our judgment within the bounds fixed by the facts in that case."

The divorce being invalid, it was held that the defendant, who had contracted a second marriage in New York, was indictable for bigamy.

In Doughty *v.* Doughty, 27 N. J. Eq. 315, it was held that a decree of divorce, where the jurisdiction of the court arises out of the *status* and domicil of one of the parties, and where the other party is not served with process or notice, and does not appear, the only notice being by publication, has no extra-territorial efficiency.

"The judgment," said Beasley, C. J., "is not entitled to recognition and enforcement in other states by force of the act of Congress and the Constitution of the United States. In



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view is sanctioned by very high authorities.[1] But the cases of my opinion, it is only judgments that ensue from jurisdiction regularly obtained over the parties by service of process upon them, or by voluntary appearance, or when the proceeding is strictly *in rem*, that carry with them these high sanctions, and which, therefore, are everywhere conclusive. Jurisdiction in divorce suits arising out of the *status* and domicil of one of the parties cannot impart to a judgment any such efficiency. In this case, the judgment rendered in Illinois is entirely destitute of those properties that entitle it to extra-territorial acceptance; *the residence of the defendant to it was known, she was not summoned, she did not appear, and she was not served with process, nor was notice given to her.* I should say that a judgment so obtained is not obligatory in this state, and on the ordinary principles of international law has no title to recognition by this court."

In Ralston's Appeal, 8 Weekly Notes, 393, it was ruled by the Supreme Court of Pennsylvania, that under the Pennsylvania statute, an extra-territorial service by the sheriff would not give jurisdiction to a Pennsylvania court, overruling Harvey *v.* Harvey, 2 Weekly Notes, 225.

In Missouri an Indiana divorce, obtained by the husband, on order of publication, without personal service, is held to operate as a divorce in his favor in Missouri, so as to prevent his wife from claiming her dower in lands owned by him in Missouri. The decree, it was held, when so pronounced, is a judgment *in rem*, and when not affected by fraud is valid everywhere; but when rendered on an order of publication only, can have no effect *in personam* extra-territorially. Gould *v.* Crow, 57 Mo. 200. "Such judgments," said Adams, J. "when rendered on orders of publication, can only have effect upon the thing acted on by the decree, and such rights as are dependent upon that for their existence. Therefore, if a court, in severing the marriage tie, undertakes to render a decree *in personam* as to alimony, it can have no extra-territorial effect.

"But the marriage *status* being acted on and dissolved by the decree, that relation becomes severed and continues so in all other states and territories, and property rights dependent alone upon its continued existence must cease not only in the state where the decree is rendered, but in all other dominions. After such dissolution, neither party can claim rights dependent upon its continued existence. The husband is no longer entitled to curtesy in the wife's lands, or to recover to his possession her *choses in action*, and the wife's incomplete right to dower in his lands, wherever situated, must cease. See Harding *v.* Alden, 9 Me. 140.

"These are the doctrines of the common law. There may be some statutory changes in some of the states, and hence the conflict in the decisions of some of the state courts on these questions."

[1] 2 Kent's Com. 6th ed. 110, note; Bishop Mar. & Div. i. § 161, citing Mansfield *v.* McIntyre, 10 Ohio, 27; Tolen *v.* Tolen, 2 Blackf. 407; Hull *v.* Hull, 2 Strob. Eq. 174; Cooper *v.* Cooper, 7 Ohio, 594; Harrison *v.* Harrison, 19 Ala. 499; Gleason *v.* Gleason, 4 Wis. 64; Hubbell *v.* Hubbell, 3 Wis. 662; Thompson *v.* State, 28 Ala. 12; S. P., Ellison *v.* Martin, 53 Mo. 575.

In a Maine case which has been cited to the same effect, it appeared



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failure of justice arising from the abuse of this process are both numerous and grave; and it is submitted that the only safe course is to view foreign divorces, based on mere publication, as having no extra-territorial effect, as to a defendant domiciled in another jurisdiction, unless there be satisfactory proof that the whereabouts of such defendant, after diligent search, could not be discovered.

Service within jurisdiction sufficient, though defendant is non-domiciled, and so of appearance.

§ 238. If the defendant is personally summoned within the jurisdiction, this is sufficient to confer competency on the court, unless there is a distinctive rule in the state that the only competent court is that of the defendant's domicil. An appearance by the defendant, also, with the same limitation, confers competency, even though he be a non-resident.[1]

that the defendant was personally cited in the foreign state in which he resided; and although technically this is equivalent to no service, yet the fact of such notice is very important for the consideration of a foreign court. Harding *v.* Alden, 3 Greenl. 140.

The subject of *ex parte* divorces is examined with much acuteness in leading articles in the Amer. Law Reg. for February and April, 1877.

[1] Kinnier *v.* Kinnier, 58 Barb. 424; 45 N. Y. 53.

In Loud *v.* Loud, 10 Rep. 113, S. Ct. Mass. 1880, it was held that a wife residing in Massachusetts, who appeared in a previous successful *bonâ fide* suit for divorce brought by her husband in another state, and afterwards executed a release to him of all claims on his estate for a pecuniary consideration paid by him, cannot treat his subsequent marriage as illegal, and obtain a divorce here therefor.

Gray, C. J., said: "The conclusive answer to this libel is, that the wife not only appeared in the suit brought by the husband, but that she afterwards executed a release, reciting the divorce therein obtained by him, and, for a pecuniary consideration, discharging all her claims upon him or his estate. Having done this, she cannot treat his subsequent marriage and cohabitation with another woman as a violation of his marital obligations to herself. The defence is allowed, not upon the ground of strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage. Palmer *v.* Palmer, 1 Sw. & Tr. 551; Boulting *v.* Boulting, 3 Ibid. 329, 335; Gipps *v.* Gipps, Ibid. 116, and 11 H. L. Cas. 1; Pierce *v.* Pierce, 3 Pick. 299; Lyster *v.* Lyster, 111 Mass. 327, 330. See, also, Smith *v.* Smith, 13 Gray, 209, in which it was decided that a decree of divorce, obtained in another state *ex parte*, and in violation of the Gen. Stats. c. 107, § 54, was no bar to a libel previously filed in this commonwealth by the same libellant for the same cause."

A divorce in another state, when both parties were at the time resident in New York, and when the defendant was not at the time served with process,



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§ 239. Pennsylvania has taken an exceptional position in this respect, it being maintained in that state, on reasoning entitled to great respect, that the primary forum of divorce is the matrimonial domicil; *i. e.* the domicil the parties, when in agreement, select as their permanent home.[1] Thus, where a husband left his wife in Pennsylvania, their common domicil, and settled in Iowa, where he obtained a divorce from the wife on ground of desertion, notice being given by publication, there being no personal notice, it was held by the Supreme Court of Pennsylvania, in 1867, that the divorce did not divest the wife of her marriage rights in Pennsylvania.[2] "The injured party," to adopt the succinct language of Judge Sharswood, "must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicil of both."[3]

In Pennsylvania the forum is the matrimonial domicil.

will not be held valid in New York, though the defendant, subsequent to the decree, applied to set it aside, and was defeated on technical grounds. Hoffman *v.* Hoffman, 46 N. Y. 30.

That appearance will not give jurisdiction, when otherwise wanting, see Chase *v.* Chase, 6 Gray, 157, 161; People *v.* Dawell, 25 Mich. 247. Supra, §§ 23, 230.

In Kinnier *v.* Kinnier, 45 N. Y. 535, Church, C. J., said: —

"The court had jurisdiction of the subject matter of the action; that is, *it had jurisdiction to decree divorces according to the laws of that state;* and every state has the right to determine for itself the grounds upon which it will dissolve the marriage relation of those within its jurisdiction. The *court also had jurisdiction of the parties by the voluntary appearance of the defendant.*"

In Platt's App. 80 Penn. St. 501, appearance is viewed as completing jurisdiction, when the suit is brought within plaintiff's domicil.

[1] See supra, § 190.

[2] Colvin *v.* Reed, 62 Penn. St. 375; approved in Reed *v.* Elder, 62 Penn. St. 308. See, also, Van Storch *v.* Griffin, 71 Penn. St. 240; Scott *v.* Noble, 72 Penn. St. 115; Platt's Appeal, 80 Penn. St. 501; Turner *v.* Turner, 44 Ala. 437.

"When the injured party seeks a new domicil, and the domicils are, therefore, actually different, there is no greater reason why the husband's new domicil should prevail over the wife's than that hers should prevail over his." Agnew, J., Colvin *v.* Reed, 62 Penn. St. 375.

[3] Sharswood, J., Reed *v.* Elder, 62 Penn. St. 315, 1869. See, also, Gray *v.* Hawes, 8 Cal. 462.

Afterwards, however, this seems to have been enlarged: —

"The rule is that suit must be brought either in the jurisdiction in which the injured party resided at the time of the injury, or in the actual domicil of the other party at the time of suit." Sharswood, J., Platt's App. 80 Penn. St. 501. In this case it would seem to be held that appearance by a non-resident defendant gives a binding effect to a decree of a court of the plaintiff's domicil.



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§ 239 *a*. Whether an *ex parte* judgment of divorce against a defendant domiciled in another state, supposing it to bind his person, binds his property in such other state, has been doubted. That such a judgment has no extra-territorial force as to property, though it may dissolve the marriage, is maintained by high authority;[1] and it is clear that at least as to real estate the *lex rei sitae* must prevail. On the other hand, that such a distinction is illogical and untrue has been maintained by eminent judges.[2] The question depends upon the local policy of the state where the contested property is situated; and so it is regarded, as is seen in the prior section, in Pennsylvania. At the same time it is difficult to avoid the force of the conclusion, that an *ex parte* judgment cannot bind property extra-territorially. It may divorce, for instance, an Indiana husband from a Massachusetts wife. But it cannot divest the wife's interest in her husband's property in Massachusetts.[3]

Judgment may dissolve marriage, yet not affect property.

[1] 2 Kent's Com. 110, note *b*; 2 Bishop Mar. & Div. § 69; Harding *v.* Alden, 9 Greenl. 140; Gould *v.* Crow, 57 Mo. 200. See Colvin *v.* Reed, cited in last section. This would follow, it may be argued, from the nature of *ex parte* judgments. Infra, § 667.

[2] Jackson *v.* Jackson, 4 Johns. 432. See Judge Redfield's argument in 3 Am. Law Reg. 215.

[3] See infra, § 665.



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# CHAPTER V.

## PARENTAL RELATIONS.


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### I. LEGITIMATION.

### 1. *By Subsequent Marriage.*

§ 240. So far as concerns children born during matrimony, there can be no dispute. The universal rule among all civilized nations is that such children are legitimate. *Pater est quem justae nuptiae demonstrant.* It is otherwise, however, as to children born out of matrimony. By the common law of the continent of Europe, as a general rule, such children are legitimated by the subsequent marriage of the parents. By the common law of England, however, as well as by that in force in most of the United States, this is not the case, no such legitimation being worked by a subsequent marriage. Then, again, special decrees of legitimation have been issued by European sovereigns, and special acts of

Conflict of laws as to such marriage legitimation.



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legitimation have been passed by some of the state legislatures in the United States. As persons thus legitimated move from land to land, and claim by force of descent property in various countries, interesting questions in this respect are likely to constantly arise. These questions are often very complex. (1.) The child may be born, before the parents' marriage, in their domicil in a country where subsequent marriage does not work legitimation; the parents may subsequently marry in such country, and then move to a domicil where marriage has such retrospective legitimating effect. (2.) Or, after the birth of the child, they may move to such second legitimating domicil, and there marry. (3.) Or, by the law of the domicil, both of the birth and of the marriage, such legitimation may ensue. (4.) Or, after the birth of the child in such legitimating domicil, the parents may move to a domicil where the law has no such retrospective force, and there marry. (5.) Or a child may be born illegitimate in a state which does not admit legitimation by subsequent marriage; but the father is domiciled in a state which admits of such legitimation, and afterwards, retaining such domicil, marries the mother in the state which does not admit such legitimation. In considering these contingencies, the older jurists have indulged in conflicting speculations which have been faithfully given by Judge Story, and which it is not necessary here to reproduce.[1] It will

[1] §§ 93 *et seq.* In Massachusetts, if the parents of illegitimate children intermarry, and the father acknowledge them as his, the children, by St. 1853, c. 253, are legitimated to all intents and purposes. Monson *v.* Palmer, 8 Allen (Mass.), 551. Subsequent marriage and acknowledgment, legitimate in Kentucky anterior children. Dannelli *v.* Dannelli, 4 Bush (Ky.), 51. And so in Louisiana. Caballero's Succession, 24 La. An. 573.

"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 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 represen-



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be sufficient, at this moment, to state what, in this respect, is the present English and American law; and what are the positions taken by those German and French jurists who exercise a controlling authority on European practice.

In England laws of both place of birth and of marriage must concur to effect legitimation.

§ 241. Legitimation by subsequent marriage takes place by English law only when permitted (1.) by the father's personal law at the time of the child's birth;[1] and (2.) by his personal law at the time of the marriage.[2] In this country the law in this relation

tatives of their father, and were therefore not within the exception of the statute, but were entitled to the benefit of the bequest." Gray, C. J., in Ross *v.* Ross, 129 Mass.

[1] Wright, in re, 2 K. & J. 595; Udny *v.* Udny, L. R. 1 S. & D. A. 447; Goodman *v.* Goodman, 3 Giff. 643.

[2] Dalhousie *v.* McDouall, 7 Cl. & F. 817; Munro *v.* Munro, 7 Cl. & F. 842. As to domicil of legitimated children, see supra, § 38.

The *status* of a child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the *status* of the putative father, not on that of the mother; and according to the English law, where, at the time of a bastard's birth, the father has his domicil in England, no subsequent change of domicil can render practicable the bastard's legitimation. Udny *v.* Udny, 1 S. & D. Ap. 441.

S., when domiciled in England, had three children by T., a woman with whom he there cohabited. He subsequently became domiciled in Holland, where he married T., and, before and after such marriage, had other children by her. It was held by the court, that as the law of Holland admitted of retroactive legitimation by marriage, *all the children born during the Holland domicil were legitimate; but as the test was the period of the child's birth, those born in England were illegitimate.* The question was, not inheritance to realty, but right to take under a bequest to the children of S. Goodman *v.* Goodman, 3 Giff. 643. That children illegitimate by the law of the domicil of their birth cannot be subsequently legitimated by their parents' change of domicil to a state where such legitimation is the law, and their subsequent marriage in such state, is ruled also in Munro *v.* Sanders, 6 Bligh, 468.

On the same state of facts it is now finally held, that "brothers' and sisters' children," in the English statute of distributions, means children legitimate by English law. Goodman, in re, L. R. 14 Ch. D. 619; 43 L. T. 14.

In Ross *v.* Ross, 129 Mass. , we have the following criticism by Gray, C. J.: —

"The leading case in Great Britain on this subject is Shedden *v.* Patrick, briefly reported in Morison's Dict. Dec. Foreign, App. 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



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fect such legitimation.

is unsettled. We have an Alabama ruling consistent with the position that the law of the father's domicil

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 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 afterwards 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. App. 89–91, 95; S. C., 6 Paton, 645, 656, 657, 662. Lord Redesdale's judgment in S. C. 4 Wils. & Sh. App. 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 inconsist-



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at the time of birth controls, though the case may be placed on the ground that in matters of succession the law of the decedent's last domicil determines.[1] Judge Story contents himself with giving at large on this point the views of prior jurists without advancing a positive opinion of his own. He intimates, however, that the law of the place of the birth of the child, and not the law of the place of the marriage of the parents, is to decide whether a subsequent marriage will legitimate a child or not.[2] But this is based on English decisions, which, as we have seen, now tend to the conclusion that the applicatory law is that of

ent 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 sitae;* 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 sitae* 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 English woman and married her in England; and it was held that by force of the law of England the son did not inherit the peerage. So in Rose *v.* Ross, above cited, where a Scotchman by birth became domiciled in England, and had a son there by an English woman, 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."

[1] Lingen *v.* Lingen, 45 Ala. 411, cited infra, § 243.

[2] § 93 *a*.



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*the father's domicil* at the time of marriage and the time of birth, and not that of the place of birth itself. Mr. Wheaton's general statement is that "legitimacy or illegitimacy" are among "universal personal qualities;" and "that the laws of the state affecting all these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they may be resident." [1]

If we look at the matter on principle, it is hard to see how the law of the father's domicil at the time of the child's birth can affect the issue. It is a *petitio principii* to say that the *father's* domicil at the time controls, since the question of fatherhood is not determined until afterwards on the marriage and recognition.[2]

In respect to real estate, territorial

§ 242. In a celebrated case, which was decided finally in the English House of Lords in 1840,[3] it was determined that a legitimation by a subsequent marriage, though

[1] Ed. 1863, 172.

[2] The rulings of Lord Hatherley in Wright, in re, and Udny *v.* Udny, are shown by Mr. Westlake (1880, p. 85) to be founded on a misapprehension of prior rulings.

In Ross *v.* Ross, 129 Mass. , Gray, C. J., said: "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 Touillier Droit Civil (5th ed.) 217; Savigny's Private International Law, § 380 (Guthrie's ed.), 250 and note, 260."

In Smith *v.* Kelly, 23 Miss. 167, 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, it was held that 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. See Scott *v.* Key, 11 La. An. 232, cited infra, § 250.

[3] Birtwhistle *v.* Vardill, 7 Cl. & F. 940. This case was first heard in 1826, 5 B. & C. 438, and in 1830 in the House of Lords, 2 Cl. & F. 571. The appeal was then ordered to be further argued before the judges, and



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internationally conferring legitimacy, does not, under the statute of Merton, entitle the person legitimated to take English real estate by descent.[1] torial policy prevails.

§ 243. So far as concerns succession to personalty, it has been generally stated that where a natural son is entitled to succeed by the law of the father's last domicil, he is en- Such legitimation does not

in 1839 ten judges (all present at the hearing) concurred in maintaining that, to hold English real estate as heir, a person must have been born after his parents' marriage. 7 Cl. & F. 895. This was affirmed in 1840 in the House of Lords, Lord Brougham not concurring.

[1] To the same effect see Don's Est. 4 Drew. 194. See comments in Westlake, 1880, § 168. Cf. criticism in Ross *v.* Ross, 129 Mass.

In Birtwhistle *v.* Vardill, the claimant was born in Scotland, before marriage, of Scotch parents, who afterwards married in Scotland, and thereby legitimated him in Scotland. Here, applying the test of domicil to every point of time, — to that of the father and mother at the time of birth and at the time of marriage, and to that of the child at both these periods, — the child would be legitimate *jure gentium*. But it was held by the House of Lords, following the unanimous opinion of the judges, that this child was incapable of inheriting real estate in England. The opinion was based on the special ground that the English law, as to the descent of honors and real property, was of a positive and distinctive character, and could not be invaded by the prescription of a foreign jurisprudence. "The very rule that a personal *status* accompanies a man everywhere," said Littledale, J., commenting on this case, "is admitted to have this qualification, that it does not militate against the law of the country where the *consequences* of that *status* are sought to be enforced." 5 B. & C. 455. To which Sir R. Phillimore adds: "This ground does really constitute the defence of the judgment. In England, it is to be recollected, consequences of great political and constitutional moment flow from territorial possession." Phil. Int. L. iv. 363. The decision in this remarkable case, therefore, did not go to the *status* of the child said to be so legitimated. It simply declared that such legitimation should not, on grounds of special territorial policy, give title to territorial possessions in England. See Brocher, Droit int. privé, 22.

In Shaw *v.* Gould, L. R. 3 E. & I. Ap. 55, 70, Lord Cranworth said: "The opinions of the judges in Birtwhistle *v.* Vardill, 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."



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control successions.

titled everywhere;[1] and that as to the general *status* of legitimacy, the law of such last domicil is conclusive.[2] But as to land, the limitations of the *lex rei sitae*, when by statute only children born in wedlock can inherit, must prevail.[3] And it has been held, as we have seen, that under the English statute of distribution, speaking of "brothers' and sisters' children," children illegitimate by English law cannot take.[4] In Alabama, also, as has been stated, neither at common law, nor under the legislation of that state, will "an act of legitimation in a foreign country, or even in a sister state," avail to take away the incapacity of illegitimacy, so as to enable an illegitimate child to claim a share in his deceased father's estate in Alabama, where the father was domiciled.[5]

Otherwise as to legacy and succession duty.

§ 244. According to Mr. Westlake (1880),[6] "a child whose legitimacy has been acquired through the subsequent marriage of its father, domiciled abroad, ranks as a child under the British legacy and succession duty acts."[7] But this can only hold good in cases of legacies by name, if the doctrine of the last section be correct, since such a child could not inherit in intestacy, by English law.

Nationality cannot be thus imparted.

§ 245. For two reasons nationality cannot be imparted, in a country rejecting such legitimation, by this mode of legitimation under a foreign law. In the first place, laws of this class are laws of distinctive national policy, which foreign laws are not permitted to infringe.[8] In the second place, the home nationality, in case of children born abroad, is imparted by the English statutes, and by our own settled law, only to children whose fathers at their birth were natural born

[1] Doglioni *v.* Crispin, 1 H. of L. Rep. (1866), 30; Don's Est. 4 Dr. 194; Westlake (1880), § 169. See fully infra, § 576.

[2] Ibid.

[3] Birtwhistle *v.* Vardill, supra, § 242; Don's Est. in re, 4 Dr. 194; Smith *v.* Derr, 34 Penn. St. 126.

[4] Goodman, in re, L. R. 14 Ch. D. 619: 43 L. T. 14; cited supra, § 241.

[5] Lingen *v.* Lingen, 45 Ala. 411.

[6] Page 86.

[7] In Skottowe *v.* Young, L. R. 11 Eq. 447, cited by Mr. Westlake to this point, Stuart, V. C. said: "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."

[8] Supra, §§ 87, 104 *b*.



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subjects; whereas children of this class, at their birth, have in the eye of the law no father.

§ 246. The law determining the *status* of the father at the time of marriage decides, according to the preponderating view of continental European jurists, as to the legitimation by marriage.[1] This law is the law of his domicil, although Fiore,[2] true to his system of nationality already stated,[3] makes the law of the father's nation the test.[4]

In France and cognate states, father's personal law at time of marriage prevails.

[1] Boucher, Droit int. privé, p. 153; Fœlix, by Demangeat, Droit int. privé, i. No. 30.

[2] Op. cit. Nos. 137–49.

[3] Supra, § 7.

[4] The early French rulings are conflicting. Conty de Quesnoy, a domiciled Frenchman, cohabited, in France, with Jeanne Peronne Durnay of Flanders, and a child was born to them in France. The parents subsequently removed to England, where they married. It was decided that the domicil of the place of birth was that which applied the law; that the child thus born in France was legitimated by the subsequent marriage; and that it did not affect the question that such marriage took place in England, where marriage has no such retroactive effect. Journal des principales audiences du parlement, tom. 3, L. 2, c. 17. This case is called "Conty's case" by Sir W. P. Wood, in Wright's Trusts, and the parties are declared by him to be "a domiciled Frenchman, residing temporarily in England, who married an English woman." The point of law however, is the same.

It has been further held, that legitimation conferred on a child by a state of which the father is not a subject confers no claim on the child as against the father, though it removes the general incapacity of bastardy in the land where it is granted. Judgment of Court of Appeals of Paris, Feb. 11, 1808; Sirey, 8, 2, p. 86.

It has been also held that the legitimacy of the child is to be governed by the laws of the father's domicil at the child's birth; and this certainly determines the question of the child's subjection to the paternal power. Bouhier, ch. 24, No. 122; Merlin, Quest. de droit, art. Légitimation, § 1.

On the other hand, there is high authority to the effect that where the right to legitimate children in this way is given to a man by his personal law, the rule *locus regit actum* applies. Gand, Code des Étrangers, etc. Nos. 436, 458.

And it has been more recently held that the mere celebration of a marriage in France between an English man and a French woman, does not legitimate children previously born. The nationality (or domicil) of the father was held in such case to determine the applicatory law. Skottowe's case, Court of Cassation, 1857; Dalloz, 1857, p. 423. This ruling is approved by Brocher, Droit int. privé, p. 190. See Bertauld, Conflits des lois, No. 21. A similar ruling was made by the Court of Caen, in 1852. Fœlix, by Demangeat, i. 97, n. 6.

It is also held in France that a Frenchman may legitimate, by a marriage contracted in England, a child which had previously been recog-



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§ 247. Among the German jurists, at least three distinct conflicting opinions have been expressed in this relation. The first, in order of time, to which we call attention, is that of Schäffner, as given in 1841, in his "Entwickelung des internationalen Privatrechts." He emphatically rejects the theory that the place of marriage is that which is to supply the law which decides whether children previously born of the same parents shall be legitimate or not; and the reason he gives is, that were the place of marriage to determine this question, it would be at the option of the parents to impress either legitimacy or illegitimacy on such children, by the arbitrary choice of such place of marriage. For the same reason, he rejects the domicil of the parents at the time of such marriage. And he declares that the law of the place of birth (not as the English cases decide, that of the *domicil of the father* at the time of birth) must settle the question whether, by a subsequent marriage, the child is legitimated.[1] Savigny (1848) disposes of the question summarily by saying that legitimation by subsequent marriage is to be governed by the law of the domicil of the father at the time of the marriage (nach dem Wohn-

Conflict of German views.

nized by him and his wife. Jour. du droit int. privé, 1878, p. 40. In this case the father retained his French nationality, though he had an establishment in England when he died.

In Russia there can be no legitimation of children born out of marriage, unless by imperial decree. But after a Russian subject is naturalized in France, he is entitled, under the French law, to recognize a natural child previously born. Jour. du droit int. privé, 1879, p. 391.

According to Sir W. P. Wood (afterwards Lord Hatherley), Wright in re, 2 K. & J. 595, "The Roman law clearly proceeds wholly upon the fiction that the subsequent marriage evidences a consent to have passed at the time of the connection of which the child was born; and accordingly Merlin, in his Répertoire, shows how the old Roman law found great difficulty when an intermediate regular marriage with somebody else had taken place between the birth of the child and the subsequent marriage of the parents; and it considered such intermediate marriage to be an obstacle to the legitimation of the child; because, if upon the subsequent ceremony and declaration before witnesses, the parties should be held to have been married, in fact, from the time of their first connection, the intermediate marriage was an adultery, and that offspring spurious. The settled rule, however, now acknowledged in France, is as laid down in Pothier on the Marriage Contract. Part v. c. 2, s. 3, art. 421."

[1] Schäffner, § 37. The whole passage in this connection will be found in Mr. Guthrie's excellent translation of Savigny, p. 255.



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sitz des Vaters zur zeit der geschlossenen Ehe), and that the time of the birth of the child is unimportant. He answers Schäffner's argument, in favor of the place of birth, by saying that, viewing the question in any light, the exercise of legitimation rests on the arbitrary choice of the father, who may not marry the mother unless he choose, and, if he marry her, need not recognize the child.[1] Bar (1862) has the advantage of his predecessors in being able to take a survey of the intermediate opinions of English and French jurists. He discusses the question with great copiousness and subtlety, and comes to the following conclusions : —

The question whether a child is begotten (erzeugt) in marriage, and whether he is consequently subject to the father's power, is to be decided according to the laws of the place where the father was domiciled at the birth of the child.[2] This is the personal right of the child ; and all the presumptions which bear on paternity are to be determined by this law of the place of his father's domicil at his birth, and not by that of the place of the contract of marriage, or by the *lex fori*.

Where a special form is requisite for the recognition of an illegitimate child, the rule, *Locus regit actum*, applies. This is sustained by the decision of French courts as to the construction of the *Acte de Naissance*, by which a child born of foreigners in France may prove his legitimacy.[3] But, as a general rule, the *actual domicil of the father at the time of the act supposed to constitute such legitimation* is to supply the law as to such legitimation (ist die Legitimation unehelicher Kinder nach den Gesetzen desjenigen Domicils zu beurtheilen, welches der Vater zur zeit des die Legitimation angeblich begründenden Ereignisses hatte). The period of the *marriage* is immaterial ; the decisive point of time is that when the father acknowledges the child. This acknowledgment, as has been seen when discussing the French law, is the prerequisite to legitimation. It may take place at the child's birth, or at a subsequent period ; but whenever it takes place, it supplies, according to Bar, the point of

[1] Savigny, viii. § 380.

[2] He cites to this Bouhier, ch. 24, No. 122 ; Günther, p. 732 ; Walter, § 46 ; Gand, No. 430, ff ; Savigny, p. 338 ; Burge, i. 89 ; Fœlix, i. No. 33, 19.

[3] Gand, No. 436.



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time at which the father's actual domicil applies its law to the child's *status*.[1]

The Prussian Code treats carnal cohabitation at a certain period before the birth as evidence of paternity;[2] but in legitimation by marriage, it makes the rights to legitimacy date from the marriage ceremony.[3]

We may consequently hold that wherever the marriage is the act of legitimation, then the father's domicil at the time of marriage determines, in Germany, the law. And there is strong reason for this conclusion. When a sovereign gives to a domiciled subject the right to legitimate his children by any solemn act, such legitimation is to be regarded as decreed by the sovereign himself. Whether such provision be part of the common law of the land, or be part of a general code, it is nevertheless an act of sovereignty which, when the sovereign has jurisdiction, cannot be disputed by other states. If the child and the parent are both domiciled subjects of the sovereign decreeing the legitimation, this legitimation cannot be extra-territorially impeached.

Form determined by rule *locus regit actum*.

§ 248. So far as concerns the *form* of legitimation, the better opinion is that the principle of *locus regit actum* prevails. In most countries it is required that legitimation should be by a solemn act, the object being to protect parties charged with having illegitimate children from fraud, surprise, or force. The recognition by an Austrian of a natural child in Italy, it is therefore held, must be in conformity with Italian law. Yet it is urged by Fiore that this rule should be taken with some reservation. If the act of recognition should be solemnly made in Italy, it would be hard if it should be pronounced void in Austria, the father being an Austrian, because in some slight particular it did not come up to Italian law.[4]

2. *Legitimation by Sovereign Decree (rescriptum principis).*

Legitimation by personal law valid in Europe.

§ 249. Such forms of legitimation have been not infrequent in Europe by act of the supreme power; and in the United States they have been held, when enacted by state legislatures, before the death of the putative pa-

[1] Bar, § 102.
[2] A. L. R. ii. 1, § 1077.
[3] A. L. R. ii. 2, § 598.
[4] Fiore, Op. cit. § 139.



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rent, to entitle such legitimated children to all the rights of children born in wedlock. The question however, is, what force such statutes should have abroad. It has been argued, on the one side, that as the edicts of a particular sovereign such acts can have no extra-territorial force.[1] Sir R. Phillimore, on this point, says that this "might give rise to an international question of some nicety, though reason and principle are in favor of the recognition by other countries of such legitimation, where it is valid *lege domicilii*. As to immovable property, the rule respecting such legitimation would, perhaps, be liable to the same restrictions as the legitimation by sentence of a court of justice."[2] Schäffner earnestly presses the universal validity of such legitimation, when valid according to the laws of the country where such legitimated party has domicil. The question, he argues, is one of *status*, as to which the law of domicil has universal force.[3] And this conclusion rests on the sound position, that legitimacy may be imparted by a state to its domiciled subjects according to its own system of law.[4] Should, however, the child have a different domicil from the father, to affect the child the legiti-

[1] P. Voet, iv. 3, § 15; Argentræus, No. 20; J. Voet, de stat. § 7; Boullenois, i. s. 64; Bouhier, ch. 24, No. 129.

[2] Int. Law, iv. 365.

[3] Schäffner, § 39; Guthrie's Savigny, p. 258. Schäffner cites as authorities, Anton. de Rosellis, *tract. de Legit.* (in Oceano Juris); Wenig-Ingenheim, Lehrbuch des gemeinen Civilrechts, § 22; Mühlenbruch, D. P. § 72.

According to a French ruling, to make such legitimation effective as against the father, it must be granted by a state in which the father is domiciled. Judgment of the Court of Appeals of Paris, February 11, 1808; Sirey, 8, 2, p. 86.

[4] At the reconstruction consequent on the late civil war, several of the Southern States, by constitutional amendments, enacted that the informal marriages previously existing between colored persons should be validated.

By the Texas Constitution of 1869, children born previously during the cohabitation of a white man and negress are legitimated. Honey *v.* Clark, 37 Tex. 686. Other cases of marriages by constitutional amendment, at the reconstruction era, are cited supra, § 173, note.

But no extra-territorial validity can be assigned to marriages not based on consent, nor to compulsory legitimations of whole populations by constitutional amendment. To constitute a valid legitimation, internationally, there must be a prior special application from the persons (or their guardians) whose *status* is to be affected.



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mation must be approved by the state where the child is domiciled.[1]

By English common law such legitimations have no extra-territorial force.

§ 250. By the English common law, as we have already seen, it is essential, to entitle a child to take real estate by inheritance, that he should have been born in lawful wedlock; and the same rule has been applied to the construction of the term "children" as used in distribution statutes.[2] This rule, so far as the right of inheritance to real estate is concerned, has been adopted in cases of legitimation by legislative act in Pennsylvania and Maryland.[3] In Louisiana, where the English common law does not obtain, in a case where an illegitimate son was, by an act of the legislature of Arkansas, where he and his parents had their *bonâ fide* domicil, legitimated, it was held, on his removal with his father to Louisiana, by the Supreme Court, that he was to be regarded as legitimate in Louisiana, capable of inheriting his father's immovable estate, on the latter's death intestate.[4] And even where the English common law holds, the exclusion in such cases from inheritance is based, not on a repudiation of the legitimacy of such children, but on the positions that real estate can only, by the English common law, go to children born in lawful wedlock, and that "children," under distribution statutes, must be defined in the same sense.[5]

## II. ADOPTION.

Adoption governed by the law of domicil of parties.

§ 251. According to the Roman law, a child could be received into a family, and vested with the filial relation, in two ways. One was by imperial rescript (*principali rescripto*), which enabled persons who were free, and *sui juris*, to be thus received as the adoptor's children. This was technically called *arrogatio*, or *adrogatio*. The other, which was more properly *adoption* (*adoptio*), was, by authority of the magistrate (*imperio magistratus*), and transferred children already under the power of their parents.[6] In modern states the institution has been essentially modified, and, even in

[1] Bar, § 102.
[2] See supra, §§ 242–3.
[3] Smith *v.* Derr, 34 Penn. St. 126; Barnum *v.* Barnum, 42 Md. 251.
[4] Scott *v.* Key, 11 La. Ann. 232, Merrick, C. J. diss.
[5] Supra, § 241.
[6] Inst. I. ii. 1; Cod. ii. 48.



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states accepting the Roman law, is the creature of positive legislation.[1] This legislation, in most states, imposes conditions which are essential to the constitution of the act. Thus in Italy the person adopting must be childless, must be at least fifty years old, and must be eighteen years older than the person adopted.[2] The French Code[3] provides that "l'adoption n'est permisse qu'aux personnes de l'un ou l'autre sexe, âgées de plus de cinquante ans, qui n'auront, á l'époque de l'adoption, ni enfants, ni descendants l'egitimes, et qui auront au moins quinze ans de plus que les individus qu'elles se proposent d'adopter."[4] In Austria,[5] and in Prussia,[6] there can be no adoption by persons who have taken vows of celibacy. In the United States the statutes prescribe fewer conditions, and fall into two divisions, — those severing the adopted child entirely from his natural family, and those permitting him to inherit from such family, if not subjecting him to duties to his natural parents.[7]

[1] Fiore, Op. cit. § 150; Merlin, Répertoire, V°. Adoption, § 1.

[2] Code, art. 262.

[3] Article 343.

[4] "In France," says Lord Mackenzie, "the usage of adoption was lost after the first race of kings; it disappeared, not only in the customary provinces, but also in the provinces governed by the written law. Reëstablished in 1792, adoption is now sanctioned by the Civil Code. Adoption, however, is only permitted to persons of either sex above the age of fifty, having neither children nor other lawful descendants, and being, at least, fifteen years older than the individual adopted. No married person can adopt without the consent of the other spouse. The privilege can only be exercised in favor of one who has been an object of the adoptor's care for at least six years during minority, or of one who has saved the life of the adoptor in battle, from fire, or from drowning. In the latter case, the only restriction respecting the age of the parties is, that the adoptor shall be older than the adopted, and shall have attained his majority. In no case can adoption take place before the majority of the person proposed to be adopted." Mackenzie's Rom. Law, 123.

[5] Code, art. 173.

[6] Code, art. 668.

[7] The laws of several European states in respect to adoption are given by Mr. Lawrence, Com. sur Wheaton, iii. 162 *et seq.*

In an instructive article in 1 South. Law Rev. (N. S.) pp. 78 *et seq.* (April, 1875), will be found an analysis of the adoption statutes at the time in force in several states.

Whether the Massachusetts statute involves a contract with the adopted party, see Sewall *v.* Roberts, 115 Mass. 262.

The Mexican law, which was in force in 1832 in Texas, did not permit any one who had a legitimate child living to adopt a stranger as co-heir with such child. Teal *v.* Sevier, 26 Tex. 520. This was afterwards corrected by statute.



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In view of the diversity of the statutes it becomes important to inquire what is the law determining a particular case of adoption. The tendency, on the continent of Europe, is to hold that the law of the domicil of the parties at the time of the act of adoption is to determine so far as concerns the validity and effect of the adopting act,[1] and this conclusion is in accordance with the law already stated in reference to legitimation by subsequent marriage. So far as concerns the *status* of the person adopted, this is to be determined by the law of his domicil, though there is authority to hold that when the act is based on contract, the law relative to contracts prevails.[2] But so far as concerns the change of *status*, the act must be one which the domiciliary law of both parties approves.[3]

Whether a foreign adoption will be recognized in a state retaining in this respect the English common law may be questioned. In such states, judging from the law laid down in respect to other forms of modification of the common law rules

[1] Bar, § 102; Ibid. § 103; Bouhier, ch. 24, No. 86; Boullenois, ii. pp. 48, 49; Merlin, Rép. Puissance paternelle, vii. Nos. 5-7; Wächter, ii. p. 185.

[2] Can a foreigner exercise the privilege of adoption according to the laws of a country where it is permitted, and where he is at the time resident? Supposing him to be a mere temporary resident, it has been argued in France that he cannot, the privilege being one which, from the nature of things, is limited to the subjects of the state conferring it. Demolombe, Adoption, No. 48.

The Roman law is distinct to this effect, the paternal power, in the Roman sense, being restricted to Roman citizens. On the other hand, it is argued (Fiore, Op. cit. § 151) that adoption is a contract, and as such subject to the same law as other contracts. A foreigner in France may make a contract for apprenticeship; why not for adoption? A foreigner may marry in France, and may thus convey family rights to his descendants; why may he not adopt? Hence the prevalent opinion is that a foreigner in France may exercise this privilege. Zachariæ, § 78; Demangeat, Condition civile des étrangers en France, p. 362, and note by Fœlix to No. 36; Dragoumis, Condition de l'étranger en France, p. 37. Pradier-Fodéré, note to Fiore, Op. cit. § 151.

In Italy the right is limited by the Civil Code. Fiore, § 151. Brocher (Droit int. privé, p. 156) argues that if adoption concern only title to property, it is a contractual institution, and should be subjected to the rules regulating contracts. If it result in a change of *status*, it rests on the principles on which *status* rests. But the true view is that the act should be authorized by the personal law of both of the parties. One state cannot impose such a *status* as this on the domiciled subject of another state.

[3] Supra, §§ 84 *et seq.*



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of descent, the *lex rei sitae*, at least as to real estate, in cases of intestacy, would be held to prevail.[1] As to movables, we encounter the same disputes as exist in reference to the legitimation. By Fiore,[2] it is held, in consistency with the scheme of nationality maintained by him in common with recent Italian and French jurists, that the law of nationality must prevail. The law of the nationality of the adoptor is to decide in all that concerns his relations to the adopted person; the law of the nationality of the adopted person is to decide in all that concerns the relations of the latter to his own family. According to the view maintained in the prior pages as to *status*, the law of domicil, and not the law of nationality, is to determine. In the United States, where the legislations of particular states differ so widely in this connection, to take the test of nationality would be impracticable. Each of the states is part of one nationality; no state is a distinct nation. Each state, however, has its special legislation as to civil *status*; and domicil, therefore, must determine what particular legislation is to apply.

In this country, therefore, the law of the domicil of the parties must determine the validity of the adoption. If both parties are domiciled in the state of the adoption, then the adoption should be held extra-territorially valid, at least in all states which accept the policy of adoption, or to whose jurisprudence adoption is not repugnant.[3] But no state can declare that a person not its domiciled subject shall be the adopted child of another person. Both the adoptor and the adopted must be personally subject to the laws of the state by whom the adoption is enacted. But when those conditions exist, then an adoption so effected will be regarded by states with cognate jurisprudences as placing the adopted child in the same position as if he were a legitimate child of the adopting parent.[4]

[1] See supra, §§ 242–3.

[2] Op. cit. § 153.

[3] See Foster *v.* Waterman, 125 Mass. 125.

[4] In Ross *v.* Ross, 129 Mass. , the question was whether a child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in Pennsylvania, where the parties, at the time of the adoption, had their domicil, under statutes substantially similar to those of Massachusetts, and which 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



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Adoption by Indian tribes.

§ 252. Adoption in a North American Indian tribe, according to our legislation,[1] involves a change of political allegiance and of personal law as well as of family relations. The person adopted loses full citizenship in the United States, and in the particular state in which he previously resided, and becomes nationalized in the tribe of his adoption. He no longer is taxable by either federal or state authorities, nor is he liable to suit, in either federal or state court, by other members of his tribe. He may be indicted, it is true, in state or territorial courts for crimes committed by him on persons not of his tribe; but for offences against members of his tribe he is only justiciable before the tribal authorities. So far as concerns his domestic relations, he is governed, not by territorial, but by tribal law. When living within the tribal reservation he is not indictable for polygamy, should he have two wives; though it would be otherwise should he leave the reservation and undertake to carry his two wives with him into non-tribal life. In case of his contracting in the tribe a marriage not monogamous, this marriage, though valid in the tribe, would be considered invalid by state or federal courts.[2] He inherits, after adoption, in accordance with tribal law; but in those tribes (forming a great majority) in which succession is only through women, only through the adoptive mother or the adoptive sister. In short, while he retains his subjection to the territorial government (state or federal, as the case may be), in all that relates to transactions outside of the tribe; so far as concerns transactions within the tribe, his allegiance is to the tribe, and he is governed exclusively by tribal law.[3] In addition to this, he becomes a member of the family by which he is specially adopted.[4]

child have removed their domicil into Massachusetts, to inherit the real estate of such parent in Massachusetts upon his dying intestate. This question was decided in the affirmative by the court, Gray, C. J., giving its opinion, portions of which have been cited supra, § 241.

[1] Supra, § 9.

[2] Supra, § 130.

[3] U. S. *v.* Rogers, 4 How. 571; U. S. *v.* Ragsdale, Hemp. 497; 2 Op. Atty. Gen. 483.

[4] The special mode of adoption in families is given in Hunter's Memoirs of Captivity among the Indian Tribes, London, 1823, pp. 13 *et seq.*, Phil., 1823, p. 235, and in John Tanner's Narrative of Captivity, N. Y. 1830, p. 30. In Schoolcraft's great work on the History, Condition, and Prospects of the Indian Tribes, published by Congress in 1851 (5 vols.), under the



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### III. PATERNAL POWER.

#### 1. *As to Person.*

§ 253. By the advocates of the ubiquity of *status* it is maintained that a father's prerogatives follow him wherever he goes, unless their exercise is forbidden by the spe- Paternal power over person reg-

titles, Manners and Customs, and Tribal Organization, will be found the practice of various tribes in this relation. In this work numerous instances of adoption of white children into Indian families are given, such adoption bringing with it the duties and privileges attached to such families.

The history of our Indian legislation is given with great accuracy and fulness by Colonel Otis, in a book called the Indian Question, N. Y. Sheldon & Co. 1878, and the complications arising from our recognition of Indian adoption are noticed, p. 141. The conclusion reached by this able writer, that we should sweep away the tribal organizations, and subject the Indians to territorial law, is open, however, to serious objections. Waiving the question of our right to destroy, under the Constitution, tribal sovereignty, it will be a task exceedingly difficult to frame a code to which Indians can be properly subjected. It is admitted, and properly, by Colonel Otis, that the codes of civilized states will not answer for this purpose. But how can we form a special code for Indians without conflicting with the fourteenth and fifteenth amendments? And if we could, would not a less stringent moral system (*e. g.* as to marriage) established by us among Indians, give the sanction of government to this system throughout the whole land?

In Hunter's Memoirs it is stated that "white people, generally, when brought up among the Indians, become unalterably attached to their customs, and seldom abandon them." He adds: "I have known two instances of white persons, who had arrived at manhood, leaving their connections and civilized habits, assuming the Indian's, and fulfilling all his duties. These, however, happened among the Cherokees." There are several cases reported by the Moravians of white persons, adopted in infancy in Indian tribes, and afterwards recovered by their friends, who resolutely returned to the tribes of their adoption. Madame Montour's case, detailed in the Pennsylvania Magazine for 1880, is an illustration of the determination with which tribal life, when adopted, will be clung to. Madame Montour, according to the statement of Conrad Weiser, as given by Schoolcraft, was of French parentage, and voluntarily accepted an Indian adoption. On Indian usages in this respect see McCoy's Hist. Bapt. Ind. Miss. (1840); Friends' Efforts to civilize Indians (1866–7); Shea's History of Catholic Missions (1875); on tribal government, Bancroft's Native Races of the Pacific States (1876), vol. v. Index, tit. Government; on the treaties of tribal organization, Moneypenny, Our Indian Wards (1880), pp. 92–150.

By leaving his tribe, an Indian loses his Indian domicil and nationality. Kenyon, ex parte, 5 Dill. 385. Otherwise Indian domicil controls. Davis *v.* Davis, 1 Abb. N. C. 640. See 15 Am. Law Rev. 21.



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ulated by place of residence.

cial policy of states which he visits. The domicil which thus gives the law is that, according to high authority, of the father at the time of the birth of the child.[1] But this rule cannot be accepted as binding.[2] The power, for instance, given to parents in Germany and Switzerland, of interfering with their children's marriages, is one that cannot be tolerated in England or the United States.[3] On several occasions have the municipal authorities in New York been compelled to intervene to prevent the use of arbitrary paternal power by Italian parents; and the same interference has been found necessary in San Francisco in respect to the Chinese. And any attempt on the part of a parent to illegally imprison or chastise a child becomes an offence against the particular country in which it takes place, and will be dealt with by the *lex loci*.[4] On the other hand, there have been German and Scotch jurists who have professed to be staggered at the license the English common law gives to husband and father in the line of physical chastisement.[5]

Father's right to custody governed by local law.

§ 254. The question of a father's right to the custody and education of his children is usually raised in England and in the United States either by a writ of *habeas corpus*, or by an application to the local court having chancery guardianship over infants. In such cases local policy determines how far, and under what terms, a foreign father is

[1] Savigny, viii. 380; Phillimore, iv. 351. Compare Dr. Behrend's discussion of the Law of Family, in Holtzendorff's Encyclopædie, Leipzig, 1870, p. 400.

[2] See supra, § 116.

[3] See Sherwood *v.* Ray, 1 Moore P. C. 398.

[4] See cases in Whart. Crim. Law, 8th ed. §§ 631, 1563.

[5] Fergusson on Mar. & Div. 399; Wächter, § 23. Supra, § 116.

Lord Cottenham thus discusses this point: "It was urged that the court must recognize the authority of a foreign tutor and curator, because it recognizes the authority of the parent of a foreign child. This illustration proves directly the reverse; for although it is true that the parental authority over such a child is recognized, the authority so recognized is only that which exists by the *law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than in this country, is it supposed that a father would be permitted here to transgress the power which the law of this country allows?* If not, then the law of this country regulates the authority of the parent of a foreign child living in England by the laws of England, and not by the laws of the country to which the child belongs." Johnstone *v.* Beattie, 10 Cl. & Fin. 114. See, as to qualifications of this case, infra, § 261.



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entitled to such custody.[1] An interesting question arises under foreign laws, providing that the sons of mixed marriages are to be brought up in the religion of the father; the daughters in the religion of the mother. It will not be pretended that a law so distinctively local in its policy would be enforced extra-territorially.[2] The question of a father's right to change a child's domicil has been already discussed.[3] The question of a foreign father's right to guardianship will be hereafter noticed.[4]

### 2. *As to Property.*

§ 255. As a general rule, the right of the father to the property and earnings of the child is to be governed, so far as concerns the modern common Roman law, by the law of the father's actual domicil.[5] By the present French Civil Code the same rule is established.[6] Judge Story gives at length the views of the older European jurists, which, expressed before the theory of domicil had taken positive shape, were indistinct and conflicting.[7] He declares his own view as follows: "The common law" (*i. e.* that of England) "has avoided all these difficulties by a simple and uniform test. It declares that the law of the *situs* shall exclusively govern in regard to all rights, interests, and titles, in and to immovable property."[8] But as to movables the English rule is that the law of the father's domicil is to determine.[9]

Father's right to child's movables dependent on law of domicil.

§ 256. By those who claim that the law of domicil defines the

[1] Infra, §§ 255 *et seq.* See Hauteville case, Pamph. Phil. 1840.

[2] As to whether an Italian court, on the application of a foreign husband, will compel the delivery by the wife to the husband of their child detained by the wife, see case of Prince of Monaco, reported in Fiore, Op. cit. p. 658. The American and English cases will be found in Schouler on Domestic Relations, § 333.

[3] Supra, § 41.

[4] Infra, § 263.

[5] Savigny, ii. p. 396; Wächter, ii. § 46; Mittermaier, § 30; Bar, § 104.

[6] See Bouhier, ch. 24, No. 47.

[7] §§ 456, 457.

[8] § 463.

[9] In Gambier *v.* Gambier (1835), 7 Sim. 263, it was virtually ruled that parental power over the child's movables is determined by the domicil of the child at the time. Phillimore, iv. 354; Westlake (1880), § 8. Hellman, in re, L. R. 2 Eq. 363, apparently *contra*, Mr. Westlake thinks may be explained on grounds of judicial discretion. But see supra, §§ 102, 118; infra, § 268. As to father's right to guardianship, see infra, § 263.



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Qualifications to this rule.

father's power in this respect, the following qualifications are admitted: —

*First*, the father cannot, by an arbitrary change of domicil, disturb rights which have already actually vested in his children. Hence, in determining the father's power in relation to particular articles of property, there is a strong tendency of opinion to take as authoritative the law of the place where the father was domiciled when such property was acquired.[1]

*Secondly*, the son may from his own earnings, in countries subject to the modern Roman law, purchase foreign real estate, in which his father, according to the same Roman law, will have no usufruct.[2]

*Thirdly*, a foreign father, resident but not naturalized in the United States, is not entitled to set up his personal law as an excuse for an appropriation of his child's earnings to an extent inconsistent with local policy.

### 3. *Alimentation or Maintenance of Illegitimate Children.*

Aliment of illegitimate children a matter of police.

§ 257. Numerous perplexing and intricate questions have arisen in Germany as to the law that is to be applied where a party is sued for the aliment or maintenance of an illegitimate child. The difficulties have sprung from the variety of aspects in which may be viewed the duty to render such support. One opinion is that this is a law distinctively national, by which a state protects persons domiciled within its borders, but not foreigners. Hence, according to this view, the laws of the mother's domicil are those by which the issue is to be determined. This seems to be the view of the Prussian courts.[3] By others, and these by far the preponderating authorities, the claim is viewed as springing from a delict or tort, of which the court of the place of the offence has jurisdiction. But those holding this opinion fall, on the question of the applicatory law, into two distinct and opposing ranks. In Bavaria, and in Saxe-Weimar-Eisenach, it has been decided that the place where the delict was committed is conclusive in this

[1] Bouhier, ch. 22, No. 17; Bar, § 104; Merlin, § 2. See more fully supra, § 41.

[2] Bar, § 104.

[3] Bar, § 105.



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respect.[1] On the other hand, Mittermaier,[2] and Savigny,[3] are positive in declaring that the *lex fori* must in such case prevail; and there are decisions of the courts in Würtemberg and Saxony to this effect.[4]

In France, no such question can come before the courts. The famous article, in this relation, in the Code Civil, "*La recherche de la Paternité est interdite*,"[5] is regarded as declaring that wherever that Code obtains, suits for the alimentation or maintenance of an illegitimate child are prohibited as immoral. Fœlix extends the idea of domicil so far as to maintain that a Frenchman carries this immunity to foreign countries, so as to be everywhere relieved from such inquiries;[6] though he thinks that the child of a French woman by a foreigner might sue the latter for maintenance in his home.

Laws by which the alleged father of a bastard is condemned to pay for his maintenance, being of a penal character, are not extra-territorially effective. They cannot, therefore, be invoked to determine *status* extra-territorially.[7] In the United States, laws of this class are regarded as penal ordinances, and the man convicted of illegitimate parentage is held justiciable in the place of the commission of the offence.[8] The aliment of the child, after the conviction of bastardy, is, in most states one of the conditions of the sentence. But when the question is one of mere police relief, the place where the relief is required assumes jurisdiction.[9] Laws of aliment, as laws of local policy, are not extra-territorial in their operation.[10]

[1] Seuffert, i. 157; ii. 161; iv. 325; Bluntschli, i. § 12; iii. 3.
[2] § 30, a. E.
[3] VIII. 278, 279.
[4] Bar, § 105, note 14.
[5] Art. 340.
[6] I. No. 3, p. 79, note 4.
[7] Brocher, Droit int. privé, p. 156. Supra, § 4.
[8] Supra, § 4; Whart. Crim. Law, 8th ed. §§ 1741 *et seq.*
[9] Kolbe *v.* People, 85 Ill. 336; Duffies *v.* State, 7 Wis. 672.
[10] See supra, §§ 4, 104 *b*.



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# CHAPTER VI.

## GUARDIANSHIP.


I. How to be constituted.

Country of ward's personal law has primary jurisdiction, § 259.

In England and the United States foreign guardian must have sanction of home courts, § 260.

II. How to be administered.

1. *As to Person.*

Foreign guardian at one time refused all authority, § 261.

Tendency now is to recognize such authority *primâ facie*, but, if disputed, to require local sanction, § 262.

Question one of local policy, § 263.

Guardianship not permitted in cases of artificial minority, § 264.

2. *As to Property.*

Foreign guardian cannot seize ward's effects without local authority, § 265.

Ancillary guardian accounts to his own court, § 266.

Foreign law as to sale of assets not ubiquitous, § 267.

By English common law, *lex rei sitae* controls, § 268.

III. Lunatics and Spendthrifts.

Foreign guardian of lunatic may act with local sanction, § 269.

Decrees as to spendthrifts not extra-territorially binding, § 270.


### I. HOW TO BE CONSTITUTED.

§ 259. The state wherein a ward is domiciled is that which both in interest and in conscience is charged with his protection; and it is that, therefore, which, on general principles, should nominate and direct the guardian of such ward. Hence, by the uniform practice of European continental states, the guardian appointed by such home authority has control of his ward's estate abroad as well as at home.[1] Vattel writes: "Le droit des gens, qui veille au commun avantage et à la bonne harmonie des Nations, veut que cette nomination d'un tuteur ou curateur (par la juge du domicile) soit valable et reconnue dans tous les pays, où le pupille peut avoir des affaires."[2] This, however, does not prevent the appointment

Country of ward's personal law has primary jurisdiction.

[1] Savigny, viii. § 380; Wächter, § 23; Pütter, § 62, iii.; Fœlix, ii. p. 198, No. 466; No. 33, p. 187; No. 89; Argentræus, No. 19; Bar, § 106; Schæffner, p. 55; Hertius, iv. 29; Stockman Decis. Brabant, 125, No. 6; Boullenois, ii. p. 3; Garrison's Success. 15 La. An. 27.

[2] Vattel, ii. 7, c. 7, § 85.



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of special, subordinate guardians to take charge of the ward's estate in other territories. This, Savigny declares,[1] is in accordance with the Roman law; and by that law, as Bar remarks, such guardians are responsible to the personal court of the ward, according to the laws of the latter's domicil. By the Prussian Code, there is but one guardianship for the whole estate, which is that appointed at the last domicil of the father; but, in subordination to this guardian, special curators are permissible for foreign estates.[2] The appointment of such ancillary guardians, whenever a special emergency requires, is a duty of humanity, and occurs whenever an infant or lunatic is personally exposed to spoliation in a foreign land, or when the estate of such person is so exposed.[3]

In England and the U. S. foreign guardian must have sanction of local courts.

§ 260. The question, as we have already seen in principle,[4] and as will be hereafter illustrated in detail, is one of policy, to be determined, when the custody of the ward is involved, by the law of the place where he is resident,[5] and, when his estate is concerned, by the *lex rei sitæ*. It is true, as Phillimore says: "Whatever may be the differences in the positive laws of different states with respect to the mode of constituting a guardian, the rule of international comity imperatively demands that a guardian duly constituted according to the laws of the domicil of the ward should be recognized as such by all other countries."[6] But, as is the case with foreign executors, a foreign guardian is not usually permitted to act in England and in the United States without giving bond in the local court.[7] And it has been declared that a foreign guardian appointed by the court of domicil is not, by virtue of his office, necessarily entitled to the custody of a child in Massachusetts, though the court, even after appointing a local guardian, may decree the custody of the child to the foreign guardian.[8]

[1] § 380.

[2] A. L. R. ii. 18, §§ 56, 81, 86.

[3] See infra, §§ 261, 262.

[4] Supra, §§ 104 *b*, 113, 116, 117.

[5] Infra, §§ 261 *et seq.*

[6] IV. 377. See, also, Nugent *v.* Vetzera, Law Rep. 2 Eq. 704 (1866). Infra, §§ 263, 606-608.

[7] Young's Succession, 21 La. An. 394; Stephens' Succession, 21 La. An. 497. Supra, § 117; infra, § 265.

[8] Woodworth *v.* Spring, 4 Allen, 321. See infra, § 263.

"By the principles of private international law, the jurisdiction to grant primary (as distinguished from ancil-



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## II. HOW TO BE ADMINISTERED.

### 1. *As to Person.*

§ 261. By the Roman law, as has been noticed, the power of the guardian appointed by the state within which the ward is

lary) administration of personal property belongs to the courts of the owner's domicil at the time of his death, because, as a general rule, the law of that domicil governs the distribution of his personal property; but the jurisdiction to appoint a guardian of the person and of the movable property of a minor belongs to the courts of the domicil of the ward at the time when the occasion arises for judicial action, because the law of that domicil is the fundamental rule by which his *status* is governed; although the extent to which the authority of an administrator or guardian appointed by the courts of the domicil shall be recognized in another state depends upon the law or comity of that state." Gray, C. J., Harding *v.* Weld, 128 Mass. 591.

The N. Y. Court of Appeals, in Hubbard's Guardianship (1880), 22 Alb. L. J. 315, held that the jurisdiction of appointing guardianship does not depend upon the legal domicil of the infant. It is sufficient if the infant is a resident within the jurisdiction of the court where the proceedings are taken. "This was determined by the House of Lords in Johnstone *v.* Beattie, 10 Cl. & Fin. 43, in which case it was held that the English Court of Chancery had power to appoint guardians for an infant, who was a resident in England, notwithstanding she had no property there, and her domicil was in Scotland. So on the other hand property gives jurisdiction to appoint a guardian thereof, although the infant in whose behalf the application for guardianship is made is out of the jurisdiction and a resident abroad. Logan *v.* Fairlee, Jacob, 193; Stephens *v.* James, 1 M. & K. 627; Salles *v.* Savignon, 6 Ves. Jr. 572. But if the infant is not within the jurisdiction or domiciled there, and has no property therein, there is no basis for the interposition of the court." In the case at bar, the father (still living) of the infants was born in Rhode Island, and removed to New York in 1858, where he engaged in business and was married. His wife died in 1873, leaving the infants, two in number, the fruit of the marriage. The father, in 1875, becoming suddenly insane, was taken by his brother, who resided in that state, to Rhode Island, and placed in an asylum there. He recovered his reason and was discharged from the asylum. In 1877, upon a recurrence of the malady, he was again placed in the asylum, where he has since remained. He never returned to New York after leaving in 1875. The infants were taken to Rhode Island in 1875, and remained there until 1878, when one of them was secretly taken from a school she was attending, by a son-in-law of their maternal grandfather, and brought to the grandfather's house in New York, where she has since resided. The evidence strongly tended to show that she was brought into New York for the purpose of having her within the jurisdiction of the New York courts, for the institution of proceedings for guardianship. Neither infant had property in New York. It was held that the Supreme Court had no juris-



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domiciled is universal, though it will be necessary for him to apply for the appointment of ancillary guardians in order to take charge of special foreign assets. At one time the English courts exhibited a disposition to go to the opposite extreme, denying all authority whatever to a foreign guardian. An English guardian, to carry out this principle, has no power over his ward in a foreign state. A foreign guardian has no power over his ward in England. In a conspicuous case in England,[1] an attempt was made to recognize in that land the authority of a Scotch guardian over a ward who was personally in England, but all whose estate was in Scotland; but this attempt failed, in the House of Lords, by the preponderating voices of Lords Lyndhurst, Cottenham, and Langdale, against Lords Brougham and Campbell. It had previously been held, somewhat exceptionally, by the House of Lords, that the authority of an English guardian extended to the institution and management of a suit respecting the ward's personal property in Scotland.[2] Judge Story, after discussing these cases, adds: "It (the Roman view) 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."[3]

Foreign guardian at one time refused all authority.

§ 262. But notwithstanding these high authorities, and notwithstanding the weight to be attached to the judicial action of the majority of the House of Lords in Johnstone *v.* Beattie, there is a growing tendency to hold that in this respect the English law has taken an attitude too provincial to permit its general and permanent acceptation. Next to the parents of a minor, his country, acting through its proper courts charged with such

Tendency now to recognize such authority *primâ facie*, but if disputed, to require local sanction.

diction to appoint a guardian for the infants on petition of their mother's mother. S. C., 10 Rep. 818.

[1] Johnstone *v.* Beattie, 10 Cl. & Fin. 42; approved in Hubbard's case, supra, § 260.

[2] Morrison's case, 4 T. R. 140.

[3] § 499. He cites Morrell *v.* Dickey, 1 Johns. Ch. R. 153; Kraft *v.* Wickey, 4 Gill & J. 332.



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an office, has the greatest personal interest in his welfare. It is there that his property generally lies. It is to that country that his prosperity will be of value; by it his circumstances are best known; by its officers, duly charged with such a trust, the education, the mode of living, the marriage, best suited to him can be most wisely settled. Hence, as has already been said, the tendency both in England and the United States is to recognize foreign domiciliary guardianships in all cases where this will best conduce to the interests of the ward.[1]

Question one of local policy.

§ 263. The question of the recognition of a foreign guardian is one of local policy, but not of a policy based on mere caprice. It is a policy which itself is a rule of private international law, viz. that the court of a place of a minor's sojourn will, when there is no positive local law in the way, and when there is nothing in the foreign guardianship repugnant to local institutions, "support" (to adopt Mr. Westlake's statement)[2] "the authority of the guardian or committee existing under the personal law or jurisdiction, and not defeat it unless it should be abused.'' Thus Lord Chancellor Hatherley, in 1866, refused to interfere with a foreign guardian, duly appointed, of subjects of a foreign country, when he wished to remove his wards from England, where they had been sent to be educated, in order to complete their education in their own country. The court declined to discharge an order appointing English guardians, but gave the foreign guardians exclusive control of the children.[3] And in a subsequent case, before Vice-Chancellor James, the authority of the *lex domicilii* in this respect was asserted with even increased emphasis.[4] But how far a foreign guardian is to be controlled or superseded is to be determined by local law.[5] And foreign guardians, in order duly to exercise a control over their wards' estate in England, should obtain authority from English courts. That they have been appointed by the

[1] See supra, § 102. This passage is adopted and approved by M. Brocher, in his Droit int. privé, p. 163.

[2] Westlake, 1880, § 7.

[3] Nugent *v.* Vetzera, L. R. 2 Eq. 704. See § 260.

[4] Di Savini *v.* Lousada, 18 W. R. 425; S. P., Townsend *v.* Kendall, 4 Minn. 412.

[5] Stuart *v.* Bute, 9 H. L. C. 440. That we must act as to property under the *lex situs*, see Leverich *v.* Adams, 15 La. An. 310.



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*judex domicilii* is no bar to independent appointment in England.[1]

[1] Johnston *v.* Beattie, 10 Cl. & F. 421; Nugent *v.* Vetzera, L. R. 2 Eq. 704. Statutes exist in several states permitting foreign guardians to act as such under specific limitations. Morrell *v.* Dickey, 1 Johns. Ch. 153; Kraft *v.* Wickey, 4 Gill & J. 322; Stephens' Succession, 19 La. An. 499.

That foreign parents or guardians will not be permitted to exercise authority not in conformity with domestic law, see supra, § 116, and compare McLoskey *v.* Reid, 4 Bradf. (Sur.) 334.

In Georgia a father's guardianship will be extra-territorially sustained. Taylor *v.* Jeter, 33 Ga. 195.

By the French law (Aubry et Rau, 4th ed. i. 285; Demolombe, i. p. 245), a foreigner cannot be guardian of a French minor. Guardianship, it is said, is *munus publicum*, an institution of civil law distinctively French, and not controlled by the law of nations. Parents, however, by a decree of the Court of Cassation, Feb. 16, 1875, are excepted from the operation of this law. Jour. du droit int. privé, 1875, p. 441. By Pasquale Fiore, Droit int. privé, p. 302, and Laurent, i. p. 560, it is argued that by private international law foreigners are not excluded from guardianship.

When a foreigner, who is not *capax negotii*, is left in France without a legal protector, the French courts, in cases where it is necessary for the foreigner's protection, will intervene and appoint a guardian. Jour. du droit int. privé, 1878; Pasquale Fiore, Droit int. privé, trad. Pradier-Fodéré, No. 174; Aubry et Rau, Cours de droit civil, i. p. 264. And a natural guardian, though a foreigner, will be recognized in proper cases by the courts, when the child is of the father's domicil. Brocher, Droit int. privé, p. 158. Such a guardian, however, cannot act permanently in France for want of the conditions requisite to French guardianship. Infra, § 267.

"S'il s'agit d'une incapacité suffisamment grave, générale et permanente, pour constituer un état spécial et bien caractérisé, c'est la loi de statut personnel qui doit la regir. Si cette incapacité ne porte pas une atteinte assez grave pour causer un tel résultat, si la personne ne se trouve affectée que transitoirement pour telle localité et dans quelques-unes de ses attributions seulement, c'est le caractère de police civile, ou, souivant les cas, celui de procédure qui prédomine dans les mesures prises en telles circonstances." Brocher, Droit int. privé, p. 158.

Even by the stanchest adherents of the theory of nationality it is admitted that a child, or other incapable person of foreign nationality, may be protected, when necessary, by a guardianship instituted by a state in which he is temporarily resident. Fiore, Op. cit. § 174.

Sir R. Phillimore, on this point, thus speaks (iv. 381): "It is to be observed, however, that though these countries (England and the United States) differ from the rest of the civilized world, in holding a new authority to be requisite in the case of a foreigner in respect to movable as well as immovable property, there is no reason to suppose that such an authority would be denied to the person already clothed with the authority of guardian in his own country; the analogy, as will be seen, of the foreign executor or administrator leads to the opposite conclusion. The practice is



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§ 264. It should, however, be kept in mind, as has just been repeated, that the infancy which is thus extra-territorially protected is that which is such *jure gentium*, and which bears notice of incapacity and tutelage on its face. A mere artificial minority — *i. e.* one extended beyond the time of natural immaturity, and bearing on its face no notice of incapacity — will not, as has been already seen, be thus protected.[1]

Not permitted in case of artificial minority.

The power of the guardian to change the ward's domicil has been previously discussed.[2]

justified by the allegation that comity may, in both instances, require you to clothe the foreign officer with the power necessary for the execution of his office in the foreign country, but that in both instances the state has a right to take care that its own subjects are not debarred from an opportunity of vindicating their claims upon the *property* in the country wherein it, movable or immovable, is situate."

That a foreign guardian of a minor will be appointed in England to act in subordination to the English law in controlling the person of the minor, see Nugent *v.* Vetzera, L. R. 2 Eq. 704; Di Savini *v.* Lousada, 18 W. R. 425. In the latter case an Italian court appointed guardians for an Italian infant, who, on removing to England, was made a ward in chancery. With the consent of the Italian guardians, he was placed in the custody of English guardians, who did not, however, carry out the directions of the Italian guardians. Upon this the Court of Chancery, on the application of the Italian court, appointed new guardians, and declared its readiness to carry out the orders of the Italian court with regard to the infant, so far as might be consistent with the laws of England.

In a much discussed English case, determined in 1854, a British subject was naturalized in New York, and there married a New York lady of fortune. Both parents died, leaving an infant daughter, who inherited the mother's estate. Attempts having been made to remove the child from New York, the Supreme Court of the state granted an injunction to restrain such removal. The surrogate of New York city appointed a maternal aunt of the child as guardian; but after this, and after the injunction, the child was surreptitiously removed from her residence, and brought to England by paternal relatives. In England, the maternal aunt claimed the custody of the child; and on a cross petition by the paternal relatives praying the appointment of other guardians, the court appointed the maternal aunt and two paternal relatives guardians. The reason of the decision was that the infant was domiciled in England, her father being held never to have lost his English domicil. Dawson *v.* Jay (1854), 3 D. M. & G. 764, per Lord Cranworth. See Lord Campbell's criticism in Stuart *v.* Bute, 9 H. L. 463; S. C., under name Stuart *v.* Moore, 4 Macq. 1; Bennett's Story, § 499 *a*. The authority of this case, however, is weakened by the rulings above given.

[1] Supra, §§ 104 *b*, 113, 116, 117.

[2] Supra, §§ 41–44.



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### 2. *As to Property.*

§ 265. The jurists of continental Europe are now agreed, that at least so far as concerns *movables* the power of the domiciliary guardian extends to foreign lands.[1] Whether such power is or should be recognized by the courts of England and of the United States has been the subject of the same struggle as has been noticed as existing in relation to the guardian's personal authority. Certainly the practice among us is to require a foreign guardian, before he can formally act, to take out fresh authority from the appropriate local tribunal (*forum gestae administrationis*).[2] "Few decisions," says Judge Story,[3] "upon the point are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded on the close analogy of the case of foreign executors or administrators." And he justly states that "no foreign guardian can *virtute officii* exercise any rights, or powers, 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."[4] And under the English practice it is within the discretion of the court to determine under what conditions property, under the control of the court, will be given to a foreign committee.[5]

Foreign guardian cannot seize ward's effects without local authority.

[1] See Savigny, viii. § 380; Bar, §§ 105, 106.

[2] Curtis *v.* Smith, 6 Blatch. C. C. 537; Noonan *v.* Bradly, 9 Wal. 394; Young's Succes. 21 La. An. 394; Stephens' Succes. Ibid. 497; Woodworth *v.* Spring, 4 Allen (Mass.), 321.

[3] § 504 *a*.

[4] As to administrators, see infra, §§ 606–608.

[5] Morgan, in re, 1 H. & T. 212; Stark, in re, 2 M. & G. 174; Garnier, in re, L. R. 13 Eq. 532.

In Westlake (ed. of 1880, p. 49), it is stated that "the guardian, curator, or committee of the estate, either appointed by the personal jurisdiction, or holding the office without judicial appointment, can sue and give receipts in England for the personal property of his minor or lunatic."

To this he cites Newton *v.* Manning, 1 M. & G. 362; Elias, in re, 3 M. & G. 234; Baker, in re, L. R. 13 Eq. 168, in lunacy cases; and in cases of minors, Gambier *v.* Gambier, 7 Sim. 263; Mackie *v.* Darling, L. R. 12 Eq. 319. But see Watkins, ex parte, 2 Ves. Sen. 470.

In Pennsylvania, a foreign guardian



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§ 266. An ancillary guardian appointed in a foreign state, and giving bond there, is not bound to account in the court of the ward's domicil for funds received in such foreign state.[1] He accounts to his own court, which thereupon makes the proper order.[2]

Ancillary guardian to account to his own court.

§ 267. Much discussion has been had as to what court is to determine as to the sale of the ward's foreign assets. Even among those who insist most strongly on the general applicability of the ward's *lex domicilii*, there are those who hold that when it comes to the alienation of foreign assets, an exception is to be made, for the reason that this concerns the ward's property, not his person. Of this view are Argentræus,[3] Burgundus,[4] Molinæus,[5] Merlin,[6] and Burge.[7] On the other hand, Savigny argues that as laws regulating the sale of a ward's estate are for his special protection, the court of his domicil, which is familiar with his case, is the one most competent to so mould and apply these laws as best to supply his wants and promote his interests; and that the court of the domicil, therefore, should control such matters, even as to foreign assets. In accordance with Savigny are Rodenburg,[8] Bouhier,[9]

Foreign law as to sale of assets not ubiquitous.

cannot act without a specific appointment by the Orphans' Court, on due security being given. Colesbury's Est. 1 Phila. 300; Rice's Est. 9 Weekly Notes, 255.

In Indiana it is held that a court with chancery jurisdiction may order assets of a ward to be given to a foreign guardian when having natural claims to the office. Earl *v.* Dresser, 30 Ind. 11.

When goods are ordered by a chancellor to be delivered to a foreign guardian, it will be under such conditions as will conduce to the ward's protection. Dawson, ex parte, 2 Bradf. 130; McNeely *v.* Jamison, 2 Jones Eq. 186; Andrew's Heirs, 3 Humph. 562; Leverich *v.* Adams, 15 La. An. 310. See Stephens *v.* James, 1 M. & K. 627.

[1] Smoot *v.* Bell, 3 Cranch C. C. R. 343. See, as to the analogous case of administrators, infra, § 616.

[2] The Prussian Code prescribes that a change in the ward's domicil shall work no change in the management of the guardianship of the estate. This, however, has been held not to apply to a permanent emigration to a foreign land, which requires a special order of the tutelary court (die obermundschaftliche Genehmigung). A. L. R. Einl. § 85; Mannkopf, das Pr. a. L. R. Bd. 7, 8, 16.

[3] No. 19, 20.

[4] I. § 6.

[5] L. i. C. de S. Trin.

[6] Rép. Majorité, § 5.

[7] II. p. 270; i. p. 14.

[8] I. 3, § 7.

[9] Chap. 24, No. 10.



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Walter,[1] Stockmans,[2] and Bar.[3] Express decisions to the same effect have been given in Berlin by the courts of last resort.[4]

The French Code is such as to make an interference of a foreign court in a French guardianship peculiarly difficult. In the case of a proposed sale of the ward's real estate, it is required that a family council should be convened, to discuss the question under the superintendence of the *Juge de paix* of the domicil of the minor.[5] Of course this could not be done under the *lex rei sitae*, when the estate is in a foreign land. And yet, according to the French view, the deliberations of a family council are essential to the preservation of the true interests of the ward.[6]

§ 268. The English rule that, as to real estate, the *lex rei sitae* must govern, and that the guardian cannot intermeddle with land without the sanction of the local court, is too deeply settled in the English common law to be shaken.[7] As to personalty, he may make himself liable on his bond for money received by him in a foreign jurisdiction.[8]

By English common law *lex rei sitae* controls.

### III. PECULIARITIES IN CASES OF LUNATICS AND SPENDTHRIFTS.

§ 269. A lunatic differs from an infant in this, that a lunatic is capable of inflicting peculiar mischief, from the fact that his disease may be latent as well as dangerous; and hence the reason for the interposition of the authority of a court of residence, as distinguished from a court of domicil, applies to lunatics with even greater force than to infants. It is also to be observed that lunacy is a fluctuating state; that a man may have been held insane last year in England who this year is sane in France; and that a man may be this year insane in France who last year was decreed to be sane

Foreign guardian of lunatic may act with local sanction.

[1] § 46.

[2] Decis. Brabant, decis. 125.

[3] § 106.

[4] Bar, § 106.

[5] Arts. 406–457.

[6] Lawrence, sur Wheat. iii. 170.

[7] Phil. iv. 383; Story, § 500; Westlake, § 402; though see Brooke *v.* Potowmack Co. 1 Cranch C. C. 526.

[8] U. S. *v.* Nicholls, 4 Cranch C. C. 191; U. S. *v.* Bender, 5 Ibid. 620.

How far a guardian may change his ward's domicil has been already considered. Supra, §§ 41, 42.

In England it has been ruled that an English legacy to an infant domiciled abroad may be paid when the infant comes of age by the law of England, or of the domicil, whichever first happens. Hellman, in re, Law Rep. 2 Eq. 363.



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in England. It would be therefore impracticable to give absolute effect to a foreign decree of lunacy, and it is settled in England that a foreigner will not be treated as a lunatic without an English commission.[1] It may also be necessary to appoint a local guardian for a resident but non-domiciled lunatic who may have a guardian already appointed in his domicil. At the same time, when an application is made for such an appointment, the local court (following the rule already laid down as to infants) will appoint, unless there be grave objections, as such guardian, the guardian of the domicil. And where there is no application for a local guardian, the guardian of the domicil may sue for the lunatic's assets.[2] But no English procedure, based on special

[1] Houston, in re, 1 Russ. R. 312.

[2] Newton *v.* Manning, 1 M. & G. 362; Elias, in re, 3 M. & G. 234; Baker, in re, L. R. 13 Eq. 168; though see Houston, in re, 1 Russ. 312. Comp. Garnier, in re, L. R. 13 Eq. 532.

That a foreign guardian in lunacy will be sustained in his authority over the person of the ward, in acts in conformity with the law of England, see Sottomaier, in re, 9 Ch. Ap. 677 (1874); Westlake, 1880, p. 48. See supra, § 265. As to practice in ancillary guardianships, see Com. *v.* Rhoads, 37 Penn. St. 60.

A remarkable case, cited by Sir R. Phillimore, shows that the French courts are not always ready to apply to the subjects of other lands the same rule of domicil which the French Code claims for Frenchmen when residing abraod. Mr. Dyce Sombre, after due examination under the direction of the lord chancellor, had been found a lunatic, and had been committed to the care of guardians. From these he escaped to France, and, having there declared himself to be sane, invoked the aid of the local authorities. "He was claimed by the agent of the committee appointed by the English lord chancellor; but the French authorities refused to give him up; tried the case over again at Paris, causing him to be inspected by French physicians, and, on their verdict of his sanity, allowed him to live in France without restraint. The English court, of course, retained possession of his property." Phil. iv. 386. Sir R. Phillimore remarks that "it is certainly difficult to defend this proceeding at Paris upon the principles of international comity." It certainly is difficult to defend it on the principles of the French law, which hold that the court of the domicil should, at least in all matters personal, be the court of superior authority, as to any foreign wards it may find within its bounds. Supra, § 261. But not widely differing from the case just cited is a decision of the lord chancellor, in the case of a person who was declared a lunatic in Jamaica, the place of his domicil, and who, under the care of a committee duly appointed by the proper court, was brought to England for his health. The lord chancellor, on the application of an illegitimate sister of the lunatic, treated the Jamaica committee as without authority, and issued a new commission to place the lunatic



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legislation, can be applied to a foreign committee or guardian of a lunatic, without express words giving such power.[1]

§ 270. Spendthrifts, under the rules of the Roman jurisprudence, may be specially placed under guardians; and this principle is incorporated in several modern codes.[2] According to the views of Fœlix, a decision to this effect by the court of domicil should be binding in all other lands.[3] In the celebrated case of the Duke of Brunswick, however, this view was not taken by the French courts, who refused to give effect to the decrees of the court of domicil, placing the duke under a curator, on the ground (1.) that such decree was made without proof of the *private* prodigality required by the French law; and (2.) that the proceeding, having a public and political aspect, could not have extra-territorial effect.[4] So far as concerns the United States, decrees of this class cannot be regarded as extra-territorially binding. They are made often on what we would consider absurd grounds;[5] and they conflict with a policy essential to our national growth, that business capacity should be subject to no foreign artificial restraints.[6]

Decrees as to spendthrifts not extra-territorially binding.

under English control. Houston, in re, 1 Russ. R. 312.

The law with regard to the domicil of lunatics is discussed in a former chapter. § 52.

[1] Westlake, *ut supra*.

[2] See, as to France, Code Civil, xi. c. ii. 489–492; Rogron, Code Napoléon expliqué, i. pp. 375–489. As to Massachusetts and New Hampshire, see Metc. on Cont. 95, 96.

[3] Fœlix, §§ 33, 89.

[4] Pütter, § 63; Phil. iv. p. 386.

[5] Supra, § 122.

[6] See supra, § 101.

Whether in Italy the courts are held to have power to "interdict" foreigners, see Jour. du droit int. privé, 1876, p. 213. As to Switzerland, see Ibid. p. 231.

As to France, the editor of the Journal du droit int. privé states that in such matters the French rule is not settled; a great number of decisions being based on reasons of little solidity, and confusing ideas essentially distinct, such as the jurisdiction of the court and the law the court is to apply, or the enjoyments of civil rights and personal *status*.

Simple residence by a party in a place gives the courts of such place jurisdiction, as a matter of police security, to appoint a guardian for him in case of his incapacity. Jour. du droit int. privé, 1876, pp. 215, 216.

That trustees under an English marriage settlement are not recognized in France is ruled by a judgment of the Tribunal of Commerce of the Seine, 1868. Lawrence sur Wheat. iii. 173.

The French law that a spendthrift, whose business capacity has been interdicted in France, except in cases where he acts with a *conseil judiciaire*, does not follow the party to England so as to limit his business capacity



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And what has been said as to lunatics applies still more strongly to spendthrifts. It by no means follows that a man who was a spendthrift a year ago in his European home will be a spendthrift after he emigrates to one of our Western States. Here, at least, with maturer years, and new surroundings, he should have a chance to reform.

there. Worms *v.* de Valdor, 41 L. T. 791 ; 28 W. R. 346; Westlake (1880), errata, xxv.



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# CHAPTER VII.

## LAW OF THINGS.


I. When Things become the Subject of Property.

*Lex rei sitae* decides whether a particular thing is the subject of property, § 272.

II. Immovables.

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Under Roman law immovables so governed, § 273.

So by English common law, § 274.

Bankrupt, insolvent, and lunatic assignments do not operate on foreign immovables, § 275.

Prescription regulated by *lex situs*, § 275 *a*.

And so as to establishing of liens, § 275 *b*.

So as to money representing land, § 275 *c*.

So as to land passing in succession, § 275 *d*.

So as to alienage, § 275 *e*.

Local laws as to registry must be complied with, § 275 *f*.

Exception where all parties to collateral contract are bound by another law, § 276.

Claims not affecting title governed by personal law, § 276 *a*.

2. *Reasons for Rule.*

Tenure of land to be governed by national policy, § 278.

So as to questions of mortmain and monopoly, § 279.

So as to questions of alien's settlement, § 280.

Incumbrances can only be so determined, § 281.

From the nature of things *lex rei sitae* must decide, § 282.

No other arbiter possible, § 283.

Merchantable value depends on assertion of rule, § 284.

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Immovables include all interest in land, § 286.

Distinguishable in this respect from real estate, § 287.

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Sale by administrator or trustee must accord with *lex situs*, § 289.

When jurisdiction may be taken of injury to foreign land, § 290.

5. *Liens on Immovables.*

Such liens determinable by *lex rei sitae*, § 291.

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When lien covers undivisible estate in two states, § 292 *a*.

6. *Limitations on Alienation.*

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Realty passing by descent or marriage governed by same law, § 294.

8. *Forms of Conveyance.*

Forms of conveyance prescribed by *lex rei sitae*, § 295.

9. *Capacity to acquire and convey; Alienage.*

Capacity to acquire and convey limited by *lex rei sitae*; alienage so determined, § 296.

III. Movables.

1. *Governed by lex rei sitae.*

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Modern authority tends to *lex rei sitae*, § 298.

This a necessary tendency, § 299.

Savigny holds there is no difference in this




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respect between movables and immovables, § 300.
He concedes that goods in transit cannot be governed by *lex rei sitae*, § 301.
Fixtures and heirlooms he holds to be immovables, § 302.
He maintains that wherever there is location, the *lex situs* controls, § 303.

2. *Reasons for Rule.*

Required by policy of sovereignty, § 305.
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*Situs* the necessary arbiter, § 307.
To invoke *lex domicilii* involves a *petitio principii*, § 308.
Maintenance of values depends on ubiquity of rule, § 309.
Title *in rem* only acquired in *situs*, § 310.
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3. *Liens determined by lex situs.*

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As to mechanics' liens, *lex situs* prevails, § 321.
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Rule questioned by Story, § 336.
Sustained by Savigny, § 337.
And by Guthrie, § 338.
And by Bar and Wächter, § 339.
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Early English and American *dicta* indefinite, and based on misunderstanding of terms, § 343.
Analogy from succession inapplicable, § 344.
In England *lex situs* now determines title, § 345.
So in the United States: New York, § 346.
Maine, New Hampshire, and Vermont, § 347.
Massachusetts, § 348.
Connecticut, § 349.
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Kentucky and Alabama, § 351.
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Creditor's domicil, which is the prevailing view, § 363.
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A judgment between such parties does not affect third parties, § 370.
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9. *Forms of Assignment.*

Forms of assignment governed by *lex situs*, § 372.
And so as to movables regulated by local law, § 373.
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By Roman law prescription must be definite, § 379.
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2. *England.*

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Foreign bankrupt assignments not extra-territorial, § 390.
So as to compulsory insolvent assignments of other states, § 390 *a*.
Foreign receivers subject to same rules, § 390 *b*.

## I. WHEN THINGS BECOME THE SUBJECT OF PROPERTY.

§ 272. Whether a thing is or is not the subject of property, as in the case of waifs, treasure trove, and animals found dead, and if it be, who is the owner, is to be decided by the law of the place in which the thing is found.[1] When such things are claimed by a foreigner, having a domicil in another territory, it would be begging the question to assume that the law of his domicil, when such claim is in litigation, is to prevail. Assuming the law of his domicil, because he is owner, is assuming his ownership, which is the point at issue. Consequently, the *lex situs* has in such cases been acknowledged, even by those who, in other matters, reject this law as inapplicable to things personal.

*Lex situs* decides whether a thing is property.

[1] Bar, § 64; Savigny, viii. p. 183. ii. § 3; Whart. Crim. Law, 8th ed. § See Lawrence's Wheaton, pt. ii. c. 863.



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## II. IMMOVABLES.

### 1. *Governed by the lex rei sitae*

§ 273. Jurists of all schools, and courts of all nations, are agreed in holding that land is governed by the law of the place where it is situated. The ancient Roman jurists, it is true, did not recognize this forum;[1] but it gradually crept into recognition, and finally received settled acceptance. The plaintiff, according to the Roman practice, was entitled to bring suit either in the *forum rei sitae*, which was the special court, or in the *forum domicilii*, which was the one in which the defendant was generally responsible. But the fluctuation and confusion which arose from the applicability of two distinct systems of law to one subject led ultimately, in all suits concerning immovables, to narrow the law to that of the *forum rei sitae*. Nor was the necessity, in matters so important, of having a single settled standard, the only cause which led to this exclusion, in such controversies, of any other law than that of the place where property in litigation was situated. Several persons, with as many domicils, would contest the title to such property; and if the law of domicil were to prevail, there would be as many laws to be applied as there were litigants. The only alternative, therefore, would be to accept as a permanent rule the *forum rei sitae*. This is the view accepted as to immovables by the leading jurists of continental Europe, both ancient and modern.[2]

Under Roman law immovables governed by *lex situs*.

§ 274. So far as concerns England and the United States, real estate, to adopt our distinctive phraseology, in all jurisdictions, and by an uninterrupted current of authority,

So by English

[1] Vatic. Fragm. § 326; Savigny, viii. § 366.

[2] Massé, p. 93; Fœlix, i. p. iii. (No. 61); Mailher de Chassat, No. 63; Bouhier, ch. 24, No. 177; ch. 29, No. 2; Vattel, ii. ch. 8, §§ 103, 110; Merlin, Rép. Vo. Biens, § 20; Vo. Loi. § 5; Argentræus, No. 31; Burgundus, i. 41, 42; iv. 26; Boullenois, i. p. 121; Pothier, Des choses, § 2, No. 3; Mittermaier, § 31; Savigny, viii. p. 169; Bar, §§ 57, 59; Schæffner, pp. 65, 82; Wächter, ii. pp. 199, 200; Mevius, in Jus. Lub. prolog. qu. 6, § 10; P. Voet, De statut. lib. ix. c. i. No. 2; Jo. a. Sande Decis. iv. tit. 8, defin. 7; Eichhorn, § 36; Thöl, § 84; Fiore, § 337.

The Jour. du droit int. privé, 1874, pp. 253, 256, cites two remarkable cases where this rule was enforced in Spain and Mexico.



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common law as to real estate.

is held to be subject to the *lex rei sitae*. To cite cases to this point would be superfluous. It is sufficient to give a few illustrations.

Bankrupt, insolvent, and lunatic assignments do not operate on foreign immovables.

§ 275. A bankrupt assignment in England does not pass the bankrupt's immovables in Scotland; nor, according to later authorities, will the court in any way compel the bankrupt to make an assignment of such immovables to his bankrupt assignee.[1]

It has also been repeatedly held that a general assignment, executed under the insolvent laws of one state, for the benefit of creditors, of all the assignor's estate, real and personal, does not, unless conforming to the *lex situs*, carry his real estate situate in another state.[2] And a voluntary conveyance of land by an insolvent, though good in the place of execution, will not hold against creditors unless good by the *lex situs*.[3] The guardian or committee of a foreign lunatic, also, has no authority over the lunatic's home real estate.[4]

[1] Cockerell *v.* Dickens, 3 Mo. P. C. 98, 134; Selkrig *v.* Davies, 2 Rose, 97; 2 Dow, 230, in this respect qualified. See infra, §§ 391, 798.

[2] Infra, § 390 *a;* Osborn *v.* Adams, 18 Pick. 247; Hutcheson *v.* Peshine, 1 C. E. Green (N. J.), 167; Mosselman *v.* Caen, 34 Barb. 66; McCullough *v.* Roderick, 2 Hammond, 234; Rodgers *v.* Allen, 3 Ohio, 488. But see Lamb *v.* Fries, 2 Penn. St. 83.

[3] Infra, §§ 334 *et seq.*, 391; Cutter *v.* Davenport, 1 Pick. 81; Osborn *v.* Adams, 18 Pick. 245; Van Nest *v.* Yoe, 1 Sandf. C. 43; Houston *v.* Nowland, 7 Gill & J. 480; Wood *v.* Parsons, 27 Mich. 15; Loring *v.* Pairo, 10 Iowa, 232.

Lewis *v.* Barry, 72 Penn. St. 18, may be thought an exception to the rule. In that case H., domiciled in Pennsylvania, owning real estate there and in Maryland, executed in Maryland an assignment for creditors to B., of *all* his estate, with preferences; but being advised that it was void as to the Pennsylvania estate, he, the next day, made an assignment there to L., reciting the first; this was recorded immediately; the first was not recorded within thirty days. L. received the rents and sold the real estate in Pennsylvania. It was held, that the deed to him passed nothing, and that B. was entitled to the balance in his hands. It was also held, that the deed to B. passed all H.'s real estate in Pennsylvania for the benefit of creditors without preferences, and that as to creditors both assignments were void; so that the land could be sold under judgments against H., — B. claiming and receiving from L., validated, it was held, L.'s sale. It was further held, that the money received by B. from L. was to be distributed according to the laws of Pennsylvania. Now in this case, so far as the Maryland assignment was held good, this was because it was validated by Pennsylvania law.

[4] Grimwood *v.* Bartels, 46 L. J. (N. S.) Ch. 788; Perkins, ex parte, 2 John. C. 124.



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Prescription governed by *lex situs*.

§ 275 *a*. The terms of prescriptive title are settled by the *lex situs*.[1]

So as to establishing of liens.

§ 275 *b*. No lien can be established on land except by the court of the *situs*.[2]

So of money representing land.

§ 275 *c*. Money into which immovables, by action of law, are converted, and which represents such immovables, is governed by the *lex situs*.[3]

§ 275 *d*. In respect to succession, the same rule obtains.[4] In an English case, in 1846,[5] it appeared that an estate in Sicily was granted to an English subject, which he disposed of by his will, upon certain trusts; it was held, that as he could not subject his successor to a course of succession different from that which accorded with the grant and the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations different from the duties and obligations which by the grant and the law of Sicily were annexed to his holding.

So as to succession.

As we have already seen, the English laws of legitimacy have been ruled, in England and the United States, to exclude from the inheritance of real estate parties not born in marriage, though legitimated abroad.[6]

So as to alienage.

§ 275 *e*. When the right of an alien to hold land is in question, the prevailing law is that of the *situs*, and not that of the alien's domicil.[7]

Local laws as to registry must be complied with.

§ 275 *f*. It is scarcely necessary to say, that when the *lex situs* makes the validity of a document to depend upon a certain mode of acknowledgment and registry, those conditions must be complied with. Their omission cannot be made good by the most solemn modes of attestation and registration adopted by the state from which the document emanates.[8]

[1] Beckford *v.* Wade, 17 Ves. 87; Pitt *v.* Dacre, L. R. 3 Ch. D. 295. Infra, § 378.

[2] Norris *v.* Chambres, 29 Beav. 246; 2 D., F. & J. 583; Boyce *v.* Grundy, 9 Pet. 275. See infra, § 291.

[3] Forbes *v.* Adams, 9 Sim. 462; Lewis *v.* Barry, 72 Penn. St. 18.

[4] Infra, § 560.

[5] Nelson (Earl) *v.* Bridport (Lord), 8 Beav. 547; 10 Jur. 1043.

[6] Supra, §§ 242 *et seq*.

[7] Supra, §§ 17, 123.

[8] Kerr *v.* Moon, 9 Wheat. 565; U. S. *v.* Fox, 94 U. S. 315; Goddard *v.* Sawyer, 9 Allen, 78; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252; Donaldson *v.* Phillips, 18 Penn. St. 170; Lewis *v.* Barry, 72 Penn. St. 18, and



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§ 276. To the proposition, however, of the exclusive authoritativeness of the *lex situs*, there has been introduced a modification which will be considered more fully hereafter, when the law as to movables is reviewed.[1] This modification rests on the position ably maintained by Savigny, that jurisdiction is founded on consent. The consent of the owner, he argues, places his property in a particular state, and subjects that property to the law of such state. The consent of the individual, in electing a particular land as his domicil, subjects him to the sovereign of that land, whose laws he thus adopts as binding on himself. Now when all the parties claiming a certain piece of real estate are of one domicil, they may be viewed, in accordance with this principle, as electing such domicil to govern them in relation to such real estate. In accordance with this view it was held, in 1868, in Missouri, that an assignment executed in New York, which was good in New York, but would have been bad in Missouri, was capable, after being duly executed and acknowledged, in accordance with the Missouri laws, of passing real estate in Missouri, as against an execution creditor, who was a citizen of New York. The case was put on the ground that the party contesting the New York assignment was himself subject to the New York jurisdiction. "It never could be endured," said Wagner, J., "that a foreign assignment, made directly in opposition to our legislation, should have the effect of giving an advantage to non-resident creditors to the injury of our own citizens. But as the case presents no such question, we think comity requires and justice will be subserved by holding the assignment good according to the law of the place where it was executed."[2] A similar

Exception where all parties to collateral contract are bound by another law.

other cases cited Whart. on Ev. § 1052. As to assignments on corporation books, see infra, § 376.

The common law rule prescribing that suits affecting title to real estate must be brought in a court of the *situs*, being a principle of international law, has not been affected by the English Judicature Act. Foote's Priv. Int. Jur. p. 258.

[1] Infra, § 369. As to control over foreign real estate by compelling assent of owner, see infra, § 283.

[2] Thurston *v.* Rosenfield, 42 Mo. 474. See Bryan *v.* Brisbrin, 26 Mo. 423. But here all that could have passed was the assignor's title in such land, simply as against the particular execution creditor. The land would have still been open to attack by a creditor domiciled in Missouri, notwithstanding such assignment.



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decision was given by the Supreme Court of Indiana in 1877. In this case a deed made between domiciled citizens of Indiana, of land situated in Missouri, contained no covenant of seizin except the words "grant, bargain, sell, and convey," which, by the laws of Missouri, implied a covenant of seizin, but by the laws of Indiana did not so imply. It was ruled by the Supreme Court of Indiana that the meaning of the controverted words was governed by the laws of Indiana.[1] And the verbal interpretation of an executory contract as to land in another state may depend on the law of the domicil to which both parties belong.[2]

Claims not affecting title governed by personal law.

§ 276 *a*. Whether a security given on immovables is governed by the *lex situs* of the immovables is to be determined by that law. If that law says, "This security is an alienation of the immovables," then the security is governed by the *lex situs*.[3] But where a claim may be sued on without affecting title, it is governed by the law applicable to contracts,[4] as is the case with an action for breach of covenant of quiet enjoyment.[5] And, as a general rule, contracts relating to immovables are governed by their own distinctive law, unless it is necessary to act directly on the immovables, in which case the *lex situs* prevails.[6] The remedy against a mortgagor can be pursued in any state in which he may be served; though the land cannot be proceeded against except in the *situs*.[7] Yet in England, when the parties are subject to the jurisdiction of the chancellor, bills to foreclose foreign mortgages have been entertained.[8]

[1] Bethel *v.* Bethel, 54 Ind. 428. See De Wolf *v.* Johnson, 10 Wheat. 368.

[2] Ibid.; Glenn *v.* Thistle, 23 Miss. 42.

That the law of the domicil of the parties is to determine the verbal interpretation of a contract as to real estate, while the *lex situs* determines the mode of its operation, see Westlake (1880), § 160; Holmes *v.* Holmes, 1 Rus. & M. 660.

[3] Infra, § 368; Westlake (1880), § 150, citing Johnstone *v.* Baker, 4 Madd. 474, note; Elliott *v.* Minto, 6 Madd. 16, and other cases; Watts *v.* Waddle, 6 Pet. 400; Brine *v.* Ins. Co. 96 U. S. 627; Goddard *v.* Sawyer, 9 Allen, 78.

[4] De Wolf *v.* Johnson, 10 Wheat. 368. Infra, § 368.

[5] Jackson *v.* Hanna, 8 Jones L. 188. Infra, §§ 292, 368.

[6] Infra, §§ 292, 368; Campbell *v.* Dent, 2 Moore P. C. 292.

[7] Jones on Mortgages, § 661.

[8] Paget *v.* Ede, L. R. 18 Eq. 118.



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### 2. *Reasons for Rule.*

§ 277. The following reasons, which may be suggested for this conclusion, are here stated in brief, and will be further examined when we reach the subject of movables.

Tenure of land to be determined by national policy.

§ 278. (*a.*) A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil. Thus in France, Switzerland, Norway, and Belgium, and the Rhine provinces of Prussia, the policy of the country encourages peasant proprietorship.[1] Under this policy large sections of these countries have been so exquisitely tilled as to become a garden, while a vast multitude of independent farmers have sprung up whose interests are coupled with the maintenance of stable government and the suppression of communism. To foster this system laws have been passed which prohibit primogeniture and entail, and promote subdivision. In England, on the other hand, a contrary policy prevails; and, on the assumption that the land is best tilled and its resources best brought out by large proprietorships, every facility is given to the massing of large estates, while, through the enormous expenses of conveyances, the multiplication of tenant proprietorships is checked. In England, title to land by occupancy is unknown; and if known would be discouraged. In the United States, so far as concerns our unsettled territory, it is stimulated, as tending at once to cultivate untilled land and to introduce a hardy population, whose interests, like those of the peasant proprietors of France, are conservative and not communistic or revolutionary.[2]

§ 279. (*b.*) In Italy and Austria, until very recently, the absorption of land in ecclesiastical foundations was favored. In England

[1] See Mills' Polit. Econ. vol. i. book ii. ch. v.

Mr. Mill bases the right of property in land on a different ground than that in movables. The owner of land has a morally just right only in so far as he is an improver of the soil. Land is, in its nature, a monopolized article, and the possessor of it, accordingly, owes certain duties to the community. These duties the territorial legislature alone can determine.

[2] The view of the text is adopted in Frierson *v.* Williams, 57 Miss. 451.



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and in the United States, on the contrary, such absorption is subjected to specific limitations. In France, in 1880, a policy of violent reaction set in, in accordance with which no ecclesiastical corporation, unless licensed by the state, is permitted to hold land even when necessary for educational purposes. In the United States such proscription of specific religious bodies, if not unconstitutional, is hostile to the sanction on which our whole system rests. It would be impracticable to apply foreign policies either of encouragement or of depression in this respect to the United States; it might be impossible to establish in Europe our principle of equal rights to all religious bodies. Between resident proprietorship and absentee proprietorship, also, the difference is great. By the latter, if permitted in large blocks, the prosperity of a country may be checked and revolution precipitated. Hence, laws regulating alien proprietorship [1] and determining farmers' tenure are peculiarly within the province of territorial policy. Between real and personal estate, also, there is this important distinction: The quantity of the former within any territory is limited; that of the latter is unlimited. The same antithesis exists between land and population. There can be only a certain quantity of land in a state, but the population can be indefinitely extended. The former, therefore, should be regarded as a trust for the latter.

And so as to questions of mortmain and of monopoly.

§ 280. (*c.*) No sovereign, adopting a settled policy of this order, can permit it to be invaded from abroad. Such an invasion, however, would take place, if home property should be purchased by foreigners, and then declared to be subject to the laws of the country in which such foreigners are domiciled. To prevent such an intrusion, even in its inception, laws have been adopted in most civilized countries, limiting the right of foreigners to take real estate. In the United States, it is true, this limitation has been very much relaxed, partly from the importance of reclaiming, as soon as possible, untilled land, and partly because no mere prohibition as to legal title can reach fiduciary estates. But the mischief is cured by the adoption of the rule *lex rei sitae regit;* whoever may be the owner, or wherever the contract was made, the law

And so as to the question of alien settlements.

[1] Supra, § 17.



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of the land reigns. No other law, either as to the transfer or control of property, is to intrude.[1]

§ 281. (*e.*) A person, as is argued with great force by Savigny, when purchasing property whose situation is in a particular land, purchases it subject to the charges, liens, duties, and other legal relations, which the local law imposes. It is true that this involves a *petitio principii* in a controversy with a hostile claimant; for the plaintiff's case, in a suit for possession, would be, that the *lex rei sitae* gave title because of the plaintiff's submission to it, and that the plaintiff had title because it was conferred on him by the *lex rei sitae*. But in a larger sense, viewing the land as an actor, the position seems unanswerable. Every article of property is subject to the law of the land where it abides. Whoever chooses to take it, chooses to take it subject to such law.

Incumbrances adjudicated by *lex rei sitae*.

§ 282. (*f.*) *Situs* must, from the very nature of property, be the arbiter. The mere continuance of a thing in a particular jurisdiction gives possessory title to it in that jurisdiction. The possessor can only be ejected by appealing to that jurisdiction.

*Lex rei sitae* must, from nature of things, decide.

§ 283. (*g.*) If the *lex rei sitae* be abandoned, there is no other law that can be invoked. The law of the owner's domicil cannot; because, first, the question generally is, who the owner is, which must be discovered before the law of his domicil is applied; and secondly, where there are two or more owners with different domicils, we must resort to an arbiter outside of the domicil of either to determine which domicil is to prevail. The *lex loci contractus* cannot avail; for, when a thing is contended for by parties claiming under hostile contracts executed in different countries, here, also, an umpire is required; and to assume that the *lex loci contractus* of either contract is to prevail is to assume the very point in dispute. The law of the court of process, unless it be the *lex rei sitae*, cannot; for in personal actions, such court can only sell a defendant's interest in the thing contended for, which interest may be nothing; and no proceedings *in rem* will lie, unless the thing be within the jurisdiction of the court.[2] The only alternative is the adoption of the *lex rei sitae*.

No other arbiter practicable.

[1] See supra, § 17; infra, § 305.

[2] Phil. iv. p. 542. Infra, § 308.



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§ 284. (*h.*) Unless the *lex situs* be enforced, property loses its merchantable value. No two countries agree as to the way in which purchasers are to be notified of incumbrances or of prior sales. In England, until comparatively recent years, there was no office for the registry of mortgages on realty; and even now, there is none in which hypothecations of movables may be recorded. In some of the States of the American Union, judgments are not liens on real estate until execution issues, and then the lien is limited to thirty days; in others, a judgment is a lien for six years from its entering; in one, at least (Maryland), for twelve years. If the *lex loci contractus* or the *lex domicilii* prevail, no person can purchase property with safety. Suppose the *lex loci contractus* be the test. It will be necessary, then, to search the records of every state in which any prior contract may have been executed; nor even then will it be possible to guard against prior tacit or unrecorded incumbrances which any prior owner may have assumed on his travels. Or, if the *lex domicilii*, which is the alternative usually presented, be taken, the difficulties are even greater. Wherever any owner or part owner, present or past, may have been domiciled, there an incumbrance could have been validly created. The only relief is the adoption of the *lex rei sitae*. By this is prescribed a field of exploration which is easily defined and as easily examined. No incumbrance exists on the land that the law of its situation does not indicate. A purchaser knows what is the law as to such incumbrances, and knows where they are to be found. He knows that, subject to this law, he can obtain a perfect title, which the law will defend to the end.[1]

Merchantable value depends on assertion of rule.

[1] Laurent, in the second volume of his treatise on le Droit civil international (1880), p. 299, after criticising the general proposition in the text, in relation to immovables, says: "Undoubtedly this is true, but it is true also of movable property; it is true of right (droit) in general." "Je l'ai dit et repété," he continues, "dans ces études; le droit est l'expression de la vie nationale, comme la langue. Est ce une raison pour imposer à l'étranger une langue qui n'est pas la sienne, et pour le soumettre à un droit qui ne répond pas a ses sentiments et à ses idées? La conséquence logique serai, me semble-t-il, de laisser à l'étranger sa langue et son droit." But we do not leave foreigners, when they come to us, the use of their language, so far as to make that language a legal instrument. If they are naturalized, their declaration and their oath have to be in English. If they acknowledge a deed, the acknowledgment has to be in English. If



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§ 285. (*i.*) An absolute title to a thing, whether movable or immovable, can only be made through a proceeding *in rem*.[1] But a proceeding *in rem* can only be instituted in a court of the *situs*.[2] It alone can give title.

### 3. *What "Immovables" include.*

§ 286. Immovables, so far as concerns the applicability of the rule which prescribes the exclusive authoritativeness of the *lex rei sitae*, include not merely the land itself, "but all dismemberments of the property in land, and the right to their enjoyment: as of servitudes; rent-charges; the property in the surface as severed from that of the subsoil, or *vice versa;* future estates, or particular ones limited in duration; rights of mortgage, pledge, or lien; the equitable ownership as distinguished from the legal, or *vice versa;* and if there be any other legal right in any way falling short of the entire dominion of the soil."[3] This is substantially the view of the modern Roman law.[4] They include all interest in land.

§ 287. It will be seen that interests in land less than freehold, mortgages, and leases, which, by the English common law,[5] are personalty, are immovables by the Roman Distinguishable

they sell property, either real or personal, by a document to be recorded, the formal parts of the document, in order to be effective, must be in English. That the argument in the text applies to such "movables" as are connected with the political interests of the estate (*e. g.* railroad and bank securities), I concede. But the consequence is, not that we must subject real estate to the *lex domicilii*, but that we must subject such personal estate as is distinctively territorial to the *lex rei sitae*. I should add that the difference between my learned critic and myself may be only verbal. He says: "S'il a des lois qui sont réellement fondamentales pour la police d'un état, comme Wharton le suppose, ces lois formeront, par cela même, un statut réel, et par conséquent l'étranger ne pourra pas leur opposer sa loi nationale. Il est donc donné pleine satisfaction aux intérêts vitaux de la société." The question, then, is whether laws regulating the title to real estate are laws of policy. Laurent admits that mortmain laws, and laws forbidding the massing of real estate for ecclesiastical purposes, are laws of policy. Why, then, are not laws prohibiting perpetuities, and laws requiring the registration of titles, laws of policy?

[1] Infra, § 664.

[2] Wheaton, i. p. 145; Story, §§ 551, 559; Bar, p. 214.

[3] Westlake (1858), art. 63.

[4] Merlin, Rép. de Jur. p. 119.

[5] Despard *v.* Churchill, 53 N. Y. 192.



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in this respect from real estate.

law.[1] Judge Story[2] gives a definition of immovables which leaves very little in the way of movables, so far as value is concerned, to which the owner's *lex domicilii* can attach. After classing with immovables "servitudes and easements, and other charges on lands, as mortgages and rents," he adds to the same category, "all other things, though movable in their nature, which, by the local law, are deemed immovable." This, then, leaves the question to the *lex rei sitae* to decide. Leaseholds, though personal estate by the English law, are yet regarded by English courts as immovables in their international relations.[3]

4. *Indirect extra-territorial Jurisdiction asserted over Immovables.*

Chancellor may compel party to do equity as to foreign immovables.

§ 288. Notwithstanding the rigor with which the English courts have applied the *lex rei sitae* to immovables, the Court of Chancery has claimed the right to compel parties, subject to its jurisdiction, to take specific action with regard to foreign real estate. Thus an injunction has been granted to restrain the prosecution of claims for such foreign realty;[4] specific performance of articles of agreement for the sale of foreign realty has been enforced;[5] and reconveyances and releases ordered of estates fraudulently acquired in foreign lands.[6] On the other hand, to quote from Mr. Westlake,[7] "the claim, to affect foreign lands, *must be strictly limited to those cases where the relief decreed can be entirely obtained through the parties' personal obedience; if it went beyond that, the assumption would not only be presumptuous but ineffectual.* Thus, a bill will not lie for partition of lands beyond the jurisdiction;[8] or to settle their boundaries;[9] nor can any equity be

[1] See Dr. Bruns' excellent dissertation in Holtzendorff's Encyclo. Leipzig, 1870, p. 240.

[2] § 147.

[3] Freke *v.* Carbery, L. R. 16 Eq. 461. See Despard *v.* Churchill, 53 N. Y. 192.

[4] Bunbury *v.* Bunbury, 1 Beav. 318.

[5] Archer *v.* Preston, cited 1 Vernon, 77; Boundaries of foreign estates have been adjusted by decree. Penn *v.* Baltimore, 1 Ves. 444.

[6] Arglasse *v.* Muschamp, 1 Vern. 75; Cranstown *v.* Johnstown, 3 Ves. 170; 5 Ves. 277.

[7] (1858) Art. 65.

[8] Carteret *v.* Petty, 2 Swans. 323, n.; 2 Ch. Ca. 214; Roberdeau *v.* Rous, 1 Atk. 543.

[9] Penn *v.* Baltimore, 1 Ves. 444,



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enforced by sequestration of such land;[1] nor, again, will the court try any question which, like the validity of a will in a foreign land,[2] does not involve a special equity between the parties, but is a general one affecting the land, and therefore solely dependent on the *lex situs*, on which law another tribunal than its own can only pronounce incidentally and not directly." Yet while direct action on foreign immovables is thus out of the range of judicial power, a court of equity, when it has a trustee or other defendant before it who cannot be compelled to do justice in any other way, will direct him, as a condition of his release from heavier penalties, to take certain action with regard to foreign immovables.[3] But in order to enable a court of equity to compel a party subject to such court to perform acts in reference to foreign real estate, there must be a fiduciary relation between the party on whom the decree acts, and the party asking for the decree.[4] And either the defendant must be domiciled within the jurisdiction of the court granting the relief, or the contract must be performable within that jurisdiction.[5] When these conditions exist, and when there is no other way of compelling the execution of a trust, or the prevention of fraud, a court of equity will direct a party subject to it to execute a deed in another state;[6] and such a decree will be regarded as binding the person

447, which is rather to be followed than Tulloch *v.* Hartley, 1 Y. & C. C. C. 114.

[1] 3 My. & K. 109.

[2] Pike *v.* Hoare, 2 Eden, 182.

[3] Story, § 545. Judge Story, in citing Cranstown *v.* Johnston, 3 Ves. Jr. 170, where the master of the rolls compelled a British creditor, within the jurisdiction of the court, to vacate a fraudulent purchase of real estate in the West Indies, says, "To the extent of this decision perhaps there may not be any well founded objection; and the same doctrine has been repeatedly acted upon by the equity courts of America." For this he cites Massie *v.* Watts, 6 Cranch, 148, 158; Ward *v.* Amedon, Hopkins R. 213; Mead *v.* Merritt, 2 Paige R. 402; Mitchell *v.* Bunch, 2 Paige R. 606.

[4] Harrison *v.* Harrison, L. R. 8 Ch. 342.

[5] See Blake *v.* Blake, 18 W. R. 944; Matthaei *v.* Galitzen, L. R. 18 Eq. 340; Norris *v.* Chambres, 30 L. J. Ch. 285; Rice *v.* Harbeson, 63 N. Y. 493.

[6] Muller *v.* Dows, 94 U. S. 444; Massie *v.* Watts, 6 Cranch, 148; Mead *v.* Merritt, 2 Paige, 402; Mitchell *v.* Bunch, 2 Paige, 606; Vaughan *v.* Barclay, 6 Whart. 392; McElrath *v.* R. R. 55 Penn. St. 189; McCurdy's App. 65 Penn. St. 291; Sturdevant *v.* Pike, 1 Ind. 277. See Wood *v.* Warner, 15 N. J. Eq. 81; White *v.* White, 7 Gill & J. 208.



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acted on by the courts of the *situs*.[1] But such an equity will not be enforced, if it conflicts with the prescriptions of the *lex situs*.[2] We must remember, at the same time, that the verbal interpretation of a contract for real estate may be governed by the place of the common domicil of the parties, and that they may be bound by the law of such domicil in respect to covenants not directly concerning the transfer of land.[3] And whenever jurisdiction is assumed over the owner of foreign immovables, on the ground that he is subject to equities imposed on him by parties under whom he takes, liability is to be determined by the *lex situs*.[4]

Sale by administrator or trustee of foreign real estate inoperative unless good by *lex situs*.

§ 289. But while a trustee, in order that equity may be done, will thus be ordered to make a sale in a foreign country, yet this sale is not regarded as a sale by the court, but a sale by the trustee, who proceeds according to the law of the *situs*. A direct jurisdiction over foreign immovables no court can assume. Thus a court of probate has no jurisdiction to direct an administrator to sell foreign real estate. Such real estate must be sold, if belonging to a decedent's estate, by order of a court of the *situs*. A deed not so executed is inoperative.[5] And a trustee appointed by the court of one state cannot pass title to real estate in another state.[6]

Exception as to injury to land in another state.

§ 290. An English court has no jurisdiction of injuries sustained by foreign real estate, even if the aggressor be a domiciled Englishman,[7] though it seems the parties may bind themselves by an agreement not to

[1] Burnley *v.* Stevenson, 24 Oh. St. 474.

[2] Westlake, § 64; Martin *v.* Martin, 2 R. & M. 507; Waterhouse *v.* Stansfield, 10 Hare, 259.

[3] Supra, § 276.

[4] Westlake (1880), § 165; Martin *v.* Martin, 2 Rus. & M. 507; Hicks *v.* Powell, L. R. 4 Ch. Ap. 741; Norton *v.* Land Co. L. R. 7 Ch. D. 332.

[5] Watkins *v.* Holman, 16 Pet. 26; McElrath *v.* R. R. 55 Penn. St. 189; Henry *v.* Doctor, 9 Ohio, 49; Blake *v.* Davis, 20 Ohio, 231.

[6] Williams *v.* Mans, 6 Watts, 278; Bingham's App. 64 Penn. St. 345.

The fact that mortgaged land belonging to a deceased person is situate in a particular state does not give the *judex rei sitae* jurisdiction to compel the executor, a citizen of another state, to pay such mortgage out of personal property situate in the latter state. Rice *v.* Harbeson, 63 N. Y. 493.

[7] 1 Smith's Lead. Cas. 781; Skinner *v.* E. Ind. Co. cited Cowp. 167; The M. Moxham, L. R. 1 P. D. 112.



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set up defect of jurisdiction.[1] In this country we have numerous rulings to the effect that an action for injuries to land must be brought in the state where the land is situated.[2] Hence an action for cutting down telegraph poles (regarded as part of the land) can only be maintained in the state where the offence was committed.[3] But it has been held that where a wrongful act is done in one state from which an injury to land accrues in another state, the defendant may be sued in either state.[4] And it has been also held that to exempt the defendant in an extra-territorial suit, the plaintiff's cause of action must rest on an injury to something attached to the realty, which is not the case when the thing injured is a movable fishing shanty.[5]

### 5. *Liens on Immovables.*

§ 291. It has already been stated that all interests in land, whether consisting of equitable interests, charges, trusts, or servitudes, — all interests, in other words, that may fall under the term *lien* in its most general sense, — are controlled by the *lex rei sitae* even in the opinion of those who would confine that law within the narrowest limit. Thus Judge Story declares, that "not only lands, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates, are deemed to be in the sense of the law immovables, and governed by the *lex rei sitae*."[6] The only way by which title can be made to such liens, or the only process by which such liens can be enforced, is that of the *situs*. Thus a Scotch heritable bond, charged on land, goes to the Scotch heir, and does not pass as personalty to the legatee by the cred-

Liens determinable by *lex situs*.

[1] The M. Moxham, *ut supra*. See, however, Foote's Priv. Int. Law, p. 390, where it is said that while by the old law, before the abolition of the rules in respect to venue, suits for injury to immovable property could only be brought in the jurisdiction within which such property was situate, since the abolition, by the Judicature Act, of the old rules as to venue, the question may be held to be open, citing the M. Moxham, L. R. 1 P. D. 107. Infra, § 711.

[2] Livingston *v.* Jefferson, 1 Brock. 203; McKenna *v.* Fish, 1 How. 241; Watts *v.* Kinney, 23 Wend. 484; 6 Hill, 82; Champion *v.* Doughty, 18 N. J. L. 3.

[3] Am. Un. Tel. Co. *v.* Middleton, Ct. Ap. N. Y. 1879.

[4] Rundle *v.* Canal Co. 1 Wal. Jr. 275. See, however, Worster *v.* Lake Co. 25 N. H. 525; and compare discussion infra, § 711.

[5] Rogers *v.* Woodbury, 15 Pick. 156. See infra, § 711, and articles on this topic in 22 Alb. L. J. pp. 47, 219.

[6] Confl. of Laws, § 447.



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itor's English will.[1] So the validity of a mortgage, as a lien on land, is to be determined by the laws of the place where the land is situate, although both the parties reside in another state.[2] Nor can a lien be imposed on foreign real estate.[3]

But law of contract may determine as to mere contract.

§ 292. The law, however, is modified when the pledge or mortgage of land is merely collateral and subsidiary to a personal contract of loan. In such case, while the mortgage or pledge cannot be enforced, or the land touched, except in the court having local jurisdiction, it is otherwise with regard to the contract, which is governed by the law of the place in which such contract has its proper seat. This principle has been applied in two distinct lines of adjudications. The first occurs when, by the *lex loci contractus*, a contract is illegal, or inoperative as to creditors, although it is secured by land in a country where the contract would have been legal; and in such a state of facts it has been ruled that the *lex loci contractus*, as to the contract, prevails.[4] So, also, the converse proposition may be accepted, that if the contract is good by the law of the country to which it is distinctively subject, it will not be invalidated by the fact that it carries with it a mortgage in a country where the transaction would not have been good against creditors.[5] The other line of adjudications, to which reference has been just made, arises when a loan, usurious by the law of the place to which the contract is subject, is good by the law of the place in which is situate land by which such loan is collaterally secured. In this case, it has been frequently determined that the law which rules the question of usury is that to which the contract is distinctively subject, and not that of the place where the land is situate.[6] A bond secured

[1] Johnstone *v.* Baker, 4 Madd. 474, n.; Jerningham *v.* Herbert, 4 Russ. 388. See Elliott *v.* Minto, 6 Madd. 16.

[2] Supra, § 276 *a;* Goddard *v.* Sawyer, 9 Allen (Mass.), 78. See infra, § 317. As to the law in respect to declaring liens, see supra. § 275 *b.*

[3] De Witt *v.* Burnett, 3 Barb. 89; Ainsley *v.* Mead, 3 Lans. 116. Supra, § 275 *b.*

[4] Richards *v.* Goold, 1 Molloy, 22; Pine *v.* Smith, 11 Gray (Mass.), 38. See infra, § 368.

[5] Hoyt *v.* Thompson, 19 N. Y. 207.

[6] Lloyd *v.* Scott, 4 Pet. 211; De Wolf *v.* Johnson, 10 Wheat. 383; Pine *v.* Smith, 11 Gray, 38; Cope *v.* Alden, 53 Barb. 350; 41 N. Y. 313; Dolman *v.* Cook, 1 McCarter (N. J.), 56; Andrews *v.* Torry, Ibid. 355; Atwater *v.* Walker, 1 C. E. Green (N. J.), 42; Newman *v.* Kershaw, 10 Wis. R. 333; Story, § 287 *a.* See infra, § 368.



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by mortgage, as has also been held, is taxable at the creditor's domicil, the mortgage being a mere collateral.[1] But a mortgage cannot be paid off or extinguished or assigned, except in conformity with the *lex situs;* and the *lex situs* must decide whether the contested act amounts to extinguishment or assignment.[2]

When lien covers indivisible estate in two states.

§ 292 *a*. When an indivisible estate (*e. g.* the bed of a railroad), situated in two or more states, is subjected to a single lien, the mode of sale, under process from a state court, is a matter involving serious difficulties. In South Carolina it has been held that under such circumstances the court in which a sale on tax procedure is ordered may direct a sale of the whole road, that part which is in the other state to be subject to the liens imposed in such state.[3] But although the franchise might be sold under such procedure, where the forum is the state chartering the road, and where such a sale is good under the local law, yet the title to any extra-territorial real estate belonging to the railroad must be conveyed according to the *lex situs*.[4]

### 6. *Limitations on Alienation.*

Limitations on alienation governed by *lex rei sitae.*

§ 293. So far as this concerns the capacity of owners to alienate, the topic belongs to a subsequent division. At present it is sufficient to say that all limitations or charges which the *lex situs* imposes are to be applied according to the construction of the courts of the *situs*.[5] Thus a Scotch will, executed for the benefit of a Scotch charity, cannot carry English lands contrary to the English mortmain

[1] Supra, §§ 79 *a*, 80.

[2] Wilkinson *v.* Simson, 2 Mood. P. C. 275. A *debt* may be assigned according to the law of the place of assignment, the parties there residing; and this was all that Judge McLean ruled in Dundas *v.* Bowler, 3 McLean, 397. Infra, § 375. Whether a mortgage was validly assigned must in such, as in all other cases, be referred to the determination of the courts of the *situs;* as by process from no other courts could such mortgage be foreclosed. See supra, § 276 *a*. See, as to collateral liability, Brown *v.* Knapp, 79 Y. N. 137.

[3] Hand *v.* R. R. 12 S. C. 316.

[4] See Jones on Mortgages, § 661. Supra, § 276 *a;* Railroad *v.* Jackson, 7 Wal. 262; Cooper *v.* Canal Co. 2 Murph. (N. C.) 195; Morgan *v.* R. R. 2 Woods, 244.

[5] See McGoon *v.* Scales, 9 Wal. 23; Lucas *v.* Tucker, 17 Ind. 41; Loving *v.* Pairo, 10 Iowa, 282.



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act;[1] and immovables are liable for a deceased owner's debts in the way the *lex situs* prescribes.[2]

### 7. *Immovables as affected by Operation of Law.*

Realty passing by descent or marriage governed by same law.

§ 294. The subjects that are here involved are distinctively considered under other divisions.[3] It is enough at this place briefly to say that in England, on grounds of territorial policy, persons who, though legitimate by the general principles of international law, would, if born in England, have been illegitimate, cannot inherit land.[4] On the continent of Europe, in general, a child legitimate by the law of his father's domicil at the time of birth is legitimate everywhere; and this may be accepted as the international rule.[5]

Marriage, in its transfer of property, must act, so far as immovables are concerned, in subordination to the *lex situs*.[6]

### 8. *Forms of Conveyance.*

And so of forms of conveyance.

§ 295. This topic is noticed in its special relation in a future section of this chapter,[7] and will be fully discussed in a subsequent chapter, under the head of *Locus regit actum*.[8] It will be seen that where the law of the place prescribes certain forms as requisite for transfer, such forms must be observed.

### 9. *Capacity to acquire and convey; and herein of Alienage.*

Capacity to acquire so limited; alienage so determined.

§ 296. There can be no question that as to realty, capacity is determined by the *lex situs*.[9] By some continental jurists, it is true, the *lex domicilii* is applied to immovables in cases of succession; but in England and America, even this exception is not recognized.[10] No persons can acquire or convey real estate except those whom the *lex rei*

[1] Curtis *v.* Hutton, 14 Ves. 537. See §§ 105 *a*, 297, 517.

[2] Benatar *v.* Smith, 3 Knapp, 143, note. See, also, Chapman *v.* Robertson, 6 Paige R. 630.

[3] As to legitimacy, see §§ 240–249; and as to the general questions arising under succession and marriage, see those heads.

[4] Supra, §§ 241, 250.

[5] See §§ 240 *et seq.*, 249.

[6] Jephson *v.* Riera, 3 Knapp, 130, 149; Story, § 454; Westlake, art. 94. See supra, § 190.

[7] Infra, § 372.

[8] See infra, § 676.

[9] Story, §§ 430, 434.

[10] Infra, § 332.



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*sitae* may recognize as capable for this purpose. Hence, the question whether a married woman, domiciled in Louisiana, can bind her Mississippi land by a note, is determined by the law of Mississippi, not that of Louisiana.[1]

Although the policy of laws limiting the right of aliens to hold real estate is open to exception,[2] it is conceded by Savigny that even as to matters of succession, positive territorial laws to this effect override the law of domicil. And he argues that of this character are local laws forbidding aliens to acquire real estate beyond a certain limit, or to engage in trade. So far as concerns real estate, this proposition has been universally accepted in England and America.[3] A person also, who is by the laws of his domicil of full age, and therefore capable of conveying real estate in such domicil, may execute a valid conveyance of such real estate when residing in a foreign state, in which he is a minor, and incapable of making such conveyance.[4]

### III. MOVABLES.

### 1. *Governed by lex situs.*

§ 297. In considering recent conditions operating to change the character of private international law it is important, in the first place, to notice the growing political and economical value of personal as distinguished from real property. The maxims *Mobilia personam sequuntur*, and *Mobilia ossibus inhaerent*, were originated by the mediæval jurists at a time when movable property consisted mainly of gold or jewels, which could easily be carried by the owner from place to place, or secreted by him in spots known only to himself. Even the terms "Personalty" and "Movables" speak the same thought: "Land is the only stable and independent element of property; the only thing that the territorial sovereign deems worthy of his care and protection; all other wealth is regarded as so insignificant as to be a mere incident of the owner's person, having no site of its own." Now, however,

Inapplicability of old law that movables are governed by *lex domicilii*.

[1] Frierson *v.* Williams, 57 Miss. 451.

[2] See supra, § 17.

[3] Sewell *v.* Lee, 9 Mass. 363; Buchanan *v.* Deshon, 1 Harr. & Gill, 280; Norris *v.* Hoyt, 18 Cal. 217. See infra, § 330, as to distinction between *taking* and *holding*. For a notice of the local laws in this respect, see supra, § 17.

[4] Sell *v.* Miller, 11 Oh. St. 331.



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the relations of the two kinds of property are reversed. The taste for the accumulation of land is rare and comparatively harmless. The modern tendency is to create multitudes of small proprietors, who, acting without concert, are most unlikely to combine in such a way as to intimidate or corrupt the governing powers. But it is otherwise with personalty. It is capable of being collected, by corporations, into enormous masses, whose power, vast as it is, and directed by a policy which may be at once constant, skilful, single, persistent, and secret, there are few governments which may be able continuously to resist. The old rules, therefore, distinguishing in this respect between *mobilia* and *immobilia*, fall with the reversal of the conditions from which they emanated.[1]

Modern authority tends to *lex rei sitae*.

§ 298. Among the early European jurists who held to this distinction may be mentioned Argentræus,[2] Rodenburg,[3] Paul Voet,[4] and John Voet,[5] who maintained as inviolable the subjection of movables to the owner's domicil. Nor has this opinion been wanting in distinguished defenders down to the present time.[6] It is asserted by Savigny, however, that the adhesion of these authors to this view is technical rather than real, and that the great weight of modern authority among the civilians is on the other side. As maintaining

[1] Infra, § 305. I have discussed this question more fully in the Southern Law Rev. for Jan. 1881, vol. vi. p. 689.

Fiore (Op. cit. § 199) unites in rejecting the distinction between real and personal estate, so far as concerns the applicatory law. There are no movables, he argues, notwithstanding the maxim *Mobilia ossibus inhaerent*, which adhere so to the person as to evade the *lex rei sitae*. That law has to determine what are, and what are not, *mobilia*. It must determine when a movable can be moved. It must decide between liens upon movables. It alone can issue an execution by which a movable can be attached. An exception is recognized in cases in which the place occupied by a movable is so accidental and momentary as to completely exclude the operation of the territorial law. This obtains in cases of baggage carried by a traveller in his transit over several territories, and of merchandise expressed by a merchant in a vessel belonging to him. In such cases, the law is that of the owner's domicil, because such goods cannot be regarded as in any particular territory.

[2] Num. 30.

[3] Tit. i. c. 2.

[4] Sect. 4, c. 2, § 8.

[5] § 11.

[6] Fœlix, i. pp. 72–75, 80; Demangeat, i. 111; Schäffner, §§ 54–56, 65–68; Story Confl. of Laws, c. 9, 10, &c.



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the latter view, — that movables as well as immovables are to be subjected to the law of their locality, — Savigny cites Mühlenbruch, Meissner, and Wächter, to whom may be added Bar and Schmid.[1]

§ 299. It is insisted, by the advocates of the latter opinion, that if it is the domicil of the owner which is to decide, it becomes a difficult and sometimes insoluble question to determine who this owner is. An action is brought to decide as to the ownership of a chattel. The litigants have different domicils; and if the article in dispute is to be subjected to the owner's domicil, the question as to who is the owner not being yet decided, the suit has to be stopped at the outset from inability to determine as to how it shall be tried. Then, again, if possession be the test, there may be several possessors, or persons claiming to be such, each with a different domicil, from which confusion almost equally obstructive would ensue.[2]

This a necessary tendency.

§ 300. But it is further denied, and especially by Savigny,[3] that there is any real difference between movables and immovables which should impress upon the one legal qualities utterly distinct from those of the other. In order to enforce his views on this point, this great jurist takes, by way of illustration, what he calls two cases at the opposite extremes.

Savigny holds there is no difference between movables and immovables.

§ 301. First, he calls attention to such movables as occupy so vague and shifting a *status* as to make their locality incapable of positive definition, so that in this way the idea of a voluntary submission to the local law by their owner is excluded. A traveller passes with his luggage through several countries in the course of a single day; and so it is with goods forwarded from country to country until they reach the distributing market. Now it is admitted by him that in such cases the *lex rei sitae* cannot be applied.

He concedes that goods in transit cannot be governed by the *lex situs*.

§ 302. At the opposite extreme are to be mentioned fixtures, viewing the term in its largest sense. The library of a country seat, for instance, or the gallery of pictures with which it is adorned, — these, in a cultivated com-

On the other hand, he holds fixtures and heir-

[1] Savigny, viii. § 366; Bar, § 57. App. A. to 1st ed. of this book.

[2] See, particularly, Wächter, i. pp. 292–298.

[3] Röm. Recht, viii. 366.



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looms to be immovables.

munity, attach themselves permanently to the domain, and can only, by the most attenuated of fictions, be supposed to wander with the owner's person. So, also, in a farming community, is it with the tools and other machinery which have been prepared for the working of a farm. Now, it is argued that there is no reason whatever for viewing such things as otherwise than immovable. They are not, in the eyes of the owner or of third parties, movable; all engagements made in reference to them contemplate an opposite assumption. Hence this class of goods is sometimes treated as governed by the law of the territory by authors who are most strenuous in applying the law of domicil to movables generally.[1]

He maintains that wherever there is location, there the law of the location determines.

§ 303. Between these two extremes is a wide range, including many gradations. Savigny mentions as illustrations, merchandise which the owner stores temporarily away from his domicil, and luggage which a traveller carries with him on a visit of considerable length to a foreign land. Now, whether these articles are governed by the law of domicil, or by the law of the place where they are deposited, depends in a large measure on the general question which has just been mentioned. How, in other words, are such articles to be alienated, and by what forms of law? A very short residence on the part of their owner, it is urged, is necessary to apply the *lex rei sitae* for this purpose, though it might be otherwise with the acquisition of title by prescription or occupancy. And as a general principle, he urges that the only safe and consistent course is to apply to all goods, except such as clearly travel with the owner, the *lex rei sitae*.

### 2. *Reasons for Rule.*

§ 304. The reasons for the applicability of the *lex rei sitae* to immovables have been already stated.[2] Let us, to apply this question more closely, examine how far the same reasons apply to movables.

The policy of sovereignty

§ 305. (*a.*) It has been already shown[3] that national preservation requires that no sovereignty should permit the dominancy on its soil of a foreign law. It can be well under-

[1] J. Voet ad Pand. i. 8, § 14. See Wächter, i. p. 296.

[2] Supra, § 297.

[3] Supra, § 278.



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stood how, at a period of society when almost all wealth consisted in land, and the appurtenances of land, this maxim should be coupled with property in immovables, on which alone, practically, it could operate. It can be well understood, also, how, when most movable property consisted in jewels and bullion, which could be packed up, and either concealed or carried with the owner, the rule *Mobilia sequuntur personam* should spring up; and as the owner was subject to the law of his domicil, such would also be the case with the movables which thus he held and moved as he moved himself. But now by far the greater wealth of a nation consists in its public loans and its railway and other securities. By the control of these a foreign sovereign could obtain at least as great political influence among us as by the control of land. By infusing foreign principles into the management of such securities, such foreign principles would enter at least as deeply into the vitals of the nation as they would if they were infused into the management of land.

requires the application of this rule.

§ 306. (*b.*) If a domiciled foreigner, in purchasing land, submits himself, so far as concerns the land, to the sovereign of the country where the land is situate, equally is this the case with one who purchases the public loans or stocks of such state, for these contribute at least equally to the wealth of the state, and wield at least an equal influence on its polity.

Purchase involves submission to local laws.

§ 307. (*c.*) As to such movables, *situs* is as necessarily the arbiter as is the case with immovables. It is by the local, the municipal, or the corporate law alone that the registry title to such movables can be made out. And on them the local statutes of limitation operate, as to adverse possession, even more sharply, and with more rapid strokes, than on land. So, also, local prescription, when it attaches, cannot be unseated by the removal of the movable to another state.[1]

*Situs* the necessary arbiter.

§ 308. (*d.*) To movables as well as to immovables applies the position that if the *lex rei sitae* be not accepted, there is no available decisive law. To invoke for this purpose the *lex domicilii* of the plaintiff is a *petitio principii.* The only ground on which such law can be adopted is that of the plaintiff's title, as to which it is the purpose of the

To invoke the *lex domicilii* is a *petitio principii.*

[1] See Waters *v.* Barton, 1 Cold. (Tenn.) 43. Infra, § 717.



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litigation to inquire. A domiciled Englishman, for instance, sues a domiciled Bostonian for chattels situated in Illinois. To say that the law of England is to determine the suit, because the plaintiff is domiciled in England, is to beg the very question on litigation, which is whether the plaintiff has any title at all. The same observation applies to the assumption that the defendant's domicil is to supply the applicatory law. This, also, assumes that the defendant is the owner, which is the very question the plaintiff contests. There is, also, the additional objection, that in this way, the issue of the applicatory law is made dependent on the form of the suit, and the absurdity would arise, that if on proceedings in error, or after transfer of property through execution, the original defendant becomes plaintiff, then the applicatory law is reversed. No less conspicuous is the failure of justice which would flow from the application of the *lex domicilii* to issues framed to determine which of several claimants is entitled to a particular article. Suppose, for instance, as to a bale of cotton stored in New York, there are two claimants, one domiciled in Louisiana, and the other in Massachusetts, states whose laws on the subject of hypothecation and of transfer are widely distinct. If there be an issue framed to determine as to which of these claimants has title, and if the *lex domicilii* is the exclusive judge, there could be no decision on any point in which the laws of Massachusetts and of Louisana differ, for we would have then a collision between two independent systems of law, each supreme, with no arbiter to decide which is to prevail. Because, therefore, the *lex domicilii* (1.) involves a *petitio principii*, and, (2.) is from its very nature incapable of deciding an issue between two or more claimants of distinct domicils, we must reject it as insufficient for the purposes for which it is here invoked. The *lex loci contractus*, as has been elsewhere shown, cannot decide, for, when a thing is contended for by parties claiming under hostile contracts executed in different countries, an independent umpire is required to decide which law is to be preferred. The law of the place of process cannot; for such law, unless it be the *lex rei sitae*, can only sell the defendant's interest in the litigated article. The remaining alternatives are to accept either the law of the domicil of the actual possessor of the thing in litigation, or the *lex rei sitae*. But the possessor may



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be a mere wrong-doer, or a trustee, or a stakeholder; and if his domicil happen to be in a foreign land, this would introduce, on grounds purely arbitrary, a foreign and often most inapplicable law. The only alternative, then, is the *lex rei sitae;* and this has the advantage of being the law to which the thing litigated is, by the very fact of its being deposited on the soil, at least tacitly committed by the parties.[1]

Maintenance of values depends on ubiquity of rule.

§ 309. (*e.*) Unless the *lex rei sitae* be enforced, property loses its merchantable value. If the fact that any prior owner of a share of railroad stock, or of any certificate of loan, was a domiciled foreigner, subjected such stock or loan to the law of the domicil of such foreigner, such stock or loan would cease to have a merchantable price. The same reasoning applies to all other movables, with the exception of those which from their nature follow the person, and which, during such possession, are subject to his domiciliary law.

Title *in rem* only acquired in *situs*.

§ 310. (*f.*) As to movables, as well as immovables, the English common law is explicit, that no absolute title can be given except by a proceeding *in rem*.[2] But a proceeding *in rem* can only be instituted and executed in a court of the *situs*. Such court may, it is true, accept a foreign law. But it does so by its own action, making such foreign law *pro hac vice* domestic, subject to the positive enactments of the *lex situs*. Nor, if the contrary view be maintained, will there be any security to the officers of the courts of the *situs*. This is well put by Mr. Justice Miller, in a case in 1868, before the Supreme Court of the United States. "If the judgment in the State of Illinois (on an attachment on goods in Illinois), while it protects all such persons against a suit in that state, is no protection anywhere else, it follows that in every case where personal property has been seized under attachment or execution against a non-resident debtor, the officer whose duty

[1] These considerations have already been noticed in connection with real estate. They apply still more forcibly to personalty, from the fact that personalty, as more easily transmitted from country to country, attracts to itself a greater variety of conflicting laws. In this view applies the maxim, *Vigilantibus et non dormientibus jura subserviunt.* Local claimants cannot complain if by want of vigilance they permit property subject to their local law to be carried away to another country where prevails another jurisprudence.

[2] Infra, § 664.



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it was to seize it, and any other person having any of the relations above described to the proceeding, may be sued in any other state, and subjected to heavy damages by reason of secret transfers of which they could know nothing, and which were of no force in the jurisdiction where the proceedings were had and where the property was located."[1] If a judgment *in rem* determines title, the same reasoning applies to the law of the *situs*, since a judgment is only a formal expression of the law of the *situs*.[2]

As will be presently seen, this reasoning does not apply to movables when gathered in a group, as they are in cases of succession and marriage, to which, from the necessity of the case, the law of domicil applies.

It will also be seen that when all the claimants to a movable are domiciled in the same country, and may therefore be viewed as consenting to the same municipal law, then, *so far as concerns their title* to the movable, there is authority to the effect that the law of this common domicil prevails.[3]

§ 311. The rule of international law, therefore, may be thus stated: —

Conclusion is that movables not in transit are governed by *lex rei sitae*, except for succession and matrimonial estate.

Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs;* though in some jurisdictions an exception may be made in cases where all the parties, being subject to a common domicil, are held to be bound by the laws of that domicil.

The extra-territorial effect of bankrupt assignments will be noticed under a future head.[4] It will be there seen that foreign bankrupt assignments are not extra-territorial in their effects, and that the same rule is applicable to compulsory insolvent assignments.[5]

§ 312. As a general rule, claims which are described by the modern Roman law as Real Rights, or Jura in Re, are subject to the law of the place where they territorially

In Roman law real rights

[1] Miller, J., in Green *v.* Van Buskirk, 7 Wal. 139.

[2] This is forcibly put by Westlake, 1880, § 140, citing Castrique *v.* Imrie, 8 C. B. N. S. 405; L. R. 4 E. & I. A. 414. See infra, §§ 664 *et seq.*

[3] See infra, § 369.

[4] Infra, § 386 *et seq.*

[5] Infra, §§ 390 *et seq.*



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exist. This is peculiarly the case with *Emphyteusis and Superficies*, which from their nature are confined to things immovable.[1] governed by *lex situs*.

### 3. *Liens determined by situs.*

§ 313. (*a.*) *Leases and Bailments.* — By the Prussian law, heirs or lessees or other bailees of goods have a real (or possessory) right to what is thus leased or contracted for, with an action *in rem* against strangers who may happen to be in possession, provided there has been a prior delivery to such bailees.[2] But as by the Roman law there is no such real right, a collision may arise when goods which have been thus leased, have been moved. According to Savigny, the real right applies when the thing, be it movable or immovable, is in Prussia at the time of delivery; but that it is otherwise when this delivery is in a country where the Roman law prevails. And so as to bailments.

But there is another case more difficult of solution. If movables be leased and delivery effected in Prussia, and the lessee carries the articles into a country where the Roman law prevails, the question arises whether the lessee has an action *in rem* against a third party in possession. This is denied by Savigny, on the ground that the claim rests upon a peculiar sanction foreign to the Roman law.[3] The contrary view is held by Bar,[4] on the ground that the common Roman law, supposed to be in force in the latter country, recognizes servitutal customary rights (servitutische Gebrauchsrechte) in particular things, which may be enforced against third parties in possession; but he admits that the position holds good in lands where the rule is "*Possession vaut titre.*"

§ 314. (*b.*) *Pledge or Pawn.* — A pledge or pawn (*Pfandrecht*) in the modern Roman law, according to Bar's definition,[5] is a real, or possessory right, to follow a thing in the hands of third parties, for the satisfaction of a personal claim. So as to pledges and pawns.

The old Roman Law of Pledge has the following peculiarities: When goods are pledged, even though there be no delivery, a

[1] Savigny, Röm. Recht, viii. § 368.
[2] Savigny, viii. § 368.
[3] Ibid.
[4] § 65.
[5] § 65.



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real right may be maintained against third parties in possession. The pledge may be implied and silent. In fact, in several classes of obligation, a pledge is feigned to exist as a sort of collateral security. Immovable as well as movable things may be pledged. A whole estate may be thus pledged, and in such cases the pledge covers not only what is on the estate at the time, but what may afterwards be added to it, even though the parties have, at the time, no knowledge of such addition.[1]

Among those European nations who accept the Roman jurisprudence as the basis of their common law, there are several new features introduced into this system. These new features principally concern the implied or silent pledge which is above referred to. Take, for illustration, the case of a country where the rule of the Roman law obtains, that an engagement to give a *dos* is accompanied by an implied though silent hypothecation of the covenantor's whole estate. Suppose that a person domiciled in this country enters at home into a contract of this nature with another person domiciled in the same country. If the debtor holds real (landed) estate in a second country, where the rule is not recognized, the point to be determined is whether this estate is subject to the lien above mentioned. According to Savigny, this is a question of fact, to be decided by the law to which the contract is subject. Since, however, by that law, the debtor's whole estate, including that in the second country, has been hypothecated, the latter is included in the lien.[2] On the other hand, if the dotal contract had been executed in the second country by persons domiciled in it, the hypothecation would not attach.

Prussian Code disallows secret pledges.

§ 315. But the Prussian Code, on this question of hypothecation, takes a position much in advance of the Roman law, and similar, in its discountenancing secret and implied liens, to the laws existing in the United States. A naked contract cannot, by the Prussian law, create a lien. To constitute a valid lien on immovables, there must be not only an express grant, but a registry in the Mortgage Records (Hypothe-

[1] Savigny, viii. § 368.

[2] Ibid., citing Meissner, Vom Stillschweigenden Pfandrecht, §§ 23, 24. This "Pfandrecht," giving as it does a lien on real estate, is an important branch of modern Roman law.



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kenbuch) of the appropriate office.[1] Now an agreement for the hypothecation of a specified piece of land is a title on which registration may be claimed; but this is not so with regard to a contract of hypothecation of a whole estate. And so, also, there can be no lien on movables, according to the Prussian law, unless accompanied with delivery.[2]

In Roman law hypothecation determined by *lex situs*.

§ 316. Supposing, then, an hypothecation is consummated, in a country where the Roman law obtains, by contract alone, this cannot cover with lien the debtor's property in Prussia; the furthest claim that it can give rise to is an equitable right to compel the delivery of an hypothecation duly executed. If, on the other hand, a contract of pledge of specific assets or of an entire estate, is executed in Prussia, and parts of the debtor's property are in a country where the Roman law controls, then such property in the latter country may be treated as duly hypothecated, for by the Roman law such hypothecation is conditioned neither by the place of contract nor by the domicil of the debtor.[3] The *lex rei sitae* in such case must decide. By the same reasoning a general assignment of the debtor's effects, executed as collateral security in the United States, would hypothecate the debtor's estate situated in countries subject to the Roman law, if the assignment be locally registered in such lands, so as to make it technically valid.[4]

In our law the *situs* determines lien for purchase money, and also fact of chattel mortgage.

§ 317. By the English common law, while the enforcement of a lien for unpaid purchase money of goods must be in accordance with the law to which the goods are subject, the question whether a lien is intended depends upon the law governing the contract. As to what this is, however, a further question arises, between the place of final assent and that of delivery, which is that, in the eye of the law, of performance. In most cases these coincide. The order comes from the purchaser; and, as will be seen, the courts, even when this order is given to a travelling agent of the vendor, regard this agent, *primâ facie*, as clothed with the principal's domicil, or, at all events, as reserving the final decision to the principal in person. The

[1] A. L. R. i. 20, §§ 402, 403, 411, 412.

[2] A. L. R. i. 20, § 111.

[3] Savigny, viii. § 368.

[4] See infra, 334.



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place of final assent, therefore, is the vendor's domicil; and the place of performance is the same, for the delivery of the goods to a common carrier is a delivery to the vendee's agent, and hence a performance of the contract.[1]

The law in reference to a chattel mortgage is determined by the *situs*.[2]

When lien is extinguished by transfer to another place.

§ 318. Supposing that by the law to which the contract of sale is subject the vendor has a lien on the goods, is this lien extinguished on the arrival of the goods at their place of destination, in which place the law recognizes no such lien or right?[3] Judge Story argues in the negative, on the ground that "upon the general principles as to the operation of contracts, and the rule that movables have no locality" (which is admitted on all sides as to movables in transit), "it would seem that these privileges, hypothecations, and liens ought to prevail over the rights of subsequent purchasers and creditors in every country, and that having once attached rightfully *in rem*, they ought not to be displaced by the mere change of local situation of the property."[4] In conflict with this view

[1] See Orcutt *v.* Nelson, 1 Gray, 536. That a lien is determined by the law of the place where a thing is delivered, and not by that of the place where the contract for delivery is made, is ruled in Culver *v.* Benedict, 13 Gray, 7.

[2] Wattson *v.* Campbell, 38 N. Y. 153; McCate *v.* Blymyre, 9 Phil. 615; McKaig *v.* Jones, 2 Clark, Phil. 123. Liens on personalty are determined in Germany by the *lex rei sitae*. Jour. du droit int. privé, 1874, p. 131.

See, however, Mumford *v.* Canty, 50 Ill. 370, cited infra, § 318; Reed *v.* Gray, 37 Penn. St. 508, where it was held that, if a trust of personal property be valid by the law of the domicil, it will be protected, on a subsequent removal of the parties into another state.

[3] See infra, § 354.

[4] Story, § 402, citing Livermore, Dissert. p. 159, § 249. Inglis *v.* Usherwood, 1 East R. 515, is also cited to this point by Judge Story; but Mr. Westlake (1st ed. art. 272) remarks that the "conflict here imagined did not arise in Inglis *v.* Usherwood, for there the vendor repossessed the goods while still in Russia, under the right given by the law of that country, which was also the place of sale."

It was held in 1869 in Illinois (Mumford *v.* Canty, 50 Ill. 370), when, after personal property was mortgaged in Missouri, where it then was, and permitted to remain with the mortgagor after the maturity of the debt the mortgage was to secure, which was valid in Missouri, the property was moved to Illinois, where it was levied on by a *bonâ fide* creditor, that the Missouri mortgage was not divested by the sale, though bad by Illinois laws. But this supposes notice. Ift here was no notice, and the lien was secret, then the Illinois at-



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is a case decided in Alabama in 1860, in which it was held that a lien given in Mississippi, on a chattel then in that state, for minor's interests, under a sale in the probate court, could not be enforced in Alabama, when the chattel was moved into that state, against a *bonâ fide* purchaser.[1] If we follow the line of Savigny,[2] we must hold that a lien rightfully imposed in one state, where the goods at the time are, cannot be maintained, when the goods are moved into another state not recognizing such lien, as against *bonâ fide* purchasers without notice.[3] It is true that Bar, as we have seen, qualifies this by the statement, that in countries subject to the common Roman law foreign liens will be recognized, because such liens are in harmony with the local law. But when the local law is based on the rule "*Possession vaut titre*," then, when the goods arrive at their permanent destination in such place, the liens in question yield to the claims of creditors and purchasers. So we come back again, in this view, to the position as to liens on movables, that the *lex rei sitae* prevails.[4]

Conflict as to whether liens can be established by transfer to another place.

§ 319. Can a lien, not given by the law of the place in which the goods are sold, be asserted by a vendor or creditor when the thing reaches a country where, on such a contract, a lien is given? In Louisiana, the rule seems to be that no such lien is acquired by a vendor.[5] To the same effect is Mr. Burge's reasoning, so far as concerns the vendee, on the ground that between the vendor and vendee the contract is to be construed by the law of the place where it is made.[6] Savigny[7] negatives the right to the lien on the general principle that the lien is part of the contract, and only arises when the *lex rei* and the law of the contract both confer it. In

tachment should have been held good. Supra, § 317. See infra, § 354.

[1] Marsh *v.* Ellsworth, 37 Ala. 85.

[2] Supra, § 313.

[3] Skiff *v.* Solace, 23 Vt. 279, and cases infra, § 324.

[4] In New Hampshire it has been held that a lien for attorneys' fees, in accordance with Vermont law, applies to money collected in New Hampshire on a Vermont judgment. National Bk. *v.* Culver, 54 N. H. 327.

[5] Whiston *v.* Stodder, 8 Martin, 95. Where consignees have no lien on cotton in the state where they have advanced supplies to raise it, they do not acquire a lien by being afterwards moved into a state where such lien exists in transactions subject to its law. Delop *v.* Windsor, 26 La. An. 185.

[6] III. p. 770.

[7] § 368.



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New York, however, it was ruled, in 1861, that where an Ohio statute gave a lien for articles furnished in equipping a ship, a New York creditor, who furnished such articles in New York, on a New York contract, to a New York ship, could avail himself of the Ohio lien when the ship reached an Ohio port. "Of course," said Johnson, J., in giving the opinion of the court, "the statute of Ohio could not create a lien upon a vessel lying in the waters of this state, for a debt created here, while the vessel was thus situated. But I do not see why the State of Ohio may not by statute give the creditor residing here, when he comes into that state, a right to attach such vessel whenever it may come there, to enforce the payment of such debt. The action in such a case is not to enforce a lien existing previously, but to create one by the service of the process upon the property." [1]

§ 320. By the common Roman law a person can hypothecate his entire estate as an aggregate, *i. e.* all things which he has *in bonis* at the particular time, and those which he will possess in future. This law prevails in Hanover. A person domiciled in Hanover hypothecates in Hanover his entire estate, present and future. He possesses a collection of pictures in Berlin, which, by the *lex situs*, is not subject to this law. This collection is brought to Hanover, and the moment it arrives there, according to Bar, is subject to the hypothecation.[2] As to tacit liens, however, there are several questions open still to doubt. Thus, in some countries, the law gives a tacit lien for purchase money; and so, also, particular local laws give liens to material-men and others, for things furnished to houses or ships, without any agreement being entered into to this effect by the ship or house-owner. *First*, do such liens attach whenever they are given solely by the *lex rei sitae?* Or, *secondly*, do they attach, irrespective of the question of the *situs* when they are part of the remedies which are afforded by the law to which the contract of sale is subject? Or, to constitute them, is it nec-

Conflict in this respect among foreign jurists.

[1] Steadman *v.* Patchin, 34 Barb. 218.

[2] Bar, § 65. But the New York case goes much beyond this; for in the case put by Bar the contract was Hanoverian, and implied a lien; whereas in Steadman *v.* Patchin the contract was subject to the law of New York, by which no such lien was given.



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essary, *thirdly*, that they should be given both by the *lex rei sitae*, and by the law of the place to which the contract is subject? The first view is sustained by Rodenburg,[1] and by J. Voet,[2] and, inferentially, by a case already mentioned as occurring in New York.[3] This view is contested by Bar,[4] and with him Fœlix coincides.[5] But when such an hypothecation is given by the law to which the contract is subject, as well as by the *lex rei sitae*, then the lien attaches. Thus in some countries subject to the Roman law, the wife has a lien on her husband's property for the money furnished by her to their joint estate. Does a wife, who is a foreigner, enjoy this lien? The better opinion seems to be that she does, when it is given, not only by the *lex rei sitae*, but by the law of the matrimonial domicil.[6] But in France the point has been much doubted. The prevalent practice has been to refuse such liens to a foreign wife, or, in case of the parents' death, to foreign minor children,[7] on the ground that the *Hypothèque legale* belongs to the *Droits civils;* which no foreigners can acquire. This, however, has been much deplored by recent eminent French jurists,[8] and, when the law of the matrimonial domicil concurs with the *lex rei sitae* in giving such lien, is inconsistent with sound international law.

§ 321. It is difficult to see how this question can arise on mechanics' liens on buildings, because it is hard to conceive of a case where the *lex rei sitae* is not also the law to which the contract of sale is subject. Mechanics' liens on goods, however, when allowed by the local law, are subject to the rules laid down above. The *lex situs* must control. And such lien is lost if the goods are removed into another state (not recognizing such liens), so far as concerns *bonâ fide* purchasers without notice.[9]

As to mechanics' liens, *lex situs* controls.

§ 322. Liens on ships will be more fully discussed hereafter.[10] At present the following questions arise: Do liens of material-men on ships continue on ships in ports where

Liens of material-men on

[1] II. part i. c. 5, § 6.
[2] Dig. 20, 2, No. 34.
[3] Steadman *v.* Patchin, 34 Barb. 218. Supra, § 319.
[4] § 65.
[5] I. p. 137.
[6] Bar, § 65.
[7] Sirey, 34, pt. ii. p. 482, giving a decision to this effect of the Cour roy. d'Amiens; Massé, No. 331.
[8] Demangeat, in note to Fœlix, i. p. 137; Merlin's Répertoire, cited by Massé, as above.
[9] See supra, § 318.
[10] Infra, § 356.



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ships continue unless excluded by law of port.

the local law establishes no such liens? This point is involved in that last stated; and it is only necessary, in addition, to give the solution of Bar,[1] which harmonizes with both the rule and the exception which are here laid down. He argues that such lien should be sustained in such foreign ports, for the lien, having attached to the ship, continues to adhere wherever she goes; but that when there is a positive local law to the contrary (*e. g.* "*Possession vaut titre*"), or there are conflicting local titles, then the lien is postponed.[2]

State can create liens for labor and port dues.

§ 322 *a*. Although under the federal Constitution a state cannot create a maritime lien to be enforced by remedies not existing at common law,[3] a ship, when within the territorial jurisdiction of a state, is not exempted from the operation of state laws for the collection of claims, or the creation of liens, not founded on maritime contracts or torts.[4] A claim for labor on the hull of a ship, before launching, is not a maritime lien, of which a state court cannot take cognizance;[5] nor does the furnishing of needful supplies to a vessel at her home port create such a lien.[6] And the rule excluding state legislation from imposing liens, enforcible in state courts, does not apply to vessels engaged exclusively in the internal commerce of a state.[7] Nor does the rule extend to contracts for ship-building, as to which a state may create a lien.[8] On the

[1] § 65.

[2] See particularly infra, § 358.

An elaborate exposition of the law in reference to maritime hypothecations will be found in the Jour. du droit int. privé, for 1875, pp. 93 *et seq*. Compare Billette's L'Hypothèque maritime et ses consequences, and criticisms thereon in the Gazette des Tribunaux, Ap. 1 & 2, 1875; Dufour's Traité de droit maritime, ii. pp. 296 *et seq*.

According to the French law, a French court will not enforce a maritime lien which by a foreign law is attached to a vessel at the time in French territory. Jour. du droit int. privé, 1875, p. 270. But see § 358.

Although by British law masters' wages may have priority, yet on a British ship, when refitted in our ports, the lien of material-men for supplies is preferred to the master's lien for wages. The Selah, 4 Sawy. 40.

[3] Edwards *v*. Elliott, 21 Wal. 532; The Edith, 11 Blatchf. 451; Poole *v*. Kermit, 37 N. Y. Sup. Ct. 114; Dever *v*. Hope, 42 Miss. 715.

[4] Brookman *v*. Hamill, 43 N. Y. 554.

[5] Sheppard *v*. Steele, 43 N. Y. 52.

[6] The General Smith, 4 Wheat. 438; The Lotawana, 21 Wal. 558.

[7] Montauk *v*. Walker, 47 Ill. 335; Marshall *v*. Curtis, 5 Bush, 607.

[8] Mitchell *v*. The Magnolia, 45 Mo. 67.



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other hand, the admiralty courts have no jurisdiction to enforce a contract for building a ship.[1]

Mortgage on ship postponed to port liens.

§ 323. Does a mortgage given on a ship, without transfer of possession to the mortgagee, bind the ship in a port where such transfer of possession is required to constitute a valid mortgage? It has been held by Savigny that it does not; and a practice in accordance with this view has been adopted in Louisiana,[2] in cases on which the English courts have animadverted with unnecessary harshness, and which Judge Story, though in much milder terms, unequivocally condemns. Bar[3] strikes out a middle course. He argues, as in the last instance, that the two modes of mortgage are so similar that they should be recognized as reciprocally valid. The courts in New Orleans, therefore, ought, in the cases in issue, so far as concerned the mortgagor and the mortgagee, to have recognized the foreign mortgage. But it is otherwise when attaching cred-

[1] Young *v.* The Orpheus, 2 Cliff. 29.

The Michigan state lien law applies to vessels on voyages from ports outside the state. City of Erie *v.* Canfield, 27 Mich. 479.

Our admiralty courts may enforce a lien given by a foreign jurisdiction, notwithstanding the parties are foreigners. Maggie Hammond, 9 Wal. 435.

There can be no lien, under the New York statute, for goods furnished to a vessel in a foreign state. Moores *v.* Lunt, 4 Thom. & C. 154; 1 Hun, 650.

In The Lotowana, 21 Wal. 38, will be found an instructive opinion on this point by Bradley, J.

In Pelham *v.* Schooner Woolsey, 22 Alb. L. J. 316 (1880), Choate, J. ruled as follows:—

"A contract for the repair of a domestic vessel is a maritime contract. The Josephine, 39 N. Y. 19; Brookman *v.* Hamill, 43 Ibid. 554; Hoole *v.* Kermit, 59 Ibid. 554–556; The General Smith, 4 Wheat. 438. A suit to enforce a maritime contract is within the exclusive jurisdiction of the admiralty, 'saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.' 1 U. S. Stat. 77, § 9; Vose *v.* Cockcroft, 44 N. Y. 415. The reservation of the act of Congress relates to well-known forms of actions and remedies, distinguished alike from those prosecuted *in rem* in courts of admiralty, and from those that are peculiar to courts of equity. A statutory remedy in the nature of a bill in equity to foreclose a mortgage, for the enforcement of a common law lien founded upon a maritime contract, is not within the reservation of the act of Congress limiting the admiralty jurisdiction. A lien is not a collateral contract; it is a right in, or claim against, some interest in the subject of the contract, created by the law as an incident of the contract itself. See The Belfast, 7 Wal. 624; Hine *v.* Trevor, 4 Ibid. 555."

[2] Infra, §§ 345, 357.

[3] § 65.



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itors, or innocent purchasers, spring up in New Orleans. Over these the foreign mortgage can assert no claim. And so in a case in Hanover, in 1861, it was authoritatively settled, so far as concerns the German law.[1] But under our federal system a duly recorded mortgage on a vessel has priority over a lien under a state law, for materials and supplies furnished, in a state court.[2]

*Lex situs* generally controls.

§ 324. Not merely as to maritime liens, but as to liens of all kinds, it should be kept in mind that as to priority of conflicting liens the *lex rei sitae* prevails. "The right of priority," said Chief Justice Marshall,[3] "forms no part of the contract. It is extrinsic, and rather a personal privilege, *dependent on the place where the property lies*, and where the court sits which is to decide the cause."[4] So Judge Story[5] declares that "the recognition of the existence and validity of such liens by foreign governments is not to be confounded with the giving them a superiority or priority over all other liens *and rights*, justly acquired in such foreign countries under their own laws, merely because the former liens in the countries where they first attached had there, by law or by custom, such a superiority or priority. Such a case would present a very different question, arising from a conflict of rights equally well founded in the respective countries." Here again we have one of those embarrassing exceptions which expand to proportions as large as the rule. Suppose, for instance, in Vermont, where a mortgage of chattels is not good without transfer, a chattel is attached by a Vermont creditor of the owner. Here is a *right* justly acquired under the Vermont law. Can this right be crowded out by a prior mortgage of the chattel, without transfer, in New York, where such mortgage would have been good, when the chattel at the time of the mortgage was there situate, and where, therefore, a valid lien was acquired? This has been decided in the negative in Vermont;[6] and also in a case at Hamburg, in 1851;[7]

[1] Bar, § 65. The Kate Henchman, 7 Biss. 238.

[2] Harrison *v.* Sterry, 5 Cranch, 289, 298.

[4] See, also, Donald *v.* Hewitt, 33 Ala. 546.

[5] § 323.

[6] Skiff *v.* Solace, 23 Vt. 279. So also in Louisiana, in reference to ships

[7] Bar, § 65, note 27 *a*.



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though it is hard to reconcile this with the position already given by Judge Story, that liens on movables once validly acquired, in the land where the movables at the time are, "ought to prevail over the rights of subsequent creditors and purchasers in every country." And ordinarily the *lex situs* determines the validity of a chattel mortgage, no matter through what states the chattel may have been carried.[1] Where, however, the lien creditor, the owner, and the attaching creditors or vendees belong to the same domicil, there is authority to hold that the law of such domicil internationally binds the parties.[2]

Patent rights not extra-territorial.

§ 325. A patent right (*brevet d'invention*), according to the general principles of international law, does not extend beyond the territorial limits of the sovereign by whom it is granted.[3]

Conflicting rules as to trade-marks.

§ 326. In England and the United States, the counterfeiting of any trade-mark, with intent to defraud a vendee, is indictable as a cheat at common law. The distinction between the intent to defraud the vendee, and that to defraud the manufacturer, seems overlooked by both Bar and Fœlix. When a vendee is defrauded, by imposing on him an inferior article with a forged brand or stamp, he can prosecute criminally the offender, though no civil action may lie in favor of the foreign manufacturer whose trade-mark is counterfeited. In England a foreign manufacturer has a remedy by suit for an injunction and account of profits against a manufacturer who has in England committed a fraud upon him by using his trade-mark for the purpose of inducing the public to believe that the

mortgaged without delivery in England, and then attached in New Orleans, where the local law recognizes no such lien, though this ruling has been much censured in England. Simpson *v.* Fogo, 1 H. & M. 18; Marine Co. *v.* Hunter, Law Rep. 3 Ch. Ap. (1868) 484. See criticisms infra, §§ 345, 647, 664. See, also, Taylor *v.* Boardman, 25 Vt. 581.

[1] Jones *v.* Taylor, 30 Vt. 42; Jeter *v.* Fellowes, 32 Penn. St. 465; Fouke *v.* Fleming, 13 Md. 54. See, also, Waters *v.* Cox, 2 Ill. App. 129. But see supra, § 318.

[2] Supra, § 276; infra, § 369.

[3] Phillimore, p. 398; Fœlix i. ii. t. ix. c. vi.; Renouard, des Brevets d'Invention; Code Internationale de la propriété industrielle artistique et litéraire, par Pataille et Huguet, Paris, 1855; Bar, p. 319. See, also, Bluntschli, Staatswörterbuch, i. p. 615; Curtis on Patens s, p. 98. For an interesting article on Swiss Patents, see Revue de droit international (1869), vol. i. p. 617. Compare Curtis on Patents, p. 564.



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goods so marked are manufactured by the foreigner,[1] and he may thus restrain the fraudulent appropriation of his trade-mark, although the goods on which such trade-mark is affixed are not usually sold by him in England.[2] But the Cour de Paris, in 1850, went so far as to hold that unless there is a statute forbidding the sale of such wares, the home manufacturer has no protection, even at home, against foreign imitations.[3] It was afterwards, on the same legislation, decided that it is lawful for a Frenchman to make or counterfeit the subjects of a patent granted by a foreign state; and the extraordinary position was taken that a Frenchman, in France, without any liability, civil or criminal, may counterfeit, and place on his own manufactures, the stamp or trade-mark of a foreign manufacturer.[4] Whether a foreigner can protect his trade-marks in France now depends, by statute, upon the question of reciprocity.[5]

U. S. treaties and statutes.

§ 327. By the treaty of December 20, 1868, between the United States and Belgium, the counterfeiting of trade-marks is made the subject of action for damages, provided the trade-mark be lodged at the Patent Office in Washington, or the Tribunal of Commerce in Brussels. The same provision, with limitations, is engrafted in the convention of April 16, 1869, between the United States and France. Statutes protecting trade-marks, and carrying into effect these treaties, were passed on July 8, 1870, and August 14, 1876.[6] As an indication of the amount of business embarked under the protection of this legislation it may be mentioned that between 1870 and 1878, 8,000 trade-marks were deposited at Washington, as required by the statute of 1870. In 1879 it was decided by the Supreme Court of the United States,[7] that the statutes just

[1] Collins Company *v.* Brown, 3 Kay & J. 423; 3 Jur. N. S. 929.

[2] Ibid. *v.* Reeves, 4 Jur. N. S. 865. The recent English legislation in respect to trade-marks is examined in the Jour. du droit int. privé for 1876, pp. 23 *et seq.*

[3] Demangeat, note to Fœlix, ii. p. 321.

[4] Phil. iv. 399; Bar, p. 319.

[5] Jour. du droit int. privé, 1879, p. 358. If a trade-mark, used by an English house, has become open to public use in England, it will not be protected in France. Jour. du droit int. privé, 1875, p. 190. An article on the rights of strangers in France in relation to trade-marks will be found in the Jour. du droit int. privé, 1875, p. 257. The forger may be punished for the cheat. Ibid. 1880, 193.

[6] Rev. Stat. 4937–4947.

[7] U. S. *v.* Steffens, 100 U. S. 82.



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noticed are unconstitutional, falling neither under the power to give copyrights and patents, nor under the power to regulate commerce. This ruling does not, it is scarcely necessary to say, touch the right of the states to legislate on the topic, nor does it in any way conflict with the position above taken that counterfeiting trade-marks may be the subject of state procedure either at common law or equity.[1]

§ 328. Copyrights, being the exclusive right which the law allows an author of reprinting and republishing his own original work,[2] have no extra-territorial force. Treaties however, for international copyright have been established by the great European states. The German Diet adopted a convention to this effect in 1837. England, in 1846, incorporated the principle in a treaty with Prussia; in 1851, with France; and in 1843, with Belgium. Statutes of reciprocity, in reference to extra-territorial copyright, have been passed by England, France, and Belgium.[3]

Copyrights not extra-territorial.

An alien friend, who, during his temporary residence in a British colony, publishes in the United Kingdom a book of which he is the author, is entitled to the benefit of English copyright.[4] And it was further held in the House of Lords, by Lords Cairns and Westbury (Lords Cranworth and Chelmsford doubting), that where the book is first published in the United Kingdom, the author has this right, wheresoever he may be then resident.[5]

[1] Alb. L. J. Nov. 1879, p. 402; N. Y. Times, 19 Nov. 1879. A pamphlet entitled, De l'Etat internationales avec les Etats-Unis en matiere de marques de commerce, par M. Edouard Clunet, was published in Paris in 1880. This pamphlet contains a learned argument from M. Clunet, and opinions of Mr. Kelly, of N. Y., and MM. Huard, Pouillet, and Lyon Caen, of Paris.

[2] Phil. iv. p. 400.

[3] See Bar, p. 319; Bluntschli, Staatswörterbuch, i. p. 615.

[4] Routledge *v.* Low, 3 H. of Lords Rep. (1868) 100.

[5] Ibid.; S. C., Low *v.* Routledge, 10 Jur. N. S. 922; 33 L. J. Chan. 717; 12 Week. Rep. 1069; 10 L. T. N. S. 838.

Drone on Copyright (1879), pp. 92, 93, gives the reports of Mr. Clay and Mr. Baldwin in favor of an international copyright, and the provisions of English statutes are detailed. Pp. 214–220. Under these statutes, a translation, to be protected, must be of a whole work, and *bonâ fide*. P. 218. Protection is extended to foreign dramatists, so far as concerns representing as well as publishing (p. 215), and also to foreign newspapers and periodicals. P. 219.



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On the assumption that an author's right in his productions is a literary mechanic's lien, it would be governed, on the principles above stated, by the *lex situs* of each book.[1]

4. *Capacity of Persons to acquire and dispose of Movables.*

§ 329. The capacity of the person (in this respect to be distinguished from the character of the thing) is held by Savigny to be determined by the law of his domicil, and not by the place where the thing to be disposed of is situate; while by jurists of the Italian and Belgian schools nationality is held to be the test. But, as we have already seen,[2] the ubiquity of personal restrictions in this respect cannot be maintained when in conflict with national policy. A foreign minor, for instance, brings an article to Massachusetts for sale, he being of full age in Massachusetts. In this case it could not with any show of reason be maintained that the sale is void because he is incapable of selling. It is agreed on all sides that in respect to real estate, or things immovable, the *lex rei sitae* is to determine capacity to sell. If this view be true, then, on the reasoning hereinbefore given, the same rule must be applied to personalty. As has been already shown, every reason which justifies a state in reserving to itself the decision as to who shall hold land within its borders, applies with equal force to the question as to who shall own its railroads, its banks, and its public loans. Those who control great corporations have at least as much power in the body politic as those who control land; and if to the latter public safety requires that the *lex rei sitae* should apply, *à fortiori* to the former. And, in addition, if personal incapacities are ubiquitous, fraud may be perpetrated by vendors of goods, at least as readily as by vendors of real estate. It is not often that we hear of vendors of real estate whose past history cannot be traced. But of the itinerant vendors of goods by whom our country districts are permeated, there is scarcely one whose prior history his customers have the opportunity of knowing.[3] If the *lex rei sitae* determines the capacity of the ven-

Capacity depends on place of transaction.

[1] An article on the French law as to literary and artistic property, viewed internationally, will be found in the Jour. du droit int. privé for 1878, p. 117.

[2] Supra, §§ 101 *et seq.*

[3] See fully supra, §§ 87–104.



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dor of real estate, there are still stronger reasons why this should be the case with the vendor of personal estate.

§ 330. We have already had occasion to notice the distinction taken by foreign jurists between a capacity to hold property and a capacity to do business. The first, if the distinction were to be applied to the present issue, would be determined by the *lex situs;* the second by the *lex domicilii.*[1] So far, however, as this distinction concedes the ubiquity of domiciliary business disability, it cannot, in conformity with the reason already given,[2] be sustained.

Distinction between capacity to hold and capacity to act unfounded.

§ 331. The rule heretofore laid down,[3] that in matters of national policy the distinctively local law must be maintained, applies with peculiar force to the United States. In a new country, such as that which comprises our Western States, business is conducted by new men. Many of these are Germans, coming from countries imposing various limitations on business capacity; some of them are Jews, who by their domiciliary law may be incapable of negotiating commercial paper. Many are at that intermediate period of life which falls between majority in the country of their personal law and majority in the country of their residence. If the disabilities of old countries are ubiquitous, the business of new countries would be beset with many disturbing complications. It would be impossible to know, in a country where the whole population is of recent arrival, and is largely made up of foreigners, who is capable of making a contract and who is not. Selling goods would be a sort of lottery; and the chances of loss would be so great as to lead to exorbitant prices and a gambling temper productive of insolvencies by which business stability would be destroyed. Criminal prosecutions, based on the allegation that the party buying held himself out to be responsible when he really was not, would take the place of civil suits. No country is called upon to admit as operative a foreign law productive of such consequences as these. And least of all can the States of the American Union be expected to carry into effect laws of this class, — laws as hostile to our traditions as they are detrimental to our interests.

Foreign incapacities inapplicable to this country.

[1] Supra, § 98.

[2] Supra, §§ 101 *et seq.*

[3] Supra, § 104 *b.*



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§ 332. We must also hold, in reference to sales of personal property, that on principles of general policy, for reasons heretofore fully stated, restrictions of capacity, unless based on natural disqualifications, have no extra-territorial force.[1]

Restrictions on natural capacity not extra-territorial.

Alienage determined by *lex situs*.

§ 333. So far as alienage can be involved in questions of purchase and sales of movables, it is determined by the *lex situs*.[2]

### 5. *Acquiring and Passing Title.*

By Roman law *lex situs* prevails as to title.

§ 334. By the Roman law, as has been seen, to make a valid sale, there must be delivery; and the modern Prussian law is the same.[3] In France the thing may be alienated by contract without delivery.[4] If the *lex rei sitae* prevails, where a Frenchman in Paris sells furniture in Berlin to a Prussian, the sale must be consummated by tradition. On the other hand, where a Prussian in Berlin sells his furniture in Paris to a Frenchman, then tradition is not necessary, but the sale is effected by mere contract. The modern Roman law declares that this question is to be determined by the *lex rei sitae*.

So in Louisiana.

§ 335. Then, again, by the common law of England, a sale of goods on payment of price, without delivery, is good as to all parties.[5] By the Roman law, in force in Louisiana, delivery is necessary. Hence the Supreme Court of that

[1] See supra, §§ 99 *et seq.*

Mr. Dicey gives the following conclusions (Op. cit. p. 248): —

"*First.* The capacity to assign movables depends in general upon the law of the country where the owner is domiciled" (*sed quære*). "When, however, movables are assigned individually, as by sale or gift, a person's capacity to make, *e. g.* a valid sale, constantly depends on the law of the place where the movable sold is situated (*lex situs*).

"*Secondly.* Individual assignments of movables, *e. g.* by gift or sale, are, as regards modes of forms of alienation, mainly governed by the *lex situs*, though an assignment in accordance with the owner's *lex domicilii* may also be valid.

"*Lastly.* General assignments of movables in which property is transferred as a whole, as in consequence of bankruptcy, marriage, or death, are governed almost entirely by the *lex domicilii* of the person whose rights are assigned."

That this is not the rule as to bankruptcy is argued infra, §§ 389 *et seq.*

[2] Supra, § 17.

[3] A. L. R. 10, § 1; Koch, Preuss. Recht, i. §§ 252, 255.

[4] Code Civil, art. 1138.

[5] Black. Com. i. 446; Kent Com ii. 492.



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state has held that, to pass the title as against *bonâ fide* attachments, of goods there situate, there must be a delivery in conformity with the laws of Louisiana; and this though the goods were sold by the owner in his own domicil, by the laws of which delivery is not necessary.[1] And this court, while giving a general assent to the principle that the alienation of movable property must be governed by the law of the owner's domicil, declared that when a state, on grounds of public policy, places restraints on alienation, those restraints must be maintained as to property situate in such state so far as is necessary to protect citizens of such state.[2]

§ 336. This decision Judge Story gravely questions.[3] His reasoning, however, is based on the assumption that personal property has no locality. This, however, as we have seen, is only exceptionally true.[4] Rule questioned by Story.

§ 337. On the other hand, Savigny reviews the whole topic with his usual masterly sagacity,[5] showing, as has already been seen, that the *lex rei sitae* controls transfers of movables as well as of immovables; and this without recognizing any such distinction as that between codes and judgments to which Judge Story appeals. Sustained by Savigny.

§ 338. In Mr. Guthrie's edition of Savigny's eighth volume it is declared:[6] "The doctrine of certain cases in Louisiana, applying the *lex rei sitae*, which required tradition in order to the transfer of property in movables, and rejecting the *lex loci contractus*, which was the law of the owner's domicil, has been strongly controverted by Story and others, but no authority is cited against it except the cases which establish the *lex domicilii* as the law regulating succession. On the contrary, the application of the *lex rei sitae* appears to be assumed in all the numerous cases in which conflicts have arisen in regard to the transmission by sale of property in movables, between the And by Guthrie.

[1] Norris *v.* Mumford, 4 Martin, 20; Ramsay *v.* Stevenson, 5 Martin, 23; Fisk *v.* Chandler, 7 Martin, 24; Oliver *v.* Townes, 14 Martin, 93. Supra, §§ 317, 325; infra, § 342.

[2] Oliver *v.* Townes, 14 Martin, 93.

[3] Confl. of L. § 390.

[4] Westlake (1880), § 139, p. 162, gives a qualified assent to the Louisiana ruling.

[5] VIII. § 367.

[6] 2d ed. p. 184; 1st ed. p. 138.



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law of Scotland, which requires delivery, and that of England, which does not."

And by Bar and Wächter.

§ 339. Bar, the latest and one of the ablest German writers on this topic, after a review of the whole tenor of authorities down to 1860, reaffirms Savigny's position, declaring that property in things, whether movable or immovable, situate in a country subject to the modern Roman law, cannot be transferred by a contract which does not observe the requirements of this law.[1] Should, he declares, taking up the question of the conflict just noticed between Germany and France, as to the necessity of delivery to sale, the thing, in pursuance of the contract of sale, have been brought into France, where delivery is not necessary, the property vests at once in the vendee, unless the rights of creditors have intermediately intervened. So, also, holds Wächter, canvassing the same question in 1841.[2] To the same effect may be cited the present business practice of Germany.[3]

And by Fœlix and Fiore.

§ 340. Fœlix, who is appealed to by those who hold to the law of domicil as controlling movables, is far from taking the broad view which is maintained by Judge Story, and holds substantially the distinction of the text.[4] Fiore adds his high authority to the same view.[5]

§ 341. Mr. Westlake[6] argues that practically the *lex situs* is to determine title to movables; and this same position is

[1] § 64.

[2] Wächter, Collis. der Privatgesetze, ii. pp. 388, 389.

[3] Thöl, Handelsrecht, §§ 79, 80.

[4] Fœlix, Op. cit. p. 78.

[5] Suppose, he says (Op. cit. § 338), a merchant domiciledin one land sells certain merchandise in another land, and that a partner in that land, before hearing of this sale, sells the same goods to a third party, delivering them. Suppose, also, that by the law of the land where the first sale is made, property may be passed by such a sale without delivery, and suppose that by the *lex situs* tradition is necessary. If we hold to the fiction that movables are attached to the owner's domicil, *a quo legem situmque accipiunt*, the first sale would hold good against the second. But since the *lex situs* controls, and as by this law delivery is necessary to sale, the first purchaser would be restricted to an action *exempto* against the vendor. He could not recover possession of the goods, since they were never delivered to him, and he could not compel the execution of the contract, since that execution has become impossible.

[6] 1st ed. art. 287; 2d ed. (1880) § 139. See infra, § 345.



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maintained by President Woolsey, who, in his International Law,[1] adopts, in this respect, the reasoning of Savigny.

And by Westlake and Woolsey.

§ 342. Sir R. Phillimore, after stating that the abstract opinions of accredited authors and jurists tended towards the older view, goes on to say, "In practice, and especially in recent practice, a great approach has been made to Savigny's doctrine of the *lex situs*."[2]

And by Phillimore.

§ 343. If we examine closely the cases on this point in English and American courts, we will find, that whatever may be their *dicta*, their results do not in the main vary from that of the Supreme Court of Louisiana, in the much contested case before us. *Dicta* enough, indeed, are to be found, declaring that all personalty follows its owner, and is to be judged by the law of his domicil.[3] But when we scrutinize these *dicta*, two features will be observed, which in a great measure destroy their effect. One is, that they appear often with qualifications which leave them without any practical efficiency, as is the case with the general expressions to the same effect in the opinion of the Supreme Court of Louisiana, which has been already quoted. The other feature is, that these *dicta* are founded on a misapprehension of the Roman law. If we view that law as now applied, we must admit that the tendency of present authority, as has already been shown, is to deny the proposition *in toto;* and to hold, on the contrary, that all property, movable and immovable, is to be judged of and determined by the *lex rei sitae*. This, as has been

Early English and American *dicta* indefinite, and based on misapprehension of terms.

[1] § 71.

[2] Phillimore, iv. 396, 417. See Lewis *v.* Barry, 72 Penn. St. 1.

[3] Sill *v.* Worswick, 1 H. Black. 690; Birtwhistle *v.* Vardill, 5 B. & C. 438; S. C., 6 Bligh R. 32; 2 Cl. & Fin. 571. So, also, Tilghman, C. J., in Milne *v.* Moreton, 6 Binn. 361, who declares that the proposition, that personal property is governed by the law of the owner's domicil, "is true in general, but not to its utmost extent, nor without several exceptions;" and he then proceeds to make an exception almost as large as the rule, by declaring that "every country has a right of regulating the transfer of all personal property within its territory;" and that "of these circumstances" (those of situation, &c.) "the most liberal nations have taken advantage, by making such property subject to regulations which suit their own convenience." And see a number of other cases, cited by Judge Story, § 380 *et seq.*, where the same general *dicta* are thrown out, often, however, with similar exceptions. Compare 6 South. Law Rev. 686.



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seen, is expressly declared by Savigny and Bar, and by recent French jurists: among whom Fœlix (1847), Demangeat, in his edition of Fœlix (1856), and Pradier-Fodéré, in his translation of Fiore (1877), while they repeat generally the old doctrine, hold that it has no practical application to particular things.[1] And if we examine the opinions of the old jurists, so copiously cited by Judge Story, we will see that the weight attached to them in England and in America arose from a misapprehension of what they really declared. For, by *mobilia*, when they pronounced the rule that movables follow the owner, they were far, as has been seen, from meaning *personalty*. In the largest sense, *mobilia* do not include charges on real estate, or leases of any length or nature, or fixtures of any kind, or even the stock on farms. And when we recollect the time when lived those who originated this famous maxim, we may question whether *mobilia* included anything except what was attachable to the person, and capable of being carried about with it. It was before the age of railway transportation in bulk. It was at a time when such transportation was mostly by sea, to which the *lex rei sitae* does not reach. It was before the age of government and other loans for the transfer of which minute municipal regulations have been imposed. It was at a time, however, when travellers were apt to carry their valuables about their person, and when it was proper that, for such valuables, the law of personal domicil should be invoked. In such cases the maxims, "*Mobilia ossibus inhaerent*," and "*Mobilia sequuntur personam*," have proper application. It is doubtful whether they were originally meant to include much more.[2]

Analogy from succession inapplicable.

§ 344. One other observation is to be made before a search for the actual points decided by the courts in this connection. It is conceded that succession is subject to the law of domicil, and hence is governed by principles distinct from those that are here maintained. The law of succession will be discussed hereafter; it is enough now to say that when succession takes hold of property, it takes hold of it as a mass, enveloping it in its owner's personality, and viewing it as a whole, even after his legal connection with it closed, as in some

[1] Fœlix, Droit int. privat, p. 78; Demang. i. 120; Fiore, Prel. c. vi.

[2] Supra, §§ 297, 305.



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way his representative. This conception arose from the *universitas juris* of the old Roman law; but, as will hereafter be seen, this idea of a *universitas* or corporate and continuous aggregation of an estate, both in its debts and in its possessions, was not a mere fiction. It was based on the conviction that were an estate, when it passed from its owner by death, to be stripped of its cohesive power, and each of its component parts left to the law of the place where it existed, intolerable confusion would ensue. It was necessary, to prevent this, that some common centre of legal unity should exist, round which these fragments should be grouped until the period of their final distribution; and if so, what centre could be found so suitable as that of the late owner's person, continued, in the eye of the law, after his decease? Each estate becomes in this sense an agglomeration, to which the legal character of its owner adheres even after his actual death, until it goes to its new depositaries. It receives in its parts as well as in its aggregate his domicil; by the laws of that domicil its evolution, its transfer, its distribution, are controlled. Hence the laws which regulate succession are governed by principles which do not apply to transfers *inter vivos* of single movables, which it is the owner's intention to detach from the body of his estate.[1] The primary object of jurisprudence is the preservation of family. To this object all other objects yield. Hence it is that the *lex situs*, when it approaches the cradle, the place where marriage is solemnized, and the death-bed, drops its claims, and recognizes as supreme the *lex domicilii*. This may be so because the *lex situs* wills it. It may be so in obedience to the common sentiment of humanity that property, when to be moulded by family conditions, should be governed by the law of family. But all this is consistent with the firm maintenance of the rule that property when not so conditioned should be governed by the *lex situs*.

§ 345. In England, notwithstanding the earlier *dicta*, the weight of authority is that if personal property be disposed of *inter vivos* in a manner binding by the law of the country where it is, that disposition is binding everywhere;[2] and the converse is also true, that when

In England the *lex situs* now alone determines title.

[1] See infra, §§ 548–565.

[2] Cammell *v.* Sewell, 5 H. & N. (Exch.) 728.



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the law of a foreign country places a restraint upon the alienation of property there situate, a contract respecting that property cannot be enforced against the foreign law.[1] It is true that we meet with occasionally conflicting decisions. Of this we have an illustration in a case decided in 1860, where it appeared that several English ships mortgaged in England, without transfer of possession (which in England is valid), were attached in the port of New Orleans by the creditors of the mortgagor. The Louisiana courts, in accordance with the Roman common law, as adopted in that state, held that such mortgage, without delivery to the mortgagee, gave no title as against creditors. This has been strongly condemned in England, as a violation of the comity of nations;[2] though as the law of Louisiana in this respect is well known in England, parties who choose to put their goods under Louisiana control do so with full notice, and though it is now admitted that had the proceedings been in admiralty they would have given a good title.[3] It was ruled, however, that the English courts would not regard the title in the ships as affected by the Louisiana decree.[4] But, in apparent inconsistency with such ruling, it was held, where a vessel was attached in New Orleans, and according to the Louisiana law such attachment preceded prior mortgages of the ship, the mortgagee not being in possession, and where, to release the ship, the mortgagees gave bond to the plaintiffs for their debt, that in England these bonds could be enforced.[5] And in 1870, in the House of Lords, in a

In Cammell *v.* Sewell, 5 H. & N. 728, Crompton, J., said: "Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or other countries. Among others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them it would again be changed by the being taken by the new owner into the foreigner's own country."

[1] Waterhouse *v.* Stansfield, 10 Hare, 254; 16 Jur. 1006.

[2] Simpson *v.* Fogo, 1 J. & H. 18; 1 H. & M. 195. See Liverpool Marine Co. *v.* Hunter, L. R. 3 Ch. App. (1868) 484.

[3] See infra, § 664.

[4] Ibid. See particularly infra, § 358.

[5] Liverpool Marine Credit *v.* Hunter, L. R. 4 Eq. 62. See Hooper *v.* Gumm, L. R. 2 Ch. 282.



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case of great interest and authority, the general principle, aside from questions of maritime law, was declared to be that the control of the *lex rei sitae*, as to movables as well as immovables, is absolute.[1] Mr. Westlake (1880)[2] declares that it will be found that the weight of later English authorities is in favor of this rule.

§ 346. Undoubtedly we have innumerable opinions of American judges in which the same obeisance is paid to the *lex domicilii*.[3] But this obeisance is only titular. There is scarcely a case to be found in which, no matter how emphatic may be the nominal recognition of the *lex domicilii*, the *lex situs*, when the question is *inter vivos*, is not held to be the arbiter. Thus in New York, in 1865, it was declared in the Court of Appeals, by Judge Potter, "to be the settled law in this court, that, as a general rule, a voluntary conveyance upon a good and valid consideration, made by a party according to the law of his domicil, will pass his personal estate, whatever may be its locality, abroad as well as at home." And then comes a limitation which reduces the proposition to a small compass: "If I am right in this view of the law, then, *in an action in this state between citizens of this state, in regard to a contract made in this state, conveying the title to personal property*, it must be determined by the laws of New York."[4] If the exception last stated be kept in view, the New York law is consistent with the proposition already laid down, that movables, as a general rule, are subject to the *lex situs*, except when the parties, by consent, submit them to some other law. But even as to this exception, the ruling in New York was reversed, in 1868, by the Supreme Court of the United States, which expressly decided that though the owner, the mortgagee, and the attaching creditor of chattels were domiciled in New

So in the United States.

New York.

[1] Castrique *v.* Imries, Law Rep. 4 H. of Lords, 414. To same effect see Van Grutten *v.* Digby, 31 Beav. 561. Infra, §§ 829, 830.

[2] § 139, p. 163.

[3] Noble *v.* Smith, 6 R. I. 446; Van Buskirk *v.* Warren, 34 Barb. (N. Y.) 457; Moore *v.* Willett, 35 Barb. (N. Y.) 663; Hanford *v.* Paine, 32 Vt. 442. See Rhode Island Bk. *v.* Danforth, 14 Gray (Mass.), 123; Wilson *v.* Carson, 12 Md. 54; Balt. & Oh. R. R. *v.* Glenn, 28 Md. 287.

[4] Van Buskirk *v.* Warren, 2 Keyes (N. Y.), 119. See Hoyt *v.* Thompson, 5 N. Y. 352; Parsons *v.* Lyman, 20 N. Y. 112. See to this point infra, §§ 367–9.



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York, yet a subsequent attachment by such attaching creditor in Illinois, where the goods were seized, was good as against the prior mortgagee.[1] On the other hand, so powerful is the effect of the *lex situs* deemed in some cases in New York, that it has been ruled in that state that while a state statute cannot give a lien on a vessel in another state, to secure a debt created in that state, yet if afterwards the vessel appears in the jurisdiction of the first state, the creditor may follow, and enforce the lien.[2] And now, in New York, the rule as adopted by the Supreme Court of the United States is accepted as final.[3]

[1] Green *v.* Van Buskirk, 7 Wal. 139; S. C., 5 Wal. 307. See, also, Smith *v.* Smith, 19 Grattan (Va.), 545.

[2] Stedman *v.* Patchin, 45 Barb. (N. Y.) 218. Supra, § 319.

[3] McDonald *v.* Mallory, 77 N. Y. 547. Infra, § 357. In Edgerly *v.* Bush, N. Y. Court of Appeals, 1880, as reported in 22 Alb. L. J. 16, we have the following: —

"Personal property belonging to A., a citizen of New York, who had acquired title here, and situated here, was taken without the consent of A. to Lower Canada, where it was purchased by B. for value, and without notice of the rights of A., from a trader in property of like kind, who had it in his possession. By the law of Lower Canada the purchaser of personal property from a trader in like property confers good title. B. conveyed the property to defendant, who brought it again into New York, where his domicil was. In an action by A. against defendant for a conversion of the property in the courts of New York, it was held that the title of A. was superior to that of defendant, and the title of B., acquired under the law of Lower Canada, would not be recognized. Though a transfer of personal property valid by the law of the domicil is valid everywhere, as a general principle, there is to be excepted that territory in which the property is situated, and where a different law has been set up, when it is necessary for the purposes of justice that the actual *situs* of the thing be examined. Green *v.* Van Buskirk, 7 Wal. 139. Yet statutes have no extra-territorial force, and where they are permitted to operate in another state through comity, they will not be so allowed to the inconvenience of the citizen, or against the policy of the State. It would be to the contravention of that policy and to the inconvenience of the citizens of this state if its courts should give effect to the statutes of Lower Canada, in respect to purchases from traders to the divesting of titles to movable property, acquired and held under the law of New York, without the assent or intervention, and against the will, of the owner under that law. The case of Cammel *v.* Sewell, 5 H. & N. 728, was concerning property sold in Norway, which had not been in England until after that sale, and had never been in possession of the English owners. See, as sustaining the case at bar, Greenwood *v.* Curtis, 6 Mass. 358; Taylor *v.* Boardman, 25 Vt. 581; Martin *v.* Hill, 12 Barb. 631; French *v.* Hall, 9 N. H. 137; Langworthy *v.* Little, 12 Cush. 109. Such cases as



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§ 347. The law of Massachusetts provides that an attachment shall be dissolved if the debtor make an assignment under the insolvent laws for the benefit of all his creditors. It was held in Maine, in 1863, that where an insolvent debtor was domiciled in Massachusetts, this statute did not affect his personal effects in Maine, which were governed by the Maine law.[1]

Maine, New Hampshire, and Vermont.

In the Supreme Court of New Hampshire, in 1867, Judge Sargent, referring to Judge Story's position, that movables are governed by the law of domicil, proceeded to say: "But whatever weight the English or early New York authorities might otherwise have been entitled to, the great weight of American authorities is now the other way; and it may 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 sitae* prevails over the law of domicil, with regard to the rule of preferences in the case of insolvents' estates. The laws of other governments have no force beyond their territorial limits; *and if permitted to operate in other states, it is upon a principle of comity, and only when neither the state nor its citizens would suffer any inconvenience from the application of the foreign law.*"[2]

In Vermont, it was ruled in 1851,[3] that a prior New York mortgage, without change of possession, would not protect against a Vermont attachment, though the goods were brought into Vermont, where they were attached, merely for a temporary purpose.[4]

Grant *v.* McLachlin, 4 Johns. 34, and The Helena, 4 Rob. Adm. 3, do not conflict. In them there were, in the foreign country, legal proceedings *in rem*, or analogous thereto, so that the question was as to respect for the judicial proceedings of another country. Order of General Term reversed, and judgment on report of referee ordered."

[1] Boston *v.* Boston, 51 Me. 585. See Felch *v.* Bugbee, 48 Me. 9; Upton *v.* Hubbard, 28 Conn. 274, cited infra, § 364.

[2] Dunlap *v.* Rogers, 47 N. H. 287. See Kidder *v.* Tufts, 48 N. H. 125.

[3] Skiff *v.* Solace, 23 Vt. 280.

[4] In a later case, where this judgment is apparently qualified (Hanford *v.* Paine, 32 Vt. 442; see Taylor *v.* Boardman, 25 Vt. 581), the plaintiff was not a mortgagee without possession, but had an absolute title, acknowledged to be good by the laws of Vermont. The case was that of an antecedent *bonâ fide* purchaser whose title the Vermont law adopted, as against a subsequent attaching creditor. In a still later case, the defendants, who were citizens of New York, assigned their property for the benefit of creditors, and among the claims so



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§ 348. In an early case in the Supreme Court of Massachusetts, it was held that a voluntary assignment by a debtor of all his property, made in Pennsylvania for the benefit of creditors generally, does not override a subsequent attachment of Massachusetts funds of the debtor, such an assignment being void by the laws of Massachusetts.[1] It has since been held that it makes no difference in such a case that the assignment was special, not general.[2]

Massachusetts.

§ 349. In a case before the Court of Errors in Connecticut, in 1859, it appeared that A., a creditor, was domiciled in New York, and B., a debtor, in Connecticut. B. being in failing circumstances, at A.'s request agreed with A. to deliver to A., in discharge of the debt, certain personal property belonging to B., in New York; and the property was imme-

Connecticut.

assigned was a debt due them from the trustees, who were citizens of Vermont. Before notice to the trustees of the assignment, the debt due by them to the defendant was attached in Vermont by trustee process by the plaintiffs, who were creditors of the defendants. The plaintiffs, it was held by the Vermont Supreme Court, were entitled to hold the debt in preference to the assignees. Martin *v.* Potter, 34 Vt. 87. But see Walters *v.* Whitlock, 9 Fla. 86; and compare infra, § 363 for other cases.

[1] Ingraham *v.* Geyer, 13 Mass. 146; S. C., cited 6 Pick. R. 307. See Oliver *v.* Townes, 6 Pick. 97. Infra, § 365.

[2] Ames *v.* McCamber, 124 Mass. 85. In Pierce *v.* O'Brien (1880), a debtor in Rhode Island made an assignment for the benefit of creditors, valid under the laws of that state. The assignee came into Massachusetts and took possession of personal property there belonging to the debtor, but before the property was removed from Massachusetts it was attached by C., a Massachusetts creditor. At this time no creditor had assented to the assignment, and the only consideration therefor was the acceptance of the assignee. Afterward all creditors but C. proved their claims in the assignment proceedings. The court held that the assignment was invalid as against the attachment, it being the distinctive rule in Massachusetts that voluntary assignments by a debtor in that state, in trust for the payment of debts, and without other adequate consideration, are invalid as against an attachment, except so far as assented to by the creditors for whose benefit they were made. Such assignments made in another state are not binding in Massachusetts. Taylor *v.* Ins. Co. 14 Allen, 353. It was therefore held that an assignment of movables situate in Massachusetts, made by the debtor himself in another state, which, if made in Massachusetts, would be set aside for want of consid eration, will not be sustained against an attachment by a Massachusetts creditor, although valid in the place where it is made. As sustaining this position were cited Zipcey *v.* Thompson, 1 Gray, 243; Swan *v.* Crafts, 124 Mass. 453; Fall River Iron Works *v.* Croade, 15 Pick. 11.



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diately so delivered. Two days after this, B. made in Connecticut a general assignment for the benefit of his creditors, under the Connecticut insolvent laws, which provide, among other things, that all transfers of property, in view of insolvency, made sixty days before assignment, shall be void. It was understood that A. and B., in the assignment above mentioned, intended to evade the Connecticut law. It was, nevertheless, held by the Court of Errors, that the title of the goods passed validly to A., such transfer being valid by the laws of New York, and that the Connecticut insolvent laws did not divest such title.[1] And in this state all application of its distinctive laws is disclaimed as to movables in another state,[2] while preference is given to an attaching creditor, though not a citizen, over a foreign assignee, under a compulsory assignment.[3]

§ 350. In Pennsylvania, under the registry acts of that state, it has been held that an assignment made in New York, and recorded in Pennsylvania, operates as an assignment in Pennsylvania against all attachments subsequent to time of recording, and, prior to that, against purchasers and creditors with notice.[4] But here it is the *lex situs* that prevails; the registry laws of Pennsylvania giving to foreign assignments, recorded in the proper county of Pennsylvania, the force of intra-territorial assignments.[5] And as a rule, a title can only be given in this state conformably to the *lex situs*. Pennsylvania.

§ 351. An insolvent assignment in Ohio was held, in Kentucky, in 1868, not to pass, as against a subsequent Kentucky attaching creditor, a debt due the assignor by a citizen of Kentucky.[6] Kentucky and Alabama.

In Alabama it has been determined that a statute lien created in another state will not be enforced on personal property in that state against a *bonâ fide* purchaser.[7]

§ 352. In Louisiana, the law already stated to be held in that state, that the *lex rei sitae* is the arbiter, continues to be maintained.[8] Thus it has been ruled that under the Louisiana.

[1] Mead *v.* Dayton, 28 Conn. 33.
[2] Ballard *v.* Winter, 39 Conn. 179.
[3] Paine *v.* Lester, 44 Conn. 196. See Pond *v.* Cooke, 145 Conn. 130.
[4] Evans *v.* Dunkelberger, 3 Grant, 134. See Lewis *v.* Barry, supra, § 275.
[5] Noble *v.* Thompson Oil Co. 79 Penn. St. 354.
[6] Johnson *v.* Parker, 4 Bush (Ky.), 149. See infra, § 391.
[7] Marsh *v.* Elsworth, 37 Ala. 85.
[8] Fell *v.* Darden, 17 La. Ann. 236.



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Louisiana system, a surrender made out of the state of property situated in it has no binding effect;[1] and, by the converse of the same principle, that where a citizen of Louisiana, being in the State of New York, executed a deed of trust in conformity with the laws of the latter state, conveying a fund in that state to trustees, this conveyance could not be impeached in Louisiana.[2]

General rule is that an extra-territorial assignment passes no property in movables unless in conformity to *lex situs*.

§ 353. We may, in fine, hold it to be the settled law of our courts, both federal and state, that as against attaching creditors, an extra-territorial assignment has no effect unless valid by the *lex situs*, even though the assignment was valid by the law of the state of the assignor's domicil, in which state it was made.[3] To this rule two qualifications are to be observed. In the first place, property once vested in an assignee will not be disturbed in another state, while retained by him in

[1] Brent *v.* Shouse, 15 La. Ann. 110.

[2] Hullin *v.* Faure, 15 La. Ann. 622.

[3] Infra, §§ 386–391; Green *v.* Van Buskirk, 5 Wal. 307; 7 Wal. 139; Felch *v.* Bugbee, 48 Me. 9; Ames *v.* McCamber, 124 Mass. 85; Bishop *v.* Holcomb, 10 Conn. 444; Paine *v.* Lester, 44 Conn. 136; Pond *v.* Cook, 45 Conn. 130; Guillander *v.* Howell, 35 N. Y. 657; Varnum *v.* Camp, 1 Green N. J. 326; Bentley *v.* Whittemore, 19 N. J. L. (3 C. E. Green) 366; Stricker *v.* Tinkham, 35 Ga. 176; Olivier *v.* Townes, 14 Mart. La. 97; Johnson *v.* Parker, 4 Bush, 149.

As sustaining the text, see Southern Law Rev. for April, 1873, p. 223 *et seq.* As holding to the old doctrine, see opinion of Ranney, J., in Swearingen *v.* Morris, 14 Ohio St. 424, who, however, concedes that local liens have priority.

Where, in pursuance of a contract to be performed in a series of states, particular transfers of property are to be made, such transfers are to be in subordination to the *lex rei sitae*. Morgan *v.* R. R. 2 Woods, 244. See supra, § 292 *a*.

As leading to conclusions irreconcilable with the text may be mentioned Mason *v.* Alexander, 2 Ired. 288. In this case a father, domiciled in South Carolina, loaned to his daughter, resident in North Carolina, a slave; and subsequently made a gift of the slave to the daughter for life, with remainder to her issue. This limitation, it was admitted, would have been bad in South Carolina; and though good in North Carolina, was rejected by the Supreme Court of that state, on the ground that the *lex domicilii* of the father should prevail. The reason given was that it was to be supposed that the testator had the South Carolina law in his mind at the time. But so far from this being the case, we must conclude, supposing that the grantor intended to execute a valid instrument, that he had the law of North Carolina in his mind, by which the instrument would be effectual.

In Allen *v.* Baine, 2 Head, Tenn. 100, B., who was domiciled in Pennsylvania, assigned to trustees for creditors a legacy to which he was entitled under the will of a testator who was



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possession, no matter how defective by the law of the latter state the assignment may be.[1] In the second place, we must remember that in some jurisdictions, where the attaching creditor is domiciled in the same state with the assignor, he may be precluded, on grounds elsewhere stated, from disputing the assignment in a foreign court.[2] At the same time, the rule in the Supreme Court of the United States is that such co-domicil makes no difference,[3] and this, in a matter of inter-state law, is decisive.

Foreign voluntary assignments with preferences may be inoperative by local policy.

§ 353 *a*. According to Judge Story, whether a voluntary assignment with preferences carries movables depends upon the *lex loci contractus*.[4] This may be true as between the parties to the assignment, but the rule does not hold good when the question arises whether a particular movable passes by a foreign voluntary assignment with preferences. In such case the *lex situs* must prevail. If by that law voluntary assignments with preferences are proscribed, as against business morality, then to a foreign assignment will not be conceded a force denied to a domestic assignment of the same class, and such an assignment will

domiciled in Davidson County, Tenn. The assignment was duly executed and acknowledged on March 30, 1857, before a commissioner from Tennessee in Philadelphia. It was forwarded to Tennessee, and filed for registry in Davidson County, Tenn., in June, 1857. In October, 1857, the legacy was attached in Tennessee at the suit of C., a creditor of B. The court held that either the *lex domicilii* or the *lex loci actus* must prevail; that in either of these alternatives the law of Pennsylvania must be taken; and that by that law the assignment was bad, not having been recorded. The mischiefs which would arise from a general adoption of the ruling in this case are shown in the Southern Law Review for April, 1873, p. 242.

[1] "When property has once vested in a trustee, assignee, or receiver, by the law of the state where the property is situated, it makes no difference whether it is done under the local law of the state or under the common law. The law of another state will not divest the trustee, assignee, or receiver, of his right to the property, should he take it into such state in the performance of his duty." Park, C. J., Pond *v.* Cooke, 45 Conn. 132; citing Crapo *v.* Kelly, 16 Wal. 610; Wales *v.* Alden, 22 Pick. 245; S. P., Delane *v.* Moore, 14 How. 253; Taylor *v.* Boardman, 25 Vt. 581; Bruce *v.* Smith, 2 Har. & J. 499.

[2] Infra, § 369; Thurston *v.* Rosenfield, 42 Mo. 474.

[3] Supra, § 346.

On this topic will be found some acute remarks by Fiore, § 341.

[4] § 423 *f*.



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not be good as against a subsequent attaching creditor.[1] At the same time there are cases, as we have just seen, in which, when the assignee under such an assignment has taken possession of the movables in question, his title will not be divested by the fact that the assignment is of a character prohibited by the *lex situs*.[2]

Distinctive rule as to goods in transit.

§ 354. From the supremacy of the *lex situs*, as above stated, may be excepted movables *not in transit, or following the owner's person*. This exception rests on necessity, and ceases when the goods take a final location, — and the exception, as we will see, does not obtain in cases of common carriage.[3] And the reasoning which diverts the *lex rei sitae* from goods in transit operates in the case of goods forcibly or fraudulently withdrawn to a state other than that of the owner's domicil. In such a case the Supreme Court of Louisiana, which holds, as has been seen, the *lex rei sitae* in its fullest sense, decided that the legal site of such goods continues to be the state from which they were thus surreptitiously removed.[4] Yet even the exception as to goods in transit has limits which show the supremacy of the rule. The goods of a traveller may be seized to pay his hotel bill, no matter how numerous may be the states through which his railway ticket may entitle him to pass, or how transient may be his stay in the place of seizure. And the moment a package reaches the port of New York it is liable to be seized by custom-house officials, though the intention of the owner is to carry it immediately to the Havana steamer.

Stoppage *in transitu* governed by *lex domicilii*.

§ 355. In all modern systems the vendor of goods has a right, in case of gross breach of contract or bankruptcy on the part of the vendee, to arrest the delivery; but this right assumes in practice forms almost as various as there are countries. Now, in case the vendor desires to exercise this right, as to goods in transit through several countries, by what law is he bound? Subject to the qualifications above given, the answer may be, not by the law of the country in which

[1] Zipcey *v.* Thompson, 1 Gray, 243; Maberry *v.* Shisler, 1 Har. (Del.) 349; Stricker *v.* Tinkham, 35 Ga. 177; Mason *v.* Stricker, 37 Ga. 262. See supra, § 348.

[2] Supra, § 353; Crapo *v.* Kelly, 16 Wal. 610; Pond *v.* Cooke, 45 Conn. 132; U. S. *v.* Bank U. S. 8 Rob. La. 262. See Dundas *v.* Bowler, 3 McL. 397.

[3] Infra, § 471. See Mumford *v.* Canty, 50 Ill. 370. Supra, § 301.

[4] Paradise *v.* Farmers' Bank, 5 La. Ann. R. 710.



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the goods may casually be, prior to delivery, but by that of his own domicil in all cases when from that domicil the goods are forwarded. And such appears to be the law generally received.[1]

The subject of common carriers will be hereafter discussed.[2]

### 6. *Ships at Sea.*

§ 356. A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries.[3] Hence follows the conclusion that when a merchant forwards goods on a ship of his own nationality, the *lex rei*

Ship part of territory of flag.

[1] See Abbott on Shipping, pt. i. c. 1, § 6; pt. iii. c. 9, § 3; Merlin Rép. Revendication; 2 Kent Com. Lect. 39; Story, § 401; Inglis *v.* Usherwood, 1 East R. 515; Inslee *v.* Lane, 57 N. H. 454; State *v.* Worthingham, 23 Minn. 528; More *v.* Lott, 13 Nev. 576. Mr. Burge, however, declares that the *lex loci contractus* prevails (3 Com. pt. ii. c. 20, pp. 770-778), and to the latter view Judge Story seems to incline. §§ 322-401. It is certain that liens of this class do not conform to the law of the vendee's country, when that is different from the vendor's. Thus where goods were purchased in England by a citizen of Louisiana, it was held that it was the English law of lien, and not that of Louisiana, which prevailed. Whiston *v.* Stodder, 8 Martin, 95. And, generally, a vendor's privilege, as understood in Louisiana, does not apply to contracts made in states where no such privilege exists, even though the goods be in Louisiana. Brent *v.* Shouse, 16 La. Ann. R. 158.

The topic in the text is discussed at length in Houston's Stoppage In Transitu; and in Benjamin on Sales, 2d Lond. ed. p. 661. See London Law Times, Aug. 28, 1880.

*Stoppage in transitu* is determined in Germany by the *lex rei sitae* of the goods. Jour. de droit int. privé, 1874, p. 131. See Revue du droit int. 1874, p. 236.

[2] Infra, § 471.

[3] Crapo *v.* Kelly, 16 Wal. 610; Bye, in re, 2 Daly, 525; McDonald *v.* Mallory, 77 N. Y. 547. See this position applied to damages in Lloyd *v.* Guibert, Law Rep. 1 Q. B. 115. See, also, Story, § 423 *g*; Westlake (1880), § 14. The modern German law is express to this point. Bluntschli, in his "Moderne Völkerrecht" (1868), § 317, declares it to be an axiom that "ships are to be regarded as floating sections of the land to which they nationally belong, and whose flag they are entitled to carry." This principle, he says, is of some antiquity, "and has its foundation in the national connection of the ship with her country, as symbolized in the flag; in the protection of the ship from foreign attacks; and in the extension of national power and commerce through the naval and merchant service. It is, therefore, of great importance to place the nationality of ships in a clear light. The English jurists for some time resisted the application of this principle to the merchant service. To ships of war it was unavoidably applicable; because a ship of war is the appointed embodiment of national



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*sitae* of the goods and the *lex domicilii* of the owner of the goods coincide, until the ship arrives in port in another state. By this may be explained several cases quoted as establishing the *lex domicilii*, though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears. And, as Bar well remarks, this disposes of Judge Story's objection to the *lex rei sitae*, that it affords no rule for vessels at sea.

power. But the application of this principle to merchant ships is equally beyond doubt." "When, however," as this eminent author further states (§ 319), "the ship enters a foreign jurisdiction, she is subjected to the law of the same." Bischof, in his recent excellent "Grundriss des positiven internationalen Seerechts" (Graz, 1868), speaks most positively to the same effect. "Every state is free on the free seas, so that its ships are to be regarded as floating sections of its territory; *territoria clausa, — la continuation ou la prorogation du territoire;* and those on board such ships, in foreign waters, are under their country's laws and protection. This even applies to children born to subjects on such ships." See, also, Woolsey Int. Law, §§ 54, 64; and Story, § 373*h*. This passage was adopted by the Supreme Court of the United States in Crapo *v.* Kelly, 16 Wal. 61. To the same effect see 5 J. Q. Adams' Autob. 389. Compare Mohr *v.* R. R. 106 Mass. 67; Calahan *v* Babcock, 21 Oh. St. 281; Parker *v.* Byrnes, 1 Low. 539. The English government took this view in the Trent case; and it is now accepted by the English courts. R. *v.* Lesley, 8 Cox C. C. 269. Mr. Wheaton states the law to the same effect (part ii. c. ii. § 4); and see, also, Mr. Lawrence's very able notes, *in loco.* As to owner's responsibility for master, see infra, § 440; as to general average, infra, § 443.

The doctrine of the text was asserted by the United States during the Napoleonic wars, in opposition to the English claim of the right of imprisonment, and the collision between the two countries on this question was one of the causes of the War of 1812. The treaty of Ghent, which closed that war, ignored the question, but since then no claim of this order has been put forward by the British government. Sir R. Phillimore, i. p. 377, says: "I cannot think it would be now contended that the claim of Great Britain was founded on international law. In my opinion it was not."

Mr. Hall (Int. Law, 1880, § 76) rejects the doctrine that a merchant vessel is part of the territory whose flag it bears; and he states that this doctrine is "not admitted" by Wheat. Elem. pt. ii. c. ii. § 100; Manning, 275; Twiss, i. § 159; and Harcourt, Historicus, No. x. Whatever we may say to the English citations, there can be no question that Mr. Wheaton's authority is otherwise interpreted by the Supreme Court of the United States. And Mr. Webster (Letter to Lord Ashburton, Aug. 8, 1842) emphatically declares that the territoriality of merchant ships is a doctrine beyond dispute. Compare 1 Halleck Int. Law (Baker's ed.), 175, where the position in the text is approved. To the same effect is Calvo, Droit. Int. (1872), i. 455-467; and Lawrence, in his commentary on Wheaton, *ut sup.* So far as concerns the United States, the question is settled by Crapo *v.* Kelly, *ut sup.*



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That such vessels are technically governed by the laws of their nationality, Judge Story concedes, when he tells us[1] that the statutable transfer of ships is excepted from the *lex domicilii*. But, in respect to principle, ships at sea, and the property in them, must be viewed as part of the country to which they belong. And when the contract of affreightment does not provide otherwise, the law of the country to which the ship belongs must be considered to be that, in respect to sea damage and its incidents,[2] to which the parties submitted themselves.

In the U. S. ship belongs to state of registry.

§ 357. As between the several states in the American Union, a ship at sea is presumed to belong to the state in which it is registered; and hence, where an insolvent in Massachusetts assigned a vessel at sea, which vessel was registered in Massachusetts, by an assignment valid according to the law of Massachusetts, but void by that of New York, the assignment was held good by the Supreme Court of the United States as against a New York creditor, who attached the vessel after her arrival at New York.[3]

[1] §§ 384, 423 *g*.

[2] Lloyd *v.* Guibert, L. R. 1 Q. B. 115.

[3] Crapo *v.* Kelly, 16 Wal. 610.

To the same effect is Kelly *v.* Crapo, 41 Barb. 603, reversed in Kelly *v.* Crapo, 45 N. Y. 86, which latter ruling was itself reversed by the Supreme Court of the United States in Crapo *v.* Kelly, above cited. The latter case was followed by the N. Y. Court of Appeals in McDonald *v.* Mallory, 77 N. Y. 547, where it was held that in matters regulated exclusively by state law, the state to which a vessel belongs is the sovereignty to which it is subject. Hence civil rights of action, arising from matters occurring at sea, depend upon the laws of such state. This was applied to damage sustained by the plaintiff through a fire caused by the defendant's negligence. See supra, § 346.

In Moore *v.* Willett, 35 Barb. 663, a North Carolina assignment, bad in New York, though good in North Carolina, was sustained in New York as to a North Carolina vessel at the time on the high seas. Koster *v.* Merritt, 32 Conn. 246, may at first sight conflict with these views. In that case, an assignment in New York, of a vessel owned in Connecticut, was sustained in Connecticut, though invalid by the laws of that state. But the vessel was in the port of New York, at the time of the assignment, and hence subject to New York, and was moreover registered in New York. See, also, Thuret *v.* Jenkins, 7 Martin (La.), 318.

The following cases are cited to the proposition that the place of the owner's residence determines the character of the vessel: Dudley *v.* Steamboat Superior, 1 Newb. Adm. 176; Hill *v.* Golden Gate, Ibid. 308; Weaver *v.* The Steamboat Owens, 1 Wal. Jr. C. C. 365; 2 Pars. Ship. and Adm. 525.



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§ 358. A ship in port, however, is subject to the law of the port,[1] and according to the law as already stated, an attaching creditor in such port is entitled to precedence as against a foreign vendee on an assignment bad in such port.[2] By the same practice, a prior mortgage creditor, without transfer of possession, is postponed to attachments and liens which attach at the port at which the vessel may at the time lie.[3] Nor, severely as this position has been criticised, is it without powerful support. It coincides, as has been seen, with the opinion of Savigny, so far as concerns a conflict of liens.[4] In the latter respect it is not distinguishable from what is seen, as to conflicting liens, to be an acknowledged principle of international law. So, if we can judge from a decision of the Hanover Supreme Court, at Celle, on April 17, 1861,[5] the practice of the courts of the North German Confederacy is to hold that liens or possessory claims (Pfandrechte), which by the *lex rei sitae* attach, divest, *pro tanto*, prior incumbrances. Nor can this be justly denounced, as it has been in English courts, as barbarous, or as destructive of international comity. It may promote, at first glance, the interests of ship-building nations, to hold that incumbrances on the ship, attaching at her home port, are to override all liens for loans or supplies which may attach at ports which she may subsequently visit. But there are two answers to this. First, the advantage is illusory; for to a ship in distress in a foreign port, where the character and credit of the owners are not known, no relief will be furnished, if the lien which the law of the port gives is to be overridden by secret incumbrances which the parties relieving the ship have no means of gauging. The only way in which maritime credit, in such circumstances, can be maintained, is by accepting the position, "Here is the ship; at least between you and all persons dealing at home with

Ship in port subject to port law.

The *situs* of sea-going vessels for the purposes of taxation is the port where they are registered under the laws of the United States as their home port. This is not lost by mere absence and employment elsewhere, but continues until a new *situs* is acquired. People *v.* Commissioners of Taxes, 58 N. Y. 242.

[1] Woolsey, § 64.

[2] Price *v.* Morgan, 7 Martin (La.), 707; Koster *v.* Merritt, 32 Conn. 246. Supra, § 323.

[3] See supra, § 345.

[4] Supra, §§ 317–323.

[5] Bar, § 65.



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the owner, on his own credit, you have the preference." In the second place, in marshalling assets, as between those who had the opportunity, at the home port, of testing the owner's responsibility, and have the double security of his liability and the mortgage on the ship, and those who, in a foreign port, supply the ship in her distress, solely on the credit of her bottom, a priority, on general equity, is due to the latter. These views have been applied, in Alabama, with much good sense, to steamboats navigating our great inland rivers. "A sound public policy," said Judge Walker, "does not require that liens, such as those springing up under the Kentucky statute, upon boats navigating our inland rivers, should have conceded to them a priority over other liens, which may be acquired in other states to which they may be carried. *Steamboats might be covered up, if such priority was allowed, by antecedent liens, of which there was no notice; and great injustice might be done to those who trusted the boat, upon the assumption of its liability; and there would be great room for collusive arrangements, to shelter the boat, by virtue of such liens, from just debts.*" [1] But such liens, when not strictly maritime, have been held, under the United States bankrupt laws, to be postponed to mortgages previously recorded.[2] And when there is no question of priority, the practice in the United States bankrupt courts is to determine the question of the liens of materialmen for goods furnished to a vessel in a foreign port by the *lex loci contractus*.[3]

[1] Donald *v.* Hewitt, 33 Ala. 546, Walker, J.; and see The Antelope, 2 Benedict, 405; Calkin *v.* United States, 3 N. & H. 297; S. P., Kellogg *v.* Brennan, 14 Ohio, 72; Provost *v.* Wilcox, 17 Ohio, 359. See supra, § 322. Infra, § 440.

[2] Scott, ex parte, 18 Am. L. R. 349; S. C., 3 Bank. Reg. 181.

[3] Hatton *v.* The Melita, 1 Balt. L. T. 133. See other cases cited Brightley's Federal Digest, ii. p. 127.

When advances are made to the captain of a vessel in a foreign port, on his request, to pay for necessary repairs or supplies, so that his vessel may proceed on her voyage, the presumption of law is that they were made on the credit of the vessel; and it is not necessary that there should be any express hypothecation of the vessel, or stipulation that the credit was given on that account. The presumption, however, may be rebutted by proof that the person advancing the goods had notice, such as, on the exercise of due diligence, ought to have enabled him to discover that the master had funds or credit sufficient to enable him to meet the expenses in question. The Emily Souder, 17 Wal. 666; The Eclipse, 3 Biss. 99; The J. F. Spencer, 5 Ben. 151. Infra, §§ 440–1.



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§ 358 *a*. In 1879, two cases involving the liability to process of foreign public vessels came up before Sir R. Phillimore, sitting in admiralty. In the first (Jan. 1879) [1] it appeared that the Constitution, a United States ship

Exemption of foreign public vessels.

Liens for advances of funds for the necessities of vessels in foreign ports have a priority over existing mortgages to home creditors. The Emily Souder, 17 Wal. 666.

The lien for advances to a ship for purchase of necessities in a foreign port is not defeated by proof that the owner resided at the port where a part of the supplies were furnished. The Walkyrien, 11 Blatch. 241.

It was held in France, in 1872, that when an English ship is mortgaged in England, and then proceeds to France, where she is taken in execution, if the mortgage is not valid by French law (though valid in England), it will not be sustained in France as against subsequent French creditors. From this ruling Fiore dissents. Op. cit. App. p. 671. He argues that if mortgages legitimately placed on ships are thus disregarded in foreign ports, commerce will receive a serious shock, and the nation which permits such procedure will share in the common ruin. To say that an English mortgage on a ship must be placed according to French law is preposterous, since no English mortgage could be so placed. It might, indeed, be objected that a mortgage imposed secretly tends to fraud. But this objection does not apply to mortgages imposed under the English statute which are registered in the proper custom house, and as to which all persons inquiring can obtain information. A note is added by M. Pradier-Fodéré, to the effect that since the above decision a statute was passed by the national assembly declaring ships to be susceptible of hypothecation.

A title to goods given by the decree of a foreign court having control over the goods is valid against the claim of an English owner. Castrique *v.* Imrie, L. R. 4 H. L. 414; Liverpool Marine Co. *v.* Hunter, L. R. 4 Eq. 62. See Simpson *v.* Fogo, 1 H. & M. 195, discussed infra, § 664; supra, § 345. "These decisions," says Mr. Dicey (Op. cit. p. 257), "are not conclusive, since they may be explained as depending on the weight to be given to a foreign judgment, but they are far more naturally regarded as applications of the principle enunciated in Cammell *v.* Sewell, and stated in the rule under consideration. When it is noticed that the principle of this rule is approved by almost all jurists, is adopted, to a great extent, by the courts of continental nations, is supported by some American cases, and is not opposed to any reported English decision, the conjecture may be hazarded with some confidence that it will ultimately be adopted in its full extent by our courts." See supra, § 345; Infra, § 441.

In Hooper *v.* Gumm, L. R. 2 Ch. Ap. 282, it was held that a mortgage of an American ship, duly executed in America, would not be sustained in England, when the fact of the mortgage was suppressed by the American parties, to the injury of subsequent English purchasers.

"Contracts of affreightment may be made in half savage or barbarous

[1] The Constitution, 40 L. T. N. S. 219.



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of war, whilst on a voyage from Havre to New York, and having on board a large quantity of empty cases, and also of goods returned from the Exhibition at Paris, got ashore on Bollard Point, near Swanage, and whilst in that position salvage services were rendered to her by the steam-tug Admiral and other vessels. Sir R. Phillimore refused to allow a warrant to issue for the arrest of a foreign vessel of war, or of private property on board of her, and of which the government to which she belongs have the care, at the suit of salvors.[1] In March, 1879, it was held by the same judge, that a steamship belonging to or chartered by a foreign government, and regularly employed for the purposes of carrying mails and passengers and some cargo, is not entitled to the privileges of a man-of-war as to extra-territoriality, but is liable to an action for damage done by her to the vessel of a British subject. It was further held that the English crown has not power, by treaty with a foreign government, to

ports, or even, to take a more familiar instance, in such places as Alexandria, where it would be absurd to hold that the parties intended their mutual rights to be regulated by the local maritime law of the place of affreightment. . . . . The choice of the law of the flag of the vessel, *i. e.* the law of her owner, appears, therefore, as was said in that case (Lloyd *v.* Guibert, L. R. 1 Q. B. 115), 'not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.'" Foote's Priv. Int. Jur. p. 325. Infra, § 440. To same effect is Machlachlan Merch. Ship. 3d ed. (1880) pp. 64 *et seq.* Infra, § 441.

Professor Lyon Caen, in an article in the Jour. du droit int. privé, 1877, p. 487, argues that we cannot apply to the sale of ships the rule applicable to other movables, that the law of the port of sale is to prescribe the formalities of sale. The law of the flag, *i. e.* that of the country to which the ship belongs, he maintains, is to govern, and for this he cites high French authority. He concludes with the following summary of the law: "La loi du pavillon du navire sert à fixer les formalités de publicité requise pour la translation de la propriété, même quand le navire se trouve dans un pays étranger."

The law governing ships navigating rivers, as well as ships at sea, is that of the state to which they belong. Jour. du droit int. privé, 1874, p. 131.

Valuable articles on private maritime international law will be found in the Jour. du droit int. privé, 1877, pp. 479 *et seq.* See infra, § 440.

[1] "It is clear," he said, "upon all the authorities, which are to be found in the case of The Charkeih (L. Rep. 4 A. & E. 59; 28 L. T. Rep. N. S. 513), that there is no doubt as to the general proposition that ships of war belonging to another nation with whom this country is at peace are exempt from the civil jurisdiction of the country. I have listened in vain for any peculiar circumstances to take this case out of the general proposition."



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give to vessels of, or employed by, that government other than vessels of war, the privilege of freedom from civil process extended by international law to vessels of war.[1] The judgment of Sir R. Phillimore, however, was reversed in February, 1880, in the Court of Appeal, James, Baggallay, and Brett, JJ., concurring.[2] It was held that an unarmed vessel belonging to a foreign sovereign, employed by such sovereign in what he considers a national service, is free from arrest; nor is this privilege forfeited by the partial employment of the vessel in carrying merchandise and passengers.[3]

### 7. *Debts.*

Theories as to seat of debts.

§ 359. No more embarrassing question arises than that which concerns the *situs* of debts. The question is important chiefly in two relations. First, where is a debt taxable? This is a question elsewhere discussed.[4] The second, which we have now to consider, is, what debts does a general assignment carry? Supposing such an assignment is good in Massachusetts but bad in Rhode Island, does it carry a debt due from a domiciled citizen of Rhode Island to the assignor, a domiciled citizen of Massachusetts? To solve questions of this class several theories have been proposed.

*Lex loci contractus.*

§ 360. (1.) The first theory to be noticed is that of the *lex loci contractus*.[5] The inadequacy of this theory will be hereafter fully shown. It is sufficient now to say, that the place where a contract is solemnized is often fortuitously determined. This place may be on the high seas. It may be in a state which the parties are casually visiting, whose laws, of which they know nothing, would give their engagement a meaning utterly inconsistent with that which they intended. It may be in a state where the parties meet for the purpose of inter-

[1] The Parlement Belge, 40 L. T. N. S. 222.

[2] 42 L. T. N. S. 273; L. R. 5 P. D. 97.

[3] The judgment of Brett, J., relied largely on The Exchange, 7 Cranch, 116; The Prince Fredon, 2 Dod. 451, and Briggs *v.* Light-Boats, 11 Allen, 157, in which it was held that a Massachusetts statutory lien could not be enforced against United States light-boats. Further references were made to the Santissima Trinidad, 7 Wheat. 283, and U. S. *v.* Wilder, 3 Sumner, 308.

The analogous case of extra-territoriality of diplomatic residences is discussed supra, § 16. That a foreign sovereign is privileged from suit, see supra, § 124 *a*.

[4] Supra, §§ 79 *et seq.*

[5] See Burrill on Assignments, § 309.



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changing signatures, not because they have anything to do with the place, but because it may be a half-way spot which they find more accessible than would be the place of business of either of them. To subject a debt to such a law would be unreasonable, as conditioning the validity of the debt on accident, or exposing it to fraud.

Debtor's domicil.

§ 361. (2.) Unless the debtor's domicil is the place of payment, it has no necessary connection with the terms of the debt. It may be that in jurisdictions where debtors are only suable in their domicils, this domicil may be supposed to give the applicatory law.[1] But it is not so where debtors are suable wherever they can be found.

Place of payment.

§ 362. (3.) That the place of payment is the place whose law determines the seat of an obligation has been zealously urged.[2] That the law of the place of payment determines the mode of performing an obligation we will hereafter see.[3] This, however, is a different question from that which arises when we inquire what is the place in which the fruits of an obligation are ultimately to fall. I may be domiciled, for instance, in New Jersey, and I may hold notes payable to me in New York. The law as to the mode of paying may be New York law. Yet as the money ultimately reaches me in New Jersey, it is by New Jersey that the value represented by the notes is finally controlled.

Prevailing theory is that law of creditor's domicil determines.

§ 363. (4.) The remaining theory to be considered is that of the *lex domicilii* of the creditor. This theory is now generally accepted in England and the United States, though it is sometimes urged on grounds which have prevented its universal adoption. *Mobilia sequuntur personam* is a maxim, we are told, peculiarly applicable to debts, which have no local site, and which therefore follow the owner. The difficulty about this position is that if it is good, it subjects debts, not to a fixed jurisprudence, *i. e.* the creditor's *domicil*, but to a fluctuating jurisprudence, and one that could

[1] See Phillimore, iv. 544; Atwood *v.* Ins. Co. 14 Conn. 555; Clark *v.* Conn. Peat Co. 35 Conn. 303; but compare supra, § 347.

[2] This, however, is mostly when the place of payment is coincident with the creditor's domicil. Clark *v.* Conn. Peat Co. 35 Conn. 303; Pond *v.* Cooke, 45 Conn. 132.

[3] Infra, §§ 399 *et seq.*



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be changed any day in fraud of third parties, *i. e.* the creditor's *residence.* The true reason for adopting the creditor's domicil, as distinguished from his residence, and as distinguished from the formal place of payment, is that it is into the creditor's domicil that the fund which the obligation represents is ultimately passed.[1]

Exception where attachment

§ 364. Suppose that a debt due from a person domiciled in Connecticut to a person domiciled in Massachusetts is attached in Connecticut by a creditor of the payee, and

[1] To the conclusion that the law of the creditor's domicil determines the law in a conflict in another state between the creditor's assignee and an attaching creditor may be cited Smith *v.* Buchanan, 1 East, 6; Caskie *v.* Webster, 2 Wal. Jr. 131; Braynard *v.* Marshall, 8 Pick. 194; Meade *v.* Dayton, 28 Conn. 33; Clark *v.* Peat Co. 35 Conn. 302 (aff. in Pond *v.* Cooke, 45 Conn. 132); Goodwin *v.* Holbrook, 4 Wend. 377; Guillander *v.* Howell, 35 N. Y. 657; Speed *v.* May, 17 Penn. St. 91; Poe *v.* Duck, 5 Md. 1; Keyser *v.* Rice, 47 Md. 203; Klein *v.* French, 57 Miss. 662; though see Warren *v.* Copelin, 4 Met. 594; Worden *v.* Nourse, 36 Vt. 750.

In Kirtland *v.* Hotchkiss, 100 U. S. 419, Harlan, J., speaking of a debt due from a person domiciled in one state to a person domiciled in another, said, "That debt, although a species of intangible property, may, for the purposes of taxation, if not for all others, be regarded as situated at the domicil of the creditor."

In England this principle has been affirmed under the following circumstances: By the Roman common law, as adopted in Scotland, an assignment of a debt does not operate until notice is given to the debtor; and hence, under such law, an attachment or "arrest" laid on such debt, the debtor being garnishee without notice in such attachment, overrides the assignment. By the English common law, the assignment works an equitable transfer of the debt, without notice; though, if the debtor should innocently pay the debt to the assignor, without notice, the assignee has lost his claim as against the debtor. Notice, by such law, *pendente lite*, — *e. g.* subsequent to attachment laid, but before execution, — is sufficient to work such equitable assignment. Now the question is, whether, if a debt due by a Scotch debtor to an English creditor be assigned in England, the debt is equitably transferred to the assignee, as against a subsequent Scotch attaching creditor, though the notice of the assignment to the debtor was not given until after attachment laid? In England it seems to be held that such an assignment operates as an equitable transfer under such circumstances. Solomons *v.* Ross, 4 T. R. 182; Sill *v.* Worswick, 1 H. Bl. 691; Selkrig *v.* Davis, 2 Rose Banking Cases, 315, which case has since been in part overruled, 3 Moore P. C. 230. See other cases cited by Judge Story, § 395 note, § 396. The suits in question, it should be remembered, were brought in an English court in a proceeding to compel the attaching creditor to refund. Whether the state where an attachment is levied will respect a conflicting foreign assignment of a character which it holds invalid is considered infra, § 365.



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the payee, between the laying of the attachment and judgment entered thereon, makes an assignment. Does the assignment pass the debt as against the attaching creditor? It has been held that it does not, even though by the law of Massachusetts assignments of the character of that in question operate to dissolve prior attachments.[1]

is laid prior to assignment.

§ 365. Suppose, however, the *lex fori* says to the assignee, "It is a settled rule in my courts that you, in your capacity as assignee, cannot sue." In such case, which is the rule held in many states in reference to insolvent assignees, the assignee is not permitted to come in and contest the title of an attaching creditor.[2] The same rule would apply to an assignee suing on an assignment which the *lex fori* condemns as immoral or against the policy of the state.[3] Whether an assignment, good as to the attached debt in the domicil of the assignor, but bad as to that debt (from want of notice) in the domicil of the debtor, will be sustained in the latter jurisdiction as against a domestic attaching creditor, has been doubted. The affirmative has been maintained in Connecticut;[4] the negative in Vermont.[5]

Exception where *lex fori* holds assignment invalid on grounds of policy.

§ 366. It may be, also, that the *lex fori* prescribes that no assignment shall be operative unless registered in the jurisdiction. If so, a court subject to such law is precluded from recognizing the assignee under such law as a party.[6]

Exception in cases where *lex fori* requires registry.

§ 367. It may happen, however, in a case in which the *lex fori* would hold that an assignment was bad, supposing the attaching creditor was domiciled in the *forum*,

Qualification to the last excep-

[1] Upton *v.* Hubbard, 28 Conn. 274; S. P., Boston *v.* Boston, 51 Me. 585. See infra, §§ 390 *et seq.*, 802 *a*.

[2] Upton *v.* Hubbard, 28 Conn. 274.

[3] Booth *v.* Clark, 17 How. 338; Felch *v.* Bugbee, 48 Me. 9; Abraham *v.* Plestero, 3 Wend. 550. In Bentley *v.* Whittemore, 19 N. J. Eq. 462, Beasley, C. J., said: "The true rule of law and public policy is, that a voluntary assignment made abroad, inconsistent in substantial respects with our statutes, should not be put in execution here, to the detriment of our citizens, but that for all other purposes, if valid by the *lex loci*, it is valid here.

[4] Clark *v.* Peat Co. 35 Conn. 303 (1868).

[5] Worden *v.* Nourse, 36 Vt. 756; Emerson *v.* Partridge, 27 Vt. 8 (1854). This, however, was the case of a note payable in the maker's domicil, and assigned without notice to the debtor. For English cases, see supra, § 363.

[6] Infra, § 371; supra, §§ 334 *et seq.*



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tion in cases where the attaching creditor is of same domicil with original creditor.

that the attaching creditor is domiciled in the state in which the original creditor (the assignor in the contested assignment) is domiciled. In this case there is authority to the effect that the attaching creditor is precluded from assailing the assignment and thereby contesting the law of his domicil.[1]

*Situs* of debt is not changed by the fact that it is secured by a mortgage in another state.

§ 368. Is the *situs* of a debt changed by the fact that it is secured by a mortgage on real property in another state? Undoubtedly the law governing the mortgage, as such, is the law of the *situs* of the land the mortgage covers. But the *situs* of the *debt* is not lost in the *situs* of its security. The debt is governed by the law of the domicil of the party to whom it is due, no matter where its security may be situated.[2] The same rule is held when the question arises whether a debt secured by a foreign mortgage can be taxed in the domicil of the creditor.[3]

### 8. *Where Litigating Parties are domiciled in the State of the Assignment.*

A court of the *situs* may hold that an attaching creditor cannot contest an assignment good by his own domicil.

§ 369. We have already noticed that an attaching creditor of a debt may be precluded, by the fact that he is domiciled in the same state with the assignor, from contesting the validity of an assignment good by the law of that state. Whether this principle is of general application to all cases in which movables are in litigation is a point of great interest. It is generally conceded that a person who becomes domiciled in a state accepts its law as binding his person. Whether this implied acceptance may be extended to include the implied adoption, by two or more litigants, of the law of their common domicil, as determining their title to a thing in another territory, is a question of much more difficulty.[4] There is a strong current of opin-

[1] Ward *v.* Morrison, 25 Vt. 593. See Van Buskirk *v.* Hartford, 14 Conn. 141. Supra, § 346. Compare infra, § 369.

[2] Supra, §§ 276 *a*, 292, and cases there cited; infra, § 510; 3 Kent's Com. 460; Campbell *v.* Dent, 2 Moore P. C. 292; Townsend *v.* Riley, 46 N. H. 300; Williams *v.* Fitzhugh, 37 N. Y. 444; Cope *v.* Alden, 53 Barb. 350; aff. 41 N. Y. 313; Newman *v.* Kershaw, 10 Wis. 333; Kennedy *v.* Knight, 21 Wis. 340.

[3] Supra, § 80; Kirtland *v.* Hotchkiss, 100 U. S. 491.

[4] See Martin *v.* Potter, 11 Gray, 37.



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ion in the United States that such an agreement will be so far assumed as to prevent an attaching creditor, whose domicil is the same with that of the assignor, from setting up against an assignment the law of a foreign country where the goods claimed to pass under such assignment are situate. In other words, it has been held that where questions as to extra-territorial property arise between foreign assignees and foreign creditors, domiciled in the same state, the foreign law to which such parties are subject will be upheld.[1] Thus, in 1859, it was held by the Supreme Court of Massachusetts, that a mortgage in Rhode Island of personal property in Massachusetts, by a Rhode Island mortgagor, to a Rhode Island mortgagee, which mortgage was good by the laws of Rhode Island, would be sustained in Massachusetts, as against a Rhode Island creditor, who sued out an attachment in Massachusetts. "An exception," said Judge Dewey, "has sometimes been made in favor of creditors residing in Massachusetts, and who had made attachments here which were sought to be avoided by an assignment or transfer in another state to secure creditors. But this is not such a case; all the parties are citizens of Rhode Island, and a valid mortgage there may transfer the property in Massachusetts."[2]

§ 370. But this exception, if it be accepted at all (and it is rejected by the Supreme Court of the United States),[3] is subject to two marked qualifications. First, no title *in rem* can pass in such proceedings; all that can pass is the interest of the particular parties. "Where a tribunal, no matter whether in England or a foreign country, has to determine between two parties and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the

But a judgment between such parties does not affect third parties.

[1] Hall *v.* Boardman, 14 N. H. 38; Hoag *v.* Hunt, 21 N. H. 106; Smith *v.* Brown, 43 N. H. 44; Dunlap *v.* Rogers, 47 N. H. 287; Kidder *v.* Tufts, 48 N. H. 125; Whipple *v.* Thayer, 16 Pick. 25; Richardson *v.* Forepaugh, 7 Gray, 546; May *v.* Wannemacher, 111 Mass. 202; Atwood *v.* Ins. Co. 14 Conn. 555; Plestero *v.* Abraham, 1 Paige, 236; Abraham *v.* Plestero, 3 Wend. 540; Moore *v.* Bonnell, 2 Vroom (N. J.), 90; Richardson *v.* Leavitt, 1 La. Ann. R. 430; Einer *v.* Deynoodt, 39 Mo. 69; Thurston *v.* Rosenfield, 42 Mo. 474; Warren *v.* Van Buskirk, cited 35 N. Y. 658.

[2] Rhode Island Bank *v.* Danforth, 14 Gray, 123.

[3] Green *v.* Van Buskirk, 5 Wal. 307; 7 Wal. 139, cited infra, § 371.



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rights of third parties; and if, in execution of the judgment of such a tribunal, process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing."[1] And a decision rendered on the above principles, in a suit between two foreign litigants, would not bar a procedure to recover the goods by a domestic attaching creditor.

Such common domicil of foreign litigants cannot override positive prescriptions as to registry by *lex situs*.

§ 371. Then, secondly, even the express agreement of litigants domiciled in a foreign land cannot overcome such registry and other positive laws as are distinctively politic and coercive. If a state provide that no title shall pass to property within its borders except on certain conditions, such provision cannot be overridden by any foreign law, which parties domiciled abroad may choose to interpolate. Otherwise the whole system of public notice of sales and mortgages which laws of this kind, for the maintenance of fair dealing, have established, would be overthrown in favor of parties whose domicil is foreign. If this were allowed, registry laws, in such cases, would be mere traps; for a party who, on the record, might appear to be the owner of large unincumbered assets, would be able to set up, as against such record, the law of his domicil, which validated foreign incumbrances, irrespective of the question of local registry.[2]

On such a general course of reasoning may be vindicated the decision of the Supreme Court of the United States, already quoted, in which, in 1868, reversing a contrary ruling in New York, it was held that though the owner, the mortgagee, and the attaching creditor of certain iron safes were all domiciled in New York, yet an attachment laid by such attaching creditor in Illinois, where the safes were, was good against the mortgagee.[3]

[1] Blackburn, J., in giving the opinion of the judges of the House of Lords in Castrique *v.* Imrie, L. R. 4 H. of L. (1870), 428. See infra, §§ 647, 654, 664, 671.

[2] Infra, § 374.

[3] Green *v.* Van Buskirk, 7 Wal. 139. Supra, § 347. See same parties, 5 Wall. 307; and see, also, Smith *v.* Smith, 19 Grattan (Va.), 545.



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It should be observed, however, that where property has vested in an assignee, by a deed valid in the state of the assignment, and where both parties are domiciled, the title cannot be disturbed in another state, to which the parties subsequently removed.[1]

### 9. *Form of Assignment.*

Form of assignment of immovables must follow *lex situs.*

§ 372. This question has been necessarily anticipated in the pages immediately preceding, and will hereafter be again adverted to when we proceed to consider the maxim of *locus regit actum.*[2] Generally speaking, the same reasoning which has been already invoked as showing the subjection of the *mode* of transfer to the *lex situs* operates as to the *form.* So far as concerns immovables, this has been received everywhere without question. The very technicalities of transfer, according to both feudal and Roman law, required that the transfer should either be on the spot, accompanied by an actual delivery of possession, or that it should be executed before the *judex rei sitae.* And the policy of modern times, which seeks to promote fair dealing and to stimulate public improvement by a system of registration by which clean titles can be secured, prescribes with equal emphasis the same rule. This rule is that all conveyances of immovables must be in formal conformity with the law of the place where such immovables are situate.[3]

[1] Bank U. S. *v.* Lee, 13 Peters, 107; S. C., 5 Cranch C. C. 319; Crapo *v.* Kelly, 16 Wal. 610; Pond *v.* Cooke, 45 Conn. 132. Supra, § 353.

[2] Infra, § 676.

[3] Argentræus, No. 3; P. Voet, C. i. § 9, No. 2; Boullenois, i. pp. 501–503; Mittermaier, § 32; Burge, ii. pp. 843, 871; Wächter, ii. p. 383; Story, §§ 363, 435; Savigny, pp. 183, 184; Bar, § 61; Westlake, art. 84; Dundas *v.* Dundas, 2 Dow & Clark, 349; Coppin *v.* Coppin, 2 P. Wil. 291; U. S. *v.* Crosby, 7 Cranch, 115; Kerr *v.* Moon, 9 Wheat. 566; McCormick *v.* Sullivant, 10 Wheat. 192; Darby *v.* Mayer, 10 Wheat. 465; Cutter *v.* Davenport, 1 Pick. R. 81; Bonati *v.* Welsch, 24 N. Y. 157; Sell *v.* Miller, 11 Ohio (N. S.), 331; Lucas *v.* Tucker, 17 Ind. 41; Loving *v.* Pairo, 10 Iowa (2 With.), 282; Whart. on Ev. § 643. Judge Story cites a number of the older jurists to the contrary; but each citation, as Bar observes, is on the question of universal succession, and hence does not touch that of transfer *inter vivos.* In Philson *v.* Barnes, 50 Penn. St. 230, the property attached was claimed under a Maryland assignment, not recorded in conformity with Pennsylvania laws. The attachment was sustained. On the other hand, when assignees obtain



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§ 373. Savigny[1] extends the rule to movables "whose transfer is impossible except at the place where they are situate;" and this applies to all cases where stocks or loans, &c., must be transferred by formalities prescribed by local or corporate law. In this class Sir R. Phillimore[2] enumerates "many transactions of mere form, such as the act connected with bankruptcy or insolvency, termed the judicial cession (*cession judiciaire, gerichtliche Auflassung*), enrolment, or registration of mortgages or deeds, and others of a like character, which can only be duly executed before a particular public functionary, and at a particular place." And Bar, the latest authoritative German jurist on this topic, goes still further, and excepts from the rule *locus regit actum* the acquisition and loss of possessory rights not merely in immovables, but in movables (der Erwerb und Verlust dinglicher Rechte an Mobilien);[3] and he argues with much force, and without reservation, that the forms of the voluntary transfer of property are to be determined solely by the *lex situs*.[4]

And so as to movables whose assignment is regulated by local law.

§ 374. The rule that the *lex situs* determines the mode of conveyance may, in fact, taking it in a large sense, be applied to all movables.[5] "In every disposition or contract," according to the comprehensive recapitulation of Lord Mansfield, "where the subject matter relates *locally* to England, the law of England must govern, and must have been intended to govern. Thus a conveyance or will of land, a mortgage, a contract concerning stocks, must all be sued upon in England; and the *local nature of the thing* requires them to be carried into execution according to the law there."[6] It is no reply to this position that in reference to many movables the *lex situs* recognizes the rule *locus regit actum*. The rule *locus regit actum* can only act on things when permitted to do so by the *lex situs*. It is the *lex situs* that in such cases controls.[7]

Local law prevails as to local forms.

possession of goods, under an assignment defective by the *lex situs* from non-registry, their title will not be disturbed. Forbes *v.* Scannell, 13 Cal. 241.

[1] VIII. 381.

[2] IV. 456.

[3] 34.

[4] 64.

[5] Supra, §§ 343 *et seq.* See infra, §§ 674 *et seq.*

[6] Robinson *v.* Bland, 2 Burr. 1079; 1 W. Bl. 259.

[7] As to registry, see supra, § 275 *f.*



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§ 375. In apparent conflict with these views is a case decided by Judge McLean,[1] which has been frequently referred to as deciding that the assignment of a mortgage is to be governed by the law of the state where the assignment is made. But a closer examination will show how little warrant there is for so broad a statement. A mortgage was executed by R. B. *et al.* in Cincinnati, on July 17, 1839, to the Bank of the United States, of certain lots in Cincinnati, to secure payment of a loan by that bank. On May 1, 1841, the bank, by an assignment in Philadelphia, assigned the mortgage to D. and others as trustees. A bill was brought to foreclose the mortgage in the Circuit Court of the United States at Cincinnati, in 1844: and to this the defendants set up as a defence that under the Ohio law they had a right to pay the mortgage in the depreciated notes of the Bank of the United States, and rested their case on an Ohio act of 1842, to the effect that "every debtor of a bank or banker" is entitled "to pay such debt in the notes of such bank or banker, or the assignee of either, whether such bank or banker retains an interest in the same, or has parted with all interest therein." The case came up for decision in 1844, before Judge McLean, and he very properly held the act in question not only inapplicable, but unconstitutional, as impairing the obligation of contracts. This is the only point actually decided in the case. There was no conflict of liens, or claims of innocent purchasers. With the principles of international law, as hereinbefore expressed, the case is in perfect harmony. The defendants, by borrowing from a Pennsylvania corporation, became bound, as to the general mode of payment, by Pennsylvania law. But Judge McLean does not even go this far, in rejecting the *lex situs*. He concedes that the Ohio law binds the land, so far as concerns all questions of title; but he declares that the statute of 1842 is not law in Ohio, and thus does not touch the title.[2]

On this principle conflicting rulings can be explained.

§ 376. Hence, assignments on books of corporations are to be regulated by the laws of the state by which such corporations are created.[3] This, as no state can give a

Assignments on corporation

[1] Dundas *v.* Bowler, 3 McLean, 397.

[2] Supra, § 292.

[3] Dow *v.* Gould, 31 Cal. 630. As to capacity of corporations, see supra, § 105 *et seq.*



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books regulated by local law.

corporation extra-territorial powers, coincides with the *lex situs*.[1]

§ 377. It should be remembered, however, that while no title *in rem* can be transferred except in accordance with the *lex situs*, a party, by a contract executed abroad, in submission to the principle *locus regit actum*, may make himself personally liable for damages, should he afterwards refuse to convey the property according to the *lex situs*, or may be compelled to make such conveyance by the decree of a chancellor having jurisdiction.

Party to imperfect assignment may be liable for damages.

## IV. PRESCRIPTION AND LIMITATION.

§ 378. As to things immovable, there is a general harmony of opinion to the effect that the law of the place controls.[2] This, by the English common law, is necessarily the case with regard to all suits testing the title of real estate.[3] With regard to movables, there can be no doubt as to the wisdom of Savigny's opinion, that prescription as to these, too, should be judged by the place in which they exist. The great question in such cases is the adverse posses-

Prescription and limitation governed by the *lex situs* as to immovables.

[1] See supra, § 275 *f*.

[2] J. Voet, Comment. in Dig. 43, 44, § 12; Bouhier, ch. 35, Nos. 3, 4; Boullenois, i. p. 364; Merlin, Rép. Prescription, sect. i. § 3, No. 7; Pothier, Obligations, No. 247, 248; Massé, p. 102; Story, § 682; Burge, iii. p. 221; Bar, § 63; Schæffner, p. 75; Fœlix, i. No. 63; Demangeat, note to same; Pasquale Fiore, Droit int. privé, No. 202; Jour. du droit int. privé, 1878, p. 44. When there is an exception in the law in favor of minors, it is held by Bar that this extends to foreign minors, measuring their minority by the law of their domicil. Bar, § 64. Gand, however, seems to think that such minority is to be tested by the *lex rei sitae*. Nos. 731–733.

Prescription, argues Brocher, finds its chief reason in considerations of public order, based on the imperious necessities of society. It is here that its principal characteristics are to be found. Title cannot be permitted to remain in perpetual incertitude. A prolonged possession suggests itself as a test the most satisfactory in quieting such doubts. Prescription, as is said by a celebrated Spanish jurist, is as much of a necessity to society as is inheritance to the family. We cannot conceive of the second without the first. Without such a sanction nothing would be secure. Under such circumstances individual right must yield to the needs of society in the aggregate. Brocher, Droit int. privé, p. 321.

[3] Supra, § 275 *a*; Pitt *v.* Lord Dacre, L. R. 3 Ch. D. 295; Moseley *v.* Williams, 5 How. U. S. 523; Fears *v.* Sykes, 35 Miss. 633.



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sion; and this can be only properly determined according to the local law.

When there is a continuous adverse possession in a series of distinct countries, then, it is maintained by this great jurist, the whole is to be considered as an aggregate, but the title is to be determined by the law of the place in which the article is last found, because time is essential to make such title, and it is at the place where the property is at the time of the beginning of litigation that the question of time is fixed.[1]

Such prescription by Roman law must be adverse and definite.

§ 379. On this subject Sir H. Maine writes: "It was a positive rule of the oldest Roman law, a rule older than the Twelve Tables, that commodities which had been uninterruptedly possessed for a certain period became the property of the possessor. The period of possession was exceedingly short, — one or two years, according to the nature of the commodities, — and in historical times usucapion was only allowed to operate when possession had commenced in a particular way; but I think it likely that at a less advanced epoch possession was converted into ownership under conditions even less severe than we read of in our authorities."[2] It is an incident to title of this character that it should be adverse and definite, — *adjectio dominii per continuationem possessionis temporis lege definiti*.[3]

Usucapion merged in prescription.

§ 380. Prescription operates on incorporeal hereditaments, which was not the case with usucapion; and gradually in the Roman law usucapion, as a title, has merged in prescription, which has a more comprehensive and more definite effect.

Even as to movables *lex situs* must determine.

§ 381. Title by prescription has been likened to the ordinary right to a *chose in action* based on the expiration of the legal period of bringing a suit for the same; and, in fact, the two are often mingled, as in many countries the only statutory title by prescription is that which is caused by the enactment that no suit shall be brought for the restitution of property after a specified lapse of time. Hence it

[1] See Brocher, Priv. Int. Law, p. 331.

[2] Maine, Ancient Law, ed. of 1870, p. 284.

[3] Heinec. Elem. Jur. Civ. i. 2, tit. 6. See, also, Bl. Com. 264, note *f*.



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is that we have a strong current of authority to the effect, that in all questions of prescription the law of the court of process applies. Burge,[1] Story,[2] Mittermaier,[3] together with a series of German decisions reported by Seuffert,[4] maintain this opinion. It is true, that on the general question of statutes of limitations this has been strongly contested. By some, as will hereafter be seen, the law of the place of contract, by others, that of the place of fulfilment, has been held decisive in this issue; by at least one great author, Pothier, the plaintiff's domicil is declared the test,[5] while a series of others, regarding statutes of limitations as statutes of peace, pronounce for the domicil of the defendant.[6] But when the question of prescription to things comes up, these difficulties disappear. The proceeding to recover the litigated thing can only be one *in rem;* and hence the *lex situs*, which on the principles heretofore announced would have a predominating claim, coincides with the law of the court of process. The defendant, by setting up title to the thing in that law, accepts the local law as binding him, and so does the plaintiff, by the very fact of his electing in this court to bring suit. This, of course, is on the supposition, already noticed, that the thing in litigation has a continuous lodgment on such soil. If it be at the time *in transit*, then the distinction already adverted to springs up, and the law of the possessor's domicil may be invoked.[7]

Prescription cannot be extended by removal of goods after title vests.

§ 382. A special case of conflict remains to be noticed. It is when goods, to which a title by limitation or prescription has accrued, have been moved to another territory, where a longer period for such title is required. According to the views heretofore expressed, the *lex situs* having transferred title in these goods to the possessor, this title is complete, and cannot be divested by the goods being carried elsewhere. So, in fact, has it been judicially declared.[8]

[1] III. 878.
[2] § 576.
[3] § 31.
[4] VIII. pp. 12, 324; xii. p. 446.
[5] De la Prescription, No. 251.
[6] Infra, § 534.
[7] This distinction is maintained, and rightfully, by Bar, § 64, and Massé, pp. 102, 103.
[8] Newby *v.* Blakely, 3 Hen. & Mun. R. 57; Brent *v.* Chapman, 5 Cranch R. 358; Shelby *v.* Guy, 11 Wheat. 361; Waters *v.* Barton, 1 Cold. (Tenn.) 43; Story, § 582. Supra, § 378.



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V. CONFISCATION AND ESCHEAT.

§ 383. No matter what may be grounds of confiscation, the *lex rei sitae* is to be regarded in such respects as supreme. An illustration of this is to be found in the confiscations, by the Massachusetts and Pennsylvania legislatures, of the estates of royalists at the close of the Revolutionary War. The ground of many of these confiscations was that the owners had abandoned their American domicil, and elected a domicil in England. It was never pretended, either in America or England, that the *lex domicilii* of the owner, either as to movables or immovables, could be invoked; but the conclusiveness of the action of the *lex rei sitae* was conceded in England, and compensatory damages given by the English government to the parties dispossessed.

*Lex situs* determines.

§ 384. The same rule applies to custom-house seizures; though the offended state, after a violation of custom-house rules, has not an international right to proceed against the contraband goods in the courts of another state, if, after seizure, they have been surreptitiously removed to such state.[1] But however this may be, it is clear that confiscation only attaches to things within the territorial power of the confiscating sovereign.[2]

Rule applies to custom-house seizures.

Escheats, in relation to decedents' estates, are considered hereafter.[3]

VI. BY WHAT LAW PROCESSES *IN REM* ARE TO BE GOVERNED.

§ 385. As a general rule, the modes by which the possession of property can be recovered are moulded by the forms of the court in which suit is to be brought.[4]

*Lex fori* determines process.

VII. BANKRUPT ASSIGNMENTS.

§ 386. The subject of the extra-territorial effect of bankrupt assignments has been already incidentally noticed. At present it is sufficient to consider bankrupt assignments as follows: —

[1] See Hert. iv. 18. Supra, § 4; also, infra, §§ 482–496.

[2] Bar, § 64; Bartolus, in L. 1, c. de S. Trin. No. 51; Chassenæus, tit. Des Confiscations; Mevius, Proleg. qu. 6, § 14; Bouhier, ch. 34, No. 28; Casaregis, Disc. 43, No. 17.

[3] Infra, § 602.

[4] Infra, § 717.



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### 1. *On the Continent of Europe.*[1]

Conflict as to nature of bankruptcy.

§ 387. Foreign jurists, in considering whether a decree pronouncing a person to be a bankrupt is ubiquitous, are governed in a large measure by the view they take of the question whether bankruptcy statutes are personal or real. By Fœlix,[2] following in this respect some of the older jurists, bankruptcy is regarded as a *capitis diminutio*, being an interdict (interdit), determining *status;* and hence the laws establishing it are regarded as personal. On the other hand, Rocco[3] argues that bankrupt laws are in the interest of creditors, and that their object is to prevent the squandering of goods under the control of the state enacting the laws, and to secure the due distribution of such goods. Hence it is concluded that such statutes are real, and operate only on goods in the state making the decree.[4] Massé, taking another line,[5] distinguishes between incapacities which relate directly to the person of the bankrupt, and those which relate to his goods. The first (*e. g.* those prohibiting him from the further exercise of the business of merchant or broker) follow him, in this view, wherever he may go. The second only operate in the country where the bankruptcy is declared. The incapacity of the bankrupt is, therefore, held to be relative, not absolute; and consequently a merchant declared a bankrupt in France may sell his goods in a foreign land, such goods not being within the French domain.[6] For the same reason he argues that a bankrupt may make, in a foreign land, payments which will be held valid in such land. Merlin,[7] abandoning the distinction between statutes real and personal, seeks to settle the question on the principle of equity and good faith. If a purchaser in a foreign land, he holds, knowing that his vendor is by his own law a bankrupt, buys to the prejudice of the bankrupt's creditors, the sale will be void as tainted with fraud; though it is otherwise if the purchase was in good faith. On the other hand, it is zealously argued by Fiore,[8] that the

[1] A statement of the practice in the principal European states will be found infra, § 799, note.

[2] Droit privé int. No. 89.

[3] Droit civ. int. 3d part, ch. 31.

[4] See Fiore, Op. cit. §§ 362 *et seq.*

[5] Droit Comm. No. 546.

[6] Supra, § 122; infra, § 795.

[7] Répertoire, Faillite, sect. 11.

[8] Op. cit. § 366.



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incapacity of a bankrupt, when decreed by the state to which he is subject, attaches to him wherever he holds property, so that such property passes by the decree of bankruptcy to the syndic, or bankrupt assignee. Commerce, so it is argued, is cosmopolitan; and a bankrupt decree, being a commercial and international procedure, should have a cosmopolitan effect. On the other hand, as we will see hereafter,[1] it is shown that however plausible may be this theory, the practice in Europe is to use bankruptcy as a process for the collection of local debts, and that so far from there being one domiciliary bankruptcy opened, whose operation shall be cosmopolitan, the practice is to open as many bankruptcies as there are countries in which the alleged bankrupt does business and possesses property. There is no more reason, therefore, for making an English or French or German bankrupt assignment ubiquitous, than there would be for making ubiquitous an English or a French or a German execution.

Conflict as to its extra-territorial effect.

§ 388. This conflict of opinion exhibits itself practically whenever the question arises whether a bankrupt assignment operates on the bankrupt's estate in foreign lands. Bankruptcy is not regarded as extra-territorial in its operations by those who view it either as an execution, or as a process of domestic police, issued to restrain the extravagance of a person who happens to be on the soil of the state issuing the process, the object being to place him under an interdict, and to protect those who may deal with him as well as himself. On the other hand, by those who hold that bankruptcy is an international process, to be issued only by the state in which the bankrupt is domiciled, assignments are regarded as ubiquitous.[2]

### 2. *England.*

§ 389. In England it is settled that a bankrupt assignment does not convey foreign immovables.[3]

[1] Infra, §§ 389, 803–4.

[2] The practice in the French, German, and Italian courts is given infra, § 799, note. The topic in the text is examined by me in 6 South. Law Rev. (1881) p. 690.

[3] Supra, § 275. That in England a bankrupt assignment does not pass foreign real estate is ruled in Cockerell *v.* Dickens, 3 Moore P. C. 98; nor will a bankrupt be compelled to assign such real estate to his assignees. Selkrig *v.* Davies, 2 Dow, 245; 2 Rose, 291; Lee on Bankruptcy, London, 1871, p. 110.



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Foreign bankrupt assignment does not convey immovables: doubt as to movables.

Sir R. Phillimore[1] states the law to be as follows: — "I. That an attachment by an English creditor, not acquired by a specific lien prior to, but acquired after the assignment of a foreign bankruptcy, with or without notice to the bankrupt, is impotent to effect the assignment.

"II. That, nevertheless, if the law of the foreign state in which the property may be should, in violation of comity, exercise jurisdiction over the property, and by express regulation prefer the claim of the attaching creditor to the previous assignment under the bankruptcy, the title so conveyed by the *lex rei sitae* and *lex fori* would not be disregarded in England so as to compel the creditor, when within English jurisdiction, to refund the property so acquired.

"III. That such a creditor, however, will not be allowed to take advantage of the English bankruptcy without first communicating the benefit derived from his proceedings in the foreign state.

"IV. That the last mentioned axiom, however, does not apply where the creditor obtains by his diligence something which did not and could not form a part of the English fund, or pass to the assignees under the assignment, *e. g.* foreign real estate."

It should be observed, however, that the cases cited by this learned author to sustain these propositions are cases in which the parties were British subjects, and that they were, therefore, bound by the laws of their common sovereign. To them, therefore, apply the remarks already made,[2] that such cases do not touch the question as to whether an English subject would be bound by a French bankruptcy as to personalty in England.[3]

[1] IV. 549.

[2] Supra, §§ 363, 369.

[3] "The courts of this country" (England), says Mr. Lee, in his treatise on bankruptcy above referred to, p. 111, "recognize the laws of other countries in giving effect to assignments made under laws analogous to our bankrupt laws, and accordingly creditors have been restrained from recovering by attachment a debt due to the insolvent in this country." He cites only Solomons *v.* Ross, 11 Bl. 131, n., and Jollett *v.* De Ponthieu, Ibid. 132, n.; Neal *v.* Cottingham, Ibid.; cases in which, as have already been seen (supra, § 364), the contesting parties were subject to the law of the country of assignment, and were therefore incapable on this ground of contesting it.

According to Mr. Westlake (1880), § 131, "one who is a bankrupt in England cannot be compelled to make



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But although English courts will hold an English bankrupt assignee entitled to administer the bankrupt's foreign effects, yet this title may be contested by a creditor of the bankrupt who has attached the property abroad. From a creditor domiciled in England, having notice of the bankrupt assignment, the assignee is entitled, as we have seen, to recover what he has thus received;[1] though it is otherwise as to a foreign garnishee, who has paid a debt due to the bankrupt estate to the creditor under direction of the competent foreign tribunal.[2] There is, however, no English ruling to the effect that a foreign bankrupt assignment passes English movables.

### 3. *United States.*

Foreign bankrupt assignment

§ 390. In the United States a foreign bankrupt assignment, for the reasons above given,[3] will not be

to the trustees an assignment of his immovable property outside of the British dominions, or even of his movable property in any country in which the title of the trustees to such property is not as fully recognized as in England." To this he cites Blakes, ex parte, Cox, 398; Selkrig *v.* Davis, 2 Rose, 311; 2 Dow, 245; Cockerell *v.* Dickens, 3 Moore P. C. 133.

He proceeds to say that "any creditor, British or alien, may retain any payment which he can obtain out of the non-British *immovables* of the bankrupt, and if it is only partial, may recover dividends in the bankruptcy on the residue of his debt *pari passu* with the other creditors." Whether a foreign creditor who has seized movables of the bankrupt in a state which does not recognize the extra-territoriality of a British bankruptcy will be compelled to account, if he claims before the British assignees, does not seem settled. In Hunter *v.* Potts, 4 T. R. 182, Lord Kenyon put the ruling against the creditor partly on the ground that he was a resident in England and cognizant of the bankruptcy. In Sill *v.* Worswick, 1 H. Bl. 665, and Philips *v.* Hunter, 2 H. Bl. 402, the parties were all British. That the rulings may rest on this ground, see supra, §§ 363, 369. In Wilson, ex parte, L. R. 7 Ch. Ap. 490; Banco de Portugal, L. R. 11 Ch. D. 317; L. R. 5 Ap. Ca. 161, it was held that a foreign creditor getting a dividend in a foreign collateral bankruptcy would be compelled to account when claiming in a British bankruptcy. In all these cases the law laid down was that if the creditor was British, he not only would be precluded from claiming before the British trustees until what he received was brought in, but he would be compelled to refund. See infra, § 798.

[1] Hunter *v.* Potts, 4 T. R. 182; Scinde R. R. Co. ex parte, L. R. 9 Ch. 557; though see Waring *v.* Knight, Cooke's Bank. Laws, 300.

[2] Le Chevalier *v.* Lynch, Dougl. 170; Allen *v.* Douglass, 3 T. R. 125.

[3] Supra, § 388; Story, § 410.



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not extra-territorial.

permitted to transfer property, whether movable or immovable, as against domestic attaching creditors.[1]

The non-extra-territoriality of bankrupt assignments is sometimes based on the position that compulsory conveyances in bankruptcy are the creatures of local law, and should not be extra-territorially extended; and sometimes on the priority which every state, in case of collision, should give to its own subjects. It is also argued, as has been already seen,[2] that property, personal as well as real, is subject to the local laws of its site, and that consequently if the owner locally incurs obligations on the faith of such property, it is but fair that it should primarily bear the burden of such debt. It is further urged that the forced application of the law of the *lex domicilii* to such case would oper-

[1] See supra, §§ 347–365; Oakey *v.* Bennett, 11 How. 33; Booth *v.* Clarke, 17 How. 322; Blane *v.* Drummond, 1 Brock. 62; The Watchman, 1 Ware, 232; Very *v.* McHenry, 29 Me. 208; Felch *v.* Bugbee, 48 Me. 9; Ward *v.* Morrison, 25 Vt. 593; Blake *v.* Williams, 6 Pick. 286; Fisk *v.* Foster, 10 Met. 597; Scribner *v.* Fisher, 2 Gray, 43; Hutchinson *v.* Perrine, 1 C. E. Green (N. J.), 167; Milne *v.* Morton, 6 Binney, 353; Mosselman *v.* Caen, 34 Barb. 66; McCullough *v.* Roderick, 2 Hammond, 234; Rodgers *v.* Allen, 3 Ohio, 468; Johnson *v.* Parker, 4 Bush, 149; Kidder *v.* Tufts, 48 N. H. 125. See, also, infra, §§ 524, 528; and as to the analogous case of distribution under conflicting administrations, infra, § 625.

That a foreign bankrupt assignee has no standing in conflict with attaching creditor, see Perry *v.* Barry, 1 Cranch C. C. 204; Blane *v.* Drummond, 1 Brock. 92; Hunt *v.* Jackson, 5 Blatch. 349.

In Wood *v.* Parsons, 27 Mich. 159, it was held that a compulsory insolvent assignment in Canada would not, in the absence of any transfer by the insolvent himself, vest the Canadian assignee with title to promissory notes in Michigan which have never been within the territorial jurisdiction of the Canadian court or subject by any process to its control; and that the fact that the insolvent afterwards went to Canada and submitted himself to the jurisdiction of that court would not help the matter.

Chancellor Kent (Com. ii. 405) reaffirms the position taken in Holmes *v.* Remsen, 4 Johns. Ch. 460, holding that, "by the general international law of Europe, the proceeding which is prior in point of time is prior in point of right, and attaches to itself the right to take and distribute the estate." But, as we have seen, the "general international law of Europe, since the publication of Chancellor Kent's work, sustains the issue of bankruptcy arrests on the barest and most transient residence of an alleged insolvent trader. He adds, however: "But whatever consideration might otherwise have been due to the opinion in that case (Holmes *v.* Remsen), the weight of American authority is decidedly the other way."

[2] Supra, §§ 297 *et seq.*



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ate to extend oppression and fraud.[1] Other reasons tend to the same result. (1.) A compulsory bankruptcy is in the nature of an execution, and it is settled internationally that an execution issued in one state cannot, by its own force, attach assets in another state, whatever may be the case in the state where the execution issues. The proper course in such case is to have an ancillary procedure opened in the state where the assets are found; and until then, such assets are open to attachment by individual creditors.[2] (2.) If the state of the first decree is to take possession of extra-territorial assets, there will be an unfair race, stimulated by official greed,[3] as to which country shall dispossess the rest. (3.) The procedure, being in many respects penal, has no extra-territorial effects.[4] (4.) And a final reason may be found in the fact that, whatever may be the opinion of jurists viewing the question speculatively, the practice in France and Germany is, as has just been seen, to hold foreigners as well as subjects, if residents, amenable to bankrupt process; and even in England the process is not limited by the test of domicil, but may be applied to foreigners doing casual and temporary business in England.[5] Now it cannot be rationally maintained that

[1] This question is discussed infra, §§ 799–801. Mr. Wheaton (Lawrence's Wheaton, pt. ii. c. ii. § 18) says: "How far a bankruptcy declared under the laws of one country will affect the real and personal estate of the bankrupt situate in another state, is a question of which the usage of nations and the opinions of civilians furnish no satisfactory solution. Even as between coördinate states, belonging to the same common empire, it has been doubted how far the assignment under the bankrupt laws of one country will operate a transfer of property in another."

[2] See §§ 794 *et seq.*

[3] The large emoluments of bankrupt officials may be properly taken into account when we consider the propriety of assigning ubiquity to their operations. Very often such procedure enures to the benefit chiefly of these officials. The London Economist, for instance, in August, 1880, in an article on this topic, cites the case of a jeweller "whose property realized at forced sale over £1,250, of which sum £289 were paid to preferential and secured creditors, leaving the net assets £961, an amount amply sufficient to have paid all his creditors twenty shillings in the pound. Of these net assets £945 were eaten up by the law charges, trustee's and receiver's fees and auctioneer's commissions. The residue distributed among the creditors amounted to just nine pounds seventeen shillings and twopence."

[4] Supra, § 4.

[5] Crispin, ex parte, L. R. 8 Ch. 374; Davidson's Trusts, L. R. 15 Eq. 383; Pascal, ex parte, L. R. 1 Ch. D. 509.

In Blithman, in re, L. R. 2 Eq. 23,



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a bankrupt decree, obtained in England against a citizen of Massachusetts temporarily visiting England, binds his estate in Massachusetts. And it is equally irrational to maintain that when a business firm or corporation has branches in several European states, the first state, no matter how insignificant may be its interest in the estate, which, in the race between creditors, declares the firm or corporation bankrupt, takes control of all its effects, wherever situate.

So as to state insolvent assignments.

§ 390 *a*. One state in the United States, also, will not recognize as binding property within its borders, to the prejudice of one of its own citizens, a compulsory insolvent assignment made in another.[1]

it seems intimated that in such cases the English assignee is entitled to hold the bankrupt's goods on behalf of the English creditors.

In Pyke, ex parte, 42 L. T. N. S. 664 (1880), it was held that where the legal requisites are perfected, and no equitable considerations intervene, the Court of Bankruptcy will adjudicate a debtor a bankrupt upon a petition in England, notwithstanding that a prior adjudication may have been made against the same debtor in Ireland.

In McCulloch, ex parte, 43 L. T. N. S. 161; L. R. 14 Ch. D. 714, it was held that although a debtor, who has carried on business in Ireland and England, has been adjudicated a bankrupt in Ireland, the court will, in the absence of special circumstances, adjudicate him a bankrupt in England. In this case, James, L. J., said: "I think it is our duty, under all the circumstances of the case, to allow the English adjudication to stand for what it is or may be worth."

In Blain, ex parte, L. R. 12 Ch. D. 522; 41 L. T. N. S. 47, it was said by James, L. J., that the British bankrupt legislation was applicable "to foreigners who by coming into this country, *whether for a long or a short time*, have made themselves during that time British subjects. Because every foreigner who comes into this country for however limited a time is, during his residence in this country, within the allegiance of the sovereign, entitled to the protection of the sovereign, and subject to all the laws of the sovereign."

But to give the English court jurisdiction in cases of foreigners temporarily in England, it is necessary that an act of bankruptcy should have been committed in England by such foreigner. Blain, ex parte, *ut supra*.

[1] Towne *v.* Smith, 1 Wood. & M. 137; Harrison *v.* Sterry, 5 Cranch, 289; The Watchman, 1 Ware, 232; Green *v.* Van Buskirk, 5 Wall. 307; Osborne *v.* Adams, 18 Pick. 245; Paine *v.* Lister, 44 Conn. 136 (a case where the attaching creditor was not a citizen); Kelly *v.* Crapo, 45 N. Y. 86; and cases cited in last section; Burrill on Assignments, §§ 309 *et seq.*

"When, upon the insolvency of a debtor, the law of the state in which he resides assumes to take his property out of his control, and to assign it, by judicial proceedings, without his assent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts



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§ 390 *b*. A receiver appointed in one state for an insolvent corporation has no title as such to property located in another state.[1] The same distinctions apply to other cases of receivership. Receivers take by virtue of a process analogous to execution, which, for reasons heretofore given, has no extra-territorial effect.[2]

Foreign receivers of insolvents subject to same rule.

of another state to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." Gray, J., Taylor *v.* Ins. Co. 14 Allen, 355.

Crapo *v.* Kelly, 16 Wal. 610, cited fully supra, § 357, may appear to conflict with the above; but the ground of the ruling was in this case that the ship assigned was at the time of the assignment part of the territory of the state directing the assignment.

A state statute prescribing that an insolvent assignment shall dissolve prior attachments is not extra-territorial. Upton *v.* Hubbard, 28 Conn. 274; Boston *v.* Boston, 51 Me. 585. Supra, § 347; infra, § 802.

[1] Upton *v.* Hubbard, 28 Conn. 274; Taylor *v.* Ins. Co. 14 Allen, 353; Willits *v.* Waite, 25 N. Y. 577; Hooper *v.* Tuckerman, 3 Sandf. (N. Y.) 311; Cagill *v.* Woodridge, 8 Bax. 580; Moseby *v.* Barrow, 52 Tex. 396. It is otherwise as to property actually in possession of the receiver. Pond *v.* Cooke, 45 Conn. 126.

[2] Supra, § 390; Booth *v.* Clark, 17 How. 322; Farmers' & Mech. Ins. Co. *v.* Needles, 52 Mo. 17. As to the jurisdiction of federal courts to review state courts in such respects, see Williams *v.* Benedict, 8 How. 107; Wiswall *v.* Sampson, 14 How. 52. As to practice, see Taylor *v.* R. R. 57 How. (N. Y.) Pr. 9; U. S. Rolling Stock Co. in re, 57 How. (N. Y.) Pr. 16; Peale *v.* Phipps, 14 How. U. S. 368.

The fact that a bank has been declared judicially insolvent in Rhode Island, where it is chartered, and its effects passed into the hands of a receiver, does not preclude, it is held in Illinois, an attachment in Illinois, by a creditor of the bank, of real estate of the bank situate in Illinois. City Ins. Co. *v.* Com. Bank, 68 Ill. 348.

That a foreign receiver cannot sue in a state court has been ruled by high authority (Booth *v.* Clark, 17 How. 322; Willits *v.* Waite, 25 N. Y. 577; Insurance Co. *v.* Needles, 52 Mo. 17), though it has been held that he may sue subject to local liens, and in subordination to local law. Norwood, ex parte, 3 Biss. 513; Hoyt *v.* Thompson, 5 N. Y. 320; Runk *v.* St. John, 29 Barb. 587; Cagill *v.* Woodridge, *ut supra*. But he cannot, in any view, be permitted to come in and contest existing liens. Hunt *v.* Ins. Co. 55 Me. 298; Taylor *v.* Ins. Co. 14 Allen, 353.



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# CHAPTER VIII.

## OBLIGATIONS AND CONTRACTS.


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## I. INTRODUCTORY REMARKS.

§ 393. When we approach the subject of obligations, we enter on a sphere which, so far as concerns its local legal relations, is comparatively indefinite and unmapped. A *person*, as such, must necessarily have a domicil, which invests him with a defined local law. Property, whether movable or immovable, takes its legal character from the place where it exists. For persons and property, therefore, there is, from the very space they occupy, and the corporeal relations they possess, a tangible field, which has its positive and inseparable legal atmosphere. But it is different with obligations. They are intangible and incorporeal, occupying no visible space, and adhering, of necessity, to no territorial base. Hence it is that when we come to determine the *seat* of an obligation, from which seat its legal relations are inferred, we find ourselves in a labyrinth of speculations, from which we can only emerge by following the landmarks of arbitrary, juridical rules. It follows, from the nature of the case, that these rules, applied as they are by so many courts, in so many distinct legal atmospheres, to so many varying states of fact, and without any imperative common principle to appeal to, should often conflict. It is the object of the present chapter to seek a common basis on which a preponderance of these opinions can rest, placing in connection with it, for the use of the practitioner, the various divergencies by which, in this respect, modern adjudications have been marked.

Complexity of obligations involves complexity of jurisdictions.

§ 394. Before, however, attempting to set forth a general rule,



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there are several points, already incidentally alluded to, which should be specially noticed. An obligation, as has been said, involves in its normal state two persons. Of one of these persons, the obligee, the liberty is enlarged. Of the other of these persons, the obligor, the liberty is restrained.[1] Now when the obligor resides in a different state from the obligee, the seat of the obligation, so far as concerns the obligee's right to assign it, or his duties in respect to its taxation, is his domicil.[2] On the other hand, the seat of the obligation, so far as concerns the obligor, is his domicil, whenever his domicil is the place of payment, and in many cases the obligation is presumed to be undertaken at his domicil, in which case the law of that domicil determines the way in which the obligation is to be construed.[3] And in countries subject to the Roman law, an obligor's domicil is of peculiar importance, from the fact that it determines the forum in which he is to be sued.[4]

Seat of obligation varies with relation of obligor to obligee.

§ 395. But in a large class of obligations, — in all, in fact, except those of the simple and rudimentary type, which have just been alluded to, — there is a reciprocity of engagements, so that the obligor is no longer the sole actor. It is, to adopt that formula of the Roman law which has been grafted on the common law of England and America: —

Contracts resolvable into obligations.

Do ut des, —
Do ut facias, —
Facio ut des, —
Facio ut facias.[5]

In these phases of obligation, — bilateral, as they are termed by the civilians, — each party is, in respect to the thing to be done by him, the obligor. But these bilateral contracts can be dissolved into their constituent members; and each then becomes a distinct obligation, with its own particular obligor, and with a forum and a local law applying distinctively to itself. And it is

[1] Savigny, § 56. Anson expands this into "Obligation is a power of control, exercisable by one person over another, with reference to future and specified acts or forbearances." Anson on Cont. § 2.

[2] Supra, §§ 79 *a*, 363.

[3] Infra, § 409.

[4] Supra, § 81; infra, § 396.

[5] Dig. 19, 4; Cooper's Just. Notes, 584; Bracton, fol. 19; Fleta, lib. 2, c. 60, § 23; Black. Com. ii. 444.



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insisted by Savigny,[1] that it is the *combination* of these two simple obligations that is artificial and unreal; and that the true and real view is that which treats the two as legally distinct, only blended for the purpose of practical convenience. Take, as an illustration, the contract of *facio ut facias*. Here, two persons undertake to do two distinct things; and each undertakes this as an individual, subject to his personal law, and liable to be compelled to do the thing, as we will presently see, according to the law of the place of performance; and this, though the two parties have separate domicils, and the places of performance of the things they undertake to do are distinct. Hence it was that, in the old English conveyancing, parties under such circumstances often executed separate obligations, which they exchanged. Hence, also, contracts of sale, in the old Roman law, were evidenced by two reciprocal stipulations.[2]

Roman law determining forum may indicate local law.

§ 396. Nor must we fail to keep in mind, in this relation, the bearing of the Roman law of *Forum* (Jurisdiction, Gerichtstand). As has been seen, the Roman law assigned to each person his personal forum, a forum derived from birth, or from domicil, or from both. But beside this, the Roman law prescribed, with great care and minuteness, a special forum for each obligation. It is true that technically, in our modern law, the idea of a special forum for each obligation has, as such, vanished; and the defendant, with certain exceptions, may be sued wherever he is found. But the reasoning employed by the Roman jurists to determine the forum of an obligation is equally applicable to our own efforts to determine the local law by which an obligation is to be governed. Hence the Roman law, in this respect, continues to form a common basis of adjudication, in cases of collision, in our own day.[3]

[1] VIII. § 369.

[2] Wächter, ii. p. 45.

[3] Supra, § 81; Savigny, viii. § 369.

See on this point a copious discussion in Bethmann-Hollweg's Essays (*Versuche*), pp. 1–77. The question between the prorogated forum (prorogirte Gerichtstand) and the special forum of the obligation (Gerichtstand der Obligationen) is one of much subtlety, which it is not necessary now to consider, as its practical consequences have now almost entirely passed away. See Savigny, § 369; Donell. Com. xvii. cc. 10, 14; Richards *v.* Globe Bank, 12 Wis. 692; Vliet *v.* Camp, 13 Wis. 198.



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§ 397. There are many cases, also, in which a particular local law may, by agreement of the parties, be incorporated in a contract, even though such local law be not that either of the place of fulfilment or of origination.[1] In such cases the law referred to becomes part of the contract, and as such will be enforced everywhere, if not conflicting with the policy of the *lex fori*.[2]

Parties may determine law by constructive consent.

II. WHEN LAW OF PLACE OF PERFORMANCE BINDS.

§ 398. As is well stated by Savigny,[3] the place where an obligation originates is often accidental; is remote, sometimes receding from spot to spot, as we search for it; and is extrinsic to the essence of the engagement, and to its subsequent development and efficiency (*dem Wesen der Obligation und ihrer ferneren Entwickelung und Wirksamkeit fremd*). It is true that the place in which the obligation has its inception may be agreed upon by the parties as supplying the local law by which it is to be governed. But this is not from the force of the original local connection, because the obligation may have, from its very terms, its actual seat in another locality. It can only be from a special understanding of the parties, which, if not expressed, must be implied from circumstances, showing that they mutually looked to the law of the place at which they stood at the time of agreement, as that by which the obligation was to be controlled.[4]

Place of making a contract is casual, and not necessarily conditioning it.

§ 399. It is different, however, with the place of performance, which enters into the vitals of the obligation, so far as concerns its fulfilment. The obligor, who previously was at liberty in this respect, and if conditioned at all was conditioned only by the laws of his domicil, now restricts himself to do a particular thing *at a particular place*. To this place, for this purpose, the intentions of both parties converge.

Otherwise as to place of performance.

[1] Supra, § 369.

[2] See illustrations given infra, § 434.

[3] § 370.

[4] Supra, § 369. "The common personal law of the parties will, even without the circumstance of a stipulated performance in its country, afford a safer guide to their meaning than the law of the merely casual place of contract." Westlake (1880), p. 68.



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§ 400. It is true that the earlier jurists mostly view the place where an obligation originates as its proper forum. Hence, in reference to the contract, which comprehends so large a portion of obligations, the *forum contractus* was the common expression for the distinctive forum of obligations. Whether the old Roman law actually established this position may be questioned; the most, according to Savigny, that can be cited in its favor are occasional vague expressions, which, however, by the limitations with which they are invariably connected, are destitute of any general force.[1] The later opinions, as we will see, are clear to the effect that as to the effect of a contract the *lex loci solutionis* prevails.

Older Roman authorities inconclusive: later adopt place of performance.

§ 401. A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires;[2] so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view;[3] so far as concerns the remedy, by the law of the place of suit;[4] and so far as concerns its performance, by the law of the place of performance. In this opinion unite Savigny,[5] Christinæus,[6] Mühlenbruch,[7] Fœlix,[8] Westlake,[9]

Form determined by place of solemnization; meaning of words by place of agreement; process by place of suit; performance by place of

[1] Savigny, Röm. Recht, Vorrede, i. xlv. The passages referred to by Savigny are, L. 3, de reb. auct. jud. (42, 5); L. 21, de O. et A. (44, 7), but especially L. 19, § 2, de jud. (5, 1); which, at the first look, undoubtedly favor the theory of the *forum contractus*, but which, according to Savigny, only throw out this notion speculatively, and then, by the conditions and limitations attached to it, lead the reader, according to the usual manner of the old jurists, to the true rule. Savigny, § 370, note (a).

[2] Infra, §§ 676 *et seq.*

[3] Infra, §§ 431 *et seq.*

[4] § 747.

[5] § 372.

[6] Vol. i. Dec. 283, N. S. 11.

[7] Doctr. Pand. § 73, not. 17.

[8] Du droit international privé (2d ed.), p. 142. Fœlix is often given as an authority for the exclusive authority of the *lex loci contractus*, but this is one of those errors which spring from loose citation. Undoubtedly he says that the place where the contract is made supplies the applicatory law; but he then goes on to say that the rule does not apply when the contract is to be *executed* in a country different from that in which it is *made*. When the latter is the case, the law of the place of execution prevails. Of course, this is equivalent to saying that the law of the place of execution is that of general application. See Phil. iv. 478.

[9] (1880), §§ 197–9.



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performance. Story,[1] Burge,[2] and a number of English and American courts.[3]

[1] Confl. of Laws, § 280.

[2] Col. & Con. Law, iii. 758.

[3] Robinson *v.* Bland, 2 Burr. 1084; Consequa *v.* Fanning, 3 Johns. Ca. 587; Andrews *v.* Pond, 13 Pet. 65, where it was distinctly announced "that contracts made in one place to be performed in another are to be governed by the law of the place of performance." Snaith *v.* Mingay, 1 Maule & S. 87; Scott *v.* Pilkington, 2 Best & Smith, 11; Gardiner *v.* Houghton, Ibid. 143; De la Vega *v.* Vianna, 1 B. & Ad. 284; Trimbey *v.* Vignier, 1 Bing. N. C. 151; Fergusson *v.* Fyffe, 8 Cl. & Fin. 121; Bain *v.* Whitehaven R. C. 3 H. of L. Cases, 1; Cox *v.* U. S. 6 Pet. 172; Caldwell *v.* Carrington, 9 Pet. 86; Camfranque *v.* Burnell, 1 Wash. C. C. R. 340; Mathuson *v.* Crawford, 4 McLean, 540; Hayden *v.* Davis, 3 McLean, 276; Willing *v.* Consequa, 1 Peters C. C. 317; Andrews *v.* Pond, 13 Pet. 65; Bell *v.* Bruen, 1 Howard, 169; Barnard *v.* Field, 46 Me. 526; Wilson *v.* Stratton, 47 Me. 120; Houghton *v.* Page, 2 N. H. 42; Dyer *v.* Hunt, 5 N. H. 401; French *v.* Hall, 9 N. H. 137; Hall *v.* Costello, 48 N. H. 176; Little *v.* Riley, 43 N. H. 109; Pearsall *v.* Dwight, 2 Mass. 88; Denny *v.* Williams, 5 Allen (Mass.), 1; Webster *v.* Munger, 8 Gray (Mass.), 584; Penobscot *v.* Bartlett, 12 Gray (Mass.), 244; French *v.* French, 126 Mass. 360; Smith *v.* Mead, 3 Conn. 253; Medbury *v.* Hopkins, 3 Conn. 472; Downer *v.* Chesebrough, 36 Conn. 39; Greathead *v.* Walton, 40 Conn. 226; Mather *v.* Bush, 16 Johns. 233; Potter *v.* Tallmann, 35 Barb. (N. Y.), 182; Ruse *v.* Ins. Co. 23 N. Y. 516; Balme *v.* Wombaugh, 38 Barb. (N. Y.), 352; Waldron *v.* Richings, 9 Abb. (N. Y.), Pr. N. S. 350; Croninger *v.* Crocker, 62 N. Y. 151; Dacoster *v.* Davis, 24 N. J. L. 319; Campbell *v.* Nichols, 33 N. J. L. 81; Union, &c. Co. *v.* R. R. 37 N. J. L. 506; Irvine *v.* Barrett, 2 Grant's Cases, 93; De Sobry *v.* De Laistre, 2 Harr. & J. 193; Freeman's Bank *v.* Ruckman, 16 Grattan (Va.), 126; Bowman *v.* Miller, 25 Grat. 331; Roberts *v.* Cocke, 28 Grat. 207; Roberts *v.* McNeeley, 7 Jones Law (N. C.), 506; Butler *v.* Edgerton, 15 Ind. 15; Pratt *v.* Wallbridge, 16 Ind. 147; Butler *v.* Myer, 17 Ind. 77; Phinney *v.* Baldwin, 16 Ill. 108; Milwaukee R. R. *v.* Smith, 74 Ill. 797; Savery *v.* Savery, 3 Iowa, 372; Boyd *v.* Ellis, 11 Iowa, 97; Dalter *v.* Lane, 13 Iowa, 538; Collins *v.* Burkam, 10 Mich. 287; Wilbur *v.* Flood, 16 Mich. 40; Short *v.* Trabue, 4 Metc. (Ky.) 299; Hyatt *v.* Bank of Kentucky, 8 Bush, 193; Broadhead *v.* Noyes, 9 Mo. 56; Andrews *v.* His Creditors, 11 La. 465; Hughes *v.* Klingender, 14 La. 845; Laird *v.* Hodges, 26 Ark. 356.

To the same effect are the following rules of the old Roman law: —

"Contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit." L. 21, de oblig. et act. 44, 7.

"Venire bona ibi oportet, ubi quisque defendi debet, id est — ubi domicilium habet, — aut ubi quisque contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia." L. 1, 2, 3, de reb. auct. jud. 42, 5.

Where a contract is to be performed partly in one country and partly in another, each portion should be con-



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The rule, it is true, is sometimes differently expressed. Thus in the Supreme Court of the United States, in 1875, it was said by Mr. Justice Hunt[1] that: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."[2] To this statement, however, it may be objected that in cases where the law of the place of making the contract conflicts with the law of the place of performance, the validity of the contract, so far as concerns its performance, depends upon the law, not of the former but of the latter place. It has hence been frequently held, that a contract illegal by the law of the place of performance is illegal everywhere.[3] On the other hand, an action may be maintained on a debt good where it is payable, though invalid by the local laws of the place where the contract is made.[4] But the conflict of opinion in this respect is rather nominal than real. A good deal of it may be explained by the ambiguity of the terms employed. The seat of a contract, so it is often said, is the place of its "execution," meaning the place where it is to be performed; whereas frequently such statements are considered as authority for the position that the seat of the

strued according to the laws of the country where it is to be performed. Pomeroy *v.* Ainsworth, 22 Barb. 118.

[1] Scudder *v.* Bank, 91 U. S. 406.

[2] S. P., Payson *v.* Withers, 5 Bissell, 269. In Milliken *v.* Pratt, 125 Mass. 406, the above passage is quoted with approval.

[3] Infra, § 486; Robertson *v.* Jackson, 2 C. B. 412; Grell *v.* Levy, 16 C. B. N. S. 73; Branley *v.* R. R. 12 C. B. N. S. 63; Maguire *v.* Pangree, 30 Me. 508; Zipcey *v.* Thompson, 1 Gray, 343; Jewell *v.* Wright, 30 N. Y. 259; Varnum *v.* Camp, 1 Green (N. J.), 326; Philson *v.* Barnes, 50 Penn. St. 230; Lewis *v.* Headley, 36 Ill. 433. See Kennedy *v.* Cochrane, 65 Me. 594, ruling that a contract, void in the place to whose law it is subject, will not be enforced in another jurisdiction.

[4] Junction R. R. *v.* Bank, 12 Wal. 226; Backman *v.* Jenks, 55 Barb. 468; Arnold *v.* Potter, 22 Iowa, 194; Kennedy *v.* Knight, 21 Wis. 340.

It being settled in Louisiana that a contract, the consideration of which is Confederate money, is void, such a contract when made in Louisiana, to be performed in Louisiana, will be held void in Mississippi. Ivey *v.* Lalland, 42 Miss. 444.



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contract is the place where it may have been signed by the parties. But the principal difficulty arises from the fact noticed by Mr. Westlake (1880),[1] that the term *lex loci contractus* is constantly used by judges in the sense of the *lex loci solutionis*. Indeed, the place where a contract is to be performed may be naturally spoken of as the place of the contract; and in numerous cases the term *lex loci contractus* is used with this meaning.[4]

[1] Page 234.

[2] Infra, § 410; Wright *v.* Andrews, 70 Me. 86; Bank *v.* Colby, 12 N. H. 520; Peck *v.* Hibbard, 26 Vt. 698; Greenwood *v.* Curtis, 6 Mass. 358; McIntyre *v.* Parks, 3 Met. 207; Dyke *v.* Erie R. R. 45 N. Y. 113; Sherman *v.* Gassett, 9 Ill. 521; Boyd *v.* Ellis, 11 Iowa, 97; Arnold *v.* Potter, 22 Iowa, 197; Bank *v.* Ruckman, 16 Grat. 126; Ford *v.* Buckeye Ins. Co. 6 Bush, 139; Hyatt *v.* Bank, 8 Bush, 193; Herschfeld *v.* Dexel, 12 Ga. 582; Broadhead *v.* Noyes, 9 Mo. 56.

Chancellor Kent speaks on this point in a way which illustrates the position that the *lex loci contractus* is used frequently as convertible with the *lex loci solutionis*. After announcing without qualification (ii. p. 454), "that the *lex loci contractus* controls the nature, construction, and validity of the contract," he tells us (ii. p. 459) that "it is a general rule that whatever constitutes a good defence, by the law of the place where the contract is made *or is to be performed*, is equally good in every other place where the question may be litigated."

A contract between A., residing in Rhode Island, and B., residing in Massachusetts, by which A. agrees in Massachusetts to sell to B. certain intoxicating liquors, which liquors are delivered by A. on board the cars in Rhode Island, B. paying the freight and the price of the liquors in Massachusetts, has been held in Massachusetts to be subject to Rhode Island law. Dolan *v.* Green, 110 Mass. 322. See Kline *v.* Baker, 90 Mass. 254; Abberger *v.* Martin, 110 Mass. 322; Suit *v.* Woodhall, 113 Mass. 391; Ely *v.* James, 123 Mass. 36; Backman *v.* Jenks, 55 Barb. 469. Infra, § 417.

*Opinions of Foreign Jurists.* — In the first edition of this work I gave (§ 401 *a*, *et seq.*) a summary of the views of Bar and Schmid on the topic in the text. This summary I am compelled, for purposes of condensation, now to omit.

By a judgment of the Supreme Commercial Court of Germany, in 1871, it was held that while a contract executed in a particular place is governed, unless otherwise provided, by the usages of such place, it is otherwise when the contract is by its own stipulations to be performed abroad, in which case the usages of the place of performance are to prevail. Jour. du droit int. privé, 1874, p. 135.

The rule that the debtor's domicil is to be regarded as supplying the law by which an obligation is to be construed is approved by Windscheid, a leading contemporaneous German expositor of the Pandects (Wind. Pandect. § 35). Bar, in a criticism on the first edition of my work, says: "The decisive reason for this view is that every other theory than that of the law of the debtor's domicil, or of his residence at the time of the alleged obligation, rests on a *petitio principii*, in assuming the existence of an



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But the expression is inaccurate, and, in all cases when the question is one of performance, should be abandoned. The true

obligatory relation which is the very point at issue. He further objects that to make the law of the place of performance dominant is to place our own citizens under the control of a foreign law. He concedes, however, that in many relations the law of the place of performance is important, that the mode of payment is in this way determined, and that an obligation whose performance is unlawful in the place of performance is unlawful everywhere.

A conventional obligation, according to Fiore (§§ 236 *et seq.*), derives its force from the accord of two or more persons, who determine their juridical relations by a manifestation of their common will. To produce this effect, however, certain conditions are requisite; those called *essential*, when the obligation could not be considered as existing without their concurrence, and those called *necessary*, the non-existence of which would defeat an obligation otherwise good. Every obligation, he insists, contains two elements: (1.) A juridical engagement (lien), which binds the debtor to the creditor, and which confers on the creditor the right to require the debtor to do a certain thing, and a corresponding juridical duty in the debtor to do such thing. (2.) A thing reducible to a money value, which is the object of the duty. The *vinculum juris* is established by the concurrence of the parties to the particular act; *duorum pluriumve in idem placitum consensus*. Hence, he argues, the law of the place where this concurrence is accomplished is that which regulates the obligation as such. He proceeds to distinguish the *vinculum juris* from the *onus conversionis*. A neglect of this distinction, he insists, has led to the error of holding that the law of the place of solemnization is in all cases to prevail. This view, although sustained by Story (§ 280), and Savigny (§ 372), as well as by Dumoulin, is to be taken, he goes on to maintain, subject to the distinction above stated. The relations of the parties, their competency, the mode in which their intention is expressed, are to be determined by the law of the place of contract; the mode of performance, by the law of the place of performance. A bill of exchange, therefore, drawn in Italy and payable in a foreign land, is governed, so far as concerns the days of grace, and the mode of payment, by the law of that land. To this part of the obligation is applicable the Roman maxim: *Contraxisse unusquisque eo loco intelligitur quo ut solveret se obligavit.* On the other hand, the liability of the drawer, whether an Italian or a foreigner resident in Italy, is governed by the Italian law. To such obligations applies the maxim, *Unius cujusque enim contractus initium spectandum est et causa.*

"Les conventions faites en pays étranger sont régies par la loi à laquelle les parties ont entendu se soumettre." Laurent, Droit civil int. (1880) ii. 382. To the same effect are several decisions of the Supreme Commercial Court of Germany. Jour. du droit int. privé, 1874, p. 242 *et seq.* This is the place of performance.

"Solutio," says Fiore (Op. cit. § 298), "as a means of extinguishing an obligation is governed by the law of the place designed for the performance of the obligation. And all questions relating to the mode of payment, to the quality of the things to be paid,



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rule in such cases is that the law of the place of performance determines the validity of the contract in respect to performance.

Mode of payment determined by place of payment.

§ 402. We have just observed that the place of performance is to be inferred from facts. In many cases the inference is simple, as when from the character of the contract the performance must be necessarily in a particular place. And when the question is mode of payment, then the law of the place of payment ordinarily determines the mode of payment.[1]

Illustrations of rule.

§ 403. We have already noticed several illustrations of the rule that so far as concerns the performance of a contract, when the law of the place of solemnization conflicts with that of the law of the place of performance, it is the latter law that controls.[2] It has been also ruled that a contract in one state to subscribe to railroad stock in another is governed by the laws of the latter state.[3] The validity, also, of a mortgage is determined by the laws of the state where the thing mortgaged exists, because, apart from all other reasons, it is there alone that payment can be enforced; and this, though the parties both reside in another state.[4] And where a security is

to the person to whom the payment is to be made, to the effect of payment with subrogation, are governed by the *lex loci solutionis*."

Novation consists in the substitution of a new debt for an old. "*Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio, hoc est cum ex praecedenti causâ ita nova constituatur ut prior perimatur.*" L. 1 D. de Nov. 46, 2. No matter, so argues Fiore (Op. cit. § 309), how novation is constituted, since it always consists in a contractual transformation of one obligation into another, the old obligation, as to the applicatory law, is merged in the new. The creditor, who consents to a novation, cannot avail himself of the law of the original transaction, but submits himself to the law governing the novation.

[1] Savigny, § 370, note (*c*), cites to this effect L. 19, § 4, de jud. (5, 1); L. 1, 2, 3, de reb. auct. jud. (42, 5); L. 21, de O. et A. (44, 7), "contraxisse . . . . in eo loco intelligitur;" C. 17 X. de foro comp. (2, 2); L. 1 de eo quod certo loco (13, 4). See, also, Savigny, Obligationsrecht, i. 510; Murphy *v.* Collins, 121 Mass. 6; Stanton *v.* Demerritt, 122 Mass. 495; Ruse *v.* Ins. Co. 23 N. Y. 516; Balme *v.* Wombaugh, 38 Barbour (N. Y.), 352; Little *v.* Riley, 43 N. H. 109; Boyd *v.* Ellis, 11 Iowa, 97; Collins *v.* Burkam, 10 Mich. 287; Butler *v.* Myer, 17 Ind. 77.

[2] Supra, § 401.

[3] Penobscot *v.* Bartlett, 12 Gray (Mass.), 244.

[4] Goddard *v.* Sawyer, 9 Allen (Mass.), 78. See Pine *v.* Smith, 11 Gray (Mass.), 38. But it is other-



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given in pursuance of a decree of a court of justice, it is to be performed at the place where the court exercises its jurisdiction.[1]

§ 404. But there are obligations in which no place of performance is specified, or in which this place is left open. Among these are engagements to render particular services to the person, which services are to be performed wherever the obligee is resident; engagements to work at movable things, the removal of which things the parties may at the time contemplate; engagements for the sale of movables, which may involve transfer from spot to spot; and engagements for the payment of money, in which the payee may transfer the obligation to third parties of different domicils, or where he may change his own domicil. Then, on the other hand, there are obligations whose place of performance is necessarily fixed, *e. g.* work to be done to immovables, the building of houses, the cultivation of land; in which cases the necessities of the transaction fix absolutely the place of performance, and here, unless there be an express agreement to the contrary by the parties, is to be found the controlling local law. It is not as to such cases, therefore, as those last noticed that doubt arises. It is as to the former class, where there is no place of performance, either prescribed by the express agreement of the parties, or exacted by the necessities of the case. In such cases it becomes necessary to discover what place the parties contemplated as the place of performance, for this works an implied appointment by the parties of such place as the place of performance, and hence a voluntary submission to the local law of that place. In this view it becomes important to study critically each obligation at issue, and the facts from which it springs.

Difficulties when place of performance is undetermined.

§ 405. Although obligations, in their primary state, are insulated, and may be viewed as single acts, connecting parties, in other respects strangers to each other, in some particular transaction, yet in modern law they spring very largely from certain general and continuous rela-

When principal leaves his business in the hands of a gen-

wise when a foreign mortgage is taken as collateral security merely, in which case the place of performance is the place of the payment of the principal bond. De Wolf *v.* Johnson, 10 Wheaton, 367; Hosford *v.* Nichols, 1 Paige R. 221. Supra, § 368; infra, § 410.

[1] Irvine *v.* Barrett, 2 Grant's Cases (Penn.), 73. Infra, § 411 *a*.



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eral local agent, then the agent's act is to be imputed to the principal.

tions which the parties assume. Thus the selling agent of a manufacturing company is its permanent representative, and is under a constant engagement to receive its goods, to sell them in the best way he can, and to pay to his principal the proceeds. So, in a still larger sense, a trustee or man of business may take charge of the entire affairs of another; and this may be either by the voluntary act of such latter person desiring to be relieved of care, or by act of the law, as in the case of guardianships and commissions of lunacy. And, when the agency is voluntary, it may be the result of a contract, or of an act of trust emanating from the grantor alone, without contract (*negotiorum gestio*). Then, beside these agencies, which parties enter into specially with each other, there are what may be called open agencies, as where banking or commission business is done in behalf of whomsoever may apply. Now the form of agency which we have here to consider is that which has a particular place or office for its continuous exercise. And wherever this place of business or office of such agent is, there, according to the Roman law, is the local law that governs such contract, no matter what may be the domicil of the parties: "Si quis tutelam . . . . vel quid aliud, unde obligatio oritur, certo loci administravit, etsi ibi domicilium non habuit, ibi se debebit defendere."[1] This office, or place of business, under whatever name it may assume, — counting-room, store, or office, — is that which the agent advertises as his locality; is that on which, as a general thing, his sign, as agent, is placed; is that at which payments are received and made by him; and is that to which, as the permanent site of the agency, the voluntary submission of the parties point as that which determines the local law. The agent says: "By my acts I appoint this place as that in which I do business, and what I here do is controlled by the laws that here obtain." The principal says: "I accept you as my representative, enveloped, as you are, in the laws under which you thus exist." Now the agent's individual domicil as a person may be on the other side of a river, in another state, where obtain other laws. But, notwithstanding this, his existence, as an agent, is in the place where he does business, and this becomes the place where his principal, by force of the contract of agency, is, for

[1] L. 19, § 1, de jud. (5, 1).



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this purpose, presumed to act, and the place where the obligation, so far as he is concerned, has its seat, and by whose local laws, when the principal's position is determined, the obligation is controlled.[1]

§ 406. It should be remembered, however, that this assumes the agent's place of business to be definite and fixed, and that he is clothed with full powers.[2] Where an agent, having no authority to complete a contract, obtains orders in a foreign state, which orders he forwards to his home principal, who accepts and fills them, the seat of the contract is in the state in which the principal resides, — that being the actual place of sale.[3] On the other hand, where an agent is sent to a foreign country with full power to purchase goods, and does so, the seat of the contract is the place of sale.[4] The

Otherwise as to travelling agent.

[1] See Owings *v.* Hull, 9 Pet. 607; Albion Ins. Co. *v.* Mills, 3 Wils. & Sh. 233.

[2] It has been ruled by the Supreme Commercial Court of Germany that the construction of a foreign mandate, so far as concerns the relations between principal and agent, is to be governed by the law of the place from which the mandate proceeds. Revue de droit int. 1874, pp. 234 *et seq.* But the principal's domicil controls in cases where an agent has no authority to buy or sell, and is charged simply with the reception and transmission of offers, the right of acceptance and objection being reserved to the principal. Pardessus, No. 1354. To the same effect are several French decisions cited by Fiore, Op. cit. § 249.

[3] Hyde *v.* Goodnow, 3 N. Y. 266. See Backman *v.* Jenks, 55 Barbour, 469. That place of ratification is place of contract, see infra, § 418 *a*.

[4] Pattison *v.* Mills, 1 Dow & Clark, 342; Albion Ins. Co. *v.* Mills, 3 Wils. & Shaw, 218; Whiston *v.* Stodder, 8 Martin R. 95. See Heebner *v.* Eagle Ins. Co. 10 Gray, 131.

"If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter, across the boundary line between the two states. As was said by Lord Lyndhurst, 'If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them.' Pattison *v.* Mills, 1 Dow & Cl. 342, 363. So if a person residing in this state signs and transmits, either by a messenger or through the post-office, to a person in another state a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this commonwealth." Gray, C. J., Milliken *v.* Pratt, 125 Mass. 374. The first case given above, however, assumes a general agent, or an agent with power



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same distinction applies to insurance agencies. When the agent has full powers to close a contract, the seat of the agency is the seat of the contract. When he has to refer the decision to his principal, the principal's domicil is the seat of the contract.[1]

Place of final indebtedness determines on litigated accounts.

§ 407. Complicated questions arise, under this head, where a balance is to be determined between two merchants doing business with each other in countries with different local laws. In a case where goods had been consigned by a Boston merchant to a consignee at Trieste, and the agent of the consignee advanced at Boston a sum greater than the goods brought when sold, a suit was brought by the consignee to recover the balance. The question arising as to what was the rate of interest, the court held that this depended upon where the balance was reimbursable. This being ruled to be in Boston, the court held that the Boston rate of exchange was to be adopted.[2] On the other hand, it has been ruled in Louisiana, and apparently with more correctness, that the transaction has its seat at the place where the goods are sent to be sold, and that the law of such place must control the question of interest and exchange on the bal-

to complete the transaction; not an agency without such power.

[1] Infra, §§ 465 *et seq.*

When the contract is made through an intermediary, it is agreed on all sides that what is done by a general agent fully authorized is considered as done by the principal in the place where the agent performs the commission. When the commission is given by letter, the contract between the principal and agent is complete at the time when the latter accepts and undertakes the commission. The reason given for the distinction between this and other contracts is, that when an agency is constituted it is presumed that the principal continues to hold to it until he revokes it, and that the act of the agent in undertaking the commission expresses his assent unequivocally. In cases of sale by letter the two contracting parties oblige themselves to do a particular thing, and their duties are reciprocal, and depend upon the accord of two minds; whereas, in the contract of agency, the primary obligation is for the benefit of the principal, who can revoke it at any time at his pleasure, on notice, while the agent may, on like notice, at any time renounce. But whatever we may think of this reasoning, yet it is clear that while, as between the principal and the agent, the law of the place of the execution of the contract may prevail in all matters not bearing on the performance, as between a general agent and third parties the law is ordinarily (except as to matters of performance when the performance is in a foreign state) that of the place of the agency. Fiore, Op. cit. § 248.

[2] Grant *v.* Healey, 3 Sumner, 523.



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ance due.[1] So a party advancing money for another is entitled to be repaid at the place of advance, and in conformity with its law.[2] And where an order is sent to a correspondent abroad to purchase goods, and to draw on the principal for the price, the seat of the contract is the place where the goods are purchased, and the money advanced for their payment; and the law of the latter place determines the question of interest.[3]

Conflict whether principal's death revokes power of attorney.

§ 408. In Massachusetts and other states the principal's death revokes a letter of attorney, and hence, after such death, all acts of the agent are invalid. In France, and in Louisiana, such acts by an agent, when *bonâ fide*, are good. It is still an open question, in case of a principal dying in one of the former states, with an agent acting for him in the latter, by what law the acts of the agent, after the principal's death, would be governed. Judge Story[4] argues by the law of the principal's domicil. Sir R. Phillimore[5] thinks by the law of the agent's domicil, on the ground of the "duty as well as the expediency of upholding, wherever it is possible, *bonâ fide* transactions with the subjects of foreign states."[6] Fiore,[7] however, argues that on the facts stated the sale would be valid in respect both to purchaser and third parties. The contract of agency, he holds, is performed in the place where the agent resides, and hence the law of such place is to determine as to the nature, the duration, and the effect of the mandate. If the agent, for instance, should reside in Italy, there would be no doubt, he insists, of the validity of the sale.

Agency as to common carriers is hereafter discussed.[8]

Insulated acts determined by their particular law.

§ 409. Insulated acts are not bound, as in the last mentioned class, to a particular continuous place of business, previously accepted by the parties. They are, in their nature, complete in themselves, called into action each by its own specific demand and promise. To these the idea

[1] Ballister *v.* Hamilton, 3 La. An. 401.

[2] Bayle *v.* Zacharie, 6 Peters, 635; Lanusse *v.* Barker, 3 Wheaton, 101; Yerker *v.* Wistar, 16 Haz. B. Reg. 153.

[3] Lanusse *v.* Barker, 3 Wheaton, 101. See, also, Consequa *v.* Fanning, 13 Johns. Ch. 587; 17 Johns. R. 518.

[4] § 286 *d.*

[5] IV. 508.

[6] See Westlake (1878), art. 218; and see, also, a note by Mr. Guthrie, in his translation of Savigny, p. 186. Cf. Whart. on Agency, §§ 101 *et seq.*

[7] Op. cit. § 335.

[8] Infra, § 471.



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of the old Roman obligation distinctively applies: "Will you do this thing?" "I will do this thing."[1] What we then have to consider is, what is the seat of the obligation in such cases.

Obligation assumed at domicil there to be performed, unless otherwise provided.

§ 410. (*a.*) *Where a Person assumes an Obligation at his own Domicil.* — When there is no other place of performance indicated, the law of that domicil controls the contract so far as concerns the mode of its performance.[2] Thus where a domiciled citizen of Massachusetts applied to a domiciled citizen of New York for a loan, which the latter agreed to give, and wrote to the former to send him a note and mortgage of the estate, which was done, and the money sent, it was held that the seat of the contract was in Massachusetts.[3] This law, however, is the law of such domicil at the time of the transaction; not the law of any subsequent domicil to which the party may remove. A., in Philadelphia, makes a promissory note in which no place of payment is specified, and which is therefore payable in Philadelphia. On this hypothesis, the obligation is governed as to payment by the law in force in Philadelphia. But, subsequently to the assumption of the obligation, A. shifts his domicil to New York. He does not, however, change by this the law applicable to his obligation entered into in Philadelphia. The latter law, *i. e.* that in force in Philadelphia, continues to adhere to the obligation, even though A., between assumption and performance, has changed his domicil, or though he has died, and his estate, which is responsible for his obligations, has descended to representatives who are domiciled in another state.[4] Or, to go back to a case in Ulpian: A woman, domiciled at Rome, borrowed money in that city. After her death, her estate descended to her daughter,

[1] See Maine's Ancient Law, 4th ed. (1870) p. 328.

[2] Supra, § 401; Bank *v.* Colby, 12 N. H. 520; Dyke *v.* Erie R. R. 45 N. Y. 113; Potter *v.* Tallman, 35 Barb. (N. Y.) 182; Pratt *v.* Walbridge, 16 Ind. 147; Boyd *v.* Ellis, 11 Iowa, 97; Hyatt *v.* Bank, 8 Bush, 193. For a series of French rulings, that the effect of such contract is determinable by the *lex loci contractus*, see Fiore, Op. cit. pp. 673 *et seq.*

[3] Pine *v.* Smith, 11 Gray (Mass.), 38. See § 402; Goddard *v.* Sawyer, 9 Allen (Mass.), 78.

[4] Potter *v.* Tallman, 35 Barbour, 182; Short *v.* Trabue, 4 Metc. (Ky.) 299; Savigny, § 370, citing to this point L. 19, pr. de jud. (5, 1); L. 2, C. de jurisdict. (3, 13); Bethmann-Hollweg, Versuche, No. 1, p. 24.



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who was domiciled in one of the provinces. In this case, the special forum (*judicati actio*), carrying with it to the case the particular local law, was ruled still to remain at Rome, because, says Ulpian, the obligor had herself selected Rome for this purpose.[1]

§ 411. The mere dating at a particular place is not conclusive.[2] Even as to negotiable paper, evidence, so far as concerns accommodation parties, may be received to contest such date. Thus, in a case in Virginia, the evidence was that a paper was signed in blank in Virginia, and sent to Maryland to be filled up there. It was so filled up there, and at the same time and place was indorsed by the payee to the holders, for value, the note being in fact for the accommodation of the payee. This was held to be a Maryland contract, to be governed by the Maryland law, though the note was headed W., a place in Virginia.[3] But when a place of performance, not that of the obligor's domicil, or of the solemnization of the instrument, is expressed or implied, then the law of such place of performance prevails so far as concerns the terms of performance.[4] Thus, official bonds of navy agents are payable at Washington; and though executed at New Orleans, the domicil of the obligor, they are governed, not by the law of Louisiana, but by the common law in force at Washington.[5]

Dating at particular place not conclusive; though otherwise when a place of performance, other than the place of contract, appears in the contract.

§ 412. (*b.*) *When the Obligor assumes the Obligation away from his Domicil.* — An obligation may be entered into in a place not the obligor's domicil; and yet in subordination to the laws of this place the obligation may have been framed. In such case, as between the law of domicil, and that of the place of solemnization, the latter is to prevail. This, according to Savigny, arises when a merchant conducts a course of business at a place where he is not domiciled, but which he makes his special residence for the purpose of such business, and in which the understanding arises that he

Place of business may prevail over domicil.

[1] L. 45, de jud. (5, 1).

[2] Whart. on Ev. § 977. Infra, §§ 457–464.

[3] Fant *v.* Miller, 17 Gratt. 47. See other cases cited in Whart. on Ev. § 977.

[4] See supra, § 401.

[5] Cox *v.* U. S. 6 Pet. 172; Duncan *v.* U. S. 7 Pet. 435; U. S. *v.* Stephenson, 1 McLean, 462. See supra, § 403.



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will forward the goods he sells from this special residence; by which course, he and the party knowingly dealing with him subject the transaction to the laws of this special residence. Ulpian so states this rule, qualifying it by the exception hereafter to be noticed, that a mere transient traveller is not in this respect bound by the local laws of any place through which he may pass: . . . . "*durissimum est quotquot locis quis navigans, vel iter faciens, delatus est, tot locis se defendi. At si quo constitit, non dico jure domicilii, sed tabernulam . . . . officinam conduxit, ibique distraxit, egit: defendere se eo loci debebit.*"[1] In such case, the *forum contractus* prevails, because it is in the special contemplation of the parties.[2]

Public officer's debts governed by law of place of contract.

§ 413. But all this depends on the inference of mutual intent to be drawn from circumstances. According to Savigny, this inference is in favor of the place of contract in the following case: —

Where a public officer, whose domicil is the residence of his family in another place, remains for months at the place of his official duties. In such case, debts incurred by him for his personal subsistence (*Schulden die sich auf sein täglichen Lebensunterhalt beziehen*) are subject to the law of the place where they were thus contracted, *i. e.* the place of his official duties. And this, whether he be an officer of the executive department or a member of the legislature.

Watering-place debts governed by law of place of contract.

§ 414. It is held, also, by Savigny, that when a person incurs debts for family purposes when at a watering-place, the law of the latter place determines. But it is otherwise when debts relate to business transactions, whose consummation can only be expected at his domicil.[3]

Rule not dependent on time of residence.

§ 415. Nor, in such special cases, is any longer stay required to invest the case with the law of the place than is natural under the peculiar circumstances. Thus, it is incident to a traveller's relations that his stay at hotels should be only brief. He remains at such places simply *in transitu*. Such buildings are designed for transient accommodation. In such cases, the usage is that the traveller is to pay before

[1] L. 19, § 2, de jud. (5, 1).

[2] Savigny, § 370; Donel. Com. xvii. c. 14; Bruns, Obligationsrecht, in Holtzendorff's Encyc. Leipzig, 1870, p. 314.

[3] Savigny refers on this point to Bethmann-Hollweg's Essay, pp. 24, 25.



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leaving the house. The place of performance is hence the place where the obligation is incurred. And hence, the law of the place applies, in spite of the obligor's distinct domicil, even though his stay be only for a few hours.

§ 416. (*c.*) *In the Case of Commercial Travellers.* — In such cases a business house, which has its own well-known local seat (*e. g.* manufacturing establishments, insurance companies, importing houses, jobbers, publishers), sends out an agent, who may either be a member of the firm or corporation, or a clerk, to travel on its behalf, to solicit orders, and to enter into contracts for the sale of goods, or, in a particular case, for the effecting of insurances. Now, here a conflict at once springs up. Is the seat of the contract, which determines its applicatory local law, to be the place where the contract was entered into, or the place where the goods (or, in case of insurance, the policy) were received, or the place from whence they were issued? Savigny declares for the latter position.[1] Two rules of the Roman law he cites to sustain his view: *first*, the risk of accidental loss is shifted to the vendee from the moment of the inception of the transfer;[2] and, *secondly*, the execution of a contract for the delivery of movables can only be compelled at the place where the goods lie. The present Prussian law is distinct to this effect. It provides that the title, and all risks as to possession, pass to the purchaser at the time the goods are forwarded to him; provided he either designates, or may be presumed tacitly to approve, the mode of forwarding.[3]

By Savigny place of delivery of goods is place of performance.

That in cases of insurance the law binding the insurer is that of the seat of his principal office will be hereafter seen.[4]

§ 417. It has been frequently held in this country that delivery of goods at a railway depot, directed to the vendee, is such a performance as to make the law of the place of such delivery decisive.[5] In a suit in New York, in 1869, for the price of liquors sold by the plaintiff, domiciled in New York, to the defendant, domiciled in Vermont, it appeared that the

So in our own law.

[1] VIII. § 390.

[2] § 3, Inst. de emp. (3, 23). Not from the moment of *contract*, as Savigny's rendering might imply.

[3] A. L. R. i. 11, §§ 128–133.

[4] Infra, § 465.

[5] Infra, § 486. See Finch *v.* Mansfield, 98 Mass. 149; Suit *v.* Woodhall, 113 Mass. 391.



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liquors were obtained on the defendant's orders, given by him in Vermont through the plaintiff's agent, who was travelling to solicit orders, but had no right to sell liquors. The orders were given at the defendant's hotel, where the price and amount were fixed, which orders the agent forwarded to the plaintiff in New York, who there filled them, and forwarded the liquors. It was held that the contract, which, if its seat were in Vermont, would be void under the Vermont statute, had its seat in New York, and under the New York law was valid. "The transaction," said Mr. Justice Bockes, "had no binding force until the order or request was filed in New York." "*The property, on due delivery on the railroad or steamboat, as directed, became the property of the defendant, subject only to the plaintiff's right of stoppage in transitu.*" [1]

### III. WHEN LAW OF PLACE OF CONTRACT BINDS.

Place of contract determines interpretation, and generally mode of solemnization.

§ 418. We have already seen that while the law of place of performance determines the mode as well as the legality of performance, the interpretation of the words of a contract, so far as they indicate the meaning of the parties, is usually settled by the *lex loci contractus*. In other words, while the *lex loci solutionis* determines whatever relates to the operation of the contract, the *lex loci contractus* determines whatever relates to the form of expression. The *lex loci solutionis* determines application. The *lex loci contractus* solves ambiguities, and, when it is the place of solemnization, determines formalities.[2]

Place of ratification is place of contract.

§ 418 *a*. As is elsewhere illustrated, a contract made in one state, to be fulfilled there, subject to ratification in another state, is, when ratified, to be interpreted by the laws of the first state.[3]

Place of registry may be

§ 419. It is argued by Savigny that when by local legislation certain forms are necessary to the validity of certain contracts (*e. g.* registry, enrolment, acknowledgment before

[1] Backman *v.* Jenks, 55 Barb. 469; S. P. Dolan *v.* Green, 110 Mass. 323; Hyde *v.* Goodnow, 3 N. Y. 266. Supra, § 401.

[2] Infra, § 433. See Gilliland *v.* Phillips, 1 S. C. 152.

[3] Supra, § 406; infra, § 465; Hyde *v.* Goodnow, 3 N. Y. 266; Hildreth *v.* Shepard, 65 Barb. 265; Golson *v.* Ebert, 52 Mo. 260. See Whart. on Agency, § 77.



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a magistrate or notary), then the place where those forms are complied with is to be regarded as the place of contract.[1] It certainly is, so far as the registry is prescribed by the legislature in order to give additional security to the transmission of property, and so far as the registry takes place, as is almost universally the case, in the place of the situation of the property. Property, both movable and immovable, as we have seen, so far as its assignment is concerned, is governed by the *lex situs*, and as the registry is in the *situs*, is governed by the law of the place of registry. In this sense we may say that the place of registry indicates the law that governs contracts for the transmission of property; and the same may be said of the registry of marriages. At the same time we can conceive of cases in which the registry is in a different place, with distinct law, from that which governs the transaction registered. In such case the rule above stated does not apply.

Place of contract.

§ 420. The question sometimes arises as to which, in cases of conflict, is to be regarded as the place of contract, — that of the formal attestation of an instrument, or that where the parties came to a final and substantial assent. It is maintained by Hertius,[2] that this depends upon whether the final execution is merely for evidential purposes, or is necessary to the validity of the instrument.[3] In the first case, the place where the instrument is thus attested (*i. e.* that in which particular formalities are attached to it merely to enable it to be put in evidence) is not to be regarded as the place of contract.[4] In the second case, where such attestation is necessary to the validity of the instrument, then, as has been seen, the place of attestation is that of contract, though the prior preparatory paper is admissible for purposes of interpretation. But to this rule should be applied the exception noticed in the preceding section.

So of place of attestation.

§ 421. Supposing that the parties to an alleged contract are living, at the time of the contract, in different places, and that they negotiate by letters, the question arises,

Place of acceptance of proposi-

[1] Savigny, viii. 371.

[2] IV. 55.

[3] See, also, Burge, iii. p. 775; Bar, p. 266.

[4] To this effect is a judgment of the Supreme Court at Jena, on October 26, 1826, cited by Bar, p. 267; and also Massé, ii. p. 138; Fœlix, i. p. 238; Mittermaier, i. § 36.



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tion is place of contract.

which place, in case of conflict, is to be regarded as giving the applicatory law. Where the transaction consists in a proposition from one party and an acceptance from the other, the law, Savigny answers, is that of the place to which the proposition is sent and from which the receiver forwards his assenting reply.[1] It is at this place that the purposes of the parties for the first time coalesce. The same rule applies where the proposition is made, not in writing, but through a messenger, and where a written contract signed by one party is forwarded to be signed by the other, and where a bill or promissory note is submitted to a party for his signature. In each of these cases, the place where one party assents to the other's proposition is the place of contract, so far as the particular transaction between the two parties is concerned. And if from this or other circumstances we can infer that the place of such acceptance was regarded by the parties as the place in which the matter was to be determined, then the law of such place is the *lex loci contractus*, and is also the *lex loci solutionis*, so far as concerns the acceptor's liability.[2]

[1] VIII. § 371. See, also, McIntyre *v.* Parks, 3 Met. 207.

[2] Savigny, viii. § 371; Meier, p. 159; Lauterbach, de nuncio, § 25 (Diss. T. 3 N. 107); Puchta, Pandect. § 251; Wening, Archiv, f. civ. Praxis, B. 2, pp. 267–271; Story, § 285; 3 Burge, p. 753; Parsons (5th ed.), i. 483; Pattison *v.* Mills, 1 Dow & C. 342; Adams *v.* Lindsell, 1 B. & Ald. 681; Kennedy *v.* Lee, 3 Meriv. 452; Dunlap *v.* Higgins, 1 H. L. Cas. 381; Stocken *v.* Collen, 7 M. & W. 515; Eliason *v.* Henshaw, 4 Wheat. 225; Tayloe *v.* Merchants' Ins. Co. 9 How. 390; Beckwith *v.* Cheever, 1 Foster (N. H.), 41; Milliken *v.* Pratt, 125 Mass. 374; Heebner *v.* Ins. Co. 10 Gray, 131; McIntyre *v.* Parks, 3 Met. 207; Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 14 Barb. 341; Clark *v.* Dales, 20 Barb. 42; Hamilton *v.* Ins. Co. 5 Barr, 339; Whiston *v.* Stodder, 8 Martin, 95; Malpica *v.* McKown, 1 La. R. 248. As to the Scotch law, see Mr. Guthrie's note to Savigny, p. 169; and to present Roman law, Dr. Brun's Treatise on Obligations, in Holtzendorff's Encyc. Leipzig, 1870. The question of acceptance of proposal by mail is discussed in Story on Contracts, §§ 498 *et seq.* See 22 Alb. L. J. 424.

Whether the place that gives the law is that of the acceptance, or that of the notification of the acceptance, has been much discussed among foreign jurists. See Fiore, Droit int. privé, trad. Pradier-Fodéré, 1877. Grotius maintains that such cases are governed by what he calls Natural Law, le Droit naturel. To this Savigny replies that no one knows what "Natural Law" is. By Savigny, as we have seen, the place of such contracts is held to be that in which the offer is received and accepted; and in this he is sustained by many



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§ 422. Among the elements from which the place of an obligation may be inferred is the time when it was perfected, and as to this the following rules may be laid down: — Inference of place from time.

While an acceptance is irrevocable, a proposal may be revoked at any time before acceptance.

When negotiation is by letter or messenger, a revocation is inoperative which does not reach the acceptor before acceptance, provided the acceptance is not unreasonably delayed.

"The reasons," says Sir W. R. Anson, "for this rule are obvious. It is necessary, where parties are contracting at a distance, to fix some moment of time when the contract should be complete, for otherwise, a man who accepted an offer made to him and acted upon it immediately might be exposed to serious loss if the proposer could revoke his offer at any moment before the actual receipt of the acceptance. Nor, on the other hand, would it conduce to the conduct of business if the acceptor was forced to postpone acting on the contract until he heard that his letter had reached the proposer. It is necessary, therefore, to fix a moment for the conclusion of the contract; this moment is the moment when he to whom the offer is made signifies his acceptance; and the acceptance is signified when the acceptor has done all that he can to communicate his intention. In other words, the moment of acceptance is the moment of dispatch. An acceptance once dispatched is irrevocable, for the contract is then made."[1] In the law adopted, therefore, as to the *time* of a con-

eminent authorities. On the other hand, Mühlenbruch, Merlin, Toullier, Rocco, and other recent writers, maintain that the acceptance is a *propositum in mente retentum*, until it is notified to the author of the proposition. *Nec si per litteras alteri ab altero conditiones propositae sunt, ante est perfecta conventio, quam acceptatio facta in notitiam pervenit ejus qui obtulit conditionem.* Mühlenbruch, Doc. Pan. § 331. To the same effect is Merlin, Répertoire, Vente, § 1, art. 3; Troplong, Vente, i. No. 22; Pardessus, Droit com. No. 250; Massé, Droit com. No. 578; Fiore, Op. cit. § 247.

It is argued by the writers just noticed that the person making the offer can withdraw down to the time in which he receives the letter of acceptance, since there can be no contract until the party offering knows that the other party accepts.

[1] Anson on Contracts, part ii. ch. i. § 4; citing Adams *v.* Lindsell, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 H. L. C. 381; Harris's case, L. R. 7 Ch. 587. To the same effect are Tayloe *v.* Ins. Co. 9 How. 390; Vassar *v.* Camp, 11 N. Y. 441; Hamilton *v.* Ins. Co. 5 Barr, 339, already cited.



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tract, we have an additional support to the view taken in the last section of its *place*.

Each obligor may be bound by his special law.

§ 423. But in many instances it is irrational to suppose that the person making the proposal intended to waive his own personal law. We have, therefore, in a conflict between jurisprudences, where the question is the interpretation of letters, or other matter which the *lex loci actus* determines, to resolve the contract into its constituent obligations, and to hold that in such relations such obligor is bound by the law to which his own act is specifically subject. Of course, when a place of performance is named in the contract, or may be legitimately implied from it, this fixes the special forum, whose local laws apply to all questions concerning the mode of performance.[1]

A unilateral obligation as to a business is governed by the place of business.

§ 424. Wherever a duty is imposed, either by the party undertaking a particular office or trust, or by implication of law, there an obligation springs forth. In the common law, this is an implied assumpsit; in the civil, a unilateral contract (*contrat unilaterale; einseitige Handlung*). When such an obligation arises from a person holding himself forth as carrying on a particular course of business, the applicatory local law, as has been seen, is that of the place where such business is established.[2] Such cases, however, it should be remembered, are rare with us, as by our common law the only strictly unilateral engagement (*e. g.* one which is not conditioned on a consideration on the other side) is an obligation under seal.

Under Roman law place of acceptance controls obligations of heir.

§ 425. More complicated is the case where the heir, under the Roman law, has thrown on him the obligations which attach to an estate, whether these obligations be to legatees or creditors. There has been much difference of opinion as to the special forum in such cases. By some it is held to be the place where the estate is situate; by others, that of the domicil of the deceased.[3] It seems, on the other hand, to be implied by Savigny, that the special forum is that where the heir accepts the succession.[4]

[1] Supra, § 401.

[2] Supra, § 412.

[3] Linde, Abhandlung, B. 2, p. 101; Mühlenbruch, p. 379.

[4] Savigny, viii. § 371.



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§ 426. Savigny supplies the following general rules by which the applicatory local law can be determined: [1] —

Savigny's tests of local law.

A. *The place of performance* supplies its local law where the obligation definitely fixes such place of performance — (*Erfüllungsort*).[2]

B. *The seat of a continuous business* supplies its local law to all obligations emanating from him who conducts such business.[3]

C. *The debtor's domicil* supplies its local law to all single, independent engagements emanating from the debtor at such domicil; nor does a subsequent change of domicil on his part change such local law.[4]

D. *A place detached from the debtor's domicil*, in which place he is temporarily sojourning, supplies its local law to obligations undertaken by him in such case, under such circumstances as lead to the inference that in such place they are to be performed.[5]

E. *The debtor's domicil* is to be referred to as supplying its local law to all cases to which the conditions of A., B., and D., do not apply.

§ 427. Under the old Roman law the plaintiff had the election between the special forum which was appropriate to the particular case, and the general forum of the defendant personally, be it that of *origo* or *domicilium*. In our own law he may elect as his forum (with certain rare limitations arising from privilege) any jurisdiction where the defendant or his property may be found. *But as to the applicatory local law*, according to Savigny, *the plaintiff has no election*.[6] There are no two such laws between which he may choose. It would be gross injustice to the defendant, as well as a great discredit to the law itself, argues this great jurist, if such an election were allowed. Each case has, in right, its own particular law which attached to it when it arose, by the assent of the parties, which law continues always to envelop it; and such law must be applied, as a general rule, by every court to which the plaintiff may appeal.[7] There

Law in this respect to be uniform.

[1] VIII. § 372.
[2] Supra, § 397.
[3] Supra, §§ 405–409.
[4] Supra, § 410.
[5] Supra, § 412.
[6] See supra, § 81.
[7] Supra, § 1.



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are, however, certain special circumstances in connection with this rule which now remain to be noticed.

### IV. WHEN THERE IS A POSITIVE, ABSOLUTE LAW OF THE JURISDICTION WITHIN WHICH THE SUIT IS BROUGHT.

Distinctive law of forum to be supreme.

§ 428. Such cases, as we will hereafter see more fully,[1] arise when from public policy, or other reason, some distinctive national peculiarity is wrought into the law of forum.[2] Of this may be mentioned as illustrations, the laws of landed primogeniture in England; those which exclude nobles from trade, in some portions of Germany; those which in other countries confine the right to purchase real estate to subjects, or to certain classes of subjects; those which impose artificial restraints on capacity;[3] those whose object is to check marriage,[4] and those whose object is to impose onerous restraints on commerce.[5]

### V. WHEN THERE ARE CONFLICTING LAWS MORE OR LESS FAVORABLE TO THE CONTRACT.

Law favoring contract to be preferred.

§ 429. It is laid down by Eichhorn, that when there are several possible laws, that is to be applied which is most favorable to the contract;[6] and in cases where there are varied local forms for the consummation of a contract by correspondence, this is specifically provided by the Prussian Code.[7] Savigny supports this position so far as to declare that when a contract would be valid by the law of domicil, but invalid by the place of contract, it is to be presumed that the parties intended to be bound by the law of domicil.[8] And such, it has been argued, is the position of the English common law.[9] It is always to be presumed that persons agree effectually to do

[1] Infra, § 490.

[2] Infra, § 490; supra, §§ 8, 104 *b*; Klinck *v.* Price, 4 W. Va. 4.

"No state is bound, or ought to enforce or hold valid, in its courts of justice, a contract which is injurious to its public rights, offends its policy, or violates a public law." Folger, J., Dickinson *v.* Edwards, 77 N. Y. 578. This is virtually adopted by the French and Italian codes. Supra, § 104 *a*.

[3] Supra, §§ 104 *a*, 114, 115.

[4] Supra, §§ 137, 147; infra, § 490.

[5] Infra, § 482. See Fœlix, i. p. 216.

[6] Deutsches Recht, § 37, notes f, g.

[7] A. L. R. I. 5, § 113.

[8] VIII. § 372.

[9] Co. Litt. 6 *b*; Broom's Maxims, 730.



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that which they contract; and if so, this agreement becomes part of the contract, overriding such local law as does not rest on a ground distinctively moral or political. And when there is a conflict of possible applicatory laws, the parties are presumed to have made part of their agreement that law which is most favorable to its performance.[1]

§ 430. Yet, when the proper governing law is determined, it is to be applied, not as a matter of courtesy, but, as we have seen, as a matter of right.[2] And where a particular interpretation has been given by a court of the jurisdiction, this will be accepted as universally binding, as the court of each country must be regarded as the best expositor of its particular laws.[3]

Proper law applied as a matter of right.

The subject of the proper proof of foreign laws will be discussed under a future head.[4]

## VI. PARTICULAR CASES.

### 1. *Obscurities and Ambiguities.*

§ 431. By the old Roman law, when there was a patent ambiguity in an instrument, the construction least favorable to the obligor, vendor, or lessor was to be assumed; and the reason given was that it was through the negligence or fraud of such party that the terms were not made more distinct.[5] This, however, as Savigny remarks, refers

Patent ambiguities to be construed against obligor.

[1] Whart. on Ev. § 1250; Parsons on Contracts, ii. 95; Kent's Com. ii. 460; Westlake Int. Law (1858), §§ 203–207; Hellman, in re, L. R. 2 Eq. 363; Cromwell *v.* Sac, 96 U. S. 51; Cutler *v.* Wright, 22 N. Y. 472; Kilgore *v.* Dempsey, 25 Oh. St. 413; Kenyon *v.* Smith, 24 Ind. 11; Smith *v.* Whitaker, 23 Ill. 367; Arnold *v.* Potter, 22 Iowa, 194; Talcott *v.* Despatch Co. 41 Iowa, 249; Baldwin *v.* Gray, 16 Mart. 192; Saul *v.* His Creditors, 17 Mart. 596; Depau *v.* Humphreys, 20 Mart. (La.) 1; Brown *v.* Freeland, 34 Miss. 181. See, as to usury, infra, § 507. As has already been seen, this rule obtains when there is a conflict of local laws as to the capacity of parties. Supra, §§ 101–104, 112–115. But see Dickinson *v.* Edwards, 77 N. Y. 578. Infra, §§ 505–507.

[2] Supra, § 1; King of Spain *v.* Machado, 4 Russ. R. 225; Blanchard *v.* Russell, 13 Mass. 1.

[3] Supra, § 1; Elmendorf *v.* Taylor, 10 Wheaton, 159; Saul *v.* His Creditors, 17 Martin, 587; Botanico Medico College *v.* Atchison, 41 Miss. 488. Infra, § 776.

[4] Infra, § 771.

[5] L. 26, de reb. dub. (34, 5); L. 38, § 18; L. 19, pr. de V. O. (45, 1); L. 39, de pactis (2, 14); L. 21, 33, de cont. emt. (18, 1); L. 172, pr. de R. J. (50, 17).



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to ambiguities which exist on the face of the instrument. Where, however, an ambiguity is *latent*, *e. g.* where a word has one meaning at one place, and another meaning at another place, then such reasoning does not apply.

This distinction is well known in the English law. *Ambiguitas verborum patens nulla verificatione suppletur.* In other words, the law will not permit vacancies or deficiencies in a writing to be filled by oral testimony; for "that would be to make all deeds hollow and subject to averments, and so in effect that to pass without deed which the law appointeth shall not pass but by deed."[1] Patent ambiguities are subjective, and cannot be extrinsically explained, while latent ambiguities are objective, there being two or more objects answering the description, which may be distinguished by extrinsic proof.[2]

Rules of evidence determined by *lex fori*.

§ 432. The law under which the contract was prepared determines in such cases the interpretation of the document. But the *lex fori* must determine whether the ambiguity is patent or latent; and if patent, what presumption exists against the obligor.[3] And so far as our distinctive rulings are concerned, we have followed the Roman law in holding that an ambiguous document is to be construed in a way consistent with the writer's good faith.[4]

As we have already seen,[5] the fact that a document is dated at a particular place is not conclusive to the effect that such place is the place of performance.[6]

Latent ambiguities may be explained by proof of local facts.

§ 433. But, on the other hand, by the same law, a latent ambiguity, which arises from extraneous circumstances, may be removed by an exhibition of the fact as it really is. *Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.* Thus, "If I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be that I have both the manors of South S. and North S., this ambiguity is matter in fact, and therefore it shall be holpen by aver-

[1] Broom's Max. 468–69.
[2] Wharton on Ev. § 957.
[3] Infra, §§ 767–8.
[4] Infra, § 782; Wharton on Ev. § 1249.
[5] Supra, § 411.
[6] See infra, § 457.



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ment, whether of them was that the party intended to pass."[1] In such case the suppletory evidence is to be derived from the spot where the grantor's estate lies; and the law applicable to the construction of such evidence is that which governed the grantor when he used the disputed terms. At the same time the customary use of terms in a district where lies such property is not sufficient to establish, as a matter of law, that the parties contracting used the terms in conformity with such custom, but is only evidence from which the jury can infer such conclusion.[2] As such, local usage affixing a particular meaning to ambiguous terms may be proved, provided such evidence does not contradict the tenor of the document.[3]

Whether local meaning was adopted is a question of intent.

§ 434. Where a contract is drawn at a place where both parties are domiciled, it may be generally said that ambiguities are to be interpreted according to the local meaning.[4] When, however, one of the parties is a foreigner, the question arises whether he knew of this peculiar local meaning, and whether he meant to accept it as his own.[5] Judge Story[6] gives as illustrations of ambiguities, "to be construed according to the meaning of the country where the contract is made," the term "usance," which in some countries means one month, in other countries different periods; and also the word "pound," which in America has a different value from what it has in England. If a contract, however, to be performed in England was executed by two Englishmen, travelling in America, the law of the place of performance, and not that of the place of contract, would prevail.[7] And the *lex loci contractus*

[1] Bacon's Max. 90, 92; 2 Kent's Com. 556; 1 Steph. Com. 463; Broom's Max. 468; Whart. on Ev. § 961, where the cases are given at large.

[2] Trimby *v.* Vignier, 1 Bing. N. C. 151; Clayton *v.* Gregson, 5 Ad. & El. 302; De la Vega *v.* Vianna, 1 Barn. & Ad. 284; De Wolf *v.* Johnson, 10 Wheat. 323; Bank U. S. *v.* Donally, 8 Peters, 368; Pope *v.* Nickerson, 3 Story R. 484; and cases cited in Whart. on Ev. § 961.

[3] Whart. on Ev. § 961.

[4] Story, § 263; Watson *v.* Brewster, 1 Barr, 381; Allshouse *v.* Ramsay, 6 Wharton, 331; Benners *v.* Clemens, 58 Penn. 24; Balt. & Ohio R. R. *v.* Glenn, 28 Md. 287.

[5] Savigny, viii. § 374.

[6] § 271.

[7] Whart. on Ev. §§ 960 *et seq.*; Stebbins *v.* Leowolf, 3 Cush. 137.

In Howard *v.* Ins. Co. 109 Mass. 384, which was a suit on insurance made in Boston between Boston parties, upon a vessel for a voyage from Hamburg to Cardiff and thence to Hong Kong, containing a warranty



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cannot supply the materials for interpretation when it is not the personal law of the parties, or the law of the place where the contract is to be performed. When the parties solemnize a contract in a place at which they are only casually present, and which has nothing to do with the performance of the contract, it is irrational to suppose that the law of that place was in any way appealed to by them in framing the contract. The interpretation of a foreign contract is a logical induction from facts; and such being the case, we must look to the place which the parties had in mind to supply the meaning of latent ambiguities. This place is a matter of proof, varying with each case. It may be the place of signing. It may be, as the Italian Code prescribes, the place where the parties in common reside. It may be the place where one of them resides. It may be, as is the case with marriage settlements, the place of matrimonial domicil.[1] It may be the place of performance. But what it is must be proved as a matter of fact; and its effect in the interpretation of a foreign contract is a matter of fact, to be proved like any other foreign law.[2]

Usage of place of first employment determines.

§ 435. Where a contract is entered into by correspondence, then, according to Wächter and Savigny, the usage of the place of the writer who first employs the controverted terms is to be followed, although this was not the place where the contract was closed; because the party who first introduces these terms is supposed to do so in the sense with which he is familiar. Thus, where a Leipzig insurance company introduced into its printed policy the exception of riot (*Aufruhr*), and where a fire covered by this policy took

not to load more than her registered tonnage with coal, which the underwriters defended on the ground of a breach of the warranty, in that she was loaded at Cardiff beyond her registered tonnage with a substance called patent fuel, the judge refused the plaintiff's request for a ruling that whether patent fuel was coal within the meaning of the policy was to be determined by the usage at Cardiff, and ruled that, if the plaintiff relied on a commercial usage to the effect that it was not so, the usage must be shown to have been known to the parties at the time of their contract, or so generally known at that time that they might fairly be presumed to have contracted in view of it. It was ruled that the plaintiff had no ground of exception.

[1] Supra, § 199.

[2] Westlake, § 200. To this effect is the judgment of Lord Cranworth in Di Sora *v.* Phillips, 10 H. of L. 633.



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place abroad, it was held by Wächter, in view of the diversity of local meanings attached to the word "Aufruhr," that the meaning in force in Leipzig was to prevail.[1] To the same effect argues Westlake, citing several adjudicated cases, English and American.[2] Yet this rule does not apply where the person first using a term selects it as one which for local reasons is familiar to his correspondent.[3]

So of place from which term emanates.

§ 436. That the place from which the term emanates is the standard is illustrated by a case[4] reported by Goldschmidt, and cited by Bar.[5] A Bremen firm contracted in Smithfield with an English shipmaster, in the English language, and in English form. The instrument was a bond with the usual conditional penalty. The Supreme Court at Lübeck, having taken evidence of the English law in this respect, held that the penalty was to be governed by such law, and to be treated as merely cautionary, and as in no way fixing the actual amount of the debt.

Where place of performance is in view, that place determines.

§ 437. But where there is a place of performance, whose language and usages the parties meant to adopt, then such language and usages must prevail. Thus, when money is to be paid, or goods delivered, or lands conveyed, in a foreign country, then the currency, weights, and measurements of such foreign country are to be the standards: first, because such is presumed to be the intention of the parties; and second, because generally there will be no other currency, weights, or measurements in such country, by which the contract could be performed.[6] This is expressly prescribed in the Prussian[7] and the Austrian[8] codes.

[1] Wächter, l. c. p. 117; Savigny, viii. § 374.

[2] Westlake (1858), § 209; Power v. Whitmore, 1 M. & S. 141, 150.

[3] Whart. on Ev. §§ 960 *et seq.*

[4] Zeitsch. für das gesammte Handelsrecht, ii. p. 140.

[5] P. 292.

[6] Boullenois, pp. 496–498; Story, § 270, 311, n.; Savigny, viii. 374; Bar, pp. 241, 253; Rosetter v. Cahlman, 8 Exch. 361; Stapleton v. Conway, 3 Atk. 727; De Wolf v. Johnson, 10 Wheat. 323. See Clayton v. Gregson, 5 Ad. & El. 302. Infra, § 514.

When a contract of sale of land, so it is argued by Fiore (Op. cit. § 273), has been concluded at the domicils of the parties, we have a right to presume that they employed the language with which they were familiar, and when using terms of measurement

[7] A. L. R. I. 5, § 256.

[8] A. G. B. art. 905.



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§ 438. The Civil Code of France provides:[1] "Ce qui est ambigu s'interprète par ce qui est d'usage dans le pays où le contrat est passé." Fœlix[2] holds that this does not apply to foreign contracts. But Merlin[3] thinks differently, arguing that those who contract in a state must be considered as accepting the law of such state. And Massé[4] comes to the same conclusion, on the ground that the local law must be taken for interpretation, as there is no other law possible for the purpose. He thinks, however, that this does not apply when the place of contract is not the place of performance, or when the parties are foreigners.

French law is to this effect.

§ 439. The question of local interpretative law bears closely on the obligation of sureties on a foreign bond. "Suppose," says Judge Story,[5] "a contract for the payment of the debt of a third person, in a country where the law subjected such a contract to the tacit condition, that payment must first be sought against the debtor and his estate; that would limit the obligation to a mere accessorial and secondary character; and it would not be enforced in any foreign country, except after a compliance with the requisitions of the local law. Sureties, indorsers, and guarantees are therefore liable everywhere, only according to the law of the place of their contract.[6] Their obligation, if treated by such local law as an accessorial obligation, will not anywhere else be deemed a prin-

Distinction applicable to sureties on foreign bond.

used those terms in the sense in which they were used in such domicil, although the meaning be different from that prevalent in the place where the property is situate. If only one of the parties was domiciled in the place of the contract, but if the other party was familiar with the language of such place, and had lived there, the same conclusion results. On the other hand, as to movables, the better opinion is that terms of measurement are to follow the law of the place indicated for the consignment of goods. The measure is an act distinct from the sale, and is to be regarded as a mode of execution dependent on the law of the place where the goods are to be delivered. So far as concerns terms of measurement of real estate, I dissent from the position expressed by M. Fiore. It is true that informal estimates may be regarded as thus framed. But there are few cases of agreements for the sale of real estate in which the measurements are not made in subordination to surveys prepared on the spot.

[1] Art. 1159.

[2] § 120.

[3] Rép. v. Loi, *add.* p. 590.

[4] Le Droit Comm. ii. 153.

[5] § 267.

[6] Aymar *v.* Sheldon, 12 Wend. 439.



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cipal obligation.[1] So, if by the law of the place of a contract its obligation is positively and *ex directo* extinguished after a certain period by mere lapse of time, it cannot be revived by a suit in a foreign country, whose laws provide no such rule, or apply it only to the remedy.[2] To use the expressive language of a learned judge, it must be shown, in all such cases, what the laws of the foreign country are, and that they create an obligation which our laws will enforce." [3] But this reasoning rests on the supposition that the place of contract is the place of performance. If it be not, the same rule does not necessarily apply. Thus if two persons, domiciled in a country where the Roman law prevails, enter into a contract when travelling in a country subject to the common law, which contract is to be performed in their own country, the law of the latter is to be the arbiter.[4]

### 2. *Maritime Cases.*[5]

§ 440. (*a*) *Responsibility of Owners for Master.* — The Roman law, which is the basis, in this connection, of our commercial system, has established special rules for the relationship of master to owner. The *magister navis* is the captain. The *exercitor* is the lessee or charterer of the ship for a voyage. The *dominus* is the owner. The *dominus* is bound by the acts of the *magister*, and, as to third parties, by those of the latter's deputy, though the appointment of a deputy was forbidden in the engagements between the *dominus* and the *magister*. This was required by the *utilitas navigantium*. In the then rudimentary state of navigation, when the means of communicating with the owner, the ship being in a distant port, were so slight, it was necessary, for the general interests of shipping, that the master's power of binding the owner should be unlimited. The superior facilities of communication, however, enjoyed in modern times, render it less necessary that such un-

Master's power to bind owner enlarged in foreign port.

[1] See Pothier on Oblig. n. 407; Trimbey *v.* Vignier, 6 C. & P. 25; S. C. 1 Bing. N. C. 151; 3 Burge, 764.

[2] See Le Roy *v.* Crowninshield, 2 Mason R. 151; Pothier, Oblig. n. 636 to 639; Voet ad. Pand. lib. 4, tit. i. § 29, ad. finem.

[3] Lord Ch. J. Eyre, Melan *v.* Duke of Fitz James, 1 Bos. & Pul. 141.

[4] See Prentiss *v.* Savage, 13 Mass. 23; Brown *v.* Richardson, 13 Martin, 202. Supra, § 434.

[5] As to common carriers in general, see infra, § 471. As to property in ships, supra, § 356.



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checked power should be placed in the master's hands; and now, by the present maritime law, the owner's liability for the master's wrongful acts is limited to the value of the vessel and freight.[1] And the extent of the master's power to bind the owner *ex contractu*, depends upon whether the ship is in a home or foreign port. In the latter case, the necessities of commerce require far larger discretionary powers than in the former.[2]

Master's authority to bind owner depends on law of flag.

§ 441. As a general rule, the master's authority to bind the owner depends on the law of the country to which the ship belongs.[3] The master's authority to bind the cargo by a contract of bottomry is to be determined by the same standard;[4] though it may be otherwise as against insurers.[5] But when the question, apart from the law of a particular port in which the ship may at the time be,[6] is, what law governs a ship, the answer is, to adopt Mr. Maclachlan's words,[7] "that the flag at the mast-head is notice to all the world of the extent of such power (that of the master) to bind the owners or the freighters by his acts." And when there are several local laws under the same flag, the law of the place of registry must prevail.[8]

[1] Phil. iv. 583; Abbott on Shipping, pt. 3, c. 5; The Rebecca, Ware, 188; Malpica *v.* McKown, 1 La. R. 259.

[2] Story on Agency, § 33.

[3] Pope *v.* Nickerson, 3 Story R. 465; Lloyd *v.* Guibert, L. R. 1 Q. B. 115. See supra, § 356; infra, §§ 440, 473. In Malpica *v.* McKown, 1 La. R. 248; Arayo *v.* Currell, 1 La. R. 528, the *lex loci contractus* was held to determine. See The Oriental, 7 Moore P. C. 398; The Buonaparte, 8 Moore P. C. 459. As to Naylor *v.* Baltzell, Taney C. C. 58, see infra, § 471.

[4] Droege *v.* Stuart, L. R. 2 P. C. 505. Supra, § 358.

[5] Greer *v.* Poole, L. R. 5 Q. B. D. 272.

[6] Supra, § 356.

[7] Merch. Shipping, 3d ed. 1880, §§ 64 *et seq.* p. 156.

[8] Supra, § 357.

According to Mr. Foote (Priv. Int. Jur. p. 386), while it is now held in England that in contracts of affreightment and bottomry bonds the parties are presumed to have contracted with reference to the ship's flag, the validity of a sale by a master, in a foreign port, of the ship or cargo, depends upon the *lex loci actus*.

Cammell *v.* Sewell, 5 H. & N. 350, as has been noticed (supra, § 345), is to this effect. It is elsewhere shown that the law of the port in which a vessel is situate must govern as to liens imposed in such port. Mr. Foote gives another reason as follows: "This law" (that of executory contracts), "it has been determined in Lloyd *v.* Guibert, L. R. 1 Q. B. 115, is the law of the ship's flag; *i. e.* the parties must be taken to have assumed that the law of the ship's flag would govern the *future*



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§ 442. It would seem that although the master's right to hypothecate the vessel is restrained, by the English law, to cases where personal credit is unattainable, yet he can, without restriction, pledge his principals personally for repairs and furniture. The French law gives the master unlimited power of hypothecation, but limits his power to bind his principals personally, at least to the extent of the value of ship and cargo.[1] Distinctive French rule.

§ 443. (*b.*) *General Average.* — The *Lex Rhodia de jactu*, which is the foundation of this branch of maritime law, prescribes that when goods have been voluntarily thrown overboard at sea for the common benefit, the owners of the ship and goods saved are to contribute for the *pro ratâ* relief of those whose property has been sacrificed.[2] But, to *Lex Rhodia de jactu* the common rule.

incidents of the obligation, the master having no authority to undertake that the owners of the ship or cargo will do anything, except as defined by that law. But in an absolute and immediate sale, such as that in Cammel *v.* Sewell, the master is not required to pledge his owners to anything. No future relations between the parties are contemplated, and therefore they cannot be taken to have referred to any law to govern the future incidents of the obligation. The master simply contracts to sell the ship or cargo according to the law of the place where they are lying, and he does actually so sell them, while they are there. By the comity of nations, or, to speak more correctly, by those principles of international jurisprudence which the law of England, in common with the law of most civilized nations, adopts, a title to property which has once validly accrued according to the law of the situation is good as against all the world; and the purchaser is not to be put in a worse position because the master of the ship has carelessly or improperly mistaken or exceeded his instructions." Foote's Priv. Int. Jur. p. 336.

The judgment in the Eliza Cornish, 1 Ecc. & Ad. 36, was overruled in Cammel *v.* Sewell, 5 H. & N. 350, where it was held that where the master of a Prussian vessel, chartered in Russia by English shippers for Hull, and wrecked on the Norway shores, sold the cargo to a purchaser who would have a good title by Norwegian law, but not by English, the *lex loci* was to prevail, and the sale was good. Foote's Priv. Int. Jur. p. 334.

On the question of the owner's responsibility for the master, Mr. Guthrie, in a note to Savigny (p. 189), cites The Osmanli, 3 W. Rob. Adm. 198; The North Star, 29 L. J. Adm. 73, 76; Lloyd *v.* Guibert, L. R. 1 Q. B. 115; 35 L. J. Q. B. 74; Story, § 286; The Nelson, 1 Hagg. Adm. 161; Pope *v.* Nickerson, 3 Story R. 465. Bar (p. 262) urges the serious consequences if such unlimited authority be allowed to an agent. Are agents, by going abroad, to have unlimited authority? Are they, by putting to sea, to be able to ruin their principals by unlimited speculations? What is the use of having by-laws to corporations, or checks on joint-stock companies, if agents are thus unrestrained?

[1] Westlake, 1858, art. 214.

[2] D. 14, 2.



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found this claim, there are certain prerequisites: First, that the sacrifice should have been voluntary; and secondly, that it should have been successful, and that the ship should thereby have been relieved. Each party is only liable for his own particular share. As commerce has expanded, great variation has arisen as to the kinds of property to which this doctrine is to extend, and different nations have propounded different rules. The following points have been made by the English and American courts: —

Insurance does not ordinarily cover general average.

§ 444. 1st. "The insurer of goods to a foreign state is not liable to indemnify the insured, though a subject of that state, who has been obliged by a decree of a competent court of that state to pay a contribution as for general average, unless it be proved as a fact that the insured and insurer contemplated in their contract the general usage among merchants, or the usage of the port in which the general average was struck." [1]

Place of destination supplies the rule of adjustment.

§ 445. 2d. "The place of the ship's destination, or delivery of her cargo, is the place where the average is to be adjusted." [2] The law of such place supplies the maritime rule.[3]

[1] Phil. iv. 594; Westlake (1858), art. 209, citing Park on Insurance, 900; Power *v.* Whitmore, 4 M. & S. 149; Schmidt *v.* U. S. Ins. Co. 1 Johns. R. 178; Lenox *v.* U. S. Ins. Co. 3 Johns. C. 178; Shiff *v.* La. Ins. Co. 6 Martin N. S. 629.

[2] Phil. iv. 594.

[3] Simonds *v.* White, 2 B. & C. 805; Dalglish *v.* Davidson, 5 D. & R. 6; Tudor's Leading Maritime Cases, 96; Berkley *v.* Presgrove, 1 East R. 220; The Copenhagen, 1 Robinson R. 293. On the general question the Supreme Court of the United States says: "There may be cases in which the contract of the captain in relation to the amount of salvage to be paid to the salvors, or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster, it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo; and when, from his situation, he is unable to consult them or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage, and he is not bound in all cases to wait for the decision of a court of admiralty. So, too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners that the amount should be settled at once by the captain, and the vessel proceed on her voyage, without waiting even a day for the purpose of consulting them. But in all such cases, unless the acts of the captain are ratified by the owners, his conduct will be carefully watched and scrutinized by the court,



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§ 446. In contracts for marine insurance a clause is sometimes inserted making the underwriters liable for general average "as per foreign statement." This clause has been construed to determine, not only that the appraisement of the foreign average-taker is to be regarded as *primâ facie* correct, but that the law of the port where the appraisement is made is to determine what general average is.[1] The appraisement is to be regarded, also, as determining law as well as fact.[2] Even without a special clause in the policy, the settlement is made according to the foreign adjustment; though in such case it is argued that the "foreign law is only entitled to regulate the adjustment, and not to make that an average loss which is not so according to the law of the country where the policy is effected."[3] Foreign adjustment determines.

### 3. *Commercial Paper.*

§ 447. Capacity to negotiate commercial paper has been already incidentally discussed. It is sufficient here to say, that artificial limitations on capacity of this kind are not extra-territorially binding.[4] How far married women may be made liable on negotiable paper has also been already noticed.[5] Limitations of capacity not ubiquitous.

and his contracts will not be regarded as binding upon the parties concerned, unless they appear to have been *bonâ fide*, and such as a discreet owner, placed in the like circumstances, would probably have made. If he settles the amount by agreement, those who claim under it must show that the salvage allowed was reasonable and just. If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair, and the referees worthy of the trust." Houseman *v.* Schooner North Carolina, 15 Pet. 40. See New World Steamboat *v.* King, 16 How. 469.

[1] Mavro *v.* Ocean Ins. Co. L. R. 10 C. P. 414.

[2] Harris *v.* Scaramanga, L. R. 7 C. P. 481; Hendricks *v.* Ins. Co. L. R. 9 C. P. 460.

[3] Foote on Priv. Int. Jur. p. 340; citing Phillips on Insurance, §§ 1413, 1414; cf. remarks of Blackburn, J., in Mavro *v.* Ins. Co. L. R. 10 C. P. 418; Power *v.* Whitmore, 4 M. & S. 141, as explained in Dent *v.* Smith, L. R. 4 Q. B. 414.

[4] Supra, § 110.

[5] Supra, § 121.

The German ordinance, in article 84, provides that in respect to his capacity to contract the special engagements of bills of exchange, a foreigner will be judged according to the laws of the state to which he belongs; though when doing business in a foreign country he becomes liable according to the laws of the country. The



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By the French Code, capacity is governed by the law of domicil.[1]

§ 448. *Form of Bills.* — As to the verbal form of bills, the rule *locus regit actum* prevails.[2] The mode or custom of negotiation that exists in any particular country will, as a general rule, be sufficient for any bills executed in such country.[3] This is expressly provided for in the General German Exchange Law.[4] In accordance with this view, the Supreme Court at Berlin, in July, 1860,[5] decided that American promissory notes, valid in the place of their origination, would be treated as valid in Germany, though not in conformity with the German Exchange Law.[6]

Formalities regulated by *lex loci actus.*

Swiss states have adopted the same rule. Brocher, in Revue de droit int. 1874, p. 196; Bar, p. 302. According to Fiore and other recent jurists of Italy, Belgium, and France, the capacity of parties to negotiate paper is determinable by their nationality. Fiore, Op. cit. § 343. But the rulings of the French courts do not sustain this position. Thus it was held in 1834 by the Court of Paris, that a foreigner who in a promissory note signed by him describes himself as domiciled in France cannot set up, against holders of this note, that he was a minor by the law of his country. Ibid. § 344. And Fiore admits that the same principle applies to the case of a minor who holds himself out as a major; and to members of royal families who, though prohibited by their own law from making commercial paper, are nevertheless bound in a foreign land by paper executed by them in such land.

A report of a committee on the codification of the law of nations, as to bills of exchange (Sir Travers Twiss, chairman), will be found in the Central Law Journal for Oct. 1, 1875.

[1] Code de Commerce, I. i. t. viii.; Phil. iv. 607.

[2] Infra, § 676.

[3] Infra, § 676; Story, § 318; Fœlix, i. No. 80; Massé, p. 143; Bar, p. 303. The following variations of form are mentioned by Bar (p. 303, note 5): By the French Code of Commerce (arts. 110, 137, 138), the memorandum of value received is essential to the bill; but it is otherwise with the General German Exchange Law. By the English law, bills may be made payable to bearer; but it is otherwise with the French and German.

[4] Art. 85, § 1.

[5] Seuffert, 14, p. 279.

[6] The French Chambre des requêtes (1856; Dalloz, 1857, 1, 39) has ruled that the formal requisites of negotiable paper are determined by the law of the place where the paper is subscribed. And it was held by the Court of Paris, in 1839, that a bill of exchange drawn in London, by an Englishman, accepted by a Frenchman, and payable in London, which is valid in England, will be held valid in France, though if drawn in France it would have been invalid under the French law requiring that to a bill of exchange it is necessary that it should be payable in a place other than that in which it was drawn. And it was held by the same court, in 1854, that an indorsement in blank, made in



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§ 449. Each party who puts his name to negotiable paper incurs a distinct and several liability. It may be that of a principal, as is the case with the maker of a note and the acceptor of a bill. It may be that of a surety, as is the case with the drawer of a bill and the indorsers of bills and notes. But however this may be, the engagement of each party is for himself, either as principal or surety, and is governed by the law to which this particular engagement is subject.[1]

Each party individually bound.

§ 450. The law settling the obligations of the acceptor of a bill

England and valid in England, will be held valid in France, though it would have been otherwise if it had been made in France. Fiore, Op. cit. § 360.

The question whether local regulations as to formalities of commercial paper have extra-territorial force is discussed by Brocher, in an article in the Revue de droit int. 1874, pp. 200, 201.

There is no doubt, says Fiore (Op. cit. § 345), that the rule *locus regit actum* applies to determine the forms essential to the validity of commercial paper. Hence it has been held in France that a bill of exchange made in Scotland, which does not specify the day of payment, is valid in France, because, according to Scotch law, such letters are held valid and payable at sight. Ibid.; Nougier, i. p. 447. The same rule, adds Fiore, applies to the form of indorsement, of acceptance, of protest. Thus, for instance, the question whether an indorsement in blank is sufficient, or whether the word *vu* with the signature of the drawee is equivalent to an acceptance, or whether certain acts amount to a tacit acceptance, as where the drawee retains, without objection, the paper for a specific time, is determined by the local law.

At the same time, so holds Fiore (Op. cit. § 345), if the parties follow, as to the form, the law of the place where the bill is payable, this is valid, as the maxim *locus regit actum* is facultative, not imperative. And it has been held by the Court of Cassation that the proof requisite to establish liability on a bill is to be determined by the law of the place where the bill is payable, and not by the law of the place where it was drawn. Ibid.

[1] Potter *v.* Brown, 5 East, 124; 1 Smith Leading Cases, 351; Trimbey *v.* Vignier, 1 Bing. N. C. 151; 4 M. & S. 695; 6 C. & P. 25; Don *v.* Lippman, 2 S. & M. 737; Allen *v.* Kemble, 6 Moore P. C. 314; Coughan *v.* Banks, Chitty on Bills, 683; Burroughs *v.* Hannegan, 1 McLean, 315; Davis *v.* Clemson, 6 McLean, 622; Slacum *v.* Pomeroy, 6 Cranch, 221; Masson *v.* Lake, 4 How. U. S. 262; Powers *v.* Lynch, 3 Mass. R. 77; Prentiss *v.* Savage, 13 Mass. R. 20; Brabston *v.* Gibson, 9 Ibid. 263; Hicks *v.* Brown, 12 Johns. R. 142 (though see Lee *v.* Selleck, 33 N. Y. 615); Artisans' Bank *v.* Park Bank, 41 Barbour, 615; Hazelhurst *v.* Kean, 4 Yeates, 19; Depau *v.* Humphreys, 20 Martin, 1; Trabue *v.* Short, 18 La. An. 257; Rose *v.* Thames Bank, 15 Ind. 292; Short *v.* Trabue, 4 Met. (Ky.) 299; Carlisle *v.* Chambers, 4 Bush (Ky.), 268; Hyatt *v.* Bank of Ky. 8 Bush, 193; Trabue *v.* Short, 5 Cold. (Tenn.) 293; Story, §§ 317, 345, 347; Westlake, art. 241. As to Germany and France, see § 449. See more fully infra, § 456.



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Acceptor's obligation determined by place of payment.

of exchange is determined by the place of payment. If qualified by such law, it is qualified everywhere; if absolute, it is absolute everywhere.[1]

By some codes, an acceptance is inoperative if prior to its date the drawer has failed. Such a law, applicatory to the acceptor, does not affect the liability of indorsers who are bound by their own local law.[2]

And so of maker's.

§ 451. The same rule applies to the liability of a maker of a promissory note. Hence where a negotiable promissory note, made in Massachusetts and there payable, is indorsed in another state, the liability of the maker to the indorsee is determined by the law of Massachusetts.[3]

And so of days of grace.

§ 452. Days of grace are allowed in accordance with the place of payment.[4]

[1] Bar, p. 305; Story, § 333; Allen *v.* Kemble, 6 Moore P. C. 322; Lewis *v.* Owen, 4 B. & Ald. 654; Halstead *v.* Skelton, 5 Q. B. 86; Cox *v.* Nat. Bank, 100 U. S. 704; Van Cleef *v.* Therasson, 3 Pick. 12; Bright *v.* Judson, 47 Barb. 291; Everett *v.* Vendryes, 19 N. Y. 436; Freese *v.* Brownell, 35 N. J. L. 285; Ellicott *v.* Early, 3 Gill, 31; Evans *v.* St. John, 9 Port. 186; Bayley on Bills, 10th ed. 200.

It was ruled by the Supreme Court of the United States, in 1877, where a bill of exchange was drawn by a party in Illinois on a party in Missouri and made payable in Illinois, and the drawee being then in the latter state orally promised to accept it, that on such a state of facts, as according to the law of Illinois an oral promise to accept is valid and equivalent to an acceptance, the drawee was liable to the bank which paid the bill. Scudder *v.* Bank, 91 U. S. 406.

[2] Beseler, iii. p. 368. See Tilden *v.* Blair, 21 Wal. 24.

An article on the law applicable to the holders of French paper negotiated abroad will be found in the Jour. du droit int. privé for 1880, p. 260.

The contract between the drawer and the drawee, says Fiore (Op. cit. § 346), is a contract of mandate and of commission; that between the holder of the bill and the acceptor is a *caution solidaire*, by virtue of which the acceptor appropriates the obligation of the drawer; that between the drawer and the acceptor *par intervention* is a *quasi contract de gestion d'affaires*. To each of these contracts, in all that determines the reciprocal duties of the parties, applies the law of the place where the contract was perfected, while the law of the place of performance applies to whatever relates to performance.

[3] Woodruff *v.* Hill, 116 Mass. 310; Peck *v.* Mayo, 14 Vt. 33; Hunt *v.* Hunt, 16 N. Y. Sup. Ct. 622; aff. 72 N. Y. 217. See, generally, to same point, Allen *v.* Bratton, 47 Miss. 119; Evans *v.* Anderson, 78 Ill. 558; Hunt *v.* Standart, 15 Ind. 33; Alford *v.* Baker, 53 Ind. 221; Lindeman *v.* Rosenfield, 67 Ind. 246; Arnold *v.* Potter, 22 Iowa, 194.

[4] Westlake, 1880, § 213; Massé, pp. 168, 196; Story, §§ 316, 353 *c*; Pardessus, No. 1495; Rouquette *v.* Oberman, L. R. 10 Q. B. 535; Pomeroy *v.*



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§ 453. The interest chargeable on default of payment by maker or acceptor is graded in conformity with the law of the place of payment.[1] And so of interest.

§ 454. Demand and protest, being made necessarily at the place of payment, are determinable by the law of the place of payment.[2] Where there is no place of payment designated in a note, then it has been ruled that the place where the note is made is to be viewed as the place of payment.[3] The law of the place of payment, in case of failure to accept or pay, will determine as to the demand necessary to have been made against the principal debtor;[4] as to the nature of the requisite protest;[5] and as to the notice of dishonor.[6] But as will be next seen, between an indorser, whose And so of demand, protest and notice of dishonor.

Ainsworth, 22 Barb. 118; Young *v.* Harris, 14 B. Mon. 556.

In all that respects the manner of presenting a bill of exchange for acceptance, and the mode of refusing acceptance, and the character of the protest, the applicatory law is that of the place of payment; and if the latter gives days of grace in favor of the drawee, this practice obtains, notwithstanding that the *lex loci contractus* is to the contrary. Fiore, Op. cit. § 347; Pardessus, No. 1495; Massé, Droit Comm. No. 591.

[1] Infra, § 503; Cooper *v.* Waldegrave, 2 Beav. 282; Depau *v.* Humphrey, 20 How. 1; De Wolf *v.* Johnson, 10 Wheat. 367; Miller *v.* Tiffany, 1 Wal. 310; Campbell *v.* Nicholls, 33 N. J. L. 81; Mullen *v.* Morris, 2 Barr, 85; Butters *v.* Olds, 11 Iowa, 1. That the law of the place of drawing and discount determines interest, see Merchants' Bank *v.* Griswold, 72 N. Y. 472; 9 Hun, 561.

In Cooper *v.* Waldegrave, 2 Beav. 282, it was held by Lord Langdale that the liability of an acceptor of a bill to pay interest is dependent on the place where the liability was assumed, such place being the place of payment; and the same rule was afterwards applied to the drawer. Gibbs *v.* Fremont, 9 Ex. 25. See, also, Burrows *v.* Jaminean, 2 Str. 733. As to interest by way of damages, see infra, § 460.

[2] Rothschild *v.* Currie, 1 Q. B. 45; Hirschfield *v.* Smith, L. R. 1 C. P. 340; Horne *v.* Rouquette, L. R. 3 Q. B. D. 514; Cox *v.* Nat. Bk. 100 U. S. 704; Hayden *v.* Davis, 2 McL. 276; Wright *v.* Andrews, 70 Me. 86; Blodgett *v.* Durgin, 32 Vt. 361; Butler *v.* Myer, 17 Ind. 77; Thorp *v.* Craig, 10 Iowa, 461. To same effect see Massé, pp. 168–196; Bar, p. 306; Pardessus, No. 1495; Story, §§ 316–353 *e*.

[3] Blodgett *v.* Durgin, 32 Vt. (3 Shaw) 361. See Braynard *v.* Marshall, 8 Pick. 194; Story, § 317; Phil. iv. 616.

[4] Masson *v.* Lake, 4 Howard U. S. 262; Williams *v.* Wade, 1 Met. (Mass.), 82.

[5] Story, §§ 267, 360; Ballingalls *v.* Gloster, 3 East, 481; Aymar *v.* Sheldon, 12 Wend. 439.

[6] Cook *v.* Litchfield, 5 Seld. 279; Thorp *v.* Craig, 10 Iowa (2 With.), 441. See infra, § 455.



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liability is fixed, and his immediate indorser, the law of their special contract determines.

With this practically coincides the rule that the form of the protest is to be governed by the laws of the place in which it is made;[1] and such is the effect of a decision of the Supreme Court at Lübeck in 1833.[2]

A bill payable in France, though drawn in England, is in the English practice a foreign bill, and notice to the drawer of dishonor according to the French law is sufficient.[3] Such is the law in Germany,[4] and in France.[5]

[1] Infra, §§ 699–702.

[2] Bar, p. 309; and of the Paris Cassation Court of 18 Brum. an. 11, Sirey, 3, i. p. 139.

[3] Hirschfeld *v.* Smith, L. R. 1 C. P. 340; 35 L. J. C. P. 177.

[4] Bar, p. 207.

[5] Pardessus, Op. cit. arts. 1485, 1495.

The positions taken in the text are discussed by Fiore (Op. cit. § 359), who holds that it is the law of the place in which the bill was negotiated that must control. We cannot, he argues, properly say that as acceptance is a mode of "*execution*," and a preliminary of payment, we must apply the law of the place where the bill is payable. So far from this being the case, the conditions of acceptance and protest enter into the foundation of the contract. The party who draws a bill of exchange under a law which exacts that it should be presented for acceptance (other laws not making this necessary), guarantees the payment of the bill on the condition that the party holding it, by presenting it for acceptance, takes immediate measures to realize funds which may be in the drawee's hands. The bill passes through the hands of successive indorsers on the same conditions; and the holder cannot maintain an action against the drawer until these conditions have been satisfied.

In Rothschild *v.* Currie, 1 Q. B. 43, the plaintiff was indorsee of a bill drawn in England, accepted and payable in Paris, and then indorsed in England to the plaintiff. The bill was dishonored on presentation, and the plaintiff in England being notified, transmitted the notice to the defendant, the plaintiff's immediate indorser. The notice of dishonor was too late by the English law, though in time by the French. It was held that the French law was that which was to rule the case, as it was in France the payment was to be made. This ruling has been excepted to by Judge Story (Story on Bills, § 296 *n.*) and Mr. Westlake (Int. Law, 1st ed. § 227); and is in conflict with the rule laid down by eminent continental jurists, that an indorser is liable in subordination to the law of his domicil. But if the law of the place of payment of negotiable paper is to determine the mode of payment, and the terms of notice are determinable by such law, the ruling in Rothschild *v.* Currie, may be sustained. See Hirschfield *v.* Smith, L. R. 1 C. P. 340. At the same time, as is said above, as between an indorser, who becomes liable, and his immediate indorser, their special contract should decide. Rouquette *v.* Overmann, L. R. 10 Q. B. 525; Horne *v.* Rouquette, *ut supra*.



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§ 455. When an indorser is fixed, by protest and notice, as immediate debtor, the notice he is to give to the party from whom he took depends upon the law governing the contract between him and such party.[1]

Notice by indorser depends upon special law.

§ 456. The acceptor's liability, according to the law of the place of payment, determines that of drawer and indorser.[2] And on the same rule, the maker's liability at the place of payment determines that of the indorser. But the law, as to payment, in a suit against the indorser, based on the drawee's failure to accept, is determined by the place of his payment, which is usually the place of indorsement.[3] The same rule applies to the drawer, who is liable at his own domicil as the place of payment.[4] When the place of indorsement and the place of payment are different, it is the law of the latter that prevails.[5]

Liability of drawer and indorser conditioned by that of acceptor, but subject, as to payment, to the special place of payment.

[1] Horne *v.* Rouquette, L. R. 3 Q. B. D. 514; Rose *v.* Bank, 15 Ind. 292; Chatham Bank *v.* Allison, 15 Iowa, 357; Huse *v.* Hamblin, 29 Iowa, 501; Nat. Bk. of Mich. *v.* Green, 33 Iowa, 140.

[2] Rouquette *v.* Overmann, L. R. 1 Q. B. 525.

[3] Greathead *v.* Walton, 40 Conn. 226; Aymar *v.* Sheldon, 12 Wend. 439; Freese *v.* Brownell, 35 N. J. L. 285; Ripka *v.* Geddis, 20 Penn. St. 140; Short *v.* Trabue, 4 Metc. (Ky.) 299; Hatcher *v.* McMorine, 4 Dev. 122; Crawford *v.* Bank, 6 Ala. 574. See for other cases supra, § 449. As to accommodation paper, see infra, § 464.

[4] Freese *v.* Brownell, 35 N. J. L. 285.

The transfer of the property of a bill of exchange, by means of indorsement, according to Fiore (Op. cit. § 349), constitutes sometimes a contract of exchange pure and simple, sometimes a contract composed of assignment, transfer of property, and exchange. The first occurs when the drawer draws the bill on himself and indorses it to another. The second occurs when the proprietor of a complete bill, drawn in one place on another place, indorses it to a person who gives him the value in exchange for the sum which is to be paid to the indorsee in the place in which the bill is drawn. In both cases the law of the place where the indorsement is negotiated is to rule in all questions relating to the contract between the indorser and the indorsee. The same law determines whether there has been a transfer of the property, and hence a blank indorsement in England has been held operative in France. To these points are cited a series of French decisions. Pardessus, No. 1485; Nouguier, i. p. 477.

The negotiability of an indorsement, it has been held in Italy, is determinable by the place where the bill is payable, and not where the indorsement is made. Jour. du droit int. privé, 1878, p. 51; though see *contra*, Esperon, Droit int. p. 23. In France the law of the place of indorsement prevails. Fœlix-Demangeat, No. 80.

[5] Infra, § 457; Lawrence *v.* Bas-



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§ 457. The place from which a note or acceptance is intended by the maker (or acceptor) to issue is the place of payment, when no other is expressed, though he may have been absent from such place when signing his name.[1] The paper, as against a party without notice, cannot be contradicted by parol proof that it is not what it claims to be. Hence a maker or indorser of a Massachusetts note will not be permitted, as against a *bonâ fide* Massachusetts indorsee, before maturity, to show that the note, though dated in Massachusetts, was made in New York, and void by New York law.[2] As to accommodation paper, however, and paper with notice, the real place of the transaction may be shown.[3]

Place of date not necessarily place of payment.

§ 458. A bill defective in formal matters in the place where made may, nevertheless, if good by place of indorsement, bind indorsers. To this effect is a decision of the Supreme Court at Lübeck, of March 1, 1844, cited by Bar,[4] and of the Cassations Court at Paris, of September 25, 1829.

Bill formally defective in place where made may bind indorsers if good in place of indorsement.

The General German Exchange Code provides, in this respect, as follows: —

"When foreign bills of exchange conform to our domestic law, the fact that they are defective under their own law constitutes no objection to subsequent indorsements valid by our law.

sett, 5 Allen, 140; Chatham Bank *v.* Allison, 15 Iowa, 357.

Rothschild *v.* Currie, 1 Q. B. 43, is not inconsistent with the above, though apparently so, the real point being the application of the rule *locus regit actum* to the formalities of the protest. See Bigelow's Bills and Notes, 1880, pp. 342–3.

[1] Chapman *v.* Cottrell, 5 H. & C. 565; Horne *v.* Rouquette, L. R. 3 Q. B. D. 514; Grimshaw *v.* Bender, 6 Mass. 157; Heidersheimer *v.* Mayer, 72 N. Y. Sup. Ct. 506; Vanzant *v.* Arnold, 31 Ga. 210; though see Story, § 319. See Glyn, in re, 15 Bank. Reg. 495, and cases cited infra, § 505 *a*.

[2] Towne *v.* Rice, 122 Mass. 67.

[3] Infra, § 464; supra, § 411; Fant *v.* Miller, 17 Grat. 47; Overton *v.* Bolton, 9 Heisk. 762.

In Cox *v.* Nat. Bk. 100 U. S. 704, a bill of exchange was drawn by A. (domiciled in Kentucky) to the order of B. (also domiciled in Kentucky), on "Messrs. Cox & Cowan, New York, N. Y." The bill was accepted by Cox & Cowan. It was in evidence that Cox & Cowan were a Kentucky firm, doing business in Hopkinsville, Kentucky, but occasionally visiting New York and transacting business at the office of W. & Co., N. Y. It was held that the bill was payable in New York, and that a presentment and demand in conformity with the laws of New York was sufficient.

[4] Page 304.



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"Negotiable signatures, by which one German subject binds himself to another subject in a foreign land, have the effect of commercial paper when they are executed in conformity with our own code."

This, however, would not apply to substantial defects. An indorser guarantees that the maker (or acceptor) will pay at maturity. But this is supposing that the paper indorsed substantially binds maker (or acceptor).

Defective intermediate indorsements do not destroy negotiability when good by law of place of payment.

§ 459. Intermediate indorsements, defective by the *lex loci actus*, but valid by the law of the place to which the maker (or acceptor) is subject, do not preclude an indorsee under such indorsements from recovering from the maker or acceptor.[1] Thus, on a bill of exchange payable to order, drawn, accepted, and payable in England, an indorsee can maintain an action against the acceptor in England, though such action could not be maintained in France, and though the indorser and indorsee were, at the time of the indorsement, which was made in France, residents of and domiciled in France.[2] It is otherwise when the indorsements are defective by the law to which the contract of the acceptor (or maker), being the party sued, is subject.[3]

[1] Supra, § 449; Lebel *v.* Tucker, L. R. 3 Q. B. 77; S. C., 8 Best & Smith, 830. See De La Chaumette *v.* Bank, 9 B. & C. 208; 2 B. & Ad. 385; Robertson *v.* Burdekin, 6 D. (Scotch) 17.

[2] Lebel *v.* Tucker, *ut supra.*

[3] See McClintick *v.* Cummins, 3 McLean, 158; Roosa *v.* Crist, 17 Ill. 450; Trimby *v.* Vignier, 4 Mo. & Sc. 695; 1 Bing. N. C. 151; 6 C. & P. 25.

The rule in the text is much shaken by a subsequent case (Bradlaugh *v.* De Rin, L. R. 3 C. P. 538; S. C., on App. L. R. 5 C. P. 473), in which a bill having been drawn in France and accepted in England, and the indorsement on which the plaintiff sued being alleged to be imperfect in France, though valid in England, the question was which law was to prevail. A majority of the Court of Common Pleas held that the indorsement, being invalid in France, was to be held invalid everywhere. On appeal the ruling was reversed, on the ground that the French law had been misunderstood in the court below, and that by that law, as well as by the English, the plaintiff was entitled to recover. There being no conflict, the question was not agitated whether the English or the French law was to prevail. On this question, however, the ruling in Lebel *v.* Tucker, L. R. 3 Q. B. 77, is opposed by the opinion of the majority of the Court of Common Pleas in Bradlaugh *v.* De Rin, L. R. 3 C. P. 538.

In Trimby *v.* Vignier, above cited, where a promissory note was made in France, and indorsed in blank by the payee in that country, the maker and



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§ 460. The holder of a protested bill may draw a new bill, by which he reimburses himself for the capital of the protested bill, the expenses incurred by him, and the new exchange he pays, which are to be specified in the account (le compte de retour) which accompanies the new bill.[1] The party on whom the new bill is drawn may make

Conflict as to cumulation of expenses on reëxchange.

payee, both at the times of making and indorsing the note, being domiciled there, it was held, that as no action could have been maintained upon it against the maker in the French courts of law, in the name of the indorsee, the indorsement according to the law of France operating as a procuration only, and not as a transfer, so no action could be maintained against the maker by him in England. Trimby *v.* Vignier, 4 M. & Scott, 695; 1 Bing. N. C. 151; 6 C. & P. 25.

An indorsement by the executor of a payee, which indorsement is good by the laws of the state where the note was held at the payee's death, will, it seems, entitle the indorsee of such executor to sue on the note in a foreign state, without such executor taking out letters in such foreign state. Story, § 359; Barrett *v.* Barrett, 8 Greenl. 353. *Contra*, Stearns *v.* Burnham, 5 Greenl. 261; Thomson *v.* Wilson, 2 N. H. 291.

The possessor, it is said by Fiore (Op. cit. § 349, citing Pardessus, No. 354), of negotiable paper indorsed in blank, or irregularly, can transmit, as a simple mandatary (mandataire), the property to a third person. The reason is that a bill of exchange being, by its nature, a title of credit (titre de créance) intended for negotiation, a procuration not limited to the simple right of collecting the money is presumed to comprehend the power of assigning the title. . . . . Hence when a bill of exchange is successively indorsed in countries governed by different laws, an indorser can be bound by the obligations of a guarantee to his own indorsee (cessionaire), without having the same rights against his indorser (cédant). The position, it is added, of two indorsers who transfer a bill of exchange, under the empire of different laws, corresponds, virtually, to that of two successive indorsers, of whom one transmits the bill with certain conditions, and the other transmits it by an indorsement pure and simple, and without condition. If the first transmits the bill with the clause *sans contrainte personnelle*, or *sans compte de retour*, and if his indorsee transmitted the bill by an indorsement pure and simple, and without condition, the latter can be subjected to the *contrainte personnelle*, and be held to pay the *compte de retour*, without having these rights as against his immediate indorser. It is added, that though an indorser can assume towards his indorsee greater or less special obligations, he cannot impose on his assignee any qualification of the rights held by the latter against the drawer and acceptor, which rights must always be determined by the law of the place where the bill was drawn or accepted, and not by the law of the place where the bill was indorsed. On this subject see Robertson *v.* Burdekin, 1 Ross Leading Cas. 812, cited Phil. iv. 612; De la Chaumette *v.* Bank, 4 B. & A. 385.

[1] See Story, § 314.



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another on his indorser, and so, successively, until the drawer is reached. This is the practice in England, and in other states. On the other hand, by the French and Italian systems, exchanges are not permitted in this way to accumulate. The question then arises, when a bill is drawn in a country where this cumulation of exchange is permitted, and is indorsed and is payable in a country where the cumulation is not permitted, whether in such case there can be such cumulation. So far as concerns the drawer, his obligations are determinable by the law of the place where they are entered into; and if the drawer signed the bill giving the right thus to negotiate, he is bound to pay the cumulation of damages given by the law to which he subjects himself. It is as to the indorsers that the dispute arises. Pardessus [1] holds that they are bound to pay the cumulation of exchanges. This, he argues, is the penalty attached to the failure on the part of the drawer and indorsers to comply with their obligations. Every indorser who guarantees payment assumes the same obligations as the drawer. This is disputed by Massé,[2] who holds that an indorser's liabilities are determined by the law of the place of indorsement.[3]

Where the drawer or the indorser, whom the holder has recourse to, is subject to a law fixing a specific percentage on the original bill instead of an assessed amount by way of reëxchange, then this law adjusts the liability of the drawer or indorser, as the case may be.[4]

§ 461. So far as concerns assignability and taxability, the law to which commercial paper is subject is the law of the party beneficially interested.[5] The mode of assignment has been already noticed. The law of the creditor's domicil ordinarily governs.[6]

Assignability and taxability determined by holder's domicil.

[1] Droit Com. No. 1500.

[2] Droit Com. No. 622.

[3] This question is discussed by Westlake (1858), art. 235, and by Fiore, § 355. As to New York practice see Denston *v.* Cairns, 13 Johns. 322.

[4] Auriot *v.* Thomas, 2 T. R. 52; Suse *v.* Pompe, 8 C. B. N. S. 538; South Am. Co. in re, L. R. 7 Ch. D. 637. See Westlake (1880), § 219.

[5] Supra, § 79 *a*.

[6] Supra, § 363; Hyatt *v.* Bank, 8 Bush, 193.

An assignment, without indorsement, in a state whose laws provide that "every action must be prosecuted in the name of the real party in interest" of a promissory note, payable there to order, does not bar an action on a note in Massachusetts, in the name of the payee. Foss *v.* Nutting, 14 Gray, 484.



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§ 462. In some of the European states, special process is granted for the holders of commercial paper, and special forms of arrest allowed. When the right to use such process is made part of the bill itself (as is waiver of stay of execution in some of our American States), then it is dependent on the law to which the bill is subject.[1] But practically process must be moulded by the *lex fori*, as it is by that alone that such process can be put in actual operation.[2] It was held, however, by the Supreme Court at Berlin, on July 10, 1860, that a defendant, sued on a bill of exchange executed by him in America, was not liable to commercial arrest (Wechselhaft), which, by the German Code, is part of the process allowed on all bills.[3] As has been seen, the holder may have different claims, and different grades of damages, against drawer, acceptor, and indorsers; each being bound by his own particular local law.[4]

Process determined by *lex fori*.

§ 462 *a*. A defence that goes to the merits, and concerns the mode of performance, is to be determined in accordance with the law of the place of payment.[5] It is otherwise as to defences purely processual. These are determined by the *lex fori*.[6]

Defences that go to the merits dependent on place of payment.

§ 463. The verbal interpretation of a bill is subject to the

[1] Bar, p. 313; Heisè, Handelsrecht, p. 140; Renaud, Wechselrecht, Anm. 16. See Behrend's Wechselrecht, Holtzendorff's Encyc. Leipzig, 1870, p. 441.

[2] Bar, p. 313. Infra, § 747.

[3] Seuffert, 14, p. 282.

[4] Supra, §§ 450–460; Story, §§ 304, 314, and cases cited above. See Westlake (1858), art. 227; and Rothschild *v.* Currie, 1 Ad. & El. 43.

A conflict has arisen in Europe as to the law which is to determine whether the holder of a bill of exchange protested for default of payment can sue the indorsers and drawer collectively, or must proceed against them singly. In Austria the proceedings must be single; in Italy they may be collective. Fiore (Op. cit. § 358) argues that if the bill has been made in Italy and then indorsed in Austria, the holder of the bill will have a collective action, even against Austrian indorsers. But he holds that if the bill had been originally made in Austria, and then indorsed in Italy, the holder could not maintain a collective action against the drawer and Austrian indorsers, because an assignor cannot transmit greater rights than he holds himself. Collective action against the Italian indorsers, he holds, may be exercised by the holder, though Massé's opinion is opposed to this conclusion. Droit Com. No. 625.

[5] Brabston *v.* Gibson, 9 How. 263. Infra, §§ 519 *et seq.*

[6] Ruggles *v.* Keeler, 3 Johns. 261; Jones *v.* Jones, 18 Ala. 248. Infra, § 542.



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same rules as we have already noticed as applying to the interpretation of other foreign documents. The question is, what is the sense in which the parties used the controverted terms. For this purpose, usages to which they may be supposed to be familiar may be proved,[1] though this can only affect parties with notice.[2] But whether such evidence is admissible depends upon the *lex fori*. Thus the *lex fori* decides whether a blank indorsement can be explained by parol.[3]

Interpretation provable by usage.

§ 464. An accommodation indorser lends his name for the purpose of giving strength to paper whose place of payment and other incidents are already settled by the law to which it is subject, which is the law of the place of payment by the party whom the accommodation indorser purposes to aid.[4] Thus it has been ruled by the Supreme Court of the United States that the acceptance of a draft dated in one state and drawn by a resident of such state on a resident of another, and by the latter accepted without funds and purely for the accommodation of th former, and then returned to him to be negotiated in the state where he resides, and the proceeds to be there used by him, he providing for its payment; is, after it has been negotiated and in the hands of a *bonâ fide* holder for value and without notice of equities, to be regarded as a contract made in the state where the draft is dated and drawn, even though by the terms of the acceptance the draft is payable in the state where the acceptor resides.[5]

Accommodation indorser bound by law of place in which paper is to operate.

[1] Supra, § 433; infra, § 767; Whart. on Ev. §§ 958–971.

[2] Whart. on Ev. § 1069.

[3] Whart. on Ev. § 1059; Downer *v.* Chesebrough, 36 Conn. 39. As to how far the date may be varied by parol, see supra, §§ 411, 433, 457.

The cosmopolitan character of bills of exchange causes them to be couched in terms which are simple, concise, and even elliptical. Brocher, in Revue de droit int. 1874, p. 7. The words are purely traditional; they represent not so much what they signify in our present use, but what they signified at the time they were adopted for this particular purpose. Ibid. The international character of commercial paper is ably discussed by Brocher, Ibid. pp. 7, 196.

[4] See Weil *v.* Lange, 6 Daly, 549.

[5] Tilden *v.* Blair, 21 Wal. 241.

The *lex loci contractus* determines, according to the French and Italian codes, the question whether an accommodation drawer is personally bound as against the holder and the indorsers; and it determines, also, the delay permitted in presenting the bill for acceptance. By the same codes, also, if the drawer is discharged from responsibility when, in the case of a



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### 4. *Insurance.*

Insurer's engagements determined by place of principal insurer.

§ 465. The law defining the insurer's engagements is that of the place where the corporation issuing the policy has its seat; and where the loss, if it be incurred, is to be paid. When the policy is procured by correspondence, or through the action of an agent, this rule obtains, in all cases in which the agent has no power to conclude the insurance, but refers the matter to the principal for decision.[1] It is also held that the insurer will be liable on the policy when good by the law of the state where the insurance has its seat, though bad by the law of the state where the thing insured is situated.[2] Hence when a local agent negotiates a

neglect of protest, he proves that he had made provision for payment at the proper time, this law will prevail, though the law of the place where the bill is payable is to the contrary. The reason given for this is that the obligation of the drawer is, in this respect, conditional. He guarantees the payment, but under the tacit condition that the holder will present it for acceptance at a proper time, which, when not expressed in the paper itself, is that which is determined by the law of the place where the bill of exchange was made. Fiore, Op. cit. § 347.

[1] Supra, § 146; Pattison *v.* Mills, 1 Dow & Cl. 342; 3 Wils. & Sh. 218; Cood *v.* Cood, 33 Beav. 314; Dent *v.* Smith, L. R. 4 Q. B. D. 432; Wright *v.* Sun Ins. Co. 23 Howard, 412; though see Griswold *v.* Union Ins. Co. 3 Blatch. C. C. R. 231.

[2] Supra, § 406; Dent *v.* Smith, L. R. 4 Q. B. 414; Hyde *v.* Goodnow, 3 Comstock, 266; Western *v.* Genesee Mutual Ins. Co. 12 N. Y. 263. But such company, though responsible, cannot, in the state where the insured property exists, recover the premium; as the obligation to pay the premium is subject to the state where it was made, and by such state the transaction was illegal. That place of ratification is place of contract, see supra, § 418 *a*.

"It was held," says Guthrie, in his note to Savigny (p. 215), "that a contract of insurance on the life of a domiciled Scotchman with an English company was an English contract, in respect that, though it was made through the company's agents at Edinburgh, the agents had no power to bind the company, the proposals for insurance and the policy in the English form being merely transmitted through them, and the insurance or continued undertaking of the risk being in England. The interpretation of the contract and liability of the insurers (especially as to interest) are therefore governed by the law of England. Parker *v.* Royal Exchange Assurance Co. 13 Jan. 1846, 8 D. 365. Where the agents had authority to bind the company, by entering into contracts without reference to the head office, the contract was held to be made at the place where the agency was established. Brebner *v.* St. Patrick As. Co. 14 Nov. 1829, 8 S. 51; Mills *v.* Albion Ins. Co. 5 S. 930; 6 S. 409; 3 W. S. 218; 1 Dow & Cl. 342. Cf. as to jurisdiction, Douglas, Heron & Co. *v.* Palmer, 1777, 5 B. S. 449;



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policy, he having no power to act, but being obliged to refer all disputed matters (*e. g.* waiver of non-payment of premium) to his principal, then the law which determines the insurer's duties is that of the place of the insurer's principal office, where the disputed points are decided, and whence the policy issues. The insurance contract is governed by the laws of the latter state, and cannot be affected by the laws of the state where the policy was delivered.[1]

Emérigon,[2] on this topic, remarks: Insurance contracts executed by French parties in a foreign land will be judged according to French law; as the law of their country (by the French Code) adheres everywhere to contracting parties. But insurance contracts executed abroad by a Frenchman with foreigners are governed by the law of the place where the insurance is made. The same principle applies when a Frenchman abroad undertakes the business of an insurer abroad.

In Germany the business practice is to regard as operative the local law of the place where an insurance company has its office, and from which it issues its policies.[3]

Hailes, 748; Haldame *v.* York Bys. Co. 1724, M. 4818; Bishop *v.* Mersey & Clyde Co. 19 Feb. 1830, 8 S. 558.

"In Cook *v.* Greenock Ins. Co. 18 July, 1843, 5 D. 1379, the verdict of a jury, in an action against Scotch insurers at the instance of foreign owners, was set aside on the ground that the jury had given weight to the usage or understanding as to seaworthiness at the domicil of the owners, which was different from that at the place of the insurers' business. But it does not appear that in that case the doctrine above stated was fully adopted, some of the judges seeming to construe the contract by the general usage of trade, and others by the usage of the place of contract." Guthrie's Savigny, *ut supra.*

[1] Shattuck *v.* Ins. Co. 4 Cliff. 598; Desmazes *v.* Ins. Co. 7 Rep. 136; Wright *v.* Sun Ins. Co. 23 How. 412; Ruse *v.* Ins. Co. 23 N. Y. 521; Todd *v.* Ins. Co. 33 Leg. Int. 239; S. C., 3 Weekly Notes, 330; Clay Fire Ins. Co. *v.* Huron Salt Co. 31 Mich. 346; Spratley *v.* Ins. Co. 11 Bush, 443; Quinn *v.* Ins. Co. 28 La. An. 105. See supra, § 418 *a.* See, however, May on Insurance, § 66; Bliss on Life Ins. 2d ed. § 362; Schwartz *v.* Ins. Co. 18 Minn. 448, as indicating that the place of delivery of policy determines the law. In Daniels *v.* Ins. Co. 12 Cush. 416, it was held that a contract by the president of a company in one state, *not to be valid until countersigned by an agent in another state*, was subject to the law of such other state. This is on the same principle as the text. In Granger Ins. Co. *v.* Brown, 57 Miss. 308, it is held that place of payment determines interest.

[2] Traité des Assur. i. c. iv. § 8.

[3] Voigt's Archiv. für Handelsrecht, 1858, i. p. 210.

In Harpers' Mag. for Jan. 1881, it



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§ 466. An insurer, however, doing business in a particular state by an agency with power to act, puts itself by so doing under the control of such state law. The agency

Otherwise as to agen-

is stated that in Great Britain and Ireland 1,935 millions of dollars are insured on 810,000 lives; in the United States, 2,705 millions on 1,100,000 lives. The income of the American companies is stated to be $80,000,000, "a sum equal to twice the American tobacco crop of the year, and to more than the entire potato crop." The greater part of this business is done by extra-territorial agencies. Recent statutes imposing territorial restrictions on such companies are noticed in same journal, p. 276.

In Shattuck *v.* Ins. Co. *ut supra* (1878), Clifford, J. said: —

"Contracts of insurance are completed when the proposals of one party have been accepted by the other by some appropriate act signifying such an acceptance; and it follows from that rule that the place or seat of the contract is the place where it was accepted. Consequently if an agent appointed in a state other than that which chartered the company, and in which the company has its home office, forwards the requisite papers to that office, and a policy is thereupon executed there, and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated; and since the acceptance of the proposals is the test of completion, it follows that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, if the policy conforms in all respects to the proposals, would have the like effect, unless by the terms of the policy it was not to be binding until it was countersigned by the agent who forwarded the proposals. May on Ins. § 66; Hyde *v.* Goodnow, 3 N. Y. 265; Huntley *v.* Merrill, 32 Barb. 566; Western *v.* Ins. Co. 12 N. Y. 263."

In Desmazes *v.* Ins. Co. *ut supra*, the same judge, on a case presenting similar features, said: —

"The seat of the continuous business of the corporation was at Newark, and the contract was made and was to be performed there, and must be interpreted by the law of the place where it was made. Savigny (Guthrie's ed.), 175; Ex parte Hedleback, 2 Lowell, 532; Whart. Confl. of Laws, § 426. Decided support to that proposition is also found in another section from the last-named author, in the words following: 'Where an agent having no power to complete a contract obtains orders in a foreign state, which orders he forwards to his home principal, who accepts and fills them, the seat of the contract is in the state in which the principal resides,' which is the exact case before the court. Whart. Confl. of Laws, § 406; Hyde *v.* Goodnow, 3 N. Y. 266; Buckman *v.* Jenks, 55 Barb. 469. Insurance contracts are, in general, subject to the laws of the place where the policy is issued, and where the corporation issuing it has its seat, and where the loss, if it be incurred, is to be paid. When the policy is procured by correspondence, still the same rule obtains, nor does it make any difference whether the policy is sent by mail or delivered by an agent to the party insured, as courts will presume that the contract is governed by the law of the place where the policy was completed and issued. Whart. Confl. of Laws, § 465; Ruse *v.* Ins. Co. 23 N. Y. 516; Parker *v.*



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then becomes the seat of the obligation.[1] And where the insurance is made dependent on the action of an agent in a particular state, by whom the policy must be countersigned, then the policy is subject to the laws of such state.[2] But statutes passed for the purpose of making foreign companies liable in subordination to the *lex situs*, though they may bind courts within the jurisdiction of the statutes, cannot internationally affect the distinction above stated.[3]

cies with power to act.

§ 467. When the insured is sued by the insurer for the premium, the law of the place of payment controls, which, when the contract is made at the insured's domicil by a general agent with full power to act, is such domicil.[4] But when a note for the premium is forwarded to the principal office in another state, then the latter state is the place

In suit for premium, law of place of payment controls.

Ins. Co. 8 Court of Sessions, 2d series, (Scotch), 372." . . . . "Authorities to show that the validity of a contract is to be decided by the law of the place where it is made, are numerous, and it is clear that the proposition is correct, unless it was agreed either expressly or tacitly that it should be performed in some other place, and then the general rule is that the contract as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance. Green *v.* Collins, 3 Cliff. 507; Hill *v.* Spear, 50 N. H. 262; Story Confl. of Laws (6th ed.), § 242; Andrews *v.* Pond, 13 Pet. 65; Don *v.* Lippman, 5 Cl. & Fin. 13; Railroad *v.* Bartlett, 12 Gray, 246; Meagher *v.* Ins. Co. 20 U. C. R. 607. When the agents have authority to bind the company by entering into contracts without reference to the head office, the contract is held in many cases to be made at the place where the agency is established, which makes it necessary to keep in mind that the agent in this case had no such authority, and that the contract was made, and was to be performed, at the office in the state where the charter was granted. Daniels *v.* Ins. Co. 12 Cush. 422; Kennebec Co. *v.* Ins. Co. 6 Gray, 205; Heebner *v.* Ins. Co. 10 Gray, 134." See 7 Rep. 136.

[1] Insurance Co. *v.* Norton, 96 U. S. 234; Union Ins. Co. *v.* McMillan, 24 Oh. St. 67; Young *v.* Ins. Co. 45 Iowa, 377; Schmidt *v.* Ins. Co. 2 Mo. Ap. 339.

[2] Daniels *v.* Ins. Co. 12 Cush. 416; Heebner *v.* Ins. Co. 10 Gray, 131; Pomeroy *v.* Ins. Co. 40 Ill. 398; Continent. Ins. Co. *v.* Webb, 54 Ala. 688.

[3] See Thwing *v.* Ins. Co. 111 Mass. 93; Morris *v.* Ins. Co. 120 Mass. 503; Columbia Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

In Barry *v.* Ins. Co. 59 N. Y. 587, it was held that an assignment of a policy of insurance, sent by mail from New York where the insured resided, to a creditor in another state, is governed by the laws of New York.

[4] See Bliss on Life Ins. (2d ed.) § 302; Rogers *v.* Ins. Co. 41 Conn. 97; Heinman *v.* Ins. Co. 17 Minn. 153; Cooper *v.* Ins. Co. 7 Nev. 116.



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of performance, and its laws govern the claim.[1] It cannot be enforced in the state where the premium is given, if the company be prohibited from acting by the *lex fori*.[2]

### 5. *Partnership.*

Partner holding himself out as such cannot set up restrictions of his domicil.

§ 468. A partner who holds himself out as such, and as such contracts debts in a foreign country, is liable for such debts by the law of such country, even though by the law of his own country, which is that of the seat of the partnership, he has but a limited interest in the firm, and is liable only to such amount. Thus, in a case decided in 1870, in Rhode Island, where it appeared that W., a special partner, who was not by the laws of Cuba responsible for more than the capital invested by him, came to New York, and made purchases of goods as a general partner, it was ruled that he thereby became liable, as a general partner, for such purchases.[3] It, of course, follows that when A., B., and C. appear and contract as partners, neither can afterwards avail himself of the laws of the domicil of the partnership, to avoid his several liability *in solido* for the whole amount.[4] The principle is the same as that heretofore mentioned, by which restrictions on business capacity are held not to be extra-territorial.[5] But when the limitations of a foreign partnership are based on the same policy as obtains in the place of contract, then such limitations will be held operative by the courts of the latter place.[6]

Otherwise as to secret partnerships.

§ 469. Secret special partners, not disclosed at the time of the transaction, are protected, so far as concerns indebtedness to foreign creditors, by the laws of theirdomicil.[7]

Foreign partners

§ 470. But by whom is existence of others than the contracting partners to be determined? Suppose A., in Germany, claims to be a member of the New York firm of

[1] Lamb *v.* Bowser, 7 Biss. 315, 372. Supra, § 362. See American Ins. Co. *v.* Cutler, 36 Mich. 261.

[2] Lamb *v.* Lamb, 13 Bk. Reg. 17. See Stewart *v.* Ins. Co. 38 N. J. L. 436; Union Ins. Co. *v.* Thomas, 46 Ind. 44; Franklin Ins. Co. *v.* Packet Co. 9 Bush, 590.

[3] Barrows *v.* Downs, 9 R. I. 446.

[4] Carroll *v.* Waters, 9 Mart. 500; Fergusson *v.* Flowers, 16 Mart. 312.

[5] Supra, § 101. That statutes limiting liability of joint stock companies are not extra-territorial, see Taft *v.* Ward, 106 Mass. 518; Gott *v.* Dinsmore, 111 Mass. 45.

[6] King *v.* Sarria, 69 N. Y. 25.

[7] Story, § 320 *a*; Barrows *v.* Downs, *ut supra.*



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must be proved to be such.

B., C., and D., and as such makes contracts in the name of such firm. Neither in England nor in the United States does this question appear to have been determined. In Germany it was decided by the Supreme Court at Lübeck, on March 31, 1846, that the question is to be determined by the laws, not of the place where the alleged partner made the litigated contracts, but of the place where the partnership was alleged to be established.[1] The liability of others than A., the contracting partner, cannot be determined by A's declarations.[2] If the other alleged partners are sued, and it appears that they were undisclosed at the time of their contract with A., then the nature of the alleged partnership must be proved in conformity with the laws of the place in which it was constituted.[3]

In former sections reference is made to the law of partnership, so far as involved in agency,[4] and in the structure of corporations.[5]

### 6. *Common Carriers.*

The interpretation of a bill of lading, so far as concerns its intrinsic quality, is for the state of the carrier's principal office.

§ 471. When goods are given to a carrier for safe carriage, by what law is the contract, so far as its intrinsic conditions are concerned, to be interpreted? To this question a common answer has been, "the *lex loci contractus*." If we examine the cases, however, appearing to sanction this answer, we will find that in all of them the place of contract was the place of the carrier's principal office.[6] If, however, a contract is made in Florida with a runner of the Pennsylvania railroad, for the forwarding of goods from Philadelphia to Pittsburg, it would not be contended that the contract was to be interpreted by Florida law. Nor can we say that the interpretation of such a contract, so far as its intrinsic quality is concerned, is by Florida law. The place of agreement, we should remember, is, in a large number of cases of railroad carriage contracts, casual. Not only are these contracts made by runners meeting customers on the cars,

[1] Bar, p. 262.

[2] Whart. on Ev. § 1200.

[3] See King *v.* Sarria, 7 Hun, 167; 69 N. Y. 24.

[4] Supra, §§ 405–409.

[5] Supra, §§ 105 *et seq.*

[6] See Peninsula, &c. R. R. *v.* Shand, 3 Moo. P. C. 290; Kline *v.* Baker, 99 Mass. 153; Malpica *v.* McKown, 1 La. R. 249; Arayo *v.* Currell, 1 La. R. 528.



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or at points distant from their places of business, but tickets are sold by "scalpers" at places where neither the "scalper" nor the purchaser is resident. We must therefore reject the place of contract as distinctively supplying the interpretative law. Nor can we take for this purpose the law of the place where the person or thing to be carried happens to be injured. This place is not only casual, not entering into the specific contemplation of the parties at the time of making the contract; but in many cases (*e. g.* where goods on arriving at their destination are injured without any indication where the injury happened) cannot be ascertained. Rejecting, therefore, the place where the contract is made, and the place where the injury happens, we have two remaining hypotheses, — the place of the carrier's principal office, and the place where the contract is to be performed. It so happens, however, that these, in most instances, coincide. Ships are part of the territory whose flag they bear, and when a carrier carries goods in a ship of his own nation, the country of performance is ordinarily the country of the carrier's principal office. With regard to land carriage in a foreign country more difficult questions arise; yet even here, if such foreign country gives the carrier transit, this may be construed to be in such a way as not to affect his liability to his customers according to his own laws. But however this may be, there is a great preponderance of opinion to the effect, that in determining the interpretation of a contract for carriage the law of the carrier's principal office is to prevail.[1] This, however, reserves to the *judex fori* the determination of the question how far a bill of lading can be explained by parol.[2]

§ 472. What has been just said, if correct, settles the moot

[1] Peninsula R. R. *v.* Shand, 3 Moo. P. C. N. S. 290; Moore *v.* Harris, L. R. 1 Ap. Cas. P. C. 318; Naylor *v.* Baltzell, Taney C. C. 58; The Blohm, 1 Ben. 228; Morgan *v.* R. R. 2 Woods, 244; Kline *v.* Baker, 99 Mass. 253; McDaniell *v.* R. R. 24 Iowa, 412; Talbott *v.* Merchants' Co. 41 Iowa, 247; Penns. R. R. *v.* Fairchild, 69 Ill. 260; Milwaukee, &c. R. R. *v.* Smith, 74 Ill. 197.

That a bill of lading made in France, so far as concerns its interpretation, may be, when such appears to have been the intention of the parties, governed by French law, though the goods were to be delivered in England, see Blanchet *v.* Colleries Co. L. R. 9 Ex. 74. As to negotiability of bills of lading, see Hirschorn *v.* Canney, 98 Mass. 149; infra, § 473 *b*.

[2] Whart. on Ev. §§ 1070, 1150.



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question of the carrier's limitation by contract of liability for negligence. On this topic there is a great diversity of legislation. In some states such limitations are void *in toto*. In other states (*e. g.* England) they are void when unreasonable. In other states they are allowed full play. Suppose there is a contract of carriage, either for goods or for persons, where the line of transport extends through several states with distinct laws in this relation, which law is to prevail? On the reasoning above given, the law of the state where the corporation has its seat and principal office. To this result the cases, though for varying reasons, converge.[1]

And so of the construction of contracts limiting liability for negligence.

[1] In Peninsula, &c. R. R. *v.* Shand, 3 Moo. P. C. N. S. 290, the Peninsula & Oriental Company, an English corporation, contracted to carry the plaintiff, an Englishman, from Southampton to Mauritius *via* Alexandria and Suez. The entire journey (with the exception of the railway passage across the Isthmus of Suez) was to be performed in the defendants' ships. The ticket, which was bought in England, contained the condition "that the company does not hold itself liable for damage to, or loss, or detention of passengers' baggage." On arriving at his destination the plaintiff found that an article of his baggage was lost. It was held by the court that *primâ facie* the plaintiff was to be understood as having submitted himself to the law of England, as that of the place of contract, and not to that of France, which was the law of the place of destination, and that the exemption was binding, in conformity with English law, though it might have been otherwise had the law of France, which was the law of the place of destination, prevailed. "When they," the defendants, so it is argued in the opinion, "tendered this contract to the respondent, and required his signature to it, what must it be presumed that he understood to be their intention as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and damage to it; or to stipulate for something to which, however clearly expressed, the law would allow no liability? . . . . If their lordships take the respondent to have understood the intention of the appellants in the first way, they must take him to have adopted the first intention; it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different on so important an article." In this case, it must be remembered, there was no evidence as to the place where the contract was broken; and consequently there was no place as to which it might be said, "the defendants agreed to carry the baggage safely through this place, but did not do so." No evidence was offered as to the Egyptian law, though the loss might, so far as any proof went, have occurred in Egypt. Under these circumstances the conclusion of the court may be sustained, without derogating from the rule that ordinarily the law



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§ 472 *a*. A question, analogous to that just discussed, in reference to limitation of liability by common carriers, arises under the British and American statutes limiting the liability

Limitation of ship's liability by

of the place of performance is to control, on either of the following grounds: (1.) the ships were English, and to be regarded internationally as part of English soil; (2.) wherever by one of two conflicting laws an obligation will be sustained while by the other it will be annulled, the former will be preferred; (3.) the intention of the parties was to select the English law as that by which their contract was to be governed; (4.) the place of performance, when not English ships, was a line of transit to which the *lex situs* conceded *pro tanto* the operation of English law.

As Mr. Westlake (1880, p. 235) shows, while the court (Turner, L. J.) begins by declaring that the *lex loci contractus* governs, the ground on which the decision rests is that the intention of the parties must be taken clearly to have been that this was an English contract, to be interpreted according to English law. And he gives as reasons that the company was an English company, its office was in England, and the ships used were English ships.

In a more recent case (Cohen *v.* R. R. L. R. 1 Ex. D. 217; S. C., on appeal, L. R. 2 Ex. D. 253), the plaintiff, an Englishman, entered into a contract with an English railway company, at their office at Boulogne, for his conveyance, *via* Folkestone, to London. The plaintiff's baggage was lost on the channel through the defendants' negligence; and the defendants sought to evade liability by setting up a condition on the back of the ticket exempting them in such cases. If the exemption had been held good by English law there would have been a conflict with the law of France, by which it would have been bad. The exemption, however, was held to be bad in England, and therefore the conflict did not arise. But the opinions of several of the judges tended to the conclusion that England, as the seat of the company's office, and the site of its corporate existence, should supply the dominant law; though Brett, L. J., intimated that if the starting-place had been Paris instead of Boulogne, the French law would be held to prevail in that part of the journey which was to be accomplished in France.

The same result was reached in Moore *v.* Harris, L. R. 1 App. Cas. P. C. 318. Not inconsistent with the text are Penns. Co. *v.* Fairchild, 69 Ill. 261; Milwaukee, &c. R. R. *v.* Smith, 74 Ill. 797; Mich. Cent. R. R. *v.* Boyd, 91 Ill. 268.

Directly to the point is Brown *v.* R. R. 83 Penn. St. 316. In this case, the plaintiff bought a ticket from Philadelphia to Atlantic City, New Jersey, over the Camden & Atlantic R. R. Co., a New Jersey corporation. He delivered his trunk to the railroad company at their office on a wharf on the Pennsylvania shore of the Delaware River. The trunk having been lost, he brought suit against the company, and recovered a verdict for its value, viz., $1,300. It was held by the Supreme Court that the Pennsylvania Act of 11th April, 1867, limiting the liability of railroad companies in such cases to $300, did not apply.

"As the contract," said Sharswood, J., "relied on in this case as the ground of the liability of the defendants was to be performed in the State



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of owners of a ship charged with negligent collision to the value of the ship and freight.[1] In England it has been held that this limitation operates in favor of an English ship charged with colliding with a foreign ship within three miles of the English coast,[2] and in favor of an English ship charged with colliding with a foreign ship in the Mediterranean.[3] The limitation, however, must be one adopted by the law of the delinquent ship: it is not enough that it should be adopted by the law of the ship that is the complainant.[4] It does not apply to collisions of foreign ships outside of three miles from the British coast; and it may be well doubted whether it applies to such collisions within that zone.[5] And where vessels in English waters are under the direction of pilots whose employment is made compulsory by English law, torts resulting from the pilots' misconduct are not imputable to the owners.[6] It is otherwise when the fault is chargeable in part to the master.[7] Exemption in

law of flag ubiquitous.

of New Jersey, we must look to the law of that state to determine the extent of that liability. It is no answer to say that part of the undertaking was to carry the plaintiff and his baggage across the Delaware to Camden, and so in part within the limits of Pennsylvania. That river is conterminous between Pennsylvania and New Jersey, and the inhabitants of both have equal rights of navigation and passage." . . . . "The negligence, of which the defendants are presumed to have been guilty, was in the course of the exercise of their franchises as a New Jersey corporation, and the extent of their liability, therefore, is to be determined by the law of that state."

To the same effect is McDaniel *v.* R. R. 24 Iowa, 412. On the other hand, we have a New York ruling to the effect that in such cases the law of the place of destination applies. Curtis *v.* R. R. 74 N. Y. 116. In this case the injury occurred at the place of destination.

It has been held in France, that a French railway company which undertakes the transfer of baggage received at the French frontier from a foreign company, and the delivery of such baggage in the interior, contracts immediately (*directe*) with the foreign company, and is liable to the foreign company for damages for non-delivery, though the price of transport was paid at the outset to the foreign company. Nor can the French company set up in the French court the foreign limitation of liability in such cases. Boissonneau *v.* Ch. d. fer du Nord, Jour. du droit int. privé, 1877, p. 430.

[1] Foote's Priv. Int. Law, pp. 404–5.

[2] General Iron Screw Co. *v.* Schurmanns, 1 J. & H. 180.

[3] The Amalia, 1 Moore P. C. N. S. 471.

[4] The Girolamo, 3 Hagg. Ad. 186.

[5] Cope *v.* Doherty, 4 K. & J. 367; aff. 2 D. J. 614. See Mr. Westlake's criticism, 1880, p. 226.

[6] The Vernon, 1 W. Rob. 316; The Christiana, 2 Hagg. Ad. 183.

[7] The Girolamo, 3 Hagg. Ad. 169.



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these cases is maintained on the ground that the litigated act was on British territory; though it may also be explained by the rule that a ship is part of the country whose flag she bears.[1]

Liability for tort during the performance of a contract for carriage is determinable by the *lex loci delicti*.

§ 473. Where a plaintiff sues for a tort committed by a carrier in a particular place (and not on the contract of carriage for non-performance of its conditions), then, in conformity with the rule hereafter stated,[2] it is necessary, in order to entitle the plaintiff to recover, that the act complained of should be suable both in the place where it was committed and in the *forum*.[3] Where an injury occurs on ship-board, then, on this principle, the injury must be one cognizable in the country whose flag the ship bears.[4] On the other hand, when the party injured sues on the contract, the carrier has been held in some jurisdictions liable for injuries received incidentally to the conveyance on any part of the journey, even though the persons to whom the negligence is primarily imputable were employed by a connecting line.[5] In such case the connecting lines may be regarded as agents for the principal line, which becomes responsible for their misconduct.[6] But it has been elsewhere held that where the principal carrier does not undertake to carry to the *terminus*, then only the offending carrier is liable.[7] On the other hand, there is a strong

[1] See articles in Albany Law Jour. for Aug. 28, and Sept. 4, 1880.

[2] Infra, § 478.

[3] See Baxter *v.* Wheeler, 49 N. H. 9; Gray *v.* Jackson, 51 N. H. 9; Nashville R. R. *v.* Eakin, 6 Cold. 582, and cases cited infra, §§ 478–9. See Dyke *v.* R. R. 45 N. Y. 113, where it was held that when the place of starting and the *terminus* of a railroad are in the same state, an action lies in that state for a negligent injury to a passenger in another state through which the road passed, the passenger having taken his ticket from the place of starting to the *terminus*.

[4] Peninsula R. R. *v.* Shand, *ut supra*. See Pope *v.* Nickerson, 3 Story R. 465; Lloyd *v.* Guibert, L. R. 1 Q. B. 115. See supra, § 356.

[5] Thomas *v.* R. R. L. R. 5 Q. B. 226; 6 Q. B. 266; Bank of Kentucky *v.* Adams, 93 U. S. 174; Cary *v.* R. R. 29 Barb. 35; De Rutte *v.* R. R. 36 Barb. 420; Ill. Cent. R. R. *v.* Copeland, 24 Ill. 332; Southern Ex. Co. *v.* Shea, 38 Ga. 519; Southern Ex. Co. *v.* Thornton, 41 Miss. 216.

[6] See cases cited in Whart. on Neg. § 578.

[7] R. R. *v.* Man. Co. 16 Wal. 318; R. R. *v.* Pratt, 22 Wal. 128; Farmers', &c. Bank *v.* Champlain Co. 23 Vt. 186; Nutting *v.* R. R. 1 Gray, 502; Burroughs *v.* R. R. 100 Mass. 26; Hood *v.* R. R. 22 Conn. 502, and cases cited in Whart. on Neg. § 581; Stewart *v.* R. R. U. S. C. C. Mo. 1880, 10 Rep. 618.



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line of authority to the effect that unless the principal carrier in such case limits his liability he is liable for the whole route.[1]

Law of place of performance determines mode of performance.

§ 473 *a*. The mode of delivery, under contracts of carriage, is determined by the law of the place of delivery. Hence a contract to deliver freight at a particular port is to be construed as meaning that the delivery should be in conformity with the laws of such port.[2]

Advances on bill of lading bind extra-territorially.

§ 473 *b*. Where advances are *bonâ fide* made on a bill of lading, such advances bind the goods wherever they go. The law that rules the effect of the advances is that to which the bill of lading is subject.[3]

### 7. *Delicts and Torts.*

Delicts and torts convertible.

§ 474. The points which emerge in the sections immediately preceding, in which the duties of common carriers are considered, show how impossible it is to consider contracts without incidentally considering torts. A carrier, for instance, is charged with negligence; and whether this is regarded as a tort, or as a defect in the discharge of a contract, depends, according to the old English common law, on the form of the suit. According to that law, torts, it is true, cannot logically be placed under the head of contracts. They can be placed, however, under

[1] Muschamp *v.* R. R. 8 M. & W. 421; Mobile, &c. R. R. *v.* Copeland, Sup. Ct. Ala. 1880, 10 Rep. 625; Hutchinson on Carriers, §§ 145, 149.

[2] Robertson *v.* Jackson, 2 C. B. 412. See Hudson *v.* Clementson, 18 C. B. 213.

[3] Bailey *v.* R. R. 49 N. Y. 70; First Nat. Bank *v.* Kelly, 57 N. Y. 34; First Nat. Bank *v.* Shaw, 61 N. Y. 283. See Lickbarrow *v.* Mason, 2 T. R. 63; Smith's Leading Cases, 7th Am. ed. i. 1147.

A questionable exception to this rule is made in Faulkner *v.* Hart (N. Y. App. 1880), 23 Alb. L. J. 46.

In Henry *v.* Philadelphia Warehouse Co. 81 Penn. St. 76, it was held that where the holder of a bill of lading by the law to which the bill is subject has a right to transfer or pledge the goods specified in the bill, the transaction is in other states to be regarded as a *bonâ fide* pledge for value.

That the negotiation in Pennsylvania, of a bill of lading issued in Missouri for transportation to Pennsylvania, is governed by Pennsylvania law, see Bank *v.* Shaw, U. S. Dist. Ct. Phil. 1877, 2 Weekly Notes, 542. In Bank of Toledo *v.* Shaw, 61 N. Y. 283, it was held that when a bill of lading executed in Ohio is pledged in Ohio to a party in Ohio making *bonâ fide* advances, this is an Ohio contract, though the goods were to be forwarded to New York.

That statutes providing for the transfer of bills of lading by indorsement are not ubiquitous, see Hirschorn *v.* Canney, 99 Mass. 194.



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the head of obligations, since the duty to repair wrong done by a tort is as much an obligation as is the duty to comply with a contract. Delicts and torts, in the present relation, may be viewed as convertible; and as delicts may be discussed in the Roman law under obligations, it may not be erroneous to discuss torts in the present chapter which treats of obligations in their largest sense. The term "delict," in fact, is used in this sense by Bracton.[1] Hence the term actions *ex delicto*, comprehending such actions for damages as are not *ex contractu*. In the Scotch law the term "delict" is still distinctively used.[2]

By Roman law *lex delicti commissi* prevails.

§ 475. By the Roman law, wherever a delict is committed, whether the stay of the delinquent is permanent or transient, there is the *forum delicti*. And the local law applicable is and continues to be that of such special *forum*. *Delicti puniuntur juxta mores loci commissi delicti, et non loci ubi de crimine cognoscitur*.[3] The selection of this law is not, of course, that of a voluntary concert by the parties, but is the necessary consequence of the delinquent's wrong committed in the particular spot. The plaintiff may sue either at this place, or at that of the defendant's domicil.[4]

By Savigny place of process controls.

§ 476. On this topic Savigny advances views in which he stands almost alone, and in which he seems to depart from those broad and consistent principles of general justice which make his works such noble monuments of juridical genius. "The laws concerning delicts are to be classed among those which are compulsory and strictly positive. In such cases the law of the place of the process is to obtain, not that of the place where the delict was committed."[5] For this he cites no authority; but the Roman law, as quoted by him under another head, shows that the special forum of a delict (and hence the place of applicatory law) is that of the place of commission.[6]

Distinction between suits for

§ 477. Bar[7] distinguishes delicts which call for the restoration or reparation of an injury, and those which call for a fine or penalty payable to the injured party. The first

[1] Bracton, fol. 101.
[2] Ersk. Inst. b. 4, tit. 4, § 2.
[3] Bartholus, cited Henry on Foreign Law, 47.
[4] Infra, § 716.
[5] VIII. § 374, p. 278.
[6] VIII. § 371, citing Nov. 69, c. 1; C. 20, x. de foro Comp. (2, 2.)
[7] § 66.



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damages and prosecutions for fines.

he subjects to the law of the place where the delict was committed. Every person, foreigner or subject, is bound to repair any damage done by him, according to the local law.[1] On the other hand, a fine or penalty to the injured party is in the nature of a criminal sentence. Whether the process be civil or criminal, the procedure rests on grounds of police; and hence, in such cases, the *lex fori* rules. Where, however, at the place of commission the act was legally innocent, it cannot be elsewhere made a delict, as otherwise the principle of territorial sovereignty would be infringed.[2] In theory, at least, this distinction is recognized by the English common law. And it is settled in England that actions will be maintained for injury to the person or to personal property in foreign lands only when such acts are unlawful in such lands.[3]

*Lex fori* and *lex delicti commissi* must concur in making act justiciable.

§ 478. In the United States it is generally conceded that such suits lie, even though the parties be foreigners, and the tort complained of was committed in the land to which they in common belonged.[4] But the policy of this extension of jurisdiction has been gravely questioned.[5] And the prevalent rule is, that to sustain an action for a tort committed abroad, the *lex fori* and the *lex loci delicti* must concur in holding that the act complained of is the subject of legal redress.[6]

[1] See, also, to this point, Burgundus, v. 2; Mittermaier, § 30; Eichhorn, § 36; and two decisions, one at Munich and one at Berlin, cited by Bar.

[2] See Fœlix, ii. p. 316. The same result is reached by Brocher, p. 315.

[3] Neale *v.* De Garay, 7 T. R. 243; Mostyn *v.* Fabrigas, Cowp. 161; Cope *v.* Doherty, 4 Kay & J. 367; 2 De G. & J. 614; Ekins *v.* E. I. C. 1 P. W. 394; Seymour *v.* Scott, 1 H. & C. 217. Infra, § 711.

[4] McKenna *v.* Fisk, 1 How. 241; Mitchell *v.* Harmony, 13 How. 115.

[5] Dewitt *v.* Buchanan, 54 Barbour, 31. See Gardner *v.* Thomas, 14 Johns. R. 134. Infra, §§ 707, 744.

[6] Westlake (1880), § 186, citing R. *v.* Lesley, Bell C. C. 220; Phillips *v.* Eyre, L. R. 4 Q. B. 225; L. R. 6 Q. B. 1; The M. Moxham, L. R. 1 P. D. 107; Dobree *v.* Napier, 2 Bing. N. C. 781.

To same effect see General Steam Nav. Co. *v.* Guillon, 11 M. & W. 877; Cope *v.* Doherty, 4 Kay & J. 367; 2 De G. & J. 614; Phil., Wil. & Balt. R. R. *v.* Quigley, 21 How. 202; Glen *v.* Hodges, 9 John. 67; Woodward *v.* R. R. 10 Oh. St. 121; Curtis *v.* Bradford, 33 Wis. 190; Nashville R. R. *v.* Eakin, 6 Cold. 582. In Mitchell *v.* Harmony, 13 How. 115, jurisdiction of a tort to goods in Mexico was assumed. See Foote's Priv. Int. Law, p. 394.



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It is no defence, however, that by the law of the place of the offence civil proceedings cannot be had unless accompanied by criminal prosecution.[1]

Whether a state has jurisdiction over nuisances originating in another state is elsewhere discussed.[2]

No remedy for representatives of deceased unless given by both laws.

§ 479. In conformity with the rule just stated, it has been frequently held, under statutes giving the personal representatives of a deceased person an action for damages against those by whom his death was caused, that unless such survivorship is given in the state where the tort was committed, the representatives of the deceased cannot maintain an action in a state where such survivorship is allowed.[3] Nor, when the *locus delicti* gives such remedy, can administrators sue on it in another state where the remedy is not given.[4]

Nor will one state enforce in

§ 480. Nor, even supposing a statute exists in the *forum* making such misconduct justiciable, will a foreign law to the same purport be enforced. The foreign stat-

[1] Seymour *v.* Scott, 1 H. & C. 217.

In Massachusetts by statute, every owner of a dog is liable to any person injured by it for double the damages suffered by him. It has been held in Massachusetts that where a dog which was owned and kept in Massachusetts, strayed into New Hampshire, and there bit plaintiff, an action on the statute was not maintainable in Massachusetts. Le Forest *v.* Tolman, 117 Mass. 109.

[2] Supra, § 290; infra, § 711.

[3] Mackay *v.* R. R. U. S. Dist. Ct. N. Y. 1880; Pitts. L. J. Dec. 8, 1880; Needham *v.* R. R. 38 Vt. 294; Whitford *v.* R. R. 23 N. Y. 465; S. C. 3 Duer, 67; Crowley *v.* R. R. 30 Barb. 99; Beach *v.* R. R. 30 Barb. 433; Allen *v.* R. R. 45 Md. 41; Selma R. R. *v.* Lacy, 43 Ga. 461; Western R. R. *v.* Strong, 52 Ga. 461; Great West. R. R. *v.* Miller, 19 Mich. 305; Nashville R. R. *v.* Eakin, 6 Cold. 582.

The right of action based on death by negligence can only be maintained in the state making such acts unlawful. "At least," says Rapello, J., in McDonald *v.* Mallory, 77 N. Y. 550, "without proof of the existence of a similar statute in the place where the wrong was committed."

[4] Richardson *v.* R. R. 98 Mass. 85; Woodward *v.* R. R. 10 Ohio St. R. 121.

In Allen *v.* R. R. 45 Md. 41, the defendant was a corporation operating a railroad lying partly in Pennsylvania and partly in Maryland, and was chartered by the laws of both states, and the deceased, who resided in Maryland, and was employed by it, was killed by an accident occurring in Pennsylvania. The court held that the statute did not apply to the case of a wrongful act or neglect occurring in another state, and that it was immaterial that the deceased was a citizen of Maryland at the time of his death.



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ute, being penal, can have no extra-territorial application.[1] this respect another's penal laws.

§ 481. Of injuries done to real estate, the *judex rei sitae*, as a general rule, has exclusive jurisdiction.[2] And when a cause of action could have arisen only in one place, then that place alone has jurisdiction.[3] Injuries to real property redressed only by local laws.

## 8. *Revenue Offences.*

§ 482. It is agreed on all sides that the courts of a country, into which an attempt is made to illegally smuggle goods, will refuse to enforce a foreign contract in which such smuggling is an ingredient.[4] State will not sanction contract to evade its revenue laws.

§ 483. There must, however, be complicity in the transaction. Thus, when it appeared that A., a Frenchman, sold goods to B., an Englishman, which goods A. knew were to be smuggled into England, A. having no part in the smuggling transaction, it was held that A. could recover the price of the goods in an English court.[5] But mere knowledge of intended smuggling does not invalidate sale.

§ 484. It has been frequently ruled, in English and American courts, that a contract in one country to evade or defraud the revenue laws of another is not illegal in the Contracts to evade foreign

[1] Woodward *v.* R. R. 14 Oh. St. 121; McCarthy *v.* R. R. 18 Kan. 46. Supra, § 4.

In McCarthy *v.* R. R. *ut supra*, the deceased, an inhabitant of Kansas, was injured in the State of Missouri by the wrongful acts of a railway company operating a railroad in the latter state, and was brought to Kansas, where he died from the effect of such wrongful acts. It was held, that the personal representative of the intestate, appointed under the laws of Kansas, could not maintain an action therefor in this state against the railway company.

[2] See supra, §§ 274 *et seq.*; infra, § 711.

[3] Cooley on Torts (1879), p. 471. Infra, § 711.

[4] Story, § 246; Waymell *v.* Reed, 5 T. R. 599; Lightfoot *v.* Tenant, 1 Bos. & P. 551; Holman *v.* Johnson, Cowper R. 341; Cannan *v.* Brice, 3 B. & Ald. 179; Armstrong *v.* Toler, 11 Wheaton, 258; Cambiso *v.* Maffit, 2 Wash. C. C. R. 98; Hannay *v.* Eve, 3 Cranch, 245; Greenwood *v.* Curtis, 6 Mass. 378. See Marshall *v.* Balt. & O. R. R. Co. 16 Howard U. S. 334; Kennett *v.* Chambers, 14 Howard U. S. 38.

[5] Holman *v.* Johnson, Cowp. R. 341. See Hannay *v.* Eve, 3 Cranch, 342; McIntyre *v.* Parks, 3 Met. 207.

See Lord Abinger in Pellicat *v.* Angell, 2 Cromp., M. & R. 311; James *v.* Catherwood, 3 D. & R. 190; Planché *v.* Fletcher, 1 Dougl. 251. See cases cited infra, § 486, to the effect that the knowledge must be specific.



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revenue laws held not illegal.

country of its origin.[1] And so speak several eminent masters of the Roman law, both ancient and modern.[2] But the decisions just noticed, validating contracts whose incidental effect is to evade foreign revenue laws, are condemned by the high authority of Pothier,[3] of Judge Story,[4] of Chancellor Kent,[5] of Mr. Chitty,[6] of Mr. Westlake,[7] of Mohl,[8] and of Bar.[9] Every sovereign, according to well settled principles,[10] has the exclusive right to control the importation of foreign goods, and no sovereign ought to tolerate, it is insisted, acts interfering with this prerogative of other sovereigns. It is argued, also, that when the evasion is attempted through the corruption of officials, this is an offence against good morals, avoiding any contract of which it is an ingredient.[11] In Germany, at least, all contracts of this kind are judicially stamped with illegality.[12] At the same time, it is impossible not to feel the force of the position that smuggling, though illegal by local law, may, nevertheless, be stimulated, if not by the laxity of local officials, at least by the oppressiveness of tariffs vexatiously prohibitive; and it is impossible, also, to forget that smugglers have been among the most effective instruments by which the modification of such tariffs has been produced. When a tariff tends to perpetuate an odious and cruel monopoly, foreign courts may be excused for looking on it as a punitive law they are not bound to enforce.[13]

[1] Biggs *v.* Lawrence, 3 T. R. 454; Clugas *v.* Penaluna, 4 T. R. 466; Planché *v.* Fletcher, Dougl. R. 251; Lightfoot *v.* Tenant, 1 Bos. & P. 551; Ludlow *v.* Van Rensaellaer, 1 Johns. R. 94; Kohn *v.* Schooner Rénaisance, 5 La. An. 251; Ivey *v.* Lalland, 42 Miss. 444; Armendiaz *v.* Serna, 40 Tex. 291.

[2] Pardessus, No. 1492; Emérigon, i. c. 8, No. 58; Straccha, cited by Bar, p. 247; and Massé, ii. p. 116. As to contracts to export goods contraband of war, see § 496; and to violate blockades, Ibid.

[3] Assur. n. 58.

[4] § 257.

[5] III. Com. 266.

[6] 1 Chitty on Commerce, 83.

[7] 1st ed. art. 199.

[8] Staats recht, &c. i. p. 724

[9] Page 247.

[10] Vattel, i. c. 8, § 90.

[11] Massé, ii. No. 83.

[12] See Judgment of the Superior Tribunal at Cassel, Dec. 13, 1828, given by Bar, p. 417; and see De Herrera *v.* The Acme, 7 U. S. Int. Rev. Rec. 148; 2 Ben. 386.

[13] Supra, § 4. On this point see Fiore, Op. cit. § 286.



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### 9. *Local Statutory Bonds.*

§ 485. A bond, executed in obedience to a local statute, imposing a penalty in case of misconduct, is regarded as in the nature of a penal obligation which foreign states will not undertake to execute.[1] And in any view, statutes enabling such bonds to be sued on by parties injured concern the remedy, and have no extra-territorial force.[2]

Such bonds not extra-territorial.

### 10. *Sales of Prohibited Liquors and Drugs.*

§ 486. Where a sale of spirituous liquor is valid by the law of the place of contract, but invalid by the law of the place where the goods are to be delivered, the vendor cannot, in the latter place, recover the price, where he has knowledge that the vendee intends to resell the goods contrary to law, and where he aids in so doing.[3] The guilty knowledge, however, of the vendor, and the illegal intent of the purchaser, must be proved in order to avoid in such case the contract, and the knowledge must go to the fact that the sale was specifically to violate the law of the state of delivery.[4] A similar ruling has been made in England as to the sale

Sales of unlawful liquors or drugs determined by place of performance.

[1] Pickering *v.* Fisk, 6 Vt. 102; Hunt *v.* Pownall, 9 Vt. 411; Indiana *v.* John, 5 Ham. (Oh.) 217. See McFee *v.* Ins. Co. 2 McCord, 503. Supra, § 4.

[2] Pickering *v.* Fisk, 6 Vt. 102; Dimick *v.* Brooks, 21 Vt. 569. Infra, § 747.

[3] Supra, §§ 399 *et seq.*; Banchor *v.* Mansel, 47 Me. 58; Wilson *v.* Stretton, 47 Me. 120; Webster *v.* Munger, 8 Gray (Mass.), 584; Anstadt *v.* Sutter, 30 Ill. 164; Dalter *v.* Lane, 13 Iowa, 538. But see Territt *v.* Bartlett, 21 Vt. 184; Spalding *v.* Preston, Ibid. 9.

If the delivery is to be to a common carrier within the state of sale where the sale is legal, the fact that the goods are ultimately to be transported to a state where the sale is illegal does not prevent a recovery of the price. Backman *v.* Jenks, 55 Barb. 469; Boit *v.* Maybin, 52 Ala. 252; McCarty *v.* Gordon, 16 Kans. 35; Kling *v.* Fries, 33 Mich. 275; Roetke *v.* Philip Best Brewing Co. 33 Mich. 340; Webber *v.* Donelly, 33 Mich. 469. See Dolan *v.* Green, 110 Mass. 322; Suit *v.* Woodhall, 113 Mass. 391.

[4] Barnard *v.* Field, 46 Me. 526; Savage *v.* Mallory, 4 Allen (Mass.), 492; Frank *v.* O'Neil, 125 Mass. 473; Bligh *v.* James, 6 Allen (Mass.), 570; Whitlock *v.* Workman, 15 Iowa (7 With.), 351. See South. Law Rev. July, 1874; and Alb. L. J. Aug. 10, 1872. As to *scienter*, see Hill *v.* Spear, 50 N. H. 253; Boothby *v.* Plaisted, 51 N. H. 436. Supra, § 483. That the agent's knowledge will be imputed to the principal, see Suit *v.* Woodhall, 113 Mass. 391.



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of drugs to be illegally used in the manufacture of beer.[1] On the other hand, although in the place where the contract is solemnized the sale is illegal, yet the contract is not invalid if its performance is to be exclusively in a state where the sale is legal.[2]

### 11. *Lotteries.*

When lotteries are permitted in place of performance, contracts to be judged by that law.

§ 487. Where lotteries are not illegal at the place of sale, a contract for the purchase of lottery tickets, it has been ruled in Massachusetts, will be supported, although the vendee belonged to a state where the sale is illegal; and the courts of the latter state will sustain an action for the recovery of the price of the ticket.[3] And an analogous ruling has been made in New York.[4]

So where lotteries are illegal in place of performance.

§ 488. The converse was held in Maryland, in 1866, where it was ruled that a court of equity will not entertain a suit based upon a contract involving a violation, in the sale of lottery tickets, of the laws of sister states within their limits.[5] In such case, however, it must be shown that the plaintiff knew that the object of the specific contract was to violate the law of the state of performance.[6]

Distinction taken in states where lotteries are

§ 489. On the other hand, we have a case decided by the Supreme Court at Berlin, on October 16, 1855, in which the *lex fori* would seem, under such circumstances, to have been taken as the standard.[7] More closely in

[1] Langton *v.* Hughes, 1 Maule & S. 593.

[2] Supra, §§ 399 *et seq.*; Banchor *v.* Mansel, 47 Me. 58; Dolan *v.* Green, 110 Mass. 322, cited supra, § 401. See Kentucky *v.* Bassford, 6 Hill N. Y. 526.

When an executory contract for the sale of intoxicating liquors is made in Massachusetts, to be completed and performed in New York, such contract is not a sale "in violation of law" under the Mass. Gen. Stat. c. 86. Abberger *v.* Marrin, 102 Mass. 70; Ely *v.* Webster, Ibid. 304.

[3] McIntyre *v.* Parks, 3 Met. 207.

When foreign lotteries were prohibited in France, the question was agitated whether an action could be maintained in France on a contract for the sale of such tickets. The negative was held by the Cour Royale de Paris, and such was considered to be the rule by Massé, even in cases where the contract was made in a state where lotteries were lawful. Massé, Droit Com. No. 570.

[4] Kentucky *v.* Bassford, 6 Hill, 526.

[5] Paine *v.* France, 26 Md. 46. See Ibid. 163.

[6] Supra, §§ 483, 486.

[7] Bar, p. 248.



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point, however, is a decision at Lübeck, on September 11, 1849, in which it was held that as the Frankfort lottery is a government institution, the Frankfort courts will compel the execution of contracts based on it, though such contracts are to be performed in foreign lands where lotteries are prohibited.[1]

government institutions.

## 12. *Contracts against Public Policy.*

§ 490. As a general rule, no state will enforce a contract conflicting with public policy.[2] And in England it has been declared that where a court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of the latter; for if any part of the contract is inconsistent with the law and policy of the former, the contract will not be enforced even as to another part of it, which may not be open to this objection, and may be the only part remaining to be performed.[3] That a state will not recognize foreign distinctions of *status* or caste conflicting with its distinctive policy we have already seen.[4]

Foreign contracts inconsistent with home policy will not be enforced.

§ 491. An agreement entered into in France, but intended to be carried out in England, of such a nature that if entered into in England it would have been void for champerty, cannot be enforced in England.[5]

Illustrated by champertous contracts.

§ 492. Gaming debts, as founded on an immoral consideration, are, according to Savigny, governed by the law of the place in which the suit is brought. This, alone, is to

By gaming debts.

[1] Bar, p. 248.

[2] Smith *v.* Stotesbury, 1 W. Bl. 204; 2 Burr. 924; Fores *v.* Johnes, 4 Esp. R. 97; Walcot *v.* Walker, 7 Vesey, 1; Southey *v.* Sherwood, 2 Meriv. 435; Forbes *v.* Cochrane, 2 B. & C. 448; Andrews *v.* Pond, 13 Peters, 65; Armstrong *v.* Toler, 11 Wheat. 258; S. C., 4 Wash. C. C. 297; Smith *v.* Godfrey, 8 Fost. 382; Bliss *v.* Brainerd, 41 N. H. 256; Greenwood *v.* Curtis, 6 Mass. R. 376; Blanchard *v.* Russell, 13 Mass. 1; Com. *v.* Aves, 18 Pick. 193; Merchants' Bank *v.* Spalding, 12 Barb. 302; Davis *v.* Bronson, 6 Iowa, 410; Phinney *v.* Baldwin, 16 Ill. 408; Eubanks *v.* Banks, 34 Ga. 415; Newcomb *v.* Leavitt, 22 Ala. 631; Castleman *v.* Jeffries, 60 Ala. 380; Ohio Ins. Co. *v.* Edmondson, 5 La. R. 295; Woodward *v.* Roane, 23 Ark. 523; Westlake (1880), § 204. See supra, § 428.

[3] Hope *v.* Hope, 8 De G., M. & G. 731.

[4] Supra, §§ 104 *b*, 112, 114, 127, 428.

[5] Grell *v.* Levy, 16 C. B. (N. S.) 73; 10 Jur. N. S. 210; 12 W. R. 278; 9 L. T. N. S. 721.



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determine, according to its own precepts, as to the validity or the invalidity of the obligation, no matter where it may have been assumed.[1] To the same effect is the Scotch law.[2] On the other hand, it was ruled by Lord Lyndhurst that money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the English courts,[3] though the authority of this decision has been subsequently somewhat impugned.[4]

Contracts in restraint of trade determined by place of performance.

§ 492 *a*. Whether a contract in restraint of trade is to be enforced depends, not on the law of the place of contract, but on the law of the place of performance. And the courts of the latter place, if appealed to, will not enforce a contract conflicting with their policy in this respect.[5]

Immorality tested by the *lex fori*.

§ 493. No state, also, will enforce a contract contrary to good morals; the question being determinable by the *lex fori*.[6] The French law, on the ground that public policy and morality require that no suit should be sustained whose basis is illicit cohabitation, positively interdicts such suits; and as this law is of that positive and coercive character which has been already referred to as exclusive, it overrides all foreign law.[7] In Germany the decisions conflict.[8]

By the law of Scotland, the obligation to maintain a natural child is not considered as *ex delicto*.[9]

By the English common law, foreign contracts made in con-

[1] Savigny, viii. § 374.

[2] Bruce *v.* Ross, M. 9523, 3 Pat.; O'Connell *v.* Russell, 1864, 3 Macph. 89; Paterson *v.* Macqueen, 4 Macph. 602, cited by Guthrie in his note to Savigny, *in loco*.

[3] Quarrier *v.* Colston, 1 Ph. 147; 6 Jur. 959.

[4] Wynne *v.* Callander, 1 Russ. 293.

[5] Roussillon *v.* Rousillon, L. R. 14 Ch. D. 351. See Morris Run Coal Co. *v.* Barclay Coal Co. 68 Penn. St. 173, cited supra, § 485, where it was held that a statute which makes it a misdemeanor for "persons to conspire to commit any act injurious to trade or commerce," will not be upheld in another state.

[6] Hope *v.* Hope, 8 De G., M. & G. 731; Armstrong *v.* Toler, 11 Wheat. 258; Windsor *v.* Jacob, 2 Tyler, 192; Greenwood *v.* Curtis, 6 Mass. 358; Phinney *v.* Baldwin, 16 Ill. 108.

[7] Code, art. 340; *La recherche de la paternité est interdite*. The judges are positively commanded to quash all suits affected by this taint.

[8] Savigny, viii. § 374, note (*bb*). As to German and French law, see Bar, §§ 110, 362–364.

[9] Note to Savigny, p. 206 (*bb*).



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sideration of illicit cohabitation will not be enforced.[1] And so of agreements stipulating for divorce, and for the custody of children in a mode contrary to English law.[2]

§ 494. Wherever engaging in the slave trade is by statute illegal, contracts based on that trade are invalid; nor, in view of the immorality of the consideration, and the fact that any knowing participation in the transportation of slaves is involved in the statutory prohibition, does it make any difference that the place of delivery of the intended slaves is to be in a foreign state.[3]

So of the slave trade.

### 13. *Contracts against Law of Nations.*

§ 495. A contract conflicting with the law of nations will be regarded by our courts as invalid, the law of nations being part of our municipal law.[4]

Contracts conflicting with law of nations invalid.

§ 496. The question next arises as to what contracts conflict with the law of nations. How far neutral duties extend, so as to make it unlawful for subjects of neutral states to supply aid to belligerents, has been discussed elsewhere.[5] We may say, however, that no contracts which involve a breach of neutrality, as neutrality is defined either by local statutes or by the law of nations will be sustained by the courts.[6] Under this head fall contracts to raise a loan to assist insurgents, as yet unrecognized as belligerents, in their revolt;[7] and contracts to advance money to enlist soldiers in a foreign friendly state to revolt against such state.[8]

So of contracts involving breach of neutrality.

[1] See Walker *v.* Perkins, 3 Burr. 1568; Binnington *v.* Wallis, 4 B. & C. 650; Lloyd *v.* Johnson, 1 Bos. & P. 340; Appleton *v.* Campbell, 2 Carr. & P. 347; Greenwood *v.* Curtis, 6 Mass. 379; De Sobry *v.* De Laistre, 2 Harr. & J. 193; Story, § 258.

[2] Hope *v.* Hope, 8 D., M. & G. 731; 22 Beav. 351.

[3] Somerset *v.* Stuart, Lofft's R. 1; Madrazo *v.* Willes, 3 B. & Al. 353; Forbes *v.* Cochrane, 2 B. & C. 248; Fales *v.* Mayberry, 2 Gallison, 560. See Story, § 259.

[4] Supra, § 1.

[5] Whart. Crim. Law, 8th ed. §§ 1901 *et seq.*

[6] De Witz *v.* Hendricks, 9 Moore, 586; 2 Bing. 314; Thompson *v.* Powles, 2 Sim. 194; Coppell *v.* Hall, 7 Wal. 542.

[7] Macnamara *v.* D'Evereux, 3 L. J. Ch. 156; Thompson *v.* Powles, 2 Sim. 194; Taylor *v.* Barclay, 2 Sim. 213. See Kennett *v.* Chambers, 14 Howard U. S. 38; Westlake, art. 199.

[8] Hall *v.* Costello, 48 N. H. 176. See Baily *v.* Milner, 35 Ga. 330.



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And it has been generally stated that contracts to do acts calculated to imperil national neutrality, as to stir up war with a friendly state, are void.[1]

Otherwise as to supply of munitions of war, and of blockade breach.

§ 496 *a*. A contract between two subjects of a neutral state to export munitions of war to a belligerent is not unlawful in the neutral state.[2] Of course, it is otherwise when the contract to transport such goods is with an enemy.[3]

### 14. *Contracts with Public Enemies.*

Such contracts void.

§ 497. All contracts made by the citizens of one country with the citizens of another country, when the two countries are in a state of public war, will be adjudged void, no matter where such contracts are made, or when they are to be performed.[4] And eminently is this the case when the contract is to import goods contraband of war.[5] But this rule does not affect contracts made prior to the war;[6] the right to sue on which revives on peace. The same distinctions apply to contracts with belligerent insurgents.[7]

How far an alien enemy is entitled to sue is to be hereafter considered.[8]

A contract by a citizen to observe neutrality with an enemy is, under ordinary circumstances, void; but he may make such an

[1] Hennings *v.* Rothschild, 9 B. & C. 470; 4 Bing. 315; Thompson *v.* Powles, 2 Sim. 194; Taylor *v.* Barclay, 2 Sim. 213.

[2] Chavasse, ex parte, in re Grazebrook, 4 De G. & S. 655; 11 Jur. N. S. 400; 34 L. J. Bank. 17; 13 W. R. 627; 12 L. T. N. S. 249. This question is discussed at large in Whart. Crim. Law, 8th ed. § 1903.

[3] Infra, § 497. Story, § 259.

[4] Abdy's Kent, p. 294; Wheaton Int. Law, p. 556; Baglehole, ex parte, 18 Vesey, 528; Anthon *v.* Fisher, 2 Dougl. 649; Scholefield *v.* Eichelberger, 7 Peters, 586; Hyatt *v.* James, 2 Bush (Ky.), 463; Crawford *v.* The William Penn, 3 Wash. C. C. 484; U. S. *v.* Grossmayer, 9 Wall. 72; Stevenson *v.* Payne, 109 Mass. 378; Noblam *v.* Milborne, 21 La. An. 641; Graham *v.* Merrill, 5 Cold. (Tenn.) 622; Rice *v.* Shook, 27 Ark. 137. See Shares U. S. *v.* Shares, &c. 5 Blatch. C. C. 231. Infra, § 737.

[5] Griswold *v.* Waddington, 16 Johns. R. 438; Musson *v.* Fales, 16 Mass. R. 332.

[6] McConnell *v.* Hector, 3 Bos. & Pul. 113; Omealy *v.* Wilson, 1 Camp. 481; Stiles *v.* Easley, 51 Ill. 275; Seymour *v.* Bailey, 66 Ill. 288; Cockburn on Nationality, p. 150.

[7] Ibid. See Seymour *v.* Bailey, 66 Ill. 288.

[8] Infra, § 737.



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engagement by capitulation, when it is out of the power of his government to protect him.[1]

### VII. EFFECTS OF OBLIGATIONS.

#### 1. *Specific Performance.*

Specific performance determined by place of performance.

§ 498. This, according to the foregoing principles, will be governed by the law of the place fixed for the performance of the contract, unless otherwise provided by the parties.[2]

#### 2. *Rescission, Extension, and Stay Laws.*

So of rescissions and renewals.

§ 499. By the local law of several European states, the vendor of real estate has a right to recede from and cancel the contract, under certain limitations, until possession is delivered. According to Savigny, the law of the place where the estate lies, the place being that of the performance of the contract, is that which is to prevail, and not that of the place where the contract was entered into, or where the suit was brought.[3] And this rule is good in our own law.[4]

Stay laws governed by *lex fori*.

§ 500. Stay laws, being part of the process, are under the law which governs the court in which suit is brought.[5]

### VIII. INTEREST.

How classified.

§ 501. Interest, in its international sense, is of three kinds: —

(*a.*) That which is secured by contract, either directly or by implication, there being no wrongful act charged;

(*b.*) That which is assigned by way of damages for breach of contract; and which in the English practice is called *damages*, in the French, *dommages-intérêts;*

(*c.*) That which comes from delay in due performance of a contract, and which in the English practice is sometimes called *moratory interest;* in the German, *Verzugszinsen;* in the French, *intérêts moratoires.*

[1] Miller *v.* The Resolution, 2 Dallas, 10.

[2] Supra, § 397.

[3] VIII. § 374, D.

[4] Supra, § 274.

[5] Infra, §§ 747 *et seq.*



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§ 502. But of these kinds of interest there is, according to Savigny,[1] a common characteristic. Where there is a special and distinct legal rate assigned at each of several places to which a contract may relate, then the law of the place which is the seat of the obligation is to control. Generally, when there is a stipulated place of payment, the law of that place applies; and, in most cases, that is the place of performance.

Savigny's rule.

### 1. *Interest based on Contract.*

§ 503. On the reasoning already given,[2] the place where a contract happens to be solemnized cannot determine either its rate of interest, when no rate is fixed, or the legality of the interest charged, when such interest is part of the contract. The place of solemnization is often casual. It may be in a railway car, or at a watering-place, or at an intermediate spot to which the parties resort for convenience, though it is not the domicil of either, nor the place of performance. The law of the place of solemnization, therefore, has no necessary connection with the meaning or operation of the contract.[3]

Place of solemnizing contract cannot control.

§ 504. The general import of the adjudicated cases, both in England and the United States, is, that interest of this character is to be governed by the law of the place where the contract is to be performed.[4]

Place of performance determines.

[1] VIII. § 374, D.

[2] Supra, § 401.

[3] See, however, Hull *v.* Augustine, 23 Wis. 383.

[4] Burge, iii. 774; Phillimore, iv. 515; Guthrie's Sav. 208; Henry on Foreign Law, 43, note; 2 Parsons on Contracts, 5th ed. 584; Westlake, (1880), § 211; Story, § 291; 2 Kent Com. Lect. 39, p. 460; Jones on Mortgages, §§ 656 *et seq.*; Cash *v.* Kennison, 11 Vesey, 314; Robinson *v.* Bland, 2 Bur. R. 1077; Ferguson *v.* Fyffe, 8 Cl. & Fin. 121; Andrews *v.* Pond, 13 Pet. 65; Junction R. R. *v.* Bank, 12 Wal. 226; Miller *v.* Tiffany, 1 Wal. 298; Scudder *v.* Bank, 91 U. S. 406; Dodge, in re, 17 Bk. Reg. 504; Houghton *v.* Page, 2 N. H. 42; Little *v.* Riley, 43 N. H. 109; French *v.* French, 126 Mass. 360; Phelps *v.* Kent, 4 Day, 96; Fanning *v.* Consequa, 17 Johns. R. 511; 3 Johns. Ca. 610; Hosford *v.* Nichols, 1 Paige R. 220; Stewart *v.* Ellice, 2 Paige, 604; Potter *v.* Tallman, 35 Barb. 182; Balma *v.* Wombaugh, 38 Barb. 352; Jewell *v.* Wright, 30 N. Y. 259; Dickinson *v.* Edwards, 77 N. Y. 578; Cartwright *v.* Greene, 47 Barb. 19; Healy *v.* Gorman, 3 Green (N. J.), 328; Archer *v.* Dunn, 2 W. & S. 327; Wood *v.* Kelso, 27 Penn. St. 241; Mullen *v.* Morris, 2 Barr, 85; Irvine



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§ 505. But as to what is the place of performance, in this sense, great divergence of opinion exists. It is often ruled, and in the facts of the particular cases properly, that it is the place of payment. But the place of payment is often designated from reasons of momentary convenience; and it seems hard to subject a *bonâ fide*

Place of payment not necessarily place of performance.

*v.* Barrett, 2 Grant's Cas. 93; Bowman *v.* Miller, 25 Grat. 331; Roberts *v.* McNeeley, 7 Jones Law (N. C.), 506; Findlay *v.* Hall, 12 Ohio St. 610; Collins *v.* Burkam, 10 Mich. 287; Savery *v.* Savery, 3 Iowa, 272; Boyd *v.* Ellis, 11 Iowa, 97; Arnold *v.* Potter, 22 Iowa, 194; Newman *v.* Kershaw, 10 Wis. 333; Lapice *v.* Smith, 13 La. R. 91; Howard *v.* Branner, 23 La. An. 369; Kennedy *v.* Knight, 21 Wis. 340; Hunt *v.* Hall, 1 Ala. 634; 37 Ala. 702; Cubbege *v.* Napier, 62 Ala. 518; Grangers' Ins. Co. *v.* Brown, 57 Miss. 308; Bolton *v.* Street, 3 Cold. (Tenn.) 31; Greenwade *v.* Greenwade, 3 Dana, 497; Young *v.* Harris, 14 B. Mon. 556; Butler *v.* Edgerton, 15 Ind. 15; Butler *v.* Myer, 17 Ind. 77.

In Scudder *v.* Bank, 91 U. S. 106, Hunt, J., said: "So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent. interest, which is legal in that state, the note is valid, although but seven per cent. interest is allowed by the laws of the former state. Miller *v.* Tiffany, 1 Wal. 310; Depau *v.* Humphry, 20 Mart. 1; Chapman *v.* Robertson, 6 Paige, 634; Andrews *v.* Pond, 13 Pet. 65."

That the *lex fori* determines what interest is payable on a note when no place of payment is designated, see Stickney *v.* Jordan, 58 Me. 106.

In Consequa *v.* Fanning, 3 John. Ch. 587, it was ruled by Chancellor Kent that the Chinese law, relating to interest, would be applied in New York to a contract distinctively subject to that law.

In Dickinson *v.* Edwards, *ut supra*, 77 N. Y. 573, the opinion of the majority of the court (Rapello and Danforth, JJ., dissenting) was given by Folger, J. From this opinion are extracted the following passages: —

"The general rule is and has been that where the contract, either expressly or tacitly, is to be performed in a given country, then the presumed intention of the parties is that it is to be governed by the law of the place of performance as to its validity, nature, obligation, and interpretation. Story on Confl. of Laws, § 280, citing Andrews *v.* Pond, 13 Pet. 65; and 9 N. Y. 53, citing Holman *v.* Johnson, Cowp. 341.

"This rule has been specially applied to the rate of interest to be allowed; and it has been held that where a personal contract is expressly or by implication to be paid at a given place, and the rate is not fixed by the parties, interest is to be taken or reserved according to the law of the place where payment is to be made. Fanning *v.* Consequa, 17 Johns. 511; Scofield *v.* Day, 20 Johns. 102; De Wolf *v.* Johnson, 10 Wheat. 367. It is said that such a rule of construction will not be applied if it will render the contract illegal, for that construction will be given to a contract which will render it valid, if it can be reasonably done. Brown *v.* Bradley, infra.

"But this remark has no application to the case in Jewell *v.* Wright, or to that before us. There and here no question comes up of the rate of interest to be allowed upon a clause in a



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creditor to forfeiture, simply because, in order to oblige the debtor, or to facilitate his own business, he inserts in the contract, as the seat of payment, a place (*e. g.* a bank in some neighboring city) where the interest settled on by the parties may be usurious, and the contract void. The place where the money is to be paid has no necessary connection with the risks which the loan subjects it to, or the value of the money during the loan.[1]

But is usually so with negotiable notes.

§ 505 *a*. In several cases it is said that the place named in a note for its payment is the place whose law determines the interest it is to bear.[2] This is true so far as con-

contract expressly providing for it, and for the rate of it. There and here the note was silent as to interest, and the rate adopted on the negotiation of it was more than the law of the place of performance allowed. Hence the only indication which the contract gives of the mind of the maker as to the rate of interest is in the phrase which specifies the place of payment, and the indication from that is of a rate lawful at that place.

"Nor did Jewell *v.* Wright go to judgment without reliance upon authority. Jacks *v.* Nichols, 5 N. Y. 178, states, as a ground of the decision in it, that the contract was to be performed in this state (see page 185); so Curtis *v.* Leavitt, 15 N. Y. 9, 227, recognizes the rule; and Cutler *v.* Wright, 22 Ibid. 472, is much in point. The note there, made and delivered in New York, reserved, in terms, interest at the rate of eight per cent.; but as it was dated and made payable in Florida, it was held to be a Florida contract, and not to be governed by the laws of this state on a defence of usury." An effort is then made to distinguish the case at bar from Tilden *v.* Blair, *ut supra*.

It has been frequently decided in France that a stipulation for interest higher than the legal rate is valid in France, when the law to which the stipulation is subject permits the stipulation. See cases cited in Fiore, Op. cit. § 264.

[1] Miller *v.* Tiffany, 1 Wal. 298; Junction R. R. *v.* Ashland Bank, 12 Wal. 226; Providence Bank *v.* Frost, 14 Blatch. 233; Pratt *v.* Adams, 7 Paige, 615; Martin *v.* Martin, 1 Sm. & M. 176; Roberts *v.* McNeeley, 7 Jones N. C. 506. See Potter *v.* Tallman, 35 Barb. 182; Richards *v.* Bank, 12 Wis. 692; Vliet *v.* Camp, 13 Wis. 198.

Mr. Westlake (1880) declares the rule to be that "interest will be given by the court according to the law of the country in which the principal *ought to be paid*." To this he cites, as the more recent cases, Cooper *v.* Waldegrave, 2 Beav. 282; Ferguson *v.* Fyffe, 3 C. & F. 121. The paucity of late cases is to be explained by the repeal in England of all usury laws. But Mr. Westlake's rule does not hold good when the place of such payment is not the place where the money is invested, or the place of the creditor's domicil, but merely a central business point, selected as a matter of mutual convenience, as are New York banks by New England or other capitalists making loans in the West.

[2] Scofield *v.* Day, 20 Johns. 102;



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cerns the relations of the maker to *bonâ fide* holders without notice. But it does not necessarily hold good as between parties with notice, who may show that when a note was dated and made payable in a particular state, this was merely for temporary convenience, and that it was negotiated and made really payable in another state.[1] But where a promissory note made in New York, and there made payable, is negotiated in Massachusetts at a higher rate of interest than the New York law permits, the question of the validity of the note is to be determined by New York law.[2]

tiable paper.

§ 506. Then it has been said that where no place of payment is mentioned in an obligation, the court will assume as such the residence of the obligee. But this would only entitle the money invested to receive the interest due at the obligee's residence; whereas, his object in sending it to another country was to obtain a higher interest, though at a greater risk. The obligor's domicil has been also assigned as the place of performance;[3] but this is open to the objection that the obligor may employ the money in some distant country, and that the obligee is entitled to the interest prevailing in such country.

Nor does residence or domicil of parties control.

§ 507. More reasonable is the view maintained by Savigny,[4] and substantially adopted by Mr. Parsons,[5] that when there are two conflicting laws bearing on this point, that law will be adopted by which the validity of the obligation is best sustained.[6] The applicability of a local law, it is argued, is based on the presumed consent of the parties; but parties cannot be presumed to consent to a local law by which

Hypothesis of most favorable law.

Hackettstown Bank *v.* Rea, 6 Lans. 455; 64 Barb. 175; Bowman *v.* Miller, 25 Grat. 331; Campbell *v.* Nichols, 33 N. J. L. 81; Vinson *v.* Platt, 21 Ga. 135.

[1] Infra, § 510; Tilden *v.* Blair, 21 Wal. 241. Dating a note at a particular place is not a designation of such place for payment. Cook *v.* Moffat, 5 How. 295; Merchants' Bk. *v.* Griswold, 72 N. Y. 472; Hart *v.* Wills, Iowa, 1879. Supra, § 457.

[2] Dickinson *v.* Edwards, 77 N. Y. 573, cited supra, § 504.

[3] Story, § 293 *c*, note 3.

[4] § 372, c.

[5] II. p. 584; and see, also, Peck *v.* Mayo, 14 Vt. 33; Bolton *v.* Street, 3 Cold. (Tenn.) 31.

[6] See supra, § 429; S. P., Cromwell *v.* Sac, 96 U. S. 51; Nat. Bk. *v.* Smoot, 2 MacArthur, 371; Fisher *v.* Otis, 3 Chand. 83; Bolton *v.* Street, 3 Cold. 31; Bullard *v.* Thompson, 35 Tex. 313.



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their engagements would be made null. And this seems to be the true reason of a much criticised decision of the Supreme Court of Louisiana, that in such cases there may be considered to be two applicatory local laws, and that the court will select that one by which the contract will be upheld.[1]

That of the place where the money is to be used.

§ 508. But the true view seems to be, that the place of the performance of an obligation for the payment of money is the place where the money is used. Suppose, for instance, it is to be used for the purchase of lands, or the working of mines in Colorado, where interest may be fifteen per cent. The money may be lent in New York; the contract executed in New York; and the payment designated to be made in a New York bank. But, for all this, the place of performance is Colorado, where the money is employed. The interest is great, but so is the risk; and the lender should have full remuneration for this risk. Similar reasoning applies to the bonds executed by Western railroads payable in Boston and New York. To declare such obligations usurious, because conflicting with the local law of the place of payment, would not only be a gross wrong to innocent and meritorious creditors, but a serious shock to national enterprise. Improvements in new countries would be slow, if capital should be exposed to such risks of forfeiture. It would be otherwise, however, if the rule be maintained that the place of performance (*i. e.* the place that supplies the applicatory local law) is that where the money lent is to be used. This view, it should be added, is maintained by Bar,[2] and by a high French tribunal.[3] It has, also, the sanction of an eminent Scotch court.[4]

[1] Depau *v.* Humphreys, 20 Martin, 1, a decision to which Judge Story objects (§ 298), but which is approved by Chancellor Walworth in Chapman *v.* Robertson, 6 Paige, 629. But see *contra*, Dickinson *v.* Edwards, 77 N. Y. 578, cited supra, § 504, where Folger, J., dissents from Depau *v.* Humphreys.

As holding that parties may stipulate the law which they desire should govern their contract, may be cited Townsend *v.* Riley, 46 N. H. 312; Strawbridge *v.* Robinson, 5 Gilm. 470.

To same effect is Judge Redfield, Story Confl. of L. § 304 *b*.

[2] Pages 237, 238, 256.

[3] Jour. du droit int. privé, 1874, p. 128. See Fiore, § 265.

[4] Parker *v.* Royal Exchange Co. 8 D. 372, cited Guthrie's Savigny, p. 204, note. See, to same effect, Harvey *v.* Archibold, 1 Ry. & Moo. 184; S. C., 3 B. & C. 626; Young *v.* Godbe, 15 Wal. 562; Fitch *v.* Remer, 1 Biss.



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§ 509. Nor is this view unfamiliar to the Roman law. "*Usurae vicem fructuum obtinent;*"[1] where the tree is, there properly is the fruit. It is true that this is regularly at the debtor's domicil. But if he goes to a foreign land, and uses the money there, applying it by his labor and skill to the realization of foreign staples, then the law of the place where the money is used is that which determines the interest.[2] And this view derives support from parallel cases which the most eminent civilians have regarded as definitely settled.[3]

This view sustained by analogy.

§ 510. On this principle we may be able to reconcile the apparent conflict of cases on the question whether, when a mortgage is given as security for a loan, and the mortgage is in one state and the place of payment of the loan in another, the law of the former state, or that of the latter state, is to prevail in the settlement of interest. This question has been frequently litigated in the United States, and with results which on their face are irreconcilable. The true test is, was the mortgage merely a collateral security, the money being lent primarily on the debtor's personal credit; or was the money employed on the land for which the mortgage was given. If the former be the case, then the law of the place where the money is due, and not that of the mortgage, applies.[4] If the latter, then the law of the place where the

When mortgage is not merely collateral, law of site prevails.

337; Phelps *v.* Kent, 4 Day, 96; Potter *v.* Tallman, 35 Barb. 182; Bank of Georgia *v.* Lewin, 45 Barb. 340; Bowen *v.* Bradley, 9 Abb. N. Y. Pr. 395; Findlay *v.* Hall, 12 Oh. St. 610; Arnold *v.* Potter, 22 Iowa, 194; Senter *v.* Bowman, 5 Heisk. 14; Duncan *v.* Helm, 22 La. An. 418.

The tendency of the French authorities is to hold that the rate of interest is to be determined by the law of the place where the money is to be employed. Jour. du droit int. privé, 1875, p. 354; Brocher, p. 363.

[1] L. 34, D. de usur. 22, 1.

[2] Hert. iv. 53; Seuffert, Comment. i. p. 254.

[3] Infra, § 672; Bar, p. 256.

A consignor of goods is entitled to interest according to the law of the place where the goods are transmitted for sale. Cartwright *v.* Greene, 47 Barb. (N. Y.) 9.

[4] Connor *v.* Bellamont, 2 Atk. 382; Stapleton *v.* Conway, 3 Atk. 727; S. C., 1 Vesey, 427; De Wolf *v.* Johnson, 10 Wheat. 383; Davis *v.* Clemson, 6 McLean, 622; Kavanaugh *v.* Day, 10 R. I. 393; Atwater *v.* Walker, 1 C. E. Green N. J. 42; Cope *v.* Alden, 41 N. Y. 313; 53 Barb. 350; Newman *v.* Kershaw, 10 Wis. 333; Kennedy *v.* Knight, 21 Wis. 340; Sands *v.* Smith, 1 Neb. 108; Dolman *v.* Cook, 1 McCarter N. J. 56; Andrews *v.* Torry, Ibid. 355.



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mortgage is situate must prevail.[1] Hence, when an investment is made in a mortgage in Michigan, the note accompanying which is made payable in New York, the law of Michigan and not of New York determines the question of usury.[2]

*Lex fori* to control process.

§ 511. It should be remembered, however, that when usury laws are declared by a local government to be of a positive moral nature, absolutely binding in the country in which they are imposed, they may be enforced by the judges of such country on all litigants coming before them. And this opinion is pressed to its utmost limit by those jurists who hold that as usury laws are laws for the protection of good morals, no court will allow interest in any case higher than that prescribed by the laws of its own sovereign. Such is the opinion of Demangeat.[3] And, on the same principle, a contract which is not infected by usury according to the laws of the country in which suit is brought will be sustained by the judges of such country, though in the country in which the contract was entered into it was so tainted.[4] But, when interest is imposed by a foreign law as a penalty, it will not be extra-territorially exacted.[5]

[1] Fitch *v.* Remer, 1 Biss. 337; Chapman *v.* Robertson, 6 Paige, 627; Goddard *v.* Sawyer, 9 Allen (Mass.), 78; Pine *v.* Smith, 11 Gray (Mass.), 38; Phil. Loan Co. *v.* Towner, 13 Conn. 249; Levy *v.* Levy, 78 Penn. St. 507; Kilgore *v.* Dempsey, 25 Oh. St. 413; Fisher *v.* Otis, 3 Chand. 78; Arnold *v.* Potter, 22 Iowa, 194. See supra, § 368.

Fœlix goes even further, allowing to the parties absolute liberty of choice as to the local law to be applied, which would, as Mr. Westlake remarks, destroy all usury laws.

Where there is no evidence as to the foreign rate of interest, it will be presumed to be the same as the domestic. Cooper *v.* Reaney, 4 Minn. 528.

[2] Fitch *v.* Remer, 1 Biss. 337.

[3] Com. on Fœlix, i. p. 232.

[4] Savigny, viii. § 374; Fœlix, ed. Demangeat, i. 232; Bar, p. 227, n. 10. See supra, § 428.

It has been ruled in Pennsylvania that a California contract to pay monthly two and a half per cent. interest, and to compound it, though lawful in California, is not only unconscionable but deceptive, and will not be enforced in Pennsylvania. Sime *v.* Norris, 8 Phila. 84. Mr. Brightly, in noting this case in his Digest, says: "This was a case at *nisi prius;* directly the contrary was held by the District Court, in Ransom *v.* Jones, S. '60, 1190, which was affirmed by the Supreme Court, J. '63, 33. And see Hoag *v.* Dessau, 1 Pitts. 390."

[5] Supra, § 4; Lindsay *v.* Hill, 66 Me. 212; Phila. Loan Co. *v.* Towner, 13 Conn. 124; Lee *v.* Selleck, 33 N. Y. 615; Sherman *v.* Gassett, 9 Ill. 521; Robb *v.* Halsey, 11 Sm. & M. 140.

The broker who negotiates commercial paper may, according to the French and Italian law, transcend the



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### 2. *When claimed in Damages.*

§ 512. According to Judge Story, the law which determines what interest is due determines what is to be the assessment of damages.[1] On the other hand, there is a line of cases tending to show that that which is *processual*, and partakes of the character of special damages imposed by the court of process, is governed by the *lex fori*.[2]

Conflict of opinion as to damages.

### 3. *Moratory Interest.*

§ 513. Moratory interest, as has been stated, is that which comes from delay in due performance of a contract. According to the views just expressed, the law which is to regulate such interest is that which obtains in the place where the money was used. A., for instance, is to pay money to B. at C. He makes default; and, if there be no tort involved in the non-payment, and the fund was not by agreement invested in another state, the interest is to be determined by the rate that obtains at C.[3] But the whole question changes its aspect on the introduction of the element of tort. Does a guardian hold back his ward's money, employing it for his own use? Then all the profits he could make by such use belong to his ward. Does a vendor wrongfully hold back stock from a vendee? Then all the interest or profits made by the vendor by such retention belong to the vendee. In other cases the rule already stated applies: that the interest to be allowed is that which obtains at the place where the money is used.

Moratory interest to be determined by place of use.

legal local limits assigned by usury statutes. Fiore, Op. cit. § 343; Pardessus, Contrat de change, No. 361.

[1] Supra, § 460; Story, § 307; Courtais *v.* Carpentier, 1 Wash. C. C. 376; Slocum *v.* Pomeroy, 6 Cranch, 22; Hazelhurst *v.* Keen, 4 Yeates, 19.

[2] Lindsay *v.* Hill, 66 Me. 212; Lougee *v.* Washburn, 16 N. H. 134; Porter *v.* Munger, 22 Vt. 437; Ives *v.* Farmers' Bank, 2 Allen, 236. Supra § 460.

[3] Story, § 307.



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IX. CURRENCY IN WHICH PAYMENTS ARE TO BE MADE.

Determined by place of payment.

§ 514. The currency in which a contract is payable is to be that of the place where the money called for is payable.[1] If suit is brought in another country, the judgment must be for an amount sufficient to enable the plaintiff to purchase the allotted amount of currency at the place of performance.[2]

Real not formal value to be recovered.

§ 515. The true course, according to Judge Story,[3] is to allow "that sum in the currency of the country in which the suit is brought, which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par of exchange."[4] In Pennsylvania it has been ruled that in such cases the value is to be fixed "according to the rate of exchange at the time of the trial."[5]

Otherwise when exchange is established by law.

§ 516. On the other hand, in New York and Massachusetts it has been held that in such case the plaintiff can only recover for the debt according to the par of exchange, as established by law, and not according to the actual rate of exchange necessary to remit the amount to the foreign country where the debt was payable.[6]

But internationally plaintiff entitled to full equivalent.

§ 517. When a currency at the place of payment has depreciated between the time of contract and the period when payment is claimed, then, viewing the matter according to the principles of international law, the plaintiff, if the question arises before a foreign court, is entitled to recover that which would give him an equivalent in currency

[1] See Boullenois, pp. 496-498; Bar, pp. 241, 253; Story, § 270; Rosetter v. Cahlmann, 8 Exch. 361; De Wolf v. Johnson, 10 Wheaton, 323; Benners v. Clemens, 58 Penn. 24. Supra, § 437.

[2] Story, § 308, citing Scott v. Bevan, 2 Barn. & Ad. 78; Delegal v. Naylor, 7 Bing 460; Ekins v. East India Co. 1 P. Will. 396; Cockerill v. Barber, 16 Ves. 461. See Stanwood v. Flagg, 98 Mass. 124; Cushing v. Wells, 98 Mass. 550; Marbury v. Marbury, 26 Md. 8.

[3] § 309.

[4] See, also, to same effect, Smith v. Shaw, 2 Wash. C. C. 167; Marbury v. Marbury, 26 Md. 20; Grant v. Healey, 3 Sumn. 523. This was held by Lord Eldon in Cash v. Kerrison, 11 Ves. 314.

[5] Lee v. Wilcocks, 5 Serg. & R. 48.

[6] Scofield v. Day, 20 Johns. R. 102; Adams v. Cordis, 8 Pick. 280.



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to that which he would have been entitled to had no such depreciation taken place.[1]

§ 518. By Massé the question whether a foreign creditor is to accept, under compulsory domestic legislation, depreciated paper, is negatived;[2] at all events, the creditor (according to this author) is to be debited with such money only at its actual value. Hence, although the creditor, in the land where the legal tender act is in force, cannot compel the debtor to pay beyond this amount, he is nevertheless entitled, on this view, to proceed for the difference, or, in other words, for the actual amount of the indebtedness, in the courts of any other land where the debtor may have property. Bar, however, dissents from this conclusion.[3] If it is good, then no extra-territorial force, he argues, is to be ascribed to other methods of barring contracts, such as bankrupt discharges, or the statute of limitations. But the view taken by Massé may be sustained by the rulings of courts in reference to bankrupt assignments. When the parties litigating an assignment are all domiciled citizens of the state under whose legislation it is executed, they may be held by a foreign state precluded by that legislation from disputing its effects.[4] So the domiciled citizens of a state are precluded from contesting its taxation, unequal though that taxation may be. But such legislation does not bind foreigners, and no foreigner can be internationally compelled to take a depreciated currency in payment of a debt, even though such currency be a legal tender in the debtor's domicil.

Legal tender acts not extra-territorial.

### X. HOW OBLIGATIONS MAY BE BARRED.

§ 519. According to Roman law, an obligation is barred (*tollitur*) by the following processes: —

(*a.*) *Payment — Solutio.*[5] — The mode of payment, when there is a conflict of territorial law, is considered under prior heads.[6]

Modes of barring by Roman law.

[1] See Story, § 313 *a*, for a full discussion of this point. See, also, Warder *v.* Avell, 2 Wash. Va. R. 282; Searight *v.* Calbraith, 4 Dall. 325; Bartsch *v.* Atwater, 1 Conn. 409; Descadillas *v.* Harris, 8 Greenl. 298.

[2] Op. cit. p. 170.

[3] Op. cit. p. 277.

[4] Infra, § 523.

[5] See Mackenzie's Roman Law, p. 248.

[6] Supra, § 514. See, as to *solutio*, supra, § 401, *note*.



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(*b.*) *Compensation.* — This is the reciprocal extinction of debts (or *set-off*) between two persons.[1]

(*c.*) *Novation.* — This occurs either when the debtor grants a new obligation to the creditor in lieu of an old one which is extinguished, or when a new debtor is substituted for an old one who is discharged by the creditor, in which case the old debt merges in the new.[2]

(*d.*) *Confusion*, which arises when the same person becomes both creditor and debtor, and the debt is thus extinguished.[3]

(*e.*) *Acceptilation*, which is release without payment, operating as would a sealed release with us.[4]

Barring in place of performance good everywhere.

§ 520. The general position laid down by the jurists is that the extinction or bar of an obligation in the place of performance is its extinction or bar everywhere;[5] and this rule has been frequently approved by the English and American courts.[6] It is true that in many cases the rule is said to be, that a discharge in the place of *contract* is a discharge everywhere. But this is on the assumption that the place of contract is the place of performance. When the two conflict, the law of the place of performance prevails. And this obtains as to the effect of the release of one partner of the indebtedness of another.[7]

Conditioned upon fairness of procedure.

§ 521. Of course this is on the hypothesis that such bar or discharge is in conformity with the principles of international law. If this be not the case (*e. g.* if the creditor had no hearing, or if the decree contravene natural justice, or if it be a gross imposition on a foreign creditor), it will not be recognized as binding by the state of which such creditor is a subject.[8]

[1] Ibid.

[2] Mackenzie, p. 251. As to local law of novation, see supra, § 401, note.

[3] D. 46, 3.

[4] D. 46, 4.

[5] "Locus in quo peragenda est solutio." See Paul Voet, de Stat. s. ix. c. 11, n. 11; c. 12; Burge, iii. 875; Phil. iv. 562.

[6] Ballantine *v.* Golding, 1 Cooper Bank. Law, 347; Potter *v.* Brown, 5 East, 130; Story, § 340; Phil. iv. 563.

[7] See Seymour *v.* Butler, 8 Iowa, 304.

[8] Story, § 349; Blanchard *v.* Russell, 13 Mass. 6. See infra, § 654.



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### 1. *Bankrupt and Insolvent Discharges.*

§ 522. A discharge by a state other than that of the performance of the obligation will not be elsewhere binding.[1] That with debts the state of performance is the state of the domicil of the creditor will be presently seen.

Discharge by state without jurisdiction inoperative.

§ 523. *United States.* — The conclusiveness in the United States of bankrupt decrees, when made in conformity with constitutional federal legislation, cannot be questioned; nor is there any question, when there is a bankrupt or insolvent discharge of a debtor by the court of a state in which an obligation is to be performed, and in which both obligor and obligee are domiciled, that by such decree the debt is discharged. Other questions arise, however, when the state in which the obligation is to be performed is not that in which the obligor is discharged, or when the obligee is a citizen of some other state.

Federal bankrupt discharges effective throughout the United States.

§ 524. A state has the constitutional power to pass insolvent laws, in the nature of bankrupt laws, which will discharge all contracts made or existing between citizens of the state which enacted the law, and whose tribunals granted the discharge; nor, as we will see, is this affected by a change of residence by the creditor after the contract was made.[2] The same rule applies to parties who, though foreigners, assent to the operation of an insolvent discharge by participating in the insolvent procedure.[3] In Louisiana, however, actual notice to a resident creditor is required in order to bring him within the bar.[4]

State insolvent discharges operative as between citizens of state and validating creditors.

§ 525. It was always agreed that such a discharge will not bar an action between a citizen of one state and a citizen of another

[1] Smith *v.* Buchanan, 1 East, 6; Phil. iv. 563; Phillips *v.* Allen, 8 B. & C. 477; Lewis *v.* Owen, 4 B. & Ald. 654. Infra, §§ 525, 804.

[2] Ogden *v.* Saunders, 12 Wheat. 213; Stone *v.* Tibbetts, 26 Me. 110; Stevens *v.* Norris, 10 Foster (N. H.), 466; Brigham *v.* Henderson, 1 Cush. 430; Smith *v.* Smith, 2 Johns. 241; Smith *v.* Parsons, 1 Ohio, 226; Stoddard *v.* Harrington, 100 Mass. 87; Einer *v.* Beste, 32 Mo. 240; 3 Parsons on Cont. 439.

That the creditor becomes domiciled in the state at any time before the decree precludes him, see Brown *v.* Bridge, 106 Mass. 563.

[3] Infra, § 528.

[4] See Breedlove *v.* Nicolet, 7 Pet. 413.



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state, where the contract is not by its express terms to be performed in the state granting the discharge;[1] and that such bar does not operate as to contracts made, in the state granting the discharge, with a citizen of another state, where no place of performance is named.[2] And the rule now settled is, that when the creditor is domiciled in another state, a discharge by the state of the debtor's domicil does not bar the debt.[3] And this conclusion is consistent with that already stated, that the place of the creditor's domicil is the place to whose law the assignment of a debt is subject.[4]

But not usually as to other persons.

§ 526. Where negotiable paper of an insolvent is indorsed *bonâ fide* to a citizen of another state, before maturity, and before proceedings instituted in insolvency, this is a new contract, and a suit on it is not barred by such discharge.[5] And it has been determined by the Supreme Court of the United States that a note payable in Massachusetts to the maker's order, and indorsed by him to a Vermont creditor, is not barred by an insolvent discharge in Massachusetts before the note was payable.[6]

Nor as to negotiable paper indorsed abroad.

§ 527. Whether, when an obligation is made and is to be per-

[1] Farmers' & Mech. Bk. *v.* Smith, 6 Wheat. 131; Stevenson *v.* King, 2 Clifford, 1; Palmer *v.* Goodwin, 32 Me. 535; Savoy *v.* Marsh, 10 Met. 594; Fisk *v.* Foster, 10 Met. 597; Braynard *v.* Marshall, 8 Pick. 194; Sherrill *v.* Hopkins, 1 Cowen, 103; Ory *v.* Winter, 16 Mart. (La.) 277; 3 Parsons on Contracts, 441.

[2] See Green *v.* Sarmiento, 3 Wash. C. C. 17; Ilsley *v.* Miriam, 7 Cush. 242; Clark *v.* Hatch, 7 Cush. 455; Scribner *v.* Fisher, 2 Gray, 43. Infra, § 528.

[3] Cook *v.* Moffat, 5 How. 309; Baldwin *v.* Hale, 1 Wal. 223; Gilman *v.* Lockwood, 4 Wal. 409; Stevenson *v.* Kery, 2 Cliff. 1; Van Glahn *v.* Varrenne, 1 Dill. 515; Felch *v.* Bugbee, 48 Me. 9; Anderson *v.* Wheeler, 25 Conn. 603; Easterly *v.* Goodwin, 35 Conn. 271; Donelly *v.* Corbet, 7 N. Y. 500; Pratt *v.* Chase, 44 N. Y. 597; Poe *v.* Duck, 5 Md. 1; Potter *v.* Kerr, 1 Md. Ch. 275; Pugh *v.* Bussel, 2 Blackf. 394; Brighton Bank *v.* Merick, 11 Mich. 403; Hawley *v.* Hunt, 27 Iowa, 303; Urton *v.* Hunter, 2 W. Va. 83; Beer *v.* Hooper, 32 Miss. 246; Crow *v.* Coons, 27 Mo. 512; Beers *v.* Rhea, 5 Tex. 349. See Banks *v.* Greenleaf, 6 Call, 27; 1 Hughes, 261; Byrd *v.* Badger, 1 McAl. 263; Woodhull *v.* Wagner, Bald. 300; Cook *v.* Moffat, 5 Howard, 403; Springer *v.* Foster, 2 Story, 387; Towne *v.* Smith, 1 Woodb. & Min. 115; Worthington *v.* Jerome, 5 Blatch. C. C. 279. Other cases will be found infra, §§ 531, 804.

[4] Supra, § 363.

[5] Bancher *v.* Fisk, 33 Me. 316; Houghton *v.* Maynard, 5 Gray, 552; Anderson *v.* Wheeler, 25 Conn. 603. See Towne *v.* Smith, 1 W. & M. 115.

[6] Baldwin *v.* Hale, 1 Wal. 223; S. P., Felch *v.* Bugbee, 48 Me. 9.



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formed in the state discharging the insolvent, who is its citizen, such discharge is a bar to a suit by a creditor, who is a citizen of another state, was once doubted. That it is a bar was at one time held in Massachusetts;[1] though even in Massachusetts this view is now, in obedience to the ruling of the Supreme Court of the United States, abandoned.[2]

No exception from debt being payable in discharging state.

§ 528. At the same time it must be kept in mind that citizens of other states, who would not otherwise be bound by an insolvent discharge, may be estopped from disputing it by becoming parties to the procedure.[3]

Exception as to party to procedure.

§ 529. In 1868, subsequent to the publication of the last mentioned decisions of the Supreme Court of the United States, it was held by the Supreme Court of Massachusetts, in a case in which it appeared that there was a contract between two citizens of the same state, within such state, one of whom afterwards removed therefrom and became a citizen of another state, and the other remained in the first state, that a discharge under the insolvent law of the first state, which law was in force when the contract was made, was a bar to an action on the contract.[4]

Removal of creditor to another state after debt incurred does not privilege him as against assignment.

§ 530. It is conceded on all sides that an obligation is not barred by a discharge under an insolvent law passed subsequent to the making of such obligation.[5]

Retrospective discharge is inoperative.

§ 531. Foreign bankrupt laws are to be subjected to the same limitations as are state insolvent laws. A foreign bankrupt discharge has no necessary cosmopolitan effect.[6] Such a discharge does not extinguish a debt payable by the alleged bankrupt when the creditor is domiciled in

Foreign bankrupt discharges not extraterritorial.

[1] Scribner *v.* Fisher, 2 Gray, 43; Blanchard *v.* Russell, 13 Mass. 1; 3 Parsons on Cont. 439, note *w*. See Producers' Bank *v.* Farnum, 5 Allen, 10. Since Baldwin *v.* Hale, 1 Wal. 223, this case is to be considered as overruled.

[2] Kelly *v.* Drury, 9 Allen, 27.

[3] Ibid. Supra, §§ 389 *et seq.*; Clay *v.* Smith, 3 Pet. 411; Van Glahn *v.* Varrenne, 1 Dill. 515; Pratt *v.* Chase, 44 N. Y. 597.

[4] Stoddard *v.* Harrington, 100 Mass. 87, in which the principle of Baldwin *v.* Hale, 1 Wal. 223, was accepted, but held not to rule the above case. See, also, Kelly *v.* Drury, 9 Allen, 27.

[5] Sturges *v.* Crowninshield, 4 Wheat. 122; Farmers' & Mech. Bk. *v.* Smith, 6 Wheat. 131.

[6] Infra, § 804. The question is the same as that discussed supra, §§ 387–389, 390. If we had a perfect cosmopolitan system of bankruptcy, a dis-



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another state.[1] If it did, all that would be necessary for a debtor to get rid of his debts would be for him to visit a state which takes bankrupt jurisdiction over mere visitors, and there be discharged.[2]

Otherwise as to discharges in special forum or common domicil.

§ 532. It is otherwise, however, when the discharge is in the special forum of the debt (*i. e.* the creditor's domicil),[3] or, *a fortiori*, in a state which is the common domicil of the parties,[4] or in a state to whose common bankrupt law all parties are subject.[5] The question is analogous to that which is presented when a foreign divorce is set up. The divorce, to be valid, must be by a tribunal to which the parties are internationally subject.[6] A party, however, who ratifies a bankrupt procedure by appearing and claiming under it is barred by its decrees.[7]

Distinctive Roman law.

§ 533. The *lex Julia*, passed under Julius Cæsar, prescribed for insolvent debtors the *cessio bonorum*, which relieved them from imprisonment on condition of their assigning their estates to their creditors. The debt, however, was not released until the creditors were fully paid; but the debtor was thenceforth privileged from imprisonment for these particular

charge in one state would be a bar to suits in other states for all classes of debts. But there is no cosmopolitan system of bankruptcy. On the contrary, there is no European state which does not permit bankrupt process to be issued against any temporary resident who may be in embarrassed circumstances. Decrees based on such process are entitled to no greater effect than are local attachments. To this purport see Westlake (1880), § 224. Supra, § 390; infra, §§ 794, 804; 6 South. Law Rev. 690.

[1] Phillips *v.* Allen, 8 B. & C. 477; Lewis *v.* Owen, 4 B. & Ald. 657; Smith *v.* Buchanan, 1 East, 86; Quin *v.* Keefe, 2 H. Bl. 553; McMillan *v.* *v.* McNeill, 4 Wheat. 209; Green *v.* Sarmiento, 3 Wash. C. C. 17; Zarago, in re, 1 N. Y. Leg. Obs. 40, note; Saunders *v.* Williams, 5 N. H. 215; Munroe *v.* Guilleaume, 3 Keyes (N. Y.), 30; Banks *v.* Greenleaf, 6 Call, 271; 1 Hughes, 261. For other cases see infra, § 804.

[2] See supra, §§ 387 *et seq.*; infra, § 804. Bar, in his review of the first edition of this work (p. 36), maintains that a bankrupt discharge, to be binding, should emanate from the jurisdiction to which the obligation is subject.

[3] Potter *v.* Brown, 5 East, 124; Gardiner *v.* Houghton, 2 B. & S. 743.

[4] Supra, § 369.

[5] Ellis *v.* McHenry, L. R. 6 C. P. 228; Simpson *v.* Mirabita, L. R. 4 Q. B. 25. In May *v.* Breed, 7 Cush. 15, it was held that a discharge in the place where the debt was contracted and is payable has ubiquitous effect. But see supra, § 527, indicating overruling.

[6] See supra, § 235.

[7] Bartley *v.* Hodges, 1 B. & S. 375. Supra, §§ 353 *a*, 528.



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debts. His future earnings were attachable for such debts, — exempting, however, what was needed for his subsistence. The *cessio bonorum* has been adopted in Scotland,[1] in France,[2] and in Spain and Holland.[3]

This subject, however, is reserved for fuller consideration under a future head.[4]

### 2. *Statute of Limitations.*

Conflicts between statutes of different grades.

§ 534. When there are two or more possibly applicatory local codes, with different provisions as to the outlawry or limitation (*Klagverjährung*) of contracts, the question arises as to which law is to prevail. Suppose different statutes of limitation or of prescription exist in the place where the suit was brought, and that in which the contract was executed, and that in which it was to be performed: which is to prevail?

When statutes are processual *lex fori* governs.

§ 535. The weight of authority is, that when laws of limitation are laws of process, they are to be governed by the law of the jurisdiction in which the suit is brought, without regard to the local law applicatory to the contract itself. Of this view are Huber,[5] Weber,[6] and (though somewhat hesitatingly) Fœlix,[7] among civilians; and the same course is followed by most English and American judges and jurists.[8]

[1] Mackenzie's Rom. Law, 341.

[2] Code de Proc. Civ. arts. 898, 906.

[3] Phil. iv. 568. Infra, § 794.

[4] Infra, §§ 794 *et seq.*

[5] De Conflictu Legum, etc. § 7.

[6] Natürliche Verbindlichkeit, § 95.

[7] Du droit int. privé, pp. 147–149.

The distinction in the text is condemned by Prof. Bar, in his review of the first edition of this work, p. 36. His objection is, that this distinction assumes that statutes of limitation are laws of process, which they are not; and that it is irrational to ascribe validity to a foreign law when its prescriptions are strong, and to refuse validity to a foreign law when its prescriptions are weak. See Fiore, App. 686 *et seq.*

[8] Westlake, 1880, p. 253; Story, § 576; Phil. iv. p. 573; Parsons on Contracts (5th ed.), p. 590. The following cases, English and American, may be cited to the same effect: Williams *v.* Jones, 13 East, 439; Huber *v.* Steiner, 2 Bing. N. C. 202; 2 Cr. & M. 629; Don *v.* Lippman, 5 Cl. & F. 1; Ruckmaboye *v.* Lulloobhy Mottichund, 8 Moore P. C. 4; De la Vega *v.* Vianna, 1 B. & A. 287; British Linen Co. *v.* Drummond, 10 B. & C. 903; Fergusson *v.* Fyffe, 8 Cl. & F. 121; Van Reimsdyk *v.* Kane, 1 Gallis. 371; Le Roy *v.* Crowninshield, 2 Mason, 151; Hinkley *v.* Marean, 3 Mason, 88; Titus *v.* Hobart, 5 Mason, 378; Bank U. S. *v.* Donally, 8 Pet. 361; McElmoyle *v.* Cohen, 13 Pet. 312; Town-



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§ 536. As will presently be seen more fully, the distinction between statutes suspending the remedy and statutes barring the debt is acknowledged in all jurisprudences; and statutes of the latter class may be pleaded in bar of the debt, although in the state to which the debt is subject it is still in force.[1]

Where *lex fori* outlaws debt it is barred.

§ 537. The converse, also, is true, that where by the *lex fori* a debt is not outlawed, it is no defence that by the law to which the debt is subject it is processually barred.[2] Hence it has been ruled that the statute of limitations of another state, when going merely to process, is not a bar to an action in New York, though both parties have been residents of the other state since the cause of action accrued, and though the claim is barred by the statute of limitations of such state, and would have been barred in New York if the defendant had been within the state since the cause of action first accrued, and had been amenable to process.[3] And it has been argued in Mississippi, in an opinion of great merit, that although the parties had both lived in the state to which the debt was subject until in that state the statute had taken effect, yet such statute could not be set up in Mississippi, where the *lex fori* must determine.[4]

Where *lex fori* continues debt it is not barred by foreign processual statute.

send *v.* Jamison, 9 How. 414; Thibodeau *v.* Levasseur, 36 Me. 362; Paine *v.* Drew, 44 N. H. 306; Pearsall *v.* Dwight, 2 Mass. 84; Tappan *v.* Parr, 15 Mass. 419; Carver *v.* Adams, 38 Vt. 500; Woodbridge *v.* Wright, 3 Conn. 523; Atwater *v.* Townsend, 4 Conn. 47; Medbury *v.* Hopkins, 3 Conn. 472; Nash *v.* Tupper, 1 Caines, 402; Smith *v.* Spinolla, 2 Johns. 198; Ruggles *v.* Keeler, 3 Johns. 263; Peck *v.* Hozier, 14 Johns. 346; Whittemore *v.* Adams, 2 Cowen, 626; De Couche *v.* Savetier, 3 Johns. Ch. 190; Gans *v.* Frank, 36 Barb. 320; Lincoln *v.* Battelle, 6 Wend. 475; Power *v.* Hathaway, 43 Barb. 21; Carpentier *v.* Minturn, 6 Lans. 56; Miller *v.* Brenham, 68 N. Y. 83; Bruce *v.* Luck, 4 Greene (Iowa), 143; Fletcher *v.* Spaulding, 9 Minn. 64; Bigelow *v.* Ames, 18 Minn. 537; McArthur *v.* Goddin, 12 Bush, 274; Brown *v.* Stone, 4 La. An. 235.

[1] Infra, § 538; British Linen Co. *v.* Drummond, 10 B. & C. 903; Pardo *v.* Bingham, L. R. 6 Eq. 485; L. R. 4 Ch. Ap. 735. See Hawse *v.* Burgmire, 4 Col. 513; Bonnifield *v.* Price, 1 Wy. Terr. 223, and cases cited to § 535.

[2] Huber *v.* Steiner, 2 Bing. N. C. 202; 2 Scott, 304; Harris *v.* Quine, L. R. 4 Q. B. 653; Paine *v.* Drew, 44 N. H. 306.

[3] Power *v.* Hathaway, 43 Barb. 214; S. P., Bulger *v.* Roche, 11 Pick. 36. To same effect see Townsend *v.* Jamison, 9 How. U. S. 407. See comments in Story, § 582 *b*.

[4] Perkins *v.* Gay, 55 Miss. 153. As to statute in Iowa, by which a party



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§ 538. But a different question arises as to the effect, on a suit brought in England or the United States, of the bar of a foreign statute of limitations which goes not merely to suspend the right of action, but to extinguish the debt. Suppose the obligor and the obligee are domiciled in such foreign country while the obligation was incurred, and during the whole period of the running of the statute. Is the statute, in such cases, a bar? Judge Story [1] argues that it is. And this conclusion is correct.[2] Where a debt is subject to the jurisdiction of a state, such state, on the reasoning above given, has power to limit or even extinguish such debt.[3]

Distinction as to statute extinguishing debt.

§ 539. Admitting, however, that a statute thus extinguishing a debt is effective everywhere, so far as concerns debts subject to the state enacting the statute, the question next to be considered is, What constitutes subjection, in this sense, of a debt to a state? And the answer must be that debts payable to a domiciled citizen of a state are subject to the legislation of such state, but subject to no other legislation.[4] Hence we must hold that where a statute of limitations extinguishes all debts due subjects of the enacting state, such debts are everywhere extinguished. And this view is accepted by Fiore,[5] Savigny,[6] and Demangeat.[7]

Such statutes bind as to debts due subjects.

may avail himself of foreign statute of limitation, see Davis *v.* Harper, 48 Iowa, 513.

[1] § 582, citing Beckford *v.* Wade, 17 Ves. 88; Huber *v.* Steiner, 2 Bing. (N. C.) 202; Newby *v.* Blakeley, 3 Hen. & Mun. 57; Brent *v.* Chapman, 5 Cranch, 358; Shelby *v.* Guy, 11 Wheat. 361. But see Lord Dudley *v.* Warde, Ambler R. 113. Compare Don *v.* Lippman, 5 Cl. & F. 1, and cases cited supra, § 536. The same view is taken in Gans *v.* Frank, 36 Barb. 320; and in Rucks *v.* Taylor, 47 Miss. 191.

[2] Lincoln *v.* Battelle, 6 Wend. 475; Brown *v.* Parker, 28 Wis. 21.

[3] Supra, § 536; Ang. on Lim. § 66.

[4] Supra, §§ 359, 526.

[5] Op. cit. § 295.

[6] VIII. p. 271.

[7] Condit. des étrangers, p. 358.

See, as tending to the same result, Page *v.* Melvin, 10 Gray, 208.

In Belgium statutes of limitation extinguishing a claim are held to be governed by the law of the domicil of the debtor. Jour. du droit int. privé for 1874, p. 142. In a note to this ruling the editor thus classifies the laws which have been appealed to to settle this question:—

(1.) The law of the creditor's domicil.

(2.) The law of the debtor's domicil.

(3.) The law of the place of payment.

(4.) The *lex fori*.

(5.) The *lex loci contractus*.

The latter view, it is added, is prev-



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§ 540. If a debt is thus extinguished in the state to one of whose subjects it is due, it cannot be afterwards revived in another state. Of this rule the following illustration may be given. The Act of Congress of 1870, c. 59, regulating the rate of interest in the District of Columbia, allows the recovery back of all interest paid when more has been exacted than is permitted by the act, provided suit be brought for such purpose within one year after such payment. This statute may be regarded as extinguishing a claim for the recovery of usurious interest unless suit be brought within a year. A case was litigated in Maryland in 1876,[1] in which the defendant pleaded as a set-off, usurious interest alleged to have been paid to the plaintiff by the defendant when both were domiciled in the District of Columbia. The court held that the right to recover the illegal interest being given by the act of Congress must be subject to the terms prescribed by that act as to the time within which the right must be asserted, and that the sums being paid by the defendant in the District of Columbia more than one year before the filing of the plea of set-off, could not be abated from the plaintiff's claim.[2]

Nor can such debts be afterwards elsewhere revived.

§ 541. It has been determined, both in England and the

alent in France. See Demangeat s. Fœlix, i. p. 241; Massé, 3d ed. p. 590. But see Jour. du droit int. privé, 1874, p. 333, giving a judgment of the French Court of Cassation, that in such cases the *lex domicilii* of the debtor is to prevail. This may be under the French Code. But under our system the *lex domicilii* of the creditor must, as in the parallel case of bankruptcy, be its standard. And the weight even of French authority now is that the *lex domicilii* of the creditor determines.

Prof. Bar, in his work on Private International Law, took the ground that the *lex domicilii* of the debtor was to supply the rule as to the outlawry (Verjährung) of obligations. The reason given was that the statutes of limitations, thus outlawing obligations, are for the relief of debtors, and that such being the case the law of the debtor's domicil is the only law that can be applied. In a review of the first edition of my work, however, published by this eminent jurist in 1873 (p. 35), he states that his opinion in this respect is now changed; and he now holds that the law which is to determine as to the extinction of an obligation must be the law under which this obligation is constituted, which is the creditor's domicil.

[1] Eastwood *v.* Kennedy, 44 Md. 563.

[2] Stewart, J., in his opinion, cited De Wolf *v.* Johnson, 10 Wheat. 367; Varick *v.* Crane, 18 N. J. Ch. (3 Green) 128; Smith *v.* Bank, 29 Ind. 258; Newman *v.* Kershaw, 10 Wis. 333; Turpin *v.* Powell, 8 Leigh, 93; Goodman *v.* Munks, 8 Port. 84; Fears *v.* Sykes, 35 Miss. 633.



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United States, that the restrictions and limitations imposed by the *lex fori* apply to a suit brought on a foreign judgment.[1] Limitations bind foreign judgment.

§ 541 *a*. So far as concerns its own domiciled citizens, it is within the power of a state, subject to its own constitutional prescriptions, to prescribe other lines of limitation than that based on the domicil of the debtor.[2] Distinctive state provisions.

§ 542. A statute which provides that a party shall be "precluded from maintaining any action upon a claim," which he has neglected to plead in a former suit with the party against whom he has the claim, has been ruled to be local, so that it cannot be pleaded as a defence to claims due in other jurisdictions;[3] though it would be otherwise when the defendant in the former suit appeared at the trial, and the set-off was not one which he was at liberty to reserve.[4] Statutes as to set-offs not extra-territorial.

§ 543. The statute of the fourth of Anne (c. 16, s. 19), which has been adopted in most of the United States, enacts that if any person against whom there shall be a cause of action shall, at the time when such cause of action accrues, be beyond the seas, then the action may be brought at any time within six years after his return. This has been construed to apply to foreigners, so that the statute does not begin to run as to them until they arrive in the state in which such statute is in force.[5] And this view obtains even where the defendant had, prior to his personal arrival, a business agent in the state where the suit was brought.[6] Exception to statute of limitations applies to foreigners.

§ 544. In New York it has been decided, after a long struggle, that a foreign corporation sued in that state cannot avail itself

[1] Don *v.* Lippman, 5 Cl. & F. 1; McElmoyle *v.* Cohen, 13 Peters, 312; Loveland *v.* Davidson, 3 Penn. L. J. R. 377. Infra, § 646.

[2] State *v.* Todd, 1 Biss. 69; Van Dorn *v.* Bodley, 38 Ind. 402; Harris *v.* Harris, 38 Ind. 403; Gillett *v.* Hill, 32 Iowa, 220; Hoggett *v.* Emerson, 8 Kan. 262.

[3] Infra, § 788; Carver *v.* Adams, 38 Vt. 500. See Whart. on Ev. §§ 789 *et seq.*

[4] Whart. on Ev. §§ 789–91.

[5] Strithorst *v.* Græme, 3 Wilson, 142; 2 W. Bl. 723; Lafonde *v.* Ruddock, 13 C. B. 839; Dunning *v.* Chamberlin, 6 Vt. 127; Graves *v.* Weeks, 19 Vt. 178; Hall *v.* Little, 14 Mass. 203; Chomqua *v.* Mason, 1 Gallis. 342; Ruggles *v.* Keeler, 3 Johns. 263; King *v.* Lane, 7 Mo. 241; Tagart *v.* State, 15 Mo. 209. See U. S. *v.* O'Brien, 3 Dill. 381.

[6] Wilson *v.* Appleton, 17 Mass. 180; 3 Parsons on Cont. (5th ed.) 96.



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of the New York statute of limitations.[1] But this is a matter of distinctive legislation. If a foreign corporation be admitted at all as a party, it is, at common law, entitled to all the privileges the *lex fori* gives.

Question as to foreign corporations.

§ 545. The views of English and American courts, as has been seen, are based on the principle that questions of limitation as touching the *remedy*, are to be determined by the *lex fori*. But it is important to observe, in reference to suits brought in Germany, that in that country, at least, the principle so enunciated does not prevail. It is held by Savigny, following, in this respect, Wächter, Schäffner, and Hertius, that the local law of the obligation itself, and not that of the place where the suit is brought, is to obtain.[2] But however worthy these opinions may be of consideration, they cannot now affect the conclusion of our courts, that as to the statute of limitations the *lex fori* must prevail. The rule is now too firmly settled to be shaken.

In Germany the law of the obligation prevails.

### XI. ASSIGNMENT OF OBLIGATIONS.

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How negotiable paper is transferred, §§ 447 *et seq.*

Whether assignee can sue, §§ 735 *et seq.*

[1] Thompson v. Tioga R. R. 36 Barbour, 79; overruling Faulkner v. Delaware & Raritan Canal Co. 1 Denio, 141.

[2] Savigny, Röm. Recht, v. § 237; Hert. De Collisione Legum, § 65; Wächter, ii. p. 408; Schäffner, ii. § 87. On this subject reference may be made to the remarks of Lord President Campbell (Watson v. Benton, Bell's (8vo) Ca. 108), cited in Guthrie's Savigny, p 221.



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# CHAPTER IX.

## SUCCESSION, WILLS, AND ADMINISTRATION.


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## I. THEORY OF THE ROMAN LAW.

*Successio per universitatem* the basis of the Roman law.

§ 548. The foundation of the existing Roman law of succession is the *successio per universitatem*. "*Haereditas est successio in universum jus quod defunctus habuit.*" According to the Roman economy, the individual man, who, as the head of a family, was invested with an estate, became an artificial person, who continued to exist, for the



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purpose of succession, after his death. Hence, whatever law governed the owner, was held to govern the devolution, after his death, of his whole estate, in all its particles, and both as to its debits and credits. And when ultimately the law of domicil became the exclusive law as to the owner, the law of domicil became the exclusive law as to succession on the owner's death.[1]

Principle based on the supremacy of home.

§ 549. We have already seen [2] that the exception establishing the dominancy of the *lex domicilii* over the *lex rei sitae* in matters concerning marriage settlement and succession is based on the supreme importance attached by the Roman law, as well as by our own, to the maintenance of home. Goods, when transferred as matters of bargain and sale, are governed by the *lex situs*.[3] But when they are massed for the purpose of maintaining the marital relation, or of preserving a family, after the death of one of its heads, until the period of final distribution has passed, then the *lex domicilii* prevails, as the only way by which the assets to be distributed can be brought under the dominion of an equal and consistent law.[4]

Extreme consequences drawn by classical jurists.

§ 550. The logical exactness of the classical Roman jurists, however, pushed the doctrine of universal succession to consequences which have been abandoned even by those modern codes which maintain the doctrine in its essential features. Some of these consequences are the following: First, the delation as well as the acquisition or repudiation of an inheritance must be *in solidum*, and not *pro parte*. It must descend, either as a whole or not at all. The maxim was, *Nemo pro parte testatus pro parte intestatus decedere potest.* Secondly, the same rule of entirety was applied to the heir's liability for debts. He was to be liable for the whole, if he took the inheritance. It is true that Justinian modified this by his *beneficium inventarii;* but this was only a partial relief. Thirdly, as a result of this, the assumption of an estate required a distinct act of acceptance by the heir. He must elect to accept or reject. And fourthly, singular succession, through special legacies, pre-

[1] Supra, §§ 273, 275 *d*, 294, 344. The Roman law in this respect is lucidly given by Sir H. Maine, in his Treatise on Ancient Law, 4th Lond. ed. (1870) p. 177 *et seq.*

[2] Supra, §§ 20 *et seq.*

[3] Supra, § 297.

[4] Supra, § 20.



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sumed a superior universal succession in the heir; the legatee taking as a sort of beneficiary, subsequent to, and through the agency of the heir.

§ 551. These consequences the later Roman jurists repudiated. It is true the general principle of the unity of universal succession was still maintained; but it was maintained subject to exceptions. Feudal estates, military munitions, paraphernalia, formed subjects of singular succession. Hence it became necessary to limit the heir's liability to the amount of the estate he actually received.[1]

These consequences afterwards repudiated.

§ 552. If, in modern law, the idea of the absorption of the family in its head has faded away, other circumstances have come in to sustain, in a modified shape, the theory of universal succession. We do not feel, it is true, so strongly the importance of the father's patriarchal power. Municipal laws, school establishments, social opinion, have succeeded to a large part of that jurisdiction which, in primitive days, could be asserted by the father alone. The necessities, also, of new communities, taking with them those institutions which make children the wards of the commonwealth, have led to an earlier and more complete emancipation from paternal control. On the other hand, while the father's importance, as the sole representative of the family, has been thus circumscribed, the theory of the continuity of the family itself, in the advance of civilization, has acquired increased practical weight. It is remarkable, in fact, that this has occurred in countries, such as England and the United States, where the influence of the Roman law has been least felt. With us, the family, in all cases of intestacy, is provided for as a group; and this feature has become more prominent by the gradual depression of primogeniture. With us, the surviving husband or wife has an interest more or less absolute in the marital estate, and is not in the naked position of a commercial partner, as with the Roman law. On the other hand, the family has been divested of the *damnosa haereditas* of debts. These touch the assets, but not the heir. The family takes the real estate immediately, and the personalty, after the debts are satisfied. The law says, "We

Solidarity of family recognized in England and the United States.

[1] See Bruns on Roman law, § 88, contributed to Holtzendorff's Encyclopädie der Rechtswissenschaft, Leipzig, 1870.



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recognize you as in your own persons the successors of your deceased ancestor. But, in order to prevent conflict and promote speed, we appoint a public officer who is to see that the claims of third parties are properly settled, at the period when this new devolution of the estate commences. This officer, on the principle of *universal* succession, represents your ancestor until his debts are paid and the plan of distribution settled. But at once, on the principle of *singular* succession, the real estate and the exempted personalty go to you."

Universal succession qualified by the introduction as to specific objects of particular succession.

§ 553. Such, as will be seen more fully hereafter, is the position, not merely of the English and American, but of the French and of the old German law. Undoubtedly, so far as logical exactness is concerned, the old Roman law has claims to which a merely speculative jurisprudence will always bow. Wherever universal succession obtains, there the law of the decedent's domicil, in all matters of distribution and descent, must prescribe an absolute and universal law. But, on the other hand, it is equally difficult to avoid the conclusion that where singular succession exists, there the *lex rei sitae* must be the arbiter. If specific items of property are to be disentangled from the mass of a decedent's estate, — then, viewing them singly, they revert to the dominion of the *lex rei sitae*.[1] To that law they are from the nature of things subject. They are only withdrawn from it when, for the purpose of settling a decedent's estate, it is necessary to seize upon some common principle of distribution, which, in such case, the law of domicil alone can supply. The latter view is conceded, as will be seen, by the English common law, with regard to personal property generally; which, as the fund primarily liable for the payment of debts, goes to the executor or administrator, and is governed by the law of the decedent's domicil. But this reasoning does not apply to articles of property which the state thinks proper to place in a specific line of distribution, into which, relieved from the decedent's debts, they are immediately to pass.[2]

[1] See infra, § 571.

[2] As to exemption laws, and laws prohibiting total disinheritance see infra, §§ 584, 598, 791.



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II. THEORIES OF THE MODERN LAW.

Theory that succession, both as to movables and immovables, is governed by *lex rei sitae.*

§ 554. The fiction of universal succession, as it existed among the classical jurists, assumed, as we have just seen, that the individuality of the decedent continued, for juridical purposes, to exist after his death, in the person of his heir. In the reaction of feudalism, however, not only were immovables, but by some authorities movables, held to be subject in succession to the *lex situs.*[1]

Theory that succession is generally governed by the *lex domicilii.*

§ 555. That the law of last domicil is to determine all questions of succession is now generally held by German jurists. Among those who maintain this view may be mentioned Wächter,[2] Glück,[3] Martin,[4] Eichhorn,[5] Mittermaier,[6] Savigny,[7] Bluntschli,[8] Thöl,[9] Unger,[10] Göschen,[11] and, with the modifications heretofore mentioned, Bruns.[12] It has also been sustained, so far as concerns movables, by the practice of the highest German courts.[13]

It should be observed that it is actual domicil, not allegiance or residence, that is in Germany the test.[14]

[1] Bar enumerates the following jurists as holding, at least as to singular succession, to the supremacy of the *lex rei sitae.* Bald. Ubald. in L. i. C. de S. Trin.; Molinæus, in L. i. C. de S. Trin.; Argentræus, No. 24; Burgundus, ii. 16; Rodenburg, ii. § 1; Abraham a Wesel, De Connub. bon. societate, Tract. i. 1, No. 118; Christianæus, Decis. Fris ii. dec. 4, No. 2, iv. 8, defin. 7; Petrus de Bellapertica, in L. i. C. de S. Trin.; Vinnius, Select. Jur. quaest. ii. c. 19; P. Voet, ix. 1, No. 3; No. 50; Mevius, Decis. ii. 99; Mynsinger, Observ. Cent. v. obs. 19; Cocceji, de fund. vii. 14, 19; Carpzov, Defin. for. P. iii. const. 12, def. 12; J. Voet, de stat. § 21, and in Dig. 38, 17, No. 25; Boullenois, i. p. 223; ii. p. 383; Hofacker, Princip. § 140; Ricci, p. 550; Kori, Erört. iii. p. 19; Mailheur de Chassat, No. 28, No. 58, No. 292; Demangeat on Fœlix, i. p. 128. By the more recent of these writers, however, the supremacy of the *lex rei sitae* is maintained on the assumption that it accepts, by comity, the *lex domicilii* so far as concerns movables.

[2] Collision der Privatgesetze, ii. 192–198.

[3] Intestaterbfolge, § 42.

[4] Rechtsgutachten der Heidelberger Fakultät, B. 1, s. 175.

[5] Deutsches Recht, § 35.

[6] Deutsches Recht, § 32.

[7] Röm. Recht, § 376.

[8] I. § 12, v.

[9] § 79.

[10] I. p. 199.

[11] Civilr. i. p. 112.

[12] Supra, § 551.

[13] Savigny quotes in illustration, Gericht zu Cassell, 1810; Seuffert, Archiv. B. 1, N. 92.

[14] Bar, § 127, note 22 *a*, citing a decision of the Supreme Court at Lübeck, March 21, 1861.



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§ 556. This view is declared by Savigny to be defended, not merely by the Romanists, in deference to the theory of universal succession, but by the exponents of distinctively German jurisprudence, on the ground that by no other theory can national prosperity and personal justice be subserved. In cases of intestacy, he argues that it is a presumption of law that each person should expect his estate to descend according to the family system of the state in which he is voluntarily domiciled.

Savigny's argument from presumed intent.

§ 557. It must, however, be observed, that this argument does not apply to land. The owner, for instance, of goods *in transitu* from market to market may well be supposed to be ignorant of the succession laws of the various territories in which they may happen to be severally arrested by his death. But it is otherwise, generally speaking, with land, which a party cannot, except in rare instances, purchase without deliberate formalities; which, when accepted by him, is stationary, giving him opportunity to examine the laws by which it is affected; and which, from its comparative larger value and importance, is likely to provoke him to such examination.

This argument does not apply to land.

§ 558. It is also argued by Savigny, in defence of his view, that if it be not accepted, no prudent father would hazard his property in commercial ventures, the result of which would be, in case of his death, not merely to introduce inextricable confusion into the settlement of his estate, but to ultimately pass it to undesired heirs (*unerwünschte Erben*). But land, not being a subject of international commerce, is not within the operation of this reasoning.[1]

So as to argument from the necessities of commerce.

§ 559. Fiore,[2] following to its extremest consequences the nationality theory of the Italian school, insists that even as to succession, the nationality of the deceased should

Theory that nationality in

[1] In Spain the law determining the succession of immovables as well of movables is the law of the nationality of the deceased. Jour. du droit int. privé, 1874, p. 44. How far this rule is established elsewhere is discussed in the same journal, 1875, p. 52. It has been held by the Spanish Supreme Court, that the law which governs the distribution of Spanish immovables belonging to the estate of a Frenchman dying in France is to be the French law, though in conflict with the law obtaining in Spain. Jour. du droit int. privé, 1874, p. 40.

[2] Op. cit. § 394. See, also, Jour. du droit int. privé, 1875, p. 51.



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all cases determines.

supply the controlling law. The objections to this view have been already stated.[1]

Theory that immovables are governed by *lex rei sitae*.

§ 560. We have already noticed that the reasons which bear so strongly in favor of the subjection of movables in such case to the law of domicil cease to apply with anything like the same force to real estate. And in fact, if, as we assume with Savigny, as will presently be seen, that the law of domicil is in all cases to yield to local laws resting on national policy or morality, it will require only a nominal divergence from that great jurist to withdraw all real estate, in countries such as France, England, and the United States, from the category of property to which the law of domicil arbitrarily applies. But however this may be, the law both in England, the United States, and France is clearly settled, that in those countries, in matters of succession, realty is governed by the *lex rei sitae*.[2]

[1] Supra, §§ 7, 8.

An elaborate analysis of the French Code in relation to succession, and an examination of the conflicting interpretations it has received, will be found in Brocher, Droit int. privé, pp. 253 *et seq.* A valuable article on the French law of intestate succession by M. Renault will be found in the Jour. du droit int. privé for 1875, pp. 329, 422 *et seq.* That the *lex domicilii* controls as to movables, see Forgo *v.* Domaine, Sup. Ct. Pau, 1874, Jour. du droit int. privé, 1875, pp. 357–8.

By the French statute of July 14, 1819, the French heirs of a foreigner who has died in France are entitled to receive, out of his estate in France, a portion equal to that from which they are prevented, by the *lex rei sitae*, from receiving from his estate situated abroad. In such case the law determining the rights of the French heir must be the law of France. But where all the heirs are foreigners, then the personal law of the deceased must prevail. Jour. du droit int. privé, 1874, pp. 182–3, 1878, p. 611. Demolombe, Des Successions, ii. 282; Westlake (1880), § 146.

The French Code directs that the succession of real estate in France should be governed exclusively by French law, even though all the parties are foreigners, and the Court of Pau, in consequence, refused an exequatur to a foreign sentence, which, in opposition to the French law, decreed French immovables to first cousins instead of to aunts. Jour. du droit int. privé, 1874, p. 79, 1875, p. 192.

"Une succession purement mobilière doit être régie par le statut personnel du *de cujus*." Trib. civ. Seine, 14 May, 1878, and other cases cited in Jour. du droit int. privé, 1879, p. 285.

In Germany and Austria real estate is governed by the *lex rei sitae*. Bar, p. 189; Fœlix, i. No. 59; Savigny, viii. p. 169; though speculatively the doctrine is much questioned. Ibid. As to the construction of the Italian Code, which apparently sanctions the same view, see Laurent, ii. 310.

[2] Supra, §§ 273–275 *d*; Phil. iv.



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Hence, where a local statute requires that to enable a foreign will to affect real estate, such will must be recorded in the country where the land is situate, the requisitions of the statute must be strictly complied with, or the will is inoperative.[1]

The question, also, whether foreign real estate is bound by a decedent's debts is to be determined by the *lex rei sitae*. And this rule is applied in cases of distribution of a decedent's estate either by will or under intestate statutes.[2] This principle, however, "may be modified (1.) by the rule that the construction of a will depends upon the law of the domicil of the deceased; (2.) by a personal equity affecting the heir."[3] Where a testator undertakes to dispose of foreign real estate by a will not duly executed under the *lex rei sitae*, and where by the will the heir at law of the real estate receives a legacy, he will not be entitled to take the legacy, and at the same time claim the real estate as heir at law. He will be put to his election as to which he will take.[4]

And movables by *lex domicilii*.

§ 561. With this recognition of the absolute control of the *lex rei sitae* over immovables is coupled, in England and the United States, an equally emphatic recognition of the law of the last domicil as governing succession as to movables.[5]

pp. 627, 635; Westlake (1880), § 146; Story, § 483; Burge, iv. p. 154; Redfield on Wills (3d ed.), i. chap. ix.; Coppin *v.* Coppin, 2 P. Wms. 291; Birtwhistle *v.* Vardill, 5 Barn. & Cr. 451; 9 Bligh R. 479, note; 1 Rob. R. 627; U. S. *v.* Crosby, 7 Cranch, 115; Kerr *v.* Moon, 9 Wheat. 565; McCormick *v.* Sullivant, 10 Wheat. 192; Darby *v.* Mayer, Ibid. 465; Hosford *v.* Nichols, 1 Paige, 220; Cutter *v.* Davenport, 1 Pick. 81; Lucas *v.* Tucker, 17 Ind. 41; Dunbar *v.* Dunbar, 5 La. Ann. 159; Applegate *v.* Smith, 31 Mo. 166; Holman *v.* Hopkins, 27 Tex. 38.

[1] Kerr *v.* Moon, 9 Wheat. 565; O'Brien *v.* Woody, 4 McLean, 75; Carr *v.* Lowe, 7 Heisk. 84. Infra, § 583.

[2] Harrison *v.* Harrison, L. R. 8 Ch. 342.

[3] Foote's Priv. Int. Jur. 1878, pp. 146, 151, citing Buccleuch *v.* Hoare, 4 Mad. 467; Cust *v.* Goring, 18 Beav. 383; but see supra, § 597.

[4] Dewar *v.* Maitland, L. R. 2 Eq. 834; Orrell *v.* Orrell, L. R. 6 Ch. 302; Johnson *v.* Telfourd, 1 Rus. & M. 254.

[5] Potter *v.* Brown, 5 East, 130; Sill *v.* Worswick, 1 H. Black. 690; Price *v.* Dewhurst, 4 Mylne & C. 76; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Robins *v.* Dolphin, 1 Swaby & Trist. 37; Laneuville *v.* Anderson, 2 Swaby & Trist. 24; Enohin *v.* Wylie, 10 H. L. Cases, 1; Dixon *v.* Ramsey, 3 Cranch, 319; Kerr *v.* Moon, 9 Wheaton, 565; Ennis *v.* Smith, 14 Howard U. S. 400; Harrison *v.* Nixon, 9 Peters, 483; Grattan *v.* Appleton, 3 Story, 755; Gilman *v.* Gilman, 52 Me. 165; Eyre *v.* Storer, 37 N. H.



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§ 562. It has been already shown that the division of a decedent's estate into two portions, one subjected to the law of his domicil, the other to the *lex rei sitae*, is not without a solid philosophic basis.[1] In this way, a home is ordinarily continued to a family after the decease of its head. And as there can be only a fixed quantity of land in a particular state, it is proper that this land should be held under the specific directions of the territorial sovereign in trust for the population by which it is inhabited.[2]

This distinction not merely feudal.

§ 563. The Roman law, by which the whole estate as a mass is swept into the vortex of a universal succession, is at first sight more favorable to a prompt

Nor unfavorable to prompt liquidation.

114; Holmes *v.* Remsen, 4 Johns. C. R. 460; Moultrie *v.* Hunt, 23 N. Y. 374; Bascom *v.* Albertson, 34 N. Y. 584; Suarez *v.* Mayor, 2 Sandf. Ch. 173; Knox *v.* Jones, 47 N. Y. 389; Mercure's Est. 1 Tuck. (N. Y.) 288; Freeman's Est. 68 Penn. St. 151; Page's Est. 75 Penn. St. 88; Desesbats *v.* Berquiers, 1 Binney, 336; Noonan *v.* Kemp, 34 Md. 73; Swearingen *v.* Morns, 14 Ohio (N. S.), 424; Converse *v.* Starr, 23 Oh. St. 491; Johnson *v.* Copeland, 35 Ala. 521; Lingen *v.* Lingen, 45 Ala. 410; Abston *v.* Abston, 15 La. An. 137; Hill *v.* Townsend, 24 Tex. 575; Danelli *v.* Danelli, 4 Bush (Ky.), 51.

In Massachusetts (Gen. Stat. c. 92, § 8), it is provided that a will made out of the state, which might be proved and allowed according to the laws of the state or country in which it was made, may be proved, allowed, and recorded in Massachusetts, and shall thereupon have the same effect as if it had been executed according to the laws of Massachusetts. See Bayley *v.* Bailey, 5 Cush. 245; Slocomb *v.* Slocomb, 13 Allen, 38. "In the latter case the law finds a good illustration. It was decided under the foregoing statute that a nuncupative will made in another state, which would not have been valid had it been executed in Massachusetts, but might be proved and allowed in the state in which it was made, might be proved, allowed, and recorded in Massachusetts, having the same effect as any valid will, duly proved in that state. In many other states provision has been made by statute for allowing and recording foreign wills, or wills made in sister states, according to the laws of the place where made. Thus, the record of a will, with the proof of it and the letters issued thereon, constitutes the probate of it in New Jersey, and entitles a New Jersey will to be filed for probate in Michigan. Wilt *v.* Cutler, 38 Mich. 189. See Irwin's Appeal, 33 Conn. 128; Manuel *v.* Manuel, 13 Oh. St. 458; State *v.* M'Glynn, 20 Cal. 233." Jarman on Wills (Bigelow's ed. 1881), 1, note.

In Virginia, it has been ruled that a will of lands in that state may be proved there, although it has been declared void in another state, where the testator resided. Rice *v.* Jones, 4 Call, 89; Morrison *v.* Campbell, 2 Rand. 217.

[1] Supra, §§ 548, 552.

[2] See supra, §§ 278 *et seq.*



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liquidation. Practically, as the law now exists in England and the United States, the creditor, after exhausting the personalty, is entitled to come upon the realty; so that between the two systems there is, in this respect, virtual harmony. But the English common law, as it obtains in most of our states, in confining the duties of administrators to the collection and distribution of personalty, is promotive of an earlier release of the estate than would be possible if real and personal property were thrown together. It says: "That which is more easily handled, and which is capable of being more readily transferred from country to country, we set apart for the payment of debts, and to this the fiction of universal succession is applied; the rest of the estate, relieved from this fiction, remains subject to the law of the place where it exists, and under whose law it was acquired." From the manageableness of the funds which go to the executor, an earlier settlement may be expected than would be the case if it were necessary to wait until the whole estate, real and personal, be fused into a mass for distribution.

Protects family interests.

§ 564. But as to heirs and successors, the promptness of application which results from the doctrine of singular succession works a great relief. The surviving wife has her dowry, the surviving husband his curtesy, the surviving family its homestead, the heirs their distinctive estates, and this at once, unembarrassed by any question of foreign law.

From law of domicil cases of territorial policy are excepted.

§ 565. It has already been argued that if we admit that a positive local law, based on distinctive national policy or morals, overrides the general principle of the applicability to successions of the law of domicil, it will be difficult to withdraw from this exception the land laws of England, the United States, and France.[1] And the same reasoning, as we have just noticed, and as will be hereafter more fully seen, applies to exemptions established by the local law, for the support of the family of the deceased, and, in the shape of inheritance taxes, for the support of government. Whether the estate be real or personal, the sovereign of the *situs* is entitled to say, "Before it leaves me it must pay such charges as I hold conducive to the well-being of the state and to the support of the

[1] See supra, § 557.



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family of the owner, resident, though not domiciled, on my soil."[1] The same distinction applies to perpetuities.[2]

This exception defended by Savigny.

§ 566. This exception is ably defended by Savigny, whose maintenance of the general applicability in succession to immovables of the law of domicil has already been noticed, and who copiously illustrates the distinction by German cases based on the laws encouraging peasant proprietorship.

Principle recognized in exemption laws.

§ 567. The same principle, of the supremacy of the *lex loci* in all matters of distinctive policy, is recognized in the United States.[3] Exemption and homestead acts, as are elsewhere noticed, are of this character,[4] their object being the welfare of the state and the relief of distress among families left suddenly destitute. Such laws operate equally in favor of non-domiciled and of domiciled residents. Nor can local creditors complain. They know, when they trust a man, that they trust him subject to this contingency.

Leaseholds are governed by *lex rei sitae.*

§ 567*a*. The validity of a testamentary disposition of a leasehold is governed by the law of the *situs*, and not by that of the testator's domicil.[5]

### III. PERSONAL CAPACITY OF TESTATOR.

By Savigny capacity must exist by law of solemnization and law of last domicil.

§ 568. So far as concerns a testator's *legal relations*, these may be viewed as two distinct periods of time: *first*, that of the making of the will; *second*, that of his death. Hence, when he changes his domicil between these two periods, the laws of two distinct places are to be considered; and according to Savigny the will is not valid unless good by the law of both domicils.[6]

Restrictions of Roman law.

§ 569. According to the Roman law, testamentary capacity is denied to the *Filiusfamilias*, to the *Latinus Junianus*, as well as to all classes of slaves.[7]

[1] Infra, § 791.

[2] Despard *v.* Churchill, 53 N. Y. 192.

[3] Mahorner *v.* Hooe, 9 Sm. & Mar. 247; Story, § 472 *a*.

[4] See infra, § 791.

[5] Supra, § 286. Freke *v.* Lord Carbery, L. R. 16 Eq. 461. See Despard *v.* Churchill, 53 N. Y. 192. Supra, § 565.

Hence, to enable a will to pass English leaseholds it must be executed in conformity with the *lex situs*. Jarman on Wills (Bigelow's ed. 1881), 4, note; Hood *v.* Barrington, L. R. 6 Eq. 218.

[6] VIII. §§ 377, 393.

[7] Gaius, i. §§ 23, 87; Ulpian, xx.



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§ 570. By the English common law, as held both in England and the United States, testamentary capacity, as to personalty, is governed by the law of the domicil of the testator at the time of his death.[1] As we will hereafter see, by statutes in England, and in most of our states, no change of domicil can avoid or affect a will which was valid by the law of the testator's domicil at the time of its execution.[2] So far as concerns real estate, the prevalent doctrine is that the testator's testamentary capacity is determined by the *lex rei sitae*.[3] If that law says that only certain portions of real estate can be alienated from the heirs at law, or that certain portions are to be reserved for the widow or children of the deceased, this controls all within the jurisdiction, though

With us domicil is the test as to personalty and *situs* as to realty.

§§ 8, 14. But see, on this point, Bar, § 108, p. 393.

[1] Supra, §§ 296–329; Story, § 465; 4 Burge, 577; Phil. iv. p. 627; Redfield, i. 386; Lawrence *v.* Kittredge, 21 Conn. 582; Schultz *v.* Dambmann, 3 Bradf. Sur. 379; Davison's Will, 1 Tuck. N. Y. 479; Cherry *v.* Speight, 28 Tex. 503.

The English rule is thus stated in Jarman on Wills (Bigelow's ed. 1881), p. 5 and note: —

"The English court *will* grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicil, though invalid and incapable of operation as an English will. Thus (Maravar, in re, 1 Hagg. 498) probate was granted of the will of a married lady, who at the time of her death was domiciled in Spain (of which country she was, it seems, also a native), on its being shown that by the Spanish law a *feme covert* may, under certain limitations, dispose of her property by will as a *feme sole*.

"And it is the constant practice of the court here to grant [ancillary] probate of wills of [testators domiciled in foreign countries] which have been previously proved there, without inquiring [or permitting inquiry] into the grounds of the [foreign] proceeding, though the bulk of the property of the deceased testator should happen to be in England. Head, in re, 1 Hagg. 474; Earl, in re, L. R. 1 P. & M. 4; Cosnahan, in re, L. R. 1 P. & M. 183."

[2] Infra, § 586.

[3] Bar, § 108. Thus the following authors, who hold strictly to the *lex rei sitae*, at least as to immovables, apply the test of the *lex rei sitae*, to the same extent, to testamentary capacity. Bartolus, Nos. 38–41; Burgundus, i. 45; P. Voet, De stat. iv. c. 3, § 12; Huber, § 15; Hert. iv. 22; Stockmanns, Decis. Brabant, 125, No. 10; Rodenburg, ii. 5, § 7; Merlin, Rép. Test. i. § 5, art. 2; 4 Burge, pp. 217, 220; Bornemann, Preussisches Civil Recht, i. p. 63. So by those who maintain the universality of the *lex domicilii* as to succession, the supremacy of the *lex domicilii* as to testamentary capacity, as to all forms of property, is vindicated. Hofacker, De off. § 24; Molinæus, in L. i. C. de S. Tr.; Bouhier, ch. 24, No. 91; Wächter, ii. p. 365; Thöl, Einl. § 79; Savigny, p. 311.



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the testator's domicil was in a land where no such restrictions obtain. And our own law is to the same effect.[1]

But domicil qualified by the *lex situs*.

§ 571. We have already seen that, in respect to taxes and exemptions, the *lex situs* is supreme. This rule requires the *lex domicilii* to yield to the *lex situs* in all cases of conflict in such respect, even as to personalty. If the *lex situs*, therefore, says, "A certain proportion of the deceased's property is to go to his widow and children, if here resident, for their support;" then the *lex domicilii* will not be internationally considered as having the capacity to withdraw even his personal property from this limitation;[2] nor can the law of his domicil be invoked to sustain the incorporation into his estate of property which by the *lex situs* is to be held on distinct trusts.[3]

Conflict of opinion on this point.

§ 572. It is true that among European jurists there are some who, while holding to the *lex rei sitae* as to succession, argue that as to capacity (*Habilitas*, *capacitas*, *capacité*) the *lex domicilii* is the necessary and universal test.[4] But as Bar shows, this conclusion is induced by two side issues. The one is that when a territorial law makes testamentary capacity dependent on freedom from family control, then the *lex domicilii*, as determining the family law, must be necessarily invoked. The other is, that the term *capacity* is discussed by them in its general sense, and not in its specific relation to testaments.

Local policy predominates.

§ 573. In addition, it should be observed that in all matters of distinctive policy, each state will apply to property within its territory the conditions which its own policy exacts.[5] This has been uniformly held as to the capacity to convey *inter vivos*.[6] The principle applies to capacity to dispose by will.[7]

Mental incapacity determined

§ 574. By the Roman law, there must be mental capacity in the testator at the time when the will is executed, and this capacity is decided by the law of the testator's then

[1] Supra, § 567; White *v.* Howard, 52 Barb. 294. As to exemptions, see §§ 576, 584, 598, 791.

[2] Supra, § 311; infra, § 791.

[3] Bingham's Est. 64 Penn. St. 346.

[4] D'Aguesseau, Œuvr. iv. p. 539; Fœlix, i. p. 180; Demangeat on Fœlix, i. p. 62; Schäffner, p. 180; Hugo Grotius, Epistolæ, No. 464; Boullenois, i. p. 486.

[5] Supra, § 104 *b*.

[6] Supra, § 296.

[7] Supra, § 275 *d*.



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domicil. Hence when one who, by his domicil, is incapable as a minor, or an insane person, executes a will, no subsequent change of domicil can give the will effect.[1] On the other hand, when a testator is competent, by his then *lex domicilii*, at the time of making the will, and becomes subsequently incompetent, through insanity, by the law of a second domicil, the validity of the will is not affected by such change.

by *lex domicilii* as to movables.

In our own practice, the jurisdiction in which wills of movables are litigated, on the issue of sanity, is that of the deceased's last domicil, and the question is whether, by the law of that domicil, the testator, at the time of the will, had a disposing mind. The *lex fori* must determine all questions of evidence, including that of the burden of proof.

§ 575. So far as concerns the mental capacity to dispose of immovables, the *lex rei sitae* obtains.[2]

As to immovables *lex situs*.

## IV. PERSONAL CAPACITY OF SUCCESSORS.

§ 576. The question, who are the parties entitled to inherit, either in testacy or intestacy, is governed in the distribution of movables by the law of the last domicil of the deceased.[3] Thus this law is to determine whether a legacy is adeemed by the legatee's death during the testator's

*Lex domicilii* determines as to movables.

[1] Savigny, viii. §§ 377, 393.

[2] Supra, §§ 572, 573; infra, § 578.

[3] Jarman on Wills, 2. Infra, § 592; Grattan *v.* Appleton, 3 Story C. C. 755; Ennis *v.* Smith, 14 How. 400; Harvey *v.* Richards, 1 Mason, 381; Potter *v.* Titcomb, 22 Me. 300; Porter *v.* Heydock, 6 Vt. 374; Dawes *v.* Boylston, 9 Mass. 355; Schultz *v.* Pulver. 3 Paige, 182; Hunter *v.* Bryson, 5 Gill & J. 483; Stent *v.* McLeod, 2 McCord, Ch. 354; Garland *v.* Rowan, 3 Sm. & M. 617; Dorsey *v.* Dorsey, 5 J. J. Marsh. 280; Danelli *v.* Danelli, 4 Bush, 51.

A clause granting both real and personal property upon the same trust is generally severable, the validity of one not depending upon the validity of the other; and though the real estate be situated in another country, the trust, so far as it relates to personalty within the country of the forum, will be enforced. Knox *v.* Jones, 47 N. Y. 389.

Fiore (Op. cit. § 397) holds that the question of the capacity of successors is to be determined by the law of their nationality. I have already shown that this rule is impracticable in countries, such as Great Britain and the United States, where, under one nationality, there are collected a number of conflicting jurisprudences.

By Rocco a distinction is made, as to successors in intestacy, between personal capacity and capacity to receive. The first is governed by the personal law of the successor, the second by the *lex rei sitae*. Droit privé int. i. ch. 23. This distinction is rejected by Fiore as illogical, and as



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lifetime, or whether it goes to the testator's representatives.[1] Where the law of the parent's last domicil entitles natural children to succeed, this is binding in countries where only children born in wedlock have this right.[2] On the other hand, where the law of the testator's domicil incapacitates natural children, this incapacity applies to a bequest to the children of A., which children would be illegitimate by such law of domicil, though they would be legitimate by the law of the country where they are domiciled.[3] And it was held by Jessel, M. R., in 1880, that a child, illegitimate according to English law, but who has been, according to the law of its domicil and of its parent's domicil, legitimized by a post-natal marriage, cannot take under the statute of distributions as one of the next of kin of an intestate dying domiciled in England.[4]

The nature of the interest of legatees is in like manner regulated by the law of the testator's domicil;[5] and so also of the husband and wife's distributive interest.[6]

Whether distributees are to succeed *per capita* or *per stirpes*, or to what extent the representation of collaterals is to be carried in cases of intestacy, depends in like manner on the law of the last domicil.[7] Local policy, however, takes precedence as to taxes and exemptions.[8] Thus, where the *lex situs* says, even as

productive of absurd inconsistencies. On the other hand, as we will presently see, while a successor, by our law, has his rights determined by the law of his predecessor's last domicil, his own personal law must decide whether he can hold in his own country. See infra, § 579.

[1] Anstruther *v.* Chalmer, 2 Sim. R. 1; Thornton *v.* Curling, 8 Sim. R. 310; Jarman on Wills (Bigelow's ed. 1881), p. 5. As to exceptions, see infra, § 584.

[2] Supra, §§ 240–246; Westlake, § 114; Story, § 481; Redfield (3d ed.), i. p. 374; Doglioni *v.* Crispin, L. R. 1 H. of L. (1866), 301; S. P., Enohin *v.* Wylie, 10 H. of Lords Cases, 1.

[3] Boyes *v.* Bedale, cited Story, § 491 *d;* Goodman *v.* Goodman, 3 Giff. 643. See Skottowe *v.* Young (1867), Law Rep. 11 Eq. 4. And see supra, §§ 240, 245.

[4] Goodman's Trusts, in re, 43 L. T. (N. S.) 14; L. R. 14 Ch. D. 619. Supra, § 241. See Goodman *v.* Goodman, 3 Gif. 643; Boyes *v.* Bedale, 1 H. & M. 798.

If by the law of the country in which h e land lies a posthumous child, not provided for by the testator, is entitled to part of the estate, his rights will prevail, notwithstanding the law of the country in which the testator resided. Eyre *v.* Storer, 37 N. H. 114.

[5] Brown *v.* Brown, 4 Wils. & Sh. 281. See infra, § 592.

[6] Supra, § 193.

[7] Story, § 481 *a*; Brock's Est. 51 Ala. 85.

[8] Supra, § 567; infra, § 791.



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to personalty, "This is to be reserved for the widow," such a provision prevails as against the *lex domicilii*.[1]

§ 577. The Code Civil of France provides that in case of a natural child dying without posterity, he having survived parents who have recognized him, his property shall go to his natural brothers and sisters, or their descendants. This Code is in force in the Island of Mauritius. In an English case, in 1866, where the deceased was domiciled in Mauritius, it was ruled that the word "descendants," in this law, is not limited to legitimate descendants, so as to preclude the natural children of a natural brother from succeeding to their natural uncle's property,[2] this being the French interpretation of the law.

Foreign laws in this respect applied.

As an exception to the rule that the law of the last domicil determines the capacity of legatees may be noticed a case decided in New York in 1879, where it was held that a legacy to a Pennsylvania charitable corporation was invalid, under a Pennsylvania statute providing that no charitable bequest is valid unless made at least a month before the testator's decease.[3] But this decision is open to grave objections; and is inconsistent with the principles that succession is determined by the *lex domicilii* of the party whose estate is to be distributed, and that no state will enforce extra-territorial restrictions on alienation.

§ 578. The English common law is positive to the effect that the question of the descent and heirship of real estate is to be governed exclusively by the *lex rei sitae*.[4]

But *lex situs* as to immovables.

§ 579. Whether a successor can individually hold property (*e. g.* in cases of infancy and coverture) is, in general, to be determined by the law of the domicil belonging

Business capacity of successor

[1] Supra, § 567.

[2] Procureur Gen. *v.* Bruneau, 1 Priv. Coun. R. 169; 4 Moore P. C. (N. S.) 1.

[3] Kerr *v.* Dougherty, 79 N. Y. 327; citing Chamberlain *v.* Chamberlain, 43 N. Y. 424, Rapello & Earl, JJ., diss. See supra, § 293.

[4] Supra, § 243; Story, § 483; Westlake (1880), § 114; Harrison *v.* Harrison, 8 L. R. Ch. 342; Birtwhistle *v.* Vardill, 5 B. & C. 438; 6 Bligh, 479, note; 2 Cl. & Fin. 571; U. S. *v.* Crosby, 7 Cranch R. 115; Kerr *v.* Moon, 9 Wheat. 556; Dunbar *v.* Dunbar, 5 La. Ann. 159; Lucas *v.* Tucker, 17 Ind. 41; Harvey *v.* Ball, 32 Ind. 99; Kerr *v.* White, 52 Ga. 362; Brock's Est. 52 Ala. 85; Applegate *v.* Smith, 31 Mo. 166; Holman *v.* Hopkins, 27 Tex. 38.



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determined by his domicil.

to him at the time of the devolution of the estate.[1] This, however, so far as concerns real estate, is conditioned by the limitations of the *lex situs*.

Except as to artificial incapacities.

§ 580. If successors to an estate are subjected by their personal law to artificial and arbitrary restrictions, these restrictions will not affect them extra-territorially. This, as we have seen,[2] is good with regard to non-natural extensions of minority and restrictions of business capacity. A foreigner, also, who is precluded by outlawry or heresy from inheriting in the place of his domicil, would nevertheless be regarded as free from such incapacity, if he should claim succession in a country where no such restraints exist.[3]

Restrictions of *lex fori* to be applied.

§ 581. On the other hand, successors, on whom rests no incapacity in their domicil, may yet be deemed incapable in the land in which they bring suit, through the stress of laws based on public policy (*e. g.* statutes of mortmain, laws prohibiting perpetuities, laws restricting the landed estate of foreigners),[4] and this has been held to apply to laws which prohibit, under certain circumstances, substitutions, survivorships, and remainders.[5] When the law of the testator's domicil prohibits devises for charitable purposes, this will be held to apply to a devise to a foreign charity, though such devise be good in the country where the charity exists.[6]

So as to alien succession.

§ 582. By the English common law, as has been heretofore shown, aliens may take land by deed or devise, and hold against any one but the sovereign until office found.[7]

[1] Savigny, viii. § 377; Hill *v.* Townsend, 24 Texas, 575.

[2] Supra, §§ 101, 113.

[3] Supra, §§ 107–109. But see Earl *v.* Dougherty, 79 N. Y. 327. Supra, § 578.

[4] Breadalbane *v.* Chandos, 3 S. & McL. 377. See Mackintosh *v.* Townsend, 16 Ves. 330; Atty. Gen. *v.* Mill, 2 Russ. C. C. 328; 5 Bligh, 593.

[5] Bouhier, ch. 27, Nos. 91–93; Savigny, p. 312; Code Civil, ch. 27, No. 91; Harper *v.* Stanbrough, 2 La. An. R. 377; Harper *v.* Lee, Ibid. 382.

[6] Curtis *v.* Hutton, 14 Ves. 537; Story, § 479 *d*. See supra, § 565.

The French statute providing for the succession of a father to the estate of a deceased child is held in France to be a real statute, so far as concerns goods situate in France. Jour. du droit int. privé, 1878, p. 165. For the several theories in this respect, see Fiore, No. 394.

[7] Supra, §§ 17, 275 *e*, 333; Craig *v.* Radford, 3 Wheat. 594; Taylor *v.* Benham, 5 How. U. S. 233; Jones *v.* McMasters, 20 How. U. S. 19; Cross *v.* De Valle, 1 Wal. 5; Sewall *v.* Lee, 9 Mass. 363; Guyer *v.* Smith, 22 Md. 239.



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How far this restriction continues to operate in the United States has been already considered.[1] But whatever be the limitation imposed, it is to prevail as against the *lex domicilii* of either party.

Forms of delivery prescribed by *lex situs* must be followed.

§ 583. When by the *lex rei sitae* certain forms are requisite to enable a legatee to take possession of a thing bequeathed, these forms must be observed, though not required by the *lex domicilii*.[2]

Limitations as to necessary succession.

§ 584. In several European states the right of testamentary alienation is limited to certain portions of the testator's estate. The rest goes of necessity to the heirs at law. The rights of such heirs by necessity (*Notherben*, or *Phlichttheilserben*) are determined by the laws which regulate intestacy. As to movables, the *lex domicilii* generally prevails. As to immovables, the question rests upon whether the property at issue passes by universal succession or singular succession. If the former, the rights of the heir by necessity are determined by the law of the decedent's last domicil. If, on the other hand, the property descends by singular succession, then the *lex rei sitae* controls.[3] The same reasoning would operate, as has been already[4] suggested, as to personalty exempted, by the *lex rei sitae*, for the support of an insolvent testator's family,[5] or for taxes.

### V. MODE OF SOLEMNIZATION AND REVOCATION OF WILLS.

Will must be solemnized by forms of last domicil.

§ 585. The general question of the proper authorization of documents will be considered under a future head.[6] At present a few special points connected with wills will be discussed.

It is a principle of the common law of England, as has been already stated, that a will, executed according to the forms of the testator's last domicil, will pass his movable property wherever it may be found; and that if not executed according to such form, it is inoperative as to movables.[7] And the

[1] Supra, § 17.

[2] Bar, § 111; Carr *v.* Lowe, 7 Heisk. 84. Supra, § 560.

[3] Supra, §§ 565–7; Bar, § 112.

[4] Supra, § 553; and see infra, § 598.

[5] Supra, § 567. As to exemption laws, see infra, § 791.

[6] Infra, § 676.

[7] Potter *v.* Brown, 5 East, 130; Sill *v.* Worswick, 1 H. Black. 690; Stanley *v.* Bernes, 3 Hagg. Ecc. R. 373;



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courts will give effect to a foreign will thus executed, though invalid as to execution by English law.[1] An Englishman domiciled abroad must follow the law, in this respect, of his domicil, and not that of his native land.[2] In the United States, the same view at common law obtains. If a will as to personalty is properly executed by the law of the last domicil, it is good everywhere; if void by that law, it is void everywhere.[3] Even when a testator, having executed a will according to the forms of his then domicil, abandons such domicil, and acquires a second domicil in which the will would be invalid for want of proper execution, the law of the latter domicil at common law prevails.[4]

But this modified by statute.

§ 586. By the 24 & 25 Victoria, c. 107 (Lord Kingsdown's Act), it is provided that a will validly executed at an actual domicil is not affected by a subsequent change of domicil. This amendment of the law has been adopted generally in the United States.[5] It has been held in England, under this act, that an appointment by will of movables may be validly exercised if the will conform to English law, though not to the law of the testator's domicil at the time of his death.[6]

Moore *v.* Darell, 4 Hagg. Ecc. R. 346; Price *v.* Dewhurst, 4 Mylne & C. 76; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Robins *v.* Dolphin, 1 Sw. & Tr. 37; Crookenden *v.* Fuller, 1 Sw. & Tr. 442; Laneuville *v.* Anderson, 2 Sw. & Tr. 24; Phil. iv. p. 628; Westlake, 1st ed. art. 84, 325.

[1] Guttierez, ex parte, 38 L. J. Rep. (N. S.) pt. 3, 48.

[2] Moore *v.* Darell, 4 Hagg. Ecc. R. 346; Stanley *v.* Bernes, 3 Hagg. Ecc. R. 373; Ferraris *v.* Hertford, 3 Curteis, 468.

[3] Dixon *v.* Ramsay, 3 Cranch, 319; Armstrong *v.* Lear, 12 Wheat. 169; Harrison *v.* Nixon, 9 Peters, 483; Gilman *v.* Gilman, 52 Me. 165; Dunlap *v.* Rogers, 47 N. H. 281; Desesbats *v.* Berquiers, 1 Binney, 336; Moultrie *v.* Hunt, 23 N. Y. 394; Swearingen *v.* Morris, 14 Oh. St. 424; Johnson *v.* Copeland, 35 Ala. 521; Hill *v.* Townsend, 24 Tex. 575; Abston *v.* Abston, 15 La. An. 137; Perin *v.* McMicken, Ibid. 154; Jones *v.* Gerock, 6 Jones Eq. (N. C.) 190.

[4] Story, § 473, citing Desesbats *v.* Berquiers, 1 Binney, 336; Pottinger *v.* Wightman, 3 Meriv. 68, and J. Voet, ad Pand. Lib. 38, tit. 3, tom. 2, § 12, p. 292; Nat *v.* Coon, 10 Mo. 543. To same effect is Moultrie *v.* Hunt, 3 Brad. Sur. 322; 22 N. Y. 394. See Bremer *v.* Freeman, 10 Moore P. C. 359.

[5] Redfield (3d ed.), i. 381. See, also, Coffin *v.* Otis, 11 Met. 156; Manuel *v.* Manuel, 13 Oh. St. 458.

[6] See Hallyburton, Goods of, L. R. 1 P. & M. 90; though see Tatnall *v.* Hankey, 2 Moo. P. C. 342.

Under the statute 24 & 25 Victoria, a will may be admitted to probate if executed in conformity with either the *lex loci actus*, or the *lex domicilii*, or the *lex domicilii originis*. As to construction of this act see Pechell *v.*



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§ 587. In England and the United States, as to realty, the *lex rei sitae* prevails, as to all that concerns the will, including the solemnities by which it is to be attested.[1] Thus a will, though not valid by the law of the testator's last domicil to pass his personalty, may yet, if executed in conformity with the laws of the state where the testator's real estate is situate, be valid to pass such real estate, and may be admitted to probate in such latter state.[2]

*Lex rei sitae* determines as to realty.

§ 588. According to the modern Roman law, a will is validly executed when it conforms either to the *lex domicilii* or the *lex loci actus*.[3] The great weight of authority is to the effect that the observance of the forms of the place of the execution of the will is sufficient.[4]

By Roman and modern European law forms of either the domicil or place of solemnization will be enough.

The French law has been the subject of much dispute, arising from the conflicting rulings of the French courts. In 1859, Sir C. Cresswell held that by the law of France a will made by a domiciled Frenchman, during a mere temporary residence in a foreign country, would be valid, if executed according to the law of that country.[5] "In order

Hilderley, L. R. 1 P. & M. 673. The *lex domicilii*, at the time of the testator's death, is that which, under this statute, will be adopted by the English courts. Lynch *v.* Provisional Government of Paraguay, L. R. 2 P. & M. 268. Subsequent changes of the law, by the state of the deceased's domicil, will not be regarded as binding. Ibid; Cottrell *v.* Cottrell, L. R. 2 P. & M. 400.

[1] Coppin *v.* Coppin, 2 P. Will. 291; Curtis *v.* Hutton, 14 Ves. 537; U. S. *v.* Crosby, 7 Cranch, 115; McCormick *v.* Sullivant, 10 Wheat. 192; Armstrong *v.* Lear, 12 Wheat. 169; Lucas *v.* Tucker, 17 Ind. 41; Applegate *v.* Smith, 31 Mo. 166.

[2] Holman *v.* Hopkins, 27 Texas, 38. As to statutes admitting foreign wills to probate, see supra, § 561.

[3] Bar, § 109.

[4] Rodenburg, ii. c. 3, § 1; Bartolus, in L. i. C. de S. Trin. No. 36; P. Voet, 9, c. 2, No. 1; Vattel, L. ii. ch. 8, § 3; Hert. iv. §§ 23, 25; Boullenois, i. p. 422; Bouhier, ch. 25, No. 61; Mittermaier, § 32, p. 121; Wächter, ii. p. 191; Gand, No. 579; Savigny, p. 355; Bar, § 109. To the same effect are decisions of the French courts (Sirey, 32, i. p. 51), and of the German (Striethorst, 23, p. 353). But it is at the testator's option to avail himself of the forms either of the *lex domicilii* or the *lex loci actus*. Either will suffice. Bar, § 109; Fiore, §§ 404–6. For references to French law see Dupuy *v.* Wurtz, 53 N. Y. 556. As to *locus regit actum*, see infra, §§ 646 *et seq.*

[5] Crookenden *v.* Fuller, 1 Sw. & Tr. 442; S. P., Laneuville *v.* Anderson, 2 Sw. & Tr. 24.



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that a will made by a Frenchman in a foreign country be reputed as made by authentic act, it is sufficient that formalities used in that country have been observed, though no public officer have been employed, if the intervention of a public officer be not required by the law of that foreign country."[1] And this view was reaffirmed in 1877 by the same court.[2] But by several French rulings it is held that the prescriptions of French law must be complied with in the solemnization of wills executed abroad.[3]

The Italian Code[4] makes the external forms both of acts *inter vivos* and of last wills determinable by the law either of the place where they are made, or by the *lex domicilii*, at the option of the parties.

The Prussian Code[5] gives the same option, with the qualification that the validity of the form is to be judged according to the law of the place most favorable to it, though with immovables the *lex rei sitae* is to prevail.

So by Scotch law.

§ 589. By the law of Scotland, the will of a domiciled Scotchman abroad is valid, so far as concerns the form, if executed according to the *lex loci actus*.[6]

Execution of power determinable by *situs*.

§ 590. Where a testator has a power to dispose of personalty in a particular country, it is sufficient if the forms of such country are satisfied, though that of the testator's domicil are not observed.[7] On the other hand, it has been held, when the power is in subordination to a trust established in a particular country, that unless the forms of the *lex situs* are complied with, the execution of the power will not be sustained by the *judex situs*.[8]

[1] Dalloz Rep. 1843, 1st pt. p. 208, cited in Crookenden *v.* Fuller, 1 Sw. & Tr. 453.

[2] Lacroix, in re, L. R. 2 P. D. 94.

[3] Jour. du droit int. privé, 1877, p. 149; and see infra, § 681. But the French law requiring that the witnesses to wills should be of French nationality has been held not to invalidate wills where the witness was honestly believed by the parties to be a Frenchman, being generally supposed to be such. Jour. du droit int. privé, 1875, p. 193.

[4] Prel. art. 9.

[5] § 114.

[6] Onslow *v.* Cannon, 2 Sw. & Tr. 136; Phil. iv. Adden. p. 1.

[7] Tatnall *v.* Hankey, 2 Moore P. C. 342. See infra, §§ 597-9; 1 Redfield, 410.

[8] Bingham's Appeal, 64 Penn. St. 346.



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§ 591. The mode of revoking a will is governed by the same rules as is that of its solemnization.[1] It has been ruled in France, however, that a valid holograph will, executed by an Englishman in France, disposing of French assets, is not revoked by a second will, executed in England, which will is good by English law, but not valid by French.[2]

Revocation subject to same rules.

### VI. CONSTRUCTION OF WILLS.

§ 592. The last domicil of the testator is to be resorted to as giving the law by which the interpretation of a will, so far as concerns personalty, is to be determined.[3] In a leading case before the Supreme Court of the United States, it was ruled that in a bequest of personalty to the testator's "heir at law," the question as to who came under this designation was to be determined by the law of the testator's last domicil. If he were domiciled in England, it would be the eldest son. If in Pennsylvania, and states of similar jurisprudence, it would be all the children.[4] Nor does it matter

Interpretation as to personalty by law of last domicil.

[1] Bar, § 112; Whart. on Ev. § 692.

[2] Gand, No. 597.

A will and revocation, executed according to the testator's domicil at the time of his death, revokes a will made under a former English domicil, with the appointment of executors contained in it, if the intention that it should have that effect is apparent. Cottrell *v.* Cottrell, L. R. 2 P. & M. 397.

[3] Redfield (3d ed.), i. 383; Story, § 479 *a;* Phil. iv. 631; Fœlix, p. 171; Yates *v.* Thompson, 1 S. & McL. 325; 3 Cl. & F. 544; Stewart *v.* Garnett, 3 Sim. 298; Trotter *v.* Trotter, 4 Bligh (N. S.), 502; Enohin *v.* Wylie, 10 H. L. Cases, 1; Pierson *v.* Garnett, 2 Bro. Ch. 38; Gordon *v.* Brown, 3 Hagg. 455; Wilson's Trusts, L. R. 1 Eq. 217; L. R. 3 H. of L. 55; Levy *v.* Solomon, 37 L. T. N. S. 263; Adams *v.* Norris, 23 How. U. S. 354; Parsons *v.* Lyman, 20 N. Y. 103; Bascom *v.* Nichols, 1 Redfield (N. Y. Sur.), 340; Freeman's App. 68 Penn. St. 151. In California, it is said that the will is to be interpreted according to the place where it is made, if the property affected is there situate. Norris *v.* Harris, 15 Cal. 226.

"As a will, in regard to movable property, is construed according to the law of the domicil, there is, it will be observed, nothing on the face of it which gives the peruser the slightest clue as to the nature of the laws by which its construction is regulated; it may have been made in England, be written in the English language, the testator may have described himself as an Englishman, and it may have been proved in an English court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence." Jarman on Wills (Bigelow's ed. 1881), p. 6. Wms. on Ex. (1879), 374, 1092.

[4] Harrison *v.* Nixon, 9 Peters, 483.



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that the testator was a native of another land;[1] nor even that after the will was made in one domicil he moved to another, where he died.[2] In either case, it is the last domicil that prevails. And in conformity with this rule, legacies are payable in the currency and according to the modes of the testator's last domicil.[3] The law of the last domicil is the rule, subject to exceptions to be stated, because, in respect to personalty, it is the law of last domicil that is supreme.

Rules of evidence are for *judex fori*.

§ 593. This rule, however, does not require a court to adopt foreign rules of evidence; each court having its own technical rules of procedure.[4]

Latent ambiguities may be explained by other laws.

§ 594. It is also to be observed, that in the explanation of latent ambiguities resort can be had to any law as well as to any facts which it can be proved the testator had in mind at the time.[5]

Judgment of court of domicil has ubiquitous authority.

§ 595. The judgment of the court of the domicil of the deceased, at the time of his death, is authoritative on the courts of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign court as have been decided by the court of the domicil, and where such judgment does not conflict with positive prescriptions of the *lex situs*.[6]

[1] Anstruther *v.* Chalmer, 2 Sim. R. 1; Harrison *v.* Nixon, 9 Peters, 483.

[2] Nat *v.* Coon, 10 Mo. 543; Story, § 479 *g*. Supra, § 586.

[3] Infra, § 641; Story, § 479 *b*, citing Saunders *v.* Drake, 2 Atk. 465; Pierson *v.* Garnett, 2 Bro. Ch. 39; Malcom *v.* Martin, 3 Bro. Ch. 50; Wallis *v.* Brightwell, 2 P. Will. 88.

[4] Infra, § 747; Yates *v.* Thompson, 3 Cl. & F. 548; Di Sora *v.* Phillips, 10 H. L. Cas. 624; Adams *v.* Norris, 23 How. U. S. 354.

[5] Whart. on Ev. § 998; Van Dyke's App. 60 Penn. St. 481; Gardner *v.* Ladue, 47 Ill. 271. See Story Confl. Laws, § 479 *h*; Trotter *v.* Trotter, 3 Wils. & S. 407; S. C., 5 Bligh (N. S.), 502, 505; 2 Burge, Comm. Col. & For. Law, 857, 858. "If the will of a party is made in the place of his actual domicil, but he is, in fact, a native of another country; or if it is made in his native country, but in fact his actual domicil at the time is in another country, still it is to be interpreted by reference to the law of the place of his actual domicil. 2 Greenl. Ev. § 671; Story Confl. Laws, § 479 *f*; Harrison *v.* Nixon, 9 Peters, 483." Jarman on Wills (Bigelow's ed. 1881), p. 2, note.

[6] Crispin *v.* Doglioni, 3 S. & T. 96; 32 L. J. Prob. 169; 8 L. T. N. S. 518; S. C. in error, L. R. 1 H. of L. 301; supra, § 576; Gordon *v.* Brown, 3



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Foreign law presumed the same as domestic.

§ 596. In the construction of a foreign will, the foreign law will be presumed to be the same as the domestic, unless the contrary be proved.[1]

When *lex rei sitae* determines construction.

§ 597. It is said by Judge Story,[2] that the same rules of construction "apply to wills and testaments of immovable property; unless, indeed, it can be clearly gathered from the terms used in the will that the testator had in view the law of the place of the *situs*, or used other language which necessarily referred to the usages and customs or language appropriate only to that *situs*."[3] But this is scarcely reconcilable with the general position, that in respect to immovables the law of the *situs* controls. That law may say, "It appears from the structure of the will that the testator wished to apply the law of his domicil," and the law of the *situs* may, for this purpose, adopt the law of domicil, or on similar reasoning the *lex loci actus*, or the law of the testator's temporary, as distinguished from that of his last, domicil. But this will be at the election of the courts of the *situs*. The law that they impose must be decisive.[4] In conformity with this view is a decision in Missouri, where it was held that whether after-acquired real estate passes by a will depends upon the *lex rei sitae*.[5] And it

Hagg. 455; Cosnahan, in re, L. R. 1 P. & M. 183; Miller *v.* James, L. R. 3 P. & M. 4. See infra, § 644.

Probate or administration with will annexed will in England be refused or revoked on the strength of a judgment by the *judex domicilii*. Moore *v.* Darell, 4 Hagg. Ecc. 346; Laneuville *v.* Anderson, 2 Sw. & T. 24.

Mr. Westlake (1880, p. 90) states the law of England to be, that "where the court of a deceased person's last domicil has had an opportunity of declaring who are entitled to the beneficial interest in his personal property, subject to the payment of his debts, funeral expenses, and expenses of administration, its authority is regarded in England as final, whether the question arises on a claim to a grant of administration, on a claim to be heard as contradictor to a will propounded for probate, in the distribution of the English assets after payment of debts and the other expenses above mentioned, or in any other way." To this he cites Crispin *v.* Doglioni, 3 Sw. & T. 96; L. R 1 H. of L. 300.

[1] Sharp *v.* Sharp, 35 Ala. 574. See infra, §§ 771–782.

[2] § 479 *h*.

[3] To this he cites Trotter *v.* Trotter, 3 Wils. & Shaw, 407; 2 Burge, 858.

[4] Jennings *v.* Jennings, 21 Oh. St. 56; Kerr *v.* White, 52 Ga. 362; Brock's Est. 51 Ala. 85; Roffignac's Succes. 21 La. An. 364.

[5] Applegate *v.* Smith, 31 Mo. 166. See supra, § 307. See Norris *v.* Harris, 15 Cal. 226, as to questions of conflict when debts are charged on realty; and where the combined relations of realty and personalty are concerned, see Story, §§ 485, 486;



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has been held in England that a will in Dutch, written in Holland, must, as to English real estate, be construed as if written and made in England.[1]

*Judex fori* bound by laws of policy.

§ 598. From the rule that as to personalty the law of the testator's last domicil binds, those cases are to be excepted where aid is asked from a court to enforce a provision which by the law binding on such court is forbidden by rules based on distinctive public policy. Thus provisions for disinheritance will be restricted in those countries where only a restricted disinheritance is permitted;[2] and the same limitation applies to provisions creating trusts and entails, and endowing ecclesiastical corporations in mortmain. A court, in giving effect to such provisions, will be governed by the law of the land.[3] Thus laws prohibiting perpetual entail, and perpetual accumulations, remainders of personalty, and substitutions, will be enforced by the state in which they exist, although no such laws obtained in the place of the testator's domicil.[4]

Extra-territorial interference with vested rights not permitted.

§ 599. A statute in the state in which a testator is domiciled, prescribing that where a testator disposes of his estate by will, he is to be regarded as disposing of estates of which he has a power of disposition, is not operative in another state so as to control a trust which the testator had power to dispose of, when in the latter state the trust is established and the assets situate.[5]

### VII. CONTRACTS FOR SUCCESSION.

Same test as with wills.

§ 600. Such contracts were unknown to the Roman law.[6] They have not been unknown, however, in England and the United States; and questions may, therefore, arise as to the law by which, in case of conflict, they are to be

Brodie *v.* Barry, 2 Ves. & B. 130; 4 Burge, 722.

[1] Jarman on Wills, p. 1, citing Bovey *v.* Smith, 1 Vern. 85; Gambier *v.* Gambier, 7 Sim. 263.

[2] Supra, § 584.

[3] Savigny, viii. § 377. Supra, § 305.

[4] Breadalbane *v.* Chandos, 3 S. & McL. 377; Somerville *v.* Somerville, 5 Ves. 749; Mackintosh *v.* Townsend, 16 Ves. 330; Atty. Gen. *v.* Mill, 2 Russ. C. C. 328; 5 Bligh, 593; Harper *v.* Stanbrough, 2 La. An. 377; Harper *v.* Lee, 2 La. An. 382; Mahorner *v.* Hooe, 9 Sm. & Mar. 247. As to exemption laws, see supra, §§ 571, 576, 584. Infra, § 791.

[5] Bingham's App. 64 Penn. St. 346. See supra, § 590.

[6] Savigny, viii. § 377.



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governed. It may be now enough to say generally that when an engagement is made to will certain property to another, this is to be determined, after death, so far as concerns movables, by the law of the last domicil of the deceased. The same law governs mutual engagements by two parties, to will their estates to each other (bilateral contracts of succession). In this case the party who dies first is regarded as the testator whose last domicil supplies the governing law.[1] It is scarcely necessary to say that immovables would not be affected by this rule, but would be controlled by the *lex rei sitae.*

VIII. TRUSTS.

§ 601. By the Roman law the usufruct of a trust did not descend to heirs. It consisted in the right to use and enjoy things belonging to others, without impairing the substance of the things themselves (*jus alienis rebus utendi fruendi, salva rerum substantia*).[2] But this right vanished when the *usus fructuarius* died.[3] In trusts, originally the party interested (*fidei-commissarius*) had only what was called *jus precarium*, which could only be enforced by personal appeal; but subsequently a particular court, called that of the *praetor fidei-commissarius*, was, like the English chancery, instituted to take cognizance of and to apply such trusts.[4] A *fidei-commissum*, therefore, could not be the subject of an estate of inheritance, and that when the *usus fructuarii*, who was designated in the will, died, the whole estate, equitable as well as real, reverted to the legal owners, — to the *haeres fiduciarius*. Hence the *fidei-commissum* is not the subject of *succession*, in its proper sense; and hence it is governed, not by the law of domicil, but by the *lex rei sitae*, — the place where the land which is the subject of the *fidei-commissum* lies.

Distinctions of Roman law.

IX. ESCHEATS AND CADUCIARY RIGHTS.

§ 602. By the Roman law, in cases where it is maintained that goods are left without an owner, by the last owner's death without heirs, it is held that the law of the last owner's last domicil is to determine.[5]

By Roman law last domicil of deceased owner prevails.

[1] Savigny, viii. § 377.

[2] Inst. 2, 4, pr.

[3] Inst. 2, 23, 2; 1 Steph. Com. 329.

[4] Inst. 2, 23, 1; 1 Steph. Com. 329. See McDonogh *v.* Murdoch, 15 How. U. S. 407–410, where the question is discussed by Judge Campbell.

[5] Savigny, viii. § 377; Glück, Intestaterbfolge, § 147; Puchta, Pandekten, § 564.



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The state or *fiscus*, in such case, on the theory that things left without an owner are *bona vacantia*, comes in as successor, and hence the general doctrine of succession applies, *i. e.* that of the last domicil of the deceased owner. And hence it is the *fiscus* of such domicil, according to Savigny, Glück, and Puchta, that, by the modern Roman law, is entitled to succeed to such *bona vacantia*, and is to enjoy these caduciary rights.

Otherwise by our law.

§ 603. On the other hand, where the theory of universal succession is rejected, and where the *bona vacantia* are viewed by the territorial law as subject to singular succession (*e. g.* when there is a positive local law treating property left by an intestate without known heirs as an escheat, or where on feudal principles such property reverts to the lord paramount), then the *lex rei sitae* controls.[1] And this is no doubt the law in England and the United States with regard to real estate.

## X FOREIGN ADMINISTRATIONS.

### 1. *When Foreign Administrators may act.*

Limited to territory of appointment.

§ 604. By the English common law, personal property, as has been already observed, is technically charged with a decedent's debts; and the court of the *situs* regards the executor or administrator as a trustee to see that the property is applied to the uses that the law prescribes. Hence, neither administrator nor executor can meddle with any portion of the estate of a deceased person before proving the will, or receiving authorization from the proper court.[2] Nor can a foreign executor or administrator, whose authority springs from the last domicil of his deceased principal, by mere force of such authority, take possession of property in countries subject to the English common law. To do this, he must obtain legal authority or probate to act from the courts of the *situs*.[3]

[1] See Blackstone, ii. p. 243; Stephen, ii. p. 409; Bar, § 114. According to Demangeat, the French courts have repeatedly decided that all property in France, movable as well as immovable, that is found without an owner, goes to the French *fiscus*.

[2] Westlake, ed. of 1880, p. 405; Wms. on Ex. (1879), 366, 2025.

[3] Pipon *v.* Pipon, Ambl. 25; Price *v.* Dewhurst, 4 My. & Cr. 76; 8 Sim. 279; Fernandez's Executors, L. R. 5 Ch. Ap. 315; Bond *v.* Graham, 1 Hare, 482; Preston *v.* Lord Melville, 8 Cl. & Fin. 1; Fenwick *v.* Sears, 1 Cranch, 259; Armstrong *v.* Lear, 12 Wheat. 169; Vaughan *v.* Northup, 15 Peters, 1; Swatzel *v.* Arnold, 1



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§ 605. The reasoning on which this rule is based has already been examined.[1] It is there shown that property, whether immovable or movable, is primarily subject to the law of the territory wherein it is found. The sovereign is guardian of all property within his bounds. As he alone can protect such property from foreign invasion, so

This required by policy of territoriality.

Woolw. 383; Borden *v.* Borden, 5 Mass. 67; Langdon *v.* Potter, 11 Mass. 313; Picquet, ex parte, 5 Pick. 65; Trecothick *v.* Austin, 4 Mason, 16; Pond *v.* Makepeace, 2 Metcalf, 114; Riley *v.* Riley, 3 Day, Conn. Cases, 79; Vermilya *v.* Beatty, 6 Barb. 431; Webb, in re, 18 N. Y. Sup. Ct. 124; Clark *v.* Blackington, 110 Mass. 369; Banta *v.* Moore, 2 McCart. (N. J.) 97; Sayre *v.* Helme, 61 Penn. St. 478; Watson *v.* Pack, 3 W. Va. 154; Vickery *v.* Beir, 16 Mich. 50; Sheldon *v.* Price, 30 Mich. 296; Rosenthal *v.* Renick, 44 Ill. 203; McClure *v.* Bates, 12 Iowa, 77; Turner *v.* Linam, 55 Ga. 253; Henderson *v.* Rost, 15 La. An. 405; Burbank *v.* Payne, 17 La. An. 15; Riley *v.* Mosely, 44 Miss. 37; Anderson *v.* Gregg, 44 Miss. 170; Rucks *v.* Taylor, 49 Miss. 552; Merton *v.* Hatch, 54 Mo. 408; Apperson *v.* Bolton, 29 Ark. 418; Rutherford *v.* Clark, 4 Bush (Ky.), 442. For other cases see infra, § 610.

The same rule applies to testamentary trustees. Noonan *v.* Bradley, 9 Wallace, 394; Curtis *v.* Smith, 6 Blatch. C. C. 537.

The administrators of a party domiciled in another state may take out ancillary letters in a state where the deceased was killed by the negligence of a railroad company, in order to sue the company under a law of the latter state giving damages in such cases. Hartford, &c. R. R. *v.* Andrews, 36 Conn. 213. Supra, § 479.

An experienced New York judge said, after reviewing the cases: "I am inclined to think that the modern rule, accommodating itself to new cases and exigencies, is in favor of the exercise of jurisdiction *upon the sole basis of assets of a foreign decedent coming into the state after his decease.*" Kohler *v.* Knapp, 1 Bradf. Sur. 244.

In Pennsylvania foreign administrators were at one time allowed to take action as such; Swearingen *v.* Pendleton, 4 S. & R. 389; Evans *v.* Taten, 9 S. & R. 252; though this was deplored by Chief Justice Gibson; Brodie *v.* Bickley, 2 Rawle, 431; and subsequently, with certain exceptions, has been prohibited by legislation. Magraw *v.* Irwin, 87 Penn. St. 139. And by the Act of March 15, 1832, it is provided that no foreign letters "shall confer upon any person the powers and authorities possessed by an executor and administrator within this state." By subsequent acts it is provided that the Act of 1832 shall not apply to stocks or bonds of incorporated companies within the commonwealth. When a foreign administrator takes stocks and bonds under this legislation to his own jurisdiction, they become subject to that jurisdiction, and he cannot afterwards, when he has settled his accounts in that jurisdiction, be called upon to account in Pennsylvania. Magraw *v.* Irwin, 87 Penn. St. 139. See Alfonso's App. 70 Penn. St. 347.

In Louisiana a domiciliary foreign administrator may pursue and recover property taken from him and carried into that state. Crawford *v.* Graves, 15 La. An. 243.

[1] Supra, §§ 297–311.



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it is his duty to see that its use is secured to the proper owner. Hence those who meddle with it, when occupancy has been closed by death, must first obtain his sanction, and act under his control. And what has been said in respect to foreign corporations applies with equal force to foreign administrators. An administrator (and the same remark applies to an executor) acts under the control of the sovereign from whom he takes out letters. He is therefore the officer of such sovereign, and cannot be permitted, as such, to exercise his office in another sovereignty.[1]

Also by duty to citizens.

§ 606. Nor is this course uninfluenced by the consideration that without it domestic creditors might be unjustly prejudiced by being forced into a foreign court. A man who brings his property to New York, for instance, and there contracts debts, may be said to do so on the credit of such property. It would be wrong to send such property abroad until the debts with which it is thus equitably chargeable are satisfied.

Local authorization therefore required.

§ 607. This, however, could not be done, if, without regard to such creditors, a decedent's assets were at once sent abroad to be mingled in a foreign fund. Hence comes the practice, universally accepted by countries where the English common law obtains, of requiring foreign administrators, as a necessary preliminary to the taking possession of domestic assets, to obtain authority from the court of the *situs*.

But domiciliary administrator usually recognized by court of *situs*.

§ 608. But while it is thus clear that a foreign administrator, as such, is not entitled to sue in courts subject to the English common law, yet the position is now almost universally accepted, that the executor or administrator authorized by the law of the deceased's last domicil will be recognized in England and the United States as the person to whom ancillary probate will be granted, upon proper security, empowering him to administer to all local effects.[3] So far as concerns local assets, he acts under the direction of the courts of the *situs*, and hence the principle of territorial suprem-

[1] Supra, § 105.

[2] As to Louisiana practice see Dixon *v.* D'Armand, 23 La. An. 200.

[3] Foote Priv. Int. p. 199; Price *v.* Dewhurst, 4 M. & Craig, 76; Earl, Goods of, L. R. 1 P. & M. 450; Hill, Goods of, L. R. 2 P. & M. 89; Campbell *v.* Sheldon, 13 Pick. 8; Campbell *v.* Wallace, 10 Gray, 162; Swatzel *v.* Arnold, 1 Woolw. 383. Infra, §§ 609 *et seq.*



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acy is not invaded; while by accepting him as the officer for this purpose, international harmony of distribution is subserved.

This the settled rule in England.

§ 609. In conformity with this view it has been ruled by the House of Lords that when an Englishman is domiciled in a foreign country, and dies there, it becomes the duty of the Court of Probate, in case of his leaving personal property in England, to grant ancillary probate to the foreign executors.[1] And, as a general rule, the English practice is to give power to the foreign domiciliary administrator to administer the English assets.[2]

So in the United States.

§ 610. The same practice obtains in the United States. The new administration, thus taken out, is then viewed as subsidiary or ancillary to that obtained in the country of the last domicil of the deceased.[3]

But not when contravening local law.

§ 611. But this rule will not be followed when the effect would be to contravene a local law. Thus when an application was made to the Court of Probate to grant letters of administration, with the will annexed, to the estate of the widowed Duchess d'Orleans, in accordance with a grant made in France, the country of her domicil, the administrator for whom the appointment was asked being her son, Count de Paris, then a minor, the judge refused.[4] It is also said that the practice of giving ancillary letters to a foreign administrator does not apply when the foreign administrator was appointed, not as heir, but as creditor.[5]

Courts may restrain parties as to administrations.

§ 612. The courts of a testator's last domicil may, it seems, in proper cases, restrain his successors from proceeding to set up anything but ancillary administrations in foreign lands.[6]

[1] Enohin *v.* Wylie, 10 H. L. Cas. 1; Wms. on Ex. (1879) 437.

[2] Hill, in re, 2 P. & M. 89. See to same point, Bianchi, in re, 1 Sw. & Tr. 511; Preston *v.* Lord Melville, 8 Cl. & Fin. 15; Miller *v.* James, L. R. 3 P. & M. 4.

[3] See Boston *v.* Boylston, 2 Mass. 384; Richards *v.* Dutch, 8 Mass. 506; Hooker *v.* Olmstead, 6 Pick. 481; Jennison *v.* Hapgood, 10 Pick. 77; Ela *v.* Edwards, 13 Allen, 48; Lymes *v.* Coley, 1 Redfield (N. Y.), 405; Miller's Estate, 3 Rawle, 312; Parker's Appeal, 61 Penn. 478. For other cases see supra, § 604.

[4] Orleans, Duchess of, in re, 1 Sw. & Tr. 253.

[5] Lord Mansfield, Burn *v.* Cole, Ambl. 416; Westlake, 1st ed. art. 292.

[6] Hope *v.* Carnegie, L. R. 1 Ch. App. (1866), 320; L. R. 1 Eq. 126. See supra, § 560; infra, § 785.



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Foreign administrator cannot sue in his own name.

§ 613. At common law, and in the practice of most states, a foreign administrator will not be recognized as a party entitled to sue in his own name.[1]

But may retain what he has acquired.

§ 614. But though a foreign administrator cannot, as such, without local authorization, sue, yet this limitation vanishes when by any process he becomes the principal creditor, or reduces into his own possession the property of an estate, so that the action would lie by him individually for disturbance of his interest in the same. Thus, if in the country of his administration he acquires possession of goods of the estate, and those goods are carried to a foreign land, in such foreign land he can maintain personally an action for their recovery, or for damages done to them. He has, by reducing them into his own possession, in his own *forum*, made himself personally responsible for them; and thus he becomes personally entitled to sue in foreign lands.[2] And when the local law permits the assignee of a chose in action to sue in his own name, an assignment by an administrator will enable his assignee to sue in another state without taking out letters.[3]

So when he holds negotiable paper.

§ 615. A foreign administrator, also, has a right to sue, without local authorization, on negotiable paper held by him.[4] An administrator who holds negotiable paper belonging to the deceased, payable to bearer, becomes personally principal on such paper, and may sue on it in a foreign country in which the debtor resides, without taking out letters of administration.[5] So an indorsee of such administrator

[1] See cases cited supra, § 604.

That foreign administrators cannot sue without grant of local letters, see Noonan *v.* Bradley, 9 Wal. 394; Sayre *v.* Helme, 61 Penn. St. 299.

No grant from any *foreign* jurisdiction is necessary to sustain a suit for the deceased's property in England. Whyte *v.* Rose, 3 Q. B. 496. An English probate or administration is necessary. Ibid. But the English court will follow the *judex domicilii*. Supra, § 609.

That local letters procured after suit commenced will give title, see Dixon *v.* Ramsay, 3 Cranch, 319; Swatzel *v.* Arnold, 1 Woolw. 383.

[2] Bollard *v.* Spencer, 7 T. R. 358; Shipman *v.* Thompson, Willes, 103; Com. *v.* Griffith, 2 Pick. 11; Slack *v.* Wolcott, 3 Mason R. 508.

[3] Harper *v.* Butler, 2 Pet. 239. See Talmage *v.* Chapel, 16 Mass. 71.

[4] Patchen *v.* Wilson, 4 Hill N. Y. 57; Sanford *v.* McCready, 28 Wis. 102; Brooks *v.* Floyd, 2 McCord, 364.

[5] Klein *v.* French, 57 Miss. 66; Story, § 517, citing Robinson *v.* Crandall, 9 Wend. 425; Barrett *v.* Barrett,



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is capable of bringing suit in a foreign land, without the administrator taking out ancillary letters.[1] This does not apply, however, to bonds. To sue on an English bond, there must be an English administration.[2]

§ 615 *a*. Where a domiciliary administrator obtains a judgment against a debtor in the land of the deceased's domicil, such a judgment may be the basis of an action by such administrator in a foreign state, where the debtor resides, or has assets; the debt having merged in the judgment, and the administrator having become personally liable for the same.[3]

May sue on judgment.

### 2. *Where he may be sued.*

§ 616. The general rule is that the foreign administrator of a foreign intestate cannot be called to account, so far as concerns assets received by him in the land of his appointment, except in the state in which he took out letters of administration.[4] The tribunal from which he takes out letters is that to which he is distinctively amenable.[5]

Only in his own forum.

§ 617. When, however, he comes into court and makes de-

8 Greenl. R. 353; though see Stearns *v.* Burnham, 5 Greenl. R. 361; Thompson *v.* Wilson, 2 N. H. 291; McNeilage *v.* Holloway, 1 Barn. & A. 218.

[1] Peterson *v.* Chemical Bank, 32 N. Y. 21.

[2] Whyte *v.* Rose, 3 Q. B. 507.

[3] Bonafores *v.* Walker, 2 T. R. 127; Macnichol, in re, L. R. 19 Eq. 81; Talmage *v.* Chapel, 16 Mass. 1; Smith *v.* Webb, 1 Barb. 230; Barton *v.* Higgins, 41 Md. 539; Greasons *v.* Davis, 9 Iowa, 219; Wayland *v.* Porterfield, 1 Metc. (Ky.) 638; Rucks *v.* Taylor, 49 Miss. 552; Klein *v.* French, 57 Miss. 882; but see Smith *v.* Nicholls, 5 Bing. N. C. 208.

[4] Brownlee *v.* Lockwood, 5 Green (N. J.), 243; Boston *v.* Boylston, 2 Mass. 384; Fay *v.* Haven, 3 Met. 109; McRae *v.* McRae, 11 Louis. R. 571; Bond *v.* Graham, 1 Hare, 482; Price *v.* Dewhurst, 4 Myl. & C. 76; Preston *v.* Lord Melville, 8 Cl. & Fin. 12; Vaughan *v.* Northrup, 15 Peters, 1; Caldwell *v.* Harding, 5 Blatch. C. C. 501; Morrill *v.* Morrill, 1 Allen, 132; Chase *v.* Chase, 2 Allen, 101; Vermilyea *v.* Beatty, 6 Barb. 432; Story, § 513, note i.; § 514 *b*. But see McNamara *v.* Dwyer, 7 Paige, 236; Swearingen *v.* Pendleton, 4 Serg. & R. 389; Evans *v.* Tatem, 9 Serg. & R. 252; Bryan *v.* McGee, 2 Wash. C. C. 337; Wms. on Ex. (1879), 1939.

[5] Atty. Gen. *v.* Dimond, 1 Cromp. & Jer. 356; Atty. Gen. *v.* Hope, 2 Cl. & Fin. 84; S. C., 1 Cr., M. & R. 538; Webb, in re, 18 N. Y. Sup. Ct. 124; Sayre *v.* Helme, 61 Penn. St. 299; Boston *v.* Boylston, 2 Mass. 384; Fay *v.* Haven, 3 Met. (Mass.) 109; Brownlee *v.* Lockwood, 5 Green (N. J.), 243; Brookshire *v.* Dubose, 2 Jones Eq. 276.



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fence in a suit brought against him by a creditor of the estate, he cannot be compelled, after summons and appearance, to take out new letters and enter bond.[1] And where an administrator goes into a foreign country, and there, by collecting debts or seizing assets belonging to the estate, makes himself executor *de son tort*, he is liable to suit for the same.[2] And he may be required by bill of discovery to disclose how far he has taken action in respect to the estate.[3]

Exceptions to rule.

Where, also, funds are forwarded by a domiciliary administrator to an agent in a foreign land, in order to pay legatees and distributees, such agent may be compelled to pay over to the *cestuis que trust*, without setting up, as technical defendant, an ancillary administrator.[4]

Judgment against one administrator cannot be enforced against another.

§ 618. An action does not lie against an administrator in one state on a judgment recovered against another administrator of the same intestate appointed under the authority of another state.[5]

### 3. *What is to be the Course of Distribution in Ancillary Administrations.*

Ancillary administrator must first settle in his *forum*.

§ 619. As to the regulation of ancillary administrations, the law of the place in which such administration is taken out must necessarily prevail. But, while this must be conceded, several subordinate questions of interest arise. When the funds in the hand of the ancillary administrator are sufficient to pay all legitimate claims existing in the jurisdiction by which such administration is granted, the administrator's course, it is true, is plain. He is to pay such debts, under direction of the court to which he owes his authority; settle his accounts, under the supervision of such court; and when such accounts are legally passed on and affirmed, transmit the residuum to the administrator in chief, *i. e.* the administrator appointed by the court of the deceased's last domicil, to be distributed among heirs and legatees.[6] But in such cases, in view of

[1] Moss *v.* Rowland, 3 Bush (Ky.), 505.

[2] Taylor *v.* Benham, 5 How. U. S. 233; Campbell *v.* Tousey, 7 Cow. 64.

[3] Clopton *v.* Booker, 27 Ark. 482.

[4] Arthur *v.* Hughes, 4 Beav. 506.

[5] Infra, § 629.

[6] Preston *v.* Melville, 8 Cl. & F. 1; Meiklan *v.* Campbell, 24 Beav. 100.



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the delicacy of the issues and complication of the trust, it is important that the ancillary administrator should make no payments except under decree of the court by which he is appointed.[1] To such court he is exclusively bound to account.[2] Nor are any assets to be transmitted to the administrator of the domicil when there are claimants within the jurisdiction of the ancillary administrator.[3]

State will protect its own citizens.

§ 620. The primary liability of the assets of the ancillary administration for debts due to citizens residing in its jurisdiction is defined in an able opinion by Chief Justice Parker, of the Supreme Court of Massachusetts.[4] After stating that the general principle is that the ancillary administrator is to collect the debts in his particular jurisdiction, and forward the assets to the domiciliary administrator, he declares that an exception to the general rule grows out of the duty of every government and its courts to protect its own citizens in the enjoyment of their property and the recovery of their debts, — so far as this may be done without violating the rights of creditors living in a foreign country. In relation to the effects found within our jurisdiction and collected by aid of our laws, a regard to the rights and interests of our citizens requires, it is argued, that those effects should be made answerable for debts due to them, in a just proportion to the whole estate of the deceased, and all the claims upon it, whatever they may be.[5]

Conflict in cases of insolvency.

§ 621. But when the estate is insolvent much more difficult questions arise. That which is most easy to settle is the primary question, whether, admitting such insolvency, the ancillary administration is to pay the creditors of the ancillary jurisdiction in full, or whether such creditors are only to come in *pro ratâ* with creditors who prove in other lands. That the latter course is proper is urged by Chief Justice Parker, in the case just cited, relying mainly on the supposed rule of the ubiquity of bankrupt procedure.

[1] See Preston *v.* Lord Melville, 8 Cl. & Fin. 12; Vaughan *v.* Northrup, 15 Pet. 1; Richards *v.* Dutch, 8 Mass. 506; Dawes *v.* Boylston, 9 Mass. 337; Dawes *v.* Head, 3 Pick. 128; Hooker *v.* Olmstead, 6 Pick. 481; Jennison *v.* Hapgood, 10 Pick. 77; Miller's Est. 3 Rawle, 312.

[2] Ibid.; infra, § 634.

[3] Mackey *v.* Coxe, 18 How. U. S. 100; Porter *v.* Haydock, 6 Vt. 374; Parker's Appeal, 61 Penn. St. 478.

[4] Dawes *v.* Head, 3 Pick. 128.

[5] See infra, § 639.



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§ 622. It should be observed, in reference to this argument, that the practice of bankrupt courts, appealed to above, is far from sustaining the position that an ancillary administrator must remit, in cases of insolvency, the fund for distribution by the principal administrator. No question exists that a bankrupt assignee is to apply all funds that come into his hands to all creditors who prove their claims according to the law of the country to which he owes his appointment. The court of the *situs*, which is in such case the court of the bankruptcy, distributes the assets according to its own law. But when the court of the *situs* and the court of the bankruptcy are in separate territories, then, as has been already seen,[1] the prevalent opinion now is that the court of the *situs* is supreme, and must apply to the property found within its jurisdiction its own territorial law. In harmony with this view we find it laid down in 1867, by a learned judge in New Hampshire, that "whatever weight the English or early New York authorities might otherwise have been entitled to, the great weight of American authorities is the other way; and it may be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitae* prevails over the law of domicil, with regard to the rule of preferences in the case of insolvents' estates."[2] If then we extend the analogy drawn from insolvency *inter vivos*, we would hold that where a person domiciled abroad has assets and contracts debts in Massachusetts, where, after his death, an ancillary administration is started, the Massachusetts assets are to be governed by the law of the *situs*. That law may say, in application of its distinctive policy, "Hand over the assets to the principal administrator, and let him distribute according to the law of the deceased's domicil." But at the same time, it is in accordance with all the analogies of international law to say: "The Massachusetts assets are first to go to the Massachusetts creditors, who may be presumed to have trusted the deceased on the faith of such

Argument that creditors of forum have priority.

[1] Supra, §§ 386–391; infra, § 798.

[2] Dunlap *v.* Rogers, 47 N. H. 287. As sustaining the text, see, further, Goodall *v.* Marshall, 11 N. H. 88; Tunstall *v.* Pollard, 11 Leigh, 1. Supra, §§ 345 *et seq.* See, also, infra, § 639. The question as to bankrupt assignments will be found further discussed infra, §§ 794, 806.



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assets. Independently of this, no government is bound, according to one of the acknowledged principles of international law, to surrender property to which its own citizens have a legal claim. If the insolvency of the owner of these goods had been known before his death, this claim could have been made good by process of foreign attachment. This right we will not allow to be defeated by the accident of the owner's death."[1] And then it should be remembered that this priority is not limited to Massachusetts creditors. It is given on the same terms to all who come in under the Massachusetts administration. There is no exclusion in this. It does not mean that we will keep all these assets for ourselves. It simply asserts that those who claim payment from such assets must look after them. They must hunt for the assets; the assets are not to hunt for them.

Difficulties attending submission to foreign forums.

§ 623. It has been said that this point is of comparatively easy solution, dealing as it does with a purely elementary principle. But it is otherwise when it is conceded that the assets, in case of insolvency, are to be forwarded to the domiciliary administrator, and when the question arises, how is this insolvency to be determined. Is the ancillary administrator to wait until such insolvency be decreed by the court having domiciliary jurisdiction? This would conflict with the acknowledged principle, that a judgment against an administrator in one state is no evidence of indebtedness in a suit against another administrator of the same decedent in another state, for the purpose of affecting assets received by the latter under his administration.[2]

Or is the ancillary administrator to wait until the accounts of the domiciliary administrator are finally settled? This is the only course that would protect the ancillary administrator, but it would work great delay and often great injustice, for in the case of a widely scattered estate, years would elapse before the assets could all be called in, and the realization would probably be very imperfect, as some countries where assets are found might decline to postpone their domestic creditors, and the domiciliary courts might have their own rules of process and prefer-

[1] See, to this point, Union Bank v. Smith, 4 Cranch C. C. 21; Carson v. Oates, 64 N. Car. 115. Infra, §§ 625, 640.

[2] Lightfoot v. Bickley, 2 Rawle, 431; Rosenthal v. Renick, 44 Ill. 203; Story, § 522.



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ence, by which foreign creditors would be postponed, if not shut out. Again, such insolvency could not be decreed by the domiciliary court until the assets were all realized and called in; yet, on this hypothesis, the assets could not be realized and called in until the insolvency is decreed. It will be seen, therefore, that the rule, that in cases of solvency the ancillary administrator is to apply the ancillary debts to the payment of the ancillary creditors, but that in insolvency he is to remit the ancillary assets and remand the ancillary creditors to the domiciliary administrator, is one which, even supposing it to be theoretically correct, cannot be maintained in practice.

Priority must be determined by forum.

§ 624. In fact, the point is virtually decided in cases where there is a conflict of law as to priority of payment among contending claimants. Thus, in some states, judgment creditors have priority; in others, creditors secured by sealed instruments; in others, the state has priority. Which law is to decide as to a special fund, — the law of the deceased's domicil, or the *lex rei sitae?* No doubt the tendency of the Roman jurists is to enforce that of the domicil.[1] But in America the decisions are positive that the law of the *situs* is to prevail, which, of course, when *situs* and domicil conflict, is that of the ancillary administration granted at the spot where the property in question lies. In other words, funds in Massachusetts, belonging to a deceased person whose domicil was English, are to be distributed according to the law of priority in Massachusetts.[2] And this is now understood to be the English rule,[3] and is in accordance with the general doctrine that as

[1] So Story, §§ 526, 527 *et seq.* But the present view, in all cases of insolvency, is to regard both immovables and movables (except such of the latter as actually follow the person) as subject to the priorities of the *situs*. Bar, § 128. Infra, §§ 803-4; supra, § 324. As sustaining this rule, see Wms. on Ex. (1879), 1000.

[2] Holmes *v.* Remsen, 20 Johns. 265; Miller's Est. 3 Rawle, 312; Milne *v.* Moreton, 6 Binn 353. See Union Bank *v.* Smith, 4 Cr. C. C. 509; Harrison *v.* Sterry, 5 Cranch, 289; McElmoyle *v.* Cohen, 13 Peters, 312; Dawes *v.* Head, 3 Pick. 128; Story, § 524.

[3] Pardo *v.* Bingham, L. R. 6 Eq. 480; L. R. 4 Ch. Ap. 735; Cook *v.* Gregson, 2 Drew. 286; Hanson *v.* Walker, 7 L. J. Ch. 135. See Westlake (1880), § 102.

Mr. Westlake (1880), § 102, says: "Every administrator, principal, or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the ju-



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to liens the *lex situs* must, from the nature of things, prevail.[1] It should, of course, be remembered that under an ancillary administration foreign creditors are entitled to prove their debts.[2]

§ 624 *a*. When there are several distributions opened in separate states, a creditor who has obtained a dividend in one of these distributions must account for it when claiming a dividend in another distribution. He will only be entitled to as much as brings him on an equality with other creditors.[3]

A creditor receiving at one distribution must account on claiming at another.

§ 625. It is not necessary, in order to enable an ancillary administrator to obtain an order to sell real estate in the ancillary jurisdiction, for him to show that the personal estate in the domiciliary jurisdiction is exhausted. It is enough if it be exhausted in the ancillary jurisdiction.[4]

Ancillary administrator may sell real estate.

### 4. *Payment of Debts to a Foreign Administrator.*

§ 626. It has already been seen that the authority of an administrator has no extra-territorial force; and consequently no foreign administrator as such, without proper local authority, can collect assets of the estate in any country subject to the English common law.[5] It has,

When payment of debts to foreign administrator is good.

risdiction from which the grant issued or out of it, and whether owing to creditors domiciled in that jurisdiction or out of it, in that order of priority which, according to the nature of the debts or of the assets, is prescribed by the law of the jurisdiction from which the grant issued."

[1] Supra, § 324.

[2] Cook *v.* Gregson, 2 Drew. 286. Supra, § 623.

In Pennsylvania, when there is an ancillary administration, all creditors domiciled in the jurisdiction of the ancillary administration are to be first settled with, and the balance is to be paid to the domiciliary administrator, to whom a creditor domiciled in the latter's jurisdiction is bound exclusively to resort. Barry's App. 88 Penn. St. 131. See Miller's Est. 3 Rawle, 319; Williams on Executors (Phil. ed.), 1664, note.

In New York and Alabama, it is held that whether the court will decree distribution or remit the property abroad to the domiciliary administration is a matter of judicial discretion, dependent on the circumstances of the case. Despard *v.* Churchill, 53 N. Y. 192; Fretwell *v.* McLemore, 52 Ala. 124.

In Mississippi, it is the duty of the ancillary administrator to remit the surplus, after paying debts, to the domiciliary administrator. Klein *v.* French, 57 Miss. 66.

[3] Infra, § 798; Loomis *v.* Farnum, 14 N. H. 119; Tyler *v.* Thompson, 44 Tex. 497.

[4] Rosenthal *v.* Renick, 44 Ill. 202. Supra, § 275 *d*.

[5] Supra, § 604. As to Pennsylva-



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however, been much disputed, whether paying a debt or delivering assets to a foreign administrator is a discharge of such debt or liability, or whether the party so paying or delivering would be liable to a second suit from an administrator of the *rei situs*, should such be appointed. The prevalent doctrine is, that such payment or delivery is no bar to such second suit,[1] though there have been cases where it has been held that a voluntary payment of a *debt* to a foreign administrator, when there is no domestic administrator appointed, is a good discharge of the debt.[2] But it is impossible not to feel that great confusion would be introduced into practice, as well as violence done to one of the fundamental maxims of the English common law, if an administrator should be permitted to collect debts out of his forum.[3] It is even doubted whether a payment made, under decree of court, to a foreign administrator, is a defence to a suit brought on the same debt by a domestic administrator.[4] But where there are no creditors in the ancillary jurisdiction, and no ancillary administration either set up or called for, there can be no practical objection to the principal administrator receiving debts in such jurisdiction.[5]

nia practice, see Shakespeare *v.* Trust Co. 8 Weekly Notes, 92.

[1] Atty. Gen. *v.* Dimond, 1 Cromp. & Jer. 356; Story, § 514.

A payment in New York, where the mortgaged property was, by the mortgage debtor, to a foreign administrator, appointed at the domicil of the mortgagee, has been held no defence to a suit by a domestic administrator, appointed and qualified before the payment. Stone *v.* Scripture, 4 Lansing, 186.

[2] Mackey *v.* Coxe, 18 How. U. S. 104; Stevens *v.* Gaylord, 11 Mass. 256; Hooker *v.* Olmstead, 6 Pick. 481; Trecothick *v.* Austin, 4 Mason, 16; Doolittle *v.* Lewis, 7 Johns. Ch. 49; Brown *v.* Brown, 1 Barb. Ch. 189; Vroom *v.* Vanhorne, 10 Paige, 549; Parsons *v.* Lyman, 20 N. Y. 103; Klein *v.* French, 57 Miss. 66; Story, § 515, note 3. See Huthwaite *v.* Phayre, 1 Man. & Gr. 159.

[3] This is argued in Story, § 515 *a*. Mr. Westlake, 1st ed. art. 296, thinks that "a debt will be recoverable in any forum where the action will otherwise lie, by an administrator who has obtained his grant in that forum, without the necessity of a grant from the forum where the debt must have been recovered at the time of the death;" citing to this effect Whyte *v.* Rose, 3 Q. B. 493; S. P., Young *v.* O'Neal, 3 Sneed, 55.

[4] Shaw *v.* Staughton, 3 Keble, 163. See Huthwaite *v.* Phayre, 1 Man. & Gr. 159; Westlake (1st ed.), art. 298; 2d ed. § 90.

[5] Vaughan *v.* Barret, 5 Vt. 333.

The question in the text is beset with peculiar complications. On the one side (see supra, § 363), the better opinion is that the seat of a debt is



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When there is no appeal from the action of a court of probate affirming the accounts of a domestic administrator, and the time of such appeal is past, a foreign administrator will not be allowed to come in and dispute such accounts on the ground that the domestic administrator had no jurisdiction, not being administrator in the deceased's domicil.[1]

### 5. *Conflicts between Domiciliary and Ancillary Administrations.*

§ 627. The administration taken out in the place of the deceased's domicil is technically the principal, and that taken out in the *situs* of special assets is technically the ancillary. The two administrations are, however, independent of each other to the following extent: —

Special points in relations of domiciliary and ancillary administrations.

§ 628. (*a.*) A decree in favor of the ancillary administrator, in his own forum, finding a balance due him from the estate, is not conclusive as against the domiciliary administrator, in the latter's forum.[2] And so when the same person is both domiciliary and ancillary administrator, a decree in his favor in the domiciliary forum is no bar to a suit against him in the ancillary forum.[3]

§ 629. (*b.*) So a judgment against one such administrator in one state gives no right of action against the other administrator in another state.[4]

the creditor's domicil, and applying this rule to the present point, a domiciliary executor would be entitled at such domicil to receive such debt, just in the same way as he is entitled to receive other assets of his principal situate in such domicil. On the other hand, as he is not entitled to sue the debtor in the latter's domicil, he cannot, in the latter jurisdiction, collect the debt by process of law, though this objection would not apply to a suit against the debtor should he be served when a transient visitor in the domicil of the deceased creditor, which is the state in which the domiciliary administrator has taken out letters. It should be observed, in this connection, that Huthwaite *v.* Phayre, 1 M. & G. 159, so far as it holds that a foreign executor may *sue* on a debt due his principal, is overruled by Whyte *v.* Rose, 3 Q. B. 496. The English rule, no doubt, is, as is stated by Mr. Westlake (1880), § 90, that "on principle, it (a payment of a debt to a foreign administrator) should not be a sufficient discharge."

[1] See infra, § 645.

[2] Ela *v.* Edwards, 13 Allen, 48; Lightwood *v.* Bickley, 2 Rawle, 431. Supra, § 618.

[3] Aspden *v.* Nixon, 4 How. U. S. 467.

[4] Stacey *v.* Thrasher, 6 How. U. S. 458; Hill *v.* Tucker, 13 U. S. 458; Lightwood *v.* Bickley, 2 Rawle, 431. See Mackey *v.* Coxe, 18 How. U. S.



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§ 630. (*c.*) A judgment by one administrator in one state cannot be used as the basis of an action by another administrator, against the same debtor, in another state.[1]

§ 631. (*d.*) Where assets which have been reduced into possession by a foreign administrator find their way into another land, the domiciliary administrator, in such land, cannot seize such assets, either by attachment against the garnishees, or suit against the foreign administrator.[2] The foreign administrator has made himself liable for the assets in his own court, where alone he can be pursued.[3]

§ 632. (*e.*) Assets can only be sold, transferred, or assigned, by the administrator of the *situs*. A foreign administrator, to enable him to make such transfer, must take out ancillary letters in the *situs*.[4]

§ 633. (*f.*) Goods *in transitu* are to be charged to the administrator who first reduces them into possession.[5] With ships on a round voyage, the home port seems to be that whose administration attaches. On this point Judge Story states,[6] that "according to the common course of commercial business, ships and cargoes, and the proceeds thereof, locally situate in a foreign country at the time of the death of the owner, always proceed on their voyage, and return to the home port, without any suspicion that all the parties concerned are not legally entitled so to act; and they are taken possession of and administered by the administrator of the *forum domicilii*, with the constant persuasion that he may not only rightfully do so, but that he is bound to administer them, as part of the funds appropriately in his hands." This view is accepted by Mr. Westlake,[7] and has been frequently adopted in practice.[8]

§ 634. (*g.*) An ancillary administrator can only be called on, in the state where he takes out ancillary letters, for the

100; McLean *v.* Meek, Ibid. 16; Tighe *v.* Tighe, cited infra, § 647; Whart. on Ev. §§ 763 *et seq.*

[1] Talmage *v.* Chapel, 16 Mass. 71. See supra, § 615.

[2] Currie *v.* Bircham, 1 Dowl. & Ry. 35; Dawes *v.* Head, 3 Pick. 128; Harvey *v.* Richards, 1 Mason, 381; Story, § 518.

[3] Supra, § 614.

[4] Supra, § 604; Goodwin *v.* Jones, 3 Mass. 514.

[5] Orcutt *v.* Orms, 3 Paige, 459.

[6] § 520.

[7] 1st ed. art. 295.

[8] Wells *v.* Miller, 45 Ill. 382; Collins *v.* Bankhead, 1 Strobh. 25.



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amount of the assets in such state where such ancillary letters were granted.[1]

§ 635. (*h.*) In a conflict between the law of the domicil and the law of the *situs*, as to the priority of payment, in cases of insolvency, the law of the *situs* prevails.[2]

§ 636. (*i.*) The rules of international law, as here laid down, apply to the reciprocal relations of administrations taken out in the several United States. Each state, in this respect, is sovereign within its own limits. Each is foreign, so far as concerns the issue, to the other states in the Union.[3]

§ 637. (*j.*) A domiciliary administrator who, during his administration, receives assets belonging to the estate which were in a foreign land at the time of the death of the principal, is accountable for such assets, supposing he has not taken out letters in the *situs*.[4]

§ 638. (*k.*) When there are several local administrators, the commission of each is to be governed by the law of the place in which his letters are granted.[5]

§ 639. (*l.*) Although in theory the ancillary administrator, in cases of solvency, should transmit the residuum in his hands to the domiciliary administrator for final distribution,[6] yet, to avoid circuity, the court having jurisdiction over the ancillary administration may order it to pay its residuum directly to the heirs or legatees.[7]

[1] Lynes *v.* Coley, 1 Redfield (N. Y.) 405. Supra, § 619.

[2] Supra, § 624.

[3] Hill *v.* Tucker, 13 How. U. S. 358; McLean *v.* Meek, 18 How. U. S. 16; Goodall *v.* Marshall, 11 N. H. 88; Porter *v.* Heydock, 6 Vt. 374; Bullock *v.* Rogers, 16 Vt. 294; Abbott *v.* Coburn, 28 Vt. 170; Dawes *v.* Boylston, 9 Mass. 337; Fay *v.* Haven, 3 Met. (Mass.) 109; Brownlee *v.* Lockwood, 5 Green (N. J.), 243; Mothland *v.* Wireman, 3 Penn. R. 185; Sayre *v.* Helme, 61 Penn. St. 478; 2 Kent's Com. pp. 434, 435.

[4] Evans *v.* Tatem, 4 Serg. & R. 252; Dowdale's case, 6 Coke, 46 *b*. See Mr. Westlake's comments, 1st ed. art. 304; 2d ed. § 95, and those of Judge Story, § 514 *a*. And see Vaughan *v.* Barret, 5 Vt. 333; Rand *v.* Hubbard, 4 Met. (Mass.) 252.

Judge Story was under the impression that in Dowdale's case the English executor received the assets under an Irish grant, and hence that the case is irreconcilable with other rulings. But Mr. Westlake replies that it does not appear in the reports that there was any Irish grant. As sustaining the text see Stirling-Maxwell *v.* Cartwright, L. R. 11 Ch. D. 522.

[5] Freeman *v.* Fairlee, 3 Mer. 24.

[6] Fay *v.* Haven, 3 Met. 109; Wheelock *v.* Pierce, 6 Cush. 288.

[7] Supra, § 620; Meiklan *v.* Camp-



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§ 640. (*m.*) An ancillary administrator must satisfy in full the creditors of his jurisdiction, even though the principal administration be insolvent.[1]

### XI. CURRENCY IN WHICH DISTRIBUTEES ARE PAYABLE.

Such currency usually determinable by place of administration.

§ 641. The rule is, that distributive interests are to be paid in the currency of the country in which the decedent died domiciled, which is also the place of the administration,[2] unless, in case of a will, it appears that he intended otherwise. Nor is this practice varied when a legacy is to be paid out of real estate situated in a land where a currency prevails different from that of the testator's domicil.[3]

Practice as to interest.

§ 642. The English practice is to allow to distributees that interest which is established in such case in the state "in which the assets had been placed by the executors or administrators since they became payable," supposing this to be the proper place for investment.[4]

### XII. TAXES ON SUCCESSION.

Such taxes generally dependent on domicil.

§ 643. By the English practice, taxes on probate or administration are payable according to the *lex situs* of the assets at the death of the decedent; those on distributive interests, according to the *lex domicilii* of the decedent, without regard to the residence of the distributees.[5] The rules

bell, 24 Beav. 100; Innes *v.* Mitchell, 4 Drew. 141; 1 De G. & J. 423. See Dawes *v.* Head, 3 Pick. 145; Mackey *v.* Coxe, 18 How. U. S. 100; Carmichael *v.* Ray, 5 Ired. Eq. 365; Westlake, 1st ed. art. 312. Supra, § 622.

[1] Supra, §§ 623–4; Redfield, ed. of 1870, 29, 254. See Cook *v.* Gregson, 2 Drew. 286; Pardo *v.* Bingham, L. R. 6 Eq. 485; L. R. 4 Ch. Ap. 735, and cases cited supra, § 624.

[2] See on this point last sentence of § 592.

[3] Story, § 479 *b*, and cases there cited; Phil. iv. p. 636.

[4] Phil. iv. 636; Westlake, 1st ed. art. 321; Raymond *v.* Brodbelt, 5 Ves. 199; Bourke *v.* Ricketts, 10 Ves. 330. See supra, § 509.

In Hamilton *v.* Dallas, 26 W. R. 326; L. R. 1 Ch. D. 257 (1875), it was held that though personal property will be distributed according to the law of the place of domicil, the payment of interest will be governed by the practice of the Court of Chancery.

[5] Phil. iv. p. 636; Westlake, 1st ed. art. 320; Thomson *v.* Adv. Gen. 12 Cl. & F. 29. Where a testator's last domicil is foreign, no legacy duty is payable. Bruce, in re, 2 Cr. & J. 436; Logan *v.* Fairlie, 1 Myl. & Cr. 59. See as to prior cases, as to



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laid down for the determination of taxation in relation to domicil have been already noticed.[1] The valuation of the assets, when the object is to determine what probate or administration duty is payable, is to be settled, it is held in England, by the English standard, irrespective of their value at the deceased's domicil at the time of his death.[2] In such cases stock is held to be localized in the place where it is transferable.[3] *Succession and legacy* taxes are payable on the estate of a person who dies domiciled in England, and are imposed on his entire personalty wherever situate. It is otherwise as to annuities and legacies charged on foreign land, and as to immovables situate abroad. But such taxes are imposed on real estate and chattels real in England, when adjudged to be such by English law.[4]

Succession duty is payable on personal estate directed to be invested in England by a testator domiciled abroad.[5] And this is the case as to money directed to be invested in English funds though it has not yet arrived in England.[6]

### XIII. OF PROBATE.

§ 644. So far as concerns the adequacy of the execution of a will, the rule is that the probate of the testator's last domicil is conclusive.[7] "If probate," said Lord Chancellor Chelmsford, in a case in the House of Lords,[8] "is granted of a will, then that conclusively establishes, in all courts, that the will was executed according to the law of the country where the testator was domiciled." Of course such pro-

Domiciliary probate conclusive.

which there is much conflict, 1 Redfield, 399, 400. Compare Frederickson *v.* Louisiana, 23 How. 446.

[1] Supra, § 79 *a*.

[2] Fernandes' case, L. R. 5 Ch. 314.

[3] Atty. Gen. *v.* Hope, 1 C., M. & R. 530; 2 Cl. & F. 84. See further Foote's Priv. Int. Jur. 209 *et seq.*

[4] Thompson *v.* Adv. Gen. 12 Cl. & F. 1; Wallace *v.* Atty. Gen. L. R. 1 Ch. 1; Ewin, in re, 1 Cr. & J. 151.

[5] Atty. Gen. *v.* Campbell, L. R. 5 H. L. 524.

[6] Lyall *v.* Lyall, L. R. 15 Eq. 1. In Frederickson *v.* Louisiana, 23 How. 446, it was held that the treaty with Würtemberg did not cover cases of Würtemberg subjects becoming naturalized in the United States. See Dip. Corr. 1868, part ii. p. 55.

[7] A judgment in favor of a will by the *judex domicilii* has been held in England to determine the question of its validity. Cosnahan, in re, L. R. 1 P. & M. 183; Miller *v.* James, L. R. 3 P. & M. 4. See supra, § 595.

[8] Whicker *v.* Hume, 7 H. of L. Cas. 124.



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bate does not touch the question of the application of the will to real estate, as the will must be executed and recorded according to the *lex rei sitae*,[1] nor does it determine the domicil of the testator.[2] And even as to personalty there must be an ancillary probate in the home jurisdiction to give effect to a foreign probate.[3]

A will disposing solely of property in a foreign land will not be admitted to probate in England,[4] though it is otherwise when such will is referred to in an ancillary will intended to dispose of English property.[5]

When an ancillary probate is granted of a foreign will, it will be afterwards presumed that the probate court of the place of the testator's last domicil had jurisdiction. All exceptions to the validity of the original probate must be taken before the granting of the ancillary probate; otherwise they will be shut out.[6]

It is usual to attach to the probate a translation of a foreign will; but the fact of probate does not go to the accuracy of the translation, which may be revised either in the probate court or in a court of error.[7]

Effect of statutory limit of probate appeal.

§ 645. The law, as originally settled in Massachusetts, was, that if an administrator or guardian was appointed by a judge of probate, who had not jurisdiction from the want of domicil on part of the deceased, the whole proceedings were void, and all titles passing under the same null.[8] To correct this, and to give stability to the law, statutes

[1] Jones *v.* Robinson, 17 Ohio St. 171; Kerr *v.* Moore, 9 Wheat. 565.

[2] "A probate is conclusive evidence that the instrument was proved testamentary according to the law of this country. But it proves nothing else." Lord Cranworth, Whicker *v.* Hume, 7 H. L. C. 156.

[3] Price *v.* Dewhurst, 4 My. & Cr. 76; Bond *v.* Graham, 1 Hare, 482; Campbell *v.* Sheldon, 13 Pick. 8; Armstrong *v.* Lear, 12 Wheat. 169.

[4] Howden, Goods of, 43 L. J. P. & M. 27; Cood, Goods of, L. R. 1 P. & M. 449.

[5] Harris, Goods of, L. R. 2 P. & M. 83; Saussaye, Goods of, L. R. 3 P. & M. 43. See Astor, Goods of, L. R. 1 P. D. 150.

[6] Townshend *v.* Downer, 32 Vt. 184; Barstow *v.* Sprague, 40 N. H. 27. See, as to American practice, 3 Redfield, 3d ed. pp. 400–412. Cf. Shannon *v.* White, 109 Mass. 146.

[7] L'Fit *v.* L'Batt, 1 P. Wms. 526. See Rule, in re, L. R. 4 P. D. 76.

[8] Holyoke *v.* Haskins, 5 Pick. 20; 9 Pick. 259.



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were passed in Massachusetts and Maine and other states limiting the time of appeal from probate decisions. Under these statutes it was held by the Supreme Court of Maine, in 1870, that when administration was commenced in Maine on the assumption that the deceased was domiciled in that state, and there was a final decree of the Probate Court on the settlement of the fourth account, after due proof, based on this assumption, then the question of domicil must be regarded as conclusively settled, so far as concerns distribution of Maine assets, and that it was not competent to show that the last domicil of the deceased was in another state.[1] But such statutes cannot operate extra-territorially so as to invest internationally with domicil a person not domiciled in the enacting state.[2]

### XIV. PRACTICE IN TRYING THE ISSUE AS TO THE VALIDITY OF A WILL.

§ 645 *a*. While the law of domicil governs as to the formalities and construction of bequests of movables, this, as is noticed elsewhere,[3] does not determine the mode of trial, the admissibility and effect of evidence, and the shape of the issue. These, as well as all other matters of practice, are determined by the law of the court of process.[4]

Trial to be by *lex fori*.

[1] Record *v.* Howard, 58 Me. 225.
[2] Supra, § 77 *a*.
[3] Supra, § 593; infra, § 747.
[4] Yates *v.* Thomson, 3 Cl. & Fin. 548; Di Sora *v.* Phillips, 10 H. of Lords Cases, 624; Adams *v.* Norris, 23 How. U. S. 354.



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# CHAPTER X.

## FOREIGN JUDGMENTS.


I. Distinctive English and American Practice.

Foreign judgments, to be binding, must be internationally regular, and must be final, § 646.
Such judgments are conclusive, § 647.
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### I. DISTINCTIVE ENGLISH AND AMERICAN PRACTICE.

§ 646. To give extra-territorial effect to a foreign judgment the following conditions are essential: —



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Foreign judgments, to be binding, must be internationally regular and final.

(1.) The court, in personal actions, must have jurisdiction of the person of the party sued.[1]

(2.) The court, in real actions, must have jurisdiction of the thing attached.[2]

(3.) The parties interested must have been duly summoned.[3]

(4.) The judgment, if *in personam*, and for a pecuniary claim, must be for a fixed sum.[4]

(5.) The judgment must be final.[5] But it is not a bar to a suit on a foreign judgment that in the foreign court a stay of execution has been entered; though the court will give a corresponding stay of execution on the defendant's demand.[6]

Whether the pendency of an appeal from the foreign judgment is a stay to a suit on such judgment depends upon whether such an appeal is a stay to the suit in the foreign court. In France, a judgment can be executed under certain circumstances during the pendency of the appeal; and hence, in an English suit on such French judgment, stay of execution, pending the appeal, has been refused.[7] And the mere fact of the pendency of an appeal in the foreign court does not prevent the suit being pressed to judgment in the domestic court.[8]

How far *lis pendens* is a defence will be hereafter discussed.[9]

§ 647. It is now settled in England that a judgment, under the conditions above stated, is conclusive on the merits, if such judg-

[1] Infra, § 652. If this jurisdiction vests by international law it is enough, though in exercising it the court may transcend its own rules. Vasquelin *v.* Bouard, 15 C. B. N. S. 341.

[2] Infra, § 664.

[3] Infra, § 649; Rebstock *v.* Rebstock, 2 Pitts. (Penn.) 124; Crafts *v.* Clark, 31 Iowa, 77; Whart. on Ev. § 796.

[4] Infra, § 647; Henderson *v.* Henderson, 6 Q. B. 288; Sadler *v.* Robins, 1 Camp. 253. That it may be for costs, see Russell *v.* Smyth, 9 M. & W. 810; though see Sheehy *v.* Ass. Co. 2 C. B. (N. S.) 211.

[5] Ricardo *v.* Garcias, 14 Sim. 263; S. C., 12 Cl. & F. 380; Frayes *v.* Worms, 10 C. B. N. S. 149; Plummer *v.* Woodburne, 4 B. & C. 625; Smith *v.* Nicolls, 5 Bing. N. C. 208.

[6] Hall *v.* Odber, 11 East, 118. As to practice on inter-state judgments, see infra, § 657 *a*.

[7] Alivon *v.* Furnival, 1 Cr., M. & R. 297. See Henderson *v.* Henderson, 3 Hare, 100; Scott *v.* Pilkington, 2 Best & Smith, 11.

[8] Munro *v.* Pilkington, 31 L. J. Q. B. 81; Castrique *v.* Behrens, 30 L. J. Q. B. 163; Foote's Priv. Int. Law, p. 476. Infra, § 657 *a*.

[9] Infra, §§ 784, 785.



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ment be for a definite sum;[1] and this even though the judgment proceeded on a mistaken notion of English law.[2] This result, however, was not reached without hesitation; and at one time there was an inclination to hold that a foreign judgment is not to be treated as constituting a record debt, but only as evidence of a simple contract debt.[3] But it was finally decided by the House of Lords,[4] and by the Judicial Committee of the Privy Council,[5] that the home tribunal cannot act as a court of appeal from the foreign tribunal; *i. e.* a foreign judgment cannot be impeached as being erroneous on the merits, or as founded on a mistake either of law or fact. It has, however, been intimated by Lord Hatherley that if a foreign court, in deciding a case whose proper seat is in England, should refuse, in violation of international law, to apply the English law by which the case is properly bound, the judgment will be impeachable in England.[6]

In England such judgments are conclusive.

[1] Supra, § 646; Bank of Australasia *v.* Nias, 16 Q. B. 717; Patrick *v.* Shedden, 2 E. & B. 14; Scott *v.* Pilkington, 2 Best & S. 11; Paul *v.* Roy, 15 Beav. 433; Arnott *v.* Redfern, 3 Bing. 353; Doglioni *v.* Crispin, L. R. 1 H. L. 301; Godard *v.* Gray, L. R. 6 Q. B. 139; Ricardo *v.* Garcias, 12 Cl. & F. 368; Castrique *v.* Imrie, L. R. 4 H. L. 414; Gen. St. Nav. Co. *v.* Gouillou, 11 Mees. & W. 877; Simpson *v.* Fogo, 1 J. & H., 18; S. C. 1 H. & M. 195.

[2] Godard *v.* Gray, L. R. 6 Q. B. 139.

A colonial judgment against the colonial administrator of a deceased person has been held not evidence of the debt against an Irish administrator of the same estate. Tighe *v.* Tighe, Ir. Rep. 11 Eq. 203. See supra, §§ 628 *et seq.*

[3] Hall *v.* Odber, 11 East, 124; Plummer *v.* Woodburne, 4 B. & C. 625; Smith *v.* Nicolls, 5 Bing. N. C. 208. See article in London Law Times, June 2, 1877, p. 75.

Mr. Westlake (1880), § 309, after reviewing the cases, says, "The judgment of an ordinary European or American state cannot be questioned in England for error in fact or in law."

[4] Castrique *v.* Imrie, L. R. 4 H. L. 415. See Imrie *v.* Castrique, 8 C. B. N. S. 405; overruling Castrique *v.* Imrie, Ibid. And see fully cases cited Whart. on Ev. § 803.

[5] Messina *v.* Petrococchino, L. R. 4 P. C. 150; 41 L. J. P. C. 27; 20 W. R. 451; Godard *v.* Gray, L. R. 6 Q. B. 139–150.

[6] See Simpson *v.* Fogo, 1 J. & H. 18; Powell's Ev. 4th ed. 129. Cf. Meyer *v.* Ralli, L. R. 1 C. P. D. 359.

But in Castrique *v.* Imrie, 4 H. L. 414, it was said: "Assuming that there was a mistake of the law, still this error will not render the French judgment void in this country. Even if evidence had been offered to the French courts of the English law applicable to the case, and they had honestly come to an erroneous conclusion upon the subject, their judgment could not be impeached in our courts."



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§ 648. Such being the rule now finally adopted in England, it follows that in that country a foreign judgment, when offered for the plaintiff as the basis for a suit, cannot be contested by the defendant, supposing that the court of the original judgment had jurisdiction, the judgment was for a fixed sum, and, as will presently be seen, the defendant had been duly summoned.[1]

So when offered by plaintiff.

§ 649. A personal judgment based solely on extra-territorial service, the defendant not being domiciled within the jurisdiction, is to be regarded, as has been already incidentally noticed, as internationally invalid. One state cannot in this way obtain jurisdiction of a person domiciled in another state. And the averment in the original record of service may be impeached and explained by parol in the domestic court.[2]

Judgment based on extra-territorial service invalid.

[1] 2 Smith's L. C. 686. As to decrees of foreign courts in equity, see Henderson *v.* Henderson, 6 Q. B. 297; Houlditch *v.* M. of Donegal, 8 Bligh, N. S. 301; 2 Cl. & Fin. 470; Lloyd & G. 82, S. C.

Mr. Taylor (§ 1553) thus marshals the English authorities on this controversy. It has several times been held by the Court of the Queen's Bench (Henderson *v.* Henderson, 6 Q. B. 288, 298, 299; Ferguson *v.* Mahon, 11 A. & E. 179, 183; 3 P. & D. 143, S. C.; Bk. of Australasia *v.* Nias, 16 Q. B. 717; Munroe *v.* Pilkington, 31 L. J. Q. B. 81; 2 B. & S. 11, S. C., *nom.* Scott *v.* Pilkington), once by the Court of Common Pleas (Vanquelin *v.* Bouard, 15 Com. B. N. S. 341; 33 L. J. C. P. 78, S. C.), and once by the Court of Exchequer (De Cosse Brissac *v.* Rathbone, 6 H. & N. 301; 30 L. J. Ex. 238, S. C.), that no inquiry can be instituted into the merits of the original action, or the propriety of the decision, and that the defendant is not at liberty to raise any objection, which would have constituted a defence in the foreign court, and which, consequently, should there have been pleaded and finally disposed of. See Gold *v.* Canham, cited in note to Kennedy *v.* Cassillis, 2 Swanst. 325; Galbraith *v.* Neville, 1 Doug. 6, n.; Tarleton *v.* Tarleton, 4 M. & Sel. 22; Martin *v.* Nicholls, 3 Sim. 458; Martin *v.* Nicolls, in Becquet *v.* MacCarthy, 2 B. & Ad. 954. On the other hand, Lord Hardwicke (Isquierdo *v.* Forbes, cited by Lord Mansfield in 1 Doug. 6), Lord Mansfield (Walker *v.* Witter, 1 Doug. 1), Chief Baron Eyre (Phillips *v.* Hunter, 1 Doug. 1), Mr. Justice Buller (Galbraith *v.* Neville, 1 Doug. 6, n.; Messin *v.* Ld. Massareene, 4 T. R. 493), Mr. Justice Bayley (Tarleton *v.* Tarleton, 4 M. & Sel. 23), and especially Lord Brougham (Houlditch *v.* M. of Donegal, 8 Bligh N. S. 301, 337–342; 2 Cl. & Fin. 470, 477–479, S. C.; Donn *v.* Lippman, 5 Cl. & Fin. 1, 20–22), have argued that such judgments are only *primâ facie* proof of the facts they aver.

[2] Ferguson *v.* Mahan, 11 Ad. & E. 179; Donn *v.* Lippman, 5 Cl. & Fin. 1; Cavan *v.* Stewart, 1 Stark. 525;



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Even an extra-territorial acceptance of service has been held not to be a sufficient basis of a judgment.[1]

Houlditch *v.* Donegal, 8 Bligh N. S. 338; Vallee *v.* Dumergue, 4 Ex. 290; Brook, in re, 16 C. B. N. S. 403; Copin *v.* Adamson, L. R. 9 Ex. 345; Schibsby *v.* Westenholz, L. R. 6 Q. B. 288; Meyer *v.* Ralli, L. R. 1 C. P. D. 358; Darcy *v.* Ketchum, 11 How. 165, 649; Christmas *v.* Russell, 5 Wal. 291; Bischoff *v.* Wethered, 9 Wal. 812; Cooper *v.* Reynolds, 10 Wal. 308; Thompson *v.* Whitmore, 18 Wall. 457; Knowles *v.* Gas Co. 19 Wal. 58; Pennoyer *v.* Neff, 95 U. S. 714; McVicker *v.* Budy, 31 Me. 314; Whittier *v.* Wendell, 7 N. H. 257; Price *v.* Hickok, 39 Vt. 292; Bodurtha *v.* Goodrich, 3 Gray, 508; 6 Gray, 323; Carleton *v.* Bickford, 13 Gray, 591; Mowry *v.* Chase, 100 Mass. 79; Sears *v.* Dacey, 122 Mass. 386; Wood *v.* Watkinson, 17 Conn. 500; Frothingham *v.* Barnes, 9 R. I. 474; Shaver *v.* Brainard, 29 Barb. 25; Brown *v.* Nichols, 42 N. Y. 26; Hoffman *v.* Hoffman, 46 N. Y. 30; People *v.* Baker, 76 N. Y. 78; Kuehling *v.* Lebermann, 2 Weekly Notes, 616; Reber *v.* Wright, 68 Penn. St. 471; Scott *v.* Noble, 72 Penn. St. 115; Noble *v.* Oil Co. 79 Penn. St. 354; Rebstock *v.* Rebstock, 2 Pitts. (Penn.) 124; Arndt *v.* Arndt, 15 Ohio, 83; Zepp *v.* Hager, 70 Ill. 223; Crafts *v.* Clark, 31 Iowa, 77; Outwhite *v.* Porter, 13 Mich. 533; Tyler *v.* Pratt, 30 Mich. 63; McEwen *v.* Zimmer, 38 Mich. 765; Jones *v.* Spencer, 15 Wis. 583; Williams *v.* Preston, 3 J. J. Marsh. 600; Davidson *v.* Sharpe, 6 Ired. L. 14; Miller *v.* Miller, 1 Bailey S. C. 242; Ponce *v.* Underwood, 55 Ga. 601; Winston *v.* Taylor, 28 Mo. 82; Barlow *v.* Street, 65 Mo. 611. See *contra*, Field *v.* Gibbs, 1 Pet. C. C. 155; Roberts *v.* Caldwell, 5 Dana, 512. That such is the rule as to judgments of sister states, see infra, §§ 653, 660 *et seq.* The question in its relations to practice is discussed infra, § 715. That a service on a resident partner will not bind a non-resident unless partnership be proved, see Frink *v.* Sly, 4 Wis. 310.

[1] Pennoyer *v.* Neff, 95 U. S. 714; Scott *v.* Noble, 72 Penn. St. 115. See *contra*, Copin *v.* Adamson, L. R. 1 Ex. D. 17; aff. S. C., L. R. 9 Ex. 345.

In Meyer *v.* Ralli, L. R. 1 C. P. D. 369, the principle of Schibsby *v.* Westenholtz, that the obligation of a foreign judgment rested on duty, such judgment being obligatory only on subjects of the state, was reaffirmed. This, and not comity, is the only ground on which the validity of a foreign judgment can be rested. Did the court, entering judgment, have jurisdiction over the person or over the thing as to which the judgment was entered? If the person was a domiciled subject of the state from which the judgment proceeds, or if he was in the state at the time of the service of the writ, and was duly served, or duly entered an appearance, then there is jurisdiction; otherwise there is no jurisdiction, nor is there jurisdiction as to a proceeding *in rem*, when the thing attached was not at the time within the state in which the writ was issued.

In Rousillon *v.* Rousillon, L. R. 14 Ch. D. 351, where the defendant possessed no property in France, the country of the contract and of judgment, and was not personally notified, Fry, J., refused to sustain a suit on the judgment, and said that it was a "very material circumstance," that



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§ 650. Should a plaintiff, who has obtained a judgment in a foreign court, sue the same defendant in an English court on the original cause of action, saying nothing about the judgment, the defendant cannot set up the foreign judgment, if unsatisfied, as a bar.[1] The plaintiff, such is the reason given, has no higher remedy in consequence of the foreign judgment, and he cannot issue immediate execution upon it, but can only enforce it by bringing a fresh action.[2] It is, however, plain, that if the foreign judgment has been satisfied, this will bar the suit.[3] As we will see, however, hereafter, an unsatisfied judgment of a sister state for the plaintiff bars a suit on the original demand.[4]

Plaintiff may sue on original cause of action, and may waive judgment.

§ 651. Although at one time there were intimations to the contrary,[5] it is now settled that when the plaintiff thus waives the judgment, the defendant, notwithstanding the subsequent production of the judgment, may dispute the plaintiff's demand; for it may well be contended, that, by this mode of declaring, the plaintiff has

When plaintiff waives judgment defendant may defend on merits.

the contract, though entered into in France, "was evidently intended to be performed in England." See comments in Westlake (1880), § 303.

A plea to the jurisdiction, in order to be good, must aver that the defendant was not a subject of the foreign state, or resident, or even present in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicil, or temporary presence, by the decision of the courts. Gen. Nav. Co. *v.* Guillou, 11 M. & W. 894; Cowan *v.* Braidwood, 1 M. & Gr. 892, 893, per Tindal, C. J.; Russell *v.* Smyth, 9 M. & W. 810; Reynolds *v.* Fenton, 3 Com. B. 187. If true, it may be in addition averred that the defendant had no notice of the suit. Cowan *v.* Braidwood, 1 M. & Gr. 893. See Cowan *v.* Braidwood, 1 M. & Gr. 882; 2 Scott N. R. 138, S. C.; Douglas *v.* Forrest, 4 Bing. 686, 701–703; 1 M. & P. 663, S. C.

An article on this topic will be found in the London Law Magazine for November, 1880.

[1] See, as to merger, infra, § 651; and to judgments of sister states, infra, § 658.

[2] See infra, § 655; Maule *v.* Murray, 7 T. R. 470; Hall *v.* Odber, 11 East, 118; Bank of Australasia *v.* Harding, 9 C. B. 661; Bank of Australasia *v.* Nias, 16 Q. B. 717; Smith *v.* Nicolls, 5 Bing. N. C. 208, 220, 221; 7 Scott, 147, S. C.; Wilson *v.* Dunsany, 18 Beav. 293. See U. S. *v.* Dewey, 6 Biss. 501; Middlesex Bank *v.* Butman, 29 Me. 19; McVicker *v.* Beedy, 31 Me. 314.

[3] Barber *v.* Lamb, 29 L. J. C. P. 234; 8 Com. B. N. S. 95, S. C.

[4] Infra, § 659; Henderson *v.* Staniford, 105 Mass. 504.

[5] Ricardo *v.* Garcias, 12 Cl. & Fin. 368; McGilvray *v.* Avery, 30 Vt. 538.



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himself courted a reinvestigation of the merits.[1] The satisfaction of the foreign judgment of course bars the claim.[2]

Judgment for defendant in foreign suits bars domestic suit.

§ 652. If, to a suit on an ordinary cause of action, the defendant adduces a foreign judgment, on the same cause of action, in his favor, this, if properly pleaded, will bar the suit.[3] In such case, however, although the plea, in England, need no longer set forth the proceedings and judgment at length,[4] nor contain, as formerly was the case,[5] any formal commencement or conclusion; yet if it contain no averment that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country by reason of allegiance, domicil, or temporary presence,[6] or that the foreign court had jurisdiction over the subject matter of the suit, or that by the law of the foreign country the judgment recovered was final and conclusive, so as to be an absolute bar to a fresh action;[7] or that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit;[8] in any of these cases, the plea will be exposed to the risk of being held bad on demurrer.[9] On the other hand, if the defendant, instead of pleading the judgment, contents himself with putting it in evidence, it is subject to the contingencies to which, according to local practice, a domestic judgment, when not pleaded, is subject.[10] And if there was no jurisdiction, or the judgment was fraudulent, it is no bar.[11] Nor does a technical foreign refusal of relief on special grounds bar a domestic suit for relief on other grounds.[12] It is open to the plaintiff in replica-

[1] 2 Smith's Lead. Cas. 683, and cases cited to § 650.

[2] Barber *v.* Lamb, 8 C. B. N. S. 95.

[3] Phillips *v.* Hunter, 2 H. Bl. 410, per Eyre, C. J.; Plummer *v.* Woodburne, 4 B. & C. 625; 6 D. & R. 25; Ricardo *v.* Garcias, 12 Cl. & F. 368.

[4] Ricardo *v.* Garcias, 12 Cl. & F. 368.

[5] Gen. St. Navig. Co. *v.* Guillou, 11 M. & W. 877, 894.

[6] Gen. St. Navig. Co. *v.* Guillou, 11 M. & W. 877, 894.

[7] Plummer *v.* Woodburne, 4 B. & C. 625; 7 D. & R. 25, S. C.; Frayes *v.* Worms, 10 Com. B. N. S. 149.

[8] Ricardo *v.* Garcias, 12 Cl. & F. 368.

[9] Taylor's Ev. § 1548.

[10] See Whart. on Ev. § 765.

[11] Henderson *v.* Henderson, 3 Hare, 117. Infra, § 662.

[12] Catlander *v.* Dittrich, 4 M. & Gr. 68; Hunter *v.* Stewart, 31 L. J. (N. S.) Ch. 346. Infra, § 666.



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tion to show that the claims pressed in the domestic suit were not included in the foreign suit whose judgment is pleaded in bar.[1]

In this country rulings of English courts followed.

§ 653. The earlier rulings in the United States, following the earlier English rulings, were that a foreign judgment is only *primâ facie* evidence of the debt it represents, being likened in this respect to a bond.[2] But the better view now is that a foreign judgment, supposing it to possess the requisites of international validity above stated, is to be regarded in our courts, as it is now in England, as conclusive on the merits of the defendant's indebtedness to the plaintiff.[3] And there is strong reason for adopting the present conclusions of the English courts. Guarding the position in the way it is done, by requiring that the case should have been fairly committed to the foreign court whose judgment is sued on, and that that court should have had the parties fairly before it, and should have conformed in its action to the settled rules of private international justice,[4] litigation will be simplified, expense saved, and the rights of the parties protected, by treating such judgment as conclusive. *Ne bis idem* is the true rule; and when a defendant is duly summoned before a court having jurisdiction, he is bound to submit his case, or take the consequences. In most cases the jurisdiction in which the suit is first entered is that in which both parties are domiciled, and in which the proofs can be more readily adduced. In this respect the Roman law, as now at least the-

[1] Burnham *v.* Webster, 1 Wood. & M. 172.

[2] Lazier *v.* Westcott, 26 N. Y. 146. See Cummings *v.* Banks, 2 Barb. 602; McEwen *v.* Zimmer, 38 Mich. 765. Supra, § 647.

[3] Middlesex Bank *v.* Butmann, 29 Me. 19; Rankin *v.* Goddard, 54 Me. 28; Taylor *v.* Barron, 30 N. H. 78; Boston Co. *v.* Hoitt, 14 Vt. 92; Bartlett *v.* Knight, 1 Mass. 400; Bissell *v.* Briggs, 9 Mass. 462; Aldrich *v.* Kinney, 4 Conn. 380; Hitchcock *v.* Aicken, 1 Caines, 460; Pawling *v.* Bird, 13 Johns. R. 192; Benton *v.* Burgot, 10 S. & R. 240; Taylor *v.* Phelps, 1 Har. & G. 492; Barney *v.* Patterson, 6 Har. & J. 182; Pritchett *v.* Clark, 3 Har. (Del.) 517; Williams *v.* Preston, 3 J. J. Marsh. 600; Garland *v.* Tucker, 1 Bibb, 361; Clark *v.* Parsons, Rice, 16; Bimeler *v.* Dawson, 4 Scam. 536. See Burnham *v.* Webster, 1 Wood. & M. 172.

It should be noticed that, "in two of the cases just cited (Barney *v.* Patterson and Taylor *v.* Phelps) it is said that, when foreign judgments are only incidentally involved, they have the same conclusiveness as domestic judgments; and in Cummings *v.* Banks, 2 Barb. 602, it is said that all the American authorities agree in this proposition." Bigelow on Estoppel (2d ed.), 177.

[4] Supra, §§ 646, 649.



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oretically adopted in most European continental states, is more liberal to the defendants than is our own common law. By the latter law, wherever a defendant may be found, no matter how transient may be his visit, he may be summoned so as to give the summoning court jurisdiction. By the former law, a defendant can ordinarily be summoned only in his own domicil. Were the Roman law strictly followed in this respect by countries professing to accept it, we would have less cause to complain of their judgments, however much cause they may have to complain of us. The difficulty is, that they do not adhere to this principle, and not only summon transient residents, but adopt, in several states, the same mode of extra-territorial service as has been adopted in England and in some jurisdictions in the United States.

Impeachable for want of jurisdiction or fraud.

§ 654. A foreign judgment, as we have seen,[1] is impeachable for want of jurisdiction;[2] and hence, for want of personal service, within the jurisdiction, on the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the state entering judgment.[3] So it has been held that a foreign judgment can be contested for fraud in its concoction;[4] or for is flagrant violation of justice;[5] or for non-identity of subject matter;[6] or for incurable defectiveness or obscurity;[7] or for manifest errors in its processes;[8] or, generally, for any jurisdic-

[1] Supra, §§ 646–9.

[2] Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; Novelli *v.* Rossi, 2 B. & Ad. 757; Blackburn, J., Castrique *v.* Imrie, L. R. 4 H. L. 414; Colliss *v.* Hector, L. R. 19 Eq. 334 (Supra, §§ 190, 200, 218); Shelton *v.* Tiffin, 6 How. 163; Carleton *v.* Bickford, 13 Gray, 591; Folger *v.* Ins. Co. 99 Mass. 267; Borden *v.* Fitch, 15 Johns. R. 121; Andrews *v.* Herriot, 4 Cow. 524; Kerr *v.* Kerr, 41 N. Y. 272.

[3] The cases will be found supra, § 649; infra, § 715.

[4] Phillimore Int. Law, iv. 678; Foote's Priv. Int. Law, p. 449; Blackburn, J., Godard *v.* Gray, L. R. 6 Q. B. 149; Ochsenhein *v.* Papelier, L. R. 8 Ch. 695. See Wood *v.* Watkinson, 17 Conn. 500; Welsh *v.* Sykes, 3 Gilm. 197.

[5] Price *v.* Dewhurst, 8 Sim. 279; Ferguson *v.* Mahon, 11 Ad. & E. 181; Henderson *v.* Henderson, 6 Q. B. 298; Cowan *v.* Braidwood, 1 M. & Gr. 895; Sinclair *v.* Fraser, 1 Doug. 4 *a;* Blake *v.* Smith, 8 Sim. 303; Ochsenhein *v.* Papelier, L. R. 8 Ch. Ap. 695; Ilsley *v.* Nichols, 12 Pick. 290; Dunlop *v.* Cody, 31 Iowa, 260.

[6] Ricardo *v.* Garcias, 12 Cl. & Fin. 368. See Burnham *v.* Webster, 1 Wood. & M. 172.

[7] Obicini *v.* Bligh, 8 Bing. 335.

[8] Reimers *v.* Druce, 23 Beav. 145;



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tional violation of the principles of international law.[1] But if there be jurisdiction, a mere mistake of law on the part of the foreign court will in England be no defence,[2] unless both parties admit that the foreign court has wrongly interpreted its own law.[3] Nor is fraud a defence when it could have been exposed if offered as a defence on the trial of the original suit.[4]

§ 655. Judicial proceedings, as is elsewhere fully illustrated,[5] are presumed to be regular, until the contrary appears. This presumption is applicable so far to foreign judgments, that if the record itself is regular, a party suing on such judgment need not allege in his declaration, either that the foreign court had jurisdiction over the parties or the cause,[6] or that the proceedings had been properly conducted.[7] On the other hand, as we have seen, there are English cases intimating that it is still necessary for a defendant to state these particulars, when he pleads such judgment by way of estoppel or justification.[8] As we have already seen, the averment of service on the record may be disputed by parol.[9] And the defendant may show that appearance was entered for him without authority.[10]

Jurisdiction presumed if proceedings are regular.

§ 656. We have already seen that a foreign law will not be admitted for the purpose of overriding any rule of distinctive domestic policy.[11] This principle is necessarily

Will not be enforced when over-

Simpson *v.* Fogo, 1 Johns. & Hem. 18; 1 Hem. & M. 195; Windsor *v.* McVeigh, 93 U. S. 274. Infra, § 796.

[1] Shaw *v.* Gould, L. R. 3 H. of L. Ap. 55; Bank *v.* Nias, 16 Q. B. 717; Liverpool Marine Co. *v.* Hunter, L. R. 3 Ch. 479; S. C., L. R. 4 Eq. 62; Baring *v.* Clagett, 3 B. & P. 215; Wolff *v.* Oxholm, 6 M. & Sel. 92; Simpson *v.* Fogo, 1 Johns. & Hem. 18; 1 Hem. & M. 195; Kerr *v.* Condy, 9 Bush, 372.

[2] Castrique *v.* Imrie, L. R. 4 H. L. 414; Godard *v.* Gray, L. R. 6 Q. B. 151. Supra, §§ 646 *et seq.*

[3] Meyer *v.* Ralli, L. R. 1 C. P. D. 358.

[4] Christmass *v.* Russell, 5 Wal. 290; Rankin *v.* Goddard, 54 Me. 28. Duvall *v.* Fearson, 18 Md. 502; Rogers *v.* Gwinn, 21 Iowa, 58. Infra, § 662.

[5] Whart. on Ev. § 1302.

[6] Robertson *v.* Struth, 5 Q. B. 941.

[7] Cowan *v.* Braidwood, 1 M. & Gr. 882, 892, 895, per Maule, J.; 2 Scott N. R. 138, S. C.

[8] Collett *v.* Ld. Keith, 2 East, 260; Gen. St. Navig. Co. *v.* Guillou, 11 M. & W. 877. See Ricardo *v.* Garcias, 12 Cl. & Fin. 368. Supra, §§ 646-9.

[9] Supra, § 649. See, also, Rankin *v.* Goddard, 54 Me. 28; 55 Me. 389; Carleton *v.* Bickford, 13 Gray, 591; Marx *v.* Fore, 51 Mo. 69.

[10] Infra, § 660.

[11] Supra, §§ 101, 490.



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riding home policy nor when for penalty.

applicable to judgments, since otherwise, all that would be necessary to force the repugnant law upon us would be to formulate it in the shape of a judgment. The fact of the obnoxious prerogative taking shape as a judgment does not make it any the more authoritative.[1] Nor will a judgment entered for a statutory penalty be enforced in a sister or foreign state.[2]

### II. DISTINCTIVE PRACTICE AS TO SISTER STATES.

Judgment of sister state may be pleaded *puis darrien continuance.*

§ 657. A judgment of a sister state differs from a foreign judgment in this, that when the plaintiff in the domestic suit, after bringing it, obtains judgment in a sister state on the same cause of action, the defendant in the domestic suit may plead in bar the sister state judgment *puis darrein continuance.*[3] And, as a general rule, an unsatisfied judgment for the plaintiff in another state on the same cause of action may be pleaded by the defendant in bar.[4]

The plea of *lis pendens* is hereafter discussed.[5]

Stay allowed as in original suit.

§ 657 *a.* As is the practice in England as to foreign judgments,[6] the same stay will in this country be permitted by the *judex fori*, on a suit on a sister state judgment when appealed from in the original jurisdiction, as is allowed in such jurisdiction.[7]

An interlocutory or conditional sister state judgment cannot be made the basis of such procedure.[8]

Such judgment cannot be dis-

§ 658. The right of impeaching judgments of sister states, as will presently be more fully seen, applies only, it must be remembered, to cases where the validity of

[1] Of this we have an illustration in De Brimont *v.* Penniman, 10 Blatchf. 436, cited supra, § 104 *b.*

[2] Supra, § 4; Halsey *v.* McLean, 12 Allen, 438; Derrickson *v.* Smith, 3 Dutch. 166; Hill *v.* Frazier, 22 Penn. St. 320; First Nat. Bk. of Plymouth *v.* Price, 33 Md. 487.

[3] Paine *v.* Ins. Co. 11 R. I. 411; North Bank *v.* Brown, 50 Me. 241; Baxley *v.* Linah, 16 Penn. St. 214. See Bourne *v.* Joy, 9 Johns. 221; Walsh *v.* Dunkin, 12 Johns. 99.

[4] Henderson *v.* Staniford, 105 Mass. 504.

[5] Infra, § 784.

[6] Supra, § 646.

[7] Paine *v.* Ins. Co. 11 R. I. 411, cited § 657; Cherry *v.* Speight, 28 Tex. 503. See Faber *v.* Hovey, 117 Mass. 107; Bank *v.* Wheeler, 28 Conn. 433; Freeman on Judgments, § 576; S. P., Hall *v.* Odber, 11 East, 118.

[8] Supra, § 646; Kellam *v.* Toms, 38 Wis. 592.



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such judgments comes directly in litigation. When such judgments are regularly entered by courts having jurisdiction, they cannot be disputed collaterally.[1]

puted collaterally.

§ 659. Under the Constitution of the United States, when a judgment of one state in the Union is offered in a court of a sister state as the basis of a suit, *nil debet* cannot be pleaded. The only proper plea is *nul tiel record*.[2]

To judgment of sister state *nul tiel record* is the proper plea.

§ 660. It is competent for the defendant, however, to an action on a judgment of a sister state, as to an action on a foreign judgment, to set up as a defence, want of jurisdiction of the court rendering the judgment;[3] and, as indicating such want of jurisdiction, to aver by plea that the defendant was not an inhabitant of the state rendering the judgment, and had not been served with process, and did not enter his appearance, or that the attorney was without authority to appear.[4]

Want of jurisdiction may be set up to such judgment.

[1] Whart. on Ev. §§ 806–808. See cases supra, §§ 646, 653–655; infra, § 660.

[2] Mills *v.* Duryee, 7 Cranch, 481; Hampton *v.* McConnel, 3 Wheat. 234; Logansport Gas Co. *v.* Knowles, 2 Dill. 421; McElmoyle *v.* Cohen, 13 Pet. 312; Christmas *v.* Russel, 5 Wal. 290; Sweet *v.* Brackley, 53 Me. 346; Rankin *v.* Goddard, 54 Me. 28; Bissell *v.* Briggs, 9 Mass. 462; Com. *v.* Green, 17 Mass. 515; Hall *v.* Williams, 6 Pick. 232; Stockwell *v.* McCracken, 109 Mass. 84; Brainerd *v.* Fowler, 119 Mass. 265; Rocco *v.* Hackett, 2 Bosw. 579; Rogers *v.* Burns, 27 Penn. St. 525; Merchants' Ins. Co. *v.* De Wolf, 33 Penn. St. 45. See Brinkley *v.* Brinkley, 50 N. Y. 184; De Ende *v.* Wilkinson, 2 Pat. & H. 663; Matoon *v.* Clapp, 8 Ohio, 248; Burnley *v.* Stevenson, 24 Ohio St. 474; Indiana *v.* Helmer, 21 Iowa, 370; Cone *v.* Hooper, 18 Minn. 533; Walton *v.* Sugg, Phil. (N. C.) 98.

[3] D'Arcy *v.* Ketchum, 11 How. 165; Board of Public Works *v.* Columbia College, 17 Wal. 521; Thompson *v.* Whitman, 18 Wal. 457; Galpin *v.* Page, 18 Wal. 350; Knowles *v.* Gas Co. 19 Wal. 58; Hill *v.* Mendenhall, 21 Wal. 453; Hall *v.* Williams, 6 Pick. 232; McDermott *v.* Clary, 107 Mass. 501; Folger *v.* Ins. Co. 99 Mass. 267; Kerr *v.* Kerr, 41 N. Y. 272; Aldrich *v.* Kinney, 4 Conn. 380; Shumway *v.* Stillman, 4 Cow. 292; Starbuck *v.* Murray, 5 Wend. 148; Reel *v.* Elder, 62 Penn. St. 311; Eby's Appeal, 70 Penn. St. 308; Noble *v.* Oil Co. 79 Penn. St. 354; Westcott *v.* Brown, 13 Ind. 83; Lawrence *v.* Jarvis, 32 Ill. 304; Newcomb *v.* Newcomb, 13 Bush. 544. See for other cases supra, § 649. As to Illinois, see Jones *v.* Warner, 81 Ill. 343; Zepp *v.* Hager, 70 Ill. 223, 224.

[4] Whart. on Ev. § 796; Hall *v.* Lanning, 91 U. S. 160; Watson *v.* Bank, 4 Met. 343; Denison *v.* Hyde, 6 Conn. 508; Shumway *v.* Stillman, 6 Wend. 447; Pennywit *v.* Foote, 27 Ohio St. 600; Puckett *v.* Pope, 3 Ala. 552; Jones *v.* Warner, 81 Ill. 344; Harshey



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§ 661. The rule heretofore stated, that an extra-territorial service does not by itself confer jurisdiction over the person thus summoned, is as applicable to cases arising between the several States of the American Union as to distinctively foreign states.[1] In divorce procedure, however, from the fact that unless extra-territorial service of some kind is tolerated the object of the statutes would be defeated in all cases where an offending party leaves the jurisdiction, extra-territorial service is in some states sustained.[2]

In divorce extra-territorial service in some states sustained.

§ 662. Fraud, from the nature of things, when going to jurisdiction, may be set up to a judgment in a sister state as freely as it may be to a foreign judgment. It would be a *petitio principii* to say that the document offered is entitled to inter-state validity because it is a judgment of a sister state, when, whether it is a judgment of a sister state is the very question at issue. On the other hand, the defendant cannot set up, in such a suit, a defence of fraud which he could have offered in the original suit.[3] But wherever he could enjoin the execution of such judgment, according to chancery practice, he should be permitted, to avoid circuity, to set up the defence in an action brought on the judgment in a sister state.[4]

Fraud a defence to judgments of sister states.

### III. PROBATE JUDGMENTS.

§ 663. The effect of a probate judgment has been already incidentally noticed.[5] It may be here added, that judgments of courts of probate are admissible everywhere to prove the facts they state, though when *ex parte* they may be

Effect of probate judgment.

*v.* Blackmarr, 20 Iowa, 161; Iles *v.* Elledge, 18 Kan. 296.

In Pennoyer *v.* Neff, 95 U. S. 714, it was held that a personal judgment is without any validity, if it be rendered by a state court in a personal suit against a non-resident, on whom there was no personal service within the state, and who did not appear; though the state might attach any property he has within the state merely on service by publication. To same effect see Sears *v.* Dacey, 122 Mass. 388; Schwinger *v.* Hickok, 53 N. Y. 280; Bartlett *v.* McNeil, 60 N. Y. 53; Bartlett *v.* Spicer, 75 N. Y. 528.

[1] For cases see supra, § 647.

[2] See supra, § 237.

[3] See Hampton *v.* McConnell, 3 Wheat. 234; Dobson *v.* Pearce, 12 N. Y. 156; Pearce *v.* Olney, 20 Conn. 544; Rogers *v.* Gwinn, 21 Iowa, 58. Supra, § 655.

[4] Christmas *v.* Russell, 5 Wal. 290; Rankin *v.* Goddard, 54 Me. 28; Duvall *v.* Fearson, 18 Md. 502; Rogers *v.* Gwinn, 21 Iowa, 58.

[5] Supra, § 644.



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rebutted, so far as they undertake to bind persons.[1] We must on similar reasoning, hold that when the suit depends upon proof of the death of a particular person as a substantive fact, letters of administration, being *res inter alios acta*, are inadmissible to prove such death.[2]

### IV. JUDGMENTS IN REM.

Judgment of court having jurisdiction over property every where binding as to such property.

§ 664. Wherever a court has jurisdiction over a particular property, whether real or personal, a judgment of such court as to such property is conclusive everywhere and against everybody.[3] If the property attached was at the time of the attachment within the jurisdiction of the court, the title to the property passes under the judgment of the court, provided due notice, such as is held reasonable by international law, be given to parties interested to come in, and provided there be no fraud or outrageous violation of justice.[4] And the fraud, it has been held, must not be such as could have been defeated in the court rendering the judgment.[5] But however this may be, possession of the property condemned is essential to give jurisdiction in proceedings *in rem*. It is true that the English courts have recognized as judgments *in rem* forfeitures pronounced by the Court of Exchequer,[6] letters of probate,[7] or administration;[8] sentences of deprivation and expulsion, whether delivered by the spiritual court, a visitor, or

[1] Whart. on Ev. § 810.

[2] Mutual Ins. Co. *v.* Tisdale, 91 U. S. 238; citing 2 Phil. on Ev. (ed. 1868) 93, m; Clayton *v.* Gresham, 10 Ves. 288; Moons *v.* De Bernales, 1 Russ. 307. See Carroll *v.* Carroll, 60 N. Y. 123; Whart. on Ev. § 1278.

[3] Supra, § 310; Smith's Lead. Cas. 661; Hannaford *v.* Hunn, 2 C. & P. 155; Cammell *v.* Sewell, 3 H. & N. 646; The Rio Grande, 23 Wal. 458; Thompson *v.* O'Hanlan, 6 Watts, 492; Norris's App. 30 Penn. St. 122; Penn. R. R. *v.* Pennock, 51 Penn. St. 244; Noble *v.* Oil Co. 79 Penn. St. 354. See Webster *v.* Adams, 58 Me. 317; Moore *v.* R. R. 43 Iowa, 385.

[4] Shand *v.* Du Boisson, L. R. 18 Eq. 283; Messina *v.* Petrochino, L. R. 4 P. C. 144; Penn. R. R. *v.* Pennock, 51 Penn. St. 244; Noble *v.* Oil Co. 79 Penn. St. 356.

[5] Bank of Australasia *v.* Nias, 16 Q. B. 716.

[6] Geyer *v.* Aguilar, 7 T. R. 696, per Ld. Kenyon; Scott *v.* Shearman, 2 W. Bl. 977; Cooke *v.* Sholl, 5 T. R. 255.

[7] Noel *v.* Wells, 1 Lev. 235, 236; Allen *v.* Dundas, 3 T. R. 125.

[8] Bouchier *v.* Taylor, 4 Br. P. C. 708. See Prosser *v.* Wagner, 1 Com. B. (N. S.) 289; though see supra, § 810.



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a college;[1] orders of justices for dividing roads under the Act of 34 G. 3, c. 64;[2] decrees of settlement by an order of justices, whether unappealed against[3] or confirmed by a Court of Quarter Sessions on appeal;[4] and judgments of outlawry.[5] Yet all these rulings relate to intra-territorial courts, under the local law established by a common sovereign. We have nothing to show that an English court would treat a judgment in a foreign court as *in rem* unless as to property actually within the jurisdiction of such court. Nor is there any reason why a person, capable of leaving his country and taking up a sojourn in foreign lands, should be treated as a thing whose title the *lex rei sitae* necessarily determines. The conclusion that personal judgments are *in rem* is based on the assumption of the ubiquity of the *status* assigned by personal law. When this assumption falls,[6] the conclusion resting on it falls also.

§ 665. The decree of a court of admiralty, or of other court having jurisdiction of proceedings *in rem*, has extra-territorial

[1] Philips *v.* Bury, 2 T. R. 346, per Ld. Holt; R. *v.* Grundon, 1 Cowp. 315, 321, 322, per Ld. Mansfield.

[2] R. *v.* Hickling, 7 Q. B. 880.

[3] R. *v.* Kenilworth, 2 T. R. 599, per Buller, J.

[4] R. *v.* Wick St. Lawrence, 5 B. & Ad. 533, per Ld. Denman.

[5] Co. Lit. 352 *b*. As Irish authorities to the same effect, see Maingay *v.* Gahan, Ridg., L. & S. 1, 79; 1 Ridg. P. C. 43, 44, n., S. C. There, according to Mr. Taylor (§ 1488), the Irish Ex. Ch. expressly overruled Henshaw *v.* Pleasance, 2 W. Bl. 1174, a decision which, according to Fitzgibbon, Ch. (see Ridg., L. & S. 79), was reprobated by Ld. Mansfield, in Dixon *v.* Cock, and was frequently condemned by Ld. Lifford, Ch.

[6] See supra, §§ 101 *et seq.*

In Castrique *v.* Imrie, 4 H. of L. 429, Blackburn, J., said:—

"We think the inquiry is, first, *whether the subject matter was so situate as to be within the lawful control of the state under the authority of which the court sits;* and, secondly, *whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction.* If these conditions are fulfilled, the adjudication is conclusive as against all the world."

On the other hand, in Simpson *v.* Fogo, 1 H. & M. 195; 1 J. & H. 18, a sale in New Orleans of a British ship, then in that port, under proceedings by creditors of the owner, was held in England to pass no title as against a prior English mortgagee; though it was said by the vice-chancellor that had the ship been sold by proceedings technically *in rem*, the property would have passed. And the New Orleans purchaser was allowed a lien for what, in the New Orleans distribution of the proceeds, had been paid to creditors who, by the law of the port, had liens on the ship. See this case discussed supra, §§ 325, 345, 358.



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validity.[1] This ubiquity of authority is applied even in cases where the sentence is founded on mistake of law.[2] It is otherwise, however, if the jurisdiction does not appear, or where there was not the proper notice by publication or otherwise,[3] or where the judgment was fraudulent,[4] or the sentence outrageously unjust.[5] But wherever

Admiralty and similar judgments *in rem* good against all the world.

[1] Stringer *v.* Ins. Co. L. R. 4 Q. B. 676; aff. L. R. 5 Q. B. 599; Hughs *v.* Cornelius, Ld. Ray. 473; Scott *v.* Shearman, 2 W. Black. 977; Lothian *v.* Henderson, 3 B. & P. 499; Bernardi *v.* Motteux, 2 Doug. 574; The Helena, 4 Ch. Rob. 3; Cooke *v.* Sholl, 5 T. R. 255; Godard *v.* Gray, L. R. 6 Q. B. 139; Dalgleish *v.* Hodgson, 7 Bing. 504; Bolton *v.* Gladstone, 5 East, 160; Croudson *v.* Leonard, 4 Cranch, 434; Peters *v.* Ins. Co. 3 Sumn. 389; Bradstreet *v.* Ins. Co. 3 Sumn. 600; Mankin *v.* Chandler, 2 Brock. 125; Dunham *v.* Ins. Co. 1 Low. 253; The Vincennes, 3 Ware, 171; French *v.* Hall, 9 N. H. 137; Whitney *v.* Walsh, 1 Cush. 29; Denison *v.* Hyde, 6 Conn. 508; Grant *v.* McLachlin, 4 Johns. 34; Gelston *v.* Hoyt, 13 Johns. 561; Street *v.* Ins. Co. 12 Rich. (S. C.) 13; Duncan *v.* Stokes, 47 Ga. 593; State *v.* R. R. 10 Nev. 47. See Brown *v.* Bridge, 106 Mass. 563.

"A British ship is seized as prize by a Russian vessel, on the ground of attempted breach of blockade, and taken to a Russian port for adjudication as prize by a prize court. The goods on board the ship are sold under the order of the court to X. It is ultimately decided by the prize court that the ship was not lawfully captured. The title of X., the purchaser, to the goods is valid against that of A., the original owner." Stringer *v.* Ins. Co. L. R. 5 Q. B. 599, as stated in Dicey on Dom. 261.

[2] Imrie *v.* Castrique, 8 C. B. N. S. 403; L. R. 4 H. L. 414; Williams *v.* Amroyd, 7 Cranch, 423. See Neff *v.* Pennoyer, 3 Sawyer, 274; Watts *v.* Waddle, 6 Pet. 389; Pennoyer *v.* Neff, 95 U. S. 714; Sheridan *v.* Ireland, 66 Me. 138; Page *v.* McKee, 3 Bush, 135.

[3] Infra, § 668; Windsor *v.* McVeigh, 93 U. S. 274; The Griefswald, Swabey, 430; Bradstreet *v.* Ins. Co. 3 Sumn. 600; Rose *v.* Himely, 4 Cranch, 241; Slocom *v.* Wheeler, 1 Conn. 429; Sawyer *v.* Ins. Co. 12 Mass. 291; Kuehling *v.* Lebermann, 2 Weekly Notes, 616. See Denison *v.* Hyde, 6 Conn. 508.

[4] Shand *v.* Du Boisson, L. R. 18 Eq. 283; Messina *v.* Petrochino, L. R. 4 P. C. 144.

[5] Ibid. In this respect it is important to keep in mind the cautions of Lord Thurlow and Lord Ellenborough. Fisher *v.* Ogle, 1 Camp. 419, 420; Donaldson *v.* Thompson, Ibid. 432.

The effect of the decree, unless the defendant be within the jurisdiction of the court at the time, or appears as a party, is limited to the thing as to which the judgment is obtained. Infra, § 667. See Bartlett *v.* Spicer, 75 N. Y. 528.

That the rule in the text extends to all cases of state judgments *in rem*, see, in addition to cases above cited, Arndt *v.* Arndt, 15 Ohio, 33; Melhop *v.* Doane, 31 Iowa, 397; Rape *v.* Heaton, 9 Wis. 328; Sevier *v.* Roddie, 51 Mo. 580.



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a court of admiralty or prize court has jurisdiction over the property attached, then its decree as to such property, subject to the above limitations, is everywhere conclusive; and this conclusiveness extends to decrees of such courts against persons properly before them.[1]

Procedure must be regular and in point.

§ 666. It is otherwise as to decrees entered in foreign courts acting irregularly and without proper pleadings.[2] Nor can recitals of facts not absolutely necessary to the decree bind strangers.[3] In cases of condemnation, the ground of condemnation, to be conclusive, must clearly appear.[4] And a decree may be disputed and the facts opened, when the language of the sentence, by setting out several reasons for judgment, leaves it uncertain whether a ship was condemned upon a ground which would warrant its condemnation by the law of nations, or upon other ground, which amounts only to a breach of the municipal regulations of the condemning country.[5] In any view, it is agreed that the decree is conclusive only

[1] Lothian *v.* Henderson, 3 B. & P. 499; Hobbs *v.* Henning, 17 C. B. N. S. 791; Croudson *v.* Leonard, 4 Cranch, 434; Baxter *v.* Ins. Co. 6 Mass. 277; Calhoun *v.* Ins. Co. 1 Binn. 299; though see cases cited in Whart. on Ev. § 814.

In the City of Mecca, L. R. 5 P. D. 28, a decree *in rem* of a Portuguese tribunal of commerce, being brought before the Admiralty Division, in 1879, for execution, Sir R. Phillimore said: "I am of opinion that it is the duty of this court to act as auxiliary to the Portuguese court, and to complete the execution of justice, which, owing to the departure of the ship, was necessarily left unfinished by that court."

In this case an English vessel, after having collided with and sunk a Portuguese one, put into Lisbon, and a judgment for damages from the collision was rendered against it in the courts of Portugal. It was held that the English Admiralty Court would entertain a suit to enforce the judgment *in rem*. "In the Admiralty Division of the High Court, as formerly in the Court of Admiralty, effect can be given *in rem* to the sentence *in rem* of a foreign court having admiralty jurisdiction, or what is equivalent thereto. Also, if the writ is indorsed as on a personal sentence, still effect *in rem* may be given if it appears that the proceedings abroad were on a maritime lien, naturally leading to a sentence *in rem*." Westlake, 1880, §§ 292, 293.

[2] Bradstreet *v.* Ins. Co. 3 Sumn. 600; Sawyer *v.* Ins. Co. 12 Mass. 291.

[3] Van Vechten *v.* Griffiths, 4 Abb. (N. Y.) App. 487.

[4] See Lothian *v.* Henderson, *ut supra;* Christie *v.* Secretran, 8 T. R. 192; Dalgleish *v.* Hodgson, 7 Bing. 504; Fisher *v.* Ogle, 1 Camp. 418; Bradstreet *v.* Ins. Co. 3 Sumn. 600; Robinson *v.* Jones, 8 Mass. 536; Gray *v.* Swan, 1 Har. & J. 142.

[5] Dalgleish *v.* Hodgson, 7 Bing. 495, 504; Hobbs *v.* Henning, 17 Com. B. N. S. 791; 34 L. J. C. P. 117, S.



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as to matters essential to the decree.[1] But when a competent court, by proceedings directed specifically against a thing within its jurisdiction, acts on such thing, its judgment, if the procedure be regular, is everywhere binding.[2]

Judgments *in rem* do not bind person of owner unless he be a party.

§ 667. Such judgments, however, do not bind the alleged owner of the property personally; and only affect him, supposing him to be the owner, to the extent of the property attached, unless he is duly summoned and a personal judgment entered against him.[3]

If grossly unjust pass no title.

§ 668. It has been already noticed,[4] that a judgment *in rem*, based on gross violation of justice, or of settled international procedure, will be regarded as inoperative.[5]

### V. JUDGMENTS AS TO STATUS.

§ 669. If the reasoning of prior chapters be correct, a judg-

C.; Bernardi *v.* Motteux, 2 Doug. 575; Calvert *v.* Bovill, 7 T. R. 523; Baring *v.* Clagett, 3 B. & P. 215; Taylor's Ev. § 1542.

[1] Calvert *v.* Bovill, 7 T. R. 523; Maley *v.* Shattuck, 3 Cranch, 458; Fitzsimmons *v.* Ins. Co. 4 Cranch, 186.

[2] Castrique *v.* Imrie, L. R. 4 H. of L. 428; Magoun *v.* Ins. Co. 1 Story R. 157; Peters *v.* Ins. Co. 3 Sumn. 389; S. C., 14 Pet. 39; The Mary, 9 Cranch, 126; Hudson *v.* Guestier, 4 Cranch, 293; Williams *v.* Armroyd, 7 Cranch, 423; Whitney *v.* Walsh, 1 Cush. 29; Grant *v.* McLachlin, 4 Johns. 34.

[3] D'Arcy *v.* Ketchum, 11 How. 165; Phelps *v.* Holker, 1 Dall. 261; Boswell *v.* Otis, 9 How. 336; Pennoyer *v.* Neff, 95 U. S. 714; McVicker *v.* Beedy, 31 Me. 316; Price *v.* Hickok, 39 Vt. 292; Bissell *v.* Briggs, 9 Mass. 462; Ewer *v.* Coffin, 1 Cush. 23; Phelps *v.* Brewer, 9 Cush. 390; Steel *v.* Smith, 7 W. & S. 447; Scott *v.* Noble, 72 Penn. St. 126; Arndt *v.* Arndt, 15 Ohio, 33; Melkop *v.* Doane, 31 Iowa, 397; Jones *v.* Spencer, 15 Wis. 583; Outwhite *v.* Porter, 13 Mich. 533; Tyler *v.* Pratt, 30 Mich. 63; Peebles *v.* Patapso Co. 77 N. C. 233. As to divorce *ex parte* judgments, see supra, § 239 *a*; Pawling *v.* Bird, 13 Johns. 316.

Ch. J. Parsons, in Bissell *v.* Briggs, 9 Mass. 461, goes so far as to intimate that even should the defendant appear in the attachment suit, this does not give jurisdiction to the court to render against him a judgment *in personam* which would bind extra-territorially. This question was reserved in Schibsby *v.* Westenholz, L. R. 6 Q. B. 162, though in this case Blackburn, J., said that "the decision in De Cosse Brissac *v.* Rathbone, 6 H. & N. 301, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favor, he is bound." See discussion in Westlake (1880), § 307; and to same effect, Molony *v.* Gibbons, 2 Camp. 502.

[4] Supra, § 665.

[5] Windsor *v.* McVeigh, 93 U. S. 274; Whart. on Ev. § 796.



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ment determining the *status* of a person is not a judgment *in rem* which determines the *status* of such person wherever he may go. Hence extra-territorial efficiency, so far as concerns the parties when leaving the state of process and visiting other states, will not be assigned to a foreign judgment of lunacy,[1] or of business incapacity,[2] or of bankruptcy, when divesting him of business capacity.[3] On this principle it was held by the Supreme Court of the United States that a foreign judgment determining the *status* of an alleged slave had no extra-territorial effect.[4]

Judgments as to personal *status* not ubiquitous.

§ 670. Under what limitations judgments in divorce are ubiquitous has been already discussed.[5] It is sufficient here to say that such judgments cannot be regarded *in rem* so far as concerns the defendant not a party to the case.[6]

Divorce judgments when *ex parte* do not bind property.

VI. DISTINCTIVE PRACTICE ON THE CONTINENT OF EUROPE.

§ 671. Modern jurists, while maintaining, as a rule, the extra-territorial force of foreign judgments, when rendered by competent courts, have sought other and varied reasons for their conclusions. Vattel and Pufendorf have argued that to decide otherwise was to assail the judicial sovereignty of the state in which the judgment was entered.[7] To this, however, the reply is not impertinent, that if there is, in such case, any invasion of sovereignties, the invasion is on the state on whom a foreign judgment is foisted for no other reason than that otherwise the sovereignty of the state rendering the judgments would be aggrieved.[8] Others, including in Germany Klüber,[9] and the great body of English and American jurists, have rested this extra-territorial force of judgments on the consent of the parties; a consent, either express, which arises from residence, or the possession of property within the jurisdiction; or implied, from the entering

Development of Roman law in this relation.

[1] Supra, § 122.
[2] Ibid.
[3] Infra, §§ 803, 804.
[4] Davis *v.* Wood, 1 Wheat. 215.
[5] Supra, §§ 204 *et seq.*
[6] Infra, § 715; Middleworth *v.* McDowell, 49 Ind. 386.
[7] Vattel, ii. § 350; Pufendorf, Observat. juris. Univers. i. observ. 28, § 8, a. E.
[8] This is put very pointedly by Bar, § 125. Europäisches Völkerrecht, § 59.



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into an obligation bound by the law of the particular state. Assuming that every one is supposed to consent to the judicial action of a state under whose protection he places himself or his property, this is a position that it is difficult to refute.[1]

Massé,[2] Fœlix,[3] Martens,[4] Phillimore,[5] and Wächter,[6] rejecting these two last points, content themselves with falling back on the reasons of comity and reciprocal utility. But the laxity of this view is betrayed in the practice of the French jurists, by whom chiefly it has been advanced. If comity is not shown by others, they have not been slow to argue comity will not be returned. The foreign judgment in itself has no moral authority; its enforcement, they thus infer, is a matter of discretion, not to be exercised disadvantageously to French citizens.[7] A foreign judgment, in this view, is only a form of proof, capable of being overcome by other proofs.[8] In Spain, Sweden, Norway, and Russia, where the necessity for such comity presses still more lightly, foreign judgments are regarded as having not even *primâ facie* force. In these countries, according to Fœlix, the plaintiff must bring forward his original proofs. It does not help him to show that these proofs have been pushed to judgment in a foreign court. But that comity is not the basis on which a foreign judgment is to be enforced is now generally agreed.[9]

Bar,[10] advancing in this line on Savigny's lead, suggests, as an independent ground, the position that as a foreign judgment is the special law of its state applied to a case of which such state has cognizance, so, as such special law, such judgment is binding in other states on those general principles of international justice which require each case to be determined, no matter in what land the adjudication takes place, by the particular

[1] This is strongly put by Lord Denman, in 6 Q. B. 298. And see Castrique *v.* Imrie, 39 Law Jour. R. pt. 2, 350; 4 H. of Lords Rep. (1870), 428.

[2] No. 298.

[3] II. No. 328.

[4] § 94.

[5] IV. 671.

[6] II. § 417.

[7] Fœlix, No. 344. See infra, § 824.

[8] Fœlix, ii. No. 369; Emérigon, Traité des Assur. c. 4, sect. 8, § 2; Pardessus, No. 1488. See, particularly, Code Civile, art. 546, 2123, 2128.

[9] Supra, § 1.

[10] §§ 116, 125.



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law to which it is subject. It is impossible not to recognize the force of this view. The whole structure of private international law rests on the principle, that, whatever is the forum, the law by which a case is to be tried is to be that to which, on its merits, it is subject. And the judgment of a competent court is an official certificate of what the law in such country is.

In French and cognate systems judgments are declared *executoire* on application to a judge, but not conclusive.

§ 672. In England and in the United States, while foreign judgments, as a rule, are conclusive between the parties, they can only be enforced by a new suit brought. In France, and in states holding a cognate jurisprudence, on the other hand, no such suit is brought, but upon application to the local judge, on due cause being shown, he declares the judgment to be *exécutoire*, upon which execution issues on it forthwith; and yet, at the same time, while this inherent vigor of execution without suit is assigned to the foreign judgment, the prevalent opinion is that it presents, when thus offered, a mere *primâ facie* case of indebtedness.[1]

In France execution conditioned on reciprocity.

§ 673. The French courts will refuse to admit to execution the judgments of countries in which French judgments are not regarded as of force;[2] and the converse is so far from being conceded, that it has been judicially ruled in France, that the fullest recognition in a foreign

[1] The French practice will be found in Fiore, Op. cit. § 235; Goiraud's French Code (1880), 36; Brocher, Op. cit. 422; Jour. du droit int. privé, 1877, pp. 424, 425; 1779, p. 546.

In the Journal du droit int. privé will be found a series of valuable articles on the execution of foreign judgments in the following states: —

In Portugal: Jour. 1874, pp. 76, 125; 1875, pp. 54, 271, 449.

In England: Jour. 1878, p. 22, and following numbers.

In Russia: Jour. 1878, p. 139.

In Italy: Jour. 1878, p. 235; 1879, pp. 71, 244, 292.

In Holland: Jour. 1879, pp. 369, 431.

In Sweden: Jour. 1880, p. 83.

In Belgium: Jour. 1877, p. 339; Jour. 1880, p. 93.

In Denmark: Jour. 1880, p. 368.

In Turkey, though nominally equal rights are granted to suitors of all classes, Christians are excluded from the witness-box, or, if examined, are placed under such disabilities as to strip their evidence of weight. And the courts are so constituted as to make their action simply partisan. See, on this topic, a report by Sir Travers Twiss to the International Institute in 1880.

The German practice is given by Bar, § 126, and is detailed in the first edition of this work, § 793. See infra, §§ 673 *et seq.*

[2] Fœlix, ii. No. 328; Bar, § 125. Supra, § 17.



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country of French judgments imposes no absolute obligation on the French courts to recognize in return the judgments of such foreign country.[1] As a general rule, it may be assumed that in the states following the French Code, reciprocity is a prerequisite to a foreign judgment being admitted to execution.[2]

In Germany, in view of the business confusion that arises when litigated questions, with the consequences of hostile executions, are bandied to and fro between courts, each of which may claim jurisdiction over the parties or their property, recent high authorities have leaned to the opinion that retorsion in this respect should be abandoned, except so far as is required in the modification of executions.[3]

Not necessary that defendant should have no effects in country of judgment.

§ 674. It has been argued in Germany that an action will not be sustained on a foreign judgment unless it should appear that the defendant had no sufficient effects in the country of the judgment on which the plaintiff could seize.[4] But the weight of opinion is the other way.[5]

Judgments for torts not viewed as final.

§ 675. By the practice of the modern Roman law, no foreign judgments for delicts or torts are conclusive on the merits; and all such judgments are treated as open to reëxamination by extra-territorial courts.[6]

[1] Merlin, Rép. Jugement, § 14.
[2] Bar, § 125.
[3] Bar, § 125.
[4] Feuerbach, p. 121.
[5] Bar, § 125, note 21; Mittermaier, in Archiv. 14, pp. 105, 106.
[6] Bar, § 125. See supra, § 4.



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# CHAPTER XI.

## PRACTICE.


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## I. EXTERNAL FORMALITIES OF DOCUMENTS.

### 1. *Law of Place to be followed as to Solemnization.*

*Locus regit actum* generally accepted in England and this country.

§ 676. THERE is a practical concurrence of English and American jurists in the position that the mode of solemnization or authentication of a document will, in general, be considered satisfactory, if in accordance with the law of the place of solemnization.[1]

[1] Phillimore, iv. p. 454; Story, § 266.

Mr. Westlake, in his edition of 1880, announces the law to be (§ 197) that "the formalities required for a contract by the law of the place where it was made are sufficient for its external validity in England." And by the courts in England and the United States the rule to this extent has been repeatedly reaffirmed; it having been held in numerous cases that, unless the *lex rei sitae* has positive requirements of special solemnization, the external solemnization of a document will be adequate if it follows the form customary in the place of solemnization.

*Locus regit actum* is a canon of general jurisprudence, and must be assumed, in the absence of contrary evidence, to apply to a system of foreign law. Guepratte *v.* Young, 4 De G. & S. 217. To the same general effect see McAfee *v.* Doremus, 5 How. 53; Ferguson *v.* Clifford, 37 N. H. 56; Jones *v.* Taylor, 30 Vt. 42; Bank of Rochester *v.* Gray, 2 Hill N. Y. 227; Wilson *v.* Carson, 12 Md. 54; Satterthwaite *v.* Doughty, Busb. L. 314; Ray *v.* Porter, 42 Ala. 327.

Renunciation under a foreign will is to be regarded extra-territorially as having the effect that it had in the place where legally executed. Wilson *v.* Cox, 40 Miss. 538. See Partee *v.* Silliman, 44 Miss. 272.



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§ 677. Of the older jurists who adopt this rule, Judge Story has quoted several, and Bar has given a minute enumeration.[1] Among recent jurists by whom the rule has been accepted, in addition to those already mentioned, may be cited Eichhorn,[2] Fœlix,[3] Schäffner,[4] Wächter,[5] Mittermaier,[6] Bluntschli,[7] and Goldschmidt.[8] The French Code adopts it specifically.[9] The Prussian Code[10] declares that "the form of a contract is to be judged according to the laws of the place where it was concluded;" and a judgment of the Supreme Court at Berlin, in 1857, decided that the non-enactment by the Code of the general rule, that "the form of all matters of juridical business is to be determined by the law of the place where such business is solemnized," does not in any way imply that the force of this rule is weakened.[11] And the latest (1880) publications on private international law concur in maintaining the necessity of the rule, at least so far as concerns documents used in ordinary business as to which the *lex situs* does not contain any conflicting prescriptions.[12]

Adopted by foreign jurists and codes.

[1] § 35.

[2] Deutsches Recht, § 37.

[3] Page 97, ed. Demangeat, i. 149.

[4] §§ 73–85.

[5] II. pp. 368–380.

[6] D. Privatr. § 31.

[7] D. Privatr. § 12.

[8] Handbuch des Handelsrecht, Erlangen, 1864, p. 293.

[9] Code Civ. arts. 47, 48, 170, 999.

[10] A. L. R. I. 5, § 111.

[11] Striethorst, xxiii. 352. Other states who have legislated to the same effect are mentioned by Phillimore (iv. pp. 464–466), and Bar (§ 35, note 2).

[12] Fiore (Op. cit. App. p. 694) cites a series of authorities, French, German, and Italian, to show that the rule has been applied: —

(1.) To the form of private documents;

(2.) To usages in force in the place where an obligation is to be accomplished;

(3.) To the form and the time of the report in cases of general average, and to the certificates requisite to bind the insurers;

(4.) To the mode of determining the refusal to accept payment;

(5.) To the mode of verifying particular documents as matters of evidence;

(6.) To commercial and maritime forms.

As to the forms which the maxim covers, Laurent gives us the following rule: "Les formalités *dites habilitantes* dépendant du statut personnel: elles n'ont rien de commun avec la règle *locus regit actum*. Les formalités prescrites pour donner de la publicité aux actes qui interessent les tiers ne sont pas soumises à la règle *locus regit actum*."

An able exposition of this rule is given by the same author. Droit civil int. ii. 233 *et seq.*

How far the deed of a Frenchman,



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§ 678. The rule, however, is not operative in respect to the solemnization of documents in imperfectly civilized lands. Thus, it has been held that the Chinese law does not impose its terms as to formalities on American contracts in China.[1]

Rule not applicable to imperfectly civilized lands.

§ 679. Whether, however, even in cases where a document is solemnized in a civilized state, the rule is always imperative, has been doubted. A distinction is taken between a form which is *facultative*, *i. e.* optional, being prescribed merely for the purpose of facilitating the solemnization, and that which is made by the law necessary to the validity of the act. In the first case, the form is optional; in the second, imperative.[2]

Doubts as to whether the rule is imperative.

§ 680. It must be remembered that a presumption can be drawn from the omission of well-known forms of solemnization in a country in which the parties at the time have a settled residence. Forms are used to give shape and purpose to business, and as they are so commonly viewed, their non-adoption in a particular locality leads to the presumption that the paper to which they are wanting is a mere informal draft, which the parties had not as yet intended to put in binding shape. To rebut this presumption, it is undoubtedly enough if the parties to a contract have carefully recalled the laws of their domicil, and executed the contract in conformity with these laws. But when the law of domicil prescribes no particular form, then more complicated questions arise if the forms of the *lex loci actus* are neglected; for there is then no positive mark on the document to show that the parties intended to give it legal efficiency. In bilateral transactions of this class, an election may be allowed between the forms of the domicil and those of the place of business, on the ground that both parties were foreigners with the same domicil, and knew each other to be such. There should, however, be

Presumption to be drawn from omission of local forms.

solemnized abroad according to French forms, but not by the forms of the place of solemnization, is to be held good, is discussed by Laurent with much fulness. Droit civil int. ii. 433.

[1] Forbes *v.* Scannell, 13 Cal. 241.

[2] See Vraner *v.* Ross, 98 Mass. 591; Phil. 457; Savigny, § 381; Fœlix, p. 107; Demangeat, i. 163.



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something from which the intent to give legal effect to the instrument may be inferred.[1] But the presumption is in either case one of logic and not of law.

Election conceded in Roman and European law as to wills.

§ 681. With regard to wills, such an election is conceded by modern Roman jurists,[2] it being held, that if an inhabitant of a country where the Roman law prevails executes a will at Paris, he can use either the French or the Roman form.[3] And the great body of civilians concur in the opinion that a will executed abroad is valid if it complies with the testamentary forms prescribed at home.[4]

Otherwise by English common law.

§ 682. The common law of England requires in all cases the testator to adopt the form prescribed by the *lex domicilii*.[5] Statutes, however, have been adopted in many jurisdictions modifying this rule.[6]

Where local law requires registry this is imperative.

§ 683. Where the *lex rei sitae* requires certain forms to be adopted in order to validate the transfer of property, such forms must be complied with, no matter where the party may at the time be.[7]

Double solemnization may be prudent.

§ 684. Judge Story has been already referred to as holding that all the formalities, proofs, or authentications of contracts, "which are required by the *lex loci*, are indispensable to their validity everywhere."[8] He does not notice the position of the more recent jurists of France and Germany, that such prescriptions are *facultative*, and permit an election. But as long as there is so high authority for the necessity of the adoption of the form in use at the place of solemnization, double solemnization may be prudent, adopting both the form of the place of the transaction and that of the *situs*, or of the domicil, as the case may be.

[1] See, to this effect, Bar, § 36.

[2] Supra, § 588; Savigny, viii. § 381.

[3] Savigny, viii. § 381.

[4] Supra, § 588; Hert. iv. 23, 25; Rodenburg, ii. ch. 3, §§ 1, 2; Hofacker, De eff. § 28; Bouhier, ch. 28, No. 20, ff.; Vattel, ii. c. 8, § 111; Mittermaier, D. Privatr. § 32, p. 121; Gand, No. 579, ff.; Bar, § 36; Fœlix, § 83; but see, also, Sirey, v. 1, p. 357; and supra, § 588.

[5] Phil. iv. 628. See supra, § 585.

[6] Supra, §§ 586, 587.

[7] Supra, §§ 275 *f*, 305; infra, §§ 685, 697.

[8] § 260. See, to this effect, Benham *v.* Mornington, 3 C. B. 133. But a marriage settlement executed in France, where one of the parties was domiciled, though void in France from defective acknowledgment, was held operative in England, so far as concerns English funds, in Van Grutten *v.* Digby, 31 Beav. 561.



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### 2. *Stamps and Fiscal Impositions.*

Omission of stamp fatal when requisite to validity of document.

§ 685. If, by the laws of a state, a stamp is made essential to the validity of a document, then there is authority for holding that a document solemnized in such state without such stamp is invalid; though, as will next be seen, this rule does not apply when the stamp is not so essential, or is a mere fiscal imposition.[1]

So far as concerns the bearing of this question upon evidence, it is discussed under a subsequent head.[2] It is sufficient here to say generally that when the object of a stamp act is merely processual, and when the terms of the act go merely to exclude unstamped documents from being received in proof, this restriction will have no extra-territorial effect.[3]

Exception as to cases of documents casually solemnized.

§ 686. There is reason, however, to doubt whether a document, not by itself subject to a local law requiring a stamp to documents of the same class, is within the range of that law, for the single reason that it is casually solemnized in a territory in which that law is in force. So far as concerns marriage, the argument on this question has been already given.[4] So far as concerns the title to property, we have already seen that the *lex rei sitae* overrules any conflicting local law of the place in which such title may be assigned.[5] It may happen that for purposes of convenience parties living at a distance may meet at an intermediate place, in which a stamp may be required for the validity of documents such as that to be executed. We could not be expected to hold, in such case, that a document solemnized at such place would be void for want of a stamp.

[1] Phil. iv. 608; Whart. on Ev. § 697; James *v.* Catherwood, 3 D. & R. 190; Wynne *v.* Jackson, 2 Rus. R. 351; Holman *v.* Johnson, Cowp. 343; Bristow *v.* Sequeville, 5 Exch. 275; Ludlow *v.* Van Rensalaer, 1 Johns. 94; Bank of Rochester *v.* Gray, 2 Hill N. Y. 227; Skinner *v.* Tinker, 34 Barb. 333; Lambert *v.* Jones, 2 Pat. & H. 144; Fant *v.* Miller, 17 Grat. 47; Satterthwaite *v.* Doughty, Busb. L. 314; Vidal *v.* Thompson, 11 Mart. 25; Ticknor *v.* Roberts, 11 La. R. 14. But see Alves *v.* Hodgson, 7 T. R. 237; Clegg *v.* Levy, 3 Camp. 166; Boucher *v.* Lawson, Cases temp. Hardwicke, 83–94.

[2] Infra, § 757.

[3] James *v.* Catherwood, 3 D. & R. 190; Craig *v.* Dimock, 47 Ill. 308; Fant *v.* Miller, supra.

[4] Supra, §§ 170 *et seq.*

[5] Supra, §§ 345 *et seq.*



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§ 687. We may also hold, in conformity with the distinction taken above, that when the object of the statute is simply to raise revenue, it will be regarded as purely local and intra-territorial in its intent, and as not meant to extinguish all obligations not stamped as it requires.[1]

Exception when the object of the stamp act was merely revenue.

§ 688. Whatever doubt there may be as to the latter point, it is plain, as has been already incidentally stated, that if the statute does not expressly extinguish the debt when the document is unstamped, the debt may be sued on in a foreign state. The limitation in such case goes not to the obligation of the document, but simply to its availability in a particular state.[2] And it is a general rule that formalities, not held essential to a contract by the *lex loci contractus*, but which are prescribed rather for the purpose of enabling the contract to be used efficiently as a title, will not be regarded extra-territorially as affecting the validity of the contract.[3]

Exception when stamp not necessary to validity.

### 3. *Statute of Frauds, and other Statutes requiring Certain Kinds of Evidence to support an Action.*

§ 689. (*a.*) *As to Actions brought without such Evidence, in a Country where such Statutes are in Force, on a Contract made subject to a Law exacting no such Evidence.* — Savigny, in speaking of book accounts, says that the admissibility of such books in evidence is to be determined by the law of the place where they are kept; and he bases this on the strong ground that such books are wrought up in the essence of the transaction, and that a stranger who mixes himself in business with a trader in places where they are evidence, accepts them as part of the local law.[4] This, he states, has been expressly decided at Cassel. If this view is good, documents which are evidence at the place of the transac-

Ordinarily documents valid in place of making are valid everywhere.

[1] Supra, § 685; Ludlow *v.* Van Rensalaer, 1 Johns. 95; Lambert *v.* Jones, 2 Pat. & Heath, 144. See, as to the non-recognition of foreign revenue law, supra, § 482. That this position applies to federal stamp acts in the United States, see Whart. on Ev. § 697.

[2] See cases cited supra, § 685. Brocher (Revue de droit int. 1874, pp. 199 *et seq.*) declares to the same effect.

[3] Melbourn, ex parte, L. R. 6 Ch. 64; Pardo *v.* Bingham, L. R. 6 Eq. 485; L. R. 4 Ch. Ap. 735.

[4] VIII. p. 355.



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tion to which they relate are evidence everywhere, and parol agreements valid in such place are valid everywhere. And the better opinion is that if a document constituting indebtedness is good according to the law of the place of solemnization, it will be regarded as good in foreign states which do not by statute require another mode of proof, or by whose distinctive rules of evidence it is not excluded.[1]

Exception, in case of statute of frauds.

§ 690. Statutes directing that no suit shall be sustained, in certain classes of cases, except on written testimony, are based on moral grounds. Their object, as is shown by the title of that which served as the pattern of all others, is to prevent fraud and perjury. Here, then, comes into play the position on which Savigny lays such great stress, that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states.[2] It is true that Judge Story opposes to such a conclusion his great authority. He maintains[3] that where parol contracts are good by the law of the place where they are made, they may be enforced in countries where they would, if there executed, be barred by the statute of frauds; and he cites a number of cases to this point, "none of which," his editor, Judge Redfield, states, "seem to adopt the views he here intimates."[4] But it may now be regarded as settled that where the statute of frauds provides, in a particular state, that no suit shall be maintained on a particular contract unless it be in writing, the *lex fori*, in such case, is absolute, and applies to a foreign contract good by the law of the place of its solemnization.[5]

[1] Supra, § 676; infra, § 754. As to commercial paper, see supra, § 448.

[2] Supra, §§ 427, 490.

[3] § 262.

[4] Judge Redfield, in a note, proceeds to say: "We must confess that upon principle, as the statute does not declare the contracts void, but only that no action or suit, either in law or equity, shall be maintained on such contract, it ought to be regarded as a statute affecting the remedy rather than the contract, and that wherever made, it could not be sued in the courts of a state where the statute expressly provided that no such action shall be maintained."

[5] Leroux *v.* Brown, 12 C. B. 801; Gibson *v.* Holland, L. R. 1 C. P. 1; Downer *v.* Chesebrough, 36 Conn. 39; Turnow *v.* Hochstadter, 7 Hun, 80; Wilcox Co. *v.* Green, 72 N. Y. 18; Da Costa *v.* Davis, 24 N. J. L. 319; Kleeman *v.* Collins, 9 Bush, 460; Browne Stat. Frauds, 4th ed. § 136. See, however, *dicta* to the contrary,



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§ 691. (*b.*) *As to Actions brought without such Evidence in a Country where no such Statutes exist, on a Contract made subject to a Law exacting such Evidence.* — Judge Story here states "that if such contracts made by parol (*per verba*), in a country by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void, exactly as they are held void in the place where they are made."[1] Savigny's reasoning, in the illustration given by him in the case of merchants' books, may be cited to the same effect; for every one who enters into a business transaction in a foreign land is supposed to do so subject to the local law, which local law, in such matters, will be respected elsewhere unless exceptions on the ground of public policy prevail.

Contract made under statute of frauds must conform to it.

§ 692. But we cannot adopt Judge Story's rule, as stated in the last section, without subjecting it to broad exceptions. Are parol contracts solemnized by transient visitors, in a country taken by them merely as a convenient meeting-place, void merely because there happens

But not necessarily contract made in territory of statute.

by Chapman, C. J., in Denny *v.* Williams, 5 Allen, 1; cf. Finch *v.* Mansfield, 97 Mass. 89; Suit *v.* Woodhall, 113 Mass. 391; Benjamin on Sales, § 113, note.

In Bain *v.* Whitehaven, 3 House of Lords Cas. 1, Lord Brougham goes great lengths in vindicating the control of the *lex fori* over the procedure. See, also, Yates *v.* Thomson, 3 Cl. & Fin. 544. On the other hand, it has been held by the Supreme Court of the United States that a parol contract of sale made in a state where there is no statute of frauds, and good in such state, which is the state of performance, will be sustained in a state where the contract would have been void under the statute of frauds, though the goods at the time of the sale were in the latter state. Allen *v.* Schuchardt, 10 Am. Law Reg. 13; S. C., 1 Wallace, 359. To same effect may be cited Drew *v.* Smith, 59 Me. 393; Houghtailing *v.* Ball, 20 Mo. 563. See Work *v.* Cowhick, 81 Ill. 317, and note by Prof. Dwight in 10 Am. Law Reg. 16.

[1] § 262. See, as authorities, Trimby *v.* Vignier, 1 Bing. N. C. 151; Donn *v.* Lippman, 5 Cl. & Fin. 1, 18; De la Vega *v.* Vianna, 1 Barn. & Ad. 284; British Linen Co. *v.* Drummond, 10 Barn. & C. 903. Da Costa *v.* Davis, 24 N. J. L. 319, was an action on a New Jersey contract for the sale of goods *situate in and to be delivered in Philadelphia.* It was held, that the contract was subject to the operation of the New Jersey statute of frauds, on the ground that a contract entered into in one state concerning personal property situate in another, and to be there delivered, must be made in accordance with the law of the state where the contract is solemnized. This may be sustained if the parties were domiciled in or did business in New Jersey, but not otherwise, on the doctrine of the next section.



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to be in that country a conflicting statute of frauds? To do this would be to expose the business of one country to the prohibitive legislation of another with which it has no logical concern. We must therefore hold that a parol contract made in a state requiring all such contracts to be in writing is not necessarily void.[1]

Nor as to contract to be performed in such territory.

§ 693. Nor are we justified in invalidating a parol contract of sale, made in a state where it is lawful, simply because the goods are to be delivered in a state where such contracts must be in writing. Did the statute of the latter state prohibit the admission of the goods into its territory, a different case would be presented. But it simply says the *contract* for such a sale must be in a particular shape, while the contract in question is not, on the hypothesis before us, subject to the jurisdiction of the state enacting the statute. Hence it has been held in Rhode Island, that a Rhode Island contract for the sale of goods to be delivered in New York, such sale being invalid by the New York statute of frauds, will sustain an action by the vendor against the vendee for breach of contract for non-acceptance of the goods when tendered in New York.[2]

Where statute merely goes to evidence, it is not extra-territorial.

§ 694. The same distinction is to be made with regard to the statute of frauds as has been made with regard to stamp acts. If the statute goes merely to settle the terms on which certain documents are to be received in evidence, it will not be enforced by foreign courts.[3] And as a general principle, rules of evidence, when technical, are of merely local effect.[4]

### 4. *When another Country is sought, in Order to evade Home Regulations.*

Document not invalidated by mere fact that it is

§ 695. It was formerly held that when a foreign country is visited in order to evade restrictions or expenses by which the solemnization of contracts or conveyances is attended at home, a document thus solemnized will be

[1] See Browne on Stat. of Frauds, 4th ed. §§ 136 *et seq.*

[2] Hunt *v.* Jones, 12 R. I. 265.

[3] James *v.* Catherwood, 3 Dow. & Ry. 190; Bristow *v.* Sequeville, 5 Exch. 275; Craig *v.* Dimock, 47 Ill. 308; Fant *v.* Miller, 17 Grat. 47. Supra, § 688; infra, § 757. See Bank of Rochester *v.* Gray, 2 Hill N. Y. R. 227; Ticknor *v.* Roberts, 11 La. R. 14.

[4] Whart. on Ev. § 316. Infra, § 752.



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solemnized in foreign state with intention of avoiding home law.

held a nullity by the home courts as a fraud on the home law. In other words, a document which would be valid by the *lex loci contractus* is to be held by the *lex fori* to be invalid, when executed in *fraudem legis domesticae*. This position has lately been judicially repudiated, as is elsewhere seen, in cases of foreign marriage;[1] and it has been declared by the most eminent jurists to have no applicability to cases of foreign authentications in general.[2] Savigny expresses himself to the same purport;[3] and with him are Schäffner[4] and Wächter,[5] as well as eminent Scotch jurists,[6] though under the French Code there have been rulings diverging from this view.[7] That this principle is in the main correct is shown by the disastrous consequences that would flow from its absolute rejection. Many persons go to foreign lands from motives of economy, desiring to avoid domestic taxation which weighs down most articles they touch. In some cases it might be truly said that their object is to evade the revenue laws; in all cases it might be charged. Hence there is no business document executed abroad that would not be open to such assaults, and there would be none on which could be imposed implicit confidence. Consequences so serious may well be taken in account by jurists as leading to the conclusion, that, however such evasions may render the perpetrator liable to penal justice, they cannot destroy the legal effect of documents executed by a party who visits a foreign country for the purpose of avoiding revenue impositions in his own land. And this view is strengthened by the fact that even a change of domicil is held not to be invalidated for the reason that it was made in order to escape home taxation.[8]

Otherwise when the law evaded is based on policy or morals.

§ 696. Yet this position cannot be maintained when domiciled subjects of a state go to another state in order to solemnize a contract which on grounds of policy or morals would be invalid if solemnized by them in the state of their domicil. In such cases (and among these we may

[1] Supra, § 181.
[2] Bar, § 35; Phil. iv. 457.
[3] § 381.
[4] § 85.
[5] II. pp. 200, 201.
[6] Lord Meadowbank in Utterton *v.* Tewsh, Ferg. Con. Rep. 63; Fraser's Confl. of Laws in Divorce Cases, p. 43; Geils *v.* Geils, 1 Macq. 275. So, also, Westlake, art. 343.
[7] Fœlix, p. 105; ed. Demangeat, i. 161. As to marriage, see supra, § 152.
[8] Supra, §§ 79 *et seq.*



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include contracts prohibited by the statute of frauds, by gaming and by lottery statutes), the illegality of the contract cannot be purged by crossing a boundary line to solemnize it.[1] And this distinction is sustained by the rulings heretofore noticed, that while a marriage is not invalidated by the fact that it is celebrated in a foreign country in order to evade home restrictions as to forms, it is otherwise when the object is to evade home restrictions based on distinctive domestic policy or morals.[2]

### 5. *Transfers of Property.*

*Lex rei sitae* controls.

§ 697. The subject of the transfer of property *inter vivos* has been considered in a previous chapter, and it has been shown that, in such transfer, the *lex rei sitae* is to control.[3]

The practice with regard to wills is considered in connection with the subject of succession.[4]

### 6. *Capacity or Status of Parties.*

Determinable by national policy.

§ 698. The rule *locus regit actum* can only incidentally affect the question of the capacity or *status* of parties. This topic belongs, therefore, to prior chapters.[5] It is sufficient here to say that artificial incapacities are determinable, in the main, by national policy.[6] And, as we have seen, the better view is that matrimonial capacity is to be determined, not by the law of the place of solemnization, but by the distinctive policy of the *lex fori*.[7]

### 7. *Certificates of Notaries and other Officers.*

Must be in accordance with local law.

§ 699. By the laws of all civilized countries, certain officers are commissioned to take acknowledgments of deeds and other instruments, to administer oaths, and to make or record protests of negotiable paper, marine statements, and other business instruments.[8] On the continent of Europe, offices of this kind are chiefly performed by notaries.

[1] Supra, §§ 490, 690.
[2] Supra, §§ 159, 165.
[3] §§ 273–297–334.
[4] §§ 555–560.
[5] Supra, cc. ii. and iv.
[6] Supra, § 101.
[7] Supra, §§ 147, 150.
[8] This topic is discussed at large in Whart. on Ev. §§ 123, 320.



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In France[1] the notary has the exclusive power of attesting testamentary documents. In England and the United States, these functions generally are distributed among a variety of officers. So far, however, as the present issue is concerned, these officers have all one feature, — they are voluntary, *i. e.* the party resorts to them of his own free choice. And the general rule is, that the records of such officers, if not in conformity with the local law, will be viewed as irregular and inadmissible by foreign courts. Thus, when the laws of a state require that the protest to commercial paper shall be under seal, a protest executed in such state, without such seal, will be inadmissible in other states.[2] And to notaries' certificates, generally, the rule *locus regit actum* applies.[3]

*Lex fori* ultimately determines admissibility.

§ 700. But the converse, that a record by such an officer, if regular by the local law, is admissible everywhere else, is subject to some qualifications. All that can be granted in such case is, that the *praesumtio legalitatis*, which is a necessary consequence of the international doctrine of *publica fides*, requires the record of a foreign officer of this class, when duly proved, to have the same respect attached to it as is paid to the record of a corresponding domestic officer.[4] But by our law, so far as the great exclusionary rules (*i. e.* those excluding hearsay, irrelevancy, parol modifications of writings) are concerned, the *lex fori* is to have control,[5] and such is the rule in Germany and France.[6] And so the *lex fori* must ultimately decide as to the adequacy of a notarial certificate.[7]

Need and proof of notarial seal.

§ 701. To enable the certificate of a notary or notarial officer to be admissible in a foreign state, it must, as a general rule, be under the seal of the notary; and the best attainable evidence must be given as to the authenticity of such seal. The great seal of the sovereign is the highest order

[1] Code Civil, arts. 971–979.

[2] McAfee *v.* Doremus, 5 How. 53; Bank of Rochester *v.* Gray, 2 Hill N. Y. 227; Ray *v.* Porter, 42 Ala. 327. See infra, § 759; Whart. on Ev. §§ 692 *et seq.* As to commercial paper, see supra, §§ 447, 454.

[3] Davis's Trusts, L. R. 8 Eq. 98; Earl's Trusts, 4 K. & J. 300.

[4] To this effect Sirey, 35, 2, p. 52, cites a decision of the Cour de Rennes of 6th April, 1838.

[5] Whart. on Ev. §§ 28, 171, 920.

[6] Fœlix, ii. p. 199; Bar, § 116.

[7] See Whart. on Ev. §§ 689, 740; Kirkland *v.* Wanzer, 2 Duer, 278; Gantt *v.* Gantt, 12 La. An. 673.



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of evidence, and of this seal the courts will take official notice.[1] A more usual and equally satisfactory practice on the continent of Europe is for a consul, or other diplomatic representative of the state where such document is to be used, to make such certificate. In case, however, neither of these forms of proof can be obtained, and even, as a permitted alternative to such proofs, parol evidence to prove the authenticity of the notary's seal may be admitted.[2] For commercial purposes, however, in courts acting in accordance with the law merchant, the seal of a notary is judicially noticed.[3] Where no seal is used, as is the case in German states, the handwriting must be proved.[4]

Exemplifications entitled to same respect as originals.

§ 702. So far as concerns courts of record, the usage, in our law, is for the court to retain the original, and to give official exemplifications, or copies, of it, which have the same force in evidence as the original.[5] No doubt, with the recent extension of courts of record, and of registration offices, in Germany, the same usage will be recognized there. And German and French jurists concur in the position that the same respect is to be paid to such exemplifications abroad as are paid to them at home.[6] For, it is justly argued, it would be absurd to exact the exhibition of the *original* of a protocol, which the home government requires to be retained among its own records.

No distinction between general and special officers.

§ 703. No exception can justly arise from the fact that the person issuing such certificate is not a stated and continuous public officer, but a private person, whom the state, for certain special purposes, clothes with the *publica fides*. This is to be decided by the law of the place from which the certificate springs.[7]

[1] Infra, § 756; Whart. on Ev. § 320; Davis's Trusts, L. R. 8 Eq. 98; Nye v. Macdonald, L. R. 3 P. C. 331.

[2] Story, §§ 639–641. The Supreme Court of Berlin, in 1855, decided that a diplomatic certificate was not essential. Bar, § 116.

[3] See Whart. on Ev. §§ 320, for cases.

[4] Ibid. See, also, Whart. on Ev. §§ 123, 320, and cases cited infra.

[5] Whart. on Ev. §§ 94, 120.

[6] Fœlix, ii. No. 305; Bar, § 116. See infra, §§ 759, 761, 762, 764. The subject of exemplifications is fully discussed in Whart. on Ev. §§ 94, 120.

[7] Massé, p. 355, giving a decision to this point of the Paris Court of Cassation of February 6, 1843.



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The tests to which official authentications may be subjected in foreign courts are discussed under a future head.[1]

## II. JURISDICTION OF COURTS.[2]

Foreign privileges as to courts not extra-territorial.

§ 704. The fact that a person is entitled to a privileged court at his own home does not entitle him to a similar privilege abroad. A peer of England is tried for certain offences, when at home, by the House of Lords; but this prerogative would be lost in a foreign land. Certain disputes in France are settled by family councils; but Frenchmen, in England and America, cannot clothe such bodies with any local legal authority. And so the provision of the French Code, authorizing a special commercial court to try commercial cases, has no extra-territorial force; and a French mercantile case, when arising in foreign countries, must be tried by the ordinary tribunals.[3]

Alienship of parties does not affect competency of court.

§ 705. In Germany, England, and the United States (the latter with the partial exception of Louisiana),[4] the courts, as a general thing, make no distinction, so far as jurisdiction is concerned, between cases in which the parties are foreigners, and those in which they are subjects.[5] A court which is competent when the parties are subjects, is competent, other things being the same, when the parties are foreigners.[6] The peculiarities in this respect incident to the distribution of competency in this country between federal and state courts are out of the range of this treatise.

Otherwise in France.

§ 706. The French law, as will be presently noticed more fully, goes on the principle that French courts, except in certain peculiar cases, are not competent to determine questions litigated by foreigners.[7] So far as this concerns

[1] Infra, § 753.

[2] See supra, § 646, where this topic is discussed in reference to foreign judgments.

[3] Fœlix, i. No. 126; Bar, § 118.

[4] In Louisiana the criterion is generally the defendant's domicil. State v. Judge, 21 La. An. 258. But by statute, a joint obligor may be cited at the domicil of his co-obligor. Adams v. Scott, 25 La. An. 528.

[5] Supra, § 17; infra, §§ 739–744.

[6] The American and English cases are cited at §§ 732, 744. For the German law see Bar, § 118; Peck, De jure sistendi, c. i. 2; Baumeister's Hamburgisches Privatrecht, i. § 13, p. 87. Several express German decisions to this point are cited by Bar.

[7] Supra, § 17; infra, § 745.



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persons doing business or owning property in France, this is an injustice; for the French law, in inviting such persons to invest in France, or to engage in business in France, tacitly pledges itself to afford them judicial protection in such transactions. It should be added, however, that in the hands of the French courts the provisions of the French Code in this regard are endowed with great elasticity, extending jurisdiction to many classes of cases in which, while the parties are of foreign domicil and nationality, the cause of action is distinctively French.

Danger of undue expansion of common law rule.

§ 707. On the other hand, the principle asserted by the English and American courts, that they will entertain jurisdiction of cases in which parties and subject matter are foreign, to the same extent as in cases where parties and subject matter are domestic, has been pushed too far.[1] Cases have thus been brought before the courts, particularly in connection with divorce, in which the plaintiff sought the jurisdiction only for the purpose of bringing suit, and in which the defendant never came within the jurisdiction at all. Cases have also arisen, where the defendant's presence in the jurisdiction was only transient, and where he possessed in it neither property nor residence. Thus, where litigation is expensive, or the law inauspicious, the subjects of one country may succeed in throwing on the courts of another country the burden of cases in which the thing contested, as well as the parties contesting, are foreign, and which the courts thus appealed to were not organized to undertake. Lately, while acknowledging the principle, there has been a growing tendency to narrow its application. In England, in Massachusetts, in New York, and in Pennsylvania, the courts, on the subject of divorce, have maintained, with more or less strictness, the necessity of domicil to confer jurisdiction. In other respects, however, the practice of taking jurisdiction in all transitory suits in which the defendant is summoned within the jurisdiction, is too deeply seated to be now shaken.[2]

§ 708. In those countries in which the defendant's domicil is

[1] Infra, § 744.

[2] But see Dewitt *v.* Buchanan, 34 Barb. 31. As indicating that such jurisdiction may be declined when exclusively concerning foreign objects, and the parties are all foreigners, cf. Field Int. Code, 623. Infra, §§ 732, 743 *et seq.*



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the criterion of the competency of the court, such competency is based on the assumption that domicil implies a voluntary submission to the local law, and invests the courts of the domicil with jurisdiction over the party thus domiciled. He may, in such domicil, be served with process, either personally, or by a copy left at his residence or place of business. He cannot complain of this, for he has voluntarily accepted the liabilities of this domicil, in exchange for the protection it affords.[1] And though an alien, he is bound, when domiciled, for taxes;[2] as well as subject to process.[3]

In Roman law criterion of domicil is based on submission.

*Forum*, as existing in the old Roman law, has been already noticed.[4]

§ 709. But when one domicil is formally abandoned for another, and when no property liable to attachment remains in the former domicil, the right to serve process by publication or other constructive methods at the abandoned domicil is, according to the Roman practice, lost. Nor can the plaintiff complain of this. If the cause of action arose before the removal, the suit should have been promptly brought. *Vigilantibus jura sunt scripta.*[5] If afterwards, the new domicil should be that in which the defendant should be sought.

In the same law defendant's change of domicil divests jurisdiction.

§ 710. In cases of delicts, however, there is, according to the modern Roman law, an election given to the wronged party to sue the wrong-doer, either at the *Forum delicti commissi*, or at the *Forum domicilii*. The reason given for this is, that a wrong-doer may leave the place where the wrong was committed before detection; and that consequently delay to institute suit before his removal implies no want of vigilance in the wronged party.[6]

Otherwise as to delicts.

§ 711. We have already seen that suits affecting immovables must, as a rule, be brought in the country where such immovables are situate.[7] This rule obtains also in the

Local actions to be brought in

[1] Supra, § 81; Bar, § 119; Fœlix, i. p. 299.

[2] See State *v.* Bordentown, 3 Vroom (N. J.), 192. Supra, §§ 79, 80.

[3] Infra, § 738.

[4] Supra, § 81.

[5] Bar, § 119.

[6] Ibid. Supra, §§ 474–8.

[7] Supra, § 290.



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local courts, otherwise as to transitory actions.

Roman law.[1] In our own law this principle is at the basis of the distinction between *local* and *transitory* actions. "Actions," to use the words of Mr. Stephen,[2] as adopted by Sir R. Phillimore,[3] "are either *local* or *transitory;* the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land; the latter on such causes of action as may be supposed to take place anywhere, as in the case of trespasses to goods, batteries, and the like. Real actions are always in their nature local; personal are, for the most part, transitory. Between local and transitory actions there is this important distinction, — that the former are, as the general rule, tried in the proper county where the cause of action arose, and by a jury of that county; the latter may be tried in any county, at the discretion (in general) of the plaintiff. It follows from this, that when an injury is committed out of England, and its nature is such as to make the action local, no action at all will lie for its redress in any English court. On the other hand, where the nature of the injury is such that the action is transitory, such action will lie in the English courts, whether the injury was committed in England or elsewhere." Or, as the rule is put by an eminent American judge, "The distinction between transitory and local actions is this: if the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local."[4]

Court may enjoin from suing in other state.

§ 711 *a*. We have already seen[5] that a court of equity may compel a subject to take action as to foreign real estate. It is now to be observed that similar action may be taken to enjoin a domiciled subject from pushing in another state an inequitable claim against another domiciled subject.[6]

[1] Vattel, ii. § 103; J. Voet, in Dig. 5, i. n. 77; Mevius, in Jus. Lub. v. 2, art. 5; Burge, iii. p. 125. This right is sometimes secured by treaty. Bar, § 119; Krug, pp. 40, 41. See discussion in 22 Alb. L. J. pp. 47, 219.

[2] Comm. iii. p. 451.

[3] IV. 648.

[4] Cooley on Torts, 1879, p. 47. See Gorman *v.* Marsteller, 2 Cr. C. C. 311; North. Ind. R. R. *v.* Mich. Cent. R. R. 5 McLean, 444; 15 How. 233.

[5] Supra, § 286.

[6] Dehon *v.* Foster, 1 Allen, 545; Vail *v.* Knapp, 49 Barb. 299; Keyser *v.* Rice, 47 Md. 203; Snook *v.* Snetzer, 25 Oh. St. 516; Engel *v.* Schemmen, 40 Ga. 206; Story Eq. § 899. Supra, § 612. Infra, § 785.



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§ 712. Although transitory suits are based on injuries the plaintiff claims to have received in a foreign place, or on debts payable in a foreign place, they may be brought, under our common law, in any court by whose process the defendant can be served, though to enable the jurisdiction in such cases to attach, the defendant must be served within the jurisdiction of the court.[1]

Competency for transitory suits sustained by intra-territorial service of process.

§ 713. By recent legislation, however, in England and the United States, a new prerogative of jurisdiction has been set up. Without abandoning the right to found jurisdiction on the temporary local presence of foreigners who are intra-territorially summoned, jurisdiction is also claimed over all actions whose causes have arisen intra-territorially, even though the defendant is out of the territory, and cannot be intra-territorially served.[2]

By recent legislation extra-territorial service permitted.

[1] Supra, § 649; infra, § 738; Cook *v.* Dey, L. R. 2 Ch. D. 218.

As holding that a court will decline to take cognizance of a suit between foreigners for a tort in a foreign ship, see Gardner *v.* Thomas, 14 Johns. 135. But in Mitchell *v.* Harmony, 13 How. 115, jurisdiction was taken of a tort committed in Mexico. Supra, § 478.

[2] In England, by the Common Law Procedure Act, passed in 1852, service was permitted abroad in all actions arising within the jurisdiction, or in respect to a contract made or broken within the jurisdiction. This construction was finally adopted in Jackson *v.* Spittall, L. R. 5 C. P. 542. See Vaughan *v.* Weldon, L. R. 10 C. P. 48. Under the rules of court in the schedule to the judicature acts of 1873 and 1875, "service out of the jurisdiction of a writ of summons or notice of a writ of summons, may be allowed by the court or a judge whenever the whole or any part of the subject matter of an action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property; and whenever the contract which is sought to be enforced or rescinded, dissolved or annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction." If the subject matter of the suit be foreign, and the parties be foreign, the extra-territorial process, being discretionary with the court, will be refused. See Foote Priv. Int. Jur. p. 254; citing Doss *v.* Secretary of State, L. R. 19 Eq. 509, and other cases.

"The parties," said Cresswell, J., in a case decided in 1860, "by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by the



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§ 714. We have already seen that a foreign corporation will not be recognized, either as plaintiff or defendant, by the practice of most of our states, except under the distinctive legislation of the forum.[1] In some states no foreign corporation is permitted to do business intra-territorially until it establishes within the state an office where it may be sued. Even without such a limitation a corporation may be served within the jurisdiction through a general agent or manager whom it may have established there as its representative.[2] And under the English statute above noticed a foreign corporation may, in England, be served out of English jurisdiction by notice to the same effect as may a foreign individual.[3] In any view, service on a foreign corporation, through its agent, is good if in conformity with the *lex fori*.[4]

Foreign corporation may be so served.

§ 715. It is, however, a matter of serious question whether a state is required to recognize as valid a foreign judgment based exclusively on jurisdiction thus obtained.[5] And on this point the Supreme Court of the United States has recently declared that without intra-territorial service the judgment *in personam* of a foreign court is a nullity.[6] And whatever we may say as to cases in which the defendant so served was at the time domiciled within the state serving him, we must hold that an extra-territorial service upon a person not so domiciled will not be regarded as valid in any state except that of the service.[7]

Internationally jurisdiction cannot be based on mere extra-territorial service.

English tribunal." Simonton *v.* Mallac, 2 Sw. & Tr. 67.

Similar statutes have been adopted in most of the jurisdictions in the United States.

[1] Supra, § 105 *d*.

[2] Newby *v.* Van Offen & Colt's Patent Fire Arms Co. L. R. 7 Q. B. 293; Western Union Tr. Co. *v.* Pleasants, 46 Ala. 641.

[3] Scott *v.* Wax Candle Co. L. R. 1 Q. B. D. 404.

[4] Supra, § 105 *d*; infra, § 747, where cases are given.

[5] Story speaks strongly in the negative. Confl. of Laws, § 546. See Fergusson *v.* Mahon, 3 Per. & D. 143; S. C., 11 Ad. & El. 179; Buchanan *v.* Rucker, 9 East, 192; Smith *v.* Nichols, 5 Bing. N. C. 208; Douglass *v.* Forrest, 4 Bing. 686; Don *v.* Lippmann, 5 Cl. & F. 1, 21.

[6] Bischoff *v.* Wethered, 9 Wallace, 812. See, also, supra, §§ 647–649.

[7] See cases collected supra, § 647, and see Whart. on Ev. § 803; D'Arcy *v.* Ketchum, 11 How. 165; Pennoyer *v.* Neff, 95 U. S. 714.

A judgment for alimony rendered in another state, where the only notice was by publication, and the defendant did not appear, and was not a resident of the state, has no extra-



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Appearance, however, may be treated as equivalent to personal service.[1]

§ 716. Divorce, as we have already seen, stands in this respect on a distinct basis, marriage being a *status* internationally established, and it being also open to argument that divorce statutes, being remedial, are not to be defeated by the offending party putting himself out of the jurisdiction of the court. How far jurisdiction can in such cases rest upon service by publication or by extra-territorial notice is elsewhere discussed.[2]

Exception in divorce cases.

§ 717. As we have already seen, execution and sale under proceedings *in rem*, when had under a competent court of the place where the property lies, give a title which cannot be extra-territorially contested.[3] In these proceedings, which are common to all nations, the defendant is summoned, by means of attachment, arrest, or notice placed on such property, to attend court and defend the suit. Under this head, also, may be classed actions on mort-

Proceedings *in rem* give title to thing intra-territorially attached.

territorial force. Middleworth *v.* McDowell, 49 Ind. 386.

In Blain, ex parte, L. R. 12 Ch. D. 522; 41 L. T. N. S. 47, James, L. J., said: —

"No doubt it," English legislation, "has a right to say to a Chilian or to anybody else, 'If you make a contract in England, or commit a breach of a contract in England, under a particular act of parliament particular procedure may be had by which we can effectually try the question as to that contract and that breach, and with regard to any property you may have in this country we may give execution against that property;' but that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognized abroad remains to be considered, and will be determined by the tribunals abroad. If a foreigner, being served under the Judicature Acts, did not choose to appear; and the legislature said, 'If you do not appear default is committed against you,' whether that judgment would be recognized under these circumstances by a foreign tribunal as being consistent with international law, and the general principles of justice, is a matter that will be determined by them." In the same case, Brett, L. J., said: "The governing principle is, that all legislation is *primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects, and binds the subjects of other countries who for the time bring themselves within the allegiance of the legislating power."

[1] Vallee *v.* Durmergue, 4 Exch. 290; Meens *v.* Thellusson, 8 Exch. R. 638. But see, as to divorce procedure, supra, § 238.

[2] Supra, §§ 236, 237.

[3] Supra, § 664.



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gages, where a non-resident mortgagor may be proceeded against by publication; actions on covenants for rent, where the same process is granted; foreign attachments, and trustee processes, where the absent defendant's property, whether it be in real estate, or movables, or debts, is attached in the hands of garnishees or trustees. These are virtually proceedings *in rem*.[1] As to the power of the state to sell such property on such a judgment, there can be no question. The state is absolute master of all property within its borders, no matter where the owner is domiciled. This has always been held to be the law with regard to immovable property; and, as has been already seen, the fiction that movables follow the person is now gradually vanishing from the field of practical jurisprudence.[2]

But not extra-territorially.

§ 717 *a*. The converse, also, is true, that no court can pass the title to property, either real or personal, in a foreign state. As to real estate, this has never been disputed.[3] As to personalty, the result flows from the exclusive jurisdiction of the *lex rei sitae*, as above stated.[4]

Statutory extra-territorial service to follow statute.

§ 718. Process for extra-territorial service, or service by publication, being in derogation of common law, must strictly follow the statute.[5]

Service when one partner is abroad.

§ 719. Under the present English practice, a person resident abroad, carrying on business in England in the name of a firm apparently consisting of more than one person, may be sued by service, at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of the service the control of such business.[6]

§ 720. We have already considered how far diplomatic agents are to be regarded as entitled to the privileges of extra-territorial-

[1] As to suits to foreclose mortgages of alien enemies, see infra, § 742.

[2] See Castrique *v.* Imrie, L. R. 4 H. of Lords (1870), 428, where the doctrine above stated is finally and authoritatively settled. Infra, § 828. See supra, § 310.

[3] Page *v.* McKee, 3 Bush (Ky.), 135. Supra, § 273.

[4] Supra, §§ 297–334.

[5] See Gray *v.* Larrimore, 2 Abb. U. S. 542; Denton *v.* Denton, 41 How. (N. Y.) Pr. 221; Phelps *v.* Baker, Ibid. 237; Claybrook *v.* Wade, 7 Cold. 555.

[6] O'Neil *v.* Clason, 46 L. J. N. S. Q. B. D. 191; cited Westlake, 1880, § 172. See Bennett *v.* Cadwell, 70 Penn. St. 253.



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ity.[1] It may be here noticed, that consuls are held in France not entitled to diplomatic immunity, but are justiciable before the courts of the state of their residence in matters not concerning their official duties.[2] And in this country, where on an action of debt against a foreign consul, for money received in a fiduciary capacity, the defendant, being arrested, moved on affidavits to vacate the arrest, it was held that, under the federal Act of February 28, 1839, in connection with the Act of January 14, 1841, and the 179th section of the New York Code, the defendant was liable to the arrest.[3]

Consuls not privileged from service.

### III. LETTERS ROGATORY.

§ 722. Letters rogatory to take testimony in foreign lands (*litterae requisitoriales*, according to the Roman law; *commissions rogatoires*, according to the French; *Ersuchungsschreiben*, according to the German) are known to all forms of modern practice.[4] Questions concerning these commissions are in a large measure governed by local regulations, which it would be impracticable here to discuss. All that is now attempted is to notice some of the general features attending the execution of such commissions abroad.[5]

Framing governed by local practice.

§ 723. Until recently, the practice in England and the United States was to direct such letters to parties holding no local judicial rank in the country where the testimony was sought; sometimes lawyers, the subjects of such country, being appointed as commissioners; sometimes the diplomatic or business representatives of the country sending the

In Europe are executed by courts.

[1] Supra, § 16.

[2] Bernet *v.* Herran, Trib. civ. de la Seine, 1876; Jour. du droit int. privé, 1876, p. 272.

[3] McKay *v.* Garcia, 6 Benedict, 556.

An able article by Demangeat on the immunity of diplomatic agents will be found in the Jour. du droit int. privé, 1875, pp. 89 *et seq.*

It is held in France that a military attaché of a foreign legation participates in the privilege of extra-territoriality. Jour. du droit int. privé, 1878, p. 502.

[4] Phil. iv. 638; Mittermaier, Archiv. für die civilist. Praxis, 13, p. 308; Massé, Nos. 281, 282; Fœlix i. No. 240.

[5] See Brightly's Practice, § 619; Hoffman Chan. Pr. 481; Lawrence Com. sur Wheat. iii. 415; Weeks on Depositions, § 128. For cases involving such letters, see Nelson *v.* U. S. Pet. C. C. 235; Mexico *v.* De Arangois, 5 Duer, 634; 3 Ab. Pr. 470; Kuehling *v.* Leberman, 9 Phila. 160.



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commission. The letter itself issued from a court of record, under the seal of such court. Being, however, addressed to persons vested with no local judicial authority, the proceedings were often held voluntary, and in some jurisdictions no witness could be compelled to attend and testify.[1] On the continent of Europe a more convenient and effective practice has obtained, and letters of this class are directed to judges of courts, who, as a rule, undertake their execution as they would similar mandates from their own sovereign.[2] In our own practice it is not usual to issue letters rogatory when an ordinary commission to take testimony will effect the end.[3]

Practice of execution that of examining court.

§ 724. Letters rogatory (differing in this respect from commissions which are issued to examiners as subordinates to the court of trial) are based on the assumption that "by the law of nations the courts of justice of different countries are bound to be mutually assisting each other for the furtherance of justice;" and that "hence, when the testimony of witnesses, who reside abroad, is necessary to a cause, the court where the action is pending may send to the court or tribunal within whose jurisdiction the witnesses reside, a writ patent or close,"[4] informing the latter court of the pending cause, and asking it to take the requisite testimony. According to the practice that has grown up under this system, the judge to whom the letter is addressed conducts the examination in conformity with the law of the court of which he is a member; and this is necessary, as it is only in submission to such law that witnesses can be summoned before him, and their testimony rendered under the sanction of an oath.[5] That the commission is so executed is a presumption of law; and when so executed is accepted, so far as the form is concerned, by the court from whom it issued. Thus, for instance, under this system, it has been held

[1] Spanish Consul's Petit. 1 Ben. 225.

[2] See authorities cited in last note, and also Bartolus in L. 15, D. de re jud. 42, 1, § 1, No. 8; Paulus, De Castr. ad L. ult.; D. de jurisd. 2, 1; Gensler, Commentar Zu Martin's Lehrbuch des Civil-processes, i. p. 106.

[3] Froude *v.* Froude, 1 Hun, 76.

[4] Hall's Ad. Pr. § 37.

[5] Mittermaier, as cited above; Bouhier, ch. 28, No. 93; Boullenois, i. p. 546; Pardessus, No. 1489; Schäffner, p. 206; Fœlix, i. No. 246, *a.* E; Bar, § 124.



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no objection to the execution of letters rogatory that the witnesses did not subscribe the protocol, this not being the general practice of the court to whom the commission was addressed.[1] At the same time, it is recommended by the German jurists that the specific directions of the letter, as to matters of form, should be followed in all cases where this does not contravene a local coercive law, or does not invade the privileges of either witnesses or judge.[2]

Whether, on letters rogatory, the question of capacity of witnesses is to be tested by the law from whence the letters issue, or by the law of the place in which the testimony is taken, has been much discussed by European jurists. By Massé, Mittermaier, Schäffner, and others, the former view is maintained; it is stoutly contested by Fœlix. On the one side, it is argued that every court must judge of admissibility by its own rules of evidence. On the other side, it is argued that it is absurd to reject witnesses in whom the local law has confidence.[3] But however strong may be the last point in jurisdictions in which the execution of such commission is left to a judge with discretionary powers, it has no force in respect to commissions addressed to persons without discretion. And in any view, by our law the competency of witnesses is for the *judex fori*.[4]

§ 725. It does not, however, follow that the deviation by an examining court, from the instructions of the letters, demands the suppression of the return. It must be remembered that letters rogatory differ from commissions to take testimony in the fact that the former are addressed to a court with discretion; the latter to a mere examiner without discretion. Thus, in 1866, the English divorce court refused to suppress a return to a requisition with interrogatories and cross-interrogatories attached, because the judge of the French court, to whom the requisition was addressed, with the interrogatories and cross-interrogatories before him, examined the witness by putting such questions as he deemed convenient, no other questions hav-

Discretion allowed examining tribunal.

[1] Bar, § 124.
[2] Heffter, § 39, ii.
[3] See summary in Revue de droit int. 1875, p. 377.
[4] Whart. on Ev. § 391.
[5] Bar, § 124.
[6] Heffter, § 39, ii.



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ing been put.[1] But as a general rule the examination must follow the interrogatories.[2]

But competency and admissibility are for court of trial.

§ 726. Of course, so far as concerns the substance of the commission, the question of admissibility is solely for the court issuing the commission; though where no directions are given, the usage of the place of execution will be observed, subject to the revision of the court where the case is tried.[3]

Privilege determinable by law of place of examination.

§ 727. Witnesses are to be subjected, in answering to such commissions, to the laws of the court of examination, strangers and subjects being equally bound in this respect, the former having no right to interpose any privilege they may have by the law of their domicil.[4] If a witness, whether stranger or subject, is excused by the law of the place of examination from answering particular questions, this privilege will be sustained by the judge executing the commission.[5]

Extradition of witnesses provided for in treaties.

§ 728. Treaties exist in several continental states providing for the extradition of witnesses, so that they may be compelled to testify in person before a foreign court. This, however, is generally refused where the journey is one of great distance; and is never granted unless the witness is to be protected from expense, and invasion of personal rights. Nor will such attendance be compelled when the witness shows that he would, in the foreign court, be coerced to reply to questions which he would be privileged from answering at home.[6]

Court of examination determines on production of papers.

§ 729. The obligation of *parties* to produce papers, and even to submit to an examination, is to be determined by the law of the court of examination; supposing that the party in question is subject to the jurisdiction of such court.[7]

§ 730. The oath administered must be in accordance with the

[1] Hitchins *v.* Hitchins, L. R. 1 P. & M. 153.

[2] Kimball *v.* Davis, 19 Wend. 437.

[3] Bar, § 124; Whart. on Ev. §§ 400 *et seq.*; Cornett *v.* Williams, 20 Wal. 226; Eslaro *v.* Mezange, 1 Woods, 623.

[4] P. Voet, x. c. § 10; J. Voet, in Dig. 2, 13, § 24.

[5] Bar, § 124.

[6] Bar, § 124.

[7] See Whart. on Ev. §§ 742–756.



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law of the court executing the letters rogatory, which is supposed to be that of at least the provisional residence of the witnesses. The court issuing the letters cannot prescribe the form of the oath.[1] Thus the German courts have uniformly insisted on maintaining, in executing such commissions, the adjuration of God contained in the German oath, though this be in response to a commission from France, where no such adjuration is usual.[2] On the other hand, it would seem that in France the courts under a German requisition will, if demanded, insert in the oath the German invocation of God and the Gospels.[3] It is sufficient if it appear that the oath was administered by a competent officer in the presence of the commissioners.[4]

And so as to mode of oath.

§ 731. In England, statutes have been recently passed authorizing the issuing of commissions to foreign courts, and the executing by English judges of such commissions when coming from abroad.[5]

Recent statutes provide for executing commissions by foreign courts.

A similar statute, requiring district judges to execute such commissions, and to issue compulsory process to examine witnesses, was, in 1863, adopted in the United States.[6]

### IV. PARTIES.

§ 732. We have already seen that in England and in this country a plaintiff, who is a foreigner, is not thereby incapacitated from bringing suit against a defendant who is a subject;[7] nor does it generally matter that the cause of action, if transitory, arose abroad.[8] He is, in most states, however, compelled to give security for costs and damages (*fournir caution*); this being

In our practice alien may sue, but may be compelled to give security for costs.

[1] But see Bacon *v.* Bacon, 33 Wis. 147.

[2] This was decided at Cassel, in 1841 and 1853. See Bar, § 124.

[3] Fœlix, i. p. 455. See Brocher, Droit int. privé, p. 415.

[4] Lincoln *v.* Battelle, 6 Wend. 475; Vaughan *v.* Blanchard, 2 Dall. 192.

[5] Phil. iv. 638. See Clay *v.* Stephenson, 3 Ad. & E. 807; Ponsford *v.* O'Conner, 5 M. & Wels. 673; Pischer *v.* Sztaray, 31 L. T. 130, for practice.

[6] 12 Stat. at Large, 769; Brightly, ii. 204.

[7] Supra, § 705; Taylor *v.* Carpenter, 3 Story, 458; S. C., 2 Wood. & M. 2; Fœlix, i. ii. t. ii. c. 1, etc.; Phillimore, iv. 641. Thus an alien friend, though resident abroad, is entitled to sue in the courts at Westminster for a libel published concerning him in England. Pisani *v.* Lawson, 6 Bing. N. C. 30; 8 Scott, 180; 8 D. P. C. 57; 3 Jur. 1153.

[8] Supra, § 709; Dewitt *v.* Buchanan,



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relaxed in cases where he has a freehold or other reliable assets in the jurisdiction.[1] In England, the present practice is not to require such security if the plaintiff is actually in England.[2] It is in any view necessary for the defendant to swear that the plaintiff's actual residence is abroad, in order to obtain such security.

Such security may also be required in France.

§ 733. The French Code specially exempts from the necessity of giving such security (*fournir caution*) the following cases: —

(1.) Commercial suits.

(2.) Cases where the plaintiff possesses in France immovable property sufficient to meet costs and damages.

(3.) Cases excepted by treaty.

(4.) Cases where the plaintiff acts ministerially, under direction of the court.[3]

The French practice treats the right to require security from the plaintiff as a privilege solely of French defendants; a privilege which cannot be claimed by undomiciled foreigners.[4] The justice of this position has been much questioned by Demangeat[5]

54 Barb. 31; Glen *v.* Hodges, 9 Johns. R. 67; Smith *v.* Bull, 17 Wend. 323; Johnson *v.* Dalton, 1 Cowen, 548. As to *torts*, see supra, §§ 474–479, 707.

[1] Tambisco *v.* Pacifico, 7 Exch. R. 816. Security has been required of a foreign corporation, Bank of Michigan *v.* Jessop, 19 Wend. 10; of a foreign government, King of Greece *v.* Wright, 6 Dow. P. C. 12; of a non-resident guardian. Ten Broeck *v.* Reynolds, 13 How. Pr. 462.

[2] Drummond *v.* Tillinghast, 16 Q. B. 740. This point was elaborately discussed in 1879, and it was held by the Court of Appeal, Redondo *v.* Chaytor, L. R. 4 Q. B. D. 453, that a plaintiff, who is a foreigner, domiciled abroad, and has come to England for the purpose of bringing an action, and intends to leave England as soon as the action is decided, cannot be compelled to give security for costs.

The Act of Congress of July 27, 1868 (15 Stats. at Large, 243), bases on reciprocity the right of an alien to prosecute claims against the United States in the Court of Claims. In O'Keefe's case, 11 Wal. 178, it was held that, by the proceedings known as a "petition of right," the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its courts; and, therefore, that British subjects, if otherwise entitled, may prosecute claims against the United States in the Court of Claims. Carlisle *v.* U. S. 6 Ct. of Cl. 398.

[3] See Fœlix, i. t. xi. c. ii. § 1.

[4] Sirey, 36, 2, p. 362; 28, 2, p. 193; Fœlix, i. p. 270. These writers report several decisions to this effect.

[5] Note to Fœlix, i. pp. 271, 275.



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and Massé;[1] and the contrary doctrine was maintained by the Supreme Court at Cassel, in 1856.[2]

§ 734. A defendant is not put in the position of a plaintiff, in this respect, by his pleading a set-off, or, in the same process, adopting a defence which is equivalent to an independent claim against the plaintiff.[3] It is otherwise, however, when he retaliates by a distinct suit, or by injunction in another court.[4]

Defendant cannot be so compelled.

§ 735. Whether an assignee can sue in his own name is sometimes a technical question, sometimes one that is essential.[5] When it is technical (*i. e.* when the point is merely whether the suit is to be brought by A. to the use of B., or by B. immediately, there being no dispute that the title, as between the two, is virtually in B.), then the *lex fori* is to decide. It is a mere matter of process. If allowed by the *lex fori*, the assignee may sue in his own name, although forbidden by the foreign law to which the obligation is subject.[6] If forbidden by the *lex fori*, the assignee cannot sue in his own name, though permitted to do so by the foreign law to which the obligation is subject.[7]

*Lex fori* determines whether assignee can sue in his own name.

[1] Page 336, n. i.

[2] Heuser, Annalen, 4, p. 688.

[3] Fœlix, i. pp. 367, 368.

[4] Bar, § 117; Fœlix, i. p. 369.

[5] As by assignment of obligations generally, see supra, § 545.

[6] Foss *v.* Nutting, 14 Gray (Mass.), 484.

[7] Fisk *v.* Brackett, 32 Vt. 798; Usher *v.* D'Wolfe, 13 Mass. 390; Foss *v.* Nutting, 14 Gray, 484; Hay *v.* Green, 12 Cush. 282; Leach *v.* Greene, 116 Mass. 536. See, also, Wolff *v.* Oxholm, 6 M. & S. 99; Folliott *v.* Ogden, 1 H. Black. 131; Innes *v.* Dunlop, 8 Term R. 595; Jeffrey *v.* McTaggart, 6 M. & S. 126; Levy *v.* Levy, 78 Penn. St. 507; Murrell *v.* Jones, 40 Miss. 565. These cases go to show that even in cases where, in the country whose law applies to the essence of the case, the assignee could sue in his own name, the question, so far as this right is concerned, is to be decided by the *lex fori*. Thus the Scotch assignee of a bankrupt was compelled to use his assignor's name in an English suit in two of the cases just cited. 6 M. & S. 99, 131. See, also, Orr *v.* Amory, 11 Mass. 25; Caskie *v.* Webster, 2 Wal. Jr. 131. In Connecticut, the foreign assignee, where there are claims on the property adverse to the assignment, cannot sue. Upton *v.* Hubbard, 28 Conn. 274. In some cases, however, now much questioned (supra, § 388), it was said that the foreign assignee in bankruptcy can appear and sue in his own name, when there is no conflict with the assignor or with creditors. Alivon *v.* Furnival, 1 Cromp., Mees. & Rosc. 296; Holmes *v.* Remsen, 4 Johns. C. R. 485; Milne *v.* Moreton, 6 Binn. 363, 374; Blake *v.* Williams, 6 Pick. R. 286; Ingra



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A difficult question arises when there is a positive local law limiting, as does the Roman law, the assignment of suits, *Res litigiosae.* When the local law positively forbids, as a rule of practice, the assignment of causes after litigation is commenced, the courts are bound to obey it, although the assignment and the case itself are governed by a foreign law, where such an assignment is permitted. But it does not follow that the converse is true. A debtor who, by the laws by which his debt is governed, is liable to a particular plaintiff, and to him alone, may with great justice say that it is a matter, not of form, but of substance, whether, in a foreign country, he is to be compelled to meet, on the same cause of action, another plaintiff, against whom he may not be able to present the same set-offs or equitable defences. If a matter of substance, the point is to be decided, not by the *lex fori*, but by the law of the place to which the debt is subject.[1]

Validity of assignment determined by its own law.

§ 736. It should at the same time be kept in mind, that the question whether the foreign assignment on which the plaintiff claims is valid at all, or, whether it is valid as against the defendant, goes to the merits, and must be decided by the law in which the case has its legal seat. How far such assignments pass the title has been considered under another head.[2]

Whether a bankrupt assignee can sue in a foreign state is elsewhere discussed.[3]

§ 737. An alien enemy, as such, is not entitled to sustain a

ham *v.* Geyer, 13 Mass. 146; Goodwin *v.* Jones, 3 Mass. R. 517; Perry *v.* Barry, 1 Cranch C. C. 204; Blane *v.* Drummond, 1 Brock. 62; Hunt *v.* Jackson, 5 Blatch. 349. This, however, even if law, does not touch the issue. It may be the practice of the *lex fori* to permit a foreign assignee to sue in his own name. But this is a practice which it is within the absolute power of the legislature of the forum to determine; Levy *v.* Levy, 78 Penn. St. 507; and in Massachusetts one who has purchased in a foreign state a *chose in action* belonging to a bankrupt estate cannot sue in his own name. Leach *v.* Greene, 116 Mass. 534. The New York practice is given infra, § 805.

The subject of the indorsement of bills has been already separately considered. Supra, §§ 450–461.

A foreign claim distinctively equitable will require equity process for its enforcement, in a state in which law and equity are distinct. Burchard *v.* Dunbar, 82 Ill. 450.

[1] Bar, § 76.

[2] Supra, §§ 345–72.

[3] Supra, § 735, note; infra, § 803.



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suit, unless under a safe conduct, or under the special protection or license of the government.[1] And every resident of a hostile place or country, even though a subject, is regarded as an alien enemy.[2] Nor can such person sue through a trustee.[3] It is otherwise, however, in the United States, as to confiscation acts of 1861 and 1862.[4] After peace, the right to sue revives, as to actions accruing before the war.[5]

Alien enemies not entitled to sue.

The general subject of contracts with an alien enemy has been already noticed.[6] That of the liability of alien enemies to suit will be considered hereafter.[7]

§ 738. We have already seen that if a defendant can be summoned within the jurisdiction, it is no bar to the action that he is an alien, or that the cause of action arose abroad.[8]

With us foreign defendant may be sued.

§ 739. In states where the defendant's domicil is the test of jurisdiction, the defendant must be sought in this domicil, and if it be within the state, he cannot be elsewhere sued.[9]

Otherwise where defendant's domicil is test of jurisdiction.

§ 740. In Europe where the defendant is a foreigner, or when there is special proof laid before the court that he is about to fly from the jurisdiction, provision is made in several states for his arrest.[10]

Arrest of defendant permitted in European states.

§ 741. The arrest of the defendant under such circumstances, and the writ *ne exeat regno*, depend upon the *lex fori*, and, in English practice, will be granted on due proof that the defendant is about to fly the jurisdiction,

Arrest is now determined by *lex fori*.

[1] Omealy *v.* Wilson, 1 Camp. 481; McConnell *v.* Hector, 3 Bos. & P. 113; Mumford *v.* Mumford, 1 Gallison, 366; Johnson *v.* Falconer, 2 Paine, 639; S. C., Van Ness, 45; U. S. *v.* The Isaac Hammett, 4 West. L. J. 486; S. C., 10 Pitts. L. J. 97; Crawford *v.* The William Penn, Pet. C. C. 106; S. C., 3 Wash. C. C. 484; Otteridge *v.* Thompson, 2 Cranch C. C. 108; Rice *v.* Shook, 27 Ark. 137.

[2] The Sargeant, Bl. Pr. Cases, 576; Elgee *v.* Lovell, U. S. Rev. Cases, 72; U. S. *v.* Hicks, 12 Am. L. R. 735; Cockburn on Nationality, p. 150.

[3] Crawford *v.* William Penn, Pet. C. C. 106; S. C., 3 Wash. C. C. 484.

[4] U. S. *v.* Shares of Stock, &c. 5 Blatch. 231.

[5] Stiles *v.* Easley, 51 Ill. 275; Cockburn on Nationality, p. 150; Supra, § 497; Semmes *v.* City Fire Ins. Co. 36 Conn. 543; Hanger *v.* Abbott, 6 Wallace, 532.

[6] Supra, § 497.

[7] Infra, § 742.

[8] Supra, §§ 705–707.

[9] State *v.* Judge, 21 La. An. 258. See supra, § 706.

[10] This is the case in France. Gand, No. 609, 701; Massé, No. 196; Bar, § 118.



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leaving no assets;[1] and this even though it appear that the law of the foreign country where the debt was contracted did not warrant an arrest under such circumstances.[2] And generally it is no defence that the debt, in its proper seat, was not one for which there could be an arrest. Thus one foreigner may arrest another in England for a debt which accrued in Portugal while both resided there, though the Portuguese law does not allow of arrest for debt.[3]

When non-resident alien enemy may be sued.

§ 742. The fact that the mortgagor of land is a non-resident alien enemy does not preclude a loyal citizen from the right of enforcing the local laws so as to subject the real estate, within its limits, to the payment of a debt contracted before the war began, and secured by a mortgage upon the property itself.[4]

Alienage of parties does not divest jurisdiction.

§ 743. We have already seen that the fact that both parties are foreigners does not divest our courts of jurisdiction.[5]

In Germany this jurisdiction declined.

§ 744. In Germany the courts have jurisdiction of attachments brought against foreigners by subjects, and when the subject matter is domestic, of suits against foreigners by foreigners.[6] But when the question is one having its seat in a foreign state, the parties being foreigners, jurisdiction will not be entertained in a German court.

§ 745. In France, it is open to the defendant, in such a suit,

[1] Imlay *v.* Ellefsen, 2 East, 453-5; De la Vega *v.* Vianna, 1 B. & Ald. 284; Brettilot *v.* Sandos, 4 Scott, 201, overruling Melan *v.* Fitzjames, 1 Bos. & Pul. 138. Infra, § 748.

[2] Brettilot *v.* Sandos, 4 Scott, 201.

[3] De la Vega *v.* Vianna, 1 B. & Ad. 284.

[4] Seymour *v.* Bailey, 66 Ill. 288.

In this case the court said: "In McVeigh *v.* United States, 11 Wallace, 259, it is said: 'Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence.' As further bearing upon this point, see Albrecht *v.* Tussan, 2 Vesey & Beames, 323; Barrick et al. *v.* Buba et al. 32 Eng. L. & Eq. Rep. 465; Dorsey *v.* Kyle, 30 Md. 518; Dorsey *v.* Dorsey, Ibid. 524; Griswold *v.* Waddington, 15 Johns. 83; Kemp's Lessee *v.* Kennedy, 5 Cranch, 173; Ludlow *v.* Ramsey, 11 Wal. 581." Seymour *v.* Bailey, 66 Ill. 295.

[5] Supra, §§ 17, 706; Rafael *v.* Verelst, W. Black. 1055; Mostyn *v.* Fabrigas, Cowp. 161; Roberts *v.* Knights, 7 Allen, 449; Gardner *v.* Thomas, 14 Johns. 134; Story, §§ 541, 542; Phil. iv. p. 645. So it also is, Fœlix tells us, in Spain. Fœlix, i. p. 287.

[6] Jour. du droit int. privé, 1874, p. 195.



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by pleading alienage, to divest the court of jurisdiction. This is a privilege of the defendant, and may be waived, if he choose. The court cannot set it up of its own motion.[1] So in France.

§ 746. But whatever may be the derivation of the French principle, that a foreigner cannot compel a foreigner to answer in a French court, it is subject to several exceptions. Thus the rule does not apply (in other words, foreigners, according to the Code, may sue foreigners) in the following cases: — Exceptions.

Where possessory suits are brought in respect to French movables;[2]

When the suit concerns a payment to be made in France;[3]

When the suit relates to a commercial transaction;[4]

In all cases concerning succession where the inheritance fell in France, or where French immovables are involved;[5]

In suits for damages for injuries sustained in France;[6]

When the defendant has even a transitory domicil in France, or where he has no actual domicil elsewhere;[7] and

When, in peculiar cases, the conditions of the 420th article of the Code de Procedure are satisfied.

§ 746 *a*. A foreign sovereign may sue, not merely for injury to him personally, or to property vested in him by the state, but for all rights of property which accrue to the state of which he is the head, from the individuals sued.[8] For political rights, based on injuries alleged to When foreign sovereigns may be parties.

[1] Code de Procéd. art. 168; Cockburn on Nationality, p. 157; Goiraud's French Code, 1880, 36. Compare supra, §§ 17, 706.

[2] Gand, No. 201; Fœlix, i. No. 160.

[3] Fœlix, i. p. 302.

[4] Fœlix, i. 304–306.

[5] Massé, No. 177; Fœlix, i. p. 321.

A learned exposition of the law on the competency of French courts to entertain suits between strangers will be found in the Jour. du droit int. privé, 1877, p. 109.

[6] Fœlix, i. p. 311.

[7] Fœlix, i. pp. 299, 309.

As to the jurisdiction of French courts over foreigners, see Jour. du droit int. privé, 1878, p. 160. That such jurisdiction will not extend to suits between foreigners as to matters transacted abroad, see London & Dover R. R. *v.* South East. R. R. Ibid. p. 162. Comp. same journal, 1879, p. 541. Supra, § 17.

In Italy foreigners are in this respect entitled to the same rights as citizens. Supra, § 17.

[8] Emperor of Austria *v.* Day, 2 Giff.



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have been received by his state from a foreign state as such, he cannot sue in a court of the latter state. The remedy for such is by diplomatic negotiation. Where a republic sues, it may sue in its technical political name; and a suit in England by "The United States of America" has been sustained.[1] But the proper political title must be correctly given.[2] A foreign sovereign or foreign state cannot be sued for a personal grievance to an individual; though the privilege may be waived, either expressly or by submission to the jurisdiction.[3] When, however, a foreign sovereign is at the same time an English subject, he may be sued in the latter capacity in an English court.[4] As we have already seen,[5] the members of a foreign embassy, comprising the minister himself, his family, his assistants and attachés, and his servants, are assumed, by the law of nations, to be resident in the territory of their sovereign.

### V. FORM OF SUIT AND PROCESS.

*Lex fori* decides as to process.

§ 747. No matter what may be the law to which a case may be subject, the *lex fori*, as has been seen, must decide as to the form of the suit in which such case is to be presented.[6] Thus, in several of the United States a scroll attached to the obligor's signature converts a note into a sealed instrument. According to the local law, in such cases, debt or covenant is the suit to be brought on the sealed instrument, while assumpsit would be the proper form on the unsealed note. Nor is this all. To a sealed instrument, by such local law, the defendant cannot plead want of consideration; although such a

628; King of the Two Sicilies *v.* Wilcox, 1 Sim. N. S. 301. See supra, § 16.

[1] United States of America *v.* Wagner, L. R. 2 Ch. 582; Republic of Peru *v.* Wegualin, L. R. 20 Eq. 140; S. C., 7 C. P. 432.

[2] Columbian Government *v.* Rothschild, 1 Sim. 94.

[3] Supra, § 124 *a*.

[4] Foote's Private Int. Jur. 1878, pp. 92–110. Supra, § 124 *a*.

[5] Supra, §§ 16, 720.

[6] Supra, § 721; Imlay *v.* Ellefsen, 2 East, 453; De la Vega *v.* Vianna, 1 B. & Ad. 284; Robinson *v.* Campbell, 3 Wheat. 212; Hinkley *v.* Mareau, 3 Mason, 88; Smith *v.* Spinolla, 2 Johns. 198; Woodbridge *v.* Wright, 3 Conn. 523; Atwater *v.* Townsend, 4 Conn. 47.

Even where a local action is removed from one jurisdiction to another, while the rights of the parties are governed by the law of the place to which the case is otherwise subject, the form is controlled by the *lex fori*. Alexandria *v.* Swann, 5 How. 83.



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plea would have been proper had the action been assumpsit, and the obligation without a seal. On the other hand, in other states of the Union, a scroll has no such effect; but a note with a scroll attached to the maker's name is still an unsealed note, to which want of consideration may be pleaded.[1] Now it has been repeatedly ruled that where a note with such a scroll, made in a state where a scroll has this effect, is sued on in a state where a scroll is a mere nullity, then assumpsit, and not debt or covenant, is the proper remedy, and the defendant may plead want of consideration.[2] And in all cases in which the technical rightfulness of process is at issue, the *lex fori* must decide.[3]

Imprisonment for debt to be so determined.

§ 748. As we have already seen, imprisonment for debt is determined by the *lex fori*. It will be applied, in a state where it is established by law, to procedure on a foreign judgment emanating from a state which aban-

[1] Andrews *v.* Herriott, 4 Cow. 508.

[2] U. S. *v.* Donelly, 8 Pet. 361; Roy *v.* Beard, 8 How. 451; Douglass *v.* Oldham, 6 N. H. 150; Warren *v.* Lynch, 5 Johns. 239; Andrews *v.* Herriott, 4 Cowen, 508; Williams *v.* Haynes, 27 Iowa, 251. See Trasher *v.* Everhardt, 3 Gill & J. 234; Adams *v.* Kerr, 1 B. & P. 360; Parsons on Cont. iii. 589.

The converse is also true. Watson *v.* Brewster, 1 Barr, 381.

[3] Supra, § 121; Bank of Australasia *v.* Harding, 9 C. B. 661; Bank of Australasia *v.* Nias, 16 Q. B. 717; Bullock *v.* Caird, 10 Q. B. 278; Bank U. S. *v.* Donelly, 8 Pet. 362; Wilcox *v.* Hunt, 13 Peters, 378; Leach *v.* Greene, 116 Mass. 534; Peck *v.* Hozier, 14 Johns. 346; Stoneman *v.* R. R. 52 N. Y. 429; Sturgess *v.* Vanderbilt, 73 N. Y. 384; Thornton *v.* Ins. Co. 31 Penn. St. 529; Halley *v.* Ball, 66 Ill. 250; Mineral Point R. R. *v.* Barron, 83 Ill. 365; Carson *v.* Hunter, 46 Mo. 467; Laird *v.* Hodges, 26 Ark. 356. See Wheaton, i. p. 118; Story, § 556; Burge, iii. p. 1054; Phillimore, iv. p. 637; Pardessus, v. No. 1496; Bouhier, c. 28, v. 87; Boullenois, i. pp. 528–544; Fœlix, p. 97; ed. Demangeat, i. 149; Savigny, viii. § 381; Mittermaier, Archiv. f. d. Civil Praxis, 13, p. 298; Burgundus, v. 1; Rodenburg, ii. p. 1, c. 5, § 16; J. Voet, in Dig. 5, 1, § 51.

The question in the text is discussed in the Revue de droit int. for 1875, pp. 366 *et seq.*

As to process against foreign corporations, *lex fori* governs. Sturgess *v.* Vanderbilt, 73 N. Y. 384; S. P., R. R. *v.* Harris, 12 Wal. 81. Supra, § 105 *d.*

In a case arising in 1862, in the Supreme Court of Michigan, a suit was brought in that state on a bill drawn in Ohio, and there payable. The bill was part of a usurious contract; but, by the law of Ohio, this does not avoid the contract, but only affects the remedy. It was held by the Supreme Court of Michigan that the Ohio law prevailed as to the cause of action, but that as to the remedy, that of Michigan, the *lex fori* was to obtain. Collins *v.* Burkam, 10 Mich. 283. Supra, §§ 401, 504.



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dons the practice of such imprisonment.[1] As to arrest on final process, the law of the place of execution is to prevail.[2]

Foreign remedies will not be adopted.

§ 749. "The courts of a state," said Judge Bigelow, in a case decided in the Supreme Court of Massachusetts in 1860, "where the laws of a foreign state are sought to be enforced, will use a sound discretion as to the extent and mode of exercising this comity. They will not suffer foreign laws or statutes to work injury or injustice upon their own citizens, nor permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the state that enacted the law, and which tend to operate with hardship on their own citizens and subjects."[3] It is on this principle that it has been held that suits to enforce the statutory liability of stockholders in foreign corporations will not be sustained, if incapable of execution by the process of the court.[4]

Illustrated in suits by assignees, and by survivors.

§ 750. It has already been shown that the question whether the assignee can sue in his own name, when this is a matter of process, is to be determined by the court from which the process emanates.[5] [The same remark may be made as to proceedings under recent statutes entitling the representatives of deceased parties injured by others to redress in other states than that in which the statute exists and the injury occurred.[6]] "If this be a penal statute," said Judge Hoar, in a case of this class, "it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another in a mode which the common law does not recognize, and which is not in conformity with the laws of this commonwealth, there is equally an insuperable objection to pursuing such a remedy in our courts."[7]

### VI. ATTORNEYS AND PROCTORS.

§ 751. Whether the parties can appear in person, or whether

[1] Supra, § 741; Fiore, Op. cit. App. p. 682.

[2] Fiore, Op. cit. § 270.

[3] Ericson *v.* Nesmith, 15 Gray, 221.

[4] Ibid.; Halsey *v.* McLean, 12 Allen, 438; Toomer *v.* Dickerson, 37 Ga. 428. But see supra, §§ 105 *et seq.*

[5] Supra, § 735.

[6] See this subject discussed supra, § 479.

[7] Richardson *v.* R. R. 98 Mass. 85.



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they must be represented by attorneys or proctors, and if so, under what limitations, is a question exclusively for the *lex fori*.[1]

*Lex fori* determines relations of.

VII. EVIDENCE.

1. *General Rules.*

§ 752. There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case. The old jurists used to draw a line between the merits of a case, and the proofs by which it is to be sustained. The first they treated as *ea quae spectunt decisoria causae et litis decisionem;* the second, as *ea quae litis formam concernunt ac ordinationem.* In later times this distinction has been expressed by the terms substantive and adjective; the first describing the essentials of a transaction, the second its transitory and mere local incidents. That there must be some such discrimination is clear enough. On the one side, every case must be governed by the law in which it has its seat. On the other side, the court, in which such case comes to be tried, must direct its own procedure. The question, then, is, under which of these categories is the evidence produced to prove a case to fall.

Difficulty in distinguishing the case itself from the evidence offered to prove it.

§ 753. A prominent solution is given by Rocco,[2] cited by Sir R. Phillimore. By this theory the *lex fori* determines only matters of form. So far as concerns substance, whatever is part of the contract should be put in evidence wherever the contract is the subject of litigation.[3]

Solution that *lex fori* determines only matters of form.

§ 754. A solution more consonant with our particular institutions is founded on the doctrine of the supremacy of state policy heretofore vindicated.[4] As matters of distinctive state policy bearing on this topic we may notice the rules excluding, (1.) irrelevant matter; (2.) hear-

Solution that our distinctive rules of evidence are matters

[1] Brightly's Troubat & Haley's Pr. § 201. See, as to the German practice, Linde, Civil Process, § 41, note 4; Schäffner, p. 202; and, in its present phase, by Dr. John, in Holtzendorff's Enc. Leipzig, 1870, p. 587.

[2] See, also, the discussion of "Processualische Beweis," in Holtzendorff's Ency. Leipzig, 1870, p. 602.

[3] See Phil. iv. 660.

[4] See supra, §§ 8, 101, 113.



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of state policy, to be enforced by *judex fori* in all cases.

say; and (3.) parol evidence to vary writings.[1] In the same way our rules admitting or excluding witnesses on ground of privilege, interest, or immediate connection with the case, are the products of distinctive policy, adopted after long discussion, and a careful weighing of reports of litigation far more copious and accurate than those possessed by continental European states. Whether, for instance, a defendant in a criminal case is to be admitted as a witness on his own behalf is a question as to which no state could permit any but an inflexible arbitrary rule of its own to be imposed. Such admission may be wise, or it may be unwise, but it is a matter each state must determine for itself. The same remark may be applied to the admissibility of a husband for or against his wife, or of a wife for or against her husband; of a priest in respect to facts learned in the confessional; of atheists; of convicts; of professional attendants. Each of these questions is based on distinctive principles of policy and morals, which each state must settle by a general rule applicable to all cases tried in its courts, no matter by what law the merits of such cases are determinable.[2]

### 2. *Documents.*

Proof of documents is for *lex fori*.

§ 755. It has been already stated,[3] that the law of the place where an act is solemnized determines, with certain well-defined exceptions, the mode of solemnization. Whether, however, the law of the place of solemnization has been complied with, and whether the case is one to be governed by that law, is for the *lex fori* to decide.[4]

Seal of foreign sovereign self-proving.

§ 756. In the United States it has been held that the public seal of a state proves itself in the courts of such state and in the courts of the United States. The same rule has been extended, and with reason, to the seals of such

[1] Infra, § 767.

[2] British Lin. Co. *v.* Drummond, 10 B. & C. 903; Clark *v.* Mullick, 3 Moo. P. C. 299; Trimby *v.* Vignier, 1 Bing. N. C. 151; Bain *v.* R. R. 3 H. of L. Cas. 19; Yates *v.* Thomson, 3 Cl. & F. 577; Brown *v.* Thornton, 6 Ad. & E. 185; Don *v.* Lippmann, 5 C. & F. 1; and cases cited in Whart. on Ev. §§ 391 *et seq.*

[3] Supra, § 676.

[4] Infra, § 764; Whart. on Ev. §§ 615 *et seq.*; P. Voet, x. § 8; Bouhier, ch. xxi. No. 205, 206; Hertius, iv. 67; Mittermaier, Im. Archiv. f. d. Civil Praxis, 13, p. 300; Walter, D. Privatr. § 44; Bar, § 123; Story, §§ 352, 565.



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subordinate executive officers as are entitled to use seals.[1] The seal of a foreign sovereign has also been held to be self-proving, so far as to constitute a *primâ facie* case.[2]

Exclusionary effect of stamps only local.

§ 757. It has been already stated that where the law of a state in which a note is made declares that it shall be void if without a stamp, it is void everywhere. Where, however, the law is simply fiscal, and declares merely that such note shall not be used in evidence, an action can be maintained on it in another state.[3]

Such defects do not invalidate papers executed extra territorially.

§ 758. So far as concerns the laws requiring stamps for *receipts*, in cases where the *lex fori* prescribes that no payment can be proved except by such stamped receipt, it would be most unjust to apply such law to debts paid abroad, without a stamped receipt having been taken. The *lex fori* could, therefore, in such case, not be applied. On the other hand, the *lex loci contractus* would be equally onerous, should it be held to cover all debts contracted in a country where such a stamp act obtains, so that such debts cannot be validly discharged, even in foreign lands, without such stamp. So far as concerns payment, *locus regit actum* seems the safest rule.[4]

Parish records admissible by Roman and canon law.

§ 759. Parish records, in states subject to the Roman law, with the exception of France, are regarded as primary evidence of births, marriages, and deaths. Ecclesiastics, it is argued, are specially charged with the duty of keeping such records, and may be expected to keep them conscientiously. From a period as remote as the third century, baptismal registries have been kept by the parish clergy, and have been regarded as *primâ facie* proof of the facts which they certify; and this practice now obtains in most European states, Protestant as well as Roman Catholic.[5]

[1] People *v.* John, 22 Mich. 461.

[2] U. S. *v.* Wiggin, 14 Pet. 334; U. S. *v.* Rodman, 15 Pet. 130; Watson *v.* Walker, 23 N. H. 471; Spaulding *v.* Vincent, 24 Vt. 501; Griswold *v.* Pitcairn, 2 Conn. 85; Stanglein *v.* State, 17 Oh. St. 453; Steward *v.* Swanzy, 23 Miss. 502. See other cases supra, § 701.

[3] Supra, §§ 685 *et seq.*; Jour. du droit int. privé, 1878, p. 510.

[4] See supra, § 685. The French Code, in such cases, permits a personal examination of the parties, to supply the defect arising from want of formality in the instrument. Code Civil, arts. 1341, 1348, 1358.

[5] Whart. on Ev. § 649.



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*Parochial registries of death* have become in like manner authoritative.

*Parochial registries of marriages* are of later origin, as marriages without ecclesiastical interposition frequently took place prior to the Reformation and the Council of Trent; and even when the benediction of a priest was given, this, according to the better opinion, did not go to the essence of the institution. The Council of Trent, however, established an important limitation. By that council it was ordained,[1] "habeat parochus librum, in quo conjugum et testium nomina diemque et locum contracti matrimonii describat, quem diligenter apud se custodiat." By subsequent particular councils further details have been exacted, it being required that the priest should register the names of the parents of the persons married; the conditions of the latter as to prior marriages; the time of publishing the banns, when such are imposed by law; and the nature of any dispensations which may have been issued to facilitate the marriage. By several Protestant communions similar duties have been imposed.[2] In this country we have, in most states, distinctive legislation providing for such registry.[3]

Such records admissible under our law.

§ 760. Under the English common law, as adopted in most of the United States, an official registry is admissible, when kept in conformity with law, and, when duly authenticated, to prove such facts as the law requires to be registered. It follows that a baptismal, marriage, or burial registry kept in accordance with statute, and duly authenticated, is admissible to prove the facts which are within the statutory authority.[4] Even though there be no enabling statute,

[1] Concil. Trident. sess. 24, cap. 1, de reformat.

[2] See Boehmer, Jus paroch. sect. 4, cap. iii. § 8.

[3] See Whart. on Ev. § 658; comp. Weiske, Rechtslex. *in loco*.

[4] Gilb. Ev. (3d ed.) 77; Wihen *v.* Law, 3 Stark. R. 63; May *v.* May, 2 Stra. 1073; Draycott *v.* Talbot, 3 Bro. P. C. 564; Doe *v.* Barnes, 1 M. & Rob. 389. See State *v.* Wallace, 9 N. H. 515; State *v.* Horn, 43 Vt. 20; Jackson *v.* People, 2 Scam. 232; Glenn *v.* Glenn, 47 Ala. 204.

"Parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses." Per Lord Mansfield, C. J., Boit *v.* Barlow, Doug. 172. They are, therefore, provable under 14 & 15 Vict. c. 19. Re Hall's Estate, 7 Hare, App. xvi.

A *burial* entry is evidence to prove *death*. Lewis *v.* Marshall, 5 Peters, 470.



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there is much strength in the position that as the canon law, so far as concerns the law of marriage, is part of our common law,[1] and as parish records are public records by the canon law, they are to be regarded by us as public records, and hence admissible in evidence by our own common law.[2] This position, however, may be open to doubt, and is in conflict with English rulings excluding registries by dissenting religious bodies, unless supported by proof *aliunde* as to their accuracy.[3] It is more prudent, therefore, in order to authenticate the facts stated in such records, to call the person by whom they were made, if living, to testify to their accuracy, or if he be dead, to prove that the entries were made by him in discharge of his duties. But a copy of a foreign registry will be admitted wherever such registry is kept in accordance with the local law, and its genuineness, and the signature of the registrar, and his authority by the local law, are duly proved.[4] Unless these conditions are complied with, the registry, when not distinctively public, is inadmissible.[5]

Copies of foreign records provable by seal or by parol.

§ 761. In England, by statute, foreign judicial records may be proved by examined copies, sealed with the seal of the proper court, or, if there be no seal, signed and certified to by the judge, who must also certify to the fact of there being no seal.[6] In this country we have several local statutes to the same effect. At common law, it has been held sufficient if an exemplification of a foreign record is certified to by the clerk and the presiding judge, with a certifi-

[1] Supra, §§ 169 *et seq.*

[2] Steyner *v.* Droitwich, 1 Salk. 281; S. C., 12 Mod. 86; Holt, 290; Chouteau *v.* Chevalier, 1 Mo. 243; Kingston *v.* Lesley, 10 S. & R. 383; Am. Life & Trust Co. *v.* Rosenagle, 77 Penn. St. 507.

[3] Birt *v.* Barlow, 1 Doug. 191; Taylor, ex parte, 1 Jac. & Walk. 483; S. C., 3 Man. & Ry. 430, n.; Whittuck *v.* Waters, 4 C. & P. 375; D'Aglie *v.* Fryer, 13 L. J. N. S. Ch. 398; Doe *v.* Andrews, 15 Q. B. 759; Athlone's Claim, 8 Cl. & F. 262; Coode *v.* Coode, 1 Curt. Ec. L. 764.

So as to the Fleet records: Reed *v.* Passer, 1 Esp. 213; S. C., Pea. R. 303; Doe *v.* Gutacre, 8 C. & P. 478.

So as to Irish registers: Stockbridge *v.* Quicke, 3 C. & K. 305.

So as to Jewish registries: Davis *v.* Lloyd, 1 C. & K. 275.

[4] Perth Peer. 2 H. of L. Cas. 865, 873, 874, 876, 877; Abbott *v.* Abbott & Godoy, 4 Swab. & Trist. 254; Am. Life & Trust Co. *v.* Rosenagle, 77 Penn. St. 507. In the absence of such proof, a copy of a baptismal register in Guernsey has been rejected in England. Huet *v.* Le Mesurier, 1 Cox Ch. R. 275.

[5] State *v.* Dooris, 40 Conn. 145.

[6] Taylor's Evidence, § 1398.



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cate under the great seal of the state of the official character of the judge.[1] It has also been ruled that sworn copies, proved by the copyist himself, will be received when attested by the seal of the clerk.[2] A certificate from a secretary of foreign affairs has been held sufficient to authenticate the proceedings of a foreign court.[3] But a consular certificate is not sufficient to authenticate the copy of a record of a foreign court of admiralty. In a common law suit, the seal must be proved by a witness to whom it is familiar.[4] It has been held that an exemplification may be admitted on proof by an expert of the genuineness of the seal of the court and of the signature of the judge;[5] and, when the court has no seal, by proof of the handwriting of the clerk, and of the regularity of the exemplification.[6] And it has been held, under statute, that the exemplification of the record of a foreign court, admitted to have common law jurisdiction, may be proved by the signature of the clerk verified by the seal of the court.[7]

Exemplifications of sister states admissible under act of Congress.

§ 762. An exemplification from a registry of another state is not admissible merely by force of the statutes of such other state.[8] It must be authenticated (unless there be local legislation or adjudications prescribing less stringent tests) according to the act of Congress,[9] if the registry was in conformity with the laws of the registering state, which must be duly proved.[10]

[1] Watson *v.* Walker, 23 N. H. 471; Spaulding *v.* Vincent, 24 Vt. 501; Griswold *v.* Pitcairn, 2 Conn. 85; Thompson *v.* Stewart, 3 Conn. 171; Hadfield *v.* Jamieson, 2 Munf. 53; Stewart *v.* Swanzy, 23 Miss. 502.

[2] Pickard *v.* Bailey, 26 N. H. 152; Buttrick *v.* Allen, 8 Mass. 273; Spaulding *v.* Vincent, 24 Vt. 501; Delafield *v.* Hand, 3 Johns. R. 310; Stewart *v.* Swanzy, 23 Miss. 502.

[3] Stanglein *v.* State, 17 Ohio St. 453; U. S. *v.* Wiggins, 14 Pet. 334; U. S. *v.* Rodman, 15 Pet. 130; Stein *v.* Bowman, 13 Pet. 209. But see Church *v.* Hubbart, 2 Cranch, 187. See infra, § 119.

[4] Catlett *v.* Ins. Co. 1 Paine, 594.

[5] Owings *v.* Nicholson, 4 Har. & J. 66.

[6] Packard *v.* Hill, 7 Cow. 434; 2 Wend. 411.

[7] Lazier *v.* Westcott, 26 N. Y. 146; Capling *v.* Herman, 17 Mich. 524; though see Vandervoort *v.* Smith, 2 Caines, 154.

[8] Drummond *v.* Magruder, 9 Cranch, 122; Hylton *v.* Brown, 1 Wash. C. C. 298; Quay *v.* Ins. Co. Anthon, 173; Petermans *v.* Laws, 6 Leigh, 523. See Thompson *v.* Bank, 3 Coldw. 46.

[9] Drummond *v.* Magruder, 9 Cranch, 122; Secrist *v.* Green, 3 Wal. 744; Garrigues *v.* Harris, 17 Penn. St. 344; Pennel *v.* Weyant, 2 Harring. 502; Key *v.* Vaughn, 15 Ala. 497; Watrous *v.* McGrew, 16 Tex. 506. See McCormick *v.* Evans, 33 Ill. 327.

[10] Stevens *v.* Bomar, 9 Humph. 546; Dickson *v.* Grissom, 4 La. An. 538;



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§ 763. Exemplifications of foreign wills, decrees, or grants, or of other instruments that cannot be removed from the original archives, may be proved by the official certificate and seal of the secretary of the sovereign of the country where the archives exist.[1] In Pennsylvania, an exemplification of a will under the seal of the English Prerogative Court has been received.[2] And notarial copies have, in such cases, been admitted.[3]

Copies of foreign documents provable by seal or parol.

§ 764. We have already had occasion frequently to recur to the position that the law of the place of solemnization determines, as to formalities, the mode of solemnization. This rule is applied to records as well as to voluntary and private documents.[4] In accordance with this rule, an English court has determined that an erasure in a foreign affidavit, in the recital of a death, the certificate of which was proved as an exhibit, is immaterial, notwithstanding the notary, before whom the affidavit was sworn, did not affix his initials to the erasure; and, where it was proved that the practice of verifying the mark of a marksman, in an affidavit sworn abroad, did not require, as in this country, the notary to insert in the jurat that the "witness saw the deponent make his mark," it was held that the omission of these words is immaterial.[5]

Records as well as documents governed by rule *locus regit actum*.

§ 765. This rule, however, is to be modified by the incorporation of the qualifications that whenever the *lex situs* prescribes certain forms for the alienation of property, these

Except as to forms prescribed

Dunlop *v.* Dougherty, 20 Ill. 397; Kidd *v.* Manley, 28 Miss. 156.

[1] U. S. *v.* Wiggin, 14 Pet. 334; U. S. *v.* Delespine, 15 Pet. 226; De Sobry *v.* De Laistre, 2 Har. & J. 19.

[2] Weston *v.* Stammers, 1 Dall. 2.

[3] Bowman *v.* Sanborn, 25 N. H. 87.

So far as concerns the admission of copies and other secondary evidence, each country will be governed by its own rules of evidence. Brown *v.* Thornton, 6 Ad. & El. 185. See Don *v.* Lippmann, 5 Cl. & F. 577; Appleton *v.* Braybrook, 6 M. & S. 34; Black *v.* Braybrook, Ibid. 31.

The Supreme Court of New York, in 1870, held that, under the New York statute, an exemplified or authenticated copy of a will can only be proof when the original will is in the possession of a foreign "court or tribunal." A notary public was ruled, *primâ facie*, not to be such a tribunal; and it was necessary, the court said, in order to show him to be such by the foreign law, to prove such foreign law as a fact. Diez, in re, 56 Barbour (N. Y.), 591.

[4] Phil. iv. 659. See Fœlix, § 226.

[5] Savage *v.* Hutchinson, L. R. 3 Eq. (1853) 368.



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by *lex situs*, and as to wills.

forms must be complied with, whether such forms relate to real[1] or personal[2] estate; and that of the solemnization of wills the law of the last domicil is the criterion, so far as concerns personalty, except in those states where the law of the domicil at the time of solemnization is admitted as an alternative.[3] But where there is a positive rule of the *lex fori* prescribing that proof of a particular fact must be made in a particular way, this rule must be followed.

Merchants' book accounts tested by *lex fori*.

§ 766. The subject of book accounts has been already glanced at;[4] and it has been seen that the high authority of Savigny goes to sustain the position that the effect of such accounts is to be judged by the law of the place where they are kept, as being inseparably connected with the juridical act itself.[5] Sir R. Phillimore adopts Savigny's views on this point without dissent or qualification.[6] Mr. Westlake (1880)[7] argues that if such evidence is excluded by the *lex fori* on the ground of policy (*i. e.* that the admission would be conducive to perjury), this exclusion is to be maintained, although by the *lex loci contractus* the evidence would be received. And this conclusion is consistent with the views elsewhere expressed.[8] The rules excluding self-serving declarations and book entries are part of our distinctive policy; and it would be productive of great confusion, as well as repugnant to a logical system of evidence, to permit them to be broken down in favor of foreign merchants. On the other hand, we must remember that in many of our states, shop books, when verified by the accountant's oath, are admissible by the *lex fori*, and in such states the fact that the entries were made abroad gives no ground for this exclusion.[9]

Tests of relevancy and hearsay for *lex fori*.

§ 767. In view of the difference between the methods of judicial investigation prevailing on the continent of Europe and those prevailing in England and the United States, we must hold that our distinctive rules excluding irrelevant matter and hearsay are to be applied to all cases

[1] Supra, §§ 275 *et seq.*
[2] Supra, §§ 297, 334 *et seq.*
[3] Supra, §§ 585 *et seq.*
[4] Supra, § 583.
[5] VIII. § 381.
[6] IV. 662.
[7] § 198.
[8] Supra, § 754; infra, § 767.
[9] Whart. on Ev. § 678.



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coming before our courts, no matter to what law the substantive merits of such cases are subject. The rules, in the long run, work evenly. They are certainly essential to the preservation of our system of trial by jury. In other countries, where evidence is received tentatively, and where trials, even when begun, are adjourned from day to day, so as to give parties constantly renewing opportunities for the collection of proof, such rules can be dispensed with. They cannot be dispensed with by our courts without abandoning our distinctive jurisprudence, and they must therefore be applied to all cases, no matter to what law the merits of the case may be subject.[1]

So as to parol variation of documents.

§ 768. In France, by the *lex fori*, it is inadmissible to impeach a written instrument by parol; and it is urged by Fœlix that no foreign country, whatever may be its own rule of evidence in this respect, should receive such evidence to affect writings executed in France.[2] Fœlix cites Judge Story as holding the same view; but this cannot be gathered from what the last named eminent jurist has written on this topic. On the contrary, we find in Judge Story's work, cited without dissent, Lord Brougham's statement, already quoted, that "whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, and where the remedy is sought to be enforced, and where the court sits to enforce it."[3] The same passage is quoted as authoritative on this point by Sir R. Phillimore.[4] And this, for the reasons just given, is the law. At the same time latent ambiguities may be explained by proof of foreign facts,[5] and of foreign law.[6]

### 3. *Witnesses.*

Admissibility of witnesses for *lex fori*.

§ 769. The admissibility of witnesses is a question exclusively for the *lex fori*.[7] Whether a foreign conviction of infamy should operate to exclude is discussed in another volume,[8] but whatever may be the differences among

[1] Supra, § 754; Downer v. Chesebrough, 36 Conn. 39.

[2] Fœlix, § 227. See Brocher, Droit int. privé, p. 283.

[3] § 635 *e*.

[4] IV. p. 667.

[5] Supra, § 433.

[6] Supra, § 434.

[7] Supra, § 754.

[8] Whart. Crim. Ev. §§ 363, 489.



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our courts on this interesting topic, they agree in holding that the question is one which the *judex fori* must decide. In harmony with this view, a witness will not be excused from testifying because his answer would expose him to a criminal prosecution in a foreign land.[1]

The French practice differs from that which is just stated. Fœlix,[2] Demangeat,[3] and Pardessus,[4] hold the *lex loci actus* to be here of universal application. And to this view the Louisiana Supreme Court seems to incline.[5]

But not number necessary to solemnization of document.

§ 770. From this rule, however, is excepted cases where the *lex situs* requires, for the solemnization of a document, a specific number of witnesses.[6]

### 4. *Proof of Foreign Law.*

Courts take judicial notice of law merchant and maritime, and of elementary Roman and canon law.

§ 771. Judicial notice, in England and the United States, will be taken of the law merchant, as part of the common law of the land.[7] "Those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as part of it" (the law merchant), "upon a principle of convenience, and for the benefit of trade and commerce; and when so adopted it is unnecessary to plead and prove them. They are binding on all without proof. Accordingly we find that usages affecting bills of exchange and bills of lading are taken notice of judicially."[8] It is accordingly held that judicial notice will be taken of the general lien of bankers.[9] Judicial notice, also, will

[1] King of Sicily *v.* Wilcox, 1 Sim. N. S. 329.

[2] L. No. 235.

[3] Ibid. note *a*.

[4] No. 1490.

[5] Clark *v.* Cochran, 3 Martin, 353.

[6] Supra, § 765.

[7] Wharton on Agen. § 678; Edie *v.* East Ind. Co. 2 Burr. 1226; Young *v.* Cole, 3 Bing. N. C. 724; Sutton *v.* Tatham, 10 Ad. & El. 27; Bayliffe *v.* Butterworth, 1 Ex. 445; Bank of Met. *v.* Bank, 1 Howard, 234; Schuchardt *v.* Allen, 1 Wal. U. S. 359; Jones *v.* Fales, 4 Mass. 245; Jewell *v.* Center, 25 Ala. 498; Bradford *v.* Cooper, 1 La. An. 325; Goldsmith *v.* Sawyer, 46 Cal. 209.

[8] Denman, C. J., Barnett *v.* Brandao, 6 M. & G. 630.

[9] Ibid.; aff. on this point in House of Lords, Brandao *v.* Barnett, 12 Cl. & F. 787. See, as to noticing custom of conveyances, Rowe *v.* Grenfel, Ry. & Moo. 398; 3 Sugd. V. & P. 28.



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be taken of the rules of maritime law, so far as recognized by maritime nations,[1] and of the ecclesiastical law of Christendom, for the purpose of determining how far it makes part of the common law.[2] And the practice is for judges, when the elements of the Roman law are appealed to, to consult standard works on the topic, and not to require proof to be given by experts.[3]

Otherwise foreign law must be proved.

§ 772. Where the law of a foreign state is set up as bearing on a litigated issue, such law must be substantively proved.[4] If the law as proved be contrary to the principles of natural justice, or if its recognition would militate against the policy of the state of which he is an officer, the judge may refuse to accept it as interpretative of a transaction on which he has to act. But whatever it may be, it must be proved to him, as would be any other fact in issue, to be the law of the foreign state from which it proceeds. And when proved, it must be accepted as would be any other fact duly put in evidence. Thus, when an action is brought on a contract on its face valid, and the defence claims that the contract is avoided by a foreign statute to which it is distinctively subject, the *judex fori* will require such statute to be proved.[5] But in respect to those matters in which the states, under the federal Constitution, are not foreign to each other (*e. g.* under the provision as to the reciprocal credit to be given to judgments), the courts of one state will take notice of another's statutes.[6] And it has been recently said that a federal court will permit the law of England to be proved by volumes of statutes and reports and the works of text writers.[7]

[1] Chandler *v.* Grieves, 2 H. Bl. 606, n. See Whart. on Ev. §§ 285, 331.

[2] Supra, § 171. Sims *v.* Marryatt, 17 Q. B. 292.

It was held by the German Reichsoberhandelsgericht (the German Supreme Court of Commercial Appeal), in 1871, that the court will not take notice of foreign law, but that such law must be proved. Revue de droit int. 1874, p. 231. But this is not necessary in cases where (as with commercial law) the foreign law is known to the court as part of the law by which its conduct is governed. Ibid.

[3] Whart. on Ev. § 313.

An exposition of the German fluctuations of opinion as to the proof of foreign laws will be found in Laurent's Droit civil int. ii. p. 475. The French practice is stated in the same volume, p. 483.

[4] See cases given in Whart. on Ev. § 300.

[5] Ibid.

[6] Paine *v.* Ins. Co. 11 R. I. 411; State *v.* Hinchman, 27 Penn. St. 479 See Carpenter *v.* Dexter, 8 Wal. 513; Whart. on Ev. §§ 96, 288.

[7] The Pawashick, 2 Low. 142.



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§ 773. As to the position that foreign laws are to be proved as facts *to the jury*, there is some difference of opinion. Judge Story declares that the issue is for the court.[1] The same view is maintained by the Supreme Court of New Hampshire.[2] On the other hand, the rule that the *fact* of a foreign law must be proved to the jury like any other fact, while questions of competency and of construction are for the court, is that which now generally obtains.[3]

Question one of fact for jury.

§ 774. The only way of proving a distinctive foreign law in the concrete is by a witness who is an expert (*peritus virtute officii*) in such law.[4] It may be objected to this usage that experts of this character, selected by the parties, are often so selected either from their prejudices or their pliability, and that the result sometimes is that as many experts will be found to testify on one side of a case, and with as equal positiveness, as are found to testify on the other side.[5] At the same time, it cannot be concealed that there are great objections to the adoption of printed statutes or decisions of foreign states as final. A new statute may have been enacted since that produced; the decision of last year may have been overruled yesterday. Even text books are modified edition after edition, and that which the edition of this year may assert, the edition of next year may deny.[6] Aside from this objection, such books are but secondary evidence of the facts they commu-

Experts admissible to prove foreign law.

[1] Confl. of Laws, § 638; De Sobry *v.* DeLaistre, 2 Har. & Johns. 219, and Trasher *v.* Everhardt, 3 Gill & Johns. 234, which are cited as authorities, do not sustain, in whole, the position of the text.

[2] Hall *v.* Costello, 48 N. H. 179. See, also, Monroe *v.* Douglass, 5 N. Y. (1 Selden) 444.

[3] Kline *v.* Baker, 99 Mass. 254; Dyer *v.* Smith, 12 Conn. 384; Diez, in re, 56 Barb. 591; Leavenworth *v.* Brockway, 2 Hill N. Y. 201; Ingraham *v.* Hart, 11 Ohio, 255. That *construction* is for court, see Ely *v.* James, 123 Mass. 26.

[4] See for cases Whart. on Ev. § 305.

[5] Hyde *v.* Hyde, L. R. 1 P. & M. 133, gives an illustration of erroneous expert testimony of this class. And see supra, § 221, where a parallel illustration is noticed.

[6] Whart. on Ev. § 665.

An able criticism of the difficulties attending on the practice of proving foreign law, by experts selected by the parties, will be found in Laurent's Droit civil int. ii. 491.

The only remedy, it is argued, is to have the experts in such cases selected by the court.



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nicate. And the same objections apply to annotated volumes of statutes published by private individuals.[1]

Practical knowledge sufficient for this purpose.

§ 775. At one time in England it was held not necessary that an expert should be a practising lawyer; and a London hotel keeper, who had formerly been a stock-broker in Belgium, was admitted to prove the law of Belgium on the subject of presentment of a promissory note, made in that country, payable at a particular place.[2] So a Jewess has been permitted to give parol evidence that her own divorce in a foreign country was in conformity with the laws of her church as sanctioned in that country.[3] In 1875, however, when in the Court of Probate and Divorce the object being to prove the Italian law of succession, an affidavit of a "certified special pleader," who stated that he was "familiar with Italian law," was produced, the court rejected an application for administration with the will annexed based on this affidavit, and held that "the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it in a foreign university."[4] And it was

[1] In Hynes *v.* McDermott, N. Y. Ct. of App. 1880, 22 Alb. L. J. 367, a witness was shown for the first time in court three volumes, purporting to contain the statute law of France. They were issued with notes by a private author, and had no official authentication. The witness testified that he had been a practising lawyer in France from 1837 until 1862, and left that country in 1863; that the volumes (two dated in 1859 and one in 1877) constituted a printed copy of the statutes of France as they existed when he practised there; that they were commonly received in the judicial tribunals of France as evidence of the existing laws thereof; that he had no doubt they were an exact copy of the French statutes, but that he had not looked into the books save at the title-page. It was ruled by the Court of Appeals that this volume was not admissible as proof of French law at the time of the facts under consideration, which took place in 1871.

It was said by Folger, C. J., in giving the opinion of the court, that even under the New York Code it is necessary to prove the statute law of a foreign state. "There must be produced a copy authenticated there, or a sworn copy (Lincoln *v.* Battelle, 6 Wend. 482); and such proof as was produced in our case, according to that decision, would not have been deemed equivalent to a sworn copy. Ibid. 483–4; Chamoine *v.* Fowler, 3 Ibid. 173."

[2] Vander Donck *v.* Thelusson, 8 C. B. 812.

[3] Ganer *v.* Lanesborough, Peake, 18, explained, however, by Lord Lyndhurst in 11 Cl. & Fin. 124, to rule only that a witness familiar with a foreign custom could prove such custom.

[4] Bonelli's case, L. R. 1 P. D. 69;



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afterwards held in the same court that an English barrister, not practising in Canada, but residing in London, and there practising in Canadian appeals before the Privy Council, is not admissible as an expert to testify to the validity, according to Canadian law, of a marriage solemnized in Canada.[1] In the United States, however, a more liberal practice obtains. A layman has been permitted to prove Chinese commercial law;[2] and officiating clergymen the law of marriage under which they officiated.[3] So far as concerns the canon law, this would not be disputed in England, where it has been held that a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in England, is, by virtue of his office, a person so skilled in the Roman Catholic law of marriage as to be an expert capable of proving that law.[4]

The expert may produce standard works in his specialty to sustain his views, and may be cross-examined as to such and other pertinent works.[5]

following Bristow *v.* Sequeville, 5 Ex. 275; 3 Cl. & F. 64. See, also, Dalrymple *v.* Dalrymple, 2 Hagg. Cons. R. 54; Sussex Peerage case, 11 Cl. & F. 85, 114–117; Baron de Bode's case, 8 Q. B. 208, 250–267; Lord Nelson *v.* Lord Bridport, 8 Beav. 527; Perth Peerage case, 2 H. L. Cas. 865, 873; Duchess di Sora *v.* Phillips, 33 L. J. Ch. 129, quoted in The Stearine, &c. Company *v.* Heintzmann, 17 C. B. N. S. 60, overruling R. *v.* Dent, 1 C. & Kir. 97.

[1] Cartwright *v.* Cartwright (1878), P. & D. 26 W. R. 684.

[2] Wilcocks *v.* Phillips, 1 Wal. Jr. 47.

[3] State *v.* Abbey, 29 Vt. 60; Amer. Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507; Bird *v.* Com. 21 Grat. 800.

[4] Sussex Peerage, 11 Cl. & Fin. 84.

[5] Whart. on Ev. § 438; Barrows *v.* Downs, 9 R. I. 447. In the latter case will be found an elaborate exposition of the law by Judge Potter, from which the following passage is extracted:—

"The courts have been for some time relaxing the rigor of the ancient rules in relation to the proof of foreign statutes.

"In Ennis *v.* Smith, 14 Howard, 400, a copy of foreign statutes, received through the agency of the Vattemaire system of exchange, was admitted.

"In Jones *v.* Moffit, 5 Sergeant & Rawle, 523, a copy of Irish statutes, sworn to by a barrister as having been received from the king's printer, was received.

"The United States Supreme Court, in Talbot *v.* Seeman, 1 Cranch, 19, lay down the rule that the laws of a foreign country, designed for the direction of its own affairs, are not to be noticed, unless proved as facts; and in that case they admitted an edict of France, which had been promulgated by the United States government. And in Church *v.* Hubbart, 2 Cranch, 187, they say that the sanction of an oath is required, unless veri-



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§ 776. The construction by the courts of a state of the statutes of a state will be accepted as authoritative by other

fied by some other high authority entitled to equal respect with an oath.

"In that case a Portuguese law and its translation were certified by the United States consul at Lisbon. He did not testify to them on oath. The court say that 'they are not verified by an oath,' and that it was not a consular function to certify to laws; and imply strongly, that if there had been testimony on oath it would have been admitted. 'It is impossible,' says C. J. Marshall, 'to suppose that this copy might not have been authenticated by the oath of the consul, as well as by his certificate.' That this was the ground of that decision is stated in the opinion of the Supreme Court, in Ennis *v.* Smith, 14 Howard, 427, where the court say the copies would have been admitted in that case if sworn to.

"And in Ennis *v.* Smith, 14 Howard, 400, 626, the court hold that foreign written laws may be 'verified by an oath or proved by exemplification, &c. . . . . But such modes of proof as have been mentioned are not to be considered as exclusive of others, especially of codes of law and accepted histories of the laws of a country.' And they say 'that a foreign written law may be received when it is found in a statute book, with proof that the book has been officially promulgated by the government which made the law.' Ibid. 429. In Packard *v.* Hill, 2 Wendell, 411 (S. C., 7 Cow. 434), the court rejected a copy of a statute establishing the court of consulado in Havana, produced by a witness who had purchased it in Havana, and who testified that he had practised in that court, and that the court was governed by this law. A 'book purchased in a book-store, purporting to contain the laws of a state, *unless published by authority*, would not be admitted anywhere,' &c.

"In the case of Chamoine *v.* Fowler, 3 Wendell, 173, the edition of laws rejected did not purport to be an official edition.

"In the case of R. *v.* Dent, 1 Car. & Kir. 97, a witness, not of the legal profession, was admitted to prove the fact as to law. But this decision is decidedly condemned. See The Sussex Peerage, 11 Clark & Finnelly, 124, 134; and see 8 M., G. & S. 824.

"In the case of Lacon *v.* Higgins, A. D. 1822, 3 Starkie, 178, Abbot, C. J. (Lord Tenterden), admitted a copy of the French Code, produced by the French consul, and sworn to by him as the one used and acted on by him, and purporting to be printed at the royal French printing-office, where the laws were printed by authority. The decisions seem to have very much conflicted; sometimes (as generally in New York) the written law being rejected, unless proved by exemplification. And see Richardson *v.* Anderson, in note to 1 Campbell, 64. See, also, the new English statute, 15 & 16 Vic. c. 96, s. 7.

"Chancellor Kent, in Brush *v.* Wilkins, 4 Johns. Ch. Rep. 506, admitted the law of Demerara, as to succession and wills, to be proved by a witness. The report does not indeed say that it was statute law.

"The decisions of a later date, however, have evidently tended to allow the statute laws of a foreign state to be verified, or the effect and construction of such law to be proved, by the oath of a witness."

The Sussex Peerage case, 11 Cl. &



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states.[1] And the reports of adjudged cases in another state are always worthy of consideration in inter-state practice as indicating the law of such state,[2] and may be received on an argument before a court as exhibiting such law.[3] Even the construction given in one state to an agreement of arbitration entered into in such state will be regarded as authoritative in other states.[4]

Judicial constructions extra-territorially respected.

§ 777. The usual mode of authenticating foreign statutes is "by oath, or by an exemplification of a copy under the great seal of a state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate by an officer properly authorized by law to give the copy; which certificate must be duly proved. But such modes of proof as have been mentioned are not to be considered exclusive of others, *especially of codes of laws, and accepted histories of the law of a country.*"[5] It is necessary that only the pertinent parts of a statute containing several topics should be certified.[6] But it is essential that the statute in question should be shown to have been in force at the time of the events it is claimed to govern.[7]

Foreign statutes may be proved by exemplifications.

§ 778. Treaties have been adopted in several instances rendering less onerous the proof of foreign statutes. By a convention between the United States and Italy, in 1868, copies of papers authenticated by official seals are to be received as legal evidence in the courts of both countries.[8] The same provision is made in the treaty of December 5,

By treaty and statute copies admissible.

F. 5, is then cited as sustaining the point of the text; and also De Bode's case, 8 Ad. & E. N. S. 208; Nelson *v.* Bridport, 8 Beav. 527; Robert's Will, 8 Paige, 446; Vander Donck *v.* Thelusson, 8 C. B. 812.

[1] Elmendorff *v.* Taylor, 10 Wheat. 159; Blanchard *v.* Russell, 13 Mass. 1; Botanico Medical Coll. *v.* Atchinson, 41 Miss. 188; Saul *v.* His Creditors, 17 Martin, 587. Supra, § 430.

[2] Kilgore *v.* Buckley, 14 Conn. 362; Lockwood *v.* Crawford, 18 Conn. 361; Donald *v.* Hewitt, 33 Ala. 534; Marguerite *v.* Chouteau, 3 Mo. 375.

[3] Penobscot R. R. *v.* Bartlett, 12 Gray, 244; Cragin *v.* Lamkin, 7 Allen, 395.

[4] Green *v.* R. R. 37 Ga. 456.

[5] Wayne, J., Ennis *v.* Smith, 14 Howard, 400; Story Confl. of Laws, § 641. See De Bode *v.* R. 8 Q. B. 217. The Pawashick, 2 Low. 142.

[6] Grant *v.* Coal Co. 80 Penn. St. 208.

[7] Hynes *v.* McDermott, cited supra, § 775

[8] 15 Stats. at Large, 609.



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1868, between the United States and Belgium,[1] and in other treaties. When there is an authorized interchange of statutes, then the volumes of the statutes received may be proved; or the statutes may be proved by exemplification, or by parol.[2] The federal Supreme Court has accepted as sufficiently proved a copy of the French Civil Code, bearing the imprint of the French royal press, and received in international exchange, with the indorsement, "Les Garde des Sceaux de France à la Cour Supreme des États Unis."[3]

In several of the States of the American Union statutes exist by which the volumes of statutes of a sister state, printed by the authority of the state, are *primâ facie* proof of the authenticity of the statutes,[4] and so of volumes of reports as to the decisions contained therein.[5] And in some jurisdictions such statutes are judicially noticed, from the printed volume, without an enabling statute.[6]

Foreign law presumed the same as our own.

§ 779. When there is no evidence as to the character of a foreign law, the courts will presume it to be the same with the domestic law; in other words, in lack of such evidence, the courts will presume the law governing the case before them to be the same with the *lex fori*.[7] "In the absence of other proof," so was this expressed by Lord Mansfield, "the court will treat the foreign law as being like our law as to liabilities on contracts and interest."[8]

[1] Stats. at Large, 1870, 535.

[2] De Rothschild *v.* U. S. 6 Ct. of Cl. 204; Dauphin *v.* U. S. 6 Ct. of Cl. 221. See Grant *v.* Coal Co. 80 Penn. St. 208.

[3] Ennis *v.* Smith, 14 Howard, 400. See, however, Munroe *v.* Guilleaume, 3 Keyes (N. Y.), 30.

[4] Cragin *v.* Lamkin, 7 Allen, 396; Paine *v.* Ins. Co. 11 R. I. 411; Hunt *v.* Johnson, 44 N. Y. 40; People *v.* Calder, 30 Mich. 87; Paine *v.* Lake Erie, 31 Ind. 283; Bradley *v.* West, 60 Mo. 34.

[5] Cragin *v.* Lamkin, 7 Allen, 395; Ames *v.* McCamber, 124 Mass. 85.

[6] Lord *v.* Staples, 3 Foster N. H. 449; Emery *v.* Berry, 8 Foster N. H. 486; Barkman *v.* Hopkins, 6 English (Ark.), 157.

[7] Wheddon *v.* Seelye, 40 Me. 255; Chase *v.* Alliance Ins. Co. 9 Allen (Mass.), 311; Dubois *v.* Mason, 127 Mass. 37; Huth *v.* Ins. Co. 8 Bosw. (N. Y.) 538; Sherill *v.* Hopkins, 1 Cow. 103; Chapin *v.* Dodson, 78 N. Y. 74; Girard *v.* Philadelphia, 4 Rawle, 333; Smith *v.* Smith, 19 Grat. (Va.) 545; Ellis *v.* Maxson, 19 Mich. 186; Cooper *v.* Reaney, 4 Minn. 528; Rape *v.* Heaton, 19 Wis. 328; Hill *v.* Grigsby, 32 Cal. 55; Allen *v.* Watson, 2 Hill S. C. 201; Walker *v.* Walker, 41 Ala. 353; Cubbedge *v.* Napier, 62 Ala. 618.

[8] Mostyn *v.* Fabrigas, Cowper R.



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§ 780. This presumption, however, cannot be invoked in cases when the provision of the domestic law appealed to as a standard is an exceptional and peculiar variation from the common law.[1] But it has been held to operate in cases where the domestic law is the law adopted originally as part of a general common law; *e. g.* as in the case of the validity of consensual marriages. In such case modifications by particular countries must be proved, or the old law will be presumed to be in force.[2]

But not as to domestic idiosyncrasies.

§ 781. It has also been said that this presumption will not be allowed to operate so as to work a forfeiture, or defeat the intention of the contracting parties.[3]

And not to work forfeiture, or defeat intention.

### 5. *Presumptions.*

§ 782. Presumptions, as is elsewhere shown, are reducible to two classes: (1.) such as are rules of process for the purpose of disposing of the burden of proof; and (2.) such as are inferences from facts to facts.[4] The first, as matters of process, are determined by the *lex fori*. The second, as matters of argument, must be applied by the proper tribunal (court or jury, as the case may be), as the facts developed in the particular case may require. Of the value of such presumptions the *judex fori* must be the arbiter.[5] In the interpretation of contracts, on the other hand, the presumptions, according to Fœlix,[6] and of several German courts,[7] are those of the *lex loci contractus*.[8] And if this be limited to such presumptions as are inferences to be drawn from the local meaning of words, it is in harmony with what has been heretofore stated.[9]

Presumptions determinable by *lex fori*.

174. See, as to torts, Langdon *v.* Young, 33 Vt. 136. Where difference is set up, the party is bound to show that there is such a difference. Smith *v.* Gould, 4 Moore P. C. C. 21; 6 Jur. 543.

[1] Whart. on Ev. § 315; Greenl. on Ev. § 488 *a*.

[2] Hynes *v.* McDermott, cited supra, § 775. In Pierce *v.* R. R. 36 Wis. 283, it was held that it would be presumed that the Illinois exemption laws were the same as those of Wisconsin. See an examination of this ruling in 2 Cent. Law J. 380.

[3] Cutler *v.* Wright, 22 N. Y. 472; Smith *v.* Whitaker, 23 Ill. 367.

[4] Whart. on Ev. § 1234.

[5] See Hoadley *v.* Trans. Co. 115 Mass. 304.

[6] I. No. 237.

[7] Bar, § 123, note 7 *b*.

[8] See, also, Dr. John's interesting remarks on Presumptiones und Beweislast, in Holtzendorff's Enc. Leipzig, 1870, p. 603. Supra, § 431.

[9] Supra, §§ 401, 418.



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## VIII. LIS PENDENS.

§ 783. The plea of *lis pendens* (*exceptio litis pendentis*), as accepted by the modern Roman law, rests, in this relation, on the principle, that a party who has instituted a suit before a foreign tribunal has renounced the right to sue, for the same cause of action, and as against the same defendant, in a home court. To sustain the plea, however, it is necessary, first, that the case should have arisen before the foreign court by a voluntary submission of the parties, either express or implied; and, secondly, that the foreign court should be competent, on the principles of private international law.[1] No doubt the weight attached, in the Roman law, to this plea, arose from the fact of the federative character of the provincial courts under the Justinian Code. But the practice is sufficiently vindicated by the evils that it corrects. Much confusion and injustice would result if a defendant be forced to defend at the same time, in two or more countries, the same suit.

A stay by Roman law.

§ 784. Under our common law the plea of *lis pendens* is not in itself a bar.[2] Thus it has been held that this plea does not prevent a British subject from sustaining in England against another British subject a suit for an assault committed in a foreign land.[3] So, in Kentucky, the Supreme Court ruled, in 1868, that it was no ground to abate a suit, in that state, that there was a pending suit, on the same debt, and between the same parties, in a court of another state.[4] And this is in accordance with the uniform American practice.[5]

With us prior foreign suit no bar.

§ 785. But when a prior suit is still pending on the same cause of action in a foreign court, the plaintiff in the home suit may be put under such terms as may be conducive

Party may be enjoined from pro-

[1] See Bar, § 122; Fœlix, i. Nos. 181, 182.

[2] Whart. on Ev. § 781. Supra, § 646; Ostell *v.* Lepage, 5 De Gex & Sm. 95; Maule *v.* Murray, 7 T. R. 470; The Delta *v.* The Erminia Foscolo, L. R. 1 P. D. 393. Supra, § 657 *a*.

[3] Scott *v.* Seymour, 1 Hurl. & Colt. (Exch.) 219.

[4] Davis *v.* Morton, 4 Bush (Ky.), 442.

[5] White *v.* Whitman, 1 Curtis C. C. 494; Colt *v.* Partridge, 7 Met. 570; Paine *v.* Ins. Co. 11 R. I. 411; Hatch *v.* Spofford, 22 Conn. 485; Browne *v.* Joy, 9 Johns. 221; Walsh *v.* Durkin, 12 Johns. 99; McJilton *v.* Love, 13 Ill. 486; Story, § 610 *a*.



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ceeding in foreign land.

to justice;[1] or may be compelled to elect.[2] And a foreign judgment entered on such *lis pendens* after the inception of the English suit does not, without satisfaction, bar.[3] When the English suit is the first instituted, the plaintiff, before commencing a foreign suit on the same cause of action, should obtain permission to do this from the English court;[4] and a party may be restrained from proceeding in a foreign court in all cases where he would be restrained from proceeding in a second court in England.[5] This will not be done, unless there are greater facilities for reaching a just decision in the country granting the injunction than in the foreign court,[6] though it would seem that even this condition is not always required.[7]

Whether a foreign judgment is a bar has been already discussed.[8]

In proceedings *in rem*, first attachment holds.

§ 786. With regard to proceedings *in rem*, in the United States, it is ruled that where a state court and a federal court both have jurisdiction, the exclusive control attaches to that tribunal which first takes possession of the thing.[9]

Foreign attachment may be pleaded *pro tanto*.

§ 787. The pendency of a foreign attachment or trustee process in a foreign land may be pleaded *pro tanto*, in abatement to a domestic suit, on the same cause of action.[10] It is otherwise, however, when a foreign personal action is pleaded to an action *in rem*.[11]

[1] Ostell *v.* Lepage, *ut supra*. See The Mali Ivo, L. R. 2 A. & E. 356; Wilson *v.* Ferrand, L. R. 13 Eq. 362. Supra, § 612.

[2] Ibid.; The Catterina Chiazzare, L. R. 1 P. D. 368.

[3] The Delta, L. R. 1 P. D. 393.

[4] Wedderburn *v.* Wedderburn, 1 M. & Cr. 596.

[5] Carron *v.* Maclaren, 5 H. L. Cas. 416; Bushby *v.* Munday, 5 Madd. 297. Supra, §§ 560, 612.

[6] Ibid.

[7] Portarlington *v.* Soulby, 3 My. & K. 104.

[8] Supra, §§ 646 *et seq.*

[9] Ship Robert Fulton, 1 Paine C. C. 621. See Taylor *v.* Royal Saxon, 1 Wal. Jr. 311.

[10] Philips *v.* Hunter, 2 H. Bl. 402; McDaniel *v.* Hughes, 3 East, 367; Embree *v.* Hanna, 5 Johns. R. 101; Holmes *v.* Remsen, 4 Johns. Ch. 460; 20 Johns. 229; 2 Pars. Cont. 607; Wheeler *v.* Raymond, 8 Cow. 311. Supra, §§ 664 *et seq.*

[11] Harmer *v.* Bell, 7 Moore P. C. 268. See Certain Logs, &c. *v.* Richardson, 2 Sumner R. 589.



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### IX. SET-OFF AND WANT OF CONSIDERATION.

§ 788. A set-off is a matter pertaining to process, being incorporated with the remedy; and therefore it is admissible in claims between persons belonging to different states or countries, when such is the *lex fori*, though it would not have been admissible by the law of the country in which the debt sued upon had its legal seat.[1]

Set-off governed by *lex fori*.

§ 789. The same principle applies to the mode of attacking consideration. When the *lex fori* allows a plea of want of consideration in a suit on an obligation, which, by the *lex loci contractus*, was sealed, and to which, by such latter law, no such plea could be offered, the *lex fori* is in this, being a matter of process, to control.[2]

So as to assailing consideration.

### X. EXECUTION.

§ 790. The mode of execution, it is hardly necessary to say, is exclusively to be determined by the court of process.[3] The cause of action depends upon the law of the state where it has its seat. When judgment is sought for it in a foreign state, however, then the judgment must be executed according to the law of the latter state.[4]

Execution to be governed by *lex fori*.

§ 791. Whether specific property is to be exempted from exe-

[1] Story Confl. of Laws, §§ 575–581; Gibbs *v.* Howard, 2 N. H. 296; Carver *v.* Adams, 38 Vt. 500; Ruggles *v.* Keeler, 3 Johns. R. 263; Second Nat. Bk. *v.* Hemingway, 31 Oh. St. 168; Bank *v.* Trimble, 6 B. Monroe, 601; Davis *v.* Morton, 5 Bush (Ky.), 161. See Bliss *v.* Houghton, 13 N. H. 126; Harrison *v.* Edwards, 12 Vt. 648; Peck *v.* Hibbard, 26 Vt. 702; Aymer *v.* Sheldon, 12 Wend. 439; Ory *v.* Winter, 16 Mart. 277. Supra, § 542.

[2] Williams *v.* Haynes, 27 Iowa, 251. See Douglass *v.* Oldham, 6 N. H. 150; Andrews *v.* Herriott, 4 Cowen, 508; Warren *v.* Lynch, 5 Johns. 239; U. S. *v.* Donnelly, 8 Pet. 361. Supra, § 747.

[3] Story, §§ 556–559, and cases there cited. See, in addition, Ferguson *v.* Fyffe, 8 Cl. & Fin. 121; Gen. St. Nav. Co. *v.* Guillon, 11 Mees. & W. 877; Erickson *v.* Nesmith, 15 Gray, 221; Halsey *v.* McLean, 12 Allen, 438; Shaffer *v.* Bolander, 4 Greene (Iowa), 201.

[4] Adams *v.* Waitt, 42 Vt. 16. But see Camfranque *v.* Burnell, 1 Wash. C. C. 540, where it was held that the law of a foreign country, protecting a party to a contract from execution, will, in our courts, protect him from arrest on the same contract. Imprisonment for debt is discussed supra, § 748; and see Lawrence Com. sur Wheat. iii. 411. The question of currency of payment has been already considered. Supra, §§ 514–8.



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cution is also a question for the *lex fori*.[1] Whether certain articles of property are exempt for the support of a family depends upon the *lex rei sitae*, supposing the parties claiming relief are resident in the *situs*.[2] This will enable a widow, as a matter of local relief, to obtain, for her support an award of exempted property.[3]

So as to exemption.

[1] Brightly's Prac. §§ 1016 *et seq.*; Bronson *v.* Kinzie, 1 How. 315; Coffin *v.* Coffin, 16 Pick. 323; Woodbridge *v.* Wright, 3 Conn. 523; Odiorne's App. 54 Penn. St. 178; Hettrick *v.* Hettrick, 55 Penn. St. 292; Platt's App. 80 Penn. St. 501; Newell *v.* Hayden, 8 Iowa, 140.

[2] Supra, §§ 43, 189, 571, 576, 598.

Christie's Succ. 20 La. An. 629. See Pierce *v.* R. R. 36 Wis. 283, which can be sustained on the ground that the *situs* of the wages as attached in Illinois was in Wisconsin, and therefore subject to Wisconsin law. See criticism in 2 Cent. L. J. 377.

[3] Supra, § 189.



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# CHAPTER XII.

## BANKRUPTCY.


I. Effect of Bankruptcy in Country of Bankruptcy.

In modern Roman law bankruptcy is a national execution, § 794.
In some states decree works business incapacity, which is not extra-territorial, § 795.
Local assets pass to syndic or assignee, § 796.

II. Reciprocal Relations of Creditors.

All creditors may come in, § 797.
But must give credit for extra-territorial receipts, § 798.

III. Effect on Foreign Assets.

Bankrupt assignments do not operate extra-territorially, § 799.

IV. Collision with Local Liens.

As to local liens *lex rei sitae* prevails, § 800.

V. Question between Local Bankruptcies.

Each separate fund goes to its particular creditors, § 801.

VI. Applicatory Law as to Prior Transactions.

*Lex rei sitae* determines, § 802.

VII. Effect on Subsequent Executions.

Provisions to this effect not extra-territorial, § 803.

VIII. Effect of Bankrupt Discharge.

Bankrupt discharges of debts due abroad not a bar, § 804.

IX. When Foreign Bankrupt may sue.

Dependent on *lex fori*, § 805.

X. Summary as to Conflict.

Conclusion of ubiquity of bankruptcy founded on false assumptions, § 806.
Practical difficulties attending the doctrine of such ubiquity, § 807.


§ 793. We have previously noticed the effect of foreign bankrupt assignments in transferring title,[1] and in discharging obligations.[2] It remains now to give a brief analysis of the practice in bankruptcy, so far as concerns its international relations.

Topic already incidentally discussed.

### I. EFFECT OF BANKRUPTCY IN THE COUNTRY OF SUCH BANKRUPTCY.

§ 794. Bankruptcy (*Concurs process*), according to the practice of those countries whose jurisprudence is based on the Roman law, is a species of national execution against

In modern Roman

[1] Supra, § 390.

[2] Supra, § 531.



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law a national execution.

the estate of an insolvent. In England,[1] in France,[2] and generally on the continent of Europe,[3] bankrupt process can be issued against foreigners, and hence there can be as many bankruptcies as there are countries in which a party does business.[4]

In some states decree works business incapacity and is not extra-territorial.

§ 795. On the continent of Europe, the effect of a bankrupt decree is to deprive the insolvent of the power of continuing to conduct mercantile affairs, though not of general capacity for business. Thus, subsequent to his bankruptcy, he is able to accept or decline testamentary trusts, or carry on any independent business of a fiduciary character which in no way conflicts with the management of his assigned estate. This local incapacity remains until his restoration be decreed by the *Judex domicilii*. As a matter of safety to the business community, foreign bankruptcy decrees, when duly registered, are permitted to have, in some countries, a modified intra-territorial force.[5] But, in accordance with the views heretofore expressed, incapacities of this class do not follow a bankrupt when visiting the United States and here doing business.[6]

Local assets pass to assignee.

§ 796. According to the modern Roman law, all the bankrupt's estate, in the jurisdiction within which the decree is pronounced, goes to the assignee appointed by the court (Curator, Syndic). In the mean time all the bankrupt's creditors are called upon by public notice to present their claims.

### II. RECIPROCAL RELATIONS OF CREDITORS.

All creditors may come in.

§ 797. As, however, the interests of the several creditors are conflicting, each creditor, foreign or domestic, whose interest in the common fund would be diminished by

[1] Supra, § 390.

[2] Goirand's French Code, 1880, p. 438, and cases infra.

[3] Bar, § 128.

[4] We have several French rulings to the effect that alienage, and non-domicil, if there be even a temporary residence, is no bar to bankrupt procedure in France. Jour. du droit int. privé, 1874, p. 32; Ibid. 1878, pp. 375, 434, 606. That a prior bankrupt decree against the same party in another state in which he was domiciled is no bar, see Jour. du droit int. privé, 1877, p. 144; 1878, pp. 271, 606. For other foreign cases, see notes to § 799.

[5] Phil. iv. p. 552.

[6] Supra, § 122.



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the admission of another, is entitled to appear as intervenient in process by other creditors against the assignee. This intervention may lead to a series of independent issues or interpleadings (*Prioritätsstreitigkeiten*) between the several creditors. Yet, generally, in all countries, the degree of proof required to establish a claim against a bankrupt state is determinable by the court of bankruptcy.[1] A debt barred in the state in which it is due is barred in a bankrupt procedure.[2]

§ 798. A creditor who has obtained a dividend in a foreign bankruptcy, or by a foreign attachment subsequent to the domiciliary bankruptcy, can only claim such a dividend at the domiciliary bankruptcy as will establish equality between himself and other creditors appearing before the domiciliary assignee. And this rule applies to foreign creditors as well as to domestic.[3] All securities held by such creditor must be accounted for.[4]

But must give credit for extra-territorial payments.

### III. EFFECT OF BANKRUPTCY ON FOREIGN ASSETS.

§ 799. But notwithstanding the assignment executed under order of a domiciliary bankrupt court, the bankrupt still retains his capacity to dispose of his property in foreign lands; a capacity which remains to him as to such property until divested by the *Judex rei sitae.* This point is abundantly settled by decisions both in Germany and France,[5] as well as in the United States.[6] But the domestic assignee, as the representative of the creditors in general, as well as foreign creditors specially, may apply, according to the practice of the modern Roman law, in foreign countries where the estate has assets, for an attachment (*exequatur*) of such as-

Bankrupt assignment cannot operate extra-territorially.

[1] Melbourn, in re, L. R. 6 Ch. 64.

[2] Kingsley, in re, 1 Low. 216; O'Neale, in re, 6 Bankr. Reg. 425; Doty, in re, 16 Bankr. Reg. 202. See Ray, ex parte, 2 Ben. 53.

[3] Supra, §§ 389, 624 *a;* Wilson, ex parte, L. R. 7 Ch. Ap. 490; Banco de Portugal, ex parte, L. R. 11 Ch. D. 161; S. C., aff. under title of Banco de Portugal *v.* Waddell, L. R. 5 Ch. Ap. 161; Murray, ex parte, 3 Bankr. Reg. 187; Bugbee, in re, 9 Bankr. Reg. 419; Bonnaffe's case, 23 N. Y. 169.

[4] Granger, in re, 8 Bankr. Reg. 30.

[5] Dec. of Sup. Ct. at Lübeck on Jan. 19, 1824; Seuffert, 5, p. 439; Dec. of Sup. Ct. at Cassel of March 1, 1834, and at Berlin on July 16, 1857; Bar, § 128, note 1 *a;* Massé, No. 324; J. Voet, Comment. 20, 4, § 12.

[6] Supra, §§ 390 *et seq.*



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sets.[1] This, unless a particular bankruptcy is opened, and unless the bankrupt's property consists of mere fragments which can be readily collected and without injustice forwarded to the assignee of the domicil, is an application generally granted (subject to any local attachments already laid), as tending to prevent the further dissipation of the estate. Whether or no such foreign assets, or their produce when realized, are to be forwarded to the assignee of the domicil, depends, therefore, upon the question whether the *Judex rei sitae* has instituted a particular bankruptcy (*special concurs*), and whether there are prior local attachments or liens which operated on the property before it was attached locally, under local law, by the domiciliary assignee. Undoubtedly we find in French and Italian elementary works many statements to the effect that a bankrupt decree, good under the bankrupt's personal law, passes instantaneously his property wherever situate. But aside from the fact that these authorities do not agree on the important question whether the personal law in such cases is that of domicil or that of nationality, we discover, on examining the proceedings of French and Italian, as well as of German courts, that in France and Italy, as well as in Germany, no such immediate extra-territorial effect is given to bankrupt procedure in foreign states. Practically, on the continent of Europe, as well as in the United States, a foreign bankrupt assignment is regarded as *ipso jure* ineffective as against attaching creditors, until it is either adopted by domestic process, or the property is realized by the assignee.[2]

[1] Massé, Nos. 62, 72, 314; Demangeat on Fœlix, ii. p. 205.

[2] See cases cited by Bar, § 128, note 6. To the same effect is the argument of McLean, J., in Oakey *v.* Bennett, 11 How. 44.

Cases in which French courts have refused recognition to foreign bankrupt assignments, so far as concerns French assets, will be found in Fiore, Op. cit. § 373, and in the Jour. du droit int. privé, 1874, pp. 137, 242; 1877, p. 42. Without an *exequatur* the foreign assignee cannot proceed in a French court. Ibid. 1878, p. 376. A Frenchman, however, who is a party to a foreign bankrupt assignment, cannot contest the bankrupt assignee's title to the bankrupt's assets in France. Jour. du droit int. privé, 1875, p. 269; Ibid. 1876, p. 181.

In Germany a foreign bankrupt assignment, as such, does not transfer German assets. Suit must be brought by the assignee, to which a local attachment is a defence. And German creditors, when there is no treaty stipulation to the contrary, have the priority. Dabelow, Lehre vom Concurse.



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But where there are no conflicting claims by attaching creditors, the institution of local bankruptcy proceedings, with the assent of the insolvent, gives the assignee at least the position of an agent or attorney in fact, who, after a petition to this effect is granted by the local court, is entitled to expose the goods of the insolvent to judicial sale, and remit the price to the court of the original or domiciliary bankruptcy.

### VI. COLLISION WITH LOCAL LIENS.

§ 800. Local lien creditors, whose liens are prior to the actual arrest under local process, unquestionably have precedence. The question of priority between them and the bankrupt assignee is one of which the *lex rei sitae* is the sole arbiter.[1] Thus, under the United States bankrupt law it has been ruled that in New York, where no lien is obtained against equitable interests by judgment and execution, such interests, whose site is in New York, go to the assignee unburdened by such liens.[2] Such is also the case with funds in Illinois, as to which a landlord claims priority for rent, and which are governed exclusively by the *lex rei sitae*.[3]

As to local liens *lex rei sitae* the arbiter.

After the claims of such lien creditors upon due adjudication, in which the foreign creditors and assignee are entitled to intervene, have been paid, the residue, according to the modern Roman practice, is to be forwarded for distribution to the court of dom-

Jour. du droit int. privé, 1874, pp. 129–133.

It is true that by eminent writers the scheme of a cosmopolitan bankruptcy is zealously urged; but even Fiore, the most strenuous advocate for this system, admits that if a bankrupt possesses goods in a foreign land, and not a distinct commercial establishment, the weight of authority is that his syndics cannot meddle with these goods. To this is cited Pardessus, Droit. com. No. 1488, who gives as a reason that a man may be declared a bankrupt in France, and yet not be a bankrupt in England or Belgium. Merlin argues to the same effect. Droit com. ii. No. 809. The universal validity of bankrupt assignments is advocated with much energy by Prof. Carle, La dottrina giurdica nel diretto privato internazionale, Naples, 1872; and by M. Humblet, of Liege, Belgium, in the Jour. du droit int. privé, 1880, p. 91. But this is in opposition to the rulings of the courts.

[1] Supra, § 313; McMillan *v.* McNeill, 4 Wheat. 209. See Melbourn, in re, L. R. 6 Ch. Ap. 64.

[2] Hinds, ex parte, 3 Bank. Reg. 91.

[3] Joslyn, ex parte, 2 Chicago Leg. News, 137; S. C., 3 Bankr. Reg. 118; Brightly's Fed. Dig. ii. p. 42. See infra, § 806, and authorities cited under §§ 803 *et seq.*



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iciliary bankruptcy.[1] But the creditors appearing at the distribution are to be first satisfied.[2]

### V. QUESTIONS BETWEEN LOCAL BANKRUPTCIES.

Each separate fund goes to its particular local creditors.

§ 801. In the domiciliary bankruptcy,[3] foreign creditors are entitled to come in *pari passu* with domestic; and it has been even ruled in the United States that a claim, valid by the *lex loci contractus*, but void by the law of the debtor's domicil, may be proved in the domiciliary bankruptcy against the estate.[4] It is true, that where several particular or ancillary bankruptcies have been opened in corresponding independent states, each independent court satisfies the creditors of its territory out of the corresponding local assets.[5] But in case of such particular bankruptcies, each creditor, unless cause be shown why his claim should be restrained to a single jurisdiction, has a right, it is argued, to claim a dividend in each procedure, though he must account for this if he claims before one of the other bankruptcies.[6] He is bound, however, to apply primarily at the *forum* to which his claim locally belongs.[7]

### VI. APPLICATORY LAW AS TO BANKRUPT'S PRIOR TRANSACTIONS.

*Lex rei sitae* decides as to bankrupt's prior property.

§ 802. If the bankrupt has made an alleged collusive transfer of assets, the *lex situs* must decide as to the question of the collusiveness of such transfer.[8] Bankruptcy being an execution, the law applied must be that of the place where the execution attaches the goods.[9] And to this effect is a decision of the Supreme Court at Lübeck,[10] as well as repeated rulings in the courts of the United States.[11]

[1] Supra, § 624; Bar, § 128.

That the mode of proof is determined by the *lex fori*, see Melbourn, in re, L. R. 6 Ch. Ap. 64.

[2] See supra, § 624, where this is shown in reference to insolvent administrations.

[3] Supra, § 797.

[4] Murray, ex parte, 3 Bankr. Reg. 187. Supra, § 798.

[5] Supra, § 799. See, as to practice in administrative distribution, supra, §§ 622, 639.

[6] Supra, § 798.

[7] See § 799, and notes.

[8] Allen *v.* Massey, 4 Bankr. R. 248; 7 Ibid. 401; 17 Wal. 351; 2 Abb. C. C. 60; 1 Dill. 40; 2 Chicago Leg. News, 285; S. C., 3 Am. L. T. 188; Edmondson *v.* Hyde, 2 Saw. 205.

[9] Bouhier, ch. 31, No. 15.

[10] Bar, § 128, note 16.

[11] Smith *v.* Union Bank, 5 Peters, 518; Allen *v.* Massey, *ut supra;* Broome, ex parte, 3 Bankr. Reg. 113; Wynne, ex parte, 4 Ibid. 113. Supra, § 800. For the analogous case arising in insolvent assignments, see supra, §§ 347, 364.



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### VII. EFFECT OF BANKRUPTCY ON SUBSEQUENT EXECUTIONS.

§ 803. When by a particular bankrupt law subsequent domestic execution on individual process is prohibited, foreign executions cannot be issued in states where the bankrupt assignment is accepted as valid. When this is not the case, this limitation has no extra-territorial effect.[1]

Provisions to this effect are not extra-territorial.

It has been judicially decided in Berlin that an execution at the domicil is admissible, as to goods at the domicil, though there had been bankrupt proceedings against the insolvent in a foreign state.[2]

### VIII. EFFECT OF FOREIGN BANKRUPT DISCHARGES.

§ 804. It has already been seen that a foreign bankrupt discharge does not relieve the bankrupt from a debt due to a person domiciled in another state. No state has internationally the power thus to confiscate debts whose seat is in the territory of another sovereign; and so has it been frequently decided in the United States.[3] Sometimes, indeed, the cases go beyond this, it being said that a foreign bankrupt discharge does not affect debts contracted in this country. This, however, does not apply to debts casually contracted here, but payable in the state granting the discharge. But when the debts are payable to a creditor in this country, they cannot be affected by any foreign bankrupt discharge.[4]

Bankrupt discharges of debts due abroad not a bar.

[1] Supra, §§ 364, 390 *a*.

[2] Striethorst, xxix. p. 291.

[3] Supra, §§ 531–3.

[4] Supra, § 531, and cases there cited; Banks *v.* Greenleaf, 6 Call, 271; 1 Hughes, 261; McMillan *v.* McNeill, 4 Wheat. 209; Green *v.* Sarmiento, 1 Peters C. C. 72; Leroy *v.* Crowninshield, 2 Mason, 162; Saunders *v.* Williams, 5 N. H. 215; Hilliard on Bankruptcy (1867), pp. 282, 292; Blumenstiel's Bankruptcy (1878), p. 550.

"A discharge as a bankrupt in a foreign country is not deemed here a bar to any action that may be brought. The discharge is considered as local, and although the assignee of an individual declared a bankrupt in a foreign country would be allowed to sue as such assignee, yet our courts would not recognize the discharge as a bar to debts contracted in this country, or due to citizens of this country." Betts, J., Zarega, in re, 1 N. Y. Leg. Ob. 40, note.

In Armani *v.* Castrique, 12 M. & W. 447, Pollock, C. B., said: "A foreign certificate is no answer to a demand in our courts; but an English certificate is surely a discharge as against all the world in the English courts." See Gill *v.* Barron, L. R. 2 P. C. 157; Foote's Priv. Int. Jur, 381.



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### IX. WHEN FOREIGN BANKRUPT MAY SUE.

§ 805. As a general rule, a foreign bankrupt assignee, being, like a foreign administrator, the statutory officer of a foreign state, is not entitled to sue unless under such conditions as the *lex fori* may impose.[1]

Dependent on *lex fori*.

### X. SUMMARY AS TO CONFLICT.

§ 806. The grounds on which earlier jurists claimed that in bankruptcy the bankrupt's entire estate is to be governed by the *lex domicilii* are, first, that bankruptcy is a sort of universal succession; and, secondly, that it involves an equitable distribution of the bankrupt's assets by means of a common tribunal to which all have equal access, and before which all have equal rights. But the assumption that bankruptcy is a universal succession is not true. If it were, the bankrupt's creditors would be jointly liable for his debts. The second position involves a *petitio principii*. The question at issue is, whether the bankrupt's creditors possess a common property in the estate. This is what is disputed. The interest of each creditor may be special, or may be protected by a particular lien, or may be governed by a local law sustained only by the *lex rei sitae*.[2] And so far from bankrupt procedure being based upon domiciliary jurisdiction (or national jurisdiction, as the case may be), the European practice, as we have already seen, is to issue bankrupt process against all persons, foreigners as well as subjects, undomiciled as well as domiciled, as to whose local solvency there may be doubt, and who may have any local assets on which the bankrupt process

Conclusion of ubiquity of bankrupt procedure based on false assumptions.

S. P., Ruiz *v.* Erckerman, 12 Cent. L. J. 60.

[1] Supra, § 735, note; Blane *v.* Drummond, 1 Brock. 63.

In New York, while the bankrupt assignee is postponed to conflicting domestic attachments, there is some conflict of opinion as to whether he can sue in his own name. This is apparently denied in Mosselman *v.* Caen, 34 Barb. 66; and Willis *v.* Waite, 25 N. Y. 577; but affirmed in Hoyt *v.* Thompson, 1 Seld. 320; Hunt *v.* Jackson, 5 Blatch. 349. Judge Story says (§ 420) that in "most of those cases in which assignments under foreign bankrupt laws have been denied to give a title against attaching creditors, it has been distinctly admitted that assignees might maintain suits in our courts under such assignments, for the property of the bankrupt." See supra, §§ 388, 735.

[2] Bar, § 128.



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may seize.[1] It is impossible to assign ubiquity to decrees in cases such as these, when the process issues against a person whose personal *status* the bankruptcy court has no right to determine; and we must consequently hold that even when there has been but one bankruptcy decreed as to a particular person, such bankruptcy is only valid in the domicil (or, according to the Italian view, in the nationality) of the alleged bankrupt. But in cases of widely extended insolvencies, so far from there being only one European bankrupt decree presented to us, we have frequently several. English courts do not hesitate to pile an English decree on top of an Irish decree which was entered only a few days before against the same person.[2] And with insolvent corporations, having branches in several states, bankrupt process becomes a mere scramble for priority. Creditors in each state where the corporation has a branch hurry, as soon as its solvency is suspected, to throw it into bankruptcy; and these creditors are backed up by public officials, who share a large part of the proceeds, and who are therefore far from being unbiased critics of the procedure. Each bankrupt assignee seizes the local effects of the corporation; each refuses to recognize the others; there is no arbiter to determine in what state the corporation had its principal seat, and if there were, no one state would yield to such an arbiter; and from the very fact that we have in many cases no means of determining which of these procedures has precedence, we must hold to the *lex rei sitae*, when the question comes up as to the distribution of assets in the United States, as the only law that can operate. But we are not driven to this conclusion merely because no other arbiter is attainable. In view of the fact that by the universal practice of European states bankruptcy is a mode of local execution, we may assume this to be a doctrine of private international law, and ascribe to such

[1] Supra, § 390.

[2] See supra, §§ 387, 390; Crispin, ex parte, L. R. 8 Ch. 374; the rule of which case was afterwards extended to cases where a foreigner is proceeded against, under the Bankrupt Act, for an act of bankruptcy, by another foreigner, on a debt contracted abroad. "Transient residence" in this case was held enough. Pascal, ex parte, Meyer, in re, L. R. 1 Ch. D. 509. "Domicil" will not be regarded as the test. Ibid. Supra, § 803. Such is the rule in France and Germany. Supra, § 794. See supra, §§ 388, 390, 531.



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procedure no greater extra-territorial force than we would to other foreign execution.

Practical difficulties attending the doctrine of such ubiquity.

§ 807. Undoubtedly there is an apparent simplicity in the idea of a ubiquitous bankruptcy. Feuerbach, whose authority as a jurist is deservedly high,[1] in furtherance of this idea, proposed that the principal bankruptcy should be opened at the place where the largest proportion of assets exists; though this would introduce, as a condition precedent to jurisdiction, a point often exposed to much doubt. Many embarrassments, of course, when an estate is much scattered, must flow from the opening of a series of ancillary particular bankruptcies; and at first sight it would seem far simpler to recognize exclusively that which is established at the debtor's domicil. But there are difficulties on the other side. The *judex domicilii*, on the latter view, at least as to immovables, is compelled to follow the *lex rei sitae*, though with far less adequate opportunities of knowledge and adjudication, as rigorously as would the *judex rei sitae*. The same distinction applies to particular foreign funds burdened with particular foreign equities. If, in cases of liens on personalty, the *lex domicilii* be adopted, then the rights of innocent claimants holding good title under the *lex rei sitae* will be often overridden; or creditors who have a lien by the *lex rei sitae*, on faith of which lien they trusted the bankrupt, will find this lien divested by the *lex domicilii*, — a law foreign both to themselves and to the assets thus torn from them. Very often, if this romantic cosmopolitan efficacy be assigned to bankruptcy, the bankrupt's contracts, entered into by him in a foreign land in reference to property there situate, would be avoided, and payments to him or his agents there made would be nullities. And, even with the best disposition, a bankrupt court must fail to give notice of the bankruptcy to creditors in foreign lands. If a foreigner, for instance, opens a business agency in Germany, and subsequently becomes bankrupt at his domicil, then, if the view of the ubiquity of such bankruptcy be correct, no payments by German debtors to such agency would be a release, even though such payments were innocently made, and there was actually no publication of the bankruptcy in Germany. It is also to be noticed that the opening in each country

[1] Themis, p. 115.



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of its own bankruptcy enables not only the local law to be applied, but evidence to be more readily and effectively collected than it could be if the procedure be in a different country. And, once more, a party doing business in England and in the United States may be a bankrupt in England, but be very far from being a bankrupt in the United States. He may be conducting a large enterprise highly conducive to public prosperity, and on which multitudes may be dependent for support. He may be fully solvent, if let alone. Is he to be dishonored, and his business broken up, by the decree of a foreign court, in a state where he is not domiciled, where his assets are small, where prospective receivers and other officials interested have the temptation of enormous emoluments should they make the procedure cosmopolitan, and where the very fact of the local disproportion of assets to debts is considered an act of bankruptcy? We can only escape dangers such as these by holding that bankrupt decrees have no extra-territorial effect.[1]

[1] This subject is further discussed supra, §§ 390 *et seq.*



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# CHAPTER XIII.

## CRIMINAL JURISDICTION.


I. Subjective Theories.

Jurisdiction assumed by country of arrest of offender, when offence is by a subject, or when necessary for prevention or indemnity, § 810.

Jurisdiction assumed by country of defendant's locality at time of crime, § 811.

II. Objective Theory.

Jurisdiction assumed by country of locality of offence, § 812.

III. Particular Cases.

1. *Offences against Government.*

Such offences abroad cognizable by offended state, § 813.

2. *Offences in Barbarous and Semi-civilized Lands.*

Such jurisdiction assumed, § 814.

3. *Offences at Sea.*

Piracy cognizable in all civilized states, § 815.

Each state has cognizance of offences in its own ships, § 816.

So when ship is in foreign port or river, § 817.

Conflict as to jurisdiction over waters bordering a coast, § 818.

4. *Offences by Aliens.*

Aliens bound to local allegiance, § 819.

Limitation as to offences abroad, § 820.

5. *Offences by Subjects abroad.*

Political offences abroad cognizable at home, § 821.

Conflict as to other offences, § 822.

6. *Offences in two or more Jurisdictions.*

Such offences cognizable in both jurisdictions, § 823.

So as to accessoryship, conspiracy, and treason, § 824.

So as to extra-territorial principles, § 825.

So as to continuing offences, § 826.

IV. Defences.

1. *Foreign Judgments.*

Such judgments a bar, § 827.

But this dependent on jurisdiction, § 828.

Proceedings must have been regular, § 829.

Offences must have been the same, § 830.

2. *Pardon.*

Pardon by proper sovereign a bar, § 831.

3. *Statute of Limitations.*

In what cases a bar, § 832.

V. Penal Judgments.

Have no extra-territorial force, § 833.


### I. SUBJECTIVE THEORIES.

Jurisdiction assumed by country of arrest of offender, when offence is by a subject, or when necessary for

§ 809. 1st. *That the State in which the supposed Perpetrator is arrested has Jurisdiction.* — This view has been maintained by leading French and German authorities, when either of the following qualifications obtains: —

§ 810. (*a.*) *That Jurisdiction belongs to the Country of the Arrest, provided the Defendant owes Allegiance to the Sovereign of such Country, where such Offence is a Crime.* — In other words, the penal amenability of



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a subject residing abroad to his sovereign is placed on the ground of his allegiance. If, when residing abroad, he violates the laws of such sovereign, he is punishable for this when he reaches home.

prevention or indemnity.

It is maintained by high authority [1] that this view is a result of the doctrine that a subject, wherever he wanders, is under the protection of his sovereign. But as is acutely remarked by Hälschner, in his treatise on Prussian Criminal Law, this protection is only conditional, and is provisionally called into being by the failure on the part of the territorial sovereign to rightfully administer justice. Besides, it may be fairly urged that this doctrine of the coextensiveness of penal responsibility with governmental protection proves too much. It would restore the whole system of personal statutes, whose judicial abandonment has been already recorded. And it introduces an unsatisfactory gauge of penal responsibility, making it dependent on the degree of personal protection granted to the accused party by the prosecuting state.

Dismissing, therefore, this reason for the acceptance of allegiance as a test of penal responsibility, it remains to notice that, so far as concerns practical domestic jurisprudence, the theory is inadequate. We punish every day aliens who owe us no allegiance, for crimes committed on our soil. If allegiance be a condition of criminal responsibility, such aliens must have undisturbed license to commit among us any crimes they may choose. Nor will this theory cover the cases to be hereafter mentioned of jurisdiction assumed by England and the United States over crimes against their sovereignty committed by aliens abroad.[2]

(*b.*) *That Penal Jurisdiction belongs to the Country of Arrest provided such Jurisdiction be necessary for the Prevention of Crime.* — That this view cannot be logically maintained is argued at large in another work, whose positions cannot, for want of space, be here recapitulated.[3]

(*c.*) *That Penal Jurisdiction belongs to the Country of Arrest,*

[1] The French Code takes this ground, and so also several German jurists cited by Bar, § 133. See London Law Magazine for 1868, p. 124. The question is discussed by Professor Holland in the last chapter of his Elements of Jurisprudence, and in Revue de droit int. xii. (1880) p. 565.

[2] Infra, § 813.

[3] Whart. Crim. Law, 8th ed. §§ 2 *et seq.*



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*provided such Jurisdiction is necessary to protect or indemnify Parties injured.* — So far as concerns the question of prevention this position is blended with the last. So far as concerns jurisdiction, for the purpose of binding over a dangerous person to keep the peace, it is what has always been exercised by justices of the peace under the English common law. Every justice of the peace is authorized by that law to require such persons, on cause being shown that injury to persons or things is justly to be apprehended from them, to give bail for good behavior, or, in default of such bail, to be committed to prison. The claim, however, put forward in this connection by several codes,[1] goes beyond this. It assumes that criminal jurisdiction is based on the right of a sovereign, in order to protect his subjects from injury, or to indemnify them for injuries sustained, to penally prosecute the offender, whether he be subject or alien, or whether the offence was committed at home or abroad. Aside, however, from the objections noticed under the last head to the assumption of penal jurisdiction over aliens for offences committed abroad against their own sovereigns, there are two special difficulties in the way of the reasoning on which this particular claim is advanced. In the first place, the right of protection, as such, justifies, not punishment of others, but simply defence of the party endangered. Secondly, to urge protection or indemnity as a ground of jurisdiction involves, as Bar[2] acutely observes, a

[1] See Bar, § 134; Witte, die Rechtsverhältnisse der Ausländer in Russland, p. 47.

[2] Page 517.

The French Criminal Code of 1808 (official edition of Ap. 28, 1832), art. 7, while recognizing generally the rule that a crime is cognizable solely in the place of the offender's presence at its commission, excepts the case of "crimes" committed by French citizens abroad, "*crimes commis par les Français à l'etranger.*" It has been held that this exception does not include minor offences; and among these offences, not cognizable in France, the Court of Cassation, in 1855, included adultery. In 1866 a statute was adopted extending the exception to "delicts" (*delits*), provided that such *delits* should be penal in the place of their commission. Hence it is now held that adultery committed abroad by a Frenchman is punishable in France when it is punishable in the place of its commission. The paramour in such guilty act, however, when a foreigner, cannot, under the statute, be punished in France, Jour. du droit int. privé, 1880, p. 96.

As a rule, though Frenchmen can be punished in France for offences committed abroad, a foreigner cannot be punished in France for an offence committed abroad, unless such offence distinctively assails French order and



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*petitio principii.* To assume that a sovereign has jurisdiction because one of his subjects is injured by the defendant is to assume the defendant's guilt, concerning which it is the object of the procedure to inquire. And once more, if the government can only intervene to protect or indemnify subjects, a large class of offences must go unpunished; such as those against foreigners; or those in which joint defendants, as in case of some sexual crimes, are equally guilty of the common wrong.

(*d.*) *That Penal Jurisdiction belongs to the Country of Arrest, as to all Offences committed against the Laws of such Country, with the Limitation, that as to Offences committed in Foreign Civilized Lands, such Country of Arrest has Jurisdiction only of Offences distinctively against its Sovereignty.* — This brings us practically to the *objective* theory, to be presently stated, by which jurisdiction is based, not upon the locality at the time of a crime of a particular party charged, but upon the locality of the crime. Not the person of the supposed offender, but the object of the crime, is the criterion.[1]

sovereignty, *e. g.* conspiracy to overthrow French institutions, forgery of French securities, &c. Jour. du droit int. privé, 1880, p. 96.

[1] At the annual meeting of the Institute for International Law, in 1877, a commission was appointed on the question of criminal jurisdiction, and of this commission, M. Brocher, of Geneva, an eminent judge and jurist, was made chairman. In September, 1878, at the annual meeting of the Institute in Paris, and in September, 1879, at the annual meeting in Brussels, reports were presented by M. Brocher, the first on Criminal Jurisdiction, and the second on Extradition. These reports are printed in Annuaire de l'institut for 1880, pp. 50, 202. The following translation was published by me in 1 Crim. Law Mag. (1880) pp. 691 *et seq.*:—

In the report on Criminal Jurisdiction, the following conclusions were substantially given:

(1.) The general principles of criminal law, and the exigencies of a good administration of repressive justice, unite in establishing, as far as is practicable, the supremacy of territorial jurisdiction.

(2.) This jurisdiction covers all acts which invade rights in the territory of each particular state.

(3.) The criminal jurisdiction of a state is not limited to cases in which the perpetrator was, at the time of the offence, on the soil of such state. It should extend to acts which, transpiring abroad, affect domestic peace and order.

(4.) This extension of territorial jurisdiction is correlative to facts which present themselves in various aspects. Among these may be mentioned: (1.) a shot on one side of a boundary taking effect on the other side; (2.) swindling letters, issued from one country and operating in another; (3.) poisonous food sent into a foreign land addressed to a specific person; (4.) forgery of commercial



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§ 811. 2d. *That the State where the supposed Offender was, at the time of the supposed Offence, has Jurisdiction.* — Such has been the prevalent view in England and in the United States. As has been already shown, this view is inadequate in not covering (1.) offences on the high seas; (2.) offences in barbarous lands; (3.) political

Jurisdiction assumed by country of offender's locality at time of crime.

paper meant to operate extra-territorially; (5.) treason and political offences by subjects abroad, counterfeiting of public money and other securities; (6.) acts committed abroad to elude home law, such as a duel, arranged within the territory, to take effect outside; (7.) accessory help and co-conspiracy in cases in which the principal offender acts intra-territorially; (8.) acts penetrating to the moral core of the state, such as bigamy, incest, or adultery, committed by two subjects abroad; (9.) acts of piracy, and other acts of a similar class committed on the high seas or in barbarous lands, on the ground that each state has territorial rights in such regions.

(5.) Simple residence in a country gives territorial jurisdiction of all things done by such resident in such country; though not of things done by him before his arrival.

(6.) Domicil, as distinguished from residence, does not usually impose subjection by the domiciled person to the state for acts done when he is absent from the state.

(7.) Nationality, in certain states, is a basis of criminal jurisdiction; all persons who are members of a nationality being subject, wherever they may be, to the laws of the nationality to which they belong. Such nationality, however, is not to be considered as a personal law, binding a citizen of a nationality to obey its laws wherever he may be. Its extra-territorial effect should be limited to special cases, as, for instance, those in which the order of a state is assailed by its subjects abroad, and it has no other means of redress.

When the report came up for discussion at Brussels, it was advocated by its author, M. Brocher, who claimed that each state, beside *territorial*, was entitled to exercise a *quasi-territorial* jurisdiction, authorizing it to assume, in all matters relative to its public order and security, jurisdiction over persons in foreign lands; and he cited several examples to show that this jurisdiction could be sustained on neither the territorial nor the personal theories. It is true that in this way an offence might be subjected to two jurisdictions, — that of the country where the crime takes effect, and that of the country where it is concocted, — but for this purpose a hierarchy of jurisdiction should be recognized, to be graduated as follows: where the act is concocted and takes effect exclusively in a particular territory, that territory should have jurisdiction; if in two territories, then the territory of concoction, as well as of execution, should have jurisdiction.

Prof. von Bar replied that the scheme proposed would give each state almost universal jurisdiction, which would endanger the authority of other countries, as well as the security of individuals.

Mr. Westlake took the ground that the claim by a state of a right to punish the subjects of other states for acts committed by them outside of its



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offences by subjects abroad; (4.) perjury before consuls abroad; (5.) forgery of government securities abroad; (6.) offences committed by a party acting abroad through a domestic agent; and (7.) offences committed by a party acting abroad through intra-territorial mechanical agencies, — *e. g.* poisonous food, explosive packages, libellous letters, and fire-arms of long range. It begs the question, also, in an essential particular. It assumes

territory, derogates from the security which a foreigner admitted within such territory ought to enjoy; and that this pretension would give rise to diplomatic collisions. He admitted the right of a state to punish for acts done on its territory, and also for acts done by its citizens abroad. An individual, he argued, is punished for violating the law of the country in which he lives, because he is bound to know this law; he cannot be punished for violating a foreign law, which he is not bound to know.

Prof. Goos, of the University of Copenhagen, also thought that M. Brocher went too far. He was not ready to do more than admit territorial and personal jurisdiction, and he thought it desirable that the subject should be remanded to a future session, where it could receive fuller consideration.

The president, M. Rolin-Jacquemyns, a Belgian jurist and statesman of eminence, and minister of the interior, questioned whether, in addition to territorial and personal jurisdiction, a third scheme, the quasi-territorial, could be recognized.

M. Asser, of Amsterdam, professor of law in that city, and author of several learned papers on international law, argued that a person who, outside of a country, concocts a plan imperilling the safety of such country, is amenable to the courts of such country.

Mr. Westlake and M. Goos refused to admit such an exception.

Prof. von Bar conceded that there would be jurisdiction in the attacked state when the state in which the offender resides will not interfere.

Prof. Neumann, of the University of Vienna, urged that public safety is a sufficient ground for punishment. The Austrian Code went still further, authorizing Austrian courts to punish a foreigner, resident in Austria, for an offence committed by him in a state which refuses to make a demand for his extradition.

The following proposition by Prof. von Bar was adopted by a vote of 19 to 7: —

"Each state has the right to punish for acts committed outside of its territory by foreigners, in violation of its penal laws, when these acts constitute an attack (*atteinte*) on the social existence of the state, compromising its safety, and which are not cognizable by the penal law of the country where they take place."

The president then put the question whether the "quasi-territorial" jurisdiction assumed was to include other acts than those determined by the proposition of Prof. von Bar, — that is to say, whether a state can punish a foreigner who commits abroad offences against its laws other than those designated in that proposition. This was answered in the negative by a vote of 17 to 9.

At the annual meeting of the Institute in Oxford, in September, 1880, the question was left undetermined.



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that the party charged committed the crime under consideration, which is yet to be proved. Instead of innocence being presumed, it begins by presuming guilt.[1]

### II. OBJECTIVE THEORY.

Jurisdiction assumed by country of locality of offence.

§ 812. It has been already argued[2] that only on the objective theory of crime can the practice in the United States, of taking jurisdiction of offences whose object is the state or its essential prerogatives, be sustained. It has also been shown that this theory is consistent with the constitutional limitation, that a criminal prosecution is to be tried in the place where the crime shall have been committed, — the locality of the crime, and not the locality of the offender, being here made the criterion. It becomes incumbent, next, to take up particular cases of contested jurisdiction, considering in what way they can be harmonized with the theories which have been just stated.[3]

[1] See these points expanded, supra, § 18.

[2] Supra, § 18.

[3] The following additional reasons (see supra, § 18) for the above conclusion may be here given: —

(1.) Until consummation, a crime is only punishable as an attempt.

(2.) Of a bad *man*, no constitutional government can ordinarily take penal cognizance; such cognizance is limited to a bad *act*. Reformatory institutions for children can no doubt be instituted without violating the sanctions of free constitutional government; but when children have arrived at maturity, to punish them for being generally bad (unless such badness manifests itself in vagrancy or in common and professional thievery) would violate not only constitutional freedom, but sound governmental policy. See Whart. Crim. Law, 8th ed. §§ 1 *et seq.* No judge can determine, apart from overt acts, whether or no a man is really "bad." There could be no freedom or personal safety if "badness" be the ground of conviction. If all "bad" people are to be prosecuted, there could be no court that would not have to try itself, no sheriff who would not be bound to arrest himelf, no prosecutor who would not be bound to prosecute himself. It is, therefore, only the bad act, as the projection of the bad man, that gives jurisdiction.

(3.) The preponderance of testimony in such cases is that which is to be found about the seat of its commission. An explosive package is sent across the country, and takes effect in the city of San Francisco. How do we know that the package is so constructed as to imply an intention to do great bodily harm? The answer is, by its construction, its address, and the mode of its explosion. It is addressed to a party who in some way has exposed himself to an attack of this kind. It is so constructed that on opening it, however gently, its contents explode. The way in which it explodes shows the dangerous agents that were em-



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The means of obtaining possession of the defendant's person, in cases when he is out of the territory of the prosecuting state at the time of the crime, are the same as when he leaves the state, after the crime is consummated. In barbarous lands he may be arrested wherever found, and either tried on the spot, or brought to the offended country to be tried. In the same category may be placed offences on the high seas. A pirate, for instance, if he cannot safely be brought to shore for trial, may be tried summarily on the quarter-deck. If the offender, on the other hand, was at the time of the offence in a civilized state, and there remains, he may be brought by extradition process to the offended state.[1] Or he may visit the offended state voluntarily.

### III. PARTICULAR CASES.

#### 1. *Offences against Government.*

Such offences abroad cognizable by offended state.

§ 813. As is elsewhere shown in detail, jurisdiction is assumed by the United States government of offences against it by its citizens abroad.[2] By the English law, also, all offences by subjects against the government are cognizable by English courts, no matter where the defendant may have been resident at the time of the offence.[3] By the jurists of continental Europe this view is accepted as authoritative;[4] and the proposition is adopted in the United States.[5] Nor does it exclude the jurisdiction of the offended state that a foreign country, within whose bounds the offence

ployed in its construction. All this testimony must be collected in San Francisco. It is true that, supposing the package to have been forwarded from New York, it will be necessary to obtain evidence from New York as to the way in which the package was forwarded, so that the offender may be tracked. But in San Francisco, in other words, in the place where the guilty purpose is effected, the vast preponderance of relevant testimony is to be found. See 1 Crim. Law Mag. (1880), p. 696. The main arguments, however, for this theory, will be found supra, § 18.

[1] An article on the topic in the text by Bar will be found in the Gerichtsaal, vol. 28. The position in the text is sustained in Lawrence Com. sur Wheat. iv. 365 *et seq*, 564.

[2] Whart. Crim. Law, 8th ed. § 274. Infra, § 823, where limitations are given.

[3] Infra, § 821; Wendell's Blackstone, iv. p. 305; R. *v.* Azzopardi, 1 C. & K. 203; R. *v.* Anderson, 11 Cox, 198; L. R. 1 C. C. 161. See Sir Geo. Cornwall Lewis's work on Foreign Jurisdiction, &c., p. 20.

[4] Bar, p. 530, § 138; Ortolan, No. 880.

[5] Infra, § 821.



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was organized, had concurrent jurisdiction of the offence. It is a fundamental principle of international law that each state is primarily authorized to punish offences against itself. Of course it cannot invade the territory or the ships of another country in order to arrest the offender.[1] But the arrest may certainly be made whenever the offender is found in the territory of the offended sovereign.[2] There is also high authority to maintain that an alien who when abroad plans violations of the laws of a foreign state is amenable to the laws of such state, should he be arrested on its soil after the commission of an overt act. Of course it would be a defence to him that he committed such acts in obedience to his own sovereign, on whom the responsibility then shifts.[3] Such is by statute the law in Prussia.[4] The limitations on this position are hereafter given.[5]

Perjury, also, before consuls abroad, and forgery of consular papers, are offences of which the federal government takes cognizance.[6]

### 2. *Offences in Barbarous and Semi-civilized Lands.*

Such jurisdiction assumed.

§ 814. It is shown elsewhere[7] that offences committed in barbarous and semi-civilized lands against the subjects of a civilized state are regarded as so far justiciable by such state as to authorize it to punish, after due trial, the offenders. Criminal jurisdiction, by statute, is assumed by most civilized states, through their consuls, over their subjects in barbarous and semi-civilized states.[8] The reasoning on which this jurisdiction is claimed has been already stated.[9] If the offender was, at the time of the offence, in a barbarous or semi-barbarous country, then the offended state exercises the jurisdiction in two ways: (1.) Summary process may be employed, as where a cit-

[1] See this discussed in the Koszta case, Woolsey, § 81; supra, §§ 6, 356; and in the Trent case, Lawrence Com. sur Wheat. iv. 356, 363, in which latter page the d'Enghien case is discussed.

[2] For instances in which the government of the United States has assumed jurisdiction of this class, see Whart. Crim. Law, 8th ed. § 274.

[3] See Bar, § 138, p. 535; Foelix, p. 296.

[4] Ibid.

[5] Infra, § 820.

[6] Rev. Stat. U. S. (1878), §§ 4083–4130; Whart. Crim. Law, 8th ed. § 276. Infra, § 820.

[7] Whart. Crim. Law, 8th ed. § 273.

[8] The statutes adopted for this purpose by the United States will be found in Whart. Crim. Law, 8th ed. § 273.

[9] Supra, § 15.



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izen of the United States is murdered on a savage island, and a ship of war is ordered to the spot to punish the offender; (2.) In states semi-barbarous, consular courts are established, as in China and in Egypt, by which such wrongs are redressed.[1]

### 3. *Offences at Sea.*

§ 815. Offences at sea may be classed under three heads: first, those committed on board ships, which are cognizable by the courts of the country of the flag, there being concurrent jurisdiction, on territorial waters, in the sovereign of the territory; secondly, those of the nature of piracy, committed on the high seas, out of the bounds of territorial waters, which are admitted, on all sides, to be covered by the law of nations, and which are cognizable by the proper courts of all civilized states; and thirdly, those commit-

Piracy cognizable by all civilized states.

[1] As maintaining, generally, jurisdiction of this class, see Brocher, in Revue de droit int. 1875, p. 41. That a Mexican raid may be repelled by crossing the boundary line, see supra, § 15; Lawrence Com. sur Wheat. iv. 365. As to jurisdiction by consular courts, see supra, § 15.

The subject of consular jurisdiction is elaborately discussed by Mr. Lawrence in the Revue de droit int. 1878, p. 283, and in the fourth volume of his commentary on Wheaton.

In 1880 a naturalized American citizen named Mirzan was sentenced to death by an American consular court at Egypt. Lawrence Com. sur Wheat. iv. 564. See 22 Alb. L. J. 281, citing a report in the Daily Saratogian of Sept. 27, 1880; London Law Mag. Nov. 1880, 99. In the same year two American citizens named Ross and Dinkelle were convicted by an American consular court in Japan, and sentenced to death. In both cases the parties were reprieved by the President of the United States. See Washington letter in N. Y. World, Aug. 10, 1880. In 23 Alb. L. J. 87, Mirzan's case is discussed at large.

"Where an act," said Judge Vredenburgh (State *v.* Carter, 3 Dutch. 501), in 1859, in the Supreme Court of New Jersey, "*malum in se*, is done in solitudes, upon land where there has not yet been formally extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water." To same effect see Lewis on Foreign Juris. p. 11. In 1878 the British government sustained, after reference to the crown lawyers, the execution, on board the ship Beagle, of a South Sea Islander, convicted of murdering an Englishman on shore. See discussion in 4 Southern Law Rev. 676, and Saturday Review, Aug. 10, 1878. The jurisdiction is doubted in Roscoe's Crim. Ev. pp. 246, 247.



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ted on the territorial waters of a particular state. With regard to the two first classes it is necessary, at present, simply to remark that, if we rest exclusively on the subjective theory, it is difficult to see how our jurisdiction of them can be maintained. As to the first class, indeed, resort might be had to the position that a ship is part of the territory of the state whose flag it bears, and that a person on board a national ship is on part of the territory of the nation. But no such pretext can be set up with regard to piracy. A piratical vessel is certainly not part of our territory, or of the territory of any civilized state. A pirate, on board such a vessel, cannot, for instance, be regarded as on the territory of the United States. Yet no one has ever questioned, even in face of the constitutional provision that an accused party is to be tried in the district or state where the crime was committed, either the constitutionality or the international rightfulness of the numerous statutes by which Congress has given the federal courts jurisdiction over piracies. And the reason is, that when piracy is committed on the high seas, it is a crime against the rights which we, as well as other civilized nations, have on the ocean. A pirate attacks these rights, disturbing, without warrant, the peace of the high seas. It is a species of treason against the sovereignty of every civilized state.[1]

[1] Of crimes not merely on the high seas, but on navigable waters in barbarous countries, the English Court of Admiralty is held to have jurisdiction, and such offences may consequently be piracies. And where, on an indictment for larceny out of an English vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; the judges held that the admiralty had jurisdiction, it being a place where great ships go. R. *v.* Allen, 1 Mood. C. C. 494. As to offences committed on the coasts, the admiralty is ruled to have exclusive jurisdiction of offences committed beyond the low water-mark; and between that and the high water-mark, the admiralty jurisdiction is asserted over all offences done upon the water when the tide is in; it being admitted that courts of common law have jurisdiction over offences committed upon the strand when the tide is out. All the other parts of the high sea are within the jurisdiction of the admiralty. But see infra for statutory modifications of this view.

By the Merchants' Shipping Act, 1854, British jurisdiction is pushed so far as to embrace offences committed by British seamen abroad, in port as well as on ship. Lewis on For. Jur. p. 25. Since this act, it has been held that the English common law courts have jurisdiction of offences committed on British ships in foreign rivers, though the offenders be foreigners. See R. *v.* Anderson, L. R. 1 C. C. R. 161. The same rule has been adopted in Germany and France. Bar, § 138; Ortolan, No. 880.



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§ 816. As has been already incidentally seen, every state is internationally entitled to take cognizance of offences on board its own ships, wherever they may be. This results from the principle, already stated, that a ship is part of the state whose flag she carries.[1]

Each state has cognizance of offences in its own ships.

§ 817. We have just seen that jurisdiction is asserted, by civilized states, over offences committed on board their ships when in foreign ports. The state having territorial jurisdiction over the port has a concurrent jurisdiction; but the prevalent opinion is that unless the peace of the port is disturbed, the territorial government will not take cognizance of an offence committed on board a foreign ship, the parties being exclusively foreigners.[2]

So when ship is in foreign port or river.

In the United States, by statute, the federal courts have jurisdiction not only of all piracies, revolts, homicides, robberies, and malicious injuries to vessels, and of other crimes on the high seas, by all persons without regard to nationality, but of offences committed in American ships in foreign ports; "and the trial of crimes committed on the high seas, *or in any place out of the jurisdiction of any particular state, shall be in* the district where the offender is apprehended, or into which he may be first brought." See Whart. Crim. Law, 8th ed. 270, where the rulings under this statute are given.

[1] Supra, § 356. As English cases to this point may be cited R. *v.* Lesley, Bell C. C. 220; 8 Cox C. C. 269; R. *v.* Bjornsen, 10 Cox C. C. 74; L. & C. 545; R. *v.* Sattler, 7 Cox C. C. 431; D. & B. 525. In the latter case it was expressly declared "that an English ship on the high seas is to be considered part of the territory of England."

[2] In R. *v.* Anderson, L. R. 1 C. C. R. 161, Bovill, C. J. said: "With respect to France, M. Ortolan in his work says, that it is clear that, with regard to merchant vessels of foreign countries, the French nation do not assert their police law against the crews of those vessels, unless the aid of the French authority be invoked by those on board, or unless the offence committed leads to some disturbance in their ports. The law of France is very clear on this point. Amongst the instances mentioned are two cases of American vessels, one being in the port of Antwerp, and the other in the port of Marseilles, where, offences being committed on board, the Americans claimed the exclusive jurisdiction over their vessels; though being in foreign ports, they were vessels belonging to America. As far as America is concerned, she has by statute made regulations for those on board her vessels in foreign ports, and we have adopted the same course in this country. When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; but they must also respect the laws of the nation to which the vessel belongs. When our vessels go into foreign countries we have the right, even if we are not bound, to make such laws as to prevent disturbance in foreign ports, and it is the right of every nation, which sends ships to



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§ 818. The extent and nature of the jurisdiction by a state over the waters bordering its coast have been the subject, since 1876, of an animated controversy. In February, 1876, the German steamer Franconia ran negligently into the English steamer Strathclyde. The place of collision was in the British Channel, near Dover, about two miles from Dover pier, and two miles and a half from Dover beach. Much damage was done to the Strathclyde, and several lives lost. The first proceedings for redress were in the Admiralty Division, in which, on a libel for collision brought by the owners of the Strathclyde, judgment was given against the Franconia. A short time afterwards, Keyn, the captain of the Franconia, was arrested at Dover on the charge of manslaughter. He was found guilty, after a trial in the Central Criminal Court, but Pollock, B., before whom the case was tried, reserved the ques-

Conflict as to jurisdiction over waters bordering a coast.

foreign countries to make such laws and regulations." See supra, § 358.

It has been held in Mexico that there is no jurisdiction in the courts of that state of a homicide committed in a foreign ship when in a Mexican port, the parties being connected with the ship, and the quiet of the port not being disturbed. Jour. du droit int. privé, 1876, p. 413. As sustaining this conclusion see also Fiore and Pradier-Fodéré. Droit int. pub. i. p. 361; Ortolan, i. p. 159. And it has been ruled by the Supreme Court of Chili, that criminal jurisdiction cannot be assumed by that state of an offence committed by foreigners on foreigners on the open sea, between seven and nine miles of the coast. Jour. du droit int. privé, Jan. 1875, p. 36.

Mr. Webster took the view of the text in the discussion in the Creole case. Letter to Lord Ashburton, August 1, 1842. To the same point may be cited Halleck, i. p. 191. That the jurisdiction of the country of the port is thus limited is doubted by Hall (Int. Law, 1880, § 58), though he states that many recent consular conventions give consuls exclusive charge of the purely internal order of the merchant vessels of their nation.

A commission was appointed in England, in 1876, to report what is the *status* of a ship of war in the waters of a friendly power. The commission reported that such ships, by the law of nations, were exempt from local authority, and yet were obliged to respect the local law. See Revue de droit int. 1878, p. 172.

In The Moxham, 33 L. T. N. S. 463; L. R. 1 P. D. 112 (see supra, §§ 290, 478), Sir R. Phillimore adopted the following language of Bovill, C. J., in R. *v.* Anderson, L. R. 1 C. C. 161: —

"There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the law of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and as such he must be taken to have been under the protection of the British law, and also amenable to its provisions."



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tion whether that court had jurisdiction of the offence. At an early period, it must be remembered, jurisdiction over all offences on the high seas was claimed in England. Subsequently, this was limited to the assertion of a jurisdiction over the waters contained within headlands, and over the open sea within a limited distance from shore.[1] After the introduction of fire-arms, gunshot was spoken of as the test. Then cannon shot was introduced; and as a marine league, or three English miles, was regarded as the range of cannon shot, a marine league, or three English miles, was taken by several eminent authorities as the limit. By other authorities, equally eminent, it was held that as the principal object in view is the defence of the peace of the country from attacks of marauders on the waters surrounding it, and as the range of cannon shot now greatly exceeds three miles (nine miles being within such range), the test of cannon shot should be adopted.[2] It was agreed on all sides, that the limits of the English counties extend only to low water-mark; that all within this limit is within the jurisdiction of the common law courts, and that if any court has jurisdiction of crimes committed outside of this limit, it is the admiralty. Since, however, admiralty jurisdiction of crimes on the high seas had been vested by statute in the Central Criminal Court, and as the case in review had been tried before that court, the controversy in the Franconia case was narrowed to the single question whether England, at the time of the collision, had such jurisdiction over the place of collision as would sustain a prosecution for the manslaughter of a British subject, caused by the negligence of a foreigner. On this question a majority of one of the Court of Criminal Appeal held that there was no such jurisdiction, and that the conviction must be set aside. In this conclusion concurred Cockburn, C. J.; Kelly, C. B.; Bramwell, J. A.; Lush, J.; Field, J.; Pollock, B., and Sir R. Phillimore. From it dis-

[1] The U. S. government, in 1793, claimed Delaware Bay as a part of its territory, and on this ground the French government restored the English ship Grange, captured within the capes of that bay. Am. State Papers, i. 73.

[2] Mr. Hall (International Law, 1880, p. 127) takes the ground that "a state has the right to extend its territorial waters from time to time at its will with the increased range of guns." Fiore (i. 373) speaks to the same effect. Bluntschli (§ 303) holds that the belt of three miles is too narrow.



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sented Lord Coleridge, C. J.; Brett, J.; Amphlett, J. A.; Grove, Denman, and Lindley, JJ.[1] The conclusion reached by the majority of the court, however, was far from being satisfactory in England. In 1877 a bill was enacted, asserting territorial jurisdiction over the sea to the extent of one marine league from the coast, and prescribing that admiralty jurisdiction should extend to all offences within this zone, though committed on foreign ships.[2] The bill was advocated in the House of Lords by Lord Cairns (Chancellor), and by Lords Selborne, Hatherley, and Hammond, all of whom treated it as merely reaffirming doctrines of international law already settled in England. The Solicitor General (Gifford) and Sir W. Harcourt took the same position in the House of Commons. On the other hand, Sir Travers Twiss, in the London Law Magazine for February and March, 1877, and Mr. Sheldon Amos, in a memoir before the British Social Science Association, in 1877, deny that the statute is a mere codification of preëxisting law, and argue that in view of the conflicting legislations of the maritime states, especially in respect to crime, it would be productive of great inconvenience and of great injustice if all vessels on the sea, within three miles of a country, should be subject to the criminal laws of that country.[3] And M. Renault, a member of the International Institute, after an exhaustive review of the Franconia case, holds to the

[1] R. *v.* Keyn, 13 Cox C. C. 403; L. R. 2 Ex. D. 63.

[2] 41 & 42 Vict. c. 73. The statute is given at large in 1 Crim. Law Mag. (1880) pp. 704 *et seq.*

Clause 7 gives the following definitions: "The territorial jurisdiction of her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of her Majesty; and for the purpose of any offence declared by this act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast, measured from low water-mark, shall be deemed to be open sea within the territorial waters of her Majesty's dominions.

"'Offence,' as used in this act, means any act, neglect, or default of such description as would, if committed within the body of a county in England, be punishable on indictment, according to the law of England for the time being in force. 'Ship' includes every description of ship, boat, or other floating craft. 'Foreign ship' means any ship which is not a British ship."

[3] Mr. Amos in his edition of Manning's Law of Nations, however, asserts a political supervision over the three-mile zone.



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conclusion that the claim of England to criminal jurisdiction over all offences within the league zone cannot be internationally sustained.[1]

If the reasoning on which the objective theory of jurisdiction rests is sound, we may adopt the following positions on this vexed question :[2] —

[1] Jour. du droit int. privé, 1879, p. 238. He cites, as supporting him, Bluntschli (Le droit int. cod. reg. 322) and Desjardins (Traité du droit commercial maritime, 1st vol. No. 6).

Hauteville, in his work on the Droits devoirs des nations neutres, vol. i. tit. i. ch. 3–31, says:

"La limite de la mer territoriale est réclement, d'apres le droit primitif, *la portée d'un canon placé a terre.* Le droit secondaire a sanctionné cette disposition; la plupart des trailes qui ont parlé de cette portion de la mer ont adopté la même règle — Grotius, Hubner, Bynkershoeck, Vattel, Galiani, Azuni, Klüber, et presque tous les publicistes modernes les plus justement estimés, ont pris la portée du canon comme le senle limite de la mer territorial qui fut rationelle et conforme aux préscriptions du droit primitif. Cette limite naturelle a été reconnue par un grand nombre de peuples, dans les lois et réglements interieurs." To the same effect writes Bluntschli, 1879, in his Völkerrecht, IV., §§ 302, 309. But neither of these authors claims for a state criminal jurisdiction of all offences committed within this distance from its coast.

[2] An article on the Franconia case, by Judge Foster, formerly of the Supreme Court of Massachusetts, and now (1881), a distinguished lawyer in Boston, will be found in the American Law Review for July, 1877.

In Com. *v.* Roxbury, 9 Gray, 512, as cited by Judge Foster in the article just stated, it is said by Shaw, C. J.: "Counties are composed of towns, and for many purposes the body of the county extends not only over the shores of the sea, *but to some distance below the ebb of the tide, for many purposes of civil and criminal proceedings, and for some purposes of jurisdiction.*" But in 1859, on a trial for kidnapping before the Superior Court for Barnstable County, Massachusetts, it was said by Judge Allen (according to the report given by Judge Foster in the article above noticed) : "If the jurisdiction of the state extends to the distance of a marine league from the shore, as I suppose it does, it does not follow, as a matter of course, that the jurisdiction of the county of Barnstable extends to that distance. I do not find any authority to that effect." This was followed by the statute of 1859, c. 289, which provides that "the territorial limits of this commonwealth extend one marine league from the sea-shore at low water-mark. . . . . The boundaries of counties bordering on the sea extend to the line of the state as above defined." That a state has jurisdiction for the purpose of restraining undue fishing within three miles of its line, see Dunham *v.* Lamphere, 3 Gray, 270.

A similar assertion of jurisdiction is made in statutes adopted in several jurisdictions, by which cognizance is given of homicides when the blow is given at sea, or in a foreign state, and the death takes place on the soil of the prosecuting state. Without a



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I. A person who, from a vessel at sea, shoots another on shore, or, by hot shot or other means of devastation, injures property on shore, is indictable in the state in which the injury is inflicted, whether the distance was inside or outside of three miles.[1]

II. In the United States, the federal courts have no criminal jurisdiction, without an enabling statute, of collisions on the open sea. But if the reasoning of the above sections be correct, a state has criminal jurisdiction of injuries to its citizens when at sea, by collision or otherwise, whether within or without the three-mile zone. It is conceded that this is the case if the person injured was at the time on shore. There is no reason why the fact that the person injured was at sea should make any difference, if he were a citizen of the prosecuting state. Nor can we limit this jurisdiction to three miles. The only true basis of limitation is this: If a person negligently or maliciously injures one of our citizens at sea, not on board a foreign ship, the offender is responsible to our authorities, no matter how far from the land such offender may have been. If, however, we have to take the range of cannon as the test, we ought to take nine miles instead of three miles.[2] If, on the other hand, we speak of municipal control, so as to give jurisdiction over all matters, three miles is as unreasonable as ten miles. And if we are to admit that our jurisdiction of injuries committed on our citizens on the high seas is limited to offences within the three-mile zone, we must hold that such offences, when negligent, are as cognizable within our courts as they would be when malicious.

statute no jurisdiction exists, it has been held, in such cases. U. S. *v.* McGill, 4 Dall. 427; S. C., 1 Wash. C. C. 463; U. S. *v.* Armstrong, 2 Curt. C. C. 446. But a statute giving the jurisdiction has been held constitutional in Massachusetts; Com. *v.* Macloon, 101 Mass. 1; and in Michigan, Tyler *v.* People, 8 Mich. 326; nor has there been any question that the federal statute to the same effect is in like manner constitutional.

[1] In R. *v.* Coomes, 1 Leach C. C. 388; 1 East P. C. 367, it was held by all the judges, on an admiralty commission, that when a shot is fired from the shore at a person in a vessel at sea, the assailant is triable at admiralty. From this we would infer the converse to be true, that if a shot is fired at sea which takes effect on shore, the offence is cognizable at common law by the state in which the injury is inflicted. This is admitted by Cockburn, C. J., in Keyn's case. As bearing on this question in its civil relations, see supra, § 472 *a*.

[2] Hall, Int. Law (1880), p. 128. Bluntschli and Fiore, cited supra, speak to the same effect.



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III. A sovereign has criminal jurisdiction over all offences committed on bays or arms of the sea within a line drawn between their headlands;[1] but this jurisdiction will not be exercised as to offences in foreign vessels unless the peace of the country be disturbed.[2]

4. *Offences by Aliens.*

§ 819. It is admitted, as has been seen, on all sides, that where the country of arrest is that of the commission of the crime, the country of arrest has jurisdiction. It has been sometimes questioned, however, whether political offences, committed by an alien in a country where he is temporarily residing, are subject to this rule.

Aliens bound to local allegiance.

The German law is clear to this effect. "Whoever," says Berner, in his authoritative work on the territorial bounds of penal jurisdiction,[3] "enters our territory, juridically binds himself to submit to the laws of this territory. This duty is the more imperative as the laws which exact obedience are the more stringent. It is absurd to suppose that this obedience diminishes or ceases in respect to those laws on which the very existence of the community is staked."

In conformity with this view the codes of Prussia, and of most German states, make alien residents as well as subjects responsible for obedience to the laws, and liable to prosecution for treason. And it is even held in Prussia that a foreigner, who lingers in a country with which the sovereign of his allegiance is at war, may be tried for treason to the country of his residence if he aids in any warlike designs against it.

The English common law is equally decisive on this point. "Local allegiance," says Blackstone, "is such as is due from an alien or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases the instant such stranger transfers himself from the kingdom to another."[4] Indictments for political offences of all grades have been based

[1] Heffter, § 76; Wheat. pt. ii. c. iv. § 7; Bluntschli, § 309; Halleck, i. 140; Direct U. S. Cable Co. *v.* Anglo-Am. Cable Co. (1877), L. R. 2 Ap. Cas. 394; Mowatt *v.* McFee, Sup. Ct. Can. June, 1880. Mr. Hall (p. 128) doubts the right to "gulfs of considerable size and wide entrance."

[2] Supra, § 817.

[3] Berlin, 1853, p. 83; Bar, § 138. To the same effect is Heffter, Strafrecht, § 264.

[4] Stephen's ed. ii. 378.



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on this form of allegiance.[1] In Guinet's case, which was a prosecution in the United States Circuit Court in Philadelphia in 1795, for fitting out in Philadelphia a French armed vessel, to cruise against England, the United States and England being then at peace, the point that the defendant, a Frenchman by birth, had entered into the service of the French republic, was made by the defence, but was treated by the court as without weight, and the defendant was convicted.[2] In the trial of the Fenian conspirators in England and Ireland in 1868, several of the defendants set up alienage, and citizenship in the United States, as a defence, but in vain.[3] Mr. Adams, speaking of this in a letter to Mr. Seward of May 2, 1868,[4] says: "The only question he," one of the defendants, "raises, is that of citizenship; but even that relates rather to the form of trial, as, on the merits, even his being admitted to be an alien would not shield him from the consequence of acts dangerous to the peace of the realm." The same view was taken by Mr. Buchanan, when secretary of state.[5] Such also is the tenor of a speech by Lord Lyndhurst in the House of Lords, in March, 1853.[6]

Limitation as to offences abroad.

§ 820. The question has been already partially discussed,[7] whether a state has jurisdiction over offences committed by aliens abroad against its sovereignty. That such offences, committed abroad by subjects, would be so cognizable, has been already shown. It is also shown that the statutes of the United States, in regard to forgery and perjury before consuls, make no distinction between citizens and aliens.[8] It has been shown, also, that as to offences committed

[1] See 27 Howell's St. Tr. 627; Peltier's case, 28 Ibid. 530.

[2] Wharton's St. Tr. 93; U. S. *v.* Wiltberger, 5 Wheaton, 97; Wh. St. Tr. 185. The Act of July 31, 1861, punishing seditious conspiracy, applies to "persons within any state or territory of the United States," embracing all residents. So, also, as to the neutrality acts. Further authorities will be found in Whart. Crim. Law, 8th ed. § 282.

[3] R. *v.* McCafferty, 10 Cox C. C. 603.

[4] Diplomatic Corr. U. S. 1868, pt. i. p. 192.

[5] See Cockburn on Nationality, London, 1869, p. 82, for other authorities to this effect.

[6] 124 Hansard's Parl. Deb. 1046. See, also, 27 Howell's State Trials, 627; 28 Ibid. 530; Whart. State Trials, 90, 93, for offences of this class.

[7] Supra, § 813.

[8] Supra, § 813; infra, § 821; Whart. Crim. Law, 8th ed. §§ 276, 285.



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at home, the distinction between subject and alien does not exist. It may be further urged that if any overt acts of treason be committed in the United States, all persons aiding and abetting in such treasonable acts may be held penally responsible, even though at the time in a foreign land. This results in part from the axiom, that in treason all concerned are principals; and in part from the doctrine heretofore expressed, that a person who directs an offence to be committed in a foreign country is responsible to the courts of such country, though he was at the time of the offence resident in another country. And, in addition, there is high authority to the effect that all political offences, even by aliens residing at the time abroad, are liable to punishment after arrest in the offended country, should the defendant, by visiting it, accept its jurisdiction.[1] It must be remembered, however, that there is a marked difference, in this connection, between the relation of subjects and that of absent aliens to the offended sovereign. The essence of treason (*Trèson*, *Treubruch*) is betrayal (*trahir*) of allegiance.[2] Allegiance to the sovereign offended is averred in the indictment, and is assumed to be proved on trial. But no such allegiance can be assumed to exist in case of a non-resident alien in political cases. The highest punishment that can be inflicted, on this view, is that which the offended state could inflict on its own subjects engaged in similar adventures against a foreign state. And it should also be kept in mind that it is contrary to all principles of international law to punish a foreigner for acts to which he is compelled by his own sovereign. The quarrel, in such a case, is with the sovereign and not the subject.[3]

### 5. *Offences by Subjects abroad.*

§ 821. Undoubtedly political offences, as has been seen,[4] may be committed against his sovereign by a subject resident abroad. But no punishment should be inflicted

Political offences abroad

[1] The French, Prussian, Austrian, and other continental codes speak permissively to this effect. Bar, § 138, note 20. See, also, Hélie, Traité de l'instruction criminelle, p. 591; though *contra*, Heffter, § 26; Feuerbach, § 31.

[2] See 4 Steph. Com. 185; Bar, § 138.

[3] Bar, § 139; Whart. Crim. Law, 8th ed. § 310.

[4] Supra, § 813. For illustrations in the United States, see Whart. Crim. Law, 8th ed. § 274.



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cognizable at home.

on a subject for acts exacted from him by a foreign prince. A sovereign who permits his subject to visit a foreign land cedes to him the right to obey the laws of such land while there remaining.[1] And again; the right each state claims to compel aliens to obey its laws, it must grant to other states.[2]

Conflict as to other offences.

§ 822. It has been already stated that as to crimes committed by subjects in foreign civilized states, with the single exception in England of homicides, the English and American practice is to take cognizance only of offences directed against the sovereignty of the prosecuting state, — perjury before consuls and forgery of government documents being included in this class.[3] That this view is that which is most consistent with a sound and wise system of international law has been also demonstrated. A wider jurisdiction, however, is assumed both in Germany and France.[4]

### 6. *Offences in two or more Jurisdictions.*

Cognizable in both jurisdictions.

§ 823. It has already been shown that the prevailing opinion in England and the United States is, that a person who when abroad is concerned in directing a crime may be punished for the same if arrested in the place where the crime is committed, though he was at the time both of commission and concoction out of the latter's jurisdiction. It may be added that this view the German and the French law practically accepts.

[1] Bar, § 138; Beseler, Comment. p. 77.

[2] To hold a subject responsible to his own state for political offences committed abroad, it is argued by Prof. Bar, in his review of the first edition of this work, is in nowise inconsistent with the sanction of international law. We do not by this claim the right to seize the delinquent when residing in a foreign state. All that we say is that he owes to his own government duties for a breach of which he may be punished should he place himself again within the power of that government, or should he be arrested by extradition process. No collision can thus arise with the state in which the delinquent resides at the time of the offence.

[3] Supra, § 813; Whart. Crim. Law, 8th ed. § 276.

[4] Supra, §§ 810 *et seq.* See Villefort, Des crimes et des delits commis à l'étrangér, Paris, 1865, p. 26; Bar, § 141; Berner, *ut supra*, p. 126; cf. 6 J. Q. Adams' Memoirs, p. 430.

The German law on this subject is succinctly stated in Holtzendorff, Leipzig, 1870, pp. 582–585. Three jurisdictions are there noticed: (1.) that of the *forum delicti commissi*; (2.) that of the *forum domicilii*; and, (3.) that of the *forum deprehensionis*, which, in Prussia, have concurrent jurisdiction. Supra, § 810.



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In such cases the *forum delicti commissi* and the *forum deprehensionis*, either of which generally gives jurisdiction, coincide; and it would scarcely be argued that the jurisdiction is lost because the defendant was at the time of commission in another land.

So as to conspiracies and treason.

§ 824. According to the English common law, all accessaries in treason and in misdemeanors are principals. In felonies, an accessary before the fact is one who, though absent at the time of the commission of the felony, procures, counsels, commands, or abets another to commit such offence; an accessary after the fact is one who, when knowing the felony to have been committed by others, receives, relieves, comforts, or assists the felon. The old rule was that the accessary is to be tried at the place where his guilty act took place; though now, by statutes in most of the United States, he may be tried in the court having jurisdiction of the principal felon. In conspiracies, by the same law, each conspirator is responsible to the jurisdiction in which any overt act by any of his co-conspirators is done. It is so, also, with treason.[1] And whatever may be the technical rules of the English common law in this respect in particular states, it is clear that where the offence can be divided into successive stages, any participant may be prosecuted for his particular act in the place of such act. This, in reference to homicides, is in several states affirmed by statute.[2] But when one offence is against two sovereigns, the first prosecuting the offence absorbs it.[3]

[1] See, as to points in this section, Whart. Crim. Law, 8th ed. §§ 206 *et seq.*

[2] See specifications in Whart. Crim. Law, 8th ed. §§ 271, 293.

[3] Ibid. § 293.

Bar, in his review of the first edition of this work (p. 46), objects to the position in the text on the ground that to say that an accessary or instigator is liable in the place of the commission of the offence is a *petitio principii*, since it assumes that the inculpatory act was indictable under a specific law, which is the question at issue. I do not see the force of this criticism. The law in a specific state is violated: *e. g.* a person is found dead on the soil of the state of A., close to the boundary separating it from the state of B., and there are numerous indications leading to the conclusion that he was murdered. Who did it? The proof is that he was shot by a person standing at the time in the state of B. I do not think that there is a *petitio principii* in this. We do not introduce proof against the alleged offender until we first prove the commission of the offence.

The Roman common law, as moulded in the present practice of continental



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So as to extra-territorial principals.

§ 825. But what, is the next question, when an offence is begun in one country to take effect in another, is the place of commission? Supposing a libellous or forged writing be mailed in one place to be published in another, or an explosive package be expressed in one place to be opened in another, which is the place of the commission of the offence? Arguing by analogy from the law which makes the place of performance the seat of a contract, we would conclude that the place of consummation is the peculiar seat of the crime. So, in fact, under the English common law, it has frequently been decided, though a concurrent jurisdiction exists in the place of forwarding or mailing. The position that the place of reception has

Europe, treats the confederacy of two or more in a guilty act (*concursus plurium ad idem delictum*) as a substantive crime. From the definition of this crime, however, is excluded (1.) all cases in which there is no guilty purpose, as where a chemist innocently gives poison to a murderer; (2.) all cases in which there is not logical concert (*concursus necessarius*). Of course in this view an absent supposed confederate could not be found guilty, unless he knew of the guilty purpose, and unless he actually was in concert, either by letter or word, with the other parties charged. By the same law, aid rendered to an offender after the completion of the act (*Begünstigung*), whether in sheltering him from pursuit, or receiving the fruits of his offence, is an independent offence, to be tried in the place of its particular commission. Where part, however, of a conspiracy entered into before the commission of the principal act is performed out of the country, then the place of such act has concurrent jurisdiction. Holtzendorff, Leipzig, 1870, p. 523.

Confederates, by the same law, are viewed as of two classes: (1.) the planner (*Intellectueller Urheber, moralischer Urheber*), being he who plots a crime which another is to execute: the penal complicity of the planner, however, not beginning until the performance of a guilty act, for which, with all its consequences, he is responsible; (2.) the actual operator or agent of the crime (*Physischer Urheber, Thäter*), being the one who executes the act in whole or in part. The planner as well as the operator is liable to punishment, if arrested, in the place of the commission of the crime, according to the measure of the guilt of the consummated act. The same rule applies to the accomplice (*Gehülfe*), who aids the perpetrator. But if it should appear that the perpetrator was an ignorant or innocent tool, then the accomplice, though absent, is viewed as the principal guilty party. Holtzendorff, p. 523; Hélie, p. 636, citing Julius Clarus, Sent. v. But where either confederate is guilty of a preliminary offence, in furtherance of the common design, he may be tried either in the place of such preliminary offence, or in that of the consummated crime. Ibid. Whart. Crim. Law, 8th ed. §§ 287, 293. Bar, however (§ 142), seems to think that only the place where the participant (*Theilnehmer*) himself acts is the *locus delicti commissi*.



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jurisdiction is strengthened by the accepted doctrine that an act designed in one state, and consummated in another, exposes the perpetrator to an action for damages only when the act is unlawful in the place of execution. By the English common law, indeed, attempts to commit crimes are cognizable in the place of the attempt, and such, *a fortiori*, is the case with conspiracies, where the conspiracy is the gist of the offence. But there can be no question, also, that the principal who organizes a crime extra-territorially is indictable in the state where the crime takes effect, though he does not set foot on the soil of that state until his subsequent arrest.[1] And the same rule obtains in German and French practice.[2]

[1] Cases can easily be conceived in which a person, whose residence is outside a territory, may make himself, by conspiring extra-territorially to defeat its laws, intra-territorially responsible. If a forger, for instance, should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he would not be liable to arrest on extradition process, and that he could even take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our government into contempt. Supra, § 15.

To reply that in such case the Mexican government can be relied upon to punish is no answer; because, first, in countries of such imperfect civilization penal justice is uncertain; secondly, because Mexico holds that we have jurisdiction, and that therefore she will not exert it; thirdly, because in cases where, in such countries, the local community gains greatly by the fraud, and suffers by it no loss, the chances of conviction and punishment would be slight; and fourthly, because all that the offender would have to do to escape justice in such a case would be to walk over the boundary line into the United States, where on this hypothesis he would go free. In political offences there is this consideration to be added, that it is now an accepted doctrine of international law that no government will punish a refugee for treason against his sovereign; and hence a government, on the hypothesis here disputed, would have no redress for offences directed abroad by refugees against its sovereignty, even though the offenders were its own subjects, and should, after the commission of the offence, return to its soil.

The principle is now generally accepted in the United States, that a non-resident principal is penally liable for criminal acts committed by his agent. Thus, it has been held that the originator of a nuisance in a stream in one country, which affects such stream in another country, is liable to prosecution in the latter country; that the author of a libel uttered

[2] Dr. Geyer, in Holtzendorff's Enc. Leipzig, 1870; P. Voet, xi. c. i. note 8; Ortolan, No. 951; Jul. Clarus, Sent. v. § fin. qu. 32, note 9; Pütter, § 98; Temme Archiv. ii. p. 329; iv. p. 332; Hélie, p. 499; Bar, § 557.



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§ 826. In England, by statute, wherever a felony or misdemeanor is begun in one county and completed in another, the venue may be laid in either county; and offences committed when travelling may be laid in any county through which the passenger, carriage, or vessel passes. Embezzlement or larceny can, therefore, in England be tried in any county into which the spoils of the offence are brought. In the United States similar legislation has been adopted. And although by the English common law, as adopted in the United States, when goods are stolen in one country, and brought by the thief into another country, the latter country has no jurisdiction;

So as to continuing offences.

by him in one country and published by others in another country, from which he is absent at the time, is triable in the latter country; that such is also the case when a man in one country incites an agent in another country to commit perjury; that he who on one side of a boundary shoots a person on the other side is amenable in the country where the blow is received; that he who in one state employs an innocent agent to obtain goods by false pretences in another state is amenable in the latter state; that a thief who sends goods by another person, not an accomplice in the theft, to a foreign state for sale, is indictable in the latter state; that he who sells through agents, guilty or innocent, lottery tickets in another state, is amenable in the state of the sale, though he was absent from such state personally; that he who gives poison in one jurisdiction which operates in another is responsible in the latter jurisdiction; and that so is a person who in one county advises another, by signals, when to commit a highway robbery in another county. In England we have the same principle affirmed by the highest judicial authority. Thus, in a case or obtaining money by false pretences in England, the offender being at the time in Russia, this absence was in itself held to be no ground for acquittal; and Lord Campbell, sustained by Baron Parke, declared "that a person may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts." Baron Parke saying that "a person, though personally abroad, might commit a crime in England, and be afterwards punished here: as, for instance, if he, by a third party, sent poisoned food to one in England, meaning to kill him, he would be guilty of murder, if death ensued, although he could not be amenable to justice till he was personally within the jurisdiction." R. *v.* Garrett, 6 Cox C. C. 260; Dears. 232. "It was a monstrous thing," Sir R. Phillimore is reported as saying at a meeting of the Law Amendment Society, in 1868, "that any technical rule of venue should prevent justice from being done in this country on a criminal for an offence which was perpetrated here but the execution of which was concocted in another country." Hence we may hold that personal presence is not an essential condition of indictability. The authorities for these positions will be found in Whart. Crim. Law, 8th ed. §§ 278–280.



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yet it has been ruled to be within the constitutional province of each state to pass statutes giving the country of arrest, to which the goods are brought, jurisdiction. In most of our states statutes to this effect have been passed.[1]

### IV. DEFENCES.

#### 1. *Foreign Judgments.*

Foreign judgments a bar.

§ 827. When two courts have concurrent criminal jurisdiction, the court that first assumes this jurisdiction over a particular person acquires exclusive control, so that its judgment, if regularly rendered, is a bar to subsequent action of all other tribunals.[2] "*Ne bis in idem*" is the Roman maxim in this relation, having much the same meaning as the English doctrine that no man shall be placed twice in jeopardy for the same offence; and though this maxim is based on the Roman theory of the union of all nations under one imperial head, yet it must be allowed now to prevail in all cases where concurrent courts deal with the same subject matter under the same common law. Difficulties, however, spring up, when the question arises as to the effect of the conviction or acquittal of a defendant in a foreign court, under a distinct jurisprudence.[3]

But this dependent on jurisdiction.

§ 828. Had the foreign court jurisdiction over the offence in question? If it had not, the law undoubtedly is that its action is a nullity.[4] But who is to judge of the question of jurisdiction? Suppose a German court, in exercise of the cosmopolitan surveillance which is established in some parts of Germany, should try an American in Germany for an assault committed on another American in New York. Would the judgment of the German court in this respect be final? Certainly, by the tests of the English common law, it would not. Neither in England nor in the United States could the assumption of German courts to exercise extra-territorial jurisdiction of this kind be tolerated. And yet this is a different question from

[1] Whart. Crim. Law, 8th ed. §§ 928, 930.

[2] Whart. Crim. Pl. & Pr. 8th ed. §§ 441, 442.

When an offence has several territorial aspects, successive governments may prosecute. Ibid.

[3] As to civil procedure, see supra, § 646.

[4] Whart. Cr. Pl. & Pr. 8th ed. § 438, where the authorities are given.



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that which would arise if an American citizen should be *bonâ fide* arrested and punished by a German court, exercising a jurisdiction for which it has at least a respectable show of international authority. Could such an offender be a second time punished for this offence? It would seem not, as a legitimate result of the maxim, *Ne bis in idem*. So far as concerns penal international law, this maxim, as to offences of which the prosecuting state has international jurisdiction, may be viewed as at least establishing the position that if a person is tried by a government to which he is corporeally subject, he cannot, after punishment by that government for a particular offence, be punished for this offence elsewhere. This, indeed, seems to be a necessary corollary of the doctrine accepted even by the English common law, that every person is subject to the penal laws of the state in which he is resident, even though he owes allegiance to another country. But it is necessary, to make such punishment a satisfaction and a bar to a future trial, that it should be complete, and should have been executed to its full extent. Punishment but partially submitted to is only a defence *pro tanto*.[1] It is certain, also, that in offences against the state's own sovereignty the judgment of a foreign court would be no bar to a prosecution.[2]

With acquittals, however, another course of reasoning obtains. It is true that an acquittal in the *forum delicti commissi* is viewed, when the proceedings are regular and the issue of fact made, as conclusive on the question of the local criminality of the offence charged,[3] though it would not prevent a foreign sovereign from prosecuting for offences against himself.[4] But an acquittal in the *forum domicilii* would only be regarded as conclusive when it should appear to have been rendered by a court having local jurisdiction after a fair trial.[5] Certainly, while a judgment of a court *delicti commissi* would be final, to the effect that the act in question was not penal in that country, no extra-territorial force

[1] See the authorities to this point fully collected by Bar, § 143, note 10. Whart. Crim. Pl. & Pr. 8th ed. § 442.

[2] Ibid. See Halleck's Int. Law, 175; Woolsey, § 77; Hélie, Traité de l'instruction criminelle, p. 621.

[3] Whart. Crim. Pl. & Pr. 8th ed. §§ 441, 442; Whart. Crim. Law, 8th ed. §§ 264, 283. Bar, § 143, p. 560, argues such an acquittal is to be regarded as a *lex generalis* that the case was not penal.

[4] Supra, §§ 813 *et seq.*

[5] Whart. Crim. Pl. & Pr. 8th ed. § 451, and cases there cited.



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can be assigned to a decision of the *Judex domicilii*, unless he has international jurisdiction. The judgment in such a case could not be regarded as barring a prosecution in the *forum delicti commissi*.[1]

Proceedings must have been regular.

§ 829. The proceedings must have been regular, according to the practice of international law. An acquittal for a defect in the process, or through any fraud by the parties concerned, is no bar.[2]

Offences must have been the same.

§ 830. It is as to identity that the greatest difficulties are likely to spring up. Many criminal acts are divisible, so that the complete offence may contain several subordinate offences, each of which is severally indictable. Thus burglary may or may not, at the election of the government, include larceny; the parties to a conspiracy to cheat may be tried either for the cheating or the conspiracy. In addition to this, the same general offences take different special types in different lands. When, therefore, the plea of a former trial in another land is interposed, it is open to the prosecution either to demur to the competency of the foreign court, and the regularity of its proceedings, or to deny by replication the identity

[1] Mr. Wheaton on this point speaks without his usual precision. Lawrence's Wheaton, p. 242; Dana's Wheaton, § 121, p. 192: "If pronounced," he says, "under the municipal law in the state where the supposed crime was committed, *or* to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal would, of course, be an effectual bar (*exceptio rei judicatae*) to a prosecution in another state. If pronounced in any other foreign state than that where the offence is alleged to have been committed, *or* to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against a prosecution in any other state having jurisdiction of the offence." But most, if not all the cases of conflict in this respect, arise between the state to whom is owed allegiance, either permanent or temporary, and the state where the offence was committed. The state of allegiance, for instance, acquits, and the state *delicti commissi* subsequently prosecutes, or *vice versa*. Under such circumstances we must fall back on the suggestions of the text. It should be added, that eminent authorities hold that the *Judex domicilii* should regard the penal sentences of subjects in foreign courts only so far as to credit the defendant, in case of a second conviction, with the punishment previously endured by him. Heffter, Völkerr. § 36, and decisions cited by Bar, § 143, note 10. So would we hold as to offences abroad against our own sovereignty.

[2] See Whart. Crim. Pl. & Pr. 8th ed. §§ 456 *et seq.*; Whart. Cr. Law, 8th ed. §§ 264–283. Supra, §§ 646 *et seq.*



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of the offence pleaded with that for which the defendant is on trial.

### 2. *Pardon.*

Pardon by proper sovereign effective.

§ 831. Will a pardon by a foreign prince be a bar to a home prosecution? The tests already suggested in case of acquittals may be applied to pardons. Was the defendant within the jurisdiction of the pardoning sovereign at the time of the pardon? Was the offence committed within the territory of such sovereign? In the latter case, a pardon, based on the ground that no offence was committed, is in effect, as has been argued as to acquittals, a *lex generalis* declaring that the act is not in that land to be made liable to criminal punishment. But, in the former case, it should appear, to give extra-territorial force to such pardon, first, that the offender was so far subject to the pardoning sovereign that he could have been prosecuted by such sovereign for the particular offence; secondly, that, by the law of the country of the second trial, the courts of the country of the first trial had jurisdiction; and thirdly, that the pardon should have been regular and fair, and after a due examination of the facts. Should these conditions exist, the tendency is, in municipal prosecutions, to regard a foreign pardon as conclusive.[1] In prosecutions political or semi-political, however, the case would be reversed. It would be preposterous, for instance, to suppose that a prosecution in the United States, for treasonable offences against the United States committed in Germany, or for perjury in Germany before a United States consul, could be barred by a pardon by the German sovereign within whose territory the offender was at the commission of the offence. The true issue, both here and in respect to acquittals, is, had the sovereign thus intervening the jurisdiction to pronounce a *lex generalis* as to the particular case? If so, his action is final. If otherwise, it is not.

### 3. *Statutes of Limitation.*

§ 832. It has already been shown that statutes of limitation,

[1] Feuerbach, Lehrbuch des peinlichen Rechts, edited by Mittermaier, § 516. See a decision to this effect of the Supreme Court at Cassel, given by Heuser, in his Reports, i. p. 686, and cited by Bar, § 143, note 1. As to removal of disabilities by pardon, see Whart. Crim. Ev. 8th ed. § 365.



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unless the words of the law expressly direct the contrary, are merely processual, and have no extra-territorial force.[1] If, to apply this principle to the present question, a foreigner commits an offence in England or the United States, it could not be pretended that he could plead that in his own country the period for prosecution had expired. So, also, where jurisdiction is based on allegiance, as in case of political offences against the United States committed abroad, the defendant, when put on trial in the country of his allegiance, would not be permitted to set up the limitations of the *forum delicti commissi*.[2] In either case, the law as to limitation is that of the court of process. And in this view most foreign jurists coincide.[3] Fœlix, however, seems to think, that in case of a difference in this respect in the codes of states having concurrent jurisdiction, the milder legislation is to be preferred.[4] And in any view, the construction most favorable to the defendant will be adopted.[5]

So as to statutes of limitation.

### V. PENAL JUDGMENTS.

§ 833. We have already seen[6] that penal laws have no extra-territorial force. The same limitation applies to foreign penal judgments, since otherwise all that would be necessary to give ubiquitous effect to a penal law would be to put it in the shape of a judgment.[7] Hence the better opinion is that a witness cannot be impeached by proof of a foreign conviction.[8]

Such judgments have no extra-territorial force.

[1] Supra, §§ 534–544.

[2] Whart. Crim. Pl. & Pr. 8th ed. § 329.

[3] Berner, Wirkungskreis der Strafgesetze, p. 164; Köstlin, Syst. Deutsc. Straf. p. 24; Bar, § 143, p. 568.

[4] II. No. 602.

[5] Whart. Crim. Pl. & Pr. 8th ed. § 450.

[6] Supra, §§ 4, 108.

[7] Com. *v.* Green, 17 Mass. 515; Sims *v.* Sims, 75 N. Y. 466; Uhl *v.* Com. 6 Grat. 706; Campbell *v.* State, 23 Ala. 44; Lawrence Com. sur Wheat. iv. 355, 547. "Les jugements rendus en matière pénale ne dépassent généralement pas les frontières." Brocher, Droit int. privé, 103. He cites to same effect Rocco, Dell uso ed. autorita delle leggi, iii. 13. See Jour. du droit int. privé, 1878, p. 518.

[8] See cases in Whart. Crim. Ev. § 363, note.



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# CHAPTER XIV.

## EXTRADITION.


Generally limited by treaty, § 835.
By law of nations offence must be one recognized in asylum state, § 836.
Treaties are retrospective, § 837.
Extradition refused when there cannot be fair trial, § 838.
And so for political offences, § 839.
And so for persons escaping military service, § 840.
Extradition not refused because person demanded is subject of the asylum state, § 841.
Where asylum state has admiralty jurisdiction there should be no surrender, § 842.
Question as to whether foreign state can claim a subject who has committed a crime in a third state, § 843.
When there is a treaty extradition does not lie for a case not enumerated, § 844.
Nor where defendant is in custody for another offence, § 845.
Trial should be restricted to the offence charged, § 846.
In our practice courts may hear case before mandate, § 847.
Complaint should be special. § 848.
Warrant returnable to commissioner, § 849.
Evidence should be duly authenticated, § 850.
Terms to be construed as in asylum state, § 851.
Evidence must show probable cause, § 852.
Evidence may be heard from defence, § 853.
Circuit Court has power of review, § 854.
Executive has discretion as to surrender, § 855.
Extradition may be conditional, § 856.
Treaties to be construed on fixed principles, § 857.


§ 835. THE prevalent opinion in the United States is that extradition, as between foreign states, is limited to cases provided for by treaty; nor, as will hereafter be seen, when there is a treaty, will a requisition be sustained for an offence which the treaty does not include.[1] It has, however, been held by eminent jurists that, independently of the cases provided for by treaty, it is by the law of nations within the discretion of the executive to surrender a fugitive from another land when there is reasonable proof showing such fugitive to be guilty of any offence regarded *jure gentium* as a gross crime,[2] and this ju-

Generally limited to treaty.

[1] Infra, § 844.

[2] Washburn, in re, 4 Johns. Ch. R. 106; British Privateers, 1 Wood. & M. 66. See, also, 5 Memoirs of J. Q. Adams, 400. The topic is discussed at large in Lawrence Com. sur Wheat. iv. 396 *et seq.* According to Grotius, De jure Belli, ii. c. 91, for an asylum state to refuse to surrender a criminal is to take such criminal's guilt upon itself; and in all cases, extradition, when due cause is shown by a foreign sovereign, is obligatory; a view which, though



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risdiction was assumed by the President of the United States, in

with some modifications of expression, has been sustained by Berner; Wirkungskreis des Strafgesetzes nach Zeit, Raum, und Personen, Berlin, 1853, pp. 181, 182. Vattel (II. § 230), however, expresses what is not only the more reasonable, but the more practicable rule, when he declares that this high prerogative, apart from treaty obligation, is only to be exercised in cases of those crimes which constitute the perpetrators the enemies of human society in general, and as to which the territory in which the offence was committed is the appropriate forum of punishment. Mohl (page 710) and Heffter (page 120) substantially maintain the same view; and it has been sustained by Bluntschli, though with several judicious modifications. This able jurist's argument in this respect may be condensed as follows (§§ 394–401): "The duty to surrender foreign criminals, or fugitives charged with crime, is only to be recognized when required by special extradition treaties, or when necessary to the establishment of a common juridical comity. *In the last case, the duty of surrender is limited to great and common crimes, and assumes that the judicial system of the state so demanding affords sufficient guarantees for a civilized administration of justice.* Opinions as to extradition and as to the right of asylum, are as much divided in practice as in theory. Two extreme opinions have been advanced. By one it is maintained that the right of asylum is unlimited, and is only restrained by extradition treaties. The defenders of this view — Pufendorf, Martens, Story, and others — insist that fugitives of this class have not offended against the law of the state they have taken refuge in, and should be therefore left by it in peace; that punitory power is by its nature territorial, and not international; that there is but little security that justice will be executed, in case of surrender, in the sense in which justice is viewed by the asylum state; and that the latter has little inducement, therefore, to serve a foreign tribunal, and no duty to limit its own sovereignty. On the other hand, men of high authority, such as Grotius, Vattel, and Kent, have called attention to the universal importance of the maintenance of justice; to the necessity of the punishment of criminals; and to the dangers which will arise to society when criminals can find a refuge in which they will feel perfectly secure, and where they can renew their attacks on public justice; and that hence it is a mutual duty of states to support each other in the effective execution of penal jurisprudence.

"According to my view, the unrestrained allowance of the right of asylum would threaten, especially in these days of rapid locomotion, the cause of public order and justice. It is of universal, not of national, interest that murderers, robbers, notorious cheats, and thieves should be punished. The French minister, Rouher, in his note of March 4, 1866, has pointedly placed this on the right ground: 'The principle of extradition is the principle of solidarity, and of the reciprocal protection of governments and peoples against an evil threatening on every side (*contre l'ubiquité du mal*).'

"On the other hand, an absolute system of extradition would in many cases imperil the interests of humanity and freedom; and it cannot be forgotten that there are many offences which are pointed exclusively at the offended state, and in no sense affect human



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1864, though without the opportunity of judicial revision.[1] But

society in general; and that there are many strong reasons why, under the proper restrictions, a right of inviolable asylum should be secured.

"Where particular treaties provide for extradition in particular cases, as at present is often the case, the treaties close the question. If there are no treaties, then there must be a recurrence to the general principles of justice. As these, however, are not everywhere measured by the same standards, *it depends upon the asylum state to determine the obligations under which it lies.* It is probable, however, that certain positive rules in this respect will be gradually introduced into the law of nations, by which the caprice of particular states will be restrained." Bluntschli, *ut supra.*

[1] In this case a Cuban officer, of the name of Arguelles, fraudulently sold into slavery a number of Africans committed to his charge; and, covering for a time the transaction by false returns and forgeries, succeeded in making good, with his plunder, his escape to New York. No extradition treaty existed between Spain and the United States; but the Spanish government appealed to the President of the United States to direct the arrest and surrender of the fugitive, as a matter of international comity and justice. Mr. Seward adopted this view, and Arguelles was arrested by a warrant of the President of the United States, and surrendered to the Spanish authorities. The Senate of the United States, on May 28, 1864, passed a resolution inquiring into the circumstances; and the President replied, inclosing a report from the Secretary of State, Mr. Seward, admitting that the extradition was made without treaty sanction, but was "understood by this department to have been made in virtue of the law of nations and the Constitution of the United States." "Although," continues the report, "there is a conflict of authority concerning the expediency of exercising comity towards a foreign government, by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender upon a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals, who are offenders against the human race; and it is believed that if in any case the comity could with propriety be practised, the one which is understood to have called forth the resolution furnished a just occasion for its exercise." "A resolution," says Mr. Dana, commenting on this case, "introduced into the House of Representatives, condemning this act, as a violation of the Constitution and in derogation of the right of asylum, was rejected by a large majority, and the subject referred to a committee; but it was followed by no action of Congress. An indictment was found in New York against the officer who made the arrest under the secretary's warrant, on a charge of kidnapping, but the case has not been adjudicated; and, as no petition for *habeas corpus* was filed in behalf of Arguelles before his removal from the country, the legality of the act of the secretary has not been judicially passed upon."

Tweed, after his arrest in Cuba, in 1876, was surrendered to the United States government without the obligation of treaty. See New York World, Nov. 6, 7, 1876. According to Mr. Lawrence (Com. sur Wheat. iv. 400),



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the weight of authority in the United States is against such a course,[1] though it has high European sanction.[2]

the Spanish government treated this as a return for Arguelles' surrender, and as a favor to New York city.

*A State may set forth the Conditions on which it will grant Asylum to Fugitives.* — They have themselves no legal claim to such asylum. Such fugitive cannot, as could another traveller, rely on the right of free transit; for it is an essential condition of this right that the traveller's reputation should be good. No state is bound to afford refuge either to criminals or suspected criminals, because such visitors endanger the peace of the state or of its subjects. Bluntschli, *ut supra.*

The state that grants the asylum is justified, should it be abused, in withdrawing it; and is bound to do so, should the refugee use the opportunity of the asylum to persevere in plots against the peace of a friendly state. Bluntschli, *ut supra.*

[1] See Clarke's Extradition, 2d ed.; Spear on Extradition, 1 *et seq.*; Letters from Mr. Lawrence in 15 Alb. L. J. 44; 16 Alb. L. J. 365; 19 Alb. L. J. 329; Article by Mr. Lawrence in Revue de droit inter. x. 285; Lawrence Com. sur Wheat. iv. 363 *et seq.* In Stupp's case, in 1873, the U. S. refused to surrender to Belgium on the ground of want of treaty stipulation. Infra, §§ 843–854. As coinciding with this conclusion, see U. S. *v.* Davis, 2 Sumn. 482; Dos Santo's case, 2 Brock. 493; Adriance *v.* Lagrave, 59 N. Y. 110; Com. *v.* Hawes, 13 Bush, 697; 14 Cox C. C. 135.

In England, by the third section of the Extradition Act, a fugitive criminal is not to be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to the queen's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. A clause embodying this principle is contained in the English extradition treaties concluded since 1870 with Germany, Belgium, Austria, Italy, Denmark, Brazil, Switzerland, Honduras, and Hayti. The treaty of 1842 with the United States contains no such restriction.

It was on the ground of the above rule that the British government refused, in 1876, to deliver Winslow. Infra, § 846. See report of the Royal Commission on Extradition, in 1878, reviewing the position (infra, § 846), and criticism by Mr. Lawrence, 19 Alb. L. J. 329; Lawrence Com. sur Wheat. iv. 517 *et seq.* For English practice, see Terraz's case, L. R. 4 Ex. D. 63; 14 Cox C. C. 153. The student is also referred to 11 Revue de droit int. (1879), 88; Ducrocq, Théorie de l'extradition; Vazelhes sur l'extradition, 1877.

For notice of decision of Mexican Supreme Court, sustaining extradition from Mexico to the United States, see 18 Alb. L. J. 141.

[2] At the meeting of the Institute for International Law at Oxford, in September, 1880, the following propositions were adopted (London Times, September 11, 1880): —

"1. L'extradition est un acte international, conforme à la justice et à l'intérêt des États, puisqu'il tend à prévenir et à réprimer efficacement les infractions à la loi pénale.

"2. L'extradition n'est pratiquée



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§ 836. Extradition, where no treaty stipulations exist, only lies for offences *jure gentium*, and which are therefore punishable alike in the country granting the arrest and

By law of nations offence must

d'une manière sûre et régulière que s'il y a des traités, et il est à désirer que ceux-ci deviennent de plus en plus nombreux.

"3. Toutefois ce ne sont pas les traités seuls qui font de l'extradition un acte conforme au droit et elle peut s'opérer même en l'absence de tout lien contractuel.

"4. Il est à désirer que, dans chaque pays, une loi règle la procédure de la matière, ainsi que les conditions auxquelles les individus réclamés comme malfaiteurs seront livrés aux gouvernements avec lesquels il n'existe pas de traité.

"5. La condition de la réciprocité, en cette matière, peut être commandé par la politique; elle n'est pas exigée par la justice.

"6. Entre pays dont la législation criminelle reposerait sur des bases analogues et qui auraient confiance mutuelle dans leurs institutions judiciaires, l'extradition des nationaux serait un moyen d'assurer la bonne administration de la justice pénale, parce qu'on doit considérer comme désirable que le juridiction du *forum delicti commissi* soit, autant que possible, appelée à le juger.

"7. En admettant même la pratique actuelle qui soustrait les nationaux à l'extradition, on ne devrait pas tenir compte d'une nationalité acquise seulement depuis la perpétration du fait, pour lequel l'extradition est réclamée.

"8. La compétence de l'État requérant doit être justifiée par sa propre loi, et elle ne doit pas être en contradiction avec la loi du pays de refuge.

"9. S'il y a plusieurs demandes d'extradition pour le même fait, la préférence devrait être donnée à l'État sur le territoire duquel l'infraction a été commise.

"10. Si le même individu est réclamé par plusieurs États à raison d'infractions différentes, on devrait avoir égard, en général, à la gravité relative de ces infractions.

"11. En règle, on doit exiger que les faits, auxquels s'applique l'extradition, soient punis par la législation des deux pays, excepté dans les cas ou, à cause des institutions particulières ou de la situation géographique du pays de refuge, les circonstances de fait qui constituent le délit ne peuvent s'y produire.

"12. L'extradition, étant toujours une mesure grave, ne doit s'appliquer qu'aux infractions de quelque importance. Les traités doivent les énumérer avec précision; leurs dispositions à ce sujet varient naturellement suivant la situation respective des pays contractants.

"13. L'extradition ne doit pas avoir lieu pour faits politiques.

"14. Le gouvernement requis apprécie souverainement, d'après les circonstances, si le fait à raison duquel l'extradition est réclamée a ou non un caractère politique. Dans cette appréciation, il doit s'inspirer des deux idées suivantes :

"(*a.*) Les faits, qui réunissent tous les caractères de crimes de droit commun (assassinats, incendies, vols), ne doivent pas être exceptés de l'extradition à raison seulement de l'intention politique de leurs auteurs.

"(*b.*) En tout cas, l'extradition pour crimes ayant tout à la fois le caractère de crime politique et de crime de droit commun ne devra être accor-



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that making the requisition.[1] It has been held, in accordance with this rule, that a warrant will not be issued for the surrender of a fugitive for a crime, the prosecution of which, in the place where the fugitive is found, is barred by the statute of limitations.[2] "If by our laws," argues Bar,[3] "we declare that the lapse of time has been such as to destroy the evidence necessary to a fair trial, or to extinguish the memory and consciousness of the offence, our aid in its prosecution cannot be granted to a foreign state."[4] And the extradi-

be one recognized by asylum state.

dée que si l'État requérant donne l'assurance que l'extradé ne sera pas jugé par des tribunaux d'exception.

"15. L'extradition ne doit pas s'appliquer à la désertion des militaires appartenant à l'armée de terre ou de mer, et aux délits purement militaires. L'adoption de cette règle ne fait pas obstacle à la livraison des matelots appartenant à la marine de l'État ou à la marine marchande, qui est réglée par les traités ou par les usages maritimes.

"16. Une loi ou un traité d'extradition peuvent s'appliquer à des faits commis antérieurement à leur mise en vigueur.

"17. L'extradition doit avoir lieu par la voie diplomatique.

"18. Il est à désirer que, dans le pays de refuge, des magistrats soient appelés à apprécier la demande d'extradition après un débat contradictoire.

"19. L'État requis ne doit pas faire l'extradition si d'après son droit public l'autorité judiciaire a décidé que la demande ne doit pas être accueillie.

"20. Le gouvernement qui a obtenu une extradition pour un fait déterminé est, de plein droit et sauf convention contraire, obligé de ne laisser juger ou punir l'extradé que pour ce fait.

"21. Le gouvernement qui a accordé une extradition peut ensuite consentir à ce que l'extradé soit jugé pour des faits autres que celui qui avait motivé sa remise, pourvu que ces faits peuvent donner lieu à l'extradition.

"22. Le gouvernement qui a un individu en son pouvoir par suite d'une extradition ne peut le livrer à un autre gouvernement sans le consentement de celui qui le lui a livré.

"23. L'acte émané de l'autorité judiciare qui déclare l'extradition admissible devra constater les circonstances dans lesquelles l'extradition a eu lieu et les faits pour lesquels elle a été accordée.

"24. L'extradé devrait être admis à proposer, comme exception préalable, devant le tribunal appelé à le juger définitivement, l'irregularité des conditions dans lesquelles l'extradition a été accordée."

[1] See Bar, § 149; Berner, p. 188. Sir R. Phillimore speaks positively to this effect. Int. Law, i. 413.

[2] Marquardson, p. 47.

[3] Page 589.

[4] The English Commission of 1878 reported on the topic in the text as follows: —

"If the question be asked, whether we should refuse to give up a fugitive where the offence in respect of which the surrender is asked for, though an offence against the law of the country asking it, is not an offence against our own, the answer is involved in what has been already said. The crimes in respect of which nations should



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tion treaties executed by the United States contain generally the provision that the surrender "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed." But under this provision it has been held that it is sufficient if the offence charged be a crime in the asylum state at the time of its commission, though it was not so at the time of the execution of the treaty.[1]

Treaties are retrospective.

§ 837. The action of an extradition treaty, it has been held in this country, is to be extended to crimes committed before its adoption, so that under it process may issue to arrest fugitives charged with such crimes.[2] In England, on the other hand, it has been held that extradition treaties cannot act retrospectively.[3]

make common cause against criminals, and refuse them shelter, are those which it is the common interest of all to repress. There are offences against society in respect of person and property which in all countries there will always be found persons disposed to commit, and which can only be kept under by the strong arm of the law. It is these offences which it should be the common purpose of all nations to endeavor to suppress, by preventing those who have committed them from escaping from justice. But these offences are known to and dealt with by the law of all civilized nations, though they may be differently dealt with both as to procedure and punishment. If some offence unknown to the law of other nations — to what may figuratively be called the common law of nations — should be created by the law of a particular people, such an offence would not come within the category of crimes which it is the purpose of extradition to repress."

"If it be asked how it is to be ascertained that the offence charged is known and recognized as an offence, the answer is that our own law will afford a sufficient test, being abundantly comprehensive as to offences against person and property.

"Besides which there is another reason for seeing that the charge in respect of which extradition is asked for is an offence under our own law. It is and always must be necessary that a *primâ facie* case shall be made out before a magistrate, in order to support the application for extradition. But the English magistrate cannot be expected to know or interpret the foreign law. It is not desirable that he should be required to do more than to see that the facts proved constitute *primâ facie* an offence which would have been within judicial cognizance if done in this country."

[1] Müller's case, 5 Phil. Rep. 289; 10 Opin. Att'y Gen. 501.

[2] Giacomo, *alias* Ciccariello, in re, 12 Blatch. C. C. 391.

[3] Clinton's case, reported in Clarke on Extrad. p. 115; Lawrence Com. sur Wheat. iv. 445.

A similar view is taken by Bar in



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§ 838. The sole object of extradition being to secure the due and effective administration of justice, a surrender cannot be rightfully made, apart from treaty obligation, to a state in which a fair trial cannot be had. It may be said that if this view be accepted, every civilized country adopting it would become the unresisting refuge of fugitive criminals from semi-civilized lands. But this objection rests on a confusion of expulsion with extradition. Every state has the international right to refuse to admit aliens, or to expel them if their presence should be detrimental to the public welfare.[1] But extradition is in the nature of an arrest, the warrant returnable to a committing magistrate, who will proceed to trial according to those rules of justice established by civilized nations. Of course, a treaty of extradition may be enacted with a barbarous country; and if enacted, it must be carried out. But when no such treaty exists, and when it is the high police prerogative of the chief magistrate that is appealed to, to arrest a person resident in his realm, the warrant ought to issue only as the preliminary to a fair trial on the merits of the case, where the defendant will have an opportunity of proving his innocence before an impartial court. A surrender, also, will be refused when the effect is to expose the fugitive to a barbarous punishment, or one revolting to a civilized jurisprudence. And so, as we will see, the surrendering country may impose conditions as to the way in which the surrendered fugitive is to be tried.[2]

Extradition refused when there can be no fair trial.

§ 839. Notwithstanding the authority of Grotius,[3] there is a general consent of modern jurists to the effect that between independent sovereignties there should be no extradition for political offences.[4] Bluntschli has vigorously de-

And so for political offences.

an article in the Revue de droit international for 1877.

The federal Supreme Court of Mexico, in 1878 (reversing the decision of the District Court of Matamoras), held that the extradition treaty of 1861, between Mexico and the United States, was constitutional, and should be enforced by the courts as to prior offences. The opinions are given at large in Foreign Relations of the U. S. 1878, p. 560. For other extradition proceedings, see Foreign Relations, U. S. 1879, p. 741.

[1] Bar, § 148.

[2] Infra, § 856.

[3] II. c. 21, §§ 4–6.

[4] Lawrence's Wheaton, 245, note; Woolsey, § 79; Lewis, p. 44; Phil. 407; Heffter, § 63; Fœlix, ii. No. 609; Mohl, p. 705; Marquardson, p. 48; Bar, § 150; Geyer, in Holtzendorff's Ency. Leipzig, 1870, p. 540; Kluit, p. 85.



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fended this position;[1] and his argument may be extended by mentioning the following points: The mode of trial and nature of punishment in political prosecutions instituted by the offended sovereign have not, as a general rule, that impartiality and moderation which will justify, on the principles heretofore stated, an umpire state in exercising this high and delicate prerogative of sovereignty. Then, again, though the object of treason is the same in all civilized states, yet as to what constitutes treason there is the widest divergence. In one country dissent from the established church; in another the maintenance of freedom of speech; in another an appeal for a reformed constitution, or for trial by jury, — may be regarded as treason. A marked distinction also exists between the allegiance of nationality and the allegiance of residence. There is a partial allegiance arising from residence; there is a fuller allegiance arising from nationality; and these two may conflict.[2] The safer, as well as the

[1] The state granting such an asylum is not bound either to surrender or to eject the fugitive. But the asylum state is bound to refuse to permit this privilege to be used to imperil the peace or justice of the other state, and is also bound to take proper measures to ward off such abuse. The distinction between political and ordinary crimes is now recognized both specially in treaties and generally in diplomatic practice; and it obtains even with such states as in principle extend the doctrine of extradition to political fugitives, but who may desire to protect particular fugitives on the ground of sympathy. Political offences are necessarily directed against the constitution and the political condition of an especial state, and form, therefore, no cause of anxiety to other states. It is possible that the political principles and tendencies of two states thus brought into controversy may be opposite and hostile. The proscribed political offender of one land may perhaps be honored as a martyr of freedom in another land; he who in the name of justice expels subjects from one state may, as a destroyer of justice, be execrated by the subjects of another state. Even when such contrasts do not exist, those conversant with history cannot fail to have observed that political prosecutions are far more than other forms of criminal proceeding likely to be swayed by partisan passion; and that sometimes men noble and venerated have assailed the political constitution of their native land. The interests of statesmanship, of justice, and of humanity, unite in invoking protection of this kind for political fugitives. But while such an asylum should be awarded, it should not be abused. No fugitive should be permitted to use this asylum for the continued prosecution of political assaults on his home state. Bluntschli, *ut supra*. The topic in the text is further illustrated in Lawrence Com. sur Wheat. iv. 447 *et seq.*

[2] Geyer (Leipzig, 1870, *ut supra*) says: The right of asylum in this case must be held sacred; for if we



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more liberal and humane, rule is for the asylum state in all political cases to refuse its intervention.

This principle may now be viewed as incorporated in public international law. In the case, it is true, of the Hungarian insurgents, who took refuge in Turkey in 1849, Russia and Austria made a requisition for surrender on the sultan, but this was refused, and the demand ultimately withdrawn. On this demand Lord Palmerston, in a despatch of October 6, 1849, said: "If there is one rule more than another that has been observed in modern times by independent states, both great and small, of the civilized world, it is the rule not to deliver up political refugees. The laws of hospitality, the dictates of humanity, the general feelings of mankind, forbid such surrenders, and any independent government which, by its own free will, was to make any such surrender, would be universally stigmatized as dishonored, unless a state is bound to extradition by the positive obligations of a treaty; but such treaty engagements are few, if indeed any such exist."[1] The same view was substantially taken by the government of the United States in the case of Koszta.[2]

Among confederated states, however, the insertion in their common constitution of treason as a cause for extradition is not unusual. This is the case with the Constitution of the United States,[3] and with that of the German Confederacy;[4] though the Swiss articles of confederation except political offences from the cases in which extradition is obligatory.[5] A special convention was entered into in 1834 by Austria, Prussia, and Russia, for the mutual surrender of political fugitives in a particular emergency; but this convention is not considered to have had continuous force.

would punish or surrender foreign political offenders, we must decide the preliminary question whether the foreign government or constitution they have so assailed is legitimate, — a decision the courts have not always the proper materials to make, and which may lead to international complications. Extradition may be not infrequently made an agency for the suppression of movements really just and noble.

[1] See authorities on this question fully collected by Mr. Lawrence, Com. sur Wheaton, iv. 447 *et seq.*

[2] Woolsey, § 81. Supra, § 6.

[3] Art. 4, § 2.

[4] Bar, § 150, note 9.

[5] Schweizerische Bundesverfassung, art. 50.



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In the extradition treaties negotiated by the United States, political offenders are either implicitly excluded, by non-specification among those for which extradition will be granted, or are excepted in express terms.

It is important to remember, however, that there may be cases nominally political, which, nevertheless, are essentially distinguishable from those in which the gist of the offence is opposition to government, and as to which extradition is to be refused.[1]

[1] On this point we have some striking remarks from Lord Stanley, since Earl of Derby, made in the House of Commons on August 3, 1866: —

"It does seem to me that, while on the one hand we desire to retain inviolate the right of exemption from arrest for political offences, it is monstrous to say, on the other hand, that if any private person is assassinated in the streets of Paris, for example, and the murderer escapes to England, he may be punished; but that if the person so assassinated is invested with any political character, then the offence becomes a political offence, and the law of England declares that he shall not be given up to justice. This position appears to me to be utterly untenable. There is, I apprehend, a discretionary power given to the secretary of state as to the application of the act, and all I can say on this point is, that if an honorable gentleman can succeed in establishing a distinction between the case of a purely political offence and an offence against morality, I shall be willing to consider the proposal to insert a clause to meet such a case."

"But it becomes a very different thing when, in furtherance of some political or pretended political purpose, some foul crime, such as assassination or incendiarism, is committed. Thus attempts by conspirators to assassinate a reigning sovereign, — regardless, perhaps, that in doing so other lives may be sacrificed, — or the setting fire to a prison at the risk of burning all those within it, or the murder of the police for the purpose of rescuing prisoners in custody for political offences, are crimes, in respect of which — though the motive was a political one — we cannot think that any immunity should be afforded. Civil war and insurrection take place openly in the face of day, and may or may not be justified or excused by circumstances; but assassination or other forms of revolting crime lose none of their atrocity from their connection with political motive.

"Generally speaking, we would, therefore, decline to recognize the suggestion of a political motive as a ground on which a magistrate or judge should refuse a demand for the surrender of a person accused of what (in the absence of such motive) would be an ordinary crime, unless the act, to which a political character was sought to be ascribed, occurred during a time of civil war or open insurrection. Cases, however, may occur in which it would be undesirable to surrender a person accused of a crime instigated by a political motive, even though a magistrate or judge could not pronounce that there existed either civil war or open insurrection, and consequently could not discharge the accused as of right. To meet this possibility a discretionary power in favor of the prisoner should be re-



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On the one side, we may hold that there should be no extradition for a crime, though covered by a treaty (*e. g.* homicide), which is incidental, in the nature of things, to the execution of a revolt. On the other hand, when a political disturbance is used to further private revenge or cupidity, extradition should be granted.[1]

Political offences, to be within the range of the exception, are distinguishable, therefore, from assassinations, or attempted assassinations, in this: that a political offence of the excepted class must be an ordinary incident to an attempt, by warfare permissible to belligerent insurgents, to overthrow a government by force, or to reform a government by public agitation. Hence extradition will not be granted of a person charged with assisting in a revolt whose object is to overturn a government. On the other hand, as the assassination of a political leader is a mode of warfare which is denounced by all civilized states, no matter how democratic may be the government of such states, such assassination cannot be regarded as a strictly political offence. Hence, while no European state would have delivered to the United States parties to the late secession insurrection, or even secession naval officers charged with piracy,[2] it has been agreed by European jurists that there is no European state that would not have delivered to the United States one of the parties concerned in the murder of President Lincoln. The same distinction is to be applied to the demand, by the Russian government, in 1879, on France, for the surrender to Russia of Hartmann, who was charged with being concerned in an attempt to destroy by explosion a railway train for the purpose of killing the Russian Emperor, together with some of his high officials. The French authorities declined to surrender on the ground that the identity of the accused was not made out. This may have been an eva-

served to the government to refuse to deliver up a person so accused." Report of English Commissioners of 1878. See proceedings of Inst. Int. Law, supra, § 835; Vazelhes sur l'extradition, 1877.

[1] Cf. Billot, Traité de l'extradition, pp. 104–6; Hélie, Theorie du code pénal, i. 410; Clark, Law of Extrad. 170 *et seq.*; Westlake, Memoir in 1876 before Social Science Association; Ortolan, Elements de droit pénal, i. 730–1.

[2] R. *v.* Tirnan, 5 B. & S. 645. See, to same effect, Canada rulings cited in Lawrence, Com. sur Wheat. iv. 439, in Boston Law Reporter, April, 1865, p. 92; Clarke, *ut supra*, p. 87.



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sion, in order to avoid the popular clamor based on the sympathy of the communistic party with the nihilists, of whom it was alleged that Hartmann was a leader. But on principle Hartmann, if his identity as a party concerned in the offence charged was established, should have been surrendered by France. And unless the exception be otherwise limited by statute, the immunity awarded to political offences should not be extended (1.) to cases where political hostility is set up to cover private spite or greed; or (2.) cases where agencies (*e. g.* assassination) are employed which, by the laws of civilized warfare, are not permitted to belligerent insurgents.[1]

[1] To this effect is the action of the International Institute, at its meetings at Brussels, in September, 1879, and at Oxford, in September, 1880, as given supra, § 835. See the exposition by M. Renault in Jour. du droit int. privé, 1880, p. 78.

A discussion on this topic at the meeting of the International Institute in 1877 will be found in the Revue de droit int. for 1878, pp. 382, 383. Professor Brocher, in his report to the Institute at that session, took the ground that while crimes of a political character were generally excepted in extradition treaties, the exception was not absolute, but that it was within the discretion of the asylum country to surrender in cases where the crime charged was not in its nature a due incident of belligerent insurgency. Prof. Hornung, of Geneva, in a communication in the Revue du droit int. for 1879, p. 518, argues that even in cases of attempted regicide there should be no extradition; but he bases this conclusion on the position that states which punish offences against the law of nations can inflict proper punishment on offenders of this class without surrendering them to the state immediately offending. In the same review (p. 520) will be found a letter from Prof. Martens, of St. Petersburg, vindicating extradition in cases of regicide, and of Prof. Saripolos, of Athens, to the same effect (p. 524).

An article by Prof. Teichmann, of Basle, on political offences, in reference to extradition, is published in the Revue de droit int. for 1879, pp. 473, 488, 517. That an attempt at assassination will not be withdrawn from the operation of extradition by the fact that the attempt was designed to subserve the purposes of revolution, he illustrates by the case of Bardon, implicated in the Fieschi conspiracy, and delivered by Prussia to France, in 1835; that of parties delivered by Switzerland to France, in 1845, on the charge of attempted regicide; that of the extradition by France, in 1848, of the assassins of the Duke of Lichtenstein; that of a French extradition, in 1869, of a party concerned in the attempted assassination, for political purposes, of General Folliot.

The demand of Austria and Russia on Turkey for the surrender of Kossuth, and other parties implicated in revolutionary movements in Hungary and Poland, was withdrawn on condition that the refugees would not be permitted to remain on the shores of Asia Minor. Billot, p. 108; Woolsey, Int. Law, § 81. On the same principle, Louis XIV., while declin-



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§ 840. "The delivering up by one state," says Mr. Wheaton,[1] "of deserters from the military or naval service of another, also depends entirely upon mutual comity, or upon special compact between different nations;" but so far as this implies the extension of such surrender to any cases not provided for by convention, it may now be viewed as too broad a statement of the law. With regard to the extradition of persons flying from threatened conscription, it is now conceded that no surrender should be made by the state of refuge.[2] So far as concerns deserters, no doubt cartel conventions for mutual extradition may, in some cases, be expedient. But without such conventions, such surrenders are not now made; and under any circumstances there should be satisfactory proof that the deserter to be surrendered was not led to enlist by wrong means, and will not be subjected, on his return, to a barbarous punishment.[3] In the United States conventions of this kind are rare.[4]

Nor for escape from military service.

§ 841. We must now recur to the distinction mentioned as existing between the English common law and the Roman common law, as now applied in Europe. By the former, a subject cannot be tried by his sovereign for of-

Extradition not refused because person de-

ing to surrender parties implicated in conspiracies to subvert the government of William III., agreed, at the peace of Ryswick, that they should not be harbored in France.

An article by Renault, on extradition for political crimes, will be found in the Journal du droit int. privé for 1880. In this article a historical sketch is given of the law of asylum, and it is shown that this right was held inviolable as against Spain, under Philip II., by France and England, in favor of Antonio Perez, charged with high treason; against France, by England and Holland, in favor of Huguenots charged with treason; against England, by France, in favor of the Jacobites charged with treason. This line of political action is traced to the present day, and it is maintained that it is now established by the great weight of authority that extradition of political offenders will not be granted. Cf. Dallmann, in Bluntschli's Staatswörterbuch, tit. "Auslieferung;" Fiore, Dell estradizione; Teichmann, Les délits politique.

Political crimes presuppose audacity rather than perversity; unrest of temper rather than corruption of heart; fanaticism rather than wickedness. F. Hélie, cited in Jour. du droit int. privé, 1880, p. 59.

A statement of the earlier demands of this class will be found in Lawrence, Com. sur Wheaton, iv. 376 *et seq.*

[1] Lawrence's Wheaton, p. 237.

[2] Rotteck, in Staatslex. ii. p. 40; Bluntschli, *ut supra;* Mohl, die Völkerrechtliche Lehre vom Asyl.

[3] Bar, § 150; Kluit, p. 75.

[4] Dana's Wheat. § 121.



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manded is a subject of the asylum state.

fences committed abroad against another sovereign. By the latter, a subject may not only be tried for such offences, but the sovereign in some countries and in certain issues deems it his duty to institute such a trial. Hence it is that while England and the United States, on the ground that there would otherwise be a failure of justice, grant warrants, as between themselves, on due cause shown, for the extradition of their own subjects, no such reason exists why a similar course should be taken by states not in this way limited. If a demand is made on one of the latter states for the extradition of a subject charged with an offence against a foreign sovereign, the answer is, "We try such cases ourselves." On the other hand, in the United States and in England, extradition is not refused of a subject when demanded by the sovereign of a foreign state, for a crime committed in such state;[1] though it might be otherwise if it were an offence of which the asylum state took cognizance. In Germany, however, where offences by subjects abroad are justiciable, surrender is, under such circumstances, refused.[2]

[1] See Robbins's case, Wharton's St. Tr. 392; Bee, 266; Jour. Jur. 13; Kingsbury's case, 106 Mass. 223.

This subject is discussed by the Commission on Extradition, appointed by the British government in 1877, which concludes as follows: —

"On the whole, the Commission unanimously were of opinion that it is inexpedient that the state should make any distinction in this respect between its own subjects and foreigners; and stipulations to the contrary should be omitted from all treaties." Central Law Journal, 1878, 40; 19 Alb. L. J. 329.

[2] Dana's Wheaton, § 120, note; Lawrence's Wheaton, p. 237, note; Lawrence Com. sur Wheaton, iv. 363 *et seq.*

A valuable article on the extradition of subjects will be found in the Jour. du droit int. privé, 1876, p. 425.

Apart from treaty stipulations, no doubt the weight of authority among European jurists is against the surrender by a sovereign of his own subject to a foreign prince to be tried for a crime committed within the latter's dominions. See Bluntschli, quoted supra, §§ 835 *et seq.* To some extent this result is influenced by the latent disbelief, by those versed in the Roman jurisprudence, in the equity of foreign laws. But the ostensible reasons assigned are not without great weight. Each state, it is urged, is bound to correct as well as to protect its own subjects, as long as they are on its soil. The relation of sovereign to subject is that of father to child; as long as the subject resides within the sovereign's territory, this relation continues, and no other foreign jurisprudence should be permitted to step in. If the subject has done wrong, his own state must punish him; to permit others to assume this office, would be not only to usurp the prerogatives, but to weaken the authority, of the state thus invaded. Nor is the suspected party



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An exception to this effect exists in our treaties with Prussia and the North German States, with Bavaria, with Baden, with

without his rights in this respect. He is entitled to be judged in his country, by laws familiar to himself, among his neighbors, where his character is known, and where witnesses to sustain it can be secured and an *alibi* proved. If it be said that by going to another land to commit a crime, he subjects himself voluntarily to the jurisdiction of such land, the answer is that this begs the question, for the question at issue is whether the defendant committed the crime at all. And it may be also argued that such extradition is peculiarly unjust when the prosecuting country, as is the case with those following the English common law, refuses, in criminal cases, to receive the testimony of any witnesses, except such as are at the trial capable of examination and cross-examination orally. What chance would a German, thus brought to trial in the United States, have of vindicating his character, or of proving an *alibi*, when the witnesses for this purpose would have to be carried across the ocean? How could the successive and sudden emergencies of a trial be in this way properly met? For these and other reasons we have arrayed against the principle of a state surrendering its own subjects to another state for trial the high authority of Vattel (i. § 232, ii. § 77), of Ortolan (No. 897), of Hélie (p. 668), of Mittermaier (Strafverfahren, § 55), of Berner (p. 184), of Bluntschli (supra, §§ 835 *et seq.*), of Heffter (p. 118), of Fœlix (ii. No. 324, p. 224, note), and it may also be said of Wheaton (Lawrence's Wheaton, p. 236, where Mr. Wheaton says that the non-delivery by a state of its own citizens is a rule "generally followed, and especially by constitutional governments.") It is true that the treaty of the United States with France makes no such express exception; and an imperial decree of December 23, 1811, authorized the extradition of French subjects at the discretion of the emperor. But it is stated by Bar (§ 151, note 3), that no use has ever been made of this prerogative; and that in recent French treaties clauses are introduced precluding such extradition. See Lawrence Com. sur Wheaton, iv. 413 *et seq.*

That there are difficulties in the way of the non-extradition by a state of its own subjects, cannot be denied. No government, for instance, however determined to subject any of its citizens to an impartial trial for an offence committed in a foreign land, can secure as full an attendance of witnesses as to the fact of crime as would be possible in the *locus delicti*. It is true that this is counterbalanced in part by what has been already stated, that it is at the defendant's home that testimony as to character, and also as to *alibi*, can generally be best obtained; and in part, also, by the fact that in the states which refuse such extradition, the practice is to permit, in criminal as well as in civil cases, rogatory letters to issue to take the testimony of absent witnesses. But however this may be, the present practice in the United States, in respect to these countries, is singularly unequal. If a German comes to us, commits a crime, and then returns to his own land, though we cannot demand his surrender, yet he may be punished, and restitution awarded, under proceedings from his own sovereign. But if an American goes to Germany, and there



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Norway and Sweden, with Mexico, with Austria, and with other states to be hereafter specified.[1] No such exception appears in the treaties with Great Britain, France, Hawaiian Islands, Italy, Switzerland, Nicaragua, Venezuela, Ecuador, Free States of Orange, and the Dominican Republic. The true rule is, that wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offence alleged to have been committed by such subject abroad, the extradition in such case should be refused; the asylum state having the right of trying its own subject by its own laws. When, however, it does not assume jurisdiction of extra-territorial crimes committed by its subjects, then extradition should be granted.

No surrender where asylum state has admiralty jurisdiction.

§ 842. But whatever we may think on the point just stated, we must hold that when the state in which the defendant has sought an asylum has, with the prosecuting state, admiralty jurisdiction of the offence, as where the offence was committed on the high seas, a surrender ought not to be made.[2] In the first place, by refusing to surrender, a needless circuity of process involving great cost is arrested. In the second place, a defendant's personal rights would be needlessly imperilled by his forcible removal to a foreign forum. And again, if a surrender could be made in one case of admiralty jurisdiction, it could be made in another;

is guilty of a crime against the territorial law, and returns to America, his offence goes unpunished. He cannot be punished by us, because our courts take no jurisdiction of offences committed abroad against foreign laws. He cannot be surrendered to Germany, because our treaties with Germany expressly prohibit such surrender.

[1] See last note in this chapter.

The Austrian government, in 1876, demanded of England the extradition of De Tourville, a naturalized Englishman, who was charged with having murdered his wife in the Austrian Tyrol. The defence claimed that by the third article of the extradition treaty between Great Britain and Austria, neither party was obliged to surrender its subjects. Mr. Vaughan, the magistrate before whom the hearing was had, ruled that the treaty left it discretionary with the British government to surrender or discharge, and that the point was one for the government to determine. See Solicitors' Journal, Dec. 9, 1876, Jour. du droit int. privé, 1876, p. 426. The surrender ultimately took place.

[2] This point was conceded in 1867 by Messrs. Twiss and Forsyth, the crown advisers, on a question of piracy. Lawrence sur Wheat. iv. 433.

Extradition for piracy was refused by the federal government in 1833. Lawrence Com. sur Wheaton, iv. 561; and the same position was reasserted in 1878. Ibid. 561.



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and if the rule be admitted at all, there would be few admiralty prosecutions that might not, at executive discretion, be removed to a foreign land under a foreign law. Even, therefore, should a surrender of a party in a case of admiralty jurisdiction be granted, a court under the English common law, on a writ of *habeas corpus*, would direct his discharge.[1]

Conflict of opinion as to whether a foreign state can claim a subject who has committed a crime in a third state.

§ 843. Difficulties, also, arise when the offence was committed by a subject of the demanding state in the territory of an independent foreign state. The only admissible interpretation, it has been argued, of the term "jurisdiction," is to treat it as convertible with country, so as to make it necessary for the offence, in order to sustain a requisition, to have been committed within the territory of the demanding state. Such is the view of Sir R. Phillimore,[2] and of the British law officers, when consulted in 1858 on the question whether the American government could be asked to surrender to England a British subject who had been guilty of homicide in France.[3] But for an offence against the demanding country the process should be granted.

[1] As sustaining this view, see R. *v.* Tirnan, 5 B. & S. 645; S. C., under name of "Tivnan," 12 W. R. 848. On the other hand, in Sheazle, in re, 1 Wood. & Min. 66, it was held that the extradition treaty with England required the surrender by the United States of a British subject who committed, on a British ship, on the high seas, piracy which was such by act of parliament, but not by the law of nations. Compare Bennett, in re, 11 Law T. R. 488.

Robbins's case, where the question incidentally arose, has been the subject of animated controversy. Phil. i. 460; Lawrence sur Wheat. iv. 401. Robbins was a citizen of the United States, who had been guilty of murder in an English ship on the high seas. It was objected to his delivery that the case was one of which the American courts had jurisdiction. By the direction of Judge Bee, he was surrendered to the British government, being the first surrender under the treaty of 1794. Whart. St. Trials, p. 392–457; Bee's R. 266. The surrender was justified by Mr. Marshall (afterwards chief justice) in the House of Representatives, in a speech which was pronounced by Mr. Gallatin, then a leader of the opposition, to be unanswerable. Adams's Gallatin, 231, 232. The objection to Robbins's surrender was put in part on the ground that he had been forcibly impressed into the English service. He was ultimately executed.

[2] It is stated by Sir R. Phillimore, that "the country demanding the criminal must be the country in which the crime is committed." 1 Phil. Int. Law, 413.

[3] Allsop's case, cited by Atty. Gen. Williams, 14 Opin. Atty. Gen. 281; 11 Blatch. 129; given more fully infra.

In 1873 the question arose in the



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§ 844. Where a treaty exists making certain offences the subject of extradition, this must be regarded as declaring that only such offences shall be the subject of extradi-

When there is a treaty ex-

United States on the following case: Joseph Stupp, alias Carl Vogt, a Prussian subject, was charged with having committed, in October, 1871, at Brussels, in Belgium, the crimes of murder and arson, and a demand for his arrest was made on the United States by Prussia. The proceedings were in the usual form, consisting of a complaint before a United States commissioner in New York, accompanied by the usual executive warrant, which was followed by a warrant of arrest by the commissioner, under which the accused was arrested on the 10th day of April, 1873, and brought before the commissioner. The counsel for the prisoner thereupon sued out writs of *habeas corpus* and *certiorari*, which were granted, and made returnable in the Circuit Court on the 16th day of April, 1873. The returns to these writs set forth the mandate, complaint, and warrant aforesaid, as the cause of arrest and detention, and thereby the sole question presented for the consideration of the court was, whether Prussia could demand the extradition of the prisoner for the alleged crimes committed out of the territory of Prussia, but punishable by its laws. The prisoner was remanded by Judge Blatchford to the custody of the marshal, after an opinion by that learned judge in which it was elaborately argued that the term "jurisdiction" in the treaty covers cases such as that before the court. Stupp, in re, 11 Blatch. 124. When, however, the question of issuing a warrant of surrender came before the secretary of state, he called upon Attorney General Williams for an opinion on the question as to whether the surrender could be lawfully made. The question was answered in the negative by the attorney general, on the ground that, so far as concerns the extradition treaties, "jurisdiction" by the demanding state cannot be held to exist over the territory of an independent civilized state. Restricting the opinion of the attorney general to this narrow statement, it may be accepted as a suitable rule for the guidance of the federal executive in the delicate question of determining to which of two foreign civilized states a fugitive, in case of conflict, is to be surrendered. But so far as concerns the meaning of the term "jurisdiction" the reasoning of Judge Blatchford is unanswerable. "Jurisdiction" cannot, in our international dealings with other states, be restricted to "territory," without abandonment, not only of our right to punish for offences on the high seas, and in barbarous lands, but of that authority over American citizens in foreign lands which we have uniformly claimed (see Whart. Crim. Law, 8th ed. §§ 273 *et seq.*), and which our imperial position as one of the leading powers of Christendom demands. Whart. Crim. Law, 8th ed. §§ 273 *et seq.* Supra, § 821.

From the opinion of Judge Blatchford we take the following: —

"Thomas Allsop, a British subject, was charged as an accessary before the facts to the murder of a Frenchman in Paris, in 1858, and escaped to the United States, and as he was punishable therefor by the laws of Great Britain, the question as to whether he could be demanded by Great Britain of the American government, under the extradition treaty of 1842, was



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tion between the countries in question, and that consequently extradition is not to be granted for other offences.[1] Thus in Vogt's case, which has been just discussed, the attorney general, after arguing that the case was not within the treaty with Prussia, properly held that if the claim was not within that treaty, it could not be based generally on the law of nations.[2]

tradition does not lie for a case not enumerated.

In France it has been held that the existence between two states of an extradition treaty does not preclude a surrender for other crimes than those specified in the treaty. The right of extradition, it is considered, is an incident of sovereignty. And every state, so it is ruled, is at liberty, irrespective of treaty, to exclude from its shores, or to surrender, an obnoxious person or criminal whom it may not desire to retain.[3] The prerogative of extradition has been repeatedly declared in France to be an attribute of sovereignty which can be exercised in cases not provided for by treaty.[4]

Whether there can be extradition under a treaty without legislation has been much discussed. That there can be was affirmed under the British treaty, before an act of Congress was passed prescribing the mode of procedure.[5]

submitted to Sir J. D. Harding, the queen's advocate, the attorney and solicitor general, Sir Fitzroy Kelly, since chief baron of the exchequer, and Sir Hugh Cairns, since lord chancellor, and they recorded their judgment as follows: 'We are of the opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British crown, within the meaning of the treaty of 1842, and that his extradition cannot properly be demanded of the United States under that treaty.' Forsyth's case, p. 268." 11 Blatch. 128. See, also, Opinion of Atty. Gen. Cushing, 8 Opin. Atty. Gen. 215.

[1] See Windsor's case, 34 L. J. M. C. 163; 13 W. R. 655; 12 L. T. N. S. 307; Counhaye, ex parte, L. R. 8 Q. B. 410.

[2] On this point the attorney general said: "Able writers have contended that there was a reciprocal obligation upon nations to surrender fugitives from justice; though now it seems to be generally agreed that this is altogether a matter of courtesy. But it is to be presumed where there are treaties upon the subject that fugitives are to be surrendered only in cases and upon the terms specified in such treaties." Vogt, in re. See Whart. Crim. Pl. & Pr. 8th ed. § 46, for the other questions arising in this case.

[3] Court of Cass. 1876; Jour. du droit int. privé, 1876, p. 180.

[4] Lawrence Com. sur Wheat. iv. 472 *et seq.*

[5] Robbins's case, Whart. St. Tr. 392; Bee's R. 266. Judge Marshall's approval of this rule has been already stated, supra, § 842. See *contra*, Spear on Extrad. 53.



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Nor where the defendant is in custody for another offence.

§ 845. Where the defendant is already in custody, or under recognizances for trial in the state on which the requisition is made, the requisition will be refused, at least until the defendant's discharge.[1]

Should be restricted to the particular offence charged.

§ 846. The proper object of extradition is to secure the presence of a fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to criminal prosecutions other than that specified in the demand. Provisions guaranteeing to the fugitive the right to leave the demanding country after his trial for the offence for which he is surrendered, in case of acquittal, or in case of conviction, after his endurance of the punishment, are incorporated in many treaties. When not, they should be made the subject of executive pledge. It is an abuse of this high process, and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offence for which extradition lies to be used to cover an offence for which extradition does not lie, or which it is not considered politic to invoke. At the same time this does not preclude a technical variation of the offence charged.[2]

[1] Whart. Crim. Pl. & Pr. § 33.

[2] See Bouvier, ex parte, 27 L. T. R. 844; 12 Cox C. C. 303. See supra, § 829.

It was decided in France, in 1876, that a person extradited on a charge of fraudulent bankruptcy cannot complain that he was tried for forging a negotiable instrument, if the penalty imposed on him does not exceed that which could be imposed for the offence on which he was extradited. Brandoly's case, Court of Cassation, 1876. Jour. du droit int. privé, 1877, p. 354. *A fortiori* he can be convicted of an attempt to commit the crime for which he was extradited. Ibid. 1878, p. 39.

The question noticed in the text has been the subject of much recent discussion. In Caldwell's case, 8 Blatch. 131, Benedict, J., denied "that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery, affords him any legal exemption from prosecution for other crimes by him committed." This view was accepted by the N. Y. Court of Appeals, in Adriance *v.* Lagrave, 59 N. Y. 110; S. P., U. S. *v.* Lawrence, 13 Blatch. 295.

In 1876, Lord Derby, in Winslow's case, refused to surrender unless the American government would stipulate not to try except for the offence specified in the demand. The United States government refused thus to stipulate, and the British government declined to surrender. In consequence of this difference of opinion extradition was suspended between the two countries, but was soon afterward resumed. See English Parliamentary



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The privilege, even when recognized, does not preclude the defendant's arrest on civil procedure.[1]

Papers, N. Am. No. 1, 1877; U. S. Ex. Doc. 44 Con. 2d Sess. No. 15; President's Mess. Dec. 27, 1876; Lawrence Com. sur Wheat. iv. 520.

In Lawrence's case, it should be observed, there was an abandonment, by the United States authorities, of the attempt to try for any offence except that specified in the demand. As holding that the prisoner may be detained for other offences, have been cited several Canada rulings. U. S. Foreign Relations, 1876, p. 235; Clarke on Extrad. 2d ed. 90–93. This is the case in inter-state extradition. Whart. Crim. Pl. & Pr. §§ 29–37.

Mr. Westlake discusses the same topic in an address before the Association for Social Science at Liverpool, in 1876; and Prof. von Bar, in an able argument (Revue du droit int. 1877, p. 5), holds that an extradited person should not be tried for an offence, prior to extradition, but not specified in the demand, unless the government of the asylum state consents.

In 1878, the English Commission on Extradition, including Cockburn, C. J., and Lord Selborne, C., reported (in opposition to the rule embodied in the act of parliament), that "If there be another accusation against him (the prisoner) in respect of a crime which would properly be the subject of extradition, we see no reason why he should not be called upon to answer it." See Comments by Mr. Lawrence, 19 Alb. L. J. 330.

It does not appear, however, that this report was acted on by parliament. See Lawrence Com. sur Wheaton, iv. 528.

The question is discussed at large by Mr. Lawrence, in 14 Alb. L. J. 96; 19 Alb. L. J. 329; Lawrence Com. sur Wheat. iv. 504 *et seq.*; holding that the defendant can be tried only for the offence recited in the requisition, and showing that the great preponderance of foreign authority is to the same effect. Such is the conclusion of Cairns, Lord Chancellor, on the Winslow case, as given in the Foreign Relations of the United States for 1876, pp. 286, 296. To the same effect is Spear on Extradition, c. i.; a learned article by Judge Lowell, in the American Law Rev. vol. x. 617; an opinion by the Court of Appeals of Kentucky; Com. *v.* Hawes, 13 Bush, 697; 14 Cox C. C. 135; and the argument of Professor Renault's Étude sur l'extradition, Paris, 1879. Compare Clarke on Extradition, 2d ed. 107, 108; Bouvier, in re, 27 L. T. N. S. 844; 42 L. J. Q. B. 17; 12 Cox, 303.

[1] In Pooley *v.* Whetham (Eng. Ct. App. 1880), 43 L. T. 272, an attachment was issued against a party to an action for his disobedience of an order of court. Being bankrupt and abroad, he was brought back to England under a warrant issued under the Extradition Act, 1870, in respect of an alleged offence under the Bankruptcy Act, 1869, and confined in jail pending inquiry into the charge before a magistrate. While he was so in custody, the attachment was lodged with the keeper of the prison. On the inquiry before the magistrate the extradition charge was dismissed as groundless. It was not proved that the extradition proceedings were a device to bring over the prisoner in order that he might be subjected to the attachment. It was ruled by the Court of Appeals that the prisoner was not entitled to be discharged from custody till he had purged his contempt by obeying the order.

"The real truth," said Brett, L.



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§ 847. In several treaties it is provided that *after* the requisition made on the President, he may issue a mandate of arrest, so that the fugitive may be subjected to a judicial examination.[1] But unless so provided by treaty or statute, the present practice is that an executive mandate is not to be regarded a condition precedent of a judicial examination.[2]

In our practice courts may hear case before mandate.

§ 848. *The complaint* should set forth the substantial and material features of the offence, though it need not aver personal knowledge on the part of the affiant.[3]

Complaint should be special.

§ 849. *The warrant of arrest may be returnable* before the judge issuing it, or before a commissioner previously designated under the act of Congress, by the Circuit Court, for that purpose.[4]

Warrant may be returnable to commissioner.

§ 850. It has been ruled in the United States, that documentary evidence from abroad "should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country."[5] The commissioner, it is also held, should keep a record of the oral evidence,

Evidence should be duly authenticated.

J., "is that the word 'offence' in the 19th section, means a criminal charge, whether a felony or a misdemeanor is immaterial, but an offence which would be triable in a criminal court. Therefore the 19th section does not apply to civil process, and the objections which were taken on that reading of the statute all fail." To the same effect see Adriance *v.* Lagrave, 59 N. Y. 110.

[1] See 6 Opin. Atty. Gen. 91; Henrich, in re, 5 Blatch. 425; Farez's case, 7 Blatch. 34.

[2] Thomas, in re, 12 Blatch. 370; Ross, ex parte, 2 Bond, 252; Calder's case, 6 Opin. Atty. Gen. 91; and see remarks of Lowell, J., in Kelley's case, 2 Lowell, 339; Spear on Extrad. 211. Cf. Macdonnell, in re, 11 Blatch. 79.

[3] Farez's case, 2 Abbott U. S. 346; 7 Blatch. 34. See Macdonnell, in re, 11 Blatch. 79.

[4] Kaine, in re, 14 Howard, 142; though see Farez's case, 2 Abbott U. S. 346; 7 Blatch. U. S. 34. See Macdonnell, in re, 11 Blatch. 79. As to duty of judge in issuing warrant, see Kelley, in re, 2 Low. 339; Dugan, in re, 2 Low. 367; Ross, ex parte, 2 Bond, 252.

[5] U. S. Rev. Stat. § 5271; Kaine, in re; Farez's case, *ut supra;* and 10 Opin. of Atty. Gen. 501. As to English practice, see Counhaye, ex parte, L. R. 8 Q. B. 410; Terraz's case, 14 Cox C. C. 161; L. R. 4 Ex. D. 63.



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with the objections made to it or to the documentary evidence, briefly stating the grounds of such objections. The party, also, seeking the extradition, should be required by the commissioner to furnish an accurate translation of every foreign document, said translation to be verified by affidavit.[1] Depositions, on a hearing for extradition, are to be allowed the same weight as if the witness were present at the hearing.[2]

Terms to be construed as in asylum state.

§ 851. A crime, when distinctively specified in a treaty, must be defined in the sense in which it is used in the asylum country. Thus it was held by the English Queen's Bench, in 1866, that the term fraudulent bankruptcy, in the French treaty, would be sustained by general evidence indicating what would be fraudulent bankruptcy in England.[3] And the same court ruled, in 1865, that "forgery," in the treaty with the United States, did not include embezzlement.[4] The defence is permitted to show that the case is not one included in the treaty.[5]

Evidence must show probable cause.

§ 852. Evidence of probable guilt must be adduced in order to justify a surrender.[6]

[1] Henrich, in re, 5 Blatch. 425.

[2] Farez's case, 7 Blatch. 491; 2 Abb. U. S. 346.

[3] Widermann's case, 12 Jurist N. S. 536; Clarke on Extrad. 87; Whart. Confl. of L. § 972. In Terraz, ex parte, L. R. 4 Ex. D. 63, 14 Cox C. C. 161, the rule as to bankruptcy offences is further discussed.

[4] Windsor's case, 34 L. J. M. C. 163; 13 W. R. 655. See, however, as to French practice, supra, § 844.

[5] Supra, § 844.

[6] As to the degree of evidence required, the law is well stated by Judge Blatchford as follows (2 Abbott U. S. 351; 7 Blatch. 481): "It was urged at the hearing, on the strength of an observation made by Mr. Justice Nelson, in the case of Ex parte Kaine, 3 Blatch. 1, 10, that the evidence must be so full as in his judgment, if he were sitting on the final trial of the case, to warrant a conviction of the prisoner. While I always hesitate to differ with Mr. Justice Nelson in opinion, I am not prepared to adopt this view. It seems to me to be in conflict with the decision in the case of Burr. In that case Chief Justice Marshall sat as a committing magistrate on the question as to whether Burr should be committed for trial for the crime of setting on foot an expedition against the territories of a nation at peace with the United States. The Chief Justice said (1 Burr's Trial, 11; Wh. Cr. Pl. & Pr. § 73): 'On an application of this kind, I certainly should not require the proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be



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Evidence may be heard from defence.

§ 853. In England and in the United States, the practice for the asylum state, through its proper tribunals, is to hear evidence for the defendant.[1] Where the

a case made out by proof, furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it.' The chief justice acted upon that view, and committed Colonel Burr for trial. The convention, in the present case, says that the commission of the crime must be so established as to justify the commitment of the accused for trial, if the crime had been committed here. The question before Chief Justice Marshall, in the case of Burr, was merely the question as to the extent to which the fact of the commission of the crime must be established. To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, work great injustice. The theory on which treaties for extradition are made is, that the place where a crime was committed is the proper place to try the person charged with having committed it; and nothing is required to warrant extradition except that sufficient evidence of the fact of the commission of the crime shall be produced to justify a commitment for trial for the crime. In acting under section 33 of the Judiciary Act of 1789, in regard to offences against the United States, a committing magistrate acts on the principle that, in substance, after an examination into the matter, *and proper opportunity for the giving of testimony on both sides*, there is reasonable ground to hold the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offence was committed, the country where the witnesses on both sides are presumptively to be found, but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties." See, also, same case before Judge Woodruff, 7 Blatch. 491; where the requisite evidence is spoken of as *primâ facie;* and see Wh. Cr. Pl. & Pr. § 71.

In Mexico it has been held that a fugitive from the United States will not be surrendered unless the requisition contains in itself proof of the alleged crime. This is based on the first article of the treaty of 1862, which provides that extradition is not to be granted unless the fact of the crime is proved in the way crimes are proved in the state of refuge. Jour. du droit int. privé, 1876, p. 224.

Christiana Cochran, a Scotchwoman, charged with the murder of her husband, was the first person arrested under the Ashburton treaty, which contains the provision that the object of the arrest by a magistrate is that "the evidence of criminality may be heard and considered; and if on such hearing the evidence be deemed sufficient to sustain the charge," the examining judge is to certify the same to the executive. In this case the counsel for the fugitive asked to be allowed to show her insanity. This was refused, and she was remanded. 4 Opinions of Atty. Gen. 202. See St. Albans Raid, Pamph. 229; Fœlix, ii. 357 n.; Clarke on Extrad. 38. In the

[1] See cases in § 852.



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local laws allow it, he is entitled to be personally examined.[1] And the better opinion would seem to be that where, on the whole case, there is probable cause that the defendant was guilty of an offence under the provisions of a treaty, he should be surrendered.[2] Such appears to be the rule in England under the Extradition Act of 1870.[3]

§ 854. In our own practice, the federal Circuit Court has power to review the decision of the commissioner on questions of law, but not of fact;[4] and the court will not reverse the commissioner's action upon technical

Circuit Court has power of review.

case of Franz Müller, subsequently demanded from the United States by the British government on the charge of murder, the commissioner in New York refused to receive evidence of an *alibi* offered by the defendant's counsel. The commissioner ruled that the only question before him was whether there was probable cause in the evidence of the prosecution. Clarke on Extrad. 46. This decision is declared by Mr. Clarke to be "without doubt as to its propriety." Ibid. 104.

On the other hand, in two cases in Canada, in 1865, it was ruled to be not only the part of the magistrate hearing the case to determine whether the facts constitute a crime in his jurisdiction, but that he can hear exculpatory evidence for the defence. Clarke on Extrad. 59.

But where the evidence shows that on the prosecution's case there could be no legal conviction in the country on which the demand is made, there the usual English practice is to discharge. Lord Campbell, as an illustration of this, mentioned in the House of Lords (60 Hansard, 326; Clarke on Extrad. 53) the case of a fugitive slave, who had been demanded by New York from Canada on the ground that he had ridden off on his master's horse, which, however, he had turned loose on reaching the frontier. The Canadian authorities consulted the attorney general, who advised that the defendant should not be given up, as the case lacked the *animus furandi*, without which there could be no larceny. Anderson's case (10 Can. C. P. 60; 30 L. J. Q. B. 127; 9 W. R. 225; 71 Hansard, 56; Papers of the Jurid. Soc. ii. 452; Clarke on Extrad. 56) may be cited on the same point. Anderson, a fugitive slave, killed in Missouri a person seeking to arrest him, and fled to Canada, from whence he was demanded by the then secretary of state, Mr. Cass. A *habeas corpus* was sued out before the Canadian Queen's Bench, a majority of the court holding that the killing of a person legally seeking to arrest would be murder in England, and that this was the case before the court. A *habeas corpus* was then sued out before the English Queen's Bench, but before it was returned Anderson was discharged, on technical grounds, by the Canadian Common Pleas.

[1] Farez's case, 2 Abb. U. S. 346.

[2] Dugan, in re, 2 Low. 367. The accused is not entitled, under the treaty with England, to be confronted with the adverse witnesses. Ibid.

[3] 1 Phil. Int. Law, ed. 1871, App. ix.; 39 Law Jour. 1870, N. S. pt. 3, Stat. 786.

[4] Kaine's case, 3 Blatch. 1; Henrich's case, 5 Blatchf. C. C. 414;



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grounds or matters of form; and only for substantial error in law, or for such manifest error in procedure as would warrant a court of appeals in reversing.[1] As was subsequently ruled, it is not enough to charge a conclusion at law, *e. g.* "forgery." The time and place and nature of the crime, and its subject matter, should be set out.[2] Nor will the court discharge absolutely on account of an error of the commissioner in admission or rejection of evidence.[3] The practice is, in such case, simply to discharge from the first commitment, leaving the examination to proceed anew.[4]

No *habeas corpus* lies in such case to the Supreme Court of the United States.[5]

Surrender at discretion of executive.

§ 855. Under the statutes of the United States, after the final commitment by the commissioner, and the remanding, in case of a *habeas corpus* before the Circuit Court, of the prisoner to the custody of the marshal, the final warrant of the executive must be obtained before the prisoner is surrendered to the custody of the demanding state. This warrant the executive may refuse to issue, on grounds of law as well as of policy.[6] Such was the course taken by the President in

overruled Veremaitre's case, 9 N. Y. Leg. Obs. 137, where Judge Judson held that he had no power to revise the judgment of the commissioner on questions of fact; Heilbronn's case, 12 N. Y. Leg. Obs. 65; and Van Aernam's case, 3 Blatch. C. C. 160, where the same view was expressed by Judge Betts.

On the other hand, in Stupp's case, 12 Blatch. 501, Judge Blatchford held that there could be no reviewal on the *effect* of the evidence when legally admitted. This is affirmed in Vandervelpen's case, 14 Blatch. 137. In Wiegand's case, 14 Blatch. 370, Blatchford, J., said: "In a case of extradition before a commissioner, when he has before him documentary evidence from abroad, properly authenticated under the act of Congress, and such is made evidence by such act, it is the judicial duty of the commissioner to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon is imposed on any judicial officer. This province of the commissioner extended to a determination as to whether the embezzlement was a continuing embezzlement."

[1] Henrich, in re, 5 Blatch. C. C. 425.

[2] Farez's case, 7 Blatch. U. S. 35.

[3] Macdonnell, in re, 11 Blatch. 79.

[4] Farez's case, *ut supra*.

[5] Kaine, ex parte, 14 How. 103; 1 Robins. Pr. 430; Macdonnell, in re, 11 Blatch. 79; citing In re Veremaitre, 9 N. Y. Leg. Obs. 129; In re Kaine, 10 Ibid. 257; In re Heilbronn, 12 Ibid. 65; Ex parte Van Aernam, 3 Blatch. C. C. R. 160; Kaine, in re, Henrich, in re, Farez, in re, *ut supra*.

[6] Stupp, in re, 12 Blatch. 501; 14 Opin. Atty. Gen. 281.



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1873, in Vogt's case.[1] In England, the surrender, after remander on *habeas corpus*, may be made without such final executive warrant.[2]

[1] Supra, § 843.

[2] The following statement of the English practice is taken from the London Times of Feb. 17, 1873:—

"In the case of a Belgian accused of crime, whose surrender is demanded from this country, the procedure is as follows: The Belgian minister, or diplomatic agent, presents to our principal secretary of state for foreign affairs a requisition for the surrender, accompanied by the proofs deemed necessary in Belgium to establish the fugitive's guilt, or, at least, sufficient presumption of his guilt to justify his arrest. This requisition the foreign secretary is bound to transmit to the home secretary. He has no discretionary power in the matter. It does not appear to us quite clear whether the home secretary is then bound to put the affair into the hands of a police magistrate, or whether he may exercise his own discretion as to the necessity for such a course. The treaty states that the home secretary 'shall then signify to some police magistrate in London that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive.' If it be here meant, in accordance with the strictly grammatical construction, that the home secretary may decide whether 'there be due cause,' why should he have been already ordered unconditionally to make a 'signification' to the magistrate, which would be utterly superfluous and useless whenever he decided there was no due cause? But if the clause, 'if there be due cause,' refer to the issuing of a warrant by the magistrate, then it is worthy of remark, that upon a simple police magistrate, with no other proviso than that he be a London magistrate, is in the first instance thrown the responsibility of deciding whether a foreign fugitive ought to be given up, — a responsibility which, in cases easily imaginable, might become exceedingly grave. In any case, it rests ultimately with the magistrate to determine whether the documents presented to him justify his issuing a warrant for the fugitive's arrest; and again, when the fugitive is brought before him, he determines whether the evidence is such as would justify commitment for trial according to English law, if the alleged crime had been perpetrated in England. In case of commitment, the fugitive is sent to prison, and, after a certain period, not to be less than fifteen days, is surrendered on an order from the secretary of state to any duly authorized person the Belgian government may appoint, unless the prisoner meantime choose to apply for a writ of *habeas corpus*, in which case 'his surrender must be deferred until after the decision of the court upon the return of the writ.' If the decision is in his favor, he cannot be surrendered; but if it is against him, he 'may be surrendered immediately, without any order from the secretary of state.' In the case of a fugitive convicted, the procedure is the same, *mutatis mutandis*, as in the case of a fugitive accused. The procedure is naturally very much the same in the case of an English fugitive whose surrender is demanded from Belgium. The only important point of difference, perhaps, is, that after the fugitive has been arrested, tried, and com-



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§ 856. The surrendering state, it is generally held, may require that the person surrendered shall be prosecuted only for an ordinary crime, and not for one that is political, or that no death penalty be inflicted. And as we have seen, the condition may be imposed that the prosecution consequent on the extradition shall be only for the offence specified in the demand, and that if there be an acquittal on this offence the defendant shall be returned.[1] The state receiving a person on such conditions is bound to comply with them.[2] This limitation, however, the United States government, as we have seen, has declined to accept.[3]

Extradition may be conditional.

§ 857. It remains to urge the importance of construing extradition treaties on fixed principles of construction, so that each special case that arises should not be affected by the caprice of the officials concerned, or by feelings of national pride. The question is one of law. A committing magistrate would not be justified in refusing to issue a warrant for the arrest and committal of an alleged offender on grounds of mere private policy. And extradition, when divested of its political incidents, and limited to municipal crimes, is a matter of police.[4] As has been justly said by Sir G. C. Lewis,[5] the increased facilities of travel, rendering the escape, especially of powerful criminals, so easy, make the exercise, in all proper cases, of this prerogative, one of the necessities of an advanced civilization. The crimes, in fact, which such a civilization distinctively engenders, are those which extradition alone can effectively suppress. Robberies and homicides in most cases produce an immediate hue and cry which render a local arrest comparatively easy; nor is there generally in such cases such possession of wealth or power on the part of the offender as enables him to conceal his flight. But frauds, forgeries, and em-

Treaties to be construed on fixed principles.

mitted, the minister of justice decides in the last resort, from the judicial documents submitted to him, whether the prisoner should be given up." See Terraz's case, 14 Cox C. C. 161.

[1] Supra, § 846.

[2] Bluntschli, *ut supra*. See, also, Abdy's Kent (London, 1866), p. 125; Massé, ii. § 44; Earl Russell to Mr. Adams, June 12, 1862; English Official Papers (N. Am.), No. 4, p. 164; Halleck, § 28, and also Sir R. Phillimore's chapter in his Int. Law, i. p. 407. Cf. Lawrence Com. sur Wheat. iv. p. 504 *et seq.*

[3] Supra, § 846.

[4] Lawrence Com. sur Wheat. p. 363, *et seq.*

[5] Lewis on For. Jur. 35.



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bezzlements may be covered up for years; and discovery may not follow until the perpetrator has placed himself with his booty in a foreign land. Under these circumstances extradition may be the only means by which dishonesty on the part of those charged with great pecuniary trusts can be punished, and the wrongs of those injured redressed.[1]

[1] See fully on this topic, Bar, 149; and Lawrence sur Wheat. iv. 366 *et seq.* Lord Brougham said in the House of Lords, on the 14th of February, 1842: "He thought the interests of justice required, and the rights of good neighborhood required, that in two countries bordering upon one another, as the United States and Canada, and even that in England, and in the European countries of France, Holland, and Belgium, there ought to be laws on both sides giving power, under due regulations and safeguards, to each government to secure persons who have committed offences in the territory of one and have taken refuge in the territory of the other. He could hardly imagine how nations could maintain the relationship which ought to exist between one civilized country and another without some such power."

Lord Campbell, upon the same occasion, said: "For his own part, he would like to see some general law enacted, and held binding on all states, that each should surrender to the demands of the others all persons charged with serious offences except political; this, however, he feared, was a rule or law which it would be difficult to get all nations to concur in."

The report of the English Commission of 1878, with the accompanying observations as found in the Foreign Relations U. S. for 1878, p. 268, deserve careful consideration in this relation.

By Mr. Lawrence (Com. sur Wheat. iv.), the extradition treaties executed by the United States are classified as follows: —

*Those excepting the Subjects of the other Contracting Power.*

1. With Prussia, June 16, 1852, extended to the Confederation of the North by the Convention of Feb. 22, 1868 (Treat. U. S. 1873, p. 730).
2. With Bavaria, Sept. 12, 1853 (Ibid. p. 55).
3. With Hanover, Jan. 18, 1855 (Ibid. p. 457).
4. With the Two Sicilies, Oct. 1, 1855 (Ibid. p. 48).
5. With Austria, July 3, 1856, Sept. 20, 1870 (Ibid. p. 45).
6. With Baden, Jan. 30, 1857 (Ibid. p. 48).
7. With Sweden and Norway, March 21, 1860 (Ibid. p. 822).
8. With Mexico, Dec. 11, 1861 (Ibid. p. 580).
9. With Salvador, May 23, 1870 (Treaties, 1874, p. 10).
10. With Peru, Sept. 12, 1870 (Ibid. p. 36).
11. With Belgium, March 19, 1874 (Ibid. p. 122).
12. With Turkey, Aug. 11, 1874 (Treaties, 1875, p. 16); U. S. Stat. at Large, vol. 19, p. 572.
13. With Spain, June 5, 1876 (Treaties 1876–7, p. 94); U. S. Stat. at Large, vol. ii. p. 650.

To this is to be added that with



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Hayti, Nov. 3, 1864 (Treat. &c. 1873, p. 420.

*Those containing no such Exception.*

1. With Great Britain, Nov. 19, 1794, and Aug. 9, 1842 (Treat. U. S. p. 332).
2. With France, Nov. 9, 1843 (Ibid. p. 374).
3. With Hawaii, Dec. 20, 1849 (Ibid. p. 472).
4. With Switzerland, Nov. 25, 1850 (Ibid. p. 832).
5. With Venezuela, Aug. 27, 1860 (Ibid. p. 894.)
6. With the Dominican Republic, Feb. 8, 1867 (Ibid. p. 226).
7. With Italy, March 23, 1868 (Ibid. p. 503).
8. With Nicaragua, June 25, 1870 (Ibid. p. 636).
9. With the Free States of Orange, Dec. 22, 1871 (Treaties, &c. 1874, p. 67).
10. With Ecuador, June 28, 1872 (Ibid. p. 73).

The treaty with France, Mr. Lawrence goes on to state, is the first executed in the United States which explicitly excepts extradition for crimes committed anterior to its date, and political crimes. The treaties with Switzerland, with the two Sicilies, with Austria, with Hayti, with the Dominican Republic, with Peru, with the Free State of Orange, with Belgium, and with Spain, contain the same restriction, except that Belgium excludes from the exception murder and arson. The treaty with Spain provides that "no person shall be tried for any crime or offence other than that for which he was surrendered, unless such crime shall have been enumerated in art. ii. of the treaty." The treaties with Baden, with Sweden, with Italy, with Nicaragua, with San Salvador, and with Ecuador, contain no exception in favor of political offences. The treaties with Nicaragua, with San Salvador, with Ecuador, with Belgium, provide that the person delivered is not to be tried for an offence committed prior to that for which he is extradited.

Fraudulent bankruptcy (Lawrence, *ut supra*) is not included in any treaty executed by the United States, except that with Peru.

In addition to the treaties above mentioned, treaties were adopted by the United States with Bremen (1853), with Oldenberg (1853), and with Frankfort (1852).



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