

## REFORM OF THE LAW OF DOMICILE

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From time to time the problems arising from the concepts collected under the name of 'domicile' receive consideration by judges and by contributors to law journals. There is considerable justification for the plentiful supply of commentary, however, in the developments which have taken place in recent years in the thinking of a variety of legal systems and the legislation, conventions, memoranda and case law which they have produced. It may be convenient to begin this survey of current problems by referring to the discussions in England, since these have centred around specific problems which are nevertheless of common concern. Much has been written in recent years about the possibility of reforming the English concept, but it will be appropriate to begin from the events of 1958, and in particular the Domicile Bill introduced into the House of Lords in June of that year by Lord Meston. The Bill followed the Report, issued in January, 1954, of the Private International Law Committee (The Wynn-Parry Committee).<sup>1</sup> The particular purpose of the Bill was to enable Great Britain to adhere to the Hague Convention of 1951 on the conflicts between the law of nationality and the law of domicile as the applicable law. It has frequently been suggested that it was as the result of the lobbying for the Bill by certain American business men and others, who complained of possible double death duties and increased taxation, that the Bill made no progress. Dr. Cheshire has remarked, however, that as far as death duties were concerned, an Englishman in the United States was already in exactly the same position as the United States business man feared they would occupy in England.<sup>2</sup>

In order to understand the cases which lie behind the Bill, and whose effect was to have been perpetuated by an amended Bill later introduced, it is first of all necessary to examine briefly the way in which the concept of domicile is regarded in English law. Occasion will be found later to consider some apparent changes in the concept in recent Canadian case law. The first important thing to be said about the idea of domicile is that it

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1. Cmnd. 9068, reprinted 1958.

2. Some indication of the strength of Dr. Cheshire's feelings may be gathered from a letter he wrote to the *Times* on February 27th, 1959, in which he spoke with force of the representations made as "something that must surely be unique in the history of English legislation." But a month later the *Times* carried a letter from Dr. Schmitthoff drawing attention sympathetically to the circumstances of expatriate employees who might be held to be domiciled in the country to which they were posted. Dr. Schmitthoff did not regard the provision in the draft Bill affording the opportunity to such employees of disproving the presumption as being a sufficient safeguard against possible injustice. But, as he adds, in introducing the second and amended Bill the Government went to the opposite extreme and declined the chance to put right what was (and is) clearly wrong in the existing law.

is the applicable law in matters of personal status, and takes the place occupied by nationality on the Continent in this respect. Here, however, there is a difficulty, for whereas the standard texts attach the concept of domicile to that of status, it is by no means entirely clear that all matters referred to the *lex domicilii* in common law countries are readily assimilable to the heading of 'status' — a heading which is not defined in precisely the same way by all conflicts lawyers. Furthermore, the Continental systems make use of a concept of 'domicile', which for them means 'habitual residence' in the English sense of that phrase, and use it for quite different purposes from those traditionally associated with the English usage of domicile. Nevertheless, in the light of the extent to which domicile governs in English law it is to be regretted that there should be so many anomalies in the law surrounding it. The situation is further burdened with the continued effect of *Bell v. Kennedy*,<sup>3</sup> which requires that a domicile of choice shall exhibit the two characteristics of physical presence and the intention to remain permanently. These formal constituents, the wisdom of which has been queried in relation to the needs of the present world situation, are far from the simple concept of domicile implied in Wolff's "centre of gravity" or Holmes' "the one technically pre-eminent headquarters". Nevertheless, in *Bell v. Kennedy* itself some relaxation of the requirement of two components to domicile is seen:

"It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."<sup>4</sup>

Both presence and intention call in these days for some re-examination, and this has been given to both in the Canadian cases of *Schwebel v. Ungar*<sup>5</sup> and *Osvath-Latkoczy v. Osvath-Latkoczy*.<sup>6</sup> In both cases, the political climate in occupied Hungary was a potent factor, and the relation between intention in the technical sense and realistic anticipation of what the future would hold on the other hand assumed prominence. In *Schwebel v. Ungar*, it was stated that:

"there may be circumstances which so clearly indicate the existence of an intention to remain permanently in the new country so that the mere fact of arrival there is enough to establish a new domicile"<sup>5</sup>

and this appears to be good law for modern times. Already in 1858, in *Hodgson v. De Beauchesne*,<sup>7</sup> such a principle had been

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3. (1868), L.R. 1 Sc. & Div. 307, H.L.

4. At page 319, per Lord Chelmsford.

5. (1965) 48 D.L.R. (2nd) 644.

6. (1959) S.C.R. 751.

7. (1858), 12 Moo.P.C. 285.

recognized where the *propositus* had wound up his affairs and emigrated. But the need for such a principle in a wider context is now clear, and the context in which it was enunciated in *Schwebel* is one in which the need is especially evident. For the problem considered in that case related to the validity of an Ontario marriage, following the divorce by Jewish procedure, in Italy, of two persons domiciled in Hungary. They later acquired a domicile of choice (so it was held) in Israel, where the divorce was recognized, though recognition would not be given in either Italy or Hungary. The case is therefore some indication also of the extension which current circumstances may bring about to the principle of *Armitage* with reference to the recognition of foreign decrees of divorce.

The *Osvath-Latkoczy* case is also concerned with the situation in Hungary, and its refugee camp context is reminiscent of the English *Taczanowska*<sup>8</sup> case. In *Osvath-Latkoczy*, the trial judge ignored further answers to counsel's questions, making his judgment as to domicile rest upon the answer "Yes" to the question, "Would you go back to Hungary, if the Russians were out of Hungary?" But the Supreme Court would not treat the matter as closed by this reply, and referred to the subsequent questioning. Counsel elicited the reply that the witness saw no hope of a change in conditions such as would permit him to return. The Court therefore underlined a passage in *Lord v. Colvin*<sup>9</sup> which Dr. Cheshire cites with approval but which, as he adds, has been obscured by later decisions:

"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

What is important, however, about *Osvath-Latkoczy* is the life which it imparts to those closing words, now rendered more meaningful by the actual circumstances of a new case.

The development of the English concept of domicile owes much to the decisions in two cases, the earlier of which was decided in 1904 and the later in 1930.

In *Winans v. Attorney-General* (1904),<sup>10</sup> the facts were that Mr. Winans, born in the United States and continuously engaged in business there until 1850, worked for some time in Russia where he married a British subject. In 1859 he was advised to

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8. *Taczanowska v. Taczanowska*, (1957) p. 301.

9. (1859), 4 *Drew.* 366.

10. A.C. 287.

winter in England on account of his health and from 1860 to 1870 it was his practice to spend four months of the winter in England, at Brighton, and the remainder of the year in Russia. From 1870 to 1883, he divided his time between England, Scotland and Germany as his places of residence until 1893, when he fixed his abode in England, where he remained until he died in 1897. On the question whether Winans had retained his domicile of origin or acquired a domicile of choice it was concluded that he had not lost his domicile of origin in America. In this connection, Lord McNaghten said, "On the whole, I am unable to come to the conclusion that Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England."

To this somewhat unfortunate and inconvenient approach must be added the case of *Ramsay v. Liverpool Royal Infirmary* (1930),<sup>11</sup> though it should be added immediately that Lord Denning has treated both these cases as having been justifiably decided in the manner in which they were, considering the facts of the particular case situations. In the later case, the facts were that George Bowie, born in Glasgow in 1845, moved to Liverpool in 1892 and lived there dependent upon his brother, who died in 1913. At that date, Bowie actually moved into his brother's house and remained there until he himself died in 1927. Bowie had expressed the intention of remaining in England and had said that he had no wish to set foot in Glasgow again; furthermore, he had arranged for his burial in Liverpool. But in spite of these facts the House of Lords unanimously decided that Bowie had retained his domicile in Scotland and had not acquired a domicile of choice in England.

These two cases certainly evince what is positively stated in the *Winans* case in the form that intention to acquire a new domicile is not to be inferred from "an attitude of indifference or a disinclination to move increasing with increasing years."

Dr. Cheshire has criticised the *Winans* rule on three grounds: namely, that it is in the first place peculiar to the British Commonwealth and therefore disastrously insular in its nature and effect; secondly, that in particular it is contrary to the Continental view, without demonstrating any superiority, and that at a time when differences across that particular axis are especially undesirable. The third criticism is that it places the emphasis unduly upon subjective intention.

With regard to the first of these criticisms, it should be remarked that in the Report already referred to, which must now

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11. A.C. 588.

be read alongside a further Report to be considered presently, the desirability of adopting the Continental view of domicile is efficiently discussed. The Committee said,

"We have considered whether domicile should mean no more than habitual residence, so that the Courts when ascertaining a person's domicile would no longer have to take account of his intention to reside permanently in any given place. We do not think that this is desirable and it would in our view have consequences quite unacceptable to public opinion."<sup>12</sup>

The Continental view of domicile as being the place of habitual residence is however paralleled in the English *Wills Act*, 1963.

In the Canadian and American case law, until recent years, the principal emphasis has been on questions related to the acquisition of a separate domicile by a person having a domicile of dependence upon someone else. Thus, for example, there has been considerable discussion of the separated wife's domicile. Legislation giving a right of petition to a deserted wife despite her not being domiciled does not, in Canada or in England, as it does in Australia and New Zealand, give also a right to a separate domicile.

#### *Main Features of the Problem*

The principal characteristics of the present situation and the problems which it raises may usefully be summarised at this stage. In the first place, the kind of provision contemplated by the first of the English Bills referred to above creates quite unnecessary hardship by providing that domicile shall be determined by the criterion of "having his home and intending to reside permanently" and then going on to add that "A person who has his home in a country is presumed to intend to live permanently in that country".<sup>13</sup> When the second Bill was introduced, submitting (it is suggested) quite rightly to American representations (see Dr. Schmitthoff's observations detailed in footnote 2 above), the idea of reforming the unsatisfactory domicile law was abandoned and a reaction was immediately provoked from leading lawyers on the Continent, who saw this as a threat to negotiations on the 1951 Convention in particular, and generally prejudicial to understanding and co-operation.<sup>14</sup>

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12. Para. 7.

13. Clauses 3 and 4, Domicile Bill, 1958.

14. Van Hoogstraten and Offerhaus wrote to the *Times* on March 28th, 1959, speaking of domicile as "the cornerstone of English private international law". They saw the problem particularly from the point of view of possible unification of United Kingdom and Continental views, and asked if this possibility should be sacrificed for the sake of avoiding inconveniences and difficulties occasioned in one particular aspect. "Could not (this problem)" they asked, "be solved by inserting an express supplementary provision in the Act?" Their closing remarks underlines a theme repeated in this article: "It would be a sad day when the *Winans* and *Ramsay v. Liverpool Royal Infirmary* cases were called to stay for ever in the way of European unification in legal matters."

The extent to which the English view of domicile is significant may be gathered from the fact that according to the present law a person must have a domicile, and he may not have two domiciles simultaneously.<sup>15</sup> Furthermore, this conception alone obtains in all English proceedings. But above all the presumption in favour of the existing domicile operates restrictively. In fact the Private International Law Committee's First Report itself says,

"The present law suffers from two serious defects . . . . These are (1) the excessive importance attached to the domicile of origin and (2) the difficulties involved in proof of intention to change a domicile."

The particular reference here is to the case of *Udny v. Udny*,<sup>16</sup> we shall return to this problem briefly later.

As Professor Kahn-Freund has shown particularly well in *The Growth of Internationalism in English Private International Law*, *Travers v. Holley*<sup>17</sup> is an enlightened case in more than one respect; but in their First Report the Committee quoted Jenkins L. J., in that case, saying:

"Change of domicile, particularly when the change is from the domicile of origin to a domicile of choice (as distinct from a change from one domicile of choice to another) has always been regarded as a serious step which is only to be imputed to a person upon clear and unequivocal evidence."<sup>18</sup>

In the draft Code on Domicile, prepared by the Canadian Commission on Uniformity of Legislation in Canada in 1961, but not yet adopted, the ideas of a single domicile and a domicile for every person are again set out, though the reference to a "principal home" contributes something to the attempt at a clear and useful definition. The attempt is made, also, to secure that a domicile continues to operate until a new domicile is acquired, a provision which has not been implemented in England, though it appears in the Code of the Law of Domicile contained in the First Report above referred to.

Another characteristic of the English view which calls for comment is its particular peculiarity in respect of married women, who take and retain the domicile of their husbands. The first of the two proposed Bills would have given limited capacity to a married woman to acquire her own domicile, and the second Bill provided that "a person of or over the age of sixteen acquires a domicile in a country by residing in that country with the settled intention of making it his permanent home."<sup>19</sup> With regard to a married woman separated from her husband, the Private Inter-

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15. *Udny v. Udny*: see note (16).

16. (1869) L.R. 1 Sc. & Div. 441, H.L.

17. (1953) P. 246.

18. (1953) P. 246, at p. 252.

19. s.3.

national Law Committee itself, in drawing up the Code referred to above, included a provision to the effect that a married woman who has been separated from her husband by an order of a court of competent jurisdiction should be treated as a single woman.<sup>20</sup> This would have brought the law into line with the American Restatement:

"If a wife lives apart from her husband without being guilty of desertion according to the law of the state which was their domicile at the time of separation, she can have a separate domicile."<sup>21</sup>

A number of writers associated with systems of private international law other than English have commented on the peculiarities of the English position. Thus the present editor of Rabel's comparative study seeks to overcome some of the problems presented by suggesting that the domicile of origin in England corresponds to the Continental idea of domicile,<sup>22</sup> but it is suggested that this represents a failure to understand the English concept properly. Elsewhere, he makes uncomplimentary reference to "the prevalence of tendentious casuistry"; but in rather different vein Wolff patiently lists six particular problems to which the English approach gives rise.

As has already been said, Canadian and American courts have discussed very fully the problem of the separated wife's domicile. American states have largely done away with the domicile of dependence where a woman and her husband are living apart.

The further Report issued by the English Private International Law Committee, referred to above, which is technically its Seventh Report, adds little to the situation. There is some capitulation on the question of a wife's acquiring a separate domicile for limited purposes, but again (as in the First Report) the Committee says that there is difficulty in this situation. It can indeed be shown from jurisdictions other than the English that problems can arise where the unity of domicile of husband and wife is given up; obvious examples are the remaining differences between States in the American context, the recognition of divorces in the light of the Full Faith and Credit Clause, and *Williams v. North Carolina*.<sup>23</sup>

#### *Displacement of Domicile*

It is, then, in respect of the difficulty of displacing a domicile (as in *Udny v. Udny*) that most of the problems in English law

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20. Art. 3 of Appendix A of First Report.

21. 1958 Re-draft, para. 28.

22. *Conflict of Laws: A Comparative Study* (University of Michigan, 1958). Compare Norman Bentwich, *Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (1911) at p. 12.

23. (1942) 317 U.S. 237 and (1945) 325 U.S. 226.

arise. Similar difficulties are encountered throughout the common law jurisdictions. Since it has been held that the termination of a domicile of origin requires the cessation of both its characteristics, Dr. Cheshire has observed that it is "difficult to conceive any situation where a domicile of origin is shaken off."<sup>24</sup> The Wynn-Parry Committee and both the Bills proposed would have rectified the law in relation to the acquisition of a new domicile of choice, and would have prevented the re-emergence between one and the next of the irrelevant domicile of origin, hence creating a closer and better correspondence to the American law in the Restatement Redraft.<sup>25</sup> Furthermore, as we have already seen, opportunity would have been taken to bring to an end the subjection of a married woman's domicile to that of her husband, described by Lord Denning in *Gray v. Formosa*<sup>26</sup> as "the last barbaric relic of a wife's servitude."<sup>27</sup>

#### Conclusion

In the absence of more extensive reform of the law of domicile in the common law countries, the inconsistencies and anomalies of the present law remain. Thus, the application of the principles as currently carried out can lead to the situation where one court holds that a person is domiciled in a country other than that in which the court sits, whereas the courts of the country of the alleged domicile would come to a different conclusion. There was even some vacillation in earlier cases as to the law by which a person's domicile should be determined. The problem here is not entirely straightforward, and attention has been drawn to the difficulties if domicile is being determined for purposes of *renvoi*.

A further big problem which arises is that of the law governing a person's capacity to acquire a domicile. The matter was discussed in *Robinson-Scott v. Robinson-Scott*,<sup>28</sup> but the Committee Report has, regrettably, nothing to say on the matter. The American Restatement settles for the *lex fori*<sup>29</sup> in answer to this question.

The overall problems arising from the present situation might without too much over-simplification be set out in the form of three antitheses. The first of these is the difference between insularity on the one hand and integration on the other, and a good deal of attention has been directed to this in view of the primary

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24. See discussion of domicile in *Private International Law*.

25. Para. 23.

26. (1963) P. 259, but Cheshire argues its reasonableness, and refers to the attitude adopted by the Royal Commission on Marriage and Divorce Report.

27. *Id.* at p. 267.

28. (1958) P. 71.

29. Para. 10.

purpose of the Code of Domicile proposed by the Committee. But again an antithesis may be drawn between the subjective and objective views, as so often in matters arising in private international law. As Dr. Cheshire has pointed out, the English view of domicile places undue emphasis on matters of a subjective nature. The same might be said of the determination of the intention of the parties as to the law which is to apply to a contract entered into by them but in respect of which they have not indicated the governing law,<sup>30</sup> though here recent English (but not Canadian) decisions have moved into the objective camp.<sup>31</sup>

The third antithesis, and the one which perhaps should be given most attention, is that between a doctrinaire and a practical view of the law of domicile. It is unfortunate that whereas in the law of international trade, and now in some other areas also, we have recognised the need to revise our thinking after taking into account the different attitudes of those countries with which we have a good deal to do, in the law of domicile the same attitude has not prevailed. It is to be hoped that in England and elsewhere in the common law jurisdictions something will be done about a problem which has too long been left alone, despite the opportunities which earlier consideration of it in the English context afforded.

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30. See *Pick v. Manufacturers Life Insurance Co. of Canada* (1958), 2 Lloyd's Rep. 93; cf. e.g., *Lloyd v. Guilbert* (1865) 1 Q.B. 155. See also Graveson's *Lectures on the Conflict of Laws and International Contracts* (Michigan, 1951) 26-28, Counter, *Proper Law of the Contract - a Re-examination*, (1965) *Journal of Business Law*, 326.

31. Contrast, e.g. *Pick v. Manufacturers Life Insurance Company of Canada* (above) with *The Assunzione* (1954) P. 150, where "the proper which . . . which the parties . . . ought to have intended" is in practice decided by "localising the contract" (Cheshire), by determining what connections it has with various systems of law. Compare *Castelcivro v. Imperial Life Assurance Company of Canada* (Supreme Court of Ontario, Nov. 1984, unreported; Ont. Court of Appeal (1985) 51 D.L.R. 122; Supreme Court of Canada, May 23, 1987) where the objective approach was rejected, despite strong arguments by counsel.

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