THE RECEPTION OF DOMICIL INTO ENGLISH PRIVATE INTERNATIONAL LAW

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PART I — THE CIVILIAN BASIS

A: Its Roman Origins

The term '*domicilium*' finds its roots in the words '*domus*' and '*colere*,' justifying perhaps a rough translation as the place where one keeps house. And as such it was defined by Justinian's lawyers; in their view domicil was 'the place where a man has established his household and the centre of his business activities which he does not leave unless something calls him away, being absent from which he is said to be travelling and returning to which he is said to have ceased to travel.'[1]

In this classical age of Roman law there were two ways in which a man could become attached to a municipality, liable to its burdens and amenable to its courts. They were *origo*, attaching itself by inheritance to, and domicil, which was generally dependent on the free will of the subject. Though for most practical purposes their effect was similar, there was still an important jurisprudential distinction between them. 'Descent (*origo*), manumission, election and adoption make a man a citizen (*civis*), but, as the divine Hadrian has clearly declared in his edict, domicil makes him a resident (*incola*).'[2]

Origo determined citizenship and as such was no doubt the more ancient concept, harking back to the days when only a Roman citizen was entitled to the protection of the Roman law and the stranger was an outlaw. So long as Rome distinguished between the law applicable only to its citizens and the law applicable to foreigners, *origo* must have remained a concept of primary importance. In essence it denoted the claim to citizenship by descent primarily through blood relationship and later through those legal relationships such as manumission and adoption which create a situation akin to it. A child would inherit the citizenship of its father (and in certain circumstances that of its mother[3]), which in its turn was derived from *origo* irrespective of the ancestor's domicil at the time of the birth.[4] Citizenship would also be inherited from the

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1 *C.* 10. 39. 7.

2 *C.* 10. 40. 7.

3 *D.* 50. 1. 1.

4 *D.* 50. 1. 6.

patron or adopter by the manumitted slave or the adopted child. The only way in which citizenship could be attained without inheritance was by way of *adlectio*, the election to citizenship by the municipal magistrates or, as it would be termed in modern times, naturalisation. The city in which a man had his *origo* was his *patria* or *civitas*, and the analogy to the modern laws of nationality is obvious.[5]

But with the extension of Roman power and after the grant of Roman citizenship to virtually all the free inhabitants of the Empire in 212 A.D. the value of citizenship including that of Rome must have diminished greatly. In a world where the once free city states descended to the rank of local government units within the Empire, where Romans moved out to settle in the *coloniae* and the Orontes emptied itself into the Tiber, other *indicia* had to be found to bind men to the municipal obligations which were playing an ever-increasing role in the general administration of the Empire. Domicil was the method through which a man could become liable in like manner as a citizen of a municipality[6] and in the later Empire there seems to have been little difference between *civis* and *incola*.

Domicil depended, however, in the main on free choice not descent. It could equally be lost by free choice whilst *origo* was never to be denied.[7] It is true that at birth a child would inherit its father's domicil of necessity, but there was nothing to prevent it from acquiring a domicil of its own subsequently, even if still subject to parental power.[8] Apart then from the domicil inherited at birth by the child and at manumission by the freedman[9] the only cases where a so-called 'necessary domicil' was imputed by law to a person irrespective of intention were the domicil which the wife of necessity shared with her husband until she changed it after his death,[10] the domicil of the soldier at the place where he was stationed,[11] and that of the exile at his place of banishment.[12]

So far the rules relating to domicil are remarkably like the rules applicable at the present day. But the purpose which domicil served in Roman law was radically different. It existed next to *origo* primarily for administrative purposes; to subject the resident to his municipal obligations and as an incident thereof to subject him to the jurisdiction of the municipal courts. It also served to delimit the authority which a governor might possess judicially over the people domiciled in his province.

If in the early days of Roman history there had been any recognition of the law of foreigners, it would most probably have been the law of his *origo*, of the city to which he belonged by descent. There does not

5 See Salmond in *L.Q.R.* 17 (1901) 272, 273.
6 *D.* 50. 4. 3.
7 *D.* 50. 1. 6.
8 *D.* 50. 1. 4.
9 *D.* 50. 22. 2.
10 *D.* 50. 22. 1.
11 *D.* 50. 23. 1.
12 *D.* 50. 22. 3.

seem to be any direct evidence but the analogy with the personal law systems based on race in the early Middle Ages and on citizenship in Northern Italy in the subsequent period would suggest this. But in the classical age of the Roman law it was virtually a universal law and foreigners who were not subject to it must have been exceedingly rare.[13]

Whatever may have been the position in the earlier period of Roman history, it seems certain that in the period of the later Empire only local customs would have been recognised by the general law,[14] though there may have been until a late date more important divergencies in the Eastern provinces.[15] But even if there were any such divergencies the reference would have lain to the law of a man's *civitas* not his domicil.[16]

In the later Empire the devaluation of *origo* had as its counterpart the steady rise of domicil in importance, until both came to fulfil largely the same function in the administration of the Empire. In the Code of Justinian domicil seems to have grown to greater importance; at any rate it was the major criterion for jurisdiction,[17] both as to personal actions and actions *in rem.*

B: Its Rebirth in the XIIth Century

Since they had been mainly administrative concepts, the disintegration of the Empire after the barbaric invasions must have rendered *origo* and *domicilium* largely obsolete. With the eclipse of the urban civilisation on which the old Empire had been based went the municipal obligations and the municipal courts. The Germanic conquerors did not submit themselves to the Roman law of their subjects, but neither did they desire to deprive these subjects of their own law. The system which resulted was a system of personal law; each man was to be judged according to the law of his nation, whether he be Roman, Frank, Visigoth or Longobardian. The connecting factor, however, was race, not citizenship of a distinct geographical area acquired by either descent or settlement. Nor would it be wholly correct to speak of the resulting situation as a 'conflict of laws,' there being no conflict between Roman and Frankish law as such; both existed side by side in watertight compartments, though within the same geographical area and political unit. If a man was to be judged by Frankish law then that entire law was applicable to him both in substance and in procedure. Roman law could make no claim to affect him in any respect.

This system of personal laws lasted until about the 12th century. But at the same time as the antithesis between Roman and Barbarian became nothing more than an archaic legal curiosity and the population mixed

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13 See Jolowicz, *Roman Foundations of Modern Law* (1957), 39, 40. But see Savigny, *A Treatise on the Conflict of Laws* (transl. W. Guthrie, 2nd ed.), s. 356, nn.c.h.

14 Jolowicz, *op. cit. supra n.* 13, 40. In some cases the Court is directed to apply the custom of the *locus contractus; e.g., D.* 21. 2. 61; *D.* 42. 1. 1.

15 Vinogradoff, *Collected Papers* (1928), I, 235, 236.

16 Savigny, *op. cit. supra* n.13, s.357.

17 *Id.*, s. 355 (11).

to form new ethnic communities, so the emphasis in the general political fragmentation of that period shifted from racial law to local custom.[18] In the North this led to the growth of local customs mainly Germanic in origin which varied in each feudal domain; but in southern France and northern Italy the revived interest in the *Corpus Juris* in the 12th century led to the recognition of Justinian's Code as the basic common law of that area, subject however to the customs and statutes of the city states.

For the independent states of northern Italy had modified and added to the Roman law by their statutes which recorded their customs and their specific legislation, and as a result, even though they shared a common law, there were such divergencies between the statutes of each city that the conflicting claims of their laws had to be resolved.[19]

The first and most simple solution was to submit all foreigners to the *lex fori*; and this was no doubt the method first adopted. But with the re-emergence of urban life in northern Italy in the 12th century and the increased relations between these cities in trade and commerce it became recognised that such a treatment would be unjust.

In reaction to this a reversal to the system of personal laws took place based this time not on race, but like the ancient concept of *origo* on municipal relationship.[20] This is reflected in the so-called gloss of Accursius, 'if a citizen of Bologna is called to justice in Modena, he must not be judged according to the statutes of Modena, to which he is not subject, but according to the statutes of Bologna.'

The jurists in accordance with the spirit of those times sought for justification in the *Corpus Juris* and found it in the first law of the Code, the so-called *lex De Summa Trinitate*, imposing the orthodox religion on the subjects of the Empire, which commences with the words 'All those persons who are subject to Our Clemency We desire to . . .'[21] From this they deduced that the Emperors could only bind those who owed them obedience, and applying the analogy to the cities the jurists held that they equally could only bind their citizens. The Book of the Digest relating to municipal organization[22] told the glossators who the citizens were; persons who had their *origo* or domicil in the particular municipality. Additional support was found in the provisions of the Code and Digest[23] dealing with jurisdiction which were generally though not exclusively based on *origo* and domicil, applying the principle that where a man owed obedience to the courts he owed it also to the laws of that court (*ibi forum ergo et jus*).

In those circumstances then were *origo* and domicil resurrected, but it was a different purpose to which they were put. Whereas the Roman

18 Vinogradoff, *Roman Law in Mediaeval Europe* (2nd ed.), Ch. II.

19 See generally, Meyers in *Recueil des Cours*, 49 (1934), 36, and also Gutzwiller, *ibid.*, 29 (1929), 291.

20 Gutzwiller, *op. cit. supra*, n. 19, at 299.

21 *C.* 1. 1. 1.

22 *D.* 2. 50.

23 *E.g.*, *D.* 50. 1. 29; *D.* 5. 1. 19; *D.* 5. 2. 29; other jurisdictional factors such as the *forum contractus* were sometimes alternatives, *D.* 42. 5. 1., 2, 3.

had used those concepts mainly for administrative purposes, in the contemporary fragmented political situation they assumed a mainly conflictual aspect. Domicil or *origo* no longer bound a citizen to a municipal district so that he could be properly classified for the purposes of administration of a world Empire, but it subjected him to the power of an independent city or state with its own customs and statutes.

Logically this could only have strengthened the incipient return to a personal law system with *origo* or domicil as the connecting factors; but the remnants of feudalism were strong enough to insist on the territorial sovereignty of each city-state especially with regard to land.

Consequently, a distinction was drawn following the traditional Roman division[24] between these statutes which concerned persons, those concerning things and those, sometimes called 'mixed,' concerning acts.[25] The first group only bound those who were citizens of the legislating state, the latter two were territorial in their effect irrespective of citizenship. On the whole, the feudal influence in Italy had been weak and this caused the Italian jurists to draw most of the statutes within the personal sphere. The statutist school in Italy solved the problem of which was a personal or a real statute by a grammatical analysis of the statute in question. If it emphasized the *res* it was real, if the *persona* was the main object it was personal; even if the statute in substance regulated a question such as succession to immovables.[26] Such an interpretation, of course, led to a very wide definition of personal statutes and any statute concerning a capacity or incapacity to act was regarded as personal with the result that a large part of the law of contract depended on the law of origin or domicil of the actors.[27]

The Italian school then was characterized by a heavy bias towards the system of personal laws which was obvious in the wide definition of personal statutes and in the major role that jurists such as Bartolus gave to the concept of *origo* or citizenship as a connecting factor[28] rather than domicil—which, however, was not totally disregarded.[29]

C: Its Development in the Northern Schools

In the north feudalism had taken a much stronger hold, and the influence of Roman law had been slight. When France was reunited as a political entity it was divided into innumerable regions each with its own 'customs.' For the French jurists the problem was not to solve the conflict between the statutes of cities with a well-defined citizenship and sharing a common basic law, but a conflict between the customs of various regions defined not by reference to citizenship but to the ancient feudal fiefs.

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24 *E.g.*, Justinian's *Institutes*, 1. 2. 12.

25 Bartolus, *De Summa Trinitate* (Beale's transl. 1914), ss. 33, 36, 42.

26 *Id.*, s. 42.

27 Meyers, *op. cit. supra*, n. 19, at 617.

28 Bartolus, *op. cit. supra*, n. 25, ss. 32, 45, 47; Meyers, *op. cit. supra*, n. 19, at 619.

29 *E.g.*, Baldus, *Comm. Cod.* 1. 1. 59 equated domicil with *origo* as creating the obligations of citizenship.

Though the earlier jurists, especially those of southern France, had followed the Italian statutists,[30] a reaction set in against their methods in the 16th century.

D'Argentre and his disciples maintained the distinction between real, personal and mixed statutes which had been established by the Italians, but in their definition of those concepts they took an opposite approach. As much as the Italians had been influenced by the old system of personal law, so the French maintained the territoriality of their customs. Everything concerning land, including transactions concerning it, was real and as such governed by the *lex loci.* Only those matters which were purely personal, in which however were included movables,[31] were governed by the law of the domicil. The form of the law with which the Italians had been so concerned was treated as irrelevant, it was the substance which now mattered.[32]

Mixed statutes, now redefined as those concerning both goods and the person were governed by the *lex loci*; thus much of the law of contract which the Italian school had treated as personal now became dependent on the *lex loci.*[33] The effect of this doctrine was to limit severely the scope of the personal law governed by domicil mainly to matters of status such as majority, guardianship, marriage, etc. On the other hand, D'Argentre regarded as personal and thus governed by domicil the capacities resulting from a particular status even if those capacities involved dealing with immovables, *e.g.*, the capacity to make a will.

Origo was abandoned by the French school as a connecting factor. In France, unlike Italy, there was no distinct concept of city nationality;[34] since a man could become part of a community by residence there for a year and a day,[35] domicil and citizenship for conflictual purposes became synonymous either deliberately or by confusion.[36] The feudal principal was hostile to allegiance on the basis of descent; if a man was born or settled on the lord's land he should owe him obedience.[37]

A new distinction, however, developed; that between the *domicilium originis* and the *domicilium habitationis*, a distinction which Du Moulin in

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30 *E.g.*, Pierre de Belleperche (Orleans), Guillaume de Cun (Toulouse).

31 The Italian School had not drawn any distinction between movables and immovables but had treated of 'things' (*res*) indiscriminately. In Northern France as well as in England the feudal tradition regarded land as of prime importance and '*res*' came to indicate immovables only. As to movables in the period before commerce revived, the rule '*mobilia sequuntur personam*' reflected most probably the feudal situation as well as the law. See Meyers, *op. cit. supra*, n. 19, at 620, 621.

32 See Gutzwiller *op. cit. supra*, n. 19 at 323.

33 Meyers *op. cit. supra*, no. 19 at 641.

34 *Id.*, at 619; Cassin in *Recueil des Cours*, 34 (1930), 659, 699.

35 *E.g.*, *Schwartz's Case* (1738) 2 Comyns 693.

36 *E.g.*, P. Voet, *De Statutis*, s. IX, c. 1. 9; see also H. Bellot in *Recueil des Cours*, 2 (1924), 99 at 113, 114.

37 *Origo* possibly did not completely disappear from modern continental private international law. See Wolff, *Private International Law* (2nd ed.), 101; but domicil had certainly displaced it entirely as the primary connecting factor in questions of personal status until *origo* was reintroduced in the modern shape of nationality by the French Civil Code of 1804.

the 16th century already treated as well accepted.[38] Though *domicilium originis* was sometimes confused with *origo*,[39] it had nothing to do with this ancient concept even if it was influenced by it in its development.[40] This domicil of origin without any special distinction had already existed in the classical Roman law, where it had been accepted that a child at its birth would inherit its father's present domicil, but unlike *origo* it could be irrevocably lost by the subsequent acquisition of a fresh domicil. Domicil of origin at first had no special quality except in the time and method of its acquisition. But with the disappearance of *origo* the need arose for a stable connecting factor to which could be attached certain aspects of personal status free from the difficulties inherent in a choice of domicil.[41] If a man's personal law was to be determined by his domicil then it followed that a gap in that domicil could not be tolerated. The domicil of origin took the place of the defunct *origo* in supplying the courts with a reference which accompanied a man from birth and on which they could always fall back if he had no present domicil.[42]

The Dutch jurists of the 17th and 18th centuries followed in the main D'Argentre by allowing the *lex domicilii* to govern the purely personal laws, though there were differences as to its exact extent.

The earlier Dutch writers following D'Argentre allowed domicil to govern both status and the capacities resulting therefrom. Thus a man suffering an incapacity under the law of his domicil suffered under that incapacity everywhere.[43] But subsequently Ulric Huber[44] drew a distinction between status and capacity. Whilst he allowed the personal qualities, by which he meant status, imposed upon a person by the law of any place to be carried with him anywhere, the capacities resulting from that status were only to be such as persons of the same status would enjoy and be subject to in the countries where those capacities were sought to be exercised.[45] Thus, for instance, a minor in Frisia would be able whilst in Holland to exercise the power which minors have in Holland of making a will even though he could not have done so under Frisian law.[46]

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38 Du Moulin, *Conclusiones de Statutis et Consuetudinibus localibus*. See also Voet, *ad Pandectas* 5. 1. 92.

39 Thus Voet, *id.* at s. 92 defines *origo* as 'the place where the subject was born or where he should have been born, though he was perhaps born elsewhere his mother having given birth to him whilst travelling' which is more appropriate to domicil of origin than *origo* in which the place of birth was irrelevant. See also Story, *Treatise on the Conflict of Laws* (2nd ed.) at 49.

40 Savigny, *op. cit. supra* n. 13, s. 359.

41 Cassin, *op. cit. supra* n. 34, 706.

42 *Supra*, n. 39.

43 Rodenburg, *De Div. Stat.* 1. 3. 40. This was also the view of the later French and German jurists in the 18th century such as Boullenois: *Dissertation*, 20 rule 10; Hertius: *De Collis Leg.* s. 4, n. 5; Merlin: *Rep. Stat.* s 5.

44 *De Conflictu Legum* (1689).

45 *Id.*, ss. 12, 13.

46 *Id.*, s. 13.

Though references to domicil in his work are few[47] it is obvious that Huber, like his predecessors, accepted the law of the domicil as the law governing status.[48]

Later Dutch writers followed Huber in maintaining the distinction between status and capacity, and whilst allowing only the first mentioned to be governed by the *lex domicilii* submitted questions of capacity to the *lex loci*.[49]

At the end of the 18th century it was generally accepted on the Continent that the law of the domicil governed status, whilst views were divided on the question of capacity resulting from status. It is probable, however, that the majority view favoured the inclusion of capacity within the field of personal laws.[50] Strangely enough the rule that movables follow the person seems never to have been doubted.[51]

PART II — THE COMMON LAW VERSION

A: The Prehistory

English legal history has two salient features; a strong feudal background which caused its courts to stress the territoriality of the common law (helped in no mean regard by the isolation of the country itself from the rest of Europe) and, on the other hand, an early movement towards centralization which made for the emergence of a 'common law' for the Kingdom. This was not to say that there were no local customs especially in the field of succession law, some of which persisted into the 19th century;[52] but since they were characterised either as local, *e.g.*, the custom of York, or personal, *e.g.*, the custom of London, they in effect carried with them their own conflictual rules.

English law took little note of foreign law. In principle its application could not be tolerated within the realm though to some classes of foreigners, such as the Jews and the merchants, the King had granted the privilege of being governed by their own customs. But they were like the personal laws of the early Middle Ages, substantive and not conflictual rules. However, rights acquired abroad or legal acts performed there were not completely disregarded. The courts administering the Law Merchant in the various countries might assist one another in the recognition and enforcement of their decrees,[53] and within that large field of private law which was administered by the Courts Ecclesiastical throughout Christendom there had developed a system of referring for determination questions such as the validity of marriages to the diocese

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47 *Id.*, ss. 3, 14, 14.

48 This is implied in his casual acceptance of domicil as such in ss. 14, 15.

49 Meyers, *op. cit. supra* n. 19, at 655.

50 Story, *op. cit. supra* n. 39, s. 52; Savigny, *op. cit. supra* n. 13, s. 362.

51 Meyers, *op. cit. supra* n. 19, at 672.

52 *Somerville* v. *Somerville* (1801) 5 Ves. 750, 790.

53 *Wier's Case* (1607) 1 Rolls Abr. 530 pl. 12; *Jurado v. Gregory* (1669) 2 Keble 511.

where the marriage was celebrated or questions of legitimacy to the diocese in which the lands to which the alleged heir laid claim were situated.[54]

It is from these humble beginnings that the common law developed its own native conflictual rules without at first any reference to the sophistications of the continental jurists. It was simple to continue to recognise marriages valid according to the law of the place of celebration[55] or wills of personality made abroad[56] even though the Reformation had broken Christian unity. It was a far bolder step for the Court of Common Pleas to concede that 'if a contract be made in Paris in France it shall be tryed either by the common law or by the law of France; and if it be tryed here then those of France shall write to the Justices of England and shall certifie the same unto them.'[57] This admission that both the courts of England and France were competent to try the matter, but that the English courts should apply the *lex loci contractus*, is one of the earliest considered statements of a rule of English private international law.[58]

The English courts did not see the foreign laws as personal, *i.e.*, attaching to a person and governing his actions wherever he went, but as territorial, *i.e.*, the validity and construction of all actions and their consequences depending on the law of the place where the action took place. This attitude was in fact a more liberal version of past feudal territorial exclusiveness and as such had not been confined to England, but whilst the French and the Dutch schools had compromised with the doctrines from the south, English law retained its feudal outlook for some time to come.

This led to the insistence that foreign judgments, even if they affected the personal status of the parties, should be recognised if they had validity according to the law of the place where rendered. Thus, in *Cottington's Case*, Lord Nottingham said that 'it was against the law of nations not to give credit to the judgments and sentences of foreign countries till they be reversed by the law and according to the form of the countries wherein they were given.'[59]

Contracts also were to be judged both as to validity and construction by the law of the place of contracting.[60] Acts valid according to the law of their place of performance were recognized as effective in England.[61] There was no inquiry as to the origin, domicil, or residence of the actors,

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54 See *Ilderton* v. *Ilderton* (1793) 2 H. Bl. 145.

55 *Alsop* v. *Bowtrell* (1618) Cro. Jac. 541.

56 *Lee, Moore and Roblin's Case* (1621) Palm. 163.

57 *Greenway and Barker's Case* (1612) Godbolt 260, 261.

58 See, for an earlier similar statement, the *Case of the Admiralty Court* (1611) 2 Brownl. 16, 17.

59 (1678), refd. to in *Kennedy* v. *Earl of Cassilis* (1818) 2 Swans. 326.

60 *E.g., Blankard* v. *Goldy* (1695) 2 Salk 411; *Smith* v. *Brown* (1706) 2 Salk. 666; *York Buildings Co.* v. *Meers* (1728) 5 Vin.Abr. 511.

61 *Ashcomb's Case* (1674) 1 Chan. Cas. 232.

but only as to the locality of the act; the *lex loci* not the *lex personae* was relevant.

The person as opposed to the locality first became of importance in relation to succession to movables in the course of the 18th century. It was left to Lord Hardwicke, in *Pipon* v. *Pipon*,[62] to make the first inroad into the territorial principle and apply the principle '*mobilia sequuntur personam*' by making the succession to movables dependent on the law of the place of residence of the deceased whether they might in fact be situated. Lord Hardwicke justified his decision with the eminently pragmatic reason that one universal law should govern the disposition of the deceased's assets, but as his judgment of the same year in *Omychund* v. *Barker*[63] shows he was well aware of the civilian writings on private international law.

Residence and not domicil was adopted as the connecting factor in *Pipon* v. *Pipon* and the decisions which followed it,[64] domicil at that stage being regarded as an essentially civilian concept and foreign to the common law.[65]

B: Domicil v. Lex Loci

Domicil is first considered as a connecting factor in English private international law in Sir Edward Simpson's judgment in *Scrimshire* v. *Scrimshire*.[66] However, it was only considered in a negative sense since Sir Edward rejected the argument that the validity of a marriage must be governed by the law of the parties' domicil, and he in fact tested it by the *lex loci celebrationis* in conformity with the existing attitude of the English law.[67] But the judgment is of importance in that domicil was no longer rejected out of hand as being a foreign concept of no relevance to English law.

In *Harford* v. *Morris*,[68] Sir George Hay took the opposite view and held domicil or an established residence essential before the *lex loci* could become applicable,[69] but this was reversed on appeal by the Court of Delegates[70] and subsequent decisions again applied the *lex loci* to determine the validity of a marriage.[71]

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62 (1744) Amb. 26.

63 (1744) 1 Atk. 22.

64 *Thorn* v. *Watkins* (1750) 2 Ves. Sen. 35; *Burne* v. *Cole* (1762) Amb. 415.

65 *Schwartz's Case*, supra n. 35.

66 (1752) 2 Hag. Con. 395.

67 *Id.*, at 405.

68 (1776) 2 Hag. Con. 423.

69 *Id.*, at 431.

70 2 Burr. 1077, 1079 n. (e), but a different version of the Court's reasons is given in 2 Hag. Con. 436.

71 *Sinclair* v. *Sinclair* (1798) 2 Hag. Con. 294, 297; *Middleton* v. *Janverin* (1802) 2 Hag. Con. 437; *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con. 54, 59. Though these cases are only concerned with the formalities of marriage, the Courts did not at that stage draw any distinction between formalities and essence, a distinction which the civilians had accepted since Bartolus.

At the same time domicil obtained its first foothold not in the field of personal status, where it had so far been denied, but in the government of movables where English law had already acknowledged the possibility of a universal personal regime. This was the result of a curious interaction with Scots law. Despite the reception of civil law in Scotland, Scottish conflictual rules had been particularly territorial. Thus it was accepted law in Scotland prior to 1792 that the *lex rei sitae* governed the succession to personal as well as to real property.[72] But following the English decision in *Pipon* v. *Pipon*,[73] the House of Lords first expressed its preference for a universal personal regime as to movables based on domicil in *Bruce* v. *Bruce*,[74] and then subsequently enshrined those *obiter dicta* into binding precedent in *Hog* v. *Hog*.[75] English law which had so far spoken of residence and not domicil as the connecting factor followed suit in *Bempde* v. *Johnstone*.[76] The bias of the English courts in favour of the *lex loci* still persisted, however,[77] and it was not till 1830 that domicil was accepted as governing the entire question of succession to movables including the substantial and formal validity of the will,[78] and that suggestions were made that all dealings with movables should depend for their validity on the law of the domicil.[79]

A similar development took place with respect to bankruptcy. The earliest reported decisions on the subject treated foreign bankruptcies as assignments *inter vivos* and thus governed by the *lex loci*,[80] but in *Sill* v. *Worswick* Lord Loughborough applied the maxim '*mobilia sequuntur personam*' and regarded the vesting of the bankrupt's assets in the assignee as dependent on the law of the bankrupt's residence.[81] Subsequently residence was interpreted as meaning domicil.[82]

With regard to personal status and the capacities flowing therefrom it took much longer before domicil was regarded as being of any relevance in such matters. The *lex loci* was still strong as shown by the refusal of the judges in *R.* v. *Lolley*[83] to recognise the dissolution abroad of a marriage celebrated in England on a ground for which it was not dissoluble in England. And this was regarded as the law as late as 1831.[84]

Again, legitimacy or legitimation were seen at that time to be dependent not upon domicil but upon the law of the place of birth. As Lord

72 See *Balfour* v. *Scott* (1793) 6 Brown's P.C. 550, 562 and the cases cited in the Appendix thereto; *contra Brown* v. *Brown* (1744) M.4604.

73 *Supra* n. 64; see also *Sill* v. *Worswick* (1791) 1 H. Bl. 665, 690.

74 (1790) 2 Bos. and Pull. 229 n. (a) *per* Lord Thurlow.

75 (1792) 2 Coop. 497.

76 (1796) 3 Ves. Jun. 199.

77 *E.g.*, *Curling* v. *Thornton* (1823) 2 Add. 6.

78 *Stanley* v. *Bernes* (1820) 3 Hag. Eccl. 373.

79 *Re Ewin* (1830) 1 Cr. & J. 156 *per* Bayley B.

80 *Solomons* v. *Ross* (1764) 1 H. Bl. 132 (n) as explained by Lord Loughborough in *Folliott* v. *Ogden* (1789) 1 H. Bl. 123.

81 (1791) 1 H. Bl. 665, 690.

82 *Smith* v. *Buchanan* (1800) 1 East. 6, 11.

83 (1812) R. and Ry. 237.

84 *McCarthy* v. *De Caix* (1831) 2 R. & My. 614.

Brougham L.C. expressed it in the Scottish appeal of *Munro* v. *Saunders*:[85] 'It is sufficient that the child being born in a country where the illegitimacy is indelible, that in any country whatever would have the effect of rendering that child illegitimate.' And in the subsequent English case of *Birtwhistle v. Vardill*[86] the same judge thought the question of the status of legitimacy dependent upon the place of birth or, as a possible alternative, upon the place of the parents' marriage.[87]

Judicial opinion of that period is very well reflected in Story's *Treatise on the Conflict of Laws*.[88] Though Chapter IV commences with a survey of civilian writings on the subject their views are either rejected *in toto* or qualified to such an extent as to make the *lex loci* almost exclusively applicable. Thus, though Story admits that status itself is determined by the *lex domicilii*,[89] the capacities flowing therefrom are to be determined by the *lex loci contractus aut actus*. This includes not only the capacity to contract in the strict sense, but also the capacity to marry.[90] Equally so, legitimacy depends on the *lex loci celebrationis* of the parents' marriage and legitimation on the *lex loci nativitatis*.[91] Therefore, the role of the law of the domicil, though admitted as to status is strictly limited in effect, and the *lex loci* prevails as an effective connecting factor since Story rejects the Huberian view that the local law must attach such consequences to the foreign status as it would to its own equivalent status. In Story's view capacities acquired under the local law can be exercised regardless of the foreign status or its local equivalent.[92]

C: The Triumph of Domicil

The role of domicil in English private international law was to be greater than Story had supposed. One of the reasons for the rise of domicil in importance was to overcome the claim of the *locus celebrationis* to determine not only the formal and essential validity of the marriage but also the consequences thereof such as its dissolubility. The conflict between the two *loci*, the *locus celebrationis* and the *locus dissolutionis*, had to be resolved by a superior factor, domicil. Already, in *Conway* v. *Beasley*,[93] it was said that domicil governed the capacity of the parties to the marriage and it was suggested that the *lex domicilii* would also govern the dissolution of marriage.[94] Lord Brougham, in *Warrender v. Warrender*,[95] sought to compromise by suggesting that the *lex loci contractus* was not the actual place of marriage but the place of the intended matrimonial

85 (1832) 6 Bligh N.S. 468, 474.
86 (1835) 2 Cl. & Fin. 570.
87 *Id.*, at 589, 590.
88 2nd ed. 1841.
89 Ch. IV, s. 101.
90 Ch. IV, s. 103.
91 Ch. IV, s. 105.
92 Ch. IV, ss. 62, 102 (b).
93 (1831) 3 Hag. Ecd. 639, 652.
94 *Id.*, at 653.
95 (1834) 9 Bligh N.S. 89.

domicil[96]. But it was not until *Brook* v. *Brook*[97] that the House of Lords restricted the operation of the *lex loci* to the formalities of marriage and left the incidents and essence of the marriage to be determined by the law of the parties' domicil.[98]

Shortly before that Page-Wood V.C., following the decision of the House of Lords in the Scottish appeal of *Munro* v. *Munro*,[99] held in *Re Wright's Trusts*[1] that the law of the father's domicil at the time of the child's birth and at the time of the subsequent marriage governed the validity of *legitimatio per subsequens matrimonium*.

Though the decision of the House of Lords in *Shaw* v. *Gould*[2] has often been regarded as the authority establishing domicil as the governing factor in relation to personal status and especially the dissolution of marriage,[3] only two of the Law Lords did in fact say so.[4] What the case decided was that the *lex loci contractus* did not determine either the validity or the dissolubility of a marriage, nor did the *lex loci celebrationis* or the *lex loci nativitatis* determine the question of the children's legitimacy. It was not necessary for their Lordships to decide what should be substituted for the *lex loci* and on this they differed. Only Lord Westbury was unambiguously in favour of domicil,[5] whilst at least two of the Law Lords were prepared to accept a less stringent connecting factor.[6]

From *Shaw* v. *Gould* onwards the concept of a personal law governing status including certain capacities flowing therefrom and dependent on domicil has not been doubted. But though this has at times been stated as a general proposition[7] it is hardly correct. The English law has never been doctrinal and its rules are explicable rather on historical and pragmatic grounds.

In general, English courts have neither accepted Story's view that status only and not the capacities resulting therefrom are governed by domicil nor the continental majority view[8] that both status and capacity depend on the law of the domicil.[9] Whilst Story's views may be applicable to the status of a 'natural' child created by way of adoption,[10] and

96 *Id.*, at 116, 117. *Cf.* Huber, *op. cit. supra* n. 44, s. 10.

97 (1861) 9 H.L.C. 193; but despite this decision Kindersley V.C. still asserted in 1865 that by international law 'all questions as to the validity, or incidents, or consequences of a marriage are to be decided according to the *lex loci contractus*, *i.e.*, the law of the country where it was solemnised.' *In re Wilson's Trusts* (1865) 1 L.R. Eq. 247, 256.

98 On the other hand, Page-Wood V.C. regarded this as already 'clearly settled' in 1857. *In re Wright's Trusts* (1857) 2 K. & J. 595, 603.

99 (1840) 7 Cl. & Fin. 842.

1 (1857) 2 K. & J. 595.

2 (1868) 3 H.L.C. 55.

3 *E.g.*, *Le Mesurier* v. *Le Mesurier* (1896) A.C. 517, 540.

4 (1868) 3 H.L.C. 55 at 83, *per* Lord Westbury.

5 *Id.*, at 85.

6 *Id.*, at 77, *per* Lord Chelmsford; *id.*, at 96, *per* Lord Colonsay.

7 *Von Lorang* v. *Administrator of Austrian Property* (1927) A.C. 641, at 670, 671, *per* Lord Phillimore.

8 *E.g.*, Savigny, *op. cit. supra* n. 13, s. 362.

9 *Baindail* v. *Baindail* (1946) P. 122, 128 *per* Greene M.R.; see also *Sottomayor* v. *De Barros* [No. 2] (1879) 5 P.D. 94, 100.

10 *Re Marshall's Trusts* (1957) 1 Ch. 507.

to the capacity to contract,[11] the capacity to marry and the capacity to make a will[12] depend on domicil.

But even as regards status the rule of the *lex domicilii* is far from universal. Whilst it predominates mainly in family relations and is as such firmly established in dissolution of marriage,[13] adoption[14], legitimation,[15] and possibly legitimacy,[16] the only decision relating to majority dates from the era of supremacy of the *lex loci*,[17] nor is domicil the exclusive factor in determining the international validity of an adjudication in lunacy[18] or bankruptcy.[19]

As to movables the *lex loci rei situs* has re-established itself despite the sweeping statements made in favour of domicil as the universal governing factor in all dealings with movables made at the beginning of the last century,[20] It is now accepted that the *lex situs* governs dealings with movables except in the special classes of general assignments such as marriage settlements, devolution on death and bankruptcy where the old rule '*mobilia sequuntur personam*' still applies.[21]

It may be that domicil has seen its greatest triumph and that even in the field of family relations where it has had its strongest hold, a reversal to the territorial principles albeit in modified form and in the guise of new doctrines is imminent.[22] But this is outside the scope of the present article which mainly served to show how a Roman administrative concept, adopted by mediaeval jurists as a compromise between the personal law system of the Dark Ages and the feudal territorialism of the succeeding Middle Ages, was finally received, if only partially so, into English private international law during the middle of the last century.

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11 *Male* v. *Roberts* (1800) 3 Esp. 163.

12 *In bonis Marever* (1828) 1 Hagg. Eccl. 498; see also Dicey, *Conflict of Laws* (7th ed.), 769.

13 *E.g., Armitage* v. *Attorney-General* (1906) P. 135; *Har-Shefi v. Har-Shefi* [No. 2] (1953) P. 220; *Abate* v. *Cauvin* (1961) 2 W.L.R. 221. On the other hand, if *Travers* v. *Holley* (1953) P. 246 finds general acceptance the *lex fori* and therefore the *lex loci dissolutionis* may prevail: *Manning* v. *Manning* (1957) P. 112, 121, *contra Fenton* v. *Fenton* (1957) V.L.R. 17; *La Pierre* v. *Walter* (1960) 24 D.L.R. (2d) 483.

14 *Purcell* v. *Hendricks* (1925) 3 D.L.R. 854; *In re Brophy* (1949) N.Z.L.R. 1006; *In re Pearson* (1879) V.L.R. 356.

15 *Supra* n. 1.

16 *In re Bisschoffsheim* (1948) ch. 79.

17 *Supra* n. 11. In many cases the courts have applied the *lex fori*.

18 *New York Security & Trust Corpn.* v. *Keyser* (1901) 1 Ch. 666.

19 *E.g., Re Davidson's Settlement Trusts* (1873) L.R. 15 Eq. 383; *Re Anderson* (1911) 1 K.B. 896, but the title of the assignee may still depend on the *lex domicilii*: *In Re Anderson, ibid.*, at 902, *per* Phillimore J.

20 *Supra* n. 79.

21 *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* (1953) 1 Q.B. 248, 257, *per* Devlin J.

22 *Supra* n. 13.