

# YALE LAW JOURNAL

---

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.,  
Edited by Students and members of the Faculty of the Yale Law School.

---

SUBSCRIPTION PRICE, \$4.50 A YEAR SINGLE COPIES, 50 CENTS  
Canadian subscription price is \$5.00 a year; foreign, \$5.25 a year.

---

## EDITORIAL BOARD

SAMUEL WINOKUR

*Editor-in-Chief*

EDWARD MYRON BULL

*Case and Comment Editor*

WAYNE GRIDLEY JACKSON

*Secretary*

JAMES WAYNE COOPER

*Managing Editor*

BENJAMIN MAG ROBINSON

*Book Review Editor*

ERIC BERNHARD NELSON

*Business Manager*

GEORGE SCHUYLER TARBELL, JR.

*Circulation Manager*

ALFRED M. BINGHAM

ROBERT BOASBERG

ROBERT M. BOZEMAN

OSCAR S. COX

JULIUS G. DAY, JR.

GEORGE H. DESSION

ALFRED L. FERGUSON

WILLIAM C. FITTS

S. RICHARD GAMER

LEE M. GAMMILL

RUTH A. HALL

GARRETT S. HOAG

BERNARD C. KAMERMAN

ELLIOTT R. KATZ

HERBERT B. LAZARUS

I. OSCAR LEVINE

MYER D. MERMIN

BENJAMIN NASSAU

GEORGE NEBOLSINE

MILTON I. NEWMAN

HAYDN J. PROCTOR

PAUL O. RITTER

CHARLES U. SAMENOW

MINIER SARGENT

ROBERT A. STEPHENS, JR.

CLIFFORD H. TUTTLE

T. DONALD WADE

JOHN WALLIS

---

The JOURNAL consistently aims to print matter which presents a view of merit on a subject deserving attention. Beyond this no collective responsibility is assumed for matter signed or unsigned.

---

## CONTRIBUTORS OF LEADING ARTICLES IN THIS ISSUE

ROBERT M. HUTCHINS is Dean of the School of Law, Yale University.

DONALD SLESINGER is Sterling Fellow and Psychologist, Yale University.

ROBERT VON MOSCHZISKER is Chief Justice of the Supreme Court of Pennsylvania.

JOSEPH F. FRANCIS is Professor of Law, University of Oklahoma Law School.

---

## WHAT IS A STATUTE UNDER THE FEDERAL JUDICIAL CODE?

The construction of the word "statute" has an important bearing upon the jurisdiction of the United States Supreme Court. Section 237 (a) of the Judicial Code substantially repeating the language of the Judiciary Act of 1789, provided before 1925 for review by the United States Supreme Court upon writ of error of a

“ . . . final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity . . . ”<sup>1</sup> (Italics ours).

The taking of jurisdiction in such cases by the United States Supreme Court was obligatory, as contrasted with a number of cases in which the Court's jurisdiction, theretofore obligatory, was in 1916 made subject to the Court's discretionary jurisdiction through writ of certiorari.

By the Act of February 13, 1925, the so-called Judges' Bill, proposed and adopted for the purpose of reducing the obligatory jurisdiction of the Court, the italicized words in the above quotation were stricken out, and the obligatory jurisdiction from the highest state courts was thus limited to questions of the validity of treaties and of federal and state statutes.<sup>2</sup> The language of section 237 (a) remains as so altered, except that appeal was in 1928 substituted for writ of error.<sup>3</sup>

Under section 237 (a) as it stood before 1925, the United States Supreme Court clearly had an obligatory jurisdiction to review decisions of the highest state courts involving the validity of municipal ordinances, and the validity of regulations, legislative in character, issued by federal or state administrative bodies under authority delegated to them; for such ordinances and such regulations were either statutes or “an authority exercised under” either the United States or the state. The jurisdiction of the Court being undoubted before 1925, it was immaterial whether the Court based its action in taking jurisdiction upon the word “statute” or upon the words “an authority exercised under;” and judicial expressions before 1925 as to the one or the other basis of jurisdiction may be classed as dicta.

Chief Justice Marshall in *Weston v. City of Charleston*<sup>4</sup>

<sup>1</sup> 39 STAT. 726 (1916), 28 U. S. C. § 344 (1926).

<sup>2</sup> 43 STAT. 937 (1925), 28 U. S. C. § 344 (1926).

<sup>3</sup> Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1, 27-29, properly refer to the change from writ of error to appeal by the Act of January 31, 1928, as “a warning on how not to legislate.”

<sup>4</sup> 2 Pet. 449 (U. S. 1829). The same statement applies to *Smoot v. Heyl*, 227 U. S. 518, 33 Sup. Ct. 336 (1913), where the court said that a municipal regulation of the District of Columbia was an authority exercised under the United States; and to *New Mexico v. Denver Rio Grande R. R.*, 203 U. S. 38, 27 Sup. Ct. 1 (1906), where a territorial statute was said to be an authority under the United States. Nor does *Board of Public Utility Commissioners v. Manila Electric R. R. & Light*

stated that a city ordinance of Charleston was an exercise of an "authority under the State of South Carolina," but this statement did not necessarily imply that the ordinance was not also a state statute; and the jurisdictional statement in *Home Insurance Company v. City Council of Augusta*<sup>5</sup> is even less decisive. It is difficult to understand the statement of Justice Brandeis in the recent case of *King Manufacturing Co. v. City Council of Augusta*<sup>6</sup> that these cases on full consideration settled the basis of the Court's jurisdiction.

Speaking for a unanimous Court in *Atlantic Coast Line R. R. v. Goldsboro*<sup>7</sup> and in *Reinman v. Little Rock*,<sup>8</sup> Justice Pitney referred to a municipal ordinance as a statute of a state under section 237 of the Judicial Code. Speaking also for a unanimous Court, Justice Brandeis said in *Zucht v. King*<sup>9</sup> in 1922:

"A city ordinance is a law of the state within the meaning of § 237 of the Judicial Code as amended, which provides a review by writ of error where the validity of a law is sustained by the highest courts of the State in which a decision in the suit could be had."

*Atlantic Coast Line R. R. v. Goldsboro* was cited by Justice Brandeis in support of this statement. And in *Live Oak Water Users' Association v. Railroad Commission of California*,<sup>10</sup> decided under the act as it stood before 1925, Justice McReynolds said for the Court:

"Under repeated rulings here for jurisdictional purposes the order of the Commission must be treated as though an act of the Legislature."

A similar statement was made for the Court by Justice Van Devanter in *Lake Erie & Western R. R. v. State Public Utilities Commission*,<sup>11</sup> where an administrative order is said to be a "state law" for the purpose of jurisdiction.

The whole context makes it clear that in using the terms "law of the state", "act of the legislature" and "state law," Justices Brandeis, McReynolds and Van Devanter were attributing the

---

Co., 249 U. S. 262, 39 Sup. Ct. 272 (1919), appear at all decisive in support of Justice Brandeis's view.

<sup>5</sup> 93 U. S. 116 (1876).

<sup>6</sup> 48 Sup. Ct. 489 (U. S. 1928).

<sup>7</sup> 232 U. S. 548, 34 Sup. Ct. 364 (1914).

<sup>8</sup> 237 U. S. 171, 35 Sup. Ct. 511 (1915).

<sup>9</sup> 260 U. S. 174, 176, 43 Sup. Ct. 24, 25 (1922).

<sup>10</sup> 269 U. S. 354, 356, 46 Sup. Ct. 149, 150 (1926).

<sup>11</sup> 249 U. S. 422, 39 Sup. Ct. 345 (1919); see also *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S. 679, 43 Sup. Ct. 675 (1923), and *Northern Pacific Ry. v. Department of Public Works*, 286 U. S. 39, 45 Sup. Ct. 412 (1925).

Courts' jurisdiction to the term state "statute" in section 237 rather than to the phrase "an authority exercised under any state." On the basis of the dicta before the amendment of 1925, it may therefore be said that the weight lay with the view that the term "statute" includes municipal ordinances and administrative regulations of a legislative character. And this view is supported by the fact that for three years after the coming into effect of the Act of 1925 the United States Supreme Court took jurisdiction of such cases on writ of error as matters of obligatory jurisdiction without any question being raised by parties or by the court.

In *King Manufacturing Co. v. City Council of Augusta*,<sup>12</sup> decided May 14, 1928, the issue was squarely raised and determined, because of doubt upon the part of some members of the Court, although counsel on both sides treated the case as one rightly brought on writ of error. Speaking through Justice Van Devanter the Court determined that a municipal ordinance is a state statute within the language of section 237. Justice Brandeis, in an elaborate dissent in which Justice Holmes concurred, urged that a municipal ordinance was not a state statute, and that under the terms of section 237 the Court should exercise by certiorari a discretion as to whether to take the case. Through the same member of the Court, and with the same dissents, the Court, in *Sultan Railway and Timber Co. v. Department of Labor and Industries*,<sup>13</sup> on May 14 also determined that orders legislative in character, made by a state bureau, are state statutes under section 237. In both the *King* and the *Sultan* cases the judgments of state courts were affirmed. In *Sprout v. City of South Bend*,<sup>14</sup> decided on the same day, Justice Brandeis, speaking for a unanimous Court in reversing a state court, assumes it to be settled that the case was properly brought by writ of error, although involving a municipal ordinance.

The dissent of Justice Brandeis in the *King* case is persuasive, and appears convincing when first read. But doubts are raised by further analysis. The points raised by the dissent are (1) that the construction given to the section runs counter to the general purpose of the Act of 1925 to reduce the obligatory jurisdiction of the United States Supreme Court; (2) that "it completely frustrates the particular purpose which Congress must have had in striking from section 237 the clause 'or an authority exercised under any state';" (3) that it preserves in the obligatory jurisdiction of the Court a number of cases of trifling significance, and (4) that it is opposed to the natural

---

<sup>12</sup> *Supra* note 6.

<sup>13</sup> 48 Sup. Ct. 505 (U. S. 1928).

<sup>14</sup> 48 Sup. Ct. 502 (U. S. 1928).

meaning of the phrase "statute of any state." Each of these may be briefly examined.

(1) The general purpose of the Act of 1925 is undisputed. The measure was proposed by a committee of the Supreme Court for the purpose of reducing the work of that Court. An excellent history of the act is found in Frankfurter and Landis, *The Business of the Supreme Court*.<sup>15</sup> But as Justice Van Devanter said for the Court, "the purpose was to cut down and change our jurisdiction in particular respects, and to leave it as before in others." Clearly section 237 retained obligatory jurisdiction as to the validity of federal and state statutes, and the scope of such obligatory jurisdiction depends upon the meaning of the term "statute" as used before and in the Act of 1925. Little of congressional intent as to the point here at issue is to be derived from the general purpose of the act to reduce the obligatory jurisdiction of the Court.

(2) But Justice Brandeis urges that there must have been some purpose in omitting the words "or an authority exercised under" from two places in section 237 (a), and that Congress has done a fruitless thing in omitting these words if state administrative regulations and municipal ordinances are to be comprehended within the phrase "statute of any state." This argument would be convincing, if true. But Justice Brandeis himself suggests that, independently of municipal ordinances and commission orders, possibly eight cases between 1916 and 1925 may have come to the United States Supreme Court by virtue of the words "or an authority exercised under." Frankfurter and Landis, moreover, writing in 1927, offer another explanation, independent of Justice Brandeis' suggestion:

"Ever since the First Judiciary Act, the Supreme Court had been able to review the judgment of a state court which denied an attack, based on the Federal Constitution, on 'an authority exercised under any state'. The Act of 1916 eliminated review upon an assailed exercise of authority; the 'validity' of authority, not an illegitimate exercise of it, alone furnished warrant for a writ of error from the Supreme Court. Subtle distinctions were thereby invited, which were happily dispensed with by the Judges' Bill. This proposal probably did not effect a reduction of cases; it did avoid waste in litigation."<sup>16</sup>

According to these commentators the omission of these words was primarily for the purpose of clarification. Justice Brandeis suggests also a possible reduction in number of cases.

---

<sup>15</sup> (1927) c. 7; see also the recent article by the same authors, cited *supra* note 3.

<sup>16</sup> *THE BUSINESS OF THE SUPREME COURT* (1927) 265-266, and 265-267, nn. 37, 38. For an opposing statement see the recent article by Frankfurter and Landis, cited *supra* note 3.

(3) The argument that the view taken by the Court preserves in the obligatory jurisdiction of the Court a number of cases of trifling significance is of legal weight only as it supports the view that the language of the statute intended to exclude such cases. For, if the intent to preserve such jurisdiction were clear, the statute would have to be construed to preserve it. Justice Brandeis is clearly correct in his statement that the constitutionality of municipal ordinances can rarely be determined simply by applying a general rule, but the same statement applies to statutes which clearly remain within the obligatory jurisdiction.

Assuming the language of section 237 (a) to be in doubt as to obligatory jurisdiction over municipal ordinances, are the questions presented by such ordinances (and by federal and state administrative regulations as well) more trivial than those of which the Court must under the statute clearly take jurisdiction? And would the transfer from obligatory to discretionary jurisdiction necessarily reduce the Court's burden of work to the extent suggested by Justice Brandeis? With respect to new problems, municipal ordinances present questions equally as important as state statutes. Irrespective of obligatory or discretionary jurisdiction, the Court would have been substantially compelled to consider on their merits the recent zoning and set-back cases of *Euclid v. Ambler Realty Co.*,<sup>17</sup> *Gorrie v. Fox*,<sup>18</sup> *Zahn v. Board of Public Works*,<sup>19</sup> and *Nectow v. City of Cambridge*.<sup>20</sup> The consideration of these cases on the merits laid the foundation for a memorandum opinion in *Beery v. Houghton*; <sup>21</sup> and without their consideration on the merits, the Court would have found difficulty in denying petitions for certiorari in *Village of Terrace Park v. Errett* <sup>22</sup> and in *Village of University Heights v. Cleveland Jewish Orphan Home*.<sup>23</sup>

Were cases of this character altogether within the discretionary jurisdiction, their consideration would have involved (1) the preliminary consideration of each case on petition for certiorari, (2) the further consideration on the merits of each case in which the Court granted the petition for certiorari. In the group of cases just referred to, obligatory jurisdiction probably would not have increased the Court's work. It might have resulted in the substitution of memorandum opinions for denials of certiorari. The same statement may apply in some

<sup>17</sup> 272 U. S. 365, 47 Sup. Ct. 114 (1926).

<sup>18</sup> 274 U. S. 603, 47 Sup. Ct. 675 (1927).

<sup>19</sup> 274 U. S. 325, 47 Sup. Ct. 594 (1927).

<sup>20</sup> 48 Sup. Ct. 447 (U. S. 1928).

<sup>21</sup> 273 U. S. 671, 47 Sup. Ct. 474 (1927).

<sup>22</sup> 273 U. S. 710, 47 Sup. Ct. 100 (1926).

<sup>23</sup> 275 U. S. 569, 48 Sup. Ct. 141 (1927).

other cases involving municipal ordinances and administrative regulations of a legislative character, and the difference in burden between an obligatory and a discretionary jurisdiction may not be as great as Justice Brandeis fears.

(4) Justice Brandeis says:

“To construe the phrase ‘statute of any state’ as applying to a municipal ordinance disregards the common and appropriate use of the words, ignores decisions which for nearly a century have governed our jurisdiction to review judgments of state courts sustaining the validity of such ordinances, and tends to defeat the general purpose of the Act of 1925 ‘to relieve this court by limiting further the absolute right to a review by it.’”<sup>24</sup>

This is the language of a partisan. It assumes that the general purpose applies to and controls every change wrought by the Act. Upon slight basis of authority, it alleges that the opinion of the Court “ignores decisions that for nearly a century have governed our jurisdiction.”

But the primary issue here is as to the meaning of the word “statute.” This word is used twice in section 237 (a), once referring to a “statute of the United States,” and once to “a statute of any state,” and similar uses occur in section 237 (b). The term “statute” appears to mean the same in all these cases, and the term “statute of any state” is used in the same context in section 240 (b) of the same act as amended in 1925.<sup>25</sup> The Court in construing the phrase “statute of any state” in the present case appears necessarily to have determined the content of the word “statute” in these other cases.

How is the congressional intent as to the meaning of this language to be determined? Congressional purpose or intent is a formless thing. There is no specific purpose or intent upon the part of 435 representatives and 96 senators, either individually or collectively. There can be no such thing. Assuming the highest competence upon the part of these members, only a few of them can by any possibility have any expertness upon the technical problems respecting the jurisdiction of the United States Supreme Court. As a body they had and could have had no specific intent in omitting in two places in section 237 (a) the words “or an authority exercised under.” No specific intent can be imputed to them as to this particular change because of the generally understood purpose of the whole act. No reports, debates or committee discussions appear to lend aid.

The intent of a legislative body must primarily be found in the language of the statute through which that body speaks. If the language is clear, the Court needs no aid. If it is uncer-

---

<sup>24</sup> *Supra* note 6, at 501.

<sup>25</sup> 43 STAT. 939 (1925), 28 U. S. C. § 347 (b) (1926).

tain, the Court may determine what it terms the "legislative intent" from the language aided by certain external tests. The test of general or specific purpose aimed at in changing this section, fails, when standing alone, because it has no basis outside the terms of the statute itself. We get little aid from "the common and appropriate use of the words," because the same word differs in meaning with different uses. In seeking to apply the test of "common and appropriate use" Justice Brandeis approaches the dogmatism of Humpty Dumpty, who said: "When I use a word it means just what I choose it to mean—neither more nor less." But it is possible to apply to this case certain tests as to the meaning of words.

(a) If the same or similar words are used elsewhere in the same Act, and if the context of the use is not such as to vary their meaning, the words should receive a uniform construction. This rule obviously applies to the same words as used in sections 237 (b) and 240 (b). But Justice Brandeis urges that his position in the present case is supported by the prior judicial construction of the words "any statute of a state" in section 266 so as not to include municipal ordinances.<sup>26</sup> And three weeks after the decision in *King Manufacturing Co. v. City Council of Augusta*,<sup>27</sup> a unanimous Court, in *Ex parte Collins*,<sup>28</sup> through Justice Brandeis, reaffirmed the position that the language of section 266 does not embrace municipal ordinances. But are there differences in the context of section 266? Certain elements of distinction appear from the opinion of Justice Brandeis in the *Collins* case. Section 266 as it now reads requires the action of three federal judges to enjoin or restrain, under certain conditions, "the enforcement, operation or execution of *any statute of a state* by restraining the action of *any officer of such state* in the enforcement or execution of such statute, or in the enforcement or execution of any order made by an administrative board or commission acting under and pursuant to the statutes of such state," and requires that at least five days' notice be given "*to the governor and to the attorney general of the state.*" (Italics ours). The words here italicized, when read together, appear rather definitely to limit the section to action by the central state authority. The requirement of notice to the governor and attorney general appeared in the original form of

<sup>26</sup> 36 STAT. 1162 (1911), 28 U. S. C. § 380 (1926).

<sup>27</sup> *Supra* note 6.

<sup>28</sup> 48 Sup. Ct. 585 (U. S. 1928). Frankfurter and Landis, *op. cit. supra* note 3, at 27, suggest that a jurisdictional problem presents itself if a municipal ordinance is regarded as a state statute for review as a matter of right from the circuit court of appeals under § 240 (b), but not as a state statute for review as of right where action is by three judges under § 266. This, however, appears to present no difficulty.

this enactment in 1910,<sup>29</sup> and in the *Collins* case Justice Brandeis refers to a statement of Senator Burton in debate in 1910, supporting the construction of the word "statute" to exclude municipal ordinances. It would appear therefore that the use of similar language in section 266 gives little aid in the construction of section 237 (a). Section 266 was not intended to include municipal ordinances, and it was made to include orders of an administrative board or commission only by an amendment of 1913.<sup>30</sup> The limited intent of section 266 appears from the whole language of the section. No such limited intent appears from the language of section 237 (a), as amended in 1925.

(b) A second test is that of the meaning of a term at the time of the enactment of a statute. The term here under discussion came into the statute in 1789, and has remained the same throughout. Presumably it has had the same content since 1789, but the omission of the words "or an authority exercised under" in 1925 primarily raises the question as to what was the jurisdiction in 1925 under the terms "a statute of any state," for these words were left in the statute by the draftsmen of the Act of 1925 as the basis for the determination of future jurisdiction of the court. There was no necessity that the court specifically determine the content of these words before the Act of 1925. Yet dicta are of importance as indicating the content of the term "statute" before 1925, and it has already been pointed out that the weight of dicta in 1925 supports the view of Justice Van Devanter that municipal ordinances and administrative regulations of a legislative character were included in the term.

The manner in which the term was used in 1925 by those who must act under it is of much greater significance in statutory construction than an allegation as to "the common and appropriate use of the words." And although the term "law" may be admitted to be broader than the term "statute," it is of some weight that municipal ordinances have long been held to be state laws under the contract clause and the Fourteenth Amendment of the Constitution of the United States. To the uninitiated layman, it is just as inappropriate to call a municipal ordinance a state law as to call it a state statute.

(c) The meaning of a statute as understood by its framers is always of importance if so expressed that it may properly be presented to a court; and in construing the Constitution of the United States, the Supreme Court has given great weight to the

---

<sup>29</sup> 36 STAT. 557 (1910), 28 U. S. C. § 380 (1926).

<sup>30</sup> 37 STAT. 1013 (1913), 28 U. S. C. § 380 (1926). There is some force in the view that the amendment of 1913 should have been unnecessary because the term "statutes" as now construed should include not only acts of the state legislature but also administrative regulations of purely state authorities.

opinions of the framers, however that opinion may have been expressed.<sup>31</sup> Here the specific intent of the framers was not before the court in any outwardly shown form. But here the actual "intent" of Congress was specifically the intent of the United States Supreme Court through a committee of its own members. And the members of the Court most likely to be familiar with this specific intent of the measure were the members of the committee charged with the responsibility for the measure, Justices Van Devanter, McReynolds and Sutherland. The draftsmanship of the measure was primarily the work of Justice Van Devanter, who wrote the opinion in the present case, an opinion concurred in by his committee associates, Justices McReynolds and Sutherland.

On the whole, the opinion of the Court seems preferable to the dissent. The question of jurisdiction, although unargued by counsel, received the thorough consideration of the Court. One is tempted to call the contest within the Court a "tempest in a teapot." The heat of argument in the case is out of proportion to the issue involved. The opinion of the Court is not nearly as vulnerable as Justice Brandeis seeks to make it appear, and the future welfare of the Court did not depend upon such a decision as Justice Brandeis sought. If the Court finds itself unduly burdened by the scope of the obligatory jurisdiction as determined by this case, there should be little difficulty in obtaining a reduction by methods similar to those employed in 1925. If a statute properly conferred jurisdiction, it is not the province of the Court to narrow that jurisdiction. A good portion of Justice Brandeis' dissent may perhaps more appropriately constitute an argument in support of congressional action.

W. F. D.

#### REGULATION OF EXPERT TESTIMONY AS TO INSANITY IN CRIMINAL CASES

There are now in practice two principal methods of eliminating the evils caused by the use of expert testimony where insanity is the defense to a criminal prosecution. One is the so-called Briggs Law of Massachusetts, which has not yet been adopted elsewhere, and the other is a modified form of the Expert Testimony Bill sponsored by the American Institute of Criminal Law, which has been passed by the legislatures of six states. The Massachusetts law has proved the more effective, and suggests the conclusion that the apparent evils of expert testimony can be traced directly to the conflict between the medical conception of mental disorder and the legal conception of criminal responsi-

---

<sup>31</sup> *Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926).

bility;<sup>1</sup> that it is this conflict which, more than anything else, destroys the weight of expert testimony, confuses the issue of fact with the issue of insanity, places the expert at the mercy of the unqualified, and thus subjects the entire medical profession to public and legal ridicule which it does not merit.

In 1915 the American Institute of Criminal Law and Criminology, drew up a bill<sup>2</sup> known as the Expert Testimony Bill and recommended that it be passed by the state legislatures as a practical means of abolishing the abuses of expert testimony in criminal cases. It provided that the trial judge in such cases should have the power to appoint three disinterested physicians to examine a defendant who pleaded insanity. They were to make a report in writing and their appointment was not to preclude either side from calling other experts during the trial. Since that time five states have passed laws substantially the same as the model which the Institute sponsored. These states are California,<sup>3</sup> Colorado,<sup>4</sup> Indiana,<sup>5</sup> Ohio,<sup>6</sup> and Wisconsin.<sup>7</sup> New York<sup>8</sup> passed a similar statute in 1871, but it has not proved

---

<sup>1</sup> The legal tests go on outworn assumptions, (1) that knowledge of the nature and quality of an act . . . or the incapacity to know right from wrong is the sole or even the most important element of mental disorder. (2) That such knowledge is the sole instigator or guide of conduct, (3) that the capacity of knowing right from wrong can be intact and perfectly functioning even though the defendant is otherwise of demonstrably unsound mind. . . . In other words, the law neglects the fundamental notion of the unity of the mind and the interrelationship of the mental processes. Gluck, *Psychiatry and the Criminal Law* (1923) 14 VA. L. REV. 155, 166; see *Anderson v. State*, 43 Conn. 514, 519 (1876); cf. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) c. 6, for an exhaustive discussion of the subject of responsibility; cf. also ARNOLD, *PSYCHOLOGY APPLIED TO LEGAL EVIDENCE* (1906); WHITE, *INSANITY AND THE CRIMINAL LAW* (1923); BARNES, *THE REPRESSION OF CRIME* (1925); Hand, *Considerations Regarding Expert Testimony* (1901) 15 HARV. L. REV. 40; Briggs, *Medico-Legal Insanity and the Hypothetical Question* (1923) 14 J. CRIM. L. 62; Keedy, *Insanity and Criminal Responsibility* (1917) 30 HARV. L. REV. 535; *ibid.* 724; Adler, *Organization of Psychopathic Work in the Criminal Courts* (1917) 8 J. CRIM. L. 362; White, *Expert Testimony in Criminal Procedure* (1920) 11 J. CRIM. L. 499; Hamilton, *Making the Punishment Fit the Crime* (1921) 12 J. CRIM. L. 159; Note (1922) 36 HARV. L. REV. 333.

<sup>2</sup> The text of this bill is given in Keedy, *Insanity and Criminal Responsibility* (1915) 6 J. CRIM. L. 672.

<sup>3</sup> Cal. Laws 1925, c. 156, § 1871.

<sup>4</sup> Colo. Laws 1927, c. 90, §§ 2-4.

<sup>5</sup> Ind. Acts 1927, c. 102, § 172.

<sup>6</sup> Ohio Laws 1927, §§ 13603, 13609. Power to pass such regulatory statutes was expressly given to the legislature by the Ohio Constitution of 1912, art. 2, § 39.

<sup>7</sup> WIS. STAT. (1927) c. 357, §§ 1-6.

<sup>8</sup> N. Y. Laws 1871, c. 666, §§ 1, 2, as amended N. Y. Laws 1910, c. 557, § 658; N. Y. CODE CRIM. PROC. § 658.

successful.<sup>9</sup> Michigan<sup>10</sup> passed one in its simplest form in 1905, which was declared unconstitutional<sup>11</sup> on grounds open to criticism. The Wisconsin statute dates from 1921, the California statute from 1925, and the others from 1927. It is hazarded that these statutes will not prove satisfactory. Perhaps the best proof of this is the report of a special committee of the New York State Crime Commission, submitted in 1928, recommending that the old New York law be entirely revised by amendment.<sup>12</sup> While the more recent statutes of other states have been more carefully drawn, they nevertheless contain the weaknesses which made the New York law ineffective. With the exception of Wisconsin and Indiana, these laws are couched in discretionary terms. The judge may or may not appoint experts when the plea is raised. Furthermore he alone is to decide who are qualified. The result is that the success of the law depends directly upon the wisdom and intelligence of the trial judge.<sup>13</sup>

<sup>9</sup> The killing of Stanford White by Harry K. Thaw resulted in four "judicial or quasi-judicial" determinations of the question of the prisoner's insanity. In a habeas corpus proceeding instituted in 1909 to procure Thaw's release Justice Mills speaking of the above proceedings and of the report of the commission, appointed by the trial judge in the first trial for murder, stating that the prisoner was sane at the time of trial, says: "Under the statute such report was for a preliminary purpose merely . . . to determine whether or not the trial should proceed." *People v. Lamb*, 118 N. Y. Supp. 389, 392 (Sup. Ct. 1909). The statute was expressly declared to be discretionary in *People v. McElvaine*, 125 N. Y. 596, 609, 26 N. E. 929, 932 (1891).

<sup>10</sup> Mich. Acts 1905, No. 175, § 3.

<sup>11</sup> *People v. Dickerson*, 164 Mich. 148, 129 N. W. 199 (1910). The court said that it infringed due process of law, and that by transferring the power to choose witnesses to a member of the judicial department it violated the state constitutional provision for the separation of the powers of the government. The power granted by the legislature seems to have been more nearly that of appointing referees than of choosing witnesses for a side. Due process of law does not require rigid adherence to rules of procedure. See Note (1910) 24 HARV. L. REV. 483.

<sup>12</sup> N. Y. STATE CRIME COMMISSION; SPECIAL REPORT ON FIRE ARMS LEGISLATION AND PSYCHIATRIC AND EXPERT TESTIMONY (1928) 17.

<sup>13</sup> "One reason for the apparent . . . abuse of the plea of insanity has been the fact that initiation of the plea has depended upon laymen . . . as for instance, the judge, the prison officials, and, of course the defense attorney. As a result . . . the cases in which the proceedings have been begun are either the obvious ones, those in which there is but little doubt even in the minds of laymen, or those in which the plea . . . appears to be advantageous strategy for the defense. . . . The upshot of this situation is that the whole matter becomes a partisan one. Some district attorneys . . . instead of endeavoring to determine the truth . . . contest the plea regardless of the facts. Instead of permitting the psychiatrists retained by each side to consult with each other in an effort to agree on the facts, they assume that the other side is made up entirely of incapable or dishonest men and insist on fighting the matter out. . . . The present disrepute of expert testimony is much more the fault of the

It assumes that a busy member of the judiciary will acquaint himself with the doings of the medical men in his locality, ascertain who are the specialists in psychiatry, and familiarize himself with the medical knowledge of mental disorders in order that he may choose the physicians most competent to report on the mental condition of the defendant.

This difficulty is avoided under the Massachusetts system.<sup>14</sup>

---

machinery than it is of the individual psychiatrists or even of the lawyers." Overholser, *Psychiatry and the Courts in Massachusetts* (1928) 19 J. CRIM. L. 75, 78.

<sup>14</sup> Mass. Acts 1927, c. 59, § 1, amending Mass. Acts 1921, c. 415; Mass. Acts 1923, c. 331; Mass. Acts 1925, c. 169, now reads as follows: "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to make . . . discloses facts which if known to the clerk would require notice as aforesaid, such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney, and to the attorney for the accused. In the event of failure by the clerk of the district court or the trial justice to give notice to the department as aforesaid, the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the clerk of a court or the trial justice shall so certify on the papers. The physician making the examination shall, upon certification by the department, receive the same fees and travelling expenses as provided . . . for the examination of persons committed to institutions. . . . Any clerk of court or trial justice who willfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars."

In a report on the results of the first five years under this law [Glueck, *Psychiatric Examination of Persons Accused of Crime* (1926) 36 YALE L. J. 632, 639] it is mentioned that of the total number reported to the State Department of Mental Diseases, 72 were never examined and of these nearly one-half for the reason that they "had been released on bail and could not be found when the examiners called at the place of detention." In order to remedy this condition the Massachusetts Legislature enacted Mass. Acts 1926, c. 320, §§ 1, 2 relating to the duties of Probation Officers. The amendment is in part as follows:

"Before the amount of bail of a prisoner charged with an offense punishable by imprisonment for more than one year is fixed in court, the court shall obtain from its probation officer all available information relative to prior criminal prosecutions. . . of the prisoner. . ."

". . . in the case of a criminal prosecution . . . charging a person with an offense punishable by imprisonment for more than one year the proba-

The wording of the statute makes the mental examination of certain classes of offenders a routine compulsory affair. The examination is not made by a group of physicians picked for the occasion, but by a permanent group of specialists<sup>16</sup> forming a branch of the State Department of Mental Diseases whose duties in connection with the regulation of the State Insane Asylums are varied and continuous the year round.

Four methods of disposing of a case coming within the scope of the law seem possible.<sup>16</sup> 1. When the report of the examiners shows the defendant to be insane or mentally deficient the prosecuting attorney abandons the prosecution. Under these circumstances the criminal charge is filed and the defendant committed without the formality of a trial. Where the charge is homicide some prosecuting attorneys have preferred to close the case by having the court order the jury to return a verdict of not guilty by reason of insanity.<sup>17</sup> 2. When the report of the board finds the defendant insane but the prosecution insists on proceeding with the trial, in the only case reported the prosecution called the examiners and had them testify personally concern-

---

tion officer shall in any event present to the court such information as the commission on probation has in its possession relative to prior criminal prosecutions . . . before such person is admitted to bail in court and also before disposition of the case against him by sentence or placing on file or probation."

<sup>16</sup> "There shall be a department of mental diseases, consisting of a commissioner of mental diseases and four associate commissioners. The commissioner and at least two associate commissioners shall be physicians and experts in the care and treatment of the insane." MASS. GEN. LAWS (1921) c. 19, § 1. For the many duties of this department see MASS. GEN. LAWS (1921), c. 123, §§ 3-5, 7, 10-14, 20, 22, 23.

<sup>16</sup> With the exception of the article by Glueck, *op. cit. supra* note 14, which has little to say of the procedure under this law, our only source of information is the report of Dr. Overholser, a member of the Massachusetts Department of Mental Diseases. The report appears in the record of the proceedings of the National Conference on the Reduction of Crime published in 1927 by the National Crime Commission, 120 Broadway, New York City.

<sup>17</sup> See report of Dr. Overholser, cited *supra* note 16: "In most cases . . . the defendant has been committed without the formality of a trial, the criminal charge being filed. Certain district attorneys have preferred to close the case where the offense was homicide by obtaining a verdict of not guilty by reason of insanity. This has necessitated only the briefest and most formal of proceedings, . . . rarely lasting as long as an hour. By agreement of counsel the offense is shown and evidence of the defendant's mental condition is introduced. An instructed verdict is then promptly returned calling by statute for commitment to a state hospital for life. By either method . . . the matter is finally settled in an orderly, dignified and efficient way." As to the commitment under report of insanity by the board in cases other than homicide, MASS. GEN. LAWS (1921) c. 278, § 13 provides that the court may commit "under such limitations as it deems proper."

ing their examination.<sup>18</sup> It does not appear that in this case the defendant called partisan experts to corroborate the testimony of the board but it seems certain that he could have done so. 3. When the report of the board finds the defendant sane his counsel usually drops the issue of insanity,<sup>19</sup> knowing that the testimony of any hired experts rebutting the report of the board would have little weight with the jury. 4. When the report of the board finds the defendant sane his counsel may nevertheless wish to pursue this line of defense by calling in his own experts. Since the Briggs Law has been in operation, less than one case a year of this sort has been reported.

The Briggs Law was designed to accomplish more than the mere regulation of the use of expert testimony. Indeed, neither the word "insanity" nor "expert" is used in the text of the law as it stands. In a small field of crime, the Commonwealth need not wait for the defense to raise the issue of insanity, before examining the defendant to determine his mental condition. On the theory that the mental condition of a person sometimes had a direct bearing on the type of crime he or she had committed,<sup>20</sup> the state concluded that all persons committing that type of crime should be examined by the best medical talent available. The object of such a law is not merely the abolition of the old evils of expert testimony, but the protection of society from crimes induced by mental instability. The defense of insanity is seldom raised except in cases of murder, arson, or rape, yet the Briggs Law subjects the burglar and every other felon to the mental examination. The Massachusetts law recognizes the fact that a man may be of dangerously unsound mind

---

<sup>18</sup> See report of Dr. Overholser, cited *supra* note 16: "Of the prisoners reported insane, in only one instance was the report of the psychiatrists disregarded. In that case the Judge, despite the evidence given on the stand by the examiners, found the defendant sane and sentenced him to state's prison. . . ." That it is unlikely that the board's testimony will again be disregarded may be concluded from the rest of the statement that ". . . within a few months . . . the prisoner manifested his former symptoms, threatening his fellow prisoners and accusing them of conspiring to injure him."

<sup>19</sup> *Ibid.*: "As a result of the neutral and impartial status of the examiners, occasion to employ the services of partisan experts in criminal cases has practically ceased to exist. The clashes of such experts . . . are now virtually unknown in Massachusetts."

<sup>20</sup> While Mr. Paul E. Bowers was in charge of the Indiana State Prison he wrote: "In a recent study that I made of 100 recidivists each of whom had been convicted not less than four times, 12 of them were insane, 23 were feeble-minded, 10 were epileptic and in each instance the mental defectiveness bore a direct causal relation to their crimes. No less than 180 trials have been held for these persons." Bowers, *The Necessity for Medical Examination of Prisoners at the Time of Trial* (1918) 24 CASE & COMM. 482.

without being legally insane.<sup>21</sup> More important still, it recognizes the fact that the statutory penalties for crime arbitrarily imposed by the state legislature do not prevent the so-called habitual criminal from repeating the same or similar offense upon his release after the expiration of his sentence. Under the Massachusetts Laws for the Commitment of the Insane, those pronounced mentally unsound by the board are confined for an indeterminate period, and released only when medical examination has proved them to be cured.

It might seem reasonable to suppose that physicians would, if given such power as is conferred upon them by the Massachusetts law, find all felons brought before them insane or psychotic in some degree. This has not been the case in Massachusetts, nor should it be in any state where care is made to select only the men of highest standing in their profession. A member of the examining committee of the Massachusetts State Department of Mental Diseases reported recently that of the total number of cases examined so far only twenty-one per cent were diagnosed either as insane or mentally deficient.<sup>22</sup>

It might be asked why the salutary results obtained in Massachusetts could not have been accomplished through a change in the rules of law rather than by recourse to such a novel piece of legislation as was felt to be necessary to obtain its ends. It is believed that the answer lies in the fact that the law of criminal responsibility has so crystalized that society must needs go around it to avoid the consequences of its operation in connection with the use of expert testimony. Experience has proved that expert medical testimony is of little value in trials where such opinion is often most needed to prevent a miscarriage of

---

<sup>21</sup> The criminologist has discovered that there are certain forms of mental disease such as dementia praecox and some stages of paranoia which make of their victim a more dangerous person potentially to society than the more obvious forms of insanity which have their accompanying physical manifestations. There have been developed tests to detect signs of dementia praecox. "These tests are to dementia praecox in reliability and applicability what the Binet-Simon tests are to the feeble-minded. These psychological symptoms [of dementia praecox] are as clear and definite to the properly trained man as they are unknown and unappreciated to those unfamiliar with the method." Hickson, *Psychopathology and its Influence on Criminal Law* (1921) 92 CENT. L. J. 443, 444. They show that the mental side of dementia praecox can be well advanced so as to make the person dangerous without any of the physical signs.

<sup>22</sup> Overholser, *op. cit. supra* note 13. The number examined up to October 15, 1925 was 295. The number examined to date would probably be over 400. This assumption is based on the fact that the amendments, cited *supra* note 14, to the original law refusing bail until examination had been made, and requiring probation officers to submit records of those arrested whenever they possessed such information, have probably increased greatly the number of offenders who come before the Board yearly. See Glueck, *op. cit. supra* note 14, at 647.

justice. Psychiatrists, for example, are convinced that a crime may be the result of mental disease and yet the criminal's faculties of reason, his powers to premeditate and to scheme may be unimpaired, and indeed in many cases strengthened, by his mental condition. Legally, however, unless his powers to distinguish right from wrong, and his ability to comprehend the nature and consequences of his act are impaired, he is not immune from punishment. The mere recognition of the "insane impulse" doctrine does not change the picture. A skilful psychiatrist may be convinced that mental disease caused the defendant to commit the crime for which he is being tried, but the lay jury must use the yardstick of the right and wrong test in coming to their verdict. Thus, after a long and expensive trial, a man has been convicted and sentenced for a murder which he committed apparently in cold blood and with malice aforethought, yet before sentence could be executed the mental paralysis from which he had been suffering for years affected him physically while in jail, and on being transferred to an asylum he died within the month.<sup>23</sup> Conversely, in crimes where insanity is seldom made an issue,<sup>24</sup> mentally diseased individuals complete their sentences or are released on parole only to commit further offenses. Obviously, the proper treatment requires confinement indefinitely, with release only if cured. If incurable, the individual may be at least employed for the benefit of the state.<sup>25</sup> The public, from which juries are impanelled, adheres to the test of rationality as the measure of a man's guilt, and for the physician to tell the jury that a man may be perfectly rational and yet dangerously insane, seems to them to be a contradiction in terms which they are unable to credit in arriving at their verdict.<sup>26</sup> The rules of law making rationality a test

---

<sup>23</sup> A very interesting account of the case referred to in the text, together with the views of an experienced criminologist on the subject of responsibility and the expert witness, is to be found in SULLIVAN, CRIME AND INSANITY (1924) 245, 248.

<sup>24</sup> These are crimes such as rape, burglary, and habitual larceny.

<sup>25</sup> Judge Olson of the Municipal Court of Chicago after pointing out that one of the most serious weaknesses of the statutory penalty as applied to the mentally deficient is its failure to prevent the reproduction of defectives, says: "Under such control [confinement to an institution until cured], there is an abrupt end to criminal depredations and to reproduction. . . . They will greatly reduce costs of the defective to society. . . for the defective will be able to pay his way when given proper restraints and wise management. And other institutions which are well intended but have practically failed because defectiveness was not understood will be relieved and permitted to accomplish some good." Olson, *Psychopathic Laboratory of the Municipal Court of Chicago* (1921) 92 CENT. L. J. 102, 108.

<sup>26</sup> "The force of his (the expert's) testimony is sometimes lessened be-

are in direct conflict with the present understanding of mental instability and its influence on crime. Finding the rules inflexible, Massachusetts through the enactment of the Briggs Law ended the conflict by ignoring them.

The most important difference between the laws modelled upon the provisions of the American Institute bill, and the Briggs Law, is that under the latter the state need not wait for the issue of insanity to be raised, while under the former, the issue must be raised by the defense, or the judge must have good reason to believe that it will be raised before he can provide for non-partisan examination of the defendant. Furthermore, under the Briggs Law the state is provided with machinery capable of supplying information that may be used in combatting crime of a predatory or violent nature. Progress in the readjustment of the criminal law through the study of records collected and filed by the examiners is possible.<sup>27</sup> There is an incentive to compel clerks of court and probation officers to keep criminal records for the use of the examining physicians as is required in Massachusetts. Such information as to past criminal activity is essential to the proper diagnosis of the individual to be examined. In other words, the Briggs Law lays the foundation for the intelligent study of crime as well as insanity and affords the means of collecting much needed information hitherto unobtainable. It is submitted that the appointment of expert physicians by the court could not be made to serve such a purpose. Thus, while the appointment of experts by the court might add to the weight of expert testimony as respects the jury, such a system fails to profit by the advancement of medicine in the study of the criminal and the prevention of crime, and therefore falls short of protecting the public to the extent that such protection is afforded under the Briggs Law.

#### ATTACHMENT STATUTES

A recent Maine case<sup>1</sup> raises for the first time the question of the constitutionality of the type of attachment statute that pre-

---

cause he testifies to matters which while true seem improbable to the jury." BROWN, *LEGAL PSYCHOLOGY* (1926) 113-114.

<sup>27</sup> The examiner who appears in court is restricted by the rules of evidence in making his examination. Evidence of prior indictments is not admissible in most courts and even a record of conviction is good only as evidence to impeach and never to prove the charge in the indictment. And yet psychiatrists need as much of the early history of an individual as they can acquire in order to make a just diagnosis of his mental condition; hence, the several amendments to the Massachusetts law requiring that this information be passed on to the board whenever it is available.

<sup>1</sup> *McInnes v. McKay*, 141 Atl. 699 (Me. 1928).

vails in the New England states. The Maine statute<sup>2</sup> provides that civil actions shall be commenced by original writs framed to attach the goods of the defendant. In an action instituted under this statute the defendant challenged its constitutionality upon the ground that such general attachment in advance of judgment deprived him of his property without due process of law, in that the statute did not require an affidavit setting out the cause of the attachment, or a bond as security for good faith. Although there is a total lack of authority upon the precise question, the decision upholding the law seems sound. The court points out that long acquiescence in the operation of a law has always been recognized as a cogent argument against its invalidity;<sup>3</sup> the statute in question, with slight changes, had been in operation unquestioned since 1820. In addition, the court's contention that the constitutional prohibition did not include the taking of property under an attachment for the purpose of furnishing security for the satisfaction of a judgment in favor of the plaintiff seems well founded.<sup>4</sup> Even if this should be regarded as a prohibited taking it would seem that the requirements of due process are satisfied.<sup>5</sup>

Statutes practically identical with the one in question exist in Massachusetts,<sup>6</sup> Connecticut,<sup>7</sup> and New Hampshire.<sup>8</sup> Although Rhode Island<sup>9</sup> requires an affidavit to be signed by the plaintiff or his attorney to the effect that there is a just claim due against the defendant, the practice there is as broad in scope as in the other states except for one limitation mentioned below. This is

---

<sup>2</sup> ME. REV. STAT. (1916) c. 86, § 2.

<sup>3</sup> Cf. *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14 (1905) (long acquiescence considered as valid argument for upholding a statute providing for beginning prosecutions for felonies by information); *Levin v. United States*, 123 Fed. 826 (C. C. A. 8th, 1904) (act of Congress authorizing state courts to naturalize aliens upheld upon this ground).

<sup>4</sup> In a case where it was contended that unless the affidavit is served with the summons the procedure in attachment amounted to a taking without due process, it was held that there was no taking within the constitutional prohibition. *American Bank v. Goss*, 236 N. Y. 488, 142 N. E. 156 (1923).

<sup>5</sup> See *Bennett v. Davis*, 90 Me. 102, 105, 37 Atl. 864, 865 (1897); *Randall v. Patch*, 118 Me. 303, 305, 108 Atl. 97, 98 (1919); *Inhabitants of York Harbor v. Libby*, 126 Me. 537, 539, 140 Atl. 382, 385 (1923).

<sup>6</sup> MASS. GEN. LAWS (1921) c. 223, § 42. "All real and personal property liable to be taken on execution . . . may be attached upon the original writ in any action in which debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover."

<sup>7</sup> CONN. GEN. STAT. (1918) § 5861. "Attachment may be granted upon all complaints containing a money demand against the estate of the defendant."

<sup>8</sup> N. H. PUB. LAWS (1926) c. 332, § 1. "All property real and personal which is liable to be taken in execution may be attached and holden for the judgment the plaintiff may recover."

<sup>9</sup> R. I. GEN. LAWS (1923) § 5146.

due to the custom, sanctioned by statute,<sup>10</sup> by which attorneys keep on hand a supply of form writs having stamped upon them a facsimile of the signature of the clerk of the superior court. By this means the attorneys need only fill out the form when the occasion arises. The procedure in Connecticut is much the same. Every resident attorney in good standing is a commissioner of the superior court,<sup>11</sup> authorized to sign writs of attachment.<sup>12</sup> Since under the statute the plaintiff is not required to post a bond as security for his good faith in prosecuting the action, other than the bond for costs required in all civil actions, this practice affords ample opportunity for abuse. Some statistics published in a recent number of the Connecticut Bar Journal<sup>13</sup> are helpful in determining the value of this practice. The figures indicate that the Connecticut practice is very effective in aiding collections and settlements out of court when the defendant has property.<sup>14</sup> But apparently attorneys do not hesitate to provide for a large margin between the amount of the attachment and the possible recovery.<sup>15</sup> Where no bond or undertaking is required the defendant's only remedies for an illegal or excessive attachment are an application to a judge for release or reduction of attachment,<sup>16</sup> and a possible claim for damages for malicious abuse of process.<sup>17</sup> If the defendant is able to procure a surety he may put up a bond equal to the value of the property attached and retain possession of the property.<sup>18</sup> The Vermont statute,<sup>19</sup>

---

<sup>10</sup> *Ibid.* § 5135.

<sup>11</sup> Conn. Acts 1921, c. 67.

<sup>12</sup> CONN. GEN. STAT. (1918) § 5628. The result of these two provisions is that attorneys issue the writ themselves. But where an attorney is interested as a party a writ signed by him may be abated. *Doolittle v. Clark*, 47 Conn. 316 (1879).

<sup>13</sup> See Clark, *Research in Law Administration* (1928) 2 CONN. BAR J. 211, 229.

<sup>14</sup> *Ibid.* In the superior courts of the state in the year 1925-1926 attachments were ordered in 2627 cases. Of these, attachments were levied in 1607 cases, of which 1082 were withdrawn or discontinued before judgment.

<sup>15</sup> *Ibid.* In twelve of the cases in which a judgment was recovered, the difference between the amount recovered and the value of the property attached, was between \$1 and \$100; in ten, between \$100 and \$200; in fifty-nine, between \$200 and \$500; in sixty-one, between \$500 and \$1000; in sixty, between \$1000 and \$2000; in sixty-four between \$2000 and \$5000; and in sixty-eight, over \$5000.

<sup>16</sup> CONN. GEN. STAT. (1918) §§ 5892, 5893. It has been held that the power of a judge upon an application for the reduction or dissolution of an attachment is confined to a decision as to excess or illegality. He has no authority to weigh the plaintiff's chances of success, and dissolve the attachment because he does not believe that the plaintiff will obtain a judgment. *Sachs v. Nussenbaum*, 92 Conn. 682, 104 Atl. 393 (1918).

<sup>17</sup> This claim is, of course, very difficult to prove. See Clark, *op. cit. supra* note 13, at 228.

<sup>18</sup> CONN. GEN. STAT. (1918) §§ 5884-5887.

which is practically identical with that of Maine in other respects, requires the plaintiff before attachment to post a recognizance by one other than the plaintiff that the latter shall prosecute the writ with effect, and shall answer all costs and damages that the defendant may recover.

Attachment may be had in actions arising out of tort as well as in those arising out of contract, in all of the New England states<sup>20</sup> except Rhode Island. There attachment may be had in a tort action only when it is against a non-resident.<sup>21</sup> Rhode Island also provides for attachment in equity in suits on claims for which it would be available if the action were at law.<sup>22</sup>

In most states outside of New England the remedy by attachment is confined to cases coming within certain categories specified in the statutes. It is difficult to generalize because the statutes and judicial interpretations vary. Most of the statutes still require as a prerequisite that the claim arise out of contract,<sup>23</sup> and be already due. West Virginia provides for attachment in a suit in equity for a claim not yet due,<sup>24</sup> and other states allow the remedy in law actions for claims not due making the requirements more strict in these cases.<sup>25</sup> By most statutes attachment is not allowed where the creditor has other security.<sup>26</sup> In general it may be said that even within the above restrictions attachment in these states is allowed only when the defendant is a non-resident or is attempting to abscond or dispose of his property.<sup>27</sup> Moreover, most of these statutes require the plaintiff to file an affidavit stating the nature and amount of his claim with the grounds of the attachment, and in addition he must furnish a bond conditioned upon payment of costs and damages, if the

<sup>19</sup> VT. GEN. LAWS (1917) §§ 1678, 1701, 1707.

<sup>20</sup> See *supra* notes 2, 6, 7, and 8.

<sup>21</sup> R. I. GEN. LAWS (1923) § 5160.

<sup>22</sup> *Ibid.* § 5159.

<sup>23</sup> DRAKE, ATTACHMENT (7th ed. 1891) § 10; 1 SHINN, ATTACHMENT AND GARNISHMENT (1896) § 12; 74 CENT. L. J. 399 (1912). But *cf.* N. Y. CODE CIV. PROC. § 635 (providing for attachment in tort actions); MICH. COMP. LAWS (Cahill, 1915) § 13049, *semble*; WASH. COMP. STAT. (Remington, 1922) § 648 (attachment on claim for damages arising out of the commission of a felony or seduction); 2 MINN. STAT. (Mason, 1927) § 9342 (attachment in actions for money demand excepting actions for libel, slander, seduction, breach of promise to marry, false imprisonment, malicious prosecution, assault, and battery).

<sup>24</sup> An affidavit must state when the claim will become due. W. VA. CODE ANN. (Barnes, 1923) c. 106, § 1. The constitutionality of this statute has been upheld. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55 (1889).

<sup>25</sup> 1 WADE, ATTACHMENTS (1887) § 162. As examples *cf.* WASH. COMP. STAT. (Remington, 1922) § 649; MONT. REV. CODES (Choate, 1921) § 9258.

<sup>26</sup> 1 SHINN, *op. cit. supra* note 23, § 24.

<sup>27</sup> 1 WADE, *op. cit. supra* note 25, §§ 75, 84-98. As examples *cf.* N. Y. CODE CIV. PROC. § 636; ILL. REV. STAT. (Cahill, 1927) c. 11, § 1; PA. STAT. (West, 1920) § 17160.

judgment is for the defendant, or if the warrant is vacated.<sup>28</sup> In Michigan and Delaware no bond is required where the claim arises out of contract,<sup>29</sup> but in Michigan the plaintiff must post a bond when he proceeds by attachment in a tort action.<sup>30</sup> A statute requiring the bond in case of an action against a resident, but dispensing with it in an action against a non-resident has been held not unconstitutional.<sup>31</sup>

In some of the far western states<sup>32</sup> the plaintiff may have the defendant's property attached in any action upon an unsecured contract, made within the state, for the direct payment of money; and also in either contract or tort actions against a non-resident. An affidavit must state that the claim is within the statute and further that the attachment is not sought to hinder, delay, or defraud creditors of the defendant. A bond not exceeding the amount of the claim, nor less than \$200, must be posted by the plaintiff. The Montana statute adopts these provisions in cases where the debt is due, but when attachment is sought for a debt not yet due the plaintiff must state in his affidavit either that the defendant has absconded or is about to do so, or that he is fraudulently disposing of his property.<sup>33</sup>

It is to be noted that in attachment proceedings the federal courts require the attaching creditor to comply with the law of the state in which the initial proceeding is brought.<sup>34</sup>

Since attachment is a remedy that exists only by statute the provisions of the statute must be strictly complied with before the writ can be legally issued. Where the affidavit and bond are required they are conditions precedent to the jurisdiction to proceed with the attachment.<sup>35</sup> In many states the writ of attach-

<sup>28</sup> 1 WADE, *op. cit. supra* note 25, §§ 64-73, 102. As examples *cf.* ILL. REV. STAT. (Cahill, 1927) c. 11, § 2; PA. STAT. (West, 1920) § 17160; WASH. COMP. STAT. (Remington, 1922) § 647. The New York statute does not require the bond where the action is brought to recover money held by governmental agency which has been wrongfully converted or disposed of, or where the defendant's responsibility arose out of his own false statement in writing as to his credit. N. Y. CODE CIV. PROC. §§ 639, 640.

<sup>29</sup> MICH. COMP. LAWS (Cahill, 1915) §§ 13023, 13029; DEL. REV. CODE (1915) § 4118.

<sup>30</sup> *Ibid.* § 13049.

<sup>31</sup> *Central Loan and Trust Co. v. Campbell*, 173 U. S. 84, 19 Sup. Ct. 346 (1899) (classification reasonable because of the greater difficulty in satisfying a judgment against a non-resident).

<sup>32</sup> CAL. CODES OF CIV. PROC. (Deering, 1923) §§ 537, 538, 539; NEV. REV. LAWS (1919) § 5147; ORE. LAWS (Olson, 1920) §§ 296, 297; IDAHO COMP. STAT. (1919) §§ 6779, 6780, 6781.

<sup>33</sup> MONT. REV. CODES (Choate, 1921) §§ 9256, 9257, 9258.

<sup>34</sup> *Savings Bank of Danbury v. Lowe*, 242 U. S. 357, 37 Sup. Ct. 172 (1917); *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379 (1888); 17 STAT. 197 (1872), 28 U. S. C. § 726 (1926).

<sup>35</sup> *Sousa v. Lucas*, 156 Cal. 460, 105 Pac. 413 (1909); *DRAKE, op. cit. supra* note 23, §§ 87, 115.

ment must be preceded by a summons or *capias*, but in others it issues as the original writ serving as both summons and attachment.<sup>36</sup> Originally the writ was regarded as a form of distress for the purpose of coercing the appearance of the defendant.<sup>37</sup> Its principal purpose now is to furnish security to the plaintiff for any judgment he may obtain.<sup>38</sup> Thus its effect is to give the plaintiff a lien on the attached property.<sup>39</sup> The duration of this lien is limited by statute.<sup>40</sup>

There can be no doubt that attachment is the best method yet devised for facilitating the collection of claims and for preventing the fraudulent disposition of property by debtors. Since this is the end toward which every statute dealing with the subject should be directed, it seems wise policy to extend the scope of the remedy as far as the necessity for protecting the debtor from abuse of process permits. Sufficient protection is given by requiring the attaching party to furnish a bond at least equal to the value of the property under the writ. With this safeguard, therefore, the broad scope of the New England statutes would seem to give a most effective and at the same time unimpeachable procedure.

#### CAPACITY OF A MARRIED WOMAN TO ACQUIRE SEPARATE DOMICIL

The domicile of the wife, both in England<sup>1</sup> and in the United States,<sup>2</sup> is, in general, determined by that of the husband, even though the wife has never lived at her husband's domicile.<sup>3</sup> Two

<sup>36</sup> 1 SHINN, *op. cit. supra* note 23, § 3.

<sup>37</sup> 1 WADE, *op. cit. supra* note 25, § 1; see *Barber v. Morgan*, 84 Conn. 618, 622, 80 Atl. 791, 792 (1911); *Coit v. Sistare*, 85 Conn. 573, 577, 84 Atl. 119, 121 (1912).

<sup>38</sup> *Ibid.* 577, 84 Atl. at 121.

<sup>39</sup> *Meyers v. Mott*, 29 Cal. 359 (1866) (death of defendant before judgment terminates the lien); *Coit v. Sistare*, *supra* note 37; 1 WADE, *op. cit. supra* note 25, § 27.

<sup>40</sup> In Connecticut, if execution is not levied within sixty days after judgment, the lien is dissolved. CONN. GEN. STAT. (1918) § 5914. The usual period is between thirty and sixty days after judgment.

<sup>1</sup> *Dolphin v. Robins*, 7 H. L. Cas. 389 (1859); *Yelverton v. Yelverton*, 1 Sw. & Tr. 574 (1859); *In re Mackenzie*, [1911] 1 Ch. 578; *Lord Advocate v. Jaffrey*, [1921] A. C. 146; *Alberta v. Cook*, [1926] A. C. 444; see *Warrender v. Warrender*, 9 Bli. N. S. 89, 103 (1834); DICEY, *CONFLICT OF LAWS* (2d ed. 1908) 124, 132, 134; (1921) 30 YALE L. J. 631.

<sup>2</sup> *Kennedy v. Kennedy*, 87 Ill. 250 (1877); *McClellan v. Carroll*, 42 S. W. 185 (Tenn. 1897); *In re Geiser's Will*, 82 N. J. Eq. 311, 37 Atl. 628 (1913); *Bruce v. Bruce*, 3 S. W. (2d) 6 (Ark. 1928); *CONFLICT OF LAWS RESTATEMENT* (Am. L. Inst. 1925) § 29; *GOODRICH, CONFLICT OF LAWS* (1927) § 30; *MINOR, CONFLICT OF LAWS* (1901) § 46.

<sup>3</sup> *Yelverton v. Yelverton*, *supra* note 1; *Thoms v. Thoms*, 222 Ill. App. 618 (1921); *COMMENTARIES ON CONFLICT OF LAWS RESTATEMENT* (Am. L.

reasons have been assigned for the rule.<sup>4</sup> The first was the fictitious identity of person of husband and wife;<sup>5</sup> the second, that public policy demanded that the family unit be protected by allowing one family to have only one domicil.<sup>6</sup> The fiction that husband and wife are legally one person has practically vanished,<sup>7</sup> but the idea that the welfare of society demands the protection and preservation of the family as a unit still persists. In England a married woman has always been incapable of acquiring separate domicil for any purpose whatever.<sup>8</sup> The English rule was followed by a few early American cases,<sup>9</sup> but recognition of the failure of the reasons supporting the rule soon led the courts of this country to adopt a more liberal view. The hardship<sup>10</sup> of compelling the wife to follow the husband wherever he might choose to establish his domicil, for the purpose of obtaining a divorce, induced the first step toward liberality, namely, that where the husband was guilty of acts which gave ground for divorce the wife might retain the matrimonial domicil<sup>11</sup> in order to secure such divorce.<sup>12</sup> Where the unity of the family has in fact been dissolved<sup>13</sup> there would seem to be little, if any, reason for refusing to permit the wife to acquire a separate domicil. Practically all American courts permit the

---

Inst. 1925) § 29.2, n. 2 and cases cited; see *Warrender v. Warrender*, *supra* note 1, at 104.

<sup>4</sup> CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) § 29.1.

<sup>5</sup> 1 BL. COMM. \*442; see *Heyman v. Heyman*, 19 Ga. App. 634, 92 S. E. 25, 26 (1917); *Taubman v. Davis*, 199 Mo. App. 439, 443, 203 S. W. 654, 656 (1918).

<sup>6</sup> Beale, *Domicil of a Married Woman* (1917) 2 So. L. Q. 93.

<sup>7</sup> See *Williamson v. Osenton*, 232 U. S. 619, 625, 34 Sup. Ct. 442 (1914); Note (1921) 20 MICH. L. REV. 86, 88.

<sup>8</sup> *Warrender v. Warrender*, *supra* note 1; *Re Daly*, 25 Beav. 456 (1858); *Dolphin v. Robins*; *Yelverton v. Yelverton*; *In re Mackenzie*; *Alberta v. Cook*, all *supra* note 1; *H. v. H.*, [1928] 2 P. 206; *Hughes*, *Judicial Method and the Problem in Ogden v. Ogden* (1928) 14 L. Q. REV. 217.

<sup>9</sup> *Smith v. Moorehead*, 6 Jones Eq. 360 (N. C. 1863); see *Harrison v. Harrison*, 20 Ala. 629, 644 (1852).

<sup>10</sup> See *Goodrich*, *Divorce and Conflict of Laws* (1923) 2 TEX. L. REV. 1, 9.

<sup>11</sup> ". . . matrimonial domicil means nothing more than the place where the parties last lived as husband and wife with the intent of making that place their home, and which was still the domicil of the one spouse when the divorce action was brought." *Ibid.* 12; see also *Fox*, *The Recognition of Foreign Decrees of Divorce* (1927) 33 W. VA. L. Q. 139, 149.

<sup>12</sup> *Shaw v. Shaw*, 98 Mass. 158 (1867); *Burtis v. Burtis*, 167 Mass. 508, 37 N. E. 740 (1894); see *Harteau v. Harteau*, 14 Pick. 181, 185 (Mass. 1833); cf. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525 (1906); *Corkum v. Clark*, 161 N. E. 912 (Mass. 1928).

<sup>13</sup> That is, husband and wife "have severed marital relations and intend to live apart." This is also the suggestion of Mr. Page, cited *infra* note 17. ". . . a wife may acquire a domicil separate and distinct from that of her husband, where the unity of husband and wife has been breached." *Hairs v. Hairs*, 300 S. W. 540, 543 (Mo. 1927).

wronged wife to acquire a separate domicile for purposes of divorce<sup>14</sup> and many allow her to acquire such domicile for all purposes.<sup>15</sup> The American Law Institute states that the limit of the law today is that "if a wife lives apart from her husband without being guilty of desertion,<sup>16</sup> she may acquire a separate domicile.<sup>17</sup> The reasoning that the wife should be allowed to acquire a separate domicile once the family unity has disappeared would seem to apply with equal force to the case where she is herself at fault. Artificial rules of domicile can have no power to preserve the unity of a family the members of which are estranged, nor does it seem desirable that they should.<sup>18</sup> A few cases have already gone to the extent of allowing a wife who was at fault to acquire a separate domicile,<sup>19</sup> but the weight of authority appears to be to the contrary.<sup>20</sup>

<sup>14</sup> *Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869); *Michael v. Michael*, 34 Tex. Civ. App. 630, 79 S. W. 74 (1904); *Sneed v. Sneed*, 14 Ariz. 17, 123 Pac. 312 (1912); *Rinaldi v. Rinaldi*, 19 N. J. Eq. 14, 118 Atl. 635 (1922); *Herron v. Passallaigue*, 110 So. 539 (Fla. 1926); see *MINOR, CONFLICT OF LAWS* (1901) § 50; *Beale, op. cit. supra* note 6, at 101.

<sup>15</sup> *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 232 (1893) (administration of estate); *Watertown v. Greaves*, 112 Fed. 183 (C. C. A. 1st, 1901) (suit for tort); *Bradford v. City of Worcester*, 184 Mass. 557, 69 N. E. 310 (1904) (pauper settlement); *Gordon v. Yost*, 140 Fed. 79 (C. C. W. Va. 1905) (alienation of affections); *Buchholz v. Buchholz*, 63 Wash. 215, 115 Pac. 88 (1911) (administration of estate); *Fitch v. Huff*, 218 Fed. 17 (C. C. A. 4th, 1914) (tort action); *Williamson v. Osenton, supra* note 7 (damage suit); *Rector v. Rector*, 186 N. C. 618, 120 S. E. 195 (1923) (suit for alimony without divorce); (1921) 30 YALE L. J. 631. *Contra: Estate of Wickes*, 128 Cal. 270, 60 Pac. 867 (1900).

<sup>16</sup> The question arises as to what law is to determine whether or not the wife has been guilty of desertion. It is believed that the law of the forum should decide, though under the view referred to *infra* note 22, the law of the prior domicile would be determinative.

<sup>17</sup> *CONFLICT OF LAWS RESTATEMENT* (Am. L. Inst. 1925) § 20. Two of the Advisers working on the Restatement advocate a further extension of the law, Mr. Goodrich suggesting that a wife should be permitted to acquire a separate domicile if she live apart from her husband and Mr. Page suggesting that she be allowed to do so if she and her husband have severed marital relations and intend to live apart. *Ibid.* 4.

<sup>18</sup> Note (1921) 20 MICH. L. REV. 86, 89.

<sup>19</sup> *Smith v. Smith*, 4 Mackey 255 (D. C. 1885); *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806 (1889); *Saperstone v. Saperstone*, 73 Misc. 631, 131 N. Y. Supp. 241 (Sup. Ct. 1911); *Matter of Dunning*, 211 Ill. App. 633 (1918). A wife may acquire separate domicile ". . . whenever the wife has adversary interests to those of her husband,—[but] she cannot acquire such a domicile so long as the unity of the marriage relation continues. . . ." See *Howland v. Granger*, 22 R. I. 1, 2, 45 Atl. 740 (1900); *cf. Prater v. Prater*, 87 Tenn. 78 (1888).

<sup>20</sup> *Matter of Bushby*, 59 Misc. 317, 112 N. Y. Supp. 262 (Surr. Ct. 1908); *Pane v. Pane*, 152 La. 415, 93 So. 246 (1922); see *Cheely v. Clayton*, 110 U. S. 701, 705, 4 Sup. Ct. 328, 332 (1884); *Collum v. Hervey*, 3 S. W. (2d) 993, 995 (Ark. 1928); *GOODRICH, op. cit. supra* note 2, § 32.

It has been said<sup>21</sup> that "the power to acquire a domicil must depend upon whether the person is capable of acquiring a domicil first, by the law of his prior domicil and second, by the law of the place where he attempts to acquire a new domicil."<sup>22</sup> The basis for this statement would seem to be the theory that the law defining the legal relations of any one person, often called "status,"<sup>23</sup> should be uniform<sup>24</sup> in all jurisdictions.<sup>25</sup>

In the recent case of *Torlonia v. Torlonia*,<sup>26</sup> the plaintiff left her husband, domiciled in and a citizen of Italy, and established her domicil in Connecticut, where she brought suit for divorce on the ground of adultery. The court held that she had the power to establish a domicil in Connecticut for the purpose of obtaining a divorce,<sup>27</sup> regardless of the fact that "under the law of Italy, the husband is entitled to the control of the wife to the extent that she must follow him wherever he chooses to establish his

<sup>21</sup> CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) § 11.2.

<sup>22</sup> In support of this statement only one case is cited. In that case a resident of Ohio went to Florida at the age of nineteen and there attempted to establish her domicil. Under the law of Ohio she would have been capable of acquiring a domicil of choice at the age of eighteen; under Florida law she could not do so until she was twenty-one. The Florida court held that she could not establish a domicil of choice until she became capable under the law of Florida. *Beekman v. Beekman*, 53 Fla. 858, 43 So. 923 (1907). The reporter infers that the converse would also be true *i. e.*, that the Florida court would hold her incapable of acquiring a domicil of choice if the Ohio law required her to be twenty-one, even though Florida law only required her to be eighteen—in other words, that the court would require that she be capable under the laws of both Ohio and Florida. It is submitted that such an inference has no justification in the case. *Cf. Hiestand v. Kuns*, 8 Blackf. 345 (Ind. 1847), where on similar facts capability under the law of Ohio was held to be sufficient, regardless of lack of capability under Indiana law.

<sup>23</sup> See Cleveland, *Status in Common Law* (1925) 38 HARV. L. REV. 1074. The term "status" seems to denote an indefinite aggregation of legal relations not susceptible to accurate definition.

<sup>24</sup> "It can by no means be assumed that uniformity and certainty are the sole ends to be attained." Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468, 479.

<sup>25</sup> "... it is necessary that there should be one universal rule whereby to determine whether parties are to be regarded as married or not." 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1st ed. 1891) § 856; see CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) § 13.2.

<sup>26</sup> 142 Atl. 843 (Conn. 1928).

<sup>27</sup> English courts, in general, will not recognize the jurisdiction of foreign courts in matters of divorce unless both parties to the marriage bond are domiciled in the country whose court granted the divorce. See *The Validity of Foreign Divorces in English Courts* (1926) 70 SOL. J. 1126, 1127. In speaking of domicil a court may mean one of two things: (1) the domicil necessary to confer jurisdiction, (2) the domicil determining what rules of the conflict of laws are to be applied. For an example of the second classification see *Armitage v. Attorney General*, [1906] Prob. 135.

residence, except as such control may be modified or affected by a decree of an Italian court of competent jurisdiction.<sup>28</sup> The decree of divorce granted in this case would be refused recognition in an Italian court because of lack of jurisdiction in the Connecticut court.<sup>29</sup> Although there may be theoretical objections to the situation, the plaintiff being divorced in Connecticut but regarded as married in Italy, it nevertheless seems quite justifiable from a practical point of view.<sup>30</sup> The finding that the plaintiff has set up her domicile in Connecticut amounts to a finding that she intends to reside there indefinitely.<sup>31</sup> Since her home is to be in Connecticut,<sup>32</sup> it would seem that she should be entitled to have her legal relations determined by the law that has grown out of the mores of the community in which she expects to live.<sup>33</sup> Some confusion may occasionally result, but this does not appear to be a compelling reason for denying her the benefit of the laws applicable to her neighbors in the community.<sup>34</sup>

---

<sup>28</sup> ITALIAN CIV. CODE, art. 18; *Deput. Prov. di Novara v. Deput. Prov. di Milano* (App. Milan) *Monitore* 1886, 910; 1 RICCI, *CORSO TEORICO PRACTICO DI DIRITTO CIVILE* (3d ed. 1923) 276.

<sup>29</sup> This would be true regardless of the fact that under the municipal law of Italy divorce is not allowed. See *Cass. Turin, La Legge* 1894, 2, 515; CIV. CODE, art. 148.

<sup>30</sup> " . . . a general principle of uniformity . . . can never correspond to the realities of judicial administration." Yntema, *loc. cit. supra* note 24.

<sup>31</sup> *Foss v. Foss*, 105 Conn. 502, 136 Atl. 98 (1927); *Youngblood v. Rector*, 126 Okla. 210, 259 Pac. 579 (1927). In general, one of the requisites of establishing a domicile of choice is the intention to remain indefinitely. See *Comment* (1927) 36 *YALE L. J.* 408, 412.

<sup>32</sup> "Where one has one's fixed home or habitat, there is one's domicile." Coudert, *Some Considerations of the Law of Domicil* (1927) 36 *YALE L. J.* 949.

<sup>33</sup> " . . . it will probably be safer, if we must suggest a general principle, to insist upon a just decision than upon one which may as well as not be erroneously believed to be uniform." Yntema, *loc. cit. supra* note 24.

<sup>34</sup> No case has been found which, in ruling on the domicile of a married woman, has required that she be capable of acquiring domicile both by the law of her prior domicile and by the law of the state wherein she seeks to acquire a new domicile.