THE DOMICIL OF A CORPORATION

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Any discussion of a legal subject at once discloses assumptions about life, law and logic; about proof, thinking and truth. Frequently these assumptions are implicit only and the author is unaware of them;[1] as a result his discussion is apt to be illogical, that is, his statements may be inconsistent and his conclusions may not necessarily follow. The failure to analyze these assumptions, it is believed, is chiefly responsible for the unconscious use of terms in more than one sense. It is further believed that much could be done for the cause of clear thinking, and that much confusion and useless controversy could be avoided, if writers would cultivate the habit of searching for their implicit assumptions and making them explicit by listing and keeping these before them in any discussion.[2]

Despite the danger of this method, the writer here wishes to list some of his assumptions in the discussion of the domicil of a corporation. Brevity is, of course, a limiting factor in the substantiation of these assumptions. It is evident that the conclusions on this subject are apt to be sound only in so far as the assumptions are sound. If the reader does not agree with the conclusions, it is hoped that this discussion will be in such form that he can place that disagreement on a criticism of one or more of the major assumptions or on a criticism of the logical development of these premises. Most of the assumptions here listed are not chosen because it is believed that they have any *a priori* validity or because it is assumed that they are generally accepted, but because they represent tentative hypotheses believed to be of value by many critical thinkers and careful observers.

In order to avoid omission the following list will contain some assumptions that are perhaps somewhat remote and overlapping.

LIST OF ASSUMPTIONS

1. The test of the validity of any term, proposition, rule, law or principle is to be found in its use.[3]

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[1] KEYSER, THINKING ABOUT THINKING (1926) 73; KEYSER, MATHEMATICAL PHILOSOPHY (1922) 40-60; Cook, *Scientific Method and the Law* (1927) 13 A. B. A. J. 303, 306. The writer is indebted to Professor Cook for many citations and valuable suggestions upon which this article is based, although Professor Cook is in no way responsible for the way his suggestions have been applied herein. See also Wilson, *Statistical Inference* (1926) 63 SCIENCE 289.

[2] KEYSER, *loc. cit. supra* note 1.

[3] JAMES, THE MEANING OF TRUTH (1909) 51; SCHILLER, FORMAL LOGIC

2. The object of any science is to obtain general statements that are descriptive of past events and of help in predicting future events.[4] These statements are called "laws."

3. As new data are observed and these laws found to be non-descriptive and non-predictive, the laws are changed or modified.[5]

4. In so far as the "lawyers' law" has to do with the description and prediction of the behavior of certain societal agents, it is fundamentally like the law of the physical scientists.[6]

5. When confronted with a new case of doubtful classification, the logical methods of the physical scientist, the doctor, or the lawyer are fundamentally identical.[7]

6. There are at least two types of thinking, the sub-human (organic), and the human (postulational) thinking. Man does some human thinking and much sub-human thinking.[8] Each of these types of thinking are further subject to classification into methods.

7. Human thinking may be either "inductive" or "deductive" or, what is most frequent, a combination of both (often called "inductive").[9] Neither exists entirely independently of the other.

8. One of the first assumptions of modern scientists is that no rule or principle is ultimate, final, or immutable, *i. e.*, all laws

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(1912) 277, *et seq.*; DEWEY, HUMAN NATURE AND CONDUCT (1922) 238-247; DEWEY, ESSAYS IN EXPERIMENTAL LOGIC (1916) 303-334; LEWIS, THE ANATOMY OF SCIENCE (1926) 43; Cook, *op. cit. supra* note 1, at 306.

[4] In addition to references cited *supra* notes 1, 3, see PEARSON, THE GRAMMAR OF SCIENCE (3d ed. 1911) 85; WHITEHEAD, SCIENCE AND THE MODERN WORLD (1926) 254; WHITEHEAD, AN INTRODUCTION TO MATHEMATICS (1911) 87, 248; Cook, *The Present Status of the "Lack of Mutuality" Rule* (1927) 36 YALE L. J. 897; Bernard, *Scientific Method and Social Progress* (1925) 31 AM. J. SOCIOLOGY 1-9.

[5] *Supra* notes 1, 2, 3 and 4; JENNINGS, PROMETHEUS (1925) vi-vii.

[6] HOLMES, COLLECTED LEGAL PAPERS (1920) 173, 313; CUNNINGHAM, TEXTBOOK OF LOGIC (1924) 329-339; *cf.* PEARSON, *op. cit. supra* note 4, at 85; AUSTIN, LECTURES ON JURISPRUDENCE (5th ed. 1885) 86; HOLLAND, JURISPRUDENCE (11th ed. 1910) 21, 41; Hall, *The Next Task of the Law School* (1925) 24 MICH. L. REV. 42, 47; BEALE, TREATISE ON THE CONFLICT OF LAWS (1916) 132-137.

[7] Cohen, *The Subject Matter of Formal Logic* (1918) 15 J. PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHODS 673; DEWEY, *op. cit. supra* note 3; Cook, *op. cit. supra* note 1; Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457.

[8] KEYSER, THINKING ABOUT THINKING (1926) 73.

[9] Professor Cohen denies that there is any such thinking as inductive logic. See Cohen, *op. cit. supra* note 7, and Cohen, *The Myth about Bacon and the Inductive Method* (1926) 23 SCI. MONTHLY 504; *cf.* Cook, *op. cit. supra* note 1, at 306, 307; Dewey, *Logical Method and Law* (1924) 10 CORN. L. Q. 17; Wilson, *op. cit. supra* note 1.

are merely tentative hypotheses, and science is not concerned with ultimate truths.[10]

[10] See Jennings, *Diverse Doctrines of Evolution, Their Relation to the Practice of Science and of Life* (1927) 65 SCIENCE 19-31. "I have heard a brilliant experimentalist—a man who has marvelously advanced biological science—say that the moment he moves a few inches beyond his experimental results he goes wrong, as the next experiment shows . . . . But always there is the possibility that emergents may come into the circle; always must the conclusions be tested by experiment. Reasoning is good; computation is good; but for *what* are they good? They are good as guides to the next experiment, the next observation . . . When the reasoned conclusion conflicts with experiment, it is the reasoned conclusion that must give way. . . . Thinking is an instrument, a very fallible instrument, for helping to decide what to try, but the *last* word must be *try*." (p. 21)

"Organic evolution will be seen as emergent evolution in its most conspicuous manifold display. In that day resplendent with promise when this is recognized, the practice of facile generalization which honeycombs with error biological science will lose its seductive charm. To generalize will be recognized as the most laborious task in biology, instead of the lightest and simplest." (p. 22)

"Data drawn from the study of man are as ultimately valid (provided drawn by equally sound methods) as are those from amœbae, the frog, or the rat; . . . . It is true that the investigation of man is difficult; but unhappily that does not make it the less necessary." (p. 22)

"In such progress (social) by trial and error will indeed be found free play for the utmost sharpness of vision as what is best to try, and for all possible astuteness of judgment as to what has turned out error; but in the end a *trial* it must be, with no antecedent certainty as to results."

"I fear that never that twain (fundamentalist and evolutionist) shall meet in peace till one is inside the other. The fundamentalist that subtly assails the foundations of science by attempting to destroy the basis on which it rests; or the cruder variety that assaults it with legal and physical restraint—these are the enemy, with whom there is peace only in defeat or victory." (p. 25)

" . . . one must hold doctrines experimentally, as he practices science experimentally." (p. 25)

Compare with Jennings' wholesome method the fundamentalist views and assumption in Morgan, *The Relation of Biology to Physics* (1927) 65 SCIENCE 213. "But while I agree with Jennings most heartily that, in the study of organisms, we can not neglect a single detail of their structure, our real problem is not to discover how many kinds of structures exist, but whether there are common principles that run through them all. If there are no such principles, then we are indeed headed toward chaos." (p. 219) In defending Mendel's Law, he exposes his whole mental background by stating: ". . . his (Mendel's) two laws still hold *for the cases that Mendel studied and for the characters of the majority of animals and plants so far studied.* But because linkage and crossing-over has been added to our equipment, and because with knowledge of these we can apply the laws of heredity over a much wider field, is this a reason for stating that because 'the systems of structure are different the rules of heredity are different'?" (p. 219-220) (Italics ours).

Cf. also Cady, *The Chemistry of the Future* (1927) 65 SCIENCE 1. The theory of immutability of laws and facts has a tremendous influence even in

9. The validity of premises is never arrived at *a priori;* the only guarantee we have of their validity is their workability based upon experience.[11]

10. There is no such thing as a fundamental principle in the sense that it is unchangeable.[12]

11. Principles exist as hypotheses with which to experiment, to be used in handling past experience but not to be slavishly served in new or doubtful situations. The same applies to rules and "standards." [13]

12. What are commonly called "facts" are not merely "found" but are also "made." In facts the element "found" is the crude raw data in the external world, untangled, unarranged, unclassified and unmeaning; the ordering, analyzing, and classification is the "made" portion.[14]

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science today as seen in Cady's definition of "facts" as "the direct result of observation *unmodified by any act of reason.*" *Cf.* Cohen, *op. cit. supra* note 9.

[11] Hurst, *The Conception of a Species* (1927) 65 SCIENCE 271. "A species is a group of individuals of common descent with certain constant characters in common which are represented in the nucleus of each cell by constant and characteristic sets of cleromosouns." The old conception of a species proving inadequate, Mr. Hurst adopts a new one.

[12] This follows from postulate 8. *Cf.* Cohen, *The Place of Logic in the Law* (1916) 29 HARV. L. REV. 622, 627.

[13] Wilson, *Some Recent Speculations on the Nature of Light* (1927) 65 SCIENCE 265. "Perplexing as our situation is, we should be happy in it. For it is wholesome, healthy and young. We have become again as little children to whom everything is new and wonderful, and we are learning facts so fast that their systematization is not to be expected. In due time we shall come again to a period of senility in which we shall understand and no longer learn. It will be some precocious, maybe I had better say some prematurely senile young man from whom will issue this virus of scelerosis." (p. 266)

"Some years ago A. G. Webster in commenting at the American Academy on the difficulties we have been discussing said that the modern physicist had a perfectly good coat and an equally good pair of trousers, but was completely naked between the two. It sometimes seems as tho the still more recent discoveries and disputations had tended dangerously to fray out the nether parts of the coat and the upper portion of the trousers. We shall sometime have a beautiful whole new suit, possibly with spats and cravat and patent leathers and a plug hat, but those will be evil days when the grinders cease because they are few and those that look out of the windows be darkened. Let us enjoy our present gamin life." (p. 271)

Biology, especially genetics, is in exactly the same condition today. Jennings, *Biology and Experimentation* (1926) 64 SCIENCE 96; Jennings, *op. cit. supra* note 5, at 17; *cf.* BEALE, *op. cit. supra* note 6, at § 118: "Such a man (the learned judge) solving a legal problem presented to him does not say, such and such a solution seems reasonable or reaches a practical result; he says, *it is* law." (Italics ours).

[14] JAMES, *loc. cit. supra* note 3; DEWEY, *loc. cit. supra* note 3. We little realize how much of our "facts" and our "laws" of any science are

13. Law is not merely "found" but "made." [15] The found element of law consists in the uniformity of the behavior of materials or human beings.[16] The "made" element consists in the formulation of propositions that are descriptive of this behavior. Where doubt exists, neither the laws nor the facts are ever merely "given," nor are they merely "found."

14. Conflict of laws is based upon prevalent notions of convenience, like all other law; and not on "comity," as is generally stated.[17]

15. A corporation is no more a fiction than John Brown is a fiction, nor is it any the less "real." A corporation is a legal person for the same reason that John Brown is a legal person, *i. e.*, because it is subject to rights and duties.[18] We call a "corporation" "it." "It" becomes an it, only because the court thinks of it as a right-and-duty-bearing unit or "entity." The fiction and the reality cause difficulty only when the non-legal factors of human beings associated together for profit in a certain manner are confused with the legal consequences of such association.

We now examine the problem of the domicil of a corporation. Courts [19] and text-writers [20] of this country are generally agreed

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fabricated until we stop to list the implications back of these. Davis, *The Value of Outrageous Geological Hypotheses* (1926) 63 SCIENCE 463.

[15] GRAY, THE NATURE AND SOURCES OF THE LAW (1909) § 221. This proposition is now generally accepted among law teachers although it is far from general acceptance by the legal profession as a whole.

[16] Cook, *op. cit. supra* notes 1, 4; HOLMES, *loc. cit. supra* note 6.

[17] YOUNG, FOREIGN COMPANIES AND OTHER CORPORATIONS (1912) 15-19, and works there cited; *cf.* STORY, CONFLICT OF LAWS (8th ed. 1883) §§ 3-7; WHARTON, CONFLICT OF LAWS (3d ed. 1905) § 1½; DICEY, CONFLICT OF LAWS (3d ed. 1922) 10; Comment (1927) 36 YALE L. J. 694.

[18] Dewey, *The Historic Background of Corporate Legal Personality* (1926) 35 YALE L. J. 655; Book Review (1923) 18 ILL. L. REV. 281, 282-3; Cohen, *Communal Ghosts and Other Perils in Social Philosophy* (1919) 16 J. PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHODS 673; Smith, *Legal Personality* (1928) 37 YALE L. J. 283.

[19] See the cases collected in BEALE, THE LAW OF FOREIGN CORPORATIONS (1904) 121; also *infra* notes 20 and 21. "Its (corporation's) place of residence is there (at place of its charter) and cannot be elsewhere. Unlike a natural person it cannot change its domicil at will, and although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there." Davis, J., in Insurance Co. v. Francis, 11 Wall. 210, 216 (U. S. 1870). This is typical in sentiment and in the fact that it is mere dictum.

[20] COOK, PRINCIPALS OF CORPORATION LAW (1925) 29; 1 THOMPSON, CORPORATIONS (2d ed. 1908) 592; MARSHALL, CORPORATIONS (1902) § 27; CLARK, PRIVATE CORPORATIONS (2d ed. 1916) 82; 1 CLARK AND MARSHALL, PRIVATE CORPORATIONS (1903) 354; SPELLING, PRIVATE CORPORATIONS (1892) § 77; *cf.* MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) 917 n.; BALLANTINE, PRIVATE CORPORATIONS (1927) 39; see also STORY, CONFLICT OF LAWS

in *saying* that the domicil of a corporation is in the state of its creation. The encyclopedia [21] tell us that this is undoubtedly the law, citing a baffling array of cases. The Committee of the American Law Institute on the Restatement of the Conflict of Laws has adopted this statement [22] as to the domicil of a corporation. With all due deference to this solid wall of authority it is suggested that today the statement is not true (descriptive of the decisions of the courts) and is not "the law," in that (a) it is useless in predicting what a court will do, and (b) it is actually not supported by the cases. It is like the prayer at the opening of a legislative assembly or the title of an after-dinner speech: it has nothing to do with what follows. Like many other venerable statements in corporation law, and the conflict of laws, this one stands as mute but eloquent evidence of the power of the dead past over the living present. It will be the thesis of this paper that the term domicil is inapplicable to a corporation, or, if used at all it will have a substantially different meaning than when used in connection with an ordinary person. If the term is to be used at all, it will be found that a corporation has not only *a* domicil but *many* domicils.

At the outset it will be necessary to examine the concept domicil as used in non-corporation cases. An adequate treatment of domicil would require at least one good sized volume; it will be impossible, therefore, to do more here than trace in the broadest outline the rise and decline of the concept and to suggest a method for a critical re-examination of the whole subject.

DOMICIL OF A NATURAL PERSON

The Roman Empire was a hodge-podge of many countries with many laws. The rulers were at once faced with the problem of what "law" to apply in a given case; so, according to Jacobs [23] "we are indebted to the Civil Law for both the term 'domicil' and the legal idea which it represents." Where "foreigners" should be subject to municipal burdens, where subject to suit, and what rules should be applied, were questions partially answered by the Roman concept "domicil." Not all laws of the domicil were to be ruling; so, the fiction of "personal law" was invented. With the rise of nationality in Europe, local customs (laws) were dis-

(1834) § 585; *cf.* STORY, *op. cit. supra* note 17, at 177, 178, and note; WESTLAKE, CONFLICT OF LAWS (5th ed. 1925) 387; *cf.* DICEY, *op. cit. supra* note 17, at 160; WHARTON, *op. cit. supra* note 17, at 109; BEALE, *op. cit. supra* note 19, at § 71; HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) 190.

[21] 1 FLETCHER, CYCLOPEDIA OF CORPORATIONS (1917) 815; 14 C. J. 338; 14A C. J. 1224.

[22] 1 CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) § 42.

[23] JACOBS, LAW OF DOMICIL (1887) 1, 7.

regarded and a single body of laws made to apply to all alike; hence domicil dropped out of importance except as to its international aspect, and this also was soon to be eliminated by the theory of *nationality* as governing one's personal law.

It is generally believed that the Anglo-American concept of domicil is strictly of English origin;[24] but it is highly probable that the clerical judges who administered the probate of estates were influenced by the civil law. Be that as it may, it seems that English law did not know the concept until nearly the beginning of the 19th century.[25] The first cases involved problems of personal succession, holding that personal property must be distributed according to the laws of the decedent's domicil. The British people were colonizers. The domicil rule in this instance seemed to them sensible, and calculated to meet the reasonable and just expectations of the decedents; likewise in the matter of marriage and divorce. Unfortunately, this concept domicil was generalized into a universal law, applicable to some twenty-five to thirty different types of purposes.[26] By the middle of the century, this whole body of the law of the conflict of laws seems to revolve about the sun "domicil." The last decade or two of the century witnessed a remarkable decline in the alleged importance of domicil in the conflict of laws. The same thirty purposes have dwindled down to some eight or ten in the *Conflict of Laws Restatement.*[27] Nor is it any longer seriously contended that domicil has any sanction in international law.

A careful examination of the cases involving domicil and a critical analysis of these, it is believed, will disclose that there are at least five different concepts of domicil, depending upon five distinct problems in the solution of which the concept is used.[28] These are: (1) How will the court act in the settlement of property rights upon death of testate and intestate, and in the legitimation of children in so far as property rights are involved? (2) Ought the court to act, as in the construction of many statutes such as the responsibility to pay taxes in the forum, or the duty to support a pauper? (3) Has the court power to act, as in jurisdiction to grant divorce, or jurisdiction to try a case under the diversity of citizenship clause of the Judiciary Act defining the jurisdiction of federal courts? (4) Will the court recognize the judgment of a foreign court, as where constructive service is involved, or a decree of divorce has been granted with one or both of the parties resident without

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[24] *Ibid.* 19.

[25] The concept is not to be found in Bracton, Coke, the Abridgments or even in Blackstone.

[26] JACOBS, *op. cit. supra* note 23, at 29-92.

[27] 1 CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) 5.

[28] Comment (1927) 36 YALE L. J. 408.

the state? (5) How will a court act in time of war in prize cases, in the matter of business assets within the jurisdiction? Closely connected with, but confused with domicil in questions 2, 3, and 4, is the constitutional question in this country of how far a court must act or refrain from acting under the "due process" and the "full faith and credit" clauses of our Constitution. These are separate and distinct questions from those of domicil, although it must be confessed that they have often been confused by the courts; and until these two questions are unscrambled and analyzed no clear statement of the conflict of laws is possible.

A further sub-classification will have to be made between (a) international cases, (b) interstate cases, and (c) intra-state cases, for the fairly obvious reason that courts have different emotional reactions in these three types of cases, and because different considerations of policy are involved.[29] There is not so much difference between the laws of the states of the Union as there is between the laws of the various nations. In the intra-state cases, certainty is often the chief social interest involved: for example, the rules of the road. In view of the habits of courts in giving different meanings to the same term as different problems present themselves for solution, it would be strange if domicil were given the same meaning for all purposes. Facts sufficient to constitute domicil for purposes of taxation may not be sufficient where the problem is the distribution of one's property on death. It is a mistake to assume that what the courts call domicil in an intra-state case will also be held to be domicil in an interstate case; or that what they call domicil in an interstate case will constitute a domicil in an international case. Nor can we be put off merely by the fact that the judge renders lip service to the generalization that domicil is a definite unitary concept for all purposes under all situations. Repetitions of the golden text have very little to do with the decision in doubtful cases. It is not, of course, urged that the concept domicil is any different in this respect from any other symbol or label. In a popular sense it does contain a common core of meaning for most persons because of associations aroused by the term. Beyond this, there is a twilight zone, a penumbra of vague implications.[30] The courts have sharpened the concept by a process of inclusion and exclusion and the term has become highly technical (non-popular). The courts have determined what phenomena (cases) to include and what to exclude, not by the cases already included but rather by their notions of the demands of policy and convenience for the problems in hand. After many problems have troubled the

[29] Condert, *Some Considerations in the Law of Domicil* (1927) 36 YALE L. J. 949.

[30] See Wurzel, *Juridical Thinking*, in 9 SCIENCE OF LEGAL THINKING (1917) 286, 336-345.

courts we find that, due to the scarcity of concepts and possibly to the delusion that the law exists before the decision, the courts use the term domicil for different types of cases just as they have used the term "possession" in property, procedure, larceny, and in the Volstead Act. The term covers markedly different operative facts in each of these fields.

An objection seriously raised to this analysis is that it makes the law too complicated. There is a type of mind that would reduce the universe into relatively simple categories, determine the "essence" of these categories, and make the facts fit the theories at the cost of exceptions and fictions galore. Modern theories of the structure of the atom or Einstein's Theory of Relativity do not make the universe "more complicated" than our experiences show it to be. The error lies in the assumption that the universe is simpler than it is.

Above we have five different shades of meaning of domicil which are used in five distinct classes of purposes with as many classes of legal consequences, depending upon the questions involved. Is it, then, wise to try to give one meaning to the word domicil; to construct a "pure type" of domicil and to reject the bulk of the cases as not "proper" or "true" cases of domicil?

It is submitted that what is most needed is some degeneralization of domicil and some re-valuation of the use of the concept. There has been too much over-generalization and confusion of the factual with the legal elements, with an accompanying array of exceptions, fictions, and rejections to cover the cases and keep preconceived notions.

With this background we are now ready to sketch the development of the concept of the domicil of a corporation, and to examine the purposes for which the term is said to be important.

DEVELOPMENT OF THE CONCEPT DOMICIL AS APPLIED TO CORPORATIONS

What is the position or the status of a corporation without the state of its origin? Will it be treated as a duty-bearing unit abroad? There have been two distinct and contradictory answers in theory. The restrictive theorist says "no," the liberal theorist says "yes." In all the countries whose law was derived from the Roman law, it was the orthodox theory that a corporation was a mere creature of some sovereign whose existence and personality were purely fictitious.[31] The social and political struggles back of this theory have been noted elsewhere.[32] Being a fiction it could not have a personal status abroad. This theory

[31] YOUNG, *op. cit. supra* note 17, at 65.

[32] Dewey, *The Historic Background of Corporate Legal Personality* (1926) 35 YALE L. J. 655, 664.

was first formulated in the United States,[33] and developed to its logical conclusion by the famous Belgian jurist, Laurent.[34] Since corporations of the eighteenth century were monopolies, they possessed only those rights expressly granted to them by their charter. Their rights were in derogation of individual rights and were not to be allowed to cross state boundary lines. So when Marshall, Story, and Taney were uttering their famous dicta about the nature of a corporation they were using the stock phrases of the bar of their time, and reflecting the fears of the public in regard to the corporations of that day.[35] But the demands of business were unmindful of the restrictive theory. Corporations could sue and be sued in foreign states. A fiction had to be created to save the theory: namely, the fiction of "comity." Business knows no boundary lines. Corporations were fast being shorn of their monopolistic features, but still the theory had to be kept although everything is conceded under the comity fiction. Lest this fiction bear too heavy a burden it was bolstered up with another fiction: namely, that of "agency." Taney's statement has become classical:

"It is very true that a corporation can have no legal existence outside of the state of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where the law ceases to operate, and is no longer obligatory, the corporation can have no existence. *It must dwell in the place of its creation, and cannot migrate to another sovereignty.* But although it must live and have its being in that state alone, yet it does not by any means follow that its existence will not be recognized elsewhere; and its residence in one state creates no *insuperable* objection to its power of contracting in another. . . . Now natural persons . . . are continually making contracts in countries in which they do not live; and where they are not personally present when the contract is made; and no one has ever doubted the validity of these agreements. And what greater objection can this be to the capacity of an artificial person, *by its agents,* to make a contract, within the scope of its limited powers in a sovereignty in which it does not reside; provided such contracts are permitted to be made by the law of the place?" [36] (Italics ours).

This is quoted at length for here we have not only the two famous fictions of "comity" and "agency" but also the starting point of the domicil of the corporation. If all "persons" must

[33] Bank of Augusta v. Earle, 13 Pet. 519 (U. S. 1839).

[34] The fact that Belgium was suffering from the invasion of French *sociétés anonymes* in 1847 no doubt is rationally connected with Laurent's theory with its animosity for foreign corporations. YOUNG, *op. cit. supra* note 17, at 11.

[35] HENDERSON, *op. cit. supra* note 20, at 10.

[36] Bank of Augusta v. Earle, *supra* note 33.

have a domicil, since a corporation is a "person," a corporation also must have a domicil. Little does it matter that the question can hardly arise with respect to corporations. Furthermore, if a corporation has its existence only in the state that creates it and cannot migrate, it must follow that its domicil is in the state of its creation. Such has been the reasoning of the courts and text-writers.[37]

The artificial character of the fiction of comity will be readily detected when we liken the corporate status to a marriage status. To say that the marriage status of *A* and *B* exists only in the state where they were married, thereafter to recognize the marriage in all other states (by comity), and then to say that the marriage status "exists" only in the state of marriage, does not sound very convincing. More accurately analyzed, the group of legal relations we call "marriage status" does not "migrate," of course, but there are as many marriage "statuses" as there are states that recognize the marriage, even though the legal relations in all these are identical. Thus, a man has as many "titles" to his land or chattels as there are jurisdictions giving him the legal relations he has to others in respect to the land or chattels.[38] These titles, however, may, and often do, vary from state to

[37] BEALE, *op. cit. supra* note 20, at 121. "A corporation must come into being in the state by which it is created and there it must first be located and have its domicil, *and since it can have no legal existence outside of the incorporating state, it would seem clear, that it can never acquire any other domicil,* although the principal part of its business is done in another state, and this is the prevailing view." (Italics ours; citing nine cases of which but two or three are in point). Compare the following interesting statement by the same writer. "And so a body created as a corporation in one State must be recognized as such in another State." BEALE, SUMMARY ON THE CONFLICT OF LAWS (1902) 517.

[38] So a corporation exists as a corporation in as many states as recognize the corporation. There are as many legal entities as there are states. What state will be referred to for the "proper rule" in any given case, where there is a conflict of rules, will as in all other cases of conflicts depend upon net result of balancing interests involved. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1910) 10 COL. L. REV. 283, 297, 326. For the same suggestion as to "titles" to property, see Comment (1927) 36 YALE L. J. 694.

"Shall we, must we, say that there are as many 'rights,' all growing out of one group of facts under consideration, as there are jurisdictions which will give the plaintiff relief? Since such an assertion is merely a shorthand way of making the prophecy that the appropriate persons, the officials, in each of these jurisdictions would re-act to the situation, if it were presented to them, so as to 'give relief' to the plaintiff, there seems to be no other statement to make. Thus interpreted, the statement is not only startling but plain common sense." Cook, *op. cit. supra* note 7, at 478. Professor Beale takes just the opposite view: namely, that a right, a title, a slave, a wife, in one state is such in every state whether or not so recognized by the courts of any other state. BEALE, *loc. cit. supra* note 37.

state. We are not interested in the physical existence of the land or chattels, the husband and wife, or the human beings, etc., that we call the factual corporation. These can and do migrate. The question is whether there is any more or less migration in the statuses of natural persons than there is of corporate persons. It is submitted that there is no migration of either. Both exist in a legal sense, so far and only so far as there are legal relations in foreign states. These legal relations are "created" by the foreign states and not by the organizing or marrying state.

All that is necessary to be said of the agency fiction is to ask, how can there be an agent in a state which does not recognize the existence of a principal? Taney's argument from natural persons doing business abroad by agents is not sound; natural persons are admitted to have rights to do business abroad. But more fundamentally the same objections apply to this theory that apply to the comity theory. The fiction of no rights is destroyed by the fiction of rights.[39]

In the United States the restrictive theory of corporations is little more than an empty shell, due, in addition to the above fictions, to the extension of the meaning of the "commerce clause," the "due process clause," and the "equal protection" clause of the Constitution; and the exclusion of foreign corporations is being thwarted by the doctrine of "unconstitutional conditions."

England has, consciously or unconsciously, adopted the liberal theory of the status of corporations abroad, and legal persons are regarded as the subject of rights in the same manner as natural persons.[40] As would be expected, the English courts and textwriters have little to say about the domicil of a corporation, and when they do speak of it their notions of the concept, on the whole, are at wide variance from those of American courts and writers.

In what cases do we find the courts talking about the domicil of a corporation in this country? When is domicil important today? In *Commentaries on Conflict of Laws Restatement,* section 10, defining domicil, we find:

> "Jurisdiction often depends upon domicil, and it is therefore necessary in order to determine the questions of jurisdiction to establish the principles upon which domicil is based. The principal rights determined by a person's domicil concern (a) status such as legitimacy, adoption, and divorce; (b) the transfer by act of law of a personal estate as a whole, as for instance, upon death; (c) the incidence of personal taxes; (d) judicial jurisdiction." [41]

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[39] YOUNG, *op. cit. supra* note 17, at 49.

[40] *Ibid.* 50-53.

[41] 1 CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) 5.

Admitting for the sake of discussion that this is true, then, since questions of legitimacy, adoption, divorce, and succession of personal estate upon death can hardly arise with respect to corporations, the only purposes for which the domicil of a corporation can be important are taxation and judicial jurisdiction. If it is insisted that questions of the status of corporations also arise, and that domicil is also important there by way of analogy, it is sufficient answer that the courts have seldom used the word domicil in that connection, and even the committee restating the law seems to be able to restate the law of the conflict of laws regarding corporations without using the term.[42] Let us now look at jurisdiction.

JURISDICTION

The term jurisdiction is used to cover a multitude of sins.[43] Great confusion has resulted from the unconscious use of the term in different senses. The factual elements have been confused with the legal elements. It would be a great gain if the sense of this term was indicated when there is danger of confusion.

At least six[44] distinct meanings have been masked by the term jurisdiction. These are indicated by the following questions:

1. How far has a court of a given state (questions of constitutional and international law aside) power to render a judgment that will be binding within the state rendered? (internal jurisdiction)

2. How far has a court of a given state (constitutional questions aside) power under international law to render a judgment where a foreign element is involved that will be binding within the state? (international jurisdiction)

3. How far has a court of a given state (questions of international law aside) power under the Constitution to render a

[42] 3 *ibid.* 32-100.

[43] See Cook, *op. cit. supra* note 7, at 460-461, for an account of jurisdiction starting from an English rule of venue for the trial of murder "introduced originally apparently for purely practical reasons, later enacted into an immutable principle of jurisdiction, based on arguments as to the territorial nature of law."

Implicit in the phrases "jurisdiction to tax" and "jurisdiction over the parties" is the erroneous assumption that there is some immutable principle determining the power of a state to tax or to adjudicate. Note (1921) 34 HARV. L. REV. 542. The term power here and in the text is used in a little broader sense than Hohfeld's "legal power," broader in so far as Hohfeld assumes the state to be sovereign and not subject to legal relations; as it is here assumed that no state is sovereign in the above sense in so far as there exists international law.

[44] This list is not exhaustive of the use of the term in other connections: for example, "executive jurisdiction," etc., where there is like confusion.

judgment that will be binding within the state? (internal-constitutional jurisdiction)

4. How far has a court of a given state power to render a judgment (questions of constitutional and international law aside) that will be recognized as valid in another state? (external jurisdiction)

5. How far has a court of a given state power under international law to render a judgment (constitutional questions aside) that must be recognized in another nation? (external-international jurisdiction)

6. How far has a court of a given state power under the Constitution to render a judgment (questions of international law aside) that must be recognized and enforced by a sister state? (external-constitutional jurisdiction)

The above may be somewhat simplified if expressed in another way. (a) Has the court power to act under a given statute defining its scope of judicial action: for example, have the federal courts the power to adjudicate a cause arising between an individual of New York and a corporation of Georgia? (b) Will the court act when it is asked to enforce a foreign judgment and the regularity of the proceedings is brought into question: for example, where process is not properly served because *D* was out of the state, or the summons was neither read nor left with *D*? (c) Must the court act or refrain from acting when it is asked to enforce a foreign judgment because of some constitutional provision such as the "due process clause" or the "full faith and credit" clause, or because some rule of international law is at stake?

How far is the concept domicil important in each of the above six senses? As to (1), if a court assumes to assert power that of course is the end of the matter. There are no prerequisites of domicil or anything else. The court is here somewhat in the position of the English Parliament as to the validity of its actions.[45]

The second sense of jurisdiction raises questions of disabilities under international law. The situation of an English court that is not bound by constitutional restraints in our sense is clarifying. Suppose an English court renders a judgment against an American citizen in England which violates our notions of "due

[45] For those who consider "the law" as a "homogeneous, scientific, and all-embracing body of principles," and decisions as local distortions "warping principle by bad precedent," when they personally disagree with a given result then this would not be "the law." *Cf.* BEALE, *op. cit. supra* note 6, at § 117. "A slave would still be a slave in a free country although he was free." *Ibid.* § 517.

process." Does its enforcement there violate any rule of international law, so far as a question of domicil may be involved? The answer to this question must be left to those who know much more international law than does the writer. We venture, however, to make the following observation: since domicil is primarily a peculiar Anglo-American concept, we shall be greatly surprised to find any restraints based upon this concept, imposed by the consensus of the civilized nations.[46]

The third meaning of jurisdiction raises the question of constitutional limitations. Suppose a New York court renders a judgment against a corporation originally formed in New Jersey. To what extent will the judgment be declared void under the "due process" clause because there is a defect in procedure based upon lack of domicil?[47] Domicil in the sense of place of original charter (organization) was once thought to be very important here. It is, of course, a well known fact today that there is little difficulty in getting a valid judgment against a "foreign corporation." The history of this process of development has of late been frequently traced and summarized.[48] The development has been rapid, and fictions have played their part well to disguise this development. The idea prevailed until the middle of the eighteenth century that the only way a "foreign corporation" could be reached was by attachment, a proceeding *in rem*, some would choose to call it; and even here only where a special statute authorized the proceeding. The corporation not being present and not being domiciled was thought to be not subject to service. Next were statutes giving causes of action *in personam* where the corporation was doing business within the state. The lack of presence and of domicil was covered by the fiction of implied consent. The next step was to drive out this fiction even if it

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[46] Furthermore, since the concept "jurisdiction over the person" does not depend upon domicil at all in the continental countries, and since jurisdiction over non-resident (non-domiciled) persons is assumed by substituted service by rule of court or by statute in England and Australia without challenge, it seems unlikely that all these countries are violating any international law on the subject. DICEY, *op. cit. supra* note 17, at 246; Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421, 441; Cook, *op. cit. supra* note 7, at 461, 483.

[47] It would, indeed, be an unpleasant thought to assume that the framers of the Fourteenth Amendment of the Constitution meant to embalm mid-Victorian notions of domicil in the "due process" clause.

[48] HENDERSON, *op. cit. supra* note 20, at 77-100; Note (1926) 10 MINN. L. REV. 520; Note (1925) 3 WIS. L. REV. 100; Comment (1924) 33 YALE L. J. 547; Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676; Scott, *Jurisdiction of Non-Residents Doing Business Within A State* (1919) 32 HARV. L. REV. 871; Hinton, *Substitute Service on Non-Residents* (1925) 20 ILL. L. REV. 1.

had to be done with another: namely, the fiction that a "foreign" corporation is "present" [49] within the state where it does business. The final step in freeing the court from the outworn dogmas of "domicil" and "presence" is to declare that neither of these conceptions has been or can be intelligently applied to a corporation; and jurisdiction depends upon neither of these but upon broader considerations of expediency, such as "doing business" or the "bringing about of certain results" within the state, such as "doing pleasure" in an automobile or an airplane. It is true that a judgment will be held invalid against a corporation if it is not "doing business" or "causing certain results" within the state, but this is because it would be socially undesirable to hold the corporation and not because the corporation is not domiciled within the state. At this point it will be objected that it is agreed that domicil is not the reason of this decision, but that it is a useful concept to express results. This objection contains the whole case in support of the statement that a corporation is domiciled in the state of its origin for purposes of jurisdiction. We should answer that it is no longer useful for this purpose, for it adds nothing to "state of origin." If "state of origin" is meant, then "state of origin" should be used and not the more treacherous concept domicil. And we see that it is not even descriptive of the results of the decisions [50] in so far as the cases have arisen.

The last three meanings of jurisdiction remain to be considered. In what we called "external" jurisdiction, we are faced with a question of conflict of laws: that is, how far a New York court will recognize and enforce a foreign (English) judgment depends entirely upon its own rules of the conflict of laws. There are very few cases raising this question in respect to a corporation; so, we have very little basis for prediction as to what is the law (what courts will do).

In our fifth sense of jurisdiction (external international) it is probably seldom seriously contended that England or New York by international law is required to recognize a judgment of a French court.[51]

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[49] The corporation *is* present, in the same sense that it is present where chartered; that is, legal relations exist in all states. *Supra* note 38. The members do not exist generally in the foreign state; hence the fiction, for if the existence of legal relations were enough, then you and I are always "present" in every jurisdiction. Taney's dictum "that a corporation can have no legal existence" outside of the "creating" state is obviously non-descriptive in either of the above senses.

[50] See cases collected in references cited *supra* notes 46, 48.

[51] Lorenzen, *The Enforcement of American Judgments Abroad* (1919) 29 YALE L. J. 188, 268; also Comment (1927) 36 YALE L. J. 542. Some writers on conflict of laws wish their particular notions to be raised to the dignity of international law. There is the assumption that "juris-

Finally we come to our last, sixth, sense of jurisdiction (external constitutional). Our Constitution requires that full faith and credit be given to the "judicial proceedings" of sister states of the Union. "Judicial proceedings" here is an ambiguous phrase. Not all judgments are entitled to receive this honor. Certainly full faith must be accorded to many judgments against corporations where service was had against foreign corporations neither domiciled nor present within the state. The objections made in discussing "due process" (internal constitutional) in the third sense of jurisdiction are of equal force here as to the importance of domicil. It should also be noted that it does not necessarily follow that the decisions here will be authority in any of the other of the five classes of jurisdiction.

In the above six senses, we were interested in the procedural end of jurisdiction, sometimes called "jurisdiction over the parties." Entirely different questions arise when we consider the jurisdiction of a given court over the subject matter of the action (cause of action and not the res): that is, which is the proper court to try a case where no foreign national elements are involved. We may be fairly safe in assuming that international law is silent upon this question, each nation being free to define the powers of its own courts and under no duty to recognize a judgment of any particular foreign court. Hence, only constitutional or statutory questions are apt to arise. Do the federal courts have power to try cases within the diversity of citizenship clause of the Constitution where one of the parties is a corporation and the other is an individual not a citizen of the same state, or is a corporation not organized within the same state? The great body of cases cited for the proposition that a corporation is domiciled in the state of its charter are cases involving this narrow sense of jurisdiction and are decisions on the "diversity of citizenship" clause of the federal Constitution. After a period of doubt, it is now well settled that a corporation will be deemed to be a citizen of the state first granting it a charter for purposes of this federal jurisdiction.[52] No question of domicil is involved. The question is never at issue. The sole question is and has always been, of what state the *X* corporation is a "citizen." For a long time the answer has quite uniformly been, in

diction", "domicil", "judgment," etc., are terms of international law, with a fairly definite meaning. This seems to be implicit in much of the writings of Professor Beale. Soon the desire becomes confused with the "facts."

[52] For collection of cases, see FLETCHER, *op. cit. supra* note 21, at 826. Likewise for purposes of venue of federal courts, *ibid.* 851, where "residence" is construed, for purposes of the Federal Judiciary Act of 1911, to mean for corporations "state of original charter." *Cf.* the Judiciary Act of 1874 where for purposes of venue a corporation is "found" in the federal district where it is doing business. *Ibid.* 854.

the state where it is first chartered. This was a practical problem which met with a pragmatic answer. The only possible reasons for dragging in the concept domicil are: (1) that courts have freely talked about the domicil of a corporation in these cases (talk unnecessary to the decision); (2) "citizen" for individual persons means domiciled citizen. By this indirection the courts held corporations "domiciled" within states granting their charter. It is submitted that neither of these reasons are valid. Dicta do not constitute decisions. It does not follow that because citizen means domiciled citizen for individuals, that holding a corporation a citizen is holding it a domiciled citizen. There is enough difference between these two kinds of citizens to make it unsafe and unwise to over-personify; the question of domicil is not involved directly or indirectly.

Suppose that for the sake of discussion we stay Occum's razor and save the "domicil" of the corporation. Is it true then that a corporation is domiciled in the state of its charter? It is not, where a corporation has been rechartered in another state; and it is only half true where a corporation is chartered in two states at about the same time. In the former case the courts hold that a corporation is deemed to be a citizen of the state *first* granting it a charter.[53] In the latter case it depends upon whether the corporation is plaintiff or defendant as to whether a federal court has power to try the case.[54] The statement in reference to the domicil of a corporation in the state of its charter is not only a confusing synonym but, accepted as such, is not true.[55]

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[53] Southern Railway v. Allison, 190 U. S. 326, 23 Sup. Ct. 713 (1903); HENDERSON, *op. cit. supra* note 20, at 73, 194; Beale, *Corporations in Two States* (1904) 4 COL. L. REV. 391, 407; Note (1922) 18 A. L. R. 130. If this is an unwise choice it is not due to any "logic" or "principle" based on Taney's dictum.

[54] Nashua & L. R. R. v. Boston & L. R. R., 136 U. S. 356, 10 Sup. Ct. 1004 (1890). Where the corporation is plaintiff, it may choose between federal or state jurisdiction where the defendant is a citizen of one of the states in which it is incorporated. When the corporation is defendant or the individual is plaintiff, there is no such choice. Such absurd results seem to be due to such sterile and confused concepts as "domicil" and "citizenship" of a corporation.

[55] HENDERSON, *op. cit. supra* note 20, at 190-191: "The term domicil as applied to human beings, consists of two elements: a set of legal relations, and a physical fact. In general a person's home is his domicil; and his domicil determines the law by which certain of his rights and liabilities are governed. To make the rights and liabilities for a corporation depend upon a fictitious domicil ascribed by law to an intangible entity is to disregard the tangible, physical element entirely." See also YOUNG, *op. cit. supra* note 17, at 206-7; BATY, *The Rights of Ideas—and of Corporations* (1920) 33 HARV. L. REV. 358, 370: "It may confidently be denied therefore that a corporation, in general, can have either a nationality or a domicile. . . . Domicile is in origin and principle a matter of having a home and spending an income. And a corporation cannot enjoy

TAXATION [56]

How far is the power to tax a corporation dependent upon its "domicil"? The theory that personal property is taxable only at the domicil of the owner has long been abandoned.[57] The last vestige of the domicil concept here is to be found in the rule that intangible property is taxable only at the domicil of the owner (creditor). This rule has so many important exceptions that it is doubtful whether it does not express a fact that was, rather than one that is. When we exempt real property, tangible chattels, and all intangible property that has been baptized in the name of "business situs," [58] there is indeed very little left to be referred to the domicil of a corporation. This would include only such credits as a foreign corporation holds in a state where it is chartered and is not the result of business carried on within the state seeking to tax it. Even this has been cut down with two further exceptions, property having an "independent [59] situs," and "bank accounts." [60] Power to levy succession taxes [61] and in-

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Queen Anne furniture nor drink claret. Not even a metaphor worshiper could quite realize that brilliant conception—though he might in words formulate it as an axiom." Nor is it true of federal corporations.

[56] "Jurisdiction to Tax" is the common title for this subject. We saw what a "gostak" jurisdiction was above. There is no need of mystifying the tax question by the highly formalistic term "jurisdiction." The term here is menacing rather than useful, so we do not use it. There is nothing in international law or the Constitution, it is submitted, that deprives a state from levying a *reasonable* tax on a non-domiciled natural person on a reasonably extended presence within the state or on a so-called foreign corporation doing business within the state. Note (1921) 34 HARV. L. REV. 542; 7 FLETCHER, *op. cit. supra* note 21, at 8012-8054; 1 COOLEY, TAXATION (1924) 717.

[57] Sill v. Worswick, 1 H. Bl. 665, 690 (C. P. 1791); *cf.* Rappan v. Merchants' Nat. Bank, 19 Wall. 490 (U. S. 1874); Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277 (1903).

[58] Powell, *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89, 90. "Situs" like "domicil" and "jurisdiction" is another bad term in bad company. It is so easy to unconsciously slip from physical to legal relations. "If we choose to say that a debt has its *situs* for garnishment wherever the debtor may be served with process *for the reason that* the courts have in fact allowed it to be garnisheed . . . we must forego the privilege of saying that a debt can be garnisheed . . . *for the reason that* it has its *situs*. . . ." *Cf.* Beale, *The Situs of Things* (1919) 28 YALE L. J. 525 for abundant illustrations of how this concept can play tricks on a learned legal scholar. It is difficult to conceive of a better brief for the complete abandonment of the terms "situs", "domicil", and "jurisdiction," than this article supplies.

[59] Note (1915) L. R. A. 1915C 903, 919.

[60] *Ibid.* 938.

[61] Here the old rule of *mobilia sequuntur personam*, allowing a tax both in state of the location of tangibles and in state of the domicil of the decedent, flourished until 1925 when in Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603 (1925), the Supreme Court denied the state of domicil

come taxes [62] is in no way dependent on the domicil of the corporation, except as qualified in the footnote. Property remaining after all these deductions is said to be taxable only at the domicil of the corporation, and there are cases supporting this view. So also, a few cases have held that property which has no "permanent location," such as a ship, is taxable at the "domicil" of the corporation. As to these few cases we again raise the question: is anything added, gained, or clarified by using the concept domicil? Does it turn out to be anything more than a useless and confusing synonym for "state of its charter"? Is "state of its charter" anything more here than a highly exceptional co-incident, a result, based on mere pragmatic reason? The answers, it is submitted, must be in the negative.[63]

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the power to tax tangibles outside of the state. Only intangibles remain under the old rule, and it has been scaled off so that credits represented by bonds (Note (1926) 42 A. L. R. 354) and stocks (*ibid.* 378) of a domestic corporation may be taxed to a non-resident creditor upon the death of the latter. The slight vestigial remains of the old rule allowing taxation of property out of the state, at the domicil of the owner, remains in the taxation of certain credits for the practical reason that, having no physical location, they are collected at the most convenient end. Likewise the rule that does not allow a succession tax on non-resident decedents' shares in a foreign corporation doing business within the state is not based on the fact that a foreign corporation is not domiciled there or that the decedent has no property there, but on the fact that multiple taxation is undesirable and because of the demands of business convenience in the collection of such taxes. Comment (1927) 21 ILL. L. REV. 498; Comment (1927) 36 YALE L. J. 694.

[62] The power of a state to levy an income tax is no way limited by domicil or residence, except that a state may be more severe with its citizens than with non-residents. Note (1921) 15 A. L. R. 1326; BLACK, INCOME TAXES (1913) 350, 357. In England a foreign corporation may be a "resident" within the meaning of their income tax act subjecting all income wherever earned to the tax. The London Bank, Ltd. v. Apthorpe, [1891] 2 Q. B. 378. And such a corporation is said to have "two residences." Swedish Central Ry., Ltd. v. Thompson, [1925] A. C. 495; (1927) 61 IR. LAW TIMES 61.

[63] To refer to the domicil of a corporation as the proper state to tax is no solution where a corporation is incorporated in several states. To say that all the states may tax is absurd. If only one, which one; and if proportional, in what proportion? In either case, what happens to our nice generalization? See Chicago & N. W. R. R. v. Auditor General, 53 Mich. 79 (1884), where the tax was apportioned, and Quincy R. R. Birdge Co. v. County of Adams, 88 Ill. 615 (1878), where Illinois taxed all property and stock in both states. Suppose that states realizing the added power they have over domestic corporations as compared to foreign corporations in the matter of taxation (Comment (1927) 15 CAL. L. REV. 248), service of process (Note (1926) 10 MINN. L. REV. 520), and other purposes ((1927) 40 HARV. L. REV. 495), chose to re-incorporate all their foreign corporations. The above three citations suggest this possibility. Then our domicil rule would be as valuable as it would be in case of natural persons with domicils in many states for the same purpose. *Cf.* Frost,

OTHER PURPOSES

Besides rules or statutes in regards to jurisdiction and taxation there are numerous statutes and rules that contain the term "reside", "residence", "inhabit," etc. When does residence mean domicil in these statutes? Here again we have another good illustration of the passing of domicil. It has been frequently asserted that residence generally means "domicil." [64] So it has been held in attachment statutes,[65] garnishment statutes,[66] statutes requiring the recording of chattel mortgages in the county where the mortgagee resides,[67] and statutes requiring security for costs by non-residents.[68] Probably the majority of the decisions on each of the above questions today deny that residence means domicil.[69] For the purposes of determining the jurisdiction (power) of a court to grant letters of administration [70] or to proceed under a bankruptcy statute,[71] residence has generally been held to mean domicil. Likewise statutes authorizing constructive service on "residents" [72] absent from the state, and statutes of limitation [73] of actions generally running against "residents" are held to mean domiciled persons. Let us assume that residence means domicil for the above purposes, and then apply our rule that a corporation is domiciled in the state where

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The Power of the States to Domesticate Foreign Corporations for Income Tax Purposes (1925) 59 AM. L. REV. 1.

[64] JACOBS, *op. cit. supra* note 23, and cases there cited.

[65] Reed's Appeal, 71 Pa. 378 (1872); Malone v. Lindley, 1 Phila. 192 (Pa. 1851); Chariton County v. Moberly, 59 Mo. 238 (1875).

[66] 1 WHARTON, *op. cit. supra* note 17, § 368a, and cases there cited.

[67] Cook v. Hager, 3 Colo. 386 (1877); Watson v. Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62 (1886). These cases are foreign corporations doing business within the state. They seem to blindly follow Taney's dictum. Certainly the result is indefensible. The cases cited in 1 FLETCHER, *loc. cit. supra* note 21 are not in point here, for these involve *domestic* corporations.

[68] See cases collected in 15 C. J. 196, nn.

[69] See cases cited in Beale, *Residence and Domicil* (1918) 4 IOWA L. BULL. 3; *cf.* COMMENTARIES ON CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) § 12; 1 CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) 22-34.

[70] 2 WOERNER, THE AMERICAN LAW OF ADMINISTRATION (2d ed. 1899) § 309; Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation* (1918) 31 HARV. L. REV. 905; Goodrich, *Problems of Foreign Administration* (1926) 39 HARV. L. REV. 797, 801.

[71] Beale, *op. cit. supra* note 69. Since the broad scope of the Act going beyond "domicil", "residence," and to "principal place of business," the question seldom arises. COLLIER, BANKRUPTCY (11th ed. 1917) 33-43.

[72] Beale, *op. cit. supra* note 69, at 6.

[73] *Ibid.* 9.

[74] New England Mutual Life Ins. Co. v. Woodworth, 111 U. S. 138, 145, 4 Sup. Ct. 364, 367 (1884). Said Blatchford, J.: ". . . the company must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil . . ." Lockwood v.

it is chartered. Now it is a fairly well settled rule that debts for purposes of administration are considered assets at the domicil of the decedent to whom the debts were owed. This rule would give the assets a "situs" not where the foreign corporation is doing business but where it was chartered. But the cases have given the corporation for this purpose a domicil where it does business.[75] So within our rule, a foreign corporation would be a "non-resident" within the statute of limitations, but the cases by the great weight of authority do not support the rule.[76] The few minority cases are good examples of the vicious results of over-generalization as to the domicil of a corporation. In the bankruptcy statutes defining jurisdiction of courts the problem cannot arise, for jurisdiction is given not only of persons domiciled but also those resident, or having their principle place of business within a given territory. Neither are the statutes on constructive service applicable, for by hypothesis a corporation has but one place of residence and that within its home state; hence it could not have a "last place of residence" elsewhere. Further, since residence here is held to mean domicil, to hold that it applied to corporations would be to admit the multiplicity of domicils of a corporation.

If it is still insisted that it is useful to use the concept domicil in speaking of corporations, can we generalize further than this: a corporation is domiciled in the state of its charter, when it is, or sometimes?

SHOULD THE LAW BE OTHERWISE?

Thus far we have been considering whether or not our rule was descriptive. If it is agreed that it is not, then we may take one of two positions: first, change our rule to fit the facts; second, change the facts to fit our rule. In the latter case an expected retort would be, "well if that is not the law, it is what it ought to be, and in so far as the cases are contrary, they are wrong." Let us consider this position.

Simplicity and certainty are ideals for our law, but justice is also an ideal not to be ignored. This, I take it, is what Justice Holmes meant, when he said that: "The life of the law has

U. S. Steel Corp., 209 N. Y. 375, 103 N. E. 697 (1913); Norrie v. Kansas City So. Ry., 7 F. (2d) 158 (1925); Sulz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563, 40 N. E. 242 (1895); Jellinik v. Huron Copper Mining Co., 82 Fed. 778 (1897). A possible exception is London Bank v. Aronstein, 117 Fed. 601 (1902), which turned upon the construction of a California statute.

[75] 1 FLETCHER, *op. cit. supra* note 21, at 859, for collection of cases. Most of the cases cited contra have been overruled. It is highly doubtful if a single jurisdiction would allow a foreign corporation, licensed to do business, to be an exception from the statute as a "non-resident."

[76] HOLMES, THE COMMON LAW (1881) 1.

not been logic: it has been experience," [77] and what is meant by Dean Roscoe Pound when he said, "Law must be stable yet it cannot stand still." [78] Every case marks a battle ground between these two ideals of certainty and progress, "logic" and "experience." The question is not "which one" but "what compromise" in each case. It is submitted that the social interest of certainty does not require (make desirable) the rule that a corporation is domiciled in the state of its charter. Different purposes demand different rules, and it is submitted that the purposes for which domicil is considered are sufficiently different to warrant different treatment.

This brings us to the first position: that is, "change the rule to fit the facts." The rule, if followed as generally stated, would bring about extremely undesirable results. It would give a foreign corporation immunity from suits and taxation within the state of its place of business. It would not be subject to the statute of limitations in a foreign state, and courts of that state would be denied power of administration of debts owed by foreign corporations doing business within the state owed decedents. The rule breaks down completely in corporations chartered in two or more states, and in corporations chartered by Congress. Of what value is it to say that a corporation is domiciled in both states or in all the states when the purpose of domicil is to determine whether the federal courts have jurisdiction or what one state has power to tax, to administer assets, etc. The rule seems about as helpful as a rule announced by an English court that "X is domiciled in the United Kingdom." The rule then becomes completely meaningless.

CONCLUSION

The statement that a corporation is domiciled in the state of its charter is subject to so many exceptions and qualifications that it is not descriptive. It would be more accurate to say that a corporation is not domiciled in the state of its charter, and then to give the two or three possible exceptions. A more serious objection to the concept is the likelihood of confusion inherent in the term carried over from domicil (home) of an individual. As used in corporations, the popular meaning is completely gone and the word has only a technical meaning and as such is a useless synonym for "state of charter." Courts are seldom interested in the domicil of a corporation; the inquiry seldom arises, and most of the dogma on the domicil of a corporation consists of dicta, with a good share of careless reasoning from analogy. Only by remote indirection can it be said that courts have decided for any purpose that a corporation is domiciled anywhere.

[77] POUND, INTERPRETATIONS OF LEGAL HISTORY (1925) 1.

The cases disclose that there are several kinds of domicil (if it must be insisted that a corporation has a domicil) and that these are not in the same place. It is submitted that it would be a step forward to abandon the concept of the domicil of a corporation entirely and substitute words and phrases that have some popular meaning, when it is felt necessary to speak of the domicil of a corporation. The rule that the domicil of a corporation is in the state of its creation expresses neither what the law is nor what it should be. If these conclusions are sound, further repetition of the rule must be charged to mental laziness, inertia, or complacent ignorance of the cases.

The legal theories of corporations and the conflict of laws are badly cluttered up with outworn generalizations, reflective of earlier ages and earlier theories and different social struggles. What is most urgently needed in a clarification of these subjects is a drastic pruning of dead concepts and a sharpening of those retained. Much degeneralization must be done before we can have constructive generalization of any value. The above is humbly submitted not as a model but as an attempt in the right direction in one small corner of the law.