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THE American decisions in Conflicts of Laws relating to the rights acquired by one spouse in the property of the other by virtue of the fact of marriage stand as a monument to Joseph Story.[1] Almost without exception the cases discussed hereafter have been decided on the basis of his thorough analysis of the law of the Pandects and the eighteenth century civilians. Even where his principles have not been approved, the courts have departed from them only after real and serious consideration. This fact, kept in mind, greatly simplifies the study of the cases themselves.

I

MATRIMONIAL DOMICIL

Inasmuch as almost every case dealing with matrimonial interests in movable property has occasion to refer to the "matrimonial domicil," it is well at the outset to define that term.

(a) In the Civil Law Sense. Story found his definition in the Pandectists, and to him matrimonial domicil meant

> "the domicil of the husband, if the intention of the parties be to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicil would be in New York." [2]

This definition has been brought into the cases in the form of the rule that the matrimonial domicil is the place at which the parties intend, at the time of their marriage, to make their home, and to which they remove within a reasonable time after the marriage.[3] Story

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[1] COMMENTARIES ON THE CONFLICT OF LAWS (1834).

[2] STORY, CONFLICT OF LAWS, 8th ed., sec. 194 (1883).

[3] 5 R. C. L. 1007 (1914); 57 L. R. A. 360 (1902).

found support for this definition in two Louisiana cases which had relied upon the same Roman authority.[4] Up to the time when Story wrote, the American common law jurisdictions seem not to have considered the questions involved.

There seem to be three serious objections to the definition thus advanced, which objections are deemed sufficient warrant for the statement that this definition has no place in the common law case tradition.

(1) In the first place, this definition is opposed to the common law conception of the incidents of marriage. Story's definition involves, instead, the acceptance of Roman law and so-called natural law ideas; Roman law ideas in that it places the emphasis upon the wills of the parties rather than upon the status of marriage as we know it, and natural law ideas in that it proceeds upon the basis that marriage is an institution transcending the legal systems of mankind.

The work of Story was undoubtedly influenced by the natural law view that marriage was an institution which existed in its own right and was subject only to the necessary minimum of regulation by legal process. Thus, he begins his treatment of the subject with the following:[5]

> "Marriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin a contract of natural law. It may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent and not the child of society."

The common law of today is not prepared to admit this conception. It admits that marriage is an institution of the highest social importance. It admits that marriage, in the form of a monogamous cohabitation, probably antedates conscious law. However, it does not admit that what the law calls marriage, with its myriad rights and duties, is more than an institution created by the law for the purpose of giving protection and efficacy to the interests promoted by the human family. It does not admit that either the antiquity or the importance of marriage places the parties thereto in any position in which they are not subject to the control of the law, at least to the extent of controlling the legal incidents of the union, which the law has given and the law can take away.

[4] Lebreton v. Nouchet, 3 Mart. 60 (1813); Ford's Curators v. Ford, 2 Mart. (N. S.) 574 (1824).

[5] CONFLICT OF LAWS, 8th ed., sec. 108 (1883).

A more serious factor in Story's definition, making it unsuited to the common law, is his acceptance of the theory of the Pandectists, reinforced by the prevailing natural law theory, which placed the emphasis in all legal rights and duties upon the wills of the parties involved. This is not the common law view. Of course it cannot be said that the civil law of this period regarded marriage as a contract only, or that the common law excludes all elements of contract therefrom. But there is a marked difference in the approach of the two systems to the same problems. As will be seen hereafter, the common law courts have been very reluctant to give effect to ante-nuptial agreements relating to property, and have hemmed in such agreements from all sides. Contrast with that tendency the declaration of the Code Napoleon that

> "the law does not regulate the conjugal association, as respects property, except in default of special agreements, which the married parties may make as they shall judge convenient, provided they are not contrary to good morals, and, moreover, subject to the modifications which follow." [6]

The German Code of 1900 provides:[7]

> "Both parties may regulate their property relations by contract (i.e., a marriage contract), and may also terminate or modify the matrimonial regime even after the date of the marriage."

While the common law courts speak of certain duties as being incident to the marriage, or resulting from the relationship of husband and wife, we find the Code Napoleon providing that:[8]

> "Married persons contract together, by the single act of marriage, the obligation of nourishing, supporting, and bringing up their children."

Such diversities, showing the difference of approach, might be multiplied indefinitely. Perhaps mention should be made of the method in which the marriage is made. It is undoubtedly true that for many centuries the voluntary consent of the participants has been essential to a valid marriage. This has certainly been conceded on the Continent since the Revival of Learning. It clearly appears in *Las Siete*

[6] Code Napoleon, art. 1387. Cf. Tex. Comp. Stat., 1928, art. 4610.
[7] German Civil Code, art. 1432 (Translation by Chung Hui Wang (1907)).
[8] Art. 203. Cf. New Mex. Ann. Stat., 1929, art. 68-101.

Partidas (1263?).[9] The writers since the twelfth century revival have laid great stress upon the idea of free consent. However, when Blackstone, under the natural law influence, stated that "Our law considers marriage in no other light than as a civil contract," [10] he said more than could be supported. The context of this statement shows that he intended the stress to be put upon the word *civil*, thus restricting the law to the material results of the matrimonial union, at the same time excluding the church from this field. Certainly the fact that the consent of the parties is necessary to the creation of the marriage does not justify any statement that would tend to place marriage on a parity with other contracts. No one supposes Blackstone to have had such an idea; nevertheless, his statement has resulted in some uncertainty in the law concerning the marriage relationship. And Story bases his entire treatment of the subject on the notions that the marriage is the result of the wills of the parties and that their wills create and define the resulting rights and duties, except where the state, in the interests of society, has stepped in and prohibited certain types of agreements. It would seem that both Story and Blackstone, in common with other eminent writers, have fallen into the error of confusing with the narrow common law concept of *contract* the much broader Roman *negotium* and the modern *Rechtsgeschaft* (legal transaction). These latter terms include the idea of contract, but also extend to any legal transaction voluntarily created and intended to have legal consequences, and to which the law attaches the consequences intended. This extremely broad definition would seem to include marriage.

Story's notion of marriage, resulting from a misunderstanding of basic civil law principles, or perhaps more accurately, from the distortion of those principles by an infusion of natural law theory, is not in accord with the common law idea of marriage. In our system marriage is a status determined by the law for its own purposes. Marriage is a status which one may or may not assume, as one chooses; but when once the election to assume has been made, the will of the parties ceases to have appreciable effect. The incidents of the status are imposed by the law. Every attempt by the parties to change these

[9] "Consent alone, with the desire to marry, constitutes matrimony between a man and a woman; and this is the case for the following reason, namely, although words may be spoken, as they should be for the purpose of marriage, if the will of the parties who utter them does not coincide with them the marriage is not valid so as to be genuine." Scott's trans., IV Part., tit. II, law V (1931). See also, IV Part., tit. I, law IV; IV Part., tit. XIV, law II.

[10] 1 COMM. *433.

incidents to suit their own ends is met with hostility, and is allowed to succeed only where it is shown that the interests of society are in no way prejudiced. Although a number of our courts have on occasion stated that marriage is a mere civil contract, they have done no more than to uphold a consensual marriage without public celebration. It is fair to say that this line of decisions is not due, primarily, to any notion of marriage as a simple contract, or to the infusion of Kantian philosophy, but rather to the social necessity of validating such marriages, the necessity itself depending on special circumstances of time and place.[11]

It is not without significance that the common law courts, dealing with questions of marital rights in property, do not talk as do the Continental courts in terms of the disposition made by the *contracts* of the parties, either expressly or by an implied adoption of the Code provisions; but talk instead in terms of the marriage operating as a *conveyance* of the property of the spouses, and particularly as being a conveyance by operation of law rather than by voluntary act.

Consistently with this common law conception of marriage, it is not believed that the parties can be said to have the power to select by mere agreement such an important and fundamental incident to marriage as domicil, involving as it does not only rights of property, but also questions of inheritance, legitimacy of children and kindred matters.

(2) Not only is Story's definition opposed to the common law theory of marriage, but it is also contrary to the common law theory of domicil. The cases have stated many times that intention alone will not create a domicil.[12] The most that the individual can do is

[11] It is noticeable that this rule appears in most instances when the state is in course of settlement. Thus, in Texas the institution owes its existence to the practice of Father Muldoon, a missionary priest, in approving marriages created by public profession followed by cohabitation. Unless this were done, the marriage must have waited for months, if not years, until the priest came through that part of the country. This practice of making a consensual marriage which was approved by the priest in religious form when he next came is reputed to have become a common one. The courts, when confronted with the problem of marriages with such social standing, had no alternative other than to declare them valid. See Lewis v. Ames, 44 Tex. 319, 338, and Sapp v. Newsome, 27 Tex. 537, 538. That the cases represent a rule of expediency rather than a reception of the eighteenth century individualism is further borne out by the cases which have held consent alone ineffectual to create the status unless followed by publicly known cohabitation. It is further to be noted that courts have found common-law marriages, so called, on the basis of intention and have then proceeded to impose the burdens of such a status, even though it appeared that the parties did not intend the burdens to follow.

[12] See, for example, Kerby v. Charlestown, 78 N. H. 301, 99 Atl. 835, L. R. A. 1917D 785 (1916); Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930);

to select his home and go to it. Under proper circumstances this will become his domicil by operation of law. The cases recognize two essential steps for the acquisition of a domicil of choice: (a) the person, legally competent for this purpose, must intend to make a designated place his home, in perhaps a sentimental denotation of the word; and (b) he must actually remove his person to that place.[13] Domicil then is not the mere creature of intention, but flows from actual physical presence in the place, with a contemporaneous intention to make that place a more or less permanent place of abode.

In addition to the inconsistency created by Story's intention theory of matrimonial domicil we have the further difficulty that the parties themselves may have no well formed intention at the time of the marriage. It is thus necessary to make rules for the determination of the domicil in the absence of intention shown.[14]

(3) The third objection to Story's view is one of practicality.[15] Most writers have admitted the inability of intention alone to create a domicil, and have qualified the definition with the statement that the parties must remove to the intended domicil within a reasonable time after the marriage. This view presents us with the problem of a marital relationship, validly created, and involving important rights and duties between spouses and children or third persons, the rights and duties being of such nature as to be dependent on domiciliary law, but held *in suspenso* for the period prior to actual residence in the new home. This would leave unsettled questions which might have to be decided prior to such actual residence, and would involve difficulties of some magnitude if the parties should change their minds before going to their new home and should settle elsewhere.

The difficulties thus raised are the very ones which the common law concept of domicil was designed to prevent. There is nothing mysterious about the rules governing domicil; they are rules of convenience. Our law attaches certain legal attributes to each individual

30 MICH. L. REV. 285 (1931). AM. L. INST. REST. CONF. OF LAWS, sec. 18, Proposed Final Draft No. 1. (1930): "A person cannot acquire a domicile of choice in a place without being physically present there." *Ibid.*, sec. 21: "The intention required for the acquisition of a domicile of choice is an intention to make a home in fact, and not an intention to acquire a domicile." See Heilman, "Domicile and Specific Intent," 35 W. VA. L. Q. 262 (1929).

[13] RESTATEMENT, sec. 17 (1930); GOODRICH, CONFLICT OF LAWS, secs. 22, 23 (1927); MINOR, CONFLICT OF LAWS, sec. 56 (1901).

[14] See, for example, 5 R. C. L. 1007, n. 20 (1914).

[15] This criticism and the one next preceding have been attractively elaborated by Goodrich, 27 YALE L. J. 49 (1917). See, also, MINOR, CONFLICT OF LAWS, sec. 81 (1901).

which we believe should be constant and should not change as the individual may travel about temporarily. In order to attain this constancy, we look about to find the headquarters of the individual, from which he may wander from time to time, but about which the activities of his life are centered, and use the law of that place to determine the content of those legal attributes which we believe should be fixed. To make for certainty we have the principle that every person must have a domicil at every moment of his existence. We have felt that the marital relationship, involving as it does the most important questions of human relations, must have a fixed pivot about which certain of its incidents may be grouped. The same considerations of certainty would require that there be a domicil or pivot at every instant of the marriage. The theory advanced by Story does not fill this need.

(b) A Common Law Viewpoint. On the assumption that Story's definition is unsound, it becomes necessary to define matrimonial domicil in accord with common law theory. This is done by stating the matrimonial domicil to be the domicil of the husband, from the moment of the marriage until the matrimonial unit be dissolved.[16] It is common learning that, at the instant of marriage, the wife acquires, by operation of law, the domicil of the husband.[17] Thereafter questions of the personal status of husband and wife are referred to that law. There seems to be no reason for holding that the matrimonial domicil at the instant of the marriage is in any place other than the common domicil of the husband and wife at the same instant.

(c) The State of the Cases. Turning to the cases we find that almost without exception the courts have approved the statement of Story.[18] An examination of the facts of these cases, however, shows that in almost every case decided, the intended domicil and the domicil of the husband coincided, so that the result would have been the same under either rule. In net result these cases do amount to a unanimous denial that the law of the *place of marriage* is controlling, as such, in questions involving marital rights in property.

[16] GOODRICH, CONFLICTS, secs. 29, 119 (1927).

[17] Beale, "The Domicile of a Married Woman," 2 So. L. Q. 93, 95-97 (1917). The husband, of course, may change this domicil from time to time.

[18] Jaffrey v. McGough, 83 Ala. 202, 3 So. 594 (1887); Glen v. Glen, 47 Ala. 204 (1872); Mason v. Fuller, 36 Conn. 160 (1869); Arendell v. Arendell, 10 La. Ann. 566 (1855); Ford's Curators v. Ford, 2 Mart. (N. S.) 574 (1824); Hayden v. Nutt, 4 La. Ann. 65 (1849); Lee v. Belknap, 163 Ky. 418, 173 S. W. 1129 (1915); Mason v. Homer, 105 Mass. 116 (1870). Further cases are collected in notes at 57 L. R. A. 352 (1903); and 85 Am. St. Rep. 552 (1901).

Turning to the cases where the intention was to reside at some place other than the domicil of the husband at the time of the marriage, we find little to uphold Story. There is a small group of Louisiana cases, including those upon which Story relied in making his statement.[19] Doubt has been expressed as to whether these cases actually support such a view.[20] In a leading case which appeared after Story wrote, his definition has been stated to be "as ancient as the Pandects" but the statement is entirely gratuitous, since the court found the evidence of intention to be insufficient.[21] Even if we assume that the Louisiana cases support this view, it must be remembered that they were decided at a time when that state was under the exclusive influence of what has been called the Romanesque tradition.

Apart from the Louisiana cases we have the Texas case of *McIntyre v. Chappel*,[22] which involved rights under a marriage contracted in Tennessee, by a man domiciled in Tennessee, the parties intending at the time to remove to Texas and make that place their home. They did remove to Texas within a few weeks after the marriage. The Texas court rejected the Louisiana cases and held the matrimonial domicil to have been in Tennessee until the parties reached their new home. The court said:[23]

> "To hold that this mere act of volition or intention could change and fix their matrimonial domicile in Texas, previous to any act corresponding to that intention, or actual change of residence, would, it is believed, be going further than courts have ever gone. It would certainly be going very much further than the Supreme Court of Louisiana have gone in the cases we have examined."

In the subsequent case of *State v. Barrow*,[24] the court re-examined the question, and by way of dictum expressed some doubt as to its correctness. This doubt was based upon the *Partidas* and the seventeenth and eighteenth century civilians, which is not surprising in view of the great Spanish influence in Texas at this time. The case, however,

[19] Ford's Curators v. Ford, 2 Mart. (N. S.) 574 (1824); LeBreton v. Nouchet, 3 Mart. 60 (1813); Hayden v. Nutt, 4 La. Ann. 65 (1849); Arendell v. Arendell, 10 La. Ann. 566 (1855).

[20] McIntyre v. Chappell, 4 Tex. 187 (1849); Goodrich, 27 YALE L. J. 49, 52-53 (1917).

[21] Hayden v. Nutt, 4 La. Ann. 65 (1849).

[22] 4 Tex. 187 (1849).

[23] 4 Tex. 187 at 196-197, per Wheeler, J.

[24] 14 Tex. 179 (1855).

really turned upon an entire misconception of the nature of domicil, which has been corrected in later cases.[25]

The cases are thus exhausted. Certainly there is little in them to vindicate Story's prophetic confidence in his own rule.[26]

In view of the foregoing, then, matrimonial domicil, as the term is used herein, means the domicil of the husband, which attaches to and becomes the domicil of the family unit, at least so long as the unit continues to exist in fact. This is believed to express the true meaning of the cases and is designed definitely to exclude the concept advanced by Story. It may be doubted whether matrimonial domicil is anything more than an artificiality, serving to obscure a much simpler concept.[27]

II

MOVABLES OWNED AT THE TIME OF MARRIAGE

(a) Whether Movable or Immovable.[28] In the marital rights cases, as in other problems of the conflict of laws, whether particular property is movable or immovable must be determined by the law of the place where it is situated, if tangible, or by the law which created it, if it is intangible.[29]

(b) Law Measuring Interest. Almost without exception the cases have approved Story and held that the right in the property of one party to the marriage acquired by the other at the time of, and by the fact of, marriage, is to be measured by the law of the matrimonial domicil. As Story put it:[30]

[25] Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336 (1866); Alston v. Ulman, 39 Tex. 157 (1873).

[26] "Under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not, perhaps, too much to affirm, that a contrary doctrine will scarcely hereafter be established; for, in England, as well as in America, in the interpretation of other contracts, the law of the place, where they are to be performed, has been held to govern. Treated, therefore, as a matter of tacit matrimonial contract (if it can be so treated) there is the rule of analogy to govern it. And treated as a matter to be governed by the municipal law, to which the parties were, or meant to be, subjected by the future domicile, the doctrine seems equally capable of solid vindication." STORY, CONFLICT OF LAWS, 8th ed., sec. 199.

[27] RESTATEMENT, sec. 310, Proposed Final Draft No. 2 (1931). No attempt is made herein to discuss the unhappy use of the term "matrimonial domicil" in Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1906).

[28] It is no doubt an unnecessary precaution to suggest here the distinction between movables and personal property.

[29] RESTATEMENT, sec. 232, Proposed Final Draft No. 2 (1931); Kneeland v. Ensley, Meigs 620, 33 Am. Dec. 168; Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 717 (1852).

[30] CONFLICT OF LAWS, 8th ed., sec. 186 (1883).

> "Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no situs, or rather that they accompany the person everywhere. As to immovable property the law *rei sitae* will prevail."

There seems to be no fault with this principle, under the common law theory advanced above.[31]

It is possible to find an occasional case which has refused to adopt the *lex domicilii* as a measure, but this has been placed largely on the ground of public policy under the particular facts, the validity of the general rule being conceded.[32] Here, as in other cases, it must be remembered that not every diversity in the precepts of the systems involved presents an issue of public policy.[33]

III

MOVABLES ACQUIRED AFTER MARRIAGE

(a) Where Domicil Remains Unchanged. Story's proposition was that in the absence of an express contract, and of a change of domicil subsequent to the marriage, the original matrimonial domicil measured the rights of the spouses in property acquired after the marriage was formed.[34] This would be entirely in accord with the idea that marriage itself was a contract to be bound by a certain law. The great wealth of Roman authority cited and discussed by Story would convince the most obstinate.

[31] In addition to the references in note 18, above, see, In re Mesa's Estate, 172 App. Div. 467, 159 N. Y. S. 59 (1916); aff'd. 219 N. Y. 566, 114 N. E. 1069 (1916); Land v. Land, 22 Miss. 99 (1850); Craycroff v. Morehead, 67 N. C. 422 (1872); RESTATEMENT, sec. 310 (1931); GOODRICH, CONFLICT OF LAWS, sec. 119 (1927); MINOR, CONFLICT OF LAWS, sec. 81 (1901).

[32] Such a case might arise where the legislature has enacted a statute expressly reserving to all women within the state who may marry the right to retain ownership in property. A court of that state might be justified in refusing to allow a nonresident man, who has married a local woman, to claim title to her local property under his domiciliary law, thus destroying completely the protection of the statute. Such a claim has been held invalid as opposed to the public policy of the enacting state. Locke v. McPherson, 163 Mo. 493, 63 S. W. 726, 52 L. R. A. 420, 85 Am. St. Rep. 546 (1901).

[33] "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained." Cardozo, J., in Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198. See Goodrich, "Public Policy in the Law of Conflicts," 36 W. VA. L. Q. 156 (1930).

[34] CONFLICT OF LAWS, sec. 187.

However, when the contract element is removed, as it must be in the common law cases, the problem becomes more difficult. An examination of the cases themselves shows that they have been decided on one of two grounds, or perhaps on a combination of the two. Some of the earlier cases seem to have accepted Story's idea of a contract immanent in the act of marriage. This has been shown to be untenable and will be further discussed in (b) below.

The bulk of the cases have placed emphasis on the maxim *mobilia personam sequuntur*. Most of the cases date well back into the nineteenth century. In the past fifty years we have seen this maxim fall from a position of great importance to one of disrepute, at least as concerns tangible personalty. With the growth of absentee ownership, due to the diversification of business interests, has come the realization that a rule which would assign to a chattel a situs which it does not have comes close to being absurd. The courts have felt that a rule which was formulated to meet conditions of a time when personalty was customarily with the owner, is not suited to a condition where personalty is often scattered about in places apart from the owner. Thus, in the cases of property[35] and inheritance taxation[36] of tangible personalty, we find that the domicil of the owner may no longer claim jurisdiction over the tangible personalty permanently located elsewhere. There has been the same tendency in the law of descent and distribution, although not so marked.[37] It was early recognized that the *lex domicilii* was without efficacy in the law of sales.[38] A rule which would apply the domiciliary law to marital rights in property becomes increasingly hard to justify.

The reasons which led Story to favor the law of the domicil in this connection are very greatly weakened, if not destroyed. There seem to be two further objections to this rule. When we consider the fact that the common law theory is one of conveyance by operation of law, we are confronted with the problem of the law of one state passing title to personalty in another. This of course runs counter to our

[35] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (1905).

[36] Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058, 42 A. L. R. 316 (1925).

[37] Cases collected, 2 L. R. A. (N. S.) 408n. (1906). See GOODRICH, CONFLICT OF LAWS, sec. 158 (1927).

[38] Green v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599 (1867); Cammell v. Sewell, 5 Hurl. & N. 728, 157 Eng. Repr. 1371 (1860); Rabun v. Rabun, 15 La. Ann. 471. It is inevitable that Story is colored throughout by an overreliance on the *mobilia* maxim.

general notions of jurisdiction.[39] If we try to place the cases upon the theory that the marriage, a voluntary act, purports to be a conveyance of future as well as presently-owned property, we encounter first the question of whether this is true in fact, and second the question whether an abortive conveyance of personalty creates any interest in the property when it is later acquired.[40] It seems that little will be gained by traveling this path.

A further difficulty, perhaps not fatal, is involved in the question whether or not this matter of rights in property acquired in the future by one spouse is such an integral part of the juristic conditioning of the family unit as to call for the necessity of a single law. In other words, does the property come within the policy formulated in the common law theory of domicil? A very plausible argument in the negative could be made.[41]

On the ground of the unsuitability of the contract theory and the emasculation of the *mobilia* maxim, it may then be said that the proper common law rule is that marital rights in tangible personalty acquired by the one spouse or the other subsequent to the marriage is to be determined by the law of the actual situs of the property. It may seem laudable generosity in isolated cases for the law of the situs to defer to the law of the domicil. However, under present conditions, when the result of such action will be to introduce an unnecessary and disturbing uncertainty into the title of a sizeable percentage of local tangible chattels, this generosity may become an evil. It would seem that certainty of title to all property in the jurisdiction is more desirable than unity of title within family units. After all, spouses have a better chance to protect their own interests than have creditors and purchasers.

In the case of intangible personalty, it seems clear that the domiciliary law will control. The *mobilia* maxim still prevails in these

[39] See, for example, the rather sweeping statements in Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437 (1832), and Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. ed. 640 (1891).

[40] Williston, "Transfers of After-Acquired Personal Property," 19 HARV. L. REV. 557 (1906).

[41] To pursue this line of inquiry might lead ultimately to an attack on the rule which allows the domicil to control as to property owned at the time of marriage. There is one line of distinction which might be made, namely, that it is desirable that the property owned at the time of marriage pass as a single estate, which would require the selection of a single law as controlling such passing. It is this consideration which has resulted in the continued use of the *mobilia* maxim in the case of estates of decedents.

cases.[42] The only difficulty would seem to arise in the cases where the intangible has acquired a situs in fact under some law other than that of the domicil. There is some basis for an argument that the actual legal situs might prevail over the situs imputed by the maxim, although the decisions seem to retain the domiciliary law as controlling.[43]

Turning to the cases on tangible personalty, we find practically all the cases citing Story and holding that the matrimonial domicil determines rights in after-acquired personalty.[44] However, an examination of these cases shows that almost all present no conflict between situs and domicil, the two being the same. In the cases where the conflict is actually presented we find confusion. In numbers, the cases following the domiciliary law have a majority. If we omit the cases decided during the uncontested reign of the *mobilia* maxim, say prior to 1865, we find evidence of a tendency toward acceptance of the view herein advanced.[45] About all that can be said of the present state

[42] Taxation of intangibles on the basis of a legalistic situs postulated solely upon a power to control has recently been forbidden. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371, 65 A. L. R. 1000 (1930); First National Bank v. Maine, 284 U. S. 312, 52 Sup. Ct. 174, 76 L. ed. 211 (1932). Cases where the intangible wealth has in fact acquired a situs apart from the domicil of the owner have been reserved for future adjudication.

[43] Law of domicil applied to chose in action acquired in another state, Jones v. Aetna Ins. Co., 14 Conn. 501 (1842); law of domicil applied to stock in foreign corporation, Birmingham Water Wks. v. Hume, 121 Ala. 168, 25 So. 806 (1899); cause of action for tort held subject to law creating it and not to domiciliary law, Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851; right of wife to sue alone for personal injury held governed by law creating the right, Texas & P. Ry. v. Humble, 181 U. S. 57, 21 Sup. Ct. 526, 45 L. ed. 747 (1901).

[44] Cooke v. Fidelity Co., 20 Ky. L. 667, 47 S. W. 325 (1898); Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 717 (1852); Lyon v. Knott, 26 Miss. 548 (1853); In re Mesa's Estate, 172 App. Div. 467, 159 N. Y. S. 59 (1916), aff'd. 219 N. Y. 566, 114 N. E. 1064 (1916); Davis v. Zimmerman, 67 Pa. St. 70 (1871). See also the cases in note 43, below, and those collected in GOODRICH, CONFLICT OF LAWS, 277-8 (1927); MINOR, CONFLICT OF LAWS, sec. 81 (1901); 57 L. R. A. 353, 354 (1903); 85 Am. St. Rep. 552, 557 (1902); 5 R. C. L. 1007 (1914).

[45] Holding law of domicil to control: Hicks v. Pope, 8 La. 554, 28 Am. Dec. 142 (1835); Edrington v. Mayfield, 5 Tex. 363 (1849); Nelson v. Goree's Admr., 34 Ala. 565 (1859); McLean v. Hardin, 3 Jones Eq. (56 N. C.) 294 (1857); Muus v. Muus, 29 Minn. 115 (1882). Two surprisingly recent cases reaching the same result are Snyder v. Stringer, 116 Wash. 131, 198 Pac. 733 (1921) and Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910). The last case is weakened by a presumption of similarity of laws.

Holding law of the situs to control: Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12 (1885); Smith v. McAtee, 27 Md. 420 (1867); Gooding Mill & Elevator Co. v. Lincoln County Bank, 22 Idaho 468, 126 Pac. 772 (1912). See Jacob, "Law of Community Property in Idaho," 1 IDAHO L. J. 1, 27 (1931).

Two cases purport to uphold the domiciliary law, but are so confused as to be

of the law is that it appears to be in a state of transition. The cases are few except in the Community Property states, where the matter is of growing importance. It is believed that the rule favoring the law of the situs is both more logical and more convenient, but the force of accumulated precedent must be acknowledged.

(b) Property Acquired After Change of Domicil. It would seem that where the domiciliary law is to control, as in the case of intangibles, that the proper law would be the domiciliary law at the time the property be acquired, in event the domicil has changed since the marriage. The concept of domicil includes the right to acquire a new one, and there is no reason to retain the laws of an old home when that home itself has been abandoned.

The only possible basis on which the law of the original matrimonial domicil might be claimed to follow the parties to their new home is that of contract; that the parties, by subjecting themselves to a particular law at the time of their marriage, agreed to have all their future rights determined by that law. The inconsistency of this view with our common law notions has been demonstrated. Such a contract might be implied under the French Civil Code. Thus, the House of Lords has held that a couple living in France and married in France were bound by the French law of community, even as to property acquired after the husband had removed to England.[46] This is not to be regarded as an acceptance of the contract theory as a part of the common law, but rather as a proper enforcement of a French contract.[47]

The American courts are unanimous in rejecting this result where a new domicil has been acquired.[48] If domicil is to control at all it

valueless. Pearl v. Hansborough, 9 Humph. (Tenn.) 426 (1848); State v. Barrow, 14 Tex. 179 (1855).

Special attention is directed to the recent case of Ross v. Ross, in the New York appellate division, which upholds the rule of the situs on a related point and furnishes strong authority for the rule here contended for. This case (App. Div. 1931) 253 N. Y. S. 871, is reported in 86 N. Y. L. J. 1377 (Dec. 14, 1931) and reverses 137 Mis. 795, 243 N. Y. S. 418 (1930). Strong collateral support is found in Weissman v. Banque de Bruxelles, 254 N. Y. 488, 173 N. E. 835 (1930).

[46] DeNicols v. Curlier [1900] A. C. 21; In re DeNicols [1900] 2 Ch. D. 410.

[47] DICEY, CONFLICT OF LAWS, 4th ed., rule 185 (1927).

[48] Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242 (1874); Long v. Hess, 154 Ill. 482, 40 N. E. 335, 27 L. R. A. 791 (1895); Saul v. His Creditors, 5 Mart. (N. S.) 569 (1827); Hicks v. Pope, 8 La. 554, 28 Am. Dec. 142 (1835); Muus v. Muus, 29 Minn. 115, 12 N. W. 343 (1882); In re Majot's Estate, 199 N. Y. 29, 92 N. E. 402 (1910); Gidney v. Moore, 86 N. C. 484 (1882); Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277 (1858); Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180

is to be the domicil at the time of acquisition, and not the domicil of some prior time. It is interesting to note that in the leading case in this country, *Saul v. His Creditors*,[49] decided in Louisiana, the court rejected the prevailing view of the French lawyers and the express provisions of the *Partidas*[50] and accepted that of the Spanish text writers who for a long period had been attacking the soundness of the French view.

In this case the civil law contract conception of marriage and its resulting rights met a real and decisive test in the common law courts, and failed completely. It is fair to say that even Story[51] did not follow his French authorities here, but elected instead to follow the reasoning of the *Saul* case, thus preferring inconsistency within the covers of his book to what might be called a common law absurdity.

IV

EXPRESS ANTE-NUPTIAL CONTRACT

(a) Validity. The common law does not refuse the parties the right to make express contracts relating to the effect of marriage upon rights in property, so long as no attempt is made to change the incidents of the relation which have been set up to protect the social interest in the marriage and its fruits.[52] As to the proper law to apply to determine the validity of these contracts, the decisions are involved in the same irreconcilable confusion that prevails in other cases of contract.[53] Both the law of the place of making[54] and the law of

(1869). See the cases cited at 5 R. C. L. 1008 (1914); 57 L. R. A. 353, 356 (1903); 85 Am. St. Rep. 552, 559 (1902); GOODRICH, CONFLICT OF LAWS 280 (1927); DICEY, CONFLICT OF LAWS, 4th ed., Rule 185 (1927). It has been suggested that such an implied promise would be unenforceable because of the Statute of Frauds. In re Majot's Estate, 199 N. Y. 29, 92 N. E. 402 (1910); Hunt v. Hunt, 171 N. Y. 396, 64 N. E. 159 (1902).

[49] 5 Mart. (N. S.) 569 (1827).

[50] IV Part., tit. XI, law XXIV.

[51] CONFLICT OF LAWS, secs. 187, 190.

[52] A number of cases are collected in MADDEN, PERSONS AND DOMESTIC RELATIONS, sec. 71 (1931).

[53] The cases are discussed at length in Beale, "What Law Governs the Validity of a Contract," 23 HARV. L. REV. 1, 79, 194, 260 (1909-1910). See also, Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws," 30 YALE L. J. 565, 655 (1921); 31 YALE L. J. 53 (1921).

[54] Lafitte v. Lawton, 25 Ga. 305 (1858); Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478 (1817); Scheferling v. Huffman, 4 Ohio St. 241, 62 Am. Dec. 281 (1854); In re Fitzgerald, [1904] 1 Ch. 573. See the cases in notes following.

the place of performance have been applied.[55] In most of the cases, however, there was no conflict between the two.

(b) Effect Upon Title. How far an admittedly valid contract takes effect to create an interest in a tangible chattel would seem in the last analysis not to differ from the question how far an ordinary sale takes effect, and similarly should be governed by the law of the situs of the chattel.[56]

(c) Interpretation. In spite of somewhat sweeping statements to the contrary, the trend of decision has been to limit these contracts to the clearly expressed language so far as they seek to vary the legally imposed incidents of marriage. Thus, the terms of the contract will be limited to property owned at the time of the marriage and will not be extended to after-acquired property unless it clearly appear that such was the intention of the parties.[57] So, also, where a contract is broad enough to include after-acquired property, it will be limited to the property acquired at the original matrimonial domicil, and will not be applied to property acquired after a change of domicil unless it clearly appears that the parties so intended.[58] Although the decisions have turned primarily on questions of interpretation, it is believed to be a fair statement that the courts have tended to uphold the legal regulation of the status to the greatest extent, and to limit the efficacy of ante-nuptial contracts to the clearly expressed intention of the parties.[59] That the public considers these contracts of some

[55] See Davenport v. Karnes, 70 Ill. 465 (1873). Cf. Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242 (1874); Long v. Hess, 154 Ill. 482, 40 N. E. 335, 27 L. R. A. 791 (1895). See also, LeBreton v. Miles, 8 Paige Ch. (N. Y.) 261 (1840).

[56] For example, whether a contract concerning marital rights in property to be acquired in the future would prevail as against an attaching creditor, would seem peculiarly for the law of the situs.

[57] In addition to the cases in note 58, below, see Bramer v. Bramer, 84 W. Va. 168, 99 S. E. 329 (1919); Baughman v. Baughman, 283 Ill. 55, 119 N. E. 49 (1918). A somewhat more liberal case is Landes v. Landes, 268 Ill. 11, 108 N. E. 691 (1915).

[58] Application of contract refused: Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242 (1874); Long v. Hess, 154 Ill. 482, 40 N. E. 335 (1895); Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277 (1858); Fuss v. Fuss, 24 Wis. 250, 1 Am. Rep. 180 (1869). In the following cases the principle was recognized but the court found sufficient evidence of the requisite intention: Murphy v. Murphy, 5 Mart. 83 (1817); Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478 (1817); McLeod v. Board, 30 Tex. 238, 94 Am. Dec. 301 (1867). Two more liberal cases are: Kleb v. Kleb, 70 N. J. Eq. 305, 62 Atl. 396, 65 Atl. 1118, and Scheferling v. Huffman, 4 Ohio St. 241, 62 Am. Dec. 281 (1854).

[59] It is necessary of course to limit this statement to the peculiar sort of contract here dealt with. With the rising individualization of married women, we have had an increasing liberality of the court toward those contracts between husband and wife which concern only themselves and do not affect the rights of third persons. These

interest to third persons, such as creditors, is evidenced by the statutes which require them to be in writing, or to be recorded, or which attach some other formality thereto. This common law attitude furnishes a strong contrast with the provisions of the *Code Civile* that "the law does not regulate the conjugal association, as respects property, except in default of special agreements. . . ." [60]

V

EFFECT OF CHANGE OF DOMICIL OR REMOVAL OF PROPERTY UPON INTERESTS VESTED

(a) Change of Domicil. It seems undisputed that an interest in the property of the one spouse which has actually vested in the other spouse under the proper law will not be divested or affected in any way by a subsequent change of domicil.[61]

(b) Removal of Property. It is a general principle of the Conflict of Laws that a mere removal of property from one state into another is not in itself sufficient to change the ownership of the property.[62] The interest of the owner will be affected only if there is some new dealing with the property after it has come within the jurisdiction of the second state.[63] The subsequent transaction, of course, is governed by the law of the new situs.[64]

These rules apply to interests in marital property which were vested at the time of removal, and the fact of removal alone will not affect the interests so vested.[65] The effect of a second transaction in the new situs will be determined by the law of that situs.[66] Most of the cases which have arisen, however, have preserved the former state of title even after a new transaction (unless the new transaction distinctly showed an intention to change the proprietary relationship of

latter cases are discussed sympathetically in MADDEN, PERSONS AND DOMESTIC RELATIONS, sec. 71 (1931).

[60] Code Napoleon, art. 1387 (supra, note 6).

[61] Grote v. Pace, 71 Ga. 231 (1883); Townes v. Durbin, 3 Metc. 352, 77 Am. Dec. 176 (1861); DePas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88 (1848). Cases are collected at 57 L. R. A. 352, 363-4 (1903).

[62] See, for example, the cases dealing with conditional sales and chattel mortgages, collected in 57 A. L. R. 535, 702 (1928).

[63] As to when the property is brought within the jurisdiction of the second state, see 24 HARV. L. REV. 567 (1911); RESTATEMENT, secs. 52 (1930), 280 (1931). Cf. GOODRICH, CONFLICT OF LAWS, sec. 149 (1927).

[64] Cases cited, supra, n. 38.

[65] Townes v. Durbin, 3 Metc. 352, 77 Am. Dec. 176 (1861); Powell v. DeBlane, 23 Tex. 66 (1859). See, also, the cases in notes 66-68.

[66] Avery v. Avery, 12 Tex. 54, 62 Am. Dec. 513 (1854).

the parties), usually on the theory of a resulting trust. Thus, where the husband, domiciled in a community property state, brought into a common law state money in which his wife owned a half interest, it was held that the wife was entitled to have declared a trust to an undivided half of the property purchased with the money, notwithstanding that she would have no such right under the law of the situs.[67] Conversely, where the husband, domiciled in a common law state, brought into a community property state money which was his separate property, it was held that land bought with this money was his separate estate and the wife acquired no community estate therein.[68]

VI

EFFECT OF SEPARATION WITHOUT DECREE

(a) Upon Property Previously Vested. It would seem clear upon principle that rights in property, vested at the time of the separation, would not be affected by separation without decree.[69]

(b) Upon After-Acquired Property. Whether the one spouse is to have an interest in property acquired by the other after they have decided to live apart is more difficult. In accord with what has been said, it would seem that this problem, as regards tangibles, should be determined by the law of the situs. In the case of intangibles, where the domiciliary law is to be applied, there is more difficulty. Where the family unit is broken in fact, it seems hard to say that there is still a matrimonial domicil.[70] The parties may or may not be domiciled in the same place. The husband may always acquire a new domicil, and the modern cases seem to give the wife the same freedom, unless the separation is due to her wrong.[71] The only practical solution would seem to be to refer the matter of interests in

[67] DePas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88 (1848). See also, Thorn v. Weatherly, 50 Ark. 237, 7 S. W. 33 (1887).

[68] Kraemer v. Kraemer, 52 Cal. 302 (1877); Oliver v. Robertson, 41 Tex. 422 (1874); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290 (1902); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914, 12 L. R. A. (N. S.) 921 (1908); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912).

[69] See cases cited in note 72. The effect of divorce or judicial separation upon property rights is not within the scope of this paper.

[70] The term "matrimonial domicil" used in divorce cases expresses an entirely different concept by which the state in which the spouse was deserted retains jurisdiction for purposes of divorce. Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1906).

[71] Beale, "The Domicile of a Married Woman," 2 So. L. Q. 93 (1917).

intangibles to the law of the domicil of the spouse first acquiring them, but direct authority seems to be lacking.[72]

In conclusion, it appears: (1) That marital rights in personalty rest, in the common law system, upon precepts of positive law rather than upon the intentions of the parties; (2) That rights resulting from marriage as to property then owned by one of the parties are to be determined by the law of the then domicil of the husband, even though the parties may intend to make their home elsewhere; (3) That rights in tangible personalty acquired subsequent to the marriage are to be determined by the law of the situs of such property; (4) That rights in intangibles subsequently acquired are a matter for the then domicil of the husband if the family is still unitary in fact, or a matter for the domicil of the spouse first acquiring if the family unit be disrupted; and (5) That the intentions of the parties contrary to these rules will be given effect only if clearly and expressly put into ordinary contractual form, and then only when the proper formalities have been complied with, and where no contrary social policy is involved. It appears, further, that the interests vested in accordance with the above rules are not to be disturbed either (1) by a change of domicil, or (2) by a change in the situs of the property unaccompanied by any new dealing therein, or (3) by the separation of the parties without judicial decree.

[72] Some support is found in Matter of Florance, 54 Hun. 328, 7 N. Y. S. 578 (1889). Two other cases, which however involve express contracts, suggest a distinction based upon the guilt or innocence of the party. Bonati v. Welsch, 24 N. Y. 157 (1861); Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478 (1817).