PART TWO

PERSONAL LAW OF INDIVIDUALS
CHAPTER 4

The Personal Law

I. NATURE AND SCOPE OF PERSONAL LAW

1. Personal Law Defined

The term “personal law” had its origin in the doctrine of the Italian school of postglossators (thirteenth-fifteenth centuries) and their French successors (sixteenth-eighteenth centuries). This school divided all rules of law into three categories, viz., statuta realia, statuta personalia, and statuta mixta. Statuta personalia, “personal statutes,” comprised those rules of law that followed a person from one jurisdiction to another, thus having “extraterritorial effect,” while the rules of the “statute real” applied exclusively within the territory of a single sovereign. Ever since the times of the postglossators, the terms have been in use but with considerable variations in meaning.1 Even today writers disagree in defining personal law, and particular rules of law are variously characterized as pertaining to the realm of the statute real or to the statute personal.2

Despite these differences, however, it is commonly assumed that in certain respects the legal position of an individual should normally be determined by the law of that state with which he is deemed to be connected in a permanent way, rather than by the divergent laws of those states in which he may happen to be physically present, to act, or to engage in transactions. This proposition includes two parts:

First, that a person is attributed certain legal characteristics of a comparatively permanent character; and,

1. ARMINJON (ed. 2) 70 ff. nos. 18-18 ter.
Second, that these permanent characteristics ought to be determined by one law for all purposes rather than from case to case by different laws.

**Scope of the personal law.** The sphere of application of the personal law has fluctuated in the course of time and is not everywhere the same today. Under the broadest definition, problems pertaining to the following subjects would be regarded as problems of personal law:

Personality or capacity to have rights in general (German *Rechtsfähigkeit*, French *capacité de jouissance*);
Beginning and end of personality;
Capacity to engage in legal transactions (German *Geschäftsfähigkeit*);
Protection of personal interests, such as honor, name and business firm, privacy, and the like;
Family relations, especially the relations between husband and wife, parent and child, and guardian and ward, also transactions of family law, especially marriage, divorce, adoption, legitimation, emancipation, and appointment of a committee for an incompetent person;
Succession, both testate and intestate, to movables and in more recent times also succession to immovables.

While in the various civil law countries this list is subject to varying restrictions, it is sharply reduced in American law. It is true, the general principle, repeatedly stated by British courts and textwriters, that the "status" of a person is determined by the law of his domicil,\(^3\) is plainly accepted in the United States,\(^4\) where it has even been called "the most widely advocated rule of conflict of laws."\(^5\) Nevertheless, current

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\(^3\) *Dicey* 634; *Cheshire* 208.

\(^4\) *Pfeifer v. Wright* (1929 D. C. N. D. Okla.) 34 F. (2d) 690; *Strader v. Graham* (1850) 10 How. (51 U. S.) 82; *Woodward v. Woodward* (1889) 87 Tenn. 644, 11 S. W. 892 (emancipation in Louisiana); and others.

\(^5\) *Harper and Taintor*, Cases 271 n. 17. See *Story* §§ 57 ff. and §§ 94-96 and *Wharton* §§ 101-104 2/3, both recognizing only restrictions of public policy on the ubiquity of personal law.
opinion in the United States is inclined to ascribe to the personal law a domain narrower than it receives in England and much more limited than it enjoys on the Continent. In particular, capacity to contract is now preponderantly regarded as being determined by the law of the place of contracting rather than by the law of the domicil, although in a few American decisions the domiciliary law has been recognized as governing an individual’s capacity to contract and in numerous cases it coincides with that of the place of contracting.

Beale goes still further in reducing the significance of “status,” perhaps since he encountered difficulties in reconciling an ubiquitous personal law with the system of territoriality that he advocates. In his treatise and in the Restatement, he proposes to delete what may be described as a remnant of a former status law, except for a strictly limited number of family relationships, such as marriage, the relation between parent and child, adoption, and guardianship. Although status is defined in the Restatement in general terms and although the topics dealt with in Chapter 5 of the Restatement are designated merely as “those of chief importance,” they seem nevertheless to be all-inclusive.

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6 See the results reached by Dicey 634–637, 931, 966, and more recently Cheshire 208 (“a rule which regulates the capacity or incapacity of a person is part of the law of his status”). For the entire problem, see below, p. 190.

7 Especially Brown v. Dalton (1889) 105 Ky. 669, 49 S. W. 443; MacArthur 536 (10 D. C.); Matthews v. Murchison (1883 C. C., E. D. N. C.) 17 Fed. 760; Freeman’s Appeal (1897) 68 Conn. 533, 37 Atl. 420; cf. 2 Beale 1180 n. 4.

8 Cf. Rudolf Mueller, 8 Z. ausl. PR. (1934) 888–890; Batiffol 328.

9 See Wigny, Essai 75.

10 Restatement § 119 and comment.

11 In the Restatement, “status” is not treated as containing permanent conditions or qualities, but it is limited to such “relationships” between persons as have been described by Beale as relative in contrast to absolute ones, 2 Beale 649. This narrow definition has been criticized by Kuhn as being made “wholly from the viewpoint of one (i.e., the American common law) system,” whereas, in solving problems of conflict of laws, the attribution of capacity and incapacity to persons has also to be considered. Kuhn, Comp. Com. 115.
This position will attract the attention of any civil law writer as a striking contrast to established doctrines. In all countries outside of the United States, the concept of personal law has preserved a dominant position and has retained more vigor than its ancient opponent, the territorial law, which has found such eminent defenders in this country. On the other hand, the traditional theory has been challenged in several respects by recent European critics, and reference has repeatedly been made to the American rules for this purpose.

The broader conception of the personal law is to be found authoritatively defined in recent treaties concluded between Western and Oriental powers, whereby foreigners are exempted from the territorial jurisdiction in "matters of personal law." It is interesting to note that the United States has participated in such treaties. The following definition is given, for instance, in the Agreement between the United States and Persia, concluded on July 11, 1928:12

"Whereas Persian nationals in the United States of America enjoy most-favored-nation treatment in the matter of personal status, . . . non-Moslem nationals of the United States in Persia shall be subject to their national laws in the said matter of personal status, that is, with regard to all questions concerning marriage and conjugal community rights, divorce, judicial separation, dowry, paternity, affiliation, adoption, capacity of persons, majority, guardianship, trusteeship, and interdiction; in regard to movable property, the right of succession by will or ab intestato, distribution and settlement; and, in general, family law."

By the Convention of Montreux of May 8, 1937, which abolished the system of capitulations in Egypt, the Mixed Tribunals were retained for a further period, running until 1949, and status and capacity were declared to be subject to the jurisdiction of these tribunals in the absence of consular jurisdiction where the religious courts are not competent. This

12 Published in U. S. Executive Agreement Series No. 20.
Convention provided the following definition of personal status:

“Personal status comprises: suits and matters relating to the status and capacity of persons, legal relations between members of a family, more particularly, betrothal, marriage, the reciprocal rights and duties of husband and wife, dowry and their rights of property during marriage, divorce, repudiation, separation, legitimacy, recognition and repudiation of paternity, the relation between ascendants and descendants, the duty to support as between relatives by blood or marriage, legitimisation, adoption, guardianship, curatorship, interdiction, emancipation and also gifts, inheritance, wills and other dispositions mortis causa, absence and the presumption of death.”

2. Legal Problems

Status. Usually, “status,” taken from the Roman doctrine of status libertatis (freedom), status civitatis (citizenship), and status familiae (position as head of the house or as free person subjected to the pater familias) refers to situations subjected to the personal law. The word, “status,” is commonly used but should not be taken as a precise legal term. Its exact meaning in English law has been discussed in many places but in a manner described by competent English writers as confused. "Of all the perplexing questions which the

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14 In the Roman sense status means a degree in legal capacity; cf. SIBER, 2 Römisches Recht (1928) 25.

science of jurisprudence presents, the notion of status or condition is incomparably the most difficult,” declared Austin.\(^{16}\) Some American decisions also have considered the concept nebulous; while unwarranted conclusions have been deduced from it by others.\(^{17}\) In fact, modern law recognizes no absolute legal characteristics inherent in a person as in the Roman or medieval laws. Qualification of an individual as husband or legitimate father indicates no more than the existence of legal relations with another person, although it is true that third persons may thereby to a certain degree be excluded from challenging the relationship.

Prohibitive policy. It is universally agreed that foreign laws affecting a person’s status are to be disregarded where they have a political or penal character.\(^{18}\) Hence, such impairments of a convict’s capacity to enjoy civil rights or to engage in transactions as are provided by the English Forfeiture Act of July 4, 1870, the French Law of May 31, 1854 (arts. 2 and 3), or American civil death statutes, are not enforced by the courts of other states.\(^{19}\)

Likewise, a law or decree disenabling a person from disposing of his property, in a manner discriminating against him rather than for the purpose of his protection, is generally denied effect outside of the state of enactment.\(^{20}\) Thus the

\(^{16}\) Austin, I Jurisprudence (ed. 5, 1885) 351; 2 ibid. 943: “To fix the notion of status with perfect exactness, seems to be impossible.”


\(^{18}\) See Story § 104; 1 Wharton 18 § 4b; Stimson, Conflict of Criminal Law (1936) 1; 1 Bar § 146. It is no exception to this rule, that a person may be considered incapable of being entrusted with a function, such as guardianship, because of a foreign conviction; see e.g., Spanish C. C. art. 237 par. 2 and Trías de Bes 72 no. 99.

\(^{19}\) The Treaty of Montevideo on international civil law, text of 1940, art. 1, 2nd sentence, provides that no incapacity of a penal character nor for reasons of religion, race, nationality or opinion will be recognized. On the non-application of foreign civil death statutes, see Note in 6 U. of Chi. L. Rev. (1939) 288.

Soviet Russian monopoly of trade prohibiting all private persons residing in Russia from concluding contracts with foreign countries except through the Commissariat of Commerce, like other monopolies of public law, is inapplicable outside of Russia. 21

Connection of a person with a given territory. What connection must exist between an individual and a particular state in order to subject such person to the personal laws of that state? There are two different systems. In certain countries, the necessary connection is deemed to exist between an individual and a particular state, if the individual is one of its nationals; in other countries, the necessary connection is found in the fact that the individual is domiciled in the state in question.

3. Rationale

While, a generation ago, the existence of a personal law was explained by such theoretical arguments as the nature of law, the needs of sovereignty, the character of the power of a sovereign over persons, and the like, in recent times the advocates of the theory of personal law customarily resort to more practical considerations of convenience and expediency.

A first line of argument is based upon the interests of the individuals concerned. The legal position of a person, it is said, must be the same everywhere; it would be unjust and impracticable to have it determined in different ways in different countries or in different situations, perhaps in some instances even in the same court. In other words, the unity and identity of a person should be respected and guaranteed by the consistent application of one and the same law in all countries and in all situations.

A second line of reasoning has become singularly effective today. Each state is said to have a profound governmental in-

21 Makarov, Précis 194 reaches the same result by another (mistaken) reasoning.
terest in the regulation of the personal status and the family relations of its subjects, an interest which every other state ought properly to respect. In order to protect this interest more effectively, exclusive jurisdiction over questions of status is often claimed by the state of the personal law, or the rules of the personal law are declared to belong to the domain of public policy. Thus, a state which adheres to the principle of nationality attempts to extend its own system of social regulation to its nationals living abroad, whereas a country adhering to the principle of domicil imposes its own laws upon the foreigners living within its borders. These tendencies, and particularly that of extending one's own laws to nationals living abroad, are so firmly rooted in the political traditions of Europe that recent counter-currents have not only failed to leave any deep impression on the legislatures but have even suggested to an eminent French author that the scope of application of the personal law should be expanded far beyond its present extent.

It seems, indeed, that uniform regulation of matters of status is justified; at least with respect to the basic facts of personal life. Whether a person shall be deemed to be married, divorced, adopted, subject to guardianship, or civilly dead, should be decided at any place in the same way, if uncertainty and confusion is not to beset the individual, his family, and other persons with whom he engages in transactions. The weight of this consideration may vary as regards different problems, and careful investigation of the interests at stake ought to be undertaken with regard to each situation. But, essentially, the principle seems undeniable.

22 With respect to those matters that are recognized in the Restatement as covered by status, this governmental interest is explained in § 119 comment c.

23 BARTIN, 2 Principles 20, 90. Throughout the four volumes of FRANKENSTEIN's work, the national law is considered as "the primary basic principle of private international law." See vol. 4, 650.

Recently the Danish writer BØRUM recommended that his country go over from the domiciliary principle to that of nationality. See his Personalstatutet 552, 565.
The most formidable objection against a single personal law arises from the present state of international law; the doctrine cannot be carried out consistently. Apart from the intricacies caused by conflicting rules of jurisdiction, serious conflicts are due to the difference between the principles of domicil and nationality, resulting in the subjection in different states of one and the same individual to different laws. Moreover, no agreement exists with respect to where a person is domiciled, nor is nationality an unfailing criterion. It should not be overlooked, however, that many such conflicts can be remedied by special techniques, especially by application of the "renvoi," an institution that, on account of its usefulness, should be viewed without theoretical prejudices.

II. Contacts Determining the Personal Law

1. Domicil

(a) Domicil of origin. In all the centuries since the post-glossators, the traditional contact for the determination of a person's status has been his domicil. In earlier, ancient and medieval, organizations, the legal condition of an individual in its totality was created by his "origin" as a member of a political unit, in Roman law his origo, signifying his citizenship in an autonomous city. Following the older fundamental role of descent, some of the pandectists in various cases resorted to what was shortly and paradoxically described\(^ {24} \) as the domicilium originis, generally the domicil of the father of the individual at the time of the latter's birth.\(^ {25} \) Although, naturally and legally, a child takes its father's domicil at birth and upon attaining majority may acquire a new domicil, the domicil of origin substituted for the actual domicil, when doubtful or incorrectly obtained or where no domicil was to

\( \text{\textsuperscript{24}} \) See Savigny § 359 at n. (q).

\( \text{\textsuperscript{25}} \) See Savigny § 359 at n. (n). The same definition of domicil of origin is still proper in English law. See Westlake § 245; 6 Halsbury 200.
be found. This subsidiary concept was employed in the eighteenth century by French writers and in the Prussian legislation as the prime test for determining majority or interdiction for prodigality. Even today in Argentina, it is applied to persons without an actual domicil. In British countries, this criterion has been retained and singularly developed; not only is the domicil of origin resorted to whenever the domicil of choice cannot be ascertained or has been abandoned without establishing a new domicil, but the courts also require such strong evidence of abandonment of the domicil of origin that it has been said to be “difficult to conceive of a case in which the domicil of origin can be shaken off.” It corresponds to Continental nationality rather than to Continental domicil.

(b) **Domicil of choice.** The normal concept of domicil is presented by that domicil which is voluntarily chosen by an independent person. The law of this domicil primarily controls personal relations in the following countries:

- All English common law countries and, in addition, Scotland, South Africa, and Quebec (where the principle has been laid down in the C.C. art. 6).
- Denmark, Norway, Iceland.

Prussian Allg. Landrecht of 1794, Einleitung § 29.

It may be suggested that the same idea is implied in the much discussed words of § 34 of the Austrian Allg. BGB, which may be translated as “laws of the place to which the foreigner is subject (als Untertan unterliegt) by virtue of his domicil or if he has no actual domicil by virtue of his birth.”

Originally by Froiland and Boulenois; see Pillet, Principes 304 no. 143 n. 1; Arminjon (ed. 2) 80 ff. no. 18 ter.

Argentina, C.C. arts. 96 and 89 2d part; cf. 1 Vico no. 392.


It seems to be recognized in Canada generally; cf. 1 Johnson 182, 454.

Borum and Meyer, 6 Répért. 216 no. 19.

Christiansen, 6 Répért. 569 no. 66.

4 Leske-Loewenfeld I 761.
Latvia: C.C. (1937) §§ 8–25.\textsuperscript{35}
Argentina: C.C. arts. 6 and 7.\textsuperscript{36}
Brazil: Introductory Law (1942) art. 7.
Guatemala: Constitutive Law on Judicial Power (1933) art. xvii; Law on Foreigners (1936) arts. 17 and 18.
Nicaragua: C.C. tít. prel. VI, i.
Paraguay: C.C. arts. 6 and 7.
The Treaty of Montevideo of 1889, article 1 (Argentina, Bolivia, Paraguay, Peru, Uruguay) still in force among the contracting countries, is to the same effect. Article 1 of the text of 1940, not ratified, provides that the existence, the status, and the capacity of physical persons are governed by the law of domicil.

(c) Domicil by operation of law. In most of the just mentioned countries, although not in all, as for instance not in Norway, certain groups of persons (wife, minor children, etc.) are considered by law to share the domicil of other individuals. The latter accordingly determines the status of the dependent person.

(d) Residence. If, according to the concepts of the forum, it is found that an individual has no domicil of choice or as a dependent, either within or without the country, different solutions obtain. English courts apply the law of the domicil of origin. In this country, it is generally assumed that a domicil once established continues until it is superseded by a new domicil.\textsuperscript{37} This proposition is a direct corollary of the axiom that every person must have a domicil and is therefore cate-

\textsuperscript{35} Schilling, 11 Z.ausl.PR. (1937) 484, 491.
\textsuperscript{36} Domicil is decisive not only for capacity to contract but also for personality. See 1 Vico no. 438, rejecting other theories.
\textsuperscript{37} Restatement § 23 and its various Annotations. See also 28 C.J.S., Domicile § 13.
goric. In addition, it is presumed that an intended change or abandonment of the last established domicil is not completed until a new home has been acquired. 38

All these views are represented in Latin-American legislations. In addition, the subsidiary test of residence, well known in such fields as jurisdiction and taxation, 39 at times appears in conflicts law. This method has been followed by the Montevideo Treaty 40 and the Código Bustamante, 41 as well as by the recent Brazilian law. 42 In default of residence, the latter two enactments contain a supplementary reference to the place where the individual is temporarily dwelling.

These expedients would seem to serve well also in this country in cases where the continuance of a former domicil cannot be affirmed without undue fiction.

2. Nationality

The principle that an individual’s personal law ought to be determined by his nationality was first established at the beginning of the nineteenth century in the Code Napoléon, which provided that the French laws concerning personal status and capacity govern Frenchmen even when residing in foreign countries (Art. 3 par. 3). In the converse case of a foreigner residing in France, the French courts, after some initial doubts, now generally apply by way of analogy the law of the country of which he is a national.

While this French provision exerted a steady influence as a model; an additional powerful impulse was started in the same

38 28 C.J.S., Domicile § 16.
39 This rule has been adopted in following the doctrine of Savigny 107 § 354 in an influential provision of the Chilean Civil Code art. 68: mere residence replaces civil domicil with respect to persons not domiciled elsewhere.
40 Text of 1889, art. 9, which is not really contrary to art. 5, as has been claimed; text of 1940, art. 5, § 2 – 4.

The Argentine C.C. arts. 89, 96, resorts to the domicil of origin, and art. 98 declares that the last known domicil prevails when no new domicil is known; but art. 90, § 2, provides for a legal domicil as the place of actual residence for transients as well as for persons having no known domicil.
41 Art. 26.
42 Decreto-Lei n. 4.657 of 1942, Lei de Introdução, art. 7 § 8.
direction by the Italian patriot, Mancini. In a famous lecture, delivered in Turin in 1851, he proclaimed that a person should be subject in all respects affecting his personality to the law of his nation. The Italian Civil Code adopted this doctrine, referring the concept of nationality to political allegiance to a given state and extending the sphere of the personal law from problems of "status and capacity," to which it was applied in France, to the whole law of family relations.

In this way, the notion that an individual's private rights should be determined not by his physical location but by his political allegiance, owes its origin to the awareness of national identity that was born in the French Revolution and strengthened in the Italian struggle for national unity. With the expansion of political nationalism, the idea that each country should determine the legal status of its subjects, admitting the analogous claims of other states, expanded likewise and has been adopted in the following countries:

France and French colonies: C.C. art. 3 par. 3.
Belgium: C.C. art. 3 par. 3.
Luxemburg: C.C. art. 3 par. 3.
Monaco: C.C. art. 3 par. 3.
Rumania: C.C. art. 2; for foreigners, App. Bucarest (May 9, 1901) Sirey 1904, 4.21 (with note by the procurator of the government at the court of cassation); Plastara, 7 Répert. 62 nos. 141, 143.
Bulgaria: Court decisions, see Ghénow, 6 Répert. 189 nos. 47, 51.

Finland: Law no. 379 of Dec. 5, 1929.


Greece: C.C. (1940) art. 4.


Liechtenstein: P.G.R. art. 23.

Montenegro: C.C. art. 788.


Portugal: C.C. arts. 24, 27.

Spain: C.C. art. 9; for foreigners cf. Trías de Bes 66; Lasala Llana 20–22, and decisions cited.


Turkey: Law of March 1, 1915 for foreigners: for Turks abroad see Salem, 7 Répert. 261 no. 199.

Iran: C.C. art. 962.

China: Law of Aug. 5, 1918, art. 5.

Japan: Law of June 15, 1898, art. 3.

Costa Rica: C.C. art. 3.

Cuba: C.C. art. 9.

Dominican Rep.: C.C. art. 3 par. 3.48


Haiti: C.C. art. 7.

Honduras: C.C. art. 13.


Panama: C.C. art. 5a.

Venezuela: C.C. art. 9.

Treaty: Colombia–Ecuador of June 18, 1903, art. 2.

48 See the reservation no. 1 of the Dominican delegation to their signature to the Código Bustamante, 86 League of Nations Treaty Series (1929) No. 1950, 240, 241, 376.
The nationality principle was also adopted in the Hague Conventions of 1902 and 1905, and formed the base of the Treaty of Lima, 1878. In the Treaty of Montevideo, on the other hand, the domiciliary law was preferred. During the preparation of the Código Bustamante, vigorous efforts were made to overcome the cleavage dividing the American nations with respect to the test of personal law, but unfortunately without success. Article 7 of the Código declares that

"Each contracting state shall apply as personal law the law of the domicil or the law of the nationality or that which its domestic legislation may have prescribed, or may hereafter prescribe."

Hence, no unified rule whatever has come into existence.

3. Mixed Systems

Switzerland. Switzerland applies Swiss private law to foreigners domiciled in Switzerland and prescribes that a Swiss national abroad shall be governed by the law of his domicil. If, however, the state of the foreign domicil does not subject the Swiss national to its municipal legislation, then the Swiss courts have to resort to the law of the canton of which he is a citizen. This proviso applies, for instance, to Swiss nationals domiciled in France, Germany, or Italy, all of which follow the system of national law.

In this way, conflicts with the law of the domicil are avoided, the Swiss law being resorted to only where it is also applied by the courts of the domicil. Following this approach of the Swiss law, the German courts are now in agreement that a Swiss citizen domiciled in Germany is to be judged according

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44 It also was adopted for the Egyptian Mixed Tribunals in their Regulations of Judicial Organisation, art. 29.
45 See Bustamante, La commission des jurisconsultes de Rio 215ff.
46 NAG. arts. 2 and 28. Capacity to contract, however, is excepted from the rule stated in the text and is subjected to the principle of nationality; see below, p. 185.
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to Swiss law and that Swiss law ought not to be interpreted as containing a renvoi to the law of the domicil.\(^47\)

Austria. The draftsmen of the Austrian Civil Code of 1811 probably intended that the law of the domicil, either of choice or of origin, should be applied to foreigners whether living in Austria or abroad.\(^48\) The relevant section of the Code\(^49\) was so badly drafted, however, that its meaning was never quite certain. While the older annotators regarded the provision as establishing the domiciliary test,\(^50\) authors and courts of the nineteenth century came to look upon it as a full-fledged adoption of the principle of nationality.\(^51\) This development was motivated not only by the general trend of the period but also by the provision which the Code had established for Austrians living abroad. Under this provision, not all private affairs of such citizens were subject to Austrian law, but only acts and contracts of Austrians occurring abroad, to the extent that the Austrian law limits personal capacity to undertake such acts and contracts and these acts and contracts are intended to produce legal effects in Austrian territories.\(^52\)

Most annotators were inclined to regard this provision as a general adoption of the principle of nationality so far as Austrians were concerned and to neglect the limitations expressed in the text.\(^53\) The Supreme Court, however, following a

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\(^{47}\) See the following Swiss authors: STAUFFER, NAG. art. 28 no. 3, BECK, NAG., 141 no. 36.


\(^{49}\) In the case of a person having no domicil at the relevant moment, presumably the law of his domicil of origin was intended to be applied.

\(^{50}\) Allg. BGB. § 34.

\(^{51}\) Savigny § 363 II; UNGER, I System 164; for further citations see WALKER 92 n. 19.

\(^{52}\) RANDA in 6 Grünhut’s Z. (1879) 785; KRASNOPOLSKI in 25 Geller’s Zentralblatt (1907) 108; STEINLECHNER in 2 Festschrift zur Jahrhundertfeier des Allg. BGB. (1911) 65; WALKER 93 and n. 24.

\(^{53}\) Allg. BGB. § 4.

\(^{54}\) See WALKER 91 n. 16; EHRENZWEIG-KRAINZ (1925) 94 calls the restriction superfluous.
theory which had been established by an ingenious author,\textsuperscript{54} imbued the limitations with new life by holding that the numerous peculiar restrictions of Austrian marriage law would not be applied to an Austrian marrying abroad and not intending at the time of such marriage to live in Austria.\textsuperscript{55} This decision has been criticized as opening the door to law evasion.\textsuperscript{56}

\textit{Latin America.} However, the ideas underlying the provisions of the Austrian Code appeared so reasonable to Andrés Bello, the draftsman of the Chilean Civil Code of 1855, that he adopted it, in a modified form, for his own country.\textsuperscript{57} His example has been followed in several other Latin American countries, where the Austrian rule has been adopted in combination with varying systems.

Under the Chilean Code, every inhabitant of the country, even though he may not be a citizen or a domiciliary, technically speaking, is declared subject to the law of Chile.\textsuperscript{58} Similar provisions, with or without textual modification, have been included in the laws of Colombia,\textsuperscript{59} Ecuador,\textsuperscript{60} Mexico,\textsuperscript{60a} El Salvador,\textsuperscript{61} and Uruguay.\textsuperscript{62} The provision in itself has been vigorously criticized\textsuperscript{63} and seems to have been made the object of a diplomatic exchange of notes between Chile and

\textsuperscript{54} MAX BURCKHARD, 2 System des Oesterreichischen Privatrechtes (1884) 223.
\textsuperscript{55} OGH. (May 24, 1907) 10 GlU. NF. no. 3787, 8 Amtl.S. NF. no. 1007, Spruchrepertorium (Collection of binding precedents) no. 198; cf. WALKER 91, 622; see below, p. 283.
\textsuperscript{56} PERROUD, Clunet 1922, 5; WALKER 625.
\textsuperscript{57} Bello's notes, which indicate that he was influenced by the Austrian law as well as by the French Code, are referred to by 1 RESTREPO HERNÁNDEZ 93 no. 148.
\textsuperscript{58} Chile: C. C. art. 14.
\textsuperscript{59} Colombia: Law no. 145 of 1888, art. 9; Law no. 149 of 1888, art. 59.
\textsuperscript{60} Ecuador: C. C. art. 13.
\textsuperscript{60a} Mexico: C. C. art. 12.
\textsuperscript{61} El Salvador: C. C. art. 14.
\textsuperscript{62} Uruguay: C. C. art. 3.
\textsuperscript{63} Cf. CHAMPEAU (respecting Colombia) Clunet 1894, 932; BORJA, 1 Estudios sobre el código civil chileno (1899) 211-213; URIBE (regarding Colombia) Revue 1911, 322.
France.\textsuperscript{64} On the other hand, each of these legislations declares the national law applicable to a national living abroad: first, as concerns his capacity to engage in "certain transactions" producing effects in his own country; and, second, with respect to his family relations.\textsuperscript{65} This combination of domiciliary and national law\textsuperscript{66} has already been noticed as anomalous.\textsuperscript{67} The interpretation of these provisions necessarily must cause difficulties; in fact, in Colombia\textsuperscript{68} efforts looking to a reasonable interpretation have been made, and recently, after thorough consideration, the commission for reform of the Civil Code has proposed that the entire system be replaced by the simple law of domicile.\textsuperscript{69}

In addition, Costa Rica has adopted the principle of nationality, but prescribes that foreigners are governed by the law of Costa Rica when they act in that country or if their contracts are made and are to be performed therein.\textsuperscript{70} This provision has been superadded to the others in the Civil Code of El Salvador.\textsuperscript{71}

Contrary to their Austrian prototype, which, at least in the last period of the Austrian law, was used to mitigate the effects

\textsuperscript{64} \textit{Weiss}, 3 Traité 255 mentions a diplomatic note of August 20, 1882, in which the Chilean minister, Verga, refers to a restrictive interpretation of art. 14. Apparently, the French Government had protested against the application of Chilean law to French citizens living in Chile. It has not been possible to ascertain whether any practical results ever came from this correspondence.

\textsuperscript{65} Chile: C. C. art. 15. No provision in Mexico, but see former C. C. (1884) art. 12.

Colombia: C. C. art. 19.
El Salvador: C. C. art. 15.
Uruguay: C. C. art. 4.

\textsuperscript{66} MATOS 277 no. 175; SALAZAR FLOR 483.

\textsuperscript{67} \textit{Borja}, op. cit. supra n. 63 at 213; \textit{RESTREPO HERNÁNDEZ} 93 no. 149; \textit{Soto}’s observations in: Colombia, Comisión de Reforma del Código Civil 1939–1940, 92, 98 \textit{inter alia}. The present system on that occasion was defended by \textit{Zuleta Ángel} \textit{(ibid.)} and \textit{Julliot de la Morandiére} of Paris \textit{(ibid. 116)}.

\textsuperscript{68} See \textit{RESTREPO HERNÁNDEZ} 93ff. nos. 149–159.

\textsuperscript{69} Art. 36 of the Draft on formation, promulgation, effects, interpretations and derogation of the laws, Comisión de Reforma del Código Civil \textit{op. cit. supra} n. 67.

\textsuperscript{70} Costa Rica: C. C. art. 3.

\textsuperscript{71} El Salvador: C. C. 1912, art. 16 par. 3.
of the principle of nationality, these various Latin American countries expand their own national law beyond the limits of the basic principle which they have adopted. These sophisticated modern endeavors are quite in line with recent European, especially French, tendencies, claiming application of the domestic law to nationals living abroad as well as to foreigners domiciled within the forum. The principles of nationality and of domicil are thus inconsistently combined.

A final stage of this unfortunate development has been reached at present in the Civil Code of Peru of 1936. This Code generally adopts the law of domicil to govern all foreigners whether domiciled abroad or in Peru. Nevertheless, the Peruvian law on status and capacity extends without any limitations to all Peruvians living abroad. The Venezuelan Civil Code of 1942 follows this model. The same excessive claim has been made with respect to marriage in the recent Civil Code of Latvia.

A similar conception is said to control the problems of capacity for contracting in the Soviet Union; everybody in Soviet Russia and every Russian abroad is subject to Soviet Russian law. However, this is not deemed to concern the

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72 See infra p. 152.
73 A complete history of the matter is given by Luis Alvarado, Apuntes de derecho internacional (Lima, 1940) 43-73.
74 A. Gustavo Cornejo, 1 Código Civil (1937) 50 no. 49 points out that the reference to the law of domicil is intended to include the conflicts norm of the domicil (as in Switzerland).
75 C. C. (1936) Tit. Prel. art. V par. 1. For this reason, the Peruvian delegation appointed to revise the Montevideo Treaties declared, in a reservation to the text of 1940 on international civil law, that the provisions therein respecting status and capacity should be understood not to affect the provisions of the Peruvian national law applicable to Peruvians. Cf. Rabel, "The Revision of the Treaties of Montevideo on the Law of Conflicts," 39 Mich. L. Rev. (1941) 517, 521. At the same time, under the original treaty provisions actually in force, the new code is inapplicable to Peruvians domiciled in Argentina, Bolivia, Paraguay and Uruguay; cf. Alvarado, op. cit. supra n. 73 at 71. Previously the Peruvian Code of Civil Procedure, art. 1158, had reserved the exclusive jurisdiction of the Peruvian courts over all questions of status, capacity and family relations as regards Peruvians domiciled at any place and foreigners domiciled in Peru; cf. Roger, 7 Répert. 30 no. 49.
76 Venezuela: C. C. (1942) arts. 8 and 9.
general capacity of having rights, which seems "not to be considered by the Soviet law as a faculty inherent to man as such." 78

III. Supplementary Rules

The principle of nationality cannot be applied to persons who are not nationals of any country, and it causes difficulties in its applications to persons who are nationals of more than one country. For both types of cases, the principle of nationality must be supplemented by special rules.

1. Multiple Nationality

In matters of status, a person who is simultaneously a national of the state of the forum and of some other state is usually considered by the forum as exclusively its own national, his additional foreign nationality being disregarded. This approach has been traditionally followed in France, Great Britain, Switzerland, Belgium, and Luxemburg 79 and has been adopted more recently by statutes in Japan and Liechtenstein, and by the courts of Germany and of other countries.80 The Convention on Conflict of Nationality Laws (art. 3) has recognized the right of a state to apply its law in such cases.

Where, on the other hand, a person is a national of two or more countries but the litigation arises in a third country, the law most consistently applied is that of the country of which the person is not only a national but where he also has his domicil or habitual residence or, in the absence thereof, his

78 See MAKAROV, Précis 175 and 192.
79 Surveys by KAHN, 1 Abhandl. 59, also in 30 Jherings Jahrb. (1891) 68; MAURY in 9 Répert. 297 no. 113.
80 Japan: Law of 1898, art. 27 par. 1.
Liechtenstein: P.G.R. art. 30 par. 1.
To the same effect Brazil: Former introd. art. 9 par. 2.
residence. This view was approved by the Sixth Conference on International Private Law held at the Hague in 1928, which formulated corresponding provisions to complement the older Hague treaties on international family law; eliminating reference to domicile, the test is “habitual residence” and, in its absence, simply the “residence” at the time decisive for the particular purpose, for instance, when the personal capacity to marry is in question, the moment of the marriage ceremony.

Another solution has been essayed by Japan, and still others have been suggested. For the purposes of public international law, it has long been a well-recognized tendency to prefer among several nationalities of a person that which in a given case appears the most “effective” one. This principle has been formulated by the Hague Convention on Conflict of Nationality Laws of 1930, as follows:

“Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize ex-

Brazil: C. C. Former introd. art. 9 (domicil, residence).
Liechtenstein: P.G.R. art. 30 par. 2 (domicil, residence, last acquired citizenship).
Cf. for Spain: Trías de Bes in 6 Répert. 247 no. 78; for Hungary: Szászy in 11 Z. ausl. PR. (1937) 170 (domicil). On other theories, see 2 Arminjon (ed. 2) 34ff. no. 10 bis.
82 See the list of the various supplementary clauses in Makarov 421 VIII la.
The Hague Convention of 1930 on Conflicts of Nationality Laws, art. 5 (Hudson, 5 Int. Leg. 359, also in 24 Am. J. Int. Supp. (1930) 192) declares not to prejudice the matters of personal status.
83 Law of 1898, art. 27 (law of the last acquired nationality).
Similarly, Thailand: Act on Conflict of Laws of March 10, 1939 (B.E. 2481) s. 6 par. 1, see Lewald, Règles générales des conflits de lois, no. 42 n. 8 at 102; cf. 1 Bar § 88 at 261, tr. by Gillespie at 194.
85 Greece: C.C. art. 31 par. 2; see Flournoy, “Dual Nationality and Election,” 30 Yale L. J. (1921) 6933; Maury, 9 Répert. 298 no. 114.
clusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”

2. Stateless Persons

A person not being a national of any country is called an *apatride* or *apolide* or *heimatlos*. Such a situation could arise under ordinary international circumstances, where a child of parents whose home country adheres to the pure principle of *jus soli*, was born in a country in which the *jus sanguinis* was in force. The recent unrest of legislation respecting married women has engendered other cases. Thus, where a Swiss woman marrying a Frenchman fails to sign a declaration of intention to acquire French citizenship, under article 19 of a French law of November 12, 1938, she does not acquire French nationality, though not retaining her former citizenship. Untold numbers of individuals have also been rendered stateless by the political events of this century. Many thousands of emigrants have lost their nationality by Soviet decree and many more by the ruthless legislations of Italy and Germany, introducing the system of “expatriation” as a political measure against real or alleged political enemies. Furthermore, the peace treaties following World War I and later events have made it frequently impossible in fact to ascertain the nationality of a person, who in such a case must practically be treated as an *apatride*, as is done in the case of gypsies.

At present, individuals lacking a definite nationality are generally subject to the law of their domicil or habitual resi-
dence, and, in default thereof, to the law of their temporary residence. This has been the view of the Institute of International Law since 1880. Most countries accede to this position. It was also adopted by the Sixth Conference on International Private Law at the Hague in 1928 in the complementary drafts just mentioned, in which, as in all recent treaties, the term “domicil” is abandoned in favor of “habitual residence” or, in its absence, “residence.” The new Italian Code has intentionally chosen the test of residence.

Another solution was formerly adopted by the German Civil Code (EG. art. 29), providing that a person who had once held but subsequently lost the nationality of a country without acquiring another, was declared to remain subject to his former

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90 Institut de Droit International: Resolution of Oxford, art. 6 pars. 2 and 5, Annuaire 1881–1882, 57; Resolution of Oslo, art. 3, Annuaire 1932, 471, 472. Unfortunately the Institute has changed its attitude in a Resolution on “Statut juridique des apatrides et des refugiés” voted in Brussels in 1936, Annuaire 1936, II 292. Art. 4 provides that the law applicable in the case of a stateless person will be that of the country either of a nationality possessed previously or of his domicil or, in the absence of either, of his habitual residence at the date regarded as relevant by the court.

91 Belgium: POUJET 307 no. 255; Congo: Decree of Feb. 20, 1891, art. 8 (for foreigners domiciled in Congo).


Italy: C. C. (1942) Disp. Prel. art. 29 (residence). Previously the law of June 13, 1912 on nationality, art. 14, subjected the apoliti residing in Italy to Italian civil law, but for other apatrides there was controversy, although residence was the test most frequently adopted. See UDINA, Elementi 122. The new code substitutes domicil as the test.

Liechtenstein: P.G.R. art. 31 par. 2.

The Netherlands: KOSTERS 289 (domicil).

Poland: Law of 1926, art. 1 par. 1.

Rumania: 7 Répert. 63 no. 151.

Switzerland: NAG. art. 7a.

Japan: Law of 1898, art. 27 par. 2.

China: Law of 1918, art. 2 par. 2.

Brazil: C. C. Former introd. art. 9.


92 Cf. MAKAROV 421 VIII 1 b.

national law. This provision compelled the German courts to decide the private status and the incidents of family relations of Russian émigrés in accordance with the legislation of the Soviet Union, i.e., the country which was their very enemy and which had refused to accept the role of successor to the former Russian Empire. With respect to succession upon death, the situation between Germany and Russia was at first remedied by a treaty. Recently, however, Germany has adhered, by a new law, to the rule proposed by the Sixth Conference at the Hague.

In addition, two multipartite treaties of 1933 and 1936 on the status of refugees (the one treaty, in case they have no nationality, the other irrespective of nationality), determine the personal law of refugees by the law of the country of domicile or, in default thereof, by that of the country of residence.

The test of domicile or residence has thus proved to be indispensable in important cases.

3. Nationals of Countries with a Composite System of Private Law

Composite law on personal basis. In Algeria, Tunisia, Syria, Egypt, Iran, India, China, and other Eastern countries, per-
personal status is determined by religion, class, or race. In India, for instance, the law is different for Buddhists, Hindus, Mohammedans, and whites, although it is in every case a "law of the forum." Some elements of this system also survive in Eastern European countries.

Such diversity of personal law is a part of the substantive law of the country concerned. When a conflicts rule refers to the "law" of such a country, either because it is the law of the domicile of an individual or because it is his national law, no uniform law being in force in any part of the country, the reference can only be to the particular set of rules that governs the group of persons to which the individual belongs. Under this approach, it is obvious that the conflicts rule is quite sufficient in itself and that it does not need any additional rules, complementary to those which invoke the law of domicile or nationality.

Difficulties may arise, it is true, from the fact that the regulation of interreligious or interracial relations in the oriental countries concerned is often so obscure and incomplete that it may not be easy for a foreign judge to cope with their ascertainment and application.

arts. 5, 6, in 171 League of Nations Treaty Series 75, 7 HUDSON, Int. Legislation 376 No. 448.


100 Grassetti, 5 Rivista Dir. Priv. (1935) II 10.

Composite law on territorial basis. As contrasted with the grouping of population according to personal qualifications, the law of conflicts is directly affected when the law of a country to which a conflicts rule refers is split into territorially different systems. A composite system of law on a territorial basis makes nationality an incomplete criterion. The United States, the British Empire, Poland, Rumania, Yugoslavia, and Mexico are examples of political units lacking a unified law on personal status; their territories are divided into parts where different bodies of rules are in force. A court which has to apply the "Polish law" relative to a Polish subject's capacity to marry, would be unable to find an appropriate set of rules, except by locating such person in the former Prussian or former Russo-Polish or old-Russian or Austrian or Hungarian part of Poland. A secondary rule of conflicts is necessary.

First case: Where interregional rules exist.

If the country to whose law reference is made possesses a unified internal regulation declaring which one of the several private laws applies to the individual concerned, this regulation is universally accepted for the purpose of secondary reference. For instance, the Polish law of "internal relations" (interlocal private law), enacted simultaneously with the Polish law on international private law, August 2, 1926,

102 Cf. I ZITELMANN 403; RAAPE 29 and 1 D.IPR. 94; WALKER 104; MELCHIOR 451 § 310; DE NOVA, in 30 Rivista (1938) 388 and II richiamo di ordinamenti plurilegislativi: Studio di diritto interlocale ed internazionale privato (1940) (not available); GRASSETTI, 5 Rivista Dir. Priv. (1935) II 33; I STREIT-VALLINDAS §§ 16, 17 (the best survey of facts and literature); CHESHIRE 161; FALCONBRIDGE, "Renvoi and the Law of the Domicile," 19 Can. Bar Rev. (1941) 311. The aggrandizement of Germany caused problems in view of which the doctrine of interregional law has been discussed again; see quotations by DE NOVA, 15 Annuario Dir. Comp. (1941) 338, 339. See furthermore the Swiss NAG. in its original main application to intercantonal conflicts and the French law of July 24, 1921 concerning the conflicts between the French and the local law of Alsace-Lorraine.

103 Arts. 1 and 3. Another example is art. 14 of the Spanish Civil Code, providing that the conflicts rules established with respect to the persons, the transactions and the property of Spaniards abroad and of foreigners in Spain are applicable to the persons, transactions and property of Spaniards in territories or provinces of different civil legislations; see BEATO SALA, 1 Revista Der. Priv. (1913-1914) 201; TRÍAS DE BES, 6 Répert. 266 no. 165.
provided that the status and the capacity of an individual of Polish nationality, domiciled abroad, is to be determined by Polish courts in the first instance under the law of the last domicil he had in Poland and, in the second, under the law of the Polish capital. Accordingly, German, French, Italian, etc., courts apply the same expedients. This method was recommended by the Institute of International Law and has been adopted in several statutory enactments.

It is easily understandable that a foreign court looking for the "national law" of an individual, should adopt the localizations effected by the sovereign of the foreign nation. But the theoretical background of this operation has been a subject of discussion. An essential resemblance between interregional and international private laws cannot be denied; both are types of conflicts rules. Yet the reference leading from the conflicts rules of the forum through the interprovincial rule to a particular family law of a territory must not be treated as identical with a regular renvoi; the foreign interregional rule is not in competition with the forum's own conflicts rules. As a matter of fact, the strongest adversaries of renvoi agree with this use of foreign interregional statutes.

It must be presumed that the interlocal rules are to be adopted with all their characteristics, e.g., what they understand as "domicil," the domicil concept of the forum being immaterial. Also, such particular notions must be applied as the Swiss cantonal citizenship or the "town settlement"
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(Heimatzuständigkeit) \(^{109}\) which was a basic concept in the Austro-Hungarian monarchy and remained in force in the successor states. \(^{110}\) In Hungary it was abolished but recently. \(^{111}\)

Second case: Where no interregional rules exist and the individual is domiciled within his national country.

Most countries that have no uniform private law also lack a unified set of interlocal rules. Such a situation existed in Germany before the Civil Code took effect on January 1, 1900, and after World War I the same was true in all countries that had annexed new provinces and in which legal unification was not yet achieved. Yugoslavia and perhaps Rumania are still in this situation. But the foremost examples are presented by the British Empire and the United States. With respect to the former, it is hardly doubtful that "there is in fact no system of conflict of law common to all parts of the British Empire," \(^{112}\) that would enable a foreign court to discover all-British rules connecting British subjects with their several jurisdictions. Neither is it permissible to apply the English rules on conflicts or on the law of status to all British subjects, for the English law cannot be construed as "the true national law" of all British subjects. \(^{113}\) Perhaps in the future, some

\(^{109}\) The French text of the Treaty of St. Germain of Sept. 10, 1919, art. 3 uses the term "indigénat" with the Italian equivalent "pertinenza" in parentheses. The German translation in the Austrian Staatsgesetzblatt 1920, at 1048 is "Heimatrechte". The English version "citizenship" as published in British and Foreign State Papers (1919) 505, is wrong.

\(^{110}\) See e.g., for parts of Yugoslavia, Péritch in 4 Leske-Loewenfeld I 879 n. 15 and Lovric, ibid. 1038 n. 172 (Croatia-Slovenia). See also Péritch, 32 Bull. Inst. Int. (1935) 3.

For Czechoslovakia, Hochberger, 4 Z. oosteurop. R. (1938) 621, 629 reports that Czechoslovakian nationals domiciled in Czechoslovakia are considered having the capacity of their domiciliary law, but if domiciled abroad, that of the law of their township.

\(^{111}\) In Hungary it has been replaced by domicil for interlocal purposes by Law XIII of 1939; cf. 13 Z. ausl. PR. (1940) 258, 259.

\(^{112}\) Falconbridge, 19 Can. Bar Rev. (1941) 322, supra n. 102.

\(^{113}\) This was contended by Dicey 873; see contra: Cheshire 162 n. 43; Falconbridge, 19 Can. Bar Rev. (1941) 328, supra n. 102.
point of localization might be found in local conceptions of nationality, Canadian, South African, etc., which seem to be in a state of development, in addition to the notion of British subject; but the new conception of dominion nationality apparently has not yet been taken into consideration for such purpose and in any event would not specify the law of one of the several component states or provinces of the dominion in question.

However, unanimity is still to be found in one group of cases, viz., where the individual is domiciled at some place within the entire territory of the country whose legal system is divided, or where, as to matters of inheritance, the individual was there domiciled at the time of his death. The rule is quite generally recognized that the law of such place constitutes his personal law. Thus, the principle of domicil has retained a further supplementary hold in Europe.

Although this rule is well settled, it is nevertheless not certain whether it follows that “domicil” is to be defined under

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115 The problem has scarcely been discussed; in 2 Encyclopaedia of the Laws of England (ed. 3, 1938) 467ff. it is observed that at present colonial nationality is not distinguished from the British, although in the future the principles embodied in the Statute of Westminster, 1931 (c. 4) might affect nationality within the Empire.

The latent significance of the new local nationality for the purpose of jurisdiction, in particular divorce jurisdiction, has been pointed out by Keith, “Das Verhältniss des Statute of Westminster von 1931 zum internationalen Privatrecht,” 6 Z. ausl. PR. (1932) 301, 308 and op. cit. supra n. 114 at 193; Eastman, “Australian Nationality Legislation, Nationality of Married Women,” 18 Brit. Year Book Int. Law (1937) 179. A more radical development toward the criterion of local citizenship for personal status might be expected with respect to Eire.

116 Zitelmann 405 at n. 7; Raape 36 (b); Melchior 452 § 311 n. 3.

With respect to their interprovincial rules, the Court of Cassation of Rumania (March 3, 1937) 5 Z. osteurop. R. (1939) 654, Clunet 1938, 946 held that divorce is governed by the law of the domicil of the parties at the time of the action, not by that of the place of celebration of the marriage nor by that of the origin of the parties, and, therefore, applied the Austrian Civil Code to the divorce of parties domiciled in Bucowina (the actual local law of that province).
the law of the forum and not, as in the first case described (where interlocal rules exist), in accordance with the conceptions existing in the territory where the individual is said to reside.

Third case: Where no interregional rule exists and the individual is domiciled outside his national country.

A troublesome situation arises where there are no interregional rules, and the individual is not domiciled in any part of his national country. Several opinions have been put forward.

(a) The prevailing doctrine in Germany, followed by the Swedish legislation, applies the law of that district of the national’s country where the individual now domiciled abroad had his last domicil or, if he never had any domicil in his national country, the law in force at the capital of that country.

This doctrine is satisfactory in certain cases. The connecting factors evidently were borrowed from procedural models; to allow nationals domiciled abroad to sue or be sued locally, jurisdiction, ordinarily based on actual domicil, in emergency cases may be based upon the last previous domicil or, as a final resort, may be assumed by the courts of the capital. Such provisions make sense in the intranational rules of a country like Rumania. Rumanian citizens are not subject to foreign personal laws even when domiciled abroad and therefore must be connected with one of the territorial laws

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117 Niemeyer, Das IPR. des BGB. 68; Lewald 23; Raape 36; Melchior 45.
118 Swedish Int. Fam. L. of 1904 with amendments, c. 6 § 1 par. 2; Law of March 5, 1937 on Conflict of Laws in regard to Succession, c.3 § 1. See 11 Z. ausl. PR. (1937) 937, 99 Bull. Inst. Int. (1938) 158.
119 RG. (Nov. 30, 1906) 64 RGZ. 389 at 393; OLG. Karlsruhe (May 6, 1895) 9 Z. int. R. (1899) 311, 315.
120 KG. (Aug. 20, 1936) JW. 1936, 3582 (Soviet Russian subjects); LG. Hamburg (Sept. 2, 1936) JW. 1936, 3492 (Rumanians).
of Rumania. A French or German court, adhering to the same principle of nationality, may very well agree to locate a Rumanian citizen somewhere in Rumania. For analogous purposes, in order to secure Frenchmen living abroad a domicil in France in case they need one, the French private draft of 1930 establishes an artificial domicil: (i) at the Frenchman's last domicil in France, (ii) subsidiarily at his last residence, (iii) otherwise at his birthplace, and (iv) in the last resort at any place chosen by him in a declaration before a French consul.\(^{122}\)

On the other hand, such subsidiary rules of the forum are obviously unsuitable for connecting a British subject with a determinate part of the British Empire. As a matter of fact, no German or French court is likely to apply them to a British subject. Where an Englishman is domiciled in France, French courts as well as other Continental courts apply French law, by renvoi.

(b) Italian courts reject renvoi\(^{123}\) and are confronted with a problem that has been called insoluble. When the Courts of Cassation of Florence and Naples, in leading cases of 1919 and 1920, respectively,\(^{124}\) proclaimed the anti-renvoi doctrine, they recognized at the same time that the British laws did not contain any rules linking British subjects domiciled abroad with any British legal system. The only possible result was to adopt the law of the domicil of origin.\(^{125}\)

Thus, the English judgments in the cases of Johnson and

\(^{122}\) Art. 5 par. 2, 26 Bull Soc. d'Études Lég. (1930) 176; cf. NIBOYET, 26 ibid. 78.

\(^{123}\) This well known rule was stated by Luxmoore, J., *In re Ross*, [1930] 1 Ch. 377, 403. It is expressly confirmed by the Italian Civil Code (1942) Disp. Prel. art. 30.


O'Keefe, which in fact (by renvoi) resort to the domicil of origin to determine the distribution of the estates of British subjects who die domiciled in Italy, are not without support in Italian law.

But, of course, it does not correspond to the spirit of British laws that a person firmly settled in Naples for forty-seven years, should be traced back to the origin of his father; at least, even in the eyes of a British court, the domicil of origin of the father of Miss O'Keefe was undoubtedly superseded by the domicil of her choice. For this reason alone the solution of the O'Keefe case is absurd.

(c) Recent Italian writers, with Falconbridge's approval, conclude that it is impossible to fix the status of a British subject living abroad and suggest that the Italian court apply the lex fori, viz., Italian municipal law. Such a gesture of despair seems to be uncalled for, however, if proper regard be paid to the historical development of the personal law; domicil was replaced by nationality in the nineteenth century, but not so as to exclude the test of domicil whenever the new test of political allegiance should fail to operate reasonably. Certainly, reference to domicil is preferable to a resigned resort to the lex fori. The practical consequences illustrate what the choice of law means in this case:

Suppose a Canadian dies domiciled in France, and an Italian court has to determine the intestate succession to his movables. If the Italian court were to apply Italian inheritance law qua lex fori, instead of French law qua lex domicilii, the solution would be senseless and completely destroy harmony between the conflicts rules of the forum and those of the domicil, as

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well as with those of the Canadian courts which seek to follow any solution chosen by the court of the domicil but are unable to follow the law of the forum of a third country.

(d) Zitelmann suggested taking domicil alone as the test. He would limit the reference to nationality to the case where the actual domicil is situated within the national country. It has been objected that this view runs directly counter to the principle of nationality, but this argument is evidently wrong. It is true, on the other hand, that the *lex domicilii* and the theory of renvoi result in the same decision in this case and are often hardly distinguishable from each other. But the case of a British subject domiciled in Italy induced the leader of the Italian school of international law and the prominent opponent of renvoi, Dionisio Anzilotti, to abandon his opposition.

Adoption of the law of domicil by the Italian courts, either as an independent secondary test or, more appropriately, as the result of renvoi, is the only way leading out of the impasse. Renvoi is the better method, since harmony is preserved with the British rules, especially in relation to the definition of domicil. One cannot reject renvoi and hope for anything tolerable.

It has been observed that the law of domicil has not the same domain of application in all British countries. This, however, involves only special points immaterial for the general rule.

129 I ZITELMANN 405, followed by WALKER 105 n. 57.
130 RAAPÉ 37.
132 FALCONBRIDGE, 19 Can. Bar Rev. (1941) 322, *supra* n. 102. His example, however, that under the primary rule in Quebec the *lex loci actus*, not the *lex domicilii*, governs the formal validity of a will, is not entirely relevant, since in this situation the law at the place of contracting is recognized—alone or optionally—by the Continental conflicts rules, and to such extent no renvoi problem is involved.
(e) The problem is not much different with respect to American citizens. If an American citizen is domiciled within a state of the United States, the reference to his "national" private law means the law which will be applied to him by a court sitting at his domicil. It has been properly noted in Europe that in this case the nationality principle needs no supplementary rule, because such domicil constitutes local citizenship in the state.

Where an American citizen is, however, domiciled in a foreign country, renvoi has been adopted by numerous European courts upon the erroneous view that the conflicts law of the American state in which he had his last American domicil, referring to the law of his present domicil,\textsuperscript{133} applies. The conception in this country is that such an individual is still an American citizen but no longer a citizen of a particular state.\textsuperscript{134} Consequently, if there were Federal rules of conflicts, they might appropriately be resorted to in such case by a Continental court. But there are no such rules. Since the Supreme Court's decisions requiring Federal courts in diverse citizenship cases to follow the conflicts rules of the states where they are sitting,\textsuperscript{135} it is doubtful to what extent an independent Federal system of conflicts law can be developed.\textsuperscript{136} However, in the United States, the scope of the law of domicil is substantially more uniform than in the British Commonwealth, with exception only of certain peculiarities in the law of Louisiana. Hence, it seems quite justified \textsuperscript{137} for

\textsuperscript{133} See the critical exposition by RHEINSTEIN, 1 Giur. Comp. DIP. 141.
\textsuperscript{136} Supra p. 37.
\textsuperscript{137} Professor Lawrence Preuss has attracted my attention to a somewhat similar problem which has been discussed in matters of extradition. Under the
French, German, Chinese, and other foreign courts to treat the questions that are generally decided in American courts by the municipal law of the domiciliary state, in the same way and under the same construction of domicil.

**Conclusion.** To summarize, where nationality alone is insufficient for ascertaining the applicable law, resort must be had in the first place to the rules respecting interregional relations of the country whose national the individual is. If no such rules have been established in that country by an authority covering the entire national territory, the spirit in which its courts generally solve the problem of demarcation between the legal systems included may reasonably be followed by foreign courts. Where, as in the United States and in the British Empire, domicil is generally decisive, a court of any other country has good reason to apply the same criterion with all of its implications. Only in the last resort need independent conflicts rules be applied, based on a former domicil of choice or some other contact.

Except for the last point, the attitude of the forum may thus be similar to that observed in dealing with religious, racial, or class differentiations.

treaties, extradition usually depends on the recognition, by both the requesting and the requested countries, of the criminal character of the alleged offense. How is the “principle of double criminality” to apply to the United States where the administration of criminal law has not generally been unified? Is “country” in such case the United States or the state involved? In the case of Factor v. Laubenheimer and Haggard (1933) 290 U.S. 276, 28 Am. J. Int. Law (1934) 149, the United States was requested to extradite to England, Factor, who had been found in Illinois. The Supreme Court, by a six to three vote, held it sufficient that the criminal character of the act was recognized in twenty-two states, although not proved to be such in Illinois. (It has even been said that the number, twenty-two, is too high; see HUDSON, “The Factor Case and Double Criminality in Extradition,” 28 Am. J. Int. Law (1934) 274, 303 n. 120.) BORCHARD, “The Factor Extradition Case,” ibid. 744, has given the more cautious explanation that the considerable recognition in American state statutes was evidence of the American recognition of the criminality in question. The dissenting judges and HUDSON, loc. cit., maintain the older conception that the law of the state where the fugitive is finally arrested is decisive. Evidently our own problem is easier to solve.
IV. Determination of Nationality and Domicil

1. Determination of Nationality

Whether a person is a national of a certain country is a problem that is determined exclusively by the law of that country, a settled rule of international law confirmed by the Convention on Conflict of Nationality Laws of 1930. No other law than that of Brazil determines whether or not a certain individual is a Brazilian national; no other law than that of the United States answers to the question whether an individual is a citizen of the United States. The statement in a former American nationality law that “any American woman marrying an alien shall take the nationality of her husband,” if taken literally, surpassed the powers of the United States. The same formula was incorporated, however, in many old European statutes, as for instance, article 19 of the Code Napoléon, sometimes interpreted to the effect that the wife should be subject to the personal law of the husband, irrespective of whether she acquired his nationality by the law of his national country.


139 Art. 2: “Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.”


An analogous charge of trespass upon foreign sovereignty has been made by several authors with respect to legislations attaching a certain foreign nationality to corporations. See TRAVERS, 33 Recueil 1930 III 251; CAVAGLIERI, Il diritto commerciale internazionale 203; 2 ARMINJON (ed. 2) 460, no. 179. To the same effect 1 PONTES DE MIRANDA 460 objects to the Polish Law of 1926 on private international law, art. 1 par. 3, and P.G.R. of Liechtenstein, art. 235, on the ground that these provisions choose the business center of a corporation, even if in foreign territory, as the contact for determining the personal law of the corporation, although contrary to the local law of the place, and that the Liechtenstein provision seems in this way to determine the nationality of the corporation. This attack is unjustified at least inasmuch as merely the determination of private law rules is meant and renvoi is applied.

142 COLMET-DAADE, 1 Revue de droit français et étranger (1844) 401.
The principle that acquisition and loss of nationality depend exclusively upon the law of the country concerned, is universally recognized not only in public but also in private international law; it is expressly stated in recent codifications. Occasionally, however, there have been refusals to recognize certain foreign nationality regulations deemed to be contrary to public policy. French courts, for instance, have declined to recognize a Brazilian law of December 14, 1889, which bestowed Brazilian nationality upon all foreigners who resided in Brazil on November 15, 1889, and who did not expressly object to such en bloc naturalization.

This rule of international law is applicable without doubt to the determination of status under the nationality principle. In two cases, moreover, the conflicts law itself is affected:

Suppose a divorced French woman goes through a second marriage ceremony in France with a Catholic Spaniard. To ascertain whether the woman by this marriage acquires Spanish nationality, Spanish law exclusively is consulted by all courts. Accordingly, as (i) Spanish matrimonial law prohibits the marriage of a Catholic with a divorced person, and (ii) under Spanish conflicts law this nullifying prohibition is extended to foreign marriages of Spanish nationals, consequently (iii) by Spanish nationality law the wife does not acquire the nationality of Spain. Thus, a French court, in determining the question, would not apply its own conflicts rule designating the law applicable to the validity or invalidity of the marriage. This is a remarkable case; the preliminary question relating

143 Liechtenstein: P.G.R. art. 29.
Código Bustamante: arts. 12, 14, 15.
Greece: C.C. (1940) art. 29.
Convention of the Hague on Conflict of Nationality Laws of 1930: art. 2.
to the marriage apparently is answered in accordance with the law applied in deciding the main question. On the other hand, for some other purpose the same court may declare the marriage valid under French law. The distinction between these two solutions has baffled some writers unduly.

When according to this rule that nationality depends on the municipal law applied by the country involved, the nationality of an individual has been ascertained (or found unascertainable), the ordinary conflicts rules of the forum determine his status. In a second group of problems, however, the French courts, considering that French nationality is at stake, have gravely altered their conflicts rules.

The decision of the French Supreme Court in the Mareschal case illustrates the practice. An illegitimate child was acknowledged in Switzerland by his Swiss mother’s declaration on the birth register. Under Swiss law, an illegitimate relationship was created between the child and the mother, and the child acquired Swiss nationality. French conflicts law would have recognized this state of affairs, had not the father who was of French nationality ultimately also acknowledged the child in a document sufficient under French law. Because this entailed a question of French nationality, the court examined the entire situation from the viewpoint of French municipal law, under which the mother’s recognition was found insufficient. Accordingly, the father’s was the first and decisive acknowledgment, and the child was deemed a French national. This doctrine subjects the determination of private law questions relating to acknowledgment, to considerations derived from a nationality law instead of the law of conflicts.

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145 See, as to German law Lewald § 10; Melchior 253 § 169.
147 Swiss C.C. art. 324; cf. BG. (June 29, 1928) 54 BGE.230, 232.
148 Colin, Note D.1921.11 and in his report to the Court of Cassation, Clunet 1923, 89, 93; Lerebours-Pigeonnier no. 349 A.
That this is not a foregone conclusion is demonstrated by the German law respecting legitimation, which, only if valid under the German laws, including German conflicts rules, is a ground for acquiring German nationality, and not inversely. The conflicts rules operate independently and determine whether there is German citizenship.

2. Determination of Domicil

Variety of domicil concepts. In much of the literature, the diversity of domicil concepts is emphasized. It is opportune to note just what the differences are. Primarily, the British doctrine of domicil is to be distinguished from that of all other systems; it is more or less unique, first, because of the abnormal place occupied by the domicil of origin, second, because of the prevalence of tendentious casuistry. The English writers, recognizing that the decisions of the House of Lords have done much to alienate the legal concept of domicil from its natural lines, are frankly unhappy with the artificial character of their doctrine and its arbitrary results. On the other hand, in some countries, such as Denmark, the notion of domicil is undeveloped.

Apart from these anomalies, however, it should not be supposed that in the doctrines of the great majority of coun-

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149 German Nationality Law of July 22, 1913, § 17 (5).
150 RAPE 562.
151 See the surveys given by Barbosa de Magalhaes in 23 Recueil 1928 III 121; Levasseur, Le domicile et sa détermination en droit international privé (1931); Werner von Steiger, Der Wohnsitz als Anknüpfungsbegriff im internationalen Privatrecht (Bern, 1934) 119; Vittorio Tedeschi, Il domicilio nel diritto internazionale privato (1933) and the same author's review of Steiger's book, 10 Z. ausl. PR. (1936) 1067; see also Neuner, 8 Z. ausl. PR. (1934) 89-92. On the differences of municipal conceptions of domicil see the comparative study by Vittorio Tedeschi, Del domicilio (1936).
152 Keith, "Some Problems in the Conflict of Laws," 16 Bell Yard (Nov. 1935) 4, 5. In the Winans case, [1904] A.C. 287, Keith recalls, the propositus had not found a domicil in England during 37 years; Ramsay, in Ramsay v. Liverpool [1930] A.C. 588, lived from 1891 or 1892 to 1927 in Liverpool and ordered himself buried there, but the Lords unanimously declared him domiciled in Scotland and seemed astonished that another view should be taken.
153 Hoeck, Personalstatut 6.
tries there exists no common simple idea of domicil, at least at bottom. It would be unfortunate to press to such conclusion the multitude of learned definitions of domicil. All countries deriving their laws from Roman conceptions agree in requiring both physical presence or actual abode (residence) and intention to maintain this residence for an indefinite time on the part of the person concerned. The American law shares this view, although terminology and definitions sometimes vary. Despite the frequent use of the term "residence" in American statutes involving questions of status, it is the general opinion that an appropriate intention is also required; in the Restatement, it is made plain that the proper term is "domicil."

The apparent divergence of cases concerning the domicil of choice is due not so much to national diversities as to the broad latitude of discretion which the courts all over the world seem to reserve to themselves in determining where a person is or was domiciled. In part, this is attributable to the desire of the courts to decide individual cases in accordance with what they regard as fair justice; the individualized exercise of such discretion has often given the appearance of an arbitrary or inconsistent handling of the problem. But in part the courts also seem to react against the exaggerated generalization by

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154 MAHAIM, reporter to the Institute of International Law, 1931, has collected fifty different definitions of domicil given in the world literature. See Annuaire 1931 II 180. He thinks this shows, against the current belief, that the concept of domicil is far from being similar in all countries. On the contrary, it shows that the literature has spoiled a fairly uniform subject by scholastic definitions.

155 1 BEALE 110 § 10.3; 4 Proceedings American Law Institute (1926) 348.

156 Cf. Restatement § 9 e and the use of the term "domicil" as indicated by the Index sub "domicil."

157 For instance, Englishmen and Americans are declared to be domiciled in France (see NIBOYET 610) or in Switzerland (as in the decision of the Trib. Zürich, Oct. 25, 1935, 32 SJZ. 202 no. 41 and others of the same tribunal) in order to assume jurisdiction for divorce. The same occurs daily in this country. Thus, for example in the famous case of Gould v. Gould (1923) 235 N.Y. 14, 138 N.E. 490 the matrimonial domicil for obvious reasons was declared to be in New York, although the divorce decree of Paris was recognized (infra p. 470, n. 40).
which one basic notion of domicile apparently has been adopted for such different fields as jurisdiction and venue, taxation, poor relief, exercise of civil rights, voting, and conflicts law.\(^{158}\)

Where an individual is not free to establish his domicile but is subject to the interference of legal rules, differences are more deeply rooted. Thus, the domicile of dependent persons, particularly of married women, gives rise to problems.\(^{159}\) Again, the former singular provision of the French Civil Code (art. 13) that a foreigner had to obtain authorization by the French government to have a domicile in France, greatly disturbed the international order. A British subject who was permanently located in Paris but had not obtained such authorization, for the purposes of the French courts, was not there domiciled, although so regarded under German, Italian, and even English standards. Thus, the English courts declared that Mrs. Annesley acquired a domicile of choice in France, although she never had applied for governmental permission.\(^{160}\)

By law of 1927, this peculiar doctrine was repealed, and the French courts proceeded in accordance with the ordinary concept of domicile. Recently (1938), however, a French decree has required an alien to possess a police identification card allowing him to stay in France for more than one year, in order to acquire, exercise, or enjoy statutory rights presupposing French domicile or residence.\(^{161}\) In France, adoption of children depends on this condition (C.C. art. 360), and the cele-


\(^{159}\) For illustration take the case of German RG. (Jan. 12, 1939) HRR. 1939, no. 376 (the legal domicile of a child whose legitimacy is attacked, but is not yet avoided, is determined according to the conflict law of legal paternity (EG. BGB. art. 19), whereas the court of appeal had applied the \textit{lex fori}). See in respect of the wife, below, p. 310, of the child, below, p. 605.

\(^{160}\) \textit{In re} Annesley, Davidson v. Annesley [1926] Ch. 692. See also the discussion in Harral v. Harral (1884) 39 N.J. Eq. 279.

\(^{161}\) Decret-loi (Nov. 12, 1938) J. Off. 12–13 Nov. 1938, art. 1; Sirey 1939.4.1080, D.1939.4.162–163, Clunet 1939, 315.
biration of marriage is expressly subjected to it. But the prohibition does not invalidate an act in violation thereof.

Finally, the dogmas that every person must have a domicil, and that no person can have more than one domicil at a time—in force in British countries, the United States, France, Switzerland, Argentina, etc.—have been discarded in the German Code as contrary to the realities of life.

Despite these embarrassing variances, it should not be impossible to arrive at a reasonable unification of the conditions under which domicil may be acquired. This is demonstrated by those bilateral international treaties that incorporate a definition of domicil in their text, as well as by the determinations of domicil by international courts for the specific purpose of treaties lacking such definition. A far-reaching unification has been achieved in this country, as a result of the insertion of the topic in the law of conflicts instead of regarding it as a matter of domestic law. The rules provided in sections 11 to 41 of the Restatement are uniform rules of private law, transferred into conflict of laws. The British common law countries and the countries unified by the Treaties of Montevideo have attained an analogous result.

*Which law decides?* As the answer to the question of domicil thus may vary, the question arises under what law a court should define the elements constituting domicil. This problem is of evident interest in the countries where domicil is the general test of status rights, but it is also of importance else-

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163 This seems to be the meaning of Circ. Letter, Dec. 13, 1938, J. Off. 6 Jan. 1939, A. 1939. Lois annotées 1346, Circ. 3, par. 2.

164 NEUNER regards this dogma as the chief reason for the confusion complained about by the lawyers of the common law countries, see NEUNER, “Policy Considerations in the Conflict of Laws,” 20 Can. Bar Rev. (1942) 479 at 494.

165 BGB. § 7.


167 See literature, supra n. 151.
where; for instance, in France and other countries succession to movables upon death depends on the law of the last domicile of the deceased. That this problem usually is identified by writers and courts with the question under which law domicile (or residence) required for judicial jurisdiction must be determined, is unfortunate. In consequence, the application of the *lex fori*, natural where jurisdiction is concerned, has been advocated as if it were equally natural in matters of choice of law.

*Lex fori.* Thus, the English courts, after some vacillations, now take it for granted that they have to apply the English concept whenever they determine an individual’s domicile.168 The same approach seems to prevail in the United States,169 where it has been adopted in the Restatement.170 The courts of the Netherlands likewise determine domicile in accordance with the concept of the forum and refuse to apply the national law of the person, because they believe that the definition of domicile does not pertain to the functions of the personal law.171

In a broad way, the same result has been reached through the theory that the determination of a person’s domicile is a problem of “characterization” and therefore must be answered in accordance with the *lex fori*.172 This means that the conflicts


170 Restatement § 10.

171 H.R. (Jan. 5, 1917) W.10073. It must be noted, however, that the case dealt with jurisdiction, in a suit against a ward of German nationality; for this purpose the minor was considered domiciled with his Dutch guardian, according to BW. art. 78, irrespective of German law; recently Rb. Amsterdam (Apr. 9, 1926) Clunet 1928, 1296; Rb. Amsterdam (Nov. 26, 1926) Clunet 1928, 1293; Rb. Dordrecht (Dec. 9, 1936) W. 1937, no. 921 (domicil by operation of law for a minor foreigner in the Netherlands with his guardian, BW. art. 78); see also Rb. Almelo (May 13, 1936) W. 1937, no. 258 (German illegitimate child, but domicil for the purpose of the child’s bastardy proceedings).

172 See Melchior 177 n. 7; De Nova, 30 Rivista (1938) 388, at 399. Lewald, Règles Générales des conflits de lois 91 n. 23 (with other citations).
rule of the forum referring to the law of the domicil necessarily refers to the law of the place considered to be the domicil under the private law of the forum. If, for instance, an American citizen resides in Paris, a French court would determine at what place he is domiciled solely in accordance with the French concept of domicil, as indicated by examination of the French law.

Yet, in the common opinion, it is not inconsistent with this theory that, to use the same example, the American and not the French definition of domicil should be decisive for the problem of renvoi. Where an American citizen lives in France at the time of his death, a French (or German) court in determining succession to his movables, will consult first his national law, i.e., the American, which is deemed to refer to the inheritance law of the last “domicil.” To comply with this reference, the court must ascertain whether the last residence constitutes a domicil in the meaning of the American rule, because this is the rule (of back reference, loi renvoyante) to be applied. This construction of domicil is not considered an exception to the supposed principle of characterization according to the lex fori, for in this case it is the American conflicts rule, not that of the forum, that applies and with it the American concept of domicil.

173 See particularly KAHN, Abhandl. 66; also in 30 Jherings Jahrb. (1891) 76; NIBOYET 686 no. 565; LEREBOURS-PIGEONNIÈRE 378 no. 323; 2 ARMINION (ed. 2) 58ff. no. 14 sub. (3) (with restrictions, n. 15); and among the French decisions Cass. (req.) (Dec. 30, 1929) D. H. 1930.65; Trib. sup. Colmar (Nov. 30, 1921) Clunet 1922, 379; App. Colmar (Jan. 14, 1925) Clunet 1925, 1044; Trib. civ. Seine (Apr. 27, 1933) Clunet 1934, 901. Cf. BATIFFOL, Revue Crit. 1935, 625, RG. (June 2, 1932) 136 RGZ. 361, 363; RG. (Apr. 6, 1936) 151 RGZ. 103; OLG. Karlsruhe (Jan. 21, 1930) IPRspr. 1930, no. 89 (British subject died in Freiburg; his domicil has to be ascertained according to British rules relative to British subjects born in India).

Is it not strange, however, that, to determine the status of a person according to his domiciliary law, a court in State X, when in doubt whether such person is domiciled in Y or Z, should follow its own internal law in localizing the domicil?\footnote{175}{In contrast to the domiciliary principle itself, see Niemeyer, Das IPR. des BGB. 69; Neuner, 8 Z. ausl. Pr. (1934) 90.}

Even in the French school of thought, in which the doctrine of characterization of legal concepts according to the law of the forum has gained its strongest foothold, other theories have been advanced in startling variety. Some of the older authors, emphasizing the nationality principle, have proposed that domicil be defined in accordance with the national law of the individual.\footnote{176}{Weiss, 3 Traité 321; Valéry 113 no. 116; cf. Levasseur, \textit{op. cit. supra} n. 151. Some writers claim that the Hague Convention on Divorce of 1902, art. 5 no. 2 has adopted this view, and some decisions, including German RG. (Apr. 5, 1921) 102 RGZ. 82, 84, have followed these writers. See Melchior 180 n. 3; 3 Frankensteiin 520.}

Recent discussions have put forward two further points of contact. One opinion is that the law of the place of actual residence should be consulted to determine whether such residence constitutes domicil; this law is sometimes called the territorial law\footnote{177}{1 Brocher 247 ff. His theory was advocated also by 1 Zitelmann 83, 178 and adopted by the Código Bustamante arts. 22 and 25 as well as (in respect of jurisdiction) by the Swedish Law of July 8, 1904 with amendments, c. 6 § 3. See infra n. 183.} and is favored as such by neo-territorialists such as Niboyet.\footnote{178}{178 See infra n. 183.}

Another opinion, or rather formulation of the same trend, postulates that the law of domicil which should govern under the choice of law rule of the forum should determine also where the domicil is.\footnote{179}{Steiger, \textit{op. cit. supra} n. 151, especially at 161; Tedeschi recognizes this law as determining domicil for certain status questions as a broad exception to the \textit{lex fori} doctrine.}

In fact, the Swiss rule referring the status of a Swiss domiciled abroad to the legislation of the domicil is said to imply the notion of domicil in the foreign law.\footnote{180}{Swiss NAG. art. 28; Huber-Mutzner 403.}
Argentine legislator, the domicil acquired by an Argentine national in Paris, if not authorized by the French authorities and therefore not recognized under the then French law, is insufficient to determine the law applicable to his inheritance. Actual residence in the foreign country is presupposed, however, in such cases. In these polemics, the main argument against the *lex fori* is that domicil, like nationality, establishing a social and political tie between an individual and a state, should be construed under the law of that state. Particularly, it has been considered strange to determine an individual's personal status on the ground of his domicil in a country which does not recognize him as one of its domiciliaries. This is the argument anticipated in Westlake's statement that “no one can acquire a personal law in the teeth of that law itself,” a consideration which has much impressed Niboyet, formerly the strongest advocate of the *lex fori* doctrine.

A draft treaty worked out by the League of Nations attempted to eliminate the “conflict of the conflict of laws relating to domicil” by combining the theory of “territoriality” with the *lex fori* principle. A similar spirit is shown in the rules adopted in 1931 by the Institute of International Law, according to which the courts in each country determine under its own domestic legislation whether an individual is or is not domiciled.
domiciled therein; the Institute also provides for the case where two or more foreign laws conflict in respect of domicil and declares that, between two or more voluntary domicils, the place of actual residence, if any, should be preferred. The Institute has shown a possible solution through this auxiliary conflicts rule. Further progress toward unification of "domicil", considered as a connecting factor, will perhaps be reached if future writers not only distinguish the concept as a category of status law from other meanings of domicil, but also differentiate rules dealing with capacity of contracting, succession upon death, recognition of foreign judgments, etc., in order to ascertain which kind of domicil is a desirable connecting factor for each of these separate matters.  

V. CHANGE OF PERSONAL LAW

Under the system of personal law, a person's status is changed whenever he changes his nationality or, where the domicil principle prevails, when he changes his domicil.

1. Change of Nationality

In the countries that determine personal status in accordance with the law of the country of which the individual is a national, the problem arises how a change of nationality affects an individual's status as a person of full age. Under German law, infancy is terminated upon an individual's completing his twenty-first year of life. 187 In Illinois a woman is regarded as of age when she has completed her eighteenth year. 188 When a nineteen-year-old American girl from Illinois is naturalized in Germany, is she again reduced to the status of infancy?


187 German BGB. § 2.

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Article 7 paragraph 2 of the Introductory Law to the German Civil Code contains an express provision by which this result is prevented. Even though she is now subject to German law as her personal law, the girl continues to be treated as of age by the German courts. Can the same result be reached without such a provision of the new personal law, for instance under article 3 of the Japanese Law of 1898, which, although following literally the German article 7, has omitted the said paragraph 2? This question has been answered in the affirmative, but it has been objected that full age does not constitute a vested right and would have to be reacquired under the new statute.

2. Change of Domicil

Since domicil can be changed more easily than nationality, the problem is even more acute in those countries where an individual’s personal status is determined in accordance with the law of the country where he is domiciled. That a once acquired status as a person of age is preserved in spite of a change of domicil to a country where infancy is terminated at a later age, has been recognized in the conflict of laws of Denmark, and Norway, as well as in the Treaty of Montevideo.

Austrian decisions, see Walker 128 n. 42; Bar § 144; Niemeyer, Das IPR. des BGB. 125; Rolin, 2 Principes 196 n. 655; Poullet 319 n. 2.

Weiss, 3 Traité 344; Frankenstein 426 n. 82; Raape 79; and French, Italian and other German writers quoted by these authors.

Borum and Meyer in 6 Répert. 216 no. 22 (doubtful).

Christiansen in 6 Répert. 573 no. 100 (generally recognized).

Treaty on international civil law (1889) art. 2, provides that change of domicil does not affect capacity acquired by emancipation or coming of age. The new text of 1940 reads to the effect that change of domicil does not affect capacity.

Argentina: C. C. arts. 138 and 139. Schlegelberger interprets art. 138 as not applying to a change of domicil from one foreign country to another (4 Z. ausl. PR. (1930) 751). The opposite view is taken by Vico (vol. 1, nos. 493, 494) who refers for support to the ancient statutist theories.
In the United States, however, capacity is generally independent of domicil; in the exceptional case where domicil is determinative, it seems that the actual domicil alone is taken into consideration.

VI. RATIONALE

I. Tradition

Before modern states arose and developed the concept of allegiance, the only and obvious test of personal law was domicil, either of origin or of choice, special considerations applying to dependent persons.

This test is still important in those states where private law is divided into different systems. Domicil is still the natural criterion in the British Empire and in the United States, as it formerly was in France before the Revolution, in Italy before 1866, and in the old German Empire and in most parts of the second German Empire before the Civil Code took effect on January 1, 1900. It goes too far, however, to pretend that the principle of nationality is absolutely impracticable for a country that lacks uniformity of private law throughout its territory. In such a country, domicil is the best element of contact in the relations between the several territories, but in the relations of the country as a whole to foreign countries either test may be used. As a matter of fact, in 1926, Poland chose the domicil test for interlocal relations among her several territories under Warsaw-Polish, Russian, German, Austrian, and Hungarian laws, but declared nationality to be decisive for problems of personal law in international relations. Thus,

194 Mere reference is made to the selected bibliography and the treatment of old and recent so-called "theoretical arguments," by 2 Arminjon (ed. 2) 28ff. no. 9.
195 See 1 Bar § 91 at 267, 268 discussing Wharton §§ 26 ff, whose arguments against nationality have been reassumed, however, by Pollock, Book Review, 31 Law Q. Rev. (1915) 106 and 3 Beale 1934.
a foreigner domiciled in Poland stands under his national personal law, and a Polish citizen living abroad has to obey the laws which Poland applies to all her nationals as well as the law of that Polish territory where he had his last domicil, or in the absence of any former domicil, the laws of the state capital. Such a system would be theoretically conceivable for other composite countries. In the United States especially, despite the fact that states constitute the territories of private law, the constitutional circumstances are somewhat analogous, considering that state citizenship has become subordinate to federal nationality; the American system has been determined, however, by other elements.

2. Political Considerations

An important role has been played not only by tradition but also by political considerations which have influenced the law-making agencies of the various countries, consciously as well as unconsciously.

The unilateral rule of article 3, paragraph 3 of the French Code, although reflecting traditions of the old coutumes, represented the idea that a French citizen should enjoy the achievements of the great Revolution wherever he might happen to be and that he should be bound everywhere by its laws by virtue either of tacit agreement or simply by natural law. Mancini held the idea that, in contrast to the strict territoriality of public law and public policy, the needs of an individual were served best by rules of family, inheritance, and status law of universal application; since the laws dealing with these topics are the product of all those factors that determine a people's national character, the laws of a person's national community should be considered most suitable for him wherever he may live. These notions of the French revolutionists and of Mancini were widely discussed; they appealed to the
trend of nationalism of the nineteenth century; and they were widely adopted in the numerous national codifications of the period. When the German Civil Code was enacted in 1896, the test of nationality had won such a firm hold that the traditional system of domicil could be discarded almost without discussion. Whenever new waves of national feeling were stirred up in the twentieth century, they resulted almost invariably in the adoption of the principle of nationality as best fitted to protect the needs of the national community. 196

3. Economic Considerations; Migrations

While these ideological arguments have been working in favor of the principle of nationality, the domicil principle has found support in the desire of immigration countries to incorporate new immigrants into the legal life of their country as soon as possible, and thereby to avoid the difficulties that would arise if each new immigrant prior to naturalization were to be judged in accordance with the laws of his home country. These considerations have been of crucial influence in the United States, 197 as well as in Switzerland and Argentina. 198 They have been gaining ground in Brazil: 199 the new Introductory Law of September 4, 1942, has radically substituted the principle of domicil for that of nationality, previously incorporated in the code. 200 A few other South American coun-

196 Cf. PILLAUT, Revue 1916, 14, 32, and see National–Socialist writers such as REU in 57 RVerwBl. (1936) 521 and HORST MÜLLER in DJZ. 1936, col. 1065. LORENZEN, in a Book Review, 33 Am. J. Int. Law (1939) 427 observes that RAAPÉ’s recent manual on German international private law greatly extends the principle of nationality.

197 See 3 BEALE 1935.

198 Argentina, which had adopted the principle of nationality in 1857 and re-affirmed it in 1862, later went over to the domiciliary law in the C. C. of 1869.

199 RODRIGO OCTAVIO, O direito positivo e a sociedade internacional (Rio de Janeiro, 1917) 113, quoted by I VICO 365 no. 424; Report of the Brazilian Delegate (ESPINOLA) to the Third Commission of the Sixth Panamerican Conference, see Diario de la Sexta Conferencia Internacional Americana (Habana, 1928) no. 30 p. 420; cf. BUSTAMANTE, La nacionalidad y el domicilio (1929).

200 Lei de Introdução, 1942 Decreto-Lei no. 4657, art. 7.
tries have changed in recent years from nationality to domicil, obviously yielding to the influence of immigration policy.\textsuperscript{201}

Especially in France, where considerable masses of foreigners had come to live before the outbreak of World War II, the advantages of the domiciliary system for an immigration country began to be appreciated. Characteristic of the change of mind is the attitude of the treatises edited by Niboyet. As late as 1928, he reprinted the opinion of Pillet\textsuperscript{202} explaining the French doctrine as follows:

The French sovereignty has no interest in subjecting all individuals in France to the provisions of the Civil Code in matters of status and capacity. It has, on the other hand, a marked interest not to let its nationals evade the operations of its laws . . .

But at the same time he declared\textsuperscript{203} the problem to be more political than doctrinal and shortly thereafter became the leader of a movement aiming to control all inhabitants of France by French law. Extended discussions of the Comité Français de Droit International Privé were devoted to this endeavor, which almost all French experts seem to approve.\textsuperscript{204}

\textsuperscript{201} Guatemala had the nationality rule in its Law on Foreigners of 1894, art. 48, 2d sentence, and adopted the principle of domicil in the C. C. of 1926, libro I, art. 12, from which the provisions on conflicts law were transferred in 1933 to the Constitutive Law of Judicial Power, and more recently to the Law on Foreigners of 1936, arts. 17 and 18. See Matos nos. 136, 172.

In Peru, the Civil Code of 1851 had no express rule but was often interpreted in the sense of nationality test. Despite Peru's participation in the Montevideo Treaties of 1889, the Commercial Code of 1902 seemed to confirm this theory, art. 15, following art. 15 of the Spanish Commercial Code and determining the capacity of foreigners according to their \textit{lex patriae}. Draft and text of the Civil Code of 1936 have followed the domiciliary system; cf. supra p. 119.

\textsuperscript{202} Niboyet 699. See moreover Pillet, 2 Manuel (ed. 1) 515: how would we conceive that an individual minor in his country of origin could become capable or incapable according to the countries where he would be contracting?

\textsuperscript{203} Niboyet 702 no. 587.

\textsuperscript{204} See Travaux du Comité français de droit int. privé, Années 1-4 (1934-1937) and in Revue Crit. 1939, 171, report on the meeting of May 23, 1938, concurring "le statut de l'étranger." These studies started significantly with an \textit{Exposition} by M. Louis-Lucas on the territoriality of law and the new tendencies towards it. Niboyet, Traité Vols. 1 and 2; Lerebours-Pigeonnier 266; Barbey, Le Conflit 215, and respecting the question of capacity, see below.
Countries from which large portions of the population emigrate, are attracted, on the other hand, by a principle which tends to preserve the ties between the emigrant and his home country. Great Britain furnishes a striking illustration of this tendency, namely, the doctrine of domicil of origin, which has often been compared with the bonds effected by the principle of nationality, a doctrine maintained and developed to satisfy the natural desire of a home country from which innumerable colonizers have gone out into the world. Even in the United States where in theory only one kind of domicil is known, courts usually have been reluctant to recognize that an American citizen has transferred his domicil to a foreign country, especially when there are assets in this country to be distributed or taxes to be assessed. This, in practice, is a domicil of origin.

Similar considerations have contributed to the popularity of the nationality principle itself in Germany and Italy, from which millions emigrated to the New World in the latter part of the nineteenth century. However, this circumstance should not be overestimated. Until very recent times, neither Germany nor Italy pursued any consistent policy in preserving relations with their emigrants. Until 1913, a German citizen living abroad even lost his citizenship after ten years, unless he had himself expressed his desire to retain allegiance by formally registering with the German consulate.

Wherever in those countries the principle of nationality did not satisfy nationalistic tendencies, there could scarcely have resulted a change from the principle of nationality to


206 German Law on Nationality of 1870 (Staatsangehörigkeitsgesetz), replaced by Law of July 22, 1913.
that of domicil but rather an extension of the application of the principle that "laws of public safety and police" apply to every person sojourning within the territory of the forum. By such an order of ideas, the principle of nationality is maintained for nationals abroad and narrowed with respect to foreigners living in one's own territory. This unhappy result has been achieved in the Latin American codifications indicated above.\textsuperscript{207}

4. Practicability

Respecting the practicability of the alternative tests, it has often been alleged that citizenship is not changed so easily nor so often as domicil or residence, and in consequence that a law based on nationality could not be evaded so smoothly as a law based upon domicil. The former is therefore said to be better fitted to govern the conditions of such transactions as marriage, adoption, or testament, than a law which the \textit{propositus} can voluntarily renounce. Moreover, nationality is credited with being a relatively clear and simple concept compared with the uncertainties and multiformity of domicil, especially in its British varieties. Recent critics in England have admitted that the English conception is "both artificial and complex."\textsuperscript{208} The force of this argument is somewhat questionable, in view of the complexity of modern citizenship laws and the circumstance that the British domicil of origin is not a domicil at all. On the other hand, it has been argued in favor of the principle of domicil that it is closer to facts and more consistent with the principle of territoriality.\textsuperscript{209} But neither are these considerations in themselves advantages. It is noteworthy, however, that, after the first World War, the practical difficulties caused by the consideration of strange or

\textsuperscript{207} See \textit{supra} pp. 117-119.

\textsuperscript{208} \textsc{Foster}, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84 at 84.

\textsuperscript{209} \textsc{Nibojet}, in \textit{2 Mélanges offerts à M. Mahaim} 679 ("chant de la terre") quoted by \textsc{Van Hille}, \textit{65 Revue Dr. Int.} (Bruxelles) (1938) 294, 296.
obscure foreign laws under the principle of nationality were acutely felt in Germany. For this reason, the same suggestions were made, as in France for reasons of immigration policy, that the local law should again govern the status of domiciled foreigners.\(^{210}\)

So far as outside parties are concerned, either system opens the door to prejudicial mistakes respecting the legal capacity of foreigners.

The perplexity of the situation is illustrated by the strange fact that while many Continental writers are quite set upon restoring the principle of domicil,\(^ {211}\) it has been said in England that “the best course would seem to be to adopt the doctrine of nationality as applied on the Continent.”\(^ {212}\) All agree, however, that for the time being there is no hope of any such radical modifications. It may naturally be concluded that efforts should be directed to fundamental improvement of both criteria.

5. Efforts to Reach a *Modus Vivendi* Between the Two Principles

The contrast between the two systems of determining personal status is deeply rooted in traditions and policies, and the near future holds no prospect of its elimination. It appears therefore the more necessary to devise ways and means to achieve practicable decisions in individual cases in spite of the coexistence of the two different systems.

(a) The most effective means has proved to be the renvoi, of which, in fact, the chief field of application is status and capacity to engage in transactions.

\(^{210}\) See 4 Z.ausl.PR. (1930) 390 on proceedings of the law commission of the Prussian Chamber of Representatives (particularly p. 396 on marriage requirements, see *infra* p. 291) and 5 Z.ausl.PR. (1931) 633 an opinion of Schilling recommending retention of the domicil principle for the Baltic States.

\(^{211}\) Also in the Netherlands, an address by Kollewijn in Batavia (1929) against the “degenerated” principle of nationality is regarded as a characteristic sign; cf. OFFERHAUS, in *Gedenkboek 1838-1938*, 705.

(b) The Hague Conferences simply adopted the principle of nationality; the Treaty of Montevideo adhered to the domicil principle. During the making of the Código Bustamante, serious but inadequate proposals were made to bridge the gulf: 213

First, the principle of the Hague Convention on Marriage that the national law should govern except where it refers to another law (renvoi); second, an analogous idea, advocated by the Uruguayan delegate, Varela, that the law of domicil should govern, except where it refers to another law, particularly to that of nationality; and third, the notable suggestion of De Bustamante that every contracting state shall apply to a national of another state that law which is applied to him by the state to which he belongs. Cubans would thus be treated in all states according to the national principle, and Argentinians according to the law of domicil. 214 This would give nationality a certain preference in the outcome, quite as the renvoi theory does, and evidently produce an adequate solution.

More recently, however, at the Scandinavian Convention of February, 1931, establishing conflict of laws rules for matrimonial relations, adoption, and guardianship, 215 the problem was more successfully resolved. Sweden and Finland apply nationality as the test, while Denmark, Norway, and Iceland retain domicil as controlling. To regulate the relations between the five countries, the Convention admits the law of domicil in the first instance and secondarily the law of nationality. Article 1 provides, for instance, that where a national of one of the participant states is domiciled in one of the other states for at least two years, his marriage is governed by the law

213 Bustamante, Tres Conferencias sobre derecho internacional privado (1929) 46ff.
214 Bustamante, La Nacionalidad y el domicilio (1927) 61. In twenty different situations ten times nationality, and ten times domicil would result as test (pp. 64, 67).
215 Cf. Bloch, 8 Z. ausl. PR. (1934) 627.
of the state of domicile; otherwise, the law of the state to which he belongs controls.

At its meetings in Cambridge, 1931, and Oslo, 1932, the Institute of International Law, formerly a strong supporter of the principle of nationality, attempted a compromise with a marked tendency toward the Anglo-American doctrine; but the issue did not appear hopeful. 

(c) The following case illustrates a recurrent problem, which particularly needs efficient relief:

A marriage between German parties was dissolved by a divorce decree of an American court. Subsequently, the husband became an American citizen and married another wife in this country. The judgment not being recognized in Germany because of alleged lack of reciprocity of recognition, it seemed certain that, in Germany, the second marriage would be held invalid, the issue thereof illegitimate, and as such not entitled to share in the husband's estate. However, the court of appeals in Berlin upheld the validity of the second marriage for several reasons, of which the most effective seems to have been the court's desire not to upset a factual situation that had been established in the United States.

Judgments of this kind, if more frequent, would hollow out the extraterritorial effect of the personal law. But the problem is comprehensive. States with nationality as the test extend their regulations beyond their frontiers to their citizens abroad, more often than not colliding with the states of immigration imposing different rules upon the same persons.

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217 KG. (Jan. 13, 1925) JW. 1925, 2146; cf. Melchior, 3 Z.ausl.PR. (1929) 745, also Melchior, Grundlagen 414 § 279. See, moreover, LG. Berlin (Aug. 6, 1934) 7 Giur. Comp. DIP. no. 28 (a German national was divorced and remarried in Czechoslovakia; the court recognized the divorce only because of the following remarriage); contra: Massfeller, StAZ. 1936, 335; Eckstein, 7 Giur. Comp. DIP. 33.

218 This is seen by Fedozzi 230, arguing with Cavagliari 145.
authority, so much resented in Latin America, were justified in itself, it should certainly not be allowed to produce effects beyond the time of acquisition of a new nationality by a former citizen of the forum. But even without a change of nationality, it is shocking that the national law should lay hold of a man who abandoned his country many years ago, and of his children and grandchildren, who live in different surroundings and never think of themselves as subject to any law other than that of their new country. If the principle of nationality is to survive, its claim should cease at least when the *propositus* has established himself in a new country and has founded new family relations, or simply when considerable time has elapsed. The Harvard Research in International Law in its Draft Convention on Nationality has proposed to restrict the acquisition of nationality by birth (*jure sanguinis*) to the second generation of an emigrant. This solution would be of some help, but the pretensions of the old personal law should be limited even more strictly.

6. Conclusion

We may well conclude that both systems of testing the personal law are seriously defective. The principle of nationality, however, suffers not merely from its complicated nature. We shall see that its unpopularity, so conspicuous in the French literature, has reached critical proportions in court decisions and legislation, in particular with respect to divorce.

There is one more circumstance apt to destroy what usefulness nationality may still have as a criterion for status. Many millions of people have emigrated in the course of the war, in the estimate of some experts as many as thirty millions in Europe alone, and others will do so; millions have also lost their former citizenship or will not be able to prove to which state they belong. In European countries where the nationality

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principle had its origin, a formidable intermixture of populations is about to render it obsolete. Moreover, should federations be created, the relation of individuals to the federal governments will be so important as to offset the ties of nationality.

Thus, domicil, the dominant concept of the English-speaking part of the world and the emergency concept considered above in connection with the cases of apatrides, holders of several nationalities, citizens of composite empires, etc., in Europe, might resume its old importance, if only it were not of such uncertain nature.

Can the domiciliary test be improved? It should be possible to obviate at least the clandestine establishment of a domicil of choice, which renders doubtful the determination of so many cases. In Europe, it would seem quite feasible to require that any voluntary change of domicil be reported to a public authority empowered to investigate. In European countries, residence and domicil of individuals are constantly being controlled by official agencies for the purposes of defense, police, and taxation. Little innovation is necessary to establish the personal law by a formal record. In this country, such intrusive bureaucratism is probably out of the question. But the divorce statutes present an alternative method of assuring that one party is actually domiciled at the forum; they usually require, not a public record of the establishment of domicil, but the lapse of a certain period, ordinarily a year, during which domicil must have existed.²²⁰ Very remarkably, the Polish Interlocal Law of 1926 has generally provided that a person changing his domicil from one part of Poland to another, only after the lapse of one year, becomes subject to the law of his new domicil with respect to his capacity, his family relations and his inheritance.²²¹ An analogous idea ap-

²²⁰ See 2 Vernier § 82; infra pp. 408-410, 460.
²²¹ Law on interlocal private law of Aug. 2, 1926, art. 2.
pears in the above-mentioned French decree of 1938 requiring that in order to avail themselves of their French domicil or residence, foreigners should possess police permits to sojourn in the country for more than a year. However questionable this novelty, a product of prewar apprehensions, may appear, it is true that the existence of a voluntary domicil can be better ascertained, if a period of factual residence is added to the ordinary requisites, as in the American divorce law, or if the individual has secured official authority to reside more than a year in the country, as prescribed in the French emergency decree.

222 See supra p. 141.