DOMICILE

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I. GENERAL

Domicile is the core of the Canadian system of private international law. For instance, the domicile will determine in many instances which legal system governs the personal relations of an individual whose rights are at issue in the courts of a particular province.[1] It connects this individual with some system of law. Many other important questions are also governed by the law of domicile.

In the common-law provinces the law of domicile has been greatly influenced by English law. Primacy is given to the domicile of origin. In the province of Quebec, the law of domicile has been codified in articles 79 to 85 of the Civil Code. Article 79 states:

> The domicile of a person, for all civil purpose, is at the place where he has his principal establishment.

Although this seems to be a purely technical legal concept, an abstract relationship to a place rather than a physical localization as the common-law cases hold, there is no basic difference between that approach and the words of Lord Westbury in *Bell v. Kennedy*:[2]

> Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country.[3]

In fact, the Quebec notion of domicile has been held to be the same as that prevailing in the rest of Canada. Domicile is thought of as the place of principal establishment, the permanent home.[4] This is either the place in which an individual's habitation is voluntarily fixed without any intention on his

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[1]C.C. 6.

[2][1868], L.R. 1 Sc. Div. 307, at p. 320.

[3]See the approval of these words by Ritchie C. J. in *Wadsworth v. McCord* (1868), 12 S.C.R. 466, aff'd. 14 A.C. 631.

[4]*Trahan v. Vezina*, [1947] 2 W.W.R. 563; [1947] 3 D.L.R. 769 (Que.); *Crosby v. Thomson* (1926), 53 N.B.R. 135; [1926] 4 D.L.R. 56 (C.A.); the Civil Code also states in article 63 that "for the purpose of marriage, domicile is established by a residence of six months in the same place", but this has been construed as referring only to residence which requires more than physical presence, and not to domicile in the international sense; *Wadsworth v. McCord, Ibid.* It must be noted that there may be cases where a person is domiciled in a country although he does not have a permanent home in it. Dicey, Conflict of Laws 1958 7th Ed. rule 2 p. 85.

part of removing there-from, or the place assigned to him by law.[5] Except for federal purposes, there is no such thing as a Dominion or Canadian domicile. It has been stated however that it is impossible to acquire a Canadian domicile for the purpose of divorce, although this is a matter within the legislative authority of the Dominion Parliament.[6] Domicile in one of the provinces is necessary.

The words "Canadian domicile" and "place of domicile" are found in the Canadian Citizenship Act,[7] and in the Immigration Act,[8] where domicile is defined for the purpose of immigration and citizenship only. Thus it has been held that the words "Canadian domicile" refer to residence and not international domicile.[9] Therefore in some circumstances it would appear that a person could have a domicile in Canada under these Acts although domiciled according to private international law rules in another country.

Canadian courts, have adopted the English and American view that every person must have a domicile[10] and only one at a particular time,[11] but may have more than one residence.[12] It is possible, however, that a person

[5]In general see: Johnson, The Conflict of Laws, with special reference to the law of the Province of Quebec, Vol I (1933), p. 91 et *seq.;* and Du domicile en France et dans la Province de Quebec (1934), 13 R. du D. 71; and Domicile in its Legal Aspects (1929), 7 Can. Bar Rev. 356; Gerin-Lajoie, Du domicile et de la juridiction des Tribunaux (1922); Jetté, Du domicile (1924), 2 R. du D. 210; Lafontaine, Le domicile (1891), La Themis 289; Williams, Domicil (1923), 1 Can. Bar Rev. 243; Lilkoff, Le domicile (1954), 14 R. du B. 361; Mackay, Domicile matrimonial (1941), 1 R. du B. 83.

[6]*Atty.-Gen. for Alberta v. Cook,* [1926] A.C. 444; [1926] 1 W.W.R. 742, [1926] 2 D.L.R. 702; *Marriaggi v. Marriaggi,* [1923] 3 W.W.R. 849; [1923] 4 D.L.R. 463, at p. 466 (Man. K.B.).

[7]R.S.C., 1952, c. 33, as am. 1952-53, c. 23, 1953-4, c. 34, 1956, c. 6. ss. 2 (bb) and 2 (mm). See also in *Re Lipstein,* [1923] 2 D.L.R. 1055; 56 N.S.R. 292.

[8]R.S.C., 1952, c. 325 s. 4 (1).

[9]Naturalization does not of itself change the domicile of the propositus although he would need to have a Canadian domicile to obtain his citizenship. In *re Immigration Act;* in *re Leong Ba Chai* (1952), 7 W.W.R. (N.S.) 321; 103 C.C.C. 350; [1952] 4 D.L.R. 715, aff'd. 105 C.C.C. 136, [1953] 2 D.L.R. 766 (B.C.C.A.) per O'Halloran J.A. at p. 768 (D.L.R.) per Robertson J.A. at p. 773 aff'd. by [1954] S.C.R. 10. *Cf. In re The Immigration Act and Santa Singh,* [1920] 2 W.W.R. 999 where the notion of acquisition and loss of Canadian domicile is tested by the rules applying to international domicile; see also *In re the Immigration Act; In re Carmichael and Carmichael,* [1942] 2 W.W.R. 84; 57 B.C.R. 316; 77 C.C.C. 281; [1942] 3 D.L.R. 519 and *In re Immigration Act; in re Dedar Singh Bains,* [1954] 13 W.W.R. 90 construing s. 2 (j) of the Canadian Citizenship Act, R.S.C., 1952, c. 33 now repealed by 1952-53 c. 23.

[10]*Wadsworth v. McCord, supra* footnote 3.

[11]*Kay v. Simard* (1857), 1 L.C.J. 167 (Que.); *Tennant v. The City of St. John* (1932), 5 M.P.R., 107, at p. 110 (N.B.); *Cartright v. Hinds* (1883), 3 O.R. 384, at p. 395; American Restatement of the Law of Conflict of Laws (1934) with amendments and additions ss 11, 25, hereafter cited as Restatement.

[12]*Crosby v. Thomson, supra* footnote 4. *Tennant v. The City of St. John. Ibid.* The question of domicile will be determined by the law of the *forum.*

be domiciled abroad for provincial purposes, yet domiciled in Canada for federal purposes. This is not a denial of the unity of domicile but is due to the division of legislative powers in Canada. Although the notion of domicile is closely connected with that of habitual residence it must be distinguished from it since one is essentially a question of fact while domicile also requires a mental condition, the intention.[13]

II. DOMICILE OF ORIGIN

It is the law in all the provinces that every person acquires at birth a domicile of origin which is the place in which the father of the child has his domicile at the time of the birth, or that of the mother if the father is dead or if the child is illegitimate.[14] In the case of a foundling it is the place where the child was found.[15] The domicile of origin cannot be changed. It may, however, be replaced during minority by a domicile of dependence by the act of the person upon whom he is dependent. Otherwise it will prevail until the individual once *sui juris* has acquired a domicile of choice.[16]

The domicile of origin differs from a domicile of choice mainly in that the courts have held that its character is more enduring and its hold is less easily shaken off.[17] Consequently the onus of disproving that domicile is heavier than disproving the domciile of choice.[18]

This is to be regretted. Canada is a country of immigration and it would seem erroneous to entertain the view that the ties connecting a person with his native country are particularly strong. Immigrants arriving in this country intend to sever these ties and yet they may not, for a certain time, have selected a particular place in Canada where they intend to stay *sine animo reventendi.* They may move from province to province in quest of a suitable place to live. Why force them to retain their domicile of origin during that period? Of course, this may be the reason why a Canadian domicile has been established for federal purposes although it is very limited in its effects. The emphasis on the domicile of origin does not appear in the Quebec Civil Code[19] and is not really great in practice in the other provinces.

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[13]*Wadsworth v. McCord, supra* footnote 2.; *Emperor of Russia v. Proskouriakoff* (1908), 8 W.L.R. 461, at p. 470; 18 Man. R. 56 affirming 7 W.L.R. 766 and 8 W.L.R. 10, at p. 13, appeal quashed 42 S.C.R. 226.

[14]Restatement, s. 14.

[15]Note that the Restatement, s. 14 (3) says that in the event the domicile of origin cannot be shown, it would be proper to choose as a substitute the place to which a person can earliest be traced.

[16]*Magurn v. Magurn* (1883), 3 O.R. 570, at p. 579; aff'd. 11 O.A.R. 178; *Laurie v. Baird,* [1946] O.W.N. 600; [1946] 4 D.L.R. 53; *Trottier v. Rajotte,* [1940] S.C.R. 203, [1940] 1 D.L.R. 433.

[17]*In re Murray Estate,* [1921] 3 W.W.R. 874; 31 Man R. 362. (K.B.)

[18]*Ibid.* and *McGuigan v. McGuigan,* [1954] O.R. 318; [1954] 3 D.L.R. 127, at p. 129 aff'd. [1955] O.W.N. 861; [1955] 1 D.L.R. 92.

[19]C.C. 80.

III. DOMICILE OF CHOICE

In *Crosby v. Thomson* it was stated in the New Brunswick Court of Appeal:[20]

> Domicile of choice is the relation which the law creates between an individual and a particular locality or country. It is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time.

In order that a person *sui juris* may acquire a domicile of choice different from that or origin, there must be a change of residence and the fixed intention of making the new residence a permanent home.[21] The physical fact of residence must be accompanied by the mental fact of intention, the *animus semper manendi*.[22]

Article 80 C.C. states:

> Change of domicile is effected by an actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.[23]

Residence is purely a factual concept, which requires only habitual physical presence,[24] although it does not need to be long in point of time. It is easy to prove. Once a domicile of choice has been established, it can be retained without concurrence of residence and intention. Thus you may leave your residence in the province of Quebec and retain your domicile there if you intend to return.

Intention is difficult to ascertain. One must have a present intention to reside for an indefinite period within the province.[25] The residence must not be merely for a special or temporary purpose.[26] There must be a "fixed and settled purpose" to make a particular place one's permanent home,[27] to have a residence, general and indefinite in its future contemplation. In other words

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[20]*Supra*, footnote 4 per Grimmer J., at p. 70 (D.L.R.).

[21]Restatement, s. 15.

[22]*Magurn v. Magurn, supra*, footnote 16; *Wadsworth v. McCord, supra*, footnote 3; *Adams v. Adams* (1909), 11 W.L.R. 358, 14 B.C.R. 301; *Fairchild v. McGillivray* (1910), 16 W.L.R. 562, 4 Sask. L.R. 237. As to the notion of *animus semper manendi*, see *Gunn v. Gunn and Savage* (1956), 18 W.W.R. 85, (1956), 2 D.L.R. (2d.) 351 (Sask. C.A.); *Douglas v. Hodgins*, [1957] O.W.N. 29, 7 D.L.R. (2d.) 57.

[23]See also: *Taylor v. Taylor*, [1930] S.C.R. 26, [1930] 1 D.L.R. 75; *Poissant v. Com d'Ecoles de St. Jacques le Mineur*, [1957] S.C. 123.

[24]*House v. Robinson*, [1942] 45 P.R. 114 (Que.); *Baumfelder v. Secretary of State*, [1927] Ex. C.R. 86, at p. 91 It is more than casual presence.

[25]Restatement, ss. 19 and 20.

[26]*Wadsworth v. McCord, supra*, footnote 3.

[27]*Williamson v. Williamson* (1948), 22 M.P.R. 75, [1948] 3 D.L.R. 319 (N.S.) It does not mean that the present determination to make a place one's permanent home must be irrevocable.

fixity is the basis of the Canadian concept of domicile.[28] A mere intention to leave one's domicile of origin and take up residence elsewhere without determination of any particular locality will not constitute the *animus manendi*.[29]

In Quebec the Civil Code states in article 81 that:

> The proof of such intention to make a place one's principal establishment results from the declaration of the person and from the circumstances of the case.

First of all, the onus of proof of change of domicile is on the party who seeks to show that the domicile of origin has been abandoned in favour of a domicile of choice.[30] Strong and unequivocal evidence must be adduced[31] as there is a presumption of law in favour of the continuance of the domicile of origin.[32] While prolonged residence in a foreign country has sometimes been considered as *prima facie* evidence of an intention to abandon that domicile this is not conclusive, but may be rebutted by facts tending to show that there was no such intention. The length of residence in another place is merely a circumstance insufficient by itself to establish proof of a change of domicile.[33] Other matters have also been taken into consideration such as contemporaneous declarations and the general circumstances of the case.[34] Thus the acquisition of an interest in a business together with long residence has been held to be good evidence of a change of domicile.[35]

Naturalization in Canada does not of itself necessarily involve such a change.[36] On the other hand, the fact that a person did not cast off his allegiance to the country of origin is not conclusive evidence that he did not

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[28]*Cf.* Restatement ss. 12, 19, 20 (b).

[29]Proof of residence and of an *animus manendi* in the United States generally without reference to any particular state was held insufficient in *Trottier v. Rajotte, supra* footnote 16.

[30]*Coleman v. Coleman,* [1919] 3 W.W.R. 490 (Alta.); *Picco v. Pearson,* [1954] Q.B. 67; *Poirier v. Evrard,* [1945] P.R. 209 (Que.), Re *Haldorson Estate* (1953), 9 W.W.R. (N.S.) 145 (Man.); *Finnigan v. Finnigan* (1950), 58 Man. R. 456; *Levko v. Levko,* [1947] O.W.N. 702; *K. v. K.,* 17 M.P.R. 19, [1943] 2 D.L.R. 102 (N.S.C.A.); *Chatenay v. Chatenay,* [1938] 1 W.W.R. 885, 53 B.C.R. 13, [1938] 3 D.L.R. 379; *Lamond v. Lamond and Tappin,* [1948] 1 W.W.R. 1087 (Sask. K.B.).

[31]*Baker v. Baker,* [1941] 2 W.W.R. 389, at p. 393, 49 Man. R. 163; [1941] 3 D.L.R. 581.

[32]*McGuigan v. McGuigan, supra,* footnote 18. *Seifert v. Seifert,* (1914) 32 O.L.R. 433, 23 D.L.R. 440; *Coleman v. Coleman, supra* footnote 30. *Mundell v. Mundell* (1958), 65 Man. R. 314; *Pagé v. Mercure* (1929), 46 K.B. 459 (Que.).

[33]*Nusselman v. Novik,* [1949] S.C. 431 (Que.).

[34]*Gauvin v. Rancourt,* [1953] R.L. 517 (C.A.) (Que.); *Wilson v. Frankfurt,* [1957] P.R. 111 (Que.); *Costie v. Costie,* [1947] O.W.N. 658, [1947] 3 D.L.R. 541, reversed on the facts [1947] O.W.N. 746, [1947] 4 D.L.R. 472; *Kalenczuk v. Kalenczuk,* [1920] 2 W.W.R. 415, 13 Sask. L.R. 262, 52 D.L.R. 406 (C.A.).

[35]*Rider v. Rider,* [1925] 1 W.W.R. 1051, 19 Sask. L.R. 384, [1925] 3 D.L.R. 370 (C.A.).

[36]In *re Immigration Act,* in *Re Leong Ba Chai, supra,* footnote 9.

acquire a domicile in Canada.[37] To suppose that for a change of domicile there must be a change of national allegiance is to confound the political and the civil status.[38] In general, in order to determine a person's intention at a given time, one must regard not only his conduct and acts at that time, but also acts and conduct after that time, assigning to such conduct and acts their relative and proper weight and cogency.[39] In the opinion of Kindersley V.C.,[40]

> There is no act, no circumstance in a man's life, however trivial it may be in itself which ought to be left out of consideration in trying to question whether there was an intention to change the domicile.

Thus it is not by naked assertions but by deeds and acts that a domicile is established.[41] The purchase of furniture, the renting of an apartment, the acceptance of a job, may be taken into consideration.[42] Although a person whose domicile is in question may himself give evidence of his past intention, this type of evidence will not necessarily be conclusive, especially if the course of his conduct conflicted with the expression of his intention.[43] On the other hand Mr. Justice Mignault in *Taylor v. Taylor*[44] stated that "the declarations must be contemporaneous ones and not those which a party may make as a witness at the trial." This however does not seem to represent the state of the law in Canada.[45]

In general, declarations of intention, even under oath, are examined by considering the person to whom, the purpose for which and the circumstances in which, they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared intention.[46] They are of no avail when conflicting or indefinite or when evidently made for the purpose of creating evidence in favour of the declarant after he has become appreciative of the consequences of a change of domicile.[47] In *White v. White,* Williams J.

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[37]*Chatenay v. Chatenay, supra* footnote 30, per Manson J. at pp. 390-391.

[38]*Seifert v. Seifert, supra,* footnote 32, at p. 444.

[39]*Henderson v. Muncey,* [1943] 3 W.W.R. 242, 59 B.C.R. 312, [1943] 4 D.L.R. 758 affirming [1943] 2 W.W.R. 120, 59 B.C.R. 57, [1943] 3 D.L.R. 515 (C.A.).

[40]*Drevon v. Drevon* (1864), 34 L.J. (N.S.) Ch. 129, at p. 133.

[41]*Wadsworth v. McCord, supra,* footnote 3, *Biggar v. Biggar,* 42 B.C.R. 239, [1930] 2 D.L.R. 940; *K. v. K., supra,* footnote 30, per Doull J. at p. 27 (M.P.R.).

[42]*Mills v. Morrison,* [1947] P.R. 282 (Que.).

[43]*Boyle v. Boyle,* [1925] 1 W.W.R. 829 (Man.); *Barton v. Barton,* [1940] 2 W.W.R. 494, [1940] 3 D.L.R. 211, affirming [1940] 1 W.W.R. 371, [1940] 2 D.L.R. 465 (Sask.) (C.A.) The fact that the declaration takes the form of an affidavit does not change the rule. *Walcott v. Walcott* (1914), 48 N.S.R. 322, 23 D.L.R. 261 (C.A.).

[44]*Supra,* footnote 23. See also *Roussel v. Dumais,* [1958] S.C. 448 (Que.).

[45]See *Trottier v. Rajotte supra,* Footnote 16; *Vezina v. Trahan,* [1947] 3 D.L.R. 769 [1947] K.B. 670 (Que.); *White v. White* [1950] 4 D.L.R. 474, at p. 489.

[46]*White v. White* [1950] 2 W.W.R. 687, [1950] 4 D.L.R. 474 aff'd. [1951] 3 W.W.R. (N.S.) 352, 59 Man. R. 181, [1952] 1 D.L.R. 133; *Brewster v. Brewster,* [1945] 3 D.L.R. 541, 61 B.C.R. 448 (C.A.).

[47]*Crosby v. Thomson, supra* footnote 4.

also stated that the courts will take into consideration the motives in arriving at the intention.[48] A mere declaration embodied in a marriage certificate that a person is domiciled in a certain place is not by itself sufficient evidence of an intention to acquire a new domicile of choice.[49] The courts may also look at the place where a person pays his taxes,[50] where he lives most often, where he enjoys the advantages attached to domicile.[51] Voting in a municipal election is no evidence of domicile where the franchise depends upon the ownership of property.[52]

A question has been raised as to whether there should be a difference in the weight of evidence to be adduced when a change of domicile takes place from one province to another, instead of from one foreign country to another. Should not the burden of proof in a party alleging a change of domicile from one province to another be less heavy? English courts are inclined to hold that every presumption is against the conclusion that an individual would give up his home in England for another. One could argue that less evidence should be sufficient to show a change of domicile from one province of Canada to another than would be necessary to establish a change of domicile from one country to another. There is authority in Canada to support that view. Thus in British Columbia in *Walsh v. Herman*[53] Hunter C. J. of the Supreme Court stated:

> The case is not one where the party is alleged to have acquired a foreign domicile, but where he had merely shifted from one British jurisdiction to another under the same general government; and the circumstances which would warrant the inference of a change of domicile within British Dominions only, would not necessarily warrant the inference of a change to foreign domicile.

while in *Fairchild v. McGillivray*,[54] Judge Lamont of the Supreme Court of Saskatchewan said:

> In my opinion, the circumstances which would warrant the inference of a change of residence from one province to another in Canada could not necessarily warrant the inference of a change to foreign domicile.

In *Morrisy v. Morrisy*,[55] a decision of the Supreme Court of Nova Scotia, Graham J. made the following remark:

> I think that the length of residence which is required to establish domicile in a foreign country is not necessary to establish a new domicile when the change of

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[48]The motive with which a person acquires a new home does not determine the question of the establishment of a domicile of choice but is important to show the intention. *Supra*, footnote 46. [1950] 4 D.L.R. 474 at p. 495 *contra* per Dysant J. [1951] 3 W.W.R. (N.S.) 352 at p. 362. See also *Adams v. Adams supra*, footnote 22.

[49]*Belanger v. Carrier*, [1954] Q.B. 125; *Wadsworth v. McCord, supra*, footnote 3.

[50]*Moore v. Hunt* (1934), 38 P.R. 205 (Que.) (Home divided by boundary line deemed to be in Canada as municipal taxes were paid in Canada.).

[51]*House v. Robinson, supra* footnote 24.

[52]In *re Murray Estate*, [1921] 3 W.W.R. 874, 31 Man. R. 262.

[53](1908); 7 W.L.R. 388 at p. 389, 13 B.C.R. 314, at p. 315.

[54]*Supra*, footnote 22.

[55]1948 unreported; see comment (1949), 27 Can. Bar Rev. 849.

> residence is from one province of Canada to the adjoining province. It is, of course, still the same question of fact but the probability of intention is more easily raised and does not require so long residence to prove intention.

Finally in the Saskatchewan Court of Appeal this point of view was clearly accepted.[56] It has also been said that because the laws applied in each of the common-law provinces are substantially the same, a lesser degree of proof should suffice.[57] This does not necessarily follow from the premises nor is it true that the law is substantially the same in all the provinces. The real argument in favour of a lighter burden of proof is that the old English notion of domicile ought to be adapted to the Canadian scene as it has been in the United States. Many Canadians move freely from one place to another to better their position. Does this mean that they cannot change their domicile as easily? The new trend, at least at the interprovincial level, clearly seems to favor residence rather than intent.

The word "choose" indicates that the act must be voluntary. The intent to acquire a domicile of choice must not be vitiated by compulsion.[58] Public servants cannot be said to have changed their domicile unless there is evidence that they had the intention of remaining where they were after relinquishing office. Thus the Quebec Civil Code declares that:

> A person appointed to fill a temporary or revocable office, retains his former domicile, unless he manifests a contrary intention.[59]

This does not mean that a person appointed for life acquires a domicile of choice where he is appointed. Actually, even in the case of physical coercion, such as prison, although the mere fact of imprisonment raises no inference of *animus manendi*, there is no reason why a prisoner should not acquire a domicile of choice in the place where he is imprisoned if he so wishes.[60] Again this is a matter of intent.

Canadian courts have often been faced with the problem of determining whether a member of the armed forces may have the necessary *animus manendi* to acquire a domicile of choice in the place in which he is stationed as he may be ordered to move at any time. It has been held that although *prima facie* he retains the domicile he had at the time of his enlistment,[61] this does not

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[56] *Supra*, footnote 22, reversing (1955), 16 W.W.R. 44, [1956] 1 D.L.R. (2d.) 360 and see comment (1956), 34 Can. Bar Rev. 210, 363.

[57] *Adams v. Adams, supra* footnote 22, at p. 306 (B.C.R.); see also *White v. White* [1952] 1 D.L.R. 133 dissenting opinion of Dysart J. A., at p. 136.

[58] Similarily, an involuntary residence of a national in his domicile of origin does not mean an abandonment of his domicile or residence of choice unless that as a fact is established. *Baumfelder v. Secretary of State of Canada, supra,* footnote 24.

[59] C.C. 82.

[60] *Contra,* Restatement, s. 21 (b).

[61] *Patterson v. Patterson,* (1956) 3 D.L.R. 2nd 266 (N.S.); *McKeever v. McKeever* (1956), 17 W.W.R. 393 (Alta.); *Wilton v. Wilton,* [1946] O.R. 117, [1946] 2 D.L.R. 397; *Cornish v. Cornish,* [1943] O.W.N. 341, [1943] 3 D.L.R. 525; *Hillcoat v. Hillcoat,* [1958] O.W.N. 677.

necessarily mean that he cannot acquire a domicile of choice elsewhere while in the armed forces.[62] There may exist, with a residence which has begun and is continued under military service and orders, facts and circumstances which establish a residence voluntary in character and chosen by the soldier although it is a residence in a place in which he is stationed by the order of his military superiors.[63] It results that in all matters apart from his duties, a soldier who is *sui juris* may acquire a domicile of choice,[64] if there is evidence of voluntary choosing.[65] All that can be said is that compulsory residence does not reflect the existence of intention, to make the place of residence the permanent home. Intent will have to be established by evidence of facts, and by events which are not merely incidental to the compulsory residence and which clearly show an intention to settle in the place of that residence and to remain settled there even if the residence should cease to be compulsory. In the case of an employee liable to be transferred from one place to another by order of his employer the same problem of precarious residence arises although here he can always leave the employer's service if he should not wish to comply with his orders.[66] In all cases it is a question of fact.

The domicile of choice will continue until a new domicile of choice is acquired. However some Canadian courts have held that a domicile of choice continues until it is lost by leaving it with the *animus non revertendi* although a new domicile has not been acquired *animo* and *facto*. To abandon the domicile of choice there must be the fact of abandonment of residence and the intent to leave it permanently.[67] It is not lost by prolonged absence. Also, a person who is deported from the country in which he has his domicile does not thereby abandon it.[68]

Since an individual cannot be at any time without a domicile, and, on the other hand, it has been held that he may abandon his domicile of choice without acquiring a new one, the domicile of origin revives,[69] without special intention

[62]*McBeth v. McBeth,* [1954] 1 D.L.R. 590 (B.C.); *Joyce v. Joyce,* [1943] 3 W.W.R. 283 (Sask. K.B.) Note that in *Meise v. Meise and Fiddler* [1947] 1 W.W.R. 949 (Sask. K.B.) it was stated that a soldier cannot change his domicile while he is in the army.

[63]See *Wilton v. Wilton, supra,* footnote 61 where Wilson J. relied on *Sellars v. Sellars,* [1942] S.C. 206, at p. 212.

[64]*Wilkinson v. Wilkinson,* [1949] 1 W.W.R. 249 (Sask.).

[65]*McBeth v. McBeth, supra* footnote 62; *Hillcoat v. Hillcoat, supra,* footnote 62.

[66]See *Lowry v. Lowry,* [1936] 2 W.W.R. 217 (Sask.).

[67]*Breen v. Breen,* [1930] 1 W.W.R. 30, 38 Man. R. 409, [1930] 1 D.L.R. 1006, (C.A.) reversing [1929] 2 W.W.R. 345, [1949] 4 D.L.R. 649 (C.A.); *Jones v. Kline* [1938] 3 W.W.R. 65, [1938] 4 D.L.R. 391 (Alta.); *Re Foo et al.* (1925), 56 O.L.R. 669, 44 C.C.C. 17; [1925] 2 D.L.R. 1131 (C.A.).

[68]*Lauritson v. Lauritson* (1932), 41 O.W.N. 274.

[69]*Bonbright v. Bonbright* (1901), 1 O.L.R. 629, aff'd. 2 O.L.R. 249; *Nelson v. Nelson,* [1930] 1 W.W.R. 189, 24 Sask. L.R. 250, [1930] 3 D.L.R. 522 (C.A.).

to revert to that domicile.[70] The idea is that the domicile of origin being a creature of law cannot be destroyed by the act of the *propositus* but is held in abeyance during the continuance of the domicile of choice. This view is in direct opposition to the American doctrine which more logically holds that the previous domicile continues to exist until a new one has been acquired.[71] There is no such emphasis on the domicile of origin in Quebec and the domicile of choice will remain until a new one is acquired.[72] The domicile of origin should not have the character of allegiance.

In *Nelson v. Nelson,*[73] the question was raised whether the rule should be applied where a person immigrated to the United States from Denmark with his parents who acquired a domicile of choice in the state of Colorado. After becoming an American citizen he left his domicile for Alberta, not intending to return to this particular state but always intending to return to the United States. The court refused to adopt the view that upon leaving Colorado he was domiciled in Denmark, his domicile of origin. The court said:

> The principle of reversion to the domicil of origin seems to have been laid down by the English Courts at an early date before the right of the subject to change his allegiance to another country was recognised and as it was to fix a domicil in law where there appeared to be none and in fact and thus to make the rule absolute that at every moment in his life a man has a domicil -the domicil of origin was the most convenient and logical one to designate. I have some doubt, however, as to whether the rule now applies in a case like this where the domicil of choice was only his choice in a legal sense he having immigrated with his parents as an infant and having after attaining his majority elected to become a national of the country of his domicil. I am inclined to think that the rule now would be modified to the extent of reverting to the country of which the party is a national. But whatever the correct rule may be I do not think he reverted to Denmark in any event because his domicil in Colorado involved a domicil in the United States of America, and I take it it would be impossible for him to shed it for one purpose and retain it for another. A person has only one domicil at any one time. It is a place. It may be important from a state point of view or a national but it cannot be subdivided or duplicated... It seems to me that he remained domiciled in the United States and before he could revert to his Denmark domicil of origin it would be necessary for him not only to have abandoned Colorado as his domicil but the United States as well, which he did do.
>
> ...Because a person leaves a country temporarily intending to return but not necessarily to the same spot he does not thereby abandon his domicil, it still will remain at the place where it was when he left until he resumes it again in the country and if he takes up his residence on his return at a different location he will be then domiciled at a different place but will nevertheless have continued to be domiciled all the while in the country.
>
> On his return the change in the location of his domicil within the country will be instantaneous. I, therefore, hold that the plaintiff by reason of his temporary residence in Canada did not lose his domicil in the United States but that it

[70] *Breen v. Breen, supra* footnote 67; *Jones v. Kline, supra* footnote 67; *Barton v. Barton, supra,* footnote 43; *Bonbright v. Bonbright, Ibid. In re Rattenburg Estate and Testator's Family Maintenance Act,* [1936] 2 W.W.R. 554; 51 B.C.R. 321.

[71] *Re Jones Estate* (1921), 182 N.W. 227; Restatement, s. 23.

[72] C.C. 80; *Brochu v. Bissonnette* (1898), 13 S.C. 271 (Que.); see also *Baker v. Baker,* [1941] 2 W.W.R. 389, at p. 393, Per Robson J. 49 Man. R. 163, 3 D.L.R. 581 reversing [1941] 2 W.W.R. 48 (C.A.).

[73] [1925] 3 D.L.R. 22.

remained in the location in that country from which he came which was the State of Colorado.

The rule that the domicile of origin revives when the domicile of choice is abandoned and no new domicile of choice has been established is open to criticism especially in federal countries which rely heavily on immigration.[74] It is to be hoped that the removal of this rule which has now been advocated in England will be seriously considered in Canada. The best view would seem to be the subject of domicile of origin to rules similar to those governing the domicile of choice, and decide that no domicile of any type can be lost without the acquisition of a new one.

IV. DOMICILE OF DEPENDENCY OR BY OPERATION OF LAW

A person who has no capacity to acquire a domicile of choice has a domicile by operation of law.[75]

A. Married Women

In the province of Quebec, a married woman, not separate from bed and board, has no other domicile than that of her husband.[76] Her domicile changes with that of her husband. In the common-law provinces, while the marriage subsists the domicile of a married woman is also that of her husband[77] though he deserts her and acquires a new domicile in another province or foreign country.[78] In other words a married woman cannot establish a separate domicile from that of her husband.

In 1926, the Judicial Committee of the Privy Council in an appeal from Alberta decided that a married woman, even though she has obtained a decree of judicial separation from her husband, cannot acquire a domicile of choice separate from him so as to enable a court other than that of her husband's domicile to dissolve her marriage.[79] This attitude was contrary to some earlier Canadian decisions which had held that a married woman deserted by her husband may acquire a new domicile at least for the purposes of divorce[80] or may retain her domicile at the time of the desertion although the husband has

[74]Note that some authorities have limited the revival doctrine to cases where a person dies *in itinere* to his domicile of origin, others where the person has not acquired citizenship in the domicile of choice.

[75]Restatement, s. 26.

[76]C.C. 83.

[77]*Nelson v. Nelson, supra* footnote 69; *Breen v. Breen, supra* footnote 67; *Atty. Gen. for Alberta v. Cook, supra* footnote 6; *R. v. Brinkley* (1907), 14 O.L.R. 434, 12 C.C.C. 454 (C.A.).

[78]*Harris v. Harris,* [1930] 1 W.W.R. 173, 24 Sask. L.R. 234, [1930] 4 D.L.R. 736, affirming; [1929] 2 D.L.R. 546 (C.A.); *Re Carmichael, supra,* footnote 9; *Marriaggi v. Marriaggi, supra,* footnote 6.

[79]*Atty. Gen. for Alberta v. Cook, supra,* footnote 6.

[80]*Chaisson v. Chaisson* (1920), 53 D.L.R. 360 (N.S.).

established himself elsewhere.[81] Thus in *Stevens v. Fisk*,[82] a decision of the Supreme Court of Canada in an appeal from Quebec, it was held that for the purpose of divorce the wronged wife has capacity to adopt a separate domicile if the law which governed her marriage — in that case New York — permitted the acquisition of such a domicile. The parties were married in New York while domiciled there. After, they moved to Montreal and without first obtaining a decree of separation from bed and board the wife returned to New York, acquired a bona fide residence there, and sued for divorce. In view of the decision of the Privy Council one may wonder whether such a view could be maintained today in the common-law provinces. It is also contrary to the law of the Province of Quebec, where a married woman may acquire a separate domicile only once a decree of separation from bed and board has been obtained. The hardship caused by the decision of the Privy Council prompted Parliament, in 1930, to enact the Divorce Jurisdiction Act[83] which gives the deserted wife the right, in certain circumstances, to sue for divorce, in the province in which she has been deserted, although her husband has acquired a domicile elsewhere if, at the time of the desertion, he was domiciled in the province where the action is brought.[84] Upon termination of the marriage the wife keeps her husband's domicile until she acquires a new one.[85] The American rule which allows a wife living apart from her husband to acquire a separate domicile,[86] is much more practical, as it takes into consideration the new capacity of married women. The abandonment of the old common-law rule would certainly have the favorable effect of doing away with *Stevens v. Fisk, Atty.-Gen. for Alberta v. Cook* and also the anomaly of the Jurisdiction Act. The removal of the imposition of a legal domicile in the case of married women would also be in harmony with the notion of domicile of choice based on intent to make a place one's permanent home, since she is not required by

[81] *Payn v. Payn.* [1924] 3 W.W.R. 111, [1924] 3 D.L.R. 1006 (Alta.).

[82] (1885), 8 L.N. 42, at p. 53, Cameron S. Ct. Cases 392, reversing (1883), 6 L.N. 329, 27 L.C.J. 228 which reversed (1882), 5 L.N. 79 (Que.).

[83] R.S.C., 1952, c. 84.

[84] U.S., see Goodrich, Conflict of Laws, (3d.ed.) s. 36; The American courts have allowed a wife with a cause of divorce to retain the common domicile at the time that cause was given although the husband removed his domicile to another place. She has also been allowed to establish a separate domicile for divorce whenever she chose. Some courts went even further by holding that such a domicile was valid not only for divorce jurisdiction but for all purposes: *Williamson v. Osenton* (1913), 232 U.S. 619. Other courts have also held that a wife can establish a domicile separate from her husband when she lived apart from him, without being guilty of desertion under the law of the state which was the common domicile at the time of separation, not requiring that she had a cause for divorce. The Restatement and some courts even go further since, irrespective of desertion a wife living apart from her husband can have a separate domicile (s. 28).

[85] Restatement, s. 29.

[86] *Supra*, footnote 84.

law to live in her husband's home. It may, however, for reasons of public policy, be better to quality the rule in Canada and restrict it to the case where the wife is not guilty of desertion, according to the law of the domicile of the spouses at the time of separation, which was the rule found in the 1934 draft of the American Restatement of Conflict of Laws.

B. MINORS - INFANTS

It is obvious that the domicile of a minor or infant is not always his domicile of origin. In the province of Quebec his domicile is that of his father and mother or that of his tutor.[87] A similar rule prevails at common law[88] except that an orphan retains the domicile of the father or mother, while in Quebec he acquires that of the tutor.[89] When a female minor marries she acquires her husband's domicile. In the common-law provinces the father cannot emancipate his child nor is the child emancipated by marriage, although in the province of Quebec marriage emancipates minors and consequently a male minor who marries may acquire a domicile of choice.[90] The Quebec rule is closer to the American one since in some of the states of the United States a father may authorize the children to leave and acquire their own permanent home and, in case of marriage, a minor is emancipated by operation of law. The emancipated minor may then acquire a domicile of choice.[91] During his minority the legitimate child shares the change of domicile of the father, even though his custody has been given to the mother, yet in *Hannon v. Eisler*[92] Coyne J. A. of the Manitoba Court of Appeal suggested that this would not be the case when the father permanently loses custody. In the United States on the other hand the child has the domicile of the parent to whom he has been entrusted or with whom he lives.[93] This is a more logical solution. During his minority the child cannot establish a domicile different from that of the father.[94]

After the father's death the legitimate child retains his last domicile, which is also that of the mother until she acquires a new one.[95] If after the father's death the mother remarries and goes to live at her second husband's domicile and takes her children with her, they acquire the stepfather's domicile. In

87C.C. 83.

88Restatement, s. 30.

89C.C. 83. Cf. *Ibid.* ss. 37 and 39.

90C.C. 314.

91Restatement, s. 31.

92[1955] 1 D.L.R. 183, at p. 189, 13 W.W.R. (N.S.) 565 (Man. C.A.).

93Restatement, ss. 32. In Quebec it has been held that a minor is not domiciled with the person to whom he has been informally entrusted: *Poissant v. Comm. d'Ecoles de St. Jacques le Mineur, supra,* footnote 23.

94*Holland v. Fisher,* [1951] K.B. 118 (Que.). *Doyon v. Letourneau* (1904), 10 R. de J. 564 (Que.) at least until he marries. Note that in *Costie v. Costie supra,* footnote 34, it was stated that it was doubtful whether a child engaged in trade could acquire a domicile.

95C.C. 83.

Quebec, if the child stays with the mother and a tutor is appointed to him over the mother, there is a conflict of authorities as to whether he is domiciled with the tutor or with the mother.[96] Some authors contend that since it is at the domicile that civil rights are exercised and that since the tutor exercises them, the minor is domiciled with him. Others contend that the mother has the right to fix the domicile as this is an attribute of the paternal authority which she exercises. Of course where the mother is the tutor and remarries, the domicile of the child is that of her second husband.

A natural or illegitimate child has the domicile of the mother.[97] The adopted child acquires the adopter's domicile.[98]

C. Lunatics

In the case of a person of the age of majority interdicted for insanity, his domicile in Quebec is that of his curator.[99] This differs from the rule prevailing in the other provinces, in which he retains the domicile he had before he became a lunatic.

D. Servants

According to article 84 of the Quebec Civil Code, the domicile of persons of age who serve or work continuously for others is at the residence of those whom they serve or for whom they work if they reside in the same house. Their principal establishment is the home of their masters. However, a married woman employed retains the domicile of her husband, and the minor that of his parents. The master must be a physical person and the servant capable of choosing a domicile. No such rules are in effect in the common-law provinces.

V. DOMICILE OF CORPORATIONS

Section 21 (1) of the Dominion Companies Act[100] states "The company shall at all times have a head office in the place within Canada where the head office is to be situate in accordance with the letters patent or the provisions of this Part [Companies with share Capital], which head office shall be the domicile of the company in Canada; and the company may establish such other

[96]According to C.C. 83.

[97]Restatement, s. 34.

[98]*Ibid*, s. 35. Johnson, the Quebec Adoption Act and Domicile, (1956), 16 R. du B. 5; Kennedy, Adoption and the Conflict of Laws (1956), 34 Can. Bar Rev. 507.

[99]C.C. 83; when the husband is interdicted for insanity and his wife is appointed curatrix, the wife may have a domicile of her own, but if a stranger is appointed curator the domicile of the wife like that of her husband is the domicile of the curator, Johnson, *op. cit.*, vol 1, p. 143. If the wife is interdicted for insanity and her husband is curator there is no change of domicile, but if a stranger is appointed, the domicile of the wife is that of the curator.

[100]R.S.C., 1952, c. 53. Also, Wegenast, The Law of Canadian Companies, (1931) p. 823.

offices and agencies elsewhere within or without Canada, as it deems expedient." Provincial Acts also contain provisions relating to the domicile or residence of corporations. For instance, section 30 of the Quebec Companies Act[101] provides that, "The companies shall, at all times, have an office in the place in which its chief place of business is situate, which shall be the legal domicile of the company... The Company may establish such other offices and agencies elsewhere as it deems expedient." In *National Trust Co. Ltd. v. Ebro Irrigation & Power Limited et al* and *National Trust Co. Ltd. v. Catalonian Land Co. Ltd. et al*[102], a case which involved foreign, dominion and provincial corporations, it was stated that the domicile of a corporation is in the country in which it was incorporated and clings to it throughout its existence while in *John S. Darrell & Co. v. The Ship American*[103] the principal or chief place of business was held to be its domicile irrespective of the place of incorporation. The courts have also recognized that a foreign or domestic corporation may have more than one residence.[104]

VI. CONCLUSION

The main characteristics of the Canadian law are the excessive importance attached to the domicile of origin and the difficulties involved in the proof of intention to change domicile. Too much weight is given to intention. It would seem better to abandon the present concept of domicile and attach it to a material fact such as habitual residence. For instance, the domicile of any physical person could be where he has his principal residence, and, if it cannot be established, where he exercises his principal professional activity, until changed. This would remove the difficulty of proving the intention.[105] On the other hand the draft English Code of Domicile still resorts to intent, and defines domicile as the country in which a person has his home and intends to live permanently.[106] The emphasis on domicile of origin in the common-law provinces should also be abandoned as it is now proposed in England and already in force in the United States. A domicile of choice should not be lost by leaving the country of the domicile with the intent of never returning. The acquisition of a new domicile should be required. The same weight of evidence should be adduced

[101]R.S.Q., 1941, c. 276 am. 1946 c. 20, 48, 49, 1947, c. 65, 1950, c. 70, 1952-3 c. 58, 59.

[102][1954] O.R. 463, [1954] 3 D.L.R. 326.

[103][1925] Ex. C.R.2. The company was incorporated in Nova Scotia and had its registered office there but was held not to be domiciled in that province. This view would seem untenable in the case of a Dominion corporation since according to section 21 (1) the domicile must be within Canada which is the place of incorporation.

[104]*Tyler v. C.P.R. Ry. Co.* (1898), 29 O.R. 654, at p. 657, aff'd. 26 O.A.R. 467.

[105]Cf. Restatement, s. 15.

[106]Art. 2. Graveson, Reform of the Law of Domicile, 70 L.Q. Rev. 492 also (1953), 2 C.L.Q. 608; Cmd. 9068; In Canada there is an interest in adopting the Code. See Proceedings of the 39th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1957), pp. 153 *et seq.*

in case of change from a domicile of choice to another domicile of choice as from a domicile of origin to a domicile of choice. This would take care of the Canadian state of affairs where immigration is all important and people move freely from province to province. In fact, by abolishing abandonment of domicile *animo et facto* and adopting the rule that a domicile once acquired continues until it is superseded by a new one, not only would the reverter rule be eliminated, since no vacuum could exist, but also the distinction between domicile of origin and domicile of choice would became unnecessary. Finally the fiction that a married woman's domicile depends on that of her husband in all circumstances should also be abandoned. It is contrary to present social conditions which the law should take into account.

In the province of Quebec, as well as in the common-law provinces, it would be well for the legislators to consider the work of the Commission of Reform of the French Civil Code on domicile[107] as well as the draft Code of Domicile prepared in England. The American Restatement may also be of value.[108] A strict application of the English rules of domicile to a federal state like Canada relying mainly on immigration appears to be inappropriate and it is to be hoped that the Conference of Commissioners on Uniformity of Legislation in Canada will maintain its reputation in this field of the law.

[107]Travaux de la Commission de Reforme du Code Civil (1950-1951) p. 117 *et seq.* especially at p. 129.

[108]See Revision of Restatement, 1st draft (1957).