June, 1933

ANNOUNCEMENT

The University of Pennsylvania Law Review is pleased to announce the election and induction into office of its Managing Board for the year 1933-1934, as follows:

Howard S. McMorris, Editor-in-Chief
A. Arthur Miller, Managing Editor
Jerome B. Weinstein, Note and Legislation Editor
Gilbert W. Oswald, Case Editor
J. Horace Churchman, Book Review Editor
Charles W. Woolever, Business Manager

The resignation of Emanuel E. Minskoff, an Associate Editor, has been accepted.

NOTES

Effect of Custody Decree in a State Other Than Where Rendered—An abuse exists in connection with awards of custody of children which is so peculiar to that branch of the law that one is forced to the conclusion that it is due to a defect in the law itself. This abuse is well illustrated by the facts of the recent case of Evens v. Keller.¹ In that case, a Missouri court awarded the custody of an infant domiciled in Missouri to an uncle. The child, with the consent of the Missouri court, went on a short visit to an aunt in Colorado. The aunt refused to give up the infant, and, on habeas corpus proceedings, the Colorado court awarded the child to the uncle on the basis of the prior Missouri award. The aunt then fled to New Mexico with the child. On habeas corpus proceedings, this time before the New Mexico court, the child was again awarded to the uncle. The last mention of the contumacious aunt shows her to be on her way to California in an effort to evade the New Mexico decree.²

This procession of events occurs too frequently in custody award suits³ for one to dismiss the case with the comment that the aunt is the kind of obstinate individual that the courts can never hope to control. Yet a situation such as this is seldom likely to occur in cases arising in other fields of law. Once a chattel in replevin, or a judgment in any action of debt, is awarded to a plaintiff by a competent court, the defendant does not run away to have the matter relitigated in another state. Under the full faith and credit clause of the Federal Constitution,⁴ the original judgment is conclusive of the respective rights of the parties, and going into another state can, at most, postpone the evil day of settlement but temporarily and may increase the evil consequences greatly in the form of added

¹ 35 N. M. 659, 6 P. (2d) 200 (1931).
² State v. Keller, 36 N. M. 81, 8 P. (2d) 786 (1932).
³ See Ex parte Marshall, 100 Cal. App. 284, 279 Pac. 834 (1929); Barnett v. Blakeley, 202 Iowa 1, 200 N. W. 412 (1926); In re Leete, 205 Mo. App. 225, 223 S. W. 962 (1920); Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930); Commonwealth v. Daven, 298 Pa. 416, 148 Atl. 524 (1930); Ex parte Penner, 161 Wash. 479, 297 Pac. 757 (1931).
⁴ Art. IV, § 1 “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”
costs and possible contempt proceedings. Why then should the disappointed litigant in a case involving the custody of a child go into another state and defend a similar action? The simple answer is found in the refusal of some courts to recognize the decrees of competent courts of sister states as binding on them in this situation, thus allowing a relitigation of the whole matter in a state often far from the domicil of all the parties, with the consequent difficulty of producing proper witnesses and reaching a sound decision. Thus, a disappointed litigant can hope, by appearing before another court, not merely to postpone the enforcement of the judgment but even to cause it to be "reversed" by another court after a complete re-examination of all the facts. Why should such a situation, which is contrary to our whole theory of conflict of laws and the full faith and credit clause of our Constitution, exist in this field of the law and what sort of remedy can be suggested?

The leading case which reached this conclusion is *In re Bort.* There, the Kansas court, speaking through Mr. Justice Brewer, decided that although the court of Wisconsin, in which state the infant was domiciled, had awarded the custody of an infant to the father, the Kansas court could re-examine all the facts a few months later and make a different custody award. The decision was put on the ground that the court was the guardian of all children within the state and, as such, could make any award as to the child it thought proper, unbound by prior litigation since the best interests of the child is the sole consideration in making custody awards. The classic answer to this contention is that, although it is true the paramount consideration is the interest of the child, yet that was the very thing in dispute and the basis of the award in the prior suit. "To allow relitigation of the question involves an unfortunate lack of confidence in the competence of the judicial officers of a sister state, and an unduly narrow interpretation of the full faith and credit clause of the Constitution."

*In re Bort* and the cases which followed it have, as a tacit or express premise, the proposition that the original custody decree was not such a decree as is binding on other states under the Federal Constitution. Since a decision by the Supreme Court of the United States that this is such a decree, would be binding on all state courts and would be a means of bringing the minority of jurisdictions which refuse recognition into line with the majority view, this question must be examined with a view to hazarding a prognosis as to what the Supreme Court

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5 Commonwealth v. Daven, *supra* note 3, at 422, 148 Atl. at 527, where the court said "Whether the same conclusion should be reached, even on the same facts [as found by the court of the child’s domicil which made the original decree], depends on the judgment of the court rehearing the case."

6 See State v. District Court, 46 Mont. 425, 436, 128 Pac. 590, 593 (1912), where the court said that the constitutional provision must cover custody awards “otherwise the court of the state in which a controversy should arise subsequent to the date of the decree would sit as a court of review of the action of a court of a sister state having the same jurisdiction.”

7 25 Kan. 308 (1881). The fact that Mr. Justice Brewer was later a member of the United States Supreme Court (1889-1910) seems to have given this case a commanding position which is not merited by the analysis it contains. In *Wear v. Wear,* 130 Kan. 205, 285 Pac. 606 (1930) the court in effect overruled *In re Bort.* It decided that a custody decree is binding on the parents who were parties to the litigation, and limited the application of *In re Bort* to the situation where circumstances have changed since the former award. The court also cited with approval § 125 of the *Conflict of Laws Restatement* (Am. L. Inst. 1939) “A state can exercise through its courts jurisdiction to determine the custody of children or create the status of guardian of the person only if the domicil of the person placed under custody or guardianship is within the state.”

8 Goodrich, *Custody of Children in Divorce Suits* (1921) 7 CORN. L. Q. 1, 7.

will decide when the matter comes before it. \^{11} Most of the state courts which have refused recognition of these decrees have not mentioned the Federal Constitution at all. \^{12} Those in which the point has been raised have, for the most part, dismissed the question of constitutionality on the basis of past precedents. \^{13} The very few cases which have really given the matter consideration and have decided that the full faith and credit clause does not apply, have done so on two grounds, (1) that the parents have no such property right in the infant as to cause the clause to make the matter \textit{res judicata} in other courts, \^{14} and (2) the decree is not a \textit{"final"} one \^{15} and, therefore, is not within the meaning of the enforcing Act of Congress passed in pursuance of this section. \^{16}

As to the first contention; there is nothing in the Constitution or in the legislation passed in pursuance of it which requires that a property right be adjudicated, and, even if it be assumed that it must, this still does not decide whether the \textit{status} of the infant, which the original decree sought to fix, is or is not entitled to full faith and credit. This status under the decisions, is a thing of value, carrying with it the right to support, a duty to serve, and so on, and therefore involves a property right. \^{17} It is the fixing of the status which the petitioner asks the court to recognize and not merely the respective rights of the parents.

To test the second contention, that this is not a final decree, the effect which the decree has in the state where rendered must be considered. There, it is conclusive as to the child's status on the basis of all facts which have occurred up to the time of the rendering of the decree. It may not be attacked collaterally, and a modified decree may be obtained only on the basis of new facts which have occurred subsequent to the original custody award. \^{18} This is all that is meant by a \textit{"final"} judgment \^{19} in any of the situations in which the full faith and credit clause has been held to apply. Thus it is difficult to see how the bare statement that this is not a final decree can stand up in the face of these clear facts to the contrary, and many state courts have so held in deciding that full faith and credit must be given to custody decrees. \^{20}

Since there is a final judgment, both under the decisions and on the basis of sound reasoning, it is necessary only to inquire what court has jurisdiction to make a valid custody decree, and to find the court whose decree is entitled to the

\^{11} The same lack of uniformity in recognizing decrees of other states, existed in the state courts in divorce cases. This caused the New York court in People v. Baker, 76 N. Y. 78, 88 (1879) to declare \textit{"It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment in such a case . . . shall be operative, without the territorial jurisdiction of the tribunal giving it."} These questions were subsequently settled by the Supreme Court in Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544 (1901) and Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1906).

\^{12} This is due, as Mr. Justice Holmes suggests in another connection, to the fact that \textit{"State courts do not always have the Constitution of the United States vividly present to their minds"} giving as an example his own language as a state judge. Haddock v. Haddock, \textit{supra} note 11, at 632, 26 Sup. Ct. at 553.

\^{13} Commonwealth v. Daven, \textit{supra} note 3.

\^{14} In re Bort, \textit{supra} note 7.

\^{15} Ashley v. Wendover, 113 Ore. 43, 231 Pac. 153 (1924); Barnes v. Lee, 128 Ore. 655, 275 Pac. 661 (1929).

\^{16} I 1 Stat. 122 (1790); 2 Stat. 299 (1804); 28 U. S. C. A. $687$ (1927). \textit{"... the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."}

\^{17} MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) §§ 110, 111, 120; LONG, DOMESTIC RELATIONS (3d ed. 1923) §§ 259, 270; cf. GOODRICH, CONFLICT OF LAWS (1927) § 131.

\^{18} Ruthruff v. Ruthruff, 14 P. (2d) 958 (Idaho 1932); Baer v. Baer, 51 S. W. (2d) 873 (Mo. App. 1932).

\^{19} Burns v. Shapley, 16 Ala. App. 297, 77 So. 447 (1917).

\^{20} McDowell v. Gould, 166 Ga. 670, 144 S. E. 206 (1928); (1929) 27 Mich. L. Rev. 338; Motticka v. Rollands, 144 Wash. 565, 258 Pac. 333 (1927); 2 BISHOP, DIVORCE, MARRIAGE, SEPARATION (1891) § 1189.
same effect in the courts of every other state as it has in the courts of the state where rendered. The Supreme Court has found that "jurisdiction", for the purpose of the full faith and credit clause, is the "jurisdiction" to make a valid judgment entitled to recognition under conflict of laws principles, or at least so much of that concept as the Supreme Court thinks reasonable where there are any real differences among the state authorities as to what that jurisdiction is. Thus, in the case of a personal judgment, the court which has the parties before it has jurisdiction to give a valid judgment. In divorce, only the state which is the domicil of both parties or, under certain conditions, the domicil of one party can decree a valid divorce entitled to recognition under the full faith and credit clause. These rules were based on conflict of laws rules and where, as in the divorce cases, there was a conflict among the decisions as to what was jurisdiction to grant a "valid" divorce, the Supreme Court took what in its opinion was the best conflict of laws rule, looking however to the state decisions, which, although not binding on the court in its interpretation of the Constitution, had "persuasive" force. It will therefore be necessary to look at the state decisions on this matter, as well as the bases on which they rest, before a guess may be hazarded as to what the final arbiter, the Supreme Court of the United States, will decide in this matter.

It is generally said that an award of custody is a dealing with the status of an individual, the infant, and by analogy to the other situations in which status is concerned, only the state of the domicil has jurisdiction to make a valid decree (i.e., entitled to recognition elsewhere under conflict of laws rules). There is, however, another phase of the matter in addition to the interest of the state in the status of its domiciliaries, viz., the interests of the parents in the custody of the infant. Generally, where there is a conflict between two individuals, all that is necessary to a valid judgment is the presence of the individuals before the court. It is this double aspect which has caused so much confusion in the decided cases. Is it domicil of the infant or the presence of the parents before the court or perhaps a combination of both which gives jurisdiction in the constitutional sense? The decided cases, despite the confused language used in them, give a rather definite answer.

In the case in which both parents are before the court which is also the court of the domicil of the child, the answer is clear. No matter what the basis of jurisdiction, it exists in this case. Therefore, the decree of the court must be binding as to the status of the infant wherever the case may be litigated again as though it were sought to be litigated in the same court of the domicil. This is the result which has been reached in the great majority of the state courts either on the ground of "comity" or squarely on the strength of the full faith and credit clause. The minority view, represented by those courts following In re Bort, are wrong under any civilized conflict of laws principle and, under the power which the Federal Constitution gives to the Supreme Court to force recalcitrant states to accept those principles of conflict of laws generally considered as correct, these states can and should be brought into line. The acceptance of the minority view is very often due to an attitude of reprisal for like decisions.

-- Dodd, supra note 10, at 533, 543, 560.
-- See Haddock v. Haddock, supra note 11, at 570, 26 Sup. Ct. at 527.
-- Atherton v. Atherton, supra note 11 ("matrimonial" domicil); Cheever v. Wilson, 9 Wall. 108 (U. S. 1869) (personal service on defendant).
-- See Haddock v. Haddock, supra note 11, at 585, 586, 26 Sup. Ct. at 534.
-- Goodrich, op. cit., supra note 17, at 305.
-- See 3 Freeman, Law of Judgments (5th ed. 1925) § 1448.
-- Ex parte Marshall, supra note 3; Chapman v. Walker, supra note 3.
-- Motichka v. Rollands, supra note 20; In re Leete, supra note 3.
of other courts and is the very thing which the constitutional provision is designed to prevent. Such decisions also make for increased litigation because of the opportunity for a contrary decision on the same facts in another state with the consequent disrespect for the law which always arises where the valid order of a court may be disobeyed with impunity.

Where anything less than all these “jurisdictional” factors are present the situation becomes more difficult. The conflicts rule generally stated as hornbook law is that the state of the child’s domicil has jurisdiction to make a valid decree, and perhaps, as the Restatement suggests, only that state, irrespective of the fact that both parents are not before the court. Before this rule is accepted as the rule for “jurisdiction” required by the Constitution, its reasonableness must be examined. Ordinarily, the state of domicil supplies the law which governs and, in some situations, supplies the only courts which can make a valid decree. This is in line with the fundamental idea of conflict of laws that the law of the state most closely connected with a transaction should govern it and, even further, that when an individual’s status is concerned not only must the law of the state most interested govern but also it must be applied by the courts of that state so that the state’s interest may be protected and the best possible disposition be made where all who are interested are most likely to be heard. A different rule, under our principle of recognizing decrees of other states as binding, would allow a state, having a smaller interest and a lesser opportunity of discovering all the pertinent facts, to preclude the question of status from being raised in the state most competent to decide it. By very definition, the state of domicil is the one best fitted to make such an inquiry since it is the place where the individual concerned lives and, in the usual case, where all or most of his activities are carried on.

Is there, however, the same close connection between a child and his domicil as exists in the case of an adult and his domicil or is there a sufficient difference for an exception to be made in this situation to the effect of the domicil and its courts? According to the classic idea, the domicil of an infant is a derivative domicil following that of the father. Where the child has been living with the father up to the time of the litigation as to status, it would seem that the domiciliary court should have jurisdiction to make a valid custody award since it is clearly the court of the state most interested in the infant and therefore, by fundamental premise, the court which is best fitted to decide the question of

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60 This is strikingly illustrated by two recent Oklahoma cases. In Chapman v. Walker, supra note 3, the court decided that it was bound by the decree of a sister state unless both changed circumstances and the fact that “the child is lawfully domiciled within the state” were shown. In Gaunt v. Gaunt, 16 P. (2d) 579 (Okla. 1932) on substantially identical facts the court allowed a relitigation of the whole matter and made a decree contrary to the decree of the Kansas court on the ground that the welfare of the child is the chief consideration in custody awards. The court made it clear that it was merely doing what the Kansas court had done in an earlier case where the domiciliary decree of the Oklahoma court had been refused recognition (Woodall v. Alexander, 107 Kan. 632, 193 Pac. 185 (1920)). Apparently, it would seem that the sound conflicts rule of the earlier case applies only to state courts which have a like rule. Cf. Tinker v. Tinker, 144 Okla. 97, 290 Pac. 185 (1930).

61 In Evens v. Keller, supra note 1, at 670, 6 P. (2d) at 204 the court recognized this saying “Any other rule would be disastrous in the extreme, reward contempt and place a premium on abduction.” 2 Freeman, op. cit. supra note 27, § 829.

62 Goodrich, op. cit. supra note 17 at 305.

63 Conflict of Laws Restatement, loc. cit. supra note 7.

64 To go into a definition of domicil with the admitted difficulty attached to that inquiry is not the scope of this article. It is perhaps enough to say dogmatically that the test of domicil which is used in connection with an adult seeks to name that place as domicil with which he has the closest connection. See Conflict of Laws Restatement (Am. L. Inst. 1930) c. 2.

65 Dicey, Law of Domicil (1879) 97; Goodrich, op. cit supra note 17, §§ 33, 36; Wharton, Conflict of Laws (1872) § 41.
status. This, then, is another case in which, under accepted conflict of laws principles, jurisdiction is found to be supported by reason, and should, therefore, be jurisdiction for the purposes of the full faith and credit clause. The decided cases are clearly in accord with this conclusion.28

Suppose, however, the situation where the husband and wife separate, or the husband deserts the wife. The wife remains in the same state with the children while the husband acquires a new domicil in another state. After several years, the husband institutes a divorce action in the state of his new domicil and, as part of the decree, gets an award of custody of the children. Armed with this order, he goes to the state where the wife has remained and, in *habeas corpus* proceedings, seeks to get a custody award based on the earlier decree. Under hornbook rules of domicil, since the domicil of the father is the domicil of the infant, it would seem that the court awarding the earlier decree had jurisdiction in the conflict of laws sense so that recognition must be given the decree in the state where the wife and children have remained. The courts, however, although forced by prior precedents to consider the father's domicil as the child's domicil, are moved by the fact that they are the courts most closely connected with the child and they have decided that they are not bound by the prior award.3

Some courts, unable to reach this result through conservative conflict of laws principles, renounce the whole conflict of laws theory in this situation and follow *In re Bort*. Then, saying that custody decrees are not entitled to recognition, they proceed to give a new decree on the facts presented to them.29 Other courts, unwilling to go so far as to refuse recognition to custody awards, generally proceed to give various unsatisfactory reasons for refusing to regard the decree of the father's domicil as binding under such facts. Still continuing to pay lip service to the rule that an infant's domicil is that of the father, recognition is refused either because the child was not before the court which made the award, or the wife was not present, or neither was *resident* in that state.30 This is done without showing what relation these factors have to jurisdiction to make a valid custody award. Some few courts analyze the situation properly and come to the conclusion that they are not bound by the prior award since they, and not the court of the father's domicil, are the court of the infant's domicil.40 This involves a new definition of domicil perhaps as follows: the domicil of an infant, where both parents are living and separated, and in the absence of a valid custody award elsewhere,41 is that of the parent with whom the infant is living.42 This new definition of the domicil of an infant puts him in the same position as an adult as far as his domicil is concerned. It means that his domicil is really the state which is most closely connected with him. This state is clearly the one which has jurisdiction to make a valid custody award whether it be the domicil of the

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28 Hammond v. Hammond, 90 Ga. 527, 16 S. E. 265 (1892); Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60 (1907). Conversely, if the court of the wife's domicil purports to award custody in this situation, the court of the husband's domicil will refuse recognition, Brandon v. Brandon, 154 Ga. 691, 115 S. E. 115 (1922); Thrift v. Thrift, 54 Mont. 463, 171 Pac. 272 (1918).

29 Steele v. Steele 152 Miss. 365, 118 So. 721 (1928).


41 It is of course clear that where an infant has been awarded by a competent court to a particular person, that person alone can thereafter change the domicil of the infant; Toledo Traction Co. v. Cameron, 137 Fed. 48 (C. C. A. 6th, 1905); *Conflict of Laws Restatement* (Am. L. Inst. 1939) § 34.

42 *Conflict of Laws Restatement*, loc. cit. *supra* note 41; Linch v. Harden, 26 Wyo. 47, 176 Pac. 156 (1918) (husband and wife separated by agreement).
father or the mother. The decisions, although their language is often unintelli-
gible, reach results consistent with this analysis.48

Conceding that the court of the domicil of the infant is so intimately con-
nected with the child that it can make a decree binding in sister states, the question
arises whether any other court also has jurisdiction in this sense. Suppose the
father and mother are each contesting the right of the other to the custody of their
child in a forum not that of the domicil of the child. This is a personal action
before a court having the parties before it and perhaps a decree should be
conclusive as to the same issues when raised in like circumstances, i.e., in another
foreign court not that of the domicil. However, it is clear that when the issue
of custody is raised in the court of the child's domicil, the prior adjudication
should not be binding.44 In custody awards, a great deal of discretion must be,
exercised by the awarding court since the fundamental test is the best interests
of the child. To allow a court, fortuitously concerned because of the presence of
the parents and even the child, to prevent the court most deeply interested and
most competent to exercise the discretion from doing so is contrary to funda-
mental conflict of laws practice.45 This, therefore, is not jurisdiction either in
conflict of laws or under the Constitution. This conclusion is the one invariably
reached by the courts in this situation.46

One further suggestion for jurisdiction is that of residence.47 The words
of some of the cases would seem to be in accord with the theory that the courts of
the state in which the infant resides are competent to give a valid decree binding
abroad. This is in part explainable by the constant use by the courts of the word
"residence" for the less common word "domicil",48 especially where the domicil
is the only state of residence. A further explanation is the attempt to get away
from the harsh results demanded by the conservative domicil definition where
the infant lived with the mother. The cases in which "residence" is spoken of
as the jurisdictional factor could equally well have used domicil as a basis to reach
the same conclusion. Where residence has actually been different from domicil,
even those courts which speak of residence have decided in favor of domicil,
speaking then of the residence as a "temporary" residence. Thus, they retain
the form of words to which they are accustomed.49 The further fact appears that
the concept of domicil has become relatively fixed by its use as a basis for legal
rights over a long period of years,50 while the meanings of residence are uncer-

Kenner, where the infant lived with the wife, the court reached the proper conclusion that it
was bound by a prior decree of the court of the wife's domicil but unable to overcome the
father's argument that the infant's domicil was the same as his own, said, "The domicil of an
infant . . . is unimportant in divorce cases". . . "The determining fact seems to be that
the child was in the foreign state in the custody of the parent who had there acquired a
 domicil . . . at the time the foreign court passed its decree." 139 Tenn. 211, 223, 225, 201 S.
W. 779, 783 (1917).
45 See (1929) 2 So. CALIF. L. REV. 302.
49 Duryea v. Duryea, 46 Idaho 512, 260 Pac. 987 (1928); (1929) 2 So. CALIF. L. REV.
302.
50 Linch v. Harden, supra note 42. The argument for residence as a basis for jurisdic-
tion to make a valid custody award is probably best expressed in Note (1932) 80 U. OF PA.
L. REV. 712.
51 In Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045 (1915), the court is obviously using
the word "residence" where it means "domicil". Cf. Motichka v. Rollands, supra note 20,
where "domicil" or "residence" are used interchangeably and Ashley v. Wendover, supra
note 15, where "domicil" cases are cited for a "residence" decision.
52 Brandon v. Brandon, supra note 36.
tain, ranging from temporary sojournment to a permanent connection with one
place amounting to a domiciliary relationship. These considerations lead inevi-
tably to the conclusion that the Supreme Court in looking for the basis of juris-
diction will decide in favor of domicil and that alone.

This does not mean however that a court of another state than that of the
domicil may not make an award of custody of a child found within its borders.
The adoption of this sort of police measure is always within the power of a
court either where the child has no guardian, or where its natural or appointed
guardian shows himself incapable of performing his duties to the infant. This
award need not be recognized abroad, however, since it is not a domiciliary award.
Where both parents are before the court and such an order is made as to one,
it may be accepted as binding by other courts similarly situated as to the child,
on the vague doctrine of comity, since these other courts, which are no more com-
petent to make a binding award, will not cause the parties to relitigate the whole
matter but will leave them to do so in the state of the child's domicil, the only
state whose courts can make a really binding order.

With these fundamental principles in mind, it is relatively easy to settle the
further question of the "amount" of recognition to which a custody award by
the domiciliary court is entitled. As a general rule, the same effect must be given
a decree as it is entitled to in the state where rendered. There, a decree is con-
clusive as to all facts which occurred up to the time of the last award but is
subject to change where facts have occurred subsequent to the last award which
show it to be for the best interests of the child that a change be made. Suppose
that at some period after the original custody award by the domiciliary court
the parent who was unsuccessful in the former action seeks a custody award in
another state where the child and successful parent are to be found, alleging a
change of circumstances since the last decree. It is clear that the forum is no
longer bound by conflict of laws principles or by the constitutional mandate to
treat the former decree as binding since it would not be binding where rendered.
Where the forum is the court of the present domicil of the child the situation
is clear, the court should and will make whatever award it thinks best under the
circumstances, which award has all the effect above noted of a domiciliary
award. Where the forum is not the present domicil it may make any provision
it feels is necessary under its police power. The majority of jurisdictions in
this situation are loath to make an award different from that of the domicil
unless it appears imperative. This is especially true in the case where the changed
circumstances are due to the fault of the one seeking the new award, as where the
unsuccessful litigant in the domiciliary court has abducted the child and brought
it into the forum state where it has lived for some time before being discovered
by the one awarded custody by the domiciliary court. In this latter case, the
court will, as a general rule, return the child to the parent awarded custody at the

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61 In Motichka v. Rollands, supra note 20, the court held that living four months in the
state did not make the minor a "resident". Cf. CONFLICT OF LAWS RESTATEMENT (Am. L.
Inst. 1930) § 12: "The term 'residence' is often but not always used in the sense of domicil,
and its meaning in a legal phrase must be determined in each case."
62 Note in this connection that the Supreme Court has already decided in the case of
divorce that "residence" is not sufficient to give a state jurisdiction to make a binding decree,
63 Hartman v. Henry, 280 Mo. 478, 217 S. W. 987 (1920); Beale, The Progress of the
Law, 1919-20 (1920) 34 Harv. L. Rev. 50, 57, 58.
64 Gavel v. Gavel, 123 Cal. App. 589, 11 P. (2d) 654 (1932); Eaton v. Eaton, 237 S. W.
896 (Mo. App. 1922).
65 Hamilton v. Anderson, 176 Ark. 76, 2 S. W. (2d) 673 (1928); Jernigan v. Garrett, 155
Ga. 390, 117 S. E. 327 (1923).
66 People v. Schaedel, 340 Ill. 560, 173 N. E. 172 (1930); In re Leu, 240 Mich. 249, 215
domicil and allow the parent alleging changed circumstances to go to the domiciliary court to seek a changed decree.\textsuperscript{57}

A somewhat more difficult question arises where the original domiciliary court modifies its decree. Where it is still the court of the domicil, it can, of course, make an effective decree entitled to the full faith and credit of the courts of sister states, even though the infant is at the time residing elsewhere and even though the only one personally before the court is the petitioner.\textsuperscript{58} Where the court is no longer the domiciliary court at the time of the attempt to modify the original decree, its effect is clearly that of the decree of any court not of the domicil attempting to make a declaration as to status. It is not binding on the domiciliary court.\textsuperscript{59} The difficulty arises, however, in this situation, in determining what is the domiciliary court. Where the original domiciliary court has directed that the domicil of the infant shall remain unchanged and contrary to this order the parent who has been awarded custody attempts to change it by moving to another state with the infant, where is the domiciliary state? The cases give conflicting answers. Some say that the change of domicil cannot be recognized or this would encourage disobedience to court decrees.\textsuperscript{60} The majority of jurisdictions, however, do recognize that a person to whom a general custody award is made gets such power over the child's domicil that he may exercise it even against the order of the court.\textsuperscript{61} It is for the forum to decide under its domicil rule whether the domicil of the infant has changed or not. Once this is determined the force of the decree is clear. If the modifying court is still the court of the domicil, its decree is effective elsewhere; if it is not, the court of the new domicil can disregard the modified decree and make an original decree as it sees fit.\textsuperscript{62}

In conclusion, the law may be summarized as follows:

1. An infant's domicil is that of the parent with whom he lives, in the absence of a prior custody award to another.

2. The court of the child's domicil is the only one which can make a decree binding in other states and such a decree must be accorded full faith and credit under the Federal Constitution.

3. The decree is binding until changed circumstances are shown, at which time the court of the \textit{then} domicil of the infant may make a new decree as it sees fit, but

4. Any court may as a police measure make a custody award of a child found within its borders.

\textsuperscript{57} Ex parte Penner, supra note 3. See \textit{In re Leete}, supra note 3, at 238, 242, 233 S. W. at 966, 968, where the court said: "We are of the opinion that the child is a domicil of the United States, full faith and credit must be given to the original decree . . . concerning the custody of the children . . . The wisdom of that decree . . . may well be doubted, but this is not a matter for our determination."

\textsuperscript{58} State v. District Court, supra note 6; \textit{Ex parte Livingston}, 108 Cal. App. 716, 292 Pac. 285 (1930).

\textsuperscript{59} Groves v. Barto, 109 Wash. 112, 186 Pac. 300 (1919); cf. (1920) 20 Col. L. Rev. 491; \textit{In re Volk}, 254 Mich. 25, 235 N. W. 854 (1931). See especially Goodrich, supra note 9, at 7 \textit{et seq.} Professor Goodrich makes a very cogent argument for the proposition that the modified decree of the original domiciliary court is entitled to recognition abroad under all circumstances. The basis of the argument is that, as a general rule, jurisdiction once acquired is not lost by the removal of a party or the \textit{res} from the state. On pure logic this argument is probably unanswerable. Practically, however, it is so important that the state most closely connected with the child control the award of its custody that the courts have come to recognize the decree of the child's last domicil as controlling. See \textit{infra} note 61.

\textsuperscript{60} Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598 (1920); Beale, supra note 53, at 58, 59; Gaunt v. Gaunt, supra note 30.

\textsuperscript{61} This was recognized in \textit{Friendly v. Friendly}, 137 Ore. 180, 2 P. (2d) 1 (1931) where the court of the original domicil refused to make a modified decree on the ground that it would be ineffective as to the court of the then domicil. \textit{Cf.} Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472 (1908).
CONSENT RECEIVERSHIPS—Weighed down by a complex financial structure and weakened by an ever constant drain on assets due to decreased revenues, many corporations find it increasingly difficult to meet the current demands of creditors. Assets may exceed liabilities, but it is the frozen nature of the assets which makes for a present inability to pay maturing debts. The corporation faces the possibility that its assets may be subjected suddenly to a general welter of attachments; that executions will result in sacrifice sales; that the more persistent and diligent creditors will receive an inequitable distribution of the assets; and that necessarily the corporation as a business enterprise must come to an end. In a consent receivership, there is found a means of calling a halt to this threatened race of creditors and by it the tottering corporation may be enabled to effect either an unhurried liquidation and equitable distribution of its assets, or a reorganization with a new and less burdensome financial structure.

Such a receivership is much to be preferred to bankruptcy. In bankruptcy, due to statutory requirements, there is an inelasticity of procedure; statutory limitations upon the power of a bankruptcy court to permit the continuation of the business; and a general impatience to secure an early sale and distribution. Further, the bankruptcy courts are unavailable to municipal, railroad, insurance, and banking corporations.

What are the historical antecedents of a consent receivership, this manna to famished corporations? How far has this remedy been developed and applied by the courts of equity? What is its status today under recent legislative enactments? This note is directed toward a consideration of these problems.

The English courts of chancery developed, early in their history, two exceedingly important bills in aid of creditors: (1) bills against executors and administrators; (2) bills to reach equitable assets. A creditor, seeking to establish his claim against a decedent in a suit at law against the executor, was often confronted with innumerable obstacles. Aware of these difficulties at law, the equity courts, in response to a creditor’s petition, would call upon the executor to account, and having once determined what the creditor was entitled to receive, would order payment. Soon these courts were called upon to enforce the payment of bequests to legatees and necessarily this involved the prior consideration and payment of creditors’ claims against the estate. As a final outgrowth, equity was willing, at the request of a simple contract creditor, not only to aid in the establishing of his particular claim, but also to assume the task of generally administering a decedent’s estate. The chief concern of the court became a desire to provide for an equitable and proper distribution of the assets among all claimants.


For an analysis of the difficulties encountered in effecting a reorganization see, Note (1932) 80 U. of PA. L. REV. 579.

See Cravath, Reorganization of Corporations in STETSON et al., SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (1917) 153, 160.

By an amendment to the bankruptcy laws approved March 3, 1933, railroads are now within the jurisdiction of the bankruptcy courts. Reprinted in U. S. Daily, March 1, 1933, at 2242.

See Kroeger, Jurisdiction of Courts of Equity in Insolvents’ Estates (1924) 9 St. Louis L. REV. 87, 179.

Bills to set aside fraudulent conveyances were another type of creditor’s bill, but it is not pertinent to the present discussion. See Kroeger, supra note 6, at 98.

An historical and detailed explanation of the early common law peculiarities in this respect may be found in LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (1908) 125 et seq.; I SPENCE, EQUITABLE JURISDICTION (1846) 579, 580.
An examination of the origin of bills to reach equitable assets reveals, in contradistinction to bills against executors and administrators, that they arose not because of an inadequate means of establishing a claim, but rather because of the narrowness of the common law writs of execution which did not reach all of the debtor’s assets. To remedy this defect chancery, by the latter half of the seventeenth century, had a clearly defined jurisdiction, enabling judgment creditors, who had been unsuccessful in executions at law, to subject the debtor’s equitable assets to execution. In aid of these equitable execution bills the court often appointed a receiver to control the assets and to provide for the adjustment of rights between legal and equitable owners or between competing judgment creditors.

Legal commentators have disagreed as to which of these two bills is the basis of the modern consent receivership. Is it a simple application of the principles underlying the administration of a decedent’s estate or is it merely a development of the creditor’s bill to reach equitable assets? It is sufficient to note that the consent receivership is not a sport in the development of equity jurisprudence; that equity has acted when the remedy at law was inadequate; that equity has conducted the administration of debtors’ estates; and that equity has appointed receivers in aid of its exercise of jurisdiction. When it appears that corporate property, if permitted to remain in the hands of the debtor, will be dissipated and inequitably distributed among the creditors and that this undesirable result may be prevented only if equity intervenes, then the matter is one justifying equitable cognizance. If the petitioner who asserts a claim and asks for a receiver is merely a simple contract creditor who has not yet secured a judgment at law, then there is really only one bar to the exercise of jurisdiction—the respondent’s possible defense that the creditor has not exhausted his remedy at law. Obviously, if the debtor corporation consents to equity’s exercise of jurisdiction, the final barrier is removed.

The Supreme Court of the United States first gave its full sanction to consent receiverships in 1908 in the now famous Metropolitan Railway Receivership case. A bill was filed in the federal district court in New York by simple contract creditors of the New York City Railway Company for the appointment of a receiver. The bill alleged diversity of citizenship as a ground for federal jurisdiction and insolvency as a ground for receivership. It set up the inadequacy of the remedy at law to creditors in general by reason of the inability of the company to continue to pay the interest charges on its funded debt and to meet current indebtedness, a situation which threatened to lead to dissipation of the company’s assets through foreclosures, judgments, and executions. The prayer was that equitable interest could be reached, if reached at all, in equity alone. Bispham, Principles of Equity (10th ed. 1922) § 526; Pomeroy, Equity Jurisprudence (2d ed. 1919) § 1415.


A receiver has been defined as “a person standing indifferent between the parties, appointed by the court as a quasi officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation, . . .” Pomeroy, op. cit. supra note 9, § 1330. The power to appoint receivers is inherent in all equity courts and is one of its oldest remedies. See Blum v. Girard Nat’l Bank, 248 Pa. 148, 93 Atl. 940 (1915).

Glenn, The Basis of the Federal Receivership (1925) 25 Col. L. Rev. 434 (developed from the administration of decedents’ estates); Kroeger, supra note 6, at 191 (developed from creditors’ bills to reach equitable assets).

It should be borne in mind, however, that the defendant should not always be permitted to waive his rights and consent to the court’s action. The matter must be one entitled to equitable cognizance; the prayer must not be a verbal subterfuge for fraud or oppression. In this connection see, 1 CLARK, RECEIVERS (2d ed. 1929) § 188.

the court take the railway into its possession and appoint a receiver to administer the fund, pending the ascertainment of priorities, liens, and equities of the various creditors; that the receiver be given power to operate the railways; and that an injunction be issued restraining any interference with the receiver’s possession. Other claimants who had actions pending for the recovery of their individual claims, attacked the bill. The case finally reached the Supreme Court where two major issues were presented: (1) Did the case present a dispute or controversy within the meaning of the Judicial Code?15 (2) Was the creditor to be denied equitable relief because he was merely a simple contract creditor who had not exhausted his remedies at law? Both of these interrogatories were answered in the negative.16 Thus the doctrine was established that when a corporation consents to a simple creditor’s bill for a receivership, the court need only concern itself with the questions whether the controversy is deserving of equitable interference and whether the appointment of a receiver is the most judicious procedure.

Although consent receiverships were not unknown17 before the appearance of *Re Metropolitan Railway Receivership*,18 they became increasingly recognized as a proper equitable remedy in state19 as well as federal courts.20 In 1928, however, the Supreme Court threw the propriety of a consent receivership into some doubt21 by a dictum which seemed to disapprove of the practice.

“We do not wish what we have said to be taken as a general approval of the appointment of a receiver under the prayer of a bill brought by a simple contract creditor simply because it is consented to at the time by a

15 “The district courts shall have original jurisdiction as follows: (1) . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and . . . (c) is between citizens of a State and Foreign States, citizens, or subjects.” 18 STAT. 470 (1875); 24 STAT. 553 (1887); 25 STAT. 433 (1888); 36 STAT. 1091 (1911), 28 U. S. C. A. § 41 (1926).

16 As to the former the court said: “We think that where there is a justiciable claim of some right made by a citizen of one state against a citizen of another state, involving an amount equal to the amount named in the statute, which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties, within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It was sufficient that he does not satisfy it.” 208 U. S. 90, 107, 27 Sup. Ct. 219, 223. As to the latter: “That the complainant has not exhausted its remedy at law—for example, not having obtained any judgment or issued execution thereon—is a defense in an equity suit which may be waived . . . and when waived the case stands as though the objection never existed.” 208 U. S. 90, 109, 27 Sup. Ct. 219, 224.


18 *Supra* note 14.

19 Bruch v. National Guarantee Credit Corp., 13 Del. Ch. 180, 116 Atl. 738 (1922); Northwestern National Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948 (1916). But state statutes often contain various provisions for the winding up of corporations and for the appointment of receivers at the instance of a simple contract creditor. See N. J. COMP. STAT. (Supp. 1924) p. 674; Note (1929) 38 YALE L. J. 668. Where the statute provides for the appointment of receivers on the ground of insolvency alone even though the creditor does not consent, it is considered a remedial and not a substantive right and does not enlarge the jurisdiction of the federal court sitting in that state. Pusey & Jones v. Hansen, 261 U. S. 405, 43 Sup. Ct. 454 (1923).


defendant corporation. The true rule in equity is that under usual circum-
stances a creditor’s bill may not be brought except by a judgment creditor
after a return of ‘nulla bona’ on execution.”

Despite this lingering doubt, equity courts continued to entertain petitions
for consent receiverships. In December, 1932, the Supreme Court, in *Shapiro
v. Wilgus,* removed this uncertainty and indicated that it does not dispute the
use of consent receiverships for legitimate purposes, but that it does desire to put
an end to the use of such receiverships merely to hinder and delay suitors.

“True it is indeed that receivers have at times been appointed even by
federal courts at the suit of simple contract creditors if the defendant was
willing to waive the irregularity and consent to the decree. This is done not
infrequently where the defendant is a public service corporation and the
unbroken performance of its services is in furtherance of the public good.
. . . It has been done at times, though the public good was not involved,
where legitimate private interests might otherwise have suffered harm. . . .
We have given warning more than once, however, that the remedy in such
circumstances is not to be granted loosely, but is to be watched with jealous
eyes. . . . Never is such remedy available when it is a mere weapon of
correcion, a means for the frustration of the public policy of the state or
locality.”

It appears therefore that a consent receivership continues to be a remedy
available to simple contract creditors of corporations. It is to be borne in mind,
however, that the appointment of a receiver is never a matter of right in the
creditor. On the contrary, the denial or grant of the petition rests entirely in
the sound discretion of the court. Because courts often have failed to realize
the true extent of their responsibility and often have been lax in many cases in
not carefully scrutinizing the petitions for inequities and fraud, the consent
receivership has been brought into much unnecessary disrepute. “The power
of a court of equity to appoint a receiver is something like the power of a skillful
surgeon to use a sharp knife. If used skillfully by the court and with proper
exercise of discretion the power to appoint a receiver is frequently a great aid in
business affairs, but when used unskillfully and without discretion it often results
in loss to everyone concerned.”

Thus far our discussion of the problem has been limited to consent receiver-
ships for financially involved corporations. What of the business enterprise
which is not a corporate one? The law, in its rapid growth, crystallized in a
peculiar pattern; for we find that equitable intervention in the guise of a consent

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22 Id. at 52, 48 Sup. Ct. at 274.
23 E.g., see Municipal Financial Corp. v. Bankus Corp., 45 F. (2d) 902 (S. D. N. Y.
1930); May Hosiery Mills v. F. & W. Grand 5-10-25 Cent Stores, 59 F (2d) 218 (D. Mont.
1932). In the latter case, not only was the consent receivership denied, but the application
was considered to be a contempt of court.
24 Superior Oil Corp. v. Matlock, 47 F. (2d) 993 (C. C. A. 10th, 1931); Kingsport Press
25 53 Sup. Ct. 142 (1932); (1933) 81 U. of PA. L. Rev. 642.
26 Id. at 144.
27 Kingsport Press v. Brief English Systems, supra note 24; Carolina Portland Cement
Co. v. Baumgartner, 99 Fla. 987, 128 So. 241 (1930). Great caution is required in acting
upon applications for receiverships. ROSE, FEDERAL JURISDICTION AND PROCEDURE (4th ed.
1931) § 473.
28 F. Hardy v. North Butte Mining Co., 20 F. (2d) 967 (D. Mont. 1927); May Hosiery
Mills v. F. & W. Grand 5-10-25 Cent Stores, supra note 23; Trierber, The Abuses of Re-
ceiverships (1910) 19 YALE L. J. 275.
29 CLARK, supra cit. supra note 13, at 230.
receivership is impossible if the debtor is an individual. It is generally stated that although the supervision and control of corporations is a matter for equity jurisdiction, the administration of the assets of an insolvent individual is not. If receivers may be appointed and restraining orders made in order that the assets of a corporation may not be sacrificed by executions, it is difficult to see why the same may not be done in the protection of unsecured creditors of an individual. It is more common to desire receivers for estates of corporations than for estates of individuals, due to the fact that so large a part of the business of the country is conducted through corporations. But the fact that it is unusual to desire the appointment of receivers for the estate of an individual is no reason why it should not be done in a proper case, where large assets can be saved from sacrifice in no other manner and the rights of unsecured creditors can be protected in no other way. Peculiarly enough, consent receivers have been appointed for partnerships, but the law is clear that simple contract creditors of individuals cannot resort to this remedy. When equity courts first granted consent receiverships they were venturing into a new field and, as a natural consequence, they restricted their decisions in the main to the circumstances of the cases first decided which, of course, involved only the affairs of corporations.

One aspect of the problem remains to be considered. May a corporation upon its own petition secure the appointment of a receiver? It is a self-evident fact in many consent receiverships that the prime mover in the proceedings is the corporation itself and not the petitioning creditor. Early cases permitted the insolvent corporation to petition the court on its own behalf, but these decisions have now been thoroughly discredited. In this situation the courts have been particularly obsequious to the oft reiterated dogma that a receivership is always ancillary to some other proceeding and is never an end in itself. However, if we add the fictional role of a simple contract creditor it appears that the requirement is satisfied. No sound reason can be found for preferring an indirect procedure over a more direct one. A court, if it so desired, could entertain a debtor's petition for a receivership as easily as one filed by a simple contract creditor and if found deserving of equitable cognizance the decree could be granted. Recent proposed legislation for the reorganization of corporations was a step in the right direction in that it enabled the corporation to file a petition in its own name stating that the corporation was insolvent or unable to meet its debts as they matured and that it desired to effect a reorganization. The proposal, unfortunately, was not passed by Congress. On March 1, 1933, Congress enacted an

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84 Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272 (1887); State v. Ross, 122 Mo. 435 (1894). See criticism, Chamberlain, New Fashioned Receiverships (1896) 10 Harv. L. Rev. 139.


amendment to the bankruptcy law with "Provisions for the Relief of Debtors". It provides that "any person excepting a corporation may file a petition. . . . stating that he is insolvent or unable to meet his debts as they mature and that he desires to effect a composition or an extension of time to pay his debts." Pending further adjustments and agreements the court may appoint a receiver to control the debtor's estate. Thus we find that Congress not only gave to the individual debtor the assistance of federal courts but went even further in permitting the debtor directly to petition the court. It is to be noted that the status of consent receiverships remains unaffected in so far as corporations are concerned. With regard to the individual debtor, however, where formerly he could not even indirectly seek a receivership, he may now come into a federal court and, without subterfuge, pray for the court's aid. We may expect as the next step in the development of consent receiverships that legislatures, or perhaps equity courts of their own volition, will extend to corporations this advantage now secured only to individuals.

E. F.

37 H. R. 14359 as rewritten by the Senate and as finally enacted appears in the U. S. Daily, March 1, 1933, at 2242. Provisions were also made for the reorganization of railroads in bankruptcy courts.
38 Section 74 (a).
39 Section 74 (b).