NOTES AND COMMENTS

EFFECT OF THE PRESENT WAR ON CONTRACTS

The recent order-in-council of the British Government imposing a blockade upon the export of German products\(^1\) has focused attention upon the effects of wartime dislocation upon commercial contracts made in the United States and to be performed in this country.

The shortage of imported raw materials and the necessity of filling war orders has made inevitable either a delay in performance, or an absolute failure to perform many contracts. The question to be examined is whether the outbreak of a foreign war creates a situation which makes performance of a contract by one of the parties thereto "impossible" in the legal sense, i.e., in such manner that failure to perform is excused.

Four general situations will be examined: (a) Cases in which there is no exculpatory provision in the contract; (b) cases in which there is an exculpatory provision specifically listing war as an excuse for delay in performance or for failure to perform; (c) cases in which there are general exculpatory provisions, but in which there is no specific mention of war; (d) cases in which the United States Government either directly or indirectly interferes with the performance of the contract and the government's action is based on Section 120 of the Act of June 3, 1916.\(^2\)

This article is limited to a discussion of American cases and, as much as possible, to such American cases as involve factual situations similar to those likely to arise as a result of the present war. These may be divided into two classes chronologically, depending upon whether the contract was executed prior to the beginning of the war or subsequent thereto.\(^3\)

(a) No Exculpatory Provision

The general rule as to impossibility of performance has been thus stated:\(^4\)

"A man may contract that a future event shall come to pass over which he has no, or only limited, power. If the occurrence of an event which is not within human control is in terms promised, the words are interpreted as a promise to be answerable for proximate harm unless the event occurs. Not only may such a promise be binding in case of supervening impossibility but it also may be binding though performance was impossible when the promise was made. Indeed, such promises are common. A warranty that a certain state of facts exists which in fact does not exist is an illustration. . . . And in spite of occasional statements that an agreement impossible in law is void there seems no greater difficulty in warranting the legal possibility of a performance than its possibility in fact, subject to this qualification: If a promisor undertakes to

\(^1\) Chicago Tribune, Nov. 28, 1939, p. 3, col. 2.


\(^3\) For discussions of the affect of war on contracts of citizens or subjects of belligerent nations, see Blair, "Breach of Contract Due to War," 20 Col. L. Rev. 413; Dodd, "Impossibility of Performance of Contracts Due to War-Time Regulations," 32 Harv. L. Rev. 789.

\(^4\) Williston, Contracts (Rev. ed.), VI, 5418, § 1934.
do an act whether it is legal or not, and it is or becomes illegal, the intent manifested to break the law makes the contract illegal and there can be no recovery upon it. . . ."

Several exceptions to the rule have been formulated, i.e., the promisor is absolved from liability in the following instances: (1) Impossibility arising from a change in the law; (2) where the specific thing which is essential to performance is destroyed; (3) sickness and death in a contract for personal service; (4) where conditions essential to performance do not exist.

It has been generally held that a change in foreign law does not per se make performance impossible as does a change in domestic law. The problem, then, is concerned with the fourth exception above.

Unless, therefore, the performance of the type of contracts with which this article is concerned does not come within this exception, it will follow from the general statements of the rule that in any contract where no exculpatory provisions are present, failure to perform is not excusable since the promisor could have conditioned his obligation and did not.

Similarly, the parties can provide against the economic dislocation resulting from war, and if they fail to do so they are bound in accordance with the terms of their agreements. Decisions along this line are to be expected where the contracts were entered into after the outbreak of war, as the possibility of such disturbance must have occurred to the parties.

However, there have been decisions reaching the same result even where the contracts were entered into before the outbreak of the war. In Columbus Railway, Power & Light Company v. City of Columbus, the power company sought to escape liability under a contract to furnish street railway service. The company stated that greatly increased costs resulting from the war made such service possible only at a ruinous loss. The court said that there had not been any intervention of that superior force which ends the obligation of a valid contract by preventing its performance, and that equity would not relieve from hard bargains simply because they were hard bargains.

In Furness, Withy & Co., Ltd. v. Louis Muller & Co. the libelant,
in May, 1914, agreed to furnish a ship to transport the defendant's cargo of grain to Europe. The ship was ready in Baltimore in August, 1914, but the defendant refused to load it as the war had broken out, making insurance costs very high and payment conditions difficult. The court stated that the difficulties which had arisen were not such as to make performance impossible and that the ship owner was entitled to damage amounting to the loss of revenue resulting from necessity of taking another cargo.\textsuperscript{11}

Another case directly in point is \textit{Richards & Company v. Wreschner}.\textsuperscript{12} Defendant, a German partnership, contracted in New York to deliver to plaintiff a certain quantity of antimony in New York. The contract was executed in January of 1914. The parties contemplated shipment from Belgium. When the war began, performance became impossible as the export of antimony was prohibited. The court held for the plaintiff, stating that impossibility due to a foreign war was no excuse for failure to deliver. Since the defendants had taken upon themselves the responsibility of making delivery and had not contracted against the possibility of war, they were liable for failure to deliver. The contract did not become illegal since it was entered into and was to be performed in the United States and the laws of the State of New York governed its validity.

In \textit{Tweedie Trading Company v. James P. McDonald Company},\textsuperscript{13} on April 23, 1901, plaintiff agreed to transport laborers for defendant from Barbadoes Island to Colon in the Panama Canal Zone. Both parties were American corporations and the contract was made in New York. The ship made one of the four trips called for without incident; then started to make another but the British Government thereupon forbade the further embarkation of laborers from the Barbadoes. This order was in effect before the second sailing so that instead of taking 700 men as agreed, the ship left early with only 73 men in order to beat the deadline set by the British. The ship owner sued to recover the hire of the ship for the remaining two voyages and the defendant filed a cross action to recover the payment which had been made for the second trip. The court stated that prevention by the law of a foreign country is not an excuse for failure to perform when the act contemplated by the contract was valid according to the laws of the place where the contract was made.

The relevance of this case is apparent, inasmuch as, logically, there should be no distinction between a foreign embargo resulting from war and one imposed in peace time.

(b) \textit{Exculpatory Provision Specifically Listing War}

Next there are the cases in which the contracts contain clauses exempting the promisor from liability for failure to perform in the event

\textsuperscript{11} The same results were reached in a companion case, Furness, Withy \& Co., Ltd. v. Fahey, 232 F. 189 (1916).
\textsuperscript{13} 114 F. 985 (S.D. N.Y., 1902).
of war. It might be expected that such clauses would unconditionally relieve the promisor from liability for failure to perform, but such has not always been the case.

One case in which this result was reached was *Capital Fertilizer Company v. Ashcraft-Wilkinson Company.* In May, 1914, defendant contracted to deliver a specified quantity of potash, manure salts and kainite, deliveries to be made in November, 1914, and February, 1915. A further contract was entered into in July, 1914, calling for an additional quantity. Both contracts contain the following clause: "It is understood that in case of war, rebellion or any interference by either the American or foreign government, strikes, accidents, epidemics or other contingencies happening to one or more of the mines or works furnishing or shipping the goods or any part thereof mentioned in this contract, or in case of any other contingency beyond their control, then the seller has permission to either cancel this contract or such part thereof as may be affected thereby, or to make such shipments after the removal of said impediment, but not later than thirty days after the months originally fixed." After the war broke out, the defendant wrote plaintiff cancelling the contract. Plaintiff brought an action for breach of contract. The parties intended to obtain the raw materials for this contract from Germany. The court held that the cancellation clause pertained to any war, whether the United States was involved in it or not and therefore was applicable to the factual situation. The only remaining question was whether the war must be the proximate cause of the seller's inability to perform. The court stated that in this particular case, it was not necessary that the war be the proximate cause, as the wording of the contract clearly gave the seller the right to rescind when war occurred. The court did say, however, that the question of what was a reasonable time during which the seller might cancel was a question for the jury to decide.

The cases reaching a contrary result, however, seem based on more logical principles. If the outbreak of war is to be considered as an absolute excuse despite the fact that the seller might have delivered notwithstanding said war, an unconscionable windfall is given to the seller. He should not be excused unless, first, his failure to deliver occurred despite the use of a reasonably diligent effort on his part to deliver, and, secondly, the outbreak of war was the proximate cause of his failure to deliver. The courts have imposed these limitations in several cases.

One of them is *Davison Chemical Company v. Baugh Chemical Company.* On April 28, 1913, plaintiff purchased from defendant from 30,000 to 50,000 tons of sulphuric acid per year to be delivered for a period of five years beginning with 1913. The contract contained the following provision: "Fire, accident or strike, in the work of any of the parties herein mentioned; obstruction to navigation, accident to acid, barges, war, insurrections or other uncontrollable causes rendering buyers unable
to receive or sellers unable to deliver shall be good and sufficient reasons to make this contract inoperative during the period of necessary repairs, reconstructions or continuance of the difficulties." In 1913 and 1914 deliveries were made, but in 1915 there was a failure to make full deliveries. Toward the end of 1916 defendant was unable to secure pyrites which were necessary for the manufacture of its acid because of the submarine campaign, most of the pyrites coming from Europe. After first concluding that the parties contemplated the furnishing of acid which was made from pyrites, the court held for the defendant. The court stated that the defendant was bound to make every reasonable effort to secure said pyrites and to pay any reasonable sum necessary to enable it to do so. The contract did contain a provision with regard to the contingency of war and that only ordinary diligence in securing supplies would be required under such a clause. Since the defendant had exercised such ordinary diligence but had still been unable to secure supplies, the court dismissed plaintiff's plea for an injunction requiring defendant to make deliveries in accordance with its contract.

The court thus imposed upon the seller the responsibility of the exercise of ordinary diligence in attempting to fulfill its contract, notwithstanding the specific provision for exemption from liability in the event of war.

The plaintiff in this case then brought an action at law for damages for breach of contract.\(^\text{16}\) Plaintiff proved that defendant could not deliver because it had undertaken to supply various people, including both old and new customers, with more acid than it could produce, although it expected to increase its capacity by an addition which was completed in 1916. After it had become apparent that defendant could not make delivery on all its contracts, it proposed to prorate its products among all of its customers. The court pointed out that defendant, having undertaken certain new contracts because of the war boom, could not excuse its failure to deliver under its old contracts merely by enlarging its plant in the expectation that said enlargement would enable it to deliver the full amounts called for under its old contracts.

The court thus further limited the scope of the excuse clause by holding that the seller would be excused only where the war was the proximate cause of its inability to deliver. In accord is I.C.R.R. Company v. McClellan.\(^\text{17}\) Plaintiffs delivered a quantity of corn to the defendant railroad for shipment to Cairo, Illinois. The delivery was made during the early part of 1865. Delivery was made in Cairo from 11 to 45 days after the corn was received for shipment, whereas the average time was 2½ to 3 days. Plaintiff sought damages because the corn was spoiled. The carrier claimed that the railroad was under the control of the Army and that because of war conditions the tracks at Cairo were so blocked that it was impossible to deliver the goods on time. The court, however, found that since the company had received the corn

\(^\text{16}\) Davison Chemical Co. v. Baugh Chemical Co., 134 Md. 24, 106 A. 269 (1919).
\(^\text{17}\) 54 Ill. 58 (1870).
without stipulations against any contingencies and since it was not under military orders to delay delivery, it was liable for failure to make such delivery promptly. Along the same lines is *I.C.R.R. Company v. Cobb, Christy & Co.* Here the court indicated that the railroad was liable because it had undertaken to ship more freight to Cairo than it could handle with its facilities rather than because Government interference had delayed or prevented shipment.

These cases may be considered illustrations of the "proximate cause" doctrine. Similar limitations have been imposed in other cases.

An example is *Herrmann v. Bower Chemical Manufacturing Company.* In June, 1914, defendant sold plaintiff a quantity of prussiate of potash, a German product, deliveries to be made in 1915. The bill of sale included the customary excusable clause listing "war." Because of the war, defendant was unable to deliver and plaintiff brought an action for damages for breach of contract. Although refusing to rule that the war clause applied only to wars in which the United States was involved, the court stated that the defendant was still obligated to do all that a reasonable, prudent man in good faith would do, and to use the same diligence. It was the defendant's duty to stock up on the potash while such stocks were available, and also its duty to prorate its available stock among existing customers. Since the jury below had found for the defendant, the court stated that obviously the defendant must have so acted, and held for him. It is important to note that these courts considered that the seller's obligations to their existing customers precluded the filling of new orders until the existing ones were completed.

The "escape" clause may be incorporated by reference, such as by making the contract subject to the rules of the Chicago Board of Trade, which rules attempted to provide against war dislocation, and were enforced in *Thomson v. Thomson.* Plaintiff, through a broker, employed the defendants to purchase corn, said corn to be delivered during the month of July, 1917, the purchase orders being given to plaintiff's broker in May and June of 1917. The Board of Trade, by resolution of its Board of Directors, provided that after July 5, 1917, there should be no more trading by members of the exchange in corn for delivery by grade alone. The resolution provided that a settlement price for existing contracts be set up and defendants, claiming they were bound by said resolution of the Board of Trade, offered said settlement price to plaintiff's brokers. Plaintiff brought an action for breach of contract as the market price was higher than the settlement price. The court stated

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18 *64 Ill. 128 (1872).*  
19 *242 F. 59 (C.C.A. 3d, 1917).*  
20 "Seller not liable for delays due to causes beyond their control, or for non-arrival of any shipment lost in transit, or for causes, such as strikes, lockouts, war and insurrection, fires, accidents, or the like, which may prevent or impede the manufacture or deliveries may be suspended during the period required to remove the cause of or to repair the damage, or until there is a normal production again." *Herrmann v. Bower Chemical Manufacturing Co., 242 F. 59 (C.C.A. 3d, 1917).*  
21 *315 Ill. 521, 146 N.E. 451 (1925).*
that ordinarily where an absolute contract to deliver corn had been entered into the defendant could not read a condition into it.22 In this case, however, the sales were made subject to the rules, regulations and customs of the Board of Trade. The Board of Trade had enacted the rule above referred to because more corn had been sold for future delivery than was available and the Board feared that extortionate settlements would result otherwise. Since the purchase was made subject to the Board's rules, these rules governed and the court held for the defendant. However, its language indicates no tendency to depart from the usual strict rules.

(c) Exculpatory Provisions Not Mentioning War

Next are those cases in which general exemption clauses are contained. The usual words are similar to "causes beyond the control of the seller," followed by a list of specific exemptions. Courts have generally held that, under the principle of *ejusdem generis*, these clauses do not provide for an exemption in the case of war.23

In *Winborne & Company v. Fulton Mills*,24 the plaintiff ordered a quantity of bags for delivery in October, 1914, the contract being dated prior to the outbreak of the war and containing the following provision: "It is agreed that seller shall not be liable for any damages for failure to ship goods, provided it should be prevented from so doing by storms, floods, fires, strikes, or any other condition or circumstances affecting

22 "Neither would it be any defense in such case that by reason of the declaration of war against Germany on April 6, 1917, and the unusual conditions resulting, and sure to result in the future, in abnormally high prices, which would have enabled purchasers to compel sellers to settle their contracts at extortionate prices, the Board of Trade, by resolution of the board of directors, provided that after July 5, 1917, settlements of the contract that a compliance with such contract would entail great hardship upon defendants or that by reason of the World War the fulfillment of the contract would be rendered extremely difficult, or even impossible, where defendant has failed to limit in the contract his liability in respect to such contingencies." *Thomson v. Thomson*, 315 Ill. 521, 146 N.E. 451 (1925).


*Carnegie Steel Co. v. United States*, 240 U.S. 156, 36 S. Ct. 342, 60 L.Ed. 576 (1916), gives another strict application of the rule of *ejusdem generis*. Here plaintiff contracted to manufacture certain armor plates for the Federal Government. Said plates were to be 18 inches thick, but because no such plates had ever been previously manufactured by anyone, there was a great delay in completion of the work for which the Government sought to assess liquidated damages. The court stated that notwithstanding the provisions of the contract calling for time extensions where the delay was due to "unavoidable causes such as fires, labor strikes, actions of the United States, etc.," the damages could be assessed. The court stated that "if what is agreed to be done is possible and lawful it must be done. It must be shown that the thing cannot by any means be affected [sic]. Nothing short of this will excuse non-performance." The court also pointed out that this delay was not excusable under the escape clause because of the principle of *ejusdem generis*.

either the safe arrival of goods, if imported, or in the factory of seller, or from any other cause beyond its control." These bags were made in Scotland from jute grown in India. The jute had been shipped in July, 1914, from India on a German steamer, and never arrived in New York. The court held that the defendant had shown no legal excuse for failure to deliver because it must be held to due diligence in procuring the raw material. Defendant did not show that it was shipped in time for manufacture and subsequent delivery, that it was shipped on a seaworthy vessel and that the failure to arrive and deliver the goods could not have been overcome by proper effort on defendant’s part. The court obviously did not consider that war was included within the scope of the exculpatory clause, as it proceeded to question whether the failure to deliver resulted from “any condition or circumstance affecting . . . the safe arrival of the goods.” Obviously, if war constituted an excuse, the court would have so indicated. The case thus appears to represent another application of the principle of ejusdem generis.

Another case directly in point is Thaddeus Davids Company v. Hoffman-LaRoche Chemical Works. In 1913, the plaintiff contracted to purchase carbolic acid from defendant, delivery to be made during the year 1914. The following clause was included in the contract: “Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option.” Defendant failed to deliver the quantity ordered in November, 1914, stating that its source of supply was in Europe and that the governments of European countries had placed embargoes on exports of this acid, thus preventing defendant from making delivery. The court applied the rule of ejusdem generis and said that the words “fire,” etc., limited and qualified the words “contingencies beyond our control.”

25 166 N.Y.S. 179 (1917).
26 The court stated that the plaintiff by its contract had imposed an absolute duty upon itself to make delivery because it had promised so to do and not shielded itself by proper conditions and qualifications against its inability to deliver. Defendant could have provided against the contingencies of foreign war and embargoes but failed to do so.
27 This opinion reversed the judgment in the lower court, 160 N.Y.S. 973 (1916). Another trial term case which was decided in accord with the lower court judgment in the Davids case was Ducas Co. v. Bayer Co., 163 N.Y.S. 32 (1916). On June 10, 1914, defendant sold certain dyes to plaintiff. The contract contained the following clause: “Seller not to be held accountable for delays caused by strikes or for any contingencies beyond their control, or other unavoidable acts such as fire, etc.” Delivery was to be made from and after November, 1914, for one year. After the war started supplies of dyes from Germany were cut off and defendant prorated the goods it had on hand to all its customers. The court stated that since the war had cut off the supply of dyes and since the lack of this supply was the proximate cause of non-performance by the defendant, the failure to deliver had resulted from a contingency beyond the defendant’s control. However, the court stated that the defendant could have made delivery on all its existing contracts from stocks on hand in America at the beginning and during the early part of the war, but chose instead to prorate these stocks among all its regular customers, including non-contract customers. Therefore, the lack of supply from Eu-
It is important to note that these cases concerned contracts which were executed prior to August, 1914, when the war began. The same principles should apply with much more force to contracts made during the war, as the possibility of interference with these contracts by wartime disturbances must have been in the parties’ minds and if they had intended to guard against such interference, they would have so indicated.\(^{28}\)

If the surprise element in the first World War was not sufficient to relieve parties to commercial contracts of their absolute obligations incurred prior to the outbreak of that war, it would seem that since the present war came as less of a surprise than the last one, we can hardly expect the courts to take a less strict viewpoint today.

Two other cases should be considered.\(^ {29}\) Each of these cases involved claims against a bankrupt opera company by artists for damages for breach of contract. Each contract was executed in 1914 before the war and each called for performance during the season of 1914 and 1915. The following provision is contained in one: “In case of riot, fire, railroad accident, public calamity, or any other casualties over which the party of the first part has no control, this contract may be cancelled at the option of the party of the first part.” The other contract specifically referred to war as justifying cancellation. Because of the war the company could not carry on an operatic season, and, therefore, cancelled each of these contracts. The court held that the opera company could terminate its contract whenever any public calamity occurred, citing the lower court decision in the Davids case, which was later reversed. The court construed the war as a public calamity and a casualty over which the opera company had no control and disallowed the artists’ claims in both cases.

The decision in the second case is obviously reconcilable with the other cases previously cited, as the contract specifically provided for cancellation in the event of war. The other case might appear irreconcilable, but several extraordinary circumstances differentiating it from commercial cases may be noted. First, an opera company is not a commercial institution, and secondly, any analogy to commercial contracts...
would place the opera company in the position of the buyer, rather than that of the seller, thus excluding the relevancy of considerations of due diligence in attempting to perform. Moreover, the opinion relies upon the lower court decision in the Davids case and upon the Ducas case, which, as above indicated, must be considered as of little validity.

Suppose a construction contract is entered into after September 1, 1939, when the present war began. What is the effect of (a) a specific escape clause and (b) a general escape clause under these circumstances? Several cases have been found.

One of them is *Roessler & Hasslacher Chemical Company v. Standard Silk Dyeing Company*. In January, 1915, defendant contracted to deliver imported German prussiate of soda during the year 1915. In March, 1915, the British placed an embargo on German exports and as a result defendant was unable to fill all its existing contracts. Furthermore, defendant sold some of its stock on hand to non-contract customers. The relevant portion of the exculpatory provision exempted the seller from liability “for losses or damage or delays due to causes beyond their control, including in such cases strikes, lockouts, floods, fires, accidents to work where the goods are manufactured, war, or insurrection.” The trial court held that since the war was in progress when the contract was made, the only war to which this exception clause could apply would be one in which this country was involved, as otherwise there would be no obligation upon the part of the seller to deliver. However, the Circuit Court of Appeals reversed that decision, holding that the parties had notice of the possibility of embargoes and restraints not existing when the contract was entered into but which might arise as the war went on, and that the exception was intended to cover this possibility.

Another case is *Krulewitch v. National Importing & Trading Company*. Here, the contract was entered into in March, 1918, and required defendant to ship tapioca flour from Java. Because of embargoes subsequently imposed, the defendant could not procure flour from Java. The contract provided “These goods are bought with the understanding . . . that sellers are not to be responsible for strikes, fires, accidents or anything beyond their control.” The court stated that the rule of *ejusdem generis* would apply and that, accordingly, the lack of transportation facilities was not provided against under the contract.

In *Coal District Power Company v. Katy Coal Company*, the contract was entered into in May, 1917, whereby the power company agreed to supply electric power to the coal company. The service was interrupted for several months by conditions which the power company claimed were beyond its control. An exemption clause in the contract referred to “causes reasonably beyond its control.” The interruption in service was caused by the breaking down of a number of insulators and the testimony showed that it was impracticable, if not impossible, to get

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32 141 Ark. 337, 217 S.W. 449 (1920).
proper replacements because most of the ingredients in the compound used to make the insulators were made in Germany. The court, in this breach of contract action, held for plaintiff. Since the contract imposed a duty on the company to furnish current, it could not excuse its failure to perform because certain supplies could not be procured because of the war.

The conclusion derived from these cases is that the same general rules are applied whether the contract is executed before or after the war begins.

(d) National Defense Act of 1916

The last general problem discussed herein is that arising from interference with the performance of a contract by the United States Government under the provisions of Section 120 of the National Defense Act of 1916. This statute authorizes the President in time of war to place orders for such products or materials as may be required by the government and which are produced by the persons or firms to which the orders are given. Compliance is made obligatory under penalty of the commandeering of the plant and precedence is required for government orders over all civilian orders. It is possible that the present war may lead to such developments that the President may find it necessary to invoke the powers granted by this statute by proclaiming the imminence of a state of war. Should this occur, there is no question that a delay or impossibility in performance resulting from the necessity of giving priority to government orders would be excusable.

In *Roxford Knitting Company v. Moore & Tierney, Inc.*, plaintiff agreed to manufacture certain knit underwear for defendant, the con-

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33 39 Stat. 213, 214. 50 U.S.C.A. § 80: "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company . . . [etc.]

"Compliance with all such orders for products of material shall be obligatory on any individual, firm, association . . . [etc.] and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company . . . [etc.] and any individual, firm, association, company . . . [etc.] owning or operating any plant equipped for the manufacture of arms or ammunition, . . . or any necessary supplies or equipment for the Army, and any individual, firm, association . . . [etc.] owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, . . . or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms . . . as ordered by the Secretary of War, or who shall refuse to furnish such arms . . . at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase, . . . is hereby entitled to take immediate possession of any such plant. . . ."

34 265 F. 177 (1920), 253 U.S. 498, 40 S. Ct. 588, 64 L.Ed. 1031 (1920).
tract being made in December, 1916, deliveries to be made between February and December, 1917. The following provision was contained in the contract—"All orders are taken subject to delays or nondelivery caused by strikes, accidents, fire, or for any other reason beyond our control." Plaintiff made delivery in part but failed to deliver all of the goods ordered. Defendant refused to pay for the goods delivered and plaintiff brought an action for the price thereof. The plaintiff's defense for failure to perform in full was based on the fact that the government placed with it certain orders for war materials which required the entire output of the factory from July 1, 1917, until after October 1, 1918. The court indicated that if the contracts had been voluntarily made, they were not entitled to precedence. While in this case the orders had not been given pursuant to said statute but were purchases made by the armed forces, the correspondence submitted as evidence in the case indicated that the army and navy insisted that government orders be given priority and that the plaintiff reasonably believed that failure to give precedence to the orders of the army and navy would lead to the commandeering of his plant. The court pointed out that the National Defense Act did not prescribe the method by which an order should be placed and the mere fact that the orders did not mention the National Defense Act could not alter the fact that plaintiff had been given to understand that he had no option but to give precedence to the government's orders, notwithstanding the fact that the orders were not in such form as to indicate necessarily that they were given pursuant to the National Defense Act.

Another relevant case is A. L. Young Machinery Company v. Lee Loader & Body Company.\(^35\) Defendant manufactured motor trucks, plaintiff being a distributor thereof. In January, 1918, the parties contracted to give plaintiff an exclusive territory, the plaintiff to take thirty-five trucks during the year unless shipment was prevented "through acts uncontrollable by said manufacturer." In May, 1918, plaintiff ordered certain trucks. At this time defendant had government orders for trucks but had it not been for a subsequent modification of the government's order, defendant might have been able to fill both orders. In June, plaintiff cancelled the order but at this time defendant had completed 91 per cent of the order and could have finished it within four days after cancellation. Defendant declared that the delay in deliveries was caused by an act uncontrollable by it and was, therefore, excusable under the contract and furthermore, that under the terms of the National Defense Act the government order took precedence. The court stated that since the government's orders were mandatory, the defendant was relieved from the ordinary rule of reasonable time for delivery after sale. The plaintiff was, therefore, not entitled to damages for breach of contract. The court also indicated that the delay would be inexcusable unless the proximate cause thereof was the government's order.

This case makes it clear that the usual rules concerning proximate

\(^{35}\) 218 Ill. App. 427 (1920).
cause apply to this situation. Another case making this fact clear is *Salembier, Levin & Company v. North Adams Manufacturing Company.* The plaintiff sought to recover damages for defendant's failure to complete its contract to deliver a quantity of cloth. The contract was entered into during the war. Only a small portion was delivered. Plaintiff was a jobber which had resold most of the goods ordered, as the defendant knew. Plaintiff was unable to secure merchandise elsewhere to fill its orders, although it tried diligently. However, during the war none of the cloth was available as the government had taken practically the entire woolen goods supply. Defendant argued that because the government took over the supply it was impossible to perform its contract. However, the government had not taken over the supply until after delivery was due under the terms of the contract. It was, therefore, impossible for plaintiff to secure substitute goods at that late date, but defendant might have performed in full had it taken proper preparatory steps in season. The force of this case is perhaps somewhat weakened because the court relied on the decision in the trial court in the Mawhinney case, which was reversed by the Court of Appeals of New York in a decision summarized below. However, there is no inconsistency between the two cases, and the validity of the present case would seem established.

Another case along these lines is *Crown Embroidery Works v. Gordon.* Plaintiff was a dress manufacturer and defendant was a dress cloth manufacturer. On May 21, 1918, plaintiff placed an order for a quantity of cloth to be delivered during June, July and August, 1918. Defendant failed to make complete delivery and plaintiff bought an action for damages. The contract contained this clause: "It is provided that we shall not be liable for delivery in case of quarantine, floods, fires, strikes, or from any cause beyond our control." Defendant alleged that its manufacturing could not go on unless it secured yarn from the yarn manufacturers and that it had valid contracts with such manufacturers for the delivery of ample quantities of yarn but the War Industries Board under the National Defense Act enacted regulations having the effect of cutting off the yarn supply of the defendant. The defense also showed that when the prohibition was relaxed, which was shortly after the end of August, defendant had tendered full performance, which was refused. The court stated that defendant could and should have been able to procure sufficient yarn before the government prohibition went into effect had proper diligence been exercised. The court admitted that if it was contemplated that defendant should purchase the raw material after making the contract and the purchase of such raw material became unlawful at that time, there would be a case of legal impossibility. However, there was nothing to indicate that the parties thus contemplated. The court did not discuss the excuse clause in the contract as it considered the issue settled.

37 180 N.Y.S. 158 (1920).
The last case to be discussed is *Mawhinney v. Millbrook Woolen Mills*. On February 9, 1917, defendant agreed to deliver a quantity of woolens to plaintiff during the months of May, June and July, 1917. On failure to deliver in full, plaintiff sued for damages for breach of contract. In May of 1917, defendant contracted to deliver certain quantities of woolens to the army. It entered into supplemental contracts with the government in July, August, and November, 1917, all of which increased the quantities to be delivered. The defendant began manufacturing the goods called for in the government's orders in May, 1917, but it was not until November that its cloth was formally requisitioned by the government. The court referred to the National Defense Act and stated that notwithstanding the fact that no formal requisitions were effected prior to November, still the orders that were given were in the spirit of the National Defense Act all along and the defendant's understanding was that said orders were mandatory in effect and that failure to give precedence to the government's orders would lead to the commandeering of defendant's plant and materials. The court agreed with the Roxford case, that the defendant was absolved, thus reversing the decision in the lower court which had held for the plaintiff on the theory that only formal orders specifically given under the National Defense Act could excuse failure to deliver. The Court of Appeals' decision appears to be the more realistic one.

**Conclusion**

The conclusions to be derived from these cases are: first, in the absence of a *specific* escape clause in any contract, the outbreak of the present war will not serve as an excuse for failure to perform said contract, and secondly, that interference with sources of supply by the United States Government acting under the National Defense Act would justify a failure to perform.

JEROME RICHARD

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38 231 N.Y. 290, 132 N.E. 93 (1921).
39 Member of Illinois Bar.
"Domicile" and "Residence" as Used in Divorce Statutes

Probably no words used in statutes or in legal phraseology have presented more difficult problems of interpretation and construction to the courts than the words "residence," "domicile," and terms closely associated with them in meaning and in derivation. These words appear in almost every type of statute where it is necessary to define and limit the legal rights and duties of persons, or to confer or withhold the jurisdiction of courts in certain classes of cases. The most common use of such terms occurs in statutes relating to voting, support of paupers, insolvency, administration of estates, exemptions, attachments, garnishments, guardians, minors, taxation and divorces.

The problems of construction and interpretation raised are many and the solutions contained in court decisions are almost as numerous. A study of cases construing the terms in the various types of statutes mentioned above leads to the conclusion that there is no common denominator which, when applied to the cases, will fit them into a general plan or pattern. This is not surprising when we realize that forty-eight state legislatures, passing forty-eight sets of statutes, to be interpreted by forty-eight state courts, may have a wide variety of intents or purposes in mind when the statutes are enacted. The most that can be said is that the courts, in construing one statute (such as a divorce law), may find some aid in previous cases construing other statutes (such as voting laws or

1 The variety of terms used in statutes makes it impossible to mention more than a few of them. The most common requirement for jurisdiction in divorce statutes is a certain period of "residence" in, or that the complainant be a "resident" of, state. Other statutes require the person filing suit to be a "citizen," a "bona fide resident," an "actual resident," an "inhabitant," an "actual bona fide inhabitant," a "domiciled inhabitant," etc. The addition of qualifying adjectives to the basic terms has aided some courts in interpreting the statutes, but the fundamental problem remains one of determining the intent of the legislature when it uses the terms "residence" and "domicile."

2 For use of terms in some Illinois Statutes see, Ill. Rev. Stat. 1939: Ch. 3, § 18, (bona fide resident, nonresident); Ch. 4, § 11, (inhabitant); Ch. 11, § 1, (not a resident); Ch. 39, § 1, (residents, nonresident proprietors); Ch. 46, § 65, (person having resided in state one year. § 66 contains specific definition of residence); Ch. 62, § 9 (nonresident); Ch. 64, § 2, (inhabitants of or residents in county); Ch. 85, § 43, (legal domicile in another state); Ch. 86, § 2, (nonresident); Ch. 107 § 14, (persons lawfully resident therein. § 17 contains specific definition of residence); Ch. 120, § 375, (resident, nonresident). See also 9 R.C.L. 399-403, §§ 195-200; 9 R.C.L. 540, § 4; Goodrich, Conflict of Laws (2d ed.), §§ 16-17.

3 For use of terms in Illinois Divorce Act see: Ill. Rev. Stat. 1939, Ch. 40, § 3: "No person shall be entitled to a divorce in pursuance of the provisions of this Act, who has not resided in the State one whole year next before filing his or her complaint or petition, unless the offense or injury complained of was committed within this State, or while one or both of the parties resided in this State."

4 Restatement, Conflict of Laws, § 9, comment (e); 9 R.C.L. 540, § 4; Beale, Residence and Domicile; J. H. Beale, Residence and Domicile, 4 Iowa L. Bull. 3.

5 C. G. Vernier, American Family Laws (Stanford University, Cal.: Stanford University, Press, 1932), II, 106; Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).
taxation laws). Even in the limited field of divorce cases it is difficult to find a common thread running through the decisions.

There are, however, certain general principles which have been evolved in the cases dealing with residence and domicile, and also some well known and often quoted definitions with which the courts test particular factual situations as they arise. Since these principles and definitions may be applied to divorce statutes, it may be well to examine the nature of divorce actions.

The Nature of Divorce Actions

A decree of divorce (leaving out of consideration the subject of alimony) is not a personal judgment secured by one person against another, but rather a decree changing and declaring the civil status of two persons. It is primarily an "action in rem" and, as such, it must be brought where the "res" is located. The "res" is generally said to be the "marriage status" and this is situated at the "matrimonial domicile." Whether we look on this rule to be merely a legal fiction or not, it seems logically sound. A decree of divorce does not command one person to do a positive act such as to pay a money judgment, perform a contract or deliver up property. Its main effect is to declare that two persons formerly married in the eyes of the law are now to be considered as single persons, and that they no longer owe the duties or enjoy the rights of married persons. The principle difficulty with the "in rem" theory arises from the fact that the "res" is so ethereal and elusive. A marriage status or a matrimonial domicile is so uncertain as to make it almost impossible to determine where it is located.

6 Dutcher v. Dutcher, 39 Wis. 651 (1876); Hall v. Hall, 25 Wis. 600 (1870); Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926).
7 Goodrich, Conflict of Laws (2d ed.), 339, § 125; Hiles v. Hiles, 164 Va. 131, 178 S.E. 913, 106 A.L.R. 1 (1935). This case contains an excellent discussion of residence and domicile. The annotation to this case in 106 A.L.R. 6-40, is one of the best collections of cases on the subject to be found.
8 The most frequently quoted definition of domicile seems to be that of Mr. Justice Story, "That is properly the domicile of a person, where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." Story, Conflict of Laws (8th ed.) § 41. The Restatement of Conflicts, § 9 defines domicile as follows, "Domicile is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law." "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home." In re Newcomb's Estate, 192 N. Y. 238, 84 N.E. 550 (1908). For other definitions of residence and domicile see Goodrich, Conflict of Laws (2d ed.), §§ 14, 16, 17; 9 R.C.L. 536, § 1.
domicile cannot be located as easily or with as much certainty as a tract of land.  

_Domicile as the Basis of Divorce Jurisdiction_

In this country we look on the marriage relationship as a matter in which the state is vitally concerned. The state declares what formalities are necessary to contract a valid marriage and defines the duties of the parties once the relationship is created. The reasons for these rules are obvious. If a wife or children are deserted, mistreated or not supported they are likely to become public charges. It is, therefore, natural that the state is vitally interested in the obligations to be imposed by the marriage relationship. Problems also arise, in almost every divorce action, concerning the support for the wife and children, custody of children, division of property and hence the state is again concerned. What state? Obviously the state with which the parties are most intimately connected, that is the place where the parties live or dwell or have their home. In other words, the state of their domicile.

It is a general rule that every state has the power to determine for itself the civil status and capacities of its inhabitants, and also that every state has exclusive power to deal with property or things within its territory. Since a suit for divorce is an action in rem, and since the decree is essentially a decree affecting the status of the parties, it was natural that the courts adopted the rule that only a court in the state where the parties were domiciled, had jurisdiction to grant a divorce. It has also been held that even if both parties appear in the suit, the decree will not be entitled to recognition if in fact there was no domiciliary jurisdiction.

So long as both parties to a divorce suit remained domiciled in the same state the only problems that arose were mainly problems of venue

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and local procedure rather than jurisdiction. The question of domicile was always present as a question of fact but having found the fact of domicile, there was no doubt as to the power of the court to grant the divorce.

But when the parties were domiciled or resided in different jurisdictions, difficult problems arose. The first question that arose in such situations was, can the wife have a separate domicile? Because of the fiction that husband and wife were one person, the wife’s identity being merged with that of the husband, the early rule was that under no circumstances could a wife have a separate domicile so long as the marriage existed. Such is still the rule in England. But in America when we began to relax the restrictions on married women by statute and decision, the rule as to domicile seemed unnecessarily harsh. Where a husband deserted his wife and family and evaded the duties of support and protection which the law had cast upon him, it seemed wrong to hold that the wife’s domicile followed him wherever he went. It was not long until the courts were holding that, when the husband deserted the wife, she could acquire a separate domicile at the place where the desertion occurred and secure a divorce there. And the wife need not remain in the place which was the last matrimonial domicile but was free to go where she chose to establish her new domicile. But suppose the husband did not desert the wife, but was guilty of some other offense which would be the ground for divorce, could she then leave and establish a separate domicile and secure her divorce there? The courts have so held, and the doctrine has now been extended in some jurisdictions so that whenever the wife separates from the husband without herself being guilty of desertion, she may acquire a separate domicile. There is now some authority to the effect that the wife may, with the husband’s consent, retain her separate domicile.

Allen v. Allen, 175 Ill. App. 220 (1912); Davis v. Davis, 30 Ill. 180 (1883); Walton v. Walton, 6 S.W. (2d) 1025 (Mo. App., 1928).

Garrett v. Garrett, 252 Ill. 318, 96 N.E. 882 (1911); Kennedy v. Kennedy, 87 Ill. 250 (1877); Field v. Field, 103 N. J. Eq. 174, 142 A. 644 (1928); Schneider v. Schneider, 103 N. J. Eq. 149, 142 A. 417 (1928).

Goodrich, Conflict of Laws (2d ed.), 53, § 31; Beale, The Domicile of a Married Woman, 2 So. L. Q. 93.


To so hold would leave the wife without remedy, unless she were financially able to follow the deserting husband to some distant forum to bring suit and to maintain herself there through a long period of litigation.


Ditson v. Ditson, 4 R. I. 87 (1856). This case contains one of the best expositions of the reasons and necessity for the rule that is to be found. See also Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604 (1870); Brown v. Brown, 164 Ill. App. 589 (1911).


domicile at the time of the marriage, even though the husband is and continues to be domiciled in another state. 28

Thus far we have considered domicile as the primary basis on which jurisdiction for divorce in Anglo-American law rests. In evolving the general principles applicable to this field of law the courts experienced difficulties, but the principles are now fairly well settled. The full faith and credit clause of the Federal Constitution, as applied to enforcement of divorce decrees of other states, has further complicated the problems in the United States but here also we have built up a set of fairly practical rules. It is not within the scope of this note to treat the constitutional problems, and the countless writings of eminent authorities make such discussion unnecessary. 29

American Divorce Statutes

In considering American statutes on divorce we find further complications of the problem of jurisdiction. Divorce jurisdiction in the United States is wholly statutory, 30 and until the legislature has conferred jurisdiction upon some court there can be no judicial divorce. 31 Forty-seven of the forty-eight states now have statutes vesting in some court the jurisdiction to grant absolute divorce. 32 Of the states granting absolute divorce, forty-six require a definite period of residence, domicile, citizenship or inhabitancy, varying in length from six weeks to five years. 33 It thus becomes necessary to determine what these statutes

28 Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933), noted in 82 U. of Pa. L. Rev. 55. Professor Goodrich urges that having come this far, there is no reason why we should not take the final step and allow a wife to acquire a separate domicile for all purposes whenever she does the things that establish a domicile for anyone else. There are many good arguments in favor of this. See Goodrich, Conflict of Laws (2d ed.), 55, § 33.


32 C. G. Vernier, American Family Laws, II, 106, § 82; South Carolina, by constitutional provision, forbids divorce.

33 C. G. Vernier, American Family Laws, II, 106, § 82. New York seems to have no statutory requirement for a certain period of residence. Nevada and Idaho now require only six weeks and Massachusetts requires five years. Thirty-five states, including Illinois and the District of Columbia, require one year of residence, inhabitancy, citizenship, etc. Some states, however, require a longer period of residence for certain grounds for divorce than for others. A table of the various
have added to the fundamental requirement of domicile in divorce jurisdiction.

The most widely used terms in these statutes are "resident" or "residence," and there are scores of cases construing these words. Since the legislatures are presumed to have had in mind the earlier cases on domicile when these statutes were enacted or amended, it might be expected that the courts would give to the term "residence" a meaning different from that which the courts have given to the legal term "domicile." Yet it is almost universally stated that the term "residence," when used in a divorce statute, means domicile. A minority of the states, however, have stated that the two terms are not synonymous.

What, then, is the true meaning of the word residence as used in these statutes? It is probably impossible to answer the question in such abstract form, or to give a definition broad enough to include every situation to which the term might properly apply. We can only look to the cases to see if there are any concepts on which most courts agree.

In Miller v. Miller, the parties were domiciled in Vermont until the wife was forced to leave because of the husband's cruelty. The wife moved to Illinois and, after a year's absence, she returned to Vermont and filed her bill for divorce. The defendant insisted that the wife had not been a "resident" of Vermont for the year preceding the filing of the suit as required by statute. The court, however, granted the divorce, stating that the word residence as used in the statute, does not mean actual living within the state, but rather means legal residence, which in turn means domicile. In Bechtel v. Bechtel, the factual situation was even stronger, as the wife had left the matrimonial statutes is set out in C. G. Vernier, American Family Laws, II, 106, § 82 and Supplement (1938).


37 88 Vt. 134, 92 A. 9 (1914). Here the court looks to the purpose of the statute which is said to be to prevent citizens of other states from coming to Vermont and securing fraudulent divorces. The court, impressed by the fact that Mrs. Miller had always lived in Vermont before the separation, merely states that no question of fraud arises in such a case.

38 101 Minn. 511, 112 N.W. 883 (1907). Here the court states that the main purpose of the statute is to prevent nonresidents of Minnesota from using Minnesota courts in divorce suits but that no such problem arises in this case. Thus the court found that the husband's domicile remained the wife's domicile for the purpose of filing a divorce suit; therefore it was concluded that her "legal residence" was in Minnesota and that she was an "actual resident" of Minnesota, although she had been living in Mass. for four years.
domicile in Minnesota and had lived in Massachusetts for about four years, and the Minnesota statute required the parties to have been "inhabitants" of the state for one year and required the wife to be an "actual resident" at the time of filing suit. Yet, when the wife returned to Minnesota and filed suit, the divorce was granted, the court stating that the legislature must have meant legal residence of domicile, since mere residence without domicile is insufficient to confer jurisdiction.

This is the weight of authority and there are countless cases which follow the rule and cite the cases mentioned. Let us look now to some of the cases holding the minority view. In Bowman v. Bowman, the Illinois court was called upon to dissolve a common law marriage alleged to have been entered into by the wife (a resident of Chicago) and the husband (a resident of St. Louis, Mo.). The defendant claimed that, when the marriage took place, his domicile in St. Louis became the domicile of the wife. The Illinois court agreed that, by a fiction of the law, this is true, but stated that "such fictitious domicile did not affect the fact of actual residence. . . .", and the court granted the divorce. In Trinchard v. Grace we have the opposite situation, where the plaintiff husband (a cotton broker) had lived in New Orleans most of the time for thirteen years but had been absent on business trips for long periods, even working out of brokerage offices in other states for one or two years at a time. The statute required "continuous residence" for the period of desertion (seven years) and the court refused to take jurisdiction. The court stated that if the question were one concerning domicile they might find that the plaintiff retained his Louisiana domicile, but that the statute requires something more. In McCarthy v. McCarthy the husband and wife were members of the theatrical profession and, after the separation in New York, the wife and child moved to Rhode Island. In a three year period the wife was employed in New York or on the road most of the time but spent from five weeks to two months in Rhode Island with her child each summer. In her suit for divorce the court

39 Herron v. Passailague, 92 Fla. 818, 110 So. 539 (1926); King v. King, 74 N. J. Eq. 824, 71 A. 687 (1908); Graham v. Graham, 9 N. D. 88, 81 N.W. 44 (1899); Hinds v. Hinds, 1 Iowa 36 (1855). See also Annotation, 106 A.L.R. 6.

40 24 Ill. App. 165 (1887).

41 It should be noted that the wording of the Illinois statute is peculiar in that the requirement of one year's residence is dispensed with if (1) the offense was committed in Illinois or (2) while one or both parties resided here. In the Bowman case at page 178, the court states that by force of the statute "a married woman may be an actual resident . . . though she has no domicile here; and if, while she is such actual resident, the offense . . . is committed, . . . thereafter her actual place of residence becomes her separate and legal domicile." See also Way v. Way, 64 Ill. 406 (1872).

42 152 La. 942, 94 So. 856 (1922).

43 The court further states that they do not think that the statute requires that the plaintiff must remain every moment of the time. But he must actually reside in the state and maintain a place to which he can and does return when the causes which took him away have ended. Note how near this seems to Justice Story's definition of domicile, note 8, supra.

44 45 R. I. 367, 122 A. 529 (1923).
NOTES AND COMMENTS

held that she had not satisfied the statutory requirement of "continuously residing" in the state for two years.\(^{45}\)

It would serve no purpose to continue to examine the myriad cases which have followed either the majority or minority rule. The facts are so diverse, the language of the statutes so varied, and the equities with the particular parties so strong or weak, that the results cannot be forecast with certainty. The key to the holdings of the courts seems to be the public policy of the state or the legislative purpose in enacting the statutes. In *Miller v. Miller*\(^{46}\) and *Bechtel v. Bechtel*\(^{47}\) the courts pointed out that the statutes were enacted to prevent nonresidents from using the courts, yet the courts took jurisdiction of suits by wives who had been physically residing a thousand miles away for one and four years respectively. Why? The answer is found in the opinions. Here both plaintiffs and defendants had been lifelong residents of, and domiciled in, the state of the forum prior to the separation for cause. These were not cases of "foreigners" seeking to impose on local courts. Here were two mistreated wives returning from involuntary exile to ask the courts of their home state to enforce their marital rights. Thus the interpretation of the word residence to mean domicile enables the courts to accept jurisdiction of a class of cases where the equities are with the plaintiff.

What of the cases where the husband deserts the wife and establishes his domicile in a new state and the wife later seeks to enforce her rights there? Should the court take jurisdiction? In *Thoms v. Thoms*\(^{48}\) the Illinois court granted a divorce in such a case. The court did not state that residence in the statute means domicile but, since the wife had never lived in Illinois, it is submitted that the jurisdiction was based purely on the fiction that the wife's domicile follows that of her husband.\(^{49}\) In *George v. George*,\(^{50}\) the Kentucky court, on similar facts, refused to take jurisdiction, holding that residence as used in the statute meant actual, as distinguished from constructive, residence.

\(^{45}\) The statute here required the plaintiff to prove (1) that she was a domiciled inhabitant of the state and (2) as such she had continuously resided there for two years. The court stated at page 531: "This must be an actual and continuous residence and dwelling within this state for the prescribed period . . .".

\(^{46}\) 88 Vt. 134, 92 A. 9 (1914).

\(^{47}\) 101 Minn. 511, 112 N.W. 883 (1907).

\(^{48}\) 222 Ill. App. 618 (1921).

\(^{49}\) Here the husband had deserted the family in New York in 1901, and the wife had continued to live in New York until the suit was brought. The court states, at page 622: "We think, therefore, that under such circumstances the wife should not be denied the right to invoke the doctrine that her domicile follows her husband's residence so far as her right to maintain a suit to protect her marital rights is concerned." Note the use of domicile and residence as synonymous terms.

\(^{50}\) 190 Ky. 706, 228 S.W. 408, 39 A.L.R. 700 (1921). Here the husband deserted the family in Michigan and became domiciled in Kentucky. After five years the wife came to Kentucky and filed suit, claiming that her domicile followed the husband's, hence she was domiciled in and a legal resident of Kentucky. Here is one of the cases where a descriptive adjective may have had some effect. The statute required one year of "actual residence," and the court held that this excluded constructive or legal residence.
A third class of cases are those where a woman leaves her domicile and residence and is married outside the state to one domiciled or residing elsewhere. If she later returns to her old home to enforce her right to a divorce for the husband's misconduct, should the courts take jurisdiction? In *Berlingieri v. Berlingieri*, the most recent case on divorce jurisdiction in Illinois, the court had this problem squarely presented and held that the wife was a resident of Illinois within the meaning of the statute. The opinion in this case is a good example of the careless use of language, of which most courts are guilty, in dealing with residence and domicile. The court expressly rejects the defendant's contention that residence means domicile, citing previous cases so holding. In the next paragraph the court states, "The wife's established domicile in Illinois could not shift to that of her husband until he had established one elsewhere—and this his own testimony shows he had not done." On what basis the decision rests is left to conjecture. It seems that the court is holding that the plaintiff's residence in Illinois continued after the marriage and that the short time spent in New York and California was a mere temporary sojourn. If this is true, then we need not worry about the one year of residence, since the offense, (cruelty) although committed in California, was committed while one of the parties resided in Illinois, which takes the case out of the one year requirement.

Had the Illinois court wished to base the decision on a case from another jurisdiction, the case of *Spielman v. Spielman* would have furnished ample precedent. The facts of this case are almost exactly parallel to the Berlingieri case, and the result reached is the same.

Conclusions

What conclusions then may we draw from the interpretations of the terms residence and domicile as used in divorce statutes? The answer

51 372 Ill. 60, 22 N.E. (2d) 675 (1939), reversing 297 Ill. App., 119, 17 N.E. (2d) 354 (1938). Here the plaintiff wife was a lifelong resident of, and domiciliary of Illinois. On July 31, 1937 she was married in New York to the defendant who seems to have had a domicile of origin in Rome, Italy. After living a few days in New York hotels, they left for California, the plaintiff going by train and defendant by automobile. They lived a few days in separate rooms in a Los Angeles hotel and, after the alleged acts of cruelty, plaintiff left defendant about August 17. The present suit was filed in Cook County, Illinois, September 10.

52 Way v. Way, 64 Ill. 406 (1872); Hill v. Hill, 166 Ill. 54, 46 N.E. 751 (1897).

53 See discussion of the Bowman case, note 41 supra.


55 In this case the plaintiff wife, a lifelong resident of, and domiciliary of Washington, while on a temporary visit in Oregon married the defendant, a traveling salesman, who seemed to have no home, and hence his domicile was said to be in Maryland, his domicile of origin. After about three months of living in hotels in various cities, including six weeks at the wife's home in Spokane, the husband deserted in Oregon and the wife returned to her mother's home in Spokane and filed suit for divorce. In granting the divorce the court states, at page 38: "We are convinced that the Legislature used the word 'resident' in its usually accepted meaning, and, applying that meaning here, the appellant, who never had resided
seems to be as before indicated, that there is no common denominator. The cases are in hopeless conflict. Divorce is so intimately tied up with public policy that each state feels that it is not bound by decisions of other states. The American Law Institute despaired of stating a single, all inclusive, definition of residence and some courts have also said that the term will not admit of exact definition.

It therefore seems that we should look to the general principles underlying these statutes. Most of the courts still believe that domicile of at least one of the parties is absolutely essential to confer jurisdiction to grant a divorce, and the text writers agree. This view seems justified since, as was stated earlier, the parties are more likely to remain in a state where a real domicile exists than in a state where a mere residence for a given period has been established. This requirement will seldom work hardship, since the law has always allowed a husband to establish a separate domicile and our modern rules give a wife almost as much freedom. Thus the person establishing the new domicile may secure a divorce there if the domicile was established in good faith and if the statutes are followed so as to make it reasonably probable that the absent spouse will receive notice of the proceeding. In the case of the deserted spouse, the divorce can certainly be secured at the last matrimonial domicile where he or she is still living and, if the wife is the deserted party, she may follow the husband and secure the divorce at his new domicile, relying on the fiction that her domicile follows his.

With the added requirements of a definite period of residence, should we require an actual residence in the sense of a continuous abiding and physical presence for the full statutory period within the state of the forum? It is submitted that the fairest approach is the practical view of the courts in Bechtel v. Bechtel, Thoms v. Thoms, and Spielman outside of this state, should not have that residence taken from her by any legal fiction until there is shown an intention on her part . . . to reside elsewhere."

**Notes and Comments**

56 Restatement of the Conflict of Laws, § 9, comment (e): "The word 'residence' is often but not always used in the sense of domicile, and its meaning in a legal phrase must be determined in each case. It is sometimes used as equivalent to 'domicile'; sometimes it has a broader meaning; and sometimes it has a narrower meaning."

57 Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).


59 Goodrich, Conflict of Laws (2d ed.), 334, § 123; Beale, Conflict of Laws, I, 472, 476, §§ 110.4, 111.1; Madden, Persons and Domestic Relations, 312-319, §§ 93-96.

60 Restatement of the Conflict of Laws, § 113. This section has been severely criticized by many writers on the ground that it not only enlarges the right of the wife to secure a divorce at her separate domicile, but at the same time narrows the right of the husband by requiring him to show the propriety of the separation in order to acquire a domicile for the purpose of securing a divorce. An excellent discussion of these problems and citations of authorities is contained in Goodrich, Conflict of Laws (2d ed.), 341 et seq., § 128.


63 101 Minn. 511, 112 N.W. 883 (1907).

64 222 Ill. App. 618 (1921).
v. Spielman. In none of these cases was the court called upon to grant a divorce to a person who had sought out this particular forum simply because the divorce statutes were more liberal. Thus the public policy of the state was not violated, although the term residence was given a rather broad meaning. Where, however, neither party has previously lived within the state of the forum, and the plaintiff now alleges the required residence, it seems that the courts should then require proof of a real, bona fide domicile and also actual residence for the full statutory period. This would at least put some obstacles in the way of the plaintiffs who, at the first sign of marital discontent, take a time table in one hand and the statute books in the other and start shopping for a convenient divorce forum.

It must be remembered that this discussion has dealt mainly with the problem of whether a court should take jurisdiction in certain situations, not whether it may take jurisdiction or whether its decrees will be enforced in other states. There seems to be a definite trend toward liberalization of divorce laws both by statute and by decision. Along with this there has been a marked tendency toward strengthening the marriage laws. How far this trend will go only time will tell. Perhaps the two trends indicate a gradual change in the deep rooted and fundamental public policy as regards the family as a social institution.

W. S. McClanahan

65 144 Wash. 421, 258 P. 37 (1927).
66 This article has deliberately avoided discussion of the cases in certain of the western states, since their statutes and decisions go far beyond the principles followed by a vast majority of the states, and the decrees of these courts are often questioned and refused recognition in other states. For a particularly flagrant disregard of the rule that divorce should be based on domicile see Squire v. Squire, 186 Ark. 511, 54 S.W. (2d) 281 (1932). The court stated at page 281, “Even though she moved to this state to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the court of jurisdiction, if she were actually and in good faith a bona fide resident for the period prescribed by statute.” This case and the entire attitude of the states which are frankly seeking to attract divorce litigants are severely criticized in “Our Growing Divorce ‘Racket’ and Its Legal, Social and Economic Consequences,” 17 Minn. L. Rev. 638.
67 From 1931 to 1939 twelve jurisdictions amended their residence requirements for divorce, the tendency being to reduce the necessary period of residence. During this period Nevada reduced its residence requirement from three months to six weeks, Arkansas from one year to three months, Idaho from one year to three months and then to six weeks and Florida from two years to ninety days, C. G. Vernier, American Family Laws, II, 106, § 82 and Supplement (1938).
68 Twenty-six jurisdictions now have statutes requiring some advance notice before marriage, twenty-five of which have been adopted since 1897 and nine since 1930. Thirty jurisdictions now have statutes prohibiting marriage of persons having certain diseases, including epilepsy, tuberculosis and venereal diseases. Thirteen of these states require a medical certificate before issuance of a license. Four of these statutes have been enacted in the past eight years. C. G. Vernier, American Family Laws, I, 54 et seq. and Supplement (1938).
PRACTICE CASES

APPEAL AND ERROR—EFFECT OF DECISION ON FORMER APPEAL—WHEN DECISIONS ON FORMER APPEALS NOT THE LAW OF THE CASE ALTHOUGH EVIDENCE SUBSTANTIALLY THE SAME.—Where, after reversal of a judgment as being contrary to the weight of the evidence, on the second trial without a jury the trial court reached the same decision as before on substantially the same evidence, it was held in Manitoba on the second appeal that the appellate court should not again reverse the judgment since the decision rested on the credibility of witnesses.¹

In Illinois, the rule has been stated that on the third successive appeal from identical verdicts in jury trials, unless there is no evidence to substantiate the verdict, the court ought not to reverse the judgment since the effect would be to usurp the function of the jury and the trial judge.²

The question involves the application of the doctrine of Law of the Case. As a general rule, the appellate court on a second appeal is bound by its judgment on a former appeal where the evidence and pleadings were substantially the same on retrial.³ There is some tendency to reconsider the former decision if it is erroneous and unjust.⁴

¹ Golden v. Canadian Consolidated Grain Co., Ltd. [1939] 3 W.W.R. 144 (Manitoba). This was a suit for personal injuries. The evidence was in conflict. In each case the trial court rendered decision for the plaintiff. The decision was reversed on the first appeal as being contrary to the weight of the evidence. On the second appeal the court affirmed the verdict for the plaintiff below.

² Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1 (1931); In re Estate of Swift, 267 Ill. App. 224 (1932), where the court said findings of three judges ought to be given as much weight as three verdicts. It must be noticed that in each of these cases, the appellate court reversed twice and affirmed only after the third trial resulted in the same verdict. The rule ought to be the same whether it is the second or third appeal. Does it require three appeals before the court in its policy to limit litigation will feel bound by the successive verdicts of the lower court? Or is the rule dependent on the additional weight given to credibility finally impressing itself on the appellate justices? McFarland v. Washburn, 26 Ill. App. 355 (1887). After two successive verdicts for the plaintiff, on second appeal the court reversed again without remanding it.

³ People v. Young, 309 Ill. 27, 139 N.E. 894 (1923); City of Chicago v. Lord, 279 Ill. 167 (1917); Knowles F. & M. Co. v. National Plate Glass Co., 301 Ill. App. 128 (1939); “The doctrine of law of the case is confined to a previous decision between the same parties where the same set of facts is afterward presented.” In re Estate of Swift, 267 Ill. App. 224 (1932), where third verdict for plaintiff was finally affirmed by the appellate court on the ground that evidence on retrial was substantially different; McFarland v. Washburn, 26 Ill. App. 355 (1887), strictly applying doctrine in face of a successive verdict for plaintiff; 2 R.C.L. Appeal and Error § 187; 5 C.J.S. Appeal and Error § 196d.

⁴ Blackhurst v. James, 304 Ill. 586, 592, 136 N.E. 754 (1922): “Considering the testimony then heard and the additional evidence heard at the last trial, we cannot say the decree is manifestly against the weight of the testimony.... There can be no doubt that under the authorities this court now has the power to set aside the verdict and reverse and remand for another trial; but this case has been tried before two juries, each of which found against the will, and two different judges have approved the verdicts and rendered decrees setting aside the will. In such cases reviewing courts are more reluctant to reverse than where there has been only one verdict.” Gillum v. Central Illinois Public Service Co., 250 Ill. App. 617
It would seem that where a judgment has been reversed and remanded because of the insufficiency of the evidence, the party against whom such decision has been rendered ought to introduce new evidence on retrial of the cause, or, in the alternative, fail in his contention. However, where the evidence supporting the verdict of the lower court is not insufficient, standing alone, to justify a verdict in the party’s favor, the appellate court ought to be bound by a succeeding verdict in his favor, since it rests on the credibility of the witnesses. Successive like verdicts give increasing weight to the item of credibility and give reason for excepting a case from the doctrine of Law of the Case and for affirming such verdicts where there is a conflict of evidence.

R. Richman

Courts—Rules of Court and Conduct of Business—Whether Rule of Municipal Court Declaring Defendant in Contempt of Court for Wilful Retention of Replevied Chattel Is One of Substance or One of Practice.—In the case of Universal Credit Company v. Antonsen, the Illinois Appellate Court had occasion for the first time to construe the Chicago Municipal Court rule declaring a defendant in contempt (1928). On first appeal it was held that wilful conduct under the evidence was a question for the jury. On second appeal, held that the court is bound by its decision on appeal and the verdict by the jury notwithstanding that the Supreme Court since the first appeal has announced a ruling which might warrant reversal of the original holding of the Appellate Court. It should be noted that in the Blackhurst case, there was a conflict in the evidence. In the Gillum case, while the original decision was or might have been erroneous, there was nothing unjust or against conscience in upholding the prior decision. See also McGovern v. Kraus, 200 Wis. 64, 227 N.W. 300, annotated in 67 A.L.R. 1381 (1929); 2 R.C.L. 226; Kozisek v. Brigham, 183 Minn. 457, 237 N.W. 25, 26 (1931): “There is no doubt but that this court has power . . . even to the extent of overruling a prior decision made on a prior appeal in the same case. But the power . . . has rarely, if ever, been exercised by this court.”

5 West v. Douglas, 145 Ill. 164, 34 N.E. 141 (1893), where the second trial resulted in a verdict opposed to the first decision and followed the mandate of the appellate court on the first appeal.

6 Blackhurst v. James, 304 Ill. 586, 593 (1922): “If there is no evidence to sustain the verdict a reviewing court will set it aside and reverse the decree no matter how many juries have found the same way.” St. Louis I. M. & S. Ry. Co. v. Mort- gart, 56 Ark. 213, 19 S.W. 751 (1892). The court reversed again on third appeal, this time finally because the evidence was insufficient to justify verdicts for plaintiff.

7 Weisguth v. Supreme Tribe of Ben Hur, 194 Ill. App. 17 (1915): “A verdict for the plaintiff will not be disturbed as manifestly against the weight of evidence and credence given to the testimony of one witness as against two others, where two juries have found for the plaintiff and the verdicts have been approved by the trial judges.”

1 22 N.E. (2d) 790 (Ill. App., 1939).

2 Rule 238h: “Whenever the property described in the writ, or any part of such property is so concealed that it can not be found by the bailiff, or other officer, he shall, if the plaintiff so requires, make demand upon the defendant for the delivery of the property not so found, and upon such demand being made, it shall be the duty of the defendant, if such property is in his possession or under his control, to comply with such demand and deliver the same to the officer and his failure so to do shall be deemed a contempt of court and may be punished as such accordingly,
of court, who retains replevied property in his possession or under his control after demand has been made upon him to deliver it to the court bailiff. Upon the defendant's appeal to the Supreme Court it was there held that no question of constitutionality was involved, and the case was transferred to the Appellate Court for its determination of whether this rule was one of substantive law which the Municipal Court had no power to make, or one of practice. The rule was held to be one of practice.

Section 375 of the Municipal Court Act specifically gives the municipal court judges power to adopt such rules of practice as they may deem necessary and expedient. Practice has been defined as the mode and order of procedure in obtaining compensation for an injury by action or suit in the legally established courts, from the inception of such suit until its termination in a court of last resort. The problem of applying this definition of practice has been before the courts many times. In proceedings under the Replevin Act if a defendant wrongfully conceals replevied property and refuses to surrender it, the plaintiff's sole remedy is to bring an action for the wrongful detention and recover a judgment for the value of the property not found. The municipal court rule in question is not in conflict with, but supplemental to the Replevin Act in discouraging defendants in replevin proceedings from concealing property and disobeying the court, and in accelerating the object of the suit through the procedure provided.

and the court may enter and enforce all orders necessary to compel the delivery of such property to the officer; Provided, however, that the defendant in such case may, in the discretion of court, be permitted to secure the delivery of the property by the giving of a forthcoming bond as provided in rule 238d, or the court may order the property placed in the custody of a custodian or receiver to be disposed of in accordance with the rights of the parties as determined by the final judgment in the action, or the court may make such other order as the court may deem necessary or proper for the protection of the rights of the parties."

5 Ill. Rev. Stat. 1939, Ch. 37, § 375.
6 Fleischman v. Walker, 91 Ill. 318 at 320 (1878).
7 In Wilson v. Gill, 279 Ill. App. 487 (1935), the court held that Municipal Court Rule 265 was one of practice designed to prevent any abuse of the process of the court. There a judgment creditor sought a writ of mandamus to compel the municipal court clerk to issue a capias ad satisfaciendum. The judgment creditor had failed to comply with a municipal court rule providing that such a capias shall not be issued by the clerk unless the judgment creditor has procured a special order of the court therefor. See also Am. Credit Indemnity Co. v. Yamer, 170 Ill. App. 350 (1912); City of Chicago v. Williams, 254 Ill. 360, 98 N.E. 666 (1912).