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CITIZENSHIP FOR PURPOSES OF DIVERSITY JURISDICTION*

by

Donald T. Weckstein**

JAMES Wilson of Pennsylvania spoke prophetically during the ratification debates on the Constitution: "This part of the jurisdiction [of diversity and alienage cases], I presume, will occasion more doubt than any other part, and at first view, it may seem exposed to objections well founded and of great weight, but I apprehend this can be the case only at first view."¹ This statement, in all of its elements, I believe, is as true in 1972 as it was when made on December 7, 1787. After almost two hundred years of experience the doubts remain and the objections maintain surface appeal, but both should continue to yield to close analysis and realistic scrutiny. Nevertheless, reasonable minds have differed and continue to differ on this assertion.

The latest serious challenge to diversity jurisdiction is presented by the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts.² The Study includes proposals for a revision of the Federal Judicial Code which are far-reaching in their curtailment of diversity jurisdiction.³ These provisions have now been incorporated in a bill introduced by Senator Quentin Burdick of North Dakota.⁴ If the bill is enacted, it is estimated that a little more than half of the diversity cases presently brought in the federal courts will be shifted to the state courts.⁵ While making few alterations in the basic definitions of diversity jurisdiction, the ALI proposal would prohibit its invocation, either originally or on removal, in any federal district court in a state in which a person, corporation, or unincorporated association is a citizen or has been "locally established" for more than two years.⁶

These provisions are said to reflect the basic approach of the Study "that so far as possible state cases should be tried in state courts."⁷ The fallacy is in the application of this basic assumption: that diversity cases are state rather than federal cases. As such, the Study contends, they should not be heard in federal courts in the absence of special circumstances, such as legitimate apprehensions of local prejudice, parochial procedures, or the inability of any one state court to obtain jurisdiction of all the necessary parties to a litigation.⁸ My disagree-

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¹ 2 J. ELLIOT, *ELLIOT'S DEBATES* 456 (1836).

² ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (Official Draft 1969) [hereinafter cited as ALI STUDY].

³ *Id.* at 9, 16, 22 (proposed §§ 1301-02, 1304, 1307, to amend part IV of the Judicial Code, 28 U.S.C. §§ 1251-1583 (1971)).

⁴ S. 1876, 92d Cong., 1st Sess. (1971).

⁵ See Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts*, 48 N.D.L. REV. 1, 7-20 (1971).

⁶ ALI STUDY 12 (proposed § 1302).

⁷ *Id.* at 458.

⁸ *Id.* at 2-4, 99-110.

ment with the Institute's basic premise is recorded elsewhere,⁹ and I beg leave to incorporate by reference the detailed grounds on which I conclude that diversity cases are in fact of a federal nature. In brief, however, the federal element is found in the nature of the parties to the controversy, in that they are citizens of different states and there is no tribunal outside the federal system to which they can both claim allegiance. Article III of the Constitution recognizes that the nature of the parties (ambassadors, states, the United States) is as legitimate a federal element and basis for jurisdiction as the federal nature of the law under which controversies arise.¹⁰

Accordingly, if the function of courts is to do justice in determining disputes under the law, and if one or both of the litigants believe that better justice may be obtained in a federal rather than a state tribunal, those courts ought to be open in any case presenting the constitutional element of a federal controversy, whether that element be found in the nature of the subject matter or in the nature of the parties. This opportunity for federal justice should be available whether it is the out-of-state litigant or the local resident who seeks to avail himself of it. Today the traditional local prejudice basis for diversity is but one, and not the only, nor even the principal, reason for permitting the exercise of diversity jurisdiction.

Some may agree with the ALI position on diversity. Others may follow the position endorsed by Professor Moore and myself. Still others may find the controversy "boring," or the ALI's path to its partial retention of diversity "tortuous."¹¹ Nonetheless, the fact remains that diversity will still be with us, whether in its present form, modestly modified (as I would propose), or tragically truncated (as I would view the Institute's proposals).

While innovations in the definitions of citizenship for corporations, associations, and personal representatives are suggested by the ALI,¹² no attempt is made to redefine or alter traditional judicial approaches to the definition of citizenship for natural persons.¹³ Indeed, despite the generally comprehensive nature of the Institute's Study, this subject is hardly discussed. It will be my purpose to review this subject, to report and analyze the pertinent precedents, to suggest needed improvements, and to comment on those ALI proposals which do affect the application of this aspect of diversity jurisdiction.

I. GENERAL PRINCIPLES OF STATE CITIZENSHIP

The diversity jurisdiction of the federal courts extends to civil actions be-

⁹ Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 14-27, 33-34 (1964). See also 1 J. MOORE, FEDERAL PRACTICE ¶ 0.71[3] (2d ed.) [hereinafter cited as MOORE].

¹⁰ U.S. CONST. art. III, § 2, cl. 1.

¹¹ Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4, 6 (1968).

¹² ALI STUDY 10, 13 (proposed §§ 1301(b), 1302(b), (d)); cf. Moore & Weckstein, *supra* note 9, at 30-33, 35-36; Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1435-36, 1447-51 (1964); Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 WIS. L. REV. 268; Weckstein, *Multi-State Corporations and Diversity of Citizenship: A Field Day for Fictions*, 31 TENN. L. REV. 195, 210-16 (1964).

¹³ See ALI STUDY 10 (proposed § 1301(a)); Currie, *supra* note 11, at 9-12.

tween "citizens of different states."¹⁴ But what makes one a citizen of a state? The fourteenth amendment to the Constitution provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁵ For purposes of diversity of citizenship jurisdiction, however, the word "reside" has been interpreted to mean more than to be temporarily living in the state; it means to be domiciled in the state.¹⁶ Thus, to be a citizen of a state within the meaning of the diversity provision, a natural person must be both (1) a citizen of the United States, and (2) domiciled within that state.

Whether or not one is a citizen of a particular state for diversity purposes is to be determined by federal law, not the law of any state.¹⁷ Consistent with principles generally applicable to determination of federal jurisdiction, the adverse parties in a suit must be citizens of different states at the time the complaint is filed.¹⁸ If the matter is removed to the federal court they must be citizens of different states at the time of the filing of the removal petition as well.¹⁹ Any subsequent changes in the citizenship of a party will not affect the determination of jurisdiction.²⁰ Accordingly, federal jurisdiction was held to exist both where a change of domicile creating diversity took place three days before suit was filed,²¹ and where a move terminating diverse state citizenship took place within a week after the action was commenced.²²

The burden of pleading the existence of diversity of citizenship,²³ and the burden of proof if it is questioned,²⁴ are on the party invoking the jurisdiction

¹⁴ 28 U.S.C. § 1332(a) (1971).

¹⁵ U.S. CONST. amend. XIV, § 1.

¹⁶ This was the rule before adoption of the fourteenth amendment in 1868. *See* *Parker v. Overman*, 59 U.S. (18 How.) 137, 141 (1856); *Brown v. Keene*, 33 U.S. (8 Pet.) 112 (1834). The rule remained after adoption of the fourteenth amendment. *See* *Robertson v. Cease*, 97 U.S. 646, 648-49 (1878); C. WRIGHT, *FEDERAL COURTS* § 26 (2d ed. 1970). *But see* *Kern v. Standard Oil Co.*, 228 F.2d 699, 701 (8th Cir. 1956).

¹⁷ *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *Taylor v. Milan*, 89 F. Supp. 880, 883 (W.D. Ark. 1950); Note, *Acquisition of Domicile of Choice*, 18 S.C.L. REV. 847, 849 (1966); *see* *Napletana v. Hillsdale College*, 385 F.2d 871, 872 (6th Cir. 1967).

¹⁸ *Anderson v. Watt*, 138 U.S. 694, 702, 707-08 (1891); *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

¹⁹ *Jackson v. Allen*, 132 U.S. 27 (1889); *Gibson v. Bruce*, 108 U.S. 561 (1883); *see* 1A MOORE ¶¶ 0.157[12], 0.161[1], 0.168[4.—1].

²⁰ *Clarke v. Matheson*, 37 U.S. (12 Pet.) 164, 171 (1838); *Morgan Heirs v. Morgan*, 15 U.S. (2 Wheat.) 290, 297 (1817); *see* *Schlesinger & Strasburger, Divestment of Federal Jurisdiction: A Trapdoor Section in the Judicial Code*, 39 COLUM. L. REV. 595 (1939). *See also* *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959):

Generally, in a diversity action, if jurisdictional prerequisites are satisfied when the suit is begun, subsequent events will not work an ouster of jurisdiction. . . . This result is not attributable to any specific statute or to any language in the statutes which confer jurisdiction. It stems rather from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action.

But see *Mazzella v. Pan Oceanic A/S Panama*, 232 F. Supp. 29 (S.D.N.Y. 1964) (permission granted to claim jury trial on basis of newly created diversity where court already had admiralty jurisdiction).

²¹ *Anderson v. Splint Coal Corp.*, 20 F. Supp. 233 (E.D. Ky. 1937), *aff'd*, 109 F.2d 896 (6th Cir.), *cert. denied*, 311 U.S. 661 (1940).

²² *Truitt v. Gaines*, 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1963).

²³ *See, e.g.,* *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936); *Robertson v. Cease*, 97 U.S. 646, 649-50 (1878); 1 MOORE ¶ 0.60[4]; 2A *id.* ¶¶ 8.07[1], [4], 8.10.

²⁴ *See, e.g.,* *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Kaiser*

of the federal court. Difficulties in establishing the underlying facts concerning the domicile or citizenship of the other party do not shift this burden.²⁵ A question concerning the presence of diversity jurisdiction can be raised at any time, by any party, or by the court on its own motion.²⁶ Defective allegations in the pleadings usually may be corrected by amendment.²⁷ However, the court is not limited to the pleadings in determining jurisdiction.²⁸ While there is no right to a jury trial on jurisdictional questions, the trial judge, in his discretion, may submit to the jury contested factual issues involving the presence of diversity of citizenship.²⁹

II. STATE CITIZENSHIP AND DOMICILE

A. Domicile Defined

Since a United States citizen who is domiciled in a state is a citizen of that state, state citizenship for diversity purposes is generally regarded as synonymous with domicile.³⁰ Domicile requires the concurrence of physical presence in a state and the intent to make that state a home.³¹ Despite some language in court opinions to the effect that to acquire a domicile a person must intend to make his home permanently in a particular state,³² it is sufficient if the intention is to remain there indefinitely, or that there is no fixed intention to go elsewhere or to return to the old domicile.³³

In *Gallagher v. Philadelphia Transportation Co.* the Third Circuit, remanding a decision which apparently had required an intention to reside permanently in the new domicile, said:

v. Loomis, 391 F.2d 1007, 1010 (6th Cir. 1968); *Mallon v. Lutz*, 217 F. Supp. 454, 456 (E.D. Mich. 1963) (here at best the facts regarding domicile are balanced, thus the plaintiff fails to carry burden); 1 MOORE ¶¶ 0.60[4], 0.92[2]. *But cf.* *Broadstone Realty Corp. v. Evans*, 213 F. Supp. 261, 266 (S.D.N.Y. 1962) (plaintiff has burden of controverting the allegations of the removal petition).

²⁵ *Blair Holding Corp. v. Rubinstein*, 133 F. Supp. 496, 498 (S.D.N.Y. 1955); *see Ramsey v. Mellon Nat'l Bank & Trust Co.*, 350 F.2d 874, 878-79 (3d Cir. 1965) (a defendant's stipulating to jurisdiction does not shift burden to him if he later challenges diversity).

²⁶ 1 MOORE ¶ 0.60[4]; 2A *id.* ¶ 12.23. *See, e.g., Anderson v. Watt*, 138 U.S. 694, 701 (1891).

²⁷ 28 U.S.C. § 1653 (1971); 2A MOORE ¶ 8.10; 3 *id.* ¶ 15.09.

²⁸ The court may use evidence of record or hear testimony or receive affidavits when making its determination. *See, e.g., Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377 (1904); 2A MOORE ¶ 8.10.

²⁹ *Gilbert v. David*, 235 U.S. 561, 568 (1915). The finding of the jury will be upheld unless it is without evidentiary support. *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 99 (3d Cir. 1960).

³⁰ The exceptions concern aliens who may be considered domiciled in a particular state (cases cited notes 93, 94 *infra*) and United States citizens who have abandoned a prior domicile in one state and have never acquired a new one in another state (part III *infra*).

³¹ *E.g., Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970); *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954); *see Texas v. Florida*, 306 U.S. 398, 424 (1939); *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 383 (1904); RESTATEMENT OF CONFLICT OF LAWS § 15 (1934) [hereinafter cited as RESTATEMENT OF CONFLICTS]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15, 18 (1971) [hereinafter cited as RESTATEMENT (SECOND) OF CONFLICTS].

³² *E.g., Walden v. Broce Constr. Co.*, 357 F.2d 242, 245 (10th Cir. 1966); *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954).

³³ *E.g., Williamson v. Osenton*, 232 U.S. 619, 624 (1914); *Hardin v. McAvoy*, 216 F.2d 399, 402-03 (5th Cir. 1954); *cf.* RESTATEMENT (SECOND) OF CONFLICTS § 18: "To acquire a domicile of choice in a place, a person must intend to make that place his home for the time at least."

The emphasis of the court on the permanence of the anticipated attachment to a state, in our opinion, required too much of the plaintiff. There is substantial concurrence in the correctness of the negatively stated proposition that it is the absence of an intention to go elsewhere which is controlling. . . . It is not important if there is within contemplation a vague possibility of eventually going elsewhere, or even of returning whence one came. . . . If the new state is to be one's home for an indefinite period of time, he has acquired a new domicile.³⁴

Not only is the approach of this case a sensible one in today's mobile society, but these principles find support in earlier Supreme Court opinions as well.³⁵

Although domicile as used for conflict of laws purposes and state citizenship for diversity purposes may not be the same in all cases, the federal courts sometimes rely on state conflicts cases and authorities.³⁶ While this practice may prove especially helpful when the courts are confronted with infrequently occurring circumstances for which there is little or no federal precedent, the meaning of domicile may properly vary with the purpose for which it is employed.³⁷

B. Residence Distinguished

Residence is not synonymous with domicile or citizenship.³⁸ Thus, while a person's residence may be, and often is, his domicile, it is not necessarily so. Numerous cases have held allegations that the parties were residents of different states, or that one party or the other resided in a particular state, to be inadequate to support a finding of diversity jurisdiction.³⁹ Such jurisdictional allegations may be sustained, however, on the basis of a clarifying amendment or notice of facts of record which show that diversity of citizenship in fact exists. Some courts have been willing to presume, in the absence of evidence to the contrary, that a party's residence is his place of domicile.⁴⁰ This presumption may shift the burden of producing evidence to the party challenging the allegation of domicile.⁴¹ Nevertheless, the burden of persuasion should continue to

³⁴ 185 F.2d 543, 546-47 (3d Cir. 1950).

³⁵ See *Gilbert v. David*, 235 U.S. 561, 569, 570 (1915); *Williamson v. Osenton*, 232 U.S. 619, 624 (1914); cf. *Chicago & Nw. Ry. v. Ohle*, 117 U.S. 123 (1886).

³⁶ See *Woolridge v. McKenna*, 8 F. 650, 683-84 (C.C.W.D. Tenn. 1881); *Pannill v. Roanoke Times Co.*, 252 F. 910 (W.D. Va. 1918); note 30 *supra*.

³⁷ See note 36 *supra*. See also *Currie*, *supra* note 11, at 10-12, criticizing the overly easy acceptance of the traditional concept of domicile for determining state citizenship for diversity purposes, but acknowledging that alternatives may be no more realistic, or universally applicable, or unduly complicated, or more unlikely to breed litigation than the present test.

³⁸ E.g., *Steigleder v. McQuesten*, 198 U.S. 141, 143 (1905); *Robertson v. Cease*, 97 U.S. 646, 648 (1878).

³⁹ E.g., *Realty Holding Co. v. Donaldson*, 268 U.S. 398, 399-400 (1925); *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 382 (1904); *Neel v. Pennsylvania Co.*, 157 U.S. 153 (1895). Judges sometimes express exasperation with attorneys who fail to heed the repeated rulings requiring allegations of diverse citizenship, not residence. See, e.g., *Tamminga v. Suter*, 213 F. Supp. 488, 493-94 (N.D. Iowa 1962): "It is not pedantic—in fact, it is even courtesy—for a judge to remind counsel that an allegation of *residence* is not in any sense an allegation of *citizenship*."

⁴⁰ E.g., *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 956 (5th Cir. 1966); *Eisele v. Addie*, 128 F. 941, 944-45 (C.C.D. Nev. 1904). But see *Birmingham Post Co. v. Brown*, 217 F.2d 127, 130 n.2 (5th Cir. 1954).

⁴¹ See *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 955-56 (5th Cir. 1966); *Eisele v. Oddie*, 128 F. 941, 945 (C.C.D. Nev. 1904).

rest on the party seeking to invoke federal court jurisdiction.⁴²

A party may temporarily reside in a state without any intention to remain there indefinitely or to regard it as his home. This is often the case with students living away from home.⁴³ Conversely, one may retain a domicile even though he is not presently residing there.⁴⁴

Although a person may have several residences, he can be domiciled in only one state at any one time. This may be an unrealistic classification in some cases since some people may not have any true "home" and others may maintain two or more homes. However, if one is to be considered a citizen of a state for diversity purposes, it must be determined that his principal place of residence and attachment is in that state.

The American Law Institute has proposed that an individual citizen who has had a principal place of business or employment in a state for more than two years be precluded from invoking diversity jurisdiction in the federal courts of that state.⁴⁵ This proposal is an unfortunate restriction on the federal court's exercise of jurisdiction,⁴⁶ but it does not constitute the individual a citizen of, nor establish domicile within, the state to which he commutes for his business or employment.

For most people, their domicile of birth remains their domicile throughout life, but it has become increasingly common for a person to acquire a domicile of choice, and for these persons the determination of citizenship may be more complex.

C. Domicile of Choice

When the requisite intention is coupled with physical presence, a new domicile is created instantaneously; there is no required minimum period of residence.⁴⁷ A fixed intention to acquire a new domicile does not make such acquisition operative until the physical transfer also takes place.⁴⁸ But once intention and physical presence concur, it is not necessary to maintain a physical residence continuously in such state in order to keep it as the state of domicile.

There is a presumption that an existing domicile continues in the absence of contrary evidence, and the burden is upon the party alleging the change to

⁴² See notes 24, 25 *supra*, and accompanying text.

⁴³ See *Chicago v. Nw. Ry. v. Ohle*, 117 U.S. 123, 126-28 (1886); *Sanial v. Bossoreale*, 279 F. Supp. 940 (S.D.N.Y. 1967); *Bell v. Milsak*, 106 F. Supp. 219, 220 (W.D. La. 1952); part VI, C *infra*.

⁴⁴ E.g., *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 383 (1904); *Maple Island Farm v. Bitterling*, 196 F.2d 55 (8th Cir.), *cert. denied*, 344 U.S. 832 (1952).

⁴⁵ ALI STUDY 13, 130-32 (proposed § 1302(c)).

⁴⁶ See notes 6-10 *supra*, and accompanying text.

⁴⁷ E.g., *Morris v. Gilmer*, 129 U.S. 315, 328 (1889); *Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970); *Anderson v. Splint Coal Corp.*, 109 F.2d 896 (6th Cir.), *cert. denied*, 311 U.S. 661 (1940).

⁴⁸ *Bird Mach. Co. v. Day*, 303 F. Supp. 834, 836 (D. Mass. 1969); see *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 383 (1904).

It is possible for a person vicariously to acquire a domicile in a state without ever having been there. One example is by marriage or by birth to persons who are temporarily away from their domicile. See, e.g., *Seegers v. Strzempek*, 149 F. Supp. 35 (E.D. Mich. 1957); *RESTATEMENT OF CONFLICTS* § 14, illustration 1; *RESTATEMENT (SECOND) OF CONFLICTS* § 14, illustration 1. This result may not be compatible with the policies supporting the existence of diversity jurisdiction. See *Currie*, *supra* note 11, at 10.

prove it.⁴⁹ Temporary absences from a domicile, to pursue educational⁵⁰ or employment⁵¹ opportunities, for example, are not an abandonment of domicile. Nor is the duration of the absence determinative.⁵²

On the other hand, as previously indicated, a general or floating intention to return to an old domicile or go elsewhere at some indefinite time in the future does not prevent the establishment of a domicile in one's present state of residence. In one case, the plaintiff had been a citizen of Utah, but moved to Colorado for health reasons and planned to stay as long as necessary. He hoped to return "one day" to Utah, where he still owned a home. In fact, he had returned to Utah by the time of the trial. Nevertheless, the appellate court held that the district court finding that his domicile was in Colorado was not clearly erroneous. The court reasoned that at the time the suit was instituted, the plaintiff's intention was to make a home in Colorado, where the family belongings were located, his children went to school, and his wife was active in church and community affairs.⁵³

It has been said that the determination of domicile is a compound question of law and fact, but mainly one of fact.⁵⁴ Whether or not a particular place of residence has become a domicile depends upon any number of factors which may shed light on the intention of the party concerned. No one factor, not even place of voting registration,⁵⁵ or a declaration of domicile or residence made for official purposes,⁵⁶ is controlling. While statements of intention carry considerable weight, they will not prevail over contrary facts evidencing actual

⁴⁹ *Kaiser v. Loomis*, 391 F.2d 1007, 1010 (6th Cir. 1968); *Maple Island Farm v. Bitterling*, 196 F.2d 55, 58-59 (8th Cir.), *cert. denied*, 344 U.S. 832 (1952); Note, *supra* note 17, at 852.

While the language in some of the opinions may support the conclusion that the usual rule placing the burden of proof on the party who invokes the jurisdiction of the federal court may be varied when the other party challenges the continuation of a previous domicile, it is probably more accurate to state that only the burden of going forward with the evidence shifts, not the ultimate burden of proof, or "persuasion," on the issue. See *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 955 (5th Cir. 1966).

⁵⁰ See part VI, C *infra*.

⁵¹ E.g., *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966); *Maple Island Farm v. Bitterling*, 196 F.2d 55 (8th Cir.), *cert. denied*, 344 U.S. 832 (1952).

⁵² John L. Lewis lived in Virginia for thirty years while he served as an officer of the United Mine Workers with offices in Washington, D.C., but he was held not to have forsaken his Illinois domicile since he intended to return there when his Union duties terminated, and he continued to vote and pay property taxes in Illinois. *Lewis v. Splashdam By-Products Corp.*, 233 F. Supp. 47 (W.D. Va. 1964); see notes 33, 34 *supra*, and accompanying text.

⁵³ *Leavitt v. Scott*, 338 F.2d 749 (10th Cir. 1964); *accord*, *Gilbert v. David*, 235 U.S. 561, 569 (1915); *Ehrlich v. Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970); *Hardin v. McAvoy*, 216 F.2d 399, 403 (5th Cir. 1954).

⁵⁴ See *Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970); *Julien v. Sarkes Tarzian, Inc.*, 352 F.2d 845, 847 (7th Cir. 1965).

⁵⁵ E.g., *Commercial Bank & Trust Co. v. Kattar*, 307 F. Supp. 456, 458 (D. Mass. 1969). But see *Shelton v. Tiffin*, 47 U.S. (6 How.) 163, 185 (1848) (the exercise of the right of suffrage is conclusive).

⁵⁶ E.g., *Reynolds v. Adden*, 136 U.S. 348, 351-52 (1890) (state court proceedings); *Knox v. Greenleaf*, 14 F. Cas. 814 (No. 7908) (C.C.D. Pa. 1802) (state insolvency adjudication); *Unanue v. Caribbean Canneries, Inc.*, 323 F. Supp. 63, 71 (D. Del. 1971) (divorce and other court suit pleadings and deposition); *Campbell v. Oliva*, 295 F. Supp. 616 (E.D. Tenn. 1968) (in-state tuition); *Welch v. Lewis*, 184 F. Supp. 806, 808-09 (N.D. Miss. 1960) (pleadings in probate and other court suit); *Wise v. Bolster*, 31 F. Supp. 856, 859-60 (W.D. Wash. 1939) (marriage papers); see RESTATEMENT (SECOND) OF CONFLICTS § 82.

intent.⁵⁷ Among the influential factors which may help prove the existence of domicile are the place where civil and political rights are exercised, taxes paid, real and personal property (such as furniture and automobiles) located, drivers' licenses obtained, bank accounts maintained, location of club and church memberships and of business or employment.⁵⁸

When a person's place of residence and place of conducting business differ the emphasis is usually placed on the location of his home rather than his business.⁵⁹ On occasion, the family breadwinner may have to leave his home and go to another state to seek employment and may remain in that state for an extended period of time. Normally, if his family remains in the state where they were domiciled and he returns there on weekends or other occasions, his domicile will probably remain unchanged.⁶⁰

Likewise, under present law, the person who commutes to his job in a state other than that in which he lives does not thereby lose his domicile in the latter state.⁶¹ The American Law Institute's proposal, however, would prohibit a person who commutes interstate for a period of more than two years from invoking diversity jurisdiction in the federal courts of either his state of domicile or the state where his place of business or employment is located.⁶² This would unnecessarily qualify the right of a citizen to have multi-state disputes settled in a neutral federal forum rather than the courts of a state which one party or the other may regard as less satisfactory for the adjudication of his claim.

It should be noted that the acquisition of a domicile, since it requires intent, is dependent on free choice and, therefore, does not take place when one is located in a state by compulsion.⁶³ Thus, absent other circumstances, a soldier

⁵⁷ E.g., *Shelton v. Tiffin*, 47 U.S. (6 How.) 163, 185 (1848); *Bray v. South Texas Tire Test Fleet, Inc.*, 323 F. Supp. 161, 162 (W.D. Tex. 1971); *Griffin v. Matthews*, 310 F. Supp. 341, 343 (M.D.N.C. 1969), *aff'd per curiam*, 423 F.2d 272 (4th Cir. 1970).

⁵⁸ E.g., *Bruton v. Shank*, 349 F.2d 630, 631 n.2 (8th Cir. 1965); *Griffin v. Matthews*, 310 F. Supp. 341, 343 (M.D.N.C. 1969), *aff'd per curiam*, 423 F.2d 272 (4th Cir. 1970); see *Chrystie, Where Is or Was or Will Be Your Client's Domicile?*, 1 PRAC. LAW., Oct. 1955, at 13.

⁵⁹ E.g., *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 818 n.1 (1st Cir. 1948); *Maynard v. Finney*, 92 F.2d 454 (5th Cir. 1937), *cert. denied*, 303 U.S. 648 (1938); *Commercial Bank & Trust Co. v. Kattar*, 307 F. Supp. 456 (D. Mass. 1969); see *RESTATEMENT (SECOND) OF CONFLICTS* § 11, § 12, comment g, § 18, illustrations 7, 8. "Home is the place where a person dwells and which is the center of his domestic, social and civil life." *Id.* § 12. *But cf.* *Jennings v. Fanti*, 96 F. Supp. 264 (M.D. Pa. 1951) (Plaintiff's wife moved to Pennsylvania to a house purchased by her and her husband. The plaintiff continued to work in New York and lived at the YMCA, but visited his wife on weekends. Held, domicile still in New York.) See also *RESTATEMENT (SECOND) OF CONFLICTS* § 16, comments d, f.

⁶⁰ *Jardine v. Intehar*, 213 F. Supp. 598, 600 (S.D.W. Va. 1963); *Messick v. Southern Pa. Bus Co.*, 59 F. Supp. 799, 800 (E.D. Pa. 1945).

⁶¹ *Cooper v. Galbraith*, 6 F. Cas. 472, 475-76 (No. 3193) (C.C.D. Pa. 1819); see *Broadstone Realty Corp. v. Evans*, 213 F. Supp. 261 (S.D.N.Y. 1962).

⁶² ALI STUDY 13 (proposed § 1302(c)); *id.* at 130-32 (commentary). See also text accompanying notes 6, 45 *supra*.

⁶³ *Deese v. Hundley*, 232 F. Supp. 848, 850 (W.D.S.C. 1964) (military orders); *Shaffer v. Tepper*, 127 F. Supp. 892, 894-95 (E.D. Ky. 1955) (prisoner); *Nobuo Hiramatsu v. Philips*, 50 F. Supp. 167 (S.D. Cal. 1943) (Japanese-American internee); *Wendel v. Hoffman*, 24 F. Supp. 63 (D.N.J. 1938), *appeal dismissed*, 104 F.2d 56 (3d Cir. 1939) (police custody); 42 MICH. L. REV. 321, 322 (1943); see *RESTATEMENT (SECOND) OF CONFLICTS* § 17.

transferred under military orders⁶⁴ or a prisoner incarcerated away from home does not acquire a domicile in his place of current residence.⁶⁵

D. Motive for Change of Domicile Immaterial

The motives which prompt a person to change his domicile are immaterial to a determination of diversity jurisdiction.⁶⁶ This is true even if the change was made in whole or in part for the purpose of creating diverse citizenship with a potential litigant in a federal court suit.⁶⁷ The change of domicile, however, must be bona fide;⁶⁸ that is, it must involve physical presence and the requisite intention to make a home in the new state. The reason for the move is sometimes considered in evaluating the honesty of the intention to establish a new domicile. Thus, a change of residence with the intention of returning to one's prior home upon the completion of pending litigation does not constitute a bona fide change of domicile.⁶⁹

In *Hall v. Fall*⁷⁰ the plaintiff, an emancipated minor, admitted that he initially moved from North Carolina to Virginia in order to invoke federal court jurisdiction of a suit based on an injury which had occurred in North Carolina. Subsequently he decided to live in Virginia permanently. Noting that his parents still lived in North Carolina and that plaintiff had no need to be protected against the prejudices of local courts or juries, the district court nevertheless held that he had established a domicile in Virginia and upheld his right to sue in the federal courts as "a legitimate and legal consequence" of his new citizenship which was "not to be impeached by his motive, whatever it may have been"⁷¹

A similar result was reached in *Baker v. Keck*.⁷² The court concluded that "despite the fact that one of plaintiff's motives was the establishment of citizenship so as to create jurisdiction in the federal court, there was at the time of his removal a fixed intention to become a citizen of the state"⁷³

⁶⁴ See part VI, D *infra*.

⁶⁵ See part VI, E *infra*.

⁶⁶ *Williamson v. Osenton*, 232 U.S. 619, 625 (1914); *Morris v. Gilmer*, 129 U.S. 315 (1889); *Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970); *Paudler v. Paudler*, 185 F.2d 901, 902-03 (5th Cir. 1950), *cert. denied*, 341 U.S. 920 (1951); *Delaware L. & W.R.R. v. Petrowsky*, 250 F. 554, 558 (2d Cir.), *cert. denied*, 247 U.S. 508 (1918); *Hall v. Fall*, 235 F. Supp. 631, 634 (W.D.N.C. 1964); *Baker v. Keck*, 13 F. Supp. 486 (E.D. Ill. 1936). See also RESTATEMENT (SECOND) OF CONFLICTS § 18, comment f; *In re Newcomb's Estate*, 129 N.Y. 238, 84 N.E. 950, 954 (1908): "Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention." For related materials see *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928); *cf.* 1 MOORE § 0.76[6] (change of corporate citizenship); 3A *id.* §§ 17.04, .05, .12 (collusive joinder, assignment, or appointment of fiduciaries).

⁶⁷ See cases cited note 66 *supra*.

⁶⁸ See *Williamson v. Osenton*, 232 U.S. 619, 625 (1914); *Rogers v. Bates*, 431 F.2d 16, 17-18 (8th Cir. 1970); *Sullivan v. Lloyd*, 213 F. 275, 277-79 (D. Mass. 1914); RESTATEMENT (SECOND) OF CONFLICTS § 18, comment f.

⁶⁹ *Morris v. Gilmer*, 129 U.S. 315 (1889); *Jones v. League*, 59 U.S. (18 How.) 76, 81 (1885).

⁷⁰ 235 F. Supp. 631 (W.D.N.C. 1964).

⁷¹ *Id.* at 634.

⁷² 13 F. Supp. 486 (E.D. Ill. 1936).

⁷³ *Id.* at 488.

This citizenship was not barred by some evidence of a floating intention of the plaintiff that he might return to Illinois when his case was settled.⁷⁴

III. STATELESS CITIZENS

A United States citizen, as already observed, is a citizen of the state in which he is domiciled. Of what state, if any, is one a citizen if he abandons an existing domicile and fails to acquire a new one; that is, if he lacks the requisite intent to make his home in any of the states in which he temporarily resides? The principles of conflicts of law avoid this dilemma by conclusively presuming that his old domicile is retained (regardless of his actual intent) until a new one is acquired.⁷⁵ Despite occasional dicta indicating a similar rule for purposes of diversity of citizenship jurisdiction,⁷⁶ the law appears to be established otherwise.

In *Pannill v. Roanoke Times Co.*⁷⁷ the plaintiff was domiciled in Oklahoma when he suffered an injury which left him almost completely paralyzed. He then journeyed to California intending to stay the remainder of his life while receiving support from the Grand Lodge of Elks. After a few months, this financial arrangement failed to materialize, and he commenced a tour of the country in an effort to induce the various Elks' lodges to establish a fund to support members like himself who became incapacitated. If successful, he planned to eventually establish his home in Texas or Florida, having no intention of ever returning to live in California or Oklahoma. While temporarily residing in Virginia, he sued a Virginia corporation. The district court dismissed the action for want of diversity. Although acknowledging that according to the accepted law of domicile Pannill probably would be presumed to be still domiciled in California, the district judge observed that:

Where domicile means home . . . it is usually, if not always, equivalent to state citizenship. But when (no new domicile in fact having been acquired) domicile exists only by legal fiction, and describes the state in which a citizen of the United States once had his home, but to which he intends never to return, I cannot see that domicile and citizenship are synonymous The theoretical domicile which clings to a homeless wanderer, who never intends to return, has its uses in deciding rights of succession to property, in respect to taxation and to the administration of pauper laws, but is not, I think, equivalent to citizenship in the sense in which the word citizen is used in the Judiciary Act. While domicile, in some sense, may not be lost by mere departure with intent not to return, state citizenship is thus lost.⁷⁸

Although the court recognized that a "stateless" citizen, such as the plaintiff,

⁷⁴ *Id.* at 489. See also *Paudler v. Paudler*, 185 F.2d 901 (5th Cir. 1950), *cert. denied*, 341 U.S. 920 (1951); *Shoaf v. Fitzpatrick*, 104 F.2d 290 (6th Cir.), *cert. denied*, 308 U.S. 620 (1939).

⁷⁵ *E.g.*, RESTATEMENT (SECOND) OF CONFLICTS § 19, and illustrations thereof. The English rule is that a person's domicile of origin is revived during the period between an abandonment of a domicile and the acquisition of a new one. American authorities hold that the last domicile, whether of origin or choice, continues until a new one is acquired. *Id.* comment *b*, and Reporter's Note thereto.

⁷⁶ *E.g.*, *Kaiser v. Loomis*, 391 F.2d 1007, 1009 (6th Cir. 1968); *Janzen v. Goos*, 302 F.2d 421, 425 (8th Cir. 1962); *Welsh v. American Sur. Co.*, 186 F.2d 16, 17 (5th Cir. 1951).

⁷⁷ 252 F. 910 (W.D. Va. 1918).

⁷⁸ *Id.* at 913-15.

would encounter the same risk of local prejudice in state courts as would citizens of nonforum states, it believed that its holding was compelled by the language of the Constitution which limited the jurisdiction to cases between citizens of different states. The court could find no better reason for the omission of homeless wanderers from the jurisdiction than that, as with citizens of the District of Columbia, they were simply not thought of by the constitutional framers.

The concept of the "stateless" citizen articulated in *Pannill* has since been accepted and followed by a number of federal courts.⁷⁹ However, the case of *Kaiser v. Loomis*,⁸⁰ decided by the Sixth Circuit in 1968, casts some doubt on the continuing vitality of the doctrine. The plaintiff, apparently a citizen of Michigan, alleged the defendant to be an Illinois citizen. After a jury verdict for the plaintiff, the district judge, who had reserved decision on the question, dismissed the suit for lack of diversity because the defendant was a United States citizen residing abroad and not a citizen of any state. The defendant had been domiciled in Illinois by birth. He subsequently lived in Michigan as a trainee at a hospital and in New York while being trained for overseas duty as a missionary doctor. He then was sent to Ethiopia, where he resided at the time of suit. It was found that he was only temporarily living in Ethiopia subject to a missionary assignment elsewhere. The Court of Appeals held that he was not domiciled in Ethiopia, but that his Illinois domicile "persists until and unless it is changed."⁸¹ The court further held that this presumption of a continuing domicile shifted the burden to the defendant to show that his domicile was changed to Michigan. It should be noted that the court did not expressly repudiate the stateless citizen doctrine, for while its language suggests that a domicile continues until a new one is acquired, this language is dicta since the facts failed to show a clear abandonment of the defendant's Illinois domicile.

While the Supreme Court has not had occasion to apply the doctrine in a diversity case, it has recognized that a person can be a United States citizen without being a citizen of a state.⁸² One such instance, that of the citizens of the District of Columbia and of the territories, has been remedied for purposes of diversity jurisdiction by legislatively defining such jurisdictions to be "States."⁸³ It may be that Congress would also have the power to provide that a person remains a citizen of a state in which he has been domiciled until such time as he becomes domiciled in another state or loses his American citizenship. Or, if this fictional presumption lacks sufficient rational support, diversity jurisdiction could be defined in terms of controversies "between a citizen of a

⁷⁹ *E.g.*, *Tanzymore v. Bethlehem Steel Corp.*, 325 F. Supp. 891, 892 (E.D. Pa. 1971); *Reyes v. Penoci*, 202 F. Supp. 436 (D.P.R. 1962). Aliens who are not citizens of any foreign country are also considered to be stateless and unable to sue or be sued under 28 U.S.C. § 1332(a)(2) or (3) (1971). *E.g.*, *Shoemaker v. Malaxa*, 241 F.2d 129 (2d Cir. 1957); *Factor v. Pennington Press, Inc.*, 238 F. Supp. 630 (N.D. Ill. 1964).

⁸⁰ 391 F.2d 1007 (6th Cir. 1968).

⁸¹ *Id.* at 1009, citing *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353 (1874), a case not involving diversity jurisdiction. *See also* *Desmare v. United States*, 93 U.S. 605, 610 (1877).

⁸² *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 73-74 (1873).

⁸³ 28 U.S.C. § 1332(d) (1971); *see* *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); 1 MOORE ¶¶ 0.60[8.—4], 0.71[4.—4]; C. WRIGHT, *supra* note 17, at 31-32, 81-82.

state and a party who is not a citizen of such state" or "between parties who are not citizens of the same state" similar to the minimal diversity requirement for statutory interpleader.⁸⁴ While such definitions are not likely to be adopted judicially in light of the prevailing contrary statutory constructions,⁸⁵ it would seem that Congress could so define the grant of jurisdiction "between Citizens of different States." Such a construction would be consistent with the constitutional theory which permits that fundamental document to be broadly construed⁸⁶ in order to accommodate societal developments and situations which, as stated in the *Pannill* case, probably were not thought of when the Judiciary Article was drafted.

IV. THE REQUIREMENT OF UNITED STATES CITIZENSHIP

A. Generally

Before one may become a citizen of a state for purposes of diversity jurisdiction, he must be a citizen of the United States.⁸⁷ National citizenship can be conferred only by the Constitution or laws of the United States and not by a state.⁸⁸ In the now infamous *Dred Scott* case,⁸⁹ the Supreme Court ruled that even though the state of Illinois may have regarded Scott, a slave brought there from Missouri, as its citizen, it could not grant him United States citizenship. Thus, he was precluded from invoking the diversity jurisdiction of the federal courts. Although the Civil War Amendments to the Constitution have abolished slavery and afforded United States citizenship to all persons born or naturalized in the United States,⁹⁰ the jurisdictional principles of *Dred Scott* still survive.⁹¹

In addition to the constitutional grant of citizenship, Congress has provided other methods of acquiring United States citizenship, such as being born abroad to a parent who is a citizen of this country.⁹² Federal legislation has

⁸⁴ See 28 U.S.C. § 1335 (1971); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). These definitions would also correct the anomaly which prevents American citizens domiciled abroad from suing or being sued in the federal courts on the basis of diversity jurisdiction. See part V *infra*; cf. Currie, *supra* note 11, at 9-10.

⁸⁵ Cf. *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965).

⁸⁶ 1 MOORE ¶ 0.60[2]; see *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 613 (1949) (concurring opinion); *United States v. Classic*, 313 U.S. 299, 316 (1941); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326-27 (1816); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 476 (1793).

⁸⁷ U.S. CONST. amend. XIV, § 1; *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 383 (1904); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁸⁸ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *City of Minneapolis v. Reum*, 56 F. 576 (8th Cir. 1893); see U.S. CONST. art. I, § 8. See also *United States v. Hall*, 26 F. Cas. 79, 81 (No. 15,282) (C.C.S.D. Ala. 1871): "By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause [amend. XIV, § 1] this order of things is reversed . . . and citizenship in a state is a result of citizenship in the United States." But see *Collett v. Collett*, 6 F. Cas. 105 (No. 3001) (C.C.D. Pa. 1792), where the court stated that the states could grant citizenship consistent with national policies (pre-fourteenth amendment).

⁸⁹ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁹⁰ U.S. CONST. amends. XIII, XIV.

⁹¹ See, e.g., *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 99 (3d Cir. 1960); *Porto Rico Ry., Light & Power Co. v. Cognet*, 3 F.2d 21, 24 (1st Cir. 1924), cert. denied, 268 U.S. 691 (1925). But cf. D. CURRIE, *FEDERAL COURTS* 256-58 (1968).

⁹² 8 U.S.C. § 1401 (1971). Other means of acquiring citizenship include living or being born in a territory of the United States (*id.* §§ 1402-07), naturalization (*id.*

also provided for the loss of United States citizenship under certain circumstances.

While an allegation of citizenship in a state necessarily implies United States citizenship, the same is not true of an allegation of domicile or residence in a particular state.⁹³ An alien may reside for a long period in a state and acquire a domicile there. Nevertheless, he will remain an alien for purposes of diversity jurisdiction.⁹⁴

B. Citizenship of Indians

Prior to 1924, American Indians were not considered citizens of the United States unless they were naturalized individually or collectively by treaty or federal statute.⁹⁵ In 1884 the Supreme Court held that a person born as a tribal Indian in the United States was not made a citizen by the fourteenth amendment because he was not subject to the jurisdiction of the United States.⁹⁶ Accordingly, an unnaturalized Indian could not invoke the diversity jurisdiction of the federal courts.⁹⁷ Nor could he be treated as a citizen of a "foreign state" within the meaning of the alienage jurisdiction provisions.⁹⁸

By Act of June 2, 1924, all non-citizen Indians born within the territorial limits of the United States were declared to be citizens.⁹⁹ Subsequent amendments clarified and extended this Act, and the present law provides that "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe" is a natural born American citizen.¹⁰⁰ Thus Indians now have the same right as other United States citizens to establish a domicile in a state, whether on or off an Indian reservation, and to sue in the federal courts as citizens of that state.¹⁰¹ Tribal Indians, however, still occupy a special status and are subject to certain federal controls, privileges, and re-

§§ 1421-59), admission of state of residence to Union (*Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135 (1892)). See also *Gribble v. Pioneer Press Co.*, 15 F. 689, 691 (C.C.D. Minn. 1883) (minor whose father was naturalized); *In re Graf*, 277 F. 969 (D. Md. 1922) (minor whose mother, his only surviving parent, married a citizen and, under then existing law, thereby became naturalized herself).

⁹³ *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 383 (1904); *Brown v. Keene*, 33 U.S. (8 Pet.) 112 (1834); *Cuozzo v. Italian Line*, 168 F. Supp. 304, 305-06 (S.D.N.Y. 1958). See also cases cited note 94 *infra*.

⁹⁴ E.g., *Breedlove v. Nicolet*, 32 U.S. (7 Pet.) 413, 428, 431-32 (1833); *Psinakis v. Psinakis*, 221 F.2d 418, 420, 422 (3d Cir. 1955); *City of Minneapolis v. Reum*, 56 F. 576 (8th Cir. 1893). Such a person could, however, sue or be sued in a federal court on the basis of alienage jurisdiction when the adverse party was a citizen of a state. 28 U.S.C. § 1332(a)(2)(3) (1971); 1 MOORE ¶ 0.60[8.—4].

⁹⁵ See *United States v. Nice*, 241 U.S. 591, 596 (1916); *Felix v. Patrick*, 145 U.S. 317, 332 (1892).

⁹⁶ *Elk v. Wilkins*, 112 U.S. 94, 99-109 (1884) (denying an Indian, who had separated himself from his tribe but had never been naturalized, the right to register as a voter in Nebraska).

⁹⁷ *Paul v. Chilsoquie*, 70 F. 401, 402 (C.C.D. Ind. 1895).

⁹⁸ *Id.* Nor may an Indian Nation sue as a foreign nation or state. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-20 (1831). See also *Cherokee Nation v. Southern Kan. Ry.*, 135 U.S. 641, 653-55 (1890).

⁹⁹ Act of June 2, 1924, ch. 233, 43 Stat. 253. An earlier statute had granted citizenship to all Indians born within the United States who left the reservation and accepted allotments of land. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390.

¹⁰⁰ 8 U.S.C. § 1401(a)(2) (1971). The granting of citizenship to native-born Indians has been judicially recognized and given effect. See, e.g., *Squire v. Capoeman*, 351 U.S. 1, 6 (1956).

¹⁰¹ See, e.g., *Coppedge v. Clinton*, 72 F.2d 531 (10th Cir. 1934).

strictions.¹⁰² These special regulations include exclusive jurisdiction of tribal courts over many civil and criminal actions¹⁰³ and immunity from suit in certain instances.¹⁰⁴ Other statutes grant federal court jurisdiction of specified actions involving Indians.¹⁰⁵ The fact that an Indian is a party to a suit, however, is not a general basis of jurisdiction in the federal courts.¹⁰⁶

V. UNITED STATES CITIZENS DOMICILED IN FOREIGN COUNTRIES

A citizen of the United States who is domiciled abroad is precluded from invoking either the diversity or the alienage jurisdiction of the federal courts because he is neither a citizen of a state¹⁰⁷ nor a citizen or subject of the country of his inhabitation.¹⁰⁸ Thus, when Oscar Hammerstein, a citizen of New York, sued singer Felice Lyne for breach of contract, she successfully resisted jurisdiction of the federal court by proving that she had abandoned her domicile of birth in Missouri and established a new home in London, England. Consequently, she was not a citizen of Missouri nor of any other state in which she temporarily resided, but neither had she become an alien since mere absence from the United States or permanent residence in another country are not acts of expatriation.¹⁰⁹

Whether an American citizen living abroad has acquired a new domicile in the foreign country or retains his stateside domicile may present a difficult question of fact. In *Maple Island Farm, Inc. v. Bitterling*¹¹⁰ the plaintiff had been a citizen of Oklahoma, but a series of jobs took him to Venezuela, New

¹⁰² See, e.g., *United States v. Nice*, 241 U.S. 591 (1916); Flickinger, *The American Indian*, 20 FED. B.J. 212 (1960); Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193 (1959); Schaab, *Indian Industrial Development and the Courts*, 8 NAT. RES. J. 303 (1968); Comment, *Problems of State Jurisdiction Over Indian Reservations*, 13 DEPAUL L. REV. 74 (1963); Note, *The Constitutional Rights of the American Tribal Indian*, 51 VA. L. REV. 121 (1965).

¹⁰³ See, e.g., *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962); *Hot Oil Serv., Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), cert. denied, 382 U.S. 986 (1966).

States may assume criminal and civil jurisdiction of cases involving tribal Indians with the consent of tribes located within their borders. 25 U.S.C. §§ 1321-26 (1971). See also 28 U.S.C. § 1360 (1971); 1 MOORE § 0.60[8.—2]. Potential diversity jurisdiction expands along with that of the state court's civil jurisdiction.

¹⁰⁴ See, e.g., *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir.), cert. denied, 355 U.S. 893 (1957).

¹⁰⁵ E.g., 25 U.S.C. § 345 (1971); 28 U.S.C. §§ 1353, 1362 (1971). See also *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970) (recognizing an individual right of action against the United States based upon a treaty with the Indian tribe concerned). For a short time, Congress created federal legislative courts to determine citizenship claims in certain tribes. 1 MOORE § 0.3[5].

¹⁰⁶ See *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550, 551 (2d Cir. 1929); *Paul v. Chilsoquie*, 70 F. 401, 403 (C.C.D. Ind. 1895).

¹⁰⁷ *Pemberton v. Colonna*, 290 F.2d 220 (3d Cir. 1961); *Vidal v. South American Secs. Co.*, 276 F. 855, 874-75 (2d Cir. 1922); *Hernandez v. Lucas*, 254 F. Supp. 901, 902 (S.D. Tex. 1966). But see *Spencer v. Northwest Orient Airlines, Inc.*, 201 F. Supp. 504, 505 (S.D.N.Y. 1962).

¹⁰⁸ *Pemberton v. Colonna*, 290 F.2d 220 (3d Cir. 1961); *Bishop v. Averill*, 76 F. 386 (C.C.D. Wash. 1896). But cf. *Wildes v. Parker*, 29 F. Cas. 1224, 1226 (No. 17,652) (C.C.D. Mass. 1839), in which Justice Story questioned whether an American citizen domiciled in a foreign country could be treated as a foreign merchant for some purposes but not for jurisdiction of suits arising from his commercial transactions. The question was certified to the Supreme Court but apparently the justices divided in opinion and no decision was reported.

¹⁰⁹ *Hammerstein v. Lyne*, 200 F. 165, 171 (W.D. Mo. 1912).

¹¹⁰ 196 F.2d 55 (8th Cir.), cert. denied, 344 U.S. 832 (1952).

York, and Africa, among other places, for varying lengths of times over a period of thirteen years. At the time of suit, he stated that his place of residence was Venezuela and his last state of permanent residence was Oklahoma. The court of appeals observed that the evidence could have supported a finding of domicile in either Venezuela, Oklahoma, or, perhaps, New York, but it was not clearly erroneous for the district court to have found that he retained his Oklahoma domicile and citizenship.¹¹¹

In *Van Der Schelling v. U.S. News & World Report, Inc.*¹¹² the plaintiff had been a permanent and continuous resident of Mexico for eleven years and had been granted "immigrado" status permitting her to stay indefinitely, hold any job, or not work at all. While conceding that she was a citizen of the United States, the plaintiff argued that she had become a "subject" of the Republic of Mexico. The district court acknowledged that domicile may impress one with the characteristics of a "subject" for some purposes, but held that "citizens" and "subjects" are equivalents as used in article III of the Constitution and in the Judicial Code. Both require that the party be an alien, *i.e.*, not a citizen of the United States.¹¹³

Nevertheless, it does appear anomalous that aliens may invoke federal jurisdiction against state citizens, but United States citizens who are not domiciled in the same state as their adversary, nor in any other state, may not avail themselves of the protection and benefits of the federal courts, at least on the basis of diversity jurisdiction. After many years, a similar anomaly was corrected when Congress decreed that "States" "includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico,"¹¹⁴ thereby permitting residents of such areas to invoke diversity jurisdiction on the same basis as citizens of a state. It may be that "subjects" can be validly defined by Congress to include United States citizens who are domiciled in a foreign country. The policies supporting the exercise of diversity jurisdiction, as well as the necessary federal element,¹¹⁵ would seem to be involved in any case in which the adverse parties are not citizens of the same state, even though one party is a United States citizen domiciled in a foreign country or is not otherwise a citizen of any state or foreign country.

VI. CITIZENSHIP OF PARTICULAR PERSONS

A. Married Women

As a general rule, the domicile of a wife and, consequently, her citizenship for purposes of diversity jurisdiction, is deemed to be that of her husband.¹¹⁶

¹¹¹ *Id.* at 59. See *Kaiser v. Loomis*, 391 F.2d 1007 (6th Cir. 1968). See also *United States v. Knight*, 299 F. 571, 573-74 (9th Cir. 1924): "An American citizen does not become a permanent resident of a foreign country by simply taking employment there with an American firm, however long his employment may continue."

¹¹² 213 F. Supp. 756 (E.D. Pa.), *aff'd per curiam*, 324 F.2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964).

¹¹³ *Id.* at 762; *accord*, *Pemberton v. Colonna*, 290 F.2d 220 (3d Cir. 1961). *But cf.* *Aguirre v. Nagel*, 270 F. Supp. 535 (E.D. Mich. 1967).

¹¹⁴ 28 U.S.C. § 1332(d) (1971); see note 83 *supra*.

¹¹⁵ See 1 MOORE § 0.71[3]; Moore & Weckstein, *supra* note 9, at 24-25; *cf.* Currie, *supra* note 11, at 9-10; Note, *Federal Diversity Suits by American Citizens Domiciled Abroad*, 19 WASH. & LEE L. REV. 78, 84-86 (1962).

¹¹⁶ *Anderson v. Watt*, 138 U.S. 694 (1891); *Price v. Greenway*, 167 F.2d 196, 199

In 1891 the Supreme Court was of the opinion that "where a wife is living apart from her husband, without sufficient cause, his domicile is in law her domicile."¹¹⁷ The historical justifications for the rule were the fiction of identity of person and of interest between husband and wife, and the assumption that the marriage relation was thought to be promoted and secured by presuming the home of the wife to be that of her husband.

This rule that the wife takes the domicile of her husband applies even if she has never set foot in the state in which she becomes domiciled, as may be the case when she marries a serviceman who is stationed away from his home.¹¹⁸ Upon the death of her husband the same domicile continues, unless and until she changes it; her pre-marital domicile does not automatically revive.¹¹⁹

The general rule that the husband controls the domicile of the wife has been subject to exception, however, especially in cases involving marital discord.¹²⁰ It has been suggested that the common-law rule that the domicile of the wife is that of her husband is based upon the legal duty of the wife to follow and dwell with her husband wherever he may go. Accordingly, when divorce or marital conditions terminate that duty, the wife is free to determine her own domicile.¹²¹ Whatever the theory, it is now well settled that a wife may establish a domicile of her own choice separate from her husband when they are legally separated,¹²² or the husband deserts her,¹²³ or there is other cause for legal separation or divorce.¹²⁴

(3d Cir. 1948); *Porto Rico Ry., Light & Power Co. v. Cognet*, 3 F.2d 21, 24 (1st Cir. 1924), *cert. denied*, 268 U.S. 691 (1925); see RESTATEMENT OF CONFLICTS § 27.

¹¹⁷ *Anderson v. Watt*, 138 U.S. 694, 706 (1891).

¹¹⁸ See *Seegers v. Strzempek*, 149 F. Supp. 35, 37 (E.D. Mich. 1957); *Wise v. Bolster*, 31 F. Supp. 856, 860 (W.D. Wash. 1940).

¹¹⁹ *Welch v. Lewis*, 184 F. Supp. 806, 808 (N.D. Miss. 1960); *Seidman v. Hamilton*, 173 F. Supp. 641, 643 (E.D. Pa. 1959), *aff'd*, 275 F.2d 224 (3d Cir.), *cert. denied*, 363 U.S. 820 (1960); see RESTATEMENT OF CONFLICTS § 29.

¹²⁰ *E.g.*, *Williamson v. Osenton*, 232 U.S. 619, 625-26 (1914). See the picturesque overstatement in *Gordon v. Yost*, 140 F. 79, 81 (C.C.N.D.W. Va. 1905):

Here is a home established legally and under the general rule, wherein the husband and wife are discharging their marital obligations one to the other, and living in peace and happiness. A wicked, vicious woman, with physical charms and large means it may be, determines to break up that home and succeeds. She persuades the husband to break his obligations, violate the laws of God and man, leave the wife destitute, and go to another state to live in adultery with her. Could anything be more inhuman or cruel than to say that the wife can have no other home, no other domicile, than the foul abode of these two who have so deeply wronged her? It may be said that she may secure a divorce from the husband. Yes: but she may not desire to do so. She may be willing to condone, forgive. Shall she not be permitted under the law to establish, under such conditions, a domicile wherever she can, where she may still maintain her virtue and secure a subsistence for herself, and, it may be, for helpless children abandoned with her by the faithless husband? I think so, and I am glad to find that the courts have so held.

¹²¹ See *Barber v. Barber*, 62 U.S. (21 How.) 582, 593-94 (1859); *Town of Watertown v. Greaves*, 112 F. 183, 186 (1st Cir. 1901).

¹²² *Barber v. Barber*, 62 U.S. (21 How.) 582, 592-95, 597-98 (1859); *Gonzales v. Gonzales*, 74 F. Supp. 883, 884-85 (E.D. Pa. 1947).

¹²³ See *Gordon v. Yost*, 140 F. 79, 81-82 (C.C.N.D.W. Va. 1905); *Town of Watertown v. Greaves*, 112 F. 183, 184-88 (1st Cir. 1901); *Weatherford v. Elizondo*, 52 F.R.D. 122, 124 (S.D. Tex. 1971).

¹²⁴ *E.g.*, *Paudler v. Paudler*, 185 F.2d 901 (5th Cir. 1950), *cert. denied*, 341 U.S. 920 (1951) (moved because of fear of harm from divorced husband); *Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 545 (3d Cir. 1950) (husband incarcerated for felony); *Fitch v. Huff*, 218 F. 17, 21 (4th Cir. 1914) (divorce appeal pending); *Rapoport v. Rapoport*,

While some early cases refused to recognize the power of a wife to establish an independent domicile by agreement with her husband,¹²⁵ more recently, her right to a separate domicile, whatever the reason for it, has been increasingly acknowledged.¹²⁶ This is a natural and justified consequence of the belated recognition of the rights and liberties of women as individuals, *sui juris*, and their entitlement to equal treatment under the law pursuant to the fourteenth and nineteenth amendments.

Accordingly, although the vast majority of wives continue to be domiciled with their husbands, it is possible for a married woman to have the requisite intent, with or without the concurrence of her husband, to establish her home in a residence separate from her husband. In such circumstances, no sound reason exists for the failure to recognize that she is in truth a citizen of the state where such home is located. For diversity purposes that state, rather than the state to which she is fictionally attached by virtue of her marriage, ought to be regarded as her domicile.

B. Minors

Although a suit for or against a minor may be brought in the name of a next friend or guardian *ad litem*, the courts generally consider the minor to be the real party in interest, and it is his citizenship which determines the presence or absence of diversity.¹²⁷ Therefore, it becomes necessary to decide in which state, if any, he is domiciled.

Until a person reaches the legal age of majority,¹²⁸ his domicile is generally derived from his parents. Normally the domicile of a minor is deemed to be that of his father.¹²⁹ However, if the child is illegitimate,¹³⁰ the father is deceased,¹³¹ or the parents are divorced and the minor is living with his mother,¹³² the domicile of the mother will be controlling.

273 F. Supp. 482, 483, *rev'd on other grounds*, 416 F.2d 41 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970) (established separate domicile prior to divorce).

¹²⁵ See *Anderson v. Watt*, 138 U.S. 694, 705-07 (1891); *Barber v. Barber*, 72 U.S. (21 How.) 582, 595 (1859).

¹²⁶ *Ziady v. Curley*, 396 F.2d 873, 876 (4th Cir. 1968); *Napletana v. Hillsdale College*, 385 F.2d 871, 872-73 (6th Cir. 1967); *Spindel v. Spindel*, 283 F. Supp. 797, 812-13 (E.D.N.Y. 1968); see *Oxley v. Oxley*, 159 F.2d 10, 11 (D.C. Cir. 1946); RESTATEMENT OF CONFLICTS § 28; RESTATEMENT (SECOND) OF CONFLICTS § 21(2): "A wife who lives apart from her husband can acquire a separate domicile of choice." See also *id.* comment *d.*

¹²⁷ *Ziady v. Curley*, 396 F.2d 873, 874 n.1 (4th Cir. 1968); *Appelt v. Whitty*, 286 F.2d 135, 137 (7th Cir. 1961); see 3A MOORE §§ 17.04, 17.12, 17.26.

¹²⁸ The legal age of majority is dependent on state law. In most states it is presently 21 years of age, but there is a movement to decrease it to 18 along with the voting age. See U.S. CONST. amend. XXVI.

¹²⁹ *Kaiser v. Loomis*, 391 F.2d 1007, 1009 (6th Cir. 1968); *Bjornquist v. Boston & A.R.R.*, 250 F. 929, 931 (1st Cir.), *cert. denied*, 248 U.S. 573 (1918); RESTATEMENT OF CONFLICTS § 30; RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *a.*

¹³⁰ See *Delaware L. & W.R.R. v. Petrowsky*, 250 F. 554, 558 (2d Cir.), *cert. denied*, 247 U.S. 508 (1918); RESTATEMENT OF CONFLICTS § 34; RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *c.*

¹³¹ *Bjornquist v. Boston & A.R.R.*, 250 F. 929, 931 (1st Cir.), *cert. denied*, 248 U.S. 573 (1918); *Curry v. Maxson*, 318 F. Supp. 842, 844 (W.D. Mo. 1970); RESTATEMENT OF CONFLICTS § 38; RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *b.*

¹³² *Toledo Traction Co. v. Cameron*, 137 F. 48, 56-57 (6th Cir. 1905) (court awarded custody).

In *Ziady v. Curley*, 396 F.2d 873 (4th Cir. 1968), custody had been awarded to the father, but after he died and the mother remarried, she assumed custody of the child without court order. The court held that the child was domiciled with the mother (although he had

When neither of the parents of a minor are living, he takes his domicile from a natural guardian, such as his grandparents, if he is living with them,¹³³ and perhaps from some other relative¹³⁴ or court-appointed guardian with whom he is living.¹³⁵ Otherwise, until he reaches the age of emancipation he retains the domicile last acquired from his parents or a natural guardian.

Emancipation may allow an independent choice of domicile even if the legal age of majority has not been attained.¹³⁶ Emancipation of a minor is dependent upon the applicable state law,¹³⁷ but in general requires that he have reached an age of discretion, and his father or other natural guardian relinquish any obligation of care, custody, support, direction, or control, or any right to the services or earnings of the minor.¹³⁸ In *Spurgeon v. Mission State Bank*¹³⁹ the plaintiff had left his parents' home in Missouri, with their reluctant consent, at the age of 18 years, 5 months. Thirteen days before he brought a state

not been adopted by his stepfather) despite language in *Lamar v. Micou*, 112 U.S. 452, 470-71 (1884), *aff'd on rehearing*, 114 U.S. 218 (1885), that the power of a widowed mother to change the domicile of her child ceased upon her remarriage. This early Supreme Court decision was said to be based upon outmoded concepts of the identity of a wife and husband and that modern law and thought recognized that a married woman may acquire a domicile on her own and on behalf of her child even though it is the same as that of her new husband. See Note, *Standard of Domicile in Diversity Cases*, 71 W. VA. L. REV. 420 (1969).

The same rules probably apply if the parents are legally separated. See *Oxley v. Oxley*, 159 F.2d 10, 11 (D.C. Cir. 1946); RESTATEMENT OF CONFLICTS § 32; RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *d*; H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 57-58 (4th ed. 1964) [hereinafter cited as GOODRICH & SCOLES].

If a child is abandoned by one parent and not the other, he will likely be domiciled with the parent who remains to care for him. See RESTATEMENT OF CONFLICTS § 33; RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *e*.

¹³³ Grandfather, if alive, and if not, grandmother. See *Lamar v. Micou*, 114 U.S. 218, 222-23 (1885), *aff'g on rehearing* 112 U.S. 452 (1884); RESTATEMENT OF CONFLICTS § 39.

¹³⁴ It has been stated that uncles or aunts or other close relatives are not natural guardians and they cannot control the domicile of a minor living with them. See *Bjornquist v. Boston & A.R.R.*, 250 F. 929, 932 (1st Cir.), *cert. denied*, 248 U.S. 573 (1918); RESTATEMENT OF CONFLICTS § 39, illustrations 3, 4. But the result may be otherwise if the relative has been given custody by the father's will or deed, or he has become *in loco parentis* to the minor. See *Lamar v. Micou*, 112 U.S. 452, 471-72 (1884), *aff'd on rehearing*, 114 U.S. 218 (1885); *Delaware L. & W.R.R. v. Petrowsky*, 250 F. 554, 559-64 (2d Cir.), *cert. denied*, 247 U.S. 508 (1918); *Woolridge v. McKenna*, 8 F. 650, 682-83 (C.C.W.D. Tenn. 1881); RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *i*.

Although it is no longer necessarily true that a minor apprenticed to or serving a master takes the domicile of the master, such a relationship among close relatives may be evidence of a transfer of custody and parental control from a natural parent. See *Delaware L. & W.R.R. v. Petrowsky*, *supra*, at 560-62.

¹³⁵ See RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *b*; GOODRICH & SCOLES 58-59.

¹³⁶ *Appelt v. Whitty*, 286 F.2d 135 (7th Cir. 1961); *Spurgeon v. Mission State Bank*, 151 F.2d 702 (8th Cir. 1945), *cert. denied*, 327 U.S. 782 (1946); RESTATEMENT OF CONFLICTS § 31; RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *f*.

¹³⁷ *Spurgeon v. Mission State Bank*, 151 F.2d 702, 703 (8th Cir. 1945), *cert. denied*, 327 U.S. 782 (1946); *Woolridge v. McKenna*, 8 F. 650, 659, 682-83 (C.C.W.D. Tenn. 1881); see RESTATEMENT (SECOND) OF CONFLICTS § 22, comment *f*.

¹³⁸ See, e.g., *Spurgeon v. Mission State Bank*, 151 F.2d 702, 704-05 (8th Cir. 1945), *cert. denied*, 327 U.S. 782 (1946); *Bjornquist v. Boston & A.R.R.*, 250 F. 929, 932-33 (1st Cir.), *cert. denied*, 248 U.S. 573 (1918); *Woolridge v. McKenna*, 8 F. 650, 682, 684-85 (C.C.W.D. Tenn. 1881). In some states a minor's emancipation may be accomplished by entering a valid marriage. See GOODRICH & SCOLES 54-56; cf. *Appelt v. Whitty*, 286 F.2d 135, 136-37 (7th Cir. 1961); or by being abandoned or left without a natural guardian at an age of discretion. See, e.g., *Bjornquist v. Boston & A.R.R.*, 250 F. 929, 932-33 (1st Cir.), *cert. denied*, 248 U.S. 573 (1918); see Annot., 5 A.L.R. 958 (1920); RESTATEMENT (SECOND) OF CONFLICTS § 22, comments *e*, *f*.

¹³⁹ 151 F.2d 702 (8th Cir. 1945), *cert. denied*, 327 U.S. 782 (1946).

court suit against a Kansas bank, he moved to Mission, Kansas, where he was employed. Reversing the district court, the Eighth Circuit held that he had been emancipated. He "had reached an age of discretion, and established his competence to care for himself before he departed from the home of his parents. In such circumstances modern authorities, preferring reality to fiction, sustain the right of an emancipated minor to acquire a domicile of his choice."¹⁴⁰

C. Students

Residing in a state while attending school does not, without more, establish a domicile in that state.¹⁴¹ If the intention is to leave the state upon the completion of schooling, the existence of various indicia of domicile will not alter this conclusion. Thus, in *Campbell v. Oliva*¹⁴² the plaintiff, a citizen of New Jersey, married a citizen of New York and went to Tennessee where they lived in an apartment while she attended college full-time. Her husband was employed as a local teacher, but attended college in the evenings, for which he paid in-state tuition. They also maintained local bank accounts and obtained their automobile insurance through a Tennessee agent. On the other hand, after receiving their degrees, they intended to return to New York or New Jersey, where they still maintained contacts, and seek teaching positions. The court found that the plaintiff was a citizen of New York and sustained jurisdiction of her action against a Tennessee citizen.

A student is not precluded, however, from establishing a domicile of choice in the state where he attends school. In *Wehrle v. Brooks*¹⁴³ plaintiff, who had been born in Iowa but moved with his family to North Carolina when he was eighteen years of age, returned to Iowa about five years later to attend law school. He recently had been acquitted of burglary and rape in North Carolina and felt that the adverse publicity from the trial would prevent him from establishing a successful law practice in that state. He was also partially motivated in his move to Iowa by the desire to bring the instant suit, a malicious prosecution action against the complaining witness in his criminal trial, in the federal courts. In Iowa, he lived with his uncle, with whom he agreed to practice law upon graduation, and took preliminary steps for eventual admission to the Iowa bar. The court held that he had become domiciled in Iowa, sustained jurisdiction, but granted summary judgment for the defendant on the merits.

In many cases, a college student may not know where he is going to settle after graduation. That was the plight of the defendant in *Bell v. Milsak*.¹⁴⁴ He

¹⁴⁰ *Id.* at 705. The importance of parental consent, either express or implied, to the emancipation of a child was demonstrated in the recent decision of *Curry v. Maxson*, 318 F. Supp. 842 (W.D. Mo. 1970). The child moved from Missouri to Kansas where he was employed and he registered his car. *Spurgeon* was distinguished because the facts here showed no parental consent; the plaintiff's mother was paying his medical bills and also served as his next friend for the purpose of bringing the suit.

¹⁴¹ *Chicago & Nw. Ry. v. Ohle*, 117 U.S. 123, 126-29 (1886); *Campbell v. Oliva*, 295 F. Supp. 616, 618 (E.D. Tenn. 1968); *Sanial v. Bossoreale*, 279 F. Supp. 940 (S.D.N.Y. 1967); *Mallon v. Lutz*, 217 F. Supp. 454, 456 (E.D. Mich. 1963); *Bell v. Milsak*, 106 F. Supp. 219, 220 (W.D. La. 1952).

¹⁴² 295 F. Supp. 616 (E.D. Tenn. 1968). See also *Sanial v. Bossoreale*, 279 F. Supp. 940 (S.D.N.Y. 1967); *Mallon v. Lutz*, 217 F. Supp. 454 (E.D. Mich. 1963).

¹⁴³ 269 F. Supp. 785 (W.D.N.C. 1966), *aff'd per curiam*, 379 F.2d 288 (4th Cir. 1967).

¹⁴⁴ 106 F. Supp. 219 (W.D. La. 1952).

was originally domiciled in New York but was attending college in Louisiana, where, after he turned twenty-one, he registered to vote and was permitted to pay resident fees. Before graduation, he entered the army but intended to return to Louisiana to finish school, and then to go wherever he could obtain a job. Noting that the defendant had been returning to New York during vacations, that his parents contributed to his expenses, and that he admitted that his purpose in registering to vote in Louisiana was to be eligible for lower in-state tuition, the court found that he was still domiciled in New York and sustained federal jurisdiction of a suit by a Louisiana citizen.

It should be noted, as illustrated by this case, that the question of domicile for purposes of diversity of citizenship jurisdiction is distinct from questions concerning the right to vote or to pay resident tuition in a particular state. While these matters are relevant to a determination of state citizenship within the meaning of the Judiciary Article, they are not controlling.

D. *Members of the Armed Forces*

A transfer of physical residence made pursuant to military orders will not, of itself, effect a change of domicile.¹⁴⁵ Two essential elements are lacking: the move is not made as an exercise of free choice;¹⁴⁶ the period of residence is usually intended to be temporary and of limited duration.¹⁴⁷ Consequently, a serviceman retains the domicile he had at the time of his induction or enlistment, unless adequate proof is made of his intent to abandon it and adopt a new one.¹⁴⁸

This rule does not prevent a soldier or sailor from establishing a domicile in a state in which he has been stationed if there is sufficient evidence of his intent to make his home there.¹⁴⁹ The requisite intent to adopt a new domicile can be formed after the change of physical residence has taken place (for example, when the serviceman decides he likes the location and wants to settle there), or it may concur with the movement (for example, when he requests orders to a particular state where he would like to establish his home). The fact that a serviceman's family accompanies him or that he lives with them in private housing off a military reservation is not enough, in the absence of other evidence, to demonstrate an intent to acquire a new domicile in such place.¹⁵⁰

¹⁴⁵ *Ellis v. Southeast Constr. Co.*, 260 F.2d 280, 281-82 (8th Cir. 1958); *Soderstrom v. Kungsholm Baking Co.*, 189 F.2d 1008, 1013-14 (7th Cir. 1951) (alien domiciled in Illinois became an American citizen while stationed in Texas, held to be a citizen of Illinois); *Price v. Greenway*, 167 F.2d 196, 199 (3d Cir. 1948) (Women's Army Corps); *Ferrara v. Ibach*, 285 F. Supp. 1017, 1019 (D.S.C. 1968). See also notes 51, 63 *supra*; Annot., 148 A.L.R. 1413 (1944), as supplemented through Annot., 158 A.L.R. 1474 (1945); Annot., 129 A.L.R. 1382, 1383-92 (1940); RESTATEMENT (SECOND) OF CONFLICTS § 17, comment *d*.

¹⁴⁶ See note 63 *supra*, and accompanying text.

¹⁴⁷ See notes 51-53 *supra*, and accompanying text.

¹⁴⁸ See authorities cited notes 145 *supra*, 149 *infra*. Some cases have suggested that clear and unequivocal evidence is needed to rebut the presumption that a domicile existing at the time of entry into military service continues during such service. *Ferrara v. Ibach*, 285 F. Supp. 1017, 1019 (D.S.C. 1968); *Kinsel v. Pickens*, 25 F. Supp. 455, 456 (W.D. Tex. 1938).

¹⁴⁹ See, e.g., *Ellis v. Southeast Constr. Co.*, 260 F.2d 280 (8th Cir. 1958); *Ferrara v. Ibach*, 285 F. Supp. 1017 (D.S.C. 1968); *Deese v. Hundley*, 232 F. Supp. 848 (W.D.S.C. 1964).

¹⁵⁰ See, e.g., *Bowman v. DuBose*, 267 F. Supp. 312, 314 (D.S.C. 1967) (home pur-

In *Ferrara v. Ibach*¹⁵¹ a medical doctor who was drafted and stationed in South Carolina was held to have acquired a domicile there rather than to be regarded as stateless. The doctor had sold his Pennsylvania home, severed his professional ties, and moved his family to South Carolina. His children were enrolled in school there and his family stayed in South Carolina when he was sent to Vietnam. He maintained bank accounts, paid taxes, and performed off-duty medical services in South Carolina. At the trial, he stated that he did not plan to return to Pennsylvania or remain in South Carolina after his discharge; instead he intended to seek additional schooling and an affiliation with a medical school in Florida or elsewhere. The court stated that this was a future intention and that his present home was in South Carolina and nowhere else.

E. Prisoners

Relocation because of imprisonment is clearly involuntary. Therefore, a prisoner does not acquire a new domicile in the place of his imprisonment but retains the domicile he had prior to his incarceration.¹⁵² Unlike the soldier or student, he is apparently incapable of varying this result by forming an intention to become domiciled in the state where he is imprisoned.¹⁵³

Although criminal conviction and imprisonment may limit the exercise of civil rights by a convict, it does not per se destroy his capacity to invoke the diversity jurisdiction of the federal courts.¹⁵⁴ He is still a citizen,¹⁵⁵ and, pursuant to rule 17(b),¹⁵⁶ his capacity to sue or be sued in the federal courts is determined by the law of his domicile.

F. Incompetent Persons

Since the acquisition of a domicile, other than that of origin, requires that one exercise choice and intention, a person who lacks the mental capacity to do so is incapable of changing his domicile or citizenship.¹⁵⁷ It is possible, however, for one who is legally insane or mentally deficient to still have sufficient

chased); *Lyons v. Borden*, 200 F. Supp. 956 (D. Hawaii 1961).

When a serviceman lives on post, it has been stated that he is precluded from establishing new domicile in the state where the military reservation is located. *Deese v. Hundley*, 232 F. Supp. 848, 850 (W.D.S.C. 1964); see Annot., 148 A.L.R. 1413, 1417-18 (1944). *But cf.* *Ellis v. Southeast Constr. Co.*, 260 F.2d 280 (8th Cir. 1958).

¹⁵¹ 285 F. Supp. 1017 (D.S.C. 1968).

¹⁵² *E.g.*, *Shaffer v. Tepper*, 127 F. Supp. 892, 894-95 (E.D. Ky. 1955); see *United States v. Stabler*, 169 F.2d 995, 998 (3d Cir. 1948) (non-diversity); *White v. Fawcett Publications*, 324 F. Supp. 403, 404 (W.D. Mo. 1971); *cf.* *Ames v. Kuehnle*, 425 F.2d 224 (5th Cir. 1970).

¹⁵³ See *Wendel v. Hoffman*, 24 F. Supp. 63, 64-65 (D.N.J. 1938); RESTATEMENT (SECOND) OF CONFLICTS § 17, comment c.

A wife of an imprisoned felon, however, may establish a domicile separate from that of her husband. *Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 545 (3d Cir. 1950); see part VI, A *supra*.

¹⁵⁴ See, *e.g.*, *Ames v. Kuehnle*, 425 F.2d 224 (5th Cir. 1970); *White v. Fawcett Publications*, 324 F. Supp. 403, 404 (W.D. Mo. 1971); *Miller v. American Tobacco Co.*, 158 F. Supp. 48, 49 (S.D.N.Y. 1957); *cf.* *Urbano v. News Syndicate Co.*, 358 F.2d 145, 147 (2d Cir.), *cert. denied*, 385 U.S. 831 (1966) (dissenting opinion).

¹⁵⁵ Cases cited note 154 *supra*; see *White v. Hart*, 80 U.S. (13 Wall.) 646, 651 (1871) (dictum).

¹⁵⁶ FED. R. CIV. P. 17(b).

¹⁵⁷ *Wiggins v. Bethune*, 29 F. 51 (C.C.E.D. Va. 1886); *McCampbell v. McCampbell*, 13 F. Supp. 847, 849 (W.D. Ky. 1936) (refusing to give effect to act of expatriation of incompetent person).

capacity to exercise a choice of domicile. The Court of Appeals for the Tenth Circuit has stated the rule:

Whether an incompetent may change his domicile depends on the extent to which his reason is impaired. A comparatively slight degree of understanding is required. It is sufficient if he understands the nature and effect of his act. . . .

Where a person has been adjudged an incompetent and placed under the care and control of a guardian or committee, a presumption arises that he has not sufficient mental capacity to change his domicile, but the presumption may be rebutted by satisfactory proof that he possesses the requisite mental capacity.¹⁵⁸

Where there has been a court adjudication of insanity, a guardian or committee appointed, or a commitment to a mental institution, and no evidence is offered of the party's capacity to exercise a choice of domicile, changes in his residence will be ineffective to change his domicile. In such cases, if he had previously been a competent citizen, he retains the domicile he had at the time he became incapacitated.¹⁵⁹ Otherwise, his domicile is that of his parents or other natural guardian, or perhaps that of a court-appointed guardian with whom he resides.¹⁶⁰

G. Fictitious Parties

It has been a practice in some states to name fictitious persons as defendants, usually designated John Doe (one or more), Richard Roe, or *A, B, C*, etc.¹⁶¹ Whatever the basis for the practice under state laws, it is not expressly sanctioned by the Federal Rules of Civil Procedure, and is clearly discouraged in the federal courts.¹⁶² The practice confuses the determination of jurisdiction and may result in dismissal of the action. When diversity of citizenship is claimed, how may the court determine in what state, if any, a fictitious John Doe is domiciled or whether he is a United States citizen?

Since the party invoking the jurisdiction of the federal court has the burden of affirmatively alleging and proving the existence of federal jurisdiction,¹⁶³ the naming of a John Doe as a defendant without identifying him or his citizenship is insufficient, even when a general conclusional allegation is made that the parties are citizens of different states.¹⁶⁴

¹⁵⁸ *Coppedge v. Clinton*, 72 F.2d 531, 533 (10th Cir. 1934).

¹⁵⁹ *Foster v. Carlin*, 200 F.2d 943, 946 (4th Cir. 1952); see RESTATEMENT (SECOND) OF CONFLICTS § 23, comment *b*.

¹⁶⁰ *Wiggins v. Bethune*, 29 F. 51 (C.C.E.D. Va. 1886); see RESTATEMENT (SECOND) OF CONFLICTS § 22, comments *b*, *i*, § 23, comments *c*, *f*; GOODRICH & SCOLES 59-60. When the plaintiff has never been adjudicated as insane, however, the burden of proof may be on the other party to prove that the plaintiff lacked the capacity to change his domicile. *Davis v. Mullis*, 296 F. Supp. 1345 (S.D. Ga. 1969).

¹⁶¹ Note, *Designations of Defendants by Fictitious Names—Use of John Doe Complaints*, 46 IOWA L. REV. 773 (1961).

¹⁶² "In the federal courts 'John Doe' casts no magical spell on a complaint otherwise lacking in diversity jurisdiction. There is no provision in the Federal Statutes or Federal Rules of Civil Procedure for use of fictitious parties." *Fifty Associates v. Prudential Ins. Co. of America*, 446 F.2d 1187, 1191 (9th Cir. 1970); accord, *Grigg v. Southern Pac. Co.*, 246 F.2d 613, 619-20 (9th Cir. 1957). See also 1A MOORE §§ 0.161[2], 0.168[3.—2], [3.—5]; 2A *id.* § 8.10; Note, *supra* note 161, at 780-85.

¹⁶³ Notes 23, 24 *supra*; 1 MOORE §§ 0.60[4], 0.92[3]; 2A *id.* §§ 8.07[1], [4], 8.10.

¹⁶⁴ E.g., *Pullman Co. v. Jenkins*, 305 U.S. 534, 539-40 (1939); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); *Cohn v. Dowling*, 123 F.2d 408 (6th

In *Fifty Associates v. Prudential Insurance Co. of America*¹⁶⁵ Prudential, a New Jersey corporation, sued several parties including "John Doe One through Ten; Jane Doe One through Ten; Brown and Smith, a partnership; Black Corporations One through Ten," alleging that these defendants, "whether singular or plural, are fictitious names designating an individual or individuals, masculine or feminine, or legal entities unknown to plaintiff, none of which are citizens of New Jersey nor having principal places of business within said State of New Jersey."¹⁶⁶ In holding that these allegations failed to show the existence of diversity of citizenship, the Court of Appeals for the Ninth Circuit stated:

Due to the ambiguous language employed by Prudential in the complaint, we are unable to determine whether Prudential meant to say that *names* of the defendants were not known or that *the Doe defendants themselves* were unknown.

... [I]f the identity of the Doe defendants were known so that Prudential could state that none of them were citizens of New Jersey, or had their principal places of business there, Prudential could also have stated the names of those defendants in the complaint. Likewise, if the identities of fictitious defendants were not known, then Prudential's negative allegations about the citizenship of those parties are 'mere guesswork.' The reason why the 'Doe' practice could not be applicable to federal courts of limited jurisdiction is obvious.¹⁶⁷

Nevertheless, federal courts have been permitted to exercise diversity jurisdiction where the John Doe defendants appear to be shams or nominal or disinterested parties,¹⁶⁸ or are dismissed from the action.¹⁶⁹

VII. CONCLUSION

Whether or not James Wilson's observations concerning diversity jurisdiction will remain as accurate for the next two centuries as they have for the past two is speculative inquiry. There can be little doubt, however, that diversity jurisdiction will continue to engender controversy for the near future. The controversy will concern not only its continuance and its scope, but, as illustrated herein, its complexity. Jurisdictional issues are preliminary to resolution of disputes on the merits, and intelligent judicial administration would minimize their complexity and the time and effort necessary to resolve them. Nevertheless, important policies of federalism and constitutional government are affected by the seemingly mundane issues of determining a party's citizenship. It is hoped that this dissertation has contributed to a reduction, rather than an aggravation, of the complexity of the subject matter by communicating the

Cir. 1941); *cf.* Congress of Racial Equality v. Clemmons, 323 F.2d 54, 58 (5th Cir. 1963), *cert. denied*, 375 U.S. 992 (1964).

¹⁶⁵ 446 F.2d 1187 (9th Cir. 1970).

¹⁶⁶ *Id.* at 1189.

¹⁶⁷ *Id.* at 1191 (emphasis by the court).

¹⁶⁸ *Grigg v. Southern Pac. Co.*, 246 F.2d 613, 619-20 (9th Cir. 1957); *Thiel v. Southern Pac. Co.*, 126 F.2d 710 (9th Cir.), *cert. denied*, 316 U.S. 698 (1942); *Scurlock v. American President Lines*, 162 F. Supp. 78 (N.D. Cal. 1958); *see* *Asher v. Pacific Power & Light Co.*, 249 F. Supp. 671, 675-76 (N.D. Cal. 1965); 1A MOORE ¶ 0.161[2]; 2A *id.* ¶ 8.10.

¹⁶⁹ *Roth v. Davis*, 231 F.2d 681 (9th Cir. 1956); *Fred. Olsen & Co. v. Moore*, 162 F. Supp. 82 (N.D. Cal. 1958); *see* 1A MOORE ¶¶ 0.168[3.—2], [3.—5]; 2A *id.* ¶ 8.10.

applicable rules, analyzing their foundations, and making modest suggestions for their reform. The objective has been to convey an understanding which will aid the practitioner while increasing the utility of the diversity jurisdiction to his clients in their search for a better justice.