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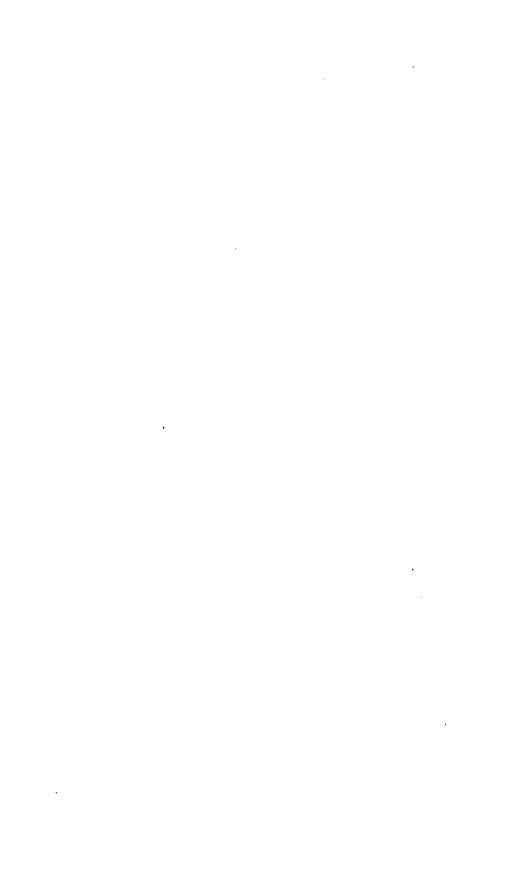
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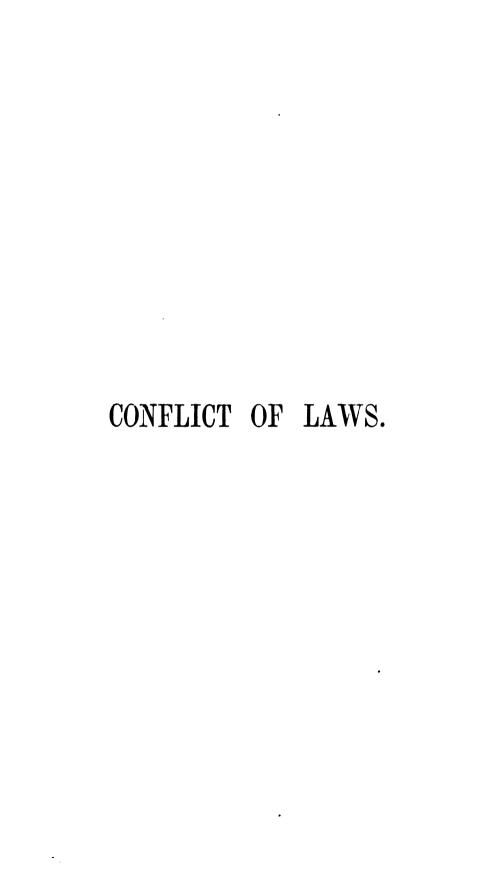
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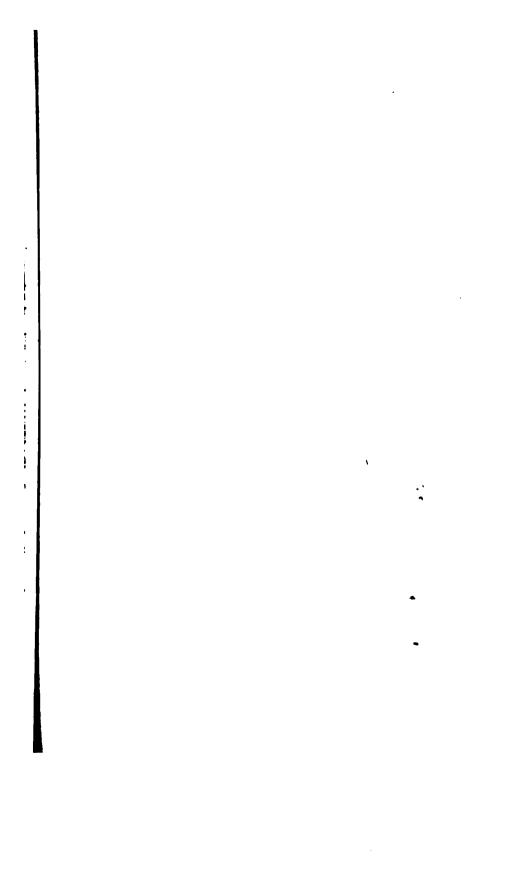
It is not probable, that, in the course of my own life, this work will undergo any essential change from its present form. Other avocations and other pressing duties, judicial as well as professorial, will necessarily occupy all the time and attention, which I may hereafter be permitted to command for any juridical pursuits. I must, therefore, dismiss these Commentaries to the indulgent consideration of the reader, not as a work, which has surveyed the whole subject, or exhausted the materials; but as an essay towards opening the leading doctrines and inquiries belonging to private international jurisprudence, which the genius, and learning, and labors of more gifted minds may hereafter mould, and polish, and expand into an enduring system of public law. My own wishes will be fully satisfied, if (to use the language of my Lord Coke, in the close of his first Institute) any thing shall be found herein, which "may either open some windows of the law, to let in more light to the student, by diligent search to see the secrets of the law, or to move him to doubt, and withal to enable him to inquire, and learn of the sages, what the law, together with the true reason thereof, in these cases is."

JOSEPH STORY.

January, 1841.







COMMENTARIES

OF THE

CONFLICT OF LAWS,

FOREIGN AND DOMESTIC,

IN REGARD TO

CONTRACTS, RIGHTS AND REMEDIES,

AND ESPECIALLY IN REGARD TO

MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS.

BY JOSEPH STORY, LL. D.
DANE PROPESSOR OF LAW IN HARVARD UNIVERSITY.

"Il régnera donc toujours entre les nations une contrariété perpétuelle de loix ; peutêtre régnera-t-elle perpétuellement entre nous sur bien des objets. Delà la nécessité de s'instruire des règles, et des principes, qui peuvent nous conduire dans la décision des questions, que cette variété peut faire natire."—Boulle nois, Traité de la Persenalité, de de Loix, Préface.

THIRD EDITION.

REVISED, CORRECTED, AND GREATLY ENLARGED.

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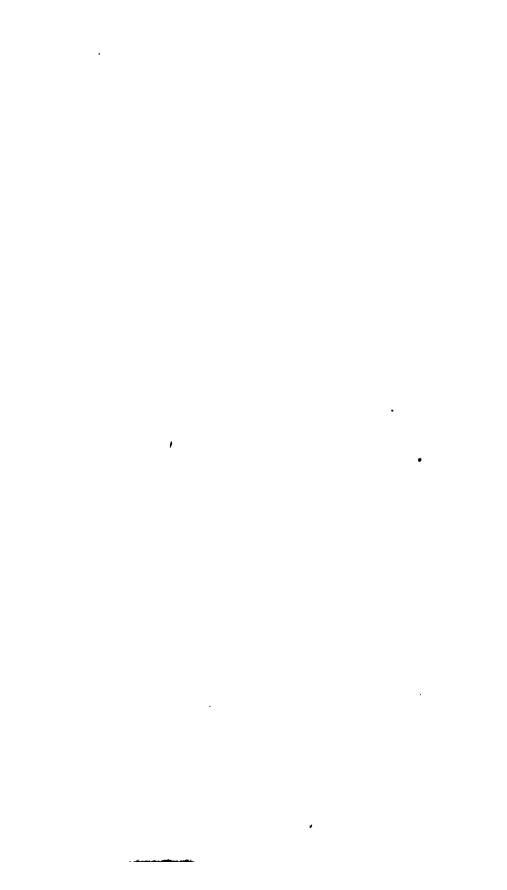
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ADVERTISEMENT TO THE THIRD EDITION.

The present edition of the Commentaries on the Conflict of Laws contains the last revisions and emendations made by the late Author. As no material alteration from the text of the last edition was contemplated by him, the Editor has not deemed it to be within his province to make any changes except such as were made by the Author in his manuscript copy, or any addition beyond the citation of the late cases.

W. W. STORY.

Возтом, July 1, 1846.



ADVERTISEMENT TO THE SECOND EDITION.

THE former edition of this work being exhausted, I have availed myself, in the preparation of the present edition, of the opportunity of revising, correcting, and amending the text and notes throughout, and of adding such new materials, as have been furnished by the recent authorities at the common law, as well as by more diligent researches into foreign jurisprudence. For the opinions of some foreign jurists, I was obliged, in the former edition, (as the reader was informed in the notes,) to rely upon the citations from their works, which I found in other authors, not having access to the originals. With one or two unimportant exceptions, the originals of these foreign jurists are now in my possession, and have been consulted by me; so that I have been enabled to correct some errors in those citations, and also to furnish more complete and perfect statements of their respective opinions. Perhaps it may not be useless here to add, that in every case, where any authority for any position is cited at the bottom of the page, the reader may rest assured, that the very citation has been perused and diligently compared by me with the original.

As the works of foreign jurists, especially of those, who lived before the middle of the eighteenth century, are rarely to be found in American Libraries, either public or private,

and are becoming daily more scarce and difficult to be purchased abroad, I have made my extracts therefrom more copious, and often cited the words of the original, so that the reader might be spared the necessity of farther researches into the originals, and also might possess the means of ascertaining the accuracy of the expositions in the text.

These explanations may account for the fact, that the work, unexpectedly to myself, has swelled to double its former size; a fact, which (as the pages and sections of the former edition are still preserved) might not readily occur to those, who are not accustomed to examine the signatures at the bottom of the different sheets.

Since the publication of the former edition, Mr. Burge has published his very able and comprehensive Commentaries on Colonial and Foreign Law, mainly, as applicable to the colonies of Great Britain, in which he has devoted a number of chapters to the consideration of many of the topics embraced in the present work. The plan of his Work, however, essentially differs from my own in its leading objects. It exhibits great learning and research; and as its merits are not as yet generally known to the profession on this side of the Atlantic, I have made many references to it, and occasional quotations from it, with the view of enabling the profession to obtain many more illustrations of the doctrines, than my own brief text would suggest, and also fully to appreciate his learned la-Monsieur Fælix, also, the accomplished editor of the Revue Etrangere et Française, (a highly useful and meritorious periodical, published at Paris,) has, in the volume of the year 1840, discussed, in a series of articles, many topics of the Conflict of Laws, and given the opinions of the leading foreign

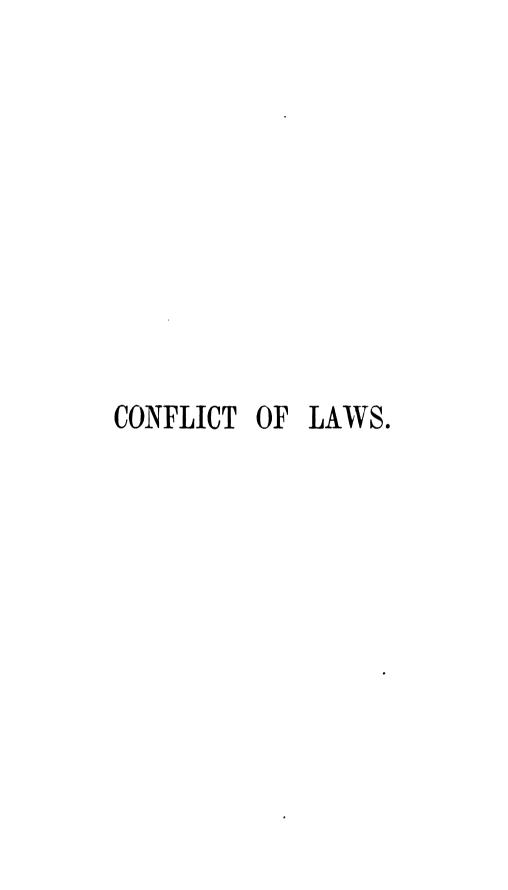
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JOSEPH STORY.

January, 1841.





RII DEDICATION.

That task has been accomplished. The "Commentaries on American Law" have already acquired the reputation of a juridical Classic, and have placed their author in the first rank of the benefactors of the Profession. You have done for America, what Mr. Justice Blackstone in his invaluable Commentaries has done for England. You have embodied the principles of our law in pages as attractive by the persuasive elegance of their style, as they are instructive by the fulness and accuracy of their learning.

You have earned the fairest title to the repose, which you now seek, and which at last seems within your reach. It is, in the noblest sense, Otiom cam dignitate. May you live many years to enjoy it! The consciousness of a life, like yours, in which have been blended at every step public spirit and private virtue, the affections, which cheer, and the taste, which adorns the domestic circle, cannot but make the recollections of the past sweet, and the hopes of the future animating.

I am, with the highest respect,
Your obliged friend,
JOSEPH STORY.

Cambridge, Massachusetts, January 1, 1834.

PREFACE.

I now submit to the indulgent consideration of the profession and the public another portion of the labors appertaining to the Dane Professorship of Law in Harvard University. The subject is one of great importance and interest; and from the increasing intercourse between foreign States, as well as between the different States of the American Union. it is daily brought home more and more to the ordinary business and pursuits of human life. The difficulty of treating such a subject in a manner suited to its importance and interest can scarcely be exaggerated. The materials are loose and scattered, and are to be gathered from many sources, not only uninviting, but absolutely repulsive, to the mere Student of the Common Law. There exists no treatise upon it in the English language; and not the slightest effort has been made, except by Mr. Chancellor Kent, to arrange in any general order even the more familiar maxims of the Common Law in regard to it. Until a comparatively recent period, neither the English Lawyers, nor the English Judges seem to have had their attention drawn towards it, as a great branch of international jurisprudence, which they were required to administer. And, as far as their researches appear as yet to have gone, they are less profound and satisfactory, than their admirable expositions of municipal law.

The subject has been discussed with much more fulness, learning, and ability by the foreign jurists of continental Europe. But even among them there exists no systematical Treatise embracing all the general topics. For the most

part they have discussed it only with reference to some few beauties of jurisprudence, peculiar to the civil law, or to the customary law (almost infinitely varied) of the neighbarring States of Europe, or the different Provinces of the same Empire. And it must be confessed, that their writings are often of so controversial a character, and abound with so many nice distinctions, (not very intelligible to Jurists of the school of the Common Law,) and with so many theories of doubtful utility, that it is not always easy to extract from them such principles, as may afford mfe guides to the judgment. Rodenburg, Boullenois, Bouhier, and Froland have written upon it with the most clearness, comprehensiveness, and acuteness. But they rather stimulate than satisfy inquiry; and they are far more elaborate in detecting the errors of others, than in widening and deepening the foundations of the practical doctrines of international jurisprudence. I am not aware, that the works of these eminent Jurists have been cited at the English Bar; and I should draw the conclusion, that they are in a great measure, if not altogether, unknown to the studies of Westminster Hall. How it should happen, that, in this age. English Lawyers should be so utterly indifferent to all foreign jurisprudence, it is not easy to conceive. Many occasions are constantly occurring, in which they would derive essential assistance from it, to illustrate the questions, which are brought into contestation in all their Courts.

In consulting the foreign Jurists, I have felt great embarrassment, as well from my own imperfect knowledge of the jurisprudence, which they profess to discuss, as from the remote analogies, which it sometimes bears to the rights, titles, and remedies recognised in the Common Law. To give their opinions at large upon many topics would fill volumes; to omit all statements whatever of their opinions would be to withhold from the reader many most important lights, to guide his own studies, and instruct his own judgment. I have adopted an intermediate course; and

have laid before the reader such portions of the opinions and reasonings of foreign Jurists, as seemed to me most useful to enable him to understand their doctrines and principles, and to assist him with the means of making more ample researches, if his leisure or his curiosity should invite him to the pursuit. Humble as this task may appear to many minds, it has been attended with a labor truly discouraging and exhausting. I dare not even now indulge the belief, that my success has been at all proportionate to . my wishes or my efforts. I feel, however, cheered by the reflection (is it a vain illusion?), that other minds, of more ability, leisure, and learning, may be excited to explore the paths, which I have ventured only to point out. I beg, in conclusion, to address to the candor of the Profession my own apology in the language of Strykius; - "Crescit disputatio nostra sub manibus; unum enim si absolveris jus, plura se offerunt consideranda. At nos temporis, quod nimis breve nobis fit, rationem habentes, accuratius illa inquirere haud possumus. Hinc sufficerit, in presens sparsisse quædam saltem adhuc jura, quidque de iis statuamus, vel obiter dixisse." *

JOSEPH STORY.

Cambridge, Massachusetts, January 1, 1834.

^{*}Strykii Disputatio 1, ch. 2, § 92, Tom. ii. p. 24.



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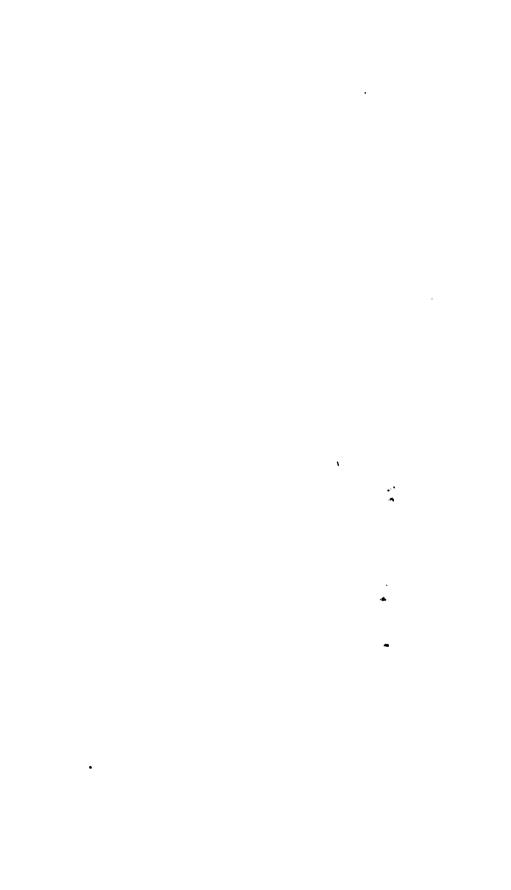
- THE following list of some of the more important Authors, whose works have been cited, may assist the student in his researches.
- D'AGUESSEAU, HENRY FRANCIS, Chancellor of France, born at Limoges, 1668, and died 1751. His works are collected and published in 13 vols. 4to.
- ALEXANDER AB ALEXANDRO, a Neapolitan lawyer, born 1461, and died at Rome about the age of 62.
- D'ARGENTRE, BRRTEAND, President of the *Presidial* of Rennes, born in 1519, and died in 1590. His works are entitled "Commentarii in Patrias Britonum Leges, seu Consuetudines generales Ducatus Britanias."
- Baldus, Unaldus, born about 1324, died 1400. His works are comprised in 4 vols. fol.
- Barrolo, or Barrellus, born at Sasse Ferrato, in the March of Ancona, 1313, and died in his 46th, year. He was called "the star and luminary of lawyers, the master of truth, the lantern of equity, the guide of the blind," &c. His works were printed at Venice, 1499, in 4 vols. fol., according to Camus; in 1599, in 10 or 11 vols. fol., according to Watt.
- BOURIER, J., President of the Parliament of Dijon, born at that place 1673, and died 1746. His works, relating to the present subject, are published in two vols. fol., and entitled, "Les Coutumes du Duché de Bourgogne avec les Observations du Président Bouhier."
- BOULEROIS, LOUIS, advocate in the Parliament of Paris, born at Paris, 1680, and died 1762. There are two works by him, on the present subject; "Traité de la Personalité et de la Réalité des Lois, Coutumes, Statuts, par forme d'Observations," in 2 vols. 4to., and "Dissertations sur des Questions, qui naissent de la Contrariété des Louix et des Coutumes." 4to. This last was published first, and is the original outline of the larger work, which afterwards appeared.
- Bartonnier Bartholemew Joseph, advocate of the Parliament of Paris, born at Montrotier, near Lyons, 1656, and died, 1727. He is the author of a work in 2 vols. 12mo., entitled "Recueil des



- EVERHARD, NICHOLAS, born in the Island of Walcheren, 1462, and died 1532. His works are "Topica Juris, sive Loci Argumentorum Legales"; and "Consilia, sive Responsa Juris."
- FŒLIX M., Editor of the "Review Etrangere et Francaise," a learned periodical published at Paris, beginning in 1833 and still (1840) continued.
- FROLAND, LOUIS, advocate of the Parliament of Rouen, died 1746.

 His works relating to the present subject, in two 4to. vols., are entitled, "Mémoire concernant la Nature et la Qualité des Statuts."
- Gaill, Andrew, born at Cologne, 1525, and died 1587. He was called the Papinian of Germany.
- Gaotrus, Hueo, born at Delft, 1583, and died 1645. His works are well known.
- Heineccius, Johannes Gotleis, Professor of Philosophy and Law at Halle, born at Eisenburg, 1681, and died 1741. His works need not be particularly mentioned.
- HENRYS, CLAUDE, jurisconsult, born at Montbrison, 1615, and died 1662.

 His works are collected in four vols. fol.
- HERTUS, JOHANNES NICOLAUS, born near Giessen, 1651, and died 1710. His treatise "Collisione Legum" is to be found in his select works in two vols. 4to.
- HUBERUS, ULRICUS, a lawyer, historian, and philologer, born at Dockum in the Dutch territories, 1635, and died 1694. His treatise "De Conflictu Legum" is to be found in his "Predectiones Juris Civilis," 3 vols. 4to.
- Kams, Load, (Henry Home,) born at Kaims, in Berwickshire, 1696, and died 1782. The reader is referred to his "Principles of Equity."
- LE BRUN, DENIS, advocate, died 1708, before the publication of his principal work, "Traité de Communautés."
- LEEUWEN, SIMON VAN, born at Leyden, 1625, and died 1682. His work referred to, in the present Commentaries, is translated into English, with the title of "Commentaries on the Roman-Dutch Law."
- LIVERMORE, SAMUEL, of New Orleans, died, 1833. He is the author of "Dissertations on the Contrariety of Laws."
- Mascardus Josephus, an ecclesiastic and Italian jurisconsult, born at Sarzana towards the end of the 16th century, and died about 1630. He is the author of an extensive work, entitled, "De Probationibus Conclusiones."
- MERLIN, M. (de DOUAL.) His voluminous works are entitled, "Répertoire Universel et Raisonné de Jurisprudence;" and "Questions de Droit."
- MORNAC, ANTOINE, born near Tours, first appeared before the Parliament of Paris in 1580, and died 1620. His works are comprised in 4 vols. fol.



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peculiar complexion and character to many of its arrangements. The bold, intrepid, and hardy natives of the North of Europe, whether civilized or barbarous, would scarcely desire, or tolerate, the indolent inactivity and luxurious indulgences of the Asiatics. Nations, inhabiting the borders of the ocean, and accustomed to maritime intercourse with other nations, would naturally require institutions and laws, adapted to their pursuits and enterprises, which would be wholly unfit for those, who should be placed in the interior of a continent, and should maintain very different relations with their neighbors, both in peace and war. Accordingly we find, that, from the earliest records of authentic history, there has been (as far at least as we can trace them) little uniformity in the laws, usages, policy, and institutions, either of contiguous or of distant nations. The Egyptians, the Medes, the Persians, the Greeks, and the Romans, differed not more in their characters and employments from each other, than in their institutions and laws. They had little desire to learn, or to borrow, from each other; and indifference, if not contempt, was the habitual state of almost every ancient nation in regard to the internal polity of all others.

§ 2. Yet even under such circumstances, from their mutual intercourse with each other, questions must sometimes have arisen, as to the operation of the laws of one nation upon the rights and remedies of parties in the domestic tribunals, especially when they were in any measure dependent upon, or connected with foreign transactions. How these questions were disposed of, we do not know. But it is most probable, that they were left to be decided by the analo-

commercial, as well as political intercourse must have brought many diversities of laws and usages in judgment before the tribunals of justice. We have the most abundant evidence on this head, in relation to the Jews, after they had submitted to the Roman yoke, who were still permitted to follow their own laws in the times of our Saviour, and down to the destruction of Jerusalem.²

§ 2 a. When the Northern nations by their irruptions finally succeeded in establishing themselves in the Roman empire, and the dependent nations subjected to its sway, they seem to have adopted, either by design, or from accident, or necessity, the policy of allowing the different races to live together, and to be governed by and to preserve their own separate manners, laws, and institutions in their mutual inter-While the conquerors, the Goths, Burgundians, Franks, and Lombards, maintained their own laws and usages and customs over their own race, they silently or expressly allowed each of the races, over whom they had obtained an absolute sovereignty, to regulate their own private rights and affairs according to their own municipal jurisprudence. has accordingly been remarked by a most learned and eminent jurist, that from this state of society arose that condition of civil rights, denominated personal rights, or personal laws, in opposition to territorial laws.3

¹ See 1 Hertii Opera, § 4, de Collis. leg. p. 119, § 2; Id. p. 169, edit. 1716. ² There are traces to be found in the Digest of the existence and operation of the Lex Loci. See Dig. lib. 50, tit. 1, l. 21, § 7; Id. lib. 50, tit. 6, l. 5, § 1; Id. tit. 4, l. 18, § 27; Id. tit. 3, l. 1; Livermore, Dissert. p. 1, n. a.

³ Savigny's History of the Roman Law in the Middle Ages. The whole passage is exceedingly interesting and curious; and therefore I

to conflicting rights, and claims, and remedies, growing out of dealings, and acts, and contracts between individuals belonging to different races. But when the question assumed a more comprehensive character,

an attachment might, indeed, create a wish among nations, or individuals to preserve their own laws, in a foreign country, or under a foreign yoke: but the question is, how were the predominant people induced to grant them this privilege? The benevolent and hospitable disposition of the victorious may have been partly the cause; but, their mere dove of freedom affords no satisfactory explanation. This humane treatment of foreigners was not deeply seated in the character of the old Germans. It is probable, that among them every foreigner was, at first, a Wildfang, and belonged to the class of the Biesterfreien; - denied the advantages, arising from service in the national army, or from the obligations of fealty, and living as an alien, unprotected by any power, except the weak hand of the general government; who, while they excluded him from the rights of marriage, inherited his property, and exacted his composition, if slain. Further, the want of such an institution, as the Personal Laws, could never have been felt, in a country without trade, and where few foreigners resided. In these circumstances, its introduction was impossible. If only a single Goth lived in the Burgundian Empire, none of his countrymen could be found to administer Gothic Law, and the Burgundians themselves were entirely ignorant of it.

"The truth is, that the want of such an institution, and the possibility of introducing it, could occur only, after the nations were blended together in considerable masses. The internal condition of each kingdom would then produce what could never have been brought about by mere benevolence toward individual foreigners. According to this account of the origin of the system of Personal laws, it prevailed in all the German States, settled in countries formerly subject to Rome. At first, the validity of two Laws only was admitted: e. g. the law of the victorious race, and of the vanquished Romans. Individuals, belonging to other German nations, did not at first enjoy the right of living under their own laws; but when our supposed kingdom had extended its conquests, and spread out its dominion over other German tribes, then the laws of the conquered German races were acknowledged, in the same manner as the Roman formerly had been. Thus, also, every foreign law, prevailing in the empire of the conqueror, was admitted and considered as valid among all the vanquished. This practice ought to have produced the following results. At first, in the northern parts of France, the Frank and Roman laws must have been exclusively received: and, under the Carlovingian dynasty, it would become necessary to admit likewise the laws of the West Goths, Burgundians, Alemans, Bavarians, and Saxons; because these, as nations belonged to the empire. Italy, however, did not form

commerce, and surrendered all private rights and contracts to mere despotic power. It was not until the revival of Commerce on the shores of the Mediterranean, and the revival of Letters and the study of the Civil Law by the discovery of the Pandects, had given an increased enterprise to maritime navigation, and a consequent importance to maritime contracts, that anything like a system of international justice began to be developed. It first assumed the modest form of commercial usages; it was next promulgated under the more imposing authority of royal ordinances; and it finally became by silent adoption a generally connected system, founded in the natural convenience, and asserted by the general comity of the commercial nations of Europe. The system, introduced for the purposes of commerce, has gradually extended itself to other objects, as the intercourse of nations has become more free and frequent. New rules, resting on the basis of general convenience, and an enlarged sense of national duty, have, from time to time, been promulgated by jurists, and supported by courts of justice, by a course of juridical reasoning, which has commanded almost universal confidence, respect, and obedience, without the aid, either of municipal statutes, or of royal ordinances, or of international treaties.

§ 4. Indeed, in the present times, without some general rules of right and obligation, recognised by civilized nations to govern their intercourse with each other, the most serious mischiefs and most injurious conflicts would arise. Commerce is now so absolutely universal among all countries; the inhabitants of all have such a free intercourse with each other; contracts, sales, marriages, nuptial settlements,

one years but less than twenty-five, and one of them is a subject of the latter country. Is such a marriage valid, or not? If valid in the country, where it is celebrated, is it valid also in the other country? Or, the question may be propounded in a still more general form; is a marriage, valid between the parties in the place, where it is solemnized, equally valid in all other countries? Or, is it obligatory only as a local regulation, and to be treated everywhere else as a mere nullity?

& 6. Questions of this sort must be of frequent occurrence, not only in different countries, wholly independent of each other; but also in provinces of the same empire, which are governed by different laws, as was the case in France before the Revolution; and also in countries acknowledging a common sovereign, but yet organized as distinct communities, as is still the case in regard to the communities composing the British Empire, the Germanic Confederacy, the States of Holland, and the Dominions of Austria and Russia. Innumerable suits must be litigated in the judicial forums of these countries, and provinces, and communities, in which the decision must depend upon the point, whether the nature of a contract should be determined by the law of the place, where it is litigated; or by the law of the domicil of one or of both of the parties; or by the law of the place, where the contract is made; whether the capacity to make a testament should be regulated by the law of the testator's domicil, or that of the location (situs) of his property; whether the form of his testament should be prescribed by the law of the place of his domicil, or by that of the

¹ See 1 Froland, Mémoires sur les Statuts, P. 1, ch. 1, § 5 to 10.

§ 8. This is the natural principle flowing from the equality and independence of nations, For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as matter of right. And, accordingly, it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory. Extra territorium jus dicenti impune non paretur, is the doctrine of the Digest; 1 and it is equally as true in relation to nations, as the Roman law held it to be in relation to magistrates. The other part of the rule is equally applicable; Idem est, et si supra jurisdictionem suam velit ius dicere; for he exceeds his proper jurisdiction, when he seeks to make it operate extra-territorially as a matter of power.2 Vattel has deduced a similar conclusion from the general independence and equality of nations, very properly holding, that relative strength or weakness cannot produce difference in regard to public rights and duties; that whatever is lawful for one nation, is equally lawful for another; and whatever is unjustifiable in one, is equally so in another.3 And he affirms in the most positive manner, (what indeed cannot well be denied,) that sovereignty, united with domain, establishes the exclusive jurisdiction of a nation within its own terri-

Dig. lib. 2, tit. 1, l. 20; Pothier, Pand. lib. 2. tit. 1, n. 7.
 Dig. lib. 2, tit. 1, l. 20; Pothier, Pand. lib. 2, tit. 1, n. 7.

³ Vattel, Prelim. § 15 to 20; Id. B. 2, ch. 3, § 35, 36; The St. Louis, 2 Dodson, R. 210.

vast extent in its commerce, and such universal reach in its intercourse and polity.¹

§ 11. The civilians of continental Europe have examined the subject in many of its bearings with a much more comprehensive philosophy, if not with a more enlightened spirit. Their works, however, abound with theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtilties, which perplex, if they do not confound, the inquirer. They are also mainly addressed to questions intimately connected with their own provincial or municipal laws and customs, some of which are of a purely local, and others of a technical and peculiar character; and they do not always separate those considerations and doctrines, which belong to the elements of the general science, from those, which may be deemed founded in particular national interests and local ordinances. Precedents. too, have not, either in the courts of continental Europe, or in the juridical discussions of its eminent jurists, the same force and authority, which we, who live under the influence of the common law, are accustomed to attribute to them; and it is unavoidable. that many differences of opinion should exist among them, even in relation to leading principles. But the strong sense and critical learning of the best minds among foreign jurists have generally maintained those doctrines, which at the present day are deemed entirely persuasive and satisfactory with us, who live under the common law, as well for the solid

¹ Mr. Chancellor Kent has remarked, that these topics of international law were almost unknown in the English courts, prior to the time of Lord Hardwicke and Lord Mansfield; and that the English lawyers seem generally to have been strangers to the discussions on foreign law by the celebrated jurists of continental Europe. 2 Kent, Comm. Lect. 39, p. 455, 3d edit.

§ 2 b. Still, however, this was but a mere arrangement in the domestic polity of each particular nation; and even then, it must often have involved serious embarrassments, whenever questions arose in regard

quote it at large from Mr. Cathcart's Translation, Vol. 1, ch, 3, p. 99 to 104. — "When the Goths, Burgundians, Franks, and Lombards, founded kingdoms in the countries, formerly subject to the power of Rome, there were two different modes of treating the conquered race. They might be extirpated, by destroying or enslaving the freemen; or, the conquering nations, for the sake of increasing their own numbers, might transform the Romans into Germans, by forcing on them their manners, constitution and laws. Neither mode, however, was followed; for, although many Romans were slain, expatriated, or enslaved, this was only the lot of individuals, and not the systematic treatment of the nation. Both races, on the contrary, lived together, and preserved their separate manners and laws. From this state of society arose that condition of civil rights, denominated Personal rights, or Personal laws, in opposition to territorial laws. The moderns always assume, that the law, to which the individual owes obedience, is that of the country, where he lives; and that the property and contracts of every resident are regulated by the law of his domicile. In this theory, the distinction between native and foreigner is overlooked, and national descent is entirely disregarded. Not so, however, in the middle ages; where, in the same country, and often indeed in the same city, the Lombard lived under the Lombardic, and the Roman under the Roman law. The same distinction of laws was also applicable to the different races of Germans. The Frank, Burgundian, and Goth, resided in the same place, each under his own law; as is forcibly stated, by the Bishop Agobardus, in an Epistle to Louis le Debonnaire. 'It often happens,' says he, ' that five men, each under a different law, may be found walking or sitting together.'

"In the East-Gothic kingdom alone, this custom was not originally followed. There, an artificial and systematic plan was adopted, which belongs to the particular history of that nation, and cannot be brought within the general inquiry. All the other States followed the system of Personal laws; and, this universal practice could not have arisen from accidental reasons, but from common views, principles and wants. These may be appropriately illustrated at present.

"According to the general opinion, the system of personal laws prevailed among all the German nations, from the earliest times; and it is customary to explain this circumstance by the love of freedom, so peculiar to these races. In the first place, however, it is difficult to perceive, how such an institution could arise merely from regard to liberty. Such

to conflicting rights, and claims, and remedies, growing out of dealings, and acts, and contracts between individuals belonging to different races. But when the question assumed a more comprehensive character,

an attachment might, indeed, create a wish among nations, or individuals to preserve their own laws, in a foreign country, or under a foreign yoke: but the question is, how were the predominant people induced to grant them this privilege? The benevolent and hospitable disposition of the victorious may have been partly the cause; but, their mere dove of freedom affords no satisfactory explanation. This humane treatment of foreigners was not deeply seated in the character of the old Germans. It is probable, that among them every foreigner was, at first, a Wildfang, and belonged to the class of the Biesterfreien; - denied the advantages, arising from service in the national army, or from the obligations of fealty, and living as an alien, unprotected by any power, except the weak hand of the general government; who, while they excluded him from the rights of marriage, inherited his property, and exacted his composition, if slain. Further, the want of such an institution, as the Personal Laws, could never have been felt, in a country without trade, and In these circumstances, its introducwhere few foreigners resided. tion was impossible. If only a single Goth lived in the Burgundian Empire, none of his countrymen could be found to administer Gothic Law, and the Burgundians themselves were entirely ignorant of it.

"The truth is, that the want of such an institution, and the possibility of introducing it, could occur only, after the nations were blended together in considerable masses. The internal condition of each kingdom would then produce what could never have been brought about by mere benevolence toward individual foreigners. According to this account of the origin of the system of Personal laws, it prevailed in all the German States, settled in countries formerly subject to Rome. At first, the validity of two Laws only was admitted: e. g. the law of the victorious race, and of the vanquished Romans. Individuals, belonging to other German nations, did not at first enjoy the right of living under their own laws; hut when our supposed kingdom had extended its conquests, and spread out its dominion over other German tribes, then the laws of the conquered German races were acknowledged, in the same manner as the Roman formerly had been. Thus, also, every foreign law, prevailing in the empire of the conqueror, was admitted and considered as valid among all the vanquished. This practice ought to have produced the following results. At first, in the northern parts of France, the Frank and Roman laws must have been exclusively received: and, under the Carlovingian elynamy, it would become necessary to admit likewise the laws of the West Goths, Burgundians, Alemans, Bavarians, and Saxons; because cheen, as nations belonged to the empire. Italy, however, did not form

commerce, and surrendered all private rights and contracts to mere despotic power. It was not until the revival of Commerce on the shores of the Mediterranean, and the revival of Letters and the study of the Civil Law by the discovery of the Pandects, had given an increased enterprise to maritime navigation, and a consequent importance to maritime contracts, that anything like a system of international justice began to be developed. It first assumed the modest form of commercial usages; it was next promulgated under the more imposing authority of royal ordinances; and it finally became by silent adoption a generally connected system, founded in the natural convenience, and asserted by the general comity of the commercial nations of Europe. The system, introduced for the purposes of commerce, has gradually extended itself to other objects, as the intercourse of nations has become more free and frequent. New rules, resting on the basis of general convenience, and an enlarged sense of national duty. have, from time to time, been promulgated by jurists, and supported by courts of justice, by a course of juridical reasoning, which has commanded almost universal confidence, respect, and obedience, without the aid either of municipal statutes, or of royal ordinances, or of international treaties.

§ 4. Indeed, in the present times, without some eneral rules of right and obligation, recognised by vilized nations to govern their intercourse with other, the most serious mischiefs and most intricus conflicts would arise. Commerce is now so molutely universal among all countries; the inhabition of all have such a free intercourse with each lier; contracts, sales, marriages, nuptial settlements,

§ 8. This is the natural principle flowing from the equality and independence of nations. For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as matter of right. And, accordingly, it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory. Extra territorium jus dicenti impune non paretur, is the doctrine of the Digest; 1 and it is equally as true in relation to nations, as the Roman law held it to be in relation to magistrates. The other part of the rule is equally applicable: Idem est, et si supra jurisdictionem suam velit jus dicere; for he exceeds his proper jurisdiction, when he seeks to make it operate extra-territorially as a matter of power.2 Vattel has deduced a similar conclusion from the general independence and equality of nations, very properly holding, that relative strength or weakness cannot produce difference in regard to public rights and duties: that whatever is lawful for one nation, is equally lawful for another; and whatever is unjustifiable in one, is equally so in another.3 And he affirms in the most positive manner, (what indeed cannot well be denied,) that sovereignty, united with domain, establishes the exclusive jurisdiction of a nation within its own terri-

¹ Dig. lib. 2, tit. 1, l. 20; Pothier, Pand. lib. 2. tit. 1, n. 7.

u Dig. lib. 2, tit. 1, l. 20; Pothier, Pand. lib. 2, tit. 1, n. 7.

³ Vattel, Prelim. § 15 to 20; Id. B. 2, ch. 3, § 35, 36; The St. Louis, 2 Dodson, R. 210.

vast extent in its commerce, and such universal reach in its intercourse and polity.¹

§ 11. The civilians of continental Europe have examined the subject in many of its bearings with a much more comprehensive philosophy, if not with a more enlightened spirit. Their works, however, abound with theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtilties, which perplex, if they do not confound, the inquirer. They are also mainly addressed to questions intimately connected with their own provincial or municipal laws and customs, some of which are of a purely local, and others of a technical and peculiar character; and they do not always separate those considerations and doctrines, which belong to the elements of the general science, from those, which may be deemed founded in particular national interests and local ordinances. Precedents. too, have not, either in the courts of continental Europe, or in the juridical discussions of its eminent jurists, the same force and authority, which we, who live under the influence of the common law, are accustomed to attribute to them; and it is unavoidable, that many differences of opinion should exist among them, even in relation to leading principles. the strong sense and critical learning of the best minds among foreign jurists have generally maintained those doctrines, which at the present day are deemed entirely persuasive and satisfactory with us, who live under the common law, as well for the solid

¹ Mr. Chancellor Kent has remarked, that these topics of international law were almost unknown in the English courts, prior to the time of Lord Hardwicke and Lord Mansfield; and that the English lawyers seem generally to have been strangers to the discussions on foreign law by the celebrated jurists of continental Europe. 2 Kent, Comm. Lect. 39, p. 455, 3d edit.

jus particulare, seu non commune, quod uno vocabulo usitatissimo Statutum dicitur, quasi statum publicum tuens.1 Appellatur etiam jus municipale. Etiam in jure nostro dicta lex, seu lex municipii, quemadmodum in genere signat jus commune.2 And he defines it thus; Est jus particulare ab alio legislatore quam Imperatore constitutum.3 Dico, jus particulare, in quantum opponitur juri communi, non prout est gentium et naturale, sed prout est jus civile Romanorum, populo Romano commune, et omnibus, qui populo parebant.4 Additur, ab alio legislatore, cum qui statuta condit, recte et suo modo legislator appelletur, ut ipsa statuta leges dicuntur municipiorum. Et quidem, ab alio, quia regulariter statuta non condit Imperator; excipe, nisi municipibus jura det, statuta præscribat, secundum quæ ipsi sua regant municipia.5 Denique adjicitur, quam imperatore, quod licet Imperator solummodo dicatur legislator, id tamen, non alio sensu obtineat, quam quod suis legibus non hunc aut illum populum, verum omnes constringat, quos suæ clementiæ regit imperium.6 Merlin says; "This term statute, is generally applied to all sorts of laws and regulations. Every provision of law is a statute, which permits, ordains, or prohibits anything." Ce terme, (statut,) s'applique en général à toutes sortes de lois et de réglémens. Chaque disposition d'une loi est un statut, qui permet, ordonne, ou défend quelque chose.7

^{1.} P. Voet, de Statut. § 4, ch. 1, § 1; Id. p. 123, edit. 1661.

² Ibid.

³ P. Voet, de Statut. § 4, ch. 1, § 2; Id. p. 124, edit. 1661.

⁴ Ibid.

⁵ P. Voet, de Statut. § 4, ch. 1, § 2; Id. p. 125, edit. 1661.

⁶ P. Voet, de Statut. § 4, ch. 1, § 2; Id. p. 125, edit. 1661; Id. § 1, ch. 4; Id. p. 35, edit. 1661; Liverm. Dissert. II, p. 21, note (b), edit. 1828.

⁷ Merlin, Répertoire, art. Statut. Vol. 31, edit. 1828, Bruxelles; Saul v. His Creditors, 17 Martin, R. 569, 589.

§ 13. The civilians have variously defined the different classes of statutes or laws. The definitions of Merlin are sufficiently clear and explicit for all the purposes of the present work, and will therefore be here cited. The distinctions between the different classes are very important to be observed in consulting foreign Jurists, since they have been adopted by them from a very early period, and pervade all their discussions. Personal statutes are held by them to be of general obligation and force every where: but real statutes are held to have no extra-terrior obligation.1 "Personal statutes," torial force (savs Merlin,) "are those, which have principally for their object the person, and treat only of property (biens)² incidentally (accessoirement); such are those, which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract, to make a will, to plead in proper person, &c.3 Real statutes are those, which have principally for their object property (biens), and which do not speak of persons, except in relation to property; such are those, which concern the disposition, which one may make of his property, either while he is living, or by testament.4 Mixed statutes are those, which concern at once persons and pro-But Merlin adds, "that in this sense almost perty."

¹ Rodenburg, De Statut. Divers. c. 3, p. 7; 1 Froland, Mémoires des Statuts. ch. 7, § 1, 2.

² The term "biens," in the sense of the civilians and continental jurists, comprehends not merely goods and chattels, as in the common law, but real estate. But the distinction between movable and immovable property, is nevertheless recognized by them, and gives rise in the civil law, as well as in the common law, to many important distinctions as to rights and remedies.

³ See Pothier, Coutum. d'Orléans, ch. 1, § 1, art. 6.

⁴ See Pothier, Coutum. d'Orleans, ch. 1, § 2, art. 21.

all statutes are mixed, there being scarcely any law relative to persons, which does not at the same time relate to things." He, therefore, deems the last classification unnecessary, and holds, that every statute ought to receive its denomination according to its principal object. As that object is real, or personal, so ought the quality of the statute to be determined. But this distribution into three classes is usually adopted, precisely as it is stated by Rodenburg;—Aut enim statutum simpliciter disponit de personis; aut solumnodo de rebus; aut conjunctim de utrisque. And he proceeds to explain this division in the following manner. Que ita constrictim dicta sic habentur explicatiùs: Aut universus personæ status,

¹ Merlin, Répertoire, Statut.; Id. Autorisation Maritale, § 10.

² Ibid.

³ Rodenburg, De Statut. Diversitate, oh. 2, p. 4; Le Brun, Traité de la Communauté, Liv. 2, ch. 3, § 20 to § 48; Bouhier, Coutum. de Bourg. ch. 21 to ch. 37; Voet, de Statut. § 4, ch. 2, p. 116 to p. 124. ld p. 120 to p. 143, edit. 1661; Livermore, Dissert. § 65 to § 162; 1 Froland, Memoires, Qualité des Statuts, P. 1, ch. 3, p. 25; Id. ch. 4, p. 49, ch. 5, p. 81, ch. 6, p. 114; Boullenois, Traité des Statuts, vol 1, pressuce, p. 23; Pothier, Coutum. d'Orleans, ch. 1, § 1, art. 6, 7, 8.— Boullenois distributes all statutes into three classes: "Ou le statut dispose simplement des personnes; ou il dispose simplement des choses; ou il dispose tout à la fois des personnes et des choses." I Boullenois, Traité des Statuts reels et personnels, tit. 1, ch. 2, obs. 2, p. 25; Id. Princ. Génp. 4, 6. Mr. Henry, in his Dissertation on Personal, Real, and Mixed Statutes, has adopted the like distribution, without any acknowledgment of the source, (Boullenois,) from which he has drawn all his materials. See Heavy on Personal and Real Statutes, ch. 1, § 2 to ch. 3, § 1, p. 2 to 13. See also Livermore's Dissert. 2, § 65 to § 162, p. 62 to 106; Id. § 168, 100 Mr. Justice Porter, in delivering the opinion of the Supreme Court of Louisiana, in the case of Saul v. His Creditors, (17 Martin, R. MR, NA, said, that foreign jurists, by a personal statute, mean that, which follows and governs the party subject to it, wherever he goes; and a real statue is that, which controls things, and does not extend beyond the lunts of the country, from which it derives its authority. Is and thus a description of the effect of such statutes, rather than a definition of their maters? See ld. 588.

learning.¹ Hertius admits, that these subtilties have so perplexed the subject, that it is difficult to venture even upon an explanation. His language is; De collisu legum anceps, difficilis, et late diffusa est disputatio, quam nescio, an quisquam explicare totam aggressus fuerit.² And in another place, he adds; Cæterum Junioribus plerisque placuit distinctio inter statuta, realia, personalia, et mixta. Verum in iis definiendis mirum est, quam sudant Doctores.³ Bartolus

¹ See 1 Boullenois, tit. 1, ch. 1, Observ. 2, p. 16, &c.; Id. ch. 2, Obs. 5. p. 114 to 122; 1 Froland, Mém. des Stat. ch. 2, p. 15; 2 Kent, Comm. Lect. 39, p. 453 to 457, (3d edit.); Saul v. His Creditors, 17 Martin, R, 569 to 596; Henry on Foreign Law, ch. 3, p. 23, &c .- The Supreme Court of Louisiana have made some very just remarks on this subject. "We are led," (says Mr. Justice Porter, in delivering the opinion of the Court,) "into an examination of the doctrine of real and personal statutes, as it is called by the continental writers of Europe; a subject the most intricate and perplexed of any, that has occupied the attention of lawyers and courts; one on which scarcely any writers are found entirely to agree, and on which it is rare to find one consistent with himself throughout. We know of no matter in jurisprudence so unsettled, or none, that should more teach men distrust of their own opinions, and charity for those of others." Saul v. His Creditors, (17 Martin, R. 569, 588.) Chancellor D'Aguesseau has attempted a definition, or test, of real and personal laws. He says; "The true principle in this matter is, to examine, if the statute has property directly for its object, or its destination to certain persons, or its preservation in families, so that it is not the interest of the person, whose rights or acts are examined, but the interests of others, to whom it is intended to assure the property, or the real rights, which were the cause of the law. Or, if, on the contrary, all the attention of the law is directed towards the person, to provide in general for his qualifications, or his general absolute capacity, as when it relates to the qualities of major or minor, of father or son, of legitimate or illegitimate, of ability or inability to contract, by reason of personal causes, In the first hypothesis, the statute is real; in the second, it is personal." Cited in 17 Martin, R. p. 594; D'Aguesseau, Œuvres, tom. 4, p. 660, 4to. edit. How unsatisfactory is this description, when applied in practice.

² 1 Hertii Opera, De Collis. Legum, § 1, n. 1, p. 91; Id. § 4, n. 3, p. 121, 122; Id. p. 129, and p. 170, edit. 1716.

^{3 1} Hertii Opera, § 4, n. 3, p. 120; Id. p. 170, edit. 1716. See also 1 Froland, Mém. Qualité des Statut. ch. 3 to ch. 7; Bouhier, Coutum. de Bourg. ch. 23, § 58, 59.— Mr. Livermore has given a concise view of the

genitus succedat,) it is a personal statute.¹ This distinction has been justly exploded by other civilians, as the mere order and construction of the words of the statute, and not its objects, would otherwise decide its character.²

¹ 1 Boullenois, tit. 1, ch. 1, Obs. 2, p. 16, 17; Liverm. Dissert. § 3, p. 22, 23; Id. § 67, 68, p. 62, 63; Mr. Justice Porter in the case of Saul v. His Creditors, 17 Martin R. 569, 590 to 595; Burgundus, Tract. 1, § 4, p. 16; Stockman, Decis. 125, § 8, p. 263.

² Ibid. p. 19; Liverm. Dissert. 2, § 67, 68; Id. § 69 to 77; 1 Froland, Mém. Statut. P. 1, ch. 3, § 3, 4; Bouhier, Coutum. de Bourg. ch. 53, § 58 to 99. — The opinion of the Court by Mr. Justice Porter, in Saul v. His Creditors, 17 Martin, R, 569, 590 to 596, illustrates this subject in a very striking manner. "According to the Jurists," (says he,) "of those countries, a personal statute is that, which follows and governs the party subject to it wherever he goes. The real statute controls things, and does not extend beyond the limits of the country, from which it derives its authority. The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove. But it is subject to a real statute of the place, where the person subject to the personal should fix himself, or where the property, on which the contest arises, may be situated. So far the rules are plain and intelligible. But the moment we attempt to discover from these writers, what statutes are real, and what are personal, the most extraordinary confusion is presented. Their definitions often differ, and when they agree on their definitions, they dispute as to their application. Bartolus, who was one of the first, by whom this subject was examined, and the most distinguished jurist of his day, established as a rule, that, whenever the statute commenced by treating of persons, it was a personal one; but if it began by disposing of things, it was real. So that if a law, as the counsel for the appellants has stated, was written thus: 'The estate of the deceased shall be inherited by the eldest son,' the statute was real; but if it said, 'The eldest son shall inherit the estate,' it was personal. This distinction though purely verbal, and most unsatisfactory, was followed for a long time, and sanctioned by many, whose names are illustrious in the annals of jurisprudence; but it was ultimately discarded by all. D'Argentre, who rejected this rule, to real and personal statutes added a third, which he called mixed. The real statute, according to this writer, is that which treats of immovables; In quo de rebus soli, id est immobilibus agitur. And the personal, that which concerns the person abstracted from things; Statutum personale est illud, quod afficit personam universaliter, abstracte ab omni materia reali. The mixed he states to be one, which

of the person, independent of property. If it does not universally govern the state of the person, but only particular acts of the person, it is not personal,

that they are considered as real statutes, the execution of which is regulated, not by the place of domicil, but by that, where the property is situated. The true principle in this matter is, to examine if the statute has property directly for its object, or its destination to certain persons. or its preservation in families, so that it is not the interest of the person, whose rights or acts are examined, but the interest of others, to whom it is intended to assure the property, or the real rights which were the cause of the law. Or, if, on the contrary, all the attention of the law is directed towards the person, to provide in general for his qualifications, or his general and absolute capacity; as, when it relates to the qualities of major or minor, of father or of son, legitimate or illegitimate, ability or inability to contract, by reason of personal causes.' 'In the first hypothesis the statute is real, in the second it is personal, as is well explained in these words of D'Argentre; "Cum statutum non simpliciter inhabilitat, sed ratione fundi aut juris realis alterum respicientis extra personas contrahentes, totas hanc inhabilitatem non egredi locum statuti."' (Œuvres, D'Aguesseau, vol. 4, 660, cinquante-quatrieme plaidoyer.) This definition is, we think, better than any of the rest; though even in the application of it to some cases, difficulty would exist. If the subject had been susceptible of clear and positive rules, we may safely believe this illustrious man would not have left it in doubt; for if anything be more remarkable in him than his genius and his knowledge, it is the extraordinary fulness and clearness, with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men, of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude, that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far; to define and fix that, which cannot in the nature of things be defined and fixed. They seem to have forgotten, that they wrote on a question, which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances, which cannot be reduced within any certain rule; that no nation will suffer the laws of another to interfere with her own, to the injury of her citizens; that, whether they do or not, must depend on the condition of the country, in which the foreign law is sought to be enforced, the particular law of her legislation, her policy, and the character of her institutions; that in the conflict of laws, it must be often a matter of doubt, which should prevail, and that, whenever that doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger."

particular occurrences. The same doctrine is, either mainly or expressly, conceded by every other jurist, who has discussed the subject at large, whether he has written upon municipal law, or upon public law.

à 21. IL. American maxim, or proposition, is, that no state or marine can by its laws, directly affect, or nimi property out of its own territory, or bind persons not resident therein, whether they are natural born subjects, or others. This is a natural consequence at the first proposition: for it would be wholly insumparishe with the equality and exclusiveness of the sovereigner at all matters, that any one nation should he at liberty is regulate either persons or things not within its own minimum. It would be equivalent to a decisionism that the sovereignty over a territory was never emphasive in any mation, but only concurwar with their of all metions; that each could legislate in all, and more in isself; and that all might estabist rules, which more were bound to obey. The absure results of such a state of things need not be ivere your Accordingly Rodenburg has significantwhich was an angular bas a right to give the law house his roat diminions; and if he attempts it, in this is it with revised obedience; for wherever the countries of laws fulls, there their force and jumedicura units desemble seite interescentiorium them steps diere nemini, idene si fecerit quis, impune .. was super : juippe not creat suturem fundamenand come is a substant? P. View speaks to the same where builden numerous wire in rem, wire in personam, si of morning were extended service institution, seese extendit

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a consequence of what is called natural allegiance. that is, of allegiance to the government of the territory of a man's birth. Thus, Mr. Justice Blackstone says; "Natural allegiance is such as is due from all men, born within the king's dominions, immediately upon their birth." "Natural allegiance is, therefore, a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place or An Englishman, who removes to circumstance. France, or to China, owes the same allegiance to the king of England there, as at home, and twenty years hence as well as now." 1 And he proceeds to distinguish it from local allegiance, which is such as is due from an alien, or stranger born, for so long a time as he continues within the dominions of a foreign prince. The former is universal and perpetual; the latter ceases the instant the stranger transfers himself to another country; and it is, therefore, local and temporary. Vattel, on the other hand. seems to admit the right of allegiance not to be pernetual even in natives; and that they have a right to expatriate themselves, and, under some circumstances, to dissolve their connexion with the parent country.3

§ 22. Without entering upon this subject, (which properly belongs to a general treatise upon public law,) it may be truly said, that no nation is bound to respect the laws of another nation, made in regard to the subjects of the latter, who are non-residents. The obligatory force of such laws of any nation cannot extend beyond its own territories. And if such laws are incompatible with the laws of the country,

^{1 1} Black. Comm. 369, 370; Foster, C. L. 184.

² Ibid.

³ Vattel, B. 1, ch. 19, § 220 to 228.

er, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.1 A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories. It may prohibit some foreign laws, and it may admit the operation of others. It may recognise, and modify, and qualify some foreign laws; it may enlarge, or give universal effect to others. It may interdict the administration of some foreign laws; it may favor the introduction of others. When its own code speaks positively on the subject, it must be obeyed by all persons, who are within the reach of its sovereignty. When its customary, unwritten, or common law speaks directly on the subject, it is equally to be obeyed; for it has an equal obligation with its positive code. When both are silent, then, and then only, can the question properly arise, what law is to govern in the absence of any clear declaration of the sovereign will. Is the rule to be promulgated by a legislative act of the sovereign power? Or is it to be promulgated by courts of law, according to the analogies, which are furnished in the municipal jurisprudence? This question does not admit of any universal answer; or rather, it will be answered differently in different communities, according to the organization of the departments of each particular government.9

§ 24. Upon the continent of Europe some of the principal states have silently suffered their courts to draw this portion of their jurisprudence from the analogies furnished by the civil law, or by their own cus-

¹ Huberus, Lib. 1, tit. 3, § 2.

² See Post, § 38.

tomary or positive code. France, for instance, composed, as it formerly was, of a great number of provinces, governed by different laws and customs, was early obliged to sanction such exertions of authority by its courts, in order to provide for the constantly occurring claims of its own subjects, living and owning property in different provinces, in a conflict between the different provincial laws. In England and America the courts of justice have hitherto exercised the same authority in the most ample manner; and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times, as they have arisen; and so far as the practice of nations, or the jus gentium privatum, has been supposed to furnish any general principle, it has been followed out with a wise and manly liberality.

§ 25. The real difficulty is to ascertain, what principles in point of public convenience ought to regulate the conduct of nations on this subject in regard to each other, and in what manner they can be best applied to the infinite variety of cases, arising from the complicated concerns of human society in modern times. No nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty. In the endless diversities of human jurisprudence many laws must exist in one country, which are the result of local or accidental circumstances,

and the world make to be engrafted upon the instituman and mores of mother. Many laws, well enough magness of heathen nations, would be manly programs to the feelings, as well as to the jusare a mass. wascis embrace Christianity. A heathen much mean usuly polygamy, or incest, contracts a mann promote. or exercises of despotic cruelty ver wrong would be repugnant to the first The laws of one nation under the committee and a marrow selfishness, exclusively manner o necessite its own peculiar policy, or the research in acquirement interests of its own subjects, to the trure or even the rain of those of the subjects of al uner muncries. A particular nation may refuse all myserce, rights, and remedies to otht me a superiority of powers and prewere purpose of crushing those of its in the less fortunate, or less powerful. to these. mee' in many other cases, which may easily was without any extravagance of supposition, there were stillighty in saying, that other nawas one sound to control laws, institutions, or cuswas a merican which were subversive of their was wrote week. interest or polity. Who, for seemen. we as multiply cases.) who would contend. the tar meeter in Christendom ought to carry into where the paternal power of the man it was in their early jurisprudence, extendthe country over the life and death of their chilit who would now contend for that terrible was a save make existed) under the law of

when it the take the Take & ch. 1; 1 Pothier, Pandects, w. 1. 5 was not then Will a RM MT); 1 Black Comm. 452; Manuscu a Manuscu and French 411; Greeins, B. 2, ch. 5, § 7.

terms; Les loix pures personelles, soit personelles universelles, soit personelles particulières, se portent partout; c'est à dire, que l'homme est partout de l'état, soit universel, soit particulier, dont sa personne est affectée, par la loi de son domicil. Les loix réelles n'ont point d'extension directe, ni indirecte, hors la jurisdiction et la domination du legislateur. Le sujet et le materiel dominant direct et immediat du statut en determine la nature et qualité; c'est à dire, que le sujet et le materiel le font etre réel, ou personnel.

§ 27. Independent of the almost insurmountable difficulties, in which the continental jurists admit themselves to be involved, in the attempt to settle the true character of these mixed cases of international iurisprudence, and about which they have been engaged in endless controversies with each other, there are certain exceptions to these rules, generally admitted, which shake the very foundation, on which they rest, and admonish us, that it is far easier to give simplicity to systems, than to reconcile them with the true duties and interests of all nations in all cases. Take, for example, two neighboring states, one of which admits, and the other of which prohibits the existence of slavery, and the rights of property growing out of it; what help would it be to either, in ascertaining its own duties and interests in regard to the other, to say, that their laws, so far as they regard the persons of the slaves, were of universal obligation; and, so far as they regard the property in slaves, they were real, and of no obligation beyond the territory of the lawgiver?

^{1 1} Boullenois, Traité des Statuts, Prin. Gén. 18, 23, 27, p. 6, 7.

² See Somerset's case, and Hargrave's note to Co. Lit. 79, b, note 44.

sone, who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that: the rulers of every empire from comity admit, that the laws of every people, in force within its own limits, ought to have the same force every where, so far as: they do not prejudice the powers or rights of other governments, or of their citizens.2 "From this," he adds, "it appears, that this matter is to be determined, not simply by the civil laws, but by the convenience and tacit consent of different people: for since the laws of one people cannot have any direct force among another people, so nothing could be more inconvenient in the commerce and general intercourse of nations, than that what is valid by the laws of one place should become without effect by the diversity of laws of another; and that this is the true reason of the last axiom, of which no one hitherto seems to have entertained any doubt."3

§ 30. Hertius seems to have been dissatisfied with these rules; and especially with the last; and he doubts exceedingly, whether this comity of nations, founded upon the notion of mutual convenience and utility, can furnish any sufficiently solid basis of a system. Ob reciprocam enim utilitatem, in dis-

¹ Huberus, Lib. 1, tit. 2, de Conflicts Legum, § 2, p. 538.

² Ibid.

³ Ibid. — These axioms of Huberus are so often cited, that it may be well to give them in his own words. "(1) Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos ebligant, nec ultm. (2) Pro-subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur. (3) Rectores imperiorum id comitur agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur." 2 Hub. Lib. 1, tit. 3; De Conflictu Legum, § 2.

ultra statuentis territorium.¹ Boullenois (as we have seen) announces the same rule: De droit étroit, toutes les loix, que fait un souverain, n'ont force et autorité que dans l'étendue de sa domination;² and indeed, it is the common language of jurists.³ Mr. Chief Justice Parker has recognised the doctrine in the fullest manner. "That the laws" (says he) "of any state cannot by any inherent authority be entitled to respect extra-territorially, or beyond the jurisdiction of the state, which enacts them, is the necessary result of the independence of distinct sovereignties."

§ 21. Upon this rule there is often engrafted an exception, of some importance to be rightly understood. It is, that although the laws of a nation have no direct, binding force, or effect, except upon persons within its own territories; yet that every nation has a right to bind its own subjects by its own laws in every other place. In one sense, this exception may be admitted to be correct, and well founded in the practice of nations; in another sense it is incorrect, or, at least, it requires qualification. Every nation has hitherto assumed it as clear, that it possesses the right to regulate and govern its own native born subjects everywhere; and consequently, that its laws extend to, and bind, such subjects at all times, and in all places. This is commonly adduced as

Voet, de Stat. § 4, ch. 2, n. 7, p. 124; Id. 138, 139, edit. 1661.
 Boullenois, des Statut. Princip. Gén. 6, p. 4; Id. ch. 3, Observ. 10,
 Idem.

⁴ Blanchard v. Russell, 13 Mass. R. 4. — The same doctrine is reasoned out with great ability in the opinion of Mr. Chief Justice Taney, in the case of the Bank of Augusta v. Earle, 13 Peters, R. 584 to 591.

⁵ Henry on Real and Personal Statutes, P. 1, ch. 1, p. 1.

a consequence of what is called natural allegiance. that is, of allegiance to the government of the territory of a man's birth. Thus, Mr. Justice Blackstone says; "Natural allegiance is such as is due from all men, born within the king's dominions, immediately upon their birth." "Natural allegiance is, therefore. a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place or An Englishman, who removes to circumstance. France, or to China, owes the same allegiance to the king of England there, as at home, and twenty vears hence as well as now." 1 And he proceeds to distinguish it from local allegiance, which is such as is due from an alien, or stranger born, for so long a time as he continues within the dominions of a foreign prince. The former is universal and perpetual; the latter ceases the instant the stranger transfers himself to another country; and it is, therefore, local and temporary. Vattel, on the other hand, seems to admit the right of allegiance not to be perpetual even in natives; and that they have a right to expatriate themselves, and, under some circumstances, to dissolve their connexion with the parent country.3

§ 22. Without entering upon this subject, (which properly belongs to a general treatise upon public law,) it may be truly said, that no nation is bound to respect the laws of another nation, made in regard to the subjects of the latter, who are non-residents. The obligatory force of such laws of any nation cannot extend beyond its own territories. And if such laws are incompatible with the laws of the country,

^{1 1} Black. Comm. 369, 370; Foster, C. L. 184.

s Ibid.

J Vattel, B. 1, ch. 19, § 220 to 228.

tomary or positive code. France, for instance, composed, as it formerly was, of a great number of provinces, governed by different laws and customs, was early obliged to sanction such exertions of authority by its courts, in order to provide for the constantly occurring claims of its own subjects, living and owning property in different provinces, in a conflict between the different provincial laws. In England and America the courts of justice have hitherto exercised the same authority in the most ample manner; and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times, as they have arisen; and so far as the practice of nations, or the jus gentium privatum, has been supposed to furnish any general principle, it has been followed out with a wise and manly liberality.

§ 25. The real difficulty is to ascertain, what principles in point of public convenience ought to regulate the conduct of nations on this subject in regard to each other, and in what manner they can be best applied to the infinite variety of cases, arising from the complicated concerns of human society in modern times. No nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty. In the endless diversities of human jurisprudence many laws must exist in one country, which are the result of local or accidental circumstances,

and are wholly unfit to be engrafted upon the institutions and habits of another. Many laws, well enough adapted to the notions of heathen nations, would be totally repugnant to the feelings, as well as to the justice of those, which embrace Christianity. A heathen nation might justify polygamy, or incest, contracts of moral turpitude, or exercises of despotic cruelty over persons, which would be repugnant to the first principles of Christian duty. The laws of one nation may be founded upon a narrow selfishness, exclusively adapted to promote its own peculiar policy, or the personal or proprietary interests of its own subjects, to the injury or even the ruin of those of the subjects of all other countries. A particular nation may refuse all reciprocity of commerce, rights, and remedies to others. It may assume a superiority of powers and prerogatives, for the very purpose of crushing those of its neighbors, who are less fortunate, or less powerful. In these, and in many other cases, which may easily be put, without any extravagance of supposition, there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, of that nation, which were subversive of their own morals, justice, interest, or polity. Who, for instance, (not to multiply cases,) who would contend, that any nation in Christendom ought to carry into effect, to its utmost range, the paternal power of the ancient Romans in their early jurisprudence, extending to power over the life and death of their children? Or, who would now contend for that terrible power (if it ever really existed) under the law of

I Laws of the Twelve Tables, Table 4, ch. 1; 1 Pothier, Pandects, and Id. § 1, 2, (8vo. edit. Paris, 1818, p. 386, 387); 1 Black. Comm. 452; Furgueson on Marriage and Divorce, 411; Grotius, B. 2, ch. 5, § 7.

§ 28. There is, indeed, great truth in the remarks, which have been judicially promulgated on this subject by a learned court. "When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude, that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far, to define and fix that, which cannot, in the nature of things, be defined and fixed. They seem to have forgotten, that they wrote on a question, which touched the comity of nations, and that that comity is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule. That no nation will suffer the laws of another to interfere with her own to the injury of her citizens. That, whether they do or not, must depend on the condition of the country, in which the foreign law is sought to be enforced; the particular nature of her legislation, her policy, and the character of her institutions. That in the conflict of laws, it must often be a matter of doubt, which should prevail; and that whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger."1

§ 29. Huberus has laid down three axioms, which he deems sufficient to solve all the intricacies of the subject. The first is, that the laws of every empire have force only within the limits of its own government, and bind all, who are subjects thereof; but not beyond those limits.² The second is, that all per-

¹ Mr. Justice Porter, in delivering the opinion of the Court in the case of Saul r. His Creditors, 17 Martin, R. 569, 595, 596.

² Huberus, Lib. ¹, tit 3. de Conflictu Legum, § 2, p. 538.

domicilii, non rei sitæ. Now, after the admission of Hertius himself, that the usage of nations must furnish a very fallacious guide on such a subject, it is not a little difficult to perceive, what superior authority or value his own rules have over those of Huberus. The latter has at least this satisfactory foundation for his most important rule, that he is mainly guided in it by the practice of nations; and he thus aimed, as Grotius had done before him, to avail himself of the practice of nations, as a solid proof of the acknowledged law of nations.

§ 31. Some attempts have been made, but without success, to undervalue the authority of Huberus. It is certainly true, that he is not often spoken of, except by jurists belonging to the Dutch School. Boullenois, however, has quoted his third and last axiom with manifest approbation.3 But it will require very little aid of authority to countenance his works, if his maxims are well founded; and if they are not, no approbation, founded on foreign recognitions of them, can disguise their defects. not, however, a slight recommendation of his works, that hitherto he has possessed an undisputed preference on this subject over other continental jurists, as well in England as in America. Indeed, his two first maxims will in the present day scarcely be disputed by any one; and the last seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries.

^{1 1} Hertii Opera, De Collis. Leg. § 4, art. 10, p. 126; Id. p. 179, edit. 1716; post, § 238.

² The Scottish courts seem constantly to have held the doctrine of Huberus in his third axiom to be entirely correct. See Fergusson on Marr. and Div. 395, 396, 410.

^{3 1} Boullenois, Traité des Statuts, ch. 3, Obser. 10, p. 155.

execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust.1. Even in other cases, is a difficult to perceive a clear foundation in morals, or in natural law, for declaring, that any nation has a right (all others being equal in sovereignty) to insist, that its own positive laws shall be of superior obligation in a foreign realm to the domestic laws of the latter, of an equally positive character. What intrinsic right has one nation to declare, that no contract shall be binding, which is made by any of its subjects in a foreign country, unless they are twenty-five years of age, any more than another nation, where the contract is made, has a right to declare, that such contract shall be binding, if made by any person of twenty-one years of age? One should suppose, that if there be any thing clearly within the scope of national sovereignty, it is the right to fix, what shall be the rule to govern contracts made within its own territories.9

§ 34. That a nation ought not to make its own jurisprudence an instrument of injustice to other nations, or to their subjects, may be admitted. But in a vast variety of cases, which may be put, the rejection of the laws of a foreign nation may work less injustice, than the enforcement of them will remedy. And, here again, every nation must judge for itself, what is its true duty in the administration

¹ See Mr, Justice Porter, in the case of Saul v. His Creditors, 17 Martin, R. 569, 596 to 599.

² See post, § 75; and Mr. Justice Porter's opinion in Saul v. His Creditors, 17 Martin, R. 569, 596, 597, 598,

of justice in its domestic tribunals. It is not to be taken for granted, that the rule of the foreign nation, which complains of a grievance, is right, and that its own rule is wrong.

§ 25. The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.1 This is the ground upon which Rodenburg puts it. Quid, igitur (says he) rei in causâ est, quod personalia statuta territorium egrediantur? Unicum hoc ipsa rei natura ac necessitàs invexit, ut cum de statu et conditione hominum quæritur, uni solummodo judici, et quidem domicilii, universum in illa jus sit attributum; cum enim ab uno certoque loco statum hominis legem accipere necesse est, quod absurdum, earumque rerum naturaliter inter se pugna foret, ut in quot loca quis iter faciens, aut navigans, delatus fuerit, totidem ille statum mutaret aut conditionem; ut uno eodemque tempore hic sui juris, illic alieni futurus sit; uxor simul in potestate viri, et extra eandem sit; alio loco habeatur quis prodigus, alio frugi.2 President Bouhier expounds the ground with still more distinctness. Mais avant toutes choses il faut se souvenir, qu'encore que le règle étroite soit pour la restriction des coutumes dans leurs limites, l'extension en a néanmoins été admise en faveur de l'utilité publique, et souvent neme par une espèce de nécessité, &c. Ainsi, quand les peuples voisins ont

¹ Liverm. Dissert. p. 28; Blanchard v. Russell, 13 Mass. R. 4.

² Rodenb. de Stat. Diversit. tit. 1, c. 3, § 4; 2 Boullenois, App. p. 8.

souffert cette extension, ce n'est point qu'ils se soient vûs soumis à un statut étranger. C'est seulement, parce qu'ils y ont trouvé leur interet particulier en ce, qu'en pareil cas leurs coutumes ont le meme avantage dans les provinces voisines. On peut donc dire, que cette extension est sur une espèce de droit des gens, et de bienséance, en virtu duquel les différens peuples sont tacitement demeurés d'accord, de souffrir cette extension de coutume à coutume, toutes les fois que l'equité et l'utilité commune le demanderoient; à moins que celle, où l'extension seroit demandée, ne contint en ce cus une disposition prohibitive.

§ 36. But of the nature, and extent, and utility of this recognition of foreign laws, respecting the state and condition of persons, every nation must judge for itself, and certainly is not bound to recognise them, when they would be prejudicial to its own interests. The very terms, in which the doctrine is commonly enunciated, carry along with them this necessary qualification and limitation of it. Mutual utility presupposes, that the interest of all nations is consulted, and not that of one only. Now, this demonstrates, that the doctrine owes its origin and authority to the voluntary adoption and consent of nations. It is, therefore, in the strictest sense, a matter of the comity of nations, and not of any absolute paramount obligation, superseding all discretion on the subject.²

§ 37. Vattel has with great propriety said; "That it belongs excusively to each nation to form its own judgment of what its conscience prescribes to it; of what it can, or cannot do; of what is proper, or improper for it to do. And of course it rests solely with

¹ Bouhier, Cout. de Bourg. ch. 23, § 62, 63, p. 467.

⁹ Kent, Comm. Lect. 39, p. 457, 458, 3d edit.

to its interests. It is not comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided. The doctrine of Huberus would seem, therefore, to stand upon just principles; and though, from its generality, it leaves behind many grave questions as to its application, it has much to commend it, in point of truth, as well as of simplicity. It has accordingly been sanctioned both in England and America by a judicial approbation, as direct and universal, as can fairly be desired for the purpose of giving sanction to it, as authority, or as reasoning.²

¹ See this doctrine expressly recognised by the Supreme Court of the United States, in Bank of Augusta v. Earle, 13 Peters, R. 519, 589. Mr. Chief Justice Taney, in delivering the opinion of the Court, said; "It is needless to enumerate here the instances, in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations be recognised and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and Courts of justice have always expounded and executed them, according to the laws of the place, in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation, by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties, to which they belong, that Courts of Justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, 37, that 'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government: unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the Courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided."

² Out of the great variety of authorities, in which the rules of Huberus

CHAPTER III.

NATIONAL DOMICIL.

- § 39. Having disposed of these preliminary considerations, it is proposed, in the further progress of these Commentaries, to examine the operation and effect of laws; first, in relation to persons, their capacity, state, and condition; secondly, in relation to contracts; thirdly, in relation to property, personal, mixed, and real; fourthly, in relation to wills, successions, and distributions; fifthly, in relation to persons acting in autre droit, such as guardians, executors, and administrators; sixthly, in relation to remedies and judicial sentences; seventhly, in relation to penal laws and offences; and eighthly, in relation to evidence and proofs.
- § 40. As, however, in all the discussions upon this subject, perpetual reference will be made to the domicil of the party, it may be proper to ascertain, what is the true meaning of the term "domicil;" or rather, what constitutes the national or local domicil of a party, according to the understanding of publicists and jurists.¹
- § 41. By the term "domicil," in its ordinary acceptation, is meant the place, where a person lives or has his home. In this sense the place, where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicil. In a strict

¹ Upon the subject of this chapter the learned reader is referred to Burge's Comment. on Col. and Foreign Law, Vol. 1, P. 1, ch. 2, p. 32 to p. 57.

lium, quam ubi colendi causa diversatur.1 again: "He is deemed an inhabitant, who has his domicil, in any place, and whom the Greeks call πάροικον, that is to say, a neighbor, or person inhabiting near to a village. For those are not alone to be deemed inhabitants, who dwell in a town; but those also, who cultivate grounds near its limits, so that they conduct themselves, as if their place of abode were there." Incola est, qui aliquâ regione domicilium suum contulit; quem Græci πάροικον (id est, juxta habitantem) appellant. Nec tantum hi, qui in oppido morantur, incolæ sunt; sed etiam, qui alicujus oppidi finibus ita agrum habent, ut in eum se quasi in aliquam sedem, recipiant.2 Some, at least, of these are more properly descriptions, than definitions of Pothier has generalized them in his own domicil. introduction, to this title of the Pandects, and says: The seat of the fortune or property, which any person possesses in any place, constitutes his chief domi-Domicilium facit potissimum sedes fortunarum suarum, quas quis in aliquo loco habet:3 Voet says; Proprie dictum Domicilium est, quod quis sibi constituet animo inde non decedendi, si non aliud avocet.4

§ 43. The French jurists have defined domicil to be the place, where a person has his principal establishment. Thus Denizart says; "The domicil of a person is the place, where a person enjoys his rights, and establishes his abode, and makes the seat

¹ Dig. Lib. 50, tit. 1, l. 27; Pothier, Pand. Lib. 50, tit. 1, n. 18; 2 Domat, Public Law, B. 1, tit. 16, § 3, art. 4.

² Dig. Lib. 50, tit. 16, l. 239, § 2; Id. l. 203; Pothier, Pand. Lib. 50, n. 16.

³ Pothier, Pand. Lib. 50, tit. 1, Introd. art. 2, n. 18.

⁴ Voet, ad Pand. Lib. 5, tit. 1, n. 94.

says; Illud certum est, neque solo animo atque destinatione patris familias, aut contestatione sold, sine re et pacto, domicilium constitui; neque solà domus comparatione in aliquâ regione; neque solâ habitatione, sine proposito illic perpetuo morandi. So D'Argentre says; Quamobrem, qui figendi ejus animum non habent, sed usus, necessitatis, aut negotiationis causa alicubi sint, protinus a negotio discessuri, domicilium nullo temporis spatio constituent; cum neque animus sine facto, neque factum sine animo ad id sufficiat.2 However; in many cases actual residence is not indispensable to retain a domicil, after it is once acquired; but it is retained, unimo solo, by the mere intention not to change it, or to adopt another. If, therefore, a person leaves his home for temporary purposes, but with an intention to return to it, this change of place is not in law a change of domicil. Thus, if a person should go on a voyage to sea, or to a foreign country, for health, or for pleasure, or for business of a temporary nature, with an intention to return, such a transitory residence would not constitute a new domicil, or amount to an abandonment of the old one; for it is not the mere act of inhabitancy in a place, which makes it the domicil; but it is the fact, coupled with the intention of remaining there, animo manendi.3

§ 45. It is sometimes a matter of no small difficulty to decide, in what place a person has his true or proper domicil. His residence is often of a very equivocal nature; and his intention as to that resi-

¹ 1 Voet, ad Pand. Lib. 5, tit. 1, n. 98, p. 346.

² D'Argentré, ad Leg. Britonum, art. 9, n. 4, p. 26.

³ Pothier, Cout. d'Orleans, ch. 1, § 1, art. 9; Encyclop. Amer. art *Domicil*; Cochin, Œuvres, tom. 5, p. 4, 5, 6, 4to. edit.

no fixed choice and intention, he could have two domicils.1

§ 46. Without speculating upon all the various cases, which may be started upon this subject. it may be useful to collect together some of the more important rules, which have been generally adopted, as guides in the cases, which are of most familiar occurrence. First, the place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents. Patris originem unusquisque sequaturs. This is usually denominated the domicil of birth or nativity, domicilium originis. But, if the parents are then on a visit, or on a journey, (in itinere), the home of the parents (at least if it is in the same country) will be deemed the domicil of birth or nativity.3 If he is an illegitimate child, he follows the domicil of his mother. Ejus, qui justum patrem non habet, prima origo à matre.4 Secondly, the domicil of birth of minors continues, until they have obtained a new domicil. Thirdly, minors are generally deemed incapable, proprio marte, of changing their domicil during their minority; and, therefore, they retain the domicil of their parents; and if the parents change their domicil, that of the infant children follows it; and if the

¹ Dig. Lib. 50, tit. 1, l. 27, § 2; Pothier Pand. Lib. 50, tit. 1, n. 18; Somerville v. Somerville, 5 Vesey, 750, 786, 790; 2 Domat, Public Law, B. 1, tit. 16, § 3, p. 462; Id. art. 6; Post, § 47.

² Cod. Lib. 10, tit. 31, l. 36; 2 Domat, Public Law, B. I, tit. 16, § 3, art. 10; 1 Boullenois, Observ. 4, p. 53; Voet, ad Pand. Lib. 5, tit 1, n. 91, 92, 100. See Scrimshire v. Scrimshire, 2 Hagg. Eccl. R. 405, 406; Cochin. Œuvres, Tom. 5, p. 5, 6; Id. 698, 4to. edit.

³ Dr. Lieber's Encyc. Amer. art. *Domicil*; Pothier, Cout. d'Orleans, ch. 1, art. 10, 12; Somerville v. Somerville, 5 Vesey, 750, 787; 1 Boullenois, Observ. 4, p. 58.

⁴ Dig. Lib. 50, tit. 1, 1.9; Pothier, Pand. Lib. 50, tit. 1, n. 3.

a right to change his domicil, it follows, that if he removes to another place, with an intention to make it his permanent residence (animo manendi), it becomes instantaneously his place of domicil. Eighthly, if a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period.2 Ninthly, the place, where a married man's family resides, is generally to be deemed his domicil.3 But the presumption from this circumstance may be controlled by other circumstances; for if it is a place of temporary establishment only for his family, or for transient objects, it will not be deemed his domicil.4 Tenthly, if a married man has his family fixed in one place, and he does his business in another, the former is considered the place of his domicil.5

§ 47. Eleventhly, if a married man has two places of residence at different times of the year, that will be esteemed his domicil, which he himself selects, or describes, or deems, to be his home, or which appears to be the centre of his affairs, or where he votes, or exercises the rights and duties of a citizen. Twelfthly, if a man is unmarried, that is generally

¹ Pothier, Cout. d'Orléans, ch. 1, art. 13.

⁹ Bruce v. Bruce, 2 Bos. and Pull. 228, note; Id. 230; Stanley v. Bernes, 3 Hagg. Eccles. R. 374.

³ Pothier, Cout. d'Orléans, ch. 1, art. 20; Bempde v. Johnstone, 3 Vez. 198, 201.

⁴ Pothier, Cout. d'Orléans, ch. 1, art. 15.

⁵ Ante, § 42, 43, 44.

⁶ Pothier, Cout. d'Orléans, ch. 1, art. 20; Somerville v. Somerville, 5 Ves. 750, 788, 789, 790; Harvard College v. Gore, 5 Pick. R. 370; Cochin, Œuvres, Tom. 3, p. 702, 4to. edit.

domicil is not gone, until a new one has been actually acquired, facto et animo.¹ Seventeenthly, if a man has acquired a new domicil, different from that of his birth, and he removes from it with an intention to resume his native domicil, the latter is re-acquired, even while he is on his way, in itinere, for it reverts from the moment the other is given up.²

& 48. The foregoing rules principally relate to changes of domicil from one place to another within the same country, or territorial sovereignty, although many of them are applicable to residence in different countries or sovereignties. In respect to the latter there are certain principles, which have been generally recognised by tribunals, administering public law, or the law of nations, as of unquestionable authority. First; Persons, who are born in a country, are generally deemed to be citizens and subjects of that country.3 A reasonable qualification of the rule would seem to be, that it should not apply to the children of parents, who were in itinere in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or occasional business. It would be difficult, however, to assert, that in the present state of public law such a qualification is universally established. Secondly; Foreigners, who reside in a country for permanent or

¹ See Jennison v. Hapgood, 10 Pick. R. 77; Bruce v. Bruce, 2 Bos- & Pull. 228; Cochin, Œuvres, Tom. 5, p. 5, 6, 4to. edit.; Ante, § 44.

² The Indian Chief, 3 Rob. 12; La Virginie, 5 Rob. 98.—On the subject of Domicil the learned reader is referred to Fergusson on Marriage and Divorce, Appendix, p. 277 to 362; and Henry on Foreign Law, Appendix A. p. 181, &c.; Cochin, Œuvres, Tom. 5, p. 4, 5, 6, 4to. edit.; Ex parte Wrigby, 8 Wend. R. 134.

^{3 1} Black, Comm. 366, 369.

domicil by operation of law. The first is the common case of the place of birth, domicilium originis; the second is that, which is voluntarily acquired by a party, proprio marte. The last is consequential, as that of the wife arising from marriage.¹

¹ Pothier, Cout. & Orléans, ch. 1. art. 12. — Whoever wishes to make more extensive researches upon this subject, may consult Denizart's Dictionary, art. *Domicil*; Encyclopédie Moderne, Tom. 10, art. *Domicil*; Merlin, Répertoire, *Domicil*; 2 Domat (by Strahan), p. 484; Lib. 1, tit. 16, § 3, of Public Law; Dig. Lib. 50, tit. 1, per tot.; Cod. Lib. 10, tit. 30, l. 2, to l. 7; Voet. ad Pandect. Lib. 5, tit. 1, § 90 to § 92; Bynkershoeck, Quæst. Priv. Juris. Lib. 1, ch. 11, and the authorities cited in Dr. Lieber's Encyclopedia Americana, *Domicil*; Henry on Foreign Law, Appendix A, on *Domicil*, p. 181, &cc. to p. 209.

down the doctrine in the following broad terms. A personal statute not only exerts its authority in the place of the domicil of the party; but its provisions follow the party, and accompany his person, in every place, where he goes to contract; and it extends over all his property (biens), under whatever customs it may be situated; Et qu'elle influe sur tous ses biens sous quelques coutumes, quils soient assis.1 Bouhier adopts the very rule of Boullenois; Quand le statut personnel du domicil est in concurrence avec le statut personnel de la situation des biens celui du domicil dont l'emporter sur celui de la situation des biens.² And again, he says; It is necessary constantly to hold, that the capacity or incapacity, which the law of the domicil has impressed upon the person, should follow the person into all places; so that it shall become utterly impossible, that a person, being incapable in the place of his residence, should go to contract in another place where he would have been capable, if he had been domiciled there. Il faut donc tenir pour constant, que la capacité ou l'incapacité, que la loi du domicil à imprimée sur la personne la suit en tous lieux. En sorte que ce seroit inutilement, que étant incapable au lieu de sa résidence, elle voudroit aller contracter dans un endroit, ou il auroit été capable, si elle y avoit été domiciliée.3 Abraham a Wesel uses language equally strong; Quotiescunque enim de habilitate atque inhabilitate personæ quæritur, toties domicilii leges et statuta spectanda, ut quocumque persona abeat, id jus sit, quod judex domicilii statuerit; and

was in the press, I have for the first time seen these Dissertations of Mr. Foelix, and I shall gladly avail myself of his learned labors.

¹ 1 Froland, Mém. ch. 7, § 2, p. 156; Id. ch. 5, § 4, p. 89; Post, § 84.

² Bouh. Cout. de Bourg. ch. 23, § 91 to 96, p. 461; Id. ch. 22, § 4 to 14, § 19.

³ Bouhier, Cout. de Bourg. ch. 24, § 11, p. 463.

⁴ Wesel, Com. ad Novell. Constit. Ultraj. art. 18, § 23, p. 169, 170.

respect even to property (biens) situate in another territory.1

§ 51 b. Paul Voet, on the other hand, speaks in far more qualified language, and lays down several rules on the subject. (1.) That a personal statute only affects the subjects of the state or territory wherein it is promulgated, and not foreigners, although doing some business there. Statutum personale tantum afficit subditos territorii, ubi statutum conditum est; non autem forenses, licet ibidem aliquid agentes.2 (2.) That as a personal statute does not affect a person out of the territory, it cannot therefore be reputed to be the same without the territory, as it is within. Statutum personale non afficit personam extra territorium; sic ut pro tali non reputetur extra territorium, qualis erat intra.3 (3.) That a personal quality cannot be added out of the territory to a person not a subject. Personalis qualitas non potest extra territorium addi personæ non subjectæ. (4.) A personal statute accompanies the person every where, in respect to property (biens) situate within the territory of the state, where the person affected by it has his donicil. Statutum personale ubique locorum personam comitatur, in ordine ad bona intra territorium statuentis sita, ubi persona affecta domicilium habet.⁵ We shall also presently see, that he distinguishes between the effect of a personal statute upon movable, and its effect upon immovable property.6

§ 52. The result of the doctrine maintained by the jurists above named, except Paul Voet, is, that a person, who has attained the age of majority by the

¹ Merlin, Répert. Majorite, § 5, edit. Brux. 1827, p. 189.

² Voet, de Stat. § 4, ch. 2, p. 137, edit. 1661.

³ Ibid. ⁴ Id. p. 138. ⁵ Id. p. 138. ⁶ Post, § 52.

until the age of twenty-five."1 But other jurists distinguish between movable and immovable property, applying the law of situs to the latter, and the law of the domicil to the former.' Paul Voet insists throughout upon this distinction; and holds, that no personal statute extends to immovable property situate elsewhere. Non tamen statutum personale sese regulariter extendet ad bona immobilia, alibi sita.3 But he admits, that such a statute will apply to movable property, upon the ground, that, wherever it may be situate, it follows the domicil of the owner. Quin tamen ratione mobilium, ubicunque sitorum, domicilium seu personam domini sequamur, ut tamen spectentur loca, quo destinata, nullus iverit inficias; idque propter expressos textus juris civilis, quibus mobilia certo loco non alligantur, verum secundum juris intellectum personam comitari, eique adhærere judicantur; id quod etiam mores ubique locorum sequuntur.4 Burgundus holds the same opinion; Consequenter ea, quæ sunt personalia, una cum persona circumferuntur, quocumque loco se transtulerit, et per universa territoria, viresque et effectum porrigunt. Realia situm rerum sic spectant, ut territorii limites non excedant; quia rebus ipsis sunt affixa.5 Many other jurists maintain the same distinction: 6 but it needs not be here further insisted

¹ Boullenois, Dissert. des Quest. de la Contrar. des Loix, Quest. I[∞] p. 19, 20; Basnage, Coutum. de Normand. tom. 2, art. 431, p. 243. See also Merlin, Répert. Majorité, § 4, 5.

² Voet, Burgundus, Stockmans, and Peckius, cited in Merlin, Répert. Majorité, § 5, p. 189, edit. 1827; Ante, § 52 a.

³ P. Voet, ad Statut. § 4, ch. 2, n. 6, p. 138, edit. 1661; Id. ch. 3, n. 4, p. 148.

⁴ P. Voet, ad Statut. § 4, ch. 2, n. 9, p. 139, 140, edit. 1661.

⁵ Burgundus, Tract. 1, § 3, p. 15.

⁶ See J. Voet, Stockmannus, and Peckius, cited Post, § 54, and 1 Boullenois, Observ. 4, p. 57; Id. Obs. 6, p. 131; Sandius, Lib. 4, tit. 8, Definit. 7, p. 104.

ral real statutes are found in conflict with each other. each one has its own effect upon the property (biens), which it governs." 1 Now, this language of Merlin is in some parts sufficiently broad to cover movable property, as well as immovable property; and yet it is very clear, that the disposition of movable property, and the capacity to dispose of it, are by many foreign jurists, and by Merlin himself, held to be governed by the law of the domicil of the owner, according to the maxim, that movables follow the person; Mobilia sequuntur personam.3 What, perhaps. Merlin intends here to assert, may be, that where a person is incapable by the law of his domicil, he cannot dispose of any of his property situate elsewhere. the incapacity extending even to places, where he is not domiciled, and where, by the local law he would otherwise have capacity to dispose of it. But that, where a person is capable by the law of his domicil, and the question does not respect his personal capacity to dispose of property, but only the extent, to which it may be exercised by persons, who are capable, there the law of the place, where it is situate, will govern. Yet he would seem also to intimate, that there is or may be some distinction between personal property and real property, (between movables and immovables,) as to the effect of the operation of the lex domicilii.4

§ 54. In another place Merlin lays down the rule,

¹ Ibid. 9 Ibid.

³ Pothier, Cout. d'Orléans, ch. 1, art. 7; 1 Boullenois, Prin. Gen. 16, p. 7; ld. Observ. 19, p. 338, &c.; Rodenburg, ch. 3, § 4, 9, 10, p. 7 to 9; ld. ch. 2, p. 6; Voet. de Stat. § 4, ch. 2, p. 125, § 8; Pothier, De Chosea, P. 2, § 3; Livermore, Dissert. 82.

⁴ See Morlin, Réport. Majorité, § 5, p. 188, 189, edit. Brux. 1827.

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seen, the doctrine of foreign jurists is, that the law of the original domicil is to prevail, as to such capacity or incapacity; some of them holding, that it applies to all personal acts whatever, and to all alienation of property, whether movable or immovable; and others apply it only to personal acts and movable property, where there is a conflict of personal laws. But, suppose, that a person has had different domicils, a domicil by birth, and a subsequent domicil by choice, when he is sui juris, which is to prevail, as to his capacity or incapacity? Hertius does not hesitate to say, that the law of the new domicil is to prevail. Hinc status et qualitas personæ regitur a legibus loci, (says he,) cui ipsa sese per domicilium subjecit. Atque inde etiam fit, ut quis major hic, alibi, mutato scilicet domicilio, incipiat fieri minor.2 The like opinion appears to be held both by Paul Voet and by John Voet.3 The former says; Nullum statutum, sive in rem, sive in personam, si de ratione juris civilis sermo instituatur, sese extendit ultra statuentis territorium.4 The latter holds, that the change of domicil of a person gives him the capacity or incapacity of his new domicil: so that, if he is of majority by the law of the place of his birth, and he removes to another country. by whose laws he would, according to his age, be a minor, he will acquire the character of his new domi-Si quis ex lege domicilii derelicti anno forte vi-

¹ See on this subject, 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 3, § 3, p. 102 to p. 106; Id. ch. 4, p. 113 to p. 125.

² I Hertii Opera, § 4, n. 5, p. 122; Id. n. 8, p. 123; Id. p. 173, 175, edit. 1716.

^{3 2} Boullenois, App. p. 57; Merlin, Rèpert. Majorité, § 4, edit. Brux. 1827, p. 186; Merlin, Rep. Retroactif. § 3, art. 9, n. 3; P. Voet, de Stat. § 4, ch 2, n. 6, p. 137, 138; Rodenburg, De Div. Stat. p. 2, ch. 1, § 5, 6; J. Voet, ad Pand. Lib. 4, tit. 4, n. 10; 1 Boullenois, Observ. 4, p. 58.

⁴ P. Voet, ad Statut. § 4, ch. 2, n. 7, p. 138, edit. 1661.

no such restriction exists, she has full liberty to dispose of her property in the latter country by will, without the consent of her husband; and vice versā.¹ This is a very nice, if it be not in many cases an evanescent, distinction: and Froland admits, that a different doctrine is held by many jurists.² But he is not singular in his opinion of the value and importance of this distinction.³ Boulienois has given to it a qualified sanction.⁴ Bouhier also cites the same distinction with approbation, declaring it to be judicious; and he insists, that in case of a transfer of the domicil, the law of the original domicil ought in all cases to regulate the personal capacity; and he enlarges on the subject with much ability.⁵

§ 56. On the other hand, Burgundus does not hesitate to hold, that the law of the new or actual domicil ought to prevail. After citing the opinion of Baldus and Gail and Imbertus, that the state of the person is to be decided by the place of his domicil; Ideo, si status personæ inspici debeat, dumtaxat rationem haberi Baldus existimat, cujus opinionem Andreas Gail et Imbertus amplectuntur; adeo ego, (he adds,) nisi ex privilegio rel longissimo usu aliud sit introductum Proinde ut sciamus uxor in potestate sit mariti necne,

^{1 1} Froland, Mém. ch. 7, § 15, p. 172; Post, § 138, note.

^{*} Ibid.—Boullenois remarks on this distinction of Froland, that it contains some truth mixed up with much obscurity, and embarrassed with ideas, liable to contradiction, without being answered. 2 Boullenois, theory. 32, p. 8, 9.

³ See Rodenburg, De Div Stat. tit. 2, ch. 1, 2, 3, 4, tit. 3, ch. 1, 2, 3, 4, tit. 4, ch. 1, 2, 3, 4; 2 Boullenois, App. p. 1, to p. 33; Id. p. 71 to p. 79; Id. p. 24 to p. 95; 2 Boullenois, ch. 1, Obs. 32, p. 1 to p. 53; Merlin, Réport. Effet. Retroactif, § 3, p. 2, art. 5, n. 3, edit. Brux. 1827, p. 13 to p. 15; Id. Majorité, § 4, p. 186, 187.

^{4 9} Houllenois, Observ. 32, p. 7 to p. 11.

Muhier, Cout. de Bourg. ch. 22, § 4 to § 10; Id. § 22, cited Merlin, Report. Autorisation Maritale, § 10, art. 4, edit. Brux. 1827, p. 243.

\$ 57. Boullenois (whose opinions will be' stated more fully hereafter) admiss the general principle to be, as Rodenburg states it, and asserts, that the whole world acknowledges, that the state of the person depends on his actual domicil, and that the natural consequence is, that, if a person changes his domicil, and the law of the new domicil is contrary to that of the old one, the state and condition of the person change accordingly.3 But then he insists, that it is necessary to make a distinction between the states and conditions of persons, which arise from laws (druits) founded in public reasons, admitted by all nations, and which have a cause absolutely unconnected with domicil, so that the moment a man is affected with these states and conditions, the original domicil not having any influence upon them, the new domical ought not to have any, but merely the public reasons, superior to those of domicil, to which all nations pay respect; and other subordinate states and conditions, which are in truth founded in public laws (druits publics), but for one nation only, or for certain provinces of that nation.3 Among the former class he enumerates interdiction, or prohibition to do acts, by reason of insanity, or of prodigality, emancipation by royal authority, legitimacy of birth, mobility, infamy, &c. These, he contends, are never altered by any change of domicil; but that having at first fixed the condition of the person, the change

plain, that D'Argentré is here speaking of a mere change of place, without a change of domicil. D'Argentré, de Leg. Briton. art. 218, § 13, p. 603.

¹ Post § 71.

^{9 9} Boullenois, Observ. 32, p. 10, 13.

^{3 9} Boullenois, Observ. 39, p. 10, 11, 18, 19; post, § 71.

mer, and the law of the situation (situs) as to the latter.1

§ 58. Merlin, after citing the opinions of other jurists, formerly came to the conclusion, that the law of the place of birth, and not that of the new domicil, ought to govern equally in all these cases, of minority, of paternal power, and of marital power after marriage; and he expressed surprise, and not without reason, that Boullenois should have attempted to distinguish between them,2 It is certainly not for me to interfere in such grave controversies between these learned jurists, differing from each other, sometimes in leading principles, and sometimes in deductions and distinctions, applicable to principles, in which they agree. Non nostrum inter vos tantas componere lites. Yet Merlin himself, after having advocated this doctrine, as best founded in principle, although involving some inconveniences, still insisted, that upon such a removal to a new domicil, the capacity of a person to dispose of his movable property by a testament is to be governed by the law of the new domicil; because the state of a person has no influence, as to the distribution of his movable property after his death; and the capacity to make a will, resulting from age, has nothing in common with what is properly called the state of the person; which is so true, that his state is governed by the domicil, and the situation decides solely concerning the age, at which a person may dispose of mova-

¹ 1 Boullenois, Obs. 32, p. 32, 33 to p. 53; Id. Dissert. Mixtes, Quest. 20, p. 406 to p. 447.

² Merlin, Répert. Autorisation Maritale, § 10, art. 4, edit. Brux. 1827, p. 243, 244; post, § 139,

pressed by the laws of any place, surround and accompany the person, wherever he goes, with this effect, that in every place he enjoys, and is subject to the same law, which such persons elsewhere enjoy, or are subject to. Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubique locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur. Therefore, (he adds,) those, who with us are under tutelage or guardianship, such as minors, prodigals, and married women, are every where deemed to be persons subject to such guardianship; and possess, and enjoy the rights, which the law of the place attributes to persons under guardianship.2 Hence, he, who in Friezeland has obtained the privilege of age (veniam ætatis), contracting in Holland, will not there be entitled to restitution in integrum, as if he were a minor.3 In other words, he, who in Friezeland has obtained the privilege of an exemption from the disabilities of his minority, will not, if he afterwards contracts in Holland, be deemed entitled to the privilege of being there held a minor, so as to exempt him from liability

¹ Huberus, De Conflict. Leg. Lib. 1, tit. 3, § 12.

² Ibid.

³ Ibid. Under the Roman Law the Prætor by his Edict declared, that he would grant redress in regard to transactions with minors under twenty-five years of age. Quod cum minore quam viginti-quinque annos natu, gestum esse dicetur; uti quæque res erit, animadvertam. Dig. Lib. 4, tit. 4, l. 1; Pothier, Pand. Lib. 4, tit. 4, n. 1. But those persons, who had ob tained the privilege of age, were not entitled to any such relief. Eos, qui veniam ætatis à principali clementià impetraverunt, etiamsi minus idonee rem suam administrare videantur, in integrum restitutionis auxilium impetrare non posse, manifestissimum est; ne hi, qui cum eis contrahunt, principali authoritate circumscripti esse videantur. Cod. Lib. 2, tit. 45, l. 1; Pothier, Pand. Lib. 4, tit. 4, n. 4. The action thus given to

enjoys, and is subject to the same law, which he enjoys, and to which he is subject, in that place, where he first becomes, or is deemed such. So that whatever he could do, or could not do in his own country, the same is allowed, and prohibited to him to do.1 This seems to me unreasonable, and would occasion too great a confusion of laws, and a burthen upon neighboring nations, arising from the laws of others.2 The importance of this thing will be made plain by a few examples. Thus, an unemancipated son (filius-familias), who cannot in Friezeland make a testament, goes into Holland, and there makes a testament; it is asked, whether it has any validity? I suppose it is valid in Holland, according to my first and second rule; 3 because the laws bind all those who are within any territory; neither is it proper (civile sit), that Hollanders, in respect to business done among themselves, should, neglecting their own laws, be governed by foreign laws.4 But it is true, that this testament would not have effect in Friezeland, according to the third rule; because in that way nothing would be more easy than for our citizens to elude our laws, as they might be evaded every day.6 But such a testament would be of validity elsewhere, even where an unemancipated son could not make a will; for there, the reason of evading the laws of a country by its own citizens ceases; for in such a case the fact (of evasion) would not be committed." 7

2 Ibid.

¹ Huberus, Lib. 1, tit. 3, § 12.

³ Ante, § 29.

⁴ Huberus, Lib. 1, tit. 3, § 13.

⁵ Ante, § 29.

⁶ Huberus, Lib. 1, tit. 3, § 13.

⁷ Ibid.

mie: but they result from some direct or implied movisions of law in the customary or positive code of the country, in which the act comes in judgment, applying to the very case; for it is competent for a councer, it is pieases, to prescribe its own rule for all cases, arising our of transactions in foreign countries, whenever any rights under them are brought into concroversy, or one sought to be enforced in its own tribunais. It. therefore, a person has a capacity to do any are, or is under an incapacity to do any are, by the law of the place of his domicil, the act, when done there, will be governed by the same law, whenever ics validity may come into contestation in any other country. Thus, an act done by a minor, in regard to his property, situate in the place of his dominit, without the consent of his guardian, if valid by the law of the place of his domicil, where it is diane, will be recognised as valid in every other place: it invalid there is will be held invalid in every wher plane. So, it a married woman, who is disabled by the law of the place of her domicil from supering into a contract, or from transferring any property therein, without the consent of her husband, should make a community or transfer any property situated therein, the transaction will be held invalid, and a million in every other country. This seems as by a principle generally recognised by all nations, m the absence of any positive or implied municipal regulations to the contrary; according to the maxm juntily his in personan dirigitur, respiciendum

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of transacting business (sui juris), in the place of his or her domicil, will be deemed incapable every where, not only as to transactions in the place of his or her domicil, but as to transactions in every other place.¹

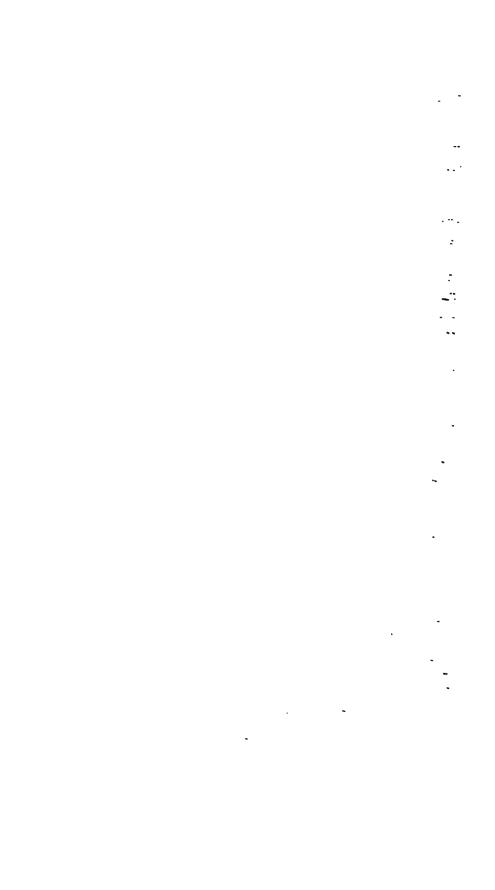
§ 66. Thus, according to this rule, if an American citizen, domiciled in an American State, as, for instance, in Massachusetts, where he would be of age at twenty-one years, should order a purchase of goods to be made for him in a foreign country, where he would not be of age until twenty-five years old, the contract will nevertheless be obligatory upon him. On the other hand, a person, domiciled in such foreign country, of twentyone years of age only, who should order a like purchase to be made of goods in Massachusetts, will not be bound by his contract; for he will be deemed a minor and incapable of making such a contract.3 The same rule will govern in relation to the disposition of personal or movable property by any person, who is a minor or a major in the place of his domi-

Voet: "Potius domicilii leges observandas existimem; quoties in quæstione, an quis minor vel majorennis sit, obtinuit, id dijudicandum esse ex lege domicilii; sic ut in loco domicilii minorennis, ubique terrarum pro tali habendus sit, et contra." J. Voet, ad Pand. lib. 4, tit. 1, § 29. See also Fælix, Conflict des Lois-Revue Etrang. et Fran. Tom. 7, 1840, p. 200 to p. 216.

¹ 1 Boullenois, Princ. Gén. 10, 19, et Observ. 4, 12, 16, p. 5; 1 Froland, Mém. des Stat. ch. 7, p. 155, 156; Rodenburg, de Divers. Stat. tit. 2, ch. 1; 2 Boullenois, Appx. p. 10.

² By the law of some commercial countries the age of twenty-five years is that of majority. This was the old law of France; but the modern code has changed the age of majority to twenty-one, except as to marriage without the consent of parents. Code Civil of France, art 488; Id. art. 148. See also Rodenburg, de Diversit. Statut. tit. 2, ch. 1; 2 Boullenois, Appx. p. 10.

³ Huberus, De Conflictu Legum, Lib. 1, tit. 3, § 12.



esset, quod absurdum, earumque rerum naturaliter inter se pugna foret, ut in quot loca quis iter faciens, aut navigans delatus fuerit, totidem ille statum mutaret aut conditionem; ut uno eodemque tempore hic sui Juris. illic alieni futurus sit : uxor simul in potestate viri. et extra eandem sit; alio loco habeatur quis prodigus, alio frugi; ac præterea quod persona certo loco non affigeretur, cum res soli loco fixæ citra incommodum ejusdem legibus subjaceant, summâ providentiâ constitutum est, ut à loco domicilii, cui quis larem fovendo se subdiderit, statum ac conditionem induat: illis Legislatoribus, pro soli sui genio, optime omnium compertum habentibus, quâ judicii maturitate polleant subditi, ut possint constituere, qui eorum, ac quando ad sua tuenda negotia indigeant autoritate. Hæc igitur personarum qualitas ac conditio, ubi venerit applicanda ad res aut actus alterius territorii, jam indirecte, ac per consequentiam vis illius personalis Statuti extra statuentis, pertinget locum: cum et alias non insolitum sit multa indirecte permitti et per consequentiam, quæ directe et expressim non valerent. Nec est, quod quemquam turbet, quod et illa Statuta extra territorii limites diximus excurrere. quibus nominatim status hominum in universum non discutitur, quæ in incertos personales actus à persona exercendos, prohibendo eos aut permittendo, concepta sunt.

§ 68. The modern law of France, as it is laid down by Pardessus, is to the same effect.² "No act, whatsoever may be its nature," (says he,) "can be stipulated, except by persons capable of binding themselves; and the general consent of civilized na-

¹ 2 Boullenois, Appx. p. 8; Fœlix Conflict des Lois-Revue Etrang. et Pran. Tom. 7, 1840, p. 200 to p. 216.

² Pardessus, De Droit Commercial, Vol. 5, art. 1482, p. 248.

proper to notice a distinction, which in many cases may have a material operation. So far as respects the capacity or incapacity of the person, the law of the new domicil would probably prevail in the tribunals of the country of that domicil, as to all rights. contracts, and acts, done or litigated there. The same law would probably have a like recognition in every other country, except that of the original or native domicil. The principal difficulty, which would arise, would be, how far any rights, contracts, and acts, would be recognised by the latter, where they were dependent upon the law of the new domicil, which should be in conflict with its own law on the same subject. It is precisely under circumstances of this sort, that the third axiom of Huberus may be presumed to have a material influence, viz. that a nation is not under any obligation to recognise rights, contracts, or acts, which are to its own prejudice, or in opposition to its own settled policy.1

§ 71. Boullenois was sensible of this distinction, as we have already seen,² and says; "On this point it is necessary to distinguish from others the states and conditions of persons which arise from laws (qui sont des droits) founded upon public reasons, admitted among all nations, and which have a foundation or cause, absolutely foreign from the domicil; so that the domicil, from the moment a man is affected with these states or conditions, not influencing it in any manner, the new domicil ought not to influence it, but merely the public reasons, superior to those of the domicil, to which all nations pay respect. Such

¹ See on this subject, 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 3, § 3, p. 129 to p. 134.

² Ante, § 57; 2 Boullenois, Obser. 32, p. 10, 11, 13, 19.

and necessity of not injuring the rights of parties requires, that it should be departed from. (3.) Thirdly: not to impair these principles, when otherwise the law furnishes the means of remedying any wrong, which the change of domicil might cause. Or. in other words, he affirms; first, that the law of the domicil ought generally to be followed, as to the state and condition of the persons; secondly, that it ought not to be derogated from, except so far as the spirit of justice, and the necessity of not injuring the rights of parties, require a departure; thirdly, that the general rule ought not to be impaired, when the law will otherwise furnish means to remedy any injury, which the change of domicil may occasion.2 He goes on to declare what he supposes to be perfectly consistent with this doctrine, that when a person in the domicil of his birth (domicilium originis). has arrived at the age of majority, and he afterwards removes to another place, where, at the same years he would still be a minor, the law of the domicil of his birth ought to prevail.3 For instance, if a person, who by the law of the domicil of his birthis of age at twenty, removes to another place after that age, where the minority extends to twenty-five years, he does not lose his majority, and become a minor in his new domicil.4 And, on the other hand, if the same person is a minor by the law of the place of his birth, and not so by that of his new domicil, his state of minority continues, notwithstanding his removal.⁵ He deduces the former from the

¹ 2 Boullenois, Observ. 32, p. 12, 13.

² 2 Boullenois, Observ. 32, p. 11, 12, 13, 19; ante, § 57.

³ 2 Boullenois, Observ. 32, p. 12.

^{4 2} Boullenois, Observ. 32, p. 12, 19, 20.

⁵ Ibid.

and that it remains unalterable by any change of domicil, is, that each State or Nation is presumed to be the best capable of judging from the physical circumstances of climate or otherwise, when the faculties of its citizens are morally or civilly perfect for the purposes of society. And with respect to cases of lunacy, idiocy, and prodigality, it is supported by them upon the general argument from inconvenience, and the great confusion and mischief, which would arise from the same person being considered as capable to contract in one place, and incapable in another; so that he might change his civil character and capacity with every change of his domicil.1 There may, perhaps, be a solid ground of argument in favor of giving a universal operation in all other countries to certain classes of personal incapacities, created by the law of the domicil of the party; but it will be difficult to maintain, that the same reasoning does or can apply with equal force in favor of all personal incapacities; or, that the law of the domicil of birth ought to prevail over the law of the actual domicil. And, even in relation to those personal incapacities, which are supposed most easily to admit of a general application, it is by no means so clear, that the argument from inconvenience is not equally strong on the other side.2

§ 73. The truth, however, seems to be, that there are, properly speaking, no universal rules, by which nations are, or ought to be, morally or politically bound to each other on this subject. Each nation may well adopt for itself such modifications of the gen-

¹ Henry on For. Law, p. 5, 6; Rodenb. tit. 1, ch. 3, n. 4; 2 Boull. App. n. 8.

² See 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 3, § 3, p. 129 to p. 134.

out of the country of the birth of the party (domicilium originis).¹ As to transactions and property within the country of his birth, the policy of most nations will naturally incline them to hold their own laws conclusive over their own subjects, wherever they may be domiciled, so far as regards their minority and majority, and their other capacity, or incapacity, to do acts.

§ 74. Illustrations may be easily found to confirm these remarks in the actual jurisprudence of many countries. Thus, (as we have seen,)2 Pardessus, while he contends, that the law of France, as to personal capacity and incapacity generally, ought to prevail as to French subjects, wherever they reside, abroad, or at home, at the same time admits, that it ought not to govern in relation to certain particular disabilities. Thus, he thinks, that the law of France. which forbids nobles, or persons of official dignity, to sign bills of exchange or other engagements, by which the bodies of the parties are liable to an arrest for a breach of the contract, ought not to extend to the like acts of the same persons done in other countries.3 For, although it may be urged, that it is a personal law, which follows the person every where, as in the case of a minor, or of a married woman under the marital power, and every person is bound to know the state and condition of the person, with whom he contracts; yet, he contends, that the rule ought not to be applied, except to the universal state of the person, such as that of a minor

¹ See 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 8, § 3, p. 129 to p. 134.

² Ante, § 68.

³ Pardessus, de Droit Comm. Vol. 5, art. 1483, p. 350.

ception, agree, that the laws or statutes, which regulate minority and majority, and those, which fix the state or condition of man, are personal statutes, and follow, and govern him, in every country. Now. supposing the case of our law, fixing the age of majority at twenty-five, and the country, in which a man was born and lived previous to his coming here, placing it at twenty-one; no objection could perhaps be made to the rule just stated. And it may be, and, we believe, would be true that a contract, made here at any time between the two periods already mentioned. would bind him. But, reverse the facts of this case: and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period, at which a man ceased to be a minor in the country, where he resided; and that, at the age of twenty-four, he came into this state, and entered into contracts; would it be permitted that he should in our courts, and to the demand of one of our citizens plead, as to protection against his engagements. the laws of a foreign country, of which the people of Louisiana had no knowledge? And would we tell them, that ignorance of foreign laws, in relation to a contract, made here, was to prevent him from enforcing it, though the agreement was binding by those of their own state? Most assuredly we would not." 1

¹ Saul v. His Creditors, 17 Martin, R. 596 to 598. The opinion of the Court was delivered by Mr. Justice Porter. See also Andrews v. His Creditors, 11 Louis. R. 464, 476.— A like doctrine was held by the same Court in another case. The Court on that occasion said; "A foreigner coming into Louisiana, who was twenty-three years old, could not escape from a contract with one of our citizens, by averring, that, according to the laws of the country he left, he was not a major until

some the latter. Perhaps it is not very easy to decide, which rule would, on the whole, be most convenient for any nation to adopt. It may be said, that he, who contracts with another, ought not to be

same place make a valid testament; and he answers in the negative. Dico quod non; quia statuta non possunt legitimare personam sibi non subditam, nec circa ipsam personam aliquid disponere. Bartolus, ad Cod. Lib. 1, tit. 1, 1. 1, n. 25, 26. De Castro (as cited in D'Argentré ubi supra) says, that a statute of Modena, permitting minors to contract at fourteen years of age, will not make valid a contract at Modena by a minor of that age belonging to Bologna: Ratio est, quia hic abstracté de habilitate personæ, et universali ejus statu quæratur, ideoque persona a statuto domicilii efficiatur. Liverm. Diss. § 21, p. 34, 35, § 25, p. 37. Burgendus, Christinaeus, Grotius, and De Wesel, appear to hold the same opinion. See Voet, ad Pand. Lib. 1, tit. 4, p. 2, n. 7; Burgundus, Tract. 1, n. 8, 34. Rodenburg is still more full to the same point. Rodenb. de Diversit. Statut. tit. 2, ch. 1, n. 1; 2 Boullenois, App. p. 11, cited also Liverm. Diss. § 31, p. 40, 41. See also Hertii Opera, Tom. 1, De Collis. § 4, n. 8.

1 Mr. Livermore says, that Huberus alone is in favor of the latter opinion. I draw the conclusion, that P. Voet, (Voet, de Statut. § 4, ch. 2, n. 6, p. 137, 138, edit. 1661,) and J. Voet, (Voet, ad Pand. Lib. 1, tit. 4, p. 2, n. 7, entertain the same opinion. There are probably many other jurists, who are on the same side. It is very certain, that the rule, that either the law of the domicil of origin, or the law of the actual domicil, or even the law of the lex loci contractus, is to govern in all cases, has never been adopted in the English courts. The rule of the actual domicil, or the place of the contract, has been admitted generally; but does not (as we shall presently see) universally govern. Mr. Burge has propounded the same doctrine as the Supreme Court of Louisiana, and said; "In a conflict between the personal law of the domicil and the personal law of another place at variance with it, that of the domicil prevails. But the preceding rule admits of some qualification. It is not to be applied, when it would enable a person to avoid a contract, which he was competent to make by the personal law of the place, in which he made it, although he was incompetent by the personal law of his domicil. Thus, if a person, whose domicil of origin was in Spain, where he does not attain his majority until his twenty-fifth year, should at the age of twenty-three, enter into a contract in England, or any other place, where his minority ceases at twenty-one, he would not be permitted to avoid his contract by alleging that he was a minor, and incompetent to contract, according to the law of Spain. The maxim, that every man is bound to know the laws of a country, in which he enters into a contract, is of universal application, and is perfectly just and reasonable; because, it is in his

by an eminent judge, that "with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts of that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself; and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation, which the law would impose upon him by virtue of that engagement."

§ 77 In another case, decided at an earlier period, the Supreme Court of Louisiana adopted the doctrine, that the laws of the domicil of origin ought to govern the state and condition of the party, whether as major or as minor, into whatever country the party removes. But the decision may, perhaps, be thought to rest on its own peculiar circumstances. The case was this. The plaintiff in the suit (a female) was born in Louisiana in 1802, and the laws of the State at that time fixed the age of majority at twentyfive years. In the year 1808, the period of majority in the State was altered to twenty-one years. The plaintiff in 1827 (when the suit was brought) was, and for several years before had been, a Spanish subject, and a resident in Spain, where minority does not cease until twenty-five years. The suit having been brought by her to recover her share in the succession to her grandmother, in the Courts of Louisiana, before she was twenty-five, the ques-

¹ Lord Stowell, in Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 61; Ante, § 75; Post, § 82.

origin. But it is difficult to perceive, why the same rule should not apply to a case of contract, arising under the like circumstances; since the capacity or incapacity to contract would depend upon the very point, whether the law of the actual domicil, or that of the domicil of origin, or that of the place of the contract, ought to govern in respect to capacity or incapacity. And if the same rule would apply, it is not easy to reconcile this with the preceding doctrine, unless upon the ground, that the courts of the native domicil ought to follow their own law, as to minority and majority, in all cases, in preference to any other.

§ 78. There is an earlier case in the same court, in which it seems to have been incidentally stated, that, according to the law of nations, "personal incapacities, communicated by the laws of any particular place, accompany the person, wherever he goes. Thus, he, who is excused from the consequences of contracts for want of age in his country, cannot make binding contracts in another." 1 This doctrine is certainly at variance with that maintained by the same court at other and later periods.2 It is somewhat curious. that it was avowed in the case of what is called a runaway marriage, celebrated at Natchez in Mississippi, between a young man and a young woman, a minor of thirteen years of age, both of them being at the time domiciled in Louisiana, without the consent of her parents; and which marriage would seem to have been void, without such consent, by the law of

¹ Le Breton v. Fouchet, 3 Martin, R. 60, 70; S. C. post, § 180.

⁹ Saul v. His Creditors, 17 Martin, R. 597, 598; Baldwin v. Gray, 16 Martin, R. 192, 193.

Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood, at forty, it might surely be a question in an English court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be invalidated in England on that account; or, in other words, whether a protection, intended for the rights of Dutch parents, given to them by Dutch law, should operate to the annulling a marriage of British subjects upon the ground of protecting rights, which do not belong in any such extent to parents living in England, and of which the law of England could take no notice, but for the severe purpose of this disqualification. The Dutch jurists (as represented in this libel) would have no doubt whatever, that this law would clearly govern a British court. But a British court might think that a question, not unworthy of further consideration, before it adopted such a rule for the subjects of this country." "In deciding for Great Britain upon the marriage of British subjects, they (the Dutch jurists) are certainly the best and only authority upon the question, whether the marriage is conformable to the general Dutch law of Holland; and they can decide that question definitely for themselves and for other countries. But questions of a wider extent may lie beyond this; whether the marriage be not good in England, although not conformable to the general Dutch law; and whether there are not principles leading to such a conclusion. Of this question, and of those principles, they are not the authorized judges; for this question and those principles belong either to the law of England, of which they are not the authorized ex-

munity, in which her he famed; and whether nev ire not to be emissioned by that law. If such he the law if his manney, the rights of English stoleers minor he said to be determined by the aws of France, but by those of their own country, which sanction mi niont this rule of decision. By the general law, all parties contracting gain a forum in the place, where the commen is entered into. All our books lay this down for law: "It is needless at present to mention more than one. Gavil, (Lib. 2 obs. 123. savs: In contractions locus contractus considerandes sic. Quoties enin susuum principaliter habilitus, vel inhabilitus comeractum, quoad solemnioutes, semper attenditur locus, in quo talis contractus celebrutur, et obligut etiam non subditum." And again. (Lib. 2. obs. 36.) Quis forum in loco contractus sortitur, si ibi loci, ubi contraxit, reperiatur; non tamen ratione contractus, aut ratione rei, quis subditus dicitur illius loci, ubi contrarit, aut res sita est; quia aliud est forum sortiri, et aliud subditum esse. Constat unumquemque subjici jurisdictioni judicis, in eo loco in quo contrarit. This is according to the text law, and the opinion of Donellus and other commentators. There can be no doubt. then, that both the parties in this case obtained a forum, by virtue of the contract in France. entering into the marriage there, they subjected themselves to have the validity of it determined by the laws of that country." And he afterwards proceeded to add; "This doctrine of trying contracts, especially those of marriage, according to the laws of the country, where they were made, is conforma-

¹ Scrimshiro v. Scrimshire, 2 Hagg. Consist. R. p. 407, 408. See Kent' v. Burgoss, 11 Simons, R. 361.

spective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented. or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country, where they are made. It is of equal consequence to all, that one rule in all these cases should be observed by all countries; that is, the law of the countries, where the contract is made. By observing this law no inconvenience can arise; but infinite mischief will ensue, if it is not." 1 Again -" If countries do not take notice of the laws of each other with respect to marriages, what would be the consequence, if two English persons should marry clandestinely in England, and that should not be deemed a marriage in France? Might not either of them, or both, go into France and marry again, because by the French law such a marriage is not good? And what would be the confusion in such a case? Or again; suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage: undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France, and the marriage should be declared null, because the man was not domiciled; he might take a second wife in France, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other." So that, in cases of this kind, the

¹ Scrimshire v. Scrimshire, 2 Hagg. Consist. R. p. 416, 417, 418.

case of extraordinary interest, which turned upon the validity of a Scotch marriage, where one of the parties was an English minor, Lord Stowell said; Being entertained in an English court, it (the case then before him) must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of the marriage rites must be tried by reference to the law of the country, where, if they exist at all, they had their origin."

§ 82. In regard to other contracts made by minors a similar rule has prevailed. In a case, where money had been advanced for a minor during his stay in Scotland (who seems to have had his general domicil in England), it was held by Lord Eldon, that the question, whether in an English court a recovery could be had for the money so advanced, depended upon the law of Scotland; for the general rule was that the law of the place, where the contract is made, must govern the contract.³ This also seems to be a just inference from the doctrine maintained by Lord Stowell, in the case of a contract of marriage.⁴

§ 82 a. Upon this point there is a diversity of opinion among foreign jurists. Some of them are strongly inclined to act upon the doctrine of the

¹ Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 54.

⁹ Id. 58, 59; S. P. Kent v. Burgess, 11 Simons, R. 361. See also Conway v. Beasley, 3 Hagg. Ecc. R. 639; Middleton v. Janverin, 2 Hagg. Consist. R. 437, 446.

³ Male v. Roberts, 3 Esp. N. P. R. 163. See also Thompson v. Ketcham, 8 John. R. 189; Grotius, Lib. 2, ch. 11, § 5. See also Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 60, 61; ante, § 21, 25, p. 34, § 75, note (1), p. 37.

⁴ Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 61; ante, § 80.

⁵ Post, § 368.

may mean the place also of the domicil of origin of the minor.¹ Grotius, however, is more explicit to the purpose. Leges civiles (says he) justa ratione motæ, quasdam promissiones pupillorum ac minorum irritas pronunciant. Sed hi effectus sunt proprii legis civilis, ac proinde cum jure naturæ ac gentium nihil habent commune; nisi quod quibus locis obtinent, ibi eas servare naturale est. Quæ etiam si peregrinus cum cive paciscatur, tenebitur illis legibus; quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur.²

§ 83. On the other hand, many foreign jurists, (as we have seen,) entertain a very different opinion on this very point of the capacity of a person to contract in another country, when he is disabled, as a minor, by the law of his own country and domicil.³ Thus, it has been said by Di Castro, and approved by D'Argentre, that where the law of Modena enabled a minor of fourteen years of age to contract, that would not enable a minor of Bologna of the same age to make a valid contract at Modena.⁴ And Rodenburg asserts the same doctrine in the most emphatic terms; in which he is followed by Boullenois.⁵

¹ See the passages cited from these Authors in 1 Burge, Comment. P. 1, ch. 4, p. 130; Christin. Decis. Vol. 1, Decis. 183, p. 155; Bartolus, ad Cod. Lib. 1, tit. 1, L. 1, n. 13, 20; 2 Boull. Observ. 46, p. 455, 456; post, § 283.

² Grotius, De Jure Belli. Lib. 2, ch. 11, § 5.

³ Ante, § 51 to 68.

⁴ D'Argentré, Comm. ad Leges Britonum, art. 218, gloss. 6, n. 47, 48, cited ante, § 76, note, and also in Liverm. Dissert. p. 42, § 33 to 56; 1 Froland, Mém. des Statuts. 112, 156, 159.

⁵ Rodenburg. De Div. Stat. tit. 2, ch. 1, § 1; 2 Boull. App. p. 11; 1 Boullenois, Obs. 16, p. 200, 201, 204, 205; Bouhier, ch. 23, n. 92; 1 Froland, Mém. p. 112, 159; 2 Froland, Mém. p. 1576 to p. 1582. — The language of Rodenburg is; De quibus et consimilibus id Juris est, ut quocunque

the law of the country of their own domicil.1 He applies also similar considerations to the case of an unemancipated son or minor belonging to one country, who, finding a woman of his own country in a foreign country, marries her there, without the knowledge of his parents, holding, that, under such circumstances, the marriage ought not to be held valid.9 But he propounds as a case of more difficulty, where such a person, going into a foreign country, without any intention of marrying, finds there a woman of his own country to his liking, whom he seeks in marriage and espouses. For, if such a marriage is celebrated according to the usual formalities in that country, he deems it valid, as being done in good faith, and affirms, that the parties are not bound to follow the laws of their own country.3 D'Argentre states the general doctrine in the following manner. "When the question is, as to the right or capacity of any person to do civil acts generally, it is to be referred to the judge, who exercises judicial functions in the place of his domicil; that is to say, to whom his person is subject, and who has authority so to pronounce respecting him, so that whatever he shall promulgate, adjudge, or ordain respecting the rights of persons, ought to obtain, and be of force, in every place, to which he may transfer himself, on account of this authority over the person." Quare cum de personæ iure aut habilitate quæritur ad actus civiles, in universum ea judicis ejus potestas est, qui domicilio judicat, id est, cui persona subjicitur, qui sic de eo statuere

Bouhier, Cout. de Bourg. ch. 28, § 61, p. 557.

Bouhier, Cout. de Bourg. ch. 28, § 62, p. 557.

³ Bouhier, Cout. de Bourg. ch. 28, § 59 to 67, p. 556, 557; Id. ch. 24, § 11, p. 463.

local law; while in other places he deems it too broad and indiscriminate, and introduces several exceptions. Thus, as we have seen, he lays it down as a general rule; Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruuntur, et subjiciantur. So, that, according to Huberus, the state or condition of the party, as to capacity or incapacity in the place of his original domicil, accompanies him every where, so far, and so far only, that the law of the place, where he happens to be, attaches to him, so far as it touches rights or powers growing out of such capacity or incapacity. A minor, for example, in his own country, is subject in every other country to the laws of minority of the latter country. In regard to the contract of matrimony he holds, that it is to be governed by the law of the place, where the marriage is celebrated, with the exception, however, of cases of incest. (says he) "the marriage is lawful in the place, where it is contracted and celebrated, it will be held valid and have effect every where, with this exception, that it does not create a prejudice to others. To which it may be added, if it is not of an evil example; as if it should be a case of incest, within the second degree according to the law of nations." Si licitum est eo loco, ubi contractum et celebratum est, ubique validum crit, affectumque habebit, sub eadem exceptione, prejudicii aliis non creandi. Cui licet addere, si exempli nimis sit abominandi, ut si incestum juris gentium in secundo gradu contingeret, alicubi esse per-

¹ Huberus, De Conflictu Legum, Lib. 1, tit. 3, § 12, 13.

country a mere nullity, when litigated in a British court.1

§ 87. Indeed, the general principle adopted in England in regard to cases of this sort appears to be, that the Lex loci contractus shall be permitted to prevail, unless when it works some manifest injustice, or is contra bonos mores, or is repugnant to the settled principles and policy of its own laws. An illustration of the general principle, and of the exception, may be found in the known difference between the Scottish law and the English law, on the subject of the legitimation of antenuptial offspring. By the law of Scotland illegitimate children become by the subsequent marriage of the parents, legitimate, and may inherit as heirs. But the law of England is otherwise; and a subsequent marriage between the parents will not take away the character of illegitimacy. Upon a recent occasion the question arose in an English court (the Court of King's Bench,) whether a person, born in Scotland of Scottish parents, who afterwards intermarried there, and thereby became legitimate in Scotland, could inherit real estate as a legitimate heir in England. It was held by the Court that he could not.2 On that occasion it was admitted by the Court, that a foreign marriage, however solemnized, if good by the foreign local law, ought to be held valid every where; but that it did not follow from this, that all the consequences of such

¹ Conway v. Beasley, 3 Hagg. Ecc. R. 639, 647, 652; Lolley's Case, 1 Russell & Ryan, Cr. Cas. 236. — It will probably be found very difficult to maintain the doctrine in Lolley's case, and in subsequent discussions its authority has certainly been a good deal shaken. See Warrender v. Warrender, 9 Bligh, R. 89; and post, § 117, 124, 221 to 231.

² Doe d. Birthwhistle v. Vardell, 5 Barn. & Cresw. 438; S. C. 9 Bligh, R. 32 to 88.

natural conclusion from this doctrine would seem to be, that, if he was the legitimate heir by that foreign law, his claim to the inheritance ought to be firmly established. Yet this conclusion has been pointedly repelled by the learned judges in the case already alluded to, and which we shall have occasion to consider more fully hereafter.

§ 88. Another illustration, touching the capacity of persons to contract marriage, may be stated from English jurisprudence. By the law of England marriage is an indissoluble contract, except by the transcendent power of Parliament. Hence it has been held. that a marriage once celebrated between British subjects in an English domicil, cannot be dissolved by a divorce obtained under the laws of a foreign country, to which the parties may temporarily remove.3 Thus, for example, that an English marriage cannot be dissolved, under such circumstances, by a Scotch divorce, regularly obtained according to the law of Scotland, by persons going thither for that purpose, who have their domicil in England.4 And a second marriage in Scotland after such divorce will be held unlawful, and

¹ Birthwhistle v. Vardell, 9 Bligh, R. 52, 53. — I confess myself wholly unable to reconcile these latter decisions with the former. The attempt to reconcile them seems to me more ingenious than satisfactory. Lord Brougham's comments on the subject, in Birthwhistle v. Vardell, 9 Bligh, R. 75, 80, 81, appear to me exceedingly forcible and difficult to be answered. Post, § 93.

⁹ Post, § 93, 94.

³ Lolley's Case, 1 Russ. & Ryan's Cases, 236. But see Warrender v. Warrender, 9 Bligh, R. 89; post, \S 219 a.

⁴ See Rex v. Lolley, 1 Russ. and Ryan, C. 236; Tovey v. Lindsay, 1 Dow, R. 124; Beazley v. Beazley, 3 Hagg. Ecc. R. 639. See also Fergusson on Marr. and Div. Appendix, 269; Warrender v. Warrender, 9 Bligh, R. 89; post, § 219 a.

state, to evade the law of the place of domicil, is on the same account held valid. Mr. Chancellor Kent formerly laid down the doctrine in regard to contracts generally in terms, which might admit of a different interpretation. He said; "The personal incompetency of individuals to contract, as in the case of infancy, and the general capacity of parties to contract, depend, as a general rule, upon the law of the domicil.² But he was then to be understood as referring to the law of the domicil, only when it is the place, where the contract is made; for in the same paragraph he stated, that the Lex loci contractus governs in relation to the validity of contracts; and he applied it especially to nuptial contracts.³

⁸ Pick. 433; West Cambridge v. Lexington, 1 Pick. R. 504; De Couche v. Savatier, 3 John. Ch. R. 190; post, § 123.

¹ fbid.

² 2 Kent, Comm. Lect. 39, p. 458, 2d edition; post, § 123.

^{3 2} Kent, Comm. Lect. 39, p. 458, 2d edition, and De Couche v. Savatier, 3 John. Ch. R. 190. — The English authorities, cited by Mr. Chancellor Kent, justify this conclusion. One is, Male v. Roberts, in 3 Esp. R. 163, which was a case of a contract by a minor in Scotland, during his temporary residence there, and it was held to be governed by the law of Scotland. Another is, Ex parte Otto Lewis, 1 Ves. R. 298, where a lunatic heir of a mortgagee, who had been declared a non compos in Hamburg, and no commission of lunacy had been taken out in England, was ordered to convey the estate in payment of the mortgage in Hamburg, under Statute 4 Geo. ch. 10. Here, Lord Hardwicke manifestly acted upon the ground, that the mortgage money was personal property, and, the lunatic being domiciled in Hamburg, the court would take notice of his disability to convey there, by the law of that place. The remaining authority is Pardessus. His doctrine is certainly more broad. But it could not have been intended by Mr. Chancellor Kent to overrule the English doctrine, and his own prior statement, upon the authority of a foreign jurist. The ambiguity is corrected in the third edition; and the words "the law of the place of contract" are substituted for the words "the law of the domicil." 2 Kent, Comment. Lect. 39, p. 458, 3d edition. Pardessus is an authority in favor of the limited doctrine, that a person incapacitated by the law of his domicil cannot contract with validity there; but he carries his doctrine much farther. The cases of Saul v. His Creditors

reason of their being under the parental power.¹ There can be little doubt, that foreign countries, where such marriages are celebrated, will follow their own law, and disregard that of France.²

& 91. If we pass from cases of minority to other disabilities, enforced by the law of the native domicil. or that of an after acquired domicil, there will be still more reason to doubt, whether any rule of such law, respecting personal capacity and incapacity, ought to be declared to be of universal obligation and efficacy. Let us take the case of a person declared infamous by the law of the place of his domicil. It is said that under such circumstances he ought to be deemed every where infamous. Hinc (says Hertius) in uno loco infamis, ubique infamis habetur. Surely, it will not be contended, that, if a Protestant should be declared a heretic in a Catholic country, and there rendered infamous, and inhabilitated thereby, he is to be deemed under the like infamy and disability in all Protestant countries. That surely would be pressing the doctrine to a wanton extravagance.3 Yet certainly many foreign jurists do press it to that extent.4

§ 92. In like manner, let us consider the civil disabilities imposed by the English laws, in cases of outlawry, excommunication, civil death, and popish recusancy.⁵ It would be difficult to maintain, that these

¹ 2 Kent, Comm. Lect. 26, p. 93, note, 3d edit.; Code Civil of France, art. 170; Id. art. 148; 1 Toullier, Droit Civil, art. 576, 577.

² See post, § 123, 124.

³ See 1 Hertii Opera, § 4, n. 8, p. 124, edit. 1737; Id. 178, edit. 1716; Liverm. Diss. p. 30, 31.

⁴ See Henry on Foreign Law, p. 30; 1 Boullenois, Observ. 4, p. 52 to 67; 1 Voet, ad Pand. Lib. 1, tit. 4, n. 7, p. 40.

⁵ See 3 Black. Comm. 101, 102, 283; 1 Black. Comm. 132; 4 Black. Comm. 54, 319, 320.

he ought to be deemed illegitimate every where, even in another country, where he would by its law otherwise be deemed legitimate.¹

§ 93 a. It has been above stated, that foreign jurists generally, although not universally, hold this opinion; for there is some diversity of opinion among them, if not as to the application of the rule ex directo to the persons, at least as to its application to property situate in a foreign country. Considering, therefore, the importance of the subject, and that it has already undergone a most elaborate discussion in England, in the case already adverted to, and which we shall have occasion to consider more fully hereafter,² it is desirable, that doctrines maintained by foreign jurists, as well as the reasoning of the English courts on the subject, should be here brought under review.

§ 93 b. It seems then generally admitted by foreign jurists, that, as the validity of the marriage must depend upon the law of the country, where it is celebrated, the *status*, or state, or condition, of their offspring, as to legitimacy or illegitimacy, ought to depend upon the same law. So that, if by the law of the place of the marriage, (at all events, if the parents were then domiciled there,) the offspring, although born before the marriage, would be legiti-

¹ Boull. Obs. 4, p. 62 to 64. But see Voet, de Statut. § 4, ch. 3, n. 15, p. 138, edit. 1712; 1 Hertii Opera, § 4, n. 14, 15, p. 129, edit. 1737.—Legitimation by a subsequent marriage is admitted with different modifications by the law of Scotland, France, Spain, Portugal, Germany. and most of the continental nations of Europe. The rule was imported into their jurisprudence from the Roman Law. 1 Burge, Comment. P. 1, ch. 3, § 2, p. 92, 93; Cod. Lib. 5, tit. 27, l. 5; Novell. 78, ch. 4; Id. 89, ch. 8. In some of the American states the same rule prevails. 1 Burge, Comment. on Col. and For. Law, ch. 3, § 3, p. 101; Griffith's Law Register.

² Birthwhistle v. Vardell, 5 Barn. & Cresw. 438; S. C. 9 Bligh, R. 82; ante, § 81.

the domicil of his parents; and that this is an inviolable rule upon every question of his state or condi-And, hence, he holds, that if he is at his birth illegitimate, and he is legitimated by a subsequent marriage in the same country between his parents, he is in all respects to be treated as legitimate every where.1 Hertius holds a similar opinion.² Froland is of the same opinion.3 Boullenois is very full on the same point. He holds that the general rule is, Pater est, quem justæ nuptiæ demonstrant; and that if a person is legitimate or illegitimate, by the law of the place of the marriage, he is to be held of the same state and condition, wherever he may go, and whatever change of domicil may take place.4 Hence he declares, that if by the law of a country a man born a bastard is legitimated by the subsequent marriage of his parents, or e contra, if by the law of the country such subsequent marriage does not legitimate him, he is in every other country affected by his original state or condition; that is to say, if legitimated by the subsequent marriage, he is legitimate every where; if not so legitimated, he is held illegitimate every where.⁵ Even Burgundus, and Stockmannus, and Christinæus, whose systems are founded upon a different theory, viz. that personal statutes have no extra-territorial effect, admit that so far as the person is concerned, though not as to immovable property, (as we shall presently see,6) the original state or condition ought to govern every

¹ Bouhier, Cout. de Bourg. ch. 24, § 122, 123, p. 481.

² Hertii, de Collis. Leg. Tom. 1, § 4, n. 15, p. 184, edit. 1716; Id. p. 129, edit. 1737

³ 1 Froland, Mem, ch. 5, § 4, p. 89; Id. ch. 7, § 2, p. 156, edit. 1716; ante, § 51 a.

^{4 1} Boullenois, Observ. 4, p. 62, 63; post, § 93 i. 5 Ibid.

⁶ Post, § 93 k.

plication in regard to movable property is generally admitted; yet, in regard to immovable property in a foreign country there has been some contrariety of judgment. The circumstances, also, under which the question of legitimacy or illegitimacy may arise, may be very various, and admit of important distinctions in the application of the general doctrine. The birth may be in one country, the marriage be in another, and the domicil of the parents be in a third.

§ 93 g. Several cases may easily be put to illustrate this suggestion. The question of legitimacy or illegitimacy may arise among others in the following cases. (1.) Where a child is born before marriage in the domicil of his parents, who afterwards intermarry there, and by the law of that domicil the child is thereby legitimated. (2.) Where a child is born before marriage in the domicil of his parents. and by the law thereof, a subsequent marriage would legitimate the child, and the parents are afterwards married in another country, by whose law no such legitimation would follow. (3.) Where a child is born before marriage in the domicil of his parents, by whose law no legitimation would follow on their subsequent marriage, and they remove to a new domicil, where the law would, upon such marriage, legitimate the child, and they are there married. (4.) Where the child is born before marriage in the domicil of his parents, by whose law no legitimation would follow from a subsequent marriage, and they are there married, and subsequently remove to a new domicil, by the law whereof such subsequent marriage would legiti-

¹ See Lord Brougham's Remarks in Birthwhistle v. Vardill, 9 Bligh, R. 78.

the English courts; 1 but, as the question is still supposed to be unsettled there, and is also of very general application and importance, it may be well to give it a fuller consideration.

§ 93 i. It is plain, from what has been already stated, and indeed is directly established by their positive declarations, that those of the foreign jurists already mentioned, who affirm the general doctrine of the universality of the rule, that capacity and incapacity depend upon the law of the domicil of birth, and that it equally applies to movable property and immovable property, situate in foreign countries, would hold the same rule applicable to the question of legitimacy and illegitimacy, in regard to the inheritance of real property in all foreign countries. This is certainly maintained by Vinnius, Huberus, Wesel, Froland, Rodenburg, Bouhier, Boullenois, Pothier, and Merlin,² and probably by Baldus and Grotius.³ Hertius puts the converse case; An filius, quem pater ante legitimum connubium in Anglia genuerat, succedere possit patri huic naturali in bonis ex Anglia sitis? And he holds, that he could not; because the son, being illegitimate in England, would be held illegitimate every where.4 And this naturally flows from one of his rules; Quando lex in personam dirigitur, respiciendum est ad leges illius civitatis, quæ personam habet subjectam.⁵ Bouhier states this as the universal rule (as we have seen); but he admits, that if the law of

¹ Ante, § 87.

² Ante, § 51 a, 52, 53, 54, 93, 93 d.

³ J. Voet, ad Pand. Lib. 1, tit. 4, n. 7, p. 40; Liverm. Dissert. § 56, p. 57, § 109 to 114, p. 84 to p. 87.

^{. 4 1} Hertii, Opera. De Collis. Leg. § 4, n. 15, p. 183, edit. 1716; Id. p. 129, edit. 1737.

⁵ Id. § 4, n. 8, p. 175; Id. p. 123, edit. 1837.

⁶ Ante, § 93 d.

law of the birth and domicil of the party. The one doctrine is certainly not necessarily inconsistent with the other.¹

§ 93 l. Paul Voet and John Voet are, as far as my researches have gone, the only jurists, who contend, that the law of legitimacy of the domicil of the party, although a personal statute, is exclusively, like all other personal statutes, confined to the territory, and has no operation directly or indirectly beyond Verius est (says John Voet) personalia, non magis quam realia, territorium statuentis posse excedere, sive directo, sive per consequentiam; and he goes on (as we have seen2) to deny, that a bastard, who is legitimated by the law of his domicil, can inherit by succession property situate in another country, where no such legitimation would take place. Paul Voet holds the same opinion. Quid autem statuendum erit de legitimato in uno territorio; censebitur, ne, ratione bonorum alibi jacentium, ubi legitimatus, non erat statutum vires suos excerere; vel, an illa qualitas seu habilitas, eum ubique locorum comitabitur, quoad effectum consequendæ dignitatis, vel succedendi ab intestato? Respondeo, etsi per legitimationem habilitetur persona, ut velint D. D., qualitatem eam comitari ubique locorum, etiam ex comitate id servari possit; quia tamen potissimum illa legitimatio fit ad effectum vel honoris vel hereditatis consequendæ; in quam nihil juris habet is, quia in suo territorio legitimavit; existimarem illum legitimationem ad honores subeundos

¹ John Voet seems to have understood, that those jurists, who hold, that legitimacy by the law of domicil extended the same capacity every where, gave the effect to it here supposed. J. Voet, ad Pand. Lib. 1, tit. 4, n. 7, p. 40.

² Ante, § 54 a; Liverm. Dissert. § 51, 52, p. 54.

directly opposed to that of the learned judges. It may, therefore, be well to present a summary of the reasoning on each side of the question, and thus to exhibit the grounds of difference.

§ 93 o. It was conceded on all sides, that the right to inherit lands in England must depend upon the laws of England; in other words, that the right of inheritance follows the law of the rei sita, and not that of the domicil of the parties. In every case, therefore, in which an inheritance is sought in England, the question is, whether the claimant is the heritable heir according to the law of England. learned Chief Baron Alexander, who delivered the opinion of the Judges against the Scottish claimant, (though legitimate in Scotland,) reasoned to this effect. He admitted that the status or condition of the claimant must be tried by the law of Scotland, where that status originated; that by the law of Scotland the claimant was clearly legitimate, and must be held so every where. But he insisted, that the question was not, whether the claimant was legitimate or not; but whether he was heir in England; that he might be legitimate, and yet might not be heir. By the law of England no person could inherit lands there, unless he was born within lawful wedlock. This was so expressly affirmed by the Statute of Merton, which declared, that "he is a bastard, that is born before the marriage of his parents." In order, therefore, to see, whether the claimant was entitled, it was not sufficient to ascertain, whether he was legitimate; but also to ascertain, whether he was born in lawful wedlock; for that circumstance is essential to heirship in England. Lord Coke has, indeed, said; "Hæres, in the legal understanding of the common

§ 93 p. On the other hand, the reasoning of Lord Brougham was to this effect. The reasoning of the judges admitted the validity of the marriage, and the status of legitimacy of the claimant. But it was said,

it, has stamped and impressed upon the land in debate. In order the more distinctly to explain what is meant. I will suppose a case in many circumstances resembling the present. In addition to the circumstances stated in the question, let it be further supposed, that the father and mother of the claimant had, after their marriage, one or more sons born to them. Suppose then the present claim to be made. The first inquiry having been satisfied, and it being upon that inquiry perfectly ascertained, that the claimant is the eldest legitimate son of his deceased parent for the purpose of taking land, and for every other purpose, by the law of Scotland, it will next be requisite to inquire, what are the rules and maxims of inheritance, which the law of England has impressed upon that land, which is the subject of the claim. Let it further be supposed, that upon this inquiry it shall turn out, that the land claimed is of that description, which is called Borough English. This being proved, we think it clear, that the claimant's legitimacy by the law of Scotland, his right to inherit by that law, will give the claimant no right whatever to the land in England held in Borough English. The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights, which are necessarily consequent upon that character: but what these rights are respecting English land must be left to the law of England, and, the comity is totally ineffectual to alter, in the slightest degree, the rules of inheritance and descent, which the law of England has attached to this English land. It would, unquestionably, descend upon the youngest son. I am anxious to mark clearly the distinction, which I have pointed out, because it is upon that distinction, that our opinion turns. I will, therefore, illustrate it by another example. Take the case of Ilderton v. Ilderton (2 H. Black, 145); that is the case of a claim to dower by a foreign widow; whether she is a widow or not, that is, whether she was the lawful wife of the man, who was, during the coverture, seised of the land, is a question, which the law of England permits, upon a claim to English land, to be determined by the foreign law, the law of the country, where the contract of marriage was made; there the comity stops. When her character of widow shall have been fixed according to these foreign rules, the law of England comes into action; and, proceeding inexorably by its own provisions and regulations, decides what are the interests in the English land, which her character of widow has conferred upon her. It inquires, what are the rules, which attach upon the particular land in favor of a widow. If, upon that inquiry, it appears, that the land is subject to the common the eldest son, and he was legitimate. In truth, legitimate son means lawful son, and the rule of inheritance is, that the eldest lawful son shall succeed the father. But lawful, or not, depends, upon the law,

quens matrimonium is not the heir of English land. What my Lord Coke says, in page 7 of the first Institute, affords the rule: - 'Hæres, in the legal understanding of the common law, implieth that he is ex justis nuptiis procreatus, for Hæres legitimus est, quem nuptiæ demonstrant.' Perhaps my Lord Coke's expression would have been more precise and accurate, if, instead of saying 'ex justis nuptiis procreatus,' he had said 'ex justis nuptiis natus.' But this is what is meant, as all experience shows. It would be useless to follow this further: but it will be material to recollect, that this maxim, which pervades all our books, and which is confirmed by all our practice, though it is, in form, a description of the person, who shall be heir, is, in substance, in our opinion, a maxim regarding the land, describes one of its most important qualities, traces out the course in which it shall descend, and is no more liable to be broken in upon by any foreign constitution, than are the degree of interest, which the heir shall take in the land, the conditions, on which he shall hold it, the proportion, which a woman shall obtain as a widow, or the limitations and conditions attached to her estate. I have endeavored to state the principles and to show the course of reasoning, which has conducted my learned brothers and myself to the conclusion, that B., the person designated by your Lordships, is not entitled to the property in question as the heir of A. Before I finish I will notice two arguments used on behalf of the Appellant, which merit particular attention. It is said for the Appellant, that according to the rule, we adopt, if he is born in lawful wedlock, he fulfils every condition required of him. Now they say he is born in lawful wedlock, because, by a presumption of the Scottish law, a presumption juris et de jure, there was a marriage anterior to his procreation. It is by force of this presumption, that he is legitimate: by this fiction he is born within the pale of lawful matrimony. We know, that this fiction is, by many respectable writers on the Scottish law, represented as accompanying the legitimation per subsequens matrimonium. But we do not concede the consequence, deduced from it, as applicable to the present question. The question is, what the law of England requires, and, as we are advised, the law of England requires, that the claimant should actually, and, in fact, be born within the pale of lawful matrimony, we cannot agree, that the presumption of a foreign jurisprudence, contrary to the acknowledged fact, should abrogate the law of England, and that by such a fiction a principle should be introduced, which, upon a great and memorable occasion, the legislature of the kingdom distinctly rejected;

place of the party's birth and of his parents' marriage, and the law of the place, where the land lies. Then, which law is to prevail? The law of the birthplace. Any other rule would involve great inconvenience, and be inconsistent with principle; for then a man would be legitimate in one place, and illegitimate in another; legitimate as to personal property, and illegitimate as to real property in the same country. And this would not only affect him, but all persons, who after his death should claim through him; even purchasers claiming from him or them.

§ 93 q. Then as to the argument, that heir means he, who is born in lawful wedlock, ex justis nuptiis. It is true. But what is lawful wedlock? It is that, which is so by the law of the place of marriage; and there is no greater reason for being bound by that law as to marriage, than there is as to legitimacy, as consequent upon the marriage. Why may not the Court look behind the marriage, and ascertain, whe-

personal status, fixed upon these persons a character of illegitimacy. fatal to their claims; on the first step the ground sunk under them, and it became impossible for them to advance. It is obvious, that if in the cases, to which I am now referring, the claimants had been declared heirs by the Scottish law, the Scottish law admitting of no heirship without legitimacy, must have been called in aid to bestow upon them that personal character of legitimacy refused to them by their own law; in other words, a law foreign to their birth, to their domicil, and to the marriage of their parents would have been held to bestow upon them their personal status and character,—a decision certainly contrary to the acknowledged principles upon this subject. The character of illegitimacy, attached to the persons of the English and American claimants by their own law, accompanied them every where, and would prevent their being received as heirs any where within the limits of the Christian world. This view, in our judgment, renders these decisions entirely consistent with the principles I have unfolded, and prevents our considering them as objections to the opinion I entertain, that B. is not entitled to the property in question, as the heir of A." Birthwhistle s. Wardill, 9 Bligh, R. 45 to 53.

birth declares to be born in lawful wedlock. We are necessarily driven to this conclusion: and we must resort to the foreign law to solve all such questions. If it is said, that he is the lawful heir in England, who is the eldest son born within lawful wedlock, it is but changing the position of the point; for we may just as well say, that he, who is the eldest son born in lawful wedlock, (and so the claimant is,) is the lawful heir in England. The real point of difficulty was not met nor considered by the learned Judges. The very question was, whether the law of England did not take the rule, as to legitimacy, the eldest son born within lawful wedlock, from the very status as to these points recognised and held by the law of Scotland. The whole constituted his personal status; and that personal status travelled with him into England.1

¹ It may be far more satisfactory to the learned reader to have his Lordship's reasoning at large in his own words. "In approaching this question, there are some things not disputed. It is admitted, that the validity of a marriage must depend on the law of the country, where it is had, and that consequently the parents of this party were validly married. It seems also to be agreed, that, generally speaking, legitimacy is a status, and must be determined by the law of the country, to which the party belongs. But it is said by those, who support this judgment, that whether the party here is legitimate or not, is no question before us; the only question being, it is alleged, whether or not he is the heir to an English real estate. This distinction, I confess, appears to me founded on an inaccurate view of the subject. It is true, that the question here arises upon the claim of an heir as such, and that therefore the only question may be said to be, whether he is heir or not. But it is also very possible, that this question may turn wholly upon another, namely, whether or not the claimant is eldest legitimate son of his father, the person last seised? Nor do I well see how legitimacy can ever come in question in any other way, than as connected with the claim to succession, either real or personal, in England, or in Scotland either, unless in the single case of a declarator of bastardy or of legitimacy, - a proceeding unknown in the English law. It is therefore by no means sufficient for deciding this

try, of parents domiciled in that country, by whose laws a subsequent marriage would not legitimate him,

bound by the law of the country, where the marriage contract was made, in deciding, whether or not the wedlock was lawful, than there is for being governed in ascertaining the legitimacy of the issue of the marriage by the law of the country, where that issue was born, more especially when it was also the country, where the marriage was had? But can the Court stop short, according to its own principle, at the mere fact of the marriage being according to the lex loci contractus? Do not the principles, on which their decision proceeds, demand this further inquiry; Were the parties able to marry by the lex loci rei site? and thus a door is opened to the further examination of how far a preceding divorce of one of the parties was sufficient to dissolve a previous English marriage. All such difficulties are got rid of by holding the lex loci contractus and nativitatis as governing the validity of the contract and legitimacy of its issue; but they are not to be got over in this way by any argument which does not with equal force apply to holding that the legitimacy of the issue is a question equally to be governed by the lex loci contractus and the law of the birth-place. Nor is it correct to say, as the Judges below assumed, that the lex loci only influences the validity of the contract, and extends not to its effects. The highest authorities have held expressly the reverse. Huber, in the Treatise De Conflictu Legum, which forms part of his larger work, and is constantly cited as the greatest authority on this question, says, 'Non solum ipsi contractus ipsæque nupties certis locis rite celebratæ ubique pro justis et validis habentur, sed etiam jura et effectus contractum nuptiarumque in iis locis recepta ubique vim suam obtinebunt.' I. 3, 9. It would be difficult to state anything more clearly and properly the effect of the matrimonial contract, than the legitimacy of the issue; it is, in fact, the main object, and therefore the principal effect of that contract. But to remove all doubt on this subject, and to extend the same rule also to the lex loci nativitatis; he adds, Qualitates personales certo loco alicui impressas ubique circumferri et personam comitari, cum hoc effectu ut ubivis locorum eo jure quo tales persone alibi gaudent vel subjecti sunt, gaudeantur et subjiciantur.' This principle was adopted and acted on in two very remarkable cases by your Lordships then proceeding under the advice of Lord Eldon; I mean Crawford v. Patrick, and Strathmore v. Bowes. In the former, a child having been born before marriage in America, where the English law prevails, claimed a Scotch estate in respect of the subsequent marriage of his parents there, of whom the father was Scotch. He contended, that the question having arisen upon a real estate in Scotland, the Court of Session was bound to administer the law loci rei site, and that law declared him legitimate. But the Court below and your Lordships held, that gitimate him, become legitimate, so as to inherit lands in the latter country. It has been held by the House

the lex loci rei site must govern the succession to real estate; un doubtedly it must; and if that law gives it in Kent to all the sons, and in Brentford to the youngest, and elsewhere to the eldest, the several sons are the heirs in those several places. But when it is said the lawful issue shall take; I agree; I too say only the legitimate son or sons shall inherit; but to find who are the legitimate sons, I must ask the law of the birthplace, which fixes the status of legitimacy; of the personal quality, according to Huber, that travels round every where with the party. But the argument assumes a narrower and apparently closer form still, for it is said that the statute declares those only inheritable, who are born in marriage, and that Lord Coke accordingly defines the heir to be him, who is ex justis nuptiis procreatus. There is in this, however, a great fallacy: 'Born in marriage' or not; 'ex justis nuptiis procreatus' or not; is to be determined by some law or other; it is not a question that answers itself and in one way only. Then what law shall determine? Certainly either the law of the country, where the party was born, or where the marriage was had; the law either of the country, where the nuptiæ were had, or where the procreatio took place. A question might arise, where the events happened in different countries; it might then be doubted which law should govern; which should be resorted to for an answer to the question. But where both events happened in the same country, as here, there seems no doubt at all in the matter. Now the law of the country, where both the marriage and the birth took place, declares that the party was born in lawful wedlock; that he was ex justis nuptiis procreatus; and wholly denies, that he was born before marriage, or out of wedlock. But it is said, that this is a fiction, and that our law cannot import the fictions of a foreign system, though its principles we are allowed to import. This distinction I do not profess to comprehend; what is a fiction, but a principle? It is only one particular view, which the law takes, and one doctrine, which it lays down. Suppose a Scotch Court were to deny the legitimacy of a child, who was born on the day after his parents married in England, should we not say, that a gross absurgity was commit-Should we not say, the child was born in lawful wedlock, and hold the doctrine absurd, which should question his being lawfully begotten? Nay, suppose a gift, in the usual terms, to the heirs of the body lawfully begotten; we should let the child born the day after marriage take under such a gift, although it was clearly not lawfully begotten in point of fact. This is a fiction exactly analogous to the Scotch fiction. The Scotch law presumes, against the fact, the marriage to have been had before the birth of the child; our law presumes, against the fact, the marriage to have been had before the cohabitation

of the parents, would not give him such a capacity to inherit land, and that the stain of illegitimacy by

no difference. A fixed and known principle of common law has exactly the same force with statutory provision. How then can the opposite principle be adopted in two cases identically the same? The Court below says, that the English law gives not an estate to the bastard eigne, and that it treats him as bastard, although by the law of his birthplace he was legitimate. The Scotch law gives the estate to the bastard eigne, regarding him as legitimate, and this House adjudged, that he should not take that estate, only because he was illegitimate by the law of his birthplace. Your Lordships decided that the lex loci rei site should not be regarded, when it differed from the lex loci contractus et nativitatis; you decided that when the former law declared for legitimacy, it should yield to the latter, which declared for bastardy. How can you be called upon here to decide that the lex loci rei site shall not overrule the other law, and that again in favor of bastardy? I profess my inability to understand how these two decisions of the same question can in any way stand together; nor am I able to perceive, that the least attention was paid by the Court below to those important decisions of your Lordships. I perceive that the whole argument in that Court turned upon a question not in dispute here. The learned Judges suppose, that they decide the question, when they prove that the English law is to govern the case, because the question relates to real property situated in England. Now undeniably the English law is to govern the case in one sense; the eldest lawful son is to succeed; but who that son is must be determined by the law of his birthplace, and by the fact found that, under that law, the lessor of the plaintiff is eldest lawful son. Nav even if we take the English law to be, that lawful son or heir is he, who was born in wedlock, then we have here the fact found, and found as a fact, that in the country, where he was born, the party was born in wedlock. No one, it must be always borne in mind, pretends to say, that the English law can in any way dispose of the whole question. Admitting that the rule cited from Lord Coke in reference to the statute of Merton is to govern us, heres, qui ex justis nuptiis procreatus est, no one contends, that the question, what are justee nuptice, can be determined otherwise than by a reference to the lex loci contractus, or it may be, loci nativitatis. To that foreign law, then, we must resort; and the only question is, at what period of our inquiry this recourse shall be had. No more needs be said to show how very far from decisive of the present question that position is, which alone is argued or defended by the learned Judges, namely, that the law of England must govern. It does govern, but with the aid, through the ministry of the foreign law. The reference made to the dictum of the Master of the Rolls, in Brodie v. Barry, (2 Ves. and Bea. p. 127,) does not stances in other respects, the change of domicil of the parents to the country, where the marriage

him from taking it homed. In the mone country, in the same Courts, in respect to the same land, he is look heatard and legitimate; bestard for the purpose of his awa succession legitimate when the succession of others is concerned. May I be permuted most respectfully to express a social whether or and this question has received all the consideration, which is deserves at the hand of those learned Judges? I know not, that it carries the argument much further; but there is a proceeding, well known to your Lordships sitting here as a Court of general jurisdiction over the whole United Kingdom, though unknown to the Courts of England: the process of declarator. Suppose a declarator of legitimacy ind been brought in the Sevech Courts by the lessor of this plaintiff, the judgment would have been, and quite as a matter of course, that he was lawful son of Wm. Birthwhistle; and the present defendant being made a party to this suit, the judgment could be given in evidence before the Court, where the ejectment now before us was brought. I agree, that such a judgment does not conclusively bind; yet it would place the conflict of the two laws in a somewhat stronger light, if the English Court should pronounce him bastard, whom the Scotch Court, sitting in the country of his birth, had pronounced lawful son. But if both judgments were brought here by appeal and writ of error, as might easily happen, your Lordships would be compelled to affirm the sentence of the Scotch Court, and yet you are now asked to affirm the opposite judgment of the King's Bench. Let it be observed, too, that all this anomaly is in England; it begins and ends here; for the Scotch Judges have decided in such cases with perfect consistency, as well as entire uniformity. Those learned persons, whose familiarity with legal principle, in its enlarged sense, is derived from a deep study of the feudal and of the civil law, as well as of the modern jurisprudence of Scotland, have been guided in all their determinations of such questions by simple, rational, and intelligible principles. If a declarator of legitimacy were brought before them by one born in England before marriage, and whose parents afterwards intermarried, their sentence would be, that he was illegitimate; and even were he to claim a Scotch estate the law would be the same. This has been ruled in Scotland in the cases more than once referred to, and affirmed upon appeal here. But you are now advised to take a different course, when the same question arises in another part of the United Kingdom. It may be observed, that, in referring to those Scotch cases, the learned Chief Justice says, without discussing them, that it is satisfactory to him, that the form of the proceeding (a special verdict) was such as to carry the question before the same tribunal which pronounced those decisions. In the advice, however, which has been given to this tribunal by the same binage, and whose parents afterwards become residents in France, and there intermarry without being naturalized, and says, that the child is not legitimated by such subsequent marriage, but remains illegitimate, as he was by the law of the country of his birth. The converse case of a child born in France, and the parents subsequently intermarrying in England, he holds equally clear, and that thereby the child will become legitimate. Boullenois has, as we have also seen, pushed his doctrine much farther; farther, indeed, than seems consistent with any just principle, especially in giving a retroactive effect to a subsequent naturalization in another country.

§ 93 u. Merlin supports the same general doctrine, holding, that it is impossible to consider as legitimate in France a natural child, born in England of English parents, who afterwards intermarry in England. But, that a natural child born in France of French parents, who should afterwards remove to England, and there intermarry, without being naturalized, would by such subsequent marriage be made legitimate. In each case he holds, that the law of the place of the birth of the child gives the rule, as to legitimacy by a subsequent marriage.

§ 93 v. Merlin supposes, that Hertius holds a different doctrine, and affirms, that the law of the place of marriage gives the rule as to legitimacy, and not that of the place of the birth of the child. I do not so understand Hertius. To me it seems clear,

¹ Ante, § 93 d, § 93 i; 1 Boullenois, Observ. 4, p. 62, 63.

Did.; Merlin, in his Quest. de Droit, art. Legitimation, § 2, n. 1, withbats this doctrine of Boullenois.

³ Merlin, Quest. de Droit, art. Legitimation, § 1, n. 1.

⁴ Ibid. § 2, n. 1, 2.

at any time during their lives. And to this very day in Catholic countries, marriages are prohibited to the priesthood, and to persons in monastic orders. Yet it would be extremely difficult to maintain, that the marriage of a nun, or a monk, or a priest, celebrated in America, where no such prohibition exists, ought, causâ professionis, to be held a mere nullity on account of such foreign prohibitions, especially where the other party is at the time of the marriage domiciled here, and as such is entitled to the protection of our laws.

§ 95. By the laws of some countries the subjects thereof are prohibited from intermarrying with foreigners, or with persons of another religious sect; and some civilians have held, that such laws are of universal obligation, and accompany the person every where.² But it can hardly be supposed, that any other nation would suffer a marriage celebrated in its own dominions, according to its own laws, between such persons, and especially where one of them was a citizen or subject thereof, to be deemed a nullity in its own courts. Such a narrow prohibition would justly be deemed odious, and be rejected.

§ 96. Another case may be put of even a more striking character. Suppose a person to be a slave in his own country, having no personal capacity to contract there, is he, upon his removal to a foreign country, where slavery is not tolerated, to be still deemed a slave? If so, then a Greek or Asiatic, held

¹ 2 Inst. 686, 687; Com. Dig. Baron and Feme, B.2; 1 Woodes. Lect. 16, p. 422.

² See Paul Voet, De Statut. § 5, ch. 2, n. 1, p. 178, 179, edit. 1661; Vattel, B. 2, ch. 8, § 115.

the undisputed law of England.¹ It has been solemnly decided, that the law of England abhors, and will not endure the existence of slavery within the nation; and consequently, as soon as a slave lands, in England, he becomes *ipso facto* a freeman, and discharged from the state of servitude.² Independent of the provisions of the Constitution of the United States, for the protection of the rights of masters in regard to domestic fugitive slaves, there is no doubt, that the same principle pervades the common law of the non slave holding states in America; that is to say, foreign slaves would no longer be deemed such after their removal thither.³

¹ See cases cited 20 Howell, State Trials, 12, 13, 14, note; and Causes Célébres, vol. 13, p. 492, edit. 1747; 1 Burge, Comment. on Col. and For. Law, ch. 10, p. 739, 740.

² Somerset's Case, Lofft, R. 1; S. C. 11 State Trials, (Hargrave edit.) 340; 20 Howell, State Trials, 1 to 79; Co. Lit. 79; Harg. note, 44; 1 Black. Comm. 424, 425, Christian's note, and Coleridge's note; Forbes v. Cochrane, 2 Barn. & Cres. 448; The Amedie, 1 Acton, R. 240; S. C. 1 Dodson, R. 84; Id. 91, 95; The St. Louis, 2 Dodson, R. 210; The Slave Grace, 2 Hagg. Adm. R. 94, 104, 105, 106, 107, 109, 110, 111, 118; 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 10, p. 734 to p. 752.

³ See the opinion of the Court delivered by Mr. Justice Porter, in Saul v. His Creditors, 17 Martin, R. 598; In re Francisco, 9 Amer. Jurist, 490; Butler v. Hooper, 1 Wash. C. C. R. 499; Ex parte Simmons, 4 Wash. C. C. R. 390. See also Butler v. Delaplaine, 7 Serg. & Rawle, R. 378; Commonwealth v. Holloway, 6 Binn. R. 213; S. C. 2 Serg. & Rawle, R. 305; Lumsford v. Coquillon, 14 Martin, R. 408; Louis v. Cabarrus, 7 Louis. R. 170, 172; 1 Burge, Comm. on Col. and For. law, P. 1, ch. 10, p. 744 to 749. Prigg v. Comm. of Penn. 16 Peters, R. 541, 611, 612. In the recent case of Commonwealth v. Aves, 1836, before Mr. Chief Justice Shaw, in Massachusetts, it was expressly held, that a slave brought into Massachusetts voluntarily by his master, from a slave state of the United States, was free here, and could not be recovered or carried back as a slave. Upon that occasion the learned Judge said; "The question now before the court arises upon a return to a Habeas Corpus, originally issued in vacation, by Mr. Justice Wilde, for the purpose of bringing up the person of a colored child, named Med, and instituting a legal inquiry into the fact of her detention, and the cause, for which she was detained. By the provisions of the revised code, the practice upon habeas corpus

or contracts made respecting such property, in countries, where slavery is permitted, may be allowed to

of the child remained at New Orleans in a state of slavery, but that Mrs. Slater brought the child with her from New Orleans to Boston. having the child in her custody, as the agent and representative of her husband, whose slave the child was, by the laws of Louisiana. When the child was brought thence, the object, intent, and purpose of the said Mary Slater being to have the said child accompany her, and remain in her custody and under her care during her temporary absence from New Orleans, and that the said child should return with her to New Orleans, the domicil of herself and husband; that the said child was confided to the custody and care of said Aves by Mrs. Slater, during her temporary absence in the country for her health. The respondent concludes by stating, that he has exercised no other restraint over the liberty of this child, than such as was necessary to the health and safety of the child. Notice having been given to Mr. and Mrs. Slater, an appearance has been entered for them, and in this state of the case and of the parties, the cause has been heard. Some evidence was given at the former hearing, but it does not materially vary the facts stated in the return. The fact testified, which was considered most material, was the declared intent of Mrs. Slater to take the child back to New Orleans. But as that intent is distinctly avowed in the return — that is, to take the child back to New Orleans, if it could be lawfully done, it does not essentially change the case made by the return. This return is now to be considered in the same aspect, as if made by Mr. Slater. It is made, in fact, by Mr. Aves, claiming the custody of the slave in right of Mr. Slater, and that claim is sanctioned by Mr. Slater, who appears, by his attorney, to maintain and enforce it. He claims to have the child as master, and carry her back to New Orleans, and, whether the claim has been made in terms or not, to hold and return her as a slave, that intent is manifest, and the argument has very properly placed the claim upon that ground. The case presents an extremely interesting question, not so much on account of any doubt or difficulty attending it, as on account of its important consequences to those, who may be affected by it, either as masters or slaves. The precise question presented by the claim of the respondent is, whether a citizen of any one of the United States, where negro slavery is established by law, coming into this State, for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicil here, who brings a slave with him as a personal attendant, may restrain such slave of his liberty during his continuance here, and convey him out of this state on his return, against his consent. It is not contended, that a master can exercise here any other of the rights of a slave owner, than such as may be necessary to retain the custody of the slave during his residence, and to remove him on his return. Until this discussion, I had supposed, that there had been adjudged

a very different question, how far the original state of slavery might reattach upon the party, if he should

reference to it. The act passed, June, 1703, imposed certain restrictions upon manumission, and subjected the master to the relief and support of the slaves, notwithstanding such manumission, if the regulations were not complied with. The act of October, 1705, levied a duty and imposed various restrictions upon the importation of negroes, and allowed a drawback upon any negro, thus imported, and for whom the duty had been paid, if exported within the space of twelve months, and bonk fide sold in any other plantation. How, or by what act particularly, slavery was abolished in Massachusetts, whether by the adoption of an opinion in Somerset's case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the Constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity, than of utility; it being agreed on all hands, that, if not abolished before, it was so by the Declaration of Rights. In the case of Winchendon v. Hatfield, (4 Mass. R. 123,) which was a case between two towns respecting the support of a pauper, Chief Justice Parsons, in giving the opinion of the Court, states, that at the first action, which came before the Court after the establishment of the constitution, the judges declared, that, by virtue of the Declaration of Rights, slavery in this State was no more. And he mentions another case, Littleton v. Tuttle, (4 Mass. R. 128, note) in which it was stated, as the unanimous opinion of the Court, that a negro born within the State, before the constitution, was born free, though born of a female slave. The Chief Justice, however, states, that the general practice and common usage have been opposed to this opinion. It has recently been stated as a fact, that there were judicial decisions in this State prior to the adoption of the present constitution, holding, that negroes, born here of slave parents, were free. A fact is stated in the above opinion of Chief Justice Parsons, which may account for this suggestion. He states, that several negroes, born in this country, of imported slaves, had demanded their freedom of their masters by suits of law, and obtained it by a judgment of court. The defence of the master, he says, was faintly made; for such was the temper of the times, that a restless, discontented slave, was worth little; and when his freedom was obtained in a course of legal proceedings, his master was not holden for his support, if he became poor. It is very probable, therefore, that this surmise is correct, and that records of judgments to this effect may be found; but they would throw very little light on the subject. Without pursuing this inquiry farther, it is sufficient for the purposes of the case before us, that by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground, that it is contrary to natural right and the plain principles of justice. The terms of the first article of the Declaration of Rights are plain and explicit.

case of this sort, held, that upon such a return of the slave to his original domicil, the state of slavery would

who have had foreign colonies, to warrant any one independent community to say, that it is opposed to the laws of nations. The authorities are cited in the case of the Antelope, and that case is itself an authority directly in point. The consequence is, that each independent community, in its intercourse with every other, is bound to act on the principle, that such other country has a full and perfect authority to make such laws for the government of its own subjects, as its own judgment shall dictate, and its own conscience approve, provided the same are consistent with the law of nations; and no independent community has any right to interfere with the acts or conduct of another State, within the territories of such State, or on the high seas, which each has an equal right to use and occupy; and that each sovereign State governed by its own laws, although competent and well authorized to make such laws, as it may think most expedient, to the extent of its own territorial limits, and for the government of its own subjects, yet beyond those limits, and over those who are not its own subjects, has no authority to enforce her own laws, or treat the laws of other States as void, although contrary to its own views of morality. This view seems consistent with most of the leading cases on the subject. Somerset's case, 20 Howell, State Trials, 1, as already cited, decides, that slavery, being odious and against natural right, cannot exist, except by force of positive law. But it clearly admits, that it may exist by force of positive law. And it may be remarked, that by positive law, in this connexion, may be as well understood, customary law, as the enactment of a statute; and the word is used to designate rules established by tacit acquiescence, or by the legislative act of any State, and which derive their force and authority from acquiescence or enactment, and not because they are the dictates of natural justice, and as such of universal obligation. The Louis. 2 Dodson, R. 238. This was an elaborate opinion of Sir Wm. Scott. It was the case of a French vessel seized by an English vessel in time of peace, whilst engaged in the slave trade. It proceeded upon the ground, that a right of visitation, by the vessels of one nation, of the vessels of another, could only be exercised in time of war, or against pirates, and that the slave trade was not piracy by the laws of nations, except against those, by whose government it has been so declared by law or by treaty. And the vessel was delivered up. The Amedie, 1 Acton, R. 240. The judgment of Sir Wm. Grant in this case, upon the point, on which the case was decided, that of the burden of proof, has been doubted. But upon the point now under discussion, he says, but we do not lay down as a general principle, that this is a trade, which cannot, abstractedly speaking, be said to have a legitimate existence. I say, abstractedly speaking, because we cannot legislate for other countries; produced by the change of local situation, is far from being a novelty in the law. A residence in a new

considering the principles, upon which they were decided, they will be found to be perfectly reconcilable. The plaintiff, a British subject, domiciled in East Florida, where slavery was established by law, was the owner of a plantation, and of certain slaves, who escaped thence and got on board a British ship of war on the high seas. It was held, that he could not maintain an action against the master of the ship for harboring the slaves after notice and demand of them. Some of the opinions given in this case are extremely instructive and applicable to the present. Holroyd, J., in giving his opinion said, that the plaintiff could not found his claim to the slaves upon any general right, because by the English law such a right cannot be considered as warranted by the general law of nature; that if the plaintiff could claim at all, it must be in virtue of some right, which he had acquired by the law of the country, where he was domiciled; that when such rights are recognised by law, they must be considered as founded not upon a law of nature, but upon the particular law of that country, and must be coextensive with the territories of that State; that if such right were violated by a British subject, within such territory, the party grieved would be entitled to a remedy; but that the law of slavery is a law in invitum; and when a party gets out of the territory, where it prevails, and under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the place only, does not continue. So in speaking of the effect of bringing a slave into England, he says, he ceases to be a slave in England, only because there is no law which sanctions his detention in slavery. Best, J., declared his opinion to the same effect. Slavery is a local law, therefore if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits, where slavery is recognised by the local law, they have broken their chains, they have escaped from their prison, and are free. That slavery is a relation founded in force, not in right, existing, where it does exist, by force of positive law, and not recognised as founded in natural right, is intimated by a definition of slavery in the civil law: 'Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.' Upon a general review of the authorities, and upon an application of the well established principles upon this subject, we think they fully maintain the point stated, that though slavery is contrary to natural right, and to the principles of justice, humanity, and sound policy, as we adopt them, and found our own laws upon them, yet not being contrary to the laws of nations, if any other state or community see fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound istear with he former rights and infigations of the same persons. Persons, would be particular con-

property on we semined a minimal writes it occid time. Then there ney be to sen convenience, declare, that staves small be become moments. or issuess or limb sistem language 'to swe has another all tad hore mply to them as the natures, that they may be someth and sold, isfrom stached, evied mon; that respect will be for in mury ione to them, is more for conventing them. But it would be a nerversion of tering to any that such neal laws in it fact make them reasonal property property; they can only determine, that the same mies of law small apply a them, as are undicable in monerty, and this affect will follow only as far as such laws progres ran operate. The same doctrine a recognised in Louisiana. In the case of Lumbori a Compillon, 14 Martin, R. M. .t : a thus stated: - The relation of owner and slave in the States of this Union, in which it has a legal existence, is a creature of the manacipal law. See Story, Conflict of Laws, 92 97. The same principle is declared by the Court in Kentucky, in the case of Rankin. a Letia, 2 Warshall, R. 670. They say, slavery is sanctioned by the laws of this State; but we consider this as a right existing by positive law of a minute pal character, without foundation in the law of nature. The conclusion, to which we come with this view of the law, is this: That by the general and now well established law of this Commonwealth. head slavery cannot exist, became it is contrary to matural right, and repregenant to animerous provisions of the constitution and lines. designed to secure the liberry and personal rights of all persons within de limits and entitled to the protection of its laws. That though by the laws of a foreign State, meaning by 'foreign' in this connexion, a State general by its own laws, and between which and our own there is no Asternational one open the other; but which in this respect are as indispandant as lineign Mates; a person may acquire a property in a slave, that such acquaition, being contrary to natural right, and affected by heat law, in dependent upon such local law for its existence and efficient. and being contrary to the fundamental law of the State, such general right of property cannot be exercised or recognised here. That as a general rule, all persons coming within the limits of a State, become auth)act to all its municipal laws, civil and criminal, and entitled to the trivileges, which those laws confer, that this rule applies as well to blacks, as whites, except the case of fugitives, to be afterwards considaged; that if such parsons have been slaves, they become free, not so much because any alteration is made in their status, or condition, as because there is no law, which will warrant, but there are laws, if they change to avail themselves of them, which prohibit their forcible detention, or foreible removal. That the law arising from the comity of nethose cannot apply, because if it did, it would follow as a necessary

for the time, when they reside in another country, and are entitled as persons totally free, although they

cannot exist, and the rights and powers of slave owners cannot be exercised therein, the effect of this provision in the Constitution and laws of the United States is to limit and restrain the operation of this general rule, so far as it is done by the plain meaning and obvious intent and import of the language used, and no farther. The constitution and law manifestly refer to the case of a slave escaping from a state, where he owes service or labor, into another state or territory. He is termed a fugitive from labor; the proof to be made is, that he owed service or labor, under the laws of the state or territory, from which he fled, and the authority given is to remove such fugitive to the state. from which he fled. This language can, by no reasonable construction. be applied to the case of a slave, who has not fled from the state, but who has been brought into this state by his master. The same conclusion will result from a consideration of the well known circumstances, under which this constitution was formed. Before the adoption of the constitution, the states were, to a certain extent, sovereign and independent, and were in a condition to settle the terms, upon which they would form a more perfect union. It has been contended by some over zealous philanthropists, that such an article in the constitution could be of no binding force or validity, because it was a stipulation contrary to natural right. But it is difficult to perceive the force of this objection. It has already been shown, that slavery is not contrary to the laws of nations. It would then be the proper subject of treaties among sovereign and independent powers. Suppose, instead of forming the present constitution, or any other confederation, the several states had become in all respects sovereign and independent, would it not have been competent for them to stipulate, that fugitive slaves should be mutually restored, and to frame suitable regulations, under which such a stipulation should be carried into effect? Such a stipulation would be highly important and necessary, to secure peace and harmony between adjoining nations, and to prevent perpetual collisions and border wars. It would be no encroachment on the rights of the fugitive; for no stranger has a just claim to the protection of a foreign state against its will, especially where a claim to such protection would be likely to involve the state in war; and each independent state has a right to determine by its own laws and treaties who may come to reside or seek shelter within its limits. the constitution of the United States partakes both of the nature of a treaty and of a form of government. It regards the states, to a certain extent, as sovereign and independent communities, with full power to make their own laws, and regulate their own policy, and fixes the terms, upon which their intercourse with each other shall be conducted.

or mistress to any part of the world. But that privilege exists no longer than his character of domestic slave attaches to him; for, should the owner deprive him of the character of being a domestic slave by employing him as a field slave, he would be deprived of the right of accompanying his master out of the colony." 1

§ 97. Struck with the inconveniences of the doctrine of the ubiquity of the law of the domicil, as to the capacity, state, and condition of persons, as an absolute and general doctrine, a learned Judge in the Scottish courts² has not hesitated to hold, that no such doctrine is recognised, as of universal obligation in Scotland. "Would a marriage here," (says he,) " be

cate according to the law of the United States, is benà fide removing such slave to his own domicil, and in so doing passes through a free state; where the law confers a right or favor, by necessary implication it gives the means of executing it. Nor do we give any opinion upon the case, where an owner of a slave in one state, is bonà fide removing to another state, where slavery is allowed, and in so doing necessarily passes through a free state, or, arriving by accident or necessity, he is compelled to touch or land therein, remaining no longer than necessary. Our geographical position exempts us from the probable necessity of considering such a case, and we give no opinion respecting it. The child, who is the subject of this habeas corpus, being of too tender years to have any will or give any consent to be removed, and her mother being a slave, and having no will of her own, and no power to act for her child, she is necessarily left in the custody of the law. The respondent having claimed the custody of the child, in behalf of Mr. and Mrs. Slater, who claim the right to carry her back to Louisiana, to be held in a state of slavery, we are of opinion, that his custody is not to be deemed by the Court a proper and lawful custody. Under a suggestion made in the outset of this inquiry, that a probate guardian would probably be appointed, we shall for the present order the child into a temporary custody, to give time for an application to be made to the Judge of Probate.

¹ The Slave Grace, 2 Hagg. Adm. R. 94, 113, 114. It seems that Christineus and Gudelin held the same opinion as Lord Stowell. See Christineus, Vol. 4, Decis. 80, n. 4, p. 115, cited also, 1 Burge, Com. on Col. and For. Law, P. 1, ch. 10, p. 749.

² Lord Meadowbank; Fergusson on Mar. and Divorce, Appx. 361, 362.

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² Lord Meadowbank; Fergusson on Mar. and Divorce, Appx. 361, 362.

ted to operate universally, and form privileged castes, living each under separate laws, like the barbarous nations during many centuries after their settlement in the Roman empire." ¹

§ 98. These diversities in the practical jurisprudence of different countries, as to the effect of personal ability and disability, and personal capacity or incapacity, abundantly establish, in the first place, that there is no general rule on the subject, which is admitted by all nations; and, in the next place, that the very exceptions introduced, or conceded, by those, who most strenuously contend for the universal operation of the law of the domicil of the party, either native or acquired, in cases of this nature, as satisfactorily establish, that no general rules, have been or can be established, which may not work serious inconvenience to the interests or institutions of some particular countries, or to some particular classes of capacities or incapacities. The proper conclusion, then, to be drawn from this review of the subject is, that the rule of Huberus is correct, that no nation is under any obligation to give effect to the laws of any other nation, which are prejudicial to itself or to its own citizens; that in all cases every nation must judge for itself, what foreign laws are so prejudicial or not; and that, in cases not so prejudicial, a spirit of comity and a sense of mutual utility ought to induce every nation to allow full force and effect to the laws of every other nation. This is the doctrine asserted by Mr. Chancellor Kent; and it certainly has a most solid foundation in the actual practice of nations. "There is no doubt," (says he,)

¹ Lord Meadowbank; Fergusson on Mar. and Divorce, App. 361, 362.

and in foreign nations, upon the same common ground of international jurisprudence, that is to say, upon a general comity, founded in the sense of mutual interests, mutual benefits, and mutual obligations to cultivate peace and harmony. It was said, on a recent occasion, with great force and propriety, by Mr. Chief Justice Taney, in delivering the opinion of the Supreme Court; "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation, by which it is offered, and is inadmissible, when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties, to which they belong, that courts of justice have constantly acted upon it, as a part of the voluntary law of nations.1

§ 100. In concluding this discussion, as to the operation of foreign laws on questions relating to the capacity, state, and condition of persons, it may be useful to bring together some of those rules, which seem best established in the jurisprudence of England and America, leaving others of a more doubtful character and extent to be decided, as they may arise in the proper forum.

§ 101. First. The capacity, state, and condition of persons according to the law of their domicil will generally be regarded, as to acts done, rights acquired, and contracts made, in the place of their domicil, touching property situate therein. If these acts, rights, and contracts have validity there, they will be

¹ Bank of Augusta v. Earle, 13 Peters, R. 589.

not by the means within his reach, but by recourse to the law of the domicil of the person, with whom he was dealing, whether the latter has attained the age of majority, and, consequently, whether he is competent to enter into a valid and binding contract. If the country, in which the contract was litigated, was also that, in which it had been entered into, and if the party enforcing it were the subject of that country, it would be unjust, as well as unreasonable, to invoke the law of a foreign state for the benefit of the foreigner, and to deprive its own subject of the benefit of the law of his own state."

& 102 b. He adds; "It has been hitherto assumed, that, according to the law of the domicil, the person was a minor, and incapable of contracting, although he had attained the age, which in loco contractus constituted majority, and where, according to that law, he was competent to contract. In such a case, it has been submitted, that the Lex loci contractus ought to be followed. It ought also to be followed, if the converse of that case occurred, and he had attained majority according to the law of his domicil, but was a minor according to that which prevailed in loco contractus. It is true, in the latter case, the party was subject to no greater liability, than he would have incurred in the place of his domicil. But if the principle be correct, that the Lex loci contractus ought to determine the validity of a contract, when that validity depends on the capacity of the contracting party, it must be uniformly applied, whether the law prevailing in the domicil be that, which capacitates or incapacitates. For it would not be reasonable, that two different

^{1 1} Burge, Comm. on Col. and For. Law, P. 1, ch. 4, p. 132.

be recognised in any country, whose institutions and policy prohibit slavery.¹

§ 105. Fifthly. In questions of legitimacy, or illegitimacy, the law of the place of the marriage will generally govern, as to the issue subsequently born. If the marriage is valid by the law of that place, it will generally be held valid in every other country, for the purpose of ascertaining legitimacy and heirship. If invalid there, it will generally (if not universally) be held invalid in every other country.²

§ 105 a. Sixthly. As to issue born before the marriage, if by the law of the country, where they are born, they would be legitimated by the subsequent marriage of their parents, they will by such subsequent marriage (perhaps in any country, but at all events) in the same country, become legitimate, so that, this character of legitimacy will be recognised in every other country. If illegitimate there, the same character will belong to them in every other country.³

§ 106. Seventhly. No nation being under any obligation to yield up its own laws, in regard to its own subjects, to the laws of other nations, it will not suffer its own subjects to evade the operation of its own fundamental policy or laws, or to commit frauds in violation of them, by any acts or contracts made with that design in a foreign country; and it will judge for itself, how far it will adopt, and how far it will reject, any such acts or contracts. Hence the acts of prodigals, of minors, of idiots, of lunatics,

¹ Co. Lit. 79, b.; Harg. n. 44; ante, § 96.

² Ante, § 79; 80, 81, 86.

³ Ante, § 87, § 87 a; Munro v. Saunders, 6 Bligh, R. 468.

riage after a divorce, lawful by the law of the place, to which they have removed. In short, every nation, in these and the like cases, will govern itself by such rules and principles as are best adapted in its own judgment to subserve its own substantial interests, and fixed policy, and to uphold its own institutions, as well as to promote a liberal intercourse, and a spirit of confidence and reciprocal comity with all other nations. But this subject will be more fully considered in the succeeding chapters.

¹ See Rex v. Lolley, 1 Russ. & Ryan's Case, 236; Tovey v. Lindsay, 1 Dow, R. 124; Beazley v. Beazley, 3 Hagg. Eccl. R. 639; McCarthy v. De Caix, 1831, 2 Russ. & Mylne, R. 620. But see Warrender v. Warrender, 9 Bligh, R. 89; post, § 215 to § 231.

prescribed by law, and endowed with civil consequences. In many civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; for it is a great mistake to suppose, that because it is the one, therefore it may not likewise be the other.1 The common law of England (and the like law exists in America) considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to ecclesiastical and religious scrutiny.2 Catholic countries, and in some of the Protestant countries, of Europe, it is treated as a sacrament.3

§ 109. There are some remarks on this subject, made by a distinguished Scottish judge, so striking, that they deserve to be quoted at large. "Marriage being entirely a personal, consensual contract, it may be thought that the Lex loci must be resorted to in expounding every question, that arises relative to it. But it will be observed, that marriage is a contract sui generis, and differing, in some respects, from all other contracts; so that the rules of law, which are applicable in expounding and enforcing other contracts, may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is juris gentium, and the foundation of it, like that of all other contracts,

¹ Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 63; Linclo v. Belisario, 1 Hagg. Consist. R. 231.

² 1 Black, Comm. 433.

³ Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 63 to 65.

⁴ Lord Robertson, in Fergusson on Marr. and Divorce, 397 to 399.

§ 111. "It is said, that, in every contract the parties bind themselves, not only to what is expressly stipulated, but also to what is implied in the nature of the contract; and that these stipulations, whether express or implied, are not affected by any subsequent change of domicil. This may be true in the general case, but, as already noticed, marriage is a contract sui generis, and the rights, duties, and obligations, which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by the private contract, but by the public laws of the State, which are imperative on all, who are domiciled within its territory. man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the Judge's finger, would it be a justification in any court, to allege, that these were powers, which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?

§ 112. "In short, although a marriage, which is contracted according to the Lex loci, will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties; yet many of the rights, duties, and obligations, arising from it, are so important to the best interests of morality and good government, that the parties have no control over them; but they are regulated and enforced by the public law, which is imperative on all, who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstance, that the marriage was celebrated in a country, where the

polygamy and incest; those positively prohibited by the public law of a country, from motives of policy; and those celebrated in foreign countries by subjects, entitling themselves under special circumstances to the benefit of the laws of their own country. Cases, illustrative of each of these exceptions, have been already alluded to.²

§ 114. In respect to the first exception, that of marriages, involving polygamy and incest, Christianity is understood to prohibit polygamy and incest; and therefore no Christian country would recognise polygamv. or incestuous marriages.3 But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases, as by the general consent of all Christendom are deemed incestuous. It is difficult to ascertain exactly the point, at which the law of nature, or the authority of Christianity, ceases to prohibit marriages between kindred; and Christian nations are by no means generally agreed on this subject.4 In most of the countries of Europe, in which the canon law has had any authority or influence, marriages are prohibited between near relations by blood, or by marriage, or in other words, by consanguinity, or by affinity: and the canon and the common law seem to have made no distinction on this point between consanguinity, or relation by blood, and affinity, or relation by marriage, although there certainly is a very

^{1 1} Burge, Comm. on Col. and For. Law, ch. 5, § 3, p. 188.

² Ante, § 89.

³ Paley on Moral Phil. B. 3, ch. 6; 2 Kent, Comm. Lect. 26, p. 81, 3d edit.; 1 Bl. Comm. 436. See Grotius, B. 2, ch. 5, § 9; Greenwood v. Curtis, 6 Mass. R. 378; 1 Burge, Comm. on Col. and For. Law, P. 1, ch. 5, § 3, p. 188, 189, 190; Huberus, Lib. 1, tit. 3, § 8. See Swift v. Kelly, 3 Knapp, R. 258, 279.

⁴ Grotius, B. 2, ch. 5, § 12, 13, 14. See 1 Brown, Civ. Law, 61 to 65; 1 Burge, Comm. on Col. and For. Law, ch. 5, § 3, p. 188.

sister in the collateral line, whether of the whole blood, or of the half blood; ¹ and indeed, such marriages seem repugnant to the first principles of social order and morality. It has been well remarked by Mr. Chancellor Kent, that it will be found difficult to carry the prohibition farther in the collateral line, than the first degree, (that is, beyond brother and sister,) unless where the legislature have expressly provided such a prohibition.² Grotius has expressed

^{1 2} Kent, Comm. Lect. 26, p. 83, 84, 3d edit. See also Butler v. Gastrill, Gilb. Eq. R. 156; 1 Burge, Comm. on Col. and For. Law, P. 1, ch. 6, § 1, p. 127; Id. § 3, p. 188; Grotius de Jure Belli, Lib. 2, ch. 5, § 12, n. 2; Id. § 13, n. 3 to n. 7.

² Wightman v. Wightman, 4 John, Ch. R. 343. — The whole remarks of the learned Chancellor on this occasion deserve to be cited at large. "Besides the case of lunacy, now before me, I have, hypothetically, mentioned the case of a marriage between persons in the direct lineal line of consanguinity, as clearly unlawful by the law of the land, independent of any church canon, or of any statute prohibition. such a marriage is criminal and void by a Law of Nature, is a point universally conceded. And, by the Law of Nature, I understand, those fit and just rules of conduct, which the Creator has prescribed to Man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by Divine Revelation. There is one other case, in which the marriage would be equally void, causa consanguinitatis, and that is the case of brother and sister: and since it naturally arises, in the consideration of this subject, I will venture to add a few incidental observations. I am aware, that when we leave the lineal line, and come to the relation by blood or affinity in the collateral line, it is not so easy to ascertain the exact point, at which the Natural Law has ceased to discountenance the union. Though there may be some difference in the theories of different writers on the Law of Nature, in regard to this subject, yet the general current of authority, and the practice of civilized nations, and certainly of the whole Christian world, have condemned the connection in the second case, which has been supposed, as grossly indecent, immoral, and incestuous, and inimical to the purity and happiness of families, and as forbidden by the Law of Nature." (Grotius de Jure, &c. lib. 2, c. 5, s. 13; Puffend. de Jure, Gent. lib. 6, c. 1, s. 34: Id. de Off. Hom. lib. 2, c. 2, s. 8; Heinecc. Oper. tom. 8, pars 2, p. 203; Taylor's Elem. Civ.

nite empura. au ut legitus ent moribus vetantur, ilicita sun esseguere. qui velucrit, experiendo discet, quam a se difficile. aus prasturi non possit.

is 114 a. At all evenes in other cases of consanenimity not in the lineal line, or in the first degree of the colliteral line, there is much room for diversity of opinion and independ among jurists, and of practice mong nations through the taken notice of this distinction, uni savs: Qua manifesta expressio ostenière miettu itserimen, quod est inter hos et alios remotiones growns. Thus he says, that it is forbidden to marry in sumt on the father's side; but not the daughter of a brother, who is of the same degree. Nam sheere amatem agreetum veritum est. At filiam rates, qui par est gradius, ducere retitum non est.3 In England it has been declared by statute, that all perwas used lawfully marry, but such as are prohibited by God's Law, that is such as are within the Levitical degrees. Under this general provision, it has

the lineal line, and in the collaboral line, beyond the degree of brothers and antern could not well be declared void, as against the first principles of action. The laws is usages of all the nations, to whom I have referred, do, undeed, extend the prohibition to remoter degrees; but this is stepping out of the family circle; and I cannot put the prohibition on any other ground than positive institution. There is a great diversity of usage on this subject. Neque tenso, neque dicts refello. The limitation must be left, until the legislature thinks proper to make some provision in the case, to the injunctions of religion, and to the quantity of manners and opinion. See also 2 Kent, Comm. Lect. 26, p. 84, 84, 84 out; 1 Burge, Comment on Col. and For. Law, P. 1, ch. 5, 1, p. 186.

¹ Ground do Juro Bolli, Lib. 2, ch. 5, § 12.

⁴ Grossum, do Juro Bolli, B. & ch. 5, § 14, m. 1.

⁴ lauk

t Com. Dag. Buren and Pens, B. 9, B. 4; 1 Black. Comm. 435; Leviti
. 114, ch. 14. Mr. Burge states the prohibitions in England arising from
the locational law in the following terms. "Cognatio, consanguinity,
of relationship by blood, and affinites, affinity, or relationship by mar-

been held, that a marriage between an uncle and a niece by blood is incestuous, (it being in the third degree,) upon the ground, that it is against the law of God, and sound morals; that it would tend to endless confusion; and that the sanctity of private life would be polluted, and the proper freedom of intercourse in families would be destroyed, if such practices were not discouraged in the strongest man-

riage, constitute impediments to a lawful marriage. Marriages between parties related by blood or by affinity, in the direct, ascending or descending line, in infinitum, are prohibited by the civil and canon law. This prohibition prevents that confusion of civil duties, which would be the necessary results of such marriages. The codes of Europe concur in this prohibition. In the collateral line, the prohibition is confined to those, who stand in certain degrees of consanguinity or affinity to each other. In the computation of these degrees there is a difference between the civil and canon law. Thus, those, who, according to the civil law, are in the second degree, are placed by the canon law in the first degree; and those who are placed by the civil law in the fourth degree, are by the canon law placed in the second degree. The degrees prohibited by the Levitical law are all within the fourth degree of consanguinity, according to the computation of the civil law; all collaterals, therefore, in that degree, or beyond it, may marry. First cousins are in the fourth degree by the civil law, and therefore, may marry. Nephew and great-aunt, or niece and great-uncle, are also in the fourth degree and may intermarry; and though a man may not marry his grandmother, it is certainly true, that he may marry her sister. All these fourth degrees in the civil law are second degrees in the canon law. By the civil law, persons in the fourth degree might intermarry with each other. Such is the law of England, Scotland, Ireland, and the colonies." 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 5, § 1, p. 146, 147. There seems to be a mistake of the press in one part of the passage of Mr. Burge's remarks, as to the difference between the civil law and the canon law. The latter counted the degrees only up to the common ancestor; the former also down to the Propositus. So, that the first degree in the canon law was the second in the civil law, and the second in the canon law was the fourth in the civil law. 2 Black. Comm. 224; Ersk. Instit. B. 1, tit. 6, § 8; 2 Burns, Eccles. Law, tit. Marriage, I. See also the London Monthly Law Magazine for Feb. 1840, Vol. 7, p. 44 to p. 46. Mr. Burge's Text reverses the statement. 1 Burge, Comment. on Col. and For. Law, P. 1, ch. 5, § 1, p. 147.

ner.1 Yet Grotius not only deems such a marriage perfectly unexceptionable; but adds, that there are examples of it among the Hebrews.2 But marriages between first cousins by blood, or cousins german being in the fourth degree, are, according to English jurisprudence, lawful; so that the prohibitions in the collateral line stop at the third degree.3 The same rule, as to the marriage of first cousins, has been adopted by the Protestant countries of Europe. But the canon law prohibited such marriages, although a dispensation might be obtained thereof.4 Incestuous marriages by the English law are not, however, deemed by the common law absolutely void; but they are voidable only during the lives of the parties; and if not so avoided during their lives, they are deemed valid to all intents and purposes.5

§ 115. Hitherto we have been speaking of cases of relation by consanguinity, between which and cases of relation by affinity, there seems to be a clear and just moral difference. The English law, however, has treated both classes of cases as falling within the same predicament of prohibition by the Levitical law. Hence it has been there held, that a marriage between a father-in-law and the daughter of his first wife by a former marriage is incestuous and unlaw-

Burgess v. Burgess, 1 Hagg. Consist. R. 384, 386; 1 Bl. Comm. 435; Butler v. Gastrill, Gilb. Eq. R. 156, 158; 2 Kent, Comm. Lect. 26, p. 84, 3d edit.; Com. Dig. Baron and Feme, B. 4.

² Grotius, De Jure Belli, B. 2, ch. 5, § 14, n. 1.

³ 1 Black. Comm. 435; Burns, Eccles. Law, tit. Marriage, I.; Harrison v. Burwell, Vaughan, R. 219; S. C. 2 Vent. 9; 2 Instit. 684.

⁴ Burns, Eccles. Law, tit. *Marriage*, I.; 1 Burge, Comm. on Col. and For. Law, P. 1, ch. 5, § 1, p. 147, 148.

⁵ 1 Black. Comm. 434, 435.—By a recent Act of Parliament, Act of 5th and 6th William 4th, ch. 54, (1835,) all future incestuous marriages are declared to be utterly void, and not merely voidable.

ful; 1 and, indeed, there seems something repugnant to social feelings in such marriages. The prohibition has also been extended in England to the marriages between a man and the sister of his former deceased wife; but upon what ground of Scriptural authority it has been thought very difficult to affirm. 2 In many, and indeed in most of the American states, a differ-

Blackmore and Thorpe v. Brider, 2 Hagg. Consist. R. 393, note; S. C. 2 Phil. Eccles. R. 359.

Burns, Eccles. Law. tit. Marriage, I; 1 Black. Comm. 434, 435, Christian's note (2), citing Gibson's Codex, 412; Harris v. Hicks, Salk. 548; Hall v. Good, Vaughan, R. 302, 312; Faremouth v. Watson, 1 Phill. Eccl. R. 355; Chick v. Rawsdale, 1 Curteis, R. 34; Com. Dig. Baron and Feme, B. 2, B. 4; 2 Inst. 683; Bac. Abridg. Marriage, A. Lord Chief Justice Vaughan, in delivering the opinion of the Court in Harrison n. Burwell (Vaughan, R. 206; S. C. 2 Vent. R. 9), says, that a man is prohibited by the statute, 32 Henry 8, [ch. 38,] to marry his wife's sister. But within the meaning of Leviticus, (ch. 18, v. 14,) and the constant practice of the Commonwealth of the Jews, a man was prohibited to marry his wife's sister only during her life; after he might. So the text is. Vaughan, R. 241; S. C. 2 Vent. 17. There seems a discrepancy between what is here said, and his judgment in the subsequent case of Hall v. Good. Vaughan, R. 302, 312, 320. The opinion of Lord Chief Justice Vaughan, in both cases, and the case of Butler v. Gastrill, Gilbert, Eq. R. 156, are full of learning and instruction on the subject of the canonical and ecclesiastical prohibitions of marriage. Dr. John H. Livingston, of New Jersey, has written an elaborate dissertation upon the subject of the marriage of a man with his sisterin-law (wife's sister), which was printed at New Brunswick, N. J., in 1816. It holds the doctrine, that such marriages are scripturally incestuous. The opposite doctrine has been maintained by many able writers. See also 2 Kent, Comm. Lect. 26, p. 85, 3d edit. note. There are some very able articles on this subject in the London Quarterly Law Magazine for May, 1839, Vol. 21, p. 371; in the London Legal Observer for January, 1840; and in the London Monthly Law Magazine for May, 1840. All these articles are designed to show, that the most learned writers have differed upon this subject, and to establish, that the doctrine is ill-founded, and ought to be abolished. Grotius maintains in strong terms, that there is no foundation for the prohibition. Certè, canonibus antiquissimis, qui apostolici dicuntur, qui duas sorores alteram post alteram duxisset aut idelqueer, id est, fratris aut sororis filiam, tantum à clero arcetur. Grotius, De Jure Belli, B. 2, ch. 5, § 14, n. 2.

ent rule prevails, and marriages between a man and the sister of his former deceased wife are not only deemed in a civil sense lawful; but are deemed in a moral, religious, and Christian sense lawful, and exceedingly praiseworthy. In some few of the states the English rule is adopted. Upon the continent of Europe most of the Protestant countries adopt the doctrine, that such marriages are lawful.¹

§ 116. It would be a strong point to put, that a marriage, perfectly valid between a man and the sister of his former deceased wife in New England. should be held invalid in Virginia, or in England, even though the parties originally belonged to or were born in the latter country or state. But as to persons not so born or belonging, it would be of the most dangerous consequence to suppose, that the Courts of either of them would assume the liberty to hold such marriages a nullity, merely because their own jurisprudence would not, in a local celebration of marriage therein, uphold it. This distinction between marriages incestuous by the law of nature, and such as are incestuous by the positive code or customary law of a state, has been fully recognised by one of our most learned American Courts. "If" (say the Court) "a foreign state allows of marriages

¹ This is certainly the law in all the New England states, and in New York. Greenwood v. Curtis, 6 Mass. R. 378, 379. In Virginia, the English rule prevails. Commonwealth v. Perryman, 2 Leigh, R. 717; 2 Kent, Comm. Lect. 36, p. 85, note (a.) Dr. Jeremy Taylor and Sir Wm. Jones both contend, that the Levitical degrees do not by any law of God bind Christians to their observation. See London Quart. Law Magazine, Vol. 21, p. 373, 374. In Prussia, Saxony, Hanover, Baden, Mechlenburgh, Hamburg, Denmark, and in most other of the Protestant states of Europe, the rule prevails, that a man may lawfully marry the sister of his former wife. Id. p. 376. It is otherwise in Scotland. Ersk. Inst. B. 1. tit. 6, § 9.

But, suppose the case of a marriage, incestuous by the law of the country, where the parties are born, or are bond fide domiciled, and without changing their domicil, for the purpose of evading that law, they go to a foreign country, where a different rule prevails, and the marriage, which would not be incestuous by its laws, is there celebrated; and the parties afterwards return to their own country. Ought such a marriage to be held valid in such country? Huberus has put the very case, and held, that it ought not there to be held valid. If (savs he) a Brabanter, who should marry within the prohibited degrees, under a dispensation from the Pope, should remove here (into Holland), the marriage would be considered valid. Yet if a Frizian should marry the daughter of his brother in Brabant, and celebrate the nuptials there, returning here, he would not be acknowledged as a married man, because in this way, our laws might be evaded by the worst examples. Brabantus uxore ductâ dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur. Attamen, si Frisius cum fratris filia se conferat in Brabantiam, ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic Jus nostrum pessimis exemplis eluderetur.1

¹ Huberus, Lib. 1, tit. 3, § 8; post, § 123; 1 Burge, Comm. on Col. and For. Law, P. 1, ch. 5, § 1, p. 147; Id. § 3, p. 188 to p. 191. — Mr. Burge maintains this to be the true doctrine, and says; "The law, which prohibits persons related to each other in a certain degree from intermarrying, and declares their intermarriage to be null, imposes on them a personal incapacity quoad that act; and that incapacity must continue to affect them, so long as they retain their domicil in the country in which that law prevails. The resort to another country, where there was no such prohibitory law, for the mere purpose of evading the law of their own country, and with the intention of returning thither, when their marriage had taken place, cannot be considered a change of their former domicil, or the acquisition of a domicil in the country

§ 117. In respect to the second exception, that of prohibitions depending upon positive law of a particular country,1 they of course can apply strictly only to the subjects of that country, An illustration of this nature may be found in the Civil Code of France, which annuls marriages by Frenchmen, in foreign countries, who are under an incapacity by the laws of France.2 A law of a similar nature may be found in the Act of 12 Geo. 3, ch. 11, respecting the royal family, by which they are prohibited from contracting marriage, unless under special circumstances, pointed out in the act;3 and the provisions of that act have been actually applied to the case of a foreign marriage, contracted by one of the royal princes. The doctrine of the English courts, already alluded to,4 in regard to the indissolubility of English marriages celebrated in England, notwithstanding a subsequent divorce in a foreign country, affords a still more striking illustration, as in its practical effects, it may render the issue of a second marriage illegitimate; so that a son, the issue of the second marriage in Scotland may be legitimate there and

to which they had resorted. They must, therefore be regarded as still subject to the personal incapacity imposed by the law of their real domicil." See post, § 123, 124. There are certain parts of the opinion of Sir George Hay, in Harford v. Morris, 2 Hagg. Consist. R. 431, 432, 435, from which it may fairly be deduced as his opinion, that the law of the place of marriage was the rule only, when the parties were domiciled there; and that if they went from their own country merely to celebrate the marriage in a foreign country, and immediately to return home, the law of such country would not govern, but the law of the country of their domicil. Post, § 124, note.

¹ Ante, § 113 a.

² 2 Kent, Comm. Lect. 26, p. 93, 3d edit.; Code Civil of France, art. 170; Marlin, Réport. Loi, § 6, n. 1.

^{3 1} Black, Comm. 226.

⁴ Ante, § 88.

illegitimate in England; he may be a lawful Scotch Peer, and yet lose the English estates, which support his peerage.¹

§ 118. In respect to the third exception, that of marriages, contracted and celebrated in foreign countries by subjects under peculiar circumstances,⁹ it has been deemed to arise in cases of a sort of moral necessity; and it has been held to apply to persons, residing in foreign factories, in conquered places, and in desert or barbarous countries, or in countries of an opposite religion, who are therefore permitted. from necessity, to contract marriage there according to the laws of their own country. In short, wherever there is a local necessity from the absence of laws, or from the presence of prohibitions or obstructions, in a foreign country, not binding upon other countries, or from peculiarities of religious opinion and conscientious scruples, or from circumstances of exemption from the local jurisdiction, marriages will be allowed to be valid according to the law of the native or of fixed actual domicil.3

§ 119. The doctrine, upon which this exception from necessity is founded, will be best explained by a quotation from the opinion of Lord Stowell, in a case, already referred to, in which the question of the validity of a marriage celebrated at the Cape of

¹ See Beazley v. Beazley, 3 Hagg. Ecc. R. 639; Rex v. Lolley, 1 Russ. & Ryan, C. C. 236; Tovey v. Lindsay, 1 Dow, 724; McCarthy v. De Caix, cited 3 Hagg. 642, note; S. C. 2 Russ. & Mylne, R. 620.

² Ante, § 113 a.

³ See Ruding v. Smith, 2 Hagg. Consist. R. 371, 384, 385, 386; ante, § 79; Lautour v. Teesdale, 8 Taunt. R. 830; S. C. 2 Marshall, R. 243; The King v. Inhab. of Brampton, 10 East, R. 282. See also Harford v. Morris, 2 Hagg. Consist. R. 432, where Sir George Hay, in delivering judgment, spoke of this exception of foreign English Factories. Ante, § 79, and Id. p. 79, note 1.

establishments existing by authority under treaties, and others under indulgence and toleration,) marriages are regulated by the law of the original country, to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek Church, but to the rubric of the Church of England, when he contracts a marriage with an English woman. Nobody can suppose, that, whilst the Mogul empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connexion can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey is left to depend, I presume, upon their own canons, without any reference to Mahometan ceremonies. There is a jus gentium upon this matter, a comity, which treats with tenderness, or, at least, with toleration, the opinion and usages of a distinct people, in this transaction of marriage. It may be difficult to say a priori, how far the general law should circumscribe its own authority in this matter. But practice has estabblished the principle in several instances; and where the practice is admitted, it is entitled to acceptance and respect, It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign country, to which they belong. I am not aware of any judicial regulation upon this point. But the reputation which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to

¹ See Pertreis v. Tondear, 1 Hagg. Consist. R. 136.

British laws, and not to the laws of the natives of India.1

§ 121. The ground, however, upon which the general rule of the validity of marriages, according to the Lex loci contractûs, is maintained, is easily vindicated. It cannot be better expressed, than in the language of Sir Edward Simpson already cited.² All civilized nations allow marriage contracts. They are juris gentium; and the subjects of all nations are equally concerned in them. Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad: and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country, where they are celebrated. By observing this rule, few, if any, inconveniences can arise. By disregarding it, infinite mischiefs must ensue.3 Suppose, for instance, a marriage celebrated in France, according to the law of that country, should be held void in England, what would be the consequences? Each party might marry anew in the other country. In one country the issue would be deemed legitimate; in the other illegitimate. The French wife would in France be held the only wife, and entitled as such to all the rights of property

¹ Lautour v. Teesdale, 8 Taunt. R. 830; S. C. 2 Marsh. R. 243.

² Ante, § 80 a.

³ Scrimshire v. Scrimshire, 2 Hagg. Consist. R. 417, 418, and ante, § 79, 80, 80 a.

marriages, is not received. Suppose they go from England to places per modum transitus, ubi obligat decretum, and marry there according to the laws of their own domicil. Some think, that such marriage is good in the case of strangers, as agreeable to their own laws, to the law of the country, in which they are domiciled, though not to the law of the place, where they are married. But Sanchez holds, that a marriage is void, where it wants the solemnities prescribed by the local law. "What" (says he) "the law of the place requires, where the contract is made, and what are to be followed in contracts. are to be decided solely by the laws of the place, in which the contract is celebrated;" Que petuni leges loci, ubi contractus initur, et quoad solemnitatem adhibendam in contractibus, solæ leges loci, in quo contractus celebratur, inspiciuntur. Locus autem, ubi hoc matrimonium initur, non petit eam parochi et testium solemnitatem ad matrimonii valorem, cum ibi decretum Tridentini non obliget.2 Ea solemnitas adhibenda est, quam petunt leges loci, ubi contractus initur; cum ergo locus, ubi celebratur matrimonium, ab his peregrinis exegat solemnitatem Tridentini in eo vigentis; aliter contractum nullum erit.3

§ 122 a. John Voet seems to affirm the same doctrine to be generally but not universally true, and liable to exceptions. He puts the case of the marriage of an inhabitant of Holland with a female of Flanders or Brabant, in Flanders or Brabant,

¹ I cite this whole passage from the case of Scrimshire v. Scrimshire, 2 Hagg. Consist. R. 412, 413. See also 1 Burge, Comment. on Col., and For. Law, P. 1, ch. 5, § 3, p. 185, 186; Sanchez, De Matrim. Lib. 3, Disput. 18, § 10, n. 26, 28.

² Cited in Burge, Comment. ubi supra, p. 185, 186.

³ Cited ibid.

solemnities. Sed, eo non obstante, magis est, ut matrimonia, eo modo extra Hollandiam ab Hollando celebrata, infirma per Judicem Hollandicum pronunciari
debeant, propter Edicti verba, quibus nuptiæ, per Hollandum sine denunciationibus publicis in domicilii loco
interpositis contractæ, irritæ esse jussæ sunt. Nihil
in contrarium faciente illo axiomate, quod sufficiat in
negotiis contrahendis adhiberi solennia loci, in quo
actus geritur: cum ista regula locum inveniat, si non
in fraudem statuti quis alio se contulerit ad actum
celebrandum, aut statutum nominatim irritum declaraverit actum, à suo subjecto peregrinâ solennitate gestum.

§ 122 b. Paul Voet holds an opinion decidedly in favor of the general rule. Quid si de contractubus proprie dictis, et quidem eorum solemnibus contentio; Quis locus spectabitur; an domicilii contrahentis, an loci, ubi quis contrahit? Respondeo affirmanter. Posterius. Quia, censetur quis semet contrahendo, legibus istius loci, ubi contrahit, etiam ratione solemnium subiicere voluisse. Huberus admits, that a marriage valid by the law of the place, where it is celebrated, is binding every where, under the exception, which he generally applies, that it is not prejudicial to others, or that it is not incestuous. Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione prejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contigerit alicubi esse permissum.3 Bouhier

¹ J. Voet, ad Pand. Lib. 23, tit. 2, § 4, p. 20.

² Voet, De Statut. § 9, ch. 2, n. 9, p. 267, edit. 1715; Id. 328, edit. 1661; poet, § 261.

³ Huberus, Lib. 1, tit. 3, § 8; ante, § 85.

adopts the general rule, hesitating as to the nature and extent of the exceptions.1 Hertius lays down the following axiom. If the law prescribes a form for the act, the place of the act, and not of the domicil of the parties, or of the situation of the property, is to be considered. Si Lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei site.2 And he puts the following as an example. A marriage contracted according to the solemnities of any place, where the married couple are commorant, cannot be rescinded upon the pretext, that, in the domicil or country of the husband, other solemnities are required. Matrimonium juxta solennitates loci alicujus, ubi sponsus et sponsa commorabantur, contractum non potest prætextu illo rescindi, quod in domicilio aut patria mariti aliæ solemitates observentur.3 He afterwards puts exceptions to this general axiom; one of which is, that a contract between foteigners, both belonging to a foreign country, is to be governed by the law of their own country, and not by that of the Lex loci contractus.4 In this exception, he has to encounter many distinguished adversaries.5 The French jurists seem generally to support the doctrine, that marriage is to be held valid or not, according to the law of the place of celebration, except in cases positively prohibited by their own laws to their own subjects, or where it is in fraud of those laws.6 And

Bouhier, Cout. de Bourg. ch. 27, § 59 to § 66.

² Post, § 242, 260; Hertii Opera, Tom. 1, De Collis, Leg. § 4, art. 10, p. 126, edit. 1737; Id. p. 179, edit. 1716.

² 1 Hertii Opera, De Collis. Leg. § 4, art 10, edit. 1837, p. 126; Id. p. 179, edit. 1716; Id. art. 10, p. 128, edit. 1737; Id. p. 182, edit. 1716.

⁴ Id. p. 128, § 10, edit. 1737; Non Valet (6.)

⁵ Ibid.

⁶ Post, § 123.

Merlin says, that it is a contract so completely of natural and moral law, that when celebrated by savages in places, where there are no established laws, it will be recognised as good in other countries.¹

§ 123. A question has been much discussed, how far a marriage, regularly celebrated in a foreign country, between persons belonging to another country, who have gone thither from their own country for that purpose, is to be deemed valid, if it is not celebrated according to the law of their own country. Huberus, as we have seen,2 has put the very question, and has applied it as well to cases of minority as of incest; and he does not hesitate to pronounce such marriages invalid, because they are an evasion. or fraud upon the law of the country, to which the parties belong, and in which they are domiciled.3 Bouhier has advocated the same opinion; 4 and it is also maintained by Paul Voet. He states it as an exception to the general rule, that the law of the place of the contract ought to govern. Nisi quis, quo in loco domicilii evitaret molestam aliquam vel sumptuosam solemnitatem; adeoque in fraudem sui statuti nulla necessitate cogente alio proficiscatur, et mox ad eorum domicilium, gesto alibi negotio, revertatur.5

¹ Merlin, Répert. Mariage, § 1, p. 343. See also 2 Boullenois, Obser. 46, p. 458; 1 Froland, Mém. p. 177, ch. 1; Pardessus, Vol. 5, P. 6, tit. 7, ch. 2, art. 1481 to 1495; Pothier, Traité du Mariage, n. 263; Journal des Audiences, Tom. 1, ch. 24; S. C. cited Scrimshire v. Scrimshire, 2 Hagg. Consist. R. 413, 414.

² Ante, § 85, § 116 a.

³ Huberus, Lib. 1, tit. 3, \S 9. See ante, \S 85, 116 a, where the passages are cited at large.

⁴ Bouhier, Cout. de Bourg. ch. 28, § 60, 61, 62, p. 557; ante, § 84. ⁵ P. Voet, De Statut. § 9, ch. 2, p. 268, edit. 1715; Id. p. 323, 324, edit. 1661.

John Voet (as we have seen) holds the same opinion.¹ Pothier puts the very case in the strongest terms. He says that the conditions and ceremonies, prescribed by the French Laws, for the validity of marriages between French subjects, are obligatory, even when the marriage has been celebrated between them in a foreign country, whenever it appears, that they have gone thither in fraud of those laws, and that the marriage, under such circumstances, will be a nullity.² This doctrine turns upon the general principle, that an act done designedly, in fraud or evasion of the law, by a mere change of locality, is utterly void.

§ 123 a. In opposition to this doctrine, it has, however, been settled, after some struggle, both in England and America, that such a marriage is good. The question in England was first solemnly decided by the High Court of Delegates, in 1768; and having been subsequently recognised, notwithstanding the doubts of Lord Mansfield, it may now be deemed

¹ Anto, § 122 a; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 5, § 3, p. 196.

Pothier, Traté du Mariage, n. 263.

³ Compton v. Bearcroft, cited in Bull. N. P. 114, and in Harford v. Morris, 2 Hagg. Consist. R. 429, 430, 443, 444. - It has been said, that this decision may be explained upon the ground, that the English Marriage Act, under which that question arose, contained an express exception of marriages in Scotland; and that the marriage of the parties in that case, who were English, and had gone from England for the express purpose of celebrating the marriage in Scotland, was therefore good, as it was according to the law of Scotland. Admitting this to be the true construction of the English Marriage Act; yet the question directly raised by the libel was, whether a marriage in a foreign country by British subjects, domiciled in England, and not changing their domicil, who had gone there expressly to avoid and evade the laws of England, was good or not; and there is strong reason to believe, that this point was deemed a material ingredient in the ultimate judgment of the case. -See the case of Compton r. Bearcroft, as commented on in 2 Hagg. Consist. R. 443, 444, and the Reporter's note in p. 444.

settled there beyond controversy.¹ Lord Mansfield, on the occasion alluded to, arguendo, said; "It has been laid down at the Bar, that a marriage in a foreign country must be governed by the law of the country, where the marriage was had; which in general is true. But the marriages in Scotland of persons, going from hence for that purpose, were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, and other writers."² This is manifestly no more than the expression of a doubt upon a point not directly before the Court.

§ 123 b. In Massachusetts, upon full discussion, the doctrine has been firmly established.³ It was admitted on that occasion, by the Court, that the doctrine is repugnant to the general principles of law, relating to contracts; for a fraudulent evasion of, or fraud upon the laws of the country, where the parties have their domicil, would not, except in the contract of marriage, be protected under the general principle.⁴ But the exception in favor of marriages is maintained upon principles of public policy, with a view to prevent the disastrous consequences to the issue of such a marriage, which would result from the

¹ See Harford v. Morris, 2 Hagg. Consist. R. 423; Robinson v. Bland, 2 Burr. R. 1077 to 1080; Fergusson on Marr. and Divorce, 63 to 65.

Robinson v. Bland, 2 Burr, R. 1079, 1080; Huber. Lib. 1, tit. 3, § 8.
 Medway v. Needham, 16 Mass. R. 157, 161; Putnam v. Putnam, 8
 Pick. R. 433.

⁴ Ibid. The Court put the following case. Thus, parties, intending to make an usurious bargain, cannot give validity to a contract, in which more than the lawful interest of their country is secured, by passing into another territory, where there may be no restriction of interest, or where it is established at a higher rate, and there executing a contract before agreed on. Medway v. Needham, 16 Mass. R. 160.

loose state, in which persons so situated would live.¹ The doctrine has been carried even farther, so as to admit the legitimacy of the issue of a person, who had been divorced à vinculo for adultery, and had been declared by the local law incompetent to marry again, but who had gone into a neighboring state, and there contracted a new marriage, and had issue by that marriage.² The like rule has been applied in favor of the widow by such second marriage, so as to entitle her to dower in the real estate of her deceased husband, situate in Massachusetts.³

§ 124. The English doctrine, in relation to Scotch marriages, by parties domiciled in England, and going to Scotland to marry, though a plain violation of the real object and intent, even if not of the words, of the English Marriage Act, seems to have proceeded mainly upon the ground of public policy.4

Medway v. Needham, 16 Mass. 160, 161.

^{*} West Cambridge v. Lexington, 1 Pick. R. 596; 2 Kent, Comm. Lect. 26, p. 92, 93, 3d edit. See Fergusson on Marr. and Divorce, note R, p. 469; ante, § 89.

Putnam v. Putnam, 8 Pick, R. 433.

⁴ Mr. Burge does not deem it to be in fraud of the English laws, because the English Marriage Act does not in fact prohibit such Scottish marriages. This is true in terms; and if it did prohibit, the question of the conflict of laws in relation to such marriages would never have arisen in England; for the statute would have directly decided the matter. Nevertheless, the whole object of the parties in this class of marriages plainly is to evade the law of their own country by a marriage, valid by the law of the country, where it is celebrated, without changing their own domicil, and thus getting rid of all the anxious provisions of the statute against ill advised and clandestine marriages. In short, all the Gretna Green marriages in Scotland (as they are called) are intended by the parties to get rid of the selemnities of the English law. Mr. Burge says; "The decisions of the courts in England, which have declared valid a marriage contracted in Scotland by English persons, who had resorted thither for the sole purpose of evading the prohibitions of

It is the least of two evils, in a political sense, a civil sense, and a moral sense. We have already seen, that

the English Marriage Act, are perfectly consistent with the admission of this exception. Such a marriage is valid, because it is not prohibited by the English Marriage Act. It is a misapplication of terms to describe it as an evasion, or in fraud of the Act; for, in fact, it is not prohibited. There is an express provision, that nothing in that act shall extend to marriages in Scotland, or to any marriages beyond sea. The act, therefore, left English subjects at perfect liberty to resort to any country for the purpose of contracting and celebrating their marriage. So far from the act containing a general and absolute prohibition, and a declaration of the nallity of all marriages, contracted otherwise than in conformity to its provisions, it confines such prohibition and declaration to marriages contracted in England. These decisions, therefore, are founded upon the right of the parties, consistently with the Marriage Act, to resort to the foreign country for the purpose of contracting their marriage, and upon the act itself containing no provision which renders void a marriage so contracted. It is upon this ground, and to this extent, that the argument of Sanchez must be understood, when he contends that a marriage is not void, because the parties have resorted to a country, in which they have contracted it, for the purpose of avoiding ceremonies, which are required in their own country. 'Displicet mihi hec limitatio, et credo, licet adirent eo fine, ut possent liberè absque parocho et testibus contrahere, esse ratum matrimonium. Nam qui iure suo utitur non potest dici fraudem committere, ut eà ratione effectus impediatur.' 'Nullus videtur dolo facere, qui jure suo utitur.' 'Est enim fraus licita, cum contrahentes utantur jure suo: ergo cum adeuntes locum, ubi non viget Trident. animo contrahendi absque parocho et testibus, utuntur jure suo, habet enim jus sic ibi contrahendi, erit fraus licita, nec ea ratione effectus ac valor matrimonii impedietur.' The same jurist, in a subsequent passage, admits the distinction between a personal incapacity imposed by the law of the domicil, which would accompany the party in whatever country he contracted, and a law which attached to the act only in respect of its taking place in the country in which that law pre-'Dic quando inhabilitas est constituta absoluté et simpliciter, sequi personam quocumque euntem: secus quando est constituta per modum legis, sicut enim lex illa non obligat in illis locis, ita inhabilitas, et annullatio actus non obligat ibi, nec sequitur personam, nisi dum est in locis, in quibus ea lex vim obligandi habet non enim ligatur lege Ecclesiastica in loco, ubi ex voluntate ac dispositione ejusdem Ecclesize non habet robur eadem lex; ut contingit in locis, ubi aut non recepta aut non publicata fuit." 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 5, § 3, p. 192, 193. The decisions in the Supreme Court of Massachusetts, as they are stated in the Commentaries on American Law, carry the doctrine much further, and reject any exception founded on the

of such a course remains to be established; and it will be no matter of surprise, if hereafter we shall

tioned before this time, if there had not been so many ways to avoid the restraint put upon the marriage of minors. It is provided, that nothing in this act shall extend to marriages in Scotland, nor to any marriages solemnized beyond sea. Then marriages in Scotland and beyond sea by the law of England remain in the same state, as if the statute had not passed. Marriage in Scotland, if not contrary to the law of England, is good, and it has been so determined. That determination passed, not on the ground, that the marriage was valid in Scotland, and that therefore it was good - nothing was laid before the Court to show, that the marriage was valid in Scotland - but because the Act of Parliament did not put any restraint upon English subjects being married in Scotland, with respect to the consent of parents. On that ground it is, that those marriages are held good, not being contrary to the law of England. The same holds as to marriages beyond sea. For English subjects going abroad, or to Scotland, to marry English subjects, have an exemption from that restraint in the act. What was the case before the marriage act? Will any body say, that before the act, a marriage solemnized by persons going over to Calais, or happening to be there, was , void in this country, because such a marriage might be void by the laws of France, as perhaps it was, if solemnized by a Protestant Priest, whom they do not acknowledge, or if any way clandestine, or without consent; and that therefore it should be set aside by a court in England. upon account of its being void by the law of France? No. The laws of the state, to which the parties are subject, must determine the marriage, unless you can show that the law of the other country is that, by which its validity is to be decided. That brings me to the other great consideration in this case, whether the validity of these marriages, being solemnized in Ypres and Denmark, are to be tried by the laws of those countries. If they are, the laws of those countries must be laid before the Court, and proved in the best manner possible; not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates, laying the ordinances of those countries before the Court. Without considering, how far that law is capable of being proved in the present case, the previous question arises with respect to jurisdiction, whether the laws of that country, in which the marriage is celebrated, should operate, merely because it was celebrated there. I conceive the law to be clear, that it is not the transient residence, by coming one morning and going away the next day, which constitutes a residence, to which the lex loci can be applied; so as to give a jurisdiction to the law, and cause it to take cognizance of a marriage celebrated there. It is certain, that domicil, or established residence, (that is, such a kind of residence as makes the party subject to the laws of that country,) may

and the other according to that of his domicil of origin. The doctrine in England has, indeed, stopped

gusson on Marr. and Divorce, 417: Id. 223, 461. It has always appeared to me, that the true doctrine of international policy is, that a foreign marriage, valid by the law of the place of marriage, is valid every where, notwithstanding the parties may be domiciled in another country, where the marriage, if celebrated there, would, by the laws thereof, be void, and the parties have gone thither for the express purpose of evading the requisitions of the law of their domicil. A learned writer, in the London Legal Observer for January 1840, has commented on this subject with great acuteness and ability. The following extract may be gratifying to the learned reader, as it constitutes an opposite view to that of Mr. Burge. "The idea of frand on the law of a country is rather a favorite one with jurists. When examined, however, we think it will be found to have a very narrow foundation for the supposed countenance afforded to it by our law. By the courts of several American states it has been repeatedly over-ruled. It is principally grounded on an opinion of the jurist, Huber, (Hub. de Confl. Leg. lib. 1, tit. 3, § 8,) supported by a dictum of Lord Mansfield, in Robinson v. Bland. (1 W. Bl. 234, 256; 2 Burrows, 1077.) In the first place, it is at once met by the difficulty, that it has been over and over again decided, that Scotch and foreign marriages (between minors and others, who could not have contracted marriage here) undertaken, expressly and admittedly, to evade our law, are good, if good per legem loci, and vice versa. But then, say the advocates of the in fraudem legis doctrine, these decisions are consistent; because the Marriage Act in terms excepts Scotch and foreign marriages. In this view, however, they at once throw over Lord Manfield's authority, because, as Sir W. Blackstone, who was counsel in the case, notes it in the margin of his report, he threw out a 'quære, whether stolen marriages in Scotland are valid.' However, as this case is really the only one, in which, as far as we are aware, the idea of evasion of our law is set up, we must go more fully into it. The case was argued in 1760. The question was, whether a bill of exchange given in France by one English subject to another, but made payable in England, the consideration of which was a gambling debt, should be held recoverable in an English Court. It was found not to be recoverable in France; but Lord Mansfield (though, on this plain ground, he afterwards said the case had after all come to nothing) had it argued twice, as bearing on international law. In his judgment he touched on the rules applicable to foreign personal contracts. He lays down the general rule as to the lex loci prevailing. But then he says; 'this rule admits

¹ 1 Toullier, Droit Civil, art. 576; Code Civil, art. 144, 148, 170; Merlin, Répert. tit. Loi, § 6, n. 1, and ante, note, § 84, 117.

doubts may justly be entertained,) that a second marriage, after a divorce, in Scotland, from a mar-

ance. He said; 'The most material consideration is the validity of the marriage. It has been argued to be valid from being established by the sentence of a court in France, having proper jurisdiction. And it is true, that if so, it is conclusive, whether a foreign court or not, from the laws of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain.' Now here, if Mr. Burge is right, Lord Hardwicke was called upon to fall back on the general principle, Mr. Burge contends for, that the subject, though broad, unless bond fide domiciled there, (which in Mr. Burge's sense of domicil was not the case.) could not avail himself of the lex loci to avoid the operation of our law. The girl here, was only eleven years old. our common law, as stated by Mr. Burge, a female under twelve could not contract matrimony. Indeed, according to Sir Matthew Hale, the attempt would have subjected the party to a conviction for rape. (1 Hall. P. C. 630; and 4 Bla. Comm. 212.) So far from doing this, in committing unreservedly the jurisdiction, as to validity, to a foreign court, he lays down a principle quite destructive of all Mr. Burge's doctrines, as to bonk fide domicil; because, as we shall presently remark further, if that principle only means bond fide, so far as required by the foreign law, it amounts to nothing, and there is nobody, who doubts it. It would then be, by common consent, one of the incidents bearing on the validity of the marriage according to the lex loci contractus. There are few opinions, which command higher respect than Mr. Jacob's. In his very learned notes appended to his edition of Roper's Husband and Wife he takes the same view. He says, as to the objection, that an intention to evade our law may effect the validity of the foreign contract; 'that, though apparently sanctioned by Lord Mansfield, it has not prevailed, either with respect to marriages in Scotland, or with respect to marriages in other places out of England, and there does not appear any exception to the rule, that a foreign marriage, valid according to the law of the place where celebrated, is good every where else.' (2 Roper, Husb. & Wife, edit. by Jacob, p. 495.) It must be observed, that Mr. Jacob does not specifically advert to objections arising from affinity, or from any prohibitory rules not being in the Marriage Act. The rule, however, is evidently older than the Marriage Act, and is always found without a limitation from the first. Except the case of legal personal disqualification against marrying at all, such as Lolley's, to which we shall soon advert, we know but of one country (France). where the validity of a foreign marriage between its own subjects is tried by its own, and not the foreign law. French subjects, who are required at home to obtain the consent of parents, &c. are required so equally, if they marry out of France. Did such a broad personal

second marriage would be unquestionably good by the law of Scotland.1 So that, here, there may be two lawful wives of the party, living at the same time, in different countries, and two families of children, one of which may be deemed legitimate by the law of the one country, and illegitimate by the law of the other.2 It is easy to see, what various difficulties may grow out of such a state of things. A son, by the second marriage, may be entitled to the whole real and personal estate of the father in Scotland, and incapable of touching either in England. The Massachusetts doctrine escapes from these incongruities; and appears to be founded upon a liberal basis of international policy, which deems it far better to support marriages, celebrated in a foreign country, as valid, when in conformity with the laws of

this case? Their notion seems to have arisen from viewing the law, as an individual, whose honor is to be vindicated, and who is to be treated with at least outward show of observance and respect. They make it, let it be observed, not a principle of English law merely, but of general law; though they can find no instance in any one country to support it, except Lord Mansfield's manifestly erroneous dictum in a bill of exchange case. To us the whole scheme seems altogether insupportable. A law, we should think, is either local, or it is personal, and any thing between we cannot comprehend. If it were the case of a foreigner's marriage here, would they ask, if he came here in evasion of his own law? Or would they not rather say with Fergusson, 'A party domiciled here cannot be permitted to import a law peculiar to his own case.' (Ferg. on Mar. and Div. 399)"-See also Huberus, Lib. 1, tit. 3, De Conflictu Legum, § 13; Paul Voet, de Statut. § 9, ch. 2, n. 4, p. 263, edit. 1715; Id. p. 319, edit. 1661. Lord Brougham, in Warrender v. Warrender, 9 Bligh, R. 129, 130, manifestly considered, that the doctrine, that a marriage in a foreign country was void, if it was a fraud upon the law of the domicil of the parties, was not maintainable in point of law.

¹ Lolley's Case, 1 Russ. & Ryan, Cas. 236. See Warrender v. Warrender, 8 Bligh, R. 891; ante, § 86, 88; post, § 215 to § 226.

² Beazley v. Beazley, 3 Hagg. Eccl. R. 639; Rex v. Lolley, 1 Russ. & Ryan, Cas. 236.

declare, that such marriages shall be deemed valid, and refuse to submit to the dictation of France. France may at home enforce such laws upon her own subjects and their property, when found within its territory. But every other nation, by whose laws the marriages celebrated therein would be valid, would sustain such marriages, and treat the claims of France, as an usurpation, founded in injustice, and a disregard of the true duty and policy of all civilized nations in their intercourse with each other.

of illustrating the endless embarrassments, arising from the conflict of laws of different provinces and nations:1 and his ample work is mainly devoted to a consideration of the mixed questions, arising from the conjugal relation, as affected by different laws in different provinces and nations. In some of the French provinces before the Revolution, a married woman had a separate power to contract; in others she had not.2 In Holland, under the old laws thereof (for it is unnecessary to consider, whether they have undergone any substantial alteration in more recent times) the husband had the sole power to dispose of all the property of his wife; and she was entirely deprived of any power over it.3 In Utrecht her consent was necessary, if there were not children by the marriage; and in some other places, whether there were, or were not children. In Utrecht the husband and wife were disabled from making donations to each other; in Holland they may or might make them.4 In some states there is a community of property between

^{1 1} Froland, Mémoires, ch. 1, § 7, 8.

² Id.; Henry on Foreign Law, 31. See also 1 Boullenois, ch. 1, p. 421; Id. p. 467, 468; Merlin, Répert. Autoris. Maritale, § 10.

^{3 1} Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 2, p. 276, 802.

4 Rodenburg, De Divers. Stat. tit. 2, ch. 5, § 9; 2 Boullenois, Appet.
p. 39.—It may be useful here to state, (once for all,) that, in referring to the laws of different countries, I generally state them as they formerly were, without any attention to the changes, which they may actually have undergone. The reasoning of the foreign jurists upon this subject would be rendered exceedingly obscure, and sometimes incorrect in any other way; and the object of this work is not so much to show, what particular conflicts of laws may now arise, from the present jurisprudence of a particular country, as to illustrate the principles, which different jurists have adopted in solving questions relating to the conflicts of laws generally. See 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 2, p. 276 to p. 332, where there will be found a summary of the laws of Holland on the subject of this chapter.

positive law of different provinces of the same empire, upon the subject of the rights of husband and wife. In some places the laws, which place the wife under the authority of her husband, extend to all her acts, as well to acts inter vivos, as to acts testamentary. In others, the former only are prohibited. In some places, the consent of the husband is necessary, to give effect to the contracts of the wife. In others, the contract is valid, but is suspended in its execution during the life of the husband. In some places, the wife has no power over the administration of her own property. In others the prohibition is confined to property merely dotal, and she has the free disposal of her other property, which is called paraphernal.

§ 129. But not to perplex ourselves with cases of a provincial and unusual nature, let us attend to the differences on this subject in the existing jurisprudence of two of the most polished and commercial states of Europe, in order to realize the variety of questions, which may spring up, and embarrass the administration of justice in the tribunals of those countries.

§ 130. The present Code of France does not undertake to regulate the conjugal association as to property, except in the absence of any special contract, which special contract the husband and wife may, under certain limitations, make, as they shall judge proper. When no special stipulations exist, the case is governed by what is denominated

^{1 2} Boullenois, Obser. 32, p. 11; 1 Domat, B. 1, tit. 9, p. 166, 167; Id. § 4, p. 179, 180, &c. See also 1 Froland, Mém. per tot.; Merlin, Répert Autoris. Maritale, § 10; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 6, § 1, p. 201 to p. 244; Id. ch. 7, § 1 to § 7, p. 262 to p. 561.

her free administration of her movable property, and may alien it. But she cannot alien her immovable property without the consent of her husband, or without being authorized by law upon his refusal. Dissolution of the marriage by divorce gives no right of survivorship to the wife; but that right may occur on the civil death or the natural death of the husband. Upon the death of either party, the community being dissolved, the property belongs equally to the surviving party, and to the heirs of the deceased, in equal moieties, after the due adjustment of all debts, and the payment of all charges, and claims on the fund.¹

§ 131. Such is a very brief outline of some of the more important particulars of the French Code, in regard to the property of married persons, in cases of community. The parties may vary these rights by special contract, or they may marry under what is called the dotal rule Le régime dotal. But it would carry us too far to enter upon the consideration of these peculiarities, as our object is only to point out some of the more broad distinctions between the English law and the French law, as to the effects of marriage.

§ 132. In regard to the personal rights, and capacities, and disabilities of the parties, it may be stated, that, independent of the ordinary rights and duties of conjugal fidelity, succor, and assistance, the husband becomes the head of the family; and the wife can do no act in law without the authority of her husband. She cannot, therefore, without his consent, give, alien, sell, mortgage, or acquire property. No general authority, even though stip-

¹ Code Civil of France, art. 1441 to 1496.

be recognised by foreign nations. In general, she is deemed to have the same domicil as her husband: and she can during the coverture acquire none other, suo jure.1 Her acts, done in the place of her domicil, will have validity or not, as they are, or are not, valid there. But as to her acts done elsewhere, there is much room for diversity of opinion and practice among nations. We have seen, that many of the civilians and jurists of continental Europe hold, that the capacity and incapacity of married women, as in other cases of the personality of laws, accompany them every where, and govern their acts. And Mr. Chancellor Kent has said. that as personal qualities and civil relations of a universal nature, such as infancy and coverture, are fixed by the law of the domicil, it becomes the interest of all nations mutually to respect, and sustain that law.3 This is true in a general sense. But every nation will judge for itself, what its own interest requires, and, in framing its own jurisprudence, will often hold acts valid within its own territories, which the laws of a foreign domicil might prohibit, or might disable the parties from doing.

§ 137. In considering this subject, it is material, at least so far as foreign jurists are concerned, to distinguish between cases, where there has been a change of domicil of the parties, and where there has not been any such change of domicil. Where the domicil of marriage remains un-

¹ Ante, § 46. See on this subject, 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 6, § 2, p. 244 to p. 262.

² See ante, § 51, 55, 56, 57, 58, 60; Henry on Foreign Law, p. 50; Fergusson on Marr. and Div. 334 to 336; Merlin, Répert. Autoris. Maritale, § 10.

³ 2 Kent, Comm. Lect. 39, p. 419, 3d edit.

or others, be held valid in England? 1 Many foreign jurists, among whom may be enumerated Hertius Paul Voet, John Voet, Burgundus, Rodendurg, Pothier, and Merlin, hold the opinion that the law of the new domicil, must in all cases of a change of domicil, govern the capacities and rights of property of married women, as well as their obligations, acts and duties.2 Froland (it should seem) would answer this particular question upon principle in the affirmative, as a mere question of capacity or incapacity, or status, of the wife; for he holds, that the capacity or incapacity of married women to do things changes with their domicil; and that acts, valid by the law of their original domicil, if done in a new domicil, by whose laws they are void, are to be deemed nullities.3 Thus, he says, that a married woman, who is incapable by the law of her domicil, where the Roman law (Droit Ecrit) prevails, of entering into a suretyship for another, by the Senatus consultum Velleianum, or of contracting with her husband, as in Normandy, if she goes to reside at Paris, where no such law exists, is there deprived of that exception. And, on the other hand, a woman married and living at Paris, and afterwards going to reside in Normandy, or in any other country, where the Roman law prevails (Droit Ecrit), loses her capacity to enter into any such contract, which she previously possessed.4 Yet Froland has in some other

¹ See Merlin, Répert. Testament, § 1, 5, art. 1, 2, p. 309 to p. 319.

² Ante, § 55 to 62; post, § 140, 141. See also I Burge, Comm. on Col. and For. Law, Pt. 1, ch. 6, § 2, p. 253 to p. 261.

³ 1 Froland, Mém. 172; ante, § 55.

^{4 1} Froland, Mém. 172; 1 Boullenois, Obser. 4, p. 61; 2 Boullenois, Obser. 32, p. 7, 13.— Froland has some subtile distinctions on this subject, which, to say the least of them, are not in a practical sense very clear. Lest I should misstate the purport of his remarks, I will quote them in the

state or condition of the wife, and by consequence the extent of the marital authority; and this state or condition of the wife being once fixed, cannot be afterwards changed by any change of domicil.1 Dumoulin seems to have entertained the same opinion.2 Merlin also at one time bent the whole strength of his acknowledged ability, to establish the doctrine, that the law of the matrimonial domicil, and not of the new domicil, as to the capacity and incapacity of the wife, ought to prevail. He reasoned it out principally in his examination of the subject of the marital power, or the incapacity of the wife, according to certain local laws, to do any valid act, make any conveyance, or engage in any contract, without the consent and authorization of her husband. And he then held, that this incapacity is not changed by a change of domicil to a place, in whose laws it has no existence.3 After maintaining this opinion (as he himself says) for forty years, he has recently changed it, and adhered to the doctrine, that the law of the new domicil ought to govern.4 In discussing the nature and extent of the parental authority, conferred by the domicil of birth, in regard to foreign property, he seems to have been aware of the difficulties of his early doctrine; and he has said, with great truth, that to put an end to all the difficulties of such cases, it is necessary to make a uniform law, not for France

¹ Bouhier, Cout. de Bourg. ch. 22, § 22 to 27; Id. § 45 to 47; Id. § 48 to 66; Id. § 69, 70; Id. § 79, 80, 82, 83; Id. § 89, 90; Id. § 147.

² Molin. Oper. Comment. ad Cod. Lib. 1, tit. 1, l. 1; Conclus. De Statutis. Tom. 3, p. 555, edit. 1681.

³ Bouhier, Cout. de Bourg. ch. 22, § 22 to 32, § 45.

⁴ Merlin, Répert. Effet Rétroactif, § 3, 2, art. 5, p. 15; Id. Autorisation Maritale, § 10, art. 4, p. 243, 244; Id. Majorité, § 5; ante, § 58, 59.

tatem domi adeptam, non aliter quam cicatricem in corpore foras circumferat. Consequenter dicemus, si mutaverit domicilium persona, novi domicilii conditionem induere.¹

§ 141. Rodenburg has distinguished the cases on this subject into two sorts; (1) those, in which there is no change of domicil of the married parties; (2) and those, in which there is a change of domicil. In the former case he holds, that the capacity and incapacity by the law of the domicil extends every where. In the latter case, that the capacity and incapacity of the new domicil attach.2 So that, according to him, the disabilities of a wife by the law of her domicil attach to all her acts, wherever done, at home, or abroad, as long as the domicil exists.3 But upon a bond fide change of domicil by her husband, she loses all disabilities, not existing by the law of the new domicil, and acquires all the capacities allowed by the latter.4 Hence, if a husband, who by the law of his domicil has his wife subject to his marital authority, changes his domicil to a place, where no such law exists, or e contra, if he changes his domicil from a place, where the wife is exempt from the marital power, to one where it exists; in each case the wife has the capacity or incapacity of the new Fac, igitur, virum, qui per leges loci, ubi degit, uxorem habeat in potestate, collocare domicilium alio, ubi in potestate virorum uxores non sunt; vel vice versâ. Dicendumne erit, induere uxorem potestatem qua priùs liberata, et exuere, cui alligata est? In af-

¹ Burgundus, Tract. 2, n. 7, p. 61.

² Rodenburg, de Div. Stat. tit. 2, ch. 1, § 1; Id. Pt. 2, ch. 1, § 1; Id. ch. 4, § 1; 2 Boullenois, App. p. 10, 11; Id. p. 55, 56; Id. p. 63.

³ Ibid. 4 Ibid.

dentiesom amors, mar sin falls under the month authority: Mr. if the same time in contents, that she Me. minimuming in him of aliminating and Menting my proportion property: because it was gren to me with the animate of manage, supported w he aw it her manman denied; and that ser maintain sensor we a state of domical extinsome her neut, humbest man such ambentic titles. And housen one summer are without the consent of ner mercent in such administration and allegation : ver he is busine to give such commen." But Boulennis is immediat in amount when exceptions to the incrine, where other considerations are mixed up in the rase. Thus, he says; Suppose a woman is married at Paris, and has a community of property with her hundard there, and she has property at Aix or Touiouse, and her husband goes to reside at either of these places; the question is, whether she is at liberty to sell her property there without the authority or consent of her husband; and he holds, that she cannot sell her property there without the consent of her bushand, although she was married at Paris. The reason he assigns is; because in the countries governed by their own customary law, the property of a married woman in community is deemed dotal property; and is presumed to have been brought there by the parties, as such; and that such property, as dotal property, is less alienable at Aix and Toulouse, than in countries governed by their customary law; and that in those Provinces, as well as in Paris, the husband has the

¹ 2 Boullenois, Observ. 32, p. 20, 21; Id. p. 22 to p. 28. See Bouhier, Cout. de Bourg. ch. 22, § 28 to § 30; Id. § 40 to § 45.

contractuum nuptiarumque, in iis locis recepta, ubique vim suam obtinebunt. In Hollandia conjuges habent omnium bonorum comunionem, quatenus aliter pattis dotalibus non convenit. Hoc etiam locum habebit in bonis sitis in Frisia, licet ibi tantum sit communio quæstus et damni, non ipsorum bonorum. Ergo et Frizii conjuges manent singuli rerum suarum, etiam in Hollandia sitarum, domini; cum primum vero conjuges migrant ex una provincia in aliam, bona deinceps quæ, alteri adveniunt, cessant esse communia, manentque distinctis proprietatibus; sic ut res antea communes factæ, manent in eo statu juris, quem induerunt. The example, he thus puts, obviously shows, that his doctrine is applied to cases, where there is no express contract.

§ 145 a. Mr. Chancellor Kent has applied the doctrine of Huberus in the case of an express antenuptial contract between the parties; and has laid down the rule, that the rights, dependent upon nuptial contracts, are to be determined by the Lex loci contractus.² This may be generally correct, in regard to cases of express or of implied nuptial contracts; and it is probable, that none other were at the time in the mind of the learned judge. But we shall presently see, that as a general question, in regard to the universal operation of the Lex loci matrominii, there is much controversy upon the subject among foreign jurists.

§ 146. There are many distinguished jurists, who, in common with Huberus, maintain the opinion, that the incidents and effects of the marriage upon

¹ Huberus, Lib. 1, tit. 3, De Conflict. Leg. § 9; post, § 169.

² See De Couche v. Savatier, 3 John. ch. R. 211; 2 Kent, Comm. Lect. 39, p. 458, 459, 3d edit. See also Feaubert v. Turst, cited in Robertson's Appeal Cases, 1, and Lashley v. Hogg, 1804, cited Id. 4; Le Breton v. Miles, 8 Paige, R. 261.

apply as well to the like property situated in foreign countries, as to that situated in France.

§ 147. The grounds, upon which this opinion has been maintained, are various. Some foreign iurists hold, that the law of the matrimonial domicil attaches all the rights and incidents of marriage to it. proprio vigore, and independent of any supposed consent of the parties.1 Others hold that there is in such cases an implied consent of the parties to adopt the law of the matrimonial domicil by way of tacit contract: and then the same rule applies, as is applied to express nuptial contracts. Dumoulin was the author, or at least the most distinguished advocate, of this latter doctrine.2 Quia per prædicta inest (says he) tacitum pactum, quod maritus lucrabitur dotem conventam, in casu, et pro proportione statuti illius domicilii, quod prævidetur, et intelligitur; et istud tacitum pactum, nisi conventum fuerit, intrat in actionem ex stipulatu rei uxoriæ, et illam informat. Itaque semper remanet forma ab initio impressa.3 And he adds, that applies to all property, whether situate, and whether movable or immovable; Non solum inspiciatur statutum vel consuetudo primi illius domicilii pro bonis sub illo sitis. Sed locum habebit ubique etiam extra fines et territorium dicti statuti, etiam interim correpti : et hoc indistincte, sive bona dotalia sint mobilia, sive immobilia, ubicunque sita, sive nomina. Ratio punctualis specifica procedat in vim taciti pacti ad formam statuti; veluti, quod tacitum pactum pro expresso habetur.4

¹ See 1 Boullenois Obser. 29, p. 741, 750, 757, 758; Huberus, Lib. 1, tit. 3, De Confi. Leg. § 9.

² 1 Boullenois, Obser. 29, p. 757.

Molin. Comm. ad. Cod. Lib. 1, tit. 1, l. 1, Opera, Tom. 3, p. 555, edit.
 1681; 1 Froland, Mém. 62, 218; Livermore, Dissert. § 89, p. 73, 74;
 Boullenois, Observ. 29, p. 756, 758.

⁴ Molin. Comm. ad Cob. Lib. 1, tit. 1, l. 1; Conclus. De Statutis, Opera,

Primum, quod Molinæus à simplici consuetudinis dispositione elicet partium conventionem et pactum, citra ullam conventionem partium adjectam consuetudini, rationem non habet. Alia enim vis et ratio, aliud et principium et causa obligationis, quæ a lege inducitur, alia ejus, quæ ab pacto et conventione partium proficiscitur.¹

§ 149. It may be useful to bring together in this place, in a more exact form the opinions of some other jurists of the highest reputation on this subject for the purpose of exhibiting some of the differences, as well as some of the coincidences, in the doctrines respectively maintained by them.

§ 150. Cochin holds the doctrine, that if the contract of marriage contains no stipulation for community of property, the law of the place, where the parties are domiciled, and to which they submit by the contract of marriage, must govern, not only as to property (biens) situate in that place, but as to property situate in all other places.2 The rights of married persons (he adds) over the property, which they then have, as well as over that, which they afterwards acquire, ought to be regulated by an uniform rule. If they have established an express rule by the contract of marriage, that ought to decide their rights as to all their property. If they have made no stipulation, then the law of the place of their common domicil establishes a rule for them; since they are presumed to submit

¹ D'Argentré, In Briton. Leg. Des Donations, art. 218, Gloss. 6, n. 33, Tom. 1, p. 656; Livermore, Dissert. § 92, p. 75, § 95, p. 77, § 106, p. 81. See also 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 8, p. 609 to p. 614; 1 Boullenois, Obser. 29, p. 761 to p. 767.

² Cochin, Œuvres, Tom. 3, p. 703, 4to edit.

answers in the negative; because the law of the place of marriage (Utrecht), does not confer it.1 Again. A person, in whose domicil there is no community of property between married persons, possesses property in another territory, where such community of all property exists, and he contracts marriage in another country, where a qualified community only exists (Ubi societas bonorum tantum, sive simpliciter, ita dicta, obtinet). What law is to prevail? Some jurists hold, that the law of the domicil shall prevail. Others are of a different opinion. Hertius himself holds, that, as the case supposes the place of the marriage to be foreign to both parties, the law of the husband's domicil ought to prevail, as an implied contract between the parties.2 Again. In the domicil of the husband, a community of property exists between married persons; will that community apply to immovable property, bought by either party in a territory, where such a law does not exist? Many jurists decide in the negative. Hertius holds the affirmative, upon the ground of an implied contract, resulting from the marriage.3

§ 152 a. Froland puts the case of a man domiciled at Paris, who goes and marries a woman in a country, governed by the Roman law, as in Rheims, Auvergne, or Normandy, or è contra; and the marriage is without any express contract; and he then asks, in such a case, what law is to prevail as to future acquisitions

¹ Hertii Opera, De Collis. Leg. § 44, p. 142, 143, edit. 1737; Id. p. 201, edit. 1716.

² Id. § 46, p. 143, edit. 1737; Id. p. 202, edit. 1716.

³ Id. p. 144, § 47, edit. 1737; Id. p. 204, edit. 1716. — The decision of Mr. Chancellor Kent in De Couche v. Sabatier, 3 John. Ch. R. 190, 211, treating it as a case of an express or an implied contract, would lead to the same conclusion.

however, Froland dissents in a qualified manner.1 He deems the law of community, independent of an express contract, to be a real law: and therefore confined to the territory. As to acquests, or acquisitions, whether of movable or of immovable property, made in foreign countries, where the law of community exists, he agrees, that, in cases of an express contract, the law of the matrimonial domicil ought to prevail. But as to foreign countries, where the law of community does not exist, he thinks the right does not extend, aut in vim consuetudinis, or in vim contractus; for it is in vain to presume a tacit contract; and that, therefore. it ought to be governed by the law rei sitee.2 It would seem, however, from subsequent passages, that he applied his doctrine to the case of immovables only; admitting, that movables should be governed by the law of the domicil of the parties.3

§ 154. Rodenburg seems to apply the same principle to cases, where there is a nuptial contract, as to cases where there is none, holding, that, in the latter cases, the law of the matrimonial domicil is adopted by a tacit contract. At the same time he asserts, that the law of community is not personal, but is real; and hence, that although it does not, or may not, directly act upon property aliunde, where no community exists; yet it will give a right of action, founded in the tacit contract, which may be enforced every where. And, therefore, the law of the matrimonial domicil, in such a case, acts indirectly and obtains universality of application by reason of the tacit

^{1 1} Froland, Mém. 315, 316, 317.

² 1 Froland, Mém. 315, 316, 317, 321, 322, 323, 338, 341; 1 Boullenois, Obser. 29, p. 758, 759.

³ Ibid.

one, merely fixing the state or condition of the married couple; and therefore not a real, but a personal law.1 Hence he holds, that the law of community or of non-community, existing in the matrimonial domicil, extends to all property of the parties, wherever it is situated; not upon the ground of any tacit contract, but, proprio vigore, as a law, binding both as to their present property, and as to their future acquisitions. But if by the law of the situs the law of community is prohibited, as to their present property, or as to their future acquisitions, or as to both, then he admits, that the law of the situs ought to prevail; for in all cases of this sort the personal law yields to the real law of the situs. Le statut personnel cede en cette occasion au statut reèl de la situation.2

§ 156. Pothier has adopted the doctrine of tacit contracts, maintained by Dumoulin; and, therefore, in case there is no express nuptial contract, if the law of the matrimonial domicil creates a community, he holds, that it applies to all property, present and future, wherever situated, and even in provinces, which do not admit of a community.³ Grotius is also stated to have held the same opinion in a case, where he was consulted.⁴

§ 157. It has been remarked by the Supreme Court of Louisiana, that the greater number of the jurists of France and Holland are of opinion, that

¹ 1 Boullenois, Obser. 29, p. 736, 741, 751 to 770.

Boullenois, Obser. 29, p. 736, 741, 750, 751 to 754; Id. p. 754 to p.
 757, 759, 760, 766, 769, 770;
 Boullenois, Obser. 37, p. 277; post, § 166.
 Pothier, Traité de la Communauté, art. Prélim. n. 10 to n. 18; post,

⁴ See Henry on Foreign Law, ch. 5, p. 36, 37, note; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 8, p. 605.

well as its nature; and to have had the one as much in view, as the other. In one word, the parties have agreed, that the law shall bind them, as far as that law extends, but no farther.¹

§ 158. The result of this reasoning (and it certainly has very great force) would seem to be, that in the case of a marriage without any express nuptial contract the Lex loci contractûs (assuming, that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country; and as to property in other countries, it will govern movables, but not immovables; the former having no situs, and the latter being governed by the Lex rei situs.

§ 159. Perhaps, the most simple and satisfactory exposition of the subject, or at least, that, which best harmonizes with the analogies of the common law, is, that in the case of a marriage, where there is no special nuptial contract, and there has been no change of domicil, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, wherever acquired, and wherever it may be situate; but that real or immovable property ought to be left to be adjudged by the Lex rei site, as not within the reach of any extra-territorial law. Where there is any special nuptial contract, between the parties, that will furnish a rule for the case; and as a matter of contract, ought to be carried into effect every where, under the general limitations

¹ Mr. Justice Porter in the case of Saul v. His Creditors, 17 Martin, R. 569, 603 to 605; post, § 187.

² See Henry on Foreign Law, ch. 7, p. 48, 49; post, § 454; Le Breton v. Miles, 8 Page, R. 261

§ 161. Upon this subject there is, as we have already seen, no small diversity of opinion among foreign jurists, as well in regard to the rights to property acquired after the change of domicil, as in regard to the rights to property antecedently acquired.1 Bouhier lays down the rule in general terms, that in relation to the beneficial and pecuniary rights (Les droits utiles et pécuniaires) of the wife, which result from the matrimonial contract, either express or tacit, the husband has no power by a change of domicil to alter or change them, according to the rule, Nemo potest mutare consilium suum in alterius injuriam; and he insists, that this is the opinion of jurists generally.9 Thus, if by the law of the matrimonial domicil there exists a community of property between the husband and the wife and they remove to another place, where no such community exists, the rights of neither party are changed; and the community applies in the same manner, as in the original domicil.3 And on the other hand, if no such community exists in the matrimonial domicil, a transfer of domicil to a place, where it does exist, will not create it; for a change of domicil would not add any thing to the marriage rights in the case of an express contract, and therefore ought not to do so in that of a tacit contract.4 This also is Dumoulin's opinion. He says, that this is controverted by some authors; but it is so unjustly and falsely. Sed controvertunt, si maritus postea cum uxore transtulerit domicilium, an debeat attendi illud, quod erat tempore contractus, an vero

¹ Ante, § 137 to 142; Id. § 143 to 159; 1 Burge, Com. on Col. and For. Law, Pt. 1, ch. 7, § 8, p. 609 to 640.

⁹ Bouhier, Cout. de Bourg. ch 22, § 63 to 72.

³ lbid. 4 Ibid.

ultimum, quod invenitur tempore mortis; et istud ultimum tenet Salicetus, et sequitur Alexander. Sed hoc non solum iniquum ; quia maritus de loco, in quo nihil lucratur, vel tantum quartam, posset transferre domicilium ad locum, in quo totam dotem lucraretur, præmoriente uxore sine liberis. Et quod sit falsum, probo per textem dictæ Legis, Exigere dotem.1 Bouhier makes no distinction whatsoever between movable property and immovable property.2 Nor does he seem to recognise any distinction between property acquired before the change of domicil, and that acquired after the change of domicil.3

§ 162. Le Brun supports the like opinion. He insists, that, if there is no special contract of marriage, the law of the place, where the marriage is celebrated, and in which the parties are domiciled, governs as a tacit contract; and that no subsequent change of domicil can change the legal rights of the parties, even as to after acquired property.4 And he puts the case of a marriage in Paris, and a subsequent change of domicil of the parties to the province of Bar, where the survivor is by custom entitled to the whole property in movables by survivorship; and holds, that if either die, the movables, whether acquired before the removal, or after the removal, are governed by the law of community, and do not all remain to the survivor. La raison est, qui ce seroit changer l'establissement de communauté fait par le contrat, ou par le coutume, selon lequel

¹ Dig. Lib. 5, tit. 1, 1. 65, De Judiciis; ante, § 147; Molin. Comment. ad Cod. Lib. 1, tit. 1, 1, 1; Molin. Opera. Tom. 3, p. 555.

Bouhier, Cout. de Bourg. ch. 22, § 79, 80.

³ Id. ch. 22, per tot.

⁴ Le Brun, Traité de la Communauté, Liv. 1, ch. 2, § 55, 56, p. 20.

on a dû partager les meubles aussi bien que les conquets.¹

§ 163. Rodenburg puts the case of a marriage, in a place, where the law of community of property between husband and wife prevails, and a subsequent removal to another place, where it has no existence; and he asks, if the community still subsists in the new domicil? He observes, that most of the Dutch jurists are of opinion that it does; and in this opinion, he concurs to this extent, that the community will continue, until the parties have, by some overt act, discarded it; and then it will cease. And he applies the same principle to cases of dowry by the customary law, holding, that the matrimonial domicil ought to prevail.

§ 164. Hertius puts the following question. A marriage is contracted in a place, where the civil law governs, (i. e. where there is no community); and afterwards the couple remove to a place, where the law of community exists; and to the inquiry, whether in such a case there is a community in the acquisitions of the parties after the removal, he answers in the negative, adopting the doctrine of Rodenburg; and he gives this reason for his opinion; that it is not probable, that the married couple, who did not agree to a community of goods in the beginning, intended to adopt it by a mere change of domicil. Nam probabile non est, conjuges, qui pactis in societatem bonorum ab initio non consensuerant, sola domicilii

¹ Ibid.; ante, § 151.

² Rodenburg, De Div. Stat. Pt. 2, tit. 2, ch. 4. § 3, 4; 2 Boullenois, Appx. p. 66, 67; Id. p. 85 to p. 87; Id. Obser. 36, p. 173; ante, § 154.

³ Rodenburg, De Div. Stat. Pt. 2, tit. 2, ch. 4, § 5; 2 Boullenois, Appx. p. 66, 67; Id. p. 87; ante, § 154.

time to live there, and afterwards they remove to Lyons; in such a case the community, formed at Paris, will continue as to property acquired at Lyons.¹

§ 166. Boullenois holds the opinion, (as we have seen,) that the law regulating the community affects the state or condition of the parties, and is, therefore, a personal law; and accompanies them every where, and affects property, wherever situate.2 He accordingly insists, that, if by the law of the matrimonial domicil a community of property exists, that community extends to all future acquisitions, whether movable or immovable, even in places, to which the parties have afterwards removed, and where no such community exists.3 Pothier has adopted the opinion of Boullenois, that the law of community is to be deemed a personal law, and not a real law; and he also adopts the doctrine of Dumoulin, as to tacit contracts.4 So, that he has no hesitation in declaring, as we have seen, that the law of the matrimonial domicil governs the property every where.5 But he has omitted to put the case of a change of domicil, and the effects, which it would produce. In another place he has laid down as a general principle, that a change of domicil delivers all persons from the empire of the laws of their former domicil, and subjects them to the new.6 What, then, ought to be the effect of

¹ Merlin, Repértiore, Communauté de Biens, § 1, p. 111.

Ante, § 155; 1 Boullenois, Obser. 29, p. 736, 741, 750 to 754; Id. p. 759 to p. 770; 2 Boullenois, Obser. 38, p. 277; 17 Martin, R. 607.

³ 2 Boullenois, Observ. 38, p. 277, 278, 283, 284, 285; ante, § 155.

⁴ Pothier, Traité de la Communauté, art. Prélim. n. 10, 11, 12, 13; ante, § 156.

⁵ Ibid.; ante, § 156.

⁶ Pothier, Cout. d'Orléans, ch. 1. n. 13; ante, § 51 a, § 156.

community, but are governed by the law rei sitæ. As to movables, he holds, that the law of the actual domicil ought to govern.¹

§ 168. There are many other jurists, who maintain, that the law of community among married persons is real, and not personal; and among these the most distinguished are D'Argentre, Dumoulin, Paul Voet, and Vander Meulen. According to them, the law rei sitæ will govern in all cases, where there is no express or tacit contract. then, we must take this proposition with the accompanying qualification, that those of these jurists, who admit of the doctrine of a tacit contract, adopting the law of the place of marriage, (among whom are Dumoulin and Paul Voet,) also hold, that although the law of the place of the marriage does not directly act upon the property in a foreign country; yet, through the means of this tacit contract, it acts indirectly, and enables the parties to enforce it against that property by a proper suit in rem.3

§ 169. Huberus (as we have seen,) does not hesitate to assert the doctrine, that, in case of a change

^{1 1} Froland, Mém. Pt. 2, ch. 3, § 9, 10, 11, p. 315 to p. 323; Id. p. 341—I confess myself under some difficulty in reconciling what is here said, with what Froland seems to decide in the next chapter (4th), § 3, p. 345, &c., where he appears to hold, that a woman marrying in a place, where the law of community does not exist, does not, by removing with her husband to a place, where it does exist, acquire any right of community to his acquisitions or movables in the latter.

² 1 Boullenois, Observ. 29, p. 758 to 761, 765; P. Voet. De Stat. § 4, ch. 3, p. 134, 135, § 9, edit. 1716; Id. p. 151, 152, edit. 1661. See also J. Voet, ad Pand. Lib. 5, tit. 1, n. 101; Merlin Communauté de Biens, § 1, art. 3, p. 104, 110; Bouhier, Cout, de Bourg. ch. 23, § 34. See Saul v. His Creditors, 17 Martin, R. 598, 599; Id. 588; ante, § 148, 159, note.

³ P. Voet, De Statut. § 9, ch. 2, n. 5, 6, 7, p. 264 to p. 266 edit. 1716; Id. p. 319 to p. 323, edit. 1661; ante, § 165, note; ante, § 147; post, § 169 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 8, p. 612 to p. 614.

of domicil, future acquisitions of married persons are governed by the law of their actual domicil, and not of their antecedent matrimonial domicil.1 Thus after asserting, that in Holland there is a community of property, and in Friezeland not; he says, if the married couple remove from the one province (Holland) to the other (Friezeland), whatever property is afterwards acquired, ceases to be common, and remains in distinct ownership (distinctis proprietatibus); and the property before held in community remains clothed with the same legal, character, that it previously possessed.2 And he applies this doctrine as well to immovable property, as to movable property, relying upon the doctrine of tacit consent, or tacit contract;3 and holding the opinion of Dumoulin; Quia pactio bene extenditur ubique, sed non statutum merum, hoc est, solá et merá vi statuti.4

§ 170. It would be endless to recount the diversities of opinion among foreign jurists on this subject, following out the almost infinitely varied cases, which the customs and laws of different provinces and countries have brought before them. According to the opinion of the Supreme Court of Louisiana, already cited,⁵ the greater number of foreign jurists are of opinion, that, in settling the rights of husband and wife, on the dissolution of marriage, to the property acquired by them, the law of the domicil of the marriage, and not of the place, where it is dissolved by death, is to be the guide.⁶ It is

2 Ibid.

¹ Ante, § 145.

³ Huberus, Lib. 1, tit. 3, 6 9; ante, 6 145.

⁴ Livermore, Diss. § 89, p. 73, 74; 1 Froland, Mem. 63.

⁵ Ante, § 157.

⁶ Mr. Justice Porter in delivering the opinion of the Court in Saul v. His Creditors, 17 Martin, R. 509; ante, § 157.

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probably so; but there is more difficulty in affirming it, where there has been a change of domicil, than where there has been no such change. It may be inferred, that the Scottish law has adopted the rule, that in cases of community, where there is no written contract, the law of the domicil of the parties at the death of either of them regulates the disposal of the property of the parties.¹

¹ Fergusson on Marr. and Divorce, 346, 347; Id. 361.—There are some remarks of Mr. Burge on this subject, which deserve to be cited in this place. "In hoc igitur" (says he) "conflictu quibus adstipulabimur? was the obvious question of one of the jurists, after he had been reviewing these discordant opinions. The following considerations will perhaps justify a concurrence with him in the answer, given by himself. 'Mihi tutius videtur, adhærere secundæ sententiæ, (quæ negat prædia alibi sita communicari.) quam non solum ratio validissima munit, sed et prestantes auctores, et consensus aliquot municipiorum probant.' The law, which by its own force and operation, and independently of contract, gives an interest in immovable property, is a real law. 2d. Immovable property is not subject to the power of a real law, unless such law exists in the country, where that property is situated. 3d. The joint interest, which the husband and wife acquire under the community in the immovable property of each other, is conferred by the law alone, unless that law be controlled in its operation by a tacit agreement; such an interest, therefore, will not be acquired in immovable property situated in a country, where the law of community does not exist. 4th. If a tacit agreement could be inferred for the purpose of giving to the law of community a more extensive operation, than belongs to the quality of a real law, it might with equal propriety be inferred for a similar purpose in the case of other real laws, i. e. those, which govern the succession to real property, &c. A preference of the law of the country, in which a man has passed his life, to that of another country, in which his real property may be situated, is as natural a presumption as that in favor of the law of the matrimonial domicil. 5th. It cannot be said, that, because the title is conferred by the law, as the consequence of the marriage, there is a ground peculiar to marriage for admitting the presumption of a tacit agreement; because no such presumption is admitted in respect of other titles conferred by law as the consequence of Marriage, e. g. the titles to douaire and droit de viduité. 6th. The laws, which confer douaire, and le droit de viduité, are admitted by all jurists to be real laws; and consequently they attach on that property only, which is situated in the country, where they prevail, and they do not extend to

that, according to this doctrine, the law of the actual domicil will govern as to all property, without any distinction, whether it is property acquired antecedently, or subsequently, to the removal.

§ 171 a. In a more recent case, where the parties were inhabitants of Prussia, and domiciled there, a question arose in the Court of Exchequer upon the distribution of an intestate's estate under the administration of the court, whether the wife, being a distributee, was entitled in equity, upon a petition by her husband for the amount, to have any of the money settled on her, or whether the whole was to be paid to him. It appeared, that, by the laws of Prussia, the whole of the personalty of the husband and wife is, during the coverture, at the absolute disposal of the husband; but on the death of either it is divided between the survivor and the heirs of the deceased. The man made no application to the court; and the court ordered the whole money to be paid over to the husband.1 Here, we see, the court adopted the law of their actual domicil, to regulate the rights of the parties to the movable property.

§ 172. In America there has been a general silence in the States, governed by the common law. But in Louisiana, whose jurisprudence is framed upon the general basis of the Spanish and French law, the point has several times come under judicial decision. The law of community exists in that state; ² and from the frequency of removals from, and to that state, it is scarcely possible, that

¹ Sawyer v. Shute, 1 Anstr. R. 63. See also Anstruther v. Adair, 2 Mylne & Keen, 513.

² Civil Code of Louisiana (1809), 336, art. 63; New Code (1825), art. 2369 to 2393.

some of the doctrines, which have so much perplexed foreign jurists, should not be brought under review.

§ 173. We have already had occasion to take notice of some of the views entertained by the Supreme Court of Louisiana upon this subject.¹ It has been very properly remarked by that Court, that questions upon the conflict of the laws of different states are the most embarrassing and difficult of decision of any, that can occupy the attention of courts of justice.² And it may be added, almost in their own language, that the vast mass of learning, which the researches of counsel can furnish, leaves the subject as much enveloped in obscurity and doubt, as it would be, if one were called upon to decide, without the knowledge of what others had thought and written upon it.³

§ 174. It is manifest, that the great body of foreign jurists, who maintain the universality and ubiquity of the operation of the law of the matrimonial domicil, notwithstanding any subsequent change of domicil, found themselves upon the doctrine of a tacit contract, which, being once entered into, is of legal obligation every where. The remarks of the Supreme Court of Louisiana on this point have been already cited; and certainly they have a great tendency to shake its foundation. If the law of community be a real law, and not a personal law, it would seem to follow, that it ought to regulate

¹ Ante, § 157, 170.

² Ibid.

³ Mr. Justice Porter in delivering the opinion of the Court in Saul v. His Creditors, 17 Martin, R. 571, 572.

⁴ Ante, § 147 to 170.

⁵ Saul r. His Creditors, 17 Martin, R. 599 to 608; ante, § 157, 170.

all things, which are situate within the limits of the country, wherein it is in force, but not elsewhere. The most strenuous advocate for the doctrine of tacit contract must admit, that, if by the statute of any country community is prohibited, as to property there, the law of the matrimonial domicil ought not to prevail in such country, in contradiction to its own. And the learned Court, above referred to, have said, that they can perceive no solid distinction between the case of a real statute, and a prohibitory statute, as to property situate in that country.

§ 175. But if the law of community be personal, still there is strong ground to contend, that the personal laws of one country cannot control the personal laws of another country, ipso facto, where they extend to and provide for property within the jurisdiction of the latter. No one can doubt, that any country has a right to say, that contracts for community, made in another country, shall have no operation within its own territory. The question, then is reduced to the mere consideration, whether the law of the country does directly or indirectly provide for, or repudiate, the community, as to property locally situate within it.³

§ 176. Upon reasoning to this effect, after full consideration, the Supreme Court of Louisiana came to the conclusion, that the law of community must, upon just principles of interpretation, be deemed a real law, since it relates to things, more than to

¹ Mr. Justice Porter in Saul v. His Creditors, 17 Martin, R. 601, 602.

² Ibid. See post, § 449 to 454.

³ Saul v. His Creditors, 17 Martin, R. 573, 574 to 588; 1 Hertii Opera, De Collis Leg. § 47, p. 143, 144, edit. 1737; Id. p. 294, edit. 1716; post, § 449 to 454.

persons, and it has, in the language of D'Aguesseau, the destination of property to certain persons, and its preservation in view.\(^1\) The Court, therefore, held, that, where a married couple had removed from Virginia (their matrimonial domicil), where community does not exist, into Louisiana, where community does exist, the acquests and gains, acquired after their removal, were to be governed by the law of community in Louisiana.\(^2\)

§ 177. This doctrine appears to be in full accordance with the laws of Spain. Those laws apply the same rule to cases of express contract, and to cases of tacit contract, or customary law. Where there is an express contract, that governs as to all acquisitions and gains before the removal. Where there is no express contract, the customary law of the matrimonial domicil governs in like manner. But in both cases all acquisitions and gains, made after the removal, are governed by the law of the actual domicil.3 The present revised Code of Louisiana adopts a like rule; and declares, that a marriage, contracted out of the state between persons, who afterwards come to live within the state, is subject to the community of acquests, with respect to such property as is acquired after their removal.4

¹ Mr. Justice Porter in Saul v. His Creditors, 17 Martin, R. 593, 594, 595, 606, 607; D'Aguesseau, Œuvres, Tom. 4, Pl. 54, p. 660, 4to edit.

² The law of community existed in Louisiana under the Spanish law, and now exists under the Civil Code of that state. Bruneau v. Bruneau's Heirs, 9 Martin, R. 217; Code Civil of Louisiana (1809), 336, art. 63; Revised Code (1825), art. 2370; Saul v. His Creditors, 17 Martin, R. 573; 2 Kent, Comm. Lect. 28, p. 183, note, 3d edit.

³ Saul v. His Creditors, 17 Martin, R. 576 to 581, 607, 608.

⁴ Code Civil of Louisiana (1825), art. 2370.

§ 178. This Code of course furnishes the rule for all future cases in Louisiana; but the discussions in that State have arisen upon antecedent cases, and have involved a general examination of the whole doctrine upon principle and authority. The doctrine, which, with reference to public law, has been thus established in that state, resolves itself into two fundamental propositions. First; where there is an express nuptial contract, that there shall be a community of acquests and gains between the parties, even though they should reside in countries where different laws prevail, that agreement will be held obligatory throughout, as a matter of contract, in cases of the removal of the parties to another state; with this restriction, however, which is applicable to all contracts. that it is not to cause any prejudice to the citizens of the country, to which they remove, and that its execution is not incompatible with the laws of that country.1 Secondly; where there is no such express nuptial contract, the law of the matrimonial domicil is to prevail, as to the antecedent property; but the property acquired after the removal is to be governed by the law of the actual domicil.2 This latter proposition has been laid down, in terms unusually strong, by the Supreme Court of that state. "Though it was once a question (say the Court), it seems now to be a settled principle, that when a married couple emigrate from the country, where the marriage was

¹ Mr. Justice Derbigny in Murphy v. Murphy, 5 Martin, R. 83; Mr. Justice Porter in Saul v. His Creditors, 17 Martin, R. 605, 606.

² Mr. Justice Derbigny in Gale v. Davis, 4 Martin, R. 645; Saul v. His Creditors, 17 Martin, R. 605, 606; Le Breton v. Nouchet, 3 Martin, R. 60, 73.

contracted, into another, the laws of which are different, the property, which they acquire in the place, to which they have removed, is governed by the laws of that place."1 Upon these propositions the Court have accordingly decided, that, where a couple, who were married in North Carolina, where community does not exist, had removed to Louisiana, where it does exist, the property acquired after the removal was to be held in community.2 And, in another case, where the marriage was in Cuba, and there was a special contract, that there should be a community according to the custom of Paris, in whatever country the parties might reside; and the parties remove to South Carolina, where no community exists, the contract was held to govern the property acquired in the latter state.3 The same doctrine has been maintained in New York, in the case of a marriage between French subjects, under a similar stipulation of community and of mutual donation in case of survivorship of either of the parties.4

§ 179. An instance, illustrative of the exception in cases of express contract, may be drawn from other decisions in Louisiana. Upon a marriage celebrated in that state, the parties stipulated, that the rights of the parties should be governed by the custom of Paris. The question was, whether the parties, residing in the country, were competent

¹ Mr. Justice Derbigny in Gale v. Davis's Heirs, 4 Martin, R. 645,

² Mr. Justice Derbigny in Gale v. Davis's Heirs, 4 Martin, R. 645.
³ Mr. Justice Derbigny in Murphy v. Murphy, 5 Martin, R. 83; Mr. Justice Porter in Saul v. His Creditors, 17 Martin, R. 605; Mr. Justice Derbigny in Bourcier v. Lanusse, 3 Martin, R. 581, 583.

⁴ De Couche v. Savatier, 3 John. Ch. R. 190, 211.

to enter into a nuptial contract, stipulating, that the effect of it on their property should be governed by a foreign law. The Court held, that they had no such competency, and that the contract was void.¹

§ 180. A still more striking case occurred in the same state, upon some of the doctrines of which, as stated by the Court, there may, perhaps, be reason to pause; but the grounds are nevertheless stated with great force. A man ran away with a young lady of thirteen years of age, both of them being then domiciled in Louisiana, without the consent of her parents or guardian, and they went together to Natchez in Mississippi, and were there married, and soon after returned to New Orleans, the place of their original domicil. The wife afterwards died, while they were living in Louisiana; and after her death her mother demanded her property, as it would descend by the Louisiana law. The Court sustained the demand.2 From the elaborate opinion delivered for the Court by Mr. Justice Derbigny, the following extract is made, as highly interesting. respect (say the Court) to the law the principle, recognised by most writers, may be reduced to this; that although no power is bound to give effect, within its own territory, to the laws of a foreign country; yet by the courtesy of nations, and from a consideration of the inconveniences, which would be the result of a contrary conduct, foreign laws are permitted to regulate contracts made in foreign countries. But, in order

¹ Mr. Justice Derbigny in Boucier v. Lanusse, 3 Martin, R. 581. See Code Civil of France, art. 1390.

² Le Breton v. Nouchet, 3 Martin, R. 60, 73.

Other persons have deposed, that letters, expressive of the determination of the appellant to remain there, were by them received from him, shortly after their dates. Without questioning the propriety of the admission of such testimony, the Court is satisfied, that it is insufficient to counterbalance the weight of the facts, which disclose the real intention of the parties.

§ 182. "But, should their intention still remain a subject of doubt, we have next to consider, whether by permitting the laws of the Mississippi Territory to regulate this case, this government would not injure its own rights, or the rights of its citizens. For, a foreign law having no other force, than that, which it derives from the consent of the government. within the bounds of which it claims to be admitted, that government must be supposed to retain the faculty of refusing such admission, whenever the foreign law interferes with its own regulations. A party to this marrriage was one of those individuals, over whom our laws watch with particular care, and whom they have subjected to certain incapacities for their own safety. She was a minor. Has she, by fleeing to another country, removed those incapacities? Her mother is a citizen of this state: she herself was a girl of thirteen years, who had no other domicil than that of her mother. she not remain, notwithstanding her flight to Natchez, under the authority of this government? not the protection of this government follow her, If so, this government she went? wherever cannot, without surrendering its rights, recognise the empire of laws, the effect of which would be, to render that protection inefficacious. But the

laws of the Mississippi Territory, as stated by the parties, do not only interfere with our rights, but are at war with our regulations. By our laws a minor, who marries, cannot give away any part of his property without the authorization of those, whose consent is necessary for the validity of the marriage. By the laws of the Mississippi Territory all the personal estate of the wife (that would embrace, in this case, every thing, which she had) is the property of the husband. Again; according to our laws, we cannot give away more, than a certain portion of our property, when we have forced heirs. But what our laws thus forbid, is permitted in the Mississippi Territory. And shall our citizens be deprived of their legitimate rights by the laws of another government, upon our own soil? Shall the mother of Alexandrine Dussuau lose the inheritance of her deceased child, secured to her by our laws, because her daughter married at Natchez? Shall our own laws be reduced to silence within our own precincts, by the superior force of other laws? If such doctrine were maintainable, it would be unnecessary for us to legislate. In vain should we endeavor to secure the persons and the property of our citizens. Nothing would be more easy, than to render our precautions useless, and our laws a dead letter. But the municipal law of the Mississippi Territory, which is relied upon by the appellant, is not the law, which would govern this case, even there. The law of nations is law at Natchez, as well as at New-Orleans. According to the principles of that law, 'Personal incapacities, communicated by the laws of any particular place, accompany the person, wherever he goes. Thus, he,

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who is excused the consequences of contracts for want of age in his country, cannot make binding contracts in another.' Therefore, even if this case were pending before a tribunal of the Mississippi Territory, it is to be supposed, that they would recognise the incapacity, under which Alexandrine Dussuau was laboring, when she contracted marriage, and decide, that such marriage could not have the effect of giving to her husband, what she was forbidden to give. If that be sound doctrine in any case, how much more so must it be in one of this nature; where the minor, almost a child, has, in all probability, been seduced into an escape from her mother's dwelling, and removed in haste out of her reach? We cannot, here, hesitate to believe, that the Courts of our neighboring Territory, far from lending their assistance to this infraction of our laws, would have enforced them with becoming severity. For, if, when an appeal is made to those general principles of natural justice, by which nations have tacitly agreed to govern themselves in their intercourse with each other, while nations entirely foreign to one another feel bound to observe them, how much more sacred must they be between governments, who, though independent of each other in matters of internal regulation, are associated for the purposes of common defence, and common advantage, and are members of the same great body politic?"1

§ 183. In general, the doctrines thus maintained in Louisiana, will, most probably, form the basis of the American jurisprudence on this subject.

¹ Mr. Justice Derbigny in Le Breton v. Nouchet, 3 Martin, R. 60, 66, 71.

They have much to commend them in their intrinsic convenience and certainty, as well as in their equity; and they seem best to harmonize with the known principles of the common law in other cases. In concluding this topic, the following propositions may be laid down, as those, which, although not universally established or recognised in America, have much of domestic authority for their support, and have none in opposition to them.

§ 184. (1.) Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid every where, unless, under the circumstances, it stands prohibited by the laws of the country, where it is sought to be enforced. It will act directly on movable property every where. But as to immovable property in a foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisprudence rei sitæ.

§ 185. (2.) Where such an express contract applies in terms or intent only to present property, and there is a change of domicil, the law of the actual domicil will govern the rights of the parties as to all future acquisitions.²

§ 186. (3.) Where there is no express contract, the law of the matrimonial domicil will govern as to all the rights of the parties to their present property in that place, and as to all personal property every where, upon the principle, that movables have no situs, or rather, that they accompany the

See Henry on Foreign Law, 48, 49; Id. 95; ante, § 143; Le Breton e. Miles, 8 Paige, R. 261.

² Ante, 6 171, 171 a.

person every where. As to immovable property the law rei sitæ will prevail.

§ 187. (4.) Where there is no change of domicil, the same rule will apply to future acquisitions, as to present property. (5.) But where there is a change of domicil, the law of the actual domicil, and not of the matrimonial domicil, will govern as to all future acquisitions of movable property; and, as to all immovable property, the law rei site.²

¹ See Stein's Case, 1 Rose, Bank. Cases, Appx. 481; Selkrig v. Davis, 2 Rose, Bank. Cas, 99; S. C. 2 Dow, 230, 250; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 8, p, 619.

² See Henry on Foreign Law, 48, 49; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 8, p. 618, 619.

³ How will it be as to personal or movable property antecedently acquired. See ante, § 178; ante, § 157, 158. — Mr. Burge, adverting to the different opinions on this subject, has remarked: " According to the general doctrine of jurists, the property of the husband and wife, whether it be acquired before or after the change of domicil, continues subject to the law of community, notwithstanding they have removed to another domicil, where that law does not exist. The change of the domicil neither divests them of any right, which they had acquired under the law of their matrimonial domicil, nor confers on them any right, which they could not acquire under that law. If the law of community existed in their matrimonial domicil, they will not cease to be in community, although they should have acquired another domicil in a country, where no law of community was established; and on the other hand, if there was no law of community in their matrimonial domicil, they will not become subject to the law of community, because they have taken up their domicil in a country, where that law does exist. The concurrence of jurists in this doctrine is so general, that there are few, who have dissented from it. This doctrine seems to result as a necessary and legitimate conclusion from the theory, that the community exists by force of the tacit agreement of the parties, and which is considered of the same weight, as if it had been an express agreement; because, if the rights of the parties, either in their present property, or in their future acquisitions, had been conferred by an agreement, they could not be varied by a change of domicil. But if this theory be rejected, and the law of community has no greater operation, than any other real law, it can never be necessary to consider the effect of a change of domicil on the interests of the husband and wife on their real property, because those interests in their present property, as well as in their future acquisitions, are determined by the lex loci reisits. The

§ 188. (6.) And here also, as in cases of express contract, the exception is to be understood, that the law of the place, where the rights are sought to be enforced, do not prohibit such arrangements.

application of this doctrine to the interests, acquired by the husband and wife in the personal property of each other under the law of their matrimonial domicil, so far as it regards property, acquired before their removal from their matrimonial domicil, might, it seems, be maintained without the aid of this theory. The matrimonial domicil of the parties may be supposed to be in a country, where, as in England, the marriage is an absolute gift to the husband of the wife's whole personal estate, the subsequent domicil may be in a country, where, as in British Guiana, the wife, by virtue of the communio bonorum, retains an interest in her own, and acquires an interest in her husband's personal property, or the matrimonial domicil may have been in British Guiana, and the subsequently acquired domicil in England. In the one case the whole personal estate of the wife has become vested in the husband, the wife brings no personal property of her own into British Guiana, on which the law of community can attach. In the other case, the wife arrives in England, not only retaining an interest in her own, but having acquired an interest in the property of her husband. The law of the matrimonial domicil has, in this case, already made a disposition of the property of the husband and wife at the time, when the parties and the property were subject to that law. In neither case could the law of the new domicil be admitted without divesting rights, which had been already legally acquired. But in the opinion of the greater number of jurists, not only the property, which had been acquired by the husband and wife before their removal from their matrimonial domicil, but even that acquired in their new domicil, is subject to the law of the matrimonial domicil; and their opinion has been sanctioned, even to this extent, by the decisions in France. A person was married and domiciled in L., where the civil law prevailed. He afterwards removed to Paris, and established his domicil there. On his death his widow demanded a share of his movables, and of the acquets made since the marriage. By an arret of the 29th March, 1640, her demand was rejected. A similar decision was given in the case of a person married and domiciled in Normandy, who afterwards removed to, and established his domicil in Paris. A demand by his widow for a share of the acquets, made since the removal from Normandy, was rejected. The application of this doctrine to the acquisitions of personal property made by the husband and wife in their new or actual domicil, can only be sustained by means of the theory of a tacit agreement. Even its advocates do not all concur in subjecting future acquisitions after a change of domicil, to the law of the matrimonial domicil. Thus, Huber was of opinion, that they are governed by the law of the new or

For if they do, as every nation has a right to prescribe rules for the government of all persons and property within its own territorial limits, its own law in a case of conflict ought to prevail.¹

§ 189. (7.) Although, in a general sense, the law of the matrimonial domicil is to govern in relation to the incidents and effects of marriage; yet this doctrine must be received with many qualifications and exceptions. No other nation will recognise such incidents or effects, when they are incompatible with its own policy, or, injurious to its own interests. A marriage in France or Prussia may be dissolved for incompatibility of temper; but no divorce would be granted from such a marriage, for such a cause, in England, Scotland, or America.² "If" (said a learned Scottish judge, in a passage already cited) "a man in this country were to confine his wife in an iron cage, or beat her with a rod of

actual domicil: 'Cum primum vero conjuges migrant ex una provincia, (where the community prevailed,) in aliam, (where it does not prevail,) bona, que deinceps alteri adveniunt, cessant esse communia, manentque distinctis proprietatibus; sicut res antea communes facte, manent in eo statu juris, quem induerunt.' But if the law of community be a real law, its power as to personal property cannot be more extensive than as to real property. As it affects only such real property as is actually situated in the country, where it is established, so it affects personal property only, when its owner is actually domiciled in the country, where such law is established, because the place of his domicil is the situs in fictione juris of his movable property. The real law as to personal property is that, which prevails in the place of the owner's actual domicil. He acquires and holds it according to the disposition of that law, and it depends upon that law, whether he and his wife acquire it for their joint benefit or for his sole benefit." 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 7, § 8, p. 619 to p. 622. See also Lashley v. Hogg, cited Id. 70. 623 to p. 625; Id. p. 626.

¹ See Fergusson on Marr. and Divorce, 358 to 363; Id. 383, 392 to 422; Huberus, Lib. 1, tit. 3, De Conflict. Leg. § 2; ante, § 111.

² Fergusson on Marr. and Div. 398.

where the parties are domiciled, if the marriage is celebrated elsewhere? Or, if the husband or wife have different domicils, whose is to be regarded? These, and many other perplexing inquiries may be raised; and foreign jurists have not passed them over without examination.¹

§ 192. Where the place of domicil of both the parties is the same with that of the contract and the celebration of the marriage, no difficulty can arise. The place of celebration is clearly then the matrimonial domicil. But, let us suppose, that neither of the parties has a domicil in the place, where the marriage is celebrated; but it is a marriage in transitu, or during a temporary residence, or on a journey made for that sole purpose, animo revertendi; what is then to be deemed the matrimonial domicil?

§ 193. The principle maintained by foreign jurists, in such cases, is, that, with reference to personal rights and rights of property, the actual or intended domicil of the parties is to be deemed the true matrimonial domicil; or, to express the doctrine in a still more general form, they hold, that the law of the place, where at the time of marriage the parties intend to fix their domicil, is to govern all the rights resulting from the marriage. Hence, they would answer the question proposed, by stating, that in such a case the law of the actual domicil of the parties is to govern, and not the place of the marriage in transitu.²

 $^{^1}$ See on this subject, 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 6, § 2, p. 244 to p. 261.

² 2 Boullenois, Obser. 36, p. 260; Pothier, Traité de la Communauté, art. Prélim. n. 14, 15, 16; Voet, de Statut. § 9, ch. 2, § 5, 6, p. 264, edit.

opinion of Mascardus, Bartholus, Bouhier, Pothier, Merlin, and other distinguished jurists.¹

§ 195. Cujas affirms the same doctrine. Sed ex eo contractu mulier migravit in alium locum, id est, talis est contractus, ut ex eo mulier statim migret in alium locum. Ergo non is locus spectatur, sed ille, in quem sit migratio. Hac ratione, mulier non agit, ubi matrimonium contraxit; sed ubi ex matrimonio migravit, divertit, aut aget. And in so doing, he does no more than affirm the very doctrine of the Pandects. Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est; nec enim id genus contractus est, ut eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cujus domicilium et ipsa mulier per conditionem matrimonii erat reditura.

§ 196. Huberus holds very decisive language on the same subject. "But (says he) the place, where a contract is made, is not so exactly to be looked at, but, that, if the parties have in contracting had reference to another place, that is rather to be regarded; Contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit. Therefore, the place of the marriage contract is not so

^{1 2} Boullenois, Obser. 37, p. 260 to p. 265; Pothier, Traité de la Communauté, art. Prélim. n. 14, 15, 16; Bouhier, Cout. de Bourg. ch. 22, § 18 to 28; Merlin, Répert. Autoris. Maritale, § 10, art. 5, p. 244; Id. Communuaté de Biens, § 1, p. 111; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 6, § 2, p. 241 to p. 261.

² Cujas, ad Legem, Exigere dotem, Dig. Lib. 5, tit. 1, 1. 65, Cujacii Opera, Tom. 7, p. 164, edit. 1758. See also Ford's Curators v. Ford, 14 Martin, R. 577; Le Brun, Traité de la Communauté, Liv. 1, ch. 2, § 41; post, § 198.

³ Dig. Lib. 5, tit 1, § 65; Pothier, Pand. Lib. 5, tit. 1, n. 38.

⁴ Dig. Lib. 44, tit. 7, l. 21; Pothier, Pand. Lib. 44, tit. 7, n. 21.

much to be deemed the place, where the nuptial contract is made, as that, in which the parties, contracting matrimony, intend to live. Thus, it daily happens, that men in Friezeland, natives or sojourners, marry wives in Holland, whom they immediately bring into Friezeland. If this be their intention at the time of the contract, there is no community of property, although the marriage contract is silent, according to the law of Holland; but the law of Friezeland in this case is the law of the place of a contract.1 Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die sit, homines in Frisia indigenas aut incolas, ducere uxores in Hollandia, quas inde statim in Frisiam deducunt; idque si in ipso contractu ineundo propositum habeant, non oritur communio bonorum, etsi pacta dotalia sileant, secundum jus Hollandiæ, sed jus Frisiæ in hoc casu est loco contractus.2

§ 197. Le Brun has discussed the question at considerable length, and has arrived at the same conclusion. And he puts the case of a person domiciled in Normandy, where the law of community does not exist, who marries in Paris, without any contract, where the law of community does exist; and he holds, that, if he has not changed his domicil, but returns immediately to Normandy, the law of Normandy will govern, and no community of property will exist between himself and his wife.³

¹ Huberus, Lib. 1, tit. 3, § 10; S. P. Fergusson on Marr. and Div. 174; Voet, De Statut. § 9, ch. 2, § 5, 6, p. 264, 265, edit. 1715; Id. p, 319, 320, edit. 1661.

Huberus, Lib. 1, tit. 3, § 10.

³ Le Brun, Traité de la Communauté, Liv. 1, ch. 2, § 46 to 51, § 55.

§ 198. The same doctrine has been repeatedly acted on by the Supreme Court of Louisiana. In one case of a runaway marriage (already alluded to) in another state by parties domiciled in Louisiana. who immediately afterwards returned, the Court held, as we have seen, that the law of Louisiana governed the marriage rights and property.1 In another case, where the parties were married in one state, intending immediately to remove into another, which intention was consummated, the Court held, that the marriage rights and property were governed by the law of the place of the intended residence. On this last occasion, the Court said; "We think, that it may be safely laid down as a principle, that the matrimonial rights of a wife, who marries with the intention of an instant removal for residence into another state, are to be regulated by the laws of her intended domicil, when no marriage contract is made, or one without any provision in this respect." In the same case, the Court also recognised the general rule, that, where the husband and wife have different domicils, the law of that of the husband is to prevail; because the wife is presumed to follow her husband's domicil.3

§ 199. Under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognised in America, it is not, perhaps, too much to affirm, that a contrary doctrine will scarcely hereafter be established; for in England, as well as in America, in the interpretation of other contracts, the law of the place where they are to

¹ Le Breton v. Nouchet, 3 Martin, R. 60; ante, § 78, 180.

² Ford's Curators v. Ford, 14 Martin, R. 574, 578.

³ Id. 577.

through the instrumentality of a judicial process, and a decree on account of adultery.1 By the civil law an almost unbounded license was allowed to divorces; and wives were often dismissed by their husbands, not only for want of chastity, and for intolerable temper, but for causes of the most frivolous nature.2 In France a divorce may be judicially obtained for the cause of adultery, excess, cruelty, or grievous injuries of either party; and in certain cases by mutual and persevering consent.3 In America an equal diversity of principle and practice exists. In some states, as in Massachusetts and New York, divorces are grantable by judicial tribunals for the cause of adultery.4 In other states divorces are grantable judicially for causes of far inferior grossness and enormity, approaching sometimes almost to frivolousness. In other states divorces can be pronounced by the legislature only, and for such causes, as in its wisdom it may choose from time to time to allow.5

¹ Fergusson on Marr. and Div. 1, 18; Erskine's Instit. B. 1, tit. 6, § 38, 43; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 8, § 1, p. 670 to p. 680.

² 2 Kent, Comm. Lect. 27, p. 102, 103, 3d edit.; 1 Brown, Civ. Law, 89 to 92; 1 Black. Comm. 441; Justin Novelle, 117, ch. 8; Cod. Lib. 5, tit. 17, l. 8; Merlin, Répertoire Divorce, § 2, p. 149, 150; Pothier, Traité de Mariage, art. 463; Van Leeuwen, Comm. B. 1, ch. 15, § 1, 2, 3.

³ Code Civil, art. 229 to 233; Id. 275, &c. — See in Fergusson on Marriage and Divorce, Appendix, 448, the Prussian Code on the subject of Divorce; among others, incompatibility of temper, endangering life or health, is a good cause of Divorce, art. 703.

⁴ This also is the law in Holland, in Prussia, and in the Protestant states of Germany, in Sweden, Denmark, and Russia. Fergusson on Marr. and Divorce, 202.

⁵ See 2 Kent, Comm. Lect. 27, p. 106 to 110; Id. p. 117, 118, 3d edit. See also 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 8, § 1, p. 640 to p. 668, where are brought together in a general review the laws of different nations on the subject of divorce.

domicil of the parties within it, or upon the actual presence or temporary residence of one or both of them at the time, when the process for divorce is instituted. And if, upon any of these grounds, the jurisdiction is sustained, another not less important inquiry is, whether the law of divorce of the place of the marriage, or that of the place, where the suit is instituted, is to be administered by the court, before which the suit is pending.

§ 205. It seems to have been thought, that under the Scottish law it is not necessary to found a jurisdiction for divorce in the courts of Scotland, that both the parties should at the time of the adultery committed, or at the time of the suit brought, have their actual domicil in Scotland. It seems to be sufficient, that the defendant, against whom the suit is brought, is domiciled in that kingdom, so that a citation may be served upon him, and that a divorce under such circumstances may be granted, whether the adultery is committed at home, or in a foreign country. Undoubtedly this doctrine is to be understood with the limitation, that the domicil is real, and not pretended, and that it is bond fide, and not by collusion between the parties for the mere purpose of maintaining the suit and procuring the divorce.1

¹ Fergusson on Marr. and Divorce, Introd. p. 16, 17, 18; Id. p. 51; Id. p. 114, 115, note; St. Aubyn r. Obrien, Id. Appx. p. 276; Id. note B. p. 363 to p. 376; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 8, § 2, p. 672, 674 to 679, 688, 689. See McCarthy v. De Caix, cited in a note to 3 Hagg. R. 642, and in Warrender r. Warrender, 9 Bligh, R. 141, 142; Conway r. Beazley, 3 Hagg. Eccles. R. 639, 645, 646; S. C. reported at large in 2 Russ. & Mylne, 614, 618, 619, 620; Tovey v. Lindsay, 1 Dow, R. 115, 131, 135, 136, 137; S. C. 2 Clarke & Fin. 569, note; post, § 216, 217, 218. See also Warrender r. Warrender, 9 Bligh, R. 89, 144; post, § 226 a to 226 c. — Mr. Chief Justice Gibson in delivering the opinion of the Supreme Court of Pennsylvania, in a case of divorce, used the

§ 206. A learned Scottish jurist, in remarking upon the embarrassments arising out of this state of the law of Scotland, has made the following powerful observations. "These conclusions evident-

following language. "In constructing our international law of divorce, we naturally look for the materials of it in the jurisprudence of our ancestors, whose institutions are more congenial with our own, than those of their continental neighbors, and whose process of forensic discussion is usually more exact. But we find an irreconcilable difference betwixt the decisions of the English, and of the Scottish courts. The English judges acknowledge the legitimacy of no jurisdiction, which is not founded in the law of divorce at the place of the marriage, if it be an English one; while the Scottish, in the other extreme, are willing to found theirs even on a temporary residence of the complainant in the country of the forum. Of the latter pretension, I shall say little more than that it is, in truth, a usurpation of power, to intermeddle in the domestic concerns of a neighbor. If a bona fide domicil, in the strictest sense of the word, were not essential to jurisdiction, there would be nothing to prevent the exhibition of a libel by a proctor, and without the presence even of the complainant. But the respondent's presence would be more essential still; for a sentence against one, who was not subject to the jurisdiction, would be void on the plainest principles of natural law. Moreover, it is not perceived, how the actual presence of both of them could confer jurisdiction of a cause of divorce, which was not, in its inception, subject to the law of the forum. It seems to me the fallacy in the reasoning of the Scottish judges - plausible though it be - consists in their assumption, that divorce is a penalty every where annexed to a breach of the marriage contract, which, like a civil cause of action attendant on the person, may be enforced any where; thus forgetting, that, whether it be a penalty at all, depends not on the Scottish law, as an interpreter or avenger, but on the law of the domicil, or else on the lex loci contractus, which exclusively furnishes the original conditions. The English doctrine, on the other hand, is not more reconcilable to our principle of finite allegiance; for notwithstanding the doubt and manifest inclination of Doctor Lushington in Conway v. Beazlev (3 Hagg. Eccles. R. 369), I take it to be settled by Lolley's case (1 Russ. & Ryan's Crim. Cas. 236), sanctioned in Tovey v. Lindsay (1 Dow R. 124), by the preponderating weight of Lord Eldon's name, that the dissolution of an English marriage, for any cause whatever, can be effected so as to be acknowledged in that country only by English authority. It was indeed intimated in Conway v. Beazley, that the question of jurisdiction in Lolley's case, perhaps, turned on the difference between temporary and permanent residence; but the report certainly

ly demonstrate, that, unless the remedy in this judicature shall be limited, either to that, which the Lex loci contractûs affords, or to that, which the Lex domicilii, taken in the same fair sense, as in questions of succession, might give, the public decrees of the only court of Scotland, which is competent to pronounce one in such consistorial causes, become proclamations to invite all the married, who incline to be free, not in the rest of the British empire alone, but in all countries, where marriage is indissoluble by judicial sentence, to seek that object in this tribunal. Adultery and presence within our territory are the only requisites to found the jurisdiction by citation. What numbers of foreign parties may accept such an offer, and may even commit the crime here, for the very

does not indicate it, and besides, the conclusion attained was an unavoidable consequence of the British tenet of perpetual allegiance. Though an English subject acquire a foreign character from a foreign domicil, insomuch as to be treated as an alien for commercial purposes; though he formally renounce his primitive allegiance, and profess another; he is accounted but as a sojourner while abroad, and England, by the dogma of her government, is his home, and his country still. Holding this dogma, it would be strange did she tolerate foreign interference with her domestic relations within our pale. Insisting on jurisdiction of his person, absent or present, she necessarily regards an attempt to change any one of these as an invasion of her sovereignty; and in that aspect. it cannot be denied, that the matter is within her province and her power; for though the states of marriage is juris gentium, the institution is, undoubtedly, a subject of municipal regulation. And it is this perpetual allegiance to the country, its institutions, and its laws - not an indissolubility of the marriage contract from the presumptive will and reservation of the parties - which is the root of the English doctrine. It truly assumes, that marriage is contracted on the basis of the laws, and that these forbid a British subject to dissolve it by the authority of any other country; but take away the law of perpetual allegiance, and you take away the foundation of the presumptive pledge not to submit the duration of it to foreign action." Dorsey v. Dorsey, 1 Chand. Law Reporter, p. 288, 289.

here. But would they be entitled to come into the Commissary Court, and insist for a dissolution a vinculo matrimonii, merely because their tempers. were not suitable, which, in France, was a ground of divorce, or for any of the numberless reasons for dissolving a marriage, which are allowed by the laws of Prussia? But, if we would not listen to the Lex loci, when it facilitates divorce to a degree, which our law considers as inconsistent with the best interests of society, and as not warranted by the Divine law, on what principle are we to give effect to the Lex loci, which prohibits divorce, even adulterii causa, though permitted in this country under the sanction of the Divine law?"

§ 208. These passages are sufficiently significant, as to the intrinsic difficulties of the subject, looking only to the law of divorce of a single country. But, when we look at the almost endless diversities of foreign continental jurisprudence on the same subject, and the little regard, which is habitually paid in that jurisprudence to the decrees of foreign courts, especially in matters, which concern persons belonging to any other continental sovereignty; it ought not to surprise us, that one nation should hold its own law of divorce of universal obligation and authority, and that another should yield it up in favor of the law of the domicil of the parties.

\$ 209. Upon the continent of Europe there has long existed a known distinction between the Catholics and the Protestants upon the subject of divorce. The former, according to the doctrine of the Romish Church, consider marriage as a sacrament, and in its effects to be governed by the Divine law; and according to their interpretation

mitted by the French law for any cause whatsoever.1

§ 211. Protestants have dealt differently by it.² In Scotland, which proposes on this subject to be governed exclusively by the Scriptures, divorce is allowed for the Scriptural causes, for adultery, and for wilful desertion.³ In many other Protestant countries, it is not treated as indissoluble, except for Scriptural causes; but it may be dissolved for other causes. In England, it is never dissolved, except by an act of Parliament, and for adultery.⁴ In the Protestant continental nations of Europe many other causes of divorce are known; and in America, as we have seen, it is generally treated as a matter of civil regulation.⁵

§ 212. The conflict of laws on the subject of divorce does not seem to have undergone much discussion among the continental jurists; at least I have not been able to trace any systematic examination of the subject in those works which are within my reach, and in which almost all other topics of the conflict of laws are so amply treated. The silence of the French jurists may be accounted for, in a great measure, from the uniformity of operation of the Catholic religion and its canons over all the provinces of that kingdom; from the strong probability, that few cases of foreign divorces be-

¹ Pothier, Traité du Mariage, n. 464.

² Id. n. 465; ante, § 209.

³ Erskine's Instit. B. 1, tit. 6, § 43, 44; Fergusson on Marr. and Div. Appx. note H. p. 423.

⁴ Ante, § 202.

⁵ See 1 Black. Comm. 441; Code Civil of France, art. 229 to 233; Fergusson on Marr. and Div. Appx. note N. p. 448; 2 Kent, Comm. Lect. 27, p. 95 to p. 106, 3d edit.; Van Leeuwen, Comm. B. 1, ch. 15, § 1 to 6.

tween French subjects were ever judicially examined: and from the natural conclusion, that, as in their view Christianity made the marriage union indissoluble, no earthly tribunal, either foreign or domestic, could rightfully pronounce a sentence of divorce. The silence of other Catholic countries may be accounted for in the same way. But it is not so easy to assign a satisfactory reason for the omission of the Protestant countries of the Continent of Europe to discuss the subject at large. It is highly probable, that, in those countries, the parties have been referred to their own matrimonial forum, either to furnish the true rule to expound the contract, or to administer the law of divorce, or for both purposes. This course has not been without example, even in our own country, upon cases bearing a close affinity.1

§ 213. Merlin has treated the question purely as one arising under the French law, either with reference to the allowance of divorces under the legislation of 1792, or with reference to the prohibition of divorces after the restoration of the Bourbons in 1816.2 He asks the question, whether, in virtue of the new law (of 1792), which introduced divorce, a marriage celebrated under the old law, which prohibited divorce, could be dissolved; and vice versa, whether a marriage celebrated after the new law, which permitted divorce, could be dissolved after the promulgation of the law (of 1816), which prohibited divorce.³ He says, that if divorce was, as the state of the parties (Vétat des époux), the im-

^{1 2} Kent, Comm. Lect. 27, p. 108, 3d edit.

² Ante, § 210.

³ Merlin Répertoire, Effet Retroactif, § 3, n. 2, art. 6.

Confl.

²⁷

mediate effect and simple consequence of the marriage, the question might be easily answered. Upon this hypothesis, as the state of the parties, the right of divorce would depend altogether upon the law at the time, when the marriage was celebrated: because then, in the first case put, the contract must be deemed one for an indissoluble union: and in the second case, a contract dissoluble for the proper causes of divorce.2 But, he goes on to state, that divorce does not depend upon the intention of the parties, nor is it a consequence, or interpretation of it. The legislature, in allowing or prohibiting divorce, has regard only to considerations of public order, and not to the mere contract of the parties. They are not permitted by private agreement to change the laws, or to make a marriage dissoluble or indissoluble in contravention of the policy of the state.3 He, therefore, comes to the conclusion, that in a French court a divorce in such case would be granted, or denied, according to the law of France at the time of the snit.4

§ 214. The question, how a marriage in a foreign country between French subjects, or between foreigners, would be affected by a naturalization or domicil in France, is not here touched. In another work, however, treating of moot questions, he has recently discussed the point. He asks, whether French subjects, married in France since the repealing act of 1816, who have abandoned

¹ Merlin, Répertoire, Effet Rétroactif, § 3, n. 2, art. 6, p. 19.

⁹ Ibid

³ Ibid.

⁴ Ibid.

their country, and become naturalized in a country, where divorce is allowed, could institute a suit there, and dissolve their marriage by a decree of divorce pronounced there by mutual consent. He supports the affirmative upon the general reasoning, by which he has sustained the doctrine in the preceding paragraph. It would seem, however, from his own statement, that this is quite an open question in France.

§ 215. It is to the decisions of the English and Scottish Courts, however, that we must look for the most thorough and exact discussion of this subject. From the different nature of the respective laws of England and Scotland upon the subject of divorce, from their national union, and from their constant, easy, and familiar intercourse, the Courts of both countries have been frequently called upon to pronounce very elaborate judgments respecting the jurisdiction and law of divorce in suits and contestations before them.

§ 216. Several questions on this subject have been recently discussed in the Courts of Scotland. One is, whether a permanent domicil of the parties is indispensable to found a jurisdiction in cases of divorce in the Scottish tribunals; or whether a citation given formally to the party defendant, or left at his dwelling-place in Scotland, after he has been forty days there, is sufficient to subject him to the jurisdiction of those courts in a suit for divorce. In the case, in which this question was principally discussed, the marriage was celebrated in England; the husband many years afterwards abandoned his

¹ Merlin, Questions de Droit, Divorce, § 11, p. 350; ante, § 213.

wife, and went to Scotland to reside; and the wife commenced a suit for divorce against her husband in the Scottish Consistorial Court. The Court were of opinion, that as the parties were English, and never cohabited as husband and wife in Scotland, and there was no proof, that the husband had taken up a fixed and permanent residence in Scotland, the suit ought to be dismissed upon the ground of a want of jurisdiction. Upon appeal the decree was reversed by the superior tribunal, and a decree of divorce was ultimately pronounced.¹

§ 217. The leading grounds of the reversal were; "That the relation of husband and wife is a relation acknowleged jure gentium; that the duties, obligations, and rights to redress wrongs incident to that relation, as recognised by the law of Scotland, attach on all married persons living within the territory and subject to that law, wheresoever their marriage may have been celebrated; that jurisdiction, or the right and duty of the Courts of Scotland to administer justice in such matters, over persons not natural born subjects, arises from the person sued being resident within the territory at the time of their citation and appearance, or being duly domiciled, and being properly cited accordingly, at the instance of a person having a sufficient interest and title, and proceeding in due form of law."2 The result of this decision is, that permanent domicil, or the animus remanendi, is not necessary to found the jurisdiction. In several other

¹ Utterton v. Tewsh, Fergusson on Marr. and Divorce, p. 1, to p. 55; Id. p. 56 to p. 67.

² Utterton v. Tewsh, Fergusson on Marr. and Div. p. 155, 56; Id. p. 57 to p. 67.

succeeding cases, the Court have followed up the same doctrine, affirming that a temporary residence is sufficient to found the jurisdiction, notwithstanding the permanent jurisdiction of the parties is in another country.

§ 218. This doctrine has been maintained by the - Scottish judges with great ability and learning, and no one can read their reasoning without admitting its force. It has not, however, been deemed satisfactory in England. In a very important case before the twelve judges (Lolley's case), where English subjects were married in England, and afterwards the husband went to Scotland, and procured a divorce a vinculo there, and then returned to England, and married another wife, it was decided, that the second marriage was void; and the husband guilty of bigamy.2 It has been commonly supposed, that this decision proceeded upon the broad and general ground, that an English marriage is incapable of being dissolved under any circumstances by a foreign divorce; and so it seems to have been understood by Lord Eldon on a later occasion.2 It

Duntze v. Levett, Fergusson on Marr. and Div. p. 68 to p. 167; Edmonstone v. Lockhart, Id. p. 168 to p. 208; Butler v. Forbes, Id. p. 209 to p. 225; Kibblewhite v. Rowland, Id. p. 226 to p. 248; Gordon v. Pye, Id. p. 276 to p. 362; Id. p. 383 to p. 423.

² Lolley's Case, 1 Russ. & Ryan's Cr. Cases, 236. See Warrender v. Warrender, 9 Bligh, R. 122, 123, 127, 128, 129, 130, 139 to 143.

³ Tovey v. Lindsay, 1 Dow, R. 117, 131. See also McCarthy v. De Caix, 1831, cited 3 Hagg. Eccles. R. 642, note; S. C. 2 Russ. & Mylne, 614, 620. — Lord Eldon on this occasion is reported to have used the following language. "Here then we have a case, in which both parties were domiciled in England, and then the husband went to Scotland, where it was said he had a domicil by reason of origin, and his being heir of entail of an estate there, and instituted a suit against his wife, which she said did not affect her in England; and, if his domicil was at Durham, the answer would be sufficient, though the rule of law should

has been suggested, however, that Lord Eldon was not prepared to carry the doctrine to such a length; and certainly there was room in that case for a distinction, founded upon the fact, that neither of the

be admitted, that the domicil of the wife followed that of the husband. But if the jurisdiction by reason of the original domicil could be maintained, it would be attended with the most important consequences to the law of marriage. The decision in the second case appeared rather singular, when connected with the decision in the first. They stated, as a main ground of the judgment in the second cause, that the Respondent was confessedly domiciled in Scotland, and that therefore they had jurisdiction, which appeared to imply a doubt, whether they had jurisdiction in the first cause. If the first cause could be supported, there was no occasion for the second. But, suppose the Respondent were domiciled in Scotland at the time of the alleged acts of adultery there, the question still remained, whether in 1810 he could institute a suit against her with effect, unless she had changed her forum likewise, merely upon the ground of the fiction, which had been stated. This was a question of the very highest importance." Lord Brougham in delivering his own judgment in McCarthy v. De Caix, 2 Russ. & Mylne, 614, 620, said; "I find from the note of what fell from Lord Eldon on the present appeal, that his Lordship labored under considerable misapprehension as to the facts in Lolley's case. He is represented, as saying, he will not admit, that it is the settled law, and that therefore he will not decide, whether the marriage was or not prematurely determined by the Danish divorce. His words are, 'I will not without other assistance take upon myself to do so.' Now, if it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been established. For what was Lolley's case? It was a case the strongest possible in favor of the doctrine contended for. It was not a question of civil right, but of felony. Lolley had bona fide, and in a confident belief, founded on the authority of the Scotch lawyers, that the Scotch divorce had effectually dissolved his prior English marriage, intermarried in England, living his first wife. He was tried at Lancaster for bigamy, and found guilty; but the point was reserved, and was afterwards argued before all the most learned judges of the day, who, after hearing the case fully and thoroughly discussed, first at Westminster Hall, and then at Serjeant's Inn, gave a clear and unanimous opinion, that no divorce or proceeding in the nature of divorce in any foreign country, Scotland included, could dissolve a marriage contracted in England; and they sentenced Lolly to seven years' transportation. And he was accordingly sent to the hulks for one or two years; though in mercy, the

lish marriage utterly void.1 The language of his opinion is so important, that it deserves to be quoted at large. "A case," (says he,) "in which all the parties are domiciled in England, and resort is had to Scotland (with which neither of them have any connexion) for no other purpose, than to obtain a divorce a vinculo, may properly be decided on principles, which would not altogether apply to a case differently circumstanced; as, where, prior to the cause arising, on account of which a divorce was sought, the parties had been bond fide domiciled in Scotland. Unless I am satisfied, that every view of this question had been taken, the Court cannot from the case referred to (Lolley's case) assume it to have been established as a universal rule, that a marriage had in England, and originally valid by the law of England, cannot, under any possible circumstances, be dissolved by the decree of a foreign court. Before I could give my assent to such a doctrine, (not meaning to deny that it may be true,) I must have a decision, after argument, upon such a case, as I will now suppose, viz. a marriage in England, the parties resorting to a foreign country, becoming actually bona fide domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. I am not aware, that that point has ever been distinctly raised; and I think, I may say with certainty, that it has never received any express decision. I believe the course of decision in Scotland up to the present hour has been to consider, that the Scotch Courts have a right

¹ Doctor Lushington in Conway v. Beazley, 3 Hagg. Eccles. R. 639, 645, 646, 647, 653.

general question already hinted at, whether an English marriage between English subjects, being indissoluble by the law of England, can under any possible circumstances be dissolved by a decree of divorce in Scotland. In the next place, whether a marriage in Scotland by English subjects, domiciled at the time in England, is dissoluble under any circumstances by a decree of divorce in Scotland. In the next place, whether, in case of a marriage in England, it will make any difference, that the parties are both Scotch persons, domiciled in Scotland, or afterwards become bonâ fide and permanently domiciled there.

§ 221. Upon these questions the highest tribunals in Scotland have come to the following conclusions. First, that a marriage between English subjects in England, and indissoluble there, may be lawfully dissolved by the proper Scottish Court for a cause of divorce, good by the law of Scotland, when the parties are within the process and jurisdiction of the court; or, in other words, that it is not a valid defence against an action of divorce in Scotland for adultery committed there, that the marriage was celebrated in England. Secondly, that a Scotch marriage by persons, domiciled at the time in England, is dissoluble in like manner by the proper Scottish Court; or in other words, that it is not a valid defence, that the parties were domiciled in England, when the marriage was celebrated in Scotland. Thirdly, that in case of a marriage in England, it will make no difference, that the parties are Scottish persons, domiciled in Scotland, or are afterwards bona fide and permanently domiciled there; or, in other words, that it is not a

fulfil and exercise, or the redress which the violation of those duties, or abuse of those powers, may entitle them to in all other countries. All these functions belong to the law of the country, where they may eventually reside, and to which they unquestionably contract the duties of obedience and subjection, whenever they enter its territories. Even, if it had been the will of the parties by any stipulation, however express, to make the Lex loci the law of their marriage, it would derive no force from that circumstance. of divorce could not be dismissed, because the parties. when intermarrying, had in the most formal manner renounced the benefit of divorce, and had become bound, that their marriage should be indissoluble. would be no objection to a divorce at the instance of a Roman Catholic, that his marriage was to him a sacrament, and, therefore, by its own nature indisso-These are all facta privatorum, and cannot impede or embarrass the steady, uniform course of the jus publicum, which with regard to the rights and obligations of individuals, affected by the three great domestic relations, enacts them from motives of political expediency and public morality; and in no wise confers them as private benefits, resulting from agreements concerning meum et tuum, which are capable of being modified and renounced at pleasure.1

§ 223. If this supposed obligation of indissolubility, resulting from contract, can derive no force from the will of the parties, it cannot derive any from the dictates of the municipal law, where the relation of marriage originated, so as to give it efficacy

¹ Fergusson on Marr. and Divorce, 359, 360; Id. 398, 399, 402.

and servant, among foreigners in this country, Scotland could not be deemed a civilized country; as thereby it would permit a numerous description of persons to traverse it, and violate with utter impunity all the obligations, on which the principal comforts of human life depend. If it assumed jurisdiction, but applied not its own rules, but the rules of the law of a foreign country, the supremacy of the law of Scotland within its own territories would be compromised; its arrangements for domestic comfort would be violated, confounded, and perplexed; and the powers of foreign Courts, unknown to its law and constitution, would be usurped and exercised. In every country the laws relative to divorce are considered of the utmost importance, as positive laws affecting the domestic interests of society; and in some places they are treated as of divine authority. A party domiciled here cannot be permitted to import into this country a law peculiar to his own case, and which is in opposition to those great and important public laws, which are held to be connected with the best interests of Society.3

§ 225. That there is great force in this reasoning, cannot well be denied. For a long time it did not obtain any positive sanction in England; but, as far as judicial opinions went, they were against the doctrine, that an English marriage is dissoluble by a Scottish divorce.⁴ The reasoning, by which this latter view

¹ Fergusson on Marr. and Divorce, 57, 58, 414, 418.

² Id. 398, 402, 403; ante, § 108, 210.

³ Id. 399, 400, 412, 418.

⁴ Lolley's Case, 1 Russ. & Ryan's Cas. p. 236; Tovey v. Lindsay, 1 Dow, R. 124; McCarthy v. De Caix, 3 Hagg. Eccles. R. 642, note; S. C. 2 Russ. & Mylne, 620; 2 Kent, Comm. Lect. 27, p. 116, 117, 3d edit.

was sustained, was to the following effect. The law of the place, where the marriage is celebrated, furnishes a just rule for the interpretation of its obligations and rights, as it does in the case of other contracts which are held obligatory according to the Lex loci contractûs.1 It is not just, that one party should be able at his option to dissolve a contract by a law different from that, under which it was formed, and by which the other party understood it to be governed. If any other rule, than the Lex loci contractus, is adopted, the law of marriage, on which the happiness of society so mainly depends, must be completely loose and unsettled; 2 and the marriage state, whose indissolubility is so much favored by Christianity, and by the best interests of society, will become subject to the mere will, and almost to the caprice, of the parties as to its duration. The courts of the nations, whose laws are most lax upon this subject, will be constantly resorted to for the purpose of procuring divorces; and, thus, not only frauds will be encouraged, but the common cause of morality and religion be seriously injured, and conjugal virtue and parental affection become corrupted and debased.3 Thus, a dissatisfied party might resort to one foreign country, where incompatibility of temper is a ground of divorce; or to another, which admits of divorce upon even more frivolous pretences, or upon the mere consent of both, or even of one of the par-

§ 226. In this manner a nation may find its own

Pergusson on Marr. and Divorce, 283, 284, 285, 311, 312, 313, 318, 325, 335, 339.

⁹ Id. 283, 298, 312.

J. Id. 103, 104, 283, 284, 318, 319, 353, 355, 356.

inhabitants throwing off all obedience to its own laws and institutions, and subverting, by the interposition of a foreign tribunal, its own fundamental policy. Nay, a stronger case may be put of a marriage, deemed, as a sacrament, indissoluble by the public religion of a nation, which is vet dissolved at the will of a foreign nation, in violation of the highest of all human duties, a perfect obedience to the Divine law. There is no solid ground upon which any government can be held to yield up its own fundamental laws and policy, as to its own subjects, in favor of the laws or acts of other countries. Parties contracting in a country, where marriage is indissoluble, voluntarily submit to the jurisdiction and laws of that country, if they are foreigners domiciled there. If they are natural subjects, they are bound by the laws of the country in virtue of the general duty of allegiance. Why then should England permit her subjects, by a foreign domicil, to escape from the indissolubility of a marriage, contracted in England, and thus permit them to defeat a fundamental policy of the realm? 1 Such is a summary of the reasoning on each side of this vexed question.

§ 226 a. The whole subject, however, recently came before the House of Lords in England, upon an appeal from the Court of Session in Scotland, in which the direct question was, whether it was competent for the Scottish courts to decree a divorce between parties domiciled in Scotland, who were

¹ Mr. Chancellor Kent has given an excellent summary of the reasoning on each side in his Commentaries; 2 Kent, Comm. Lect. 27, p. 110 to p. 117, 3d edit. My own duty required me to follow out his doctrine by some additional sketches.

bound to administer the law of Scotland. The Court did not, however, decide, what effect that divorce would have, or ought to have in England, if it should be brought in question in an English court of justice.¹ Lolley's case was a good deal discussed; and without being overturned as to its professed general doctrine, must be now deemed to be greatly shaken, except as a decision upon its own peculiar circumstances.

§ 226 c. But although the general question as to the indissolubility of an English marriage, so far at least, as it could arise in England upon a litigation there, was left undecided, Lord Brougham, in delivering his judgment, went into an elaborate examination of the general principles of international law upon this subject. It cannot, therefore, but be acceptable to the learned reader to have in the subjoined note a summary of the reasoning, by which this distinguished judge maintained the opinion, that upon principles of public law, a divorce from an English marriage, made by a competent Court of a foreign country where the parties are domiciled, ought to be deemed in England to dissolve the marriage, and to confer upon the parties all the rights arising from a lawful dissolution.2

¹ Warrender v. Warrender, 9 Bligh, R. 89; S. C. 2 Clarke & Finell. R. 488.

² His Lordship's reasoning was in substance to the following effect.—
"The general principle is denied by no one, that the lex loci is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying, that there is a comitas shown by the tribunals of one country towards the laws of the other country. Such a thing as comitas or courtesy may be said to exist in certain cases, as where the French Courts inquire, how our law would deal with a Frenchman in similar or parallel circumstances, and upon proof of it, so deal with an Englishman in those circumstances. This is truly a comitas,

the place of its actual celebration shall prevail, not only as to its original validity, but also as to its

yond all doubt such a marriage would there be valid by the lex loci contractus, and incapable of being set aside by any proceedings in that country. But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties. that is, the existence of the contract and its construction. If, indeed, there go two things under one and the same name in different countries - if that which is called marriage is of a different nature in each there may be some room for holding, that we are to consider the thing, to which the parties have bound themselves, according to its legal acceptation in the country, where the obligation was contracted. But marriage is one and the same thing substantially, all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations; because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground, except our holding the Infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same every where. Therefore, all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation, which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country, where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it, according to the principles of the municipal law. which they administer. But it is said, that what is called the essence of the contract must also be judged of according to the lex loci; and as this is somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really petitio principii. It is putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things, which may just as well be reckoned of the essence as this. If it is said, that the parties marrying in England must be taken all the world over to have bound themselves to live, until death, or an Act of Parliament them 'do part;' why shall it not also be said, that they have bound themselves to live together on such terms, and with such mutual personal rights and duties as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that mode of dissolution, some other interesting questions will still remain for decision. In the first place, will

persons married in England and settled in Scotland will be entitled only to the personal rights, which the Scotch law sanctions, and will only be liable to perform the duties, which the Scotch law imposes. Indeed, if we are to regard the nature of the contract in this respect as defined by the lex loci, it is difficult to see, why we may not import from Turkey into England a marriage of such a nature, as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract. The fallacy of the argument, 'that indissolubility is of the essence, appears plainly to be this; it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode, in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country, where the parties reside, and where the contract is to be carried into execution. But at all events this is clear, and it seems to be decisive of the point, that if on some such ground as this a marriage indissoluble by the lex loci is held to be indissoluble every where, so conversely, a marriage dissoluble by the lex loci must be held every where dissoluble. The one proposition is in truth identical with the other. Now, it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery, or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore, a wife married in Scotland might sue her husband in our courts for adultery, or for absenting himself four years, and ought to obtain a divorce a vinculo matrimonii. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that, which is only a matter touching the jurisdiction of the courts, and their power of dealing with the rights and duties of the parties to it. If there were a country, in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there, and uphold a second marriage contracted after such separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained; and yet it is not like, but identical with the proposition, upon which the main body of the Appellant's argument rests, that the question of indisany foreign Court have a right to entertain jurisdiction to decree a divorce for causes justified by the

soluble or dissoluble must be decided in all cases by the lex loci. Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstances of parties belonging to one country marrying in another (which is the case at bar) presents the question in another light. In personal contracts much depends upon the parties having regard to the country, where it is to be acted under, and to receive its execution - upon their making the contract, with a view to its execution in that country. The marriage contract is emphatically one, which parties make with an immediate view to the usual place of their residence. An Englishman marrying in Turkey contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the Appellant's argument) must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is, disagreement, may dissolve the contract. As he marries with a view to English domicil, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In like manner a domiciled Scotchman may be said to contract not an English, but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties looking to residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract, according to the law of that country, their home; a connexion formed for cohabitation, for mutual comfort, protection, and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home, where they are to fulfil their mutual promises, and perform those duties, which were the objects of the union; in a word, their domicil; the place so beautifully described by the civilian — 'Locus, ubi quisque larem suum posuit sedemque fortunarum suarum, unde cum proficiscitur peregrinare videtur quo cum revertitur redire domum.' It certainly may well be urged, both with a view to the general question of lex loci, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicil and its laws; that the contract assumes, as it were, a local aspect, but that, at any rate, if we infer the nature of any mutual obligation from

for a similar cause in case of a domestic marriage? For instance, could a Consistory Court of England

boast was founded not on any legal principle, but upon the fact, that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery, which their warriors had fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the capitis diminutio, that citizenship was indelible and indestructible in the country of his birth. The lex loci must needs govern all criminal jurisdiction from the nature of the thing and the purposes of that jurisdiction. How then can we say, that, when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch Courts can be justified in importing an exception in favor of those, who had contracted an English marriage; an exception created by the English law and to the Scotch law unknown? But it may be said, that the offence being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may, however, be answered, that where a person has his domicil in a given country, the laws of that country, to which he owes allegiance, may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason committed by Englishmen abroad are triable in England and punishable here. Nay, by the bill, which I introduced in 1811, and which is constantly acted upon. British subjects are liable to be convicted of felony for slavetrading in whatever part of the world committed by them. It would no doubt be going far to hold the wife criminally answerable to the law of Scotland in respect of her legal domicil being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force; and without admitting that application, I do not well see, how we can hold, that the Scotch legislature ever possessed that supreme power, which is absolutely essential to the very nature and existence of a legislature. If we deny this application, we truly admit, that the Scottish Parliament had no right to punish the offence of adultery by the penalty of divorce. Nay, we hold, that English parties had a right to violate the Scotch criminal law with perfect impunity in one essential particular; for, suppose no other penalty had been provided by the Scotch law, except divorce, all English offenders against that law must go unpunished. Nay, worse still, all

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entertain a suit for a divorce a vinculo for the cause of adultery in case of a Scottish marriage? Or in

Scotch parties, who choose to avoid the punishment, had only to marry in England, and then the law, the criminal law, of their own country became inoperative. The gross absurdity of this strikes me as bearing directly upon the argument, and as greater than that of any consequences, which I remember to have seen deduced from almost any disputed position. It may further be remarked, that this argument applies equally to the case, if we admit, that the Scotch divorce is invalid out of Scotland. and consequently, that it stands well with even the principles of Lolley's case. In order to dispose of the present question, it is not at all necessary on the one side, to support, or on the other to impeach, the authority of Lolley's Case, or of any other, which may have been determined in England upon that authority. This ought to be steadily borne in mind. The resolution in Lolley's Case was, that an English marriage could not be dissolved by any proceeding in the Courts of any other country, for English purposes; in other words, that the Courts of this country will not recognise the validity of the Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the courtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such a divorce in Scotland, and for Scotch purposes, the Judges gave, and indeed could give, no opinion; and as there would be nothing legally impossible in a marriago being good in one country, which was prohibited by the law of another; so, if the conflict of the Scotch and English law be complete and irreconcilable, there is nothing legally impossible in a divorce being valid in the one country, which the Courts of the other may hold to be a nullity. Lolley's Case, therefore, cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view, that the parties were not only married, but really domiciled, in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicil there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas, here, the domicil of the parties is Scotch, and the proceeding is bond fide taken by the husband in the Courts of his own country, to which he is amenable, and ought to have free access, and no fraud upon the law of any other country is practised by the suit. It must be added, that, in Lolley's Case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland; whereas the marriage now in question was had by a Scotchman and a woman, whom the contract made Scotch, and therefore may be held to have contemplated an execution and effects in

such cases is the remedy to be exclusively pursued in the domestic forum of the marriage? Whoever

Scotland. But although for these reasons, the support of my opinion does not require, that I should dispute the law in Lolley's Case, I should not be dealing fairly with this important question, if I were to avoid touching upon that subject; and as no decision of this House has ever adopted that rule, or assumed its principle for sound, and acted upon it. I am entitled here to express the difficulty, which I feel in acceding to that doctrine - a difficulty, which much deliberation and frequent discussion with the greatest lawgers of the age - I might say both of this and of the last age - has not been able to remove from my mind. If no decision had ever been pronounced in this country, recognising the validity of Scotch marriages between English parties going to Scotland with the purpose of escaping from the authority of the English law, I should have felt it much easier to acquiesce in the decision, of which I am speaking. For then it might have been said consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the government of Scotch questions, ours is an irreconcilable conflict with it, and we cannot permit the positive enactments of our statute-book, and the principles of our common law, to be violated or eluded by merely crossing a river, or an ideal boundary line. Nor could any thing have been more obvious, than the consistency of those, who, holding that no unmarried parties, incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate dectrine, that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground, the decision of all the English Courts have loss since prevented us from taking our stand. They have held both the Consistorial Judges in Compton r. Bearcroft, and those of the common law in Ilderton v. Ilderton, the doctrine uniformly recognised in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage, contracted by English parties in the face and in frank of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting in its consequences, land, and honors, and duties, and mivileges, precisely as does the most lawful and solemn matrimonial contract, entered into among ourselves, in our own churches, according to our ritual, and under our own statutes. It is quite impossible after this to say, that we can draw the line, and hold a foreign law, which we acknowledge all-powerful for making the binding contract to be utterly impotent to dissolve it. Were the sentence of the Scotch Court in 8 declarator of marriage to be given in evidence here, it would be conclusive, that the parties were man and wife, and no exception could be taken to the admissibility, or the effect of the foreign evidence, upon

shall diligently consider these questions, will not find them without serious embarrassment. They are

the ground of the parties having been English, and repaired to Scotland for the purpose of escaping the provisions of the English law. A similar sentence of the same Court, declaring the marriage to be dissolved by the same law of Scotland, is now supposed to be given in evidence between parties, who had married in England. Can it, in any consistency of reason, be objected to the reception, or to the force of this sentence, that the contract had been made, and the parties had resided here? In what other contract of a nature merely personal - in what other transaction between men - is such a rule ever applied - such an arbitrary and gratuitous distinction made - such an exception raised to the universal position, that things are to be dissolved by the same process, whereby they are bound together; or rather, that the tie is to be loosened by reversing the operation, which knit it, but reversing the operation according to the same rules? What gave force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law and by the forms of another country, in which the parties happen to reside, and in whose courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such voidance, release or redemption. But at any rate this is certain, that if the laws of one country and its courts recognise and give effect to those of another, in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws, when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the Courts of this country (and we have some restraints upon certain parties, which come very near prohibition); and suppose a sale of chattels by one to another party, standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong) recognise such a rule, because the Scotch law would affirm it - surely it would follow, that our Courts must equally recognise a rescission of the contract of sale in Scotland by any act, which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract, thus made in this country, and that the objection of its invalidity were waved for some reason: if the party resisting its execution were to produce either a sentence of a Scotch Court, declaring it rescinded by a Scotch matter done in pais, or were merely to produce evidence of the thing so done, and proof of its amounting by the Scotch law to a recission of the contract - I apprehend, that the party, relying on the contract, could never be incidentally treated in the Scottish decisions already alluded to; and the reasoning on each side

heard to say, 'The contract is English, and the Scotch proceeding is impotent to dissolve it.' The reply would be, 'Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it - unumquodque dissolvitur eodem modo, quo colligatur.' Suppose, for another example, (which is the case,) that the law of this country precluded an infant, or a married woman, from borrowing money in any way, or from binding themselves by deed; and that in another country those obligations could be validly incurred; it is probable, that our law and our Courts would recognise the validity of such foreign obligations. But suppose a feme covert had executed a power, and conveyed an interest under it to another feme covert in England, could it be endured, that, where the donee of the power produced a release under scal from the feme covert in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said, that our Courts, having decided the contract of a feme covert to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the feme covert to be valid, if it be valid in the same foreign country? Nor can any attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground, that its effects govern the enjoyment of real rights in England, and that the English law alone can regulate the rights of landed property. For, not to mention, that a Scotch marriage between English parties gives English honors and estates to its issue, which would have been bastard, had the parties married, or pretended to marry, in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower, or arrears of pin money, charged on English property, more immediately, affect real estate here, than a bond, or a judgment released in Scotland according to Scotch forms, discharges real estate of a lien, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate. It appears to me quite certain, that those, who decided Lolley's Case, did not look sufficiently to the difficulty of following out the principle of the rule, which they laid down. At first sight, on a cursory survey of the question, there seems no impediment in the way of a judge, who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear, how the dissolution and the constitution of the contract should come in conflict, though diametrically opposite principles are applied to each. But only mark, how that conflict arises, and how, in fact and in practice,

tutions has always been found extremely difficult; and as we shall hereafter see, has led to the conclusion,

as in England; for the rule in Lolley's Case has no greater force in disqualifying parties from marrying in Scotland, where that is not the rule of law, than the English Marriage Act has in disqualifying infants from marrying without bands published, and yet these may, by the law of England, go and marry validly in Scotland. Indeed, if there be any purely personal disqualification or incapacity caused by the law, and which, more than any other, may be said to travel about with the party. it is that, which the law raises upon a natural status, as that of infancy, and fixes on those, who by the order of nature itself, are in that condition, and unable to shake it off, or by an hour to accelerate its termination. If, in a manner confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find, that manifest and serious inconvenience is sure to result from one view, and very little in comparison from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one, that the greatest hardships must occur to parties, the greatest embarrassment to their rights, and the utmost inconvenience to the Courts of Justice in both countries, by the rule being maintained, as laid down in Lollev's Case. The greatest hardship to parties - for what can be a greater grievance, than that parties living bona fide in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, ay, and unless they can comply with the parliamentary forms in serving notices; - the greatest embarrasment to their rights - for what can be more embarrassing, than that a person's status should be involved in uncertainty, and should be subject to change its nature, as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there? the utmost inconvenience to the Courts - for what convenience can be greater, than that they should have to regard a person as married for one purpose, and not for another - single and a felon, if he marries a few vards to the southward - lawfully married, if the ceremony be performed a few yards to the north - a bastard, when he claims land - legitimate when he sues for personal succession - widow, when she demands the chattels of her husband -his concubine, when she counts as dowable of his land? It is in vain to remind us of the opportunity, which a strict adherence to the lex loci, with respect to dissolution of the contract. would give to violators of our English marriage-law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any question, this argu-

that the safest and best rule is to give remedies only

ment ab inconvenienti might have been urged and set against those other reasons, which I have adduced, drawn from the same consideration. But we have it now firmly established, as the law of the land, and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually, as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance, without incurring any penalty, and to obtain its aid, without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk, infraction, or evasion arising to the English law from supporting Scotch divorces, after having thus given to the Scotch marriages the power of eluding, and breaking, and defying that law for so many years. I have now been commenting upon Lolley's Case on its own principle - that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its Courts. I have felt this the more necessary, because I do not see, for the reasons which have occasionally been adverted to in treating the other argument. how, consistently with any principle, the Judges, who decided the case, could limit its application to England, and think, that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England, without assuming, that the Scotch divorce was void even in Scotland. In my view, of the present question, therefore, it was fit to show, that the Scotch Courts have a good title to consider the principle of Lolley's Case erroneous even as an English decision. This, it is true, their Lordships have not done; and the Judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriagecontract in Scotland only. I must now observe, that, supposing (as may fairly be concluded) Lolley's Case to have decided, that the divorce is void in Scotland, there can be no ground whatever for holding, that it is binding upon the Scotch Courts on a question of Scotch Law. If the cases and the authorities of that law are against it, the learned persons, who administer the system of jurisprudence, are not bound to regard - nay, they are not entitled to regard - an English decision, framed by English judges upon an English case, and devoid of all authority beyond the Tweed. Now, I have no doubt at all, that the Scotch authorities are in favor of the jurisdiction, and support the decision under appeal. But I must premise that, unless it could be shown, that they were the other way, my mind is made up with respect to the principle, that I should be for affirming on that ground of principle alone, if precedent or dicta did not displace the argument. The principle I hold so clear upon grounds to the extent, and in the manner, which the Lex loci justifies and approves.1

§ 228. In America questions respecting the nature and effect of foreign divorces upon domestic marriages, and vica versa, have, as might be expected, not unfrequently been under discussion in our courts. In Massachusetts, in some early cases, the Supreme Court refused to interfere, and grant a divorce, where the parties lived in another state at the time the adultery was charged to have been committed, and the libellant had since that time removed into the state. These decisions seem mainly to have proceeded upon the construction of the local statutes, which conferred jurisdiction upon the Court in matters of divorce; but it was admitted, that the state, to which the parties belonged, had jurisdiction, and could exercise it, if it appeared expedient.² In a later case, where a marriage, celebrated in Massachusetts, had been dissolved in Vermont, upon a suit by the husband for a divorce, for the cause of extreme cruelty of his wife, (a cause inadmissible by the laws of Massachusetts to dissolve a marriage,) it appearing, that the parties had not at the time domicil in Vermont, but any permanent

of general law, that the proof is thrown, according to my view, upon those, who would show the Scotch law to be the other way." I have given his Lordship's reasoning at large, because it seem difficult to admit particular passages, which have been already cited, or will be cited hereafter in other connexions, without impairing its true force. Ante, § 115; post, § 259 b.

¹ See in English Law Magazine, Vol. 6, p. 32, a review of the English law as to Divorces. See on this very point the judgment of Lord Brougham in Warrender v. Warrender, 9 Bligh, R. 115 to 118, cited ante, 5 226 c. note.

² Hopkins v. Hopkins, 3 Mass. R. 158; Carter v. Carter, 6 Mass. R. 269.

but a species of punishment, which the public have placed in the hands of the injured party to inflict, under the sanction, and with the aid of the competent tribunal; operating as a redress of the injury, when, the contract having been violated, the relation of the parties, and their continuance in the marriage state, have become intolerable or vexatious to them, and of evil example to others. The Lex loci, therefore, by which the conduct of married persons is to be regulated, and their relative duties are to be determined, and by which the relation itself is to be in certain cases annulled, must be always referred, not to the place, where the contract was entered into, but where it subsists for the time, where the parties have had their domicil, and have been protected in the rights resulting from the marriage contract, and especially where the parties are, or have been amenable for any violation of the duties incumbent upon them in that relation."1

§ 229 a. In another case the question, as to the jurisdiction to found a suit for a divorce, also arose, and it was held, that ordinarily such a suit cannot be

Barber v. Root, 10 Mass. R. 265.— By the Revised Statutes of Massachusetts, 1835, ch. 76, \S 9, 10, 11, it is declared, that no divorce shall be decreed for any cause, if the parties have never lived together as husband and wife in this state. No divorce shall be decreed for any cause, which shall have occurred in any other state or country, unless the parties had, before such cause occurred, living together as husband and wife in this state. No divorce shall be decreed for any cause, which shall have occurred in any other state or country, unless one of the parties was then living in this state. It is also by another section (\S 39) of the same chapter provided, that when an inhabitant of this state shall go into any other state or country, in order to obtain a divorce for any cause, which had occurred here, and whilst the parties resided here, or for any cause, which would not authorise a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state.

§ 230. In New York, as far as decisions have gone, they coincide with those of Massachusetts. Thus, in a case, where the marriage was in that state, and afterwards the wife went to Vermont, and

certainly did not live in any county of this commonwealth. This suggests another course of inquiry, that is, how far the maxim is applicable to this case, 'that the domicil of the wife follows that of the husband.' Can this maxim be true, in its application to this subject, where the wife claims to act, and by law, to a certain extent and in certain cases, is allowed to act, adversely to her husband? It would oust the Court of its jurisdiction, in all cases, where the husband should change his domicil to another state, before the suit is instituted. It is in the power of the husband to change and fix his domicil at his will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether, and yet she could not libel for a divorce in this State, where, till such change of domicil, they had always lived. He clearly lives in Rhode Island; her domicil, according to the maxim, follows his; she therefore, in contemplation of law, is domiciled there too; so that neither of the parties can be said to live in this commonwealth. It is probably a just view, to consider, that the maxim is founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption, that from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognise a wife, as having a separate existence, and separate interests, and separate rights, in those cases, where the express object of all proceedings is to show, that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicil and home, bed and board being put, a part for the whole, as expressive of the idea of home. Otherwise, the parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicil at will, but not in that of the wife. The husband might deprive the wife of the means of enforcing her rights, and in effect of the rights themselves, and of the protection of the laws of the commonwealth, at the same time, that his own misconduct gives her a right to be rescued from his power on account of his own misconduct towards her. Dean v. Richmond, 5 Pick. 461; Barber v. Root, 10 Mass. R. 260. The place, where the marriage was had, seems to be of no importance. The law looks at the relation of husband and wife, as it subsists and is regulated by our laws, without considering under what law or in what country the marriage was contracted. The good sense of the thing seems to be, if the statute

instituted a suit for divorce there, for a cause not recognised by the laws of New York, against her husband, who remained domiciled in New York, the Supreme Court of the latter state refused to carry the decree into effect in regard to alimony, notwithstanding the husband had appeared in the cause, upon the ground, that, there being no bonâ

will permit us to reach it, that where parties have bona fide taken up a domicil in this commonwealth, and have resided under the protection and subject to the control of our laws, and during the continuance of such domicil, one does an act, which may entitle the other to a divorce, such divorce shall be granted, and the suit for it entertained, although the fact was done out of the jurisdiction, and whether the act be a crime, which would subject a party to punishment or not; that after such right has accrued, it cannot be defeated, either by the actual absence of the other party, however long continued animo revertendi, or by a colorable change of domicil, or even by an actual change of domicil; and that it shall not be considered in law, that the change of domicil of the husband draws after it the domicil of the wife to another state, so as to oust the courts of this state of their jurisdiction, and deprive the injured wife of the protection of the laws of this commonwealth and of her right to a divorce. But where the parties have bona fide renounced their domicil in this state, though married here, and taken up a domicil in another state, and there live as man and wife, and an act is done by one, which, if done in this state, would entitle the other to a divorce, and one of the parties comes into this state, the courts of this commonwealth have not such jurisdiction of the parties, and of their relation as husband and wife, as to warrant them in saying, that the marriage should be dissolved. The case of Barber v. Root, is an authority for saying, that such a divorce would not be valid in New York. It is of importance, that such a question should be regulated, if possible, not by local law, or local usage, under which the marriage relation should be deemed subsisting in one state and dissolved in another; but upon some general principle, which can be recognised in all states and countries, so that parties, who are deemed husband and wife in one, shall be held so in all. So many interesting relations, so may collateral and deprivative rights of property, and of inheritance, so may correlative duties depend upon the subsistence of this relation, that it is scarcely possible to overrate the importance of placing it upon some general and uniform principle, which shall be recognised and adopted in all civilized states."

¹ This does not appear in the statement of facts; but it is averred by counsel, to appear upon the exemplification of the record of the decree

of Vermont. 1 John. R. 431.

fide change of the domicil of the parties, it was an attempt fraudulently to evade the force and operation of the laws of New York.1 The Court. however, abstained from declaring, what was the legal effect of the divorce so obtained. In another case, where the marriage was in Connecticut, and the husband afterwards went to Vermont, and instituted a suit there for a divorce against his wife, who never resided there, and never appeared in the suit, it was held, that the decree of divorce, obtained in Vermont, was invalid, being in fraudem legis of the state, where the parties were married, and had their domicil. It was further held. that the Courts of Vermont could not possess a proper jurisdiction over the case, both parties not being within the state, and the wife not having had any personal notice of the suit.2 What would be the effect of a marriage in Connecticut, a subsequent bonâ fide change of domicil to New York, and then a divorce in Connecticut, both parties appearing in the suit, remains as yet undecided.

§ 230 a. Upon the whole, the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual bona fide domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause, allowed by the local law without any reference to the law of the place of the original marriage, or the place, where the offence, for which the divorce is allowed, was committed. Perhaps the doctrine cannot be

¹ Jackson v. Jackson, 1 John. R. 424.

² Broden v. Fitch, 15 John. R. 121. See 2 Kent, Comm. Lect. 27, p. 108 to p. 118, 3d edit. See also Bradshaw v. Heath, 14 Wend. R. 407.

³ Pawling v. Bird's Ex'ors, 13 John. R. 192, 208, 209.

stated, with more clearness, than in the reasoning of Mr. Chief Justice Gibson, in a recent case. "The law of the place (says he) is necessarily the law of the marriage, for its primitive obligation; but, except on the principle of perpetual submission to its supremacy in all things, it is not the law of the contract for the determination of its dissolubility. Is, then, a rule thus founded, adapted to the jurisprudence of a country, whose law of allegiance is different, and whose asserted right of affiliation in respect to those, whom it admits, on that ground, to its civil and political privileges, divorce among the rest, concedes the same right to every other country? Framed on the basis of this law, the contract implies no perpetuity of municipal regulation. While the parties remain subject to our jurisdiction, the marriage is dissoluble only by our law; when they are remitted to another, it is incidentally remitted along with them. And that consequence must ensue, as well when they are remitted to a jurisdiction entirely foreign, as when they are remitted to that of a sister state; for whatever ultraterritorial force a sentence of divorce, by a Court of competent jurisdiction, may have been thought to gain from the constitutional precept, that the judgment of a state Court is to receive the same faith and credit in every other state as in its own, nothing in the federal constitution or laws has been thought to touch the question of jurisdiction; and the members of the union, therefore, stand towards each other in relation to it, as strangers. With what consistency, then, would naturalized citizens be allowed our law of divorce, if the validity of a divorce by the law of the domicil in a sister state were

disallowed, because the marriage had not the same origin? Transfer of allegiance and domicil is a contingency, which enters into the views of the parties, and of which the wife consents to bear the risk. By sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it; but with this limitation we part not with the remedy of past transgression."

§ 230 b. The incidents to a foreign divorce are also naturally to be deduced from the law of the place, where it is decreed. If valid there, the divorce will have, and ought in general to have all the effects, in every other country, upon personal property locally situated there, which are properly attributable to it in the forum, where it is decreed. In respect to real or immovable property, the same effects would in general be attributed to such divorce, as would ordinarily belong to a divorce of the same sort by the Lex loci rei sitæ. If a dissolution of the marriage would there be consequent upon such a divorce, and would there extinguish the right of dower, or of tenancy by the curtesy, according to such local law, then the like effects would be attributed to the foreign divorce, which worked a like dissolution of the marriage.2

¹ Dorsey v. Dorsey, 1 Chand. Law Reporter, 287, 289.

² Warrender v. Warrener, 9 Bligh, R. 127; ante, § 226 c, note.

CHAPTER VIII.

FOREIGN CONTRACTS.

§ 231. We next come to the consideration of the highly important branch of international juris-prudence, arising from the conflict of laws in matters of contract generally. This subject has been very much discussed, not only by foreign jurists and foreign courts, but in our own domestic tribunals. The general principles, which regulate it, have, therefore, acquired a high degree of certainty; although, upon so complex a topic, many intricate and difficult questions yet remain unsettled.

§ 232. It is easy to see, that, in the common intercourse of different countries, many circumstances may be required to be taken into consideration, before it can be clearly ascertained, what is the true rule, by which the validity, obligation, and interpretation of contracts are to be governed. To make a contract valid, it is a universal principle, admitted by the whole world, that it should be made by parties capable to contract; that it should be voluntary; that it should be upon a sufficient consideration; that it should be lawful in its nature; and that it should be in its terms reasonably certain. But upon some of these points there is a diversity in the positive and customary laws of different na-

¹ See on the subject of this chapter, 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 23, 24, 29; Id. Vol. 3, Pt. 3, ch. 22, p. 749 to p. 780; Fælix, Conflict. des Lois, Reyue Etranger et Français, Tom. 7, 1840, § 39 to 51, p. 344 to p. 365.

tions. Persons, capable in one country, are incapable by the laws of another; 1 considerations, good in one country, are insufficient, or invalid in another; the public policy of one country permits, or favors certain agreements, which are prohibited in another; the forms, prescribed by the laws of one country, to ensure validity and obligation of contracts, are unknown in another; and the rights, acknowledged by one country, are not commensurate with those belonging to another. A person sometimes contracts in one country, and is domiciled in another, and is to pay in a third; and sometimes the property, which is the subject of the contract, is situate in a fourth; and each of these countries may have different, and even opposite laws, affecting the subjectmatter. What then is to be done in this conflict of laws? What law is to regulate the contract, either to determine the rights, or the remedies, or the defences growing out of it; or the consequences flowing from it? What law is to interpret its terms, and ascertain the nature, character, and extent of its stipulations? Boullenois has very justly said, that these are questions of great importance, and embrace a wide extent of objects.5

§ 233. There are two texts of the civil law, which treat of this subject, which have been supposed by Civilians and Jurists to involve an apparent antinomy. One seems to require, that the place where the contract is entered into, should alone govern the contract. Si fundus vænierit, ex consuetudine ejus regionis, in qua negotium gestum est, pro evictione

¹ Ante, § 51 to 90.

⁹ 2 Boullenois, Obser. 46, p. 445.

(Si fundus,) Locus contractûs regit in contractibus, they mean in every thing, which concerns the manner of contracting, the exterior form of the contract. that the law of the domicil is to govern in whatever respects the substance and effects of the acts done.1 However, the generality of French authors have reconciled these laws in a different manner; by considering, that the place of a contract admits of a double meaning, viz. the place, where the contract is entered into, Ubi verba proferuntur, and that, where the contract is to be executed, where payment is to be made, Ubi solutio distinatur.2 They think, therefore, that the Law, Si fundus, is to be understood of the place. where the contract is entered into. Ubi verba prolata sunt; and, that it properly applies to cases, where it is necessary to decide upon the form, either of the proof, or the substance, or the constitution, or the mode of the contract, or of its extrinsic ceremonies or solemnities; and, that the Law, Contraxisse, applies to the case, where the question is respecting the rights, which spring from the contract, of which the exeand performance are referred to another cution place.3

§ 235. Boullenois holds both interpretations unsatisfactory, and insufficient for many occasions; for they suppose, that two places only are to be examined in resolving all questions, the place of the making, and the place of performance of the contract; and in effect, they put aside the law of the place of the situs of the thing (rei situe), and that of the domicil of the parties, which are often

¹ Le Brun, De la Communauté, Liv. 1, ch. 2, § 46.

² 2 Boullenois, Observ. 46, p. 446, 447; post, § 299 to 304.

³ Ibid. See also Everhard. Consil. 78, n. 18, 19, p. 207.

imperative, and on many occasions deserve a preference.1 He adds, that there is another difficulty, which arises in these mixed questions, which is, that the laws in one place affix to certain clauses a certain sense and a certain effect, and the laws of another place give them a sense and an effect, either more extensive. or more restrained.2 He also informs us, that many foreign jurists have warned us against two errors, which constitute the quicksands of the law on this subject, and which are necessary to be avoided.3 One of these errors is the confounding of those things, which belong to the solemnities of the acts, and the effects which result from the nature of the acts, on the one side, with those, which belong to the charges or liens, which spring up after the acts, purely as accidents, on the other side.4 The other, the omission in a proper case to have a due regard or deference to the law of the situs or locality of the thing.5

§ 236. Mævius has given us a warning in this matter against confounding the solemnities of acts and contracts, as well as the effects caused by them, with the charges thereof, and extrinsic accidents, which follow the contracts, but are not in the contracts themselves. Cave, autem, in hæc materia, confundas actuum et contractuum solennia, nec non effectus ac ipsis causatos cum eorum onere, et accidenti extrinseco, quod contractus subsequitur, sed ex non ipsis contractibus est. Id, dum multi ignorant, aut non discernunt,

^{1 2} Boullenois, Observ. 46, p. 447.

² Post, § 275.

^{3 2} Boullenois, Observ. 46, p. 447, 449.

^{4 2} Boullenois, Observ. 46, p. 447, 448, 449.

⁵ 2 Boullenois, Observ. 46, p. 449, 450.

forenses maximè lædunt, et gravantur. So that, according to Mævius, the law of the place of the contract is to govern, first, as to the solemnities of the act or contract; and secondly, as to the effects caused thereby; but as to the charges (onus) and extrinsic accidents, that it is not to govern. Forenses servare teneri statuta et consuetudines loci, ubi aliquid agunt, et contrahunt ad validitatem actus et contractus. Statutum enim actus seu contractus semper attenditur, cui disponentes vel contrahantes se alligare et conformare voluisse censetur. And speaking afterward upon the charges and extrinsic accidents of acts and contracts, he adds; In his enim, quia non spectant ad formam modumque contrahendi, contractum autem extrinsecus subsequuntur, non sectamur statuta loci contractus.3 In this system he is not generally followed; and Boullenois has observed, that it is very difficult to say, what ought to be deemed to belong to the solemnities of contracts; what are the effects caused by them; and what are the charges and extrinsic accidents resulting from them.4

§ 237. Burgundus has offered the following system. In relation to express contracts two things are to be considered, the form and the matter of the contract. (Omnis autem obligandi ratio habeat, necesse est, remet verba, hoc est, formam et materiam.⁵) But he adds, that it is not indiscriminately permitted to contract in all times and places; but it is very often material, with what persons we contract; and all these things

¹ Mævius, ad Jus Lubecense, Quest. Prelim. 4, n. 18, p. 22.

² Mævius, ad Jus Lubecense, Quest. Prelim. 4, n. 11, 13, 14, p. 22.

³ Mævius, ad Jus Lubecense, Quest. 4, n. 18, p. 22; 2 Boullenois, Observ. 46, p. 448, 449, 450.

^{4 2} Boullenois, Observ. 46, p. 447, 448, 449.

⁵ Burgundus, Tract. 4, n. 1, p. 100.

done, the consequence will be, that we are to follow what is usual in the country, where the act took For the law is the common instructor of the whole country, whose voice all hear; and, therefore, every one, who contracts in another province, is not supposed to be ignorant of its customs; but whatever he does not express plainly, he refers to the interpretation of the law, and wills and intends that, which the law itself wills and intends. And all these things may well be said of the solemnities of contracts. Igitur, ut paucis absolvam, quoties de vinculo obligationis vel de ejus interpretatione quæritur, veluti, quos et in quantum obliget, quid sententiæ stipulationes inesse, quid abesse credi oporteat: item in omnibus actionibus, et ambiguitatibus, quæ inde oriuntur, primum ouidem id sequemur, quod inter partes actum erit; aut si non paret, quid actum est, erit consequens, ut id sequamur, quod in regione in qua actum est, frequentatur. Imputandum enim ei est, qui dicit, vel agit, quod apertiùs legem non dixerit, in cujus potestate erat cuncta complecti, et voluntatem suam verbis exprimere. Nec enim stipulator ferendus est, si ejus intersit aliter actum non esse, cùm scire debuerit, id quod à contrahentibus est omissum, suppleri legibus, quæ haud aliter dirigunt humanas actiones, quam corpora nostra luna alternat. Lex enim communis est præceptrix civitatis, cujus vocem cuncti exaudiunt. Et ideo, qui in aliena provincia paciscitur, non credendus est esse consuetudinis ignarus: sedid, quod palam verbis non exprimit, ad interpretationem legum se referre, atque idem velle, et intendere, quod lex ipsa velit. Et hæc quidem cuncta de solemnitate dicta sint.1

¹ Burgundus, Tract. 4, n. 8, p. 105, 106.

est locus actus, non domicilii, non rei sitæ.¹ This last rule, in an especial manner, he applies to contracts, even when they regard property situated in a foreign country. Valet etiamsi, bona in alio territorio sunt sita.²

§ 239. Huberus lays down the following doctrine. All business and acts done in court, and out of court. (or, as we should say, in pais, or judicial,) whether testamentary, or inter vivos, regularly executed in any place according to the law of that place, are valid every where, even in countries, where a different law prevails, and where, if transacted in the like manner, they would have been invalid. On the other hand, business and acts executed in any place contrary to the law of that place, where they are executed, as they are in their origin invalid, never can acquire any And this rule applies not only to persons, who are domiciled in the place of the contract, but to those, who are commorant there. There is this exception, however, to be understood, that if the rulers of another people would be affected with any notable inconvenience thereby, they are not bound to give any effect to such business and transactions. Inde fluit hæc Positio: Cuncta negotia et acta, tam in judicio, quam extra judicium, seu mortis causâ sive inter vivos, secundum jus certi loci rite celebrata, valent, etiam ubi diversa juris observatio viget, ac ubi sic inita, quemadmodum facta sunt, non valerent. E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nus-

¹ 1 Hertii Opera, De Collis. Leg. p. 126, § 10; Id. p. 179, edit 1716.

² 1 Hertii Opera, De Collis. Leg. § 4, p. 126, § 10, edit. 1737; Id. p. 179, 180, edit. 1716; post, 371 a.

dere jus diversi territorii.¹ And he deduces the following general conclusion, that if the law of a foreign country is in conflict with the law of our own country, in which a contract is also entered into, conflicting with another contract, which is entered into elsewhere, in such a case our own law ought to prevail, and not the foreign law. Ampliamus hanc regulam tali extensione. Si jus loci in alio imperio pugnet cum jure nostræ civitatis, in qua contractus etiam initus est, confligens cum eo contractu, qui alibi celebratus est, magis est, ut jus nostrum, quam jus alienum, servemus.²

§ 239 a. Bartolus, on the subject of contracts between foreigners in another country, has expressed himself to the following effect; That we are to distinguish, whether the question is (1.) as to the law or custom, which regulates the solemnities of the contract; or (2.) as to the institution of the remedy; or (3.) as to those things, which belong to the jurisdiction, in executing the contract. In the first case, the law of the place of the contract is to govern; in the second case, the law of the place, where the suit But in the third case, as to those is instituted. things, which arise from the nature of the contract at the time, when it was made, or those, which arise afterwards on account of negligence or delay, the law of the place of the contract is to govern. Quæro quid de contractibus? Pone contractum celebratum per aliquem forensem in hac civitate; litigium ortum est, et agitatur lis in loco originis contrahentis; cujus loci Statuta debent servari, vel spectari? Distingue, aut loquimur de Statuto, aut de consuetudine, quæ respiciunt

^{1 2} Huberus, Lib. 1, tit. 1, § 11.

⁹ Id. tit. 3, § 11.

ipsius contractus solemnitatem, aut litis ordinationem, aut de his quæ pertinent ad jurisdictionem ex ipso contractu evenientis executionis. Primo casu, inspicitur locus contractus. Secundo casu, aut quæris de his, quæ pertinet ad litis ordinationem, et inspicitur locus judicii. Aut de his quæ pertinent ad ipsius litis decisionem; et tunc, aut de his, quæ oriuntur secundum ipsius contractus naturam tempore contractus, aut de his, quæ oriuntur ex post facto propter negligentiam, vel moram. Primo casu, inspicitur locus contractus.

§ 240. Boullenois has discussed this subject in a most elaborate manner; and has laid down a number of rules, which are entitled to great consideration.2 First. The law of the place, where a contract is entered into, is to govern, as to every thing, which concerns the proof and authenticity of the contract, and the faith, which is due to it, that is to say, in all things, which regard its solemnities or formalities.3 Secondly. The law of the place of the contract is generally to govern in every thing, which forms the obligation of the contract (le lien du contrat), or what is called vinculum obligationis.4 Thirdly. The law of the place of the contract is to govern as to the intrinsic and substantive form of the contract.5 Fourthly. When the law has attached certain formalities to the things them-

Bartol. Comment. ad Cod. Lib. 1, tit, 1, l. 1, n. 13, cited also 2 Boullenois, Observ. 46, p. 455, 456.

² Boullenois, Observ. 46, p. 445 to p. 538.— Mr. Henry has laid down the first eight rules of Boullenois, as clear law, without the slightest acknowledgment of the source, whence they are taken, In fact, his Treatise is in substance taken from Boullenois, whose name, however, occurs only one or twice in it.

^{2 2} Boullenois, Observ. 46, p. 458.

⁴ Ibid.

^{5 2} Boullenois, Observ. 46, p. 467.

selves, which are the subject of the contract, the law of their situation is to govern. This rule is applicable to contracts respecting real estate. Fifthly. When the law of the place of the contract admits of dispositions or acts, which do not spring properly from the nature of the contract, but have their foundation in the state and condition of the person, there, the law, which regulates the person, and upon which his state depends, is to govern. Sixthly. In questions, whether the rights, which arise from the nature and time of the contract, are lawful or not, the law of the place of the contract is to govern.3 Seventhly. In questions concerning movable property, of which the delivery is to be instantly made, the law of the place of the contract is to govern.4 Eighthly. If the rights, which arise to the profit of one of the contracting parties, in fact arise under a contract, valid in itself, and not subject to recision, but they arise from a new cause purely accidental, and ex post facto; in this case, the law of the place, where these rights arise, is to govern, unless the parties have otherwise stipulated.⁵ Ninthly. These rules are to govern equally, whether the contestation be in a foreign tribunal, or in a domestic tribunal, having proper jurisdiction over the controversy.6 Tenthly. In questions upon the true interpretation of any clauses in a contract, or in a testament, the accompanying circumstances ought ordinarily to decide them.

^{1 2} Boullenois, Observ. 46, p. 467.

³ 2 Boullenois, Observ. 46, p. 472.

² Ibid; post. § 437.

⁴ Id. Observ. n. 46, p. 475. ⁵ 2 Boullenois, Observ. 46, p. 477. ⁶ Id. Observ. 46, p. 489.

^{7 2} Boullenois, Observ. 46, p. 489. See also Fœlix, Conflict. des Lois, Revue, Etrang. et Franc. Tom. 7, 1840, § 39, p. 344 to p. 346.

§ 241. Without entering farther into the examination of the opinions and doctrines of foreign jurists,1 (a task, which would be almost endless,) we shall now proceed to the consideration of those doctrines, touching contracts made in foreign countries, which appear to be recognised and settled in the jurisprudence of the common law. The law, which is to govern in relation to the capacity of the parties to enter into a contract, has been already fully considered.2 It has been shown, that, although foreign jurists generally hold, that the law of the domicil ought to govern in regard to the capacity of persons to contract;3 yet, that the common law holds a different doctrine, viz. that the Lex loci contractus is to govern.4

§ 242. (1.) Generally speaking, the validity of a contract is to be decided by the law of the place.

¹ The learned reader, who wishes for farther instruction as to the opinions of foreign jurists on all these points, will find many of them collected in 2 Boullenois, Observ. 46, from p. 458 to p. 538.

² Ante, § 51 to 79.

Ante, § 51 to 79.—In addition to the foreign authorities already cited, we may add that of Cochin and D'Aguesseau. The former says, that the subjects of the king of France are always subjects, and they cannot break the bonds, which attach them to his authority; and parties, contracting in a foreign country, cannot possess any capacity to contract, but according to the law of their own country. It is a personal law, which follows them every where. Cochin, Œuvres, Tom. 1, p. 153, 154; Id. 545, 4to. edit.; Ib. Tom. 4, p. 555, 4to. edit. "When" (says D'Auguesseau) "the question is, as to an act purely personal, we consider only the law of the domicil. That alone commands all persons, who are subject to it. Other laws cannot make those capable, or incapable, who do not live within their reach. And this is what Bartolus intended to remark, when he said, Statutum non potest habilitare personam sibi non subjectam." D'Aguesseau, Œuvres, Tom. 4, p. 639, 4to. edit.

^{*} See ante, ch. 4, § 51 to 54; Id. § 100 to 106. See also Male v. Roberts, 3 Esp. R. 163; Thompson v. Ketcham, 8 John. R. 189; Liverm. Diss. p. 34, § 21, p. 35; Id. § 22, 23, 24, p. 38; Id. § 26, 27, p. 40; In. § 31, p. 42; Id. § 33, p. 43, § 35; Andrews v. His Creditors, 11 Louis. R. 464, 476.

where it is made, unless it is to be performed in another country, for, as we shall presently see, in the latter case, the law of the place of performance is to govern.1 If valid there, it is by the general law of nations, jure gentium, held valid every where, by the tacit or implied consent of the parties.2 The rule is founded, not merely in the convenience, but in the necessities, of nations; for otherwise, it would be impracticable for them to carry on an extensive intercourse and commerce with each other. whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation; and the nation. which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state, like that, in which it now exists among savage tribes, among the barbarous nations of Sumatra, and among other portions of Asia, washed by the Pacific. Jus autem gentium (says the Institute of Justinian) omni humano generi commune est; nam, usu exigente, et humanis necessitatibus, gentes humanæ jura quædam sibi consti-

¹ Post, § 280.

² Pearsall v. Dwight, 2 Mass. R. 88, 89. See Casaregis, Disc. 179, § 1, 2; Willing v. Conseequa, 1 Peters, R. 317; 2 Kent, Comm. Lect. 39, p. 457, 458, 3d edit.; De Sobry v. De Laistre, 2 Harr. & John. R. 193, 221, 228; Smith v. Mead, 3 Connect. R. 253; Medbury v. Hopkins, 3 Connect. R. 472; Houghton v. Page, 2 N. Hamp. R. 42; Dyer v. Hunt, 5 N. Hamp. R. 401; Erskine's Inst. B. 3, tit. 2, § 39, 40, 41, p. 514 to p. 516; Trimbey v. Vignier, 1 Bing. New Cas. 151, 159; S. C. 4 More & Scott, 695; Andrews v. Pond, 13 Peters, R. 65; Andrews v. His Creditors, 11 Louis. R. 465; Fergusson v. Fyffe, 8 Clarke & Finn. R. 121; post, § 316 a; Bayley on Bills, ch. (A), 5th edit. by F. Bayley, p. 78; Id. Amer. Edit. by Phillips and Sewell, 1836, p. 78 to p. 86; 1 Burge, Comment. on Col. and For. Law, Pt. 1, ch. 1, p. 29, 30; Whister v. Stodder, 8 Martin, R. 95; Bank of U. States v. Donally, 8 Peters, R. 361, 372; Wilcox v. Hunt, 13 Peters, R. 378, 379; French v. Hall, 9 N. Hamp. R. 137.

found, that it did not, by the law of France, the Court held, that no recovery could be had by the holder upon the note in an English Court. The Court on that occasion said, that the question, as to the transfer, was a question of the true interpretation of the contract, and was therefore to be governed by the law of France, where the contract and indorsement were made.

243. (2.) The same rule applies, vice versa, to the invalidity of contracts; if void, or illegal by the law of the place of the contract, they are generally held void and illegal every where. This would seem to be a principle derived from the very elements of natural justice. The Code has expounded it in strong terms. Nullum enim pactum, nullam conventionemn, ullum contractum, inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente. If void in its origin, it seems difficult to find any principle, upon which any subsequent validity can be given to it in any other country.

§ 244. (3.) But there is an exception to the rule, as to the universal validity of contracts, which is, that no nation is bound to recognise or enforce any contracts, which are injurious to its own interest, or to those of its own subjects. 4 Huberus has ex-

Trimbey v. Vignier, 1 Bing. New Cases, 151, 159; post, § 267, 270.
 Huberus, Lib. 1, tit. 3, De Confl. Leg. § 3, 5; Van Reimsdyk v. Kane,
 Gallis. R. 375; Pearsall v. Dwight, 2 Mass. R. 88, 89; Touro v. Cassin,
 Nott and McCord, R. 173; De Sobry v. De Laistre, 2 Harr. and John.
 R. 193, 221, 225; Houghton v. Page. 2 N. Hamp. R. 42; Dyer v. Hunt,
 N. Hamp. R. 401; Van Schaik v. Edwards, 2 John. Cas. 355;
 Robinson v. Bland, 2 Burr. R. 1077; Burrows v. Jemino, 2 Str. 732;
 Alves v. Hodgson, 7 T. R. 237; 2 Kent, Comm. Lect. 39, p. 457, 458,
 3d edit.; La Jeune Eugenie, 2 Mason, R. 459; Andrews v. Pond, 13
 Peters, R. 65, 78.

³ Cod. Lib. 1, tit. 14, l. 5.

⁴ Greenwood v. Curtis, 6 Mass. R. 376, 379; Blanchard v. Russell, 13 Mass. R. 1, 6; Whiston v. Stodder, 8 Martin R. 95; De Sobry v.

a rule of international law. and it is subject only to the exception, that the contract, to which aid is required, should not, either in itself, or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced." 1 Mr. Justice Best (afterwards Lord Wynford, on another occasion with great force said. that in cases turning upon the comity of nations (comitas inter communitates), it is a maxim, that the comity cannot prevail in cases where it violates the law of our own country, or the law of nature, or the law of God. Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects, contracts against good morals, or against religion, or against public rights, and contracts opposed to the national policy or national institutions, are deemed nullities in every country, affected by such considerations; although they may be valid by the laws of the place, where they are made.

§ 245. Indeed, a broader principle might be adopted; and it is to be regretted that it has not been universally adopted by all nations, in respect to foreign contracts, as it has been in respect to domestic contracts, that no man ought to be heard in a court of justice to enforce a contract, founded in or arising out of moral or political turpitude, or in fraud of the just rights of any foreign nation whatsoever.³ The Roman law contains an affirmation of this whole-

¹ Mr. Justice Porter in Ohio Insur. Company v. Edmonson, 5 Louis. R. 205, 200, 300.

² Forbes v. Cochrane, 2 Barn. & Cres. R. 448, 471.

³ Armstrong v. Toler, 21 Wheaton R. 258, 260; Chitty on Bills, (8th edit.), 1853, p. 143, note; Boucher v. Lawson, Cas. Temp. Hard. 84, 89, 194; Planche v. Fletcher, Doug. R. 250; post, § 255, 257.

some doctrine. Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est.1 Pacta, quæ turpem causam continent, non sunt observanda.2 Unfortunately, from a very questionable subserviency to mere commercial gains, it has become an established formulary of the jurisprudence of the common law, that no nation will regard or enforce the revenue laws of any other country; and that the contracts of its own subjects, made to evade or defraud the laws or just rights of foreign nations, may be enforced in its own tribunals.3 Sound morals would seem to point to a very different conclusion. Pothier has (as we shall presently see) reprobated the doctrine in strong terms, as inconsistent with good faith, and the just duties of nations to each other.4

§ 246. A few cases may serve to illustrate the exceptions under each of the foregoing heads.⁵ First, contracts, which are in evasion or fraud of the laws of a particular country.⁶ Thus, if a contract is made in France, to smuggle goods into America in violation of our laws, the contract will be treated by our courts as utterly void, as an intended fraud upon our laws.⁷ And in such a case, brought into con-

¹ Cod. Lib. 2, tit. 3, 1. 6.

² Dig. Lib. 2, tit. 14, l. 27, § 4. See also 1 Chitty on Comm. and Manuf. ch. 4, p. 82, 83.

³ See Boucher v. Lawson, Cas. Temp. Hard. 85, 89, 194; post, § 256, 257

⁴ Post, § 257.

Many of the cases upon this subject will be found referred to in the argument of Armstrong v. Toler, 11 Wheaton, R. 265, 266.

⁶ See 1 Bell, Comm. § 233 to 247, p. 232 to p. 240, 4th edit.; Id. p. 298 to p. 314, 5th edit.; Kaims on Eq. B. 3, ch. 8, § 1.

⁷ See Holman v. Johnson, Cowper, R. 341; Armstrong v. Toler, 11 Wheaton, R. 258; Cambioso v. Maffit, 2 Wash. Cir. R. 98.

troversy in our courts, it will be wholly immaterial, whether the parties are citizens or are foreigners. So, if a collusive capture and condemnation are procured in our courts in fraud of our laws by foreigners, who are even enemies at the time, their contract for the distribution of the prize proceeds will be held utterly void by our courts; although the acts are a mere stratagem of war. And it will make no difference, that the laws have since been repealed, or that the war has since ceased; for the contract, being clearly in fraud of the laws existing at the time, the execution of it ought not to be enforced by the courts of the country, whose laws it was designed to evade.¹

§ 247. The same principle applies, not only to contracts growing immediately out of, and connected with, an illegal transaction, but also to new contracts, if they are in part connected with the illegal transaction, and grow immediately out of it.² Thus, for example, a man, who, under a contract, made in a foreign country, imports goods for another, by means of a violation of the laws of his own country, is disqualified from founding any action in the courts of that country upon such illegal transaction, for the value, or for the freight of the goods, or for other advances made on them. He is thus justly punished for the immorality of the act; and a powerful discouragement from the perpetration of the act is thus provided.³ And if the

¹ Hannay v. Eve, 3 Cranch, R. 242. See Jaques v. With, 1 H. Black. R. 65; The Springfield Bank v. Merrick, 14 Mass. R. 322.

² Armstrong v. Toler, 11 Wheat. R. 261, 262, See Canaan v. Brice, 3 Barn. & Ald. 179.

³ lbid.

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such as packing them in a particular way, there, the seller is deemed active, and the contract will not be enforced. The same doctrine has accordingly been held in other cases.

§ 252. Huberus puts a case illustrative of the same doctrine. In certain places (says he) particular merchandise is prohibited. If sold there, the contract is void. But, if the same merchandise is sold in another place, where there is no such prohibition, and a suit is brought upon the contract in the place, where the prohibition exists, the buyer will be held liable, (Emptor condemnabitur); because the contract therefor was, in its origin, valid. But, if the merchandise is sold to be delivered in the other place, where it is prohibited, the buyer will not be held liable; because such a contract is repugnant to the law and interest of the country, which made the prohibition.³

§ 253. The result of these decisions certainly is, that the mere knowledge of the illegal purpose, for which goods are purchased, will not affect the validity of the contract of sale of goods, intended to be smuggled into a foreign country, even in the courts of that country; but that there must be some participation or interest of the seller in the act itself.

It is difficult, however, to reconcile this doctrine with the strong and masculine reasoning of Lord Chief Justice Eyre in an important case upon the

¹ Waynell v. Reed, 5 T. R. 599; Lightfoot v. Tenant, 1 Bos. & Pull, 551; Biggs v. Lawrence, 3 T. R. 459; Clugas v. Penelula, 4 T. R. 466; Holman v. Johnson, Cowp. R. 341; post, § 254, and note.

² Ibid.

³ Huber. Lib. 1, tit. 3, De Conflictu Legum, § 5; S. P. Greenwood v. Curtis, 6 Mass. R. 378; Executors of Cambioso v. Assignees of Moffat, 2 Wash. Cir. R. 98.

same subject; reasoning, which has much to commend it in point of sound sense, and sound morals. "Upon the principles of the common law," (said he,) "the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay, the agreement to sell and deliver goods, is, prima fucie, a meritorious consideration to support a contract for the price. But the man, who sold arsenic to one, who, he knew, intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case, because the principle of it will be felt and acknowledged without further discussion. Other cases, where the means of transgressing a law are furnished, with the knowledge, that they are intended to be used for that purpose, will differ in shade more or less from this strong case: but the body of the color is the same in all. No man ought to furnish another with the means of transgressing the law, knowing, that he intended to make that use of them."1 The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswera-

§ 224. The doctrine of Lord Chief Justice Eyre has been expressly adopted in other cases. Thus, on one occasion,² the Court of King's Bench in England, held, that a person, who sold drugs to a

Lightfoot v. Tenant, 1 Bos. & Pull. 351, 356.
 Langton v. Hughes, 1 Maule & Selw. 593.

brewer, knowing, that they were intended to be used in the brewing of beer contrary to an Act of Parliament, was not entitled to recover the money due upon the sale. Lord Ellenborough on that occasion said; "A person, who sells drugs, with a knowledge, that they are meant to be so mixed, may be said to cause or procure, quantum in illo, the drugs to be mixed. So, if a person sell goods with a knowledge, and in furtherance of the buyer's intention to convey them upon a smuggling adventure, he is not permitted by the policy of the law to recover such a sale."1 And the other members of the Court concurred in that opinion. Mr. Justice Bayley added; "If a principal sell articles in order to enable the vendee to use them for illegal purposes. he cannot recover the price. The smuggling cases, which were decided on that ground, are very fa-There are other cases, which adopt the miliar." 2 same general principle of enlightened justice.3 It has, however, been directly denied in some later decisions.4 Whether these last decisions will be sustained. remains a question for the determination of other tribunals. It is difficult to perceive any just or solid ground, upon which a contract is maintainable, or ought to be enforced in the tribunals of a country, which is knowingly entered into in a foreign country, with the subjects of the former country for the sale of goods, which are to be smuggled into it against its

¹ Langton v. Hughes, 1 Maule & Selw. 593.

Ibid.

³ Canaan v. Brice, 3 Barn. & Adolp. 179, 181; Catlin v. Bell, 4 Camp. R. 183.

⁴ Hodgson v. Temple, 5 Taunt. R. 183; Pellicat v. Angell, 2 Cromp. Mees. & Rosc. 311. See also Johnson v. Hudson, 11 East. R. 180.

laws; for the sale thus made is the avowed means to accomplish the illegal end.1

§ 255. There seems at present a strong inclination in the courts of law to hold, that, if a contract is

¹ In Pellicat v. Angell, 2 Cromp. Mees. & Rosc. 311, the case was of a bill of exchange, accepted in France by the defendant, a British subject, payable to the plaintiff, (a Frenchman,) being for the price of goods sold by the plaintiff to the defendant in Paris for the avowed purpose of being smuggled into England. The bill was sued in the English Court of Exchequer. Lord Abinger on that occasion said; "It is perfectly clear, that, where parties enter into a contract to contravene the laws of their own country, such a contract is void; but it is equally clear, from a long series of cases, that, the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this; except indeed, that where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing, that the goods he sells are to be disposed of in contravention of the fiscal laws of another country. It would have been most unfortunate, if it were so in this country, where for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other states. The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there, he must take the consequences of his own act. But it has never been said, that merely selling to a party, who means to violate the laws of his own country, is a bad contract. If the position were true, which is contended for on the part of the defendant, that this appears upon the plea to have been a contract for the express purpose of smuggling the goods, it would follow, that it would be a breach of the contract, if the goods were not smuggled. But nothing of the kind appears upon the plea; it only states a transaction, which occurs about once a week in Paris. The plaintiff sold the goods; the defendant might smuggle them, if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was an essential part." It appears to me that this reasoning is wholly unsatisfactory. The question is not, whether it is a part of the contract with the Frenchman, that the goods shall be smuggled; but whether he does not knowingly cooperate by the very sale, as far as in him lies, to accomplish the illegal intention of a British subject to smuggle his goods contrary to the laws of his country. Can a British tribunal be called upon to enforce such a contract? Can it be called upon to aid a Frenchman to recover a debt, contracted for the purpose of violating British laws? Could a Frenchman, selling poison in France to an Englishman, for the avowed purpose of poisoning the King or Queen of England, recover

made in foreign parts by a citizen or subject of a country for the sale of goods, which he knows at the time are to be smuggled in violation of the laws of his own country, he shall not be permitted to enforce it in the courts of his own country, although the contract of sale is complete, and might be enforced in the like case of a foreigner. The true doctrine would seem to be, to make no distinction whatsoever between the case of a sale between citizens or subjects, and the case of a sale between foreigners; but to hold the contract in each case to be utterly incapable of being enforced at least in the courts of the country, whose laws are thus designedly sought to be violated. Sound morals and a due regard to international justice seem equally to approve such a conclusion.

§ 256. Pardessus has asked the question, whether, if Frenchmen have entered into a contract abroad, forbidden by the laws of the place, where it is made, they can insist upon its execution in France; as for example, a contract for contraband trade, or smuggling against the laws of that country. And he has answered, that he rather thinks they may; since this offence is only a violation of the law of the

on such a contract in England? In Wetherell v. Jones, (3 Barn. & Adolp. R. 225,) Lord Tenterden said; "When a contract, which a plaintiff seeks to enforce, is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect. And there are numerous cases in the Books, where an action on a contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, or sound policy." Can a contract be fit to, be entertained in a British Court, whose very object is to aid in a violation of British laws, and policy, and morals?

¹ Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 T. R. 466; Weymell v. Reed, 5 T. R. 599; Eunomus, Dial. 3, § 67; Executors of Cambioso v. Assigness of Moffat, 5 Wash. Cir. R. 98.

⁹ Ante, § 244, 245.

foreign state; and governments in this respect exercise a sort of mutual hostility; and, without openly favoring enterprises of a contraband nature, they do not proscribe them.1 But this doctrine of Pardessus is certainly a departure from the general principle, that the validity of contracts depends upon the Lex loci contractûs; for, in the case supposed, the contract is clearly void by the laws of the country, where it is made. Huberus holds a doctrine somewhat different, and approaching nearly to sound principles. If (says he) goods are secretly sold in a place where they are prohibited, the sale is void ab initio, and no action will lie thereon, in whatever country it may be brought, nay not even to enforce the delivery thereof; for if there had been a delivery thereof, and the buyer should refuse to pay the price. he would be bound not so much by the contract as by the fact of having received the goods, and so far he would enrich himself at the expense and loss of another.2

§ 257. It might be different, according to the received, although it should seem upon principle indefensible, doctrine of judicial tribunals, if the contract were made in some other country, or in the foreign country, to which the parties belong; for (as we have seen)³ it has been long laid down as a settled principle, that no nation is bound to protect, or to regard the revenue laws of another country; and, therefore, a contract made in one country by subjects or residents there to evade the revenue laws of another country, is not deemed

^{1 5} Pardemus, art. 1492.

² Hub. De Conflic. ch. 3, § 5.

³ Ante, § 245.

illegal in the country of its origin.¹ Against this principle Pothier has argued strongly, as being inconsistent with good faith, and the moral duties of nations.² Valin, however, supports it; and Emerigon defends it upon the unsatisfactory ground, that smuggling is a vice common to all nations.³ An enlightened policy, founded upon national justice, as well as national interest, would seem to favor the opinion of Pothier in all cases, where positive legislation has not adopted the principle, as a retaliation upon the narrow and exclusive revenue system of another nation.⁴ The contrary doctrine seems

¹ See Boucher v. Lawson, Cas. Temp. Hard. 84, 89, 194; Holman v. Johnson, Cowper R. 341; Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 T. R. 466: Ludlow v. Van Rensaellaer, 1 John. R. 94; Lightfoot v. Tenant, 1 Bos. and Pull. 551, 557; Planché v. Fletcher, Doug. R. 251; Lever v. Fletcher, 1 Marsh. Insur. 58 to 61, 2d edit.

² Pothier, Assur. n. 58.

³ 2 Valin, Comm. art. 49, p. 127. 1 Emérig. ch. 8, § 5, 212, 215, (p. 215 to 218, edité par Boulay-Paty.) and see note of Estrangin to Pothier, Assur. n. 58; 1 Marsh, Ins. ch. 3, § 1, p. 59, 60, 2d edit.

⁴ It is gratifying to find, that Mr. Marshall and Mr. Chitty have both taken side with Pothier on this point. The following passage from a work of the latter expounds the reasoning with considerable force. "There is something in these decisions, to which a liberal mind cannot readily assent; and the impropriety of them seems to have been hinted at by Lord Kenyon, in the before-mentioned case of Weymell v. Reed. It is impossible not to feel a greater inclination towards the opinion of Pothier, who observes, 'that a man cannot carry on a contraband trade in a foreign country, without engaging the subjects of that country to commit an offence against the laws, which it is their duty to obey; and it is a crime of moral turpitude to engage a man to commit a crime; that a man, carrying on commerce in any country, is bound to conform to the laws of that country; and therefore to carry on an illicit commerce there, and to engage the subjects of that country to assist him in so doing, is against good faith; and consequently a contract made to favor or protect this commerce is peculiarly unlawful, and can raise no obligation. If our law be instifiable in protecting these transgressions, it can be only on the plea of necessity. But where is the necessity? Shall we be told, that it is impossible to ascertain in the English courts the complex provisions of another country's revenue law? Surely this argument can avail but little, when it is recollected, that in all cases, where the argu-

however, firmly established in the actual practice of modern nations without any such discrimination, too firmly, perhaps, to be shaken except by some Legislative Act abolishing it.

§ 258. (2) The second class of excepted contracts comprehends those against good morals, or religion, or public rights. Such are contracts made in a foreign country for future illicit cohabitation and prostitution; 2 contracts for the printing or cir-

ment is not convenient, the law of another country, however complex, is the rule, by which contracts negotiated in that country are tried and construed. It may be true, that the rule of our law was adopted by way of retaliation for the illiberal conduct of other states, and is continued from a cautious policy. But a cautious policy in a great state is but too often a narrow policy; and, after all, the best policy for a state, as well as for an individual, will perhaps be found to consist in honesty and honorable conduct. Indeed the system is so directly opposite to the clear principles of right feeling between man and man, that nothing could have withheld the states of Europe from concurring for its total abrogation, except the smallness of the gain or loss, that attends upon it." 1 Chitty on Commerce and Manuf., p. 83, 84; 1 Marshall Insur. 59 to 61, 2d edit. Mr. Chancellor Kent has also added his own high authority in favor of the rule of Pothier. He has observed; "It is certainly matter of surprise and regret, that in such countries as France, England, and the United States, distinguished for a correct and enlightened administration of justice, smuggling voyages, made on purpose to elude the laws, and seduce the subjects of foreign states, should be countenanced, and even encouraged, by the Courts of justice. The principle does no credit to the commercial jurisprudence of the age." 3 Kent, Comm. Lect. 48, p. 266, 267, 3d edit. See also La Jeune Eugenie, 2 Mason, R. 459, 461.

1 1 Bell, Comm. § 232, p. 232 to p. 242, 4th edit; Id. p. 297 to p. 314, 5th edit.

² See 1 Selwyn's Nisi Prius, Assumpsit, p. 59, 60; Walker v. Perkins, 3 Burr. 1568; Greenwood v. Curtis, 6 Mass. R. 379; Birmington v. Wallis, 4 Barn. and Ald. 650; Lloyd v. Johnson, 1 Bos. and Pull. 340; Jones v. Randall, Cowp. R. 37; Appleton v. Campbell, 2 Carr. and P. 347; De Sobry v. De Laistre, 2 Harr. and John. R. 193, 228.—Lord Mansfield, in the case of Robinson v. Bland, 2 Burr. 1084, puts the very case. In many countries (says he) a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here; but that could never be allowed in this country. Therefore, the lex loci cannot in all cases govern and direct.

culation of irreligious and obscene publications; contracts to promote or reward the commission of crimes; contracts to corrupt, or evade the due administration of justice; contracts to cheat public agents, or to defeat the public rights; and in short, all contracts, which in their own nature are founded in moral turpitude, and are inconsistent with the good order and solid interests of society.¹ All such contracts, even though they might be held valid in the country, where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice are allowed to have their due force and influence in the administration of international jurisprudence.

§ 259. (3.) The next class of excepted contracts comprehends those, which are opposed to the national policy and institutions. For example, contracts made in a foreign country to procure loans in our own country, in order to assist the subjects of a foreign state in the prosecution of war against a nation with which we are at peace; for such conduct is inconsistent with a just and impartial neutrality; contracts entered into with a foreign government or its agents, (such as for a loan of money) such government being a new government, unacknowledged by our own government, to which the party, entering into the contract, belongs; for a like rule of public policy applies to such cases; contracts entered into by our own citizens or others

¹ See Com. Dig. Assumpsit, F. 7; Smith v. Stotesbury, I W. Bl. 204; S. C. 2 Burr. 924; Foxes v. Johnnes, 4 Esp. R. 97; Willis v. Baldwin, Doug. R. 450; Walcot v. Walker, 7 Vesey, R. 1; Southey v. Sherwood, 2 Morivale, 435, 441; Lawrence v. Smith, Jacob, R. 471, 474, note; Jones v. Randall, Cowp. R. 37; Fergusson on Marr. and Div. 396, 397.

² De Weitz v. Hendricks, 9 Moore, R. 586; S. C. 2 Bing. R. 314.

³ Thompson v. Powles, 2 Simons, R. 194. See also Jones v. Garcia del Rio, 1 Turner and Russ. R. 299.

in violation of a monopoly, granted by our own country to particular subjects thereof;¹ contracts by our own citizens or others to carry on trade with the enemy, or to cover enemy property, or to transport goods contraband of war;² contracts to carry into effect the African slave trade, or the rights of slavery, in countries, which refuse to acknowledge its lawfulness, at least if entered into by subjects of, or residents within, such countries.³ In all such cases the contracts would, or might be, held utterly void, whatever might be their validity in the country, where they are made, as being inconsistent with the duties, the policy, or the institutions, of other countries, where they are sought to be enforced.⁴

¹ Pattison v. Mills, 1 Dow and Clarke, R. 342.

² I Marshall, Insur. B. 1, ch. 3, § 3, p. 78, § 4, p. 85, 2d edit.; Griswold v. Waddington, 16 John. R. 438; 2 Wheaton, R. Appendix, 35; Richardson v. Maine Ins. Co. 6 Mass. R. 102, 110, 112, 113; Musson v. Fales, 16 Mass. R. 332; Coolidge v. Inglee, 13 Mass. R. 26.

³ See Somerset's Case, Lofft's R. 1; 20 Howell's State Trials, 79; Fergusson on Marr. and Div. 396, 397; Madrazo v. Willes, 3 Barn. and Ald. 353; Forbes v. Cochrane, 2 Barn. and Cresw. 448; and especially the opinion of Best, J .- I am not unaware of the bearing of the case of Greenwood v. Curtis, 6 Mass. R. 358, on this point; and without undertaking to examine its authority, it may be sufficient to say, that it is not without difficulty in its principles and application, as will abundantly appear from the elaborate argument of Mr. Justice Sedgwick in the same case (Id. 362, n.), and the later reasoning of Mr. Justice Best in Forbes v. Cochrane, 2 Barn. and Cresw. 448. I have given, in the text, what seems to me to be the just doctrine resulting from the modern cases, without meaning to assert, that the authorities cited are fully in point. Ante, § 96 a. Mr. Chief Justice Shaw, arguendo, in the case of Commonwealth v. Aves (Ante, § 96 a, p. 93, note,) held, that a suit brought here upon a note of hand, given in a state, where slavery was allowed, for the price of a slave, might be maintainable in our courts, and that the consideration would not be invalidated upon the ground of the consideration. It may be so here; but this doctrine, as one of universal application, may admit of question in other countries, where slavery may be denounced as inhuman and unjust, and against public policy.

^{4 1} Bell, Comm. § 234 to § 250, p. 232 to p. 240, 4th edit.; Id. p. 298 to p. 314, 5th edit.

§ 259 a. A case, illustrative of the same principle, but of far less repugnancy to the policy and interests of the particular country, where the rights under a contract are sought to be enforced, occurred in Louisiana. A debtor in another state made a contract, and transferred his property to certain creditors in preference to his general creditors, which were not deemed by the laws of that state fraudulent in regard to the latter creditors; he afterwards came to Louisiana, and was arrested there: and he then by petition sought the benefit of the insolvent laws of Louisiana, by those laws such a preference would be fraudulent; and would deprive the debtor of the benefit of a discharge under the insolvent acts of the state. The Court held, that as the debtor sought the benefit of the Louisiana laws. he could entitle himself to it only by showing a compliance with all their provisions; and that the preference, so given being fraudulent by those laws, he was not entitled to the discharge. On that occasion the Court said; "But it is said, that if we put such a construction upon the act, we give an extra-territorial operation to our law, by treating, as null, contracts sanctioned by the Lex loci, and regarding as fraudulent those transactions, which were in fact not only legal, but meritorious. To this it may be answered, that we leave those contracts undisturbed, and take cognizance of them no further, than as the voluntary disposition of property in reference to our own insolvent laws, when the insolvent seeks an extraordinary remedy, to which he would not be entitled by the law of his domicil; that of being declared exonerated from the payment of his remaining debts, on the assignment of the remainder of his effects. We look at them only so far, as they

form a condition, upon which depends his right to be discharged, and consequently as pertaining to the remedy sought for. It is further urged, that the acts, spoken of in the statute, must be shown to have been done in contemplation of taking the benefit of the act, and, that it cannot be supposed, that Andrews had in view the bankrupt laws of Louisiana, when he made these assignments in Alabama. Taken in their literal sense, it is certainly difficult, if not impossible, to give any legal effect to these expressions, without resorting to the extravagant supposition, that the insolvent had procured his own arrest, by colluding with some one creditor, and, that he had done other acts, which would tend to defeat his own project. But the charge prayed for does not omit those expressions, and it is not now our duty to inquire, in what sense they are to be understood, and whether, by the general principles of our law, all contracts of the kind spoken of. within three months preceding insolvency, between debtor and creditor, be not presumed to be in fraud of other creditors,"1

§ 259 b. A case of a more difficult character, if indeed it be not of a more questionable character, is one put by Lord Brougham, arguendo, in the course of one of his judgments. Speaking upon the point, that the Lex loci contractûs is the governing rule in deciding upon the validity or invalidity of all personal contracts, he said; "Thus, a marriage, good by the laws of one country, is held good in all others, where the question of its validity may arise. For why? The question always must be; Did the parties intend to contract marriage? And if they did, what in the

¹ Andrews v. His Creditors, 11 Louis. R. 464, 479.

place, they were in, is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain qualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case, that the parties are absolutely incapable of the consent required to make the contract, and in the other case, that they are incapable, until they, have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not, perhaps, in certain cases, which may be put, be found very willing to act upon it throughout. Thus, we should expect, that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation; because would clearly be avoidable in this country. I strongly incline to think, that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the Lex loci contractûs, and incapable of being set aside by any proceedings in that country." 1

§ 260. (4.) Another rule, naturally flowing from, or rather illustrative of, that already stated, respecting the validity of contracts, is, that all the formali-

¹ Warrender v. Warrender, 9 Bligh, R. 111, 112; post, § 226 c.

ties, proofs, or authentications of them, which are required by the Lex loci are indispensable to their validity every where else.1 And this is in precise conformity to the rule laid down on the subject by Boullenois.2 Il faut, par rapport à la forme intrinse que et constitutive des actes, suivre encore la loi du contrat. Quand la Loi exige certaines formalites, lesquelles sont attachées aux choses memes, il faut suivre la loi de la situation.3 Burgundus has expressed the same doctrine in very pointed terms. Et quidem in scriptura instrumenti, in solemnitatibus, et ceremoniis, et generaliter in omnibus, quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis, ubi fit negotiatio.4 Dumoulin says; Aut statutum loquitur de his, quæ concernunt nudam ordinationem vel solemnitatem actus; et semper inspicitur statutum vel consuetudinem loci, ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis, aut aliis conficiendis.5 And again : In concernentibus contractum, et emergentibus, spectatur

See ante, § 123; 1 Burge, on Comment. on For and Col. Law, Pt. 1, ch. 1, p. 29, 30; 3 Burge, Comm. Pt. 2, ch. 20, p. 752 to p. 764; Fælix, Conflit. des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 40, to § 51, p. 346 to p. 360; Warrender v. Warrender, 9 Bligh, 111; ante, § 259 c.

² Erskine's Inst. B. 3, tit. 2, § 39, 40, 41, p. 514, 515; Boullenois, Quest. Mixt. p. 5; Bouhier, Cout. de Bourg. ch. 21, § 205; 2 Boullenois, Observ. 46, p. 467; ante, § 240; 1 Hertii Op. De Collis. Leg. § 4, n. 59, edit. 1737; Id. p. 209, edit. 1716. See also Voet, ad Pand. Lib. 5, tit. 1, § 51; 1 Boullenois, Observ. 23, p. 523; Id. p. 446 to p. 466; Henry on Foreign Law, 37, 38; Id. 224; 5 Pardessus, Droit. Comm. art. 1485; Mr. Justice Martin, in Depau v. Humphreys, 20 Martin, R. 1, 22; ante, § 122, § 259 b; post, § 299 a.

³ 2 Boullenois, Observ. 46, p. 467; ante, § 240; 1 Boullenois, Observ. 23, p. 491, 492.

⁴ Burgundus, Tract, 4, n. 7, n. 29; post, § 300 a; 2 Boullenois, Observ.

Molin, Opera, Comment. Cod. Lib. 1, tit. 4, l. 1, Conclus. de Statut. Tom. 3, p. 554, edit. 1681; post, § 441, 479 k.

locus, in quo contrahitur; et in concernentibus meram solemnitatem cujuscunque actus, locus, in quo ille celebratur. Casaregis says: Communissima enim est distinctio, quod aut disseritur de modo procenendi in judicio, aut de juribus contractus, cui robur et specialis forma tributa est a statuto, vel a contrahentibus. Et in primo casu attendendum sit statutum loci, in quo judicium agitatur; in secundo, vero, casu attendatur statutum loci, in quo fuit celebratus contractus.2 Hertius is still more direct. Si Lex actui formam dat, inspiciendus est locus actûs, non domicilii. non rei sitæ; id est, si de solemnibus quæratur, si de loco, de tempore, de modo actus, ejus loci habenda est ratio, ubi actus sive negotium celebratur.3 Christinæus, Everhardus, and other distinguished jurists, adopt the same doctrine.4 And it seems fully established in the common law. Thus, if by the laws of a country a contract is void, unless it is written on stamp paper, it ought to be held void every where; for unless it be good there,

¹ Molin. Opera, tit. 1, De fiefs, § 12, Gloss. 7, n. 37, Tom. 1, p. 224. edit. 1681.

² Casaregis, Disc. Comm. 179, n. 59.

³ Hertii Opera, Collis. Leg. § 4, n. 10, p. 126; Id. n. 59, p. 148, edit. 1737; Id. p. 179, p. 209, edit. 1716; post, § 3, 8, 10, 11. See also Cochin, Œuvres, Tom. 1, p. 72, 4to. edit.; Id. Tom. 3, p. 26; Id. Tom. 5, p. 697; D'Aguesseau, Œuvres, Tom. 4, p. 637, 722, 4to. edit.

⁴ Everhard. Consil. 72, n. 11, p. 206; Id. n. 18, p. 207; Id. 27, p. 209; post, § 300 b; Christin. Decis. 283, Vol. 1, p. 355, n. 1, 4, 5, 8, 9, 10, 11; post, § 300 c; Molin. Comment. ad Consuet. Paris. tit. 1, § 12, Gloss. 7, n. 37, Tom. 1, p. 224; post, § 300 d; 2 Boullenois, Observ. 46, p. 460, 461; ante, § 122. — Dumoulin pushes the doctrine further, and says; Et est omnium Doctorum sententia, ubicumque consuetudo, vel statutum locale, disponit de solemnitate, vel formà actus, ligari etiam exteros ibi actum illum gerentes, et gestum esse validum, et efficicacem ubique, etiam super bonis solis extra territorium consuetudinis. Molin. Consil. 53, § 9; Molin. Oper. Tom. 2, p. 965, edit. 1681; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 865, 866; post, § 441.

to the admissibility of other proof of the contract in the foreign court, where a suit was brought to enforce it; or if the contract concerned real or immovable property, situated in another country, whose laws are different, respecting which, as we shall presently see, there is a difference of opinion among foreign jurists, although in England and America the rule seems firmly established, that the law rei sitæ, and not that of the place of the contract, is to prevail.²

§ 260 a. So, where the forms of public instruments are regulated by the laws of a country, they must be strictly followed, to entitle them to be held valid elsewhere. As, for example, if a protest of a bill of ex-

country was, in order to ascertain, whether the instrument was, or was not, valid." With great submission to his Lordship, this reasoning is wholly inadmissible. The law is as clearly settled, as any thing can be, that a contract, void by the law of the place, where it is made, is void every where. Yet, in every such case, whatever may be the inconvenience, courts of law are bound to ascertain, what the foreign law is. And it would be a perfect novelty in jurisprudence to hold, that an instrument, which, for want of due solemnities in the place, where it was executed, was void, should yet be valid in other countries. We can arrive at such a conclusion only by overturning well established principles. The case alluded to, before Lord Hardwicke, was probably Boucher v. Lawson, (Cases T. Hard. 85,); Id. 194, which was the case of a contract between Englishmen, to be executed in England, to carry on a smuggling trade against the laws of Portugal. Lord Hardwicke said, that such a trade was not only a lawful trade in England, but very much encouraged. The case is wholly distinguishable from the present case; and from that of any contract made in a country and to be executed there, which is invalid by its laws. A contract made in Portugal by persons domiciled there, to carry on smuggling against its laws, would, or ought to be held void every where. See also 3 Chitty on Comm. and Munf. ch. 2, p. 166.

¹ Ludlow v. Van Rensselaer, 1 John. R. 93; James v. Catherwood, 3 Dowl. & Ryl. 190. See Clarke v. Cochran, 3 Martin, R. 358, 360, 361; Brown v. Thornton, 6 Adolp. & Ellis, R. 185; Yates v. Thompson, 3 Clarke & Fin. R. 544.

² Post, § 363 to 373, 435 to 445; Fœlix, Confl. des Lois. Revue Etrang. et Franc. Tom. 7, 1840, § 40 to 50, p. 346 to p. 359.

change, made in another state, is required by the laws of that state to be under seal, a protest, not under seal, will not be regarded as evidence of the dishonor of the bill.¹

§ 261. The ground of this doctrine, as commonly stated, is, that every person, contracting in a country, is understood to submit himself to the law of the place, and silently to assent to its action upon his contract. Paul Voet has expressed it in the following language. Quid si de contractibus proprie dictis, et quidem eorum solemnibus contentio; quis locus spectabitur, an domicilii contrahentis, an loci, ubi quis contrahit? Respondeo, affirmanter; Posterius. Quia censetur quis, semet contrahendo, legibus istius loci, ubi contrahit, etiam ratione solemnium subjicere voluisse. Ut quemadmodum loci consuetudo subintrat contractum, ejusque est declarativa ita etiam loci statutum.² It would, perhaps, be more

¹ Ticknor v. Roberts, 11 Louis. R. 14; Bank of Rochester v. Gray, 2 Hill N. Y. Rep. 227.

P. Voet, De Stat. § 9, ch. 2, n. 9, p. 267; Id. p. 323, edit. 1661; Cochin, Œuvres, Tom. 5, p. 697, 4to. edit.; Fergusson on Marr. and Div. 397; 2 Boullenois, Observ. 46, p. 475, 476; Id. 500, 501, 502; Casaregis Disc. 179, § 56; ante, § 122. - Boullenois, and some other jurists contest the universality of this presumed assent to the law of the place of the contract; and assert, that the principle generally and broadly taken, généralement et cruement (nuditer et indistincte,) is not correct. But where no other place of performance is pointed out, it seems difficult to see, what other law is to govern. See 2 Boullenois, Observ. 46, p. 457, 458, 459; Id. 501, 502 to 518; Bouhier, Cout. de Bourg. ch. 21, § 191, 192; Voet, De Stat. § 9, ch 2, § 10, p. 269 ; Id. p. 325, edit. 1661. Hertius even goes so far as to say, that the law of the place of a contract does not govern, where the party is a stranger, ignorant of its laws; "Non valet, si externs ignoravit statutum." 1 Hertii Opera, De Collis. Leg. § 4, p. 126, 127, § 10, edit. 1737; Id. p. 179, edit. 1716. See also 2 Boullenois, Observ. 46, p. 502. Can a stranger, living in a country, plead ignorance of the laws of that country in his defence? Is he not bound by them, whether he knows them, or not? Huberus, on the contrary, holds, that the law of the place of the contract governs, not only in respect to those, who are domiciled, but those, who are commorant there. Huberus, Lib. 1, tit. 3, De Conflict. Leg. § 3.

correct to say, that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty. possessed by every nation, to regulate all persons. and property, and transactions, within its own territory.1 And, in admitting the law of a foreign country to govern in regard to contracts made there. every nation merely recognises, from a principle of comity, the same right to exist in other nations. which it demands, and exercises for itself.2 foreign jurists make an exception from the general rule in cases of contract, made in a foreign country by any persons, for the purpose of evading the revenue system, or the local solemnities, prescribed by the laws of their own country, respecting such contracts.3 Thus, Paul Voet lays it down among his exceptions. Nisi quis, quo in loco domicilii evitaret molestam aliquam vel sumptuosam solemnitatem, adeoque in fraudem sui statuti nulla necessitate cogente alio proficiscatur, et mox ad locum domicilii, gesto alibi negotio, revertatur.4 Nisi etiam extra locum domicilii velit uti statuto suæ patriæ favorabili, quoad solemnia; tu forte contractus alibi ita gestus, ubi alia solemnia erant adhibenda. ex æquo et bono in patria, sustineretur.5

§ 262. Illustrations of this rule might be easily multiplied. Thus, by the English and American law, contracts, which fall within the purview of,

¹ See the opinion of Mr. Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. R. 332, 338 to 347.

² Blanchard v. Russell, 13 Mass. R. 1, 4.

³ P. Voet, De Statut. § 9, ch. 2, n. 9, p. 268, Excep. 3, 4; Id. p. 324, edit. 1661.

⁴ P. Voet, de Statut. § 9, ch. 2, Ex. 2, p. 268, edit. 1715; Id. p. 324, edit. 1661.

⁵ Ibid.

what is called, the Statute of Frauds, are required to be in writing; such are contracts respecting the sale of lands, contracts for the debts of third persons, and contracts for the sale of goods beyond a certain value. If such contracts made by parol, (per verba,) in a country, by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void, exactly as they are held void in the place, where they are made. And the like rule applies, vice versa, where parol contracts are good by the law of the place, where they are made; but they would be void, if originally made in another place, where they are sought to be enforced, for want of certain solemnities, or for want of being in writing, as required by the local law.1 It is a very different question, as we shall presently see, what rule is to prevail, where the contract respects real or immovable property, and the law of the place of the contract and that

^{1 2} Boullenois, Observ. 33, p. 459, 460, 461; 1 Boullenois, Observ. 46, p. 492 to p. 498; Id. 499; Id. 506; Id. 523; Erskine's Inst. B. 3, tit. 2, § 39, 40; Vidal v. Thompson, 11 Martin, R. 23; Casaregis, Disc. 179, n. 59, 60; 1 Hertii Opera, De Collis. Leg. p. 148, § 59, edit. 1737; Boullenois, Quest. de la Contrar. des Loix. p. 5; Livermore Diss. p. 46, § 41; 1 Burge, Comm. Pt. 1, ch. 1, p. 29; 3 Burge, Comm. p. 2, ch. 20, p. 758 to p. 762, 769; Alves v. Hodgson, 7 T. R. 241; Clegg v. Levy, 3 Camp. 106. But see Wynne v. Jackson, 2 Russell, R. 251; and James v. Catherwood, 3 Dowl. and Ryl. 190; ante, § 260, and note, p. 216; post, § 362 to § 373. Hertius seems to think, that, if foreigners in another country make a contract according to the law of their own country (both belonging to the same country,) in such a case, the contract will avail in their own country, even if not made according to the lex loci contractus. I Hertii Opera, De Collis. Legum, § 10, p. 126, 128, edit. 1737; Id. p. 179, 180, 181, edit. 1716. So is Voet, de Statut. § 9, ch. 2, Excep. 4, p. 268, edit. 1716; Id. p. 325, edit. 1661. But Boullenois has observed, that he does not find any authors, who are of opinion, that such a contract made elsewhere, according to the law of their own country, ought to have place even beyond the country. 2 Boullenois, Observ. 46, p. 459. Confl. 34

of the situs rei require different forms and solemnities to give validity to them.1

§ 262 a. But, suppose goods are bargained for by a merchant in one country, to be paid for on delivery by a merchant in another country, who is domiciled there, and has given the order therefor; and the law of the country, where the bargain is made, does not require, that there should be any memorandum there-of in writing; but the law of the country, where the delivery is to be made, does require such a memorandum in writing. By what law is the bargain to be governed; by the law of the place of the bargain, or by that of the place of delivery? It seems to have been thought, that, in such a case, the law of the place of delivery is to govern.²

¹ Post, § 363 to 373, § 435 to 445; 1 Boullenois, Observ. 23, p. 448

² The case of Acebal v. Levy, 10 Bing. R. 376, seems to have involved this very question, although it does not appear to have attracted the attention either of the Bar or of the Court. The case went off upon a supposed variance between the counts and the evidence. The statement of the facts in the body of the Report does not show, whether the goods in the case, which were sold and shipped at Gigon in Spain, by order of an agent of the defendants, were to be sent to the defendants in England, were sold to be paid for in England after their arrival and delivery there, or were to be paid for on their shipment. But Lord Chief Justice Tindal in delivering the opinion of the Court said, that in point of fact the parol evidence at the trial established, that the price of the goods was to be the current shipping price at Gigon; and to be paid for on the delivery thereof in England. The defendants refused to receive them; and the agent of the plaintiff then sold them for account of the plaintiff, and the action was brought for the difference between the price of the purchase, and the sale thus made. One of the objections taken was, that there was no memorandum in writing required by the English Statute of Frauds. The objection was not sustained, because the Court thought, that there was a sufficient memorandum; but the memorandum varied from the counts in the declaration. But the Court and Bar seem to have supposed, that the English Statute of Frauds did apply to the case; which is certainly a matter open to much discussion, and as we shall presently see, (post, § 285, § 318,) has been thought open to a very different conclusion. See Vidal v. Thompson, 11 Martin, R. 23, 24, 25.

§ 263. (5.) Another rule, illustrative of the same general principle, is, that the law of the place of the contract is to govern, as to the nature, the obligation, and the interpretation of the contract; Locus contractûs regit actum.¹ Again; Quod si de ipso contractu quæratur (says Paul Voet) seu de naturâ ipsius, seu de iis, quæ ex naturâ contractûs veniunt, puta fidejussione, etc. etiam spectandum est loci statutum, ubi contractus celebratur; quod ei contrahentes semet accommodare præsumantur.² First, as to the nature

¹ I Emér. Assur. ch. 4, § 8, p. 122, 125, 128. See Casaregis, Disc. 179, § 60; Erskine's Inst. B. 3, tit. 2, § 39, 40, p. 514, 515; Delvalle v. Plomer, 3 Camp. R. 444; Harrison v. Sterry, 5 Cranch, 289; Le Roy v. Crowninshield, 2 Mason, R. 15; Van Reimsdyke v. Kane, 1 Gallis. R. 371; 2 Kent, Comm. Lect. 37, p. 394, Lect. 39, p. 458 to 460, 3d edit.; S. P Ferguson v. Fyffe, 8 Clarke, & Fin. 121, 140.

² P. Voet, De Stat. & P., ch. 2, § 10, p. 269, edit. 1737; Id. p. 325, edit. 1661. J. Voet is still more full on the same point. Voet, ad Pand. Lib. 4, tit. 1, § 29, p. 240, 241. Si adversus contractum (says he) aliudve negotium gestum factumve restitutio desideretur, dum quis aut metu, aut dolo, aut errore lapsus, damnum sensit contrahendo, transigendo, solvendo, fidejubendo, hereditatem adeundo, aliove simili modo; recte interpretes statuisse arbitror, leges regionis in qua contractum gestumve est id, contra quod restitutio petitur, locum sibi debere vindicare in terminandà ipsà restitutionis controversià, sive res illæ, de quibus contractum est, et in quibus læsio contigit, eodem in loco, sive alibi sitae sint. Nec intererit, utrum læsio circa res ipsas contigerit, veluti pluris minorisve, quam æquum est, errore justo distractas, an vero propter neglecta solennia in loco contractus de-Si tamen contractus implementum non in ipso contractus loco fieri debeat, sed ad locum alium sit destinatum, non loci contractus, sed implementi leges spectandas esse ratio suadet: ut ita, secundum cujus loci jura implementum accipere debuit contractus, juxta ejus etiam leges resolvatur. Boullenois says, that Jurists distinguish four things in contracts, (1.) Substantiala contractuum; (2.) Naturalia contractuum; (3.) Accidentalia contractuum; (4.) Solemnia contractuum. He says; Ils appellent substantialia contractuum, tout ce qui sert à la composition intérieure des contrats; c'est-à-dire, tout ce qui est de l'essence déterminant la nature de chaque acte, et sans quoi il ne seroit pas un tel acte. Substantialia sunt, que ita formam et essentiam uniuscujusque actus constituunt, ut sine iis talis actus esse non possit, cum forma dat unicuique esse id, quod est. Suivant cette définition, le consentement

of the contract: by which is meant those qualities, which properly belong to it, and by law

des Parties dans tons les contrats. la chose, et le prix de la chose dans un contrat de vente, pertinent ad substantialia contractuum et ad speciem contractus constituendam : et elles sont tellement nécessaires, intrinseques et constitutives d'un contrat que sine ils actus qui geritur, non valeat. Naturalia contractuum, ce sont les suites et les engagements qui finent et derivent de la nature et de l'espece des contrats, dont il s'agit. Naturalia contractuum dicuntur ea, que pendent et manant à natura et préestate cujusque actus; sed ejus formam non constituent. Telle est la garantie dans la vente. Mais par rapport à ces engagements qui dérivent des contrats, on en distingue de deux sortes. Il y en a, que sunt interna, intrinseca et inseparabilia ; c'est-à-dire, qui sont lies et attachés à chaque espece de contrats, et qui sont propres à chacun de ces contrats, suivant la différente nature, dont ils sont. Que nature contractus coherent, et sunt veluti proprise possessiones, proprise affectiones ab essentialibus cujusque contractus principiis enatæ. Telle est, dans un contrat de vente, la nécessité que le domaine de la chose vendue, soit transféré à l'Acquérenr; et à cet égard on ne peut se soustraire à ces choses; on ne pourroit pas en effet stipuler, que le domine de la chose vendue ne passeroit pas à l'acquéreur; et il y en a qui ne naissent que de l'usage ordinaire ou on est d'en convenir, et qui, à raison de ce, sont toujours présumés être convonus par les Parties. Que ex consuetudine etiam insunt contractibus, que consuctudo in naturam quasi contractus transiit; et on les appelle, externa et separabilia. Telle est la garantie de fait dans une cession, et à cet egard on peut y déroges, les Parties peuvent stipuler qu'il n'y aura d'autre garantie que celle que l'on appelle garantie de droit. Accidentalia contractus, ce sont les choses, qui ne sont point de la substance constitutive de l'acte, qui ne fluent et ne dérivent point de sa nature et de non espece, et ne tombent point en convention ordinaire : mais qui ne se roncontrent dans les contrats que parce que les parties en conviennent. Accidentalia contractus ea sunt, que neque substantiam contractuum constituunt, neque ex natura et potestate contractus dimanant, sed pro voluntato contrahentium, adjici contractibus solent, veluti varia pacta. Je voudrois ajouter, et encore celles, qui ne sont requises que par des disponitions légales, à la vérité, mais pures locales comme la nécessité de donner caution pour la garantie d'un contrat, laquelle a lieu dans certains ondroits. Enfin, il y a, solemnia contractuum; et on en distingue de deux sortes, solemnia intrinseca, et solemnia extrinseca. intrinseca sunt ca, que insunt in ipsa forma cujusque actus, neque separari ab ca possunt; tellos sont les choses qui appartiennent à la preuve ot à l'authenticité de l'acte, et qui comme telles sont partie de ce qui constitue l'être et l'existence de cet acte; aussi sont-elles appellées par quelques-uns substantialia contractuum. Solemnia extrinseca sunt ea, que

or custom always accompany it, or inhere in it.¹ Foreign jurists are accustomed to call such qualities Naturalia contractus.² Ea enim, quæ autoritate legis vel consuetudinis contractum comitantur, eidem adherent, Naturalia à Doctoribus appellantur. Lex enim altera est quasi natura, et in naturam transit. Atque quoad naturalia contractuum etiam forenses statuta loci contractus observare debent.³ Thus, whether a contract be a personal obligation, or a real obligation; whether it be conditional, or absolute; whether

actui per se formam habenti, et ultra conventionem contrahentium sed ad ipsam conventionem roborandam, extrinsecus accedunt, et ce sont les choses, qui n'appartenant en rien à la composition intrinseque de l'acte, sont seulement requises, post actum originatum, pour lui procurer son exécution. La solemnité intrinseque est tellement nécessaire, que si on l'omet, l'acte n'est pas acte, il n'a nul être, nulle existence; l'omission vitiat et corrumpit actum; raison pour laquelle on la place volontiers inter substantialia contractuum. Mais à l'égard de la solemnité extrinseque, il n'en est pas toujours de même, aliquando obmissa impedit executionem ex omni parte. 1 Boullenois, Observ. 23, p. 446 to p. 448. See also 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 848, 849, 850; 3 Burge, Comm. on Col. and For Law, Pt. 2, ch. 20, p. 758, 759, 762, 763; Don v. Lippman, 5 Clarke & Fin. 1, 12, 13.

¹ Pothier, as well as other jurists, distinguish between the essence, the nature, and the accidents of contracts; the former includes whatever is indispensible to the constitution of it; the next, whatever is included in it, without being expressly mentioned by operation of law, but is capable of a severance without destroying it; and the last, those things, which belong to it only by express agreement. Without meaning to contest the propriety of this division, I am content to include the two former in the single word, nature, as quite conformable to our English idiom. Cujas also adopts the same course. See Pothier, Oblig. n. 5. See also 2 Boullenois, Observ. 46, p. 460, 461, 462; Bayou v. Vavasseur, 10 Martin, R. 61; Merlin, Répertoire Convention, § 2, n. 6, p. 357; Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, App'x. 50; 1 Boullenois, 688; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 848 to p. 851.

⁹ I Boullenois, Observ. 23, p. 446; 2 Boullenois, Observ. 46, p. 460, 461; Voet, De Stat. § 9, ch. 10, § 10, p. 287; Id. p. 325, edit. 1661; Hertius, De Collis, Leg. Tom. 1, § 10, p. 127; Id. p. 179, 180, edit. 1716; post 6 301 f.

³ Lauterback, Diss. 104, Pt. 3, n. 58, cited 2 Boullenois, Obs. 46, p. 460 34* it be the principal, or the accessary; whether it be that of principal, or of surety; whether it be of limited, or of universal operation; these are points properly belonging to the nature of the contract, and are dependent upon the law and custom of the place of the contract, whenever there are no express terms in the contract itself, which otherwise control them. the law of some countries, there are certain joint contracts, which bind each party for the whole, in solido; and there are other joint contracts, where the parties are, under circumstances, bound only for several and distinct portions.1 In each case the law of the place of the contract regulates the nature of the contract, in the absence of any express stipulations.2 These may, therefore, be said to constitute the nature of the contract.3

¹ 4 Burge, Comment. on Col. and For. Law, Pt. 2, ch 15, § 4, p. 722 to to p. 735; post, § 322.

² Pothier on Oblig. n. 261 to 268; Van Leeuwen, Comment. B. 4, ch. 4, § 1; Fergusson v. Flower, 16 Martin T. 312; 2 Boullenois, Observ. 46, p. 463; Code Civil of France, art. 1197, 1202, 1220, 1222; Id. Code of Comm. art. 22, 140.— One may see, how strangely learned men will reason on subjects of this nature, by consulting Boullenois. He puts the case of a contract made in a country, where all parties would be bound in solido, and by the law of their own domicil, they would be entitled to the benefit of a division, and vice verså; and asks, What law is to govern? In each case he decides, that the law should govern, which is most favorable to the debtor. "Ainsi, les obligés solidaires ont contracté sous une loi, qui leur est favorable; j'embrasse cette loi; elle leur est contraire, j'embrasse la loi de leur domicile." 2 Boullenois, Observ 46, p. 463, 464. See also Bouhier, ch. 21, § 198 199.

³ See Henry on Foreign Law, 39.—Pothier on Obligations, n. 7, has explained the meaning of the words, the nature of the contract in the following manner. "Things which are only of the nature of the contract are those, which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract, that they shall be included and understood. These things have an intermediate place between those, which are of the essence of the contract, and those, which are merely accidental to it, and differ from both of them.

§ 264. An illustration may be taken from a case often put by the civilians. By the law of some countries a warranty is implied in all cases of sale;

They differ from those, which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties; and they differ from things, which are merely accidental to it, inasmuch as they form a part of it without being particularly expressed, as may be illustrated by the following examples. In the contract of sale the obligation of warranty, which the seller contracts with the purchaser, is of the nature of the contract of sale; therefore the seller, by the act of sale, contracts this obligation, though the parties do not express it, and there is not a word respecting it in the contract; but as the obligation is of the nature and not of the essence of the contract of sale, the contract of sale may subsist without it; and if it is agreed, that the seller shall not be bound to warranty, such agreement will be valid, and the contract will continue a real contract of sale. It is also of the nature of the contract of sale, and as soon as the contract is completed by the consent of the parties, although before delivery, the thing sold is at the risk of the purchaser; and that, if it happens to perish without the fault of the seller, the loss falls upon the purchaser, who is, notwithstanding the misfortune, liable for the price; but as that is only of the nature, and not of the essence of the contract, the contrary may be agreed upon. When a thing is lent to be specifically returned [commodatur,] it is of the nature of the contract that the borrower shall be answerable for the slightest negligence in respect to the article lent. He contracts this obligation to the lender by the very nature of the contract, and without any thing being said about it. But as this obligation is of the nature, and not of the essence of the contract, it may be excluded by an express agreement, that the borrower shall only be bound to act with fidelity, and shall not be responsible for any accidents merely occasioned by his negligence. It is also of the nature of this contract, that the loss of the thing lent, when it arises from inevitable accident, falls upon the lender. But as that is of the nature, and not of the essence of the contract, there may be an agreement to charge the borrower with every loss, that may happen until the thing is restored. A great variety of other instances might be adduced from the different kinds of contracts. Those things, which are accidental to a contract, are such as, not being of the nature of the contract, are only included in it by express agreement. For instance, the allowance of a certain time for paying the money due; the liberty of paying it by instalments; that of paying another thing instead of it; of paying to some other person than the creditor; and the like, are accidental to the contract; because they are not included in it without being particularly expressed."

by that of others, it is not. Suppose, a contract of sale is made in any of the former countries, by parties domiciled in any of the latter countries. the contract is to be executed in the country, where it is made, a warranty will be implied, as an incident arising from the nature of the contract; if it is to be executed in the place of the domicil of the parties, for reasons, which we shall presently see, no warranty will be implied. By the civil law. there is an implied warranty, as to the quality and soundness of goods sold; by the common law, there is not.2 A sale of goods in England would be governed by the common law; a sale in a foreign country, under the civil law, would be governed by that law, as to this implied warranty. Boullenois lays down this as one of his fundamental rules, in the interpretation of contracts. Whenever (says he) the controversy respects movables, of which an immediate delivery is made, the law of the place of the contract is to govern; adopting on this point the doctrine, although not the reasoning, of Colerus. Consuetudo si quidem loci, ubi negotium geritur, ita subintrat ipsum contractum; ut secundum leges loci intelligatur actus fuisse celebratus, quamvis ea de re nihil fuerit expressum.3

§ 265. Another illustration may be borrowed from an actual decision under the common law. By the law of England an acceptance of a bill of ex-

¹ Pothier, Oblig. n. 7; 2 Boullenois, Observ. 46, p. 475, 476; Id. 460 to 463; Code Civil of France, art. 1135; Voet. De Statut. § 9, ch. 2, § 10, p. 269, edit. 1715; Id. p. 325, edit. 1661; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 769, 770.

² Pothier, Pand. Lib. 19, tit. 1, art. 5, § 48 to 51; 2 Black. Comm. 451;
2 Kent Comm. Lect. 39, p. 478 to 481, 3d edition.

³ 2 Boullenois, Observ. 46, p. 475, 476.

change binds the acceptor to payment at all events. By the law of Leghorn, if a bill is accepted, and the drawer fails, and the acceptor has not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance becomes void. An acceptance in Leghorn is governed by this latter law; and under such circumstances it has been held void, and not obligatory upon the acceptor.1

§ 266. Secondly, the obligation of the contract, which, though often confounded with, is distinguishable from, its nature.2 The obligation of a contract is the duty to perform it, whatever may be its nature. It may be a moral obligation, or a legal obligation, or both. But when we speak of obligation generally, we mean legal obligation, that is, the right to performance, which the law confers on one party, and the corresponding duty of performance, to which it binds the other.3 This is what the French jurists call Le lien du contrat (the legal tie of the contract,) Onus conventionis, and what the civilians generally call, Vinculum juris, or Vinculum obligationis.4 The Institutes of Justinian have thus defined it. Obligatio est juris vinculum, quo necessitate adstringimur alicujus rei solvendæ, secundum nostræ civitatis jura.5 A contract may in its nature be purely voluntary, and possess no legal obligation. It may be a mere naked pact (nudam pactum). It may possess a legal

² See 2 Boullenois, Observ. 46, p. 454, 460, 462, 463, 464; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 764, 765.

4 2 Boullenois, Observ. 46, p. 458, 459, 460.

¹ Burrows v. Jemimo, 2 Str. R. 733; 2 Eq. Abr. 526; S. P. Pardessus, Tom. 5, art. 1495, p. 270, 271.

² See 3 Story, Comm. on Constitution, § 1372 to 1379; Ogden v. Saunders, 12 Wheaton, 213; Pothier on Oblig. art. 1, n. 1, p. 173, 174, 175.

⁵ Inst. Lib. 3, tit. 14; Pothier, Pandect. Lib. 44, tit. 7, P. 1, art 1, § 1; Pothier, Oblig. n. 173, 174.

obligation; but the laws may limit the extent and force of that obligation in personam, or in rem. It may bind the party personally, but not bind his estate; or it may bind his estate, and not bind his person. The obligation may be limited in its operation or duration; or it may be revocable or dissoluble in certain future events, or under peculiar circumstances.¹

§ 266 a. An illustration may be readily seen in the common case of a Scotch heritable bond. It is well known, that by the common law of England a bond. which is also a charge on land, as, for example, a bond, accompanying a mortgage of land as a security, is primarily, in a contest between the heir and the administrator, a charge on the personal estate, and of course the heir has a right in equity to be relieved therefrom, so far as there are personal assets to discharge the bond.2 In the Scotch law the same rule prevails as to movable debts, which are primarily and properly chargeable upon the personal assets.8 But, as to heritable bonds, a different rule prevails; and they are primarily a charge on the real estate of the debtor.4 Now, suppose a question should arise in England, as, indeed, it has arisen, whether, in the case of a Scotch movable debt, the heir upon payment of it was entitled to be exonerated therefrom, and to receive the amount out of the personal assets

¹ See 2 Boullenois, Observ. 46, p. 452, 454; Code Civil of France, art. 1168 to 1196.

² 1 Story on Eq. Jurisp. § 571, 574; Earl of Winchelsea v. Garetty, 2 Keen, R. 293, 309.

³ Earl of Winchelsea v. Garetty, 2 Keen, R. 293, 309, 310; post, § 487, § 529.

⁴ Post, § 486 to 489, § 529; Drummond v. Drummond, 6 Bro. Parl. R. by Tomlins, 550.

in England. Upon principle it should seem clear, that he would be entitled to the relief and exoneration; for the heir, having by the law of the country, where the land lies, a right to such relief and exoneration, would have the same right in regard to the same debt in every other country, since it properly belongs to the nature, obligation, and interpretation of the contract. On the other hand, a Scotch heir,

Earl of Winchelsea v. Garretty, 2 Keen, R. 293, 308, 309, 310.— Upon this occassion Lord Langdale said; "By the law of England, the personal estate is the primary fund for the payment of all debts contracted by the deceased person, whose estate it was. By the law of Scotland movable debts are primarily and properly chargeable upon the personal estate. The creditor may, indeed, enforce payment against the real estate in the hands of the heir; but if he does so, the heir is entitled to relief against the executors out of the personal estate; in other words, according to the law of Scotland, the real estate, though subject to the payment of movable debts, is only a subsidiary fund for the purpose of payment. Payment by the heir does not extinguish the debt, but vests in him a right to recover the amount against the personal estate and constitutes him a creditor against the personal estate; and whether he can enforce payment against the personal estate, which is to be distributed according to the laws of another country, which makes the personal estate the primary fund for the payment of debts, is the question. Prima facie there would seem to be no difficulty; the heir, having by the law of the country, in which the land lies, a right to relief or exoneration would seem to be at liberty to make that right available in a country, where the personal estate is the primary fund for the payment of all debts. But it is objected, that in all the opinions, upon which the finding of the Master rests, it has been assumed, that the law of domicil makes no difference; whereas it is clear, that the domicil determines the law by which the personal estate is to be distributed; and that, although it be true, that in England the personal estate must be applied in exoneration of the English heir of real estate, yet, that the right of the heir to be exonerated is founded on the law peculiar to England, and that a foreign heir of foreign lands is not entitled to the same relief as an English heir of English lands. The law of England, it is said, affords no relief to foreign real estate out of English personal estate; and although the law of Scotland regulates the administration of the real estate, and provides that the real estate, if applied in payment of personal debts, shall be exonerated out of the personal estate, the proposition must be limited to personal estate, of which the distribution is regulated according to the

paying a heritable bond, would be entitled to no such relief or exoneration, because the debt is primarily

law of Scotland, and consequently to the personal estate of debtors domiciled in Scotland. Several cases were cited. They sufficiently establish the propositions, which are not disputed on either side; and Drummond v. Drummond establishes, that a Scotch heir is ultimately liable to pay heritable debts, which have, in the first instance, been paid out of the personal estate distributable according to the law of England; but no case has occurred, in which it has been decided, that the Scotch heir. having paid movable debts, is entitled to be relieved out of the personal estate distributable according to the law of England; and that is the question here. The personal estate is taken by the administrator, according to the law of England, subject to the payment of all the debts of the intestate. The real estate is taken by the heir, according to the law of Scotland, subject to the payment of all movable debts, but with a right of relief out of the personal estate, and subject to the payment of all heritable debts without such right of relief. As to the heritable debts. in respect of which there is no such right of relief, the heir is not entitled to the benefit of the English law, which makes the personal estate subject to the payment of all debts. The Scotch law, which makes the heir ultimately liable to the payment of such debts, and which governs the distribution of the real estate, prevails in favor of the persons entitled to the personal estate distributable according to the law of England. As to personal debts, in respect of which there is such a right to relief, the English law subjects the personal estate to all debts; the Scotch law relieves the real estate, as far as it can consistently with the claims of the creditors. The heir, by paying, satisfies the creditor, but at the same time acquires for himself a right of demand against the executor; he may, if he pleases, take an assignation for the debt, and make it available: but that is not necessary, because, without any assignation, his own claim to relief subsists and constitutes him a creditor against the personal estate. Under these circumstances the question does not appear to me to be fully stated, when it is said to be, whether a foreign heir of foreign lands is entitled to the same relief, as an English heir of English lands. The case is, that a foreign heir of foreign lands is, in respect of those lands, subsidiarily liable to pay debts, to which the personal estate, distributable according to the law of England, is primarily liable; and that, having paid the debt, he is by the law of the country, in which the land lies, constituted a creditor upon the personal estate distributable according to the law of that country. And it is under these circmstances, and without reference to English tenures, or the title to exoneration, which an English heir may possess, that the question arises, whether the subsiduary debtor, or the person, who by the law of a foreign country is constituted surety for the payment of

by the local law a charge on the real estate; 1 and if such heritable bond should be paid by an English administrator out of the personal assets, he would be entitled to reimbursement from the Scotch heir.2

§ 267. It would be easy to multiply illustrations under this head. Suppose a contract by the law of one country to involve no personal obligation, (as was supposed to be the law of France in a particular case which came in judgment,)3 but merely to confer a right to proceed in rem; such a contract would be held every where to involve no personal obligation whatsoever. Suppose, by the law of a particular country, a mortgage for money borrowed, should, in the absence of any express contract to repay, be limited to a mere repayment thereof out of the land, a foreign court would refuse to entertain a suit giving to it a personal obligation. Suppose a contract for the payment of the debt of a third person, in a country where the law subjected such a contract to the tacit condition, that payment must first be sought against the debtor and his estate; that would limit the obligation to a mere

debts, primarily chargeable on another fund, and paying the debts by force of, and according to the law, which constitutes him a creditor upon that other fund, is or is not entitled to make his title as to creditor available in another country, where the personal estate is distributable, and where the law makes the personal estate primarily liable to the payment of all debts. And, upon consideration of the case, I am of opinion, that the right of relief or demand against the personal estate, which in the administration of the real estate by the law of Scotland is vested in the heir, who has paid movable debts, is capable of being made available in England, where the personal estate is the primary fund for the payment of all debts."

¹ Drummond v. Drummond, 6 Bro. Parl. R. by Tomlins, 550; post, § 486 to § 489, § 529; Elliott v. Lord Minto, 6 Madd. R. 16; Earl of Winchelsea v. Garetty, 2 Keen, R. 293, 308 to 310.

Robertson on Personal Succession, 209 to 214.

Melan v. Fitz James, 1 Bos. & Pull. 138.

accessorial and secondary character; and it would not be enforced in any foreign country, except after a compliance with the requisitions of the local law. Sureties, indorsers, and guarantees are, therefore, liable every where, only according to the law of the place of their contract.1 Their obligation, if treated by such local law, as an accessorial obligation, will not any where else be deemed a principal obligation.⁹ So, if by the law of the place of a contract, its obligation is positively and ex directo extinguished after a certain period by the mere lapse of time, it cannot be revived by a suit in a foreign country, whose laws provide no such rule, or apply it only to the remedy.³ To use the expressive language of a learned judge, it must be shown, in all such cases, what the laws or the foreign country are, and that they create an obligation, which our laws will enforce.4

§ 267 a. This doctrine was fully recognised in a recent case, where the question was, as to the rights of parties, growing out of various bonds, executed in a state, which was governed by the common law, some of the bonds being designed as security or indemnity to a surety on the other bonds. The Court said; "These different bonds were entered into in states of the Union, where the common law prevails, and consequently the rights and liabilities of the parties are to be measured by that system of juris-

¹ Aymar v. Sheldon, 12 Wend. R. 439.

² See Pothier on Oblig. n. 407; Trimbey v. Vignier, 6 Carr. & Payne, 25; S. C. 1 Bing. N. C. 151, 159; 4 Moore & Scott, 695; post, § 314, 316 a; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 764 to p. 766.

³ See Le Roy v. Crowninshield, 2 Mason, R. 151; Pothier, Oblig. n. 636 to 639; Voet, ad Pand. Lib. 4, tit. 1, § 29, ad finem.

⁴ Lord Chief J. Eyre, Melan v. Duke of Fitz James, 1 Bos. and Pull. 141.

prudence; and whatever the plaintiff (the assignee of the surety) would be entitled to recover (upon the indemnity bond) in a court of law or equity in the state, where the transaction originated, he is entitled to in this Court, in the present form of action."1

§ 268. Let us take another case, which has actually passed into judgment. By the common law, heirs are not bound by the simple contracts of their ancestor, but only by instruments under seal, declaring them expressly bound. By the law of Louisiana, the heirs are ipso facto bound by such simple contracts of their ancestors.2 If a simple contract is made in a state governed by the common law, it cannot be enforced in Louisiana against the heirs of the debtor, although they are domiciled in Lou-

¹ Mr. Justice Bullard in King v. Harman's Heirs, 6 Louis. R. 607,

² Brown v. Richardson, 13 Martin R. 202.- Mr. Justice Porter in delivering the opinion of the Court in this case said; "We recognise the distinction made by the plaintiffs' counsel between the right and the remedy, and agree with him, that contracts should be expounded according to the laws of the country, where they are made, and enforced according to the regulations, which prevail, where the debtor is found. It is that distinction, which gives the defendants immunity in this case. For in order to ascertain, who is debtor, we must recur to the laws of the country, where the contract was made; and if these laws do not make persons standing in the character of the appellants liable, under the circumstances now in proof, they cannot be made so by a change of jurisdiction. It is true, that, according to our jurisprudence, the heir is obliged to pay the debts of the ancestor, if he accepts the succession unconditionally; but it does not follow, that the same rule exists in other countries. An embarrassment is created in considering the case, from a feeling, which it is difficult to check, that there exists something like a natural obligation on the child to pay the parent's debts; particularly if he takes any of his property. But, that obligation is, in fact, nothing but the creature of positive law, and is of course subject to all the modifications, which the policy of different states may induce them to adopt." Id. p. 208.

isiana.¹ The remedy must be sought through the instrumentality of an administration of the assets there.²

§ 268 a. To this head, of the obligation of contracts, may also be appropriately referred the consideration of the nature and extent of the obligation of contracts, in respect to their dissolubility or indissolubility in point of duration. This topic has been already incidentally discussed in examining the nature and obligation of the contract of marriage, which indeed is truly a contract; but, properly speaking, it is something more, an institution of civil society.3 It has been often urged, especially in regard to the contract of marriage, that indissolubility is of its very essence: and that, what is of the essence of a contract, must be judged of according to the Lex loci contractûs. It has been remarked by an eminent Judge that this is somewhat a vague, and for its vagueness a somewhat suspicious, proposition, and that there are many other things, which may just as well be reckoned of the essence of the contract, as this. He afterwards added; "The fallacy of the argument, 'that indissolubility is of the essence,' appears plainly to be this; it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract: it makes the mode, in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents and the rights of the par-

¹ Brown v. Richardson, 13 Martin, R. 202.

² Ibid.

³ Ante, § 108 a; § 218 to 230; Id. § 226 c, note.

ties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country, where the parties reside, and where the contract is to be carried into execution."1 These considerations are certainly entitled to great weight: but they only show the intrinsic difficulty of laying down any general rules on such complicated subjects. which shall be of universal application. It will probably be found, that the proposition, that a contract cannot be dissolved, except in the manner and under the circumstances prescribed by the law of the place, where it was made, if true at all, must be asserted with many qualifications and exceptions. Contracts of marriage, and other contracts of a peculiar nature. may perhaps require a different exposition in this respect from other ordinary pecuniary contracts. And even if a contract be indissoluble by the Lex loci contractûs, except in a special mode, it may nevertheless be thought reasonable, that that rule should not prevail upon a change of domicil, as to an act of the parties done in the latter place, where another mode is prescribed, or allowed for its dissolution.2 But of this we shall speak hereafter.3

§ 269. Cases sometimes occur, in which the tribunals of a foreign country are called upon to decide upon the law of another country, where the contract is made; and they by mistake misinterpret that law. In such a case if they discharge the parties form the obligation of the contract, in consequence of such misinterpretation of the foreign law, that discharge will

³ Lord Brougham in Warrender v. Warrender, 9 Bligh, R. 114; ante, § 226 c. note.

² Ibid.

² See post, § 351 a; ante, § 226 a, note.

not be held obligatory upon the courts of the country where the contract was made. A recent case has occurred on this subject. A bill of exchange, drawn in France, and indorsed there, and accepted and payable in England at a banker's, was passed by an indorsee in discharge of an antecedent debt; and upon presentment for payment, it was dishonored, and the banker's clerk by mistake cancelled the acceptance, and then wrote on it, "cancelled by mistake." Afterwards the indorser, who had so passed the bill in discharge of his debt. cited all the parties, and among others, the creditor and holder of the bill, before the tribunals of France, who decreed, that the cancellation operated as a suspension of legal remedies against the acceptor, and consequently discharged the other parties, the indorsers, as well as the drawer. A suit was afterwards brought by the creditor against the debtorendorser in England; and it was held, that the courts of France had mistaken the law of England. as to the effect of the cancellation; and that the plaintiff was entitled to recover against the defendant the full amount of the debt, notwithstanding the decree in the French courts.2

§ 270. Thirdly. The interpretation of contracts. Upon this subject there would scarcely seem to be any room for doubt or disputation. There are certain general rules of interpretation recognised by all nations, which form the basis of all reasoning on the subject of contracts. The object is to ascertain the real intention of the parties in their stipulations; and when the latter are silent, or ambiguous,

¹ Novelli v. Rossi, 2 Barn, & Adolp. 757.

² Thid.

ous, custom and usage in a particular place may give them an exact and appropriate meaning. Hence, the rule has found admission into almost all, if not into all, systems of jurisprudence, that, if the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place, where it is made, that course is to be adopted. Such is the rule of the digest. Semper in stipulationibus, et in cæteris contractibus id sequimur, quod actum est. Aut si non appareat, quod actum est, erit consequens, ut id sequamur, quod in regione, in quâ actum est, frequentatur.1 Conservanda est consuetudo regionis et civitatis (says J. Sande) ubi contractum est. enim actiones nostræ (si non aliter fuerit provisum inter contrahentes) interpretationem recipiunt a consuetudine loci, in quo contrahitur.2 Usage is, indeed, of so much authority in the interpretation of contracts, that a contract is understood to contain the customary clauses, although they are not expressed, according to the known rule, In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis. Thus, if a tenant is by custom to have the outgoing crop, he will be entitled to it, although not expressed in the lease.4 And if a lease is entirely silent, as to the time of the tenant's quitting, the custom of the country will fix it.5 By the law of England, a month

¹ Dig. Lib. 50,tit. 17, l. 34; 1 Domat, Civil Law, B. 1, tit. 1, § 2, a. 9; 2 Boullenois, Observ. 46, p. 490; 3 Burg, Comm. on Col. and For. Law Pt. 2, ch. 20, p 775, 776.

² J. Sande, Op. Comm. de Reg. Jur. 1, 9, p. 17.

³ Pothier, Oblig. n. 95; Merlin, Repertoire, Convention, § 7; 2 Kent, Comm. Lect. 39, p. 555, 3d edit.

⁴ Wigglesworth v. Dallison, Doug. R. 201, 207.

⁵ Webb v. Plumer 2 B. and Ald. 746.

to ascertain, what is the true sense of the words used, and what ought to be implied in order to give them their true and full effect.\(^1\) The primary rule in all expositions of this sort is that of common sense, so well expressed in the Digest. In conventionibus contrahentium voluntas, potius quam verba, spectari placuit.\(^2\) But in many cases the words used in contracts have different meanings attached to them in different places by law by custom. And where the words are in themselves obscure, or ambigu-

² Dig. Lib. 50, tit. 16. 1. 219.—Many rules of interpretation are found in Pothier on Obligation, n. 91 to 102; in Fonblanque on Equity, B. 1, ch. 6, § 11 to 20, and notes; 1 Domat, Civil Law, B. 1, tit. 1, § 2; 1 Powell on Contracts, 370 et seq.; Merlin, Répertoire, Convention, § 7, p. 366.

¹ See Lord Brougham's striking remarks on this subject already cited Ante, § 226 c. In Prentiss v. Savage, 13 Mass. R. 23, Mr. Chief Justice Parker said; "It seems to be an undisputed doctrine, with respect to personal contracts, that the law of the place, where they are made, shall govern in their construction; except when made with a view to performance in some other country, and then the law of such country is to prevail. This is nothing more than common sense and sound justice, adopting the probable intent of the parties as to the rule of construction. For when a citizen of this country enters into a contract in another, with a citizen or subject thereof, and the contract is intended to be there performed, it is reasonable to presume, that both parties had regard to the law of the place, where they were, and that the contract was shaped accordingly. And it is also to be presumed, when the contract is to be executed in any other country, than that in which it is made, that the parties take into their consideration the law of such foreign country. This latter branch of the rule, if not so obviously founded upon the intention of the parties as the former, is equally well settled as a principle in the law of contracts." Mr. Chancellor Walworth in Chapman v. Robertson, (6 Paige, R. 627, 630,) used equally strong language. "It is an established principle" (said he) "that the construction and validity of personal contracts, which are purely personal, depend upon the laws of the place, where the contract is made, unless it was made with reference to the laws of some other place or country, where such contract in the contemplation of the parties thereto was to be carried into effect and performed." 2 Kent, Com. Lect. 39, p. 457, 458, 3d edit; 3 Burge, Com. on Col. and For. Law, Pt. 2, ch. 20. p. 752 to p. 764.

the English note, sued in America, the less sum only ought to be recovered; and on the other hand, on the American note, sued in England, that one third more ought to be recovered.

§ 271 a. Another illustration may easily be suggested, which is not quite so simple in its circumstances. Suppose a contract is made in England between two Englishmen for the sale of lands situated in Jamaica; and the vendee agreed to give £20,000 for the lands, without specifying in what currency. The difference between Jamaica pounds currency and English sterling pounds currency, by the par of exchange, exclusive of any premium on bills of exchange on England, is forty per cent. Consequently, £28.000 Jamaica currency would constitute only £20,000 sterling. The question might then arise, according to which currency the purchase money is to be paid. In the absence of all expressions and circumstances, from which a different intention may be inferred, the interpretation of the contract would be, that it was payable in the currency of the country, where the contract was made, and not in that of the situs of the property.² Another illustration may be in case of a sale of lands situated in one country, and the contract made in another, and the sale to be of a certain number of acres for a gross price, or at a specific price per acre, the mode of measuring an acre, or the contents thereof, being different in different coun-The question might arise, whether the acre

¹ See also Powell on Contracts, 376; 2 Boullenois, Observ. 46, p. 498, 503; Henry on Foreign Law, Appendix, 233; Pardessus, Droit Commart. 1492; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20. p. 772, 773; post, § 272 a, § 307, 308.

² 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 860, 861.

was to be according to the measurement in the one country, or in the other. Now, upon this very point different opinions and judgments have been held by different jurists and tribunals on the continent of Europe: some holding, that the Lex loci contractûs ought to govern, and others, that the Lex situs ought to govern the admeasurement.1 Choppin has reported a case, where the highest tribunal of Orleans held. that the laws of the place of the contract should determine the admeasurement of the acre. But he disapproves of it, and says; Justior tamen est diversa opinio, venditi agri mensuram ex lege petendam situs prædiorum non loci pactæ venditionis.2 John Voet holds the same opinion : Si res immobilis ad certam mensuram debeantur, et ea pro locorum diversitate varia sit, in dubio solvi debent juxta mensuram loci, in quo sitæ sunt.3 In respect to movables he holds the opposite opinion. that they are governed by the law of the place of the contract. Dumoulin holds the same opinion as to immovables; that they are governed by the Lex situs. Unde stantibus mensuris diversis, si fundus venditur ad mensuram, vel affirmatur, vel mensuratur. non continuo debet inspici mensura, quæ viget in loco contractus, sed in dubio debet attendi mensura loci, in quo fundus debet metiri, et tradi, et executio fieri.4 He admits, that other jurists differ from him, and that other circumstances may vary this interpretation. Et ita

^{1 2} Burge, Comm. on Col. and For Law, Pt. 2, ch. 9, p. 858, 859.

² Choppini Opera, De Feudis Andeg. Tom. 2, Lib. 2, tit. 3, n. 10, p. 132, 133, edit. 1611; 2 Boullenois, Observ. 46, p. 497; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 858, 859.

³ J. Voet, Lib. 46, tit. 3, n. 8, p. 949; 2 Burge, Comm. Pt. 2, ch. 9, p. 850; 2 Boulleneis, Observ. 46, p. 497.

⁴ Molin. Oper. Comm. ad Cod. Lib. 1, tit. 1, l. 1, Tom. 3, Conclus. de Statut. p. 554.

tenendum, nisi ex aliis circumstantiis constet, de qua mensura senserint.¹ Indeed he denies, that any universal rule can be established.² The same doctrine, that the Lex situs ought to govern in the like cases, would seem to be favored, if not positively established, in the jurisprudence of England and America.³

§ 272. The general rule, then, is, that, in the interpretation of contracts, the law and custom of the place of the contract is to govern in all cases where the language is not directly expressive of the actual intention of the parties, but it is to be tacitly inferred from the nature, and objects, and occasion of the contract.4 The rule has been fully recognised in the Courts of Common Law; and it has been directly decided by those courts, that the interpretation of the contract must be governed by the laws of the country, where the contract is made.5 And the rule is founded in wisdom, sound policy, and general convenience. Especially, in interpreting ambiguous contracts, ought the domicil of the parties, the place of execution, the various

¹ Molin. Opera, Comm. ad Cod. Lib. 1, tit. 1, l. 1, Tom. 3, Conclus. do Statut. p. 554.

² Ibid.; post, § 274 a.

³ Ante, § 270.

⁴ See the opinion of the Court, delivered by Mr. Justice Martin, in the case of Depau v. Humphreys, 20 Martin, R. 1, 8, 9, 13, 22, 23, 24; Mr. Justice Porter, in the case of Morris v. Eves, 11 Martin, R. 730; Courtois v. Carpenter, 1 Wash. Cir. R. 376.

⁵ Trimby v. Vignier, 1 Bing. New Cases, 151, 159; post, § 316 a; De la Vega v. Vianna, 1 Barn. & Adolp. R. 284; British Linen Company v. Drummond, 10 Barn. & Cresw. 903; Bank of United States v. Donally, 8 Peters, R. 361, 372; Wilcox v. Hunt, 13 Peters, R. 378, 379.—We shall presently see, that the same rule is adopted in the interpretation of wills. See Lansdowne v. Lansdowne, 2 Bligh, R. 60, 88, 89, 91, and cases there cited. Holmes v. Holmes, 1 Russ. & Mylne, 660, 662; Chapman v. Robertson, 6 Paige, R. 627, 630; post, § 479 a to 479 n.

provisions and expressions of the instrument, and other circumstances, implying a local reference, to be taken into consideration.¹ Thus, Gothofredus says; Consuetudo regionis sequemur, et ideo conducere, concedere, contrahere, et quidvis agere pro modo regionis in dubio presumitur. Nam sicut natura non separetur a subjecto, ita nec à consueto. Quod est de consuetudine habetur pro pacto.² Burgundus is more full and pointed to this point, as we have already seen.³ John à Sande expresses the same doctrine in these words. Quando verba sunt dubia et ambigua, tunc inspicimus, quod verisimiliter a contrahentibus actum sit, aut quid Testator senserit.⁴

§ 272 a. One of the simplest cases, to illustrate the rule, is the case of a promissory note, made and dated in a particular country, payable in a currency, which has the same name, but is of a different value in different countries. The question is, what currenev is presumed to be intended by the parties? The answer would seem to be equally certain, the currency of the country, where it is payable. Suppose, then, a promissory note dated in Dublin, and thereby the maker promises to pay to the payee, or order, one hundred pounds in forty days after date; and the note is afterwards sued in England; the question would arise, whether the note meant a hundred pounds English currency, or Irish currency. This would depend upon another question, where the note was payable, as no place of payment was named, in England, or in Ireland.

Ante, § 237. See Lansdowne v. Lansdowne, 2 Bligh, Parl. R. 60, 87; post, § 479 m. to to 479 n.

² Gothofred. ad Pand Lib. 50, tit. 17, l. 34; Le Brun, Traité de la Commanauté, Liv. 1, ch. 2, § 46.

³ Ants, § 237; 2 Boullenois, Observ. 46, p. 451.

⁴ J. Sande, Op. Comm. De Reg. Juris. 1, 9, p. 17.

Confl. 3

Now, by the rules of law in the interpretation of all such contracts, when no other place of payment is named, the contract is treated as a contract made in. and governed by the law of the place, where it is made and dated, and therefore it would be interpreted to mean one hundred pounds Irish currency, because payable there, and, indeed, payable every where, where the maker should afterwards be found. The converse rule would be applied, if the note, though drawn in the same terms, and dated at Dublin, were upon its face made payable in London.2

§ 273. Boullenois, while he admits the general propriety of the rule, Locus contractûs regit actum, contests its universality.3 He seems to think, and some other jurists have adopted the same opinion, that where a contract is made between foreigners belonging to the same country, who are not domiciled, but are merely transient persons, in the place, where the contract is made, it ought to be governed by the law of their own country; and that this rule applies, a fortiori, where they are ignorant of the laws of the place, where the contract is made.4

¹ Kearney v. King, 2 Barn. & Ald. R. 301; Sprowle v. Legge, 1 B. & Cresw. 16.

² Ibid.; ante, § 271; post, § 317; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 772, 773; 2 Burge, Comm. Pt. 2, ch. 9, p. 860, 861,

³ 2 Boullenois, Observ. 46, p. 456, 489, 490.

^{4 2} Boullenois, Observ. 46, p. 455 to p. 458; Id. p. 495, 496, 497, 501, 502, 503, and note.— Boullenois (in p. 494, 495) says; To return to our question upon the interpretation of contracts or testaments, I think the sole rule, which can be prescribed, is that of determining it according to the different circumstances. These different circumstances will lead us sometimes in favor of the law of the place of the contract, sometimes in favor of that of the situs, often in favor of that of the domicil, and often in favor of that, where the payment is to be made. And hence he agrees to Dumoulin's opinion in his Commentary on the Code. Molin. Comment.

Without undertaking to say, that the exception may not be well founded in particular cases, as to persons merely in transitu, it may unhesitatingly be said, that nothing but the clearest intention on the part of foreigners, to act upon their own domestic law, in exclusion of the law of the place of the contract, ought to change the application of the general rule. And, indeed, even then, if the performance of the contract is to be in the same country, where it is made, it seems difficult, upon principle, to sustain the exception. Huberus has applied the same rule to those, who are domiciled, and to those, who are merely commorant, in the place of the contract; that the law of the place of the contract is to govern.

§ 274. Grotius has also affirmed the doctrine in a general form, "If" (says he) "a foreigner makes a bargain with a native, he shall be obliged by the laws of his state; because he, who enters into a contract in any place, is a subject for the time being, and must be obedient to the laws of that place." Quare etiamsi peregrinus cum cive paciscatur, tenebitur illis legibus; quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur. Emèrigon follows Grotius, and adopts his very language. "A stranger," (says he,) "who contracts in the territories of a state, is held as a temporary subject of the state, subject to the

ad Cod. Lib. 1, tit. 1, l. 1, Conclus. de Statut. p. 554; ante, § 263; Bartol. Comment. ad Cod. Lib. 1, tit. 1, l. 1, n. 13; post, § 279; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 775, 776, 777.

See Pardessus, Droit Comm. n. 191, 182; 1 Emérigon, ch. 4, § 8.
 Huberus, Lib. 1, tit. 3, De Confl. Leg. § 2, 3; ante, § 261, note. See Livermore's Diss. p. 46, § 42.

³ Grotius, B. 2, ch. 11, § 5, n. 2.

laws thereof. L'étranger, qui contracte dans les terres d'un état, est tenu, comme sujet à temps de cet état, de se soumettre aux lois du pays. Lord Stowell, in a passage in one of his most celebrated judgments, has refused to acknowledge ignorance of the law of a foreign country to be any foundation to release a party from the obligation of a contract made there.

§ 274 a. Dumoulin, while he admits the general rule to be, that the law and custom of the place, where a contract is made, ought generally to govern in the interpretation of the contract, at the same time denies, that it is of universal application. On the contrary, he holds, that there are cases, in which it ought to be disregarded. "Et animadvertendum," (says he,) " quod doctores pessimè intelligunt, d. l., quia putant ruditer et indistinctè, quod debeat ibi inspici locus et consuetudo, ubi fit contractus, et sic jus in loco contractus. Quod est falsum; quinimo jus est in tacita et verisimiliter mente contrahentium. Fac, civem Tubingensem peregrè euntem per urbem Italiæ, vendere ibi domum suam Tubingæ vel Augustæ, an teneatur dare duos fidejussores evictionis, et de duplo, prout probat statutum loci contractus. Et omnes dicunt, quod sic, in quo errant, non intelligentes praxim, et hic non perspicientes mentem, d, l., quæ est practica. Ideo contrarium dicendum; quia venditor non est subditus statutis Italiæ, et statutum illud non concernit rem, sed personam, et sic non potest ligare exteros, qui non censentur sese obligare ad statutum, quod ineunt. Ideo non tenetur cavere, nisi secundum morem sui domicilii, vel

¹ Emérigon, Assur. ch. 4, § 8, Tom. 1, p. 124, 125. See also Casaregis, Disc. 179, n. 60, 61, 62.

² Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 60, 61.

secundum jus commune; nec verum est, quod istud statutum concernat solemnitatem et modum contrahendi. Quinimo respicit effectum, meritum, et decisionem, et dicta lex malè allegatur ad materiam primæ conclusionis. Faciamus civem Tubingensem hic vendere vicino domum Genevæ, vel Tiguri sitam, ubi sit statutum, quod venditor fundi tenetur de duplo cavere, per duos idoneos cives, ne teneantur litigare extra forum suum. Iste est proprius casus et verus, intellectus, d. l. in quâ dicitur : Venditorem teneri cavere secundum consuetudinem loci contractus; quod est intelligendum non de loco contractus fortuiti, sed domicilii, prout crebrius usuvenit, immobilia non vendi peregrè, sed in loco domicilii. Lex autem debet adaptari ad casus vel hypotheses, quæ solent frequenter accidere: nec extendi ad casus raro accidentes. Saltem quando contrarium apparet de ratione diversitatis, vel quando sequeretur captio ingerentis. Quia qua ratione dicta lex, excludit externum locum situs rei, in quo contrahentes non habent domicilium; multo fortius excluditur locus fortuitus contractus, in quo partes peregrè transeunt. Patet: Quia quis censetur potius contrahere in loco, in quo debet solvere, quam in loco, ubi fortuito transiens contrahit. Sed hic venditor eo inso se obligat, solutionem et traditionem realem, per se, vel per alium, facere in loco, in quo fundus situs est : ergo ibi contraxisse censetur. Et tamen in dubio non attenditur consuetudo loci contractus. Quia venditor illi non subest, nec ejus notitiam habere præsumitur, ergo multo minus consuetudo loci fortuiti, quam magis ignorat.1

¹ Molin. Oper. Comm. ad Cod. Lib. 1, tit. 1, l. 1, Conclus. de Statut. Tom. 3, p. 554; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 851, 852; Id. p. 858, 859.

§ 275. Cases, illustrative of the importance of the general rule, may be easily found in the jurisprudence of modern nations. "In some countries." (savs Boullenois,) "the laws give a certain sense and a certain effect to clauses in an instrument. while the laws of another country give a sense and effect more extensive, or more restrained. ample, at Toulouse, the cause, si sine liberis, added to a substitution, means a gradual substitution; and in other places, it means only a condition, if other circumstances do not concur."1 The full effect of this example may be felt only by a civilian. an analogous one may be put from the common A contract in England for an estate there situate, or a conveyance of such an estate, to A.. and the heirs of his body begotten, would, before the statute de donis, have been interpreted to mean a contract for, or a conveyance of, a conditional fee simple; but since that statute, it would be construed to be a contract for or a conveyance of a fee tail.2 The rights growing out of these different interpretations are (as every common lawyer knows) exceedingly different; and to construe them otherwise, than according to the common law, would defeat the intention of the parties, and uproot the

^{1 2} Boullenois, Observ. 46, p. 447, 518, 519.—In the French Law substitution is either simple or gradual. It is called simple, when one person only is substituted for another in a donation; as a donation to A., and if he refuses or dies to B. It is called gradual, when there are several substitutes in succession; as a donation to A., and if he refuses or dies to B., and if B. refuses or dies to C., and if C. refuses or dies to D., &c. &c. Pothier, Traité des Substitution, art. Prelim.; Id. § 3, art. 1, See also 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 855, 856, 857.

⁹ 2 Black. Comm. 110 to 112.

solid doctrines of law. The sense of the terms, and the legal effect of the instrument ought, and, it is to be presumed, would be every where ascertained by the same mode of interpretation wherever the point should come, directly or indirectly,

in judgment, in any foreign country.

§ 276. The language of marriage contracts and settlements must, in like manner, be interpreted according to the law of the place, where they are contracted. A moment's consideration would teach us the inextricable confusion, which would ensue from disregarding the habitual construction put by courts of law upon instruments of this sort, executed in England, or in France, and brought into controversy in any other country. The whole system of interpretation of the clauses of marriage contracts and settlements in England is in a high degree artificial; but it is built upon uniform principles. which could not now be swept away without leaving What could a forinnumerable difficulties behind. eign court do in interpreting the terms, heirs of the body, children, issue, connected with other words of limitation, or description, in a marriage settlement or a will made in England? The intricate branch of English jurisprudence, upon which the true exposition of such clauses depends, has tasked and exhausted the diligence and learning of the highest professional minds; and requires almost the study of a life to be thoroughly mastered.1 Probably the system of interpretation in similar cases in France does not involve fewer difficulties, dependent upon the nice shades of meaning of words in different connexions, and the necessary complexity

¹ See Fearne on Contingent Remainders, passim.

of matrimonial rights, and nuptial contracts, and prospective successions.¹ The general rule is in no cases more firmly adhered to, than in cases of nuptial contracts and settlements, that they are to be construed and enforced according to the Lex loci contractûs.²

§ 276 a. The same doctrine was fully recognised in a recent case in England. In that case the parties were domiciled and married in Scotland, and executed a nuptial contract, containing mutual provisions for the benefit of the parties and their offspring. Afterwards the wife, upon the death of her mother in England, became entitled to certain stock: and the husband filed a bill in chancery to have the stock conveyed to him by the trustee thereof, without a settlement being made upon his wife in regard thereto. The question was, whether the wife was entitled to the common equity to a settlement out of the stock, according to the English law. peared, that, by the law of Scotland, acting upon the interpretation and construction of the provisions of the nuptial contract, the wife was not entitled to any such equity to a settlement. The Lord Chancellor held. that the Court, in administering the rights of the parties under that nuptial contract, was bound to give the same construction and effect to it in England, as the Scottish law would give to it; and he therefore awarded the stock to the husband without any settlement.3

¹ See 2 Boullenois, Observ. 46, p. 489 to 494, 503, 504, 505, 513; Martyn v. Fabrigas, Cowper, R. 174.

² Feaubert v. Turst, Prec. ch. 207; De Couche v. Savatier, 3 John. Ch. R. 190.

³ Anstruther v. Adair, 2 Mylne & Keen, R. 513, 516. See also Bread-

§ 277. The same rule is also universally acknowledged in relation to commercial contracts.1 Where the terms of an instrument, executed by foreigners in a foreign country, are free from obscurity, it will be construed according to the obvious import of those terms, unless there is some proof, that, according to the law of the foreign country, the true interpretation of them would be different.2 But where a particular interpretation is established, that must be followed. Indeed, the courts of every country must be presumed to be the best expositors of their own laws, and of the terms of contracts made with reference to them. And no court on earth, professing to be governed by principle, would assume the power to declare, that a foreign Court misunderstood the laws of their own country, or the operation of them on contracts made there.3

§ 278. The remarks already suggested upon this rule cannot be better enforced, than by a quotation from an opinion of the late learned Mr. Chief Justice Parker. "That the laws of any state cannot by any inherent authority, be entitled to respect extra-territorially, or beyond the jurisdiction of the state, which enacts them, is the necessary result of the independence of distinct sovereignties. But the courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced

albane v. Chandos, cited in 4 Burge, Comment. on Col. and For. Law, App'x. 749, 755.

¹ Pardessus, Droit Comm. Tom. 5, n. 1491, 1492; 2 Kent, Comm. Lect. 39, p. 457, 458, 3d edit.

⁹ King of Spain v. Machado, 4 Russell, R. 225; post, § 286.

³ Mr. Chief Justice Marshall in Elmendorf v. Tayler, 10 Wheaton, R. 159; Mr. Justice Porter in Saul v. His Creditors, 17 Martin, R. 587.

so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts. So, that it is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the state, in which they are made, unless from their tenor it is perceived, that they were entered into with a view to the laws of some other state. And nothing can be more just than this principle. For when a merchant of France, Holland, or England, enters into a contract in his own country, he must be presumed to be conusant of the laws of the place, where he is, and to expect, that his contract is to be judged of and carried into effect according to those laws; and the merchant, with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has in some other way excepted his particular contract from the laws of the country, where he is." 1

§ 278 a. Hence it is adopted by the common law, as a general rule in the interpretation of contracts, that they are to be deemed contracts of the place, where they are made, unless they are positively to be performed or paid elsewhere. Therefore, a note made in France, and payable generally, will be treated as a French note, and governed accordingly by the laws of France, as to its obligation and construction. So, a policy of insurance, executed in England on a French ship for the French owner, on a voyage from one French port to another, would be treated as an English contract, and, in case of loss, the debt would

¹ Blanchard r. Russell, 13 Mass. R. 1, 4, 5,

be treated as an English debt. Indeed, all the rights and duties, and obligations, growing out of such a policy, would be governed by the law of England, and not by the law of France, if the laws respecting insurance were different in the two countries.1

& 279. It has sometimes been suggested, and especially by foreign jurists, that contracts, made between foreigners in a foreign country, ought to be construed according to the law of their own country, whenever they both belong to the same country.2 Where they belong to different countries, some controversy has arisen as to the point, whether the law of the domicil of the debtor, or that of the creditor ought to prevail.3 Where a contract is made in a country between a citizen and a foreigner, it seems admitted, that the law of the place, where the contract is made, ought to prevail, unless the contract is to be performed elsewhere.4 In the common law of England and America. all these niceties are discarded. Every contract.

¹ Don v. Lippman, 5 Clarke & Fin. 1, 18, 19, 20; post, § 317.

² Ante, § 273; 2 Boullenois, Observ. 46, p. 455 to p. 458; Id. p. 495 to p. 503. - Hertius seems to make the following distinction. After having stated the general rule to be; Si lex actui formam dat, inspiciendum est locus actus, non domicilii, non rei sitæ; he adds; Nimirum valet hæc Regula, etiam in extero, qui actum celebrat, licet enim hic subjectus revera maneat patrim sum, tamen illud, de actu primo est intelligendum, quoad actum vero secundum subditus illius loci sit temporarius, ubi agit, vel contrahit, simulque ut forum ibi sortitur, ita statutis ligatur. Non valet si exterus ignoravit statutum. Hertii Opera, Tom. 1, De Collis. Leg. § 4, n. 10, p. 126, 128; Id. edit. 1716, p. 179 to 181.

³ See Fœlix, Confl. des Lois, Revue Etrang. et Franc. 1840, Tom. 7, § 21 to 23, p. 200 to p. 209; Id. § 40 to 50, p. 46 to p. 49; 3 Burge,

Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 775, 776.

⁴ See Livermore's Dissert. § 42, p. 46; 1 Hertii Opera, De Collis. Leg. § 10, p. 126, 128; Id. p. 179 to p. 181, edit. 1716; Voet, de Statut. § 9, ch. 2, Excep. 4; Id. § 10, p. 268, edit. 1715; Id. p. 325, edit. 1661. But sec contra, 2 Boullenois, Observ. 46, p. 459; ante, § 263, § 273, 274;

whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place, where it is made, and is to be executed.¹

\$ 279 a. Hertius has put a case, where a contract made in a country is subject to a condition, and the performance of that condition takes place in another country, the laws of which are different; and the question is, whether the laws of the one, or those of the other ought to govern the contract. He answers, that the laws of the country, where the contract was made; because the condition, when fulfilled, refers back to the time of the contract. Quia conditio retrotrahitur ad tempus conventionis.² J. à Sandè adopts the same doctrine almost in the same words.³

§ 280. The rules already considered suppose, that the performance of the contract is to be in the place, where it is made, either expressly, or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of

¹ Smith v. Meade, 3 Connect. R. 253; De Sobry v. De Laistre, 2 Harr. and John. R. 193, 228.

⁹ Hertii Opera, De Collis. Leg. § 4, n. 54, p. 147, edit. 1737; Id. p. 207, edit. 1716.

³ J. à Sandè, Comm. ad Reg. Jur. l. 9, p. 18; post, § 287.

⁴ Anto, § 242.

⁵ 2 Kent, Comm. Lect. 37, p. 393, 394, and Lect. 39, p. 459, 3d edit. Canarcgis, Disc. 179; 1 Emérigon, c. 4, § 8, Voet, de Stat. § 9, ch. 2, § 15, p. 270, edit. 1715; Id. p. 328, edit. 1661; Boullenois, Quest. Contr. des Lois, p. 330, &c.; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771, 772; Don v. Lippman, 5 Clarke & Finn. R. 1, 13, 19; Forgusson v. Fyffe, 8 Clarke & Finell. 121.

natural justice; and the Roman law has (as we have seen) adopted it as a maxim; Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.¹ And again, in the law, Aut ubi quisque contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia.² The rule was fully recognised, and acted on in a recent case by the Supreme Court of the United States, where the Court said, that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the laws of the place of performance.³

§ 281. Paul Voet has laid down the same rule. Hinc, ratione effectus et complementi ipsius contractus, spectatur ille locus, in quem destinata est solutio; id, quod ad modum, mensuram, usuras, &c. negligentiam, et moram post contractum initum accedentem, referendum est. He puts the question; Quid si in specie, de nummorum aut redituum solutione difficultas incidat, si forte valor sit immutatus, an spectabitur loci valor, ubi contractus erat celebratus, an loci, in quem destinata erat solutio. Respondeo; Ex generali Regulâ, spectandum esse loci statutum, in quem destinata erat solutio. So that, according to him, if a contract is for money or goods, the value is to be ascertained at the place of performance, and not at the place, where the contract is made. And the same rule applies to the weight or

¹ Dig. Lib. 44, tit. 7, l. 21; ante, § 233.

⁰ Dig. Lib. 42, tit. 5, 1. 3.

² Andrews v. Pond, 13 Peters, R. 65.

⁴ P. Voet, De Stat. § 9, ch. 2, p. 270, § 12, 14, 15, 16, p. 269 to p. 273, edit. 1715; Id. p. 326 to p. 329. edit. 1661; post, § 301 f.

⁵ P. Voet, De Stat. § 15, 16, p. 271, edit. 1715; Id. p. 328, edit. 1661; post, § 301 f.

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measure of things, if there be a diversity in different places. Everhardus adopts the same doctrine. Quod. extinatio rei debitæ consideratur secundum locum, ubi destinata est solutio, seu deliberatio, non obstante quod contractus alibi sit celebratus.2 Ut videlicit inspiciatur rales meneta. qui est in loco destinata solutionis.3 Huberus adopts the same exposition. Ferum tamen non ita præcise respiciendus est locus, in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus.4 Indeed, it has the general consent of foreign jurists; 5 although to this, as to most other doctrines, there are to be found exceptions in the opinions of some distinguished names. Thus, John a Sande maintains, that the law of the place, where the contract is made, is to govern. although the payment is to be made in another place. Denique inspicitur locus contractus, etiamsi solutio in alium locum sit destinata. Et proinde mensura usurpanda est non loci, ubi frumentum vel vinum exigitur, sed ubi de eo conventum est.6 The general rule has. however, been adopted both in England and America. In one of the earliest cases, Lord Mansfield stated the doctrine with his usual clearness. "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule, by which it is to be

¹ P. Voet, De Stat. § 15, 16, p. 271, edit. 1715; Id. p. 328, edit. 1661.

² Everhard. Consil. 78, n. 9, p. 205; post, § 300 b.

³ Ibid.

⁴ Huberus, Lib. 1, tit. 3, § 10; ante, § 239; post, § 299.

⁵ 2 Boullenois, Observ. 46, p. 475, 476; Id. p. 488; 1 Hertii Oper. De Collis. Leg. § 4, n. 53, p. 147, edit. 1737; Id. p. 207, edit. 1716; Voet ad Pand. Lib. 4, tit. 1, § 29; Post, § 300 a to § 300 f.

⁶ J. à Sandè, Opera, Comm. De Reg. Jur. l. 9, p. 18. See also Colerus, de Process. Exec. Pt. 2, n. 79, cited 2 Boullenois, Observ. 46, p. 475, 476.

its practical bearing, it may be well to illustrate it by some cases.1

§ 283. One of the most simple cases is, where two merchants, doing business with each other, reside in different countries, and have mutual accounts of debt and credit with each other for advances and sales. What rule is to be followed as to the balance of accounts existing from time to time between them? Is it the law of the one country, or of the other, if there is a conflict between their laws on the subject? If the business transactions are all on one side, as in case of sales and advances, made by a commission merchant in his own country for his principal abroad; there, the contracts may well be referred to the country of the commission merchant, and the balance be deemed due to him according to its laws.2 For, although it may be truly said, that the debt is due from the principal, and he is generally expected to pay it, where he dwells; yet it is equally true, that the debt is due, where the advances are made, and that payment may be insisted upon there.

§ 284. But, suppose the advances have been made in the country of the principal, and the goods sold in the other country; is the same rule to prevail?

¹ Mr. Burge has expressed the true sense of the general rule, and its qualifications, in the following terms. "It may be stated generally, that with respect to contracts, of which movable property is the subject, the law of the place, in which the contract is made, will in some respects exclusively prevail, although the contract is to be performed in another; and that in those respects, in which it does not prevail, the law of the place, where the contract is to be performed, must be adopted. But this conclusion is subject to some qualifications and exceptions."

² Coolidge v. Poor, 15 Mass. R. 427; Conseequa v. Fanning, 3 John. Ch. R. 587, 610. See also Bradford v. Harvard, 13 Mass. R. 18; Milne v. Moreton, 6 Binn. R. 353, 359, 365.

Or, are the advances to be governed by the law of the place, where they are advanced, and the sales of the goods, by that of the place, where they are received by the commission merchant? Suppose both the merchants, in different countries, sell goods and make advances mutually for each other; and upon the accounts a balance is due from one to the other; by the law of what place is such balance to be ascertained and paid? In these and many other like mixed cases, the amount of the balance. the time, and the manner, and the place of payment, and the true principle of the adjustment of the mutual accounts, may materially depend upon the operation of the Lex loci, when the law of the one country conflicts with that of the other. The habits of business and trade between the parties may sometimes decide these points; but if no such governing circumstances are established, the cases must be reasoned out upon principle. Upon principle, it may, perhaps, be found most easy to decide, that each transaction is to be governed by the law of the place, where it originated; advances by the law of the place, where they are advanced; and sales of goods by the law of the place, where they are received.1 The importance of the true rule is peculiarly felt in all cases of interest to be paid on bal-

§ 284 a. This subject was a good deal discussed in a recent case, where goods had been consigned for sale in Trieste by a merchant of Boston, and advances were made by the agent of the consignees in

¹ See Conseequa v. Fanning, 3 John. Ch. R. 588, 610; 17 John. R. 511; Casaregis, Disc. 179.

Boston to an amount exceeding the amount of the proceeds of the goods when sold. A suit was brought by the consignees to recover the balance, and the question was, at what rate of exchange the balance was to be allowed; and that depended upon another question, where the balance was reimbursable, in Boston, or in Trieste. The Court held, that the balance was reimbursable at Boston, where the advances were made; but that, if the advances had been made at Trieste, the balance would have been reimbursable there. The Court consequently allowed the par of exchange at Boston upon the balance, it being payable there.

§ 285. Another case may serve to illustrate the same doctrine. A merchant in America orders goods to be purchased for him in England. which country is the contract to be deemed complete and by the laws of which is it to be governed? Casaregis has affirmed, that in such a case the law of England ought to govern; for there the final assent is given by the person, who receives and executes the order of his correspondent. Pro hujus materiæ declaratione præmittenda est regula ab omnibus recepta, quod contractus vel negotium inter absentes gestum dicatur eo loci, quo ultimus in contrahendo assentitur, sive acceptat; quia tunc tantum uniuntur ambo consensus.2 Sic mandati contractus dicitur initus in loco, quo diriguntur literæ missivæ alicujus mercatoris, si alter ad quem diriguntur, eas recipit, et acceptat mandatum.3 He goes on to illus-

¹ Grant v. Healey, 2 Chand. Law Reporter, 113. See Post, 311 a, and note.

² Casaregis, Disc. 179, § 1, 2. See 1 Hertii Opera, De Collis. Leg. § 56, p. 147; Id. p. 208, edit. 1716; 1 Burge, Comment. on Col. and For. Law, Pt. 2, ch. 20, p. 753.

³ Ibid.

trate the doctrine by putting the case of a merchant, directing his correspondent, in a foreign country, to buy goods for him; in which case he says, if the correspondent accept the order, and in the execution of it he buys the goods of a third person, two contracts spring up; the first of mandate between the principal and his agent, and the second of purchase and sale between the vendor and the agent, as purchaser in the name of the principal; and both are to be deemed contracts made in the place, where the agent resides. His language is; Quando Mercator alteri suo Corresponsori mandat, ut aliquas merces pro se emat, easque sibi transmittat, quo casu si Corresponsor acceptet mandatum, et in illius executionem ab aliqua tertia persona merces commissas emat, duo perficiuntur contractus: Primus, mandati inter mandantem, et mandatarium, et alter, emptionis, et respective venditionis inter eundem mandatarium, uti emptorem nomine mandantis, et venditorem, et ambo perficiuntur in loco mandatarii: Nam, quoad mandati contractum, ratio est, quia consensus mandantis per literas unitur cum ultimo consensu mandatarii in loco, quo mandatarius reperitur, et acceptat mandatum, eoque magis quoad alterum venditionis, et respective emptionis, quia mandatarius vere emit in loco, in quo et ipse, et venditor existunt.1 This doctrine, so reasonable in itself, has been expressly affirmed by the Supreme Court of Louisiana.2 It has also received a sanction in a recent case in the House of Lords. where the Lord Chancellor said; "If I, residing in England, send down my agent to Scotland, and

¹ Casaregis, Disc. 179, n. 10, p. 192.

² Mr. Justice Martin in Whiston v. Stodder, 8 Martin, R. 93. See also Malpica v. McKown, 1 Louis. R. 248, 355.

he makes contracts for me there, it is the same, as if I myself went there, and made them.¹" The same rule has been held to apply even to an English corporation, contracting by its agent in Scotland; for the contract takes effect as a contract in Scotland.²

§ 286. And if a like contract of purchase is made by an agent without orders, and the correspondent ratifies it, Casaregis says, that the contract is not to be deemed a contract in the country of the ratification, but of the purchase; because the ratification has reference back to the time and place of Ratio est, quia ille ratificationis conthe purchase. sensus, licet emitatur in loco ratificantis, et ibi videatur se unire cum altero precedenti gerentis consensu. qui venit a loco gerentis ad locum ratificantis, retrotrahitur ad tempus et ad locum, in quo fuit per gestorem initus contractus emptionis; vel aliud negotium pro absente; et ratio rationis est, quia consensus ratificantis non unitur in loco suo ad aliquem actum seu contractum perficiendum, sed acceptandum contractum vel negotium pro se in loco gestoris jam factum; ac si eodem tempore et loco, in quo fuit per gestorem negotium

¹ Pattison v. Mills, 1 Dow. & Clarke, R. 342; Albion F. and L. Insur. Co. v. Mills, 3 Wils. & Shaw, 218, 233.—It is difficult to reconcile this doctrine with the views of the Court and Bar in Acebal v. Levy, 10 Bing R. 376, 379, 380, 381, (Ante, § 262 a,) where upon a sale of goods in Spain, to be delivered in England, the purchase having been made by an agent of the purchasers by orders sent to Spain, the Court and Bar seem to have thought, that the contract was governed by the English Statute of Frauds. See Ante, § 262 a; Post, § 318, and note. Did the place of the delivery and payment make any difference? See Post § 318, and note.

Albion F. and L. Insur. Co. v. Mills, 3 Wils. & Shaw, R. 218, 233,
 See also 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20
 p. 753.

gestum, ipsemet ratificans esset præsens, ibique contraxisset.¹ So, a like rule applies, if a merchant in one
country agrees to accept a bill drawn on him by a
person in another country. It is deemed a contract
in the place, where the acceptance is to be made.²
Paul Voet adopts the same conclusion. Quid si de
literis cambii incidat questio, Quis locus erit spectandus?
Is spectandus est locus, ad quem sunt destinatæ, et
ibidem acceptatæ.³

§ 286 a. Hertius takes a curious distinction on this subject. If, says he, a contract is made in one country, and is ratified in another, it may be asked, if the laws of the different places vary, which is to govern? To which he answers: If the confirmation is made to add additional faith to the contract, as for example, if the contract is reduced to writing for the sake of proof, then the law of the place, where the contract is made, is to be looked to. But, if to give validity to the contract itself, the law of the place of confirmation - Contractus in alio loco fit, in alio confirmatur; quæritur, cujus loci leges, si discrepare eas usuveniat, intuer idebeamus? Si confirmatio accedat ad conciliandam contractui majorem fidem, v. g. contractus probationis gratia in scripturam redigatur, arbitramur, spectandam loci, ubi contrahitur legem. Sin, ut contractus sit validus, loci, ubi confirmatur, jura prævalebunt.4 So that Hertius seems to put the solution of the case upon the point of the supposed intention of the parties, to give validity to a defective

¹ Casaregis, Disc. 179, § 20, 64, 76 to 80, 83.

² Boyce v. Edwards, 4 Peters, R. 111.

³ P. Voet, De Statut. § 9, ch. 2, § 14, p. 271, edit. 1715; Id. p. 327, edit. 1661.

^{4 1} Hertii Opera, De Collis. Leg. § 4, n, 55, p. 147, edit. 1737; Id. p. 208, edit. 1716; Ante, § 297.

contract, or only to impart a better proof of its original validity.

§ 286 b. A question of a somewhat analogous nature, growing out of agency, and of very familiar occurrence, deserves notice in this place. It is well known, that by the common law the master of a ship has a limited authority to take up money in a foreign port, and give a bottomry bond in cases of necessary repairs, and other pressing emergencies. But he is not at liberty to give such a bond for mere useful supplies or advances, which are not strictly necessary. It is highly probable, that in some maritime countries, the basis of whose jurisprudence is the civil law, a broader authority is allowed to the master, or at least a broader liability may attach upon the vessel and the owner.1 In such a case, the question might arise, whether the liability of the ship, or of the owner, was to be decided by the authority of the master according to the law of the foreign place, where the money was advanced, or by the law of the place of the domicil of the ship and owner. In England it would be held, (at least such seems the course of the adjudications,) that the master's authority to bind the ship, or the owner, in a foreign port, would be governed by the law of the domicil of the owner; and that consequently the master of an English ship could not bind the owner for advances, or supplies in a foreign port, which were not justifiable by the English law.² But it is far from being certain, that

¹ See 2 Emérigon, Contrats à la Grosse, ch. 4, § 2 to § 6, § 8, p. 422 to p. 445.

² The Nelson, 1 Hagg. Adm. R. 169, 175, 176.—In the case of The Nelson, Lord Stowell said; "It is certainly the vital principle of this species of bonds, that they shall have been taken, where the owner was

would adopt the same rules, if the lender or supplier

&c., such a jus in re ought to be implied, as the actual import and understanding of the transaction, and as therefore no less acquired ex lege loci, than if it had been constituted by a formal writing. But if in this way such a right do arise ex lege loci, then ex justitia, and on principles of international law, ought to be rendered effectual with us; a point, which will be manifest, if we consider, that the validity of a written instrument must be tried by the law of the place, in which it was executed. Still however, must it be remembered, that it is merely as the presumed understanding and intention of parties, that the jus in re can so arise; as a right conceived in favor of the creditor it can unquestionably be renounced by him; and then comes the question, whether circumstances do not exclude the presumption quoad a mutal understanding founded on the law of the place. When, not to speak of necessary advances, a foreign ship is repaired here, the shipwright, who parts with the possession without stipulating for, and obtaining in due form, a security over the thing, may be supposed to have, according to the principle of the common law, relied exclusively on the personal credit of his debtor; did, therefore, the other party even conceive, that he had likewise bound the vsssel. there would be wanting the mutual understanding to infer an agreement. So far, then, does the lex loci operate against the contraction of a jus in re for the debt; but it does not thence follow, that elsewhere the lex loci should operate in favor of a tacit hypothecation. A distinction is ever to be attended to between the case of a party causally entering a foreign country, and that of one, who resides in it; and the distinction is particularly strong in regard to an individual, who, as master, has the charge of a vessel in a foreign port. Well may such a person, when he orders repairs on personal credit, be presumed to be ignorant of any further condition, which the law of his own country denies; and while, if the other party leave that unexplained, it may be argued with great plausibility, that he has consented to waive the additional security, tacitly admitted in ordinary cases, ex lege loci, it must be considered, that there would, at all events, be wanting the mutual assent, which constitutes the basis of a contract. But this is not all. The contract, in such cases, is made with the shipmaster, who acts as the implied mandatory of the owners; and the effect of the transaction must greatly depend on the extent of his authority. Now, it is true, that, as a person, who has been appointed to an office, must be presumed to be invested with the usual powers, so restrictions upon the ordinary authority will not be effectual against another party, who has not been apprized of them; - yet it will be observed, that, since it is the duty of those, who deal with an agent, to make themselves acquainted with the extent of his powers, whether expressed or fairly implied from his office, so the presumed mandate here must be measured, either by some general principle of maritime law, or

had acted with good faith, and in ignorance of the want of authority in the master.1

§ 286 c. In a recent case in Louisiana, where the question arose, as to the liability of the owner for the property on board, belonging to a passenger, who died on the voyage, the property being afterwards lost, the point was made, whether, as the passenger and property were taken on board at a foreign port, the

by the law of the country, to which the ship belongs. Such a general principle of maritime law would of itself, though in a different way, tend in my apprehension, to exclude the lex loci; but there is no such universally received principle, and the more positive exclusion of the principle of the lex loci is the consequence. Thus, the English law does not allow the master to hypothecate the vessel, at least expressly, unless in a foreign port, where personal credit is unattainable; but entitles him to pledge the absolute personal responsibility of his constituents for the amount of necessary repairs, furnishings, &c.; while on the other hand, the French law authorizes him to hypothecate the vessel, &c., not bind his constituents personally, at least not beyond the eventual value of the ship and freight, &c. on her return. And it is quite clear, that the merchants and artisans of the respective countries must contract with the shipmasters of each other, according to the powers respectively inherent in those offices. It would be to no purpose for the English artisan or merchant to plead in France the law of his own country in support of his action for absolute responsibility; and to allow the Frenchman to have the benefit of a privilege ex lege loci, while he has acquired the absolute personal liability of the owners, would, while an opposite measure of justice was awarded to the English, be to afford him a double advantage - the combined effect of the laws of both countries, - would give him a right, the opposite party never contracted for, nor himself could fairly anticipate. The clear result then is, that the transactions must be held to have reference to the master's implied mandate, according to the law of his own country -a mandate, which it is the duty of those, who deal with him as an agent, to ascertain the extent of; and, that, while they never can justly complain of having their right limited by such a principle, the shipmaster cannot be supposed to intend an abuse of his powers, - whence the very gist of all contracts, the understanding of parties, would be wanting to infer a right, ex lege loci contractus, which the scope of his authority did not import. Thus much for the principle of the lex loci contractus. We shall now proceed to inquire into the principles recognised in England."

1 2 Emérigon, Contrat. à la Grosse, ch. 4, § 8, p. 441, 442; Malpica

v. McKown, 1 Louis. R 249, 254, 255. 38

law of that port, or the law of the place, where the vessel and owner belonged, ought to govern as to the owner's liability. On that occasion the Court said: - We are of opinion, that the law of the place of the contract, and not that of the owner's residence, must he the rule, by which his obligations are to be ascertained. The Lex loci contractis governs all agreements, unless expressly excluded, or the performance is to be in another country, where different regulations prevail. What we do by another, we do by ourselves; and we are unable to distinguish between the responsibility created by the owner, sending his agent to contract in another country, and that produced by going there and contracting himself.1 Perhaps the case itself did not require so broad an expression of opinion; since the Court seem to have assumed, that the law of the owner's domicil coincided with the law of the place of the contract, as to the owner's responsibility, and the authority of the master. But the same doctrine has been elaborately maintained by the same Court in another case.3

¹ Mr. Justice Porter in Malpica v. McKown, 1 Louis. R. 249, 254; Ante. 6 255.

² Arago v. Currell, 1 Louis. R. 528.—Mr. Justice Martin in delivering the opinion of the court in this case said; "The first question, it presents, relates to the law, by which the rights of the parties are to be governed. The defendant sent his vessel from New-Orleans to Vera Cruz, to be employed in the transportation of passengers—and the master there entered into a contract for their passages, which being within the scope of his authority, must be as binding on the defendant, as if it had been entered into by him personally. This proposition is, however strenuously combatted by his counsel, who contends, that the master had no authority to bind the owner absolutely, but only to the amount of the value of the vessel and freight; because the laws of the country, in which the owner has his domicil, fix the measure of his responsibility, on all contracts made by the master; that the question, whether an agent has exceeded his powers, must be solved by the laws of the place in which he received them. The admission of this

286 d. Another case may readily be suggested as to the conflict of laws in cases of Agency. Let us

position would still present the question, whether, according to the laws of Louisiana, the agent, who contracted in Mexico, in the manner, the master did in the present case, exceeded his powers; and the question would still remain open as to the laws, which ought to govern. So it would be under the provision of our code, relied on, that the principal is bound only for the acts of his agent, which he could have prevented. So, if it be held, that the law of Mexico is to govern a contract directed to be made there, the question would not be, whether the agent exceeded his powers, but what responsibility the principal would have incurred, had he contracted personally. This has appeared to us the sole question for our examination and solution. The master was sent to Vera Cruz to take passengers on board of the vessel he commanded. He did so. It is not pretended, that he made any other than the agreement usual on such an occasion. Whether the property was received and put on board by the owner, or master, would make no difference. If the last was committed out of the presence of the owner, his liability would be the same. No question therefore arises as to the authority conferred being exceeded. The owner is sought to be made liable, not on the contract, but for a tort committed by the master, acting within the scope of his powers, in the execution of the contract. The law relied on, which furnishes the owner with an exemption on account of the misfeasance of the master and crew, on the surrender of the vessel and freight, would cause the same immunity had the owner contracted personally. If we understand the matter rightly, the immunity is independent entirely of the agreement having been entered into by the agent. For example, in England, where such a rule prevails, we do not understand, that there could be the slightest difference in the responsibility of the owner for the torts of the master, whether the contract was for passage or freight, whether the contract entered into with one or the other. We repeat, therefore, that we cannot see, how the question, whether the agent exceeded his powers, is at all involved in the inquiry before us. The moment it is admitted, or established, that the master's agreement for carrying passengers was on terms, such as he was authorized to make, its legal consequences must depend on other principles than those of the law of the contract of mandate. The agreement must have the same effect, as if entered into with the owner personally. If then the defendant had gone himself to Vera Cruz, and entered into a contract with a man there, which was to be performed in the island of Cuba, would it have been governed by the law of Louisiana? Now, if there be a principle, better established than any other, on the subject of the conflict of laws, it is, that contracts are governed by the laws of the country, in which they are entered into, unless they be so with a view to a performance in another. Every writer on that subject recognises it.

suppose, that A., in Massachusetts, should by a letter of Attorney, duly executed in Boston, authorize B.,

Judicial decisions, again and again, through the civilized world have sanctioned it. Why then should this form an exception? Why should the contract of affreightment, or for the conveyance of passengers, stand on different grounds than those of buying and selling merchandise? Whoever contracts in a particular place, subjects himself to its laws, as a temporary citizen. The idea, that the law of a man's domicil follows him through the world, and attaches to all his contracts, is as novel, as The proposition was not, indeed, maintained in general terms; but that offered to the Court, in relation to the contract, is identical with it; and it is impossible for us not to feel, that, if the defendant and appellant is to have the contract decided by the laws of Louisiana, it will be equivalent to a declaration of this amount, that an inhabitant of this state carries its laws with him, wherever he goes, and they regulate and govern his contracts in foreign countries - that, whether a man contracts with him in Paris or London, our municipal regulations are the measure of the rights and duties of both parties to the contract. That the legislature of Louisiana may have a right to regulate the contracts of her own citizens in every country, so long as they owe her allegiance, may, or may not be true. But where the citizen contracts abroad, with a foreigner, it is evident the rule must be limited in its operation. The legislature may refuse permission to enforce the agreement at home; but abroad, and particularly, where the agreement is entered into, it is valid. The general rule, however, is never to extend the prohibition to contracts made abroad, unless there be an express declaration of the legislative will. We, therefore, conclude, that, as the master was sent with the vessel to Vera Cruz, to take passengers; as he acted as the owner's agent in making the agreement, and this is admitted by the answer; and as the limitation to the responsibility is resisted on grounds, which would have an equal force, if the agreement had been made with him personally, we are bound, in our inquiry as to the law, which governs the agreement, to consider it as made personally by the owner, and it is to be governed, not by the laws of his domicil, but by those of the country, in which it was entered into and to be performed. But, although the case does not present the question of the owner's responsibility, in relation to the contract of mandate, the agent having confined himself within his powers; yet, as the argument has placed the immunity claimed by the defendant, and appellant on that ground, it is well to notice it more particularly. If we understood the arguments correctly, it was contended, that the laws of Louisiana, having put some limitations to the power of the master to bind the owner, any contract of the former, in a foreign country, must be subject to the limitation; and if they be exceeded, there is an end to the latter's responsibility. Where a general power is confined to an agent, the party

his agent in New Orleans, to sell his ship, then lying in New Orleans, and to execute a bill of sale in his

contracting with him is not bound by any limitation, which the principal may have affixed, at the time or since, by distinct instructions. Now, in the case before us, if instructions be supposed to have been given to the master, not to bind the owner beyond the value of the vessel and freight. or for any act, which the latter could not prevent, would parties contracting with the former, in a foreign country, be bound by them? We think, it is certain they would not. Every contract, which by the general maritime law the master can make, is binding on the owner. By putting the former in command, and sending him abroad, the latter invests him with the general powers masters have as such, and those, who contract with him have nothing to do with any private instructions, by which the general power may have been limited. If the limitation arises not from the owner's instructions, but from the particular laws of the country, from which the vessel has sailed, must not the consequences be the same? Can these laws limit the master's power more effectually than the owner could, or can they extend farther? We think not. They have no force in a foreign country, where they are presumed to be equally unknown. Emerigon, treating of the case, where the master was prohibited from taking des deniers a la grosse, during the voyage, examines the question, whether those, who furnished them, would have an action against the owner. He cites all the texts of the Roman laws, on which the negative can be maintained, and concludes, that if the lender had no knowledge of the prohibitions, the owner would be responsible; that those, who contract with him in a foreign country. have a right to presume he is clothed with all the powers, which belong to his station. Boulay Paty is of the same opinion, as to the responsibilities of the owner for the acts of the master appointed by him, whom they put in command, with a special prohibition from making a subrogution of his powers. (2 Emerig. Contracts à la Grosse, ch. 4, 68; Boulay Paty, 289.) In another part of his work, Emerigon treats of the power of a master to draw bills on his owners in a foreign port, contrary to the authority given by the ordinance, and he considers he cannot, because he exceeds the powers of his legal mandate. In support of this opinion he cites decisions in opposition to what, he says, was the former jurisprudence of France, founded on the authority of Valin. He seems to conclude the rule is firmly fixed, as he understood it. But we find it was not generally adopted. Boulay Paty states, that opinions were divided, and the Chamber of Commerce of Nantz, in their observations on the Code of Commerce, observe, it is a question often agitated and which had been decided in different ways. (3 Emerig. Contracts à la Grosse, ch. 4, § 11, p. [441] 458; 2 Boulay Paty, 71.) The new Code adopted Valin's doctrine.

(A.'s) name, to the purchaser, and B. should accept the agency, and sell the ship after the death of A., but before he had received, or could receive any notice thereof, and should execute a bill of sale in A.'s name to the purchaser. In such a case, the question might arise, (especially if A. died insolvent, or the money was invested in pursuance of other orders of A. in goods, which had perished by fire, or other accident,) whether the bill of sale was valid or not valid. By the law of Massachusetts a letter of Attorney is revoked by the death of the principal, whether known or unknown, and all acts done, after his death. under it are mere nullities. By the law of Louisiana. if an attorney, being ignorant of the death, or of the cessation of the rights of his principal, should continue to act under his power of attorney, the transactions done by him, during this state of ignorance, would

But Emerigon, who is an author of distinction, in treating of the question, says, that although the master cannot abroad go beyond the legal mandate, provided, that his contract (son raccord) or the general mercantile laws give him a more extensive power, a moins que son raccord ou le droit commune, en certant cas, ne lui donne un pouvoir plus étendu. (2 Emerig. Contrats à la Grosse, ch. § 11, p. 452.) The general rule, where there is no statute, limiting the owner's responsibility, is, that he is responsible for all damages done by the master, while acting within the scope of his powers. Abbott states, that this is the doctrine of the common and civil law, and so do all the writers, we have been able to consult. In Chancellor Kent's late work, and in Judge Story's edition of Abbott, it is stated, that the owner is bound for the whole amount of the injury done by the master or crew, unless where ordinances and statutes have established a different rule. 3 Kent, Comm. 172; Abbott on Shipping, edit. 1829; 1 Pothier, Oblig. n. 451, 452. If this question turned on the master's having exceeded his powers, we are inclined to think, that, as the general rule authorised him to bind the owner to the extent contracted for, the plaintiff and appellant, who contracted with him, was unaffected by a limitation in a statute of another country, of which he could not be presumed to have any knowledge, and to the authority of which he was not subject."

¹ Story on Agency, § 488, 489.

be valid.1 Assuming, that this provision covers all cases, not only when the transaction is executed in the name of the agent, but also when it is executed in the name of the principal, upon which some doubt may be entertained, (as a dead man cannot act at all,)2 still the question would be, by what law the letter of attorney, with reference to its revocability, duration, and effect. is to be governed. The general rule certainly is, that all the instruments, made and executed in a country, take effect, and are to be construed, as to their nature. operation, and extent, according to the law of the country, where they are made and executed. Locus regit actum.3 But the question here would be, whether, as the execution of the power was to be in another country, the power should not be construed and executed, and its nature, operation, and extent, ascertained by the law of the latter, as an exception to the general rule. There is no doubt, that where an authority is given to an agent to transact business for his principal in a foreign country, it must be construed in the absence of any counter proofs, that it is to be executed according to the law of the place where the business is to be transacted.4 But this may well be admitted to be the rule, while the authority is in full force, without making the law of that place the rule, by which to ascertain, whether the original power of attorney is still subsisting, or is revoked, or dead by operation of law in the place of its origin.

¹ Code Civil of Louisiana, art. 3001. The Civil Code of France contains a similar regulation. Code Civil of France, art. 2008; Pothier on Oblig, n. 81.

² See Story on Agency, § 491 to § 499.

³ Ante, § 263.

⁴ Owings v. Hull, 9 Peters, R. 607, 627, 628.

point has never, as far as my researches extend, been directly decided, either at home or abroad; and, therefore, it is submitted to the learned reader for his consideration. Some of the cases, already alluded to, may be thought to furnish an analogy unfavorable to the validity of the sale.¹

§ 287. Another class of cases may be stated. merchant in one country sends a letter to a merchant in another, requesting him to purchase goods, and to draw on him for the amount of the purchase money by bills. In which country is the contract. for the repayment of the advances, if the purchase is made, to be deemed to be made? Is it in the country, where the letter is written, and on which the drafts are authorized to be drawn? Or where the goods are purchased? The decision has been. that when such advances are made, the undertaking is to replace the money at the same place, at which the advances are made; and, therefore, the party advancing will be entitled to interest on the advances according to the law of the place of the advances.2 So, if advances are made for a foreign merchant at his request, or security is given for a debt, the party paying, or advancing, is in like manner entitled to repayment in the place, where the advances are made, or the security is given, unless some other place is stipulated therefor.3

§ 287 a. So, where a loan is made in one state, and security is to be given therefor in another state by

¹ Ante, § 286 b. § 286 c.

² Lanusse v. Barker, 3 Wheat. R. 101, 146; Grant v. Healey, 2 Chand. Law Reporter, 113; ante, § 284 a. See also Hertii Opera, Tom. 1, De Collis. Leg. § 4, n. 55, p. 147, edit. 1737; Id. p. 208, edit. 1716.

³ Bayle v. Zacharie, 6 Peters, R. 635, 643, 644; post, § 320 a.

way of mortgage; it may be asked, what law is to govern in relation to the contract and its incidents? The decision has been, that the law of the place, where the loan is made, is to govern; for the mere taking of a foreign security does not (it is said) necessarily alter the locality of the contract. Taking such security does not necessarily draw after it the consequence, that the contract is to be fulfilled, where the security is taken. The legal fulfilment of a contract of loan on the part of the bondsman is repayment of the money; and the security given is but the means of securing, what he has contracted for, which, in the eye of the law, is to pay, where he borrows, unless another place of payment be expressly designated by the contract.1 But if the mortgage is actually to be executed in a foreign country, and the money is to be paid there, the loan will be deemed to be there completed, although the money may have been actually advanced elsewhere.2

§ 288. A case somewhat different in its circumstances, but illustrative of the general principle, oc-

630; post, § 293 b.

¹ De Wolf v. Johnson, 10 Wheaton, R. 367, 383. See also Ranelagh v. Champant, 2 Vern. R. 395, and Raithby's note; Conner v. Bellamont, 2 Atk. 382; post, § 293. See Chapman v. Robertson, 6 Paige, R. 627,

² De Wolf v. Johnson, 10 Wheaton, R. 367; Hosford v. Nichols, 1 Paige, R. 221; Lloyd v. Scott, 4 Peters, R. 211, 229. - Whether a contract, made in one state, for the sale of lands situate in another state, on credit, reserving interest at the legal rate of interest of the state, where the lands lie, but more than that of the state, where the contract is made, would be usurious, has been much discussed in the state of New York. In Van Schaick v. Edwards, 2 John. Cas. 355, the judges were divided in opinion upon the question. See also Hosford v. Nichols, 1 Paige, R. 220, and Dewar v. Span, 3 T. R. 425; ante § 279 n.

curred formerly in England. By a settlement made upon the marriage of A. in England, a term of five hundred years was created upon estates in Ireland, in trust to raise £12,000 for the portions of daughters. The parties to the settlement resided in England; and a question afterwards arose, whether the £12,000, charged on the term of years, should be paid in England, without any abatement or deduction for the exchange from Ireland to England. It was decided, that the portion ought to be paid in England, where the contract was made, and the parties resided; and not in Ireland, where the lands lay, which were charged with the payment; for it was a sum in gross, and not a rent issuing out of the land.

§ 289. Let us take another case. A merchant, resident in Ireland, sends to England certain bills of exchange, with blanks for the dates, the sums, the times of payment, and the names of the drawees, These bills are signed by the merchant in Ireland, indorsed with his own name and dated from a place in Ireland, and are transmitted to a correspondent in England, with authority to him to fill up the remaining parts of the instrument. The correspondent in England accordingly fills them up, dated at a place in Ireland. Are the bills, when thus filled up, and issued, to be deemed English, or Irish contracts? It has been held, that under such circumstances they are to be deemed Irish contracts, and of course to be governed, as to stamps and

thipper v. Farl of Anglesca, cited 5 Vin. Abridg. 209, pl. 8; 2 Eq. Abridg. 230, pl. 1; Id. 754, pl. 3; 1 P. Will. 696; 2 Bligh, Parl. R. 83, 80. Non also Lansdowne v. Lansdowne, 2 Bligh, Parl. R. 60; Staphoton v. Conway, 3 Atk. 727; S. C. 1 Vez. 427.

other legal requisitions, by the law of Ireland; and that as soon as they are filled up, the whole transaction relates back to the time of the original signature of the drawer. One of the learned judges on that occasion said, that if the drawer had died, while the bills were on their passage, and afterwards the blanks had been filled up, and the bill negotiated to an innocent indorsee, the personal representatives of the drawer would have been bound.²

& 290. Bonds for the faithful discharge of the duties of office are often given with sureties, by public officers, to the government of the United States; and it sometimes happens, that the bonds are executed by the principals in one state, and by the sureties in a different state, or in different states. What law is in such cases to regulate the contract? The rights and duties of sureties are known to be different in different states. In Louisiana one system prevails, deriving itself mainly from the civil law; in other states a different system prevails, founded on the common law. It has been decided, that the bonds in such cases must be treated, as made and delivered, and to be performed by all the parties, at the seat of the government of the Union, upon the ground that the principal is bound to account there; and, therefore, by necessary implication, all the other parties look to that, as the place of performance, by the law of which they are to be governed.3

² Mr. Justice Bayley, ibid p. 95.

¹ Snaith v. Mingay, 1 Maule & Selw. 87.

³ Cox and Dick v. U. States, 6 Peters. R. 172, 202; Duncan v. U. States, 7 Peters, R. 435.

§ 291. The question, also, often arises in cases respecting the payment of interest. The general rule is that interest is to be paid on contracts according to the law of the place, where they are to be performed, in all cases, where interest is expressly or impliedly to be paid. Usurum modus ex.

¹ Fergusson v. Fyffe, 8 Clarke & Fin. 121, 140; Post, §292, 293, § 293 a to § 293 e, § 304; Conner v. Bellamont, 2 Vern. R. 382; Cash v. Kennion 11 Vesey, R. 314; Robinson v. Bland, 2 Burr. R. 1077; Ekins v. East India Company, 1 P. W. 395. Ranelagh v. Champant, 2 Vern. R. 395, and note, ibid, by Raithby: 1 Chitty on Comm. & Manuf. ch. 12, p. 650, 651; 3 Chitty, Id. ch. 1, p. 109; Eq. Abridg. Interest, E.: Henry on Foreign Law, 43, note; Id. 53; 2 Kaims, Equity B. 3, ch. 8, § 1; 2 Fonbl. Eq. B. 5, ch. 1 § 6, and note; Bridgman's Equity Digest, Interest, vii; Fanning v. Conseequa, 17 John. R. 511; S. C. 3 John. Ch. R. 610; Hosford v. Nichols, 1 Paige, R. 220; Houghton v. Page, 2 N. Hamp. R. 42; Peacock v. Banks, 1 Minor, R. 387; Lapice v. Smith, 13 Louis. R. 91, 92; Thomson v. Ketchum, 4 John. R. 285; Healy v. Gorman, 3 Green, N. J. R. 328; 2 Kent, Comm. Lect. 39, p. 460 461, 3d edit. - A case, illustrative of this principle, recently occurred before the House of Lords. A widow in Scotland entered into an obligation to pay the whole of her deceased husband's debts. It was held by the Court of Sessions in Scotland, that the English creditors, on contracts made in England, were entitled to recover interest in all cases, where the law of England gave interest, and not where it did not. Therefore, on bonds, and bills of exchange, interest was allowed, and on simple contracts not. And this decision was affirmed by the House of Lords. Montgomery v. Budge, 2 Dow. & Clarke, Rep. 207. The case of Arnott v. Redfern (2 Carr. & Payne, 88) may at first view seem inconsistent with the general doctrine. There the original contract was made in London between an Englishman and a Scotchman. The latter agrees to go to Scotland as agent four times a year, to sell goods, and collect debts for the other party, to remit the money, and to guaranty one fourth part of the sales; and he was to receive one per cent. upon the amount of sales, &c. The agent sued for a balance of his account in Scotland, and the Scotch Court allowed him interest on it. The judgment was afterwards sued in England; and the question was, whether interest ought to be allowed. Lord Chief Justice Best said; "Is this an English transaction? For, if it is, it will be regulated by the rules of English law. But, if it is a Scotch transaction, then the case will be different." He afterwards added, "This is the case of a Scotchman, who comes into England, and makes a contract. As the contract was made in England, although

more regionis, ubi contractum est, constituitur, says the Digest.1 Thus, a note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent., bears English interest only.2 Loans made in a place bear the interest of that place, unless they are payable elsewhere.3 And, if payable in a foreign country, they may bear any rate of interest not exceeding that, which is lawful by the laws of that country.4 And, on this account, a contract for a loan made, and payable in a foreign country, may stipulate for interest higher than that allowed at home.5 If the contract for interest be illegal there, it

it was to be executed in Scotland, I think, it ought to be regulated according to the rules of the English law. This is my present opinion. These questions of international law do not often occur." And he refused interest, because it was not allowed by the law of England. The Court afterwards ordered interest to be given, upon the ground, that the balance of such an account would carry interest in England. But Lord Chief Justice Best rightly expounded the contract, as an English contract, though there is a slight inaccuracy in his language. So far as the principal was concerned, the contract to pay the commission was to be paid in England. The services of the agent were to be performed in Scotland. But the whole contract was not to be executed exclusively there by both parties. A contract made to pay money in England, for services performed abroad, is an English contract, and will carry English interest.

¹ Dig. Lib. 22, tit. 1, l. 1; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 860, 861, 862,

Scofield v. Day, 20, John. R. 102.

³ De Wolf v. Johnson, 10 Wheaton, R. 367, 383; Conseequa v. Willing, Peters, Cir. R. 225; 2 Boullenois, Observ. 46, p. 477, 478; Andrews v. Pond, 13 Peters, R. 65, 78.

⁴ Ibid.; 2 Kent, Comm. Lect. 39, p. 460, 461, 3d edit.; Thomson v. Ketchum, 4 John. R. 285; Healy v. Gorman, 3 Green, N. J. R. 328.

³ 2 Kent, Comm. Lect. 39, p. 460, 461, 3d edit.; Hosford v. Nichols, 1 Paige, R. 220; Houghton v. Paige, 2 N. Hamp. R. 42; Thomson v. Powles, 2 Simons, R. 194. In this last case the Vice Chancellor said; "With respect to the question of usury, in order to hold the contract to be usurious, it must appear, that the contract was made here, and that

will be illegal every where. But if it be legal, where it is made, it will be of universal obligation, even in places, where a lower interest is prescribed by law.

§ 292. The question, therefore, whether a contract is usurious or not, depends, not upon the rate of the interest allowed, but upon the validity of that interest in the country, where the contract is made, and is to be executed. A contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would, nevertheless, be valid in England; and so a contract to allow interest upon credits given in Gibraltar at such higher rate, would be valid in favor of the English creditor.

§ 292 a. This too seems to be the doctrine propounded by Rodenburg, who says; Status quidem aut

the consideration for it was to be paid here. It should appear at least, that the payment was not to be made abroad; for if it was to be made abroad it would not be usurious." See also Andrews v. Pond, 13 Peters, R. 65, 78; De Wolf v. Johnson, 10 Wheat R. 383.

^{1 2} Kaims, Equity, B. 3, ch. 8, § 1; Hosford v. Nichols, 1 Paige, R, 220; 2 Boullenois, Observ. 46, p. 477.—In the case of Thompson v. Powles (2 Simons, R. 194), the Vice-Chancellor said, "In order to have the contract (for stock) usurious, it must appear that the contract was made here, and that the consideration for it was to be paid here." See also Yrisarri v. Clement, 2 Carr. and Payne, R. 223. In Hosford v. Nichols (1 Paige, R. 220), where a contract was made for the sale of lands in New York, by citizens then resident there, and the vender afterwards removed to Pennsylvania where, the contract was consummated, and a mortgage given to secure the unpaid purchase money with New York interest (which was higher than that of Pennsylvania), the Court thought the mortgage not usurious, it being only a consummation of the original bargain made in New York.

⁹ Ibid.

³ Harvey v. Archbold, I Ryan and Mood. R. 184; Andrews v. Pond, 13 Peters, R. 65, 78; Ante § 243.

⁴ Ibid.

conditio personarum dirigitur à loco domicilii: cæterum tamen in vinculo cujusque obligationis, ut sciamus, quos obliget conventio, spectamus leges reigionis, ubi illa celebratur. Quemadmodum et in illicita stipulatione, quæ legibus est interdicta, ut puta; si debitum modum usurarum excedit, traditum est valere pactum, quo foris secundum mores illius regionis stipulati sumus prohibitam domi usurarum quantitatem. Unde non longe abire videtur, quod memini nuper apud nos responsum esse, si contracta sit eo loci obligatio, ubi sortem liceat exigere cum usuris, ut maxime jam earum aliquæ essent persolutæ, Jure caput cum usuris et apud nos exigi, ubi usurarum solutione protinùs via petitioni sortis præcluditur, locumque sibi vindicat decantata adeo paræmia.¹ Burgundus is still more direct and positive.²

§ 293. And in cases of this sort, it will make no difference, (as we have seen,) that the due performance of the contract is secured by a mortgage, or other security, upon property, situate in another country, where the interest is lower.³ For it is collateral to such contract, and the interest reserved being according to the law of the place, where the contract is made, and to be executed, there does not seem to be any valid objection to giving collateral security elsewhere, to enforce and secure the due performance of a legal contract.⁴ But, suppose a debt is contracted in one country, and afterwards, in consideration of farther delay,

¹ Rodenburg, Diversit. Stat. tit 4, Ps. 2, ch. 2, p 92.

² Burgundus, Tract. 4, n. 10, p. 109; Post § 293 e, § 300 a; 2 Burge, Comm. Pt. 2, ch. 9, p. 860, 861, 862.

³ Ante, § 287.

⁴ Conner v. Bellamont, 2 Atk. R. 382; Stapleton v. Conway, 3 Atk. R. 727; S. C. 1 Vesey, R. 427; De Wolf v. Johnson, 10 Wheaton, R. 367, 383.

the debtor in another country enters into a new contract for the payment of interest upon the debt at a higher rate, than that allowed by the country, where the original debt was contracted, but not higher than that allowed by the law of the country, where it is so stipulated; it may be asked whether such stipulation is valid? It has been decided, that it is.¹ On the other hand, suppose the interest so stipulated is according to the rate of interest allowed in the country, where the debt was contracted, but higher than that in the country, where the new contract is made; is the stipulation invalid? It has been decided, that it is.² In each of these cases the Lex loci contractûs was held to govern as to the proper rate of interest.

§ 293 a. In the cases hitherto stated, the transaction is supposed to be bonâ fide between the parties. For if the transaction is a mere cover for usury, as if the transaction is in form a bill of exchange drawn upon and payable in a foreign country but in reality the parties resort to that, as a mere machinery to disguise usury in the transaction against the laws of the country, where the contract is made, the form of the transaction will be treated as a mere nullity; and the Court will decide according to the real object of the parties. Thus, for example, where a bill of exchange was drawn in New York payable in Alabama, and the bill was for an antecedent debt, and a large discount was made from the bill, greater

¹ Conner r. Bellamont, 2 Atk. R. 382. See also Hosford r. Nichols, 1 Paige, R. 220.

⁹ Dewarr, Span, 3 T. R. 435. See also Stapleton r. Conway, 3 Atk. R. 382; S. C. 1 Vescy, R. 427. See Chapman r. Robertson, 6 Paige, R 627, 631.

than the interest in either state, for the supposed difference of exchange, the Court considered the real question to be as to the bonâ fides of the transaction. If a mere cover, it was usurious.¹

¹ Andrews v. Pond, 13 Peters, R. 65, 77, 78. - On this occasion Mr. Chief Justice Taney said; "Another question presented by the exception, and much discussed here, is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent. in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent and in Alabama eight; and this small difference of one per cent per annum, upon a forbearance of sixty days, could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations, which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find, that it was given upon an usurious consideration, the plaintiff would not be entitled to recover; unless he was a bona fide holder, without notice, and had given for it a valuable consideration; while by the laws of Alabama, he would be entitled to recover the principal amount of the debt, without any interest. The general principle, in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance - and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews and Co., for the debt then due to them, payable at Mobile, in sixty days, with eight per cent. interest, such a contract would undoubtedly have been valid; and would have been no violation of the laws of New York, although the lawful interest in that state is only seven per cent. And, if in the account adjusted at the time this bill of exchange was given, it had appeared, that Alabama interest of eight per cent. was taken for the forbearance of sixty days, given by the contract; and the transaction was in other respects free from usury; such a reservation of interest would have been valid and obligatory upon the defendants; and would have been no violation of the laws of New York. But that is not the question, which we are now called on to decide. The defendants allege, that the contract was not made with

Inde-i in all asses of this sort we are to ook to the mai intentions of the parties, and their note are expressive if nem. Thus, where a citizen if New Tirk innier in England to a British subent for a can if money apon the security of a bond and normage mon and in New York, at the legal rate of interest seven per cents of that state; and it was agreed, that the horrower should upon his return to New Yers execute the bond and mortgage, and duly record the same: and upon the bond and mortgage being received in England, the lender agreed to deposit the money loaned at the bankers of the borrower in London for his use: and the bond and mortgage were executed and received, and the money paid accordingly to the bankers; the question arcse, whether the transaction was usurious or not: and that depended upon the law of the place, by which it was to be governed, whether by the law of England (where interest is only five per cent.),

reference in the laws of either state, and was not intended to conform in either. That a race of interest forbuilden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the .aw. Now, if this defence is true, and shall be so found by the iner, the question is not, which law is to govern in executing the contract; but, which is to decide the fate of a security taken upon an services agreement, which neither will execute? Unquestionably, it must be the law of the state, where the agreement was made, and the instrument taken to secure its performance. A contract of this kind connect stand on the same principles with a bonk fide agreement made in one place to be executed in another. In the last mentioned cases the agreements were permitted by the lex loci contractus; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of much an agreement must be decided by the law of the place, where the contract was made. If void there, it is void every where." See Chapman v. Robertson, 6 Paige, R. 627, 630, 631.

or by the law of New York. It was held by the Court, that the contract was to be construed according to the laws of New York, and therefore, that a bill to foreclose the mortgage, filed in New York, was maintainable; and that the law of usury of England was no defence to the suit. On that occasion the learned Chancellor said, that as no place of payment was mentioned in the bond or mortgage, the legal construction of the contract was, that the money was to be paid, where the obligee resided, or wherever he might be found; that the residence of the obligee, being in England at the time of the execution of the bond, that must be considered the place of payment for the purpose of determining the question, where that part of the contract was to be performed; and that the execution of the bond in New York did not make it a personal contract there, because it was inoperative until received there, and the money deposited with the bankers for the borrower. And he concluded by saying; "Upon a full examination of all the cases to be found upon the subject, either in this country, or in England, none of which, however, appear to have decided the precise question, which arises in this cause, I have arrived at the conclusion, that this mortgage executed here, and upon property in this state, being valid by the Lex situs, which is also the law of the domicil of the mortgagor, it is the duty of this Court to give full effect to the security, without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon the lands here."1

¹ Chapman v. Robertson, 6 Paige, R. 627, 630 to 633.

§ 293 c. Whatever objections may be made to the reasoning of the learned Chancellor, and it is certainly open to some observation, the decision itself seems well supported in point of principle; for the parties intended, that the whole transaction should be in fact, as it was in form, a New York contract, governed by the laws thereof, and the repayment of the debt was there to be made. It is easily reconcilable with other laws and principles, if viewed in this light; if viewed, as the Chancellor interpreted the case, it is perhaps irreconcilable with other cases and with general principles.¹

¹ Chapman v. Robertson, 6 Paige, R. 627, 630 to 633. -- It appears to me, that the case was correctly decided; but, with the greatest deference for the learned Chancellor, upon principles and expositions, to which I cannot assent, and which appear to me inconsistent with the general reasoning of the authorities. It appears to me, that there being no place of payment designated in the bond and mortgage, which was executed at New York, where the borrower was domiciled, that, although it was not operative until received by the lender, yet, when received and adopted by him, the transaction related back to its origin, and it was valid, not as a bond and mortgage executed in England for the payment of money there, but as a bond and mortgage for the payment of the money in New York, as having originated there, and having its whole validity and operation from the law of New York. If an order for goods were sent from New York to England; and the order were complied with, and the goods received in New York; after the receipt of the goods the debt would be treated as an English debt, since the contract of purchase would there be deemed to be negotiated and perfected. Ante, § 285, 286. In truth, where no place of payment was mentioned, the law of the place, where the contract is made, fixes it in that place. wherever the parties may be domiciled. The bond and mortgage took effect, as contracts of the borrower executed at New York. If a negotiable note is made in one state, and is negotiated to an indorsee in another state, the contract with the indorsee by the maker takes effect as a promise in the state, where the note was made, and not where it was indorsed. The payment of the money to the bankers of the borrower in London was merely for his accommodation, and it by no means made the money repayable there. The case of Stapleton v. Conway, 3 Atk. R. 727; S. C. 1 Ves. is as far as it goes, in opposition to the decision

§ 293 d. John Voet, in his Commentaries on the Pandects, holds this very doctrine, which appears to me to be entirely in harmony with the received principles of international law. He considers, that the interest must be according to the law of the place, where the contract is to be performed, whether that place be, where the contract is made, or it be another place. If the interest is in either case stipulated for beyond that rate he deems it usurious. Si alio in loco graviorum usurarum stipulatio permissa, in alio vetita sit, lex loci, in quo contractus celebratus est, spectanda videtur in quæstione, an moderatæ, an vero modum excedentes, usuræ per conventionem constitutæ sint. Dummodo meminerimus, illum proprie locum contractus in jure non intelligi, in quo negotium gestum est, sed in quo pecuniam ut solveret, se quis obligavit. Modo etiam bonâ fide omnia gesta fuerint, nec consulto talis ad mutuum contrahendum locus electus sit. in quo graviores usuræ, quam in loco, in quo alias contrahendum fuisset, probatæ inveniuntur. Etiamsi de cætero hypotheca, in sortis et usurarum securitatem obligata, in alio loco sita sit, ubi solæ leviores usuræ permissæ; cum æquius sit, contractum accessorium regi ex loco principalis negotii gesti, quam ex opposito contractum principalem regi lege loci, in quo accessorius contractus celebratus est.1

§ 293 e. Burgundus adopts the same doctrine, and says; Licita vero sit, an illicita, stipulatio, à formâ quo-

in 6 Paige, R, 627. It is not, however, my design in this place to enter upon the reasons of my dissent from the doctrines stated by the learned Chancellor in 6 Paige, R. 627. The principles stated from § 280 to § 321, sufficiently explain some of the grounds, upon which that dissent may be maintained. See also 2 Kent, Comm. Lect. 39, p. 460, 461, 3d edit., and Andrews v. Pond, 13 Peters, R. 65; Ante, § 291; Post, § 304.

¹ J. Voet, ad Pand. Lib. 22. tit. 1, § 6, p. 938; post, § 304.

que videtur proficisi, et ideo ejusdem legibus dirigitur, quibus ipsa forma, et ad locum contractus collimare, oportet. Quare et usurarum modus is constituendus est, qui in regione in qua est contractum legitime celebratur. Et cûm reditus duodenarius, in Gallia stipulutus, in controversiam incidisset, patrocinante me judicatum est, in curia Flandriæ valere pactum: nec obesse, quod in Flandria, ubi reditus constitutus, sive hypothecæ impositus proponeretur, usuras semisse graviores stipulari non liceat; quia ratio hypothecæ non habetur, quæ hac in re nihil conferens ad substantium obligationis, tantum extrinsecus accedit legitimæ stipulationi. Sed hoc intellige de usuris in stipulationem deductis, non autem de iis, quæ ex mora debentur, in quibus ad locum solutionis (ut docebimus posteà) respicere oportet.1

\$ 294. In cases of express contracts for interest foreign jurists generally hold the same doctrine. Dumoulin and after him Boullenois says; In concernentibus contractum, et emergentibus tempore contractûs spectatur locus, in quo contrahitur. And hence the latter deduces the general conclusion, that the validity of contracts for rates of interest depends upon the laws of the place, where the contract is made and payable, whether it be in the domicil of the debtor, or in that of the creditor, or in that, where the property hypothecated is situated, or elsewhere. He holds this also to be a just inference from the language of the Digest.

¹ Margandus, Track & § 10, p. 108, 109; post § 302.

Missin Opera, Comment ad Consuet. Paris, tit. 1, § 12, Ginn. 7. n. N. Toro. 1, p. 224; 2 Boulleavis, Observ. 46, p. 472; Henry on Phrogen Law, p. 35; Roulleman, Quest, de la Contr. des Lois, p. 330 to 35; auto. § 37 a.

¹² Reciement Chairs to a 52

pers i districted when assertes notice, be-The prises where the near the money loaned so the wife in a first that the make no day is fixed the manufact out as it the themselve of the credi-The rest of the same the party are place of payment is merromed in the numer case, he holds, that the perform is bound, in order to avoid default, to sees, the predictor and may ame; and therefore the region to make payment arses in the domicil of the over the and arress ought to be allowed acconting to the are of that place. In the latter case the credition is to bemand payment of the debtor; and, the regest of payment is in the domicil of the because and therefore universe ought to be allowed amounding to the 4m of his domicil.3 And, if, between the time of manusting the debt, and the forward of the resinter, the debtor has changed has former. Bou come is of opinion, that, if the fermand is in the new aximical, interest for neglect of according to the law of the street assessment of the change of domicil is known to the same rule to a assumption to the law of the old domicil, a simple the mean of the new deed and investigate process is necessary.5 to have any foundation symplectic fire whether the debt be payable and a vid day, or open a demand of the creditor, if or access to the most is prescribed, the contract takes and is a contract of the place, where it is made; and cong pavable generally, it is pavable every which and after a demand and refusal of payment,

¹ h . Chair, Observe 16, 16 177, 178,

D.d. Bid.

⁵ Id. p. 477 to p. 479.

interest will be allowed according to the law of the place of the contract.1

§ 296. It may, therefore, be laid down as a general rule, that, by the common law, the Lex loci contractûs will, in all cases, govern as to the rule of interest, following out the doctrine of the civil law already cited; Cum judicio bonæ fidei desceptatur, arbitrio judicis usurarum modus, ex more regionis, ubi contractum, constituitur; ita tamen ut legi non offendat.2 But if the place of payment or of performance is different from that of the contract, then the interest may be validly contracted for at any rate not exceeding that which is allowed in the place of payment or performance. And in the absence of any express contract as to interest, the law of the same place will silently furnish the rule, where interest is to be implied or allowed for delay (ex mora) of payment, or performance.3

§ 297. But, clear as the general rule, as to interest, is, there are cases, in which its application has been found not without embarrassments. Thus, where a consignor in China consigned goods for sale in New York, and delivered them to the agent of the consignee in China, and the proceeds were

Confl. 40

¹ Ante, § 272, § 278 a; post, § 317, § 329.

² Dig. Lib. 22, tit. 1, l. 1; Id. l. 37; ante, § 294; 1 Eq. Abr. Interest, E.; Champant v. Ranelagh, Prec. Ch. 128; De Sobry v. De Laistre, 2 Harr. & John. R. 193, 228. See 1 Burge, Comment. on Col. and For. Law, Pt. 1, ch. 1, p. 29, 30.

² Ante, § 291; ² Kent, Comm. Lect. 32, p. 460, 461, 3d edit.; Robinson v. Bland, ² Burr. R. 1077; Ekins v. East India Company, ¹ P. W. 396; Royce v. Edwards, ⁴ Peters, R. 111; ² Fonbl. Eq. B. 5, ch. 1, § 6; Fanning v. Conseequa, ¹⁷ John. R. 511; De Sobry v. De Laistre, ² Harr. & John. R. 193, ²²⁸; Smith v. Mead, ³ Connect. R. ²⁵³; Winthrop v. Carlton, ¹² Mass. R. ⁴; Foden v. Sharp, ⁴ John. R. 183; Henry on Foreign Law, p. 53.

to be remitted to the consignor in China, and there was a failure to remit, the question arose, whether interest was to be computed according to the rate in China, or the rate in New York. Mr. Chancellor Kent held, that it should be according to the rate in China. But the Appellate Court reversed his decree. and decided in favor of the rate in New York. Each Court admitted the general rule, that the interest should be according to the law of the place of performance, where no express interest is stipulated. But the Court of Chancery thought, that the delivery of the goods being in China, and the remittance being to be made there, the contract was not complete. until the remittance arrived, and was paid there. The Appellate Court thought, that the delivery of the goods in China, to be sold at New York, was not distinguishable in principle from a delivery at New York; and, that the remittance would be complete, in the sense of the contract, the moment the money was put on board the proper conveyance in New York for China; and it was then at the risk of the consignor. The duty of remittance was to be performed in New York, and the failure was there; and consequently the rate of interest of New York only was due.1

§ 298. Another case has arisen of a very different character. The circumstances of the case were somewhat complicated; but the only point for consideration there arose upon a note, of which the defendants were the indorsers, and with the amount thereof they had debited themselves in an account with the plaintiff; and which they sought now to avoid upon

Consecqua r. Fanning, 3 John. ch. R. 587, 610; S. C. 17 John. R,
 511, 520, 521. See Grant r. Healey, 2 Chand. Law Reporter, 113; ante,
 284 a.

the ground of usury. The note was given in New Orleans, payable in New York, for a large sum of money, bearing an interest of ten per cent., being the legal interest of Louisiana, the New York legal interest being seven per cent. only. The question was, whether the note was tainted with usury, and therefore void, as it would be, if made in New York. The Supreme Court of Louisiana decided, that it was not usurious; and that, although the note was made payable at New York, yet the interest might be stipulated for, either according to the law of Louisiana, or according to that of New York. The Court seems to have founded their judgment upon the ground, that in the sense of the general rule, already stated,1 there are, or there may be, two places of contract; that, in which the contract is actually made; and that, in which it is to be paid or performed : Locus, ubi contractus celebratus est : locus, ubi destinata solutio est: and therefore, that if the law of both places is not violated, in respect to the rate of interest, the contract for interest will be valid.2 In support of their decision the Court mainly relied upon the doctrines, supposed to be maintained by certain learned jurists of continental Europe, whose language, however, does not appear to me to justify any such interpretation, when properly considered, and is perfectly compatible with the ordinary rule, that the interest must be, or ought to be, according to the law of the place, where the contract is to be performed, and the money is to be paid. It may not

Ante, § 280.

² Depan v. Humphreys, 20 Martin, R. 1. — Mr. Chancellor Walworth, in Chapman v. Robertson, 6 Paige, R. 627, 634, has expressed his entire concurrence in the decision in 20 Martin, R. 1. But see Van Schaike v. Edwards, 2 John, ch. Cas. 355.

be without use to review some of the more important authorities thus cited, although it must necessarily involve the repetition of some, which have been already cited.

§ 299. There is no doubt, that the phrase Lex loci contractûs may have a double meaning or aspect; and, that it may indifferently indicate the place, where the contract is actually made, or that, where it is virtually made according to the intent of the parties. that is, the place of payment or performance.1 have seen, that the rule of the civil law clearly indicates this. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia.2 Many distinguished jurists refer to this Huberus, in the passage already cited, distinction. says; Verum tamen non ita præcisè respiciendus est locus, in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus.3 Everhardus (as we have seen) says; Ubi certus locus solutioni faciendæ destinatus est, tunc non facta solutione in termino et loco præfixo mora dicitur. contrahi in loco destinatæ solutionis, et non in loco celebrati contractus. Nimirum, ergo, si inspiciatur valor rei debitæ secundum locum, ubi destinata est solutio. Tum etiam, quia locus contractus, conventio, sive obligatio, perficitur, seu verba proferuntur. Secundo, ubi solutio seu deliberatio destinatur. And he adds ; Quia dico. ut supra dixi; quod locus contractus dicitur duobus modis: primo, ubi contractus celebratus est; secundo, ubi solutio destinata est.5 And again; Duplex est locus con-

^{2 2} Boullenois, observ. 46, 446; ante, § 235.

² Dig. Lib. 42, tit. 5, l. 3; Pothier, Pand. Lib. 42, tit. 5, n. 24; ante, 280.

³ Ante. 6 239, 6 281 : Huber. Lib. 1, tit. 3, § 10.

⁴ Everhard. Consil. 78, n. 10, 11, p. 205; ante, § 295.

⁵ Everhard, Consil. 78, n. 18.

tractus, ut supra dixi, quo casu in tantum censetur contractus celebratus in loco destinatæ solutionis, quod nullo modo censetur celebratus in loco, ubi verba fuerunt prolata, quoad ea, quæ veniunt post contractum in esse productum.¹ Paul Voet places it in a strong light. Ne tamen hic oriatur confusio, locum contractûs duplicem facio; alium, ubi fit, de quo jam dictum; alium, in quem destinata solutio. Illud locum verum, hunc fictum appellat Salicetus.² Uterque tamen recte locus dicitur contractûs, etiam secundum leges civiles, licet postremus aliquid fictionis contineat.³

& 299 a. But for what purpose do these foreign jurists refer to the distinction? Is it, that the validity of the same contract is to be at the same time ascertained in part by the law of one country, and in part by that of another? By no means. They no where assert, that the validity of the contract is not to be judged of throughout by one and the same law, that is, by the law of the place, where it is made, or by the law of the place, where it is to be performed, according as, in a just sense, with reference to the nature and objects of the particular contract, the one or the other is properly to be deemed the place of the contract. They no where assert, that one and the same rule is not to apply throughout to all the stipulations in the contract. That the contract is good, notwithstanding it does not conform either to the law of the place, where it is made, or to that, where it is to be performed. That the contract is to be treated.

not as a whole; but is to be distributed into parts;

¹ Id. n. 17; Id. n. 20.

² Lib. 1, Cod. tit. 1. Summ. Trinit. n. 4.

³ Voet, De Statut. § 9, ch. 2, § 11, p. 270, edit. 1715; Id. p. 326, edit. 1661. See also 2 Boullenois, Observ. 46, p. 488; Boullenois, Quest. sur. Contr. des Lois, p. 330 to p. 338.

so that, if in some of the stipulations it violates the law of each place, it shall still be good throughout. if it does not violate in the whole the law of both places. In many of the passages cited in support of the supposed mixed character, and mixed interpretation, and mixed operation of the contract, these learned jurists were considering questions of a very different nature. Some of them were considering the question as to the rule, which is to govern generally in regard to the formalities, solemnities, and modes of execution of contracts, where the place of execution is the same place, where it is made; others again were considering the rule, as to the interpretation and extent of the obligation of contracts generally, under the like circumstances; and others again were considering the rule, where the contract is made in one place. and is to be executed in another. We are therefore to understand their language according to the particular occasion, and the particular circumstances, to which it is applied.

§ 300. Let us examine then the particular language, which is used by these jurists, in the passages cited. Thus Alexander is said to use the following passage. In scriptura instrumenti, in ceremoniis, et

¹ I cite the passage from Alexander, (Consil. 37), as I find it in 20 Martin, R. 22, 23, not having been able to obtain the works of Alexander. But I have some doubt, whether the first part of the passage is not copied by mistake from Burgundus, who uses almost the identical language. Burgundus, Tract. 4, n. 7, p. 104; Post, § 300 a. I now suspect that the citation is not (as I supposed it was) from Alexander al Alexandro, but by a mistake of the Court in 20 Martin, R. 22, 23, (probably taking it at second hand from some other author), from Alexander Tartagni Instead (or De Imola) who wrote a large work in 5 and 7 vols. folio, of Consilia, published Mediol. 1488, 1489. Lipenius in his Bibl. Jurid. vol. 1, p. 333, refers to this work. 1842. Everhardus in his Consil. 78, in several sections refers to Alex. de Imola, Consil. 37, and Consil. 49.

solemnitatibus, et generaliter in omnibus, quæ ad formam et perfectionem contractus pertinent, spectanda est consuetudo regionis, ubi fit negotium. Debet enim servari statutum loci contractus, quoad hæc, quæ oriuntur secundum naturam ipsius contractus. This language expresses only a general truth, and we have no means of knowing that the author intended to speak here of any thing further than the general rule, applicable to all contracts made and to be performed in the same place.¹

§ 300 a. Burgundus says; Et quidem in scriptura instrumenti, in solemnitatibus, et ceremoniis, et generaliter in omnibus, quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis, ubi fit negotiatio. Rationem assignant Doctores quod consuetudo influat in contractus, et convenientes ad eum respicere, ac voluntatem suam accommodare videantur. Et recte.2 Now, we know upon what occasion this language was used. Burgundus was here considering the question solely with reference to the point, when a contract is to be deemed lawful, or not; or in other words, by what law its validity is to be governed. Illicita stipulatio est, (says he,) quæ legibus est interdicta, utputa, si debitum modum usarum excedat Nunc ergo considerandum, cuius loci ratio haberi debeat.3 He does not even allude to a case, where the contract is made in one place, and is to be performed in another place He

¹ From other passages cited by Everhardus from Alexander de Imola, and Bartolus, and Baldus, it seems clear, that they all consider the locus solutionis to be the proper locus contractus, except so far as regards the solemnities and creation of the contract. (Solemnitatem et subsistentiam contractus.) See Everhard. Consil. 78, n. 20, p. 207; Id. n. 24, p. 208.

² Burgundus, Truct. 4, n. 7, p. 104; ante, § 260.

J Id. n. 6, p. 104.

adds; Igitur, ut paucis absolvam, quoties de vinculo obligationis, vel de ejus interpretatione ouæritur, veluti. quos et in quantum obliget, quid sententiæ, stipulationis inessæ, quid abesse credi oporteat; item in omnibus actionibus, et ambiguitatibus, quæ inde oriuntur, primum quidem id sequemur, quod inter partes actum erit, aut si non apparet, quid actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequen-And he concludes by saying; Doctores toties ingerunt ea, quæ respiciunt solemnitatem actus, vel quæ tempore contractus ex natura ipsius adhibentur, oriunturque, ex more regionis, ubi contractum est, legem ac-Ea vero, quæ ad complementum vel executionem contractus spectant vel absoluto eo superveniunt, solere a statuto loci dirigi, in quo peragenda est solutio.2

§ 300 b. Everhardus says; Quod quo ad perfectionem contractus seu ad solemnitatem ad esse seu substantiam ejus requisitam semper inspicitur statutum seu consuetudo loci celebrati contractus. Et est ratio, quia ex quo agitur de consuetudine contrahendi non mirum, si inspiciatur locus initæ conventionis, ubi contractus accepit perfectionem.³ But he immediately adds; Sed ubi agitur de consuetudine solvendi, ut in casu presenti, (that is, where a contract, made in one place, was payable in another,) vel de his, quæ veniunt implenda diu post contractum, et in alio loco impletioni destinato, tunc inspicitur locus destinatæ solutionis. Now, this latter passage would seem as strictly to apply to the case of payment of interest, as to the

¹ Burgundus, Tract. 4, n. 7, p. 105.

² Id. n. 29, p. 116. See also Id. n. 10, p. 109; ante, § 292 a, § 293 e.

³ Everhard. Consil. 78, n. 11, p. 206; Id. n. 18, p. 207; Id. n. 27, p. 209.

case of payment of principal. If the parties have not stipulated for a particular rate of interest, the usage of the place of payment ought constantly to govern. If they have stipulated for a particular rate of interest, inconsistent with that of the Lex loci solutionis, the question will still remain, whether it can lawfully be done. Everhardus has not here discussed it; far less has he decided it. And he cites Baldus in support of his opinion, as saying; Quod in expeditivis contractus non inspiciuntur ordinativi contractus, sed locus solutionis.1 He afterwards adds, that this rule, in regard to the forms and solemnities, required in order to create and perfect any contract, equally applies to cases, where the performance is to be in the same place, and where it is to be in another place. Ubi vero in uno loco celebratus est contractus, et in alio loco destinata est solutio, tunc quoad ea, quæ concernunt solemnitatem actus, item ad esse et perfectionem contractus, inspicitur consuetudo loci celebrati contractus. Unde si ex statuto loci contractus requiratur certa solemnitas in ipso contractu, &-c., tale statutum vel consuetudo debet observari, licet in loco destinatæ solutionis non sit simile statutum.2 How far this latter doctrine is correct and maintainable, as a general rule, we have already had occasion, in some measure, to consider.3 It is not material to the present discussion, which turns upon another point, that is, whether the validity of a contract may depend partly upon the law of one place, and partly on the law of another

¹ Everhard. Consil. 78, n. 11, p. 206; Id. n. 17, p. 207; Id. n. 27, p. 209.

² Id. n. 18, p. 207.

³ Ante, § 280.

place, some of its stipulations being contrary to the law of each place.

§ 300 c. Christinæus expressly professes to follow the doctrine of Everhardus on this subject. Consuetudo loci, (says he,) ubi contrahitur spectanda est, scilicet quoad observantiam solemnitatum ipsius actus. Generaliter enim in omnibus, que ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis ubi fit negotiatio, quia consuetudo influit in contractus, et videtur ad eos respicere, et voluntatem suam eis accommodare. Idquè recté. Conditio quoque loci et temporis perfectionem formæ etiam respicit, et idcirco à regione contractus vicissim diriguntur.1 He adds; Sed quoad ejus executionem, utpote quoad solutionem faciendam, inspicienda venit consuetudo destinatæ solutionis. And again; Quoad ea, quæ celebrato contractu veniunt facienda, inspicitur consuetudo loci, ubi ea debent fieri, puta, tradi, solvi.3

§ 300 d. Gregorio Lopez states only the general doctrine. Quando contractus celebratur in uno loco, puta in Hispali, et destinata solutio in Cordubæ; tunc non inspicitur locus contractus, sed locus destinatæ solutionis; ut habetur in ista Lege ff. l. contraxisse. Dumoulin (Molinæus) says; In concernentibus contractum, et emergentibus tempore contractus, spectatur locus, in quo contrahitur, et in concernentibus meram solemnitatem, cujus actus, locus, in quo ille actus celebratur. In another place he says; Aut

¹ Christin. Decis. 283, Vol. 1, n. 1, 4, 5, 9, 10, 11, p. 255.

⁹ Id. n. 8, 9, p. 355.

³ Id. n. 10, 11, p. 355.

^{4 20} Martin, R. 9, 17; ante, § 233; Dig. Lib. 44, tit. 7, L 21.

⁵ Dumoulin, cited in 20 Martin, R. 24; Molin. Comm. ad Consest. Paris. tit. 1, § 12, gloss. 7, n. 37, Tom. 1, p. 224, edit. 1681; 2 Boullemois, Observ. 46, p. 472.

statutum loquitur de his, quæ concernunt nudam ordinationem et solemnitatem actus; et semper inspicitur statutum vel consuetudo loci, ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis aut aliis conficiendis. Aut statutum loquitur de his, quæ meritum scilicet causæ, vel decisionem concernunt; et tunc, aut in his, quæ pendent à voluntate partium, vel per eas immutari possunt, et tunc inspiciuntur circumstantiæ, voluntatis, quarum una est statutum loci, in quo contrahitur; et domicilii contrahentium antiqui vel recentis, et similes circumstantiæ.1 In another passage he finds fault with those, who exclusively look to the place where the contract is made in all cases. Quia putant nuditer et indistinctè quod debeat ibi inspici locus et consuetudo, ubi fit contractus, et sic jus in loco contractus.2 Quod est falsum : quinimo jus est it tacita et verisimiliter mente contrahentium. He adds; Quia quis censetur potius contrahere in loco, in quo debet solvere, quam in loco, ubi fortuito transiens contraxit.3 It is plain, that these passages do not justify the inference sought to be adduced from them. They import no more, than that the law, which is to govern contracts, is not, in all cases, to be exclusively the law of the place, where they are made

§ 300 e. Boullenois is also relied on in support of the doctrine. In one of the passages cited he says; When the question is, whether, in contracts upon any subject, the rights, which spring from the nature and time of the contract, (natura et tempore contractus,) are lawful or not, it is necessary to follow the law of

¹ Molingus, Comm. in Cod. Lib. 1, tit. 1, Tom. 3, p. 554, edit. 1681.

² Ibid.

³ Ibid.

the place, where the contract is made.1 another passage, he says; When the question is, to determine the lawfulness of a rate of rent, or annuity. (taux de rentes,) and in the place, where the contract is made, the rate is different from that, which is to be paid, either in the country of the domicil of the debtor, or in that of the domicil of the creditor; or finally, in the place, where the property hypothecated is situated; the rate will be adjudged lawful, if it conforms to the law of the place, where the contract is The context shows that Boullenois was only contemplating the case, where the contract was made in the place of its intended performance. For he adds; This is the provision of the law of the Digest (De Usuris,) where it is declared; Cum judicio bonæ fidei disceptatur, arbitrio judicis usurarum modus ex more regionis, ubi contractum est, constituitur; ita tamen, ut legi non offendat; 3 and I believe it takes place, whenever the parties designedly contract in one place, rather than another.4 The true meaning of Boullenois, in this citation, may be gathered from his own interpretation of the law of the Digest in another page, where he cites, with approbation, the opinion of Gothofredus, that the words "Ubi contractum" ought to be understood to mean the place. where the payment ought to be made. Hee verba, "Ubi contractum est," sic intellige, ubi actum est. ut solveret.6

^{1 2} Boullenois, Observ. 46, p. 472.

^{2 2} Boullenois, Observ. 46, p. 472.

³ Dig. Lib. 22, tit. 1, l. 1; Pothier, Pand. Lib. 22, tit. 1, n. 52; ante, 296.

^{4 2} Boullenois, Observ. 46, p. 472; Id. p. 446.

⁵ Id. p. 446.

⁶ Gothofred n. 10, ad Dig. Lib. 22, tit. 1, l. I.

§ 301. Bartolus has discussed the question somewhat at large, how far the law of the place of the contract is obligatory upon foreigners, and what effects the laws of the place of the contract have beyond the territory. And, first, (he says,) let us suppose a contract made by a foreigner in one place, and afterwards a suit is litigated thereon in another place, that of the origin of the contracting party; of which place ought the laws to be observed and followed in deciding it? He says, we should make a distinction. Either we speak of the statute or custom, which respects the solemnities of the contract, or of the process and proceedings in the suit, or of those things, which appertain to the jurisdiction in the execution of the contract. In the first case, we are to look to the law of the place of the contract; in the second case, (as to the process and proceedings in the suit,) to the place of the judgment.1 Or else, we speak respecting those things, which belong to the decision of the cause; and then the question is as to those things, which arise from the very nature of the contract itself in its origin, or as to those things, which arise afterwards, on account of negligence, or delay. In the first case, the law of the place of the contract is to be looked to, that is, the place, where the contract is made, and not where it is performed. In the second case, either the payment is to be made in a fixed place, or alternately in several places, so that the plaintiff has his election; or it is to be made in no particular place, because the promise is simply made. In

Confl.

¹ Everhardus manifestly understands Bartolus to speak with reference to contracts, where payment is to be made in loco celebrati contractus. Everhard. Consil. 78, n. 26, 27, p. 208.

the first case, the custom of the place is to be looked to, in which the payment is to be made. In the second and third cases, the place is to be looked to, where the suit is brought. His language is; Et primo, utrum statutum porrigatur extra territorium ad non subditos; secundo, utrum effectus statuti porrigatur extra territorium statuentium. Et primo, quæro, quod de contractibus. Pone contractum celebratum per aliquem forensem in hac civitate; litigium ortum est, et agitatur lis in loco originis contrahentis, cujus loci statuta debent servari et spectari. Distingue. Aut loquimur de statuto, aut de consuetudine, quæ respiciunt ipsius contractus solemnitatem, aut litis ordinationem, aut de his, quæ pertinent ad jurisdictionem ex ipso contractu evenientis executionis. Primo casu, inspicitur locus contractus. Secundo casu, aut quæris de his, quæ pertinent ad litisordinationem, aut de his, quæ pertinent ad litis ordinationem; et inspicitur locus judicii. Aut de his, quæ pertinent ad ipsius litis decisionem; et tunc, aut de his, quæ oriuntur secundum ipsius contractûs naturam tempore contractûs, aut de his, quæ oriuntur ex post facto propter negligentiam, vel moram. Primo casu, inspicitur locus contractus, ubi est celebratus contractus; et intelligo locum contractus, ubi est celebratus contractus, non de loco, in quem collata est solutio. Secundo casu. aut solutio est collata in locum certum, aut in pluribus locis alternative, ita quod electio sit actoris; aut in nullum locum, quia promissio fuit facta simpliciter. Primo casu inspicitur consuetudo, quæ est in illo loco, in quem est collata solutio; secundo et tertio casu, inspicitur locus, ubi petitur. Ratio prædictorum est, quia ibi est contracta negligentia vel mora.1 Now taking this

¹ Bartolus, ad Cod. Lib. 1, tit 1, l. 1, n. 14, 15, 16, Tom. 7, p. 4, edit. 1602.

ed by some of them; and, therefore, if any exception was intended by them, there, the exception would naturally have found its appropriate place. The omission of any exception becomes, under such circumstances, peculiarly significant. Let us, therefore, review, in this connexion, some of the passages, in which the subject of interest is expressly or impliedly discussed.

§ 301 d. Everhardus says; Aut quærimus, quis locus inspiciatur, quoad accessoria, utputa expensas et damna de jure canonico, et usuras de jure civili, si minores vel leviores sunt in uno loco, quam in alio, et similiter; certum est, quod inspicitur locus destinatæ solutionis; nedum quoad principalem obligationem, sed etiam quoad accessoria.1 And he insists, that the leading jurists, whom he quotes, hold the same opinion. This language would seem to be as direct, as possible, to the present inquiry; and it affirms, that the Lex loci solutionis must govern, as well as to the interest, as to the principal, the former being merely accessorial to the latter. It is no answer to suggest, that he meant to speak of interest ex mora, or interest, not expressly provided for; because there is no such qualification in his language, and it is positive, as well as general. as to the accessorial rights, under all circumstances.

§ 301 e. Christinæus avows the same doctrine, Sic etiam inspicitur statutum loci destinatæ solutionis, si agatur de extinctione actionis per præscriptionem staturiam vigentem in uno loco, et non in alio. Item si agatur de accessoriis, ut de expensis, damnis et interesse, aut denique usuris, si majores vel minores sint in uno loco, quàm in alio.²

Everhard. Consil. 78, n. 24, p. 208; Id. n. 27, 28, 29, p. 208, 209.

them, even when they do not refer to this distinction, may be fairly applied, indifferently, to both classes of cases. But several, and indeed, most of them do expressly and directly recognise the rule, that, where the contract is made in one place, and is to be performed in another, not only may the law of the latter be properly called the *locus contractus*; but that it ought in all respects, except as to the formalities, and solemnities, and modes of execution, to be deemed the rule to govern such cases.

§ 301 b. In the next place, when these foreign jurists speak of payment or performance, they all agree, that the contract must be governed by the law of the place of payment or performance, and not by the law of the place, where the contract is made. How, then, are we to distinguish between different parts of the payment? If principal and interest are both to be paid in a foreign place, how can the law of that place govern, as to the one, and not as to the other? As these jurists make no distinction in respect to the payment of principal, and that of interest, but say generally, that the payment must be according to the law of the place, where the payment is to be made, it is certainly a reasonable inference, that they did not intend to make any exception whatsoever, but deemed both the principal and the interest governed by the same rule. Indeed, it will be found exceedingly difficult to maintain any distinction between them, which is not purely artificial and arbitrary; for interest is but an incident or accessory to principal.

§ 301 c. But we need not rest entirely on the silence of foreign jurists in these passages; for the subject of interest will be found to be expressly treated by some of them; and, therefore, if any exception was intended by them, there, the exception would naturally have found its appropriate place. The omission of any exception becomes, under such circumstances, peculiarly significant. Let us, therefore, review, in this connexion, some of the passages, in which the subject of interest is expressly or impliedly discussed.

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² Christin. Decis. 283, n. 12, 13, Vol. 1, p. 355.

Everhard. Consil. 78, n. 24, p. 208; Id. n. 27, 28, 29, p. 208, 209.

§ 301 f. Paul Voet may fairly be deemed to hold the same opinion. After having said, in the passage already cited, that there may be a double place of the contract, one where it is made, and the other, where it is to be paid or performed, he immediately adds; Hinc ratione effectus, et complementi ipsius contractus, spectatur ille locus, in quem destinata est solutio, id, quod ad modum, mensuram, usuras, &c., negligentiam et moram post contractum initum accedentem referendum est; 1 and he then refers to several authorities in support of this opinion. It seems plain from this language, in this connexion, that, as to interest, he deemed the true law, by which the legality of the contract was to be adjudged, was the law of the place of payment.

§ 302. In one passage Burgundus says, that interest is to be allowed according to the place of the contract; and that, if the question comes under consideration in a foreign court, the interest stipulated, though higher than what is lawful by the Lex fori, ought to be allowed. But, where no interest is stipulated, there, the interest is to be ex morâ, according to the law of the place of payment.2 His language is; Quare et usurarum modus is constituendus est, qui in regione, in qua est contractum, legitimè celebratur. Et cum redditus duodenarius in Gallia stipulatus, in controversiam incidisset, patrocinante me, judicatum est, in Curia Flandriæ, valere pactum; nec obesse, quod in Flandria, ubi redditus constitutus, sive hypothecæ impositus proponeretur, usara semisse graviores stipulari non liceat. Quia ratio hy-

¹ P. Voet, de Statut § 9, ch. 2, n. 12, p. 270, edit. 1715; Id. p. 326 edit. 1661; ante, § 281.

^{2 20} Martin, R. 28; Burgundus, Tract. 4, n. 10, p. 109. See also Vidal v. Thompson, 11 Martin, R. 23.

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mithece son raibetur, mice hair in re niku a ul nostantian migationis. Infine air mit egune similationi. Sed. hoc intelliz e me a separationem teduces, non autem de ils 🗪 💳 tenentur in pulpus at locum solutions i matest resmore mortes. Now, if see F 2- 32 where the contract is made in France are immed mere, the converse would see there : mercer i me contract had been me u mare ne negiterated in Flanders; that the course would whi he asmy as against the law of 11- merauther pace he says; Idem ergo de sauneme. cum schicet, ut in omnibus, que = e su. et ; mundur aut circa illam consistus: 2: augu. a. affinia sunt. consuetudinis loci seconia su implere convenit. He adds: Iww - annum solemnia, valor rei debitæ, pretinu moner - c oriuntur præstatio apochæ, animmus circa solutionem consistant poneexpense, mora, damna, interess: et ejusmodi. And he concluse no same of the doctrine, as given in a manmutuantur à Juris Consuu: m: m eo loco contrazisse intelaza : un gavit.4 So that, if the many in its broad sense, up mine be according to the me Burgundus's opimo: ::::

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ienou. Obsert. 40 : -

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^{5 14} a 10, : 10 . .

be thought of less value, however, because he applies the like rule to prescriptions. Affinia solutioni sunt præscriptio, oblatio rei debitæ, consignatio, novatio, delegatio, et ejusmodi. 1

§ 303 Boullenois has no where, to my knowledge, directly and positively treated the question, whether the interest may be stipulated for according to the place of the contract, when payment is to be made in another place, where it would be illegal. The citations, already referred to,2 which are supposed to countenance the affirmative, put the case only of a rate of interest, or of an annuity, good by the law of the place of the contract, (and for aught that appears, payable there,) and hold, that it will be good, although different from the law of the domicil of the creditor, or debtor, or even from the law of the place. where the property, pledged for security, is situate.3 There is, however, a passage, which seems to indicate, although not directly, an opinion of Boullenois in the negative. After referring to, and approving the doctrine of Gothofredus, that interest is to be according to the law of the place of payment, he adds, that it is in this sense, that Gothofredus is to be understood, in what he says of the Law, 20, of the title of the Digest de Jurisdictione,4 where he supposes a Parisian, who has contracted at Rome (Demus Romæ contractum esse); and inquires, whether the Parisian, if sued at Paris, shall be condemned to pay the interest prescribed by the law of Rome for the

¹ Burgundus, Tract. 4, n. 28, p. 116; 2 Boullenois, Observ. 46, p. 488, 498; ante, § 300 e.

² Ante, § 300 e.

^{3 2} Boullenois, Observ. 46, p. 472, 473.

⁴ Dig. Lib. 2, tit. 1, l. 20; Gothofred. n. 37.

delay; and he answers in the affirmative, saving; Id videtur. Contractus enim istius initium vitio caret. Boullenois says, that this decision is very just in effect, if we suppose, that the Parisian has not only made the contract at Rome, but also has promised to pay at Rome.1 The natural inference certainly would be, that if he expressly agreed to pay interest, that he should pay according to the rate of interest at the

place of payment.

§ 304. It may then be affirmed with some confidence, that the foreign jurists, who have been relied on, do not establish the asserted doctrine. On the other hand there are other foreign jurists, whose doctrines lead to an opposite conclusion. Thus, John Voet says, if a stipulation for a high interest is allowed in one place, and in another, it is prohibited, the law of the place, where the contract is made, is to decide, whether it is good, or whether it exceeds that, which is allowable. Nevertheless, we must remember, that, in point of law, that is not properly to be deemed the place of the contract, where the business is transacted, but where the money is by the contract to be paid. But good faith must also be observed; and the place of the contract, where higher interest is allowed, must not be sought for the purpose of evading the law. He adds; that an hypothecation of property, as security, situated in another place, where the interest is lower, will not vary the rule; for the security will be treated as merely accessorial. And it is more equitable, that the accessorial contract should be governed by the law of the place, where the princi-

^{1 2} Boullenois, Observ. 46, p. 446.

pal contract is made, than, on the contrary, that the principal contract, should be governed by the law of the place, in which the accessorial contract is made.¹

¹ Voet, ad Pand. Lib. 22, tit. 1, § 6, Tom. 1, p. 938; Id. Lib. 4, tit. 1, § 29, Tom. 1, p. 241; ante, § 293 d — I have given the sense, although not a precisely literal translation of the passage. The words are; Si alio in loco graviorum usuraram stipulatio permissa, in alio vetita sit, lex loci, in quo contractus celebratus est, spectanda videtur in questione, an moderate, an vero modum excedentes usuræ per conventionem constitutæ sint. Dum modo meminerimus, illum proprie locum contractus in jure non intelligi, in quo negotium gestum est, sed in quo pecuniam, u. solveret, se quis obligavit. Modo etiam bonà fide omnio gesta fuerint, nec consulto talis ad mutuum contrahendum locus electus sit, in quo graviores usure, quam in loco, in quo alios contrahendum fuisset, probatæ convenientur. Etiamsi de cætero hypotheca in sortis et usararum securitatem obligata, in alio loco sita sit, ubi solæ leviores usuræ permissæ; cum æquius sit, contractum accessorium regi ex loco principalis negotii gesti, quam ex opposito contractum principalem regi lege loci, in quo accessorius contractus celebratur. It appears to me, that the first part of the passage has been misunderstood, or at least mistranslated, in Depau v. Humphreys, 20 Martin, R. 32. The reasoning of the Court upon the passage will here be given, in justice to that learned tribunal. "The authority of the passage" (says Martin, J. in delivering the opinion of the Court) from Voet remains to be examined. This author says; Si alio in loco graviarum usurarum stipulatio permissa, in alio vertita sit, lex loci, ubi contractus celebratus est, spectanda videtur, an moderate, an vero modum excedentes usure, per conventionem stipulate sint. If in a place, the stipulation of higher interest be permitted, in another forbidden, the law of the place, in which the contract was celebrated, is to be resorted to, in order to ascertain, whether the lesser or the greater rate of interest be stipulated by the contract. Thus far Voet teaches, what we have seen Alexander, Bartolus, Burgundus, Everhard, Strykius, and Boullenois teach, and the contrary, of which no other commentator positively asserts; what, in our opinion, every sound principle of law dictates. But the appellant's counsel urges, that Voet, unsays, in the succeeding paragraph, what he appears to have so emphatically expressed. The words of the second paragraph are; Dummodo meminerimus illum proprie locum contractus, in jure non intelligi, in quo negotium gestum est, sed in quo, ut pecuniam solveret, se obligavit. In the argument, which the appellee's counsel draws, in this respect, he is fully supported, by what is said, arguendo, by Lord Mansfield, in Robinson v. Bland, and in some degree, by Judge Kent, in the same manner, in the case of Van Schaick v. Edwards, already cited. In endeavoring to ascertain the

§ 304 a. If to this doctrine, thus maintained by John Voet, (himself an author of distinguished weight and ability,) we add the concurrent testimony of Huberus, Everhardus, Christinæus, and Paul Voet, already cited,¹ on the same side, and the entire absence of any direct and absolute authority to the contrary, it is not perhaps too much to affirm, that the decision already alluded to of the Supreme Court of Louisiana,²

character of the rate of interest, stipulated in a note given in Massachusetts, Judge Kent says; 'Had the money, for instance, in this case been made payable at Albany, or elsewhere in this state, (New-York,) then perhaps the decision in Robinson v. Bland, would have applied. If, in the second paragraph, Voet meant to introduce an exception to the rule laid down in the first; if he meant to teach, that the legality of a rate of conventional interest, arising not ex mora, but tempore contractus, is exclusively to be tested by the law loci solutionis, even when it is different from the law loci celebrati contractus; then, we cannot consider him as affording to us a legitimate rule of decision in the present case; because the weight of his authority is borne down by that of a crowd of the most respectable commentators of the law he cites. Perhaps, he must be understood, in the second paragraph, to convey to the student a warning, that by what he teaches in the first, he must not be understood to impugn the proposition, that, in a great degree, the law loci solutionis, influences the obligation of the party, who bound himself, ut solveret pecuniam. Upon the whole, we must conclude, as we did in Norris v. Eves, and Videl v. Thompson, that contracts are governed by the law of the country, in which they were made, in every thing, which relates to the mode of construing them, the meaning to be attached to the expressions, by which the parties bound themselves, and the nature and validity of the engagement. But that, wherever the obligation be contracted, the performance must be according to the law of the place, where it is to take place. In other words, that in a note executed here, on a loan of money made here, the creditor may stipulate for the legal rate of conventional interest authorized by our law, although such a rate be disallowed in the place, at which payment is to be made." If I am right in the remarks in the text, it will be found, that the authorities cited by the learned Judge by no means justify the judgment See Bouhier, Cout. de Bourgogne, Vol. 1, ch. 21, p. 313; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 773, 774, 775.

¹ Ante, § 299, 300 b, § 300 c.

² Depau v. Humphreys, 20 Martin, R. I.

is not supported by the reasoning or the principles of foreign jurists. It is certainly also at variance with the doctrine maintained by Lord Mansfield, and the Judges of the King's Bench, in a highly interesting case, (although not positively necessary to the judgment then pronounced,) that the law of the place of payment, or performance, constitutes the true test, by which to ascertain the validity or invalidity of contracts.1 And finally, in a very recent case the Supreme Court of the United States have adopted the doctrine, that, where a contract is made in one place, to be executed in another, it is to be governed, as to usury, by the law of the place of performance, and not by the law of the place, where it is made. So, that if the transaction is bona fide, and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest, than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest. But, then the transaction must be bond fide, and not intended as a mere cover of usury.3 Bohier, indeed, thinks, that every contract of this sort would almost from its very terms and nature import a design to evade the laws, and to cover usury. But he manifestly presses the presumption far beyond its legitimate application; for the circumstances of the case may often establish, that the contract is perfectly innocent and praiseworthy.

§ 305. It has been said, that, if the principle be, that a contract, valid in the place, where the con-

¹ Robinson v. Bland, 2 Burr. 1077. See also Van Schaick v. Edwards, 2 John. Cas. 355.

² Andrews v. Pond, 13 Peters, R. 65, 77, 78.

³ Bouhier, Cout. de Bourg. Vol. 1, ch. 21, p. 413.

tract is celebrated, is void, if it is contrary to the law of the place of payment, it must establish the converse proposition, that a contract, void by the law of the place, where it is made, is valid, if good by the law of the place of payment.1 This would seem to be reasonable; and the doctrine is supported by the modern cases, notwithstanding the old cases have been supposed to lead to a contrary conclusion. In one case,2 a bond was executed in Ireland for a debt contracted in England; and because it constituted a security on lands in Ireland, Lord Chancellor Hardwicke held, that it was valid, although it bore the Irish interest of seven per cent. But he thought it would have been otherwise, if it had been a simple contract debt; or if the bond had been executed in England.3 Mr. Chancellor Kent has correctly laid down the modern doctrine; and he is fully borne out by the authorities. "The law of the place, (says he,) where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on lands in another state, unless there be circumstances to show, that the parties had in view the law of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern."4

¹ Depau v. Humphreys, 20 Martin, R. 1, 30.

² Connor v. Bellamont, 2 Atk. R. 381.

³ Stapleton v. Conway, 3 Atk. R. 727; S. C. 1 Ves. R. 427. See

Dewar v. Span, 3 T. R. 425.

^{4 2} Kent, Comm. Lect. 39, p. 460, 461, 3d edit.; D'Wolf v. Johnson, 10 Wheaton, R. 367; Scofield v. Day, 20 John. R. 102; Thompson v. Powles, 2 Simons, R. 194; Robinson v. Bland, 2 Burr. 1077; Boyce v. Edwards, 4 Peters, R. 111. But see Chapman v. Robertson, 6 Paige, R. 627, 630.

§ 306. But it has been asked, if this be the established doctrine, of what use is it for any legislature to pass a law for the protection of the weak and necessitous? 1 And the case of minors has been mentioned, as exhibiting the inconvenience of the principle. But we have already seen, that minors in one country may lawfully contract in another, in which they are deemed of age.2 The true answer to all such suggestions is, that no country can give to its own laws any extra-territorial authority, so as to bind other nations. If it undertakes to legislate in regard to acts done, or contracts performed elsewhere, it can claim for its own laws no other validity. than such as the comity of other nations may choose to allow towards them. It may, if it chooses, deem all such acts and contracts valid, or invalid. according to its own laws; but it cannot impose a like obligation on other nations, so to treat them. The repose and common interest of all nations, therefore, require each to observe towards all others the principles of reciprocal justice and comity; and these, as we have seen, are best subserved by the adoption of the general rule, that the law of the place of the contract and payment shall govern.3

§ 307. Analogous to the rule respecting interest, would seem to be the rule of damages in cases of contract, where damages are to be recovered for a breach thereof ex mora, or where the right to damages arises ex delicto, from some wrong, or injury done to personal property. Thus, if a ship should be illegally or tortiously converted in the East Indies by a

Depau v. Humphreys, 20 Martin, R. 1, 30.

² Saul v. His Creditors, 17 Martin, R. 596, 597; ante. 6 82.

³ Ante, § 242, 280.

party, the interest there will be allowed by way of damages in a suit against him.1 So, the rate of damages on a dishonored bill of exchange will be according to the Lex loci contractûs of the particular party.2 So if a bill of exchange be made in one state and indorsed in another state, and again indorsed by a second indorser in a third state, the rate of damages upon the dishonor of the bill will be against each party according to the law of the place, where his own contract had its origin, either by making, or by indorsing the bill.3 So, if a note, made in a foreign country, is for the payment of a certain sum in sugar, and by the custom of that place, the like notes are payable in sugar at a valuation, the law of the place is to govern in assessing the damages for a breach thereof.4

§ 308. Where a contract is made in one country, and is payable in the currency of that country, and a suit is afterwards brought in another country, to recover for a breach of the contract, a question often arises, as to the manner, in which the amount of the debt is to be ascertained, whether at the nominal or established par value of the currencies of the two countries, or according to the rate of exchange at the particular time existing between them In all cases of this sort, the place, where the money is payable, as well as the currency, in which it is promised to be paid, are (as we shall presently see) material ingredients. For instance, a debt of £100

¹ Ekins v. East India Company, 1 P. Will. 395, 396; Conseequa v. Willing, Peters, Cir. R. 225; Id. 303.

² Slacum v. Pomeroy, 6 Cranch, 221; Hazlehurst v. Kean, 4 Yates, R. 19; Pothier on Oblig. n. 171.

³ Post, § 314, 317.

⁴ Courtois v. Carpentier, 1 Wash. Cir. R. 376.

⁵ Post, § 310.

sterling is contracted in England, and is payable there; and afterwards a suit is brought in America for the recovery of the amount. The present par fixed by law between the two countries is, to estimate the pound sterling at four dollars and forty-four cents.1 But the rate of exchange, on bills drawn in America on England, is generally at from 8 to 10 per cent. advance on the same amount. In a recent case, it was held by the King's bench, in an action for a debt payable in Jamaica, and sued in England, that the amount should be ascertained by adding the rate of exchange to the par value, if above it; and so, vice versa, by deducting it, when the exchange is below the par.2 Perhaps, it is difficult to reconcile this case with the doctrine of some other cases.3 In a late American case, where the payment was to be in Turkish piastres, (but it does not appear from the report, where the contract was made, or was made payable,) it was held to be the settled rule, "where money is the object of the suit, to fix the value according to the rate of exchange at the time of the trial."4 It is impossible to say,

¹ This is the par for ordinary commercial purposes. But by the Act of Congress of 1832, ch. 224, § 16, the par, for the purpose of estimating the value of goods, paying an ad valorem duty, and for that purpose only, is declared to be to estimate a pound sterling at four dollars and eighty cents. The still more recent Act of 22d July, 1842, ch. 66, makes the par, for estimating duties in like cases, at four dollars and eighty-four cents for the pound sterting.

² Scott v. Bevan, 2 Barn. & Adolp. 78—Lord Tenterden in delivering the opinion of the Court in favor of the rule said; "Speaking for myself personally, I must say, that I still hesitate as to the propriety of the conclusion." See Delegal v. Naylor, 7 Bing. R. 460; Ekins v. East India Company, 1 P. Will. 396.

³ See Cockerell v. Barber, 16 Ves. 461; post, § 312.

⁴ Lee v. Wilcocks, 5 Serg. & Rawle, 48.— It is probable, that in this case the money was payable in Turkey.

that a rule laid down in such general terms ought to be deemed of universal application; and cases may easily be imagined, which may justly form exceptions.

§ 309. The proper rule would seem to be, in all cases, to allow that sum in the currency of the country, where the suit is brought, which should approximate most nearly to the amount, to which the party is entitled in the country, where the debt is payable, calculated by the real par, and not by the nominal par of exchange.1 This would seem to be the rule, also, which is adopted by foreign iurists.2 In some countries there is an established par of exchange by law, as in the United States, where the pound sterling of England, is now valued at four dollars and forty four cents for all purposes, except the estimation of the duties on goods paying an ad valorem duty.3 In other countries, the original par has, by the depreciation of the currency, become merely nominal; and, there, we should resort to the real par. Where there is no established par from any depreciation of the currency, there, the rate of exchange may justly

In Cash v. Kennon, (11 Vesey, R. 314,) Lord Eldon held, that, if a man in a foreign country agrees to pay £100 in London, upon a given day, he ought to have that sum there on that day. And if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much, as he would have had, if the contract had been performed. J. Voet says, "Si major, alibi minor, corundem nummorum valor sit, in solutione faciendà; non tam spectanda potestas pecunise, que est in loco, in quo contractus celebratus est, quam potius que obtinet in regione illà, in quà contractus implementum faciendum est." Voet, ad Pand. Lib. 12, tit. 1, § 25; Henry on Foreign Law, 43, note. See also ante, § 281; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771, 772, 773.

² Ante, § 281.

³ Ante, § 308, n. 2.

furnish a standard, as the nearest approximation of the relative value of the currencies. And where the debt is payable in a particular known coin, as in Sicca rupees, or in Turkish piastres, there the mint value of the coin, and not the mere bullion value, in the country, where the coin is issued, would seem to furnish the proper standard, since it is referred to by the parties in their contract, by its descriptive name as coin.

§ 310. But in all these cases we are to take into consideration the place, where the money is, by the original contract, payable; for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay, in order to remit it to that country.1 Thus, if a note were made in England, for £100 sterling, payable in Boston (Mass.), if a suit were brought in Massachusetts, the party would be entitled to recover four hundred and fortyfour-dollars and forty-four cents, that being the established par of exchange by our laws. But, if our currency had become depreciated by a debasement of our coinage, then the depreciation ought to be allowed for. so as to bring the sum to the real par, instead of the nominal par.2 But, if a like note were given in England for £100, payable in England, or payable

¹ See 1 Chitty on Comm. and Manufact. ch. 12, p. 650, 651. See Ante, § 281, 308.

² Paul Voet has expressed an opinion upon this subject in general terms. "Quid, si in specie de nummorum aut redituum solutione difficultas incidat, si forte valor sit immutatus; an spectabitur loci valor, ubi contractus erat celebratus, an loci, in quem destinata erat solutio? Respondeo, exgenerali regulà, spectandum esse loci statutum, in quem destinata erat solutio." P Voet, de Stat. § 9, ch. 2, § 15, p. 271; Id. p. 328, edit. 1661. And he applies the same rule, where contracts are for specific articles, the measures whereof are different in different countries. Id. § 16, p. 271; Id. p. 328, edit. 1661.

generally (which in legal effect would be the same thing); there, in a suit in Massachusetts, the party would be entitled to recover, in addition to the four hundred and forty-four dollars and forty-four cents, the rate of exchange between Massachusetts and England, which is ordinarily from eight to ten per cent. above par. And if the exchange were below par, a proportionate deduction should be made; so that the party would have his money replaced in England at exactly the same amount, which he would be entitled to recover in a suit there.

§ 311. This distinction may, perhaps, reconcile some of the cases, between which there might seem, at first view, to be an apparent contrariety. It was evidently acted on in an old case, where money, payable in Ireland, was sued for in England; and the Court allowed Irish interest, but directed an allowance to the debtor for the payment of it in England, and not in Ireland.¹ It is presumable, that the money was of less value in Ireland, than in England. A like rule was adopted in a later case, where money payable in India was recovered in England; and the charge of remitting it from India was directed to be deducted.²

§ 311 a. There is, however, an irreconcilable difference in some of the authorities on this subject. Thus, it has been held in New York, that, where a debt is contracted in a foreign country and is payable there, if the creditor afterwards sues the debtor here for the debt, he is entitled to recover only for the debt according to the par of exchange, and not according to

¹ Dungannon v. Hackett, 1 Eq. Cas. Abr. 288, 289.

² Ekins v. The East India Company, 1 P. Will. 396; S. C. 2 Bro. Par. Cas. 382, edit. Tomlins.

the rate of exchange, necessary to remit the amount to the foreign country. On that occasion the Court said: "The debt is to be paid according to the par, and not the rate of exchange. It is recoverable and payable here to the plaintiffs, or their agent, and the Courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. may remit the debt to his principal abroad in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the United States, or to other countries on the same account. We cannot trace the disposition, which is to take place subsequent to the recovery, nor award special damages upon such uncertain calculations.¹ The same doctrine has been adhered to in subsequent decisions.² It has also been adopted by the Supreme Court of Massachusetts, as the proper rule in all cases, except bills of exchange.3 On the contrary, in the Circuit Courts of the United States the opposite doctrine has been maintained.4

¹ Martin v. Franklin, 4 John. R. 124, 125.

² Scofield v. Day, 20 John. R. 102.

³ Adams v. Cordis, 8 Pick. R. 260, 266, 267.

⁴ Smith v. Shaw, 2 Wash. Cir. R. 167, 168; Grant v. Healey, 2 Chand. Law Reporter, 113; S C. 3 Sumner R. 523; Ante, § 284 a.—In this last case the subject was considered at great length; and the following remarks were made by the Judge, in delivering the opinion of the Court. "I take the general doctrine to be clear, that whenever a debt is made payable in one country, and is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country, where it ought to have been paid, with interest for the delay; for then and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is, therefore, entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted from, the amount, as the case may require, in order to replace the money in the country, where it ought

§ 312. In one case, where by a will made in India, a legacy was given of 30,000 Sicca rupees,

to be paid. It seems to me, that this doctrine is founded on the true principles of reciprocal justice. The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact than of law. In cases of accounts and advances, the object is to ascertain, where according to the intention of the parties the balance is to be repaid? In the country of the creditor, or of the debtor? In Lanusse v. Barker, (3 Wheat. R. 101, 147,) the Supreme Court of the United States seem to have thought, that where money is advanced for a person in another state, the implied understanding is to replace it in the country, where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances. Governed by this rule, the money being advanced in Boston, so far as it was not reimbursed out of the proceeds of the sales at Trieste, would seem to be proper to be repaid in Boston. In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining, where the balance is reimbursable, whether where the creditor resides, or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application, that advances ought to be deemed reimbursable at the place, where they are made, and sales of goods accounted for at the place, where they are made, or authorized to be made. Thus, if a consignment is made in one country for sales in another country, where the consignee resides, the true rule would seem to be, to hold the consignee bound to pay the balance there, if due from him; and if due to him, on advances there made, to receive the balance from the consignor there. The case of Conseequa v. Fanning, (3 John. Ch. R. 587, 610,) which was reversed in 17 John. R. 511, proceeded upon this intelligible ground, both in the Court of Chancery, and in the Court of Errors and Appeals, the difference between these learned tribunals not being so much in the rule, as in its application to the circumstances of that particular case. I am aware, that a different rule, in respect to balances of account and debts due and payable in a foreign country, was laid down in Martin v. Franklin, (4 John. R. 125,) and Scofield v. Day, (20 John. R. 102;) and that it has been followed by the Supreme Court of Massachusetts, in Adams v. Cordis, (8 Pick. R. 260.) It is with unaffected diffidence, that I venture to express a doubt, as to the correctness of the decisions of these learned courts upon this point. It appears to me, that the reasoning in 4 John. R. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly, that the Court have nothing to do with inquiries into the disposition, which the creditor may make of and the testator afterwards died in England, leaving personal property, both in England, and in In-

his debt after the money has reached his hands; and the Court are not to award damages upon such uncertain calculations, as to the future disposition of it. But that is not, it is respectfully submitted the point in controversy. The question is, whether if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who by the breach of this contract has occasioned the loss. The loss, of which we here speak, is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows, that the very same sum of money, paid in the one country, is not an indemnity or equivalent for it, when paid in another country, to which by the default of the debtor the creditor is bound to resort. Suppose a man undertakes to pay another \$10,000 in China, and violates his contract; and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth at the very moment 20 per cent. more than it is in Boston; what compensation is it to the creditor to pay him the \$10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule, that interest is payable according to the law of the place, where the contract is to be performed, except it be the very same, on which a like claim may be made as to the principal, viz. that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation, as if he had punctually complied with his contract there. It is suggested, that the case of bills of exchange stands upon a distinct ground, that of usage; and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain, what should be the rate of damages for a violation of the contract generally, as a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard dependent upon the daily rates of exchange; exactly for the same reason that the rule of deducting one third new for old is applied to cases of repairs of ships, and the deduction of one third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange, drawn between countries, where no such fixed rate of damages exists, the doctrine of damages, applied to the contract, is precisely that, which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum, which he ought to have received in that country. That is sufficiently clear from the case of Mellish v. Simeon, (2 H. Black. R. 378,) and the whole theory of reexchange. My brother, the late Mr. Justice Washington, in the case of Smith v. Shaw, (2 Wash. Cir. R. 167, 168, in 1808,) which was a suit brought by an English merchant on an account for goods shipdia; upon a suit in chancery for the legacy, the master, to whom it was referred, estimated the Sicca rupees at 2s. 6d. per Sicca rupee, being the East India Company's rate of exchange between India and Great Britain, (i. e. on bills drawn in India on Great Britain,) at the time the legacy became due. At the same time, the par or sterling value of the Sicca rupees in India and England was 2s. 1d. per Sicca rupee; and the East India Company's rate of exchange between Great Britain and India, (i. e. on bills drawn in England on India,) was 2s. 3d.

ped to the defendants' testator, where the money was doubtless to be paid in England, and a question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held, that the debt was payable at the then rate of exchange. To which Mr. Ingersoll, at that time one of the ablest and most experienced lawyers at the Philadelphia bar, of counsel for the defendant, assented. It is said, that the point was not started at the argument, and was settled by the Court suddenly, without advancing any reasons in the support of it. I cannot but view the case in a very different light. The point was certainly made directly to the Court, and attracted its full attention. The learned Judge was not a Judge accustomed to come to sudden conclusions, or to decide any point, which he had not most scrupulously and deliberately considered. The point was probably not at all new to him; for it must frequently have come under his notice in the vast variety of cases of debts due on account by Virginia debtors to British creditors, which were sued for during the period, in which he possessed a most extensive practice at the Richmond bar. The circumstance, that so distinguished a lawyer, as Mr. Ingersoll, assented to the decision, is a farther proof to me, that it had been well understood in Pennsylvania to be the proper rule. If, indeed, I were disposed to indulge in any criticism, I might say, that the cases in 4 John. R. 125, and 20 John. R. 101, 102, do not appear to have been much argued or considered; for no general reasoning is to be found in either of them upon principle, and no authorities were cited. The arguments and the opinion contained little more than a dry statement and decision of the point. The first and only case, in which the question seems to have been considered upon a thorough argument, is that in 8 Pick. R. 260. I regret, that I am not able to follow its authority with a satisfied assent of mind."

Upon exceptions taken to the Report, it was contended, that either the par of exchange, or the rate of exchange between Great Britain and India ought to have been adopted.1 Lord Eldon on that occasion said; "In all the cases reported upon the wills of persons in Ireland or Jamaica, and dving there, and vice versa in this country, some legacies being expressed in sterling money, others in sums, without reference to the nature of the coin, in which they are to be paid, the legacies are directed here to be computed according to the (real) value of the currency of the country, to which the testator belonged, or where the property was; and I apprehend, no more was done in such cases, than ascertaining the value of so many pounds in the current coin of the country, and paying that amount out of the funds in Court. On the other hand. I do not believe the Court have ever said, they would not look at the value of the current coin of the country, but would take it as bullion. At the time of Wood's half-pence in Ireland, whatever was their actual worth, yet payment in England must have been according to their nominal current value, not the actual value. So whatever was the current value of the rupee at the time, when this legacy ought paid, is the ratio, according to which payment must be made here in pounds sterling. If twelve of Wood's half-pence were worth six pence in this Court, six pence must have been the sum paid. And in a payment in this Court, the cost of remittance has nothing to do with it. So if the value of 30,000 rupees, at the time the payment ought to

¹ Cockerell v. Barber, 16 Ves. 461, 465.

have been made in India, was £10,000, that is the sum to be paid here, without any consideration as to the expense of remittance." And he accordingly directed the master to review his report, and the legacies to be paid, according to the current value of the Sicca rupee in Calcutta.

§ 313. In considering this decision, it is material to observe, that the will was made in India, and, of course, the legacy payable there; and the testator died in England, leaving personal assets in both countries. Under these circumstances, the legatee was not compellable to resort to England for payment of the legacy; but he elected of his own mere choice to receive it there. He might have resorted to India, if he had pleased; 2 and if so, he would have been entitled to the exact amount of 30,000 Sicca rupees, according to their current value there. He ought not, then, by resorting to a court in England, to oblige the estate to bear the charge of the remittance of the amount to England, with which it was charged by the master's report. Nor ought the estate, upon his mere election to receive the amount in England, to pay for the remittance of the same from England to India. The decree of the Court was, therefore, manifestly right, and consistent with the principles above stated. The language of the Court, however, does not seem to put the case upon this clear ground; but to put it upon the ground, that the value, at the par of exchange, (not indeed the nominal, but the real par,) without any reference to

¹ Cockerell v. Barber, 16 Ves. 461, 465.

² See Bourke v. Ricketts, 10 Ves. 332, and Raithby's Notes to Ranelagh v. Champant, 2 Vern. 395; Saunders v. Drake, 2 Atk. R. 466; Stapleton v. Conway, 1 Ves. 427.

the place of payment, or of remittance, was, in all cases, the true rule. It admits, however, of some doubt, whether the Court intended to make so general an application of its language, and did not intend to restrain it to the circumstances of the particular Suppose the executor in India had remitted all the funds to England, and had become domiciled there, and the legatee had always lived in India; would not the latter, having no other means of getting payment but by a suit in England, have been entitled to the charge of remittance to India? Without expressing any opinion upon the subject, it may, perhaps, be thought worthy of further consideration. Some of the cases, already cited, are certainly at variance with this decision, if it is to be deemed to assert a doctrine of universal application.2

¹ Scott v. Bevan, 2 Barn. & Adolp. 78. See also Delegal v. Naylor, 7 Bing. R. 460, which apparently supports the rule in Scott v. Bevan, and ante, § 308, 309, 311, 311 a.

² In the case of mixed money, in Sir John Davies's Reports [28], 48, there is a curious discussion, as to the nature and changes of English currency. A bond was given in England for the payment of "£100 sterling, current and lawful money of England," to be paid in Dublin, Ireland; and between the time of giving the bond, and its becoming due, Queen Elizabeth, by proclamation, recalled the existing currency in Ireland, and issued a new debased coinage, (called mixed money,) declaring it to be the lawful currency in Ireland. A tender was made in this debased coin, or mixed coin, in Dublin, in payment of the bond. The question, before the Privy Council of Ireland, was, whether the tender was good, or ought to have been in currency, or value, equal to the current lawful money, then current in England. The Court held the tender good; first, because the mixed money was current lawful of England, Ireland being within the sovereignty of the British crown; and secondly, because the payment being to be in Dublin, it could be made in no other currency, than the existing currency of Ireland, which was the mixed money. The Court do not seem to have considered, that the true value of the Euglish current money might, if that was required by the bond, have been paid in Irish currency, though debased, by adding so much more, as would bring it to the

§ 313 a. The question touching the effect of a depreciation of the currency between the time, when the debt is contracted, or it becomes due, and the subsequent payment thereof, which was hinted at in the preceding case, has since arisen in a more direct and solemn form, and undergone no inconsiderable discussion. The French government, during the war between England and France, had confiscated a debt, due from a French subject to a British subject; and subsequently an indemnity was stipulated for, on the part of the French government; and, there having been a great depreciation of the French currency after the time when the debt was confiscated, the question arose, whether the debt was to be calculated at the value of the currency at the time, when the confiscation took place, or subsequently; and it was held, that it ought to be calculated according to the value at the time of the confiscation. On that occasion, the case in Sir John Davies's Reports, already alluded to,1 was referred to, as well as the opinions of foreign jurists on the same subject; and Sir William Grant in delivering the opinion of the Court said; "Great part of the argument at the bar would undoubtedly go to show, that

par. And it is extremely difficult to conceive, how a payment of current lawful money of England could be interpreted to mean current, or lawful money of Ireland, when the currency of each kingdom was different, and the royal proclamation made a distinction between them, the mixed money being declared the lawful currency of Ireland only. Perhaps the desire to yield to the royal prerogative of the Queen a submissive obedience, as to all payments in Ireland, may account for a decision so little consonant with the principles of law in modern times. See also the comments on this case in the case of Pilkington v. Commissioners for Claims, 2 Knapp, R. 18 to 21; S. C. cited 2 Bligh, R. 98, note. See Kearney v. King, 2 Barn. & Ald. 301; Sprowle v. Legg, 1 Barn. & Cres. 16.

¹ Ante, § 312, 313, note 2.

the Commissioners have acted wrong in throwing that loss upon the French government in any case; for they resemble it to the case of depreciation of currency, happening between the time that a debt is contracted, and the time, that it is paid; and they have quoted authorities for the purpose of showing, that in such a case the loss must be borne by the creditor, and not by the debtor. That point it is unnecessary for the present purpose to consider, though Vinnius, whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davies's Reports. He takes the distinction, that if, between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more, as would make it equal to the sum he borrowed. But he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30s., the debtor may liberate himself from a debt of 11. 10s. by paying a guinea, although he had borrowed the guinea, when it was but worth 21s. I have said it is unnecessary to consider, whether the conclusion drawn by Vinnius, or the decision in Davies's Reports. be the correct one; for we think this has no analegy to the case of creditor and debtor. a wrong act done by the French government; then

they are to undo that wrong act, and to put the party into the same situation, as if they never had done it. It is assumed to be a wrong act, not only in the treaty, but in the repealing decree. They justify it only with reference to that, which, as to this country, has a false foundation; namely on the ground of what other governments had done towards them, they having confiscated the property of French subjects; therefore, they say, we thought ourselves justified at the time in retaliating upon the subjects of this country. That being destitute of foundation as to this country, the Republic themselves, in effect, confess, that no such decree ought to have been made, as it affected the subjects of this country. Therefore it is not merely the case of a debtor paying a debt at the day it falls due; but it is the case of a wrong-doer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50d., he does not make compensation by returning an assignat, which is only worth 20d.; he must make up the difference between the value of the assignat at different periods. And that is the case stated by Sir John Davies, where Restitutio in integrum is stated. He says, two cases were put by the Judges, who were called to the assistance of the Privy Council. although they were not positively and formally resolved. He says, it is said, if a man upon marriage receive 1,000l. as a portion with his wife, paid in silver money, and the marriage is dissolved causa precontractûs, so that the portion is to be restored, it must be restored in equal good silver money, though the State shall have depreciated the currency in the mean time. So, if a man recover 1001.

damages, and he levies that in good silver money, and that judgment is afterwards revised, by which the party is put to restore back all he has received, the judgment-creditor cannot liberate himself by merely restoring 100l. in the debased currency of the time: but he must give the very same currency, that he had received. That proceeds upon the principle, that if the act is to be undone, it must be completely undone, and the party is to be restored to the situation, in which he was at the time the act to be undone took place. Upon that principle, therefore, undoubtedly the French Government, by restoring assignats at the end of 13 months, did not put the party in the same situation, in which he was, when they took from him assignats, that were of a very different value. We have said, that as this point is not directly or immediately before us, it can make no part of our decree. At the same time, it may not perhaps have been without some utility to have given an opinion upon it, inasmuch as it was argued and discussed at the bar. And we think, therefore, the Commissioners have proceeded on a perfectly right principle in those cases, in which we understand they have made an allowance for the depreciation of paper money; and considering that this case does not differ from those, in which they have made that allowance, we are of opinion, that the claimants ought to have the same equity administered to them in remunerating them for the loss they have sustained."1

313 b. The opinions of Vinnius and Pothier, alluded to in the opinion of Sir Wm. Grant fully confirm

¹ Pilkington v. Commissioners for Claims, 2 Knapp, R. 17 to 21.

his statements. Vinnius is of opinion, that the value of the money at the time when it ought to be paid, is the value, which is to be allowed to the creditor. Of the same opinion, he adds, are Bartolus, and Baldus, and De Castro, and indeed of jurists generally, with the exception of Dumoulin, and Hotomannus, and Donellus, who think the value at the time of making the contract ought to govern. Hence, after having discussed the principle, Vinnius says, in conformity with the opinions of the former jurists; Hoc autem fundamento posito, siquidem neutri contrahentium injuriam fieri volumus, ita definiendum videtur, ut si bonitas monetæ intrinseca mutata sit, tempus contractus, si extrinseca, id est valor imposititius, tempus solutionis in solutione facienda, spectari debeat.¹ Pothier holds the

¹ Vinnius, ad Instit. Lib. 3, tit. 15, Textus, De Mutuo. Comm. n. 12, p. 599, edit. 1726; Id. p. 664, edit. 1777, Lugduni. The whole passage deserves to be cited. Atque hinc pendet decisio nobilissimæ quæstionis, si post contractum estimatio nummorum creverit aut decreverit, utrum in solutione facienda spectare oporteat valorem, quem habebant tempore contractus, an qui nunc est tempore solutionis: intellige si nihil, de ea re expresse dictum sit, neque mora intervenerit. Molinæus, Hotomannus, Donellus contendunt, tempus contractus inspiciendum esse, id est, ea estimatione nummos reddendos, non que nunc est, sed que initio fuit, cum dabantur. Nimirum nihil illi in pecunia numerata præter æstimationem considerandum putant, totamque nummi bonitatem in hac ipsa restimatione consistere: ac proinde creditori non facere injuriam, qui eandem æstimationem, quam accepit, reddit: tantum enim reddere eum, quantum accepit, quod ad solutionem mutui sit satis. Itaque secundum horum sententiam, si 100. aurei mutuo dati sint, cum aureus valebat asses 50, reddantur autem, cum singuli valent asses 55, debitor reddens creditori aureos 90. aut in singulos aureos 50. asses reddit, quantum accepit, et liberatur: et vicissim si imminuta sit ad eundem modum accepit, et liberatur: et vicissim si imminuta sit ad eunsem modum aureorum estimatio, non liberatur, nisi reddat aureos 110. aut in singulos aureos asses 55. Bartolus vero (in l. Paulus. 101. de solut.) Baldus (in l. res in dotem. 24. de jur. dot.) Castro, (in lib. 3. de reb. cred,) et DD. comm. ut videre est apud Boer, decis. 327. contra censent, spectandum esse in proposito tempus solutionis, id est, aucto vel deminuto nummorum valore, ea æstimatione reddi eos oportere, non quæ tunc fuit, cum dabantur, sed que nunc est, cum solvuntur; neque aliud statui posse sine creditoris aut

opposite opinion, and says; "It remains to be observed, in regard to the price, that it may be rendered in a money different from that, in which it is paid.

debitoris injuria. Que sententia, ut mihi videtur, et verior et equior est. Nam quod contrariæ sententiæ auctores unicum urgent, in nummis non materiæ, sed solius æstimationis imposititiæ atque externæ, quam ob id vulgo extrinsecam nummi bonitatem vocant, rationem duci, nummumque nihil aliud esse, quam quod publicè valet, vereor, ut simpliciter verum sit. Utique enim materia numismatis fundamentum est et causa valoris: quippe qui variatur pro diversitate materiæ: oportetque valorem hunc justa aliqua proportione materiæ respondere: neque in bene constituta repub. nummo ea æstimatio imponi debet, quæ pretium materie, ex qua cuditur, superat, aut superet ultra modum expensarum, que in signanda pecunia fiunt; quod ad singularum specierum valorem parum addere potest. Sed hoc ad actus et præstationes privatorum non pertinet. Illud pertinet, quod si dicimus, creditis nummis nihil præter æstimationem eorum creditum intelligi, necessario sequitur, creditorem teneri in alia forma aut materia nummos accipere contra definitionem Pauli in d. 1. 99. de solut, etiamsi damnum ex eo passurus sit: nam, qui recipit, quod credidit, nihil habet, quod conqueratur. Sequitur et hoc, si contingat mutari nummorum bonitatem intrinsecam, id est, si valore veteri retentio percutiantur novi nummi ex deteriore materia, quam ex qua cusi, qui dati sunt. puta, si qui dati sunt, cusi fuerint ex puro auro, postea alii feriantur ex auro minus puro et mixto ex ære, debitorem restituendo tot mixtos et contaminatos, quot ille puros accepit, liberari cum insigni injuria creditoris: et contra interpp, pene omnium doctrinam, qui hoc casu solutionem faciendam esse statuunt ad valorem intrinsecum monetæ, qui currebat tempore contractus. testibus Gail. 2, obs. 73, n. 6 & 7. Borcholt. de feud. ad cap, un. que sunt regal, num. 62. Illud enim maxime in hac disputatione considerandum est, quoniam hic finis nummi principalis est, ut serviat rebus necessariis comparandis, auctore Aristotele 1. Polit. 6. quod mutata monetes bonitate sive extrinseca, sive intrinseca, pretia rerum omnium mutentur, et pro modo auctæ aut imminutæ bonitatis nummorum crescant aut decrescant: quod ipsa docet experientia: eoque facit l. 2. C. de vet. num. pot. lib. 11. Crescunt rerum pretia, si deterior materia electa, aut manente eadem materia valor auctus sit: decrescunt electu materiæ melioris, aut si cadem bonitate materiæ manente valor imminutis fuerit. Fallitur enim imperitum vulgus, dum sibi persuadet, ex augmento valoris aurei aliquid sibi lucri accedere. Hoc autem fundamento posito, siquidem neutri contrahentium injuriam fieri volumus, ita definiendum videtur, ut si bonitas monetæ intrinseca mutata sit, tempus contractus, si extrinseca, id est, valor imposititius, tempus solutionis in solutione facienda spectari debeat. Atque ita sæpissimè judicatum est.

If it is paid to the seller in gold, the seller may repay it in pieces of silver, or vice versa. In like manner, though subsequent to the payment of the price, the pieces, in which it is paid, are increased or diminished in value; though they are discredited, and at the time of the redemption, their place is supplied by new ones of better or worse alloy: the seller, who exercises the redemption, ought to repay in money, which is current at the time he redeems, the same sum or quantity, which he received in payment, and nothing more nor less. The reason is, that, in money, we do not regard the coins, which constitute it, but only the value, which the sovereign has been pleased, that they shall signify; Eaque materia forma publica percussa, usum dominiumque non tam ex substantia præbet, quam ex quantitate; D. 18, 1, 1. When the price is paid, the seller is not considered to receive the particular pieces, so much as the sum or value, which they signify; and, consequently, he ought to repay, and it is sufficient for him to repay, the same sum or value in pieces, which are current, and which have the signs, authorized by the prince, to signify that value. This principle being well established in our French practice, it is sufficient merely to state it. It cuts off all the questions made by the Doctors concerning the changes of money."1

§ 314. Negotiable instruments often present questions of a like mixed nature.2 Thus, suppose a negotiable bill of exchange is drawn in Massachusetts on England, and is indorsed in New York, and

² See post, § 344, 353 to 361.

¹ Pothier, Traité du Contrat de Vente, n. 416. I quote from Mr. Cushing's excellent Translation, n. 416, p. 264, 265. See Pardessus, Tom. 5 art. 1495, p. 269, 270, 271.

again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored: what damages will the holder be entitled to? The law as to damages in these states is different. In Massachusetts it is 10 per cent., in New York and Pennsylvania 20 per cent., and in Maryland 15 per cent.1 What rule then is to govern? The answer is, that, in each case, the Lex loci contractus. The drawer is liable on the bill according to the law of the place where the bill was drawn: and the successive indorsers are liable on the bill according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract.2 The consequence is, that the indorser may render himself liable, upon a dishonor of the bill, for a much higher rate of damages, than he can recover from the drawer. But this results from his own voluntary contract; and not from any collision of rights arising from the nature of the original contract.3

^{1 3} Kent, Comm. Lect. 44, p. 116 to p. 120, 3d edit.

² Ante, § 307; post, § 317; Powers v. Lynch, 3 Mass. R. 77; Prentiss v. Savage, 13 Mass. R. 20, 23, 24; Slacum v. Pomeroy, 6 Cranch, 221; Depau v. Humphreys, 20 Martin, R. 1, 14, 15; Hicks v. Brown, 12 John. R. 142; Bayley on Bills, ch. A. p. 28, Phillips & Sewall's Edition; Trimbey v. Vignier, 1 Bing. R. 151, 159, 160; ante, § 267; post, § 316 a, § 353 to 361; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771 to p. 774.

³ Pardessus has discussed this matter at large. He adopts the general doctrine here stated, that the law of the place of each indorsement is to govern, as each indorsement constitutes a new contract between the immediate parties. And he applies the same rule to damages; and says, that, if the law of the place, where a bill of exchange is drawn, admits of the accumulation of costs and charges on account of re-exchanges, (as is the law of some countries,) in such a case each successive indorser may become liable to the payment of such successive accumulations, if allowed by the law of the place, where they made their indorsement. He seems, indeed, to press his doctrine farther, and to hold, that, if the

§ 315. It has sometimes been suggested, that this doctrine is a departure from the rule, that the law of the place of payment is to govern.1 But, correctly considered, it is entirely in conformity to the rule. The drawer and indorsers do not contract to pay the money in the foreign place, on which the bill is drawn; but only to guarantee its acceptance, and payment in that place by the drawee; and in default of such payment they agree upon due notice to reimburse the holder, in principal and damages, at the place, where they respectively entered into the contract.2

§ 316. Nor is it any departure from the rule to hold, that the time, when the payment of such a bill is to accrue, is to be according to the law of the place, where the Bill is payable; so that the days of grace (if any) are to be allowed, according to the law or custom, where the Bill is to be accepted and paid;3 for such is the appropriate construction of the contract, according to the rules of law, and the presumed intention of the parties.4

law of the place of such indorsement does not allow such accumulation of re-exchanges, but the law of the place, where the bill is drawn, does, the indorsers will be liable to pay, as the drawer would. But his reasoning does not seem satisfactory; and it is certainly inconsistent with the acknowledged doctrines of the common law. Pardessus, Droit Commerc. art. 1500. See also Henry on Foreign Laws, 53 Appx. 239 to 242; 3 Kent, Comm. Lect. 44, p. 115, 3d edit. See Rothschild v. Currie, 1 Adolp. & Ell. N. R. 43.

^{1 2} Kent, Comm. Lect. 39, p. 459, 460, 3d edit.; Chitty on Bills, p. 191 to p. 194, 8th edit. London,

Potter v. Brown, 5 East, R. 123, 130; Hicks v. Brown, 12 John. R. 142; Powers v. Lynch, 3 Mass. R. 77; Prentiss v. Savage, 13 Mass. R. 20, 24; Pardessus, Droit Comm. art. 1497.

³ See 2 Kent, Comm. Lect. 39, p. 459, 460, 3d edit.; Chitty on Bills, p. 191, 8th edit., London; Pothier, Contrat de Change, n. 15, 155; 5 Pardessus, § 1495; post, § 347, 361.

⁴ Mr. Justice Martin in Vidal v. Thompson, 11 Martin, R. 23, 24.

§ 316 a. Another illustration of the general doctrine may be derived from the case of negotiable paper, as to the binding obligation and effect of a blank indorsement. It seems, that by the law of France an indorsement in blank of a promissory note does not transfer the property to the holder, unless certain prescribed formalities are observed in the indorsement, such as the date, the consideration, and the name of the party, to whose order it is passed: otherwise, it is treated as a mere procuration.1 let us suppose a note made at Paris, payable to the order of the payee, and he should there indorse the same in blank without the prescribed formalities, and afterwards the holder should sue the maker of the note in another country, as, for example, in England, where no such formalities are prescribed; the question would arise, whether the holder could recover in such a suit in an English Court upon such an indorsement. It has been held, that he cannot; and this decision seems to be founded in the true principles of international jurisprudence; for it relates, not to the form of the remedy, but to the interpretation and obligation of the contract, created by the indorsement, which ought to be governed by the law of the place of indorsement.2

§ 316 b. Another illustration may be derived from the different obligations, which an indorsement creates in different states. By the general commercial law, in order to entitle the indorsee to recover against any antecedent indorser upon a negotiable note, it is

¹ Code de Commerc. art. 137, 138; Trimbey r. Vignier, 1 Bing. N. Cas. 151, 158, 159, 160.

² Trimbey r. Vignier, 1 Bing. New Cases, 151, 158, 159, 160; ante, § 272.

only necessary, that due demand should be made upon the maker of the note at its maturity, and due notice of the dishonor to the indorser. But by the laws of some of the American States, it is required in order to charge an antecedent indorser, that not only due demand should be made and due notice given, but that a suit shall be previously commenced against the maker, and prosecuted with effect in the country, where he resides; and then, if payment cannot be obtained from him under the judgment, the indorsee may have recourse to the indorser. In such a case, it is clear, upon principle, that the indorsement, as to its legal effect and obligation, and the duties of the holder, must be governed by the law of the place, where the indorsement is made. This very point has been recently decided in a case, where a note was made and indorsed in the state of Illinois. On that occasion, Mr. Chief Justice Shaw, in delivering the opinion of the Court, said; "The note declared on, being made in Illinois, both parties residing there at the time, and it also being indorsed in Illinois, we think, that the contract created by that indorsement must be governed by the law of that State. The law in question does not affect the remedy, but goes to create, limit, and modify the contract effected by the fact of indorsement. In that, which gives force and effect to the contract, and imposes restrictions and modifications upon it, the law of the place of contract must prevail, when another is not looked to as a place of performance. Suppose it were shown, that, by the law of Illinois, the indorsement of a note by the payee merely transferred the legal interest in the note to the indorsee, so as to enable him to sue in his own name, but imposed no con-

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ditional obligation on the indorser to pay; it would hardly be contended, that an action could be brought here upon such an indorsement, if the indorser should happen to be found here, because by our law such an indorsement, if made here, would render the indorser conditionally liable to pay the note. By the law of Illinois, the indorser is liable only after a judgment obtained against the maker; and as no such judgment appears to have been obtained on this note, the condition, upon which alone the plaintiff may sue, is not complied with, and therefore the action cannot be maintained."

§ 317. But, suppose a negotiable note is made in one country, and is payable there, and it is afterwards indorsed in another country, and by the law of the former country equitable defences are let in. in favor of the maker, and by the latter such defences excluded; what rule is to govern, in regard to the holder, in a suit against the maker to recover the amount upon the indorsement to him? The answer is, the law of the place, where the note was made; for there the maker undertook to pay; and the subsequent negotiation of the note did not change his original obligation, duty, or rights.2 Acceptances of bills are governed by the same principles. are deemed contracts of acceptance in the place, where they are made, and where they are to be performed.3 So Paul Voet lays down the doctrine.

¹ Williams v. Wade, 1 Metcalf, R. 82, 83.

² Ory v. Winter, 16 Martin, R. 277; post, § 332, 343, 344.

³ Lewis v. Owen, 4 Barn. & Ald. 654; ante, § 307; post, § 333, 344, 345. If made in one place and accepted there, payable in another place, the law of the place where the Bill is payable governs. Cooper v. Earl of Waldegrave, 2 Beavan, R. 282. What bills are deemed foreign? Bills drawn in one State payable in another State, are deemed foreign. Bleekner v. Finley, 2 Peters, R. 236; Halliday v. McDougal, 22 Wend.

Quid si de literis Cambii incidat questio; quis locus erit spectandus? Is spectandus est locus, ad quem sunt destinatæ, et ibidem acceptatæ. But, suppose a negotiable acceptance, or a negotiable note, made payable generally, without any specification of place; what law is to govern, in case of a negotiation of it by one holder to another in a foreign country, in regard to the acceptor, or to the maker? Is it a contract by them to pay in any place, where it is negotiated, so as to be deemed a contract of that particular place, and governed by its laws? The Supreme Court of Massachusetts have held, that it creates a debt payable any where, by the very nature of the contract; and it is a promise to whosoever shall be the holder of the bill or note.2 Assuming this to be true; still it does not follow, that the law of the place of the negotiation is to govern; for the transfer is not, as to the acceptor, or the maker, a new contract; but it is under, and a part of, the original contract, and springs up from the law of the place, where that contract was made. A contract to pay generally is governed by the law of the place, where it is made; for the debt is payable there, as well as in every other place.3 To bring

R. 264, 272; Wells v. Whitehead, 15 Wend. R. 527; Rothschild v. Currie, 1 Adolp. & Ell. N. Rep. 43.

P. Voet, de Statut. § 9, ch. 2, n. 14, p. 270, edit. 1713; Id. p. 327, edit. 1661; poet, § 346, note.

Braynard v. Marshall, 8 Pick. R. 194; post, § 341, 343 to 346.

² See Kearney v. King, 2 Barn & Ald. 301; Sprowle v. Legge, 1 Barn. & Cres. 16; ante, § 272 a; post, § 329; Don v. Lippmann, 5 Clark & Finn. 1, 12, 13.— In this last case a bill of Exchange was drawn and accepted in Paris by a Scotchman domiciled in Scotland, and it was payable generally. It seems, that, by the law of Scotland, an acceptance is deemed payable at the place of the domicil of the acceptor, at the time, when it becomes due. Lord Brougham on this occasion said; "It appears, that in Scotland,—and it is rather singular, that it should be so,—where a bill is accepted payable generally, without any particular place

a contract within the general rule of the Lex loci, it is not necessary, that it should be payable exclusively in the place of its origin. If payable every where, then it is governed by the law of the place, where it is made; for the plain reason, that it cannot be said to have the law of any other place in contemplation, to govern its validity, its obligation, or its interpretation. All debts between the original parties are payable every where, unless some special provision to the contrary is made; and, therefore, the rule is, that debts have no situs: but accompany the creditor every where.1 The holder, then, takes the contract of the acceptor, or maker, as it was originally made, and as it was in the place. where it was made. It is there, that the promise is made to him to pay every where.2

§ 318. A case a little more difficult in its texture is, when a contract is made in one country, for

being named, it shall be deemed payable at the place, at which the acceptor is domiciled, when it becomes due. It becomes of some importance to know, where the bills were payable, because this principle, which has been adopted of late years in many of the Scotch decisions, and towards which I admit the great leaning of the Scotch profession is, renders it material to consider, whether this is a Scotch or a foreign debt. Yet sometimes this expression is used in the cases without affording any accuracy of description; for sometimes the debt is called English, or French in respect of the place, where the contract was made; sometimes it is the place of the origin, sometimes of the payment of the contract; and sometimes of the domicil of one of the parties. But at all events it becomes important to consider, whether this was a foreign or a Scotch debt. In the present case it was held most properly to be a foreign debt. That is a fact admitted; it is out of all controversy. This, therefore, must now be taken to be a French debt; and then the general law is, that where the acceptance is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt. I shall therefore deal with this bill, as if it was accepted, pavable in Paris."

Blanchard v. Russell, 13 Mass. R. 1, 6; Slacum v. Pomeroy, 6 Cranch, 221; post, § 329, 362, 399, 400.

² Post, § 343, 344.

payment of money in another country, and, by the laws of the latter, a stamp is required, to make the contract valid, and it is not by those of the former; whether it is governed by the Lex solutionis, or by the Lex loci contractûs, as to the stamp. It has been held, that a stamp is not required in such a case to give validity to the contract, upon the ground, that an instrument, as to its form and solemnities, is to be governed by the Lex loci contractûs, and not by the law of the place of payment; and that, therefore, a stamp is not required by the principle.1 On that occasion the Court said; "An instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place, where it is made; but the laws and usages of the place, where the obligation, of which it is evidence, is to be fulfilled, must regulate the performance. A bill drawn out of London, must be paid at the expiration of the days of grace, which the laws and usages of that place recognise; but need not have those stamps, which are by law required on a bill drawn there."2

§ 319. But a case, more difficult to reconcile with established principles, in its actual adjudication, has occurred in Massachusetts. A bill of exchange was drawn in Manchester, in England, upon a firm established at Boston, in Massachusetts, payable in London, and was accepted at Manchester by one of the firm, then there. The bill was, therefore, drawn in England, accepted in England, and pay-

¹ Mr. Justice Martin in Vidal v. Thompson, 11 Martin, R. 23, 24, 25. But see ante, § 260, and note, § 262, 262 a; Wynne v. Jackson, 2 Russell, R. 351; Clegg v. Levy, 3 Camp. R. 166; James v. Catherwood, 3 Dowl. & Ryl. R. 190.

able in England. But upon its dishonor, it was held, that it was to be deemed a bill accepted in Boston; because the domicil of the firm was there. and that damages were recoverable of 10 per cent.. as they would be upon a like bill, accepted in Boston.1 There was nothing upon the face of the bill, that alluded to an acceptance in Boston, and nothing in the circumstances, that pointed in that direc-It was certainly competent for the firm to contract in England, and to accept in England; and, beyond all question, if the bill had been drawn solely on the person, who accepted it, the acceptance must have been deemed to be made in England, notwithstanding his domicil was in Boston. Is there any difference between an acceptance by a firm, and an acceptance by a single person? Is not the general principle of law that, which is affirmed by Casaregis, that a contract or acceptance is to be deemed made, where the contract or acceptance is perfected: Eo loci, quo ultimus in contrahendo assentitur? It has certainly been put upon that ground in many modern authorities.3 And, therefore, if the acceptor be an accommodation acceptor in one country, payments made by him of the bills, drawn by the drawer in a foreign country, will be deemed

¹ Grimshaw v. Bender, 6 Mass. R. 157.—The case of Acebal v. Levy, 10 Bing. R. 376, 379, seems to have involved a question very nearly the same, arising under the Statute of Frauds of England, the contract having been made in Gijon in Spain for the delivery of the goods purchased in England. The Court and Bar seem to have thought, that the contract was to be governed by the English Statute of Frauds, although made in Spain. See ante, § 262 a, and note. See also Cooper v. Earl Waldegrave, 2 Beavan, R. 282.

² Casaregis, Disc. 179, n. 1; ante, § 285.

³ Boyce v. Edwards, 4 Peters, R. 111; P. Voet, De Statut. § 9, ch. 2, § 14. See also McCandish v. Gruger, 2 Ray, R. 377; Bain v. Ackworth 1 S. Car. R. 107; Lewis v. Owen, 4 B. & Ald. 654.

payments under a contract, made with the drawer in the place of acceptance and payment.1

§ 320. The doctrine maintained in Massachusetts, in this last case, is directly in conflict with that maintained under similar circumstances by the Supreme Court of New York. The latter Court has held, that the bill, having been drawn in England, and made payable there, and accepted there, it was to be treated as an English contract; and that the English interest of 5 per cent. only was to be allowed for the delay of payment.² This decision, being in entire harmony with the general principles on this subject, will probably obtain general credit in the commercial world.³

§ 320 a. Many other cases might easily be put, to illustrate the law in relation to the conflict of the laws of different countries in cases of contract. In some countries there are limited or special partnerships, called in France partnerships in commandite. In these partnerships the contract is between one or more partners, who are jointly and severally responsible for the whole contracts and orders of the partnership, and one or more partners, who merely furnish a particular amount of funds, and are responsible only to the amount of such funds, and who are called commandataires, or partners in commandite.4 Similar limited partnerships are also authorized in some of the American States. Now, let us suppose an order given by the general partner in such a firm in one of such States, upon a house in England, for the purchase of goods

¹ Lewis v. Owen, 4 B. & Ald. 654.

<sup>Foden v. Thorp, 4 John. R. 183.
See Bayley on Bills, (5th edition,) ch. A. p. 72, to p. 86, Phillips & Sewall's N. Edit.</sup>

⁴ Code of Commerce of France, art. 23 to art. 37.

§ 322. But there are some other effects, which may be deemed accompaniments, effects, or incidents of contracts, which may here deserve a passing notice. They are properly collateral to them, and arise by operation of law, or by the act of the parties. Among these may be placed the liability of partners and part owners for partnership debts. If, by the law of the place, where the contract is made, they would be liable in solido, although by the law of the domicil of the partnership, they might be liable only for a proportionate share, the law of the former will follow the debt every where; or in other words, the effect of the Lex loci of the contract upon the liability of the partners and part owners will be of universal obligation.1 By the law of some countries the acceptor of a bill of exchange is discharged from his acceptance, if, when he accepted, the drawer was bankrupt; and this effect of the acceptance regularly accompanies it every where, as an incident.2

§ 322 a. Another illustration may be found in the law of some countries, (as in Alost in Flanders,) which allows to a debtor, who has assigned, or transferred a debt, the right of redemption of it upon payment back of the price. In such a case, according to Burgundus, the right of redemption will exist, notwithstanding the debt has been contracted in another country; for, in such a case, the right is for the benefit of the debtor, and the debts and the rights of action are judged of by the law of his domicil, without any consideration of the place, where the debts

¹ Fergusson v. Flower, 16 Martin, R. 312. See also Carroll v. Waters, 9 Martin, R. 500; Pardessus, Droit Comm. art. 1495.

² Pardessus, Droit Comm. art. 1495.

were contracted. Unde recte dici potest, consuctudinem Alostensem, quæ indulget debitori redemptionis cessi nominis, eo pretio, quod assionis auctori solutum est, etiam locum habere in ære alieno extra territorium Alostense contracto. Cum enim ejusmodi redemptio in favorem debitoris introducta, situm nominum, et actionum ex domicilio ejus metitur, sine consideratione qua regione contracta fuerint.\(^1\) A more unexceptionable illustration is the incidental right of warranty, conferred by the civil law in cases of sales of merchandise, not merely as to title, but as to quality.\(^2\)

§ 322 b. Of the like nature is the benefit of the right of discussion, as it is called. By the Roman law sureties were not primarily liable to pay the debt, for which they became bound as sureties; but were liable only after the creditor had sought payment from the principal debtor, and he was unable to pay. This was called the benefit or right of discussion.3 Under those systems of jurisprudence, which adopt the Roman law, and under the present law of France, the rule is similar; and the obligation contracted by the surety with the creditor is, that the latter shall not proceed against him, until he has first discussed the principal debtor, if he is solvent. This right the surety enjoys, as the beneficium ordinis vel excussionis. And, again: if other persons are joined with him in the obligation as sureties, he is not in the first instance to be proceeded against for the whole debt, but only for his

¹ Burgundus, Tract. 2, n. 24, 25.

² Ante, § 264; Henry on Foreign Law, 51, 52; 2 Boullenois, Observ. 46, p. 475, 476; P. Voet, De Statut. § 9, ch. 2, § 10.

³ 1 Domat, B. 3, tit. 4, § 2, art. 1; Dig. Lib. 46, tit. 1, l. 68; Novell. tit. 4, cap. 1.

⁴ Pothier on Oblig. n. 407 to n. 414; Code Civil of France, art. 2021 to art. 2026.

share of it, if his co-sureties and co-obligees are solvent.1 This is commonly known as the benefit of division, or beneficium divisionis. If the suit should be brought in a different country from that, where the contract or obligation is made, the right of discussion or division would still belong to the surety, as an incident to his contract, although it did not exist by the law of the place, where the suit was brought (Lex fori).2 The converse proposition would be equally true.3 Such, also, is the lien of a vendor, upon a real estate sold for the payment of the purchase money, according to the law of England; the lien given for the purchase money, upon goods or merchandise sold, by the civil law, and by the law of some modern countries; 4 the right of stoppage in transitu of the vendor of goods, in case of the insolvency of the purchaser in the course of the transit;5 the lien of a bottomry bond on the thing pledged; the lien of mariners on the ship for their wages; the priority of payment in rem, which the law sometimes attaches to peculiar debts, or to particular persons. In these, and like cases, where the lien, or privilege, is created by the Lex loci

Pothier on Oblig. n. 415 to n. 427; Code Civil of France, art. 2026.
 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 765, 766;
 Carroll v. Waters, 9 Martin, R. 500.

³ Ibid.; ante, § 316 b.

^{4 1} Domat, Civil Law, B. 4, § 2, n. 3; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 770, 771. See, as to Lien of Vendor on Real Estate, Gilman v. Brown, 1 Mason, R. 219, 220, 221; Warrender v. Warrender, 9 Bligh, R. 127.—It seems, that a lien created by the Lex loci contractus may be dissolved and extinguished not only according to the law of that place, but also by any act done in a foreign country, which, according to the law of that country, would work such dissolution or extinguishment. See post, § 351 a to 351 d.

⁵ Post, § 401.

contractûs, it will generally, although not universally, be respected and enforced in all places, where the property is found, or where the right can be beneficially enforced by the Lex fori. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law, where the suit is brought, would otherwise sustain it. Thus, if goods are purchased in England by a citizen of Louisiana, no lien or privilege will exist for the unpaid price, in case of his insolvency, although the

¹ See 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 770, 771, 779; post, § 401; Fœlix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, 6 33, p. 217, 228. The latter says; "Nous avons vu, que la règle suivant laquelle les meubles sont régis par la loi du domicile de celui, à qui ils appartiennent, repose sur le rapport intime entre les meubles et la personne du propriétaire, sur une fiction légale, qui les répute exister au lieu du domicile de ce dernier. De là il suit, que cette règle ne peut s'appliquer, qu'aux circonstances, ou actes dans lesquels les meubles n'apparaissent, que comme un accessoire de la personne; par exemple: en cas de succession ab intestat, de dispositions de dernière volonté ou entre-vifs (telles que les contrats de mariage exprès ou tacites). La règle est sans application à tous les cas ou les meubles n'ont pas un rapport intime avec la personne du proprietaire : par exemple, lorsque la propriété de meubles est réclamée, et contestée, lorsqu'on invoque la maxime, qu'en fait de meubles possession vaut titre; lorsqui'il s'agit d'exercer des priviléges ou des voies d'exécution sur les meubles, d'en prohiber l'alienation, d'en prononcer la confiscation, ou de déclarer une succession mobilière en déshérence au profit du fisc, ou enfin d'interdire l'exportation des meubles. Dans tous ces cas, il faut appliquer la loi du lieu, ou les meubles se trouvent effectivement : car la dite fiction cesse par le fait. Par rapport aux priviléges sur les meubles, Hert soutient l'opinion contrarie, en faisant observer, que toutes les questions de privilége sur les meables doivent être décidées dans le lieu du domicile du débiteur, par suite de la connexité des causes. Cette opinion revient à celle, qui attribue à la loi du domicile son effet sur l'universalité des biens d'un individu. Nous réfuterons cette opinion au nº 37 ci-aprés. Ce que nous venons de dire des meubles s'applique non-seulement aux meubles corporels, mais aussi aux meubles incorporels; il y a identité de raison." See post, § 401 to 403. 2 Ibid.

law of Louisiana allows it in common cases; because it is not given by the law of the place of the contract, (England). Nor would there seem to be any just ground of doubt, that a bottomry bond would, generally, be held valid in rem in all commercial countries, if the lien is good by the law of the place of the contract.²

§ 322 c. We have said, that such liens will be generally, although not universally, respected; for, although the foreign jurists generally assert the doctrine, they do not universally agree in it, as to all kinds of property, or under all circumstances. Some of them take a distinction between personal or movable property, and real or immovable property; giving effect to the former, according to the law of the place of the contract, and insisting, as to the latter, that no lien can exist, except it is founded in the law of the place, where the property is situated (rei sitæ). Others make no distinction whatsoever, in respect to such lien or privilege, between movable property and immovable property; some holding, that in both cases the Lex loci contractus is equally to govern; and some, that in both cases the Lex rei sitæ is equally to

§ 322 d. Rodenburg notices these distinctions; and says, that, although, by the laws of some countries, where a marriage is had, the wife has an hypothecation upon all the property of her husband,

Whiston v. Stodder, 8 Martin, R. 95, 134, 135.

² Post, § 323, note 2.

³ See some of these opinions cited in Rodenburg, De Divers. Statut. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 49, 50, 51; Matthæus, De Auctionibus, Lib. 1, ch. 21, n. 35 to n. 41, p. 294 to p. 299; 1 Boullenois, Obs. 30, p. 833, 834, 838; Fælix, Conflit des Lois, Revue Etrang. et Franç. 1840, Tom. 7, § 32 to 34, p. 222 to p. 228.

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for her dotal portion, (pro restitione dotis,) yet a question may arise, whether this hypothecation can reach the property of the husband, situate in another country; where no such law exists; or the law is to the contrary. He remarks, also, that Christinæus has stated, that the affirmative has been maintained in many decisions. But Rodenburg adds, that he dares not affirm, that they have been rightly made. Quæ tamen an recte se habeant, affirmare non ausim. And he thinks, that the hypothecation does not extend to the real property of the husband, situate in a foreign country; because the statute is real, and cannot have an extra-territorial authority. Consequenter non tacita seu legalis hypotheca adstringit bona alia, quam quibus lex poterit imperare; ea nimirum, quæ legislatoris territorio sunt supposita, cujus solius loci legis est, tanquam statuti realis, realem in rebus effectum producere, cum ulterius judicis auctoritas non efficiat kypothecam.1

§ 323. But the recognition of the existence and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights, justly acquired in such foreign countries under their own laws, merely because the former liens in the countries, where they first attached, had there by law, or by custom, such a superiority or priority. Such a case would present a very different question, arising from a conflict of rights, equally well founded in the respective countries.² This very distinction was

² Post, § 324, 327, § 524, to § 527, § 582; Fœlix, Conflit des Lois, Revue

Rodenburg, De Divers. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx.
 See also Rodenburg, tit. 2, ch. 5, § 5, 6, 7; 2 Boullenois, Appx.
 37, 38. See also post, § 324, 325; 1 Boullenois, 684, 685.

pointed out by Mr. Chief Justice Marshall, in delivering the opinion of the Court, in an important case. His language was; "The law of the place, where a contract is made, is, generally speaking, the law of the contract; i. e. it is the law, by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent on the law of the place, where the property lies, and where the court sits, which is to decide the cause." And the doctrine was, on that occasion, expressly applied to the case of a contract, made in a foreign country, with a person resident abroad.

§ 324. Huberus has also laid down the same qualifying doctrine; Foreign contracts are to have their full effect here, provided they do not prejudice the rights of our own country, or its citizens. Quaterus nihil potestati aut juri alterius imperantes ejusque civium præjudicetur. Or, as he has more fully expressed it in another place; Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creatur præjudicium

Etrang. et Franc. Tom. 7, 1840, § 33, p. 227, 228. — This question might arise even in relation to a bettomry bond, which by the law of most maritime countries has a priority or preference over most other claims, in case of a deficiency of the proceeds to satisfy all claims. In such a case, if the local law of the country, where the bond was sought to be enforced, differed, as to such propriety or preference, from that of the place, where the bond was made and executed, it might be a very nice question, which ought to prevail; and would therefore probably be disposed of upon consideration of local and municipal policy. But upon this subject we shall have occasion to speak hereafter. See post, § 401 to § 403.

¹ Harrison v. Sterry, 5 Cranch, 289, 298. See Ogden v. Saunders, 12 Wheaton, R. 361, 362.

² Ibid.

³ Huberus, de Conflict. Leg. Tom. 2, Lib. 1, tit. 3, § 2.

in jure sibi quæsito; ad quod potestas alterius loci non tenetur, neque potest extendere jus diversi territorii.1 Hence he adds, that the general rule should be thus far enlarged. If the law of another country is in conflict with that of our own state. in which also a contract is made, conflicting with a contract made elsewhere, we should, in such a case, rather observe our own law, than the foreign law. Amplianus hanc regulam tali extensione. Si jus loci in alio imperio pugnet cum jure nostræ civitatis, in qua contractus etiam initus est, confligens cum eo contractu, qui alibi celebratus fuit; magis est, ut jus nostrum, quan jus alienum, servemus.3 And he puts several cases to illustrate the rule. By the Roman law, and the law of Friezeland, an express hypothecation of movable property, oldest in date, is entitled to a preference or priority, even against a third possessor. is not so among the Batavians. And, therefore, if, upon such an hypothecation, the party brings a suit in Holland against such third possessor, his suit will be rejected; because the right of such third possessor cannot be taken away by the law of a foreign country.4

§ 325. He also puts another case. In Holland, if a marriage contract is privately or secretly made, stipulating, that the wife shall not be liable for debts contracted solely by the husband, it is valid, notwithstanding it is to the prejudice of subsequent creditors. But in Friezeland such a con-

¹ Huberus, Tom. 2, Lib. 1, tit. 3, De Confl. Leg. § 11; post, § 355.

² Huberus, Tom. 2, Lib. 1, tit. 3, § 11; post, § 525.

³ Huberus, Tom. 2, Lib. 1, tit. 3, § 11; ante, § 239.

⁴ Ibid.— See also Rodenburg, De Divers. Stat. tit. 2, ch. 5; 2 Booknois, Appx. p. 47; 1 Boullenois, p. 683, 684.

tract is not valid, unless published; nor would the ignorance of the parties be an excuse, according to the Roman law and equity. If the husband should contract debts in Friezeland; on a suit there, the wife would be held liable for a moiety thereof to the Friezian creditors, and could not defend herself under her private dotal contract; for the creditors might reply, that such a private dotal contract had no effect in Friezeland, because it was not published. But the Batavian creditors, contracting in Holland, although suing in Friezeland, would not be entitled to a similar remedy; for, in such a case, the law of the place of their contract alone, and not the law of both countries, would come under consideration.1 The author was probably here treating of a case, where the debts were contracted in Friezeland, after the husband and wife had removed their domicil there; or, at least, if there was no change of domicil, where the property of the parties, to be affected by the marriage contract, was situate in Friezeland. Under any other aspect, it would be difficult to maintain the doctrine.

§ 325 a. Huberus in another place asserts a similar doctrine. A creditor (says he) on account of a bill of exchange, exercising his right in due time, has a preference in Holland to all other creditors against the movable property of his debtor. The debtor has

¹ Huberus, Lib. 1. tit. 3, De Confl. Leg. § 11.—Huberus adds; Et hoc prevalet apud nos, in contractibus heic celebratis, ut nuperrimè consultus respondi. The sense of this passage in Huberus is mistranslated in the note to 3 Dallas, R. 375. The translator has translated the words, in contractibus heic celebratis, "where the marriage was contracted here," and jus loci contractus, "the law of the place, where the marriage was contracted; "whereas the author in this clause is manifestly referring to the contracts (debts) of the respective creditors.

property of the same kind in Friezeland, where no such law obtains. The question is, whether such a creditor will be preferred there to all other creditors? Certainly not, since by the law there, the right of the creditors is established. Creditor ex causa Cambii, jus suum in tempore exercens, præfertur apud Batavos omnibus aliis creditoribus in bona mobilia debitoris. Hic habet ejusmodi res in Frisia, ubi hoc jus non obtinet. An, ibi, creditor etiam præferetur aliis creditoribus? Nullo modo; quoniam heic creditoribus vi legum hic receptarum jus pridem quæsitum est.

§ 325 b. The same doctrine is adopted by Her-After remarking, that in this matter of preferences and privileges of creditors, the statute laws of particular countries have changed the common (the civil) law; in answer to the question, what haw ought to govern in such cases, he says; If the controversy respects immovables, the law of the country of the situs rei is, without doubt, to govern. But in respect to movables, if the question arises in cases of contract, or of quasi contract, the law of the place of the contract is to be examined. But. inasmuch. as the preference arises from some peculiar law or privilege, it ought not to be extended to the preinfice of the state, where the debtor resides, and his morables are deemed to be collected. In the conflict (concursus) of creditors, the law of the place of domicil of the debtor ought to be observed. Eximero. quia antelatio ex jure singulari vel privilegio competit, non debet in præjudicium illius civitatis, sub que debitor degit, et res ejus mobiles contineri censentu.

¹ D. Hub. Lib. 3, J. P. Univer. cap. 10, § 44, cited 1 Hertii Open, De Collis. Leg. § 4, n. 64, p. 150, edit. 1737; Id. p. 511, edit. 1716; per, § 627.

extendi. Ad jura igitur domicilii debitoris, ubi fit concursus creditorum, et quo omnes cujuscunque generis lites adversus illum debitorem propter connexitatem causæ traduntur, regulariter respiciendum erit.¹

§ 325 c. Rodenburg has discussed this subject at large, in relation to the liens, the privileges, and the priorities of creditors in cases of insolvency, and in other cases, where his property, movable or immovable, is situated in different countries, and is not sufficient to satisfy all his debts. This is commonly known by the name of Concursus creditorum, and the privilege, or priority itself, by the mame of the Jus Prælationis. It may be useful to present a brief sketch of the substance of his remarks and his conclusions on the subject. In respect to the property of debtors in different countries, he says, that jurists have distinguished between those things, which concern the form and order of the suit, and those, which concern the decision or matter of the suit. The suit is to be according to the law of the place, where it is instituted. As for example, if the debtor's property is to be taken in satisfaction of a judgment, the execution and sale thereof are to be according to the law of the place, where the goods are situated, or where they are taken upon the judgment. But if the debtor has become bankrupt, or notoriously insolvent, so that there is no further opportunity for the seizure of his movables, or for execution thereon, all the creditors being in the same condition, the question as to their rights and privileges should be discussed or litigated in the place of his domicil; for it is properly a question as to the proceedings in the

¹ I Hertii Opera, De Collis. Leg. § 4, n. 64, p. 150, edit. 1737; Id. p. 211, edit. 1716.

suit, de litis ordinatione.¹ But a different rule prevails as to the decision and merits of a suit: and the rights of the creditors, in respect to the priority of their debts upon the property of the debts. ought to be measured according to the law of the place, where it is really situated, or is presented to be situated.²

§ 225 d. In respect to movable preparty, as it is always supposed to be in the place of the domicil of the debtor, (for all effects not having a fixed location are presumed to adhere to his person.) it is the law of his domicil, which ought to decide the rights of creditors as to such movables. This rule will prevail, where the goods are in his possession, unless indeed a creditor has by his diligence, according to the laws of the place, acquired a superior right by an execution over them; for he will then retain that privilege, since it is not so much founded in the quality of the debt, as that the creditor has by his diligence gained a priority; so that this privilege being attached to the formalities regulating the execution, it ought therefore to be regulated by the law of the place of execution. And besides; the Judge, who puts the creditor judicially in possession of property. seized within his jurisdiction, is regarded as acting in the name of the debtor; so that it may be deemed affected by the same reasoning, as if the debtor himself had given it in pledge to the creditor in the place, where the property is seized.3

¹ Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 47, 48; 1 Boullenois, 684, 685.

² Rodenburg, ibid.; 2 Boullenois, Appx. p. 48; 1 Boullenois, 685; post, § 524 to 527, 582.

³ Rodenburg, ibid.; 2 Boullenois, Appx. p. 48; 1 Boullenois, 685.

§ 325 e. Rodenburg afterwards puts the case of a merchant having different shops of trade in different places; and he says, that the question has been put, whether in such a case the creditors in each place are entitled to be paid out of the property there in trade, or the whole property is to be divided among all the creditors. Some jurists maintain the affirmative. But others, with whom Rodenburg agrees, hold, that the whole should be distributed among the creditors generally in cases of insolvency.¹

§ 325 f. Rodenburg then puts the case of a contract made in a foreign country, not being the domicil of the debtor, by whose laws a preference is granted to creditors by promissory notes of hand; and he says, that it might seem in such a case, that the law of the place, where the contract is made, ought to govern; for that is the law, by which the obligation of contracts is ordinarily expounded and governed;2 Eo quod obligationes dirigi soleant a loco, ubi contrahuntur.3 But after stating, that Mascardus has expressed a similar opinion, following Decianus, he adds; That it is a nearer approach to the truth to say, that the law of the place of the contract ought not to govern; because that law can determine only the greater or less extent of the engagements of the debtor, and concerns only the contracting parties, who, having contracted in another place than that of their domicil, are presumed to have referred to the laws of that place the form, the obligation, the mode,

Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; Boullenois, Appx. p. 49, 50; 1 Boullenois, 687, 688.

⁹ Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 50; 1 Boullenois, 688.

³ Ibid.

the condition, and whole nature of the contract. Verum non esse respiciendum locum contractûs vero proprius est: utpose, qui eo duntavat pertineat, quo rel arctius, rel remissius ex contractu suo teneatur ipse delater, adeoque spectatur, quoad ipsos contrahentes, quod eo ipso, quod alio in loco contractum celebrant, ad ejusdem leges, formam, vinculum, modum, conditionem, totam denique negotii naturam, sui respectu, component.1 He proceeds to render the reasons of his opinion, that this preference of creditors constitutes no part of the law of the contract, obligatory in other countries, and says; Moreover, what does not arise from the act of man, but simply from the authority of the law, of which sort all privileges of preference among creditors are, it should be said, that the authority of the legislator has no effect upon property not subjected to him, when the controversy respects the interest of third persons, or of other creditors, who have not contracted in that place, and who consequently have submitted themselves to the laws of that place. Besides; it is manifest, that we do not exercise these sorts of privileges upon the persons of debtors, because, being directed upon the property, they have their place properly among all the creditors. Cæterum, si quid non ab actu hominis, sed a potestate legis proficiscitur, cujusmodi sunt prælationis privilegia omnia, dicendum est vim legislatoris nullam esse in bona sibi non subjects tertii respectu, seu creditorum aliorum, qui inibi sullum gesserint negotium, nec legibus loci istius se submiserint. Ad hæc constat privilegiis istis non agi in deb-

Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appr. p. 60; 1 Boullenois.

itoris personam, utpote quæ in res directa, locum habeant inter creditores.1

§ 325 g. Rodenburg farther insists, that the same rule applies, when the debtor has changed his domicil to another country. If in the country of his original domicil, where the contract is made, there would be a privilege thereby created upon the movables of the debtor, and he afterwards removes to another country, where no such privilege exists, Rodenburg says, that although it might seem, that the privilege ought still to continue on his movables in his old domicil, vet the true rule is, that the law of the new domicil is to prevail; for movables are governed by the law of the domicil. Nec aliud de eo debitore dicendum est, qui in loco illo privilegii domicilium foverit tempore celebrati contractus; quamvis enim videri possit Jus illud prælationis creditori per leges loci domicilii in rebus mobilibus legitime quæsitum, subsecutà domicilii mutatione non debere amitti; mobilia tamen, in quibus prioris domicilii lege tenuit prælationis privilegium, traductis alio domesticis laribus, traducuntur quoque in leges novi domicilii, euque lege administrantur; mutatione enim domicilii mutatur et mobilium conditio eorum, quæ in manum aliis tradita non sunt, etiam dispendio tercii.2

§ 325 h. In regard to immovables, Rodenburg holds, that, if there is either an express or tacit hypothecation or lien by the law of the domicil of the debtor, which is not equally allowed by the law of the

Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 50; 1 Boullenois, 688; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 770, 771.

² Rodenburg. De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 50; 1 Boullenois, 688, 689; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 770, 771.

situs thereof, the law of the situs or situation is to govern: and that the creditor will in vain seek to assert any right of priority or privilege; for, as no man has authority expressly to create such a charge under a foreign law by a judicial proceeding, so neither can the foreign law itself exert such an authority; since real statutes have no operation beyond the territory, where they are enacted. Tandem ut ad immobilia transeam. Fac, jus tacitæ seu legulis hypothecæ non obtinere idem in loco rei sitæ. anod obtinet in loco domicilii debitoris, dicendum frustre est esse creditorem, qui hujusmodi hypothecæ obtents prioritatem sibi asseruerit; cum æque alque expressim facto hominis, coram uno judicio, hypothecæ nezu devinciri nequeunt alterius territorii bona, ita nec legis ullius potestas est afficere prædia extera; quod statuts realia territorium non egrediantur.1 The result, therefore, of the doctrine of Rodenburg seems to be, that the proper forum, to decide upon all questions of the priorities and preferences of creditors, is the place of the domicil of the debtor; and that the law of that place, and not the law of the place of the contract, is to govern in all cases of such priorities and preferences, in respect to movables situated in his place of domicil. But as to movables situate elsewhere. well as to immovables, the law rei site is to govern; although, to prevent confusion and inconvenience, the administration and adjudication thereof is all cases is to be by the forum or tribunal of the debter's domicil.2

¹ Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appr. p. 50, 51; 1 Boullenois, 689, 690; Id. Observ. 30, p. 818 to p. 875.

² 1 Boullenois, Observ. 30, p. 818 to p. 820.— As the work of Rodseburg is rarely found in our Libraries, and the subject here discussed

§ 325 i. Boullenois in commenting upon Rodenburg says, that every hypothecation or privilege upon property is to be deemed a real right (jus ad rem, or jus in re). An action without any hypothecation or

is of great practical consequence, it may be useful to subjoin the whole passage in this note. "Pergamus quærere ulterius, creditoribus de prælatione contendentibus, quod Jus cujusque loci oporteat inspicere. Primum utamur vulgatà D D. distinctione, qua separantur ea, que litis formam concernunt ac ordinationem, ab iis, que decisionem aut materiam. Lis ordinanda, secundum morem loci, in quo ventilatur. Ut, si judicati exequendi causà bona debitoris distrahantur, qui solvendo sit, executio peragatur eo loci, ubi bona sita sunt, aut in causam judicati capi-Sin cesserit foro debitor, aut propalam desierit esse solvendo, ut isti mobilium capioni, aut ulli omnino executioni non sit ultra locus, factà jam omnium creditorum conditione pari, disputatio de privilegiis, aut concursu creditorum veniat instituenda, ubi debitor habuerit domicilium. Unde cum apud nos relictis fortunis solum vertisset debitor obæratus, ac res ejus sitas in Hollandia venum proscriberet curator, creditores Hollandi, apud Provinciæ suæ Curiam venditioni intercedentes, causà ibidem ventilatà, tulerunt repulsam: audito in eo curatore, quod apud nos super universis debitoris facultatibus, adeoque et pretio ex venditione illa redigendo, ab uno eodemque Judice perasagenda decidendaque sit creditorum contentio: ex communi scribentium placito. Ob manifestam quoque causæ continentiam, ne super creditorum Jure 'à diversis Judicibus dissonæ sententiæ pronuntientur. Hec de litis ordinatoriis. Aliud fere à præcedentibus obtinere dixeris in ejusdem decisoriis: Jus enim creditorum super prioritate in bonis debitoris demeteri oportet à loco, ubi distracta bona sita sunt, velle esse, intelliguntur. Et quidem de mobilibus si quæratur, cum semper ibi esse existimentur, ubi Creditor [Debitor] fovet domicilium, cujus ossibus vagæ hæ res intelliguntur adhærere, utique ex lege ejusdem domicilii discutienda causa creditorum est. Hæc ita nisi forsan executio directa sit in ejus debitoris mobilia, qui adhuc in possessione suorum bonorum sit, feret enim tum creditor diligentiæ ac vigilantiæ suæ præmium, si quod eo nomine loci mores, ubi in causam judicati ceperit mobilia, præ aliis creditoribus ipsi indulserint; quod privilegium illud non tam proficiscatur ex credito, quam ex actu ipso executionis, qua alios creditor prævertit, adeoque hac res tanquam concernens exequendi ordinem, legem accipiat à loco, ubi illa peragitur, ac præterea pignus illud judiciale ita constituens Judex in bonis, apud se in causam judicati captis, dicitur supplere vicem debitoris; ut perinde res habeatur, ac si ipse debitor bona illa eo loci pignori tradidisset. Hæc ita si in uno loco debitoris sit domicilium." Again; "Fac foris contractum celebratum, privilege is purely personal. The existence of a real right must depend either upon local ordinances, or upon the law of the situs of the property; and if the law of the situs differs from the ordinances of the place,

ubi per mores ejusdem loci Jus prælationis inter chiro-grapheius competit, locus videri posset attendendus esse contracte obligationis: eo qued obligationes dirigi soleant à loco, abi contralement. Verus non esse respiciendum locum contractus vero propries est: states qui eo duntaxat pertineat, quo vel arctius, vel reminius ex contacte suo teneatur ipse dibitor, adeoque spectetur quoad ipsos contrib quod eo ipeo, quod alio in loco contractum celebrent, ad ejundon lagua, formam, vinculum, modum, conditionem, totam denique negati and ram, sui respectu, componunt. Cesterum si qui non ab acta hemi sed à potestate legis proficiecitur, cujusmodi sunt prediction privilegia omnia, dicendum est vim Legislatoris nullam esse in han sait non subjecta tertii respectu, seu creditorum aliorum, qui inili unilim gesserint negotium, nec legibus loci istius se submiserint. Ad bac constat privilegiis istis non agi in debitoris personam, utnote que in res directa, locum habeant inter creditores. Ecquid autem Juis est alieno Judici circa res sibi non suppositas, dispendio testii, qui apud se non contraxit? Nec est, quod retorserit creditor sum non mi spectari oportere, atque debitoris domicilium. Constat quippe, qui cum alio contrahit, non esse vel debere esse conditionis ejus insuras. Ut nihil imputetur ei, qui in mobilibus à loco domicillii debitais sur terresus est privilegia, ad quem locum palam est mobilia pertinura: cum culpa non vacent alii, qui privilegium sibi assumpaerint à publica Legislatoris alieni, cui de mobilibus disponendi nullum Jus est. Jus aliud de eo debitore dicendum est, qui in loco illo privilegi dan foverit tempore celebrati contractus: quamvis enim videti punt la illud pra lationis, creditori per leges loci domicilii in rebus malifica legitime quesitum, subsecutà domicilii mutatione non debese andi; mobilia tamen, in quibus prioris domicilii lege tennit predicionis publica gium, traductis alio domesticis laribus, traducuntur quoque in l novi domicilii, eaque lege administrantur: mutatione caim desi mutatur et mobilium conditio corum, que in manua alie tende un sunt, etiam dispendio tertii: quo argumento, alia quanquasa la apacia, usus est Senatus Parisiensis, apud Chopin. De buc spectat qual langundus tradit, mobilia sequi personam, hoc est (inquit) in desira ejus existere, et non aliter quam cum domicilio transferi. Turi Fac Jus tacite, sea legalis layed ut ad immobilia transeam. non obtinere idem in loco rei sitz, quod obtinet in loco domicil toris, dicendum frustra esse creditorum, qui hujumpodi hypethece 🕹 tentu prioritatem sibi asseruerit: cum eque atque expression

where the parties create the hypothecation or privilege, in allowing or disallowing such an hypothecation or privilege, the law of the situs must govern. In regard to movables, they are presumed to have their situs in the place of the domicil of the owner; and if the law of that domicil gives a privilege upon them, that privilege ought to be regarded in every other place, in which those movables may be found.1 Boullenois in this respect adopts the language of Lautenburg. In rebus mobilibus observari debent jura illius loci, in quo illorum dominus, vel creditor habet domicilium, etiam quando agitur de concursu et prælatione creditorum.2 In regard to immovables, Boullenois adopts the doctrine, that all preferences and privileges thereon are real, and are therefore governed by the law rei sitæ.3

§ 325 k. John Voet has treated this question with great fullness. In respect to priority and privileges in cases of hypothecations, he insists, that, as to

hominis, coram uno judicio, hypothecæ nexu devinciri nequeunt alterius territorii bona, ita nec legis ullius potestas est afficere prædia extera: quod Statuta realia territorium non egrediantur, ut supra tractatum est. Ita si Hollandus, cui generaliter bona debitoris coram quocunque Hollandiæ judicio, hypothecæ data sunt, apud nos cum reliquis creditoribus experiatur de prælatione, profutura erit ei hypotheca in bonis, in quacunque Hollandie parte, extra districtum Amstelodamensem, sitis; non autem in bonis suppositis territorio nostratium, quibus nulla subsistit hypothece datio, nisi pacta coram judice rei sitæ. Contra cum apud Hollandos hypotheca generalis extinguatur alienatione, non juvabitur creditor moribus nostris, quibus res ita obligata ad emptores transit cum suo onere. Consimilitèr, si teneat alibi Consuetudo, ut in bonis debitoris concurrant creditores, nullà habità ratione hypothecarum quale Statutum profert Florentinum Straccha. Ex lege loci rei sitæ dirimenda creditorum contentio." Rodenburg, De Div. Statut. tit. 2 ch. 5, § 16; 2 Boullenois, Appx. p. 47 to p. 51.

¹ Boullenois, Observ. 30, p. 832, 833, 834.

² Id. p. 834.

³ Ibid.

movable property, the law of the domicil of the debtor ought to govern the order thereof, as well, because all movables are understood to be in the place. where the owner lives, and are to be governed by the law of that place, as because all creditors, who ought to bring their suit in the tribunal, where the property is (forum rei), are deemed in their contracts to have had reference to the place of domicil of the debtor, since in that place the debtor, as the principal forum, ought to be sued; and also, because, if the laws of the place, where the contract is made, or of the forum, in which the controversy respecting the conflict of rights and preferences between creditors are to be observed, inexplicable difficulties will arise, or notorious absurdities will be fallen into; of which he proceeds to give some illustrations. But in respect to immovables, he holds, that the law of the place of the situs ought to govern in all questions of priority and privileges. Immobilia regenda esse jure loci, in quo sitæ sunt.1

¹ J. Voet, ad Pand. Lib. 20, tit. 4, n. 38, p. 904. — The whole passage deserves to be cited. "In questione, cujus loci statuta in prelatione tum hypothecariorum tum chirographariorum privilegio munitorum spectari debeant, dicendum videtur secundum fundamenta generalia in tit. de constitut. Princip. parte alterà, de statutis proposita. In mobilibus debitoris bonis illum observari oportere prælationis ordinem, qui in loco domicilii debitoris probatus est; tum quia mobilia omnia. ubicunque existentia, illic domino suo præsentia esse intelliguntur, ac propterea isto quoque jure regenda sunt; tum quia creditores omnes, qui sequi in agendo debent forum rei, etiam maxime locum domicilii in contrahendo respexisse videntur, quippe in quo precipue debitor, velut in foro præprimis competente, conveniendus est; tum denique, quia, si leges vel loci in quo contractum est, vel fori in quo de creditorum prælatione ac concursu disputatur, observandas censueris, aut inexplicabilibus te difficultatibus implicaturus es, aut ad notabiles delapsurus absurditates. Etenim, si contractuum singulorum loca spectari debere contendas, explicari non poterit, quid fieri debeat, si in Hollan-

§ 325 l. Matthæus holds, in a great measure, the same opinion, and has discussed the subject at large. The whole passage is too long for insertion in this place; but a moderate extract will present his views in a very clear manner. Speaking of movables, he says; Quantum igitur ad res mobiles attinet, tametsi omnes sint ejusdem generis atque naturæ, motu tamen et quiete discriminari possunt. Earum enim aliæ nullo certo loco dispositæ, huc illuc feruntur trahunturve; veluti merces

dià, Frisià Anglià, Italià, Hispanià diversi per eundem debitorem contractus initi sint, quarum regionum unaqueque diversis ex parte, quin et subinde contrariis de protopraxià legibus utitur, dum in Anglià aut Hollandia contrahens ex legibus Anglicanis aut Hollandicis præferri desiderabit ei, qui in Frisià contraxit; hic vero ex Frisiæ legibus contrariis potior esse velit eo, qui in Hollandià vel Anglià effecit sibi devinctum debitorem. Quod si locum, ubi mobilia proscribuntur, et judicium concursus inter creditores agitatur, spectandum existimes quasi distributio pecuniarum inter creditores pars et sequela executionis sit, (posito, quod alibi, quam in loco domicilii postremi debitoris obærati mobilia vendi et lis de protopraxià agitari possit, cujus contrarium apud nos nunc obtinere, supra x. t. num. 12. dictum est) absurdum illud inde sequeretur, quod tunc non mobilium tantum sed et immobilium intuitu leges loci, in quo judicium de protopraxià agitur, observandæ forent; cum non minus distributio pecuniæ ex immobilibus, quam ex mobilibus, redactæ dici deberet executionis sequela aut pars; atque ita fieret, immobilia non ex lege situs regi, sed incerti juris subesse dispositioni, prout in hoc vel illo loco, diversis juribus utente, contentio fuerit inter creditores instituta de prelatione. Quinimo, posito illo jure, quod judicium universale concursus creditorum in eo loco ventilari debeat, in quo debitor, cum moreretur aut foro cederet, domicilium habuit, esse in arbitrio debitoris positum, ut migrando de loco in locum creditores non privilegiatos efficeret privilegiatos, hypothecam legalem faceret aliis nasci, aliis interire, prout aliud atque contrarium domicilii prioris aut rei sitæ legibus jus in novissimi domicilii loco viguerit: quod in immobilibus loco certo alligatis, nec arbitrio domini situm mutantibus, ferendum non est; sed potius (cum jam ad immobilia nos deduxerit ratiocinium) in immobilium pretio inter creditores secundum cujusque privilegium distribuendo servandæ erunt leges locorum illorum, in quibus immobilia singula existunt, idque convenienter regulæ in tit. de constit. Princip. parte alterà de statutis num. 12. firmatæ, ac dictanti, immobilia regenda esse jure loci, in quo sita sunt."

in itinere deprehensæ, et ut hodiè fieri solet, arresto retentæ: aliæ vero certo loco dispositæ quiescunt; veluti instrumentum et supellex, quam paterfam, prædiorum instruendorum gratia in provinciam misit: item feræ bestiæ, et pisces, et reliqua animalia, que in fundis habentur fæturæ et propagationis gratia. Quæcunque ejus generis deprehenduntur, ut certo loco prædiove affixæ non sint, în iis haud dubie superior definitio observanda est. Cum enim maxime in motu sint. ac incertis quasi sedibus vagentur, nihil propius est, quam ut in disputatione de prærogativa creditorum spectemus domicilium debitoris. Qua vero loco affixa, aut certis possessionibus attributæ sunt, eæ naturam prædiorum sequentur, ejusque provinciæ esse censentur, in qua prædia sita sunt. Unde dicendum videbatur, in his rebus spectandas esse leges ejus loci, ubi prædia sita sunt, non ubi domicilium debitor habet.1 Again; referring to objections, which might be made, he says; Illud etiam objici poterat definitioni nostræ: In contractibus spectandas esse leges ejus loci, ubi contractum est, vel in quem solutio destinata est: his enim legibus contrahentes ultro subjecisse se intelliguntur. lgitur in creditorum quoque contentione, non semper leges domicilii, sed si alibi contractum sit, loci contractus sunt observandæ. Respondeo: Si ex contractu agatur, spectari quidem leges ejus loci, ubi contractum est, non tamen in omnibus controversiis. Etenim, si de solennibus quæratur, si de loco, de tempore, et modo obligationis, tum quidem locum contractus observamus: sin de materia obligationis, seu de rebus, quæ in eam deducuntur, ejus loci habenda ratio est, ubi res sitæ sunt. Situm autem cum

¹ Matthæus, De Auctionibus, Lib. 1, ch. 21, n. 35, 36, p. 295.

dicimus, prædia denotamus: hæc enim propriè sita dicuntur, non etiam res mobiles. In disputatione verò creditorum de prærogativa, quo minus locum contractus spectemus, ipsa quodammodo rerum natura impedimento est. Quid enim si obæratus cum multis contraxerit, et variis quidem in locis, vario ac diverso jure utentibus: veluti Romæ, Lugduni, Antuerpiæ, Amstelodami, Dantisci, Genuæ, etc. qui poterit spectari locus contractus, et cujus potissimum loci leges spectabis citra manifestam aliorum creditorum injuriam? At locum domicilii debitoris possis observare citra cujusquam injuriam, dum omnes cujuscunque gentis aut nationis cum aliquo debitore contrahentes, domicilium ejus spectasse, ac fortunam judiciorum ibidem experiri voluisse videantur. Postremò, opponi poterat, non tam domicilium debitoris spectandum esse, quam eum locum, ubi bona proscribuntur. Executionis enim seu pars, seu appendix, et sequela, videtur esse illa distributio pecuniarum inter creditores. Communi autem calculo doctorum traditur, in executione facienda spectandum eum locum ubi executio sit. Verum hunc obicem ita facile removebimus, si cogitaverimus communem illam sententiam de ordine et solennibus executionis duntaxat loqui, non etiam de ipsa creditorum contentione et causa, quæ inter eos vertitur : hæc enim incidit quidem in executionem, ab ordine tamen executionis separata est. In iis autem, quæ ad causæ decisionem pertinent, non illicò locum judicii, sed untiquiorem aliquem, puta domicilii, interdum contractus, aliquando situm rei spectamus. Instari poterat: Si ad decisionem causæ pertinet disputatio illa creditorum, jam sententia hæc premetur alio argumento: Nempe, quod in decisoriis litis observandæ sint leges ejus loci, ubi contractum est. Sed respondetur, hoc tum procedere, cum inter creditorem et debitorem lis vertitur: cum verò plures creditores ejusdem debitoris de prærogativa disputant, locum domicilii debitoris spectamus; quia locum contractus citra injuriam aliorum spectare per rerum naturam non possumus: nullo certè modo, cum idem debitor, qui variis in locis negotiari solet, habuerit variarum gentium atque locorum creditores: puta ltalos, Gallos, Belgas, Germanos, Hispanos, etc. Hic enim constituere non possis, cujus potissimum loci leges sint spectandæ: ut autem omnium simul locorum leges atque mores spectentur, rerum natura non patitur.

§ 325 m. And, then, referring to immovables, he says; Quantum ad res immobiles attinet, videndum, an rectè separaverimus hypothecam à privilegio: ita ut in æstimandis viribus hypothecæ spectemus eum locum, ubi prædium situm est; in privilegio inter hypothecarios exercendo, domicilium debitoris? Argumentum enim, quo usi sumus, infirmius videtur: Privilegium concernit personam: igitur domicilium debitoris in eo spectandum. Quasi verò non sit duplex privilegiorum ratio: ita ut alia quidem personæ, alia rei seu causæ data sint. Deinde, non videtur illa necessaria consecutio: privilegia personam concernunt; igitur personam comitantur, quocunque locorum commigraverit. Etenim illo duntaxat jura que personæ qualitatem aliquam imprimunt, comitari personam solent : veluti si quis minor, fatuus, prodigus, infamis, declaretur: Vitium enim hoc perdurat, et quocunque locorum te contuleris, circumferes tecum notam illam et qualitatem in loco domicilii tibi impressam. At privilegium, quod personæ conceditur, nul-

¹ Mattheus, De Auctionibus, Lib 1, ch. 21, n. 37, 38, 39, 40, p. 296, 207, 288.

lam qualitatem personæ imprimit, nullam notam inurit : comitari ergo personam non poterit in eam provinciam, in qua fortè privilegium cessat. Sed imprimis illud obstat, quod privilegium detur quidem personæ, tamen in bonis debitoris exercendum. Ut autem in prædiis debitoris in alia provincia sitis exerceam privilegium, non possunt mihi tribuere ii, qui in loco domicilii debitoris jura condunt: quippe quorum jurisdictioni ager alterius territorii subjectus non sit. Mobilia duntaxat, quia personam comitantur, jurisdictioni eorum subjecta videntur, quocunque in loco reperiantur. Itaque si mulier nupserit in Frisia, ubi dotes sunt, dotiumque privilegia: distrahantur mariti prædia in Gelria, Hollandia, Trajecti, ubi ne dotes quidem veræ sunt, nedum dotium privilegia: non videtur mulier inter hypothecarios habitura privilegium, quod haberet, si in Frisia sita prædia distraherentur. Valdè enim absurdum sit, velle hypothecariis eam præferri, quam ne numerant quidem Gelri inter hypothecarios. His de causis generalius concludendum, sive de viribus hypothecæ, sive de privilegio inter hypothecarios exercendo loquamur, in prædiis spectandas esse leges ejus loci, ubi prædia sita sunt.1

§ 325 n. Mævius adheres to the same rule in cases of movables, that is to say, that the law of the domicil of the debtor is to govern in all cases of preferences and privileges.² D'Argentre adopts the same opinion; Quare statutum de bonis mobilibus verè personale est, et loco domicilii judicium sumit; et quodeunque Judex domicilii de eo statuit, ubique locum obtinet.³

¹ Mattheus, De Auctionibus, Lib. 1, ch. 21, n. 41, p. 298, 299.

Mavius, ad Jus, Lubesense, Lib. 3, tit. 1, art. 11, n. 23 to n. 35.
 D'Argentré, de Briton. Leg. Art. 218, Gloss. 6, n. 30, p. 654.

Burgundus may also fairly be presumed to hold the like opinion. De cetero mobilia ibi esse dicemus, ubi quis instruxit domicilium; et ideo quodcumque Judex domicilii de iis statuerit, ubique locorum obtinet, sive, quod persona ibi est, aut esse, semper intelligitur, sive quod ibi rerum suarum summam collocavit. Et sic intelligendum est, quod dicimus mobilia sequi personam, hoc est, in domicilio ejus existere, et non aliter quam cum domicilio transferri. Nec refert, eadem bona in loco domicilii reperiantur, an non.¹ Many other jurists assert the same doctrine.³ Still, however, (as has been already intimated,) all foreign jurists are not agreed in this doctrine, at least not without many modifications thereof.³

§ 325 o. But, whatever may be the differences of opinion among them, as to the operation of the rights of preference or privilege of creditors upon movable property, situate in fact in a foreign country, there seems to be a great preponderance of authority, although certainly not an universal agreement, in respect to immovable property, in favor of the doctrine, that the law of the place rei sitæ ought to prevail, as to the denial or allowance of such preferences and privileges. Paul Voet expressed the general sense, when he said; Vero immobilia reguntur locorum statutis, ubi sita; etiam quoad ea, si de æstimandû hypothecû, aut de privilegiis inter hypothecarios agatur, non inspiciendus erit locus domicilii, vel debitoris, vel creditoris, verum locus statuti, ubi jacent.

¹ Burgundus, Tract. 2, n. 21, p. 113.

² 1 Boullenois, Observ. 30, p. 834, 835, 840.

³ Ante, § 322 b, § 322 c.

⁴ Ante, § 322 to § 325 m; Post, § 362 to § 373.

⁵ P. Voet, de Stat § 9, ch. 2, n. 8, p. 267, edit. 1715; Id. p. 322, edit. 1661.

An easy example may illustrate the importance of the distinction. Suppose a contract, made in Massachusetts for the sale of lands lying in New York, by whose laws the vendor has a lien for the unpaid purchase money, and by the laws of Massachusetts there would in such a case be no lien, if the land were in Massachusetts; the question would then arise, whether any lien attached on such a contract on the land. According to the opinions of the foreign jurists already referred to, the law of the rei sitæ, and not the law of the place of the contract, would attach upon the contract; and consequently, a lien for the unpaid purchase money would exist on the lands in New York, although no such lien would exist in Massachusetts under, or in virtue of the contract.

§ 326. Lord Ellenborough has laid down a doctrine essentially agreeing with that of Huberus. "We always import," (says he,) "together with their persons, the existing relations of foreigners, as between themselves, according to the laws of their own countries; except, indeed, where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way; in which case our own is entitled to the preference. This having been long settled in principle, and laid up among our acknowledged rules of jurisprudence, it is needless to discuss it farther."2 The Supreme Court of Louisiana have adopted a little more modified doctrine, coinciding exactly with that of Huberus; "That, in a conflict of laws, it must oftener be a matter of doubt, which should pre-

¹ See Gilman v. Brown, 1 Mason, R. 219, 220, 221; S. C. 4 Wheat R. 255.

² Potter v. Brown, 5 East, R. 124, 120.

vail; and, that whenever that doubt does exist, the court, which decides, will prefer the law of its own country to that of a stranger. And if the positive laws of a state prohibit particular contracts from having effect according to the rules of the country, where they are made, the former must prevail."

§ 327. Mr. Chancellor Kent has laid down the same rule in his Commentaries, as stated by Huberus, and Lord Ellenborough, and has said: "But on this subject of conflicting laws, it may be generally observed, that there is a stubborn principle of imisprudence, that will often intervene and act with controlling efficacy. This principle is, that when the Lex loci contractus and the Lex fori, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. In tali conflictu magis est, ut jus nostrum, quam jus alienum, servemus." 3 Mr. Barge has expressed his own exposition of the same doctrine in the following terms. "It may be stated generally, that, with respect to contracts, of which movable property is the subject, the law of the place, in which the contract is made, will in some respects exclusively prevail, although the contract is to be performed in another; and that in those respects, in which it does not prevail, the law of the place, where the contract is to be performed, must be adopted. But this conclusion is subject to same qualifications and exceptions. If a right, which is claimed as resulting from the contract, or if an act

¹ Mr. Justice Porter in the case of Saul v. His Creditors, 17 Matin, 2.

⁹ Id. p. 586, 587.

^{3 2} Kent, Comm. Lect. 39, p. 461, 3d edit.

or disposition affect the interest of third parties, as the creditors of the owner, resort must be had to the law of his domicil to determine, whether that right exists, and whether he was competent to do the act or make the disposition. A preference claimed by a creditor on the estate of his debtor, by virtue of the contract, and a disposition made by a debtor, which might be void against his creditors, are instances of this exception. The law of a foreign country, is admitted, in order that the contract may receive the effect, which the parties to it intended. No state, however, is bound to admit a foreign law even for this purpose, when that law would contravene its own positive laws, institutions, or policy, which prohibit such a contract, or when it would prejudice the rights of its own subiects."1

327 a. A question involving considerations of this nature came recently before the Supreme Court of Louisiana. It was a suit brought in Louisiana upon a bottomry bond of a peculiar character, given by the owner of a steamboat in Cincinnati (Ohio), and pledging the vessel for the repayment of a sum of money and interest lent to the owner for a year. The steamboat had in the intermediate time been sold in Kentucky to a purchaser with notice of the lien, and she was at New Orleans at the time of the suit brought; and the object thereof was to enforce the hypothecation or lien created by the bond. Various objections were taken in the defence; and

¹ 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 778, 779; Id. p. 770. See also Fœlix, Conflit des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 33, p. 227, 228.

among them was the effection, that no lien was created in such a case on the laws of Louisiana, where the suit was brought. Mr. Justice Porter, in delivering the orthion of the Court on this occasion, said: -But a more icranidable objection has been raised against the regularity of the proceedings. The statutes and jurisprudence of Louisiana, it is contended, only confer the privilege of sequestration to enforce liens given by its laws; and that, in aid of which this remedy was extended here, was not one, that had any force, or conferred any privilege in our state, though it might have that effect in the country, where it was made." "The objection now taken raises a distinction in cases so circumstanced, between remedies before and after judgment; and we confess we are unable to see any solid grounds. on which it can rest. If it be true, as we apprehend it is, that the Court can and should enforce the personal obligation, which a party, not a citizen of the state, may have entered into in another country, and that on the judgment so rendered, the foreign creditor could obtain the benefit of all writs of execution, which an inhabitant of Louisiana might resort to against a domestic debtor. then we can see no good ground for refusing the auxiliary process in the first instance; whether it be an order to arrest the person of the debtor, and hold him to bail, or a writ to seize the property brought within the jurisdiction of a Court, if it be the subject of contest. Both seem to rest on the same principles. And a familiar illustration of the common received opinion on this subject, may be given in the case of attachments, which are almost every day resorted to in aid of the foreign

creditor against the foreign debtor; and vet there is nothing in our law more expressly giving that remedy to the stranger, than there is in the case of sequestration." After taking notice, that by the laws of Ohio, it had been found, that the bond created a lien on the steamboat, the learned Judge proceeded to say; "If the steamboat, then, had remained within the state of Ohio, the evidence satisfies us, the plaintiffs could have had a lien on her. But the main difficulty in the cause still remains. She was sold in the State of Kentucky. under a decree of one of the courts of that state. and purchased by the defendant at the sale. It is admitted on all hands, that this sale was legal and regularly made, and the question is not, what was the effect of the lien in the country, where the contract was made, nor in that, where it is sought to be enforced, but what effect it had in the state, where the defendant acquired title to the property." He then examined the laws of Kentucky on the subject; and concluded in the following words; "The State of Kentucky, we presume, gives effect to liens, existing on property brought there from another country, on the principle of comity, which we have already noticed, and we must also presume, until the contrary be shown, that she admits them with the same limitation, which other states do; namely, that they shall not work an injury to her own citizens. To ascertain, whether they do or not, recurrence must be had to her laws and policy in relation to contracts made within her limits; for we take the true principle in such cases to be, that the foreign creditor, who has a lien, should have no greater or no less privilege, than the domestic creditor. If,

for example, the laws of Kentucky required no record to be made of liens given on personal property within the state, she would not require registry on the part of the stranger, who came there to enforce a mortgage on property, on which he had a lien in another country; for if she did, she would neither carry the contract into effect, according to the law of the country, where it was made, nor according to her own. If this be true, whatever time is given to the domestic creditor to record his lien, should be given to him, who comes from another state with one, if his lien be recognised as valid, when enregistered, and his prayer to enforce it be admitted, as we are told by the testimony it could be." The court accordingly enforced the lien against the steamboat.1

§ 327 b. Another case, which may serve to illustrate the difficulty of laying down any universal rule on the subject of contracts, as to the incidents and rights which may attach to or against third persons, residing in different countries, may readily be stated, as it is one, which may not infrequently occur in practice. By the law of England, if two policies are underwritten on the same ship or cargo for the same voyage, to the full amount of the property at risk, it is treated as a double insurance, and each policy is valid, without any reference to the respective dates thereof. And in case of a loss, the insured may recover the whole loss from the underwriters on either policy at his own election; and they are then entitled to a contribution pro ratâ from the under-

¹ Ohio Insur. Company v. Edmondson, 5 Louis. R. 295 to 305; Ante, § 244.

writers on the other policy.1 Now, in France, no such rule of contribution exists; but the policy prior in date is, in case of a double insurance, to be first exhausted, and if that is sufficient to pay the whole loss, there is no right to recover the loss, or to exact contribution from the underwriters on the policy of a later date.2 This also seems to be the general rule among most of the maritime nations of continental Europe.3 Now, let us suppose, that two policies, of different dates, are underwritten on the same ship or eargo, the one in France, and the other in England, or an American owner, on the same voyage, each olicy being for a sum equal to the full value of the roperty at risk, and there should be a total loss on he voyage; the question might arise, whether the Inglish underwriters were liable at all, if the French olicy was prior in date; and also, whether, if liable, ev could claim contribution from the French underriters; and conversely, the question might arise. hether, if the English policy was prior in date, the rench underwriters were liable at all; and if liable. hether they could claim contribution from the Engh underwriters. No such case seems as vet to ve undergone any judicial decision. But probably would be held, that each contract was to be excluely construed according to the obligations and hts, created by the Lex loci contractûs between the

Park on Insur. ch. 15, p. 280, 281, 5th edit.; 3 Kent, Comm. Lect. 48, 80, 281, 3d edit.; 1 Marsh. on Insur. ch. 4, § 4, p. 146, 2d edit.; illips on Insur. p. 59, 60; 2d edit.

³ Kent, Comm. Lect. 48, p. 280, 281, 3d edit.; Code de Commerce, 59, Ordin. of Louis 14th, 1681; 2 Valin, Comm. Lib. 3, tit. 6, art. 23, 5, p. 72, 73.

¹ Emerigon, Assur. ch. 1, § 7, p. 23; 1 Marsh. on Insur. ch. 4, § 4, p. 2d edit., note a.

parties themselves, without any regard to the collateral rights and obligations which might arise between the underwriters, if both contracts were made ed. there might be an entire want of reciprocity in its operation. Thus, if the French policy were prior in date, and a recovery were had thereon against the French underwriters, they might have contribution from the English underwriters; and yet, if a recovery were had against the English underwriters, they could not have contribution from the French underwriters. On the other hand, if the English policy were prior in date, the French underwriters might be exempted from all liability for the loss, or, if liable. might recover a contribution from the English underwriters: at the same time, that if a recovery were had against the English underwriters, they would not be entitled to any contribution against the French underwriters. However; this case is merely propounded as one, on which the author professes to have no fixed opinion; and is designed rather to awaken inquiry, than to satisfy doubts.1

§ 328. This subject will be resumed hereafter under other heads.² But the remarks of a learned Scottish Judge³ may here be properly introduced as exceedingly pertinent to the present discussion.

¹ In some of the present American policies, there is now what is commonly called a priority clause, similar in effect to the French law. The very question, therefore, may arise in the case of a double insurance by different policies in England, and in a state using the priority clause, or in the latter state, and a state, which uses the common English policy, and is governed by its laws.

² Post, § 401, 402, 423 a, § 524 to § 527.

³ Lord Robertson in the case of Mrs. Levett in Fergusson on Marr. and Div. 385, 397.

"The application of the Lex loci to contracts, although general, is not universal. It does not take place, where the parties, at the time of entering into the contract, had the law of another kingdom in view; or where the Lex loci is in itself unjust, or contra bonos mores; or contrary to the public law of the state, as regarding the interests of religion, or morality, or the general well being of society."

§ 329. It may also be stated, although the proponition has been already incidentally considered, that, when a debt is contracted in a foreign country, it is not to be deemed exclusively payable there, unless here is in the contract itself some stipulation to that ffect.¹ On the contrary, a debt contracted in a articular country, and not limited to a particular lace of payment, is, by operation of law, payable every where, and may be enforced, wherever the ebtor or his property can be found.²

§ 330. Having considered the principles applicate to the nature, validity, interpretation, and incints and effects of contracts, we are next led to e consideration of the manner, in which they may discharged, and what matters upon the merits ll constitute a good defence to them. I say upon merits; for the objections arising from the law the state, where the suit is brought, (Lex fori,) has the limitations of remedies, and the forms I modes of suit, will constitute a separate head of uiry.³

Post, § 524 to § 527.

Ante, § 272 a, § 278 a, § 295, § 317; Don v. Lippmann, 5 Clark & R. 1, 12, 13.

See Blake v. Williams, 6 Pick. R. 286, 315; ante, § 272 a, § 317; v. Lippmann, 5 Clark & Fin. 1, 12, 13.

§ 331. And, here, the general rule is, that a defence or discharge, good by the law of the place, where the contract is made, or is to be performed. is to be held of equal validity in every other place, where the question may come to be litigated. John Voet has laid down this doctrine in the broadest terms. Si adversus contractum aliudve negotium gestum factumve restitutio desideretur, dum quis aut metu, aut dolo, aut errore lapsus, damnum sensit contrahendo, transigendo, solvendo, fidejubendo, hereditatem adeundo, aliove simili modo; recte interpretes statuisse arbitror, leges regionis, in quâ contractum gestumve est, id, contra quod restitutio petitur, locum sibi debere vindicare in terminanda ipsa restitutionis controversià; sive res illæ, de quibus contractum est, et in quibus læsio contigit, eodem in loco, sive alibi sitæ sint. Nec intererit utrum læsio circa res ipsas contigerit, veluti pluris minorisve, quam æquum est, errore justo distractas, an vero propter neglecta solennia in loci contractus desiderata. Si tamen contractus implementum non in ipso contractûs loco fieri debeat, sed ad locum alium sit destinatum, non loci contractus, sed implementi, leges spectandas esse ratio suadet: ut ita secundum cujus loci jura implementum accipere debuit contractus, juxta ejus etiam leges resolvatur.2 Casaregis in substance lays down the same doctrine:3

^{1 2} Bell, Comm. B. 8, ch. 3, § 1267, p. 692, 4th edit.; Id. p. 688, 5th edit.; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 874 to p. 886; Id. ch. 22, p. 924 to p. 929. — As to what will constitute a discharge in foreign countries, and especially by novation, by confusion, by set-off or compensation, by payment or consignation, and by relapse, see 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 1 to § 6, p. 781 to p. 880. See also Bartsch v. Atwater, 1 Connect. R. 409.

² J. Voet ad Pand. Lib. 4, tit. 1, § 29, p. 240.

³ See Casaregis, Disc. 179, § 60, 61.

and Huberus throughout implies it,1 as indeed does Dumoulin.2

§ 331 a. Burgundus says; Idem ergo de solutionibus dicendum; scilicet, ut in omnibus, quæ ex ea sunt, aut inde oriuntur, aut circa illam consistunt, aut aliquo modo affinia sunt, consuetudinem loci spectemus, ubi eandem implendam convenit. Itaque ex solutione sunt solemnia, valor rei debitæ, pretium monetæ; ex solutione oriuntur præstatio apochæ, antigraphi, similiaque. Iffinia solutioni sunt, præscriptio, oblatio rei debitæ, onsignatio, novatio, delegatio, et ejusmodi. Ea, vero, uæ ad complementum vel executionem contractus spectut, vel absoluto eo saperveniunt, sola a statuto loci irigi, in quo peragenda est solutio. Many other reign jurists maintain the same doctrine.

§ 332. In England and America the same rule is been adopted, and acted on with a most liberal stice. Thus, infancy, if a valid defence by the ex loci contractûs, will be a valid defence every here. A tender and refusal, good by the same v, either as a full discharge, or as a present fulfilmt of the contract, will be respected every where.

Huberus, Lib. 1, tit. 3, § 3, 7; J. Voet, De Statut. § 9, ch. 2, § 20; 75, edit. 1715; Id. p. 332, 333, edit. 1661.

² Boullenois, Observ. 46, p. 462; Molin. Comm. ad. Cod. Lib. 1, tit. 1; Conclus. de Stat. Tom. 3, p. 554, edit. 1681.

Burgundus, Tract. 4, n. 27, 28, p. 114, 115, 116.

d. n. 29, p. 116.

Burge, Comm. in Col. and For. Law, Pt. 2, ch. 21, § 7, p. 874, 875,

Kent, Comm. Lect. 39, p. 459, 3d edit; Potter v. Brown, 5 East, Dwarris on Stat. Pt. 2, p. 650, 651; 2 Bell, Comm. § 1267, p. 691, th edit.; Id. p. 688, 5th edit.

homson v. Ketcham, 8 John. R. 189; Male v. Roberts, 3 Esp. R.

Varder v. Arell, 2 Wash. Virg. R. 282, 293, &c.

Payment in paper money bills, or in other things, if good by the same law, will be deemed a sufficient payment every where. And, on the other hand, where a payment by negotiable bills or notes is, by the Lex loci, held to be conditional payment only, it will be so held, even in states, where such payment under the domestic law would be held absolute. So, if by the law of the place of a contract (even although negotiable) equitable defences are allowed in favor of the maker, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it cum onere.

§ 333. The case of an acceptance of a bill of exchange in a foreign country affords another illustration. Although by our law it is absolute, and binding in every event; yet, if by that of the foreign country it is merely a qualified contract, it is governed by that law in all its consequences. Acceptances are deemed contracts in the country, where they are made; and the payments are regulated by the law thereof.

§ 334. But, although the general rule is clear, as above stated, that a discharge by the law of a place,

¹ Warder v. Arell, 2, Wash. Virg. R. 282, 293; 1 Brown, Ch. R. 376; Seabright v. Calbraith, 4 Dall. 325; Bartsch v. Atwater, 1 Connect. R. 409.

² Bartsch r. Atwater, 1 Connect. R. 409. See other cases cited, 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 876, 877, 878.

³ Ante, § 317.

⁴ Ory v. Winter, 16 Martin, R. 277. See also Evans s. Gray, 12 Martin R. 475; Charters v. Cairnes, 16 Martin, R. 1.

⁵ Burrows r. Jemino, 2 Str. R. 733; S. C. 2 Eq. Abridg. 525. See Van Cleff r. Terasson, 3 Pick. R. 12.

⁶ Lewis r. Owen, 4 B. & Ald. 654; 5 Pardessus, § 1492; ante, § 307, § 317; Cooper r. Earl of Waldegrave, 2 Beavan, R. 282.

where a contract is made, is a discharge every where; yet there are exceptions to the rule, which every country will enforce, or not, according to its own discretion and sense of justice.1 Thus, where a contract was made in England between two Danish subjects, one of whom was domiciled in England: and afterwards, during a war between England and Denmark, the Danish government confiscated the debt, and required it to be paid by the debtor, who was then in Denmark, and he paid it accordingly; the English Court of King's Bench on a suit, brought in England after the peace, by the creditor against the debtor, held, that the payment to the Danish government was no discharge, although it would have been so by the laws of Denmark, upon the ground, that such a confiscation was not justified by the law of nations.9

§ 336. The most important, or, at least, most frequent cases of discharges of contracts, occurring in practice, are those of discharges arising from matters ex post facto; such as a discharge from the contract upon the subsequent insolvency or bankruptcy of the contracting party. And, here, the general rule is, that a discharge from the contract according to the law of the place, where it is made, or where it is to be performed, is good every where,

¹ Post, § 337.

Wolfe v. Oxholme, 6 M. & Selw. R. 92. See post, § 348, 349, 350, 351. It is wholly unnecessary here to consider, whether the confiscation of debts by an enemy is conformable, or not, to the law of nations. That is a point belonging to the public law of nations, and underwent very grave discussions in England, in the case in 6 Maule & Selw. 92, as well as in the American Courts, during the late war with Great Britain. See the Emulous, 1 Gallison, R. 563; S. C. on Appeal, Brown v. United States, 8 Cranch, R. 110.

and extinguishes the contract.1 This doctrine was fully recognised in the English law by Lord Mansfield (and it doubtless had a much earlier existence) in a formulary of language, which has been since often quoted, as a general axiom of jurisprudence. "It is a general principle," (said he,) "that, where there is a discharge by the law of one country, it will be a discharge in another."2 The expression is too broad, and should have the qualification annexed, which the case before him required, and which has been uniformly understood, viz. that it is a discharge in the country, where the contract was made, or was to be performed. And so it was interpreted by Lord Ellenborough in a much later case. "The rule" (said he) "was well laid down by Lord Mansfield, in Ballantine v. Golding, that, what is a discharge of a debt in the country, where it was contracted, is a discharge of it every where."3 This doctrine is also firmly established, and generally recognised, in America.4 By some judges the

¹ 2 Kent, Comm. Lect. 37, p. 392, 393, 3d edit.; 2 Bell, Comm. § 1267, p. 691 to 695, 4th edit.; Id. p. 688, 5th edit.; 1 Chitty on Comm. and Manuf. ch. 12, p. 654.

² Ballantine v. Golding, 1 Coop. Bank. Laws, p. 347, 5th edit., p. 515, 4th edit.; 13 Mass. R. 7; 2 Bell, Comm. § 1267, p. 691, 692, 4th edit.; Id. p. 688, 5th edit.

³ Potter v. Brown, 5 East. 124, 130. See Hunter v. Potta, 4 T. R. 182; Quin v. O'Keefe, 2 H. Bl. 553.

⁴ See on this point Smith v. Smith, 2 John. R. 235; Hicks s. Brown, 12 John. R. 142; Van Reimsdyk v. Kane, 1 Gallis. R. 371; Blanchard v. Russell, 13 Mass. R. 1; Baker v. Wheaton, 5 Mass. R. 511; Watson v. Bourne, 10 Mass. R. 337; 4 Cowen, Rep. note, p. 515; Green v. Sarmiento, Peter's Cir. R. 74; McMenomy v. Murray, 3 John. Ch. R. 435, 440, 441; Walsh v. Nourse, 5 Binn. R. 381; Sturgis v. Crowninshield, 4 Wheaton R. 122; Ogden v. Saunders, 12 Wheaton, R. 213, 358; 2 Kent. Comm. Lect. 27, p. 392, 393; Id. Lect. 39, p. 459, 3d edit.; Atwater v. Townsend, 4 Connect. R. 47; Hempstead v. Reed,

doctrine has been put upon the implied consent of the parties in making the contract, that they would be governed, as to all its effects, by the Lex loci contractûs. By others, it has been put upon the more firm and solid basis of the sovereign operation of the local law upon all contracts made within its sovereignty; and the indispensable comity, which all other nations are accustomed to exercise towards such laws, whenever they are brought into question, either as to contracts, or to rights, or to property.

§ 336. The doctrine has been stated in a ore general form by a late learned American adge, who said; "It may be assumed, as a rule affect-g all personal contracts, that they are subject to all e consequences attached to contracts of a similar ture by the laws of the country, where they are ade, if the contracting party is a subject of, or ident in, that country, where it is entered into, I no provision is introduced to refer to the laws another country." This is not, perhaps, in stricts of language, entirely correct. There are many sequences flowing from contracts in the place, are they are made, which do not accompany them may where, and are not of universal obligation. I nedies are a consequence of contracts, when

<sup>anect. R. 480; Houghton v. Page, 2 New Hamp. R. 42; Dyer v.
5 New Hamp. R. 401; 2 Bell Comm. § 1267, p. 691, 692, 693, it.; Id. p. 688, 5th edit.</sup>

se ante, § 261; Blanchard v. Russell, 13 Mass. R. 1, 4, 5; Pren-Savage, 13 Mass. R. 20, 23.

tter v. Brown, 5 East, R. 124; Ante, § 261.

r. Chief Justice Parker in delivering the opinion of the Court in e of Blanchard v. Russell, 13 Mass. R. 1, 5. atc, § 325 to § 327.

broken; but, as we shall hereafter see, they are governed by different rules from rights.1 And the rights, given by the law of the place of the contract, are not always deemed of universal obligation or validity. Marriage, for instance, is admitted to be a valid contract every where, when it is valid by the law of the place, where it is celebrated. But, as we have seen, all the consequences, attached to marriage in one country, do not follow it into other countries.3 In Scotland a subsequent marriage legitimates children antecedently born; but this consequence has not yet been (as we have seen) finally adjudged in England, to the extent of making such ante-nuptial children legitimate, so as to be entitled to inherit lands of their parents situate in England. Adhuc sub judice lis est.4 So, the indissolubility of marriage by the law of one country will not attach to it every where.5

§337. And even in regard to common contracts of a different nature, the general rule, as to the consequences of them, must receive many qualifications and limitations, resulting from the public policy, or the domestic laws of other states, where they are sought to be enforced, and the right and duty of self-protection against unjust foreign legislation.⁶ If, for example, a country, where a

¹ Post, § 556 to § 575.

² Ante, § 111, 113, § 121 to § 125.

³ See Ante, § 145 to § 190; Fergusson on Marr. and Div. 359, 360, 361, 397, 398, 399, 402, 414; Conway v. Beazley, 3 Hagg. Ecc. R. 639.

⁴ Doe dem. Birtwhistle v. Vardill, 5 B. & Cresw. 438; S. C. 9 Bligh, R. 468; ante, § 87, 93, 94; 1 Hertii Opera, De Collis. Leg. § 4, § 15, p. 129, edit. 1737; Id. p. 183, 184, edit. 1716.

⁵ Ante, § 215 to § 230.

⁶ Ante, § 325 to § 327, § 334.

contract was made, should, under the pretence of a general bankrupt act, authorize a discharge from all contracts made with foreigners, and should, at the same time, exclude the latter from all participation with domestic creditors in the assets; it cannot be presumed, that such an act would be held a valid discharge in the countries, to which such foreigners belonged.1 And, certainly, the priorities and privileges, annexed by the laws of particular states to certain classes of debts contracted therein, are not generally admitted to have the same pre-eminence over lebts contracted in another country, which is called ipon to enforce them.2 Nor are the courts of any tate under any obligation to give effect to a disharge of a foreign debtor, where, under its own aws, the creditor has previously acquired a right proceed against his property within its own terrirv.3

§ 338. When we speak of the discharge of a debt the country, where it is contracted, being a disarge thereof every where, care must be taken to stinguish between cases, where, by the Lex loci ntractûs, there is a virtual or direct extinguishent of the debt itself; and where there is only a rtial extinguishment of the remedy thereon. By a bankrupt laws of England, and by the corresponding insolvent laws of some of the United States, absolute discharge from all rights and reme-

Blanchard v. Russell, 13 Mass. R. 1, 6; Huberus, De Conflict. Leg. 1, tit. 3, § 11. See ante, § 322 to § 327; Huberus De, Conflict. Leg. Lib. 1, tit. 3,

Cappan v. Poor, 15 Mass. R. 419; Le Chevalier v. Lynch, Doug. R. But see Hunter v. Potts, 4 T. R. 182; S. P. 2 H. Bl. 402; ante, to § 327.

only suspends remedies against either the one, or the other, for a limited period, is not to be deemed a discharge from the contract, and its operation is the we shall presently see, purely intra-territorial.

5.340. The general form, in which the doctrine is expressed, that a discharge of a contract by the law of the place, where it is made, is a discharge every where, seems to preclude any consideration of the question, between what parties it is made; whether between citizens, or between a citizen and a foreigner, or between foreigners. The continental jurists recognise no distinction in the The English decisions are understood to cases. maintain the universality of the doctrine, whatever may be the allegiance of the country of the creditor.2 And a like doctrine would seem generally to be maintained in America.3 There are, however, some cases, in which a more limited doctrine would seem to be laid down; and which appear to confine it to cases of a discharge from contracts between citi-

Tappan v. Poor, 15 Mass. R. 419; Morris v. Eves, 11 Martin, R. 730; Judd v. Porter, 7 Greenleaf, R. 337; Hinckley v. Morean, 3 Mason, R. ≥; Titus v. Hobart, 5 Mason, R. 378: 1 Kent, Comm. Lect. 19 p. 420, 422, 3d edit.; 2 Bell, Comm. § 1162 to 1164, p. 562, 567, 694, 4th edit.; Id. p. 550 to 598, 5th edit.; Mason v. Haile, 12 Wheat. R. 370; 2 Kent, Comm. Lect. 37, p. 394 to p. 401, 3d edit; Phillips v. Allan, 8 Barn. & Cres. 479; Ex Parte Burton, 1 Atk. R. 255; Huberus, Lib. 42, tit. 3, § 5; Heineccii Elem. ad Pand. Tom. 3, P. 6, Lib. 42, tit. 3, § 253; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 22, p. 924 to p. 929; White v. Canfield, 7 John. R. 117; James v. Allen, 1 Dall, R. 188; Quin v. O'Keefe, 2 H. Bl. 553; Le Roy v. Crowninshield, 2 Mason, R. 160; Wright v. Paton, 10 John. R. 300; Peck v. Hozier, 14 John. R. 346; Walsh v. Nourse, 5 Binn. R. 381.

² See Mason v. Haile, 12 Wheaton, R. 360; Potter v. Brown, 5 East, R. 124.

³ See Robinson v. Bland, 1 W. Black. R. 258; Blanchard v. Russell, 13 Mass. R. 1; 2 John. R. 235; 2 Kent, Comm. Lect. 37, p. 392, 393, 3d edit.; Ory v. Winter, 16 Martin, R. 277; Sherrill v. Hopkins, 1 Cowen, R. 103, 107.

carcerem.¹ Huberus informs us, that in Holland a Cessio Bonorum does not even exempt from imprisonment, unless the creditors assent. Secundum jus nostrum Cessio Bonorum, invitis creditoribus, debitorem a carcere publico non liberat;² and Heineccius proclaims the same, as the law of some parts of Germany.³ The Scottish law conforms to the Roman Code in its leading outlines;⁴ and the modern Code of France adopts the same system.⁵ An Insolvent Act, or Bankrupt Act, or Cessio Bonorum, which only absolves the person of the debtor from mprisonment, but not his future property, or, which

¹ Cod. Lib. 7, tit. 71, l. 1; 1 Domat, Civ. Law, B. 4, tit. 5, § 1, n. 1, 2, ee Mather v. Bush, 16 John. R. 424, note (b.); 2 Bell, Comm. ch. 5, 1162 to § 1164, p. 563 to p. 567, 4th edit.; Id. p. 580 to p. 598, 5th edit. 2 Huberus, Tom. 3, Lib. 42, tit, 3, § 1, § 3, note; Ex Parte Burton, 1 Atk. 5; McMenomy v. Murray, 3 John. ch. R. 442; Voet, ad. Pand. Lib. 42, 3, 68; Le Roy v. Crowninshield, 2 Mason, R. 160. - Lord Mansfield reported to have said in Ballantyne v, Golding, (1 Cooke, Bank. Laws, 347, 5th edit., p. 515 4th edit.) "That he remembered a case in Chany, of a Cessio Bonorum in Holland, which is held a discharge in that antry, and it had the same effect here." The case alluded to is most bably Ex parte Burton, (1 Atk. R. 255.) The law of Holland is the erse of what his Lordship is here supposed to affirm, as the case in Atk. R. 225, and the citations from Huberus and Voet establish. ether the error is in the Reporter, or in Lord Mansfield himself, may be questioned. Mr. Henry has given a sketch of the present law rance, as to the Cessio Bonorum in cases of foreign contracts, which ainly has some peculiarities, not conforming to the general principles ternational law adopted in other nations. Henry on Foreign Law, x. p. 250. See Pardessus, art. 1324 to 1328. The Cessio Bonorum cotland is (it seems) a mere discharge of the person. See 2 Bell. n. ch. 5, p. 563, &c. 4th edit.; Id. p. 580, &c. 5th edit.; Phillips v. 8 Barn. & Cresw. 479.

feinecc. Elem. Jur. Civ. ad Pand. Lib. 42, tit. 3, § 252, 254, p. 6; n. ch. R. 441, 442.

krikine, Inst. B. 4, tit. 3, § 26, 27; 2 Bell, Comm. ch. 5, § 1162 to 4, p. 563 to p. p. 567, 4th edit; Id. p. 580, 5th edit.

ode Civil of France, art. 1265 and 1270; Merlin, Répert. Cession ens.

only suspends remedies against either the one, or the other, for a limited period, is not to be deemed a discharge from the contract, and its operation is (as we shall presently see) purely intra-territorial.¹

§ 340. The general form, in which the doctrine is expressed, that a discharge of a contract by the law of the place, where it is made, is a discharge every where, seems to preclude any consideration of the question, between what parties it is made; whether between citizens, or between a citizen and a foreigner, or between foreigners. The continental jurists recognise no distinction in the The English decisions are understood to cases. maintain the universality of the doctrine, whatever may be the allegiance of the country of the creditor.2 And a like doctrine would seem generally to be maintained in America.3 There are, however, some cases, in which a more limited doctrine would seem to be laid down; and which appear to confine it to cases of a discharge from contracts between citi-

¹ Tappan v. Poor, 15 Mass. R. 419; Morris v. Eves, 11 Martin, R. 730; Judd v. Porter, 7 Greenleaf, R. 337; Hinckley v. Morean, 3 Mason, R. 88; Titus v. Hobart, 5 Mason, R. 378: 1 Kent, Comm. Lect. 19 p. 420, 422, 3d edit.; 2 Bell, Comm. § 1162 to 1164, p. 562, 567, 694, 4th edit.; Id. p. 580 to 598, 5th edit.; Mason v. Haile, 12 Wheat. R. 370; 2 Kent, Comm. Lect. 37, p. 394 to p. 401, 3d edit; Phillips v. Allan, 8 Barn. & Cres. 479; Ex Parte Burton, 1 Atk. R. 255; Huberus, Lib. 42, tit. 3, § 5; Heineccii Elem. ad Pand. Tom. 3, P. 6, Lib. 42, tit. 3, § 253; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 22, p. 924 to p. 929; White v. Canfield, 7 John. R. 117; James v. Allen, 1 Dall, R. 188; Quin v. O'Keefe, 2 H. Bl. 553; Le Roy v. Crowninshield, 2 Mason, R. 160; Wright v. Paton, 10 John. R. 300; Peck v. Hozier, 14 John. R. 346; Walsh v. Nourse, 5 Binn. R. 381.

² See Mason v. Haile, 12 Wheaton, R. 360; Potter v. Brown, 5 East, R. 124.

³ See Robinson v. Bland, 1 W. Black. R. 258; Blanchard v. Russell, 13 Mass. R. 1; 2 John. R. 235; 2 Kent, Comm. Lect. 37, p. 392, 393, 3d edit.; Ory v. Winter, 16 Martin, R. 277; Sherrill v. Hopkins, 1 Cowen, R. 103, 107.

zens of the same state. Thus, in one case, it was laid down by the Supreme Court of Massachusetts, that if, when the contract was made, the promisee was not a citizen of the state, where it was made, he would not be bound by the laws of such state in any other state; and, therefore, that a discharge there would not bind him or his rights.1 In another case the same learned Court said, that a discharge of the contract can only operate, where the law is made by an authority, common to the creditor and the debtor in all respects; where both are citizens and subjects.2 But this qualification of the loctrine (which was only incidentally argued in hose cases) was afterwards deliberately overruled by he same Court; and the general doctrine was estabished in its universality.3 The qualification seems, owever, again to have been asserted in a more recent ecision of the same Court; upon grounds not very learly defined, or perhaps not entirely satisfactory, unss the case is to be governed by the decisions of the upreme Court of the United States upon the subject discharges under insolvent laws, with reference to e Constitution of the United States.4 It has been

Baker. v. Wheaton, 5 Mass. R. 511.

Watson v. Bourne, 10 Mass. R. 337, 340.

Blanchard v. Russell, 13 Mass. R. 1, 10, 11, 12.

Braynard v. Marshall, 8 Pick. R, 194. - The case was a negotiable missory note, made by A. in New York to B. or order; the note was erwards indorsed to C. in Massachusetts, who sued A., the maker, there, he pleaded his discharge under the insolvent laws of New York. that occasion Mr. Chief Justice Parker, in delivering the opinion of Court, declaring the discharge no bar to the suit, said; "The quess, which arise out of the subject of state insolvent laws, and the effect discharges under them, have been so long unsettled in this Commonulth, owing to the unsatisfactory character of the decisions of the reme Court of the United States, which ought to govern cases of

expressly denied by other learned state Courts.¹ In commenting upon some of the cases, in which, upon questions of discharge, considerable importance has been attached to the circumstance, that one or both

this nature, that we have waited with anxiety for a revision of all the cases by that high court, and a final adjudication upon a subject so universally interesting, and hitherto involved in so much perplexity. case of Ogden v. Saunders seemed, in its progress, to promise such a result, but unhappily, on some of the points, which the case presented, the law is left as uncertain as it was before. One thing, however, we understand to have been clearly decided by a majority of the justices of that court, and virtually by all, (as those, who admit no validity at all to such laws, may be considered as uniting with those, who give them only a limited operation,) which is, that discharges under such laws have no effect without or beyond the territory of the state, where they are obtained, or against a party, not a citizen of that state, or where the suit shall be brought in a court of the United States, or of any state other than that, in which the proceedings took place, not withstanding the contract, on which the discharge was intended to operate, was entered into and was to be performed in the state, in which the dis-Now this law, thus settled, is binding upon this charge was granted. Court, as well on account of the nature of the question which is neculiarly proper for the decision of the highest court of the nation, as because the case itself, unless restrained by the smallness of the sum in controversy, may be carried to that court by writ of error, and our indement be reversed; it being a question, of which, by § 25, of the judiciary act of the United States (of September 24, 1789), that court has jurisdiction. But even if we were not inclined to repose on the decision in Ogden v. Saunders, but considered ourselves at liberty to resort to general principles, we are disposed to think, that the defence set up under the certificate in this case could not prevail. It does not come within the case of Blanchard v. Russell, in which the contract was made in New York, by a citizen of that state, and was to be performed there, it not being transferable in his nature, being matter of account. A negotiable instrument, made in New York, and indorsed for a valuable consideration to a citizen of Massachusetts before an application for the benefit of the insolvent law, ought not to be discharged under the process provided by that law. It is a debt payable any where, by the very nature of the contract, and it is a promise to whosever shall be the holder of the note. At the time of the defendants application

¹ Ory v. Winter, 16 Martin, R. 277; Sherrill v. Hopkins, 1 Cowen, R. 103, 107.

of the parties were inhabitants of and domiciled in the state or country, where the contract was made, the Supreme Court of New York have said; "All these cases stand upon a principle, entirely independent of that circumstance. It is, that of the Lex loci contractûs, that the place, where the contract is made, must govern the construction of the contract; and that, whether the parties to the contract are nhabitants of that place, or not. The rule is not ounded upon the allegiance due from citizens or abjects to their respective governments; but upon ne presumption of law, that the parties to a conact are conusant of the laws of the country, where e contract is made."1

§ 341. Under the peculiar structure of the contution of the United States, prohibiting the states om passing laws impairing the obligation of conicts, it has been decided, that a discharge, under insolvent laws of the state, where the contract s made, will not operate as a discharge of the

discharge, his creditor upon this note was a Massachusetts man, according to the case of Baker v. Wheaton, (5 Mass. R. 509,) the ficate would be no bar to the action. The principle of this case fully recognized and adopted in the case of Watson v. Bourne, Mass. R. 337.) Nor is there any thing in the case of Blanchard v. ell to controvert these decisions, whatever may have been said, endo, by the judge, who delivered the opinion. The contract in case was in its nature to be performed in New York, and so was governed entirely by the laws of that state. The case before us it of a negotiable promissory note, given in the first place by a a of New York to a person resident there, by whom it was immey indorsed to a citizen of Massachusetts. The promisor became, liately upon the indorsement, the debtor to the indorsee, who ot amenable to the laws of New York, where the application ande for relief under the insolvent law." See Ogden v. Saunders, neaton, R. 213, 358; Post, § 341, 343, 344. herrill v. Hopkins, 1 Cowen, R. 102, 108.

contract, unless it was made between citizens of the same state. It cannot, therefore, discharge a contract made with a citizen of another state.¹ But this doctrine is wholly inapplicable to contracts and discharges in foreign countries, which must, therefore, be decided upon the general principles of international law.

§ 342. The converse doctrine is equally well established, viz. that a discharge of a contract by the law of a place, where the contract was not made, or to be performed, will not be a discharge of it in any other country.2 Thus, it has been held in England, that a discharge of contract, made there, under an insolvent act of the State of Maryland, is no bar to a suit upon the contract in the courts of England.3 On that occasion, Lord Kenyon said; "It is impossible to say, that a contract, made in one country, is to be governed by the laws of another. It might as well be contended, that, if the State of Maryland had enacted, that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer given is, that a law has been made in a foreign country

Ogden v. Saunders, 12 Wheaton, R. 358 to 369; Boyle v. Zacharie Peters, R. 348; 2 Kent, Comm. Lect. 37, p. 392, 393, 3d edit.; 3 Story, Comm. on Const. § 1384; 1 Kent, Comm. Lect. 9, p. 418, 422, 3d edit.

² See 2 Bell, Comm. § 1267, p. 691 to p. 695, 4th edit.; Id. p. 688 to p. 692, 5th edit.; Phillips v. Allan, 8 B. & Cresw. 479; Lewis v. Owen, 4 Barn. & Ald. 654; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 22, p. 924 to p. 929: Quelin v. Moisson, 1 Knapp, R. 265, note; Rose v. McLeod, 4 S. & D. 311, cited 3 Burge, Comm. ubi supra, p. 927, 928.

³ Smith v. Buchanan, 1 East, R. 6, 11.

to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But, how is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended, that he is bound by a condition, to which he has given no assent, either express or implied?" In America the same doctrine has obtained the fullest sanction.² It is also clearly established in Scotland.³

§ 343. The subject of negotiable paper is generally governed by the same principles. Wherever the contract between the particular parties is made, the law of the place will operate, as well in respect to the discharge as to the obligation thereof. A nice question, however, has recently arisen on this subject, in a case already mentioned. A negotiable note was made at New York between persons resident there, and was payable generally; and the payee subsequently indorsed the note to a citizen of Massachusetts, by whom a suit was brought in the state court of the latter state against the maker. One point of the argument was, whether a discharge of the maker under the insolvent laws of New York

Smith v. Buchanan, I East, R. 6, 11; Lewis v. Owen, 4 Barn. & Ald. 654; Phillips v. Allan, 8 Barn. & Cresw. 477.

² Van Raugh v. Van Arsdaln, 3 Cain. R. 154; Frey v. Kirk, 4 Gill & John. R. 509; Green v. Sarmiento, Peters, Cir. R. 74; Le Roy v. Crowninshield, 2 Mason, R. 151; Smith v. Smith, 2 John. R. 235; Bradford v. Farrand, 13 Mass. R. 18; 2 Kent, Comm. Lect. 37, p. 392, 393; Id. Lect. 39, p. 458, 459, 3d edit.; 2 Bell, Comm. § 1267, p. 692, 693, 4th edit.; Id. p. 688 to 692, 5th edit.; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 22; p. 924 to p. 929; Rose v. McLeod, 4 S. & D. R. 311, cited in 3 Burge, Comm. 928, 929.

² Bell, Comm. § 1267, p. 692, 693, 4th edit.; Id. p. 688 to 692, 5th edit.

⁴ See Aymar r. Shelden, 12 Wend. R. 439.

⁵ Ante, 6 317, 6 340.

operated as a bar to the suit? The case was decided upon another ground. But the Court expressed a clear opinion, that it did not; and said; "It is a debt payable any where by the very nature of the contract; and it is a promise to whoever shall be the holder of the note." "The promisor became, immediately upon the indorsement, the debtor to the indorsee, who was not amenable to the laws of New York, where the discharge was obtained."

§ 314. It is difficult (as has been already intimated) to perceive the ground upon which this doctrine can be maintained, as a doctrine of public law.2 The Court admit, that a debt contracted in New York, and not negotiable, would be extinguished by such a discharge; although such a debt is by its very nature payable every where, as debts have no locality. As between the original parties, (the maker and the payee,) the same result would How, then, can the indorsement vary it? It does not create a new contract between the maker and the indorsee in the place of the indorse-The rights of the indorsee spring from, and under, the original contract, and are a component part of it. The original contract promises to pay the indorsce, as much as the payee, and from the first of its existence. The indorsement is but a substitution of the indorsee for the payee; and it transfers over the old liability, and creates no new liability of the maker.3 If the indorsement created

¹ Braynard v. Marshall, 8 Pick. R. 194. See Ogden v. Saunders, 12 Wheaton, R 358, 362, 363, 364; ante, § 317, § 340.

² Ante, § 340.

³ Pothier, De Change. art. 22; ante, § 317.

a new contract in the place, where it was made, between the maker and the indorsee, then the validity, obligation, and interpretation of the contract would be governed by the law of the place of the indorsement, and not by that of the place, where the note was originally made. It would not, then, amount to a transfer of the old contract, but to the creation of a new one, which, from a conflict of laws, not unusual in different states, would, or might, involve obligations and duties wholly different from, and even incompatible with, the original contract. Nav, the maker might, upon the same instrument, incur the most opposite responsibilities to different holders, according to the law of the different places, where the indorsement might be made.1

§ 345. Such a doctrine has never been propounded in any common law authority, nor ever been supported by the opinion of any foreign jurist. The same principle would apply to general negotiable acceptances, as to negotiable notes; for the maker stands in the same predicament, as the acceptor. Yet, no one ever supposed, that an indorsement after an acceptance ever varied the rights or obligations of the acceptor. It is, as to all persons, who become holders, in whatever country, treated as a contract made by the acceptor in the country, where such acceptance is made.2 Yet, the acceptance being general, payment may be required in any place, where the holder shall demand it. The other point, that the indorsement was to a citizen of another state. is equally inadmissible. The question is not, whether he is bound by the laws of New York generally;

¹ Ante, § 314, 316, 317. ² Ante, § 314, 317.

but, whether he can, in opposition to them, avail himself of a contract, made under the sovereignty of that state, and vary its validity, obligation. interpretation, and negotiability, as governed by those laws. If the payee had been a citizen of Massachusetts, and the note had been made by the maker in New York, there could be no doubt, that the contract would still be governed by the laws of New York, in regard to the payee. What difference, then, can it make, that the indorsee is a citizen of another state, if he cannot show, that his contract has its origin there? In short, the doctrine of this case is wholly repugnant to that maintained by the same Court in another case, which was most maturely considered, and in which the argument in its favor was repelled. The Court there declared their opinion to be, that full effect ought to be given to such discharges, as to all contracts made within the state, where they are authorized, although the creditor should be a citizen of another state.1

§ 346. The Supreme Court of Louisiana have adopted the same reasoning; and held, that, where a negotiable promissory note was made in one state, and was indorsed in another state to a citizen of the latter, the contract was governed by the law of the place, where the note was made, and not by that of the place, where the indorsement was made. "We see nothing" (said the Court) "in the circumstance of the rights of one of the parties being transferred to the citizens of another state, which can take the case out of the general principle." "It is a demand

Blanchard v. Russell, 13 Mass. R. 1, 11, 12. See also Prentice v. Savage, 13 Mass. R. 20, 23, 24; ante, § 317, § 340.

made under an agreement (a note) entered into in a foreign state; and consequently the party, claiming rights under it, must take it with all the limitations, to which it was subject in the place, where it was made; and that, although he be one of our citizens." This is certainly in conformity to what is deemed settled doctrine in England, as well as in some other states in America.2 It was taken for granted by the Supreme Court of the United States to be the true doctrine in the case of a negotiable bill of exchange, in which the drawer's responsibility was supposed to be governed by the law of the place, where the bill was drawn, notwithstanding an indorsement in another country;3 and also by the Court of King's Bench in England, in a case, in which the right to a bank of England note was supposed to be governed by the law of England, notwithstanding a transfer of the same had been subsequently made in France.4

§ 347. Pardessus has laid down a doctrine equally broad. He says, that it is by the law of the place, where a bill of exchange is payable, that we are to ascertain, when it falls due, the days of grace belonging to it, the character of these delays, whether for the benefit of the holder or of the debtor; in one word, every thing, which relates to the right

Ory v. Winter, 16 Martin, R. 277; Sherrill v. Hopkins, 1 Cowen, R. 103; ante, § 317, § 340.

² See Blanchard v. Russell, 13 Mass. R. 12; Ogden v. Saunders, 12 Wheaton, R. 360; Potter v. Brown, 5 East, R. 123, 130.

² Slacum v. Pomeroy, 6 Cranch, R. 221.

⁴ De la Chaumette v. The Bank of England, 9 Barn. & Cresw. 208; S. C. 2 Barn. & Adolp. 385; post, § 353. See also 2 Bell, Comm. § 1267, p. 622, 693, 4th edit.; Id. p. 688 to 692, 5th edit. — Quid si de literis cambii incidat questio, (says Paul Voet,) quis locus spectandus? Is locus, ad quem sunt destinate, et ibidem acceptate. P. Voet, De Stat. § 9, ch. 2, § 14, p. 271, edit. 1715; Id. p. 327, edit. 1661; ante, § 317.

of requiring payment of a debt, or the performance of any other engagement, when the parties have not made any stipulation to the contrary.1 And it is of little consequence, whether the person, who demands payment, is the creditor, who made the contract, or an assignee of his right; such as the holder of a bill of exchange by indorsement. This circumstance makes no change in regard to the debtor. The indorsee cannot require payment in any other manner, than the original creditor could.8 And he applies this doctrine to the case of successive indorsements of bills of exchange, made in different countries, stating, that the rights of each holder are the same, as those of the original payee against the acceptor.3 He adds, also, that the effects of an acceptance are to be determined by the law of the place, where it has been made; that every indorsement subjects the indorser to the law of the place, where it has been made; and that it governs his responsibility accordingly.5

§ 348. Notwithstanding the principle, that a discharge of the Lex loci contractûs is valid every where, and vice versû, is generally admitted, as a part of private international law; yet it cannot be denied, that any nation may by its own peculiar jurisprudence refuse to recognise it; and may act within its own tribunals upon an opposite doctrine. But, then, under such circumstances its acts and decisions will be deemed of no force or validity beyond

¹ Pardessus, Droit Comm. art. 1495, 1498, 1499, 1500; ante, § 316; post, § 361.

² Ibid.

³ Ibid

⁴ Pardessuss, Droit. See Rothschild v. Currie, 1 Adolp. & Ellis. New R. 43; ante, § 314, § 316; post, § 361; Comm. art. 1499.

⁵ Id. art. 1499.

⁶ Ante, § 334; post, § 349, 350, 351.

its own territorial limits. Thus, if a state should by its own laws provide, that a discharge of an insolvent debtor under its own laws should be a discharge of all the contracts, even of those made in a foreign country, its own courts would be bound by such provisions. But they would, or might be held mere nullities in every other country.

§ 349. And even in relation to a discharge according to the laws of the place, where the contract is made, there are (as we have seen) some necessary limitations and exceptions engrafted upon the general doctrine, which every country will enforce, whenever those laws are manifestly unjust, or are injurious to the fair rights of its own citizens.3 It has been said by a learned Judge with great force; "As the laws of foreign countries are not admitted ex proprio vigore, but merely ex comitate, the judicial power will exercise a discretion with respect to the laws, which they may be called upon to sanction: for if they should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected. Thus, if any state should enact, that its citizens should be discharged from all debts due to creditors living without the state, such a provision would be so contrary to the common principles of justice, that the most liberal spirit

¹ See Penniman v. Meigs, 9 John. R. 325; Babcock v. Weston, 1 Gallis. R. 168; Murray v. De Rottenham, 6 John. Ch. R. 52; Holmes v. Remsen, 4 John. Ch. R. 471.

See Blanchard v. Russell, 13 Mass. R. 6; post, § 349; Van Raugh v. Van Ardalu, 3 Cain. R. 154; Smith v. Buchanan, 1 East, R. 6; Smith v. Smith, 2 John. R. 235; Green v. Sarmiento, Peters, Cir. R. 74; McMenomy v. Murray, 3 John. Ch. R. 435; Wolff v. Oxholm, 6 Maule & Selw. R. 92; ante, § 338.

³ Ante, § 339; post, § 350, 351.

of comity would not require in adoption in any other state. So, if a state, under the pretence of establishing a general bankrupt law, should authorize such proceedings, as would deprive all creditors living out of the state of an opportunity to share in the distribution of the effects of the debtor, such a law would have no effect beyond the territory of the state, in which it was passed."

§ 350. The same reasoning was again asserted by the same learned Judge in another case, calling for an exposition of the limitations of the doctrine. "This rule" (said he) "must however, from its very nature. be qualified and restrained; for it cannot be admitted. as a principle of law or justice, that, when a valid personal contract is made, which follows the person of the creditor, and may be enforced in any foreign jurisdiction, that a mode of discharge, manifestly partial or unjust, and tending to deprive a foreign creditor of his debt, while he is excluded from a participation with the domestic creditors in the effects of the debtor, should have force in any country, to the prejudice of their own citizens. The comity of nations does not require it, and the fair principles of a contract would be violated by it."2

§ 351. "Thus if a citizen of this state, being in a foreign country, should, for a valuable consideration, receive a promise to pay money, or to perform any other valuable engagement, from a subject of that country; and the law should provide for a discharge from all debts upon a surrender of his effects, without any notice, which could by possibility reach creditors out of the country, where such

¹ Mr. Chief Justice Parker, in Blanchard v. Russell, 13 Mass. R. 6.

⁹ Ibid.

a law should exist; we apprehend, that the contract ought to be enforced here, notwithstanding a discharge obtained under such law. For although the creditor is to be presumed to know the laws of the place, where he obtains his contract; yet that presumption is founded upon another, which is, that those laws are not palpably partial and unjust, and calculated to protect the creditors at home at the expense of those, who are abroad. Such laws would come within the well known exception to the rules of comity, viz. that the laws, which are to be admitted in the tribunals of a country, where they are not made, are not to be injurious to the state, or the citizens of the state, where they are so received." 1

§ 351 a. But although the general rule, that a contract, as to its dissolution and discharge, is to be governed by the law of the place, where it is made, is thus, with few exceptions and limitations, admitted to be well established; yet we are not to understand, that it thence follows, as a necessary consequence, that in no cases whatever, can a contract be discharged or dissolved, except in the mode, and by the process and formalities, prescribed by the same law; or in other words, that it must be discharged and dissolved eo ligamine, quo ligatur, or rather by reversing the operation, which knit it under the local law. On the contrary, there are, or may be, circumstances, under which an opposite rule may be maintainable; and the

³ See Warrender v. Warrender, 9 Bligh, R. 124, 125; ante, § 226 c,

¹ Mr. Chief Justice Parker in Prentiss v. Savage, 13 Mass. R. 23, 24.
See also Fergusson on Marr. and Div. 396, 397; Wolff v. Oxholm,
6 Maule & Selw. 22; ante, § 244.

law of another country, prescribing different modes of proceeding, or different formalities, or different acts, which shall establish a dissolution thereof, may also well prevail to annul or discharge the contract. A change of domicil of the parties to the latter country, or an act done in that country, which would there operate to dissolve or discharge the contract, may well produce the fullest effect, although the same act might not be recognised by the law of the place of the origin of the contract. Thus, for example, as we well know, the obligation of a bond, or other sealed instrument, after a breach of the contract created thereby, cannot in England be discharged, or released, except by a sealed instrument, or a release under seal, according to the known maxim of the common law; Eodem modo, quo quid constituitur, eodem modo dissolvitur. And vet by the law of most, if not of all, of the continental countries, whose jurisprudence is founded on the Roman law, a simple receipt or discharge, not under seal, would, if executed in such countries, be held to discharge the bond or other sealed instrument. Let us. then, suppose a bond, executed in England for the payment of money, and when it became due, there should be a default in payment, and afterwards the creditor should receive payment of the debtor in France, or otherwise should discharge him by a written unsealed instrument in France; such a discharge would in France be held valid, and conclusive, if good by the law of France, notwithstanding it might be held invalid in an English court of common law. In short, any act done, after such an obligation was created, in a foreign country, by whose laws the act would operate as a dissolution thereof, would be treated in

that country at least, as a complete extinguishment thereof.

§ 351 b. It is not easy therefore, upon principle, to say, why such an extinguishment of a contract, according to the Lex Loci, ought not every where else to have the same operation, even in the country of the origin of the contract. For, if the contract derives its whole original obligatory force from the law of the place, where it is made, it is but following out the same principle to hold, that any act subsequently done, touching the same contract, by the parties, should have the same obligatory force and operation upon it, which the law of the place, where it is done, attributes to it. And in this respect there certainly is, or at least may be, a clear distinction between acts done by the parties in a foreign country, and which derive their operation from their voluntary consent and intention, and acts in invitum, deriving their whole authority and effect from the operation of the local law, independent of any such consent.1

§ 351 c. Indeed, the reasonable interpretation of the general rule would seem to be, that, while contracts made in one country are properly held to be dissoluble and extinguishable, according to the laws of that country, as natural incidents to the original concoction of such contracts, they are, and may at the same time also be equally dissoluble and extinguishable by any other acts done, or contracts made subsequently in another country by the parties, which acts or contracts, according to the law of the latter country, are sufficient to work such a dissolution or extinguishment. It is to this double posture

² Post, § 411.

of a case, that Lord Brougham referred in one of his judgments. "If a contract" (said he) "for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed, by the law and by the forms of another country, in which the parties happen to reside, and in whose courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws, when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the Courts of this country, (and we have some restraints upon certain parties, which come very near prohibition); and suppose a sale of chattels by one to another party, standing in this relation towards each other, should be effected in Scotland, and that our Courts here should, (whether right or wrong,) recognise such a rule, because the Scotch law would affirm it; surely it would follow that our Courts must equally recognise a recission of the contract of sale in Scotland by any act, which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court, declaring it rescinded by a Scotch matter done in pais, or were merely to produce evidence of the thing so done, and proof of its amounting by the Scotch law to a recission of the contract; I apprehend, that the party relying on the contract could never be heard to say; The contract is English, and the Scotch proceeding is impotent to dissolve it.' The reply would be, 'Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar, but reverse proceeding to dissolve it - Unumquodque dissolvitur eodem modo, quo colligatur.' Suppose, for another example, (which is the case,) that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed; and that in another country those obligations could be validly incurred; it is probable, that our law and our Courts would recognise the validity of such foreign obligations. But, suppose a feme covert had executed a power, and conveyed an interest under it to another feme covert in England; could it be endured, that where the donee of the power produced a release under seal from the feme covert in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said, that our Courts having decided the contract of a feme covert to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the feme covert to be valid, if it be valid in the same foreign country?"

§ 351 d. Nor does there seem to be in this respect any acknowledged distinction between contracts. which are purely personal, and contracts, which impose or may impose any charge on real estate; for although in respect to immovable property the law of the situs should be admitted (as certainly is the case at the common law) to regulate all the rights to immovable property; yet it does not thence follow, that an act, which would operate as a dissolution or extinguishment of the contract, creating such charge, according to the law of a foreign country, where it is subsequently done, may not incidentally and indirectly work such a dissolution or extinguishment thereof, although it does not conform to the Lex rei site. Lord Brougham on the same occasion, referring to this topic, said; "All personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin money, charged on English property, more immediately affect real estate here, than a bond or a judgment, released in Scotland according to Scotch forms, discharges real estate of a lien, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequently charges English real estate." 9

§ 352. Before we quit this head of contracts, it may be well to bring together some principles applicable to negotiable instruments, which have not been brought as distinctly under review in the preceding

¹ Warrender v. Warrender, 9 Bligh, R. 125 to 127; ante, § 226 c, note.

² Warrender v. Warrender, 9 Bligh, R. 127; ante, § 226 c, note.

discussions, as they deserve to be, and which afford important illustrations of the operation of foreign law upon contracts and their incidents. The subject of the assignments of debts and other choses in action, not negotiable by the general law merchant, or the laws of particular countries, will more properly find a place in our subsequent inquiries.

§ 353. Questions have arisen, whether negotiable notes and bills, made in one country, are transferable in other countries, so as to found a right of action in the holder against the other parties. Thus, a question occurred in England, in a case, where a negotiable note, made in Scotland, and there negotiable, was indorsed, and a suit brought in England by the indorsee against the maker, whether the action was maintainable. It was contended, that the note, being a foreign note, was not within the statute of Anne (3 and 4 Ann. ch. 9.), which made promissory notes payable to order assignable and negotiable; for that statute applied only to inland promissory notes. But the Court overruled the objection, and held the note suable in England by the indorsee, as the statute embraced foreign, as well as domestic notes.2 In another case a promissory note, made in England, and pavable to the bearer, was transferred in France: and the question was made, whether the French holder could maintain an action thereon in England;

³ Post, § 355, § 395 to § 400, § 566; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778.

Milne r. Graham, 1 Barn. & Cresw. 192.—It does not distinctly appear upon the Report, whether the indorsement was made in Scotland or in England. But it was probably in England. But see Carr v. Shaw, Bayley on Bills, p. 16, note, 5th edit.; Id. p. 22. American Edition by Phillips & Sewall, 1836.

such notes not being by the law of France negotiable; and it was held, that he might: But in each of these cases the decision was expressly put upon the provisions of the statute of Anne respecting promissory notes, leaving wholly untouched the general doctrine of international law.

353 a. In a more recent case, which has been already cited,2 a negotiable note was made in France and indorsed in France, and afterwards a suit was brought thereon by the indorsee against the maker in England. One question in the case was, whether a blank indorsement in France was by the law of France sufficient to transfer the property in the note, without any other formalities. It was held, that it was not sufficient. But it seems to have been taken for granted. that if the note was well negotiated by the indorsement, a suit might be maintained thereon in England by the indorsee in his own name. On that occasion the Court said; "The rule, which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this; that the interpretation of the contract must be governed by the law of the country, where the contract was made (Lex loci contractûs); the mode of suing, and the time within which the action must be brought, must be governed by the law of the country, where the action is brought. (In ordinandis judiciis, loci consuetudo, ubi agitur.) This distinction has been clearly laid down and adopted in the late case of De la Vega v. Vianna. See also the case of the

¹ De la Chaumette v. The Bank of England, 2 Barn. & Adolp. R. 385; S. C. 9 Barn. & Cresw. 208; and see Chitty on Bills, p. 551, 552, 8th edit.; ante, § 346.

² Ante, § 316 a.

British Linen Company v. Drummond where the different authorities are brought together. The question therefore is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule, which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case, it must be adopted by our courts, in the latter it may be altogether disregarded, and the suit commenced in the name of the present plaintiff. And we think the French law on the point above mentioned is the law, by which the contract is governed, and not the law, which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point, that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences, that would follow, if the plaintiff sues in his own name, or is compelled to use the name of the former indorser, as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences, we think the law of France falls in with the distinction above laid down, that it is a law, which governs the contract itself, not merely the mode of suing. We therefore think, that our courts of law must take notice, that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country, where such contract was made; and that such being the case there, we must hold in our courts, that he can have no right of suing here."1

§ 354. Several other cases may be put upon this

¹ Trimbey s. Vignier, 1 Bing. N. Cas. 151, 159, 160; post § 565, § 566

subject. In the first place, suppose a note negotiable by the law of the place, where it is made, is there transferred by indorsement: can the indorsee maintain an action in his own name against the maker in a foreign country, (where both are found,) in which there is no positive law on the subject of negotiable notes applicable to the case? If he can. it must be upon the ground, that the foreign tribunal would recognize the validity of the transfer by the indorsement according to the law of the place, where it is made. According to the doctrine maintained in England, as choses in action are by the common law (independent of statute) incapable of being transferred over, it might be argued, that he could not maintain an action, notwithstanding the instrument was well negotiated. and transferred by the law of the place of the con-So far, as this principle of the non-assignability of choses in action would affect transfers in England, it would seem reasonable to follow But the difficulty is in applying it to transfers made in a foreign country, by whose laws the instrument is negotiable, and capable of being transferred, so as to vest the property and right in the In such a case it would seem, that the more correct rule would be, that the Lex loci contractûs ought to govern; because the holder under the indorsement has an immediate and absolute right in the contract vested in him, as much as he would have in goods transferred to him. Under such circumstances to deny the legal effect of

¹ See 2 Black. Comm. 442; Jeffrey v. McTaggart, 6 Maule & Selw. 126; Innes v. Dunlop, 8 T. R. 595. See also Jeffrey v. McTaggart, 6 Maule & Selw. R. 126; post, § 565, 566.

the indorsement is to construe the obligation, force, and effect of a contract, made in one place, by the law of another place. The indorsement in the place, where it is made, creates a direct contract between the maker and the first indorsee; and if so, that contract ought to be enforced between them every where. It is not a question, as to the form of the remedy; but as to the right.¹

§ 355. The same view of the doctrine seems to have been taken in another case in England, much stronger in its circumstances, than the case of a foreign negotiable note, which may be thought to stand in some measure upon the custom of merchants. A suit was brought by the assignee of an Irish judgment against the judgment debtor in England, the judgment being made expressly assignable by Irish statutes; and the objection was taken, that no action could be maintained by the assignee, because it would contravene the general principle of the English law, that choses in action were not assignable. But the Court intimated a strong opinion against this ground of argument: and the cause finally was disposed of upon another point; but in such a manner, as left the opinion in full force.2 It is matter of surprise, that in some of the more recent discussions in England upon the negotiations of notes in foreign countries, this doctrine has not been distinctly insisted on. For, even in England, negotiable notes are not treated, as mere choses in action; but they are

See Trimbey v. Vignier, 1 Bing. New Cases, 159, 160, 161; ante,
 353 a, where the same reasoning seems to have applied; post, § 565, 566.
 O'Callaghan v. Thomond, 3 Taunt. R. 82; post, § 565, 566.

deemed to have a closer resemblance to personal chattels on account of their transferability; so that the legal property in them passes upon the transfer, as it does in the case of chattels.¹ If so, no one could doubt, that a title of transfer of personal property in a foreign country, good by the laws of the country, where it is made, ought to be held equally good every where.²

§ 356. In the next place, let us suppose the case of a negotiable note, made in a country, by whose laws it is negotiable, is actually indorsed in another, by whose laws a transfer of notes by indorsement is not allowed. Could an action be maintained by the indorsee against the maker, in the Courts of either country? If it could be maintained in the country, whose laws do not allow such a transfer, it must be upon the ground, that the original negotiability by the Lex loci contractûs, is permitted to avail, in contradiction to the Lex fori. On the other hand, if the suit should be brought in the country, where the note was originally made. the same objection might arise, that the transfer was not allowed by the law of the place, where the indorsement took place. But, at the same time, it may be truly said, that the transfer is entirely in conformity to the intent of the parties, and to the law of the original contract.3

¹ McNeil v. Holloway, 1 Barn. & Ald. R. 218.

² Ante, § 353 a.

³ See Chitty on Bills, ch. 6, P. 218, 219, 8th Lond. edit. See Kaims on Equity, B. 3, ch. 8, § 4; ante, § 353, 354.— In the cases of Milne v. Graham, 1 Barn. & Cresw. 192, De la Chaumette v. Bank of England, 2 Barn. & Adolp. 385, and Trimbey v. Vignier, 1 Bing. N. Cas. 151, the promissory notes were negotiable in both countries, as well where the note was made, as where it was transferred.

§ 357. In the next place, let us suppose the case of a note, not negotiable by the law of the place, where it is made, but negotiable by the law of the place, where it is indorsed; could an action be maintained, in either country, by the indorsee against the maker? It would seem, that in the country, where the note was made, it could not: because it would be inconsistent with its own laws. But the same difficulty would not arise in the country, where the indorsement was made; and, therefore, if the maker used terms of negotiability in his contract, capable of binding him to the indorsee, there would not seem to be any solid objection to giving the contract its full effect there. And so it has been accordingly adjudged in the case of a note made in Connecticut, payable to A., or order, but by the laws of that state, not negotiable there, and indorsed in New-York, where it was negotiable. In a suit, in New-York, by the indorsee against the maker, the exception was taken, and overruled. The Court, on that occasion, said, that personal contracts, just in themselves, and lawful in the place, where they are made, are to be fully enforced, according to the law of the place, and the intent of the parties, is a principle, which ought to be universally received and supported. But this admission of the Lex loci contractûs can have reference only to the nature and construction of the contract, and its legal effect, and not to the mode of enforcing it. And the Court ultimately put the case expressly upon the ground, that the note was payable to the payee, or order; and therefore, the remedy might well be pursued according to the law of New-York against a party, who had contracted

to pay to the indorsee.¹ But, if the words, "or order," had been omitted in the note, so that it had not appeared, that the contract between the parties originally contemplated negotiability, as annexed to it, a different question might have arisen, which would more properly come under discussion in another place; since it seems to concern the interpretation and obligation of contracts, although it has sometimes been treated as belonging to remedies.²

§ 358. Another case may be put, which has actually passed into judgment. A negotiable note was given by a debtor, resident in Maine, to his creditor, resident in Massachusetts. After the death of the creditor, his executrix, appointed in Massachusetts, indorsed the same note in that state to an indorsee, who brought a suit, as indorsee, against the maker in the State Court of Maine. The question was, whether the note was, under the circumstances, suable by the indorsee; and the Court held, that it was not; for the Court said, that the executrix could not herself have sued upon the note, without taking out letters of administration in Maine; and therefore she could not, by her indorsement, transfer the right to her indorsee.³

§ 359. It does not appear, by the report, whether the note was made in Massachusetts or in Maine. It is not, perhaps, in the particular case material,

¹ Lodge v. Phelps, 1 Jon. Cases, 139; S. C. 2 Caines, Cas. in Error, 321. See Kaims on Equity, B. 3, ch. 8, § 4.

² See Chitty on Bills, ch. 6, p. 218, 219, 8th Lond. edit.; 3 Kent, Comm. Lect. 44, p. 77, 3d edit.; ante, § 253 a.

³ Stearns v. Burnham, 5 Greenl. R. 261; S. P. Thomson v. Wilson, 2 N. Hamp. R. 291. But see Huthwaite v. Phaire, 1 Maun. & Grang. R. 159, 164; and Rand v. Hubbard, 4 Metc. R. 252, 258, 259; post, § 516, 517.

as, according to the law of both states, the note was negotiable by indorsement, whether made in the one or in the other state. If it had been different, it might have given rise to a different inquiry. But in either state, the creditor might certainly, in his lifetime, by his indorsement have transferred the property in the note to the indorsee; and clearly his executrix could do the same; for it is entirely well settled, that an executor or administrator can so transfer any negotiable security by his indorsement thereof.1 If, then, by the transfer in Massachusetts, the property passed to the indorsee, it is difficult to perceive, why that transfer was not as effectual in Maine, as in Massachusetts; and, by the law of both states, an indorsee may sue on negotiable instruments in his own name. In truth, such instruments are treated, not as mere choses in action, but rather as chattels personal.2 Choses in action are not assignable by law; and actions must be brought thereon in the name of the original parties. But negotiable notes are transferable by indorsement; and when transferred, the indorsee may sue in his own name. Upon the reasoning in the above case, the note would cease to be negotiable after the death of the pavee; which is certainly not an admissible doctrine.3 The decision, in a recent case, in the Supreme Court of the United States, is founded upon the doctrine, that an assign-

Richards, 2 Barn. & Adolp. 447, 452, 453; ante, § 355.

¹ See Rawlinson v. Stone, 3 Wilson, R. 1; S. C. 2 Str. R. 1260.

McNeilage v. Holloway, I Barn. & Ald. 218. But see Richards v.

Rawlinson v. Stone, 3. Wilson, R. 1; S. C. 2 Str. R. 1260; Bayley on Bills, ch. 5, p. 78, 5th edit. — The effect of assignments of debts and other personal property will come more fully under review in the succeeding chapter, when we enter upon the subject of the law, which regulates the transfer of personal property. Post, § 395 to § 400.

ment by an executor of a chose in action in the state, where he is appointed, and which is good by its laws, will enable the assignee to sue in his own name in any other state, by whose laws the instrument would be assignable, so as to pass the note to the assignee, and enable him to sue thereon.¹

§ 360. As to bills of exchange, it is generally required, in order to fix the responsibility of other parties, that, upon their dishonor, they should be duly protested by the holder, and due notice thereof given to such parties. And the first question, which naturally arises, is, whether the protest and notice should be in the manner, and according to the forms of the place, in which the bill is drawn, or according to the forms of the place, in which it is payable. By the common law, the protest is to be made, at the time, in the manner, and by the persons prescribed, in the place, where the bill is payable." But, as to the necessity of making a demand and protest, and the circumstances, under which notice may be required or dispensed with, these are incidents of the original contract, which are governed by the law of the place, where the bill is drawn.3 They constitute

¹ S. P. 3 Kent. Comm. § 44, p. 88, 4th edit; Rand v. Hubbard 4 Metc. R. 252, 258, 259; Harper v. Butler, 2 Peters, Sup. Court R. 239. — The case of Trimbey v. Vignier, 1 Bing. N. Cases, 151, (Ante, § 353 a,) seems to inculcate the doctrine as general, that a transfer of property, good by the Lex loci of the transfer, will, at least in cases of negotiable instruments, be held good every where, so as to enable the indorsee to sue in his own name.

² Chitty on Bills, p. 193, 490, 506, 507, 508, 8th Lond. edit. 1833; Post, § 631. See Rothschild v. Currie, 1 Adolp. & Ell. 43; Pothier, De Change, n. 155; S. P. Pardessus Droit, Comm. Tom. 5, art. 1497, 1489, n. 155, states the same point.

³ Ibid. See Aymar v. Sheldon, 12 Wend. R. 439; Id. p. 490, 506, 507, 508, 8th Lond. edit. 1833; 1 Boullenois, Observ. 23, p. 531, 532. Pardessus, Tom. 5, art. 1489, 1498. Savary, Le Parfait Negotiant, Tom. 1 Part 3, Lib. 1, ch. 14, p. 851.

implied conditions, upon which the liability of the drawer is to attach, according to the Lex loci contractûs; and, if the bill is negotiated, the like responsibility attaches upon each successive indorser, according to the law of the place of his indorsement; for each indorser is treated as a new drawer. The same doctrine, according to Pardessus, prevails in France.

§ 361. Upon negotiable instruments, it is the custom of most commercial nations, to allow some time for payment beyond the period fixed by the terms of the instrument. This period is different in different nations; in some, it is limited to three days; in others, it extends as far as eleven days. The period of indulgence is commonly called the days of grace; as to which, the rule is, that the usage of the place, on which a bill is drawn, and where payment of a bill or note is to be made, governs as to

¹ See Rothschild v. Currie; 1 Adolp. & Ell. 43, Pothier De Change, n. 155; Bayley on Bills, ch. A. p. 78 to p. 86, 5th edit. 1836, by Phillips & Sewall; Chitty on Bills, ch. 6, p. 266, 267, 370, 8th Lond. edit.; Ballin-

galls v. Gloster, 3 East, R. 481; ante, § 314 to § 317.

² Pardessus, Droit Comm. art. 1485, 1495, 1496 to 1499; Henry on Foreign Law, 53, Appx. p. 239 to 248. Ante, § 314 to § 347. Boullenois admits, that the protest ought to be according to the law of the place, where the bill is payable. But, in case of a foreign bill, indersed by several indorsements in different countries, he contends, that the time, within which notice or recourse is to be had upon the dishonor, is to be governed by a different rule. Thus, he supposes, a bill drawn in England on Paris in favor of a French payee, who indorses it to a Spaniard (in Spain), and he to a Portuguese (in Portugal), and he to the holder; and then says, that the holder is entitled to have recourse against the Portuguese, within the time prescribed by the law of France, because the holder is there to receive payment; the Portuguese is to give notice to the Spaniard within the time prescribed by the law of Portugal, because that is the only law, with which he is presumed to be acquainted, &c.; and so in regard to every other indorser, he is to have recourse within the period prescribed by the law of the place, where the indorsement was made, and not of the domicil of the party indorsing. 1 Boullenois, Observ. 20, p. 370, 371, 372; Id. Observ. 23, p. 531, 532.

Bayley on Bills, 5th Amer. Edit. by Phillips & Sewall, p. 234, 235; Chitty on Bills, p. 407, 8th Lond. edit.; Id. p. 193.

the number of the days of grace to be allowed thereon.1

§ 362. This head, respecting contracts in general. may be concluded by remarking, that contracts, zespecting personal property and debts, are now universally treated as having no situs or locality; and they follow the person of the owner in point of right: (Mobilia inhærent ossibus domini;) although the remedv on them must be according to the law of the place, where they are sought to be enforced. The common languge is; Mobilia non habent sequelam; Mobilia ossibus inhærent; Actor sequitur forum Rei; Debita sequentur personam debitoris.3 That is to eay, they are deemed to be in the place, and are disposed of by the law of the domicil of the owner, wherever in point of fact they may be situate. Quin tamen ratione mobilium, (says Paul Voet, a strenuous opposer of the general doctrine of the extra-territorial operation of statutes,) ubicunque sitorum, domicilium seu personam domini sequamur.4 Burgundus says; Sed tamen, ut existimem, bona moventia, et mobilia, ita comitari personam, ut extra domicilium ejus censeantur existere, adduci sane non possum.5 Rodenburg says the same.

¹ Ibid. Bank of Washington v. Triplett, 2 Peters, Sup. C. R. 30, 34; ante, § 316 to § 347; Pardessus, Tom. S. P. Chitty on Bills, p. 407, 3th Lond. edit.; Id. p. 193; S. P. 2 Boullenois, Observ. 23, p. 531, 533, and Mascard. Conclus. 7, n. 72, there cited.

² Thorne v. Watkins, 2 Ves, 35; 1 Boullenois, Observ. 20, p. 348; Liverm. Diss. § 251, p. 162, 163; P. Voet, de Statut. ch. 2, § 4, n. 8, p. 126, edit. 1715; Id. p. 139, edit. 1661; post, § 377, 378.

³ Kaims on Equity, B. 3, ch. 8, § 3, 4; Dwarris on Statutes, Pt. 2, p. 650; Liverm. Diss. § 251, 252, 254, p. 162, 163, 167; Fuelix, Gonflit des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 32, p. 221 to p. 226; Id. § 33, p. 227, 228; Christinseus, ad Cod. Lib. 1, tit. 1, Decis. 5, a. 1, 2, 3. p. 7; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777; post, § 376 to § 385, § 395 to § 400.

⁴ P, Voet, De Statut. § 4, ch. 2, n. 8, p. 126; Id. p. 139, 140, edit. 1661.

⁵ Burgundus, Tract. 2, n. 20, p. 71.

Diximus, mobilia situm habere intelligi, ubi dominus instruxerit domicilium, nec aliter mutare eundem, quam unà cum domicilio.¹ He goes on to assign the reasons, founded upon the perpetually changeable location of movables. Pothier is equally expressive on the same point.² Indeed, the doctrine is so firmly established, that it would be a waste of time to go over the authorities;³ and especially as the same

¹ Rodenburg, De Diver. Stat. tit. 2, ch. 2, n. 1; 2 Boullenois, Appx. p. 14, 15.

² Post, § 381.

³ See Bouhier, Coutum. de Bourg. ch. 21, § 172, p. 408; Id. ch. 22, § 79, p. 429; Id. ch. 25, § 5, 6, p. 490; Pothier, Des Choses, Tom. 8, P. 2, § 3, p. 109, 110; Id. Coutum. d'Orléans. Tom. 10, n. 24, p. 7; 2 Bell, Comm. 684, 685, 4th edit.; Bruce v. Bruce, 2 Bos. & Pull. 230; Sill v. Worswick, 1 H. Bl. 690, 691; In Re, Ewing, 1 Tyrwhitt, R. 91; Thorne v. Watkins, 2 Ves. R. 35; 4 Cowen, R. 517, note; Blanchard v. Russell, 13 Mass. R. 6; Liverm. Diss, 163, 164 to 171; Fælix, Conflit des Lois, Revue Etrang. et Franc. Tom 7, 1840, § 31, p. 220, § 32, p. 221 to § 36 p. 229. - There are some few jurists, who seem to dissent from the doctrine, either in a qualified or absolute manner, who are cited by Mr. Fœlix. He enumerrates Tittman, Muhlenbruch, and Eichhorn. Id. p. 223, 224. John Voet has expounded this whole doctrine very fully. Atque ita (says he) evictum hactenus existimo, in omnibus statutis, realibus, personalibus, mixtis, aut quacunque alia sive denominatione sive divisione concipiendis, verissimam esse regulam, perdere omnino officium suum statuta extra territorium statuentis; neque judicem alterius regionis, quantum ad res in suo territorio sitas, ex necessitate quadam juris obstrictum esse, ut sequatur probetve leges non suas. In so tamen forte scrupulus heserit; si scilicet hac ita sint, qui ergo fiat, quod vulgo reperitur traditum, in successionibus, testandi facultate, contractibus, aliisque, mobilia ubicunque sita regi debere domicilii jure, non vero legibus loci illius, in quo naturaliter sunt constituta; videri enim hac saltem ratione jurisdictionem judicis domicilii non raro ultra statuentis fines operari in res dispersas per varia aliorum magistratuum, etiam remotissimis ad orientem occiduumque solem regionibus imperitantium, territoria. Sed considerandum, quâdam fictione juris, seu malis, præsumtione, hanc de mobilibus determinationem conseptam niti : cum enim certo stabilique hec situ careant, nec certo sint alligata loco; sed ad arbitrium domini undiquaque in domicilii locum revocari facile ac reduci possint, et maximum domino plerumque commodum adferre soleant, cum ei sunt præsentia; visum fuit, hanc inde conjecturam surgere, quod dominus velle censentur, ut illic omnia sua sint

subject will occur, in a more general form, in the succeeding chapter. 1

§ 362 a. Debts, in the vocabulary of the civil law, are often known by the title of Nomina debitorum; and they also follow the person of the owner; or, as Jason says; Nomina infixa sunt ejus ossibus. Burgundus also says; Nomina et actiones loco non circum-

mobilia, aut saltem esse intelligantur, ubi fortunarum suarum larem summamque constituit, id est, in loco domicilii. Proinde si quid domicilii judex constituerit, id ad mobilia ubicunque sita non alià pertinebit ratione, quam quia illa in ipso domicilii loco esse concipiuntur. Si tamen has juris fictiones quis à ratione naturali, in hisce solum consideranda, alienas putet, quippe desiderantes unum communem legislatorem, lege suà fictiones tales introducentem ac stabilientem; non equidem repugnaverini, atque edeo tunc hoc ipsum comitati, quam gene genti prestat, magis, quam rigori juris, et summæ potestati, quam quisque magistratus in mobilia, suo in territorio constituta, habet, adscribendum putem. Præsertim cum considero, subinde per magistratus loci, in quo mobilia vere existunt, de illis ea constitui sancirique, que domicilii judici dis-Quid enim, si domicilii judex frumenta importari plicere possent. jubeat, penurià frugum vexatà regione; incola spe lucri majoris frumenta sua, in alià regione horreis recondita inferre desiderit; regioni vero isti imperans omnem vetuerit frugum exportationem, jure suo in sui territorii frumentis usus? Quis hic obsecro negare sustineat, mobilia regi lege loci, in quo vere sunt, non in quo ob domicilium domini esse finguntur. Nec minus id in rerum publicationibus ex delicto apparet, in quantum fisco loci, in quo reus condemnatus est, non sunt cessura bona omnia mobilia ubicunque sita, sed ea sola, que in loco condemnantis inveniuntur; nisi aliud ex comitate alicubi servetur. Nec dicam, variare de rebus quibusdam locorum plurimorum statuta, utrum mobilibus illæ, an immobilibus accensendæ sint; nec novum esse, ut que unà in regione mobilia habentur, immobilium catalogo alibi adscripta inveniantur; annui, verbi gratià, reditus à Provincia debiti, in Hollandià mobiles, immobiles Trajecti: arbores grandiores solo hærentes passim immobiles, mobiles tamen in Flandrik habites. Quo posito, neccesse fuerit, ut, quæ in domicilii loco mobilia habentur. immobilia vero illic ubi sunt, regantur lege loci in quo vere sunt. magistratu ne ex comitate quidem permissuro, ut quasi mobilia domicilii dominici sequerentur jura. J. Voet, ad Pand. Lib. 1, tit. 4, P. 2, 6 11. p. 44, 45; post, § 481, 482.

¹ Post, § 374 to § 401.

² Ersk. Inst. B. 3, tit, 9, § 4; Cujaccii, Opera, Tom. 7, p. 491, edit. 1738; Dig. Lib. 10, tit. 2, l. 2, § 6; Vicat. Vocab. Voce, Nomen.

^{3 1} Boullenois, Observ. 20, p. 348.

scribuntur, quias unt incorporales; tamen et ibi per fictionem esse intelliguntur, ubi creditor habet domicilium.
Nam, quod quidam ossibus creditoris, esse affixa putant,
non magis movet, quam si dicamus, dominium fundi
esse in proprietario; cum alioquin, si quis strictius interpretetur, aliud est fundus, aliud dominium; sicuti
aliud est obligatio, aliud creditum.¹ Dumoulin is
equally explicit. Nomina et jura, et quæcumque incorporalia, non circumscribantur loco; et sic non opus
est accedere ad certum locum. Tum si hæc jura alicubi esse censerentur, non reputarentur esse in re pro
illis hypothecata, nec in debitoris persona, sed magis
in persona creditoris, in quo activè resident, et ejus
ossibus inhærent.²

§ 362 b. The language of Hertius is; Mobilibus interdum etiam κατ ἀναλογίαν, (nam proprie neque mobiles sunt, nec immobiles,) accensentur res incorporales.³ Huberus holds them to fall under the class of movables.⁴ Paul Voet says; Verum, quid de nominibus et actionibus statuendum erit? Respondeo, quia proprie loquendo, nec mobiliam nec immobiliam veniunt appellatione; Etiam vere non sunt in loco, quia incorporalia. Ideo non sine distinctione res temperari poterit. Aut igitur realis erit actio, tendens ad immobilia, et spectabitur statutum loci situs immobilium. Aut erit actio realis spectans mobilia, et idem servandum erit, quod de mobilibus dictum est. Aut erit actio personalis sive ad mobilia sive ad immobilia per-

¹ Burgundus, Tract. 2, n. 33, p. 73.

⁹ Dumoulin, Comm. de Consuetud. Paris. Tom. 1, De Fiefs. tit. 1, gloss. 4, n. 9, p. 56, 57; Liverm. Dissert. § 251, p. 162, 163; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777; post § 392 to § 400.

³ Hertii, Opera, De Collis. Leg. § 4, n. 6, p. 122, 123, edit. 1737; Id. p. 174, edit. 1716.

[#] Ibid.

tinens, quæ cum inhæreat ossibus personæ, statutum loci creditorum æstimari debebit.¹

§ 363. But a question of a very different character may arise, as to executory contracts respecting real estate, or immovables. Are they governed by the law of the place, where the contract is made? Or by the law of the place, where the property is situate? Take, for instance, the case of a contract for the purchase or sale of lands in England or in America, arising under the Statute of Frauds, by which all contracts respecting real estate, or any interest therein, are required to be in writing; and otherwise they are void. such a contract is made in France by parol, or otherwise, in a manner not conformable to the law rei site. for the purchase or sale of lands situate in England or in America, and the contract is conformable to the law of France on the same subject; is the contract valid in both countries? Is it valid in the country, where the land lies, so as to be enforced there? is it valid in the country, where the contract was made 22

§ 364. If this question were to be decided exclusively by the law of England, it might be stated, that, by the law of England, such a contract would be utterly void; and it would be so held in a suit brought to enforce it in that realm, upon the ground, that all real contracts must be governed by the Lex rei sitæ. Lord Mansfield took oc-

¹ P. Voet, de Statut. § 9, ch. 1, n. 11, p. 256, edit. 1715, p. 312, 313, edit. 1661.

² Ante, § 262; post, § 435, 436 to 445. See 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 840 to p. 871; 4 Burge, Comm. Pt. 2, ch. 5, § 11, p. 217.

³ See 2 Dwarris on Statut. 648; Warrender v. Warrender, 9 Bligh, R. 127, 128; ante, § 351 d.

casion, in a celebrated case, to examine, and state the principle. "There is a distinction" (said he) " between local and personal statutes. Local ones regard such things, as are really upon the spot in England; as the Statute of Frauds, which respects lands situate in this kingdom. So stockjobbing contracts, and the statutes thereupon, have a reference to our local funds. And so the statutes for restraining insurances upon the exportation of wool respect our own ports and shores. Personal statutes respect transitory contracts, as common loans and insurances." And in another report of the same case, after a second argument, he said: "In every disposition or contract, where the subject-matter relates locally to England, the law of England must govern; and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must all be sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here."2

¹ Robinson v. Bland, 1 W. Black. R. 234, 246; post, § 383, and note.

² Robinson v. Bland, 2 Burr. R. 1079; S. P. 1 W. Black. R. 259. See also Ersk. Inst. B, 3, tit. 9, § 4; Henry on For. Law, p. 12 to 15; Scott v. Alnutt, 2 Dow & Clarke, 404. See also Selkrig v. Davies, 2 Dow, R. 230, 250; post, § 383, 435.—Mr. Burge, speaking on this subject, says; "There is an entire concurrence amongst them (jurists) in considering, that the title to movables, or the validity of any disposition of them, is not governed by the law of their actual situs. This, which may be regarded as a general rule, is subject to this qualification, that the law of the country, in which the movable may be actually situated, has not prescribed some particular mode, by which alone the movable can be transferred. Thus, property in the public funds or stocks, shares in companies, joint stocks, &c., is a species of personal property, which, as it is created, so it is regulated by the law of the country, in which it exists. Certain forms are prescribed, by which alone the holder of any share or interest can transfer it. Here the transfer is so far sub-

§ 365. The same doctrine has been laid down in equally emphatic terms in the Scottish courts. Lord Robertson in a highly interesting case said; "Although the rule, as to the Lex loci contractus, is of very general application, particularly as to the constitution and validity of personal contracts and obligations, it is not universal. In the first place, it does not apply to contracts or obligations relative to real estates." Lord Bannatyne, on the same occasion, affirmed the like principle. And it has received an

ject to the law of the place, where the property is situated, that the legal title to it is not acquired unless those forms are observed. But although the contract may, in consequence of a non-compliance with those forms, fail in conferring the legal title on the diponee, yet it will give him a right to compel the disponer, by action or suit, to make a transfer in the manner required by the local law. To this limited extent the lex loci rei site affects and controls the transfer by acts inter vivos of certain movables. But unless the local law gives to them the quality of immovable or real, as it may do, and has done in many instances, they still, as subjects of succession, are governed by the law of the owner's domicil. The rule is, that the title to movable property is governed by the law of the place of the owner's domicil; and this rule is uniformly applied in deciding on the title to movable property as a subject of succession. The law of the owner's domicil is not that, which exclusively decides on the title to moveable property, as a subject of transfer and acquisition by acts inter vivos. When contracts of purchase and sale, mortgage or pledge, are completed in a place, which is not the domicil of the owner, the validity of such contracts and the rights and obligations, which they confer, are governed by the law of the country, in which they are completed. 'Semper in stipulationibus, et in cœteris contractibus id sequimur, quod actum est : aut si non pareat, quid actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur.' 'Generaliter enim in omnibus, que ad formam ejusque perfectionem pertinent, spectands est consuetudo regionis, ubi sit negotiatio, quia consuetudo influit in contractus, et videtur ad eos respicere, et voluntatem suam eis accommodare.' " 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 751. 752; 2 Burge, Comm. Pt. 2, ch. 9, p. 863 to p. 870. See post, § 434.

¹ Forgusson on Marr. and Div. p. 395; Id. 397. See Ersk. Inst. B. 3, tit. 2, § 40, p. 515; post, § 436, and note.

² Fergusson on Marr. and Div. p. 401; 2 Kaims on Equity, B. 3, ch. 2, § 2.—Erskine, in his Institutes, seems to assert a more modified doc-

unequivocal sanction in America; where it has been broadly declared to be a well settled rule, that any title or interest in land, or in other real estate, can only be acquired or lost agreeably to the law of the place, where the same is situate.¹

365 a. Paul Voet has expressed the same opinion. Quid si itaque contentio de aliquo jure in re, seu ex ipsâ se descendente? Vel ex contractu, vel actione personali, sed in rem scripta? An spectabitur loci statutum, ubi dominus habet domicilium, an statutum rei sitæ? Respondeo; Statutum rei sitæ. Ut tamen actio etiam intentari possit, ubi Reus habet domicilium. Idque obtinet, sive forensis sit ille, de cujus re controversia est, sive incola loci, ubi res est sita.²

§ 366. This doctrine may be farther illustrated by the case of Scotch heritable bonds. By heritable bonds in that law are meant bonds for the payment of money, which are secured by a conveyance or charge upon real estate. Such bonds usually contain not only a charge upon real estate, but a personal obliga-

trine. He says; "All personal obligations or contracts entered into according to the law of the place, where they are signed, or as it is expressed in the Roman Law, secundem legem domicilii, vel loci contractus, are deemed effectual, when they come to receive execution in Sootland, as if they had been perfected in the Scotch form. And this holds even in such obligations as bind the granter to convey subjects within Scotland; for where one becomes bound by a lawful obligation, he cannot cease to be bound by changing places." Yet Erskine afterwards adds, that if an actual conveyance of the property had been made, not according to the Scotch forms, the courts of Scotland would not compel the party to convey, nor treat it as an obligation of the granter to execute a more perfect conveyance. Ersk. Inst. B. 3, tit. 3, 4 40, 41, p. 515. See post, § 436.

¹ Cetter v. Davenport, 1 Pick. R. 81; Hosford v. Nichols, 1 Paige, R. 220; Wills v. Cowper, 2 Hamm. R. 124; S. C. Wilcox, R. 278; post, § 424, 427, 435.

² P. Voet, de Statut. § 9, ch. 1, n. 2, p. 250, edit. 1715; Id. p. 305, edit. 1661; post, § 426, § 442.

tion to pay the debt. In general, by the Scotch law, mere personal bonds and other debts, on the decease of the creditor, pass to his personal representative; but heritable bonds belong to the heir; because the charge on the real estate, being jus nobilius, draws to it the personal right to the debt. According to the Scotch law, no contract or other act, disposing of an heritable bond, will be good, unless it is according to the law of Scotland; and no contract, intended to create such a heritable bond, will be valid, as such, unless it be made with the solemnities of the Scotch law. There are other collateral consequences growing out of the same doctrine. Thus, if a Scotch heir should seek to be exonerated from a heritable bond by the application of the personal assets in England, his right would depend upon the law of Scotland, that is, the law of the place, where the real estate was situate; and would not depend upon the law of the place, where the personal estate happened locally to be.3

§ 367. The same reasoning seems to have governed in the House of Lords in a recent case, where certain entailed estates in Scotland were sold for the redemption of the land tax, and the surplus money of the proceeds of the sale was vested, according to a statute on the subject, in trustees, who were

¹ Ersk. Inst. B. 2, ch. 2, § 9 to § 20, p. 198 to p. 204; Id. B. 3, tit. 2, § 39, 40, 41, p. 514, 515; Jerningham v. Herbert, 1 Tamlyn, R. 103; 2 Bell, Comm. § 668, p. 7, 8; Id. § 1266, p. 690, 4th edit.; Id. p. 687, 5th edit.; post, § 485, to § 489.— Yet Mr. Erskine in his Institutes seems to admit, that obligations to convey things in Scotland, although not perfected in the Scottish form, yet if perfected according to the Lex domicilii of the parties, are binding in Scotland, not as conveyances, but as contracts, under some circumstances. Ante, § 365, note 2.

² Elliott v. Lord Minto, 6 Madd. R. 16; Earl of Winchelsea v. Garetty, 2 Keen, R. 203, 309, 310; ante, § 266 a. See also 4 Burge, Comm. on Col. and For. Law, ch. 15, § 4, p. 722 et seq.

required to pay the interest of it to the heir of entail in possession, until the money should be reinvested in land. The heir of entail next entitled sold his reversionary and contingent right to the interest of this fund by a deed in the English form, and executed in England, where the parties were domiciled, but without the solemnities required by the law of Scotland. It was admitted, that the fund was to go to the heirs in entail, and that the principal thereof was consequently heritable, and could only be passed according to the solemnities of the law of Scotland, But the House of Lords adjudged the intermediate interest of the surplus, before the investment in lands, to be movable property, and alienable by the proprietor, as such; and, therefore, they held the assignment of it according to the English law good.1

§ 368. From what has been already stated in the preceding discussions, it will be seen, that foreign jurists are by no means agreed in admitting the general doctrine.² On the contrary some of them maintain, that the validity of a contract is, in all cases, to be governed by the law of the place, where it is made, whether it regards movables or immovables.³ Thus, in respect to the capacity of persons to contract, their doctrine is, that, if they are of age to contract in the place of

¹ Scott v. Alnutt, 2 Dow & Clark, 404, 412.

² Ante, § 260 to § 263. See also ante, § 82, § 325 to § 327; post, § 369 to § 373, § 474 to § 479. See 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 840 to p. 871.

Ante, § 52, 53, 60, 61, 62; post, § 435 to § 445. See also Fœlix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 37, p. 307 to p. 311; Id. p. 352 to 360; post, § 371 f, note. — Mr. Burge has made a large collection of the various opinions of foreign jurists on this subject. 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 840 to p. 871.

their domicil, but are not in the place, where their immovable property is situate, the contract to sell or alienate the latter will be valid every where; and so, vice versá.¹ Others hold a different opinion, and insist, that, whatever may be the law of the domicil, as to capacity, and although it governs the person universally; yet it does not apply to immovable property in another country.²

¹ Ante, § 51 to § 54, § 58 to § 63; post, § 430 to § 435; Rodenburg, tit. 1, ch. 3; Id. tit. 2, ch. 3; Liverm. Diss. § 44, 45, 46, p. 48, 49; Id. § 55, 56, p. 56; Id. § 58, 59, p. 58; 1 Boullenois, Observ. 2, p. 27; Id. p. 145; Id. Observ. 9, p. 152, 153, 154; Id. Observ. 12. p. 175 to p. 177; Id. Observ. 23, p. 456 to p. 460; 1 Froland, Mém. 156, 160. See on this point Fœlix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 27 to § 33, p. 216 to p. 228; 2 Burge, Comm. on Col and For. Law, Pt. 2, ch. 9, p. 840 to p. 870.

² Ante, § 54 to § 62; poet, § 430, 431, 432, § 435 to § 445; Livern. Diss. § 44, p. 48, 49; Id. § 46 to § 53, p. 49 to p. 53; Id. § 59, p. 58. See 1 Boullenois, Observ 6. p. 127 to 30, 135; 1d, Observ. 9, p. 150 to 156; J. Voet ad Pand. Lib. 1, tit. 4, § 7, p. 40; 2 Froland, Mém des Stat. 821. — There are some nice distinctions put by different authors upon this subject, which are stated with great clearness and force by Mr. Livermore, (Dissert. § 58, p. 58 to 62,) and upon which we may have occasion to comment more fully hereafter. At present it is only necessary to say, that Boullenois, Bouhier, and others hold, that, while the law of the domicil, as to general capacity, governs as to contracts and property every where, the law of the situs of immovable property governs, as to the quantity, which the party, having full capacity, may sell, convey, or dispose of. See Livermore, Diss. § 58 to § 63, p. 58: 1 Boullenois, Prin. Gén. 8, p. 7; Id. Observ. 6, p. 127 to 133; Id. Observ. 12, p. 172, 175, to 178; Id. Observ. 13, p: 177, 183, 184, 188, 189; Bonhier Cout. de Bourg. ch. 21, § 68 to § 70; Id. § 81 to 84. See also 1 Boullenois, Observ. 5, p. 101, 102, 107, 111, 112; 2 Henrys, Œuvres, Lib. 4, ch. 6, Quest. 105. Rodenburg seems to admit, that a contract respecting real property, which is entered into according to the forms of the Lex loci contractus may be good to bind the party personally, although it is not according to the forms prescribed by the Lex rei site. Rodenburg, tit. 2, ch. 3; 1 Boullenois, 414, 415, 416; 2 Boullenois, Appx. p. 19. Mr. Fœlix has enumerated many of the jurists on each side of this question in his Dissertation on the Conflict of Law. Fælix, Conflix des Lois, Revue Etrang. et Franc. 1840, Tom. 7, § 27 to § 32, p. 216 to p. 221; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 840 to p. 870.

§ 369. So, in respect to express nuptial contracts, we have seen, that many foreign jurists hold them obligatory upon all property, whether movable or immovable, belonging to the parties in other coun-

Muhlenbruch, who is a very modern author, and is cited by Mr. Fælix, has a single passage on the subject, which, from its generality, may serve to show, how difficult it is to obtain any certainty, as to the exact opinion of foreign jurists on the various questions, which may arise from the conflict of laws as to personal capacity, contracts, and rights to property. He lays down the following rules on the subject. (1.) Jura atque officia ejusmodi, que hominum personis inhærent, et quasi sunt infixa, ex hisque apte pendentia, tum etiam ea, que ad universitatem patrimonii pertinent, ex legibus judicanda sunt, quæ in civitate valent, ubi is, de quo quæritur, larem rerumque ac fortunarum suarum summam constituit, scilicet non adversante exterarum civitatum jure publico. Enimvero mutato domicilio jura quoque hujusmodi mutantur, sic tamen, ut ne cui jus ex pristina ratione quæsitum, certisque suis terminis jamjam definitum eripiatur. (2.) Jura, quæ proxime rebus sunt scripts, velut que ad dominii causam spectant, vel ad vectigalium tributorumque onus, vel ad pignorum in judicati exsecutionem et capiendorum et distrahendorum, tum etiam rerum apud judicem petendarum persequendarumve rationem, et quæ sunt reliqua ex hoc genere, æstimantur ex legibus ejus civitatis, ubi sitæ sunt res, de quibus agitur, atque collocate, nullo rerum immobilium atque mobilium habito dis-(3.) Negotiorum rationem quod attinet, de forma quidem, quatenus non nisi ad fidem auctoritatemque negotio conciliandam valeat, nec in aliarum legum fraudem actum sit, non est, quod dubitemus, quin accommodate ad ejus loci instituta, ubi geritur res, dirigenda sit atque sestimanda. Nec est, quod non idem statuamus aut de personis, scilicet possintne omnino jure suo et velut arbitrio negotia instituere? Aut de negotiorum materia, atque vi et potestate, que iis cum per se insit, tum vero quoad agendi excipiendique facultatem, hac tamen itidem adscripta exceptione, ut ne quid in aliena civitate fiat contra ejusdem civitatis mores, leges, instituta, ad que immutanda prorsus nihil valet privatorum arbitrium. Quid? quod omnino sese, qui negotium aliquod insituerunt, tacite accommodasse videri possunt ad ejus regionis leges consuctudinesve, in qua ut exitum habeat res, de qua agitur, aut legum decreto, aut privatorum auctoritate certo constitutum est. (4.) Judex igitur, qui rem apud exteros natam judicabit, ea certe, que ad formam modumque litium instituendarum pertinent, adjurium normas institutaque, quibus ipse paret, dirigat necesse est. In reliquis vero, quatenus aut idem illud servet jus domesticum, aut jus exteris scriptum, tamquam privatorum voluntate constitutum,

tries, if they are valid by the law of the place of the nuptial contract.¹ And in respect to implied nuptial contracts, all those jurists, who maintain, that the law of the domicil furnishes, in the absence of any express contract, the rule to ascertain the rights and intentions of the parties, by way of tacit contract, necessarily give to the doctrine the same universal operation.²

§ 369 a. Dumoulin is most emphatic upon this matter. Primo, in sano intellectu, (says he,) nullum habet dubium, quin societas (he is speaking of cases of marriage) semel contracta, complectatur bona ubicunque sita, sine ulla differentia territorii, quam ad modum quilibet contractus, sive tacitus, sive expressus, ligat personam, et res disponentis ubique. Non obstat, quod hujusmodi societas non est expressa, sed tacita, nec oritur ex contractu expresso partium, sed ex tacito, vel præsumpto contractu a consuetudine locali introducto.³

§ 370. Merlin seems to think, that, although in

in judicando sequatur, id ex principiis modo propositis quisque facile intelliget. Quibus etiam hac esse consentanea videntur, ut prescriptio quidem acquisitiva, quam vocant, ex juribus rei site, extinctiva vero ex judicii accepti legibus astimanda sit, praterquam quod nihil hac quoque ratione juris detrahatur actori, si forte ingratiis suis loco haud condicto convenire reum cogatur; ut actiones, que vel ad rescindenda negotia, vel ad damna resarcienda comparate sunt, secundum legis loci, ubi res acta est, judicentur, nisi si ut alio loco fiat solutio, inter partes convenerit. Caterum que de negotiorum alibi contractorum in alieno territorio vi diximus atque potestate, eadem sententiis quoque decretisque a judice prolatis apt convenient. Muhlenbruch, Doctrina Pandectarum, Tom. 1, p. 166 to 170. See also P. Voet, de Statut. § 4, ch 2, n. 15, p. 127; Id. p. 142, edit. 1661.

¹ Ante, § 143 to § 160.

² Ante, § 57, § 143 to § 171; Boullenois, Observ. 5, p. 120, 121; Id. p. 673, 674; Id. Observ. 29, p. 757 to p. 767.

³ Dumoulin, Consil. 53, Tom. 2, § 2, p. 964, edit. 1681; 2 Burge, Comm. Pt. 2, ch. 9, p. 864, 865; ante, § 260.

general the French law must govern in all cases of immovables in France, even when the owners are foreigners; yet that there are exceptions to the rule. As, for instance, if the foreign law, in the country, where a contract is made respecting immovables, has been adopted by the contracting parties, and converted by them into an express contract; in such a case, he holds, that the contract is binding, because the foreign law, as such, does not act upon the immovables in France; but it acts solely by way of contract. And he applies the same principle to cases, where there is no express adoption of the foreign law, but where it arises by way of tacit contract from the place of the contract.

§ 371. On the other hand, Pothier treats as real property, not only lands and houses and inheritable property, but also all rights in them, and growing out of them; such as ground rents, or other rents annexed to lands and inheritances, which fall under the denomination of jus in re; and also all rights to inheritances which fall under the denomination of jus ad rem, such as contracts or debts (créances) respecting the sale and delivery of immovable property, which are deemed to have the same situation, as the things which are the object of them. Les choses, qui ont une situation véritable, sont les héritages, c'est à dire, les fonds de terre, el maisons, et tout ce, qui en fait Les droits réels, que nous avons dans un héritage, qu'on appelle Jus in re, tels qu'un droit de renté fonciere, de champart, &-c. sont cénses avoir le meme situation, que cet héritage. Pareilment, les droits, qué nous avons à un heritage, qu'on appelle Jus ad rem,

¹ Merlin, Répert. Lois, § 6, n. 2, 3

² Ibid.

c'est à dire, les créances, que nous avons contre quelqu'un, qui c'est obligé à nous donner un certain héritage, sont censés avoir la meme situation, que l'héritage. qui en est l'objet.1 And he asserts the general principle, that all things, which have a real or fictitious situation, are subject to the law of the place, where they are situate, or are supposed to be situate. Toutes ces choses, qui ont une situation réelle, ou feinte, sont sujettes à la'loi ou coutume du lieu, où elles sont situées, ou censeés d'etre. 2 This also is the doctrine maintained by Rodenburg and Boullenois.3 Media, in a general view, assents to it.4 Pothier further states in relation to debts, which are but just and rem, that they follow the nature of the thing, which is the object of the contract, according to the maxim; Actio mobilis est mobilis; actio ad immobile est immobilis. Hence, a debt due for money, or for any morable thing, belongs to the class of movable property.

¹ Pothier, Coutum. d'Orléans, ch. 1, § 2, n. 23, 34; Id. ch. 3, á. 說; 足. Traité des Choses, § 3; post, § 382.

² Pothier, Coutum. d'Orléans, ch. 1, § 2, n. 24; Id. ch. 3, n. 51; M. Traité des Choses, § 3.

^{3 1} Boullenois, Prin. Gén. 34, 35, 36, p. 8, 9; Id. Obs. 5, p. 121, 120; IL. p. 223, 224, 225; Id. Obs. 20, p. 374, 381, 488; 2 Boullenois, Obs. 46, p. 25; Rodenburg, De Div. Stat. tit. 2, ch. 2, n. 2, p. 15; Henry on Foreignles, 14, note; Id. 15. — Cochin lays down the following doctrine: "Les families, dont un acte doit être revêtu, se règlent par la loi, qui chilés lie empire dans le lieu, ou l'acte a été passé; mais, quand il shalles pliquer les clauses, qu'il renferme, aux biens des parties containts, c'est le lieu de la situation de ses biens, qui doit seule être containts." And he illustrates by reference to a donation, in Paris, of impublication de la contains intervivos are prohibited, labin, dat such donations, although clothed with all the proper Parisian families, are nullities. He then adds, "Ce n'est donc pas la loi du lieu, a l'este a été passe, qui en détermine l'effet." Cochin, Chuvres, Tous & p. 25.

⁴ Merlin, Répertoire, Meubles, § 5; Id. Biens, § 2, n. 2; Id. Lei § 6 n. 3.

also, does a contract to do, or not to do any particular thing. He admits, that the same rule applies, even when it is accompanied by an hypothecation of immovable property therefor. So that, when a debt is executed, and an hypothecation is made of immovable property, as collateral security, the debt is still to be deemed a movable debt, although the hypothecation might, per se, be an immovable debt; because the debt is the principal, and the hypothecation the accessory; and, Accessorium sequitur naturam principalis.1 But he insists, that contracts, which have for their objects any inheritable property, or other immovable, are to be deemed immovable property; such as for instance, in the case a contract for the purchase of real estate, the right of the vendee against the vendor for the delivery of the same.2

§ 371 a. D'Argentre says; Whenever the question respects immovables or inheritances, situate in different places, where there are different modes of acquiring, transferring, and asserting ownership, and the question is, by what law they are to be governed, the most certain rule in use is, that the law of the place, where the property is situate, is for the most part to be observed, and its laws, statutes, and customs to be observed. He adds, that this rule prevails in contracts, in testaments, and in commercial matters. Cum de rebus soli, id est immobilibus agitur, (quils appellent d'héritage,) et diversa diversarum possessionum loca et situs proponuntur, in acquirendis, transferendis, aut asserendis dominiis, et in controversia est,

1 Pothier, Coutum. d'Orléans, ch. 1, § 2, n. 24; Id. n. 50.

Pothier, Coutum. d'Orléans, ch. 3, art. 2, n. 50, n. 51; Id. Traité des Choses, § 2. See Merlin, Répertoire, Biens, § 1, n. 13, § 2, n. 1; Id. Meubles, § 2, 3; Liverm. Diss. p. 162, 163.

quo jure regantur, certissima ust observatio est, id jus de pluribus spectari, quod loci est, et suas cuique loco leges, statuta, et consuetudines servandas, et qui cuique mores de rebus, territorio, et potestatis finibus sint recepti, sic ut de talibus nulla cujusquam potestas sit præter territorii legem. Sic in contractibus, sic in testamentis, sic in commerciis omnibus, et locis conveniendi constitutum; ne contra situs legem in immobilibus, quidquam decerni privato consensu, et par est sic judiciari.

§ 371 b. Christinæus adopts the very language of D'Argentre with seeming approbation; although there are other passages, in which he seems to admit, that a different rule prevails in respect to the acts which are done by a party, which are to be governed by the Lex loci actûs. At least he cites without disapprobation the doctrine of Baldus (who certainly contradicts himself in the passages cited), that in the solemnities of testaments, the law of the place, where the testament is made, is to govern, even although the property is situate elsewhere. However, he admits, that, in Belgium, by an express edict, the law of the situs in such cases prevails.

§ 371 c. John Voet has expressed a very different opinion. He holds, that it is sufficient in all cases, whether the contract respects movable property, or immovable property, to follow the law of the place, where the contract is made, and the act done, whether it be a contract, or a will. Neque minus de statutis mixtis, actus cujusque solemnia respicientibus, percre-

¹ D'Argent. ad Boit. Leg. Des Donat. Art. 218, Gloss. 6, n. 3, 1 vol. p. 647; post, § 438.

² Christinæus, Tom. 2, Decis. 3, n. 1, 2; Id. Decis. 4, n. 1, 4, 5, 6, p. 4, 5, 6.

³ Id. Decis. n. 7.

⁴ Id. Decis. 4, n. 1, 2, 3, p. 6.

buit, insuper habitis de summo cujusque jure ac potestate ratiociniis, ad validitatem actus cujusque adhibitionem solemnitatum, quas lex loci, in quo actus geritur, præscripserit observandas; sic ut quod ita gestum fuerit, sese porrigat ad bona mobilia et immobilia, ubicunque sita aliis in territoriis, quorum leges longè alium, longeque pleniorem requirunt solemnium interventum. He assigns as the principal reason, that otherwise, from ignorance or want of skill, it would be almost impossible for a man, who possessed real property, to make a valid disposition thereof by an act inter vivos, or by testament. He adds, that this rule prevails in Belgium, in Spain, in Germany, and in France.

¹ J. Voet, ad Pand. Lib. 1, tit. 4, Pr. 2, § 13, p. 45.

² Ibid.

³ Ibid. citing authorities. His language is; "Quod ita placuisse videtur, tum, ne in infinitum prope multiplicarentur et testamenta et contractus, pro numero regionum, diverso jure circa solennia utentium: atque ita summis implicarentur molestiis, ambagibus, ac difficultatibus, quotquot actum, res plures pluribus in locis sitas concernentem, expedire voluerint: tum etiam, ne plurima bona fide gesta nimis facile ac prope sine culpà gerentis conturbarentur. Tum quia ne ipsis quidem in juris praxi versatissimis, multoque minus aliis simplicitate desidiaque laborantibus, ac juris scientism haud professis, satis compertum est, ac vix per industriam exquisitissimam esse potest, que in unoquoque loco requisita sint actuum solennia, quid indies in hac vel illà regione novis legibus circa solennium observantiam mutetur: ut proinde, que ratio de militari testamento obtinuit Quiritium jure, milites nempe solennibus paganorum non fuisse adstringendos, dum in castris et expeditione occupati crant, quia et juris imperiti crant, et peritiores consulere in castris non poterant, etiam nunc suadeat, illum, qui actum gerit, ad alterius loci, quam in quo gerit, solennia non esse obligandum : quia et probabiliter aliorum locorum solennia ignorare potest, et in loco, in quo actum gerit, peritiores morum alienze regionis non satis consulere; dum ita fere comparatum est, ut pragmatici, quibus auctoribus contractus celebrantur, aut conduntur testamenta, vesati quidem plerumque satis sint in jure patrio, non item locorum omnium et universi orbis jure; atque insuper non raro more ad inquisitionem anxiam adhibendam impatiens est, quod geritur negotium.

§ 371 d. Paul Voet holds a similar opinion; and puts several cases to illustrate it. If a testator in the place of his domicil makes a will according to the law of the place rei sitæ, but not according to the law of the place of his domicil, he asks the question, whether such a will is good, as to property situate elsewhere; and he answers in the negative. He next puts the case of a testator, who makes his will according to the law of his place of domicil, as for example, before a notary and two witnesses; and asks, whether the will has effect upon property situate in another country, where more and other solemnities are required; and he answers in the affirmative. He then asks, if a foreigner makes his will according to the law of the place, where he is merely lodging or commorant. whether the will is valid elsewhere, where he either has immovable property, or he has his domicil: and he answers in the affirmative. The only exception he makes is, where the testator, in order to evade the law, or in fraud of the law of his own domicil. goes into another country, and there makes his will.1

§ 371 e. Hertius, as we have seen,² lays down the rule, that as to the forms and solemnities of acts and contracts, they are to be governed altogether by the law of the place, where the acts are done, and con-

ergo in Frisià septem testes in testamento requiri constet, alibi fere tabellionis testiumque duorum præsentia ac fides sufficiat, aut saltem in universum longe minor solennitas desideretur; tamen æquitate rei motus Frisiæ Senatus ratam habuit de bonis Frisicis dispositionem, Sylvæducis coram parocho duobusque testibus declaratam, juxta Sylvæducensis regionis usum. Et ita in praxi hæc Belgis, Germanis, Hispanis, Gallis, aliisque placuisse, auctores cujusque gentis testantur.

¹ P. Voet, de Statut. § 9, ch. 2, n. 1, 2, 3, 4, p. 261, 262, edit. 1715; Id. p. 317, 318, 319, edit. 1661.

² Ante, § 260.

tracts made, and not by the law of the domicil of the party, or the law of the situs rei. Si Lex actui formam dat, inspiciendum est locus actus, non domicilii, non rei sitæ; id est, si de solennibus quæratur, si de loco, de tempore, de modo actus, ejus loci habenda est ratio, ubi actus vel negotium celebratur. He adds; Regula hæc apud omnes, quantum quidem sciam, est indubitata; and then says; Valet etiamsi bona in alio territorio sint sita.

§ 372. Burgundus apparently admits, that generally the law of the place of the contract ought in all cases to prevail, so far as respects its form, its ceremonies, and its obligation. The passage already cited 3 is to this effect. In scriptura instrumenti, in solemnitatibus, et ceremoniis, et generaliter in omnibus, quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis, ubi fit negotiatio. Igitur, ut paucis absolvam, quoties de vinculo obligationis vel de ejus interpretatione vel interpretatione quæritur, veluti quos, et in quantum obliget, quid sententiæ stipulationem inessæ, quid abesse credi oporteat, &c., ut id sequamur, quod in regione, in qua actum est, frequentatur.4 But he immediately adds, that if we would know, whether the contract was valid or not in respect to the subject-matter thereof, we must look to the law of the situs. Cæterum, ut sciamus, contractus ex parte materiæ utilis sit vel inutilis, ad leges, quæ rebus, de quibus tractatur, impressæ sunt, hoc est, ad

¹ Hertii, Opera, De Collis, Leg. § 4, n. 10, p. 126, edit. 1737; Id. p. 179, 180; ante, § 238.

² Ibid.

³ Ante, § 300 a.

⁴ Bargundus, Tract. 4, n. 7, 8, p. 104.

consuetudinem situs, respiciemus.¹ He also expresses surprise, that authors, in considering contracts should have excluded altogether the nature of the thing contracted for, and generally to have interpreted contracts according to the law of the place, where they are made; for in sales, and also in letting to hire, and in other contracts, it becomes us to look to the usage touching the subject-matter. Quippe non solum in emptione obtinet, ut ad consuetudinem rei spectare deceat, sed in locatione præterea, en conductione, ceterisque contractibus.² It must be confessed, that on this subject the distinctions and doctrines of Burgundus are open to much question.

§ 372 a. Dumoulin says, that it is the general opinion of jurists, that, wherever the custom or law of a place prescribes the solemnities or form of an act, it binds foreigners, who there do the act; and the act is valid and efficacious even in respect to immovable property, beyond the territory of the custom or law. Et est omnium Doctorum sententia, ubicunque consuetudo, vel statutum locale, disponet de solemnitate, vel forma actus, ligari etiam exteros, ibi actum illum gerentes, et gestum esse validum, et efficacem, ubique etiam super bonis solis extra territorium consuetudinis vel statuti. Gaill adopts an equally broad conclusion. Contractus enim, celebratus cum solemnitate requisita in loco contractus, extendit se ad omnia bona, licet in loco bonorum major solemnibus requireretur.

Burgundus, Tract. 4, n. 8, 9, p. 107, 108;
 Boullenois, Observ. 46, p. 450 to p. 454. See J. Voet, ad Pand. Lib. 1, tit. 4, P². 2, § 12, 13, p. 45;
 post, § 433.

² Burgundus, Tract. 4, n. 9; Id. n. 7; ante, § 302; post, § 433 to § 438.

³ Dumoulin, Consil. 53, Tom. 2, § 9, p. 965; post, 441.

⁴ Gaill, Pract. Observ. 123, n. 2, p. 548.

§ 372 b. Rodenburg, as we shall presently see, goes the full length of this doctrine, and applies it even to the cases of wills and testaments, which, he says, if made according to the law of the place, where they are executed, are valid even upon property situate elsewhere. There are many other jurists, who maintain the same opinion, both as to contracts, and other instruments, and to wills and testaments.

! Rodenburg, de Div. Statut. tit. 2, ch. 3, n. 1; 2 Boullenois, Appx. p. 19; post, § 475.

² Many of them are enumerated in 1 Boullenois, Observ. 23, p. 491 to p. 516; ante, § 301.-Mr. Fœlix also has given us a long list of jurists, who hold the doctrine. Indeed, he thinks the doctrine firmly and generally established. His language is; Un principe aujourd'hui genéralement adopté par l'usage des nations, c'est que la forme des actes est réglée par les lois du lieu dans lequel ils sont faits ou passés.' C'est-àdire que, pour la validité de tout acte, il suffit d'observer les formalités prescrites par la loi du lieu ou cet acte a été dressé ou rédigé ; l'acte ainsi passé exerce ses effets sur les biens meubles et immeubles situés dans un autre territoire, dont les lois établissent des formalités différentes et plus étendues (Locus regit actum). En d'autres termes, les lois, qui règlent la forme des actes, étendent leur autorité tant sur les nationaux que sur les étrangers, qui contractent ou disposent dans le pays, et elles participent ainsi de la nature des lois réelles. Le driot romain ne contient aucune disposition qui consacrat le principe : locus regit actum. Dans lesquelles on a prétendu trouver cette règle, ne parlent point de la forme, mais de la matière des contrats. Dès le temps des glossateurs, la question s'est presentée par rapport aux testaments. Bartole a adopté l'affirmative: Albert de Rosate s'est prononcé pour la négative, sur le motif que la loi n'oblige que les sujets, et que ceux-ci seuls ont le droit d'employer une forme prescrite. Plus tard, Cujas a soutenu, qu'il faut suivre la loi du domicile du testateur : Fachinée exigeait l'accomplissement des formalités precrites dans le lieu de la situation des biens: Burgundus, tout en admettant la régle relativement aux contrats, la rajette quant aux testaments; il regarde comme affectant la chose et comme lois réelles les solennités prescrites pour les testaments, en invoquant l'édit de 1611 (pour les Pays-Bas), art. 12. Choppin, au contraire, soutient que le testament fait en pays étranger, d'après les formes prescrites dans le lieu de la confection, doit sortir ses effets, même à l'égard des immeubles situés dans un autre lieu, et il rapporte un arrêt du parlement de Paris, rendu en ce sens. Dumoulin, Mynsinger et Gail professent la

§ 372 c. Boullenois seems to have labored under no small embarrassment as to the question, whether a

même doctrine. Ces deux derniers auteurs attestent la jurispradence constante de la chambre impériale (Reichskammergericht) en ce sens. Mevius, en admettant aussi la règle générale, fait remarquer que la coutume de Lubeck ne la reconnait que sous les trois conditions suivantes: 1º maladie qui met le testateur en danger de mort; 2º décés réel en pays étranger; 30 absence de toute intention de préjudicier aux héritiere naturels. Rodenburg et Voet, en adoptant la règle par rapportanz contrats comme aux testaments, la motivent sur les raisons suivantes: Ie nécessité d'éviter aux individus possédant des biens dans differents pays, l'embarras et la difficulté de rédiger autant de testaments ou de contrats qu'il y a d'immeubles situés sous l'empire de lois différentses, ou de remplir dans un même testament ou contract toutes les solennites prescrites dans les divers lieux de la situation des biens; 20 impossibilité dans laquelle l'individu surpris à l'étranger par une maladie mortelle peut se trouver de remplir les solennités prescrites dans le pays de son domicile ou de la situation de ses biens; 3º nécessité d'empêcher que les actes faits de bonne foi soient annullés trop facilement sans la faute de la partie ; 40 impossibilité pour la majecure partie des hommes de connaitre les formes prescrites dans chaque localité; 50 enfin. Vost ajoute, qu'il faut appliquer ici les motifs, qui, chez les Romains, ont fait introduire la forme simple du testament militaire. En terminant, cet auteur cite presque tous ses devanciers indiques ci-dessus, en déclarant que l'opinion professée par lui a été reconnue par la jurisprudence dans les Pays-Bas, en Allemagne, en Espagne, et en France. Tel est aussi le sentiment de Zoesius, Grotius, Christin, Paul Voet, Vinnies, Jean de Sande, Vander Kessel, Vasquez, Perez, Cochin, Boullenois, Menochius, Carpzov, Huber, Hert, Hommel, Gluck, Thibant, Denz, Weber, Mansord, Muhlenbruch, Mittermaier, Tittman, Merlin, Meier, Pardessus, Story, Rocco, Hartogh, et Burge." Folix, Conflit des Lois Revue Etrang. et Franç. 1840, Tom. 7, § 40 to § 42, p. 346 to 350. Mr. Fælix has, however, subsequently qualified the general doctrine here stated by the following exceptions. "L'acte fait d'après les formes prescrites par la loi du lieu de sa rédaction est valable, non-seulement par rapport aux biens meubles appartenant à l'individu et qui se trouvent au lieu de son domicile, mais encore par rapport aux immenhles, en quelque endroit qu'ils fussent situés. Cette dernière proposition, selon la nature des choses, admet une exception, dans le cas nu la loi du lieu de la situation prescrit, à l'égard des actes translatifs de la propriété des immeubles, ou qui y affectent des charges réelles, des formes particulières, qui ne peuvent être remplies ailleurs que dans ce même lieu; telles sont la rédaction des actes par un notaire du

contract was obligatory or not, merely by pursuing forms or solemnities prescribed by the law of the

même territoire, la transcription ou l'inscription aux registres tenus dans ce territoire, des actes d'alienation, d'hypothèque, etc. L'acte fait dans un pays étranger suivant les formes qui y sont prescrites, ne perd pas sa force, quant à sa forme, par le retour de l'individu au lieu de son domicile; aucune raison de droit ne milite en faveur de l'opinion contraire. La règle, locus regit actum, ne droit pas être êtendue au delà des limites, que nous lui avons tracées au no 40; elle ne s'applique qu'à la forme extérieure' et non pas à la matière ou substance des actes, ainsi que nous l'expliquerons encore au § suivant. Ainsi, dans un testament, la capacité de la personne et la disponibilité des biens ne se règlent point par la loi du lieu de la rédaction. Dans les dispositions entre-vifs, soit à titre oné reux, soit à titre gratuit, la loi du lieu de la rédaction peut avoir influé, soit sur l'ensemble de l'acte, soit sur les termes employés par les parties; et, sous ce double titre, cette loi peut être consultée par les juges comme moyen d'interprétation; mais elle ne forme pas la loi décisive, à moins que les parties ne s'y soient soumises expressément." He afterwards adds; "La règle d'après laquelle la loi du lieu de la rédaction régit la forme de l'acte, admet differentes exceptions, dont voici les principales: 1º Lorsque les contractants ou l'individu dont émane une disposition se sont rendus en pays étranger dans l'intention d'éluder une prohibition portée par la loi de leur domicile; car la fraude fait exception à toutes les régles; 26 Lorsque la loi de la partrie défend expressément de contracter ou de disposer hors du territoire et avec des formes autres que celles prescrites par cette même loi; car alors l'idée d'un consentement tacite de cette nation se trouve formellement exclue. exception est la même que celle indiquée par M. Eichhorn, sous le no 2; 30 En cas d'opposition expresse du statut réel Voy. supra, no 43; Lorsque la loi du lieu de la rédaction attache à la forme qu'elle prescrit un effet, qui se trouve en opposition avec le droit public du pays ou l'acte est destiné à recevoir son exécution; 50 Par rapport aux ambassadeurs ou ministres publics et à leur suite. Ces personnes ne sont pas soumises aux lois de la nation près de laquelle elles exercent leur mission diplomatique." And he finally sums up thus; "Une autre question est celle de savoir, si le contractant ou disposant, que se trouve en pays étranger, peut se borner à employer les formes prescrites par la loi du lieu de la situation de ses immuebles, au lieu de suivre celle du lieu de la rédaction? Nous tenons pour l'affirmative, par une raison analogue à celle donnée sur la question précédente. Le statut réel régit les immeubles; c'est un principe résultant de la nature des choses; la permission d'user des formes établies par la loi du lieu de la rédaction de "acte n'est qu'une exception introduite en faveur du propriétaire, et à

place, where it is made. He puts the case of two persons contracting, who are domiciled in one place,

laquelle il lui est loisible de renoncer. Tel est aussi le sentiment de Rodenburg, de Jean Voet, et de Vander Kessel; Cocceii soutient même que la forme des actes entre vifs ou testamentaires est régie exclusivement par la loi de la situation des biens. Fachinée et Burgandus (V. suprà, no 41) partageaient cet avis, mais par rapport aux testaments seulement. En Belgique, l'edit perpétuel de 1611, art 13, ordonnait, qu'en cas de diversité de coutume au lieu de la résidence du testateur et au lieu de la situation de ses biens, on suivrait par rapport à la forme et à la solennité, la coutume de la situation. Paul Voet, Huber, Hert, Hommel et l'auteur de l'ancien répertoire de jurisprudence, se prononcent pour la nullité; ce dernier invoque l'autorité de Paul de Castres, au passage rapporté au no précédent, et le principe que la loi lie tous les individus, vui vivent dans son ressort, ne fut-ce que momentanément. Nous renvoyons à ce sujet aux observations présentées sur la question précédente. Mevius distingue entre le citoyen faisant partie de la nation dans le territoire de laquelle les biens sont situés, et entre l'étranger; il n'accorde qu'au premier la faculté de tester ou de contracter partout d'après les formes prescrites au lieu de la situation. L'auteur ne donne pas de motif de cette distinction, et nous ne pouvons la trouver fondée." Fælix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, p. 352 to p. 360. See also the opinions of foreign jurists on the subject, 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 840 to. 871. In respect to some of these he has certainly been led into an error; and some speak so indeterminately, that it is difficult to gather, what their opinion is. It is certain, that Mr. Fœlix has misunderstood the opinion of Mr. Story in his Conflict of Laws (see § 364); and also the opinion of Mr. Burge. See 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 21 to p. 24. His language is; "In examining all contracts, instruments, or dispositions, whether they are made inter vivos, or are testamentary, our attention may be directed to four subjects; the first is, the capacity of him. who makes it; the second is, the property, which is the subject or occasion of the contract or instrument; the third regards the formalities or ceremonies, with which it is made; and the fourth is the judicial process, by which the rights, which it confers, are to be enforced. The capacity of the party to make the instrument is ascertained by consulting the law of the place of his domicil; because it is that law, and that law alone, which affects the person, and which gives or denies him the capacity or power to make the instrument. With respect to the property. the subject of the contract, disposition, instrument, or testament, recourse is had to the real law, being that, which prevails in the place, in which the property, if immovable, is actually situated; or in which. if it be movable or personal, it is persumed to be situated; that is, in

and contract in another, and the thing, respecting which the contract is made, being situate in another,

the place of the possessor's domicil. When, however, it is necessary to ascertain, whether the contract be valid, what is its true construction and effect, and whether the instrument, in which it is expressed, or whether a testament be duly and formally made, recourse is had to the law of the place, in which the contract is entered into, or the instrument or testament was made; because, if it be made according to the forms prescribed by that law, it is valid every where. statutum loquitur de his, quæ concernunt nudam ordinationem vel solemnitatem actus, et semper inspicitur statutum, vel consuetudo loci, ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis aut aliis conficiendis, ita quod testamentum, factum coram duobus testibus in locis, ubi non requiritur major solemnitas, valet ubique.' A distinction, however, must be observed between such solemnities as are purely formal, and those, which are of the substance and essence of the disposition or instrument. There are some solemnities, which intrinsically affect the disposition itself, so as to render their observance essential to its validity, whilst there are others, which only extrinsically regard them. An example of the former description of solemnities is given by Stockmans, in the case of a law, which prohibits the husband and wife from instituting the one the heir of the other, unless by a will executed before two notaries. If the party made a will in the common form, in a place where no such law prevailed, it would be invalid, in respect of property situated in the place, where it did provail. Similar examples are afforded by the English Statute of Frauds, which denies the capacity to devise real property, otherwise than by a will attested by three or more credible witnesses; and by the law of Jamaica, which enables a married woman to convey her real estate, and a tenant in tail to bar the remainder, and acquire the fee by a simple conveyance; but it requires at the same time, that the married woman should be examined apart from her husband, and that the conveyance should be acknowledged and recorded. The following example of that species of solemnity, which is extrinsic to the disposition, is given by Stockmans, in the case, which has been cited; 'Si quis incola ditionis regiæ testetur in urbe Leodiensi, ubi testatoris subscriptio in testamentis necessaria non est, sed sufficit communis ritus, qui in aliis publicis instrumentis requiritur.' There may be said to be three species of solemnities; first, those, which are requisite to enable the person, as for instance, the authority from the husband to the wife, essential, by the law of some countries, to the validity of her act. These are derived from, and must be examined with reference to the law of the domicil, or the Lex loci rei site. Secondly, those, which form a part of, and are essential to the act, such as the delivery of the subject-matter of a gift.

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and asks, what ought to be the form and solemnities necessary to make it valid, if in each place they are different. If it is clear, that the forms appertain to the solemnities of the act, he thinks, that there is no difficulty in affirming, that the law of the place of the contract ought to govern. If the forms relate to the capacity of the person, then the law of the place of his domicil ought to govern. But if, on the contrary, they appertain either to the substantials of the contract, or its nature, or its accidents, or its fulfilment, (sive ad substantialia contractus. sive ad naturalia, sive ad accidentalia, aut complementaria,) there is great difficulty; and if any general rule is established, either to follow the law of the place of the contract, or that of the situs of the thing, or that of the domicil of the contracting parties, a false principle will be introduced; for sometimes the formalities belong to the quality of the person, sometimes to the contract, and sometimes to other things. He, therefore, arrives at the conclusion, that no universal rule can be laid down applicable to all classes of cases.1 In another place Boullenois remarks, that the French authors (nos auteurs) are generally of opinion, that the law of the place of the contract is to govern; Locus contractûs regit actum. And he then proceeds to lav down certain rules on the subject, which have been already cited, as the guiding principles.3 And

The third species of solemnities consists of those, which are designed to establish the truth or authenticity of the instrument, such as the proof by two or more notaries, or one notary and two witnesses, or the number, age, and quality of witnesses required for the validity of a will."

¹ 1 Boullenois, Observ. 23, p. 464, 465, 466; 2 Boullenois, Observ. 46, p. 445.

^{2 2} Boullenois, Observ. 46, 456.

³ Ante, § 240.

among them is the very important rule, applicable to the subject before us, that where the law requires certain formalities, which are attached to the things themselves, the law of the situs or situation is to

§ 372 d. Mr. Burge, after suggesting, that there are three species of solemnities, which he enumerates, adds; "A further distinction may be made between those solemnities, which relate to contracts and instruments for the transfer of real property, and those, by which it is actually transferred. With respect to the first, those are to be followed, which prevail in the place, where those contracts are made, or those instruments executed; but with regard to the actual transfer of such property, those are to be observed, which are prescribed by the law of the place, where it is situated. Thus, a contract to sell or mortgage real property will be valid, if the solemnities are observed, which are required by the law of the place, where the contract is made, and will be the foundation of a personal action against the party to that contract, to compel the transport or mortgage of such property, but no transport or mortgage will be complete, nor will the dominium in the property have been transferred or acquired, unless those solemnities are observed, which are required by the law of the place, where it is situated." 2 Again he adds in another place; "In considering the law, by which the transfer of immovable property is governed, a distinction should be made between the contract to transfer, and the

^{1 2} Boullenois, Observ. 46, p. 467; ante, § 240.

^{2 1} Burge, Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 24; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 844, 845.

actual transfer of the dominium. There may be cases, in which the law of the domicil, or that of the place of the contract, will prevail, notwithstanding it may be opposed to that of the situs, whilst. in other cases, the law of the situs will prevent the contract taking effect. Thus, instances are cited by jurists, where the law of the domicil incapacitates the party from contracting; but the law of the situs authorizes the alienation of his immovables. Thus, by the law of Ghent, persons were minors until they had attained the age of twenty-five years: but in Hainault, a person of the age of twenty might alienate his fief situated in that country. An inhabitant of Ghent contracts to sell a fief in Hainault. of which he was the owner. The contract, in the opinion of Burgundus, would create no obligation on him to complete this alienation. Ut puta, civis Gandensis ætate minor, tamen vigesimum egressus annum, Hannonica feuda sine auctoritate tutoris vendidit; procul dubio in ejusmodi actu nihil agi existimandum est, et inutilem omnino contrahi obligationem; quia Gandavi, qui aliter emancipati non sunt, ante vigesimum quintum annum rebus suis intervenire prohibentur. But if the alienation, were actually made, the same jurist considers, that it would be valid: Si tamen ejusmodi feudi mancipationem fecerit venditor, tutum esse emptorem, et ouod actum erit valere quotidiana accipimus experientia, quando hæc sit ætas et competens, quæ in Hannonicorum feudorum alienatione requiritur. Nec enim consuetudo Gandensis potest tollere libertatem mancipationis, quia res alienas legibus suis alligare non potest; hoc enim jus dicere extra territorium. cision is reported by Stockman, in which the same

doctrine was held. T. being of the age of twenty. and married, was according to the law of his domicil so far emancipated, as to be capable of administering, but not of alienating his estate. He alienated a property situated in Louvain, where the effect of his marriage gave him the full capacity of majority. An action was brought by his heir to recover back the purchase money, on the ground, that T. was incompetent by the law of his domicil to alienate his property, and that this law extended to, and prevented the disposition by him of his property in Louvain. But the purchaser insisted, and the Court held, that the validity of the alienation must be decided according to the law of Louvain, and dismissed the action. It follows from this doctrine, that if the person, competent by the law of his domicil, should contract to make an alienation of property situated in a country, where he was incompetent to make it, his contract could not be enforced, although he might be answerable in damnges to the person, with whom he had contracted. On the other hand, if he were incompetent by the law of his domicil to contract, but competent to alienate by the Lex loci rei site, and an alienation was actually made by him, it would not be rescinded on the ground, that he was incompetent by the law of his domicil to contract. In the cases put by Burgundus, and reported by Stockman, it will be perceived, that the alienation was complete. It does not follow, that if the vendor had refused to perform his contract, the forum of the rei sitæ would have enforced it. The doctrine of Rodenburg is, that the contract is a nullity, and that effect cannot be given to it in any Court to

compel its performance by the delivery of the property. Wesel, who concurs with Rodenburg, treats the delivery or mancipatio as the simplex implementum of the contract; and, as it is required for the validity of a sale, that there should have been a preceding contract, he urges; Cùm ergo totus venditionis contractus ob defectum ætatis sit irritus, nec sit quod mancipatione solenni impleri possit, utique nuda simplexque fundi mancipatio omnino nihil operatur, cessante causâ ad mancipandum idoneá."

§ 372 e. And, again, he says; "So, if those solemnities, which the Lex loci contractus requires, have been observed, and the contract according to that law is valid and obligatory, it will be valid every where else. But the latter proposition is subject to the qualification, that it does not affect immovable property, subject to a law in the country of its situs, which annuls a contract, because it has not been entered into with the solemnities, which it requires. If the disposition of the law does not annul the contract on account of its non-observance of the solemnities, which are prescribed, but gives to it a degree of authenticity or credit, which it will want, if they are not observed, or if, in other words, its effect is either to dispense with a more formal proof of the instrument, if it bears on it evidence of their observance, or if in consequence of the non-observance it attaches a presumption against the execution of the instrument, and therefore requires from the parties a greater burden of proof, such solemnities are to be classed amongst the

^{1 2} Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 844 to 846; Id. p. 867 to 870.

proofs in the cause, which are governed neither by the Lex loci contractûs, nor by that of the situs, but by that of the Forum. This question, in the opinion of Paul Voet, regards non tam de solemnibus, quàm probandi efficaciá; quæ licet in uno loco sufficiens, non tamen ubique locorum; quod judex unius territorii nequeat vires tribuere instrumento, ut alibi quid operetur." There are other jurists, who maintain the same distinction.²

¹ 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 867, 868. See also 3 Burge, Comm. Pt. 2, ch. 20, p. 751, 752.

² P. Voet, ad Statut. § 4, ch. 2, n. 15, 16, p. 142, edit. 1661; Ersk. Inst. B. 3, tit. 2, § 40. - Mr. Burge adds on this point; "When the question regards the property, which the law allows to be alienated, or the persons to whom, or the purposes for which, its alienation may be made, it can be determined only by the law of the situs. The Statutes of Mortmain, the law of death-bed, the restriction of gifts inter conjuges, are strictly real laws, to which the parties to the contract must conform, although no such laws exist in the place of their domicil, or in that of the contract. In these instances the law of the situs is prohibitory, and impresses on the property a quality excluding it from the alienation. A contract, therefore, to make such an alienation as would, in any of these respects, contravene the law of the situs, would be wholly ineffectual. But when the contract does not expressly, nor by necessary implication, contravene it, but on the contrary, may be carried into effect consistently with, or by means of its provisions, although the contract itself may not give a title, yet it will be the foundation of an action by the one to compel the other to complete it in that manner, which the law of the situs requires, in order to give him that title. The observation of Du Moulin, in commenting on an article of the coutume of Auvergne, illustrates this distinction. By that article all contracts or conventions respecting the succession had the effect of vesting the seisin in the person, in whose favor they were made. This great jurist, whilst he thus limits its operation, de prædiis sitis sub hac consuctudine, et non extra ejus territorium, at the same time adds, Valet quidem pactio ubique, sed translatio possessionis, que sit in vim consuctudinis, non valet nisi intra ejus territorium. The deed, by which parties in England convey an estate in British Guiana, has no effect as a transport of it, but it operates as a contract of transport, and enables the purchaser to compel the vendor to complete the transport in the manner prescribed by the law of that settlement. Erskine has thus stated the doctrine of the law of Scotland

§ 372 f. That there may be some ground for such a distinction, as is above stated, may well be admit-But that the rule generally prevails in all nations may well be doubted. Thus, it seems very clear, that a contract, made in a foreign country, for the sale of lands situate in England, Scotland, or America, would not be held a binding contract in either of those countries, to be enforced in their courts in personam, or in rem, unless the contract was in conformity to the forms prescribed by those countries.1 the same time, it is quite possible, that the same contract might be enforced in the country, where it was made, if it should conform to the law of that country touching real property.2 But, after all, looking to the great diversity of views of foreign jurists, there is much reason to be satisfied with the general rule of the common law on this whole subject, that is to say, that in respect to movables the law of the place. where the contract is made, will, with few exceptions, be allowed to govern the forms and solemnities thereof: 3 but as to immovables, no contract is obligatory

on this subject. All personal obligations or contracts entered into according to the law of the place, where they are signed, or secundum legem domicilii, vel loci contractus, are deemed as effectual, when they come to receive execution in Scotland, as if they had been perfected in the Scotlish form. And this holds even in such obligations as bind the grantor to convey subjects within Scotland; for where one becomes bound by a lawful obligation, he cannot cease to be bound by changing places. An English deed, if so executed in point of form as validly to carry Scots heritage, will be given effect to, in regard to such heritage, agreeably to the law of Scotland, notwithstanding the same deed would, by the English law, under similar circumstances, be unavailable in respect of heritage situate in England." 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 846 to p. 848; Id. p. 864, 865.

¹ Ante, § 363, 364, 365.

² Ante, § 76.

³ Ante, § 362, 364; post, § 379, 383, 384.

or binding unless the contract is made with the forms and solemnities required by the local law, where they are contracted. (Lex sitûs).1

§ 373. But, whatever may be the true rule in cases, where the law of the situs does not prohibit the contract, as for instance, a contract for the sale of land, it is very clear, that, if prohibited there, it is every where invalid to all intents and purposes. So the doctrine is laid down by Rodenburg. After remarking, that if a contract is made, that the dotal rights shall be according to the custom of another place, than that of the domicil of the husband, it will be good, if there is no local law of either place, which prohibits it; he adds, that the contrary, if the contract is opposed to the local law, is true rei sitæ. Contra, si per leges loci, ubi bona constituta sunt, limitetur illud rerum immobilium doarium, &c.; eo quod nemini liceat privatà cautione refragari legi publicæ negativæ aut prohibitoriæ.2 Boullenois also lays down the same rule among his general maxims; Une convention, toute légitime qu'elle soit en elle-meme, n'a pas son éxécution sur les biens, lorsqu'ils sont situés en coutumes prohibitives de la convention.2 Mr. Burge also lays down among his general principles the following rule. "In a conflict between a personal law of the domicil and a real law, either of the domicil, or of any other place, the real law prevails over the personal law. Thus, a person, who has attained his majority, has, as an incident to that status, the power of disposing by donation inter vivos of every thing he

¹ Ante, § 364 to § 367, § 382, 383.

Rodenburg, De Div. Stat. tit. 3, ch. 4, n. 1, 2; 2 Boullenois, Observ. 42, p. 401, 402; Id. Appx. p. 79, 80.

³ 1 Boullenois, Princ. Gén. 41, p. 9, 10; ante, § 262.

possessed, may, by the real statute of the place, in which his property is situated, be restrained from giving the whole, or from giving it, except to particular persons." 1

¹ Burge, Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 28, § 20; Id. p. 26, § 8, 9. It may be remarked, that some of the general principles laid down by Mr. Burge in the chapter here cited, which he says "may be adopted," admit of grave question, and are not supported by the common law.

CHAPTER IX.

PERSONAL PROPERTY.

§ 374. We next come to the consideration of the operation of foreign law in relation to personal, real, and mixed property, according to the known divisions of the common law, or to movable and immovable property, according to the known divisions of the civil law, and continental jurisprudence. For all the purposes of the present commentaries it will be sufficient to treat the subject under the heads of personal or movable property, and real or immovable property, since the class of mixed property appertains to the latter.¹

§ 375. We have already had occasion to state, that in the civil law the term, Bona, includes all sorts of property, movable and immovable; as the corresponding word, Biens, in French also does.² But there are many cases, in which a broad distinction is taken by foreign jurists between movable property, and immovable property, as to the operation of foreign law. We have also had occasion to explain the general distinction between personal and real laws respectively, and mixed laws in the sense, in which the terms are used in continental jurisprudence; personal, being those, which have princi-

See on the subject of this chapter, 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 749 to p. 780.

⁹ See Liverm. Dissert. p. 81, § 106; 1 Boullenois, Observ. 2, p. 28; Id. Observ. 6, p. 127; Rodenburg, De Divers. Stat. tit. 1, ch. 2; 2 Boullenois, Appx. p. 6; Merlin, Répert. Biens, § 1.

pally persons for their object, and property incidentally; real, being the principally property for their object of persons only in relation to property those, which concern both perty.¹

§ 376. According to this distrespecting property, whether it be movable, would fall under the real laws; and, of course, upon the leading foreign jurists, would seem their operation to the territory, whis situate. This, however, is a upon a larger examination will be ineous, the general doctrine held by jurists being, that the right and diables is to be governed by the law of the owner, and not by the law uation.

§ 277. The grounds, upon which to movables, is supported, are diffidifferent jurists; but the difference inal, than real. Some of them are

¹ Ante, § 12 to § 16; 1 Boullenois, Princ. Gén.]
2, p. 20; Id. Observ. 6, p. 122 to p. 127; P. Voet,
n. 2, p. 117, edit. 1715; Id. p. 130, 131, edit. 1661
² Thus Muhlenbruch (Doctrina Pandectarum,
167) lays down the following rule. Jura, que pro
velut quæ ad dominii causam spectant, vel ad vec
onus, vel ad pignorum in judicati executionem et
hendorum, tum etiam rerum apud judicem petends
rationem, et quæ sunt reliqua ex hoc genere, æstin
civitatis, ubi sitæ sunt res, de quibus agitur, atque
immobilium atque mobilium habito discrimine.

³ See ante, § 362; post, § 377 to § 380. See For Revue Etrang. et Franc. Tom. 7, 1840, p. 216, 217 Cockerell v. Dickens, 3 Moore Priv. Coun. R. 98, Majesty's Advocate Gen. 13 Sim. R. 152, 160; In &. Jerv. 436.

all laws, which regard movables are real; but at the same time they maintain, that by a fiction of law all movables are supposed to be in the place of the domicil of the owner, a quo legem situmque accipiunt. Others are of opinion, that such laws are personal, because movables, have in contemplation of law no situs, and are attached to the person of the owner, wherever he is; and, being so adherent to his person, they are governed by the same laws, which govern his person; that is, by the law of the place of his domicil.1 The former opinion is maintained by Paul Voet, Rodenburg, and Boullenois; and the latter by D' Argentre, Burgundus, Hertius, and Bouhier.2 Paul Voet says; Verum mobilia ibi censeantur esse, secundum juris intellectum, ubi is, cujus ea sunt, sedem atque larem suarum fortunarum collocavit.3 So Rodenburg; Mobilia quippe illa non ideo

^{1 &}quot;Mobilia" (says John Loet) "vero ex lege domicilii ipsius defuncti, vel quia semper domino presentia esse finguntur, vel ex comitate passim usu inter gentes receptà." J. Voet, ad Pand. Lib 38, tit. 17, § 34, p. 596. And in another place he adds; "Sed considerandum, quadam fictione juris, seu malis, præsumptione, hanc de mobilibus determinationem conceptam niti; cum enim certo stabilique hec (mobilia) situ careant, nec certo sint alligata loco; sed ad arbitrium domini undiquaque in domicilii locum revocari facile ac reduci possint, et maximum domino plerumque commodum adferre soleant, cum ei sunt præsentia; visum fuit hanc inde conjecturam surgere, quod dominus velle censeatur, ut illuc omnia sua sint mobilia, aut saltem esse intelligantur, ubi fortunarum suarum larem summamque constituit; id est, in loco domicilii." J. Voet, ad Pand. Lib. 1 tit. 4, Pt. 2, § 11, p. 44. Hertius says; "Nam mobiles ex conditione persons legem accipiunt, nec loco continentur." 1 Hertii, Opera, De Collis, Leg. § 4, n. 6, p. 122, 123, edit. 1737; Id. p. 174, edit. 1716; Fælix, Conflit des Lois Revue Etrang. et Franc. 1840, Tom. 7, p. 221, 222; ante, § 362.

Liverm. Dissert. p. 128, 129; 1 Boullenois, Observ. 19, p. 338 to 340; 1 Hertii, Opera, De Collis. Leg. § 4, ch. 2, n. 6, p. 122, 123, edit. 1737; Id. p. 174, edit. 1716.

² P. Voet, De Stat. § 4, ch. 2, n. 2, p. 118, edit. 1715; Id. § 9, ch. 1, § 8, p. 255; Id. p. 132, 309, edit. 1661.

subjacent statuto (reali), quod p quod mobilia, certo ac fixo situ situm relle haberc, ac existere in fortunarum fixit summam &c. I intelligantur existere. Again, says; Et quidem, de mobili semper ibi esse existimentur, ubi ium, cujus ossibus ragæ hæ i rere. Boullenois affirms the gives this reason for it, that such fixed and perpetual situs necessary, that their situs sh pleasure of the owner, and th situs, which he wishes, when own domicil.

§ 378. On the other hand, mobilibus alia censura est; quod ditione personarum legem accunegantur, nisi affixa et cohæren dicuntur propter habilitatem m Quare statutum de bonis mobili et loco domicilii judicium sumit domicilii de eo statuit, ubique vatio indubita est, mobilia pe judicari, aut a locis judicium quite as explicit. As movabl

¹ Rodenburg. De Divers. Stat. Tit. 1, c Appx. p. 6; 1 Boullenois, Observ. 2, p. 25

² Rodenburg, De Div. Stat. tit. 2. ch. 5 ³ 1 Boullenois, Observ. 16, p. 223, 22

Prin. Gén. 33, p. 8; 3 Burge, Comm. on C p. 750. 751. 4 D'Argentré, De Leg. Brit. Tom. 1, De

⁴ D'Argentré, De Leg. Brit. Tom. 1, De n. 30, p. 654; Liverm. Diss. § 213, p. 128, 19. p. 339.

fixed situs, and are easily transported from one place to another, according to the pleasure of the owner, therefore it is supposed, by a sort of fiction, that they adhere to his person; and from hence comes the maxim in our customary law, that movables follow the body or person of the owner; Meubles suivent le corps, ou la personne,-Mobilia sequun-

tur personam.1

§ 378 a. Burgundus puts the doctrine in the strongest form. Puto equidem (says he) mobilia sequi conditionem personæ, id est, si persona fuerit servituti obnoxia, bona quoque ejus mobilia libera esse desinere, cum apud nos servitus magis sit bonorum, quam personæ. Utputa, si quis natus in simili regione territorii Alostensis, inde postea alio migraverit, atque decesserit, bona ejus mobilia quocumque loco reperta, cedunt natalis soli Domino. Quia perinde haberi debent, ac si per eventum nativitatis, alienæ se potestati, ac dominio defunctus subjecisset. Non aliter quam mobilia clerici, quæ et conditionim ejus sequentur. Sed tamen, ut existimem, bona moventia, et mobilia ita comitari personam, ut extra domicilium ejus censeantur existere, adduci sane non possum. Quod neque rationi, neque juri scripto congruat, sicuti nec doctorum opinionibus, aut forensi usu firmatur. Credo ego, mobilia comitari personam quamdiu domicilium non habet. Quod utique procedere poterit, si quis domicilio relicto naviget, vel iter faciat, quærens quo se conferat, atque

⁴ Bouhier, Cout. de Bourg. ch. 25, § 2 p. 490; I Boullenois, Observ. 19, p. 338. - Les meubles (says Cochin) quelque sorte qu'ils soient, suivent le domicile. Cochin, Œuvres, Tom. 5, p. 85, 4to. edit.; 2 Henrys, Œuvres, Lib. 4, ch. 6, Quest. 105, p. 612; Id. 720; ante, § 362; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 750, 751; Fælix, Conflit des Lois, Revue Etrang. et Franç. Tom. 7, § 32, p. 221, 222.

ubi domicilium constituat. Hertius says; Nam mobiles ex conditione personæ legem accipiunt, nec loco continentur.

§ 379, But, whether the one opinion or the other is adopted, it has been truly remarked by Boullenois, that the same conclusion is equally true, that movables follow the person.3 The probability is, that the doctrine itself had not its origin in any distinction between real laws, or personal laws, or in any fictitious annexation of them to the person of the owner, or in their incapacity to have a fixed situs; but in an enlarged policy, growing out of their transitory nature and the general convenience of nations. If the law rei sitæ were generally to prevail in regard to movables, it would be utterly impossible for the owner in many cases, to know, in what manner to dispose of them during his life, or to distribute them at his death; not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing with minute accuracy the law of transfers inter vivos, or of testamentary dispositions and successions in the different countries, in which they might happen to be. change of place at a future time might defeat the lest considered will; and any sale or donation might be rendered inoperative, from the ignorance of the parties of the law of the actual situs at the time

¹ Burgundus, Tract. 2, n. 20, p. 71, 72.

² I Hertii, Opera, De Collis Leg. § 4, n. 6, p. 122, 123, edit. 1737; id. p. 174, edit. 1716; ante, § 362. See J. Voet, Comm. ad Pand. Vel. 3 Lib. 38, tit. 17, n. 34, p. 596.

³ I Boullenois, Observ. 19, p. 339. See also J. Voet, ad Pand. Lib. 25, tit. 17, § 34, p. 5105; Holmes v. Remsen, 4 John. Ch. R. 487; I Burge Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 28, 29; Fuelix, Confit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, p. 204, 205, 206.

of their acts. These would be serious evils, pervading the whole community, and equally affecting the subjects and the interests of all civilized nations. But in maritime nations, depending upon commerce for their revenues, their power, and their glory, the mischief would be incalculable. A sense of general utility, therefore, must have first suggested the doctrine; and as soon as it was promulgated, it could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy.

¹ See Harvey v. Richards, 1 Mason R. 412; ante, § 372 a. - Mr . Justice Bayley, in delivering his opinion in the case of In Re, Ewin, 1 Cromp. & Jerv. 156, said; "Now what is the rule with respect to it? It is clear, from the authority of Bruce v. Bruce, and the case of Somerville v. Somerville, that the rule is, that personal property follows the person, and it is not, in any respect, to be regulated by the situs: and if in any instances, the situs has been adopted as the rule, by which the property is to be governed, and the lex loci rei site resorted to, it has been improperly done. Wherever the domicil of the proprietor is, there the property is to be considered as situate; and, in the case of Somerville v. Somerville, which was a case, in which there was stock in the funds of this country, which were at least as far local as any of the stocks mentioned in this case are local, there was a question, whether the succession to that property should be regulated by the English, or by the Scotch rules of succession. The Master of the Rolls was of opinion, that the proper domicil of the party was in Scotland. And having ascertained that, the conclusion, which he drew, was, that the property in the English funds was to be regulated by the Scotch mode of succession; and if the executor had, as he no doubt would have, the power of reducing the property into his own possession, and putting the amount into his own pocket, it would be distributed by the law of the country, in which the party was domiciled. Personal property is always liable to be transferred, wherever it may happen to be, by the act of the party, to whom that property belongs; and there are authorities, that ascertain this point, which bears by analogy on this case, namely, that if a trader in England becomes bankrupt, having that, which is personal property, debts, or other personal property, due to him abroad, the assignment under the commission of bankrupt operates upon the property, and effectually transfers it, at least as against all those persons, who owe obedience to these bankrupt laws, the subjects of this country."

§ 380. But, be the origin it may, it has so general a si ilized nations, that it may nov of the Jus Gentium. Lord Lo it with great clearness and fo elaborate judgments. "It is (said he,) "not only of the la every country in the world, wh blance of science, that pers The meaning of th locality. property has no visible localit to that law, which governs the both with respect to the disp respect to the transmission of i or by the act of the party. The owner in the person. pose of his personal property. the law of the country, in whi the law of the country, of wh that will regulate the succession trine was recognised by Lord on another important occasion. (said he) has no locality. that, it is not correct to say, the gives way to the law of the that it is part of the law of] property should be distributed domicilii." 2 same do The stantly maintained both in with unbroken confidence an

Sill v. Worswick, 1 H. Black. 690.
 R. 185, 323.

Doe d. Birtwhistle r. Vardill, 5 Barn.
 Bligh, R. 32 to 88; 2 Clarke & Fin. R.

³ The authorities on this point are ve

§ 381. Foreign jurists are not less expressive in its favor. Constat inter omnes, (says Bretonnier) que les meubles suivent les personnes, et se réglent suivant la coutume du domicile. 1 And he speaks but the common language of the continental jurists. 9 Pothier, after remarking, that movables have no locality, adds; "All things, which have no locality, follow the person of the owner, and are consequently governed by the law or the custom, which governs his person, that is to say, by that of the place of his domicil."3 Merlin adopts language equally general and exact. "Movables" (says he) "are governed by the law of the domicil of the owner, wherever they may be situate; and this law of course changes with his change of domicil.'4 Bynkershoek asserts the principle to be so well established that no one has dared to question it; Adeo recepta hodie sententia est, ut nemo

Foreign Law, p. 13, 14, 15; 4 Cowen, R. 517, note; 2 Kent, Comm. Lect. 36, p. 428, &c., 3d edit.; Id. p. 405; Kaims on Equity, B. 3, ch. 8, § 3, 4; Ersk. Inst. B. 3, tit. 2, § 40, p. 515; Dwarris on Statutes, 649, 650; In re Ewing, 1 Tyrwhitt, R. 91; 1 Rose, Bank. Cas. 478; 5 Barn. & Cresw. 451, 452; 2 Bell, Comm. p. 2 to p. 10, 4th and 5th edit.; Piper v. Piper, Ambler, R. 25; Potter v. Brown, 5 East, R. 130; Holmes v. Remsen, 4 John, Ch. R. 460; Guier v. O'Daniel, 2 Binney, R. 349, note; Bruce v. Bruce, 2 Bos. & Pull. 229, note; Liverm. Diss. p. 128 to p. 132; De Sobrey v. De Laistre, 2 Harr. & John. R. 191, 224; Hunter v. Potts, 4 T. R. 182, 192; Phillips v. Hunter, 2 H. Black. 402, 405; Goodwin v. Jones, 3 Mass. R. 514, 517; Blake v. Williams, 6 Pick. R. 286, 314; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 749 to p. 753; French v. Hall, 9 N. Hamp. R. 137; Cockerell v. Dickens, 3 Moore, Priv. Com. R. 98, 131, 132.

¹ 2 Henrys, Œuvres, Lib. 4, Quest. 127, p. 720.

Pothier, Coutum. d'Orleans. ch. 1 § 2, Tom. 10, p. 7, 4to edit.; Id.

Traité de Choses; § 3, Tom. 8, p. 109, 4to edit.

² See 1 Boullenois, Observ. 18, p. 328; Observ. 19, p. 339, 340; Bouhier, ch. 22, p. 429, § 79, ch. 25, p. 490, § 2; 5 Cochin, Œuvres, 85; Liverm. Diss. § 212 to § 216, p. 129, 130; Huberus, De Confi. Leg. Lib. 1, tit. 3, § 15. See Fælix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 32 to § 35, p. 221 to p. 229.

⁴ Merlin, Répert. Biens, § 1, n. 12; Id. Meubles, § 1; Id. Loi. § 6, n. 3.

ausit contra hiscere. Huberus says; Verum in mobilibus nihil esse causæ, cur aliud, quam jus domicilii sequamur; quia res mobiles non habent affectionem versus territorium, sed ad personam patrisfamilias duntaxat, qui aliud, quam quod in loco domicilii obtinebat, voluisse obtinere non potest. So that there seems a general, although not an entire harmony on this point between foreign jurists and domestic jurists.

^{1 2} Kent, Comm. Lect. 37, p. 429, 3d edit.; Bynkershoek, Quest. Pris. Juris. Lib. 1, cap. 16, p, 179, 180, edit. 1744. — Bynkershoek, in the passage here referred to, is speaking of the right of succession; but his language has been thought susceptible of a broader interpretation. See post, § 483.

⁹ Huberus, P. 1, Lib. 3, Tom. 1, De Success, ab Intest. n. 21(s).

³ Sec Fœlix. Conflit. des Lois, Revue, Etrang. et Franc. Ton. 7.1840. § 32, to § 35, p. 221 to 229. See also Muhlenbruch, Doctr. Panil Ten. 1, Lib. 1, § 72, 73, p. 166 to 170, who seems to make the law rei situageous in many cases, as well with respect to movables as immovables. June quæ proxime rebus sunt scripta, vel quæ ad dominii cansam speciasi. Sc. &c. estimantur ex legibus ejus civitatis, ubi sites res, de quibusaite, atque collocatæ, nullo rerum immobilium atque mobilium habita distrimine. Id. § 72. Mr. Fælix says on this subject; "Par la man des choses, les meubles, soit corporels, soit incorporels, n'ont pes, à l'igni des immeubles, une assiette fixe dans l'endroit ou ils se tressent de fait: ils dépendent nécessairement de la personne de l'individe à qui ils appartiennent, et ils subissent la destination, qu'il leur donns. que individu étant légalement censé avoir réuni en fortune at le son domicile, c'est-à dire au siège principal de ses affaires, sa sasjours regardé en droit les meubles comme se trouvant au lieu du des icile de celui, à qui ils appartiennent; peu importe si, de fit 🖢 🗃 trouvent ou non au dit lieu. Par une fiction legale, on les cani comme suivant la personne, et comme étant soumis à la même leigh régit l'état et la capacite de cette personne; et nous avons va (1996) nº 21) que cette loi est celle du domicile (mobilia sequentur par mobilia ossibus inherent). En d'autres termes, le statut p gouverne les meubles corporels ou incorporels. Ce statut est à leuré réel par suite de la fiction, qui les répute se trouvez au lieu régi par et Tel a toujours été le sentiment presque masine mème statut. auteurs et des cours de justice. Témoins Dumoulin, Chopin, Bectanic, d'Argentrée, Brodeau, Lebrun, Poullain du Parc, Burgundus, Red burg, Abraham à Wesel, Paul Voet, Jean Voet, Sande, Christis, Gri,

§ 382. When, however, we speak of movables, as following the person of the owner, and as governed by the law of his domicil, we are to limit the doctrine to the cases, in which they may be properly said to retain their original and natural character. For movables may become annexed to immovables, either by incorporation, or as incidents; and then they take the character of the latter. 1 Thus in the language of the common law, movables, annexed to the freehold, are deemed a part of the latter. Such are the common cases of fixtures of personal property in houses, in mills, and in other hereditaments, whether for use, or for ornament. law of foreign countries a similar distinction is recognised; and wherever movables become thus fixed by operation of law, or by the express determination of the owner, they are deemed a part of the immovable

Carpzov, Wernher, Mevius, Franzke, Boullenois, Pothier, Struve, Leyser, Huber, Hert, Hommel, Danz, Gluck, Thibaut, Merlin, MM. Mittermaier, Hauss, Meier, Favard, Duranton, Story, Wheaton, Rocca, et Burge. Trois auteurs seulement ne sont pas entiérement d'accord, en cette matière, avec ceux que nous venons de citer : ce sont Tittmann, M. Muhlenbruch, et M. Eichborn. Le premier, en soumettant les meubles à la même loi, qui régit les immeubles, ne s'attache qu'à l'un des cas exceptionnels, dont nous parlerous ou no 33 ci-aprés, sans examiner la règle elle-même. M. Muhlenbruch repousse toute distinction entre les meubles et les immeubles par rapport à la loi, qui les régit, par le seul motif, que l'opinion contraire établirait une différence entre la succession dans les immeubles et celle dans les meubles du même individu; nous démontrerons au no ci-après la nécessite de reconnaître cette différence. M. Eichhorn, en rejetant l'application de la loi de la situation des meubles, n'admet cependant la règle, qu'avec la modification, que, selon les circonstances, il faudra appliquer la loi du lieu ou la cause se plaidera : il cite comme exemple le cas ou le défendeur en revendication invoque la maxime, qu'en fait de meubles possession vaut titre." Fœlix, Conflit des Lois, Revue Etrang. et Franc. 1840, Tom. 7, § 32, p. 222 to p. 224. 1 Ante, § 371; post, 447.

property. 1 John Voet ranks them among immovables. Idemque statuendum in mobilibus, per patrisfamilias destinationem perpetui usus gratia ad certum locum, domum puta, vel fundum, delatis, ita ut perpetuo illic istius usus causa mansura sint, etiamsi vel nunquam immobilibus naturalitur jungenda sint, vel ex destinatione jungenda, necdum tamen inceperint immobilibus juncta esse, modo ad ipsas edes fundosse, quibus jungenda sunt, delata fuerint. 2 Among the class of immovables are also ranked (as we have seen) horitable bonds by the Scottish law, and ground rests, and other rents charged on lands. 3

§ 383. It follows as a natural consequence of the rule, which we have been considering (that personal property has no locality), that the laws of the council should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be inter vivos, or be post morten. And this is regularly true, unless there is some positive or customary law of the country, where they are situate, providing for special cases (as is sometimes done), or from the nature of the particular property, it has a necessarily implied locality.

¹ Pothier, Traité des Choses, § 1; Id. Coutum. d'Orléann, ch. 2, st. 46, 47, 48; Merlin Répert. Biens, § 1, n. 13, § 2, n. 1; Id. Merlin § 43; 1 Bell, Comm. § 660, p. 648 to p. 652, 4th edit.; 2 Bell, Comm. p. 3, 4, 4th edit.; 1 Bell, Comm. p. 752 to p. 755, and 2 Bell, Comm. p. p. 10; 1 Boullenois, Observ. 19, p. 340, 341; 1 Keims on Bull, Ch. 8, § 3; Ersk. Inst. B. 3, Tit. 9, § 4.

² J. Voet, ad Pand. Lib. 1, tit. 8, n. 14, p. 67.

³ 1 Bell, Comm. § 660, p. 648 to p. 659; 2 Bell, Comm. p. 2.3.448 edit.; Ersk. Inst. B. 2, ch. 2 § 9 to § 20; Pothier, Traits des Chara, § 347.

⁴ Livermore, Diss. § 215 to § 220, p. 130 to p. 137; French a 121, P. N. Hamp. R. 137; Sessions v. Little, 9 N. Hamp. R. 271.

⁵ Mr. Chief Justice Tilghman on one occasion said; * The propertion" (that personal property has no locality, but is transferred accorded

Lord Mansfield has mentioned, as among the latter class, contracts respecting the public funds or stocks, the local nature of which requires them to be carried into execution according to the local law. The same rule may properly apply to all other local stock or funds, although of a personal nature, or so made by the local law, such as Bank stock, Insurance stock, Turnpike, Canal, and Bridge shares, and other incorporeal property, owing its existence to, or regulated by, peculiar local laws. No positive transfer can be made of

to the law of the country, in which the owner is domiciled) "is true in general, but not to its utmost extent, nor without several exceptions. In one sense personal property has locality, that is to say, if tangible, it has a place in which it is situated, and if invisible (consisting of debts), it may be said to be in the place, where the debtor resides; and of these circumstances the most liberal nations have taken advantage, by making such property subject to regulations, which suit their own convenience." "Every country has a right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure." Moreton v. Milne, 6 Binn. R. 361; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 751, 752; ante, § 364, and note.

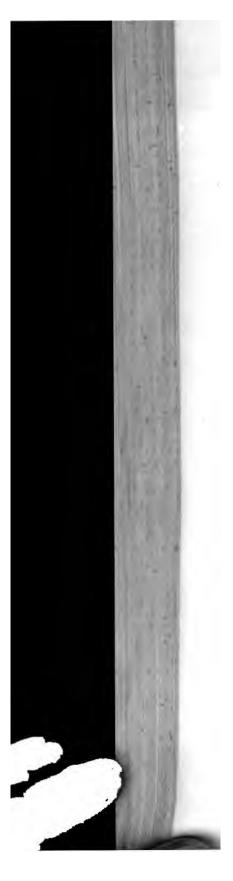
¹ Robinson v. Bland, 2 Burr, R. 1079; S. C. I, W. Black. R. 247; ante,

^{2 2} Bell, Comm. p. 4, 5, 4th edit.; Id. p. 1 to 10, 5th edit.; I Bell, Comm. p. 65, 67, 68, 4th edit.; Id. p. 105 to p. 108, 5th edit.; 3 Burge, Comm. on Col. . and For. Law, Pt. 2 ch. 20, p. 750, 751, 752. — Mr. Burge says, that although stocks of this nature can only be transferred according to the forms of the lex rei site, so as to confer a legal title on the purchaser; yet it will give the purchaser a right of action to compel the vendor to make a transfer in the manner required by the local law. Ibid.; ante, § 364, note. Erskine, in his Institutes, (B. 3, tit. 9, § 4,) puts the like exceptions. "We must except" (says he) "from this general rule, as Civilians have done, certain movables, which by the destination of the deceased are considered as immovables. Among these may be reckoned the shares of the trading companies, or of the public stocks of any country, for example, the Banks of Scotland, England, and Holland, The South Sea Company, &c., which are, without doubt, descendible, according to the law of the state, where such stocks are fixed. But the bonds

such property, except in the the local regulations. But, to transfer such property wo according to the Lex domi the Lex loci contractus, unles specially prohibited by the I property would be treated, as in the course of administrat local law. 2

§ 384. Subject to exception nature, (such as the statuta and of goods in the wareho of a government, which we same predicament,) the gentransfer of personal property, the owner's domicil, is valid, erty may be situate. But i

^{3 1} Kaims on Equity, B. 3, ch. 8, § 3.— (says Erskine) lying in Scotland, the deaccording to the lex domicilii, is effect movables have no permanent situation.



or notes of such companies make no exc They are accounted part of the movable of \$3:4, 3:5; post, \$3:8; Robertson on St Gen. v. Dimond, I Cromp. & Jerv. 356, 3 Cromp. Mees. & Rosc. 538; S. C. 8 Bligh R. 84; Attor. Gen. v. Bonwers, 4 Mees. & post, \$4:32.

¹ Though stock abroad may be, as to laws, it is not to be treated, as of course, of real estate and descendible as such. local law personal estate, it may be dispossuch; and the title passes, if it be made foreign law. See Attor. Gen. c. Dimonmatter of Ewing, I Tyrwhitt, R. 91; Ers Comm. p. 65; 2 Bell, Comm. p. 4, 5, 4th a

² Abbott on Shipp. Pt. 1, ch. 2, § 10; 1 556, 558, 569, &c.; 2 Kent, Comm. Lect.

a transfer made by the owner, according to the law of the place of its actual situs, would not as completely devest his title; nor even that a transfer by him in any other foreign country, which would be good according to the law of that country, would not be equally effectual, although he might not have his domicil there. For purposes of this sort, his personal property may, in many cases, be deemed subject to his disposal, wherever he may happen to be at the time of the alienation. Thus, a merchant, domiciled in America, may, doubtless, transfer his personal property according to the law of his domicil, wherever the property may be. But, if he should direct a sale of it, or make a sale of it in a foreign country, where it is situate at the time, according to the laws thereof, either in person, or by an agent, the validity of such a sale would scarcely be doubted. If a merchant is temporarily abroad, he is understood to possess a general authority to transfer such personal property, as accompanies his person, wherever he may be; so always, that he does not violate the law of the country, where the act is done. The general convenience and freedom of commerce require this enlargement of the rule; for otherwise, the sale of personal property, actually situate in a foreign country, and made according to the forms prescribed by its laws, might be declared null and void in the country of the domicil of the owner. In the ordinary course of trade with foreign coun-

^{515; 3} Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 750, 751, 752; ante, § 364, note.

¹ See 1 Kaims on Equity, B. 3, ch. 8, § 3.

tries, no one thinks of transferring personal property according to the forms of his own domicil; but it is transferred according to the forms prescribed by the law of the place, where the sale takes place.

§ 385. A question, involving other considerations, may be presented; and that is, whether a transfer of personal property is good, which is made according to the law of the owner's domicil, but not in conformity to the law of the place, where it is situate? And whether there is any difference in such a case, between the transfer being made by the owner in his place of domicil, or its being made in the place rei sitæ? For instance, let us suppose that, by the law of the domicil of the owner, a sale of goods is complete, and perfect, to pass the title without any delivery; and that, by the law of the place of their situs, the sale is not complete. until delivery, In such a case, if the transfer of the goods is made in the domicil of the owner, would it be valid without any delivery thereof, so as to pass the title against third persons? If it would, in such a case; what would be the effect, if the transfer was made in the place, were the goods were situate, without any such delivery?

§ 386. The former question has been much discussed in the courts of Louisiana, from a supposed difference between the rule of the common law and that of the civil law on this subject. By the common law, a sale of goods is, or may be, complete without delivery. But by the law of

The common law deems a sale, as between the parties, complete without a delivery; but not as to third persons. If, therefore, a sale is made, the purchaser, in order to complete his title against creditors and

Louisiana, delivery is necessary to complete the transfer, according to the well known rule of the civil law; Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur. Upon the fullest examination, and after repeated arguments, the Supreme Court of Louisiana have held the doctrine, that the transfer of personal property in that state is not complete, so as to pass the title against creditors, unless a delivery is made in conformity to the laws of that state, although the transfer is made by the owner in his foreign domicil, and would be good without delivery by the laws of that domicil. 2

§ 387. The reasoning, by which this doctrine is maintained, is most fully developed in a case, in which a transfer of a part of a ship was made in Virginia, the ship, at the time of the sale, being locally at New Orleans; and, before any delivery,

other purchasers, must take possession within a reasonable time. Where the property is at sea at the time, and is incapable of delivery, there the title is complete without delivery. But it may be lost by an omission to take possession within a reasonable time after its arrival in port. See Meeker v. Wilson, 1 Gall. R. 419; 1 Black. Comm. 446, 448; 2 Kent, Comm. 492, 493, 498; Id. p. 515 to 522; Bohlen v. Cleaveland, 5 Mason, R. 174; 3 Chitty on Comm. and Manuf ch. 5, § 2, p. 272, &c.; Lanfear v. Sumner, 17 Mass. R. 110; Bigelow's Digest, Sale, A. B.; post, § 389, note. See also Long on Sales, by Rand, edit. 1839, ch. 7, p. 259, to p. 307.

¹ Cod. Lib. 2, tit. 3, 1. 20; Olivier v. Townes, 14 Martin, R. 93, 102; Norris v. Mumford, 4 Martin, R. 20; Dumford v. Brooks's Syndics, 3 Martin, R. 222, 225.

² The point appears to have been first decided in Norris v. Mumford, 4 Martin, R. 20; and it has been repeatedly since adjudged in other cases, and particularly in Ramsay v. Stevenson, 5 Martin, R. 23; Fisk, v. Chandler, 7 Martin, R. 24; and Olivier v. Townes, 14, Martin, R. 93. Mr. Livermore has contested the doctrine asserted in these decisions with great earnestness and ability. Liverm. Diss. § 220 to § 223, p. 137 to p. 140.

thereof, she was attached by the creditors of the vendor. 1 It was, therefore, a case of conflict of rights between the creditor and the purchaser. The learned Judge, 2 who delivered the opinion of the Court, on that occasion, said: "The position assumed in the present case is, that by the laws of all civilized countries, the alienation of movable property must be determined according to the laws, rules, and regulations in force, where the owner's domicil is situated. Hence, it is insisted, that, as by the law existing in the state, where the vendor lived, no delivery was necessary to complete the sale, it must be considered as complete here; and, that it is a violation of the principle just referred to, to apply to the contract rules, which are peculiar to our jurisprudence, and different from those contemplated by the parties to the contract."

§ 388. "We readily yield an assent to the general doctrine, for which the appellee contends. He has supported it by a variety of authorities drawn from different systems of jurisprudence. But some of those very books furnish also the exception, on which we think this case must be decided, namely, that 'when those laws clash with, and interfere with the rights of the citizens of the countries, where the parties to the contract seek to enforce it, as one or other of them must give way, those prevailing, where the relief is sought, must have the preference.' Such is the language of the English books, to which we have been referred; and Huberus, whose authority is more frequently resorted to on this subject that of any other writer, because he has treated it

¹ Olivier v. Townes, 14 Martin, R. 93, 102.

² Mr. Justice Porter.

more extensively, and with greater ability, in his Treatise De Conflictu Legum, (n. 11,) tells us, Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur prejudicium, in jure sibi quæsito. The effects of a contract entered into at any place, will be allowed, according to the law of that place, in other countries, if no inconvenience will result therefrom, to the citizens of that other country, with respect to the right, which they demand. This distinction appears to us founded on the soundest reasons. The municipal laws of a country have no force beyond its territorial limits; and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken, that no injury is inflicted on her own citizens: otherwise justice would be sacrificed to courtesy. Nor can the foreigner or stranger complain of this. If he sends his property within a jurisdiction, different from that, where he resides, he impliedly submits it to the rules and regulations in force in the country, where he places it. What the law protects, it has a right to regulate. A strong evidence of this is furnished by the doctrine in regard to successions. The general principle is, that the personal property must be distributed according to the law of the state. where the testator dies; but, so far as it concerns creditors, it is governed by the law of the country, where the property is situated. If an Englishman or a Frenchman dies abroad, and leaves effects here. we regulate the order, in which his debts are paid, by our jurisprudence, not by that of his domicil."1

¹ Post, § 524.

§ 389. "We proceed to examine, whether, giving effect to the law of Virginia, on the contract now set up, would be working an injury to this state, or its citizens. In doing this, we must look to the general doctrine, and the effect it would have on our ordinary transactions, as well as its operation in this particular case. If we held here, that this sale can defeat the attachment, we should, on the same principle, be obliged to decide, that the claiment would hold the object sold in preference to a second purchaser, to whom it was delivered: the rule being, that, when the debtor can sell, and give to the buyer a good title, the creditor can seize; or, in other words, where the first sale is not complete as to third persons, the creditor may attach and acquire a lien. In relation to movable property, or law has provided, that delivery is essential to complete the contract of sale, as to third parties. This valuable provision, by which all our citizens are bound in their dealings, protects them from the fruits. to which they would be daily subjects, were they liable to be affected by previous contracts, not followed by the giving of possession. The exception contended for here, in behalf of the residents of another state, would deprive them of that motection, wherever their rights, as purchasers, case in contact with strangers; a protection, which it may be remarked, it is of the utmost importance, owing to our peculiar position, that we should carefully maintain. This city is becoming a vest storehouse for merchandise sent from abroad, owned by non-residents, and deposited here for sale; and our

¹ McNeil v. Glass, 13 Martin, R. 261.

most important commercial transactions are in relation to property so situated. If the purchasers of it should be affected by all the previous contracts made at the owners' domicil, although unaccompanied by delivery, it is easy to see, to what impositions such a doctrine would lead; to what inconvenience it would expose us; and how severely it would check and embarrass our dealings. However anxious we may be to extend courtesy, and afford protection to the people of other countries, who come themselves, or send their property, within our jurisdiction, we cannot indulge our feelings so far, as to give a decision, that would let in such consequences, as we have just spoken of. It would be giving to the foreign purchaser an advantage, which the resident has not; and that, frequently, at the expense of the latter. This, in the language of the law, we think, would be a great inconvenience to the citizens of this state; and, therefore, we cannot sanction it."1

¹ Olivier v. Townes, 14 Martin, R. 97 to 103. But see 1 Kaims on Equity, B. 3, ch. 8, § 3. - The doctrine of this case seems supported by that of Lanfear v. Sumner, (17 Mass. R. 110,) although in the latter case the Court do not found their judgment upon any supposed conflict between foreign and domestic laws. There can be little doubt, that the sale and assignment in Philadelphia, in that case, was a complete transfer by the Lex loci contractus; and there was certainly legal diligence in endeavoring to obtain possession after the sale. The Court, however, thought, that delivery was essential to perfect the transfer by the law of Massachusetts; and, as there had been no delivery, until the property was attached by the attaching creditor in Massachusetts, they decided in favor of the title of the latter against the vendee. The Court also said, that, where each of the parties claimed the same goods by a legal title, he who first obtained possession, would hold against the other; and for this principle, they relied on Lamb v. Durant, 12 Mass. R. 54; and Caldwell v. Ball, 1 T. R. 205. The former case is certainly in point. But in the latter the decision was in favor of the party, who first had acquired a legal title by the prior indorsement of the bills of lading to

§ 390. There is certainly great force in this reasoning upon general principles. And no one can seriously doubt, that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits.1 Nor can such a rule, made for the benefit of nocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy. But, how far any court of instice ought, upon its own general authority, to interpose such a limitation, independently of positive legislation, has been thought to admit of more serious question; since the doctrine, which it unfolds, aims a direct blow at the soundness of the policy, on which the general rule, that personal property has no locality, is itself founded.2 It is not, indeed, very easy to reconcile it with the doctrine maintained by Lord Loughborough (which has been already cited),3 or with other cases to the same effect. Nor is it easy to say, to what extent it may be presed

him. "Whoever (said Ashhurst, J.) was first in possession (ast of the goods, but) of either of these bills of lading, had the legal this vested in him." Buller, J. said; "Both parties claim under T.; but F. & Ca. have the first legal right, for two bills of lading were first indexed to them." But see Conrad v. Atlantic Insurance Co. 1 Peters, Sop. C. R. 386, 445; Nathan v. Giles, 5 Taunt. R. 558; Bohlen v. Cleveland, 5 Meson, R. 174.

¹ See Liverm. Diss. § 221, p. 137, 138; Id. § 249, p. 159 to p. 168; Hall v. Campbell, Cowp. R. 208; Hunter v. Potts, 4 T. R. 162, 162; Phillips v. Hunter, 2 H. Bl. 402, 405; Sill v. Worswick, 1 H. M. R. 673, 689, 681; Davis v. Jaquin, 5 Harr. & John. R. 100.

² See Livermore, Diss. § 221 to § 223, p. 137 to p. 140.

³ Ante, § 380; Sill v. Worswick, 1 H. Bl. 690. See also 1 Kniss an Equity, B. 3, ch. 8, § 3; Ersk. Inst. B. 3, tit. 2, § 40; Bruce s. Bruce, 2 Bos. & Pull. 220, note 231; Hunter v. Potts, 4 T. R. 182, 192; Phillips v. Hunter, 2 H. Bl. 402, 405.

in subversion of the general rule; since every country has so many minute regulations in regard to the transfers of personal property incorporated into its municipal code, each of which may be properly deemed beneficial to its own government, or to the interests of its citizens.¹

§ 391. Another case, illustrative of the doctrine. may be stated. A ship belonging to New York, and owned there, was transferred, while at sea, according to the law of the owner's domicil; and the ship subsequently arrived at New Orleans, and was attached by creditors, before any delivery thereof to the vendee. The question was, whether the attachment overreached the title by the transfer. The Supreme Court of Louisiana held, that it did not; and that the transfer was valid to all intents and purposes. The court took the distinction, that the transfer was complete before the Louisiana laws could locally attach upon it. "In the present case (said the Court) the ship, the subject of the sale, was a New York ship, and the vendor and vendee resident in New York. If, therefore, according to the Lex loci contractus, that of the domicil of both parties, the sale transfers the property without a delivery, it did eo instanti, or not at all. In transferring it, it did not work any injury to the rights of the people of another country; it did not transfer the property of a thing within the jurisdiction of another government. If two persons in any country choose to bargain, as to the property, which one of them has in a chattel not within the jurisdiction of the

Mr. Burge manifestly deems the decision untenable. 3 Burge, Comm. on Col. and For. Law Pt. 2, ch. 20, p. 763, 764.

place, they cannot expect, that the rights of persons in the country, in which the chattel is, will be permitted to be affected by their contract. But, if the chattel be at sea, or in any other place, if any there be, in which the law of no particular country prevails, the bargain will have its full effect, eo instanti, as to the whole world. And the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it." But, if the ship had been, at the time of the sale, in New Orleans, and she had been attached before an actual delivery to the vendee, the title of the attaching creditor would have prevailed.

§ 392. But, let us suppose two persons, each claiming as purchaser, under different transfers of the same personal property, one by a transfer from a partner in the place, where the property is locally situate, and another by a transfer made by the other partner in the domicil of the firm; and by the law of the latter place delivery is not essential to complete the transfer; but by the law of the former it is; which title is to prevail? According to the doctrine held in Louisiana, the title of the purchaser in the place rei site ought to prevail.3 And that doctrine seems confirmed by the reasoning in certain decisions of the Supreme Court of Massachusetts, although the precise point as to the conflict of laws was not litigated, and the

¹ Thuret v. Jenkins, 7 Martin, 318, 353, 354.

² Price v. Morgan, 7 Martin, R. 707; ante, § 386 to § 389.

³ Ramsay v. Stevenson, 5 Martin, R. 23, 77, 78; Thurst s. Jenkins, 7 Martin, R. 353.

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law of Massachusetts was supposed to require a delivery to complete the title.1

§ 393. A case somewhat different has been put by the Supreme Court of Louisiana. "If (say the Court) A. and B. be partners in New Orleans, and C. purchases from A. a quantity of cotton in the warehouse of the firm; will his right thereto, if he take instant possession of it, be affected by a sale made a few days before by B. in Natchez, or Mobile? Will not C. be listened to in his own state. when he shows, that by the Lex fori, by that of Loci contractus, by that of the domicil of his vendors, and of his own, the sale and delivery vested the property?"2 The case is certainly very strongly put. But, after all, it must entirely depend upon the point, whether the prior transfer at Natchez or Mobile conveyed a perfect title by the law of those places, without delivery; and if so, whether the Lex rei sita ought to prevail against it? If no delivery were required by the law of Louisiana to perfect the title, the Natchez or Mobile purchaser would prevail, even in the courts of Louisiana, against the purchaser in New Orleans, whatever might be the apparent hardship of the case under all the circumstances.

§ 394. On the other hand, let us take the case of a shipment of goods from England to New Orleans, on account and risk of a merchant domiciled in England, who owes debts in New Orleans; and a subsequent transfer of the bill of lading in England to a purchaser, after their arrival at New Orleans

¹ See Lamb v. Durant, 12 Mass. R. 54; Lanfear v. Sumner, 17 Mass. R. 110; ante, § 386, 389, note.

² Thurst v. Jenkins, 7 Martin, R. 353.

leans, but before the unlading thereof. Could a creditor of the shipper at New Orleans in such a case, by an attachment, oust the title of the purchaser, because there had been no delivery to the purchaser under the bill of lading? By the law of England, and, indeed, by that of many other commercial states, the legal title of the goods passes by the mere indorsement and delivery of the bill of lading, without any actual possession of the goods by the purchaser.2 Would such a title so acquired be devested by the want of a delivery according to the laws of Louisiana? If so, it would most metrially impair the confidence, which the commercial world have hitherto reposed in the universal validity of the title acquired under a bill of lading. No opinion is intended to be here expressed on the point by the Author; but it is presented, in order to show, that the doctrine is not without its embarrassments.

§ 395. If, however, the doctrine of the law rei sitæ is to prevail over that of the law of the place of the transfer in some cases, even in respect to movables, what is to be said in relation to assignments of choses in action, or debts due by debtors, resident in a foreign country? Would an attachment before notice defeat such assignments in favor of the attaching creditor, although notice of the

¹ Lickbarrow v. Mason, 2 T. R. 63; Abbett on Shipp. P. 2 d. 9, § 16

² By the old French law, bills of lading were not negotiable, as a pass a title in the property to the assignee, but only gave him a right action subordinate to the rights of third persons. 1 Emerig. Assumed 11, § 3. By the Code of Commerce, (art. 261,) bills of lading and are negotiable, so as to pass the property to the indorses. See 3 Passess. Pt. 3, tit. 4, ch. 3, art. 727.

assignment should be afterwards given to him within a reasonable time? 1 By the law of some countries an assignment of a debt is good without any notice. to the debtor, and takes effect instanter; by the law of other countries notice is necessary to perfect the title.2 Would an assignment of a debt in the creditor's domicil, where it would be good without any such notice, be ineffectual, if the debtor resided in a country, where such notice would be necessary? Suppose an attachment made by a creditor, in the intervening period between the time of the assignment and the notice; would the assignment or the attachment be entitled to a preference?3 By the Scottish law a creditor may assign his debt to another person; but the transfer is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment, or, (as the Scotch phrase is,) until an intimation of the assignment is given to the debtor.4 If, therefore, an assignment is made, a creditor of the original creditor may, before such intimation, arrest or attach the debt in the hands of the debtor, and will thereby acquire a preference over the assignee. That doctrine, it would seem, has been actually applied in Scotland to debts due by Scottish debtors to foreign creditors, and assigned in the domicil of the latter.5

³ See Sill v. Worswick, 1 H. Bl. 691, 692; Bohlen v. Cleveland, 5 Mason, R. 174. See Holmes v. Remsen, 4 John. Ch. R. 460; Lewis v. Wallis, Sir Thomas Jones, R. 223; 1 Kaims, Equity, B. 3, ch. 8, § 3, p. 344.

² 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778.

See In Re, Wilson, cited 1 H. Bl. 691, 692; Post, § 399 a.

Ibid. Selkrig v. Davis, 2 Rose, Bank. Cases, 315; Stein's Case, 1 Rose Bank. Cas. 481; 2 Bell, Comm. p. 21, 22, 23, 4th edit.; Id. p. 16 to 23, 5th edit.; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778.

⁵ Ibida

§ 396. According to our law, a different doctrine would prevail; for an assignment operates,

But see In Re, Wilson, cited 1 H. Bl. 691, 692. - I have stated the law of Scotland, as I understand it to be stated in the opinion of Lord Eldon, in Selkrig r. Davis, (2 Rose, Bank. Cas. 315; 2 Dow, R. 230, 250,) though in would seem to be exactly like the Massachusetts law stated in the next section (§ 306). And so it was understood by Lord Hardwicke, and Lord Loughborough. The following passage from the judgment of the latter, in Sill r. Worswick, (1 H. Black. R. 691, 692,) gives a very exact view of their opinions. "A question of this nature came before Lord Hardwicke very largely in the bankruptcy of Captain Wilson. With the little explanation I am enabled to give of that case, in which the Court of Sessions entirely concurred with Lord Hardwicke, the distinctions will be apparent. There were three different cats of creditors, who claimed, subject to the determination of the Court, on the ground, that Wilson had considerable debts due to him in Sestand. By the law of Scotland, debts are assignable, and an assignment of a debt notified to the debtor, which is technically called an intimation, makes a specific lien quoad that debt. An assignment of a debt at intimated to the debtor, gives a right to the assignee to demend that debt; but it is a right inferior to that of the creditor, who has obtained his assignment and intimated it. By the law of Scotland also, there is a process for the recovery of debts, which is called an ansatzent. Some of Wilson's creditors had assignments of specific debts intented to the debtors and completed by that intimation, prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had arrested the debts due to him anhaquest to the bankruptcy, and were proceeding under those arrestment recover payment of those debts. The determination of Land Hardwicke, and that of the Court of Sessions, entirely concurred. The first class I have mentioned, namely, the creditors, who had specific assignments of specific, debts, intimated to the debtors prior to the bankruptcy, were holden by Lord Hardwicke to stand in the same situation as creditation claiming by mortgage antecedent to the bankruptcy. All, thursday, he would do with respect to them was, that, if they recovered under that decree, they could not come in under the commission without accounting to the other creditors for what they had taken under their specific security. With respect to the next class of crediens, Lard Hardwicke was of opinion, and the Court of Sessions were of the opinion, that their title, being a title by assignment, was probable to the title by arrestment; and they likewise held, that the arrestment being subsequent to the bankruptcy, were of no avail, the property being by assignment vested in the assignees under the commission. is in this sense, that an expression has been used by Lord Manufell,

per se, as an equitable transfer of the debt.¹ Notice is, indeed, indispensable to charge the debtor with the duty of payment to the assignee; so that, if, without notice, he pays the debt to the assignor, or it is recovered by process against him, he will be discharged from the debt.² But an arrest or attachment of the debt in his hands by any creditor of the assignor, will not entitle such creditor to a priority of right, if the debtor receives notice of the assignment, pendente lite, and in time to avail himself of it in discharge of the suit against him.³

§ 397. In such a case of conflict of laws, the difficulty of applying any other than the general principle, that movables are transferable according to the law of the domicil of the owner, is apparent. Let us take the case of a Massachusetts creditor, assigning in that state a debt contracted there, and

in one or two cases, in which his language, rather than his decision, has been quoted, with respect to the law of Scotland, namely, that the effect of the assignment under a commission of bankruptcy was the same, as a voluntary assignment. For so the law of Scotland treats it, in contradistinction to the assignment perfected by intimation, and to an assignment, which the party might be compelled to make. But it does not follow, that it is an assignment without consideration. On the contrary, it is for a just consideration; not, indeed, for money actually paid, nor for a consideration immediately preceding the assignment. In that respect, therefore, it is a voluntary assignment, But taking it to be so, it excludes, and is preferable to all others attaching; it is preferable to all the arresters; it is preferable to all creditors, who stand under the same class; and to all, who have not taken the steps to acquire a specific lien till after the act of bankruptcy committed."

¹ See ante, § 395, and note; 3 Burge, Com. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778.

² Foster v. Sinkler, 4 Mass. R. 450; Blake v. Williams, 13 Mas. R. 286, 307, 308, 314; Wood v. Partidge, 11 Mass. R. 488; Dix v. Cobb, 4 Mass. R. 508; Bohlen v. Cleveland, 5 Mason, R. 174; Holmes v. Remsen, 4 John. Ch. R. 460, 486. See 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, 777, 778; Alair v. Schenck, 3 Hill, N. Y. R. 228. But see Story on Equity Jurisp. § 421, a. § 1035, a.

³ Ibid.

due to him by a person then domiciled in Scotland. The transfer is in equity complete in the place, where it is made, without notice; but in the place, where the debt is due, it is not complete without notice. To give effect, in such a case, to the law of Scotland, in opposition to that of Massachusetts. would be to give a locality to the debt, and to subject it to the exclusive operation of the law of the debtor's domicil. And it might involve this most serious difficulty, that if the debtor were afterwards found in Massachusetts, or in any other country than Scotland, he might be compelled to pay the debt to the assignee, although it might have been recovered from him in Scotland by a creditor, in a proceeding by attachment of the debt in his hands, he having had notice of the assignment, pendente lite.

§ 398. The reasoning of Lord Kenyon, in a celebrated case, would certainly lead to the conclusion, that an assignment, of personal property, whether it were of goods or debts, according to the law of the owner's domicil, would pass the title in whatever country it might be, unless there were some prohibitory law in that country. His language is; "Every person, having property in a foreign country, may dispose of it in this; though, indeed, if there be a law in that country, directing a particular mode of conveyance, that ought to be adopted. But in this case no law of that kind is stated; and we consecute thimself, prior to his bankruptcy, to have disposed of his property, as he pleased." The same doctrice

Hunter v. Potts, 4 T. R. 182, 192. See Liverm. Diss. p. 140 to 139;
 Id. p. 159, § 249. See ante, § 383.

is maintained by Lord Hardwicke, and Lord Loughborough. And all these learned Judges apply it equally to the cases of assignments of goods and debts, to voluntary assignments by the party, and also (as we shall more fully see hereafter) to assignments by operation of law, as in cases of bankruptcy. The question of prior notice, or intimation, does not seem to have been thought by them material; for they treat the transfer, as complete, from the time of the assignment; and, if that has priority, in point of time, over an arrest or attachment of the property, it is to prevail. The law of England would certainly give effect to such an assignment of any goods or debts in England, which were assigned by the owner in a foreign country.

§ 399. Lord Kaims, in commenting on the subject, says; "That, considering a debt as a subject belonging to the creditor, the natural fiction would be (if any were admissible) to place it with the creditor, as in his possession, upon the maxim, Mobilia non habent sequelam. Others are more disposed to place it with the debtor." But, in fact, a debt is not a corpus capable of local position, but purely a jus incorporale. And, therefore, where the debtor and

¹ See Solomons v. Ross and other cases cited, ¹ H. Bl. 131, 132, note;
Sill v. Worswick, ¹ H. Bl. 665, 690, 691; In re Wilson, cited Ibid. p.
691, 692, 693; Lewis v. Wallis, T. Jones, R, 223. See also Selkrig v.
Davis, ² Rose, Bank. Cas. 97; S. C. Id. 291, 315, 316, 317; Kaims on
Equity, B. 3, ch. 8, § 4; Scott v. Allnutt, ² Dow & Clarke, R. 404, 412;
Liverm. Diss. p. 159; Ogden v. Saunders, ¹² Wheat. R. 364, 365. See
also Merlin Répert. Faillité, p. 412, 414, 415.

Kaims on Equity, B. 3, ch. 8, § 4. See Morrison's Case, 4 T. R. 185;
 H. Bl. 677; ante, § 362; Rodenburg, De Divers. Stat. tit. 2. ch. 5, § 16;
 Boullenois, Appx. p. 47, 48, 49; ante, § 377.

² See ante, § 362, 376, 384; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778, 779.

creditor live in different countries, and are subjected to different laws, Lord Kaims thinks the law of the domicil of the creditor ought to prevail. He then adds; "When the creditor makes a voluntary conveyance, it is to be expected, that he should speak in the style and form of his own country; and, consequently, that the rule of his own country should be the rule here. In a word, the will of a proprietor, or of a creditor, is good title jure gentium, that ought to be effectual every where. Thus, an assignment made by a creditor in Scotland, according to our forms, of a debt due to him by a person in a foreign

¹ On this point I cannot do better than insert a passage from Mr. Livermore's Dissertations (p. 162, § 251,) illustrative of the same principles. "It was formerly doubted by some, whether personal actions should be considered as movables, and whether they should not be considered to have a location in the domicil of the debtor. But the common opinion seems to be well settled, that, considered actively, and with respect to the interest of the creditor and his representatives, they must be considered, as attached to the person of the creditor; and this, although the payment of the debt is secured by an hypothecation upon an immovable property. Such is the doctrine of Dumoulin. Nomina et jura, et quacumque incorporalia, non circumscribantur loco, et sic non cons est accedere ad certum locum. Tum si hac jura alicubi case consciention. non reputarentur esse in re pro illis hypothecatà, nec in debitoris persona, sed magis in persona creditoris, in quo active resident, et ejus ossibus inhærent. Molin. Oper. Comm. ad Consuet. Paris. Tit. 1, De fiefs. § 1, n. 9, p. 56, 57. So also Casaregis, after saying that movables are attached to the person of the owner, and, at his death, will be distributed according to the laws of his domicil, proceeds to consider, what? will be the rule with respect to debts, and determines, that they follow the person of the creditor. An ita dicendum de nominibus debitoratio, actionibus, ac juribus, que bons neque dicuntur mobilia, neque francebilia, sed tertiam speciem bonorum componunt, et dicuntur incorporalia? Et respondeo affirmative; nam statutum benè comprehendit nombre debitorum, licét forensium, quia eorum obligationes non circumscribuntur locis, ideoque attenditur statutum, cui subjectus est testator. Et hec verior est sententia; nam debitorum nomina, tanquam persone coherentia, debent regulari secundum statuta loci, cui creditor est subjectus." Casaregis, In Rubr. Stat. Civ. Genuæ de Success. ab Intest. n. 64, 65, Tom. 4. p. 42, 43.

country, ought to be sustained in that country, as a good title for demanding payment; and a foreign assignment of a debt due here, regular according to the law of the country, ought to be sustained by our judges."1 In another place he adds; "An equitable title, in opposition to one that is legal, can never found a real action (actio in rem). It cannot have a stronger effect than to found an action against the proprietor to grant a more formal right, or, in his default, that the Court shall grant it. But in the case of a debt, where the question is not about property, but payment, an equitable title coincides, in a good measure, with a legal title. An assignment made by a foreign creditor, according to the formalities of his country, will be sustained here, as a good title for demanding payment from the debtor; and it will be sustained, though informal, provided it be good jure gentium; that is, provided, that the creditor really granted the assignment. Such effect hath an equitable title; and a legal title can have no stronger effect."2 This is in perfect coincidence with the law of England and America. 3

§ 399 a. Questions may arise upon the conflict of

2 Kaims on Equity, B. 3. ch. 8, § 4, sub finem. See also Huberus, De

Confl. Leg. Lib. 1, tit. 3, § 9.

¹ Kaims on Equity, B. 3, ch. 8, 6 4.

³ See Holmes v. Remsen, 4 John. Ch. R. 460, 486; S. P. 20 John. R. 229, 267; Moreton v. Milne. 6 Binn. R. 353, 361, 369; Blake v. Williams, 6 Pick. R. 286, 307, 314. - It is a very different question, when an assignment of a debt is lawfully made, whether the assignee can sue the debtor in his own name; or must sue in the name of the assignor. That point has been sometimes thought to belong to the mode of remedy, rather than the right, and of course is to be governed by the lex fori. See 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778; and see also Wolff v. Oxholm, 6 Maule & Selw. 92, 93. But see Alivon r. Furnival, 1 Cromp. Mees. & Rosc. 277, 296; post, § 420, 566.

laws, where an assignment is sonal property in one country and the property is at the ti locally in another country, by to be attached by a trustee p and an attachment is actually the assignor before notice of such a case (as we have seen given before judgment in the be entitled to maintain his prior pose the Lex fori enforces a in such a case entitle the c right, and a judgment against judgment conclude the assign afterwards found in the count ment is made, by whose law Qui prior est in tempore, pot pose the property to be found country, and the assignee show the courts thereof; what law ascertaining the title; the law signment, or that of the jud any difference, whether the not have intervened for his rig fore judgment? Or, that he country, where the judgment time of the rendition thereof more easily put than answered the attention of courts of i called upon to enforce the rilocal tribunals, against the I

¹ Ante, § 39

assignees under assignments of debts, or other personal property, made in a foreign country.1

§ 400. But where an attachment or garnishment has been made by a creditor according to the local law rei sitæ, before any assignment by the party, or by operation of law in invitum, there is room for a distinction; and it may well be held, that in such a case, the attaching creditor is entitled to a priority over the assignee. For, in such case, the rule may justly prevail, Qui prior est in tempore, potior est in jure; and the creditor is equitably entitled to the benefits of his diligence. A case to this effect is reported by Casaregis, and reasoned out with great force upon general principles. The doctrine does not, indeed, seem in its nature susceptible of any well founded doubt; and it is in entire conformity to the principles on the same subject recognised both in England and in America.2

§ 401. There are some other matters connected with this subject, which deserve attention. Upon the sale of goods on credit, by the law of some commercial countries, a right is reserved to the vendor to retake them, or he has a lien upon them for the price, if unpaid; and, in other countries, he possesses a right of stoppage in transitu only in cases of insolvency of the vendee.3 The Ro-

¹ Ante, § 395, 396.

² Mr. Livermore, in his Dissertations, (p. 159 to 162,) has given the case, and the reasoning of Casaregis at large. See Selkrig r. Davis, 2 Rose, Bank. Cases, 291, 310; Casaregis, Il Cambista Instruito, cap. 7, Tom. 3, p. 64.

³ Abbott on Shipp. Pt. 1, ch. 1, § 6; Id. Pt. 3, ch. 9, § 2; I Domat, Civil Law, B. 1, tit. 2, § 3, n. I, 2; Id. § 12, n. 13; Id. B. 3, tit. 1, § 5, n. 3, 4, note; Merlin Répert. Revendication, § 1, n. 8; Code Civil, art.

man law did not generally consider the transfer of property to be complete by sale and delivery alone, without payment or security given for the price, unless the vendor agreed to give a general credit to the purchaser; but it allowed the vendor to reclaim the goods out of the possession of the purchaser, as being still his own property. Ouod vendidi (say the Pandects) non aliter fit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine datum, vel etiam fidem habuerimus emptori sine ullá satisfactione.1 The present Code of France gives a privilege, or right of revendication, against the purchaser for the price of goods sold, so long as they remain in the possession of the debtor.2 In respect to ships, a privilege is given by the same Code to certain classes of creditors (such as vendors, builders, repairers, mariners, &c.) upon the ship, which takes effect even against subsequent purchasers, until the ship has made a voyage after the purchase.3 And, by the general maritime law, acknowledged in most if not in all commercial countries, hypothecations and liens are recognised to exist for seamen's wages, and for repairs of foreign ships, and for salvage.4

^{2102; 4} Pardessus, Droit Comm. art. 939, 940, 1204; 2 Kest, Comm. Lect. 30, p. 540, 3d edit.; ante, § 322 to § 328; 3 Burge, Comm. on Cal. and For. Law, Pt. 2, ch. 20, p. 770.

¹ Digest, Lib. 18, tit. 1, l. 19; Id. Lib. 14, tit. 4, l. 5, n. 18.—As be liens for unpaid purchase money on lands, see ante, § 322 b, and Glass r. Brown, 1 Mason, R. 219, 220, 221.

² Code Civil. art. 2102, n. 4.

³ Code of Commerce, art. 192, 193; 3 Pardessus, Droit Comm. art. 942, 950. See also 1 Valin, Comm. 340; Abbott on Shipp. Pt. 1, ch. 1, § 6.

⁴ See ante, § 322 a, § 323; Conflit des Lois, Revue Etrang.

Franç. Tom. 6, 1840, § 33, p. 227, 228.

§ 402. The question, then, naturally arises, whether, if such privileges, hypothecations, or liens, are recognised in the country, where the contracts, or acts, which give rise to them, are made, they are to be deemed obligatory in every other place, where the property may be found, even against innocent purchasers, or against creditors who would otherwise, by the law of rei sitæ, have a preference of right? Would an attachment, for instance, of foreign creditors prevail against them in the tribunals of the domicil of such creditors? Upon the general principles already stated, as to the operation of contracts, and the rule, that movables have no locality, it would seem, that these privileges, hypothecations, and liens, ought to prevail over the rights of subsequent purchasers and creditors in every other country. That having once attached rightfully in rem, they ought not to be displaced by the mere change of local situation of the property.1 This doc-trine was in some measure recognised in an important case in England, where the right of stoppage in transitu was supposed to depend upon doctrines of foreign law, materially different from the law of England. The right conferred by the foreign law was upheld against the claims of English creditors, under circumstances of that case, which were somewhat peculiar, the lien having been given by the foreign law, and enforced in the foreign country, so far as to compel the master, who was in possession of the goods, to recognise it, and to agree to hold the property subject to it.9

¹ See Livermore, Dissert. p. 159, § 249; ante, § 322.

² Inglis v. Underwood, 1 East, R. 515; Abbott on Shipp. Pt. 3, ch. 9,
§ 3. On that occasion Lord Kenyon said; "The decision in this case

§ 102 a. Nevertheless, as we have already seen, there is no inconsiderable conflict of opinion among foreign jurists, and even among domestic jurists, as to the extent, to which the right of privilege or priority ought to be allowed in cases, where such privilege or priority has arisen under foreign laws, against subsequent purchasers, or against creditors in the country, where the property is subsequently found

will not at all trench upon the general rule of law, respecting the right of stopping goods in transitu: but giving the plaintiffs the fall benefit of the argument, that the delivery of the goods on board a chanced ship was a delivery to the bankrupt, still the circumstance of the Russian ordinance set forth in the case varies it very importantly, and takes it out of the general rule. By that law, the consignors, under the circumstances stated, had a right to repossess themselves of their goods; and they did so in effect; not indeed by actually taking them out of the ship on board of which they were laden, or by instituting legal precess for the recovery of them; but having a right so to do, which it because unnecessary to exert, because it was in the first instance acknowledged and submitted to by the captain, in whose possession the property was, they imposed terms upon him, that he should sign bills of laine to their order, upon his compliance with which, they suffered the care to proceed to the place of its destination, disposable there as creat might turn out. The goods are therefore sent with the condition attached to them. The law of Russia in this respect is a very contable law; and I have often lamented, that our own code was defective in the same particular. For every man contracting to supply enother with goods acts on the presumption, that that other is in a condition to pay for them; and therefore when the condition of the consignes is, altered at the time of the delivery, and he is insolvent, and no ken capable of performing his part of the contract, honesty and good his require, that the contract should be rescinded. However, the control has been settled to be law, unless the consignor stop the goods in tersitu before they get into the consignee's possession. But this being a transaction into a foreign country, where a more equitable law in the respect prevails, I am far from being desirous of limiting its counties; and for the reasons before given, I think, that the consigner have substantially availed themselves of it; and that the defendant, by delivering the goods to their order, has done no more than he will

¹ Ante, § 322 to § 328; post, § 524 to § 528.

Whether an exception would be allowed generally in favor of maritime liens and privileges, and priorities, founded upon the public policy of giving them full effect as matters of public convenience and interest, founded upon the necessities and exigencies of commerce and naval intercourse, may admit of question. It is highly probable, however, that most, if not all, commercial nations will adopt such an exception, upon the principle of comity sub mutuæ vicissitudinis obtentu. Indeed, upon any other system, bottomry bonds, respondentia bonds, and other maritime hypothecations, would constitute so unsafe a security, that no merchant abroad would venture to lend his money upon so fragile a title, which might be undermined or destroyed by a local law, wholly unknown and unsuspected by him.

§ 403. Hitherto we have been considering cases of voluntary transfers inter vivos; and we are now naturally led to the consideration of involuntary transfers by operation of law in the domicil of the owner, such as are statutable transfers under the Bankrupt or Insolvent Laws of the country of his domicil. The great question here is, whether an assignment under such laws has a universal operation, so as to transfer the movable property of the bankrupt or insolvent in all other countries, to the same extent as a voluntary transfer made by him would, and thus to withdraw it from the process of the local foreign laws, by way of arrest, attachment, or otherwise, issued in favor of the foreign creditors in the country, where the movable property is situate. This question has been very gravely discussed both at home and abroad; and the Courts of England and the Courts of America have arrived at opposite conThe Courts of the former country continue that the doctrine of the unitarial operation of such an assignment upon all movable property. Released it may be locally situate at the observable in the assignment. Many (but not all) of the Courts of the latter country confine the operation of such an assignment to the territory, where the party is femaled bensariot or insolvent. The question is worthy of a very full examination, and a summary of the reasoning on each side of the question, will therefore, be here brought under review.

1494. These, who maintain, that assignments under Bankrupt, or Inscivent laws are, and ought to be, of universal operation to transfer movable property, in whatever country it may be locally sitnate, adopt reasoning to this effect. The general principle certainly is, that personal property has no locality: but, that, as to its disposition, it is subject to the law, which governs the person of the owner, that is to say, it is subject to the law of his domicil. 2 There can be no doubt, that the owner may, by a voluntary assignment or sale, made according to the law of his domicil, transfer the title to any person, wherever the property may be locally situate. Now, an assignment under the bankrupt laws of his domicil is by operation of law a valid transfer of all the bankrupt's property, as valid, as if

¹ Mr. Bell has examined this subject with his usual ability and accuracy, and vindicated at large the propriety of the rule, giving universal effect to assignments in Bankruptcy. See 2 Bell, Comm. B. 8, ch. 2, § 1266, p. 684 to p. 690, 4th edit.; Id. p. 680 to p. 691, 5th edit.

² Sill v. Worswick, 1 H. Black. 690, 691; Hunter v. Potts, 4 T. R.

³ In Re. Wilson, cited 1 H. Black, 691, 692.

made personally by him. The law upon his bankruptcy transfers his whole property to the assignees, who thus become, Lege loci, the lawful owners of it, and entitled to administer it for the benefit of all his creditors. The mode of transfer is wholly immaterial. The only proper question is, whether it is good according to the law of his domicil. This rule is admitted and applied in all cases of the succession to movable property in cases of intestacy, where the property passes by mere operation of law, in the same manner, and to the same extent, as

¹ Sill v. Worswick, 1 H. Black. 691, 692; Hunter v. Potts, 4 T. R. 182, 192; Phillips v. Hunter, 2 H. Black. 402, 405; Goodwin v. Jones, 3 Mass. R. 517. - "It is a proposition," (said the Court in Phillips v. Hunter, 2 H. Black. 402, 403,) "not to be disputed, that previous to the bankruptcy the Bankrupts themselves might have transferred or assigned this property, though abroad, as absolutely, as if it had been in their own tangible possession in this country; and it seems, that the assignees under their commission were entitled, by operation of law, to do with it after the bankruptcy, what the Bankrupts themselves might have done." In Potts v. Hunter, (4 T. R. 182, 192,) the Court said ; "The only question here is, whether or not the property in that Island (Rhode Island) passed by the assignment, in the same manner, as if the owner (the Bankrupt) had assigned it by his voluntary act. And that it does so pass cannot be doubted, unless there were some positive law of that country to prevent it." "On the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained, but that by the laws of this country, uncontradicted by the laws of any other country, where personal property may happen to be, the commissioners of a Bankrupt may dispose of the personal property of a Bankrupt here, though such property be in a foreign country." In Goodwin v. Jones, (3 Mass. R. 517,) Mr. Chief Justice Parsons said; "The assignment of a Bankrupt's effects may be considered as his own act, as it is in the execution of laws, by which he is bound, he himself being competent to make such an assignment, and voluntarily committing the act, which authorized the making of it." See also Livermore's Dissert. p. 159, § 249, 250. The same doctrine was affirmed by Lord Mansfield in Wadham v. Marlow, cited 1 H. Black. 437, 438, 339, note; S. S. and S. P. 8 East, R. 314, 316, note z. ² Ante, § 399, 420, 566.

where it passes by the voluntary act or transfer inter vivos of the owner, or where it passes by his last will or testament. 1

§ 405. The same principle applies with equal force and general convenience to the disposition of the effects of bankrupts; for the just and equal distribution of all the funds of that class of debtors becomes the common concern of the whole commercial world. In cases of intestacy, it is presumed to be the intent of the Intestate, that his movables, which by fiction of law have no locality. independent of his person, should be brought home, and distributed according to the law of his domicil. It is equally to be presumed, as the understanding of the commercial world, that the bankrupt's effects should follow his person, and be distributed in the place of his domicil, where the credit was bestowed, or the payment expected according to the laws thereof. 2 An assignment under the bankrupt laws ought to be deemed in all respects of equal force and validity with a voluntary assignment of the party; for, by implication of law, he consents to all transfers made of his property according to the law of his domicil. Great inconveniences would follow from a different proceeding. Different commissions might issue in different countries, and have concurrent operation simul et semel in different countries. thus, it would be in the power of the bankrupt to throw his property under either commission at pleasure, and to give local preferences to different creditors, according to his own partialities or prejudices.

¹ Sill v. Worswick, 1 H. Black. 690, 691.

² Holmes v. Remsen, 4 John. Ch. R. 460, 470; Hunter v. Potts, 4 T. R. 182, 192.

Such a state of things, and such conflicting systems, would lead to great public inconvenience and confusion, and be the source of much fraud and injustice, and disturb the equality and equity of any bankrupt system in any country.¹

§ 406. There is great wisdom, therefore, in adopting the rule, that an assignment in bankruptcy shall operate as a complete and valid transfer of all his movable property abroad, as well as at home; and it has accordingly received a very general sanction. It is true, that any nation may adopt, if it pleases, a different system, and prefer an attaching domestic creditor to a foreign assignee or to foreign creditors. But such a course of legislation can hardly be deemed consistent with the general comity of nations, and could scarcely fail to bring on a retaliatory system of preferences in every other nation injured thereby. But, until such a legislation is positively made, and interposes a direct obstruction, the true rule is, to follow out the lead of the general principle, that makes the law of the owner's domicil conclusive upon the disposition of his personal prop-

¹ Holmes v. Remsen, 4 John. Ch. R. 471; Phillips v. Hunter, 2 H. Black. 402. — In Phillips v. Hunter, (2 H. Black, 402, 403,) the Court said; "The great principle of the Bankrupt laws is justice founded on equality. This being the principle of those laws, it seems to follow, that the whole property of the bankrupt must be under their (the assignees,) control, without regard to the locality of that property, except in cases, which directly militate against the particular laws of the country, in which it happens to be situated." "If the bankrupt laws were circumscribed by the local situation of the property, a door would be open to all the partiality and undue preferences, which they were framed to prevent; it being easy to foresee, how frequently property would be sent abroad with that unjust view immediately previous to and in contemplation of bankruptcy."

erty.¹ This reasoning applies in an especial manner to contracts made in the very country, where the party is declared bankrupt.²

§ 407. There are many authorities in favor of this doctrine. As early as 1723, Lord Talbot, then at the bar, gave an opinion, that the statutes of bankruptcy of England did not extend to the plantations; yet that the personal property of an English bankrupt in the plantations passed to the assignees. Lord Hardwicke, in a case in judgment before him, adopted and acted upon the doctrine, that an assignment in bankruptcy in England conveyed the personal property of the bankrupt in foreign countries; and that their title would overreach that of an attaching creditor after the assignment, although at

¹ Holmes r. Remsen, 4 John. R. 471, 472; Hunter v. Potts. 4 T. L. 182, 192. Sill v. Worswick, 1 H. Black. 691, 693. - In Philips s. Hunter, (2 H. Black. 402, 405,) the Court said; "It is true, that the laws of the country, where the property is situated, have the immediate control over it, in respect to its locality, and the immediate pustection afforded to it; yet the country, where the proprietor resides, in respect to another species of protection afforded to him and his menerty, has a right to regulate his contract relating to that property," And in Hunter v. Potts, (4 T. R. 182, 192,) the Court said; " Every passes having property in a foreign country may dispose of it in this; though, indeed, if there be a law in that country, directing a particular mode of conveyance, that must be adopted." "If (said Lord Loughborough) the bankrupt happens to have property, which lies out of the jurisdiction of the law of England, if the country, in which it lies, proceeds according to the principles of well regulated justice, there is no doubt that it will give effect to the title of the assignees." "But if the law of that country preferred him (a creditor) to the assignees, though I must suppose that determination wrong, yet I do not think, that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle, on which that law so decided." 53 v. Worswick, 1 H. Black. 691, 693.

² Sill r. Worswick, 1 H. Bl. 691, 693, 694; Phillips v. Hunter, 2 H. J. 404, 405; Hunter r. Potts, 4 Term R. 182.

³ Livermore, Diss. 140; Beames, Lex Mercatoris, p. 5, 6, 6th edit.

that time it was not made known to the debtor.1 In another case in the Court of Chancery in England, in 1704, where, the property of the owner, who was domiciled in Holland, was taken under a commission of bankruptcy, and according to the laws of Holland, the administration thereof given to, and vested in persons, who are called Curators of Desolate Estates, it was decided, that the Curators had immediately upon their appointment a title to recover the debts due to the bankrupt in England, in preference to the diligence of particular creditors seeking to attach those debts.2 In another case in 1769, the same point was decided.3 These are cases, in which the rule was asserted in favor of foreign assignees.4 A like decision in favor of English assignees was made in the Court of Chancery in Ireland in 1763.5 Lord Thurlow gave it the sanction of his own great name in a case decided by him in 1787.6

§ 408. The question was most elaborately considered in England in two cases decided in 1791, in which it was solemnly held, that the operation of the bankrupt laws is to vest in the assignees all the personal property of the bankrupt, wherever it may be situate; and that whenever that property shall

¹ In Wilson's Case, cited in I H. Bl. 691, 692, and probably decided between 1752 and 1756. See also S. C. cited in Hunter v. Potts, 4 T. R. 186, 187.

Solomons v. Ross, 1 H. Bl. 131, note; Id. 691; S. C. Cooke's Bank. Laws, 306, 4th edit.

³ Jollet v. Deponthieu, 1 H. Bl. 132, note; Id. 691.

⁴ Ibid.

Neale v. Cottingham, 1 H. Bl. R. 132, note; S. C. cited in Hunter v. Potts, 4 T. R. 194, and Cooke's Bank. Laws, p. 303, 4th edit., 1799. See also Quelin v. Moisson, 1 Knapp, Appeal R, 265, note.

⁶ Ex parte Blakes, 1 Cox, R. 398.

be brought into England by any obtained it, the assignees will have it of him, for the benefit of all the consequently, that an attachment and property, made by a creditor in a after such assignment, will be held in the principle, that the title, which of time, ought to obtain preference and law.1 Upon a writ of error the maintained in these cases was affir actual application it was restricted made by British creditors against In this state the doctrine remained cent period, when in the case of an English partner in a Scotch pa A commission of discussed anew. issued in England; and subsequentl tachment, or sequestration, was made of debts due to the bankrupt in ! question then arose, whether the a attaching creditor, was entitled to p depended on the question, whether a mission of bankruptcy passed to the title to property, or debts location due in Scotland. The Court of S land held, that it did; 2 and upon ap ment was affirmed by the House of thing" (said Lord Eldon) "is quite c

Sill v. Worswick, 1 H. Bl. 665, 690, 691, 694
 R. 192; S. C. in Err. 2 H. Bl. 402.

² The Court of Session, in Scotland, gave very this subject, in the Royal Bank of Scotland v. Cut as Stein's case, 1 Rose, Bank. Cases, Appx. 412; 91, 78. See also Smith v. Buchanan, 1 East, R. 6 to 687, 4th edit.; Id. p. 680 to p. 691, 5th edit.

is not in any book any dictum or authority, that would authorize me to deny, at least, in this place, that an English commission passes, as with respect to the bankrupt and his creditors in England, the personal property he has in Scotland, or in any foreign country."

1 Selkrig v. Davis, 2 Rose, Bank. Cas. 291, 314; S. C. 2 Dow, R. 230; 250; 2 Rose, Bank. Cas. 97. See also Ex parte Dobrey, 8 Ves. 82; 2 Bell, Comm. 684 to 687, 4th edit. ; Holmes v. Remsen, 4 John. Ch. R. 460; S. C. 20 John. R. 229. - The Judgment of Lord Eldon, which was affirmed apparently with entire unanimity, contains many striking remarks upon the difficulties attendant upon any other system of international jurisprudence. The following extracts are particularly valuable to be submitted to the consideration of the American Courts. "In whatever way a Scottish sequestration may be enforced, the distribution of a bankrupt's effects under it is perfectly different from what it is under an English commission of bankruptcy. The Scottish law cuts down all securities, that have been made or given within a certain number of days prior to the issuing of the sequestration, whether they have been given bona fide, or given, as we should say, in contemplation of bankruptcy, On the other hand, in our law, though the approximation of the security to the date of the commission may be evidence, that it was given in contemplation of bankruptcy, yet it is but evidence; and the security may be perfectly good. Again, in England, a man cannot become a bankrupt, without committing an act of bankruptcy. The commission must be founded on that act of bankruptcy; and there are various other differences, applying to the property of a bankrupt, as administered under an English commission, or, vice versa, as distributed by the rules, and according to the forms, of a Scottish sequestration. If, my Lords, you attempt to obviate these inconveniences by a co-existing sequestration and commission, the difficulty is tenfold greater, unless the one should be used merely as the means of assisting the distribution of the funds on the other. What personal property shall belong to the one proceeding, and what to the other proceeding, is no ordinary difficulty. The counsel for the appellant say there is no difficulty. - That a debt owing to the house in Scotland, wherever the debtor lives, ought to go to the Scotch sequestration; and, in like manner, that the debt owing to the house in England, wherever the debtor lives, should go to the commission. But the house may be constituted of persons, of whom it may be difficult to say, whether a man is a Scotchman or an Englishman. It may happen, that a house is composed of persons, some of whom reside in Scotland and some in England. I should wish to know, not only, how the joint debts due to

§ 409. This is now, accordingly, the settled law of England, in which the following propositions are firmly established; first, that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England; secondly, that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment; thirdly, that in England the same doctrine holds under assignments by her own bankrupt laws, as to personal

one firm, and the joint debts due to the other, are to be distributed; but, where separate debts are due to each, whether the separate debts are to be a fund of distribution under the English commission, or under the Scottish sequestration, or what is to become of them. All these difficulties certainly belong to this case. But, notwithstanding that, one thing is quite clear; there is not in any book, any dictum or authority, that would authorize me to deny, at least in this place, that an English commission passes, as with respect to the bankrupt and his creditors in England, the personal property he has in Scotland or in any foreign country. It is admitted, that the assignment under the English commission, as between the bankrupt and the English and Scotch proprietors, passes the Scotch property, and vests in the assignees, when the Scotch creditors have not used legal diligence. I think the case was put at the bar thus; That the commission of bankruptcy operated so as to bring into the fund the Scotch personal property, provided that such personal property was not arrested by legal diligence in Scotland, prior to the intimation of the assignment in Scotland. It was therefore argued, that this was to be put on the same footing as the case of the assignation of a particular debt to a particular individual. Now, your Lordships need not be told that, by the law of Scotland, if B. assign a debt, which is due from C. to B., a creditor of B. may arrest that debt in the hands of the debtor, notwithstanding the assignment, unless the assignee has given an intimation formally to the person, by whom the debt is owing. That must be admitted. Upon that it has been insisted here, that no intimation has been given, and that this subsequent arrestment in 1798 ought to have the preference of the title of the assignees, under the commission, that was sued out in the year 1782." 2 Rose, Bank. Cas. 314 to 316. He afterwards proceeded to decide, that no intimation was necessary; and if necessary, it was given. 1d. 318, 319. See Quelin r. Moisson, 1 Knapp, Rep. 265.

property and debts of the bankrupt in foreign countries; fourthly, that, upon principle, all attachments made by foreign creditors, after such assignment in a foreign country, ought to be held invalid; sixthly, that at all events a British creditor will not be permitted to hold the property acquired by a judgment under any attachment made in a foreign country after such assignment; and seventhly, that a foreign creditor, not subjected to British laws, will be permitted to retain any such property acquired under any such judgment, if the local laws (however incorrectly upon principle) confer on him an absolute title.1 There is no inconsiderable weight of American authority on the same side; but it must be admitted, that the preponderating authority is certainly now the other way.2

§ 410. The reasoning, which is urged in support of what may be deemed the American Doc-

¹ 2 Bell, Comm. § 1266, p. 687 to 690, 4th edit.; Id. p. 680 to 690, 5th edit.; Holmes v. Remsen, 4 John. Ch. R. 560; S. C. 20 John. R. 229; Dwarris on Statutes, 650, 651.

² Mr. Chief Justice Parsons certainly held this opinion in Goodwin v. Jones, 3 Mass. R, 517. And Mr. Chancellor Kent has sustained it in one of his most elaborate judgments, which will well reward a diligent persual, Holmes v. Remsen, 4 John. Ch, R. 460. This is also, as we shall see, the law in France and Holland. Post, § 417. See Parish v. Seton, Cooper's Bank. Law, 27; Holmes v. Remsen, 4 John. Ch. R. 484; S. P. 20 John. R. 258; Blake v. Williams, 6 Pick. R. 312, 313; Merlin Répertoire, Faillité et Banqueroute, Art. 10. Mr. Chancellor Kent, in his Commentaries (2 Kent, Comm. Lect. 37, p. 404 to 408, 3d edit,) has with great candor admitted, that the American doctrine is now established the other way by a preponderance of authority; although he has an undisguised distrust of the validity of its foundation. There are not a few jurists in America, each of whom may be disposed to use on this occasion the language of a great orator of antiquity, " Ego assentior Scevolm." See Livermore's Diss. § 223 to 248, p. 140 to 158. There are in Mr. Henry's Appendix to his work on Foreign Law, p. 251 to p. 258, some curious opinions given by Counsel in 1715, as to the effect of an attachment after a foreign bankruptcy. See also Devisme v. Martin, Wyeth's Virg. R, 133.

trine, is to the following effect. It is admitted, that the general rule is, that personal property, including debts, has no locality, but follows, as to its disposition and transfer, the law of the domicil of the owner. But every country may by positive law regulate, as it pleases, the disposition of personal property found within it; and may prefer its own attaching creditors to any foreign assignee; and no other country has any right to question the determination. When there is no positive law, the general rule is to govern, with the exception of such cases as fall within the known principle of Huberus, that it is not prejudicial to the State, or to the just rights of its citizens. And this exception is the very ground, upon which the objection to the ubiquity of operation of the bankrupt laws of a country, as respects the personal estate of the bankrupt, is to be rested.1

§ 411. There is a marked distinction between a voluntary conveyance of property by the owner, and a conveyance by mere operation of law in cases of bankruptcy in invitum. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the Legislature of a country can do, when justice requires it, is to assume the disposition of his property in invitum. But a statutable conveyance, made under the authority of any Legislature, cannot operate upon any property, except that, which is within its own territory. This makes a solid distinction between a voluntary conveyance of the own-

¹ Blake r. Williams, 6 Pick. 286; Olivier v. Townes, 14 Martin, R. 93, 97 to 100; Milne r. Moreton, 6 Binn. 353.

er and an involuntary legal conveyance by the mere authority of law. The former has no relation to place; the latter, on the contrary, has the strictest relation to place. This distinction is insisted on with great force by Lord Kaims. 1 It is, therefore, admitted, that a voluntary assignment by a party, according to the law of his domicil, will pass his personal estate, whatever may be its locality, abroad, as well as at home. But it by no means follows, that the same rule should govern in cases of assignments by operation of law.

§ 412. The true rule in such cases is to hold, that the assignees are in the same situation, as the bankrupt himself, in regard to foreign debts. They take the property under the assignment, subject to every equity belonging to foreign creditors, and subject to the remedies provided by the laws of the foreign country, where the debt is due; and when they are permitted to sue in a foreign country, it is not as assignees, having an interest, but as the representatives of the bankrupt. They stand upon the footing of administrators only, with a right to sue for the benefit of all the creditors. But our local law will not regard the choses in action of the debter, as exclusively appropriated to the use of such assignees; and a preference can be gained by them only by pursuing the remedies, which our local laws afford. This was formerly the rule in England.2

§ 413. Nor can it be truly said, that an assignment by the bankrupt laws is with the consent of the bankrupt, because he assents by implication to such laws.

¹ Kaims on Equity, B. 3, ch. 8, § 6; Remsen v. Holmes, 20 John. R. 258, 259; Moreton v. Milne, 6 Binn. 353, 369; ante, § 351 b.

² See Mawdesley v. Park, cited I H. Black. R. 680.

This is a very unsafe and dangerous principle, on which to risk the doctrine; for in the same way it may be said, that a man, committing a crime, for which his estate is forfeited, voluntarily consents to its transfer. But the principle, whether correct or not, can only apply to cases, where the debtor and creditor belong to the same country. It is wholly inapplicable to foreign creditors.

§ 414. Besides; national comity requires us to give effect to such assignments only so far, as may be done without impairing the remedies, or leavening the securities, which our laws have provided for our own citizens. The rule is; Quatenus sine prejudicio indulgentium fieri potest.1 And after all, this is mere comity, and not international law. All comity of this sort must be built up in a great measure upon de doctrine of reciprocity; and this is extremely difficult from the known diversities in the jurispendence of different nations.2 It would prejudice the news and remedies of our citizens in our own courts, to suffer the assignments under foreign bankrust hws to prevail over their own diligence, in seeking remedies against their debtors in our own cours. If there is in such cases a conflict between our such laws and foreign laws, as to the rights of our citizens. and one of them must give way, our own live ought to prevail.3 The most convenient and pretical rule is, that statutable assignments, as to creditors, shall operate intra-territorially only. If our citizens conduct themselves according to our laws

¹ Huberus, Lib. 1, tit. 3, De Conflict. Leg. § 2.

Blake v. Williams, 6 Pick. R. 269, 313, 314, 215; Milne v. Mines.
 6 Binn. 353, 375; Remsen v. Holmes, 20 John. R. 229, 263, 264.

³ Potter v. Brown, 5 East, R. 131; ante, 4 336.

in regard to the property of their debtors, found within our jurisdiction, it is reasonable, that they should reap the fruits of their diligence, and not be sent to a foreign country to receive such a dividend of their debtor's effects, as the foreign laws allow. If each government in cases of insolvency should sequester, and distribute the funds within its own jurisdiction, the general result will be favorable to the interest of creditors, and to the harmony of nations. This is the rule adopted in all cases of administration of the property of deceased persons; and there is no real difference between the principle of those cases, and of cases of bankruptcy.¹

§ 415. Down to the time of the American revolution, this may fairly be deemed to have been the English doctrine. It has since been changed. Even in England the principle has not as yet been applied in favor of any foreign countries, except such as have bankrupt laws in form or substance; and we have none in our country.² It can make no difference in the case, whether the debt of the attaching creditor accrued here, or in foreign countries; for in either case the question is not, as to the validity of the contract; but as to a collateral matter, that is to say, the effect to be given to it, in a conflict between rights growing out of our own laws, and those of a foreign country.³

R. 353, 361; Blake v. Williams, 6 Pick. R. 286.

^{*} Remsen v. Holmes, 20 John, R. 229; Blake v. Williams, 6 Pick. R. 286; Milne v. Moreton, 6 Binn. R. 353; Wallis v. Patterson, 1 Harr. & McHea. R. 463; Abraham v. Plestero, 3 Wendell, R. 538, 549, 550.

Milne r. Moreton, 6 Binn. 360.

\$416. Neither is it true, that even the voluntary conveyances of parties in all cases are to be held valid, where they are prejudicial to the rights and remedies of our own citizens. In Massachusetts, for instance, it has been held, that a voluntary assignment by a debtor of all his property, made in Pennsylvania for the benefit of creditors generally, shall not prevail over a subsequent attachment of the funds of the debtor made after the assignment: because such an assignment would be void by the laws of Massachusetts, if made in that state, as being in fraud of creditors: and it is unjust and unequal in its effects. and prejudicial to the citizens of the state. In such a case, therefore, the party, who shall by process first attach the debt, or seize the property, ought to prevail whether creditor or assignee.1

§ 417. It is admitted in the reasoning in the American cases, that the old law of France and Holland is in coincidence with the British doctrine,* The modern law of those countries is equally decisive in its

Ingraham v. Geyer, 13 Mass. R. 146; S. C. cited 6 Pick. E. 307. See also Olivier v. Townes, 6 Pick. R. 97 to 101.— This seasons of the American reasoning is principally extracted from the three healing cases of Milne v. Moreton, 6 Binn. R. 353, Remsen v. Halman, 20 John. R. 229, and Blake v. Williams, 6 Pick. R. 286, where the subject is very elaborately discussed. The same doctrine will be found supported in other American cases, cited in 2 Kent, Comm. Lect. 37, p. 405 to 468, 3d edit. See also Olivier v. Townes, 14 Martin, R. 93, 99; Handam s. Sterry, 5 Cranch, R. 289; Ogden v. Saunders, 12 Wheaton, R. 283; K. 360 to 369; Saunders v. Williams, 5 New Hamp. R. 213; Flatter v. Abraham, 1 Paige, R. 237; S. C. 3 Wendell, R. 538; Fox a Alama, 5 Greenl. R. 245; Wallis v. Paterson, 1 Harr. & McHen. R. 225, 465; Ogden v. Saunders, 12 Wheat. R. 213, 359, 360, 361, 362; ann, § 300 to 401.

² Holmes v. Remsen, 4 John. Ch. R. 484; Remsen v. Holmes, 20 Jeles. R. 258; Blake v. Williams, 6 Pick. R. 312, 313; ante, § 409, note; Henry on Foreign Law, p. 127 to 135; Id. p. 153 to 160; Id. p. 266 v. 250.

support; and very recent cases have given it a complete confirmation in their tribunals. The principal grounds of their decisions may be summed up in the following propositions. (1.) That the law of the domicil may rightfully devest the debtor of the administrator of his property, and place it under the administration of assignees or syndics. (2.) That laws, whose effects are to regulate the capacity and incapacity of persons, their personal actions, and their movables, every where belong to the category of personal statutes. (3.) That it is a matter of universal jurisprudence, and especially of that of France and the Netherlands, that the debts, actively considered, of an inhabitant against a foreigner, are deemed a part of his movable property, and have their locality in the place of domicil of the creditor.1 At the same time, it is admitted, that a purchaser from the bankrupt, in a foreign country, of property there locally situate, would be entitled to hold it against the assignees, if, at the time, he had no knowledge of any bankruptcy, or of any intent to defraud creditors.2

§ 418. The American doctrine has been followed out to another result. Suppose (as was the fact in one case) after a commission and assignment in bankruptcy in England, the bankrupt should voluntarily make a confirmatory conveyance in aid of the commission; the question is, whether it will have the effect of a voluntary assignment, so as to defeat a subsequent attachment in America? It has been held by a learned judge in New York, that it will

⁹ Merlin, Id. p. 415, 416.

Merlin Répertoire, Faillité and Banqueroute § 2, 3, art. 10, p. 412; Heary on Foreign Law, p. 127 to 135; Id. 175.

not; because, by the law of England, the commission devests the title of the bankrupt in all his property throughout the world; and he no longer has any capacity to convey it; but in regard to that property, he is to be treated as civiliter mortuus. There is great difficulty in maintaining this doctrine. For if the statutable assignment does, per se, transfer the personal property of the bankrupt in foreign countries to the assignees, and devest all his title to it. then it would seem to follow, that a subsequent attachment of it must be wholly inoperative, became he has no longer any attachable interest in it. We are not at liberty to treat the property, as still in him for one purpose, and out of him for another. The doctrine of Mr. Chancellor Kent is certainly here far more satisfactory, giving to such a voluntary assignment a full confirmatory effect.2

§ 419. There are some other questions, arising from the operation of foreign bankrupt laws, and other analogous systems of proceeding for the bearefit of creditors generally, in invitum, which have come under judicial cognizance, and deserve attention. In the first place, suppose a British subject is declared bankrupt, while he is on a voyage in transits from England to America; and he has a large shipment of property with him; is he entitled to hold it, when it arrives in America? Or, can his assigned maintain a suit against him, or against other persons, holding it for his use, not being creditors? It has been held, by a learned Chancellor of Nev. York (Walworth), that the assignees are entitled to recove,

Mr. Chief Justice Platt, in Remsen v. Holmes, 20 John. R. 267
 Holmes r. Remsen, 4 John. Ch. R. 489.

upon the ground, that the assignment operates as a good conveyance to them against the bankrupt, and those holding for his use. On that occasion, the learned Judge stated the distinction between that case, and the preceding cases. "In those cases." (said he,) "the contest was between foreign assignees and domestic creditors, claiming under the laws of the country, where the property was situate, and where the suits were brought. The question in those cases was, whether the personal property of the debtor was to be considered as having locality, for the purpose of giving a remedy to the creditors residing in the country, where the property was in fact situated, at the time of the foreign attachment. In this case, the controversy is between the bankrupt and his assignees and creditors, all residing in the country, under whose laws the assignment was made. Even the property itself at the time of assignment was constructively within the jurisdiction of that country, being on the high seas, in the actual possession of a British subject. Under such circumstances the assignment had the effect to change the property, and devest the title of the bankrupt, as if the same has been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignees for the benefit of his creditors." Upon an appeal, however, this doctrine was not in terms confirmed by the appellate Court; and some of the judges dissented from the doctrine of the Chancellor. But the case was ultimately reversed on another point.9

Plestero v. Abraham, 1 Paige, R. 236; S. C.3 Wend, R. 538.

² Abraham v. Plestero, 3 Wend, 538.—It is difficult to perceive, how the doctrine of the Chancellor, as to the operation of the British bank-

§ 420. It is obvious, that the great question involved in this case was, whether an assignment under a foreign bankrupt law operates as a transfer of personal property in this country. It matters not, in respect to the bankrupt himself, or others claiming under him, not being creditors or purchasers, whether it operates as a legal, or as an equitable transfer. In either way it will devest him of his beneficial interest. Upon this point, it is impossible not to feel, that the general current of American authority is in perfect coincidence with that of England, in favor of the title of the assignces.1 In most of the cases, in which assignments under foreign bankrupt laws have been denied to give a title against attaching creditors, it has been distinctly admitted, that the assignees might maintain suits in our courts under such assignments for the property of the bankrupt.2 This is avowed in

rupt laws upon British subjects and their property in transitu, can be answered. The transfer must be admitted to be operative to divest the bankrupt's title to the extent of an estoppel, as to his own personal claim in opposition to it; for the law of America, be it what it may, had not then operated upon it. It was not locally within our jurisdiction. No one could doubt the right of the assignment property locally in England at the time of the assignment. In what respect does such a case differ from a case, where it has not passed into another jurisdiction? Is there any substantial difference between its being on board of a British vessel and its being on board of an American vessel on the high seas? See ante, § 391.

¹ Sce ¹ H. Black. (2)1; ⁶ Maule & Selw. 126; ¹ East, R. 6; Coke's Bank. Laws, (4th edit.) 304; Doug. R. 161, 170; ante, § 403 to § 410.

² In Alivon v. Furnival, 1 Cromp. Mees. & Rosc. 296, it was held, that if by the law of the foreign country the assignees or syndics of a foreign Bankrupt may sue there, the same right to sue in England will be allowed by the comity of nations; and that if there are three assignees or syndics appointed under the foreign law, that two may by that law sue without joining the third, the same right to sue by two will be acknowledged and enforced by the same comity in England. Upon that

the most unequivocal manner in the leading cases in Pennsylvania and New York already cited, and it is silently admitted in those in Massachusetts. 1 And unless the admission can be overthrown, it surrenders the principle; for no one will contend, that the assignees can sue either in law or equity in our courts, unless they possess some title under the assignment. The point has hitherto been a struggle for priority and preference between parties, claiming against the bankrupt under opposing titles; the assignees claiming for the general creditors, and the attaching creditors for their separate rights.

§ 421. It is true, that Mr. Chief Justice Marshall, in delivering the opinion of the Court in Harrison v. Sterry, 2 used the following language: "As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two thirds of the funds are liable to the attaching creditors, according to the legal preference obtained by their attachments." But the very terms of this statement show, that the Court were examining the point, only as between the conflicting rights of the assignees and those of the at-

occasion Mr. Baron Parke, in delivering the opinion of the Court, said; "This is a peculiar right of action created by the law of the country, and we think it may by the comity of nations be enforced in this, as much as the right of foreign assignces or curators, or foreign corporations appointed or created in a different way from that, which the law of this country requires." See ante, § 355, 399, 400; post, § 565, 566.

¹ Holmes v. Remsen, 4 John. Ch. R. 485; S. C. 20 John. R. 262, 263; Milne v. Moreton, 6 Binn. 363, 374; Livermore's Diss. 142, 152; Blake v. Williams, 6 Pick. R. 305; Ingraham v. Geyer, 13 Mass. R. 146, 147; Goodwin v. Jones, 3 Mass. R. 517. But see contra Orr v. Amory, 11 Mass. R. 25. See ante, § 399, note; post, § 566.

⁹ 5 Cranch, R. 289, 302. See also Ogden v. Saunders, 12 Wheaton, R. 61, 362, 363, 364.

taching creditors, and not in relation to the bankrupt himself. And this is manifestly the light, in which the doctrine was contemplated by the majority of the Court in a subsequent case. 1

& 422. In cases of partnership, where there are different firms in different countries, or some of the partners reside in one, and some in another country, there are still more embarrassing difficulties attendant upon questions of foreign bankrupt assignments. If one partner is declared a bankrupt under a foreign commission, his share and interest only in the funds there can pass to his assignees, as against the partners in another country. And of course they must take, subject to an account between all the partners, and stand precisely, as the bankrupt does, on a settlement of all claims as between debtor and creditor.² Let us suppose the case of a partnership in the British West Indies, and in England; and one of the partners resides in England, and becomes bankrupt; and an assignment is made; and afterwards a British West India creditor of the firm attaches a debt, due to the firm in the West Indies, and procures a judgment and satisfaction there. Can he be compelled to refund the same upon a suit brought by the assignees against him in Eng-Sir William Grant, in a case of this sort, decided in the negative; and on that occasion seemed to have great difficulty in reconciling his mind to the decisions upon the more general questions of satisfaction obtained abroad by a creditor in case of a sole bankruptcy. He held, that the bankruptcy of the partner resident in England could

¹ Ogden v. Saunders, 12 Wheaton, R. 359 to 365.

² Harrison v. Sterry, 5 Cranch, R. 289, 302.

not affect the partners remaining in the West Indies, in a country not subject to the bankrupt law, so as to devest them of the management of the partnership concerns, or of the disposition of the partnership property. If they applied the partnership assets in the payment of the partnership debts; or, if, in a legal course of proceedings against them, the debts were recovered according to the law of the country, no jurisdiction could exist in England to force the partnership, or the creditor to refund, what he had so received, or so recovered. Under such circumstances the foreign partners and foreign creditors must be left to their general rights and remedies.1 The same doctrine seems to be acknowledged in other nations, where there are partnerships and partners resident in different countries.2

§ 423. But, whatever may be the rule in relation to foreign voluntary assignments or foreign bank-rupt assignments, for the benefit of creditors generally, there is no doubt, that there are some assignments, which take effect by mere operation of law in foreign countries, and are admitted to have universal validity and effect upon personal property, without respect to its locality. Such is the case of a transfer of personal property arising from marriage. Thus, a marriage, contracted by citizens of Massachusetts, is a gift in law to the husband of all the personal, tangible property of the wife, and operates as a transfer of it to him, wherever it may be situate, at home or abroad. And the right, thus ac-

¹ Brickwood v. Miller, 3 Merivale, R. 279.

See Merlin, Répertoire, Faillité et Banqueroute, § 2, art. 10, p. 414.

³ See ante, § 398.

quired by the law of the matrimonial domicil, will be held of perfect force and validity in every other country, notwithstanding the like rule would not arise in regard to domestic marriages by its own municipal code. This doctrine was adverted to by Lord Meadowbank, in a very important case already referred to, as perfectly clear and established. "In the ordinary case," (says he,) "of a transference by contract of marriage, when a lady of fortune, having a great deal of money in Scotland, or stock in the banks, or public companies there, marries in London, the whole property is, ipso jure, her husband's. It is assigned to him. The legal assignment of a marriage operates without regard to territory all the world over." Lord Eldon, on several occasions, has given this doctrine the fullest sanction of his own indement, averring, that notice was not even necessary to give full effect to such a title.2 The same doctrine was fully admitted in Remsen v. Holmes:3 and it is treated by elementary writers as beyond controversy.4 We have already seen that foreign jurists press the doctrine to its fullest extent.5

§ 423 a. It is principally in cases of voluntary assignments, made by a debtor for the benefit of creditors, or of involuntary assignments under the Bankrupt laws of a state against a debtor in invites, that questions arise respecting the conflicting rights of creditors (Concursus creditorum), as to the print-

Ante, § 50, note; Royal Bank of Scotland v. Cuthbert, 1 Ross, Ind. Cas. Appx. 481. See ante, § 306, 397, 398.

² Selkrig r. Davis, 2 Rose, Bank. Cas. 97, 99; Id. S. C. 291, 317.

^{3 20} John. R. 267.

^{4 2} Bell, Comm. § 1266, p. 696, 697, 4th edit.; Id. p. 680, 685, 686, 24 edit.; Liverm. Diss. 140, § 223.

⁵ Ante, § 145, 146, 417.

ties and privileges, in the distribution and marshalling of the assets, when they are insufficient to pay all the debts of the party. We have already had occasion to take notice, that generally in cases of movable property the priorities and privileges are to be adjusted, and the distribution is to be made, according to the law of the domicil of the debtor,1 founded upon the notion, that there all his movable property is in contemplation of law concentrated, although a part of it may be locally situated elsewhere, according to the maxim; Mobilia non habent sequelam; Mobilia tamquam ossibus affixa personæ.2 And in relation to immovable property, the distribution is to be made according to the Lex rei site.3 Exceptions may doubtless exist, where the law of the country, in which either movable or immovable property is situate, prescribes a different rule, which must then be obeyed.4 Similar rules will govern in cases of voluntary assignments by debtors, and of involuntary assignments under the bankrupt laws of a state. In each case the Lex loci of the assignment, or the bankruptcy will ordinarily form the basis of the priorities and privileges attaching to his movable property, and will regulate the distribution thereof among his creditors, at least if that is the place of his domicil, and of the situs of the property. If the property is immovable, or is situate elsewhere, the Lex loci rei sitæ will, or at least may, govern the same.5

¹ Ante, § 323 to § 328.

² Ante, § 362, 377, 378.

³ Ante, § 322 to § 328; post, § 428.

⁴ See Rodenburg, De Divers. Statut. tit. 2, ch. 5, § 5, 6; 2 Boullenois, p. 37, 38; post, § 550.

⁵ Ante, § 322, 328, § 385 to § 400, § 402 to § 416, § 412 to § 422.

§ 423 b. Priorities and privileges are indeed generally treated as belonging to the form and order of proceedings, and are therefore properly governed by the Lex fori; and they are not treated as belonging to the merits and matters of the decision. says; Primum utamur vulgata D. D. distinctione, qua separantur ea, quæ litis formam concernunt ac ordinationem, separantur ab iis, quæ decisionem aut materiam. Lis ordinanda secundum morem loci, in quo ventilatur. Ut si judicati exequendi causa bona debitoris distrahantur, qui solvendo sit, executio peragatur eo loci, ubi bona sita sunt, aut in causam judicati capiuntur. Sin cesserit foro debitor, aut propalam desierit esse solvendo, ut isti mobilium capioni, aut ulli omnino executioni non sit ultra locus, factà jam omnium creditorum conditione pari, disputatio de privilegiis at concursu creditorum, veniat instituenda, ubi debitor habuerit domicilium.1

§ 423 c. Matthæus (whose opinions have been already in part cited in another place, holds, that hypothecations of movables are to be governed by the law of the domicil of the debtor; and hypothecations of immovables by the Lex loci rei site. In respect to priorities and privileges between hypothecary creditors upon movables, the law of the domicil of the debtor is to govern; and in respect to such priorities and privileges, between hypothecary creditors upon immovables, the law of the situs rei, micri indeed the contest solely concerns their rights in the domicil of the debtor. Quantum ad leges, secundum quasin disputatione de protopraxia judicandum, distinctie al-

¹ Rodenburg, De Divers. Statut. tit 2, ch. 5, § 16; 2 Boullesois, App. 47, 48; ante, § 325 c to § 325 f, and note.

² Ante, § 325 i, 325 k.

hibenda est. Si bona mobilia debitoris in diversis provinciis sint, spectandæ sunt leges ejus loci, ubi debitor domicilium habet. Est enim vulgatum apud doctores, mobilia sequi personam, et idcirco censeri eo jure, quod obtinet, ubi domicilium persona habet. Itaque si in loco domicilii valet pignus rei mobilis nudo pacto constitutum, manente possessione penes debitorem, potior erit in pignore is, cui ante res obligata est, licet non sit translata in eum possessio. Et si creditor aliquis in loco domicilii debitoris privilegium inter personales habeat, gaudebit eodem privilegio in ea civitate, in qua debitor tabernam habuit et merces. Contra, si in loco domicilii mobilia non habeant sequelam, nec creditor privilegium, frustra volet uti jure alterius civitatis, in qua utrumque contrario modo se habere perspicit. Quantum vero ad prædia attinet, separanda videtur hypotheca ab eo privilegio, quod quis inter hypotheca-In astimanda hypotheca spectanda sunt rios exercet. ejus territorii jura, ubi prædium situm est. Itaque si in loco domicilii debitoris prædia obligari possint citra judicis auctoritatem, prædia vero sita sint in ea provincia, ubi oppigneratio judicialis desideratur, frustra obtendes locum domicilii, ad excludendum secundum creditorem, cui coram judice loci prædium pignori nexum est. Quod, si utrique fundus ritè oppigneratus sit, disputetur autem solummodo de privilegio, quod alter inter hypothecarios in loco domicilii debitoris habere se dicit, tum locus domicilii spectandus videtur: quia privilegium illud personam concernit, fundum autem pigneratum non afficit. 1

§ 423 d. Mr. Burge maintains a similar opinion, taking a distinction between ordinary liens and the

Mattheus, de Auctionibus, Lib. 1, cap. 21, § 10, n. 35, p. 294, 295;
Id. n. 41, p. 298, 299.

priorities between creditors. "The vendor's lien. (says he,) on the movables sold, and the right to stop them in transitu for the payment of the price, are privileges, which attach to the subject sold, and are governed by the Lex loci contracties. They are distinguished from the preferences, which a creditor may claim on the estate of a debtor, when it is distributed under an execution sale, or general con-The latter depend, not on cursus of his creditors. the Lex loci contractus, but on that of the place, where the movable estate is fictione juris considered to be situated, namely, in the domicil of its owner. The Lex loci contractus, although it is properly invoked as between the parties to the contract, vet it is considered unjust to give it effect against third parties, the creditors."1

§ 423 c. Mr. Bell adopts the doctrine in its fullest extent, that an assignment in bankruptcy conveys all the movable property of the bankrupt, wherever it may be, and it is to be distributed according to the law of the place, where the debtor has his domicil, and the proceedings in bankruptcy are had. But in relation to immovable property, that it is to be distributed and administered according to the territorial law. His language is: "The great rule, on which the whole of the doctrine relative to the international effect of bankruptcy depends, has been completely fixed in all the three kingdoms upon a general principle of the law of nations; namely, that the personal estate is held as situate in that country, where the bankrupt has his domicil: and that it is to be

^{4/3} Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 770; Id. p. 775, 779; ante, g/327, note.

administered in bankruptcy according to the rules of the law of that country, just as if locally placed within it. The consequence of fixing this rule is, that a commission of bankruptcy in England, or in Ireland, and the assignment following on it, or a sequestration in Scotland, and the conveyance to the trustee, have the effect of transferring to the trustee or assignees the whole personal estate of the bankrupt; that this transference defeats all preferences attempted to be obtained by the diligence of the law of the country, where such estate happens to be placed, or by any voluntary conveyance of the bankrupt, after the period when the effect of the proceedings under the bankruptcy attaches to the funds." 1 And again; "Another great point in this doctrine is, what effect shall be allowed in Scotland to a different decision in any foreign country from that which has been adopted in these islands? Let it be supposed, for example, that effects of the bankrupt are in a country, in which the sequestration and the conveyance to the trustee are held to be of no force, and where preference is given to the diligence of the country, in which the effects are situate; - Is the creditor, who recovers payment under such local rule, obliged to pay over to the trustee in this country, for general distribution, the money he has received? And this, again, resolves into two questions, -(1.) Whether the creditor can claim for any balance, without having communicated what he has received? and (2.) Whether he is liable to an action for restitution? In England,

¹ 2 Bell, Comm. § 1266, p. 684, 685, 4th edit.; Id. p. 681, 682, 5th edit.

where there is no provision by stat this matter, it is held, —(1,) That itor, who, having notice of the ba affidavit in England, in order to cannot retain against the assignees ers. (2.) That a creditor in the would not, if preferred by the laws be obliged to refund in England: a all events, such a creditor cannot of the bankrupt laws in England, nicating the benefit of his foreign Scotland, there is an express provis relative to payments and preferen policy of which it is proper to explain diction of the Court of Session do eign countries, wherever the prin of nations does not operate, or l it is provided, — (1.) That the cre the first deliverance on the petition shall obtain payment or preference obliged to communicate, and assithe trustee for behoof of the cre can draw any dividend out of the fu of the trustee; and, (2.) That, in a he claims under the sequestration. be liable to an action before the at the instance of the trustee, to said security or payment, in so fa tion of the court can reach him. as already observed, be doubted, actment, in so far as it exposes a lenge, even where he does not sequestration, might be held to inc itors, not apprized of the bankruptcy

in this country, but who having recovered, in the usual way, the property of their debtor abroad, should have come afterwards to Scotland. Recently the question occurred under these enactments, whether a local statute in one of our colonies abroad, which was said to proceed on views of local utility, did not so far qualify the sequestration statute of this country, that the foreign creditors should be entitled to retain the preference they had obtained? But the Court held, that the preference could not be supported. As to real estate, the estate in land, or connected with land, there is a difference of principle very remarkable. The real estate is, not like the personal, regulated by the law of the domicil; but by the territorial law. A real estate in England is not held to be under the disposition of the bankrupt laws of Scotland, if the proprietor be a trader there. Nor is an heritable state in Scotland affected by the commission of the English law. And yet the spirit and policy of the laws, considered internationally, should open to the creditors of a bankrupt in either country the power of attaching his real estates."1

§ 423 f. In regard to voluntary assignments for the benefit of creditors with certain preferences, they must (as has been already stated), as to their validity and operation, be governed by the Lex loci contractus. If they are valid there, full operation will ordinarily be given to them in every other country, where the matter may come into litigation and discussion. But it is a very different question, whether they shall be permitted to operate upon property lo-

2 Ante, § 259 a.

⁴ 2 Bell, Comm. § 1266, p. 689, 690, 4th edit.; Id. p. 685, 686, 5th edit. See Lord Eldon's Remarks in Selkrig v. Davis, 2 Rose, R. 311.

cally situated in another country, whether movable or immovable, by whose laws such a conveyance would be treated as a fraud upon the unpreferred creditors. That question was discussed in the case already alluded to, where an assignment, made in Alabama, giving preferences to certain creditors. came collaterally under discussion in Louisiana, by whose laws such an assignment would be treated as a fraud. On that occasion the Court said; "We find no difficulty in assenting to the proposition, that contracts entered into in other states, as it relates to their validity and the capacity of the contracting parties, are to be tested here by the Lex loci celebrati contracts. This Court has often recognised that doctrine, as well settled. When a contract is entered into in Alabama, in conformity to the local law, to have its effects and execution there, it is clear the courts of this state cannot declare its nullity, on the ground, that sach a contract would not be valid according to our system Such would be the case, even if one of jurisprudence. of the contracting parties, or both, were not citizens of Alabama. If Andrews, for example, had been a citizen of Louisiana, having creditors and effects both here and in Alabama, had gone over to that state, and transferred a portion of his property there to certain preferred creditors, such a transaction. as to its legality, would depend upon the law of Als-But if such a citizen of Louisiana should immediately afterwards seek to avail himself of the benefit of our insolvent laws, a different question would present itself. Although our courts might not be authorized to annul such contracts, as to their effects between the parties; yet they might well inquire, whether it was not the intention of the Legislature to afford the protection of the insolvent laws to such only, as shall have abstained from giving an undue preference to certain creditors, in derogation of that vital principle of our system, that the property of the debtor forms the common pledge of his creditors, and although such preferences may be tolerated by the Lex loci. If the legislature has thought proper to declare such a condition as one, upon which shall depend the right to claim the benefit of the insolvent laws, which it is not denied they had an unquestionable right to do, then there is an end to the argument, unless it can be shown, that the mere residence of the party in another state dispenses him from a compliance with the creditor."

§ 423 g. These are by no means the only cases of a conflict of laws, or of rights growing thereout, touching personal or movable property; and which ought to admonish us of the danger and difficulty of attempting to lay down universal rules on such complicated subjects. By the laws of many of the nations of continental Europe in cases of collision of ships by accident, without any fault on either side, the loss is to be sustained by a contribution by both ships.² By the law of England in such a case, there is no contribution whatsoever; but each party is to bear his own loss. Res perit domino.³ Now, let us suppose, that such a collision takes place upon the high seas, beyond any territorial jurisdiction, between an

¹ Andrews v. His Creditors, 11 Louis. R. 476, 477. See also 2 Bell, Comm. § 1266, p. 684, 685, 686, 4th edit.; Id. p. 681, 682, 683, 5th edit.

Story on Bailm. § 608; Peters v. Warren Insur. Comp'y, 14 Peters, R. 94.

³ Story on Bailm. § 608, 610.

English ship and a foreign continental ship, whose laws divide the loss, and both or either of the ships is injured thereby. How is the loss to be borne? Will it make any difference, whether the proceeding against the ship or owners for redress is in England, or in the proper continental court? If the right depends upon the law of the place, where the proceedings are had against the ship or the owner, then there will be no reciprocity in the operation of the rule. In a case so confessedly novel in its presentation, it will be found very difficult to affirm any ground of principle, upon which the law of the one country, rather than that of the other, ought to prevail.

§ 423 h. Considerations of an analogous nature may be presented in cases of torts, committed on the high seas, and in other extra-territorial places, by the subjects of one nation upon vessels, or other movable property, belonging to the subjects of another nation, where the laws of these nations are different, touching either the nature and character and consequences of the tort, or the rule of damages applicable thereto. It is not easy to say in such cases, what laws ought to govern. The most, that can with any probability be stated, is, that in the absence of any general doctrine to the contrary, either each nation, would, in respect to the case, when pending in its own tribunals,

¹ The very question was recently presented at Havre, in France, in the case of the steamer ship James Watt, an English ship, which was seized in France for having by collision run down a French ship, at sea. The Court of Rouen, it is said, decided against the right to seize and detain her. But the ground of the decision is not stated. See also Abbott on Shipp. by Shee, p. 184, note z, the case of the Maria there stated. See, also, 3 Hagg. Adm. R. 169; Id. 184; Id. 244. See, also, The Genl. Steam Navigation Co. v. Guillen, 11 Mees. & Wels. 877.

follow its own laws; or would apply the rule of reciprocity, granting or refusing damages, according as the law of the foreign country, to which the injured ship belonged, would grant or withold them in the case of an injured ship belonging to the other nation. The rule of reciprocity is often applied in cases of the recapture of ships from the hands of a public enemy.

See Percival v. Hickey, 18 John. R. 257.

² The Girelamo, 3 Hagg. Adm. R. 169.

The Santa Cruz, 1 Rob. R. 50; 2 Wheat. R. Appx. 44, 45; The Adeline, 9 Cranch, R. 244. In the case of the Vernon, 1 W. Robinson, New Adm. R. 316, which was a case of collision between a British ship, having on board a licensed pilot, and a foreign ship, the British ship's pilot being in fault, Dr. Lushington held the owners of the British ship not responsible for the damage, upon the ground that the foreign ship seeking the remedy, must take it according to the law of the country where the suit is brought. Quære, if this was a case within the meaning of the Rule, did the statute apply to foreign ships or only to British ships?

CHAPTER X.

REAL PROPERTY.

\$ 424. Having disposed of the more important mestions, which have arisen respecting personal property, we are next led to the consideration of the operation of foreign law in regard to real or immovable property. And, here, the general principle of the common law is, that the laws of the place, where such tratterny is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the schemnities, which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the Lex rei site. This is generally, although (as we shall presently see) not universally, admitted by courts and by jurists, foreign, as well as domestic. Paul Voet states the rule in a brief but clear manner: Ut immobilia statutis loci regantur, ubi sita.2 He adds in another place, Quid si itaque contentio de aliquo jure in re, seu ex ipsa re descendente, vel ex contractu, vel actione personali, sed in rem scripta? An spectabitur loci statutum,

¹ See on the subject of this chapter 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 4, p. ±40 to p. ±70; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 4, [5, p. 150, &c.; Id. ch. 5, n. 11, p. 171, 217; Id. ch. 12, p. 576; Fushix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1740, § 27 to § 37, p. 216 to p. 230; Id. p. 307 to 312.

² P. Voet, De Stat. § 9. ch. 1, n. 3, p. 253, edit. 1715; Id. p. 307, edit. 1661. — Yet we shall see, that Paul Voet adopts some strange notions as to the forms and solemnities of instruments of transfer of real estate, whether inter vivos or testamentary, holding, that the lex loci actus, and not the lex loci rei sitæ, ought to govern. Post, § 442.

ubi dominus habet domicilium, an statutum rei sitæ? Respondeo; Statutum rei sitæ.¹ Sir Wm. Grant lays down the rule in very expressive terms. "The validity of every disposition of real estate" (says he) "must depend upon the law of the country, in which that estate is situated."² The same rule would also seem equally to apply to express liens and to implied liens upon immovable estate.³

§ 425. And here it may be proper to advert a little more particularly to some of the definitions of foreign jurists, in regard to personal laws and to real laws. We have already seen, that laws purely personal are those, which solely affect the person, without any reference to property. Laws, purely real, directly and indirectly regulate property, and the rights of property, without intermeddling with, or changing the state of the person. There are other laws, again, which are deemed both personal and real, containing a mixed operation upon persons and property, and which are therefore called mixed.

post, § 428 to § 444.

¹ P. Voet, De Statut. § 9, ch. 1, n. 2, p. 253, edit. 1715; Id. p. 305, edit. 1661.

² Curtis v. Hutton, 14 Ves. jr. 537, 541; S. P. Chapman v. Robertson, 6 Paige, R. 627, 630; Elliot v. Lord Minto, 6 Madd. R. 16; Birtwhistle v. Vardill, 5 Barn. & Cresw. 438; S. C. 9 Bligh, R. 32 to 88;

³ See 1 Boullenois, p. 683 et seq. 689, 818; Rodenburg, De Divers. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 47; 1 Hertii, Opera, De Collis. Leg. § 4, n. 64, p. 150; P. Voet, De Stat. § 9, ch. 1, n. 2, p. 253, edit. 1715; Id. p. 307, edit. 1661; ante, § 322 to § 328; Id. § 363 to § 374; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 25, 26; Curtis v. Hutton, 14 Ves. jr. 537, 541; Elliott v. Lord Minto, 6 Madd. R. 16.

^{4 1} Boullenois, Prin. Gén. 10, p. 4.

⁵ 1 Boullenois, Prin. Gén. 22, p. 6; Id, Pr. Gén. 21, p. 7. See P. Voet De stat. § 4, ch. 2, n. 4, p. 134, 135, edit. 1661.

⁶ I Boullenois, Prin. Gén. 15, 16, p. 5.

Thus, a particular, law, which shall authorize a minor or other person, ordinarily incapacitated, to dispose of property under particular circumstances, would be deemed a mixed law: because, so far as it affects the particular capacity of a person, it is personal, and so far as it enables him to do a particular act respecting property, it is real.1 In illustration of these distinctions Boullenois considers the Law, known as the Senatus-consultum Velleianum, prohibiting married women from making contracts, as purely personal; a law declaring, that no person of full age shall devise more than a third or fourth part of his property, as purely real; and a law allowing a minor, (otherwise incapacitated) when married, to make a testament or donation in favor of his wife, as mixed.2 These distinctions are very important in examining the doctrines of foreign jurists, as they often enter very deeply into the elements of their particular opinions.

§ 426. Now, in regard to laws purely real, Boullenois lays down the rule in the broadest terms, that they govern all real property within the territory, but have no extension beyond it. Les lois

¹ 1 Boullenois, Prin. Gén. 15, 16, p. 5.

² 1 Boullenois, Pr. Gén. 14, 15, 26, p. 5, 6, 7; Id. Observ. 2, p. 25 to 26; Id. Observ. 16, p. 206, Observ. 23, p. 456, 457, 477, 488; 2 Boullenois Observ. 32, p. 11. — This definition of mixed laws is given by Boullenois, who has drawn it from Rodenburg. But it is very different (as he informs us) from the sense, in which D'Argentré, Burgundus, and Voet use the same phrase. 1 Boullenois, Prin. Gén. 16, p. 5; Id. Observ. 6, p. 122 to 140; Rodenburg, De Div. Stat. tit. 1, ch. 2; 1 Boullenois, Observ. 2, p. 25 to p. 29; Id. Observ. 3, p. 29 to 48. See also, 1 Froland, Mém. ch. 6, p. 114.

³ J. Voet has devoted a whole title to the subject of personal, real, and mixed laws, which will reward the diligence of the student in a thorough persual. J. Voet ad Pand. Tom. 1, Lib. 1, tit. 4, p. 2, p. 38, et seq. The same subject is elaborately discussed by Froland. 1 Froland, Mém ch. 4, p. 49, ch. 5, p. 31, ch. 6, p. 114.

réelles n'ont point d'extension directe ne indirecte hors la jurisdiction et la domination du législateur.1 In regard to mixed laws he lays down the rule expressively, that of right they act only upon real property within the territory, to which the persons are subject; but that sometimes they act upon real property situate elsewhere; and then it is only, because the laws are conformable to each other, and by a sort of kindred title only, (à titre de paternité seulement.)2 Rodenburg lays down a like rule in regard to real laws (dismissing as unnecessary the class of mixed laws;) Statuta realia inter et personalia hoc interest, quod illa, in res scripta, territorii sui concludantur metis, hæc extra eas vim et effectum protendant.3 Paul Voet contends, that no personal laws can regularly extend to immovable property situate in a foreign country; Non tamen statutum personale sese regulariter extendet ad bona immobilia alibi sita; 4 and he treats it as utterly unimportant, whether it assume to do so directly or indirectly, openly or consequentially. Neque hic distinguam, cum lex non distinguat, an sese extendut statutum directe ad bona extra-territorium statuentium sita, an indirectè, an propalam, an per consequentiam. Cum non sint indirecte, in fraudem legis aut statuti permittenda, quæ directè sunt prohibita.5

¹ I Boullenois, Pr. Gén. 27, p. 7; Id. 230. — Froland lays down the rule in even more brief terms. Le statut réel ne sort point de son territoire. 1 Froland, Mêm. 156. And he applies the same rule to mixed statutes. Id. 157.

² 1 Boullenois, Prin. Gén. 20, 21, p. 6; 1 Boullenois, Observ. 16, p. 223, 224.

² Rodenburg, De Div. Statut. tit. 1, ch. 3; 2 Boullenois, Appx. p. 7; 1 Boullenois, 145; Id. Observ. 9, p. 152; Id. 230.

⁴ P. Voet, ad Stat. § 4, ch. 2, n. 6, p. 123, edit. 1715; Id. p. 138, edit.

³ P. Voet, De Stat. § 4, ch. 2, 6, 7, p. 123, 124, edit, 1715; post, § 442.

§ 126 a. John Voct resolutely maintains the same opinion.1 D'Argentre holds the following language. Qua realia, aut mixta sunt, haud dubie locorum et rerum situm sic spectant, ut aliis legibus, quam territorii, judicari non possint.2 Huberus, after remarking, that the foundation of the general doctrine is the subjection of every man to the laws of a country, so long as he continues to act there, which makes his act there valid or invalid, according as those declare it invalid, proceeds to say, that this reasoning does not apply to immovable property, which does not depend upon the mere will of the owner; but so far as certain characters are impressed upon it by the law of the country, where it is situate, these characters remain indelible in that country, whatever dispositions the laws of other countries, or the acts of private persons, may ordain otherwise or contrary thereto-Nor would it be without great confusion and prejudice to the country, where the immovable property is situate, that its own laws respecting it should be changed by such dispositions. Fundamentum universa hujus doctrina diximus esse, et tenemus, subjectionem hominum infra Leges cujusque territorii, quandiu illic agunt, quæ facit, ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed have ratio non convenit rebus immobilibus, quando illa spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certe notæ lege cujusque Reip. ubi sita sunt, illis impressæreperiuntur : ha nota manent indelebiles in ista Republica,

¹ J. Voet, ad Pand. Tom. 1, Lib. 1, tit. 4, § 7, p. 40; ante, § 54 a; post. § 433 a.

² D'Argentr, De Briton, Leg. Art. 218. Gloss. 6, n. 8, Tom. p. 650; post. [-439; Livermore's Dissert. § 97, p. 77.

quicquid aliarum Civitatum Leges, aut privatorum dispositiones, secus aut contra statuant; nec enim sine magna confusione præjudicioque Reip. ubi sitæ sunt res soli, Leges, de illis latæ, dispositionibus istis mutari possent.¹ He adds in another place; Communis et recta sententia est, in rebus immobilibus servandum est jus loci, in quo bona sunt sita.²

§ 426 b. Christinæus takes the common distinction in various places between movable property and immovable property, alleging, that it is observed as a general rule, that movable property is governed by the law of the domicil, and real property by the law of the situs rei. Ubi pro regula generali servatum fuit, quod bona mobilia sequi et regulari debent secundum statuti loci domicilii ejus, ad quem pertinent vel spectant, immobilia vero juxta statuta locorum, ubi illa sunt sita, ut communiter tenent Interpretes, licet dicta regula non semper locum habeat.³

¹ Huberus, De Conflict Leg. Lib. 1, tit. 3, § 15; post, § 413.

² Huberus, Tom. 1, P. 1, Lib. 3, tit. 13, 21, s. De Success. ab Intes.

p. 278. See post, § 443, 443 a. § 476.

³ Christinæus, Tom. 2, Decis. 5, n. 1, 2, 3, 4, p. 7. — Mr. Fælix on this subject says; " Cette loi réelle régit les biens situés dans l'étendue du territoire, pour lequel elle a été rendue, en excluant l'application de la loi personnelle du propriétaire, ou de celle du lieu ou l'acte a été passé ; (Nous parlerons plus bas de l'application de cette dernière loi); mais aussi les effets de cette loi ne s'êtendent jamais au delà des limites du territoire. Telle est la règle reconnue par toutes les nations et professée par les auteurs. Nous citerons Burgundus (Tract. 1, nos 4, 11, 12 et 14), Rodenburg (Tit. 1, chap. 2), Paul Voet (De Statutis, sect. 4, cap. 2, nos 4 et 6), Jean Voet (Ad ff. Tit. de stat , no 3), Abraham a Wesel (Art. 16, no 19), Christin (Decisiones, vol. 2, tit. 1, dec. 3, no 2), Boullenois (Aux endroits citées au nº 24 ci-dessus, et t. 1, p. 107), Hert (Sect. 4, § 9), Huber (Nº 15), Cramer (Observations Juris Universi, tom. V. obs. 1462), Pothier (Sur la contume d'Orléans, chap I, § 2, nos 22, 23 et 24; ch. 3, no 51), Vattel Liv. 2, chap. 8, § 103 et 110), Gluck (Commentaire, § 76, Droit privé, § 17 et 18), Danz (Manuel, t. 1, § 53, nº 1), Portalis pére (Exposé des motifs du Code Civil. Locré, t. 1, p. 581; V. aussi le discours du tribun Faure ibid.,

§ 427. But it is wholly unnecessary to repeat at length the opinions of foreign jurists, since in the main proposition they generally, although not universally, concur, (for some of them insist upon certain exceptions, to which we may hereafter allude,) that the law of the situs exclusively governs as to immovable property.¹ Pothier has laid down the

p. 613), Meier (P. 17), MM. Mittermaier (§ 32), Eichhorn (§ 36), Tittmann (Chap. 5), Muhlenbruch (§ 72, no 2), Brinkmann (P. 10 et 11), Story (§ 374, 424 et suiv., et surtout § 428), Wheaton (Chap. 2, § 5, t. 1, p. 136), Rocca (P. 104, 110, 118 et 122), et Burge (Règle 6, t. 1, p. 25; t. 2, p. 14, 26, 78 et 840)." Fælix, Conflit des Lois, Revue Etrang. et Franç. Tom. 7, § 27, p. 217, 218.

¹ The learned reader may consult Livermore's Dissert. § 9 to § 162. p. 28 to p. 106. Hertii Opera, Tom. 1, De Collis. Leg. § 4, n. 9, p. 125, edit. 1737; Id. p. 177, edit. 1716; Ersk. Inst. B. 3, tit. 2, § 40, p. 515; Bouhier. Cout. de Bourg. ch. 23, § 36, 37 to § 63, p. 456 to 457; 2 Bell, Comm. § 1266 p. 690, 4th edit; Id. p. 687, 688, 5th edit.; Fergusson on Marr. and Div. 395; Le Brun, de la Communauté, Lib. 1, ch. 5, p. 9, 10; D'Aguesseau, Œuvres, Ton. 4, p. 660, 4to edit.; Cochin, Œuvres, Tom. 1, p. 545 4to edit.; Id. Tom. p. 555; Henry on Foreign law, p. 12, 14, 15; Id. App. p. 196; J. Voet, ad Pand. Lib. 1, tit. 4. P. 2, § 3, 5, 6, p. 39, 40; 1 Froland, Mém. ch. 4, p. 49, ch. 7, p. 155; 2 Kaims on Equity, B. 3. ch. 8, § 2. Mr. Burge on this subject says; "The summary given in the preceding chapters exhibits a great diversity amongst the laws, which regulate the modification and creation of estates and interests in real property, and the transfer and acquisition of it. The law of the place, where the act making the modification or alienation is passed, frequently differs either from that of the place, in which the party to the act was domiciled, or from that of the place, in which the property is situated. It becomes necessary to inquire, which of these conflicting laws is selected, and what are the principles, on which the selection is made. There exists a difference of opinion amongst jurist as to the law, which ought to govern the decisions of some of the subjects comprehended under the titles, which have been just mentioned, when one of the conflicting laws affects persons, as well as things, or where it applies to the form and solemnity of the acte, by which the modification or alienation of property is passed, as well as to things. The primary or principal object of the law, or the comparative degree in which, in the one case, it affects persons or things, and in the other, the form of the act or thing, affords the ground, on which some jurists consider the law as real or personal, and accordingly adopt the lex loci rei sitæ, or the law of the domicil, or

rule in the most general form, declaring, that real laws have an exclusive dominion over all things

that of the place, in which the act is passed. In the opinion of other jurists, if the law of the situs be prohibitive, it must be preferred to the personal law of the domicil, without regard to the object of that law, or its immediate effect upon the status of the person. There is, however, no difference of opinion among them in adopting the lex loci rei site in all questions regarding the modification or creation of estates or interests in immovable property. This subject does not involve any of the considerations, which, in other cases, produced that difference of opinion. The law primarily and principally affects things. It is wholly independent of the status of persons, and is strictly a real law. There is the concurrence therefore, not only of those jurists, who give the greatest effect to the lex loci rei sitm; but even of those, who are disposed to give such an effect to laws affecting the general status of persons, as would greatly control the operation of the lex loci rei site. Thus, according to the definition of Rodenburg In solas nudasque res statuti dispositio dirigitur, ut nullum intervenire necesse sit actum hominis aut aliquam concurrere personæ operam.' It is comprised in the rule laid down by Burgundus: 'Statuta realia sunt, que de jure, et conditione, seu qualitate rei disponunt. Statuto reali propositum est dirigere res ipsas, certisque qualitatibus dominia afficere.' The doctrine of D'Argentré is to the same effect: 'Realia sunt, ut que de modo dividendarum hereditatum constituuntur, in capita, in stirpes, aut talia. Item de modo rerum donandarum, et quota donationum.'- Item illud, ne in testamento legari posset viro ab uxore, quod quidem de immobilibus constituit et rebus soli, etsi mixtam habeat de personis considerationem, quando impotentia agnatis applicatur rei soli : Nam si de mobilibus solum quæreretur, posset videri in totum esse personale. The doctrine of Du Moulin is, 'In his, que concernunt rem, vel onus rei, debet inspici consuetudo loci ubi sita res est.' Boullenois also concurs in treating those laws as real: 'Qui affecte directement les biens en fixant leur sort, et leur destination par une disposition particulière et indépendanté de l'état personnel, dont l'homme est affecté pour les actes du commerce civil, encore que quelquefois ce statut ait égard à l'état personnel, que nous avons cidevant appellé pur politique et distinctif.' Merlin maintains the same doctrine: 'Si l'objet principal, diret, immédiat de la loi, est de regler la qualité, la nature des biens, la maniere d'en disposer,' it is a real law, and that, 'les effets par rapport aux personnes ne sont plus, que des conséquences éloignées de la réalité." The estate or interest, which the law permits or prohibits to be created in immovable property, whether it be by substitution, entail, executory devise, condition, or any other species of limitation, may be considered as a quality impressed on, and inherent in the property. So

submitted to their authority, whether the persons, owning them, live within the territory, or without

also are the rules and limits, under which the permission is given. According to the doctrine of those jurists, who are the most disposed to allow personal laws, affecting the general status, to control those of the situs, the law, which confers on immovable property its qualities, is strictly real, and prevails over the personal law. Thus Hertius defines the law to be real, when it impresses any certain quality on immovable property: 'Rebus fertur lex, cum certam iisdem qualitatem imprimit. vel in alienando, e. g. ut ne bona avita possint alienari, vel in acquirendo a. g. ut domini rei immobilium venditæ non aliter acquiratur, nisi facta fuerit judicialis resignatio.' The same rule is laid down by Mestertius and Burgundus, and is followed by Boullenois. These jurists, in treating of the solemnities, which the law requires should accompany certain acts, distinguish those, which are 'tanquam qualitates rebus impressæ.' The existence and nature of those qualities must be determined by the law of the situs. It is conceived, therefore, to be indisputable, that the law of the situs must be adopted in all questions respecting the power of alienating immovable property, or the restrictions, under which that power may be exercised. Hence, also, it follows. that the law of the situs must prevail, when the question regards the existence or validity of any substitution, the degrees, to which it may be limited, the manner of computing those degrees, or the extent, to which the power of alienation may be restrained, and generally the condition, to which the persons substituted may be subjected. Upon the same principles it will decide, if the question regard the acts, which are essential to render the substitution or entail valid, or the respective rights and liabilities of the fiduciary, fidei commissary, or tenant in tail." 2 Burge, Comm on Col. and For. Law, Pt. 2, ch. 9, p. 840 to 844. Again. alluding to the same subject in another place, he says; "In treating of the alienations of real property by act inter vivos, it has been stated as a conclusion, sanctioned by the authority of jurists and of judicial decisions, and most consistent with admitted principles, that the capacity to make and to take under the alienation was governed by the law of the actual situs of the property, if it were immovable, and by that of the domicil, if it were movable. It is admitted by all jurists, that the transfer of, and title to real property, must be regulated by the lex loci rei site; that a law, which prohibits its alienation, is a real law, and must, in whatever place the alienation is attempted, prevent the acquisition of any title. It necessarily follows from that admission, that the character and effect of the law must be the same, whether its prohibition has relation to the quality of the property itself, or to the person of the owner; or whether the prohibition be general and absolute, or partial and qualified, or existing only sub modo. It is a quality impressed on the property no less, when

the territory. And Vattel has laid it down, as a principle of international law, that immovables are to be disposed of according to the laws of the country, where they are situate.

§ 428. The consent of the tribunals, acting under the common law, both in England and America, is, in a practical sense, absolutely uniform on the same subject. All the authorities, in both countries, so far as they go, recognise the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government, within whose territory it is situate.³ So that

the property is prohibited to be alienated under particular circumstances, than when it is prohibited to be alienated under any circumstances, or when it is prohibited to be alienated by and to persons standing in certain relations to each other, or by persons, who are under a certain age, or who are in any situation, which by the law precludes them from making or taking under the alienation." 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 577; Id. p. 580 to 596.

¹ Pothier, Coutum. d'Orléans, ch. 1, § 2, n. 22, 23, 24, ch. 3, n. 51.

² Vattel, B. 2, ch. 8, § 110; Id. § 103; Chapman v. Robertson, 6 Paige, R. 627.

³ The authorities are very numerous, in which it has been decided, or taken for granted; and among them in England are, Sill v. Worswick, 1 H. Black. 665; Hunter v. Potts, T. R. 41, 182; Phillips v. Hunter, 2 H. Black, 402; Selkrig v. Davis, 2 Rose Bank, Cas. p. 29; 2 Dow R. 230; Coppin v. Coppin, 2 P. Will, 290, 293; Broadie v. Barry, 2 Ves. and Beames, R. 130; Birtwhistle v. Vardill, 5 B. and Cres. 438; 2 Bell, Comm. 690, 4th edit.; Id. p. 687, 5th edit.; and in America are, United States v. Crosby, 7 Cranch, 115; Clarke v. Graham, 6 Wheaton, R. 597; Kerr v. Mason, 9 Wheaton, R. 566; Harper v. Hampton, 1 Harr. and John. R. 687; Goodwin r. Jones, 3 Mass. R. 414, 518; Cutter v. Davenport, 1 Pick. R. 81, 86; Holmes v. Remsen, 4 John. Ch. R. 460; S. C. 20 John. R. 254; Hosford v. Nichols, 1 Paige, R. 220; Blake v. Williams, 6 Pick, 286; Milne v. Moreton, 6 Binn. R. 359. See also 4 Cowen, R. 510, 527, note; Dwarris on Stat. 649, 620; Wiles v. Cowper, Wilcox's Ohio Rep. 279; S. C, 2 Hammond, R. 124; Henry on Foreign Law, 8, 9; McCormick v. Sullivant, 10 Wheaton, R. 192; Darby v. Mayer, 10 Wheaton, R. 465; Curtis v. Hutton, 14 Ves. 537, 541; Elliott v. Lord Minto, 6 Madd. R. 16; Chapman v. Robertson, 6 Paige, R. 627, 630; Cockerell v. Dickens, 3 Moore, Priv. Coun. R. 98, 131, 132; Tulloch v. Hartley, 1 Y. & Coll. New R. 114; post, § 434; ante, § 424.

we may here fully adopt the language of John Voet: De realibus quidem, cum plerorumque consensus sit, id pluribus docere supervacuum fuerit. Indeed, so firmly is this principle established, that in cases of bankruptcy the real estate of the bankrupt, situate in foreign countries, is universally admitted not to pass under the assignment, although, as we have seen, there are great diversities of opinion as to movables.2 And Lord Eldon has gone so far as to declare, that there exists no legal or equitable obligation (although there is a moral obligation) in the bankrupt to make a conveyance thereof to his assignees; and that the creditors are without redress, unless by way of remedy in rem, where the real estate is situate, or by withholding a certificate of discharge until the bankrupt executes such a conveyance.3

§ 429. Considering, however, the diversity of opinion on this subject among foreign jurists, it may be of some utility to examine into the application of the general rule in some of its more important aspects. We shall, therefore, consider it, first, in relation to the capacity of persons to take or to transfer real estate; secondly, in relation to the forms and solemnities necessary to transfer it; thirdly, in relation to the extent of interest to be taken or transferred in it; and fourthly, in relation to the subject-matter itself, or what are properly to be deemed immovables.

§ 430. First, in relation to the capacity of persons

¹ J. Voet, ad Pand. Lib. 1, tit. 5, P. 2, § 6, p. p. 40.

¹ Selkrig v. Davis, 2 Rose, Bank. Cas. 97; Id. 191; 2 Dow, R. 230, 250; 2 Bell, Comm. 690, 4th edit.; Id. p. 687, 5th edit.; anta, § 403 to § 422, § 423 u.

Selkrig v. Davis, 2 Rose, Bank. Cas. 97; Id. 281; S. C. 2 Dow, 230
 But see Stein's case, 1 Rose, Bank. Cas. 462; ante, § 423 a.

to take or transfer real estate. It may be laid down, as a general principle of the common law, that a party must have a capacity to take according to the law of the situs, otherwise he will be excluded from all ownership. Thus, if the laws of a country exclude aliens from holding lands, either by succession, or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicil. On the other hand, if by the local law aliens may take and hold lands, it is wholly immaterial, what may be the law of their own domicil, either of origin, or of choice.

§ 431. So, if a person is incapable from any other circumstance of transferring his immovable property by the law of the situs, his transfer will be held invalid, although by the law of his domicil no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the situs. he may make a valid title, notwithstanding an incapacity may attach to him by the law of his dom-This is the silent, but irresistible result of the principle adopted by the common law, which has no admitted exception. We may illustrate the principle by an application to cases of common occurrence under the dominion of the common law. By that law a person is deemed a minor, and is incapable of conveying real estate, until he has arrived at twenty-one years of age. But by the law of some foreign countries minority continues until twenty-five or even until thirty years of age. Let us, then,

¹ See Buchanan v. Deshon, 1 Gill, R. 280; Sewall v. Lee, 9 Mass. R. 263.

suppose a foreigner, owning lands in England or America, (where the common law prevails,) who is by the law of his domicil in his minority, but who is over twenty-one years of age. It is clear, that he may convey his real estate in England or America, notwithstanding such domestic incapacity; for he is of the age required by the local law. On the other hand, let us suppose a married woman. who is domiciled in a foreign country, and by the law of that country is capable of alienating her real estate without the consent of her husband. owning real estate in England or in America, where she is incapable of alienating it without such consent: she cannot alienate it without the consent of her husband; and her separate act will be held ipso facto void by the law of the situs.

& 432. But, however clear this may seem, according to the principles of the common law on this subject, a very different doctrine is, as we have already seen, maintained by many foreign jurists on this very point.2 They contend, that the capacity or incapacity of persons to transfer property, or to do any other act, depends altogether upon the law of the place of their domicil. If they have a capacity or incapacity there, it governs all their property elsewhere, whether movable or immovable. Thus, Boullenois maintains, that, if a man has immovable property in a place, where majority is attained at twenty-five, and by the law of his domicil he is of age at twenty, he may at twenty sell such immovable property. And, alienate or

¹ See Saul v. His Creditors. 17 Martin, R. 569, 597.

² Ante, § 51, 52 to 61, 65; 1 Burge, Comm. on Col. & For. Law, Pt. 1, ch. 1, p. 21, 22, 23.

on the other hand, if by the law of the situs of the immovable property, he is of age at twenty, but by the law of his domicil not until twenty-five, he cannot sell or alienate such property until the age of twenty-five.\(^1\) Rodenburg adopts the same doctrine, and maintains it with abundance of zeal.\(^2\) After having remarked, that among personal statutes are to be reckoned all laws, which affect the state or condition of the person, such as laws respecting majority, the paternal power over children, the marital power over the wife, and cases of prodigals, he adds; De quibus et similibus id Juris est, ut quocumque transtulerit persona statuto loci domicilii ita affecta, habilitatem aut inhabilitatem ademptam domi, circumferat ubique, ut in universa territoria suum statutum

Rodenburg, De Div. Stat. tit. 2, ch. 1; 2 Boullenois, Appx. p. 10; 1
 Boullenois, 77, 79, 154, 155, 194, 295; 1 Hertii Opera, De Collis. Leg.
 4, n. 23, p. 133, edit. 1737; Id. p. 175. edit. 1716; Livermore, Dissert.
 31, p. 40; Id. § 44, p. 48, § 45, 46, p. 49; Bouhier, Cout. de Bourg. ch. 24,

§ 91 to § 108, p. 476, 477, 478; ante, 51, 51 a, § 52, § 52 a, § 53.

¹ Ante, § 52, 71. - There is a curious distinction maintained by many jurists on this subject, which deserves notice. - They say, that, if the local law fixes the age of majority at a particular period, and declares, that, until the party has arrived at that period, he shall not alienate immovable property, - in that case the local law governs; for it does not turn upon the mere fact of being a major or not. But if the local law only says, that no person, who is not a major, shall alienate, then, if the party is a major by the law of his domicil, though not by that of the rei site, he may alienate the property, because the only point is majority or not, and that must be ascertained by the lex domicilii; for the state or capacity of a person by the law of his domicil extends every where. Boullenois dwells much on this distinction, and it has received the support of Merlin. 1 Boullenois, Observ. 4, p. 57; Id. Observ. 5, p. 102; Id. Observ. 12, p. 175; Id. Observ. 13, p. 183; Id. Observ. 23, p. 499; Id. Observ. 28, p. 700, 705, 720; Boullenois, Quest. Mixt. p. 19; 2 Merlin, Répertoire, Testament, § 1, 6, art. 3, p. 318, art. 2, p. 317, 318; Id. art. 3; 2 Froland, Mem des Stat. p. 824, 825; Livermore, Diss. § 44, p. 48; Id. § 47, 48, p. 50; Id. § 59 to 62, p. 58, 59, 60.

exerceat effectum. Yet Rodenburg this doctrine, in regard to the capacit to make a will or testament, which I according to the Lex rei site. Others, who adhere to the same

¹ Rodenburg, De Divers. Stat. tit. 2, ch. 1; 21 ante. 6 51.

² Rodenburg, De Divers. Statut. tit. 2, ch. 5, n. p. 38, 39. His language is; Sed, ut id, quod i nostras testetur anno ætatis decimo quarto, sortiet in rebus, que alterius regionis solo inhæreant, in desideratur ætas? Sit dubitandi ratio, quod de capacitate lata lex in personam concepta esse via cunque producenda territoria. Verum contra re dixeris, quod in statutum ac conditionem personi expressim directum in rerum alienationes aut alt solam testamenti speciem, adeoque circumscriptiv actum; cujusmodi Statuta realia esse traditum proposito conspicere est, quod immoto personæ s tutelæ subducitur, auctoritate tutoris non specta tribuatur nostratibus hæc testamenti factio, adeq betur, lex personalis dici nequeat. See alse Col. and For. Law. Pt. 2, ch. 12, p. 578, 579. Burge has well remarked. "The difficulty of tinction arises from the consequences, to which to import, that if the law of the situs prohi a minor, the question, whether he is a mine whether he is competent to make a testament, i by that law, but by the law of his domicil. Bu ited an alienation by a person, who had not atta one or twenty-five years, or any other age, wi the law as the age of majority, the law of the the competence of the person would depend on But without further pursuing the inquiry, made in the former volume, it may be consider Dumoulin, Burgundus, Peckius, John and Paul reported by Stockmans, afford authority suffici clusion, that the capacity to alienate by test established by the law of the country, in which is situated, and by that of the domicil, when the regards movable property." Ibid. See also 1 Bu For. Law, Pt. 1, ch. 1, p. 21, 22, 23; post, § 433 : 3 Ante, § 51, 52, 53, 54, 60; 1 Froland, M

groundwork of their argument is, that the capacity and incapacity of the person must be uniform-

Liverm. Diss. 47, p. 54, § 55, p. 56; 2 Froland, Mém des Stat. p. 1576 to p. 1594; Merlin Répertoire, Testament, § 1, 5, art. 2, p. 517, 518; 1 Boullenois, Observ. 6, p. 127 to p. 140; 1 Boullenois, Observ. 28, p. 705 to p. 731. - This is manifestly the opinion of Mr. Livermore, (Diss. p. 40 to p. 42; Id. p. 48 to p. 57). So of Merlin, (Repertoire, Majorite, § 5; Autorisation Maritale, § 10, art. 2; Id. Puissance Parternelle, § 7, p. 142 to 146); of Froland, (1 Froland, Mém. des Stat. p. 156, 171; 2 Froland, Mem. des Stat. p. 1595); of Bouhier, (Bouhier, Cout. de Bourg. ch. 23, 6 90 to 96, p. 461; Id. ch. 24, 6 91, &c. p. 476; Id. 1 Boullenois, Observ. 28 p. 724); of Pothier, (Pothier, Cout. d'Orléans, ch. 1, § 1 n. 7, p. 2); of Huberus, (Huberus, Lib. 1, tit. 3, § 12; ante, § 60); and of Hertius, (Hertii Opera, Tom. 1, De Collis. § 4, n. 8, p. 123, 124, edit. 1737; Id. p. 175, edit. 1716.) Merlin in another place admits, that a law, which prohibits a prodigal from making a testament, is personal; but at the same time it will not prevent the prodigal from making a valid will of immovable property in a foreign country, which allows it (as in Bourbourg); for which he gives two reasons; first, that a law is real, which permits one act to be done by a person, who is otherwise incapable; and secondly, because a real law always prevails, when it comes in conflict with a personal law. He applies the same rule to an unemancipated son, who cannot by the law of his domicil make a testament, but yet may alienate any of his property acquired in Hainault; for its laws form an exception to the general incapacity of the son, and therefore they are real. Merlin, Répertoire, Testament, § 1, n. 5, art. 1, p. 310. This opinion seems to coincide with that of Hertius, (1 Hertii, Opera, De Collis. Leg. 4, n. 22, p. 133, edit. 1737; Id. p. 188, edit. 1716.) It seems also supported by Rodenburg, (Rodenburg, De Div. Stat. P. 1, tit. 1, ch. 2: 2 Boullenois, Appx. p. 4, 5, 6, cited by Merlin, ubi supra.) -But Merlin says, that, if by the laws of the country of his domicil an unemancipated son cannot make a testament, and by the laws of another country he has a general capacity; in such a case such laws are personal and in conflict, and therefore the law of the domicil is to govern. Merlin, Id. p. 311. See also I Boullenois, Observ. 5, p. 77, 78. Boullenois lays down some rules upon this subject, which seem also to have received the approbation of Bouhier. (1.) When the personal statute of the domicil is in conflict with the personal statute of another place, the law of the domicil is to prevail. (2.) When the personal statute of the domicil is in conflict with the real statute of the same or another place, it yields to the real statute. (3.) When the real statute of the domicil is in conflict with the real statute of the situs of the property, each one has its own authority in its own territory. 1 Boullenois, Pr. Gén. 29, 30, 31; Id. Observ. 5, p. 181, 182; Bouhier, Cout. de Bourg. ch. 23, § 90,

ly the same every where; that a domicil ought to regulate it; and be utterly incongruous to make a place a major in another, thus investigated in the control of the contro

opposite personal qualities.1

§ 433. This notion is combatted and ability by other foreign jurists, have been already alluded to.9 that personal laws, as to capacity all personal acts, such a govern Nam, (ut Imola et Cast tracts. qui inhabilis est in uno loco, etiam inhabilis; quod utique accipiendum es inhabilitate, quæ à statuto personali p tus personales dirigitur.3 But in rega property, he says, that it is sufficien be of the age required by the law authorize him to make a valid trans may be incapable by the law of his language is; Quippe (sicut Bartolus ex personæ ad actus personales non trahit sitas extra territorium. Proinde, si aliquid circa rem, jam non respiciem

^{96,} p. 461; Id. ch. 24, § 91, &c. p. 476; Liver 59. See the opinion of Grotius cited, post, § 479.

¹ Mr. Henry says, that the personal statutes of directly and by comity on immovable property sit decree of lunacy may by its effects deprive a parate his foreign property; and so of the disabil ruptcy. Henry on Foreign Law, 15. This see doctrine of the common law.

² Ante, 52, 53, 54, 54 a.

³ Burgundus, Tract. 1, n. 7, 8, p. 19. See als Stat. tit. 2, ch. 1; 2 Boulleuois, Appx. p. 11, 12; 1 p. 127 to 131; Id. p. 199, 201, 202; Liverm. Dis 51, 52; Bouhier, Cout. de Bourg. ch. 24, § 91, 9 478.

tum, quem foris assumpsit; sed an mancipens in ea sit conditione quam bonorum situs ipse requirit.1 And again: Et quidem eodem modo, quoties de jure, vel servitute, aut libertate personæ quæritur, item de facultate ad res personales constituta, respondendum erit secundum conditionem personæ, quam induit in loco domicilii. Et contra, ergo si de jure ac facultate, quæ a re ipså proficiscitur, item de ejus servitute, atque libertate, plane ad leges situs spectare oportet. Cum enim unicuique provinciæ suæ propriæ sint leges, possessionibus injunctæ atque indictæ, sane incapacitas foris adepta in considerationem venire non potest; sed omnis, sive qualitas, sive personæ habilitas, quoad eadem bona pertinet, a loco situs proficiscitur.2 Bartolus affirms the same doctrine. Cum est, quod de aliquo jure descendente ex re ipsa servari consuetudo vel statutum loci, ubi est res.3 Boullenois, after some fluctuations of opinion, comes to the result, that the capacity to make a testament, so far as it regards the person, is personal; but so far as it regards immovables, is real, and governed by the law of the situs of the property.4

§ 433 a. Stockmans, Dumoulin, Bouhier, Paul Voet, and John Voet maintain the same opinion. 5 Dumoulin says: Aut statutum agit in rem, et quacum-

Burgundus, Tract. 1, n. 8, p. 19; ante, § 54; Liverm. Diss. § 47, 48, p. 51, 52.

⁹ Burgundus, Tract. 1, n. 8, p. 19, 20. See also 1 Boullenois, Obser. 6, p. 129, 130; Id. Obser. 9, p. 150; ante, § 372.

³ Bartol. ad Cod. Lib. 1, tit. 1, n. 27; Bartol. Oper. Tom. 7, p. 5.

⁴ I Boullenois, Obser. 28, p. 718, 719, 720. See Id. Obser. 5, p. 81, 82, 83, 84, 101, 102. See also Merlin, Repert. Testament, § 1, n. 8, art. 1, p. 310; Cochin, Œuvres, Tom. 4, p. 555, 4to edit.

⁵ Liverm. Diss. § 49 to § 52. p. 52, 53, 54; 1 Froland, Mém. des Stat. p. 65, 66; 2 Froland, des Stat. p. 819 to 823; 4 Burge, Comm. on Col. and For. Law, Pt. 2. ch. 12, p. 579; ante, § 432, note.

que verborum formula utatur, semp ubi res est.1 Si statutum dicat, qu non possit testari de immobilibus, 1 spicit personam, nec agit in perso nec in solemnitatem actus, sed agit finem conservandi patrimonii, et sic idem est, ac si dictum esset, immobil nari in testamento per minores. inspicietur, sive persona subdita sit, mans says; Jampridem Pragmaticor fori invaluit, ut ubicumque agitur natione, mancipatione, investura, si translationis et acquisitionis modis, loci, ubi res sitæ sunt, sive questic alia qualitate, habilitate, vel inhabi agatur de statuto verbis in rem, sive i concepto; cum effectus ipse, potius dendus sit, qui prorsus realis est, qu transferendis et mancipandis quæri ab hoc effectu statutum omne, quod rem deducit, pro reali habendum j Paul Voet adds, that personal law extend, so as to affect immoval foreign country, either directly o John Voet has gone into an el

¹ Molin. Comm. ad Cod. Lib. 1, tit. 1, l. 1, Cor 3, p. 556; Liverm. Diss. § 81, p. 69.

Molin. Comm. ad Cod. Lib. 1, tit. 1, l. 1, Cop, 556; post, § 475, Bouhier, Cout, de Bourg. 476, 477, 478; 1 Froland, Mém. des Stat. p. 65.

³ Stockmans, Decis. 125, n. 9, p. 263; ante, § p. 52, 53; 2 Burge, Comm. on Col. and For. 1 864.

⁴ P. Voet, de Stat. § 4, ch. 2, n. 7, p. 124, edi 1661; ante, § 54, note. — Paul Voet admits, th pany the person every where, as to property, w

tion of the subject and positively denies, that personal laws can operate out of the territory. Nulla tamen ratione (says he) sufficiente, cum hæc nitantur, nec a legibus Romanis huic sententiæ patrocinium accedere possit; verius est personalia, non magis quam realia, territorium statuentis posse excedere, sive directo, sive per consequentiam. And he proceeds to put very pointed inquiries, whether any foreign country will permit its own territorial laws to be overthrown by the laws of another country, on the subject of prodigals, infamous persons, minors, illegitimacy, or legitimacy and heirship.1

& 433 b. Christinæus adopts the same opinion. Quodcum de rebus soli, hoc est immobilibus, agitur, et diversa diversarum possessionum loca, et situs proponuntur, in acquirendis, transferendis, et asserendis, dominiis, et in controversia quo jure reguntur, certissimam in usu observationem esse noti satis juris, est, id jus de pluribus spectari, quod loci est vel situs, et suas quoque leges, statuta et consuetudines servandos fore;

government of which he is a subject; but not as to any property elsewhere. Statutum personale ubique locorum personam comitatur, in ordine ad bona infra territorium statuentis, ubi persona affecta domicilium habet. Non tamen statutum personale sese extendit ad bona immobilia alibi sita. P. Vogt, De Stat. § 4, ch. 2, n. 6, p. 123, edit. 1715; Id. p. 138, edit. 1661. In another place he says; Immobilia statutis loci reguntur, ubi sita. P. Voet, De Statut. § 9, ch. 1, n. 4, p. 252, 253, edit. 1715; Id. p. 306, 307, edit. 1661; ante, § 54, note; post, § 475, 483 b; ante, § 52, 52 a; S. P. J. Voet, ad Pand. Lib. 1, tit. 4, § 2, 9, p. 43.

1 J. Voet, ad Pand. Lib. 1, tit. 4, § 7, Pars 2, De Stat. p. 40, cited at large, ante, § 54 a. - There are some jurists, who adopt an intermediate opinion, holding, that, in order to transfer real property, the party must have capacity according to the lex domicilii and the lex rei site. Thus, if in the country rei site the age to convey is twenty-one years, and in the country of the domicil the age is twenty-five years, a party cannot convey, although he is twenty-one years of age, nor unless he is twenty-

five. Ante, § 432, note; ante, § 388.

respondente de man melle cupusquam potestas sit præter territor segum. Persons is equally direct. Etenim votore statute est, ut non emendatur ad bona in alio terratorio site, una contrario mai juris dispositio. Bona cottem decortor esse un reus invisdictione, in cujus terratorio sara? And exem: Quod sive statutum loquatur sa tem site in personam, habeat locum in bonis postas sa terratorium statuemium, et non in aliis.

(373). The opinion of these latter jurists is in coincidence with that of the common law, as already stated; and it has been fully recognised in England, in a recent case, of which we have had occasion to take notice in another place. Upon that occasion Lord Chief Justice Abbott said; "The rule as to the law of domicil has never been extended to real property; nor have I found, in the decisions of Westminster Hall, any doctrine giving a countenance to the idea, that it ought to be so extended. There being no authority for saying, that the right of inheritance follows the law of the domicil of the parties, I think it must follow that of the country, where the land lies." The same doctrine was concurred in by the other Judges.

43b. Secondly in relation to the forms and solumnities of passing the title to real estate. We

¹ Christin. Decis. 3, Vol. 2, p. 4; 1 Boullenois, Observ. 6, p. 127 to p. 140.

² Peck. Oper. De Testam. Conjug. Lib. 4, ch. 8, n. 5, p. 619, edit. 1666.

³ Idem.

⁴ Id. n. 6, 7, p. 620.

⁵ Ante, § 87.

⁶ Doe dem. Birtwhistle v. Vardill, 5 Barn. & Cres. 438. But see S. C. 2 Clarko & Finell. 571; 9 Bligh, R. 32 to 88.

⁷ See 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 840 to p. 870; Id. Vol. 1, Pt. 1, ch. 1, p. 21, 22, 23.

have already had occasion to examine the point, whether executory contracts respecting real estate must not be in the form prescribed by the local law, in order to have validity; as for instance, a contract for the sale of land in England to be in writing according to the Statute of Frauds. The result of that examination was, that in countries acting under the common law, the affirmative is admitted; although foreign jurists are divided on the point. It would seem clear, also, according

¹ Ante, § 363 to 373. See also 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 867, 868, 869.

² Ante, § 237, 363 to 373. - Mr. Feelix speaking on this subject, says; "Un principe aujourd'hui généralement adopté par l'usage des nations, c'est que 'la forme des actes est réglée par les lois du lieu dans lequel ils sont faits ou passés.' C'est-à-dire, que, pour la validité de tout acte, il suffit d'observer les formalités prescrites par la loi du lieu ou cet acte a été dressé ou rédigé: l'acte ainsi passé exerce ses effets sur les biens meubles et immeubles situés dans un autre territoire, dont les lois établissent des formalités différentes et plus étendues (Locus regit actum). En d'autres termes, les lois, qui règlent la forme des actes, étendent leur autorité tant sur les nationaux que sur les étrangers qui, contractent ou disposent dans le pays, et elles participent ainsi de la nature des lois réelles." Fælix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 40, p. 346, 347. And again; "Parmi les écrivains modernes, nous en comptons trois, qui n'adoptent point la maxime, que la forme des actes est réglée par la loi du lieu dans lequel ils sont faits ou passés. Suivant M. Eichhorn, les actes d'une personne, qui affectent sa fortune, doivent, en régle générale, être conformes aux lois de son domicile, quant à la forme et quant à leur substance, lorsqu'on se propose de les mettre à exécution dans ce domicile : la raison en est, dit l'auteur, dans le principe de la souveraineté des nations et dans la loi 21 ff. de obl. et act. (Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit). Cette règle, continue l'auteur, admet des exceptions : le lorsque l'acte a été fait sans frande dans un pays étranger, ou il y a eu impossibilité de remplir les formes prescrites au lieu du domicile de la personne, qui contracte ou qui dispose; 2º lorsque l'acte a été fait dans un pays étranger dont les lois ne protégent les actes et contrats qu'autant qu'on y a suivi une certaine forme; 3º lorsque le statut réel exige, pour l'acquisition ou l'aliénation d'un immeuble, un acte qui précède, la forme et le contenu de cet acte doivent se règler par ce statut reél. - Par application de la règle profesée

to the common law, that no conveyance or transfer of land can be made, either testamentary or inter vivos, except according to the formalities prescribed by the local law. Thus, in England, no instrument

par M. Eichhorn, cet auteur soutient que le tentament fait en pays étranger, d'après les formes qui y sont établies, n'aura ses effets, dans la patrie du testateur, quant à la forme, qu'autant que les lois de cette patrie reconnaissent la même forme, à moins que le testateur ne soit également décèlé dans le pays de la confection du testament : dans ce dernier cus soulment, ledit testament sortirait ses effects dans sa patrie. La pessestica enseignée par Eichhorn peut être vraie en droit étroit: mais elle est contraire à l'usage des nations, attesté par le sentiment général des auteurs cités plus liaut : on ne doit donc pas s'arrêter à l'opinies imbie de M. Eichhorn. D'ailleurs, les exceptions admises per cet autes, sutest la première, ramènent son système à celui que nous avons expest un pe 41 : en effet, notre système a précisèment sa base principale due l'inpossibilité ou du moins dans la difficulté de rimplir à l'étranger les famalités prescrites au lieu du domicile de l'individu. Du reste ma système admet aussi les deux exceptions énoncées per M. Echlera sous les nos 2 et 3, ainsi que nous l'expliquerons au no suivent. M. Mahlenbruch, en parlant des testaments, revient sur l'opinion per lei duise dans sa doctrina pandectarum; il se range de l'avis de M. Es iben. Le troisième auteur qui repousse l'application de la règle less regit actum, en ce qui concerne la forme des actes, c'est Hanse. Il regule cette règle comme vague et inutile, et il n'en admet l'application que dans deux cas: le promier, lorsqu'il s'agit d'actes de procédes (a de processu ordinando queritur); le second, lorsque les parties, en verte de leur autonomie, se sont soumises aux lois du pays dens lequel elles ent passé un acte. L'opinion de cet auteur a sa base des une confisien d'idées : il a cherché à appliquer la règle locus regit atten sen coulement à la forme des actes, mais encore à leur substrace; pluyent pu parvenir à justifier cette opinion, il a rejeté entièrement laite sègle, « il a cru trouver uniquement dans la volonté expresse ou tacite des pes la base de l'application des lois du lieu, quant à la forme et quant à la matière de l'acte. L'acte fait d'après les formes prescrites per la lei de lieu de sa rédaction est valable, non-seulement par rapport aux bisses meubles appartenant à l'individu et qui se trouvent au lieu de sur des cile, mais encore par rapport aux immeubles, en quelque culture fussent situés. Cette dernière proposition, selon la meture des chasses, admet une exception, dans le cas ou la loi du lieu de la citation precrit, à l'égard des actes translatifs de la propriété des immessiles et qui y affectent des charges réelles, des formes particulières qui ne passes être remplies ailleurs que dans ce même lieu; telles sent la rédacti actes par un notaire du même territoire, la transcription ou l'inscription est

not under seal can operate as a conveyance of land, so as to give a perfect title thereto. An instrument therefore, not under seal, executed in a foreign country, where no seal is required to pass the title to lands, would be held invalid to pass land in England. The same rule is established in America, where it is held, (as we have seen,) that the title to land can be acquired and lost only in the manner prescribed by the law of the place, where the property is situate.

registres tenus dans ce territoire, des actes d'aliénation, d'hypothèque, etc. L'acte fait dans un pays étranger suivant les formes qui y sont prescrites, ne perd pas sa force, quant à sa forme, par le retour de l'individu au lieu de son domicile; aucune raison de droit ne milite en faveur de l'opinion contraire. La règle locus regit actum ne doit pas être étendue au delà des limites que nous lui avons tracées au nº 40; ne s'applique qu'à la forme extérieure, et non pas à la matière ou substance des actes, ainsi que nous l'expliquerons encore au § suivant. Ainsi, dans un testament, la capacité, de la personne et la disponibilité des biens ne se réglent point par la loi du lieu de la rédaction. Dans les dispositions entre-vifs, soit à titre-onéreux, soit à titre gratuit, la loi du lieu de la rédaction peut avoir influé, soit sur l'ensemble de l'acte, soit sur les termes employés par les parties; et, sous ce double titre, cette loi peut être consultée par les juges comme moyen d'interprétation ; mais elle ne forme pas la loi décisive, à moins que les parties ne s'y soient soumises expressément. La règle indiquée au nº 40 ne s'applique pas seulement aux actes publics ou solennels, mais aussi aux actes sous signature privée, comme, par exemple, les testaments olographes. Feu M. Merlin fait remarquer que 'la règle locus regit actum est générale, et il faudrait, pour la restreindre aux testaments reçus par personnes publiques, une exception autorisée par une loi expresse. Nous ajouterons que les raisons exposées au nº 41 a'appliquent aux actes sous seing-privé comme aux actes publics. Nous regardons comme une erreur l'opinion contraire professée par M. Duranton. Nous empruntons à M. Pardessus une observation importante. C'est que, dans tous les cas ou l'une des parties invoque un acte passé hors du royaume, il faut avant tout s'assurer que l'acte a été passé dans le lieu règi par les lois auxquelles on veut le soumettre." Id. § 42 to § 47, p. 350 to 354.

Ante, § 363, 364. See Dundas v. Dundas, 2 Dow & Clarke, 349; Coppin v. Coppin, 2 P. Will. 291, 293; 2 Fonbl. Equity, B. 5, ch. 1, § 6, note, p. 444, 445.

² Ante, § 427, 428; United States v. Crosby, 7 Cranch, 115; Cutter

§ 436. Erskine in his Institutes states this to be the law of Scotland. "In the conveyance (says he) of an immovable subject, or of any right affecting heritage, the grantor must follow the solemnities established by the law, not of the country, where he signs the deed, but of the state, in which the heritage lies, and from which it is impossible to remove it. For though he be subject with respect to his person to the Lex domicilii, that law can have no authority over property, which hath its fixed domicil in another territory, and which cannot be tried, but before the Courts, and according to the laws of that state, where it is situated. And this rule is so strictly adhered to in practice. that a disposition of an heritable jurisdiction in Scotland, executed in England after the English form, was not sustained, even as an obligation to compel the grantor to execute a more formal conveyance."1

v. Davenport, 1 Pick. R. 81, 86; Hosford v. Nichols, 1 Page, R. 220; Wills v. Cowper, 2 Hamm. R. 124; S. C. Wilcox's Rep. 278; Kerr v. More, 9 Wheaton, R. 566; McCormick v. Sullivant, 10 Wheaton, R. 192; Darby v. Mayer, 11 Wheaton, R. 465.

¹ Ersk. Inst. B. 3, tit. 3, § 40, p. 515; ld. § 41; 2 Kaims on Equity, B. 3, ch. 8, § 2, p. 328. — But Erskine in the same section makes a distinction between contracts to convey real estate situate in Scotland, and actual transfers, holding, that if the contract to convey is good by the lex loci contractus, it will be enforced in Scotland; but an actual transfer will not. "But," (says he,) "though obligations to convey, if they be perfected secundum legem domicilii, are binding here; yet conveyances themselves, if of subjects within Scotland, are not always effectual, if they are not executed according to the solemnities of our law." The other part of the section has been already cited in a note, ante, § 365. The common law, as we have seen, with masculine vigor, and upon principle, rejects such niceties; and indeed it seems repudiated by many of the learned Judges of Scotland. Ante, § 365. See Lang s. Whitlaw, 2 Shaw, App. Cases, p. 13; S. C. 5 Wils. & Shaw, p. 66, 67, note; Brack v. Johnston, 5 Wils. & Shaw, p. 61.

Confl.

He is well borne out in this doctrine by other authorities.1

§ 437. Boullenois admits, that, when an incapacity to do an act, or to make a conveyance of a thing, except by certain formalities, i/ created by the Lex rei site, that law must be observed in regard to that thing, although the party be otherwise capable by the law of his domicil. He adds, in

Ante, § 365, 366, 367; Jerningham v. Herlert, I Tamlyn, R. 103; Fergusson on Marriage and Div. p. 395, 397.—Mr. Burge, speaking on this subject, says; "There is a perfect uniformity in all systems of jurisprudence in the adoption of this rule. Thus a contract in England for the sale to A. of immovable property situated in England, or in those colonies, which are governed by he law of England, would transfer the dominium in equity, and A. would become the owner; but if the property were situated in British Guiana, it would not transfer the dominium. On the other hand, a contract in British Guiana for the sale of immovable property atuated in England, or in those colonies, would transfer the dominium on that property, but it would not transfer the dominium of property situated in British Guiana." 2 Burge, Comm. on Col. & For. Law, Pt. 2, ct. 9, p. 865.

² 1 Boullenois, Observ. 23, p. 473, 477, 488, 492, 498, 499, 500; ante, § 240. — Boullenois, speaking on this subject says; "Ces formes distinctives des contrats font, pour la plusart, dictées par le Droit commun ; mais comme Me Ch. du Molin observe que chacune des Villes ayant Jurisdiction, peut prescrire une forme particuliere à chaque espece de contrat, il pourroit arriver que ces forme, ou formalités varieroient à l'infini ; que dans le lieu du contrat, il y es auroit une ; que dans le lieu ou domicile, il y en auroit une autre; et que dans le lieu de lu situation, il y en auroit encore une autre. Dans els cas, si ceux qui contractent, sont domiciliés dans un lieu, qu'ils contactent dans un autre, et que la chose dont ils contractent, soit encore ans un autre quelle forme les contractants donneront-ils à l'acte, eu égard à toutes ces formalités variées et multipliés? S'il étoit clair que ces formes appartinssent à la solemnité, il n'y auroit pas de difficulté qu'il audroit suivre ce que la Loi du lieu ou l'acte se passeroit, prescriroit i cet égard. Si ces formalités étoient habilitantes la personne, il faudroit suivre la Loi du domicile de la personne habilitée. Si au contraire elles appartenoient, sive ad substantialia contractus, sive ad naturalia, sive ad accidentalia aut complementoria, c'est là ou se rencontreroit la véritable difficulté ; et si vous donnez pour principe général et indefini, qu,il faci toujours suivre la Loi du lieu ou se passe le contrat, ou bien qu'il faut toujours suivre la Loi de la situation, ou bien qu'il faut

another place, that, if these to things, and not to persor prescribe them, are real; ar of the place of their situation ingly he lays it down, as a la loi exige certaines formalit aux choses memes, il faut sui

tonjours suivre la Loi du domicile d vous donnerez un faux gincipe; parce tantot ces formalités appartiennent au et dépendent de la qualité de la person 465. Boullenois in another place s dans ce nombre considéré de différent que différence qui'il y ait mene dans convienment unanimement, que nour parte, il ya des choses requises, pou personnes qui contractent, et eles ser dent du domicile; qu'il y en a de sequ ité, et elles dépendent du lieu en e tachees aux choses, et elles déperle en a qui sont de l'essence et de 'a des actes, et ces choses sont, sele munément et assez universellement fleuent de la nature et espece dont se nent de la propre nature de ces contr tachées par un usage bien constant, et choses qui peuvent faire naitre le plus servant que de complément aux actes o fèrentes Loix ; et qu'il y en a encore d'autres dont l'accomplissement plus des parties, et celles-ci n'entrainent p véritable difficulté en cette matiere, ces formalitiés, et les ranger chacun afin de ne pas appliquer à une forma cipes et des decisions qui ne conver classe. Plusieurs exemples vont faire Obser. 23, p. 456, 457; Id. p. 488, 492 tament, § 1, 5, art. 1, 2, 3.

¹ 1 Boullenois, Obs. 23, p. 467; Id p. 58 to 60; Henry on Foreign Law, ² 2 Boullenois, Observ. 46, p. 467,

enois, Obser. 9, p. 151.

Yet, strangely enough, he departs from this general doctrine in relation to testaments, upon some subtile distinctions, which he takes, between extrinsic and intrinsic forms, between the solemnities required to the perfection and authenticity of an act, and those, which relate to the capacity to do it, or to dispose of the thing, which is the subject of it.¹

& 437 a. Sandius (John à Sandé) has given us some quite as subtile distinctions, insisting, that there is a wide distinction between the solemnities of an alienation and the thing, of which the alienation is the subject; Quod multum intersit inter solennitates dispositionis et rem, de quâ sit dispositio. The solemnities respect but the form of the disposition or alienation, and the things disposed of or alienated constitute the substantial matter thereof; So that what respects the solemnities, affects only the form of the act, and not the things. Solennitates sunt forma: res est subjectum dispositionis; quare tale statutum magis efficere videtur dispositionem ipsam, quam rem.2 According, Sandius holds, that, if a foreigner makes his will according to the forms and solemnities of the law of the place, where it is made, it will be valid, even as to immovables in another country, where different forms and solemnities are required. He assigns the following reason. Ratio hujus sententiæ est, quod statutum vel consuetudo, præscribens solennitates testamenti, non afficiat res Testatoris, neque ejus personam, sed ipsam dispositionem, quæ fit in loco statuti vel consuetudinis. At in cujusvis actus solennitate inspicitur consuetudo loci, ubi is celebratur, eoque in iis quæ

1 1 Boullenois, Obser. 21, p. 422 to 426.

² 1 Boullenois, Obser. 21, p. 422, 423; Sand. Decis. Frisic. Lib. 4, tit., Defin. 14, p. 142, 143.

spectant ad formam et solennitates testamenti, inspicitur consuetudo loci, ubi illud factum est, licet testator ibi larem fixum non habeat. And again; Deindè hæc sententia non facilè ad praxin transferri potest, uti incommoda testari volentibus, qui si habeant bona sita in diversis regionibus, quæ, quod ad testamenti solennitates attinet, diversis moribus reguntur, non possunt secundum hanc sententiam uno testamento defungi, sed si nolint pro parte intestati decedere, coguntur contrà juris rationem plura testamenta exarare; singula scilicet juxtà con suetudinem cujusque regionis, vel in uno testamanto sequi consuetudines plurium locorum, et actum per se individuum huic, et illi loco diversimodè impartiri.

§ 438. D'Argentre and Burgundus maintain with great clearness the general doctrine, that the law rei sitæ must govern as to the solemnities of alienation, inter vivos and testamentary.3 D'Argentre's opinion has been already in part stated.4 He adds in another place. Cum de rebus soli, id est immobilibus, agitur, (qu'ils appellent d'heritage) et diversa diversarum possessionem loca, et situs proponuntur in acquirendis, transferendis, aut asserendis, dominiis, et in controversia est, quo jure regantur, certissima usu observatio est, id jus de pluribus spectari, quod loci est, et suos cuique loco, leges, statuta, et consuetudines servandos; et qui cui mores de rebus, territorio, et potestatibus finibus sint recepti, sic ut de talibus nulla cujusquam potestus sit præter territorii legem. Sic in contractibus, sic in testamentis, sic in commercii omnibus, et

¹ Sand. Decis. Frisic. Lib. 4, tit. 1, Defin. 14, p. 142, 143.

² Id. p. 123.

^{3 1} Boullenois, Observ. 6, p. 129; Id. Observ. 9, p. 151; Id. Obser. 22,
p. 422, 425; Cujacii, Opera. Tom. 3, Observat. Lib. 14, ch. 12, p. 399,
edit. 1758; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 866.

⁴ Ante, § 426.

locis conveniendi constitutum; ne contra situs legem in immobilibus quidquam decerni possit privato consensu; et par est sic judicari.¹ Burgundus, in addition to what has been already cited,² says in another place; Siquidem solemnitates testamenti ad jura personalia non pertinent; quia sunt quædam qualitas bonis ipsis impressa, ad quam tenetur respicere quisquis in bonis aliquid alterat. Nam, ut jura realia non porrigunt effectum extra territorium; ita et hane præ se virtutem ferunt, quod nec alieni territorii leges in se recipiant.³ This is also the opinion of other distinguished jurists.⁴

§ 439. Froland treats, as clearly real, all laws, which respect the alienation of immovable property, and consequently that it is governed by the Lex rei sitæ. He lays down, as a fundamental rule; La premiere (chose), que le Statut Réel ne sort point de son territoire. Et de là vient, que dans le cas, ou il s'agit de successions, &c. d'alienation d'immoveables, &c. il faut s'attacher aux coutumes des lieu, où les fonds sont situes. Cochin lays down the rule, that, though the formalities of an instrument (acte) may be, and indeed ought to be, according to the law of the place of the instrument; yet, when the clauses or

¹ D'Argent. De Briton. Leg. Art. 218, n. 2, p. 647; ante, § 371 a.

Ante, § 372, 433, 438; post, § 477.

Burgundus, Tract. 6, n. 2, 3, p. 126, 129; post, § 477; Rodenburg, De Divers. Stat. tit. 2, ch. 3, § 1, 2; 2 Boullenois, Appx. p. 19, 20, 21; 1 Boullenois, Observ. 6, p. 129, 130; Id. Obser. 9, p. 151; Id. Obser. 21, p. 422, 423, 425; ante, § 433 a; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 581 to 585; post, § 477.

⁴ Ante, § 363 to 373. See 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 865, 866; 1 Boullenois, Obser. 21, p. 423, 424; Sand. Decis. Frisic. Lib. 4, tit. 1, Defin. 14, p. 142, where many opinions of Jurists are cited.

^{5 1} Froland, Mém. 156; Id 65.

contents of such an instrument are to be applied to property in another country, the law rei site must govern. Les formalités, dont un acte doit etre revetu, se règlent par la loi, qui exerce son empire dans le lieu, où l'acte a été passé; mais quand il s'agit d'appliquer les clauses qu'il renferme, aux biens des parties contractantes, c'est la loi de la situation de ces biens, qui doit seule etre consultèe.

§ 440. But there are many other jurists, who maintain the same opinion, as Cochin, holding, that, if the act or instrument have the formalities, which are prescribed by the law of the place, where it is made, it ought to have a universal operation; and they apply it especially to the case of testamentary dispositions of real property. They found themselves upon the extreme inconvenience, which would otherwise result from requiring a party to make different testaments for their property, lying in different countries, and the

¹ Cochin, Œuvres, Tom. 5, p. 697, 4to edit. — There is some difficulty in reconciling this passage with another cited in the note to § 440. Perhaps Cochin only means here to say, that the solemnities of the place, where the act is done, are to be observed: but that the interpretation of the clauses or provisions of the instrument are to be according to the law of the situs. See also 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 866.

² P. Voet, de Statut. § 4, ch. 2, § 6, p. 123, § 7, p. 124, edit. 1715; Id. p. 137, edit. 1661; J. Voet, ad Pand. Lib. 1, tit. 4, P. 2, § 5, 6, p. 39, § 10, p. 43, 44; 1 Boullenois, Obser. 21, p. 426 to p. 433. — Mr. Livermore, in his Dissertations, sums up the opinions of different Jurists. Liverm. Diss. § 78 to § 214, p. 69 to p. 130. So does Mr. Burge. 4 Burge, Comm. Pt. 2, ch. 12, p. 581 to p. 585. Sandius, or Sandé, has also brought together the opinions of different Jurists on this subject. Sand. Decis. Frisic. Lib. 4, tit. 1, Defin. 14, p. 142, 143.

³ See Rodenburg, de Div. Stat. tit. 2, ch. 3; 2 Boullenois, Appx. p. 19; 1 Boullenois, p. 414 to 421; Id. Observ. 21, p. 422 to 433; 1 Hertii, Oper. § 4, n. 10, p. 125, edit. 1737; Id. p. 179, edit. 1716; J. Voet, ad Pand. Lib. 1, tit. 4, p. 2, 13, p. 43; Bouhier, Cout. de Bourg. ch. 23, § 81 to § 89 p. 460; Vinnius ad Instit. Lib. 2, tit. 10, § 14, n. 5; 1 Boullenois, Obser. 21, p. 426, 427; Merlin, Répert. Loi. § 6, art. 6, 7.

almost utter impossibility, in many cases, of ascertaining at a critical moment, what are the peculiar solemnities prescribed by the laws of each of these countries.1 They seem wholly to have overlooked. on the other side, the inconvenience of any nation suffering property, locally and permanently situate within its own territory, to be subject to be transferred by any other laws, than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws, to regulate its own titles to such property, many of which laws can be but imperfectly ascertained, and many of which may become matters of subtile controversy.2 Some of these jurists press their doctrine so far, as to doubt, whether a transfer, made according to the solemnities of the place, where the

¹ Rodenburg, De Div. tit. 2, ch. 3; ² Boullenois, Appx. p. 19; ¹ Boullenois, p. 414 to 417; Vinnius, ad Instit. Lib. 2, tit. 10, § 14, n. 5; ¹ Boullenois, Obser. 21, p. 426, 427; Hertii, Opera, De Collis. Leg. § 4, n. 10, p. 126, edit. 1737; Id. p. 179, edit, 1716; Id. n. 23, p. 133, edit 1737; Id. p. 189, edit. 1716; Fælix, Conflit des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 41, p. 347, 348. John Voet has given the reasoning on this side of the question. J. Voet ad Pand. Tom. 1, Lib. 1, tit. 4, P² 2, § 13, 15, p. 45, 46. See also 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 590; post, 444 a.

² Cochin says, it is one of the most uniform principles, that the form of acts depends upon the law of the place, where they are passed; so that, if a man is domiciled at Paris, and there has all his property (biens), but he makes his testament in another province under a different law, the law of the latter is alone to be regarded in its form, though the succession to the testator, either of heirship or testamentary, may be regulated by the law of Paris. Cochin, Œuvres, Tom. 2, p. 72, 4to edit. See ante, § 439. D'Aguesseau treats with some sarcasm those, who venture to suggest a doubt on the point. "We leave such discussions (says he) to the ultramontane Doctors. We say with D'Argentré, that these questions are not worthy to occupy a moment's attention. No one can doubt, that the formalities of a testament ought to be governed by the law of the place, where the act is done." D'Arguesseau, Œuvres, Tom. 4, p. 637, 4to edit.

property is locally situate, would be good, if not also executed according to the law of the place, where the act is done.

§ 441. The opinion of these jurists is supported by Dumoulin. His language is; Et est omnium doctorum sententia, ubicumque consuetudo, vel statutum locale disponit de solemnitate, vel formá actûs, ligari etiam exteros, ibi actum illum gerentes, et gestum esse validum, et efficacem ubique, etiam super bonis solis extra territorium consuetudinis vel statuti. In another place he says; Aut statutum loquitur de his, que concernunt nudam ordinationem vel solemnitatem actûs, et semper inspicitur statutum vel consuetudo loci,

¹ Rodenburg, De Div. Stat. tit. 2, ch. 3; 2 Boullenois, Appr. p. 21; 1 Boullenois, 417; Id. Observ. 21, p. 428, 429, 430. Grotius appears to have held the same opinion, and to have applied it to the case of wills and testaments. See post, § 479, where his opinion is cited.

² Molin, Oper. Torn. 2, edit. 1681, Consil. 53, § 9, p. 965; ante, § 200, note, § 274 a, § 372 a; 1 Boullenois, Observ. 21, p. 423, 429. Mr. Livermore manifestly entertained the opinion, that it was sufficient for a testament of immovable property to have the formalities prescribed by the law of the testator's domicil. After adverting to Dumoulin's division of statutes into those, which relate to the solemnities and forms of acts (nudam ordinationem vel solemnitatem actus), and those, which concern the merits and decisions of causes, que meritum cause val decisionsus. concernant.) he added: "The statutes of the first class I do not comsider to be either personal, real, or mixed. They do not act directly upon persons, nor upon property; but upon the act for the purpose of determining its authenticity. The laws of some countries require, that a testament shall be made in presence of seven witnesses. In other countries, the law requires only the presence of a notary and two These laws dispose of the solemnities of all testaments made within their jurisdiction; but they neither affect the causely of the testator, nor do they dispose of his property. The har of the testator's domicil determines his capacity to make a testament; the law of the place, where his immovable property is situated determines, whether it may be disposed of by testament, or not; the will of the testator disposes of his property; and the sole purpose and effect of the statute, which requires a certain number of witnesses to a testament, to show, whether that will has been expressed, or not."

ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis, aut aliis conficiendis. Ita quod testamentum, factum coram duobus testibus in locis, ubi non requiritur major solemnitas, valet ubique. Idem in omni alio actu.¹ And yet Dumoulin in another place uses language not very consistent with the foregoing, unless indeed he is there to be understood as speaking, not of the forms and solemnities of testaments, but of the operation and interpretation thereof. Sed emergit incidens quæstio, cujus loci inspiciatur, an loci testamenti, contractus, vel loci dominantis, an vero loci servientis? Et omnino dicendum inspiciendam consuetudinem loci servientis, seu rei, quæ conceditur.²

§ 441 a. Bouhier maintains, that in general the forms and solemnities of all acts done, (which of course include testaments,) should be according to the law of the place, where the acts are done, even when the property is situated elsewhere; at least if the custom of the situs is not in opposition to it. He lays it down in another place among his general rules. Tout statut, qui concerne les formalites extrinceques des actes et leur authenticité, est personnel; en sorte que, quand l'acte est passé dans les formes usitées au lieu, où il est redigé, il à par tout son exécution; and he then applies the rule expressly to testaments.

Molin. Oper. Tom. 3, ad Cod. Lib. 1, tit. 1, 1. 1, Conclus. des Statutis, p. 554, edit. 1681; ante § 260; post, § 479 k; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 583; 1 Boullenois, Observ. 21, p. 423, 424; ante, § 365 a.

Molin. Opera, Tom. 1, De fiefs, § 33, n. 86, Tom. 1, p. 410, edit. 1681;
 Boullenois, Observ. 21, p. 423, 424, 425; Burgundus, Tract. 6, n. 2,
 p. 128; Bouhier, Cout. de Bourg. ch. 23, § 39 to § 44, p. 454, 455.

³ Bouhier, Cout de Bourg. ch. 28, § 10, p. 550.

⁴ Bouhier, Coat de Bourg. ch. 23, § 81, 82, p. 460; Id. ch. 28, § 10 to § 20, p. 550, 551; Id. ch. 21, § 219, p. 417.

§ 112. Paul Voet holds the opinion, that the solemnities of contracts and other instruments respecting the transfer of immovable property are to be according to the laws of the place, where the act is done, and not of the rei sitæ; for he holds laws respecting solemnities not to be either real, or personal, but of a mixed nature. Statutum quippe circa solumnia, nec est in rem, nec in personam, sed mixti generis.1 He therefore, insists, that, if a testament is made according to the solemnities of the place rei site, but not according to that of the testator's domicil, it will not be valid, as to property situate elsewhere. Verum (savs he) quid de solemnibus, in negotiis adhibendis, statuendum erit, si locorum statuta discrepent? Finge, quempiam testari in loco domicilii, adhibitis solemnibus rei sitæ. non sui domicilii; valebitne testamentum ratione bonorum alibi sitorum? Respondeo, quod non. Neque enim aliter testamentum valere potest, quam si ea servetur solemnitas, quam requirit locus gestionis.2 He further holds, that if a testament is made by a person in his own country (sui loci) according to the forms and solemnities required by the laws thereof, it will be valid in respect to his immovable property in other countries, where different forms and solemnities are required. And this without any distinction, whether such person has retained his original domicil, or whether he is settled in another country. Quid, si quispiam testetur secundum solemnia sui loci, puta corum notario et duobus testibus, an vires capiet tes-

¹ P. Voot, Do Statut, § 9, ch. 2, n. 3, p. 263, edit. 1715; Id. p. 318, 319, edu., 1661.

⁹ P. Voet, De Statut. § 2, ch. 2, n. 1, p. 202, edit. 1715; Id. p. 317, edit. 1661.

tamentum ratione bonorum extra territorium statuentis jacentium, puta in Frisiâ, ubi plures solemnitates requiruntur? Aff. (affirmo). Idque procedit, sive testator domicilium prius retinuerit, sive alio transtulerit.1 And he adds, that if a foreigner makes his testament according to the law of the place, where he is only temporarily abiding, it will still be valid, as to his immovable property elsewhere, even in his domicil. Quid, si forensis secundum loci statutum testamentum condat, ubi tantum hospitatur, an valebit alibi, ubi vel immobilia, vel domicilium habet? Respondeo. quod ita. Cum enim agatur de actus solemnitate, quæ quoscunque obligat, in loco negotium aliquod gerentes, etiam obligat forensem ibi disponentem, si suam dispositionem vel suum actum velit utilem, licet non præcisé liget eundem.2 He makes an exception, indeed, of a party's making a testament in a foreign country, with a view to a fraudulent evasion of the law of his own country. Si tamen quispiam, ut evitaret solemnitatem loci sui domicilii, in fraudem talis statuti, extra territorium se conferat, ejus testamentum non valere existumarem?

¹ P. Voet, De Stat. § 2, ch. 2, n. 2, p. 262, edit. 1715; Id. p. 317, 318, edit. 1661.

² P. Voet, De Stat. § 9, ch. 2, n. 3, § 262, 263, edit. 1715; Id. p. 318,

^{319,} edit. 1661; post, § 475.

² P. Voet, De Stat. § 9, ch. 2, n. 4, p. 264, edit. 1715; Id. p. 318, 319, edit. 1661. — In 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 590. Mr. Burge supposes, that Paul Voet holds a somewhat differently medified opinion, like that of Rodenburg, that the testament will be good, if made either according to the law of the place, where it is made, or according to that, where he has his domicil. Post, § 444. See also ante, § 365 a. I do not see any thing in the passage of Paul Voet, referred to by Mr. Burge, that leads to such a conclusion. The text contains all the cases put by Paul Voet on this point, in his Work De Statut. § 9, ch. 2.

§ 413. Huberus supports the same opinion. Holland, " (says he,) "a testament may be made before a notary and two witnesses. In Friezeland it is not valid, unless established by seven witnesses. A Batavian made a testament in Holland, according to the local law, under which property situate in Friezeland is demanded. The question is, whether the judges in Friezeland ought to sustain the demand under that testament. laws of Holland cannot bind the Friezians; and. therefore, by the first axiom the testament would not be valid in Friezeland; but by the third axiom it would be valid; and, according to that, judgment should be pronounced in favor of the testament. But a Friezian goes into Holland, and there makes a testament according to the local law (more loci.) contrary to the Friezian law, and returns into Friezeland, and dies there. Is the testament valid? It is valid by the second axiom; because while he was in Holland, although temporarily, he was bound by the local law; and an act, valid in its origin, ought to be valid every where by the third axiom; and this without any discrimination of movable or of immovable property. So the law is, and is practised. On the other hand, a Friezian makes his will in his own country before a notary and two witnesses; and it is carried into Holland, and property situate there is demanded. It will not be allowed: because the testament was from the beginning a nullity, it being made contrary to the local law. The same law will govern, if a Batavian should make a testament in Friezeland although it would be

 $^{^{-1}}$ The axioms here referred to by Huberus are those already stated in $\lesssim 20,$

valid if made in Holland; for in truth such an instrument would from the beginning be a nullity, for the reasons just stated.¹

§ 443 a. What Huberus here says may seem not very consistent with what he has said in another passage already cited; 2 but he has endeavored to reconcile the passages by the following remarks. But it may be asked, (says he,) whether what we have already said does not give rise to an objection, that if a testament is made, which is valid by the law of the place, it ought to have the same effect even in respect to property situate elsewhere, where it is lawful to dispose thereof by will? There is no such objection; because the diversity of laws of that sort does not affect the immovable property, neither does it speak concerning the same, but only directs the act of making a testament; which, when rightly executed, the law of the country does not prohibit that act from being valid in respect to immovable property, so far as no character, impressed upon that property by the law of the place, is injured or diminished. This observation has a place also in contracts. Thus, if certain things or rights of the soil of Friezeland are sold to persons in Holland, in a mode prohibited in Friezeland, though valid, where the sale takes place, the things are understood to be well sold. The same is true as to things not, indeed, immovable, but annexed to the soil. But if corn growing on the soil of Friezeland should be sold in Holland, according to the lasts, as it is called, the sale is void, although the law of Holland does not speak on the point; be-

¹ Huberus, Lib. 1, tit. 3, § 4, § 15.

² Ante, § 426.

Confl.

cause it is prohibited in Friezeland, and it adheres to the soil, and is part thereof. Sed an hoc non obstat ei, quad anten diximus, si factum sit testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, abi de illis testari licet? Non obstat : quia legum diversitas in illa specie non afficit res soli, neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, Lex Reipubl, non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus læditur aut imminuitur. Ĥæc observatio locum etiam in contractibus habet: ouibus in Hollandia venditæ res soli Frisici, modo in Frisia prohibito, licet, ubi gestus est, valido, recte renditæ . intelliguntur : idemque in rebus non quid**em immobilibus.** at solo coherentibus; uti si frumentum soli Frisici in Hollandia secundum lastas, ita dictas, sit renditum. non valet renditio, ner quidem in Hollandia secundum cam jus dicetur, etsi tale frumentum ibi non sit vendi prohibitum: quia in Frisia interdictum est: et solo coharet ejusque pars est.1

§ 111. Rodenburg seems at first to consider, that laws, which regulate the forms and solemnities of acts touching property, are neither strictly personal laws, nor real laws; but a third sort. Subsequitur tertium et ultimum genus, corum nimirum statutorum, quibus lex prafigitur actui, qui à persona peragendus, cundum actum vel veta do, vel certo etiam modo circumscribendo.² He afterwards proceeds to state, that the opinion commonly entertained by jurists is, that as to such

³ H dorns, De Conthet, Log. Lab. 1, tit. 3, § 15. — Whether this distance in a satisfactory or not, will be for the learned reader to decide. See past. 476.

Robinburg, De Divers, Stat. tit. 2, ch. 3, § 1: 2 Boullenois, Appr. p. 10.

acts, the law of the place, where the act is done, is alone to be regarded, although it respects immovable property. Si de solemnibus quæratur, ea jampridem in foro ac pulpito prævaluit opinio, ut spectandæ sint loci cujusque leges, ubi actus conficitur.1 Quare sicubi ex more loci solemnite, ordinatum fuerit testamentum, valiturum illud, ubicunque oportuerit exequi.2 He then remarks, that Cujacius and Burgundus had attacked this doctrine; holding, that testators are bound to observe the forms and solemnities of the res sitæ. He distinguishes cases of this sort from cases of contract, which bind only the person; Cujus ossibus ubique inhæret, semel ex forma loci contractæ obligationis, nexus. De re vero alibi constituta disponendi, aut ejus in alium transcribendæ forman hæc non concernunt. Realium namque jurium eorumve actuum, quibus fit mancipatio, aut dominium transfertur, aliam esse rationem, vel quotidiana praxis edocet, et recte disputat Burgundus. Jus in re, ut nascatur, quod hic ex causa testamenti contingit, non posse id præstare alterius regionis consuetudinem, ut formâ illâ ac solemnibus circumdaret alienorum fundorum alterationes, adeoque omnino jus diceret extra territorium.3 He then proceeds to examine the reasoning, upon which the opinion is maintained, that the law of the place of the making a testament should govern as to the forms and solemnities thereof, and not the law rei site. He admits his own view to be, that a testament made according to the forms and solemnities of the place where it is made, ought to be held valid; and

¹ Rodenburg, De Divers. Stat. tit. 2, ch. 3, § 1; 2 Boullenois, Appx. p. 19.

² Ibid.

³ Ibid.

also, that a testament, made in such place, according to the forms of the law rei site, ought equally to be held valid. The former he treats as an indulgence. founded in general convenience: the latter, as correct in point of strict right. Ego potius utrobique pro testamento respondendum duxerim, quippe personæ qualitas ad summam rei non facit, tum factura, si Statuta illa, in solemnitates scripta, personalia forent, nt subditus iis ganderet, non gauderet exterus : sed contra constat ca mere realia esse. Quicunque enim fuerit, sire invola, sive exterus, qui rem alienare intendit, necesse habet respicere ad solemnitatem territorii, cui bona sunt obnoxia. Quare dicendum est decidenda quæstionis rationem in modo prolatis positam esse: necessitatis nimirum rationem, summumque jurotem, qui pro testamentis facit, impetrasse, ul, quancis illa mancipent aque atque alienationes inter vivos, ideoque consimiliter componenda forent ad normam loci, ubi res sitæ sunt, suffecerit tamen ordinásse. secondium leges loci, ubi actus conficitur. si quis co, quod ad testandum expeditius sua causa comparatum est, noluerit uti, quod ei forte promptius sit componere suprema ad loci leges, cui bona subjaceant, quo minus testamentum ejus valiturum sit. non video: vulla enim Juris ratio, aut æquitatis benignitas patitur, at qua salubriter pro utilitate hominum introducuntur, ca nos duriore interpretatione contra ipsorum commodum producamus ad severitatem; nec cum superaddatur alia testandi forma, adimitur prior, quod novæ solemnitatis adjectionem potius dedisse DD. quam priorem ac ordinariam permutásse videantur. consequens est dicere, ne disputem sine speciei appositione. Amersfurti, ubi coram trinis testibus und cum Notario ultima conduntur elogia, viribus subsistere

celebrata, coram binis testibus sûpra Notarium, de bonis in Hollandia, aut in alia Provinciæ nostræ parte sitis.¹ It is hardly possible to conceive a stronger illustration of the difficulty of undertaking to build

¹ Rodenburg, De Div. Stat. tit. 2, ch. 3, n. 1, 2; 2 Boullenois, Appx. p. 21 22; 1 Boullenois, p. 414 to 418; Id. Obs. 21, p. 422, 423. See also 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 865 to 868. - Mr. Burge says; "In selecting the law, by which it is to be determined, whether the acts or instruments of alienation have been made with the necessary solemnities to render the alienation valid, the distinction must be made between those, which are required for the proof or authentication of the act, and those, which are required to be observed as the condition, on which alone the law either authorizes the alienation, or gives to it an effect, which it withholds if they are not observed. The former are called sometimes solemnia probantia, and the latter solemnia habilitantia. Thus, with respect to the former, if the lex loci contractus treats as null and void every contract, the subject-matter of which exceeds in value a certain sum, if it be not reduced to writing and proved before notaries, &c., when the notarial proof is not that, which is prescribed, the contract will be void in whatever place it is enforced. So if those solemnities, which the lex loci contractus requires, have been observed, and the contract according to that law is valid and obligatory, it will be valid every where else. But the latter proposition is subject to the qualification, that it does not affect immovable property. subject to a law in the country of its situs, which annuls a contract because it has not been entered into with the solemnities, which it requires. If the disposition of the law does not annul the contract on account of its non-observance of the solemnities, which are prescribed, but gives to it a degree of authenticity or credit, which it will want, if they are not observed, or if, in other words, its effect is either to dispense with a more formal proof of the instrument, if it bears on it evidence of their observance, or if in consequence of the non-observance it attaches a presumption against the execution of the instrument, and therefore requires from the parties a greater burden of proof, such solemnities are to be classed amongst the proofs in the cause, which are governed neither by the lex loci contractus, nor by that of the situs, but by that of the forum. This question, in the opinion of Paul Voet, regards Non tam de solemnibus, quam probandi efficacia; que licet in uno loco sufficiens, non tamen ubique locorum; quod judex unius territorii nequeat vires tribuere instrumento, ut alibi quid operetur.' The solemnities, which are called habilitantia, and constitute the mode, by which alone the alienation of immovable property is permitted to be made, or by which alone that alienation can give to the grantee or pur-

up systems of jurisprudence upon private notions of general convenmon law has wisely adhered to the title to real property can pass

chaser certain rights, are those, which are pro sitæ. As that law may impose restrictions, whi withhold the power of alienating immovable | territory, to which all persons owning that p prescribe the conditions, on which such alien the law of Scotland does not permit a destinat mentary disposition, neither does it permit ce One of the conditions may be the f shall be made. This solemnitas dispositionis itas rebus inpressa, and the validity of the alic compliance with the prescribed solemnity. As trating the species of solemnities prescribed h to which effect must be given in all question the alienation, may be mentioned the Statut Unless there be such an agreement in writing is sanctioned by the judicial constructions, whi or interest in immovable property situated in I according to the law of the place, where the ag be sufficient if it were by parol. if the question regard the insinuation or regist instruments, or the effects, which are induced by seems to treat it as a solemnity which is of the and to be governed by the lex loci rei sitse. registris ordinariæ curiæ loci semper omnibus substantià : quemadmodum insinuatio donatio erat de substantià, si excedebat quingentos aur that if the registration does not take place whe loci rei site, the alienation is void: 'Que s dans un royaume, et les biens situés dans u endroits requierent une insinuation, je dis dan que si elle n'est pas insinuée dans les deux domicile, donatio insinuatur virtute legis mur tum suum ad bona sita extra territorium, pa pas insinuée dans le lieu de la situation, ell formalité réelle qu'exige la loi de la situation." validity of a testament, as to its form, can only tic judge, whose sentence, delivered in form, acknowledged." But at the same time he adn bequests may be disputed, as not being acc

and by the forms, and to the extent, allowed by the local law. It has thus cut off innumerable disputes, and given simplicity, as well as uniformity, to its operations.

§ 444 a. John Voet maintains in substance the same opinion as Rodenburg; and insists, that it is sufficient for the validity of testaments of immovable property, that the forms and solemnities thereof should be either according to the law of the place, where the testament is made, or according to the law of the place

Vattel, B. 2, ch. 7, § 85; Id. § 111. Mr. Fœlix seems to hold a similar opinion. He says; "Une autre question est celle de savoir, si le contractant ou disposant, qui se trouve en pays étranger, peut se borner à employer les formes prescrites par la loi du lieu de la situation de ses immeubles, au lieu de suivre celle du lieu de la rédaction ? Nous tenons pour l'affirmative, par une raison analogue à celle donnée sur la question précédente. Le Statut réel régit les immeubles; c'est un principe résultant de la nature des choses; la permission d'user des formes établies par la loi du lieu de la rédaction de l'acte n'est, qu'une exception introduite en faveur du propriétaire, et à laquelle il lui est loisible de renoncer . Tel est aussi le sentiment de Rodenburg, de Jean Voet, et de Vander Kessel; Cocceji soutient même, que la forme des actes antre vifs ou testamentaires est régie exclusivement par la loi de la situation des biens. Fachinée et Burgundus partageaient cet avis, mais par rapport aux testaments seulement. En Belgique, l'édit perpetuel de 1611, art. 13, ordonnait, qu'en cas de diversité de coutume au lieu de la résidence du testateur et au lieu de la situation de ses biens, on suivrait, par rapport à la forme et à la solemnité, la coutume de la situation. Paul Voet, Huber, Hert, Hommel, et l'auteur de l'ancien répertoire de jurisprudence, se prononcent pour la nullité. Ce dernier invoque l'autorité de Paul de Castres, au passage rapporté au no précédent, et le principe, que la loi lie tous les individus, qui vivent dans son ressort, ne fut-ce que momentanément. Nous renvoyons à ce sujet aux observations présentées sur la question précédente. Mevius distingue entre le citoyen faisant partie de la nation dans le territoire de laquelle les biens sont situés, et entre l'étranger ; il n'accorde qu'au premier la faculté de testeur ou de contracter partout d'apres les formes prescrites au lieu de la situation. L'auteur ne donne pas de motif de cette distinction, et nous ne pouvons la trouver fondée." Fælix, Des Conflit des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 50, p. 359, 360. See also 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 581 to p. 587; Id. p. 590.

ver sita. His language is: Neque minus de statutis mertis, cetas cajasque solennia respicientibus, percrebuit. ins que habites de summo enjusque jure ac potestate ratiocivis, ed coliditatem actus enjusque sufficere adhibitionem solennitatum, quas lex loci, in quo actus geritar, præso it sout observandas; sie, ut quad ita gestum inerit, sese poursant of bond mobilio et immobilia ubientique site alus in territoriis, quorum leges longe alium, longeque pleniment requiremet solennium intervention; quod ita nhacaisse videtur, tum, ne in infinitum prope multiplicacentar et lestamenta et contractus, pro numero regionum, diverso jure circa solemnia utentium; aspie ita summis implicacentur molestiis, ambagibus, ac deficultatibus; quotquot actum, res pluces pluribus in locis sitas concerned town expedite volucion: tum etiam, ne plurime bona fale gesta nimis facile ac prope sine culpa gerentis compactancetar. He afterwards adds : Posito vero hoc zone. Weet excelentium adhibitionem jure, excutiendum superest, and statuendum sit, si quis, in loco aliquo actum geren , reglectis loci istins solennibus, adhibuerit ca. gare vel d'associlii vel vei sita statuta requirunt, sive diressa illa sint, sire paneiora? Mynsingerus quidem et Michael Gerssus actus ita gestos mullius fore momenti y or reduct, sive actum gerens extra domicilii locum servire a salemie domicilii, sive ca, quæ requirebantur Letter of the mobilis sita. Commenium ante dictum sit. ologica es restione domicilii, et ratione honorum immehitran . abetitum esse magistratibus locorum, in quibus e l'el cui le su firit, rel bona immobilia possidet : ne ga syar mazistratas secundum jus summum de quo sa e sas dispatetum, quodque hie usum invente sui See the least of the latter, quo usque potest, iniques s account a silal subjection ratione domicilii out bemant, si a ar respecta bonorum, in suo territorio jacentium, ratam haberet ultimam voluntatem aut contractum ejus, à quo sua statuta solennium intuitu servanda videt; maxime, cum hâc ratione defendens sui statuti potestatem non conturbet aut subvertat alibi bene gesta, atque adeo nequaquam alterius territorii magistratibus ullam

videri possit injuriam facere.1

& 444 b. Cujacius seems to hold, that the law of the place of the domicil of the testator ought to be regarded as to the forms and solemnities of making wills and testaments, without reference to the place, where the will is made, or the property is situated. Quæri hodie sæpenumero solet, cujus regionis aut civitatis leges moresve serviri oporteat in ordinando testamento; nam quot sunt civitates, tot fere sunt ordinandi testamenti leges et mores; et soleo dicere, patriam testatoris solam spectari oportere, &c. Jus igitur patriæ spectatur, potius quam jus commune Populi Romani, &c. Suæ igitur patriæ et civitatis legibus aut moribus quisquis testari debet, &-c. Denique non spectari locum volo, in quo bona sunt, sed patriam testatoris, &c. Et domicilii potius quam originis spectari patriam. Possit autem quis quo loco habet bona, ejus neque originalis esse, neque incola.2 Nec ejus loci ulla habebitur ratio in faciendo Testamento. This might seem sufficiently explicit. On another occasion he says; Intelligimus, inquam, in faciendo testamento, privilegium et morem patriæ Testatoris, spectari oportere, non situm bonorum. Nam sola possessio bonorum non creat mihi patriam. Si possideo prædium in hac urbe, hæc urbs non est ideo

¹ J. Voet, ad Pand. Lib. 1, tit. 4, P= 2, § 13, 15, p. 45, 46; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 590; ante, § 440 to § 443.

Cujacii, Opera, Tom. 3, Observ. Lib. 14, cap. 12, p. 399, edit. 1758;
 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 582.

mea, nisi in ea posui domicilium. Solam possessionem nec civem facere, nec incolam. Ergo in servandis solemnibus testamenti non spectabo situm bonorum, ut pro vario situ bonorum etiam varia solemnia observentur, variique mores in exequenda defuncti voluntate; sed spectabo tantum morem et privilegium patriæ testatoris.¹

¹ Cujac. Opera, Tom. 9, Comm. ad Cod. Lib. 6, 6t. 21, p. 709, edit. 1768; Bonhier, Cout. de Bourg. ch. 28, § 8, p. 549; I Boullemis, Obser. 21, p. 423; 2 Borge, Comm. on Col. and For. Law, P. 1, th. 9, p. 886; 4 Burge, Comm. Pt. 2, ch. 12, p. 582; Sand. Decis. Prise. Lib. 4, tit. 8, Defin. 7, p. 194. Vinnius holds a similar opinion. He says; Questum est, an testamentum juxta alicujus loci consuetudinem auf Satutum factum, etiam vim habet extra illum locum; exempli gratik texator ibi testamentum fecit, ubi coram duahus testibus et Noturio testari licet, ut in hac nostra Batavia; quæritur, an valent etiam in iis locu, ubi septem testes requiruntur, uti in Frisia, ubi sequentur jus rivile. Affirmant comm. DD. in L. 1, C. C. de summ. Trinit, et secundom harc Sententiam supissime judicatum. Sunt tamen qui in contrarium sunt et in questione proposita sic distinguendum arbitrantur, ut circa res quiden mobiles, et nomina, admittenda sit communis interpret, sententia. At circa res soli, spectandum jus ejus loci in quo sitro sunt, &c. Mili price sententia videtur probabilior, multumque referre utrum Statutum discost circa solemnitatem alicujus actus, an circa rum, puta fundum, locument que Statuta in rem concipiontur. Qualia sunt, quae do enccessione ab intestato disponunt, rem ipsam hand dubie afficient, ut ubicumque et ejas loci ubi est, legibus obstringatur. Idemque habendum de Statzus, que circa habilitatem personarum, dispensando aliquid, disponunt. Gaill. Coras, Gomes. Que autem Statuta disponunt circa actus solemnitatem duntaxat, cum neque rem afficiant, neque personam actum celebrantis, sed ipsam solummodo dispositionem, que, fit in loce Statuti, vel consustudinis, rationi, et juri consentaneum est, ut en vim susm exerent efize ad bona alibi sita; quoniam actuum solemnia ad corum spectant Jurisdictionem, in quorum territorio celebrantur; et alias contra rationem janis, testato decedere volenti, plura testamenta essent condenda, act quod absurdum est, plurium locorum consuctudines in uno testamente esquirere oporteret, actumque unum, atque individuum, qualis est testament, secundum diversa loca adjudicari. Ubi contraria scite expedit, et prodenter temperat, novam quandam distinctionem Fachinei adde, que nes, lib. 2, Select, quest, C. 19. Plane si Lex expresse testatores sequi jubest jus loca. in quo bona sita sunt, aliud dicendum est. Talis est constitutio Principus Brabantie, emissa anno 1611, cujus meminerunt Burgundus, &c. Vina ad

§ 445. Thirdly; in relation to the extent of the interest to be taken or transferred. And, here, there seems a perfect coincidence between the doctrine of the common law, and that maintained by foreign jurists. It is universally agreed, that the law rei site is to prevail in relation to all dispositions of immovable property, and the nature and extent of the interest to be alienated. If the local law, therefore, prescribes, that no person shall dispose, by deed or by will, of more than half, or a third or a quarter of his immovable property; or, that he shall dispose only of a life estate in such property; such laws are of universal obligation, and no other or farther alienation thereof can be made.1 It follows that, if the local law prohibits the alienation of certain kinds of immovable property, or takes from the owner the power of charging them with liens, or with mortgages, that law will exclusively govern in every such case. D'Aguesseau fully assents to this doctrine, and says, that no one can be ignorant, that, when the question is, what portion of immovable property may be devised, it is neces-

Inst. Lib. 2, tit. 10, § 14, n. 5; 1 Boullenois, Observ. 21, p. 426, 427. Gaill is equally explicit. Alibi statutum est, ut testamentum coram Notario et duobus testibus factum valeat. Quæsitum, utrum tale testamentum ubique vires habeat, etiam extra territorium statuentium, ubi fortè major solennitas requiritur, vel jus Civile observantur. Conclusum quod sie; quin ex communi Doctor. opinione, statutum disponens citra solennitates testamenti, extendit se etiam extra territorium, ita ut hæres succedere possit in omnibus bonis, ubicunque sitis, et in universum jus testatoris; quin quoad solennitates attenditur consuctudo loci, in quo actus celebratur. Gaill, Pract. Observ. Lib. 2, Observ. 123, p. 548. See Peckius, De Testam. Conjug. ch. 28, n. 9, p. 620, who holds a similar opinion. Fælix, Conflit des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 37, p. 307 to 312; ante, § 426 to 428.

¹ I Boullenois, Prin. Gén. 30, p. 8; Id. Observ. 16, p. 205; and 1 Froland, Mém. 156; Rodenburg, De Div. Stat. tit. 2, ch. 2, § 1; 2 Boullenois, App. p. 14; post, § 479.

sary invariably to follow the law the property is locally situate.

¹ D'Aguesseau, Œuvres, Tom. 4, p. 637. on this subject says; "In a former part of the that the power to alienate immovable property impressed on the property; that the law, from which it was regulated, was a real law; and power and the validity of its exercise must be country, in which that property was situated certam iisdem qualitatem imprimit, vel in 1 avita possint alienari, vol in aquirendo, v. g. 1 venditæ non aliter acquiratur, nisi facta fi The power of making the alienation by testam impressa, than that of making the alienation fore the question arises, whether the immovi posed of by testament, recourse must be had to law must also decide, whether the full and u tion is enjoyed, or whether it is given under of the testamentary disposition depends in t formity to that restriction, whether the res the extent or description of property, over wi tion may be exercised, or the persons, in w is made, or in requiring, that the testator shoul number of days after the execution of the act was made. The total or partial defect of the it did not institute heirs, or that it omitted to herison of the heirs, the grounds, on which the fied, are essentially connected with the po movable property by testament, and are th law of its situs. Many of the restrictions ing by testament have been considered reference to the operation of the law, by Rodenburg states the rule, 'Unde certissimà u est, cum de rebus soli agitur, et diversa sunt loca et situs, spectari semper cujusque loci les esse proponuntur, sic ut de talibus nulla cuju territorii leges.' He illustrates it by refer prohibits a disposition of allodial property by such a statute a real law, which renders inc disposition of the property, in whatever plac Ferriere has stated this doctrine; 'Si je legue contume, qui en défende la disposition, tel lege fourni sur les biens situez en cette coutume, q l'égard des choses, dont on peut disposer par de

§ 446. An illustration of the doctrine may be borrowed from the English jurisprudence, prohib-

la coutume ou elles sont situées Celui, quia son domicile en cette coutume peut instituer sa femme dans les biens, qu'il a dans le pais de droit écrit, comme il a été jugé par arrest du 14 Aoust, 1754 rapporté par Marion au de ses playdoyez, ce qui doit être sans dificulté.' A testament made in a foreign country bequeathing heritable subjects situated in Scotland, is not sustained, in that kingdom, though by the law of the country, where the testament was made, heritage might have been settled by testament, because by the law of Scotland no heritable subject can be disposed of in that form. On this principle a Scot's personal bond taken to heirs and assignees, but 'secluding executors." cannot be bequeathed by a foreign testament. But in all questions touching heritable subjects situate abroad, the foreign testament will be given effect to according to the lex loci. Dumoulin lays down the same doctrine respecting the restriction on the testamentary power over biens propries. 'Unde statutum loci inspicietur, sive persona sit subdita, sive non; itam si dicat, hæredia proventa ab una linea, redeant ad heredes etiam remotiores linea, vel heredes linea succedant in hærediis ab illà lineà proventis. Vel quod illi de lineà non possunt testari de illis in totum, vel nisi ad certam partem. Hæc enim omnia et similia spectant ad caput statuti agentis in rem, et precedentem conclusionem.' Again; the statute, which prohibits a disposition to particular persons, or (which involves the same consequence) requires the disposition to be made in favor of certain persons, and therefore excludes all others, is a real law. 'Directé enim in rerum alienationem scripta hac lex realis omnino dicenda est: nec enim statutum reale sit, an personale metiri oportet à ratione, que a conjugali forsan qualitate fuerit ducta, sed ab ipså re, que in prohibitione statuti ceciderit.' So also it has been held, that the law, which requires, that the testator should have survived the execution of his testament, will control the disposition of property, situated in the country, where that law prevails, although the testament is made, or the testator domiciled in a place. where no such law exists. If a testator, whose domicil and real estate were both in Normandy, made a will in some other place, in which he had occasion to be present, but where the law did not require, that the testator should survive forty days, it was held, that the survivorship was essential to the validity of the testament, so far as it related to the real property in Normandy. If these questions arise on the power to dispose of movable property by testament, the law, by which they are decided, is that of the domicil pour les meubles, ils suivent la loi du domicile, et il ne sauroit jamais y avoir de choc entre différentes coutumes, en sorte qu'il est assez inutile, quant aux meubles, d'agiter si le

the search as and decision of care of a chair to pure the converse basis in En-A second and selecting land, she is and on visition of t and provide whether interviews or real yard. And the same the thest moded in personal of he's hals in England for the - 47. Loughly: in relati or where he to be deemed in we have already seen, not o for s windes and desemen or chals, as mentages (is a score defined to be, in the elected by the end by the and the state of the sec, which is so the satake of the nat

(as the common law phrase is) to savor of the reality, all other things, though movable in their nature, which by the local law are deemed immovables, are, in like manner, governed by the local law. For every nation, having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character, which it shall choose; and no other nation can impugn, or vary that character. So, that the question, in all these cases, is not so much, what are, or ought to be deemed, ex sua natura, movables, or not; as what are deemed so by the law of the place, where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place, in which any controversy shall arise respecting their nature and character.1 In other words, in order to ascertain what is immovable or real property, or not, we must resort to the Lex loci rei.2

Id. p. 309, edit. 1661. Rodenburg speaking on this point says; De reditibus peculiaris esto consideratio. Et illi quidem, qui à re prestantur, vel cujus nomine constituta hypotheca est, collocantur à Doctoribus in immobilium numero, ita tamen, si perpetui sunt, secus si temporales, quà distinctione et Burgundus utitur. Sed vix est ut non utrobique idem sit dicendum: cum enim ob id ipsum annumerentur immobilibus, quod rei immobili per hypothecæ constitutionem innitantur, ponendi alioquin, vel si perpetui sint, in mobilium classe; nec hypothecæ immutetur natura, temporis aliqua ad redimendum præstitutione, nihilque ad summam rei intersit, certum an incertum luitionis sit tempus, consequens est dicere constitutos ad tempus reditus, æque atque perpetuos, immobilium nomine venire, maxime cum per hypothecæ constitutionem, res ad summam debiti habeatur quasi alienata, quæ per solutionem redimitur. Rodenburg, De Div. Stat. tit. 2, ch. 2, § 2; 2 Boullenois, Appx. p. 15. See also Burgundus, Tract. 2, n. 29, 30, p. 77, 78, 79.

¹ See Ersk. Institutes, B. 3, tit. 9, § 4; ante, § 382.

² Chapman v. Robertson, 6 Paige, R. 630.

CARL Hitherto we have a and acquisitions made by the memselves. The question the same principles apply to quired by operation of law. watacat hesitation, that, indepe express or implied, no estate operation of law in any other other extent, or by any other prescribed by the Lex rei site in dowry, or tenancy by the estate, or interest in immova acquired, except by such percircumstances, as the local la if the law of a state, where at his death, should confer a wife, though she were an a prevail in any other state, w dowable, and where the intestat . 449. Many questions un gisen in the course of the a animonial rights, conferred 1 over immovable property, situ tries. In the different Italian in some of the provinces of governed by the Roman Law, a gulations with regard to dov Program dotise By the laws a places, the husband gained by a of the dotal effects; by other a fourth, and by others nothing

S. J. J. Jee, Diss. 55, 59, p. 72, 79 hay the co. Diss. 56, p. 71; J. Doma T. Geren, et. 1540 to art. 1573; 2 Bouller

tions, which has been most elaborately discussed among foreign jurists, is, whether, in such a case, the law of the matrimonial domicil ought to govern the rights of the parties, as to immovable property in foreign countries, as it does in the matrimonial domicil. It seems agreed on all sides, that, where there is in the country rei sitæ a prohibitory law against any such dotal rights, and against any contract to create them, the law of the matrimonial domicil cannot prevail, if a different rule exists there. But the question has been made, whether, in the absence of any such prohibitory law, or any express contract, the law of the matrimonial domicil ought not to prevail, so as to give the same dotal rights in every other place.

§ 450. Baldus held, that, in such cases, the law or custom of the matrimonial domicil ought to govern, as to property every where. Consuetudines et statuta, (said he,) vigentia in domicilio mariti, non curo, ubi res sint positæ, quæ in dotem datæ sunt.⁴ Dumoulin asserted the same doctrine, upon his favorite theory, that in all cases the law of the matrimonial domicil constituted a tacit contract between

134, 135, edit. 1715; 1 Froland, Mem. . 62, 63, 64.

^{1 1} Boullenois, Observ. 29, p. 732 to p. 818.

Livermore, Diss. § 85 to 91, p. 71 to 75; 2 Boullenois, 89, 90, 91, 92; ante, § 176 to 180, 184, 188; P. Voet, de Stat. § 4, ch. 3, § 9, p.

² Even Paul Voet, who is a strong advocate for the reality of statutes, admits, that cases of express contract may govern, as to property locally situate in a foreign country. 'Si statuto in une territorio contractus accesserit, seu partium conventio, etiam si in rem sit conceptum, sese extendit ad bona extra jurisdictionem statuentium sita; non ut afficiat immediate ipsa bona, quam ipsam personam, quad illa.' P. Voet, De Stat. § 4, ch. 2, § 15, p. 127, edit. 1715.

⁴ Livermore, Diss. § 87, p. 71, 72; 1 Froland, Mem. 62.

the parties. There are many ju the same opinion.

§ 451. Boullenois, as we have mit the existence of any such Dumoulin contends for; but he d which respect property, making, he in cases of laws, which respect th persons in each other's property, laws respecting the state or col son.4 But he contends, that, eve a tacit contract, it does not rend place in regard to dowry personal so (he adds,) then the dowry of at Paris would be the same in in the realm as it is in Paris, which yet contended for.5 Rodenburg so where there is no matrimonial con case, the law of the situs is to g dowry, approving the doctrine of

Livermore, Dis. § 87, p. 73, 74; 1 Frolai moulin, in treating of the question, what law the rights of the husband, in regard to the case of a change of domicil before the dissol mately decides in favor of the law of the language is; 'Hinc infertur ad questionem dotis et matrimonii, qui censetur fieri, non in l in loco domicilii viri; et intelligitur, non de domicilio habitationis ipsius viri, de quo ner sentiunt.' Molin. Oper. Tom. 3, edit. 1681, 1, l. 1, Conclus. de Statut. p. 555; 1 Frolai § 147.

² Ante, § 145 to 156.

³ Ante, § 155; 1 Boullenois, Observ. 29, p.

⁴ Ante, § 155; 1 Boullenois, Observ. 5, p. 1 738.

^{5 1} Boullenois, Observ. 5, p. 121; 2 Bouller§ 155.

Burgundus on this point.1 D'Argentre says; Cum cautum est virum, uxore præmortua, dotem, dotisve partem lucrari; cujus loci statutum spectamus, viri, an uxoris, quod olim fuit, an quod nunc est? Nos rerum lucrandarum situm spectandum dicimus; et quid ea de re statuta singularia permittant, quid abnuant respiciendum.2 Burgundus boldly asserts the opinion, that the law rei sitæ must govern in all such cases as to immovable property.3 Nam si dotalitium rei immobilis in controversiam veniat, ea antiquitus obtinerit sententia, ut ad locum situs respicere oporteat; quæ cum usque ad nostra tempora, apud omnes, qui moribus reguntur, inviolabilis duret, non est committendum, ut illam dubiam faciam defensionis sollicitudine.4 Many jurists concur with them in opinion.5

§ 452. Similar questions have arisen in relation to the rights of community, and of mutual donations between husband and wife, whether they extended to immovable property situate elsewhere than in

Rodenburg, De Divers. Statut. Pt. 2, tit. 2, ch. 4, § 5; 2 Boullenois, Appx. p. 67.

D'Argent. ad Briton. Leg. Des Donations, art. 218, gloss. 6, n. 46, Tom. 1, p. 664; Liverm. Dissert. § 92 to § 99, p. 75 to 78.

^{3 1} Boullenois, Observ. .5, p. 121

⁴ Burgundus, Tract. 2, n. 10, p. 63, 64, Liverm. Diss. § 104 to § 114, p.\80 to 87.

⁵ Ante § 142, 148, 152, 153, 167, 168; 1 Froland, Mêm. 66, 67, 156; Id. 316 to 323, 328, 341; 2 Froland, Mêm. 816. — Froland expresses himself in the following terms. 'La premiere (Regle,) que le statut réel ne sort point de son territorie. Et delà vient que dans le cas, ou il s'agit de successions, de la manière de les partager, de la quotité dei biens, dont il peut disposer entre vifs ou par testament, d'aliénation d'immeubles, de douaire de femme ou d'enfans, de légitime, retrait lignager, féodal ou conventionnel, de droit de puissance paternelle, de droit de viduité, et autres choses semblables, il faut s'attacher aux coutumes des lieux, ou les fonds sont situez.' 1 Froland, Mêm. 156; Id. 49, 60 to 81.

the matrimonial domicil, or not; and the general result of the reasoning among foreign jurists turns very much upon the same considerations, which have been mentioned in relation to dowry. But this subject has been already discussed in another place, and it need not be here again examined.

- § 153. Similar questions have also arisen in considering the effect of mutual donations by married couples, when they are admitted by the law of the matrimonial domicil, but are unknown to, or prohibited by, the law of the place rei site. But they proceed upon the same general principles. Cochin says, that it is not the law of the place, where an act is done, which determines its effect. If, (says he.) property is situate in a place, whose laws prohibit donations inter vivos, or reduce them to a particular portion, no one supposes the donation to be less a nullity, or less subject to reduction, because the act is done in a place, where no such prohibition exists.
- § 15). The doctrine of the common law seems uniformly to be, that in all cases of this sort, touching rights in immovable property, the law of the place reisite is to govern. Hence, if persons, who are

¹ See anne, ¹ 143 to 158, § 160 to 170, 174, 175, 176, 177; 1 Froland, Mean. 66, 67, 68–60; 1d. 177, Pt. 2, ch. 1, per tot.; Cochin. Œuvres, Tom. 5, p. 80, 4to edit.; Merlin, Repertoire, Testament § 1, n. 5, art. 1, p. 309, 310. We have already seen Boullenois's view of this subject, ante. 155. See also, ante, § 451.

² Ante, 143 to 159.

<sup>J. Laverm, Diss. § 181, 132, p. 114, 115; 1 Voet, ad Pand. Lik I, tit.
J. n. 3, p. 39; 2 Froland, Mem. ch. 18, p. 840, &c., ch. 19, p. 904; Rodenburg, De. Div. Stat. tit. 2, ch. 5; 2 Boullenois, Appx. p. 33, 34; I Boullenois, 660, 661, 663; Id. Observ. 29, p. 767; 2 Boullenois, Observ. 14, p. 430, 431, 432; ante, § 143 to 159.</sup>

³ Cochin, Clayres, Tom. 5, p. 697, 4to edit.

Ante. 157, 158, 159, 174 to 179, 186, 187.

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married in Louisiana, where the law of community exists, own immovable property in Massachusetts, where such community is unknown; upon the death of the husband, the wife would take her dower only in the immovable property of her husband, and the husband, upon the death of the wife, would take, as tenant by the curtesy only, in the immovable property of his wife.

§ 455. Another class of cases, illustrating this subject, may be derived from the known rights of fathers over the property of their children according to the provisions of the Roman law, and the customary law of countries, deriving their jurisprudence from the Roman law.1 By the ancient Roman law all the sons were in subjection to the authority of the father, until they were emancipated by the father, or by some other mode known to that law. During such subjection they were incapable of acquiring any property for themselves by succession, or donation, or purchase, or otherwise; and whatever they thus acquired belonged of right to their father, saving only what was called the son's peculium, which consisted of property acquired by his service in the army, or by his skill at the bar, or in the exercise of some public employment.2 This sort of property was, therefore, known by the name of peculium castrense, when it was acquired in war, and of peculium quasi castrense when it was

¹ Ante, § 139.

I Domat, Civ. Law, Prelim. B. 2, tit. 2, § 2, p. 24, note; Id. B. 2, tit. 2, § 2, p. 667 to 669, 670, n. 1, 2, 3; Bouhier, Cout. de Bourg. ch. 16, § 8 to 12, p. 295; I Brown, Civ. Law, p. 122, 123; 2 Froland, Mem. 806 to 813; 2 Henrys, Œuvres, par Bretonnier, Lib. 4, Quest. 127, p. 772, &c., 717; Merlin, Répertoire, Puissance Paternelle, § 7, p. 142.

required in any other man Justinian the law was alter no longer entitled to the p uncarancipated son; but he first or profits thereof duri does modified, has found it and sometimes without mod prudence of many provinces a Europe.³

a 156. Under this aspect to the paternal power, the discussed among foreign jur respecting the paternal power, in other words, whether allowed and secured by the domicil, extend to the immovasituat in other countries, wheno such paternal rights:

respecting the paternal perconsequently have effect up their children, wherever it is as to the profits and usufruct of particle of the nature of a the question, whether father try using the Roman law Ecrit, whose sons have recountry, having a different titled to the profits of the

^[4] D. J. B. 2, (2, v. 668.

J. D. Joseph B. Q. Japanowski Caville Phys. J. Med. Rev. 2 Probably Mean B. Phys. Rev. B 64 (1994).

²⁰¹ and Media 505, 510 to 520

whether the paternal power extends every where, he proceeds to say; Cette question ne me semble pas susceptible d'une grande difficulté; parceque la puissance paternelle est un droit personnel, et par conséquent il ne peut etre borné par aucun territoire; car c'est une maxime certaine meme dans les pays de coutume, que les statuts personnels sont universels, et produisent leur effet partout. D'ailleurs, les fruits sont des choses mobiliares. Or, constat inter omnes, que les meubles suivent les personnes, et se règlent suivant la coutume du domicile.

§ 458. Hertius seems to hold a like doctrine, as to the personality of such laws; and puts a question, whether a daughter, who is emancipated by marriage, may afterwards make a testament of property situate elsewhere; and whether the father would have a right to the usufruct of her property, situate in a place, where she would be deemed unemancipated. He answers: Questio hic duplex est : verum ex eodem principio decidenda. Jus nempe datum est personæ, quod etiam per consequentiam in bona atterius civitatis, licet immobilia, operatur.2 Yet Hertius, in another place, holds, that an unemancipated son, (filius-familias) who by the law of his domicil may make a testament, cannot make a testament of property situate in a foreign country. Nam statutum est in rem conceptum, et conditio filiifamiliæ non est in dispositione.3 Hinc juxta regulam Puduensis filius-familias de bonis alibi sitis testari non

¹ Henrys, Œuvres, par Bretonnier, Tom. 2, p. 720. See 2 Boullenois, Observ. 32, p. 46, 47.

⁹ 1 Hertii Opera, De Collis. Leg. § 4, n. 17, p. 130, edit. 1737; Id. p. 185, edit. 1716.

³ 1 Hertii Opera, De Collis. Leg. § 4, n. 22, p. 133, edit. 1737; Id. p. 188, edit. 1716.

poterit. The ground of this of the general incapacity is admit of the domicil, and the special real. In this opinion Hertius from Huberus, whom he asser that if a Batavian, who is an a has authority to make a t makes a testament in Holland situate in Friezeland, that test Friezeland, although in Frieze rich and of whatever age, cann of his property.

§ 459. Bonhier maintain ability, that the paternal posonal, and that it extends to erry of the unemancipated chilicematry, where the like law, thority, does not exist. At the opinion of Le Brun, D'Arge

\$ 160. On the other hand, the paternal power in regard to erry of a child is purely reastone and real; if no sectend podows une contume, qui n'a par Boullenois, while he admits, give the paternal power, are they respect the state or con

⁻ La :.

More A. Reportero, Testament, J. I. n.

Heeth Oriena De Colas, Leg. 4, n. 22, e
 Boulier, Cont. de Bourg, eta 24, p 37 t

b. (c., 24). 41, p. 468; Le Brun, De b. S. D'Arbeitt, De Briton, Leg. Des. I (c.), Though p. 648.

² J. Uryland, Men., 69 ; Id. 39, 60, 156 ; to 519

contends at the same time, that, so far as those laws gave rights over immovable property, they are real, and are to be governed by the law of the place, where the property is situate. And he proceeds to vindicate his opinion in a most elaborate manner.

§ 461. D'Aguesseau says; "That, which characterizes a real statute, and distinguishes it essentially from a personal statute, is not, that it relates to certain personal qualities, or to certain personal circumstances, or to certain personal events; otherwise we should be compelled to say, that all laws, which concern the paternal power, the right of guardianship, the right of widowhood (le droit de viduité), and the prohibition of donations between married persons, are all personal laws. And accordingly it is beyond doubt, that in our jurisprudence all these laws are real, which are to be governed, not according to the law of the domicil, but according to that of the place, where the property is situate."

§ 462. Merlin has examined the same subject in a formal discussion; and he endeavors to hold a middle course between the opinions of Bouhier and Boullenois, agreeing with the latter, that the usufruct arising under the paternal power is a real right, and governed by the Lex rei site and at the same time, holding with Bouhier, that the father cannot possess the right, unless by the law of the place of his domicil the paternal power is recognised. He then

¹ I Boullenois, Observ. 4, p. 68; 2 Boullenois, Observ. 32, p. 30 to 33; Id. p. 39 to 47; Boullenois, Quest. Mixtes Quest. 20, p. 406.

² Ibid.

³ D'Aguesseau, Œuvres, Tom. 4, p. 660, 4to edit.

Confl.

the progression plantiples, which r ... all the difficulties upon th 1. The law, which subjects the or his father, has no need of of man fix its execution; and it i from the very nature of its c law, which declares an unemai fils de figuille incapable of alie able property without the author is personal, although its object is determines the state of the person he can, and cannot do. (3.) The to a father the usufruct of the p ought to be real; because its obj makes no regulation concerning incapacity of the unemancipated so In another place, he holds,

¹ Merlin, Répertoire, Puissance Paternelle, €! The reasoning of Merlin on this subject is mar ness and force of statement; and I have, therefo from it might not be unacceptable to the reader dans la puissance paternelle? Trois choses, mine l'état des enfans ; et à cet égard, elle forr sunt les enfans partout. Ainsi, une mere, domic sone sa puissance les enfans, qu'elle a cus dans que le hasard ou certaines circonstances les ont contume, qui n'accorde pas les mêmes droits at sur la personne de leurs enfans. En second li imprime dans les enfans, qui y sont assujètis, u tains actes: comme cette incapacité est la suit egalement partout et influe sur tous leurs bier ation. Ainsi, un fils de famille, ne dans une contracter sans l'autorite de son père, ne per biens, qu'il possede dans une autre coutume, qu paternelle; et reciproquement un fils de fami tume, qui n'admet pas la puis-ance paternelle, son pere, alièner les biens qu'il possede dans le la même raison, un fils ne a Senlis, ou la couf toute puissance paternelle, quoique nourri et el

prohibits an unemancipated son to make a testament is personal; but he, at the same time, asserts, that this will not prevent him from making a tes-

acquérir pour lui-même en Hainaut et dans les pays de droit ecrit. Et reciproquement, un fils de famille, né en Hainaut, ou dans un pays de droit écrit, ne peut s'approprier les bien, qu'il acquiert dans la coutume de Senlis, lorsque ses acquisitions ne réunissent pas toutes les circonstances requises, pour qu'elles tombent dans le pécule castrense, quasi-castrense, ou adventice. Troisièmement, la puissance paternelle donne au père, dans les pays de droit écrit et dans quelques coutumes, la jouissance des biens de ses enfans. Cette jouissance est, à la vérité, un accessoire de la puissance paternelle; mais elle ne forme dans les enfans ni capacité ni incapacité : le statut, qui la défère, n'a pas besoin, pour son exècution, du ministère de l'homme; il agit seul; l'homme n'a rien à faire. On ne peut donc pas appliquer ici les raisons, qui ont déterminé l'espèce de concordat tacite, dont nous avons parlé. Quel inconvénient y a-t-il à restreindre cette jouissance au territoire des lois ou coutumes, qui l'accordent? Quoi! parcequ'un père jouira des biens, que ses enfans ont dans une province, et qu'il ne jouira par de ceux, qu'ils ont dans une autre, l'ordre public serait troublé, le commerce serait dérangé! Non. Il n'y a pas en cela plus de trouble ni plus de confusion, qu'à succéder à un défunt dans une coutume, et de ne pas lui succéder dans une autre. Il est donc constant que le système du président Bouhier ne peut pas se soutenir, et que le statut, qui donne à un père l'usufruit des biens des enfans, qu'il a sous sa puissance, n'est pas personnel. Mais est-il purement réel, comme le prétend Boullenois, ou bien est-il personnel réel, c'est-à-dire, faut-il, pour qu'il produise son effet, que le père soit domicilié dans une coutume, qui admet la puissance paternelle? C'est la difficulté, qui nous reste à résoudre. Le principal peut subsister sans les accessoires : mais les accessoires ne peuvent jamais subsister sans le principal. Ce principe est aussi clair, qu'indubitable, et il nous conduit droit à la décision de notre question. Ainsi, la puissance paternelle peut avoir lieu sans l'usufruit dont nous parlons ici. La coutume de Douai nous en fournit un example, puisqu'elle admet l'une chap. 7, art. 2, et qu'elle exclut l'autre par son silence, comme l'a décidé le parlement de Flandre, par un arrêt du 27 janvier 1739, rendu au rapport de M. de Casteele de La Briarde, en faveur du marquis de Sin, contre les sieurs et demoiselles d'Aoust. Mais l'usufruit ne peut avoir lieu sans la puissance paternelle, dont il n'est l'accessoire. Un père ne peut donc en jouir, s'il n'a ses enfans sous sa puissance, et par conséquent s'il n'est domicilié dans une coutume, qui admet la puissance paternelle. Un père, qui émanciperait son fils au moment même de sa naissance, n'aurait certainement aucun droit à l'usufruit des biens, que cet enfant acquerrait nsuite, soit dans la coutume du domicile qu'il avait alors, soit dans toute

than at of movable property in other countries, where the permits define anse this case is a more exception term his general incapacity, and also falls within the rate, that, in a conflict of real and personal laws, the latter most yield."

163). Wathout going farther into an examination of the applicions of foreign jurists upon this subject, it is sufficiently obvious, what difficulties they are compalled to encounter at almost every step, in order to early into effect their favorite system of the division of laws into real and personal. The common law has avoided all these difficulties by a simple and uniform test. It declares, that the law of the satus shall exclusively govern in regard to the satus shall exclusively govern in regard to the satus, interests, and titles, in and to immovable property. Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withhold the capacity to acquire or to dispose of immovable property.²

the paternal power and rights, came recently under consideration in England, in a case somewhat complicated in its circumstances, and touching personal estate only. It may be briefly stated as follows. A marriage took place in Holland between the parties. At the time of the marriage, a marriage contract was there executed in the Dutch form, making certain

the place to the Oracle and colored est supposé faire. In Ioi le fait elletion de la colored estames qui madmettent pas la puissance paternelle : le colored estament elles qu'il voit le jour, et causséquenment elle sont estament elle sont le la colored dans la sonte, à l'usufruit que son père en autre passe de la colore par out." Merlin, Reporteire, Phissance, Paterte les 7, 115, 146, ed.c. 1827.

Met at Repeatore, Testanent, at I. n. 5, art. 1, p. 310, Son Brown, R. Barry, 2 Ves. and Beames, R. 127.

provisions, and among other things, provision for the distribution of the wife's property in the event of her husband's surviving her. They afterwards removed to and became domiciled in England, and had children born there. The wife died; and by her death the children became entitled, under a compromise in Holland, to one fourth of certain property of the wife in the public funds. By the French Code, which is the law of Holland also, when children are under the age of eighteen years, their surviving parent has the enjoyment of their property, until they attain that age; and the father insisted, that as the children were under that age, and the marriage contract and compromise, under which they took the one fourth, were both made in Holland, the children must take it, subject to his paternal rights by the law of Holland. The Vice Chancellor held, that the father was not so entitled. On that occasion the learned Judge said: " By the Code Napoleon, which is the law of Holland, as well as of France, when children are under the age of eighteen, their surviving parent has the enjoyment of their property until they attain that age. But that is nothing more than a mere local right, given to the surviving parent, by the law of a particular country, so long as the children remain subject to that law: and, as soon as the children are in a country, where that law is not in force, their rights must be determined by the law of the country, where they happen to be. These children were never subject to the law of Holland; they were both born in this country, and have resided there ever since. The consequence is, that this judicial decree has adjudged certain property to belong to two Britishborn subjects domiciled in this country; and so long

as they are domiciled in this property must be administered of this country. The claim of arise by virtue of the contra local law of the country, who the time of his marriage; and erty must be considered just English legacy given to the of the father is entitled to, is the master to inquire, what allows to him for the past and fut children."

¹ Gambier v. Gambier, 7

CHAPTER XI.

WILLS AND TESTAMENTS.

§ 464. HAVING taken these general views of the operation of foreign law in regard to movable property, and immovable property, and ascertained, that the general principle, at least in the common law, adopted in relation to the former is, that it is governed by the law of the domicil of the owner, and in relation to the latter, that it is governed by the law of the place, where it is locally situate; we now come to make a more immediate application of these principles to two of the most important classes of cases arising, constantly and uniformly, in all civilized human societies. One is, the right of a person, by an act or instrument, to dispose of his property after his death; the other is the right of succession to the same property, in case no such postmortuary disposition is made of it by the owner. The former involves the right to make last wills and testaments; and the latter the title of descent and the distribution of property ab intestato. We shall accordingly in this and the succeeding chapter exclusively discuss the subject of foreign law, in relation to testaments, and to successions, and distributions of movable and immovable property.

§ 465. And first, in relation to testaments of movable property. So far as respects the capacity or

¹ See 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 579, 580, 581; post, § 466, 467.

incapacity of a testator, to make a will of personal or movelde, property, we have already had occasion to consider the subject in another place. The result of that examination was, that the law of the actual domicil of the party, at the time of the making of his will or testament, was to govern as to that capacity or incapacity. We may, therefore, preceed to the considertion of the forms and selemnities. by which wills of personal estates are to be governed. And here it may be stated now to be a well settled principle in the English law, that a will of personal or movable property, regularly made according to the forms and solemnities required by the law of the testator's domicil, is sufficient to pass his personal or movable property in every other country, in which it is situated. But this doctrine. although now very firmly established, was for a great length of time much agitated and discussed in Westminster Hall.2 On one occasion Lord Loughborough laid down the doctrine, that, with respect to the disposition of movable property, and with respect to the transmission of it, either by succession, or by the act of the party, it follows the law of the person." The owner in any country may

Nov. 52 to 62, 64 to 78, [10] to § 106, § 368, § 430 to § 434. See 2. B. 190, 88, Appx. p. 38; 4. Burge, Comm. on Col. and For Low, Pr. Low, 12, p. 577, 578, 579.

See G. et al., Berry, 2 Ves. & Beames, R. 127, 131; Bengde r. Jenether, B. Ves. R. 192, 200; Price r. Dewhurst, S. Sim. R. 273, 299, 360; M. et al., Baid, 4 Hagg, Review, R. 346, 354; Robertsen en Successions, p. 19, 191, 214, 215, 2-5, 290, 297; The case of the Gods of Mass. Branch, Jedge Sir H. Jenner, July 1840, London Monthly Law Magnetic, Sci. 1840, p. 264.

S. J. W. 186, J. H. Black, 690. See also Ommaney r. Bingham, 46 J. Vet. 757; J. Hegg. Eccles. R. 414, note; Stanley r. Baraes, J. H. L. C. R. 373; Hegg. r. Lashley, J. Hagg. Eccles. R. 415, note.

dispose of his personal property. On another occasion Lord Thurlow asserted the same doctrine as to succession to personal property, and by implication as to wills,1 Lord Ellenborough put it as clear in his day. He observed; " It is every day's, experience to recognise the law of foreign countries, as binding on personal property; as in the sale of ships, condemned as prize by the sentences of foreign courts, the succession to personal property by will or intestacy of the subjects of foreign countries."2 But antecedently to this period many learned doubts and discussions had existed on the subject.3 In the Duchess of Kingston's case, a will of personal property executed in France, but not in conformity to the laws of that country, was admitted to probate in the Ecclesiastical Courts of England in 1791, it being duly executed according to the English forms, although she was domiciled in France at the time of making the will, and also at the time of her death.4

§ 466. Even at so late a period as 1823, Sir John Nicholl doubted, whether a will of personal property made abroad by an English subject domiciled abroad, ought to be held valid, unless it was executed in conformity to the forms prescribed by the English law. The ground of his doubt was, whether an English subject was entitled to throw off his country (exuere patriam) so far as to select a

¹ Bruce v Bruce, 2 Bos. & Pull. 229, note.

² Potter v. Brown, 5 East, R. 130; Ferraris v. Marquis of Hertford, The English Jurist, April 1, 1843, p. 262; S. C. 3 Curteis, R. 468.

² See Bempde v. Johnstone, 3 Ves. 198, 200; Somerville v. Somerville, 5 Ves. 750; Balfour v. Scott, 6 Brown, Parl. Cases, 550, Tomlin's Edit.; S. C. 2 Addams, Eccles. R. 15, note.

⁴ See Curling v. Thornton, 2 Addams, Eccles. R. 21. See 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 588, 589, 590.

foreign demicil in complete derogation of his mative domicil, and thus to render his property in England distributable by succession or testament according to the foreign law. He took a distinction between testacy and intestacy (assuming, for the sake of argument, that in the latter case the foreign law might prevail, thinking, that cases of testacy might be governed by very different considerations from those of intestacy. Even, if a will, executed according to the law of the place of the testator's domicil, would in such a case be valid, he contended. that it by no means followed universally, and upon principle, that a will, to be valid, must strictly conform to that law, which would have regulated the succession to the testator's property, if he had died intestate. And, therefore, he held, that a will of personal property, made by a British subject in France, according to the forms of the English law, was good as to such property situate in England. He admitted, that as to British subjects domiciled in any part of the United Kingdom, the law of their domicil must govern in regard to successions and wills: and so, the like law must govern in regard to successions and wills of foreigners resident abroad. The restriction, which he sought to establish, was, that a British subject could not, by a foreign domicil, defeat the operation of the law of his own country, as to personal property situate in the latter.1

167. To this opinion the same learned Judge firmly adhered in a still later case. But upon an appeal, the decision was overturned by the High Court of Delegates, and the doctrine fully established, that the law of the actual foreign domicil of a Brit-

¹ Cur. (g. r. Trornton, 2) Addams, Eccles. R. p. 6, 10 to 25; S. C. San, R. p. 310, 311.

ish subject is exclusively to govern in relation to his testament of personal property; as it would in the case of a mere foreigner.1 This case is the stronger; because it was the case of a will, and several codicils, made according to the law of Portugal, and also of several codicils made, not according to the law of Portugal where the testator was domiciled. The will and codicils executed according to the Portuguese law were held valid; the others were held invalid. And this doctrine necessarily t goes to the extent of establishing, not only whether there be an instrument called a will; but whether it constitutes a will in the sense of the Lex loci. The doctrine also applies, whether the personal property be locally situate in the domicil of the testator, or in a foreign country.2

§ 468. The same doctrine is now as firmly established in America. The earliest case, in which it was directly in judgment, was argued in the Supreme Court of Pennsylvania in 1808; and this case may be truly said to have led the way to the positive adjudication of this important and difficult doctrine. There, a foreign testator, domiciled abroad, had made a will of his personal estate, invalid according to the law of his domicil, but valid according to the law of Pennsylvania; and the question was, whether it was competent and valid to pass personal property situate in Pennsylvania. The Court decided, that it was not; and asserted the general doctrine, that

¹ Stanley v. Barnes, 3 Hagg. Eccles. R. p. 373 to 465; Moore v. Davell, 4 Hagg. Eccles. R. 346, 354; S. P. Price v. Dewhurst, 4 Mylne and Craig, 76, 80, 82; Ferraris v. Marquis of Hertford, The English Jurist, April 1, 1843, p. 263; S. C. 3 Curteis, R. 468.

² Ibid. Countess of Ferraris v. Marquis of Hertford, The English Jurist, April 1, 1843, p. 262; S. C. 3 Curteis, R. 468.

Desesbats v. Berquiers, 1 Binney, R. 336.

§ 470. Foreign jurists are as generally agreed, as to the doctrine in regard to movables, upon the ground, maintained by all of them, that Mobilia sequentur personam.1 John Voet lays down the rule in the following terms. In successionibus, testandi facultate, contractibus, aliisque, mobilia, ubicunque sita, regi debere domicilii jure, non vero legibus loci illius, in quo naturaliter sunt constituta.2 He adds : Ibique D. D. (Doctores) mobilium tamen ratione in dispositionibus testamentariis, dum quæritur, an illæ in universum permittendæ sint, nec ne, uti et ab intestato successionibus, donationibus inter conjuges vetitis permissisve, et aliis similibus, de juris rigore communi quasi gentium omnium consensu laxatum est; sic ut ex comitate profecta regula praxi universali invaluerit, mobilia in dubio regi lege loci, in quo eorum dominus domicilium fovet, ubicunque illa vere exstiterint.3

§ 471. Vattel has spoken in terms, admitting of more question, as to the extent of their meaning. After observing, that a foreigner in a foreign country has by natural right the liberty of making a will, he

cases cited, ante, § 495; Ersk. Inst. B. 3, tit. 2, § 40, 41; 2 Kaims, Equity,

See 1 Buollenois, Obser. 28, p. 696 to 721; Cochin, Œuvres, Tom. 5, p. 85, 4to edit.; ante, § 362, § 362 a, § 399; 4 Burge, Comm. on Col. and For. Law, 2, ch. 12, p. 579, 580; Fælix, Conflit. des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40 to § 50, p. 346 to 360; post, § 481.

² J. Voet, ad Pand. Lib. 1, tit. 4, P. 2, § 11, p. 44.

³ J. Voet, ad Pand. Lib. 1, tit. 4, P. 2, § 12, p. 45. See also J. Voet, ad Pand. Lib. 28, tit. 1, n. 13, 15, 44; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 579, 580, 590; P. Voet, de Statut. § 9, ch. 1, n. 8, p. 255, edit. 1715; Id. p. 309, edit. 1661; Burgundus, Tract. 1, n. 36; Id. Tract. 6, n. 1, 2, 3; Fælix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 24 to § 27, p. 204 to p. 216; Id. § 32, 33, p. 221 to p. 227; ante, § 381, note, § 444 a; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 5, p. 217, 218; Id. ch. 12, p. 576 to 580; post, § 479; Sand. Decis. Frisic. Lib. 4, tit. 1, Defin. 14, p. 142, 143.

a will of personal estate must, in order to pass the property, be executed according to the law of the place of the testator's domicil at the time of his death. If void by that law, it is a nullity every where, although it is executed with the formalities required by the law of the place, where the personal property is locally situate. The Court asserted, that in this respect there was no difference between cases of succession by testament, and by intestacy.\(^1\) The same doctrine has been since repeatedly recognised by other American courts, and may now be deemed, as of universal authority here.\(^2\)

\$ 169. In Scotland the doctrine was formerly involved in many doubts. By the law of Scotland, illegitimate persons are not deemed capable of making a will; and hence a will of movables in Scotland, made by such a person, domiciled in England, was formerly held in Scotland to be invalid.\(^3\) In like manner a nuneupative will, being in Scotland invalid, was formerly held invalid to pass movables in Scotland, although the will was made in England (where such a will is valid) by a person domiciled there.\(^4\) But the general doctrine is now the same in Scotland, as in England. The law of the domicil university prevails, as to successions and wills of movables in other countries.\(^6\)

⁽b) S. P. Berghers, I Bann, R. 336; S. P. Moore v. Budd, 4 Hagg. Etc., S. R. 346, 354.

See H. Josev, Reinsen, 4 John, Ch. R. 460, 469; Harvey r. Richards, 1 W. Sei, R. 681, and cases cited, p. 408, note; Dixon's Exfors r. Reins yis indices, 3 Cranch, R. 319; De Sobry r. De Laistre, 2 Harr. & Long, R. 193, 224; Amstrong r. Lear, 12 Wheat, R. 169; Harrison r. N.S. a. (1998), R. 483, 504, 505.

Ers., Post, B. 3, tit. 2, § 41, p. 515; 3 Kaims, Equity, B. 3, ch. 8, § 3 § 2 Kaims, Equity, B. 3, ch. 8, § 3, p. 345

See Bergde et Johnstone, 3 Ves. 198, 201; Somerville r. Somerville,
 Ves. R. 757; Brodie r Barry, 2 Ves. & Beames, 127, 131, and the

§ 470. Foreign jurists are as generally agreed, as to the doctrine in regard to movables, upon the ground, maintained by all of them, that Mobilia sequentur personam.1 John Voet lays down the rule in the following terms. In successionibus, testandi facultate, contractibus, aliisque, mobilia, ubicunque sita, regi debere domicilii jure, non vero legibus loci illius, in quo naturaliter sunt constituta.2 He adds : Ibique D. D. (Doctores) mobilium tamen ratione in dispositionibus testamentariis, dum quæritur, an illæ in universum permittendæ sint, nec ne, uti et ab intestato successionibus, donationibus inter conjuges vetitis permissisve, et aliis similibus, de juris rigore communi quasi gentium omnium consensu laxatum est ; sic ut ex comitate profecta regula praxi universali invaluerit. mobilia in dubio regi lege loci, in quo eorum dominus domicilium fovet, ubicunque illa vere exstiterint.3

§ 471. Vattel has spoken in terms, admitting of more question, as to the extent of their meaning. After observing, that a foreigner in a foreign country has by natural right the liberty of making a will, he

cases cited, ante, § 495; Ersk. Inst. B. 3, tit. 2, § 40, 41; 2 Kaims, Equity, ch. 8, § 6.

¹ See 1 Buollenois, Obser. 28, p. 696 to 721; Cochin, Œuvres, Tom. 5, p. 85, 4to edit.; ante, § 362, § 362 a, § 399; 4 Burge, Comm. on Col. and For. Law, 2, ch. 12, p. 579, 580; Fœlix, Conflit. des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40 to § 50, p. 346 to 360; post, § 481.

² J. Voet, ad Pand. Lib. I, tit. 4, P. 2, § 11, p. 44.

³ J. Voet, ad Pand. Lib. 1, tit. 4, P. 2, § 12, p. 45. See also J. Voet, ad Pand. Lib. 28, tit. 1, n. 13, 15, 44; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 579, 580, 590; P. Voet, de Statut. § 9, ch. 1, n. 8, p. 255, edit. 1715; Id. p. 309, edit. 1661; Burgundus, Tract. 1, n. 36; Id. Tract. 6, n. 1, 2, 3; Fœlix, Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, § 24 to § 27, p. 204 to p. 216; Id. § 32, 33, p. 221 to p. 227; ante, § 381, note, § 444 a; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 5, p. 217, 218; Id. ch. 12, p. 576 to 580; post, § 479; Sand. Decis. Frisic. Lib. 4, tit. 1, Defin. 14, p. 142, 143.

is unitable to the form of a to settle the validity of a will testatus kius is to it serve itsese usited in the transitive where he se onerwise or lanel by the la which he is a member: in wh collect to observe the firms, w if he would validity dispose of he possesses in his own country. tator cannot dispese of his proimmovable, which he possesses otherwise than in a manner cor of that country. But as to move and other effects, which he possess he has with him, or which follow to distinguish between the local lay not extend beyond the territory, as peculiarly affect the character of eigner, remaining a citizen of still bound by those last mentio he happens to be, and is obliged in the disposal of his personal p movables whatsoever. The law: in the country, where he resides which he is not a citizen, are respect to him. Thus, a ma: will, and dies in a foreign cour his widow of the part of his signed to that widow by the lav try. A Genevan, obliged by the try to leave a portion of his p his brothers or cousins, if they cannot deprive them of it by m foreign country, while he contint But a foreigner, dying neva.

obliged in this respect to conform to the laws of the Republic. The case is quite otherwise in respect to local laws. They regulate, what may be done in the territory, and do not extend beyond it. The testator is no longer subject to them, when he is out of the territory; and they do not affect that part of his property, which is also out of it. The foreigner is obliged to observe those laws in the country, where he makes his will, with respect to the goods he possesses there."

§ 472. Vattel is in this passage principally considering the effect of the law of a foreign country upon a foreigner, who is resident there. And there can be no doubt, that every country may by its laws prescribe whatever rules it may please, as to the disposition of the movable property of its citizens, either inter vivos or testamentary. But it is equally clear, that such rules are of no obligation, as to movable property in any other country; and can be in force there only by the comity of nations. So that a will of such movable property, made in the foreign country, where he is domiciled, and according to its laws, will be held valid, whatever may be the validity of such a will in the country, to which the testator owes his allegiance by birth. But the discussion, in which we are engaged, does not respect the effect of any local prohibitory laws over movable property within the particular territory; but the general principles, which regulate the disposition of it, when no such prohibitory laws exist. And, here, by the general consent of foreign jurists, the law of the domicil of the testator governs as to transfers inter vivos and testamentary.2

1 Vattel, B. 2, ch. 8, 6 111. See post, 6 479.

² See ante, § 465; Hertii, Opera, De Collis. Leg. § 4, n. 6, p. 112, edit. 1737; Id. p. 174, edit. 1710; Pothier, Cont. d'Orléans, ch. 1, § 2, n. 24

§ 473. But it may be asked: effect of a change of domicil a tament is made of personal or if it is valid by the law of the pla was domiciled, when it was mad the law of his domicil at the time terms, in which the general rule seem sufficiently to establish the such a case the will or testament law of his actual domicil at the and not the law of his domicil at his will or testament of personal r govern.1 This doctrine is very fu laid down by John Voet. Tamen, loco, in quo minor annorum nume quiritur, veluti in Hollandiâ, ib quinto testamentum fecerit, deina alio transtulerit, ubi necdum per a veluti Ultrajectum, ubi plena puberi tatore exigitur, testamentum ejus q per talem migrationem irritum eveniet, si Hollandus uxorem herede ibi licitum,) deinde vero ad aliai ibique domicilium figat, ubi gratifu ne supremo quidem elogio permis

J. Voet, ad Pand. Tom. 2, Lib. 38, tit. 17, § difficult questions, however, may still arise, as the real domicil of a party, who is a native of yet been long resident in another. The quo ar idence has been originally taken, or subseque a very important element in the decision. S Gen. v. Dunn, 6 Mees. & Welsb. 511; De 1 Curteis, Eccl. R. 856; post, § 481, note; N (House of Lords) p. 493.

See Desesbats v. Berquier, 1 Binn. R. 33
 Meriv. R. 59, 68; Henry on Foreign Law, A
 th. 1, p. 2, &c.; Id. p. 7, &c.; Id. p. 54; I
 Burge, Comm. on Col. and For. Law, Pt. 2, cl

in casu mobilium intuitu in irritum deducitur voluntas ejus: cum mobilia in successione testatà vel intestatà regantur ex lege domicilii defuncti, adeoque res devenerit in hisce ad eum casum, à quo propter qualitatem testatoris, vel honorati, initium habere nequit. enim sufficit in honorato, quod tempore facti testamenti capax sit, sed et tempore mortis testatoris eum capacem esse, necesse est.1 Again he adds; Quod si is, cujus testamentum migratione ex Hollandia ad regionem Ultrajectinam irritum factum fuerat, ibidem ætatem expleverit in testatore requisitam, de novo quidem repetere solenniter potest priorem voluntatem, atque ita de novo testari; sed si id non fecerit, testamentum, antea anno ætatis decimo quinto in Hollandia conditum, ipso jure quantum ad mobilia vel immobilia Ultrajectina nequaquam convalescit; non magis, quam jure civili aut prætorio testamentum ab impubere conditum, si is pubes factus in fata concedat.2 If, however, he should afterwards return and resume his domicil, where his first will or testament was made, its original validity will revive also. Diversum esset, si testator talis iterum postea mutatâ mente in Hollandiâ rerum ac fortunarum suarum sedem reponat; tunc enim voluntas illa, quæ migratione in irritum deducta fuerat, quasi recuperata pristina ad testandum habilitate redintegratur ex æquitate; eo modo, quo sustinetur jure prætorio testamentum, à patrefamilias conditum, quod per arrogationem irritum factum fuerat, si is iterum postea sui juris factus in eadem perstiterit voluntate.3

§ 473 a. Another question may arise under this head.

² Ibid. § 13, p. 293.

J. Voet, ad Pand. Lib. 28, tit. 3, Tom. 2, § 12, p. 292.

³ J. Voet, ad Pand. Lib. 28, tit. 3. Tom. 2, § 13, p. 293; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 580, 591; Robinson on Succession, p. 95.

Suppose a power of appointment to be given to a party enabling him to dispose by will of personal estate situate in one country, and he has his domicil in another country; and he executes the power and complies with all the requisites of the power, making a will according to the law of the country, where the power was created, and the personal estate is situated; but the will is not made according to the requisites prescribed by the law of the place of his domicil; the question would then arise, whether the power of appointment was well executed, and the will entitled to probate as a will in the country where the personal property is situate. It has been held that it is.

§ 17). We next pass to the consideration of wills made of immovable property.² And here the doctrine is clearly established at the common law, that the law of the place, where the property is locally situate, is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will or testament its due attestation and effect.

¹ Tata dl r. Hankey, 2 Moore, Priv. Conn. Rep. 342.

Sec. 4 Burge, on Col. and For. Law, Pt. 2, ch. 12, p. 586, 585; Fælix, Condit. dos. Lais, Revue Etrang. et Franc. Tom. 7, 1840, § 40 to § 51, p. 346 to 366.

Commer. Coppin. 2 P. Will. 201, 203; Curtis r. Hutton, 14 Ves. 537, 541; Batwaistier, Vardill, I Fonb. Eq. p. 444, 445, note; U. States r. Crosby, 7 Charlen, 115; Holmes r. Reinsen, 4 John. Ch. R. 460; S. C. 20 John R. 229; McCher ache, Sallivant, 10 Wheaton, R. 192, 202; Willis r. Cowper. 2 Haram. R. 124; Henry on Foreign Law, p. 13, 15; ante, § 428, 434; 4 Burge, Chann, on Col. and For. Law, Pt. 2, ch. 12, p. 576 to 580; Id. Pt. 2, ch. 4. 5, p. 169, 170; Id. Pt. 2, ch. 5, p. 217. — Mr. Burge speaking on this point. Id. p. 217, 218, says; a The power of making the alienation by testiment as no less qualitas rebus impressa, than that of making the are not in by contract. When therefore the question arises, whether the industry of property may be disposed of by testament, recourse must be had to the lex notion of disposition is enjoyed, or whether it is given

§ 475. The doctrine of foreign jurists does not, as we have seen, entirely accord with that of the com-

under restriction. The validity of the testamentary disposition depends in the latter case on its conformity to that restriction, whether the restriction consists in limiting the extent or description of property, over which the power of disposition may be exercised, or the persons, in whose favor the disposition is made, or in requiring, that the testator should have survived a certain number of days after the execution of the act, by which the disposition was made. The total or partial defect of the will on the ground, that it did not institute heirs, or that it omitted to name the heirs, the disherison of the heirs, the grounds, on which the disherison may be justified, are essentially connected with the power of disposing of immovable property by testament, and are therefore dependent on the law of its situs." Again Mr. Burge says; " By the jurisprudence of England and the United States, a will devising lands in England or the States, if the solemnities prescribed by the Statute of Frauds have not been observed, would be ineffectual to pass those lands, This doctrine is fully warranted by the qualification, which has been given by jurists to the rule, Lex loci regit actum. The Statute of Frauds, as regards real property situated in England and in the States of America, *Est lex, que expressé testatores jubet jus loci sequi, in quo bona sita sunt.' It may be said, that the jurisprudence, which allows a testament executed according to the solemnities prescribed by the lex loci actus to affect real property situate in the country, where that jurisprudence prevails, does not depart from the general principle, that the lex loci rei sitæ must determine, whether the instrument is sufficient to dispose of real property. The difference between that jurisprudence and the doctrine of England and the United States is, that the effect of the latter is to require a particular form for the execution, whether it be made in England or in any other country, that is, it makes no provision for a will made in a foreign country, but the terms of its enactment are so comprehensive, as to include all wills, in whatever country they are made, if they affect real property in England. In the other systems of jurisprudence, it is a part of the lex loci rei site, that its immovable property should pass by a testament executed with certain formalities, if it he made in the country where the property is situated, but that if it be made in another country, it may be executed with other solemnities, that is, with the solemnities required by the law of that country. The jurists whose opinions have been cited in support of the rule, that the testament is valid, if the testator has complied with the forms and solemnities prescribed by the law of the place, in which it was made, apply it to a testament of movable, as well as of immovable property. The decisions of the courts of England on the validity of testaments of personal estate made abroad are few. The two most important are on the testaments of the Duchess of Kingston and of Bernes. The former was resident in Paris; she obtained letters patent from the mon law; but even among them there is great weight of authority in favor of the general prin-

King of France, which gave her the same power of devising, as she would have had in England. Although she died in France, she had not relinquished her English domicil. She made ber testament in Paris. It was clearly null under the contume. But she had observed the forms required by the Statute of Frauds, and the will was valid according to the law of England. It was the upinion of M. Turgot. an advocate of France, and his spinion was confirmed by the Court of Probate, that the testament, although made in Paris, was valid. This opinion proceeds on a principle, which is admitted by jurists, that although a will made with the solemnities of the lex leci actus may he valid, yet if it were made with the solemnities of the locus rei site in respect of immovables, and the locus domicili in respect of movable property, it would also be valid. In Bernes's will it appeared, that, although an Irishman by birth, he had acquired a domicil in Madeira. He made a will and several codicils in that island, some of which were not executed with the solemnities required by the law of Portugal, but with those formalities, which would satisfy the law of England. The decision given by Sir John Nicholl, that the latter codicils were valid, and that it was competent to have executed them in the manner, which would be consonant to the law of England, was reversed by the delegates, and they were deemed invalid. Bernes in this case had no longer a domicil in Ireland. His domicil was in Permeal. It was necessary to establish that fact to distinguish the case from that of the Duchess of Kingston. If he had still retained his domical in Ireland, the codicils would, upon the principles referred to, and which will be presently more fully stated, have been valid. In neither of these cases did the question arise on a testament made with the solemnities required by the lex loci actus, although deficient in those regard by the law of the domicil. In another case the testator was an Englishman by birth, and although he had been for many years residing in France, it did not appear, that he had abandoned his English domicil. He cane to England, and during his residence there made his will, which was a valid testamentary disposition in respect of forms and solemnities seconding to the law of England. It was contended, that it ought not to be admitted to probate, because it was not made in the manner required by the law of France. Here the Court adopted the lex loci acts, but from the report of the case, the learned judge dwells so much as circumstances founded on the testator's domicil of origin, that it would be perhaps not correct to describe the decision as warranting the conclusion, that, if the testator had not been an Englishman, his will made in England would have been valid. In Nasmyth's case, the testator was denicaled in Scotland, and his will was made and found there. He died in England in transitu. The Court of Probate in England held riself found to defer to the law of Scotland. In giving effect to a testament made with

ciple.1 We have already had occasion to consider the opinions of foreign jurists, as to the capacity and incapacity of the testator to make a testament of immovable property, whether it is to be governed by the law of his domicil, or by the law rei site.1 We have also had occasion to consider their opinions, as to the law, which ought to govern in respect to the forms and solemnities of testaments of immovable property, whether it is the law rei site, or that of the domicil of the testator, or that of the place, where the will was made.2 Putting out of view these questions, as to the form and solemnities of acts, and the capacity and incapacity of the testator, (upon which we have sufficiently commented,) there seems to be a general coincidence of opinion among foreign jurists; that the Lex rei sitæ must in other respects govern as to wills and testaments of immovable property. Thus, John Voet says; Bona defuncti immobilia, et quæ juris interpretatione pro talibus habentur, deferri secundum leges loci, in quo sita sunt.3 Dumoulin's opinion

the solemnities prescribed by the lex loci actus, jurists do not deny it to a testament made according to the forms required by the lex loci rei site, if it be immovable, or the lex loci domicilii, if it be personal property, which is the subject of the disposition: "Proinde, si quis eo, quod ad testandum expeditius sua causa comparatum est, noluerit uti, quod ei forté promptius sit componere suprema ad loci leges, cui bona subjaceant, quo minus testamentum ejus valiturum sit, non video." Paul Voet and John Voet adopt this opinion. 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 586 to 590; Robertson on Succession, p. 95. See also Harrison v. Nixon, 9 Peters, R. 505; post, 479 g.

¹ See ante, § 52 to § 62, § 430 to § 435.

² See ante, § 363 to § 373, § 435 to § 446; 1 Burge, Comm. on Col. and For. Law, Pt. 1, ch. 1, p. 21, 22, 23; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 576 to p. 586; Id. ch. 5, p. 217 to 221. See also Fœlix, Conflit des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40 to § 50, p. 346 to 360; Sand. Decis. Prisic. Lib. 4, tit. 1, Defin. 14, p. 142, 143.

² J. Voet, ad Pand. Lib. 38, tit. 17, § 34, p. 596; ante, § 424.

is to the same effect. His language is; Aut statutum agit in rem, et quaeunque verborum formula utatur. semper inspicitur locus, ubi res sita est. And again: Quoties ergo statutum principaliter agit in personam et in ejus consequentiam, agit in res immobiles, non extenditur ad res sitas in locis, ubi jus commune vel statutum loci diversum est.1 Hertius is even more direct. Si Lex directo rei imponitur, ea locum habet, ubicunque etiam locorum et a quocunque actus celebretur.2 He adds in another place; Rebus fertur Lex. cum certam iisdem qualitatem imprimit, vel in aliendo. v. g. ut ne bona avito possint alienari, vel in acquirendo, e. g. ut dominium rei immobilis venditæ non aliter acquiritur, nisi facta fuerit judicialis resignatio. D'Aguesseau deems it a mere waste of time to do more than to state the general rule.4 Paul Voet has stated the doctrine in an expressive manner: Non tamen statutum personale sese regulariter extendit ad bona immobilia alibi sita.5 In another place he says: Immobilia statutis loci, ubi sita, mobilia loci statutis, ubi testator habuit domicilium.6 In another place he says; Quid, si itaque contentio de aliquo jure in re, seu ex ipså re descendente; vel ex contractu. vel actione personali, sed ad rem scripta; an spectabitur loci statutum ubi dominus habet domicilium, an statutum rei sitæ? Respondeo; Statutum

¹ Molin, Oper, Comm. ad Cod. Lib. 1, tit. 1, 1. 1, De Conclus. Statut. Tom. 3, p. 556, edit. 1681; ante, § 443; 1 Froland, Mém. 65; Id. Vol. 2, p. 779.

² Herta, Oper. De Collis. Leg. § 4, n. 9, p, 125, edit. 1737; Id. p. 177, edit. 1716.

³⁸ I Herti, Opera, De Collis, Leg. § 4, n. 6, p. 122, edit. 1737; Id. p. 174, edit. 1716; 2 Burge, Comm. p. p. 843; 4 Burge, Comm. p. 217.

⁴ D'Aguesseau, (Euvres, Tom. 4, p. 636, 637. See Cochin, Œuvres, Tom. 4, p. 555, 4to, edit.

³ P. Voet, De Stat. § 4, ch. 2, n. 6, p. 123, edit. 1715; Id. p. 138, edit. 1661.

⁴ Id. ch. 3, n. 10, p. 135, edit. 1715; Id. p. 153, edit. 1661; ante. § 442.

rei sita.1 Boullenois cites another jurist as holding similar language; Sive in rem sive in personam loquatur statutum, ad bona extra territorium non extenditur. Consideratur namque bonorum dominus, ut duplex homo; quoad bona nempe sita in uno territorio est unus homo; et quoad alterius territorii bona est alius homo.2 Again; Idem quod inferendum, quoad successionem testamentariam; finge enim testamentum hic fieri permissum esse, in Geldria non ita? Hinc si quispiam hic fecerit testamentum, non capiet vires, ratione bonorum, in Gelria jacentium. Tale quippe statutum spectut ipsa bona, adeoque erit reale, non exserens vires ultra statuentis territorium.3 Again he adds : Quid, si testamento bona immobilia relicta, diversis subjacent statutis? Idem dicendum; nihil enim interest, testatus quis, an intestatus decedat, ut locus sit regulæ. Extra territorium jus dicenti impune non paretur.4 This is certainly the doctrine of the common law; for a man may have a capacity to take real estate in one country, when he is totally disabled to take it in another. Boullenois (as we have seen) lays it down among his general principles, that, when the personal laws of the domicil are in conflict with the real laws of the same country, or of a foreign

Id. § 9, ch. 1, n. 2, p. 252, edit. 1715; Id. p. 305, edit. 1661. — We are not to confound the opinion of Paul Voet, as here expressed, with what he has said in another place, (ante, § 442,) that testaments are to be executed according to the forms and solemnities of the place, where they are made, and not by those of the situs of the immovable property. He takes a distinction between the forms and solemnities of testaments, and their operation on this point. Whether there be any solid foundation for such a distinction, it is for the learned reader to decide. Ante, § 442.

² Id. ibid.; 1 Boullenois, Observ. 10, p. 154.

³ P. Voet, De Statut. § 4, ch. 3, n. 11, p, 135, edit. 1715; Id. p. 153, edit. 1661.

⁴ P. Voet, De Statut. § 9, ch. 1, n. 4, p. 253, edit. 1715; Id. p. 306, 307, edit. 1661.

country, the personal laws are to yield; and that, when the real laws of the domicil are in conflict with the real laws of another country, both have effect within their own respective territories, according to the laws thereof.¹

§ 475 a. Rodenburg admits, that, where the law rei sitae prohibits married persons to devise their immovable estate by will or testament to each other: or, where the law rei sitae prohibits certain kinds of immovable property from being devised by will or testament, in such cases the law rei sitae is to govern, notwithstanding the parties are domiciled, or make their will or testament in a place, where no such prohibition prevails: because these are real laws. Unde certissima usu ac observatione regula est, cum de rebus soli agitur, et diversa sunt diversarum possessionum loca et situs, spectari semper cujusque loci leges ac jura, ubi bona sita esse preponuntur, sic ut de talibus nulla eujusquam potestas præter territorii leges.³

§ 176. Huberus has expounded the subject at large. We have already had occasion to cite his remarks on the subject, so far as respects the forms and solemnities of testaments, which he insists are valid, if made according to the forms and solemnities of the place, where the testament is made, although not made according to the forms and solemnities required by the law of the situs of the property. But he takes a distinction between the forms and solemnities of testaments, and the right to dispose of immova-

⁴ I Boelienous, Pr. Gen. 30, 31, p. 8.

² Rodenburg, De Div. Stat. tit. 2, ch. 5, § 1, 2, 3, 4, 5; 2 Boulienois, Appx. p. 95, 36, 37, 38.

Robinburg, De Div. Stat. tit. 2, ch. 5, § 1; 2 Boullenois, Appx. p. 35; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 5, p. 218; Id. ch. 12, p. 552, 583. See also Burgundus, Tract. 1, p. 40, 41, p. 41, 42.

⁴ Ante, < 443, 443 a.

ble property by testament. "The foundation (says he) of the whole of this doctrine, which we have been speaking of, and hold, is the subjection of all persons to the laws of any territory, as long as they act there, which settles it, that an act valid or invalid from the beginning, will be accordingly, valid or invalid every where else. But this reasoning does not apply to immovable property, when this is considered, not as depending upon the free disposition of the head of the family (pater-familias), but as having certain marks impressed upon it by the laws of every commonwealth, in which it is situate, which marks remain indelible therein, whatever the laws of other governments, or whatever the dispositions of private persons may establish to the contrary. For it would cause great confusion and prejudice to the commonwealth, where immovable property is situate, that the laws, promulgated concerning it, should be changed by any other acts. Hence, a Frizian, having lands and houses in the province of Groningen, cannot make a will thereof, because the laws there prohibit any will to be made of such real estate; and the Frizian laws cannot effect real estate, which constitutes an integral part of a foreign territory."1 Fundamentum universæ hujus doctrinæ diximus esse, et tenemus, subjectionem hominum infra Leges cujusque territorii, quamdiu illic agunt, quæ facit, ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus, quando illæ spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certæ notæ lege cujusque Reip. ubi

¹ Huberus, Lib. 1, tit. 3, § 15.

sita sunt, illis impressæ reperiunti indelebiles in ista Republ., quicqui Leges aut privatorum dispositione statuant; nec enim sine magna e cioque Reip. ubi sitæ sunt res soli, dispositionibus istis mutari possent. bens agros et domos in provincie potest de illis testari, quia Lege p bonis immobilibus testari, non v adficere bona, quæ partes alieni 1 constituunt. And yet, with thi view, he proceeds to declare, contradict the rule, which he down, that if a will is valid ! place, where it is made, it out even in regard to real property countries, by whose laws such pro by a will; because (says he) th in that respect does not affect the of it, but simply directs the mai will, which being rightly done, th monwealth does not prohibit the validity in regard to immovable characteristic or incident, impress the country, is injured or diminishe

§ 477. Burgundus lays down eral terms, that in every thing, and other real inheritances, it is t tion, which is to decide.² He t between movable and immovable tween real and personal statutes. tum (statutum) est reale, et immobil

¹ Huberus, Lib, 1, tit. 3, § 15. The original

² Ante, § 433.

ritorii non egreditur.1 And again : Quando hoc unum generaliter obtineat, ut in immobilibus bonorum situs semper spectandus veniat; in mobilibus autem locus domicilii.2 And (as we have seen) he applies the rule specially to wills. Si quidem solemnitates testamenti ad jura personalia non pertinent; quia sunt quædam qualitas bonis ipsis impressa, ad quam tenetur respicere, quisquis in bonis aliquid alterat.3 Quare etiam mihi videtur consequens, juris civilis rationem exigere in testamentis exarandis adhibitionem solemnitatis, quam præscripserit consuetudo cujusque possessionis. Nam si ex solemni testamento nascitur jus in ipsû re, quomodo id potest præstare alterius regionis consuetudo, quæ alienis fundis alterationis necessitatem imponere non potest? Hoc enim esset jus dicere extra territorium cui impune non paretur. There is a great deal of solid sense in these remarks; and they form a satisfactory answer to the distinction propounded by Huberus.5

§ 478. The Scottish law is in perfect coincidence with the common law on this subject. Erskine, in the passage already cited, has stated, that in the conveyance of an immovable subject, or of any right affecting heritage, the owner must follow the solemnities established by the law, not of the country, where he signs the instrument, but of the state in which the heritage lies.⁶ And even if all due solemnities are observed, still no estate will pass,

¹ Burgundus, Tract. 1, n. 26, p. 38, 39.

² Burgundus, Tract. 1, n. 41, p. 43.

Burgundus, Tract. 6, n. 3, p. 128; ante, § 372, § 438.

⁴ Burgundus, Tract. 6, n. 1, 2, 3, p. 129; Id. Tract. 1, n. 36, p. 38, 39; ante, § 372, 433, 438; 1 Boullenois, Observ. 9, p. 151. See also Henry on Foreign Law, p. 97, 98.

⁵ Ante, § 476. See also 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 582 to 586.

⁶ Ante, § 436.

unless in conformity with the (he adds,) a foreign testament be subjects, situate in Scotland, is Scotland, although by the law of the testament was made, a herital actually settled; because by the sitable subject can be disposed of it

§ 479. Vattel (as we have see rule, as a general one of the i bequests, he asserts in the most when they respect immovables formable to the law of the coun situated.3 He adds: In the sam of a testament, as to its form, car the Judge of the domicil, whose in form, ought to be every w But without affecting the valid itself, the bequest contained in before the Judge of the place, w situated; because those effects of of conformably to the laws of th makes a distinction between th of making wills and testaments solemnities thereof, and the right pose of property, whether move holding, that the forms and soler by the law of the place, where is made; the capacity of the person law of his domicil; and the right

¹ Ersk. Inst. B. 3, tit. 2, § 41, p. 515, 516; § 3.

² Ante, § 471, 472.

³ Vattel, B. 2, ch. 7, § 85, ch. 8, § 103, 110

⁴ Vattel, B. 2, ch. 7, § 85. See also Id. ch

is governed in the case of movables by the law of the domicil, and in the case of immovables, by the law of the situs rei. Ubi de formâ sive solemnitate testamenti agitur, respici locum conditi testamenti; ubi de persona antestari jus domicilii; ubi de rebus, quæ testamento relinqui possunt, vel non, respici locum domicilii, in mobilibus, in rebus soli situm loci.¹ If it were necessary, the opinions of many other foreign jurists might be cited to the same effect; but it would encumber these pages to give them a more extended review.²

¹ Grotius, Epist. 467, cited 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 5, p. 220.

² See 4 Burge, Comm. on Col and For. Law, Pt. 2, ch. 5, p. 217, 218; Id. ch. 12, p. 576 to p. 585. - Mr. Burge (in 4 Burge, Comm. p. 218, 219, 220; Id. p. 581 to 585) states the opinions of many foreign jurists; and among others he says (p. 218 to 220); "Ferriere has stated this doctrine; 'Si je legue un heritage propre situé en coutume, qui en défende la disposition, tel legs est nul, et ne peut être parfourni sur les biens situez en cette coutume, quoi qu'acquest, parce qu'à l'égard des choses, dont on peut disposer par derniere volonté, on considere la coutume ou elles sont situées. Celui qui a son domicile en cette coutume peut instituer sa femme dans les biens, qu'il a dans le pais de droit écrit, comme il a été jugé par arrest du 14 Aoust, 1754, rapporté par Marion au de ses plaidoyez, ce qui doit être sans difficulté." A testament made in a foreign country, bequeathing heritable subjects situated in Scotland, is not sustained in that kingdom, though by the law of the country, where the testament was made, heritage might have been settled by testament; because by the law of Scotland no heritable subject can be disposed of in that form. On this principle a Scot's personal bond taken to heirs and assignees, but 'secluding executors,' cannot be bequeathed by a foreign testament. But in all questions touching heritable subjects situate abroad, the foreign testament will be given effect to according to the lex loci. Dumoulin lays down the same doctrine respecting the restriction on the testamentary power over biens propres. 'Unde statutum loci inspicietur, sive persona sit subdita, sive non; itam si dicat, hæredia proventa ab una linea, redeant ad hæredes etiam remotiores lineæ, vel hæredes lineæ succedant in hærediis ab illå lineå proventis. Vel quod illi de linea non possunt testari de illis in totum, vel nisi ad certam partem. Have enim omnia et similia spectant ad caput statuti, agentis in rem, et præcedentem conclu-

§ 479 a. Passing from these considerations as to the law, by which the forms and solemnities of wills

sionem.' Again; the statists, which prohibits a disposition to particular persons, or (which involves the same consequence) requires the disposition to be made in favor of certain persons, and therefore excludes all others, is a real law. Directé enim in raram alienationem scripta hæc lex realis omnino dicanda est; noc enim stamtum reale sit, an personale metiri oportet à ratione, que a conjugali forma qualitate fuerit ducta, sed ab ipsà re, que in prohibitione statuti cocident." So also it has been held, that the law, which requires, that the testator should have survived the execution of his testament, will control the disposition of property, situated in the country, where that law prevails, although the testament is made, or the testator dominied in a place, where no such law exists. If a testator, whose domicil and real estate were both in Normandy, made a will in some other place, in which he had occasion to be present, but where the law did not require, that the testator should survive forty days, it was held, that the survivorship was essential to the validity of the testament, so far as it related in the real property in Normandy. If these questions arise on the power to dispose of movable property by testament, the law, by which they are decided, is that of the domicil; 'Pour les meubles, ils suivent la lei du domicile, et il ne sauroit jamais y avoir de chec entre differentes coutumes, en sorte qu'il est assez inutile, quant aux meubles, d'agiter si le statut, qui permet de tester, ou qui le défend, est personnel, au s'il est réel." See also Fælix, Conflit des Lois, Revue Etrang. et Franc Tem. 7, 1840, § 37, p. 307 to p. 312. The latter Author says in this place; "Le second cas, ou le statut personnel semble devoir prédominer sur le statut réel, est celui de la succession à toute la fortune d'un individu, soit ab intestat, soit par testament. Voici les arguments invoqués par les auteurs qui, dans ces deux hypothèses, prétendent faire régir la succession per la loi personnelle du défunt. Lorsque, par la mort d'un individe, il s'agit de succèder à tous ses droits actifs et passifs, à treste sa fortune (universum patrimonium), on regarde en dmit cette fortune comme un ensemble (universitas juris), sans égard aux objets particuliers qui la composet; et cette universalité représente de droit le définit, même avant l'arceihension faite par l'héritier. L'heritier succède ensuite dans cette universalité, et c'est alors seulement qu'il représente la personne de défant. L'universalité des biens du défunt formant ainsi la continuation de la personne de ce dernier, on doit, pour tout ce qui concerne la soccasion à cette universalité, suivre la loi de son domicile, c'est à-dire em statut personnel; tous les objets compris dans la succession sont soumis à ce statut personnel. Ainsi la succession d'un Français es règie par le Code civil, meme à l'égard des immembles appartenant un défant et situés en Autriche, et on ne suit pas l'ordre des successions établi pur

and testaments of movable property and of immovable property are to be regulated, in order to give

le Code Autrichien. Cette doctrine a été professée par un grand nombre d'auteurs distingués; elle l'a été d'abord par Cujas, relativement à la succession testamentaire; ensuite la même opinion a été adoptée, quant à la succession ab intestat, par Puffendorf, Bachov, J. H. Boehmer, G. L. Boehmer, Helfeld, Gluck, Hamm, Meier, par MM. Mittermaier, Eichhorn, Muhlenbruch, et Grundler. Toutefois, quatre des auteurs cités, Puffendorf, Hert, Gluck, et Hamm n'admettent le principe qu'avec deux restrictions: il ne sera pas applicable, lossqu'il existe une loi prohibitive an lieu de la situation des immeubles, ou lorsqu'une qualit spéciale se trouve imprimée aux biens ; par exemple, s'ils sont féodaux, stemmatiques on frappés d'un fidéicommis. En faveur de cette opinion on invoque, outre le principe que la succession rprésente la défunt, plusieurs considérations accessoires. D'aprés l'opinion commune des auteurs, la succession ab intestat repose sur la volonté présumée du défunt : le défunt n'ayant connu, en règle générale, d'autre loi que celle du lieu de son domicile, on doit admettre qu'il a etendu faire passer ses immeubles aux parents appelés par cette loi : si telle n'avait pas été son intention, il en aurait disposé par testament. On fait remarquer que toutes les nations admettent chez elles l'exécution des testaments consentis par un étranger dans sa patrie et dans les formes qui y sont prescrites. Ces testaments ne sont autre chose que l'expression formelle de la volanté du défunt, sanctionnée par la loi civile de sa patrie : à plus forte raison devra-t-on accorder un effet semblable à cette loi civile lorsque, sans un acte du défunt, elle prononce seule. On cite encore les inconvenients résultant de la division des patrimoinies en différentes successions particulières, au préjudice des héritiers et des créanciers ; enfin on fait observer que la chose publique est sans intérêt dans la question, parce que les prohibitions, les charges et impositions pesant sur l'immeuble peuvent néanmoins produire leur effet, et que, du reste, peu importe à l'état quelle est la personne, qui hérite de tel immeuble. D'autres non moins respectables n'admettent l'application du statut personnel en matière de succession, qu'en ce qui concerne les meubles, et ils la rejettent par rapport aux immeubles ; ils appliquent à ceux-ci la loi de la situation, sans distinguer s'il s'agit de succéder à un immeuble particulier au à l'universalité de la fortune d'un individu. Ils admettent autant de successions particulières qu'il y a de territoires ou sont situés les immeubles provenant du défunt (Quot sunt bona diversis territoriis obnoxia, totidem patrimonia intelligunter). Nous citerons Burgundus, Rodenburg, Paul Voet, Jean Voet, Abraham à Wesel, Christin, Sande, Gail, Carpzov, Wernher, Mevins, Struve, Leyser Huber, Hommel, Berger, Lanterbach, Vattel, Tittmann, Danz, Hauss, MM. Thibaut, Story. et Burge. Aucune législation positive ne s'est expliquée sur la question

them validity, let us proceed, in the next place, to the consideration of the rules, by which such wills and testaments are to be interpreted. And, in the first place, in regard to wills and testaments of personal property. In such cases, where the will or testament is made in the place of the domicil of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of his domicil, in which it is made.2 therefore, made of personal estate in England, is to be construed according to the meaning of the terms used by the law of England; and this rule equally applies, whether the judicial inquiry, as to its meaning and interpretation, arises in England, or in any other country.2 Thus, for example, if the question

de saveur, su c'est la loi reche ou la loi personnelle, qui doit regir la succession de anteste. Nons pensons qu'il faut appliquer le statut de la saturdien des le accubies. Le premier principe, en matière de cenfit des lois, c'est que les lois de chaque etat regissent les biens situes dans le territoire : la nélest millement établi qu'une convention tacité s'est formée et le les hois necles maillement établi qu'une convention tacité s'est formée et le les necles necles neulles et immeubles d'un individuitémoin le divergence des sontiments des auteurs. Les arguments invoquées en troche de cette application sont fondés en partie dans le droit évil, en partie dans le droit évil, en partie dans la vantage commun des nations : mais on ne voit pas que l'asserte les il tons ait consacre cette opinion." See also Fælix, Id. § 27, p. 216, 217, 215 : Ante, ; 429 to § 444.

³ Yates v. Thousson, 3 Clarke & Finell. R. 544, 570; Robertson on Successions, p. 99, 100, 194, to 197, 214, 255; post, § 490, 491.

The eter v. Trotter, 4 Bligh, N. S.: 502: S. C. 3 Wils. & Shaw, R. 407. -In this case the testator, a Scotchman domiciled in the dominous of England in India, made his will there; he being possessed of Scotch territive totals as well as of personal property there. The will was inserted to any a Scotch heritage according to the law of Scotland; and there a stem arise, whether his heir in Scotland, who claimed the heritage according to the well as a legated according to the will, was also contiled to share in the movables, as a legated according to the will, without bringing in the heritable bonds, or being put to his excetable. It was neld, that the will as to its terms must be interpreted according to the law of England; and that by the law of England.

should arise, whether the terms of a will include a bequest of real estate, or show on the part of the

land the terms used were not such as to import an intention to convey real estate by the testator; and therefore, that the heir was entitled to the whole heritable bonds, and also to his share of the movable property under the will. On that occasion the Lord Chancellor (Lord Lyndhurst) said; "It was stated at the bar, and I see by the papers it was also argued below, that in cases of this description, it is not unreasonable, that, when any technical points arise in the construction of a will of this description, the Court of Session should resort to the opinion of lawyers of the country, where the will or instrument was executed, but that this applies only to technical expressions; that where a will is expressed in ordinary language, the judges of the Court of Scotland are as competent to put a proper construction upon it as judges or lawyers of the country, where the will was executed. But the judges below were not of that opinion; and it is impossible, as it appears to me, that such an opinion can be reasonably entertained. A will must be interpreted according to the law of the country, where it is made, and where the party making the will has his domicil. There are certain rules of construction adopted in the Courts, and the expressions, which are made use of in a will, and the language of a will, have frequently reference to those rules of construction; and it would be productive, therefore, of the most mischievous consequences, and, in many instances, defeat the intention of the testator, if those rules were to be altogether disregarded and, the judges of a foreign Court, (which it may be considered in relation to the will,) without reference to that knowledge, which it is desirable to obtain, of the law of the country, in which the will was made, were to interpret the will according to their own rules of construction. That would also be productive of another inconvenience, namely, that the will might have a construction put upon it in the English Courts different from that, which might be put upon it in the foreign country. It appears to me, that there is no solid ground for the objection; but that where a will is executed in a foreign country by a person having his domicil in that country, with respect to that person's property the will must be interpreted according to the law of the country where it is made. It must, if it comes into question in any proceeding, have the same interpretation put upon it, as would be put upon it in any tribunal of the country, where it was made. It appears to me, therefore, that the judges were perfectly right in directing the opinion to be taken of English lawyers of eminence, with respect to the import and construction of this will according to the law of England. The main question, that was ultimately put to the learned persons, to whom I have referred, is this, - Whether on the supposition of the question having arisen for trial in England, the heir would have been

testator an intention to bequeath real estate, as well as personal estate, the question must be decided according to the law of the place of his domicil, and where the will was made; and the same interpretation must be put upon those terms in every other country, which would be put upon them by the law of that domicil.¹ So, what is to be deemed "real

put to his election if he had claimed money secured by heritable bond in Scotland, as well as his share of the personal estate under the will." The answer is in these terms, - Considering heritable bonds in Scotland as real estates, to winch the heir at law is entitled, unless they are conveyed away with due solemnity by his ancestor, we think the here at law would be entitled in this case to claim, them, without being but to his election, if the question had arisen in a court of justice in When that opinion was communicated to the Court in Scotfind, the Court, immediately affirming that opinion, decided in favor of the hear at law. The hear at law was undoubtedly entitled to take the real estate, - that is, the heritable bond; and the sole question was whether, when he came in to claim under the will his proportion of the personal estate, it was required by law, that he should be put to his election, that is, whether he should take the one or the other; whether he should allow the real estate to be connected with the personal, so as to for a me wass of the property, and the whole divided, or should take the real estate, and give up the personal estate? Whether he was oblighed or not to do this, depended entirely on this consideration, whether upon the face of the will there was sufficient to manifest a clear intenthen that the testator designed by his will to dispose of his real estate; been see if he intended to dispose of his real estate, although he had not carried that intention effectually into execution, the party taking tabler that will would not be entitled to have the benefit of the will, and it the same tene to defeat the intention of the testator. was, therefore, simply a question of construction. Does it appear upon the face of the will, that it was the intention of the testator to dispose of his real estate, that is, of those heritable bonds? Now, the rule of law in England with respect to subjects of this kind is well ascertained and well defined, and it is this, -- that you are not to proceed by probability or by conjecture, but that there must be a clear and manifest expression of the intention on the face of the will, to include that properry, which is not properly devised, before the heir can be put to his election." Ibid. See also Prince r. Deerhurst, 8 Sim. R. 279, 299, 300; post. 459; Robertson on Successions, p. 189 to 197.

⁴ Trotter v. Trotter, 4 Bligh, R. (N. S.) p. 502; S. C. 3 Wils. & Shaw, p. 407.

estate" in the sense of a will, devising real estate to certain persons, must be decided by the law of the domicil of the testator. Thus, where a testator was domiciled in Jamaica, in which place he made his will, and the devise was in these words; "I give, devise, and bequeath one moiety of the rents, issues, and profits of my estate named Islington and Cove's Penn, in the parish of St. Mary, to be divided equally amongst my grandchildren. The other moiety of the rents, issues, and profits of my said estate. and Penn I give, devise, and bequeath to my son, &c." According to the import of the words "my estate," as they are understood and used in Jamaica, not only the land, but the works, buildings, utensils, slaves, cattle, and stock on the plantation would be included. The court put this construction on the devise.1

§ 479 b. In like manner, whether the words of a will give a legacy, or create a trust, in favor of a party, where the expressions used import a wish or desire, or other language of a similar sort is used, must be decided by the law of the place, where the will is made, and the testator has his domicil.² So, where a legacy is given in terms expressive of a currency in use in different countries, but of different values therein, the same rule will apply. Thus, for example, a will made in Ireland by a testator domiciled there, giving a legacy of £1000, will be interpreted to be a legacy of £1000 Irish currency, and payable accordingly, and not a £1000 English sterling

¹ Stewart v. Garnett, 3 Sim. R. 298; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 591.

² Pierson v. Garnett, 2 Bro. Ch. R. 38; 2 Story on Eq. Jurisp. § 1068 to § 1074.

currency. So legacies are deemed payable according to the law of the country, and in the currency of the country, where the will is made and the testator is domiciled.²

- \$ 179 c. In like manner the question, whether a legatee by the terms of a foreign will or testament takes an estate for life, or in fee, is to be decided by the law of the place, where the will is made. and the testator is domiciled, and not by the law of the place, where the controversy arises, or the testator was born." So if the question arises, whether it is competent to make a particular bequest of property, the validity of it must be decided by the law of the place, where the will or testament is made, and the testator is domiciled.4 So, if a legacy is given by a will or restament to a party, who dies in the lifetime of the testator, the question, whether it is an ademption of the legacy, or whether the legacy goes to his personal representatives, is to be decided by the law, where the will or testament is made, and he is domiciled.
- 3 179 d. Another illustration may arise under a will, which purports to direct the testator's real estate to be sold, and the proceeds to be applied to foreign charities, which devise is good by the law of the foreign country, but is prohibited by the law of the

³ Id. p. 17.

Politi, Sounders r. Drake; 2 Ath. 465; Pierson r. Garnett, 3 Bro. Ch.
 R. 10, 47; Modern r. Martin, 3 Bro. Ch. R. 50; Wallis r. Brightwell,
 P. W. 1885; Lansdowne r. Lansdowne, 2 Bligh, R. 60, 88, 89, 95;
 Plaryer, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 505, 326; ante. § 259, 340 to 343.

Br. wn v. Brown, I Wils, & Shaw, 28, 37; post, § 490.

⁽Pr. c. r. Deerhurst, S. Simons, R. 279, 209, 300, 301; 2 Boullenois, Observ. 46, p. 505 to p. 508.

Austruther v. Chalmer, 2 Sim. R. 1; Thornton v. Curling, 8 Sim. R. 310; S. C. 2 Addams, Eccles. R. 6, 10 to 25; post, § 491.

testator's domicil. In such a case the devise will be void, because it is against the law of his domicil. This was held in a case, where a testator in England by his will directed his real estate to be sold, and the produce to be laid out in lands, or in the funds. for the maintenance of a charity in Scotland. On that occasion the Master of the Rolls (Sir Wm. Grant) said: "The statute (9 Geo. 2, ch. 36) contains no express words prohibiting a bequest of money, to be produced by the sale of land, to charitable purposes: but it is settled by construction, that such a bequest is within the spirit and meaning of the law; and it is clear, that no charity in England, not within the exception of the statute, could have derived any benefit from the produce of the real estate. The question, then, is, whether such produce may be given to what, in contemplation of the English law, is for a charitable purpose, when that purpose is to be carried into execution in another country. The validity of every disposition of real estate must depend upon the law of the country, in which that estate is situated. The subject of this statute is real estate in England. The owners of such property are disabled from disposing of it to any charitable use, except by deed, executed twelve months before the death of the owner, &c. to take effect from the execution. The words are perfectly general, 'any charitable use whatsoever;' and the object could not be to treat English charities less favorably than charities to take effect for the benefit of other countries. It would be somewhat incongruous to refuse to permit such a disposition for the most laudable and meritorious charitable institution in England; but if the party chose to carry

Confl.

his benevolent intention beyond I him to do so, to the effect of dis in his last moments. The disinh ful heirs by languishing or dying is treated by the statute as a m less so, when the effect is to car of England. Therefore, neither statute, nor the presumable into in declaring, that it is to be cor purposes to be carried into exe The statute not containing an of the universities of Scotland, a gard to the universities of Engla this as a charitable disposition, that is the produce of the testate pass. 771

§ 479 e. The same rule will ap ment of the persons, who are to or testament, when it is made by particular class or description of the proper persons entitled to take personarum, is a point to be ascer the place, where the will is made domiciled. Thus, for example, bequeath his personal estate to his is the person entitled to take und will depend upon the law of his ciled in England, it will be to domiciled in most of the States of be all his children. So, if a

¹ Curtis v. Hutton, 14 Ves. 537, 541. See 501 to 503.

² Harrison v. Nixon, 9 Peters, R. 483, 50 Court said; "No one can doubt, if a testator b

Holland should bequeath his property to the "male children" of certain persons, and the question should

land during his whole life, should, by his will, give his personal estate to his heir at law, that the descriptio personse would have reference to and be governed by the import of the terms in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, in Louisiana, in Pennsylvania, or in Massachusetts. In short, a will of personalty speaks according to the laws of the testator's domicil, where there are no other circumstances to control their application; and to raise the question, what the testator means, we must first ascertain, what was his domicil, and whether he had reference to the laws of that place, or to the laws of any foreign country. Now, the very gist of the present controversy turns upon the point, who were the person, or persons, intended to be designated by the testator, under the appellation of 'heir at law.' If, at the time of making his will, and at his death, he was domiciled in England, and had a reference to its laws, the designation might indicate a very different person, or persons, from what might be the case, (we do not say, what is the case,) if, at the time of making his will, and of his death, he was domiciled in Pennsylvania. In order to raise the question of the true interpretation and designation, it seems to us indispensable that the country, by whose laws his will is to be interpreted, should be first ascertained; and then the inquiry is naturally presented, what the provisions of those laws are." Mr. Burge has put a number of cases from the foreign law on the same subject. He says; "The legal effect of the expression, 'lawful heirs,' will not be controlled by words, which import an equality of distribution amongst the heirs; but those words will be understood as referring to the equality, which is consistent with, and recognised by that law, which the testator is presumed to have invoked. The institution of heirs was thus expressed: 'Fratrum et sororum filios ac nepotes hæredes legitimos ex equis partibus.' (Voet, lib. 28, tit. 5, n. 17.) If the whole inheritance were to be divided amongst those heirs in equal parts, the qualification of legitimus heres would be disregarded, because, according to the order of succession established by law, the grandsons of one brother succeeding with the sons of another do not take per capita, but per stirpes. The equality, therefore, to be observed in the distribution, and which must be presumed to have been that contemplated by the testator, is that, which the law admits, namely, an equality between the stirpes, and not between the individuals. (Neostad, Decis. 33.) A case arose in the court at Brabant, of a father domiciled in Brabant, who had, in the institution of his son, desired him to allow that, which he had left him, to go to his lawful children. It was decided, that the grandfather's estate would devolve on those children only, who would take according to the law of Brabant in the case of intestacy, namely,

arise, as well it might, whether be meant male descendants, t

the children of the first, to the exclusion of (Stockmans, Curiæ Brab. Decis. 27.) Under a tion of 'brothers,' brothers of the whole bloc ing to the law in the place of the lex loci d father's or mother's side only are excluded fro ad Leg. Mech. tit. 16, art. 7, n. 5, 6; Voet, li de Jure, Quod Ori. de Stat. Divers. tit. 3, c. Repræs. c. 5, n. 4.) If a testator institute calls proximi, without using any expression p by law succeed to him in case of intestacy it is doubtful, who are entitled to the suc would take according to the law of the place who were really and naturally the nearest although according to that law they could not testator were domiciled in a country, where t mother succeed in preference to the survivi nearest in blood to the deceased, although h of succession. It seems, that the term prox ural signification, and consequently the fath would succeed, and not the descendant in t 28, tit. 5, n. 19, and lib. 36, tit. 1, n. 25; Some it is said, that this construction is made to which the law of succession deviates from the proximus. And where in cases of intestact admitted to the succession with some more retion would be according to the legal sense. tuting his wife as his heir, should direct, th death should revert to the nearest, then accor [Sen-Cons-Trebellianicum,] the father would all the brothers to the other half. (Ib. Sar 5, def. 6.) If the testator has called to the nearest to him in case of intestacy, recourse i of the different countries, in which his imm to decide, who are the persons entitled to domicilii. And then it may happen, that the not be the nearest in blood. (Sand, Decis. Voet, lib. 36, tit. 1, n. 25, lib. 28, tit. 5, n. 5 Volunt lib. 8, tit 14, n. 10; Van Leeuwen, C n. 19; Neostad, decis. 35; Jul. Clarus. 6 Someren, de Repræs. c. 5, n. 16; ante, Vol of a pecuniary legacy, where the will afford currency, in which the testator intended

claiming through males only, the question would be decided by the interpretation put upon those words by the law of Holland.

§ 479 f. But the question may be asked in these and the like cases, what is to be the rule of construction, if the will or testament is made by the party in the place of his domicil; but he is in fact a native of another country; or if the will or testament is made in a country, of which the party is a native, and according to the forms of law in that country, and yet at the time his actual domicil is in another country, by whose laws the will or testament so made is equally good. The answer to both questions is the same. The law of the place of his actual domicil. Thus, for example, where a native of Scotland domiciled in England, having personal property only, executed during a visit to Scotland, and depos-

familiarity with the currency of the country, in which he is domiciled, than with that of any other place, justifies the presumption, that he has in view that currency, when he expresses no other currency, in which his bequest is to be paid. The father of a family, who was domiciled in a village in Peyrouse, in Italy, was on a visit to Ancona on business. He made his will in the latter place, and gave a legacy to one of his daughters of five hundred florins. Florins were of less value at Ancona than at Peyrouse, and the question raised was, whether the legacy should be paid according to the value of the florins at Ancona, or at Peyrouse; and it was determined it ought to be paid according to the value at Peyrouse, the place of the testator's domicil. Where a legacy consists of a certain number of modii of corn, Hertius says, that the modii ought to be according to the measure of the place of the testator's domicil, and not according to that of the place, where the testament was made. So, if a testator having lands in different places devise a thousand acres without any other expression, such a devise must be understood according to the measurement prevailing in the place of his domicil." 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 591 to 594. See also 2 Burge, Comm. Pt. 2, ch. 9, p. 855 to 860; ante, § 271, 271 a, note; post, § 484; Sand. Decis. Frisic. Lib. 4, tit. 8, Defin. 7, p. 194.

ited a will there, prepared in and died in England; it was belo to be construed according to the I

§ 479 g. Another question may ed. Suppose at the time of the testament, the testator is domi where it is made, and he afte another place, where he is dom does such removal change the so that, if there is a difference

Anstruther v. Chalmer, 5 Sim. R. 1; Has 483, 504, 505, note. - Mr. Burge on this suf place of domicil in many cases affords the ra testator has used expressions, which are ferent significations in different countries. institute his heirs by name, but by the desc succeed to his estate in case he had dies succession, where his real or immovable p ferent from those, which prevail in the plan in which he made his will, or in that, wh which adjudicates on the will, the laws o in the place of his domicil, are those, which the more general opinion is, that even with real or immovable property, the laws of domicil, and not those in loco rei sitze prethis rule rests, is that, as it becomes necess which the testator has used the expression sion he contemplated, it is presumed, that i try, in which he was domiciled, because it familiar with those laws. There are grow acquainted with them; but there exist no to be acquainted with any other laws of sense, in which he has used certain work presumed to have adopted that, which predomicil. It has been sometimes said, that in the sense, in which they are accustom where the will or contract was made. Be consider this as a general rule; for the place may have been for so short a time us that he was even acquainted with that sens and For. Law, Pt. 2, ch. 12, p. 590, 591. Col. and For. Law Pt. 2, ch. 9, p. 855, 856.

the original domicil and that of the new domicil, as to the interpretation of the terms, the law of the new domicil is to prevail? Or, does the interpretation remain, as it was by the law of the original domicil? This question does not seem to have undergone any absolute and positive decision in the courts acting under the common law.

§ 479 h. The same rules of construction will generally apply to wills and testaments of immovable property; unless, indeed, it can be clearly gathered from the terms used in the will, that the testator had in view the law of the place of the situs, or used other language, which necessarily referred to the usages and customs or language appropriate only to that situs.2 "Thus." (to borrow an illustration from Mr. Burge,) "in case the limitation of a deed or will were made in England, in favor of the heir of A., a person, who had no children, and the settler or testator has property in England, Jamaica and British Guiana, if the construction of the term, heir, was to be in conformity with the law of England, the father of A. would take, if according to the law of Jamaica, the elder brother, and if according to the law of British Guiana, his father, brothers, and sisters, would take his immovable property. It is not to be presumed, that he used the expression in three different senses, or that he adopted the legal import given to it by the law of the one place, rather than that

It was alluded to, and reserved for consideration in Harrison v. Nixon, 9 Peters, R. 483, 505. See ante, § 473; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 4, § 5, p. 169; Yates v. Thomson, 3 Clarke & Finell. 544, 583 to 589.

² Trotter v. Trotter, 3 Wils. & Shaw, 407; S. C. 4 Bligh, R. (N. S.) 502, 505; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 857, 858.

of the contract, or testament, sometimes that of the situs rei, sometimes that of the domicil of the party, and sometimes the place, where the payment or performance is to be. He adds, that he finds no doctrine more reasonable, than that, which Dumoulin has laid down upon this subject.¹

^{1 2} Boullenois, Observ. 46, p. 494, 503 to 518; Id. p. 537, 538. -Mr. Burge has cited from 2 Boullenois, Observ. 46, p, 534 et seq. a passage illustrating Boullenois's opinion. "The terms," (says Mr. Burge,) "in which the contract is expressed, may receive a construction, according to the law or usage of the place, where the contract is made, different from that, which is given to them by the law of the situs. If, by adopting the one sense, the contract would be brought within the prohibition of the law of the situs, that construction ought to be rejected. But if this would not be the consequence, and the adoption of either meaning would not afford a ground to prevent the contract from being completed by the law of the situs, it has been a question, whether the construction given by the law or usage of the situs, or that given by the law of the place, where the contract was made, ought to prevail. Thus, in some countries the limitation by gift or devise to a person, and 'si sine liberis discesserit' to another operates as a substitution. The children, 'positi in conditione,' are also considered as 'positi in dispositione,' and are entitled to take. Such was the law of Toulouse. But under the coutume of Paris the expression, 'si sine liberis,' imported only a condition, and consequently, if there were no failure of children, there was no substitution. The following case occurred, on which M. Boullenois gave his opinion: The Comte de R., domiciled in Languedoc, made a settlement on the marriage of his son, who had resided in Paris many years, and the lady with whom he married was a native of and domiciled in Paris. The Comte executed a general power of attorney to the Bishop of - to arrange the marriage settlement. By this settlement he gave to his son a moiety of all his estate, movable and immovable, then belonging to him, or, which should belong to him on the day of his death. 'Sous la condition que, si le futur époux décede sans enfans mâles, nés de ce mariage, la moitié des biens à lui présentement donnés, retournera à l'ainé de ses freres, ou a l'ainé des enfants males dudit ainé; après toutes fois que les conventions de la dite Demoiselle future épouse auront été payées et acquittées, et que déduction sura été faite de la légitime des filles.' There were issue of the marriage a son and daughter. The real property was situated in Toulouse. The son claimed it, insisting that his father had created a substitution, and that he took as a substitute. The daughter contended, that no substitution was created, that the condition had failed, and, that con-

 $\S 479 k$. We have already l to refer to the opinions of D ject. He reproves the doctrin

sequently, the father having died without was entitled with her brother as one of opinion given by M. Boullenois was, that given by the law of Paris, where the conti of the parties to it were domiciled, and t attorney, must prevail. This opinion wa Requêtes du Palais of the 21st of August, But this sentence was reversed on appeal, favor of the son. There is great force in learned jurist maintains his opinion. The decision proceeded, was, that the domicil in Toulouse, and that it must be presumed which he was acquainted, rather than that be unacquainted, and, that in donations the cipally to be considered, since the part o acceptance of the donation. But, in the p loses much of the weight, to which it because the donor had granted a general resident in Paris to arrange the settleme terms or conditions it should contain. nor is it the doctrine of jurists, that the sit application of its law to determine the leg the contract. The text of the civil law is cæteris contractibus, id sequimur, quod a actum est, erit consequens, ut id sequamur, est, frequentatur.' It has been justly consid eral; for that if it were universally follow tracting parties must be frequently defeat passage already cited, that it was condemn ion, and he is followed by Boullenois, the in a contract must depend, not on the p those other circumstances, from which the may be inferred. Generally, the interpreta in the place of their domicil, is that which conformable to their intention." 2 Burge, Pt. 2, ch. 9, p. 855 to 857; 2 Boullenois, O § 275. Boullenois gives other illustrations Observ. 46, p. 495 to p. 518. Bouhier s Bouhier, Cout. de Bourg. ch. 21, n. 220, 22 ¹ Ante, § 274, 441.



jurists, that the law and custom of the place, where a contract is made, are to govern the contract in all cases. Et advertendum, quod Doctores pessime intelligunt, L. si fundus de evicti; Quia putant ruditer et indistincte, quod debeat ibi inspici locus et consuetudo, ubi fit contractus, et sic jus in loco contractus. Quod est falsum; quinimo jus est in tacita et verisimiliter mente contrahentium. And he explains himself thus. Aut statutum loquitur de his, quæ concernunt nudam ordinationem vel solemnitatem actus, et semper inspicitur statutum vel consuetudo, ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis, aut aliis conficiendis.1 Aut statutum loquitur de his, quæ meritum scilicet causæ vel decisionem concernunt; et tunc aut in his, quæ pendent à voluntate partium, vel per eas immutari possunt, et tunc inspiciuntur, circumstantiæ voluntatis quarum, una est statutum loci, in quo contrahitur, et domicilii contrahentium antiqui vel recentis, et similes circumstantia.2

§ 479 l. Hertius lays down the rule, that the words of a testator are to be especially interpreted according to the custom of the place, where the testator had his origin or domicil. Hinc jurisconsultiverba testatoris præcipuè interpretantur secundum loci consuetudinem, ubi testator originem vel domicilium habeat.³ And he illustrates it by the case of a bequest of so many measures of wheat, or so many acres of land, where the question arises as to the quantity of

Molin. Opera, Tom. 3, Comm. in Cod. Lib. 1, tit. 1, p. 554, edit. 1681; ante, § 260, 274, 441; 2 Boullenois, Observ. 46, p. 495.

² Ibid.

³ 1 Hertii, Op. De Collis. Leg. § 6, n. 3, p. 222, edit. 1716; Id. p. 158, edit. 1737; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 859, 860.

the measures or of the acres, wl according to the Lex loci of the domicilii of the testator. The by John Voet, by Stockmans Rodenburg, and by Sandius.² following language. Non exi regula, quæ dictat, testatorem i sitionem suam aptare jure illius tamentum condit, et consuetudin les loci tacitè influere, ac temp tium locutiones et dispositiones. specie autem consuetudo legis pretatur; et si non appareat, qui trahentes, ad eam, tanquam reri nam, recurritur. Quam etiam in voluntate.4

§ 479 m. Indeed, it may be rule, that wherever there are w signification, or different sign countries are used in a will, the in the sense, in which they are domicil, with which he may be most familiar, or to have adopte ambigua hac testatoris voluntate suetudinem regionis, in qua teste same rule has been recognised it has been generalized; for held, that in the construction

Ibid.; Molin. Opera, Tom. 1, De Fiefs
 See ante, § 479 e, note; 4 Burge, Co

^{2,} ch. 12, p. 591 to p. 594, where the opinic 3 Stockm. Decis. 27, n. 1, p. 61.

⁴ P. Voet, de Statut. § 3, ch. 1, n. 2, p. 1 1661.

⁵ Sand. Decis. Frisic. Lib. 4, tit. 8, Defi

ments or contracts, the place of executing them, the domicil of the parties, the place appointed for its execution, and other circumstances are to be taken into consideration.¹

§ 479 n. In respect to another point, whether a Court of Equity can enforce a foreign will, of which there has been no probate obtained from our own courts, the principle seems clear, that it cannot. A Court of Equity can know nothing of a will of personalty in England, unless it has first been adjudged a will in the proper Probate or Ecclesiastical Court. A fortiori the rule must apply to a foreign will.²

¹ Lanedowne v. Lanedowne, 2 Bligh, R. 60, 87; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 12, p. 590, 591. See Bunbury v. Bunbury, 2 Jurist, (English) 1839, (before Lord Cottenham) p. 104, 111 to 114.

² Price v. Deerhurst, 4 M. & Craig, 76, 80.

CHAPTER X

SUCCESSION AND DISTE

§ 480. Having considered the law, in regard to testaments of and of immovable property, we right of succession in cases of it phrase is, of succession ab inteste preceding discussions have left litt than to state the general principle species of property.

§ 481. First, in relation to move universal doctrine, now recognis law, although formerly much consuccession to personal property sively by the law of the actual contact at the time of his death.

Many of the authorities to sustain this po ante, § 350 to 355, § 465 to 474. But some to. Pipon v. Pipon, Ambler, R. 25: Thorne v Chitty on Comm. and Manuf. 661; Sill r. Wor Bruce v. Bruce, 2 Bos. & Pull. 229, note; H Potter r. Brown, 5 East, R. 130; Doe d. Birt Cresw. 43s, 450 to 455; S. C. 9 Bligh, R. 3 R. 571; Yates r. Thomson, 3 Clarke & Fi Succession, ch. 7, p. 104 to 117; Id. ch. 8, p. Curling, 8 Sim. R. 310; Price r. Deerhurst, r. Budd, 4 Hagg, Eccles, R. 346, 354; 4 Bur Law, Pt. 2, ch. 4, § 5, p. 156 to 170; ante, § time the law of Scotland was unsettled on this with that of England. Robertson on Succ Comm. ubi supra; Stairs, Instit. B. 3, tit. 8, 5 4; Livermore, Dissert, 162, 163; Olivier v. Shultz r. Pulver, 3 Paige, R. 152: De Sol

quence, what is the country of the birth of the intestate, or of his former domicil, or what is the actual situs of the personal property at the time of his death; it devolves upon those, who are entitled to take it, as heirs or distributees, according to the law of his actual domicil at the time of his death. Hence, if a Frenchman dies intestate in America, all his personal property, whether it be in America, or in France, is distributable according to the statute of distribution of the state, where he then resided, notwithstanding it may differ essentially from the distribution prescribed by the law of France.

§ 481 a. So, the like rule prevails in the ascertainment of the person, who is entitled to take as heir or distributee. The law of the domicil, therefore, is to decide, whether primogeniture gives a right of preference, or an exclusive right to the succession, and whether a person is legitimate, or not, to take the succession. So, whether persons are to take per capita, or per stirpes; and the nature and extent of the right of representation. Thus, for example, in England, and in some of the American States, there is no right of representation beyond that of brothers' and sisters' children, as to the right of distribution, in cases of intestacy of movable property.

John. R. 193, 224, 228; Holmes v. Remsen, 4 John. Ch. R. 460; S. C. 20 John. R. 229; De Couche v. Savatier, 3 John. Ch. R. 190; Erskine, Inst. B. 3, tit. 2, § 40, 41; Id. B. 3, tit. 9, § 4; 2 Kaims, Equity, B. 3, ch. 8, § 3, 4, p. 333, 345; 1 Boullenois, Observ. 20, p. 358; 2 Boullenois, 54, Id. 57; Fergusson on Marr. and Div. 346, 361; Vattel, B. 2, § 85, 103, 110, 111; 1 Hertii Opera, De Collis. Leg. § 4, n. 26, p. 135, edit. 1737; Id. p. 192, edit. 1716; Huberus, De Confl. Leg. Lib. 1, tit. 3, § 15; Henry on Foreign Law, p. 13, 14, 15; Id. p. 46, 196; J. Voet, ad Pand. Lib. 38, tit. 17, § 34, p. 596; Harvey v. Richards, 1 Mason, R. 418; 2 Froland, Mém. 1294; 2 Dwarris on Statut. 649; Price v. Deerhurst, 4 M. & Craig, 76, 82; Preston v. Melville, 8 Clarke & Finell. 1, 12.

If, therefore, a man should die, sister, and the grand children of latter would not take any thing i tation of the deceased brother.

§ 481 b. This same doctrine equal broadness by foreign jurist great measure upon the doctrine no situs, and accompany the per that in fictione juris they are alw the place of his domicil. Mobili et ejus ossibus adhærent.² Thu

^{1 4} Burge, Comm. on Col. and For. Law, As in cases of movable property, the law regulate the succession and distribution th become important, what is the actual domic Upon this subject many difficult q example, De Bonneval v. De Bonneval, 1 C Dunn, 6 Mees. & Welsb. R. 511. But the modification, where the law of the domic to take away the rights of persons, who I movable property in another country, h sity. Thus, it has been said, that, under passed by Napoleon, Englishmen were rend to the personal estates of intestates dying require England to disallow the operation of property of the same intestate situate in Er 1 Curteis, Eccl. R. 691; ante, § 472, note. in transitu from his acquired domicil, the whether the law of his native domicil, or his intended domicil was to govern. whether native or acquired, is not lost by a 1 defeated animo merely; but animo et facto til a subsequent domicil is acquired, at le transitu to his intended domicil. This last though stated by a learned Judge, may be whether it varies the rule. Munroe v. Dougle 2 Boullenois, Appx. p. 59, 60; Jennison v. H ² See ante, § 362, 377, 378; 4 Burge, C Pt. 2, ch. 4, § 5, p. 157; Fælix, Conflit. des 1 Tom. 7, 1840, § 32, p. 221, 222.

to the effect of a change of domicil on succession, takes the very distinction between movable property and immovable property, founded upon its nature and character. Jus rebus succedendi immobilibus. semper a loco rei sitæ metiendum, huc non pertinet; succedendi mobilibus pertinet; quod ea certo loco non circumscripta, comitentur personam a domicilio ejus accipientia leges.1 Boullenois fully concurs in this opinion.2 Burgundus holds the same opinion.3 Perhaps it might, with quite as much accuracy, be said, that the doctrine is founded in a great public policy, observed, ex comitate, by all nations, from a sense of its general convenience and utility, and its tendency to avoid endless embarrassments and conflicts, where personal property has often changed places; which is the view entertained by John Voet.4

§ 482. Paul Voet has put the principle in a compendious manner. Idem ne inferendum de statutis, quæ spectant successiones ab intestato? Respondeo, quod ita; rem enim afficiunt, non personam, ut legibus loci, ubi bona sita sunt, vel esse intelliguntur, regi debeant. Immobilia statutis loci, ubi sita; mobilia loci statutis, ubi testator habuit domicilium. And again; Verum an, quod de immobilibus dictum, idem de mobilibus statuendum erit? Respondeo, quod non. Quia illorum bonorum nomine nemo censetur semet loci legibus subjecisse. Ut quæ res certum locum non habent,

¹ Rodenburg, de Div. Stat. tit. 2, Pt. 2, ch. 2, § 1; 2 Boullenois, Appx. p. 59; 2 Boullenois, ch. 2, p. 54.

^{2 2} Boullenois, Observ. 33, p. 57, 63, 64.

³ Burgundus, Tract. 2, n. 20, 21; Id. Tract. 1, n. 26.

⁴ J. Voet, ad Pand. Lib. 38, tit. 17, n. 34, Tom. 2, p. 596; post, § 482 s, note.

⁵ P. Voet, § 4, ch. 3, n. 10, p. 135, edit. 1716; Id. p. 153, edit. 1661; ante, § 475.

quia facile de loco in locum tra secundum loci statuta regulantur buit defunctus.¹

§ 482 a. Sandius, in speaking the like distinction between movables. Aliud judicium est conditione personarum legem accip dicuntur, sed personam sequuntur, ideo omnia ubicunque mobilia leg untur.2 Strykius affirms the sa Gaill, and Christinaus, and John says: Cæterum occasione varian intestatam statutorum, generaliter defuncti immobilia, et quæ juris libus habentur, deferri secundum sunt; adeo, ut tot censeri debear ac tot hereditates, quot locis, a immobilia existunt. Mobilia v ipsius defuncti, vel quia semper a finguntur, aut (ut exposui,) ex e Bynkershoek is equally positive. terest scire non tam, ubi quis deces domicilium habuit ; nam si hoc sc domicilii hereditas intestati defe

P. Voet, De Stat. § 9, ch. 1, n. 8, p. 250
 See also to the same point John Voc. 4, Ps. 2, n. 11, p. 44; ante, § 362, note 3.

Sand. Decis. Frisic. Lib. 4, tit. 8, Defin. 3 Strykius, de Success. Diss. 1, ch. 4, n. 2, Observ. 124, n. 18, p. 552; Christin. Decin. 2, 3, p. 4; J. Voet, ad Pand. Lib. 38, tit. n. 34, Tom. 2, p. 596; Fœlix, Conflit des I. Tom. 7, 1840, § 37, p. 307 to 311; 4 Burge, Pt. 2, ch. 4, § 5, p. 156 to 158.

⁴ J. Voet, Comm. ad Pand. Lib. 38, tit. 17,

minor decesserit quod ad mobilia nempe, et quæ pro mobilibus habentur.1

§ 483. Secondly, in relation to immovable property. And here a very different principle prevails at the common law. The descent and heirship of real estate is exclusively governed by the law of the country, within which it is actually situate. No person can take, except those, who are recognised as legitimate heirs by the laws of that country; and they take in the proportions, and the order, which those laws prescribe. This is the indisputable doctrine of the common law.²

§ 483 a. Foreign jurists are not, indeed, universally agreed, even as to this point, although certainly they differ less than in most other cases. It may truly be said, that the generality of them, (having a great weight of authority,) unequivocally admit, that the descent and distribution of real estate is, and ought to be, governed by the Lex rei site.3 On

Bynkers. Quest. Privat. Jur. Lib. 1, ch. 16, p. 179, 180.

² 4 Burge, Comm. on Col. and For. Law, ch. 4, § 5, p. 151, 152, Doe d. Birtwhistle v. Vardill, 5 Barn. & Cres. p. 451, 452; S. C. 6 Bligh, R. 479, note; 9 Bligh, R. 32 to 88; 1 Rob. R. (House of Lords) p. 627; ante, § 364 to 366, § 426 to 429; post, § 483 a, note; S. P. Bunbury v. Bunbury, 1 Jurist, (English) 1839, p. 104.

The authorities to this point also have been already cited, ante, § 424 to 448. See Doe dem. Birtwhistle v. Vardill, 5 Barn. & Cres. 438; United States v. Crosby 7 Cranch, R. 115; Kerr v. Moon, 9 Wheaton, R. 566, 570; McCormick v. Sullivant, 10 Wheaton, R. 192; Darby v. Mayer, 10 Wheaton, R. 469; Hosford v. Nichols, 1 Paige, R. 220; Cutler v. Davenport, 1 Pick. R. 81; Wills v. Cowper, 2 Hamm. R. 124; 1 Hertii Opera, De Collis. Leg. § 4, n. 26, p. 135; I Boullenois, 25, 223, &c.; 1 Froland, Mém. 60, 61, 65; P. Voet, De Stat. § 4, ch. 2, n. 6, p. 123; J. Voet, ad Pand. Lib. 1, tit. 4, Pt. 2, § 3, p. 39; Ersk. Inst. B. 3, tit. 2, § 40, 41, p. 515; D'Aguesseau, Œuvres, Tom. 4, p. 637; Huberus, Lib. 1, tit. 3, § 15; 2 Dwarris, on Statut. p. 649; Rodenburg, Pt. 2, tit. 2, ch. 2; 2 Boullenois, Appx. p. 59, 63; 2 Boullenois, 54, 57, 383; 2 Froland, Mêm. ch. 27, p. 1288; Fælix Conflit des Lois Revue, Etrang. et Franc. Tom. 7, 1840, § 37, p. 307 to 312; 4 Burge, Comm. on Col. and

this head it might seem almost the language of John Voet, in real and personal statutes. He of real statutes whatever regards pertinent jura successionum ab in dine ad bona quæque ab intestate vel stirpes, vel lineas, vel jure p tendus sit; quâ ratione legitimi a cognati vocentur ; quæque his sunt denburg is equally decisive. J immobilibus semper a loco rei site land gives the rule in the most co terms, attributing the language bilia sequuntur personam; immobili says; Aut statutum datur in rem dentis veniant ad primo genitur statutum loci, in quo sita sunt bon his bold and uncompromising man rule is so well established, that no

For. Law, Pt. 2, ch. 4, § 5, p. 151 to 156. were worked off, I have ascertained, that the Vardill, above cited, has been affirmed in th R. (House of Lords) p. 627. The ground w land no person could inherit lands as heir, marriage of his parents.

¹ J. Voet, ad Pand. Lib. 1, tit. 4, P. 2, § 3, tit. 17, n. 34, Tom. 2, p. 596.

Rodenburg, De Div. Stat. P. 2, tit. 2, Appx. p. 54, 57. See also Henrys, Œuvres, 105, Observ. Bretonnier, p. 613, 614, edit. 177

³ 2 Froland, Mém. 1289. — I cannot find an used by Dumoulin in the passage cited by I clude, that it is his own concise statement which he is certainly correct. The passages p. 701, edit. 1681, Coutumes de Senlis, art. d'Auvergne, art. 4; Id. Consil. 53, p. 964; ide Statut.

⁴ Molin. Oper. Comm. In Cod. Lib. 1, tit. 556, edit. 1681.

his mouth against it. Immobilia enim deferri ex jure, quod obtinet in loco rei sitæ, adeo recepta hodie sententia est, ut nemo ausit contra hiscere.1

483 b. Paul Voet says; Quid si circa successionem ab Intestato, statutorum sit difformitas? Spectabitur loci statutum, ubi immobilia sita, non ubi testator moritur.2 Rodenburg speaking of laws, which are purely real, (quæ quidem jure precipui merè realia sunt,) says; Cujusmodi appellamus ea, quæ de modo dividendarum ab intestato hæreditatum tractant, territorium non egredientia; conspirant enim eo vota fere omnium, bona ut dijudicentur sua lege loci, in quo sita sunt vel esse intelliguntur.3 Burgundus, after remarking, that there is a diversity of opinion upon this subject among jurists, some holding, that the law of the situs of the property is to govern, some, that the law of the domicil of the intestate, and some few, that the law of the place, where the intestate happened to die, then asserts his own opinion. Bonorum dua sunt species; alia enim mobilia sunt, alia immobilia; illa a personâ, hæc a situ cujusque provinciæ legem accipiunt; videlicet, ut nulla habita ratione originis, aut mortis, aut domicilii, tam hæredum, quam ipsius defuncti, dividantur secundum consuetudines locorum, ubi bona vel sunt, vel sita esse intelliguntur.4

§ 483 c. Boullenois treats the subject as so entirely free from doubt, as to require no comment or expla-

3 2 Rodenburg, De Divers. Statut. tit. 2, ch. 2, § 1, n. 1; 2 Boullenois,

Appx. p. 14; 1d. p. 74.

¹ Bynkers. Quest. Privat. Jur. Lib. 1, ch. 16, p. 180; ante, 1, § 381.
½ ² P. Voet, de Statut. § 9, ch. 1, n. 3, 4, p. 252, 253, edit. 1715; Id. p. 305, 306, 307, edit. 1661; ante, § 433, 475. — Paul Voet gives a long list of authorities, supporting the doctrine, ut immobilia statutis loci regantur, ubi sita, P. Voet, § 9, ch. 1, n. 4, ubi supra.

⁴ Burgundus, Tract. 1, n, 36, p. 38.

§ 484. We have already had occasion to state, that in the interpretation of wills of immovable property, and of movable property, if the description of persons, who are to take, be by some general designation, such as "heirs," or "next of kin," "issue," or "children," the rule of the common law is, that they are to be ascertained by the Lex domicilii, both in regard to immovable property, and to movable property, unless the context furnishes some clear guide for a different interpretation.1 The same rule will apply in cases of the descent and distribution of movable property ab intestato, for the reason already suggested; that it is deemed by fiction of law to be in the place of his domicil, and therefore to be distributable according to the Lex domicilii; and consequently, who are the "issue," or "children," or "heirs," or "next of kin," is a matter to be ascertained by that law.2 But in regard to immovable property a different rule prevails, founded upon the actual situs; and as the succession is to be according to the Lex loci situs, the persons, who are to take by succession, can be ascertained only by reference to the same law.3

§ 484 a. Foreign jurists generally, although not

1 Ante, § 479 a, 479 m, 479 n; 2 Burge, Comm. on Col. and For. Law,

Pt. 2, ch. 9, p. 855 to 858.

² See Thorne v. Watkins, 2 Ves. 35; Brown v. Brown, or Gordon v. Brown, 2 Hagg. Eccl. R. 455, note; S. C. 4 Wilson & Shaw, 28; P. Voet, De Statut. § 3, ch. 1, n. 2, p. 100, edit. 1715; Id. p. 111, edit. 1661; Elliott v. Lord Minto, 6 Madd. R. 16; Earl of Winchelsea v. Garety, 2 Keen, R. 293, 309, 310; ante, 479 e; post. § 490, § 529.

³ Doe d. Birtwhistle v. Vardill, 5 Barn. & Cresw. 438; S. C. 6 Bligh, R. 749; S. C. 9 Bligh, R. 32; ante, § 364 to § 366, § 426 to 429, § 483; 4 Burge, Comm. on Col. and For. Law, ch. 4, § 5, p. 150 to p. 156; Id. ch. 15, § 4, p. 722 to p. 734; Elliott v. Lord Minto, 6 Madd. R. 16; Earl of Winchelsea v. Garety, 2 Keen, R. 293, 309, 310; post, § 529.

nation.¹ D'Argentre, as we l maintains the same opinion.² 5 tamen vulgo a doctoribus recepturet successione intestati disponenegredi fines territorii. Atque is diversitatem statutorum diversim aliter, quam si per fictionem u sunt patrimonia. Et immobilia loci, in quo jacent. Statutum i extendit se ad res immobiles in subjacent dispositione juris comobtinet,³

§ 483 d. And not to dwell i although not without controvers rists, is generally established, we ion of Huberus. His language omitti Quæstio frequens in foris l mani tamen aliena terminis: Quia jus succedendi ab intestato in locis domicilium, atque in iis locis, ubi b dubitatur, secundum utrius loci le, sit. Communis et recta sententia ibus servandum esse jus loci, in quia cum partem ejusdem territorii risdictionis legibus adfici non possu ibus nihil esse causa, cur aliud sequamur; quia res mobiles nor versus territorium, sed ad personar taxat : qui aliud quam, quod in loc voluisse videri non potest.4

⁴ I Boullenois, Observ. 20, p. 358; 2 Boul

² Ante, § 438.

Sand, Decis, Lib. 4, tit. 8, Defin. 7, p. 19;
 Hubecus, Vol. 1, Lib. 3, De Success, n. (s
 Comm. on Col. and For. Law, Pt. 2, ch. 4, § 5

the law of real property, which must be taken the country, where the land lies, and how much the law of personal property, which must be from the law of the domicil, and to blend together, so as to form a rule applicable to the question, which neither law separately fursufficient materials to decide."

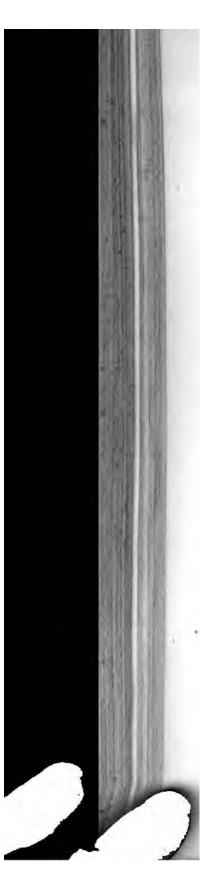
186. Two cases of a curious nature were on ame occasion mentioned by Sir William Grant, lustrative of his remarks, which cannot be better d than in his own language. "I have argued, he) in the House of Lords, cases, in which culties of that kind occurred. Two of the most mrkable were those of Balfour v. Scott,2 and mmond v. Drummond.3 In the former, a perdomiciled in England died intestate, leaving d estate in Scotland. The heir was one of the et of kin; and claimed a share of the personal tate. To this claim, it was objected that, by the w of Scotland, the heir cannot share in the personal property with the other next of kin, except on conlition of collating the real estate; that is, bringing into a mass with the personal estate, to form one common subject of division. It was determined, however, that he was entitled to take his share without complying with that obligation. There, the English law decided the question."4

Brodie v. Barry, 2 Ves. & Beames, R. 130, 131.

² See Robertson on Successions, p. 202 to 207; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 15, § 4, p. 731; 6 Brown, Parl. R. 731, by Tomlins.

³ 6 Brown, Parl. R. (Tomlin's Edit.) p. 550; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 15, § 4, p. 729.

⁴ Brodie s. Barry, 2 Ves. & Beam. 130, 131.



§ 487. He then added; "In mond, a person, domiciled in estate in Scotland; upon which itable bond, to secure a debt co He died intestate; and the que of the estates this debt was to clear, that by the English law was the primary fund for the pa was equally clear, that by the real estate was the primary fund the heritable bond. Here wa legum. It was said for the he estate must be distributed acc England, and must bear all the it is by that law subject. On the said, that the real estate must law of Scotland: and bear all the it is by that law subject. It the law of Scotland should preva estate must bear the burthen."1

§ 488. In conclusion he s case, the disability of the l him to England; and the per tributed, as if both the domicil had been in England. In the to claim exoneration out of the per into England; and the personal ε as if both the domicil and the rea Scotland." ²

¹ Ibid. See also Drummond v. Drummolin's Edit.) p. 550; post, § 529; Robertson 4 Burge, Comm. on Col, and For. Law, P. 734.

² Brodie v. Barry, 2 Ves. & Beam. p. 132:

§ 489. Another illustration is furnished by the very case then in judgment before Sir William Grant, which turned upon the question, whether an heir at law of heritable property in Scotland, being a legatee of personal property, which was in England, under a will of the testator, which intended to dispose of all his real property in England and Scotland, but which will, not being conformable to the law of Scotland, was not capable of passing real estate there, should be put to his election to take the legacy under the will, or to surrender to the purposes of the will the Scotch heritable property. Sir William Grant decided in the affirmative; and said: " Now, what law is to determine, whether an instrument of any given nature or form is to be read against an heir at law for the purpose of putting him to an election, by which the real estate may be affected? According to Lord Hardwicke, and the Judges who have followed him, that is a question belonging to the law of real property; for they have decided it by a statute, which regulates devises of land. Upon that principle, if the domicil were in Scotland, and the real estate in England, an English will, imperfectly executed, ought not to be read in Scotland for the purpose of putting the heir to an election; and, upon the same principle, if, by the law of Scotland, no will could be read against the heir, it would follow, that a will of land, situated in Scotland, ought not to be read in England, to put the Scotch heir to an election. Doubting much the soundness of that principle, I am glad, that the case of Cunningham v. Gayner,1 relieves

¹ I Bligh, R. 27, note; Robertson on Successions, p. 219, 220.

me from the necessity of decidin whichever law is applied to the present case, the result will be the law of Scotland is resorted to determines, that the English against the Scotch heir, for the him to an election."

§ 489 a. Other questions of a embarrassing nature may arise, as extent of the liability of the hei debts, and other charges of the in on his real estate, situate in differe different rules prevail, as to the na the liability of the heirs in respect and the real estate descends to dit in a different manner in the r The question may respect the e: applicability of one or more of t the discharge of such debts or ot liability of the heirs in solido, or tariâ; or the right of the heirs real estates in one country, to con nity from the heirs or devisees of another country; or the right of tl ceed against them all in solido, or tariâ.2

§ 489 b. Many cases of this secussed by foreign jurists, and debunals. Thus, for example, where succession has been situate in a

¹ Brodie v. Barry, 2 Ves. & Beames, R. 127 Robertson on Successions, p. 217, 218.

² See 1 Boullenois, Observ. 17, p. 277 to p much discussed. Bouhier, Cout. de Bourg. ch

laws the creditors are permitted to proceed against each heir in solido, and another part in the country of the domicil of the intestate, by whose laws the creditors are entitled to proceed against each heir pro portione hæreditaria; there has been no small diversity of judgment, as to the rule, which ought to be applied in favor of the creditors; whether the rule of the law rei sitæ, or of the law of the domicil, as to the nature and extent of the liability of the heirs.1 Perhaps, in such a case, the right of the creditors against the heirs respectively may most properly be deemed to be governed by the Lex rei sita; and the mode of proceeding against them be regulated by the law of the place, where he seeks his remedy. If he seeks to enforce his rights in the place of the domicil of the intestate, he must recover against each heir pro portione hæreditaria. If he seeks to enforce them in the other country, then the heirs are there liable to him in solido. But this opinion is far from having the assent of several distinguished jurists. They hold, that the creditors are entitled to proceed against the heirs in either country, according to the law of the domicil of the intestate; because it is there, that they suppose the heirs to have contracted the debt to the creditors. Of this opinion are Paul de Castro, Christinæus, and Bouhier, as well as the judges of several foreign tribunals.2 On the other hand,

¹ 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 15, § 4, p. 722, 723, 724, who cites several authorities upon the subject. Among them are Christin. Tom. 1, Decis. 283, n. 15, 16; J. Voet, Lib. 29, tit. 2, n. 31; Merlin, Répert. tit. Dette, § 4; 1 Boullenois, Observ. 17, p. 278; Bouhier, Cout. de Bourg. ch. 21, n. 213.

² 1 Boullenois, Observ. 17, p. 277, 278; Bouhier, Cout. de Bourg, ch. 31, n. 213, p. 416; Christin. Decis. Tom. 1, Decis. 283, n. 15, 16, p. 353.

other jurists hold, that in each of the heirs contract with the creative the law of the place, where the support, and is assumed by the heir, site. Of this latter opinion are jurists. Merlin inclines strong ion. Boullenois leaves the quexpression of his own views, say full of difficulty.

§ 489 c. A question of another tween the heirs or devisees of who, as between themselves, in ca wills of immovable property in governed by different laws, is ul debts of creditors or other char property is liable, and which son been compelled to pay. In sucl must first arise, which fund is prin payment or discharge thereof inte seem, that, as between themselve liable should ultimately be held of in exoneration of all the other fu such priority of liability, but all t liable pari passu, then it should : each fund, wherever it is actually bute pro rata, according to its va each heir respectively, to the disc burthen. If part of the funds contribution, they should still po

See also J. Voet, ad Pand. Lib. 29, n. 31, Répert. Dette, § 4.

¹ Bouhier, Cout. de Bourg. ch. 21, n. 213,

Merlin, Répertoire, Dette, § 4.
 Boullenois, Observ. 17, p. 279.

and the residue contribute. It will, however, be found difficult to affirm, that foreign jurists and tribunals have given any uniform support to these doctrines.¹

Pothier appears to hold this doctrine. Pothier des Successions, ch. 5, § 1, p. 223, 4to edit. He there cites a case, of which Mr. Burge has given the substance as follows. "An inhabitant of Blois, where the coutume burthened the heir to the movable estate with all the movable debts, left in his succession biens propres situated in Blois, and others situated in Orleans. The coutume of the latter place makes all the different heirs subject to all the debts. He left an heir to his movable estate, and another heir to his biens propres, situated in Orleans and Blois. In this case Pothier says, that the heir to the bien propres must, comformably to the coutume of Orleans, where he had succeeded to that part of the succession, bear his part of all the debts of the succession, even those, which are movable, regard being had to the value, which the real estate at Orleans would bear to the whole succession. By this apportionment effect is given to the coutume of Orleans as well as to that of Blois, for the heir to the real estate contributes only to the debts in respect of that part of the estate, which is situated in Orleans, and he does not contribute in respect of that part, which is situated in Blois." 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 15, § 4, p. 724, 725. The same subject is discussed at large in 2 Froland, Mem. des Statut. ch. 32, p. 1547 to p. 1573, and he cites several adjudications, and among others one stated by Basnage, Coutum. de Normand. Tom. 2, art. 408, p. 141. See also 1 Boullenois, Observ. 17, p. 284, who cites Mornac, Comm. on Dig. Lib. 5, tit. 1, 1. 50, 1, De Judiciis. Mr. Burge has expressed his own opinion in the following words. "It may perhaps be stated as the correct rule, that where an obligation or an exemption is annexed to the personal estate, but no similar obligation or exemption is annexed to the real estate, the lex loci domicilii will prevail in whatever country the rights or liabilities of the heir became the subject of adjudication. But if similar obligations or exemptions are annexed to the personal and real estate by the respective laws, to which the succession to these two species of property is subject, and the effect of adopting the one law rather than the other would be to throw on the one estate a burthen, or confer on it an exemption not annexed to it by the law of the country which governed the succession to it, it would be the more just and correct rule to adopt the lex loci rei sitm, rather than the lex loci domicilii. The case of Drummond and Drummond would seem to warrant the adoption of such a rule, nor is the decision in the Bishop of Metz's succession at variance with it. The lex loci domicilii had alone annexed to the personal estate an exclusive liability to pay the

§ 490 Other illustrations of the ant upon the administration of tl are to be found in the application the interpretation of wills, whether Lex domicilii or the Lex rei site. regard movable property, or im We have already had occasion to ject in another place.1 But it m use to state one or two cases a litt has been already done. A quest recently discussed in the House will made in Virginia, by which queathed to his sister, Mary Brown one fourth share of the balance of death to be equally divided amou she should have any." The qu estate Mary Brown took under a life estate, or an absolute prop pearing, that the courts of Virgi the bequest to give her an ab the footing of that decree, the deeming it a question of America the same construction.2

§ 491. In another case, the s adopted; and the Court laid do

debts, and no such liability was annexed to t loci rei sitæ. The only liability which was a by that law, was an obligation to contribute but such a contribution could not take placestate was subject to a law, which made it extherefore the liability to contribute could only estate was subject to the same law as the real on Col. and For. Law, Pt. 2, ch. 15, p. 732, 733.

¹ Ante, § 479 a to 479 n.

² Gordon v. Brown, or Brown v. Brown, 3 I S. C. 4 Wils. & Shaw, p. 28; ante, § 479 c.

in the construction of a will the Lex domicilii must govern, unless there is sufficient on its face to show a different intention in the testator. The facts were these. A lady, a native of Scotland, was domiciled in England. On a visit to Edinburgh she made a will entirely in the Scotch form, and it was deposited with the writer at Edinburgh. She had personalty in England only, and died in England. Scotland, then, was the domicilium originis et forum contractûs; but, on the other hand, England was the forum domicilii and the locus rei sitæ. The question was, whether by the legatee's death in the lifetime of the testatrix the legacy lapsed according to the law of England, or survived to the legatee's representatives according to the law of Scotland. The Court decided, that being domiciled in England, it was to be presumed, that she intended the law of England to be applied; and, that there was not enough in the will to repel that presumption.1

Anstruther v. Chalmers, 2 Simons, R. 1; 3 Hagg. Eccl. R. 444[‡] Yates v. Thomson, 3 Clarke & Finell. R, 544, 570; ante, § 479 c.

CHAPTER XII

FOREIGN GUARDIANSHIPS AND AL

§ 492. THE order of our subject the consideration of the operation in relation to persons acting in an guardians, tutors, and curators in ecutors and administrators post mort And first, in relation to the Roman law guardianship was Tutela, and (2.) Cura. The firs until they arrived at fourteen vea females, until they arrived at two which was called the age of pu respectively. From the time of 1 were twenty-five years of age, wh majority, they were deemed mino During the first p curatorship. their guardian was called tutor, and pupils; during the second period, called curator, and they were ca England the guardian performs t a tutor and a curator under the France, the tutorship lasts until tl jority.4

¹ See 3 Burge, Comm. on Col. and For. I 1001 to 1014.

² I Domat, Civil Law, B. 2, tit. 1, p. 260;
Law, ch. 9, p. 15, 17, 18; 1 Brown, Civil Law
See also Ersk. Inst. B. 1, tit. 6, § 1, p. 128.

³ Halifax, Analysis of Civil Law, ch, 9, p. 1 Law, B. 1, ch. 5, p. 129, 130.

⁴ 1 Domat, Civil Law, B. 2, tit. 1, p. 261.

§ 494. In treating of guardianship, two questions naturally arise; (1.) Whether the authority of a guardian over the person of his ward is local, and confined to the place of his domicil, or extends every where? (2.) Whether the authority of the guardian over the property of his ward is local, or extends every where?

§ 495. In regard to the first point, (the authority of the guardian over the person of his ward,) Boullenois maintains, that the laws, which regulate it, are strictly personal; and therefore that the authority extends to the ward in foreign countries, as well as at home; and is of equal validity and right, according to the law of the domicil, in every other place. "Je mets (says he) au nombre des statuts personnels, ceux, qui mettent les enfants sous la puissance de leur père, ou de leur tuteur." 1 From this, it would seem to follow, that the tutor is to be recognised, as fully entitled to assert any claims over the movable property of his ward, and to sue for the debts due to his ward in foreign countries, without having any confirmation of the guardianship by the local authorities.2

§ 496. Merlin expressly holds the same doctrine, asserting that the foreign guardian, in such a case, is competent to maintain any suit for the debts due to his ward in France and in the Netherlands, without any interposition of the local authorities, to confirm the guardianship.3 "Il est (says he) de

^{1 1} Boullenois, Observ. 4, p. 51; Id. p. 68; ante, § 57; 2 Boullenois, Observ. 39, p. 320, 330.

² 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1002,

Merlin, Répertoire, Absens. ch. 3, art. 3, p. 37; Id. Faillite, § 2,

principe, que les procurations rever quise par la loi du lieu, où elles s effet partout. Aussi ne s'est-on jo tendre, que le tuteur nommé à u interdit, par le juge de son domic un pays étranger contre les dél l'autre, qu'après avoir fait décla sa nomination exécutoire dans ce

§ 497. Vattel lays down a simi comprehensive terms. "It belo domestic Judge to nominate tu for minors and idiots. The lav has an eye to the common advar harmony of nations, requires, t nomination of a tutor or guardia knowledged in all countries, wi have any concerns."2 Huberus, as we have already semaintained by Hertius. After h he adds; Ratio hujus regulæ est enim subditi quá talis nemini ali summo imperanti, cui se submisit. quæ personæ qualitatem sive ch comitari personam soleant, ubicu versetur, tametsi in aliam civitate si quis, mager, infamis, vel prodigi tutor, (says he,) datus in loco c

n. 2, art. 9, 10, § 2, p. 412. See also Id. 1 art. 2; ante, § 53, 54.

¹ Merlin, Réportoire, Faillite, § 2, n. 2, ar 54.

² Vattel, B. 2, ch. 9, § 85.

³ Ante, § 60.

^{4 1} Hertii Opera, de Collis. Leg. § 4, n. 8, p. 175, edit. 1716; ante, § 51.

alibi sita administrat. He applies this rule, however, solely to personal rights and personal incapacities, rights of property and power over movables. For in respect to immovables, he adds this important qualification; Quoniam ipsi fatemur, si externa civitas circa bona immobilia aliquid directe disposuit, eam legem servari oportere.\(^1\) Stockmans holds a broader opinion. Tutor etiam pupilli a Prætore authoritatem et administrationem suam extra territoriam Prætoris, et in bona ubicunque locorum sita exercet.\(^2\) Indeed, this same doctrine is commonly asserted by all those foreign jurists, who give to personal laws an ubiquity of operation.\(^3\)

I Ibid.

² Stockman. Decis. 125, n. 6, p. 262. Dumoulin is thought to hold the same opinion; but it may well be doubted, if it admits of that interpretation. Post, § 502 a; Molin. Opera, Tom. 3, Comm. ad Cod. Lib. 1, tit. 1, l. 1, Conclus. de Stat. p. 556, edit. 1681. Matthæus, who has also been cited on the same side, certainly does not hold the opinion. His language is; Sed etsi silentio suo quodammodo approbare videatur curatorem a judice domicilii datum, vix tamen est, ut curator illa prædia alibi sita proscribere ac vendere possit, sine speciali permissu ejus judiciis, in cujus territoria sita sunt. Sic enim et Tutor hodie a judice domicilii datur; nec tamen universorum negotiorum et bonorum administrationem consequitur, nisi cesset judex ejus territorii, in quo prædia sita sunt. Matthæus, de Auctionibus, Lib. 1, ch. 7, n. 10, p. 39. See also 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1002, 1003. He says; "The appointment of tutor or guardian, committees or curators, so far as it confers the care and custody of the person of the minor or lunatic, could not consistently with the principles of international jurisprudence be made by any other judicial tribunal but that of the country, to which the minor or lunatic was by his residence subject. According to the opinion of foreign jurists, every judicial tribunal is bound to recognise this appointment. They consider, that the law, which places the minor or lunatic sub tutelà or sub curà is a personal law, affecting the status of the person, and that the relation of tutor and ward, which it has constituted, continues to exist notwithstanding the persons may have resorted to any other country."

^{3 3} Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1004,

§ 498. On the other hand, th maintain a different opinion. Pau laws respecting either persons o the sense of the civil jurisprude ritorial authority, and lays down following rules; (1.) that a person affect the person beyond the terr so that he is not to be repute territory, as he was within; (2.) ute accompanies the person eve to property within the territory where the person has his dom he is subjected.1 He adds. distinction in this respect, whet rem or in personam; or, whether tend to property situate in a for directly or indirectly; for the sam case. Quia nullum statutum, si sonam, si de ratione juris civilis extendit ultra statuentis territoriu doctrine, however, by admitting always deemed to be in the place party, and are therefore govern John Voet, as we have se lar opinion in the broadest a terms.4

§ 499. It would seem from I the House of Lords deemed English guardian sufficient to it

¹ P. Voet, De Stat. § 4, ch. 2, n. 6, p. 12. 1661.

² Id. n. 7, p. 124, edit. 1716; Id. p. 138, e

³ Ante, § 52, § 377.

⁴ Ante, § 54 a.

⁵ Cited in 4 T. R. 140, and 1 H. Black. 6

personal property of his ward in Scotland, upon the ground, that the administration of his personal estate, granted by the usual authority, where he resided, must be taken to be every where of equal force with a voluntary assignment by himself. The courts of Scotland had unequivocally decided the other way. Whether this decision has since been acted upon in England does not distinctly appear.1 It has certainly not received any sanction in America, in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy, which have circumscribed the rights and authorities of executors and administrators.2

§ 500. In regard to the other point, whether guardians appointed in foreign countries have any authority over the property of their wards, situate in other countries, foreign jurists are generally, although not universally, of opinion³ in respect to movable property, that since it is deemed to be in the domicil of the owner, the law of the domicil is to govern, and the rights and powers of the guardian, tutor or curator over it, ought to be admitted to prevail every where to the same extent, as they are acknowledged by the law of the domicil.⁴ But in respect to immovable property, foreign jurists as

¹ See Beattie v. Johnstone, 1 Phillips, Ch. R. 17; S. C. 10 Clarke & Finell. R. 42, where the point is ruled the other way.

² Morrill v. Dickey, 1 John. Ch. R. 153; Kraft v. Vickery, 4 Gill & John. R. 332.

³ See Muhlenbruch, Doctr. Pand. Lib. 1, P. 1, § 72, p. 167, 168.

⁴ Ante, § 495 to § 498; 4 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1010, 1011.

generally, although not unive doctrine, (whatever may be t able property,) that the rights a dians are circumscribed by the of their appointment, and do countries, where the immovable In other words, the laws rei sita a guardian in one country ca another, except in the form under the regulations prescribe Burgundus states the doctrine Speaking of the capaci ness. minors, he says; Proinde confite circa rem alterare minor velit, ut pothecandi facultatem exigere, ibi debere, ubi bona sunt sita. Nam tiani in alienatione manifestè requ ejus provinciæ, in quo prædius He then adds; Nec immerito Fel enda est dispensatio respectu re esse erit, cui persona subjecta est, cui res supponitur. He says, tha given by others. Cujus rei ratio per ejusmodi dispensationem alter tura ipsius beneficia et non person qualification of the doctrine in c ætatis is obtained, saying; Erge ætatis in hoc dumtaxat impetretur minor celebrare et peragere possit rum administrationem consequi, tiones inire, sane hoc casu postu domicilii, cui in personas plen

¹ Burgundus, Tract. 1, n. 12, p. 23.

tum.¹ But whether it exists, or not, is immaterial, as Burgundus in another passage speaks directly on the present point. Unde ferè obtinuit, ut Judex domicilii, ubi et mobilia, rationesque et instrumenta reperiuntur, tutelam solus deferat. Sed non aliter universorum bonorum administrationem consequitur, quam si supersedente judice situs, solus ille constituatur.² This, however, is a qualification by no means generally conceded or admissible.

§ 500 a. We have already seen, that Hertius, and Matthæus and Paul Voet, and John Voet, hold the opinion, that the guardian has not, by virtue of his appointment in the place of the domicil of his ward, any rights or authorities over the immovable property of his ward in a foreign country.3 Paul Voet in another place adds; Verum à contractibus proprie sic dictis, me conferam ad quasi contractus, et quidem tutelæ, vel curatelæ. Ubi sequentia examinanda. Quid si pupillo dandus sit tutor, illene dabit, ubi pupillus domicilium habet, an ubi bona pugilli immobilia sita sunt? Respondeo; Quamvis regulariter ab illo Magistratu detur tutor, ubi pupillus domicilium habet, ubi parentes habitarunt; etiam qui dat tutorem, eum primario personæ, non rei dedisse, censeatur; adeoque is, qui simpliciter datus est, ad res omnes etiam in diversis Provinciis sitas, datus intelligatur; Id quod plerumque jure Romano obtinebat, quo diversarum Provinciarum Magistratus, uni suberant Imperatori. Ne tamen videatur Judex domicilii quid extra territorium fecisse, non præjudicabit Judici

¹ Ibid. n. 14, p. 24; 1 Boullenois, Observ. 9, p. 150; Id. Observ. 6, p. 129.

² Burgundus, Truct. 2, n. 18, p. 69.

³ Ante, § 497, 498.

loci, ubi nonnulla pupillaria bon pupillo ratione illorum bonorun ibidem recte dederit. Unde etial rum alienandis contentio; si qu Provincia, tùtius egerit tutor, qui icilii, si deeretum ub utroque Jua domicilii pupilli, et rei sitæ. 1 1 contend, that permission ought to Judge to such a guardian to ad immovable property, at the san without such permission the gua any rights or authorities over i Non autem in loco originis vel si sed tantum in loco domicilii pi illius camerá pupillari aut ma est; qui hoc ipso dati intelligu patrimonio, ubicunque existenti. itate magis, quam juris rig**o**re su quo pupillus immobilia habet subest eidem magistratui suprem ratione domicilii, magistratus le bilia, rebus in suo territorio e. posset tutorem dare.3

§ 501. Boullenois after stati principal object of guardianship custody of the person, as of pr has in view the administration a crty (biens), and that the right:

⁴ P. Voet, de Statut, § 9, ch. 2, n. 17; Id Id. p. 329 to 331, edit, 1661.

 ³ Burge, on Col. and For. Law, Pt. 2, c
 3 J. Voet, ad Pand. Lib. 26, tit. 5, § 5, Tc
 Pt. 2, 8, 7, Tom. 1, p. 39, 40. See als
 3 Burge, Comm. on Col. and For. Law, ch.

all real rights. La garde consiste, ou en droits de proprietè, ou en droits d'usufruit; et il n'y a rien de plus réel, que ces sortes de droits. Par conséquent elle ne peut être régie, que par la loi de la situation. C'est cette Loi, qui donne, ou ne donne pas; qui appelle certaines personnes, ou qui ne les appelle pas. De là il semble, qu'il faudroit nécessairement en conclure, que chaque coutume, qui admet la garde, et où il y a des biens, a seule le droit de déférer la garde, à qui bon lui semble; et qu'il n'y a que ceux, à qui elle la défère, qui puissent etre gardiens, quelque domicile d'ailleurs, qu'aient ceux, qui tombent en garde, et ceux, qui sont appelés à la garde. He admits, that there are jurists, who assert the contrary.²

§ 502. Hertius, as we have seen, asserts the same doctrine as to immovable property.³ Froland arranges himself on the side of those, who assert the reality of the laws, which respect guardianship, distinguishing, however, as to the quality of persons entitled, the right of possessing the property, and the formalities accompanying it.⁴

§ 502 a. Dumoulin holds the opinion, that the Lex rei sitæ is to govern in all such cases; and explains himself with unusual fulness on the point. Aut statutum agit in personam, et tunc non includit exteros, sive habiliter, sive inhabiliter personam, unde si statuto hujus urbis cavetur, quod contractus facti per minorem 25. annis non valeant sine consensu suorum pro-

¹ 2 Boullenois, Observ. 29, p. 320, 321, 322, 339, 340; 3 Burge, Comm. on Col and For. Law, Pt. 2, ch. 23, p. 1001, 1002.

² Ibid.

³ Ante, § 497; 1 Hertii, Opera, De Collis, Leg. 4, n. 8, p. 123, 124, edit. 1737; Id. p. 175, edit. 1716.

^{4 1} Froland, Mém. ch. 16, p. 717, 749, 750, 752.

pinquorum, et authoritate Judicis de subditis suæ jurisdictioni per curat, et tutor, dat, ab his. Und poterit etiam extra locum prædie locare sine dicta solemnitate : Sed dia alibi sita. Quia in quantr restringitur ad suos subditos; et i restringitur ad sitas intra suum te autem minor annis poterit etiam de statuti etiam inter locum illum dis qui datus est tutor vel curator à sit inhabilitatus propter tutelam, et pro bonis ubicumque sitis. Quia solius, sed in vim juris communis. pretationem legis, quæ locum habe holds the same opinion. Ubi r risdictionum et territoriorum diver et unus non intromittat se de terri enim inspicienda est consuetudo l maxime quoad immobilia.2

§ 503. Lord Kaims lays dow trine to be, that it is of no imp curators of minors are chosen; choice made in England of cur lish or Scotch, will be held e He admits, that the powers of a in England are limited, extendi and not to his estate; or rather, dians are, or may be, appoint Chancery for each. But the

² Everhard. Consil. 185, n. 3, p. 406.

Molin. Opera, Tom. 3, ad Cod. Lib. 1, tp. 556, edit. 1681; ante, § 497, note. See Statut. tit. 2, ch. 5, n. 16; 2 Boullenois, Apr. 3 Boullenois

dian or curator, however appointed, in a foreign country, is not understood by him to extend to any real estate in Scotland.12

§ 504. There is no question whatsoever, that, according to the doctrine of the common law, the rights of foreign guardians are not admitted over immovable property, situate in other countries. Those rights are deemed to be strictly territorial; and are not recognised, as having any influence upon such property in other countries, whose systems of jurisprudence embrace different regulations, and require different duties and arrangements.2 No one has ever supposed, that a guardian, appointed in any one state of this Union, had any right to receive the profits, or to assume the possession, of the real estate of his ward in any other state, without having received a due appointment from the proper tribunals of the state, where it is situate. The case falls within the well known principle, that rights to real property can be acquired, changed, and lost only according to the law rei sitæ.3

§ 504 a. The same rule is applied by the common law to movable property, and has been fully recognised both in England and in America. No foreign guardian can virtute officii exercise any rights, or powers, or functions over the movable property of his ward, which is situated in a different state or country, from that, in which he has obtained his letters of guardianship. But he must obtain new letters of

^{1 2} Kaims, Equity B. 3, ch. 8, § 1, p. 325; Id. § 4, p. 348.

² See 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1009, 1010, 1011.

³ Ante, § 424, 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1005, 1006, 1009, 1010.

guardianship from the local tri grant the same, before he can powers, or functions over the sa upon the point are to be foun American authorities, probably has always been taken to be un upon the close analogy of the c tors and administrators.¹

§ 505. Whether a guardian h the domicil of his ward from o seeing, that it may have a most as to the succession to his mov of his death, is a matter, which In favor of the affirm cussed. distinguished foreign jurists, as enumerate Bynkershoek, Breton Bynkershoek says John Voet. pilli sui domicilium mutare, per superstes, nescio quisquam serio sionis legitimæ causa non vers setur, multa disputatio est. bunt, si superstes parens vel tut transferat, ut ejus, intestati mo quam ante fuit? He proceeds question, and comes to the con Sic puto. Scio impuberem. marte non recte domicilium suum non posset, qui eum repræsentat, cum omni effectu, nisi qua lex

^{1 3} Burge, Comm. on Col. and For. Law, 1010; ante, § 499; Morrell v. Dickey, 1 Vickery, 4 Gill & John. R. 332, 340, 341; § 512, 513. But Mr. Chr. Walworth see in McNamara v. Dwyer, 7 Paige, R. 236, 2 2 Bynkers. Quest. Privat. Juris. Lib. 1, 1744.

Rodenburg says: Quæramus et illud quod frequentioris est incursionis : Hollandus major viginti, minor viginti quinque annis transfert domicilium Ultrajectum, ubi vigesimo anno tutela vel cura finitur. Quid dicemus perventurum illum suam in tutelam? Respondi ex facto consultus minori hodie constituendi domicilii. facultatem non eses, tutori esse; qui ut contrahere, ita et domicilium potest constituere, quod collocetur illud per contractum, de quo mox latius. Proinde in proposita mihi specie, cum mater, quæ tutrix esset, mutato à morte viri domicilio, Ultrajectum concessisset, ibique infans adolevisset: dixi ex Ultrajectinis legibus æstimandos perfectæ ætatis annos; dummodo fraus absit, aut præjudicium tertii, extra quod vix est ut non dixeris tutori, maximè matri locum ad habitandum, pupillumque educandum, eligendi Jus esse, illudque ipsum dubii veriti Batavi Jurisconsulti tutori agnato auctores fuerunt, ut stipularetur à matre illa, cum cogitaret ex Hollandia concedere Trajectum, ne ea res infantis adspectu ullo modo domicilii mutationem induceret; quanquam fateor, si quid hoc ad rem pertinet, positâ hâc sententia, in potestate tutoris fore, tutela semet ocius exuere, nisi tum potius super fraude quærendum foret.1 John Voet says; Plane, si etiamnum minorennis sit, patre vel matre viduâ domicilium mutante, filium etiam videri mutasse, si et ipse translatus sit, nec ex prioris sed novi domicilii, à patre matreve recenter constituti, jure censeri in dubio debere, rationis est. Utut enim haud difficulter admittendum sit, minorennem non magis posse domicilium mutare, quam contrahendo se obligare : tamen, quemadmodum contrahere auctore tutore per-

Rodenburg, De Div. Stat. tit. 2, ch. 1, § 6; 2 Boullenois, Appx. p. 57, 58.

missum ei est, ita et domiciliu tanquam tutelæ ejus aut saltem tutoribus cæteris non contradic vetat: nisi ex circumstantiis m domicilii pupillaris translatione morum, spem successionis ex prio bentium, factam esse.¹

§ 505 a. Bynkershoek thinl make any such exception of cas intrinsic difficulty of ascertaining shall constitute evidence of a Burgundus seems to domicil.2 that the domicil of the guardia of the minor. Pupilli ipsi sibi non possunt. Bartolus autem ib ium, ubi cum tutoribus, sive alit sententia ita demum mihi vera vid studiorum caussâ, vel alio profe Qui venian ibi non steterint. propriæ negotiationi commodisq minor domicilium instruere potes habere domicilium, ubi maritu tori separatione factà, ipsa sibi d

§ 505 b. Boullenois has spok ness and precision on this subject easy to say with entire exactness. From the best examination, whice make of his various discussions of different works, he seems to have the law of the actual domicil minor constituted the rule to re

¹ J. Voet, ad Pand. Lib. 5, tit. 1, § 100, T

² Bynkers. Quest. Jur. Priv. Lib. 1, ch. 1

³ Burgundus, Tract. 2, n. 34, p. 80, 81.

to the minor, if he died during his minority, although it was not the domicil of his birth, but was acquired by his parents afterwards. (2.) That the like rule did not apply to the case of a minor under tutelage; and that his guardian could not by a change of domicil change the succession to the property of the minor. (3.) That, hence, if a minor, following the change of domicil of his parents, should die, his movable estate would be governed by the law of sucsession of the new domicil, if there was no fraud in the removal. (4.) But that there was no reason. why a minor might not be reputed domiciled in the domicil of his guardian, so far as the law of that domicil would confer on him particular faculties or privileges; and that, therefore, if the law of the domicil of the guardian would give him the power of making a testament of his movables, he might make one conformable to that law; for it is but just, that, in such a case, a person domiciled there, even although a minor, should be held subject to the real laws, or laws in rem, of the place, where he is domiciled without fraud.1

¹ Boullenois, Dissert. sur Quest. de la Contrar. des Lois, Quest. 2, p. 59 to 62; 2 Boullenois, Observ. 32, p. 49 to 53. — It may not be unacceptable to give some extracts from Boullenois in this place. He says in his Dissertations; En effet, il y a plusieurs raisons, pour lesquelles le dernier domicile du pere doit régler la succession mobiliaire du fils, lorsqu'il décede en minorité. La premiere est, que le fils mineur tombant sous la puissance d'autrui, on n'a pas voulu qu'il put dépendre d'un Tuteur de changer l'ordre de succeder au mineur en lui faisant changer de domicile; ensorte qu'on n'a pas cru qu'un Tuteur dut avoir la liberté de donner ou d'ôter aux hérities présomptifs. La seconde est, qu'un mineur à raison de sa minorité est toujours présumé grevé et chargé de fidei-commis envers les héritiers de celui de qui il a reçu les biens qui doivent composer sa succession, et un Tuteur ne doit pas avoir le pouvoir de déroger à cette espece de fidei-commis. Again he says; Sur le changement de domicile d'un mineur en ce qui touche ses biens, il sem-

§ 505 c. On the other hand, I Bouhier, and Pothier, maintain

ble qu'il y auroit quelque consideration à fa venable que la succession d'un mineur aufut reglée par le domicile de ses pere et mere par mariage, il puisse se choisir tel domicile sa succession mobiliaire soit régie par ce d en suivant le domicile du pere, ou de la me mobiliaire soit pareillement assujettie aux I pourvu que d'ailleurs il n'y ait point de frau un mineur que de continuer de vivre sous pere et mere que Dieu lui a conservé, et justice dans cette conduite, ce nouveau meure juste et légitime pour le mineur, d doit suivre le sort. Que le fils mineur qui fi qui pour ce, s'est choisi un domicile soit p ses biens mobiliers, assujetti à la Loi du lie tune, et cela paroit indispensable quand le d'industrie. Il n'y a pas d'inconvenient qu ciliè au domicile de son Tuteur, quant aux Loi de ce domicile peut lui donner: c'es domicile de son Tuteur il a faculté de tes tester conformément à cette Loi. Il est juste même mineur, subisse les Loix pures réelles d Mais quant à son état de majeur, le faire dépendre que de la Loi de son or été cy-devant alleguées. Boullenois, Diss. d 2, p. 59, 61, 62. In his larger Treatise, he nous disons ici pour le cas de la succession avoir lieu pour le cas d'un testament? S' savoir si le mineur incapable de tester pi droit, le pourroit en vertu de la Loi de sor des Observations sur Henrys, observe loc mineurs sont mis sous la tutele d'un Lyon tament, lorsqu'ils seront parvenus à la pube suivent, à cet égard, le domicile de leur décidé en consultation, avec M. Severt, po Servieres, fait à l'âge de dix-huit ans. Son Paris: après son décès et celui de sa semn bas age, furent mis sous la tutele de Char nel, domicilié en Lyonnois. Le sieur de partir pour l'armée, ou il fut tué, fit son tes sœurs : il fut contesté par une autre sœur, et M. le P. Bouhier, ch. 21, n. 4, n'a ment.

equivocal terms, that the domicil of a minor, so far as it regards his succession to his estate, cannot be changed by his guardian. Mornac says; Quæsitum est, mortuo impubere, de cujus bonis mobilibus agitur, quod spectari debeat illius domicilium, utrum patris et matris, an tutoris, apud quem defunctus est; atque id,

j'avoue qu'elle n'est pas sans difficulté. En effet, puisque la Loi détermine le domicile du mineur, par le domicile du pere, je parle d'un mineur non établi, pourquoi lui donner deux domiciles, l'un pour règler sa succession mobiliaire, et l'autre pour régler sa capacité personnelle de tester? Il n'y a, comme nous venons de le dire, que le domicile de la personne qui puisse rendre capable celui qui est incapable ; et puisque le domicile du mineur est fixé au domicile du pere, comment celui de fait, qu'il peut avoir par-tout aillerus, peut-il affecter sa personne, préférablement à son domicile de droit qui est nécessairement, selon la Loi, son vrai domicile? D'ailleurs un testament apporte toujours un changement dans la succession legale du testateur, et la Loi du domicile de droit qu'a le mineur, ne lui permet pas de disposer de ses biens, et de changer rien dans sa succession. Mais pour le soutien de la décision de MM. Severt et Bretonnier, deux savants Consultants, ne peut-on pas répondre que le mineur est dans son devoir, quand il demeure avec son tuteur qui est chargé de son éducation, qu'il v demeure nécessairement et sans fraude? A la bonne heure que le domicile de son pere regle sa succession ab intestat; c'est l'intérêt des héritiers qui l'a voulu ninsi, et c'est pour cela qu'il reti ent le domicile de son pere. Mais si le mariage, si l'emancipation permettent à un mineur de changer de domicile, comme en convient M. Bouhier luimême, et que dans ce cas, le mineur puisse tester conformément à la Loi du domicile qu'il s'est choisi, pourquoi ne veut-on pas pareille chose dans le cas ou le mineur passe, par nécessité, et sans fraude, dans le domicile de son tuteur? Il est vrai que dans le cas du mariage et de l'émancipation, la succession mobiliaire de ce mineur se réglera par la Loi de son domicile de choix, et que je n'en dirai pas de même par rapport à un mineur qui n'est ni marié, ni émancipé; mais ce que je ne dirai pas pour le cas de la succession ab intestat, parce qu'il y a une Jurisprudence formée à cet égard, je puis le dire pour le cas du testament, parce que la Loi n'a rien décidé là-dessus, et qu'il semble juste de laisser à un mineur, que la mort prévient, une capacité que lui donne la Loi ou il demeure actuellement, sans fraude. Néanmoins le premier avis me paroit le meilleur; un mineur hars le domicile de son pere, avec son tuteur, habite avec lui ; mais il n'est pas proprement domicilié avec lui : il séjourne en attendant sa majorité; c'est ud plaideur qui attend là que le temps lui fasse gagner son procès." 2 Boullenois, Observ. 32. p. 51 to 53; ante, § 44, note 2, p. 44.

quia locus domicilii parentum, el ris contrarias, quoad successiones que consuetudines ferant. tuendum domicilium in ædibus Prævaluit vero eorum s referret. um minoris præsertim eo casu in in ædibus paternis ac maternis Cum enim domicilium quatuor natura, ac origine, item voluntat conventione, aut ex necessitate mi naturale domicilium minori supe quo ipse creverit, parentesque def aliud fuerit affingere minori in c ætatem non habeat iligendi nemp Imo et præstaretur ansa interdus veros mobilium minoris intereunt tibus scilicet domicilium in loca, viderent ex patriis moribus, intere nore desideria.1 Christinæus ado of Mornac on this subject.2 and positive; holding, that tl domicil of his parents, and that by his guardian. He says, that the law in Burgundy is, that the respect to the succession to th be changed by their guardians d and he reasons out the doctrin takes a distinction between the the domicil of a parent from th

¹ Mornacci, Observ. ad Cod. Lib. 3, ti 1721.

² Christin. Decis. 176, Tom. 2, p. 204.

³ Bouhier, Cout. de Bourg. ch. 21, § 3, p; § p. 441, 442.

of a guardian; and holds, that in the former case, if a change is made without fraud, the minor follows the domicil of his parents and of the survivor. But in the case of a guardian no such effect follows; for the minor is no part of the family of the guardian, but is like a stranger there, and only for a time (ad tempus).

§ 506. The same question has occurred in England; and it was on that occasion held, that a guardian may change the domicil of his ward, so as to affect the right of succession, if it is done bonâ fide and without fraud.² In that case the father, a native

¹ Pothier, Coutum. d'Orleans, Introd. n. 17. He uses there the following language. "Il nous suffit de dire, que les mineurs ne composent pas la famille de leur tuteur, comme les enfans composent la famille de leur pere : ils sont dans la maison de leur tuteur comme dans une maison étrangere . ils y sont ad tempus, pour le temps que doit durer la tutelle : par conséquent le domicile de leur tuteur n'est pas leur vrai domicile, et ils ne peuvent être censés en avoir d'autre que le domicile paternel, jusqu'à ce qu'ils soient devenus en âge de s'en établir un eux-mêmes par leur propre choix, et qu'ils l'aient effectivement établi. Il n'en est pas de même de la mere : la puissance paternelle étant, dans notre Droit, différent en cela du Droit Romain, commune au pere et à la mere, la mere, àpres la mort de son mari, succede aux droits et à la qualité de chef de la famille, qu'avoit son mari vis-à-vis de leurs enfans : son domicile, quelque part qu'elle juge de le tranfèrer sans fraude, doit donc être celui de ses enfans, jusqu'à ce qu'ils aient pu s'en choisir un, qui leur soit propre. Il y auroit fraude, s'il ne paroissoit ancune raisou de sa translation de domicile, que celle de se procurer des avantages dans les successions mobiliaires de ses enfans. Les enfans suivent le domicile, que leur mere s'établit sans fraude, lorsque ce domicile lui est propre, et que, demeurant en viduité, elle conserve la qualité de chef de famille : mais lorsqu'elle se remarie, quoiqu'elle acquiere le domicile de son second mari en la famille duquel elle passe, ce domicile de son second mari ne sera pas celui de ses enfans, qui ne passent pas comme elle en la famille de leur beau-pere; C'est pourquoi ils sont censés continuer d'avoir leur domicile au lieu ou l'avoit leur mere avant que de se remanier, comme ils seroient censès le conserver, si elle étoit morte."

² Potinger v. Wightman, 3 Meriv. R. 67; Robertson on Personal Succession, 197 to 202.

of England, died intestate, dom leaving a widow and infant ch also by a former wife. The wid was appointed guardian of her c conjunction with the guardian of first marriage, sold their real estainvested the amount in the Engli wards removed to England with the death of some of the child question arose, whether their sha able by the law of England, or b and it was decided by the Mas Wm. Grant), that it was to be by On that occasion the learned Juquestion is, whether, after the children remaining under the ca follow the domicil, which she m that, which their father had at I are capable of gaining one by The weight of authority is c the former proposition. It has of Voet and Bynkershoek; th qualifying it by a condition, the not have been changed for the of obtaining an advantage by succession. Pothier, whose aut that of either, maintains the prop ified. There is an introductory tise on the Custom of Orleans, in several points, that are common France, and, among others, the holds, in opposition to the opinion a tutor cannot change the domicil considers it as clear, that the don mother is also the domicil of the children, provided it be not with a fraudulent view to their succession, that she shifts the place of her abode. And he says, that such fraud would be presumed, if no reasonable motive could be assigned for the change. There never was a case, in which there could be less suspicion of fraud than the present. The father and mother were both natives of England. They had no long residence in Guernsey; and after the father's death, there was an end of the only tie, which connected the family with that island. That the mother should return to this country, and bring her children with her, was so much a matter of course, that the fact of her doing so can excite no suspicion of an improper motive. I think, therefore, the Master has rightly found the deceased children to have been domiciled in England. It is consequently by the law of this country, that the succession to their personal property must be regulated."1 This doctrine

¹ Potinger v. Wightman, 3 Meriv. R. 79, 80. - Mr. Burge on this subject remarks; "The domicil of choice being, that which the person himself establishes, it can only be acquired by him, who is sui juris. It cannot, therefore, be acquired by a lunatic or minor. The domicil of the father, or of the mother, being a widow, is that of the child, and a change by either of those parents of their former domicil, would necessarily operate as a change of the child's domicil. It is, however, only during the mother's widowhood, that she could change the domicil of her infant. The domicil, which she acquired on her second marriage would not become that of the infant; but his domicil would continue to be that, which the mother possessed previously to her second marriage. The power which the parent thus possesses, of changing the domicil of his child, is assimilated by writers to that, which the guardian of an infant possesses, of hinding him by contracts, entered into by him on behalf of the infant. But this power, it is said, must be exercised by the parent bona fide. If he changed the domicil of the child, who was sick, with no other apparent object than that of removing him from a place, in which, according to the law of succession there prevailing, the parent would not succeed to the child's estate, to another place,

has also been recognised as t America,1

Secondly; in relati § 507. According to the administrators. made no distinction in this res immovable property, able and was indiscriminately applied to was called to the succession. called by the act of the par of law. Thus, the person, who sal successor by a will, was cal heir (hæres factus), and the no in cases of intestacy, was call (hæres natus) or heir by intestac er consisting of one or more p testamentary or by intestacy,

which admitted the parent to such succes deemed a fraud on the rights of those, wh no such removal had taken place, and wo But if the health of the child was such, his death, or if there was any reasonable indeed, if the child had attained an age, v of his domicil, he had the power of making case there could be no ground for presun the part of the parent in changing his dom impeached." 1 Burge, Comm. on Col. and 39. Notwithstanding this weight of author exception, is applied solely to the case of I there is much reason to question the princ founded, when it is obviously connected w to the property of the child. In the case mere guardian, not being a parent, it is ex reasonable principle, on which it can be m change of domicil change the right of succe The reasoning of Bynkershoek upon the while that of Mornac, Bouhier, and Pothier, to sustain it. See Robertson on Successions 1 Guier v. O'Daniel, 1 Binn. R. 349, not

R. 543; Holyoke. v. Haskins, 5 Pick. R. 20.

cession to all the estate of the deceased, whether it was real or personal; and he was chargeable with all the burthens and debts due from him.¹ But inasmuch as the succession in either case might be onerous, as well as profitable, the law allowed the heir, whether he were so by testament, or by intestacy, to renounce the inheritance if he pleased; or he might accept it with the benefit of an inventory, the effect of which was to exonerate the heir from any farther liability, than the amount of the assets, or property inventoried.² These explanations are important in order fully to understand the reasonings of foreign jurists, and to apply them to the present subject; for the civil law distinctions every where pervade the jurisprudence of continental Europe.

§ 508. It will be at once seen, that the executor under the common law in many respects corresponds with the testamentary heir of the civil law; and that

^{1 1} Domat, B. 1, tit. 1, p. 557; Id. § 1, n. 1, 2, p. 558. — Domat says, that in France, in the Provinces, which are governed by the testamentary law, and not by the Roman Law (Droit écrit) the title of heirs is given only to the heirs by blood, or heirs at law, and that the testamentary heirs are called universal legataries. But this distinction is merely nominal, and the same rules are applied to the universal legataries, as to the heirs by blood. 1 Domat, B. I, tit. 1, p. 557, 558. Erskine in his Institutes, B. 2, tit. 2, § 3, p. 192, says, that in Scotland, "Heritable subjects are those (immovables), which on the death of the proprietor descend to the heir; and movables those, which go to executors, who are on that account sometimes styled heredes in mobilibus. It may be also observed, that those, who undertake to gather in and distribute among such as are interested in the succession the movable estate of a person deceased, in virtue of a nomination, either by the testator, or by the Judge, frequently get the name of executors, because it is their office to execute the last will of the deceased." See Id. B. 3, tit. 9, § 1, 2,

² 1 Domat, B. 1, tit. 1, § 4, n. 3, 4, p. 593.

the administrator in many respethe heir by intestacy. The between them, which is here in sidered, is, that executors and no right, except to the person ceased; whereas the Roman ladminister both the real estate and all the assets were treated as without any distinction of equilegal assets.

§ 509. From what has already whether testamentary, or by into property, can take only accord rei; or, in other words, he is no so as to administer the estate in unless he is duly qualified acco ples, rules, and forms of the respect, he does not differ, either or to responsibilities, from an hei able at the common law, or by s debts of his ancestor or testator reason, that a power to sell given to an executor, cannot upon due probate of the will i the property is situate, and show lawfully done by the Lex location the party claims, not under devisee, in trust to sell it for th it is also necessary to have a

³ Wells v. Cowper, 2 Hamm. R. 124.

 ¹ Brown, Civil and Adm. Law, § 344, nc
 2 See 2 Kaims, Eq. B. 3, ch. 8, § 3, p. 33
 110, 111; 1 Boullenois, Observ. 17, p. 242;
 dem. Lewis v. Mc Farland, 9 Cranch, 151.

will. But it is not necessary in the latter case to take out letters of administration, although the devise be in trust to the party by the description of executor; for in such case he takes, as devisee, and not as executor; and his title is under the will, and not under the letters testamentary.

§ 510. But in regard to movable estate a like rule does not necessarily prevail in foreign countries, governed by a jurisprudence, which is drawn from, or modelled upon the civil law; for movables being treated as having no situs, and to be governed by the law of the domicil of the testator or intestate, the title of the heir, taking its effect directly from that law, is, or at least may, consistently, be held to carry the right to such property, wherever it may be locally situated, in the same manner as the title would, or might pass, by an assignment by the owner by an act inter vivos.²

§ 511. Lord Kaims seems to take a distinction between the case of a testamentary heir, and that of an heir by intestacy, asserting that the nomination of an executor (haæres de mobilibus, or hæres fiduciarius²) by the testator in his testament, as to his movables, is effectual all the world over, jure gentium, and will be sustained in Scotland; whereas letters of administration in a foreign country are strictly territorial, and, when granted in a foreign country, are not recognised in Scotland, unless they are confirmed there by a proper judicial proceeding.⁴ It may be so; but Erskine lays it down as clear law,

Doe dem. Lewis v. McFarland, 9 Cranch, 151.

^{2 2} Kaims, Equity, B. 3, ch. 8, § 4.

³ Ersk. Inst. B. 3, tit. 9, § 2, 26.

^{4 2} Kaims, Equity, B. 3, ch. 8, § 3; Id. § 4, p. 347, 348.

that in Scotland neither executo foreign or domestic, are entitle estate of the deceased, until t confirmed by the competent Jud Lord Kaims meant to say, was ecutor was a good title, jure established in the m it was process prescribed by the law it was sought to be exercised, of universal obligation. And so civilized nations, except such, now are,) as adopt the Droit fiscate the movable property of and leaving such property within § 512. In regard to the tit administrators, derived from a gi in the country of the domicil o to be considered, that that title tend, as a matter of right, bey the government, which grants property therein. As to movab in foreign countries, the title, all, is acknowledged ex comitat is subject to be controlled or nation may think proper, with

institutions, and its own policy

reference has been so often made strength, that no nation is under force foreign laws, prejudicial t to those of its own subjects. Pe

its own subjects.

And here

¹ Ersk. Inst. B. 1, tit. 9, § 27, 29. See Ro to p. 273.

dying in one country, and are often deeply indebted to foreign creditors, living in other countries, where there are personal assets of the deceased. In such cases it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from the foreign country, without the payment of such debts, and thus to leave the creditors to seek their remedy in the domicil of the original executor or administrator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law.

§ 513. It has hence become a general doctrine of the common law, recognised both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the Courts of any other country, except that from which he derives his authority to act in virtue of the probate and letters testamentary, or the letters of administration there granted to him.¹ But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration, and give new security according to the general rules of law prescribed in that country, before the suit is brought.² So, on the other hand, if

¹ Bond v. Graham, 1 Hare, R. 482.

² Preston v. Ld. Melville, 8 Clarke & Fin. 1, 12; Whyte v. Rose, 3 Adolp. & Ell. New R. 498, 507; Spratt v. Harris, 4 Hagg. Eccles. Rep. 403; Price v. Dewhurst, 4 Mylne & Craig, 76. The authorities to this point are now exceedingly numerous and entirely conclusive. See Lee v. Moore, Palmer R. 163; Tourton v. Plower, 3 P. Will, 369, 370; Thorne v. Watkins, 2 Ves. 35; Atty. Gen. v. Cockerell, 1 Price, R. 179; Burn v. Cole, Ambler, R. 416; Lowe v. Pairlie, 2 Madd. R. 101; 1 Hagg. Eccl. R. 93, 239; Mitford's Plead. 177 (4th edit.); Fenwick v. Sears, 1 Cranch, 259; Dixon's Executors v. Ramsay's Executors, 3 Cranch, 319,

a creditor wishes a suit to be bre country, in order to reach the e testator or intestate, situated the cessary, that letters of administrate taken out in due form according to fore the suit can be maintained; administrator appointed in another there, and has no positive right to assets, neither is he responsible of a foreign executor or administrator.

323; Kerr v. Moon, 9 Wheaton, R. 565; Arn R. 169; Thompson v. Wilson, 2 N. Hamp. istrator v. McCrow, 4 Randolph, R. 158; Gle R. 493; Stearns v. Burnham, 5 Greenleaf, Mass. R. 514; Borden v. Borden, 5 Mass. R Mass. R. 256; Langdon v. Potter, 11 Ma Thurston, 20 Martin, R. 232; Riley v. Ri Champlin v. Tilley, Id. 303; Trecothick v. Ex parte Picquet, 5 Pick. 65; Holmes v. Re Smith, Administrator v. The Union Bank 518; Campbell v. Tousey, 7 Cowen, R. 64 Stu. 284; Atty. v. Bouwens, 4 Mecs. & W Bell, 1 Keen, R. 826, 829; S. C. 2 Mylne occasion Lord Cottenham said; "That an e in the absence of a personal representative resentative must obtain his right to represe siastical court in this country, has, I believe The cases of Tourton v. Flower, (3 P. WI Atk. 63); Swift v. Swift, (1 Ball & B. 326); ill, (1 Price, 165); Lowe v. Fairlie, (2 Mad Sim. & Stu. 284); all proceed upon this, th for the security of property, will not admini deceased, in the absence of a person autho and that they look only to the judgment in this country, in granting probate or let certain, who are so authorized; and it is it court in this country, has granted probate, provided the state of the property was suc But see Anderson v. Caunter, 2 Mylne &

new administration is usually admitted, as a matter of course, unless some special reason intervene to vary or control it; and the new administration is treated as merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution, of them.¹ Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees, who are resident within the country, where it is granted; and the residuum is transmissible to the foreign country only, when a final account has been settled in the proper tribunal, where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found there.²

sound authority. Lord Cottenham in Tyler v. Bell, 2 Mylne & Craig, 110, manifestly disapproved of it. 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 23, § 5, p. 1010, 1011, 1012. Mr. Ch. Walworth, in McNamara v. Dwyer, 7 Paige, 236, 241, held, that although a foreign administrator could not sue, he might be sued in another state, for an account of the assets received under the foreign administration. Can such a distinction be maintained?—The Supreme Court of the United States, in Vaughan v. Northup, 15 Peters, R. 1, decided against it.—S. P. Bond v. Graham, 1 Hare, R. 482; Price v. Dewhurst, 4 Mylne & Craig, 76, 80. See Preston v. Lord Melville, 8 Clarke & Finel, 12, 14.

¹ Harvey v. Richards, 1 Mason, R. 381; Stevens v. Gaylord, 11 Mass. R. 256; Case of Miller's Estate, 3 Rawle, R. 312.

⁹ Preston v. Lord Melville, 8 Clarke & Finel, 12, 14. — See Harvey v. Richards, 1 Mason, R. 381; Dawes v. Boylston, 9 Mass. R. 337; Selectmen of Boston v. Boylston, 2 Mass. R. 318, 384; Richards v. Dutch, 8 Mass. R. 506; Dawes v. Head, 3 Pick. R. 128; Hooker v. Olmstead, 6 Pick. R. 481; Davis v. Estoy, 8 Pick. R. 475; Jennison v. Hapgood, 10 Pick. R. 77; Stevens v. Gaylord, 11 Mass. R. 256; Case of Miller's Estate, 3 Rawle, 312; Gravillon v. Richards, Ex'or, 13 Louis, R. 293. Many complicated questions may grow out of original and ancillary administrations, some of which have been stated in the cases of Harvey v. Richards, 1 Mason, R. 381, and Dawes v. Head, 3 Pick. R. 128. The following extract, from the opinion of Mr. Chief Justice

§ 513 a. In England "it is in the case of a British subject a colonies or in foreign countries, istration extends to all the person testate wherever situate at the whether in Great Britain, or in a country abroad: and, indeed, a Scarth v. Bishop of London it ap intestate dies abroad, not having a in England, but only in the diocal istration granted to such intesta Court of the Bishop of Lon effectual." How far this doctr

Parker, in the latter case, deserves an atte there arose, how assets under an ancillary posed of in cases of insolvency, and of de to the same country, as the deceased debtor. posing of these particulars, said; "Thus t out touching the questions, upon which i which are of a novel and delicate nature, do not appear to have been decided, eithe the Union. We wish to avoid any thing, v conclusive adjudication, and yet are of or throw out for consideration the results of ou If the technical difficulties, upon which this not occurred, but the estate had been rer decree of distribution for a proportion had of Lenox and Sheafe had been ascertained ings to a suit on the bond had been the question would be, whether the funds, co administration, should be appropriated to t might be regularly proved here, notwithsta that the whole estate was insufficient to 1 effects here were wanted by the executor : administer the estate. It has been conten because the administrator has given bond h this were the original administration, and

Whyte v. Rose, 3 Adolp. & Ell. (Ne: Bishop of London, 1 Hagg. Eccles. R. 625.

carried is not perhaps very clearly defined; and certainly, if carried fully out, it may materially impair the

authorizes this administration, requires, that the Judge of Probate shall settle the estate in the same way and manner, as he would, if the original will had been proved here. With respect to the bond, it will be saved by a faithful administration of the estate according to law; and with respect to the settlement by the Judge of Probate, this must be understood to authorize him to require the administrator to account, and that the due course of proceedings in the probate office shall be observed. It certainly cannot be construed to mean, that in all cases a final settlement of the estate shall take place here; if it did, then, if there were no debts here, and none to claim as legatees or next of kin, it would be necessary for all such to prove their right and receive their distributive shares here, notwithstanding the settlement must in such case be made according to the laws of the country, where the deceased had his domicil. But we think in such case it would be very clear, that the assets collected here should be remitted to the foreign executor or administrator; for it seems to be a well settled principle, that the distribution is to be made according to the laws of the country, where the deceased was domiciled; and if any part is to be retained for distribution here, it will be only by virtue of some exception to this general rule, or because the parties interested seek their remedy here; in which case it might be within the legal discretion of the court here to cause distribution, or to remit, according to the circumstances and condition of the estate. exception to the general rule grows out of the duty of every government and its courts to protect its own citizens in the enjoyment of their property and the recovery of their debts, so far as this may be done without violating the equal rights of creditors living in a foreign country. In relation to the effects found within our jurisdiction and collected by the aid of our laws, a regard to the rights and interests of our citizens requires, that those effects should be made answerable for debts due to them, in a just proportion to the whole estate of the deceased and all the claims upon it, whatever they may be. In the several cases, which have come before this Court, where the legal character and effects of an ancillary administration have been considered, the intimations have been strong, that the administrator here shall be held to pay the debts due to our citizens. The cases, Richards v. Dutch, Dawes, Judge, &c. v. Boylston, Selectmen of Boston v. Boylston, and Stevens v. Gaylord, are of this character. In all these cases, however, we must suppose the Court had reference to a solvent estate, and in such case there seems to be no question of the correctness of the principle; for it would be but an idle show of courtesy to order the proceeds of an estate to be sent to a foreign country, the province of Bengal for instance, and oblige our citizens to go or send there for their debts, when no possible prejudice

general doctrine as to the necess trations, as well as trench upon

could arise to the estate, or those interested paid here; and possibly the same remark me payable to legatees living here, unless the should require the funds to be sent abroad. states claining payment of their debts of the be put upon the same footing with citizens of the privileges and immunities secured to the United States, is a point, which we do n doubt the courts of the United States, havin enforce payment upon the principles above gestion of insolvency of the estate. There that payment of debts by the administrato that they were due, and an allowance of his bate Court with proper notice, would be fait to the condition of his bond, and would be to the principal administrator abroad. In r within our jurisdiction, belonging to an ir person having his domicil abroad, the que We cannot think, however, that in any civi to be taken of the accidental circumstan within its territory, which may be reduced courts and laws, to sequester the whole for or citizens, where it shall be known, that a deceased are insufficient to pay his just de be derogatory to the character of any gove bankrupt system, foreigners as well as su and share in the distribution. Without do where there is a cessio bonorum, or other estates, the same just principle is adopted. law, while that was in force, and no reaso honest and just a principle should not be a estates of deceased persons. It is always persons dying within our jurisdiction, he that is, creditors of all countries have the zens, to file their claims and share in the then a right in any one or more of our citi creditors, to seize the whole of the effects, claim an appropriation of them to the pay sion of foreign creditors. It is said this it done by virtue of our attachment law, in r ing debtor, who is insolvent. But the just tionable, and its application ought not to b creditors and foreign governments. Is it meant to be said, that if personal property is in a foreign country

ogy, which do not come within its express provisions. What then is to be done with the effects collected here belonging to an insolvent estate in a foreign country? Shall they be sent home in order to be appropriated according to the laws of that country? This would often work great injustice, and always great inconvenience, to our own citizens, whose debts might not be large enough to bear the expense of proving and collecting them abroad; and in countries where there is no provision for an equal distribution, the pursuit of them might be wholly fruitless. As in Great Britain, our citizens, whose debts would generally be upon simple contract, such as bills of exchange, promissory notes, accounts, &c., would be postponed to creditors by judgment, bond, &c., and even to other debts upon simple contract, which might be preferred by the executor or administrator. It would seem too great a stretch of courtesy to require the effects to be sent home and our citizens to pursue them under such disadvantages. What then shall be done to avoid, on the one hand, the injustice of taking the whole funds for the use of our citizens to the prejudice of foreigners, when the estate is insolvent, and on the other, the equal injustice and greater inconvenience of compelling our own citizens to seek satisfaction of their debts in distant countries? The proper course would undoubtedly be, to retain the funds here for a pro ratà distribution according to the laws of our state among the citizens thereof, having regard to all the assets, either in the hands of the principal administrator, or of the administrator here, and having regard also to the whole of the debts, which by the laws of either country are payable out of those assets, disregarding any fanciful preference, which may be given to one species of debt over another, considering the funds here as applicable to the payment of the just propotion due to our own citizens; and, if there be any residue, it should be remitted to the principal administrator, to be dealt with according to the laws of his own country, the subjects of that country, if there be any injustice or inequality in the payment or distribution, being bound to submit to its laws. The only objection, which can be made to this mode of adjusting an ancillary administration upon an insolvent estate, is the difficulty and delay of executing it. The difficulty would not be greater than in settling many other complicated affairs, where many persons have interests of different kinds in the same funds. The powers of a court of chancery are competent to embrace and settle all cases of that nature, even if the powers of the Court of Probate are not sufficiently extensive; which however is not certain. The administrator here should be held to show the condition of the estate abroad, the amount of property subject to debts, and the amount of debts, and a distribution could be made upon perfectly fair and equitable principles. The delay would undoubt-

at the death of the intestate, it is thence, and administered und

edly be considerable, but this would not be sending our citizens abroad upon a forlorn h of an insolvent estate, or paying the whole o erty without regard to the claims of foreign bate Court has not sufficient power to mal nent, a bill in equity, in which the admi principal respondent, would probably productime and opportunity could be given to mak of the estate, and all persons interested middecree; in the mean time the administrat remitting the funds until such decree should 3 Pick. R. 143 to 148.

The following extracts are made from Harvey v. Richards. "One objection un the authority of the Court is, that, as nation bution of the property according to the law ity requires, that the distribution should be r consequence, however, is not admitted; and ion with the preceding proposition. The ru according to the law of the domicil of t merely upon the notion, that movables have low the person of the proprietor, even in true sense, that personal property is subject the person of the owner. Nor is it, perhap ed intention of the deceased, that all his pr according to the law of the place of his de posed to be best acquainted and satisfied; against the express intention of the decease that intention is expressed, would give it seems, indeed, to have had its origin in a n upon the general convenience and necessi view the maxim above stated flows from, rat tion of that policy. The only reason, why foreign laws within its own territory, is which would otherwise be introduced in it nations. The rights of its own citizens w and, in many instances, totally extinguishe and sustain the doctrines of foreign law. I eration is an illustration of the perfect justic practice of nations. A person may have me various countries, each of which may have tession. If the law rei site were generally

ministration in England, or administered in England without such a removal, and in either case be obliga-

impossible for any such person to know in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy, the law of succession of every country, in which it might then happen to be. He would be under the same embarrassment, if he attempted to dispose of his property by a testament; for he could never foresee, where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of his own domicil, to destroy the best digested will; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. Nor is this all. The nation itself, to which the deceased belonged, might be seriously affected by the loss of his wealth, from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils, pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontancous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private enterprise of all. It flowed from the same spirit, that dictated judicial obedience to the foreign commissions of the admiralty. Sub mutuæ vicissitudinis obtentu, damus petimusque vicissim, is the language of the civilized world on this subject. There can be no pretence, that the same general inconvenience or embarrassment attends the distribution of foreign effects according to the foreign law by the tribunals of the country, where they are situate. Cases have been already stated, in which great inconvenience would attend the establishment of any rule, excluding such distribution. It may be admitted also, that there are cases, in which it would be highly convenient to decline the jurisdiction and remit the parties to the forum domicilii. Where there are no creditors here, and no heirs or legatees here, but all are resident abroad, there can be no doubt, that a court of equity would direct the remittance of the property upon the application of any competent party. The correct result of these considerations upon principle would seem to be, that whether the Court here ought to decree distribution or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case; that there ought to be no universal rule upon this subject; but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons, having a title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equi-

tory upon the foreign governmentitle to the property?

ties. It is farther objected, that a rule, w cation upon the particular circumstances to be considered a safe guide for general affords no solid ground for declining the j infinite variety of cases, in which no gen laid down, as to legal or equitable relief before judicial tribunals. In many of the the subject-matter; and where a general n each case must, and indeed ought to, res stances. The uncertainty, therefore, is no longs to many other complicated transacti law administers relief ex æque et bono. more pointedly to a class of cases like tl settling the accounts of the estate, ascer are sperate, what desperate, and, finally as to be distributed, and who are the next of add to our embarrassment, we are told, t eign executor to render any accounts in ou this cannot be done, if he is not here; ministrator here cannot be compelled to a for all the assets, which he has received u And if the foreign executor chooses to lie account of the foreign funds in his hands here to ascertain, whether the funds are of debts or legacies, or not, he has no righ fuses to remit the assets, and distributes legally claim them. And as to settling t are the distributees, there is no more diffi in many cases, arising under the ordinal these objections are, in fact, reasons for c diction in particular cases, rather than n the jurisdiction itself. It seems, indeed, sel for the defendant, that, if there be no f be the duty of the Court to grant relief Yet every objection, already urged force in that, as in the present case. Th tributed according to the foreign law of same difficulty would exist, as to ascertai and the assets and distributees entitled t case now put, the administration here wot tion, whereas in the case at bar, it is only a istration. I have no objection to the us

§ 514. But although an executor or administrator, appointed in one state, is not in virtue of such appointment entitled to sue, nor is he liable to be sued, in his official capacity in any other state or country; yet there are many other questions, which may require consideration, and in which a conflict of laws may arise in different countries. In the first place, let us suppose, that an executor or administrator should go into a foreign country, and, without there taking out new letters of administration, should there collect property, effects, and debts of his testator or intestate, found or due there; the question might arise, whether he would not thereby, to the extent of his receipt and collection of such assets, be liable to be sued in the courts of that country by any creditor there. Upon general principles it would seem, that he would so be liable; and, upon the principles of the common law, he would be liable as an executor de son tort, or person intermeddling with such assets without any rightful authority, derived from the local

auxillary, as indicating a distinction in fact as to the objects of the different administrations; but we should guard ourselves against the conclusion, that therefore there is a distinction in law as to the rights of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority; and each might, under circumstances, justly be deemed an auxiliary administration. If the bulk of the property, and all the heirs and legatees and creditors were here, and the foreign administration were only to recover a few inconsiderable claims, that would most correctly be denominated a mere auxiliary administration for the beneficial use of the parties here, although the domicil of the testator were abroad. The converse case would of course produce an opposite result. But I am yet to learn, what possible difference it can make in the rights of parties before the Court, whether the administration be a principal or an auxiliary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin." Harvey v. Richards, I Mason, R. 381. See also Gravillon v. Richard's Ex'or. 13 Louis. R. 293.

authorities under a new grant For it would not lie in his m had rightfully received such not rightfully receive them ex would be quite a different quest ment of any such debts, or the property or effects to him by the persons, owing or possessing t valid payment or discharge of from, or would confer any ti executor or administra any executor or administrator. ed in such foreign state or c the right or title.2 Upon that c room for discussion and doubt. has been asserted in some o under the common law.3 For i that the probate grant of lette letters of administration, authority to collect the asset intestate only in that country, the collection of assets in forei would be to assume an extra or authority, and to usurp the f local tribunals in those matters.

¹ Campbell v. Tousey, 7 Cowen, R. 64.

² Preston r. Lord Melville, 8 Clarke & 1

³ Doolittle r. Lewis, 7 John. Ch. R. 45,

⁴ See Pond, Administrator v. Makepeace Lord Melville, 8 Clarke & Finell. 1, 12, Bouwens, 4 Mees. & Welsb. 171, 190, 191. Abinger said; "Whatever may have been of the ordinary to grant probate, it is clear, and can be exercised in respect of those have had himself to administer in case therefore have been so situated as that h

the objection to say, that the effects of the testator or intestate are assets, wherever they are situated, whether at home or abroad; and that such effects, as are in a foreign country at the time of the death of

in pios usus. As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute. But to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets, where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration, that could be performed by the ordinary, would be to recover or to receive payment of the debt, and that would be done by him, within whose jurisdiction the debtor happened to be. These distinctions being well established, it seems to follow, that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interest in foreign funds payable abroad, and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects. But, on the other hand, it is clear, that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate. In this case, assuming that the foreign governments are liable to be sued by the legal holder, there is no conflict of authorities; for their governments are not locally within the jurisdiction, nor can be sued here; and no act of administration can be performed in this country, except in the diocese, where the instruments are, which may be dealt with, and the money received by their sale in this country. Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act of administration, which his administrator could perform here, would be to sell the bills and apply the money to the

the testator or intestate, although a wholly administered there equally assets. Doubtless this is tion is not, whether they are as is clothed with authority to this must be decided by the lothey are situated; for the origino extra-territorial operation.

§ 514 a. In the next place, executor or administrator app where his testator or intestate of foreign country, and should, wi letters of administration, collect country, and bring them hom which he had received his original tary, or letters of administratio arise, whether, in such a case, account in the courts of the assets, which he had so received try, in the same way and u stances, as he would be liable t he had received them in the l words, whether they would co home assets, which he is bound which he is liable to account u

payment of his debts. In order to make the inust have letters of administration; them, if they are improperly withheld from of administration, (for even if there were an established rule, that an administration where the suit is instituted): and that the must be stamped with a duty according bills, the case of Hunt v. Stevens, is an Doolittle v. Lewis, 7 John. Ch. R. 45, 46, 4 Ch. R. 153.

¹ Attor. Gen. v. Dimond, 1 Cromp. & Je

ministration, according to the domestic laws. It has been said, that the assets, so received and collected, are to be so administered and accounted for, as home assets, by such executor or administrator. And the doctrine laid down in an ancient case is relied on for this purpose; where it is asserted to have been held by the Court, that "if the executor have goods of the testator in any part of the world, they shall be charged in respect of them; for many merchants and other men, who have stocks and goods to a great value beyond sea, are indebted here in England: and God forbid, that those goods should not be liable to their debts; for otherwise, there would be a great defect in our law." 1 Now, this language in its broad import is certainly unmaintainable in our day; for it goes to the extent of making a domestic executor or administrator liable for all assets of the testator or intestate, which are locally situate abroad; although, as we have seen, he has not in virtue of the domestic letters of administration any authority to collect them, or to compel payment or delivery thereof to himself.2 But the circumstances of the case called for no such doctrine. The case was of a testator, who died in Ireland, and the defendant, who was his executor, collected and administered in Ireland certain property of the deceased. Afterwards he came to England, and was sued there by a creditor as executor; and the question arose, whether he was liable to the creditor in such suit for the assets collected and received by him in Ireland under the administration there. With reference, therefore, to the

² Ante, § 314.

¹ Dowdale's Case, 6 Co. R. 47, 48; S. C. Cro. Jac, 55; cited and approved also in Evans v. Tatem, 9 Serg. & R. 252, 259.

actual facts of the case, the tion did arise. But according tained in England in modern til liable to be sued in England, ters testamentary taken out in not for the assets received an land under that appointment. case may, therefore, well be caspects. 2

\$ 514 b. Some of the American the length of recognising to i trine asserted in this case; a foreign executor or admir having received assets in the f to be sued here, and to account with standing he has taker of administration here, nor positively settled in the fore trine asserted in these courts eign executor or administration.

¹ Ante, § 314; post, § 515.

^{2 &}quot;If, after such administration shall he should remain, and it shall appear that the Scotland, to which it was devoted by for the Court of Chancery to consider whe not to be paid to the pursuers, for the puperformance of such trusts; and in considition ought to be paid to the authority unde appointed trustees, and the consent which premature to decide that point, it being at there will be any surplus of the personal will be the amount of it, and no declaration sion would be binding upon the Court of tion the property in England is placed by stituted." Preston v. Lord Melville, 8 Ch

³ Swearingen's Ex'ors v. Pendleton's E Evans v. Tatem, 9 Serg. & Rawle, 252, 2 Cir. R. 337; Campbell v. Tousey, 7 Cowe

as executor, for all the assets, which he still retains in his hands, or which he has expended, or disposed of here, unless expended or disposed of here in the due course of administration, whether they were received here, or in the foreign country, although he has not taken out any new letters of administration here.1 There is very great difficulty in supporting these decisions to the extent of making the foreign executor or administrator liable here for assets received by him abroad in his representative character, and brought here by him. If a foreign executor or administrator cannot sue in his representative character in another state for the assets of the deceased situate there without new letters of administration; because he derives his authority solely from a foreign government, which has no authority to confer any right upon him, except to collect and receive the assets, found within its own territorial jurisdiction, and to which, therefore, he is properly and directly responsible for the due administration of the assets, actually collected and received in such foreign country under its exclusive appointment, it is not easy to perceive, how he can be suable in such state for such assets in his hands, received abroad by him under the sanction of the foreign administration, and by the authority of the foreign government, to which he is thus accountable for all such assets. One of the learned Courts, however, which decided the point, seems to have taken it for granted, that a foreign executor or administrator was of course suable here for all assets found in his hands.

I Ibid.

If a foreign executor " (said to be sued here, of which we be no question, he must from t case, primâ facie, be responsible are shown to have been in his state." With great deference point to be established by some ed upon the principles of inte generally recognised by fore uniform established doctrine o this subject in modern times. ceedingly difficult to cite any the common law in support of no authority could be shown On the other hand, there are thorities, which indicate a ve

¹ In the cases of Swearingen's Ex'ors Rawle, 389, 392, and Evans v. Tatem, 9 Supreme Court of Pennsylvania contente the doctrine in Dowdale's Case, (6 Co. R soning on the subject.

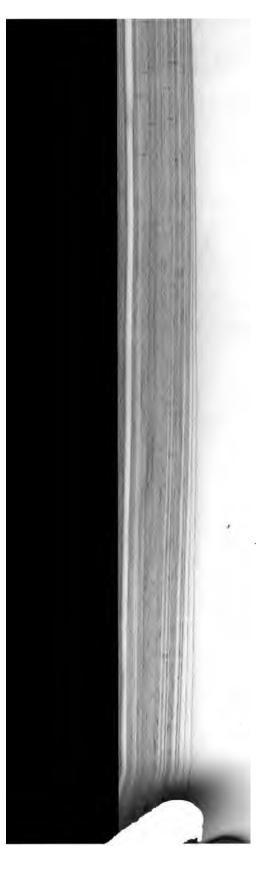
² The very recent case of Fay v. Have point. See Selectmen of Boston v. Boyli v. Jones, 3 Mass. R. 514; Davis v. Estey, 3 Pick. R. 128; Doolittle v. Lewis, 7 John ministrators v. McRae, 11 Louis. R. 57 men of Boston v. Boylston, 2 Mass. R. 3 in delivering the opinion of the Court, a the testator died in England, and that adm his estate to the defendant cum testament took out ancillary letters of administration was brought, and in respect whereof he w the plaintiffs for the assets both in England Probate has, in this case, proceeded, a proceed, according to the powers, which He can exercise no other po respondent administration on the estate this government, with the will annexed. to the administrator, is over the estate ly

The modern English authorities, are to the same effect. They fully establish the doctrine, that, if

Judge is to settle the said estate. What estate? Clearly, I think, the estate lying in this government. And it will neither consist with the intention of the legislature, nor the purposes of justice, because the administrator, with the will annexed, is here, to proceed upon the fiction, that by his relation to the testator, in the same capacity, in England, we ought to consider all the assets possessed by him there, as the estate of the testator lying in this government; because the estate by the statute subjected to the control of the court of probate, and to be settled by it, was that which was lying here before granting the letters of administration. To that and to that only, do the words, and, as I think, the meaning of the legislature extend. The argument from the inconveniences of admitting the construction, for which the counsel for the appellants have contended, is strong and irresistible. reasonably be presumed, that the largest part of the testator's estate lies in the country, where the original administration is granted; and that there also is the greatest portion of claims upon it. For what purpose of utility is the property to be transported to a distant region, and those to whom it belongs compelled to follow it, for the satisfaction of their demands? The expense and trouble of such a procedure, while wholly unnecessary, could not fail to be considerable. Suppose an English merchant of great property and extensive dealings to have been the testator: suppose this property to be principally in England, but portions of it to be left in several foreign countries, and that the administrator appointed there goes to collect it, and seeks the aid of the foreign governments for that purpose; and they, under pretence of giving this aid, claim an authority of drawing within their jurisdiction all the personal property of the testator, and all those, who have demands upon it, or are interested in it. All these governments are independent of each other; and what is to establish a right of precedence? The commencement of a prosecution? How is this to be known? How are the other authorities to be controlled? If this is to be the construction, who will become bound for the administrator? By what means can the liability of the administrator and his sureties be known? In terms they only guaranty the settlement of the estate lying within the commonwealth: but in effect, if this construction be admitted, estate lying in every part of the globe. It is, in our opinion, impossible, that such could have been the intention of the legislature. There are innumerable other inconveniences, which might be, but which it is unnecessary should be pointed out." In Goodwin v. Jones, 3 Mass. R. 514, 519, 520, Mr. Chief Justice Parsons in delivering the opinion of the Court said; "When any person, an inhabitant of another state, shall die intestate, but leaving real estate within this Commonwealth, if administration

a foreign executor or adminimits property here, which he

should not be granted by some judge (the estate lies, there would be no legal deceased to avail themselves of his rea debts due to them. Therefore to prev tration in such case must be granted by the administrator so appointed will, by tration, and of the laws, also have the chattels, rights, and credits of the intest And if a foreign administrator of that administration of his personal estate her trators of the same goods of the same other, and deriving their authority from which cannot be admitted. cannot divest the foreign administrate in him; and the necessary inference be, or be not, granted in this state another state cannot legally claim any testate, which are subject to an adminis it is no objection to this reasoning, simple contract are to be considered as if the position be admitted, contrary to his Executor (page 46), where it is so notabilia where the debtor lives: yet judgment on such contract in this ste lands, which certainly in their disposit control of the laws of the Commonw statute relating to foreign administrat executor of a will proved without the s is regulated by the statute of 1785, Ju any person interested in any will prove a copy of it, and of the probate under the proved it, before the judge of probate had real or personal estate, whereon t to have the same filed and recorded, hearing all parties, may order to be de of the executor, or may grant administ the testator's estate lying in this gove settle the estate, as in cases, where the This statute needs no explanation. out the State cannot intermeddle with State, but with the assent of a judge give bond. Neither can an administra



administration abroad, or if he is personally present, he is not, either personally or in his representative capacity, liable to a suit here; nor is such property liable here to creditors; but they must resort for satisfaction to the forum of the original administration.¹ So, where property is remitted by

meddle, unless he is appointed by some judge within the State, who has authority to settle the whole estate within his jurisdiction. And it would be inconsistent with the manifest intent of the statute to allow an administrator of an intestate, not an inhabitant or resident within the State at his death, an authority derived from a foreign administration, which he could not have under the foreign probate of a will, of which he was the executor." In Doolittle v. Lewis, 7 John. Ch. R. 45, 47, Mr. Chancellor Kent said; "It is well settled, that a party cannot sue or defend in our courts, as executor or administrator, under the authority of a foreign Court of Probates. Our Courts take no notice of a foreign administration; and before we can recognise the personal representative of the deceased, in his representative character, he must be clothed with authority derived from our law. Administration only extends to the assets of the intestate within the state, where it was granted; if it were otherwise, the assets might be drawn out of the state, to the great inconvenience of the domestic creditors, and be distributed, perhaps, on very different terms, according to the laws of another jurisdiction. The authorities on this subject were cited by me in the case of Morrel v. Dickey, (1 Johns. Rep. 154,) and I presume there is no dispute about the general rule; and the only difficulty lies in the application of it to this particular case."

Currie, administrator v. Bircham, I Dowl. & Ryl. R. 34; Davis v. Estey, 8 Pick. R. 475; Attor. Gen. v. Bouwens, 4 Mees. & Wels. R. 171, 191; Tyler v. Bell, I Keen, R. 826, 829; S. C. 2 Mylne & Craig, 89 109, 110; Attor. Gen. v. Dimond, I Cromp. & Jerv. R. 356, 371; Spratt v. Haris, 4 Hagg. Eccl. R. 408; Attor. Gen. v. Hope, 2 Clarke & Finell. R. 84, 90, 92; S. C. 8 Bligh, R. 44; I Cromp. Mees. & Rosc. 538. But see Dowdale's case, 6 Co. R. 47, and Anderson v. Caunter, 2 Mylne & Keen, 763; Spratt v. Harris, 4 Hagg. Eccl. R. 405, 408; ante, § 513, § 514 a. In Scrimshire v. Scrimshire, (2 Hagg. Consist. R. 420,) Sir Edward Simson said; "If an Englishman makes a will abroad, and makes a foreigner executor, and has no effects in England, and the executor proves the will lawfully abroad, that probate, or sentence of the proper court, establishing the will, as to effects there, of a man domiciled there, would be a bar to a discovery in chancery of effects abroad."

a foreign executor to this cono suit can be maintained specific appropriation of it, wit taken out here.¹

§ 515. But, although an e is not entitled to maintain a in virtue of his original let yet, it has been said, that, if untarily there to pay him a lawfully receive under that a or will be discharged.² Th least may be, true to the exteguardedly laid down and limit istration should be taken of tate in the country, where debtor resided at the time of much as a debt is properly du properly falls within that adr

¹ Logan v. Fairlie, 2 Sim. & Stu. R. 2 ² The proposition is thus guardedly l 11 Mass. R. 256. But the question ma tary payment of a debt by a domestic foreign administrator, when there is no d will be a good discharge of the debto the domicil of the debtor, but in the indeed, unless a particular place of p due and may be demanded any where. foreign country, where the creditor die is appointed, he would certainly be sua himself by a plea, that he was liable to pointed in the place of his (the debtor's Thorne v. Watkins, (2 Ves. 35,) said, that of the debtor in respect of the right o whom due. In Doolittle v. Lewis, (7 Je Kent held, that a voluntary payment to a trator was a good discharge of the d Paige, R. 182; Hooker v. Olmstead, 6 P Atk. R. 63; Trecothick v. Austin, 4 Mas

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paid voluntarily by the debtor in another country, if he should afterwards change his domicil to that country, or if he should be found there; and the discharge of the administrator will be held a good discharge every where else, although no new administration be taken out; because the right to receive it primarily attached, where the original administration was granted. Thus, for example, if an intestate should die in Ireland, leaving a bond debt there due by a debtor, residing there at the time of his death, that bond debt would be bona notabilia there, and a payment afterwards by the debtor made in England to such administrator would or might be a good discharge, notwithstanding no administration were taken out in England.¹

§ 515 a. There is, however, (as has been already stated,2) much reason to doubt, whether the doctrine be maintainable to the extent, which the proposition has been sometimes understood to justify; that is to say, so as to apply it to a debt due by a debtor, who at the death of the creditor is actually domiciled in, and owes the debt in the foreign country, where no administration is taken out. Suppose an administration should afterwards be granted in the foreign country; would it be any bar to an action brought by the foreign administrator, against the debtor for the same debt, that the debtor had already paid it to another administrator, who had no right to demand it in virtue of his original administration, and who, therefore, might properly be deemed a stranger to the

¹ Huthwaite v. Phaire, 1 Mann. & Grang. 159, and particularly what is said by Lord Chief Justice Tindal in page 162.
² Ante, § 514. See Preston v. Lord Melville, 8 Clarke & Finell. 1, 14.

debt? Suppose a contest to nal administrator and the fore tion to the administration of assets of the deceased, cou trator retain it against the wi trator; or thereby subject it in the course of administratio from that, which would othe difficult to answer these que without shaking some of the ples of international law on

§ 516. And here it may ∣ a distinction, important in its If a foreign administ ces. administration, reduced the deceased, there situated, in so that he has acquired the cording to the laws of that c should afterwards be found be carried away and converte he may maintain a suit for i and right personally, without of administration; for he is poses the legal owner there the character of trustee 1 like manner, if a specific l erty is bequeathed in a for legatee has, under an adr admitted to the full possession

³ See Currie v. Bircham, 1 Dowl. & R. 826; S. C. 2 Mylne & Craig, 89, 1 1 Cromp. & Jerv. 356, 370; Contra 1 Keen, R. 763. But the latter case seen § 518, 519, 520, 521, 525; Huthwaite v. 164, 165.

administrator, he may afterwards sue in his own name for any injury or conversion of such property in another country, where the property or wrong doer may be found, without any probate of the will there. The plain reason in each of these cases is, that the executor and the legatee have, each in his own right, become full and perfect legal owners of the property by the local law; and a title to personal property, duly acquired by the Lex loci rei site, will be deemed valid, and be respected as a lawful and perfect title in every other country.

§ 517. The like principle will apply, where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name: and he need not take out letters of administration in the state, where the debtor resides, in order to maintain a suit against him.2 And for a like reason, it would seem, that negotiable paper of the deceased, payable to order, actually held and endorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such endorsement, would confer a complete legal title on the indorsee, so that he ought to be treated in every other country, as the legal indorsee, and

¹ See Commonwealth v. Griffith, 2 Pick. R. 11; Bollard v. Spencer, 7 T. R. 354; Shipman v. Thompson, Willes, R. 103; Slack v. Walcutt, 3 Mason, R. 508, 518.

² Robinson v. Crandall, 9 Wendell, R. 425. But see Stearns v. Burnham, 5 Greenleaf, R. 361; Thompson z. Wilson, 2 New Hamp. R. 291; NcNeilage v. Holloway, 1 B. and Ald. 218; ante, § 354, 358, 359.

allowed to sue thereon accomanner, that he would be, it any personal goods or merchasituate in such foreign count

§ 517 a. And where an exe has remitted to another country, land), that fund to be distribute domiciled; the distribution voluntarily by the remittee, or Equity in such country, with being taken there, or making of the testator a party to

§ 518 a. Where there are granted in different countries principal or primary administ in the country of the domicil for the final distribution of heirs or distributees is to be Hence, any other his domicil. is granted in any other cou its nature ancillary merely, seen, generally held subordin ministration.3 But each adm less, deemed so far independ property received under on under another, although it n locally situate within the ju Thus, if property is received administrator abroad, and it here, an executor or admini

¹ Ib. and ante, § 358, 359.

² Arthur v. Hughes, 4 Beavan, R. 506.

³ Ante, § 514.

could not assert a claim to it here, either against the person, in whose hands it might happen to be, or against the foreign executor or administrator.\(^1\)
The only mode of reaching it, if necessary for the purposes of due administration in the foreign country, would be to require its transmission or distribution, after all the claims against the foreign administration had been duly ascertained and settled.\(^2\)

§ 519. But suppose a case, where the personal estate of the deceased has not, at the time of his decease, any positive locality in the place of his domicil, or in any foreign territory; but it is strictly in transitu to a foreign country, and afterwards arrives in the country of its destination. It may be asked, in such case, to whom would the administration of such property rightfully belong? Would it belong to the administrator in the place of the domicil of the deceased, or to the administrator appointed in the place, where it had arrived? And if (as may well happen in case of a ship and cargo sent abroad) the property, or its proceeds, should afterwards return to the domicil of the original owner, would the administrator, there appointed, be entitled to take it, and bound to account for it, in the due course of administration? Practically speaking, no doubt is entertained on this subject; and the property, whenever it returns to the country of the domicil

¹ Currie, administrator v Bircham, 1 Dowl. & Ryl. R. 35. See Jauncey v. Seeley, 1 Vern. R. 397: ante, § 513, 515, § 515 a. See Huthwaite v. Phaire, 1 Mann. & Grang. 159.

² See Dawes v. Head, 3 Pick. R. 153 to 148; Harvey v. Richards, 1 Mason, R. 381; ante, § 513, and note, § 514; Selectmen of Boston v. Dawes, 2 Mass. R. 384; Goodwin v. Jones, 3 Mass. R. 514; Dawes v. Boylston, 9 Mass. R. 337.

of the owner, whether by r is understood to be under the administrator appointed there a doubt hitherto judicially exso sent abroad, and returned so administered, and that all tected by their doings in region.

§ 520. Indeed, according of commercial business, ships proceeds thereof, locally situ try at the time of the death proceed on their voyages, ar port, without any suspicion, t cerned are not legally entitled are taken possession of, an administrator of the forum de stant persuasion, that he do so, but that he is bound part of the funds appropriatel ferent course of adjudication almost inextricable difficulties this extraordinary result, that erty of the deceased must be situs, where it was at the mon if removed from it, must be purpose of a due administra in a foreign country would to be retained there, until a le obtained; and could not with remitted to the creditor's domic should in the mean time remo it might become matter of ex payment to a local administ charge him from the debt.¹ But it may, perhaps, after all, be doubtful, whether with a strict regard to the principles of international law, the personal property of the deceased testator or intestate, whether it consisted of goods or of debts, situate at the time of his death in a foreign country, could be lawfully disposed of, except under an administration granted in that country, although they had since been removed, or transmitted to the domicil of the deceased, and had been received by his administrator appointed there.²

§ 521. A case illustrative of these remarks has recently occurred. The personal estate of an intestate consisted in a considerable degree of stage coaches and stage horses, belonging to a daily line, running from one state to another; and letters of administration were taken out by the same person in both states, one being that of the intestate's domicil. A question arose, under which administration the property was to be accounted for, part of it being in one state and part in the other, and part in transitu from one to the other, at the moment of the intestate's death. The learned Chancellor of New York said, that, if administration had been granted to different individuals in the two states, the property must have been considered as belonging to that administrator, who first reduced it to possession within the limits of his own state. But that in the case before him, as both administrations were granted to the same person, if an account of admin-

See ante, § 513 to § 518; post, § 525.

See Stevens v. Gaylord, 11 Mass. R. 256; ante, § 515, § 515 a.

istration were to be taken, it settle that by ascertaining, who and accounted for by him un in the other state.¹

§ 522. Where administrati ferent persons in different state ed independent of each other tained against one will furni against the other, to affect a latter in virtue of his own adm templation of law, there is n and the other administrator. if the same person were admir On the other hand, a judg foreign administrator against tate, will not form the fou against the debtor by an anc pointed in another state.4 But tor himself might in such a ca suit against the debtor in any judgment would, as to him, m and make it personally due to he being responsible therefor

§ 523. So strict is the prin ministrator cannot do any ac another state, that, where the securities in the hands of an

¹ Orcutt v. Orms, 3 Paige, R. 459.

Lightfoot v. Bickley, 2 Rawle, R. 431

³ Lightfoot v. Bickley, 2 Rawle, R. 431

Talmage v. Chapel, 16 Mass. R. 71.
 Ibid. But see Smith v. Nicolls, 5

^{607.}

sonal assets, which he may sell or assign, he cannot dispose of such real securities, until he has taken out letters of administration in the place rei sitæ.¹ Thus, mortgages are declared by the laws of Massachusetts to be personal assets in the hands of administrators; and disposable by them accordingly. But the authority cannot be exercised by any, except administrators, who have been duly appointed within the state.² On the other hand, if an administrator sells real estate for the payment of debts, pursuant to the authority given him under the local laws rei sitæ, he is not responsible for the proceeds as assets in any other state; but they are to be disposed of, and accounted for, solely in the place and in the manner pointed out in the local laws.³

§ 524. In relation to the mode of administering assets by executors and administrators, there are in different countries very different regulations. The priority of debts, the order of payments, the marshalling of assets for this purpose, and, in cases of insolvency, the mode of proof, as well as the mode of distribution, differ in different countries. In some countries, all debts stand in an equal rank and order; and, in cases of insolvency, the creditors are to be paid pari passu. In others, there are certain classes

Goodwin v. Jones, 3 Mass. R. 514, 519. See Bissell v. Briggs, 9 Mass.
 R. 467, 468. But see Doolittle v. Lewis, 7 John. Ch. R. 45, 47; Attor.
 Gen. v. Bouwens, 4 Mees. & Welsb. 171, 191, 192.

² Cutter v. Davenport, 1 Pick. R. 80. But see Doolittle v. Lewis, 7 John. Ch. R. 45, 47.

³ Peck v. Mead. 2 Wendell, R. 471; Hooker v. Olmstead, 6 Pick. R. 481, 483; Goodwin v. Jones, 3 Mass. R. 514, 519, 520.

⁴ Harvey v. Richards, 1 Mason, R. 421; ante, § 323 to § 328, § 401 to 6 403

of debts entitled to a priority are therefore deemed privile England, bond debts and judg privilege; and the like law states of this Union.1 found in the law of France classes of creditors.2 On the chusetts, and in many other s debts, except those due to the equal rank, and are payable p pose, then, that a debtor dies where such priority of right an he has personal assets situate debts stand in an equal rank duly taken out, in the place in the place of the situs of the to govern in the marshalling law of the domicil? Or the l established rule now is, that the administration of assets is to be governed altogethe country, where the executor and from which he derives them; and not by that of the The rule has been laid down force on many occasions.3

¹ Smith administrator v. Union Bank o

Merlin, Répertoire, Privilége; Civi 2106.

³ See Harrison v Sterry, 5 Cranch, 2 R. 353, 361; Olivier v. Townes, 14 Mart Sobry v. De Laistre, 2 Harr. & John. R. v. Union Bank of Georgetown, 5 Peters 3 Pick. R. 128; Holmes v. Remsen, 20

§ 225. The ground, upon which this doctrine has been established, seems entirely satisfactory. Every nation, having a right to dispose of all the property actually situated within it, has (as has often been said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests. The rule of a preference, or of an equality in the payment of debts, whether the one or the other course is adopted, is purely local in its nature, and can have no just claim to be admitted by any other nation, which in its own domestic arrangements pursues an opposite policy. And in a conflict between our own and foreign laws, the doctrine avowed by Huberus is highly reasonable, that we should prefer our own. In tali conflictu magis est, ut jus nostrum, quam jus alienum, servemus.1

§ 526. It seems, that many foreign jurists, but certainly not all,² maintain a different opinion, holding, that in every case the privileges of debts and the rank and order of payment thereof, are to be governed by the law of the domicil of the debtor at the time of his contract, or of his death. They found themselves upon the general rule, that the creditor must pursue his remedy in the domicil of the

Estate, 3 Rawle, R. 312; McElmoyle v. Cohen, 13 Peters, R. 312. Where there are administrations and assets in different States, and the estate is insolvent, the general principle adopted by the Courts of Massachusetts is, to place creditors there, as to the assets in the state, upon a footing of equality with other creditors in the state, where the party had his domicil at his death. Davis v. Estey, 8 Pick. R. 475.

¹ Huberus, De Confl. Leg. Lib. 1, tit. 3, § 11. See also Smith adm'r v. Union Bank of Georgetown, 5 Peters, R. 517; ante, § 322 to 327.

² See ante, § 325 a, to § 325 o, and 1 Boullenois, p. 684 to 690; Rodenburg Diversit. Statut. tit. 2, ch. 5. 16; 2 Boullenois, Appx. p. 47 to p. 50.

debtor, and that debts follow of the creditor. This rule matters of jurisdiction in the is said; Juris ordinem convertei forum, sed reus actoris sequium reus habet, vel tempore co postea transtulerit, ibi tantum But it by no means follows, the rule in the municipal jurispru fore it ought to be adopted, international law. Nor doe even if the rule were admitt forum, where the suit should

Livermore, Diss, p. 164 to 171; a § 401 to 403. — Mr Livermore has, in h controverted the correctness of the An that the law of the debtor's domicil, a contracted, furnishes the true rule. that when the law of the domicil of th to classing debts and rights of action ar the law of the domicil of the debtor Henry on Foreign Law, 34, 35. Mr. Dw quotes the maxims, "Actor sequitur foru personam debitoris." He admits, indeed. attend upon the person of the creditor, but, to recover them, one must follow th debtor. If the question regard the dist the law of his domicil is to be observe degree or proportion the representatives with payment from his effects, then it i law of the domicil of the debtor should b 650. It would be difficult to point out in in support of this doctrine. See also Du cited in Livermore's Diss. 162, 163; M suctud. Paris. De fiefs. tit. 1, § 1, Gloss. Casaregis in Rubr. Stat. Civ. Genuæ Tom. 4, p. 42, 43; ante, § 322, to 328. ² Cod Lib. 3, tit. 13, l. 2.

debtor in his lifetime, that upon his death, in a conflict of the rights and privileges of creditors (concursus creditorum) of different countries, the municipal law of the country of the debtor should overrule the jurisprudence of the situs of the effects.¹

§ 527. This, however, seems to be the doctrine of Coquille, Mævius, Carpzovius, Burgundus, Rodenburg, Matthæus, and Gaill.2 But it is manifest, from the language used by them, that it is a matter of no small difficulty; and a diversity of laws and opinions may well be presumed to exist in regard to it. Boullenois holds the same doctrine.3 Hertius seems in one passage to affirm it, saying; Si de re immobili agitur, spectandas esse leges situs rei indubium est, etiamsi privilegium in ea propter qualitatem personæ tribuatur. At in rebus mobilibus, si ex contractu vel quasi agatur, locus contractus inspiciendus esset. Enimvero, quia antelatio ex jure singulari vel privilegio competit, non debet in præjudicium illius civitatis, sub qua debitor degit, et res ejus mobiles contineri censeatur, extendi. Ad jura igitur domicilii debitoris,

1 Ante, § 332 to § 327.

² Livermore, Diss. § 254 to § 257, p. 166 to 171; Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Appx. p. 47; ante, § 324 to 325 o; 1 Boullenois, p. 686 to p. 687; Id. Observ. 30, p. 818 to p. 834; Bouhier, Cout. de Bourg. ch. 21, § 204, ch. 22, § 151; Mævius, Comm. in Jus Lubesence, Lib. 3, tit. 1, art. 11, n. 24 to n. 27, p. 39, 40; Id. art. 10, n. 51, p. 33; Matthæus, de Auction. Lib. 1, ch. 21, § 35, n. 10, p. 294, 295; Gaill, Observ. Pract. Lib. 2, Observ. 130, n. 12, 13, 14, p. 563; Burgundus, Tract. 2, n. 21, p. 72, edit. 1621; ante, § 324 to § 327. — Not having access to the works of Carpzovius and Coquille, I am obliged to rely on the citations, which I find in Livermore's Dissertations of Coquille's opinion, and upon Rodenburg, Mævius, (ubi supra,) and Hertius for the citations from Carpzovius. The other Authors I have examined, and the citations are correct. Ante, § 324 to § 327; post, § 582.
³ I Boullenois, p. 818; Id. Observ. 30, p. 834.

ubi fit concursus creditorum, generis lites adversus illum itatem causæ trahuntur. regi Yet he afterwards admits the undue preferences, given b state in favor of its own sul just retaliation by others.2 Huberus,3 which would see was of a different opinion. rus) upon a bill of exchange reasonable time, has a prefe other creditors upon the He has property o debtor. land, where no such law exis there preferred to means; since those creditor ceived, have already acquii causâ cambii, jus suum in te apud Batavos omnibus ali bus? I in bona mobilia del modi res in Frisiâ, ubi hoc j creditor etiam præferetur al modo; quoniam heic creditor rum jus pridem quæsitum remarks. Nimirum rectè d teneri Potestates sequi jus ali

¹ 1 Hortii, Opera, De Collis. Leg. (211, edit. 1716; ante § 325 b.

² Id.

³ Huberus, J. P. Univers, ch. 10, § 4 4 I quote the passage as I find it is work of Huberus here referred to. He 1 Hertii, Opera, De Collis. Leg. § 4, n edit. 1716. See ante, § 325 a. Should

et civium suorum. Hinc in quibusdam Germaniæ regionibus cives et incolæ in concursu creditorum antehabentur exteris, et pro consuetudine, quæ Biberaci est,
ut cives chirographiarii præferantur extraneis forensibus, anteriorem hypothecam habentibus, pronunciatum in
Camera Imperiali.¹ Now, this seems a virtual surrender
of the main ground in all cases, where there is a conflict of laws, as to the priorities and preferences of
creditors, between the law of the domicil of the debtor, or of the contract, and that of the situs of the
movables. *

§ 528. In the course of administration, also, in different countries, questions often arise as to particular debts, whether they are properly and ultimately payable out of the personal estate, or are chargeable upon the real estate of the deceased. In all such cases, the law of the domicil of the deceased will govern in cases of intestacy; and, in cases of testacy, the intention of the testator. A case, illustrating this doctrine, occurred in England many years ago. A testator, who lived in Holland, and was seised of real estate there, and of considerable personal estate in England, devised all his real estate to one person, and all his personal estate to another, whom he made his executor. At the time of his death, he owed some debts by specialty, and some by simple contract in Holland, and he had no assets there to satisfy those debts; but his real estate was by the laws of Holland made liable for the payment of simple contract debts, as well as specialty debts, if there were

¹ 1 Hertii, Opera, De Collis. Leg. § 4, n. 64, p. 150, edit. 1737; Id. p. 211, 212, edit. 1716; ante, § 325 b.

not personal assets to answer itors in Holland sued the d decree there for the sale of the payment of their debts. And t a suit in England against th tee of the personalty) for the personal estate. The Co upon the ground, that in Holk personal estate was the primar of debts, and that it should c estate, and be in the first place § 529. In the Scottish lav recognised, that is to say, that marily chargeable with the de it in exoueration of all other fi cation under the local law to posite result may be produced f mentioned; for the personal exonerated, and the real estat Thus, for example, in Scotl primarily payable out of the 1 have seen, the personal estate and dving in England, is he charge of such a heritable bon real estate in Scotland, to s in England; and the Scottis to bear the burthen.2 On th

debts

of Scotland, movable



Anonymous, 9 Mod. R. 66; S. P. Boy
 Ante. 486, 487, 488; Drummond
 Cases, 550 [Tomlin's edit. 1803); S. C
 Winchelsea v. Garetty, 2 Keen, R. 293
 200, 214; 4 Burge, Comm. on Col. and
 722 to p. 734; ante, § 266 a, 366, 486, 48

heritable bonds) are primarily and properly chargeable upon the personal estate. The creditor may indeed enforce payment against the real estate in the hands of the heir; but if he does so, the heir is entitled to relief against the executor out of the personal estate. In other words, according to the law of Scotland, the real estate, though subject to the payment of movable debts, is only a subsidiary fund for the purpose of payment. Payment, therefore, by the heir does not extinguish the debt in his hands, but vests in him a right to recover the amount against the personal estate.1 The question has arisen, whether, under such circumstances, the heir is entitled to enforce a payment out of the personal estate of his ancestor, not only in Scotland, but in England (where he died domiciled), according to whose laws the personal estate is also the primary fund for the payment of debts; and it has been held, that he is so entitled, upon the ground, that as between the heir and the persons entitled to the distribution of the personal estate, the primary fund must in all cases ultimately bear the burthen.2

Earl of Winchelsea v. Garetty, 2 Keen, R. 293, 308.

² Earl of Winchelsea v. Garetty, 2 Keen, R. 293, 310, 311, 312. See Lord Langdale's opinion cited at large, ante, § 266 a.

CHAPTER

JURISDICTION AND

§ 530. WE are next led to subject of remedies, or the m violation of the rights of othe ings in courts of justice. things, these may well be cl first, those remedies, which I movable and immovable; secon ly regard persons; and, third both persons and property. dence took notice of this distin divided all remedies, as to the kinds; (1.) Real action, oth tions, which were those, in something, that was his own, a on dominion, or jus in re; (2. nominated also Condictions, which a man demanded, what and which were founded on ad rem; (3.) Mixed actions, which some specific thing was also some personal obligation performed. The real action were not, like the real action

¹ Halifax on the Roman Law, B. 3, c Civil and Adm. Law, p. 439, 440.—In F Orléans, there will be found a correspon same classes Pothier, Coutumes d'Orlé to 122.

confined to real estate; but they included personal, as well as real property. But the same distinction, as to classes of remedies and actions, equally pervades the common law, as it does the civil law. Thus, we have in the common law the distinct classes of real actions, personal actions, and mixed actions, the first embracing those, which concern real estate, where the proceeding is purely in rem; the next, embracing all suits in personam for contracts and torts; and the last, embracing those mixed suits, where the person is liable by reason of, and in connexion with, property.

§ 531. In considering the nature of actions, we are necessarily led to the consideration of the proper tribunal, in which they should be brought; or, in other words, what tribunal is competent to entertain them in point of jurisdiction. And, here, the subject naturally divides itself into the consideration of matters of jurisdiction in regard to the administration of mere municipal and domestic justice; and matters of jurisdiction in regard to the administration of justice inter gentes, founded upon principles of public law.

§ 532. In the Roman jurisprudence, and among those nations, which have derived their jurisprudence from the civil law, many embarrassing questions, as to jurisdiction, seem to have arisen.² The general rule of the Roman Code is, that the plaintiff must bring his suit or action in the place, where the defendant has his domicil, or where he had it at

^{1 3} Black. Comm. 294; Comyns, Dig. Action, N.

² See 1 J. Voet, ad Pand. Lib. 5, tit. 1, § 303; Id. § 64, 66, 74, 91, 92; Huberus, Lib. 5, tit. 1, De Foro Compet, Tem. 2, § 38 to § 52, p. 722 to 730; Strykius, Tom. 6, 11, p. 1, 8, Tom. 7, 1, p. 5; 1 Boullenois, Observ. 25, p. 601, 618, 619, 635.

the time of the contract. Emperor Diocletian) convert rei forum, sed reus actoris se icilium reus habet, vel tempor hoc postea transtulerit, ibi tar But it is not to be u 101.1 applied to all cases, when was found, without any rethe thing sought, as if its more favor to the party defer Its sole object was, that th made, where it could be enfo doctrine laid down in the general rule is, that the pla in the domicil of the defer pensed with in certain suits brought in the place rei sitæ. in rem, sive in personam sit locis, in quibus res, propter q sunt, jubemus in rem actio moveri.2

§ 533. Huberus thus expl ratio non tam est, quod reetsi verissima; sed quod nece alium ad jus æquum, non queat; superior autem cujusqu prius rector. Vocandi, inque dem sine coactione judicia for rum lege stabilitur, quam ub hiberi potest; non tamen, ui forum, sed ubi res et æquitas

Cod. Lib. 3, tit. 13, l. 2; ante, § 5
 Cod. Lib. 3, tit. 19, l. 3; 1 Boulle
 551.

lendi partes ad æquum jus, imprimis est in loco domicilii, est etiam in loco rei sitæ, et rei gestæ, si Reus illic haberi possit, alias secus. Hinc tria sunt loca fori in jure nostro, Domicilii, Rei sitæ, Rei gestæ.¹ And, hence he thinks, that the rule of the civil law rei sitæ applies, not only to immovables, but to movables, although many jurists confine it to the former.² Sed heic aliam potius rationem sequimur; quod in foro stabiliendo maxime consideretur, an in promptu sit effectum dare citationi, in cogendis partibus ad obsequium jurisdictionis; quæ facultas æque locum habet in mobilibus, ubi detinentur, quam in immobilibus, ubi sitæ sunt.³

§ 534. But he admits, that, as the forum domicilii was of universal operation, actions in rem might be brought in the forum domicilii, as well as in the forum rei sitæ. Videlicet, hoc semper tenendum, domicilii forum esse generale, quod in cunctis actionibus, adeoque etiam in actionibus in rem, obtinere, sciendum est, ut de dd. legibus constat. Again he says; Summa igitur hæc esto. Domicilium in omnibus rebus et actionibus præbet forum. Res sita præterea in actionibus in rem singularibus, non excluso domicilio. And he supposes the same rule to apply in modern times in the civil law countries. Hæc ego de foro domicilii,

¹ Huberus, Lib. 5, tit. 1; De Foro Compet. § 38, Tom. 2, p. 722. See also 1 Boullenois. Observ. 25, p. 618, 619; post, § 551.

² The subject is a good deal controverted among the civilians; but the present work does not require me to engage in the task of discussing the various opinions, which are held by them. The learned reader will find many of them referred to in J. Voet ad Pandect. Tom. 1, Lib. 5, tit. 1, § 77, &c., p. 337.

³ Huberus, Tom. 2, Lib. 5, tit. 1, § 48, p. 727.

⁴ Id. § 49, p. 728. 5 Id. § 50, p. 728.

reique sitæ alternè conjuncto, n modo putem obtinere, quemadmo scriptum est; ut maxime in rem possit tamen omnino etiam, ubi

§ 535. In regard to mixed is no text of the Roman law rus thinks, that they may be place of domicil of the defenda De mixtis actionibus, exceptâ ha partim in rem, partim in person sunt textus speciales, ubi sint in ex earum proprietate colligunt imitentur naturam personalium illas et apud domicilium et apu das, &c. Proinde sic quidem illas actiones utroque moveri; verum, si faciendæ s nuque divisio regenda sit, parte tendas esse, res ipsa loquitur.2

§ 536. The civil law control of jurisdiction, to wit, the place made, or was to be fulfilled, o was done, if the defendant of found there, although it was notical. Illud sciendum est, eum ut in Italia solveret, si in proventrobique posse conveniri, et i explains this thus. Sequitur Rem Gestam esse diximus, ean ex delicto admisso, &c. Sed a

¹ Huberus, Tom. 2, Lib. 5, tit 1, § 50.

² Id. § 51, p. 729.

³ Dig. Lib. 5, tii. 1, l. 19, § 4. See Pothier, Pand. Lib. 5, tit. 1, n. 29 to 44;

buit, si contrahens in eodem loco reperiatur; quod convenit, requisito communi inde ab initio collocato, nullam esse fori causam, nisi cum facultate cogendi conjunctam; qualis non est ex historiâ contractûs, si vel Reus ibi non inveniatur, vel bona duntaxat sita non habeat, in quæ missio fieri possit, quando Reus se in loco contractûs non sistit.¹ These distinctions of the Roman law have found their way into the jurisprudence of most, if not of all, of the continental nations of modern Europe.

§ 537. Accordingly we find it laid down by foreign jurists generally, that there are, properly speaking, three places of jurisdiction; first the place of domicil of the party defendant, commonly called the forum domicilii; secondly, the place, where the thing in controversy is situate, commonly called the forum rei sitæ; and thirdly, the place, where the contract is made, or other acts done, commonly called forum rei gestæ, or forum contractûs. Vis illa compellandi partes ad æquum jus (says Huberus) imprimis est in loco domicilii; est etiam in loco rei sitæ; et rei gestæ, si reus illic haberi posse; alias secus.2 The same distinctions are fully laid down by John Voet, and Boullenois, to whom we may generally refer for more copious information.3 They are also recognised in the Scottish law.4 They have been here brought into view, because they constitute the basis of the reasoning of many of the foreign jurists, in discuss-

Huberus, Tom. 2, Lib. 5, tit. 1, § 53, 54, p. 729, 730.

² Huberus, Tom. 2, Lib. 5, tit. 1, De Fore Compet. § 38, p. 722.

² J. Voet, ad Pand. Lib. 5, tit. 1, De Judiciis, p. 303, § 64 to § 149; 1 Boullenois, Observ. 25, p. 601; Id. p. 618, 619; Id. p. 635; Henry on Foreign Law, ch. 8, p. 54, ch. 9, p. 63.

⁴ Erskine, Inst. B 1, tit. 2, § 16 to 22, p. 29 to 39.

ritory, or upon the thing being within the territory; for, otherwise, there can be no sovereignty exerted, upon the known maxim; Extra territorium jus dicenti impune non paretur.1 Boullenois puts this rule among his general principles. The laws of a sovereign rightfully extend over persons, who are domiciled within his territory, and over property, which is there situate.2 Vattel lays down the true doctrine, in clear terms. "The sovereignty, (says he,) united to domain, establishes the jurisdiction of the nation in its territories, or the country, which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country." 3 On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals.4 This subject, however, deserves a more exact consideration.

§ 540. In the first place, let us consider the subject of jurisdiction a little more particularly in regard to persons. These may be, either citizens (native or naturalized), or foreigners. In regard to the former, while within the territory of their birth, or of their adopted allegiance, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled; and it ought to be

¹ Dig. Lib. 2, tit. 1, 1, 20.

² I Boullenois, Pr. Gén. 1, 2, p. 2, 3.

³ Vattel, B. 2, ch. 8, § 84.

⁴ Picquet v. Swan, 5 Mason, R. 35, 42. See Russel v. Smyth, 9 Mees. & Welsh. R. 819.

had received no notice; however the proceedings might be in conformity to the local laws. This is the just result deducible from the axioms of Huberus already quoted; and, especially, from the first and second of these axioms.1 Whatever authority should be given to such judgments, must be purely ex comitate, and not as matter of absolute or positive right on

one side, and of duty on the other.

§ 541. In regard to foreigners, resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear, upon general principles of international law, that such a right does exist; and the extent, to which it should be exercised, is a matter purely of municipal arrangement and policy. Huberus lays down the doctrine in his second axiom. All persons, who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.2 Boullenois says, that the sovereign has a right to make laws to bind foreigners in relation to their property within his domains; in relation to contracts, and acts done therein; and, in relation to judicial proceedings, if they implead before his tribunals.3 further, that he may, of strict right, make laws for all foreigners, who merely pass through his domains, although commonly this authority is exercised only as to matters of police.4 Vattell asserts the same general doctrine, and says, that foreigners are subject to

¹ Ante, § 29.

² Id.; Huberus, Tom. 2, Lib. 1, tit. 3, § 2, p. 538; ante, § 29, note 3; Henry on Foreign Law, ch. 8, p. 54, ch. 9, p. 63, ch. 10, p. 71.

^{3 1} Boullenois, Pr. Gén. 4, 5, p. 3.

⁴ Id. 5, p. 3.

for instance, be maintainable against him, so as absolutely to bind his property situate elsewhere; and, a fortiori, not so as absolutely to bind his rights and titles to immovable property situate elsewhere. It is true, that some nations do, in maintaining suits in personam, attempt, indirectly, by their judgments and decrees, to bind property situate in other countries; but it is always with the reserve, that it binds the person only in their own courts in regard to such property. And, certainly, there can be no pretence, that such judgments or decrees bind the property itself, or the rights over it, which are established by the laws of the place, where it is situate. If a Court of Chancery, in England, should compel a bankrupt by its decree, to convey his personal and real estate, situate in foreign countries, to the assignees under the commission, (as it was at one time thought they might do, although now the doctrine is repudiated);1 yet such a decree would not operate to transfer the property, so as to affect the rights of creditors, or the regular operation of the laws of the state rei sitæ. So, a foreign court cannot, by its judgment or decree, pass the title to land situate in another country; neither can it bind such land by a judgment or decree, that in default of the defendants in the suit conveying it, shall be conveyed by the deed of its own officers to the plaintiffs. Such a conveyance, made by its officers, would be treated, in the country, where the land is situate, as a mere nullity.2

§ 544. The doctrine of the English Courts of Chancery, on this head of jurisdiction, seems carried

Ex parte Blades, 1 Cox, R. 398; Selkrig v. Davies, 2 Rose, Bank.
 Cases, 97; Id. 291; S. C. 2 Dow, R. 231.
 Watts v. Waddle, 6 Peters, R. 389, 400.

to bid: the question is, whether any court will permit the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued, very sensibly, that it is strange for this Court to say, it is void by the laws of the island, for want of notice. I admit, I am bound to say, that, according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it; the question is, whether an English Court will permit such an use to be made of the law of that island, or any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value; and to pay himself more than the debt, for which the suit was commenced, and for which only the sale could be holden. It was not much litigated, that the Courts of equity here have an equal right to interfere with regard to judgments or mortgages upon the lands in a foreign country, as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here. Archer v. Preston, Lord Arglasse v. Muschamp, Lord Kildare v. Eustace, (1 Eq. Abr. 133; 1 Vern. 75, 135, 419.) Those cases clearly show, that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction, as if they were situated in England. Lord Hardwicke lays down the same doctrine, (3 Atk. 589). Therefore, without affecting the jurisdiction of the

Courts there, or questioning proceedings, as in a court of la sale would have been set aside there, I have no difficulty in have to say, that this creditor the advantage he got by the proceed behind the back of t structive notice, which could point, to which a constructive 1 might be actual notice witho he has gained an advantage, of this, nor of any other cou will lay down the rule as bi will not permit him to avail any other country to do, wha tice."1

§ 545. To the extent of thi may not be any well-founds same doctrine has been repeat equity courts of America.³ the Court of Chancery will lands in the plantations, so the possession, or the rents at will it entertain jurisdiction gard to lands in foreign color title there; or to prevent a junction; ⁵ although it has b

¹ Cranstown v. Johnston, 3 Ves. R. 17

² S. P. Jackson v. Petrie, 10 Ves. 164.

³ See Massie v. Watts, 6 Cranch, 14 kins, R. 213; Mead v. Merrett, 2 Paig Paige, R. 606.

⁴ Roberdeau v. Rous, 1 Atk. 543. S

<sup>§ 551.

&</sup>lt;sup>5</sup> White v. Hall, 12 Ves. Jr. 321.

148, 156.

very general terms, that there is no doubt of the jurisdiction of the Court of Chancery, as to land in the West Indies, or in other foreign places, if the

persons are in England. 1

& 546. But it is not an uncommon course for a nation by its own municipal code to provide for the institution of actions against non-resident citizens, and against non-resident foreigners, by a citation viis et modis, (as it is called,) or by an attachment of their property, nominal or real, within the limits of its own territorial sovereignty; and to proceed to judgment against the party defendant, whether he has any actual notice of the suit, or not, or whether he ever appears to the suit, or not. In respect to such suits in personam, by a mere personal citation, viis et modis, such as by posting up such a citation on the Royal Exchange, in London, as is done in the Admiralty in England, or by an edictal citation, (as it is called,) posted up at the Key in Leith, at the market cross of Edinburgh, and the pier and shore of Leith, according to the practice of Scotland,2 there is no pretence to say, that such modes of proceeding can confer any legitimate jurisdiction over foreigners, who are nonresidents, and do not appear to answer the suit, whether they have notice of the suit, or not. The

1 Jackson v. Petrie, 10 Ves. 165.

² Ersk. Instit. B. 1, tit. 2, § 17, 18; Id. B. 4, tit. 1, § 8. — After a decree is obtained in personam, in Scotland, it seems, that letters of horning, as they are called, issue, requiring the defendant to comply with the decree, which may be served by personal service, or, if the party cannot be found, by application at his place of domicil, or dwelling-house; and, if he is out of the kingdom, then he is charged by a copy put up at the market cross in Edinburgh, and at the pier and shore of Leith. Ersk. Inst. B. 2, tit. 5, § 55; Id. B. 4, tit. 3, § 9. See Douglas e. Forrest, 4 Bing. R. 686, 690.

present there, and were subject to the jurisdiction of the Court, out of which the process issued; and, as nothing of that sort was in proof here to show, that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained."

¹ Buchanan v. Rucker, 9 East, R. 192, 194. See Cranstown v. Johnston, 3 Ves. R. 170; S. C. 5 Ves. 276; Cavan v. Stewart, 1 Starkie, R. 525; Becquet v. McCarthy, 2 Barn. & Adolph. 951; S. P. Ferguson v. Mahon, 11 Adolph. & Ellis, 179, 182 .- In Smith v. Nicholls, 5 Bing. New Cases, 208, which was an action of trover for a ship, the defendant, among other things, pleaded a foreign judgment and recovery by the plaintiff in the Vice Admiralty Court at Sierra Leone for the same subject-matter. To that plea there was a replication, that the defendant was not in the Colony of Sierra Leone, or at any place, within the jurisdiction of the Vice Admiralty Court, at the commencement of, or at any time during the proceedings, or any time until after the judgment in the Colony of Sierra Leone, and had no notice thereof, &c.; and Lord Chief Justice Tindal in delivering his opinion, adverting to this point, said; "The effect of the plaintift's replication is this, - He shows some matters, by which at least prima facie the judgment relied on is a void judgment; for he says, at the time of the suit being commenced, and from that time down to the termination of the suit, not only was the defendant in that action absent from the place, but that he had no person, whatever, no agent, or any other person, on whom any process or monition from the Court could be served, or who could answer for him. Till that is answered by showing, that there was some law in the colony from which, in the situation the party was, the judgment would not be a void one, we must say the plaintiff is setting up that, which, if unanswered, shows it to be a void judgment. In Plummer v. Woodurne, the Court says, that before you set up a foreign judgment as conclusive in the nature of an estoppel between the parties, it must appear on the record, that it is decisive and binding between them in the colony, where the judgment is given. That does not appear here; and therefore on both grounds I think the plea is a bad plea, as far as the foreign judgment is concerned." See also Plummer v. Woodburne, 4 Barn. & Crosw. 625. Lord Brougham in alluding to the same subject in Don v. Lippmann, 5 Clarke & Finell. 1, 20, 21, said; "But supposing that the debt might have been sued for in France, then comes the question, whether the French judgment cannot be sued on as a substantive cause of action. It is, in fact, tendered as one of the grounds of suit here. A foreign judgment is good here for such a purpose, provided that it has

ment of his heritable property in Scotland, and due proclamation, by what is technically called "borning," in Scotland, which judgment was rendered against the defendant by default for his non-appearance to answer the suit. The question was, whether the judgment so rendered was void, or not. It was held, that the judgment was valid. This decision was founded partly upon the construction of the articles of union between Scotland and England, and partly upon the recognition of such a practice, as valid, by a British Act of Parliament, and partly upon the fact, that the judgment was against a Scottish subject.1 On that occasion, Lord Chief Justice Best in delivering the opinion of the Court said; "A natural born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation. The deceased, before he left his native country, acknowledged, under his hand, that he owed the debts; he was under a moral obligation to discharge those debts, as soon as he could." And after adverting to the case of Buchanan v. Rucker, and some others, he added; "To be sure, if attachments, issued against any persons, who were never within the jurisdiction of the Court issuing them, would be supported and confirmed in the country, in which the person attached resided, the legislature of any country might authorize their Courts to decide on rights of parties, who owed no allegiance to the government of such country, and were under no

2 Ibid.

Douglas v. Forrest, 4 Bing. R. 686, 702, 703.

Proof, however, was given, that by the law of the colony, in the case of a person, formerly resident in the island, absenting himself, and not leaving any attorney, upon whom process in a suit might be served, the Procurator General or his deputy was bound to take care of the interests of such absent party. It was said, that the law of the island did not provide any means, whereby the Procurator General or his deputy might be required to hold communication with. or receive directions from an absent person. There may, perhaps, be some deficiency in the law in that respect; but as the law of the island is, that the process shall be served upon the public officer, it must be presumed, that he would do whatever was necessary in the discharge of that public duty; and we cannot take upon ourselves to say, that the law is so contrary to natural justice, as to render the judgment void in a case, where the process was so served."1

§ 549. A still more common course, in many states and nations, is, to proceed against non-residents, whether they are citizens, or whether they are foreigners, by a seizure or attachment of their property situate or found within the territory. Sometimes the seizure or attachment is purely nominal, as, for example, of a chip, or a cane, or a hat. In other cases the seizure or attachment is bonâ fide of real prop-

Becquet v. McCarthy, 2 Barn. & Adolph. 951, 958, 959. — It has been justly remarked by Lord Brougham, (in Don v. Lippmann, 5 Clarke & Finell. 21,) that that case "has been supposed to go to the verge of the law; but the defendant in that case held a public office in the very colony, in which he was originally sued." Perhaps a stronger doubt of its correctness might upon principles of public justice have been pronounced. Boullenois manifestly deems an exercise of jurisdiction against an absent foreigner to be unfounded in point of authority. 1 Boullenois Observ. 25, p. 610.

§ 550. In the next place, let us consider the subject of jurisdiction in regard to property. It will be unnecessary to discuss the matter at large, as to personal property, since the general doctrine

in New Hampshire having jurisdiction of the cause for the purpose of rendering that judgment, and the bailiff, factor, trustee, or garnishee producing it, not to obtain execution of it here, but for his own justification. If, however, those goods, effects, and credits are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this state to obtain satisfaction, he must fail; because the defendant was not personally amenable to the jurisdiction of the Court rendering the judgment. And, if the defendant, after the service of the process of foreign attachment, should either in person have gone into the State of New Hampshire, or constituted an attorney, to defend the suit, so as to protect his goods, effects, or credits from the effect of the attachment, be would not thereby have given the Court jurisdiction of his person; since this jurisdiction must result from the service of the foreign attachment. It would be unreasonable to oblige any man living in one state, and having effects in another state, to make himself amenable to the courts of the last state, that he might defend his property there attached." See post, § 584, 592, 598 to 618. Mr. Burge has made the following remarks on the same subject. "In order that it may produce the effect of res judicata in the country, in which it is pronounced, and à fortiori in a foreign country, the sentence must be given by a competent tribunal. It must put a final termination to the matter in litigation, and it must be certain. The want of either of these requisites is such a defect as to render the sentence null and void, and this defect is called a nullity. The judicial tribunal must be competent to entertain jurisdiction of the subjectmatter of the suit. If, according to the constitution of the tribunal, the subject-matter of the sentence was excluded from its cognizance, the sentence pronounced by the individuals composing it would possess the weight, which belonged to an arbitrament made by those, to whom the litigating parties had submitted their differences, but it would not possess the authority of res judicata. Where a limited tribunal takes upon itself to exercise a jurisdiction, which does not belong to it, its decision amounts to nothing, and does not create any necessity for an appeal. Such a defect in the sentence cannot be cured by the appearance of the party. Another nullity in the sentence is, a decision given upon that, which was not demanded or not contested, or when more has been adjudged than was demanded, for in either case the judge has exceeded his jurisdiction: "Ultra id, quod in judicium deductum est, potestas judicis nequaquam potest excedere." The party, against whom the sentence has been obtained, must be subject to the jurisdiction of

for the purpose of justice, that the actual situs of the thing should be examined. A nation, within whose territory any personal property is actually situate, has as entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for, and control the uses and disposition of it, to the same extent, that it may exert its authority over immovable property. One of the grounds, upon which, as we have seen, jurisdiction is assumed over non-residents, is, through the instrumentality of their personal property, as well as of their real property, within the local sovereignty. Hence it is, that, whenever personal prop-

an action before the defendant had actually appeared in court to answer him; and even if he pertinaciously neglected or refused to appear, the only course was to issue continued process, or to distrain upon his goods, in order thereby, as it was expected, to induce him to appear, or to outlaw him, by which process he incurred a qualified forfeiture of his lands and goods, and all his civil rights as a subject were suspended. But in certain cases, after actual personal service the plaintiff was, by the aid of certain statutes, permitted to enter an appearance for the defendant. But if the defendant were abroad, or avoided the service of process, and had no goods (the distraining of which was considered nearly equivalent to actual service, because it was supposed the defendant would hear of that proceeding,) then the only course was, and still is, to proceed to outlawry, which, however, does not enable the plaintiff to proceed in his action, or to obtain judgment therein, but only causes a seizure of the lands, goods, and property of the defendant, as forfeited to the king for the defendant's contumacy and disrespect of his process. But the plaintiff may thereupon, by application to the Court of Exchequer or by petition, when his claim exceeds fifty pounds, obtain satisfaction of his debt by sale of the defendant's property seized under his outlawry, unless previously the defendant appears to the action, and enables the plaintiff to try the merits." 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 24. p. 1016, 1019.

¹ See ante, § 423 a.

² Ante, 549.

erty.1 The same rule is applied to mixed actions, and to all suits, which touch the realty.2

§ 552. Boullenois has treated this whole subject with becoming fullness and accuracy. He has divided actions into those, which are purely personal, those, which are purely real, and those, which are mixed, and partake of the character of both, following, in these respects, as he avows, the division of Burgundus.3 The first, (personal actions,) respect the quality, state, or condition of persons, and pronounce against them judgments purely personal, Ad dandum, vel faciendum, aut non faciendum. The next, (real actions,) respect things, either the proprietary right or ownership, or the right of possession, or the right or title of a creditor, or some other right or title. The last, (mixed actions,) respect both persons and things, either in adjudging the property to one, or pronouncing against him a personal judgment for the profit of the other, or adjudging the property to one, and adjudging the other to make restitution of the profits to him; so that it is the title of the action, which characterizes the action.4 Personal actions may rightfully be brought

¹ The jurisdiction as to the rights of real property is local, the subject being fixed and immovable. Lord Chief Justice De Grey in Rafael v. Develst, 2 Wm. Black. R. 1058.

² Henry on Foreign Laws, ch. 8, § 3, p. 59, ch 9, § 1, p. 63; 1 Boullenois, Observ. 25, p. 601, &c.; Id. p. 618, 619; Id. p. 635, &c.; Id. p. 619.

³ The language of Burgundus is; Omnium condemnationum summa divisio, pariter in tria genera deducitur. Aut enim in rem, aut in personam, aut in utramque concipiuntur. In rem, quoties alicui res asseritur, hoc est ejus esse dicitur, vel jure creditoris, aut alio modo possidenda datur. In personam, si condemnetur ad aliquid dandum aut patiendum, faciendum aut non faciendum, vel, si personæ statum afficiat. In utramque si et res, et personæ simul in condemnationem veniant. Burgundus, Tract. 3, n. 1, 2, p. 84, 85.

⁴ I Boullenois, Observ. 25, p. 601, 602.

they may be sued for as personal actions.1 There are many other jurists, who adopt the like distinctions.2

§ 553. Vattel explicitly avows the same doctrine. "The defendant's judge," (that is, the competent judge,) says he, "is the judge of the place, where the defendant has his settled abode, or the judge of the place, where the defendant is when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country, where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such [real] property can only be decided in the state, in which it depends."

§ 554. It will be perceived, that in many respects the doctrine, here laid down, coincides with that of the common law. It has been already stated, that by the common law personal actions, being transitory, may be brought in any place, where the party defendant can be found; that real actions must be brought in the forum rei sitæ; and that mixed actions are properly referable to the same jurisdiction. Among

Id. Observ. 25, p. 635, 636.

² Id. Observ. 25, p. 601 to p. 651; 1 Hertii, Opera, De Collis, Leg. § 70, p. 132, edit. 1737; Id. p. 215, edit. 1716; J. Voet, ad Pand. Tom. 1, Lib. 4, tit. 1, § 28, p. 241.

³ Vattel, B. 2, ch. 8, § 103.

⁴ Personal injuries are of a transitory nature, et sequentur forum Rei. Lord Chief Justice De Grey in Rafael v. Develst, 2 W. Black, R. 1058, See Mostyn v. Fabrigas, Cowper, R. 161, 176, 177; Robinson v. Bland, 2 Burr. R. 1074; S. C. 1 W. Black, 259; ante, 364.

⁵ Ante, § 364; 4 Cowen, R. 527, note, — Lord Mansfield in Mostyn v. Fabrigas, (Cowper, R. 161, 176,) said; "There is a formal and a substantial distinction as to the locality of trials. I state them as different things. The substantial distinction is, where the proceeding is in rem;

§ 555. The grounds, upon which the exclusive jurisdiction is maintained over immovable property are the same, upon which the sole right to establish, regulate, and control, the transfer, descent, and testamentary disposition of it have been admitted by all nations. The inconveniences of an opposite course would be innumerable, and would subject immovable property to the most distressing conflicts arising from opposing titles, and compel every nation to administer almost all other laws, except its own, in the ordinary administration of justice.

§ 556. Having stated these general principles in relation to jurisdiction, (the result of which is, that no nation can rightfully claim to exercise it, except as to persons and property within its own domains,) we are next led to the consideration of the question, in what manner suits arising from foreign causes are to be instituted, and proceedings to be had until the final judgment. Are they to be according to the law of the place, where the parties, or either of them, live? Or are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place, where the suits are brought? Fortunately, here, there is scarcely any ground left open for controversy, either at the common law, or in the opinions of foreign jurists, or in the actual practice of nations. It is universally admitted and established, that the forms of remedies, and the modes

by Mr. Chief Justice Marshall, in the case of Livingston v. Jefferson, before the Circuit Court of Virginia, in 1811, (4 Hall's American Law Journal, p. 78.) It was an action quare clausam fregit, brought against Mr. Jefferson on account of an alleged trespass to lands (the Batture) in New Orleans, by his order, while he was President of the United States. The suit was dismissed for want of jurisdiction.

¹ Ante, § 364, 365.

The jurisprudence of one nation may be very refined and artificial, with a multitude of intricate and perplexed proceedings; that of another may be rude, uninformed, and harsh, consisting of an undigested mass of usages. It would be absolutely impracticable to apply the process and modes of proceeding of the one nation to the other. Besides; there would be an utter confusion in all judicial proceedings by attempting to engraft upon the remedies of one country those of all other countries, whose subjects should be parties or be interested therein. No tribunal on earth, however learned, could hope, by any degree of diligence, to master the laws and processes and remedies of all other nations, and the qualifications and limitations properly belonging thereto. A whole life might be passed in obtaining little more than a few unconnected elements; and litigation would thus become immeasurably complicated, if not absolutely interminable. All, that any nation can, therefore, be justly required to do, is to open its own tribunals to foreigners, in the same manner and to the same extent, as they are open to its own subjects; and to give them the same redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code for natives and residents.1

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Confl.

¹ Lord Brougham, in delivering his judgment in Donn v. Lippmann, 5 Clark & Finnell. R. 1, 13, 14, made some striking remarks on this subject. "The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the lex fori, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in the British Linen Company v. Drummond, (10 Barn & Cres. 903); De la Vega v. Vianna, 1 Barn & Adol. 284,) and in Huber v. Steiner, (2 Scott, 304; 1 Hodges, 206; 2 Bing. N. C. 202; 2 Dowl. Prac. Cas. 781; and 4 Moore & Scott, 328,) though the reverse had previously been recognised in Williams v. Jones, (13 East, 439). Then,

§ 558. The doctrine of the common law is so fully established on this point, that it would be useless to do more than to state the universal principle, which it has promulgated; that is to say, that, in regard to the merits and rights involved in actions,

assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law, which relates to the contract itself, or to the remedy. When both the parties reside in the country, where the act is done, they look of course to the law of the country, in which they reside. The contract being silent as to the law, by which it is to be governed, nothing is more likely than that the lex loci contractus should be considered at the time the rule: for the parties would not suppose, that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise, when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy, when they make the contract. They bind themselves to do. what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. That is the lowest ground, on which to place the case. The inconveniences of pursuing a different course is Not only the principles of the law, but the known course of the courts renders it necessary, that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. It is true, that there may be no difficulty in knowing the law of the place of the contract, while there may be a great difficulty in knowing that of the place of the remedy. But that is no answer to the rule. The distinction, which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the courts, where the remedy is to be enforced. No one can say, that because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts, where the contract is to be enforced, or the other preliminary proceedings of those courts must be adopted, or that the rules of pleading, or the curisl practice of the foreign country, must necessarily be followed. No one will assert, that before the Jury Court in Scotland the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury; or take the converse, that a Scotchman might refuse the intervention of a jury here, and insist on having the case tried, as in Scotland, by the judge only. No one will contend in terms, that the foreign rules of evidence should guide us in such cases; and yet it is not so easy to avoid that principle in practice, if you once admit, that though the remedy is to be enforced in one country, it is to be enforced according to the laws, which govern another country.

the law of the place, where they originated, is to govern; In iis, quæ spectant decisoria causæ, et litis decisionem, inspiciuntur statuta loci, ubi contractus fuit celebratus.¹ But the forms of remedies and the order of judicial proceedings are to be according to the law of the place, where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act.²

¹ 2 Boullenois, Observ. 46, p. 462; ante, § 260; Bank of United States v. Donnally, 8 Peters, R. 361, 372; Andrews v. Pond, 13 Peters, R. 65; Wilcox v. Hunt, 13 Peters, R. 378. See also Bouhier, Coutum. de Bourg. ch. 18, n. 10; ante, § 242, § 260 to § 273.

The authorities are exceedingly numerous. Among them we may cite the following. Andrews v. Herriott, 4 Cowen, R. 408; and see Id. 528, n. (10), and authorities there cited; 2 Kent, Comm. Lect. 27, p. 118, &c. 3d edit.; Robinson v. Bland, 2 Burr. 1084; De la Vega v. Vianna, 1 Barn. & Adolp. R. 284; Trimbey v. Vignier, 1 Bing. N. Cas. 159, 160, 161; Don v. Lippmann, 5 Clark & Fin. R. 1, 13, 19, 20; ante, § 557, note; Fenwick v. Sears, 1 Cranch, 259; Nash v. Tupper, 1 Cain. R. 402; Pearsall v. Dwight, 2 Mass. R. 84; Smith v. Spinola, 2 John. R. 189; Van Reimsdyk v. Kane, 1 Gallis. R. 371; Lodge v. Phelps, 1 John. Cas. 412; Thrasher v. Everhart, 3 Gill & John. 234; Peck v. Hozier, 14 John. R. 346; Ohio Insur. Company v. Edmondson, 5 Louis, R. 295 to 300; Warren v. Lynch, 5 John. R. 239; Jones v. Hook's administrator, 2 Rand, Virg. R. 303; Wilcox v. Hunt, 13 Peters, R. 378, 379; French v. Hall, 9 N. Hamp. R. 137; Bank of United States v. Donally, 8 Peters, R. 361, 370, 371, 372, 373. - This last case was an action brought in Virginia on a promissory note made in Kentucky, not under seal, but which by the law of Kentucky was deemed a specialty. The Statue of Limitations of Virginia was pleaded in bar; and one question was, whether it was a good bar or not. On that occasion the court said; "The other point, growing out of the statute of limitations, pleaded to the fourth and fifth counts (for as to the three first counts it is conceded to be a good bar) involves questions of a very different character, as to the operation and effect of a conflict of laws in cases governed by the lex loci. The statute of limitations of Virginia provides, that 'all actions of debt, grounded upon any lending or contract without specialty,' shall be commenced and sued within five years next after the cause of such action or suit, and not after. This being the language of the act, and confessedly governing the remedy in the courts of Virginia, the bar of five years must apply to all cases of contract, which are without specialty, or in other words, are not founded on some instrument acknowledged as a specialty

§ 559. Nor are foreign jur recognition of it. Thus Bar contracts, says; Quæro, quid contractum celebratum per ac

by the law of that state. The commo and the word 'specialty' being a term the consideration, whether the present no to be a specialty. And certainly it is r contract, nor does it fall under any oth contracts or acts known in the commo ment does not deny this conclusion; b its force, by affirming, that the note laws of Kentucky; and if so, that thi and obligation; and it ought, every international jurisprudence, to be deem The act of Kentucky of the 4th of F writings hereafter executed without a s payment of money or property, or for the duties, shall be placed upon the sam containing the like stipulations, receiving courts of justice, and to all intents and and effect, and upon which the same s as if scaled.' Now, it is observable, tl declare, that such writings shall be dec that they shall be deemed sealed instrui they shall be put upon the same footing the same consideration, force, effect, and So that it is perfectly consistent with the act, to give them the same dignit without intending to make them such. tainly provide, that the same remedy sh as on a bond or scaled instrument; bu note a bond or sealed instrument. It may force shall be the same, as if it were se an unscaled contract. But whatever n as to the obligation or remedy on cont authority beyond its own territorial jur they have in other states, depends up comity, and a sense of justice. civilized nations is, that the nature, val tracts, are to be governed by the law tracts are made, or are to be performed governed by the laws of the country, v

civitate; litigium ortum est, et agitatur lis in loco originis contrahentis. Cujus loci statuta debent servari vel spectari? Distingue; Aut loquimur de statuto, aut de consuetudine, quæ respiciunt ipsius contractûs solennitatem, aut litis ordinationem, aut de his, quæ pertinent ad jurisdictionem ex ipso contractu evenientis executionis. Primo casu, inspicitur locus contractûs. Secundo casu, aut quæris de his, quæ pertinent ad litis ordinationem, et inspicitur locus judicii; aut de his quæ pertinent ad ipsius litis decisionem, et tunc, aut de his, quæ oriuntur secundum ipsius contractûs naturam tempore contractûs, aut de his, quæ oriuntur ex post facto, propter negligentiam vel moram; primo casu inspicitur locus contractûs, &c.¹

§ 560. Rodenburg asserts the same distinction.

it is compendiously expressed, by the lex fori. No one will pretend, that because an action of covenant will lie in Kentucky on an unsealed contract made in that state; therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy, which every state prescribes to its own tribunals, in the same manner, in which it prescribes the times, within which all suits must be brought. The nature, validity, and interpretation of the contract may be admitted to be the same in both states; but the mode, by which the remedy is to be pursued, and the time, within which it is to be brought, may essentially differ. The remedy, in Virginia, must be sought within the time, and in the mode, and according to the descriptive characters of the instrument, known to the laws of Virginia, and not by the description and characters of it, prescribed in another state. An instrument may be negotiable in one state, which yet may be incapable of negotiability by the laws of another state; and the remedy must be in the courts of the latter on such instrument, according to its own laws. If then, it were admitted, that the promissory note, now in controversy, were a specialty by the laws of Kentucky, still it would not help the case, unless it were also a specialty, and recognised as such by the laws of Virginia; for the laws of the latter must govern as to the limitation of suits in its own courts, and as to the interpretation of the meaning of the words used in its own statutes." Post, § 567. -

Bartolus, Comm. ad Cod. Lib. 1, tit. 1, l. 1; Bart. Oper. Tom. 7, p. 4, edit. 1602; 2 Boullenois, Observ. 46, p. 455, 456; ante, § 301.

Primum utamur vulgata doctorum distinctione, qua separantur ea, quæ litis formam concernunt ac ordinationem, ab iis, quæ decisionem aut materiam. Lis ordinanda secundum morem loci, in quo ventilatur.1 Boullenois affirms the same doctrine. A Perard (says he) du principe de décision, quantum ad litis decisoria, il se tire, ou de la loi du contrat, ou de la loi de la situation, ou de la volonté présumée des parties, lorsqu'elles ont contracté ensemble; en unmot la Loi seule de la jurisdiction n'y influe point comme telle. Diversitas fori non debet meritum causæ variare. A l'égard des formalités judiciaires, quantum ad litis ordinationem, la règle est de suivre la procédure et les usages observés dans le lieu, où l'on plaide.2 Hertius states the same point in his compendious way. Expedita est Doctorum Responsio, Jura judicii tantum in illis observanda esse, quæ ad ordinem processûs judicialis pertinent, etsi lis sit de bonis immobilibus, in alio territorio sitis.3

§ 561. Strykius states it in the following language. Quotiescunque circa judicii ordinationem controvertitur, statuta loci judicii, omnibus cæteris posthabitis, introspiciantur. In modo procedendi consuetudo judicii attendenda, ubi lis agitatur. In modo vero decidendi, seu in ipsâ causæ decisione, consuetudo litigantium, seu ubi actus est gestus, attendendus. Huberus says; Adeoque receptum est optimâ ratione, ut in ordinandis judiciis loci consuetudo, ubi agitur, etsi de

Rodenburg, De Div. Stat. tit. 2, p. 5, n. 16; 2 Boullenois, Appx. p. 47; 1 Boullenois, 660; Id. 685, 818; ante, § 325 c, § 325 d, § 325 h, note 2.
 Boullenois, Observ. 33, p. 535 to 546; Id. Prin. Gén. 49, p. 11.

^{3 1} Hertii, Opera, De Collis. Leg. § 4, n. 70, p. 152, 153, edit. 1737; Id. p. 215, edit. 1716.

⁴ Strykii, Tract. et Disp. Tom. 2, p. 27; De Jure Princ. ext. Territ. ch. 3, n. 34; ante, § 295.

negotio alibi celebrato, spectetur.¹ Dumoulin says: Unde an instrumentum habeat executionem, et quo modo debeat exequi, attenditur locus ubi agitur, vel fit executio. Ratio, quia fides instrumenti concernit meritum, sed virtus executoria et modus exequendi concernit processum.² Again he adds; Quod in his, quæ pertinent ad processum judicii, vel executionem faciendam, vel ad ordinationem judicii, semper sit observanda consuetudo loci, in quo judicium agitatur.³ Emérigon says: Pour tout ce, qui concerne l'ordre judiciare, on doit suivre l'usage du lieu, où l'on plaide. Pour ce, qui est de la décision du fond, on doit suivre, en règle générale, les lois du lieu, où le contrat a été passé. Cette distinction est consignée dans tous nos livres.⁴

§ 562. We may conclude this reference to the opinions of foreign jurists by a citation from John Voet, who states at once the rule and the reason of it. Quia vero regionum, civitatum, vicorum varia, imo contraria sæpe jura sunt, observandum est, quantum quidem ad ordinem judicii formamque attinet, judicem nullius alterius sed sui tantum fori leges sequi. Sed in litis ipsius definitione, si de solennibus contractûs, testamenti, vel negotii alterius quæstio sit, validum pronunciare debet ac solenne negotium, quoties adhibita invenit solennia loci, in quo illud gestum est, licet aliæ, aut majores, in loco judicii ad talem actum solennitates requisitæ essent.⁵

¹ Huberus, Tom. 2, Lib. 1, tit. 3, De Confl. Leg. § 7.

² 1 Boullenois, Observ. 23, p. 523, 524; Molin. Oper. Comm. ad Cod. Lib. 1, tit. 1, Tom. 3, p. 554, edit. 1681.

^{3 1} Boullenois, Observ. 23, p. 523, 524; Molin. Opera, Comm. Cod.

Lib. 6, tit. 32, Tom. 3, p. 735, edit. 1681.

^{4 1} Emérigon, Traité des Assur. ch. 4, § 8, n. 2, p. 192; Le Roy v. Crowninshield, 2 Mason, R. 163. See also to the same effect, P. Voet, De Stat. § 10, ch. 1, n. 1, 6, p. 281, 285, 286, edit. 1715; Id. p. 339, 340, 341, edit. 1661.

⁵ J. Voet, ad Pand. Tom. 1, Lib. 5, tit. 1, § 51, p. 328.

party suing is not the original party to the debt or claim; but he takes a derivative title only from the original party, as where he is an assignee or grantee or donee of the debt or other claim. We have already had occasion to take notice of a peculiarity of the common law, that debts and choses in action are not, with the exception of negotiable promissory notes and bills of exchange, assignable.1 Hence, if any other debt or chose in action, such as a bond, or a covenant, or other contract, is assigned, no action can be maintained thereon in a common-law court by the assignee in his own name.2 The same rule has been applied to assignments of debts or choses in action, made in foreign countries, although the assignee might be entitled to found an action thereon in such foreign country in his own name, in virtue of such assignment.3 For (it has been said) the inquiry, in whose name a suit is to be brought, belongs not so much to the right and merit of the claim, as form of the remedy. No distinction seems to have been made in England, as to the right to sue, between the case of an assignee by the private voluntary act of the assignor, and an assignee by operation of law by an assignment in invitum under the bankrupt laws. Thus, it has been held, that a Scotch assignee of a bankrupt could not maintain a suit in his own name in England for a chose in action of the bankrupt, which was admitted

Ves. 347; Silver Lake Bank v. North, 4 John. Ch. R. 370; Bank of Augusta v. Earle, 13 Peters, R. 519, 588, 589.

¹ Ante, § 354, 355, § 395 to 400.

² 3 Burge, on Col. and For. Law. Pt. 2, ch. 20, p. 777, 778; Wolff v. Oxholme, 6 Maule & Selw. 99; ante, § 354, 355.

Wolff v. Oxholme, 6 Maule & Selw. R. 99; Folliott v. Ogden, 1 H. Black, 131; Innes v. Dunlap, 8 Term R. 505; Jeffrey v. McTaggart, 6 Maule & Selw. R. 126.

the voluntary act of the party, even where he could sue in his own name in the country, in which the assignment was made, although certainly there is room for a distinction in such a case; and it has sometimes been recognised. Thus, in a case, where the assignee of an Irish judgment brought a suit in his own name in England, such a judgment being assignable in Ireland, so as to vest a title at law in the assignee, the Court of Common Pleas held, that he was entitled to recover; because (as it should seem) a legal title by the Lex loci vested in him, and the case was not to be governed by the law of England, as the assignment was in Ireland.1 The distinction, although nice, is at the same time clear; for the remedy is sought upon a legal right, vested ex directo by the local law in the assignee against the judgment debtor. There does not seem, therefore, any solid ground upon principle, why a right confessedly legal in the country, where it originated, and passing a direct and positive fixed title in the assignee, should not have the same remedy in every other country, which legal fixed titles in the party are there entitled to. It is assuming the very ground in controversy, to assert, that it is a mere equitable title; for the local law has adjudged it otherwise, and vested the original title ex directo in the assignee. In the common case, where an executor or administrator indorses negotiable paper in the country, from which he derives his administrative authority, no one will doubt, that the legal title passes to the indorsee, and that he may sue thereon in any other country in his own name; and yet such an indorsement, in

O'Callaghan v. Thomond, 3 Taunt. 82, 84; ante, § 355; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 777, 778.

§ 567. Another illustration may be taken from the forms of action upon instruments under seal. Thus, in Virginia a contract to pay money with a scrawl instead of a seal, is treated as a sealed instrument, so that debt lies upon it in that state. But in New York, where such a scrawl is not treated as a seal. the remedy must be, as upon an unsealed simple contract.1 The same doctrine has been maintained in England upon an instrument executed in Jamaica, where there was no seal, but a mark or scrawl in the place, where the seal is usually affixed.2 On the other hand, a single bill is deemed in Virginia not to be a specialty: in Maryland it is otherwise. A remedy brought in Maryland upon such a single bill, executed in Virginia, cannot be by an action of assumpsit, as upon a simple contract, but must be by action of debt, as upon a specialty.3

§ 568. In the next place, as to process and proceedings. There is no controversy, that in a general sense the mode of process constitutes a part of the remedy. But the question has arisen, whether upon contracts made in a foreign country, and which by the laws of that country are precluded from being enforced by a personal arrest or imprisonment, the like exemption applies in suits to enforce them in another country, where such process constitutes a part of the remedial justice. Such a contract existed,

proceed on principles materially different, applicable to rights, and not merely to remedies. Ante, § 399, note, § 420, 512, 513.

Warren v. Lynch, 5 John. R. 239. See also Andrews v. Herriot, 4 Cowen, 508. But see Meredith v. Hindsdale, 2 Caines, R. 362.

Adam v. Kerr, 1 Bos. & Pull. 360. See also Bank of United States v. Donnally, 8 Peters, R. 361; ante, § 558, note.

³ Trasher v. Everhart, 3 Gill & John. R. 234; Bank of United States v. Donnally, 8 Peters, R. 361; ante, § 558, note.

obligation, but an obligation in rem only, it cannot be, that its nature can be changed, or its obligation varied, by a mere change of domicil. That would be to contradict all the principles maintained in all the authorities, that the validity, nature, obligation, and interpretation of a contract are to be decided by the Lex loci contractûs.1 A suit in personam in England could not be maintained, except upon some contract, which bound the person. If it bound the property only, the proceeding should be in rem; and, if in express terms the party bound his property only, and exempted himself from a personal liability, no one would doubt, that a suit in personam would not be maintainable. The same principle would apply, if the laws of a country should declare, that certain classes of contracts should not bind the person at all, but only property, or a particular species of property. Such laws do probably exist in some countries. But it does not follow, because a personal remedy is not given by the laws of a country, that therefore there is no personal obligation in a contract.2

§ 570. The real difficulty lies, not in the principle itself, but in its application. There is a great distinction between a contract, which ex directo excludes personal liability, and a contract made in a country, which binds the party personally, but where the laws do not enforce the contract in personam, but only in rem. In the latter case the remedy constitutes no part of the contract. The liability is general, so far as the acts of the parties go; and

Ante, § 263 to § 273;
 Burge, Comm. Pt. 2, ch. 20, p. 765, 766, 776.
 Talleyrand v. Boulanger, 3 Ves. Jr. R. 446;
 Flack v. Holm, 1 Jac. & Walk. 405.

thorize such a mode of proceeding, as a part of the local remedy.1 In a recent case in England, where the plaintiff and defendant were both foreigners. and the debt was contracted in a country, by whose laws the defendant would not have been liable to arrest, an application was made to discharge the defendant from arrest on that account; but the Court refused the application. Lord Tenterden on that occasion in delivering the opinion of the Court said; " A person, suing in this country, must take the law, as he finds it. He cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here. And he ought not, therefore, to be deprived of any superior advantage, which the law of this country may confer. He is to have the same rights, which all the subjects of this kingdom are entitled to."2 The same doctrine has been solemnly promulgated by the House of Lords on a still more recent occasion.3

§ 572. The like principles apply to the form of judgments to be rendered, and of executions to be granted in suits. They must conform to the Lex fori

¹ See Imley v. Elfesson, ² East, R. 453; Peck v. Hozier, 14 John. R. 346; Robinson v. Bland, ² Burr. 1089; Hinkley v. Morean, ³ Mason, R. 88; Titus v. Hobart, ⁵ Mason, R. 378; Smith v. Spinolla, ² John. R. 198, 200; De la Vega v. Vianna, ¹ Barn. & Adolp. R. 284; ³ Burge, Comm. on Col. and For. Law, Pt. ², ch. 20, p. 766 to 769; Atwater v. Townsend, ⁴ Connect. R. 47; Woodbridge v. Wright, ³ Connect. R. 523, 526; Smith v. Healy, ⁴ Connect. R. 49.

² De la Vega v. Vianna, I Barn. & Adolph. R. 284. See also Whittemore v. Adams, 2 Cowen R. 626; Willing v. Consequa, 1 Peters, Cir. R. 317; Courtois v. Carpentier, 1 Wash. Cir. R. 376; Bird v. Caritat, 2 John. R. 345; Wyman v. Southward, 10 Wheaton, R. 1. See Henry on Foreign Law, p. 81 to 86.

³ Don v. Lippmann, 5 Clark & Finnell. R. I, 13, 14, 15; ante, § 557, note.

ubi agi et exigi possunt.¹ Again he adds; Sed revertar, unde fueram digressus, ad concursum statutorum variantium circa judicia. Ubi occurrunt nonnulla circa solemnia in judiciis servanda, circa tempora, cautiones, probationes, causarum decisiones, executiones, et appellationes. Finge, enim, alia servari solemnia, in loco domicilii litigatoris, alia in loco contractûs, alia in loco rei sitæ, alia in judicii loco. Quænam spectanda solemnia? Respondeo; Spectanda sunt solemnia, id est, stylus judicis fori illius, ubi litigatur. Idque in genere verum est, sive loquamur de civibus, sive forensibus: statuta quippe circa solemnia meo sensu mixti erant generis; adeoque vires exserunt tam intra quam extra territorium, tam in ordine ad incolas, quam ad exteros.²

§ 574. The same doctrine is fully confirmed by John Voet, as a received doctrine of foreign law. Multis præterea in locis id obtinet, ne duo ejusdem provinciæ seu territorii incolæ se invicem, aut bona, sistant in alio territorio. Sic duo Brabantini se invicem non extra Brabantiam; duo Hollandi non extra Hollandum, &c. Quod si quis, neglectâ statuti dispositione, concivem aut bona ejus alibi stiterit, litis movendæ gratiâ, non peccabunt quidem istius loci judices, si arrestum confirment; cum non ligentur alieni territorii legibus, talem arrestationem concivium vetantibus. Sed, qui ita detentus litigare coactus est, recté petet a suo judice, condemnari concivem, ut arresti vinculum, contra statuti domicilii prohibitionem alibi impositum, remittat, litique alibi cæptæ cum impensis renunciet, ac

¹ P. Voct, ad Stat. § 10, ch. 1, n. 2, p. 281, edit. 1715; Id. p. 340, edit. 1661.

² P. Voet, de Statut. § 10, ch. 1, n. 6, p. 285, edit. 1715; Id. p. 345, 346, edit. 1661.

exceptions, to be the general doctrine maintained by foreign jurists; and Boullenois has collected their opinions at large. He treats the question of imprisonment as purely one modus exequendi; and he applies the same principle to mesne process and to process of execution. He accordingly puts the case, where a Frenchman contracts a common debt in a country, by whose laws such a debt imparts a right to arrest the body, and says, that this right is a mere mode of enforcing the contract, modus exequendi, and consequently it depends upon the law of the place, where the execution of it is sought; so that if it is sought in a place, where no such arrest of the body is allowable, the creditor has no right to claim any restraint by such a rigorous course.

574 b. But a distinction is taken by some foreign jurists between a contract, made in a country between a stranger and a citizen thereof, or between two citizens, and a contract, made in the same country between two foreigners belonging to another country, when the law of the place, where the contract is made, allows an arrest of the person, and the law of the place, where the suit is brought, or to which the two foreigners belong, disallows such an arrest. Thus, in Brabant, there is a law of Charles the Fourth, which prohibits any Brabanter from arresting another Brabanter in a foreign jurisdiction; and Peckius puts the question, whether in a case of this sort any Braban-

^{524, 526; 2} Boullenois, Observ. 46, p. 488. But see Burgundus, Tract. 4, n. 27, p. 116, cited post, § 574 c, note.

¹ 1 Boullenois, Observ. 23, p. 523, 524, 525, 528, 529; Id. p. 535 to p. 543; Id. p. 544 to p. 569. See Henry on Foreign Law, p. 81 to 85.

⁹ Id.; Henry on Foreign Law, p. 55, 56; Id. p. 81 to 85.

³ 1 Boullenois, Observ. 23, p. 525; Id. p. 528, 529; Id. Observ. 25, p. 601, &c.

does not, (and so e contra in the converse case,) the law of the latter is to prevail. He quotes the language of Everhardus on the same point with approbation. Quod si in loco celebrati contractus sit statutum, quod debitor possit capi et incarcerari, vel quod instrumenta notariorum habeant executionem paratam; in loco vero destinatæ solutionis, non sit simile statutum, sed servetur jus commune, attendatur, quoad hoc, mos, observantia, statutum, aut lex, destinatæ solutionis. Quippe, quod in his, quæ concernunt judicariam executionem, inspicitur locus destinatæ solutionis.1 He then adds in the converse case; Quod et in arrestatione, si similis casus occurrat, locus destinatæ solutionis et judicii spectari debeat.2 Christinæus uses similar language.3 The common law of England and America, however, does not recognise any such distinction.4

¹ Everhard. Consil. 78, n. 22, p. 208; Peck. De Jure Sist. cap. 11, p. 758, edit. Peck. Oper. 1666.

² Peck. Oper. De Jure Sist. cap. 11, n. 1, p. 758, 759, edit. 1666.

³ Christin, Tom. 1, Decis. 283, n. 12, p. 355; 1 Boullenois, Obser. 23, p. 525; 2 Boullenois, Observ. 46, p. 488,

⁴ Post, § 581; Campbell v. Steiner, 6 Dow, R. 116; Don v. Lippmann, 5 Clark & Finnell. R. 1, 19, 20. In this latter case Lord Brougham said, speaking on this point; "All the authorities, Huber (De Confl. Leg. in Div. Imp.); Voet (Dig. Lib. 24, t. 3, s. 12.); and Lord Kaimes, (Kaimes's Principles of Equity, 3. 8. 6. 1. 5. 3,) are cited in that case. Campbell r. Steiner, (6 Dow, 116,) was an action for a bill of costs for business done in this House. The Court below there allowed the rule of Scotch prescription. That judgment was affirmed by Lord Eldon, who, however, said, that he moved it with regret. He said, that it had been ruled, that the debtor being in Scotland, and the creditor in England, the debtor might plead the Scotch rule of prescription; that that was against some of the old authorities, but was in accordance with those of later date. That case cannot be reconciled with the principle, that the locus solutionis is to prescribe the law. It has nothing to do with the case. Why is it, then, that the law of the domicil of the debtor was there allowed to prevent the plaintiff from recovering? It was, because the creditor must follow the debtor, and must suchim, where he resides; and by the necessity of that case, was obliged to sue him in

nature of counter claims or set-offs to actions analogous to compensation in the Roman and foreign law;1 or they may be matters of discharge, such as discharges under insolvent laws, arising at a subsequent period; or they may be laws, regulating the time of instituting suits, called, in the foreign law, statutes of prescription, and, in the common law, statutes of limitations. The latter defence will deserve a very exact consideration. The former may be disposed of in a few words. The subject of discharges from the contract, either by the act of the parties, or by operation of law, have been already sufficiently considered.2 As to set-off or compensation, it is held in the courts of common law, that a set-off to any action, allowed by the local law, is to be treated as a part of the remedy; and that therefore it is admissible in claims between persons, belonging to different states or countries, although it may not be admissible by the law of the country, where the debt, which is sued, was contracted.3 The liens, and implied hypothecations, and priorities of satisfaction, given to creditors by the law of particular countries, and the order of payment of their debts, are, as we have already seen,4 generally treated, as belonging to the proceedings in suits, Ad litis ordinationem, and not to the merits of the claim.5

¹ Pothier, Oblig. n. 587, 588.

² Ante, § 330 to § 352. See also 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 874 to 886.

³ Gibbs v. Howard, 2 New Hamp. R. 296; Ruggles v. Keeler, 3 John. R. 263. See Pothier on Oblig. n. 641, 642.

⁴ Ante, § 322 b to 328, § 423 a.

⁵ Rodenburg, De. Div. Stat. tit. 2, ch. 5, n. 15, 16; 2 Boullenois, Appx. p. 47, 49; 1 Boullenois, Observ. 25, p. 634, 635, 639; Id. p. 685; Id. p. 818. See also P. Voet, De Stat. § 10, ch. 1, n. 2 to n. 6, p. 282 to 289, edit. 1715; Id. p. 340 to 346, edit. 1661.

§ 577. It has accordingly become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country, where the suit is brought, (Lex fori,) otherwise the suits will be barred; and this rule is as fully recognised in foreign jurisprudence, as it is in the common law.1 Not, indeed, that there are no diversities of opinion upon this subject; but the doctrine is established by a decisive current of well considered authorities.2 Thus, Huberus lays down the doctrine in clear terms, applying it to the very case of a prescription; and he assigns the reason; Ratio hac est, quod præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ, quæ per se, quasi contractum, separatum negotium constituit. Adeoque receptum est optima ratione, ut ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio, alibi celebrato, spectatur, ut docet Sandius, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci, in quo fit executio, non ubi res judicata est.3

The authorities in the common law are very numerous. A considerable number of them are cited in 4 Cowen, R. 528, note 10; Id. 530; Van Reimsdyk v. Kane, I Gallis. R. 371; Le Roy v. Crowninshield, 2 Mason, R. 351; British Linen Company v. Drummond, 10 Barn. & Cresw. 903; De La Vega v. Vianna, I Barn. & Adolp. R. 284; Huber v. Steiner, 2 Bing. New Cases, 202, 209 to 212; Don v. Lippmann, 5 Clark & Finnell. R. I, 13, 14, 15, 16, 17; Medbury v. Hopkins, 3 Connect. R. 472; Woodbridge v. Wright, 3 Connect. R. 523; Bank of U. S. v. Donnally, 8 Peters, R. 361; Bulger v. Roche, 11 Pick. 36; De Couche v. Savatier, 3 John. Ch. R. 190; Lincoln v. Battelle, 6 Wend. R. 475.

See Ersk. Inst. B. 3, tit. 7, n. 49, p. 633, 634.

³ Haberus, Tom. 2, Lib. 1, tit. 3, De Conflict. Leg. § 7; 1 Hertii, Opera, De Collis. § 4, n. 65, p. 150, 151, edit. 1737; Id. p. 312, edit. 1716. Hertius seems of a different opinion; saying, that, if the prescription only of the place, where the suit is brought, could prevail, the times of prescription would be very uncertain; for a man might

is in precise conformity to that of the common law.1

§ 578. But if the question were entirely new, it would be difficult upon principles of international justice or policy to establish a different rule. Every nation must have a right to settle for itself the times, and modes, and circumstances, within and under which suits shall be litigated in its own courts. There can be no pretence to say, that foreigners are entitled to crowd the tribunals of any nation with suits of their own, which are stale and antiquated, to the exclusion of the common administration of justice between its own subjects. As little right can foreigners have to insist, that the times and modes of proceeding in suits, provided by the laws of their own country, shall supersede those of the nation, in which they have chosen to litigate their controversies, or in whose tribunals they are properly parties to any suit.

§ 579. The reasoning sometimes insisted upon by foreign jurists, in opposition to this plain and intelligible doctrine, is, in the first place, that the statute of limitations or prescription really operates as a peremptory bar, and therefore does not in fact touch the mode of proceeding, but the merits of the case; Non tangit modum simplicem procedendi; sed tangit meritum causæ; and, in the next place, that it subjects the party to different prescriptions in different places, and therefore leaves his rights in uncertainty. The latter ob-

¹ Erskine, Inst. B. 3, tit. 7, § 48, p. 633; Le Roy r. Crowninshield, 2 Mason, R. 174; Kaims on Equity, B. 3, ch. 8, § 4, 6; P. Voet, De Statut. § 10, ch. 1, n. 1, p. 280, 281, edit. 1715; Id. p. 339, 340, edit. 1661.

² I Boullenois, Observ. 23, p. 529, 530; ante, § 577.

³ 1 Hertii Opera, De Collis, Leg. § 4, n. 65, p. 150, 151, edit. 1737; Id. p. 212, edit. 1716.

section may be answered by the obvious consideration, that, if the party chooses to reside within any particular territory, he thereby subjects himself to the laws of that territory, as to all suits brought by or against him. It may be added, that, as the law of prescription of a particular country, even in case of a contract, made in such country, torms no part of the contract itself, but merely acts meen it ex post facto in case of a suit, it cannot properly be deemed a right stipulated for, or included in the contract. Even these foreign jurists do not cremend, that the prescription of a country, where a contract is made, constitutes a part of the contract. What they contend for amounts at most only to was, that the prescription of the Lex loci contractus acts about and appertains to, the decision of the He pertinet ad decisionem causæ, says Baldus. d processum, says Gerhard Titius. This objection indeed is fully and satisfactorily answered by Boellenois in the passage above cited.2

¹⁰ p. 10 p. 10 s. Observ. 23, p. 529, 530; Erak. Inst. B. 3, tit. 7, § 48, 1000, 201

As a 1977. Ford Brougham also in delivering his judgment in Don at 1999 and 1979 k & Finnell, p. 1, 15, 16, met the very objection. His large against a received was it being the case of a bill of exchange acceptation is a first on France, and sued afterwards in Scotland, and the Scotlash as section on set up as a bar); "It is said, that the limitation is of the very nature of the contract. First, it is said, that the party is bound for a given time only. That is a strained construct of the obligation. The party does not bind himself for a particular period of all, but merely to do something on a certain day, or on one or other of certain days. In the case at the bar the obligation is to pay a sum certain at a certain day; but the law does not suppose, that he is at the moment of making the contract contemplating the period, at which he may be freed by lapse of time from performing it. The argument, that the limitation is of the nature of the contract, supposes,

§ 580. The other objection is well founded in its form, but it does not shake the ground of the general doctrine. It is true, as Baldus contends, that the statute of limitations or prescription does go to the decision of the cause; Exceptio peremptoria pertinet ad decisionem causæ. But that is not the question. The question is, whether it is a matter of the original merits, as for example, a question of the original validity, or interpretation, or discharge of a contract, or whether it is a matter touching the time and mode of remedial justice, which is provided by law to redress grievances, or to prevent wrongs, or to suppress vexations litigation. Suppose a nation were to declare, (as France has done in regard to foreigners in some cases,) that no suits should be maintained in its own courts between foreigners.1 This would be a peremptory exception. But could it be denied, that France had a right so to regulate the jurisdiction of its own tribunals? Or that it was an enactment touching remedies? Considering in their true light, statutes of limitation or prescription are ordinarily simple regulations of suits, and not of rights. They regulate the times, in which rights may be asserted in courts of justice, and do not purport to act upon those rights. Boullenois has truly said; L'exception ne tombe, que sur l'action et la procédure intentée.2 Pothier very properly treats prescription.

that the parties look only to the breach of the agreement. Nothing is more contrary to good faith, than such a supposition, that the contracting parties look only to the period, at which the Statute of Limitations will begin to run. It will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness."

¹ Ante, § 542.

⁹ 1 Boullenois, Observ. 23, p. 530; ante, § 577; Ersk. Inst. B. 3, tit. 7 § 48, p. 633, 634.

doctrine of these authors must be understood to be limited to prescription in personal actions; for, as to prescription in cases of immovable property, it is beyond reasonable doubt, that it is and ought to be governed purely by the Lex loci rei site.1 Dumoulin has laid down the distinction in broad but exact terms. Aut statutum disponit de præscriptione, vel usucapione rerum corporalium, sivè mobilium, sivè immobilium, et tunc indistincte inspicitur locus, ubi res est. Idem in rebus sivè Juribus incorporalibus limitatis ad res corporales, sivè quatenus ad illas res limitantur; Secus si de Juribus, vel actionibus personalibus, sivè momentaneis, sivè annuis personæ adherentibus, id est non limitatis ad certas res, etiamsi illis actionibus adhæreat hypotheca generalis, vel accessoria rerum corporalium.2 Paul Voet takes the like distinc-Quid, si itaque contentio de aliquo jure in re. seu ex, ipsû re descendente? vel ex contractu, vel actione personali, sed in rem scripta? An spectabitur loci statu-

the place, where he has promised to pay; or, if this place has not been determined, then at the domicil of the debtor, at the time when he contracted the obligation; because, prescription being a plea given to the debtor against the demand of his creditor, it is naturally in the domicil of the debtor, or of his government, that he should find this protection. Pardessus, Tom. 5, P. 6, tit. 9, ch. 2, § 2, art. 1445, p. 275; Henry on Foreign Law, Appendix, p. 237. Pardessus goes on to state, that these rules apply to the case, where several sureties for the same debt reside in jurisdictions, where the laws respecting prescription are different. Each, in becoming a surety, must be supposed to have intended to enjoy all the real pleas or exceptions existing in favor of the principal debtor, without renouncing the particular prescription in his own favor, to extinguish his obligation as surety, which is regulated by the law of his domicil at the moment, when he signed the contract. Pardessus, Id. art. 1495, p. 275, 276; Henry on Foreign Law, 238. This is certainly pressing the doctrine to a very great extent.

Boullenois, Observ. 20, p. 350; J. Voet, ad Pand. Lib. 44, tit. 3, § 12.
 Molin. Opera, Tom. 3, Comm. ad Cod. Lib. 1, tit. 1, l. 1, p. 557, De Prescript. edit. 1681; 1 Boullenois, Observ. 20, p. 350.

mm, ubi dominus habet domi sita? Respondeo: Statutum etiam intentari possit, ubi reus obtinet, sive forensis sit ille, de sire incola loci, ubi res est s tains the same doctrine. S alia præfinita sint tempora in in loco ubi reus domicilium 1 tempus, quod obtinet ex statute ratur, nisi de immobilium pi quo casu neque leges domic leges domicilii ejus, in cujus sit, sed magis leges loci, in qu da: sunt : cum tralatitium sit, in quo sita sunt.2 Pothier nise the same doctrine.3 firmly fixed its own doctrine the Lex fori must prevail actions. In all cases of real touching things savoring of tion of the law rei sitæ is als the common law, no actio brought ex directo, except i follows, that the Lex fori go applicable to all cases.1

⁴ P. Voet, De Statut, § 9, ch. 1, n. 2, 1661.

² J. Voet, ad Pand, Tom. 2, Lib. 44, t on Col. and For. Law, Pt. 2, ch. 10, § 5 Tom. 1, Lib. 5, tit. 1, n. 77.

³ Pothier, Traité de la Prescript. n. ! ton, Sect. I. § 3, n. 7 ; 3 Burge, Comm 10. 5, p. 123, 124.

^{See British Linen Company r. Dri} Unber r. Steiner, 2 Bing, N. Cas. 202
Ciark N. Finnell, R. I. 13 to 17;

§ 582. But although statutes of limitation or prescription of the place, where a suit is brought, may thus properly be held to govern the rights of parties in such suit, or as the proposition is commonly stated, the recovery must be sought, and the remedy pursued within the times prescribed by the Lex fori, without regard to the Lex loci contractûs, or the origin or merits of the cause; yet there is a distinction, which deserves consideration, and which has been often propounded. It is this. Suppose the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, ipso facto, and declare it a nullity after the lapse of the prescribed period; and the parties are resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case; under such circumstances the question might properly arise, whether such statutes of limitation or prescription may not afterwards be set up in any other country, to which the parties may remove, by way of extinguishment, or transfer of the claim or title. This is a point, which does not seem to have received as much consideration in the decisions of the common law, as it would seem to require. That there are countries, in which such regulations do exist, is unquestionable. There are states, which have declared, that all right to debts, due more than a prescribed term of years,

De Couche v. Savatier, 3 John. Ch. R. 190, 218, 219; De la Vega v. Vianna, 1 Barn. & Adolp. 284; Lincoln v. Battelle, 6 Wend. R. 475; ante, § 552 to § 555; Broh v. Jenkins, 9 Martin, R. 526; 3 Burge, Common Col. and For. Law, Pt. 2, ch. 10, § 5, p. 123, 124, 125. — The Roman law seems to have given an election to the plaintiff to bring his action in the domicil of the defendant (rens) or of the rei site. Ante, § 532; 1 Boullenois, Observ. 25, p. 618, 619.

shall be deemed extinguish to real and personal prope the prescribed time, shall I in the adverse possessor.1 (as has occurred.) persona held in a state for a period by the laws of that state, has elapsed the possessor other state, which has a long or is without any prescrip owner assert a title there whose title by the local law had become final and co moval? It has certainly be a case, the title of the pugned.2 If it cannot, the the bar of a statute extinguis ought not equally to be hel in every other country? deemed by some persons still It has, however the direct Court of the United State correctness has been recei Court of Common Pleas in I

R. 113.

¹ See J. Voet, ad Pand. Lib. 44, tit. [1, 2, 7, 8]; Beckford v. Wade, 17 Ves R. 175. - A statute of this sort, extinuter an adverse possession, and transf sessor, actually exists in the State of R of Rhode Island Laws, p. 363, 364, edi. ² See Beckford v. Wade, 17 Ves, 8 Mum. R. 57; Brent v. Chapman, 5 11 Wheat, R. 361, 374, 372. But see

Shelby r. Grey, 11 Wheat, R. 36

¹ Huber v. Steiner, 2 Bing. N. Cases

ican Courts other than the Supreme Court, it does not seem hitherto to have obtained any direct approval or recognition. But in all the cases, in which the question might have been incidentally discussed in these Courts, the statutes under consideration did not purport to extinguish the right, but merely the remedy.¹

§ 582 a. A question of a kindred character has been discussed of late years, both in England and America; and that is, whether the Statute of Limitations, or prescription of the country, where a suit is brought, is a good defence and bar to a suit brought there to enforce a foreign judgment. In both countries it has been held, that it is a good defence and bar.2 In America the case was stronger than it was as presented in England, for it was a judgment rendered in one of the United States, which was sought to be enforced in another state of the Union; and therefore fell within the clause of the constitution, which declares, that full faith, and credit, and effect, shall be given in each state to the judicial proceedings of every other. It was thought, that this clause did not in the slightest degree vary the application of the

mann, 5 Clark & Finnell. 1, 16, 17; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 10, § 5, p. 883, 884.

² Don v. Lippmann, 5 Clark & Pinnell. R. 1, 19, 20, 21; Mc Elmoyle v. Cohen, 13 Peters, R. 312.

On this subject, see De Couche v. Savatier, 3, John. Ch. R. 190, 218. 219; Van Reimsdyk v. Kane, 1 Gallis. R. 371; Le Roy v. Crowninshield, 2 Mason, R. 151, and the cases there cited; Lincoln v. Battelle, 6 Wend. R. 475; 1 Domat, B. 3, § 4, art. 1, p. 464; Id. art. 10, p. 466. John Voet says in one place; "Si prescriptioni implende alia prefinita sint tempora in loco domicilii actoris, alia in loco, ubi reus domicilium fovet, spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur." J. Voet, ad Pand. Lib. 44, tit. 3, § 12, p. 877.

§ 582 b. It may be important, then, carefully to distinguish between cases, where the statute of limitations is strictly a mere bar to the remedy, and cases, where it goes directly to the extinguishment of the debt, claim, or right. Where it professes to dispose of the latter, it would seem difficult to say, that a mere removal to another country can revive an extinguished debt, claim, or right, or change the positive title of property acquired and perfected under the local law of the place, where the parties and property are situated.1 But where it professes to deny, or control, or extinguish the remedy only, other considerations may properly apply. It has, indeed, been decided upon a recent occasion, in one of the American Courts, that in cases falling within the latter predicament, it will make no difference, whether both parties have remained domiciled in the same country, where the original cause of action arose,

state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining the remedy upon the judgment of another state, leaving those of its own Courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years. In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state, and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this safe declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the Constitution, from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled, that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the lex fori, or the suit will be barred." Don v. Lippmann, 5 Clark & Finnell. R. 1, 15, 16, 17.

visions, or inculcate such a doctrine. But no other nation is bound to give effect to such provisions or to such a doctrine. They are strictly intra-territorial regulations and interpretations of the Lex fori, which other nations are not bound to observe or keep. While the parties were domiciled there, the statute of limitations continued to run against them; but it had not then extinguished any rights of action. When they changed their domicil, the statute, as to them or their rights of action, in respect to personal property, or personal claims, was no longer operative or obligatory; but the statutes only of their new domicil. It would, or at least might, then, require a very different consideration, where the local law had before the change of domicil actually extinguished all rights of action; for then to revive them is to create new rights, and not to enforce old rights subsisting at the time of the removal.1

¹ In Bulger v. Roche, 11 Pick. R. 36, the very case arose of a cause of action extinguished by the local law of the country, (Nova Scotia,) where both parties resided during the whole period of the running of the statute of limitations; and the Supreme Court of Massachusetts held, that the right of action after a change of domicil of the defendant by a removal to Massachusetts was not thereby extinguished in the state tribunals; but might be pursued within the period prescribed by the statute of limitations of Massachusetts. On that occasion Mr. Chief Justice Shaw in delivering the opinion of the Court said; "The facts, so far as they are material, are these; that the cause of action accrued in 1821, more than six years before the commencement of this action, that the plaintiff and defendant were both domiciled at Halifax in Nova Scotia, and were subjects of the King of Great Britain, and that by the law of that country, an action of assumpsit is barred in six years. It is stated in the replication, and admitted by the rejoinder, that the plaintiff came into this commonwealth, for the first time, in 1829, and that the action was commenced within six years from that time. That the law of limitations of a foreign country cannot of itself be pleaded as a bar to an action in this commonwealth, seems conceded; and is indeed too well settled by authority to be drawn in question. Byrne v. Crowninshield,

reader. Quod, si restitutio concedenda sit non ex causa, quæ ipsum negotium ab initio comitabatur, (uti comitatur metus, dolus, error) sed ex ea, quæ post supervenit, (qualis est Usucapio verum, aut Præscriptio jurium et actionum, propter absentiam non interrupta) ita generaliter definiendum existimo, illius loci leges in restitutione facienda attendendas esse, secundum cujus loci leges impleta summo jure fuit per absentiam Usucapio vel Præscriptio. Quid enim, obsecro, aut justius aut æqius, quam ut ex eorundem legislatorum præscripto remedium adversus læsionem indulgeatur, ex quorum præscripto et summo jure primitus læsio nata Quibus consequens est, ut si immobilium rerum Usucapio impleta sit, serventur in restitutione faciendâ jura regionis, in quâ immobiles res sitæ sunt : adeoque, ut in amittendo, sic et in recuperando dominio, regantur immobilia ex sitûs sui lege, juxta vulgatam regulam in materiâ statutariâ. Sin mobilia usucapta fuerint, in restitutione magis erit, ut serventur leges domicilii ejus, qui per usucapionem dominium amiserat; ut ita mobilia, quæ censentur illic esse, ubi domicilium fovet dominus, ex lege domicilii redeant, uti fuerant amissa. Sed si actiones in personam temporis lapsu, per absentiam contingente, extinctæ sint; probabilius fuerit, in illis restituendis ob justam absentiæ causam spectandum esse jus loci, in quo debitor com-

the reason, upon which these cases proceed, which is, that statutes of limitation affect only the time, within which a legal remedy must be pursued, and do not affect the nature, validity, or construction of the contract. This reason, whether well founded or not, applies equally to cases, where the term of limitation has elapsed, when the parties leave the foreign state, as to those, where it has only begun to run before they have left the state, and elapses afterwards." But see Don v. Lippmann, 5 Clark & Finnel. R. 1, 15, 16, 17.

CHAPTER XV.

FOREIGN JUDGMENTS.

§ 584. We come in the next place to the consideration of foreign judgments, or of the force and effect of foreign sentences, Exceptio rei judicatæ. As to the effect to be given to foreign judgments, there has been much diversity of practice, as well as of opinion, among jurists and nations. We do not speak here of cases, where the point was, whether the court pronouncing the judgment, had jurisdiction, or not; but, assuming the jurisdiction to be unquestionable, what force and effect ought to be given to such judgment. Ought it to be held conclusive upon the parties? Or ought it to be open to impeachment by new evidence, or to be re-examined upon the original merits? The subject may be considered in two general aspects; first, in regard to judgments in rem; and secondly, in regard to judgments in personam.1 The latter is again divisible into several heads; first, where the judgment is set up by way of defence to a suit in a foreign

¹ Burgundus divides judgments (sententiæ) into three classes; (1.) in rem; (2.) in personam; (3.) mixed in rem et in personam. "Omnium condemnationum summa divisio, pariter in tria genera deducitur. Aut enim in rem, aut in personam, aut in utramque concipiuntur. In rem, quoties alicui res asseritur, hoc est ejus esse dicitur, vel jure creditoris, aut alio modo possidenda datur. In personam, si condemnetur ad aliquid dandum aut patiendum, faciendum aut non faciendum, vel si personam statum afficiat. In utramque, si et res et personam simul in condemnationem veniant." Burgundus, Tract. 3, n. 1, 2, p. 84, 85; 1 Boullenois, Observ. 25, p. 602. See the learned opinion of Mr. Vice Chancellor Bruce, in Barrs v. Jackson, 1 Y. & Coll. 585, as to what domestic judgments are conclusive or not.

which it has received from the common law, is far more extensive and uniform, than it has received in the jurisprudence of continental Europe. In order, however, to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish, that the court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is (as we have already seen) treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals. And this is equally true, whether the proceedings be in rem or in personam, or in rem and also in personam.

§ 587. This subject was a good deal considered in a celebrated case, (a proceeding in rem,) before the Supreme Court of the United States, where the principal point was, whether there had been a change of the ownership of the property by the sentence of a foreign court in a suit there pending in rem. Upon that occasion Mr. Chief Justice Marshall, in delivering the opinion of the Court, used the following language. "The power of the [foreign] court, then, is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide, whether its sentence has changed the right of property. The power, under which it acts,

See I Boullenois, Observ. 25, p. 618, 619, 620. See S. P. Ferguson
 Mahon, 11 Adolph. & Ell. 179, 182, 183.

Ante, § 539, 546, 547; Buchanan v. Rucker, 9 East, R. 192; Bissell v. Briggs, 9 Mass. R. 462; Shumway v. Stillman, 6 Wend. R. 447; Don v. Lippmann, 5 Clark & Finnell. 1, 20, 21; 4 Cowen, R. 524, n.; 1 Starkie on Evid. P. 2, § 68, p. 214; Henry on Foreign Law, 18, n; Id. 23; Id. 73; Cavan v. Stuart, 1 Stark. 525; Hall v. Williams, 6 Pick. 232; Wood v. Tremere, 6 Pick. R. 354; S. P. 11 Adolph. & Ellis, 179, 182, 183.

without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal, which is to decide on the effect of the sentence.

§ 590. "Passing from principle to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect, as are given to them in any part of the civilized world, the position, that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation, that it has, in the given case, jurisdiction of the subject-matter."

§ 591. Let us now consider the operation of judgments in the different classes of cases, which have been already adverted to. And first in relation to judgments in rem. If the matter in controversy is land, or other immovable property, the judgment pronounced in the forum rei sitæ is held to be of universal obligation, as to all the matters of right and title, which it professes to decide in relation thereto.² This results from the very nature of the case; for no other court can have a competent jurisdiction to inquire into, or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the forum rei sitæ is held absolutely conclusive.² Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt.⁴ On the other hand, a

Rose v. Himely, 4 Cranch, 269, 270.

² Ante, § 532, 545, 551.

^{3 1} Boullenois, Observ. 25, p. 618, 619, 623.

⁴ Id. p. 619; 1 Hertii, Opera, De Collis. § 4, n. 73, p. 153, 154, edit. 1737; Id. p. 216, edit. 1716. See also J. Voet, ad Pend. Tom. 1, Lib. I, tit. 4, Ps. 2, n. 11, p. 44, and Ante, § 302, note 3.

Confl. {

is applied to other courts proceeding in rem, such as to the Court of Exchequer in England, and to other courts, exercising a like jurisdiction in rem upon seizures.1 And in cases of this sort it is wholly immaterial, whether the judgment be of acquittal or of condemnation. In both cases it is equally conclusive.2 But the doctrine, however, is always to be understood with this limitation, that the judgment has been obtained bonû fide and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence. So it must appear, that there have been regular proceedings to found the judgment or decree; and that the parties in interest in rem have had notice, or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced, before the party has an opportunity to be heard.4

§ 592 a. Proceedings also by creditors against the personal property of their debtor in the hands of

Law Reporter, 222; Blad v. Bamfield, 3 Swanst. R. 604, 605; Bradstreet v. Neptune Insur. Co. 2 Chand. Law Report. 262, 264, 265; S. C. 3 Sumner, Rep. 600; Magoun v. New England Insur. Co. 3 Chand. Law Rep. 127, 130, 131.

³ Did. and Starkie on Evid. P. 2, § 67, 80, 81, p. 336; Gelston e. Hoyt, 3 Wheaton, R. 246; Williams e. Armroyd, 7 Cranch, 423.

² Ibid.

² See Post, § 597; Duchess of Kingston's Case, 11 State Trials, p. 261, 262; S. C. 20 Howell, State Trials, p. 355; Id. p. 538, the opinion of the Judges; Bradstreet v. The Neptune Insur. Co. 2 Chand. Law Rep. 262, 264, 265; S. C. 3 Sumner, R. 600; Magoun v. The N. England Insur. Co., 3 Chand. Law Report. 127, 130, 131.

⁴ Sawyer v. Maine Fire and Mar. Ins. Co. 12 Mass. R. 291; Bradstreet v. The Neptune Insur. Co. 2 Chand. Law Reporter, 263; S. C. 3 Sumner, R. 600; Magoun v. N. England Insur. Co. 3 Chand. Law Reporter, 127, 129.

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Sond sesonate land I Cowen, R. 5t The serve Jam R. was Halled Hagas at Blanck, 2004; Philips at I S.A. S. 51 S. et En S.; Bessille, Br Birge, Colombia Cilomi For Lawel So it is a proper property of the standard of the second section of the second for growing and organish part in grows, and the property or credits of the section of the Da who claims the and a transfer of from the su Will I make any difference, that A., notice of D.'s clam and right? Wil might by the lex thrich we intervened title, and to support it, if he was no time, altimuch he had notice of the sa put involving similar considerations. foreign country by A. against B. to which C., who is domiciled in a forei is, the law of the country where the s for his title; but he does not, althoug cleans judgment in the suit for the probind C. in the courts of that country, by C. against A. for the same property it bind him in a suit brought in the

§ 593. In all these cases the same principle prevails, that the judgment, acting in rem, shall be held conclusive upon the title and transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned; and whether it be directly or incidentally brought in question. But it is not so universally settled, that the judgment is conclusive of all the points, which are incidentally disposed of by the judgment, or of the facts or allegations, upon which it professes to be founded. In this respect different rules are adopted by different states, both in Europe and in America. In England such judgments are held conclusive, not only in rem, but also as to all the points and facts, which they professedly or incidentally decide,1 In some of the American States the same doctrine prevails. While in other American States the judgments are held conclusive only in rem, and may be controverted as to all the incidental grounds and facts, on which they profess to be founded.2

another foreign country? These questions are propounded for the consideration of the learned reader, without any attempt to discuss or solve them.

In Blad c. Bamfield, decided by Lord Nottingham, and reported in 3 Swanst. R. 604, a perpetual injunction was awarded to restrain certain suits of trespass and trover for seizing the goods of the defendant (Bamfield) for trading in Ireland, contrary to certain privileges granted to the plaintiff and others. The property was seized and condemned in the Danish courts; Lord Nottingham held the sentence conclusive against the suits, and awarded the injunction accordingly.

² See 4 Cowen, R. 522, n. and cases cited; Vandenheuvel v. U. Insur. Co. 2 Cain. Cases in Err. 217; 2 John. Cases, 451; Id. 481; Robinson e. Jones, 8 Mass. R. 536; Maley v. Shattuck, 3 Cranch, 488; 2 Kent, Comm. Lect. 37, p. 190, 121, 3d edit. and cases there cited; Tarleton v. Tarleton, 4 M. Selw. 20. See Peters p. Warren Insur. Co. 3 Summer, R. p. 389; S. C. 1 Chand. Law Reporter, 281; Gelston v. Hoyt, 3 Wheat. R. 246.

all other countries. Lord Hardwicke is reported to have said in a case before him, in which the validity of a marriage in France was asserted to have been established by the sentence of a court in France, having the proper jurisdiction thereof; "It is true, that if so, it is conclusive, whether in a foreign court, or not, from the law of nations in such cases; otherwise the rights of mankind would be

very precarious."1

§ 596. On the other hand Lord Stowell, in a case before him, in which the validity of a foreign sentence of divorce was set up, as a bar to proceedings in the English Ecclesiastical Courts between the same parties, said; "Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly a sentence of separation in a proper court for adultery would be entitled to credit and attention in this court. But I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country, where it is celebrated. A sentence of nullity of marriage, therefore, in the country, where it was solemnized, would carry with it great authority in this country. But I am not prepared to say, that a judgment of a third country on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding. For

¹ Roast v. Garvin, 1 Ves. 157. See also a case in the time of Charles 2d, cited by Lord Hardwicke in Boucher v. Lawson, Cas. T. Hard. 89; and also in Kennedy v. Earl of Cassilis, 2 Swanst, R. 326, note.

riage, in whatever country it may have been originally celebrated. Of course we are to understand, that the sentence is obtained bonâ fide and without fraud; for fraud in this case, as in other cases, will vitiate any judgment, however well founded in point of jurisdiction.

§ 598. In the next place, as to judgments in personam. And here a distinction is commonly taken between suits brought by a party to enforce a foreign judgment, and suits brought against a party, who sets up a foreign judgment in bar of the suit by way of defence. In the former case it is often urged. that no sovereign is bound jure gentium to execute any foreign judgment within his dominions; and therefore, if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it, if, upon such examination, it should appear unjust and unfounded. He acts in executing it upon the principles of comity; and has, therefore, a right to prescribe the terms and limits of that comity.3 But it is otherwise, (it is said,) where the defendant sets up a foreign judgment, as a bar to proceedings; for if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to in-

¹ See ante, § 212, 215 to 230.

² See Starkie on Evid. Pt. 2, § 77, 79, 83; Duchess of Kingston's case, 11 State Trials, 261, 262; S. C. 20 Howell, State Trials, 355, and the opinion of the Judges; Id. p. 538, note. See also Mr. Hargrave's learned argument in this case, as to the conclusiveness of res adjudicata, especially in cases of jactitation of marriage and divorce, and of the effect of fraud in procuring such sentences. Harg. Law Tracts, 449, 479, 483. See also Bowles v. Orr, 1 Younge & Coll. 464.

³ 2 Kent, Comm. Lect. 37, p. 119, 120, 3d edit.; and the cases there cited. See also 1 Boullenois, Observ. 25, p. 601; post, § 611 to 618.

receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us."1 The same distinction is found applied in the same manner in the jurisprudence of Scotland.2

§ 599 a. The view, which was thus taken by Lord Chief Justice Evre, does not appear to have been acted upon to its full extent in subsequent times. It would seem a natural result from that view, that if a suit was brought for the same cause of action, in an English Court, which had already been decided in favor of either party in a foreign court of competent jurisdiction, and was final and conclusive there, that judgment might be well pleaded in bar of the new suit upon the original cause of action, and would, if bonâ fide, be conclusive. It may be doubted, however, whether the same doctrine is at present entertained in England. In a recent case, the Court seem to have thought, that if a plaintiff has recovered judgment in a foreign country upon any original cause of action, he may notwithstanding sue in England upon that original cause of action, or may sue upon the judgment there obtained, at his option; because the original cause of action is not merged in such a judgment.3 Now, if the original cause of action is not merged in a case, where the

¹ Phillips v. Hunter, 2 H. Black. R. 410.

² Erskine, Inst. B. 4, tit. 3, § 4.

³ Smith r. Nicolls, 5 Bing. N. Cases, 208, 221 to 224. There were peculiar circumstances in the case, and therefore the point was not positively decided. The same doctrine seems to have been asserted in Hall v. Odber, 11 East, R. 118; but there also it was not directly decided. But see Plummer v. Woodhouse, 4 Barn. & Cresw. R. 625; ante, § 547, note; Becquet v. McCarthy, 2 Barn. & Adolp. 951; ante, § 548 u.

judgment-condemnator ought not to be final against the defendant, because he gave no consent. But a decreet-absolvitor ought to be final against the plaintiff, because the judge was chosen by himself; with respect to him, at least, it is equivalent to a decreet-arbitral. Public utility affords another argument extremely cogent. There is nothing more hurtful to society, than that lawsuits be perpetual. In every lawsuit there ought to be a ne plus ultra: some step ought to be ultimate; and a decree dismissing a claim is in its nature ultimate. Add a consideration, that regards the nature and constitution of a court of justice. A decree dismissing a claim, may, it is true, be unjust, as well as a decree sustaining it. But they differ widely in one capital point; in declining to give redress against a decree dismissing a claim, the court is not guilty of authorizing injustice, even supposing the decree to be unjust; the utmost, that can be said, is, that the court forbears to interpose in behalf of justice. But such forbearance, instead of being faulty, is highly meritorious in every case, where private justice clashes with public utility. The case is very different with respect to a decree of the other kind; for to award execution upon a foreign decree, without admitting any objection against it, would be, for aught the court can know. to support and promote injustice. A court, as well as an individual, may in certain circumstances have reason to forbear acting, or executing their office; but the doing injustice, or the supporting it, cannot be justified in any circumstances."1

§ 602. It does not appear, that this distinction of Lord Kaims, between judgments sustaining suits, and

^{1 2} Kaims on Equity, p. 365, 3d edit. 1778. 84

question is, whether they are to be deemed conclusive; or whether the defendant is at liberty to go at large into the original merits, to show, that the judgment ought to have been different upon the merits, although obtained bona fide. If the latter course be the correct one, then a still more embarrassing consideration is, to what extent, and in what manner, the

original merits can be properly inquired into.

§ 604. Lord Nottingham, in a case, where an attempt was made to examine a foreign sentence of divorce in Savoy, in the reign of Charles the Second, held, that it was conclusive, and its merits not examinable. "We know not (said he) the laws of Savoy. So, if we did, we have no power to judge by them. And, therefore, it is against the law of nations not to give credit to the sentences of foreign countries, till they are reversed by the law, and according to the form, of those countries, wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place, until it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."1 Lord Hardwicke manifestly held the same opinion, saving : "That where any court, foreign or domestic, that has the proper jurisdiction of the cases, makes the determination, it is conclusive to all other courts,9

& 605. On the other hand, Lord Mansfield thought, that foreign judgments gave a ground of action, but

¹ Kennedy v. Earl of Cassilis, 2 Swanston, R. note, 326, 327.

² Boucher v. Lawson, Cas. T. Hard. 89. See also Roach v. Garvan, 1 Ves. 157.

ofa different opinion, and expressed serious doubts, whether foreign judgments were not binding upon the parties here.1 And Lord Ellenborough upon an occasion, in which the argument was pressed before him, that a foreign judgment was re-examinable, and that the defendant might impeach the justice of it. pithily remarked, that he thought he did not sit at Nisi Prius to try a writ of error, upon the proceedings of the court abroad.2 In a more recent case Sir L. Shadwell, (the Vice-Chancellor,) upon a full examination of the authorities, held the opinion, that the true doctrine was, that foreign judgments were conclusive evidence, and not re-examinable: that this was the true result of the old authorities; and therefore in a suit brought in England to enforce a foreign judgment, he held the judgment to be conclusive.3 The present inclination of the English Courts seems to be to sustain the conclusiveness of foreign judgments; 4 although certainly there yet remains no inconsiderable diversity of opinion among the learned judges of the different tribunals.5

² Tarieton v. Tarieton, 4 Maule & Selw. 21. But see Hall v. Odber, 11 East, R. 118.

4 See Guinness v. Carroll, I Barn. & Adolph. 459; Becquet v. McCar-

thy, 2 Barn. & Adolph. R. 951.

¹ Galbraith v. Neville, Doug. R. 5, note 3. See also Guinness v. Carwell, 1 Barn. & Adolph. 459.

³ Martin v. Nicolls, 3 Simons, R. 458.

⁵ In Houlditch v. Donegal, 8 Bligh, R. 301, 337 to 340, Lord Brougham held a foreign judgment to be only prima facie evidence, and gave his reasons at large for that opinion. On the other hand, Sir L. Shadwell, in Martin v. Nicolls, held the contrary opinion, that it was conclusive; and also gave a very elaborate judgment on the point, in which he reviewed the principal authorities. Of course, the learned Judge meant to except, and did except, in a later case, Price v. Dewhurst, 8 Sim. R. 279, 302, judgments, which were produced by fraud. See also Don v. Lippmana, 5 Clark & Finnell. 1, 20, 21; ante, § 545 to § 550, to § 605;

to be prima facie evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side: for under such circumstances it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original justice of the judgment, by showing, that the court had no jurisdiction; or that he never had any notice of the suit; 1 or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by the local law, Fori rei judicatæ. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits.2

§ 608. The general doctrine maintained in the American courts in relation to foreign judgments certainly is, that they are primâ facie evidence; but that they are impeachable. But how far, and to what

¹ S. P. Ferguson v. Mahon, 11 Adolp. & Ellis, 179, 182.

² See Arnot v. Redfern, ² Carr. & Payne, 88; S. C. ³ Bing, R. 353; Novelli v. Rossi, ² Barn. & Adolph. 757; Douglas v. Porrest, ⁴ Bing, R. 686; Obicini v. Bligh, ⁸ Bing, R. 335; Martina v. Nicolls, ³ Sim. R. 458; Alivan v. Furnival, ¹ Cromp. Mees. & Rosc. 277. See also Starkie on Evidence, Pt. ², ⁶ 67; Phillips & Amos on Evidence, (8th edit.) p. 537, 538, (1838); Buttrick v. Allen, ⁸ Mass. R. 273; Huberus, Tom. ², Lib. ¹, tit. ³, De Conflictu, ⁶ 6.

³ Many of the cases are collected; 2 Kent, Comm. Lect. 27, p. 118, &c. 3d edit.; in 4 Cowen, R. 520, note 3; and in Mr. Metealf's notes to his valuable edition of Starkie on Evidence, Pt. 2, § 67, 68, edit. 1830, p. 214 to 216. See also Bissell v. Briggs, 9 Mass. R.462; Borden v. Fitch, 15 John. R. 121; Green v. Sarmiento, 1 Peters, Circt. R. 74; Field v. Gibbs, 1 Peters, Circ. R. 155; Aldrich v. Kinney, 4 Connect. R. 380; Shumway v. Stillman. 6 Wend. R. 447; Hall v. Williams, 6 Pick. 247; Starbuck v. Murray, 5 Wend. R. 148; Davis v. Peckars, 6 Wend. R. 327; Buttrick v. Allen. 8 Mass. R. 273; Pawling v. Bird's Ex'rs. 13 John. R. 192; Hitchcock v. Aicken, 1 Cain. R. 460;

within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes; but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privilege, or lien, which they have in the state, where they are pronounced, but that only, which the *Lex fori* gives to them by its own laws in their character of foreign judgments. 2

§ 610. In the next place, as to judgments in personam in suits between citizens, in suits between foreigners, and in suits between citizens and foreigners. The common law recognises no distinction whatever, as to the effect of foreign judgments, whether they are between citizens, or between foreigners, or between citizens and foreigners. In all cases they are deemed of equal obligation, whoever are the parties. The cases, which have been already cited, refer to no such distinction; but the same rules are indiscriminately applied to all persons.

§ 611. We have hitherto been principally considering the doctrines of the common law. But it cannot be affirmed, that the same doctrines are generally maintained, either by foreign Courts, or by

¹ See Story's Comment. on the Constit. ch. 29, § 1297 to 1307, and cases there cited;—Hall v. Williams, 6 Pick. R. 237; Bissell v. Briggs, 9 Mass. R. 462; Shumway v. Stillman, 6 Wend. R. 447; Evans v. Tarleton, 9 Sergt. & R. 260; Benton v. Rurgot, 10 Sergt. & R. 240; Hancock v. Barrett, 1 Hall, Sup. Ct. R. 155; S. C. 2 Hall, Sup. Ct. R. 302; Wilson v. Niles, 2 Hall, Sup. Ct. R. 338; Hoxie v. Wright, 2 Vermont R. 263; Bellows v. Ingraham, 2 Vermont R. 573; Aldrich v. Kinney, 4 Connect. R. 380.

² McElmoyle v. Cohen, 13 Peters, R. 312, 328, 329; ante, § 582 a, note.

opinion in all suits except those respecting immovables. Licet autem regulariter Judex requisitus non cognoscat de justitià sententiæ per alterum Judicem latæ, nec eam ad examen penitius revocet; sed pro justitià ejus ex æquitate præsumat; tamen, si animadvertat, eam directo contra sui territorii statuta latam esse circa res immobiles in suo territorio sitas, eandem non exsequetur.

§ 613. There are, however, other foreign jurists, who maintain a very different opinion.2 We have already had occasion to take notice of the doctrines of Boullenois upon the right of jurisdiction;3 and he applies them in an especial manner to the authority of foreign judgments. In regard to judgments in rem, or partly in rem and partly in personam, he deems the jurisdiction to belong exclusively to the tribunals of the place rei sitæ, and, consequently, that the judgment rendered there, ought to be of universal obligation.4 But, in regard to judgments in personal actions, he makes the following distinctions. If the foreign judgment is in a suit between natives of the same country, in which it is pronounced, and it is rendered by a competent tribunal, in such a case it ought to be executed in every other country without any new inquiry into the merits.5 The reason assigned is, that the judgment has emanated from a lawful authority, and has been rendered between per-

is an error in the reference of Boullenois to Gaill. It should be to Observ. 113, instead of 123.

¹ J. Voet, ad Pand. Tom. 2, Lib. 42, tit. 1, n. 41, p. 788.

² See I Boullenois, Observ. 25, p. 601 to p. 650; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 24, p. 1050; Id. p. 1050 to p. 1060; Id. p. 1062 to p. 1076.

³ Ante, § 552.

^{4 1} Boullenois, Observ. 25, p. 618, 619, 620 to 624; Id. p. 635, 636.

⁵ 1 Boullenois, Observ. 25, p. 603, 605.

the suit; in such a case the judgment is not conclusive against the defendant.1

§ 614. Boullenois concludes his remarks upon this subject in the following manner. "When, then, some of our authors say, that foreign judgments are not to be executed in France, and that it is necessary to commence a new action, that is true without any exception in all matters touching the realty. It is also true in personal matters, when the defendant is a Frenchman, who has not contracted in the foreign country, nor promised to pay there, nor submitted himself voluntarily to the foreign jurisdiction; for in such a case a new action should be brought, saving the right to demand a provisional execution of the foreign judgment. But, in the other cases above mentioned, the judgment ought to be executed without a new action."

§ 615. There was in France an ancient Ordinance (in 1629), one article of which expressly declared, that judgments, rendered in foreign countries for any cause whatever, should not be executed within the realm, and that subjects against whom they were rendered, might contest their rights anew throughout France.³

§ 616. Emerigon says, that judgments rendered in foreign countries against Frenchmen are not of the slightest weight in France; and that the causes must be there litigated anew. In support of this

^{1 1} Boullenois, Observ. 25, p. 610, 617.

^{2 1} Boullenois, Observ. 25, p. 646. — Toullier has commented upon and denied the distinctions of Boullenois, as not being well founded in French jurisprudence. 10 Toullier, Droit Civ. Franc. ch. 6, § 3, p. 83.

³ 1 Boullenois, Observ. 25, p. 646; 2 Kent, Comm. Lect. 37, p. 121, 122, note, 3d edit. See 10 Toullier, Droit Civ. Franç. in ch. 6, § 3, n. 82, 83.

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try.1 But the merits of the judgment are examinable; and no distinction seems to be made, whether the judgment is in a suit between foreigners, or between Frenchmen, or between a foreigner and a Frenchman; or whether it is in favor of one party, or of the other; or whether it is rendered upon default, or upon confession, or upon a full trial and contestation of the merits.2 Toullier considers it as now the established jurisprudence of France, that no foreign judgment can be rendered executory in France, but upon a full cognizance of the cause before the French tribunals, in which all the original grounds of the action are to be debated and considered anew.2 And he adds, that the same principle is applied to cases, where foreign judgments are set up by the defendant by way of bar to a new action. The judgments are equally reexaminable upon the merits.4

§ 618. It is difficult to ascertain, what the prevailing rule is in regard to foreign judgments in some of the other nations of continental Europe; whether they are deemed conclusive evidence, or only primâ facie evidence. Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a

¹ Code de Procédure Civile, art. 546; Code Civil, art. 2123, 2128; 10 Toullier, Droit Civ. Franc ch. 6, § 3, n. 76, 77, 78, 84, 85, 86.

² 10 Toullier, Droit Civ. Franc. ch. 6, § 3, n. 76, 77, 78, 80, 81, 84, 85, 86; Pardessus, Droit Comm. Tom. 5, art. 1488; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 24, p. 1048, 1049.

³ Id. n. 85, 86; 2 Kent, Comm. Lect. 37, p. 121, 122, note, 3d edit.; Pardessus, Droit, Comm. Tom. 5, art. 1488.

^{4 10} Toullier, Droit Civ. Franc. ch. 6, § 3, n. 76 to 86; Merlin, Répertoire, Jugement, § 6; Id. Questions de Droit, Jugement, § 14; Pardessus, Droit Com. Tom. 5, art. 1488; 2 Kent, Comm. Lect. 37, p. 118 to 121, 3d edit.

CHAPTER

PENAL LAWS AND OFFENCES.

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§ 619. We are next led to the consideration of the operation of foreign Laws in regard to penalties and offences. And this will not require any expanded examination, as the topics are few, and the doctrines maintained by foreign jurists and by tribunals acting under the common law involve no intricate inquiries into the peculiar jurisprudence of different nations.

§ 620. The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed.1 No other nation, therefore, has any right to punish them; or is under any obligation to take notice of, or to enforce any judgment, rendered in such cases by the tribunals, having authority to hold jurisdiction within the territory, where they are committed.2 Hence it is, that a criminal sentence of attainder in the courts of one sovereign, although it there creates a personal disability to sue, does not carry the same disability with the person into other countries. Foreign jurists, indeed, maintain on this particular point a different opinion, holding, that the state, or condition of a person in the place of his domicil accom-

^{1 &}quot;Crimes (said Lord Chief Justice De Grey, in Rafael v. Verelst, 2 Wm. Black. R. 1058) are in their nature local, and the jurisdiction of crimes is local,"

Rutherf. Inst. B. 2, ch. 9, § 12; Martens, Law of Nations, B. 3, ch. 3, 9 22, 23, 24, 25; Merlin, Répertoire, Soévernineté, § 5, n. 5, 6, p. 379 to 382; Commonwealth v. Green, 17 Mass. R. 515, 545, 546, 547, 548.

the Supreme Court, said; "The Courts of no country execute the penal laws of another." On another occasion, in New York, Mr Chief Justice Spencer said; "We are required to give effect to a law (of Connecticut), which inflicts a penalty for acquiring a right to a chose in action. The defendant cannot take advantage of, nor expect the Court to enforce, the criminal laws of another state. The penal acts of one state can have no operation in another state. They are strictly local, and affect nothing more than they can reach." Upon the same ground also, the Supreme Court of Massachusetts have held, that a person, convicted of an infamous offence in one state, is not thereby rendered incompetent as a witness in other states.

§ 622. The same doctrine is stated by Lord Kaims as the doctrine in Scotland. "There is not (says he) the same necessity for an extraordinary jurisdiction to punish foreign delinquencies. The proper place for punishment is, where the crime is committed. And no society takes concern in any crime, but what is hurtful to itself."

§ 623. The same doctrine is laid down by Martens, as a clear principle of the law of nations. After remarking, that the criminal power of a country is confined to the territory, he adds; "By the same principles a sentence, which attacks the honor, rights or property of a criminal, cannot extend beyond the Courts of the territory of the sovereign, who has pronounced it. So that he, who has been

¹ The Antelope, 10 Wheat. R. 66, 123.

² Scoville v. Canfield, 14 John. R. 338, 340. See also The State v. Knight, Taylor's N. C. Rep. 65.

³ Commonwealth v. Green, 17 Mass. R. 515, 540, 541, 546, 547.

⁴ Kaims on Equity, B. 3, ch. 8, § 1. See also Ersk. Inst. B. 1, tit. 2, p. 23.

there.¹ Paul Voet says; Statutum personale ubique locorum personam comitatur, &-c., etiam in ordine ad pænam a cive petendam, si pæna civibus sit imposita.² And he, as well as some others of the foreign jurists, enters into elaborate discussions of the question, whether, if a foreign fugitive criminal is arrested in another country, he is to be punished according to the law of his domicil, or according to the law of the place, where the offence was committed.³ If any nation should suffer its own courts to entertain jurisdiction of offences committed by foreigners in foreign countries, the rule of Bartolus would seem to furnish the true answer. Delicta puniuntur juxta mores loci commissi delicti, et non loci, ubi de crimine cognoscitur.⁴

§ 626. There is another point, which has been a good deal discussed of late; and that is, whether

¹ Hertii, Opera, De Collis. Leg. § 4, n. 18 to n. 21, p. 130 to 132, edit. 1737; Id. p. 185 to 188, edit. 1716.

⁹ P. Voet, de Statut. § 4, ch. 2, n. 6, p. 123, edit. 1715; Id. p. 138, edit. 1661. See Id. § 11, ch. 1, n. 4, 5, p. 294 to 296, edit. 1715; Id. p. 355 to 360, edit. 1761.

³ See 1 Hertii, Opera, De Collis. Leg. § 4, n. 19 to n. 21, p. 131, 132, edit. 1737; Id. p. 185 to 188, edit. 1716; P. Voet de Stat. § 11, ch. 1, § 1, 4, 5, p. 291 to 297, edit. 1715; Id. p. 355 to 360, edit. 1661.

⁴ Henry on Foreign Law, p. 47.—I quote the passage as I find it in Henry. Upon examining Bartolus in the place apparently intended to be cited by Mr. Henry (Bartolus, Comm. ad Cod. Lib. 1, tit. 1, lib. 1, n. 20, 21; Id. n. 44; Id. n. 47, Tom. 7, p. 4, edit. 1602,) I have not been able to find any such language used by Bartolus. Martens deems it clear, that a sovereign, in whose dominions a criminal has sought refuge, may, if he chooses, punish him for the offence, though committed in a foreign country; though he admits, that the more common usage in modern times is to remand the criminal to the country, where the crime was committed. Martens, Law of Nations, B. 3, ch. 3, § 22, 23. See also Vattel, B. 2, ch. 2, § 76; Grotius, de Jure Belli et Pac. B. 2, ch. 21, § 2, 3, 4, 5; Burlemaqui, P. 4, ch. 3, § 24, 25, 26. See Lord Brougham's opinion in Warrender v. Warrender, 9 Bligh, R. 118, 119, 120.

vinciæ Fæderatæ uni supremo parent;1 a remark strictly applicable to the American States. It is manifest, that he treats it purely as a matter of

comity and not of national duty.

§ 627. It has, however, been treated by other distinguished jurists, as a strict right, and as constituting a part of the law and usage of nations, that offenders charged with a high crime, who have fled from the country, in which the crime has been committed, should be delivered up and sent back for trial by the sovereign of the country, where they are found. Vattel manifestly contemplates the subject in this latter view, contending that it is the duty of the government, where the criminal is, to deliver him up, or to punish him; and if it refuses so to do, then it becomes responsible, as in some measure an accomplice in the crime.2 This opinion is also maintained with great vigor by Grotius, by Heineccius, by Burlemaqui, and by Rutherforth.3 There is no inconsiderable weight of common law authority on the same side; and Mr Chancellor Kent has adopted the doctrine in a case which called directly for its decision.4

§ 628. On the other hand, Puffendorf explicitly denies it as a matter of right.5 Martens is manifest-

¹ Id. See also Matthei Comm. de Criminibus, Dig. Lib. 48, tit. 14, l. 1.

⁹ Vattel, B. 2, ch. 6, § 76.

³ Grotius de Jure Belli et Pacis, ch. 21, § 2, 3, 4, 5; Heineccii Prelect. in Grot. h. t.; Burlemaqui, Pt. 4, ch. 3, § 23, to § 29, p. 258, 259,

edit. 1763; Rutherf. Inst. B. 2, ch. 9, § 12.

⁴ In the matter of Washburn, 4 John. Ch. R. 106; 1 Kent, Comm. Lect. 2, p. 36, 3d edit.; Rex v. Hutchinson, 3 Keble, 785; Rex v. Kimburley, 2 Strange, R. 848; East India Company v. Campbell, 1 Ves. Sen. 246; Mure r. Kaye, 4 Taunton, R. 34, Per Heath J.; Wynne's Eunomus, Dialog. 3, § 67; Lundy's case, 2 Vent. R. 314; Rex r. Ball, 1 Amer. Jurist, 287.

⁵ For this reference to Puffendorf's opinion, I must rely on Burlemaqui (Pt. 4, ch. 3, § 23, 24), not having been able to find it in his Treatise

CHAPTER XVII.

EVIDENCE AND PROOFS.

§ 629. We come in the last place to the consideration of the operation of foreign laws in relation to evidence and proofs. And, here, independently of other more complicated questions, two of a very general nature may arise. In the first place, what rule is to prevail, as to the competency or incompetency of witnesses? Is the rule of the law of the country, where the transaction, to which the suit relates, had its origin, to govern, or the law of the country, where the suit is brought? In the next place, what is the rule, which is to prevail in the proof of written instruments? In other words, in what manner are contracts, instruments or other acts made or done in other countries to be proved? Is it sufficient to prove them in the manner and by the solemnities and proofs, which are deemed sufficient by the law of the place, where the contracts, instruments, or other acts, were executed? Or is it necessary to prove them in the manner and according to the law of the place, where the action or other judicial proceeding is instituted?

§ 630. Various cases may be put to illustrate these questions. A contract or other instrument is executed and recorded before a Notary Public in a foreign country, in which by law a copy of the contract or other instrument certified by him is sufficient to establish its existence and genuineness; would that certificate be admissible in the courts of common law

one occasion, when a question of this very nature was before him, a late learned Judge (Sir William Grant) said; "There are many instances, in which principles of law have been adopted from the Civilians by our English Courts of Justice; but none that I know of, in which they have adopted presumptions of fact from the rules of the civil law."

& 630 b. There are certain rules of evidence, which may be affirmed to be generally, if not universally, recognised. Thus, in relation to immovable property, inasmuch as the rights and titles thereto are generally admitted to be governed by the law of the situs, and as suits and controversies touching the same ex directo properly belong to the forum of the situs, and not elsewhere, it would seem a just and natural, if not an irresistible conclusion, that the law of evidence of the situs touching such rights, titles, suits, and controversies, must and ought exclusively to govern in all such cases.2 So, in cases relating to the due execution of wills and testaments of immovables, the proofs must and ought to be according to the law of the situs. So in respect to the due execution of wills and testaments of movables, as they are governed by the law of the domicil of the testator, the proofs must and ought to be according to the law of his domicil. By the present law of England a will or testament of movable property, in order to be valid, must be executed in the presence of two witnesses. If then an Englishman, domiciled in England, should make his will in England, in the presence of one witness only, that will could not be admitted to proof in Scotland to

¹ Mason v. Mason, 1 Meriv. R. 308, 312.

² See Tulloch v. Hartley, 1 Y. & M. New Cas. in Ch. 114, 115.

in evidence unless it is properly stamped.¹ In all these cases the proper proofs must doubtless be given in conformity with the local law.² And if the proofs are given in the mode, which the local law requires, there is some difficulty in asserting, that such proofs ought not to be deemed every where a full authentication of the instrument.³

& 632. Boullenois divides the formalities of acts into several classes; those, which are required before the act quæ requiruntur ante factum; those; which are required at the time of the act; quæ requiruntur in facto; and those, which are required afterwards: quæ requiruntur ex post facto.4 But a more important distinction in his distribution is of the formalities at the time of the act, which he denominates the formalities of proof, (formalites probantes) and those which are substantial and intrinsic formalities.5 Among the former he includes those, which respect the number of witnesses, who are to witness the execution of the act, their age, and quality, and residence, and the date and place of the act. And here he holds, that as to the formalities of proof the maxim applies; Solemnifates testimoniales non sunt in potestate contrahentium, sed in potestate juris.6 tates sumendæ sunt ex consuetudine loci, in quo res et actus geritur."

§ 632 a. Mascardus holds a similar opinion; and says, that an act, executed before a notary in any place,

¹ Ante, § 260.

Ante, § 260, 260 a, § 360, 361, § 363 to § 373.

See Ersk. Inst. B. 3, tit. 2, § 39, 40.
 Boullenois, Observ. 23, p. 491.

⁵ I Boullenois, Observ. 23, p. 492, 498, 506, &c.

^{6 1} Boulleneis, Observ. 23, p. 492, 493; ante, § 260.

⁷ Ibid.

§ 633. Paul Voet also in another place, speaking upon the subject of the operation of the Lex fori, as to the modes of proceeding in suits, uses the following language. Si de probationibus, et quidem testibus : sic eas adhibebit, sic examinabit hosce, prout exigit forum judicis, ubi producuntur. Si de instrumentis; sic exhibenda, sic edenda, ut fert loci statutum, ubi exhibentur, vel eduntur.1 The generality of these expressions must lead us to the conclusion, that he was of opinion, that the modes of proof and the law of evidence of the Lex fori ought to regulate the proceedings in all suits, whether these suits arose from foreign contracts, or instruments, or other acts, or not. But perhaps he may have intended to give them a more limited application.2

§ 634. Bouhier states a case, where a suit was brought in France by an Englishman against another

existumem hic agi, non tam de solemnibus, quam probandi efficacià; que licet in uno loco sufficiens, non tamen ubique locorum ; quod judex unius territorii nequeat vires tribuere instrumento, ut alibi quid operetur. Hinc etiam mandatum ad lites, coram notario et testibus hic sufficienter factum, non tamen erit validum in Gelrise partibus, ubi notarii non admittuntur, ut coram lege loci, hic confectum esse oporteat, quo in Geldrià sortiatur effectum. Quemadomdum enim personam non subditam, non potest quis alibi inhabilitare; ita nec personam subditam potest alibi facere habilem. P. Voet, ubi supra.

¹ P. Voet, de Stat. 6 10, ch. 1, n. 9, 10, p. 287, edit. 1715; Id. p. 347, edit. 1661.

² Erskine in his Institutes says, that in suits in Scotland with foreigners upon obligations made in a foreign country, they may prove payment or extinguishment lege loci. If, for instance, the law of the foreign country allows the payment of a debt constituted by writing to be proved by witnesses, that manner of proof will also be allowed by the Scottish courts as sufficient for extinguishing such debt, although by the Scottish law obligations, formed by writing, are not extinguishable by parol evidence. Ersk, Inst. C. 3, tit. 5, § 7. This seems a mixed case of the law of the place governing as to the discharge of contracts, and also of the mode of proof of the discharge.

come to the confines, and when one province runs into the other, then arises the difficulty, and then we get inter apices juris. There may be cases, which

¹ Lord Brougham in Yates v. Thomson, 3 Clark & Finnell. 577, 580. -Lord Brougham on this occasion said (it being a case, where a question arose in Scotland upon the interpretation of a will made in England); "It is on all hands admitted, that the whole distribution of Mr. Yates's personal estate must be governed by the law of England, where he had his domicil through life, and at the time of his decease, and at the dates of all the instruments executed by him. Had he died intestate, the English statute of distributions, and not the Scotch law of succession in movables, would have regulated the whole course of the administration. His written declarations must, therefore, be taken with respect to the English law. I think it follows from hence, that those declarations of intention, touching that property, must be construed as we should construe them here by our principles of legal interpretation. Great embarrassment may, no doubt, arise from calling upon a Scotch Court to apply the principles of English law to such questions, many of those principles being among the most nice and difficult known in our jurisprudence. The Court of Session may, for example, be required to decide, whether an executory devise is void as being too remote, and to apply, for the purpose of ascertaining that question, the criterion of the gift passing or not passing, what would be an estate in the realty, although in the language of Scotch law there is no such expression as executory devise, and within the knowledge of Scotch lawyers no such thing as an executory estate tail. Nevertheless, this is a difficulty, which must of necessity be grappled with, because in no other way can the English law be applied to personal property situated locally within the jurisdiction of the Scottish forum; and the rule, which requires the law of the domicil to govern succession to such property, could in no other way be applied and followed out. Nor am I aware, that any distinction in this respect has ever been taken between testamentary succession, and succession ab intestato, or that it has been held either here or in Scotland, that the Court's right to regard the foreign law was excluded, wherever a foreign instrument had been executed. It is therefore my opinion, that in this, as in other cases of the like description, the Scotch Court must inquire of the foreign law as a matter of fact, and examine such evidence as will show how in England such instruments would be dealt with as to construction. I give this as my opinion upon principle, for I am not aware of the question ever having received judicial determination in either country. But here I think the importing of the foreign code (sometimes incorrectly called the comitas) must stop. What evidence the Courts

§ 635. There are very few traces to be found in the Reports of the common law of any established

upon it either way. But in England it would never be received in evidence nor seen by any Court; neither would it have been seen if it had been proved ever so formally. Our law holds the probate as the only evidence of a will of personalty, or of the appointment of executors; in short, of any disposition, which a testator may make, unless it regards his real estate. Can it be said, that the Scotch Court is bound by this rule of evidence, which, though founded upon views of convenience, and for any thing I know well devised, is yet one, which must be allowed to be exceedingly technical, and which would exclude from the view of the Court a subsequent will, clearly revoking the one admitted to probate? The English Courts would never look at this will, although proof might be tendered, that it had come to the knowledge of the party on the eve of the trial. A delay might be granted to enable him to obtain a revocation of the probate of the former will. It is absurd to contend, that the Court of Session shall admit all this technicality of procedure into its course of judicature, as often as a question arises upon the succession of a person domiciled in England. Again, there are certain rules just as strict, and many of them not less technical, governing the admission of parol evidence with us. Can it be contended, that, as often as an English succession comes in question before the Scotch Court, witnesses are to be admitted or rejected upon the practice of the English Courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be manifestly a source of such inconvenience as no Court ever could get over. Among other embarrassments equally inextricable there would be this; that a host of English lawyers must always be in attendance on the Scotch Courts, ready to give evidence, at a moment's notice, of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions, which, by the supposition, are questions of mere fact in the Scotch Courts, must arise unexpectedly during each trial, and must be disposed of on the spot in order, that the trial may proceed. The case, which I should however put, as quite decisive of this matter, comes nearer than any other to the one at bar, and it may, with equal advantage to the elucidation of the argument, be put as arising both in an English and in a Scotch Court. By our English rules of evidence no instrument proves itself, unless it be thirty years old, or is an office copy, authorized by law to be given by the proper officer, or is the London Gazette, or is by some special Act made evidence, or is an original record of a Court under its seal, or an exemplification under seal, which is quasi a record. By the Scotch law all instruments prepared and witnessed according

of other states inadmissible, as evidence, are offered in the forum of the latter to establish debts contracted in the former; ought they to be rejected?¹

§ 635 a. Cases, vice versa, may easily be put, which will present questions quite as embarrassing. Thus, for example, let us suppose the case of a crime, committed on board an American ship on the high seas by a white man, or upon a white man, and the principal witnesses of the offence are black men, either free or slaves; and suppose, (as is or may be the fact,) that in the slaveholding states black men are competent witnesses only in cases, in which black men are parties, and not in cases, where white men are parties; and in the non-slaveholding states black men are in all cases competent witnesses. If the offender is apprehended and tried for that offence before a Court of the United States in a slaveholding state, would the black men be witnesses or not? If not there, would they be witnesses in the case, if the trial were in a non-slaveholding state? In other words, will the rules of evidence in such a case, in the Courts of the United States, depend upon the rules of evidence in the state, where the trial is had? If not, then what rules of evidence are to prevail? The answer in the present state of our law cannot be given with entire confidence, as to its accuracy and universality of adoption.

¹ Upon this very point foreign jurists have delivered opposite opinions, as appears from Hertius, who, however, abstains from giving any opinion on the subject. 1 Hertii Opera, De Collis, Leg. § 4, n. 68, p. 152, edit. 1737; Id. p. 214, edit. 1716; 4 Burge, Comm- on Col. and For. Law, Pt. 2, ch. 3, § 5, p. 153. Paul Voet thinks they are to be deemed prima facie evidence, but not conclusive. P. Voet, De Stat. § 5, ch. 2, n. 9, p. 160, edit. 1715; Id. p. 183, edit. 1661.

are illustrations of the inconvenience of applying one set of rules of law to an instrument, which is to be enforced by a law of a different kind.¹

§ 635 c. In many foreign countries original contracts, deeds, conveyances, and other solemn instruments, are often written in the public books of notaries public, and executed and registered and kept there, and are not allowed to be given out to the parties; but certified copies only thereof are delivered to the parties, and these copies are deemed in such countries admissible evidence in all suits to establish and prove such original papers and documents. The question has arisen in England, whether such copies, so certified, are admissible, either as original, or as secondary evidence in suits pending in the English Courts. It has been held, that they are not; at least, not without proof, that they were made at the time of entering and registering the original paper, and in the presence of the parties, although they were admissible in the country, where the originals were executed. The ground of this decision seems to have been, that the rules of evidence of the foreign country were not to be followed, but the rules of evidence of England: and by the law of England copies of original documents were not admissible under such circumstances, unless proved by some witness, who had compared them with the original, as in common cases.2 So, upon the like ground, it has been held, that copies of a judgment of the Supreme Court of Jamaica, signed by the Clerk thereof, are not admissible evidence in a suit in England, although such copies would be admissible in Jamaica.3

¹ Don v. Lippmann, 5 Clark & Finnell. p. 15; Id. p. 17.

Brown v. Thornton, 6 Barn. & Adolph. 185.

³ Appleton v. Lord Braybrook, 6 Maule & Selw. 34; Black v. Lord

have been the inclination of the Court to admit the evidence.

§ 636. In regard to wills of personal property made in a foreign country, it would seem to be almost a matter of necessity to admit the same evidence to establish their validity and authenticity abroad, as would establish them in the domicil of the testator; for otherwise the general rule, that personal property shall pass every where by a will made according to the law of the place of the testator's domicil, might be sapped to its very foundation, if the law of evidence in any country, where such property was situate, was not precisely the same as in the place of his domicil. And, therefore, parol evidence has been admitted in courts of common law to prove the manner, in which the will is made and proved in the place of the testator's domicil, in order to lay a suitable foundation to establish the will elsewhere.1

§ 637. Passing from this most embarrassing, and as vet (in a great measure) unsettled class of questions, let us consider in what manner courts of justice arrive at the knowledge of foreign laws Are they to be judicially taken notice of? Or, are they to be proved as matters of fact? The established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts.2

§ 638. But it may be asked, whether they are to be proved as facts to the jury, if the case is a

De Sobry v. De Laistre, 2 Harr. & John. 191, 195. See Yates v. Thomson, 3 Clark & Finnell, 544, 574.

² See Mostyn v. Fabrigas, Cowp. 174; Male v. Roberts, 3 Esp. R. 163; Douglas v. Brown, 2 Dow & Clark, R. 171; De Sobry v. De Laistre, 3 Harr. & John. R. 193; Trasher v. Everhart, 3 Gill & John. R. 234; Brackett v. Norton, 4 Connect. R. 517; Talbot v. Seeman, 1 Cranch, 38; Church

§ 639. As to the manner of proof, this must vary according to circumstances. The general principle is, that the best testimony or proof shall be produced, which the nature of the thing admits of; or, in other words, that no testimony shall be received, which presupposes better testimony behind, and attainable by the party, who offers it. This rule applies to the proof of foreign laws, as well as of other facts. But to require proof of such laws by such a species of testimony, as the institutions and usages of the foregn country do not admit of, would be unjust and unreasonable. In this, as in all other cases, no testimony is required, which can be shown to be unattainable.

§ 640. Generally speaking, authenticated copies of the written laws, or of other public instruments, of a foreign government are expected to be produced. For it is not to be presumed, that any civilized nation will refuse to give such copies duly authenticated, which are usual and necessary for the purposes of administering justice in other countries. It cannot be presumed, that an application to a foreign government to authenticate its own edict or law will be refused: but the fact of such a refusal must, if relied on, be proved. But if such refusal is proved, then inferior proofs may be admissible.2 Where our own government has promulgated any foreign law or ordinance of a public nature as authentic, that may of itself be sufficient evidence of the actual existence, and terms of such law or ordinance.3

§ 641. In general, foreign laws are required

¹ Church v. Hubbart, 2 Cranch, R. 237.

² Church v. Hubbart, 2 Cranch, 237, 238.

³ Talbot v. Seeman, I Cranch, R. 38.

itself.1 But the seal of a foreign court does not prove itself; and therefore it must be established as such by competent testimony.2 There is an exception to this rule in favor of Courts of Admiralty, which being courts of the law of nations, the courts of other countries will judicially take notice of their seal without positive proof of its authenticity.3

§ 644. The mode, by which the laws, records, and judgments of the different states composing the American Union, are to be verified, has been prescribed by Congress, pursuant to an authority given in the Constitution of the United States. It is, therefore, wholly unnecessary, to dwell upon this subject, as these regulations are properly a part of our own municipal law, and do not strictly belong to a treatise on international law.4

645. And here these Commentaries on this interesting branch of public law are brought to a close. It will occur to the learned reader, upon a general survey of the subject, that many questions are still left in a distressing state of uncertainty, as to the true principles, which ought to regulate and decide them. Different nations entertain different doctrines

¹ Lincoln v. Battelle, 6 Wend. R. 475; Griswold v. Pittcairn, 2 Conn. R. 85; Church v. Hubbart, 2 Cranch, 238, 239; Anon. 7 Mod. R. 66; United States v. Johnson, 4 Dall. 416; Appleton v. Lord Braybrook, 6 Maule & Selw. 34; Black v. Lord Braybrook, 6 Maule & Selw. 39.

² Starkie on Evid. Pt. 2, § 92; Delafield v. Hurd, 3 John. R. 310; De Sobry v. De Laistre, 2 Harr. & John. R. 193; Henry v. Adey, 3 East, R. 221; Andrews v. Herriott, 4 Cowen, R. 526, note.

³ See Yeaton v. Fry, 5 Cranch, 335; Thomson v. Stewart, 3 Conn. R. 171.

⁴ See on this subject the Act of Congress of 26th of May, 1790, ch. 11, and the Act of Congress of the 27th of March, 1804, ch. 56; 3 Story, Comm. on Const. § 1297 to 1307; Andrews v. Herriott, 4 Cowen, R. 526, 527, note.

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