

## REVIEWS AND NOTICES

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*The Residence and Domicil of Corporations.* By A. FARNSWORTH.  
Foreword by the RT. HON. LORD MACMILLAN. London and  
Toronto: Butterworth and Company. 1939. Pp. xxxviii,  
370. (\$7.25)

This "admirable monograph", justifiably so characterized by Lord Macmillan in his foreword, as the title implies, is a definition of the concepts of residence and domicil with respect to corporations (the term being used almost exclusively in the commonly adopted sense of "trading company"). The author modestly apologizes for adding to the literature upon Private International Law, but no excuses are required, for an investigation of the subject reveals that no direct statutory definitions of the terms exist and judicial decisions are surprisingly few. Conflicting opinions are expressed by the leading text writers and confusion occurs because of the failure to use the terms precisely. A very valuable service is rendered in the careful discrimination of the exact meanings of the expressions as appearing in various contexts.

The subject is approached in a workmanlike and comprehensive manner, being identical to that of Lord Loreburn in the leading case of *De Beers Consolidated Mines Limited v. Howe*, [1906] A.C. 455, in applying the conception of residence to a company, that is by proceeding as nearly as possible on the analogy of an individual. Accordingly the first two chapters are devoted to an examination of residence and domicil as applied to an individual followed by a consideration of the nature and personality of a corporation. Particular attention is directed to the American common law theory of the nature of a corporation being that of the "corporate fiction". The early notion of a corporation in English law was that of an abstraction and purely metaphysical existence. But the convincing facts of life in commerce and industry resulted in the abandonment of the notion of fictional existence and the recognition of the reality of corporations, assuming more and more the functions of individuals and as a consequence by analogy individual attributes until we find Lord Halsbury stating in *Salomon & Co. Ltd. v. Salomon*, [1897] A.C. 22, "A corporation is a real thing . . . it has a real existence". The orthodox view has persisted in the United States but subject to many inroads. The divergence of developments has resulted in the enunciation of the theory of American courts, flowing from the "corporate fiction" theory that a corporation cannot exist outside the state to the laws of which it owes its creation. Throughout the text the two concepts are considered, compared and contrasted as occasion requires in regard to the relevant laws of Great Britain and the United States.

A background having been so prepared, Mr. Farnsworth proceeds with an examination of the residence of a corporation under four headings, namely taxation, commercial domicil, jurisdiction and the situs of debts. It is in connection with taxation that he excels. Unconsciously greater significance is attached to the work in this phase, when the author's connection with the

Board of Inland Revenue is recalled, although in the preface he carefully points out that the work represents the results of personal research and is to be regarded as neither official nor published under the authority of the Board. A confident familiarity with the subject is more apparent here than elsewhere undoubtedly due to repeated dealings in an official capacity with the problems arising. All relevant statutes, judicial decisions and expressed opinions of recognized text writers are reviewed and the ultimate conclusion reached where residence in the true sense is involved, and on a proper analogy with an individual a corporation may be properly said to reside, for all purposes, where the central control and management is actually situate, i.e., the place where the directors meet to exercise their powers and functions. No assistance is obtained from American law owing to the peculiar development of the common law in that country, it being conclusively laid down by American courts that a company has a permanent residence in the country where incorporated.

The discourse on "Commercial domicile" is particularly apposite since it determines the incidence of enemy character during a state of war. The conception dates from the Napoleonic Wars previous to which the test was nationality. With the great development of trade over the last century it was realized that one of the legitimate objects of war was to cripple the enemy's commerce. All trade between British subjects and the inhabitants of a hostile state had to be stopped because the benefits accruing to such residents irrespective of sympathy and allegiance would enhance the financial and economic resources of the enemy. As a natural person becomes affected with enemy character by voluntary residence in a hostile state, so by analogy does a corporation. A reading of this book will convince those previously of a contrary opinion that *Daimler Co. Ltd. v. Continental Tyre Co. Ltd.*, [1916] 2 A.C. 307, is not an outstanding example of "judicial legislation" dictated by the exigencies of war and contrary to the elementary principle of separate entity, but, as the author clearly demonstrates, a proper application to the question of enemy character of the doctrine of control as determinative of a corporation's residence in time of war as evolved over a period of some forty years prior to the Great War.

Jurisdiction over a foreign corporation is shown to be dependent upon doing business in the country and is accordingly "found" or "present", an application of the *in personam* principle, or alternatively perhaps it is based upon tacit submission, a view favoured by American authorities. The author maintains that the locality of debts is to be ascertained upon the same principle as residence (a misnomer) is used to found jurisdiction.

In the report of Lord Macmillan's Income Tax Codification Committee it is said with reference to the domicile of a corporation that the field is one which "remains practically unexplored and which throws up problems upon which no direct statutory or judicial authority exists". Mr. Farnsworth in so treading upon untrodden ground continues to proceed by way of analogy and refers to decisions and dicta where the topic was only indirectly material as well as to the text-writers with whom he does not hesitate to take issue. It is deduced upon first principles that the domicile remains fixed in the country of incorporation but that in theory a domicile of choice might be acquired if it were not impossible in law. Lord Macmillan while commending the work in the forward discreetly refrains from expressing an opinion as to the soundness of the conclusions which it might subsequently be his duty to consider in another capacity.

The thought occurs that since domicile determines the personal law it would be corollary and not assuming a conclusion to say that since the personal law of a corporation is settled by the country of creation that country must of necessity be the domicile. By so arriving at the end the difficulties of similarly concluding by an analogue would be avoided. Further, Dicey states that domicile is constituted of two elements, residence and intention, although one hesitates to rely upon Dicey because of the searching criticisms to which he has been subjected however authoritative he may have been heretofore. Therefore as a corporation is always domiciled in its country of origin it would seem to follow logically that it is always resident there, which is in line with American theory. A corporation would not be precluded from acquiring another residence upon the doctrine of control.

It is unfortunate that Mr. Farnsworth does not deal with the distinctive Canadian development where the power to incorporate is vested in the Dominion as well as the nine provinces. No doubt his conclusions respecting domicile can be applied to provincial companies. Presumably the domicile of a Dominion company is where its head office is situate which may be changed in accordance with the Act. Its personal law would possibly be that of the constating instrument considered with the provincial laws applicable varied as the company may shift its head office from province to province. In any event a Canadian practitioner if confronted with a problem where domicile or residence of a corporation is material would be well advised to utilize the erudite observations of Mr. Farnsworth.

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*Evidence Before International Tribunals.* By DURWARD V. SANDIFER. Chicago: The Foundation Press. 1939. Pp. xii, 443. (\$10.00)

This is one of the most interesting, and from the point of view of the practising international lawyer, most valuable books that has appeared in recent years. The author was himself engaged, in a legal capacity, in a boundary arbitration between two sovereign states, and he found it so difficult to ascertain what the law and procedure was in respect of evidence before an international tribunal, that he decided to write a treatise on it himself for his own enlightenment and for the benefit of others like himself, engaged in hearings before international courts and tribunals. To accomplish this he made an examination of all the available arbitration records. Knowing the facilities afforded by the State Department, the Library of Congress and the libraries of the great universities and law schools in the United States, one is justified in assuming that these records were most extensive. In addition he had recourse, in a comparative way, to the practice of municipal tribunals, in both common and civil law countries in respect of the law and rules of evidence. The volume deals with the following matters: The nature and sources of the rules of evidence; the order and time of the submission of evidence; the production of evidence; the admission

of evidence; documentary evidence; testimonial evidence; evidence subject to special rules of admission and evaluation; propositions not requiring proof; and rehearings and revision on the basis of newly discovered or fraudulent evidence. It also contains in the appendices, the rules of the Permanent Court of International Justice, the Permanent Court of Arbitration, the Central American Court of Justice, and the provisions for the establishment of an International Central American Tribunal. Mr. Sandifer's method is to go to the records of the many international tribunals to cite therefrom the practices of those tribunals and from the practices and decisions of the tribunals he sets out the international law of evidence and the rules of evidence as applied by international courts. Among the "Canadian" cases, i.e., cases involving Canadians or Canadian interests, that he examines are *The Yukon Lumber Co. Case*, *The Halifax Commission*, *The Hudson's Bay and Puget Sound Agricultural Coy. Cases*, *The Royal Bank of Canada v. Central Costa Rica Petroleum Case*, *Price Brothers v. the King*, *the North Atlantic Fisheries Case*, *The Northeastern Boundary Arbitration*, *The I'm Alone*, *The Alaskan Boundary Arbitration*, *The Cayuga Indians Case*, *The Labrador Boundary Case*, and *The Bay of Fundy Islands Case*. This book is to be recommended,—is in fact indispensable—to the agents of governments and any practising lawyers who may have occasion to take part in cases that are heard by international courts or tribunals.

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*Limitations* (Being a Treatise on The Time Limit on Actions in Canada). By EVERETT LANE WEAVER. Including Notes on Prescription in Quebec, edited by A. E. LAVERTY. Toronto: Canada Law List Publishing Company. 1939. Pp. lxviii, 499.

The industry and patient research of the author in preparing a volume of such practical usefulness as the book under review, merits the thanks and gratitude of the legal profession. From the welter of diverse statutory provisions and case law, the author has collected and classified in readily accessible form all the provisions of Canadian law relating to statutory limitations on the bringing of every conceivable type of action.

Clearly, both the author and publishers had in mind ease of reference by the busy practitioner and between them they have produced a volume which makes the finding of relevant provisions both easy and rapid—two most important requirements on a preliminary and yet ever present problem such as limitations. Practically every civil cause of action is listed and the relevant statutory provisions of England and of all the provinces are given. The inclusion of English statutory references is commendable since it opens a further field of research on difficult points. In addition to civil actions references are made to limitations on criminal prosecutions and kindred matters and defences to pleas of the Statute, both equitable and of common law, are adequately covered.

In addition, the volume contains an Appendix which lists in convenient tabulated form the sections of the various provincial limitations Acts and the corresponding sections of the English statutes and the pages in the present volume where such sections are discussed. The Appendix further contains an easy reference table to the types of notices required as a condition precedent to commencing certain kinds of actions—a problem on which many a law suit has prematurely foundered.

The author has expressly disclaimed any intention of writing a comprehensive text and consequently a reviewer is precluded from expressing any disappointment he might feel at the failure to classify or explain certain confused topics such as, for example, the extremely troublesome question regarding the differentiation between trusts and executorships and their various sub-classifications. As the author states, he has merely “attempted to create for the practitioner a ready reference to the dicta of the Legislators and the Courts”. Within such limits the task has been adequately and capably carried out and satisfies a real need of the busy practitioner who is more and more faced with the necessity of advising on causes of action which are not exclusively within his own province. The book neither suggests changes nor criticises existing judicial exposition. It is a tool, and we believe a very useful tool, in the workaday world of advising on a constantly recurring problem.

C. A. W.

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