Comment On Case:

Coury v. Prot, 85 F. 3d 244, 1996

(Diversity of Citizenship)

On June 19, 1996, opinion was rendered in the case of *Coury v. Prot*, in the Fifth Circuit of the United States Court of Appeals.

In the opinion, Circuit Judge Dennis writes:

"What makes a person a citizen of a state? The fourteenth amendment to the Constitution provides that: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' United States Const. amend XIV, § 1. However, 'reside' has been interpreted to mean more than to be temporarily living in the state; it means to be 'domiciled' there." Coury v. Prot: 85 F. 3d 244, at 248 (1996).

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http://www.ca5.uscourts.gov/opinions%5Cpub%5C94/94-20694.CVO.wpd.pdf

This is wrong!

"Resides," as used in Section 1, Clause 1 of the Fourteenth Amendment, has been presumed to mean "permanent residence." **[Footnote 1]** However, in the *Slaughterhouse Cases*, the Supreme Court states that "resides" means "bona fide residence":

"One of these privileges is conferred by the very article (Fourteenth Amendment) under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a ***bona fide residence*** therein, with the same rights as other citizens of that State." Slaughterhouse Cases: 83 U.S. (16 Wall.) 36, at 80 (1873).

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Bona fide residence does not mean domicile:

" . . . The very meaning of ***domicil*** is the technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined. *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Massachusetts, 154, 157. In its nature it is one, and if any case two are recognized for different purposes it is a doubtful anomaly. *Dicey, Conflict of Laws*, 2d ed. 98." Williamson v. Osenton: 232 U.S. 619, at 625 (1914).

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"A person may maintain more than one residence and the fact that one is maintained for political purposes does not itself prevent the residence from being actual and bona fide. *Intent to maintain a residence is an important factor, but intent alone does not establish a* ***bona fide residence****. There must be actual, physical use or occupation of quarters for living purposes before residence is established*." Williamson v. Village of Baskin: 339 So.2d 474 (1976).

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"Our statute 65.02, Florida Statutes 1941, F.S.A. reads, 'In order to obtain a divorce the complainant must have ***resided*** (emphasis not mine) ninety days in the State of Florida before the filing of the bill of complaint.' It is obvious that the word ***resided*** (emphasis not mine) could not properly be construed to encompass citizenship in a legal sense [***domicile***] because one may come to this State, establish a ***bona fide residence*** of ninety days, thereafter institute a divorce action and have it heard and conclusively adjudicated on its merits before he could under the law become a citizen and enjoy all the privileges of citizenship. On the other hand, a person might reside in Florida many years and never become a citizen of this State or renounce his citizenship in a foreign jurisdiction. Indeed, failure to renounce pre-existing citizenship is nothing more than a circumstance to be considered in connection with the question of the ***bona fides*** (emphasis not mine) of the plaintiff's residence which is the real test under our statutory law. It is necessary, as provided in 98.01, Florida States 1941, F.S.A., that a person '. . . shall have ***resided*** (emphasis not mine) **AND had his** habitation, domicile, **home**, and place of permanent abode **in Florida for one year, and in the county for six months**, . . .' in order to qualify as a voter and for full-fledged citizenship. Citizenship is not a statutory jurisdictional prerequisite for divorce and neither of the words 'citizen' and 'citizenship' can be read into our statute." Pawley v. Pawley: 46 So.2d 464, at 471 (1950).

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"The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by

this Court over a period of more than a century bear witness to this historical fact. In *Barber v. Barber*, 21 How. 582, 584 (1859), the Court said: 'We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce. . . .' In *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1878), the Court said: 'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,' and the same view was reaffirmed in *Simms v. Simms*, 175 U.S. 162, 167 (1899). . . .

The imposition of a durational residency requirement for divorce is scarcely unique to Iowa, since 48 States impose such a requirement as a condition for maintaining an action of divorce. As might be expected, the periods vary among States and range from six weeks to two years. The one-year period selected by Iowa is the most common length of time prescribed.

Appellant contends that the Iowa requirement of one year's residence is unconstitutional for two separate reasons: . . . and, *second*, because it denies a litigant the opportunity to make an individualized showing of ***bona fide residence*** and therefore denies such residents access to the only method of legally dissolving their marriage. *Vlandis v. Kline*, 412 U.S. 441 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971). . . . .

We therefore hold that the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State. . . .

Nor are we of the view that the failure to provide an individualized determination of residency violates the Due Process Clause of the Fourteenth Amendment. *Vlandis v. Kline*, 412 U.S. 441 (1973), relied upon by appellant, held that Connecticut might not arbitrarily invoke a permanent and irrebuttable presumption of nonresidence against students who sought to obtain in-state tuition rates when that presumption was not necessarily or universally true in fact. But in *Vlandis* the Court warned that its decision should not 'be construed to deny a State the right to impose on a student, as one element in demonstrating ***bona fide residence***, a reasonable durational residency requirement.' *Id*., at 452. See *Stams v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U.S. 985 (1971). An individualized determination of physical presence plus the intent to remain, which appellant apparently seeks, would not entitle her to a divorce even if she could have made such a showing. For Iowa requires not merely '***domicile***' in that sense, but (***actual***) ***residence*** in the State for a year in order for its courts to exercise their divorce jurisdiction." Sosna v. State of Iowa: 419 U.S. 393, at 404, 405, 409 thru 410 (1975).

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Therefore, a citizen of the United States, under Section 1, Clause 1 of the Fourteenth Amendment, when residing in a particular State, is not a domiciliary, but an actual resident of the particular State. However, because of the Fourteenth Amendment, he or she is made a citizen of that particular State.

Thus, a citizen of the United States is a citizen and resident of a particular State and not a citizen and domiciliary of a particular State. **[Footnote 2]**

In addition, there are two distinct state citizens for purposes of diversity of citizenship. The first is recognized at Article IV, Section 2, Clause 1 of the Constitution of the United States of America:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The next is recognized at Section 1, Clause 1 of the Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The difference between them is a citizen of a State, under Article IV, Section 2, Clause 1 of the Constitution is not a citizen of the United States, but a citizen of the several States:

"The Fourteenth Amendment declares that citizens of the United States are citizens of the state within they reside; therefore the plaintiff was at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

We do not here mean to say that there may not be a temporary residence in one State, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the ***definition of citizenship of a State as defined by the first section of the fourteenth amendment***." Bradwell v. the State of Illinois: 83 U.S. 130, at 138 (1873).

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"There can be no doubt that Balk, as a citizen of the State of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the ***privileges and immunities of citizens of the several States***, one of which is the right to institute actions in the courts of another State." Harris v. Balk: 198 U.S. 215, at 223 (1905).

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"In speaking of the meaning of the phrase '***privileges and immunities of citizens of the several States***,' under section second, article fourth, of the Constitution, it was said by the present Chief Justice, in *Cole v. Cunningham*, 133 U.S. 107, that the intention was 'to confer on the ***citizens of the several States a general citizenship***, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions.' " Maxwell v. Dow: 176 U.S. 581, at 592 (1900).

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Privileges and immunities of a citizen of the United States are located in the Fourteenth Amendment, at Section 1, Clause 2 and arise "out of the nature and essential character of the Federal government, and granted or secured by the Constitution" (*Duncan v. State of Missouri*: 152 U.S. 377, at 382, 1894) or, in other words, "owe their existence to the Federal government, its National character, its Constitution, or its laws" (*Slaughterhouse Cases*: 83 U.S. (16 Wall.) 38, at 79, 1873).

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Privileges and immunities of a citizen of the several States are those described in *Corfield v. Coryell* decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1825:

"In the *Slaughter House Cases*, 16 Wall. 36, 76, in defining the privileges and immunities of citizens of the several States, this is quoted from the opinion of Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 380." Hodges v. United States: 203 U.S. 1, at 15 (1906).

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Privileges and immunities of a citizen of the United States are not the same as privileges and immunities of a citizen of the several States:

"We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section (Section 1, Clause 2 of the Fourteenth Amendment), which is the one mainly relied on by the plaintiffs in error, speaks **ONLY** of privileges and immunities of citizens of the

United States, and does not speak of those (privileges and immunities) of citizens of the several States." Slaughterhouse Cases: 83 U.S. (16 Wall.) 36, at 74 (1873).

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Therefore, there are two distinct state citizens:

"Because the ordinance and specifications, under which the paving in this case was done, require the contractor to employ only bona fide resident citizens of the city of New Orleans as laborers on the work, it is contended, on behalf on the plaintiff in error, that thereby ***citizens of the State of Louisiana, and of each and every State and the inhabitants thereof, are deprived of their privileges and immunities under article 4, sec. 2, and under the Fourteenth Amendment to the Constitution of the United States***. It is said that such an ordinance deprives every person, not a bona fide resident of the city of New Orleans, of the right to labor on the contemplated improvements, and also is prejudicial to the property owners, because, by restricting the number of workmen, the price of the work is increased.

Such questions are of the gravest possible importance, and, if and when actually presented, would demand most careful consideration; but we are not now called upon to determine them.

In so far as the provisions of the city ordinance may be claimed to affect the rights and privileges of citizens of Louisiana and of the other States, the plaintiff in error is in no position to raise the question. It is not alleged, nor does it appear, that he is one of the laborers excluded by the ordinance from employment, or that he occupies any representative relation to them. Apparently he is one of the preferred class of resident citizens of the city of New Orleans." Chadwick v. Kelley: 187 U.S. 540, at 546 (1903). **[Footnote 3]**

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And, one who is a citizen of the United States and a citizen of a State (Fourteenth Amendment), as well as one who is a citizen of a State who is not a citizen of the United States (Article IV, Section 2, Clause 1 of the Constitution), has the requisite citizenship, as stated in *Sun Printing & Publishing* (194 U.S. 377, 1904), to give a circuit court of the United States jurisdiction in a diversity of citizenship suit:

"*Syllabus*:

The facts, which involved the sufficiency of averments and proof of diverse

citizenship to maintain the jurisdiction of the United States Circuit Court, are stated in the opinion of the court.

Opinion:

We come to the contention that the citizenship of Edwards was not averred in the complaint or shown by the record, and hence jurisdiction did not appear.

In answering the question, whether the Circuit Court had jurisdiction of the controversy, we must put ourselves in the place of the Circuit Court of Appeals, and decide the question with reference to the transcript of record in that court.

Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a 'resident of the State of Delaware,' as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, a negative answer would have been impelled by prior decisions. *Mexican Central Ry. Co. v. Duthie,* 189 U.S. 76; *Horne v. George H. Hammond Co.*, 155 U.S. 393; *Denny v. Pironi*, 141 U.S. 121; *Robertson v. Cease*, 97 U.S. 646. ***The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship, is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient***. *Horne v. George H. Hammond Co*., supra and cases cited.

As this is an action at law, we are bound to assume that the testimony of the plaintiff contained in the certificate of the Circuit Court of Appeals, and recited to have been given on the trial, was preserved in a bill of exceptions, which formed part of the transcript of record filed in the Circuit Court of Appeals. Being a part of the record, and proper to be resorted to in settling a question of the character of that now under consideration, *Robertson v. Cease*, 97 U.S. 648, we come to ascertain what is established by the uncontradicted evidence referred to.

In the first place, it shows that Edwards, prior to his employment on the New York Sun and the New Haven Palladium, was legally domiciled in the State of Delaware. Next, it demonstrates that he had no intention to abandon such domicil, for he testified under oath as follows: 'One of the reasons I left the New Haven Palladium was, it was too far away from home. I lived in Delaware, and I had to go back and forth. My family are over in Delaware.' Now, it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil, and, second, the intention to remain there. The change cannot be made, except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell v. United States*, 21 Wall. 350.

As Delaware must, then, be held to have been the legal domicil of Edwards at the time he commenced this action, ***had it appeared that he was a citizen of the United States, it would have resulted, by operation of the Fourteenth Amendment, that Edwards was also a citizen of the State of Delaware***. *Anderson v. Watt*, 138 U.S. 694. ***Be this as it may, however, Delaware being the legal domicil of Edwards, it was impossible for him to have been a citizen of another State, District, or Territory, and he must then have been either a citizen of Delaware or a citizen or subject of a foreign State. In either of these contingencies, the Circuit Court would have had jurisdiction over the controversy***. But, in the light of the testimony, we are satisfied that the averment in the complaint, that Edwards was a resident 'of' the State of Delaware, was intended to mean, and, reasonably construed, must be interpreted as averring, that ***the plaintiff was a citizen of the State of Delaware***. *Jones v. Andrews*, 10 Wall. 327, 331; *Express Company v. Kountze*, 8 Wall. 342." Sun Printing & Publishing Association v. Edwards: 194 U.S. 377, at 381 thru 383 (1904).

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One who is a citizen of the United States, under Section 1, Clause 1 of the Fourteenth Amendment, must aver that he or she is a citizen of the United States and a citizen of a State of the Union, for purposes of diversity of citizenship. One who is a citizen of a State and not a citizen of the United States, under Article IV, Section 2, Clause 1 of the Constitution, only has to aver that he or she is a citizen of a State of the Union:

"The bill filed in the Circuit Court by the ***plaintiff, McQuesten, alleged her to be 'a citizen of the United States and of the State of Massachusetts***, and residing at Turner Falls in said State,' ***while the defendants Steigleder and wife were alleged to be 'citizens of the State of Washington***, and residing at the city of Seattle in said State.' *Statement of the Case*, Steigleder v. McQuesten: 198 U.S. 141 (1905). {After the Fourteenth Amendment}

"***The averment in the bill that the parties were citizens of different States was sufficient to make a prima facie case of jurisdiction so far as it depended on citizenship***.' *Opinion*, Steigleder v. McQuesten: 198 U.S. 141, at 142 (1905).

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If one who is a citizen of the United States does not aver that he or she is a citizen of the United States, then the presumption will be that he or she is not a citizen of the United States:

"The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland; and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either.

. . . A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; ***but the petition DOES NOT AVER that the plaintiff is a citizen of the United States***. . . .

The decisions of this court require, that the averment of jurisdiction shall be positive, and that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.

The answer of James Brown asserts, that both plaintiff and defendant are citizens of the State of Louisiana.

Without indicating any opinion on the question, whether any admission in the plea can cure an insufficient allegation of jurisdiction in the declaration, we are all of opinion that this answer does not cure the defect of the petition. If the averment of the answer may be looked into, the whole averment must be taken together. It is that both plaintiff and defendant are citizens of Louisiana." Brown v. Keene: 33 U.S. (Peters 8) 112, at 115 thru 116 (1834).

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If one who is either a citizen of the United States or a citizen of a State who is not a citizen of the United States, avers that they reside in a particular State, the presumption will be that they are not a citizen of that particular State:

". . . But it has long been settled that residence and citizenship are wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States; and that a mere averment of residence in a particular State is not an averment of citizenship in that State for the purposes of [diversity of citizenship] jurisdiction. *Parker v. Overman*, 18 How. 137; *Robertson v. Cease*, 97 U.S. 646; *Everhart v Huntsville College*, 120 U.S.

223; *Timmons v. Elyton Land Co.*, 139 U.S. 378; *Denny v. Pironi*, 141 U.S. 121, 123; *Wolfe v. Hartford L. & A. Ins. Co.*, 148 U.S. 389." Steigleder v. McQuesten: 198 U.S. 141, at 143 (1905).

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Footnotes:

1. " . . . But since the adoption of the Fourteenth Amendment, which specifically provides that 'All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside,' it is **ASSUMED** that citizenship in a state is acquired by permanent residence therein of any person who by birth or naturalization has become a citizen of the United States; and state citizenship is therefore determined by this test." Constitutional Law in the United States; Emlin McClain, L.L. D.; (New York: Longmans, Green, and Company); 1907; Section 193, Page 276.

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2. As such, a citizen of the United States is not entitled to special privileges:

"Following, then, this salutary rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of ***citizenship and domicile united***; that is to say, by virtue of a citizenship confined to that particular locality." McCready v. State of Virginia: 94 U.S. 391, at 395 thru 396 (1876).

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3. It is to be noted that privileges and immunities of a citizen of a State are those in the constitution and laws of the individual State:

". . . Whatever may be the scope of section 2 of article IV -- and we need not, in this case enter upon a consideration of the general question -- the Constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one State under the constitution and laws of that State, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another State under its constitution and laws." McKane v. Durston: 153 U.S. 684, at 687 (1894).

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