

THE

AMERICAN LAW REGISTER.

MARCH, 1864.

DOMICIL.

On the determination of one's domicil depend several important questions, as

1. The jurisdiction of the Surrogate and Probate Courts.
2. The right of exercising the elective franchise.
3. The liability to taxation and to military duty.
4. The jurisdiction of the Federal Courts as between citizens of different states.
5. National character, for purposes of trade, and in case of war.
6. The disposition of the personal property of the deceased.

Says Chief Justice SHAW, in *Abington vs. North Bridgewater*, 23 Pick. 170: "The fact of domicil is often one of the highest importance to a person; it determines his civil and political rights and privileges; it fixes his allegiance; it determines his belligerent and neutral character in time of war; it regulates his personal and social relations whilst he lives, and furnishes the rule for the disposition of his property when he dies."

There is the *national* and the *domestic* domicil. Upon the former depends the law applicable to the person and personal rights, that invests him with a national character, and brings him under the dominion of the law of nations. The latter fixes his location within

the state or nation, and upon it depend certain municipal privileges and obligations, such as taxation, settlement, and voting; the jurisdiction of Surrogate and Probate Courts, and the ultimate disposition of one's personal property, when left undisposed of by will. The two should, as far as possible, be assimilated to each other.

Much difficulty has been experienced in so defining the term domicile as to meet with general acceptance. Bynkershoek declined hazarding a definition. Vattel defined it to be "the habitation fixed in any place, with an intention of always staying there;" but this has been complained of as too strict, if taken literally to govern in a question relating to voting. Another considers it synonymous with the word "home." Another able jurist, RUSH, in *Guier vs. O'Daniel*, 1 Binney 349, defines it to be—"A residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." All jurists agree that where the domicile is not a necessary one, there must be both intention and fact to constitute it—the fact of actual residence, and the intention of continuing it for an indefinite period of time.

The first inquiry that properly arises is whether certain terms, such as *dwelling*, *home*, *inhabitant*, *resident*, are to be regarded as synonymous with *domicil*, or in what respects they differ. The words *residence*, *habitation*, and *home* have, in different cases, received a different construction from that of *domicil*, as *In the matter of Thompson*, 1 Wend. 43; *In the matter of Wrigley*, 4 Wend. 602, and 8 Id. 134; *Exeter vs. Brighton*, 15 Maine 58. But all the distinctions thus taken depend less upon the words of the statutes than the purposes contemplated; and the term *domicil* in reference to the same subjects would have received the same construction. In some late cases, both in Massachusetts and New Hampshire, the terms "resident," "inhabitant," "having a dwelling or home," used in regard to voting, the settlement of paupers, and taxation, are declared to be synonymous with *domicil*, as understood at common law: *Abington vs. North Bridgwater*, 23 Pick. 170; *Moore vs. Wilkins*, 10 N. H. 452. The same doctrine has been substantially held in New Jersey and New York: *The Stat. vs. Ross*, 3 Zabriskie 527; *Crawford vs. Wilson*, 4 Barb. Sup. Ct.

Rep. 505; and in *Isham vs. Gibbons*, 1 Bradford 70, it is said that "these expressions should be construed in connection with the matter to which they are applied."

The next inquiry that presents itself relates to what may be termed a *necessary domicil*, what it is, what its limitations, and its effect. It is a domicil without the possibility of change. Its limitations are the period of time during which the conditions continue. Its effect is to require proof of change after the conditions cease, or its further continuance is presumed. One instance of a necessary domicil is found in the fact of minority. The domicil of a legitimate unemancipated minor is that of his parents, or the survivor of them, and changes with it. In *The School Directors vs. James*, 2 Watts & Sergeant 571, it is held that no infant who has a parent, *sui juris*, can, in the nature of things, have a separate domicil. His domicil must necessarily be that of his parent in order to enable the latter to perform the duties which the law devolves upon him relating to the support, nurture, and education of his children. The minor presumptively has no will, and can therefore have no intention while the condition of minority continues. The parents' domicil is therefore necessarily and unavoidably that of the child. The exceptions to this are,

1. Where the parents remove their domicil to a different place, leaving the child permanently in the charge of another in the old domicil. That other then stands *in loco parentis*, with the assent of the parent.

2. Where the father has died, and the mother having remained and gone away with her husband, has left the child behind in the place of its birth. The reason of this is that the mother, by marrying again, has lost her old domicil and assumes that of her husband, while that of the children of the first marriage remains unaltered. A child does not take the domicil of his step-father, or follow his mother's into it when she surrenders her own: *Brown vs. Lynch*, 2 Bradford 218.

Whether in case of the death of the parents the regularly appointed guardian has the power of changing the minor's domicil, does not seem to be so clearly settled. The balance of authority,

however, is in its favor: *Holyoke vs. Harkins*, 5 Pick. 20; *Leeds vs. Freeport*, 1 Fairfield 356, 2 Kent's Com. 227, note.

Another instance of necessary domicil is that of a *feme covert*, which follows that of her husband: *Greene vs. Greene*, 11 Pick. 4, 11, 14, 15. This condition, however, terminates with the reason upon which it rests. When the union between the two ceases, and the one assumes an attitude of hostility against the other, a bill being filed for a divorce, the domicils of each may be different: *Harteau vs. Harteau*, 14 Pick. 181.

A student attending an institution of learning is not understood to have thereby changed his domicil: 7 Mass. 1. So a lunatic or person *non compos mentis*, being deprived of the power of forming a rational intent, cannot change his domicil while that condition continues, and the power of the committee, or guardian of a minor, appears to be the same in imposing a domicil, as that of a parent. It has been doubted whether under the civil law, the mother or guardian could change the domicil of a minor whose father was deceased, but as the former is, and the latter stands *in loco parentis*, there seems at common law to be little doubt in relation to it. A slave will necessarily follow the domicil of his master, but a servant who follows his master for a particular service is not thereby understood to have lost his domicil of origin: *Dalhousie vs. MacDowall*, 7 Clark & Finnelly 331.

Another instance of a necessary domicil is that of a public officer, and if the office be conferred for the life of the holder, and be irrevocable, the law fixes his domicil in the places where its functions are to be discharged, and admits of no proof to the contrary. But if the office be of a temporary and revocable nature, the original domicil is not presumed to be changed. In reference to the former we have the important case of *Bruce vs. Bruce*, decided in the House of Lords, and reported in a note to *Marsh vs. Hutchinson*, in 2 Bosanquet & Puller 219. It was here held that as Mr. Bruce had entered into the India service, and not in the king's service, he was bound to reside in India, and could not reside elsewhere except by the leave of the Company, and, consequently, for a temporary purpose. Similar points are also exten-

sively discussed in *Munroe vs. Douglass*, 5 Madd. 379, and in *Craigie vs. Lewin*, 3 Curteis' Ecclesiastical Rep. 435. In the case first mentioned, it was held that persons who enter into the military service of a foreign state, acquire the domicil of that state. Neither public officers, as ambassadors, nor prisoners, lose their original domicil by being resident or confined in foreign countries, but an exile for life loses his original domicil. The emigrant who leaves his country with the view of finding for himself a new home, loses his original domicil as soon as he locates in a new settlement, but the fugitive from his country on account of civil war, is held not to have lost his intention of returning to it, and therefore still retains his domicil in his native land. But the prisoner, exile, or fugitive, may, by continuing to reside in a country after the coercion has been withdrawn, and his power of choice being restored to him, acquire a domicil therein. These points were much discussed in *De Bonneval vs. De Bonneval*, 1 Curteis' Ecclesiastical Rep. 856.

There are two kinds of domicil: 1st. Of origin. 2d. Of choice. The great difficulty has generally arisen in determining between these two; or in other words, in determining whether in the given case there has been a change of domicil. The domicil of origin is usually the first established. In determining it, the fact of birth is an item of evidence, but when standing alone is entitled to but little weight. In conjunction with the place of education and bringing up it is important, and may turn the scale where the case is *in equilibrio*, if it stands alone. The domicil of the parent attaches to the child, and the necessary domicil becomes one of origin. This presumptively continues until one of choice is established. Among the criteria of domicil, therefore, properly ranks,

1. The place of residence. This is one of the first ingredients in the constitution of domicil. In order, however, to entitle it to much weight, it should be accompanied with some evidence of an intention to continue it for an unlimited time. Intention may be evidenced by declarations or by acts, and when once the design of permanent settlement is established, a domicil may be acquired by the shortest residence. On the other hand, great length of time

will not of itself establish domicile, where the purpose was, and continues to be, temporary. But this does not preclude the transfer of a residence originally temporary into one that is permanent, growing out of the supervention of new views and purposes: *The Ship Ann Green*, 1 Gallison 275.

Time of residence and intention are the two factors that mutually contribute to constitute domicile. Neither of them will do it separately, so that length of time alone will not make the change from the old to the new residence. It is the union or concurrence both of the intention and the fact of residence that will make out a change of domicile: *Collier vs. Revar*, 2 Curteis 859. From a very long residence, however, the fact of intention to abandon his former residence may be inferred, and this may become so strong that the law will hardly receive declarations to the contrary to countervail it: *Hoskins vs. Mathews*, 35 English Law and Equity 540. In *Ennes vs. Smith*, 14 How. U. S. Rep. 423, the court lay down the doctrine that where a person lives is taken *prima facie* to be his domicile, until other facts establish the contrary, and unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place. And in *The Harmony*, 2 Robinson's Admiralty Rep. 266, Lord STOWELL held that time is the grand ingredient in constituting domicile. That it is to be taken in a compound ratio of the time and the occupation, with a great preponderance of the article of time. In regard to intention, it must be carried into effect; thus in *Bruce vs. Bruce*, 2 Bosanquet & Puller 229, n., Bruce the decedent, originally a Scotchman, left Scotland in his early years, went to India, returned to England for two years; went again to India, lived there sixteen years, and died. Much stress was laid on the fact that *he meant to return to his native country*. The court allowed that to be granted; saying that he *meant* then to change his domicile, but *died before actually changing it*.

The question arises under *place of residence* whether it is a man's dwelling-house or place of business, trade or occupation, which is to be regarded as his domicile; and as between the two it

is his dwelling-house: *Abington vs. North Bridgwater*, 23 Pick. 170. And if he has more than one dwelling-house, that in which he sleeps, or passes his nights, will govern. And if the dwelling is partly in one place, and partly in another, and it can be ascertained where he habitually sleeps, that will determine the place of his domicile.

2. Another criterion is the place of taxation or exercise of civil rights. This, however, is not regarded as of much importance, when standing alone. The attempted exercise of the latter in a single instance, in the case of a sailor, had little influence in the case of *Guier vs. O'Daniel*, 1 Binney 349. But under other circumstances it was said in *Stretton vs. Tiffin*, 6 Howard 164, that an exercise of the right of suffrage was conclusive.

3. Place of business or deposit of papers as a criterion. This also is of little importance except in an equally balanced case, or where the person whose domicile was in question, was a roving or seafaring person. It was deemed unimportant in comparison with the location of real property and of actual residence in *Hoskins vs. Matthews*, 35 English Law and Equity 542.

4. Description in legal or other documents, or treatment by official persons. This refers to the mode and place of which a party may describe himself in deeds, wills, passports, or certificates of stock; his declarations or letters when no motive existed to falsify or deceive, as before suit brought, his place of payment of taxes, the official records of public officers, such as a register of voters, service or the record of service of a notification, with other declarations or acts of like kind, are criteria of domicile and admissible evidence on the subject. Both declarations and letters of a party, whose domicile is disputed, are admissible in evidence, especially if made previous to the event which gave rise to the suit: *Kilburn vs. Bennett*, 3 Metcalf 199.

5. Location of property: *Hoskins vs. Matthews*, 35 English Law and Equity 542. In this case this criterion was a good deal relied upon. An English ex-consul, living in part on a pension, had purchased and resided in a villa near Florence. The court held that the fact that this villa was the home of Mr. Matthews for a

long time before his death, seemed to admit of no question. That it was the place where he had set up his establishment, and in which his fortune, so far as his fortune admitted of locality, was centered.

6. Place of death. The place where a man is resident at the time of his death is *primâ facie* his place of domicil, and hence it is incumbent on all those who deny it to repel the presumption of law. Where, however, the party has a previously fixed domicil, the circumstance of his dying elsewhere, affords only a slight presumption, and hence in *Guier vs. O'Daniel*, 1 Binney 349, though Guier, a seafaring man, died abroad, his domicil was held to be at the place which was his domicil of origin.

7. Place of burial: *Hood's Estate*, 21 Penn. State Rep. 116. No great weight can be attached to this as a mere fact. "A residence," as the court remark, "is established by acts while the body and soul are united. When they are separated the question of domicil is at an end. No disposition of the inanimate corpse can affect it; it is the previously expressed wish and desire as to the place of burial that can give it any importance in a question of domicil." In *Stanley vs. Bernes*, 3 Haggard's Ecclesiastical Reports 392, expressions of great strength in this respect were made, and yet they were not held to countervail a residence of fifty years in the place where he died. And yet there is no doubt in a nearly equally balanced case a direction for burial in a person's native country or place of original domicil, would be some evidence of the mode in which he himself regarded that country or place, and so far evidence of the party's domicil itself.

The remainder of what we have to say on the subject of domicil may be included under the following maxims:

1. Every person must have a domicil somewhere. This is undoubtedly true so far as concerns the national domicil, as every man must be considered subject to some law in regard to the disposition of his property upon his decease. The 10 Mass. 488, holds that every qualified voter in the state must have a domicil somewhere within the state, for the purpose of voting.

2. A person can have in law but one domicil for one and the

same purpose. It may be conceded that different domicils may exist for different purposes, as in *Putnam vs. Jackson*, 10 Mass. 488, in which it was said that the home of a citizen for the purpose of voting might be in one place, and his legal settlement in another. And in *Isham vs. Gibbons*, 1 Bradford 70, it was held that although there can be but one principal domicil for the distribution of personal property upon the decease of its owner, yet there might be two or more domicils for different purposes. The case of *Abington vs. North Bridgewater*, 23 Pick. 170, however, strongly asserts and maintains the doctrine that for the same purpose a man can have, at one time, but one domicil.

3. A man's native domicil easily reverts. That is, if a native citizen of one country by residing in a foreign country acquires a domicil by residence, without renouncing his original allegiance, his native domicil reverts the moment he puts himself in motion, *bonâ fide* to quit the country, without any intention of returning. The reason is that the law regards the foreign domicil as merely adventitious, and *de facto*, and allows it to prevail only while it continues actual and complete. The leading case that sustains this maxim is that of *White vs. Brown*, 1 Wallace Jr. 217. This maxim is limited to national domicil, and has no application in a question between the domicil of origin and an acquired domicil, when both are under the same sovereign jurisdiction. And in *Monroe vs. Douglass*, 5 Maddock 379, in which a controversy arose between the native domicil in Scotland, and a domicil of residence in India, it was denied that there was any difference in principle between the original domicil and an acquired domicil. In regard to *national domicil*, it seems to be settled that one is not extinguished by a mere abandonment, but continues until a new one has been acquired; but where one domicil has been clearly abandoned, it would strengthen the presumption that a new one was acquired elsewhere, and the succession to property would be governed by the law of the old domicil until the acquisition of a new one. In a recent case in the Supreme Court of Maine, *Butterfield vs. Inhabitants of Brooks*, 2 American Law Register 735, N. S., it is held that a domicil once acquired continues until a new one is gained, and