

CHANGE OF DOMICIL.

Domicil of origin is distinguished from domicil of choice. Domicil of origin is the domicil which every one receives at birth, while domicil of choice is that which is acquired by the voluntary act of the party. Changes from domicil of origin to domicil of choice, or from one domicil of choice to another of choice, often involve important and interesting inquiries, to some of which attention is invited. In a former article¹ we had occasion to consider the law of domicil in its relation to married women, infants and persons under guardianship. It then appeared: 1. That a married woman could not acquire a domicil of choice separate from that of her husband—that her domicil could only be changed by her husband, except in those cases in which he had been guilty of such dereliction of duty as to entitle her to a divorce. 2. That an infant could not change its domicil. That the domicil could only be changed by the father in his life time, or the mother during her widowhood. 3. It was thought that the guardian could change the domicil of the ward, if done with no fraudulent intent. The consideration that was then given to the subject makes it unnecessary to enter into any discussion of changes of domicil by persons belonging to the above classes, and attention is called rather to changes of domicil by persons who are *sui juris*.

The capacity of any person *sui juris* to change his domicil being conceded, the question presented is, under what circumstances is a change considered to have been made. And in the first place we find it laid down that no person can be at any time without a domicil somewhere. "It is," says Lord Westbury, "a settled principle that no man shall be without a domicil." In the same case Lord Chelmsford said, "it is an undoubted fact that no man can be without a domicil."² If no man can be without a domicil, it necessarily follows that the domicil of origin must continue until a domicil of choice is acquired.³

¹ 11 Cent. L. J. 421.

² *Udny v. Udny*, L. R. 1 Sc. App. 441, 457.

³ *Udny v. Udny*, *supra*; *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 320; and, see, *Glover v. Glover*, 18 Ala. 367; *Hairston v. Hairston*, 27 Miss. 721; *Sanderson v. Ralston*, 20 La. Ann. 312; *Mitchell v. United States*, 3 1 Wall. 350; *Desmare v. United States*, 93 U. S. 610;

One whose domicil of origin was in Jamaica, after he came of age sold his estates in the island and left, to use his own expression, "for good." He then went to Scotland, remaining there for some time, but without making up his mind whether to settle there or not. The court of session held that he had acquired a Scotch domicil, but the House of Lords reversed their decision, holding that notwithstanding he had abandoned Jamaica "for good," his domicil still continued there, as he had not as yet acquired one elsewhere.⁴ "It is impossible to predicate of him," so it was said, "that he was a man who had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to show that, with perfect clearness and satisfaction to yourselves, it follows that the domicil of origin continues." The above case not only illustrates the principle that the domicil of origin is retained until a new domicil is actually acquired, but it shows that this principle holds good even in those extreme cases in which a party has finally abandoned the place of his domicil with no intention of ever returning to it again. We are, therefore, prepared to find that the courts have, in numerous instances, laid down the rule, that one's domicil is not lost or changed by a mere temporary absence, no matter how long continued, provided there exists an *animus revertendi*.⁵ The doctrine of the first principle, that domicil of origin can not be lost by a final abandonment with an intention of never returning, may be farther illustrated by a case decided by the Supreme Court of Mississippi, where it was held that if an invalid sells his homestead and household property, and leaves his domicil of origin for purposes of traveling so as to regain his health or prolong his life, and shortly after dies on his travels, without having acquired any permanent abode at any place, the

Gilman v. Gilman, 52 Me. 165, 176; *Moore v. Wilkins*, 10 N. H. 452, 456; *Hood's Estate*, 21 Pa. St. 106; *Hindman's Appeal*, 85 Pa. St. 466, 469; *Kirkland v. Whately*, 4 Allen, 464; *Bangs v. Brewster*, 111 Mass. 385.

⁴ See *Bell v. Kennedy*, *supra*.

⁵ *State v. Judge*, 13 Ala. 805; *Boyd v. Beck*, 29 Ala. 703; *Griffin v. Wall*, 32 Ala. 149; *Dow v. Gould*, etc. M. Co. 31 Cal. 629; *Risewick v. Davis*, 19 Md. 82; *Crawford v. Wilson*, 4 Barb. 505, 523; *Bradley v. Lowry*, 1 Speer's Eq. 3, 14; *Case v. Clarke*, 5 Mason, 70; *State v. Daniels*, 44 N. H. 383; *Chariton County v. Moberly*, 59 Mo. 238.

domicil of birth is not lost, although he had no intention of ever returning to it.⁶ The second principle above stated, that domicil is not lost or changed by a mere temporary absence, may be illustrated by the well-known case of *Sears v. City of Boston*,⁷ decided by the Supreme Judicial Court of Massachusetts. A native of Boston had left Massachusetts for France. He took his family with him and hired a house for a year in Paris, having leased his own house and furniture, for a year, in Boston. The court held that while his residence was in Paris, his domicil continued to be in Boston, and said: "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished, in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties. *Love v. Cherry*,⁸ decided by the Supreme Court of Iowa in 1868, is an extreme case which well illustrates this same doctrine. The facts of the case were as follows: The plaintiff was, in 1860, domiciled in Iowa. During the latter part of that year she left Iowa for Texas, for the purpose of visiting a daughter residing there, and also hoping to collect, before her return to Iowa, a sum of money due to her from the estate of a deceased relative who had died in Texas. Upon her arrival in Texas she learned that the estate was unsettled, and she thereupon determined to remain until she could get the money which was coming to her. About that time Texas passed an ordinance of secession, and the rebellion breaking out, it became difficult, if not impossible, for her to return. In December, 1861, the administrator of the estate, in which she was interested, resigned and left the State, whereupon she determined to take up her residence there, and secure an appointment as administratrix of the estate. She resided in Texas until 1866, when she came North and resided in Illinois, where she was still residing when the action was commenced. She had thus

been absent from Iowa between seven and eight years, six of which were spent in Texas. But the court held that her domicil still continued to be in Iowa, because of an ultimate intention she entertained of sometime returning to Iowa. It will not do to infer, however, as one easily might from the above case, that in all cases the cherishing of an ultimate intention of sometime returning will prevent the acquiring a new domicil. For instance, we find the Supreme Court of Missouri asserting that a domicil may be changed, although the person on departure cherishes a secret purpose of returning at some indefinite time in the future.⁹ And in Tennessee the court says, that a floating intention to return at some future period will not defeat the acquisition of a new domicil.¹⁰ And in Massachusetts it is said: "An intention to return, however, at a remote or indefinite period, to the former place of actual residence will not control, if the other facts which constitute domicil, all give the new residence the character of a permanent home and place of abode."¹¹ So in Maryland we find the court declaring that the person's purpose "need not be fixed and unalterable" in order to change his domicil, and that "a floating intention to return to his former place of abode at some future period," will not defeat it.¹² So in an English case we find one of the judges saying: "I think, however, it appears that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicil? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention, or expression of intention, prevented a man having a fixed domicil, no man would ever have a domicil at all, except his domicil of origin."¹³

This leads us to inquire, under what circumstances is a domicil of origin lost, and a

⁶ *Still v. Woodville*, 38 Miss. 646.

⁷ 1 Met. 250.

⁸ 24 Iowa, 204.

⁹ *Johnson v. Smith*, 43 Mo. 499.

¹⁰ *Stratton v. Brigham*, 2 Sneed, 420. See, also, *Harris v. Firth*, 4 Cranch, C. C. 710.

¹¹ *Hallett v. Bassett*, 100 Mass. 167.

¹² *Ringgold v. Barley*, 5 Md. 186, 193.

¹³ *Attorney-General v. Pottinger*, 30 L. J. Ex. 284, 291.

domicil of choice acquired? And the answer to the inquiry is, that a domicil of choice is acquired by the combination of residence with the intention of permanently or indefinitely remaining at the place of residence. Or, as it is sometimes expressed, there must concur both the fact of residence (*factum*), and the intent (*animus manendi*). And where either of these is wanting, a new domicil can not be acquired.¹⁴ There must be a union of intent and actual bodily presence. "We are all agreed," said Lord Jeffrey, "that to constitute a domicil, there must be the fact of residence, * * * * and also a purpose on the part of (D.) to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary."¹⁵

Where a party sold his homestead in Iowa, boxed up his household furniture, sent his family to Kansas with the intent of making that State his future home, he having remained in Iowa with the household goods, it was held by the Supreme Court of Kansas that, notwithstanding the intent to make the change, and notwithstanding the fact that, in pursuance of such intent, the wife and children had actually arrived in Kansas with trunks containing their personal clothing, no change of domicil took place, inasmuch as the husband had not reached the State. "Had the defendant accompanied his wife and children to Kansas, and remained there, though for ever so short a time, if long enough to establish them in a new home, even though such new home had been a boarding place in the house of relatives, then indeed the intent might have been effectual in giving character and significance to the act. But we cannot think that the intent of the husband to follow his family to Kansas at some future time, had the effect of giving him a legal residence in this State, months before he had set foot upon her soil. Intentions and purposes are subject to

change, and are seldom to be taken as the equivalent of substantial deeds." So it was held that no change of domicil occurred, as "fact and intent" did not concur.¹⁶ On the other hand, reference may be made to a case decided in the Supreme Judicial Court of Massachusetts, in which the facts were as follows: The plaintiff was a shipmaster, whose domicil of origin was at A, but most of whose time was spent at sea. In 1867, he left his domicil in A, and went to sea with his wife, intending to make his home in the town of B. In pursuance of this intent he, in 1869, sent his wife to B, where she arrived in February. He was not personally present in B, until July of the same year, but the court held that he was domiciled there as early as May of that year. "By sending his wife to B, with the intent to make it his home, he thereby changed his domicil. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival."¹⁷ But the rule is, that an old domicil is not lost, nor a new one gained, by mere intention, unaccompanied by removal and actual residence.¹⁸ "A mere intention to remove permanently, without an actual removal, works no change of domicil; nor does a mere removal from the State, without an intention to reside elsewhere."¹⁹

But where a change has actually been made, *animo et facto*, the old domicil is at once lost, and a new one is gained, at the same time. "Length of time will not alone do it; intention alone will not do it, but the two taken together do constitute a change of domicil. No particular time is required, but when the two circumstances of actual residence and intentional residence concur, then it is that a change of domicil is effected."²⁰ And this intent must be a definitely formed one.²¹ "The time may be shorter or longer, according to the circumstances."²² "In all cases, the question whether a person has or has not acquired a domicil, must depend mainly upon his actual or presumed intention. * * *

¹⁴ *Udny v. Udny*, L. R. 1 Sc. App. 441, 457, 458; *Maltass v. Maltass*, 1 Rob. Ecc. 67, 78; *Jopp v. Wood*, 4 De. G., J. & S. 616, 621, 622; *Forbes v. Forbes*, 23 L. J. (Ch.) 724; *McClery v. Matson*, 2 Ind. 79; *Burgess v. Clark*, 3 Ind. 250; *Hairston v. Hairston*, 27 Miss. 704; *Adams v. Evans*, 19 Kas. 174; *Stiles v. Lay*, 9 Ala. 795; *White v. White*, 3 Head, 404; *Layne v. Pardee*, 2 Swan, 232; *Harvard College v. Gore*, 5 Pick. 370; *Gilman v. Gilman*, 52 Me. 177; *Stockton v. Staples*, 66 Me. 197; *Ensor v. Graff*, 43 Md. 291; *Wilkins v. Marshall*, 80 Ill. 74.

¹⁵ *Arnott v. Groom*, 9 D. 142.

¹⁶ *Hart v. Horn*, 4 Kas. 232.

¹⁷ *Bangs v. Brewster*, 111 Mass. 385.

¹⁸ *Maddox v. State*, 32 Ind. 111.

¹⁹ *Hindman's Appeal*, 85 Pa. St. 466, 469.

²⁰ *Collier v. Rivaz*, 2 Curt. 855, 857.

²¹ *Walker v. Walker*, 1 Mo. App. 404.

²² *Hairston v. Hairston*, 27 Miss. 721.

The apparent or avowed intention, not the manner of it, constitutes domicile."²³

It was at one time supposed that in order to work a change of domicile, it was necessary that the person should intend to change his allegiance; but this cannot be considered to be the law. "According to one view," says Wickens, V. C., "it is sufficient to show that he intended to settle in a new country; to establish his principal or sole and permanent home there, though the legal consequences of so doing, on his civil *status*, may never have entered his mind. According to the other view, it is necessary to show that he intended to change his civil *status*, to give up his position, as, for the purposes of civil *status*, a citizen of one country, and to assume a position as, for the like purposes, the citizen of another. This stricter view is supported by opinions of great weight; amongst others, by the Lord President in *Donaldson v. McClure*;²⁴ that of the Lord Chief Baron Pollock, in *Attorney-General v. De Wahlstatt*;²⁵ and by some expressions used by the late Lords Cranworth and Kingsdown. * * * But I cannot satisfy myself that the stricter rule, as I have called it, can be considered as the law of England. It never was, I believe, the law of any other country, except, perhaps, Scotland, or recognized as law by any of the text-writers of European authority who have dealt with questions of domicile; and it is difficult to believe that the law of England has drifted so far from the general principles on which it professed to be founded, and which it always professed to follow."²⁶

The rule being that a domicile once acquired is presumed to continue,²⁷ it necessarily follows that where a change of domicile is alleged to have been made, the burden of proving that such a change has been made, rests upon the party making the allegation.²⁸ But the doctrine that a domicile once acquired is presumed to continue, is said in a recent case not to prevail when its effect would be to im-

pose upon the party the character of an enemy to his Government.²⁹ And in determining the question of domicile, the declarations of the party "have always been received in evidence when made previous to the event which gave rise to the suit. They have been received in the courts of France, in the courts of England, and in those of our own country."³⁰ In *Hood's Estate*,³¹ the Supreme Court of Pennsylvania say: "Where a person removes to a foreign country, settles himself there and engages in the trade of the country, the presumption in favor of the continuance of the domicile of origin no longer exists." In a recent case, the same court say that where a person sells all his real estate, gives up all his business in the State in which he had lived, takes his movable property with him and establishes his home in another State, such acts, *prima facie*, prove a change of domicile.³²

Where a man is the head of a family and a house-keeper, his domicile is presumed to be where his family reside.³³ But the residence of a married man's family is not necessarily his domicile.³⁴ In *Ennis v. Smith*,³⁵ the Supreme Court of the United States answer the question as to what amount of proof is necessary to change a domicile of origin into a *prima facie* domicile of choice, by saying that "It is residence elsewhere, or where a person lives out of the domicile of origin. That repels the presumption of its continuance, and casts upon him who denies the domicile of choice, the burden of disproving it. Where a person lives, is taken, *prima facie*, to be his domicile, until other facts establish the contrary. A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time, is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, it does change the domicile. The result is,

²³ *Ibid.*

²⁴ 20 Sc. Sess. Cases (N. S.) 307.

²⁵ 3 H. & C. 374.

²⁶ *Douglas v. Douglass*, L. R. 12 Eq. 617, 644; see *Udny v. Udny*, L. R. 1 Sc. App. 441; *Brunel v. Brunel*, L. R. 12 Eq. 298.

²⁷ *Glover v. Glover*, 18 Ala. 367.

²⁸ *Hood's Estate*, 21 Pa. St. 106; *Ennis v. Smith*, 14 How. 400, 422; *Desmare v. United States*, 93 U. S. 610.

²⁹ *Stoughton v. Hill*, 3 Woods, 404.

³⁰ *Ennis v. Smith*, 14 How. 400, 422, and cases there cited.

³¹ 21 Pa. St. 106, 116.

³² *Hindman's Appeal*, 85 Pa. St. 466, 469.

³³ *Yonkey v. State*, 27 Ind. 236.

³⁴ *Pearce v. State*, 1 Sneed, 63; *Exchange Bank v. Cooper*, 40 Mo. 169; *Hairston v. Hairston*, 27 Miss. 721.

that the place of residence is, *prima facie*, the domicile, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place."

The above case of *Ennis v. Smith* involved the question of *Kosciusko's* domicile. It was urged on the one hand that his domicile was in France, he having resided there after his exile from Poland. On the other hand, the theory was advanced that his domicile still continued to be in Poland, inasmuch as he was a forced exile from that country, and had never abandoned the hope of returning to Poland when the political condition of the country should permit him to resume his rights as a citizen of it. The court held that he had a French domicile, as he continued to remain in France after he could have returned to Poland. Where a residence is purely compulsory, and is not continued after it ceases to be compulsory, it seems no domicile is acquired.³⁶ So, according to Bullen, the French jurists regarded the fugitives who accompanied James II. to France, as retaining their English domicile.³⁷ By the Roman law, a perpetual exile transferred his domicile to the place of banishment; but it is said to have been otherwise when the banishment was temporary.³⁸

If a person, having acquired a domicile of choice, abandons it with the intention of resuming his domicile of origin, it is said that the domicile of origin revives as soon as the former domicile is abandoned, and before he arrives at the domicile of origin.³⁹ But suppose the domicile of choice is abandoned without any intention of resuming the domicile of origin, and without any definite conclusion having been reached as to the place of final settlement? Then the question is presented whether the domicile of origin revives, or whether the domicile of choice continues until the new domicile is actually acquired *animo et facto*. It seems at first to have been held in England, that a domicile of choice, like a domicile of birth, was retained until another was

actually acquired. That where A, whose domicile of origin was English, had a domicile of choice in France, he continued to retain his French domicile, notwithstanding he had left France for good, having no intention of returning to England, or of settling in any country whatever. That, as a matter of law, his French domicile of choice continued until he settled in fact in some other country, intending to remain there permanently.⁴⁰ The English courts, however, have since abandoned this view of the law, and it is now laid down that a domicile of choice is abandoned when the individual leaves his adopted country, with no intention of again returning to permanently reside therein, and that he thereupon resumes the domicile of origin, which continues as his domicile until he actually settles in another State or country, thereby acquiring a new domicile of choice.⁴¹

We may be allowed, owing both to the importance of the question, as well as to the prevalent uncertainty in reference to it, to quote the following from Lord Westbury's opinion in the case last above cited: "Expressions are found in some books," he says, "and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicile has, *animo et facto*, been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domicils himself in Holland, acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land; but if he breaks up his establishment, sells his house and furniture, discharges his servants and quits Holland, declaring that he will never return to it again, and taking with him his wife and children for the purpose of traveling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it

³⁵ 14 How. 400, 422.

³⁶ *De Bonneval v. De Bonneval*, 1 Curt. 856, 864.

³⁷ *Traite de la Realite et Personalite des Statuts*, t. I, tit. ii. c. 3.

³⁸ L. 22, § 3; L. 27, § 3; See *Merlin Rep. de Jur. Dom.* iv.

³⁹ *Allen v. Thomason*, 11 Humph. 536. See *White v. Brown*, 1 Wall. Jr. 217, 265.

⁴⁰ *Munroe v. Douglas*, 5 Madd. 379.

⁴¹ See *Udny v. Udny*, L. R. 1 Sc. App. 441.

clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity, and, on the contrary, much reason in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that when it is so determined, the domicil of origin revives, until a new domicil of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing, lived for twenty years after he had finally quitted Holland, without acquiring a new domicil, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition, supposed to be authorized by one or more decisions, involves absurd results, there is great reason for believing that no such rule was intended to be laid down." The Supreme Court of Connecticut draws a distinction, and says that this principle has no application when the question is between a native and an acquired domicil, where both are under the same national jurisdiction.⁴² This decision is based upon *Munroe v. Douglas*, *supra*, which was overruled in *Udny v. Udny*, *supra*. We do not think, however, that the court ever intended, in *Munroe v. Douglas*, to sanction the conclusion reached in Connecticut, as Sir John Leach expressly declared that he could "find no difference between an original domicil and an acquired domicil." All that was decided in that case was, that an acquired domicil would be retained until another was in fact acquired, and that the domicil of origin would not revert.

HENRY WADE ROGERS.

CITY ORDINANCES AFFECTING STREET RAILROADS.

While the authority for the construction of street railroads is derived from the legislature of the State, they are subject to the control of the municipal corporation, where not otherwise prescribed for by the acts of incorporation.

That they have not the exclusive right to the streets over other vehicles, is well settled; that they have not the exclusive right to the use of the

streets over other street railroads, is also established law. It was laid down in an early case, (*The Brooklyn, etc. R. Co. v. Brooklyn City R. Co.*, 33 Barb. 420, 1861), that when the rails of a company were constructed, so as to cover the line of another road, no injunction could be obtained to restrain the one company from crossing the track of another, as it was held not to be an appropriation of the property by the former company, but a mode of exercising the public right of travel over a highway; and in subsequent cases (*The Brooklyn City, etc. R. Co. v. The Coney Island, etc. R. Co.* 35 Barb. 364, 1861; *The New York, etc. R. Co. v. Forty-second St., etc. R. Co.* 50 Barb. 285), a similar doctrine was established, where it was declared that street railroads had not the exclusive right to the use of the streets over other street railroad companies.

But one company has not the right to the use of the tracks of another without the consent of the former, or the authority of the legislature therefor decreeing compensation to the company. *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 138 (1864); *Metropolitan R. Co. v. Quincy R. Co.* 12 Allen, 262 (1866); *Jersey City, etc. R. Co. v. Jersey City, etc. R. Co.* 20 N. J. Eq. 61 (1869). The law upon the subject of the right of a company to the use of the streets was laid down in a recent case corroborating the above decisions. In that case the authority for the construction of a street railway was given by the legislature over such streets as the city council and company would agree upon; and by contract with the company the city authorized it to build and operate railways on certain designated streets. Subsequently another road was incorporated with power and privileges similar to those of the former, and commenced to construct tracks upon some of the streets embraced in the contract between the city and the former company. An injunction being asked to restrain such construction was denied by the chancellor, who held that neither the charter of the company, nor the contract with the city, gave the company the sole and exclusive right to build and operate railways on those streets, and no such exclusive right could be implied; the streets were dedicated to the use of the public, and the legislature could not be presumed to have intended to give any individual, whether natural or artificial, the right to use them in a particular way, to the exclusion of such other persons as it might see proper afterwards to permit to use them in a similar manner. *Covington St. R. Co. v. Covington, etc. St. R. Co.*, 11 Cent. L. J. No. 17, 10 Ky. Add. 17. How far and in what manner a city corporation may regulate the control of street railroads, may be gathered from the terms of the charter of incorporation, or in the absence of conditions, from adjudicated cases.

It therefore has no power to authorize the extension of a city railroad, unless such extension is necessary to the enjoyment of a previously valid

⁴² *First Nat. Bank v. Balcom*, 35 Conn. 351.