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RESIDENCE AND DOMICILE

BY KOSSUTH KENT KENNAN, A.B., LL.D.*

Some Notable Cases

The law student who is called upon to define legal residence or domicile should proceed with caution for not a few eminent authorities have declared that it "can't be done." Possibly a hundred cases can be found where courts have said that residence and domicile were synonymous and a much larger number can be produced in which that proposition is denied. But this curious contradiction is more apparent than real for it will be found on examination that in the first class of cases the particular circumstances justified the statement as applied to *that state of facts* but afforded no basis for a *general* assertion.

One cause of the confusion as to the meaning of these words is found in the fact that the statutes of most of the states refer to residence and have nothing to say about domicile; but when a case reaches the court, the judges and lawyers talk about domicile, and a question immediately arises as to whether the legislature which framed the law had in mind residence as the equivalent of domicile or just plain, every-day residence in its popular sense of mere physical presence in a place for a longer or shorter period of time.

If we may be permitted to visualize the concepts embodied in residence and domicile we can think of Residence as a giddy young thing gallivanting around the world in various garbs and even performing the unique feat of being in several places at the same moment of time, while Domicile, her staid and respectable mother-in-law, remains at home in an austere attempt to preserve the respectability of the family. The distressing feature of the situation, however, is that when Residence is not at home, Domicile becomes a subject of grave suspicion and her standing in good (legal) circles is seriously jeopardized. Residence is a mischievous sprite and can easily assume all the habiliments and attributes of Domicile, but in order to do this successfully (and legally) she has to form a temporary alliance with a somewhat visionary and vacillating character known as "Intent-to-remain"

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or *Animus Manendi*. Whether or not this alliance is made in good faith is a question which has given the courts much concern, and some of the curious situations which arise in connection with it are illustrated in the following decisions.

A Peculiar Case

One of the most novel cases which has ever arisen in respect to residence is found in the *Income Tax Decisions* (of England), Volume 5, on page 667. It appears by the evidence (taken in 1911) that one Bayard Brown, an American citizen, purchased a rather large steam yacht in May, 1889. After cruising in this yacht a few weeks he anchored it in the estuary of the River Colne, which was within the jurisdiction of Colchester in the county of Essex, England. The only village within several miles where provisions could be procured was Brightlingsea, and it is refreshing to know that among the provisions and necessaries there was included an ample stock of "spirits and wines required by the appellant for the use of himself and his crew and any other persons who might happen to come on board." The American flag was flown at the mast at all times. The yacht was in tide water and was manned by a crew of eighteen men who kept it in readiness to be used at any moment.

So far there was nothing very remarkable about the circumstances, but our credulity is tested when we learn from the evidence that these conditions were maintained for over twenty years, the owner of the yacht living there with his crew of eighteen men who observed the regular ship discipline as to watches, care of machinery, etc., both owner and crew apparently quite content with their situation. In 1909 Mr. Brown was notified of an assessment of income tax made against him of £10,000, from which assessment he appealed. It was argued on his behalf that he was an American citizen; that the yacht was an American ship and could not be a British ship for it is illegal for a foreigner to own a British ship; that Mr. Brown had the right to enter any harbor of the United Kingdom and that there was no law limiting the period for which he could remain there.

The King's counsel, in answer to the suggestion that the yacht was kept at all times ready to go to sea, replied, "Yes, but it does not go," and further that it did not make any difference that a man's house was not a house which stood by the action of gravity upon land, but happened to be a house supported by the action of

buoyancy upon water. Another point made in behalf of Mr. Brown was that: "This ship flying the American flag, being owned by an American citizen, not being on the British *Register*, is really to all intents and purposes a portion of American territory and therefore not part of this realm, and not a place which can be contemplated by the owner of the ship as being his residence in the sense of a residence in England."

The Master of the Rolls and two Lord Justices disposed of the case very briefly by dismissing the appeal. While we have no information as to what happened next, we can easily imagine that the elaborate preparations for going to sea, which had extended over a period of twenty years, were made use of and a more hospitable haven was sought.

An Early Case

One of the first (if not the very first) cases upon the subject of residence in the United States is that of *Guier v. O'Daniel*, found in a note to *Desesbats v. Berguier*, 1 Binney (Pa.) 336, 349. This case arose in the Orphan's Court in the city and county of Philadelphia and was decided on July 7, 1806. The amount involved was \$1,400.00 and it appeared that Thomas Guier was the captain of a vessel and was murdered in the West Indies in 1801. The money in controversy was part of the proceeds of certain coffee which came to Philadelphia and was sold on his account after his death. O'Daniel claimed it for his brothers and sisters by the law of Delaware and the father claimed it for himself by the law of Pennsylvania. The question at issue, therefore, was as to whether Thomas Guier was or was not a resident of Wilmington, Del. The facts which were developed at the trial showed that his father, who had previously lived in Connecticut, removed to Wilmington in 1795 and became domiciled at the latter place where Thomas studied navigation. In March, 1797, the son took a so-called "protection" from the Collector of Philadelphia and sailed from that port. Most of his voyages were made from Wilmington. It is rather curious that the attorney for the father took the somewhat untenable grounds:

1. That Thomas Guier had no domicile anywhere.
2. That where there is no domicile of preference, custom and the law of Pennsylvania established the *lex loci rei sitæ* as the rule of succession to personal as well as to real property.
3. That the *locus rei sitæ* being Pennsylvania, and no domicile of preference being shown elsewhere, by the law of Pennsylvania the father was entitled to the succession.

The decision of President Rush in this case is interesting as containing the first definition of domicile found in our reports. He defines it as "a residence at a particular place accompanied by positive or presumptive proof of continuing it an unlimited length of time." This definition probably forms the basis for the one adopted by Story which has been quoted in court so many times, both in this country and England. A well-known writer has referred to it as "the most exact definition which has been given" (Calvo, in his *Manuel de Droit Int. Pub. et Priv.* Sec. 197). The court held that Thomas Guier was domiciled in the state of Delaware during pupilage and after he became *sui juris* and held that any personal property must be distributed according to the law of the state of Delaware. The somewhat rhetorical flourish with which the decision ends has been often quoted and will, perhaps, bear repetition:

"The sailor who spends whole years in combating the winds and waves, and the contented husbandman whose devious steps seldom pass the limits of his farm, may in their different walks of life, exhibit equal evidence of being domiciled in a country. Every circumstance in the conduct of old Guier and his son Thomas, taking into view the unsettled mode of life of the latter, affords the fullest proof that they were both domiciled in Delaware. If the proof be stronger in either case, it is in the case of Thomas, who, though employed in traversing the globe from clime to clime, constantly returned to Wilmington, the source and center of his business, the seat and abode of his friends and connexions. His 'heart untravelled' appears to have been immovably fixed on the spot, to which he was attached by the powerful tie of interest, and the strongest obligations of social duty; and never for a moment to have pointed a wish to any other country."

A Hard Case

What shall be said of a man who appears to have devoted his life to making up as puzzling a case of residence as possible? We refer to the case of *White v. Brown*, 1 Wall. Jr. 217; Fed. Cas. 17538.

In submitting the case to the jury, Judge Grier said: "There are few subjects presented to courts for their decision which are surrounded with so many practical difficulties as questions of domicile. The residence is often of an equivocal nature; the intention extremely obscure, and has to be gathered from acts and declarations oftentimes conflicting and contradictory. It is probable, however, that there is not a case to be found in all the books which presents more difficulties arising from this cause than the one before us. The testimony fills an *8vo.* volume of nearly 900

pages. You have the whole history of the life of Matthias Aspden, all that he did, much that he said, and much more that he has written. Indeed it would seem, that being a man of much leisure he had spent a great part of his life writing documents which bear—some indirectly, and many directly—upon the very question which you are called on to decide. And now with an obliquity of genius rarely exceeded, he has enveloped it in so much contradiction and confusion and obscurity that it will require your utmost attention and the vigorous exercise of all your powers to solve the question.”

Any attempt to summarize the facts of this case within a small compass would be futile. The case arose on a feigned issue which presented the following questions:

- (1) “Where was the domicile of origin of the testator?
- (2) Where was his domicile at the time of his making his will, December 6, 1791?
- (3) Where was it at the time of his death, August 9, 1824?
- (4) Where was it during the intermediate time: i. e., between December 6, 1791 and August 9, 1824?”

The father of the testator came from England to America in 1718, and the testator himself, Matthias Aspden, was born in Philadelphia in 1748. It should be noted that at that time and for many years afterward Pennsylvania was a British province. In 1760 the testator was taken to England by his father and put into an English school. It does not appear how long he remained in England but in 1764 the father made his will at Philadelphia appointing his son one of the executors and died there the following year. In 1766 he went again to England for a period of about one year and in 1768 or 1769 established himself in trade with a half-brother. Although there is every evidence that he was an eccentric person, a hypochondriac, and apparently of almost unbalanced mind in his later years, he showed unusual shrewdness in money matters and accumulated a large fortune.

One of his ships having been seized in England, in 1775 he resolved to go to England to recover it. He did not make the voyage then but sent over all his vessels and sold them in England. In March, 1776, he sold much of his real estate, left a general power of attorney to manage and dispose of his affairs, and also drew a will, and in all of these papers described himself as “of Philadelphia, merchant.” He left Philadelphia about the middle of September some days before Pennsylvania came into existence as a state and before it was possible for him to owe any allegiance to it as a state. In 1780 a proclamation was issued

against him by the state of Pennsylvania requiring him to appear by April 1, 1781, to answer a charge of treason. This time was extended nine months and upon his failure to appear he was declared a traitor and all his real estate which he had not sold was confiscated. He applied to the British Government for compensation for his losses on the ground that he had been a local British subject.

Afterwards, in 1785, he came to Pennsylvania in an endeavor to get his property restored to him, but he remained in this state only ten days when he returned to England. He spent the greater portion of his life from that time on in an effort to get satisfaction for his losses on the ground that he had been a local British country and as an Englishman while in England.

In March, 1790, he made preparations for going to the United States and before leaving London, executed a will which he left there in which he requested, among other things, that his body be buried in Lancastershire. On December 9, 1791, he made another will, leaving his estate, which by that time amounted to about half a million dollars, to his heirs at law and appointing three American executors. He died August 9, 1824, at lodgings in London at the age of seventy-six, having spent about forty-eight years in England as against twenty-eight years in America. It only remains to be said that the jury, after having been out for twenty-four hours, found a verdict in favor of the American domicile on each of the dates mentioned in the issues.

It is a peculiar fact that even people much in the public eye can have a doubtful residence. As examples of this we might mention Mrs. Hetty H. R. Green (*In re Green's Est.*, 164 N. Y. Supp. 1063), Mary Garden (Protest 188, 388 Treas. Dec. 30270, G. A. 6965, Jan. 30, 1910), Gen. Frederick Dent Grant (*In re Grant*, 83 Misc. (N. Y.) 257; 144 N. Y. Supp. 576), and John D. Rockefeller (*Rockefeller v O'Brien*, 224 Fed Rep. 541). There are many strange and even romantic cases which arise in connection with the question of residence, but they will have to be reserved for some future article.