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## THE CAPACITY OF AN INFANT TO ACQUIRE AN INDEPENDENT DOMICILE

By WILLIAM KONOP

The question of domicile has ever held an important place in litigations. The laws of states and nations differ both in the procedural rules they follow and in the substantive doctrines they expound. Hence it often happens that in a given situation being domiciled in a particular jurisdiction gives you a cause of action which you would not have if domiciled elsewhere. Even oftener a more favorable interpretation of your case is to be found under the decisions of one state or nation than under those of another. The question of domicile is raised frequently in cases regarding the settlements of estates, in suits for divorce, in cases involving corporations, and in attempts to give federal courts jurisdiction on the theory of diversity of citizenship. In the settlement of estates, for example, the laws of nations and states with regard to probate and administration are very diverse. There is an axiom that "the law of the state in which the decedent had his domicile at the time of his death will control the succession and distribution of his personal estate." In the case of *White v. Tennant*, 31 W. VA. 790, the question arose as to whether the domicile of the deceased at the time of his death was in Pennsylvania or West Virginia. Administration was granted in West Virginia under whose law the widow took all personalty after the payment of debts. On appeal the domicile of the deceased was shown to have been Pennsylvania at the time of his death and the widow was, under the latter state's rules, only entitled to one-half of the excess personal property.

Domicile is "a residence at a particular place, accompanied by an intention, either positive or presumptive, to remain there permanently or for an indefinite length of time" (19 CJ 394). A person's domicile of origin is "the domicile of his parents at the time of his birth" (*In re Jones' Estate*, 192 Ia 78). A domicile of choice is "the place which a person has elected and chosen for himself to displace his previous domicile" (*Ibid*). Domicile by operation of law is "that domicile which the law attributes to a

person independant of his intention or action of residence. This generally results from the domestic relations of husband and wife, or parent and child" (Ibid).

Ordinarily the domicile of an infant is, by operation of law, that of his father. "Every person at his birth acquires a domicile of origin, which is that of the person on whom he is legally dependant, and in the case of a legitimate child is that of its father." (Deleware, L & W R. Co. v. Petrowsky, 250 Fed. 554). An infant is non sui juris and at common law and under the statutes practically universally does not become sui juris until twenty- one years of age. Upon the death of the father the child's domicile is under the control of his mother, though some jurisdictions hold she cannot change the child's domicile detrimentally to his legal rights. Upon remarriage of the mother, by operation of law, she surrenders her domicile for that of her husband, and ipso facto loses control of the domicile of her child, whose domicile thereafter is that of his mother before remarriage. (Lamar v. Micou, 112 US 452; In re Tharpe 24 NY 444). The father in changing his own domicile changes that of his wife and children. In case of the death of both parents the grandfather or grandmother may control the minor's domicile. Adopting parents exercise like control, (Matter v. Johnson, 87 Ia 130) but guardians usually cannot. The law is fair in so establishing the child's domicile, for upon the parent evolves the duty to support, in return for which it is only just that he be given the power to control the child's movements. It is to the best advantage of child and state that the minor be under the care and guidance of his parents, his natural guardians.

As a general rule the infant is incapable of changing his domicile by his own act. "An infant's domiclie is not affected by the removal of the infant from its former domicile by an unauthorized person or by the infant's own act without the consent of parent or guardian" (Sudler v. Sudler, 121 Ind 46). The mere leaving of his home by a minor and his living elsewhere do not create for him a new domicile in the eyes of the law. (Hess v. Kimball, 82 NJEq 311). The infant has no legal residence of his own, whatever his abode. His legal residence is that of his father. (In re Tharpe, 24 NY 444)

There are three situations creating a capacity in the infant who has reached the age of discretion to change his domicile from

that of his parent. They are emancipation, abandonment, and marriage. All three are much challenged and none is universally held to be an occurrence that allows an infant to choose his own domicile.

On the question of emancipation early cases cited in 10 Am. & Eng. Encyc. Law (2nd Ed) 31, note hold that an emancipated minor may gain a settlement of his own. (*Dennysville v. Trescott*, 30 Me 470; *Charleston v. Boston*, 13 Mass 469; and *Lisbon v. Lyman*, 49 NH 453). The recent case of *Jackson v. Southern Flour and Grain Co.*, 146 Ga 153, indicates that emancipation empowers the infant to change his domicile in saying that the domicile of an infant is his father's, if the father is living, and parental authority is not voluntarily relinquished. The case of *Russell v. State*, 62 Neb. 512, directly held that an emancipated infant could establish a domicile for himself. There, a young man, being emancipated by his father, left his domicile of origin in New York and took up his residence in Nebraska. After being there for eight months he was called for jury service and sat in a murder trial, having only come of age one month before the trial. By law male persons over twenty-one, having the qualifications of electors were made competent for jury service. To be a qualified voter you had to be over twenty-one and to have resided in the country for six months. The defendant said the young man was not qualified, arguing that his residence until he was twenty-one years of age was New York, with his father. The court said that by emancipation the father had empowered the minor to choose his own domicile, and concluded that the young man had the requisite six months' Nebraska residence.

A case suggesting abandonment as giving the minor who has reached the age of discretion the privilege of changing his domicile is that of *Bjornquist v. Boston & A. R. Co.*, 25 Fed. 929. This case however merely suggests the proposition just mentioned and is not authority for it. It is authority for the proposition that any minor orphan who has reached the age of discretion may choose his own domicile. Here the minor's parents had died and an uncle who had been caring for the child decided to do so no longer. Being nineteen years old and left to shift for himself the minor decided to leave Massachusetts, where he

had cause of action for personal injuries against the defendant corporation of Massachusetts; he went to Maine and there commenced suit in the federal court. Later he returned to Massachusetts. Defendant pleaded that there was no diversity of citizenship at the time of the commencement of the suit, saying that the last domicile of the plaintiff's deceased parent was Massachusetts, and that the infant having no power to change his domicile was, at the time of the commencement of the suit, domiciled in Massachusetts, despite his residence in Maine. The court decided that the plaintiff, left to his own devices, was capable of selecting his own domicile despite his minority. The court said, "None of the cases which have come to our attention have gone to the extent of holding that, under such circumstances, a minor who has attained years of discretion may not acquire a new domicile. In all of them, where it has been held that a minor cannot acquire a new domicile of his own volition, it has appeared that he was of immature years, or that he was subject to the direction and control of a person standing in the position of a natural or statutory guardian." (Citing cases). Being of tender years was mentioned as preventing an infant's change of domicile by his own volition in *Loftin v. Carden*, 203 Ala 405, and *Miller v. Bode*, 80 Ind App 338. A child abandoned by his father took residence with his grandparent and upon the return of the father was held to continue domiciled with his grandparent. (In re *Vance*, 92 Cal 195).

On the question of the effect of marriage on the infant's capacity to acquire domicile the early case of *Trammel v. Trammel*, 20 Tex 406, held that a married male minor could not change his domicile. His emancipation by marriage is not to such a degree. The later case of *Deleware, L. & W. R. Co. v. Petrowsky*, 250 Fed 554 affirmed this rule. The case further held that when once emancipated, as the minor in the case on being apprenticed to a relative, the subsequent death of the master worked no return to the control of the father so as to deny the minor's right to choose his own domicile thereafter. A minor female, unlike a male, upon her marriage escapes the parental control of domicile, but by operation of law takes that of her husband.

A great list of authorities cited in *Ann. Cas* 1913E 1206 and in 27 *CJ* 411 denies the right of the infant to change his domicile

and declares his domicile to follow that of his parent. This is perhaps for the best, but as a Pennsylvania judge said in the early case of *Mintzer's Estate*, 2 Pa Dist 584, "The rule by which the domicile of a minor is made to follow that of the parent ought not to be regarded as of inflexible obligation. Cases must arise, in which to avoid hardships amounting to cruelty, an infant may acquire a domicile independent of the domicile of his parents."