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DOMICIL FOR ORPHANS' COURT JURISDICTION*Shenton v. Abbott*¹

This is an appeal taken from an order of the Orphans' Court of Baltimore City, revoking the probate of the will of James E. Abbott, deceased, and also the letters testamentary of Harry W. Shenton, appellant, on the ground of lack of jurisdiction.

The facts showed that the testator, was born in Annapolis, in Anne Arundel County, Maryland, and had lived therein, except for a period of service with the army. In 1934, he gave up his Annapolis apartment and leased an apartment in Baltimore City for one year. At the time, he was a member of the Veterans Commission and in charge of its Baltimore office. Later his place of business in Annapolis was also given up and the furnishings of the two places were put into storage in Anne Arundel County. From 1936 to 1939, he lived at various government hospitals, clubs, homes of relatives, and apartment houses in Baltimore. In July, 1939, returning from a stay in the Washington Sanatorium, he took a room in a Baltimore hotel. Here he was married and here, on July 27, one day after his marriage, he executed his last will. In September of the same year, he transferred real estate to himself and his wife as tenants by the entirety, describing himself in the deed as "of Anne Arundel County." The testator and his wife then left for Florida, where three months later he died, after having been away from Anne Arundel county for five years except on occasional visits. The deceased had large holdings both real and personal in Annapolis, one house being bought there only two months before his death. He had always kept his membership in an Annapolis club. Furthermore, he had voted in an Anne Arundel County election only one year before his death. Upon the application for the marriage license, Mrs. Abbott had sworn that the residence of the deceased was in Annapolis. Appellant's evidence showed that Mr. Abbott's address appeared on a roster of Veterans as Baltimore City and that this city also appeared as his residence upon a passenger list in 1936 when the testator made a steamship cruise. *Held*: Upon the preponderance of the evidence, the testator had his domicile in Annapolis at the time of his death.

¹ 15 A. (2d) 906 (Md. 1940).

The Maryland statute controlling the place of proof of wills states that whenever any person shall die intestate, leaving personal property within Maryland, letters of administration shall be granted in the county where he had his "mansion house or residence".² It is also provided that any will may be proved in any county wherein letters testamentary or of administration may be granted.³ Since the word "residence" in the statute has been held to be synonymous with the word "domicil",⁴ the issue in the present case was simply whether the testator had abandoned his domicil in Annapolis and had acquired a new domicil in Baltimore City.⁵

Domicil was defined by the Court in the instant case as "that place where a man has his true, fixed, permanent home, habitation, and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning".⁶ To effect a change of domicil, two simultaneously existing conditions are necessary, (1) acquisition of a new dwelling place, and, (2) an intention to make that dwelling place a home. The necessity for the concurrence of the two conditions has often been adverted to in the Maryland decisions. The requirement of this is the generally accepted view elsewhere, and it has recently been approved in a note in this Review with reference to the problem of domicil for purposes of taxation.⁷ This proposition was stated by the Court in the principal case as follows: "To effect a change of domicil there must be an actual removal to another habitation, coupled with an intention of remaining there permanently or at least for an unlimited time." Later in the opinion it is stated that the abandonment of the old domicil must be so permanent "as to exclude the existence of an intention to return to the former place." There must be both the "animus manendi" and the "animus non revertendi".

² Md. Code (1939) Art. 93, Sec. 15.

³ Md. Code (1939) Art. 93, Sec. 356.

⁴ *Whiting v. Shipley*, 127 Md. 113, 96 A. 285 (1915).

⁵ For purposes of the principal case and of this note, it is immaterial whether his Annapolis domicil was his domicil of origin acquired there by birth and continuing during his years of military service, because he could not during such service acquire a different one (see *RESTATEMENT, CONFLICT OF LAWS*, Sec. 21); or was a domicil of choice acquired upon his retirement from military service.

⁶ *STORY, CONFLICT OF LAWS* (8th Ed. 1883) Sec. 41.

⁷ *RESTATEMENT, CONFLICT OF LAWS, MD. ANNOT.* (1936) Secs. 15, 18; Note, *What Determines Domicil* (1939) 4 Md. L. Rev. 98.

The instant case merely indicates a tendency to follow the same general rules for determining residence under the statutes determining Orphans' Court jurisdiction as were followed in a number of earlier cases.⁸ The fact of the two recent decisions on this question of domicil for purposes of probate might be of interest. In *Brafman v. Brafman*,⁹ the testator was born and had lived in Baltimore City. In later life, his health began to fail and, in consequence thereof, the testator visited various resorts along the Atlantic Coast, mainly staying in Atlantic City during the summers and in Florida during the winters. While not at these places, the testator made his abode at Baltimore hotels or with his brother or sister in that city. During a sojourn in Atlantic City, the deceased met his future wife and the marriage occurred. On the marriage license, the testator's residence was given as Baltimore City. Husband and wife lived together in Atlantic City for six months at various hotels and apartment houses until their separation, after which the testator returned to his former way of life. The testator's securities, investments, and bank accounts were mainly in Baltimore City. Upon a certificate of ownership filed for taxation purposes, his residence was given as Baltimore. However, at various times, the deceased had declared his residence to be in Atlantic City. The Court held that the residence of Mr. Brafman at the time of his death was in Baltimore, for the facts, when weighed together, strongly indicated no intention to abandon residence in Baltimore City. The rule of law applied by the Court was that to establish a change in domicil, the party seeking to establish such fact must show first an actual removal to another habitation and second, that the person removing did so with the intention of remaining there, at least for an unlimited time.

In *Pattison v. Firor*,¹⁰ the facts of which are not clearly presented, the testatrix, Mrs. Pattison, had lived with her husband in Howard County. After his death in 1915, she remained there until some time later when, selling the

⁸ The following cases deal with the question of domicil for purposes of probate: *Raborg v. Hammond*, 2 H. & G. 42 (1827); *Schultz v. Houck*, 29 Md. 24 (1868); *Ensor v. Graff*, 43 Md. 291 (1875); *Oberlander v. Emmel*, 104 Md. 259, 64 A. 1025 (1906); *Brafman v. Brafman*, 144 Md. 413, 125 A. 161 (1924); *Pattison v. Firor*, 146 Md. 243, 126 A. 109 (1924). In *Stanley v. Safe Deposit and Trust Co.*, 87 Md. 450, 40 A. 53 (1898), it was held that unless appealed from in due time, the decision of the Orphans' Court as to its jurisdiction was final, even though its ruling was unwarranted by the facts.

⁹ *Brafman v. Brafman*, *supra* n. 8.

¹⁰ *Pattison v. Firor*, *supra* n. 8.

furniture, she rented out the house and moved away never to return to live in her old home. She then made her abode with various relatives at different times, among them being her son-in-law Firor, who lived in Baltimore City. In 1918, the testatrix and Firor moved to Washington, D. C. from which city, by 1920, they had again removed, this time into a home upon the land of the testatrix in Howard County, Firor renting the house there from Mrs. Pattison. In the election of 1920, Mrs. Pattison both registered and voted in Howard County. In the same year, she and her son-in-law moved back to Baltimore where, several years later, she died. Mrs. Pattison received all her mail at the Baltimore address and kept her belongings there. Furthermore, she had declared that her home was in Baltimore City, which place also appeared as her residence in the descriptive clause of her last will. It appeared that the home of Firor in Baltimore was the only abode of the testatrix that had any permanency during the last four or five years of her life. Upon petition to deny probate in Baltimore City, the testatrix was held to have been domiciled in Baltimore at the time of her death. The opinion of the Court was that "while no one of these facts standing alone might be adequate, yet taken together they are sufficient to show a definite and certain intention of remaining in Baltimore City for an indefinite time and of becoming a resident of that city. Nor do we think the fact that, in 1920, she registered and voted in Howard County and kept some money in a bank at Laurel should affect that conclusion." The statement of law made in the case was that residence was lost by leaving one's permanent abode and removing to another place "animus non revertendi", and was gained by remaining in such new place "animus manendi".

Both the *Pattison* and *Brafman* cases are squarely within the rule that domicil is a place of fixed habitation without any present intention of removing therefrom. Mr. Brafman's stay in the resorts was for purposes of health and his constant removals showed that in none of them had he a present intention to remain for any definite period. In the *Pattison* case, the testatrix would doubtless, if her son-in-law had removed, followed him to a new abode, but a present intention which is subject to a condition subsequent will not defeat a fixed residence.

In the instant case, Mr. Abbott was certainly not shown to have abandoned his domicil at Annapolis. The deter-

mination of domicil rests upon the facts of each case and here they were preponderantly in favor of a finding that the Annapolis domicil was retained. Mr. Abbott had voted in Annapolis but one year before his death. As was said by the Court, the exercise of suffrage furnishes strong, although not conclusive, evidence of intention and may be of slight importance if overbalanced by other circumstances, as was the case of Mrs. Pattison's vote. She had voted in Howard County three years before her death, and Mr. Abbott's vote was cast barely a year before his decease. Further evidences of domiciliary intent are to be found in the description of Mr. Abbott in the deed as being "of Anne Arundel County", in the affidavit of his wife upon the license to marry, and in the testimony of a witness that Mr. Abbott intended to live in Anne Arundel County if he ever settled down. Appellant's evidence as to the address of Mr. Abbott being given as Baltimore City upon the roster of veterans and upon the passenger list was dismissed summarily by the Court, saying that it could not place much value upon such lists, printed primarily for temporary convenience, when compared with the declarations of the deceased, the affidavits, and the circumstances of the case.