

American Jurisprudence
PROOF of FACTS
Second Series

Text and sample testimony to assist in preparing for, and proving facts that may be in issue in, judicial and administrative proceedings.

VOLUME 4

1975



LCP BW

THE LAWYERS CO-OPERATIVE PUBLISHING CO.
Rochester, New York 14603

BANCROFT-WHITNEY CO.
San Francisco, California 94107

NONESTABLISHMENT OF DOMICIL IN FOREIGN JURISDICTION

GEORGE A. LOCKE, J.D.*

Fact in Issue: Whether an individual did not succeed in acquiring a new domicile by choice in a foreign jurisdiction despite a period of residence therein.

This fact question may arise in a large number of legal situations where the determination of one's domicile is called for.

Related Proofs: Absence, 1 POF 45; Domicil, 4 POF 523; Homestead, 6 POF 111

I. BACKGROUND

- § 1. In general; scope
- § 2. Acquisition of domicile, generally
- § 3. Change of domicile
- § 4. Residence distinguished from domicile
- § 5. Proving domicile; determining domicile issue

II. PROOF OF FAILURE TO ESTABLISH DOMICIL IN FOREIGN JURISDICTION DESPITE PERIOD OF RESIDENCE THEREIN

A. Elements of Proof

- § 6. Guide and checklist

B. Testimony of Defendant

- § 7. Long period of residence in forum
- § 8. Ownership of dwelling in forum
- § 9. Employment in forum
- § 10. Short period of residence in foreign jurisdiction
- § 11. Failure to acquire ownership of dwelling in foreign jurisdiction
- § 12. Short-term rental of apartment in foreign jurisdiction
- § 13. Failure to move personal effects to foreign jurisdiction

* Editor, Bancroft-Whitney Company.

- § 14. Failure to acquire employment in foreign jurisdiction
- § 15. Departure from foreign jurisdiction after accomplishment of specific purpose
- § 16. Return to dwelling in forum
- § 17. Return to employment in forum
- § 18. Payment of taxes in forum
- § 19. Failure to pay taxes in foreign jurisdiction
- § 20. Failure to procure licenses and permits in foreign jurisdiction
- § 21. Failure to vote in foreign jurisdiction
- § 22. Maintaining of bank accounts in forum
- § 23. Maintaining of church, club, and social affiliations in forum
- § 24. Selection of burial place in forum
- § 25. Declaration of intent to retain domicil in forum

C. Testimony of Defendant's Brother

- § 26. Statement of motive for residing in foreign jurisdiction

D. Testimony of Local Registrar of Voters

- § 27. Voting in forum

COLLATERAL REFERENCES

Text References:

- Acquisition, continuation, and change of domicil, 25 AM JUR 2d, Domicil §§ 16-32
- Domicil, generally, 25 AM JUR 2d, Domicil §§ 1-3
- Domicil of one *in itinere*, 25 AM JUR 2d, Domicil §§ 35, 36
- Evidence, trial, and judgment, 25 AM JUR 2d, Domicil §§ 84-102
- Kinds of domicil, 25 AM JUR 2d, Domicil §§ 12-15
- Residence distinguished, 25 AM JUR 2d, Domicil §§ 4-6

Legal Periodicals:

- Acker, Domicile Selection for a Retiring Client, 59 Ill BJ 678
- Bornstein, Residency Laws and the College Student, 1 JL & Educ 349
- Cavers, "Habitual Residence": A Useful Concept? 21 Am U L Rev 475
- Hawkins, Supreme Court Again Fails To Clear up Definition of "Home" for Tax Purposes, 26 J Taxation 336
- Kelly, Question of Domicile and Other Multi-state Estate Problems, 19 Prac Law 59
- Laymon, Residence Requirement*Indirect Restraint on Alienation? 17 SD L Rev 327
- Note, Commercial Transactions: Meaning of "Residence" Under the Uniform Commercial Code, 23 Okla L Rev 205

- Note, Constitutional Law—Conclusive Presumption of Nonresidency in College Admission, 3 Capital U L Rev 169
- Note, Problem of the “Newcomer’s Divorce,” 30 Md L Rev 367
- Plimpton, Conflict of Laws and the Disposition of Decedents’ Moveables, 24 Maine L Rev 43
- Ray, Foreign Domicile and Estate Duty, 119 New LJ 964
- Sanftner, Serviceman’s Legal Residence: Some Practical Suggestions, 26 JAG J 87
- Weckstein, Citizenship for Purposes of Diversity Jurisdiction, 26 SW LJ 360

Pleading Forms:

- Complaint alleging defendant’s change of domicil after accrual of cause of action, 9 AM JUR PL & PR FORMS (rev ed), Domicil Form 2
- Complaint alleging wife’s domicil for divorce purposes where deserted by husband, 9 AM JUR PL & PR FORMS (rev ed), Domicil Form 1
- Objection to probate of will on ground that decedent was not domiciled in state, 9 AM JUR PL & PR FORMS (rev ed), Domicil Form 3

Trial Techniques:

- Incompetency and Commitment Proceedings, 8 AM JUR TRIALS 483
- Separate Maintenance Proceedings, 7 AM JUR TRIALS 121

Annotations:

- Residence of students for voting purposes. 44 ALR3d 797
- Requirements as to residence or domicil of adoptee or adoptive parent for purposes of adoption. 33 ALR3d 176
- Probate, in state where assets are found, of will of nonresident which has not been admitted to probate in state of domicil. 20 ALR3d 1033
- Change of domicil as affecting character of property previously acquired as separate or community property. 14 ALR3d 404
- State tax on trust income as affected by foreign elements. 5 ALR3d 606
- Residence or domicil of student or teacher for purpose of voting. 98 ALR2d 488
- Change of state or national domicil of mental incompetents. 96 ALR2d 1236
- Determination of residence or nonresidence for purposes of fixing tuition fees or the like in public school or college. 83 ALR2d 497
- Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child. 44 ALR2d 886
- Requisite residence for purposes of old age assistance. 43 ALR2d 1427

- Use tax on property purchased by nonresident in another state. 41 ALR2d 535
- Right of nonresident wife to maintain action for separate maintenance or alimony alone against resident husband. 36 ALR2d 1369
- Nature and location of one's business or calling as element in determining domicile in divorce cases. 36 ALR2d 756
- What constitutes "estate" of nonresident decedent within statute providing for local ancillary administration where decedent died leaving an estate in jurisdiction. 34 ALR2d 1270
- What is "separate and independent claim or cause of action" which permits nonresident codefendant to remove case to federal court? 19 ALR2d 748
- Jurisdiction of suit involving trust as affected by location of residence of parties to trust, service, and appearance. 15 ALR2d 610
- Nonresidence as affecting one's right to custody of child. 15 ALR2d 432
- Relationship between "residence" and "domicil" under venue statutes. 12 ALR2d 757
- Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states. 10 ALR2d 764
- Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence. 9 ALR2d 471
- Length or duration of domicile, as distinguished from fact of domicile, as a jurisdictional matter in divorce action. 2 ALR2d 291
- Significance of place where one votes or registers to vote on question as to his domicile or residence for other purposes. 107 ALR 448
- What constitutes residence or domicile within state for purpose of jurisdiction in divorce. 106 ALR 6
- Inhabitancy or residence within provisions of income tax law as equivalent of domicile. 82 ALR 982

INDEX

- Abandonment of old domicile, domicile change as requiring, §§ 2, 3
- Absences from jurisdiction, domicile as affected by, § 3
- Accomplishment of purpose, departure from foreign jurisdiction after, testimony, § 15
- Acts, domicile change as affected by, § 3
- "Actual residence," definition of, § 4
- Apartment rental in foreign jurisdiction, testimony, §§ 11, 12
- Bank accounts, maintaining in forum, testimony, § 22
- Birth, domicile acquired at time of, §§ 1, 2

- Use tax on property purchased by nonresident in another state. 41 ALR2d 535
- Right of nonresident wife to maintain action for separate maintenance or alimony alone against resident husband. 36 ALR2d 1369
- Nature and location of one's business or calling as element in determining domicil in divorce cases. 36 ALR2d 756
- What constitutes "estate" of nonresident decedent within statute providing for local ancillary administration where decedent died leaving an estate in jurisdiction. 34 ALR2d 1270
- What is "separate and independent claim or cause of action" which permits nonresident codefendant to remove case to federal court? 19 ALR2d 748
- Jurisdiction of suit involving trust as affected by location of residence of parties to trust, service, and appearance. 15 ALR2d 610
- Nonresidence as affecting one's right to custody of child. 15 ALR2d 432
- Relationship between "residence" and "domicil" under venue statutes. 12 ALR2d 757
- Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states. 10 ALR2d 764
- Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence. 9 ALR2d 471
- Length or duration of domicil, as distinguished from fact of domicil, as a jurisdictional matter in divorce action. 2 ALR2d 291
- Significance of place where one votes or registers to vote on question as to his domicil or residence for other purposes. 107 ALR 448
- What constitutes residence or domicil within state for purpose of jurisdiction in divorce. 106 ALR 6
- Inhabitancy or residence within provisions of income tax law as equivalent of domicil. 82 ALR 982

INDEX

- Abandonment of old domicil, domicil change as requiring, §§ 2, 3
- Absences from jurisdiction, domicil as affected by, § 3
- Accomplishment of purpose, departure from foreign jurisdiction after, testimony, § 15
- Acts, domicil change as affected by, § 3
- "Actual residence," definition of, § 4
- Apartment rental in foreign jurisdiction, testimony, §§ 11, 12
- Bank accounts, maintaining in forum, testimony, § 22
- Birth, domicil acquired at time of, §§ 1, 2

- Burden of proving domicil change, § 5
- Burial place, selection in forum, testimony, § 24
- Capacity, domicil change as requiring legal, § 2
- Choice, domicil by, § 2
- Church affiliations, maintaining in forum, testimony, § 23
- Club affiliations, maintaining in forum, testimony, § 23
- Conflict of laws, § 1
- Continuing, domicil as presumed to be, §§ 3, 5
- Declaration—
 - of intent to retain domicil in forum, testimony, § 25
 - of motive for residing in foreign jurisdiction, testimony, § 26
- Domicil—
 - generally, § 1
 - types of, § 2
- Dwelling in forum—
 - ownership of, testimony, § 8
 - return to, testimony, § 16
- Elements of proof, § 6
- Employment—
 - in foreign jurisdiction, failure to acquire, testimony, § 14
 - in forum, testimony, § 9
 - return to former, testimony, § 17
- Evidence, weight of, § 5
- “Floating intention,” domicil as affected by, § 3
- Forum, domicil as determined by law of, § 1
- Full faith and credit, domicil decision as entitled to, § 5
- Indefinite residence, domicil as requiring, § 3
- In itinere*, domicil change of a person, § 3
- Intent—
 - change of domicil as requiring, §§ 2, 3
 - to retain domicil in forum, declaration of, testimony, § 25
- “Legal residence,” definition of, § 4
- Length of residence—
 - domicil as affected by, § 3
 - in foreign jurisdiction, testimony, § 10
 - in forum, testimony, § 7
- Licenses, failure to acquire in foreign jurisdiction, testimony, § 20
- Married man, presumption regarding domicil of, § 5
- Motive—
 - domicil as affected by, § 3
 - for residing in foreign jurisdiction, declaration of, testimony, § 26
- Operation of law, domicil by, § 2
- Origin, domicil of, § 2

- Ownership of dwelling—
 - in foreign jurisdiction, failure to acquire, testimony, § 11
 - in forum, testimony, § 8
- Permanent residence, domicil as requiring, § 3
- Permits, failure to acquire in foreign jurisdiction, testimony, § 20
- Personal effects, failure to move to foreign jurisdiction, testimony, § 13
- Physical move, domicil change as requiring, §§ 2, 3
- Presumptions aiding proof of domicil, § 5
- Proof of domicil—
 - generally, § 5
 - burden of, § 5
 - failure to establish domicil in foreign jurisdiction, §§ 6–27
 - situations necessitating, § 1
- Purpose, departure from foreign jurisdiction after accomplishment of, testimony, § 15
- Question of law and fact, domicil as, § 5
- Rental of apartment in foreign jurisdiction, testimony, §§ 11, 12
- Residence—
 - as prima facie evidence of domicil, § 5
 - domicil compared with, § 4
- Res judicata, domicil decision as, § 5
- Return—
 - to dwelling in forum, testimony, § 16
 - to employment in forum, testimony, § 17
- Social connections, maintaining in forum, testimony, § 23
- Taxes, payment of—
 - in foreign jurisdiction, failure to make, testimony, § 19
 - in forum, testimony, § 18
- Temporary absences from jurisdiction, domicil as affected by, § 3
- Uniformity of court decisions, requirement of, § 5
- Vote—
 - in foreign jurisdiction, failure to, testimony, § 21
 - in forum, testimony, § 27

I. BACKGROUND

§ 1. In general; scope

Domicil is a relationship which the law creates between a person and a particular locality. It is a place where an individual has a settled connection for certain legal purposes, either because his home

is there or because it is assigned to him by law; it is the one technically preeminent headquarters which a person has in order that, by aid of it, certain rights and duties which have been attached to it by the law may be determined.¹ All persons have a domicile somewhere.² Such a relationship is imposed on an individual at his birth, and he is never viewed thereafter as being without a domicile in one or another locality.³ Nor does a person have more than one domicile at any given time.⁴

The need to establish a particular locality as one's domicile arises in many legal situations. At least to the extent that domicile and residence are given synonymous meanings,⁵ such proof or its failure can greatly affect the outcome of those situations. For example, the place of an individual's domicile can play a deciding role in determining his right to vote and his liability for taxation. It can affect the probate of his will. It can affect the jurisdiction and venue which courts, both state and federal, have over his person. And it can affect numerous facets of his domestic relations.⁶ The list is virtually endless. □ **Observation:** The question of a person's domicile is usually determined by the law of the forum.⁷

Proof of an individual's domicile in a locality where he resides has already been covered elsewhere.⁸ The present article deals with proof of the closely related proposition that a person, contrary to his

1. *Texas v Florida*, 306 US 398, 83 L Ed 817, 59 S Ct 563, 121 ALR 1179; *Croop v Walton*, 199 Ind 262, 157 NE 275, 53 ALR 1386; *Schillerstrom v Schillerstrom*, 75 ND 667, 32 NW2d 106, 2 ALR2d 271.

Am Jur: 25 AM JUR 2d, Domicil § 1.

Annotation: Change of domicile as affecting character of property previously acquired as separate or community property. 14 ALR3d 404, 408.

2. *Ex parte Phillips*, 275 Ala 80, 152 So 2d 144; *Irvin v Irvin*, 182 Kan 563, 322 P2d 794; *Kurilla v Roth*, 132 NJL 213, 38 A2d 862; *Reynolds v Lloyd Cotton Mills*, 177 NC 412, 99 SE 240, 5 ALR 284.

Am Jur: 25 AM JUR 2d, Domicil § 2.

3. 25 AM JUR 2d, Domicil § 2.

4. *Smith v Smith*, 45 Cal 2d 235, 288 P2d 497; *Anderson v Pifer*, 315 Ill 164, 146 NE 171, 37 ALR 134.

5. See § 4, *infra*.

6. For a list of ALR annotations illuminating the important role of domicile, see *Collateral References*, *supra*.

7. *Re Baine's Estate*, 104 Misc 508, 172 NYS 604.

Am Jur: 25 AM JUR 2d, Domicil § 3.

8. See *Domicil*, 4 POF 523.

assertions, has failed to acquire a domicile in a jurisdiction despite the fact of his residence there. The article focuses on domicile in states, and no attempt is made to discuss the law relating to domicile in foreign countries.⁹ Except for purposes of background discussion, the article also avoids dealing specifically with individuals to whom special rules regarding domicile are applied, such as individuals in the armed forces, inmates in institutions, public officers and employees, students, teachers, clergymen, seamen, married women, infants, and incompetents.¹⁰ It is assumed throughout the article that the individual in question possesses the capacity to change his domicile.

§ 2. Acquisition of domicile, generally

A domicile of origin is the domicile acquired by a person at his birth. Attributed to every individual by law, it is the domicile of the child's parents or of the persons upon whom the child is legally dependent at the time he is born.¹¹ Such domicile continues until it is replaced by acquisition of another.¹² Closely related to domicile of origin is that which is assigned or attributed to a person by operation of law, independent of his residence or intention. Domicile of this nature applies to infants, incompetents, and other persons whose disabilities prevent them from choosing a domicile of their own.¹³

9. For a discussion of domicile in foreign countries, see 25 AM JUR 2d, Domicil §§ 33, 34.

10. For a discussion of persons to whom special domicile rules are applied, see 25 AM JUR 2d, Domicil §§ 39-83.

Annotations: Residence of students for voting purposes. 44 ALR3d 797.

Residence or domicile of student or teacher for purpose of voting. 98 ALR2d 488, 500.

Change of state or national domicile of mental incompetent. 96 ALR2d 1236.

Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college. 83 ALR2d 497.

What constitutes residence or domicile within state for purpose of jurisdiction in divorce. 106 ALR 6, 29.

11. *Ex parte Phillips*, 275 Ala 80, 152 So 2d 144; *Matthews v Matthews* (Fla App) 141 So 2d 799, 96 ALR2d 1231; *Re Jones' Estate*, 192 Iowa 78, 182 NW 227, 16 ALR 1286; *Hogue v Hogue* (Tex Civ App) 242 SW2d 673.

Am Jur: 25 AM JUR 2d, Domicil § 13.

→ **Note:** A child's domicile of origin is not necessarily the place of his birth. *Taylor v Jeter*, 33 Ga 195.

12. *Re Jones' Estate*, 192 Iowa 78, 182 NW 227, 16 ALR 1286.

13. *Phelps v Phelps*, 241 Mo App 1202, 246 SW2d 838; *Re Webber's Will*, 187 Misc 674, 64 NYS2d 281.

However, the type of domicile which is most often at issue, and the type most relevant to the present article, is domicile by choice. This is the domicile chosen by a person to replace his former domicile, whatever its nature.¹⁴ It involves the exercise of free will, and it implies the legal capacity to make a choice.¹⁵ There must be a voluntary change of residence coupled with an intent to make the new residence a permanent home—a place to which one has the intention of returning after an absence and from which he has no present intention of moving.¹⁶

§ 3. Change of domicile

Domicile is continuous; one domicile is never lost until another is acquired.¹⁷ Consequently, a change of domicile requires a physical abandonment of the first domicile, an intent not to return to it, an actual residence in the new locality, and an intent to make the new locality a permanent home.¹⁸ This rule is illustrated by its application to persons who are *in itinere* from an old to a new home. Since a domicile, once established, continues until a new one is acquired, and a new domicile is not acquired until there has been a concurrence of intent and physical presence, it is widely held that a person *in itinere* retains his old domicile until the place of his new domicile is actually

Am Jur: 25 AM JUR 2d, Domicil § 15.

14. 25 AM JUR 2d, Domicil § 14.

15. *Matthews v Matthews* (Fla App) 141 So 2d 799, 96 ALR2d 1231; *Zimmerman v Zimmerman*, 175 Or 585, 155 P2d 293.

16. 25 AM JUR 2d, Domicil §§ 1, 19.

Note: For a discussion of residence and intent as necessary elements of domicile, see § 3, *infra*.

17. *Oakes v Oakes*, 219 Ark 363, 242 SW2d 128; *Lyons v Egan*, 110 Colo 227, 132 P2d 794; *Hall v Morris*, 213 Md 396, 132 A2d 113; *Re Estate of Ford*, 14 Wis 2d 324, 111 NW2d 77.

Am Jur: 25 AM JUR 2d, Domicil § 16.

18. *Ryder v Ryder*, 2 Cal App 2d 426, 37 P2d 1069; *Keck v Keck*, 56 Ill 2d 508, 309 NE2d 217; *St. John v St. John*, 291 Ky 363, 163 SW2d 820; *Dotson v Commonwealth*, 192 Va 565, 66 SE2d 490.

Annotations: Residence of students for voting purposes. 44 ALR3d 797, 801.

Change of domicile as affecting character of property previously acquired as separate or community property. 14 ALR3d 404, 408.

Residence or domicile of student or teacher for purpose of voting. 98 ALR2d 488, 489.

reached.¹⁹ It is immaterial whether the journey is interrupted by death or by an abandonment of intent to change the domicil.²⁰

The physical presence necessary for acquisition of a new domicil need not be narrowed down to a particular building, municipality, or county within the state.²¹ Nor is length of residence a factor where the act and the requisite intention concur.²² In general, no definite period of time is necessary to create a domicil, and there is no requirement that the habitation be continuous and uninterrupted.²³ Temporary absences from a jurisdiction do not affect one's domicil therein as long as intent to change that domicil is lacking.²⁴ Absences for business and pleasure purposes have been held to fall within this rule,²⁵ as have changes of residence for the purpose of benefiting one's health.²⁶

The intent required for acquisition of a new domicil must be an intent to live permanently or indefinitely in the locality; it may not be an intent to live in the locality as a matter of temporary

19. 25 AM JUR 2d, Domicil § 35.

Caution: An exception to this rule is sometimes applied in the case of one who leaves his domicil of choice intending to return to his domicil of origin. Some authorities permit such an individual to reacquire the domicil of origin while *in itinere*. See 25 AM JUR 2d, Domicil § 36.

20. Reynolds v Lloyd Cotton Mills, 177 NC 412, 99 SE 240, 5 ALR 284.

21. 25 AM JUR 2d, Domicil § 22.

22. Bixby v Bixby (Okla) 361 P2d 1075; Laue v Grand Fraternity, 132 Tenn 235, 177 SW 941.

Am Jur: 25 AM JUR 2d, Domicil § 23.

23. **Annotations:** Length or duration of domicil, as distinguished from fact of domicil, as a jurisdictional matter in divorce action. 2 ALR2d 291, 293.

What constitutes residence or domicil within state for purpose of jurisdiction in divorce. 106 ALR 6, 18.

24. 25 AM JUR 2d, Domicil § 30.

Annotation: What constitutes residence or domicil within state for purpose of jurisdiction in divorce. 106 ALR 6, 23.

25. Hiatt v Lee, 48 Ariz 320, 61 P2d 401, 107 ALR 444; New York Trust Co. v Riley, 24 Del Ch (Sup) 354, 16 A2d 772, *affd* 315 US 343, 86 L Ed 885, 62 S Ct 608, *reh den* 315 US 829, 86 L Ed 1223, 62 S Ct 903.

Am Jur: 25 AM JUR 2d, Domicil § 31.

26. Croop v Walton, 199 Ind 262; 157 NE 275, 53 ALR 1386; Re Ingersol's Estate, 128 Mont 230, 272 P2d 1003.

Am Jur: 25 AM JUR 2d, Domicil § 32.

expediency.²⁷ Moreover, the intent to make a home must be unqualified and not conditional on the happening of a future event.²⁸ On the other hand, an intention to return at some indefinite time to a former place of abode—a “floating intention”—does not destroy present domicile, and thus an intent to return that is dependent on contingencies which may never happen is not sufficient to prevent the new residence from becoming the place of domicile.²⁹ Likewise, neither doubts about remaining in the new home nor an actual intent to return to the former domicile will affect the acquisition of the new domicile if such developed after the acquisition occurred.³⁰ In general, the motive of a person who purports to change his domicile is immaterial so long as there exists the requisite intention to change.³¹ **Note:** No domicile can be changed merely by a person expressing an intent which is contrary to the facts. The person’s acts must correspond with the purpose to change his domicile.³²

§ 4. Residence distinguished from domicile

“Residence” and “domicil” have been held or regarded as synonymous by a majority of the courts in dealing with such matters as jurisdiction over divorce suits, adoption of children, income tax

27. 25 AM JUR 2d, Domicil § 25.

Annotation: What constitutes residence or domicile within state for purpose of jurisdiction in divorce. 106 ALR 6, 14.

28. A person domiciled in New Jersey who left the state and went to Nevada to obtain a divorce was held never to have acquired a Nevada domicile where it was shown that he had not been able to settle permanently in that state until he could find employment there and that he returned to New Jersey after failing to secure such employment. *Sprague v Sprague*, 131 NJ Eq 104, 23 A2d 810.

Am Jur: 25 AM JUR 2d, Domicil § 26.

29. 25 AM JUR 2d, Domicil § 27.

30. 25 AM JUR 2d, Domicil § 29.

31. 25 AM JUR 2d, Domicil § 28.

Comment: Domicil is not affected by the fact that the motive prompting the change was a desire to secure lower taxes, to take advantage of easier divorce laws, to have one’s will proved and his estate settled in one jurisdiction rather than another, to carry on an adulterous relationship, or to avoid criminal prosecution. *Id.* **Distinction:** Of course, motive may be material in determining intent where that element has not been clearly established. See § 26, *infra*.

32. *Leonetti v Tolton*, 264 Mich 618, 250 NW 512, 92 ALR 1050.

Am Jur: 25 AM JUR 2d, Domicil § 24.

Annotation: What constitutes residence or domicile within state for purpose of jurisdiction in divorce. 106 ALR 6, 15.

liability, the right to vote, and venue.³³ The terms have been treated as having identical meanings by at least a substantial number of the courts in connection with such matters as probate, guardianship, eligibility for public office, taxation of personalty and intangibles, and poor relief.³⁴ At the same time, many jurisdictions have defined the words differently in statutes governing attachments, regulating service of process, and setting forth residence requirements entitling children to school privileges, and in respect of the running of the statutes of limitations against residents.³⁵

Where "residence" is viewed as not synonymous with "domicil" it is given a narrower and less comprehensive meaning than the latter term. It is said to refer merely to an act of habitation and not to require an intention to remain.³⁶ Stated another way, domicil is said to be inclusive of residence, residence being necessary (along with the requisite intent) to acquire a domicil but not necessary to preserve a domicil once it is acquired.³⁷ In line with this principle, it has been held that a person may be a resident of one jurisdiction while having a domicil in another.³⁸ It is equally clear that a person may have more than one residence—or none at all.³⁹

Comment: In several jurisdictions, a distinction is made be-

33. **Annotations:** Residence of students for voting purposes. 44 ALR3d 797, 801.

Requirements as to residence or domicil of adoptee or adoptive parent for purposes of adoption. 33 ALR3d 176, 202.

Relationship between "residence" and "domicil" under venue statutes. 12 ALR2d 757, 759.

What constitutes residence or domicil within state for purpose of jurisdiction in divorce. 106 ALR 6, 9.

Inhabitaney or residence, within provisions of income tax law as equivalent of domicil. 82 ALR 982.

34. 25 AM JUR 2d, Domicil § 5.

35. AM JUR 2d, Domicil § 5.

36. **Annotation:** Relationship between "residence" and "domicil" under venue statutes. 12 ALR2d 757, 758.

37. *Krone v Cooper*, 43 Ark 547; *Smith v Smith*, 45 Cal 2d 235, 288 P2d 497.

Am Jur: 25 AM JUR 2d, Domicil § 4.

Note: Residence is usually treated as prima facie evidence of domicil. See § 5, *infra*.

38. *Williams v Williams*, 191 Ga 437, 12 SE2d 352; *Schultz v Chicago City Bank & Trust Co.* 384 Ill 148, 51 NE2d 140; *Croop v Walton*, 199 Ind 262, 157 NE 275, 53 ALR 1386; *Re Jones' Estate*, 192 Iowa 78, 182 NW 227, 16 ALR 1286.

39. *Warren v Warren*, 73 Fla 764, 75 So 35; *State v Garford Trucking Inc.* 4 NJ 346, 72 A2d 851, 16 ALR2d 1407.

tween “legal residence” and “actual residence.” The former expression is said to have the same meaning as “domicil,” while the latter is said to denote a more temporary stay.⁴⁰

§ 5. Proving domicil; determining domicil issue

The burden of proving a change of domicil is on the person who alleges it,⁴¹ although the duty of going forward with the evidence may shift from one party to another.⁴² Accordingly, the need to prove a person’s failure to establish a new domicil does not arise until a prima facie case of such a change has been made out.

A person’s domicil is proved by evidence bearing on the existence of the two essential elements of physical presence and intent.⁴³ The weight to be given to the various facts and circumstances indicative or presumptive of domicil depends, of course, on the circumstances of each case.⁴⁴ Determination of one’s domicil depends not on one fact or combination of circumstances but on the whole, taken together, showing a preponderance of evidence in favor of some particular place as the domicil.⁴⁵ For example, a person’s declarations as to his domicil may be contradicted by evidence of acts and conduct inconsistent therewith; in such a case, the conduct is viewed as having greater evidential value than the statements.⁴⁶

Proof of domicil may be aided, under proper factual circumstances, by one or more presumptions. One well-recognized rule is that a domicil of origin or of choice is presumed to continue until it is shown to have changed, and where the evidence is conflicting, the original or former domicil is favored over a newer domicil of

40. 25 AM JUR 2d Domicil § 6.

41. *Texas v Florida*, 306 US 398, 83 L Ed 817, 59 S Ct 563, 121 ALR 1179; *Jones v State*, 207 Miss 208, 42 So 2d 123; *Caldwell v Shelton*, 32 Tenn App 45, 221 SW2d 815; *Georgia v Waterville*, 107 Vt 347, 178 A 893, 99 ALR 453.

Am Jur: 25 AM JUR 2d, Domicil § 87.

Annotation: Change of domicil as affecting character of property previously acquired as separate or community property. 14 ALR3d 404, 411.

42. 25 AM JUR 2d, Domicil § 87.

43. 25 AM JUR 2d, Domicil § 88.

Annotation: Change of domicil as affecting character of property previously acquired as separate or community property. 14 ALR3d 404, 411.

44. *Gilbert v David*, 235 US 561, 59 L Ed 360, 35 S Ct 164.

Am Jur: 25 AM JUR 2d, Domicil § 91.

45. *Fry v Fry*, 332 Ill App 484, 76 NE2d 225.

46. 25 AM JUR 2d, Domicil § 93.

choice.⁴⁷ Another principle frequently applied by the courts is that residence is prima facie evidence of domicile even though domicile is never determined by the fact of residency alone.⁴⁸ This presumption is strengthened by residence continued for a long period.⁴⁹ Finally, it is presumed that the domicile of a married man is in the locality where his family resides,⁵⁰ though the presumption is applicable only when the husband selects the residence.⁵¹

The question of domicile, or of residence, is usually considered one of mixed law and fact. It is the duty of the court to instruct the jury as to what constitutes a domicile, and the jurors are then obliged to apply the law governing domicile to the facts as found by them.⁵²

□ **Caution:** There is no constitutional requirement of uniformity among the decisions of the state courts on questions of domicile where the exertion of state power is dependent on domicile within the boundaries of the particular jurisdiction. As between the parties and privies to a proceeding wherein the issue of domicile is contested, a judgment determining the question is generally conclusive. However, an adjudication of domicile has no conclusive effect in another state with respect to persons who were not parties to the proceedings.⁵³

47. *Ex parte Weissinger*, 247 Ala 113, 22 So 2d 510; *Arnette v Arnette*, 162 Kan 677, 178 P2d 1019; *Elwert v Elwert*, 196 Or 256, 248 P2d 847, 36 ALR2d 741; *Smith v Smith*, 364 Pa 1, 70 A2d 630.

Am Jur: 25 AM JUR 2d, Domicil § 86.

48. *Schillerstrom v Schillerstrom*, 75 ND 667, 32 NW2d 106, 2 ALR2d 271.

Am Jur: 25 AM JUR 2d, Domicil § 84.

49. *Gilbert v David*, 235 US 561, 59 L Ed 360, 35 S Ct 164.

50. *Schlawig v De Peyster*, 83 Iowa 323, 49 NW 843; *Grant v Lawrence*, 37 Utah 450, 108 P 931.

Am Jur: 25 AM JUR 2d, Domicil § 85.

51. *Jones v State*, 207 Miss 208, 42 So 2d 123.

52. 25 AM JUR 2d, Domicil § 101.

53. 25 AM JUR 2d, Domicil § 102.