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Capacity Of Alien Temporary Visitor To Acquire Domicile

the jurisdiction to determine in the first instance whether or not the three-judge acts are applicable to any given complaint presented to him. If he determines that the acts are applicable, he must immediately set in motion the machinery for convening a court of three judges. If, on the other hand, he determines that the acts are not applicable, he may dispose of the action. In the latter case, the proper method of review is by appeal to the court of appeals where both the determination as to the applicability of the three-judge acts and the final disposition of the case will be subject to review. The court of appeals will first consider the district judge's determination as to the applicability of the three-judge acts. If it finds that he erroneously decided that question, that is as far as it need go; for the case must be reversed and remanded to the district court with directions to proceed with the convening of the three-judge court. If, however, it affirms the district judge's decision as to the applicability of the three-judge acts,[54] it should then proceed to review the district judge's final disposition of the case.

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CAPACITY OF ALIEN TEMPORARY VISITOR TO ACQUIRE DOMICILE

An adult male has the capacity to abandon one domicile and to acquire a new domicile of choice in another locality if he is actually present in the new place and if he has the intent to make the new location his home.[1] Courts have held, however, that persons in prison[2]

[54]For a case demonstrating this situation see Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir. 1957), cert. denied, 353 U.S. 695 (1958). There plaintiffs sought an injunction restraining the enforcement of certain Tennessee statutes on the ground of their unconstitutionality. Plaintiffs applied for a court of three judges. The district judge held that the constitutional question was unsubstantial when viewed in light of prior Supreme Court holdings and therefore refused the application for a court of three judges. The judge then disposed of the case on the merits, denying the relief asked for. The plaintiffs appealed to the Court of Appeals for the Sixth Circuit. The court of appeals affirmed the district judge's decision as to the applicability of the three-judge acts and then proceeded to review his disposition of the case on the merits. The court concluded that the relief asked for should have been granted and reversed the trial court's decision and remanded the case.

[1]Sprague v. Sprague, 131 N.J. Eq. 104, 23 A.2d 810 (1942); In re Frick's Estate, 116 Misc. 488, 190 N.Y. Supp. 262 (Surr. Ct. 1921); In re Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932); In re Barclay's Estate, 259 Pa. 401, 103 Atl. 274 (1918); Minor, Conflict of Laws 110 (1901).

[2]Goodrich, Conflict of Laws 45 (2d ed. 1938).

and in the armed forces[3] lack the requisite capacity for formulating the necessary intention to change their domicile. The reason given is that one cannot acquire a domicile by an act done under legal or physical compulsion.[4] Similar problems of capacity to acquire a domicile of choice arise in the case of infants,[5] students,[6] and married women.[7]

Another interesting capacity problem involves the alien in the United States on a temporary visitor's visa. In *Gosschalk v. Gosschalk*,[8] the Supreme Court of New Jersey decided that such an alien could acquire a domicile in that state. The New Jersy divorce statute requires one of the parties to be a bona fide resident of the state for two years preceding the commencement of the action.[9] Gosschalk was a Dutch national who was in the United States on a temporary visitor's visa that had been extended several times. He sued for a divorce thirteen months after he received a permanent immigration visa. Since the words "bona fide resident" in the New Jersey statute are synonymous with "domiciliary,"[10] the wife contended that the New Jersey court lacked jurisdiction on the theory that Gosschalk could not have been a domiciliary of New Jersey for two years.

To qualify for admission as a temporary visitor, an alien must establish: "(1) that he has a residence in a foreign country which he

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[3]Hammerstein v. Hammerstein, 269 S.W.2d 591 (Tex. Civ. App. 1954). It seems that where a serviceman lives off base and shows a clear intention to make his home where he lives, he may acquire a domicile of choice there. See Sasse v. Sasse, 41 Wash. 2d 363, 249 P.2d 380 (1952). For a discussion of state statutes which require only residence within the state in order for servicemen to sue for divorce see Comment, 15 Wash. & Lee L. Rev. 248 (1958).

[4]Note, 13 U. Pitt. L. Rev. 697 (1952).

[5]Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907).

[6]Robbins v. Chamberlain, 297 N.Y. 108, 75 N.E.2d 617 (1947); Barker v. Iowa Mut. Ins. Co., 241 N.C. 397, 85 S.E.2d 305 (1955).

[7]There has been a tendency in the United States to hold that a wife may have a domicile separate from her husband if the requirements of intention and presence are met. Williamson v. Osenton, 232 U.S. 619 (1913); Berlingieri v. Berlingieri, 372 Ill. 60, 22 N.E.2d 675 (1939); Younger v. Gianotti, 176 Tenn. 139, 138 S.W.2d 448 (1940); Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933). English law adheres rigidly to the view that a married woman cannot acquire a domicile apart from her husband. Note, 40 Harv. L. Rev. 134 (1926).

[8]28 N.J. 73, 145 A.2d 327 (1958), affirming 48 N.J. Super. 566, 138 A.2d 774 (App. Div. 1958). The court also decided that it was under no duty to stay a proceeding pending before it on account of the pendency in Holland of a similar action previously instituted by the wife. The court reasoned that comity was a discretionary matter and that each court is free to proceed in its own way without reference to proceedings in the other court.

[9]N.J. Stat. Ann. § 2A: 34-10 (1952).

[10]Voss v. Voss, 5 N.J. 402, 75 A.2d 889, 891 (1950).

has no intention of abandoning... (3) that he intends to remain in the United States temporarily; (4) that he intends in good faith and will be able to depart from the United States at the expiration of a temporary stay."[11] The majority in the principal case points out that the plaintiff could be deemed to have established a legal domicile while in the United States on a temporary visa. Since plaintiff was able to obtain periodic extensions of his visa and did remain in New Jersey, "his intention was believably probable. Certainly, the best evidence of one's intention is the fact of compliance...."[12] Judge Francis in the dissenting opinion argues that Gosschalk did not have the legal capacity to remain here permanently. "So his intention with respect to domicile was incapable of fruition. Clothed in its most favorable legal raiment, it might be said that in effect he contemplated making his home here if and when he attained immigrant status.... In other words, a domicile would come into existence when he was free to choose it, *i.e.*, upon the happening of the condition."[13] The dissent concedes that when Gosschalk was granted an immigrant's visa, he was lawfully admitted for permanent residence in New Jersey and had a right to establish a domicile. The problem is whether he could combine eleven months of residence under the temporary visa with thirteen months of residence under the immigrant visa to meet the necessary residence (domicile) requirement. The majority relied strongly on three New York cases.[14] In *Taubenfeld v. Taubenfeld*,[15] the plaintiff wife, who was unable to secure an immigration visa, was in the United States on a transit visa for the purpose of proceeding to Australia. In an action for divorce she moved for temporary alimony and counsel fees. Defendant filed a cross-motion

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[11]Besterman, Commentary on the Immigration and Nationality Act, 8 U.S.C.A. 1, 37 (1952), commenting on 8 U.S.C.A. § 1101(a)(15)(B) (1952).

[12]138 A.2d at 779.

[13]145 A.2d at 329.

[14]Greiner v. Bank of Adelaide, 176 Misc. 315, 26 N.Y.S.2d 515 (Sup. Ct. 1941); Townsend v. Townsend, 176 Misc. 19, 26 N.Y.S.2d 517 (Sup. Ct. 1941); Taubenfeld v. Taubenfeld, 276 App. Div. 873, 93 N.Y.S.2d 757 (2d Dep't 1949). In the Greiner case the court points out: "The mere fact that Plaintiff arrived under a temporary visa is not enough to prevent him from becoming a resident of this state." 26 N.Y.S.2d at 516. Plaintiff was, however, a resident of Holland and while in the United States, Holland was invaded by the Germans. In the Townsend case the parties were compelled to leave France to avoid being placed in a German concentration camp. In this situation it was impossible to get any visa to the United States other than a temporary visitor's visa. "In these unusual circumstances our courts will not interpret the statute so as to prevent plaintiff from maintaining this action." 26 N.Y.S.2d at 518.

[15]276 App. Div. 873, 93 N.Y.S.2d 757 (2d Dep't 1949).

to dismiss the complaint on the ground that the plaintiff, in view of the transitory nature of her presence in this country, was precluded from becoming a domiciliary of New York. The lower court held that plaintiff was not free to exercise an intent to establish a domicile. "[H]er declaration of intention to become domiciled in the State may be characterized as the mere expression of a hope to accomplish that result."[16] In reversing the lower court, the Appellate Division held that "plaintiff may maintain this action, even though she is not domiciled in this State, because it affirmatively appears that she was actually sojourning or dwelling here at the time the offense was committed and when the action was commenced.... In any event, the mere fact that plaintiff entered the United States on a transit visa does not establish as a matter of law that she may not acquire a domicile."[17]

The dissent in *Gosschalk* points out that in the *Taubenfeld* case domicile was not a prerequisite for maintaining the action in New York, and accordingly, if cited by the majority for the proposition that domicile is no longer a requisite for a court to exercise jurisdiction in a divorce action, it would seem to be directly in conflict with the New Jersey statutory provisions and decisions which require the element of domicile.[18] The dissent loses sight of the majority's reason for citing *Taubenfeld.* The majority cited *Taubenfeld* for the sole proposition "that the mere fact that plaintiff entered the United States on a transit visa is not of itself a fatal bar to his establishing the fact that he is domiciled here...."[19]

Another New York decision in point, although not cited in the

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[16]Taubenfeld v. Taubenfeld, 194 Misc. 505, 87 N.Y.S.2d 866, 868 (Sup. Ct. 1949).

[17]Taubenfeld v. Taubenfeld, 276 App. Div. 873, 93 N.Y.S.2d 757, 759 (2d Dep't 1949).

[18]"Jurisdiction in actions for divorce, either absolute or from bed and board, may be acquired when process is served upon the defendant as prescribed by the rules of the Supreme Court, and: 1. When, at the time the cause of action arose, either party was a bona fide resident of this state, and has continued so to be down to the time of the commencement of the action; except that no action for absolute divorce shall be commenced... unless one of the parties has been for the 2 years next preceding the commencement of the action a bona fide resident of this state...." N.J. Stat. Ann. § 2A: 34-10 (1952). In Voss v. Voss, 5 N.J. 402, 75 A.2d 889, 891 (1950), the Supreme Court of New Jersey points out that "the words 'bona fide resident' as used in the statute are synonymous with domicile and mean that the parties or either of them must be actually domiciled within the State." See also Buscema v. Buscema, 20 N.J. Super. 114, 89 A.2d 279 (Ch. 1952), where the status of a plaintiff, who was obligated to leave the United States as soon as possible, was said to be incompatible with the "bona fide residence" requirements of New Jersey.

[19]Taubenfeld v. Taubenfeld, 276 App. Div. 873, 93 N.Y.S.2d 757, 759 (2d Dep't 1949).

Gosschalk case, is *Jacoubovitch*,[20] which held that aliens in the United States on a temporary visa in connection with the employment of one of them by the United Nations were not necessarily precluded from establishing a domicile to maintain a divorce action.

Aside from these New York decisions, there is little American authority on the question of the extent to which a person may contradict the terms of his admission to the United States. The issue was involved in *McGrath v. Kristensen*,[21] a United States Supreme Court decision involving naturalization, but the holding is rather equivocal.[22] The outbreak of World War II had prevented the return to Denmark of Kristensen, a Danish citizen in the United States on a temporary visitor's visa. Kristensen applied for and received several extensions of his visa. Under the Selective Training and Service Act,[23] a person such as Kristensen was subject to military service if he was "residing" in the United States, but as a citizen of a neutral country he was authorized to apply for exemption from such service. The making of such an application, however, would constitute a permanent bar to obtaining American citizenship. Kristensen applied for this exemption from military service. During his involuntary stay in America, Kristensen was forced by economic necessity to obtain a job, which violated the terms of his visitor's status. As a result of this violation, a warrant for his deportation was issued, but its execution was suspended to determine his eligibility for naturalization.[24] The United States Supreme Court held that this alien in the United States on a temporary visitor's visa could not be a "resident" of the country within the meaning of the Selective Training and Service Act, and his application for exemption from military service was ineffective to bar him from American citizenship. Mr. Justice Reed, speaking for the Court, said, "[W]e cannot conclude, without regulations so defining residence, that a sojourn within our borders made necessary by

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[20]279 App. Div. 1027, 112 N.Y.S.2d 1 (2d Dep't 1952).

[21]340 U.S. 162 (1950), affirming 179 F.2d 796 (D.C. Cir. 1949).

[22]The Supreme Court quoted Judge Learned Hand, who points out in Neuberger v. United States, 13 F.2d 541, 542 (2d Cir. 1926): "We shall not try to define what is the necessary attitude of mind to create or retain a residence under this statute, and how it differs from the choice of a 'home,' which is the test of domicile. Frankly it is doubtful whether courts have as yet come to any agreement on the question." 340 U.S. at 175.

[23]Selective Training and Service Act § 3(a), 54 Stat. 885 (1940) (amended by 55 Stat. 845 (1941)).

[24]" '(c) In case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien if he is not ineligible for naturalization . . . .' " 340 U.S. at 163 n.1.

the conditions of the times was a residence within the meaning of the statute."[25]

The tentative draft of the *Restatement of Conflict of Laws Second,* in commenting on the *Kristensen* case, says: "Here the question is whether the illegality of his entrance or continued residence in the asylum should bear upon his ability to acquire there a domicile of choice. This question is as yet unanswered."[26] An alien on a temporary visitor's visa may acquire a domicile of choice in England.[27] The English courts have shown that the *animus manendi* is a condition separate and apart from the terms of admission of the dweller; however, as in the United States, the terms of admission are always some evidence of intention.[28]

A somewhat comparable situation arises in the case of refugees.[29] Courts may allow these persons to acquire a domicile in contradiction to the terms of admission. The majority in the principal case also denied conclusive effect to the terms of admission. Even though the terms of admission are some evidence of intention, the *animus manendi* of domicile is a condition separate and apart from the admission status of the plaintiff. It would seem to follow that in New Jersey "domicile may ... be regarded simply as a legal conclusion fixing for the forum the law of that jurisdiction which is considered appropriate to determine the rights and liabilities of the person in question; or as a finding that the relationship between the person and a state is sufficiently close for the purpose at hand to justify courts of that state in exercising judicial jurisdiction. The traditional 'rules' of domicile, under this view, are seen to function not as mechanical rules of thumb but as selectors and evaluators of those factors which the courts have hitherto deemed of importance in the ascertainment of the law to be applied to the case. Patently, under this theory the

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[25]340 U.S. at 176.

[26]Restatement (Second), Conflict of Laws, Reporter's Note § 21, at 83 (Tent. Draft No. 2, 1954).

[27]Cruh v. Cruh, [1945] 2 All E.R. 545 (P.); May v. May & Lehman, [1943] 2 All E.R. 146 (P.).

[28]Ibid.

[29]1 Beale, Conflict of Laws 154 (1935). "Domicile, of course, cannot be changed by a forced exile, or by a change made necessary in order to secure safety in time of War .... But where one leaves his country because of his dislike for a political condition, hoping to return when he can do so as a free citizen, but without immediate expectation of such an event, these facts are compatible with the acquisition of a domicile in the country to which he goes. [citing Ennis v. Smith, 14 How. 400 (U.S. 1852)]." See Note, 42 Colum. L. Rev. 640 (1942), for a detailed account of the domicile of refugees.