

[6] Last, we note that there is no conflict between the language of RSA chapter 447 and that of RSA 511-A:5. Indeed, RSA chapter 447 does not expressly deal with the bona fide purchaser for value. Were such a conflict clear, however, the considerations we have mentioned would support the inference of a repeal by implication. See, e.g., *Board of Selectmen v. Planning Board*, 118 N.H. 150, 383 A.2d 1122 (1978); *Sindt v. Gilfoyle supra*.

[7] For these reasons, we hold that the plaintiff's materialman's lien may not be secured by attachment of the Breitens' interest, since they were bona fide purchasers of the property for value before the writ of attachment was recorded. In so concluding, we caution that we have not been called upon to determine the minimum qualification of a bona fide purchaser for value. We note only that the record in this case fully supports the trial court's finding of the Breitens' good faith. The evidence is uncontroverted that they obtained an affidavit from the seller that materialmen had been paid. The trial court found that the Breitens had no knowledge that any materialmen had not been paid and had no actual or constructive notice of any lien. Neither these findings nor the trial court's conclusion that the Breitens were bona fide purchasers for value was the subject of exception or appeal.

The case will be remanded to the superior court for entry of an order removing the attachment and dismissing the petition.

Reversed and remanded.

All concurred.

Carroll
No. 83-156

GEORGE J. EVERY

v.

SUPERVISORS OF THE MADISON CHECKLIST

April 19, 1984

1. Domicile—Burden of Proof—Change of Domicile

Since a domicile once acquired continues until displaced by a subsequent domicile of choice, the acquisition of a second residence will not disturb the pre-existing domicile unless there is clear and convincing evidence to the contrary; the burden usually is on the person attempting to establish a new domi-

cile to show an intention has displaced and by that process displaced the

2. Domicile—Burden of Proof—(

In order to establish domicile plaintiff must show that he had "a fixed abode" there; rather, the question was whether Hampshire town his domicile thinks of as home.

3. Domicile—Evidence—Weight

As evidence of plaintiff's domicile, his assertions must be weighed.

4. Domicile—Evidence—General

In determining whether the evidence would be reflected in the plaintiff's residences and the purpose for his relationship to the community, the court considered the plaintiff's participation in the community and his attitude toward that dwelling place as the principal home.

5. Domicile—Particular Cases—(

Where plaintiff and his wife lived in the town for roughly 140 days per year, the court found that the town was his domicile and where for the past few years he lived in the town for 100 days per year in a New Hampshire town, the plaintiff and his family participated extensively in the town's affairs where plaintiff ran a small business, where plaintiff had a mailing address and was an owner in the district where his fourteen-year-old son began school, the court should consider the town in New Hampshire to be his domicile. There is no error in the trial court's decision to find the town in New Hampshire to be the legal voters, in view of the evidence in the town, his involvement in the town, his involvement in his son's school. RSA 654:1

Shaines, Madrigan & Mitchell on the brief and oral

Cooper, Fauver & Deans, c on the brief and orally, for the c

BROCK, J. The defendant seeks an order of the Superior Court pursuant to RSA 654:42 (Supp.

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EVERY

ADISON CHECKLIST

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Domicile

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cile to show an intention has developed to make the new home the principal one and by that process displace the previously existing domicile.

2. Domicile—Burden of Proof—Change of Domicile

In order to establish domicile in New Hampshire for voting purposes, plaintiff must show that he had "abandoned" his domicile in another State, but that did not mean that he must have abandoned his physical place of *residence* there; rather, the question was whether the plaintiff intended to make the New Hampshire town his domicile; i.e., his principal residence or the one place he thinks of as home.

3. Domicile—Evidence—Weight and Sufficiency

As evidence of plaintiff's intent to make a New Hampshire town his domicile, his assertions must be weighed against his actions.

4. Domicile—Evidence—Generally

In determining whether there has been a change of domicile, important evidence would be reflected in the amount of time that was spent at each of the residences and the purpose for which the time was spent; and the individual's relationship to the community in which each home is located and the extent of one's participation in the community affairs often evince the individual's attitude toward that dwelling place and are significant evidence for the identification of the principal home.

5. Domicile—Particular Cases—Domicile Found

Where plaintiff and his wife resided in an apartment in Massachusetts for roughly 140 days per year, the number of days he was obliged to teach there, and where for the past few years plaintiff had spent approximately 220 days per year in a New Hampshire town, where he owned a home and near which the plaintiff and his family attended church; where plaintiff and his family participated extensively in sports activities in New Hampshire and Maine; where plaintiff ran a small business using the New Hampshire residence as a mailing address and was an active member of an association of property owners in the district where his home was; and where, in 1982, the plaintiff's fourteen-year-old son began attending school in New Hampshire, about thirty miles from the New Hampshire residence; all of which led the plaintiff in 1982 to consider the town in New Hampshire his domicile, the supreme court found no error in the trial court's determination that the plaintiff was "domiciled" in the town in 1982, as that term is used in the statute governing eligibility of legal voters, in view of the evidence as to the amount of time the plaintiff spent in the town, his involvement in community affairs, and particularly the change in his son's school. RSA 654:1 (Supp. 1983).

Shaines, Madrigan & McEachern, of Portsmouth (*Donald E. Mitchell* on the brief and orally), for the plaintiff.

Cooper, Fawver & Deans, of North Conway (*Randall F. Cooper* on the brief and orally), for the defendants.

BROCK, J. The defendant supervisors brought this appeal from an order of the Superior Court (*Temple, J.*). The order, issued pursuant to RSA 654:42 (Supp. 1983), required them to add the plain-

tiff's name to the official checklist of voters for the town of Madison. The issue before us is whether the presiding justice erred as a matter of law in finding that the plaintiff was "domiciled" in Madison, as that term is used in RSA 654:1 (Supp. 1983). We find no error and affirm.

The basic facts are not in dispute. George Every has been employed for approximately twenty years as a teacher in the public schools of Boston, Massachusetts. He is obliged to teach for 140 days each year. He rents an apartment in Cambridge, Massachusetts, where he and his wife reside for roughly 140 days per year.

Mr. Every purchased land in Madison in 1965, constructed a residence there in 1969-70, and made improvements on that residence in 1977. It is now a four-bedroom house. For the last few years, Mr. Every has spent approximately 220 days a year in Madison. This includes almost every weekend, three months in the summer, all other school vacations and holidays, and "personal days" allotted to Mr. Every by his employer.

Mr. Every and his family attend church near Madison, and participate extensively in sports activities—mainly skiing and motorcycling—in New Hampshire and Maine. Mr. Every runs a small mail-order business using his Madison residence as a mailing address. He is also an active member of an association of property owners in Eidelweiss, the village district (formerly a recreational subdivision) where his Madison house is located. The purpose of the association is to represent the district's interests before various local governmental bodies.

Mr. Every has one son, Vincent, by his present wife, as well as four grown children from an earlier marriage. Until 1982, Vincent attended public schools in Cambridge. In 1982, when Vincent turned fourteen, he was accepted for admission at the New Hampton School, a private boarding school in New Hampton, New Hampshire, about thirty miles from Madison. He has attended that school since September 1982. He spends all of his vacations and most of his weekends in Madison.

Mr. Every does not dispute that until 1982 he was domiciled, for voting and all other purposes, in Cambridge. He testified, however, that the change in the location of his son's school, added to all his ongoing activities mentioned above, led him in 1982 to consider Madison as his domicile, although the amount of time he spent in Madison did not increase substantially.

In August 1982, Mr. Every attempted to register to vote in Madison and was refused. He then filed a complaint with the superior court pursuant to RSA 654:42 (Supp. 1983). The court found that the initial refusal by the defendant supervisors was justified because

Mr. Every had supplied them. Nevertheless, the court ordered Mr. Every's name on the checklist because the evidence showed that he was, in fact, domiciled in Madison. On appeal, arguing that the latter law.

[1] In this State, "domicile" poses more than for other purposes. RSA 654:1, 2. The applicable vot

"I. Every inhabitant of this State who has a permanent established domicile in this State for any meeting or election, is domiciled in that place. The determination of factual domicile is the voter's residence to which he has the intention of returning to place in which he dwells a significant portion of each year

RSA 654:1, I (Supp. 1983). The same principle in cases involving multiple domiciles must apply the general rule of domicile:

"Since a domicile once established is not displaced by a subsequent acquisition of a second residence unless there is the contrary. Thus, the attempt to establish a new domicile is not effective until the old domicile has developed to maturity and by that process the new domicile is established."

E. SCOLES AND P. HAY, CONSTITUTIONAL LAW (footnote omitted) (hereinafter cited as "SCOLES"), 93 N.H. 259, 261, 40 A.2d 581,

[2] While the plaintiff may have a domicile in Cambridge, *Chas. v. Town of Madison*, 556 (1891), this does not mean that he must have abandoned his domicile in Cambridge. The question is, rather, whether he has established a domicile in Madison his domicile; i.e., "T

ers for the town of Madison. Finding justice erred as a matter was "domiciled" in Madison, pp. 1983). We find no error

George Every has been rs as a teacher in the public blished to teach for 140 days Cambridge, Massachusetts, 140 days per year.

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to register to vote in Madi- mplaint with the superior 3). The court found that the sors was justified because

Mr. Every had supplied them with insufficient information. Nevertheless, the court ordered Mr. Every's name added to the Madison checklist because the evidence introduced at trial showed that he was, in fact, domiciled in Madison. The supervisors brought this appeal, arguing that the latter finding was incorrect as a matter of law.

[1] In this State, "domicile" is defined differently for voting purposes than for other purposes of the law. See RSA 21:6, :6-a; Laws 1981, 261:2. The applicable voting statute reads, in pertinent part:

"I. Every inhabitant of the state, having a fixed and permanent established domicile . . . shall have a right at any meeting or election, to vote in the town . . . in which he is domiciled. The determinant of one's domicile is a question of factual physical presence incorporating an intention to reside for an indefinite period. This domicile is the voter's residence to which, upon temporary absence, he has the intention of returning. This domicile is that place in which he dwells on a continuing basis for a significant portion of each year."

RSA 654:1, I (Supp. 1983). The statute does not provide clear guidance in cases involving multiple residences. In such cases, the finder of fact must apply the general rules of law governing a change of domicile:

"Since a domicile once acquired continues until displaced by a subsequent domicile of choice, the acquisition of a second residence will not disturb the pre-existing domicile unless there is clear and convincing evidence to the contrary. Thus, the burden usually is on the person attempting to establish a new domicile to show an intention has developed to make the new home the principal one and by that process displace the previously existing domicile."

E. SCOLES AND P. HAY, CONFLICT OF LAWS § 4.21, at 182 (1984) (footnote omitted) (hereinafter SCOLES & HAY); see *Bailey v. Bailey*, 93 N.H. 259, 261, 40 A.2d 581, 582 (1945).

[2] While the plaintiff must show that he has "abandoned" his domicile in Cambridge, *Chase v. Chase*, 66 N.H. 588, 592, 29 A. 553, 556 (1891), this does not mean (as the defendants argue) that he must have abandoned his physical place of residence there. The question is, rather, whether Mr. Every in 1982 intended to make Madison his domicile; i.e., "his principal residence . . . or the one

place he thinks of as home." *Kerby v. Charlestown*, 78 N.H. 301, 303, 99 A. 835, 836 (1916).

[3, 4] As evidence of this intent, the plaintiff's assertions must be weighed against his actions. *McGee v. Bragg*, 94 N.H. 349, 352, 53 A.2d 428, 430 (1947).

"Important evidence will be reflected in the amount of time that is spent at each of the residences and the purpose for which the time is spent. . . . The individual's relationship to the community in which each home is located and the extent of one's participation in the community affairs often evince the individual's attitude toward that dwelling place and is [sic] significant evidence for the identification of the principal home."

SCOLES & HAY, *supra* § 4.22, at 182.

[5] In view of the evidence as to the amount of time Mr. Every spends in Madison, his above-mentioned involvement in community affairs, and particularly the change in his son's school, we conclude that the trial court could properly find that Mr. Every intended in 1982 to make Madison his principal residence, and rule that he established his "domicile" there at that time. Accordingly, we find no error in the trial court's determination that George Every was domiciled in Madison in 1982.

Affirmed.

All concurred.

Rockingham
No. 83-244

FIFIELD ISLAND, INC. & a.

v.

TOWN OF HAMPTON

April 19, 1984

1. Zoning—Appeals From Board of Adjustment—Superior Court Review

A decision of the zoning board of adjustment may not be set aside by the superior court unless there is an error of law, or the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.

2. Zoning—Appeals From Board

Construction of the terms which the supreme court is board.

3. Appeal and Error—Findings—

Where town building inspection listed on assessors' records and court concluded that the zoning board of adjustment, first lot of record prior to March 1 in town's zoning ordinance was 1970 from street frontage requirement.

4. Zoning—Construction of Ordinance

Where plaintiffs' parcel of tract of land, the rest of which first town, and where the first plaintiffs a building permit approved street in the first town, did not meet ordinance, the supreme court decision of the zoning board, holding parcel was not exempted from requirements of the zoning permit.

Seth M. Junkins, of Hampton Shaines, Madrigan & McRobbins on the brief and oral

BATCHELDER, J. The plaintiff (23) located in the town of Fifield superior court the Hampton denial of their request for family residence on Lot 23 recommended that the ZBA Court (*Nadeau, J.*) approve defendant appeals from this

Lot 23 is part of a larger parcel and known as the Fifield All but the 2.2 acres in Fifield Hampton. The plaintiffs sought the North Hampton portion approval being granted in Board. That part of the development into 22 lots, all located in development, the 2.2 acres