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Case Comments

Dicta Editorial Board

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DIVORCE: COUNTY OF RESIDENCE A MATTER OF JURISDICTION—Petitioner in *People v. District Court* [1] was the defendant in an action for divorce brought in Rio Grande County, Colorado. In that action after defendant filed her answer and a cross-complaint, the plaintiff withdrew his complaint, and an interlocutory decree was entered in favor of the defendant. No testimony whatsoever was introduced as to the residence of either party in Rio Grande County. Nevertheless, the trial court in granting the interlocutory decree entered its findings that both parties were residents of Rio Grande County, Colorado.

The defendant later filed a motion to set aside her interlocutory decree. This motion was granted and the pleadings were reinstated to the same state and condition that existed prior to the entering of the interlocutory decree.

The defendant then filed her verified motion for a change of venue on two grounds:

1. That neither party had ever been residents of Rio Grande County, Colorado, and that the action was therefore in violation of Section 6, Chap. 56, '35 C.S.A. which provides that, "Such suit shall only be brought in the county in which such plaintiff or defendant resides, or where such defendant last resided."
2. That it would be more convenient for witnesses.

Upon the trial court's denial of this motion, the defendant filed her petition for a writ in the nature of prohibition.

The Supreme Court held that the question of whether change of venue for the convenience of witnesses should be granted was a matter within the discretion of the trial court, and that there was no abuse of discretion disclosed.

In considering the petitioner's argument that a change of venue should be granted because the action was not commenced in the proper county as provided by the statute, the Supreme Court held that, while the action had been commenced in the wrong county, this was no ground for a change of venue. It was held that the statutory provision was one of jurisdiction and not of venue. In effect the Supreme Court said that where the residential requirements are not met the court has no jurisdiction whatsoever, and the court must dismiss the case. "When bona fide residence in said Rio Grande County was not established, the court was under a mandatory duty to refuse to hear or grant any motions whatever in the action, and its dismissal must follow."

This case is merely a reaffirmation of the construction of the statute as laid down in the case of *Branch v. Branch*,[2] where the

[1] ..... Colo. ....., 258 P 2d 483 CBA Adv. Sh. No. 22, 1952-53.
[2] 30 Colo. 499, 71 P. 632.

Supreme Court said that,

> Causes can only be brought in the county where the plaintiff resides, or where the defendant resides, or where the defendant last resided. It is a jurisdictional question, and can not be waived by the parties. Unless the residence required by statute is in some manner shown, the court is without jurisdiction.

It goes without saying that the obvious result of these two cases is that probably many divorces, granted throughout the state and relied on by the parties involved, are not valid unless it was shown in some manner that the residential requirements necessary to give the court jurisdiction had been met.

Statutory provisions similar to that of Colorado's with regard to which county an action for divorce may be brought are found in many states. Most of these states interpret their residential requirements as being jurisdictional, though various reasons are suggested for so holding.[3] In Colorado in a 1902 case brought under our Civil Code, 327 (which provided that, "All civil actions, with certain exceptions, shall be tried in the county in which the defendant may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county, . . ."), our Supreme Court stated that in divorce cases, "Whatever reason might be advanced for this limitation (i.e. the mandatory venue requirements) is wholly immaterial for independent of these considerations, the legislature undoubtedly had the power to change the usual rule in civil actions, and provide that only certain forums determined by the residence of the parties should take jurisdiction of divorce proceedings by their commencement.[4] The Colorado court's opinion was largely based on statements by the California Supreme Court in the case of *Warner v. Warner*,[5] interpreting the California divorce venue statute which, while worded differently from our own, is equally mandatory on the subject.

However, construction of divorce venue statutes throughout the states is not uniform. An example of a statute similar to Colorado's holding that a provision as to the county in which the action must be brought was a requirement of venue and could be waived rather than a requirement of jurisdiction which could not be waived is Missouri's. See the case of *Osmak v. American Car and Foundry Co.*,[6] In that case the Supreme Court held that the restriction was merely for the benefit of the parties involved and could therefore be waived by their mutual consent. The states that

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[3] May v. May, 94 Pa. Super. 293. Hetherington v. Hetherington, 200 Ind. 56, 160 N.E. 345. In Re Goldberg's Estate, 288 Ill. App. 203, 5 N.E. 2nd 863 Holt v. Holt, 253 Mass. 411, 149 N.E. 40.

[4] The People v. District Court, 30 Colo. 123, 69 P. 597.

[5] 100 Cal. 11, 34 P. 523.

[6] 328 Mo. 159, 40 S.W. 2nd 714.

hold as Missouri that the venue requirements in divorce actions are not mandatory and may be waived seem to be in the minority.[7]

ELAINE S. BERNICK.

EVIDENCE: RADAR EVIDENCE OF VEHICLE'S SPEED —As there is some evidence that Colorado may install a radar system to help police and patrol our highways, the following cases may be of interest to the members of the Bar. In *State v. Moffitt*,[1] the Delaware Superior Court held that where an expert has testified to the accuracy of the "Radar Speed Meter," that a test conducted by a policeman not skilled in electronics was competent evidence and sufficient evidence for a jury to find the defendant guilty of driving at an excessive rate of speed.

In *People v. Offerman*,[2] the New York Supreme Court of Erie County held that evidence of a test conducted by a non-expert witness (policeman) without the testimony of an expert was incompetent and, therefore, not sufficient to justify a conviction of driving at an excessive rate of speed. The court in reversing and remanding the case for a new trial stated that:

> The legislature in its wisdom might see fit to declare that the reading of an electrical timing device similar to the one here may be admitted in evidence as prima facie evidence of the speed of the automobile of an accused, after such device has been certified as accurate by the authority designated by the legislature. By such legislation, the People will be relieved of the burden of proving the accuracy of the electrical timing device upon each trial and by expert testimony. The traveling public will be protected against convictions based upon the reading of an unproven and possibly inaccurate device, and of equal importance, the rules of evidence will not be violated.[3]

In the absence of legislation, it will be necessary for an expert in the field of electronics and radar to testify to the accuracy of the device, in each individual case, before any evidence of a test will be admissible into evidence.

JOHN S. PFEIFFER.

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[7] Hammons v. Hammons, 228 Ala. 264, 153 So. 210; Davis v. Davis, 179 N.C. 185, 102 S.E. 270.

[1] 100 A. 2d 778, Sept. 23, 1953.

[2] 125 N. Y. S. 2d 179, Oct. 21, 1953.

[3] *Ibid*, p. 185.

BOOK TRADER'S CORNER

Attorney Dan Lorenz of Steamboat Springs has a set of American Jurisprudence, a set of Hillyers Annotated Forms of Pleading and Practice and some miscellaneous text books and form books for sale. Anyone interested should contact Mr. Lorenz.

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