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Is Residence of the Plaintiff, in Colorado, Necessary to Support a Divorce Action Based on Cruelty within the State, if Defendant Is a Resident of Colorado?

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County	Judicial District	No. P. M.	Location	Vocation
Park	11	none		
Phillips	13	2	Holyoke	Unknown
			Haxtun	Unknown
Prowers	15	2	Lamar	JP—former farmer and old age pensioner
			Holly	Retired
Pueblo	10	1	Pueblo	Lawyer
San Miguel	7	2	Telluride	Undertaker and furniture store
			Norwood	Unknown
Sedgwick	13	1	Julesburg	JP and operator of service station
Summit	5	1	Breckenridge	Old age pensioner, prospector
Teller	4	2	Victor	City clerk and JP
			Cripple Creek	City clerk
Weld	8	*5	Greeley	Lawyer
			Eaton	JP and real estate and insurance
			Ault	JP and real estate and insurance
			Windsor	JP and real estate and insurance
			Fort Lupton	JP, employee of sugar company
Yuma	13	2	Wray	1 retired, 1 insurance business

* Due to telephone strike, unable to determine if there are more police magistrates in county.

Is Residence of the Plaintiff, in Colorado, Necessary to Support a Divorce Action Based on Cruelty Within the State, If Defendant Is a Resident of Colorado?

By EDWIN M. SEARS*

Attorneys are in doubt regarding the answer to the title question. The Colorado Supreme Court has not spoken on it. It is the purpose of this paper to prove that the answer should be in the negative.

I

It seems necessary, first, to allay the apprehension that under the construction of the Colorado divorce statutes, as here proposed, Colorado divorces could be granted, if the cruelty complained of occurred in this state, though *none* of the parties be here domiciled. If section 6 of the statute were so construed, then, it might be said, no residence requirement at all exists as to either party, and Colorado could become the Mecca of divorce seekers—a result clearly abhorred by our courts (Sedgwick vs. Sedgwick, 50 Colo. 164, 169).

But such would *not* be the effect of the above proposition. Our statute clearly, though by implication, requires the residence in the state of *one* party

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to the action as prerequisite of divorce jurisdiction. This follows from the second proviso of section 6, stating that the suit must be brought in the court of either plaintiff's or defendant's residence. While this provision purports to relate to venue rather than jurisdiction, it must be remembered that our Supreme Court considers venue rules in the divorce statutes, to some extent at least, as jurisdictional (Branch vs. Branch, 30 Colo. 499, 506). It is all the more appropriate and mandatory to find in this second proviso in section 6, a statutory rule to the effect that Colorado requires residence in this state of at least one party to a divorce action as a basis for divorce jurisdiction. This rule would prevent any undue expansion of the proposition argued in this article: that no residence of the plaintiff in this state is necessary where he sues on the ground of cruelty committed in Colorado, and if the defendant's residence is here.

II

As the question before us is that of jurisdiction, it should be pointed out that jurisdiction means "power", and in this context: "power to grant a divorce". (Williams vs. North Carolina, 65 Sup. Ct. 1092, par. 5 of opinion, 89 Law Ed. 1123, 1126). In this second Williams case, just cited, the U. S. Supreme Court said, (par. 5 of the opinion): "The domicile of *one spouse* within a state gives power to that state to dissolve a marriage wherever contracted."

It would seem to follow that a Colorado court has jurisdiction in this sense of "power" to grant a divorce to non-resident plaintiff against a resident defendant on the ground of cruelty committed within this state.

III

Whatever residence requirement may be thought to exist cannot be deduced from any vague *ius naturae,* or from any *a priori* postulate of such residence, but must follow from any one of the following sources:

The full faith and credit or the due process clause of the constitution, the common law in the sense of judge-made rules, or our divorce statute. If residence of the plaintiff is not required by any of these, then residence of the plaintiff is not necessary. It cannot be interpolated from any other source because there is none.

Residence of the plaintiff is not required under the full faith and credit clause as the above quoted par. 5 of the Williams case proves. Nevada divorces need not be recognized abroad, under that case, only because and if *neither* party is a resident of the state granting the divorce.

The *due process* clause of the constitution does not set up a domicile requirement in the plaintiff to a divorce action. This follows from the Williams case, itself, as the foreign recognition problem, there dealt with, could not even come up unless the Nevada judgment withstood the test of due process. (See Frankfurter, concurring in the first Williams case 317 U.S.

287, 306; also Prof. Powell, 58 Harvard Law Review [1945] note 139, p. 984).

The common law does not make residence of the plaintiff a prerequisite to a divorce action. Its jurisdictional requirements are satisfied if *one* party resides within the state granting the divorce.

Madden, Domestic Relations (1931) p. 312
Goodrich, Conflict of Laws (1927) p. 290
Schouler, Divorce Manual (1944) sec. 16
Restatement Conflict of Laws, Sect. 113a 1 and 111, and b.
Nelson, on Divorce (1945) par. 21.12
Restatement, Judgments, par. 33(a)

IV

The fact that so many decided divorce cases deal with plaintiff's, and so few with defendant's residence, might make plaintiff's residence appear of preponderant importance in such an action. But that phenomenon is easily explained. In the typical situation inviting *any* inquiry into jurisdiction, a plaintiff who *claims* to be a resident sues a spouse who admittedly is *not* a resident of the forum state. In this situation, clearly, the court must find residence of the *plaintiff*, or else it cannot have jurisdiction over the "res", the status of the spouses, as neither one would reside at the forum.

Finding residence of the plaintiff in this common situation is necessary not because residence of the plaintiff, but because residence of *one spouse* is a jurisdictional fact, and because the defendant in this common situation, admittedly, is not a resident of the forum state.

V

Since, then, residence of the plaintiff in a divorce action is not necessary under any of the rules discussed under III and IV above, the only remaining question is whether such requirement is set up by our divorce statute. The answer should be in the negative.

(1) The only statutory provision in Colorado, setting up any requirement of residence is section 6, chapter 56, C.S.A. In its first sentence, this section ordains one year residence of the plaintiff as a prerequisite to a divorce action; but "this section" shall not be applicable in divorce cases based on cruelty committed in Colorado.

The expression "this section" must refer to the preceding sentence, and it must refer to the whole of it. It cannot, grammatically, refer to one part, but not to another. It cannot, even in purely philological contemplation, be held to rule out the "one year", and yet sustain the "residence" requirement. The part of section 6 declared to be inapplicable in "this section", i.e. its first sentence, no more, and particularly, no less. In none of the numerous cases cited in W and P, Perm. Ed., vol. 38, p. 450, et seq. has the expression "this section" been construed not to refer to the whole of the preceding subdivision.

The correctness of this interpretation is shown by a certain practice followed in all divisions of the Denver District Court. It is the *Generally Followed Practice to Allow Proof of Plaintiff's Residence in Intra-State Cruelty cases by Means Other Than Testimony of a Third Person.* If the first proviso of section 6 eliminated the "one year" residence requirement only, but not the other elements contained in the first sentence of section 6, then, clearly, residence of the plaintiff would have to be established in all cases by testimony of a witness other than the plaintiff. The general practice dispensing with such evidence in cruelty cases is a clear indication that the first proviso is thought to qualify the initial rule in section 6 in toto, not only as to the "one year" element.

The appropriateness of this practice, and of the interpretation of section 6 here advocated, also follows from the nature of a "proviso". Bouvier (Law Dictionary) states: "The purpose of a proviso is to except the clause covered by it from the provisions of a statute, or to qualify the operation of a statute". While *definitions sunt periculosae,* and while a proviso may at times operate in a different way, it seems worth noting that under the above definition, and absent any reasons to qualify its import here, the first sentence of section 6 is superseded by this first proviso. The effect of it, then, is to do away with sentence 1 in toto, thereby eliminating any residence requirement in the plaintiff in case of cruelty committed in Colorado, but leaving, of course, intact the rule requiring residence of at least *one* party to a divorce action in this state.

(2) Public policy does not argue against this theory which considers the whole of the first sentence in section 6 inapplicable to intra-state cruelty cases. Colorado's public policy to prevent "temporary" residents from obtaining divorces in this state (Sedgwick vs. Sedgwick, 50 Colo. 164, 169) is clearly not directed at situations where Colorado has a natural connection with the matrimonial relationship of the parties, through residence of the defendant and the *locus delicti commissi.* That policy has, moreover, been tempered, in intra-state cruelty cases, by the express elimination of the one year requirement. A plaintiff could admittedly sue on cruelty, under the first proviso of section 6, the very minute after having established a possibly rather tenuous residence here; and he could then sue even a non-resident spouse. Public policy clearly permits such divorce suit operating on an actually very casual relation of the spouses to Colorado. It is difficult to see why this public policy should object to a Colorado divorce action where the spouses' relation to Colorado, through defendant's residence and misconduct, is, by comparison, intimate, and where *both* parties are personally under the jurisdiction of the Court, the plaintiff by invoking it, and the defendant by being a Colorado resident.

(3) The wording of the Colorado statute, it has been shown, supports the thesis of this paper, and public policy does not oppose it. This latter is

true, particularly, because the theory here advocated will not result in a flood of divorces sought by visitors to this state. Residence of one of the spouses is necessary, under the second proviso of section 6, to give a Colorado court divorce jurisdiction. But it is the thesis of this article that such residence of one spouse is sufficient in an intra-state cruelty case, whether that spouse be the plaintiff or the defendant.

(4) No cases but one have been found where a non-resident plaintiff sues a resident defendant on the ground of cruelty committed within the state, under a statute similar to ours. Some cases declare the occurrence within the state of misconduct, without residence of *any* of the spouses, a sufficient basis of divorce jurisdiction (see note 59 LRA p. 154), others deny that (17 A.J. sect. 245; 27 C.J.S. sec. 80 note 63). But this, obviously, is not our question, because we assume the defendant to be a resident of Colorado.

The one case in point is Kokinakis vs. Kokinakis, 180 U.S.W. 2nd, 243 (Mo).

There a soldier stationed in Missouri, whose residence in Missouri was at least questionable, sued his spouse, a resident of Missouri, in that state on the ground of cruelty committed therein. The court held for the plaintiff, on the assumption of plaintiff's non-residence. The court said under (3): "We do not need to put plaintiff's right to a divorce action upon his residence".

The applicable Missouri statute (quoted from Martindale-Hubbell) reads: "No person who has not resided in the state for one year next before filing of the petition is entitled to a divorce unless the offense or injury occurred within the state, (or while one party or both parties resided in the state)" (Parentheses ours).

The similarity of this statute to ours is fairly obvious up to that part which above is put in parentheses. This clause in parentheses must be disregarded for purposes of comparison with our statute because it deals with a situation not here involved. The clause in parentheses clearly refers to offenses which occurred outside the state. This follows from an application of elementary rules of construction, as the clause in parentheses follows that dealing with offenses *within* Missouri. The purpose of the clause in parentheses is to allow divorce actions in Missouri without one year residence of the plaintiff though the offenses occurred outside the state, if one party resided in Missouri *at the time the acts of cruelty occurred.* The Missouri statute, in other words, does away with the one year residence requirement not only in case of intra-state cruelty, but also if the cruelty is committed outside the state if one of the parties then resides in Missouri. The Missouri statute does not however say anything about the dispensability with plaintiff's residence *at the time the action is brought.* On this point, the Missouri as well as the Colorado statute are silent except insofar as they declare the

general rule of one year's residence inapplicable. The persuasiveness of the Kokinakis case can therefore not be discredited on the ground of substantial differences of the Missouri and the Colorado statutes.

When considering offenses *within* Missouri, the Missouri courts are faced with a statute which, like ours in effect, says: A plaintiff in a divorce action must have been a resident of the state for one year except where the offense occurred within the state. The only difference between the Missouri and our statute insofar is that the latter introduces the differential treatment of intra-state cruelty cases with the words "provided that this section shall not affect" them, while the Missouri statute ordains the general rule of one year residence "unless" the offense occurred in the state. Under either statute, we have a general rule of one year residence, followed by a qualification regarding intra-state cruelty cases.

Under either statute, the courts are faced, therefore, with the problem treated in this article: whether the qualification following the rule eliminates the "one year" requirement only of the rule, or whether it eliminates it *in toto,* so as to make residence of the plaintiff in intra-state cruelty cases entirely unnecessary.

On this precise question, the Missouri case deals with the identical problem now before us. And the Missouri holding to the effect that residence of plaintiff is *not* required in intra-state cruelty cases should, therefore, be persuasive to a Colorado court.

VI

Detailed analysis has led to the conclusion that neither our statute nor any other rule of law require plaintiff's residence in Colorado as a prerequisite to a divorce action against a resident defendant based on cruelty committed within the state. The same result is reached if the problem is tested against fundamental, rational, "first" principles.

The purpose of all residence requirements in divorce actions is to assure power of the court over the *res,* the martial relationship, and over the parties to the action. This power of the court is undeniably present when a resident plaintiff—be his residence ever so short—sues a non-resident defendant on cruelty committed within the state even though the defendant be served by publication. The power of the court in the situation dealt with in this paper (where a non-resident plaintiff sues a resident defendant on the ground of intra-state cruelty) seems much more direct and the *nexus* much closer than in the typical example of the preceding sentence.

The court here has power over the *res* as the defendant is a resident, and the latter's marital relationship therefore clearly subject to the power of the Colorado court. Since there can be no marital relationship except between two persons, power of the court over defendant's marriage necessarily implies that over the plaintiff's. (See Goodrich, on Conflicts of Law, 1927, p. 292, bottom). A Colorado court, therefore, has equal power over the status of

the parties to a divorce action regardless of whether the resident or the non-resident spouse brings suit.

Power of the Colorado court over the persons is, clearly, stronger in the case here dealt with, than in the typical example in the paragraph before last. In that example, the court has power over one party only, the plaintiff. Here, jurisdiction over the persons is perfect as the defendant resides here, and as the plaintiff submits himself by invoking the Colorado court's powers.

The Colorado Supreme Court has never held that Colorado courts have no power to grant a divorce in this situation. The much quoted statement, "Residence is jurisdictional and cannot be waived by the parties" (Branch vs. Branch, 30 Colo. 499, 506) does not argue against the theory here developed. In the Branch case, the plaintiff sued in a county where *neither he nor the defendant* resided. It is in this context that this statement must be read and understood. It did not mean to, and does not, say that a non-resident plaintiff may not sue a resident defendant on grounds of cruelty committed in this state.