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DICTA

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VOLUME 24
1947

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The Denver Bar Association
The Colorado Bar Association
1947

FOREWORD

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(Denver Bar Association)

Volume 24

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DICTA

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MAY, 1947

No. 5

Calendar

- June 7—Colorado and Denver Bar Associations one-day institute on planning and administration of estates, Shirley-Savoy Hotel, Denver. Carl B. Rix, president of the American Bar Association, will be the speaker at the evening dinner.
- June 13, 14 and 16—Tenth Judicial Circuit annual conference, United States District Courtroom, Post Office Building, Denver. Program will be announced in June DICTA.
- June 25—Denver Bar Association annual picnic, Troutdale.
- July 1—Term of office of new officers of Denver Bar Association begins.
- Sept. 22-26—American Bar Association annual meeting, Cleveland, Ohio.
- Oct. 6—Denver Bar Association, regular monthly meeting, 12:15 P. M., Chamber of Commerce dining room.
- Oct. 16—District Judges' Association annual meeting, County Judges' Association meeting, District Attorneys' Association meeting, Board of Governors meeting, Broadmoor Hotel, Colorado Springs.
- Oct. 17-18—Colorado Bar Association annual meeting, Broadmoor Hotel, Colorado Springs.

Denver and Colorado Bar Associations Will Hold Institute June 7th

In the April issue of DICTA announcement was made of the one day institute of the Colorado and Denver Bar Associations to be held on June 7th at the Shirley-Savoy Hotel, Denver, and the evening dinner which will be addressed by Carl B. Rix, president of the American Bar Association.

The morning and afternoon sessions will consist of an institute on estate planning and administration. The following hypothetical estate will be the basis for the discussion:

John Isekore, a resident of Colorado, is a mining engineer, 50 years of age, whose family consists of his wife, Ada, 40 years old, an adopted daughter, Bertha, age 16, a son, Carl, 18, in military service overseas, and a son Donald, 21. Donald is married and John, the father, regards Donald's wife as one of the family.

John's estate consists of the following assets, all of which stand in his name, except as otherwise stated:

<i>Description</i>	<i>Value</i>
Family car	\$ 500
Family home	15,000
Rental property, a store, leased for five years from January, 1943, at \$100 per month payable in advance on the first day of each month.....	10,000
Note of Y for \$5000, due July 1, 1948, with interest at 5%, payable January 1 and July 1.....	5,000
\$2000 face value City of Denver general obligation bonds due January 1, 1950, interest 2%, payable January 1 and July 1.....	2,000
\$2000 face value Series E, U.S. Defense bonds, dated March 1, 1941, in name of John and Ada as co-owners	2,000
\$1000 face value, series G, U.S. Defense bonds, in name of John only.....	1,000
100 shares common stock, General Motors Corporation..	6,000
75 shares common stock, A. T. & T. Co.....	10,000
Six life insurance policies, each for \$5000, each in a dif- ferent company and all payable to wife, Ada, install- ments	30,000
Total	\$81,000

John is going to South America on business and he wishes to fix up his affairs so that they will be in the best possible shape if anything happens to him. He has no will.

The morning session will be devoted to a panel discussion of the most advantageous means of arranging John's affairs. Morrison Shafroth will act as moderator of the panel, which will be comprised of Edward King, dean of the University of Colorado Law School, Willson Hurt, professor at the University of Denver Law School, and Hugh McLean, Trust Officer of the Colorado National Bank. Among the objectives and problems to be discussed are:

- Support and maintenance of the widow during her life, possibly 30 years.
- Education of the children.

- Support and maintenance until the sons get started in business and the daughter marries.

- Help for Donald's widow.

- Prevention of dissipation of estate through extravagance or bad management.

- Eventual distribution of balance, if any, to John's descendents.

- The relation of principal and income probably available as compared to the needs of the family.

Possible modes of disposition, including: inter vivos gifts, joint tenancies; living trust, both revocable and irrevocable; life insurance trusts; a will both with and without a testamentary trust; a close family corporation.

In the afternoon, Horace N. Hawkins, Jr., will carry through the administration of John's estate as finally planned by the panel in the morning, after which T. Raber Taylor will "walk through" the state and federal income tax returns of the decedent and of the estate, pointing out the differences between the state and federal requirements. If time permits, he will also highlight some of the distinctions between the state and federal laws and regulations regarding federal estate and state inheritance tax returns. The entire afternoon session will be devoted to the practical application of the probate and tax laws rather than to a theoretical interpretation of the legal problems involved.

At the noon luncheon Judge C. Edgar Kettering will discuss the administration of estates from still another angle—that of the judge who is on the receiving end of the lawyer's efforts.

To open the day the Junior Bar Section will hold a breakfast meeting at 8:15 A.M.

And to bring the day to a climax, Carl B. Rix, president of the American Bar Association will be the speaker at the informal banquet to be held at the hotel in the evening.

Milton Shrednik's seven-piece string ensemble will furnish music at the dinner, and special entertainment will be by the "Men of the West" quartet.

DON'T MISS THE JUNE 7 MEETING.

"Who's Who—Women Lawyers" Soon To Be Published

Nearing completion is the new WHO'S WHO—WOMEN LAWYERS. Editor of this book is Laura Miller Derry, Louisville attorney, active practitioner, participant and office holder in local, national and international bar associations during the past ten years. She recently completed her term as President of the National Association of Women Lawyers and is now Director of that organization. For two years she has served as Recording Secretary of the Women Lawyers International Association. Kappa Beta Pi, oldest international legal sorority, recently conferred rare honorary membership upon Mrs. Derry at a ceremony in Washington.

Assembling names and addresses of the several thousand women lawyers in the United States was no easy task, because available lists were frequently incomplete. If any woman lawyer of this state has not received a questionnaire, she should contact the editor at 509 Kentucky Home Life Building, Louisville, Kentucky, at once.

New Officers of Denver Bar Association

The following new officers of the Denver Bar Association were elected for terms beginning July 1, 1947 at the annual meeting held on May 5, 1947:

Horace F. (Jack) Phelps, First Natl. Bank Bldg.....	<i>President</i>
Sydney H. Grossman, Security Life Bldg.....	<i>First Vice-President</i>
Foster Cline, E. & C. Bldg.....	<i>Second Vice-President</i>
M. B. Holt, Jr., Colorado Natl. Bank Bldg.....	<i>Trustee</i>
Stanley R. Johnson, E. & C. Bldg.....	<i>Trustee</i>

The nominating committee consisted of: Ernest B. Fowler, Percy S. Morris, Archibald A. Lee, Ernest L. Rhoads and R. Hickman Walker.

New Members of Denver Bar Association

The following persons were admitted to membership in the Denver Bar Association at the April 7, 1947, meeting:

Charles F. Cory	John S. Poyen
Peter J. Little	Robert C. Nihan
John H. Winchell	

The following persons were admitted to membership in the Denver Bar Association at the May 5, 1947, meeting:

Jack L. Graham	Justin D. Hannen
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Some Facts Concerning District, County, and Justice Courts in Colorado

By ALBERT E. SHERLOCK, Denver Chairman of the Justice Courts Committee, and STANLEY H. JOHNSON, Executive Secretary of the Judiciary Committee of the Colorado Bar Association.

Complete data is being compiled by the Judiciary Committee, with the help of the district and county chairmen, upon the district, county, and justice courts in Colorado. Although the extensive questionnaires have not all been returned, some interesting facts concerning these courts are here presented.

District Courts

The following tabulation, based upon the 1940 census, shows, as of that date, the counties contained within each judicial district, the number of judges for each district, the population for each county, and for each district, and the number of people in each county being served by each district judge.

DISTRICT COURTS BY POPULATION
1940 Census

Dist.	County	No. of Judges	Population		Per Judge
			County	District	
2nd	Denver	7	*328,647	328,647	46,947
8th	Boulder	2	37,483	138,567	69,283
	Jackson		1,798		
	Larimer		35,539		
	Weld		63,747		
10th	Crowley	2	5,398	97,839	48,919
	Otero		23,571		
	Pueblo		68,870		
4th	Cheyenne	2	*** 2,964	85,802	42,901
	Douglas		3,496		
	Elbert		5,460		
	El Paso		54,025		
	Kit Carson		7,512		
	Lincoln		5,882		
	Teller		6,463		
1st	Adams	2	22,481	84,530	42,265
	Arapahoe		* 25,915		
	Clear Creek		3,784		
	Gilpin		1,625		
	Jefferson		30,745		
7th	Delta	2	16,470	77,973	38,986
	Gunnison		6,192		
	Hinsdale		349		
	Mesa		33,791		
	Montrose		15,418		
	Ouray		2,089		
	San Miguel		3,664		
13th	Logan	2	18,370	66,264	33,132
	Morgan		17,214		
	Phillips		4,948		
	Sedgwick		5,294		
	Washington		8,336		
	Yuma		12,102		
12th	Alamosa	1	10,484	49,217	49,217
	Conejos		11,648		
	Costilla		7,533		
	Mineral		975		
	Rio Grande		12,404		
Saguache	6,173				

* Population of Westwood added to Denver, subtracted from Arapahoe.

*** House Bill 469, now pending, transfers Cheyenne County from the 4th to the 15th District.

Dist.	County	No. of Judges	Population		
			County	District	Per Judge
3rd	Huerfano	**2	16,088	48,457	22,228
	Las Animas		32,369		
11th	Chaffee	1	8,109	33,393	33,393
	Custer		2,270		
	Fremont		19,742		
	Park		3,272		
6th	Archuleta	1	3,806	33,160	33,160
	Dolores		1,958		
	La Plata		15,494		
	Montezuma		10,463		
	San Juan		1,439		
15th	Baca	1	6,207	30,957	30,957
	Bent		9,653		
	Kiowa		2,793		
	Prowers		12,304		
14th	Grand	1	3,587	19,198	19,198
	Moffat		5,086		
	Routt		10,525		
9th	Garfield	1	10,560	15,339	15,339
	Pitkin		1,836		
	Rio Blanco		2,943		
5th	Eagle	1	5,361	13,998	13,998
	Lake		6,883		
	Summit		1,754		

** Statute now provides for only one judge as soon as vacancy occurs.

The table indicates that the average population served by each judge is in round figures 36,000. There are therefore four districts, the Third, Fifth, Ninth, and Fourteenth, so far below this average that it might be thought any two of them could be served by a single judge. On the other hand the Eighth District, comprising Boulder, Jackson, Larimer, and Weld counties, is so far above the average as to indicate some need for relief.

However, there are factors other than population bearing upon the need for district judges. They are in a sense circuit judges, and the area they are required to serve and the actual number of trials are perhaps of greater importance. From a standpoint of area, also, the Eighth District would appear to need an additional judge.

On the other hand, area does not bear upon the question in Denver. It has been said that each of the district judges in Denver tries annually ten times as many cases as some of the judges in sparsely settled districts. The

state's metropolis attracts most of the criminal element. According to the Denver Probation Department two-thirds of the crime committed in the state takes place in Denver and two-thirds of the inmates of the penitentiary have been committed from the Denver District Court. Furthermore, most civil cases in the nature of mandamus by or against state officials, declaratory judgments, workmen's compensation, appeal from decisions of Public Utilities Commission and the like are tried there. Nevertheless, during the more normal period before the war, it cannot be said that the district judges in Denver were overtaxed or the dockets overcrowded. This would indicate that the average of 36,000 population per judge could easily be increased, providing the elements of serving an extensive area, or having a judge available for matters of course at a number of county seats, did not interfere.

These are some of the questions which the committee hopes can be answered when all the returns are in. In order to obtain a sound conclusion, the Denver committee for this court must analyze the facts obtained with care. For example, together with the number of trials by a court in a given county, the number of trial days consumed must also be considered, and also the fluctuations in the number of trials and trial days over the ten year period.

Returns are in for the district courts in a number of counties. Among them are Weld and Moffat. A comparison of these two counties is interesting. Weld is one of the counties in the Eighth District. It has a total population of 138,567, served by two judges. Moffat is one of three counties in the Fourteenth District, having a population of 19,198, served by one judge. Weld's population is 63,747, Moffat's 5,086. In 1946 there were 177 cases tried by the district judges in Weld, consuming 209 days; in 1938, 163 trials consuming 302 days. In Moffat in 1946, there were 76 trials requiring 45 days and in 1938, 55 trials requiring 47 days. Hence, although the ratio of population in Moffat to Weld is only 8%, the ratio of trial days utilized was 15% in the year 1938, or nearly double the time consumed per capita in Weld County.

Although the translation of the statistics by the committee will be difficult, they will surely show more clearly than any evidence previously available the judicial needs of our state. Once these facts are established, they may be kept current by a judicial council or similar body receiving annual reports from the clerks of court, as is now done in Michigan.

County Courts

The following tabulation shows the classification of the various counties, the salaries paid the judges and clerks of the county courts, and the county population as of 1940.

SALARIES COUNTY JUDGES AND COUNTY COURT CLERKS 1945 Statute

Classes of Counties			
County	Salaries Co. Judge	Salaries Clk. Co. Ct.	1940 Population
CLASS I.			
Denver	\$7,000.00	\$4,200.00	*328,647
CLASS II			
GROUP A			
El Paso	\$5,000.00	\$2,500.00	54,025
Pueblo	5,000.00	2,500.00	68,870
Weid	5,000.00	2,500.00	63,747
GROUP B			
Arapahoe	\$3,600.00	\$2,400.00	*25,915
Boulder	3,600.00	2,400.00	37,483
Jefferson	3,600.00	2,400.00	30,745
Larimer	3,600.00	2,400.00	35,539
Las Animas	3,600.00	2,400.00	32,369
Mesa	3,600.00	2,400.00	33,791
CLASS III			
GROUP A			
Adams	\$3,000.00	\$1,800.00	22,481
Fremont	3,000.00	1,800.00	19,742
Logan	3,000.00	1,800.00	18,370
Morgan	3,000.00	1,800.00	17,214
Otero	3,000.00	1,800.00	23,571
GROUP B			
Alamosa	\$2,400.00	\$1,700.00	10,484
Conejos	2,400.00	1,700.00	11,648
Delta	2,400.00	1,700.00	16,470
Garfield	2,400.00	1,700.00	10,560
Huerfano	2,400.00	1,700.00	16,088
La Plata	2,400.00	1,700.00	15,494
Montrose	2,400.00	1,700.00	15,418
Prowers	2,400.00	1,700.00	12,304
Rio Grande	2,400.00	1,700.00	12,404
Routt	2,400.00	1,700.00	10,525
Yuma	2,400.00	1,700.00	12,102

* Population of Westwood added to Denver, subtracted from Jefferson.

Classes of Counties			
County	Salaries Co. Judge	Salaries Clk. Co. Ct.	1940 Population
GROUP A		CLASS IV	
Baca	\$2,100.00	\$1,700.00	6,207
Bent	2,100.00	1,700.00	9,653
Chaffee	2,100.00	1,700.00	8,109
Costilla	2,100.00	1,700.00	7,533
Gunnison	2,100.00	1,700.00	6,192
Kit Carson	2,100.00	1,700.00	7,512
Lake	2,100.00	1,700.00	6,883
Montezuma	2,100.00	1,700.00	10,463
Teller	2,100.00	1,700.00	6,463
Washington	2,100.00	1,700.00	8,336
GROUP B			
Crowley	\$1,900.00	\$1,500.00	5,398
Eagle	1,900.00	1,500.00	5,361
Elbert	1,900.00	1,500.00	5,460
Lincoln	1,900.00	1,500.00	5,882
Moffat	1,900.00	1,500.00	5,086
Phillips	1,900.00	1,500.00	4,948
Saguache	1,900.00	1,500.00	6,173
Sedgwick	1,900.00	1,500.00	5,294
GROUP A		CLASS V	
Archuleta	\$1,800.00	\$1,200.00	3,806
Cheyenne***	1,800.00	1,200.00	2,964
Clear Creek	1,800.00	1,200.00	3,784
Custer	1,800.00	1,200.00	2,270
Douglas	1,800.00	1,200.00	3,496
Grand	1,800.00	1,200.00	3,587
Kiowa	1,800.00	1,200.00	2,793
Ouray	1,800.00	1,200.00	2,089
Park	1,800.00	1,200.00	3,272
Rio Blanco**	1,800.00	1,200.00	2,943
San Miguel	1,800.00	1,200.00	3,664
GROUP A		CLASS VI	
Dolores	\$1,500.00	\$1,000.00	1,958
Gilpin	1,500.00	1,000.00	1,625
Jackson	1,500.00	1,000.00	1,798
Pitkin	1,500.00	1,000.00	1,836
San Juan	1,500.00	1,000.00	1,439
Summit	1,500.00	1,000.00	1,754
GROUP B			
Mineral	\$ 600.00	\$ 400.00	975
GROUP C			
Hinsdale	\$ 400.00	\$ 400.00	349

** By House Bill No. 159 which has become law, Rio Blanco County has been moved from Class V to Class IV, Group A.

*** House Bill No. 469, now pending, transfers Cheyenne County from the 4th to the 15th district.

The county judges of the following counties are lawyers: Denver, El Paso, Pueblo, Weld, Arapahoe, Boulder, Jefferson, Larimer, Las Animas, Mesa, Adams, Logan, Morgan, Otero, Conejoh, Delta, Garfield, La Plata, Rio Grande, Bent, Lincoln, Pitkin.

Omitting Denver, the average population served by the county judge is 12,800, or about one-third the number served by each district judge. Denver is not comparable because, although only one judge presides there, others are continually called in for the trial of cases, claims, and the hearing of motions and other matters. Only 18 of the 62 remaining county courts try more than the average number of cases.

The returns from the county court questionnaires will show how many days supply judges were necessary in Pueblo, Weld, and El Paso, the top three after Denver in population, and in Group B of Class II, where the population exceeds 30,000. They will also show other matters of importance, such as the number of cases tried originally in the county court and again *de novo* in the district court.

It has been stated to the committee in letters received from the bar that the county courts cannot be combined with the district courts, if such a change should appear desirable, because the county judge is always available, and a district judge would not be unless one were provided for each county. It has also been said that the county court tries as many cases as the district court in the county. Returns from Moffat show that the county court tried 66 cases in 1946 as compared with 76 cases in the district court, and in 1938, 35 cases in the county court, compared with 47 in the district court. The returns for Weld County Court are not in.

In Hinsdale where the population was 349 there were five trials before the county court in 1942, consuming one trial day, and none in 1938, 1940, 1944, and 1946. On the basis of the present statute the judge would have been paid a salary of \$400 for each of these five years, or \$2,000, so that for his services alone these hearings would have cost the county \$400 each. During the same years the county court in Boulder, where the population was 37,483, tried at least 1,526 cases, treating each estate as one case. The judge received \$3,600 for each of these years, a total for the five years of \$18,000, or about \$12 a case for his services. Incidentally, he served outside the county 45 days during the three years 1942, 1944, and 1946 (no prior record) and was paid a statutory allowance of \$12 a day, comparable to his pay per trial at home.

La Plata County has a population of 15,494, close to the average for the state. It tried 1,235 cases in the five years, together with hearings exceeding that number. Its judge received a salary of \$2,400 or \$12,000 for the five years, or a cost for the judge's services alone of about \$10 a case. His rate of pay was less than \$7 a day.

It is worthy of note that there were no jury trials in the La Plata County

Court in those five years and only five jury trials in the five years in the Boulder County Court. Apparently, there must be considerable confidence in the integrity and judiciousness of the county judges in those counties.

The statistics on these courts, when complete, will develop a great many other matters of interest to the bar and public too numerous to mention here.

Justice Courts

No other courts in this country have received the attention that has been focused upon the justice of the peace courts in the past few years. It is time, indeed, that some analysis was made of them and corrective measures taken, for no other court dispenses justice to so many people. It is important that what is dispensed should be justice, and not something else, which may impress the average citizen with the unfairness and incompetence of our judicial system.

There can be no question that the system, devised for use in frontier days or in early years when transportation was slow, has serious faults. This is easily demonstrated by the action being taken in other states, selected at random, and by the comments of our own bar.

In Missouri such courts have been abolished and magistrates under supervision of superior courts substituted, according to population requirements. In Iowa the legislature passed a resolution that they should be abolished. The judicial councils in Ohio and Michigan have recommended their abolition or control with carefully planned substitute courts, and the California legislature has requested the council there to make a thorough investigation and report on the inferior court system.

The plea of convenience is made for them, but the counter argument is that it is better to have a lawyer paid by salary at all times available at the county seat, than a village mechanic, like the justice in Hinsdale County, who repairs cars and tries cases only during the summer season, and moves on to better climes for eight months of the year. A justice of this kind in the language of one commentator is likely, when you need him, to be hoeing his brother's potato patch ten miles away, or vacationing in New Orleans.

Some of the comments received from our bar are enlightening. Under our laws and constitution the county commissioners are to determine the number of justice precincts, but for every one established there must be two justices and two constables. They are to have such jurisdiction as the legislature bestows upon them, not exceeding \$300 in civil cases.

One county chairman reports: prior to 1933 there were several precincts, but no justice who was elected ever qualified except in three towns. The commissioners then reduced the precincts to two with the hope that the requisite number would qualify, but although justices were elected in 1936, 1940, 1942, and 1946, in No. 1 none of them qualified. Even in No. 2, where there had always been two justices, last year, though two were elected, only

one qualified and later resigned. The office should be abolished and matters handled by the county judge at the county seat.

In another county there are only two justices, both in one town. The justices elected in the other precincts all failed to qualify. In a third county, five precincts were reduced some years ago to two. There is only one justice in each, and one of those is about to go on old age pension and resign. It is impossible to get candidates. In still another county there are two justices in each of two precincts, one each in two others, and none who will qualify in the other seven. In another some of the precincts have had none for over twenty years. The chairman gives these reasons: there is no necessity for them in these modern days; no one wants the job because it pays little and is a nuisance; when a justice is elected, he fails to qualify. Often the income is not enough to induce the justice to pay \$10 for his bond.

Another reports there is only one justice in the county; the commissioners do not bother to fill the vacancies or cannot get anyone to act. Another states the court in one substantial town is operated on a very loose basis. The justice fails to report his fees to the county; very little justice is dealt out; the justice's principal occupation is that of bill collector; the chairman knows of only one occasion when a lawyer has appeared in that court.

Following are the statistics on the business in one justice court, showing a substantial increase, particularly in traffic cases, where the defendant is always guilty.

COUNTY "X"

Chart #1

Year	Age of J. P.	Civil Cases Tried	Jdmt. for Pltf.	Jdmt. for Def.	Dis-missed	Costs Col-lected	Fees Col-lected
1943	70	6	5	0	1	\$ 30.25	\$22.30
1944	71	8	6	0	2	39.55	33.45
1945	72	9	3	0	6	53.95	31.60
1946	73	27*	7	0	17	120.50	84.50

* one change of venue, one no service, one continued

Year	Criminal Cases Tried	Of Which Motor Vehicle There Were	Cases Actually Tried	Jdmt. for State	Jdmt. for Def.	Dis-missed	Costs Collected	Fines Collected
1943	13	7	13	10	0	3	\$ 90.00	\$ 225.00
1944	52	35	47	39	0	8	176.18	765.00
1945	54	42	54	52	0	2	265.82	1370.00
1946	121	56	100**	93	0	5	540.14	2680.00

** one change of venue, one withdrawn

Following are the statistics concerning the number of justices and police magistrates in the various counties:

JUSTICES OF THE PEACE BY COUNTY POPULATION
1940 Census

Name	Population	No. Justices	Occupation
Counties over 300,000 Population			
Denver	*322,647	2	Lawyers
Counties over 60,000 Population			
Pueblo	68,870	2	1 old age pensioner, 1 grocer
Weld	63,747	20	1 lumberman, 1 rancher, 1 hatcheryman 1 agriculturalist, 1 miner
Counties over 50,000 Population			
El Paso	54,025	6	1 lawyer, 2 laborers
Counties over 30,000 Population			
Arapahoe	* 25,915	8	2 are police magistrates, 2 retired, 1 housewife, 1 stockman
Boulder	37,483	22	1 housewife, 1 meat cutter, 1 farmer
Larimer	35,539	6	1 retired, 1 hardware man
Las Animas	32,369	44	1 farmer
Mesa	33,791	2	
Counties over 20,000 Population			
Adams	22,481	9	1 grocer, 1 farmer, 1 printer
Jefferson	30,745	8	1 clerk, 1 mechanic
Otero	23,571	8	1 painter, 1 news stand, 1 real estate, 1 teacher, 1 stenographer, 1 lawyer, 1 license examiner
Counties over 10,000 Population			
Alamosa	10,484	1	
Conejos	11,648	7	
Delta	16,470	5	1 farmer, 1 editor, 1 none
Fremont	19,742	3	1 real estate
Garfield	10,560	5	1 towerman for railroad
Huerfano	16,088	3	
La Plata	15,494	2	1 farm manager
Logan	18,370	2	
Montezuma	10,463	6	1 collector, 1 real estate
Montrose	15,418	3	
Morgan	17,214	4	1 police magistrate
Prowers	12,304	5	1 weighmaster
Rio Grande	12,404	3	1 bookkeeper, 1 ass't postmaster
Routt	10,525	4	3 are police magistrates
Yuma	12,104	3	1 insurance

* Population of Westwood added to Denver, subtracted from Arapahoe. Only 4 of 81 justices who responded to questionnaire are qualified as attorneys.

Name	Population	No. Justices	Occupation
Counties over 5,000 Population			
Baca	6,207	2	
Bent	9,653	2	1 carpenter; 1 to resign for old age pension
Chaffee	8,109	4	1 grocer, 1 miner
Costilla	7,533	7	1 miner, 1 insurance
Crowley	5,398	2	1 filling station operator
Eagle	5,361	6	1 clerk
Elbert	5,460	5	1 farmer
Gunnison	6,192	2	1 miser, 1 real estate and insurance
Kit Carson	7,512	2	
Lake	6,883	2	1 bill collector
Lincoln	5,882	4	
Moffat	5,086	2	1 barber, 1 painter
Saguache	6,173	3	
Sedgwick	5,294	1	
Teller	6,463	3	1 miner, 1 clerical
Washington	8,336	1	
Counties over 4,000 Population			
Phillips	4,948	4	1 teacher and farmer
Counties over 3,000 Population			
Archuleta	3,806	2	1 town clerk, 1 old age pensioner
Clear Creek	3,784	1	
Douglas	3,496	4	
Grand	3,587	4	1 merchant
Park	3,272	1	1 pool room operator
San Miguel	3,664	3	
Counties over 2,000 Population			
Cheyenne	2,964	2	
Custer	2,270	1	
Kiowa	2,793	4	
Ouray	2,089	2	1 druggist
Rio Blanco	2,943	3	
Counties over 1,000 Population			
Dolores	1,958	4	1 real estate and insurance
Gilpin	1,625	4	1 carpenter, 1 hotel operator
Jackson	1,798	1	1 abstractor and clerk dist. court
Pitkin	1,836	1	
San Juan	1,439	2	
Summit	1,754	0	
Counties under 1,000 Population			
Hinsdale	349	1	(May 1 to Oct. 1) Mechanic
Mineral	975	1	1 enforcement officer

COLORADO POLICE MAGISTRATES (P. M.)
(33 Counties)

County	Judicial District	No. P. M.	Location	Vocation
Alamosa	12	1	Alamosa	Freight clerk
Arapahoe	1	4	Littleton	None
			Englewood	JP
			Aurora	Unknown
			Deer Trail	Unknown
Archuleta	6	1	Pagosa Springs	Laborer-farm and saw mills
Baca	15	3	Springfield	1 is co. judge; 1 is JP and engaged
			Walsh	in real estate and insurance; 1
			Pritchett	farms and sells farm machinery
Bent	15	1	Las Animas	City clerk
Chaffee	11	2	Salida	JP and former farmer
			Buena Vista	Notary public, real estate
Clear Creek	1	3	Idaho Springs	JP, operates filling station
			Georgetown	Mayor, abstract business
			Central City	Clerk district court
Conejos	12	4	Antonito	Editor
			Manassa	Farmer
			Romeo	Carpenter
			La Jara	Barber
Costilla	12	none		
Dolores	6	2	Dove Creek	Unknown
			Rico	Unknown
Elbert	4	none		
El Paso	4	2	Colorado Springs	Lawyer
			Manitou Springs	Town clerk
Fremont	11	3		2 are JPs (1 also in insurance and
				real estate); 1 retired
Gunnison	7	2	Gunnison	Real estate and insurance
			Crested Butte	Coal miner
Huerfano	3	1	Walsenburg	JP (former barber)
Kit Carson	4	5	Burlington	Retired (former state repr.)
			Stratton	Retired
			Vona	Filling station operator
			Seibert	Unknown
			Flagler	Real estate broker
Lake	5	1	Leadville	Bookkeeper and bill collector
Larimer	8	4	Fort Collins	Retired
			Loveland	JP
			Estes Park	Town Clerk
			Berthoud	JP
Las Animas	3	1	Trinidad	Former railroad man
Moffat	14	1	Craig	JP—painter and decorator
Montrose	7	1	Montrose	Lawyer
Morgan	13	2	Fort Morgan	Retired sugar company employee
			Brush	Real estate and insurance
Otero	10	2	Rocky Ford	JP—real estate and insurance
			La Junta	Ex-barber, ex-farmer

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

*Of the Denver bar.

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 marital 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.

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