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Residence Requirements for Divorce in Pennsylvania

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One of the radical changes made by the Sales Act in the law of Pennsylvania is in the words required to constitute an express warranty, though our Supreme Court has been slow to recognize this fact.¹⁴

The present law of England was settled by the House of Lords' decision in *Heilbut v. Buckleton*.¹⁵ As Professor Williston has said, "That good old doctrine for the encouragement of trade, known as caveat emptor, has received no such support for many years."¹⁶ The stock was misrepresented to be that of a "rubber company." This was false but it was held that the representation did not constitute a warranty.

The Sales Act deals with many problems upon which the Uniform Stock Transfer Act is silent. The Sales Act made many changes in the common law rules as found in the Pennsylvania cases. The legislature should decide as to whether the common law rules or those of the Sales Act should be applied to sales of stock when the Uniform Stock Transfer Act is silent on the subject. Such decisions as that in the principal case are an evasion of the issue by a mere judicial declaration of what every student of the law knows to be incorrect.

It might be added that since the relationship of the parties in the principal case was that of broker and customer and the broker appears to have bought the stock from a third party for the plaintiff, the provisions of the Sales Act could not possibly be applied, for the act relates to the buyer-seller relationship and not the principal-agent relationship. Liability arose from disobedience, failure to buy what was ordered— not warranty. Even the one section of the act that includes stocks can not be invoked in controversies between a stock broker and his customer.¹⁷

Joseph P. McKeehan

RESIDENCE REQUIREMENTS FOR DIVORCE IN PENNSYLVANIA

This note is limited to a discussion of residence requirements for *divorce* and does not discuss the annulment of marriage.

There is no requirement that the parties to a divorce action must have been married within the Commonwealth; that the cause of action must have accrued in Pennsylvania; or that the parties must have been domiciled here when the cause of action accrued. The Pennsylvania Divorce Act provides that the proper courts shall have power to grant divorces "notwithstanding the fact that the marriage of the parties and the cause for divorce accrued outside of this Commonwealth,

¹⁴Penna. Bar Asso. Quarterly, June, 1929, page 17; 77 Univ. of Pa. Law Rev. 1036, (1929).

¹⁵1913 App. Cas. 30.

¹⁶27 Harvard Law Rev. 1, 13. (1913).

¹⁷C. Clothier Jones v. Adams, 98 Pa. Super. 246 (1930).

and that both parties were at the time of the occurrence of said cause domiciled without this Commonwealth * * * ."¹

STATE RESIDENCE REQUIREMENT

The Pennsylvania Divorce Act further provides that "No spouse shall be entitled to commence proceedings for divorce by virtue of this act who shall not have been a bona fide resident in this Commonwealth at least one whole year immediately previous to the filing of his or her petition or libel. The libellant shall be a competent witness to prove his or her residence."²

In *Heath v. Heath*³ where the libellant proved residence within the Commonwealth for eight years, but neglected to show if, or that, the eight year period included the year immediately preceding the filing of the libel, the court decided that it lacked jurisdiction.

The one year period dates back from the filing of the original libel, not from the filing of an amended libel. In *Barning v. Barning*⁴ the date of an amendment to the libel was not permitted to control where it would have made the date of the amendment, instead of the date of filing the libel, the time prior to which the year's residence was to be computed.

COUNTY RESIDENCE REQUIREMENT

The Act of June 10, 1935,⁵ provides that "All petitions or libels for divorce shall be exhibited to the court of the county where either libellant or respondent resides." The Pennsylvania courts have interpreted the word *resides* as meaning "bona fide residence,"⁶ and again as indicating "domicile,"⁷ but in any case to

¹Act of May 2, 1929, P. L. 1237, sec. 15, par. 1. A person who has acquired a bona fide residence in this state and actually resided here for a year may bring his or her action in divorce though the offending spouse never resided within the state and the cause of action arose out of the state. *Hilyard v. Hilyard*, 87 Pa. Super. 1 (1926).

²Act of May 2, 1929, P. L. 1237, sec. 16. This is taken from section 11 of the Act of Mar. 13, 1815, 6 Sm. L. 286, as construed by section 2 of the Act of May 8, 1854, P. L. 644, and section 2 of the Act of May 9, 1913, P. L. 191. See also section 1 of the Act of Mar. 9, 1855, P. L. 68.

³44 Pa. Super. 118 (1910).

⁴46 Pa. Super. 291 (1911).

⁵Act No. 128 of General Assembly of 1935, approved June 10, 1935. This is an amendment to the Pennsylvania Divorce Act of 1929 which provided that:

"All petitions or libels for divorce shall be exhibited to the court of the county where the libellant resides, except where the husband and wife shall be resident in different counties of this Commonwealth, and, while so resident, a cause of divorce shall arise, in which case the libellant, at his or her option may institute and prosecute proceedings either in the county of his or her own residence or in the county wherein the respondent shall be resident and the cause for divorce shall have arisen." Act of May 2, 1929, P. L. 1237, sec. 15, par. 2.

⁶*May v. May*, 94 Pa. Super. 293 at 294 (1928).

⁷*May v. May*, 94 Pa. Super. 294 (1928); *Davis v. Davis*, 91 Pa. Super. 354 (1927).

mean more than the popular conception of the meanings of the words "resides" or "residence." Physical presence alone, without a required mental state, does not suffice.

The position of our courts is exemplified, in what might be called an extreme case, in *Davis v. Davis*.⁸ Here the libellant, a resident of Philadelphia County, left his wife's home, swore to a libel in divorce, and shortly afterwards went to live, temporarily, in Bucks County, with friends. While the libellant was at his friends' home, his libel was filed in Philadelphia County; to which county, the libellant shortly afterwards returned. The court said:⁹ "There was nothing in the evidence which would warrant a finding that when the libellant went to stay with his friends in Bucks County, he had the *intention* of making that place his *permanent home, with domiciliary intent*. Having been domiciled in Philadelphia that domicile must be presumed to be continued until another sole domicile has been acquired by actual residence, coupled with the intention of abandoning the domicile of origin."¹⁰ To the same effect the court in *May v. May*¹¹ states: "Domicile is a jurisdictional requirement and is to be determined by the intention of the party conjoined with an actual residence, * * *."

*Del Vecchio v. Del Vecchio*¹² is authority for the proposition that removal from the county, after filing the libel, does not affect the jurisdiction.

There is no time requirement for residence in the county either by statute or court decisions.

BONA FIDE RESIDENCE

According to the Pennsylvania Divorce Law,¹³ in order to bring a libel in divorce, the libellant must have been a bona fide resident of the state for one year. What is meant by "a bona fide resident"? We must look to the courts for our definition.

It has been held that physical presence or residence for one year within the Commonwealth is not sufficient in itself to establish bona fide residence. This residence must be accompanied by a domiciliary intent which is not presumed but must be shown by affirmative evidence.¹⁴

On the other hand, in *Price v. Price*,¹⁵ it was held that when the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. Hence, residence for a year or more,

⁸91 Pa. Super. 354 (1927).

⁹91 Pa. Super. 354 at 362 (1927).

¹⁰Italics added.

¹¹94 Pa. Super. 293 at 298 (1928).

¹²21 Dist. 564 (Pa., 1912).

¹³See footnote 2.

¹⁴*Reed v. Reed*, 30 Pa. Super. 229 (1905); *Dulin v. Dulin*, 33 Super. 4 (1906).

¹⁵56 Pa. 617 (1893).

without a domiciliary intent is not sufficient; but neither is residence *with* domiciliary intent, if for less than one year.

The Pennsylvania Superior Court has defined domicile as "the place in which, both in fact and intent, the home of a person is established without any purpose to return to a former home; the place where he lives, in distinction from that where he transacts his business; the place where he chooses to abide, in distinction from that in which he may be for a temporary purpose; * * *."¹⁶

An example of very loose language is found in two opinions by Judge Orady, of the Superior Court of Pennsylvania, written within the space of two years. In *Reed v. Reed*¹⁷ the learned judge, in determining that the court had jurisdiction as required by the statute, concludes: "Her mode of living, whether at rent, at lodgings, or at the residence of employers or friends, was not material if her *domiciliary intention* CONJOINED WITH *residence* is made out."¹⁸ Since the statute requires "bona fide residence," the conclusion is inescapable that Judge Orady is defining that term. However, the very next year we find him saying in *Dulin v. Dulin*:¹⁹ "Our statutes and decisions require that it must affirmatively appear that there has been a clear intention to abandon a former residence and to make this State a permanent one with *domiciliary intent*, COUPLED WITH an actual *bona fide residence* for one year * * *."²⁰

The language of the two cases cited immediately above might have left the interpretation of the term "bona fide residence" in some doubt, but it is submitted that the language in *Starr v. Starr*,²¹ in conformity with *Reed v. Reed*,²² gives the true interpretation. The *Starr* case held: "Domicile is a matter of intention; residence is a physical fact, and the term bona fide residence means *residence with domiciliary intent* * * *."²³

The original domicile, however, is not lost by absence from the state, unless there is an intent to abandon it.²⁴

SEPARATE RESIDENCE OF HUSBAND AND WIFE

"The maxim that the domicile of the husband is the domicile of the wife was founded upon the theoretic identity of person and of interest between husband

¹⁶*Gearing v. Gearing*, 90 Pa. Super. 192 (1926); *Gearing, Jr. v. Gearing*, 83 Pa. Super. 423 (1924).

¹⁷30 Pa. Super. 229 (1905).

¹⁸Italics and capitals added.

¹⁹33 Pa. Super. 4 (1906).

²⁰Italics and capitals added.

²¹78 Pa. Super. 579 (1921).

²²30 Pa. Super. 229 (1905).

²³Italics added.

²⁴*Heath v. Heath*, 44 Pa. Super. 118 (1910); *Harrison v. Harrison*, 69 Pa. Super. 580 (1917); *Dulin v. Dulin*, 33 Pa. Super. 4 (1906); *Hunnings v. Hunnings*, 55 Pa. Super. 261 (1913); *Shaw v. Shaw*, 72 Pa. Super. 191 (1918).

and wife as established by law. It presupposes, from the very nature of the relationship, that the home of the one is the home of the other; * * *. Under *normal circumstances*, therefore, the husband's domicile determines that of the wife, because her home in fact follows his."²⁵

In the above-quoted paragraph, what does the court mean by "normal circumstances"? A careful perusal of the cases indicates that the husband's domicile determines that of the wife during cohabitation, and as long as the parties are intending to continue the marital relation though they may be separated from one another at times.²⁶ *Barning v. Barning*²⁷ held that even though a woman makes an express pre-nuptial agreement with her prospective husband that she will maintain her domicile in this state, if, after the marriage, she should go to the state of his domicile, his domicile determines hers, notwithstanding the agreement.

When the husband and wife become separated in two different residences, however, through the fault of either one, the husband's domicile no longer determines that of the wife.²⁸ It follows that the husband's domicile does not determine that of the wife for purposes of divorce when the parties are separated,²⁹ and that the wife must establish her own residence and domicile to give jurisdiction to the court. It is submitted then, that "normal circumstances" mean all cases except those in which the spouses are separated, and are either simply in a disharmonious state or are contemplating or seeking divorce.

A distinction, however, must be made here. Although the spouses are separated, the wife does not acquire a separate domicile unless she intends to abandon her husband's home and set up an independent home of her own.³⁰

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²⁵*Starr v. Starr*, 78 Pa. Super. 579 at 581 (1921). Italics added.

²⁶*Barning v. Barning*, 46 Pa. Super. 291 (1911); *Colin v. Reed*, 55 Pa. 375 (1867); *Reed v. Reed*, 30 Pa. Super. 229 (1905); *Hilyard v. Hilyard*, 87 Pa. Super. 1 (1926); *Betz v. Betz*, 103 Pa. Super. 306 (1931).

²⁷46 Pa. Super. 291 (1911).

²⁸*Colvin v. Reed*, 55 Pa. 375 (1867).

²⁹*Hilyard v. Hilyard*, 87 Pa. Super. 1 (1926); *Betz v. Betz*, 103 Pa. Super. 306 (1931).

³⁰*Starr v. Starr*, 78 Pa. Super. 579 at 582 (1921).