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Who is a Non-Resident Within the Attachment Laws of West Virginia?

Clara Dwight Whitten
West Virginia University College of Law

WHO IS A NON-RESIDENT WITHIN THE ATTACHMENT LAWS OF WEST VIRGINIA?—The defendant in March, 1926, went with her husband, who was ill, for a brief stay at Hot Springs, Arkansas, then to North Carolina, and from there to the Walter Reed Hospital in Washington where he died in April, 1927. Her apartment in Charleston, West Virginia was leased by the month in August, 1926. An attachment was issued against her estate in November, 1926, on the ground of non-residence. The Supreme Court reversed a decree sustaining the attachment. *Held,* that a debtor domiciled in the state, temporarily absent to attend sick members of family, is not a "non-resident" within attachment laws. *Kanawha Banking and Trust Company* v. *Swisher,* 144 S. E. 294 (W. Va. 1928).

What is the determining factor in deciding who is a non-resident within the meaning of the attachment statute of West Virginia which makes non-residence of defendant one of the eight grounds on which an attachment may be issued? *Barnes' Code* 1923, c. 106, §1, West Virginia, in accordance with the majority of the decisions holds that under the statute residence and domicile are not synonymous. For the purpose of attachment the defendant may have his domicile in one jurisdiction and his residence in another, actual residence or dwelling place as distinguished from legal residence being contemplated under the statute. *State, Use of Burt,* v. *Allen,* 48 W. Va. 154, 35 S. E. 990; *Andrews* v. *Mundy,* 36 W. Va. 22, 14 S. E. 414; *Keller* v. *Carr,* 40 Minn. 428; 42 N. W. 292; *Weitkamp* v. *Loehr,* 53 N. Y. Super. 79, 11 N. Y. Civ. Proc. 36; and *Long* v. *Ryan,* 30 Gratt. (Va.) 718. But see *Greene* v. *Beckwith,* 38 Mo. 384. From the cases it may be deduced that actual residence must be something more than a mere casual or temporary sojourn in a state. Under what conditions then does one become a non-resident? In *State, Use of Burt,* v. *Allen,* cited above, Judge Brannon in writing the opinion said there must be both the intent and the act to change a man from a resident to a non-resident, and that mere going away temporarily or without set purpose to abandon the former residence is not enough. Applying this principle, the court in the principal case reached the right conclusion as the defendant did not intend to abandon her residence in West Virginia her act of leasing her apartment by the month in August, 1926, may be construed as evidencing such intention. The court did not discuss that. It is well settled law that temporary absences for business or pleasure do not constitute a change of residence. *Lyon* v. *Vance,* 46 W. Va. 781, 34 S. E. 761. Just how far is this rule to be carried? In other words, is there a length of time beyond which a resident remaining absent from his state, although intending to return gives up his residence? Let us

suppose that in the principal case the defendant had travelled at various resorts and hospitals with her husband for five, or even ten, years and then he had died, the facts being otherwise the same. Would the holding have been the same, and if so would such holding have been in accordance with the spirit of the statute? Other courts have come to different conclusions on statements of facts somewhat similar to the facts of the principal case. In *Haggart* v. *Morgan,* 5 N. Y. 422, 1 Am. Dec. 55, the debtor had absented himself from New York for three years while attending a lawsuit in New Orleans. It was argued that his absence was merely temporary for the purpose of business, and was continued no longer than necessary to complete that business. The court held that he was a non-resident under the attachment laws. Also, in *Taylor* v. *Knox,* 1 Dall. 150, 1 L. Ed. 808, the defendant had moved to Philadelphia hiring a dwelling place there, and expressing an intention to always live there. About a year later, he sailed to England on receiving notice of the misconduct of a partner there. The next year the court handed down the decision that he was not an inhabitant within the attachment laws, although he maintained his dwelling place during his absence. It is generally said that attachment is allowed against a non-resident because when a debtor is absent from his usual place of abode and has abandoned it, service of process and ordinary procedure are prevented. *State, Use of Burt,* v. *Allen,* cited above. However, possibility or impossibility of serving process is not the final test, and the mere fact personal service may be made on a non-resident temporarily in the state does not prevent attachment of property. 26 A. L. R. 180, citing *State, Use of Burt* v. *Allen, supra.* It remains to be seen what West Virginia will hold where the absence of the debtor is prolonged. But, as it is the duty of the court to define residence under the statute, it should do so in accordance with the spirit of the attachment laws.

CLARA DWIGHT WHITTEN.