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Domestic Relations--Separation--Residence (McDonald v. McDonald, 241 App. Div. 457 (1st Dept. 1934))

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will be unjustly discriminated against by permitting the discontinuance it will be denied.[10]

The motion for leave to discontinue being addressed to the discretion of the court, the decision thereon will not be disturbed unless there was evident misapprehension of the facts or of the parties or an abuse of discretion on the part of the court.[11] In the case at bar the special circumstances and equities involved are such as to differentiate it from those cases where a discontinuance will not be permitted.

H. H. H.

DOMESTIC RELATIONS—SEPARATION—RESIDENCE.—This action is brought by the wife for separation from her husband on the ground of abandonment and failure to support. The parties were married in the state of Illinois and soon after came to this state and resided here sporadically for about fourteen months. Thereafter husband and wife removed to California and while there separated. Thereafter the wife came to New York and brought this action for separation. *Held,* wife could maintain an action against husband for separation and maintenance, where both parties had previously resided in the state for more than one year and wife was a resident at commencement of action. *McDonald* v. *McDonald,* 241 App. Div. 457, 273 N. Y. Supp. 217 (1st Dept. 1934).

Where marriage was consummated without the state [1] plaintiff can only maintain an action [2] in the state against a non-resident defendant [3] when the parties have "at some time" been residents [4] of

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[10] Van Alen v. Schermerhorn, 14 How. Pr. 287 (N. Y. 1856); Keene v. Keene, 189 N. Y. Supp. 284 (1921).

[11] Levey v. Levey, 169 App. Div. 966, 153 N. Y. Supp. 1125 (2d Dept. 1915); Crosley v. Fitzpatrick, 23 Weekly Digest 35 (1886).

[1] Simmons v. Simmons, 208 App. Div. 195, 203 N. Y. Supp. 215 (1st Dept. 1924).

[2] Barber v. Barber, 137 App. Div. 665, 122 N. Y. Supp. 452 (1st Dept. 1910).

[3] Bierstadt v. Bierstadt, 29 App. Div. 210, 51 N. Y. Supp. 862 (4th Dept. 1898); May v. May, 233 App. Div. 519, 253 N. Y. Supp. 606 (1st Dept. 1931); McColl v. McColl, 112 N. Y. Supp. 519 (1908).

[4] Perrin v. Perrin, 140 Misc. 406, 250 N. Y. Supp. 588 (1931) (a person is domiciled where he has his true, fixed permanent home and principal establishment, to which, whenever absent, he intends to return; there must be a union of residence with intent to establish a domicile but it may exist without actual residence). See also Kleinrock v. Nantex Mfg., 201 App. Div. 236, 194 N. Y. Supp. 142 (2d Dept. 1922) for interpretation of "residence."

the state for at least a year [5] and the plaintiff is a resident [6] of the state when the action is commenced.[7]

The interpretation of the statute given by the court permits a plaintiff who has lived in this state with her husband for one year at any time during their marital relation, no matter at what period and notwithstanding that they had spent almost their entire life [8] up to the time of the separation in another state such as in the case before us to take up a residence here and bring an action for separation in our courts.[9]

M. E. W.

ELECTION OF SURVIVING SPOUSE TO TAKE AGAINST WILL—PRE-REQUISITES TO VALID ELECTION—TERMINATION OF RIGHT TO ELECT.—Testatrix executed a will in 1931, by which she bequeathed and devised an estate in excess of $7,000. The sole legacy to her surviving husband was a bequest of $800. One week after the demise of the testatrix, her will was filed in court. Two days later the surviving spouse executed and acknowledged a notice of election to take against the will and delivered same to his attorney, to serve, file and record. On December 8, 1932, the will was admitted to probate and letters testamentary issued to the named executors on that date and on December 22d respectively. On March 21, 1933, the surviving spouse died, and two months later his attorney personally served notice of election on the executors and filed proof of service. *Held,* the surviving spouse must strictly perform the conditions of the statute [1] in order to make a valid election and his death before compliance destroys the right to elect. *In re Coffin's Estate,* 152 Misc. 619, 273 N. Y. Supp. 974 (1934).

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[5] Barber v. Barber, *supra* note 2.

[6] See *supra* note 4.

[7] N. Y. CIVIL PRACTICE ACT §1162, subd. 3.

[8] Katz v. Katz, 203 App. Div. 672, 197 N. Y. Supp. 307 (1st Dept. 1922).

[9] *Contra:* Elwell v. Elwell, 70 Misc. 61, 128 N. Y. Supp. 495 (1910), Greenbaum, J., interpreting the statute not to mean a residence at some time during the marital relation but a continued residence—one which must be at least one year and had not ceased up to the time of the separation.

[1] N. Y. DECEDENT ESTATE LAW (1929) §18, subd. 7: "An election made under this section shall be in lieu of dower, and must be made within six months from the date of issuance of letters testamentary or if letters testamentary have not been issued from the date of issuance of letters of administration with the will annexed, and shall be made by serving written notice of such election upon the representative of the estate personally or in such other manner as the surrogate may direct *and* by filing and recording a copy of such notice with proof of service in the surrogate's court where such will was probated. * * *" (Italics author's.)