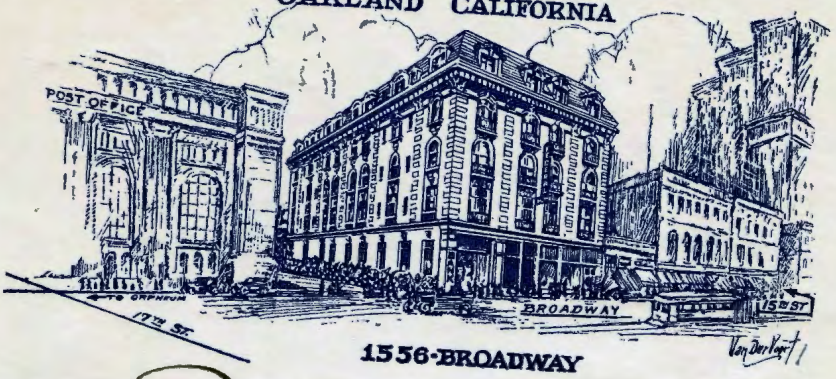
FREE GARAGE

LOUIS ABER, Lessee--Mgr.

HOTEL FEDERAL

OAKLAND CALIFORNIA



1556 BROADWAY

Judge Bartlett
Reno Nev-

Dear Judge:— I will make this brief- Knowing your tuntill time—

Mrs E. E. [redacted] is trying to make me some trouble- You know she is one who will never- forget or forgive an injury—

She fought her case out it seems in Carson city— to reopen [redacted] case tried to set aside your decision— She lost—

Now she is going at it in another way- She wrote to Mr [redacted] son—

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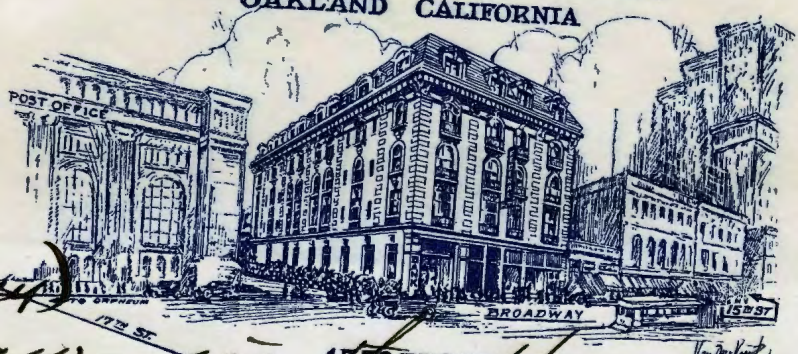

(Burkey) in-law- in 1570 BROADWAY Hamburg Pen. bank- and told him it would be to their advantage financially- to influence Mr Nat [redacted] to make a new settlement with her- a lump sum to be agreed upon by both he and she- property settlement or else- to increase her monthly allowance to a sum equal in proportion to the- increased value of his property to day— and to be given her so long as she live (not him as is) —

This letter was turned over to- Mr [redacted] Lawyer) and his lawyer wrote her- they moved take her letter under advisement

Now- she knows she has been so spiteful and vindictive to

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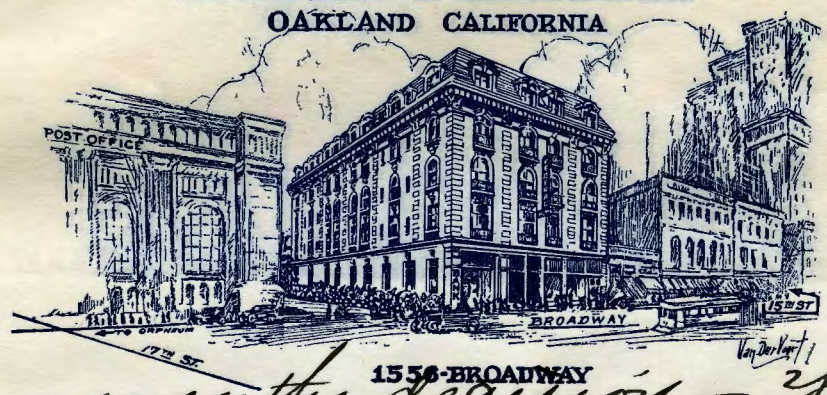

1556 BROADWAY

you — over the decision — you made — "50 per mo. so long as He lives" and dare not approach you, to intercede for her — she claims to me — you left her case open in this much — that if [redacted] properly — in Hamburg Penn — increased in value at any time — she was to be given more etc —

She ask me — to intercede for her — with you — (I being the only woman she knew — whom she thought might approach you — and intercede for her — age — helplessness — and loneliness — and failing eye sight etc etc — not enough to live on — etc

Well this, I absolutely refused to do for her — (my own mother) yes I would — but — Mr [redacted] — was very, very disagreeable to me from the day I refused — I hoped to cheer her up — but truly I believe the old girl is — "off" at

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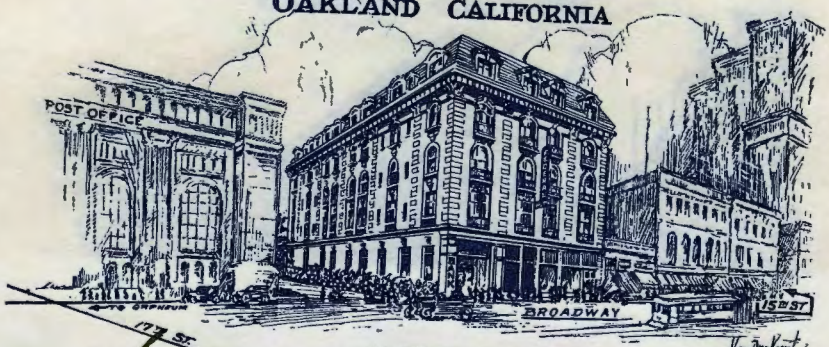

1536 BROADWAY

times — she swears — and jumps up and down — curses and pounds the fists — something fierce —

So I left at once — and when I unpacked my suitcase — found my — $25.00 new black sweater — was gone — out of my suit case — and as Mrs [redacted] + I occupied the same room — ask Mr Kirkley (by letter) to send a man down and get it + it was gone — somewhere

Say — today she wrote me a long dirty — contemptable letter — about extradition papers — her lawyers (Frame) and you know — he would like to do me dirt — (since the Hanna) case

I wrote Mr Kirkley today telling him I am sure that Judge Bartlett could + would speak well of me — as a woman even if I did have two divorces to my record in Reno —

I represent "Van Ulm Silk New York — and was on a selling trip in Reno — and

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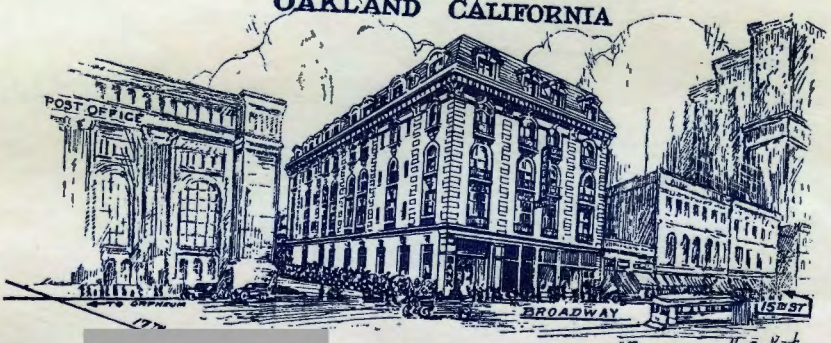
OAKLAND CALIFORNIA



1336-BROADWAY

as Mrs [redacted] had written so often to come— I went to be with her—for companionship more than convenience to my self—for I paid my way at her house—each week— and so sorry I went— now

She is crazy when she is mad— says "all is Christ that goes through her mill —— and that Reno laws made her what she is today— and she intends to stick in Reno— until she gets back what they took away from her— and that it is an art to learn to live—within the Law—

God forgive me for ever being offended at the awfull things she says & does— for she now is 70 yrs of age— and very childish & queer—

Thanks Judge for your kindness of "Kentucky"— Ruth Decoto

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

EMMA E. [redacted], : No. Dept. No.

Plaintiff, : Filed _____, 1924.

-VS- :

_____, Clerk.

NATHAN A. [redacted], :

Defendant. : By _____, Deputy.

BRIEF OF E. F. LUNSFORD AS AMICUS CURIAE.

Having been appointed as a friend of the court to consider the law as the same is raised and put in issue by the filing of the complaint in the above action, I have endeavored to approach a consideration of the points involved from a purely abstract standpoint in an earnest effort to reach a conclusion and submit the same to the court regardless of the merits of the controversy between the above parties except in so far as the same might become involved in applying what I consider to be the rule of law covering this particular proceeding. The complaint consists of much that might be considered verbiage and purely argumentative matter, but the evident purpose of the action is to set aside a decree of divorce obtained by the defendant here, plaintiff in that action on July 18, 1923, which said divorce was granted by the above court. The ground of attack upon the decree is based upon fraud alleged to have been committed upon the court and going to the jurisdiction which the court had over the subject matter; and in support of that theory it is alleged, in substance, that plaintiff falsely swore to a complaint alleging a bona fide residence within the jurisdiction, and also that he falsely testified to such a residence on the trial of the case. As before stated, there are assigned a

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number of particulars tending to show that the conduct of the defendant as plaintiff in the divorce action, was of such a nature as to impeach his testimony of a residence here in good faith, but the most that the court can do with these allegations is to simply treat them as argumentative, and not allegations of particulars in which the plaintiff testified falsely.

This reduces the whole case to one question, namely: can a decree be impeached for fraud extrinsic the record by showing that the plaintiff testified falsely to facts establishing his residence? While this is fraud extrinsic the record, never-theless it is intrinsic fraud in that it relates to the giving of false testimony on a matter material to the issue, because it must be presumed that the essentials of a bona fide residence were either expressly or impliedly found in favor of the plaintiff before the trial court entered the decree in his favor; certainly, if any of these essentials were lacking the court would not have had jurisdiction to grant the decree, and the presumption of law is in favor of the jurisdiction of the court.

The question of residence of a plaintiff in a divorce action is one of fact to be determined by the trial court.

Fleming vs. Fleming, 36 Nev. 135.
Merritt vs. Merritt, (Nev.) 160 Pac. 22.
Presson vs. Presson 38 Nev. 203.
Blakeslee vs. Blakeslee, 41 Nev. 235.

It therefore follows that before the court could have entered a decree in favor of the plaintiff it must have found as a fact contrary to the allegations of the complaint in the instant proceeding.

Having once found contrary to the plaintiff in this proceeding, the question naturally arises whether or not the same matter may again be investigated and determined, and this leads us to a discussion and consideration of the law upon this subject and to a brief discussion of the allegations of the complaint.

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No where in this complaint is it alleged that any facts were concealed by the plaintiff in the divorce action, but it is

simply alleged generally that his divorce complaint contained false allegations as to his residence and that he gave false testimony in support thereof; nor is it anywhere alleged that the defendant in the divorce action, who is the plaintiff in this action, was in any way imposed upon, or prevented from showing these very same facts which she now alleges, with but one exception, which I shall hereafter discuss.

In other words, from all that appears from this complaint, the plaintiff had ample opportunity in the divorce action to meet the testimony of plaintiff there and to show that the same was false. The only exception in this connection goes to the allegation that the plaintiff, in the divorce action, left the city, county and state immediately after the decree was entered and never since that time has been in the state; and this act of the plaintiff in the divorce action, is the only one alleged to have been unknown to the defendant at the time of the trial.

From all that appears, all of the facts alleged in this complaint, might either have been before the court in the divorce action, or the plaintiff had ample opportunity to present them in that action but failed to do so with the single exception of the fact that the defendant left the state immediately after the entry of the decree of divorce. The fact of his departure so soon after the entry of the decree being the only one pointed to as having been unknown to the defendant in the divorce action and plaintiff here, we might pause at this point to ascertain whether that fact would be sufficient to justify the court in this proceeding to set aside the divorce decree.

Our own Supreme Court, in the case of Whise vs. Whise 36 Nev. 16, in discussing the extent to which such a circumstance would affect the material issues in the divorce action, uses the following language:

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"The fact, if it be a fact, that Whise

> moved from the State of Nevada after the rendition of a judgment and of the filing of the decree could not, we think, be considered as newly discovered evidence that would affect the material issues of the case. Residence is a matter of intention, and has been generally so held. Both parties to this action had submitted themselves to the jurisdiction of the trial court, in which court there had been a trial and determination of all of the issues, and at the conclusion of the controversy either party had the right to go wherever he, or she, saw fit. Moreover, the act, or acts, of appellant in moving to another state, after the termination of the litigation could at best, be only considered as impeachment of his testimony given at the trial of the case, and then an impeachment by inference only; in fact, as shown from the motion itself, the defendant seeks only to use such evidence for the purpose of impeaching the testimony of the plaintiff at the trial."

So in the light of the language of our own Supreme Court, this allegation that [redacted] left the state immediately after the rendition of the decree is not the allegation of any fraudulent act sufficient of itself to vitiate the decree by entirely destroying his residence in this state, but it only argues the falsity of his residence, and by inference only does it impeach the same.

A case squarely in point on the proposition now under discussion is that of Reeves vs. Reeves 123 N.W. 869. The court there held that a motion to set aside a divorce which is based upon a finding of residence supported by evidence cannot prevail, on the ground that plaintiff left the state immediately after the decree was rendered, married, and took up a residence elsewhere, thereby indicating that her testimony as to domicile within the state was false.

If then, it is not sufficient in this proceeding for plaintiff to merely point to defendant's departure from this state immediately after he obtained the decree, we must assume that all of the other matters alleged in this complaint were either before the trial court or else plaintiff had an opportunity to at that time, have presented these same matters to the trial court.

From this it follows that the matters now set up by

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plaintiff are not matters extrinsic or collateral to matters examined into and determined by the trial court, and according to the great weight of authority such matters having been once examined into and determined, are now res judicata as to the two parties before the court in the divorce action.

The rule is very well stated in 19 C. J. 167, as follows:

> "Fraud or imposition is universally recognized as a sufficient ground for setting aside a decree *** , it may consist of perjury or false testimony given in favor of plaintiff, provided it relates to matters extrinsic or collateral to the matter examined and determined in the original divorce proceedings, otherwise, the perjury, with a few exceptions, does not constitute such fraud as justifies setting aside the decree, expecially where defendant had ample opportunity to meet the false testimony. *** "

There are two reasons given for this rule, namely:

(1) That there must be an end of litigation; and that when parties have once submitted a matter or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.

(2)) The judgment must be concocted in fraud, and the fraud must be actual fraud as contra-distinguished from a judgment obtained on false evidence.

Reeves vs. Reeves, supra
Kingman vs. Kingman 61 Ill. App. 134
Lieber vs. Lieber 143 S. W. 458

I have examined the case cited in support of the exception to the rule laid down in Corpus Juris, supra, and the general rule is simply further emphasized by that case because there the fraud consisted in concealing certain material facts

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from the court, and the defendant being an insane person, had no opportunity in the divorce action, to bring forward the matters alleged to have been concealed, to-wit: the existence of a bar to the second action.

This point was directly before the court in the Oregon case of Orr vs. Orr, 146 Pac. 964, and the court in disposing of the point, used the following language:

> "The only fraud attempted to be disclosed by appellant in the affidavits filed consist in seeking to show that the plaintiff testified falsely in the trial as to her residence in the state for the statutory time to entitle her to begin a suit for divorce. It has been held by this court, and the holding is abundantly supported by reason and authority, that a decree cannot be vacated upon the ground that it was obtained by the use of perjured testimony.*** "

Citing:

Friese vs. Hemmel (Ore.) 37 Pac. 458.

The Supreme Court of the United States, in the case of United States vs. Throckmorton, 98 U.S. 61, 25 L.ed. 93, in discussing this very same question refers to an earlier case and says:

> "But perhaps the best discussion of the whole subject is to be found in the case of Greene vs. Greene, 2 Gray 361, by Chief Justice Shaw. That was a bill filed by a woman against her husband for a divorce. The husband had five years before obtained a decree of divorce against the wife. And in her bill she now alleges that the former decree was obtained by fraud, and collusion, and false testimony, and she prays that this may be inquired into and that decree set aside, *** the Chief Justice says that the court thinks the point settled against the complainant by authorities, not specifically in regard to divorce, but generally as to consequences of judgments and decrees between the same parties. He then examines the authorities, English and American, and adds: 'The maxim that fraud vitiates every proceeding must be taken like other general maxims, to apply to cases where proof of fraud is admissable, But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissable; the party is estopped

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> to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted. 'It is otherwise, he says, with a stranger to the judgment, This is said in a case where the bill was brought for the purpose of impeaching the decree directly, and not where it was offered in evidence collaterally. We think these decisions establish the doctrine on which we decide the present case, namely: that the acts for which a court of equity will on account of fraud, set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

Continuing, and in the same opinion, the Supreme Court reasons:

> "That the mischief of re-trying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, *** would be greater, by reason of the endless nature of strife, than any compensation arising from doing justice in individual cases."

The whole subject is exhaustively dealt with by the author of the case note under the leading case of Graves vs. Graves 10 L. R. A. new series, at page 216 et seq.

In the Texas case of Moor vs. Moor, 63 S.W. 347, the rule was invoked that, to entitle a party to relief in equity, the perjury or fraud must consist of extrinsic acts not examined and determined in the former action.

Perhaps the leading case upon the subject is that of Reeves vs. Reeves cited supra. In that case the court discussed many leading authorities upon the question and the facts were so like those presented by this complaint that it would be hard to find an authority in support of any case more in point than the Reeves case is as applied to the instant proceedings. The grounds of attack were practically the same as those alleged in this complaint and in discussing them the court says:

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> "The argument of appellant's counsel

> is that the facts disclosed by the affidavits referred to show conclusively that, at the time of the trial and prior thereto, there was an entire absence of animus manendi on the part of the plaintiff and for that reason the court was without jurisdiction. It is a sufficient answer to this contention of appellant, that the question of domicile, which was before the trial court for determination as a question of fact, involved necessarily a consideration by that court of animus manendi as an element of domicile."

It is true that the method of remedy adopted in the Reeves case was by way of motion and the showing made by affidavit, whereas in the instant case this is a direct proceeding more in the nature of a bill in equity, but anticipating the contention of counsel that there might be a distinction between the two forms of remedy, I quote from the same opinion, as follows:

> "We fully concur with appellant's counsel that a court of equity has inherent power to vacate its own judgments when the same are procured through extrinsic fraud. But Mr. Bishop, in his work on Marriage and Divorce, Sec. 1577, in discussing this question says: 'A verdict rendered on insufficient or perjured evidence, *** is not fraudulent within the present doctrine. The adequate fraud is not quite definable, but it is some grave and serious scheming whereby the court is misled to the perversion of justice.' And it is held by many courts that, even in equity, a suit to vacate a judgment upon such grounds cannot be maintained, even in the absence of other statutory methods of review."
>
> Citing authorities.

In Pico vs. Cohn, (Cal.) 25 Pac. 970, the court points out the character of fraud which may render a judgment void or voidable, and says:

> "That a former judgment or decree may be set aside and annulled for some frauds, there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action, and we think it is settled beyond

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> controversy, that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; ***."

Applying the foregoing rules to the complaint before the court in this proceeding, we must conclude, first: that the question of the bona fides of the plaintiff's residence in the divorce action was a material issue in that action and was there examined into and determined by that court; that the false swearing alleged in this complaint went to the issue of residence and is therefore not a fraud in the sense that it was a false swearing to a matter extrinsic or collateral to the matters involved in and determined by the court in the divorce action.

This complaint therefore falls within the rule laid down by the authorities we have discussed and under those authorities which seemed to be the best reasoned, the matter set forth in this complaint must be held to be res judicata between these parties and the complaint therefore fails to state any grounds entitling plaintiff to equitable relief.

I have read the brief of plaintiff's counsel and do not believe that any of the authorities there cited have any application to the question raised by this proceeding. The authorities are all mere statements of the substantive law defining residence and they undoubtedly state the law in that respect.

The only case cited which deals with what to my mind is the only question presented by this proceeding is that of Pringle vs. Pringle 104 Pac. 135, and in that case the applicant moved within the statutory time and affirmatively showed that she was not served, and the case was heard upon the defendant's default. From this it follows that the applicant had no opportunity to meet the false statement in the affidavit of service.

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It is distinguished from the instant proceeding in that the complaint here makes no attempt whatever to show that the plaintiff had no opportunity of meeting the alleged false testimony as to residence. From the foregoing it is my opinion that the law is against the plaintiff in this proceeding and that the complaint should be dismissed.

Respectfully submitted,

E. F. Lunsford

EDWARD F. LUNSFORD
ATTORNEY AT LAW
F. & M. NAT'L BANK BLDG.
RENO, NEVADA

Filed _____, 1924.

_____, Clerk. No. 21,118.

By _____, Deputy.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

EMMA E. [redacted], PLAINTIFF.

--VS--

NATHAN A. [redacted], DEFENDANT.

DECISION.

(Findings Conf)

This action is brought to set aside a decree of divorce granted by this Court in July, 1923, upon the ground of fraud in that the residence of the successful party in the original suit had not been established in Washoe County, Nevada, in good faith. Supporting this claim it is alleged that almost immediately after the entry of the decree the party receiving it left Nevada for his former residence in Pennsylvania, where he has since remained, and where he had during his residence here owned property and kept a bank account.

The laws of Nevada require six months actual residence in one of the counties of the state before commencement of an action for divorce.

Under the allegations of the complaint in this action

it is proper for the Court to consider the record in the previous action, and this discloses the allegations of six months' residence and charges of cruelty; these allegations were challenged, trial was had, and the Court found that the evidence justified the conclusion that [redacted] had actually resided in Reno, Washoe County, Nevada, for the period of six months before commencing his action and that he had satisfactorily proved sufficient cruelty to entitle him to a decree, and the decree of divorce was accordingly granted.

"Actual physical presence within the County for the required period is the character of residence which is prerequisite and the basis of our Courts' jurisdiction. When this is established by evidence sufficient to satisfy the Court, and the cause of action is also held proved, decree follows, and the matter is determined, and our own and the Supreme Courts of other States hold that the fact that parties remove to other places at the conclusion of the controversy is not sufficient of itself to warrant setting aside the decree.

"It is adjudicated and settled and parties should not be put to the vexation of recurring litigation on matters found to have been fully complied with under the letter and spirit of the law.

"There should be an end to litigation, and when all matters necessary to the determination of a controversy have been decided by a Court of competent jurisdiction the rights of the parties are concluded; finis is written and the book closed.

"The present proceeding is on plaintiff's demand for the usual order of publication based upon defendant's present non-residence in Nevada, which demand is refused.

"It is so ordered.

"Dated this 21st day of November, 1924."

Geo. A. Bartlett

DISTRICT JUDGE.

BROWN & BELFORD
ATTORNEYS AT LAW
RENO, NEVADA

GEORGE S. BROWN SAMUEL W. BELFORD

Reno, Nev., Dec. 5, 1924.

Hon. Geo. A. Bartlett,
Court House,
City.

Dear Judge:

Jim Frame advised me today that he would file in the Supreme Court a petition for a writ of mandate, requiring you to enter an order of publication in the case of [redacted] vs. [redacted]. Inasmuch as the mandate will be directed to you, or to your court, I think it would be entirely proper for you to enter an order, of, if you prefer, to issue a request to counsel to represent your court in the hearing of this application. I think such a request should be made, or such an order entered, as a matter of precaution.

In connection with the presentation of the case to the Supreme Court, it has occurred to me that, when the alternative writ issues, a return should be made, setting up the proceedings in the former case, showing clearly the adjudication of the question of residence by your court, as one of the issues in that case, and then let the decision turn upon the sufficiency of this return, as a defense, coupling this with a demurrer to the petition itself. I think in this way the question will be presented squarely to the Supreme Court.

I would like, however, to have any suggestions you are willing to make.

Very truly yours,

Sam W. Belford

SWB:S.