IN THE SUPREME COURT OF THE STATE OF NEVADA.

FREDERICK [redacted],

Plaintiff and Respondent,

-vs-

No. 2774.

AUGUSTA [redacted],

Defendant and Appellant.

. . . . . .

PETITION FOR REHEARING.

NOW COMES the above named plaintiff and respondent and respectfully petitions the above entitled Honorable Court for a rehearing, upon the following grounds:-

1. An apparent misapprehension of the facts.

2. An apparent misapplication of the existing facts to the law.

3. An apparent misunderstanding of the conceded facts in the case.

4. An apparent lack of consideration of the established and adjudicated facts determined by the trial Court.

5. An apparent lack of consideration of the adjudicated fact of residence found by the trial court, which by law and fact determined, to the utmost requirement, a legal and statutory jurisdictional residence by the plaintiff.

6. An apparent misconception of the Nevada statutory law of residence as applicable to the case at bar.

7. An apparent misapplication of the previous adjudications of this Honorable Court to the established facts of the case.

8. Further, upon the ground, that if the final order of this honorable court, in the face of the established facts, is permitted to stand, such uncertainty will arise concerning the existing Nevada divorce law of residence as to make its application confusing and difficult.

9. And finally, and with great respect, the decision seems to be contrary not only to established principles of residence for all purposes, including divorce, but it appears to be in conflict with prior adjudications of this honorable court.

THE ESSENTIAL FACTS BRIEFLY STATED.

The plaintiff came to Reno, Washoe County, Nevada, with the intention to make Reno his permanent home and residence. He so testified, and the trial court so found. He remained in Reno, and was therefore corporeally and physically present therein, for the full statutory period of six months and more. This is conceded, and the trial court so found. He left Reno, after the expiration of the six months residential period, but only temporarily, with the full intention of returning and with no intention of abandoning his residence. He so testified, and the trial so found. He filed his divorce action a few weeks after his return to Reno.

THE CONTENTIONS FOR REHEARING.

The opinion states, among other things, the following: "It is conceded that the plaintiff had not been physically and corporeally present in the State of Nevada for the period of six

months next preceding the commencement of the suit." This statement as it stands, unexplained, and unqualified by existing facts, leads to misapprehension. A misunderstanding has evidently arisen because of the admission that the plaintiff after having been physically and corporeally present in the County of Washoe, State of Nevada, for the full residential period of six months and more and after having come to Reno with the intention of making it his permanent home and residence, did not immediately thereafter, without any intervening time, due to absence or otherwise, actually file his action. But even if the statement stands unexplained and unqualified, it evidences no departure from the requirement of the divorce statute of 1923, Ch. 214, P. 399, Sec. 221 quoted in the opinion. The first paragraph of the statute makes no reference to "physical or corporeal presence" but expressly states "or in which the plaintiff shall have resided six months before suit be brought." The last paragraph of the statute, quoted in the opinion, is the proviso clause; and this likewise makes no reference to "physical or corporeal presence." It provides expressly "that no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been a resident of the state for a period of not less than six months next preceding the commencement of the action." Therefore, if the plaintiff was a resident of Washoe County for the statutory period next preceding the commencement of the action, he was within the requirements of the statute.

The next vital consideration appears to be this:-

It is admitted the plaintiff was in Reno, physically and corporeally, for the full statutory period of six months. The trial court, after listening to the evidence, found his residence to be bona fide, having the requisite essentials of both intention

and action. This court has not presumed in its opinion to question this finding of fact by the trial court. The familiar cases of Blakeslee vs. Blakeslee, 41 Nev., 245, Miller vs. Miller, 37 Nev., 285 and Confer vs. Second Judicial District Court (Nev.) 234 Pac. 688, would probably preclude this honorable court from disturbing such a finding. At any rate the opinion assumes to adopt it, for no reference at all is made to it; so that in the condition of the record we have this established fact, namely, that the plaintiff, prior to the commencement of the action, was a bona fide resident of Reno, Washoe County, Nevada, for the statutory period of six months and that he was such a bona fide resident "next preceding the commencement of the action." Why is this conclusion logical and irresistible ? Because, having once established his bona fide statutory residence, he could only have lost it by actual or constructive abandonment; and this, the trial court found had never occurred. The fact of his absence, after having acquired his residence, was investigated through the evidence; and though it was established that he was away <u>after he had become a resident of Nevada for all purposes, including divorce</u>, yet the trial court found that this absence was only temporary, was not an abandonment of his Nevada residence, and that he was privileged as a bona fide statutory resident of this State to invoke the jurisdiction of our courts for a divorce. This finding being conclusive, he was therefore, we repeat, a bona fide statutory resident "next preceding the commencement of the action." With respect, we suggest, that this court is evidently confused over the necessity of corporeal physical presence during the period of acquiring or establishing residence and the absence of such necessity after the residence has been once acquired. True it is, that while acquiring a residence, physical

corporeal presence for the statutory time is essential, and in this respect the plaintiff is concededly and admittedly and clearly within the statute; but to what Nevada law or statute or adjudication may we be referred to sustain the contention that physical, corporeal presence is necessary after the residence has been once established ? There is none. We urge with confidence that there is no authority anywhere which either expressly or impliedly imposes conditions of residence after the statutory residence has once been acquired. The subsequent acts of a plaintiff may be scrutinized to inquire into the bona fides of a residence relied upon, but that question is not involved here. The trial court disposed of that in its findings and this court has not assumed, in its opinion, to dispute it; so that we have here an attempt to impose conditions subsequent, not even contemplated by the statute or by any adjudications in this or other forums of which we are aware.

This honorable court, in its opinion, declares as follows:- "In determining this question (of jurisdiction) we must decide if the word "resident," as used in the section of the statute quoted, means that a plaintiff must be physically and corporeally present in the county in which the action was instituted for the six months period, as contended by the defendant; or whether, as contended by the plaintiff, the fact that he had once established a residence by such presence, his absence for a time and return three weeks prior to instituting the the proceeding was sufficient to constitute him such a resident as is contemplated by the statute."

The above quotation is the premise upon which the opinion is based. It presumes to state the actual jurisdictional contention of the parties. Let us analyze it.

If this court has gathered from the briefs and arguments of respective counsel that the propositions above stated, actually and accurately present the contrary positions taken by the parties, then let us examine into just where this premise leads.

The defendant contends that the "word 'resident' as used in the section of the statute quoted, means that a plaintiff must be physically and corporeally present in the county in which the action was instituted for the six months period." It is respectfully submitted that the plaintiff in this action has complied literally in every detail with this contention of defendant. He was "physically and corporeally present in the county in which the action was instituted for the six months period." This was not only completely established by the evidence, but it has been always conceded. It having been conceded, and this court having declared it in effect to be a statutory definition of residence, how may the plaintiff be foreclosed of jurisdiction if he literally complied with it ?

Considering for a moment the plaintiff's contention as above outlined, we respectfully urge that the court in its declaration is in undoubted inadvertent error. We do not contend that the plaintiff having once established a residence by "such presence","his absence for a time and return three weeks prior to instituting the proceeding was sufficient to constitute him such a resident as is contemplated by the statute." What we do contend is, that the plaintiff having once acquired a statutory residence, his absence for a time, if he had no intention of abandoning his residence, had no effect at all upon it, at least for jurisdictional purposes. To use some of the expressions of the opinion, we are not attempting to "constitute him" a resident

after his return, but we are invoking a plain principle of law, that a residence having been once acquired can only be lost through well established act ot intention or both, as hereinabove referred to.

We seriously urge that the premise adopted by the court renders the opinion misunderstandable. What the court undoubtedly intended to base its opinion upon was the contention of the defendant that even though the plaintiff had acquired his six months statutory residence through corporeal,physical presence, act and intention, he failed to continue his corporeal physical presence up to a time next preceding the commencement of the action. But assuming that we have correctly stated the issue involved, where is there any requirement of the statute that in addition to a residence already acquired and maintained up to the very minute of filing the action, there should be continued physical presence. If a residence is once acquired as in this case, and not lost or abandoned, as in this case, does it not exist up to the commencement of the action ? If as admitted here, the plaintiff secured a six month's residence and held on to it and files his action while he is holding on to it, is he not "a resident of the state for a period of not less than six months next preceding the commencement of the action"? Where is the breach or break between residence and filing ? Where is the avoidance or evasion of the statute ? If the legislature intended to provide that after a residence of six months has been confessedly established, the plaintiff shall continue to remain personally within the jurisdiction up to the very minute of filing the action, why did it not so declare ? Certainly the statute quoted in the opinion does not so provide. There has been an apparent confusion between a temporary absence during the period

of acquiring residence and a temporary absence after the residence has been acquired.

The opinion of the court next quotes the statute defining "legal residence." Here again, we respectfully submit, the plaintiff is clearly and indubitably within every declaration or intendment of the statute. He was "actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed." He claimed his six months bona fide residence in Washoe County, Nevada, as a basis for invoking the jurisdiction of the court for divorce. The statute requires no more. He alleged his six month's residence in his complaint, and practice and procedure require no more. He based this allegation of his complaint upon physical and corporeal presence for the entire period, and he conclusively proved it, and the statute or law, requires no more. It was unnecessary for him either to allege in his complaint or prove that after having acquired a six month's statutory residence he was continuously present in Washoe County every day in addition up to the very filing of his complaint. We know of no court, anywhere, exacting this in a pleading or requiring it as evidence as a basis for taking jurisdiction. If this be the true intendment of the opinion, we respectfully petition that it be clarified through rehearing and further elucidation that there may be no existing doubt among the Nevada bar. But how could the court mean this, when the statute clearly provides that only the residence must exist and be established "next preceding the commencement of the action" and not the corporeal physical presence. And again further quoting from the statute cited in the opinion:- "provided, however, should any person absent himself from the jurisdiction of his residence with the intention in good

faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence". Will this court, after further reflection, actually hold that this provision of the statute has any bearing at all upon a person who has actually established his six months residence through corporeal, physical presence for the entire period of time ? Is it not clear that this statutory provision applies to those persons who have not acquired a residence, but who are seeking to do so and have interrupted the continuity of their physical presence by a temporary absence ? Suppose, as in this case, there had been no interruption and a residence was acquired, does this court intend to hold that because the plaintiff went away for a short time, without abandoning his residence, and then returned, he has lost his residence and must begin all over again ? If this be the intendment of the holding, then scores of divorce litigants under the present statute who repeatedly temporarily leave the jurisdiction, during the interim of service of process, after they have acquired a residence, are without a residence in Nevada when they return to take the witness stand. The seriousness of the matter as referable to divorce practice is clearly apparent. But this court has already determined this question in a case cited in the opinion in the case at bar. (Presson vs. Presson, 38 Nev. 203, 147 Pac. 1081). Before citing this case, the court reviews briefly the history of Nevada divorce legislation and states that of the purposes and reasons for the passage of the 1911 Act, "one purpose was to compel an actual corporeal presence in the county for a period of six months prior to the institution of a divorce action (Presson vs. Presson, supra) by those who came to the state to establish a residence for the purpose of instituting divorce proceedings."

It was not aimed at those who were permanent residents of years standing." May it be justly contended that the plaintiff in this case did not carry out the spirit, letter and purpose of this statute in every detail ? Quoting again from the opinion, did he not fully comply with "an actual corporeal presence in the county for a period of six months prior to the institution of (his) divorce action"? We have carefully reviewed the Preason case and we state with every confidence that there is not a holding, a conclusion or a citation in it, expressly adjudging or impliedly finding, upon which this court based its decision, that is in any particular contrary to what we understand to be the law or that contends or holds contrary to what we are contending for here. The facts of this case, showing a bona fide, six months, pure, unadulterated, undefiled and statutory residence, prior to the commencement of the action, are overwhelmingly conceded.

This court, in its opinion, then reviews further divorce legislation in Nevada, and concluding the first paragraph on page 6 thereof states, "In other words, it is the evident purpose of the language (of the subsequent amendment) not to require an aggrieved party, whose cause of action arose in the state, to be corporeally present during the entire six months next preceding the commencement of the action, but to require it of one whose cause of action did not so arise." Here again the court inadvertently misquotes the Statutes of 1923, by using the words "to be corporeally present during the entire six months next preceding the action." We repeat that the statute employs the words, "shall have been a resident of the state for a period of not less than six months next preceding the commencement of the action." And we again repeat that the plaintiff was a resident of

the State through intention and corporeal presence for a period of more than six months next preceding the commencement of the action. If, as the court holds in effect further on, that the "residence" in the case at bar must receive the construction which was given it by the court in the Presson case, namely, "that not only good faith, but actual corporeal presence was necessary to the establishment of such a residence as would give a court jurisdiction to grant a divorce," then, we again repeat that the facts in this case show, beyond question, the plaintiff's good faith and actual corporeal presence for the full six month's statutory period. Certainly, the Presson case does not hold that good faith and actual corporeal presence was necessary, after the residence was acquired. It holds that good faith and actual corporeal presence was necessary "to the establishment of such a residence. Manifestly, there is a radical difference between establishing a residence and having it. One seems to import a process of laboring to acquire something, while the other, deals with an object already possessed.

We have already discussed the obvious fact that the legislature omitted from the statute a requirement that corporeal physical presence was essential after the residence had been acquired. To require it without legislation after the residence has been completely established, seems not only plainly unjustified but candidly opposed to fundamental principles of the law of residence as already pronounced by this honorable court. The reasons for the omission are as clearly evident as the reasons for the inclusion within the 1923 Statute the words "shall have been a resident of the state for a period of not less than six months next preceding the commencement of the action." The legislature evidently wanted to acknowledge by statute the well-

recognized principle that a residence once acquired may be subsequently abandoned or lost. It did not propose that divorce litigants should come to Nevada, once acquire a residence, abandon or lose the residence, then return to Nevada and seek the jurisdiction of our courts upon the basis of the first residence, subsequently abandoned or lost. It did not propose to give a divorce litigant the privilege of acquiring a residence in Nevada, then leaving the state, abandoning the residence and taking up another in New York, only later to return and file an action on the first residence established. For that reason the legislature provided that the residence intended was the residence next preceding the commencement of the action. What other construction may logically be conceived, in the face of the plain expression that the residence must be next preceding and not the physical corporeal presence ? Certainly this honorable court will not establish the legal precedent that it has the judicial power to substitute one word for another in a legislative expression or set aside a clear pronouncement of the legislature.

While, of course, the conclusion of the court is a serious finding for the plaintiff and respondent in the case, yet we are especially eager that a rehearing may be granted to eliminate if possible an expressed confusion among many members of the Nevada bar as to its effect upon and application to existing divorce practice and procedure. The definition of "residence" has been wholesomely expressed in the many adjudications of this honorable court. The law seemed well defined and the practice in divorce litigation, established on a fairly certain basis. But if the construction be placed upon the Court's present opinion be that the acquirement of a bona fide residence is not sufficient to confer jurisdiction, but there must be corporeal physical pres-

ence afterward; or that a bona fide residence is actually forfeited for purposes of jurisdiction, even after it be acquired, if the plaintiff leave the jurisdiction for two or three days or weeks and later comes back and files his action; or that the statutory words "shall have been a resident of the state for a period of not less than six months next preceding the commencement of the action," mean "shall have been corporeally and physically present within the state for a period of not less than six months next preceding the action"; or that "corporeal and physical presence" is synonymous with "residence", irrespective of "good faith" and "intent," which seem to be essential ingredients of "residence"; or whether the courts are privileged under well established principles, to substitute new words of well defined meaning for a statutory word of equally well-defined, but different meaning; or whether a finding of fact of "residence" by a trial court may be overruled by this honorable court, without reference or opinion, irrespective of the previous adjudications of this court - - - then it is respectfully submitted that the opinion in the instant case should be further considered by a rehearing, that the situation may be clarified and that the divorce practice in this state may be continued, without confusion, upon a well-established and well-defined legal basis.

Respectfully submitted,

Attorneys for Petitioner and Respondent.