SHELTON *v.* SHELTON.

Opinion delivered January 27, 1930.

EXECUTORS AND ADMINISTRATIONS.—Under Crawford & Moses' Dig., § 5, providing that letters testamentary or of administration shall be granted in the county in which the testator or intestate resided, *held* that letters of administration should be granted in the county in which an intestate died and where he resided at the time of his death, although he had lived there only four or five weeks; and the probate court of another county had no jurisdiction to issue letters of administration on his estate.

Appeal from White Circuit Court; *W. D. Davenport,* Judge; affirmed.

STATEMENT OF FACTS.

This action was brought by appellee, appointed administratrix of the estate of her husband, Elmer C. Shelton, deceased, by the probate court of Monroe County, to have the letters of administration issued to appellant, the father of her deceased husband, by the probate court of White County, revoked and canceled, it being alleged that the deceased was a resident of Monroe County at the time of his death there, and that the letters approved by the probate court of White County were void, the deceased never having resided in that county, nor being in possession of any real estate therein. It was also alleged that appellant was a man of such character as rendered him unfit to discharge the duties of administrator, and his removal and cancellation of the letters as such was prayed on that account.

It appears from the record that deceased, Elmer C. Shelton, was killed accidentally in Monroe County, while he and his wife were living and boarding at Brinkley, where he had been at work 4 or 5 weeks in the line of his regular employment. He was buried at Bradford, in White County, where the family had formerly lived. The appellant, father of deceased, was divorced from his mother some years before, and the homestead, the house and lot, was vested in their children, the deceased and his sister, subject to the life estate of their mother, to whom

the custody of the children was awarded. They continued to live at Bradford until about two years before decedent's death, and about one year before his coming of age, when he left home to take employment with the Arkansas Power & Light Company and never returned to reside there. He later married at Stuttgart, in Arkansas County, where his wife, appellee, resided with her mother, and has continued to reside since his death. He followed his employment with the Power & Light Company thereafter, taking his wife with him to the different places out of which he worked in his employment. They had been at Brinkley in the boarding house for 4 or 5 weeks during his service near there, and where he was accidentally killed. His mother, shortly before his death, had moved from the home place at Bradford, closing the house there, to Little Rock, where she lived at the time of his death, and still continues to reside. Appellant lost his own farm in White County, and has lived for several years on his wife's farm in Jackson County, where he still lives. He went to the home of appellee's mother on the day after his son's burial, arriving about 11 o'clock at night, had appellee awakened by her mother, and procured her signature to a letter waiving all her rights to administer on the decedent's estate, with a request that letters be granted to him. She was pregnant at the time, expecting her baby to be born in July; had fainted during that day, and was in a highly nervous condition. She asked appellant before signing the release whether he was going to administer the estate for her benefit, and told him about the expected birth of her baby. Upon noticing the mention in the newspaper, a day or so afterwards, of the suit being brought for damages for the death of the decedent by appellant as administrator, in which suit no mention was made of the expected unborn child, she immediately filed objection with the probate court of White County, which had issued letters of administration to appellant, and continued to resist his appointment until the letters were approved by the probate court. She

procured letters of administration to be issued to her by the probate court of Arkansas County, and later had letters regularly issued to her by the probate court of Monroe County, and brought the suit for the removal of appellant. The probate court of White County deciding the case against her, she appealed to the circuit court, where much testimony was also introduced about the character and reputation of appellant, and judgment was rendered in her favor, finding the decedent was a resident of Monroe County at the time of his death, and the letters of administration issued to appellant void, as without the jurisdiction of the probate court of White County. The court also found that appellant was not a suitable person to administer upon the estate, if the court had had jurisdiction to make the appointment, adjudged the letters void and revoked them, adjudging the appellant an unfit and unsuitable person to administer upon the estate, and removed him as such administrator, canceling and revoking the letters, and this appeal is from that judgment.

Miller & Yingling and *Tom W. Campbell,* for appellant.

F. E. West, Geo. W. Emerson, W. R. Donham and *Culbert L. Pearce,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in holding that the probate court of White County was without jurisdiction to appoint appellant administrator of the estate of Elmer Shelton, deceased, and also in adjudging him not a suitable person to act as administrator, and his removal as such and revocation of his letters on that account. Our statutes, § 5, C. & M. Digest, providing where letters of administration shall be granted, reads:

"Letters testamentary and of administration shall be granted in the county in which the testator or intestate resided; or, if he had no known residence, and the lands be devised in the will or the intestate die possessed of lands, such letters shall be granted in the county where the lands lie, or one of them if they lie in several coun-

ties; and, if the deceased had no such place of residence and no lands, such letters may be granted in the county in which the testator or intestate died, or where the greater part of his estate may be."

This court held in *Groschner* v. *Winton,* 146 Ark. 520, 226 S. W. 162, letters issued by the probate clerk of Sebastian County appointing an administrator of decedent, who had not resided nor died in that county, void. In *Krone* v. *Cooper,* 43 Ark. 547, the terms "resident" and "nonresident," used in the provisions of our statute governing attachments, were defined. In that case the court held, notwithstanding the fact that the debtor had a home or domicile in St. Louis, Mo., where his family resided, and which he was in the habit of speaking of as his home, that he was a resident of Walnut Ridge, this State, where he spent about three-fourths of his time conducting a partnership contract business in connection with his partner. It was there said: "We may conclude from the cases that, in contemplation of the attachment laws, residence implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an understanding all the while to return at some time or other to the principal domicile; but so difficult is it found to provide a definition to meet all the varying phases of circumstances that the determination of this question may present, that the courts say that, subject to the general rule, each case must be decided on its own state of facts." See also *Jarrell* v. *Leeper,* 178 Ark. 8, 9 S. W. (2d) 778.

In *Smith* v. *Union County,* 178 Ark. 540, 11 S. W. (2d) 455, this court held, in construing the statute providing for the listing of property for taxation, (§ 9890, C. & M. Digest): "Residence, as used in § 9890, Crawford & Moses' Digest, means the place of actual abode, and not an established domicile or home which one expects to return to and occupy at some future time." The same construction was placed upon the word "residence" under the taxation laws as had been given it under the attach-

ment laws of the State. It will be seen from these cases, residence and domicile are not to be held synonymous; that a man may have a residence in one State or county, and he may be a nonresident of the State of his domicile in the sense that the place of his actual residence is not there. Conceding without deciding that decedent's residence followed that of his mother, into whose custody he was committed upon the divorce granted their parents, the undisputed facts show that he left this residence about two years before his death following his employment, wherever it required his residence and presence; that he afterwards married in Arkansas County, and, after his marriage and coming of age, continued to follow his employment and reside with his wife wherever it required his presence. That he had resided at Brinkley, in Monroe County, in a boarding house, it is true, for 4 or 5 weeks, where his presence was required by his services to his employer, and that he died in that county. He had not established any other residence or home after he in fact left the home of his mother and was married, except as stated; nor did he thereafter return to his old home to reside, and from which his mother, who owned a life estate therein and the right to possession thereof, had removed before his death.

The court correctly held that the decedent resided at Brinkley, in Monroe County, at the time of his death, consequently the probate court of White County was without jurisdiction to issue letters of administration upon his estate, and the court did not err in holding said letters void.

This case is not like *Easterling* v. *Farrell,* 178 Ark. 937, 12 S. W. (2d) 889, relied upon by appellant as in point and controlling here. There the undisputed testimony showed that decedent had married and established a domicile, or home, in another county after leaving the home of his father, and it was held that, for the purpose of administration on his estate, the home so established was his residence, in the absence of proof of his having estab-

lished another residence in a different State, and that the burden of proof rested upon the one who sought to have the letters of administration granted to show that he was not a resident thereof when he died.

Having come to this conclusion, it is unnecessary to determine the other point raised relative to the correctness of the court's holding upon the unfitness of the administrator.

Finding no error in the record, the judgment is affirmed.