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courts hold that the decree of a court giving custody of children is not binding upon a foreign court to any degree.[3] However, in one of these cases, it appears that the circumstances have changed since the foreign decree was rendered, and that the welfare of the child prompted the court to decree the custody of the children to a different party.[4]

In cases where the custody of children is granted by one court, and that decree is sued on in a foreign court, the decree does not necessarily have to be followed in the foreign court if the circumstances have changed. But the first decree should not be completely ignored, as is intimated by the minority view. As a matter of comity, each state should recognize the decree of other courts as conclusive of the rights of the parties to the custody of the children unless it clearly appears that the welfare of the children would be bettered by granting custody to some other person.

ROBERT SPRAGENS

MANDAMUS TO COMPEL A CHANGE OF VENUE

It is not uncommon to find instances where a party has petitioned for a writ of mandamus to compel the lower court to grant a change of venue, when such change had been denied upon application. It is the purpose of this note to discuss the decisions upon the matter under the various circumstances in which the question has arisen.

In the case of *Gailbraith* v. *Williams*,[1] Gailbraith—a defendant in an action in a justice's court—moved for a change of venue. Williams, the justice, overruled the motion and proceeded to try the case. Gailbraith then petitioned the circuit court for mandamus to compel Williams to grant the change. Williams' demurrer to the petition was sustained, and on appeal the decision was affirmed. The court of appeals, in upholding the circuit court, based its decision upon the fact that Gailbraith had not set out sufficient

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Larson v. Larson, 190 Minn. 489, 252 N. W 329 (1934), Haynie v. Hudgins, 122 Miss. 838, 85 So. 99 (1920), Barrett v. Barrett, 79 S. W (2d) 506 (Mo. App. 1935), Nipp v District Court, 46 Mont. 425, 128 Pac. 590 (1912) Turner v. Turner, 86 N. H. 463, 169 Atl. 873 (1934), Dixon v. Dixon, 76 N. J. Eq. 364, 74 Atl. 995 (1909), Mylius v. Cargill, 19 N. M. 278, 142 Pac. 918 (1914), Ansorge v. Armour, 267 N. Y. 492, 196 N. E. 546 (1935) Gaunt v. Gaunt, 160 Okla. 195, 16 P (2d) 579 (1932), Griffin v Griffin, 95 Ore. 78, 187 Pac. 598 (1920), Kenner v Kenner, 139 Tenn. 211, 201 S. W 779 (1917) Oldham v. Oldham, 135 S. W (2d) 564 (Tex. 1939), Cooke v. Cooke, 67 Utah 371, 248 Pac. 83 (1926), Ex parte Penner, 161 Wash. 479, 297 Pac. 757 (1931), Linch v. Harden, 26 Wyo. 47, 176 Pac. 156 (1918).

[3] Stapler v. Leamons, 101 W Va. 235, 132 S. E. 507 (1926), In re Alderman, 157 N. C. 507, 73 S. E. 126 (1911), Vetterleins' Petition, 14 R. I. 378 (1884).

[4] Stapler v. Leamons, *supra* note 3.

[1] 106 Ky. 431, 21 Ky. L. Rep. 79, 50 S. W 686 (1899)

facts to entitle him to the change and also upon the fact that mandamus does not lie to control the judgment of one vested with a discretionary power.

The writ of amandamus is an extraordinary writ and may be used to set the court in motion, but it cannot be used to control the actions or judgment of the court.[2] Consequently it is logical to assume that the courts would refuse to grant mandamus to compel a change of venue since, as a general rule, the refusing or granting of the change involves discretion or the exercise of judgment on the part of the court.[3]

However, in *Fish* v. *Benton*,[4] the court said:

> "This court has repeatedly held in respect to this question, and such is now the well settled rule, that it will not disturb the decision of the trial judge, either in granting or refusing a change of venue, unless it was based on some ground not authorized by statute, or amounted to an abuse of discretion."

The view expressed in the case of *Fish* v. *Benton* is similar to that of *State ex rel. Merritt* v. *Superior Court*.[5] In the *Merritt* case the court, in reviewing a motion for change of venue, said:

> "When the evidence is clear, unconflicting in the essentials, and points unerringly to one result, to refuse to follow it is what the law denominates an abuse of discretion, such as justifies this court in taking cognizance of the matter."

Therefore, though it is held that the granting of a change of venue is a matter of discretion and cannot be controlled, the court will nevertheless compel the judge to grant the change when there has been an abuse of the discretion.[6] The most difficult problem involved is to determine whether there has been an abuse of discretion or whether it has been properly used. In *State ex rel. Schmidt* v. *Nevins*,[7] the plaintiff made a motion for a change of

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[2] Cassidy, Auditor's Agent v. Young, County Judge, 92 Ky. 227, 13 Ky. L. Rep. 512, 17 S. W 485 (1891), Lyle et al. v. Cass, Circuit Judge, 157 Mich. 33, 121 N. W 306 (1909) (A cardinal principle in mandamus is that judicial action will not be reviewed. We may compel a judicial officer to proceed, hear, and decide; but we can neither dictate his determination in advance nor review it after it is made), Glazier v. Ingham, Circuit Judge, 153 Mich. 481, 116 N. W 1007 (1908), 2 SPELLING, INJUNCTION AND OTHER EXTRAORDINARY REMEDIES (1893) § 1394.

[3] Louisville Times Co. v. Lyttle, 257 Ky 132, 77 S. W (2d) 861 (1934), Rothenburger, Justice Peace v. Dix, 254 Ky. 107, 71 S. W (2d) 30 (1934), Winfrey v. Benton, 25 Okla. 445 (1910), State ex rel. Beffra v. Superior Court for Whatcom County, 3 Wash. (2d) 184, 100 P (2d) 6 (1940).

[4] 138 Ky. 644, 646, 128 S. W 1067 (1910).

[5] 147 Wash. 690, 267 Pac. 503, 505 (1928).

[6] Keely v. Superior Court of Nevada County, 26 Cal. 213, 146 Pac. 526 (1914) (Prohibition to prevent a change), Weaver v. Wilson, 112 Kan. 417, 211 Pac. 142 (1922), Greer v. Commonwealth, 111 Ky. 93, 63 S. W 443 (1901).

[7] 180 Wash. 356, 39 P (2d) 990 (1935).

venue, which motion was denied. He then applied for a writ of mandamus to compel the judge to change the venue. The writ was denied because there was no abuse of discretion, but the court said:

> "Where discretion, soundly exercised, leaves off and arbitrary or capricious conduct begins, is difficult to say. Essentially it must be determined from the record made in each case."

In other instances the courts have held that the granting or refusing of a change of venue was a ministerial duty and that no discretion was involved, because of the statute that governed the matter. Therefore, they held that the matter was subject to review and reversal upon appeal.[8]

From the preceding discussion it would seem that the courts regard the granting or refusal of a change of revenue as a matter for the discretion of the trial court. Therefore, the appellate court refuses to grant mandamus to compel the change, but makes an exception when it feels that the discretion has been abused. However, while the courts base their refusal to act upon the fact that there is a discretion to be exercised, it has been suggested that the existence of another form of relief—that of appeal—is probably the true basis for denying the mandamus.[9]

In the case of *Talley* v. *Maupin*[10] the court said:

> "Mandamus will not lie to compel a justice to grant a change of venue, for the reason that the party making such application has a plain and adequate remedy at law by bill of exceptions and petition in error."

In another case a justice of the peace had refused to grant a change of venue. A statute of the state provided that it was the duty of the justice to grant the change when it appeared from the affidavit that there was bias and prejudice. Upon petition to the higher court for mandamus the court ruled that the justice was to determine the question of bias and prejudice, and that this was a judicial function subject to correction on appeal.[11] Other courts have followed this line of reasoning and have refused to grant the mandamus when the remedy by appeal was adequate.[12]

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[8] Ex parte Chase, 43 Ala. 303 (1869) (Statute gave right to a change and the court said that the granting of it was not an exercise of discretion), Marshal v. Sitton, 68 Okla. 175, 172 Pac. 964 (1918) (A statute provided for a change of venue upon proper application and the court said there was no discretion exercised in granting it).

[9] HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896) § 183.

[10] 64 Okla. 196, 166 Pac. 734 (1917)

[11] Bolen v. Quihuis, 26 Ariz. 356, 225 Pac. 1110 (1914).

[12] Clark v. Minnis, 50 Cal. 509 (1875), Spacek v. Aubert, 92 Kan. 677, 141 Pac. 254 (1914), Fish v. Benton, 138 Ky. 644, 128 S. W 1067 (1910), State v District Court of 4th Judicial District, Ravalli County, 74 Mont. 488, 241 Pac. 240 (1926), State v. Norton, 131 Ore. 382, 283 Pac. 12 (1930). *Contra:* Levin v. Hewes, 118 Md. 624, 86 Atl. 233 (1912) (Adequate remedy, but granted mandamus), Hale v Barker, 70 Utah 284 (1927) (Granted).

In an Indiana case the plaintiff made an oral request for a change of venue and this was refused. He then petitioned for a writ of mandamus to compel the change and this was granted, because the higher court said that he would not have an adequate remedy by appeal.[13] It is also intimated in the cases that have denied mandamus because the remedy by appeal is adequate, that they would allow the writ to issue were it not for the fact that there can be an appeal.[14]

Subject to certain exceptions, the Kentucky Statutes do not allow an appeal where the amount involved is less than two hundred dollars ($200).[15] Therefore, it is possible for an error to be committed without an opportunity to have it corrected; i.e., the justice may—in a suit involving one hundred dollars ($100)—wrongfully admit certain evidence and the party harmed would have no remedy because of the statute. However, it might be possible in Kentucky to obtain a writ of mandamus or prohibition where the error is a wrongful denial or wrongful granting of a change of venue, if the remedy by appeal is inadequate.[16] This would lead one to believe that the only reason for granting the writ is because of the lack of a remedy by appeal. This view does not seem logical, because lack of appeal is usually not an important factor in granting mandamus, and the courts do not grant mandamus in other instances where there can be no appeal. Therefore, it would seem more consistent if the courts would refuse to grant mandamus to compel a change of venue, even though there is no adequate remedy by appeal.

JOHN E. HOWE

PROHIBITIONS OF HOUSE-TO-HOUSE CANVASSING BY MUNICIPALITIES

An ordinance of the City of Mt. Sterling declared that the practice of visiting private residences by solicitors, peddlers, hawkers, and transient vendors, without prior invitation, for the purpose of soliciting orders for the sale of goods was a nuisance, and as such punishable as a misdemeanor.[1] The Donaldson Baking Company

[13] State ex rel. McGarr v. Debaun, 198 Ind. 661, 154 N. E. 492 (1927).

[14] See note 12 *supra;* State ex rel. Spence v Dick, Circuit Judge, 103 Wisc. 407, 79 N. W 421 (1899).

[15] Kentucky Statutes (Carroll 1936) § 950-1 and 950-3.

[16] Fish v. Benton, 138 Ky. 644, 647, 128 S. W 1067 (1910).

[1] The ordinance reads:

"Section 71: The practice of being in and upon the private residences in the City of Mt. Sterling, Kentucky, by solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares, and merchandise, and/or for the purpose of disposing of and/or peddling or hawking same, is hereby declared