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Personal Service in a Foreign State in Divorce Actions in Indiana

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PERSONAL SERVICE IN A FOREIGN STATE IN DIVORCE ACTIONS IN INDIANA

Is personal service in a foreign state available against nonresident defendants in divorce actions in Indiana as a substitute for notice by publication in a weekly newspaper?

Our Indiana Code containes a general provision providing that when the defendant is a nonresident in certain actions, expressly including actions to obtain a divorce, "The clerk * * * shall cause a notice of the pendency of any action, and the term at which the same will stand for trial, to be published for three weeks successively, in some newspaper of general circulation * * *"[1] Following this section, and as a part of our code there is a general provision as follows: "When the defendant is a non-resident, personal service of the summons out of the state is equivalent to publication * * *"[2] and further providing that such service may be proved by competent affidavits as therein set forth. It was apparently the intention of the legislature in enacting the latter provision, as a part of the code, to make it applicable to all actions coming within the provisions of the first section above given.

Our latest divorce act[3] provides as follows: "If it shall appear by affidavit of a disinterested person that the defendant is not a resident of this state, or that residence of the defendant, upon diligent inquiry, is unknown, the *clerk shall give notice of the pendency of such petition by publication*[4] for three consecutive weeks in some weekly newspaper of general circulation * * * in case such affidavit state the residence of the defendant, the *clerk shall forward by mail, to such defendant the number of the paper containing such notice, with the notice marked.*"[5] It is apparent upon reading this act that the pro-

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[1] Burns' Ann. Statutes, 1926, Vol. 1, Sec. 338.

[2] Burns', 1926, Sec. 339.

[3] Acts 1929, p. 575; Burns', Vol. 4, Sec. 1100.

[4] Our italics.

[5] Our italics. This 1929 act amended Acts of 1879, special session, p. 124, Burns, 1926, Vol. 1, Sec. 1100, and repealed all parts of the former act in conflict therewith, but that part of the later act as above set out is not materially different from the former act.

vision requiring the clerk to publish a notice of the divorce petition is mandatory, and that, in case the residence of the defendant is known and shown by affidavit, the legislature intended that the defendant receive *actual* notice of the pendency of the cause by receiving, through the mail, a copy of the newspaper containing the notice, with the notice marked, and not by receiving a summons. It is submitted that there is thereby provided, in the divorce act, a certain definite procedure to be followed when the defendant in a divorce action is a nonresident of the state.

The question then arises: does the general code provision providing that personal service out of the state is equivalent to notice by publication apply in actions for divorce in which the defendant is a nonresident, thus offering an alternative method by which constructive service may be had upon which a valid decree of divorce can be rendered? Probaby cases in which this question is involved infrequently arise in most jurisdictions in Indiana. However, the writer has been confronted with several such cases while representing the state in default divorce matters, with the result that the plaintiff, at added expense and time, has obtained service by publication. In addition to the material question of the jurisdiction of the court, the plaintiff should be concerned with the property rights involved in divorce actions, and his rights and status in case he remarries after having obtained a decree based upon such service.

So far as can be ascertained, no case involving this particular point has been decided by our appellate courts. There is a line of cases, however, involving analogous propositions of law, which apparently answer this question in the negative. The case of *Powell v. Powell*[6] was an action to vacate and set aside a divorce decree previously granted. In the prior action, an affidavit for a change of venue from the judge, based upon the code provisions for such change, was properly filed and the change granted, after which a divorce decree was rendered. In the instant case the contention was made that divorce proceedings are special, hence the code provisions relative to a change from the judge did not apply, with the result that the divorce decree rendered by the special judge was null and void. The Supreme Court held that the code provisions did apply, the change from the judge was properly granted, and the divorce decree thereafter rendered was valid, saying: "* * * we think that a

[6] 104 Ind. 18.

proceeding for a divorce is, at least, in such a sense and to such an extent a civil action, that the provision of the civil code for changing the venue on account of the bias and prejudice of the judge is applicable." The court then discussed the question of whether divorce is a special proceeding wholly without the code provisions, and after citing various authorities continued: "They (the cases cited) do not hold that such a case is wholly a special proceeding; nor do they hold that it is in no sense a civil action under the code. They do hold, and correctly, that *where the procedure is prescribed in the divorce act, that should be pursued, and not the civil code*;[7] and that so far as a procedure is provided in that act, it may be called a special proceeding. They further hold that where it is apparent that the legislature intended that certain sections of the civil code should not apply in divorce cases, they will not be so applied, and especially, if the result would be to open the decree." The court then based its decision on the fact that the divorce act was silent on the question of a change from the judge, and that the legislature must have intended that the code provisions on that point should apply in divorce actions.

The *Powell* case *supra* was cited and followed in the case of *Evans v. Evans*[8] to the effect that "* * * where the procedure is prescribed in the divorce act, that should be pursued, and not the civil code." In the latter case, the Supreme Court held, on like reasoning, that a change of venue from the county, based on the code provisions for such change, was available in divorce actions.

In the case of *Simons v. Simons*[9] the Supreme Court again cited and followed the *Powell* case *supra*, saying: "* * * * * where special provisions are contained in the statute regulating proceedings in divorce cases, they will govern, although different from the rules which obtain in ordinary civil actions." Here the Supreme Court held that interrogatories could not be used in divorce actions, the divorce statute containing such provisions as make the use of interrogatories improper in such actions, citing *Barr v. Barr*[10] to that effect.

The tendency and desire of our courts is to treat all cases except criminal cases as *civil actions*, within the meaning of

[7] Our italics.
[8] 105 Ind. 204 at p. 205.
[9] 107 Ind. 197.
[10] 31 Ind. 240.

those terms as used in our code, except actions based on special statutes which contain special provisions to the contrary, as shown by the case of *Indiana State Board etc. v. Davis.*[11] Here the *Powell* case *supra* was again cited to the proposition that "* * * the Civil Code is applicable to proceedings brought under special statutes, except where such statues provide their own procedure or exclude the Civil Code." And again in the case of *Eikenbury v. Eikenbury,*[12] a divorce action in which the *Powell* case was cited and followed, the court said: "And because marriage is declared to be a civil contract, it does not follow that a suit for divorce should be considered in the light of a civil action merely. It is a civil action in so far as the divorce act in itself fails to prescribe rules of procedure. If the divorce act is to be made effective, resort must be had to the civil code. But in so far only as recourse *must*[13] be had to the rules of civil procedure is it a civil action."

Thus it is submitted that our divorce act provides a certain definite procedure for obtaining service on a nonresident defendant in divorce actions by publication; that, such a procedure being given in the divorce act, under the rule announced by our appellate courts in analagous cases, as here given, the general code provisions that personal service out of the state is equivalent to publication does not apply in divorce actions, and that no valid decree of divorce can be rendered upon such constructive service.

Probably no one would contend that such should be the law. The purpose of publication is to give the court jurisdiction and to let the defendant know that such an action is pending against him. The court could be given jurisdiction by statute in cases where such personal service out of the state might be had, and if such service was available, the defendant would actually learn of the case. The provision that the clerk shall mail the defendant a copy of the paper containing the notice is not always complied with, and even if it is mailed, he may never receive it. The cost of such personal service would also be materially less than notice by publication. And finally, under our statutes[14] a defendant against whom a judgment of divorce has been rendered without other notice than publication in a newspaper may have

[11] 69 Ind. App. 109.
[12] 33 Ind. App. 69.
[13] Our italics.
[14] Burns 1926, Vol. 1, Sec. 1116.

the judgment opened at any time within two years after the rendition of the judgment so far as relates to his defense to the granting of the decree, the allowance of alimony, and the disposition of property, upon his filing an affidavit that during the pendency of the action he received no *actual notice* thereof in time to appear in court at the time of the trial and object to the judgment. If it were possible to serve him personally in another state, he could not then say he had no actual notice of the petition, and could not then have the decree opened on that ground.

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