Denver Law Review

Volume 21 | Issue 3 Article 3

July 2021

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What Divorce Statutes Are Now in Effect in Colorado?

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The war work committee of the American Bar Association recently asked for a short digest of the Colorado laws on divorce. On first thought this seemed simple to prepare; all that was necessary was to make a digest or summary of the first thirty-two sections of Chapter 56, 1935 C. S. A. A little investigation, however, soon indicated that there was a divergence of opinion on the subject among various members of the bar, particularly on two points:

First: Since Section 9 of Chapter 56 contains provisions for appointment of an attorney for a defaulting defendant, trial by jury, and the necessity for the plaintiff's personal presence at the trial. Is this section now the law, or has part or all of it been repealed?

Second: When the summons is to be published, may we follow the RULES OF CIVIL PROCEDURE, or does the code still govern?

FIRST POINT

The effectiveness of Section 9 appears to have been in doubt for a long time. A review of the history of our legislation is necessary for an understanding of the problem and its solution. In 1893 the legislature passed an act on the subject of divorce and alimony, complete with specifications of the grounds, practice, procedure, etc. Section 5 of this act appeared as Section 2119, R. S. '08, Section 5600, C. L. '21, and Section 9, Chapter 56, 1935 C. S. A. After 1893 there were some minor changes and in 1915 the legislature passed a new "Act Concerning Marriage and Divorce," (S. L. '15, c. 74) which did not contain all the provisions of Section 5 of the laws of 1893. In 1917 the legislature passed another act on the subject which appeared to be a complete and workable unit, likewise omitting some of the provisions of Section 5 of the 1893 law. In 1921 the editors of the COMPILED LAWS included Section 5 of the 1893 statute with the comment that it was not clear whether certain of its provisions had been repealed in 1917. A similar comment was made by the compilers of the 1935 COLORADO STATUTES ANNOTATED.

In support of the continuing validity of Section 5 of the 1893 act it may be said:

1. None of the later legislation contains any precise words repealing this section, and certain of its provisions are not in irreconcilable conflict with any particular word or sentence of the later statutes;

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2. Repeals by implication are not favored;

3. The compilers of the 1921 and 1935 statutes, acting under legislative authority, carried this section forward as part of the living law of the state;

4. Several cases have referred to this section as being in effect. Among these cases are *Thum v. Thum*, 105 Colo. 352, 355, 98 Pac. (2d) 279 (1939), and *Myers v. Myers*, 110 Colo. 412, 416, 135 Pac. (2d) 235 (1943).

5. Many of our courts and lawyers have proceeded on the theory that some parts of this section are in effect.

These considerations all have validity and similar ones have been used as guides in many instances. Their effect, however, appears to have been destroyed by the decision in *Shaff, et al. v. Shaff*, 72 Colo. 184, 186, 210 Pac. 400 (1922). In that case (as distinguished from the *Thum* and *Myers* cases) the question of the effect of the 1917 act on prior divorce legislation was directly in issue and was definitely passed upon. Our supreme court held that the 1917 act "* * * covers the whole subject matter and was intended as a substitute for the former statute, and for that reason must be deemed a repeal of the earlier act." This follows the rule of statutory construction that:

> Where a later act covers the whole subject matter of earlier acts, embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject matter. The rule applies not only where the former acts are inconsistent or in conflict with the new act, but also even where the former acts are not necessarily repugnant in express terms, or in all respects, to the new act.[1]

The *Shaff* case was cited with approval in *Krogh v. Danielson*, 73 Colo. 135, 138, 213 Pac. 996 (1923).

It is generally agreed that the parts of the section in question requiring a jury in any event, and the appointment of an attorney for a defaulting defendant, have been repealed by Section 8 of the 1917 act.[2] Under the *Shaff* case it seems inescapable that the rest of the present Section 9 has also been repealed and that the plaintiff is not required to be personally present at the trial of a divorce case.

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[1] 59 C. J. 919 (1932).

[2] The appointment of attorneys to represent non-appearing defendants is required by §1, of Rule XX of the rules of the District Court of the Second Judicial District (Denver).

Under normal conditions the question of the plaintiff's personal appearance at the trial might not be considered as of great practical importance, it being usually feasible for the plainitff to appear. In many cases this is not true in war time, as the following set of facts will illustrate. Shortly before induction into the army, a young man married a young woman on the spur of the moment. Returning home on his first leave, he found that she had not been faithful to him and was chiefly interested in drawing her allotment of fifty dollars a month. His lawyer started an action for divorce and obtained personal service on the defendant, but before the waiting period of thirty days was completed the plaintiff was required to return to his station, apparently without any further prospect of obtaining a leave prior to going overseas. Many such cases have contained elements which required the plaintiff's problem to receive the most sympathetic consideration.

Some of the courts have proceeded on the theory that the section in question is effective insofar as it requires the personal presence of the plaintiff at the trial, but they have construed this to mean that the plaintiff's deposition may be taken after jurisdiction over the defendant has been obtained, and that the reading of this deposition at the trial is the equivalent of personal presence. Such a construction seems to violate the plain and simple words of the statute, would be difficult, if not impossible, to support under the authorities, and now seems unnecessary in view of the holding in the *Shaff* case.

The propriety of proceedings on the plaintiff's deposition is strengthened by Section 20, Chapter 56, 1935 C. S. A., which provides that the validity of a divorce decree may not be questioned after one year from the date of the interlocutory decree, except for lack of jurisdiction, or for fraud.

Under the *Shaff* decision, Sections 21, 22, 23, and 24, Chapter 56, 1935 C. S. A., may not be regarded as effective, but they are not of fundamental importance. Section 21 provides the circumstances under which a woman may sue without costs; Section 22 legalizes divorces granted by a jury of less than six; Section 23 validates decrees which might have been questioned because of residence, the decisions of other courts, etc.; and Section 24 sustains divorces granted by the probate courts.

SECOND POINT

Strict compliance with the law relating to publication of summons is relatively easy, but failure to comply may result seriously for either or both of the parties. Section 5 of the present law provides, among other things:

> The court or the judge thereof shall, if satisfied of the good faith of the plaintiff, cause the summons to be published in the

same manner and with like effect as is now provided by law for publication of summons in cases of attachment.

This section was passed in 1917. At that time the provision for publishing summons in attachment cases was contained in Section 45 of the CODE OF CIVIL PROCEDURE. This paragraph of the code was later amended and the 1927 act was carried forward into the 1935 compilation. The corresponding paragraph in the RULES OF CIVIL PROCEDURE is Rule 4 (g) and (h). The code paragraph was the only law on the subject existing in 1917; there was no supreme court rule relating to publication of summons.

The principal differences between the code provision existing in 1917 and the present rules are these:

1. Under the old procedure the order for publication was made by the clerk of the court, and not by the judge;

2. It was formerly required that the summons be issued for ten days and that a return be made thereon that the defendant, after diligent search, could no tbe found;

3. The affidavit of publication had to be signed by the plaintiff, or one of the plaintiffs, except when the plaintiff was a nonresident or absent from the state, when it could be made by his attorney; and

4. Under the rule as it existed in 1917, service was not complete until the expiration of ten days from the date of the last publication; whereas, it is now complete on the day of the last publication.

There are other minor differences in wording, but the principal changes are as set forth above.

It seems clear that the code provision, as it existed in 1917, must be followed. The rule is:

> A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute.[3]

Many cases are cited, including the two entitled *Schwenke v. Union Depot and R. R. Co.*, 7 Colo. 512, 4 Pac. 905 (1884), and 7 Colo. 521, 5 Pac. 816 (1884). In these cases the court was called upon to pass on the validity of a special federal statute which adopted certain provisions of a prior general statute which, in turn, was later repealed. The court approved the general rule and went on to say:

> A *local* and *special* statute which adopts, by reference, provisions relating to *procedure* from an existing general law, is not nec-

[3] 59 C. J. 937 (1932).

essarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted.[4]

The rules of construction laid down in this case have been followed in a number of subsequent decisions.

The rule is further stated:

> As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted, unless a contrary intention is clearly manifested.[5]

Some lawyers hold to the opinion that the RULES OF CIVIL PROCEDURE govern the practice in all our courts of record. The rules themselves do not assume to be this sweeping. Rule 1 (a) states that the rules govern the procedure in all actions, suits and proceedings of a civil nature, and in all special statutory proceedings, except as stated in Rule 81. Rule 81 (a) refers to special statutory proceedings, 81 (b) refers to divorce and separate maintenance, and 81 (c) refers to appeals from county to district court. Paragraph (b), *supra*, states:

> These rules do not govern procedure and practice in actions in divorce or separate maintenance insofar as they are inconsistent or in conflict with the procedure and practice provided by the present applicable statutes.

It is to be noted that this section omits the following sentence which is contained in the preceding and parallel section on special statutory proceedings:

> Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.

It has been suggested that *Chamberlain v. Chamberlain*, 108 Colo. 538, 120 Pac. (2d) 641 (1941), states the law as being different from the conclusions set forth above. In that case the husband, plaintiff in a divorce case, filed a dismissal before any cross-complaint had been made. The lower court declined to enter the order of dismsisal and this was reversed by the supreme court under Rule 41 (a) (1), with the observation:

> If we assume that Civil Code Sec. 184 controls, still the case must be regarded as dismissed.

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[4]Schwenke v. Union Depot and R. R. Co., *supra*, 7 Colo. at 515.
[5]59 C. J. 1060 (1932).

The divorce statute itself contains no provisions for dismissal of such actions, and the general practice was necessarily followed, in entire conformance with the recognized laws of divorce and procedure.

Careful compliance with the laws is indispensable in cases involving substituted service. Non-compliance with the requirements in any important particular will render void all proceedings dependent on the court's jurisdiction over the person attempted to be served. It will be noted that Section 20, Chapter 56, 1935 C. S. A., *supra*, protects decrees from attack after one year, except cases in which the court did not obtain jurisdiction of the parties, or for a fraud perpetrated upon the court. Obviously, it is of utmost importance that the defendant be before the court. Regardless of what the court may attempt to do, it is elementary that any decree or judgment against him is void if jurisdiction has not been obtained according to the law. Procedure in divorce cases should be followed with special care; otherwise bigamy, illegitimacy, litigation over property rights, and other disasters may result.

Book Review

TRAFFIC COURTS, By George Warren, Foreword by Arthur T. Vanderbilt; 1942, Boston; Little, Brown and Company, xxvii, 280, $4.00.

This work was sponsored by the National Committee on Traffic Law Enforcement and was published under the joint auspices of that body and the National Conference of Judicial Councils. It is one of the volumes of the judicial administration series of which Roscoe Pound, formerly dean of the Harvard Law School, is editor.

Mr. Warren started a nation-wide survey of traffic courts in 1938. The present volume is based upon his report of that survey, made in September, 1940. The survey made by Mr. Warren was thorough and comprehensive. He has studied both the traffic laws of each state and the laws governing the courts that enforce such laws. The material for the report was obtained by personal investigation and by conferences with traffic judges and court officials in all the states, supplemented by questionnaires sent to attorneys general, traffic judges and justices of the peace.

Many of the problems which led to the making of this survey have been abated by the train of events accelerated by the Japanese attack on Pearl Harbor December 7, 1941, but they are likely to be revived with the cessation of hostilities and the consequent ending of tire and gasoline shortages. In fact, the accident toll in Denver at the turn of the year makes one doubt that these problems have been diminished.