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Divorce-Jurisdiction-Statutory Requirements

DIVORCE—JURISDICTION—STATUTORY REQUIREMENTS—This was an action for divorce. With his petition the husband filed an affidavit of residence, setting out that he had been a bona fide resident of Indiana for two years immediately last past, giving his address in particular, his occupation, etc., as required by statute. Burns Ann. St. 1926, Sec. 1097. This affidavit was sworn to before a notary public on Dec. 14, 1928, and the affidavit was filed with the petition on Jan. 15, 1929. *Held*, this was not a sufficient compliance with the statute and the lower court acquired no jurisdiction. *Klepfer v. Klepfer*, Supreme Court of Indiana, Oct. 30, 1930, 173 N. E. 232. (This case was first appealed to the Appellate Court of Indiana and it handed down a decision on January 10, 1930, which appeared in the weekly edition of Northeastern Reporter, 169 N. E. 478. Later, however, this opinion was withdrawn so that now it will not be found in the permanent volumes of the Northeastern Reporter. The case was transferred to the Supreme Court and it wrote the present opinion.)

Sec. 1097, Burns. *supra*, relates to residence and provides that "plaintiff shall, with his petition, file with the clerk of the court an affidavit, subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the state and stating particularly the place, town, etc., in which he has resided for the last two years past, which shall be sworn to before the clerk of the court in which said complaint is filed." The question immediately arises whether an affidavit executed 32 days before being filed with the petition, as was the situation here, has fulfilled the requirements of the statute. The court said that the affidavit wholly failed "to account for plaintiff's residence for over a month just preceding the filing of the complaint", and that since there was "neither a literal nor a substantial compliance with the statute" the action must fail. *Powell v. Powell*, 53 Ind. 513; *Miller v. Miller*, 55 Ind. App. 644, 104 N. E. 588; *Canan v. Canan*, 88 Ind. App. 623, 165 N. E. 263. Repeatedly this statute has been construed as being jurisdictional, and a failure to comply therewith means certain reversal on appeal. *Hoffman v. Hoffman*, 67 Ind. App. 230, 119 N. E. 18; *Hood v. State*, 56 Ind. 263; *Smith v. Smith*, 185 Ind. 75, 113 N. E. 296. As to whether the statute is jurisdictional to such an extent that non-compliance is ground for collateral attack, it was decided in *Beavers v.*

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* For discussions of words denoting conditions, see *Scott v. Stipe, Royal v. Aultman & Taylor Co., Summer v. Darnell, Brady v. Gregory, Jeffersonville R. R. v. Barbour, Gharkey v. Garat, Indianapolis R. R. v. Hood*, and *Sheets v. Vandalia Ry., supra.*

Bess, 58 Ind. App. 287, 108 N. E. 266, that to support such collateral attack it must appear affirmatively from the face of the record that the court did not have jurisdiction. *Baker v. Osborne*, 55 Ind. App. 518, 104 N. E. 97, is in accord. Although in the earlier cases the courts used language which broadly stated that the provisions of the statute were mandatory and strict compliance was necessary, some later cases seem to have permitted a slight relaxation in certain particulars. For instance a petition under oath containing the necessary allegations as to residence may supply the place of an affidavit, *Stewart v. Stewart*, 28 Ind. App. 378, 62 N. E. 1023; and the court may properly permit the filing of a substituted affidavit of residence after reply had been filed, *Strecker v. Strecker*, 86 Ind. App. 16, 154 N. E. 503. And it has been held that notwithstanding the plain language of the statute, the oath to the affidavit may be taken before any officer authorized to administer oaths. *Eastes v. Eastes*, 79 Ind. 363; *Brown v. Brown*, 138 Ind. 257, 37 N. E. 142; *Smith v. Smith, supra*. In the *Eastes* case the court said there must be a substantial compliance with the statute, but no good would be accomplished by giving it a rigid or literal construction; and in the *Brown* case it was decided this provision (requiring affidavit to be sworn to before the clerk) had been held, in effect, to be directory, not mandatory. On the other hand an affidavit reciting that affiant had been a resident of the state for more than five years, had resided in a certain city at a named address for more than six months, etc., was held not to be in substantial compliance with the statute because it did not show where affiant lived the first 18 months of the two years. *Hoffman v. Hoffman*, 67 Ind. App. 230, 119 N. E. 18. In the case where affidavit stated that affiant was a resident of a certain county and had been for more than two years immediately preceding, etc., that was held not to be sufficient fulfillment of the provision requiring such affidavits to state particularly the place, town, city, etc., in which plaintiff has been residing. *Crowell v. Crowell*, 82 Ind. App. 281, 145 N. E. 780. One court summed up the situation when it said that while only substantial compliance was necessary yet "there is nothing in . . . any other case . . . that will justify the conclusion . . . that the courts have ever relaxed the requirements of the statute." *Hoffman v. Hoffman, supra*. Other states with statutes similar to the Indiana one have interpreted them to be jurisdictional and have held that they must be strictly followed, and that the provisions cannot be waived as between the parties. *Ayres v. Gartner*, 90 Mich. 381, 51 N. W. 461; *DeArmond v. DeArmond*, 92 Tenn. 40, 20 S. W. 422; *Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015.

The decision of the Appellate Court in this case caused much anxiety among the legal profession of the state since the language used was taken to mean that Sec. 1097 Burns, *supra*, had to be complied with literally—i. e., that the affidavit must be sworn to before the clerk of the court in which the complaint is filed. If that were so, many divorce decrees rendered in this state in the past could be attacked collaterally and great confusion would result, for supposedly settled rights would be made doubtful and uncertain. The opinion quoted Sec. 1097 and then said: "This provision of the statute is mandatory, and, without *such affidavit*, the court acquires no jurisdiction of the cause," and later, referring to the fact that the affidavit was executed 32 days before it was filed, the court said: " . . . this sit-

uation shows the reason for the statute's provision requiring the affidavit to be sworn to before the clerk. . . ." If the court meant to require a literal compliance with the statute it would have been doing so in the face of authorities which had specifically held a substantial compliance on this point to be sufficient, *Eastes v. Eastes, Brown v. Brown, Smith v. Smith, supra.* The opinion of the Supreme Court in the principal case recognizes these authorities, but reverses the lower court on the sound ground that there had been on the plaintiff's part not even substantial compliance with the statutory requirements. J. W. S.