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PUBLICATION—WHEN SERVICE BY PUBLICATION IS MADE IN ACTION FOR DIVORCE OR ALIMONY—PARTY CAUSING SUCH PUBLICATION MUST SECURE COSTS BY DEPOSITING WITH CLERK OF COURTS AT TIME PUBLICATION REQUESTED, AN AMOUNT SUFFICIENT TO COVER COST OF PUBLICATION—AMOUNT DETERMINED BY CLERK.

SYLLABUS:

When service by publication is made in an action for divorce or alimony, the party causing such publication to be made must secure the costs thereof by depositing with the clerk of courts, at the time such publication is requested, an amount as determined by the clerk to be sufficient to cover the cost of such publication.

Columbus, Ohio, November 14, 1945

Hon. Robert M. Betz, Prosecuting Attorney
Gallipolis, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "Our Clerk of Courts has requested me to ask your opinion as to whether or not the terms of Section 10222-1, General Code, recently enacted, apply to divorce actions filed under Section 11981, General Code.
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> The new section, Section 10222-1, General Code, seems to require a deposit sufficient to cover costs of publication, in all cases where service must be had by publication. However, Section 11981 relieves the plaintiff in a divorce suit from prepayment of any costs, when affidavit of inability to pay is made and filed with the petition, even though service must be had by publication.
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> It would seem that if Section 10222-1 is held to apply in such cases, a great many persons are going to be deprived of their rights to institute suit for divorce or alimony, merely because of inability to secure the costs.
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> Inasmuch as this is a question which arises more or less frequently, we should like to have your opinion at your earliest convenience."

The provisions of law relating to costs in actions for divorce and alimony are set out in Section 11981 of the General Code, which was enacted in its present form in 1906 (98 O. L. 142), which section reads:

> "No clerk of a court of common pleas shall receive or file a petition for divorce or alimony until the party named as plaintiff therein, or some one on his or her behalf, makes prepayment or deposit with the clerk of such an amount as will cover the costs likely to accrue in the action exclusive of attorney fee, or gives such security for the costs as in the judgment of the clerk is satisfactory; but when a plaintiff makes affidavit of inability either to prepay or give security for costs, the clerk shall receive and file the petition. Such affidavit shall be filed with it, and treated as are similar papers in such cases."

Section 10222-1, General Code, which became effective October 11, 1945, and which deals specifically with costs of publication in actions where service by publication is made, reads:

> "In any action brought in any court, other than the probate court, in which service by publication is made, the party causing such publication to be made shall deposit with the clerk or other proper officer of such court an amount of money as determined by the clerk to be sufficient to cover the cost of such publication, and the clerk of such court is hereby authorized to pay from such deposit the cost of such publication upon the completion of such publication, and the filing of the proof of publication. In the event that the court costs are taxed against a party to such action, other than the party making such deposit, the clerk or other proper officer is hereby authorized, upon the payment of such costs, to return said deposit to the party having made it."

We are, therefore, confronted with a question involving the interpretation of two statutes, one general in its nature in that it covers, in so far as certain actions are concerned, the subject of costs generally, including costs of publication; and the other specific in character, dealing only with the costs of publication.

The law applicable to cases involving special and general statutes covering the same subject matter has been stated by our Supreme Court in a number of instances.

In State, ex rel. v. Zangerle, 100 O. S. 414, the first paragraph of the per curiam opinion reads:

> "A special statute covering a particular subject-matter must be read as an exception to a statute covering the same and other subjects in general terms."

Likewise, in State, ex rel. v. Connar, 123 O. S. 310, the first paragraph of the syllabus reads:

> "Special statutory provisions for particular cases operate as exceptions to general provisions which might otherwise include the particular cases and such cases are governed by the special provisions."

In Leach v. Collins, 123 O. S. 530, the court, in determining whether or not a special statute enacted for a particular purpose and providing for a specific and definite proceeding, and prescribing in detail the method and form of procedure, was controlling over a general statutory provision of later enactment, used the following language:

> "It is well settled that such specific statutory provisions are to be regarded as exceptions to general statutory provisions, and that the rule that repeals by implication are not favored has additional force under such circumstances. State, ex rel. Elliott Co., v. Connar, Supt. of Dept. of Pub. Works, ante, 310, 175 N. E., 200. The rule applicable here is stated by the Supreme Court of the United States in Rodgers v. United States, 185 U. S., 83, 22 S. Ct., 582, 583, 46 L. Ed., 816, as follows: 'Where there are two statutes, the earlier special and the later general (the terms of the general being broad enough to include the matter provided for in the special), the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.' "

The above principle has been held to apply even where the general provisions of law were enacted later in time than the special, and where a general provision was amended after the enactment of a special provision. See: Shunk v. First National Bank, 22 O. S. 508; The State v. Jackson, 36 O. S. 281; Muskingum County v. Board of Public Works, 39 O. S. 632; State v. Borham, 72 O. S. 358.

Clearly, then, such rule would be particularly applicable in the instant case where the special provision is of later enactment.

Therefore, in specific answer to your question, you are advised that when service by publication is made in an action for divorce or alimony, the party causing such publication to be made must secure the costs thereof by depositing with the clerk of courts, at the time such publication is requested, an amount as determined by the clerk to be sufficient to cover the cost of such publication.

Respectfully,

HUGH S. JENKINS

Attorney General