

1951

CIVIL PROCEDURE-JUDGMENTS-REVIVAL OF JUDGMENTS ON NOTICE SERVED OUTSIDE THE STATE

Nancy J. Ringland S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Procedure Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Nancy J. Ringland S.Ed., *CIVIL PROCEDURE-JUDGMENTS-REVIVAL OF JUDGMENTS ON NOTICE SERVED OUTSIDE THE STATE*, 50 MICH. L. REV. 146 (1951).

Available at: <https://repository.law.umich.edu/mlr/vol50/iss1/10>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CIVIL PROCEDURE—JUDGMENTS—REVIVAL OF JUDGMENTS ON NOTICE SERVED OUTSIDE THE STATE—Relator filed a petition for mandamus to compel the respondent, one of the circuit judges of the City of St. Louis, to assume jurisdiction and take steps to revive a judgment for alimony in favor of relator against her former husband, who was a resident of New Jersey, where notice of the proceedings was personally delivered to him, and who had no property within the state of Missouri. The Missouri statute provided that a revival must be "upon personal service duly had upon the defendant or defendants therein."¹ *Held*, mandamus denied, on the ground that a personal judgment could not be revived on notice served outside the state against a nonresident. *State v. Kirkwood*, (Mo. App. 1950) 230 S.W. (2d) 513.

A dormant judgment may be defined as a valid judgment, not satisfied and not barred by the applicable statute of limitations, but one which is temporarily inoperative for the purposes of execution.² When a judgment has become dormant it cannot be enforced until it is duly revived,³ either by means of the writ of scire facias,⁴ the remedy sought in the principal case, or by one of its more modern equivalents.⁵ Whether or not a judgment can be revived without service within the jurisdiction, or appearance of the nonresident defendant, but only

¹ Mo. Rev. Stat. Ann. (1939) §1038.

² FREEMAN, LAW OF EXECUTIONS, 3d ed., §81 (1900). According to Freeman, at common law no execution could be issued on a judgment after a year and a day from its rendition, unless the judgment has been revived. The death of a party to a judgment usually operates to make the judgment dormant. 31 AM. JUR., Judgments §382 (1940). In most jurisdictions, after a lapse of time with no steps taken to continue or enforce the judgment, it will become dormant. 31 AM. JUR., Judgments §393 (1940).

³ *Atlantic Trust Co. v. Dana*, (8th Cir. 1903) 128 F. 209; *First Nat. Bank v. Harper*, 161 Kan. 536, 169 P. (2d) 844 (1946); 49 C.J.S., Judgments §533 (1947).

⁴ Fully discussed in 2 FREEMAN, LAW OF JUDGMENTS, 5th ed., §§1091-1103 (1925).

⁵ Among these other methods of revival listed in 49 C.J.S., Judgments §543 (1947) are action to revive, motion to revive, and summons to show cause.

on notice served outside the state,⁶ depends on whether the proceeding to revive is considered a continuation of the original action or a new and independent action. If such a proceeding is held to constitute a new action, the court will lack jurisdiction.⁷ However, according to the weight of authority, a revivor proceeding is merely a continuation of an action, and the jurisdiction which was once properly acquired by the court continues and is sufficient to sustain the later proceeding.⁸ This conclusion is based on a consideration of the purpose of such proceedings and of the matters determined therein. Since the only purpose of a revival action is to re-animate an existing right, to aid in the execution of the old judgment,⁹ and the only question to be determined is whether or not plaintiff has a right as against the defendant to have the judgment executed,¹⁰ the proceeding is clearly subsidiary to the original action. On several occasions Missouri courts have recognized the view that a revivor proceeding is merely a continuation of the original action.¹¹ It appears that the majority in the principal case may have been mistaken as to the nature of revivor actions, as evidenced by their repeated emphasis of the fact that no personal jurisdiction can be obtained on notice served outside the state; this fact is material only if the revivor proceeding is considered a new action. The only cases which might be relied on to support the opposing view that revivor is a new action are those which deal with the entirely different question of the effect to be given by another state to the judgment so revived.¹² Although a judgment can be revived on notice served outside the state, the question remains whether the Missouri statutes permit such a procedure. In its analysis of the statutes, the court found those provisions directing service outside the state in certain types of cases inapplicable to a revivor proceeding.¹³ Moreover, the statute of limitations provides

⁶ There would be no objection to the validity of constructive service against a non-resident defendant, where the proceeding for revival is of the nature of an action in rem, as where the relief sought is a continuance of a lien on defendant's land within the jurisdiction of the court. *Peak v. Peak*, (Mo. Supp. 1916) 181 S.W. 394.

⁷ *Pennoyer v. Neff*, 5 Otto (95 U.S.) 714 (1877); 49 C.J.S., Judgments §24 (1947).

⁸ *Duffy v. Hartsock*, 187 Va. 406, 46 S.E. (2d) 570 (1948); *Bank of Edwardsville v. Raffaele*, 381 Ill. 486, 45 N.E. (2d) 651 (1942); *Shefts v. Oklahoma Co.*, 192 Okla. 483, 137 P. (2d) 589 (1943); *Collin County Nat. Bank v. Hughes*, (8th Cir. 1907) 155 F. 389; *Waldstein v. Williams*, 101 Ark. 404, 142 S.W. 834 (1912). Annotation: 144 A.L.R. 403 (1943).

⁹ *Evans v. City of American Falls*, 52 Idaho 7, 11 P. (2d) 363 (1932); *Bank of Edwardsville v. Raffaele*, 381 Ill. 486, 45 N.E. (2d) 651 (1942).

¹⁰ *Smith v. Stevens*, 133 Ill. 183, 24 N.E. 511 (1890); FREEMAN, LAW OF EXECUTIONS, 3d ed., §§90 and 92a (1900).

¹¹ *Missouri v. Hughes*, 350 Mo. 547, 166 S.W. (2d) 516 (1942); *In re Jackman's Estate*, 344 Mo. 49, 124 S.W. (2d) 1189 (1939); *Kratz v. Preston*, 52 Mo. App. 251 (1893).

¹² *Weaver v. Boggs*, 38 Md. 255 (1873); *Rice v. Moore*, 48 Kan. 590, 10 P. 30 (1892); *Hepler v. Davis*, 32 Neb. 556, 49 N.W. 458 (1891); *Collin County Nat. Bank v. Hughes*, 110 Tex. 362, 220 S.W. 767 (1920). *Dicta in Bickerdike v. Allen*, 157 Ill. 95, 41 N.E. 740 (1895), which clearly stated that no revival could be had against a non-resident on service outside the state, has been disapproved. *Bank of Edwardsville v. Raffaele*, supra note 9.

¹³ Mo. Rev. Stat. Ann. (1939) §§1275 and 1276; Mo. Laws (1945) §847.28.

that revival must be "upon personal service,"¹⁴ which the court construed to mean service within the state.¹⁵ If, in fact, the Missouri statutes demand personal service within the state in order to revive a judgment, the decision in the principal case is sound.

Nancy J. Ringland, S.Ed.

¹⁴ Mo. Rev. Stat. Ann. (1939) §1038.

¹⁵ The term "personal service" is usually construed to mean service by delivering the writ, order, or notice to the defendant personally, as contradistinguished from other modes of service, such as leaving a copy at his abode, or mailing a copy to him. *Dalton v. Railroad*, 113 Mo. App. 71, 87 S.W. 610 (1905); *Westfall v. Farwell*, 13 Wis. 563 (1861).