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Service by Publication, an Exparte Proceeding

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SERVICE BY PUBLICATION, AN EXPARTE PROCEEDING

FACTS ESSENTIAL FOR ORDER AND FINDINGS IN ORDER JURISDICTIONAL

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The rights and interests of litigants in property, as well as their remedial rights, are seriously affected and frequently lost for failure of the members of the bar to comprehend and comply with the law and the failure of the trial courts to insist on a full compliance with the law which provides for service by publication. A perusing of the proceedings had thereunder in the records of the courts in this state on the subject, justifies this statement.

The fact that it is a substituted service and intended as a legal service of a process other than personal service, it is necessary that the law provides for a service that will be a substantial equivalent to personal service as the state and federal constitutions contemplate and demand, so as to give any suitor in any court of this state the right to prosecute or defend his suit, either in his own proper person or by an attorney or agent of his choice.[1]

"Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, comformably to the law."[2]

The converse to this constitutional provision is that the law extends the right to defend co-extensive with remedy for wrong claimed or alleged. This provision of the law provides for a substituted service of a process. It is limited to a certain class of actions, and excludes all actions in which personal judgments are sought.[12]

Service of the summons under the provisions of this law may be made in two ways against a defendant against whom a cause of action appears to exist or who appears to be a necessary or

[1] Article VII, Section 20.
[2] Article I, Section 9.
[12] *Moyer v. Koontz,* 103 Wis. 22; *Pennoyer v. Neff,* 95 U. S. 714; Section 2639, subd. 5.

proper party to an action relating to real estate within this state,[3] namely, by personal service without the state, or, by publication. In either and in all cases coming within this statute, it is necessary first to obtain the required order of the court to make the service in either way.

It will be observed that the jurisdiction of the court is limited under the provisions of this statute.

Certain jurisdictional facts must actually exist before the court has power to issue the order for such service of process, or proceed with a cause or enter a judgment on the issue raised therein. The essential jurisdictional facts are numerated in the statute.

The defendant must have property or an interest in property or claim an interest therein within the jurisdiction of the court and within the state.[4] The subject of the action must be real or personal property.[15]

The court must have jurisdiction of the property, real or personal, located within the state, in which the cause of action arose, whether the action be on contract or tort.

Then there must be certain material facts existing regarding the defendant. The defendant must be a non-resident of the state, or—his residence must be unknown, or—be a foreign corporation. The defendant may be a resident of the state, one that has departed therefrom, or one that keeps himself concealed with intent to defraud his creditors, or to avoid service of summons with like intent;[5] intent to defraud his creditors being a material fact, together with the fact that the defendant had property within the jurisdiction of the subject of the action subject to seizure, of which he made or is about to make a disposition, with the intent to defraud creditors and is not exempt from such seizure.[7] The defendant may be an unknown owner.[8] The property, real or personal, must be the subject of the action within the state and within the jurisdiction of the court.

The defendant above referred to must have or claim a lien or interest, actual or contingent, in the property or in the relief

[3] Section 2639; Section 2640.
[4] *McArthur v. Moffet,* 143 Wis. 564-575; Section 2639, subd. 1.
[15] Section 2639, subd. 7; Section 3196.
[5] *Hafern v. Davis,* 10 Wis. 501-503; *McCarthy v. McCarthy,* 16 Hun. 546, 84 N. Y. 671.
[7] *Townsley v. McDonald,* 32 Barb. 6066; Section 2639, subd. 2.
[8] Sections 2639, 2636, 2637, 3196.

demanded, which consists wholly or partially in excluding the defendants from any interest or lien therein.

When the action is for a divorce and the judgment in the cause concerns the status of one of our own citizens [12] the plaintiff must be a *bona fide* resident of this state at least two years next preceding the commencement of the action therefor, or the defendant must be one as hereinbefore described excepting actions for divorce on the grounds of adultery or bigamy.[10] The plaintiff or the defendant must be a resident of the state two years before the commencement of the divorce action, to give the court jurisdiction; one of the parties must be a resident during said period in all actions for any cause for divorce, except for adultery or bigamy.

When the defendant is a private corporation organized under the laws of the state, and the proper officers on whom to make service do not exist or cannot be found, order for the service by publication may be obtained. The fact that personal service or service required by law on a corporation within the State cannot be obtained must be shown.[13] It will be noted that under these statements of facts, the law assumes that proper officers on whom to make service do not exist or cannot be found, and does not assume that the corporation did not have any officers or agents within the state upon whom legal service of any process can be made. In such a case, if the sheriff makes return to that effect, it becomes *prima facie* evidence of the fact, and then service of the summons and complaint may be made by serving copies by filing them in the office of the Secretary of the State and also mailing a copy of each immediately, postage prepaid, addressed to said company at its address designated in its Articles of Incorporation on file in the office of the Secretary of State, and such service is regarded in law as equivalent to personal service.[14] Where foreign corporation is doing business in the state and has a permanent agent. See exception.[14a]

When the said defendants are unknown and have a claim or lien or interest, actual or contingent, and the relief or demand

[12] *Moyer v. Koontz,* 103 Wis. 22; *Pennoyer v. Neff,* 95 U. S. 714; Section 2639, subd. 5.
[10] Section 2355, subd. 1.
[13] Section 2637.
[14] Section 2637, subd. 10; Section 2639, subd. 6.
[14a] *Tetley-Sletten and Dahl v. Rock Falls Mfg. Co.,* 187 N. W. 204.

consists wholly or partially in excluding such defendants from any lien or interest therein[15] substituted service may be had.

Where the name of an owner of an incumbrance, lien on land, or interest therein appears on record in the proper recording office or is in actual possession of the land, he will not be regarded in law as unknown.[19] [8]

When the defendant is a resident of the state and has a usual place of abode, then the statute provides for another substituted service if the defendant cannot be found therein, by leaving a copy thereof at his usual place of abode in presence of some member of the family of suitable age and discretion who shall be informed of the contents thereof. This substituted service cannot be made in divorce actions.[6]

The practice of designating defendants as unknown heirs of the owner of a record title, unknown, without proof of death is merely fiction and unauthorized by law.[8] Next of kin or heir apparent have no right or legal interest in property of the living relative.[9]

An heir of an intestate takes his land by descent immediately upon death of the intestate.[10] If the record owner is in fact dead, and the heirs are unknown, the terms of the statute, unknown owner, covers the situation. This will apply to unknown heirs, devisees or legatees if the record owner is unknown.[11]

In an action to bar original owner to a tax title, it is necessary for the plaintiff to make all persons who were former owners of the several parcels of land defendants, or those claiming under them, or claiming an interest therein.[20]

A tax certificate is real estate and is not assets in the hands of an executor or administrator, but passes to the heirs or devisees.[21]

A deed from one not shown to have been in possession of the land is not proof of title, and therefore an action to remove a cloud from title can only be maintained by one who shows

[15] Section 2639, subd. 7; Section 3196.
[19] Section 3196.
[8] Sections 2639, 2636, 2637, 3196.
[6] Section 2636, subd. 4.
[9] *Sanborn v. Carpenter,* 140 Wis. 572-575; Section 2046.
[10] *Marsh v. Waupaca Co.,* 38 Wis. 250.
[11] *Flint v. Wisconsin Trust Co.,* 151 Wis. 231; In re Judson Estate, 168 Wis. 361.
[20] Section 75, 69.

title in himself, either legal or equitable, or at least shows that he owns a lien or incumbrance on the land.[21]

Where the claim is made on a tax title or adverse possession, it is always necessary to show that the Government parted with title by grant or patent; that is, that land was taxable, or that adverse possession was other than against the Government or state.[22]

A mortgage is not a grant and is only incident upon transfer of note.[23]

The experienced lawyer has learned his lesson by chagrin resulting from a failure to comprehend and prepare the motion papers under the statute in accordance to the demands thereof. The reputation of the profession suffers and clients lose valuable rights and confidence in the profession, due to the numerous errors resulting from such failure.

This statute requires the highest degree of care on the part of the legal profession when the facts and circumstances of the case require an entrance in this field of procedure, to protect the rights of litigants.

In preparing the necessary motion papers, the highest degree of care is required, and certain important facts should always be remembered.

First, That the jurisdiction of the court is limited to the subject of the action, to-wit: to real estate or personal property within the state and jurisdiction of the court, or the status of one of our citizens is in issue, due to the nature of the jurisdiction of the court, in requiring service of process by publication, resulting from special surrounding circumstances of the case, and because personal service of process cannot be obtained.

Second, The cause of action may be on contract or tort, but must arise within the state, and the defendant sought to be made a party must appear to be a necessary or proper party to the action.

Third, That personal service of process cannot be obtained and that no other service under the statute is available, except by substituted service on order of and by publication.

Fourth, That due to the nature of the substituted service required, the court is without jurisdiction to enter a personal

[21] *Madler, Adm. v. Kersten,* 170 Wis. 424-427-428.
[22] *Madler v. Kersten,* 175 N. W. 779; Section 2077.
[23] *Tobin v. Tobin,* 139 Wis. 494.

judgment against the defendant, but can bar the defendant's interest in the property within the jurisdiction of the court, or convert it by law to apply on or satisfy the claims due from this class of defendants described in this statute to the resident plaintiff,[61] by divesting the interest of the defendant in said property as the case may be, or fix the status of the property, or the status of one of our citizens within the jurisdiction of the court.[61] As to the property within the jurisdiction of the court, it is regarded as an action *in rem.*[24]

Fifth, That the moving papers require that the subject matter of the action, to-wit: the property be fully and accurately described, that will be effected by the action on the issues raised therein.[25] The action may be brought to fix the status of the property.[26]

It is the *res* within the jurisdiction of the court that is essential, not actual seizure of it, or even constructive seizure. The status of the property to be fixed, or burden to be placed on the property to answer the debt of another, or the status of a citizen concerned in the action must be described in the moving papers to give the court jurisdiction,[27] such as foreclosure actions,[111] actions to quiet title,[112] actions against void tax deeds,[113] action by adverse possession claimant,[114] strict foreclosure of land contracts,[115] specific performance of land contracts,[116] garnishments,[118] attachments,[117] ejectments,[118] waste;[119] all actions relating to real property and personal property and actions for divorce;[120] many others could be mentioned.

[61] *Laughlin v. Griswold,* 169 Wis. 50-57; Section 2639, sudb. 3; *Manning v. Heady,* 64 Wis. 630-633; *McArthur v. Moffett,* 143 Wis. 564-575.
[24] *Geselischaft v. Umbreit,* 127 Wis. 651-670; *Moyer v. Koontz,* 103 Wis. 22; *Pennoyer v. Neff,* 95 U. S. 714.
[25] *Classen v. Chase,* 158 Wis. 346-352.
[26] *Laughlin v. Griswold,* 169 Wis. 50-57.
[27] *Closson v. Chase,* 158 Wis. 346-352-353.
[111] Section 3154.
[112] Section 3186.
[113] Section 75.29, 75.30, 75.27.
[114] Section 3186m.
[115] *Buswell v. Peterson,* 41 Wis. 82; *Button v. Schroyer,* 5 Wis. 598; *Landon v. Burke,* 36 Wis. 378; *Miles v. Hemenway,* 111 Pac. 696-698; *Heins v. Thompson and Flieth L. Co.,* 165 Wis, 563-572.
[116] Section 2756.
[117] Section 2736.
[118] Section 3077.
[119] Section 3170.
[120] Sections 2356, 2364, 2367.

Sixth, It is elementary that no stranger to the action or proceeding is bound by the result of the action.[28] The proceedings providing for service by publication, where the defendant is a non-resident of the state and has property within the state is constitutional.[25 30]

Statutes which dispense with actual personal service of process will be strictly contrued,[29] and personal judgment cannot be entered by either service out of the state or by publication [31] only on personal service in the state, where jurisdiction of the person is obtained.[32] The property in the state gives the court jurisdiction if the action arose therein.[30 32]

The jurisdictional facts essential to court's jurisdiction must be properly and accurately set forth in the moving papers.

Seventh, Having determined the character of action to which the law for service by publication applies, it will be necessary to determine the character of the defendants and their situation at the time of the commencement of the action; how they are to be described in the moving papers so as to give the court authority to issue the order for a service either outside of the state or by publication against whom a cause of action appears to exist or who appears to be a necessary or proper party thereto, within the provisions of the law.[33 34]

Whether the defendant has or claims a lien or interest, actual or contingent, in the property in question, or the relief consists wholly or partially in excluding the interest of the defendant, or whether the defendant is a private corporation organized under the laws of this state, or whether the defendants are unknown [34] or a foreign corporation,[121] or a defendant in a divorce action, and whether they are within the jurisdiction of the court so as to obtain personal service must be determined, and if not, then an accurate and actual positive statement and proof of the situation of the defendant sought to be served must be presented in the motion papers as required by law.

[28] *Bilgrien v. Ulrich,* 150 Wis. 532.
[25] *Clossen v. Chase,* 158 Wis. 346-352.
[30] *Gesellschaft v. Umbreit,* 127 Wis. 651.
[29] *Pollard v. Wegener,* 13 Wis. 569; *Hafern v. Davis,* 10 Wis. 501; *Fladlands v. Delaplaine,* 19 Wis. 459; *Likens v. McCormick,* 39 Wis, 313.
[31] *Maxcy v. McCord,* 120 Wis. 571-572.
[32] *Zimmerman v. Gerdes,* 106 Wis. 608.
[33] Section 2639.
[34] Section 2639.
[121] Section 1770 f.

This law requires some diligence to be exercised on the part of the plaintiff to present and prove the required facts to be shown, in order to warrant the court to issue an order to serve by publication. This statute deals with facts; it is substance and not form that is required. An affidavit made on information and belief is insufficient[46] if the reasons for belief and constituted affirmation are positive facts as grounds for belief, it may be sufficient, but this practice is not recommended.[47]

An affidavit for an order for publication that the cause of action arose within the State of Wisconsin and that the court has jurisdiction on the subject of the action is a mere conclusion on the part of the affiant and is insufficient. The court must determine that from the facts presented in the motion papers.[48]

The complaint must be duly verified and filed and an affidavit showing the jurisdictional facts required to exist must be presented, not rumors or hearsay, facts and facts only. These facts must be satisfactorily proven before the order will be issued.[49]

The statute contemplates some earnest conscientious activity on the part of the plaintiff or someone in his behalf to get the facts and expects that due diligence will be exercised to get the facts and get personal service, if possible, or ascertain the whereabouts of the defendant sought.[49]

What is due diligence or sufficient degree of diligence exercised depends upon the circumstances and surroundings of each case. The mere statement that the defendant is a non-resident of the state and cannot be found is insufficient; it lacks the averment of facts that show activity or diligence to warrant the conclusion. It must show activity, that he made inquiry and search, giving evidence of local conditions and circumstances so that the court may infer that diligence was used.[50] An affidavit made by plaintiff's attorney, stating that after due diligence defendant cannot be found, was held sufficient, without stating what diligence has been used, but is questioned now.[48 51] Such diligence refers to defendant's residence within the state, not his post-office address. If it is an actual fact that the defendant is a non-resident, it

[46] *Everston v. Thomas*, 5 How. 45.
[47] *Handley v. Quick*, 47 How. 233; *Fiske v. Anderson*, 33 Barb 71.
[48] *Witt v. Meyer*, 69 Wis. 595-598; *Gesellschaft v. Umbreit*, 127 Wis. 651-670.
[49] Section 2640; Section 2641.
[50] *McCrakon v. Flanagan*, 127 N. Y. 493.
[48] Section 2639.
[51] *Young v. Schenck*, 22 Wis. 556; *Sueterlee v. Sir*, 25 Wis. 357.

should so state. In such case, a further fact must be stated, that his post-office address is known or unknown, or whether his residence is known or unknown, or whether the defendant is a foreign corporation and that its post-office address or place of business is known or unknown. If the residence or post-office address of the defendant is known or the post-office address or a place of business of a foreign corporation is known, it must be stated.

There appears to be due diligence required in two particulars under this statute; first, due diligence to make service on the defendant within the state; second, due diligence to ascertain the defendant's post-office address.[3] There is no question but what it is necessary to ascertain where the defendant can be found and diligence must be used. A careful reading of the law suggests that it is necessary to affirm the fact that personal service cannot be obtained.[48] [50]

If the defendant is a resident or was a resident, it is necessary to aver that he has or has not a usual place of abode, so as to make the service contemplated by serving at his usual place of abode, and leaving a copy therein in presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof, but under no circumstances can the service at the usual place of abode be made in divorce actions. In divorce actions only two methods of service can be relied upon, to-wit: personal service, or, by publication.[51]

The affidavit need not be made by any particular person, but must be made by one who has knowledge, and must be truthfully stated.[70] [71]

A default judgment will not be entered by the court against a non-resident to divest his interest in property at issue, unless proceedings had are in strict conformity to the statute.[69] A loose practice prevails in this state. The sheriff's jurisdiction in civil cases is confined to his county. The sheriff depends on the information he receives from the plaintiff's attorney.[52]

[3] Section 2639; Section 2640.
[48] Section 2639.
[50] *McCrackon v. Flanagan*, 127 N. Y. 493.
[51] *Heinemann v. Pier*, 110 Wis. 185.
[70] *Jenks v. Arms*, 160 Wis. 171-174.
[71] *Crouch v. Crouch*, 30 Wis. 667; *Raulf v. Chicago Fire Brick Co.*, 138 Wis. 126.
[69] *Beauprie vs. Brigham*, 79 Wis. 436-441.
[52] Section 59. 28.

It is unreasonable, to say the least, to permit the sheriff to certify that defendant cannot be found within the state; it ought to be confined to the jurisdiction of the sheriff in civil matters, as an actual fact. Hearsay and rumors may be followed as a matter of diligence but cannot be averred as facts. The sheriff is only an agent of the plaintiff and only reports hearsay information when he does report.[60] The plaintiff usually is informed as to the whereabouts of those with whom he has been dealing, although there are conditions and circumstances, when facts must be obtained by diligent search. Even unknown owners are not regarded as unknown when the name of the owner appears of record as to title, as it appears in the office of the Register of Deeds.[63]

Notice of publication is constructive and is the mode of service provided for proceedings mostly exparte and proof required is an element of jurisdiction.[122] This service required by statute is in derogation of the common law and must be strictly construed so that a publication service on an actual resident of the county where the action is brought is a nullity.[122]

The statute, which provides that if the plaintiff is ignorant of the name or a part of the name of the defendant, he may proceed by a fictitious name, or unknown heir, etc.,[78] or against unknown owners,[19] comes near being unconstitutional, and would be, if the law did not require proceedings to be taken; even after judgment if the name of the party or the defendant is ascertained.[78] There is a distinction as to status of parties defendant, where unknown defendants are proceeded against and the whereabouts of the defendant cannot be ascertained.[78 79] The law deals with reasonable certainties and requires diligence, and defendant may be sued in two names, when he is known by either.[80]

Every person is presumed to have one Christian name and one surname. Parties must sue and be sued in such name.

[60] *Delaval Separator Co. vs. Hofberger,* 161 Wis. 344-347; *Arapahoe State Bank vs. Houser,* 162 Wis. 80; *Zielica vs. Worzalla,* 162 Wis. 603-604.
[63] Section 3196.
[122] *Curtis vs. Hoyt (Iowa),* 186 N. W. 460.
[78] Section 2612; *Kellam vs. Toms,* 38 Wis. 592.
[19] Section 3196.
[79] Section 2612; Section 3196; Section 2639.
[80] *O. L. Packard Machinery Co. vs. Laev,* 100 Wis. 644.

The practice of using initials instead of Christian name is regarded loose and vicious;[32] but may be waived by appearance.[33] Distinguishing words as "senior" and "junior" form a part of the name. All persons claiming an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement in the issue involved may be defendants.[39]

This distinction between actions at law and suits in equity and the forms of such actions and suits have been abolished, leaving two remedies, denominating actions and special proceedings.[35 36 37 38 39]

Neither the issuance of a Writ of Attachment, nor seizure of the property is requisite to an order for publication. If the writ is void, proceedings become void.[40 42] Where the defendant is not a resident of the state, service of the Writ of Attachment is not required.[41] If the plaintiff desires to protect his property rights in real estate, his complaint and *lis pendens* in the action must be filed as required by law. If that is done and the proceedings in obtaining an order for service by publication is defective and void, it is not necessary or proper to dismiss the action, if the complaint states jurisdictional facts to warrant further proceedings to obtain service by publication.[43] A judgment may be vacated if the motion papers for an order for publication are void.[44] The importance of filing the complaint in an action affecting real estate and the *lis pendens* is elementary.[54 55] Even a conveyance after *lis pendens* is filed by one in possession after the action is begun will not bar the plaintiff's remedy.[56] The purchaser may be proceeded against.[57] The owner of the remainder

[32] *Kellam vs. Toms*, 38 Wis. 592.
[33] *Zwickey vs. Haney*, 63 Wis. 464.
[39] Section 2603; Harrigan vs. Gilchrist, 121 Wis. 127-277.
[35] Section 2954.
[36] Section 2595.
[37] Section 2596.
[38] Section 2602.
[40] *Gallun vs. Weil*, 116 Wis. 236-242.
[42] *DeFyn vs. Power*, 167 Wis. 342-344.
[41] *Gallun vs. Weil*, 116 Wis. 236-242.
[43] *DeFyn vs. Power*, 167 Wis. 342-344.
[44] *Winner vs. Fitzgerald*, 19 Wis. 393; *Gesellschaft vs. Umbreit*, 127 Wis. 651-670; *Closson vs. Chase*, 158 Wis. 346-352; *Gallun vs. Weil*, 116 Wis. 236-242.
[54] Section 3187.
[55] *DeFyn vs. Power*, 167 Wis. 342-344.
[56] Section 3194.
[57] Section 3195.

or reversion is not barred of his remedy by acts of the tenant.[58] A certified copy or record showing any title in issue, adverse to plaintiff, the record owner may be made a party defendant, and other proof may be admitted showing an adverse claim made.[59] This right of action to quiet title extends to the owner and holder of any lien or incumbrance to test title.[60]

Property subject to control of a deed of trust situated in this state gives the court jurisdicion to fix the status of the property, even if the property is not divested thereby, whether the defendants are residents of another state or different states.[61]

Wisconsin has what they call a declaratory statute that may be resorted to. A similar statute was declared unconstitutional in Michigan.[62]

This being an exparte proceeding and the proofs requiring an element of jurisdiction, judicial knowledge demands that facts and facts only supplying the elements of jurisdiction be submitted, and the court must be satisfied that they are properly submitted and that they are proper jurisdictional facts,[3] proven and existing to authorize court proceedings. Primarily the attorneys are responsible for all defects in these proceedings; secondarily, the courts and judges thereof; county judges and court commissioners are equally responsible. While it has been understood that court commissioners have power to issue an order for publication, it is doubted. In Section 2640 the application is made to the court or judge thereof. In Section 2640a, it must be to the satisfaction of the court. If Section 2641 is to be given legal effect, it must be to the satisfaction of the court. Under Section 2815 the term "court" excludes court commissioners and county judges of certain powers, and the power conferred on the county judge and court commissioner is subject to review by the court.

It is the court's judicial duty to test the motion papers submitted before making them an official document or entering a judgment on the service obtained. Under Section 2640a, the order cannot be issued in special proceedings unless proof is satisfactory to

[58] Section 3190.
[59] Section 3181.
[61] *Laughlin vs. Griswold*, 169 Wis. 50-57; Section 2639, subd. 3; *Manning vs. Heady*, 64 Wis. 630-633; *McArthur vs. Moffett*, 143 Wis. 568-575.
[62] Section 2687m.
[3] Section 2639.

the court, that is, a court in session.[63] If there is no compliance with the law,[63] the record is vitiated.[67] [102]

The Statute of Limitations can neither take away or supply jurisdiction of the court. Provision is made for the party defendant to appear at any time within one year nor more than three years and defend after actual notice, if the proceedings are defective, but this limitation does not apply to actions for divorce. While the title to real estate sold by defective service protects the purchaser, it does not protect the plaintiff, if the defendant appears and defends within said period and is successful.[64]

Time is the essence of this proceeding. The proofs that are elements of jurisdiction must be contemporaneous with the making of the affidavit, not past history; and the order must be applied for within ten days after the date of the affidavit.[65] The complaint must be duly verified and filed, before the order is applied for. The order of the court or judge thereof must be filed within ten days after the date of such order.[66] The complaint so verified and filed must show jurisdictional facts that will warrant the proceedings to be taken [72] and complaint and motion papers must be actually left with the clerk during said proceedings.[73] [74]

The publication must not be less than once a week for six weeks in a newspaper to be designated as most likely to give notice to the defendant to be served.[67]

On or before the day for the first publication, a proper mailing of the summons and complaint, or notice of object of action must be made as required in said order, and by said statute, if the post-office address of the defendant was ascertained. If the post-office address was and could not be ascertained and proofs warrant the court or judge to find that the post-office address of the defendants could not be ascertained, and further orders that the mailing be omitted, then for that reason the mailing may be

[63] *Pfister vs. Smith,* 95 Wis. 51.
[63] *Manning vs. Heady,* 64 Wis. 630-634.
[67] *Manning vs. Heady,* 64 Wis. 630-634; *Roosevelt vs. Land and River Co;* 108 Wis. 653; *Bibelhausan vs. Bibelhausan,* 159 Wis. 365.
[102] *DeFyn vs. Power,* 167 Wis. 342-343-344.
[64] Section 2833.
[65] Section 2640; *Zahorka vs. Greith,* 129 Wis. 498.
[72] *Roosevelt vs. Ulmer,* 98 Wis. 356.
[73] *Witt vs. Meyer,* 69 Wis. 595.
[74] *Cummings vs. Tabor,* 61 Wis. 21; *Anderson vs. Coborn, 27* Wis. 558; *Witt vs. Meyer,* 69 Wis. 595; *Manning vs. Heady,* 64 Wis. 630.
[67] *Manning vs. Heady,* 64 Wis. 630-634; *Roosevelt vs. Land and River Co.,* 108 Wis. 653; *Bibelhausen vs. Bibelhausen,* 159 Wis. 365.

omitted, otherwise not.[76 103 107] There must be a finding on this fact on the face of the record. The first publication must be made within three months from the date of the order.[76]

The form of the publication of the summons as required in each particular case is provided for by law, and the publication must be in accordance therewith.[77]

A better practice followed is to publish the summons in full and at the bottom, a further statement giving the date when the complaint was filed with the clerk, a description of the property in issue and where located, and a further statement of the character of the action. In some instances this is imperative.[85 87]

Legal notices as defined by statute includes every summons.[86 92]

The newspaper in which the summons must be published is one to be designated by the court or judge most likely to give notice to the defendant sought to be served.

When the post-office address is unknown, the proper place is the county where the land or property is situated and where the action arose. If there is none, or if that paper refuses to publish it, and there is no other, then it may be published in an adjoining county, pursuant to an order to be issued therefor. These facts must be presented by affidavit to warrant the change if necessary.[90]

If the summons is published in an adjoining county, three notices must be posted in the county where the land is situated.[91]

The qualification of the daily paper to publish a legal notice must be considered. In cities of the third and fourth class, the paper must have a *bona fide* circulation of actual subscribers of not less than 300 copies per day, at least six days in each week, holidays excepted, for at least two years before the date of the notice. In cities of the first and second class and counties with over 250,000 inhabitants, the paper must have a *bona fide* circulation of 600 copies per day, Sundays and holidays excepted for a period of two years. Note the exception of only holidays in cities

[76] Section 2640.
[103] *O Malley vs. Fricke,* 104 Wis. 280-281.
[107] Sections 2614, 2615, 2616.
[77] *Sanford vs. White,* 56 N. Y. 359; *Foster vs. Hammond,* 37 Wis. 592.
[85] Section 2634.
[87] Section 3186-3186m.
[86] Section 4276.
[92] Section 4276.
[90] Section 4270.
[91] Section 4270.

of third and fourth class. Any newspapers without these qualifications are unauthorized to recover their fees for said service.[93]

If a daily should discontinue publication during any period in which the notice was inserted by law, then on proper proofs by affidavit the court or judge may order it continued in some other newspaper.[94] If the newspaper changes its name during said period, then it may continue it, but must state the change in the proof of publication.[95] Publications on Sunday are valid.[96]

In special proceedings the court must be satisfied that the plaintiff was unable with due diligence to make the personal service of such process on proofs submitted. The responsibility lies with the court if the court permits insufficient proof to pass unnoticed.[97]

Service is complete, under two conditions: when personal service is made outside the state, and, at the end of the forty-second day after the first publication of said notice when published six weeks.[84 89 83]

In computing time for publication, the first day is excluded and the last day of the end of the period is included.[89] On a six-weeks' publication, first day being October 5 and last November 9 (thirty-five days) another week is added so as to figure a week from each publication, up to November 16, forty-two days or six weeks in all, such was regarded a legal publication.[89]

The defendant has but twenty days to answer after the completed service in either of the cases cited.[84] He must answer or demur within twenty days thereafter.[83]

In serving by mail there must be a regular communication by mail between post-office from which service is mailed, and the regular post-office address of defendant. The notice or process must be enclosed in a post-paid wrapper, addressed to the person designated, without any direction to postal officer upon the wrapper for the return thereof in case of non-delivery to such person, and must be deposited in the post-office and left there to be carried.[99] There must be proof of such mailing filed.[101]

[93] Section 4270a; *Meyer vs. Outagamie County,* 134 Wis. 86.
[94] Section 4271.
[95] Section 4272.
[96] Section 4276a.
[97] Section 2640a.
[84] *Wilmot vs. Smith,* 86 Wis. 299-301.
[89] Section 4273.
[83] *Cox vs. North Wisconsin Lbr. Co.,* 82 Wis. 141-146.
[98] Section 2648; *Cox vs. North Wisconsin Lbr. Co.,* 82 Wis. 141-146.
[99] Section 2821.
[101] Section 2642.

Double time to answer is allowed when service is made by mail, but it will be noticed that a mailing, when service is made by publication, must be made on the day of the first day of the publication of the notice, which in case of a six-weeks' publication makes it forty-two days[100] before the time to answer begins to run.

Proof of publication of the notice and mailing must be filed, specifying the first day of the publication as in the order directed.[101]

This proof of publication must be made by an affidavit of the publisher or printer, or his foreman or principal clerk. Many newspapers published and especially dailies are owned and published by corporations in corporate names. Corporations act only through their agents, so that the foreman or person authorized to make the proof by the affidavit must show the facts and if a daily, it must show the further fact that it was qualified to publish the notice in order to get its fees.[103]

If there is a change in the name of the paper during said period, it must be shown in the affidavit of proof of publication.

There is no reason why the order should contain an option to serve personally outside of the state when the defendant's residence and post-office address is unknown[103] at the time the order is issued. If it does, it may be void.[102]

The law deals with reasonable certainties and therefore must entertain positive facts proven only.

If an infant is interested and a proper party defendant, it requires an appointment for a guardian *ad litem*.[104] An appearance by his attorney will not waive this requirement.[105] A general guardian may, but doubtful if the general guardian is a non-resident without proper credentials.[106] If there be a non-resident infant interested, or if his residence is unknown, the court may obtain service of notice necessary to appoint a guardian *ad litem* to represent him by publication. The period of publication is once a week for four weeks,[107] in such cases. In such cases it will be observed that it is a conceded fact that the infant exists but his residence is known or unknown. If there is no

[100] Section 2822.
[101] Section 4270a; *Meyer vs. Outagamie County,* 134 Wis. 86.
[103] *O Malley vs. Fricke,* 104 Wis. 280-281.
[102] *DeFyn vs. Power,* 167 Wis. 342-343-344.
[104] *Helms vs. Chadbourne,* 45 Wis. 60.
[105] *Bromell vs. Holt,* 89 Ill. 77.
[106] *Smith vs. McDonald,* 42 Cal. 484; *Brudette vs. Corgan,* 26 Kan. 102.
[107] Sections 2614, 2615, 2616.

evidence of the existence of an infant interested in the property in issue, the law will not permit an assumption that there might be some infants or incompetent persons interested and appoint a guardian *ad litem* for unknown persons.

The statute of limitations cannot supply or take away the jurisdiction of the court; the facts must be real facts and elements of jurisdiction.[108] If there be a real infant, and the guardian *ad litem* is appointed, he must appear for a real party in interest.[109]

The court will not imagine elements of jurisdiction and if there is no substantial proof of the interest of an infant involved in the issue, there is no necessity for a guardian *ad item.* If it should develop later, the court will act on its own motion. The court needs no *amicus curiae* under such circumstances.

The practice of following prepared forms in drafting an affadavit for an order for publication, or the order for publication, has brought grief to many attorneys and litigants because the forms do not comply with the facts of each case essential to give the court the required jurisdiction to issue the order or obtain the service required by law for service by publication; and it follows, if the service is void, a judgment entered on such service as to the defendants so served must be void, unless there should be a general appearance thereafter by the defendant sought to be served by publication.[75]

This proceeding is an exparte proceeding and represents a rough and rugged road with pitfalls and false guide boards, and it behoves the member of the bar to act diligently and accurately, and the trial courts to examine each proceeding with a judicial viewpoint and determine judicially whether there has been a compliance with the law in obtaining substituted service, when an attempt is made to acquire an order, or, it is required in any cause before issuing an order for service outside of the state or by publication or entering a judgment in the cause.

[108] Section 3231; *Sanborn vs. Carpenter,* 140 Wis. 572.
[109] *Rohleder vs. Wright,* 162 Wis. 580-582.
[75] *Rex vs. Sprague C. M. Co.,* 157 Wis. 572.