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### New York's Statutes Governing Service of Summons by Publication: The Revision of 1946

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NEW YORK'S STATUTES GOVERNING SERVICE  
OF SUMMONS BY PUBLICATION:  
THE REVISION OF 1946

ON September 1st, 1946, the statutes of New York affecting service of summons by publication were revised in several substantial respects. The revision was the culmination of a study which I made for and submitted to the New York Judicial Council in October, 1942. The study, in many respects, was a continuation of the study on the law of attachment which I made for the Judicial Council in 1940, and which culminated in the revision of the law of attachment in 1941.<sup>1</sup>

The study on service of summons by publication contained (1) an analysis of former Sections 232-235 of the Civil Practice Act and Rules 50-53 of the Rules of Civil Practice; (2) proposed amendments of the stated sections and rules with explanatory comments; (3) a comparative legislative analysis of the law of other jurisdictions; and (4) the legislative history of former Sections 232, 233 and 235 of the Civil Practice Act and of Rules 50-53 of the Rules of Civil Practice.

In 1943, the Judicial Council included the proposed statutory amendments of the Civil Practice Act with the explanatory comments in its Ninth Annual Report, and invited comments and suggestions from bar associations and others interested in the subject.<sup>2</sup> The invitation was renewed in the Tenth Annual Report.<sup>3</sup> Suggestions concerning the proposals were received from several Bar Associations.<sup>4</sup> In the light of these suggestions, I redrafted a few of the provisions. In 1945, the Judicial Council recommended to the Legislature the revision of the statutory provisions governing ser-

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<sup>1</sup> N. Y. Laws 1941, c. 253. See Prashker, *New York's Attachment Statutes* (1941) 16 ST. JOHN'S L. REV. 53; 7 REP. JUDICIAL COUNCIL (1941) 49, 387.

<sup>2</sup> 9 REP. JUDICIAL COUNCIL (1943) 337.

<sup>3</sup> 10 REP. JUDICIAL COUNCIL (1944) 44.

<sup>4</sup> Association of the Bar of the City of New York, Brooklyn Bar Association, New York County Lawyers Association and New York Women's Bar Association.

vice of summons by publication in accord with the original proposals made in the study, supplemented by the accepted suggestions made by the Bar Associations.<sup>5</sup> The supporting study, as thus modified was included in the Eleventh Annual Report of the Judicial Council. Bills to enact the proposals<sup>6</sup> were passed by the Legislature but were vetoed by the Governor. The Council was informed that the bills were vetoed because of provisions included in the revision (1) authorizing service of summons by publication on a resident of New York without a prior attachment of the defendant's property and (2) reducing from six months to ninety days the period of continuous absence of an adult resident from the state as a basis for service by publication. I thereafter redrafted the proposed legislation to meet the two stated objections. Included too in the redraft was a provision authorizing service of summons by publication upon a domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation. In view of the general immunizing of domestic corporations from service of summons by publication implicit in the revision, Eugene R. Hurley, Esq. suggested the inclusion of a provision as to unknown domestic corporations to meet the problem of cutting off effectively the rights of possible corporate judgment creditors or corporate assignees in foreclosure and like actions.<sup>7</sup>

In 1946, the Judicial Council renewed its recommendations to the Legislature for the enactment of the proposed legislation as thus modified. Bills to enact the recommendations were passed by the Legislature, and signed by the Governor on March 19, 1946. The law constitutes Chapter 144 of the Laws of 1946 and became effective September 1st, 1946.

The text of the law is set forth in the ensuing Part II of this article.

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<sup>5</sup> 11 REP. JUDICIAL COUNCIL (1945) 39, 191.

<sup>6</sup> 1945 SENATE INT. 241, Print No. 2294; ASSEMBLY INT. 404, Senate Print No. 2382.

<sup>7</sup> See 12 REP. JUDICIAL COUNCIL (1946) 58.

II. TEXT OF AMENDATORY LEGISLATION: LAWS OF  
NEW YORK 1946, CHAPTER 144

An Act to amend the civil practice act, in relation to service of summons.

Effective September 1, 1946.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section two hundred thirty-two of the civil practice act is hereby repealed, and a new section two hundred thirty-two is substituted in lieu thereof, to read as follows:<sup>8</sup>

§ 232. *In what actions order for service of summons by publication may be made. An order directing the service of a summons upon a defendant, by publication, may be made upon the application of the plaintiff, as specified in sections two hundred thirty-two-a and two hundred thirty-two-b of this act, in any of the following actions:*

1. *Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.*

2. *Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.*

3. *Where a levy upon property of the defendant within the state has been made under a warrant of attachment granted in an action to recover a sum of money only.*

§ 2. Such act is hereby amended by adding thereto new sections two hundred thirty-two-a and two hundred thirty-two-b respectively, to follow section two hundred thirty-two, to read as follows:

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<sup>8</sup> Matter in *italics* is new.

§ 232-a. *Persons against whom order for service of summons by publication may be made. The order may be made where in a cause of action specified in section two hundred thirty-two of this act, the defendant*

1. *Is a foreign corporation, or a foreign corporation which has been dissolved; or*

2. *Is a joint stock association or other unincorporated association having a president and treasurer neither of whom is a resident of this state; or*

3. *Is a domestic corporation which has been dissolved, and after diligent effort service cannot be made within the state upon any person who at the time of said dissolution was an officer or director of said corporation; or*

4. *Is a domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation; or*

5. *Is a natural person and is not a resident of the state; or*

6. *After diligent inquiry, remains unknown to the plaintiff or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state; or*

7. *Is a resident of the state and has departed or is about to depart therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or*

8. *Is an adult and a resident of the state, has been continuously without the state more than six months next before the granting of the order and has not made a designation, provided for by statute, of a person upon whom to serve a summons in his behalf, or a designation so made no longer remains in force, or service upon the person so designated cannot be made within the state after diligent effort; or*

9. *Is an infant or incompetent, whether a resident or non-resident of the state, and complete personal service of the summons upon said defendant cannot after due diligence*

be made within the state, by delivering a copy to the person or persons to whom and each of whom a copy is required to be delivered by the provisions of sections two hundred twenty-five and two hundred twenty-six of this act; or

10. Is a resident of the state, and an attempt was made to commence the action against the defendant before the expiration of the limitation applicable thereto and the limitation would have expired within sixty days next preceding the application if time had not been extended by the attempt to commence the action; or

11. In an action against the stockholders of a corporation or joint stock company, is a stockholder thereof, and the action is authorized by the law of the state.

§ 232-b. Papers upon which order for service of summons by publication may be made. The order must be founded upon a verified complaint showing a cause of action specified in subdivisions one or two of section two hundred thirty-two of this act against the defendant to be served or upon a verified complaint showing a cause of action to recover a sum of money only against the defendant to be served and proof that a levy has been made upon property within the state of such defendant under a warrant of attachment granted in such action, together with proof by affidavit of the additional facts required by section two hundred thirty-two-a of this act, and also, where the application is made upon the ground that the defendant is a foreign corporation, a joint stock association or other unincorporated association, or a domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation, or is not a resident of the state, or is a stockholder of a corporation or joint stock company, that the plaintiff, with due diligence, has been or will be unable to make personal service of the summons.

If the defendant is an infant, the affidavit shall also set forth the name, and the last known residence, within or without the state, of the father, mother, or guardian of such infant, or the person having the care and control of him or

*with whom he resides, or in whose service he is employed, or that the name and such residence, or either, of such person is unknown to the applicant. If the defendant is an incompetent, the affidavit shall also set forth the name, and the last known residence of the committee or designee, within or without the state, of such incompetent or that the name and such residence, or either, of such person is unknown to the applicant.*

§ 3. Section two hundred thirty-three of such act is hereby amended to read as follows:

§ 233. *Personal service without the state in lieu of publication.* In all cases when publication of the summons is ordered, service of the copy of the summons and complaint and of any accompanying notice required by rules by the delivery thereof to the defendant personally without the state *in the same manner as if such service were made within the state* is equivalent to notice by publication and deposit in the post-office. The service must be made by a resident or citizen of the state of New York, or a sheriff, under-sheriff, deputy sheriff, constable, bailiff or other officer having like powers and duties of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counsellor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshal or a deputy United States marshal. Service without the state must be made and proof thereof must be filed within sixty days after the order is granted; otherwise the order becomes inoperative. Service without the state in lieu of publication is complete ten days after proof thereof is filed.

§ 4. Section two hundred thirty-five of such act is hereby amended to read as follows:

§ 235. *Personal service without the state without order.* *Where the defendant is a resident of the state and the complaint demands judgment for a sum of money only, and in any case specified in section two hundred thirty-two*

of *this act*, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the *verified* complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.

§ 5. This act shall take effect September first, nineteen hundred forty-six.

### III. SUMMARY OF AMENDMENTS

The principal amendments effected by the 1946 revision, briefly summarized, are:

1. Former Section 232 of the Civil Practice Act was partitioned into three sections designated respectively, Sections 232, 232-a and 232-b. The purpose of the partition was to remove the confusion which arose from the fact that a single section included provisions affecting (1) the actions in which an order for service of summons by publication may be made; (2) the persons against whom the order may be made; and (3) the papers upon which the order may be made. The new Sections 232, 232-a and 232-b deal respectively, with the actions in which the order may be made (Section 232); the persons against whom it may be made (Section 232-a); and the papers upon which it may be made (Section 232-b). This arrangement conforms closely to the statutory arrangement of the law of attachment.<sup>9</sup>

2. Section 232 now states three types of actions in which an order for service of summons by publication may be made: (1) Matrimonial actions; (2) actions affecting specific property within the state; and (3) actions to recover a sum of money only where an attachment levy has been made.

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<sup>9</sup> See C. P. A. §§ 902-910.



3. Section 232-a specifies the persons against whom an order for service of summons by publication may be made. The section does not authorize service by publication on a domestic corporation on the ground of inability to make service upon a stated officer, etc. The former provision (Subdivision 1 of former Section 232) was eliminated in view of modern statutory provisions authorizing service of a summons upon a domestic corporation by serving the Secretary of State.<sup>10</sup> The former provision as to a domestic corporation which has been dissolved (Subdivision 1 of former Section 232) has been retained. Subdivision 3 of Section 232-a.

4. Section 232-a includes a new provision authorizing service by publication upon a domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation. Subdivision 4 of Section 232-a.

5. Section 232-a extends the former provision (Subdivision 2 of former Section 232) authorizing service of summons by publication on a resident who has departed fraudulently from the state to include a person who is about to depart fraudulently from the state. Subdivision 7 of Section 232-a. This is in accord with a like amendment of the attachment statute made in 1941, now contained in Subdivision 2 of Section 903.

6. Section 232-b has been carved out from the first two unnumbered paragraphs following Subdivision 8 of the former Section 232. Section 232-b specifies the papers upon which an order for service of summons by publication may be made. The contents of Section 232-b are essentially the same as those of the stated paragraphs.

7. Section 233 authorizes personal service without the state in lieu of publication in all cases when publication of the summons is ordered. The section is complementary to Sections 232, 232-a and 232-b. It is closely related to Section 235 (personal service without the state without order).

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<sup>10</sup> STOCK CORP. L. § 25; C. P. A. § 228.

Section 233 has been amended to conform to Section 235 by requiring that personal service without the state shall be made "in the same manner as if such service were made within the state." The addition of the quoted phrase removes the confusion which arose in the implementation of the two sections.<sup>11</sup>

8. Section 235 authorizes personal service without the state without an order. The section was amended to authorize personal service without the state without an order where the defendant is a resident of the state and the complaint demands judgment for a sum of money only. In such case, the service is not conditioned upon the prior making of an attachment levy upon property of the defendant within the state. The provision is based largely on *Milliken v. Meyer* decided by the Supreme Court of the United States in 1940.<sup>12</sup> The provision is the most important amendment effected by the revision.

9. Section 235 was further amended by the elimination of the specification of cases in which personal service may be made without the state without an order, and the substitution therefor of a general provision that such service may be made in any case specified in Section 232 of the Civil Practice Act.

10. Section 235 was further amended by requiring the service of a *verified* complaint when service is made pursuant to the section. This effects conformity with a similar requirement when service is made pursuant to Section 232 (see Section 232-b) or Section 233.

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<sup>11</sup> See *McCoy v. Erie Forge & Steel Co.*, 201 App. Div. 570, 194 N. Y. Supp. 696 (1st Dep't 1922), *aff'd without opinion*, 234 N. Y. 545, 138 N. E. 440 (1922) (C. P. A. § 233, prior to 1946 amendment). Compare *Howard Converters v. French Art Mills*, 273 N. Y. 238, 7 N. E. (2d) 115 (1937) (C. P. A. § 235).

<sup>12</sup> 311 U. S. 457, 61 Sup. Ct. 339 (1940), *rehearing denied*, 312 U. S. 712 (1941).

IV. ANALYSIS OF RELEVANT STATUTORY PROVISIONS  
AND RULES OF CIVIL PRACTICE

[The following analysis constitutes an excerpt from a volume on New York Practice now in preparation by the writer.]

**§ 1. Technical Provisions**

The provisions of the Civil Practice Act affecting the technical aspects of service by publication were substantially revised in 1946. The principal sections of the Civil Practice Act governing service by publication are:

Section 232: In what actions order for service of summons by publication may be made.

Section 232-a: Persons against whom order for service of summons by publication may be made.

Section 232-b: Papers upon which order for service of summons by publication may be made.

Section 233: Personal service without the state in lieu of publication.

Section 234: Order for service of summons by publication; by whom made.

Section 235: Personal service without the state without order.

These sections will be considered in order.

**§ 2. In What Actions Orders for Service of Summons by Publication may be Made**

Section 232 of the Civil Practice Act provides:

An order directing the service of a summons upon a defendant, by publication, may be made upon the application of the plaintiff, as specified in sections two hundred thirty-two-a and two hundred thirty-two-b of this act, in any of the following actions:

1. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

2. Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon

specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

3. Where a levy upon property of the defendant within the state has been made under a warrant of attachment granted in an action to recover a sum of money only.

### § 3. Analysis of Section 232

Section 232 authorizes the making of an order for service of summons by publication in three types of actions: (1) Matrimonial actions; (2) actions affecting specific property within the state; (3) actions in which an attachment levy has been made.

Subdivision 1. Matrimonial actions. Where personal service of summons within the state cannot be made in a matrimonial action, service by publication is the only alternative method of effecting service of summons since in such action, substituted service is unavailable. Service by publication is permissible in a matrimonial action irrespective of the defendant's residence or non-residence.<sup>13</sup>

Subdivision 2. Actions affecting specific property. Subdivision 2 applies to both real and personal property within the state.<sup>14</sup> Typical examples are an action to foreclose a mortgage on real or personal property within the state; an action for specific performance of a contract for the sale of real or personal property within the state; an action for the partition of real property within the state. Service by publication has been allowed in an action to foreclose an attorney's lien where the fund against which the lien is asserted is within the state.<sup>15</sup>

The basis for acquisition of jurisdiction by service by publication against a non-resident defendant in actions affecting specific property is the presence within the state of

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<sup>13</sup> *Becker v. Becker*, 58 App. Div. 374, 69 N. Y. Supp. 75, 77 (1st Dep't 1901).

<sup>14</sup> *Garfein v. McInnis*, 248 N. Y. 261, 162 N. E. 73 (1928); *Ebsary Gypsum Co. v. Ruby*, 256 N. Y. 406, 176 N. E. 820 (1931).

<sup>15</sup> *McKennell v. Payne*, 197 App. Div. 340, 189 N. Y. Supp. 7 (2d Dep't 1921).

the property which constitutes the subject matter of the action and which is to be affected directly by the judgment. In such actions, an attachment is not procurable, since the right to procure an attachment is limited to an action for the recovery of a sum of money only.<sup>16</sup>

Subdivision 3. Actions in which an attachment levy has been made. Subdivision 3 applies both to resident and non-resident defendants. In actions to recover a sum of money, the procurement of a warrant of attachment and the making of a levy upon property of the defendant within the state are prerequisites to acquisition of jurisdiction by service by publication.

#### § 4. Persons Against Whom Order for Service of Summons by Publication may be Made

Section 232-a of the Civil Practice Act<sup>17</sup> limits the making of an order for service of summons by publication on the following defendants:<sup>18</sup>

Subdivision 1. *A foreign corporation, or a foreign corporation which has been dissolved.*

Foreign corporation. Personal service of summons may not be made on a foreign corporation not doing business in the state. If it does business in the state, and is licensed, it is subject to personal service of summons. If it does business in the state, and is not licensed, it may or may not be subject to personal service of summons depending upon the presence in the jurisdiction of a person to whom the summons may be delivered. A foreign corporation is not subject to substituted service. In instances where the plaintiff cannot with due diligence make personal service of the summons upon a foreign corporation, service by publication is available.<sup>19</sup>

<sup>16</sup> C. P. A. § 902.

<sup>17</sup> Section 232-a was carved out from six subdivisions formerly included in Section 232 of the Civil Practice Act. See 11 REP. JUDICIAL COUNCIL (1945) 206.

<sup>18</sup> Such limitations are in accord with similar limitations in other jurisdictions. For legislative references, see 11 REP. JUDICIAL COUNCIL (1945) 205, n. 23.

<sup>19</sup> See C. P. A. § 232-b.

Dissolved foreign corporation. A foreign corporation which has been dissolved is subject to service by publication. Corporation statutes generally provide that a dissolved corporation, notwithstanding its dissolution, has a limited existence for the purpose of winding up its affairs and prosecuting and defending actions by or against it.<sup>20</sup> During such limited existence, it may be served with a summons. If it is a foreign corporation which has been dissolved but not doing business in New York, it is not subject to personal service of summons.<sup>21</sup> In such instance, service by publication is available.

Subdivision 2. *A joint stock association or other unincorporated association having a president and treasurer neither of whom is a resident of this state.*

In an action against the president or treasurer of a joint stock or other unincorporated association, personal service of summons may be made by serving its president or treasurer, or if designated, the Secretary of State. Upon proof that personal service of the summons cannot with due diligence be made upon the resident president or treasurer, or where designated, the Secretary of State, substituted service is available. Substituted service is not available in respect to a president or treasurer who resides without the state. If neither the president nor the treasurer of the joint stock or other unincorporated association resides within the state, service by publication is available.

Subdivision 3. *A domestic corporation which has been dissolved, and after diligent effort service cannot be made within the state upon any person who at the time of said dissolution was an officer or director of said corporation.*

Ordinarily, a domestic corporation is subject to personal service of summons. It is sometimes subject to substituted service. But if the domestic corporation has been dissolved, and after diligent effort service cannot be made within the state upon any person who at the time of dissolution was an

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<sup>20</sup> N. Y. GEN. CORP. L. § 29; STOCK CORP. L. § 105, subd. 8; Chaplin v. Selznick, 293 N. Y. 529, 58 N. E. (2d) 719 (1944) (California corporation).

<sup>21</sup> Chaplin v. Selznick, *supra*.

officer or director of the corporation, it is subject to service by publication.

Subdivision 4. *A domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation.*

This provision was added in the 1946 revision of the statutes governing service of summons by publication. The provision is important in foreclosure and partition actions where the identity of a supposed owner, lienor or other interested party is unknown, or where it is difficult to determine whether such party is a domestic corporation. In such instances, neither personal service nor substituted service is available,<sup>22</sup> but service by publication is available.

Subdivision 5. *A natural person not a resident of the state.*

A non-resident natural person is not subject to substituted service. In instances where the plaintiff cannot with due diligence make personal service of the summons upon the non-resident individual, service by publication is available.<sup>23</sup>

Subdivision 6. *A defendant, who, after diligent inquiry, remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.*

This provision is important in foreclosure and partition actions where unknown heirs at law (including infants) of a decedent are made parties, or where the plaintiff is unable to ascertain whether the party is or is not a resident of the state.<sup>24</sup> In such instances, neither personal service nor substituted service is available, but service by publication is available.

Subdivision 7. *A resident of the state who has departed or is about to depart therefrom with intent to defraud his*

<sup>22</sup> Substituted service is never available in partition actions.

<sup>23</sup> See C. P. A. § 232-b.

<sup>24</sup> Wheeler v. Scully, 50 N. Y. 667 (1872); Guyer v. Raymond, 8 Misc. 606, 29 N. Y. Supp. 395 (1894).

*creditors or to avoid the service of a summons, or keeps himself concealed therein with like intent.*

This provision relates to a resident defendant who

(1) has departed or is about to depart from the state<sup>25</sup> with intent (a) to defraud his creditors or (b) to avoid the service of a summons, or

(2) keeps himself concealed within the state with intent (a) to defraud his creditors or (b) to avoid the service of a summons.

A defendant described in this provision is subject to both substituted service and service by publication. Personal service under the assumed circumstances is presumably impossible or in some circumstances, difficult to effect.

Subdivision 8. *An adult and a resident of the state who has been continuously without the state more than six months next before the granting of the order and has not made a designation, provided for by statute, of a person upon whom to serve a summons on his behalf, or a designation so made no longer remains in force, or service upon the person so designated cannot be made within the state after diligent effort.*

This provision relates to an absentee resident adult defendant who has been continuously absent from the state for a period exceeding six months and upon whom service, cannot, after diligent effort, be made upon his designee, if any. The provision does not imply any element of fraud or evasion of process. Thus, the provision may be invoked against a traveling salesman or a person visiting outside the state for a period of more than six months.<sup>26</sup> A defendant described in this subdivision is also subject to substituted service.

Subdivision 9. *An infant or incompetent, whether a resident or non-resident of the state, and complete personal*

<sup>25</sup> Projected departure from the state as a ground for the procurement of an order for service of summons by publication was added in 1946. This is in accord with a parallel provision affecting attachment. C. P. A. § 903, subd. 2.

<sup>26</sup> The writer believes that the six months absence period is too long. For recommendation made by the writer for the reduction of the period, see 9 REP. JUDICIAL COUNCIL (1943) 353 (recommended period 60 days); 11 REP. JUDICIAL COUNCIL (1945) 207 (recommended period 90 days).



*service of the summons upon said defendant cannot after due diligence be made within the state, by delivering a copy to the person or persons to whom and each of whom a copy is required to be delivered by the provisions of Sections 225 and 226 of the Civil Practice Act.*

This provision relates to a resident or non-resident infant or incompetent defendant upon whom complete personal service of the summons cannot, after due diligence, be made within the state. In our earlier consideration of personal service of summons upon an infant or an incompetent, we noted that the summons must, at times, be served upon more than one person. If complete personal service cannot be made, after due diligence, upon the infant or incompetent defendant, service by publication may be made upon the person or persons to whom a copy is required to be delivered.<sup>27</sup>

*Subdivision 10. A resident of the state, and an attempt was made to commence the action against the defendant before the expiration of the limitation applicable thereto and the limitation would have expired within sixty days next preceding the application if time had not been extended by the attempt to commence the action.*

This provision relates to a resident defendant as to whom a claim would shortly be barred by the statute of limitations. Section 17 of the Civil Practice Act. Under the latter section, the delivery of the summons to the sheriff, with intent that it shall be actually served, operates to toll the period of limitation for a period of sixty days if delivery of the summons is followed within sixty days after the expiration of the period of limitation by service of the summons personally within or without the state, or by the first publication of the summons pursuant to an order therefor, or by substituted service. If therefore a summons has been delivered to the sheriff pursuant to Section 17, the plaintiff may procure an order for service by publication. Under this subdivision, it is not necessary for the applicant to show that the plaintiff, with due diligence, has been or will be unable to make

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<sup>27</sup> The 1946 revision added the reference to Section 226 of the Civil Practice Act.

personal service of the summons. The equivalent therefor is the delivery of the summons to the sheriff for service.

Subdivision 11. *In an action against the stockholders of a corporation or joint stock company, if the defendant is a stockholder thereof, and the action is authorized by the law of the state.*

Service by publication under this subdivision is based on inability, after due diligence, to make personal service of the summons upon the defendant stockholder.<sup>28</sup>

### § 5. Papers Upon Which Order for Service of Summons by Publication may be Made

In addition to the summons to be served in the action, the plaintiff must prepare three instruments: (1) A verified complaint; (2) an affidavit; (3) an order. We proceed to a consideration of each of these instruments.

#### § 6.—1. The Complaint

As a rule, an action may be commenced with or without a complaint. But an order for service of a summons by publication must be founded upon a verified complaint. This requirement tends to minimize service by publication and to preclude its unauthorized use.

Section 232-b<sup>29</sup> provides that the order for service by publication must be founded upon a verified complaint showing a cause of action specified in Subdivisions 1 or 2 of Section 232 of the Civil Practice Act against the defendant to be served or upon a verified complaint showing a cause of action to recover a sum of money only against the defendant to be served coupled with proof of an attachment levy, specified in Subdivision 3 of Section 232 of the Civil Practice Act.

Section 232, it will be recalled, provides that an order for service of summons by publication may be made where

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<sup>28</sup> See C. P. A. § 232-b.

<sup>29</sup> By the revision of 1946, Section 232-b was carved out from the first two (unnumbered) paragraphs following Subdivision 8 of former Section 232 of the Civil Practice Act. See 11 REP. JUDICIAL COUNCIL (1945) 209.

the complaint demands judgment in (1) matrimonial actions; (2) actions affecting specific property; and (3) actions to recover a sum of money only where an attachment levy has been made. The complaint must satisfy the requirements of both Sections 232 and 232-b. That is, the judgment demanded must be of the type specified. In addition, the complaint must show the existence of the requisite cause of action. This is in accord with long recognized requirements.<sup>30</sup>

### § 7.—2. The Affidavit

The affidavit submitted in support of an order for service of summons by publication must set forth:

1. If the action is to recover a sum of money only against the defendant to be served, proof that a levy has been made upon property within the state of such defendant under a warrant of attachment granted in the action.

Such proof is necessary whether the defendant be a resident or a non-resident.<sup>31</sup>

2. Proof of facts required by Section 232-a, showing that the defendant comes within one of the subdivisions of Section 232-a. Thus, in an action against a non-resident natural person (Subdivision 5), the affidavit must establish

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<sup>30</sup> See *Ebsary Gypsum Co. v. Ruby*, 256 N. Y. 406, 176 N. E. 820 (1931). Former Section 232 of the Civil Practice Act provided that the order must be founded upon a verified complaint showing a "sufficient" cause of action, etc. The word "sufficient" does not appear in the present corresponding provision. It appeared in the revision proposed by the writer. See 9 REP. JUDICIAL COUNCIL (1943) 355. In the later reprint (11 REP. JUDICIAL COUNCIL [1945] 209) of the Study, the word was inadvertently (?) omitted. It should have been retained. In any event, no change in the law was intended or effected.

<sup>31</sup> The writer recommended the abolition of the requirement of an attachment levy as a condition precedent to service by publication in an action to recover a sum of money only brought against a resident. This recommendation was coupled with a further recommendation that service by publication be supplemented by mailing copies of the requisite papers by registered mail. The writer still believes the recommendations sound. See 11 REP. JUDICIAL COUNCIL (1945) 197. Opposition to the recommendations ensued, and the writer redrafted the proposed legislation so as to continue the requirement of an attachment levy in an action to recover a sum of money only whether brought against a resident or a non-resident, but eliminated the requirement of an attachment levy in an action to recover a sum of money only brought against a resident if the summons is served personally without the state, pursuant to Section 235 of the Civil Practice Act. See Section 13, *infra*.

that the defendant is a non-resident; or in an action against a foreign corporation, the affidavit must establish the foreign status of the defendant.

3. Proof showing that the plaintiff, with due diligence, has been or will be unable to make personal service of the summons where application for the order is made upon the ground that:

(a) The defendant is a foreign corporation. See Subdivision 1 of Section 232-a; or

(b) The defendant is a joint stock association or other unincorporated association. See Subdivision 2 of Section 232-a; or

(c) The defendant is not a resident of the state. See Subdivision 5 of Section 232-a; or

(d) The defendant is a stockholder of a corporation or joint stock company. See Subdivision 11 of Section 232-a.<sup>32</sup>

The statute (Section 232-b) does not contain a due diligence requirement in respect to the other defendants designated in Section 232-a as persons on whom service by publication may be made. But Section 232-a prescribes additional facts in respect to such persons which must be proven by affidavit.<sup>33</sup> The prescribed additional facts are the equivalent of due diligence to effect personal service. The prescribed additional facts and the defendants against whom an order for service of summons by publication may be granted, are:

(a) A domestic corporation which has been dissolved, and after diligent effort service cannot be made within the state upon any person who at the time of dissolution was an

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<sup>32</sup> The due diligence requirement governing the stated instances is expressly set forth in Section 232-b of the Civil Practice Act.

<sup>33</sup> Section 232-b provides that the order for service of summons by publication must be founded on proof by affidavit of the additional facts required by Section 232-a.

officer or director of the corporation. Subdivision 3 of Section 232-a; or

(b) A domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation. Subdivision 4 of Section 232-a.<sup>34</sup>

(c) A defendant, who, after diligent inquiry, remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state. Subdivision 6 of Section 232-a.

(d) A resident of the state who has departed or is about to depart therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with like intent. Subdivision 7 of Section 232-a.

(e) A resident adult who has been continuously without the state more than six months next before the granting of the order and has not made a statutory designation, or service upon the designee cannot be made within the state, after diligent effort. Subdivision 8 of Section 232-a.

(f) A resident or non-resident infant or incompetent defendant upon whom complete personal service of the summons cannot, after due diligence, be made within the state. Subdivision 9 of Section 232-a.

(g) A resident of the state on whom an attempt was made to commence the action before the expiration of the applicable period of limitation, and the period would have expired within sixty days next preceding the application for an order for service of summons by publication. Subdivision 10 of Section 232-a.

4. If the defendant is an infant, the affidavit must also set forth the name, and the last known residence, within or without the state, of the father, mother, or guardian of such infant, or the person having the care and control of him or with whom he resides, or in whose service he is employed, or

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<sup>34</sup> Section 232-b needlessly and misleadingly repeats the additional facts already set forth in Subdivision 4 of Section 232-a. The provision was not included in the writer's proposed legislation. See 9 REP. JUDICIAL COUNCIL (1943) 355; 11 REP. JUDICIAL COUNCIL (1945) 209.

that the name and such residence, or either, of such person is unknown to the applicant.<sup>35</sup>

If the defendant is an incompetent, the affidavit must also set forth the name, and the last known residence of the committee or designee, within or without the state, of such incompetent or that the name and such residence, or either, of such person is unknown to the applicant.<sup>36</sup>

5. In actions other than those for the recovery of a sum of money only, the verified complaint or the affidavit should show the basis for the exercise of jurisdiction. Thus, in actions to divest the defendant of an interest in property, the existence of the property in the state should be shown. In matrimonial actions, the jurisdictional basis for the action should likewise be shown. If proof of these elements appears in the complaint, there is no necessity of again establishing them in the affidavit.

6. The affidavit must establish compliance with Rule 61 of the Rules of Civil Practice which provides that no order shall be granted *ex parte* unless there shall be presented with the application therefor an affidavit showing whether any previous application has been made for the order, or for a similar order, and if there has been a previous application, to which court or judge it was made, and the determination made thereof, and which new facts, if any are shown upon such subsequent application that were not previously shown.

7. In compliance with the mailing provisions of Rule 50 of the Rules of Civil Practice, the affidavit must set forth the place where the defendant probably would receive matter transmitted through the post office, or facts showing that with reasonable diligence the plaintiff cannot ascertain a place where the defendant or other qualified person would receive matter transmitted through the post office. This requirement enables the court to decide whether the summons

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<sup>35</sup> C. P. A. § 232-b. The revision of 1946 made several verbal changes in this infancy provision formerly contained in former Section 232 of the Civil Practice Act to conform to Section 225, paragraph 1 of the Civil Practice Act. See 11 REP. JUDICIAL COUNCIL (1945) 210, n. 36.

<sup>36</sup> C. P. A. § 232-b. The revision of 1946 added this incompetency provision, and conforms to Sections 225 and 226 of the Civil Practice Act.

and other papers to be forwarded to the defendant or other qualified person are likely to reach him, or being satisfied by the affidavits that with reasonable diligence, the plaintiff cannot ascertain a place where the defendant or other qualified person probably would receive matter transmitted through the post office, to dispense with the mailing requirement.<sup>37</sup>

### § 8.—3. The Order

The order for service of summons by publication may be either a judge's order or a court order.<sup>38</sup> Rule 50 of the Rules of Civil Practice prescribes the contents of the order. It provides that the order must direct that service be made by publication of the summons in two newspapers, in the English language, designated in the order as most likely to give notice to the defendant to be served, for a specified time, not less than once in each of six successive weeks. It must also contain a direction that on or before the day of the first publication the plaintiff deposit in a post-office, or in any post-office box regularly maintained by the government of the United States, one or more sets of copies of the (1) summons, (2) complaint, (3) order, and of the (4) notice required by Rule 52 of the Rules of Civil Practice, each set inclosed in a postpaid wrapper addressed to the defendant to be served, and if the defendant be an infant, addressed to his father, mother, or guardian or a person having the care or control of him or with whom he resides at a place specified in the order. In lieu of the direction for mailing, the order may contain a statement that the court or judge, being satisfied by the affidavit that with reasonable diligence the plaintiff cannot ascertain a place where the defendant or any such person probably would receive matter transmitted through the post-office, dispenses with the mailing provision.<sup>39</sup>

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<sup>37</sup> See *Dennin v. Duffy*, 83 Misc. 523, 527, 145 N. Y. Supp. 354, 356 (1914).

<sup>38</sup> C. P. A. § 234.

<sup>39</sup> Rule 50 contains further provisions affecting a defendant within a country with which the United States is at war or in a place with which by reason of the existence of a state of war, the United States of America does not maintain postal communication. For related war provision, see Rule 303.

In action for divorce where defendant-wife was in enemy-occupied country, the court, under its inherent powers, required the order for service of summons

The notice required to be given by Rule 52 states that the summons is served upon the defendant by publication pursuant to an order therefor. If the action is brought to recover a judgment affecting the title to, or the possession, use or enjoyment of real property, the notice must also briefly state the object of the action and give a brief description of the property. Set forth below are forms of an order for service of summons by publication and the requisite notice.

**Form of Order for Service of Summons by Publication  
Against Non-Resident—Attachment and Levy**

Supreme Court  
County of New York.

TRACY ELDER,  against  MOSES SHERMAN,	}	Plaintiff,    Defendant.
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Upon the summons and duly verified complaint herein, showing a cause of action to recover a sum of money only against the defendant herein, and upon the annexed affidavit of Tracy Elder, duly verified the 20th day of January, 1947, together with the exhibits thereto annexed by which the plaintiff has made proof to my satisfaction that the defendant herein is not a resident of the State of New York, but is a resident of the City of Constantinople, Turkey; that the plaintiff has been and will be unable, with due diligence, to make personal service of the summons upon the defendant within the State; and that a levy has been made upon property within the state of the defendant under a warrant of attachment, granted in the action;

Now, on motion of Maurice Jenks, attorney for the plaintiff, it is

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by publication to include a provision appointing a person designated by the court to receive a copy of the summons, complaint and papers upon the application for publication, on behalf of the defendant, and to protect the interests of the defendant. *Rosenblum v. Rosenblum*, 42 N. Y. S. (2d) 626 (1943).



ORDERED: 1. That service of the summons in the above-entitled action upon the defendant, Moses Sherman, be made by publication thereof, with the notice required by law in two newspapers, in the English language, namely: the New York Law Journal and the Morning Telegraph, both published in the County of New York, State of New York, once a week for six successive weeks, said newspapers being hereby designated as most likely to give notice to the defendant.

2. That, on or before the day of the first publication, as aforesaid, the plaintiff deposit in a post-office, or in any post-office box regularly maintained by the government of the United States, one or more sets of copies of the summons, complaint and the order herein, and of the notice required by Rule 52 of the Rules of Civil Practice, each set properly inclosed in a post-paid wrapper, addressed to the defendant, Moses Sherman, at Galata, Abid Han 37-38, Constantinople, Turkey.

Dated: New York, January 21st, 1947.

JAMES B. M. McNALLY  
Justice of the Supreme Court  
of the State of New York.

**Form of Notice to be Subjoined to and Published With  
the Summons Upon Publication**

To: Moses Sherman: The foregoing summons is served upon you by publication, pursuant to an order of Hon. James B. M. McNally, a Justice of the Supreme Court of the State of New York, dated the 21st day of January, 1947, and filed with the complaint in the office of the Clerk of the County of New York, at the County Court House, in the Borough of Manhattan, City, County and State of New York.

Dated: New York, January 22nd, 1947.

MAURICE JENKS, Attorney for Plaintiff, Office and  
P. O. Address, 165 Broadway, Borough of Manhattan,  
New York City.

**§ 9. Compliance With Order for Service of Summons by  
Publication**

Service of summons by publication may be effectuated by making publication and in other respects following the directions contained in the order. Section 233 provides for

an alternative method of personal service without the state in lieu of publication. We proceed to a consideration of each of these methods.

### § 10.—1. Compliance Under First Method

The following provisions and rules should be followed in effecting compliance with the order for service of summons by publication :

1. The order for service of summons by publication is valid only for three months after the same has been granted.<sup>40</sup> In consequence, the order must be effectuated within the stated time.

2. The summons, complaint and order, and the papers on which the order was made must be filed with the clerk on or before the day of the first publication.<sup>41</sup> The duty rests upon the plaintiff's attorney to see that the papers are actually filed.<sup>42</sup>

3. Mail copies of summons, complaint, order and notice required by Rule 52 on or before the day of first publication.<sup>43</sup>

4. Commence publication of summons and notice required by Rule 52 in two designated newspapers.<sup>44</sup>

5. Procure and file proof of mailing of summons and other papers and proof of publication of summons and notice from printer upon completion of publication of same.<sup>45</sup>

### § 11.—2. Compliance Under Second (Alternative) Method

1. Section 233 of the Civil Practice Act authorizes personal service of a summons without the state in lieu of publication in all cases when publication of the summons is ordered. The section is complementary to Sections 232, 232-a and 232-b of the Civil Practice Act. The section is

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<sup>40</sup> Rule 51, R. C. P.

<sup>41</sup> Rule 52, R. C. P.

<sup>42</sup> *Wilson & Co. v. Banque Francaise*, 124 Misc. 690, 208 N. Y. Supp. 213 (1923).

<sup>43</sup> Rule 50, R. C. P.

<sup>44</sup> Rule 50, R. C. P.

<sup>45</sup> Rule 53, R. C. P., subsds. 7 and 8.

distinguishable from Section 235 (see Section 13, *infra*) which authorizes personal service without the state without an order.<sup>46</sup> The basic purpose of Section 233 is to make personal service of a summons without the state equivalent to service by publication. Such personal service without the state is conditioned on the procurement of a prior order for service of summons by publication.

2. The pertinent provision of Section 233 is:

In all cases when publication of the summons is ordered, service of the copy of the summons and complaint and of any accompanying notice required by rules by the delivery thereof to the defendant personally without the state in the same manner as if such service were made within the state<sup>47</sup> is equivalent to notice by publication and deposit in the post-office.<sup>48</sup>

3. When we proceed under this method, both publication and mailing are dispensed with. Personal service without the state is equivalent to publication and mailing. The order for service of summons by publication is deemed to

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<sup>46</sup> In connection with the revision of 1946, the writer considered the advisability of consolidating Sections 233 and 235. Such consolidation would remove repetitious provisions affecting (1) the manner of service, (2) the persons who may make such service, (3) the filing of proof of service, and (4) the completion of service. Notwithstanding this possible economy, it was believed desirable, for the present, to retain Sections 233 and 235 as separate sections because the Practice Act in some special cases makes the procurement of an order for service of summons by publication mandatory. See Sections 287-a to 287-d (modern types of interpleader).

<sup>47</sup> The phrase "in the same manner as if such service were made within the state" was added by the 1946 revision. The addition of the phrase effects conformity with Section 235 of the Civil Practice Act and the construction of the phrase by the Court of Appeals in *Howard Converters v. French Art Mills*, 273 N. Y. 238, 7 N. E. (2d) 115 (1937) (if defendant is a foreign corporation, service upon it outside the state must accord with the rules of service of such a defendant within the state). See 11 REP. JUDICIAL COUNCIL (1945) 211.

<sup>48</sup> The balance of Section 233 is as follows:

The service must be made by a resident or citizen of the State of New York, or a sheriff, under-sheriff, deputy sheriff, constable, bailiff or other officer having like powers and duties of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counsellor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshal or a deputy United States marshal. Service without the state must be made and proof thereof must be filed within sixty days after the order is granted; otherwise the order becomes inoperative. Service without the state in lieu of publication is complete ten days after proof thereof is filed.

authorize not only service by publication but the alternative method of personal service without the state. The order need not expressly authorize both methods.<sup>49</sup> Provision in the order for alternative personal service is mere surplusage.<sup>50</sup> An order which does not provide for publication, but merely authorizes personal service without the state, is void.<sup>51</sup>

4. The following provisions and rules should be complied with in effecting personal service without the state in lieu of publication :

(a) Service without the state must be made within sixty days after the order is granted, otherwise the order becomes inoperative.<sup>52</sup> (Compare the three-month provision under the first method.)

(b) The summons, complaint and order, and the papers on which the order was made must be filed with the clerk on or before the day of personal service. This corresponds to the procedure under the first method.<sup>53</sup>

(c) Serve copies of summons, complaint and the notice required by Rule 52 upon the defendant personally without the state within sixty days after the order is granted.<sup>54</sup> The notice subjoined to the summons, where service is made without the state, differs from the notice where service is made by publication in that the words "without the State of New York" are substituted for the words "by publication."<sup>55</sup> The persons authorized to make such service outside the state are enumerated in Section 233.

(d) Procure and file affidavit of service.<sup>56</sup>

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<sup>49</sup> *Marrone v. Tesoriere*, 92 Misc. 602, 156 N. Y. Supp. 280 (1915).

<sup>50</sup> *Banfield Co. v. Hollenbeck*, 184 App. Div. 618, 172 N. Y. Supp. 377 (3d Dep't 1918).

<sup>51</sup> *Mijon v. Mijon*, 120 Misc. 115, 198 N. Y. Supp. 627 (1923).

<sup>52</sup> C. P. A. § 233.

<sup>53</sup> Rule 52, R. C. P.

<sup>54</sup> C. P. A. § 233.

<sup>55</sup> Rule 52, R. C. P.

<sup>56</sup> Rule 53, R. C. P. subd. 6.

### § 12. When Service is Complete

Where a defendant is served by actual publication pursuant to an order therefor (first method), service is complete on the forty-second day after the day of the first publication.<sup>57</sup> Where a defendant is served personally without the state in lieu of publication (second method), service is complete ten days after proof thereof is filed.<sup>58</sup> The added period is a matter of grace to allow actual notice to be brought to the defendant before the beginning of the twenty-day period allowed to the defendant to answer.<sup>59</sup>

### § 13. Personal Service Without the State Without Order

1. Section 235 of the Civil Practice Act authorizes personal service without the state without an order in certain cases hereinafter considered. Section 235 is distinguishable from Section 233 in that Section 235 authorizes personal service without the state without an order, while Section 233 authorizes personal service without the state after the procurement of an order. Section 233 is complementary to the basic sections of the Civil Practice Act authorizing service by publication (Sections 232, 232-a and 232-b). Section 235 is dependent in part on the same basic sections.

2. The principal provision of Section 235 is:

Where the defendant is a resident of the state and the complaint demands judgment for a sum of money only, and in any case specified in section two hundred thirty-two of this act, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the verified complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred thirty-three of this act to make service without the state in lieu of publication.<sup>60</sup>

<sup>57</sup> Rule 51, R. C. P.

<sup>58</sup> C. P. A. § 233.

<sup>59</sup> *Cooper v. Amehler*, 178 Misc. 844, 35 N. Y. S. (2d) 917 (1942).

<sup>60</sup> The balance of Section 235 is as follows:

Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.

3. The first part of Section 235 stating the instances in which personal service may be made without the state without an order was first included in 1946 as part of the general revision of the law governing service by publication. The stated provision authorizes personal service to be made without the state without an order in two groups of cases:

(1) Where the defendant is a resident of the state and the complaint demands judgment for a sum of money only.

(2) In any case specified in Section 232.

We proceed to consider each of these cases.

#### § 14.—1. Action for Sum of Money Only Against Resident Defendant

The purpose of this provision is to authorize personal service without the state in an action against a resident wherein the complaint demands judgment for a sum of money only without procuring an order for service of summons by publication and without requiring a prior warrant of attachment and levy. The stated provision has no effect on a non-resident.

This provision of Section 235 is supplemental to the provision of Section 232 which authorizes the making of an order for service of summons by publication where an attachment levy has been made. Subdivision 3. The stated provision of Section 232 applies to resident and non-resident defendants alike. But the stated provision of Section 235, as already noted, applies to resident defendants only. Consequently, a plaintiff, unable to make personal service within the state on a resident in an action to recover a sum of money only, need not procure a warrant of attachment, but may make personal service of the summons without the state without procuring an order for service of summons by publication. Prior to the 1946 revision, Section 235 made no distinction in this respect between a resident and a non-resident defendant. The distinction should be and now is recognized. A plaintiff suing a resident for a sum of money only, and relying upon personal service without the state, should be *permitted* but not *compelled* to make an attachment levy. Attachment requires a plaintiff to furnish an undertaking to the effect that

if the defendant recovers judgment or the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment.<sup>61</sup> The cost of the undertaking and the hazard of the plaintiff thereunder should not be imposed upon a plaintiff who seeks to prosecute an action to recover a sum of money only against a resident. What is more, the resident defendant may have no property within the state subject to attachment. The absence of such property should not preclude the prosecution of the action.

*Milliken v. Meyer*, decided by the Supreme Court of the United States in 1940, emphasized the amenability of an absent domiciled defendant to extraterritorial service reasonably apprising the defendant of the proceedings against him, without requiring a prior attachment.<sup>62</sup>

*Milliken v. Meyer*. Milliken sued Meyer in the Wyoming court for an accounting and for the recovery of certain profits. Meyer was personally served with process in Colorado pursuant to the Wyoming statutes, on the ground that he was a resident of Wyoming. Meyer defaulted, and the court entered an *in personam* judgment against him for the profits wrongfully withheld. Meyer then sued Milliken in Colorado to enjoin the enforcement of the Wyoming judgment and for a decree declaring the Wyoming judgment a nullity for want of jurisdiction over Meyer or his property. The bill alleged that at the time of service of process in the Wyoming action, Meyer had long ceased to be a resident of Wyoming, and was a resident of Colorado; that the service did not give the Wyoming court jurisdiction of his person or property; and that such judgment was violative of the due process clause of the Fourteenth Amendment. Milliken's answer alleged that Meyer was a resident of Wyoming at the time of the Wyoming action, and that the Wyoming judgment was entitled to full faith and credit in Colorado under the federal constitution. The Colorado court, on issues joined, found that Meyer was domiciled in Wyoming when

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<sup>61</sup> C. P. A. § 907.

<sup>62</sup> 311 U. S. 457, 61 Sup. Ct. 339 (1940), *rehearing denied*, 312 U. S. 712 (1941).

the Wyoming suit was commenced; that the Wyoming service statutes were constitutional; and that the affidavit of service substantially conformed to the Wyoming statutes. The judgment was reversed by the Supreme Court of Colorado. In so doing, the court did not pass on the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter. It held that the Wyoming decree was void on the face because of an irreconcilable contradiction between the findings and the decree. The United States Supreme Court granted certiorari, and reversed the Colorado Supreme Court.<sup>63</sup> The court held that the Wyoming court had acquired jurisdiction over Meyer. The court said:

Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.<sup>64</sup> Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state . . . as well as where he was personally served without the state. . . . That such substituted service may be wholly adequate to meet the requirements of due process was recognized by this court in *McDonald v. Mabee*, 243 U. S. 90, despite earlier intimations to the contrary. See *Pennoyer v. Neff*, 95 U. S. 714, 733; *Burdick*, Service as a Requirement of Due Process in Actions in Personam, 20 Mich. L. Rev. 422. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (*McDonald v. Mabee*, *supra*) implicit in due process are satisfied. Here there can be no question on that score. Meyer did not merely receive actual notice of the Wyoming proceedings. While outside the

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<sup>63</sup> In respect to the ground of reversal by the Colorado Supreme Court, the court said that if the Wyoming court had jurisdiction over Meyer, the holding by the Colorado Supreme Court that the Wyoming judgment was void because of an inconsistency between the findings and the decree was not warranted. ". . . the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based . . . Whatever mistakes of law may underlie the judgment . . . it is 'conclusive as to all the *media concludendi*.'"

<sup>64</sup> The term "substituted service" is here employed in its comprehensive sense connoting technical substituted service (see C. P. A. §§ 230, 231) and service by publication.



state he was personally served in accordance with a statutory scheme which Wyoming had provided for such occasions. And in our view the machinery employed met all the requirements of due process. Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service. As in case of the authority of the United States over its absent citizens (*Blackmer v. United States*, 284 U. S. 421), the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable," from the various incidences of state citizenship . . . The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him. See Restatement, Conflict of Laws, secs. 47, 79; Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427. Here such a reasonable method was so provided and so employed. (Per Douglas, J.)

The *Milliken* decision was most favorably reviewed and its high importance noted.<sup>65</sup> It represents the views of text writers<sup>66</sup> and the Restatement of the Conflict of Laws.<sup>67</sup> It suggested the timeliness of the elimination from

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<sup>65</sup> For law review comment on *Milliken v. Meyer*, see Note (1941) 41 Col. L. Rev. 724, 726; Note, Sp. 1941 MONTANA L. REV. 112, 119; (1941) 13 ROCKY MT. L. REV. 253; (1941) 14 So. CALIF. L. REV. 488; (1941) 8 U. OF CHI. L. REV. 596. See also Note (1936) 24 Ky. L. J. 345. In this last Note, written in advance of the *Milliken* decision, the writer of the Note argued for the enactment of legislation in Kentucky which would sustain a judgment under the circumstances involved in the *Milliken* case.

Excerpts from the stated law review comment are included in the writer's Study for the Judicial Council. See 9 REP. JUDICIAL COUNCIL (1943) 368; 11 REP. JUDICIAL COUNCIL (1945) 218.

<sup>66</sup> 1 BEALE, CONFLICT OF LAWS (1935) 334; GOODRICH, CONFLICT OF LAWS (1938) 158; STUMBERG, CONFLICT OF LAWS (1937) 75.

<sup>67</sup> "Individual Domiciled within the State. A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state." RESTATEMENT, CONFLICT OF LAWS (1934) § 79. The annotation to Section 79 in the N. Y. Annotations (1935) reads: "The section is probably in accord with the law of New York."

the statutory law of New York of the attachment condition in an action to recover a sum of money only against a resident served personally without the state.<sup>68</sup> The elimination of the attachment condition in such cases is consistent with recognized jurisdictional principles and related statutes and rules.<sup>69</sup>

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<sup>68</sup> The writer in the Study made for the Judicial Council, proposed the elimination of the attachment condition in an action to recover a sum of money only against a resident of the state not only where he is personally served without the state but also in cases where he is served by publication. See 9 REP. JUDICIAL COUNCIL (1943) 335, 343; 11 REP. JUDICIAL COUNCIL (1945) 191, 197. To the extent that attachment has significance as a notice-giving device, provision was to be made for the effectuation of the order for service by publication of the summons and notice, and the mailing of copies of the summons, complaint, order and notice by *registered mail*. Compare Rule 50 of the Rules of Civil Practice. The Judicial Council, after considerable discussion and deliberation, concluded to recommend the elimination of the attachment condition only in the case of personal service without the state. The writer redrafted the proposed legislation to conform to this conclusion, and the law as redrafted, was enacted.

<sup>69</sup> (a) Civil Practice Act, Section 493 affects the rendering of a judgment for a sum of money only where a summons was served upon a defendant without the state or otherwise than personally, and the defendant defaults. The plaintiff may then apply for the judgment demanded in the complaint. But the judgment may not be rendered in an action for the recovery of a sum of money only, where the defendant is a nonresident or a foreign corporation, and has not appeared, unless the plaintiff, upon such application, files proof that a warrant of attachment, granted in the action, has been levied upon property of the defendant. As am'd Laws 1942, c. 313. The amendment was recommended by the Judicial Council and conforms to the provisions of Section 902 as amended in 1941.

(b) Rule 192 of the Rules of Civil Practice likewise provides that on an application for the entry of a default judgment, if the summons was served on the defendant without the state or otherwise than personally, in an action for a sum of money only, if the defendant is a nonresident or a foreign corporation, the plaintiff must produce and file proof by affidavit that a warrant of attachment granted in the action has been levied on the property of the defendant.

(c) Section 645 of the Civil Practice Act prescribes the requisites of an execution against property of the defendant where a warrant of attachment has been issued in an action, and a levy has been made upon the property of the defendant.

Section 645 classifies the requisites of such execution into two divisions.

The first division affects a nonresident judgment-debtor or a foreign corporation upon whom or which the summons was served without the state, or otherwise than personally, pursuant to an order obtained therefor, and the judgment-debtor has not appeared in the action. The statute provides that in such case the execution against the property of the defendant must require the sheriff to satisfy the judgment out of the attached property only, and in the following order: (1st) out of the attached personal property, and (2d) if the same be insufficient, out of the attached real property. The judgment in such case has an *in rem* effect.

The second division affects judgment-debtors not specified in the first division, and includes (*inter alios*) a resident judgment-debtor and a domestic

### § 15.—2. In any Case Specified in Section 232

Section 235 authorizes personal service without the state without procuring an order for service of summons by publication in any case specified in Section 232 of the Civil Practice Act. This general provision was first included in the section in 1946.<sup>70</sup> The provision is effective in any case where the plaintiff is permitted to procure an order for service of summons by publication under Section 232. This includes matrimonial actions, actions affecting specific property and actions in which an attachment levy has been made. Implicit in the implementation of Section 235 is compliance with Sections 232-a (persons against whom an order for service by publication may be made) and 232-b (use of due diligence, if required by the publication statute, to make personal service within the state). These limitations arise from the fact that Section 232, by its terms, must be read with Sections 232-a and 232-b.

Section 235 is one of the most useful and important sections of the Civil Practice Act. By dispensing with the necessity for procuring an order for service by publication, it relieves the plaintiff's attorney of the task of preparing an order with supporting affidavits, and submitting the same to the court; it relieves the court of the task of reading the

corporation. Though such resident judgment-debtor or domestic corporation was served with a summons without the state, and did not appear in the action, the statute provides that the execution against the property of the defendant must require the sheriff to satisfy the judgment out of the *attached and unattached property*, and in the following order: (1) Out of the attached personal property; (2) if that be insufficient, out of the unattached personal property of the judgment-debtor; (3) if both be insufficient, out of the attached real property, and (4) if that be insufficient, out of the unattached real property of the judgment-debtor. The judgment in such case has an *in personam* effect.

Section 645 expresses the long established policy of this state. See particularly *Place v. Riley*, 98 N. Y. 1 (1885). *Accord*, *Gilman v. Tucker*, 13 N. Y. Supp. 804 (1891), *aff'd*, 128 N. Y. 190 (1891).

(d) For consideration of 1920 amendment of statutory law of New York which for the first time required an attachment as a condition to obtaining an order for service by publication as to *all defendants* in actions to recover a sum of money only, see 11 REP. JUDICIAL COUNCIL (1945) 197, note 7, paragraph (c) and note 8.

<sup>70</sup> The general provision supplemented the multiple specification of actions in which such service could be made. The multiple specification was the product of an evolutionary legislative process. See 11 REP. JUDICIAL COUNCIL (1945) 215.

papers and issuing the order. It dispenses with the cost incurred and time consumed in publication. Most important, however, is the fact that by requiring delivery of the summons and complaint to the defendant in person, it assures his early knowledge of the commencement of an action against him and of its nature. Next to personal service within the state, personal service without the state without an order is the simplest and most effective way of giving to a defendant the notice to which he is entitled under the due process clause.

### § 16.—3. Further Aspects of Section 235

1. Personal service without the state must be made in the same manner as if such service were made within the state. Thus, if the defendant is a foreign corporation, the defendant must be served without the state in accordance with the New York rules governing service of summons on foreign corporations.<sup>71</sup>

2. A copy of the verified complaint must be annexed to and served with the summons. The revision of 1946 added the requirement of verification, and thereby effected conformity with Sections 232 and 233.<sup>72</sup>

3. Service of the summons must be made by a person or officer authorized under Section 233 to make service without the state in lieu of publication.<sup>73</sup>

4. Proof of service without the state without an order must be filed within sixty days after such service.<sup>74</sup>

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<sup>71</sup> *Howard Converters v. French Art Mills*, 273 N. Y. 238, 7 N. E. (2d) 115 (1937).

<sup>72</sup> See 11 REP. JUDICIAL COUNCIL (1945) 217.

<sup>73</sup> The writer, in the Study made for the Judicial Council, proposed the elimination from Sections 233 and 235 of the particular provisions specifying the persons and officers who may make personal service of a summons without the state, and the substitution therefor of the general provision of Section 220 authorizing any person of the age of eighteen years or over, other than a party to the action, to make such service. See 9 REP. JUDICIAL COUNCIL (1943) 360, Comment B, 367, Comment C. The Judicial Council did not adopt the proposal.

<sup>74</sup> The omission to file proof of service within sixty days is not a jurisdictional defect, and is subject to correction. C. P. A. §§ 109, 109-a. *City Bank Farmers Trust Co. v. Pleasanton*, — Misc. —, 51 N. Y. S. (2d) 672 (1944).

5. Service without the state without an order is complete ten days after proof thereof is filed.

### § 17. Right of Defendant to Defend After Default

Section 217 of the Civil Practice Act generally gives a defaulting defendant the right to defend, notwithstanding default, where substituted service was effected or service by publication was made pursuant to an order for service by publication. This provision is inapplicable where the defendant is served personally without the state in lieu of publication pursuant to Section 233 of the Civil Practice Act or where the defendant is served without the state without an order pursuant to Section 235 of the Civil Practice Act. The inapplicability of Section 217 to the two latter instances is a further advantage of personal service without the state.<sup>75</sup>

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<sup>75</sup> *Service by publication in New York City Court and New York Municipal Court.* Service by publication is permitted in an action brought in the New York City Court to the same extent as an action brought in the Supreme Court. N. Y. CITY Ct. ACT § 51. Service by publication is permitted in the Municipal Court in limited instances. N. Y. MUNICIPAL Ct. CODE § 21.