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Edson R. Sunderland

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PROCESS

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I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

A. Definition. Process, in the sense in which it is employed in the present title, means the writ, notice, or other formal writing, issued by authority of law, for the purpose of bringing defendant into a court of law to answer plaintiff's demands in a civil action,[1] although in a more technical and limited sense the

1. *Georgia.*— Savage *v.* Oliver, 110 Ga. 636, 639. See also Neal-Millard Co. *v.* Owens, 115 Ga. 959, 961, 42 S. E. 266.

Iowa.— Gollobitsch *v.* Rainbow, 84 Iowa 567, 570, 51 N. W. 48.

Michigan.— Tweed *v.* Metcalf, 4 Mich. 578, 588.

Minnesota.— Hinkly *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Missouri.— Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349, 355.

New York.— Utica City Bank *v.* Buell, 9 Abb. Pr. 385, 390, 17 How. Pr. 498.

Pennsylvania.— Philadelphia *v.* Campbell, 11 Phila. 163, 164.

Wisconsin.— Carey *v.* German American Ins. Co., 84 Wis. 80, 84, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

United States.— U. S. *v.* Murphy, 82 Fed. 893, 899.

Other definitions are: The means used to acquire jurisdiction of defendants in an action, whether by writ or notice, may properly be designated a process. Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624. See also Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266.

A writ, warrant, subpœna, or other formal writing issued by authority of law. Savage *v.* Oliver, 110 Ga. 636, 36 S. E. 54.

In its application to the commencement of the proceedings the word "process" is used to designate the writ or other judicial means by which a defendant is brought into court to answer a charge, although there may be afterward issued in the progress of the case interlocutory and final processes. Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

Synonymous with writ.—Process is synonymous with writ — all writs being called process. Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267. The common-law definition of process is a writ issued by some

term is frequently applied only to those writs or writings which issue out of a court or officer exercising judicial power. Tweed *v.* Metcalf, 4 Mich. 578. The word "process," as used in a constitutional provision relating to the style of all processes, means all such writs, whether original, mesne, or final, by which the authority of the state is exerted in obtaining jurisdiction over the person or property of the citizen, and which requires the exercise of a sovereign power for their enforcement. Hinkly *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Statutory definitions.— The word "process" shall include any writ, declaration, summons, or order whereby any action, writ, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding authorized by law in this state. Minn. Gen. St. (1894) §§ 2865, 3190; Oreg. Annot. Codes & St. (1901) § 5169; Ballinger Annot Codes & St. Wash. (1897) § 4405.

The word "process" signifies a writ or summons issued in the course of judicial proceedings. Ariz. Pen. Code (1901), par. 7, subd. 15; Sandel & H. Dig. Ark. (1893) § 7220; Cal. Code Civ. Proc. (1903) § 17, subd. 6; Cal. Pen. Code (1903), § 7, subd. 15; Cal. Pol. Code (1903), § 17, subd. 6; Ky. Civ. Code, § 732, subd. 26; Mont. Pol. Code (1895), § 16, subd. 6; Mont. Code Civ. Proc. (1895) § 3463, subd. 5; Mont. Pen. Code (1895), § 7, subd. 15; N. D. Rev. Codes (1899), § 5152; S. D. Code Civ. Proc. (1903) § 8; Utah Rev. St. (1898) § 2498; Epperson *v.* Graves, 3 Ky. L. Rep. 527, 528.

"Process," as used in the article relating to the sheriff, includes all writs, warrants, summons, and orders of courts of justices or judicial officers. Cal. Pol. Code (1903), § 4175; Ida. Pol. Code (1901), § 1644; Mont. Pol. Code (1895), § 4380; Utah Rev. St. (1898) § 5574.

Process of law, as defined by Lord Coke, is twofold, viz., by the king's writ or by due proceeding and warrant, either in deed or in law, without writ. 2 Coke Inst. 51, 52 [*quoted* in People *v.* Nevins, 1 Hill (N. Y.) 154; State *v.* Shaw, 73 Vt. 149, 50 Atl. 863]. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 1089 *et seq.*

Classification as mesne and final.—Although literally perhaps process can only be strictly characterized as the initial steps in a case, it is come to be indicated by the two terms "mesne" and "final" which are used to designate the two stages in the progress of a cause in which it is employed. Utica City Bank *v.* Buel, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. 498.

Civil process.— The term "civil process" as employed in a statute providing that no civil process shall issue against a person in the military service of the state or of the United States includes a writ of scire facias upon a mortgage, unless expressly prohibited by the act of the contracting parties. Coxe *v.* Martin, 44 Pa. St. 322.

Compulsory process.— The term "compulsory process" as used with reference to the securing of attendance of witnesses includes not only the ordinary subpœna but a warrant of arrest or attachment for such witnesses as fail to obey or avoid service of the first subpœna or recognizance. Powers *v.* Com., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 24 Ky. L. Rep. 1007. "Compulsory process for obtaining witnesses" means the right to invoke the aid of the law to compel the personal attendance of witnesses at the trial when they are within the jurisdiction of the court. Graham *v.* State, 50 Ark. 161, 6 S. W. 721. See, generally, WITNESSES.

Criminal process see, generally, CRIMINAL LAW, 12 Cyc. 297 *et seq.*

Final process is usually used as equivalent to a process of execution (see, generally, EXECUTIONS, 17 Cyc. 921), as distinguished from mesne process which must issue before final judgment (see Arnold *v.* Chapman, 13 R. I. 586). For example, where a statute provides that if there shall be no master in chancery or commissioner to execute a decree, the same may be carried into effect by execution or other final process, such process must be understood to be such as is the practice of the court of chancery to issue, which are, besides executions, writs of attachment and sequestration and writs of assistance. Armsby *v.* People, 20 Ill. 155. "Final process" as used in particular statutes has been held to comprise writs of execution. Amis *v.* Smith, 16 Pet. (U. S.) 303, 313, 10 L. ed. 973. And as a part of the proceedings upon final process a forthcoming bond executed after levy of an execution is included. Amis *v.* Smith, *supra*. A motion by a judgment debtor to allow a judgment against the judgment creditor to be created against the other judgment has been held a final process. Curlee *v.* Thomas, 74 N. C. 51 [*cited* in Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114].

Irregular process.— Irregular process has been defined to mean process absolutely void and not merely erroneous and voidable; but usually the term has been applied to all processes not issued in strict conformity with the law, whether the defects appear upon the face of the process or by reference to extrinsic facts, and whether such defects render the process absolutely void or only voidable. Doe *v.* Harter, 2 Ind. 252, 253. Irregular process is such as a court has general jurisdiction to issue, but which is authorized in the particular case by reason of the existence or non-existence of facts or circumstances rendering it improper in such a case. Bryan *v.* Congdon, 86 Fed. 221, 223, 29 C. C. A. 670. There is a great difference between erroneous process and irregular (that is void) process. The first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning. Paine *v.* Ely, N. Chipm. (Vt.) 14, 24.

Mesne process.— In its strict significance mesne process is used to embrace all writs and orders of the court necessary for the carrying on of the suit after its institution,

court.[2] It is so denominated because it proceeds or issues forth in order to compel the appearance of defendant.[3] In a more enlarged signification process includes all the proceedings of any court.[4] As employed in statutes the legal

from and after the summons which is the original process up to, but not including those writs which are necessary to secure the benefits of the suit to the successful party and which are final process. Birmingham Dry-Goods Co. *v.* Bledsoe, 113 Ala. 418, 21 So. 403. However, in some jurisdictions and under particular statutes the term "mesne process" is used to describe any and all writs except final process, or to embrace all writs preceding execution. Birmingham Dry-Goods Co. *v.* Bledsoe, *supra*; Place *v.* Washburn, 163 Mass. 530, 40 N. E. 853; State *v.* Ferguson, 31 N. J. L. 289; Arnold *v.* Chapman, 13 R. I. 586. Where used in contradistinction to final process or process to execution mesne process signifies all such process as intervenes between the commencement and end of the suit. Pennington *v.* Lowenstein, 19 Fed. Cas. No. 10,938. In the use of the phrase "mesne process" in contradiction of "final process," it has been held to include the process by which defendant is brought into court (Hirshiser *v.* Tinsley, 9 Mo. App. 339), a subpœna for a witness (Birmingham Dry-Goods Co. *v.* Bledsoe, 113 Ala. 418, 21 So. 403), a counter affidavit interposed to an execution issued upon foreclosure of a laborer's lien (Cosgrave *v.* Mitchell, 74 Ga. 824), and a writ of attachment (Place *v.* Washburn, 163 Mass. 530, 40 N. E. 853; Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133). In speaking of arrest upon mesne process the court said: "The object of mesne process is essentially different from that of final process or execution; one is to compel the appearance of the party in court; the other to satisfy the demand of the plaintiff. In one the command is to take the body 'and him safely keep so that you have him to appear' on the return day of the writ; in the other it is to take the body of the debtor, and him commit to the keeper of the jail, etc., and the keeper is commanded to him safely keep until he pays, etc." Aldrich *v.* Weeks, 62 Vt. 89, 90, 19 Atl. 115.

Original process.— Original process is the process which originates a cause (Oglesby *v.* Attrill, 12 Fed. 227), as distinguished from that which prolongs an action already begun (Oglesby *v.* Attrill, *supra*), or which is appellate in its nature (Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 586, 10 L. ed. 579, 618). It has been held, under particular statutes, to apply to the petition and citation taken together (Hotchkiss' Appeal, 32 Conn. 353, 355), but not to apply to a writ of habeas corpus (Holmes *v.* Jennison, *supra*), nor to process served by way of notice to plaintiff of a bill for new trial (Oglesby *v.* Attrill, *supra*), or to a subpœna or notice issued on the filing of a bill in equity to enjoin an action at law (Cortes Co. *v.* Thannhauser, 9 Fed. 226, 228, 20 Blatchf. 59).

Original writ.— By original writ is usually meant the first process or initiatory step in prosecuting a suit. Walsh *v.* Haswell, 11 Vt. 85. At common law it is to be distinguished from a judicial writ. Walsh *v.* Haswell, *supra*; Converse *v.* Damariscotta Bank, 15 Me. 431; Pullman Palace-Car Co. *v.* Washburn, 66 Fed. 790. The English practice was that the original writ issued from chancery and was witnessed in the name of the sovereign, but judicial writs issued from the court where the proceedings were of record, such a process being from the court and grounded on proceedings before them. Walsh *v.* Haswell, *supra*; Pullman Palace-Car Co. *v.* Washburn, *supra*. Under the practice of the United States there is no such thing as an original writ as it was known to the English common-law practice. Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71. See also Clark *v.* Paine, 11 Pick. (Mass.) 66, wherein it is said that a writ of scire facias, according to the English practice, would not be considered as an original writ, but that such a designation had in England a technical meaning which it would not be safe to adopt in giving construction to a Massachusetts statute. In the United States the term "original writ" has been held to include a writ of summons and attachment. Pressey *v.* Snow, *supra*.

Returnable process.— The term "returnable process" is used to designate process upon which the officer receiving it is bound to certify his doings. Utica City Bank *v.* Buel, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. 498.

Summary process.— "Summary," as applied to process, means immediate, instantaneous, in contradistinction from the ordinary course by emanating and taking effect without intermediate applications or delays. Gaines *v.* Travis, 8 N. Y. Leg. Obs. 45.

Trustee process see GARNISHMENT, 20 Cyc. 978.

Void process.— Void process is defined to be such as was issued without power in the court to award it, or which a court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process. Bryan *v.* Congdon, 86 Fed. 221, 29 C. C. A. 670.

2. *Colorado.*— Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506.

Florida.— Gilmer *v.* Bird, 15 Fla. 410.

Iowa.— Nichols *v.* Burlington, etc., Plank-road Co., 4 Greene 42.

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Oregon.— Bailey *v.* Williams, 6 Oreg. 71.

Wisconsin.— Porter *v.* Vandercook, 11 Wis. 70.

3. Davenport *v.* Bird, 34 Iowa 524; Fitzpatrick *v.* New Orleans, 27 La. Ann. 457; State *v.* McCann, 67 Me. 372.

4. *Connecticut.*— Palmer *v.* Allen, 5 Day 193.

meaning of the word "process" varies according to the context, subject-matter, and spirit of the statute in which it occurs.[5]

Florida.— Gilmer *v.* Bird, 15 Fla. 410, 421, where it is said: "Says Baron Comyn, 'Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment; but generally, it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's Courts, ought to be in the name of the King.'"

Iowa.— See Gollobitsch *v.* Rainbow, 84 Iowa 567, 570, 51 N. W. 48, where it is said: "It is true that the word 'process,' as generally used, is understood to mean a writ, warrant, subpœna or other formal writing issued by authority of law, but it also refers to the means of accomplishing an end, including judicial proceedings."

Minnesota.— Wolf *v.* McKinley, 65 Minn. 156, 68 N. W. 2; Hanna *v.* Russell, 12 Minn. 80.

New Mexico.— Tipton *v.* Cordova, 1 N. M. 383.

New York.— Perry *v.* Lorillard F. Ins. Co., 6 Lans. 201 [*affirmed* in 61 N. Y. 214, 19 Am. Rep. 272]; Taylor *v.* Porter, 4 Hill 140, 40 Am. Dec. 274.

Vermont.— Rich *v.* Trimble, 2 Tyler 349.

United States.— U. S. *v.* Murphy, 82 Fed. 893; Marvin *v.* U. S., 44 Fed. 405; McBratney *v.* Usher, 15 Fed. Cas. No. 8,661, 1 Dill. 367.

Modes of process as employed in statutes may be considered as equivalent to modes or manner of proceeding. Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 27, 6 L. ed. 253; U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90.

5. U. S. *v.* Murphy, 82 Fed. 893.

It has been held to include: A summons. Sherman *v.* Gundlach, 37 Minn. 118, 33 N. W. 549; McLaughlin *v.* Wheeler, 2 S. D. 379, 50 N. W. 834. *Contra*, Comet Consol Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506; Johnson *v.* Hamburger, 13 Wis. 175; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305. See also Gilmer *v.* Bird, 15 Fla. 410; Hanna *v.* Russell, 12 Minn. 80; Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey *v.* Williams, 6 Oreg. 71; Porter *v.* Vandercook, 11 Wis. 70. A summons from a justice's court. Hyfield *v.* Sims, 90 Ga. 808, 16 S. E. 990. A summons in garnishment. Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646; German American Ins. Co. *v.* Chippewa Cir. Judge, 105 Mich. 566, 63 N. W. 531; Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55; Franklyn *v.* Taylor Hydraulic Air Compressing Co., 68 N. J. L. 113, 52 Atl. 714; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252. But see Wile *v.* Cohn, 63 Fed. 759. An original notice from a city court. Tully *v.* Beaubien, 10 Iowa 187. A writ of attachment. Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267. A scire facias. Epperson *v.* Graves, 3 Ky. L. Rep. 527. A scire facias ad audiendum errores. Weiskoph *v.* Dibble, 18 Fla. 22. A scire facias upon a mortgage. Drexel *v.* Miller, 49 Pa. St. 246. A notice of motion. Field *v.* Park, 20 Johns. (N. Y.) 140. A guardian's notice of application to sell his ward's land. Nichols *v.* Mitchell, 70 Ill. 258. A rule *nisi* in an action to foreclose a mortgage. Falvey *v.* Jones, 80 Ga. 130, 4 S. E. 264. An order of sale in foreclosure. National Black River Bank *v.* Wall, 3 Nebr. (Unoff.) 316, 91 N. W. 525. An execution. Savage *v.* Oliver, 110 Ga. 636, 36 S. E. 54; Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Gowdy *v.* Sanders, 88 Ky. 346, 11 S. W. 82, 10 Ky. L. Rep. 912; Lewis *v.* Morton, 159 Mass. 432, 34 N. E. 544; National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663; Harman *v.* Childress, 3 Yerg. (Tenn.) 327; U. S. *v.* Noah, 27 Fed. Cas. No. 15,894, 1 Paine 368. An attachment execution. Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 30 Atl. 724. A fee bill. Reddick *v.* Cloud, 7 Ill. 670. A writ of assistance on a fieri facias for costs. Clark *v.* Martin, 3 Grant (Pa.) 393. Any writ issued by the commissioner for service, including the warrant, the subpœna and the mittimus writs, temporary and final, and the recognizance or bonds of defendant and witnesses in the case. Taylor *v.* U. S., 45 Fed. 531. A recognizance taken by United States commissioners for appearance and an answer in a criminal case. U. S. *v.* Murphy, 82 Fed. 893. A list of grand jurors and alternates, and petit jurors and alternates selected by the county commissioners and furnished the sheriff. Williams *v.* Hempstead County, 39 Ark. 176. A rule or order to commit in contempt proceedings. People *v.* Nevins, 1 Hill (N. Y.) 154. A warrant for arrest. Gorr *v.* Port Jervis, 57 N. Y. App. Div. 122, 68 N. Y. Suppl. 15; Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163. See also Davenport *v.* Bird, 34 Iowa 524. A declaration in actions commenced without writ, but by filing and service of a declaration, is in the nature of process. Menominee *v.* Menominee County Cir. Judge, 81 Mich. 577, 46 N. W. 23; Ellis *v.* Fletcher, 40 Mich. 321; Begole *v.* Stimson, 39 Mich. 288; Thayer *v.* Lewis, 4 Den. (N. Y.) 269; Roth *v.* Way, 2 Hill (N. Y.) 385. But strictly speaking and for all purposes it is not process. Thayer *v.* Lewis, *supra*; Corlies *v.* Holmes, 20 Wend. (N. Y.) 681.

It has been held not to include: A petition. Sowell *v.* Sowell, 40 Ala. 243; Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266. An original notice. Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene (Iowa) 42. A notice between private parties which simply goes to create a right of action. Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. 270. A notice given under a statutory provision authorizing a judgment on a contract to be obtained on motion after fifteen days' notice to defendant. Leas *v.*

B. Necessity For — 1. To Commence Action. Except in case of service by publication, an action can be commenced in most jurisdictions only by the issuance of a summons or other writ of process; in no other way can the court obtain jurisdiction of the case.[6] If expressly required, by the statute, as commencement of suit, its issuance cannot be waived;[7] but otherwise a defendant who is *sui juris* may waive issuance of process.[8]

2. Upon Defendant's Cross Demand, or Claim Against Co-Defendant. In cross actions by a defendant against a plaintiff, no additional process is necessary,[9] unless specially required by statute,[10] although the contrary is the rule of the chancery practice.[11] Nor is service of additional process necessary to confer jurisdiction to determine the relations of the co-defendants incidental to the subject-matter of plaintiff's complaint.[12] When a cross complaint is filed by a defendant raising new questions against a co-defendant, it is the doctrine of some

Merriman, 132 Fed. 510. A registry of a judgment. Fluester *v.* McClellan, 8 C. B. N. S. 357, 98 E. C. L. 357. A declaration in ejectment. Knapp *v.* Pults, 3 How. Pr. (N. Y.) 53. A rule to show cause. Taylor *v.* Henry, 2 Pick. (Mass.) 397. A motion by the attorney-general. Fitzpatrick *v.* New Orleans, 27 La. Ann. 457. An order for the holding of a local option election. Gilbert *v.* State, 32 Tex. Cr. 596, 25 S. W. 632. An order for the appearance of an absent defendant. Forsyth *v.* Pierson, 9 Fed. 801, 11 Biss. 133. A commission to examine witnesses. Duncan *v.* Hill, 19 N. C. 291. Extraordinary remedies. Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879, such as habeas corpus, quo warranto, mandamus, etc. A bond in replevin. Simpson *v.* Wilcox, 18 R. I. 40, 25 Atl. 391. Affidavits, recognizances, or justices' returns. Dorman *v.* Bayley, 10 Minn. 383. An appeal-bond on appeal from justice's judgment. Smith *v.* Waters, 25 Ind. 397. An affidavit and recognizance given by appellant as a condition for an allowance of an appeal from a justice and the return of the appeal papers by the justice. Dorman *v.* Bayley, *supra*. A decree of sale. Parks *v.* Bryant, 132 Ala. 224, 31 So. 593; Sauer *v.* Steinbauer, 14 Wis. 70. A precept under which a sale of land for non-payment of taxes is made. Scarritt *v.* Chapman, 11 Ill. 443; Curry *v.* Hinman, 11 Ill. 420. A warrant to collect taxes. Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559; Tweed *v.* Metcalf, 4 Mich. 578; Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393. But see Missouri *v.* Spiva, 42 Fed. 435, holding that the term "process" includes a tax book authenticated by the seal of the court under which a tax collector is authorized by statute to seize and sell property to enforce a collection of taxes. A copy of an indictment. Fitzpatrick *v.* New Orleans, 27 La. Ann. 457. An information from a police magistrate. Davenport *v.* Bird, 34 Iowa 524. A warrant of commitment by which criminals are transported from the court to the place of commitment. U. S. *v.* Tanner, 147 U. S. 661, 13 S. Ct. 436, 37 L. ed. 321. A writ of inquiry. Cook *v.* Tuttle, 2 Wend. (N. Y.) 289.

6. *Missouri.*— State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146; Orchard *v.* National Exch. Bank, 121 Mo. App. 338, 98 S. W. 824.

North Carolina.— Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

Ohio.— Smith *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 542, 7 Ohio N. P. 145.

South Dakota.— Ramsdell *v.* Duxberry, 14 S. D. 222, 85 N. W. 221.

West Virginia.— Moore *v.* Holt, 55 W. Va. 507, 47 S. E. 251.

Essentiality to jurisdiction of service of process and notice in general see Courts, 11 Cyc. 671.

As precedent to appointment of guardian ad litem see Infants, 22 Cyc. 653.

One summons cannot be issued for several suits.— Williamson *v.* Wardlaw, 40 Ga. 702.

7. Ramsdell *v.* Duxberry, 14 S. D. 222, 85 N. W. 221.

8. Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896; Brady *v.* Hardeman, 17 Ga. 67. In which event the case will stand in court as if it had been commenced by a summons issued on complaint and the supplemental complaint was acknowledged and the summons waived. Tuskaloosa Wharf Co. *v.* Tuskaloosa, 38 Ala. 514.

Such waiver does not affect the question of jurisdiction, but simply supersedes the necessity for the process (Washington *v.* Barnes, 41 Ga. 307), and defendant's right to defend is not impaired by such a waiver (Ochus *v.* Sheldon, 12 Fla. 138).

Waiver may be dated before filing of petition. Battle *v.* Eddy, 31 Tex. 368.

Appearance as waiver of want of process see Appearances, 3 Cyc. 517.

In action by or against infants see Infants, 22 Cyc. 681.

Stipulation waiving process as equivalent to appearance see Appearances, 3 Cyc. 510.

9. Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783; Bevier *v.* Kahn, 111 Ind. 200, 12 N. E. 169; Eisman *v.* Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072.

10. Griffith *v.* Bluegrass Bldg., etc., Assoc., 108 Ky. 713, 57 S. W. 486, 22 Ky. L. Rep. 391; Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713.

11. Thomason *v.* Neeley, 50 Miss. 310; Harris *v.* Schlinke, 95 Tex. 88, 65 S. W. 172.

Necessity for process upon cross bill in equity see Equity, 16 Cyc. 211.

12. Rodgers *v.* Parker, 136 Cal. 313, 68 Pac. 975; Fentriss *v.* State, 44 Ind. 271;

courts that process is necessary to give jurisdiction, by analogy to the chancery practice,[13] but other courts hold that no process need issue.[14] Such process is expressly required by statute in some states.[15] In other states service of the cross complaint is by statute required to give the court jurisdiction over the subject-matter of the cross complaint, and this is a substitute for, and the equivalent of, process.[16] A defendant who has not appeared and has not been served with process cannot be compelled to litigate a question with a co-defendant by the mere service upon him of an answer setting up a cross demand.[17]

3. Upon Supplemental Petitions. No new summons is needed for a supplemental petition.[18] But when a petition is filed in a pending proceeding which has no relation whatever to the subject-matter of the proceeding, defendants named in the petition must be served with a summons.[19] So where a petition substituting an entirely different plaintiff is filed, no judgment may be rendered thereon unless there has been service upon defendant or he has appeared thereto.[20]

4. Upon Bringing in New Parties. Where plaintiff is granted leave to add a new defendant, the person so added must be served with process in the same manner as for the commencement of an original suit.[21] A provision to this effect is ordinarily made by statute,[22] which applies also to persons brought in by order of court, not upon their own application, as necessary to the complete determination of the cause.[23] But where upon the decease of an original defendant his infant heirs are made parties, it has been held that service of the order making them parties is sufficient without a new summons.[24] And where the name of one of plaintiff firm has been omitted from the petition he may be made a party by amendment without further service on defendant.[25]

5. New Process After Amendment of Cause of Action. An amended statement of the same cause of action does not necessitate the issuance of further, or new, process;[26] but if a new cause of action is set up by amendment new process must

Eisman *v.* Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072.

13. Joyce *v.* Whitney, 57 Ind. 550; Fletcher *v.* Holmes, 25 Ind. 458; Amburgy *v.* Burt, etc., Lumber Co., 121 Ky. 580, 89 S. W. 680, 28 Ky. L. Rep. 551; Southward *v.* Jamison, 66 Ohio St. 290, 64 N. E. 135. And see Clay *v.* Hildebrand, 44 Kan. 481, 24 Pac. 962; Arnold *v.* Badger Lumber Co., 36 Nebr. 841, 55 N. W. 269; Crain *v.* Wright, 60 Tex. 515. But *compare* Hapgood *v.* Ellis, 11 Nebr. 131, 7 N. W. 845.

14. Tucker *v.* St. Louis L. Ins. Co., 63 Mo. 588.

15. Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051; Ringo *v.* Woodruff, 43 Ark. 469; Thode *v.* Spofford, 65 Iowa 294, 17 N. W. 561, 21 N. W. 647.

16. White *v.* Patton, 87 Cal. 151, 25 Pac. 270; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

17. Joy *v.* White, 6 N. Y. Suppl. 571; Parker *v.* Commercial Tel. Co., 3 N. Y. St. 174.

18. Moshell *v.* Reed, 97 S. W. 372, 30 Ky. L. Rep. 10.

19. La Forge *v.* Binns, 125 Ill. App. 527.

20. Armstrong *v.* Bean, 59 Tex. 492.

21. Jones *v.* Cloud, 4 Coldw. (Tenn.) 236.

22. See the statutes of the several states. And see the cases cited in the following note.

23. Meeks *v.* Meeks, 87 N. Y. App. Div. 99, 84 N. Y. Suppl. 67 (holding under Code Civ. Proc. § 453, requiring that a supplemental summons must be issued directed to the new defendant in the same form as the original, except that in the body it must require defendant to answer the original or amended complaint and the supplemental complaint, or either of them, as the case requires, that where, prior to the bringing in of an additional defendant the complaint had been amended, an order for the publication of summons directing service of the amended and supplemental summons and of the amended complaint on such defendant was proper); Romanoski *v.* Union R. Co., 30 Misc. (N. Y.) 830, 61 N. Y. Suppl. 1097 [*reversed* on other grounds in 31 Misc. 762, 64 N. Y. Suppl. 1147]; Moore *v.* Donahew, 3 Okla. 396, 41 Pac. 579.

24. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Subscription of parties upon decease of original party generally see Abatement and Revival, 1 Cyc. 109.

25. Roberson *v.* McIlhenny, 59 Tex. 615.

26. *Kentucky.*— Griffith *v.* Bluegrass Bldg., etc., Assoc., 108 Ky. 713, 57 S. W. 486, 22 Ky. L. Rep. 391.

Nebraska.— Schuyler Nat. Bank *v.* Bollong, 28 Nebr. 684, 45 N. W. 164; Healey *v.* Aultman, 6 Nebr. 349.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., (1906) 85 Pac. 393.

Texas.— Rabb *v.* Rogers, 67 Tex. 335, 3 S. W. 303; Chandler *v.* Scherer, 32 Tex. 573; Turner *v.* Brown, 7 Tex. 489; Wisley *v.* Houston Nat. Bank, 28 Tex. Civ. App. 268, 67 S. W. 195.

issue.[27] And, in particular, when service is had by publication and there is no appearance of defendant, no such amendment will be allowed.[28] When a demurrer to the petition is sustained the court on allowing an amendment may order defendants to answer without further process.[29]

C. Issuance — 1. In General. Process is deemed issued when it is prepared and placed in the hands of one authorized to serve it with the intention of having it served.[30] Process is not irregular if delivered by the clerk, signed and sealed in blank, to plaintiff's attorney.[31] In those states where the statute requires a complaint to be filed upon which the summons subsequently issues, the summons can be issued only upon the filing of a complete pleading,[32] and against those persons who are made parties in it.[33]

2. Time For Issuance.[34] Under some statutes process cannot issue before the filing of plaintiff's pleading.[35] And where the statutes so provide it must be issued

Virginia.— Norfolk, etc., R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465.

West Virginia.—Phelps *v.* Smith, 16 W. Va. 522.

Canada.— Hamilton *v.* Bovril Co., 15 Quebec Super. Ct. 62.

See 40 Cent. Dig. tit. "Process," § 5.

A correction of the boundary of the premises described in the original petition was allowed without service of new process in Moore *v.* Robinson, 91 S. W. 659, 29 Ky. L. Rep. 43.

27. Cecil *v.* Sowards, 10 Bush (Ky.) 96; Rutlidge *v.* Vanmeter, 8 Bush (Ky.) 354; Three Forks City Co. *v.* Com., 45 S. W. 353, 20 Ky. L. Rep. 149; Kentucky Eclectic Inst. *v.* Gaines, 1 S. W. 444. See also Schuttler *v.* King, 12 Mont. 149, 30 Pac. 25.

Striking out a party defendant, improperly joined, does not require the issuance of new process against those defendants already before the court after personal service or appearance. Three Forks City Co. *v.* Com., 45 S. W. 353. 20 Ky. L. Rep. 149.

28. Wood *v.* Nicolson, 43 Kan. 461, 23 Pac. 587; Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Perry Rice Grocery Co. *v.* W. E. Craddock Grocery Co., 34 Tex. Civ. App. 442, 78 S. W. 966.

But a mere amendment in form, such as the adding of a caption to the complaint, is allowable. White *v.* Hinton, 3 Wyo. 30 Pac. 953, 17 L. R. A. 66.

Permitting other claimants to intervene and file answers does not constitute an amendment of the complaint. Goodale *v.* Coffee, 24 Oreg. 346, 33 Pac. 990.

29. Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359.

30. *Illinois.*— Pease *v.* Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

Iowa.— Oskaloosa Cigar Co. *v.* Iowa Cent. R. Co., (1902) 89 N. W. 1065.

Missouri.— Burton *v.* Deleplain, 25 Mo. App. 376.

New Hampshire.—See Society *v.* Whitcomb, 2 N. H. 227.

New York.— Mills *v.* Corbett, 8 How. Pr. 500; Jackson *v.* Brooks, 14 Wend. 649.

North Carolina.—Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; Webster *v.* Sharpe, 116 N. C. 466, 21 S. E. 912.

Oregon.— White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Pennsylvania.— Person's Appeal, 78 Pa. St. 145.

Delivery of the process by the clerk to plaintiff, or attorney, followed by its delivery to an officer for service, is in fact a delivery by the clerk to the officer. Medlin *v.* Seideman, 39 Tex. Civ. App. 553, 88 S. W. 250.

Where a copy of the complaint certified by the clerk is required by the statute to be served with the summons, issuance of the process is not complete until such copy has been prepared and certified. Reynolds *v.* Page, 35 Cal. 296.

31. *Alabama.*— Slater *v.* Canter, 35 Ala. 679.

Michigan.— Potter *v.* John Hutchinson Mfg. Co., 87 Mich. 59, 49 N. W. 517.

North Carolina.— Croom *v.* Morrisey, 63 N. C. 591.

South Carolina.—Miller *v.* Hall, 1 Speers l.

United States.— Jewett *v.* Garrett, 47 Fed. 625.

Such a blank summons need not be delivered for use in any particular suit, but for any suit that the attorney may thereafter have occasion to bring. Sweet *v.* Newaygo County Cir. Judge, 95 Mich. 449, 54 N. W. 951.

Use in different court.—A writ returnable to the superior court, made on a blank issued by the clerk of the court of common pleas and intended to be used for a writ to be issued by that court, is irregular. Dearborn *v.* Twist, 6 N. H. 44.

32. See *infra*, I, C, 2.

33. Nutting *v.* Losance, 27 Ind. 37.

34. Issuance upon holiday see Holidays, 21 Cyc. 443.

Issuance upon Sunday see Sunday.

Process for summoning of jurors see Juries, 24 Cyc. 223.

35. See the statutes of the several states. And see Jones *v.* Porter, 23 Ind. 66, holding that where a complaint was filed to foreclose a mortgage and process was issued and served, and afterward process was issued against a person who was not named in the record and plaintiff amended making such person a party, the process was bad as to such person.

within a limited time after the complaint is filed.[36] In any event it is within the discretion of the court to allow or refuse the issuance of summons after a long delay.[37]

3. CONDITIONS PRECEDENT. If the statute fixes a condition precedent to the issuance of process a failure to comply with the condition invalidates the process.[38]

4. PRÆCIPE. A præcipe is a written order to the clerk of a court to issue a writ.[39] Many statutes require plaintiff to file a præcipe with the clerk before the summons issues; but the clerk may waive the præcipe without affecting the validity of the process,[40] and inaccuracies in the præcipe do not invalidate the process.[41]

5. WHO MAY ISSUE. Process is usually issued by the clerk of the court,[42] without any order from the court;[43] but under some statutes it is issued by the plaintiff or his attorney.[44] When a summons may be issued by plaintiff or his attorney, it may be considered issued when it has been duly drawn and signed, with intent

Filing an unsigned declaration will not permit of issuance of process. Carrington *v.* Hamilton, 3 Ark. 416.

A prayer for a citation is not necessary. Bauduc *v.* Domingon, 8 Mart. N. S. (La.) 434; Sompeyrac *v.* Estrada, 8 Mart. (La.) 722.

36. Linden Gravel Min. Co. *v.* Sheplar, 53 Cal. 245; Coombs *v.* Parrish, 6 Colo. 296.

37. Steves *v.* Carson, 21 Colo. 280, 40 Pac. 569 (after lapse of time allowed by statute); Reese *v.* Kirby, 68 Ga. 825 (delay of ten years in applying).

Dismissal for delay in issuance of process see DISMISSAL AND NONSUIT, 14 Cyc. 436.

38. Carrington *v.* Hamilton, 3 Ark. 416 (pleading filed without having been signed); Morse *v.* Rankin, 51 Conn. 326 (failure to file bond for costs); Lord *v.* F. M. Dowling Co., 52 Fla. 313, 42 So. 585 (failure to file affidavit); Stevens *v.* White, 2 Ohio Dec. (Reprint) 107, 1 West. L. Month. 394; White *v.* Freese, 2 Cinc. Super. Ct. 30 (want of an affidavit of verification).

Cost bond.— Where the clerk was required by statute to pass upon the bond for costs before issuing the process, a failure so to do renders the process void. Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

Penalty for issuance without security see CLERKS OF COURT, 7 Cyc. 244 note 5].

39. Black L. Dict.; Bouvier L. Dict.

The word "præcipe" is also used as meaning an original writ drawn up in the alternative to command defendant to do the thing required or to show the reason why he has not done it. Black L. Dict. [*citing* 3 Blackstone Comm. 274].

40. Johnson *v.* Murray, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174; Goff *v.* Russell, 3 Kan. 212; Manspeaker *v.* Topeka Bank, 4 Kan. App. 768, 46 Pac. 1012.

41. See the cases cited *infra*, this note.

The following inaccuracies were held insufficient to affect the process: Præcipe signed "attorneys" and not "attorneys for plaintiff." Robinson *v.* Brown, 74 Ind. 365. Return-day specified only by request to "fix in" summons a specified date. Johnson *v.* Lynch, 87 Ind. 326. See also Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163. Requiring the process to be made returnable in less than the required number of days. Davis *v.* Brode, 13 Pa. Co. Ct. 631. Use of word "process" instead of "summons." Kennedy *v.* Beck, 15 Kan. 555. Signature of præcipe by the legal plaintiff. Good *v.* Bair, 8 Lanc. Bar (Pa.) 185.

42. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; McNevins *v.* McNevins, 28 Colo. 245, 64 Pac. 199; Tucker *v.* Eden, 68 Vt. 168, 34 Atl. 698; *In re* Durant, 60 Vt. 176, 12 Atl. 650.

A deputy clerk may issue process. Yonge *v.* Broxson, 23 Ala. 684; Goodwyn *v.* Goodwyn, 11 Ga. 178; Jacobs *v.* Measures, 13 Gray (Mass.) 74; Pendleton *v.* Smith, 1 W. Va. 16.

On behalf of clerk.— The clerk may issue process in a proceeding in his own behalf. Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633; Kerns *v.* Huntzinger, 2 Leg. Rec. (Pa.) 79; Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503. *Contra*, Doolittle *v.* Clark, 47 Conn. 316.

Clerk de facto.— Process is valid when issued by one who is clerk *de facto*. State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 14 L. R. A. N. S. 794; Calvert, etc., R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

Judicial character of act.— Issuing a summons is not a judicial act. Clarke *v.* Bradlaugh, 8 Q. B. D. 63, 46 J. P. 278, 51 L. J. Q. B. 1, 46 L. T. Rep. N. S. 49, 30 Wkly. Rep. 53.

Where a woman acting as deputy clerk signs a writ, it is not absolutely void, although voidable, and is not subject to collateral attack. State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 14 L. R. A. N. S. 794.

Mandamus to compel issuance see MANDAMUS, 26 Cyc. 204.

43. Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256.

But an order may be necessary after the time allowed by statute has expired. Steves *v.* Carson, 21 Colo. 280, 40 Pac. 569.

44. See the statutes of the several states. And see Rand *v.* Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661; Gilmer *v.* Bird, 15 Fla. 410; White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

to deliver it to the process server, although it may not have been actually delivered.[45]

6. Counties to Which Process May Issue.[46] In the absence of statutory authority a court has no power to issue process to be executed beyond the limits of its territorial jurisdiction.[47] But by statute the issuance of process into counties other than that in which the action is brought is frequently authorized.[48] Thus, where two or more persons who reside in different counties may be named jointly as defendants, either county may usually be selected, and the court may send its process to the other counties;[49] but this is not true where the resident defendant is merely nominal and the real defendant is the one sought in another county.[50] The case must be rightly brought in the county from which the summons issues,[51] and the parties must be rightly joined.[52] In some jurisdictions if the action is local,

45. Mills *v.* Corbett, 8 How. Pr. (N. Y.) 500; Smith *v.* Nicholson, 5 N. D. 426, 67 N. W. 296.

46. Issuance of final process beyond limits of original jurisdiction of court see Courts, 11 Cyc. 690.

Service of process outside of jurisdiction see *infra*, II, B, 8.

47. *Arkansas.*—Auditor *v.* Davies, 2 Ark. 494.

Illinois.—Wirtz *v.* Henry, 59 Ill. 109 (holding that there was no statutory authority for issuing process to another county in an action on the case brought to recover damages for alleged fraud and deceit practised by defendant in making a contract); Aspern *v.* Lamar Ins. Co., 6 Ill. App. 235.

Indiana.— Ham *v.* Rogers, 6 Blackf. 559.

Louisiana.— Evans *v.* Saul, 8 Mart. N. S. 247.

Nebraska.— Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038.

North Carolina.— See Moore *v.* North Carolina R. Co., 67 N. C. 209; Howerton *v.* Tate, 66 N. C. 431.

Ohio.— Knight *v.* Buser, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rec. 28.

Tennessee.— See Slatton *v.* Jonson, 4 Hayw. 197.

See 40 Cent. Dig. tit. "Process," § 15.

Compare Cicero *v.* Bates, 1 Mich. N. P. 25, holding that a command in a writ to "summon defendant if to be found in this state" would not vitiate the writ after the writ was served within the proper county.

48. See the statutes of the several states. And see the following cases:

Arkansas.— Elliott *v.* State Bank, 4 Ark. 437.

Illinois.— Linton *v.* Anglin, 12 Ill. 284; Haddock *v.* Waterman, 11 Ill. 474.

Louisiana.— Berry *v.* Gaudy, 15 La. Ann. 533.

Missouri.— Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96, holding that under a statute providing that where there are several defendants residing in different counties plaintiff may have a summons directed to any county in which one or more defendants may be found, the process cannot issue to another county where a defendant is found and served with process in the county where plaintiff resides.

Ohio.— Smith *v.* Johnson, 57 Ohio St. 486, 49 N. E. 693; Steel *v.* Burgert, 4 Ohio Dec. (Reprint) 557, 2 Clev. L. Rep. 377; Campbell *v.* Woodsdale Island Park Co., 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Texas.— Ward *v.* Lattimer, 2 Tex. 245, holding that while a branch writ was authorized when defendants resided in different counties, no provision existed for sending a summons out of the county when defendants all resided in the county where the suit was instituted.

See 40 Cent. Dig. tit. "Process," § 15.

What law governs.— The right to issue process to another county is governed by the statute in force at the time the action is begun. Funk *v.* Ironmonger, 76 Ill. 506.

49. *Indiana.*— Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

Kansas.— Hendrix *v.* Fuller, 7 Kan. 331.

Kentucky.— Ford *v.* Logan, 2 A. K. Marsh. 324.

Nebraska.— Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295; Belcher *v.* Palmer, 35 Nebr. 449, 53 N. W. 380; Bair *v.* Peoples' Bank, 27 Nebr. 577, 43 N. W. 347.

Tennessee.— Nashville *v.* Webb, 114 Tenn. 432, 85 S. W. 404.

See 40 Cent. Dig. tit. "Process," § 15.

The statute expression "joint defendants" in this connection embraces all persons who may be properly joined in the one action. People *v.* Wayne Cir. Ct. Judge, 22 Mich. 493.

A misjoinder of causes of action defeats the right to summon a non-resident defendant. Stewart *v.* Rosengren, 66 Nebr. 445, 92 N. W. 586.

50. New Blue Springs Milling Co. *v.* De Witt, 65 Kan. 665, 70 Pac. 647; Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Brenner *v.* Egly, 23 Kan. 123; Seiver *v.* Union Pac. R. Co., 68 Nebr. 91, 93 N. W. 943, 110 Am. St. Rep. 393, 61 L. R. A. 319; Goldstein *v.* Fred Krug Brewing Co., 62 Nebr. 728, 87 N. W. 958; Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295; Hanna *v.* Emerson, 45 Nebr. 708, 64 N. W. 229; Cobbey *v.* Wright, 23 Nebr. 250, 36 N. W. 505; Dunn *v.* Haines, 17 Nebr. 560, 23 N. W. 501.

51. Marshall *v.* Saline River Land, etc., Co., 75 Kan. 445, 89 Pac. 905; New Blue Springs Milling Co. *v.* De Witt, 65 Kan. 665, 70 Pac. 647; Adair County Bank *v.* Forrey, 74 Nebr. 811, 105 N. W. 714; Fostoria *v.* Fox, 60 Ohio St. 340, 54 N. E. 370.

52. Marshall *v.* Saline River Land, etc., Co., 75 Kan. 445, 89 Pac. 905.

the summons may be issued to another county even though there is but a single defendant.[53] The writ sent to the other county should be an exact counterpart of the one which is to be executed within the county,[54] except that it should be directed to another sheriff [55] and only the party to be served need be named.[56] Under the practice in England [57] and in Canada [58] service of process without the jurisdiction may be allowed in actions founded upon a breach within the jurisdiction of any contract wherever made, which is to be performed within the jurisdiction. And in certain of the provinces of Canada service of process without the jurisdiction may be allowed against a foreign defendant when the action is founded upon a tort committed within the jurisdiction.[59]

D. Requisites and Validity — 1. In General. The requisites of process are largely matters of statutory regulation, and it is necessary that the writ contain whatever the statute prescribes, whether deemed important or not.[60] But irregularities in form, such as adding a required statement by way of a memorandum upon the summons instead of inserting it in the body thereof, will not vitiate the process.[61] And the citation need not contain matters which are not required by a statute enumerating the essentials of a process.[62] A general statute enacted for the purpose of securing uniformity with regard to process in courts of a particular

Some cases hold that there must be an actual joint liability disclosed, and proof of a several liability will not authorize a judgment against a defendant served in another county. McKibben *v.* Day, 71 Nebr. 280, 98 N. W. 845; Stull Bros. *v.* Powell, 70 Nebr. 152, 97 N. W. 249; Penney *v.* Bryant, 70 Nebr. 127, 96 N. W. 1033. See also Hosie *v.* Harrington, 2 Mich. N. P. 77. The court is without jurisdiction of the non-resident defendant if plaintiff fails to establish the joint liability charged, even though the non-resident defendant does not take the objection. McDonald *v.* Boardman, 17 Ohio Cir. Ct. 209, 9 Ohio Cir. Dec. 533.

53. Nebraska Mut. Hail Ins. Co. *v.* Meyers, 66 Nebr. 657, 92 N. W. 572. This case rested upon the construction of a common-law form of statute which provided that "where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of defendants, at plaintiff's request." The court held that this statute was not confined in its operation to transitory actions in which at least one defendant had been served with process in the county of venue, but to all actions rightly brought. "If, for instance, the action affects the title or right of possession of real property, it is rightly brought in the county in which the land is situated, and the summons may be issued to, and served in, any other county, although there be but a single defendant."

54. Mayo *v.* Stoneum, 2 Ala. 390.

55. Womsley *v.* Cummins, 1 Ark. 125.

56. See *infra*, I, D, 7.

57. Comber *v.* Leyland, [1898] A. C. 524, 67 L. J. Q. B. 884, 79 L. T. Rep. N. S. 180. See also Thompson *v.* Palmer, [1893] 2 Q. B. 80, 62 L. J. Q. B. 502, 69 L. T. Rep. N. S. 366, 4 Reports 422, 42 Wkly. Rep. 22; Bell *v.* Antwerp, etc., Line, [1891] 1 Q. B. 103, 7 Aspin. 154, 60 L. J. Q. B. 270, 64 L. T. Rep. N. S. 276, 39 Wkly. Rep. 89; Robey *v.* Snafell Min. Co., 20 Q. B. D. 152, 57 L. J. Q. B. 134, 36 Wkly. Rep. 224; Green *v.* Browning, 34 L. T. Rep. N. S. 760; Golden *v.* Darlow, 8 T. L. R. 57; Hassall *v.* Lawrence, 4 T. L. R. 23.

58. Dickson *v.* McInnes, 3 West. L. Rep. 60; Bishop *v.* Scott, 6 Northwest Terr. 54; Blackley *v.* Elite Costume Co., 9 Ont. L. Rep. 382, 5 Ont. Wkly. Rep. 57.

59. Anderson *v.* Nobels Explosive Co., 12 Ont. L. Rep. 644, 8 Ont. Wkly. Rep. 439, 558, 644, holding that an order permitting service upon defendants abroad was properly set aside where the cause of action alleged against defendants engaged in the manufacture of explosives in Scotland was that they were negligent in allowing a fuse, which had injured a plaintiff at a place within the province, to be manufactured and sold in a defective condition, since the manufacture and sale must be deemed to have taken place in Scotland, in the absence of any contrary allegation, and although the invasion of plaintiff's right of personal security occurred in Ontario the tort comprised also the wrongful act or omission of the alleged tort-feasor.

60. Ward *v.* Ward, 59 Cal. 139; Smith *v.* Aurich, 6 Colo. 388; Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759. See also Caldwell *v.* Glenn, 6 Rob. (La.) 9; Falkner *v.* Guild, 10 Wis. 563, specification of a day of term when a hearing will be asked.

The object of process is to give the party reasonable notice of the time and place at which he is to appear and to apprise him of the cause of action and to whom he is bound to answer. Phillips *v.* Lemoyne, 4 Ark. 144.

Where the petition is the leading process, all that is required as to the citation, if the petition is correct, is substantial conformity to the petition, and the same strictness is not demanded as in the case of the writ at common law which was the leading process in the suit. Dikes *v.* Monroe, 15 Tex. 236.

61. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169; Cook *v.* Kelsey, 19 N. Y. 412.

62. Hemken *v.* Farmer, 3 Rob. (La.) 155.

grade will apply to courts created by a prior special act,[63] the acts being repugnant to each other in respect of such provisions.

2. STYLE OR TITLE. The style or title of a writ is the formal designation of the authority under which it issues. A writ is properly said to run in the name of the person or government from whom the command on the face of the writ appears to emanate.[64] While the place for the style is properly at the head of the writ, it may nevertheless appear elsewhere without rendering the summons invalid.[65] Constitutional provisions are usually made as to the style in which process shall run.[66] In case the provision is that process shall run in the name of the state it may be styled simply "the state of," etc.,[67] or "state of," [68] The statement of the state and county in the margin of process, as ordinarily employed to show the venue, is not sufficient to cause the process to be regarded as running in the name of the state.[69] Unless process runs under the style so prescribed, it is void according to the rule of some courts; [70] but other cases hold that it is thus rendered voidable only, and is subject to amendment.[71] A summons or notice issued by a party or his

63. Starbird *v.* Brown, 84 Me. 238, 24 Atl. 824.

64. Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49.

65. Harris *v.* Jenks, 3 Ill. 475; Cleland *v.* Tavernier, 11 Minn. 194; White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

66. See the constitutions of the several states. And see cases cited *infra*, this note.

For example the constitution of the state of Colorado, art. 6, § 30, provides that process shall run in the name of "the people of the state of Colorado"; that of Ohio in the name of "the state of Ohio" (Const. art. 12, § 20); that of Kentucky in the name of "the commonwealth of Kentucky" (Const. § 123).

A citation is not within the provision of the constitution of Louisiana requiring the style of all process to be "The state of Louisiana." Bludworth *v.* Sompeyrac, 3 Mart. (La.) 719; Kimball *v.* Taylor, 14 Fed. Cas. No. 7,775, 2 Woods 37.

After the adoption of a state constitution a writ issued in the name of the united States of America, within the jurisdiction of a state, is void. Gilbreath *v.* Kuykendall, 1 Ark. 50.

To what process applicable.—A constitutional provision as to the style of process of all writs and other proceedings has been held to apply only to such process as was under the English law required to run in the name of the king. Curry *v.* Hinman, 11 Ill. 420; Lennig *v.* Newkirk, 7 N. J. L. J. 87. And under such a provision where a statute invests courts with a novel jurisdiction and lays down an original mode of proceeding, such proceeding need not run in the name of the people unless the statute expressly provides therefor. Curry *v.* Hinman, *supra*. Wis. Const. art. 6, § 17, providing as to the style of process, relates only to such process as emanates from a court of justice. Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393.

67. Branch *v.* Branch, 6 Fla. 314, holding "the state of Florida" a sufficient style of process.

The people.—A constitutional requirement that the style of the process shall be "In the name of the People of the State of . . ." is satisfied by the caption "The People of the State of. . . ." Knott *v.* Pepperdine, 63 Ill. 219. But a writ styled "State of Michigan. The Circuit Court for the County of Newaygo, in Chancery," does not run in the name of the people of the state of Michigan. Forbes *v.* Darling, 94 Mich. 621, 54 N. W. 385.

68. Weber *v.* Frost, 22 La. Ann. 348; Mabbett *v.* Vick, 53 Wis. 158, 10 N. W. 84.

69. Little *v.* Little, 5 Mo. 227, 32 Am. Dec. 317; Fowler *v.* Watson, 4 Mo. 27; Beach *v.* O'Riley, 14 W. Va. 55.

If the style is stated in the constitution in quotation marks, a literal use of the entire expression so stated is required. Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 N. W. 49; Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

70. *Illinois.*— Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Sidwell *v.* Schumacher, 99 Ill. 426; McFadden *v.* Fortier, 20 Ill. 509.

Kentucky.— Yeager *v.* Groves, 78 Ky. 278.

Michigan.— Forbes *v.* Darling, 94 Mich. 621, 54 N. W. 385.

West Virginia.— Beach *v.* O'Riley, 14 W. Va. 55; Sims *v.* Charleston Bank, 3 W. Va. 415.

United States.— Manville *v.* Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary 328.

See 40 Cent. Dig. tit. "Process," § 22.

71. *Arkansas.*— Kahn *v.* Kuhn, 44 Ark. 404.

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Missouri.— Doan *v.* Boley, 38 Mo. 449; Hansford *v.* Hansford, 34 Mo. App. 262. But *compare* Little *v.* Little, 5 Mo. 227, 32 Am. Dec. 317.

Nebraska.— Moore *v.* Fedawa, 13 Nebr. 379, 14 N. W. 170.

Texas.— Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95.

Wisconsin.— Ilsley *v.* Harris, 10 Wis. 95.

attorney under statutory authority is not deemed such process as comes within these constitutional provisions.[72]

3. DIRECTION. Process should ordinarily be directed to the officer who is to serve it,[73] although under some statutes the summons is to be directed to defendant.[74] Under these statutes such a direction need be only to the particular defendant intended to be served therewith.[75] In case the officer who ordinarily serves writs is disqualified, the statute usually provides that some other designated officer shall serve it, in which case it should be directed to such officer.[76] A statutory condition precedent to such direction must have been fulfilled.[77] And under some statutes the facts giving the substitute authority to serve the writ should appear upon the face thereof.[78] Under other statutes provision has been made for the direction of the writ to an indifferent person.[79] Whether the want of a proper direction is a fatal defect in a writ is a question upon which there is a difference of judicial opinion; some cases hold that the defect is fatal to the validity of the writ,[80] while the better view appears to be that it is not fatal but may be cured by amendment.[81] The absence of a proper direction is a mere informality in case of a statutory summons which does not issue out of the court, provided the instrument discloses for whom it is intended.[82]

72. *Colorado.*— Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506.

Florida.— Gilmer *v.* Bird, 15 Fla. 410.

Iowa.— See Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene 42, holding that the original notice provided for by the code need not be in the style of "the state of Iowa."

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Oregon.— Bailey *v.* Williams, 6 Oreg. 71.

Wisconsin.— Porter *v.* Vandercook, 11 Wis. 70.

73. *Arkansas.*— Rudd *v.* Thompson, 22 Ark. 363.

Georgia.— Cheney *v.* Beall, 69 Ga. 533.

Massachusetts.— Hearsey *v.* Bradbury, 9 Mass. 95.

Pennsylvania.— Paul *v.* Vankirk, 6 Binn. 123.

Texas.— Carroll *v.* Peck, 31 Tex. 649.

West Virginia.— Hansford *v.* Tate, 61 W. Va. 207, 56 S. E. 372.

See 40 Cent. Dig. tit. "Process," § 23.

Process directed to a sheriff who is disqualified to serve it is defective. Hansford *v.* Tate, 61 W. Va. 207, 56 S. E. 372.

Direction to an officer de facto is good. Gunby *v.* Welcher, 20 Ga. 336.

74. Plano Mfg. Co. *v.* Kaufert, 86 Minn. 13, 89 N. W. 1124. See also Glenn *v.* Augusta Drug Co., 127 Ga. 5, 55 S. E. 1032, holding that a summons was not invalid because directed to defendant who was named in the caption but not in the body of the summons.

In Louisiana a citation must be addressed to defendant. Belard *v.* Gebelin, 47 La. Ann. 162, 16 So. 739 (holding that defendants could not be held bound by a citation which was not addressed to them or their curator *ad hoc*); Jacobs *v.* Frere, 28 La. Ann. 625; Waddill *v.* Payne, 23 La. Ann. 773; Bertoulin *v.* Bourgoin, 19 La. Ann. 360; Aldige *v.* Knox, 16 La. Ann. 180.

Non-resident.— The requirement of Tex. Rev. St. art. 1230, that citation for a non-resident defendant be addressed to him is not satisfied by its being addressed to the sheriff and served by him. Porter *v.* Hill County, (Tex. Civ. App. 1895) 33 S. W. 383.

75. Traill *v.* Porter, L. R. 1 Ir. 60.

76. Minott *v.* Vineyard, 11 Iowa 90; Gallegos *v.* Pino, 1 N. M. 410; State *v.* Baird, 118 N. C. 854, 24 S. E. 668. *Compare* Tesh *v.* Com., 4 Dana (Ky.) 522.

77. Chord *v.* McCoy, Morr. (Iowa) 311, holding that an affidavit of the interest of the person to whom the writ should afterward be directed must first have been filed.

78. McPherson *v.* State Bank, 4 Ark. 558; Carlisle *v.* Weston, 21 Pick. (Mass.) 535.

79. See the statutes of the several states. And see Augur *v.* Augur, 14 Conn. 82; Case *v.* Humphrey, 6 Conn. 130; Eno *v.* Frisbie, 5 Day (Conn.) 122; Johnson *v.* Hills, 1 Root (Conn.) 504; Thatcher *v.* Heacock, 1 Root (Conn.) 284; Lawrence *v.* Kingman, Kirby (Conn.) 6; Culver *v.* Balch, 23 Vt. 618; Ingraham *v.* Leland, 19 Vt. 304; Miller *v.* Hayes, Brayt. (Vt.) 21.

80. Vaughn *v.* Brown, 9 Ark. 20, 47 Am. Dec. 730; Anthony *v.* Beebe, 7 Ark. 447; Hickey *v.* Forristal, 49 Ill. 255; Bertoulin *v.* Bourgoin, 19 La. Ann. 360.

81. *Alabama.*— Herring *v.* Kelly, 96 Ala. 559, 11 So. 600. See Nabors *v.* Thomason, 1 Ala. 590; Ware *v.* Todd, 1 Ala. 199.

Georgia.— Telford *v.* Coggins, 76 Ga. 683; Buchanan *v.* Sterling, 63 Ga. 227.

Indiana.— Simcoke *v.* Frederick, 1 Ind. 54.

Maine.— Barker *v.* Norton, 17 Me. 416.

Massachusetts.— Wood *v.* Ross, 11 Mass. 271.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

Vermont.— Chadwick *v.* Divol, 12 Vt. 499.

82. Plano Mfg. Co. *v.* Kaufert, 86 Minn. 13, 89 N. W. 1124.

4. Designation of Court. The court in which the action is brought must be designated,[83] but an inaccuracy which does not mislead or prejudice will be disregarded.[84]

5. Place of Holding Court. If the process requires defendant's appearance before the court, the place must be named with reasonable certainty,[85] unless fixed by law.[86]

6. Appearance and Return — a. Distinction Between Return-Day and Appearance Day. The day for defendant's appearance is usually the return-day of the writ,[87] so that the term "return-day" is commonly employed to mean appearance day, and, in the absence of any statutory provision on the subject, the appearance day is the return-day of the writ if an appearance can be entered on that day.[88] But as the return-day, strictly speaking, is merely the day appointed by law when writs are to be returned and filed,[89] there is no necessary connection between it and the day upon which defendant is bound to appear, and in some states the two days are by statute allowed to fall upon different dates.[90]

b. Necessity of Fixing Return or Appearance Day. The process must specify

83. Waddill *v.* John, 48 Ala. 232; Beall *v.* Siverts, 1 A. K. Marsh. (Ky.) 154; Dix *v.* Palmer, 5 How. Pr. (N. Y.) 233; Anonymous, 2 Code Rep. (N. Y.) 75. See also Orendorff *v.* Stanberry, 20 Ill. 89 (holding that where the venue of a writ is "State of Illinois, Tazewell county," and the writ is directed to "The sheriff of Logan county," commanding him to summon defendants "to appear before the circuit court of said county," the uncertainty as to which of the counties defendants are to appear in renders the summons void); Tallman *v.* Hinman, 10 How. Pr. (N. Y.) 89.

Designating a court other than the one in which the action is pending renders the process a nullity. Eggleston *v.* Wattawa, 117 Iowa 676, 91 N. W. 1044; Rutta *v.* Laffera, 1 Tex. App. Civ. Cas. § 822.

84. *California.*— Crane *v.* Brannan, 3 Cal. 192, holding that a memorandum "district court" at the head of a writ, which appears in the body to have come from the county court, is not part of the writ.

Georgia.— Georgia Southern, etc., R. Co., *v.* Pritchard, 123 Ga. 320, 51 S. E. 424.

Illinois.— Carter *v.* Rodewald, 108 Ill. 351.

Iowa.— See Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene 42, holding a notice informing defendant that the petition is to be filed in the office of the clerk of the district court of Des Moines county sufficient.

Louisiana.— Driggs *v.* Morgan, 10 Rob. 119.

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Missouri.— Payne *v.* Collier, 6 Mo. 321.

Washington.— Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

See 40 Cent. Dig. tit. "Process," § 20.

A statement of the name in the margin, required by statute, will govern a different venue stated in the body of the summons. Relfe *v.* Valentine, 45 Ala. 286.

Inaccuracy is cured if the complaint, served at the same time, correctly names the court. Yates *v.* Blodgett, 8 How. Pr. (N. Y.) 278.

85. Womsley *v.* Cummins, 1 Ark. 125. See also Warner *v.* Kenny, 3 How. Pr. (N. Y.) 323, 1 Code Rep. 96; Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759.

Specific as is usual in ordinary correspondence.— Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392.

At the court-house in a specified county is sufficiently definite. Tucker *v.* Real Estate Bank, 4 Ark. 429.

Omission to specify county as well as place in the body of the writ will not vitiate if it does not mislead. Gardner *v.* Witbord, 59 Ill. 145; Hall *v.* Davis, 44 Ill. 494; Northwestern Benev., etc., Assoc. *v.* Woods, 21 Ill. App. 372. But an actual error, such as naming the wrong county, will vitiate. Gill *v.* Hoblit, 23 Ill. 473; Cator *v.* Cockfield, 1 Brev. (S. C.) 91.

The name of the state in which the cause is to be tried need not be given where the notice follows the language of the statute. Lyon *v.* Byington, 10 Iowa 124.

86. Yonge *v.* Broxson, 23 Ala. 684; Stout *v.* Wertsner, 15 Montg. Co. Rep. (Pa.) 48.

The city or town in which the court sits need not be stated. Bond *v.* Epley, 48 Iowa 600.

Specification of place of trial in caption.— Where plaintiff is required to designate the county in which he desires the trial, the specification of a county in the caption is sufficient. Ward *v.* Sands, 10 Abb. N. Cas. (N. Y.) 60.

87. Hunsaker *v.* Coffin, 2 Oreg. 107.

A direction to defendant to appear and answer "forthwith" is not in compliance with a requirement of statute that appearance be made on the return-day. Hunsaker *v.* Coffin, 2 Oreg. 107.

88. Branch *v.* Webb, 7 Leigh (Va.) 371.

89. Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, 82 N. W. 779.

90. See the statutes of the several states. And see Clough *v.* McDonald, 18 Kan. 114, where it is said under the Kansas statute that defendant has twenty days after the return-day in which to appear.

the time when defendant is to appear and answer,[91] or defend.[92] If the return-day of the process is fixed by statute it need not be designated,[93] although the better practice is to do so, and if wrongly designated the summons is not thereby rendered invalid.[94]

c. Day to Which Writ May Be Made Returnable. In case process is made returnable to a day which is not a legal return-day it is bad,[95] as where it is made returnable at a wrong term [96] or a time when no term is to be held,[97] or at a day out of term.[98] In like manner where the date fixed for return is an impossible one,[99] or is a day past,[1] the process is void. Under some statutes a writ is properly made returnable to the next succeeding term, although less than the statutory period for notice has intervened between the issuance of the summons and the first day of the term, and although a continuance may be made necessary for lack of proper service.[2] Under other statutes, when the necessary period does not intervene, the summons should be made returnable to the term following the next succeeding term,[3] or to the next rule day in vacation.[4]

d. Period Between Issuance and Return. The common-law rule required fifteen days between the teste and the return of the original writ, that being the

91. Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759. See Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506 (holding that a summons which requires defendant to answer the complaint which "will be filed in the clerk's office on the second Monday after service" thereof fixes that day as the time when defendant must answer, and not as the time when the complaint will be filed); Kendrick *v.* Kendrick, 19 La. 36; West *v.* Wilson, 4 La. 219 (holding that a statutory provision requiring a citation to express the number of days given defendant to answer was inapplicable when he resided outside of the state).

92. Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673, holding that an original notice requiring defendant to appear and answer, instead of to defend, was not fatal as depriving him of the right to demur or plead otherwise than by answer.

93. Davis *v.* McCary, 100 Ala. 545, 13 So. 665; Yonge *v.* Broxson, 23 Ala. 684; Butcher *v.* Brand, 6 Iowa 235; Hare *v.* Niblo, 4 Leigh (Va.) 359; Cunningham *v.* Sayre, 21 W. Va. 440.

94. Morgan *v.* Woods, 33 Ind. 23; Worster *v.* Oliver, 4 Iowa 345; Merrill *v.* Barnard, 61 N. C. 569; Porter *v.* Vandercook, 11 Wis. 70. But *compare* Crowell *v.* Galloway, 3 Nebr. 215.

95. *Arkansas.*— Thompson *v.* McHenry, 18 Ark. 537, so holding, although the law making a change in the time of returning such process had not been published when the writ issued.

Michigan.— People *v.* Kent County Cir. Judge, 38 Mich. 308.

Pennsylvania.— Thompson *v.* Patterson, 2 Miles 146.

Texas.— Neill *v.* Brown, 11 Tex. 17.

Virginia.— Kyles *v.* Ford, 2 Rand. 1.

Compare Woodley *v.* Gilliam, 64 N. C. 649; Tate *v.* Powe, 64 N. C. 644.

Naming a legal holiday as the return-day of the process will not invalidate it, but the process is returnable the next legal day. Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637.

96. *Alabama.*— Brown *v.* Simpson, 3 Stew. 331.

Illinois.— Miller *v.* Handy, 40 Ill. 448; Elee *v.* Wait, 28 Ill. 70; Hildreth *v.* Hough, 20 Ill. 331.

Indiana.— Briggs *v.* Snegham, 45 Ind. 14; Carey *v.* Butler, 11 Ind. 391; Shirley *v.* Hagar, 3 Blackf. 225.

Maine.— Blake *v.* Wing, 77 Me. 170.

New York.— Ryan *v.* McConnell, 1 Sandf. 709, 1 Code Rep. 93; Bunn *v.* Thomas, 2 Johns. 190.

Compare Herberton *v.* Stockton, 2 Miles (Pa.) 164; Fisher *v.* Potter, 2 Miles (Pa.) 147.

Voidable.— Such a writ is frequently held voidable merely. McAlpine *v.* Smith, 68 Me. 423; Kelly *v.* Gilman, 29 N. H. 385, 61 Am. Dec. 648, where it is said an exception exists in the case of mesne process running against the body of defendant and made returnable after an intervening lien); Jackson *v.* Crane, 1 Cow. (N. Y.) 38; Shirley *v.* Wright, 2 Ld. Raym. 775, 92 Eng. Reprint 17.

97. Brown *v.* Simpson, 3 Stew. (Ala.) 331.

98. Wood *v.* Hill, 5 N. H. 229; Tobler *v.* Stubble, 32 Tex. 188. See also Cramer *v.* Van Alstyne, 9 Johns. (N. Y.) 386.

99. Covington *v.* Burleson, 28 Tex. 368 (where defendant was cited to appear "the second Monday after the tenth Monday in March, A. D. 1861"); McNeil *v.* Ballinger, 1 Tex. App. Civ. Cas. § 841; Scott *v.* Watts, 1 Tex. App. Civ. Cas. § 88 (where defendant was cited to appear in the year 187).

1. Hendricks *v.* Pugh, 57 Miss. 157; Violand *v.* Saxel, 31 Tex. 283; Spence *v.* Morris, (Tex. Civ. App. 1894) 28 S. W. 405; Binyard *v.* McCombs, 1 Tex. App. Civ. Cas. § 520; James *v.* Proper, 1 Tex. App. Civ. Cas. § 83.

2. Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157.

3. Hurst *v.* Strong, 1 How. (Miss.) 123. See also Blacklock *v.* Gairdner, 1 Brev. (S. C.) 249; Blacklock *v.* Gairdner, 2 Bay (S. C.) 507.

4. Walker *v.* Joyner, 52 Miss. 789.

time deemed necessary between service and return.[5] If the statute provides that a certain number of days must intervene between the return-day and the date of issuance of the writ, the specification of a less number of days makes the summons void.[6] And similarly, if the statute requires the return within a specified time, greater time will invalidate the summons.[7] Unless such procedure is authorized by statute, a summons cannot be issued upon a return-day and made returnable upon the same day.[8] A provision that process shall be returnable upon the second Monday after its date, but that when issued to another county it may be returnable at the option of the party having it issued on a third or fourth Monday, does not prevent a summons which is issued to another county from being made returnable on the second Monday after its date.[9] Under the provisions of some statutes the requirement as to appearance is made to depend upon the amount in controversy.[10]

e. Sufficiency of Provision. If the time for appearance is identified in the statute by reference to terms of court, the process should ordinarily specify, with reasonable certainty, the term,[11] and the day of the term when appearance is required;[12] but it has been held sufficient to specify the term merely, where the law determines the day of the term upon which appearance must be made.[13] The hour at which appearance should be made is frequently required to be stated.[14] The

5. Logan *v.* Lawshe, 62 N. J. L. 567, 41 Atl. 751.

6. *Delaware.*— Warrington *v.* Tull, 5 Harr. 107.

Illinois.— Matthews *v.* Huff, 113 Ill. 90.

Missouri.— Sanders *v.* Rains, 10 Mo. 770.

Nebraska.— Crowell *v.* Galloway, 3 Nebr. 215.

Pennsylvania.— Misho *v.* McClelland, 20 Pa. Co. Ct. 302.

But when the return-day and appearance day are not the same, a direction that the sheriff serve and return the process within a shorter period than the law allows him does not affect the validity of the process, or prejudice defendant. Clough *v.* McDonald, 18 Kan. 114. And an obvious clerical error in the direction to the sheriff as to date for the return of the process may be disregarded. Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105.

A statutory provision that the summons must be dated fifteen days before trial is construed to mean not less than fifteen days. Wolff *v.* Marietta Paper Mfg. Co., 61 Ga. 463.

7. Culver *v.* Phelps, 130 Ill. 217, 22 N. E. 809; Newcombe *v.* Cohn, 33 Misc. (N. Y.) 602, 67 N. Y. Suppl. 930. But *compare* Wolff *v.* Marietta, etc., Mfg. Co., 61 Ga. 463.

8. Dyott *v.* Pennock, 2 Miles (Pa.) 213.

A summons made returnable "instanter" is void. Joinar *v.* Delta Bank, 71 Miss. 382, 14 So. 464.

Under a statute providing that process shall be returnable within a specified number of days after its date, it may be issued, executed, and returned on the return-day. Spragins *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 139, 13 S. E. 45.

9. State *v.* Republican Valley, etc., R. Co., 27 Nebr. 852, 44 N. W. 51; De Vol *v.* Culver, 2 Ohio Dec. (Reprint) 154, 1 West. L. Month. 588.

10. Brauer *v.* Luntzer, 12 Nebr. 473, 11 N. W. 730, so holding where a particular court retained the practice and jurisdiction of a justice's court, although an increased jurisdiction had also been conferred upon it.

11. *Arkansas.*— Anderson *v.* Pearce, 36 Ark. 293, 38 Am. Rep. 39.

Illinois.— Williams *v.* Williams, 221 Ill. 541, 77 N. E. 928.

Iowa.— Knapp *v.* Haight, 23 Iowa 75. But stating that defendant is required to appear at the "next term" is not sufficient under a statute providing that the term shall be named. Decatur County *v.* Clements, 18 Iowa 536; Des Moines Branch State Bank *v.* Van, 12 Iowa 523. See also De Tar *v.* Boone County, 34 Iowa 488, holding the process sufficient to support a judgment by default.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

Texas.— Cave *v.* Houston, 65 Tex. 619; Kirk *v.* Hampton, 2 Tex. App. Civ. Cas. § 719, holding that the summons must require appearance at the next regular term.

If an impossible term is specified, the process is a nullity. Lowrey *v.* Richmond, etc., R. Co., 83 Ga. 504, 10 S. E. 123; Holzman *v.* Martinez, 2 N. M. 271.

12. Rattan *v.* Stone, 4 Ill. 540 (holding that a summons which names the wrong day of the term is absolutely void); Boals *v.* Shules, 29 Iowa 507 (holding that if the day of the term is designated, but the time is also otherwise specified so that two different days are named, the process is a nullity).

But if the process reads in the alternative, one of the days specified being the proper one and the other being the day prior thereto, this is a mere informality. Lemonds *v.* French, 4 Greene (Iowa) 123.

Statement of calendar day.— A statutory requirement that the day of the court term be named is satisfied by a designation of the calendar day and *vice versa*. Dunkle *v.* Elston, 71 Ind. 585; McDowell *v.* Nicholson, 2 Tex. App. Civ. Cas. § 268.

13. Merrill *v.* Barnard, 61 N. C. 569.

14. Hodges *v.* Brett, 4 Greene (Iowa) 345,

date may be fixed with reference to a term of court where the time of holding such term is prescribed by law.[15] But where it is provided that the day shall be plainly expressed, a faulty reference to the day is not aided by the fact that defendant is also required to appear at the "term next to be holden," the date of which is fixed by general law.[16] An error in stating the time at which process is returnable,[17] or a failure to follow the statutory language for the time for appearance,[18] is not fatal where defendant is neither deceived nor misled. Surplusage in regard to the time for appearance will not affect the writ.[19] But a want of proper certainty in point of time cannot be supplied by construction or intendment.[20] The return-day may be expressed in figures.[21] Where the writ is made returnable upon a certain day of a certain month "next," it has been construed to be returnable in the ensuing year in case the same month has already been expressed in stating the date of the writ.[22]

f. To Whom Returnable. In case by statute provision is made for a return of process to a particular officer, it should not be made returnable otherwise.[23]

g. Direction to Return. Where the law requires the officer to return process, a direction to him to do so need not be inserted.[24]

7. Designation of Parties. The process should state the names of the parties, plaintiff and defendant, and this requirement is frequently found expressly set out in the statute.[25] The full christian name and surname of each party required to be

where a designation "11 o'clock M.," was regarded as a fatal defect.

Naming an earlier hour, or naming the forenoon where by law defendant has the entire day, is alike immaterial. Armstrong *v.* Middlestadt, 22 Nebr. 711, 36 N. W. 151; Titus *v.* Whitney, 16 N. J. L. 85, 31 Am. Dec. 228.

15. Phillips *v.* Lemoyne, 4 Ark. 144; Rogers *v.* Miller, 5 Ill. 333.

16. Bell *v.* Austin, 13 Pick. (Mass.) 90.

17. Condon *v.* Barr, 47 N. J. L. 113, 54 Am. Rep. 121.

18. McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287; Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

The statutory language need not be used if other words of equivalent import are employed. Hurford *v.* Baker, 17 Nebr. 443, 23 N. W. 339.

An obvious clerical error in stating the time will not render the summons open to attack otherwise than on direct appeal from the judgment. Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261.

19. Lawyer Land Co. *v.* Steel, 41 Wash. 411, 83 Pac. 896, where a summons, served by publication upon a defendant outside the state, contained the clause requiring defendant to appear in twenty days after service if service should be made within the state, and it was held that this clause was mere surplusage and did not affect the summons.

20. Wright *v.* Wilmot, 22 Tex. 398; Davidson *v.* Heidenheimer, 2 Tex. Unrep. Cas. 490.

21. Maires *v.* Smith, 16 N. J. L. 360.

22. Hochlander *v.* Hochlander, 73 Ill. 618; Miller *v.* Handy, 40 Ill. 448; Elee *v.* Wait, 28 Ill. 70; Hildreth *v.* Hough, 20 Ill. 331; Calhoun *v.* Webster, 3 Ill. 221. *Contra*, Posey *v.* Branch, 2 McMull. (S. C.) 338 (holding that where a writ was tested March 4, 1842, and was made returnable to the third Monday in March next, the return-day might be taken to indicate the third Monday of the test of March 4, 1842, or the third Monday next after the fourth of March, 1842); Point Pleasant *v.* Greenlee, 63 W. Va. 207, 60 S. E. 601 (holding that a writ tested on the first day of August and made returnable on "the first Monday in August next" was not absolutely void under the statute requiring all writs to be returnable within ninety days, as the error was self-correcting, and the writ should be construed to mean the first Monday of the month therein mentioned).

23. See the cases cited *infra*, this note.

Where summons is to be made returnable before the clerk of court, it is error to make it returnable to the judge. Piercy *v.* Watson, 118 N. C. 976, 24 S. E. 659 (holding that such a summons was irregular but not void); Johnson *v.* Judd, 63 N. C. 498; Swepson *v.* Harvey, 63 N. C. 106; Smith *v.* McIlwaine, 63 N. C. 95.

24. Smith *v.* Bradley, 1 Root (Conn.) 148.

25. See the statutes of the several states. And see the following cases:

California.— Lyman *v.* Milton, 44 Cal. 630.

Illinois.— Great Northern Hotel Co. *v.* Farrand, etc., Organ Co., 90 Ill. App. 419.

Kentucky.— Bryant *v.* Mack, 41 S. W. 774, 19 Ky. L. Rep. 744. But *compare* Stern *v.* Sedden, 4 Bibb 178.

Maine.— Jones *v.* Sutherland, 73 Me. 157.

Texas.— Heath *v.* Fraley, 50 Tex. 209; Portwood *v.* Wilburn, 33 Tex. 713; Rodgers *v.* Green, 33 Tex. 661; Little *v.* Marler, 8 Tex. 107. See Hunt *v.* Wiley, 1 Tex. App. Civ. Cas. § 1214.

The abbreviation, "etc.," employed after the name of plaintiff, does not import that there are other plaintiffs. Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123.

The omission of defendant's name in one part of the writ is cured by its presence in another part. Guinan *v.* Waco, 22 Tex. Civ. App. 445, 54 S. W. 611.

Process issued to another county, against a non-resident defendant, need not name the

named should be given.[26] If a middle initial is used it should be correct, but the insertion of a wrong initial letter between the christian and surname of a party plaintiff will not render the judgment void, but it is at most reversible only on direct appeal.[27] A mere inaccuracy in the spelling of a party's name will not vitiate the process beyond the power of amendment, where it does not appear to have actually misled,[28] unless the error is so great that an entirely different person may be said to be named.[29] A variance in the name of a party to a writ where it is

other defendants. McCormick Harvesting Mach. Co. *v.* Cummins, 59 Nebr. 330, 80 N. W. 1049; Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295. And see Hartley *v.* Tunstall, 3 Ark. 119, holding that the writ to each county must contain the names of no defendants other than those who reside in that county.

Where there are several defendants the names of all must be stated in the citation issued to each. Bendy *v.* Boyce, 37 Tex. 443; Crosby *v.* Lum, 35 Tex. 41; Burleson *v.* Henderson, 4 Tex. 49; Wadley *v.* Johnson, 2 Tex. Unrep. Cas. 739; Owsley *v.* Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

Substitution.— Where the action is commenced by the filing of the complaint, a substitution because of the original plaintiff's death may properly be stated in the summons. Bunker *v.* Taylor, 13 S. D. 433, 83 N. W. 555.

Person deceased.— Process addressed to a person as if living cannot be served upon his personal representatives. Matter of Georgi, 35 Misc. (N. Y.) 685, 72 N. Y. Suppl. 431.

Defendant may be described under an alias. — Duncan *v.* McAffee, 3 Ill. 559.

Summons to answer plaintiff "or his attorney" has been held sufficient on the ground that the last-mentioned words might be rejected as surplusage. Brewer *v.* Sibley, 13 Metc. (Mass.) 175.

An entire omission of defendant's name in the process is at most an amendable defect, where the declaration or complaint is annexed, as required by statute, and correctly names defendant. Smith *v.* Morris, 29 Ga. 339.

26. See cases cited *infra*, this note.

Description by initial of christian name is a misnomer. Rush *v.* Kennedy, 7 Dowl. P. C. 199, 3 Jur. 108, 8 L. J. Exch. 85, 4 M. & W. 586. In Herf *v.* Shulze, 10 Ohio 263, the use of merely the initials of plaintiff in the writ was held to be ground for abatement. But *compare* Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910, holding a citation served by publication in attachment sufficient, although it designated defendant by his initials. The full name should be given, even though the party may have been described by the initial of his christian name in the transaction. Stoll *v.* Griffith, 41 Wash. 37, 82 Pac. 1025. If the party's full name be once given, the process is not defective if in a subsequent place the full name is not stated. Missouri, etc., R. Co. *v.* Bodie, 32 Tex. Civ. App. 168, 74 S. W. 100. The use of "Sam." for "Samuel" will not vitiate the summons under a statute declaring that service of summons shall not be set aside for defects not affecting defendant's substantial rights. Rich *v.* Collins, 12 Colo. App. 511, 56 Pac. 207.

The reason for insisting strongly upon correctness in the names of parties is that otherwise there would be considerable difficulty in establishing a plea of former recovery. Morgan *v.* Woods, 33 Ind. 23.

Blank as to christian name.— The officer serving may be given the process, with defendant's christian name blank, and authorized to ascertain and insert it. Osgood *v.* Norris, 21 N. H. 435. An omission of any christian name, with no amendment at any stage, was considered a fatal defect in Houser *v.* Jones, 1 Phila. (Pa.) 394.

When a wife is a party plaintiff with her husband her name must be stated, and it is not sufficient that the citation recite that a person named "*et uxor* are plaintiffs." Higgins *v.* Shepard, (Tex. Civ. App. 1908) 107 S. W. 79.

In Louisiana the code of practice does not require defendant's name and surname to appear at full length in the citation. Lallande *v.* Terrill, 12 La. 7.

Addition or description.— A writ naming defendant a blacksmith was held sufficient, although he claimed he was a nailer and not a blacksmith. Blower *v.* Campbell, Quincy (Mass.) 8.

27. Morgan *v.* Woods, 33 Ind. 23. In Bowen *v.* Mulford, 10 N. J. L. 230, Chief Justice Ewing said: "The introduction of a letter or name between the christian and surname is very common, for the purpose of distinction; and in the use and understanding of the people at large, and therefore in presumption of fact, John Mulford and John S. Mulford, are not the same but different persons. Hence the variance was material. To sanction it, might open the door to serious mischief."

28. Morgan *v.* Woods, 33 Ind. 23; Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53.

An abbreviation of defendant's surname, which the court considered could not have misled, was held immaterial in Cooke *v.* Shoemaker, 8 Kulp (Pa.) 212.

An error in plaintiff's christian name is cured under the Illinois statute when rightfully stated in the declaration. Sidway *v.* Marshall, 83 Ill. 438.

29. Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266; People *v.* Dunn, 27 Misc. (N. Y.) 71, 58 N. Y. Suppl. 147; McGill *v.* Weil, 10 N. Y. Suppl. 240; Southern Pac. R. Co. *v.* Block, 84 Tex. 21, 19 S. W. 300. See also Miller *v.* Flewelling, 17 Can. L. T. Occ. Notes 265.

idem sonans with the real name is not material.[30] If the name of a defendant is unknown, a fictitious name may be given in the process, adding a statement that it is fictitious, where such a proceeding is permitted by statute,[31] and in some jurisdictions a description should be added tending to identify the person intended.[32] An error in the name of a co-defendant offers no ground of objection to a defendant rightly named and served.[33] In any case, if the party plaintiff or defendant be actually before the court, as by plaintiff bringing suit or by defendant being actually served, the name by which he sues or is sued is wholly immaterial, unless a mistake therein be used as a ground for a plea in abatement.[34] The fact that defendants are named in the alternative is fatal.[35]

8. STATEMENT OF NATURE OF ACTION. Whether or not a summons should contain a statement indicating the nature of the cause of action is a matter depending upon the provisions of the statute; some statutes make no such requirement,[36] others

A writ was upheld which entirely omitted defendant's surname, but stated his christian name, which was an unusual one, where the full name appeared in the petition served. Crain *v.* Griffis, 14 Tex. 358.

30. People *v.* Hilderbrand, 71 Mich. 313, 38 N. W. 919; Tibbets *v.* Kiah, 2 N. H. 557; Petrie *v.* Woodworth, 3 Cai. (N. Y.) 219; Webb *v.* Lawrence, 1 Cromp. & M. 806, 2 Dowl. P. C. 81, 3 Tyrw. 906.

Especially when the summons is accompanied by other papers in the action in which defendant's name is correctly spelled. Baldwin *v.* McMichael, 68 Ga. 628; Sidway *v.* Marshall, 83 Ill. 438; Holman *v.* Goslin, 63 N. Y. App. Div. 204, 71 N. Y. Suppl. 197.

31. Enewold *v.* Olsen, 39 Nebr. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573; Lenehan *v.* St. Francis Xavier College, 30 Misc. (N. Y.) 378, 63 N. Y. Suppl. 1033 [*affirmed* in 51 N. Y. App. Div. 535, 64 N. Y. Suppl. 868]; People *v.* Dunn, 27 Misc. (N. Y.) 71, 58 N. Y. Suppl. 147; Waterbury *v.* Mather, 16 Wend. (N. Y.) 611.

Sufficiency.— A writ directing an officer "to summon the unknown children" of certain persons is not a valid summons, under Ky. Civ. Code, § 66, which requires that the writ "shall command the officer to whom it is directed to summon the defendant named therein." Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477, 9 Ky. L. Rep. 388. Where the process sought to include as defendants the unknown heirs of a deceased owner, the addition of the words "if any" to their designation does not invalidate the process. Abbott *v.* Curran, 98 N. Y. 665.

A citation to the unknown heirs of a decedent does not include his wife. Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99.

32. Hilton *v.* Sinsheimer, 5 N. Y. Civ. Proc. 355, holding that this description need not be added when defendant is personally served.

33. Gunter *v.* McEntire, (Tex. Civ. App. 1893) 24 S. W. 590.

34. *California.*— Welsh *v.* Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85.

Illinois.— Hammond *v.* People, 32 Ill. 446, 83 Am. Dec. 286; Guinard *v.* Heysinger, 15 Ill. 288.

Maryland.— Baltimore First Nat. Bank *v.* Jaggers, 31 Md. 38, 100 Am. Dec. 53.

Massachusetts.— Langmaid *v.* Puffer, 7 Gray 378.

Missouri.— Parry *v.* Woodson, 33 Mo. 347, 84 Am. Dec. 51.

New York.— Stuyvesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562.

Oregon.— Foshier *v.* Narver, 24 Oreg. 441, 34 Pac. 21, 41 Am. St. Rep. 874.

South Carolina.— Genobles *v.* West, 23 S. C. 154.

Vermont.— *Ex p.* Kellogg, 6 Vt. 509.

Canada.— Protestant Bd. of School Com'rs *v.* Cook, 2 Quebec Pr. 220.

Statement of rule.— No better statement of this principle can be found than the following, by Justice Cowen, in Waterbury *v.* Mather, 16 Wend. (N. Y.) 611, 613: "If the parties are in truth before the court, whether plaintiff or defendant, plaintiffs or defendants, if all or any of them be misnamed, whether they be corporate or natural persons, the only way to make the objection good is by a plea in abatement. The persons being actually before the court, by their own consent or otherwise, no matter by what name they choose to call themselves, the name, as well as everything else, becomes *rem judicatam*. The court have possession of the persons and the thing, and by whatever names the former may be called, it is enough if they can be intelligibly connected by evidence as parties in interest and participators in the litigation. They are then tied up and concluded, and in all future litigation may be connected with the subject matter by proper averments. In the immediate suit, and on the immediate trial, all the court and jury have to do, is to see that in truth the real parties are before them. It may sometimes be a troublesome question of identity; still it is, in general, a mere formal dispute of no real consequence; and an abatement is allowed for no reason but to avoid circuity in setting up the suit as a future bar."

35. Alexander *v.* Leland, 1 Ida. 425.

36. Stanquist *v.* Hebbard, 122 Cal. 268, 54 Pac. 841; Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225 (construing Arkansas statute); Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53. See Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,675, 10 Blatchf. 524, holding that a writ which requires defendant to answer to plaintiff in a plea of trespass, and also to a certain bill of plaintiff against defendant,

do.[37] If the statute requires such a statement it is mandatory.[38] A brief and general characterization, avoiding detail, is usually held a sufficient compliance with the statute.[39]

for damages, in a sum named, for deceit and breach of promise of marriage, sets forth, in the action for deceit, an action in trespass on the case, and the rest of the *ac etiam* clause may be regarded as explanatory of the subject-matter to which the deceit was applied, or may be rejected as surplusage; and therefore the writ is not incongruous.

Under former statutes in California the summons was required to state the cause and general nature of the action. Bewick *v.* Muir, 83 Cal. 368, 33 Pac. 389; People *v.* Greene, 52 Cal. 577; King *v.* Blood, 41 Cal. 314.

37. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Moody *v.* Taylor, 12 Iowa 71; Colby *v.* Dow, 18 N. H. 557; Stoddard *v.* Cockran, 6 N. H. 160; Ross *v.* Ward, 16 N. J. L. 23; Silkman *v.* Boiger, 4 E. D. Smith (N. Y.) 236; Bray *v.* Andreas, 1 E. D. Smith (N. Y.) 387; Cooper *v.* Chamberlain, 2 Code Rep. (N. Y.) 142.

Where the complaint is served with the summons it is sometimes provided that the summons need not contain a statement of the cause of action. Swem *v.* Newell, 19 Colo. 397, 35 Pac. 734.

38. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Sawyer *v.* Robertson, 11 Mont. 416, 28 Pac. 456; Boyle *v.* Victoria Yukon Trading Co., 8 Brit. Col. 352.

39. *California.*— A statement "of the nature of the action in general terms" is sufficiently made by reciting that the action is brought to recover money and to foreclose liens. Bewick *v.* Muir, 83 Cal. 368, 23 Pac. 389.

Colorado.— "The cause and general nature of the action" is sufficiently shown by declaring that it is brought to recover a sum stated, evidenced by the promissory note more fully set forth in the complaint. Barndollar *v.* Patton, 5 Colo. 46. So, stating the amount sued for and that it was due on an insurance policy described in the complaint. Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537. But a summons in an action for negligence, causing personal injuries, is fatally defective when it merely states that the action is brought to recover a stated amount, due from defendant to plaintiff on certain damages claimed to have been incurred by plaintiff by reason of the negligent operating of defendant railroad, and judgment by default is void. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512.

Indiana.— A summons need not fully inform defendant of the nature or character of the action; a statement that the action is brought "to set aside satisfaction of judgment" is sufficient to uphold a judgment on default which also directs a sale under the previous judgment. Freeman *v.* Paul, 105 Ind. 451, 5 N. E. 754.

Iowa.— Stating that a specified sum is due on a promissory note is sufficient to apprise indorsers of the nature of the claim. Davis *v.* Burt, 7 Iowa 56. Notice of a claim on contract against two is sufficient to sustain a judgment against one. Padden *v.* Clark, 124 Iowa 94, 99 N. W. 152. The original notice is not to set forth the cause of action in detail, but it is sufficient if it informs defendant with reasonable certainty of the remedy that plaintiff seeks. Harkins *v.* Edwards, 1 Iowa 296. See also Hickman *v.* Chambers, 10 Iowa 301, holding that where a petition claimed judgment against defendants for the foreclosure of a mortgage, and against one of them on a note executed by him, and the original notice claimed judgment against them on a note and a foreclosure of a mortgage to secure payment of the same, the variance was not sufficient to quash the notice.

Maryland.— The "purpose" for which defendant is summoned is sufficiently stated in a summons requiring him to "answer to an action at the suit of" plaintiff. Ritter *v.* Offutt, 40 Md. 207.

Montana.— The "cause and general nature of the action" sufficiently appears by a statement that it is brought to recover a stated sum, the value of stated personal property belonging to plaintiff and taken possession and disposed of by defendant. Sawyer *v.* Robertson, 11 Mont. 416, 28 Pac. 456.

Nebraska.— Defendant is sufficiently apprised of the "nature of the claim against him" by being summoned to answer plaintiff's bill of particulars, wherein they claim a stated sum as due on a promissory note. McPherson *v.* Beatrice First Nat. Bank, 12 Nebr. 202, 10 N. W. 707.

Rhode Island.— Describing the action as "of the case, for trover and conversion of certain personal property" is sufficient. Slocomb *v.* Powers, 10 R. I. 255.

Texas.— Old Alcalde Oil Co. *v.* Ludgate, (Civ. App. 1905) 85 S. W. 453. The statute does not design that the statement in the summons supply the place of the statement in the pleading. Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808. Nevertheless a requirement that the complaint be served with the summons does not override a requirement that the summons shall state the nature of the demand. Delaware Western Constr. Co. *v.* Farmers, etc., Nat. Bank, 33 Tex. Civ. App. 658, 77 S. W. 628. The nature of plaintiff's demand is sufficiently shown by a recital that it is a note, of specified date and amount, and on which defendant is liable. McAnally *v.* Vickry, (Tex. Civ. App. 1904) 79 S. W. 857; Houston, etc., R. Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122; Hunt *v.* Wiley, 1 Tex. App. Civ. Cas. § 1214. A statement that it is on a note, and for foreclosure of a mortgage, is sufficient. Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537. If notes are stated to have been made and delivered by defendants to plaintiffs, it is not necessary to also state that plaintiffs are the holders

9. Statement of the Relief Sought. Process is usually required to apprise defendant of the result consequent on his default,[40] as, in actions on contract for the recovery of money only, that if defendant fail to appear, judgment will be taken against him for a specified sum,[41] or, in other actions, that in such case plaintiff will apply to the court for the relief demanded in the complaint,[42] or that in such case default will be entered against him.[43] A substantial compliance with the statutory requirement is always sufficient.[44] It is sometimes required merely that the summons state the sum of money or other relief demanded,[45] or that there

of the notes, or that they ask for a money judgment. Hinzie *v.* Kempner, 82 Tex. 617, 18 S. W. 659. A statement that the action was "trespass to try title and remove cloud from title, cancel deed, and for damages" is insufficient. Ford *v.* Baker, (Civ. App. 1896) 33 S. W. 1036. A statement that the action was for taxes does not support a default judgment foreclosing a tax lien. Netzorg *v.* Green, 26 Tex. Civ. App. 119, 62 S. W. 789.

Washington.— A statement that the action is brought to recover money due on a note particularly described, and to foreclose a mortgage given to secure it, is a sufficient statement of the nature of the action. De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

See 40 Cent. Dig. tit. "Process," § 28.

40. See the statutes of the several states. And see the cases cited *infra*, this and following notes.

The omission to state the penalty of default as required by statute was held a mere irregularity in Indian Territory, by the United States circuit court of appeals. Ammons *v.* Brunswick-Balke-Colender Co., 141 Fed. 570, 72 C. C. A. 614.

41. Gundry *v.* Whittlesey, 19 Wis. 211; Chamberlain *v.* Mensing, 47 Fed. 202.

Effect of omission.— A total omission to state any amount where the statute requires it may be a fatal defect. Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231; Gundry *v.* Whittlesey, 19 Wis. 211. An omission to state the amount will not invalidate the summons if the complaint is referred to therein and served at the same time. Burkhardt *v.* Haycox, 19 Colo. 339, 35 Pac. 730; Prezeau *v.* Spooner, 22 Nev. 88, 35 Pac. 514; Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895.

Failure to insert ad damnum clause in a writ in action of covenant broken, with counts for money paid, etc., is fatal. Deveau *v.* Skidmore, 47 Conn. 19.

In New York under Code Proc. § 129, subd. 1, it was provided that in actions arising on contract for the recovery of money only, plaintiff should insert in the summons a notice that he would take judgment for a sum specified therein if defendant failed to answer the complaint. For cases decided under this provision see Mason *v.* Hand, 1 Lans. 66; West *v.* Brewster, 1 Duer 647; New York *v.* Lyons, 1 Daly 296; Montegriffo *v.* Musti, 1 Daly 77; Luling *v.* Stanton, 2 Hilt. 538; Salters *v.* Ralph, 15 Abb. Pr. 273; Levy *v.* Nicholas, 15 Abb. Pr. 63 note; Hartshorn *v.* Newman, 15 Abb. Pr. 63; Norton *v.* Cary, 14 Abb. Pr. 364, 23 How. Pr. 469; Dunn *v.* Bloomingdale, 6 Abb. Pr. 340 note; Johnson *v.* Paul, 6 Abb. Pr. 335 note, 14 How. Pr. 454; Tuttle *v.* Smith, 6 Abb. Pr. 329, 14 How. Pr. 395; Davis *v.* Bates, 6 Abb. Pr. 15; People *v.* Bennett, 5 Abb. Pr. 384 [*affirmed* in 6 Abb. Pr. 343]; McDonald *v.* Walsh, 5 Abb. Pr. 68; Champlin *v.* Deitz, 37 How. Pr. 214; Cobb *v.* Dunkin, 19 How. Pr. 164 [*reversing* 17 How. Pr. 97]; Albany County Excise Com'rs *v.* Classon, 17 How. Pr. 193; Kelsey *v.* Covert, 15 How. Pr. 92; Dunn *v.* Bloomingdale, 14 How. Pr. 474; McNeff *v.* Short, 14 How. Pr. 463; Ridder *v.* Whitlock, 12 How. Pr. 208; Baxter *v.* Arnold, 9 How. Pr. 445; Hyde Park Cemetery Bd. *v.* Teller, 8 How. Pr. 504; Hewitt *v.* Howell, 8 How. Pr. 346; Travis *v.* Tobias, 7 How. Pr. 90; Field *v.* Morse, 7 How. Pr. 12; Flynn *v.* Hudson River R. Co., 6 How. Pr. 308; Trapp *v.* New York, etc., R. Co., 6 How. Pr. 237, 1 Code Rep. N. S. 384; Clor *v.* Mallory, 1 Code Rep. 126; Leopold *v.* Poppenheimer, 1 Code Rep. 39; Diblee *v.* Mason, 1 Code Rep. 37, 2 Edm. Sel. Cas. 20.

42. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; U. S. *v.* Turner, 50 Fed. 734; Chamberlain *v.* Mensing, 47 Fed. 202.

43. McKee *v.* Harris, 1 Iowa 364.

44. Burkhardt *v.* Haycox, 19 Colo. 339, 35 Pac. 730; Kimball *v.* Castagnio, 8 Colo. 525, 9 Pac. 488; White *v.* Iltis, 24 Minn. 43; Hotchkiss *v.* Cutting, 14 Minn. 537; Schuttler *v.* King, 12 Mont. 149, 30 Pac. 25; Miller *v.* Zeigler, 3 Utah 17, 5 Pac. 518. See Leman *v.* Saunders, 72 Ga. 202; Kleckley *v.* Leyden, 63 Ga. 215.

Illustrations.— If the statute requires that the summons shall notify defendant that plaintiff will take judgment for any money or damages demanded in the complaint, or will apply to the court for any other relief demanded, the summons may follow the statute and state the two alternatives or may demand only damages, or only equitable relief. Granger *v.* Sherriff, 133 Cal. 416, 65 Pac. 873; Stanquist *v.* Hebbard, 122 Cal. 268, 54 Pac. 841. A notice in the summons that in case defendant fails to appear plaintiff "will take judgment against you for the relief demanded in his complaint" is a substantial compliance with the statute requiring a notice that plaintiff "will apply to the court for the relief demanded in the complaint." Clark *v.* Palmer, 90 Cal. 504, 27 Pac. 375. See also Behlow *v.* Shorb, 91 Cal. 141, 27 Pac. 546.

45. Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231; Freeman *v.* Paul, 105 Ind. 451, 5 N. E. 754. See Moody *v.* Taylor, 12 Iowa 71. If the relief sought consists of two diverse matters, both must be stated. Miles *v.* Kinney, (Tex. 1888) 8 S. W. 542.

be indorsed upon the summons the amount sued for.[46] The petition or statement of plaintiff's claim is sometimes required to be annexed to the process, in which case a mere folding inside of the writ is not sufficient.[47]

10. TESTE. The teste of process is the concluding clause commencing: "Witness the Honorable A. B., judge of said Circuit Court, etc.," or as the case may be.[48] It is generally considered a mere matter of form,[49] although it is frequently provided for in the state constitutions,[50] its only purpose being to give character and dignity to the process.[51] The teste is by some statutes required to be in the name of the judge,[52] by others in the name of the clerk.[53] Where it is provided that the summons may be subscribed by plaintiff to his attorney, and it is not required to issue from court, it need not be tested in the name of the presiding judge.[54] A writ must be tested in term-time.[55] A process cannot bear teste of a term after it issues, although it is returnable at a subsequent term.[56] Where a writ is sued out in vacation it must be tested as of the previous term.[57] The teste of a writ is not conclusive as to the time of its issuance.[58]

11. DATE. The date of the writ is not a material part of it,[59] and it may be entirely omitted without invalidating the writ.[60] A statutory requirement as to the date of process is directory merely.[61] While the writ is presumed to have been issued upon the day of its date,[62] the presumption is not a conclusive one, and the issuance at another time may be established by parol evidence,[63] even though such

In the absence of statutory requirement, the amount need not be stated. Marstellar *v.* Marstellar, 93 Pa. St. 350.

46. See *infra*, I, D, 14.

47. Ballard *v.* Bancroft, 31 Ga. 503; Saco *v.* Hopkinton, 29 Me. 268.

48. Bouvier L. Dict.

49. *Georgia.*— Jordan *v.* Porterfield, 19 Ga. 139, 63 Am. Dec. 301.

Illinois.— Norton *v.* Dow, 10 Ill. 459.

Maine.— Converse *v.* Damariscotta Bank, 15 Me. 431.

Massachusetts.— Hawkes *v.* Kennebeck, 7 Mass. 461.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394.

New York.— Brink *v.* Fulton, 1 Cow. 41.

South Carolina.— Charleston *v.* Schmidt, 11 Rich. 343, 345, where it is said: "The test is regarded as mere matter of form and the commencement of the suit is dated from the lodgment of the process."

England.— McNay *v.* Alt, 66 L. T. Rep. N. S. 832.

But *compare* Riggs *v.* Bagley, 2 Greene (Iowa) 383; Buchannan *v.* Kennon, 1 N. C. 530; Wimbish *v.* Wofford, 33 Tex. 109, where the writ was held void because tested in the name of the deputy instead of the chief clerk.

50. Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352. See also Ripley *v.* Warren, 2 Pick. (Mass.) 592, 594, where it was said: "Now nothing can be more precisely mere matter of form than the teste of a writ, although by some unaccountable means it was thought important enough to be provided for in the constitution of the State."

51. Reynolds *v.* Damrell, 19 N. H. 394.

52. Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352; U. S. *v.* Turner, 50 Fed. 734. See also Sapp *v.* Parrish, 3 Ga. App. 234, 59 S. E. 821 (holding that process bearing teste in the name of the judge is not void, although his official title is not also given); Howerter *v.* Kelly, 23 Mich. 337 (holding that where a vacancy has occurred in the office of circuit judge, and the governor has designated another to hold the term, process should be tested in the name of the latter, although his acceptance has not been signified to the clerk).

53. Norton *v.* Dow, 10 Ill. 459; Buchannan *v.* Kennon, 1 N. C. 530; Pendleton *v.* Smith, 1 W. Va. 16. See East *v.* Parks, 4 Greene (Iowa) 80.

54. Johnson *v.* Hamburger, 13 Wis. 175; Porter *v.* Vandercook, 11 Wis. 70.

55. Potter *v.* White, 3 Harr. (Del.) 329.

56. Hurst *v.* Strong, 1 How. (Miss.) 123.

57. Potter *v.* White, 3 Harr. (Del.) 329.

58. Allen *v.* Smith, 12 N. J. L. 159.

59. Kelley *v.* Mason, 4 Ind. 618.

60. Rogers *v.* Farnham, 25 N. H. 511; Lyle *v.* Longley, 6 Baxt. (Tenn.) 286; Andrews *v.* Ennis, 16 Tex. 45; Ambler *v.* Leach, 15 W. Va. 677.

61. Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153. See also Simmerman *v.* Clevenger, 9 N. J. L. J. 213.

62. *Arkansas.*— Jackson *v.* Bowling, 10 Ark. 578; McLarren *v.* Thurman, 8 Ark. 313.

Illinois.— Rural Press Co. *v.* Chicago Electrotype, etc., Co., 107 Ill. App. 501.

Maine.— Bragg *v.* Greenleaf, 14 Me. 395.

New Hampshire.— Society for Propagating Gospel *v.* Whitcomb, 2 N. H. 227.

North Carolina.— Currie *v.* Hawkins, 118 N. C. 593, 24 S. E. 476.

Vermont.— Chapman *v.* Goodrich, 55 Vt. 354.

A writ dated on Sunday is presumptively void. Hanson *v.* Shackelton, 4 Dowl. P. C. 48, 1 Harr. & W. 342.

The indorsement by the sheriff of the time of its receipt does not rebut this presumption. Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

63. *California.*— Hibernia Sav., etc., Soc. *v.*

evidence may be in contradiction of the date which appears on the face of the writ as the date thereof.[64]

12. SIGNATURE. Unless the statute authorizes plaintiff or his attorney to issue process,[65] process by which suit is instituted must bear the official signature of some officer authorized to issue the same,[66] usually the clerk of the court;[67] but the clerk may authorize his signature to be made by another, or adopt it as his own after it has been made,[68] or he may adopt a printed signature.[69] It is sufficient if the clerk sign with the initials only of his christian name.[70] Where the teste contained the signature of the clerk, this was held a sufficient signing of the writ.[71] Signature by a deputy should be in the name of the clerk.[72] When plaintiff, or his attorney, may sign the summons, a printed subscription is held sufficient.[73] There is a difference of opinion among courts as to the effect of a want of proper signature,

Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

Maine.— Trafton *v.* Rogers, 13 Me. 315.

New Hampshire.— Robinson *v.* Burleigh, 5 N. H. 225.

New Jersey.— Allen *v.* Smith, 12 N. J. L. 159.

New York.— Porter *v.* Kimball, 3 Lans. 330.

A further reference in the writ to the year of the independence of the United States may be considered in establishing the true date (Gilbert *v.* South Carolina Interstate, etc., Exposition Co., 113 Fed. 523), or a like reference to the existence of the state may be so considered (Bridges *v.* Ridgley, 2 Litt. (Ky.) 395).

A post-dated writ is not void for that reason. Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99.

64. Trafton *v.* Rogers, 13 Me. 315; Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661; Robinson *v.* Burleigh, 5 N. H. 225.

65. Rand *v.* Pantagraph Stationery Co., 1 Colo. App. 270, 28 Pac. 661; Johnson *v.* Hamburger, 13 Wis. 175. See also *supra*, I, C, 5.

66. Andrus *v.* Carroll, 35 Vt. 102, holding that the signature of the authority issuing a writ merely to the minute of recognizance at the foot of the writ is not a sufficient signature of the writ.

67. *Arkansas.*— Powers *v.* Swigart, 8 Ark. 363.

Connecticut.— See Tracy *v.* Post, 1 Root 191 (holding that an alderman has no right to sign any writs but such as are returnable before the city court, the mayor, or an alderman); Windham *v.* Hampton, 1 Root 175 (holding that in an action by a town the writ of summons may be signed by a justice of the peace who is a resident of the town and also one of the plaintiffs).

Kansas.— Lindsay *v.* Kearny County, 56 Kan. 630, 44 Pac. 603.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

South Carolina.— Smith *v.* Affanassieffe, 2 Rich. 334.

Texas.— Caufield *v.* Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

United States.— Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent. Dig. tit. "Process," § 34.

A magistrate cannot sign process in his own case, although he is authorized to sign and issue writs. Doolittle *v.* Clark, 47 Conn. 316.

68. Louisville, etc., R. Co. *v.* Banks, 33 S. W. 627, 17 Ky. L. Rep. 1065; Richardson *v.* Bachelder, 19 Me. 82; Stevens *v.* Ewer, 2 Metc. (Mass.) 74; Gamble *v.* Trahen, 3 How. (Miss.) 32.

General authority given by the clerk to an attorney to sign writs is ineffective, and a writ signed by the attorney is a nullity, which cannot be validated by the clerk's subsequent ratification. Gardner *v.* Lane, 14 N. C. 53.

69. Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Littleton *v.* Marshall, 8 Ohio S. & C. Pl. Dec. 672, 6 Ohio N. P. 509.

70. Bishop Hill Colony *v.* Edgerton, 26 Ill. 54.

71. Wibright *v.* Wise, 4 Blackf. (Ind.) 137; Botts *v.* Williams, 5 J. J. Marsh. (Ky.) 62. *Contra*, see Smith *v.* Hackley, 44 Mo. App. 614.

72. Felder *v.* Meredith, Walk. (Miss.) 447; Wimbish *v.* Wofford, 33 Tex. 109; Pendleton *v.* Smith, 1 W. Va. 16.

Signature by the deputy clerk, as such, is not invalid. Calender *v.* Olcott, 1 Mich. 344; Walke *v.* Circleville Bank, 15 Ohio 288; Johnson *v.* Nash, 20 Vt. 40.

73. Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841 [*overruling* Ames *v.* Schurmeier, 9 Minn. 221]; Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62; New York *v.* Eisler, 2 N. Y. Civ. Proc. 125; Mutual L. Ins. Co. *v.* Ross, 10 Abb. Pr. (N. Y.) 260 note; Mezchen *v.* More, 54 Wis. 214, 11 N. W. 534.

Signature by agent.— Plaintiff may authorize the signature by an attorney in fact. Tatum *v.* Allison, 31 Ga. 337; Hotchkiss *v.* Cutting, 14 Minn. 537. Signature by the agent, as such, is an irregularity, but the process is sufficient to confer jurisdiction and may be amended. Weare *v.* Slocum, 1 Code Rep. (N. Y.) 105.

One attorney, or firm, must sign for all the plaintiffs. Jones *v.* Conlon, 48 Misc. (N. Y.) 172, 95 N. Y. Suppl. 255.

some holding that it renders the process absolutely void;[74] but the better rule seems to be that the process is thereby rendered voidable only.[75]

13. Seal. Process which issues out of a court is almost invariably required by statute to be under the seal of that court.[76] Whether an omission of the seal in such case invalidates the writ is a question upon which there is a conflict of authority, some cases holding that it renders the writ void,[77] others that it merely renders it voidable.[78] If there is no official court seal, the clerk may affix any seal as that of the court.[79] Where process issues from the party or his attorney it need not be under the seal of the court.[80]

74. *Illinois.*— Hernandez *v.* Drake, 81 Ill. 34.

Kansas.— Lindsay *v.* Kearny County, 56 Kan. 630, 44 Pac. 603.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

New Hampshire.—Reynolds *v.* Damrell, 19 N. H. 394.

Texas.— Caufield *v.* Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

United States.— Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent. Dig. tit. "Process," § 34.

75. *Arkansas.*— Jett *v.* Shinn, 47 Ark. 373, 1 S. W. 693; Whiting *v.* Beebe, 12 Ark. 421.

Georgia.— Tatum *v.* Allison, 31 Ga. 337.

Indiana.— Wibright *v.* Wise, 4 Blackf. 137.

Kentucky.— Botts *v.* Williams, 5 J. J. Marsh. 62.

Massachusetts.— Austin *v.* Lamar F. Ins. Co., 108 Mass. 338.

Minnesota.— Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841.

New York.—Hill *v.* Haynes, 54 N. Y. 153; Barnard *v.* Heydrick, 49 Barb. 62.

North Carolina.— Henderson *v.* Graham, 84 N. C. 496.

Pennsylvania.— McCormick *v.* Meason, 1 Serg. & R. 92.

West Virginia.— Ambler *v.* Leach, 15 W. Va. 677.

76. *Arkansas.*— Reeder *v.* Murray, 3 Ark. 450; Woolford *v.* Dugan, 2 Ark. 131, 35 Am. Dec. 52.

Illinois.— Garland *v.* Britton, 12 Ill. 232, 52 Am. Dec. 487. See also Morrison *v.* Silverburgh, 13 Ill. 551, holding that the clerk is not required to state on the face of the process that it is issued under seal.

Massachusetts.— Hall *v.* Jones, 9 Pick. 446.

Mississippi.—Pharis *v.* Conner, 3 Sm. & M. 87.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394.

New York.— Churchill *v.* Marsh, 4 E. D. Smith 369.

North Carolina.— Shackelford *v.* McRae, 10 N. C. 226, holding a seal necessary when process issued to another county, although the use of the seal as to writs within the territorial jurisdiction was obviated.

Ohio.— Doe *v.* Pendleton, 15 Ohio 735; Boal *v.* King, 6 Ohio 11.

South Carolina.— Smith *v.* Affanassieffe, 2 Rich. 334.

Texas.— Chambers *v.* Chapman, 32 Tex. 569; Frosch *v.* Schlumpf, 2 Tex. 422, 47 Am. Dec. 655; Hale *v.* Gee, (Civ. App. 1895) 29 S. W. 44; Wells *v.* Ames Iron Works, 3 Tex. App. Civ. Cas. § 296; Block *v.* Weiller, 2 Tex. App. Civ. Cas. § 503; Leal *v.* Woodhouse, 2 Tex. App. Civ. Cas. § 101.

United States.— Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent Dig. tit. "Process," § 35.

Seal of a court, other than that in which process issues, invalidates the process. Hall *v.* Jones, 9 Pick. (Mass.) 446; Dominick *v.* Eacker, 3 Barb. (N. Y. 17; Imlay *v.* Brewster, 3 Tex. Civ. App. 103, 22 S. W. 226.

The seal must be referred to in the attestation. Riggs *v.* Bagley, 2 Greene (Iowa) 383.

Where no seal has been provided for the court it has been held that process may issue without seal. Goff *v.* Russell, 3 Kan. 212.

Second use of seal.— Where a seal of the court has been once used by having been affixed to a process which has been filled up, such seal cannot be detached and affixed to another writ. Filkins *v.* Brockway, 19 Johns. (N. Y.) 170.

The fact that the impression of the seal is not discernible is not material. Smith *v.* Alston, 1 Mill (S. C.) 104.

Summary process should be sealed as a writ. Hughes *v.* Phelps, 1 Brev. (S. C.) 81.

77. Kelso *v.* Norton, 74 Kan. 442, 87 Pac. 184; Choate *v.* Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424; Lower Towamensing Tp. Road, 10 Pa. Dist. 581; Carson Bros. *v.* McCord-Collins Co., 37 Tex. Civ. App. 540, 84 S. W. 391; Caufield *v.* Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

78. Rudd *v.* Thompson, 22 Ark. 363; Boyd *v.* Fitch, 71 Ind. 306; Sawyer *v.* Baker, 3 Me. 29; Foot *v.* Knowles, 4 Metc. (Mass.) 386. See also Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146. But see Stayton *v.* Newcomer, 6 Ark. 451, 44 Am. Dec. 524, holding that where a writ was not sealed, it was a nullity.

79. Beaubein *v.* Sabine, 3 Ill. 457; Stevens *v.* Ewer, 2 Metc. (Mass.) 74; Swink *v.* Thompson, 31 Mo. 336.

80. Rand *v.* Pantagraph Stationery Co., 1 Colo. App. 270, 28 Pac. 661. *Compare* Talcott *v.* Rozenberg, 3 Daly (N. Y.) 203, holding a statute dispensing with the necessity

14. INDORSEMENTS. The statutes frequently provide that process shall bear certain indorsements,[81] such as the amount claimed by plaintiff, where the action is brought for the recovery of money only,[82] or the residence of plaintiff,[83] or defendant,[84] or the name of the attorney,[85] or of the time when the writ was signed,[86] or of the officer serving the writ,[87] or of an affidavit authorizing service by an indifferent person,[88] or of the authority to serve the summons.[89] Under some statutes where plaintiff lives outside of the state, the writ is required to be indorsed by a sufficient person who is an inhabitant of the state,[90] or it may be provided that the

of a seal on process of a court of record, where it shall be subscribed by the party or his attorney, not to apply to the marine court of the city of New York.

81. See the statutes of the several states. And see cases cited *infra*, this and following notes.

The cause of action is, under some statutes, required to be indorsed upon the writ. Howell *v.* Hallett, Minor (Ala.) 102.

Name and residence of assignee.— Rev. St. c. 84, § 144, providing that the name and place of residence of an assignee, if known, shall at any time during the pendency of the suit be indorsed by the request of defendant on a writ or process, or further proceedings thereon shall be stayed, is mandatory. Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665.

In an action for a penalty, if a copy of the complaint is not served with the summons, a general reference to the statute under which suit is brought must be indorsed on the summons. Layton *v.* McConnell, 61 N. Y. App. Div. 447, 70 N. Y. Suppl. 679.

In an action on a bond the name of the real party in interest must be indorsed on the summons. Hopkinton Prob. Ct. *v.* Lamphear, 14 R. I. 291.

Indorsement by the sheriff of the day of receipt is not necessary. Chickering *v.* Failes, 26 Ill. 507; Cobb *v.* Newcomb, 7 Iowa 43; Nance *v.* Webb, 42 Miss. 268. But if made by him is conclusive of that fact until impeached or set aside. White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Process issued to another county.— Under some statutes where a process is issued to be served in another county, or, as it is sometimes termed, a branch summons, the branch summons must be indorsed so as to show that all the summonses are for one suit and one and the same cause of action. Drennen *v.* Jasper Inv. Co., (Ala. 1907) 45 So. 157.

82. See the statutes of the several states. And see Weaver *v.* Gardner, 14 Kan. 347; George *v.* Hatton, 2 Kan. 333 (holding an indorsement unnecessary where an action was brought for the recovery of money and to subject real estate to the payment thereof); Dusenberry *v.* Bennett, 7 Kan. App. 123, 53 Pac. 82; Watson *v.* McCartney, 1 Nebr. 131; Hamilton *v.* Miller, 31 Ohio St. 87; Gillett *v.* Miller, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588; Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318, 2 West. L. Month. 418 (holding that an action upon a note and mortgage is not within the statute); Vancouver Agency *v.* Quigley, 37 Can. L. J. N. S. 826; Union Bank *v.* Wurzburg, 9 Brit. Col. 160; British Columbia Land, etc., Agency *v.* Cum Yow, 8 Brit. Col. 2; Rogers *v.* Reed, 7 Brit. Col. 139. *Compare* Foster *v.* Collins, 5 Sm. & M. (Miss.) 259.

Sufficiency.— A statute requiring an "indorsement" on the summons of the amount sued for is sufficiently complied with by such a statement on the face of the summons. Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763.

Issuance of second summons.— Where the original summons was issued without a proper indorsement of the amount for which judgment would be taken, another summons with proper indorsement may be thereafter issued and served. Simpson *v.* Rice, etc., Co., 43 Kan. 22, 22 Pac. 1019.

83. Dundas *v.* McKenzie, 10 Brit. Col. 174; Sherwood *v.* Goldman, 11 Ont. Pr. 433; Taylor *v.* Lewis, 14 Quebec Super. Ct. 431.

84. State Sav. Bank *v.* Columbia Iron Works, 6 Ont. L. Rep. 358, 2 Ont. Wkly. Rep. 733.

85. Shinn *v.* Cummins, 65 Cal. 97, 3 Pac. 133.

Name and place of abode of attorney.— The Common Law Procedure Act of 1852, 15 & 16 Vict. c. 56, § 6, providing that the summons shall be indorsed with the name and place of abode of the attorney is satisfied by naming the place of business of the attorney, although it is not the place where he sleeps. Ablett *v.* Basham, 5 E. & B. 1019, 2 Jur. N. S. 285, 25 L. J. Q. B. 239, 85 E. C. L. 1019.

86. Pollard *v.* Wilder, 17 Vt. 48.

87. Stone *v.* Sprague, 24 N. H. 309.

Indorsement with lead pencil is not sufficient. Stone *v.* Sprague, 24 N. H. 309; Meserve *v.* Hicks, 24 N. H. 295.

88. Eno *v.* Frisbie, 5 Day (Conn.) 122.

89. See New York *v.* Millen, 13 Daly (N. Y.) 458, holding that Laws (1886), c. 758, § 1, did not require that the authority to serve a summons in an action for a penalty brought in a district court in the name of the mayor, aldermen, and commonalty of the city of New York, should be indorsed upon the summons.

90. See the statutes of the several states. And see cases cited *infra*, this note.

The indorsement of the attorney, who is a sufficient person, is sufficient under such a statute, although over the attorney's name appear the words "from the office of." Bennett *v.* Holmes, 79 Me. 51, 7 Atl. 902; Stone *v.* McLanathan, 39 Me. 131; Seagrave *v.* Erickson, 11 Cush. (Mass.) 89; Slate *v.* Ackley, 8 Cush. (Mass.) 62. And see

original writ shall be indorsed with his christian and surname if he is an inhabitant of the state.[91] Where an indorsement of the christian and surname is required, initials of the christian name may be employed,[92] The omission of a required indorsement renders the writ voidable only.[93] An unnecessary indorsement of the amount and nature of the claim will not affect the writ if those facts are truly stated.[94] The name of a plaintiff may be indorsed by his attorney, where the action is ratified by him.[95] In case of a suit by next friend the next friend may indorse the writ.[96] The indorsement need not be signed or sealed by the clerk.[97] The change of an indorser of a writ before service does not affect its character as a legal writ from the time of its date.[98] Under a statute requiring indorsement upon an original writ at the time when it is signed, such indorsement must be made at the time of signing.[99]

15. Various Other Requisites. Under some statutes the process must state the time [1] and place [2] of filing of plaintiff's complaint or petition, or must designate the place where service of the answer must be made,[3] or require the answer to be filed at a particular place.[4] So likewise it may be required that the summons shall state the title of the cause,[5] shall state the file number of the suit,[6] shall

Brackett *v.* Bartlett, 19 N. H. 129; Pettingill *v.* McGregor, 12 N. H. 179.

91. See the statutes of the several states. And see Feneley *v.* Mahoney, 21 Pick. (Mass.) 212; Haywood *v.* Main, 18 Pick. (Mass.) 226; Robbins *v.* Hill, 12 Pick. (Mass.) 569 (holding a writ indorsed "A. B. by attorney," insufficient); Clark *v.* Paine, 11 Pick. (Mass.) 66 (holding that any mode of signing which would bind the party to a bond or note was a sufficient indorsement); Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117.

The original indorser cannot be discharged and another substituted in his place, without the consent of defendant. Caldwell *v.* Lovett, 13 Mass. 422; Ely *v.* Forward, 7 Mass. 25.

A new indorser may be ordered where plaintiff having indorsed the original writ afterward absconded and left the state. Oysted *v.* Shed, 8 Mass, 272.

Action by corporation.— An original writ prescribed by a corporation, which is indorsed in the name of the corporation by an individual, is sufficient since defendant will be entitled to the same remedy against him as if he had written his name only. Middlesex Turnpike Corp. *v.* Tufts, 8 Mass. 266.

92. Stratton *v.* Foster, 11 Me. 467; Clark *v.* Paine, 11 Pick. (Mass.) 66.

93. Gillett *v.* Miller, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588. But *compare* Hopkinton Prob. Ct. *v.* Lamphear, 14 R. I. 291.

Where the writ is not indorsed at the time of its service, the court has no power to permit it to be indorsed at a subsequent period without the assent of defendant. Pettingill *v.* McGregor, 12 N. H. 179.

94. Weaver *v.* Gardner, 14 Kan. 347; Boulware *v.* Otoe County, 16 Nebr. 26, 19 N. W. 454; Larimer *v.* Clemmer, 31 Ohio St. 499.

95. Stevens *v.* Getchell, 11 Me. 443.

96. Crossen *v.* Dryer, 17 Mass. 222, so holding under a statute requiring original writs to be indorsed by plaintiff or his agent or attorney.

97. Abbey *v.* W. B. Grimes Dry Goods Co., 44 Kan. 415, 24 Pac. 426.

98. Steward *v.* Riggs, 9 Me. 51.

99. Wheelock *v.* Sears, 19 Vt. 559.

1. See the statutes of the several states. And see Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169; Cook *v.* Kelsey, 19 N. Y. 412 [*affirming* 8 Abb. Pr. 170, 17 How. Pr. 134]; Pignolet *v.* Daveaux, 2 Hilt. (N. Y.) 584; Houston, etc., R. Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122.

Sufficiency.— While an error of one day has been held not material (Jacquerson *v.* Van Erben, 2 Abb. Pr. (N. Y.) 315), an error of three days in stating the date has been held a fatal one (Leal *v.* Woodhouse, 2 Tex. App. Civ. Cas. § 101). A requirement that the summons state the date of the filing of the complaint is not satisfied by a statement of the date of filing of a copy of the complaint. Merrill *v.* George, 23 How. Pr. (N. Y.) 331.

2. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169 (holding that the statement is insufficient if at the foot and not in the body of the summons); Cook *v.* Kelsey, 19 N. Y. 412 (holding that the name of the state need not be given in a summons directed against a non-resident); Pignolet *v.* Daveaux, 2 Hilt. (N. Y.) 584.

3. See the statutes of the several states. And see Hotchkiss *v.* Cutting, 14 Minn. 537 (holding sufficient a requirement to serve a copy of the answer "upon the subscriber at his office in the city of Rochester, Minnesota"); Weare *v.* Slocum, 1 Code Rep. (N. Y.) 105 (holding that a summons directing service to be made upon one not an attorney, who signed the complaint and summons as agent of plaintiff, is bad).

4. See Medley *v.* Voris, 2 La. Ann. 140, holding a citation to contain a sufficient description of the location of the office of the clerk where the answer was required to be filed.

5. Louisiana Bank *v.* Elam, 10 Rob. (La.) 26; Caldwell *v.* Glenn, 6 Rob. (La.) 9.

6. Durham *v.* Betterton, 79 Tex. 223, 14 S. W. 1060; Houston, etc., R. Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122.

give the office address of plaintiff's attorney,[7] or shall have affixed thereto a revenue stamp.[8]

E. Alteration of Process. Process may be altered without application to the court, before it has been served, either as to the return-day or place of trial.[9] But it has been held that a process server cannot strike the names of defendants from a process and insert others in their stead.[10]

F. Alias and Pluries Writs. An alias writ is a writ issued when one of the same kind has been issued before in the same cause.[11] A second writ, issued when the first has failed of its purpose.[12] It presupposes the existence of an original

7. See Sullivan *v.* Harney, 53 Misc. (N. Y.) 249, 103 N. Y. Suppl. 177, holding that the failure of a summons to give the street number of plaintiff's attorney, as required by Code Civ. Proc. § 417, was a mere irregularity and not a jurisdictional defect, so that defendant having known such office address and retained the summons could not have the service set aside and the judgment entered in the case vacated.

8. Aldrich *v.* Nest Egg Co., 6 Brit. Col. 53.

9. *Maine.*— Gardiner *v.* Gardiner, 71 Me. 266.

Massachusetts.— Gardner *v.* Webber, 16 Pick. 251.

New Jersey.— Stellmacher *v.* Kloepping, 36 N. J. L. 176.

New York.— Sullivan *v.* Alexander, 18 Johns. 3; Sloan *v.* Wattles, 13 Johns. 158. But *compare* People *v.* Singer, 1 Cow. 41.

Pennsylvania.— Com. *v.* Warfel, 157 Pa. St. 444, 27 Atl. 763. *Compare* Elwood Paper Co. *v.* Radziewicz, 16 Pa. Co. Ct. 81, holding that where a summons is so altered that defendant is unable to determine therefrom the day set for hearing it is defective.

Vermont.— Hunt *v.* Viall, 20 Vt. 291, holding that a statute forbidding officers from "making writs" does not prohibit such an alteration.

England.— Crowther *v.* Wheat, 8 Mod. 243, 88 Eng. Reprint 174, where it was held that immaterial alterations might be made even after the sealing of the writ and that material alterations might be made before the writ was sealed.

See 40 Cent. Dig. tit. "Process," § 38.

Contra.— Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851; St. Mary's Bank *v.* Mumford, 6 Ga. 44. *Compare* Parsons *v.* Ely, 2 Conn. 377, holding that a material alteration in plaintiff's writ, as in the date or return, after it has been signed and issued, and after security to prosecute has been given, will render it abatable, if such security is necessary; *aliter* if not necessary.

Change of attorney.— J, an attorney, sued out a writ for plaintiff, an infant. Next day it was agreed that B should be substituted as attorney, and plaintiff's agent, with J and B, went to the crown office, where, with the permission of the clerk, J's name was struck out and B's name inserted in the præcipe. The same change was made in the writ and copy before service. It was held that the alteration was unauthorized, and that the copy and service must be set aside, since the statute required the writ to be indorsed with the name and place of business of the attorney actually suing out the same. O'Reilly *v.* Vanevery, 2 Ont. Pr. 184.

After service made, a writ may not be altered without leave of court. Childs *v.* Ham, 23 Me. 74. See also *infra*, IV, B.

10. Charities Com'rs *v.* Litzen, 1 N. Y. City Ct. 374.

11. Bouvier L. Dict.

12. Century Dict.

Issuance to another county.— In Texas it is provided by statute that where any process has not been returned or returned without service, or has been improperly served, the clerk shall upon application issue other process to the same or any other county as the party applying may direct, under this provision an alias process may be issued to a county other than that named as the residence of defendant in the petition and before amendment of the petition (Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308 [*distinguishing* Ward *v.* Lattimer, 2 Tex. 245]; Baber *v.* Brown, 54 Tex. 99. See also Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695. But *compare* Duer *v.* Endres, 1 Tex. App. Civ. Cas. § 322; Bean *v.* McQuiddy, 1 Tex. App. Civ. Cas. § 51), and leave of court is not required (Gillmour *v.* Ford, (Tex. 1892) 19 S. W. 442), nor need a copy of the application be served with the citation (Gillmour *v.* Ford, *supra*).

In England and Canada.— Under the English Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76, and under the modern rules of the supreme court, order VIII, writs not served within the time allowed may be renewed. Hewett *v.* Barr, [1891] 1 Q. B. 98, 60 L. J. Q. B. 268, 39 Wkly. Rep. 294; Hume *v.* Somerton, 25 Q. B. D. 239, 55 J. P. 38, 59 L. J. Q. B. 420, 62 L. T. Rep. N. S. 828, 38 Wkly Rep. 748; Doyle *v.* Kaufman, 3 Q. B. D. 7, 47 L. J. Q. B. 26, 26 Wkly. Rep. 98 [*affirmed* in 3 Q. B. D. 340]; Davies *v.* Garland, 1 Q. B. D. 250, 45 L. J. Q. B. 137, 33 L. T. Rep. N. S. 727, 24 Wkly. Rep. 252; Manby *v.* Manby, 3 Ch. D. 101, 35 L. T. Rep. N. S. 307, 24 Wkly. Rep. 699; Nazer *v.* Wade, 1 B. & S. 728, 8 Jur. N. S. 134, 31 L. J. Q. B. 5, 5 L. T. Rep. N. S. 604, 101 E. C. L. 728; Anonymous, 1 H. & C. 664, 32 L. J. Exch. 88, 7 L. T. Rep. N. S. 718, 11 Wkly. Rep. 293. Similar practice obtains in Canada. Laird *v.* King, 19 Ont. Pr. 307; Mair *v.* Cameron, 18 Ont. Pr. 484; Gilmour *v.* Magee, 14 Ont. Pr. 120; St. Louis *v.* O'Callaghan, 13 Ont. Pr. 322; Mackelcan *v.* Becket, 9 Ont. Pr. 289. Concurrent writs may be issued under the English practice, bearing teste the same day as the original and remaining in force

summons, and hence cannot be issued after the suit has been dismissed.[13] If the alias writ also proves ineffectual, other similiar writs may issue which are designated pluries writs.[14] Such a writ is but a continuance of the original process,[15] and every alias or pluries writ must be dated on the day of the return of the preceding process.[16] If the party permit a chasm in the proceedings to occur, by failing to continue the process regularly from term to term until service is had, it operates as a discontinuance of the action.[17] This rule is not, however, rigidly followed in some jurisdictions, but it is held that the issuance of alias and pluries writs is merely a matter of due diligence, and unless so much time is suffered to elapse as will amount to laches, there is no discontinuance of the suit.[18] Nor does the rule seem to be applicable in those jurisdictions where the action is commenced by the filing of plaintiff's complaint.[19] Service of the alias cannot relate back to the time of the issuing of the original, so as to validate any proceedings had meantime, the regularity of which depended upon defendant being before the court.[20] A return should regularly be made on the original writ, in order to show the necessity and propriety of an alias or pluries,[21] but a writ which has no proper basis as an alias

as long as the original. Collins *v.* North British, etc., Ins. Co., [1894] 3 Ch. 228, 63 L. J. Ch. 709, 71 L. T. Rep. N. S. 58, 8 Reports 470, 43 Wkly. Rep. 106; Traill *v.* Porter, L. R. 1 Ir. 60; Coles *v.* Sherard, 11 Exch. 482, 25 L. J. Exch. 59; Rules of Supreme Court, Order VI.

13. Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

After vacation of dismissal.— The intervention of a judgment of dismissal, pending the issuance of an alias summons, will not affect the validity of the alias if the judgment is subsequently vacated as unauthorized. Everett *v.* Niagara Ins. Co., 142 Pa. St. 322, 21 Atl. 817.

14. U. S. Oil, etc., Supply Co. *v.* Gartlan, 58 W. Va. 267, 52 S. E. 524.

Alternative remedies.— A statutory provision that after the return of an alias without service, plaintiff may take out an attachment against defendant's property is merely permissive as an alternative remedy, and plaintiff may secure successive summonses instead. Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

15. U. S. Oil, etc., Supply Co. *v.* Gartlan, 58 W. Va. 267, 52 S. E. 524.

No new petition need be filed, nor need the original petition be refiled. Hanna *v.* Emerson, 45 Nebr. 708, 64 N. W. 229.

Who may issue.— An alias can be issued only from the office of the officer to which the original is returnable. Boggs *v.* Symmes, 8 Rich. (S. C.) 443.

16. Slatton *v.* Jonson, 4 Hayw. (Tenn.) 197.

Where a summons is returned "not found" at any time after the lapse of the time in which it may be lawfully served, plaintiff is entitled to an alias summons without waiting until the return-day named in the summons. People *v.* Leask, 1 Abb. N. Cas. (N. Y.) 299.

17. *Maryland.*— Hazlehurst *v.* Morris, 28 Md. 67.

Michigan.— Johnson *v.* Mead, 58 Mich. 67, 24 N. W. 665.

New York.— Soulden *v.* Van Rensselaer, 3 Wend. 472.

North Carolina.— Penniman *v.* Daniel, 91 N. C. 431; Etheridge *v.* Wordley, 83 N. C. 11.

South Carolina.— State Bank *v.* Baker, 3 McCord 281 (holding that a second writ cannot be considered as an alias if it be issued more than a year and a day after the first, and all the intermediate writs must be regularly lodged with the sheriff and cannot at a subsequent period be made out so as to fill up the intermediate numbers to prevent the statute of limitations); Parker *v.* Grayson, 1 Nott & M. 171.

Tennessee.— Armstrong *v.* Harrison, 1 Head 379.

See 40 Cent. Dig. tit. "Process," § 42.

The rule is otherwise where the alias is issued against an added party defendant. State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

The direction to the clerk to issue the alias will be presumed to have been properly given. Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308.

18. Parsons *v.* Hill, 15 App. Cas. (D. C.) 532; *In re* Crucier, 28 Pa. St. 261; McClurg *v.* Fryer, 15 Pa. St. 293; O'Neill's Estate, 29 Pa. Super. Ct. 415.

19. Dunker *v.* Lutz, 48 Cal. 464.

20. Tyrone First Nat. Bank *v.* Cooke, 3 Pa. Super. Ct. 278.

21. Parker *v.* Grayson, 1 Nott & M. (S. C.) 171.

Effect of premature issuance.— But the issuance of an alias before such return does not affect a substantial right of the defendant. Ensign *v.* Roggencamp, 13 Nebr. 30, 12 N. W. 811.

Service.— The original process must have been returned without service (Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179; Gorman *v.* Steed, 1 W. Va. 1), or the service made must have been irregular (Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278; Wynn *v.* Wyatt, 11 Leigh (Va.) 584).

If the first summons was void, another summons may issue without order of court or return of the void summons. Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038; Williams *v.* Welton, 28 Ohio St. 451. It should

may nevertheless be treated as a new writ for a new suit.[22] The court has inherent power to award such further process;[23] but the clerk has no such authority to issue it without an order from the court, in the absence of statute.[24] In order that an alias summons may be issued under statutory authority it must be shown that the conditions imposed by statute exist.[25] It should be a substantial duplicate of the original process,[26] although all parties defendant need not be named;[27] but new parties defendant cannot be substituted in an alias writ.[28] The fact that a person has secured the issuance of an alias writ, which is irregular and void, does not prevent the party from availing himself of any remedy which he might have had if the writ had not been issued;[29] and where a plaintiff has discontinued as to a

not, however, be an alias summons. Folk *v.* Howard, 72 N. C. 527.

An officer will not be required to make a false return upon a writ in order that it may serve as a foundation of an alias writ. Low *v.* Little, 17 Johns. (N. Y.) 346, holding that where in a *qui tam* action the writ which had been sued out in due time and sent by mail to the sheriff of the county had been lost or miscarried, and plaintiff supposing it to have been served and returned proceeded to file his declaration, an amendment by permitting an alias capias to issue, as grounded upon a return of *non est inventus* to the former writ, was properly refused.

22. Rattan *v.* Stone, 4 Ill. 540 (holding that the words "as you have been before commanded" appearing in the alias summons might be considered as surplusage and the summons amended by striking them out); Frantz *v.* Detroit United R. Co., 147 Mich. 199, 110 N. W. 531; Axtell *v.* Gibbs, 52 Mich. 639, 640, 18 N. W. 395, 396.

23. U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

24. State Medical College *v.* Rushing, 124 Ga. 239, 52 S. E. 333; Rowland *v.* Towns, 120 Ga. 74, 47 S. E. 581; Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638.

If the original summons is being attacked as defective, the clerk cannot award an alias curing the defects unless so directed by the court. Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231.

Under statutory authority to issue alias process, the clerk may do so without direction of the court. Cherry *v.* Mississippi Valley Ins. Co., 16 Lea (Tenn.) 292.

Reissuance of same process.— Although it is erroneous, after a summons has been served upon a portion of the defendants named and returned, to place such summons in the hands of an officer for further service upon the defendants not served, without an order of court directing such action, the irregularity will not render the service of the summons void. Hancock *v.* Preuss, 40 Cal. 572.

25. Briggs *v.* Davis, 34 Me. 158, holding that Me. Rev. St. c. 114, § 48, authorizing a new summons to be issued and served in certain case, did not extend to a case in which no summons had been delivered to defendant or left at any place or with any person for him.

Election.— A statute authorizing plaintiff, in an action against several defendants, to dismiss as to those not served, or to continue the cause to perfect service, will not permit plaintiff to take judgment against those who have been served and at the same time have an alias writ for those not served. Doggett *v.* Jordan, 3 Fla. 215. An alias may issue in order that personal service may be made upon a non-resident, although proceedings in the action by attachment and publication have been commenced. Lebensberger *v.* Scofield, 139 Fed. 380, 71 C. C. A. 476.

26. Hill *v.* Morgan, 9 Ida. 718, 76 Pac. 323; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361.

These writs are in the usual form of the original, excepting the alias writ is designated by the additional words "'as we have formerly commanded you,' being inserted after the usual commencement, 'We command you.' The distinguishing feature on the face of the pluries writ is the phrase, 'as we have often commanded you,' which follows the usual commencement of process." Alderson Jud. Writs & Process 154.

A change in its form, in order to conform to a new statutory requirement, is proper. State *v.* Logan, 33 Md. 1.

The damages claimed should correspond in amount with the original (Boggs *v.* Symmes, 8 Rich. (S. C.) 443), but a variance in amount is an irregularity merely (Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361).

A duplicate indorsement of the character of the action is not essential, when the alias is served with the original summons, and the latter bears the indorsement. State Board of Pharmacy *v.* Jacob, 46 Misc. (N. Y.) 607, 92 N. Y. Suppl. 836.

Should show that it is in the same suit.— Where a writ against two persons is served upon one, and not found as to the other, and another writ issues to be served upon the person not found, the second writ should show that it is in the same suit with the first. Dunn *v.* Hall, 8 Blackf. (Ind.) 32.

27. Lewis *v.* Grace, 44 Ala. 307; Reed *v.* Boyd, 84 Ill. 66. *Contra*, Morgan *v.* Morgan, 2 Bibb (Ky.) 388.

28. Elias *v.* Hayes, 24 Misc. (N. Y.) 754, 53 N. Y. Suppl. 858.

Where new parties are added to the original writ by amendment, an alias summons may be issued and served upon them. Pittsburgh *v.* Eyth, 201 Pa. St. 341, 50 Atl. 769.

29. Grover *v.* Sims, 5 Blackf. (Ind.) 498.

defendant not served, and issues a new summons as against such defendant, the fact that the new summons contains recitals as to the issuance and failure to serve the former process will not render it void.[30] The fact that an alias writ is returned "not found" as to a defendant who was served upon the original will not have the effect of vitiating such service.[31]

G. Supplying Lost Process. A copy of a writ which has been lost or destroyed may be supplied by evidence of its contents,[32] and may be ordered filed in lieu of the original, upon notice.[33] In some jurisdictions where a writ is lost plaintiff may in a proper case have leave to file a new writ.[34]

II. SERVICE.

A. In General.[35] Service of process is the giving of such actual or constructive notice thereof to defendant as makes him a party to the proceedings and compels him to appear or suffer judgment by default.[36] It is by service of process that the court obtains jurisdiction to adjudicate upon the rights of defendant as involved in the action brought.[37] The directions of the statute as to service must be obeyed, or no jurisdiction is acquired over the person named in the writ.[38] There are two general methods of making service, actual and constructive. Personal service is actual service; service by publication is constructive service; substituted service, by leaving a copy of the writ at defendant's usual place of abode, should probably be called actual service.[39] To obtain jurisdiction, service must be had, in some way, upon the very person against whom judgment is sought.[40]

30. Smith *v.* Blakeney, 8 Port. (Ala.) 128.

31. McBeath *v.* Spann, 7 Ala. 201.

32. Fowler *v.* More, 4 Ark. 570.

The copy offered must be shown to be a true copy of the lost original. Whitcher *v.* Whitcher, 10 N. H. 440.

A mere certificate by the clerk that there had been a summons, which was lost, or a recital in the notice of publication that a summons had been issued, does not afford proof. Smith *v.* Trimble, 27 Ill. 152.

33. Long *v.* Sutter, 67 Ill. 185; Gentry *v.* Hutchcraft, 7 T. B. Mon. (Ky.) 241, 18 Am. Dec. 172. The affidavit proving the contents of the writ and its loss is not to be received in lieu of the process. Littell *v.* Cassady, Hard. (Ky.) 227.

Loss in the mail of process sent to the sheriff for service does not give plaintiff any standing to have a copy filed with a return of "not found" in order to save the action from the bar of the statute of limitations. Low *v.* Little, 17 Johns. (N. Y.) 346.

34. Taylor *v.* Cobleigh, 16 N. H. 105 (holding that where a writ has been lost without fault of plaintiff and there is in existence a certified copy thereof, leave to file another writ will be granted); Whitcher *v.* Whitcher, 10 N. H. 440 (holding that where the court on permitting a copy of the original writ to be filed may in its discretion require a new indorser); Mattocks *v.* Bishop, 4 N. H. 439 (holding that leave to file a new writ could not be granted without defendant's consent in case the original writ had not been filed with the clerk of court).

35. **Costs allowable** see COSTS, 11 Cyc. 100.

In proceedings before justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 521.

Insufficient service of process as ground for continuance see CONTINUANCES IN CIVIL CASES, 9 Cyc. 84.

Under Municipal Court Act see COURTS, 11 Cyc. 787 note 28.

Writ or process on summoning jurors see JURIES, 24 Cyc. 228.

36. Sanford *v.* Dick, 17 Conn. 213.

The object of service of process for the commencement of a suit is to give notice to the party proceeded against, and any statutory service which reasonably accomplishes that end answers the requirements of justice. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146.

37. Com. *v.* Bangs, 22 Pa. Super. Ct. 403; Wren *v.* Johnson, 62 S. C. 533, 40 S. E. 937.

38. Wright *v.* Douglass, 3 Barb. (N. Y.) 554 [*reversed* on other grounds in 2 N. Y. 373]; Stamey *v.* Barkley, 211 Pa. St. 313, 60 Atl. 991.

39. See Dunkle *v.* Elston, 71 Ind. 585, where it was held that service by leaving a copy at defendant's residence was "personal service," this term being employed in contradistinction to service by publication.

"Whether actual service shall be made by reading the summons, or notice to the defendant, or leaving a copy with him personally or at his usual place of residence, is for the Legislature to prescribe." Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 30 L. R. A. 402.

40. Adams *v.* Town, 3 Cal. 247; Jones *v.* Jones, 23 La. Ann. 304; Booth *v.* Holmes, 2 Tex. Unrep. Cas. 232; Elliott *v.* Holmes, 8 Fed. Cas. No. 4,392, 1 McLean 466.

Service upon wrong defendant.— Where an action was brought against two persons as makers and one as an indorser of a note, and the citation which was issued for one of the makers was served on the other, such service was insufficient, being a departure from the command contained in the citation. Barnett *v.* Tayler, 30 Tex. 453.

B. Personal Service — 1. In General. Personal service ordinarily means service upon defendant personally, and does not include service by leaving a copy at defendant's usual place of abode.[41] But where the statute provides for service upon a corporation or individual by actually making service upon an officer or agent, such service is personal service upon such corporation or individual.[42] Personal service is the ordinary method of obtaining jurisdiction over the person of defendant,[43] and in the absence of a statute authorizing a substitute method, service must be personal.[44]

2. Amended and Alias Process. After service of process, a formal amendment does not require service of the amended process.[45] But if the original process is defective, and has been set aside or adjudged invalid, the amended process must be served.[46] The original summons need not be served with the alias.[47]

3. Procured by Fraud or Duress. Personal service obtained by inveigling or enticing a person or an officer of a corporation, into the territorial jurisdiction of the court, by means of fraudulent representations,[48] or by trick or device,[49] is

41. *Iowa.*— McKenna *v.* State Ins. Co., 73 Iowa 453, 35 N. W. 519.
New York.—Bogart *v.* Swezey, 26 Hun 463.
North Carolina.— Charlotte First Nat. Bank *v.* Wilson, 80 N. C. 200, holding under a statute, requiring personal service of the summons, or defendant's written admission thereof, that leaving a copy with his wife is not a legal service, notwithstanding proof of delivery to him by her and his verbal assent thereto.
North Dakota.— Casselton First Nat. Bank *v.* Holmes, 12 N. D. 38, 94 N. W. 764.
Wisconsin.—Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509; Moyer *v.* Cook, 12 Wis. 335.
United States.— *In re* Risteen, 122 Fed. 732.

42. Green *v.* Snyder, 114 Tenn. 100, 84 S. W. 808.
Service upon corporation see *infra*, VI.
Substituted service see *infra*, II, C.

43. *Arkansas.*— Coffee *v.* Gates, 28 Ark. 43.
Kansas.— Newton First Nat. Bank *v.* Wm. B. Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56.
New Hampshire.— Downer *v.* Shaw, 22 N. H. 277.
Texas.— Scott *v.* Streepy, 73 Tex. 547, 11 S. W. 532.
Utah.— Greiner *v.* Ogden St. R. Co., 21 Utah 158, 60 Pac. 548.

44. Bennett *v.* Howard, 2 Day (Conn.) 416; Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685; Romaine *v.* Muscatine County, Morr. (Iowa) 357; Sainsbury *v.* Thorp, 9 Dowl. P. C. 183.
Attempts to evade service do not dispense with the necessity for personal service. Van Rensselaer *v.* Palmatier, 2 How. Pr. (N. Y.) 24.

45. Simmons *v.* Varnum, 36 Ala. 92; Jarrett *v.* City Electric R. Co., 120 Ga. 472, 47 S. E. 927; Bray *v.* Creekmore, 109 N. C. 49, 13 S. E. 723; Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166, 3 West. L. J. 79.
Amendment before service.— If the original process is ordered amended before it has been served, service of the amended process is properly ordered. Lassiter *v.* Carroll, 87 Ga. 731, 13 S. E. 825.

46. Prentice *v.* Stefan, 72 Wis. 151, 39 N. W. 364. See also Stewart *v.* Canadian Pac. R. Co., 35 N. Brunsw. 115.

47. Lawrence *v.* Bernstein, 46 Misc. (N. Y.) 608, 92 N. Y. Suppl. 817.

48. *Iowa.*— Toof *v.* Foley, 87 Iowa 8, 54 N. W. 59.
Missouri.— Diffenderffer *v.* Rowden, 83 Mo. App. 268.
Nebraska.— Jaster *v.* Currie, 69 Nebr. 4, 94 N. W. 995.
New York.— Metcalf *v.* Clark, 41 Barb. 45; Carpenter *v.* Spooner, 2 Sandf. 717; Higgins *v.* Dewey, 14 N. Y. Suppl. 894; Allen *v.* Wharton, 13 N. Y. Suppl. 38; Dunham *v.* Cressy, 4 N. Y. Suppl. 13.
Pennsylvania.—Trattner *v.* Forman, 10 Pa. Dist. 566.
United States.— Cavanaugh *v.* Manhattan Transit Co., 133 Fed. 818; Union Sugar Refinery *v.* Mathiesson, 24 Fed. Cas. No. 14,397, 2 Cliff. 146.
See 40 Cent. Dig. tit. "Process," § 51.
Where a person has voluntarily come within the jurisdiction, the fact that service is thereafter obtained upon him by fraud is not ground for setting it aside. Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377; Case *v.* Smith, 152 Fed. 730.
Pretense of settlement.— Securing presence within the jurisdiction for the ostensible purpose of arranging a settlement of existing controversy, but with the actual and undisclosed intent of serving process if the debtor does not settle, taints the service with fraud. Olean St. R. Co. *v.* Fairmount Constr. Co., 55 N. Y. App. Div. 292, 67 N. Y. Suppl. 165; Baker *v.* Wales, 35 N. Y. Super. Ct. 403.
Requesting defendant's presence to defend an attachment suit is not in itself a fraud, although personal service upon him is thereby obtained. Duringer *v.* Moschino, 93 Ind. 495.
Possibility of escape.— The fact that defendant might have escaped from the jurisdiction after the fraud was discovered will not defeat the application of the rule. Jaster *v.* Currie, 69 Nebr. 4, 94 N. W. 995.

49. Wyckoff *v.* Packard, 20 Abb. N. Cas.

void, and will be set aside. So also it is void if obtained by securing defendant's presence within the jurisdiction by means of criminal process,[50] or by the use of force.[51] The relief granted should be the setting aside of the service, not the dismissal of the action.[52]

4. Double Service. A second service of process does not waive the first service.[53] Nor can a second service within the county effect a shortening of time allowed a defendant because the first service was without the county.[54]

5. Service of Pleading With Process.[55] Statutes sometimes require a copy of plaintiff's complaint to be served with the writ, and such statutes are usually deemed mandatory, no jurisdiction being acquired in default of the service of such pleading.[56] But unless required by statute a copy of the complaint need not be served.[57]

(N. Y.) 420; Pilcher *v.* Graham, 18 Ohio Cir. Ct. 5, 9 Ohio Cir. Dec. 825; Miami Powder Co. *v.* Griswold, 5 Ohio Dec. (Reprint) 532, 6 Am. L. Rec. 464; Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

For example if plaintiff by an agreement to try the case upon a certain day has secured service upon defendant, plaintiff's subsequent refusal to carry out the agreement entitles defendant to have the service set aside. Graves *v.* Graham, 19 Misc. (N. Y.) 618, 44 N. Y. Suppl. 415. Where an inventor who had assigned his invention to certain third parties invited defendant, an infringer, into the jurisdiction where the assignees resided for the avowed purpose of settling the controversy but without the knowledge of such assignees, and procured an interview between the parties, at the close of which defendant was served with process in consequence of such infringement, it was held that there was not sufficient evidence of deceptive contrivances to obtain service on defendant, and that a motion to dismiss the action on that account must be overruled. Union Sugar Refinery *v.* Mathiesson, 24 Fed. Cas. No. 14, 397, 2 Cliff. 304. A defendant who, knowing that a possible cause of action exists against him in a certain jurisdiction, voluntarily goes into such jurisdiction on business with third parties, takes the risk of being there discovered and served with process; and such service is not invalidated because plaintiff had knowledge that defendant would come within the jurisdiction and arranged to be notified when defendant should come, where no trick or device was resorted to for the purpose of inducing his coming. Case *v.* Smith, 152 Fed. 730.

50. McNab *v.* Bennett, 66 Ill. 157; Byler *v.* Jones, 79 Mo. 261; Addicks *v.* Bush, 1 Phila. (Pa.) 19.

51. Ziporkes *v.* Chmelniker, 15 N. Y. St. 215.

52. Beacon *v.* Rogers, 79 Hun (N. Y.) 220, 29 N. Y. Suppl. 507; Metcalf *v.* Clark, 41 Barb. (N. Y.) 45.

53. Dresser *v.* Wood, 15 Kan. 344; Russell *v.* Millett, 20 Wash. 212, 55 Pac. 44.

54. Mayenbaum *v.* Murphy, 5 Nev. 383.

55. Service of pleadings generally see Pleading, 31 Cyc. 591.

56. See the statutes of the several states. And see Sacramento Sav. Bank *v.* Spencer, 53 Cal. 737; Harris *v.* Alexander, 1 Rob. (La.) 30; Slocomb *v.* Bowie, 13 La. 10; Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Hickman *v.* Barnes, 1 Mo. 156; Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695; Thomas *v.* Womack, 13 Tex. 580; James *v.* Watson, 2 Tex. Unrep. Cas. 741 (holding a citation sent to another county not good unless accompanied by a copy of the petition); Brummer *v.* Moran, (Tex. Civ. App. 1907) 102 S. W. 474; Lazarus *v.* Barrett, 5 Tex. Civ. App. 5, 23 S. W. 822; Taylor *v.* Pridgen, 3 Tex. App. Civ. Cas. § 89.

Contra, in Alabama, where failure to serve the complaint was held to be a mere irregularity, not preventing the acquiring of jurisdiction. Dew *v.* Cunningham, 28 Ala. 466, 65 Am. Dec. 362. *Compare* Wharton *v.* Franks, 9 Port. (Ala.) 232, holding that a statute requiring an indorsement of the cause of action on the writ dispensed with the necessity of service of a copy of the declaration.

Previous service of pleading.— A summons which requires defendant to answer the complaint "a copy of which . . . is herewith served on you," and which is served without the complaint, is a nullity, and the fact that a copy of a complaint has been previously served is immaterial. Tuller *v.* Caldwell, 3 Minn. 117.

57. See Collier *v.* Catherine Lead Co., 208 Mo. 246, 106 S. W. 971 (holding that a statute providing that the service of summons on several defendants by delivering to the one first summoned a copy of the petition and writ, and to those subsequently served a copy of the writ, etc., did not require a copy of the petition to be delivered to the first defendant served in each county where the defendants are in several counties); Payne *v.* McCarthy, 1 Hun (N. Y.) 78, 3 Thomps. & C. 755; Brummer *v.* Moran, (Tex. Civ. App. 1907) 102 S. W. 474 (holding that under statutes providing that where the petition shall be filed with the clerk he shall issue a citation, and a statute providing that if the citation is served without the county in which the suit is pending the officer shall deliver to defendant a certified copy of the petition to accompany the citation, there was no necessity for serving a copy of the peti-

6. Acceptance or Acknowledgment of Service. An acknowledgment or acceptance of service is the full equivalent of actual personal service [58] and renders such service unnecessary.[59] When made by a non-resident it seems to have the effect merely of personal service without the state,[60] although it has been said to be equivalent to personal service within the state; [61] and the acknowledgment may, by its terms, amount to a waiver of the want of jurisdiction in such case.[62] Defendant, by such acknowledgment, waives no right of defense.[63] The acknowledgment of service should be in writing and signed,[64] and while it is always good practice for the acknowledgment to show the time and place of service, the necessity of such showing depends upon the statute authorizing acknowledgment of service.[65] An attorney at law who acknowledges service on behalf of a defendant is presumed to have authority so to do,[66] but the authority of an agent or attorney in fact to make such an acknowledgment must be specially conferred and must be shown.[67] An acknowledgment of "due service" includes an acknowledgment both of a proper manner and a proper time of service.[68] An acknowl-

tion on defendants who were residents of the county in which the suit was brought).

58. Cheney *v.* Harding, 21 Nebr. 65, 32 N. W. 255; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008. See also Boughton *v.* Spear, 4 Ala. 257; Earbee *v.* Ware, 9 Port. (Ala.) 291; Lewis *v.* State Bank, 4 Ark. 443; Banks *v.* Banks, 31 Ill. 162; Herrington *v.* Williams, 31 Tex. 448; Barton *v.* Nix, 20 Tex. 39.

An acknowledgment made after judgment entered has been held insufficient. State *v.* Cohen, 13 S. C. 198.

59. Washington *v.* Barnes, 41 Ga. 307; Johnson *v.* Monell, 13 Iowa 300; Donlevy *v.* Cooper, 2 Nott & M. (S. C.) 548; Franklin *v.* Conrad-Stanford Co., 137 Fed. 737, 70 C. C. A. 171.

A statutory provision that the acknowledgment cannot be made until after petition filed nullifies an acknowledgment previously made. McAnelly *v.* Ward, 72 Tex. 342, 12 S. W. 206.

60. *Michigan.*—Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285.

New York.—Litchfield *v.* Burwell, 5 How. Pr. 341.

South Carolina.—Riker *v.* Vaughan, 23 S. C. 187.

Virginia.—Smith *v.* Chilton, 77 Va. 535.

Wisconsin.—Weatherbee *v.* Weatherbee, 20 Wis. 499.

See 40 Cent. Dig. tit. "Process," § 54.

Compare Chickering *v.* Failes, 26 Ill. 507.

61. Johnson *v.* Monell, 13 Iowa 300; Cheney *v.* Harding, 21 Nebr. 65, 31 N. W. 255; Vermont Farm Mach. Co. *v.* Marble, 20 Fed. 117.

62. See the cases cited *infra*, this note.

A consent incorporated in the acknowledgment of service that defendant will allow plaintiff "to proceed with the case the same as though service had been made as commanded in said summons" gives the court full jurisdiction. Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285. So of an indorsement acknowledging service and waiving the benefit of the state statutes respecting absent defendants. Richardson *v.* Smith, 11 Allen (Mass.) 134. And it has been held that an admission of service if **accompanied by an agreement to enter an appearance** is sufficient to confer jurisdiction, even though made beyond the territorial jurisdiction of the court. Shaw *v.* Mt. Pleasant Nat. State Bank, 49 Iowa 179; Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285; Keeler *v.* Keeler, 24 Wis. 522.

63. Ochus *v.* Sheldon, 12 Fla. 138.

64. Montgomery *v.* Tutt, 11 Cal. 307; Godwin *v.* Monds, 106 N. C. 448, 10 S. E. 1044. See also Doerfler *v.* Schmidt, 64 Cal. 265, 30 Pac. 816; Vanmeter *v.* Durham, 31 Ill. 237; Maher *v.* Bull, 26 Ill. 348, both holding a return of the sheriff that "defendant waived reading and accepted service" insufficient.

But it does not have to be written on the day on which service is acknowledged (Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324) and defendant's admission in court that he signed it dispenses with the statutory requirement that it be attested (Phillips *v.* Corey, 1 Indian Terr. 567, 45 S. W. 119).

Proof.—The service is sufficiently shown by proving that the signature of defendant to an acknowledgment thereupon indorsed is in his own handwriting. Norwood *v.* Riddle, 1 Ala. 195.

65. Alderson *v.* Bell, 9 Cal. 315; Maples *v.* Mackey, 15 Hun (N. Y.) 533; Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556; Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891. See Crane *v.* Brannan, 3 Cal. 102.

66. See Attorney and Client, 4 Cyc. 935.

67. Kuhnen *v.* Burt, 108 Ga. 471, 34 S. E. 125; Lamb *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 64; Lower *v.* Wilson, 9 S. D. 252, 68 N. W. 545, 62 Am. St. Rep. 865; Finney *v.* Clark, 86 Va. 354, 10 S. E. 569. See Leblanc *v.* Perroux, 21 La. Ann. 26.

Confession of judgment by the principal is a ratification of the act of the agent. Rogers *v.* Bowen, 19 Ga. 596.

68. Woolsey *v.* Abbett, 65 N. J. L. 253, 48 Atl. 949. The objection that the service was made on a legal holiday is waived by such an acknowledgment. McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062. Stating that the service was of a copy of the summons is

edgment of service does not constitute an appearance,[69] nor does it waive the issuance of process.[70]

7. AUTHORITY OR CAPACITY TO SERVE — a. In General. Statutes almost universally designate what persons shall have authority to serve process,[71] and it is necessary that the statute be observed in order that jurisdiction may be acquired;[72] but the writ itself is not invalidated by unauthorized service.[73] It has been held that at common law service outside of the state may be made by a private individual.[74] Under some statutes process may be served by the officer to whom it is directed or by any officer to whom it might have been directed.[75] But it would seem that where an officer can serve process only under particular circumstances he has no power to serve process not directed to him,[76] and it has been held that the circumstances rendering such service proper should appear from the record.[77]

immaterial. Maples *v.* Mackey, 15 Hun (N. Y.) 533.

69. Donlevy *v.* Cooper, 2 Nott & M. (S. C.) 548.

Stipulation waiving process and reciting appearance as amounting to appearance see APPEARANCES, 3 Cyc. 510.

70. Seisel *v.* Wells, 99 Ga. 159, 25 S. E. 266.

71. See the statutes of the several states.

72. *Arkansas.*— Rudd *v.* Thompson, 22 Ark. 363; Hughes *v.* Martin, 1 Ark. 386.

Colorado.— Wellington *v.* Beck, 29 Colo. 73, 66 Pac. 881.

Georgia.— McCalla *v.* Verdell, 122 Ga. 801, 50 S. E. 943; Callaway *v.* Harrold, 61 Ga. 111. See also Falvey *v.* Jones, 80 Ga. 130, 4 S. E. 264.

Illinois.— Hickey *v.* Forristal, 49 Ill. 255.

Indiana.— Kyle *v.* Kyle, 55 Ind. 387.

Kansas.— Flint *v.* Noyes, 27 Kan. 351.

Kentucky.— Long *v.* Gaines, 4 Bush 353.

Maine.— See Brown *v.* Gordon, 1 Me. 165, holding that one deputy sheriff could not serve a writ upon another deputy who was also coroner.

Mississippi.— Arnold *v.* Wynn, 26 Miss. 338.

Nebraska.— Cresswell *v.* McCaig, 11 Nebr. 222, 9 N. W. 52, holding that a bailiff unless specially appointed for that purpose has no authority as bailiff to serve process issued out of the district court.

New Mexico.— Gallegos *v.* Pino, 1 N. M. 410.

New York.— Lazzarone *v.* Oishei, 2 Misc. 200, 21 N. Y. Suppl. 267.

Ohio.— Collins *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 445, 7 Ohio N. P. 270.

South Carolina.— See Stewart *v.* Childs, 1 Bay 362.

Texas.— Witt *v.* Kaufman, 25 Tex. Suppl. 384; Wadley *v.* Johnson, 2 Tex. Unrep. Cas. 739; Douthit *v.* Martin, 15 Tex. Civ. App. 559, 39 S. W. 944; Scott *v.* Watts, 1 Tex. App. Civ. Cas. § 88. See Robinson *v.* Schmidt, 48 Tex. 13; Boyden *v.* McClane, 42 Tex. 183.

Wisconsin.— Grantier *v.* Rosecrance, 27 Wis. 488.

United States.— Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493.

The service must be made in the particular official capacity named in the process. Graves *v.* Smart, 75 Me. 295.

An officer de facto may make service. Gunby *v.* Welcher, 20 Ga. 336; Gradnigo *v.* Moore, 10 La. Ann. 670; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62. See also Flournoy *v.* Clements, 7 Ala. 535 (holding service of a writ by a sheriff *de facto* good when made so soon after his successor was qualified that it could not have been generally known that he was superseded); Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159. Powers of officers *de facto* generally see OFFICERS, 29 Cyc. 1393.

The legislature may confer upon particular persons the right to serve process without infringing a constitutional provision for the election of sheriffs by the people. Andress *v.* Roberts, 18 Ala. 387.

Prison officers.— Where by statute the warden and deputy warden of the state prison may serve legal process within the "precincts" of the prison they may serve process not only in the prison building but in the grounds connected therewith. Hix *v.* Sumner, 50 Me. 290.

73. Hughes *v.* Martin, 1 Ark. 386.

74. Stone *v.* Anderson, 25 N. H. 221.

75. Boaz *v.* Nail, 2 Metc. (Ky.) 245.

An officer who is fully empowered to make service may serve a process, although it is not directed to him. Morrell *v.* Cook, 35 Me. 207, service by constable. See also Hearsey *v.* Bradbury, 9 Mass. 95. But see People *v.* Moore, 2 Dougl. (Mich.) 1, holding that a constable did not acquire authority to serve writs directed to the sheriff by virtue of attendance upon a session of the circuit court under a statute requiring such attendance.

Where the process was directed to a nonexisting officer, another officer having by statute the same power may serve the writ. Lowe *v.* Harris, 121 N. C. 287, 28 S. E. 535. And where the sheriff's office is vacant, the coroner or his deputy may execute process addressed to the sheriff. Reed *v.* Reber, 62 Ill. 240; Greenup *v.* Stoker, 12 Ill. 24, 52 Am. Dec. 474.

Process issuing out of the federal courts and directed to a marshal cannot be served by a private person, notwithstanding process from the state courts may be so served. Schwabacker *v.* Reilly, 21 Fed. Cas. No. 12,501, 2 Dill. 127.

76. Arnold *v.* Wynn, 26 Miss. 338. See also Hickey *v.* Forristal, 49 Ill. 255; Andrews *v.* Fitzpatrick, 89 Va. 438, 16 S. E. 278.

77. Beard *v.* Smith, 9 Iowa 50.

b. Sheriff. As a general rule the sheriff is the officer primarily intrusted by statute with the duty of serving process.[78] But where he is a party, he is disqualified from serving process in the action,[79] and procession certain kinds of actions is sometimes required by statute to be served by other officers.[80] By statute the sheriff is sometimes permitted to serve process beyond the limits of his bailiwick.[81] A provision for service of process upon the sheriff by the coroner or the sheriff of the adjoining county does not prevent service on him of process from the justice's court by the constable.[82]

c. Deputies. Unless prohibited by statute, service may be made by an officer's deputy with the same effect as by the officer himself.[83] The personal disqualification of the principal to make service of process results in a similar disqualification of the deputy.[84] When the deputy is a party, service may be made upon him by

78. See the statutes of the several states.

A writ directed to all and singular the sheriffs of the state must be served by the sheriff for the district in which defendant lives or is found. Wood *v.* Crosby, 2 Hill (S. C.) 520.

Service by city sheriff.— See Dow *v.* Kelly, 1 Root (Conn.) 552.

79. *Iowa.*— Minott *v.* Vineyard, 11 Iowa 90.

Kentucky.— Knott *v.* Jarboe, 1 Metc. 504.

Louisiana.— Jacobs *v.* Ducros, 7 Rob. 115, holding that the coroner should serve the process in such a case.

Michigan.— Hubel *v.* Rorison, 81 Mich. 41, 45 N. W. 590, holding that the right of a coroner to serve process under Howell St. § 606, is confined to cases where the sheriff is himself a party or is directly interested in the suit.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24.

Nebraska.— See Barlass *v.* May, 16 Nebr. 647, 21 N. W. 436.

New Mexico.— Gallegos *v.* Pino, 1 N. M. 410.

North Carolina.— State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

South Carolina.— See Miller *v.* Yeadon, 3 McCord 11.

Texas.— Goodin *v.* State, 14 Tex. App. 443. See Robinson *v.* Schmidt, 48 Tex. 13.

A merely nominal interest will not create such disqualification. Webster *v.* Smith, 78 Mo. 163; Avery *v.* Warren, 12 Heisk (Tenn.) 559.

Relationship to a party, it has been held, will not disqualify in the absence of pecuniary interest. Dawson *v.* Duplantier, 15 La. 289.

Action against former sheriff.— The present sheriff is neither a party to nor interested in an action against a former sheriff. Barker *v.* Remick, 43 N. H. 235.

Action against town.— Under some statutes it has been held that a sheriff is incompetent to serve process in an action against a town of which he is an inhabitant and taxpayer. State *v.* Walpole, 15 N. H. 26; Lyman *v.* Burlington, 22 Vt. 131; Evarts *v.* Georgia, 18 Vt. 15; Essex *v.* Prentiss, 6 Vt. 47. But *compare* Windsor *v.* Jacob, 1 Tyler (Vt.) 241. Under other statutes such disability is removed. Bristol *v.* Marblehead, 1 Me. 82.

A constable may serve process where the sheriff or his deputy is a party and the process is such as would otherwise be within his authority to serve. Briggs *v.* Strange, 17 Mass. 405.

80. See the statutes of the several states.

The marshal shall serve summons in certain actions to recover penalty. Seydel *v.* Corporation Liquidating Co., 88 N. Y. Suppl. 1004.

81. Gaynor *v.* Wilde, 38 Pa. St. 300, holding that the power of sheriffs to serve process in cases of trespass on real estate and nuisance by non-residents was limited to the county immediately adjoining the one in which the injury was committed.

82. Hayden *v.* Atlanta Sav. Bank, 66 Ga. 150; Cron *v.* Krones, 17 Wis. 401.

83. Clark *v.* Bray, Kirby (Conn.) 237; Dungan *v.* Hall, 64 Ill. 254; Henry *v.* Halsey, 5 Sm. & M. (Miss.) 573; Yeargin *v.* Siler, 83 N. C. 348. See also Christie *v.* Loomis, 32 Fla. 401, 13 So. 891.

Service outside of county or state.— A writ directed to the sheriff of one county cannot be served by the deputy sheriff of another county to which it has been sent. Branner *v.* Chapman, 11 Kan. 118. Under a Kansas statute, permitting the sheriff to make service outside of the state upon a nonresident, the deputy is not authorized to make the service. Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704; Flint *v.* Noyes, 27 Kan. 351.

The return of service should be in the name of the sheriff. Harriman *v.* State, 1 Mo. 504; Dennison *v.* Story, 1 Oreg. 272.

84. *Georgia.*— Hillyer *v.* Pearson, 118 Ga. 815, 45 S. E. 701.

Iowa.— Minott *v.* Vineyard, 11 Iowa 90.

New Hampshire.— Ingraham *v.* Olcock, 14 N. H. 243. See also Barker *v.* Remick, 43 N. H. 235, holding that in an action against a former sheriff for the default of his deputy who was the present sheriff, process might be served by a deputy of the present sheriff.

South Carolina.— May *v.* Walters, 2 McCord 470.

Tennessee.— Stewart *v.* Magness, 2 Coldw. 310, 88 Am. Dec. 598.

Vermont.— Fairfield *v.* Hall, 8 Vt. 68.

But *compare* Hix *v.* Sumner, 50 Me. 290.

Character of disqualification.— In Minott *v.* Vineyard, 11 Iowa 90, 93, the court said: "Cases may arise where the sheriff is disqualified, when the deputy could act. Thus,

his principal, or by another deputy;[85] but it is improper for a deputy who is a party to the action, to himself serve the process.[86] A deputy may serve process already in his hands, although his principal has been removed.[87]

d. Persons Specially Deputized or Authorized. A person who is not an officer cannot ordinarily serve process unless specially authorized or deputized.[88] In many states, however, it is provided in general terms by statute that private persons may serve process.[89] A sheriff may appoint a special deputy to execute a particular process,[90] without any express authority derived from statute or otherwise.[91] Such appointment should properly be in writing indorsed upon the writ, but may be by verbal command if accompanied by delivery of the writ.[92] The authority conferred may be limited in its exercise to a particular locality.[93] Statutes commonly provide for service by properly deputized private persons in case the officers who would normally serve the process are not available.[94] The court

if the sheriff should be sick, absent from the county, or the like, and should have a deputy, it would be improper to direct the writ to the coroner. . . . But such deputy cannot act where the disqualification applies to the sheriff personally, as that he is interested, prejudiced, or the like."

Estoppel.— "If the plaintiff is willing that the process should go into the hands of the defendant, and the defendant is willing to receive it and accept service, the latter cannot afterward be heard to make any objection on the ground of irregularity. And so if the defendant's deputy receive the process and serve it upon the principal, and the latter does not make the objection *in limine*, he should not be permitted afterward to say that his deputy had done an illegal act." Turnbull *v.* Thompson, 27 Gratt. (Va.) 306, 309.

85. *Iowa.*— Minnott *v.* Vineyard, 11 Iowa 90.

Maine.— Adams *v.* Wiscasset Bank, 1 Mo. 361, 10 Am. Dec. 88.

Massachusetts.— Gage *v.* Graffam, 11 Mass. 181. See also Colby *v.* Dillingham, 7 Mass. 475.

Michigan.— Hubel *v.* Rorison, 81 Mich. 41, 45 N. W. 590.

Rhode Island.— Slocomb *v.* Powers, 10 R. I. 255.

86. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48; Holbrook *v.* Brennan, 6 Daly (N. Y.) 46. *Compare* Walker *v.* Hill, 21 Me. 481.

87. Stewart *v.* Hamilton, 23 Fed. Cas. No. 13,429, 4 McLean 534, deputy United States marshal.

88. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; Republican Valley R. Co. *v.* Sayre, 13 Nebr. 280, 13 N. W. 404; Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342.

89. See the statutes of the several states. And see the following cases:

Iowa.— Conway *v.* McGregor, etc., R. Co., 43 Iowa 32.

Minnesota.— Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775; Miller *v.* Miller, 39 Minn. 376, 40 N. W. 261.

New York.— Hunter *v.* Lester, 18 How. Pr. 347.

South Dakota.— Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692.

Washington.— Washington Mill Co. *v.* Marks, 27 Wash. 170, 67 Pac. 565.

In England.— Private persons were authorized by the English Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), to serve process. Curlewis *v.* Broad, 1 H. & C. 322, 31 L. J. Exch. 473, 10 Wkly. Rep. 797.

A minor may not serve process. Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472.

90. *Florida.*— Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

Georgia.— Twiggs *v.* Hardwick, 61 Ga. 272, holding that the sheriff might specially deputize a constable.

Illinois.— Dungan *v.* Hall, 64 Ill. 254. See Guyman *v.* Burlingame, 36 Ill. 201.

Iowa.— Wilford *v.* Miller, Morr. 405.

Kentucky.— Court of Appeals Sergeant *v.* George, 5 Litt. 198.

New Jersey.— Allen *v.* Smith, 12 N. J. L. 159.

England.— Parker *v.* Kett, 1 Ld. Raym. 658, 91 Eng. Reprint 1338.

In Vermont, before the rule was changed by statute, the appointment of a special officer to serve process was held to be a judicial act, which could only be exercised by the authority issuing the process (Dolbear *v.* Hancock, 19 Vt. 388; Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342; Bebee *v.* Steel, 2 Vt. 314), and could not be delegated (Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199). And it follows from this that such an appointment upon a blank writ is void, since the judicial officer making the appointment must consider not only the person, but the occasion and the particular case. Kelly *v.* Paris, *supra*.

If the appointment is made by a deputy sheriff, it will be taken as the act of the sheriff. Thrift *v.* Frittz, 7 Ill. App. 55.

91. Jewett *v.* Garrett, 47 Fed. 625.

92. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; Meyer *v.* Bishop, 27 N. J. Eq. 141 [*affirmed* in 28 N. J. Eq. 239]. But *compare* Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6, 358, 12 Ky. L. Rep. 664.

93. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

94. See the statutes of the several states. And see the following cases:

Connecticut.— Lawrence *v.* Kingman, Kirby 6.

Illinois.— See Reed *v.* Moffatt, 62 Ill. 300.

has inherent power to appoint a special officer to execute its process.[95] It is always proper, and sometimes required, that the special authority be indorsed upon the process.[96] The authority to serve an original will not extend to the service of an alias.[97] The circumstances which render the special appointment proper need not be recited in the appointment,[98] and it will be presumed that the person making service was properly authorized so to do until the contrary appears.[99]

e. Party, or Person Interested. Process cannot be executed by any person in his own favor,[1] nor by an attorney;[2] and this rule applies to officers as well as to other persons.[3] If, however, service be made by plaintiff, it is a mere irregularity, rendering the service voidable but not void.[4] Only an indifferent person may properly be authorized to serve process.[5] If by statute any person not a party may serve the summons,[6] plaintiff's attorney is competent.[7] So is plaintiff's

Iowa.— Currens *v.* Ratcliffe, 9 Iowa 309.

Kansas.— Dolan *v.* Topping, 51 Kan. 321, 32 Pac. 1120.

North Carolina.— Witkousky *v.* Wasson, 69 N. C. 38.

Vermont.— Culver *v.* Balch, 23 Vt. 618.

See 40 Cent. Dig. tit. "Process," § 64.

Compare McClane *v.* Rogers, 42 Tex. 214, holding that there was no authority to appoint a "special sheriff" for the service of all necessary process.

Powers.— A person deputed to serve a writ has all the powers which may be exercised by a sheriff in executing any process, except that he is not to be recognized and obeyed as a sheriff or known officer but must show his authority and make known his business if required by the party who is to obey the same. Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

A special bailiff appointed under Ky. Civ. Code, § 668, must reside in the county where defendant is to be served. Lillard *v.* Brannin, 91 Ky. 511, 16 S. W. 349, 13 Ky. L. Rep. 74.

Disinterested person.— Under some statutes provision is made for the service of process by disinterested persons. Walworth *v.* Farwell, 41 Vt. 212. See also *supra*, II, B, 7, a. A person signing a petition for the appointment of a guardian of the person and estate of one who is wasting his property cannot make service of the petition as a disinterested person. Baker *v.* Searle, 2 R. I. 115.

95. Wilson *v.* Roach, 4 Cal. 362.

A county judge in Nebraska may appoint any person specially to serve process issued by him. Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376.

96. Miller *v.* McMillan, 4 Ala. 527; Fullerton *v.* Briggs, 20 Vt. 542; The E. W. Gorgas, 8 Fed. Cas. No. 4,585, 10 Ben. 460, 13 Fed. Cas. No. 7,248, 4 Ben. 109. See Washburn *v.* Hammond, 25 Vt. 648, holding the justice form of authorizing one to serve a writ does not confer sufficient authority to serve a county court writ.

The statutory requirement of an indorsement is complied with, although the authority is written upon a separate piece of paper and attached to the back of the process. Cowdery *v.* Johnson, 60 Vt. 595, 15 Atl. 188. *Contra*, Gordon *v.* Knapp, 2 Ill. 488; Larkin *v.* Pew, 9 Del. Co. (Pa.) 292. But an omission to either fill in the name of the appointee, or to sign the appointment, invalidates the service. Davis *v.* Hamilton, 53 Ill. App. 94. An omission to date the indorsement will not vitiate the authority, although required by statute to be dated and signed. Forbes *v.* Bringe, 32 Nebr. 757, 49 N. W. 720.

97. Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6, 358, 12 Ky. L. Rep. 664.

98. Culver *v.* Balch, 23 Vt. 618.

99. Mooney *v.* McGuirk, 31 Misc. (N. Y.) 744, 64 N. Y. Suppl. 41.

If the appointee must be sworn, his oath need not be annexed, but the fact that he was sworn should be stated, and is sufficient. Minott *v.* Vineyard, 11 Iowa 90.

1. *Alabama.*— Mitchell *v.* Allen, 2 Stew. & P. 247. See also Boykin *v.* Edwards, 21 Ala. 261.

Colorado.— Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790.

Georgia.— Johnson *v.* Shurley, 58 Ga. 417.

Illinois.— Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

Michigan.— Bush *v.* Meacham, 53 Mich. 574, 19 N. W. 192; Morton *v.* Crane, 39 Mich. 526.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24; McLeod *v.* Harper, 43 Miss. 42.

See 40 Cent. Dig. tit. "Process," § 66.

In Michigan the copy of the declaration with rule to plead indorsed by which action is begun may be served by plaintiff. Penfold *v.* Slyfield, 110 Mich. 343, 68 N. W. 226.

An inhabitant of a town which is plaintiff may serve process. Windham *v.* Hampton, 1 Root (Conn.) 175.

2. Rutherford *v.* Moody, 59 Ark. 328, 27 S. W. 230.

3. See *supra*, II, B, 7, b.

4. Lillard *v.* Lillard, 5 B. Mon. (Ky.) 340; Wood *v.* Carpenter, 9 N. H. 153; Losey *v.* Stanley, 83 Hun (N. Y.) 420, 31 N. Y. Suppl. 950 [*reversed* in 147 N. Y. 560, 42 N. E. 8]; Hunter *v.* Lester, 10 Abb. Pr. (N. Y.) 260.

5. Augur *v.* Augur, 14 Conn. 82; Kellogg *v.* Wadhams, 9 Conn. 201; Culver *v.* Balch, 23 Vt. 618; Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199.

6. See the statutes of the several states. And see Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472. See also *supra*, II, B, 7, d.

7. Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775.

Special deputization.— Plaintiff's attorney

agent,[8] or a stock-holder in plaintiff corporation.[9] One who makes service of the writ will be presumed to be a proper person in the absence of any showing to the contrary.[10]

8. Place of Service. The general rule is that valid service of process cannot be made upon a defendant outside the territorial jurisdiction of the court, so as to confer jurisdiction over the person.[11] But many modifications of the rule have been introduced by statute.[12] Thus, service in another county within the state is sometimes declared valid when defendant has removed from the county where the action was commenced after such commencement;[13] it is usually valid in the case of an action against joint defendants where one of them has been properly served in the county of venue;[14] it is sometimes declared valid, within the limits of the state, when defendant has no permanent residence in any particular county;[15] and it is sometimes valid when the cause of action accrued within the county of venue.[16] While statutes frequently provide for the service of process outside the state, such service cannot give the court jurisdiction to render a personal judgment.[17] If a non-resident is found within the territorial jurisdiction of the court, personal service may be made upon him with the same effect as though he were a resident, unless his presence is under circumstances which render him privileged.[18]

may also be specially deputized. Wilford *v.* Miller, Morr. (Iowa) 405.

8. Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775; Loucks *v.* Hallenbeck, 48 N. Y. App. Div. 426, 63 N. Y. Suppl. 1; Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692; King *v.* Davis, 137 Fed. 198.

9. Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405; Hardwick *v.* Jones, 65 Mo. 54.

10. Buel *v.* Duke, 38 Mich. 167; Rowen *v.* Shapard, 2 Tex. App. Civ. Cas. § 295; Cowdery *v.* Johnson, 60 Vt. 595, 15 Atl. 188.

But it is held in California that it should appear in the affidavit of service by an unofficial person that he is more than eighteen years of age. Maynard *v.* MacCrellish, 57 Cal. 355.

11. *Arkansas.*— Ford *v.* Adams, 54 Ark. 137, 15 S. W. 186.

Iowa.— Weil *v.* Lowenthal, 10 Iowa 575.

Kansas.— Kerany County *v.* Rush, 44 Kan. 231, 24 Pac. 484.

Kentucky.— Dyas *v.* Lindsey, 4 Bush 349; Ruby *v.* Grace, 2 Duv. 540.

Missouri.— Roberts *v.* Stone, 99 Mo. App. 425, 73 S. W. 388.

New York.— Litchfield *v.* Burwell, 5 How. Pr. 341; Goldman *v.* Monds, 1 N. Y. City Ct. 97; Green *v.* Oneida Ct. C. Pl., 10 Wend. 592.

United States.— Jennings *v.* Johnson, 148 Fed. 337, 78 C. C. A. 329.

See 40 Cent. Dig. tit. "Process." § 69.

A summons served on board a British ship lying at a dock within the territorial jurisdiction of the court is properly served. Peabody *v.* Hamilton, 106 Mass. 217.

12. See the statutes of the several states.

13. Dyas *v.* Lindsey, 5 Bush (Ky.) 506; Ravmon *v.* Reed, 16 B. Mon. (Ky.) 345.

14. *Indiana.*— Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

Kentucky.— Anderson *v.* Smith, 3 Metc. 491.

Michigan.— Clark *v.* Lichtenberg, 33 Mich. 307.

Nebraska.— Adair County Bank *v.* Forrey, 74 Nebr. 811, 105 N. W. 714, a non-resident is as liable to service as a resident.

Ohio.— Allen *v.* Miller, 11 Ohio St. 374; McGill *v.* Smith, 2 Cinc. Super. Ct. 215.

Texas.— Sanders *v.* City Nat. Bank, (1889) 12 S. W. 110.

See 40 Cent. Dig. tit. "Process," § 69.

Whether the liability of defendants is joint, so as to permit service on one of them outside the jurisdiction, is a question of law. Harrison *v.* Monmouth Nat. Bank, 207 Ill. 630, 69 N. E. 871.

The filing of proof of service on one defendant within the county is a condition precedent to valid service on another defendant in another county. Allison *v.* Kinne, 104 Mich. 141, 62 N. W. 152. But see Lamar *v.* Cottle, 27 Ga. 263.

15. Reed *v.* Browning, 130 Ind. 575, 30 N. E. 704.

16. Linton *v.* Anglin, 12 Ill. 284; Haddock *v.* Waterman, 11 Ill. 474.

17. Stamey *v.* Barkley, 211 Pa. St. 313, 60 Atl. 991; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Foote *v.* Sewall, 81 Tex. 659, 17 S. W. 373; Franz Falk Brewing Co. *v.* Hirsch, 78 Tex. 192, 14 S. W. 450; York *v.* State, 73 Tex. 651, 11 S. W. 869; Stein *v.* Mentz, 42 Tex. Civ. App. 38, 94 S. W. 447.

Constitutionality of statutory provision.— A statute which permits service outside of the state is unconstitutional so far as it attempts to authorize proceedings *in personam* to be founded upon such service. Wallace *v.* United Electric Co., 211 Pa. St. 473, 60 Atl. 1046.

18. *Alabama.*— Lee *v.* Baird, 139 Ala. 526, 36 So. 720.

Illinois.— Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107.

9. Time of Service[19]—a. In General. The last day upon which process may be executed is the return-day thereof;[20] and service is in time if made any time on that day.[21] This rule is subject, however, to statutory modifications in many states.[22] For example under some statutes process is required to be served not less than six days before the return-day,[23] in or at any time before the return-day,[24] or ten days before the first day of the term,[25] or within three years after issuance.[26] If process is returnable within a given number of days from its date, it may be served and returned on the days of its issuance.[27] Service before the suit is legally

Maine.— Alley *v.* Caspari, 80 Me. 234, 14 Atl. 12, 6 Am. St. Rep. 178.

Massachusetts.— Thompson *v.* Cowell, 148 Mass. 552, 20 N. E. 170; Peabody *v.* Hamilton, 106 Mass. 217.

New York.— Matter of Washburn, 12 Misc. 242, 34 N. Y. Suppl. 44.

South Carolina.— Ford *v.* Calhoun, 53 S. C. 106, 30 S. E. 830.

Vermont.— Wilkins *v.* Brock, 79 Vt. 57, 64 Atl. 232.

United States.— Lebensberger *v.* Scofield, 139 Fed. 380, 71 C. C. A. 476; Mason *v.* Connors, 129 Fed. 831; Jewett *v.* Garrett, 47 Fed. 625.

See 40 Cent. Dig. tit. "Process," § 70.

Privileges and exemptions from service see *infra*, II, E.

Cross action against non-resident.— A defendant sued by a non-resident plaintiff may be authorized by statute to serve the attorney of plaintiff with a writ in a cross action and a personal judgment may be rendered on such service. Arkwright Mills *v.* Aultman, etc., Mach. Co., 128 Fed. 195.

19. Service upon holiday see Holidays, 21 Cyc. 443.

Service upon Sunday see Sunday.

20. *Delaware.*— Lofland *v.* Jefferson, 4 Harr. 303.

Georgia.— Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638.

Illinois.— Draper *v.* Draper, 59 Ill. 119; Hitchcock *v.* Haight, 7 Ill. 603.

New Jersey.— State *v.* Kennedy, 18 N. J. L. 22; Matthews *v.* Warne, 11 N. J. L. 295.

South Carolina.— Butler *v.* Corbitt, 2 Strobh. 1.

Texas.— Harrington *v.* Harrington, (App. 1890) 16 S. W. 538; Cobb *v.* Brown, 3 Tex. App. Civ. Cas. § 314.

Vermont.— Blodgett *v.* Brattleboro, 28 Vt. 695.

Virginia.— Crews *v.* Garland, 2 Munf. 491; Dunbar *v.* Long, 4 Hen. & M. 212.

See 40 Cent. Dig. tit. "Process," § 71.

21. Baxley *v.* Bennett, 33 Ga. 146; Heberton *v.* Stockton, 2 Miles (Pa.) 164; Cashee *v.* Wisner, 2 Browne (Pa.) 245; Boyd *v.* Serrill, 4 Pa. L. J. 114. See also Aumock *v.* Jamison, 1 Nebr. 432.

22. See the statutes of the several states. And see the following cases:

California.— Linden Gravel Min. Co. *v.* Sheplar, 53 Cal. 245.

Georgia.— Reese *v.* Shepherd, 27 Ga. 226.

Kentucky.— Stoll *v.* Knight, 3 B. Mon. 123.

Massachusetts.— Butler *v.* Fessenden, 12 Cush. 78.

New Jersey.— Raub *v.* Phillipsburg, 37 N. J. L. 48.

New York.— Nichols *v.* Fanning, 20 Misc. 73, 45 N. Y. Suppl. 409; Hovey *v.* McCrea, 4 How. Pr. 31.

Ohio.— Meisse *v.* McCoy, 17 Ohio St. 225.

South Carolina.— Buist *v.* Mitchell, 3 Brev. 485.

Utah.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008, holding service was not required to be within a year but that it was sufficient if summons issued within a year from the filing of the complaint.

Virginia.— Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933; Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

Canada.— Troup *v.* Kilbourne, 5 Brit. Col. 547.

See 40 Cent. Dig. tit. "Process," § 72.

Short summons.— Under some statutes it is provided that where all the plaintiffs or all the defendants are non-residents a summons fixing the time for answer at a shorter period than otherwise required may be issued. See Nichols *v.* Tracy, 1 Sandf. (N. Y.) 278; Lewis *v.* Davis, 8 Daly (N. Y.) 185 (holding that a person permanently employed and regularly in attendance at a store in the city of New York would be regarded as having a place of business in that city and might be sued by long summons); Mead *v.* Hartwell, 10 Misc. (N. Y.) 662, 31 N. Y. Suppl. 674, 24 N. Y. Civ. Proc. 217; Bell *v.* Good, 19 N. Y. Suppl. 693 [*reversing* 22 N. Y. Civ. Proc. 317]; Milligan *v.* Fles, 4 N. Y. Suppl. 338, 21 Abb. N. Cas. 93 (holding that the fact that plaintiff has a place of business in New York city does not preclude him from the right to have a short summons).

23. Mathewson *v.* Ham, 21 R. I. 203, 42 Atl. 871, holding that a writ issued from the district court must be served not less than six days before the return-day.

24. Claypoole *v.* Houston, 12 Kan. 324; Armstrong *v.* Grant, 7 Kan. 285.

25. French *v.* Regan, 58 Ill. App. 261; Axtell *v.* Workman, 17 Ind. App. 152, 46 N. E. 472; Broghill *v.* Lash, 3 Greene (Iowa) 357.

26. Hibernia Sav., etc., Soc. *v.* Cochran, 141 Cal. 653, 75 Pac. 315.

27. Spragins *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 139, 13 S. E. 45, holding that the provision of W. Va. Code, c. 124, that any process shall be returnable within ninety days from its date, and that the time within which any act is to be done shall be computed by excluding the first day and including the last does not preclude the execution of a writ on the day of its issuance.

commenced is a nullity.[28] Service should not be made on Sunday[29] or on a day expressly excepted by statute.[30] Statutes sometimes make special provision for service in designated cases of emergency, when defendant is about to remove out of the state.[31] Under some statutes the filing of the complaint must precede the service of summons, but under others this is not required.[32]

b. Computing Time.[33] The rules of computing time are not quite uniform in the different states. It is commonly said that in computing time, when service is required to be made a certain number of days before the return-day, the day of service should be excluded and the day of the return should be included.[34] It is also said that either the return-day or the day of service is to be excluded, which amounts to the same thing.[35] If the day of service be included and the return-day excluded, as held by some courts, the result is likewise the same.[36] Under some statutes, however, both the day of service and the return-day are to be excluded.[37]

c. Extending Time. The court has power, unless limited by statute, to extend the time for making service of process, on good cause shown.[38]

10. Manner of Service — a. In General. To constitute a good personal service of any kind, defendant must, in some substantial form, be apprised of the fact that service is intended to be made.[39] Personal service cannot be made by

28. Texas State Fair, etc. v. Lyon, 5 Tex. Civ. App. 382, 24 S. W. 328.

In Michigan service of a declaration as a substitute for process cannot properly be made until after the declaration is filed, for until that time the action is not commenced. South Bend Chilled Plow Co. *v.* Manahan, 62 Mich. 143, 28 N. W. 768; Ellis *v.* Fletcher, 40 Mich. 321.

29. See Sunday.

30. Swinney *v.* Johnson, 18 Ark. 534.

Holiday see Holidays, 21 Cyc. 443.

Day kept holy by party.— Under N. Y. Pen. Code, § 271, providing that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time . . . or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party, to be adjourned to that day for trial," is guilty of a misdemeanor, a plaintiff who procures process against such person to be returned on Saturday through inadvertence, and without intent to fix the return on a day kept holy by defendant is not criminally liable, and hence such process is not void. Martin *v.* Goldstein, 20 N. Y. App. Div. 203, 46 N. Y. Suppl. 961 [*reversing* 39 N. Y. Suppl. 254].

31. Swinney *v.* Johnson, 18 Ark. 534 (holding that service may be made on Sunday or on the fourth of July in such cases); Josey *v.* Dixon, 12 Rich. (S. C.) 378 (holding that service may be made before the debt has accrued).

32. See the statutes of the several states. And see Keith *v.* Quinney, 1 Oreg. 364.

33. Computation of time generally see Time.

34. *Indiana.*— Reigelsberger *v.* Stapp, 91 Ind. 311; Monroe *v.* Paddock, 75 Ind. 422; Moffitt *v.* Bininger, 17 Ind. 195; Kortepeter *v.* Wright, 15 Ind. 456; Martin *v.* Reed, 9 Ind. 180; Womack *v.* McAhren, 9 Ind. 6.

Michigan.— Chaddock *v.* Barry, 93 Mich. 542, 53 N. W. 785.

Minnesota.— Smith *v.* Force, 31 Minn. 119, 16 N. W. 704.

New York.— Matter of Carhart, 67 How. Pr. 216.

South Carolina.— Buist *v.* Mitchell, 3 Brev. 485.

Wisconsin.— Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

See 40 Cent. Dig. tit. "Process," § 74.

The law does not regard fractions of a day in computing the time for service of process. Ball *v.* Mander, 19 How. Pr. (N. Y.) 468.

35. Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264.

36. Dilts *v.* Zelgler, 1 Greene (Iowa) 164, 48 Am. Dec. 370; Buist *v.* Mitchell, 2 Treadw. (S. C.) 631; Dickinson *v.* Lee, 2 Coldw. (Tenn.) 615.

Last day falling on Sunday.— If the sheriff is allowed a certain number of days after a given day in which to serve process, and the last date falls on Sunday it is not to be counted. Baxley *v.* Bennett, 33 Ga. 146.

37. Sallee *v.* Ireland, 9 Mich. 154; Dousman *v.* O'Malley, 1 Dougl. (Mich.) 450; Snell *v.* Scott, 2 Mich. N. P. 108; Fitzhugh *v.* Hall, 28 Tex. 558; O'Connor *v.* Towns, 1 Tex. 107.

The expression "clear days," when applied to the time for a notice, is very well understood. It means the days included between the day of service and the day for the performance of the act, or the happening of the event, to which the notice relates — in common terms, the first and last days are both excluded. This is the meaning of the term "clear days," and it is the only meaning. Nordheimer *v.* Shaw, 8 Can. L. J. N. S. 283.

38. Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638; Allen *v.* Mutual Loan, etc., Co., 86 Ga. 74, 12 S. E. 265; Lamar *v.* Cottle, 27 Ga. 263; Bentley *v.* Reid, 133 Fed. 698, 66 C. C. A. 528.

39. Hiller *v.* Burlington, etc., R. Co., 70 N. Y. 223; Anderson *v.* Abeel, 96 N. Y. App. Div. 370, 89 N. Y. Suppl. 254. See also

mail.[40] In the absence of statutory direction as to the method of making personal service of process, such service should be by reading the original to defendant.[41] But statutes almost universally regulate the mode of service.[42] The usual methods prescribed are reading the writ to defendant,[43] or delivering to him a copy,[44] or by both methods,[45] or by either;[46] although other things are frequently required, such as producing the original and making known to defendant the contents of the writ,[47] reading the petition as well as the writ to defendant,[48] etc.[49] The statute must in all cases be strictly followed in order that the court may acquire

Woodley *v.* Jordan, 112 Ga. 151, 37 S. E. 178.

For example.— Under a statute providing for service of summons by delivery of a copy of the summons and complaint, service was insufficient where defendants voluntarily handed them back, and the person making the service did not acquaint defendants that they were entitled to retain the copies served. Beekman *v.* Cutler, 2 Code Rep. (N. Y.) 51. See also Niles *v.* Vanderzee, 14 How. Pr. (N. Y.) 547. Service of process by merely laying it on the body of a man too sick to understand it is invalid. People *v.* Judge Super. Ct., 38 Mich. 310. It is not a good service of a summons to deposit it on a chair in a room in which defendant was, without asking for defendant by name, or stating the nature of the paper and without offering to deliver it into defendant's hands. Correll *v.* Granget, 12 Misc. (N. Y.) 209, 34 N. Y. Suppl. 25.

40. *Minnesota.*— St. Paul Sav. Bank *v.* Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341.

Washington.— Bennett *v.* Supreme Tent K. M. W., 40 Wash. 431, 82 Pac. 744, 2 L. R. A. N. S. 389.

Wisconsin.— Adams *v.* Wright, 14 Wis. 408.

United States.— Levinson *v.* Oceanic Steam Nav. Co., 15 Fed. Cas. No. 8,292.

41. Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Ball *v.* Shattuck, 16 Ill. 299.

Production of original.— When a person serving a writ of summons does not, when requested, produce the original, the proceedings taken under the writ are void, and not merely irregular. Hawthorn *v.* Harris, 23 Wkly. Rep. 214.

42. See the statutes of the several states.

43. Casteel *v.* Hiday, 13 Ind. 536; Matthews *v.* Blossom, 15 Me. 400; Kleckner *v.* Lehigh County, 6 Whart. (Pa.) 66.

Sufficiency of reading.— To constitute good service of a process by reading it, the whole of it must be read. Stating the material parts is not enough. Crary *v.* Barber, 1 Colo. 172. Service by reading "in presence and hearing of" defendant is insufficient. The reading must be to defendant. Hynek *v.* Englest, 11 Iowa 210. On the other hand it has been held that where a summons is read in the hearing of defendant, although the officer addressed himself to his clerk, defendant being aware of the officer's mistake, the service is sufficient, as what is read in the presence of several persons is read to all, although the officer addresses only one specially. Metzger *v.* Huntington, 51 Ill. App. 377.

What law governs.— The statute in force at the time of the service, and not that in force at the time of the issuance, controls. Rose *v.* Ford, 2 Ark. 26.

44. *California.*— Brown *v.* Lawson, 51 Cal. 615.

Georgia.— Ballard *v.* Bancroft, 31 Ga. 503.

Kentucky.— Case *v.* Colston, 1 Metc. 145.

Mississippi.— Carter *v.* Daizy, 42 Miss. 501.

Nebraska.— Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

Ohio.— Robbins *v.* Clemmens, 41 Ohio St. 285.

Pennsylvania.— Boyle *v.* Lansford School Dist., 7 Pa. Dist. 709, 7 Del. Co. 314; Kolb *v.* Heist, 29 Pa. Co. Ct. 111, 20 Montg. Co. Rep. 23.

South Carolina.— Wallace *v.* Prince, 3 Rich. 177.

Texas.— McCoy *v.* Crawford, 9 Tex. 353.

Wisconsin.— Wilkinson *v.* Bayley, 71 Wis. 131, 36 N. W. 836; Moyer *v.* Cook, 12 Wis. 335.

Copy and translation.— Under 2 Mart. Dig. La. p. 150, providing that the citation shall "together with the petition" be delivered to the sheriff of the county where defendant resides and shall be served by delivering a copy of the petition and citation in the French and English languages, it is not necessary that the papers should be in both languages, but it is sufficient if the sheriff deliver a copy of these papers in both languages. Fleming *v.* Conrad, 11 Mart. (La.) 301.

Each defendant should be served with a copy. Covington *v.* Burleson, 28 Tex. 368.

45. Noleman *v.* Weil, 72 Ill. 502; *Ex p.* Tindall, 6 De G. M. & G. 741, 55 Eng. Ch. 575, 43 Eng. Reprint 1421. Personal service of a petition and writ may be made either by reading both to defendant or delivering a copy of both to him; but service by delivering a copy of the petition and reading the writ is not good. Waddingham *v.* St. Louis, 14 Mo. 190.

46. Rose *v.* Ford, 2 Ark. 26.

47. Skilton *v.* Mason, 24 Leg. Int. (Pa.) 228; Buchanan *v.* Specht, 1 Phila. (Pa.) 252; Thomas *v.* Pearce, 2 B. & C. 761, 4 D. & R. 317, 2 L. J. K. B. O. S. 153, 26 Rev. Rep. 543, 9 E. C. L. 330; Phillipson *v.* Emanuel, 56 L. T. Rep. N. S. 858.

48. Hickman *v.* Barnes, 1 Mo. 156.

49. Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747, where the various statutory provisions as to personal service are set out.

jurisdiction over defendant,[50] although it has been held that statutory requisites may be waived by defendant.[51] And if all that the law requires is done, the doing of additional superfluous acts will not vitiate the service.[52]

b. In Case of Several Defendants. Where there are several defendants the service must be complete and entire as to each;[53] but in case of joint debtors or partners, if process is issued against all and is served on one or more, but others cannot be found, the statutes usually provide that plaintiff may proceed against those served, and, if successful, have judgment against all.[54] Such a judgment will be enforced as to the joint property of all and the separate property of those served, but will not bind personally those not served.[55]

c. The Copy Delivered. The copy should be substantially correct, but is not to be construed with the same strictness as the original.[56] The copy need not contain any indorsement by the sheriff, but is sufficient if it contains all that was put on the summons by the clerk.[57] Clerical errors in the copy delivered will not affect the jurisdiction of the court, where defendant has not been misled thereby.[58] Thus, designating the wrong month for the term when the mistake is an obvious one,[59] giving a wrong day of the month as the return-day, when same is fixed by law,[60] the omission of words of surplusage,[61] giving the wrong year when same is obviously an impossible date,[62] the lack of the file number of the case,[63] the

50. *Arkansas.*— Fulcher *v.* Lyon, 4 Ark. 449.

California.— People *v.* Bernal, 43 Cal. 385.

Illinois.— Maher *v.* Pull, 26 Ill. 348.

Minnesota.— St. Paul Sav. Bank *v.* Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498.

Montana.— Sanford *v.* Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482.

Nebraska.— Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

New Hampshire.— Blake *v.* Smith, 67 N. H. 182, 38 Atl. 16.

New York.— Eisenhofer *v.* New Yorker Zeitung Pub., etc., Co., 91 N. Y. App. Div. 94, 86 N. Y. Suppl. 438.

Ohio.— Robbins *v.* Clemmens, 41 Ohio St. 285.

Pennsylvania.— Boyle *v.* Lansford School Dist., 7 Pa. Dist. 709, 7 Del. Co. 314.

Texas.— McCoy *v.* Crawford, 9 Tex. 353.

See 40 Cent. Dig. tit. "Process," § 76.

51. Casteel *v.* Hiday, 13 Ind. 536; Chapman *v.* Allen, Morr. (Iowa) 23 (delivery of copy); Williamson *v.* Cocke, 124 N. C. 585, 32 S. E. 963.

52. Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218.

53. *Illinois.*— Colwell *v.* Culbertson, 126 Ill. App. 294.

Iowa.— Jamison *v.* Weaver, 84 Iowa 611.

New Hampshire.— Bugbee *v.* Thompson, 41 N. H. 183.

South Carolina.— Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913.

Texas.— Anderson *v.* Brown, 16 Tex. 554. Under Paschal Dig. art. 1430, requiring that every defendant must be served personally with a copy of the petition and of the citation, where a husband and wife are defendants, each must be served personally with a copy of the petition and of the citation. Covington *v.* Burleson, 28 Tex. 368.

See 40 Cent. Dig. tit. "Process," § 79.

54. Bishop *v.* Vose, 27 Conn. 1; Southmayd *v.* Backus, 3 Conn. 474; Bishop *v.* Bull, 1 Day (Conn.) 141; Mills *v.* Bishop, Kirby (Conn.) 4; Parker *v.* Danforth, 16 Mass. 299; Tappan *v.* Bruen, 5 Mass. 193; People *v.* New York Super. Ct., 19 Wend. (N. Y.) 119. *Compare* Bartlett *v.* Campbell, 1 Wend. (N. Y.) 50.

This is a statutory proceeding in substitution for outlawry.—At the common law plaintiff in such a case was required to proceed to outlawry against those joint debtors who could not be found, and he then declared separately against those served with process and obtained a separate judgment against them, but no judgment except that of outlawry against those not found. Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271.

55. Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7; Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271.

56. Biles *v.* Basler, 24 Pa. Co. Ct. 3. See Jensen *v.* Hays, 2 Tex. App. Civ. Cas. § 566. In Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840, 841, the court said: "It may be that the sheriff could leave out some of the things which the summons must contain to be a legal command to him, and yet the copy served give the court jurisdiction over the person of the defendant, and the judgment be only voidable; but surely he cannot leave out of the copy the vital things of which he is commanded to give the defendant notice, without rendering the judgment void."

57. Dresser *v.* Wood, 15 Kan. 344; White *v.* Taylor, 48 N. H. 284; Peters *v.* Crittenden, 8 Tex. 131.

58. See the cases cited in the following notes.

59. Williams *v.* Buchanan, 75 Ga. 789.

60. Irions *v.* Keystone Mfg. Co., 61 Iowa 406, 16 N. W. 349.

61. Herman *v.* Sprigg, 3 Mart. N. S. (La.) 190.

62. Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 413.

63. Peters *v.* Crittenden, 8 Tex. 131.

want of the signature of the officer who issued it,[64] and the omission of the date of the summons [65] are at most mere irregularities. The seal of the court upon the original need not be copied upon the copy of the summons.[66] A revenue stamp on the original is no essential part of the writ, and its presence need not be indicated on the copy.[67] If by mistake the original instead of a copy be delivered to or left for defendant this will not affect the service.[68] If a single defendant is sued in more than one capacity, he need not be served with more than one copy of the writ.[69]

d. Refusal to Receive Service. Where a defendant upon whom service of process by copy is sought to be made refuses to receive the copy offered, the person or officer making the service should inform him of the nature of the paper and of his purpose to make service thereof, and deposit it in some appropriate place in his presence or where it will be most likely to come into his possession.[70] If service is sought to be made by reading and defendant refuses to hear it read, the offer to read it is sufficient to constitute a good service.[71] But the officer has no right to use force in serving civil process.[72]

64. Collins *v.* Merriam, 31 Vt. 622.

65. Mayerson *v.* Cohen, 123 N. Y. App. Div. 646, 108 N. Y. Suppl. 59.

66. Sietman *v.* Goeckner, 127 Ill. App. 67; Hughes *v.* Osborn, 42 Ind. 450; Kelley *v.* Mason, 4 Ind. 618; Peters *v.* Crittenden, 8 Tex. 131.

67. Tucker *v.* Potter, 35 Conn. 43; Watson *v.* Morton, 18 Abb. Pr. (N. Y.) 138.

68. Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100; Gould *v.* Rose, 17 Ohio Cir. Ct. 181, 9 Ohio Cir. Dec. 619.

69. Owsley *v.* Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

70. *New York.*— Davison *v.* Baker, 24 How. Pr. 39.

Wisconsin.— Borden *v.* Borden, 63 Wis. 374, 23 N. W. 573.

United States.— Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

England.— Fry *v.* Crosbie, 1 Hog. 289.

Canada.— Ritz *v.* Schmidt, 12 Manitoba 138.

For example the sheriff found defendant in front of his house, and defendant ran away, the sheriff calling out to him, when very near him, that he had two declarations to serve, naming plaintiffs, and then left the declarations in the house, and it was held not sufficient. The declarations should have been delivered or offered to defendant within his reach or laid down within his reach. Van Rensselaer *v.* Petrie, 2 How. Pr. (N. Y.) 94. When a party seeking to serve a writ was standing in defendant's yard, close to the street door of his house, and saw him at a window within the dwelling-house, and informed him in a loud voice that he had a writ against him, and held the copy out and threw it on the ground in his presence, and left it there, it was held not to amount to a personal service of the writ. Heath *v.* White, 2 D. & L. 40, 8 Jur. 575, 13 L. J. Q. B. 218. See Goggs *v.* Huntingtower, 1 D. & L. 599, 8 Jur. 66, 13 L. J. Exch. 352, 12 M. & W. 503. When a defendant was followed upstairs by a party who was endeavoring to serve him, and having run into a room and closed the door after him, the copy of the writ was put into the room through a crevice in the wall, and he was told what it was, it was held that the service was not sufficient. Christmas *v.* Eicke, 6 D. & L. 156, 2 Saund. & C. 292. And see Arrowsmith *v.* Ingle, 3 Taunt. 234. It was held in an English case that if a person who has corresponded on the subject of the action, and to whom process is sent, inclosed in a letter by the post, wilfully refuses to receive the letter, it will be deemed good service on him, although he never read it. Aldred *v.* Hicks, 1 Marsh. 8, 5 Taunt. 186, 1 E. C. L. 102. Where a director of a corporation knew of the institution of a suit against it and of the sheriff's desire to summon it by serving process on him as a director, and that a deputy was about to make that service, he could not defeat service by running out of the room and slamming a door in the officer's face. Boggs *v.* Inter-American Min., etc., Co., 105 Md. 371, 66 Atl. 259.

71. Slaght *v.* Robbins, 13 N. J. L. 340. See also Story *v.* Ware, 35 Miss. 399, 72 Am. Dec. 125.

72. State *v.* Claudius, 1 Mo. App. 551; Davison *v.* Baker, 24 How. Pr. (N. Y.) 39.

Where a process server gained access forcibly to the room where defendant was, after having obtained an entrance into the house under pretext that he wanted to see a servant named, the service was illegal, and will be set aside. Olson *v.* McConihe, 54 Misc. (N. Y.) 48, 105 N. Y. Suppl. 386.

Duty to leave premises.— The sheriff went to plaintiff's house with process which he was authorized to serve. The person on whom he was to make the service was in the house. The door was open, and he entered peaceably. When in, the wife of plaintiff ordered him out and it was held that, being legally in the house, he was not bound to leave it when ordered, and was justified in using sufficient force against the wife to enable him to serve the process. Hager *v.* Danforth, 20 Barb. (N. Y.) 16 [*reversing* 8 How. Pr. 435].

Where a person, to avoid service of summons and other papers on him, shelters himself in his wife's petticoats, and refuses to receive the papers in his hands, the laying of

C. Substituted Service — 1. In General. By substituted service is meant service by leaving a copy of the process at the residence or abode or place of business of defendant. Such service, when made upon residents, should probably be deemed actual service, and has frequently been called personal service or the equivalent of personal service,[73] although it has also been designated constructive service.[74] Service upon the agent or attorney of defendant, and service by mail, are also regarded as substituted service, although they are usually authorized under more restricted conditions. Such service is usually considered the equivalent of personal service and gives the court jurisdiction over the person of defendant.[75] In England the courts have been given large discretion in authorizing substituted service in such manner as they may deem fit,[76] but as a condition to the exercise of such discretion it must first be shown by affidavit that every means of effecting personal service has been exhausted,[77] and if the party is not subject to personal service, substituted service cannot be permitted.[78] Similar rules as to

the papers on his shoulder will be a sufficient service, and does not constitute an assault on such person. Martin *v.* Raffin, 21 N. Y. Suppl. 1043.

73. *Connecticut.*— Hurlburt *v.* Thomas, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43.

Georgia.— Lucas *v.* Wilson, 67 Ga. 356, gives court jurisdiction over the person.

Indiana.— Dunkle *v.* Elston, 71 Ind. 585 (is personal service); Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440.

Kansas.— Atchison County *v.* Challis, 65 Kan. 179, 69 Pac. 173.

Massachusetts.— Fitzgerald *v.* Salentine, 10 Metc. 436.

New York.— Ferris *v.* Plummer, 46 Hun 515; Johnston *v.* Robins, 3 Johns. 440.

Actual service.— In Bernhardt *v.* Brown, 118 N. C. 700, 705, 24 S. E. 527, 715, 36 L. R. A. 402, the court said: "Whether actual service shall be made by reading the summons, or notice to the defendant, or leaving a copy with him personally or at his usual place of residence, is for the Legislature to prescribe."

Leaving a copy is not personal service. Currier *v.* Gilman, 55 N. H. 364; Charlotte First Nat. Bank *v.* Wilson, 80 N. C. 200.

74. Carter *v.* Daizy, 42 Miss. 501.

75. Atchison County *v.* Challis, 65 Kan. 179, 69 Pac. 173; Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615; Johnston *v.* Robins, 3 Johns. (N. Y.) 440; Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

76. Jay *v.* Budd, [1898] 1 Q. B. 12, 66 L. J. Q. B. 863, 77 L. T. Rep. N. S. 335, 14 T. L. R. 1, 46 Wkly. Rep. 34; Tomlinson *v.* Goatley, L. R. 1 C. P. 230, 12 Jur. N. S. 431, 35 L. J. C. P. 183; Lewis *v.* Herbert, L. R. 16 Ir. 340; Bates *v.* Bates, 9 C. B. N. S. 561, 7 Jur. N. S. 728, 30 L. J. C. P. 191, 3 L. T. Rep. N. S. 670, 9 Wkly. Rep. 255, 99 E. C. L. 561; Davies *v.* Westmacott, 7 C. B. N. S. 829, 6 Jur. N. S. 636, 29 L. J. C. P. 150, 1 L. T. Rep. N. S. 297, 97 E. C. L. 829; Kitchin *v.* Wilson, 4 C. B. N. S. 483, 4 Jur. N. S. 539, 27 L. J. C. P. 253, 93 E. C. L. 483; Barringer *v.* Handley, 16 Jur. 1023, 12 C. B. 720, 22 L. J. C. P. 6, 74 E. C. L. 720; *In re* Boger, 3 Jur. N. S. 930; Wolverhampton, etc., Banking Co. *v.* Bond, 43 L. T. Rep. N. S. 721, 29 Wkly. Rep. 599; Hart *v.* Herwig, 28 L. T. Rep. N. S. 329, 21 Wkly. Rep. 538 [*affirmed* in L. R. 8 Ch. 860, 42 L. J. Ch. 457, 29 L. T. Rep. N. S. 47, 21 Wkly. Rep. 663]; Baillie *v.* Blanchet, 10 L. T. Rep. N. S. 365, 4 New Rep. 48; Furber *v.* King, 29 Wkly. Rep. 535; Capes *v.* Brewer, 24 Wkly. Rep. 40; Cox *v.* Bannister, 8 Wkly. Rep. 206.

Order IX of the Rules of the Supreme Court provides: "If it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of service of notice, by advertisement or otherwise as may be just."

The principle on which substituted service is ordered is that there is reasonable ground to suppose that the service will come to the knowledge of defendant. Hope *v.* Hope, 4 De G. M. & G. 328, 2 Eq. Rep. 1047, 23 L. J. Ch. 682, 2 Wkly. Rep. 545, 698, 53 Eng. Ch. 256, 43 Eng. Reprint 534; *Re* Slade, 45 L. T. Rep. N. S. 276, 30 Wkly. Rep. 28.

The method should be fixed by the order. Jones *v.* Brandon, 2 Jur. N. S. 437.

Advertisement.— The courts frequently order service by advertisement in some designated newspaper in place of or in addition to leaving the writ where defendant might be expected to find it. Crane *v.* Jullion, 2 Ch. D. 220, 24 Wkly. Rep. 691; Cook *v.* Dey, 2 Ch. D. 218, 45 L. J. Ch. 611, 24 Wkly. Rep. 362; Hartley *v.* Dilke, 35 L. T. Rep. N. S. 706; Whitley *v.* Honeywell, 35 L. T. Rep. N. S. 517; Rafael *v.* Ongley, 34 L. T. Rep. N. S. 124; Coulburn *v.* Carshaw, 32 Wkly. Rep. 33; Mellows *v.* Bannister, 31 Wkly. Rep. 238.

77. Davies *v.* Westmacott, 7 C. B. N. S. 829, 6 Jur. N. S. 636, 29 L. J. C. P. 150, 1 L. T. Rep. N. S. 297, 97 E. C. L. 829; Firth *v.* Bush, 9 Jur. N. S. 431, 11 Wkly. Rep. 611.

Registered letter.— Where a plaintiff has exhausted all means to personally serve a writ of summons out of the jurisdiction, the court will allow substituted service by registered letter. Seaton *v.* Clarke, L. R. 26 Ir. 297.

78. Wilding *v.* Bean, [1891] 1 Q. B. 100, 60 L. J. Q. B. 10, 64 L. T. Rep. N. S. 41,

substituted service have been adopted in Canada.[79] Statutes authorizing substituted service are to be strictly construed.[80]

2. Service by Leaving Copy at Defendant's Residence — a. In General. Service by the leaving of a copy of the process at defendant's residence or place of abode is exclusively a statutory proceeding, and is almost universally provided for as a method to be used in certain cases.[81] If all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof;[82] and conversely, if the statute is not complied with it is of no avail that defendant does in fact receive actual notice of the action.[83]

b. When Authorized. Substituted service is to be used only when defendant cannot be found personally.[84] It is frequently provided for in cases where defendant seeks to evade personal service.[85] It cannot be employed against non-residents,[86] although some statutes have even declared the method proper where defendant once was a resident but had ceased to be such at the time of the service.[87]

39 Wkly. Rep. 40; Fry *v.* Moore, 23 Q. B. D. 395, 58 L. J. Q. B. 382, 61 L. T. Rep. N. S. 545, 37 Wkly. Rep. 565; Sloman *v.* New Zealand, 1 C. P. D. 563, 46 L. J. C. P. 185, 35 L. T. Rep. N. S. 454, 25 Wkly. Rep. 86; Field *v.* Bennett, 56 L. J. Q. B. 89; Hillyard *v.* Smyth, 36 Wkly. Rep. 7.

79. Young *v.* Dominion Constr. Co., 19 Ont. Pr. 139; Robertson *v.* Mero, 9 Ont. Pr. 510.

80. Gage *v.* Riverside Trust Co., 156 Fed. 1002.

81. See the statutes of the several states. And see the following cases:

Georgia.— Rogers *v.* Craig, 68 Ga. 286; Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685, holding that under the statute "notorious place of residence" and "notorious place of abode" were legal synonyms.

Indiana.— Conwell *v.* Atwood, 2 Ind. 280.

Iowa.— Macklot *v.* Hart, 12 Iowa 428.

Kentucky.— Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629.

Louisiana.— Rowland *v.* Pascal, 10 La. 598.

Maine.— Matthews *v.* Blossom, 15 Me. 400.

Minnesota.— Missouri, etc., Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634.

Montana.— Sanford *v.* Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482.

Nebraska.— Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038; Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

New Hampshire.— Blake *v.* Smith, 67 N. H. 182, 38 Atl. 16.

New Jersey.— Rogers *v.* Jermen, 3 N. J. L. 527. See also Harrison *v.* Farrington, 35 N. J. Eq. 4; Wagner *v.* Blanchet, 27 N. J. Eq. 356.

New York.— McCarthy *v.* McCarthy, 13 Hun 579; Casey *v.* White, 48 Misc. 659, 96 N. Y. Suppl. 190.

Ohio.— Robbins *v.* Clemmens, 41 Ohio St. 285; Walke *v.* Circleville Bank, 15 Ohio 288.

Pennsylvania.— Bujac *v.* Morgan, 3 Yeates 258; Dyre's Case, 1 Browne 299; Nester *v.* Root, 19 Montg. Co. Rep. 213.

South Carolina.— Hunter *v.* Hunter, 1 Bailey 646; Bowers *v.* Alston, 1 Nott & M. 458.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Washington Mill Co. *v.* Marks, 27 Wash. 170, 67 Pac. 565.

See 40 Cent. Dig. tit. "Process," § 90.

82. Conwell *v.* Atwood, 2 Ind. 289; Kennedy *v.* Harris, 3 Indian Terr. 487, 58 S. W. 567.

83. Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

84. *Louisiana.*— Kendrick *v.* Kendrick, 19 La. 36.

New York.— Bishop *v.* Hughes, 117 N. Y. App. Div. 425, 102 N. Y. Suppl. 595.

Pennsylvania.— Wagenhorst *v.* Smith, 1 Woodw. 421.

Texas.— McLamore *v.* Heffner, 31 Tex. 189.

United States.— Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110.

See 40 Cent. Dig. tit. "Process," § 87.

85. Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357]. See Bishop *v.* Hughes, 117 N. Y. App. Div. 425, 102 N. Y. Suppl. 595 (holding a showing sufficient to authorize an order for substituted service); Nichols *v.* Emmett, 56 Misc. (N. Y.) 321, 107 N. Y. Suppl. 663 (where evidence was held insufficient to show that defendant had avoided service).

86. *Indiana.*— Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440.

Iowa.— Schlawig *v.* De Peyster, 83 Iowa 323, 49 N. W. 843, 32 Am. St. Rep. 308, 13 L. R. A. 785.

Kansas.— Amsbaugh *v.* Exchange Bank, 33 Kan. 100, 5 Pac. 384.

Maine.— Thomas *v.* Thomas, 96 Me. 223, 52 Atl. 642, 90 Am. St. Rep. 342.

Nebraska.— Wood *v.* Roeder, 45 Nebr. 311, 63 N. W. 853.

New York.— Lynch *v.* Eustis, 85 N. Y. Suppl. 1063.

North Dakota.— Casselton First Nat. Bank *v.* Holmes, 12 N. D. 38, 94 N. W. 764.

Pennsylvania.— Bumpus *v.* Hardenburg, 3 Pa. Dist. 27.

South Carolina.— Armstrong *v.* Brant, 44 S. C. 177, 21 S. E. 634.

Wyoming.— Honeycutt *v.* Nyquist, 12 Wyo. 183, 74 Pac. 90, 109 Am. St. Rep. 975.

87. Johnson *v.* Thaxter, 12 Gray (Mass.) 198; Orcutt *v.* Ranney, 10 Cush. (Mass.) 183;

If such service is to be deemed valid against a non-resident, it is only as the equivalent of constructive service by publication and operates only so far as the proceeding is *in rem*.[88] Some statutes require that an order for substituted service be obtained from the court, upon showing by affidavit that personal service cannot be made.[89] If the statute provides for such service only in case the place of defendant's sojourn cannot be ascertained, the service is invalid if his location can in fact be readily discovered.[90]

c. Place Where Copy May Be Left. The precise method authorized by the statute must be employed.[91] Thus, where the statute required that the copy be left at defendant's residence or usual place of abode,[92] leaving it at his place of busi-

Tilden *v.* Johnson, 6 Cush. (Mass.) 354; Wright *v.* Oakley, 5 Metc. (Mass.) 400.

Where defendant is actually in the commonwealth at the time of service of process, although his permanent residence is elsewhere, service by leaving a summons at his last and usual place of abode is sufficient and he is not entitled to the further notice under Gen. St. c. 126, § 6. Reeder *v.* Holcomb, 105 Mass. 93.

88. Eliot *v.* McCormick, 144 Mass. 10, 12, 10 N. E. 705 (where it was said that Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565, and Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372, "modify the application and effect of our statutes, and overrule the adjudications of this court, so far as they hold that a judgment *in personam* can be rendered against a non-resident defendant without any other service than attaching his property, or leaving a summons at his last and usual place of abode within the State, followed by such publication of notice as is ordered by the court"); Bumpus *v.* Hardenburg, 3 Pa. Dist. 27. See also Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883; Adams *v.* Heckscher, 80 Fed. 742.

89. McCarthy *v.* McCarthy, 13 Hun (N. Y.) 579; Simpson *v.* Burch, 4 Hun (N. Y.) 315; Carter *v.* Youngs, 42 N. Y. Super. Ct. 169; Nichols *v.* Emmett, 56 Misc. (N. Y.) 321, 107 N. Y. Suppl. 663; Lawrence *v.* Bernstein, 46 Misc. (N. Y.) 608, 92 N. Y. Suppl. 817; Molloy *v.* Lennon, 22 Misc. (N. Y.) 542, 49 N. Y. Suppl. 1004; Phillips *v.* Winne, 20 N. Y. Suppl. 49; Smith *v.* Fogarty, 6 N. Y. Civ. Proc. 366; Nagle *v.* Taggart, 4 Abb. N. Cas. (N. Y.) 144; Foot *v.* Harris, 2 Abb. Pr. (N. Y.) 454; Jones *v.* Derby, 1 Abb. Pr. (N. Y.) 458; McCarthy *v.* Kimball, 55 How. Pr. (N. Y.) 418; Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

An affidavit on knowledge and belief that defendant was within the state and avoiding service made by plaintiff's attorney is insufficient when the sources of such knowledge and belief were not stated. Nichols *v.* Emmett, 56 Misc. (N. Y.) 321, 107 N. Y. Suppl. 663.

Sufficiency of showing.—Averments in an affidavit to the effect that the affiant had at specified times called at the residence of defendant, and, on stating that he had a paper for her, was informed at such times by servants and others, that she was in, but was told by her father that he, affiant, could not see her, authorize an order directing a substituted service of the summons and complaint, under N. Y. Code Civ. Proc. § 435. McCarthy *v.* McCarthy, 16 Hun (N. Y.) 546 [*affirmed* in 84 N. Y. 671].

The order must designate a method of service authorized by the statute. Jones *v.* Derby, 1 Abb. Pr. (N. Y.) 458; Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

Variance between order and summons.—A substituted service of a summons under N. Y. Code Civ. Proc. §§ 435, 436, by mailing and posting on the door of defendant's residence, is substantially irregular where plaintiff is truly named as "Gilson F. Farrington" in the affidavit and order for substituted service, and "George F. Farrington" in the summons. Farrington *v.* Muchmore, 52 N. Y. App. Div. 247, 65 N. Y. Suppl. 432 [*reversing* 30 Misc. 218, 62 N. Y. Suppl. 165], holding, however, that an error in the given name of the plaintiff in the copy of a summons annexed to an order for substituted service may be corrected on motion; it does not require that the summons and the order for the substituted service thereof and such service be set aside. The reason for the distinction made between the correction of the name of plaintiff and of the name of a defendant under such circumstances, considered.

90. Ottman *v.* Daly, 7 N. Y. Suppl. 897.

91. Romaine *v.* Muscatine County, Morr. (Iowa) 357; Zecharie *v.* Bowers, 1 Sm. & M. (Miss.) 584, 40 Am. Dec. 111; Jones *v.* Derby, 1 Abb. Pr. (N. Y.) 458; Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

92. See the statutes of the several states.

"Place of abode" does not necessarily mean where defendant sleeps but rather where he is usually to be found. Blackwell *v.* England, 8 E. & B. 541, 3 Jur. N. S. 1302, 27 L. J. Q. B. 124, 6 Wkly. Rep. 59, 92 E. C. L. 541; Haslope *v.* Thorne, 1 M. & S. 103. "Place of residence" is substantially the same as "place of abode." State *v.* Toland, 36 S. C. 515, 15 S. E. 599. And see Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685.

Usual place of abode means the place of abode at the time of the service of the writ. Sparks *v.* Weatherby, 16 La. 594; Mygatt *v.* Coe, 63 N. J. L. 510, 44 Atl. 198; Johnson *v.* Gadsden, 1 Nott & M. (S. C.) 89; Capehart *v.* Cunningham, 12 W. Va. 750.

The term "house of his usual abode" means a person's customary dwelling-place or resi-

ness,[93] or at the dwelling-house of another person,[94] or at a house or hotel where he was temporarily stopping,[95] or at his former dwelling-house after his removal therefrom,[96] or in defendant's berth in a steamer upon which he has taken passage,[97] or in a part of the house which he does not inhabit or frequent,[98] or at any other place,[99] is insufficient. Some statutes further provide for the leaving of the writ at some public place at defendant's dwelling,[1] or at some obvious part of the house,[2] or that a copy of the writ may be posted upon the front door of his usual place of abode.[3] If the statute authorizes posting upon "the front door," a return showing posting upon "the door" does not show a valid service.[4] The question whether a defendant resides at a certain place is a question of fact, and he is shown to have once resided there, such residence will be presumed to have continued, in the absence of any showing to the contrary.[5]

dence. Missouri, etc., Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634.

The "dwelling-house" of the statute is the house in which defendant has his legal residence, and in which he permanently resides. Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 77 N. W. 588.

In the case of a married man, the house of his usual abode for the purpose of the service of summons is the house wherein his wife and family reside. Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Where a person has several residences, which he permanently maintains, occupying one at one period of the year and another at another period, a summons must be served on him at the dwelling-house in which he is living at the time of the service. Camden Safe Deposit, etc., Co. *v.* Barbour, 66 N. J. L. 103, 48 Atl. 1008.

Where plaintiff lives in premises formerly occupied by defendant temporarily absent from the province, service of process in Quebec must be made personally except upon leave granted by the judge or prothonotary. Normandin *v.* Renaud, 7 Quebec Pr. 421.

House upon plantation.— Under a statute providing that citation may be served by leaving the same at the domicile of a defendant, it is sufficient, where defendant resides on a plantation, if service is made on a person of proper age who resides in any house upon the plantation, even though it is not the residence of defendant. Rousseau *v.* Gayarre, 24 La. Ann. 355; McCalop's Succession, 10 La. Ann. 224; Maxwell *v.* Collier, 6 Rob. (La.) 86.

93. *Delaware.*—Hitch *v.* Gray, 1 Marv. 400, 41 Atl. 91; Gibbons *v.* Mason, 1 Harr. 452.
Georgia.— Smith *v.* Bryan, 60 Ga. 628.
Indiana.— Stout *v.* Harlem, 20 Ind. App. 200, 50 N. E. 492.
Iowa.— Winchester *v.* Cox, 3 Greene 575.
Nebraska.— Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456.
Ohio.— Lambert *v.* Sample, 25 Ohio St. 336; Hayes *v.* U. S. Bank, Wright 563.
Pennsylvania.— See Dyre's Case, 1 Browne 299.
Wisconsin.— Mayer *v.* Griffin, 7 Wis. 82.
United States.— Halsey *v.* Hurd, 11 Fed. Cas. No. 5,966, 6 McLean 14.
See 40 Cent. Dig. tit. "Process," § 90.

But *compare* Smith *v.* Parke, 2 Paige (N. Y.) 298.

94. Boyland *v.* Boyland, 18 Ill. 551.

95. White *v.* Primm, 36 Ill. 416; Hennings *v.* Cunningham, (N. J. Sup. 1904) 59 Atl. 12.

But a hotel may be his usual place of residence, if he has no other place to live. McFaddin *v.* Garrett, 49 La. Ann. 1319, 22 So. 358.

96. Kline *v.* Kline, 104 Ill. App. 274 (even though it is immediately forwarded to him); Matter of Norton, 32 Misc. (N. Y.) 224, 66 N. Y. Suppl. 317.

97. Craig *v.* Gisborne, 13 Gray (Mass.) 270.

98. Perry *v.* Perry, 103 Ga. 706, 30 S. E. 663; Fitzgerald *v.* Salentine, 10 Metc. (Mass.) 436; Heinemann *v.* Pier, 110 Wis. 185, 85 N. W. 646.

99. Ames *v.* Winsor, 19 Pick. (Mass.) 247; Rogers *v.* Jermen, 3 N. J. L. 527; Fisk *v.* Bennett, 69 Hun (N. Y.) 272, 23 N. Y. Suppl. 471; Phelps *v.* McCollam, 10 N. D. 536, 88 N. W. 292.

Leaving process in yard.— Leaving a process with a member of defendant's family, at a distance of one hundred and twenty feet from his dwelling, but in the yard of the dwelling, was not a sufficient service under a statute prescribing that, in the absence of a defendant, the process should be left with some member of his family "at the dwelling-house of such defendant." Kibbe *v.* Benson, 17 Wall. (U. S.) 624, 21 L. ed. 741.

1. Tomlinson *v.* Hoyt, 1 Sm. & M. (Miss.) 515.

2. Bowers *v.* Alston, 1 Nott & M. (S. C.) 458.

3. Farrington *v.* Muchmore, 30 Misc. (N. Y.) 218, 62 N. Y. Suppl. 165 [*reversed* on other grounds in 52 N. Y. App. Div. 247, 65 N. Y. Suppl. 432]; Earle *v.* McVeigh, 91 U. S. 503, 23 L. ed. 398.

4. King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676, 85 C. C. A. 348].

5. *Georgia.*— Collins *v.* Camp, 94 Ga. 460, 20 S. E. 356; Rogers *v.* Craig, 68 Ga. 286; Barrett *v.* Black, 25 Ga. 151.
Indiana.— Pendleton *v.* Vanausdal, 2 Ind. 54.
Louisiana.— Zacharie *v.* Richards, 6 Mart. N. S. 467.
Pennsylvania.— Altoona Second Nat. Bank *v.* Gardner, 171 Pa. St. 267, 33 Atl. 188.

d. With Whom Copy May Be Left. It is usually provided that the copy may be left only with certain designated persons, as a member of defendant's family, or a person over a certain age living at the house, or a person of suitable age and discretion, resident therein, etc., and these provisions must be strictly observed.[6] Even though the statute is silent as to the age of the person with whom the copy shall be left, it must be construed to mean a person of such age as would understand what was intended to be done with the summons.[7] If the statute requires the writ to be left with a member of defendant's family, it is sufficient to leave it with a member of the family in which he resides, where he has no family of his own.[8] Unless the statute provides otherwise, it is sufficient to leave the copy at defendant's residence while he and his family are absent from the county.[9]

e. Informing Recipient as to Contents. A provision of the statute that the person with whom the writ is left shall be informed of its contents is mandatory.[10]

f. Publication. Under some statutes a resident defendant who is, at the time of such service, out of the state, is entitled to further notice by publication;[11] but under other statutes no further notice is necessary.[12]

Washington.— Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Where a person disappears from home, without any expression of an intention not to return, process left with his wife, nine days after his disappearance, at his usual place of abode, is a sufficient service to give the court jurisdiction. Botna Valley State Bank *v.* Silver City Bank, 87 Iowa 479, 54 N. W. 472; Hershey *v.* Botna Valley State Bank, 89 Iowa 740, 55 N. W. 342.

6. See the statutes of the several states. And see the following cases:

Arkansas.— Du Val *v.* Johnson, 39 Ark. 182.

Georgia.— Perry *v.* Perry, 103 Ga. 706, 30 S. E. 663.

Illinois.— Boyland *v.* Boyland, 18 Ill. 551.

Iowa.— Spencer *v.* Berns, 114 Iowa 126, 86 N. W. 209; Diltz *v.* Chambers, 2 Greene 479.

Louisiana.— Sparks *v.* Weatherby, 16 La. 594.

Minnesota.— Brigham *v.* Connecticut Mut. L. Ins. Co., 79 Minn. 350, 82 N. W. 668; Temple *v.* Norris, 53 Minn. 286, 55 N. W. 133, 20 L. R. A. 159; Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342.

Mississippi.— Tomlinson *v.* Hoyt, 1 Sm. & M. 515.

Missouri.— Stewart *v.* Stringer, 41 Mo. 400, 97 Am. Dec. 278; Dobbins *v.* Thompson, 4 Mo. 118.

Pennsylvania.— Biles *v.* Basler, 24 Pa. Co. Ct. 3.

Canada.— *In re* Barron, 33 Can. L. J. N. S. 297.

See 40 Cent. Dig. tit. "Process," § 91.

The term "family," as used in the act, regulating the service of process, is not confined to persons under defendant's control or in his employ; thus, a widowed mother, who resides with her son, is a member of his family, within the meaning of the statute. Ellington *v.* Moore, 17 Mo. 424. Under the code of procedure, service of process may be made upon two minor defendants by leaving a copy with their mother as a member of the family of each. Weber *v.* Weber, 49 Mo. 45. Va. Code (1887), § 3207 (Va. Code (1904), p. 1684), authorizes substituted service by delivering a copy at defendant's usual place of abode, and giving information of its purport to his wife or any person found there, "who is a member of his family," and above the age of sixteen years. It was held that such section should be construed as requiring that the wife should be a member of defendant's family in order to be entitled to receive the process, so that a return showing service by leaving a copy with defendant's wife, but not stating that she was a member of defendant's family, is insufficient. King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676, 85 C. C. A. 348].

Person living in the house.—Under La. Code Pr. art. 189, authorizing constructive service of process upon defendant by leaving it at his domicile, with a person of suitable age, "living in the house," a citation served upon a person other than defendant, who is only transiently at defendant's domicile, and does not reside there, is fatally defective. Lewis *v.* Smith, 24 La. Ann. 617.

Leaving with plaintiff.— Service of a summons, made by leaving a copy of the original at defendant's dwelling-house with an adult member of his family, is void, if such adult member is plaintiff in the action. Rowan *v.* Ryan, 5 Lack. Leg. N. (Pa.) 321.

7. Kimbel *v.* Villella, 20 Pa. Co. Ct. 18.

It need not be an adult person.— Conrad *v.* Johnson, 25 Ind. 487 (sixteen years of age is sufficient); Biles *v.* Basler, 24 Pa. Co. Ct. 3.

A person fourteen years old is *prima facie* of "suitable age and discretion" under the statute. Temple *v.* Norris, 53 Minn. 286, 55 N. W. 133, 20 L. R. A. 159.

8. Pyles *v.* Beall, 37 Fla. 557, 20 So. 778.

9. Burbage *v.* American Nat. Bank, 95 Ga. 503, 20 S. E. 240. *Compare* People *v.* Craft, 7 Paige (N. Y.) 325.

10. Barwick *v.* Rouse, 53 Fla. 643, 43 So. 753.

11. Currier *v.* Gilman, 55 N. H. 364.

12. Du Val *v.* Johnson, 39 Ark. 182; Barrett *v.* Black, 25 Ga. 151; Abbee *v.* Higgins, 2 Greene (Iowa) 535; South Carolina Bank

g. In Case of Several Defendants. The statutory service must be complete as to each one of several defendants.[13]

3. Service by Leaving Copy With Agent or Attorney. Statutes sometimes provide for service upon resident agents of non-resident parties, particularly when the latter are engaged in business within the court's jurisdiction,[14] or upon the attorney of defendant,[15] or upon the resident agents of certain classes of principals,[16] or upon the resident agents of absentee defendants;[17] but such methods of service are invalid without statutory authority.[18] Statutes also sometimes permit individuals to designate persons upon whom service of process may be

v. Simpson, 2 McMull. (S. C.) 352; Cruikshanks *v.* Frean, 3 McCord (S. C.) 84.

13. Stewart *v.* Stringer, 41 Mo. 400, 97 Am. Dec. 278.

A copy must be left for each even though they all live together. Rogers *v.* Buchanan, 58 N. H. 47. See also Hutchens *v.* Latimer, 5 Ind. 67. Where substituted service is attempted in an action on a joint contract, copies of the summons must be left at the usual place of abode of each of defendants, whether they reside at the same house or live separately. Butts *v.* Francis, 4 Conn. 424.

14. See the statutes of the several states. And see the following cases:

Georgia.— Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426, attorney at law or in fact. Service of process cannot be perfected by service on one described as the attorney of defendant in lieu of serving defendant himself, it appearing that he has a legal residence in the state where service can be perfected on him, nor can the presiding judge by order authorize service on his attorney and by sending a copy by registered mail to defendant, although he may be absent from the state on business for an indefinite period. Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469.

Indiana.— Behn *v.* Whitney, 125 Ind. 599, 25 N. E. 187; Rauber *v.* Whitney, 125 Ind. 216, 25 N. E. 186.

Iowa.— Barnabee *v.* Holmes, 115 Iowa 581, 88 N. W. 1098.

Kentucky.— Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419, 25 Ky. L. Rep. 795.

Massachusetts.— Fall River *v.* Riley, 140 Mass. 488, 5 N. E. 481; Gardner *v.* Barker, 12 Mass. 36.

Pennsylvania.— Bumpus *v.* Hardenburg, 3 Pa. Dist. 27; Vankirk *v.* Wetherill, 1 Leg. Gaz. 131; Tyack *v.* Grove, 1 Woodw. 99.

Vermont.— Folsom *v.* Conner, 49 Vt. 4.

Wisconsin.— Frink *v.* Sly, 4 Wis. 310.

United States.— Alaska Commercial Co. *v.* Debney, 144 Fed. 1, 74 C. C. A. 374, 75 C. C. A. 131 [*reversing* 2 Alaska 303].

England.— La Compagnie Gen. Transatlantic *v.* Law, [1899] A. C. 451, 8 Aspin. 550, 68 L. J. P. 104, 80 L. T. Rep. N. S. 845.

See 40 Cent. Dig. tit. "Process," § 92.

Deceased defendant.— Ky. Civ. Code Pr. § 51, subd. 6, providing for the service of process on the resident agent of a non-resident, does not authorize a judgment against a non-resident defendant who was dead when suit was instituted, although process was served on a resident agent in charge of his business. Soper *v.* Clay City Lumber Co., 53 S. W. 267, 21 Ky. L. Rep. 933.

15. Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426 (in case of non-resident defendant); Kimball *v.* Sweet, 170 Mass. 538, 51 N. E. 116 (in case of a cross action against plaintiff in the original action); Thomas *v.* Curtis, 20 Wend. (N. Y.) 675; Levinson *v.* Oceanic Steam Nav. Co., 15 Fed. Cas. No. 8,292, 17 Alb. L. J. 285. See Muir *v.* Guinane, 9 Ont. L. Rep. 324, 5 Ont. Wkly. Rep. 324.

Attorney in another suit.— A non-resident defendant cannot be brought under the jurisdiction of the court by service upon a resident attorney at law merely employed to represent defendant in another suit. Shainwald *v.* Davids, 69 Fed. 701. *Contra*, see Chalmers *v.* Hack, 19 Me. 124.

Where two attorneys are in partnership doing business in the name of one whose name appears as attorney of record for defendants, service on the other is sufficient. Lansing *v.* McKillup, 7 Cow. (N. Y.) 416.

16. Maysville, etc., R. Co. *v.* Ball, 108 Ky. 241, 56 S. W. 188, 21 Ky. L. Rep. 1693 (common carrier); Adams Express Co. *v.* Crenshaw, 78 Ky. 136 (common carrier); Lhoneux *v.* Hong Kong, etc., Banking Corp., 33 Ch. D. 446, 55 L. J. Ch. 758, 54 L. T. Rep. N. S. 863, 34 Wkly. Rep. 753; O'Neil *v.* Clason, 46 L. J. Q. B. 191.

Service upon agent of corporation, foreign or domestic see *infra*, VI, A, 6, d; VI, B, 5, b.

17. Farmer *v.* Hafley, 38 La. Ann. 232; New Orleans First Municipality *v.* Christ Church, 3 La. Ann. 453; Cazeau *v.* Lesparre, 17 La. 498; Pilie *v.* Kenner, 16 La. 570; Nelson *v.* Omaley, 6 Me. 218. See, generally, Absentees, 1 Cyc. 208.

18. *Connecticut.*—Bennet *v.* Howard, 2 Day 416.

Georgia.—Jones *v.* Georgia Southern R. Co., 66 Ga. 558.

Iowa.— Brown *v.* Newman, 13 Iowa 546.

Louisiana.— Fuselier *v.* Robin, 4 La. Ann. 61; Jacobs *v.* Ducros, 7 Rob. 115; Holliday *v.* McCulloch, 3 Mart. N. S. 176.

Maine.— Holmes *v.* Fox, 19 Me. 107.

Montana.— Davidson *v.* Clark, 7 Mont. 100, 14 Pac. 663.

Texas.— Gamble *v.* Dalrymple, 28 Tex. 593.

United States.—Mason *v.* Connors, 129 Fed. 831.

Canada.— Kerr *v.* Miller, 8 Dowl. P. C. 322; Parmeter *v.* Reed, 7 Dowl. P. C. 545.

See 40 Cent. Dig. tit. "Process," § 92.

made in their behalf during their absence from the state.[19] Under the civil law the codes sometimes allow the service of citation upon an officer known as a curator *ad hoc* appointed to represent an absentee defendant in suits concerning interests in property.[20] But the process must in all these cases run against the principal as defendant, and not against the agent or attorney.[21]

4. Service by Mail. Service by mail is provided for in some statutes, and, as in other forms of statutory service, a strict compliance with the terms of the statute is necessary.[22]

5. The Copy Served. Inasmuch as there appears to be no substantial difference in the rules as to the sufficiency of copies of process delivered and those left at the residence, this subject has been treated in full in connection with personal service.[23]

D. Service by Publication — 1. In General. Statutes everywhere exist authorizing constructive service of process by publication in certain cases where personal service cannot be had.[24] These statutes are in derogation of the common law and hence are to be strictly construed and literally observed.[25]

2. Actions in Which Such Service May Be Employed. The statutes usually provide in substance that such service may be made by publication in all actions which have for their immediate object the enforcement or establishment of claims to or rights in specific real or personal property which is subject to the jurisdiction of the court, although they are frequently much more detailed and cover specific-

19. Lyster *v.* Pearson, 6 Misc. (N. Y.) 618, 26 N. Y. Suppl. 77 [*reversed* on other grounds in 7 Misc. 98, 27 N. Y. Suppl. 399].

Agreement of parties.— Parties may agree that service upon designated agents shall be good service upon themselves as principals. Montgomery *v.* Liebenthal, [1898] 1 Q. B. 487, 67 L. J. Q. B. 313, 78 L. T. Rep. N. S. 211, 14 T. L. R. 201, 46 Wkly. Rep. 292; Tharsis Sulphur, etc., Co. *v.* Societe des Metaux, 58 L. J. Q. B. 435, 60 L. T. Rep. N. S. 924, 38 Wkly. Rep. 78.

20. McDonald *v.* Vaughan, 13 La. Ann. 405. See Grassmeyer *v.* Beeson, 13 Tex. 524.

Service upon absentees generally see Absentees, 1 Cyc. 208.

21. Jacobs *v.* Frere, 28 La. Ann. 625; Waddill *v.* Payne, 23 La. Ann. 773.

22. Smith *v.* Smith, 4 Greene (Iowa) 266; Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106; Fisk *v.* Hunt, 33 Oreg. 424, 54 Pac. 660.

In Kentucky the statute provides that a warning order attorney shall be appointed who shall make diligent efforts to inform a defendant by mail. Ball *v.* Poor, 4 Ky. L. Rep. 746.

Registered mail.— Service may be made upon a non-resident defendant by registered mail. Brennen *v.* Redfern, 11 Pa. Dist. 248.

23. See *supra*, II, B, 10, c.

If the statute requires a certified copy of the complaint to be left with the summons, no jurisdiction is acquired where the copy of the complaint is not certified. Heatherly *v.* Hadley, 2 Oreg. 269.

24. See the statutes of the several states. And see the following cases:

Arkansas.— Parsons *v.* Paine, 26 Ark. 124.

Iowa.— Robertson *v.* Young, 10 Iowa 291.

Mississippi.— Griffith *v.* Vertner, 5 How. 736.

Texas.— Byrnes *v.* Sampson, 74 Tex. 79, 11 S. W. 1073.

United States.— Morris *v.* Graham, 51 Fed. 53; American Freehold Land-Mortg. Co. *v.* Benson, 33 Fed. 456; Salisbury *v.* Sands, 21 Fed. Cas. No. 12,251, 2 Dill. 270.

Curator ad hoc.— Under the civil law absentee defendants in actions substantially *in rem* are brought in by the appointment of and service upon a *curator ad hoc*, notice of which appointment is given by publication. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108; Mason *v.* Benedict, 43 La. Ann. 397, 8 So. 930; Young *v.* Upshur, 42 La. Ann. 362, 7 So. 557, 21 Am. St. Rep. 381; Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555; Wunstel *v.* Landry, 39 La. Ann. 312, 1 So. 393. See also Absentees, 1 Cyc. 208.

25. *Alabama.*— Sayre *v.* Elyton Land Co., 73 Ala. 85.

California.— Cohn *v.* Kember, 47 Cal. 144; Jordan *v.* Giblin, 12 Cal. 100.

Colorado.— Beckett *v.* Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399; Clayton *v.* Clayton, 4 Colo. 410.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

Iowa.— Lot Two *v.* Swetland, 4 Greene 465.

Michigan.— Granger *v.* Judge Super. Ct., 44 Mich. 384, 6 N. W. 848.

Minnesota.—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 9 Am. St. Rep. 376; Ware *v.* Easton, 46 Minn. 180, 48 N. W. 775.

Mississippi.— Foster *v.* Simmons, 40 Miss. 585.

Missouri.— Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971.

Nebraska.— Stull *v.* Masilonka, 74 Nebr. 309, 104 N. W. 188, 108 N. W. 166.

New York.— Fink *v.* Wallach, 47 Misc. 247, 95 N. Y. Suppl. 872 [*reversed* on other grounds in 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543]; Wilson *v.* Lange, 40 Misc. 676,

ally almost every form of action which is substantially *in rem*;[26] but the property to be affected must be within the territorial jurisdiction of the court if service by publication is to be effectual.[27] Such statutes are within the legislative powers of the several states.[28] Among those actions in the nature of proceedings *in rem*, in which service by publication has been held proper, are an action to fix a trust in lands,[29] an action against a simple contract debtor to subject realty to payment of debts,[30] a suit for the recovery of a fund in the possession of a resident party, although claimed by a non-resident assignee,[31] an action to set aside a judgment annulling a marriage on the ground of fraud,[32] an action by a state to recover money deposited by a prisoner with a sheriff in lieu of bail,[33] an action to quiet,[34] or remove a cloud from,[35] title to real property, a suit for divorce and alimony, where it is sought to make the decree a charge upon property lying within the

83 N. Y. Suppl. 180; Haight *v.* Husted, 4 Abb. Pr. 348.

North Carolina.— Wheeler *v.* Cobb, 75 N. C. 21.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162.

Washington.— Paxton *v.* Daniell, 1 Wash. 19, 23 Pac. 441; Garrison *v.* Cheeney, 1 Wash. Terr. 489.

Wisconsin.— Hafern *v.* Davis, 10 Wis. 501.

United States.— Cohen *v.* Portland Lodge, No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483 [*affirming* 144 Fed. 266]; Batt *v.* Procter, 45 Fed. 515.

26. See the statutes of the several states. And see the following cases:

Colorado.— Hanscom *v.* Hanscom, 6 Colo. App. 97, 39 Pac. 885.

District of Columbia.— Jones *v.* Rutherford, 26 App. Cas. 114, a check drawn by the treasurer of the United States in settlement of a claim against the government is personal property within such a statute.

Iowa.— Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941; Robertson *v.* Young, 10 Iowa 291.

Michigan.— Williams *v.* Flint, etc., R. Co., 116 Mich. 392, 74 N. W. 641.

Minnesota.— Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

Missouri.— Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; Clark *v.* Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412.

Nebraska.— Cheney *v.* Harding, 21 Nebr. 68, 32 N. W. 64.

New York.— Miller *v.* Jones, 67 Hun 281, 22 N. Y. Suppl. 86; Von Hesse *v.* Mackaye, 55 Hun 365, 8 N. Y. Suppl. 894 [*affirmed* in 121 N. Y. 694, 24 N. E. 1099].

Ohio.— Hinch *v.* D'Utassy, 1 Ohio S. & C. Pl. Dec. 372.

Texas.— Veeder *v.* Gilmer, (Civ. App. 1907) 105 S. W. 331, holding that personal service is not necessary in an action to correct an acknowledgment of a deed upon which the title to land depends.

Virginia.— Clem *v.* Given, 106 Va. 145, 55 S. E. 537, holding that under the Virginia statutes proceedings quasi *in rem* were included, and that in an action for specific performance of a contract of sale of real estate brought against a non-resident executor of the widow and children of the vendor, it was proper to proceed against the executor by publication.

Wisconsin.—Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

United States.—Evans *v.* Scribner, 58 Fed. 303 (holding that service might be had upon an absent defendant when the suit was brought to cancel for fraud a deed of land situated within the district, but that such service could not be had when the suit was for the purpose of setting aside alleged fraudulent transfers of life insurance policies issued by a foreign company, and which were not within the district, although the company in compliance with the state statute had deposited bonds with the controller-general of the state, especially when the company acknowledged its liability on the policy and offered to pay the amount thereof into court); Non-Magnetic Watch Co. *v.* Horlogere Suisse Assoc., 44 Fed. 6.

See 40 Cent. Dig. tit. "Process," § 100.

27. Bryan *v.* University Pub. Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; Moyer *v.* Koontz, 103 Wis. 22, 79 N. W. 50, 74 Am. St. Rep. 837; Evans *v.* Scribners, 58 Fed. 303.

28. Roller *v.* Holly, 176 U. S. 398, 20 S. Ct. 410, 44 L. ed. 520; Arndt *v.* Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. ed. 918; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

29. Chicago, etc., Bridge Co. *v.* Anglo-American, etc., Co., 46 Fed. 584.

30. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Hencke *v.* Twomey, 58 Minn. 550, 60 N. W. 667.

31. Taylor *v.* Security Mut. L. Ins. Co., 38 Misc. (N. Y.) 575, 77 N. Y. Suppl. 1012.

32. Everett *v.* Everett, 22 N. Y. App. Div. 473, 47 N. Y. Suppl. 994, holding that the judgment is to be deemed a *res* remaining within the jurisdiction of the court.

33. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

34. Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941; Miller *v.* Davison, 31 Iowa 435; Dillon *v.* Heller, 39 Kan. 599, 18 Pac. 693; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867.

35. Mitchener *v.* Holmes, 117 Mo. 185, 22 S. W. 1070; Morris *v.* Graham, 51 Fed. 53.

court's jurisdiction,[36] a suit to foreclose a mortgage[37] or to enforce a lien,[38] an action to trace trust funds into specific property,[39] an action to reform the description of land in a deed,[40] a suit for an accounting in respect to an estate within the jurisdiction of the court,[41] an action to construe a will,[42] an action to set aside a conveyance of realty,[43] an action to cancel a deed of real and personal property,[44] an action to set aside an assignment of a patent,[45] an action to enforce a transfer of shares of stock,[46] and an action for specific performance.[47] But if claims merely personal in their nature are joined with claims involving real estate, service cannot be had by publication so as to authorize judgment upon such personal claims,[48] although the mere fact that a party asks a greater measure of relief than can be given without personal service does not deprive the court of jurisdiction to grant such relief as is proper under service by publication.[49]

36. Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626; Hanscom *v.* Hanscom, 6 Colo. App. 97, 39 Pac. 885; Twing *v.* O'Meara, 59 Iowa 326, 13 N. W. 321; Harshberger *v.* Harshberger, 26 Iowa 503; Wesner *v.* O'Brien, 56 Kan. 724, 44 Pac. 1090, 54 Am. St. Rep. 604, 32 L. R. A. 289. *Contra*, Mussey *v.* Stimmel, 15 Ohio Cir. Ct. 439, 8 Ohio Cir. Dec. 237; Bunnell *v.* Bunnell, 25 Fed. 214.

37. Robertson *v.* Young, 10 Iowa 291; Mack *v.* Austin, 67 Kan. 36, 72 Pac. 551; Martin *v.* Pond, 30 Fed. 15.

A personal judgment cannot be rendered. Wood *v.* Stanberry, 21 Ohio St. 142.

38. Hoye Coal Co. *v.* Colvin, 83 Ark. 528, 104 S. W. 207; Morgan *v.* Mutual Ben. L. Ins. Co., 189 N. Y. 477, 82 N. E. 438 [*affirming* 119 N. Y. App. Div. 645, 104 N. Y. Suppl. 185] (holding that where a foreign insurance company doing business in the state under the laws thereof issued a policy to a resident who with the company's consent assigned it to another resident as collateral security for advanced premiums, and the assignee died a resident of the state and his trustees held the policy as an asset of his estate, the subject-matter of an action by the trustees against the company and the beneficiaries to recover the amount of premiums advanced was personal property within the state, within N. Y. Code Civ. Proc. § 438, subd. 5, authorizing the service of summons on a non-resident defendant by publication, where the complaint demands judgment that defendant be excluded from an interest in personal property within the state, and the non-resident beneficiaries may be served by publication); Chesley *v.* Morton, 9 N. Y. App. Div. 461, 41 N. Y. Suppl. 463.

39. Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108.

40. Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134.

41. Devlin *v.* Roussel, 36 N. Y. App. Div. 87, 55 N. Y. Suppl. 386.

42. Dillavou *v.* Dillavou, 130 Iowa 405, 106 N. W. 949.

43. Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4; Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

44. Robinson *v.* Kind, 23 Nev. 330, 47 Pac. 1, 977.

45. Miller *v.* Jones, 67 Hun (N. Y.) 281, 22 N. Y. Suppl. 86. But see Non-Magnetic Watch Co. *v.* Horlogere Suisse Assoc., 44 Fed. 6, where a patent right was held to be property not capable of being considered within the territorial jurisdiction of a court.

46. Sohege *v.* Singer Mfg. Co., (N. J. Ch. 1907) 68 Atl. 64 (so holding where the court had enjoined transfer of the shares and appointed receivers of them); Lockwood *v.* Brantly, 31 Hun (N. Y.) 155; Ryan *v.* Seaboard, etc., R. Co., 83 Fed. 889. But in a suit to establish their rightful title and ownership by persons claiming equitable title to stock of a Michigan corporation a federal court of that district cannot, by publication of notice, acquire jurisdiction of non-resident holders of the legal title to such stock. Jellenik *v.* Huron Copper-Min. Co., 82 Fed. 778.

47. *California.*— Seculovich *v.* Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106.

District of Columbia.— Simmons *v.* Fry, 19 D. C. 472.

Kansas.— Horner *v.* Ellis, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446, holding, however, that prior to the adoption of Laws (1903), c. 384, an action to compel specific performance of an agreement to convey land, where defendant's obligation was in contract merely, was *in personam* and not *in rem*, and that jurisdiction could not be acquired by publication.

Montana.— Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 76 Pac. 967, 67 L. R. A. 940.

Virginia.— Clem *v.* Givens, 106 Va. 145, 55 S. E. 567.

United States.— Boswell *v.* Otis, 9 How. 336, 13 L. ed. 164; Porter Land, etc., Co. *v.* Baskin, 43 Fed. 323.

"If the defendant appears, the cause becomes mainly a suit *in personam*. But if there is no appearance of defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*." Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 495, 78 Pac. 967, 67 L. R. A. 940 [*quoting* Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931].

48. Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

49. Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108; Chesley *v.* Morton, 9 N. Y. App. Div. 461, 41 N. Y. Suppl. 463; Porter Land, etc., Co. *v.* Baskin, 43 Fed. 323. Publication is

3. Persons Upon Whom Service May Be Made. Ordinarily statutes authorizing service by publication provide that such service may be made upon a non-resident,[50] or upon a resident who has left the state with intent to defraud his creditors or to avoid service, or is concealed in the state for that purpose,[51] or upon one who cannot after due diligence be found within the state.[52] One who is but temporarily absent from the state cannot be proceeded against as a non-resident,[53] nor can one be served as a non-resident merely because it cannot be ascertained where his residence is.[54] It is also sometimes provided that such service may be resorted to when defendant's last place of residence is in the state, but his residence, at the time, cannot be ascertained.[55] And inasmuch as no personal judgment can be rendered on mere constructive service of non-resident defendants, it is frequently provided that the non-resident served in this way must have property or debts owing to him within the state.[56] But a defendant does not have property within the state within the meaning of the statutes when it is merely brought temporarily

not allowable in the case of an action to enforce the performance of a contract for the sale of land where the complainant prays as condition precedent to the conveyance of the land that defendant be required to furnish him an abstract as agreed and to pay damages for delay in performance. Adams *v.* Heckscher, 83 Fed. 281.

50. *California.*— Parson *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Georgia.— Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469.

Indiana.— Johnson *v.* Patterson, 12 Ind. 471.

Nebraska.—Topliff *v.* Richardson, 76 Nebr. 114, 107 N. W. 114; Wood Harvester Co. *v.* Dobry, 59 Nebr. 590, 81 N. W. 611.

New Hampshire.— Martin *v.* Wiggin, 67 N. H. 196, 29 Atl. 450.

New York.— Bixby *v.* Smith, 3 Hun 60.

Texas.—Kitchen *v.* Crawford, 13 Tex. 516; Kilmer *v.* Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090.

Wisconsin.—Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

United States.— Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; Palmer *v.* McCormick, 30 Fed. 82; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453; Collinson *v.* Teal, 6 Fed. Cas. No. 3,020, 4 Sawy. 241.

See 40 Cent. Dig. tit. "Process," § 101.

Resident synonymous with inhabitant.— In the law of process and service thereof, the term "resident" is generally synonymous with "inhabitant." Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

51. *California.*— Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698.

Iowa.— Lyon *v.* Comstock, 9 Iowa 306.

Kansas.— Cole *v.* Hoeburg, 36 Kan. 263, 13 Pac. 275.

Nebraska.—Walter A. Wood Harvester Co. *v.* Dobry, 59 Nebr. 590, 81 N. W. 611.

New York.— Towsley *v.* McDonald, 32 Barb. 604.

See 40 Cent. Dig. tit. "Process," § 101.

A township which fails to elect, or permit or allow its trustee, clerk or treasurer to qualify or designate, some person on whom service can be made, does not "conceal" itself, within the meaning of Kan. Code, §§ 429, 440, so as to permit service by publication. Brockway *v.* Oswego Tp., 32 Kan. 221, 4 Pac. 79.

Refusal of admission.— The mere failure by two different persons, on the same day, to obtain admittance to the apartments occupied by persons on whom summons is sought to be served is not sufficient to show an intent to avoid service. Foster *v.* Moore, 68 Hun (N. Y.) 526, 22 N. Y. Suppl. 1089.

Openly avoiding service of a summons by eluding the approach of the officer is not keeping concealed, within a provision authorizing a service by publication on defendant, being a resident of the state and keeping himself concealed with intent to avoid the service of the summons. Van Rensselaer *v.* Dunbar, 4 How. Pr. (N. Y.) 151.

To establish the intent to defraud, it must appear that defendant had some property which could be reached by suit. Towsley *v.* McDonald, 32 Barb. (N. Y.) 604.

52. Braly *v.* Seaman, 30 Cal. 610; Bixby *v.* Smith, 3 Hun (N. Y.) 60; Peck *v.* Cook, 41 Barb. (N. Y.) 549.

Sufficiency of showing.— Where the sheriff was unable to find defendant at his home, and was told there in June that he was out of the state and in July plaintiff was informed that defendant could probably be found at a certain place, and plaintiff unsuccessfully tried to find him there, and defendant's relatives could not tell where he could be found, an order for service by publication was justified. Hatfield *v.* Malcolm, 71 Hun (N. Y.) 51, 24 N. Y. Suppl. 596.

The judge and not the affiant must be satisfied that defendant is not a non-resident and that personal service cannot be made. Evans *v.* Weinstein, 124 N. Y. App. Div. 316, 108 N. Y. Suppl. 753.

53. McKim *v.* Odom, 3 Bland (Md.) 407.

54. Close *v.* Van Husen, 6 How. Pr. (N. Y.) 157.

In Texas it is sufficient if defendant's residence is unknown. Kilmer *v.* Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090.

55. Close *v.* Van Husen, 6 How. Pr. (N. Y.) 157.

56. *New York.*—Fiske *v.* Anderson, 33 Barb. 71; Fiske *v.* Anderson, 12 Abb. Pr. 8; Lefferts *v.* Harris, 10 Abb. Pr. N. S. 2 note.

within the state.[57] The person sought to be served by publication must be a necessary or proper party.[58] Unknown defendants are summoned by publication under separate statutes authorizing such proceedings.[59]

4. Character of the Jurisdiction Acquired. It may be said as a general rule that where suit is brought to determine a non-resident defendant's personal rights and obligations, that is, where it is purely *in personam*, service by publication is ineffectual for any purpose, since no personal judgment can be rendered in such case;[60] but such service, when authorized by statute, is effectual so far as the proceeding is *in rem*, or quasi *in rem*, and gives the court jurisdiction over property within its territorial jurisdiction.[61] In proceedings quasi *in rem* the court usually acquires jurisdiction by attaching the property of defendant, whereas in proceedings strictly *in rem* no seizure of the property is necessary for jurisdictional pur-

North Carolina.— Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

Ohio.— Williams *v.* Welton, 28 Ohio St. 451.

South Carolina.— Lesterjette *v.* Ford, 1 McMull. 89 note.

South Dakota.—Bunker *v.* Taylor, 13 S. D. 433.

Wisconsin.— Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

See 40 Cent. Dig. tit. "Process," § 101.

Contra.— Anderson *v.* Goff, 72 Cal. 65, 69, 13 Pac. 73, 1 Am. St. Rep. 34, where it is said: "Our statute gives the right to service of summons upon defendants in all cases where they are non-residents of the state, without reference to the fact of their having or not having property here. The effect of a judgment thus obtained is quite another thing."

57. Galusha *v.* Flour City Nat. Bank, 4 Thomps. & C. (N. Y.) 68; Haight *v.* Husted, 4 Abb. Pr. (N. Y.) 348.

58. *California.*—Ligare *v.* California South. R. Co., 76 Cal. 610, 18 Pac. 777.

Colorado.— Frybarger *v.* McMillan, 15 Colo. 349, 25 Pac. 713.

Indiana.— Dowell *v.* Lahr, 97 Ind. 146; Hamilton *v.* Barricklow, 96 Ind. 398.

Kansas.— Mack *v.* Austin, 67 Kan. 36, 72 Pac. 551.

Minnesota.— Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

South Carolina.— Commercial Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

59. See the statutes of the several states. And see the following cases:

Alabama.— Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346, holding that under Code (1896), § 690, providing that where it is necessary to make persons whose names are unknown defendants to a bill the register must make publication as in case of non-residents, describing such unknown parties as near as may be by the character in which they are sued, and with reference to their title or interest in the subject-matter, an order of publication is sufficient to give jurisdiction, although containing no reference to the subject-matter of the suit and the title and interest of such defendants therein.

Arkansas.— Allen *v.* Smith, 25 Ark. 495.

California.— Moss *v.* Mayo, 23 Cal. 421.

District of Columbia.— Simmons *v.* Fry, 19 D. C. 472.

Iowa.— Guise *v.* Early, 72 Iowa 283, 33 N. W. 683.

Minnesota.—Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117; Ware *v.* Easton, 46 Minn. 180, 48 N. W. 775; Shepherd *v.* Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212.

Mississippi.— Kirkland *v.* Texas Express Co., 57 Miss. 316; Reed *v.* Gregory, 46 Miss. 740.

Missouri.— State *v.* Staley, 76 Mo. 158. See also Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979, holding a petition and order for publication in an action to enforce a lien for taxes insufficient.

Nebraska.— Stull *v.* Masilonka, 74 Nebr. 309, 104 N. W. 188, 108 N. W. 166.

New York.— Piser *v.* Lockwood, 30 Hun 6.

60. *Iowa.*— Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Smith *v.* Griffin, 59 Iowa 409, 13 N. W. 423.

New Jersey.—Lanning *v.* Twining, 71 N. J. Eq. 573, 64 Atl. 466.

North Carolina.— Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

Tennessee.—Farmers', etc., Bank *v.* Carter, 88 Tenn. 279, 12 S. W. 545.

Washington.— Paxton *v.* Daniell, 1 Wash. 19, 23 Pac. 441.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

The garnishment of the maker of a negotiable note, at the suit of creditors of the payee, because he has fraudulently conveyed his property, cannot give the state court jurisdiction to bring in the alleged fraudulent holder by publication only. Hauf *v.* Wilson, 31 Fed. 384.

61. *Kansas.*— Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

Minnesota.— Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967.

North Dakota.— Hartzell *v.* Viger, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 457.

Virginia.— Clem *v.* Given, 106 Va. 145, 55 S. E. 567.

Wisconsin.— Jarvis *v.* Barrett, 14 Wis. 591.

United States.— Arndt *v.* Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. ed. 918; Morris *v.* Graham, 51 Fed. 53; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46

poses.[62] Some statutes do not limit the use of service by publication against non-residents to actions in the nature of proceedings *in rem*, but while such service may be employed as provided by statute in proceedings *in personam*, it will not result in giving the court jurisdiction if defendant does not appear.[63] Service by publication may be sufficient to give jurisdiction over the person of a resident defendant,[64] although it has been held that such a proceeding does not constitute due process of law where defendant can be found within the state.[65]

5. Prerequisites to Service by Publication — a. In General. The existence of facts disclosing the right, under the statute, to make service by publication, should appear on the files and records of the court, and the form in which this showing is to be made, like the substance of the showing itself, is a matter regulated by statute. There is a good deal of variety in this respect among the statutes of various jurisdictions.[66]

b. Return of Not Found. Under some statutes a summons must be issued and returned "not found" before publication may be resorted to,[67] while under other statutes this is not necessary.[68] Again, such service and return, under other statutes, is necessary only when defendant is or is supposed to be a resident.[69] Some statutes require such return in the case of joint defendants, some of whom are within and some without the jurisdiction, in order to authorize service by publication.[70] A return of not found in order to form the foundation for publication must not be made until the time has expired within which personal service might be had;[71] but publication need not take place at once thereafter, and an interim of several months between the return and the publication has been held

Fed. 584; Bennett *v.* Fenton, 41 Fed. 283, 10 L. R. A. 500; Palmer *v.* McCormick, 28 Fed. 541.

62. Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122; Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Attachment not indispensable.— "A writ of attachment is the usual and familiar method of conferring jurisdiction in such cases, but is not the only one. There is no magic about the writ which should make it the exclusive remedy. The same legislative power which provided it, can devise some other, and declare that it shall have the same force and effect. . . . The legislature could, therefore, substitute the service of summons by publication founded on affidavit that the defendant had property subject to the process of the court, for the writ of attachment, and give the court power to pronounce a judgment which should be effectual against such property." Jarvis *v.* Barrett, 14 Wis. 591, 595. See also Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550.

63. Kirkpatrick *v.* Post, 53 N. J. Eq. 591, 32 Atl. 267 [*affirmed* in 53 N. J. Eq. 641, 33 Atl. 1059]; Clarke *v.* Boreel, 21 Hun (N. Y.) 594. *Compare* McMullen *v.* Guest, 6 Tex. 275, where in a purely personal action commenced by publication against a non-resident the court said: "The non-residence of the defendant constitutes no objection to the jurisdiction, however the judgment might be regarded if sought to be enforced in a foreign State."

64. Beard *v.* Beard, 21 Ind. 321; Fernandez *v.* Casey, 77 Tex. 452, 14 S. W. 149; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. (U. S.) 58, 22 L. ed. 70.

65 Bear Lake County *v.* Budge, 9 Ida. 708, 75 Pac. 614, 108 Am. St. Rep. 179; Bardwell *v.* Collins, 44 Minn. 97, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152; Brown *v.* Levee Com'rs, 50 Miss. 468.

66. See the statutes of the several states. And see the cases cited *infra*, II, D, 5, b *et seq.*

67. *Arkansas.*— Turnage *v.* Fisk, 22 Ark. 286.

Illinois.— Smith *v.* Trimble, 27 Ill. 152.

Iowa.— Trask *v.* Key, 4 Greene 372; Pinkney *v.* Pinkney, 4 Greene 324.

Kentucky.— Greenup *v.* Bacon, 1 T. B. Mon. 108.

Michigan.— Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

Missouri.— Pitkin *v.* Flagg, 198 Mo. 646, 97 S. W. 162; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971; State *v.* Finn, 87 Mo. 310.

New Hampshire.— Burney *v.* Hodgdon, 66 N. H. 338, 29 Atl. 493.

See 40 Cent. Dig. tit. "Process," § 103.

68. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903 [*overruling* Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134]; Best *v.* British, etc., Mortg. Co., 128 N. C. 351, 38 S. E. 923; Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

69. Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971; Smith *v.* Whittlesey, 19 Ohio Cir. Ct. 412, 10 Ohio Cir. Dec. 377.

70. Smith *v.* Whittlesey, 19 Ohio Cir. Ct. 412, 10 Ohio Cir. Dec. 377.

71. Clayton *v.* Clayton, 4 Colo. 410; Palmer *v.* Cowdrey, 2 Colo. 1; Pinkney *v.* Pinkney, 4

not to affect the validity of the latter,[72] although an unreasonable and unexplained delay may destroy the right to resort to publication.[73]

c. Filing Petition or Declaration. It is sometimes provided that a declaration or complaint must be filed before publication can be made, or an order therefor be given;[74] and this pleading is under some statutes required or permitted to contain a showing of facts disclosing the right to constructive service.[75] But unless required by statute such filing is not necessary as a prerequisite to service by publication.[76] If the petition must first be filed, it is in some states essential that it shall disclose a cause of action of which the court has jurisdiction.[77] Under some statutes it may appear either by affidavit or by a verified complaint or file that a cause of action exists,[78] or that defendant is a non-resident.[79] In some jurisdictions the petition on which service by publication is ordered must be sworn to.[80]

d. Affidavit For Order of Publication — (i) *NECESSITY.* It is almost universally provided that, as a prerequisite to service by publication, an affidavit shall be made and filed, showing the existence of facts authorizing recourse to that statutory substitute for personal service.[81] An affidavit may be sufficient even if made

Greene (Iowa) 324; Sweet *v.* Gibson, 123 Mich. 699, 83 N. W. 407; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158.

72. Richardson *v.* Wortman, 34 Colo. 374, 83 Pac. 381; Eagle Gold Min. Co. *v.* Bryarly, 28 Colo. 262, 65 Pac. 52.

73. Brunswick Hardware Co. *v.* Bingham, 110 Ga. 526, 35 S. E. 772, a delay of seven terms of court.

74. Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72; Anderson *v.* Coburn, 27 Wis. 558.

Failure to file is not a jurisdictional defect and can be cured by a *nunc pro tunc* order. Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543 [*reversing* 47 Misc. (N. Y.) 247, 95 N. Y. Suppl. 872].

75. McMahan *v.* Smith, 69 Ark. 591, 65 S. W. 459; Yolo County *v.* Knight, 70 Cal. 431, 11 Pac. 662; Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; State *v.* Staley, 76 Mo. 158; U. S. *v.* American Lumber Co., 80 Fed. 309.

76. Foster *v.* Henderson, 54 Iowa 220, 6 N. W. 186 [*overruling* Foster *v.* Henderson, (Iowa 1879) 1 N. W. 596; Billings *v.* Kothe, 49 Iowa 34].

When notice published fixes date of filing of the petition, such filing must be made as stated; but if the petition is in fact on file at the time of the first publication, even if filed after the date fixed in the notice, jurisdiction is acquired. Oliver *v.* Davis, 81 Iowa 287, 46 N. W. 1000.

77. Paget *v.* Stevens, 143 N. Y. 172, 38 N. E. 273; Montgomery *v.* Boyd, 60 N. Y. App. Div. 133, 70 N. Y. Suppl. 139; Haight *v.* Le Foncier de France, 84 N. Y. Suppl. 135.

78. Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777.

79. Wright *v.* Hink, 193 Mo. 130, 91 S. W. 933; Harbert *v.* Durden, 116 Mo. App. 512, 92 S. W. 746.

80. Charles *v.* Morrow, 99 Mo. 638, 12 S. W. 903; Brandow *v.* Vroman, 22 Misc. (N. Y.) 370, 50 N. Y. Suppl. 323 [*reversed* on other grounds in 29 N. Y. App. Div. 597, 51 N. Y. Suppl. 943]; McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

81. See the statutes of the several states. And see the following cases:

Arkansas.— Allen *v.* Smith, 25 Ark. 495; Coons *v.* Throckmorton, 25 Ark. 60.

California.— Weis *v.* Cain, (1903) 73 Pac. 980; People *v.* Pearson, 76 Cal. 400, 18 Pac. 424; People *v.* Mullan, 65 Cal. 396, 4 Pac. 348.

Illinois.— Millett *v.* Pease, 31 Ill. 377.

Indiana.—Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825.

Iowa.— Guinn *v.* Elliott, 123 Iowa 179, 98 N. W. 625; Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535; Bardsley *v.* Hines, 33 Iowa 157.

Kansas.— Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

Minnesota.— Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Brown *v.* St. Paul, etc., R. Co., 38 Minn. 506, 38 N. W. 698; Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836.

Missouri.— Pitkin *v.* Flagg, 198 Mo. 646, 97 S. W. 162 (holding that Rev. St. (1899) § 577, providing that where the sheriff makes a return of *non est*, the court on being satisfied that process cannot be served shall make an order of publication, does not require the court to examine the files and make orders of publication without suggestions from plaintiff's attorney); Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Murdock *v.* Hillyer, 45 Mo. App. 287.

Nebraska.— Murphy *v.* Lyons, 19 Nebr. 689, 28 N. W. 328.

New York.— Easterbrook *v.* Easterbrook, 64 Barb. 421; Waffle *v.* Goble, 53 Barb. 517.

North Carolina.— Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

North Dakota.—Pillsbury *v.* J. B. Streeter, Jr., Co., 15 N. D. 174, 107 N. W. 40.

Oklahoma.— Cordray *v.* Cordray, (1907) 91 Pac. 781, holding that where publication is relied on to confer jurisdiction the affi-

in another action.[82] It must be sufficient as to each one of the defendants sought to be served.[83] No presumptions can be indulged to sustain it when directly attacked.[84]

(II) *WHO MAY MAKE.* The statute frequently provides by whom the affidavit shall be made, whether by the party or his attorney or other person, and when there is such specific provision an affidavit is invalid if made by any one not so authorized.[85] If the statute makes no provision in regard to the matter, an affidavit by plaintiff,[86] or his attorney,[87] is sufficient, and it is not necessary in the latter case that the means of knowledge of the affiant should be stated.[88]

(III) *FORM OF AFFIDAVIT.* The affidavit must be properly sworn to,[89] and contain a proper jurat,[90] and it may ordinarily be made anywhere, within or without the state.[91] The want of a venue will not vitiate it if it clearly appears in what court, state, and county the case is pending,[92] although it has been held, on

davit as well as the publication notice are jurisdictional matters and both must comply with the statute.

Texas.— Kilmer *v.* Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090.

United States.— Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359; Bronson *v.* Keokuk, 4 Fed. Cas. No. 1,928, 2 Dill. 498.

See 40 Cent. Dig. tit. "Process," § 108 *et seq.*

Filing.—An affidavit for publication of summons is properly filed, where it is deposited with the proper officer. Bogart *v.* Kiene, 85 Minn. 261, 88 N. W. 748.

Evidence of filing.— The presumption that an affidavit of non-residence was never filed, arising from the clerk's failure to make a memorandum of such filing in the appearance docket, and the absence of such affidavit from the other papers in the case, is rebutted by positive testimony that such affidavit was made, that the clerk's office was carelessly conducted, and a recital in the decree that service had been duly made by publication. Simmons *v.* Simmons, 91 Iowa 408, 59 N. W. 272. The recital in an order for publication of process, that an affidavit of non-residence had been presented, is not sufficient evidence of that fact. Platt *v.* Stewart, 10 Mich. 260.

82. Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62.

83. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

84. Bothell *v.* Hoellwarth, 10 S. D. 491, 74 N. W. 231.

It is to be deemed sufficient evidence to support the jurisdiction unless it is controverted by defendant's affidavit. Railey *v.* Railey, 66 S. W. 414, 23 Ky. L. Rep. 1891.

85. Everett *v.* Connecticut Mut. L. Ins. Co., 4 Colo. App. 509, 36 Pac. 616; Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445; Sylph Min., etc., Co. *v.* Williams, 4 Colo. App. 345, 36 Pac. 80; Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187; Taylor *v.* Watkins, 4 B. Mon. (Ky.) 561; Gilkeson *v.* Knight, 71 Mo. 403; Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011.

A recital of agency in an affidavit made by one for another, for the purpose of an order for service by publication, is a sufficient showing of authority. Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346.

86. Waffle *v.* Goble, 53 Barb. (N. Y.) 517.

Under Va. Code, § 3230, providing that where there are or may be persons interested in the subject to be disposed of whose names are unknown, and makes such persons parties by the general description of "parties unknown" on affidavit of the fact that said parties are unknown an order of publication may be entered against such unknown parties an affidavit reciting that the parties are unknown "to affiant" is sufficient and need not state that they are unknown to all. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

87. *California.*— Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

Iowa.— Banta *v.* Wood, 32 Iowa 469.

New York.— Salisbury *v.* Cooper, 33 Misc. 558, 68 N. Y. Suppl. 876.

Virginia.— Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

Wisconsin.— Young *v.* Schenck, 22 Wis. 556.

United States.— Palmer *v.* McCormick, 30 Fed. 82.

See 40 Cent. Dig. tit. "Process," § 110.

88. Gilkeson *v.* Knight, 71 Mo. 403. But *compare* Eldridge *v.* The William Campbell, 27 Mo. 595, where in analogy to the admiralty practice the rule was said to be otherwise under a statute relating to proceedings against vessels.

89. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

90. Rumeli *v.* Tampa, 48 Fla. 112, 37 So. 563.

91. Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205.

Certification.— Where an affidavit on which an order for publication is granted is sworn to without the state, without being certified in the manner required to entitle a deed so acknowledged to be recorded in the state, the order for publication and the proceedings thereunder are without authority, as the papers are to be regarded as unverified. Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117.

92. Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401; Palmer *v.* McCormick, 30 Fed. 82.

the contrary, that a venue is absolutely essential to a valid affidavit;[93] and an affidavit wrongly entitled in the cause has been declared fatally defective.[94] A verified complaint is an affidavit, and if it contains the necessary facts, will sustain an order for publication under a statute requiring an affidavit,[95] and a verified complaint referred to in an affidavit may be looked to as part of the affidavit;[96] but a complaint not so referred to is valueless for the purpose of supplying material facts omitted from the affidavit.[97] Mere clerical errors will not vitiate the affidavit.[98]

(IV) *WHAT FACTS MUST APPEAR IN AFFIDAVIT.* Every fact should be shown which is necessary under the statute to give the right to an order for service by publication,[99] although it may be supported and aided by a sheriff's return of not found;[1] but it need show no facts other than those required by the statute.[2] The particular facts which must appear in the affidavit are always prescribed by statute, and vary in the different states, but they commonly include such facts as non-residence of defendant,[3] that defendant's residence is unknown or cannot

93. Albers *v.* Kozeluh, 68 Nebr. 522, 94 N. W. 521, 97 N. W. 646.

94. Castle *v.* Matthews, Lalor (N. Y.) 438. But *compare* Becker *v.* Linton, (Nebr. 1908) 114 N. W. 928, holding that an affidavit for service by publication was not invalid because it had a caption showing that it was made for a pending case, whereas no case was pending, or because persons named in the affidavit against whom the petition was filed were referred to as defendants.

95. Ballard *v.* Hunter, 74 Ark. 174, 85 S. W. 252; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274 [*affirmed* in 95 U. S. 714, 24 L. ed. 565].

96. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475; Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214; Davis *v.* Cook, 9 S. D. 319, 69 N. W. 18.

Unverified complaint.— It was held in Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401, that a reference to a complaint which apparently was unverified might aid an affidavit.

97. Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376.

98. Pierpont *v.* Pierpont, 19 Tex. 227.

An affidavit of non-residence, reciting that the attorney for the complainant states on oath that defendant is not a resident of the state, and that he has made diligent inquiry to learn his place of residence, and has been "enabled" to ascertain the same, is insufficient to support a service by publication, as "enabled" cannot be construed as *idem sonans* with "unable." Tobin *v.* Brooks, 113 Ill. App. 79.

Use of county instead of state.— Under a statute requiring that notice of publication be on affidavit that service cannot be had on defendant "in the state," a published notice based on an affidavit that service cannot be had on defendant "in the county" is void. Stillman *v.* Rosenberg, 111 Iowa 369, 82 N. W. 768.

99. *California.*— Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

Idaho.— Strode *v.* Strode, 6 Ida. 67, 52 Pac. 161, 96 Am. St. Rep. 249.

Illinois.— Hannas *v.* Hannas, 110 Ill. 53; Hartung *v.* Hartung, 8 Ill. App. 156.

Indiana.— Fontaine *v.* Houston, 58 Ind. 316.

Iowa.— Stillman *v.* Rosenberg, 111 Iowa 369, 82 N. W. 768; Chase *v.* Kaynor, 78 Iowa 449, 43 N. W. 269; Fuller *v.* Riggs, 66 Iowa 328, 23 N. W. 730.

Kansas.— Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Carey *v.* Reeves, 46 Kan. 571, 26 Pac. 951.

Michigan.—Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

Nebraska.—Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466.

New York.— Carleton *v.* Carleton, 85 N. Y. 313; Empire City Sav. Bank *v.* Silleck, 98 N. Y. App. Div. 139, 90 N. Y. Suppl. 561 [*affirmed* in 180 N. Y. 541, 73 N. E. 1123]; Bixby *v.* Smith, 3 Hun 60; Towsley *v.* McDonald, 32 Barb. 604.

North Carolina.— Wheeler *v.* Cobb, 75 N. C. 21.

Wisconsin.— Manning *v.* Heady, 64 Wis. 630, 25 N. W. 1.

United States.— Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359 [*reversing* 127 Fed. 219].

See 40 Cent. Dig. tit. "Process," § 114.

A showing substantially and by plain inference in accordance with the statute is sufficient on collateral attack. Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33.

Affidavit need not show all facts under some statutes.— In Wisconsin it is only necessary that the affidavit and complaint together shall show the requisite facts. Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124; Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

1. Seaver *v.* Fitzgerald, 23 Cal. 85; Howe Mach. Co. *v.* Pettibone, 74 N. Y. 68; Marx *v.* Ebner, 180 U. S. 314, 21 S. Ct. 376, 45 L. ed. 547. *Contra,* Waffle *v.* Goble, 53 Barb. (N. Y.) 517.

2. Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

3. *California.*— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Furnish *v.* Mullan, 76 Cal. 646, 18 Pac. 854.

upon diligent inquiry be ascertained,[4] that personal service of summons cannot be made within the state,[5] that he is absent from the state and cannot be served personally,[6] that defendant has left the state with the intent to defraud his creditors,[7] that defendant cannot be found within the state after due diligence,[8] that

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

Indiana.— Hamilton *v.* Barricklow, 96 Ind. 398; Davidson *v.* State, 62 Ind. 276.

Mississippi.— McKiernan *v.* Massingill, 6 Sm. & M. 375, citizenship in another state not equivalent of non-residence.

Missouri.— Wright *v.* Hink, 193 Mo. 130, 91 S. W. 933, the fact may be shown either by affidavit or in the petition.

Nebraska.— McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659.

New York.— Young *v.* Fowler, 73 Hun 179, 25 N. Y. Suppl. 875; Jerome *v.* Flagg, 48 Hun 351, 1 N. Y. Suppl. 101.

Washington.— Bardon *v.* Hughes, 45 Wash. 627, 88 Pac. 1040 (holding that a particular affidavit was not subject to the objection that it did not state that the place of residence was unknown); De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

United States.— Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359 [*reversing* 127 Fed. 219].

See 40 Cent. Dig. tit. "Process," § 118.

Contra.— Taylor *v.* Ormsby, 66 Iowa 109, 23 N. W. 288.

Conclusions of law.— The allegation in an affidavit for publication of summons that defendants, and each of them, are non-residents of the state, and that service of summons cannot be made within the state upon said defendants or any of them, is not open to an objection that it alleges a mere conclusion of law. Becker *v.* Linton, (Nebr. 1908) 114 N. W. 928.

4. *Illinois.*— Anderson *v.* Anderson, 229 Ill. 538, 82 N. E. 311; Hannas *v.* Hannas, 110 Ill. 53; Spalding *v.* Fahrney, 108 Ill. App. 602; Malaer *v.* Damron, 31 Ill. App. 572.

Mississippi.— Foster *v.* Simmons, 40 Miss. 585.

New York.— Denman *v.* McGuire, 101 N. Y. 161, 4 N. E. 278; Cook *v.* Farnam, 21 How. Pr. 286; Hyatt *v.* Wagenright, 18 How. Pr. 248.

Washington.— Bardon *v.* Hughes, 45 Wash. 627, 88 Pac. 1040.

United States.— Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483, holding an affidavit sufficient to show diligence on the part of affiant.

5. Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535; Snell *v.* Meservy, 91 Iowa 322, 59 N. W. 32; Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495; McCormick *v.* Paddock, 20 Nebr. 486, 30 N. W. 602; McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659.

The words "in this state" must appear in the affidavit. Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495.

6. People *v.* Booth, 121 Mich. 131, 79 N. W. 1100; Torrans *v.* Hicks, 32 Mich. 307; Taylor *v.* Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. Rep. 426; Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64; De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827; Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483, holding the allegations of an affidavit without a copy of the return of the sheriff on the summons sought to be served to constitute *prima facie* evidence of defendant's absence from the state.

7. Young *v.* Fowler, 73 Hun (N. Y.) 179, 25 N. Y. Suppl. 875; Stow *v.* Stacy, 14 N. Y. Civ. Proc. 45; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

8. *California.*— Chapman *v.* Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130 (holding that an affidavit was sufficient to show the exercise of diligence, although it failed to state expressly the result of affiant's inquiries); Forbes *v.* Hyde, 31 Cal. 342.

Idaho.— McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287.

Kansas.— Washburn *v.* Buchanan, 52 Kan. 417, 34 Pac. 1049.

Minnesota.— Harrington *v.* Loomis, 10 Minn. 366.

Montana.— Palmer *v.* McMaster, 13 Mont. 184, 33 Pac. 132, 40 Am. St. Rep. 634.

New York.— Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800; McCracken *v.* Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; Carleton *v.* Carleton, 85 N. Y. 313; McLaughlin *v.* McCann, 123 N. Y. App. Div. 67, 107 N. Y. Suppl. 762 (holding that an order for service of a summons by publication was authorized, upon an affidavit of plaintiff showing that the last she knew of defendant she resided in the state of Washington, since the presumption of the continuance of residence obtained and the great distance of that state warranted the finding that defendant could not be served in New York with due diligence); Sinnott *v.* Ennis, 120 N. Y. App. Div. 874, 105 N. Y. Suppl. 218 (holding that an affidavit that defendants are non-residents of the state and reside in and are subjects of Great Britain and Ireland, and have always been residents thereof, and that plaintiff is unable to make personal service of the summons, is sufficient to justify a finding that such defendants cannot with due diligence be found within the state); Bixby *v.* Smith, 3 Hun 60; Waffle *v.* Goble, 53 Barb. 517; Peck *v.* Cook, 41 Barb. 549; Fetes *v.* Volmer, 5 Silv. Sup. 408, 8 N. Y. Suppl. 294; Wichman *v.* Aschpurwis, 55 N. Y. Super. Ct. 218; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Orr *v.* Currie, 14 Misc. 74, 35 N. Y. Suppl. 198.

North Carolina.— Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

defendant is concealing himself in order to avoid service,[9] that plaintiff has mailed a copy of the summons to defendant at his place of residence,[10] that the names or residences of the unknown defendants could not be ascertained by diligent exertion,[11] that the party to be served is a foreign corporation,[12] that plaintiff has a good cause of action against such defendant,[13] that defendant sought to be served by publication is a necessary or proper party to the action,[14] that the cause of action is one of those enumerated in the statute,[15] that the court has jurisdiction of the subject of the action,[16] and that defendant has property within the state.[17] Of those facts which are stated in the statute in the disjunctive, any one is enough to be shown in the affidavit,[18] or the affidavit may state two or more of such statutory grounds for publication in the disjunctive;[19] but those facts which are enumerated in the statute in the conjunctive must all be shown in the affidavit.[20] In some jurisdictions the affidavit must disclose the facts which constitute plaintiff's cause of action;[21] in others it is sufficient if the nature of the cause of action is stated;[22] while in others the affidavit is required only to state that plaintiff

North Dakota.— Simensen *v.* Simensen, 13 N. D. 305, 100 N. W. 708.

South Carolina.—Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

See 40 Cent. Dig. tit. "Process," § 118.

9. Bradford *v.* McAvoy, 99 Cal. 324, 33 Pac. 1091.

10. Martin *v.* Pond, 30 Fed. 15, holding that under Minn. Laws (1869), c. 73, § 49, allowing service by publication upon affidavit stating among other things that plaintiff has mailed a copy of the summons to defendant at his place of residence, "unless it is stated in the affidavit that his residence is not known to affiant," the fact that the address to which the copy of summons was mailed, as stated in the affidavit, was not in fact the residence of defendant, does not affect the jurisdiction; the plaintiff having acted in good faith, upon the best information obtainable, the affidavit being in proper form, the publication being properly made, and the judgment reciting due service by publication.

11. Kirkland *v.* Texas Express Co., 57 Miss. 316; Piser *v.* Lockwood, 30 Hun (N. Y.) 6.

12. De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072. See *infra*, VI, B, 8.

13. *California.*—Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777.

Colorado.— Beckett *v.* Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399.

Indiana.— Hamilton *v.* Barricklow, 96 Ind. 398; Davidson *v.* State, 62 Ind. 276.

New York.— Rawdon *v.* Corbin, 3 How. Pr. 416.

South Carolina.—Augusta Sav. Bank *v.* Stellings, 31 S. C. 360, 9 S. E. 1028.

See 40 Cent. Dig. tit. "Process," § 117.

14. Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713; Dowell *v.* Lahr, 97 Ind. 146; Hamilton *v.* Barricklow, 96 Ind. 398; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

15. Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830; Fulton *v.* Levy, 21 Nebr. 478, 32 N. W. 307; Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64; Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466; Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

Averment of conclusion.— An affidavit for constructive service, made under a statute requiring that it be shown that the case is one mentioned in "section 72," stating merely that "this case is one of those mentioned in section 72," while defective, does not make the service thereunder void. Douglass *v.* Lieberman, 9 Kan. App. 45, 57 Pac. 254.

16. Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451.

17. *Minnesota.*— Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376.

New York.— Handley *v.* Quick, 47 How. Pr. 233; Rawdon *v.* Corbin, 3 How. Pr. 416.

North Carolina.— Spiers *v.* Halstead, 71 N. C. 209.

Oregon.— Colburn *v.* Barrett, 21 Oreg. 27, 26 Pac. 1008; Pike *v.* Kennedy, 15 Oreg. 420, 15 Pac. 637.

South Carolina.—Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

18. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706; De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

19. Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782.

20. Cook *v.* Farmer, 11 Abb. Pr. (N. Y.) 40 [*affirmed* in 34 Barb. 95, 12 Abb. Pr. 359, 21 How. Pr. 286].

21. *Nevada.*— Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

North Carolina.— Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629; Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508.

South Dakota.— Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

Wisconsin.— Rankin *v.* Adams, 18 Wis. 292; Slocum *v.* Slocum, 17 Wis. 150.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

See 40 Cent. Dig. tit. "Process," § 117.

22. *Indiana.*— Pitts *v.* Jackson, 135 Ind. 211, 35 N. E. 10; Field *v.* Malone, 102 Ind. 251, 1 N. E. 507.

has a good cause of action against defendant named.[23] A substantial difference between the cause of action described in the affidavit and that disclosed in the complaint will render the publication ineffectual to confer jurisdiction.[24] If the residence of defendant is stated as accurately as it is known, that is sufficient;[25] if the town is given the street and number need not be added.[26] Some cases have held that a showing of facts as to residence and actual abode from which it is clear that nothing would have resulted from a diligent effort to obtain personal service within the state will take the place of the showing which the statute requires that defendant, after due diligence, cannot be found within the state.[27] It is sometimes held unnecessary for the affidavit to show defendant has property in the state, although such fact must always exist in order that a judgment may be valid and effectual;[28] where it is necessary to show that defendants have property in the state, the affidavit should specify the property.[29] Defendant sought to be served by publication must be properly named in the affidavit.[30]

(v) *How Facts Should Be Stated.* When the requirement of the statute is in the form of a conclusion, such as that defendant cannot after due diligence be found, or that he is a necessary party to the action, etc., the affidavit should not merely use the words of the statute, but should set up the evidence which tends to show the existence of what the statute requires;[31] but some cases hold

Kansas.— Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830; Gillespie *v.* Thomas, 23 Kan. 138; Claypoole *v.* Houston, 12 Kan. 324. See, however, Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346, where it is held that under Code Civ. Proc. § 72, enumerating the cases in which service may be had by publication, and section 73, requiring an affidavit for such service to show "that the case is one of those mentioned" by section 72, an affidavit stating that the action is one "to quiet title to real estate as provided by section 72," does not sufficiently show that the case is "one of those mentioned."

Minnesota.—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376; Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117.

Nebraska.— Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; Majors *v.* Edwards, 36 Nebr. 56, 53 N. W. 1041; Shedenhelm *v.* Shedenhelm, 21 Nebr. 387, 32 N. W. 170; Holmes *v.* Holmes, 15 Nebr. 615, 19 N. W. 600.

United States.— Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295.

23. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713.

24. Vermont L. & T. Co. *v.* McGregor, 5 Ida. 510, 51 Pac. 104.

25. Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

26. Burke *v.* Donnovan, 60 Ill. App. 241.

27. *Iowa.*— Byrne *v.* Roberts, 31 Iowa 319.

Kansas.— Washburn *v.* Buchanan, 52 Kan. 417, 34 Pac. 1049.

Missouri.— Harbert *v.* Durden, 116 Mo. App. 512, 92 S. W. 746 [*overruling* Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495].

New York.— Kennedy *v.* New York L. Ins., etc., Co., 101 N. Y. 487, 5 N. E. 774; Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Jerome *v.* Flagg, 48 Hun 351, 1 N. Y. Suppl. 101; Hudson *v.* Kowing, 4 N. Y. St. 866.

Oregon.— Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Pike *v.* Kennedy, 15 Oreg. 420, 15 Pac. 637.

South Dakota.— Cochran *v.* Germain, 15 S. D. 77, 87 N. W. 527.

United States.— Marx *v.* Ebner, 180 U. S. 314, 21 S. Ct. 376, 45 L. ed. 547; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

But an affidavit of non-residence merely is not equivalent to an affidavit that personal service cannot be made on defendant within the state. Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941.

28. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

29. Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346; Winner *v.* Fitzgerald, 19 Wis. 393; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

30. Rawson *v.* Sherwood, (Kan. 1898) 53 Pac. 69.

31. *California.*— People *v.* Wrin, 143 Cal. 11, 76 Pac. 646; Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698; Furnish *v.* Mullan, 76 Cal. 646, 18 Pac. 854; Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Yolo County *v.* Knight, 70 Cal. 430, 11 Pac. 662; Braly *v.* Seaman, 30 Cal. 610; Ricketson *v.* Richardson, 26 Cal. 149; Seaver *v.* Fitzgerald, 23 Cal. 85; Swain *v.* Chase, 12 Cal. 283.

Dakota.— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783. But *compare* McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287.

Michigan.— Thompson *v.* Shiawassee Cir. Judge, 54 Mich. 236, 19 N. W. 967.

Minnesota.— Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134; Harrington *v.* Loomis, 10 Minn. 366; Mackubin *v.* Smith, 5 Minn. 367.

that this is unnecessary,[32] particularly when no judicial action upon the showing made in the affidavit is required,[33] even though it may be advisable.[34] Even slight evidence is sufficient to sustain the jurisdiction.[35] A return of "not found"

Montana.— Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576, under an old statute.

Nevada.— Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

New York.— Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800; McCracken *v.* Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; Belmont *v.* Cornen, 82 N. Y. 256; McLaughlin *v.* McCann, 123 N. Y. App. Div. 67, 107 N. Y. Suppl. 762; Kennedy *v.* New York L. Ins., etc., Co., 32 Hun 35 [*reversed* on the facts in 101 N. Y. 487, 5 N. E. 774]; Towsley *v.* McDonald, 32 Barb. 604; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; McLeod *v.* Moore, 15 N. Y. Civ. Proc. 77; Greenbaum *v.* Dwyer, 66 How. Pr. 266; Handley *v.* Quick, 47 How. Pr. 233.

North Carolina.— Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508.

North Dakota.— Pillsbury *v.* J. B. Streeter, Jr., Co., 15 N. D. 174, 107 N. W. 40; Simensen *v.* Simensen, 13 N. D. 305, 100 N. W. 708.

South Dakota.— Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214; Plummer *v.* Bair, 12 S. D. 23, 80 N. W. 139; Bothell *v.* Hoellwarth, 10 S. D. 491, 74 N. W. 231; Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

United States.— Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Batt *v.* Procter, 45 Fed. 515; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

"To illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the Court or Judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts — a practice too dangerous to the rights of defendants to admit of judicial toleration." Ricketson *v.* Richardson, 26 Cal. 149, 154. An affidavit for publication of a summons against non-residents recited that they had been sought for to obtain service, but after diligent search and inquiry could not be found within the state. It then proceeded to show the kind of search and inquiry that had been made; that the affiant had made inquiry of all persons from whom he could expect to obtain information as to the residence of defendants, together with the names of the persons of whom he made inquiries, and why he expected them to know of defendant's whereabouts, and it was held that the affidavit constituted a substantial compliance with Code Civ. Proc. § 412, authorizing service by publication where the person sought to be served "cannot, after due diligence, be found within the state," although the affidavit failed to expressly state the result of the affiant's inquiries. Chapman *v.* Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130. An affidavit by a plaintiff in partition, which alleges that defendants named are non-residents of the state, and reside in and are subjects of Great Britain and Ireland, and have always been residents thereof, and that plaintiff is unable to make personal service of the summons on such defendants, justifies a finding that such defendants cannot, with due diligence, be found within the state, and process may be served on them by publication, and, when so served, the court acquires jurisdiction of the person of such defendants. Sinnott *v.* Ennis, 120 N. Y. App. Div. 874, 105 N. Y. Suppl. 218.

32. *Illinois.*— Hartung *v.* Hartung, 8 Ill. App. 156.

Minnesota.— Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823, that defendant is a proper party to the action.

Montana.— Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706.

New York.— Salisbury *v.* McGibbon, 58 N. Y. App. Div. 524, 69 N. Y. Suppl. 258; Smith *v.* Mahon, 27 Hun 40.

South Carolina.— National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; Yates *v.* Gridley, 16 S. C. 496.

Wisconsin.— Sueterlee *v.* Sir, 25 Wis. 357; Young *v.* Schenck, 22 Wis. 556; Farmers', etc., Bank *v.* Eldred, 20 Wis. 196.

33. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706; Goore *v.* Goore, 24 Wash. 139, 63 Pac. 1092.

34. Little *v.* Chambers, 27 Iowa 522.

35. Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830; Crouter *v.* Crouter, 133 N. Y. 55, 30 N. E. 726; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975; Stow *v.* Stacy, 14 N. Y. Civ. Proc. 45; Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

Distinction between absence and insufficiency of evidence.— "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. . . . If, how-

by the sheriff may be sufficient evidence of due diligence,[36] or that defendant cannot be found,[37] to satisfy the court, but if the statute requires the showing to be made by affidavit, the return must be incorporated or referred to in the affidavit.[38] Affidavits upon information and belief are frequently declared to be insufficient,[39] although many cases permit their use, on the ground that they nevertheless constitute some evidence upon which the court may base its jurisdiction to order a publication.[40] If facts are stated upon information and belief, the sources of information or grounds of belief should be given.[41] Affidavits as to non-residence and due diligence in attempting to find defendant may consist of hearsay evidence;[42] but this is not allowable in affidavits purporting to show that plaintiff has a good cause of action.[43]

e. Order For Publication. The order directs what shall be done pursuant to obtaining service by publication, and the requisites of such order are prescribed by statute and should be substantially observed.[44] Under some statutes the court

ever, there is a total want of evidence on any point necessary to be determined . . . then there is nothing upon which he is authorized to act; the evidence, which is the very basis of his jurisdiction, and upon which it depends, is wanting, and his action is without authority. . . . In one case there is a defect of jurisdiction; in the other there is only an error of judgment." Forbes *v.* Hyde, 31 Cal. 342, 349. See also Staples *v.* Fairchild, 3 N. Y. 41.

36. Seaver *v.* Fitzgerald, 23 Cal. 85; Marx *v.* Ebner, 180 U. S. 314, 21 S. Ct. 376, 45 L. ed. 547.

37. Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134.

38. Empire City Sav. Bank *v.* Silleck, 180 N. Y. 541, 73 N. W. 1123 [*affirming* 98 N. Y. App. Div. 139, 90 N. Y. Suppl. 561]; Doheny *v.* Worden, 75 N. Y. App. Div. 47, 77 N. Y. Suppl. 959.

39. *Arkansas.*— Waggoner *v.* Fogleman, 53 Ark. 181, 13 S. W. 729; Turnage *v.* Fisk, 22 Ark. 286.

Indiana.— Fontaine *v.* Houston, 58 Ind. 306.

Minnesota.—Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134; Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585.

New York.— Carleton *v.* Carleton, 85 N. Y. 313; Andrews *v.* Borland, 10 N. Y. St. 396; Greenbaum *v.* Dwyer, 66 How. Pr. 266; Lyon *v.* Baxter, 64 How. Pr. 426; Evertson *v.* Thomas, 5 How. Pr. 45.

Oklahoma.— Romig *v.* Gillett, 10 Okla. 186, 62 Pac. 805.

Wisconsin.— Hafern *v.* Davis, 10 Wis. 501.

See 40 Cent. Dig. tit. "Process," § 116.

Presumption of knowledge.— Where affiant, in an affidavit of an agent for complainant, swears positively that he knows the names of the heirs of a certain person are known to complainant, it will be presumed that the facts were within the knowledge of affiant. Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346.

40. *California.*— Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240.

Illinois.— Malaer *v.* Damron, 31 Ill. App. 572.

Michigan.— Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

Nebraska.— Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

New York.— Howe Mach. Co. *v.* Pettibone, 74 N. Y. 68; Seiler *v.* Wilson, 43 Hun 629; Chase *v.* Lawson, 36 Hun 221; Walter *v.* De Graaf, 19 Abb. N. Cas. 406; Steinle *v.* Bell, 12 Abb. Pr. N. S. 171; Van Wycke *v.* Hardy, 20 How. Pr. 222 [*affirmed* in 4 Abb. Dec. 496, 39 How. Pr. 392].

See 40 Cent. Dig. tit. "Process," § 116.

41. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520 (stating that this should be done not for the purpose of adding any weight to the affidavit as evidence, but as a safeguard against reckless swearing); Belmont *v.* Cornen, 82 N. Y. 256; Davis *v.* Cook, 9 S. D. 319, 69 N. W. 18; Hafern *v.* Davis, 10 Wis. 501.

Names and residences.— An affidavit for publication, merely stating that deponent believes that defendant resides in the state, and that the process could not be served on him by reason of his concealment, or of his continued absence from the place of his residence, but not giving the names and residences of the persons from whom the information of such absence was derived, was insufficient. Evarts *v.* Becker, 8 Paige (N. Y.) 506.

42. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Cohen *v.* Portland Lodge No. 142 B. P. O. E., 144 Fed. 266 [*affirmed* in 152 Fed. 357, 81 C. C. A. 483].

43. Columbia Screw Co. *v.* Warner Lock Co., 138 Cal. 445, 71 Pac. 498.

44. *California.*—People *v.* McFadden, (1904) 77 Pac. 999; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Florida.— Laflin *v.* Gato, 50 Fla. 558, 39 So. 59.

Missouri.— Kelly *v.* Murdagh, 184 Mo. 377, 83 S. W. 437.

New York.— Eleventh Ward Bank *v.* Powers, 43 N. Y. App. Div. 178, 59 N. Y. Suppl. 314; Kennedy *v.* Arthur, 11 N. Y. Suppl. 661; Brookes *v.* Taylor, 9 N. Y. St. 68.

Utah.— Park *v.* Higbee, 6 Utah 414, 24 Pac. 524.

Wisconsin.— O'Malley *v.* Fricke, 104 Wis. 280, 80 N. W. 436.

United States.— Adams *v.* Heckscher, 83 Fed. 281.

See 40 Cent. Dig. tit. "Process," § 121 *et seq.*

makes no order, and the mere filing of the affidavit at once gives the right to publish;[45] but an order of the court for publication of summons is usually required before such publication can lawfully be made.[46] Occasionally the statute authorizes the clerk of the court[47] or the judge out of court[48] to make the order. Authority to issue the order rests upon a proper affidavit or other record showing the existence of the facts required by statute.[49] If the facts required by the statute are properly stated in the affidavit, the right to an order for publication is absolute, and it is immaterial whether or not such statements are true,[50] and similarly, if the affidavit is not sufficient, other affidavits tending to show the existence of the requisite facts are ineffectual to support the jurisdiction.[51] The statute very commonly provides that the requisite facts shall be shown by affidavit to the satisfaction of the court.[52] The order must be in conformity to the affidavit,[53] and it must purport to be based upon some ground set forth therein.[54] But the

Effect of prior order.— The validity of an order of publication is not destroyed by the existence of a prior order of publication, where, on a motion to vacate it for insufficiency of the affidavits, plaintiff, out of caution, procured such second order. Littlejohn v. Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536.

Warning order.— An order directing the publication of a warning order, in a suit by the state for the recovery of a balance due on land sold by it, must contain all the recitals required by the statute providing that the order shall contain the title of the suit, the date and amount of the note or bond proceeded upon, and a description of the land upon which the lien is sought to be enforced, and warning defendant to appear and make defense on the first day of the term of court that commences more than sixty days from the date of such order. Lawrence v. State, 30 Ark. 719.

45. Vanpelt v. Hutchinson, 114 Ill. 435, 2 N. E. 491; Crabb v. Atwood, 10 Ind. 331 (no order necessary in vacation); McClymond v. Noble, 84 Minn. 329, 87 N. W. 833, 87 Am. St. Rep. 354; Easton v. Childs, 67 Minn. 242, 69 N. W. 903; Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

46. See the statutes of the several states. And see the following cases:

California.— People v. Pearson, 76 Cal. 400, 18 Pac. 424; Seaver v. Fitzgerald, 23 Cal. 85.

Colorado.— Calvert v. Calvert, 15 Colo. 390, 24 Pac. 1043.

Iowa.— Guise v. Early, 72 Iowa 283, 33 N. W. 683; Miller v. Corbin, 46 Iowa 150.

Kentucky.— Blight v. Bank, 6 T. B. Mon. 192, 17 Am. Dec. 136.

Minnesota.— Smith v. Valentine, 19 Minn. 452.

Missouri.— Cummings v. Brown, 181 Mo. 711, 81 S. W. 158.

New York.— Von Rhade v. Von Rhade, 2 Thomps. & C. 491.

Oregon.— McFarlane v. Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468; Goodale v. Coffee, 24 Oreg. 346, 33 Pac. 990.

What court to make order.— Under N. Y. Code, § 440, requiring an order for the service of summons by publication to be made by the judge of the court or the county judge of the county where the action is triable, the supreme court at special term has no power to make an order, although signed by a judge thereof, for service by publication. Crosby v. Thedford, 7 N. Y. Civ. Proc. 245.

47. McBride v. Hartwell, 2 Kan. 410; Charley v. Kelley, 120 Mo. 134, 25 S. W. 571; Otis v. Epperson, 88 Mo. 131; Clemson Agricultural College v. Pickens, 42 S. C. 511, 20 S. E. 401; Wyser v. Calhoun, 11 Tex. 323.

48. Lowerre v. Owens, 14 N. Y. App. Div. 215, 43 N. Y. Suppl. 467; Phinney v. Broschell, 19 Hun (N. Y.) 116 [*affirmed* in 80 N. Y. 544].

49. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; People v. Booth, 121 Mich. 131, 79 N. W. 1100; Crossland v. Admire, 149 Mo. 650, 51 S. W. 463; State v. Horine, 63 Mo. App. 1; Smith v. Matson, 47 How. Pr. (N. Y.) 118.

50. Tooker v. Leake, 146 Mo. 419, 48 S. W. 638; Gallum v. Weil, 116 Wis. 236, 92 N. W. 1091. See, however, Kitchen v. Crawford, 13 Tex. 516, where the truth of the facts and not the statement in the affidavit was held to form the basis of the service by publication.

51. Wortman v. Wortman, 17 Abb. Pr. (N. Y.) 66.

52. See the statutes of the several states. And see the following cases:

California.— Bradford v. McAvoy, 99 Cal. 324, 33 Pac. 1091; Anderson v. Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Dakota.— Beach v. Beach, 6 Dak. 371, 43 N. W. 701.

Idaho.— Mills v. Smiley, 9 Ida. 325, 76 Pac. 783.

New York.— Belmont v. Cornen, 82 N. Y. 256.

South Carolina.— Gibson v. Everett, 41 S. C. 22, 19 S. E. 286.

South Dakota.— Cochran v. Germain, 15 S. D. 77, 87 N. W. 527; Davis v. Cook, 9 S. D. 319, 69 N. W. 18.

United States.— McDonald v. Cooper, 32 Fed. 745, 13 Sawy. 86.

53. Fetes v. Volmer, 5 Silv. Sup. (N. Y.) 408, 8 N. Y. Suppl. 294. An order of publication in a suit to set aside a deed, which misdescribes the land, is fatally defective. Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399.

54. Parker v. Burton, 172 Mo. 85, 72 S. W. 663.

order need not recite a finding of the jurisdictional facts which are required to appear in the affidavit.[55] If the statute contemplates the issuance of the summons before the order for publication is made, an order is void which is made prior thereto.[56] The order must be based on facts existing at the time it is made,[57] or so near such time that it may reasonably be presumed that no change has meanwhile taken place.[58] The order should ordinarily direct that the service of summons be made by publication in a newspaper for a designated period within a specified time;[59] it should designate the paper in which publication is to be made,[60] and should state that such paper is a newspaper;[61] if there is no such requirement in the statute, such designation will nevertheless not vitiate the order,[62] and generally speaking redundant recitals will not affect the validity of the order.[63] It is frequently provided that the order shall direct a copy of the summons to be deposited in the post-office addressed to defendant at his last place of residence unless it shall appear that such residence is unknown and cannot, with reasonable diligence, be ascertained.[64] If more than one method is allowed by statute, at

55. Goodale *v.* Coffee, 24 Oreg. 348, 33 Pac. 990.

56. People *v.* Huber, 20 Cal. 81.

57. Roosevelt *v.* Land Imp. Co., 108 Wis. 653, 84 N. W. 157.

For example an order of publication against non-residents, made on the twentieth of the month, on an affidavit made on the fifteenth, is defective, since the order must be based on facts existing at the time it is made. New York Baptist Union for Ministerial Education *v.* Atwell, 95 Mich. 239, 54 N. W. 760. A warning order against a defendant on the ground that he is a non-resident of Kentucky and believed to be absent therefrom cannot be made on an affidavit of such facts filed by plaintiff four months previously. Spreen *v.* Delsignore, 94 Fed. 71.

58. People *v.* Booth, 121 Mich. 131, 79 N. W. 1100.

Presumption as to change.—Where an order of publication is obtained early on Monday on an affidavit made at a late hour on Saturday, alleging that defendant is a resident of the state of Washington, there is sufficient diligence, as there is little probability of a residence in Washington being lost, and one in Michigan gained, in the meantime. Adams *v.* Hosmer, 98 Mich. 51, 56 N. W. 1051. Where service is had by publication, jurisdiction attaches, although the affidavit for service was sworn to two days before filing the petition, as the interval between the two acts was so brief that no presumption can fairly arise of a change in the jurisdictional facts set forth in the affidavit. Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

An affidavit made in the present tense is to be construed as covering the entire period during which personal service might be made under the forms prescribed by law. Snell *v.* Meservy, 91 Iowa 322, 59 N. W. 32. See also Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

59. Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124.

60. Guise *v.* Early, 72 Iowa 283, 33 N. W. 683; Otis *v.* Epperson, 88 Mo. 131. *Contra*, Green *v.* Squires, 20 Hun (N. Y.) 15.

Designation by plaintiff's counsel.— Under the Missouri statute plaintiff's counsel is required to designate the newspaper in which publication shall be made. Hansford *v.* Hansford, 34 Mo. App. 262.

Newspaper most likely to afford notice.— If the statute provides that publication shall be in a newspaper most likely to give notice to defendant, the order need not so describe the designated paper. Seaver *v.* Fitzgerald, 23 Cal. 85; Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

61. Oswald *v.* Kampmann, 28 Fed. 36.

62. Wyser *v.* Calhoun, 11 Tex. 323.

63. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491.

64. *California.*— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Colorado.—Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

New York.— Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536; Ritten *v.* Griffith, 16 Hun 454; Towsley *v.* McDonald, 32 Barb. 604; Spaus *v.* Schaffner, 2 N. Y. Suppl. 189; Cook *v.* Farnum, 34 Barb. 95, 12 Abb. Pr. 359, 21 How. Pr. 286.

Oregon.— Goodale *v.* Coffee, 24 Oreg. 346, 33 Pac. 990.

Wisconsin.— Rockman *v.* Ackerman, 109 Wis. 639, 85 N. W. 491; Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124.

Direction as to mailing.— Under N. Y. Code, § 135, subd. 5, requiring that the order for the publication of a summons must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his residence, an order merely directing that a copy of the summons and complaint be deposited in the post-office, addressed to defendant, is insufficient. Hyatt *v.* Wagenright, 18 How. Pr. (N. Y.) 248. But *compare* Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664. An order for the service of summons on a non-resident by publication, which fails to designate the post-office in which copies of the summons, complaint, and order shall be deposited for transmission to defendant, as required by N. Y. Code Civ.

the option of plaintiff, the order is sufficient if it directs any one.[65] The name of defendant must correctly appear in the order,[66] but a new defendant may be added without obtaining a new order.[67] When an entry of the order upon the court records is required, such entry in due form is not jurisdictional,[68] although a provision that the order must be filed on or before the first day of publication must be complied with to confer jurisdiction.[69] No entry is necessary unless the statute provides that it shall be made.[70] An inadvertent failure to sign the order is a mere irregularity.[71] Judicial discretion in granting an order for publication cannot be questioned on appeal where a sufficient showing of facts has been made to call into exercise the judicial mind.[72] An order for service by publication cannot be impeached collaterally if the judge making the order has jurisdiction to make it.[73]

6. Mode and Sufficiency of Service by Publication — a. In General. The means and methods provided by statute for obtaining service by publication must be strictly followed, since the whole proceeding is in derogation of the common law.[74]

Proc. § 440, is insufficient. Walter *v.* De Graaf, 19 Abb. N. Cas. (N. Y.) 406. Under a statute requiring that an order of publication must contain a direction that on or before the date of the first publication plaintiff deposit in a specified post-office one or more sets of copies of the summons, complaint, and order, an order directing that the summons be served by publication, and by mailing copies of said "summons and complaint," addressed to defendant at his last place of residence, West Eighty-Third street, said publication and mailing to be commenced within three months from the date, was void, because it did not require a copy of the order, as well as of the summons and complaint, to be served, and did not specify the post-office in which they were to be deposited, and did not require them to be mailed on or before the first day of the first publication. McCool *v.* Boller, 14 Hun (N. Y.) 73.

Defect cured.— A defect in the order of the judge, in failing to direct a copy of the petition as well as of the notice to be mailed to defendant, was held to be cured by plaintiff's mailing a copy of the petition. Lyon *v.* Comstock, 9 Iowa 306. But an order directing copies to be mailed to an incorrect address is not cured by personal service upon defendant outside of the jurisdiction. Beaupre *v.* Brigham. 79 Wis. 436, 48 N. W. 596.

65. *In re* Field, 131 N. Y. 184, 30 N. E. 48; O'Neil *v.* Bender, 30 Hun (N. Y.) 204.

66. Newman *v.* Bowers, 72 Iowa 465, 34 N. W. 212; Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874.

For example "The Washington Trust Co." for "The Washington Trust Company of the City of New York" has been held insufficient. Detroit *v.* Detroit City R. Co., 54 Fed. 1. In a suit against several defendants, publication was ordered against two of them on proper affidavit of non-residence and the publication actually made was against all of defendants, but it was held that it was ineffective as against defendants not specified in the order. Pomeroy *v.* Betts, 31 Mo. 419. But "Mary E. Byers" for "Mary Ann Byers" has been held sufficient after appearance. Beckner *v.* McLinn, 107 Mo. 277, 17 S. W. 819. In an order for publication, a clerical mistake in naming one of the defendants as "Albert," instead of "Alfred," is not sufficient to vitiate the service, where the affidavit and copies of the order, and the summons and notice served on defendant, contained the correct name. McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

67. Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 209.

68. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676; Smith *v.* Valentine, 19 Minn. 452.

69. Whiton *v.* Morning Journal Assoc., 23 Misc. (N. Y.) 299, 50 N. Y. Suppl. 899. *Compare* Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543 [*reversing* 47 Misc. 247, 95 N. Y. Suppl. 899], holding that after proper delivery to the clerk, his retention thereof and failure to actually file the papers did not amount to a jurisdictional defect.

70. Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543.

71. McDermott *v.* Gray, 198 Mo. 266, 95 S. W. 431.

72. Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

73. Evans *v.* Weinstein, 124 N. Y. App. Div. 316, 108 N. Y. Suppl. 753.

74. *California.*— McCauley *v.* Fulton, 44 Cal. 355; McMinn *v.* Whelan, 27 Cal. 300; People *v.* Huber, 20 Cal. 81.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221; Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438.

District of Columbia.— Morse *v.* U. S., 29 App. Cas. 433.

Iowa.— Shaller *v.* Marker, 136 Iowa 575, 114 N. W. 43; Bradley *v.* Jamison, 46 Iowa 68; Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117.

Mississippi.— Foster *v.* Simmons, 40 Miss. 585.

Missouri.— Otis *v.* Epperson, 88 Mo. 131.

Nebraska.— Calkins *v.* Miller, 55 Nebr. 601, 75 N. W. 1108.

Nevada.— Coffin *v.* Bell, 22 Nev. 169, 37

b. The Notice Published. The matter to be published varies in the different jurisdictions, the statute in each state providing exactly of what it shall consist.[75] In some states the summons is required to be published,[76] in others the clerk is required to prepare a warning order which is published,[77] in others there is published merely a designated notice.[78] In determining the sufficiency of the summons, order, or notice published, the substantial rather than technical and literal requirements of the statute are to be observed.[79] The published notice must give defend-

Pac. 240, 58 Am. St. Rep. 738; Victor Mill, etc., Co. v. Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

New York.— Kendall v. Washburn, 14 How. Pr. 380; Anonymous, 3 How. Pr. 293.

Oregon.— Odell v. Campbell, 9 Oreg. 298; Northcut v. Lemery, 8 Oreg. 316.

Texas.— Stephenson v. Texas, etc., R. Co., 42 Tex. 162.

Washington.—Garrison v. Cheeney, 1 Wash. Terr. 489.

Wisconsin.— Likens v. McCormick, 39 Wis. 313; Hafern v. Davis, 10 Wis. 501.

United States.— Pennoyer v. Neff, 95 U. S. 723, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. 319, 19 L. ed. 931; Cohen v. Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Hartley v. Boynton, 17 Fed. 873, 5 McCrary 453; Galpin v. Page, 9 Fed. Cas. No. 5,206, 3 Sawy. 93; Gray v. Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638. The mode provided by congress (Suppl. Rev. St. (1874–1891), p. 84 (U. S. Comp. St. (1901) p. 513) for giving the federal courts jurisdiction over an absent defendant by publication is exclusive of any other mode; and, where such requirements are not complied with, the court acquires no jurisdiction, although publication was made in the mode provided by the statutes of the state in which such court sits. Bracken v. Union Pac. R. Co., 56 Fed. 447, 5 C. C. A. 548.

See 40 Cent. Dig. tit. "Process," § 129.

An insufficient effort to obtain service by publication will not affect a subsequent personal service within the jurisdiction. McKibbin v. McKibbin, 139 Cal. 448, 73 Pac. 143.

Defective order.— The service is good if the statute is observed, even though the order inadvertently departs from the statute. Mishkind-Feinberg Realty Co. v. Sidorsky, 111 N. Y. App. Div. 578, 98 N. Y. Suppl. 496.

75. See the statutes of the several states.

76. *California.*— San Diego Sav. Bank v. Goodsell 137 Cal. 420, 70 Pac. 299; Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; McCauley v. Fulton, 44 Cal. 355.

Colorado.— Donald v. Bradt, 15 Colo. App. 414, 62 Pac. 580.

Iowa.— Fanning v. Krapfl, 68 Iowa 244, 26 N. W. 133.

New York.— Van Wyck v. Hardy, 11 Abb. Pr. 473.

Oregon.— George v. Nowlan, 38 Oreg. 537, 64 Pac. 1; Willamette Real Est. Co. v. Hendrix, 28 Oreg. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

United States.— Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Jones v. Everett Land Co., 61 Fed. 529, 9 C. C. A. 602; Palmer v. McCormick, 30 Fed. 82.

See 40 Cent. Dig. tit. "Process," § 130.

A published summons, not signed by attorney, and not stating when the complaint is or will be filed, is insufficient. Hays v. Lewis, 21 Wis. 663.

77. Beidler v. Beidler, 71 Ark. 318, 74 S. W. 13; McLain v. Duncan, 57 Ark. 49, 20 S. W. 597; McLaughlin v. McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56; Cross v. Wilson, 52 Ark. 312, 12 S. W. 576; Thomas v. Mahone, 9 Bush (Ky.) 111; Kelly v. Murdagh, 184 Mo. 377, 83 S. W. 437; Mosely v. Reily, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721; Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874; Otis v. Epperson, 88 Mo. 131; Bobb v. Woodward, 42 Mo. 482. See Stuart v. Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040, in which the nature of a warning order under the Arkansas statute is considered.

Sufficiency.— A warning order against nonresident defendants, husband and wife, which recites "the defendant," followed by the husband's name, followed by the abbreviation, "etc.," without mentioning the name of the wife, "warned to appear," etc., is void as to the wife and she is not brought into court thereby. Clark v. Raison, 104 S. W. 342, 31 Ky. L. Rep. 905.

78. Hannas v. Hannas, 110 Ill. 53; Clark v. Hillis, 134 Ind. 421, 34 N. E. 13; Morgan v. Woods, 33 Ind. 23; Green v. Green, 7 Ind. 113; Head v. Daniels, 38 Kan. 1, 15 Pac. 911; Core v. Oil, etc., Co., 40 Ohio St. 636; Gary v. May, 16 Ohio 66.

79. *California.*— People v. Davis, 143 Cal. 673, 77 Pac. 651. Under Code Civ. Proc. § 407, subd. 5, before its amendment in 1897, providing that the name of plaintiff's attorney must be indorsed on the summons, the attorney's name did not thereby become a part of the summons, so as to render void a summons by publication, a copy of which was published without the attorney's name; the record showing that the name of the attorney was indorsed on the summons. People v. McAllister, (Cal. 1904) 76 Pac. 1127; People v. Wrin, 143 Cal. 11, 76 Pac. 646.

Idaho.— McKnight v. Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287, holding that where in a publication of a summons the word "filed" was omitted from the order to appear and answer plaintiff "of the complaint filed herein," the error was not such a variance as to be fatal to the jurisdiction where the copy of the summons and complaint mailed to defendant were correct.

Indiana.— Jones v. Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215.

ant the length of time allowed by the statute to make his appearance.[80] The parties defendant who are sought to be served by publication must be properly designated by christian and surname in the summons, order, or notice,[81] but other defendants need not be mentioned.[82] Unknown heirs may be designated merely

Kansas.— Townsend *v.* Burr, 9 Kan. App. 810, 60 Pac. 477. A publication notice which advises defendant of the nature of the action and of his interest therein is sufficient. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

Missouri.— Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

New York,— Cook *v.* Kelsey, 19 N. Y. 412; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975; Van Wyck *v.* Hardy, 11 Abb. Pr. 473.

North Carolina.— Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629, holding a notice to contain a sufficient statement of the eviction of a plaintiff under a paramount title in violation of a covenant in a deed to show a cause of action.

Oregon.— George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

Washington.— Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

United States.— Ranch *v.* Werley, 152 Fed. 509, holding a summons to sufficiently state the date on which defendant is required to answer.

Omissions.— An order for publication of summons is satisfied by the publication of a copy substantially correct. An omission of unnecessary words cannot vitiate. Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392 [*affirming* 11 Abb. Pr. 473].

Statement of cause of action.— Under a statute requiring a "brief statement of the cause of action" to be made, when service is had by publication, a detailed and specific statement is not required, and a misdescription of a date, not likely to mislead, is not a fatal defect. Pipkin *v.* Kaufman, 62 Tex. 545.

80. McGowan *v.* Mobile Branch Bank, 7 Ala. 823 (holding that a discrepancy between the time at which complainant prays that defendant may answer the bill and that named in the order of notice is not fatal); Bell *v.* Good, 19 N. Y. Suppl. 693, 22 N. Y. Civ. Proc. 356. Service by publication should be quashed on motion when the published notice requires the party to answer on or before the second, instead of the third, Monday after the fourth publication of the notice. Calkins *v.* Miller, 55 Nebr. 601, 75 N. W. 1108.

Statement of time of filing complaint.— Where defendant, a non-resident, is served by publication, it is unnecessary to comply with the requirement of S. C. Code, § 156, that the summons, as published, shall state the time and place of filing the complaint, if defendant is furnished with a copy of the complaint, as well as the summons. Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401.

81. *Indiana.*— Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

Iowa.— Schaller *v.* Marker, 136 Iowa 575, 114 N. W. 43 (holding that the publication of an original notice designating defendant as "Chase" instead of "Chan" constituted a fatal misnomer); Fanning *v.* Krapfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293.

Kansas.— Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442; Morris *v.* Tracy, 58 Kan. 137, 48 Pac. 571.

Maryland.— Hardester *v.* Sharretts, 84 Md. 146, 34 Atl. 1122.

Mississippi.— Magoffin *v.* Mandaville, 28 Miss. 354.

Missouri.— Corrigan *v.* Schmidt, 126 Mo. 304, 28 S. W. 874; Hirsh *v.* Weisberger, 44 Mo. App. 506.

Texas.— Boynton *v.* Chamberlain, 38 Tex. 604.

See 40 Cent. Dig. tit. "Process," § 131.

Description held sufficient: "Frank Strimple" for "Benjamin F. Strimple." Steinmann *v.* Strimple, 29 Mo. App. 478. "Berlah M. Plimpton" for "Beulah M. Plimpton." Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

Descriptions held insufficient: "Keesel" for "Keisel." Hubner *v.* Reickhoff, 103 Iowa 368, 72 N. W. 540, 64 Am. St. Rep. 191. "P. T. B. Hopkins" for "T. P. B. Hopkins." Fanning *v.* Krapfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293. "Q. R. Noland" for "Quinces R. Noland." Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874. Notice by publication to "—— Clark" of the pendency of proceedings is not binding on "Helen I. Clark." Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13.

The omission of the middle initial is not a misnomer. Corrigan *v.* Schmidt, 126 Mo. 304, 28 S. W. 874.

Where defendant's name is stated correctly in the copy of the summons and complaint mailed to him, a mistake in the summons as published is not fatal. McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287.

Service on a married woman, who had borne the name of "Durham" for nearly twenty years, by her maiden name of "Morris," was invalid. Morris *v.* Tracy, 58 Kan. 137, 48 Pac. 571.

The description of the residence of a defendant as St. Louis, Mo., is sufficient, in a notice for constructive service by publication, without the addition of street address, it not appearing that plaintiff has more definite knowledge of defendant's residence, and defendant's name in the notice being one so uncommon that it may reasonably be assumed that post-office officials in the city named can readily find such defendant, and deliver the newspaper containing such notice, when sent pursuant to the statute. Waterhouse *v.* Waterhouse, 8 Ohio S. & C. Pl. Dec. 73, 6 Ohio N. P. 106.

82. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975.

as the heirs of a named deceased person.[83] Parties may be estopped to contend that they were not properly named, as when the grantee in a deed allows his name to be erroneously written therein and the deed so made to be recorded,[84] or where a woman having property rights in the state absents herself for a long period and marries without the knowledge of her kin and home acquaintances.[85] The property respecting which the action is brought must be properly described.[86] Surplusage will not vitiate the notice even if erroneous.[87]

c. Time of Publication. The statutes further provide when, for what period and how often publication shall be made, and the statutes must be strictly followed in this regard.[88] If the statute requires publication once a week, it is not necessary that each publication should be on the same day of the week,[89] nor is it necessary

83. Tygart *v.* Peeples, 9 Rich. Eq. (S. C.) 46.

84. Blinn *v.* Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536.

85. Jones *v.* Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215.

86. Caldwell *v.* Bigger, 76 Kan. 49, 90 Pac. 1095.

Notice by publication to non-resident heirs, if so specific as to advise the heirs of the nature of their interest to be affected with the proceeding, is sufficient. Gary *v.* May, 16 Ohio 66. But the property to be affected must be described. Lawler *v.* Whetts, 1 Handy 39, 12 Ohio Dec. (Reprint) 17.

87. Waterhouse *v.* Waterhouse, 8 Ohio S. & C. Pl. Dec. 73, 6 Ohio N. P. 106.

An unnecessary explanation as to the time for appearance will not affect the notice. Stoll *v.* Griffith, 41 Wash. 37, 82 Pac. 1025.

88. *California.*—People *v.* McFadden, (1904) 77 Pac. 999; Savings, etc., Soc. *v.* Thompson, 32 Cal. 347; Jordan *v.* Giblin, 12 Cal. 100.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

District of Columbia.— Leach *v.* Burr, 17 App. Cas. 128.

Georgia.— Smith *v.* Thompson, 3 Ga. 23.

Illinois.— Ricketts *v.* Hyde Park, 85 Ill. 110.

Indiana.— Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676; Hartford Security Co. *v.* Arbuckle, 123 Ind. 518, 24 N. E. 329.

Iowa.— Gaar *v.* Taylor, 128 Iowa 636, 105 N. W. 125.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Robinson *v.* Richardson, 4 J. J. Marsh. 574; Barclay *v.* Hendricks, 4 T. B. Mon. 251; Lawlin *v.* Clay, 4 Litt. 283; Pyle *v.* Cravens, 4 Litt. 17; Cravens *v.* Dyer, 1 Litt. 153; Payne *v.* Wallace, 2 A. K. Marsh. 244.

Missouri.— Burnes *v.* Burnes, 61 Mo. App. 612.

New Hampshire.— McTye *v.* McTye, 67 N. H. 590, 36 Atl. 605.

New York.— Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397; Soule *v.* Chase, 1 Rob. 222 [*reversed* on other grounds in 39 N. Y. 342]; Matter of Denton, 40 Misc. 326, 81 N. Y. Suppl. 1031.

North Carolina.— State *v.* Georgia Co., 109 N. C. 310, 13 S. E. 861.

Ohio.— Bacher *v.* Shawhan, 41 Ohio St. 271.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162; Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550; Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732; Blackman *v.* Harry, (Civ. App. 1896) 35 S. W. 290; Wilson *v.* Green, 1 Tex. App. Civ. Cas. § 98.

Utah.— Wells *v.* Kelly, 11 Utah 421, 40 Pac. 705.

Washington.—Fuhrman *v.* Power, 43 Wash. 533, 86 Pac. 940; Deming Inv. Co. *v.* Ely, 21 Wash. 102, 57 Pac. 353; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

United States.— Hunt *v.* Wickliffe, 2 Pet. 201, 7 L. ed. 397; Ranch *v.* Werley, 152 Fed. 509; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

See 40 Cent. Dig. tit. "Process," § 133.

Where time is not fixed.— If the time for commencing service by publication is not fixed by statute, it must be done within a reasonable time. Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Sufficiency of publication.— "Publication for three successive weeks in a weekly newspaper," means three successive publications in a weekly newspaper, and not publication for twenty-one days. Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65; Swett *v.* Sprague, 55 Me. 190; Alexander *v.* Alexander, 26 Nebr. 68, 41 N. W. 1065. Under Cal. Pr. Act, § 31, requiring summons to be published once a week for three months, if the last day of the publication is in the same week in which the three months expires, it is sufficient, although this day is less than three months from the first day of publication. Savings, etc., Soc. *v.* Thompson, 32 Cal. 347.

Where service by publication is not made sufficient time before the return-term of the writ, such service is good for the succeeding term. In principle the case does not differ from the case of personal service less than five days before the return-term. Hill *v.* Baylor, 23 Tex. 261.

The failure of the clerk to make publication pursuant to the order will not work a discontinuance, but the judge has power to allow the publication to be made, returnable to a future term of the court. Penniman *v.* Daniel, 93 N. C. 332.

89. Raunn *v.* Leach, 53 Minn. 84, 54 N. W. 1058.

that a given number of weeks shall intervene between the first and last publication where the statute provides for publication once a week for that number of weeks,[90] but publication must be made once in each of the weeks provided by the statute.[91] The word "month" will be taken to mean calendar month in the absence of a legislative definition.[92] Publication for a longer period than that prescribed will not impair the validity of the service.[93] It is of no consequence that one of the publications is made on a legal holiday.[94] Publication must be made for the required number of times in the same paper.[95]

d. Place of Publication. The statutes of the different states designate in various ways what newspapers may be employed as mediums of publication. Thus it is frequently provided that publication shall be made in a newspaper designated by the court as most likely to give notice to the person served,[96] in a newspaper published and having a *bona fide* circulation in the county in which the proceedings are had,[97] in a secular newspaper of general circulation published in the city, town, or county,[98] in a newspaper designated by plaintiff, printed or published in the county where the petition is filed,[99] in a newspaper of general circulation printed in the English language and published in the county,[1] in a newspaper selected by the governor,[2] etc.[3] Service is void if publication is made in any other paper than

90. Savings, etc., Soc. *v.* Thompson, 32 Cal. 347; Knowles *v.* Summey, 52 Miss. 377; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882. But see Morse *v.* U. S., 29 App. Cas. (D. C.) 433, holding that where publication against non-resident defendants is required to be made once a week for three successive weeks, three weekly publications extending over a period of fifteen days are insufficient.

"The month mentioned in said statutes is a calendar month, and not a lunar month. Under the contention of the appellant the publication of the summons in said paper was made for twenty-nine days only — less than a month. This presupposes that the last issue of the paper, unlike the preceding four issues, answered for only one day. That contention is incorrect." Forsman *v.* Bright, 8 Ida. 467, 470, 69 Pac. 473.

91. Doheny *v.* Worden, 75 N. Y. App. Div. 47, 77 N. Y. Suppl. 959.

Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfies the requirement of Act Cong. June 8, 1898 (30 U. S. St. at L. 434, c. 394), § 6, requiring such publication in the District of Columbia at least "twice a week for a period of not less than four weeks," although there was but one publication in the last calendar week of such period. Leach *v.* Burr, 188 U. S. 510, 23 S. Ct. 393, 47 L. ed. 567 [*affirming* 17 App. Cas. (D. C.) 128].

92. Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116.

93. Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64. But see Laflin *v.* Gato, 52 Fla. 529, 42 So. 387, holding that an order for constructive service by publication, fixing the appearance day fifty-two days from the date of the order, was void, the statute providing that the date should be fixed at not less than thirty, nor more than fifty days.

An order requiring a longer period of publication than the statute calls for is ineffectual as to the time in excess of the statutory limit. People *v.* McFadden, (Cal. 1904) 77 Pac. 999.

94. Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 131, 36 Am. St. Rep. 753.

95. Scammon *v.* Chicago, 40 Ill. 146.

96. Seaver *v.* Fitzgerald, 23 Cal. 85; Otis *v.* Epperson, 88 Mo. 131; Wakeley *v.* Nicholas, 16 Wis. 588.

Definition and designation of newspaper see NEWSPAPERS, 29 Cyc. 692.

97. Gallagher *v.* Johnson, 65 Ark. 90, 44 S. W. 1041; Thompson *v.* Scanlan, (Ark. 1891) 16 S. W. 197.

98. Railton *v.* Lauder, 126 Ill. 219, 18 N. E. 555; Kerr *v.* Hitt, 75 Ill. 51.

99. Herriman *v.* Moore, 49 Iowa 171; Cooke *v.* Tallman, 40 Iowa 133; Flint *v.* Gurrell, 12 Nebr. 341, 11 N. W. 431.

1. Lynn *v.* Allen, 145 Ind. 584, 44 N. E. 646, 57 Am. St. Rep. 223, 33 L. R. A. 779.

2. Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191; Davis *v.* Harnbell, (Tex. Civ. App. 1899) 24 S. W. 972.

3. Donald *v.* Bradt, 15 Colo. App. 414, 62 Pac. 580; Grove's Estate, 2 Woodw. (Pa.) 182. Mo. St. (1899) § 581, declares that service on a non-resident by publication may be had by publishing the notice in some newspaper published in the county where suit is instituted, if there be a paper published there, and if not, then in some paper published in the state. The act of the general assembly, approved April 28, 1877 (Laws (1877), p. 215), and the act amendatory thereof approved April 22, 1879 (Laws 1879), p. 84), gave the circuit court sitting at the city of P exclusive jurisdiction in all suits arising in a certain part of M county, and it was held that the circuit court at P could not obtain jurisdiction by publication in a newspaper issued in that part of the county other than that in which such court held jurisdiction under the act of 1877, as amended by the act of 1879, where there was a newspaper published in that part of the county in which it did have jurisdiction. Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186.

one designated by or pursuant to the statute.[4] If no newspaper is printed or published in the county, publication may under some statutes be made in a newspaper published in an adjoining county,[5] or in any newspaper published in the state.[6] A newspaper is deemed to be "printed" within the county where it is issued, notwithstanding that a portion of it is in fact printed in another state.[7] If the statute requires the paper to be published in the county it is immaterial where it is printed.[8] Where a notice is published in the paper intended by the order it is sufficient, although there has been an error in the designation of the paper in the order.[9]

e. Concurrent Requirements. Statutes frequently provide for other methods of reaching the attention of defendant to be used in addition to and concurrent with the publication. Thus a notice is sometimes required to be posted on the court-house door,[10] and it is very commonly required that when the residence of defendant is known, a copy of the notice, order, or summons, and sometimes of plaintiff's first pleading, shall be sent to him at such address by mail.[11] If an order of the court is necessary directing such mailing, a notice mailed before the making of the order is ineffectual.[12] The proper address must be used,[13] and the notice must be mailed from the post-office designated in the order.[14] Any one may deposit the notice in the post-office.[15] If required to be deposited in the post-office "forthwith," it is sufficient if done within a reasonable time.[16] If there are two or

4. Donald *v.* Bradt, 15 Colo. App. 414, 62 Pac. 580; Otis *v.* Epperson, 88 Mo. 131; Brisbane *v.* Peabody, 3 How. Pr. (N. Y.) 109; Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191.

5. Cooke *v.* Tallman, 40 Iowa 133.

6. Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186, paper designated by plaintiff or attorney with approval of the judge or clerk.

7. Palmer *v.* McCormick, 30 Fed. 82.

8. Ricketts *v.* Hyde Park, 85 Ill. 110.

9. Sheraden Borough, 34 Pa. Super. Ct. 639, holding that where an order directed that notice should be given in the "Pittsburg Gazette," and it appeared that the notice was published in the "Pittsburg Gazette Times," and that there was no other paper known as the "Pittsburg Gazette" published in the county at the time, the publication was a substantial compliance with the order of the court. It cannot, on appeal, be said that the court erred in construing its order for publication of summons in the "San Diego Union" as referring to the "San Diego Union and Daily Bee," in which it was published. People *v.* McFadden, (Cal. 1904) 77 Pac. 999.

10. Batre *v.* Anze, 5 Ala. 173; Laflin *v.* Gato, 50 Fla. 558, 39 So. 59; McKey *v.* Cobb, 33 Miss. 533; Zecharie *v.* Bowers, 3 Sm. & M. (Miss.) 641.

11. *Alabama.*— Cullum *v.* Mobile Branch Bank, 23 Ala. 797.

California.— San Diego Sav. Bank *v.* Goodsell, 137 Cal. 420, 70 Pac. 299; Schart *v.* Schart, 116 Cal. 91, 47 Pac. 927; Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

Colorado.— O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621.

Idaho.— Strode *v.* Strode, 6 Ida. 67, 52 Pac. 161, 96 Am. St. Rep. 249.

Iowa.— Bristow *v.* Guess, 12 Iowa 404; Foley *v.* Connelly, 9 Iowa 240; Taylor *v.* Brobst, 4 Greene 534.

Nevada.— Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370.

New York.— Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Von Rhade *v.* Von Rhade, 2 Thomps. & C. 491; Barnard *v.* Heydrick, 2 Abb. Pr. N. S. 47.

Oregon.— Knapp *v.* Wallace, (1907) 92 Pac. 1054.

Washington.— Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

United States.— Ranch *v.* Werley, 152 Fed. 509.

See 40 Cent. Dig. tit. "Process," § 135.

12. Rockman *v.* Ackerman, 109 Wis. 639, 85 N. W. 491.

13. Paulling *v.* Creagh, 63 Ala. 398; Anderson *v.* Anderson, 229 Ill. 538, 82 N. E. 311.

14. Smith *v.* Wells, 69 N. Y. 600.

It is not improper to deposit a summons and complaint, in an action against a nonresident, in the post-office of the city where plaintiff's attorney resides, instead of the city where the order of publication was made. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

15. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Sharp *v.* Daugney, 33 Cal. 505.

16. Lyon *v.* Comstock, 9 Iowa 306 (on the second day after the order was made); Cleland *v.* Tavernier, 11 Minn. 194 (before the first legal publication); Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392 (within four days); Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

Where an order of publication required a copy of the summons and complaint to be deposited in the post-office "forthwith," a finding of the trial court that a delay of ten days was not unreasonable will not be disturbed. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169.

more defendants, a separate notice must be mailed to each of the defendants sought to be served.[17]

f. Personal Service Outside State. Personal service outside the state is frequently provided for by statute as a substitute for and an equivalent to service by publication,[18] but no jurisdiction over the person of defendant is acquired thereby unless defendant actually appears.[19] The procedure is wholly statutory,[20] and the provisions of the statute must be observed as carefully as in case of service by publication.[21] Only the summons need be served, where the statute does not also require service of the affidavit, order, or complaint.[22] It is usually held that all necessary steps to secure the right to service by publication must be taken, and such service duly ordered, before personal service without the state may be resorted to,[23] and the summons served must be the same summons ordered to be published.[24] But it is unnecessary also to mail a copy of the summons where such personal service is had.[25] If the order provides in the alternative for both publication and personal service without the state, a defect in the former part of the order will not affect the validity of service had under the latter part.[26]

17. Wylly *v.* Sanford L. & T. Co., 44 Fla. 118, 33 So. 453; Dennison *v.* Blumenthal, 37 Ill. App. 385.

18. *Kansas.*— Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681.

Nebraska.—Anheuser-Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373.

New York.— Jenkins *v.* Fahey, 73 N. Y. 355; Lockwood *v.* Brantly, 31 Hun 155; Matthews *v.* Gilleran, 12 N. Y. Suppl. 74; Abrahams *v.* Mitchell, 8 Abb. Pr. 123.

North Carolina.— Long *v.* Home Ins. Co., 114 N. C. 465, 19 S. E. 347.

Ohio.—Williams *v.* Welton, 28 Ohio St. 451.

Washington.— Hunter *v.* Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

Wisconsin.— Wilmot *v.* Smith, 86 Wis. 299, 56 N. W. 873; Pier *v.* Amory, 40 Wis. 571.

United States.—Adams *v.* Heckscher, 80 Fed. 742; Salisbury *v.* Sands, 21 Fed. Cas. No. 12,251, 2 Dill. 270.

See 40 Cent. Dig. tit. "Process," § 136.

19. *California.*— Riverside First Nat. Bank *v.* Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; *In re* Culp, 2 Cal. App. 70, 83 Pac. 89.

Iowa.— Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030; Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986.

Kansas.—Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681.

Nebraska.—Anheuser- Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373.

New York.— Mahr *v.* Norwich Union F. Ins. Soc., 127 N. Y. 452, 28 N. E. 391.

North Carolina.— Long *v.* Home Ins. Co., 114 N. C. 465, 19 S. E. 347.

Ohio.— Williams *v.* Welton, 28 Ohio St. 451.

South Carolina.— National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

Texas.— Donovan *v.* Hinzie, (Civ. App. 1901) 60 S. W. 994; Roller *v.* Holley, 13 Tex. Civ. App. 636, 35 S. W. 1074.

United States.— Dull *v.* Blackman, 169 U. S. 243, 18 S. Ct. 333, 42 L. ed. 733.

See 40 Cent. Dig. tit. "Process," § 136.

20. Jennings *v.* Johnson, 148 Fed. 337, 78 C. C. A. 329; *In re* Cliff, [1895] 2 Ch. 21, 64 L. J. Ch. 423, 72 L. T. Rep. N. S. 440, 13 Reports 425, 43 Wkly. Rep. 436.

21. Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495.

22. Ludden *v.* Degener, 14 N. Y. App. Div. 397, 43 N. Y. Suppl. 908; Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075.

23. Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84; Peck *v.* Cook, 41 Barb. (N. Y.) 549; Fiske *v.* Anderson, 12 Abb. Pr. (N. Y.) 8; Manning *v.* Heady, 64 Wis. 630, 25 N. W. 1.

Contrary view.— "The learned counsel for appellant . . . contend that, before service can be made without the State, an affidavit must be filed that personal service cannot be made within the State, as provided by section 2832, when service is to be made by publication; and this, because actual personal service without the State only supersedes the necessity of publication. The whole argument, however, is answered by the single statement that the true construction of section 2835 is that personal service without the State supersedes the necessity of service by publication. In other words, that the word 'publication' as used in that section means not only or merely the act of publishing the notice for four weeks in the paper, but also the other acts, both preceding and following that, which the statute requires in order to make a completed service by publication. So that when personal service is made without the State, it is not necessary either to file the affidavit that service cannot be made within the State nor to procure the designation in writing by the clerk, nor to file the affidavit, etc., with the clerk." Miller *v.* Davison, 31 Iowa 435, 439. And see Jennings *v.* Rocky Bar Gold Min. Co., 29 Wash. 726, 70 Pac. 136.

24. Coffin *v.* Bell, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

25. McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

26. Sabin *v.* Kendrick, 2 N. Y. App. Div. 96, 37 N. Y. Suppl. 524.

England and Canada.— In England the entire subject of service outside the jurisdiction

7. Time When Service Is Complete. The service is in some states complete as soon as the paper containing the last publication is issued,[27] but in others the full statutory number of days or weeks must expire before service is deemed complete.[28] When personal service outside the state is resorted to as a substitute for publication, the service is in some states held not complete until the expiration of the time provided for publication,[29] although other courts hold that such service is complete as soon as personal service is in fact made.[30]

E. Privileges and Exemptions[31]— 1. Persons in Presence of the Court. It is a well-settled rule of the common law that service of a summons upon any person interested in a cause in the presence of the court in which it is being tried

is covered by Order XI of the Rules of the Supreme Court. Such service is allowed in case: (1) The subject-matter of the action is land situated within the jurisdiction; (2) the action relates to any act, deed, contract or liability affecting such land; (3) relief is sought against any person domiciled within the jurisdiction; (4) the action is brought for the administration of the personal estate of one who at the time of his death was domiciled in the jurisdiction; (5) the action is for breach within the jurisdiction of a contract to be performed within the jurisdiction; (6) an injunction is sought as to anything to be done within the jurisdiction or a nuisance is sought to be prevented within the jurisdiction; and (7) any person out of the jurisdiction is a necessary or proper party to an action brought against parties served within the jurisdiction. Comber *v.* Leyland, [1898] A. C. 524, 67 L. J. Q. B. 884, 79 L. T. Rep. N. S. 180; Thompson *v.* Palmer, [1893] 2 Q. B. 80, 62 L. J. Q. B. 502, 69 L. T. Rep. N. S. 366, 4 Reports 422, 42 Wkly. Rep. 22; Witted *v.* Galbraith, [1893] 1 Q. B. 577, 62 L. J. Q. B. 248, 68 L. T. Rep. N. S. 421, 4 Reports 362, 41 Wkly. Rep. 395; Seagrove *v.* Parks, [1891] 1 Q. B. 551, 60 L. J. Q. B. 355; Bell *v.* Antwerp, etc., Line, [1891] 1 Q. B. 103, 7 Aspin. 154, 60 L. J. Q. B. 270, 64 L. T. Rep. N. S. 276, 39 Wkly. Rep. 84; Massey *v.* Heynes, 21 Q. B. D. 330, 57 L. J. Q. B. 521, 36 Wkly. Rep. 834; Hewitson *v.* Fabre, 21 Q. B. D. 6, 57 L. J. Q. B. 449, 58 L. T. Rep. N. S. 856, 36 Wkly. Rep. 717; Kaye *v.* Sutherland, 20 Q. B. D. 147, 57 L. J. Q. B. 68, 58 L. T. Rep. N. S. 56, 36 Wkly. Rep. 508; Thomas *v.* Hamilton, 17 Q. B. D. 592, 55 L. J. Q. B. 555, 55 L. T. Rep. N. S. 385, 35 Wkly. Rep. 22; Deutsche Nat. Bank *v.* Paul, [1898] 1 Ch. 283, 67 L. J. Ch. 156, 78 L. T. Rep. N. S. 35, 14 T. L. R. 193, 46 Wkly. Rep. 243; Winter *v.* Winter, [1894] 1 Ch. 421, 63 L. J. Ch. 165, 69 L. T. Rep. N. S. 759, 8 Reports 614; Societe Generale de Paris *v.* Dreyfus, 37 Ch. D. 215, 57 L. J. Ch. 276, 58 L. T. Rep. N. S. 573, 36 Wkly. Rep. 609; Reynolds *v.* Coleman, 36 Ch. D. 453, 56 L. J. Ch. 903, 57 L. T. Rep. N. S. 588, 35 Wkly. Rep. 813; *In re* Eager, 22 Ch. D. 86, 52 L. J. Ch. 56, 47 L. T. Rep. N. S. 685, 31 Wkly. Rep. 33; Fowler *v.* Barstow, 20 Ch. D. 240, 51 L. J. Ch. 103, 45 L. T. Rep. N. S. 603, 30 Wkly. Rep. 113; Young *v.* Brassey, 1 Ch. D. 277, 45 L. J. Ch. 142, 24 Wkly. Rep. 110; Westman *v.* Aktiebolaget Ekman's Mekaneska Snickarefabrik, 1 Ex. D. 237, 45 L. J. Exch. 327, 24 Wkly. Rep. 405; James *v.* Despott, L. R. 14 Ir. 71; Peru Republic *v.* Dreyfus, 55 L. T. Rep. N. S. 802; Lisbon-Berlyn Gold Fields *v.* Heddle, 52 L. T. Rep. N. S. 796; Potters *v.* Miller, 31 Wkly. Rep. 858. The question of the service of a writ out of the jurisdiction is finally determined when leave to serve it is given under Order XI, subject to any application by defendant to rescind the leave and to the right of appeal and cannot be raised in the defense. Preston *v.* Lamont, 1 Ex. D. 361, 45 L. J. Exch. 797, 35 L. T. Rep. N. S. 341, 24 Wkly. Rep. 928. Similar rules have been adopted in some of the provinces of Canada. Young *v.* Dominion Constr. Co., 19 Ont. Pr. 139; Franchot *v.* General Securities Corp., 18 Ont. Pr. 291; Empire Oil Co. *v.* Vallerand, 17 Ont. Pr. 27; Clarkson *v.* Dupré, 16 Ont. Pr. 521; Oligny *v.* Beauchemin, 16 Ont. Pr. 508; Bell *v.* Villeneuve, 16 Ont. Pr. 413; Sears *v.* Meyers, 15 Ont. Pr. 381; Livingstone *v.* Sibbald, 15 Ont. Pr. 315; Fisher *v.* Cassady, 14 Ont. Pr. 577; Simpson *v.* Hall, 14 Ont. Pr. 310; Purves *v.* Slater, 11 Ont. Pr. 507; Martin *v.* Lafferty, 9 Ont. Pr. 300.

27. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Banta *v.* Wood, 32 Iowa 469; Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

28. Foster *v.* Vehmeyer, 133 Cal. 459, 65 Pac. 974; Grewell *v.* Henderson, 5 Cal. 465; Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397; Waters *v.* Waters, 7 Misc. (N. Y.) 519, 27 N. Y. Suppl. 1004; Brod *v.* Heymann, 2 Abb. Pr. N. S. (N. Y.) 396; Richardson *v.* Bates 23 How. Pr. (N. Y.) 516; Moore *v.* Thayer, 6 How. Pr. (N. Y.) 47; Harmon *v.* Whittemore, 7 Ohio Dec. (Reprint) 92, 1 Cinc. L Bul. 109; Gilfillin *v.* Koke, 2 Ohio Dec. (Reprint) 172, 1 West. L. Month. 705; Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130. See also Ranch *v.* Werley, 152 Fed. 509, construing Oregon statutes.

29. Bowen *v.* Harper, 6 Ida. 654, 59 Pac 179; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84; Crouter *v.* Crouter, 17 N. Y. Suppl. 758 [*affirmed* in 133 N. Y. 55, 30 N. E. 726]; Abrahams *v.* Mitchell, 8 Abb. Pr. (N. Y.) 123. But *compare In re* Macauley, 94 N. Y. 574.

30. H. L. Spencer Co. *v.* Koell, 91 Minn. 226, 97 N. W. 974.

31. Exemptions and privileges of ambassador or consul see Ambassadors and Consuls, 2 Cyc. 265 *et seq.*

Indictment for service on minister see Ambassadors and Consuls, 2 Cyc. 269 note 53.

is a contempt, but the privilege is one of the court rather than of the person.[32] In all other cases of exemption from service of summons, the privilege is deemed personal only.[33]

2. MEMBERS OF LEGISLATIVE BODIES. At common law members of parliament enjoyed no privilege from suit at any time,[34] and although there is a conflict of authority the better established opinion is that no common-law rule of exemption for legislators is to be recognized in the United States;[35] but in many American jurisdictions statutes or constitutional provisions provide for such immunity for members of legislative assemblies while engaged in the discharge of their duties.[36] Immunity from arrest is sometimes held to include exemption from service of summons,[37] but the better rule is to the contrary.[38]

3. SERVICE ON JUDGES. Judges are exempt from service of summons while holding court and for a reasonable time in going to and from the place of the session.[39]

4. SERVICE ON JURORS. Under a statute providing against the service of any writ or other process on the body of a juror, jurors are not exempt from the service of civil process without arrest during the time they are attending court.[40]

5. SERVICE ON ATTORNEYS AT LAW. Resident attorneys at law have no privilege of exemption during the trial of causes in which they are engaged, except when in the actual presence of the court;[41] and the rule has been applied to non-resident attorneys,[42] although other cases announce a contrary doctrine.[43] The immunity

32. Clark *v.* Grant, 2 Wend. (N. Y.) 257; Sandford *v.* Chase, 3 Cow. (N. Y.) 381; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Huddeson *v.* Prizer, 9 Phila. (Pa.) 65.

33. Sebring *v.* Stryker, 10 Misc. (N. Y.) 289, 30 N. Y. Suppl. 1053.

34. Stockdale *v.* Hansard, 9 A. & E. 1, 3 Jur. 905, 8 L. J. Q. B. 294, 2 P. & D. 1, 36 E. C. L. 27.

35. Berlet *v.* Weary, 67 Nebr. 75, 93 N. W. 288, 108 Am. St. Rep. 616, 60 L. R. A. 609. And see cases cited *infra*, note 38. *Contra*, Geyer *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762; Bolton *v.* Martin, 1 Dall. (Pa.) 296, 1 L. ed. 144.

36. *Connecticut.*— King *v.* Coit, 4 Day 129.

Kansas.— Cook *v.* Senior, 3 Kan. App. 278, 45 Pac. 126.

South Carolina.— Tillinghast *v.* Carr, 4 McCord 152.

Virginia.— McPherson *v.* Nesmith, 3 Gratt. 237.

Wisconsin.—Anderson *v.* Rountree, 1 Pinn. 115.

United States.—Miner *v.* Markham, 28 Fed. 387.

See 40 Cent. Dig. tit. "Process," § 144.

37. Anderson *v.* Rountree, 1 Pinn. (Wis.) 115; Miner *v.* Markham, 28 Fed. 387.

38. *District of Columbia.*— Merrick *v.* Giddings, MacArthur & M. 55.

Kentucky.— Johnson *v.* Offutt, 4 Metc. 19; Catlett *v.* Morton, 4 Litt. 122.

Minnesota.— Rhodes *v.* Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632.

Nebraska.— Berlet *v.* Weary, 67 Nebr. 75, 93 N. W. 155, 108 Am. St. Rep. 616, 60 L. R. A. 609, containing a very exhaustive discussion of the question.

New Hampshire.— Bartlett *v.* Blair, 68 N. H. 232, 38 Atl. 1004.

South Carolina.— Worth *v.* Norton, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524, 45 L. R. A. 563, an exhaustive case on the question, with dissenting opinion by Pope, J.

Texas.— Gentry *v.* Griffith, 27 Tex. 461.

Virginia.— McPherson *v.* Nesmith, 3 Gratt. 237.

United States.— Kimberly *v.* Butler, 14 Fed. Cas. No. 7,777.

See 40 Cent. Dig. tit. "Process," § 144.

Members of congress, while in attendance upon its sessions, are not privileged from being sued in this district. Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222.

39. See JUDGES, 23 Cyc. 524.

40. Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.

41. National Press Intelligence Co. *v.* Brooke, 18 Misc. (N. Y.) 373, 41 N. Y. Suppl. 658 (service made in open court held good); Parker Sav. Bank *v.* McCandlass, 6 Pa. Co. Ct. 327. But *compare* Gilbert *v.* Vanderpool, 15 Johns. (N. Y.) 242.

42. Greenleaf *v.* Peoples' Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499 (this case contains a thorough discussion of the question in a concurring opinion by Clark, C. J.); Robbins *v.* Lincoln, 27 Fed. 342.

An attorney at law who travels from one county to another in the practice of his profession is not exempt from service of process while returning from court, although he was sworn as a witness in a cause in which he was engaged. Tyrone Bank *v.* Doty, 2 Pa. Dist. 558, 12 Pa. Co. Ct. 287.

43. *Pennsylvania.*— Huddeson *v.* Prizer, 9 Phila. 65.

South Carolina.— Vincent *v.* Watson, 1 Rich. 194; Hunter *v.* Cleveland, 1 Brev. 167.

Virginia.— Com. *v.* Ronald, 4 Call 97.

United States.— Norris *v.* Hassler, 23 Fed. 581; Blight *v.* Fisher, 3 Fed. Cas. No. 1,542, Pet. C. C. 41.

England.— Cole *v.* Hawkins, 2 Str. 1094.

extends not only to those who are in the immediate presence of the judges of courts of record, but to those also who are in attendance upon the subordinate tribunals and officers appointed by those courts to assist them in the discharge of their duties.[44]

6. Service on Suitors and Witnesses. Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpœna or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going.[45] The

See Poole *v.* Gould, 1 H. & N. 99, 25 L. J. Exch. 250, where the court refused to set aside service made in court upon a witness present in obedience to a writ of summons.

44. Hoffman *v.* Bay Cir. Judge, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663 (holding that an attorney at law is privileged from service of summons while attending upon the supreme court and while going to the court and returning to the county of his residence); Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179 (holding that the privilege exists in favor of an attorney who goes into another county in the same state in order to attend court).

45. *Arkansas.*— Martin *v.* Bacon, 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81.

California.— Fox *v.* Hale, etc., Min. Co., 108 Cal. 369, 41 Pac. 308.

Georgia.— Fidelity, etc., Co. *v.* Everett, 97 Ga. 787, 25 S. E. 734.

Indiana.— Wilson *v.* Donaldson, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

Iowa.— Murray *v.* Wilcox, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534.

Kansas.— Bolz *v.* Crone, 64 Kan. 570, 67 Pac. 1108; Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15.

Maryland.— Bolgiano *v.* Gilbert Lock Co., 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582.

Michigan.— Letherby *v.* Shaver, 73 Mich. 500, 41 N. W. 677; Mitchell *v.* Huron Cir. Judge, 53 Mich. 541, 19 N. W. 176.

Minnesota.— St. Paul First Nat. Bank *v.* Ames, 39 Minn. 179, 39 N. W. 308; Sherman *v.* Gundlach, 37 Minn. 118, 33 N. W. 549.

Nebraska.— Linton *v.* Cooper, 54 Nebr. 438, 74 N. W. 842, 69 Am. St. Rep. 727.

New Hampshire.— Ela *v.* Ela, 68 N. H. 312, 36 Atl. 15.

New Jersey.— Richardson *v.* Smith, 74 N. J. L. 111, 65 Atl. 162; Mulhearn *v.* Press Pub. Co., 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101; Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754; Miller *v.* Dungan, 37 N. J. L. 182; Halsey *v.* Stewart, 4 N. J. L. 366.

New York.— Matthews *v.* Tufts, 87 N. Y. 568; Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 35; Goldsmith *v.* Haskell, 120 N. Y. App. Div. 403, 105 N. Y. Suppl. 327 (holding the facts sufficient to show that a traveling salesman had obtained residence outside of the state); Lamkin *v.* Starkey, 7 Hun 479; Grafton *v.* Weeks, 7 Daly 523; Kinsey *v.* American Hardwood Mfg. Co., 94 N. Y. Suppl. 455; Hollender *v.* Hall, 13 N. Y. Suppl. 758 [*affirmed* in 11 N. Y. Suppl. 521, 19 N. Y. Civ. Proc. 292]; Finch *v.* Galigher, 12 N. Y. Suppl. 487, 25 Abb. N. Cas. 404; Pritsch *v.* Schlicht, 5 N. Y. St. 871; Sheehan *v.* Bradford, etc., R. Co., 15 N. Y. Civ. Proc. 429; Brett *v.* Brown, 13 Abb. Pr. N. S. 295; Merrill *v.* George, 23 How. Pr. 331; Coburn *v.* Hopkins, 1 Wend. 292.

North Carolina.— Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

Ohio.— Barber *v.* Knowles, 77 Ohio St. 81, 82 N. E. 1065; Andrews *v.* Lembeck, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547; Bassett *v.* Gunsolus, 6 Ohio Dec. (Reprint) 1228, 13 Am. L. Rec. 487.

Pennsylvania.— Hayes *v.* Shields, 2 Yeates 222; Western New York, etc., R. Co. *v.* Clermont, etc., R. Co., 9 Pa. Dist. 299; Ferree *v.* Pierce, 25 Pa. Co. Ct. 112; Yeakel *v.* Brand, 7 North. Co. Rep. 31; Holmes *v.* Nelson, 1 Phila. 217; Carstairs *v.* Knapp, 35 Wkly. Notes Cas. 292.

South Dakota.— Malloy *v.* Brewer, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856; Comp. Laws, § 5274, providing that a witness shall not be liable to be sued in a county in which he does not reside by being served with a summons in such county while going, returning, or attending in obedience to a subpœna, covers only the subject of the immunity of witnesses and does not assume to regulate the exemption of suitors. Fisk *v.* Westover, 4 S. D. 233, 55 N. W. 961, 46 Am. St. Rep. 780.

Tennessee.— Sewanee Coal, etc., Co. *v.* Williams, (1908) 107 S. W. 968, holding that the exemption applied to witnesses summoned before federal courts as well as before the state courts.

Texas.— Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417.

Wisconsin.— Cameron *v.* Roberts, 87 Wis. 291, 58 N. W. 376, 41 Am. St. Rep. 43.

United States.—Skinner, etc., Co. *v.* Waite, 155 Fed. 828 (holding that a person going into another state as a witness or as a party defendant in a suit therein, either nominally or as a defendant in interest, is exempt from process in such state while he is necessarily attending there in respect to such trial, at least in the absence of a state statute unequivocally abrogating such exemption); American Wooden-Ware Co. *v.* Stern, 63 Fed. 676; Kauffman *v.* Kennedy, 25 Fed. 785; Small *v.* Montgomery, 23 Fed. 707; Wilson Sewing-Mach. Co. *v.* Wilson, 22 Fed. 803, 23 Blatchf. 51; Nichols *v.* Horton, 14

rule is broad enough to include witnesses before a legislative committee,[46] witnesses present before a commission of the supreme court,[47] a suitor attending a hearing before a referee in bankruptcy,[48] persons attendant upon summary proceedings for dispossession under a landlord and tenant statute,[49] suitors or witnesses present in the state for the purpose of taking depositions,[50] and a suitor coming into the jurisdiction in order to confer with counsel during the argument of a demurrer.[51] The rule is by most courts held to apply equally well to suitors and witnesses attending court in the state but not in the county of their residence,[52]

Fed. 327, 4 McCrary 567; Atchison *v.* Morris, 11 Fed. 582, 11 Biss. 191; Brooks *v.* Farwell, 4 Fed. 166, 2 McCrary 220; Juneau Bank *v.* McSpedan, 14 Fed. Cas. No. 7,582, 5 Biss. 64; Parker *v.* Hotchkiss, 18 Fed. Cas. No. 10,739, 1 Wall. Jr. 269. *Contra*, Blight *v.* Fisher, 3 Fed. Cas. No. 1,542, Pet. C. C. 41.

See 40 Cent. Dig. tit. "Process," §§ 148, 150.

Contra.— Bishop *v.* Voss, 27 Conn. 1; Lewis *v.* Miller, 115 Ky. 623, 74 S. W. 691, 24 Ky. L. Rep. 2533.

"This immunity is one of the necessities of the administration of justice." Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 22.

Exemption limited to jurisdiction where hearing is had.— The policy of the law exempting from service of process parties and witnesses going to and from court extends only to the jurisdiction in which attendance at court is required, and does not render invalid a service of process from a Massachusetts court upon a citizen of Vermont while traveling through Massachusetts to attend court in Connecticut as a witness. Holyoke, etc., Ice Co. *v.* Ambden, 55 Fed. 593, 21 L. R. A. 319. The contrary, however, was held in Tyrone Bank *v.* Doty, 2 Pa. Dist. 558, 12 Pa. Co. Ct. 287, in which it was held that where a witness, on the day after the trial, departs for his home in a distant county by the most direct route, he is exempt from service of process while passing through an intermediate county.

Resident coming from outside state.— A resident who had been sojourning out of the state to avoid service of process, and voluntarily came within the state to testify in a legal proceeding, and attend as a party, could not be served with process while coming, attending court or returning, provided he returned with reasonable despatch. Cake *v.* Haight, 30 Misc. (N. Y.) 386, 63 N. Y. Suppl. 1043.

Witness exempt only in personal capacity. — It was held in Linn *v.* Hagan, 121 Ky. 627, 87 S. W. 1101, 27 Ky. L. Rep. 1113, that the execution exemption of the witness, when allowed, is a personal one and that a witness who has come from a foreign jurisdiction to testify in a pending case may nevertheless be served in a representative capacity, as administratrix. But see Sewanee Coal, etc., Co. *v.* Williams, (Tenn. 1908) 107 S. W. 968, holding that a resident of another state or county, who has in good faith come to testify as a witness, is exempt from service of process for the commencement of a civil action, either against him in his individual capacity, or against a corporation of which he is an officer or agent.

Effect of statute.— N. C. Code, §§ 1367, 1735, prohibiting arrest in civil actions of parties attending court as witness or as jurors, do not by implication repeal the common-law exemption of non-residents from service of process while in the state in attendance in court either as witnesses or as suitors. Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

Final process.— The protection to suitors and witnesses attending court from service of civil process does not extend to final process, and service of an attachment execution upon a non-resident defendant and garnishee attending court as plaintiff in another suit will not be set aside. Schroeder *v.* Reynolds, 17 Lanc. L. Rev. (Pa.) 300.

46. Thorp *v.* Adams, 11 N. Y. Suppl. 479, 19 N. Y. Civ. Proc. 351.

47. Mulhearn *v.* Press Pub. Co., 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101.

48. Morrow *v.* Dudley, 144 Fed. 441.

49. Richardson *v.* Smith, 74 N. J. L. 111, 65 Atl. 162.

50. Parker *v.* Marco, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45; Langdon *v.* Baker, 7 Ohio S. & C. Pl. Dec. 423, 5 Ohio N. P. 118; Partridge *v.* Powell, 180 Pa. St. 22, 36 Atl. 419; Plimpton *v.* Winslow, 9 Fed. 365, 20 Blatchf. 82. See Bank *v.* Messenger, 1 Northumb. Co. Leg. N. (Pa.) 173.

51. Kinne *v.* Lant, 68 Fed. 436.

Selling property pursuant to decree.— A managing officer of a foreign corporation who is in the state to attend a sale of land under a decree of the federal court in an action in which the foreign corporation was a party is not in attendance on a judicial proceeding so as to exempt him from service of a summons in an action against the corporation. Greenleaf *v.* People's Bank, 133 N. C. 292, 45 S. E. 633, 98 Am. St. Rep. 709, 63 L. R. A. 499.

52. *Illinois.*— Gregg *v.* Sumner, 21 Ill. App. 110.

Indiana.— Wilson *v.* Donaldson, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

Kansas.— Underwood *v.* Fosha, 73 Kan. 408, 85 Pac. 564.

Michigan.— Mitchell *v.* Huron Cir. Judge, 53 Mich. 541, 19 N. W. 176.

Nebraska.— Mayer *v.* Nelson, 54 Nebr. 434, 74 N. W. 841.

New Jersey.— Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

New York.— Person *v.* Grier, 66 N. Y. 124,

where the process of such court could not reach them in the county of their residence.[53] But the privilege does not attach when the person is attending court merely as a spectator.[54] Some cases limit the privilege to witnesses alone, and do not accord it to suitors.[55] Resident witnesses and suitors, attending court in the county of their residence, have no such privilege.[56]

7. Service on Electors. In some jurisdictions statutes forbid the service of civil process on an elector during the time appointed for an election.[57]

8. Service on Persons Charged With Crime. When a non-resident defendant in a criminal prosecution comes into the jurisdiction involuntarily for the purpose of appearing, pleading, or being tried, he will be held immune from the service of summons in a civil suit, until after a reasonable time has elapsed to enable him to return to his home;[58] but a voluntary appearance of a person for whom requisition has been

23 Am. Rep. 35; People *v.* Inman, 74 Hun 130, 26 N. Y. Suppl. 329; Thorp *v.* Adams, 11 N. Y. Suppl. 479, 19 N. Y. Civ. Proc. 351.

North Dakota.— Hicks *v.* Besuchet, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665.

Ohio.— Barber *v.* Knowles, 77 Ohio St. 81, 82 N. E. 1065; Andrews *v.* Lembeck, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547.

Pennsylvania.— Miles *v.* McCullough, 1 Binn. 77; Wetherell *v.* Seitzinger, 1 Miles 237.

See 40 Cent. Dig. tit. "Process," §§ 148, 150.

Contra.— Legrand *v.* Bedinger, 4 T. B. Mon. (Ky.) 539; Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96. See also Sadler *v.* Ray, 5 Rich. (S. C.) 523.

Who deemed a party.— The cashier of a national bank, sent by the bank to attend the taking of depositions in another city, but without formal power of attorney from the bank to represent it in a case in which the bank was a plaintiff, is not such a party to the case as to be exempt from the service of a summons on him as cashier of the bank, in a suit against the bank. White *v.* Merchants', etc., Nat. Bank, 12 Pa. Co. Ct. 254.

Taking depositions.— The same exemption exists while a party is in another county in attendance on the taking of depositions in a pending action. Powers *v.* Arkadelphia Lumber Co., 61 Ark. 504, 33 S. W. 842, 54 Am. St. Rep. 276; Wetherill *v.* Seitzinger, 1 Miles (Pa.) 237.

Change of venue.— It was held in Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754, that the remedy upon service in such a case was not by setting aside the service but by a change of venue if an unfair advantage had been taken of defendant. And this is the construction given by the courts of Kentucky to the statute of that state. Linn *v.* Hagan, 121 Ky. 627, 87 S. W. 1101, 27 Ky. L. Rep. 1113.

Necessity of subpœna.— In Kentucky a witness is not protected from service in another county unless he is attending court there pursuant to the command of a subpœna. Currie Fertilizer Co. *v.* Krish, 74 S. W. 268, 24 Ky. L. Rep. 2471.

53. Sebring *v.* Stryker, 10 Misc. (N. Y.) 289, 30 N. Y. Suppl. 1053; Schroeder *v.* Reynolds, 17 Lanc. L. Rev. (Pa.) 300.

54. McIntire *v.* McIntire, 5 Mackey (D. C.) 344; Michaels *v.* Hain, 78 Hun (N. Y.) 500, 29 N. Y. Suppl. 567.

55. *Connecticut.*— Bishop *v.* Vose, 27 Conn. 1.

Idaho.— Guynn *v.* McDaneld, 4 Ida. 605, 43 Pac. 74, 95 Am. St. Rep. 158, where the court concedes that the majority of decisions are opposed to this limitation which it nevertheless adopts.

Illinois.— Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087; Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Gregg *v.* Sumner, 21 Ill. App. 110.

Missouri.— Baisley *v.* Baisley, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726.

Rhode Island.— Capwell *v.* Sipe, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890; Baldwin *v.* Emerson, 16 R. I. 304, 15 Atl. 83, 27 Am. St. Rep. 741.

Nature of the action may determine privilege.— In Mullen *v.* Sanborn, 79 Md. 364, 366, 29 Atl. 522, 47 Am. St. Rep. 421, 25 L. R. A. 721, the court said: "As to what the better rule may be, both as to plaintiffs and defendants, there is some conflict of authority; but we are all of opinion that this right of exemption should not be extended to one who, like the appellee, comes here and avails himself of the right given him by our statute to issue an attachment for fraud . . . The appellee having failed to prosecute his attachment with success, and the appellant having sued him in the court where the bond was filed to ascertain the damages, so that he could avail himself of a suit on the bond to make himself whole, we think the appellee should be held to have waived his right, if he had any, to exemption from summons."

56. Case *v.* Rorabacher, 15 Mich. 537; Frisbie *v.* Young, 11 Hun (N. Y.) 474; Pollard *v.* Union Pac. R. Co., 7 Abb. Pr. N. S. (N. Y.) 70. See also Hunter *v.* Cleveland, 1 Brev. (S. C.) 167; Huntington *v.* Shultz, Harp. (S. C.) 452, 18 Am. Dec. 660, holding that a statute conferring an exemption from arrest did not prohibit service of a capias ad respondendum.

57. See the statutes of the several states. And see Corlies *v.* Holmes, 20 Wend. (N. Y.) 681.

58. *Idaho.*— Guynn *v.* McDaneld, 4 Ida. 605, 43 Pac. 74, 95 Am. St. Rep. 158.

Illinois.— Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087; Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Gregg *v.* Sumner, 21 Ill. App. 110.

made in another state will not operate to create such privilege.[59] In some states defendants in criminal cases do not enjoy the same privilege as parties in civil cases, and may be served with writs of summons when on trial in jurisdictions other than where they reside,[60] unless the criminal charge is a contrivance of plaintiff in the civil suit to bring defendant within the jurisdiction.[61] Residents confined in jail or prison on criminal charges are subject to service of civil process.[62]

9. Service on Persons Engaged in Military Service. Statutes frequently exempt persons from the service of civil process while actually engaged in the military service of the state or of the United States,[63] and even in the absence of such a statute it has been held that public policy demands the recognition of such exemption.[64]

10. Waiver and Loss of Privilege. Service of civil process upon a privileged person is not void,[65] and the privilege must be asserted at the first opportunity or it is waived.[66] The privilege is waived by retaining an attorney who afterward

Michigan.— Jacobson *v.* Wayne Cir. Judge, 76 Mich. 234, 42 N. W. 1110, where relator was arrested on a criminal charge in a county where he did not reside and went to another county other than that of his residence to consult an attorney whom he regularly employed and while in this attorney's office he was served with a summons, and it was held that this was a breach of privilege and the service was set aside.

Nebraska.— Palmer *v.* Rowan, 21 Nebr. 452, 32 N. W. 210, 59 Am. St. Rep. 844, in another county in the same state.

New York.— Sander *v.* Harris, 14 N. Y. Suppl. 37; Day *v.* Harris, 14 N. Y. Suppl. 3; Murphy *v.* Sweezy, 2 N. Y. Suppl. 241.

United States.— U. S. *v.* Bridgman, 24 Fed. Cas. No. 14,645, 9 Biss. 221, 9 Reporter 74.

See 40 Cent. Dig. tit. "Process," § 149.

When appearance deemed compulsory.— "The real question is, Was the defendant's presence within this jurisdiction in fact compulsory? I am of opinion that it should be so considered. . . . The defendant came from a foreign jurisdiction where he resided, into this district, for the sole purpose of pleading to the indictment and giving bail. His attendance was really compulsory, because he knew that if he did not come without arrest he would be brought here upon a warrant. Bail could not be taken in Massachusetts, and with knowledge of this fact he was of necessity advised that he must personally attend this court, either under or without arrest; and he chose to avail himself of the opportunity extended to him for a limited time, to come without arrest. But in fact he was here none the less under compulsion . . . he was, while necessarily within this jurisdiction for that purpose, exempt from liability to the service of process upon him in the present action." U. S. *v.* Bridgman, 24 Fed. Cas. No. 14,645, 9 Biss. 221, 223, 9 Reporter 74.

59. King *v.* Phillips, 70 Ga. 409.

60. Nichols *v.* Goodheart, 5 Ill. App. 574; Metropolis Bank *v.* White, 26 Misc. (N. Y.) 504, 57 N. Y. Suppl. 460; Williams *v.* Bacon, 10 Wend. (N. Y.) 636; Moyer *v.* Place, 13 Pa. Co. Ct. 163; Treichler *v.* Hauck, 2 Woodw. (Pa.) 19.

61. Nichols *v.* Goodheart, 5 Ill. App. 574; Metropolis Bank *v.* White, 26 Misc. (N. Y.) 504, 57 N. Y. Suppl. 460; Garr *v.* Kessler, 18 Pa. Co. Ct. 216; Com. *v.* Huntzinger, 2 Leg. Rec. (Pa.) 80.

62. Davis *v.* Duffie, 1 Abb. Dec. (N. Y.) 486, 3 Keyes 606, 3 Transcr. App. 54, 4 Abb. Pr. N. S. 478; Phelps *v.* Phelps, 7 Paige (N. Y.) 150; White *v.* Underwood, 125 N. C. 25, 34 S. E. 104, 74 Am. St. Rep. 630, 46 L. R. A. 706.

63. See the statutes of the several states. And see Davidson *v.* Barclay, 63 Pa. St. 406; Drexel *v.* Miller, 49 Pa. St. 246; Coxe *v.* Martin, 44 Pa. St. 322; Rank *v.* Wenger, 1 Pearson (Pa.) 532; Heck *v.* Fink, 1 Woodw. (Pa.) 102; Gregg *v.* Summers, 1 McCord (S. C.) 461. See also Greening *v.* Sheffield, Minor (Ala.) 276; Hart *v.* Flynn, 8 Dana (Ky.) 190 (in which the exemption was said to be repealed by a law conferring exemption from arrest only); Hunter *v.* Weidner, 1 Woodw. (Pa.) 6; Hickman *v.* Armstrong, 2 Brev. (S. C.) 176.

A paymaster appointed by the president of the United States was held not to come within the Pennsylvania statute exempting from service of summons. Mechanics' Sav. Bank *v.* Sallade, 1 Woodw. (Pa.) 23.

Active service.— A militiaman who is returning from an annual encampment is doing military duty but is not in active service so as to be exempt from the service of summons. Land Title, etc., Co. *v.* Crump, 16 Pa. Co. Ct. 593. There is no exemption where one serves in the militia merely on the occasion of a public reception. Kirkpatrick *v.* Irby, 3 McCord (S. C.) 205.

64. Land Title, etc., Co. *v.* Rambo, 174 Pa. St. 566, 34 Atl. 207.

65. Peters *v.* League, 13 Md. 58, 71 Am. Dec. 622.

66. Weston *v.* Citizens' Nat. Bank, 64 N. Y. App. Div. 145, 71 N. Y. Suppl. 827; Sizer *v.* Hampton, etc., R., etc., Co., 57 N. Y. App. Div. 390, 68 N. Y. Suppl. 232; Sebring *v.* Stryker, 10 Misc. (N. Y.) 289, 30 N. Y. Suppl. 1053; Watsontown Nat. Bank *v.* Messinger, 6 Pa. Co. Ct. 609; Hendrick *v.* Gates, 3 C. Pl. (Pa.) 160; Meng *v.* Houser, 13 Rich. Eq. (S. C.) 210; Matthews *v.* Puffer, 10 Fed. 606, 20 Blatchf. 233.

acknowledges service of the declaration,[67] or by entering appearance and filing a motion for bail,[68] or taking substantial steps in the cause.[69] But there is no waiver by filing a petition and bond for removal to the federal court.[70] Any act of the person exempt from service, committed while such exemption is in force, which itself gives cause for the institution of civil proceedings against him, will be deemed a waiver of the privilege so far as service in such proceedings is concerned.[71] A suitor or witness will lose his privilege by unreasonable delay within the jurisdiction after he is through with his attendance at court,[72] or by unnecessarily remaining in the jurisdiction to attend to private business during a considerable interval while waiting for the case to be taken up.[73] The privilege is allowed with a reasonable latitude, and a party going to or returning from court need not take the most direct route; reasonable deviations or delays will be allowed, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court.[74] Deciding not to have a deposition taken after going into the jurisdiction with the *bona fide* intention of taking it will not operate as a waiver.[75]

III. RETURN AND PROOF OF SERVICE.

A. In General[76] — 1. The Officer's Return. In order for a court to obtain jurisdiction of defendant he must not only have been served in the manner pointed

Illustrations.— A delay of three weeks in applying to have set aside service of summons made on one while going to the train after attending a judicial hearing did not operate as a waiver. Morrow *v.* Dudley, 144 Fed. 441. A sojourner in Jersey City, who came to New York city to attend a trial, and, when the case was not called, remained till half-past seven in the evening, was not exempt from service of process, since he did not return with reasonable despatch. Cake *v.* Haight, 30 Misc. (N. Y.) 386, 63 N. Y. Suppl. 1043.

67. Anonymous, 9 N. J. L. J. 166.

68. White *v.* Marshall, 23 Ohio Cir. Ct. 376.

69. Sheehan, etc., Transp. Co. *v.* Sims, 36 Mo. App. 224, holding that a plea of privilege was waived where defendant appeared by counsel, filed a demurrer to the petition on grounds other than jurisdictional, entered into a stipulation concerning substantial steps in the cause, appealed from a judgment against him, and secured a reversal and then gave notice to take depositions.

70. Atchison *v.* Morris, 11 Fed. 582, 11 Biss. 191.

71. Iron Dyke Copper Min. Co. *v.* Iron Dyke R. Co., 132 Fed. 208; Nichols *v.* Horton, 14 Fed. 327, 4 McCrary 567.

72. Marks *v.* La Societe Anonyme, 19 N. Y. Suppl. 470 [*affirmed* in 139 N. Y. 630, 35 N. E. 206]; Finch *v.* Galigher, 12 N. Y. Suppl. 487, 25 Abb. N. Cas. 404.

What constitutes a reasonable time for a party or witness to take his departure is a question of fact to be determined from the evidence adduced in each particular case. Linton *v.* Cooper, 54 Nebr. 438, 74 N. W. 842, 69 Am. St. Rep. 727. Where defendant came into the state to testify in two cases that were on the day calendars in two separate courts and on the call of the calendars both cases were set for other days, but it did not appear that the witnesses were notified of that fact, it was held that by remaining in the state during that day's session of court defendant did not forfeit his privilege from service of process. Pope *v.* Negus, 3 N. Y. Suppl. 796, 14 N. Y. Civ. Proc. 406.

73. Woodruff *v.* Austin, 15 Misc. (N. Y.) 450, 37 N. Y. Suppl. 22, holding that, where the cause in which defendant was a witness appeared on the day calendar on November 7, and was passed for the day, and did not come up again until November 18, although it was marked "Ready," and liable to be called at any time, and on November 14, defendant was informed that his attendance as a witness was not required on that day, and that he might go home and return on November 18, but he remained until the afternoon, attending to private business, when he was served with summons, he had forfeited his right of exemption from service.

74. Barber *v.* Knowles, 77 Ohio St. 81, 82 N. E. 1065.

75. Wetherill *v.* Seitzinger, 1 Miles (Pa.) 237.

76. Entry on justice's docket see JUSTICES OF THE PEACE, 24 Cyc. 635.

In deportation proceedings see ALIENS, 2 Cyc. 128 note 92.

Necessity that process or notice appear from record on appeal see APPEAL AND ERROR, 2 Cyc. 1028.

Process as part of contents of record proper in appellate court see APPEAL AND ERROR, 2 Cyc. 1055.

Proof of service of notice of appeal see APPEAL AND ERROR, 2 Cyc. 872.

Recital of record as to process in lower court see APPEAL AND ERROR, 2 Cyc. 1034.

Return of not found as ground for attachment see ATTACHMENT, 4 Cyc. 438.

Return of writ as essential to pendency of

out by law,[77] but there must be a legal return of such service.[78] The return of a writ is a statement in writing indorsed thereon by the officer to whom it is directed, certifying to the court what he has done pursuant to the command of the writ.[79] It is simply evidence of service.[80] The term also has the more literal meaning of bringing the writ back to the court from which it issues and filing it with the clerk of that court.[81] Both these acts are necessary to constitute the due return of process.[82] The day upon which a writ is to be returned is usually fixed or ascertainable by law,[83] and that day is called the return-day.[84] It is the duty of the sheriff to return process to the proper court whether executed or not,[85] in default of which he is liable to an action for damages.[86] By leave of court a writ may be returned after the lawful return-day;[87] but without such leave a return after the return-day, while otherwise a good return,[88] is not sufficient to protect the officer from liability for any damages suffered by reason of the delay.[89] It may be

prior action see ABATEMENT AND REVIVAL, 1 Cyc. 24.

Statement of inability to serve process as ground for attachment see ATTACHMENT, 4 Cyc. 512.

77. See *supra*, II.

78. Albright-Pryor Co. *v.* Pacific Selling Co., 126 Ga. 498, 55 S. E. 251, 115 Am. St. Rep. 108.

79. *Arkansas.*— Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462; Phillips County *v.* Pillow, 47 Ark. 404, 1 S. W. 686.

California.— Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Iowa.— Aultman *v.* McGrady, 58 Iowa 118, 12 N. W. 233; Kingsbury *v.* Buchanan, 11 Iowa 387.

Louisiana.— Wooldridge *v.* Monteuse, 27 La. Ann. 79.

Missouri.— State *v.* Melton, 8 Mo. 417; Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349.

New York.— Iselin *v.* Henlein, 16 Abb. N. Cas. 73.

North Carolina.— Smith *v.* Kelly, 7 N. C. 507.

Tennessee.— Hutton *v.* Campbell, 10 Lea 170.

Where a suit is commenced by declaration, the certificate of service may be made on the back of the original declaration, or on a copy of it. Larned *v.* Wilcox, 4 Mich. 333.

80. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

81. Casky *v.* Haviland, 13 Ala. 314; Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903; State *v.* Melton, 8 Mo. 417; U. S. *v.* Landrum, 6 Fed. Cas. No. 3,393.

In North Carolina it may be returnable before the judge in term-time or before the clerk at any time, according to the nature of the proceedings. Sumner *v.* Miller, 64 N. C. 688; Tate *v.* Powe, 64 N. C. 644.

Return to wrong officer.—The statutory provision as to where process shall be returned is directory, and does not render process void if returned to a wrong officer. Ontario Bank *v.* Garlock, 1 Wend. (N. Y.) 288.

Due return of process means the bringing of the process into court with such indorsements on it as the law requires the officer to make. Harman *v.* Childress, 3 Yerg. (Tenn.) 327.

82. Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Atkinson *v.* Heer, 44 Ark. 174; Nelson *v.* Cook, 19 Ill. 440; Beall *v.* Shattuck, 53 Miss. 358; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707.

83. *Alabama.*— Garner *v.* Johnson, 22 Ala. 494; Caskey *v.* Nitcher, 8 Ala. 622.

Connecticut.— Hill *v.* Buechler, 73 Conn. 227, 47 Atl. 123.

Mississippi.— Story *v.* Ware, 35 Miss. 399, 72 Am. Dec. 125.

Pennsylvania.— Snyder *v.* Finn, 6 Pa. Dist. 191, 18 Pa. Co. Ct. 594; Price *v.* Scott, 21 Pa. Co. Ct. 608.

Tennessee.— Padgett *v.* Duckton Sulphur, etc., Co., 97 Tenn. 690, 37 S. W. 698.

Texas.— Maddox *v.* Rockport, (Civ. App. 1896) 38 S. W. 397.

Provision in process as to return see *supra*, I, D, 6, b *et seq.*

84. Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, 82 N. W. 779.

The date of the return of a writ is the date when it is placed by the sheriff in the office from which it was issued. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

85. Brown *v.* Baker, 9 Port. (Ala.) 503; Beall *v.* Shattuck, 53 Miss. 358.

86. Herr *v.* Atkinson, 40 Ark. 377; People *v.* Johnson, 4 Ill. App. 346; Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689; Webster *v.* Quimby, 8 N. H. 382.

No one but plaintiff in the suit can raise the question of the sheriff's failure to make due return. Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

87. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720. But *compare* Bowden *v.* T. A. Gillispie Co., (N. J. Sup. 1907) 68 Atl. 238.

88. Miller *v.* Forbes, 6 Kan. App. 617, 49 Pac. 705; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707; West *v.* Nixon, 3 Grant (Pa.) 236.

89. People *v.* Wheeler, 7 Paige (N. Y.) 433; Hyatte *v.* Allison, 48 N. C. 533.

returned before the return-day if served, but should not be returned until the return-day if no service has been had.[90] If returnable only in term, the return of the writ will be set aside if made in vacation.[91] The return-day is usually stated in the body of the writ,[92] and in case of indefinite or ambiguous designation the language of the writ will be construed so as to support it and render it operative if such construction is reasonable.[93] Thus if made returnable in a named month, without any indication of the year, it will be held returnable in the month named in the current year if possible,[94] and if made returnable on a legal holiday, it will be deemed returnable on the first judicial day thereafter.[95] Insensible words used in connection with the designation of the return-day will be rejected as surplusage.[96] The return need not be verified,[97] for it is made by a sworn officer and its truth is guaranteed by the sanctions of his official oath.[98]

2. Acknowledgment of Service. An acknowledgment of service indorsed upon the writ and subscribed by defendant is in many states sufficient under the statute to show service,[99] but it must usually be supported by proof of the genuineness of the signature.[1] Such proof may be made by the officer who makes service so stating in his return.[2]

B. Form, Requisites, and Sufficiency of Return — 1. In General. The return should show on its face that everything necessary to constitute a good service has been done;[3] but no nice criticisms will be indulged in regard to the words used, and if it can be fairly inferred from the language employed that the officer has met the requirements of the law, the return will be deemed sufficient.[4]

90. Glover *v.* Rawson, 3 Pinn. (Wis.) 226, 3 Chandl. 249, the effect of premature return is to subject the officer to an action for damages.

91. Johnson *v.* Wilmington, etc., Electric R. Co., 1 Pennew. (Del.) 87, 39 Atl. 777.

92. See *supra*, I, D, 6, b.

93. Findley *v.* Ritchie, 8 Port. (Ala.) 452; Smith *v.* Winthrop, Minor (Ala.) 378; Gibson *v.* Laughlin, Minor (Ala.) 182; Winston *v.* Miller, 12 Sm. & M. (Miss.) 550.

94. Vinton *v.* Mead, 17 Mich. 388; Nash *v.* Mallory, 17 Mich. 232.

95. Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637.

96. Lore *v.* McRae, 12 Ala. 444, holding that a writ made returnable at "our next circuit court" to be held in a month named, will be returnable at the next term of court as ascertained by law, without reference to the month stated in the writ.

97. Wolf *v.* Moyer, 21 Pa. Co. Ct. 624.

98. Dunklin *v.* Wilson, 64 Ala. 162.

99. Metz *v.* Bremond, 13 Tex. 394. A certificate of acknowledgment of service of a citation by the clerk of a court is not sufficient. Cox *v.* Wadlington, 3 How. (Miss.) 57.

Acknowledgment of service generally see *supra*, II, B, 6.

1. *Alabama.*— Norwood *v.* Riddle, 1 Ala. 195; Welch *v.* Walker, 4 Port. 120.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545; Kendrick *v.* Kendrick, 4 J. J. Marsh. 241; Jackson *v.* Speed, 3 J. J. Marsh. 56; South *v.* Carr, 7 T. B. Mon. 419; Gatewood *v.* Rucker, 1 T. B. Mon. 21.

Minnesota.— Masterson *v.* Le Claire, 4 Minn. 163.

Mississippi.— Bacon *v.* Bevan, 44 Miss. 293; Davis *v.* Jordan, 5 How. 295; Harvie *v.* Bostic, 1 How. 106.

New York.— Litchfield *v.* Burwell, 5 How. Pr. 341.

See 40 Cent. Dig. tit. "Process," § 161.

But *compare* Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

2. Norwood *v.* Riddle, 9 Port. (Ala.) 425; Rowan *v.* Wallace, 7 Port. (Ala.) 171.

3. *Arkansas.*— *Ex p.* Cross, 7 Ark. 44.

California.— Linott *v.* Rowland, 119 Cal. 452, 51 Pac. 687; People *v.* Bernal, 43 Cal. 385.

Iowa.— Watts *v.* White, 12 Iowa 330.

Missouri.— Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853; Madison County Bank *v.* Suman, 79 Mo. 527.

New York.— Cameron *v.* United Traction Co., 67 N. Y. App. Div. 557, 73 N. Y. Suppl. 981; Vitola *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273.

Ohio.— Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

Pennsylvania.—Stark *v.* Lehigh Coal, etc., Co., 9 Kulp 467; Gilbough *v.* Keller, 11 Phila. 364.

Texas.— Graves *v.* Robertson, 22 Tex. 130; Thompson *v.* Griffis, 19 Tex. 115.

Wisconsin.— Hall *v.* Graham, 49 Wis. 553, 5 N. W. 943.

See 40 Cent. Dig. tit. "Process," § 164.

For example, "Executed Oct. 18th, 1832, as commanded within" is not a sufficient return of a summons. Ogle *v.* Coffey, 2 Ill. 239. An affidavit by a sheriff made long after the alleged service that, to the best of his belief, he made service on defendant, will not give the court jurisdiction. Pearson *v.* Pierce, 40 Ohio St. 231.

4. *Illinois.*— Farnsworth *v.* Strasler, 12 Ill. 482.

It must appear that the summons served was the summons in the action.[5] In case two returns are indorsed upon a writ, both will be construed together.[6] If it is necessary that other papers or indorsements be served on defendant with the summons, the return should show that it has been done.[7] Since the sheriff can act only within his county, a return showing service by him outside his county is bad as proof,[8] but he need not name in his return the county of which he is sheriff,[9] nor need he designate himself as sheriff, since the court is presumed to know its own officers.[10] A return that defendant waived service is illegal, since the sheriff has no power to certify a waiver.[11] The return need show nothing which already

Louisiana.— Collins *v.* Walling, 6 La. Ann. 702.

Michigan.— Fleugel *v.* Lards, 108 Mich. 682, 66 N. W. 585; Elliott *v.* Preston, 44 Mich. 189, 6 N. W. 238.

Mississippi.— Bacon *v.* Bevan, 44 Miss. 293.

Missouri.— Jones *v.* Relfe, 3 Mo. 388; Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

Nebraska.— Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484.

Washington.— Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Wisconsin.— Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

See 40 Cent. Dig. tit. "Process," § 164.

Illustrations.— A return that a writ was served by reading it in presence and hearing of defendant is tantamount to stating that it was read to him. McPherson *v.* State Bank, 4 Ark. 558. The sheriff's return that he served a "copy" of the summons is equivalent to a return that he served a copy certified by the clerk. Brown *v.* Lawson, 51 Cal. 615. A statement that a copy of the writ was left with defendant is equivalent to a statement that it was served by delivering a copy to him. Buck *v.* Buck, 60 Ill. 105. To serve defendant with a true copy is "to deliver to him a true copy." Hedges *v.* Mace, 72 Ill. 472. A return, "Served by reading," implies "to the defendant." Chandler *v.* Miller, 11 Ind. 382; Holsinger *v.* Dunham, 11 Ind. 346. As the statute requires the officer to state whether a copy of the petition was demanded, a return, "No copy demanded," will be presumed to refer to a copy of the petition, and not to a copy concerning which no duty is laid on the officer. Cobb *v.* Newcomb, 7 Iowa 43. The date attached to an officer's return is not to be taken as evidence that the notice was given on the day of the date, where that would be inconsistent with the return itself. Thayer *v.* Stearns, 1 Pick. (Mass.) 109. "Not to be found in my county" implies that defendant is a resident of such county. Carlisle *v.* Cowan, 85 Tenn. 165, 2 S. W. 26. A return of a citation, "Executed . . . by a certified of this writ and copy of petition," by a fair construction would mean that a copy was served on defendant, notwithstanding the omission, and the return was sufficient. Bartlett *v.* Winkler, 15 Tex. 515. Under a statute providing that "a copy of the complaint must be served with the summons unless two or more defendants reside in the same county, in which case a copy of the complaint need only be served on one of such defendants," where several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all reside in the county. Mantle *v.* Casey, 31 Mont. 408, 78 Pac. 591. Where an affidavit states that the summons was served by leaving a copy "at the last and usual place of abode of said defendant in said Clark county," the obvious meaning is that the service was made at the last and usual abode of defendant, and that such place of abode was then in Clark county. Healey *v.* Butler, 66 Wis. 9, 27 N. W. 822.

Referring to annexed summons.— It is not necessary that an affidavit of service of process, although referring to an "annexed summons," should in fact be annexed to the summons, but it is sufficient if the court can find as a fact, from the contents of the affidavit, or from the proceedings for the appointment of a guardian *ad litem* or otherwise, that the summons was in fact served. Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357].

Strict construction.— The return of a sheriff or other officer, showing or attempting to show constructive service of a summons, is to be strictly construed, and everything may be inferred against the return which its departure from the description of the statute will warrant. Holtschneider *v.* Chicago, etc., R. Co., 107 Mo. App. 381, 81 S. W. 489.

5. Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341.

6. Pillow *v.* Sentelle, 39 Ark. 61.

7. Melvin *v.* Clark, 45 Ala. 285; Farris *v.* Powell, 10 Iowa 553; Benedict *v.* Warriner, 14 How. Pr. (N. Y.) 568; Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

A true copy means a copy with all indorsements upon it. Goodrich *v.* Hamer, 8 Ohio Dec. (Reprint) 441, 8 Cinc. L. Bul. 11.

8. Farmers' L. & T. Co. *v.* Dickson, 17 How. Pr. (N. Y.) 477.

9. Thomas *v.* Colorado Nat. Bank, 11 Colo. 511, 19 Pac. 501; Whiting *v.* Hagerty, 5 La. Ann. 686; Kendrick *v.* Kendrick, 19 La. 36; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042.

10. Thompson *v.* Haskell, 21 Ill. 215, 74 Am. Dec. 98.

11. Shannon *v.* Goffe, 15 La. Ann. 86.

appears elsewhere of record.[12] Redundancy will not vitiate the return,[13] nor is the return any evidence of non-essential matters stated therein.[14]

2. In Whose Name Return Should Be Made. The return should be made and signed by the officer who in fact served or attempted to serve it.[15] But a deputy sheriff, not being known to the court, and being deemed to act not for himself but for the sheriff, should sign a return in the name of the sheriff by himself as deputy, or should designate the sheriff for whom he purported to act,[16] although under some statutes the deputy may make the return in his own name.[17]

3. Time and Place of Service. The return should show with reasonable certainty the time of service.[18] When a single date appears in the return, without

12. Mills *v.* Howard, 12 Tex. 9.

13. Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880. A sheriff's return of a summons, "executed by serving a copy on the within named defendant, except as stated below," and dated and signed by the sheriff, where nothing is stated below, is sufficient proof of service to support a judgment by default. Colley *v.* Spivey, 127 Ala. 109, 28 So. 574.

14. Sheldon *v.* Comstock, 3 R. I. 84.

15. Sheppard *v.* Hill, 5 Ark. 308; McKnight *v.* Connell, 14 La. Ann. 396; Bennett *v.* Vinyard, 34 Mo. 216; Thomas *v.* Goodman, 25 Tex. Suppl. 446.

It is competent for a sheriff and his deputies to agree upon a particular mode of making returns to writs which would bind the parties to the contracts, but not third persons. Naylor *v.* Simmes, 4 Gill & J. (Md.) 273.

If a deputy dies after executing a writ, but without making a return, the sheriff may certify the doings of the deputy on the writ, and return it to the clerk's office. Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276. Where a deputy sheriff died before making return of a summons served by him, and affidavits were made showing statements made by him during his sickness as to the time and place, and defendants and others corroborated the statements so made, a motion to substitute proof of service was properly granted, and the sheriff instructed to make proof of service, under his certificate, according to the affidavits. Barber *v.* Goodell, 56 How. Pr. (N. Y.) 364.

16. *Alabama.*— Briggs *v.* Greenlee, Minor 123; Land *v.* Patteson, Minor 14.

California.— Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Joyce *v.* Joyce, 5 Cal. 449.

Illinois.— Ditch *v.* Edwards, 2 Ill. 127, 26 Am. Dec. 414.

Iowa.— Gray *v.* Wolf, 77 Iowa 630, 42 N. W. 504.

Mississippi.— Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261.

Missouri.— Harriman *v.* State, 1 Mo. 504.

Pennsylvania.— Bennethum *v.* Bowers, 133 Pa. St. 332, 19 Atl. 361; Bolard *v.* Mason, 66 Pa. St. 138.

Texas.— Arnold *v.* Scott, 39 Tex. 378.

Wisconsin.— U. S. *v.* Lockwood, 1 Pinn. 386.

See 40 Cent. Dig. tit. "Process," § 165.

The full name of the deputy need not be signed. Thus, "W. Y. Robinson, Sheriff of S. J. County, Texas, by C., deputy," is sufficient. Hays *v.* Byrd, 14 Tex. Civ. App. 24, 36 S. W. 777.

When served by special deputy.— If a summons is served by a regular deputy of a sheriff, the return must be in the name of the latter; but where it is served by a special deputy by appointment indorsed thereon, the statute does not require the return, which is to be made under oath, to be in the name of the sheriff. Glencoe *v.* People, 78 Ill. 382. But see Bolard *v.* Mason, 66 Pa. St. 138.

Where sheriff's name to be written.— It is immaterial that the name of the sheriff is written in the return of service of summons below, instead of above, that of the deputy by whom the summons was served. Zepp *v.* Hager, 70 Ill. 223.

A return of service, made and signed by a sheriff, when actually made by his deputy, is irregular, but not invalid. Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281.

17. Bean *v.* Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. L. Rep. 739; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042; Calender *v.* Olcott, 1 Mich. 344; Towns *v.* Harris, 13 Tex. 507; Miller *v.* Alexander, 13 Tex. 497. A return of process signed by a deputy sheriff without reference to the sheriff is sufficient to uphold a default, where the court finds that it was duly served, for if the sheriff was dead the deputy had authority under the statute to serve the summons, but if he was not dead the person on whom process was served should have shown that fact. Timmerman *v.* Phelps, 27 Ill. 496.

18. *Arkansas.*— Thompson *v.* State Bank, 5 Ark. 245; Gilbreath *v.* Kuykendall, 1 Ark. 50.

Connecticut.— Select *v.* Olmstead, 1 Root 497.

Illinois.— Dick *v.* Moore, 85 Ill. 66; Harding *v.* Larkin, 41 Ill. 413; Bletch *v.* Johnson, 35 Ill. 542; Chickering *v.* Failes, 26 Ill. 507; Ball *v.* Shattuck, 16 Ill. 299; Garrett *v.* Phelps, 2 Ill. 331; Clemson *v.* Hamm, 2 Ill. 176; Wilson *v.* Greathouse, 2 Ill. 174.

Iowa.— Hakes *v.* Shupe, 27 Iowa 465; Wilson *v.* King, Morr. 106.

Louisiana.— O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533.

any designation to the contrary, it will be held to refer to the time of service and not to the time of return.[19] It is sometimes said that both time and place should be shown in the return,[20] but many cases hold that the place need not be shown.[21] The venue given at the head of the return will be taken as indicative of the place of service when no other place is mentioned in the return.[22] If, however, a place is named outside the county in which the sheriff is authorized to serve process, it will render the return bad.[23]

4. Name of Defendant Served. The return should give the name of the party served or should designate him with such reasonable certainty as to leave no substantial doubt as to his identity.[24] Particular care should be exercised in the case

Mississippi.— Calhoun *v.* Matlock, 3 How. 70.

New Jersey.— Stediford *v.* Ferris, 4 N. J. L. 108; Morford *v.* Perine, 3 N. J. L. 474.

Texas.— Sloan *v.* Batte, 46 Tex. 215; Clark *v.* Wilcox, 31 Tex. 322; Whitaker *v.* Fitch, 25 Tex. Suppl. 308; Llano Imp. Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

Wisconsin.— Wendel *v.* Durbin, 26 Wis. 390.

See 40 Cent. Dig. tit. "Process," § 166.

In England it is required by Order IX, Rule 15, that the day of the month and week on which service is made shall be indorsed upon the writ within three days after service. This order is substantially a re-enactment of section 15 of the Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76. Dymond *v.* Croft, 3 Ch. D. 512, 45 L. J. Ch. 604, 34 L. T. Rep. N. S. 786, 24 Wkly. Rep. 824; Sproat *v.* Peckett, 48 L. T. Rep. N. S. 755; *Re* Livesey, 47 L. T. Rep. N. S. 328, 31 Wkly. Rep. 87.

19. Marlow *v.* Kuhlenbeck, 2 Colo. 602; Harmon *v.* Campbell, 30 Ill. 25; Cariker *v.* Anderson, 27 Ill. 358; Orendorff *v.* Stanberry, 20 Ill. 89. *Contra*, Bancroft *v.* Speer, 24 Ill. 227.

20. Gilbreath *v.* Kuykendall, 1 Ark. 50; Clemson *v.* Hamm, 2 Ill. 176; Wilson *v.* Greathouse, 2 Ill. 174; Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829, required by statute, the court holding further that where the return shows service on defendant "at her residence," it will be presumed that it was within the county.

Where process is served by a private individual under W. Va. Code (1899), c. 124, § 2 [Code (1906), § 3798], his return in addition to showing the manner and time must also show the place of service. Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

21. Henry *v.* Ward, 4 Ark. 150; Williams *v.* Sill, 12 Iowa 511; Hays *v.* Byrd, 14 Tex. Civ. App. 24, 36 S. W. 777; Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

State.— Where the return shows service of summons in a certain county, it is sufficient, although it does not state that such service was made in the state. The court will take judicial notice that the county is in the state. Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

The presumption is that the officer served the writ within the county where he had a right to serve it. Mahan *v.* McManus, (Tex. Civ. App. 1907) 102 S. W. 789.

22. Davis *v.* Richmond, 35 Vt. 419.

23. Northwood *v.* Barrington, 9 N. H. 369.

24. *Arkansas.*— Rose *v.* Ford, 2 Ark. 26; Gilbreath *v.* Kuykendall, 1 Ark. 50.

Illinois.— Richardson *v.* Thompson, 41 Ill. 202; Underhill *v.* Kirkpatrick, 26 Ill. 84; Pardon *v.* Dwire, 23 Ill. 572; Wanamaker *v.* Poorbaugh, 91 Ill. App. 560.

Indiana.— Brooks *v.* Allen, 62 Ind. 401; Johnson *v.* Patterson, 59 Ind. 237.

Iowa.— Boker *v.* Chapline, 12 Iowa 204; Longacre *v.* Simpson, Morr. 495.

Kentucky.— Grider *v.* Payne, 9 Dana 188.

Mississippi.—Woodliffe *v.* Connor, 45 Miss. 552.

Missouri.— Spencer *v.* Medder, 5 Mo. 458.

Nebraska.— Johnson *v.* Jones, 2 Nebr. 126.

Nevada.— Allen *v.* Mayberry, 14 Nev. 115.

Texas.— Underhill *v.* Lockett, 20 Tex. 130; Hough *v.* Coates, (Civ. App. 1894) 25 S. W. 995.

See 40 Cent. Dig. tit. "Process," § 167.

Returns held sufficient.—Return that sheriff served the summons upon "James Mayberry" and "delivered to the said Jame May a certified copy of the complaint." Allen *v.* Mayberry, 14 Nev. 115. Summons issued against Harrison Johnson; return — Duly served "on the within named H. Johnson." Johnson *v.* Jones, 2 Nebr. 126. Summons against "A. B. Sr.," return of service "on the within named A. B. Jr." Dawson *v.* State Bank, 3 Ark. 505. Writ against "Alfred Snelgrove," return of service upon "Snelgrove." Snelgrove *v.* Mobile Branch Bank, 5 Ala. 295. Writ against "A. B. junior," return of service upon "A. B." Sanders *v.* Dowell, 7 Sm. & M. (Miss.) 206. Writ against "Luther Burt," return of service upon "L. Burt." Davis *v.* Burt, 7 Iowa 56. Summons against "Schlacks," return of service upon "Schlack." Schlacks *v.* Johnson, 13 Colo. App. 130, 56 Pac. 673. Citation for "J. A. Townsend," return of service upon "J. A. Townsen." Townsend *v.* Ratcliff, 50 Tex. 148. Citation against "E. T. Stevens," return of personal service upon "E. T. Stephen." Dunn *v.* Hughes, (Tex. Civ. App. 1896) 36 S. W. 1084. Service upon a corporation through its agent "H. L. Bode," in the absence of a showing that H. L. Bode was not in fact the full name of the agent served. German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106. Summons to J. C., return of service upon "C, one of the defendants herein." Gate City Abstract Co. *v.* Post, 55

of service upon joint defendants, for the return should show clearly upon which ones service was made and when and how it was made upon each.[25] It the return

Nebr. 742, 76 N. W. 471. Summons against "A. J. Veasey," return of servic upon "Jack Veasey." Veasey *v.* Brigman, 93 Ala. 548, 9 So. 728, 13 L. R. A. 541. An insertion in the return of a superfluous initial letter will not invalidate it (Phillips *v.* Evans, 64 Mo. 17); nor will the addition of a superfluous terminal letter to the party's surname, where the return also recites that defendant was duly served (Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24); nor the omission of mere words of description (Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44); nor will the use of a wrong christian name in the return invalidate the judgment (Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938).

Returns held insufficient.— Citation against "Atanacio Vidauri," return of service upon "Rafael Vidauri." Vidauri *v.* State, 22 Tex. App. 676, 3 S. W. 347. Process against "Jacob Kraig," return of service upon "Jacob Krug." McClaskey *v.* Barr, 45 Fed. 151. William T. C. was the party sought to be served, affidavit of service upon W. F. C. Houghton *v.* Tibbets, 126 Cal. 57, 58 Pac. 318. Summons against Samuel B. Bancroft, return of service upon "S. B. Bancroft." Bancroft *v.* Speer, 24 Ill. 227. Summons against "Sylvanus H. Butterfield," return of service on "S. H. Butterfield." Butterfield *v.* Johnson, 46 Ill. 68. Citation to "Mrs. Parmelia Brown," return of service upon "Mrs. Brown." Brown *v.* Robertson, 28 Tex. 555. Citation issued to "J. W. H.," return of service upon "J. N. H." Hendon *v.* Pugh, 46 Tex. 211. Citation directed to J. W. Booth, return "Executed . . . by delivering a true copy of the within process to the within named defendant, W. Booth." Booth *v.* Holmes, 2 Tex. Unrep. Cas. 232.

25. Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505; Call *v.* Hagger, 8 Mass. 423; Stults *v.* Outcalt, 6 N. J. L. 130; Willis *v.* Bryan, 33 Tex. 429; Thompson *v.* Griffis, 19 Tex. 115; Swilley *v.* Reliance Lumber Co., (Tex. Civ. App. 1898) 46 S. W. 387; Rush *v.* Davenport, (Tex. Civ. App. 1896) 34 S. W. 380; Randolph *v.* Schwingle, (Tex. Civ. App. 1894) 27 S. W. 955; Chowning *v.* Chowning, 3 Tex. App. Civ. Cas. § 150; McDowell *v.* Nicholson, 2 Tex. App. Civ. Cas. § 268; Stephenson *v.* Kellogg, 1 Tex. App. Civ. Cas. § 542.

Sufficiency of return.— Process directed to all the defendants by name, and returned by the sheriff "Executed on the parties, this October 1st, 1870, with copy," shows a sufficient service. Florence *v.* Paschal, 50 Ala. 28. Where a writ against several defendants is returned "Executed," the court will intend that it was executed on all the defendants. Cantley *v.* Moody, 7 Port. (Ala.) 443. Where a sheriff's return recites the service of the writ upon "the within-named" persons, naming three defendants, and charges fees for service of three copies, it sufficiently appears that each of the defendants was served with a copy of the writ. Martin *v.* Hargardine, 46 Ill. 322. Returns on a summons against several defendants as follows: "Served the within named, by leaving a true copy of the same with the within named," giving the names of the several defendants, are sufficient to show that a copy was served on each defendant. Greenman *v.* Harvey, 53 Ill. 386. See also Turner *v.* Jenkins, 79 Ill. 228. A return to a summons addressed to two defendants, that the defendants, naming them conjunctively, could not be found, will be construed as meaning that neither of the defendants could be found, and not that both of them could not be found. Blinn *v.* Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536. Where process was returned "Executed on all in my bailiwick but Richard Stratton," it was held insufficient, it not appearing how many resided in the bailiwick. Hackwith *v.* Damron, 1 T. B. Mon. (Ky.) 235. A sheriff's return of service of summons on two defendants certified that "I served the within summons on Charles Blanchard . . . by then and there delivering him a true copy of the original summons; and I further certify that I served the within summons on Mrs. Louise D. Bernard . . . on the twenty-seventh day of March, 1891, by then and there delivering to Charles Blanchard a true and certified copy of said original," and was held to sufficiently show that both services took place at the same time, and not to be defective for failure to show when service on C was made. Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446. A return of a citation to several defendants showing that it was executed "by delivering to the within-named defendants, in person, a true copy of this writ," is fatally defective, since it fails to show a delivery to "each" of defendants of a copy of the writ. Chamblee *v.* Hufsmith, (Tex. Civ. App. 1898) 44 S. W. 616. Where the statute requires the delivery of a copy of a citation to each of the defendants, a return which fails to show a delivery to each is defective. Schramm *v.* Gentry, 64 Tex. 143; Vaughan *v.* State, 29 Tex. 273. Where the return on a citation fails to show that a copy was served on each defendant, but shows a joint service only, it is defective. Rutherford *v.* Davenport, (Tex. App. 1891) 16 S. W. 110; Fulton *v.* State, 14 Tex. App. 32. A sheriff's return of service on an application for mandamus, which recites that he served it on "the within named defendants, William Bishop, Sr., and W. A. Andrews . . . by delivering a true copy thereof, with a copy of the affidavit . . . to the above named, the said defendants, personally," is not void for uncertainty, as indicating but a single service on one defendant, and a motion to dismiss the proceedings is properly overruled. State Sav. Bank *v.* Davis, 22 Wash. 406, 61 Pac. 43. A return that summons was served upon James D. Myers on May 1, 1893, and upon

shows service on one but is silent as to the other, it will be presumed that no service was had as to that other.[26]

5. Manner of Service. The return should show clearly and fully the manner in which service was made, so that it may appear of record whether the statutory requirements as to manner of service have been substantially complied with.[27]

James Myers on May 2, 1893, by delivering to and leaving with them a certified copy thereof fairly imports that a copy was delivered to each. Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

26. Granberry *v.* Wellborn, 4 Ala. 118.

27. *Arkansas.*— Gatton *v.* Walker, 9 Ark. 199; Rose *v.* Ford, 2 Ark. 26; Gilbreath *v.* Kuykendall, 1 Ark. 50.

Florida.— Standley *v.* Arnow, 13 Fla. 361.

Illinois.— Botsford *v.* O'Conner, 57 Ill. 72; Vanmeter *v.* Durham, 31 Ill. 237; Ball *v.* Shattuck, 16 Ill. 299; Ogle *v.* Coffey, 2 Ill. 239.

Iowa.— Grosvenor *v.* Henry, 27 Iowa 269; Farris *v.* Powell, 10 Iowa 553; Park *v.* Long, 7 Iowa 434; Hodges *v.* Hodges, 6 Iowa 78, 71 Am. Dec. 388; Neally *v.* Redman, 5 Iowa 387.

Maine.— Blanchard *v.* Day, 31 Me. 494.

Massachusetts.— Graves *v.* Cushman, 131 Mass. 359.

Mississippi.— French *v.* State, 53 Miss. 651; Hargus *v.* Bowen, 46 Miss. 72; Moore *v.* Coats, 43 Miss. 225; Rankin *v.* Dulaney, 43 Miss. 197; York *v.* Crawford, 42 Miss. 508; Wolley *v.* Bowie, 41 Miss. 553; Robertson *v.* Johnson, 40 Miss. 500; Merritt *v.* White, 37 Miss. 438.

Missouri.— Charless *v.* Marney, 1 Mo. 537; Knoll *v.* Woelken, 13 Mo. App. 275.

Nebraska.—Forbes *v.* Bringe, 32 Nebr. 757, 49 N. W. 720; Betts *v.* Boyd, 31 Nebr. 815, 48 N. W. 889; Brown *v.* Brown, 10 Nebr. 349, 6 N. W. 397.

New Hampshire.— Pendexter *v.* Cole, 66 N. H. 270, 20 Atl. 331.

New Jersey.— Crisman *v.* Swisher, 28 N. J. L. 149; Moore *v.* Miller, 16 N. J. L. 233; Ross *v.* Ward, 16 N. J. L. 23; Stedifordv. Ferris, 4 N. J. L. 108; Morford *v.* Perine, 3 N. J. L. 474; Shin *v.* Earnest, 2 N. J. L. 155; Baylon *v.* Hooper, 2 N. J. L. 95; Hedden *v.* Van Ness, 2 N. J. L. 84; Layton *v.* Cooper, 2 N. J. L. 62.

New York.— Hughes *v.* Mulvey, 1 Sandf. 92.

Pennsylvania.— Filson *v.* Hayes, 18 Pa. St. 354; Roushey *v.* Feist, 10 Kulp 79; Philadelphia *v.* Cathcart, 10 Phila. 103; Lenore *v.* Ingram, 1 Phila. 519; Buchanan *v.* Specht, 1 Phila. 252; Beverly *v.* Hunger, 1 Woodw. 354; Leis *v.* Yost, 1 Woodw. 15.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

South Carolina.— Prince *v.* Dickson, 39 S. C. 477, 18 S. E. 33.

Texas.— Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308; Graves *v.* Drane, 66 Tex. 658, 1 S. W. 905; Sanders *v.* City Nat. Bank, (1889) 12 S. W. 110; Holliday *v.* Steele, 65 Tex. 388; Continental Ins. Co. *v.* Milliken, 64 Tex. 412; Johnson *v.* Barthold, 43 Tex. 556; King *v.* Goodson, 42 Tex. 152; Hill *v.* Grant, 33 Tex. 132; Chandler *v.* Scherer, 32 Tex. 573; Clark *v.* Wilcox, 31 Tex. 322; Ryan *v.* Martin, 29 Tex. 412; Fitzhugh *v.* Hall, 28 Tex. 558; Thomason *v.* Bishop, 24 Tex. 302; Graves *v.* Robertson, 22 Tex. 130; Hart *v.* Clifton, 19 Tex. 56; Stevens *v.* Price, 16 Tex. 572; Middleton *v.* State, 11 Tex. 255; Brooks *v.* Powell, (Civ. App. 1895) 29 S. W. 809; Randolph *v.* Schwingle, (Civ. App. 1894) 27 S. W. 955; Taylor *v.* Pridgen, 3 Tex. App. Civ. Cas. § 89; Graves *v.* Le Geirse, 1 Tex. App. Civ. Cas. § 812; Kleaden *v.* Reynolds, 1 Tex. App. Civ. Cas. § 773; Bean *v.* McQuiddy, 1 Tex. App. Civ. Cas. § 51.

See 40 Cent. Dig. tit. "Process," § 169.

Illustrations.— The following return of service, by a sheriff, upon a writ, was held sufficient: "I executed the within by reading to the within named Augustin Gatton, at his residence, in White county, on the 17th day of March, 1847. C. D., Sh'ff." Gatton *v.* Walker, 9 Ark. 199. An entry by the sheriff that he had served defendants, naming them, "each with a copy of this within writ and process," does not sufficiently show that the service was personal, within the meaning of Ga. Code, § 3457. Crapp *v.* Dodd, 92 Ga. 405, 17 S. E. 666. A return on a summons, "Served by reading and delivering a true copy to Wm. R. Morrison, a director of the defendant," is not insufficient as failing to show what was served and what was delivered. Cairo, etc., R. Co. *v.* Holbrook, 92 Ill. 297. A return to a summons which recites, "Executed this writ, by reading it to the within named James Funk, May 8th, 1861," is sufficient. Funk *v.* Hough, 29 Ill. 145. A sheriff's return that on, etc., he served, a summons on, etc., "who attempted to avoid service by concealing himself, and running from me at the time I read this process to him at the place I last saw him," is legally sufficient. Orendorff *v.* Stanberry, 20 Ill. 89. A sheriff's return in this form, "I. R. Simms, summoned by reading," and signed by the sheriff, and dated, is sufficient. Simms *v.* Klein, 1 Ill. 371. Under Ky. Civ. Code Pr. § 49, a return by a special bailiff that he served a summons "by delivering to him a copy of the within summons," with the date of service, is sufficient. Barbour *v.* Newkirk, 83 Ky. 529. A return by a sheriff indorsed on a summons, as follows: "Executed on the within-named J. J. Milam (the person named in the summons), this Oct. 12, 1870, by personal service, copy waived," signed by the sheriff, is sufficient within Miss. Rev. Code, p. 489, art. 63, requiring the sheriff to return process "with a written statement of his proceedings thereon." Milam *v.* Strickland, 45 Miss. 721. A return upon a summons, "Executed personally, with original and copy, defendant claiming such," is in conformity with the requirements of the statute.

When a copy of the complaint is required to be left with defendant, the return must show that it was done.[28] When the statute provides for substituted service by leaving a copy of the writ at the residence or last place of residence of defendant, or other place, or with certain designated persons, as the case may be, a return purporting to show such service must show that everything required by the statute was strictly performed in exactly the manner required by the statute.[29] In some

Presley *v.* Anderson, 42 Miss. 274. A return of service of summons showing service on minors by delivering to each of them a true and correct copy thereof was insufficient under Hill Annot. Laws Oreg. § 55, subd. 3, requiring summons to be served by delivering a copy thereof to minors personally, since such return did not show personal delivery; hence the court acquired no jurisdiction of the persons of such minors by such service. Harris *v.* Sargeant, 37 Oreg. 41, 60 Pac. 608. Under an act providing that summons may be served by producing the original summons to defendant and informing him of the contents, or by leaving a copy at his dwelling-house, in the presence of one or more of his family, a return of the copy, "Served personally on defendant," did not comply with the act. Lenore *v.* Ingram, 1 Phila. (Pa.) 519. A return, "Executed by serving the defendant with a true copy," is bad, under the statute, as not showing the manner of service, and not showing that it was delivered to him in person. Graves *v.* Robertson, 22 Tex. 130. Under a rule of court requiring a summons to be served on a defendant by "giving him notice of its contents," a return of service of a writ by "making known the contents" to defendant is sufficient. Trimble *v.* Erie Electric Motor Co., 89 Fed. 51.

Reasons for the rule.— "There are sound reasons why the mode of executing a writ of summons should be distinctly stated. In default of an appearance, the court may be called upon by the plaintiff to allow a judgment against the defendant: and before thus visiting a party with the penalty of a default, common and equal justice may demand that it should be unequivocally exhibited to the court by the record that the writ was served on a proper day and in a legal manner; while strict attention to the form of the return will do much to prevent remissness or negligence on the part of the officer charged with the important duty of executing the writ." Weaver *v.* Springer, 2 Miles (Pa.) 42, 44.

28. *Alabama.*— Melvin *v.* Clark, 45 Ala. 285.

California.— Linott *v.* Rowland, 119 Cal. 452, 51 Pac. 687.

Iowa.— Farris *v.* Powell, 10 Iowa 553.

New York.— Benedict *v.* Warriner, 14 How. Pr. 568.

Ohio.— Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

Texas.—Sanders *v.* City Nat. Bank, (1889) 12 S. W. 110. The return of a sheriff that he executed process "by delivering to the within named A. B., in person, a certified copy of this writ, and a copy of petition," without stating what petition, is not sufficient. Tullis *v.* Scott, 38 Tex. 537. A sheriff's return upon a citation, "Executed thirty-first March, 1859, by delivering to the defendant a true copy of this writ, together with the accompanying certified copy of petition," is sufficient. Hill *v.* Grant, 33 Tex. 132.

See 40 Cent. Dig. tit. "Process," § 169.

Co-defendants.— If service of a copy of the complaint upon only one of several defendants is sufficient provided all reside in the county, the return need not show that all the defendants do reside in the county, for if served therein they will be presumed to be residents. Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185; Calderwood *v.* Brooks, 28 Cal. 151.

29. *Arkansas.*— Barnett *v.* State, 35 Ark. 501; Bruce *v.* Arrington, 22 Ark. 362; Parks *v.* Weems, 9 Ark. 439; Vaughn *v.* Brown, 9 Ark. 20, 47 Am. Dec. 730; Patrick *v.* Johnson, 6 Ark. 380; Boyer *v.* Robinson, 6 Ark. 552; Ringgold *v.* Randolph, 4 Ark. 428; Johnson *v.* State Bank, 3 Ark. 522; Dawson *v.* State Bank, 3 Ark. 505.

Georgia.— Jones *v.* Tarver, 19 Ga. 279.

Illinois.— Bletch *v.* Johnson, 35 Ill. 542; Townsend *v.* Griggs, 3 Ill. 365; Hessler *v.* Wright, 8 Ill. App. 229.

Indiana.— Pigg *v.* Pigg, 43 Ind. 117; Bryant *v.* State, 5 Ind. 245.

Iowa.— Farris *v.* Ingraham, 34 Iowa 231; Harris *v.* Wells, 10 Iowa 587; Tavenor *v.* Reed, 10 Iowa 416; Davis *v.* Burt, 7 Iowa 56; Harmon *v.* Lee, 6 Iowa 171; Neally *v.* Redman, 5 Iowa 387; Converse *v.* Warren, 4 Iowa 158; Pilkey *v.* Gleason, 1 Iowa 85.

Kansas.— Sexton *v.* Rock Island Lumber, etc., Co., 49 Kan. 153, 30 Pac. 164; Nipp *v.* Bower, 9 Kan. App. 854, 61 Pac. 448.

Louisiana.— Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; Adams *v.* Basile, 35 La. Ann. 101; Arnault *v.* St. Julien, 21 La. Ann. 630; Cole *v.* Hocha, 21 La. Ann. 613; McCracken *v.* Simms, 19 La. Ann. 33; Feazel *v.* Cooper, 15 La. Ann. 462; Flynn *v.* Rhodes, 12 La. Ann. 239; Lancaster *v.* Carriel, 5 La. Ann. 147; Thibodaux *v.* Wright, 3 La. Ann. 130; Griffing *v.* Caldwell, 1 Rob. 15; Sparks *v.* Weatherby, 16 La. 594; Pilié *v.* Kenner, 16 La. 570; Ballard *v.* Lee, 14 La. 211; Ireland *v.* Bryan, 3 Mart. N. S. 515; Baldwin *v.* Martin, 1 Mart. N. S. 519.

Maine.— Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615; Sanborn *v.* Stickney, 69 Me. 343.

Massachusetts.— Graves *v.* Cushman, 131 Mass. 359.

Minnesota.— Goener *v.* Woll, 26 Minn. 154, 2 N. W. 163.

Mississippi.— Robison *v.* Miller, 57 Miss. 237; Hendricks *v.* Pugh, 57 Miss. 157; Bustamente *v.* Bescher, 43 Miss. 172; Glenn *v.* Wragg, 41 Miss. 654; Ford *v.* Coleman, 41 Miss. 651; Fatheree *v.* Long, 5 How. 661.

jurisdictions, when service is made pursuant to statute by leaving the writ with a member of defendant's family, the name of such member must be stated in the

Missouri.— Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; Allen *v.* Singer Mfg. Co., 72 Mo. 326; Brown *v.* Langlois, 70 Mo. 226; Phillips *v.* Evans, 64 Mo. 17; Hewitt *v.* Weatherby, 57 Mo. 276; Smith *v.* Rollins, 25 Mo. 408; Blanton *v.* Jamison, 3 Mo. 52.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New Jersey.— Derrickson *v.* White, 32 N. J. L. 137; Polhemus *v.* Perkins, 15 N. J. L. 435; Ballinger *v.* Sherron, 14 N. J. L. 144; Despreaux *v.* Barber, 3 N. J. L. 1041.

New York.— Proctor *v.* Witcher, 15 N. Y. App. Div. 227, 44 N. Y. Suppl. 190; People *v.* Matthews, 43 Barb. 168 [*affirmed* in 38 N. Y. 451]; Anonymous, 25 Wend. 677.

Ohio.— Gamble *v.* Warner, 16 Ohio 371.

Pennsylvania.— O'Brien *v.* Bartlett, 12 Pa. Dist. 746; Weaver *v.* Springer, 2 Miles 42; Hoffa *v.* Weidenhamer, 22 Pa. Co. Ct. 528; Miller *v.* Swayne, 2 Leg. Rec. 236; Stout *v.* Wertsner, 15 Montg. Co. Rep. 48; Bar *v.* Purcil, 2 Phila. 259; Johnson *v.* Aylesworth, 3 Pittsb. 237; Hiester *v.* Muhlenberg, 2 Woodw. 1; Sheaffer *v.* Dillsburg Kaolin Co., 18 York Leg. Rec. 7.

Texas.— Roberts *v.* Stockslager, 4 Tex. 307.

Virginia.— Wynn *v.* Wyatt, 11 Leigh 584.

Washington.— Mitchell, etc., Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235.

West Virginia.— Midkiff *v.* Lusher, 27 W. Va. 439; Capehart *v.* Cunningham, 12 W. Va. 750; Lewis *v.* Botkin, 4 W. Va. 533; Vandiver *v.* Roberts, 4 W. Va. 493.

Wisconsin.— McConkey *v.* McCraney, 71 Wis. 576, 37 N. W. 822; Pollard *v.* Wegener, 13 Wis. 569; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

See 40 Cent. Dig. tit. "Process," § 170.

Description of person with whom process was left.— Where the statute requires that service of a writ may be made by leaving a copy with a white member of defendant's family, a return by the officer that he left a copy with "A. B., a member of" defendant's family, is not sufficient to give jurisdiction over the person of defendant. *Ex p.* Cross, 7 Ark. 44. A return that a copy was left at his place of residence with "a" person over fifteen years of age is insufficient in not stating the person to be a member of his family. Dawson *v.* State Bank, 3 Ark. 505. A return of an original notice, "Served by leaving a copy of this notice with Mrs. Ann Thompson, the mother of J. W. Thompson, at his usual place of abode . . . said J. W. Thompson not being found in my county," was held deficient in not showing that Ann Thompson was a member of the family of J. W. Thompson, or of the family where he had his residence. Lyon *v.* Thompson, 12 Iowa 183. A return of process, "Served by certified copy left with Joseph Kerr's [defendant's] wife, at his usual residence," was insufficient, as not showing that the person with whom it was left was more than fourteen years old. Davis *v.* Burt, 7 Iowa 56. Under La. Code Pr. art. 189, authorizing the service of citation to be made at the usual domicile or the residence of defendant, if he be absent, on a free person above the age of fourteen, and living there, the sheriff's return of service of citation should state expressly that he left the process at the usual domicile or residence, with a free person, above fourteen years of age, living there, defendant being absent. Kendrick *v.* Kendrick, 19 La. 36.

Posting of copy.— A return that the summons was served on a person unknown by posting one "copy on the courthouse," and a copy on two public places in the township, not reciting the length of time they were so posted, was insufficient, the statute requiring posting for three weeks. Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.

Explaining contents of writ.— Where service of process was made by leaving a copy with a member of the family of defendant (Underwood St. p. 186, c. 22, § 11), a return which failed to show that the officer explained to such person the contents of the writ and that it was left at the usual place of abode of defendant was fatally defective. Hessler *v.* Wright, 8 Ill. App. 229.

Place of leaving copy.— A return of service of petition and citation on defendant by leaving copies at "his residence" was sufficient, without showing that it was at his "usual residence," in the absence of evidence that defendant had more than one domicile. Griffing *v.* Caldwell, 1 Rob. (La.) 15. Where defendant was described in a writ as of L, in P county, a return by the officer that he left a summons for him at his "last and usual place of abode in Kennebec county" was indefinite and insufficient, since his last and usual place of abode in K county would not necessarily be his "place of last and usual abode within the state." Sanborn *v.* Stickney, 69 Me. 343. Under a statute permitting substituted service where defendant cannot be found, and there is no free white person over the age of sixteen years who is a member of the family of defendant, by leaving a copy of the writ "at some public place at the dwelling house of the defendant," a return "Executed [on defendant] by leaving a copy at her residence," etc., is insufficient, as failing to show that it was left as some public place at the residence (Eskridge *v.* Jones, 1 Sm. & M. (Miss.) 595), and under such provision the service of a writ by leaving a return upon a writ "Executed by leaving a copy at the boarding house of the defendant," was held insufficient (Smith *v.* Cohea, 3 How. (Miss.) 35). Under a statute permitting service at the "usual place of abode," a return of service at the "last usual place of abode" was held not to show valid service. Madison County Bank *v.* Suman, 79 Mo. 527. An officer's return that he left at "the dwelling house" of a trustee a true and attested

return,[30] but in others this is not held to be necessary.[31] Where service is made upon a person as agent of defendant, the return ought to show that he is such agent;[32] and when the statute designates certain agents as competent to accept service for the principal, the return should so characterize the agent served as to show that he was one of those agents designated by the statute.[33] If the method adopted is permitted by the statute only in certain cases, the return must show facts disclosing that the case was one within the authorization of the statute, as where substituted service is authorized only when defendant cannot be found,[34] or where service upon a resident agent is permissible when defendant is a non-resident.[35]

6. Alteration of Return. Erasures or interlineations subsequently found in a return will not nullify a judgment based upon it which recites that the summons was served on defendant.[36]

7. Process Not Served. If service cannot be made upon any defendant for the

copy of the writ is a sufficient return that he left such copy at "the last and usual place of abode" of the trustee. Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111. Under Pa. Act, March 20, 1810, permitting summons to be served on defendant by leaving a copy at his "dwelling house," a return of service as served on defendant by copy left at his "residence" was sufficient. Achy *v.* Kline, 1 Woodw. (Pa.) 162. Under Tex. Rev. St. art. 1220, providing that, when a citation is served without the county in which the suit is brought, the officer shall deliver to each of defendants "the certified copy of the petition accompanying the citation," the return must show that the copy delivered to defendants was certified, and it is not sufficient to state that "a copy of the petition" was delivered to defendant, although the citation recites that a certified copy accompanies the citation, and is to be served with it. Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308. Under a statute authorizing service of summons by leaving a copy at the place of defendant's "abode," a return that the same was left at a house or usual place of "residence" was sufficient, the expressions being substantially synonymous. State *v.* Toland, 36 S. C. 515, 15 S. E. 599, 600.

30. Montgomery *v.* Brown, 7 Ill. 581; Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811 (sufficient to state that it was left with defendant's wife); Wilson *v.* Call, 49 Iowa 463; Clark *v.* Little, 41 Iowa 497; Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533; Lewis *v.* Hartel, 24 Wis. 504.

31. Box *v.* Equitable Securities Co., 71 Ark. 286, 73 S. W. 100; Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540; Robison *v.* Miller, 57 Miss. 237; Morehead *v.* Chaffe, 52 Miss. 161; Goldman *v.* Teitlebaum, 10 Pa. Dist. 53; Shea *v.* Plains Tp., 7 Kulp (Pa.) 554. But *compare* Earle *v.* Howarth, 7 Del. Co. (Pa.) 388.

32. Planters', etc., Bank *v.* Walker, Minor (Ala.) 391; Jacobs *v.* Sartorius, 3 La. Ann. 9.

33. Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 469.

34. *Iowa.*— Bonsall *v.* Isett, 14 Iowa 309; Grant *v.* Harlow, 11 Iowa 429; Sidles *v.* Reed, 10 Iowa 589; Eikenburg *v.* Barnett, 10 Iowa 593; Chittenden *v.* Hobbs, 9 Iowa 417; Nosler *v.* Githens, 9 Iowa 295; Davis *v.* Burt, 7 Iowa 56.

Louisiana.—Corcoran *v.* Riddell, 7 La. Ann. 268; Oakey *v.* Drummond, 4 La. Ann. 363.

Mississippi.— Mullins *v.* Sparks, 43 Miss. 129.

New Jersey.— Cooper *v.* Roberts, 16 N. J. L. 353; Polhemus *v.* Perkins, 15 N. J. L. 435.

New York.— Shapiro *v.* Goldberg, 31 Misc. 755, 64 N. Y. Suppl. 88.

Washington.— Mitchell, etc., Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235.

West Virginia.— Johnson *v.* Ludwick, 58 W. Va. 464, 52 S. E. 489.

Wisconsin.— Matteson *v.* Smith, 37 Wis. 333; Lewis *v.* Hartel, 24 Wis. 504; Knox *v.* Miller, 18 Wis. 397.

United States.— Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110; Harris *v.* Hardeman, 14 How. 334, 14 L. ed. 444.

See 40 Cent. Dig. tit. "Process," §§ 170, 171.

Sufficiency.—A return on a summons that service was made by leaving a copy for defendant, who being sick the officer "could not see her," gave the court no jurisdiction; the only statutory provision for service by leaving a copy with a member of the family being where a party is "not found within the county of his residence." Le Grand *v.* Fairall, 86 Iowa 211, 53 N. W. 115. The return of an officer on a writ, stating that he executed it by leaving a copy with a member of the family of defendant, the latter "being absent," is insufficient under a provision of the statute allowing such service if defendant "could not be found." Hammond *v.* Olive, 44 Miss. 543.

35. Taylor *v.* Brown, 13 Pa. Co. Ct. 655; Boyle *v.* Whitney, 8 Pa. Co. Ct. 501; Miller *v.* Swayne, 2 Leg. Rec. (Pa.) 236.

36. Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639.

reason that such defendant cannot be found in the county,[37] that defendant refused to receive the writ when offered,[38] that defendant is dead,[39] that the officer was kept off by force of arms,[40] that defendant is exempt from service by reason of certain circumstances,[41] or that service cannot be made for any other reason,[42] the facts should be set up in the return. No writ should be returned not found until the time within which service could lawfully be made has expired.[43]

8. Affidavit of Service. Service of process may frequently be made by persons other than officers,[44] but in such cases the statement of the person serving as to the fact and manner of service must be made under oath or supported by his affidavit.[45]

37. Neally *v.* Redman, 5 Iowa 387; Ford *v.* Munson, 4 N. J. L. 93; Sherer *v.* Easton Bank, 33 Pa. St. 134; Brown *v.* Belches, 1 Wash. (Va.) 9.

Sufficiency of return.— "Although *non est inventus* is the more frequent return in such a case, yet it is by no means as full an answer to the command of the writ, as is the return of *nihil*. That amounts to an averment that the defendant has nothing in the bailiwick, no dwelling-house, no family, no residence, and no personal presence to enable the officer to make the service required by the Act of Assembly." Sherer *v.* Easton Bank, 33 Pa. St. 134, 139. Where substituted service is provided for by law, the return should be that defendant could not be found in the county so as to be served with process, *non est inventus* alone not being sufficient. Moore *v.* Miller, 16 N. J. L. 233. A statement in the return that the sheriff did not go to the house of one of defendants destroys the return of not found as to such defendant. Lodge *v.* State Bank, 6 Blackf. (Ind.) 557. Under some statutes a mere return of "not found" is insufficient. Morris *v.* Knight, 1 Blackf. (Ind.) 106; Doggett *v.* Jordan, 3 Fla. 215. On a return "Not found," made by the sheriff on an original notice, it will be presumed that defendant could not be found in the county of the officer making the return. Macklot *v.* Hart, 12 Iowa 428. A sheriff is not authorized to return a defendant "No inhabitant of the State," as he cannot officially know the inhabitants of the state, although it may be good for as much territory as he can officially notice. Greenup *v.* Bacon, 1 T. B. Mon. (Ky.) 108. Since the whole county is not necessarily the bailiwick of a deputy sheriff, a return by him that defendant is "no inhabitant of my bailiwick" is not equivalent to a return that he is no inhabitant of the county. Gully *v.* Sanders, Litt. Sel. Cas. (Ky.) 424. A sheriff cannot make a return of *non est inventus*, if defendant is a known inhabitant of another state or county. Kibbe *v.* Deering, 1 Litt. (Ky.) 244. In an action against several joint contractors, where the writ described one of defendants on whom no service was made as of a certain county, the return of the proper officer that he had no last or usual place of abode within such county is sufficient. Call *v.* Hagger, 8 Mass. 423. Where there is more than one defendant, the sheriff's return that he cannot find defendants is equivalent to saying that neither can be found. Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600. Return on a writ must purport something capable of being understood without evidence *aliunde*. The letters "N. E. I." cannot be taken to mean *non est inventus*. Parker *v.* Grayson, 1 Nott & M. (S. C.) 171.

38. Fuller *v.* Kenney, 32 Me. 334, holding that if a defendant refuses to receive a summons offered him by the officer having the writ for service, the officer may return that he delivered the summons, or he may return the facts specifically, and they will be held to be a delivery.

39. Burr *v.* Dougherty, 14 Phila. (Pa.) 6, holding that the proper return to a writ of summons, when the sheriff knows defendant is dead, is *mortuus est* and not *nihil habet*.

40. Crumpler *v.* Glisson, 4 N. C. 516.

41. Hunter *v.* Weidner, 1 Woodw. (Pa.) 6, holding that a return of a summons, stating that one of defendants had gone to the war, without stating in what capacity he had gone, was insufficient as it did not prove defendant within the protection of the act of April 2, 1822, section 70, relating to those in military service.

42. Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116.

43. Combs *v.* Warner, 8 Dana (Ky.) 87.

44. See *supra*, II, B, 7, d.

45. *Arkansas.*— Coffee *v.* Gates, 28 Ark. 43.

California.— Hibernia Sav., etc., Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425; Yolo County *v.* Knight, 70 Cal. 430, 11 Pac. 662.

Iowa.— Blair *v.* Hemphill, 111 Iowa 226, 82 N. W. 501; Romaine *v.* Muscatine County, Morr. 357.

Missouri.— Murdock *v.* Hillyer, 45 Mo. App. 287.

New York.— Vitolo *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273.

South Carolina.— Barron *v.* Dent, 17 S. C. 75.

See 40 Cent. Dig. tit. "Process," § 177.

All the necessary facts may be shown in one affidavit or in two or more separate affidavits. State *v.* Whatcom County Super. Ct., 42 Wash. 521, 85 Pac. 256. Where the only proof that a summons alleged to have been lost or destroyed was served on defendant, who is in default, consists of an affidavit made by plaintiff, in which he states that said summons was served on defendant personally by a certain person more than seven and one-half years prior to making such affidavit, and there is nothing in

This rule has been applied to special deputies,[46] to constables,[47] and to a city marshal.[48] If the statute prescribes the officer before whom the affidavit shall be made, it is insufficient if made before another;[49] but if no officer is designated, it may be made before any officer authorized to administer oaths.[50] While the general rules applicable to a sheriff's return usually apply equally to such an affidavit of service, certain additional requirements are frequently imposed by statute. Thus the affidavit is often required to show that the person serving the writ has the qualifications required by the statute, as that he is of the proper age,[51] or not interested in the matter in controversy,[52] or is competent to testify as a witness at the trial of the cause.[53] Some statutes require such affidavit also to contain an averment that the person served is, or that affiant knows him to be, the identical person named in the summons.[54] It is sometimes provided that the affidavit must

the affidavit nor record showing affiant's means of knowledge, or relating to the particulars of the loss or destruction of the summons, or excusing the delay in making a return thereon, or explaining why said proof of service was not originally made by the affidavit of the party who served the summons, the proof of service is insufficient to show jurisdiction of defendant. Brettell *v.* Deffebach, 6 S. D. 21, 60 N. W. 167.

46. Edwards *v.* McKay, 73 Ill. 570; Simms *v.* Simms, 88 Ky. 642, 11 S. W. 665, 11 Ky L. Rep. 131; Doty *v.* Berea College, 15 S. W. 1063, 16 S. W. 268, 12 Ky. L. Rep. 964.

47. Berentz *v.* Belmont Oil Min. Co., 148 Cal. 577, 84 N. W. 47, 113 Am. St. Rep. 308; Moss *v.* Blinn, 7 Iowa 261.

48. Brauchle *v.* Nothhelfer, 107 Wis. 457, 83 N. W. 653.

49. Adams *v.* Heckscher, 80 Fed. 742.

50. Marine Wharf, etc., Co. *v.* Parsons, 49 S. C. 136, 26 S. E. 956.

51. Williamson *v.* Cummings Rock Drill Co., 95 Cal. 652, 30 Pac. 762; Horton *v.* Gallardo, 88 Cal. 581, 26 Pac. 375; Barney *v.* Vigoureaux, 75 Cal. 376, 17 Pac. 433; Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938; Doerfler *v.* Schmidt, 64 Cal. 265; Weil *v.* Bent, 60 Cal. 603; Howard *v.* Galloway, 60 Cal. 10; Maynard *v.* MacCrellish, 57 Cal. 355. Under 2 Ballinger Annot. Codes & St. Wash. § 4874, providing that, where summons is not served by an officer, it may be served by any person over twenty-one years of age, proof of service reciting that the one who served the summons "is more than 21 years of age," is insufficient for failing to show that he was over such age when service was made. French *v.* Ajax Oil, etc., Co., 44 Wash. 305, 697, 87 Pac. 359, 360. Where an affidavit of service of summons is made by plaintiff's attorney, who states that he is such attorney, and made the service, and appends to the summons his office and post-office address, the absence of a statement of the age and the residence of the affiant may be supplied by the court's knowledge that its officer is over twenty-one years of age, and by the statement of his office address. Booth *v.* Kingsland Ave. Bldg. Assoc., 18 N. Y. App. Div. 407, 46 N. Y. Suppl. 457.

An affidavit stating that the affiant is a male citizen of the United States, over eighteen years of age, was not sufficient to show that he was over eighteen years of age at the time of the service of the summons, on the contention that the words "male citizen of the United States" indicated that he was an elector, and therefore twenty-one years of age or over, since while it is true that a citizen, in the full acceptation of that term, is a member of the civil state, entitled to all its privileges, the possession of all political rights is not essential to citizenship, which term is a comprehensive one, and includes citizens of the state and citizens of the United States, and these include political as well as civil citizens, electors and non-electors. And hence a person may be a citizen of the United States, although under age and not entitled to vote. Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938.

52. Raub *v.* Otterbach, 89 Va. 645, 16 S. E. 933.

53. Dimick *v.* Campbell, 31 Cal. 238; McMillan *v.* Reynolds, 11 Cal. 372.

54. O'Connell *v.* Gallagher, 104 N. Y. App. Div. 492, 93 N. Y. Suppl. 643; Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44; Porath *v.* Reigh, etc., Co., 112 Wis. 433, 88 N. W. 315; German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500; Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326; Sayles *v.* Davis, 20 Wis. 302. Sanborn & B. Annot. St. Wis. § 2642, providing, if service of summons is made by one other than the sheriff, proof thereof shall be by affidavit of such person, showing that "he knew the person served to be the defendant mentioned in the summons," is not satisfied by a statement that affiant knew that the person with whom he left a copy of the summons and complaint was the general manager of defendant. Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403. In Young *v.* Young, 18 Minn. 90, a court rule making this requirement was held invalid as inconsistent with the statute. And it was held in Cunningham *v.* Water-Power Sandstone Co., 74 Minn. 282, 77 N. W. 137, that such a showing was unnecessary.

When a summons has been personally served out of the state, it must be shown by affidavit that the person served is the identical person named in the action or proceeding. It is not sufficient to show by affidavit that the person served acknowledged

show the place where service was made, the presumption which obtains in the case of service by the sheriff not being recognized.[55] If personal service is made outside the state as a substitute for service by publication, the affidavit should show the place of service.[56]

C. Proof of Service by Publication — 1. Who May Make Proof. The statute usually provides that proof of service by publication shall be by affidavit or certificate of some one of a number of designated persons, such as the proprietor, editor, printer, or chief clerk of the newspaper in which publication is made, and the statute must be observed.[57] A printed copy of the summons published is sometimes required to be returned with the affidavit.[58] If the statute does not restrict the proof, any other competent evidence of the service may be shown to establish the fact,[59] and even where the statute provided that proof "shall" be made in a designated mode, other competent evidence was held admissible to prove the fact.[60] The affidavit must positively show that the affiant is one of the persons designated by the statute,[61] and it is not enough for him to merely describe himself as such person.[62] The affiant need not describe himself by the term

himself to be such identical person. Cole *v.* Allen, 51 Ind. 122.

55. Weis *v.* Schoerner, 53 Wis. 72, 9 N. W. 794; Lewis *v.* Hartel, 24 Wis. 504, sufficient to state the county.

56. Fisher *v.* Fredericks, 33 Mo. 612.

57. See the statutes of the several states. And see the following cases:

Arkansas.—Pillow *v.* Sentelle, 39 Ark. 61; Lawrence *v.* State, 30 Ark. 719.

California.—Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Seaver *v.* Fitzgerald, 23 Cal. 85; Gray *v.* Palmer, 9 Cal. 616.

Illinois.—Riely *v.* Barton, 32 Ill. App. 524.

Kentucky.—Bainbridge *v.* Owen, 2 J. J. Marsh. 463; Freeman *v.* Brown, 7 T. B. Mon. 263; Wilkinson *v.* Perrin, 7 T. B. Mon. 214; Miller *v.* Hall, 3 T. B. Mon. 242.

Nebraska.—Taylor *v.* Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. Rep. 426; Wescott *v.* Archer, 12 Nebr. 345, 11 N. W. 491, 577.

New York.—Waters *v.* Waters, 7 Misc. 519, 27 N. Y. Suppl. 1004.

Illustrations.—An affidavit of publication made by a "publisher and proprietor" is a substantial compliance with the rule requiring it to be made by the "printer, foreman, or principal clerk." Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; People *v.* Thomas, 101 Cal. 571, 36 Pac. 9; Quivey *v.* Porter, 37 Cal. 458; Sharp *v.* Daugney, 33 Cal. 505. The editor of the paper is competent to make an affidavit under a statute requiring it to be made by "the printer, or his foreman or principal clerk." Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. *Contra*, Hay *v.* McKinney, 7 J. J. Marsh. (Ky.) 441; Butler *v.* Cooper, 6 J. J. Marsh. (Ky.) 29. The proprietor or manager is the publisher within the meaning of the statute. Stuart *v.* Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040. A certificate cannot be made by proxy. Nicholas *v.* Gratz, 2 J. J. Marsh. (Ky.) 486; Miller *v.* Hall, 3 T. B. Mon. (Ky.) 242. An entry by the clerk of the court is sometimes provided for, where that officer performs the act of which proof is to be made. English *v.* Monypeny, 6 Ohio Cir. Ct. 554, 3 Ohio Cir. Dec. 582.

An unsigned certificate is ineffectual. Star Brewery *v.* Otto, 63 Ill. App. 40.

In Texas the sheriff's return must disclose all the facts constituting legal service. O'Leary *v.* Durant, 70 Tex. 409, 11 S. W. 116; Lyon *v.* Paschal, 45 Tex. 435; Thomas *v.* Goodman, 25 Tex. Suppl. 446; Edrington *v.* Allsbrooks, 21 Tex. 186; Wilson *v.* Palmer, 18 Tex. 592; Blossom *v.* Letchford, 17 Tex. 647; Goodlove *v.* Gray, 7 Tex. 483; Chaffee *v.* Bryan, 1 Tex. App. Civ. Cas. § 770; Burns *v.* Batey, 1 Tex. App. Civ. Cas. § 419.

58 Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

59. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520; English *v.* Monypeny, 6 Ohio Cir. Ct. 554, 3 Ohio Cir. Dec. 582; Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555.

60. Robinson *v.* Hall, 33 Kan. 139, 5 Pac. 763.

61. Cross *v.* Wilson, 52 Ark. 312, 12 S. W. 576; Haywood *v.* Collins, 60 Ill. 328; Riely *v.* Barton, 32 Ill. App. 524; Brown *v.* Wood, 6 J. J. Marsh. (Ky.) 11; Brown *v.* Mahan, 4 J. J. Marsh. (Ky.) 59; Miller *v.* Hall, 3 T. B. Mon. (Ky.) 242.

Who may make.—A judgment rendered on such service has been held not to be void because the person making the affidavit is not shown by the affidavit to come within the terms of the statute. Hardin *v.* Strader, 1 B. Mon. (Ky.) 286.

Oral testimony may be received. Riely *v.* Barton, 32 Ill. App. 524.

62. Steinbach *v.* Leese, 27 Cal. 295. *Contra*, Farmer's Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664, where in an affidavit of publication the affiant described himself as "printer and publisher of the Three Rivers Herald, a public newspaper, printed, published, and circulating in the county of St. Joseph," etc., but there was no direct averment that he was such printer, or that the paper was so published, and it was held that the recital was sufficient.

employed in the statute if he states facts which disclose that he comes within its purview.[63]

2. Requisites and Sufficiency of Affidavit. The affidavit or certificate of the publication of the summons or notice must show that just such publication as the law requires has been made in precisely the manner provided by law.[64] But it is the service and not the proof thereof which gives the court jurisdiction, and a judgment will not be set aside merely because the proof is not made as provided for by statute, where it appears that service was in fact properly had,[65] although there are cases which hold that a want of the proof provided for by law is fatal to the jurisdiction.[66] It has been held that no presumption will ordinarily aid the record of a service by publication, since that is a strictly statutory proceeding in derogation of the common law.[67] It should appear that publication was made in a newspaper,[68] of the kind specified by the statute,[69] which should be named,[70] and it should appear to be the same newspaper in which publication was ordered.[71] It should also clearly appear from the affidavit that the summons, order, or notice was published at the proper time, for the requisite number of times, at the proper intervals and for the required period, as provided for by the statute.[72] It is in

63. Gray *v.* Palmer, 9 Cal. 616; Pettiford *v.* Zoellner, 45 Mich. 358, 8 N. W. 57; Waters *v.* Waters, 7 Misc. (N. Y.) 519, 27 N. Y. Suppl. 1004.

64. Haywood *v.* Collins, 60 Ill. 328; Hemingway *v.* Chicago, 60 Ill. 324.

A newspaper clipping of the notice published, attached to the affidavit and referred to therein, will be looked to in aid of a defective statement in the affidavit itself. Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117.

Where a judgment, silent as to notice, is offered in evidence on an issue in another cause, evidence of application for, and issuance of, citation to be served by publication on a non-resident of the state does not constitute such proof as is required to show that the judgment was rendered on notice by publication alone, in the absence of the sheriff's return on such citation, or of any evidence as to what else the record may show respecting service thereof. McCarthy *v.* Burtis, 3 Tex. Civ. App. 439, 22 S. W. 422.

65. Pierce *v.* Butters, 21 Kan. 124.

"Jurisdiction begins on granting the order before the publication is made. The statute merely directs proof to be made before inquiring into the merits." Soule *v.* Chase, 1 Rob. (N. Y.) 222, 233 [*reversed* on other grounds in 39 N. Y. 342].

66. O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621.

67. Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453.

68. Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555.

69. Gallagher *v.* Johnson, 65 Ark. 90, 44 S. W. 1041; Spalding *v.* Fahrney, 108 Ill. App. 602; Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

70. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.

71. Waters *v.* Waters, 7 Misc. (N. Y.) 519, 27 N. Y. Suppl. 1004; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

72. *Arkansas.*— Pillow *v.* Sentelle, 39 Ark. 61; Lawrence *v.* State, 30 Ark. 719.

California.—Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

Illinois.— Tobin *v.* Brooks, 113 Ill. App. 79.

Indiana.— Curry *v.* State, 131 Ind. 439, 31 N. E. 86.

Kentucky.— Hopkins *v.* Claybrook, 5 J. J. Marsh. 234; Banks *v.* Johnson, 4 J. J. Marsh. 649; Passmore *v.* Moore, 1 J. J. Marsh. 591; Tevis *v.* Richardson, 7 T. B. Mon. 654; Milam *v.* Thomasson, 7 T. B. Mon. 324; Lawlins *v.* Lackey, 6 T. B. Mon. 70; Miller *v.* Hall, 3 T. B. Mon. 242.

Michigan.—Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841; Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381.

Minnesota.— Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4; Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657.

Missouri.— Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549; Haywood *v.* Russell, 44 Mo. 252.

New York.— Hallett *v.* Righters, 13 How. Pr. 43.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

Texas.— Chaffee *v.* Bryan, 1 Tex. App. Civ. Cas. § 770.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

United States.— Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402.

Proof that a summons was published for six successive weeks in a weekly newspaper sufficiently shows publication once a week for six successive weeks (McHenry *v.* Bracken, 93 Minn. 510, 101 N. W. 960), although such an affidavit would not be sufficient where publication was made for six successive weeks in a daily newspaper (Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657).

Insensible statements in a certificate or affidavit will be regarded as surplusage. Michael *v.* Mace, 137 Ill. 485, 27 N. E. 694;

some states necessary to show the dates of the issues of the paper in which the notice was published.[73] If the affidavit states that the notice was properly published but the dates given in the affidavit show that the statement is not true, the showing made by the dates will control,[74] unless it is stated merely under a *vidilicet*,[75] or unless there is an obvious clerical error in the dates.[76] But an omission of a date may be supplied by a second affidavit.[77] If the mailing of a copy of the summons or complaint is also required, an affidavit of some competent witness or certificate of an authorized officer must be made to prove the fact.[78] If plaintiff's attorney does the mailing he may make the affidavit.[79] The affidavit should show such facts as to the address and time of mailing as are necessary under the statute.[80] Misstatements in the affidavit as to immaterial facts will not render it void.[81] Statutes providing when such affidavit shall be made are directory only.[82] The giving of the required affidavit may be compelled in case of refusal.[83]

D. Operation and Effect — 1. Effect on Summons. After being returned the summons is *functus officio*, and no subsequent service of the same writ will be effectual for any purpose;[84] but the return itself may be used again when judgment founded upon it has been vacated.[85]

2. Presumption in Aid of Return[86] — a. In General. There is a general presumption, applicable to a variety of cases, that a sworn officer who has acted in a matter has done his duty in the premises, and this presumption has been resorted to in various ways to support sheriff's returns indorsed upon process, where such returns are ambiguous or silent as to certain requisites provided for by law.[87]

Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Swayze *v.* Doe, 13 Sm. & M. (Miss.) 317.

73. Lawrence *v.* State, 30 Ark. 719; Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59.

74. Pierce *v.* Butters, 21 Kan. 124.

75. Howard *v.* McChesney, 103 Cal. 536, 37 Pac. 523.

76. Michael *v.* Mace, 137 Ill. 485, 27 N. E. 694; Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

77. Howard *v.* McChesney, 103 Cal. 536, 37 Pac. 523.

78. Seaver *v.* Fitzgerald, 23 Cal. 85; O'Rear *v.* Lazarus, 8 Colo. 608; 9 Pac. 621; Roberts *v.* Roberts, 3 Colo. App. 6, 31 Pac. 941; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Hallett *v.* Righters, 13 How. Pr. (N. Y.) 43.

Any one but the party himself may make the affidavit. Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

79. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

80. Foley *v.* Connelly, 9 Iowa 240; Pinkney *v.* Pinkney, 4 Greene (Iowa) 324; Steinle *v.* Bell, 12 Abb. Pr. N. S. (N. Y.) 171.

For example, where an order for publication of summons required a mailing of copies to each of the defendants, an affidavit setting forth that "a copy of said summons attached to a copy of the complaint, directed to" numerous defendants, was deposited in the post-office, does not show complete service on any of the defendants, mailing being as much a part of the service as publication; and there was no abuse of the court's discretion in setting aside a default based thereon. Harris *v.* Morris, 3 Cal. App. 151, 84 Pac. 678.

81. Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

82. McFarlane *v.* Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468.

83. Eberle *v.* Krebs, 50 N. Y. App. Div. 450, 64 N. Y. Suppl. 246.

84. Fanning *v.* Foley, 99 Cal. 336, 33 Pac. 1098; Eaton *v.* Fullett, 11 Ill. 491; Garner *v.* Willis, 1 Ill. 368; Carnahan *v.* People, 2 Ill. App. 630; Cook *v.* Wood, 16 N. J. L. 254.

A summons may be withdrawn after return by order of the court for future service. Hancock *v.* Preuss, 40 Cal. 572.

Quashing return and continuance for service.— And where the return of a special deputy on a summons in a case at law shows service only by reading, if no copy was actually delivered to defendant, so that an amendment would not be permissible, the return should be quashed, and the case continued for the purpose of getting service, and the defective service is not cause for dismissing the suit. Noleman *v.* Weil, 72 Ill. 502.

85. Brien *v.* Casey, 2 Abb. Pr. (N. Y.) 416.

86. On appeal from judgment of justice see Justices of the Peace, 24 Cyc. 745.

On collateral attack of judgment see Judgments, 23 Cyc. 1079.

87. *Alabama.*— McKeagg *v.* Collehan, 13 Ala. 828.

Connecticut.—Whittlesey *v.* Starr, 8 Conn. 134.

Indiana.— Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205.

New York.— Van Kirk *v.* Wilds, 11 Barb. 520.

Texas.— Calvert, etc., R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

b. Fact of Service. The fact of service must always appear in some form in the return, and when a return alleges service upon part of the defendants and is silent as to others, no presumption of service will be indulged.[88]

c. Person Serving Writ. It will be presumed that the person making service of process was competent to do so.[89] Thus one who purports to serve process as an officer will be presumed to be a duly qualified officer authorized to serve the writ in question;[90] one who purports to serve process as a deputy will be presumed to have been duly authorized as such;[91] when a coroner serves process it will be presumed that the conditions existed which made such service proper;[92] and when a previous grant of authority is necessary in order that one other than an officer may serve process, such grant will be presumed in order to support such service.[93]

d. Diligence Employed. Where an officer makes a return of not found or of substituted service, no showing of diligence is necessary, since he is presumed to have used the necessary diligence.[94]

e. Person Served. A return of service upon an agent, under a statute authorizing such service, which omits to set forth the character of the agent, is presumptive evidence that the party served was in fact an agent qualified to receive service for his principal.[95]

f. Manner of Service. Facts as to the manner of service should ordinarily be stated, and it has been held that no presumptions will supply an omission to allege the doing of that which the statute declares shall be done;[96] but where the statute

United States.—Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801; New River Mineral Co. *v.* Roanoke Coal, etc., Co., 110 Fed. 343, 49 C. C. A. 78.

Where a deputy sheriff is shown to have been at least a *de facto* officer at the time he served and returned a summons, the presumption of regularity attaches with reference to his acts, without proof of his appointment by official record. Mosher *v.* McDonald, 128 Iowa 68, 102 N. W. 837.

Where a return was lost, but there was an entry in the appearance docket that the writ was returned "served," the presumption is that the return was regular. Stunkle *v.* Holland, 4 Kan. App. 478, 46 Pac. 416. But it is held that this presumption may be rebutted. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614.

88. Dickison *v.* Dickison, 124 Ill. 483, 16 N. E. 861.

89. Rucker *v.* Tabor, 126 Ga. 132, 54 S. E. 959; Eversole *v.* Eastern Kentucky Insane Asylum, 100 S. W. 300, 30 Ky. L. Rep. 989; Blain *v.* McManus, 2 Tex. Unrep. Cas. 314; Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 443.

Presumption overcome.— Where it appeared that the writ was served by a person not an officer, deputized by the sheriff, and bearing the same name as that of one of plaintiffs, and nothing appeared to the contrary, it was held that it must be presumed, from the identity of names, that the person serving the writ was a plaintiff, and that the service was not good. Filkins *v.* O'Sullivan, 79 Ill. 524. Where the statute limits the right to serve process to persons having certain qualifications, the affidavit of service must affirmatively disclose the competency of the person making service. See *supra*, III, B, 8.

90. Whiting *v.* Hagerty, 5 La. Ann. 686; Kendrick *v.* Kendrick, 19 La. 36.

91. Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376.

92. Russell *v.* Durham, 29 S. W. 16, 16 Ky. L. Rep. 516; Rodolph *v.* Mayer, 1 Wash. Terr. 133.

93. Hess *v.* Smith, 16 Misc. (N. Y.) 55, 37 N. Y. Suppl. 635.

94. *Illinois.*— Chickering *v.* Failes, 26 Ill. 507, in a suit in equity for relief from a judgment.

Iowa.—Neally *v.* Redman, 5 Iowa 387, appeal from judgment by default.

Missouri.— State *v.* Finn, 87 Mo. 310, in an action against a sheriff for false return.

North Carolina.— Tomlinson *v.* Long, 53 N. C. 469, in an action against the sheriff for a false return.

Texas.— Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552, return upon attachment issued against veniremen, on appeal in criminal prosecution.

95. Fulton *v.* Commercial Travelers' Mut. Acc. Assoc., 172 Pa. St. 117, 33 Atl. 324.

96. Rose *v.* Ford, 2 Ark. 26; Philadelphia *v.* Cathcart, 10 Phila. (Pa.) 103. There are a few cases which hold that the officer need only return that he executed the writ, and it will be presumed that he did it as provided by law. Mayfield *v.* Allen, Minor (Ala.) 274; Bridges *v.* Ridgley, 2 Litt. (Ky.) 395; Norton *v.* Berlin Iron Bridge Co., 51 N. J. L. 442, 17 Atl. 1079; Strayhorn *v.* Blalock, 92 N. C. 292. But in Mississippi where the statute provides that original process shall be served "upon the defendant personally, if to be found in the county, by handing him a true copy of the process," a return, "Executed this writ by personal service on" defendant,

provides what the return shall show, it will be presumed, as to all facts not required to appear in the return, that the officer did his duty according to law.[97]

g. Place of Service. If the return states that the sheriff served defendant, without stating where such service was made, it will be presumed that it was made within the county over which the officer's authority extended.[98] If substituted service, by leaving a copy of the writ at a designated place, is provided for by statute, the writ will be presumed to have been left at the place designated by the statute even though it is loosely described in non-statutory terms.[99] But the presumption in favor of an officer will not be indulged when process is served by a private individual.[1]

h. Time of Service. Where a return is without date, or with an imperfect or uncertain date, it will be presumed that the writ was served within the time prescribed by law.[2] Where the affidavit of an unofficial person constitutes the proof of service, and it is silent as to the time of service, the date of the jurat will be presumed to be the date of the service.[3]

i. Residence. If the service can be deemed valid only in case defendant resides in the county where service is made, a presumption to that effect will be entertained to support the service.[4]

j. Copy Served. Where the return states that the sheriff served defendant with a certified copy, it will be presumed that the certification was by the clerk, he being the only one allowed to certify such copies.[5]

k. Truth of the Return. Every legal presumption is in favor of the truth of the sheriff's return.[6]

3. Evidence Affecting The Return — a. Evidence to Aid or Explain Return. If the return is lost, parol evidence of the execution is admissible.[7] No defects

is insufficient for failing to state the facts on which the officer bases his conclusion that the service was personal, although the statute also provides that a general return of "Executed" is sufficient. Dogan *v.* Barnes, 76 Miss. 566, 24 So. 965. See also Heirmann *v.* Stricklin, 60 Miss. 234; Smith *v.* Bradley, 6 Sm. & M. (Miss.) 485; Keithley *v.* Borum, 2 How. (Miss.) 683. Where writs are issued in duplicate, running to different counties, the general return, "Executed," applies only to such of defendants as reside within the county to which the writ issued. Bozman *v.* Brower, 6 How. (Miss.) 43.

97. Webber *v.* Webber, 1 Metc. (Ky.) 18. See also Collier *v.* Catherine Lead Co., 208 Mo. 246, 106 S. W. 971.

Language employed.— Where, to constitute legal service, the citation and petition must be served in both English and French, the sheriff's return that he "served the petition and citation" implies that service was made in both languages. Cox *v.* Wells, 3 Mart. N. S. (La.) 158; Fleming *v.* Conrad, 11 Mart. (La.) 301.

98. *Arkansas.*— Henry *v.* Ward, 4 Ark. 150.

California.—Crane *v.* Brannan, 3 Cal. 192.

Indiana.—Baltimore, etc., R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440.

Kansas.— Ingraham *v.* McGraw, 3 Kan. 521.

Massachusetts.— Richardson *v.* Smith, 1 Allen 541.

Missouri.— Crowley *v.* Wallace, 12 Mo. 143.

Nebraska.— Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376.

United States.— Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. 58, 22 L. ed. 70.

See 40 Cent. Dig. tit. "Process," § 195.

In a suit on a foreign judgment, the record being silent as to whether service was had in the jurisdiction in which the judgment was rendered, no presumption that it was had within that jurisdiction was indulged. Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574.

Service by constable.— In the absence of a showing to the contrary, it will not be presumed that a constable made service of process outside of his county. Mahan *v.* McManus, (Civ. App. 1907) 102 S. W. 789.

99. Jones *v.* Tarver, 19 Ga. 279; Smithson *v.* Briggs, 33 Gratt. (Va.) 180.

1. Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

2. Reid *v.* Jordan, 56 Ga. 282; Cosby *v.* Bustard, Litt. Sel. Cas. (Ky.) 137; Stanton-Belment Co. *v.* Case, 47 W. Va. 779, 35 S. E. 851.

3. Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

4. Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185; Calderwood *v.* Brooks, 28 Cal. 151.

5. Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632.

6. Ingraham *v.* McGraw, 3 Kan. 521.

Conclusiveness of presumption see *infra*, III, D, 3, b.

7. Newhouse *v.* Martin, 68 Ind. 224.

The presumption is that a lost return was regular. Stunkle *v.* Holland, 4 Kan. App. 478, 46 Pac. 416.

or omissions in respect to the return can be corrected or supplied by extrinsic evidence,[8] and this is equally true after the death of the officer making it;[9] but if the return is not defective, but for any reason it becomes material to learn more about the service than is shown in the return, extrinsic evidence may be introduced.[10] A more liberal rule, however, permits omissions in a return to be supplied and ambiguities to be explained by parol evidence if that becomes necessary to prevent a failure of justice.[11] If the jurat is wanting in an affidavit of service, it may be shown by parol evidence that the affidavit was in fact sworn to,[12] and omissions in the affidavit may be supplied by parol evidence.[13]

b. Evidence to Impeach Return — (i) *CONCLUSIVENESS OF RETURN AS TO PARTIES AND PRIVIES.* The question of the conclusiveness of the return is one upon which there is an utterly irreconcilable conflict in authority. The English common-law rule,[14] which is also the rule in many American states, is that, as between parties and privies, the return of an officer is to be taken as true, as to all matters which are properly the subject of a return by the officer, and it can be controverted only in an action against the officer for a false return,[15] unless it

8. Harris *v.* Alexander, 1 Rob. (La.) 30; Madison County Bank *v.* Suman, 79 Mo. 527; Samuels *v.* Shelton, 48 Mo. 444.

9. Wilson *v.* Greathouse, 2 Ill. 174.

10. Wardwell *v.* Etter, 143 Mass. 19, 8 N. E. 420; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

Identification of person.— Where a writ of summons is directed against a person by a certain name, and two individuals are known in the community by that name, the officer serving the writ may point out in court, in giving testimony, the person he served; and such testimony does not contradict his return. Reid *v.* Mercurio, 91 Mo. App. 673. Where process is returned served on "R. E. Morgan," a defendant whose name of "Robert E. Morgan" is not precluded, as contradicting the return, from showing by parol that the process was served on a "Rufus E. Morgan" residing in the same county as himself, since such evidence merely shows to what person the return applies. Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771.

11. Kipp *v.* Fullerton, 4 Minn. 473; Vigars *v.* Mooney, 3 N. J. L. 909; Jackson *v.* Tenney, 17 Okla. 495, 87 Pac. 867; Leonard *v.* O'Neal, 16 Lea (Tenn.) 158.

12. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

13. Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 59.

14. Goubot *v.* De Crouy, 1 Cromp. & M. 772, 2 Dowl. P. C. 86, 2 L. J. Exch. 267, 3 Tyrw. 906. See Tillman *v.* Davis, 28 Ga. 494, 497, 73 Am. Dec. 786, where Lumpkin, J., said: "I have investigated carefully in Brooke and Viner's Abridgements, and traced the question to its fountain head, and find it well settled that by the common law no averments will lie against the sheriff's return."

15. *Arkansas.*— *Ex p.* St. Louis, etc., R. Co., 40 Ark. 141.

Georgia.— Brown *v.* Way, 28 Ga. 531 (decided before the statute was passed); Tillman *v.* Davis, 28 Ga. 494, 73 Am. Dec. 786.

Indiana.— Nichols *v.* Nichols, 96 Ind. 433; Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; Birch *v.* Frantz, 77 Ind. 199; Johnson *v.* Patterson, 59 Ind. 237.

Kansas.— Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281; Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745; Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608 [*overruling* Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840]. See, however, Starkweather *v.* Morgan, 15 Kan. 274, where Justice Brewer considers the question one merely of weight of evidence.

Louisiana.— Leverich *v.* Adams, 15 La. Ann. 310; State Bank *v.* Elam, 10 Rob. 26; Skilliman *v.* Jones, 3 Mart. N. S. 686.

Maine.— Stinson *v.* Snow, 10 Me. 263, 25 Am. Dec. 238.

Massachusetts.— Taylor *v.* Clark, 121 Mass. 319; Tilden *v.* Johnson, 6 Cush. 354; Slayton *v.* Chester, 4 Mass. 478. See, however, Brewer *v.* Holmes, 1 Metc. 288, where Shaw, C. J., permitted a return to be contradicted.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Stewart *v.* Stinger, 41 Mo. 400, 97 Am. Dec. 278; McDonald *v.* Leewright, 31 Mo. 29, 77 Am. Dec. 631; Delinger *v.* Higgins, 26 Mo. 180; Hallowell *v.* Page, 24 Mo. 590; Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 62. See also Cornwall *v.* Star Bottling Co., 128 Mo. App. 163, 106 S. W. 591; Strobel *v.* Clark, 128 Mo. App. 48, 106 S. W. 585.

New Hampshire.— Bolles *v.* Bowen, 45 N. H. 124. See, however, Clough *v.* Moore, 63 N. H. 111, where the return was shown to be false.

Pennsylvania.— Bennethum *v.* Bowers, 133 Pa. St. 332, 19 Atl. 361; Paxon's Appeal, 49 Pa. St. 195; Sample *v.* Coulson, 9 Watts & S. 62; Zion Church *v.* St. Peter's Church, 5 Watts & S. 215; Mentz *v.* Hamman, 5 Whart. 150, 34 Am. Dec. 546; Knowles *v.* Lord, 4 Whart. 500, 34 Am. Dec. 525; Ben Franklin Coal Co. *v.* Pennsylvania Water Co., 25 Pa. Super. Ct. 629; Philadelphia Demokrat Pub. Co. *v.* Edwards Sad Iron Co., 9 Pa. Dist. 56; Virtue *v.* Ioka Tribe, 5 Pa. Dist. 634; Hess *v.* Weingartner, 5 Pa. Dist. 451; Goodwin *v.* Wherry Co., 26 Pa. Co. Ct.

is contradicted by other matters appearing of record in the case,[16] or unless the false return was procured or induced by plaintiff, or resulted from the mistake of the officer,[17] except where the return forms the basis for a foreign judgment, in which case it is *prima facie* evidence only.[18] But the return is not evidence, under this rule, as to matters which are not properly the subject of such return, nor is it conclusive as to matters which are not supposed to be within the officer's own knowledge,[19] although as to the latter class of facts it is *prima facie* evi-

570; Sheetz *v.* Chesapeake, etc., R. Co., 25 Pa. Co. Ct. 25; Young *v.* Trunkley, 22 Pa. Co. Ct. 127; Walker *v.* Walker Automatic Steam Coupler Co., 8 Lack. Leg. N. 125; O'Neill *v.* Philadelphia Rapid Transit Co., 19 Montg. Co. Rep. 180; Moore *v.* Fidelity Ins., etc., Co., 16 Montg. Co. Rep. 90. Where the sheriff returns that he served a summons on "the person for the time being in charge" of the business of defendant in accordance with the act of July 9, 1901, such return is conclusive. Penn Valley Creamery Co. *v.* Martin, 2 Blair Co. Rep. 364. The return of a sheriff, made two years after the proper time, is not conclusive. Weidman *v.* Weltzel, 13 Serg. & R. 96.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

Tennessee.— Home Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79.

Vermont.— McDaniels *v.* De Groot, 77 Vt. 160, 59 Atl. 166; Witherell *v.* Goss, 26 Vt. 748; Downer *v.* Back, 25 Vt. 259; Barrett *v.* Copeland, 18 Vt. 67. 44 Am. Dec. 362; Hawks *v.* Baldwin, Brayt. 85.

West Virginia.— Talbott *v.* Southern Oil Co., 60 W. Va. 427, 55 S. E. 1009; Rader *v.* Adamson, 37 W. Va. 582, 16 S. E. 808; Bowyer *v.* Knapp, 15 W. Va. 277.

United States.— Trimble *v.* Erie Electric Motor Co., 89 Fed. 51; U. S. *v.* Gayle, 45 Fed. 107; Von Roy *v.* Blackman, 28 Fed. Cas. No. 16,907, 3 Woods 98. But see Forest *v.* Union Pac. R. Co., 47 Fed. 1.

Return by person specially authorized.— The rule is the same in the case of a return by a person specially authorized. Downer *v.* Back, 25 Vt. 259.

Wrong date.— Evidence to show that the return bears a wrong date does not contradict the return. Welch *v.* Butler, 24 Ga. 445. *Contra*, White River Bank *v.* Downer, 29 Vt. 332.

Test of privity.— "It is said in some of the elementary treatises, that parties and privies are concluded by such return; but a careful consideration of the cases as well as the reason of the rule, will confine it to those whose privity is such as entitle them to have the return set aside, to maintain an action against the officer for a false return." Phillips *v.* Elwell, 14 Ohio St. 240, 244, 84 Am. Dec. 373.

16. Hunter *v.* Stoneburner, 92 Ill. 75.

Where process bears date after the sheriff's return of service, the return is no evidence of service, and defendant may show that he was never served. Keaton *v.* Moore, 59 Ga. 553.

Contradictory returns.— There was on file in a foreclosure proceeding the affidavit of one other than the sheriff that he had served the summons by leaving a copy thereof and a copy of the complaint at defendant's "usual abode in the city of Spokane" (Spokane being within the county where action was brought), as provided in Ballinger Annot. Codes & St. Wash. § 4875. There was also on file, under section 4877 (making a return of the sheriff that defendant cannot be found within the county *prima facie* evidence on which to base service by publication on the ground that he cannot be found within the state), a return of the sheriff that he was unable to make personal service, because defendant could not be found within the county, and that on information he believed him to be residing in New York, and it was held that, since the presumption of non-residence raised by the return of the sheriff was not conclusive, the affidavit of service would not be overthrown thereby, and hence a decree and sale based on such verified service would not, under a direct attack, be disturbed on account of the return. Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

17. Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554; Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608; Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; McClung *v.* McWhorter, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785.

18. *Illinois.*— Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430; Newman *v.* Greeley State Bank, 92 Ill. App. 638.

Iowa.— Webster *v.* Hunter, 50 Iowa 215.

Kansas.— Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588.

Massachusetts.— Trager *v.* Webster, 174 Mass. 580, 55 N. E. 500; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652.

Pennsylvania.— Price *v.* Schaeffer, 161 Pa. St. 530, 29 Atl. 279, 25 L. R. A. 699; Splane *v.* Splane, 29 Pa. Super. Ct. 185.

A judgment of a federal court is to be treated in the state courts as a domestic judgment; and the return of the marshal of personal service of a subpœna in chancery in the action in which the judgment is rendered is conclusive on the parties to the same extent as the return of a sheriff on a summons issued from a state court. Thomas *v.* Owen, 58 Kan. 73, 49 Pac. 73.

19. *Kansas.*— Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874; Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Bond *v.* Wilson, 8 Kan. 228, 12 Am. Rep. 466; Eastwood *v.* Carter, 9 Kan. App. 471, 61 Pac. 510.

dence.[20] In proper cases, however, it is perhaps true generally that relief may be had in equity upon a showing there made that the return is false;[21] but some fact other than the mere falsity of the return, such as fraud or mistake, must usually be shown in order that equity may assume jurisdiction.[22] The rule forbidding the contradiction of a sheriff's return does not apply to an affidavit of service made by a private person, and such affidavit is always open to attack,[23] but a judgment founded thereon should not be set aside without clear and convincing proof.[24] It may always be shown that a return which purports to be the sheriff's return is not his in fact.[25] Opposed to the common-law rule is the more liberal rule which permits the return to be impeached by affidavit or otherwise in a direct proceeding brought for that purpose, such as a motion to dismiss the action or to set aside the return or to vacate a judgment by default based thereon,[26] but the proof

Louisiana.— Baham *v.* Stewart, 109 La. 999, 34 So. 54.

Massachusetts.— Baker *v.* Baker, 125 Mass. 7.

Michigan.— Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833.

Missouri.— Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

Nebraska.— Walker *v.* Lutz, 14 Nebr. 274, 15 N. W. 352.

Pennsylvania.—Daly *v.* Iselin, 10 Pa. Dist. 193; McFeely *v.* Hohein, 25 Pa. Co. Ct. 497; Stouffer *v.* Beetem, 18 Pa. Co. Ct. 605.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

Vermont.— Johnson *v.* Murphy, 42 Vt. 645.

Washington.— Krutz *v.* Isaacs, 25 Wash. 566, 66 Pac. 141.

United States.— L. E. Waterman Co. *v.* Parker Pen Co., 100 Fed. 544; Johnson *v.* Richmond Beach Imp. Co., 63 Fed. 493.

See 40 Cent. Dig. tit. "Process," § 189.

Waiver of reading.—Where defendant waives the reading of an original notice, the sheriff's return will be sufficient evidence of such waiver. Gregory *v.* Harmon, 10 Iowa 445.

Statements as to residence or abode.— An officer's return that defendant has no residence or last or usual place of abode in the state must be taken to mean only that no such residence or last or usual place of abode is known to the officer and is conclusive only to that extent. Tilden *v.* Johnson, 6 Cush. (Mass.) 354. A recital in a sheriff's return of service as to the usual place of abode of defendant is not conclusive. Wendell *v.* Mugridge, 19 N. H. 109; Galusha *v.* Cobleigh, 13 N. H. 79; Johnson *v.* Richmond Beach Imp. Co., 63 Fed. 493.

20. Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038; Hagerman *v.* Empire Slate Co., 97 Pa. St. 534; Bragdon *v.* Perkins-Campbell Co., 19 Pa. Co. Ct. 305.

In an action against a company, the return of a sheriff on the summons that he had served it on one P, one of the partners and associates of the company, is *prima facie* evidence that P was such partner and associate. Wilson *v.* Spring Hill Quartz Min. Co., 10 Cal. 445.

21. Dunklin *v.* Wilson, 64 Ala. 162; Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666; Kochman *v.* O'Neill, 202 Ill. 110, 66 N. E. 1047; Owens *v.* Ranstead, 22 Ill. 161; Harper *v.* Mangel, 98 Ill. App. 526; Smooth *v.* Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845; Home Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79. See, generally, JUDGMENTS, 23 Cyc. 996.

22. Meyer *v.* Wilson, 166 Ind. 651, 76 N. E. 748; Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554; Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 11 Ky. L. Rep. 103; Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. ed. 586; Walker *v.* Robbins, 14 How. (U. S.) 584, 14 L. ed. 552.

Collusion must be shown between plaintiff and officer in some states, whether relief is sought at law or in equity. Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608; Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; McClung *v.* McWhorter, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785.

23. Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514; Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149; O'Connor *v.* Felix, 147 N. Y. 614, 42 N. E. 269; Peck *v.* Chambers, 44 W. Va. 276, 28 S. E. 766.

24. Smith *v.* Hickey, 25 N. Y. App. Div. 105, 49 N. Y. Suppl. 198; Dutton *v.* Smith, 23 N. Y. App. Div. 188, 50 N. Y. Suppl. 784; Marin *v.* Potter, 15 N. D. 284, 107 N. W. 970; Northwestern, etc., Hypotheck Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

25. McComb *v.* Council Bluffs Ins. Co., 83 Iowa 247, 48 N. W. 1038.

26. *Alabama.*— Paul *v.* Malone, 87 Ala. 544, 6 So. 351; Dunklin *v.* Wilson, 64 Ala. 162. But see Brown *v.* Turner, 11 Ala. 752; Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666.

Arizona.— National Metal Co. *v.* Greene Consol. Copper Co., 9 Ariz. 192, 80 Pac. 397, (1907) 89 Pac. 535, 9 L. R. A. N. S. 1062.

Colorado.— Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Connecticut.— Butts *v.* Francis, 4 Conn. 424.

Illinois.—Allegretti *v.* Stubbert, 126 Ill. App. 171. The strict rule of the common law as to the conclusiveness of the return of service on a summons or other process has been somewhat relaxed in this state, so that now

necessary to overthrow the return must be clear and unequivocal.[27] In Georgia the statute allows the return to be traversed and the truth of it tried in the court having jurisdiction of the cause, if the sheriff is made a party to the traverse.[28]

such a return may be contradicted, not for the purpose of defeating the jurisdiction, but in order to excuse a default. Cooke *v.* Haungs, 113 Ill. App. 501. See also Callender *v.* Gates, 45 Ill. App. 374. The strict common-law rule is asserted in Hunter *v.* Stoneburner, 92 Ill. 75; Fitzgerald *v.* Kimball, 86 Ill. 396; McAnaney *v.* Quigley, 105 Ill. App. 611.

Iowa.— Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340.

Kentucky.— Barbour *v.* Newkirk, 83 Ky. 529. Under the statute a showing of fraud or mistake must be made in order to question the truth of the return. Utter *v.* Smith, 80 S. W. 447, 25 Ky. L. Rep. 2272. See also Claryville, etc., Turnpike Co. *v.* Com., 107 S. W. 327, 32 Ky. L. Rep. 861, 1157.

Maryland.— Stigers *v.* Brent, 50 Md. 214, 33 Am. Dec. 317; Windwart *v.* Allen, 13 Md. 196.

Michigan.— Lane *v.* Jones, 94 Mich. 540, 54 N. W. 283; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833.

Minnesota.— Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71, distinguishing and overruling previous cases.

Nebraska.— Goble *v.* Brenneman, 75 Nebr. 309, 106 N. W. 440, 121 Am. St. Rep. 813; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707; Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Baldwin *v.* Burt, 2 Nebr. (Unoff.) 377, 383, 96 N. W. 401.

New Jersey.— Chapman *v.* Cumming, 17 N. J. L. 11.

New York.— Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Buswell *v.* Lincks, 8 Daly 518; Pfotenhauer *v.* Brooker, 52 Misc. 649, 101 N. Y. Suppl. 762; Boynton *v.* Keeseville Electric Light, etc., Co., 5 Misc. 118, 25 N. Y. Suppl. 741 [*affirmed* in 78 Hun 609, 28 N. Y. Suppl. 1117]; Van Rensselaer *v.* Chadwick, 7 How. Pr. 297. An officer's return of service of summons is conclusive, unless traversed. Mayerson *v.* Cohen, 123 N. Y. App. Div. 646, 108 N. Y. Suppl. 59.

North Carolina.— Godwin *v.* Monds, 106 N. C. 448, 10 S. E. 1044.

Ohio.— Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768; Parker *v.* Van Dorn Iron Works, 23 Ohio Cir. Ct. 444.

South Carolina.— Genobles *v.* West, 23 S. C. 154.

Texas.— Kempner *v.* Jordan, 7 Tex. Civ. App. 275, 26 S. W. 870.

Washington.— Northwestern, etc., Hypothek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Wisconsin.— Carr *v.* Commercial Bank, 16 Wis. 50.

Where process is returned as served on two defendants, evidence that it was never served on one of defendants is admissible to show the falsity of the return as a whole. Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

27. *Illinois.*— Allegretti *v.* Stubbert, 126 Ill. App. 171; Callender *v.* Gates, 45 Ill. App. 374.

Maryland.— Taylor *v.* Welslager, 90 Md. 409, 45 Atl. 476; Abell *v.* Simon, 49 Md. 318.

Minnesota.— Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127; Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452; Jensen *v.* Crevier, 33 Minn. 372, 23 N. W. 541.

Nebraska.— Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229; Wilson *v.* Shipman, 34 Nebr. 573, 52 N. W. 570, 33 Am. St. Rep. 660. There is a strong presumption that the return of an officer to a writ served by him is true, but the same may be impeached in a collateral proceeding by convincing evidence. Unangst *v.* Southwick, (1907) 113 N. W. 989.

New York.— Mace *v.* Mace, 24 N. Y. App. Div. 291, 48 N. Y. Suppl. 831; Jacobs *v.* Zeltner, 9 Misc. 455, 30 N. Y. Suppl. 238. See also Pfotenhauer *v.* Brooker, 52 Misc. 649, 101 N. Y. Suppl. 762; Mann *v.* Meryash, 107 N. Y. Suppl. 599; Halpern *v.* Sherman, 107 N. Y. Suppl. 20; Sills *v.* Maclson, 104 N. Y. Suppl. 770; Hogan *v.* Gault, 104 N. Y. Suppl. 410; Reich *v.* Cochran, 102 N. Y. Suppl. 827.

Texas.— Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227; Gatlin *v.* Dibrell, 74 Tex. 36, 11 S. W. 908; Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

Wisconsin.— Illinois Steel Co. *v.* Dettlaff, 116 Wis. 319, 93 N. W. 14.

See 40 Cent. Dig. tit. "Process," § 204.

For example the return of an officer that he served the notice of action on a married woman by leaving a copy at the residence of and with her husband, that being her usual place of residence, is not overcome by the testimony of a witness, given seventeen years thereafter, on his unaided recollection, that her husband was not then at the place where he and his family usually resided, but at the house of a neighbor. Galvin *v.* Dailey, 109 Iowa 332, 80 N. W. 420. When service is made by a deputy sheriff and return signed by the sheriff, affidavit of defendant that the paper delivered to him as a copy of the original notice was the one made an exhibit, which did not show that the original notice was signed by plaintiff or his attorney, as it was in fact, is sufficient to overcome a recital in the return that a true copy of the original notice was delivered to defendant. Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788.

28. Parker *v.* Medlock, 117 Ga. 813, 45 S. E. 61; Kahn *v.* Southern Bldg., etc., Assoc., 115 Ga. 459, 41 S. E. 648; Southern R. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585; Evans *v.* Smith, 101 Ga. 86, 28 S. E. 617; Sanford *v.* Bates, 99 Ga. 145, 25 S. E. 35; Parker *v.* Rosenheim, 97 Ga. 769, 25 S. E. 763; Cheshire *v.* Milburn Wagon Co., 89

On collateral attack, however, the rule is general that, in the absence of fraud, the return cannot be impeached, since it is part of the record and as such imports absolute verity until set aside.[29]

(II) *Conclusiveness of Return as to Officer Making It.* The return is conclusive against the officer making it, when questioned collaterally,[30] at least when the party against whom it is sought to be impeached derives some interest from or under it,[31] but it is not conclusive in the officer's favor.[32] The officer may, however, show by parol evidence facts in regard to the execution of the writ which are not inconsistent therewith.[33]

(III) *Conclusiveness of Return as to Strangers to the Record.* Strangers to the record are not concluded by the sheriff's return, and as against them statements therein are *prima facie* evidence only, subject to be disproved by any competent evidence.[34]

IV. Defects, Objections, and Amendments.

A. Defects and Objections — 1. In General.[35] As to what defects are fatal and what are mere irregularities, no general rule can be stated. It is said

Ga. 249, 15 S. E. 311; Stone *v.* Richardson, 76 Ga. 97; Elder *v.* Cozart, 59 Ga. 199; Robertson *v.* Pharr, 58 Ga. 605; Davant *v.* Carlton, 57 Ga. 489; Lamb *v.* Dozier, 55 Ga. 677; Maund *v.* Keating, 55 Ga. 396; Griffith *v.* Shipp, 49 Ga. 231; Dasher *v.* Dasher, 47 Ga. 320. There is no error in striking a traverse of an officer's return of service, where the officer is neither made a party nor given notice of the filing of the traverse. O'Connell *v.* Friedman, 118 Ga. 831, 45 S. E. 668. Where a summons of garnishment was issued against a corporation, and the officer made two returns of service, and these returns showed service on a different corporation, and the officer was allowed to amend one of the returns so as to make it show service on the corporation intended to be served, and the return, as amended, was traversed, the original returns were admissible in evidence, and it was error to exclude them from the jury. News Printing Co. *v.* Brunswick Pub. Co., 113 Ga. 233, 38 S. E. 853. Return of service by a United States marshal should be treated, in the state courts, as being equally conclusive with a return by a sheriff. Sindall *v.* Thacker, 56 Ga. 51.

The evidence offered to contradict the return must be clear and satisfactory. Davant *v.* Carlton, 53 Ga. 491; Dozier *v.* Lamb, 52 Ga. 646.

Where an affidavit of illegality was filed, the mere filing of the traverse to the entry of service by the sheriff, and service of a copy of the same on the sheriff by a private individual, did not make the sheriff a party thereto. Parker *v.* Medlock, 117 Ga. 813, 45 S. E. 61.

29. *Arkansas.*— Rose *v.* Ford, 2 Ark. 26.
California.— Egery *v.* Buchanan, 5 Cal. 53.
Illinois.— Rivard *v.* Gardner, 39 Ill. 125; Harrison *v.* Hart, 21 Ill. App. 348.
Indiana.— Johnson *v.* Patterson, 59 Ind. 237; Gillespie *v.* Splahn, Wils. 228; Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3.
Kentucky.— Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 21 Am. St. Rep. 356.
Michigan.— Johnson *v.* Mead, 73 Mich. 326, 41 N. W. 487; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833.
Missouri.— Decker *v.* Armstrong, 87 Mo. 316; Reeves *v.* Reeves, 33 Mo. 28.
New Jersey.— Castner *v.* Styer, 23 N. J. L. 236.
New York.— Sargeant *v.* Mead, 1 N. Y. Suppl. 589; Black *v.* Black, 4 Bradf. Surr. 174.
North Carolina.— Edwards *v.* Tipton, 77 N. C. 222.
Ohio.— Mueller *v.* Bates, 2 Disn. 318; Thompson *v.* C., etc., R. Co., 9 Ohio Dec. (Reprint) 209, 11 Cinc. L. Bul. 211.
Rhode Island.— Estes *v.* Cooke, 12 R. I. 6; Angell *v.* Bowler, 3 R. I. 77.
United States.— Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40, 8 Reporter 518, 20 Alb. L. J. 335.
See 40 Cent. Dig. tit. "Process," § 193.

30. Simmons *v.* Bradford, 15 Mass. 82; Duncan *v.* Gerdine, 59 Miss. 550; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362; Henry *v.* Stone, 2 Rand. (Va.) 455.

31. Baker *v.* McDuffie, 23 Wend. (N. Y.) 289.

32. McGough *v.* Wellington, 6 Allen (Mass.) 505; Duckworth *v.* Millsaps, 7 Sm. & M. (Miss.) 308; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362.

33. Evans *v.* Davis, 3 B. Mon. (Ky.) 344.

34. *Maine.*— Kendall *v.* White, 13 Me. 245.
Ohio.— Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.
Vermont.— Witherell *v.* Goss, 26 Vt. 748.
West Virginia.— Bowyer *v.* Knapp, 15 W. Va. 277.
United States.— Rigney *v.* De Graw, 100 Fed. 213.
See 40 Cent. Dig. tit. "Process," § 192.

35. Action for wrongful attachment as affected by irregular or void process see Attachment, 4 Cyc. 831.
Incorporation of return in record as essential to review see Appeal and Error, 3 Cyc. 157.
Presenting objections on appeal for first time see Appeal and Error, 2 Cyc. 688.

that only those which affect the jurisdiction will render the writ void;[36] but this determines little, for the question still arises, what defects affect the jurisdiction. The matter seems to be largely one of precedent rather than principle. But this particular inquiry belongs rather to the subject of judgments, and will be found treated at large under that title.[37] Defects in an original but unexecuted summons are not available against an alias.[38] Where process is returned not served as to one of several defendants, the action abates as to him.[39]

2. Persons Entitled to Object. As a general rule a defendant is not entitled to urge defects in the service upon his co-defendants.[40] A party may be permitted to quash his own writ and thereby work a discontinuance of the action.[41] At common-law, however, one defendant in an action upon a joint contract might plead in abatement a want of service upon a co-defendant,[42] but this rule does not apply where by statute plaintiff is permitted to proceed against defendants who have been served,[43] or judgment is authorized to be entered against all.[44] Where two or more persons are sued on a joint contract they may plead in abatement a defect of service as to one only.[45]

3. Grounds For Quashing or Abating Writ. The grounds upon which writs may be quashed or abated are numerous, and include most defects and irregularities in the writ or service which are not so trivial that they will be disregarded,[46]

Urging defects on trial de novo on appeal from justice of the peace see Justices of the Peace, 24 Cyc. 726.

Vacating judgment because of mistake as to process see Judgments, 23 Cyc. 933.

Waiver of defects by appeal see Justices of the Peace, 24 Cyc. 694.

Waiver of defects in process of justice of the peace see Justices of the Peace, 24 Cyc. 531.

36. See Judgments, 23 Cyc. 914.

37. **Collateral attack on judgment** see Judgments, 23 Cyc. 1075.

Equitable relief against judgment see Judgments, 23 Cyc. 994.

Vacating judgment see Judgments, 23 Cyc. 914.

38. Goodlett *v.* Hansell, 56 Ala. 346.

Where a correct alias capias has been served, an error in the orlginal writ which was not served is not a ground for abatement. Scull *v.* Kuykendall, 21 Fed. Cas. No. 12,570*b*, Hempst. 9.

39. Hall *v.* State, 39 Ind. 301; Glidewell *v.* McGaughey, 2 Blackf. (Ind.) 359.

40. *California.*— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

Illinois.— Gottschalk *v.* Noyes, 225 Ill. 94, 80 N. E. 72. But see Colwell *v.* Culbertson, 126 Ill. App. 294, holding that one who has a direct interest in land sought to be foreclosed might attack a service had upon minor co-defendants.

Indiana.— See Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825.

Maine.— Bonzey *v.* Redman, 40 Me. 336.

Massachusetts.— Thayer *v.* Ray, 17 Pick. 166.

New Hampshire.— Ingraham *v.* Olcock, 14 N. H. 243.

Tennessee.— Campbell *v.* Hampton, 11 Lea 440; State Bank *v.* Anderson, 3 Sneed 669.

Vermont.— Comins *v.* Jones, 54 Vt. 560.

Right to assert error as to co-party not served with process see Appeal and Error, 3 Cyc. 240 note 25.

41. Womsley *v.* Cummins, 1 Ark. 125.

42. Draper *v.* Moriarty, 45 Conn. 476; Curtis *v.* Baldwin, 42 N. H. 398.

43. Boots *v.* Boots, 84 Ind. 171. See also Richards *v.* McNemee, 87 Mo. App. 396.

44. Harker *v.* Brink, 24 N. J. L. 333.

45. Butts *v.* Francis, 4 Conn. 424.

46. Renner *v.* Reed, 3 Ark. 339; Wood *v.* Ross, 11 Mass. 271; Cooke *v.* Gibbs, 3 Mass. 193; Tilton *v.* Parker, 4 N. H. 142 (holding that the court may quash a writ on motion for defective service, or put defendant to plead the matter in abatement); Crawford *v.* Stewart, 38 Pa. St. 34. See Carlisle *v.* Cowan, 85 Tenn. 165, 2 S. W. 26, holding that where an attachment has been sued out on a false return implying that defendant was a resident of the county, under Tenn. Code, § 2812, providing that, "if action be brought in the wrong county, it may be prosecuted to a termination, unless abated by plea of the defendant," a plea in abatement is the proper method to secure the quashing of the writ.

A mere irregularity in the service, respecting a matter which is not necessary to confer jurisdiction, is not a ground for abatement. Jones *v.* Nelson, 51 Ala. 471; Cotton *v.* Huey, 4 Ala. 56; Maverick *v.* Duffee, 1 Ala. 433.

In Florida it is held that the writ will not be quashed because of defective service; the proper motion is to set aside or quash the service or return. Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884; Tidwell *v.* Witherspoon, 18 Fla. 282.

Former adjudication.— It is no ground for quashing a writ or setting aside service thereof that there has been a former adjudication of the same cause of action. Bruner *v.* Finley, 211 Pa. St. 74, 60 Atl. 488; Ford *v.* Calhoun, 53 S. C. 106, 30 S. E. 830.

Objections to the merits of plaintiff's cause of action cannot be considered in support of a motion to quash the summons and the serv-

although defects in the return which do not show insufficient service but merely fail to state enough facts to show a good service will not affect the summons itself.[47] Thus it is ground for abating or quashing a writ that it was not served the number of days before the return-day required by law;[48] that it issued in the wrong county;[49] that the writ issued prematurely;[50] that the writ issued without affidavits required by statute;[51] that the return-day was altered without authority after issuance;[52] that service was obtained by fraud;[53] that the writ issued without a proper seal;[54] that it was not signed by the clerk of the court from which it issued;[55] that it does not show the day, month, and year when the same was signed;[56] that defendant is not designated with sufficient accuracy;[57] that the writ contains no return-day;[58] that it is returnable on a day or to a court not authorized by law;[59] that it is directed to an officer who is disqualified from serving it;[60] that it was served by a disqualified or unauthorized person;[61] the want of a suitable indorsement on a writ, under

ice thereof. Embree *v.* McLennan, 18 Wash. 651, 52 Pac. 241.

A question of jurisdiction of the subject of the suit cannot be raised on a motion to set aside the service of summons, but it should be raised by demurrer or answer. Mabon *v.* Ongley Electric Co., 24 N. Y. App. Div. 50, 48 N. Y. Suppl. 973.

More appropriate remedy.— A rule of court authorizing only certain persons to use blank writs will not make abatable a writ filled up by an unauthorized person, where plaintiff is not at fault, the rule being more appropriately enforceable against the person who violates it. Kinne *v.* Hinman, 58 N. H. 363.

Quashing writ of account render see ACCOUNTS AND ACCOUNTING, 1 Cyc. 405 note 61.

47. Hopkins *v.* Baltimore, etc., R. Co., 42 W. Va. 535, 26 S. E. 187.

In Florida it has been held that no defect either in the return or the service is ground for quashing the writ. Engelke, etc., Milling Co. *v.* Grunthal, 46 Fla. 349, 35 So. 17.

48. *Connecticut.*— Payne *v.* Bacon, 1 Root 109.

Georgia.— Hood *v.* Powers, 57 Ga. 244.

Massachusetts.— Bullard *v.* Nantucket Bank, 5 Mass. 99.

Nebraska.— Ley *v.* Pilger, 59 Nebr. 561, 81 N. W. 507.

New Jersey.— Paul *v.* Bird, 25 N. J. L. 559; Pedreck *v.* Shaw, 2 N. J. L. 57.

Vermont.— Butler *v.* Lowry, 3 Vt. 14; Guilford Overseers of Poor *v.* Jamaica Overseers of Poor, 2 D. Chipm. 104.

49. McCulloch *v.* Ellis, 28 Ill. App. 439; Hawkes *v.* Kennebeck County, 7 Mass. 461.

50. Hust *v.* Conn, 12 Ind. 257; Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

51. Posey *v.* McCubbins, 5 Yerg. (Tenn.) 235.

52. Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851.

53. Van Horn *v.* Great Western Mfg. Co., 37 Kan. 523, 15 Pac. 562.

54. *Georgia.*— Lowe *v.* Morris, 13 Ga. 147.

Illinois.— Anglin *v.* Nott, 2 Ill. 395; Easton *v.* Altum, 2 Ill. 250; Hannum *v.* Thompson, 2 Ill. 238.

Maine.— Tibbetts *v.* Shaw, 19 Me. 204; Bailey *v.* Smith, 12 Me. 196.

Massachusetts.— Hall *v.* Jones, 9 Pick. 446.

Mississippi.— Pharis *v.* Conner, 3 Sm. & M. 87.

Ohio.— Boal *v.* King, 6 Ohio 11.

55. Powers *v.* Swigart, 8 Ark. 363.

56. Pollard *v.* Wilder, 17 Vt. 48.

57. Zuill *v.* Bradley, Quincy (Mass.) 6.

58. Pattee *v.* Lowe, 35 Me. 121.

A writ purporting to bear date Oct. 23, 1863, returnable in July next, issued between June 20 and 25, 1863, is likely to delude defendant by the confusion of dates and should therefore be quashed. Gorman *v.* Steed, 1 W. Va. 1.

59. Rattan *v.* Stone, 4 Ill. 540; Hooper *v.* Jellison, 22 Pick. (Mass.) 250; Dearborn *v.* Twist, 6 N. H. 44; Williamson *v.* McCormick, 126 Pa. St. 274, 17 Atl. 591. Where a writ was made returnable to the next term generally, instead of the first day of the term, as the statute required, but was nevertheless executed before the term, and returned the first day, a motion to quash the writ was properly denied. Hare *v.* Niblo, 4 Leigh (Va.) 359.

60. Hansford *v.* Tate, 61 W. Va. 207, 56 S. E. 372.

If a writ be directed to an officer who may and does serve it, it is no cause of abatement that it was not directed to another officer who might have served it, although the direction be not strictly conformable to the statutory provisions. Cooper *v.* Ingalls, 5 Vt. 508.

61. *Iowa.*— Beard *v.* Smith, 9 Iowa 50.

Kansas.— Pelham *v.* Edwards, 45 Kan. 547, 26 Pac. 41.

Massachusetts.— Brewer *v.* New Gloucester, 14 Mass. 216.

New York.— Winterroth *v.* Umschlag, 68 N. Y. App. Div. 324, 74 N. Y. Suppl. 124.

Vermont.— Howard *v.* Walker, 39 Vt. 163; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 428; Dolbear *v.* Hancock, 19 Vt. 388; Dunmore Mfg. Co. *v.* Rockwell, Brayt. 18.

A writ will not abate because the service was made by the son-in-law of plaintiff, under a special direction given him by the authority issuing the writ. Miller *v.* Hayes, Brayt. (Vt.) 21. Where no possible injury can be shown from the fact that service of process was made by a deputized person, the authority to whom omitted to mention particularly all such known officers as might

the requirement of a statute;[62] that no authority is indorsed on the writ for the indifferent person who made service to serve the same;[63] that the writ contains no declaration when such pleading is a necessary part of it;[64] that names are inserted in the writ which are not authorized by the statute;[65] that the writ has no teste,[66] or bears teste on Sunday,[67] or bears the teste of an unauthorized person;[68] that it fails to state the amount of damages demanded;[69] that the writ was filled out on a blank previously used and entered in another action,[70] or was altered after having been filled out for use in another action;[71] that it was served upon a defendant while privileged from service;[72] that it does not have the style required by law;[73] that there is a misnomer of plaintiff[74] or defendant;[75] that it does not designate with certainty the day upon which defendant is commanded to appear;[76] that the summons was issued upon a petition not verified as required by statute;[77] that the place of holding court is not designated;[78] that a supplemental summons was served without leave of court;[79] that in case of an alias writ there had been a discontinuance prior to its issuance;[80] that the cause of action is not indorsed upon the writ;[81] or that there is a variance between the declaration and the writ.[82] But there are some defects in the writ which do not invalidate the process but produce other incidental results. Thus if the sheriff is not bound to serve a writ for a non-resident plaintiff unless security for costs is indorsed upon it, service made without such indorsement is nevertheless good.[83] A mere technical variance

legally serve it, the court would not quash it. Bell *v.* Chipman, 2 Tyler (Vt.) 423.

62. Haverhill Ins. Co. *v.* Prescott, 38 N. H. 398.

63. Washburn *v.* Hammond, 25 Vt. 648.

64. Rathbone *v.* Rathbone, 5 Pick. (Mass.) 221; Brigham *v.* Este, 2 Pick. (Mass.) 420. The writ and process, to which alone the power of quashing is applicable, may be quashed for defects therein, but not for defects in the declaration. Bean *v.* Green, 4 Cush. (Mass.) 279.

65. Hartley *v.* Tunstall, 3 Ark. 119.

66. Ripley *v.* Warren, 2 Pick. (Mass.) 592; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

67. Haines *v.* McCormick, 5 Ark. 663.

68. Reynolds *v.* Damrell, 19 N. H. 394; Buchannan *v.* Keanon, 1 N. C. 530.

69. Putney *v.* Cram, 5 N. H. 174.

70. Lyford *v.* Bryant, 38 N. H. 88.

71. Eastman *v.* Morrison, 46 N. H. 136.

72. King *v.* Coit, 4 Day (Conn.) 129; Halsey *v.* Stewart, 4 N. J. L. 366. *Compare* Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Lewis *v.* Schwinn, 71 Ill. App. 265. *Contra*, Wilkins *v.* Brock, 79 Vt. 57, 64 Atl. 232; Booraem *v.* Wheeler, 12 Vt. 311.

73. Hoy *v.* Brown, 16 N. J. L. 157. Where the constitution provides that "writs shall run in the name of the state of West Virginia," a writ running in the name of the commonwealth of West Virginia should be quashed. Gorman *v.* Stead, 1 W. Va. 1.

74. Bull *v.* Traynham, 3 Rich. (S. C.) 433. But *compare* Kincaid *v.* Howe, 10 Mass. 203, holding that an objection to written evidence of a debt due to plaintiff in his proper name is the only proper remedy.

75. Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874. See Miller *v.* Stettiner, 7 Bosw. (N. Y.) 692, holding that a plea in abatement and not a motion was the proper practice in such a case. But see Lederer Amusement Co. *v.* Pollard, 71 N. Y. App. Div. 35, 36, 75 N. Y. Suppl. 619, where it is said: "If, upon a motion to set aside the service on the ground that a mistake has been made, the plaintiff by opposing it claims that the person served was the one desired in the action, then, whether the service was under the wrong name or not, it is the duty of the court as was here done, to deny the motion."

Names unknown.— The fact that defendants are designated in the summons by supposed names, their real names being unknown, affords no ground for quashing the writ. Davis *v.* Jennings, 78 Nebr. 462, 111 N. W. 128.

76. Wright *v.* Wilmot, 22 Tex. 398.

77. Kerns *v.* Roberts, 2 Ohio Dec. (Reprint) 537, 3 West. L. Month. 604.

78. Wragg *v.* Mobile Branch Bank, 8 Port. (Ala.) 195.

A summons failing to name the county in which plaintiff desires trial need not be absolutely set aside. Wallace *v.* Dimmick, 24 Hun (N. Y.) 635.

79. Boyle, etc., Co. *v.* Fox, 72 N. Y. App. Div. 617, 76 N. Y. Suppl. 102.

80. Parsons *v.* Hill, 25 App. Cas. (D. C.) 532.

81. Johnson *v.* Perry, 4 Stew. & P. (Ala.) 45.

82. Roberts *v.* Beeson, 4 Port. (Ala.) 164; Schenck *v.* Schenck, 10 N. J. L. 274. But see Stapp *v.* Thomason, 2 Litt. (Ky.) 214, holding that a variance between the original petition and the copy served is not a ground for a plea in abatement, but should be urged by motion to quash the return.

Variance as to amount of damages.— A motion to quash will not be sustained where the only defect complained of is a variance between the amount of damages stated in the summons and that stated in the complaint. Rich *v.* Collins, 12 Colo. App. 511, 56 Pac. 207.

83. Johnson *v.* Ralph, Tapp. (Ohio) 133.

between the summons and the pleading as to the title of the court will not be sufficient to set aside the summons.[84] If the only defect in the writ is that it commands appearance, in a less time than is allowed by law, the writ will not be held bad, but defendant will be granted such an extension of time as he is entitled to.[85] And an obvious clerical error as to the date of filing the petition will not be ground for setting aside the summons.[86] If a capias issues in a case where only a summons is authorized, the writ is not to be dismissed, but defendant is entitled to be discharged from custody without giving bail;[87] and a writ improperly issued as an attachment against the body of the defendant, but which is not served by attaching his body, is not abatable.[88] There are statutes in many states declaring that all defects and errors in the process or proceedings shall be disregarded unless they affect the substantial rights of the parties.[89] And some statutes provide that no summons or the service thereof shall be set aside where there is sufficient substance about either to inform defendant that there is an action brought against him in court.[90] Under some statutes insufficiency of service of process upon a part of defendants is not ground for abatement, but the cause will be continued for proper service.[91]

4. Grounds For Quashing or Setting Aside Service or Return. The grounds upon which a motion to quash or set aside the service or return is proper are much the same as for a motion to quash the writ. Thus the motion may be made on the ground that service was fraudulently procured;[92] that defendant was brought into the jurisdiction on criminal process;[93] that service was made upon a person privileged from service,[94] or upon a non-resident;[95] that service has been made upon the wrong person;[96] that there was a failure to serve a copy of the complaint

84. Hughes *v.* Osborn, 42 Ind. 450.

85. Guion *v.* Melvin, 69 N. C. 242; Jones *v.* Stokes, 3 N. C. 25; Anonymous, 2 N. C. 286; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361. See, however, Foster *v.* Markland, 37 Kan. 32, 14 Pac. 452, where it is held that service may be set aside.

86. Western Union Tel. Co. *v.* Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367.

87. Rittenour *v.* McCausland, 5 Blackf. (Ind.) 540. *Contra*, Barnard *v.* Field, 1 Dall. (Pa.) 348, 1 L. ed. 170.

88. Bowman *v.* Stowell, 21 Vt. 309.

89. Loring *v.* Binney, 38 Hun (N. Y.) 152; Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895.

90. Ross *v.* Glass, 70 Ind. 391.

91. Indiana Nitroglycerin, etc., Co. *v.* Lippincott Glass Co., (Ind. App. 1904) 72 N. E. 183, holding that it is not ground for abatement of an action against a corporation that it is brought in a county where the corporation has no office or agent, and that it was not bound by the service made therein on an alleged agent where it is sued jointly with a co-defendant properly suable in such county, the insufficiency of the service being ground only for continuance for proper service.

92. Van Horn *v.* Great Western Mfg. Co., 37 Kan. 523, 15 Pac. 562; Allen *v.* Wharton, 13 N. Y. Suppl. 38; Mason *v.* Libbey, 1 Abb. N. Cas. (N. Y.) 354; Harbison-Walker Refractories Co. *v.* Fredericks, 28 Pa. Co. Ct. 95; Addicks *v.* Bush, 1 Phila. (Pa.) 19; Saveland *v.* Connors, 121 Wis. 28, 98 N. W. 933; Gilbert *v.* Burg, 91 Wis. 358, 64 N. W. 996.

93. Byler *v.* Jones, 79 Mo. 261.

94. *New York.*—Seaver *v.* Robinson, 3 Duer 622.

Ohio.— Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179.

Pennsylvania.— Melaney *v.* Atkins, 4 Pa. Dist. 644; Partridge *v.* Powell, 4 Pa. Dist. 119; Sener *v.* McCormick, 13 Pa. Co. Ct. 352.

Tennessee.— Baker *v.* Compton, 2 Head 471.

United States.— Hale *v.* Wharton, 73 Fed. 739; Matthews *v.* Puffer, 10 Fed. 606, 20 Blatchf. 233.

Service of process on a non-resident who is exempt from service by reason of being in the state for the purpose of attending a litigation is not void, but voidable, and his remedy is by special appearance and motion to set aside the return of service, and not by motion to dismiss the action. Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

Witness.— Where service is made on a resident of the state while voluntarily attending as a witness, the court may set it aside or grant other appropriate relief, although such service is not a nullity. Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

Who may assert privilege.— A claim for exemption from service of civil process by reason of being engaged as a militiaman could only be made by the person so served, and the return of service would not be stricken off, on application by the sheriff, on the ground of privilege. Land Title, etc., Co. *v.* Crump, 16 Pa. Co. Ct. 593.

95. National Typographic Co. *v.* New York Typographic Co., 44 Fed. 711.

96. See cases cited *infra*, this note.

with the summons;[97] that the copy of the summons was left at the wrong place;[98] that service was made by an unauthorized officer;[99] that service was made in the wrong county;[1] that the name of plaintiff's attorney was not indorsed on the summons;[2] that a return of not found is false;[3] that the summons requires defendant to answer a complaint "which has been filed in the office of the clerk," when none has in fact been filed,[4] that the copy served was not attested;[5] that defendant was dead at the time of the alleged service;[6] that the return is ambiguous;[7] that the person upon whom service was made was not an agent of defendant corporation;[8] or that the summons was not served in time.[9] After a defective writ has been amended by leave of court, the original service cannot be set aside because the copy served did not conform to the writ as amended.[10] When the entry of a writ is required to be made in the sheriff's book, failure to make it is no ground for setting aside the service, as such entry is merely evidence of the delivery of the process to the sheriff.[11] The lack of an indorsement of the cause of action on a summons which is required, not by statute, but only by rule of court, is not ground for setting aside the service;[12] and a mere irregularity consisting of the failure of the summons to state the street number of plaintiff's attorney is not ground for setting aside the service.[13] Service will not be set aside because of a mistake in returning the writ to the wrong clerk's office.[14] Some cases hold that, in order to successfully object on the ground of the insufficiency of personal service, defendant must show that the writ did not in fact come into his possession and was not brought to his knowledge.[15] A motion to set aside the service of process is not

A defendant is not obliged to seek relief by motion where process is improperly served on him, although he may do so, as he is entitled to set up by answer that he is not indebted to plaintiff; not being the person against whom plaintiff's alleged claim exists. Barney *v.* Northern Pac. R. Co., 56 How. Pr. (N. Y.) 23. See also Hinton *v.* Stevens, 1 Harr. & W. 521. In Griffin *v.* Gray, 5 Dowl. P. C. 331, 2 Gale 201, it was held that where a summons issued against Thomas Gray was served upon William Gray, the latter must show at the trial that he is not the party sought to be served.

In England.— Where a writ has been served on the wrong person, and service is possible on the right person, leave will not be given under Order LXX, rule 1, to amend the irregularity, but the faulty service will be discharged with costs upon the application of the person intended to be served. Nelson *v.* Pastorino, 49 L. T. Rep. N. S. 564.

97. Houlton *v.* Gallow, 55 Minn. 443, 57 N. W. 141.

Showing.—Where defendant moved to quash return on the summons, presenting an affidavit stating that no copy of the complaint had been served with it, and the sheriff's return stated that he had served a certified copy with the summons, and it appeared that what purported to be a copy of the complaint was served with the summons, and defendant refused to present the same to the court as directed by it, it was held that the court properly refused to quash the return of the summons. Forsman *v.* Bright, 8 Ida. 467, 69 Pac. 473.

98. Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768.

99. Oliphant *v.* Dallas, 15 Tex. 138, 65 Am. Dec. 146.

1. McCullock *v.* Ellis, 28 Ill. App. 439.

2. Hutchens *v.* Latimer, 5 Ind. 67; Lee *v.* Clark, 53 Minn. 315, 55 N. W. 127, no such indorsement on copy of summons.

3. Thompson *v.* Morris, 2 B. Mon. (Ky.) 35. Where a sheriff returns the writ not found as to one of two defendants, who was a non-resident of the state, before the return-day, and afterward such defendant, two days before the return-day, presents himself to the sheriff and demands service on himself, the court, on motion of such defendant, will not quash the return of not found, but may permit the sheriff to return the fact that defendant was not an inhabitant of his county. Smith *v.* Alexander, 6 B. Mon. (Ky.) 584.

4. Millette *v.* Melmke, 26 Minn. 306, 3 N. W. 700.

5. Bank *v.* Perdriaux, Brightly (Pa.) 67.

6. Hunt *v.* Economical Mut. Ben. Assoc., 17 Wkly. Notes Cas. (Pa.) 423.

7. Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

8. Cincinnati Times-Star Co. *v.* France, 61 S. W. 18, 22 Ky. L. Rep. 1666.

9. Foster *v.* Markland, 37 Kan. 32, 14 Pac. 452.

In England, although a writ of summons expires by rules of the supreme court in one year from its date, a defendant served with a writ after it has expired should move to set it aside, and not treat it as a nullity. Hamp *v.* Warren, 2 Dowl. P. C. N. S. 758, 7 Jur. 156, 12 L. J. Exch. 215, 10 M. & W. 103.

10. Chamberlain *v.* Bittersohn, 48 Fed. 40.

11. Miller *v.* Hall, 1 Speers (S. C.) 1.

12. Wilson *v.* Pyles, 1 Strobh. (S. C.) 357.

13. Sullivan *v.* Harney, 53 Misc. (N. Y.) 249, 103 N. Y. Suppl. 177.

14. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

15. Rhodes *v.* Innes, 7 Bing. 329, 1 Dowl. P. C. 215, 9 L. J. C. P. O. S. 116, 5 M. & P.

a proper method of contesting the jurisdiction of the court over the subject-matter of the cause.[16]

5. Grounds For Setting Aside Service by Publication. Service by publication may be set aside on motion where insufficient, as when based upon insufficient affidavits;[17] where the order of publication does not have the requisites provided for by the statute;[18] or where there is no property within the state to give the court jurisdiction,[19] where claims are improperly united, some being personal and beyond the jurisdiction of the court;[20] or where there is a misnomer of plaintiff in the summons.[21] But the mere failure of the clerk to file an order for service by publication will not deprive the court of jurisdiction,[22] nor is the date of the summons so important that service will be set aside because of a variance in this respect between the original and copy.[23]

6. Procedure — a. In General. If the service or return is defective, a motion may be made to set aside or quash the service or return.[24] Acknowledgments of

153, 20 E. C. L. 151; Phillips *v.* Ensell, 1 C. M. & R. 374, 2 Dowl. P. C. 684, 3 L. J. Exch. 338, 4 Tyrw. 814; Emerson *v.* Brown, 7 M. & G. 476, 8 Scott N. R. 219, 49 E. C. L. 476.

16. Manning *v.* Canadian Locomotive Co., 120 N. Y. App. Div. 735, 105 N. Y. Suppl. 662.

17. *California.*— Braly *v.* Seaman, 30 Cal. 610.

Indiana.— Mehrhoff *v.* Diffenbacker, 4 Ind. App. 447, 31 N. E. 41.

Kansas.— Ogden *v.* Walters, 12 Kan. 282.

Kentucky.—Arthurs *v.* Harlan, 78 Ky. 138.

New York.— Vernam *v.* Holbrook, 5 How. Pr. 3; Everts *v.* Thomas, 3 Code Rep. 74. Where the affidavits on which an order is made for publication of summons in case of a non-resident defendant are defective, and it appears there was another sufficient affidavit used before the judge on procuring the order which had not been filed, a motion to set aside the order, on the ground that it had been allowed on insufficient affidavits, will be denied, as the code does not expressly require that the affidavits shall be filed, nor does it provide what shall be done with them. Vernam *v.* Holbrook, *supra.*

The question of whether or not a complaint states a cause of action should not be determined on a motion to vacate an order for service by publication, but must be raised by demurrer or answer, unless the complaint is clearly frivolous. Montgomery *v.* Boyd, 65 N. Y. App. Div. 128, 72 N. Y. Suppl. 611.

Persons who may object.— In an action to determine rights in a life insurance policy assigned to plaintiff's testator as collateral security for premiums paid to establish an equitable lien for the amount so paid, and to collect the amount of the policy, the beneficiaries are proper and necessary parties, and defendant insurer may therefore move to vacate an order for service upon them by publication. Morgan *v.* Mutual Ben. L. Ins. Co., 189 N. Y. 447, 82 N. E. 438 [*affirming* 119 N. Y. App. Div. 645, 104 N. Y. Suppl. 185].

18. Berford *v.* New York Iron Mine, 55 N. Y. Super. Ct. 516, 2 N. Y. Suppl. 516 [*affirmed* in 119 N. Y. 638, 23 N. E. 1148].

19. Bryan *v.* University Pub. Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; Von Hesse *v.* Mackaye, 55 Hun (N. Y.) 365, 8 N. Y. Suppl. 894 [*affirmed* in 121 N. Y. 694, 24 N. E. 1099].

Bill must show right to relief.— On motion to vacate an order for substituted service made in a suit purporting to have been brought under Federal Judiciary Act, March 3, 1875, 18 U. S. St. at L. 472, c. 137, § 8 [U. S. Comp. St. (1901) p. 513], which authorizes such service in local actions relating to property within the district, the court must examine the bill, and the order should be set aside unless the bill affirmatively shows sufficient grounds for relief under such statute and complainants' right to maintain the suit. Gage *v.* Riverside Trust Co., 156 Fed. 1002.

20. Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

21. Farrington *v.* Muchmore, 30 Misc. (N. Y.) 218, 62 N. Y. Suppl. 165 [*reversed* in 52 N. Y. App. Div. 247, 65 N. Y. Suppl. 432, holding that such error may be corrected on motion].

22. Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543.

23. George *v.* Fitzpatrick, 41 N. Y. Suppl. 211, 25 N. Y. Civ. Proc. 383.

24. Supreme Council C. B. L. *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105; Winrow *v.* Raymond, 4 Pa. St. 501; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

It is the practice of the federal courts to dispose of objections to the sufficiency of the service summarily on a motion to quash the return, rather than by a jury trial on a plea in abatement, regardless of the state practice. Benton *v.* McIntosh, 96 Fed. 132.

Prejudice.— Unless the case is one in which prejudice to defendant is presumed, such prejudice must be shown in order to have service set aside. Lark *v.* Chappell, 1 McCord (S. C.) 566.

Distinction between motion to quash service and to set aside return.— In Goodrich *v.* Hamer, 8 Ohio Dec. (Reprint) 441, 8 Cinc. L. Bul. 11, the court distinguished between a motion to set aside a return and a motion to quash service as follows: the former at-

service may also be set aside in proper cases.[25] A defect in the writ itself is available by plea in abatement,[26] and the same is true of a defective service.[27] A plea in abatement should be used when the defect is not apparent upon the face of the record,[28] a motion to quash being available only as to patent defects;[29] although in many jurisdictions a motion to quash supported by affidavits is considered proper practice where the defect is not apparent on the face of the record.[30] Under the codes in some states the failure to obtain jurisdiction of defendant by proper

tacks the truth of the facts stated, not their sufficiency, the latter attacks the sufficiency of the return, not its truth. The cases do not seem to observe this distinction. Thus in Scott v. Stockholders' Oil Co., 122 Fed. 835, it was held that the question of the legal sufficiency of the service may be raised by a motion to set aside the return.

25. Fail v. Presley, 50 Ala. 342.

26. Powers v. Swigart, 8 Ark. 363; Zuill v. Bradley, Quincy (Mass.) 6.

27. *Connecticut.*— Cady v. Gay, 31 Conn. 395; Gould v. Smith, 30 Conn. 88; Colburn v. Tolles, 13 Conn. 524; Parsons v. Ely, 2 Conn. 377.

Illinois.— Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; Lanza v. McNulta, 46 Ill. App. 69.

Maine.— Tweed v. Libbey, 37 Me. 49; Adams v. Hodsdon, 33 Me. 225; Patten v. Starrett, 20 Me. 145; Brown v. Gordon, 1 Me. 165.

North Carolina.— Laverty v. Turner, 15 N. C. 275.

Pennsylvania.— Northern Liberties Nat. Bank v. American Ship-Bldg. Co., 1 Pa. Cas. 380, 2 Atl. 511.

Tennessee.— Nelson v. Cummins, 1 Overt. 436.

Vermont.— Pearson v. French, 9 Vt. 349.

Wisconsin.— Bowen v. Taylor, 1 Pinn. 235.

28. *Florida.*— Putnam Lumber Co. v. Ellis-Young Co., 50 Fla. 251, 39 So. 193; Campbell v. Chaffee, 6 Fla. 724.

Illinois.— Willard v. Zehr, 215 Ill. 148, 74 N. E. 107; Greer v. Young, 120 Ill. 184, 11 N. E. 167; Montana Columbian Club v. Ketcham, 54 Ill. App. 334.

Kentucky.— Owings v. Beall, 3 Litt. 103.

Maine.— Mahan v. Sutherland, 73 Me. 158; Chamberlain v. Lake, 36 Me. 388; Cook v. Lothrop, 18 Me. 260.

Massachusetts.— Haynes v. Saunders, 11 Cush. 537; Stevens v. Ewer, 2 Metc. 74; Prescott v. Tufts, 7 Mass. 209.

Mississippi.— Lamb v. Russell, 81 Miss. 382, 32 So. 916; Mayfield v. Barnard, 43 Miss. 270.

New Hampshire.— Haverhill Ins. Co. v. Prescott, 38 N. H. 398; Scruton v. Deming, 36 N. H. 432.

United States.— Electric Vehicle Co. v. Craig Toledo Motor Co., 157 Fed. 316; U. S. v. American Bell Tel. Co., 29 Fed. 17, which cases hold that where the invalidity, irregularity, or defect in the service of the writ appears upon the face of the return, a motion to quash the service or abate the writ is the proper mode of bringing the matter to the attention of the court; but where the objection does not appear upon the face of the papers, the better rule of practice, where it is sought to question or dispute the facts stated therein, is to do so by plea in abatement, on which an issue may be regularly taken and tried.

Branch summons.— The party served with a "branch summons" can only take advantage of a variance between it and the other summons by plea in abatement, and a motion to strike it from the files is not a proper remedy. Drennen v. Jasper Inv. Co., (Ala. 1907) 45 So. 157.

Traverse of return.— In some jurisdictions the return must be traversed in connection with the plea, and where a return of service is made by a deputy sheriff, both he and the sheriff are necessary parties to a traverse of the return. Bell v. New Orleans, etc., R. Co., 2 Ga. App. 812, 59 S. E. 102.

29. *Connecticut.*—Bishop v. Vose, 27 Conn. 1.

Maine.— Sawtelle v. Jewell, 34 Me. 543 (holding that for want of sufficient service on one of two or more defendants as joint promisors, the writ must be abated as to all); Cook v. Lothrop, 18 Me. 260.

New Hampshire.— Hibbard v. Clark, 54 N. H. 521; Crawford v. Crawford, 44 N. H. 428; Merrill v. Palmer, 13 N. H. 184.

New York.— Nellis v. Rowles, 41 Misc. 313, 84 N. Y. Suppl. 753.

Tennessee.— Padgett v. Ducktown Sulphur, etc., Co., 97 Tenn. 690, 37 S. W. 698.

Vermont.— Culver v. Balch, 23 Vt. 618.

United States.— U. S. v. Banister, 70 Fed. 44.

Demurrer.— The question cannot be raised by a general demurrer. Marcus v. Rovinsky, 95 Me. 106, 49 Atl. 420.

Permitting an amendment so as to avoid the objection raised is virtually to overrule the motion. Shepard v. Ogden, 3 Ill. 257.

Summons in another action.— A motion cannot be made in one action to set aside the summons in another. Toma v. Foundation Co., 119 N. Y. App. Div. 151, 104 N. Y. Suppl. 263.

30. Delisser v. New York, etc., R. Co., 59 N. Y. Super. Ct. 233, 14 N. Y. Suppl. 382; Grady v. Gosline, 48 Ohio St. 665, 29 N. E. 768; Wall v. Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129. See also Crowley v. Royal Exch. Shipping Co., 10 Daly (N. Y.) 409 [*affirmed* in 89 N. Y. 607], holding that where the facts are undisputed and the law certain, the defective service of summons and complaint may be set aside on motion.

The motion should ordinarily be decided by the court and not sent to a referee. Buchholtz v. Florida East Coast R. Co., 59 N. Y. App. Div. 566, 69 N. Y. Suppl. 682.

service of process may be asserted as a defense.[31] After the question has been raised and determined on motion to quash it cannot be again raised by answer.[32] After judgment, the remedy is not by motion to quash but by direct attack on the judgment.[33]

b. Requisites of Plea or Motion. The motion to quash should point out clearly the defect complained of and specify the grounds upon which it is based,[34] and nothing beyond the scope of the motion will be considered.[35] All grounds of objection not set up are deemed waived or abandoned.[36] Where the denial of the return of an officer upon a summons is purely argumentative, the return will stand.[37] A plea in abatement may be directed both to the writ and the declaration, if abatement is sought as to only a part of the writ and some of the counts in the declaration.[38] A plea in abatement upon the ground that summons was illegally issued and sent to a county other than that in which the action is brought is not defective for failure to show where the cause of action arose.[39]

c. Matters Considered. In those jurisdictions where the sheriff's return is conclusive between the parties,[40] the court will look only to the face of the return on a motion to set aside the return or the service,[41] except as to those matters respecting which the return is not conclusive.[42] In other jurisdictions, however, the plea may contradict the sheriff's return.[43] Parol evidence is admissible to show that the writ, at the time of service, was void.[44] The court, in deciding upon a demurrer to a plea in abatement for want of proper service of the writ, will not look beyond the plea to ascertain whether the service was sufficient, unless the return is referred to and made a part of the case.[45]

31. Stelling *v.* Peddicord, 78 Nebr. 779, 111 N. W. 793 (holding that, where a defendant is privileged from suit in the county at the time he is sued, he may set up want of jurisdiction of his person to answer along with other defenses he may have, without first making special appearance or preliminary objections); Anheuser-Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373. But see Nones *v.* Hope Mut. L. Ins. Co., 8 Barb. (N. Y.) 541, holding that the meaning of the section of the code allowing it to be set up as a defense that the court has no jurisdiction of the person is that the person is not subject to the jurisdiction of the court, not that the suit has been irregularly commenced, and to relieve himself from an irregular service of a summons defendant must move the court to set aside the proceedings. *Compare* Cole *v.* Cliver, 43 N. J. L. 182.

32. Foye *v.* Guardian Printing, etc., Co., 109 Fed. 368.

33. Baldwin *v.* Burt, 54 Nebr. 287, 74 N. W. 594.

34. Cheney *v.* Chicago City Nat. Bank, 77 Ill. 562; Smith *v.* Delane, 74 Nebr. 594, 104 N. W. 1054; Bucklin *v.* Strickler, 32 Nebr. 602, 49 N. W. 371; Brown *v.* Goodyear, 29 Nebr. 376, 45 N. W. 618; Freeman *v.* Burks, 16 Nebr. 328, 20 N. W. 207; Smelt *v.* Knapp, 16 Nebr. 53, 20 N. W. 20; Perkins *v.* Mead, 22 How. Pr. (N. Y.) 476; Thibault *v.* Connecticut Valley Lumber Co., 80 Vt. 333, 67 Atl. 819; Barrows *v.* McGowan, 39 Vt. 238.

For example an objection "that no certified copy of the summons therein has been served on the defendant as required by law" is too general to be available. Brown *v.* Goodyear, 29 Nebr. 376, 45 N. W. 618. A motion on the grounds: "First, that no service of summons has been made upon the defendant as required by law; second, that no return of summons has been made as required by law," is too general to be considered. Forbes *v.* McHaffie, 32 Nebr. 742, 49 N. W. 721.

35. Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 87 N. Y. 355.

36. Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417.

37. Allegretti *v.* Stubbert, 126 Ill. App. 171.

38. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85.

39. Warren *v.* Saunders, 27 Gratt. (Va.) 259.

40. See *supra*, III, D, 3, b, (1).

41. Kennard *v.* New Jersey R., etc., Co., 1 Phila. (Pa.) 41.

42. Fulton *v.* Commercial Travelers' Mut. Acc. Assoc., 172 Pa. St. 117, 33 Atl. 324. See also Forrest *v.* Union Pac. R. Co., 47 Fed. 1, holding that the certificate of a sheriff that service was made upon a person named as agent of defendant is not conclusive that such person was an agent, and the same may be determined, as any other question of fact, upon an issue raised by special plea to the jurisdiction.

43. Chicago Sectional Electric Underground Co. *v.* Congdon Brake Shoe Mfg. Co., 111 Ill. 309; Union Nat. Bank *v.* Centreville First Nat. Bank, 90 Ill. 56; Sibert *v.* Thorp, 77 Ill. 43.

44. Pope *v.* Anthony, 5 Blackf. (Ind.) 212; Siggers *v.* Sansom, 3 Moore & S. 194, 30 E. C. L. 504.

45. Hill *v.* Powers, 16 Vt. 516. See also Morse *v.* Nash, 30 Vt. 76, holding that in a plea in abatement to the service of a writ, in which material facts are averred, without any statement of the time or place when and where they occurred, this omission is not

d. Operation and Effect of Ruling.[46] Upon the writ being quashed the case stands as if no writ had been issued.[47] Where one of two defendants pleads the general issue, but the other pleads in abatement because of defects in the writ, on sustaining the plea in abatement the suit should be abated as to one and retained as to the other.[48] Under some statutes it is provided that where an action abates by reason of an insufficient service or return due to the default or neglect of the officer, a new action may be begun at any time within a specified period.[49]

7. Time For Objections, Waiver, and Cure — a. In General. It is frequently held, often in conformity with a statute or court rule, that objections must be taken not later than the first term or a designated day thereof,[50] and in any case, unnecessary or unexcused delay or laches will deprive defendant of the right to urge formal objections to process, service, or return;[51] but such restrictions do not apply to substantial defects which render the writ or the service void.[52] Inasmuch as a general appearance waives all defects and irregularities in the process, service, or return, a party who wishes to raise any question as to these matters must do so at a preliminary stage, before taking any steps relating to the merits of the case.[53] A motion to quash a writ for a cause which may be taken advantage of

supplied by referring to the writ and return in the plea, and making them a part thereof, although they contain a statement of such a time and place; and by reason of such omission the plea is defective.

46. Appealability of order quashing or refusing to quash process see Appeal and Error, 2 Cyc. 609.

47. Bird *v.* Mathis, 6 Ark. 379; Minott *v.* Vineyard, 11 Iowa 90; Beard *v.* Smith, 9 Iowa 50.

48. Foster *v.* Collins, 5 Sm. & M. (Miss.) 259.

49. Ricaby *v.* Gentle, 122 Mich. 336, 80 N. W. 1093, holding that failure of an officer to make return of a summons on the return day is negligence, within 3 Comp. Laws, Mich. (1897), § 9738.

50. *Alabama.*— Tankersley *v.* Richardson, 2 Stew. 130.

Georgia.— Reynolds *v.* Atlanta Nat. Bldg., etc., Assoc., 104 Ga. 703, 30 S. E. 942; Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638; Dozier *v.* Lamb, 59 Ga. 461; Pittman *v.* Jones, 53 Ga. 134.

Illinois.— Grand Lodge B. L. F. *v.* Cramer, 60 Ill. App. 212.

Maine.— Bray *v.* Libby, 71 Me. 276; White *v.* Wall, 40 Me. 574; Stevens *v.* Getchell, 11 Me. 443; Rule XVIII, 1 Me. 416.

Maryland.— Ritter *v.* Offutt, 40 Md. 207.

Massachusetts.— Joyner *v.* Egremont School Dist. No. 3, 3 Cush. 567; Brewer *v.* Sibley, 13 Metc. 175; Carpenter *v.* Aldrich, 3 Metc. 58; Gilbert *v.* Nantucket Bank, 5 Mass. 97.

Ohio.— Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318, 2 West. L. Month. 419.

South Carolina.— Hanks *v.* Ingram, 2 Bailey 440.

Vermont.— Hill *v.* Morey, 26 Vt. 178; Wheelock *v.* Sears, 19 Vt. 559.

51. Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307 (at the trial); Dobbins *v.* Jenkins, 51 Ga. 203 (after a delay of two years); State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 14 L. R. A. N. S. 794; McLeod *v.* Harper, 43 Miss. 42 (after judgment); Wooten *v.* Wingate, 6 Sm. & M. (Miss.) 271 (after several pleas filed, two verdicts and new trials); Pollard *v.* Union Pac. R. Co., 7 Abb. Pr. N. S. (N. Y.) 70; Myers *v.* Overton, 2 Abb. Pr. (N. Y.) 344 (after judgment); Hunter *v.* Lester, 18 How. Pr. (N. Y.) 347 (after judgment). It was said in Richardson *v.* Rich, 66 Me. 249, that "if the time allowed for filing the motion is permitted to pass without doing so, it is as much a waiver, as though the appearance had been general." The motion is in time if made before the time to answer has expired. Lederer *v.* Adams, 19 N. Y. Civ. Proc. 294, 11 N. Y. Suppl. 481.

52. *Georgia.*— Brady *v.* Hardeman, 17 Ga. 67.

Maine.— Tibbetts *v.* Shaw, 19 Me. 204; Bailey *v.* Smith, 12 Me. 196.

Michigan.— Turrill *v.* Walker, 4 Mich. 177.

Mississippi.— McLeod *v.* Harper, 43 Miss. 42.

South Carolina.— Wood *v.* Crosby, 2 Hill 520.

53. *Alabama.*— Stanley *v.* Mobile Bank, 23 Ala. 652; Sawyer *v.* Price, 6 Ala. 285; Jordan *v.* Bell, 8 Port. 53; Roberts *v.* Beeson, 4 Port. 164; Hamner *v.* Eddins, 3 Stew. 192.

Arkansas.— Grider *v.* Apperson, 38 Ark. 388.

California.— Hayes *v.* Shattuck, 21 Cal. 51.

Connecticut.— Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851; Parrott *v.* Housatonic R. Co., 47 Conn. 575.

District of Columbia.— Hutchins *v.* Munn, 28 App. Cas. 271.

Florida.— Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239; Branch *v.* Branch, 6 Fla. 314.

Georgia.— Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469; Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660.

Illinois.— Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13; Edens *v.* Williams, 36 Ill. 252; Miles *v.* Goodwin, 35 Ill. 53; Lahner *v.* Hertzog, 23 Ill. App. 308.

Indiana.— Hays *v.* McKee, 2 Blackf. 11.

by a plea in abatement must in general be made within the time limited for filing a plea in abatement.[54] A failure to assert a defect or irregularity by a plea in

Iowa.— Baker *v.* Kerr, 13 Iowa 384; Turner *v.* Kelley, 10 Iowa 573.

Kentucky.— Frankfort Bank *v.* Anderson, 3 A. K. Marsh. 1; Withers *v.* Reed, 4 Bibb 258.

Louisiana.— Dunbar *v.* Murphy, 11 La. Ann. 713.

Maine.— Pattee *v.* Lowe, 35 Me. 121; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Clapp *v.* Balch, 3 Me. 216.

Massachusetts.— Simonds *v.* Parker, 1 Metc. 508; Carlisle *v.* Weston, 21 Pick. 535; Brigham *v.* Clark, 20 Pick. 43; Ripley *v.* Warren, 2 Pick. 592.

Michigan.— Improved Match Co. *v.* Michigan Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; Wiest *v.* Luyendyk, 73 Mich. 661, 41 N. W. 839; Lane *v.* Leech, 44 Mich. 163, 6 N. W. 228.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Meyer *v.* Broadwell, 83 Mo. 571.

Montana.— Butte Butchering Co. *v.* Clarke, 19 Mont. 306, 48 Pac. 303.

Nevada.— Iowa Min. Co. *v.* Bonanza Min. Co., 16 Nev. 64.

New Hampshire.— Bowman *v.* Brown, 51 N. H. 549; Lovell *v.* Sabin, 15 N. H. 29.

New Jersey.— Cook *v.* Hendrickson, 2 N. J. L. 343.

New York.— Willett *v.* Stewart, 43 Barb. 98; Bedell *v.* Sturta, 1 Bosw. 634; Gossling *v.* Broach, 1 Hilt. 49; Avogadro *v.* Bull, 4 E. D. Smith 384; Dempsey *v.* Paige, 4 E. D. Smith 218; Steinhaus *v.* Enterprise Vending Mach. Co., 39 Misc. 797, 81 N. Y. Suppl. 282; Goldstein *v.* Goldsmith, 28 Misc. 569, 59 N. Y. Suppl. 677; Seydel *v.* Corporation Liquidating Co., 88 N. Y. Suppl. 1004; Ahner *v.* New York, etc., R. Co., 14 N. Y. Suppl. 365.

North Carolina.— Jones *v.* Madison County Com'rs, 135 N. C. 218, 47 S. E. 753; McBride *v.* Welborn, 119 N. C. 508, 26 S. E. 125; Butts *v.* Screws, 95 N. C. 215; Moore *v.* North Carolina R. Co., 67 N. C. 209; Mills *v.* Carpenter, 32 N. C. 298; Jones *v.* Penland, 19 N. C. 358; Worthington *v.* Arnold, 13 N. C. 363; Dudley *v.* Carmolt, 5 N. C. 339; McCrea *v.* Starr, 5 N. C. 252.

Pennsylvania.— Porter *v.* Cresson, 10 Serg. & R. 257; Com. *v.* Smith, 2 Serg. & R. 300; Downing *v.* Baldwin, 1 Serg. & R. 298; Harpe *v.* Standard Sewing Mach. Co., 13 Pa. Dist. 44; Lane *v.* American Relief Assoc., 25 Pa. Co. Ct. 129; Gable *v.* Sechrist, 17 York Leg. Rec. 152.

South Carolina.— Williams *v.* Garvin, 51 S. C. 399, 29 S. E. 1; Orangeburgh Dist. Ordinary *v.* Lovick, 1 Brev. 459.

South Dakota.—Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472.

Texas.— Wilson *v.* Zeigler, 44 Tex. 657.

Vermont.— Huntley *v.* Henry, 37 Vt. 165; Blodgett *v.* Brattleboro, 28 Vt. 695.

Virginia.— Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; Payne *v.* Grim, 2 Munf. 297.

Wisconsin.— O'Dell *v.* Rogers, 44 Wis. 136.

United States.— Leach *v.* Burr, 188 U. S. 510, 23 S. Ct. 393, 47 L. ed. 567; Shields *v.* Thomas, 18 How. 253, 15 L. ed. 368; Barnes *v.* Western Union Tel. Co., 120 Fed. 550; Scull *v.* Briddle, 21 Fed. Cas. No. 12,570, 3 Wash. 200. See also Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

England.— Fry *v.* Moore, 23 Q. B. D. 395, 58 L. J. Q. B. 382, 61 L. T. Rep. N. S. 545, 37 Wkly. Rep. 565; Field *v.* Bennett, 56 L. J. Q. B. 89.

Canada.—Butler *v.* McMicken, 32 Ont. 422; Howland *v.* Insurance Co. of North America, 16 Ont. Pr. 514; Sears *v.* Meyers, 15 Ont. Pr. 381; McNab *v.* Macdonnell, 15 Ont. Pr. 14.

Appearance as waiver of defects in service see APPEARANCES, 3 Cyc. 517.

A code provision that the objection that the court has no jurisdiction of the person of defendant may be raised by answer when it does not appear on the face of the pleadings, means that when the person is not subject to the jurisdiction of the court the objection can be so raised, not that an answer is available for raising the question whether defendant has been properly served. Nones *v.* Hope Mut. L. Ins. Co., 8 Barb. (N. Y.) 541.

An application made by defendants for security for costs constitutes a waiver of any objection as to service. Lhoneux *v.* Hong Kong, etc., Banking Corp., 33 Ch. D. 446, 55 L. J. Ch. 758, 54 L. T. Rep. N. S. 863, 34 Wkly. Rep. 753.

Merely obtaining an extension of time to answer will not constitute a waiver of a defect in the summons. Bell *v.* Good, 19 N. Y. Suppl. 693.

Other instances of waiver.— Defendant, by answering to the merits of the case before the court rules on its motion to quash the return of the officer on the summons, waives the motion, although he state in his answer that the motion is not waived. Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706. A mere entry in the record that a cause was "continued by consent of parties," where one of several defendants had been duly served, does not constitute a waiver of service, and confer jurisdiction, as to defendants who were not served. Snow *v.* Grace, 25 Ark. 570. Waiver of notice and service by a non-resident defendant in trespass to try title is not shown by a record which discloses that at one term the cause was continued for want of service, and that eighteen months afterward an order, upon motion then made, was entered, correcting, *nunc pro tunc*, the minutes of the term held two years previously, so as to show that at such previous term defendant's attorney appeared in a motion to quash service, securing a continuance, but discloses no service upon defendant of the motion for the order *nunc pro tunc*. Hopkins *v.* State, (Tex. Civ. App. 1894) 28 S. W. 225.

54. Nickerson *v.* Nickerson, 36 Me. 417; Shorey *v.* Hussey, 32 Me. 579; Trafton *v.*

abatement or by motion is usually regarded as a waiver.[55] And it is held that defects which are grounds for plea in abatement cannot be afterward asserted if not so urged.[56] In some statutes it is provided that no summons or service shall be set aside where there is sufficient substance about either to inform the party on whom service is made that there is an action instituted against him of the name of plaintiff therein, and of the court and time where and when he is to appear.[57] In those jurisdictions where defenses in abatement may be united with defenses in bar, a plea of the latter sort does not of course waive a contemporaneous plea in abatement founded upon an improper service or return.[58] Taking depositions to be used in the cause, while a motion to quash the writ is pending, is not a proceeding touching the merits of the case which will waive the motion.[59]

b. Laches. Where formally defective process is personally served, or where personal service is improperly made, and defendant makes no appearance and enters no objection to it but lets the cause proceed, he will not be permitted to object at a subsequent term, but will be deemed to have waived the defect by his silence.[60]

c. After Objection Overruled. Failure to except to an order overruling an objection to a defective summons, service, or return is a waiver of such objection.[61]

Rogers, 13 Me. 315; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

55. *Maine.*— Cook *v.* Lothrop, 18 Me. 260.

Massachusetts.— Ripley *v.* Warren, 2 Pick. 592; Hawkes *v.* Kennebec County, 7 Mass. 461; Prescott *v.* Tufts, 7 Mass. 209.

New Hampshire.— Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

Pennsylvania.— West *v.* Nixon, 3 Grant 236.

United States.— Miller *v.* Gages, 17 Fed. Cas. No. 9,571, 4 McLean 436.

56. Johnson *v.* King, 20 Ala. 270 (failure of separate writs, served upon separate defendants in different counties, to bear an indorsement showing that they were for one and the same cause of action); Hall *v.* Gilmore, 40 Me. 578. And see cases cited *infra*, this note. But see Tilden *v.* Johnson, 6 Cush. (Mass.) 354 (holding that if the service of a writ on an absent defendant who has a last and usual place of abode within the commonwealth is not made by leaving summons or copy as required by statute at such place of abode, defendant may take advantage of the defect of service, either by a plea in abatement or by a writ of error); Parker *v.* Porter, 4 Yerg. (Tenn.) 81 (holding that where a court has no jurisdiction of the person of defendant because process was executed on him in another county, and the facts appear on the face of the bill, the court will dismiss the bill without requiring a plea in abatement).

Illustrations of matters waived by failure to plead in abatement: Wrong description of defendant's domicile. Smith *v.* Bowker, 1 Mass. 76. That writ bears teste of a justice of the common pleas who is also plaintiff. Prescott *v.* Tufts, 7 Mass. 209. That the signature of the clerk and the seal of the court on a writ of scire facias had been detached from another writ and affixed by means of wafers. Stevens *v.* Ewer, 2 Metc. (Mass.) 74. That plaintiff's residence was misdescribed. Day *v.* Floyd, 130 Mass. 488. Variance between original and alias summons as to claim of damages. Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361. That writ is returnable to wrong place. State University *v.* Joslyn, 21 Vt. 52. That service was defective. Bulkley *v.* Starr, 2 Day (Conn.) 552; Curtis *v.* Baldwin, 42 N. H. 398; Morse *v.* Calley, 5 N. H. 222. That service was not timely. Thornton *v.* Fitzhugh, 10 Sm. & M. (Miss.) 438; Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 434. That there is an erroneous direction of the writ. Peebles *v.* Weir, 60 Ala. 413; Yonge *v.* Broxson, 23 Ala. 684; Sawyer *v.* Price, 6 Ala. 285; Adamson *v.* Parker, 3 Ala. 727. But *compare* Case *v.* Humphrey, 6 Conn. 130, holding that where a direction of a writ is unlawful for failure to comply with statutory prerequisites, the court may dismiss it *ex officio*. That there has been a lack of authority in the person serving the writ. Smith *v.* Dexter, 121 Mass. 597; Shaw *v.* Baldwin, 33 Vt. 447. That there has been a defective return. Jordan *v.* Bell, 8 Port. (Ala.) 53; Bell *v.* New Orleans, etc., R. Co., 2 Ga. App. 812, 59 S. E. 102; Barksdale *v.* Neal, 16 Gratt. (Va.) 314; Hinton *v.* Ballard, 3 W. Va. 582.

57. See the statutes of the various states. And see Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65, holding that such a statute did not cure the fact that the return showed that there was no service whatever upon the person authorized by the statute to accept service.

58. Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469; Thomasson *v.* Mercantile Town Mut. Ins. Co., (Mo. App. 1904) 81 S. W. 911; Jordan *v.* Chicago, etc., R. Co., 105 Mo. App. 446, 79 S. W. 1155; Stelling *v.* Peddicord, 78 Nebr. 779, 111 N. W. 793; Pyron *v.* Graef, (Tex. Civ. App. 1903) 72 S. W. 101.

59. Briggs *v.* Davis, 34 Me. 158.

60. Peck *v.* Strauss, 33 Cal. 678; Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239; Belkin *v.* Rhodes, 76 Mo. 643.

61. Williams *v.* Browning, 45 Mo. 475.

There is some conflict in the cases as to the effect of answering to the merits after a preliminary objection to the summons, service, or return has been improperly overruled, most authorities holding that the point is not waived, at least if an exception is taken,[62] but some holding that the objection is always waived by so answering.[63]

d. Estoppel. If the sheriff, at defendant's request, serves the writ in a manner not authorized by law, defendant will be estopped to object thereafter that due service was not made.[64]

e. Other Cases of Waiver. Defective service may be waived by giving a stipulation to answer judgment,[65] by an express agreement to consider it good service,[66] or by an agreement to submit the case to referees,[67] and a confession of judgment is a waiver of a defective writ.[68] An acceptance or acknowledgment of service precludes the party from taking advantage of any defects or irregularities in the service,[69] but it is not a waiver of any defects in the summons itself.[70]

62. *Connecticut.*— Morse *v.* Rankin, 51 Conn. 326.

Iowa.— Converse *v.* Warren, 4 Iowa 158.

Kentucky.— Chesapeake, etc., R. Co. *v.* Heath, 87 Ky. 651, 9 S. W. 832, 10 Ky. L. Rep. 646.

Massachusetts.— Ames *v.* Winsor, 19 Pick. 247.

New York.— Dewey *v.* Greene, 4 Den. 93. Justice Cowen said, in Avery *v.* Slack, 17 Wend. 85, 87: "But it is said the defendant waived the objection by pleading over. Not so. He made a specific objection in due season, and that being overruled, he was compelled to plead or give up all he had to say on the merits. Resistance, to the extent of a man's power, is certainly a new kind of waiver."

North Carolina.— Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106.

Oklahoma.— Bes Line Constr. Co. *v.* Schmidt, 16 Okla. 429, 481, 85 Pac. 711, 713.

West Virginia.— Fisher *v.* Crowley, 57 W. Va. 312, 50 S. E. 422; Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

United States.— Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237; Central Grain, etc., Exch. *v.* Chicago Bd. of Trade, 125 Fed. 463, 60 C. C. A. 299.

Consent to continuance.— Where, after defendant's motion to quash a summons had been overruled, he appeared and agreed to a continuance by a stipulation in which all irregularities in the original process were waived, he was estopped thereafter to contend that the service was void on the ground that the summons did not contain a statutory clause that in the absence of appearance the complaint would be taken for confessed. Ammons *v.* Brunswick-Balke-Collender Co., 5 Indian Terr. 636, 82 S. W. 937.

63. Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Desmond *v.* San Francisco Super. Ct., 59 Cal. 274; Improved-Match Co. *v.* Mich. Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657.

64. Anderson *v.* Kerr, 10 Iowa 233. Where a sheriff by mistake left the copy of a writ against J at the house of J's brother, but met and told J of the fact on the same evening, J replying he would get the copy and accept the service, whereupon the sheriff returned the writ, "Served the within, by personal service," held, that J was estopped from denying the service. Johnson *v.* Johnson, 52 Ga. 449. If a summons be left agreeably to defendant's directions, he cannot take advantage of its not being left at the place of his usual abode. Taylor *v.* Cook, 1 N. J. L. 54. Where summons was served by leaving a copy, at request of defendant, at his office, in the presence of one or more of his family, defendant was estopped from objecting that the copy ought to have been left at his dwelling-house. Hodgins *v.* O'Malley, 4 Kulp (Pa.) 206. When a copy of a writ was delivered to the clerk of defendant, with orders to deliver it to his master, which he promised to do, and defendant afterward called on plaintiff's attorney with the writ in his hand, and wrote a letter, stating that he had received it on such a day, it was held a sufficient personal service. Aston *v.* Greathead, 2 Dowl. P. C. N. S. 547, 6 Jur. 1000.

Silence.— A defendant is not bound to give notice of a defective service of process, and his silence does not estop him from objecting to the want of jurisdiction. Williams *v.* Van Valkenburg, 16 How. Pr. (N. Y.) 144.

65. The Acadia, 1 Fed. Cas. No. 24, Brown Adm. 73.

66. Coates *v.* Sandy, 9 Dowl. P. C. 381, 2 Scott N. R. 535.

67. Hix *v.* Sumner, 50 Me. 290.

68. Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660.

69. Rodahan *v.* Goggins, 26 Ga. 408; State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

Effect on third parties.— Such a waiver cannot bind third parties. American Grocery Co. *v.* Kennedy, 100 Ga. 462, 28 S. E. 241.

Failure to file affidavit of non-residence.— Where it clearly appears from the record that defendant resided in another state, the failure to file an affidavit of non-residence required for service by publication under section 78 of the Nebraska code does not affect the jurisdiction, if defendant has acknowledged service by indorsement on the summons. Cheney *v.* Harding, 21 Nebr. 68, 32 N. W. 64.

70. Sexton *v.* Brooks, 12 La. 596; Falkner *v.* Guild, 10 Wis. 563. In Ayres *v.* Hill, 82

If a judgment is void no act of ratification can impart vitality to it.[71] Statutes sometimes provide that errors and defects in process are cured after verdict.[72]

B. Amendment of Process[73] — **1. In General.** Voidable process is amendable, but void process is not.[74] In other words, an amendment may be made only if there is something to amend by.[75] Or, as it is said in other cases, matters of form may be remedied by amendment, but not defects of substance.[76] Although courts have inherent discretionary power to amend their process,[77] this power is usually declared, defined, and limited by statutes,[78] which vary greatly in their terms, but ordinarily repose large discretionary powers in the court. It is usually provided that the court may, in furtherance of justice, at any stage of the proceedings, amend any process by correcting mistakes therein, upon such terms as it deems just.[79] An amendment may be allowed to cure a defect arising from the non-observance of a constitutional direction as well as of a statutory one.[80] No amendment will ordinarily be permitted when third persons have acquired rights which would be injuriously affected thereby.[81] But the hardships incident

Ala. 401, 2 So. 892, an acknowledgment of service was held to be a waiver of the objection that the summons was directed to the sheriff instead of to the coroner.

Process may be waived entirely.— Penn Tobacco Co. *v.* Lemon, 109 Ga. 428, 34 S. E. 679.

71. Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285.

Where judgment has been rendered upon a fatally defective return, excepting to the judgment and giving notice of appeal is not a waiver of the defect. Llano Imp. Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

72. Worthington *v.* Arnold, 13 N. C. 363.

73. **Correction of judgment with respect to recital** see Judgments, 23 Cyc. 872.

On appeal see Appeal and Error, 2 Cyc. 977; Justices of the Peace, 24 Cyc. 734.

74. *Arkansas.*— Mitchell *v.* Conley, 13 Ark. 414.

California.— Braun *v.* Blum, 138 Cal. 644, 72 Pac. 168.

Connecticut.— Eno *v.* Frisbie, 5 Day 122.

Georgia.— Neal-Millard Co. *v.* Owens, 118 Ga. 670, 45 S. E. 508; Lowery *v.* Richmond, etc., R. Co., 83 Ga. 504, 10 S. E. 123; Scarborough *v.* Hall, 67 Ga. 576.

Iowa.— Barber *v.* Swan, 4 Greene 352, 61 Am. Dec. 124.

Mississippi.— Joiner *v.* Delta Bank, 71 Miss. 382, 14 So. 464.

New Jersey.— Denn *v.* Lecouy, 1 N. J. L. 111.

New York.— Bartholomew *v.* Chautauque County Bank, 19 Wend. 99; Burk *v.* Barnard, 4 Johns. 309; Bunn *v.* Thomas, 2 Johns. 190.

United States.— Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252.

See 40 Cent. Dig. tit. "Process," § 224.

75. *Georgia.*— Fitzgerald *v.* Garvin, T. U. P. Charlt. 281.

Kentucky.— Johnson *v.* Commonwealth Bank, 5 T. B. Mon. 119.

Maine.— Porter *v.* Haskell, 11 Me. 177.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

New York.— Dwight *v.* Merritt, 59 How. Pr. 320.

Vermont.— Dean *v.* Swift, 11 Vt. 331.

United States.— Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305.

See 40 Cent. Dig. tit. "Process," § 224.

A memorandum or præcipe filed with the clerk, from which he prepares the writ, may be sufficient to amend by. Furniss *v.* Ellis, 10 Fed. Cas. No. 5,162, 2 Brock. 14.

76. Harvey *v.* Cutts, 51 Me. 604; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518; Kentzler *v.* Chicago, etc., R. Co., 47 Wis. 641, 3 N. W. 369.

77. King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739; Gribbon *v.* Freel, 93 N. Y. 93; Christal *v.* Kelly, 88 N. Y. 285; Deimel *v.* Scheveland, 16 Daly (N. Y.) 34, 9 N. Y. Suppl. 482, 955; McDonald *v.* Walsh, 5 Abb. Pr. (N. Y.) 68.

No general rule can be stated.— "It is the infirmity of this branch of the law, that no general rules can be safely laid down to govern amendments in practice. All that ought to be said is, that they are allowed for the furtherance of justice; that they ought to be so allowed as not to operate as a surprise, either in matter of law or fact, and always upon notice to the party to be affected by them; that they ought to rest in the discretion of the court allowing or refusing them, and that this discretion, if reviewed at all by the appellate court, ought rather to be revised where the amendment is wrongfully refused, than where it is erroneously allowed." Mitchell *v.* Conley, 13 Ark. 414, 420. "Though by the common law, some writs were amendable, the power of amendment only existed as to slight and formal defects." Fisher *v.* Crowley, 57 W. Va. 312, 316, 50 S. E. 422.

78. See the statutes of the several states.

79. Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Nash *v.* Brophy, 13 Metc. (Mass.) 476; Gribbon *v.* Freel, 93 N. Y. 93; Chamberlain *v.* Bittersohn, 48 Fed. 42.

After judgment.— An amendment may be made even after judgment. Scudder *v.* Massengill, 88 Ga. 245, 14 S. E. 571; Kirkwood *v.* Reedy, 10 Kan. 453.

After case is out of court.— An amendment may be allowed only while the case is in court. Van Ness *v.* Harrison, 3 N. J. L. 632; Burk *v.* Barnard, 4 Johns. (N. Y.) 309.

80. Ilsley *v.* Harris, 10 Wis. 95.

81. *California.*— Newmark *v.* Chapman, 53 Cal. 557.

to allowance of amendments may frequently be obviated by the imposition of terms suited to the exigencies of the case, and large discretionary powers are exercised by the courts in imposing terms which will make proper the allowance of amendments otherwise prejudicial.[82] The power of amendment granted by acts of congress to the federal courts may be enlarged but cannot be diminished by the practice of the state courts.[83]

2. Amendable Defects — a. Names of Parties. An amendment may be allowed in order to correct the name of a party plaintiff or defendant,[84] or to specify or alter the capacity in which plaintiff sues,[85] or the capacity in which defendant

Georgia.— Saunders *v.* Smith, 3 Ga. 121.
North Carolina.— Jackson *v.* McLean, 90 N. C. 64; Phillips *v.* Holland, 78 N. C. 31.
Pennsylvania.— Leeds *v.* Lockwood, 84 Pa. St. 70.
Tennessee.— Flatley *v.* Memphis, etc., R. Co., 9 Heisk. 230.

82. McElwain *v.* Corning, 12 Abb. Pr. (N. Y.) 16.

83. Norton *v.* Dover, 14 Fed. 106.

84. *Alabama.*—*Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.
Arkansas.— Martin *v.* Godwin, 34 Ark. 682.
Colorado.— Erdman *v.* Hardesty, 14 Colo. App. 395, 60 Pac. 360.
Georgia.— Rome R. Co. *v.* Sullivan, 14 Ga. 277.
Indiana.— Chicago, etc., Air Line R. Co. *v.* Johnston, 89 Ind. 88; Shackman *v.* Little, 87 Ind. 181.
Maine.— Griffin *v.* Pinkham, 60 Me. 123.
Massachusetts.—Langmaid *v.* Puffer, 7 Gray 378; Crafts *v.* Sikes, 4 Gray 194, 64 Am. Dec. 62; Kincaid *v.* Howe, 10 Mass. 203.
Michigan.— Final *v.* Backus, 18 Mich. 218.
Missouri.— Stone *v.* Travelers' Ins. Co., 78 Mo. 655.
New Hampshire.—Belknap County *v.* Clark, 58 N. H. 150; Lebanon *v.* Griffin, 45 N. H. 558.
New York.— Stuyvesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; Stanton *v.* Leland, 4 E. D. Smith 88; Hirsch *v.* Camman, 56 Misc. 349, 106 N. Y. Suppl. 814; Matter of Georgi, 35 Misc. 685, 72 N. Y. Suppl. 431; Mack *v.* American Express Co., 20 Misc. 215, 45 N. Y. Suppl. 362; McKane *v.* Adams, 1 N. Y. Suppl. 580; Skoog *v.* New York Novelty Co., 4 N. Y. Civ. Proc. 144; Butler Hard Rubber Co. *v.* Solomon Toube Co., 2 N. Y. City Ct. 41.
North Carolina.— Forte *v.* Boone, 114 N. C. 176, 19 S. E. 632; Lane *v.* Seaboard, etc., R. Co., 50 N. C. 25.
Pennsylvania.— Downey *v.* Garard, 24 Pa. St. 52; Dresher *v.* Williams, 4 Pa. Co. Ct. 4.
Tennessee.— Jones *v.* Miller, 1 Swan 319.
Texas.— Texas, etc., R. Co. *v.* Truesdell, 21 Tex. Civ. App. 125, 51 S. W. 272.
Vermont.— Hathaway *v.* Sabin, 61 Vt. 608, 18 Atl. 188.
United States.— Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53; Elliott *v.* Holmes, 8 Fed. Cas. No. 4,392, 1 McLean 466.
Canada.— Stewart *v.* Canadian Pac. R. Co., 35 N. Brunsw. 115.
See 40 Cent. Dig. tit. "Process," § 234.

Matter of description.— The writ may be amended by adding matter of description of defendant. Craft *v.* Rolland, 37 Conn. 491.

Names of partners.— A summons in an action against a firm, in which defendants are designated only by their firm-name, is not absolutely void, and may be amended in the trial court so as to show the names of the partners. Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714.

Changing plaintiff.— Leave will not be granted to amend the writ, before the appearance of defendant or the service of the writ and the filing of pleadings in the cause, by inserting the name of a third person as plaintiff suing for the use of the persons originally named as plaintiffs, where such third person is not before the court nor within the jurisdiction, and cannot be served with notice of the application, even though it is proposed to reserve to him the right to object to the order, such an order being, in form at least, an adjudication of the right to so use his name. Frank *v.* Union Cent. L. Ins. Co., 130 Fed. 224. Where in replevin defendant was summoned to answer to C, treasurer of city of R, for said city, and the principal in the replevin bond was described as C, treasurer of the city of R, the writ cannot be amended by making the city of R plaintiff in name. Clark *v.* Anderson, 103 Me. 134, 68 Atl. 633.

85. Anderson *v.* Brock, 3 Me. 243; Drew *v.* Farnsworth, 186 Mass. 365, 71 N. E. 783; Martin *v.* Johnson, 8 Daly (N. Y.) 541; British Columbia Furniture Co. *v.* Tugwell, 7 Brit. Col. 361.

Change to representative capacity.— Where a summons showed plaintiff suing individually and alone, but the complaint showed him suing for himself and other stock-holders of defendant corporation, under N. Y. Code Civ. Proc. § 723, providing for the amendment of any process in furtherance of justice, on a motion to strike the complaint, decision would be reserved for five days from publication of the memorandum decision to enable plaintiff to amend the summons to conform to the complaint, in default of which the motion would be granted. Wohlfarth *v.* National Export Assoc., 57 Misc. (N. Y.) 137, 107 N. Y. Suppl. 540.

Where action would be changed from civil to penal.— A writ could not be amended by inserting, immediately after the name of plaintiff, the words, "who sues for the county as well as for himself," as the amendment would convert the writ in a civil case to a penal action, and the court will not aid a prosecutor on a penal act. Walton *v.* Kirby, 3 N. C. 174.

is sued.[86] If the mistake is made by the clerk in taking the name from a memorandum or præcipe filed with him, the writ may be amended from such memorandum or præcipe.[87] But if the action is brought against one defendant, the name of another different defendant cannot be substituted by amendment without such party's consent.[88] Under liberal statutes the name of a party entirely omitted from the summons may be supplied,[89] and the names of additional defendants may be added.[90]

b. Direction to Officer. When the writ is not directed to any officer,[91] or is directed improperly or to the wrong officer,[92] it may be amended. If the sheriff cannot serve the writ and for that reason it is directed to another officer, a failure to recite the facts making such direction necessary may be cured by amendment.[93]

c. Directions For Return. There is a conflict in authority as to whether a writ made returnable at a time not authorized by law is amendable. Many early cases hold that such a writ is void,[94] but the more recent decisions hold that it is merely voidable and may be amended.[95] If the return-day is properly given, an amendment may be allowed changing it to the next term, when the amendment would

86. Southack *v.* Gleason, 49 Misc. (N. Y.) 445, 98 N. Y. Suppl. 859.

A writ issued against two persons as copartners, on the ground that they were stockholders in a corporation (Mass. St. (1851) c. 315), and were therefore liable for the corporate debts on the insolvency of the company, may be amended by charging them individually. Johnson *v.* Somerville Dyeing, etc., Co., 15 Gray (Mass.) 216.

87. Nimmon *v.* Worthington, 1 Ind. 376; Beck *v.* Williams, 5 Blackf. (Ind.) 374; Furniss *v.* Ellis, 9 Fed. Cas. No. 5,162, 2 Brock. 14.

88. *Colorado.*— Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047.

Georgia.— Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266.

New Jersey.— Maitland *v.* Henry R. Worthington, 59 N. J. L. 114, 35 Atl. 759.

New York.— Elias *v.* Hayes, 24 Misc. 754, 53 N. Y. Suppl. 858.

United States.— Comegyss *v.* Robb, 6 Fed. Cas. No. 3,049, 2 Cranch C. C. 141.

See 40 Cent. Dig. tit. "Process," § 234.

89. Van Wyck *v.* Hardy, 39 How. Pr. (N. Y.) 392.

Adding plaintiffs.— Where a warrant was issued in the name of one only of plaintiffs, and a motion to quash the writ for irregularity in issuing was made, it was held that the writ might be amended. Jarbee *v.* The Daniel Hillman, 19 Mo. 141.

A writ which has not the name of any plaintiff is not amendable. Jones *v.* Sutherland, 73 Me. 157.

90. Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357]; Pittsburg *v.* Eyth, 201 Pa. St. 341, 50 Atl. 769.

An amendment at the trial adding the name of an additional joint defendant is not allowable. Holmes *v.* Daniels, 86 N. Y. Suppl. 19.

91. Mitchell *v.* Long, 74 Ga. 94.

92. *Georgia.*— Smets *v.* Weathersbee, R. M. Charlt. 537.

Massachusetts.— Wood *v.* Ross, 11 Mass. 271; Hearsey *v.* Bradbury, 9 Mass. 95.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

New York.— Bronson *v.* Earl, 17 Johns. 63.

Vermont.— Chadwick *v.* Divol, 12 Vt. 499.

Canada.— Houle *v.* Paquet, 20 Quebec Super. Ct. 297.

Where writ is properly served.— If a writ is directed to the wrong officer but is properly served by the right one, the defect is cured. Askew *v.* Stevenson, 61 N. C. 288.

93. Thompson *v.* Bremage, 14 Ark. 59; Moss *v.* Thompson, 17 Mo. 405.

94. *Kentucky.*— Hawkins *v.* Com., 1 T. B. Mon. 144.

Massachusetts.— Bell *v.* Austin, 13 Pick. 90.

New Hampshire.— Wood *v.* Hill, 5 N. H. 229.

New Jersey.— Van Ness *v.* Harrison, 3 N. J. L. 632.

New York.— Cramer *v.* Van Alstyne, 9 Johns. 386.

Rhode Island.— Brainard *v.* Mitchell, 5 R. I. 111.

Virginia.— Kyles *v.* Ford, 2 Rand. 1.

See 40 Cent. Dig. tit. "Process," § 236.

95. *Arkansas.*— Fisher *v.* Collins, 25 Ark. 97.

Georgia.— White *v.* Hart, 35 Ga. 269; Townsend *v.* Stoddard, 26 Ga. 430.

Indiana.— Kaufman *v.* Sampson, 9 Ind. 520.

Iowa.— Graves *v.* Cole, 2 Greene 467.

Maine.— Lawrence *v.* Chase, 54 Me. 196.

Massachusetts.—Hamilton *v.* Ingraham, 121 Mass. 562; McIniffe *v.* Wheelock, 1 Gray 600.

Mississippi.—Harrison *v.* Agricultural Bank, 2 Sm. & M. 307.

Nebraska.— Barker Co. *v.* Central West Inv. Co., 75 Nebr. 43, 105 N. W. 985.

New Jersey.— Lawrence Harbor Colony *v.* American Surety Co., 70 N. J. L. 589, 57 Atl. 390; McEvoy *v.* Hudson County School Dist. No. 8, 38 N. J. Eq. 420.

North Carolina.— Simmons *v.* Norfolk, etc., Steamboat Co., 113 N. C. 147, 18 S. E. 117, 37 Am. St. Rep. 614, 22 L. R. A. 677; Thomas *v.* Womack, 64 N. C. 657; Merrill *v.* Barnard, 61 N. C. 569.

See 40 Cent. Dig. tit. "Process," § 236.

be in furtherance of justice.[96] And an indefinite designation of the return-day may be made definite by amendment.[97] If made returnable at the wrong place it is amendable, when it appears that defendant has not been prejudiced.[98]

d. Damages and Form or Cause of Action. The writ may be amended by stating, reducing, or increasing the amount of damages asked for,[99] by stating the nature of the relief demanded [1] or the nature of the cause of action,[2] or by designating the form of action;[3] but a change in the form or cause of action cannot be made where it would prejudice defendant,[4] without consent of parties.[5]

e. Miscellaneous Defects. A summons may be amended to conform to the declaration or complaint,[6] it may be amended when the seal of the court is omitted,[7] when there is an omission of or defect in the signature or teste,[8] when the date of

96. Lassiter *v.* Carroll, 87 Ga. 731, 13 S. E. 825.

97. Ames *v.* Weston, 16 Me. 266.

98. Kelly *v.* Fudge, 2 Ga. App. 759, 59 S. E. 19; Kimball *v.* Wilkins, 2 Cush. (Mass.) 555; Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

A writ returnable "before us, at," instead of "before our justices of our Supreme Court of Judicature, at," may be amended. Morrell *v.* Waggonner, 5 Johns. (N. Y.) 233.

99. *Connecticut.*— Sanford *v.* Bacon, 75 Conn. 541, 54 Atl. 204.

Maine.— Hare *v.* Dean, 90 Me. 308, 38 Atl. 227; Merrill *v.* Curtis, 57 Me. 152 (where the declaration showed that plaintiff claimed a larger amount); Converse *v.* Damariscotta Bank, 15 Me. 431; McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Graves *v.* New York, etc., R. Co., 160 Mass. 402, 35 N. E. 851; Cragin *v.* Warfield, 13 Metc. 215; Danielson *v.* Andrews, 1 Pick. 156.

Mississippi.— Foster *v.* Collins, 5 Sm. & M. 259.

New York.— Deane *v.* O'Brien, 13 Abb. Pr. 11.

North Carolina.— McBride *v.* Welborn, 119 N. C. 508, 26 S. E. 125; Clayton *v.* Liverman, 29 N. C. 92.

Ohio.— Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166, 3 West. L. J. 79.

Pennsylvania.—Clark *v.* Herring, 5 Binn. 33.

Canada.— Guess *v.* Perry, 12 Ont. Pr. 460.

See 40 Cent. Dig. tit. "Process," § 235.

Contra.— Hoit *v.* Molony, 2 N. H. 322.

Where the amount of damages sued for is stated in the præcipe, but omitted in the summons, the court will grant leave to amend. Campbell *v.* Chaffee, 6 Fla. 724; Thompson *v.* Turner, 22 Ill. 389; State *v.* Hood, 6 Blackf. (Ind.) 260.

1. Chamberlain *v.* Bittersohn, 48 Fed. 42.

2. Polock *v.* Hunt, 2 Cal. 193; Chester, etc., Coal, etc., Co. *v.* Lickiss, 72 Ill. 521; Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47; Wilson *v.* Pyles, 1 Strobh. (S. C.) 357.

The clerk having omitted to state in a capias ad respondendum the nature of the action or the amount claimed, it was held that the mistake might be amended by the præcipe. State *v.* Hood, 6 Blackf. (Ind.) 260.

3. Chester, etc., Coal, etc., Co. *v.* Lickiss, 72 Ill. 521.

4. Watson *v.* McCartney, 1 Nebr. 131; Wilbanks *v.* Willis, 2 Rich. (S. C.) 108.

Where plaintiffs have begun their action as on contract purposely and deliberately, in order that they may obtain an attachment against defendant as a non-resident and also procure an order for publication against him, and they by those means procure his appearance, they will not be permitted to amend the summons, by making it state an action of tort for converting plaintiffs' goods. Lane *v.* Beam, 19 Barb. (N. Y.) 51.

5. Anonymous, 2 N. C. 401.

6. *Illinois.*— Wilday *v.* Wight, 71 Ill. 374.

Indiana.— Riley *v.* Murray, 8 Ind. 354; State *v.* Bryant, 5 Ind. 192.

Iowa.— Culver *v.* Whipple, 2 Greene 365; Jackson *v.* Fletcher, Morr. 230.

Missouri.— Jones *v.* Cox, 7 Mo. 173.

New York.— Norton *v.* Cary, 14 Abb. Pr. 364.

Texas.— Kavanaugh *v.* Brown, 1 Tex. 481.

See 40 Cent. Dig. tit. "Process," § 230.

7. *Florida.*— Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239.

Indiana.— State *v.* Davis, 73 Ind. 359.

Missouri.— Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146.

New York.— Dominick *v.* Eacker, 3 Barb. 17. But *compare* Dwight *v.* Merritt, 59 How. Pr. 320.

North Carolina.— Clark *v.* Hellen, 23 N. C. 421.

Rhode Island.— Potter *v.* Smith, 7 R. I. 55.

Texas.— Cartwright *v.* Chabert, 3 Tex. 261, 49 Am. Dec. 742; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103.

Wisconsin.— Strong *v.* Catlin, 3 Pinn. 121, 3 Chandl. 130.

United States.— Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent. Dig. tit. "Process," § 232.

Contra.— Foss *v.* Isett, 4 Greene (Iowa) 76, 61 Am. Dec. 117; Witherel *v.* Randall, 30 Me. 168; Tibbetts *v.* Shaw, 19 Me. 204; Bailey *v.* Smith, 12 Me. 196; Hall *v.* Jones, 9 Pick. (Mass.) 446.

If both the seal and the clerk's signature be omitted, the writ is absolutely void. Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305.

8. *Florida.*— Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

Georgia.— Myers *v.* Griner, 120 Ga. 723, 48 S. E. 113; Tatum *v.* Allison, 31 Ga. 337.

Illinois.— Norton *v.* Dow, 10 Ill. 459.

its issuance is omitted or wrongly given,[9] when it fails to state when and where the complaint will be filed [10] or to name the county in which plaintiff desires trial,[11] when it does not have the style required by law,[12] or when it fails to give the address of plaintiff's attorney.[13] An amendment may be allowed so as to correct a variance between an original and branch summons,[14] to state the residence of defendant,[15] to insert the name of the state in which the writ is issued,[16] to correct or supply a date in the writ, or in the indorsement thereon,[17] to add the name of the court in which the action was brought,[18] or so as to show the authority for serving the attorney of the party instead of the party himself [19] or to strike out surplusage.[20] The writ may be amended by changing the indorsement thereon so as to add other counts to the declaration,[21] by substituting a successor in office as indorser on the writ,[22] by adding an indorsement of the name of the person for whose use the action was brought,[23] or by substituting the indorsement of the name of an attorney of the court for that of one not admitted to practice in the court.[24] The writ may be changed from a capias to a summons,[25] or from a summons into a writ of attachment.[26] A writ has been held not amendable which omits to state the place of appearance.[27]

Kansas.— Aultman, etc., Mach. Co. *v.* Wier, 67 Kan. 674, 74 Pac. 227.

Maine.—Converse *v.* Damariscotta Bank, 15 Me. 431.

Massachusetts.— Austin *v.* Lamar F. Ins. Co., 108 Mass. 338.

New Hampshire.— Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352; Reynolds *v.* Damrell, 19 N. H. 394.

New Jersey.— Den *v.* Lecony, 1 N. J. L. 111.

New York.— People *v.* New York Super. Ct., 18 Wend. 675; Jenkins *v.* Pepoon, 2 Johns. Cas. 312. Where the summons is required to be subscribed by the attorney representing plaintiff, and one is signed by several attorneys each representing different plaintiffs, it may be amended so that all the plaintiffs may be represented by the same attorneys. Jones *v.* Conlon, 48 Misc. 172, 95 N. Y. Suppl. 255.

Texas.— Andrews *v.* Ennis, 16 Tex. 45; Austin *v.* Jordan, 5 Tex. 130.

Vermont.—Johnson *v.* Nash, 20 Vt. 40, holding that where the clerk of the county court by mistake signed a writ returnable to that court as "deputy clerk," he would be allowed to amend by annexing to his signature the word "clerk."

Wisconsin.—Prentice *v.* Stefan, 72 Wis. 151, 39 N. W. 364.

United States.— U. S. *v.* Turner, 50 Fed. 734.

See 40 Cent. Dig. tit. "Process," § 232.

Contra.— Mont. Code Civ. Proc. § 774, providing that pleadings may be amended, before trial, to supply an omission, does not authorize the amendment of a summons which is void because not signed by the clerk, as required by section 632. Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

9. Jackson *v.* Bowling, 10 Ark. 578; McLarren *v.* Thurman, 8 Ark. 313; Haines *v.* McCormick, 5 Ark. 663; Gardiner *v.* Gardiner, 71 Me. 266; Mathews *v.* Bowman, 25 Me. 157; Bragg *v.* Greenleaf, 14 Me. 395; Gilbert *v.* South Carolina Interstate, etc., Exposition Co., 113 Fed. 523. *Contra,* Pollard *v.* Wilder, 17 Vt. 48.

10. Foster *v.* Wood, 1 Abb. Pr. N. S. (N. Y.) 150; Keeler *v.* Betts, 3 Code Rep. (N. Y.) 183.

11. Wallace *v.* Dimmick, 24 Hun (N. Y.) 635, holding that a motion to set aside the service of such a summons might be denied on condition that a proper summons should within five days after the entry of the order be served upon defendant.

12. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; State Bank *v.* Buckmaster, 1 Ill. 176; Ilsley *v.* Harris, 10 Wis. 95.

13. Wiggins *v.* Richmond, 58 How. Pr. (N. Y.) 376.

14. Boardman *v.* Parrish, 56 Ala. 54.

15. White *v.* Hart, 35 Ga. 269; Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660; Patten *v.* Starrett, 20 Me. 145; Gooch *v.* Bryant, 13 Me. 386.

16. Harris *v.* Jenks, 3 Ill. 475.

17. Driscoll *v.* Stanford, 74 Me. 103; Kennedy *v.* Holden, 3 Strobh. (S. C.) 175.

18. Walker *v.* Hubbard, 4 How. Pr. (N. Y.) 154.

19. Aldrich *v.* Blatchford, 175 Mass. 369, 56 N. E. 700.

20. Lowenstein *v.* Gaines, 64 Ark. 499, 43 S. W. 762, holding that when a summons commanding defendant to answer on the first day of the next spring term of court, correct in other respects, contained the unnecessary clause, "which will be on March 25, 1895," when the term commenced on the first day of April, it was error, and an abuse of discretion, to refuse to allow the summons to be amended by striking out said clause, and to dismiss the action.

21. Moore *v.* Smith, 19 Ala. 774.

22. Paine *v.* Gill, 2 Mass. 136.

23. Paterson Tp. *v.* Munn, 18 N. J. L. 440.

24. Jewett *v.* Garrett, 47 Fed. 625.

25. Ennis *v.* Ennis, 5 Harr. (Del.) 390; Harvey *v.* Cutts, 51 Me. 604.

26. Carter *v.* Thompson, 15 Me. 464.

27. Anonymous, 6 N. J. L. 166.

3. AFFIDAVITS, ORDERS, ETC., FOR PUBLICATION. Affidavits or orders for publication may be amended when defective merely,[28] and a defective summons, voidable only, may be amended during the course of the publication.[29] But when an order is based upon an insufficient showing made in the complaint or affidavit, a subsequent amendment of such complaint or affidavit cannot give life to the order, since the defect is jurisdictional.[30]

4. PROCEDURE. Leave of court must be obtained unless the statute gives the right to amend of course,[31] and notice of the application should usually be given to the other party;[32] but no notice is necessary unless required by statute, where the rights of the parties and the issues to be tried are not affected,[33] and amendments may be allowed without notice when the other party is in court attacking the sufficiency of the process.[34] Leave to amend a return does not authorize an amendment of the writ.[35] The motion to amend should be made in the court from which the writ issues,[36] although the appellate court, after taking jurisdiction of a cause, will sometimes amend the process.[37] The amendment may be made *nunc pro tunc* at a term subsequent to that at which the order allowing it is made.[38] The amendment need not always be actually made, for if the defect is amendable the

28. Weaver *v.* Lockwood, 2 Kan. App. 62, 43 Pac. 311; Equitable L. Assur. Soc. *v.* Laird, 24 N. J. Eq. 319 (error in name of newspaper in which publication was directed); Mojarrieta *v.* Saenz, 80 N. Y. 553 (error in caption); Mishkind-Feinberg Realty Co. *v.* Sidorsky, 111 N. Y. App. Div. 578, 98 N. Y. Suppl. 496; Reister *v.* Land, 14 Okla. 34, 76 Pac. 156.

29. Deimel *v.* Scheveland, 16 Daly (N. Y.) 34, 9 N. Y. Suppl. 482, 955, holding where after a summons had been published for four weeks it was discovered that it was a six-day and not a ten-day summons, as required by Code Civ. Proc. § 3165, subd. 2, that an amendment of the summons, and the continuation of its publication in its amended form for the residue of the six weeks, required by law, was sufficient compliance with Code Civ. Proc. § 638, requiring that service by publication of "the summons" be commenced within thirty days after the granting of the warrant.

30. Foster *v.* Electric Heat Regulator Co., 16 Misc. (N. Y.) 147, 37 N. Y. Suppl. 1063.

After judgment founded on service by publication, an order that the complaint be filed *nunc pro tunc*, to cure the omission of plaintiff to file it at the commencement of the action, is unavailing to give vitality to the judgment. Kendall *v.* Washburn, 14 How. Pr. (N. Y.) 380.

31. *Connecticut.*— Sanford *v.* Bacon, 75 Conn. 541, 54 Atl. 204.

Indiana.— Kaufman *v.* Sampson, 9 Ind. 520.

Maine.— Bray *v.* Libby, 71 Me. 276.

New Hampshire.— Lebanon *v.* Griffin, 45 N. H. 558.

New York.— Walkenshaw *v.* Perzel, 7 Rob. 606, 32 How. Pr. 310; Diblee *v.* Mason, 1 Code Rep. 37, 2 Edm. Sel. Cas. 20.

32. Hewitt *v.* Howell, 8 How. Pr. (N. Y.) 346; Thomas *v.* Womack, 64 N. C. 657.

Confirmation of irregular order.— An order which is irregular, as allowing an amendment of the summons without notice to defendant, cannot be confirmed *nunc pro tunc*. Luckey *v.* Mockridge, 112 N. Y. App. Div. 199, 98 N. Y. Suppl. 335.

Misnomer of defendant, because of the use of the wrong christian name, may be corrected by amendment on an *ex parte* application, if the court finds that defendant was in fact apprised of the action brought against her. Stuyvesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562.

33. Sidway *v.* Marshall, 83 Ill. 438.

Substituted service — Distinction between misnomer of plaintiff and defendant.— "Where reliance is placed upon substituted service to acquire jurisdiction, there can be no presumption that a defendant who is misnamed in the summons will have taken any cognizance of the fact that it was designed to affect him in any way. . . . The name not being his own he may safely and properly disregard the process, for the name is presumably that of another. Hence, there is good reason for holding that the misnomer of a defendant in the summons cannot be corrected *ex parte* by amendment in the event of the defendant's failure to put in an appearance in the action. . . . An entirely different condition of affairs is presented, however, when the misnomer in the summons relates to the plaintiff, as in the case at bar. . . . No harm is done to the correctly-named defendant by the error in the name of the plaintiff. . . . Being put upon inquiry as to the claim, there is no reason why an amendment may not be allowed *ex parte* to correct the name of the plaintiff, if the defendant chooses not to appear in the action and allows judgment to go by default." Farrington *v.* Muehmore, 52 N. Y. App. Div. 247, 248, 65 N. Y. Suppl. 432.

34. Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

35. White *v.* Sydenstricker, 6 W. Va. 46.

36. Sidway *v.* Marshall, 83 Ill. 438; Hildreth *v.* Hough, 19 Ill. 403; Dennison *v.* Willson, 16 N. H. 496.

37. McLean *v.* Breece, 113 N. C. 396, 18 S. E. 694; Capps *v.* Capps, 85 N. C. 408.

38. Myers *v.* Griner, 120 Ga. 723, 48 S. E. 118.

writ may be deemed amended whenever the objection is taken;[39] and this rule is frequently resorted to on appeal.[40] When a summons is amended by making a new party, the better practice is that the amendment should be inserted in the original summons; but there is a substantial amendment where an additional summons incorporating the amendment is issued.[41]

5. Operation and Effect. An amendment will ordinarily be deemed to relate back to the time of the commencement of the suit.[42] As often as a writ is amended it is open to attack for defects and errors, but not as to prior defects which have been corrected.[43] If a mistake in the name of a plaintiff be corrected by amendment, the process need not be again served upon defendant who has answered.[44]

C. Amendment of Return[45]**— 1. In General.** The sheriff is allowed, with great liberality, to amend his return so as to remedy defects therein or make it conform to the truth of the case,[46] providing rights of third parties which have

39. Denn *v.* Lecony, 1 N. J. L. 131.

40. Kaufman *v.* Sampson, 9 Ind. 520. But see Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125, where it is said that if no amendment is actually made pursuant to a leave granted to amend the return of a summons, the return remains unaffected.

41. Arthur *v.* Allen, 22 S. C. 432.

42. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; Heath *v.* Whidden, 29 Me. 108.

Where rights would be affected.—In amending a summons, the doctrine of relation will not be applied, so as to affect the rights of other parties, or defeat the defense of the statute of limitations, when complete. Flatley *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 230.

43. Mills *v.* Bishop, Kirby (Conn.) 4; Nashville, etc., R. Co. *v.* Wade, 2 Baxt. (Tenn.) 444.

44. Jarrett *v.* City Electric R. Co., 120 Ga. 472, 47 S. E. 927, holding that if in consequence of the amendment defendant was unprepared for trial he could have been allowed time.

45. On appeal see Appeal and Error, 2 Cyc. 977.

46. *Alabama.*—Daniels *v.* Hamilton, 52 Ala. 105; Hefflin *v.* McMinn, 2 Stew. 492, 20 Am. Dec. 58.

Arkansas.—St. Louis, etc., R. Co. *v.* Yocum, 34 Ark. 493; Brinkley *v.* Mooney, 9 Ark. 445.

California.— Gavitt *v.* Doub, 23 Cal. 78.

Connecticut.— Palmer *v.* Thayer, 28 Conn. 237.

Georgia.— Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25; Fitzgerald *v.* Garvin, T. U. P. Charlt. 281.

Illinois.— Waite *v.* Green River Special Drainage Dist., 226 Ill. 207, 80 N. E. 725; Barlow *v.* Stanford, 82 Ill. 298; Toledo, etc., R. Co. *v.* Butler, 53 Ill. 323; Montgomery *v.* Brown, 7 Ill. 581. A court of chancery has power, even after the rendition of a decree, to permit the sheriff to amend the return made on the summons by signing his name thereto, a sufficient showing having been made. Lies *v.* Klaner, 121 Ill. App. 332.

Indiana.—Walker *v.* Shelbyville, etc., Turnpike Co., 80 Ind. 452; Jackson *v.* Ohio, etc., R. Co., 15 Ind. 192.

Iowa.— Patterson *v.* Indiana, 2 Greene 492.

Kansas.— Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415.

Kentucky.— Combs *v.* Warner, 8 Dana 87; Scanlon *v.* Torstadt, 37 S. W. 681, 18 Ky. L. Rep. 821.

Louisiana.— State Bank *v.* Elam, 10 Rob. 26; Skilliman *v.* Jones, 3 Mart. N. S. 686.

Maryland.— O'Connell *v.* Ackerman, 62 Md. 337; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Massachusetts.— Johnson *v.* Stewart, 11 Gray 181.

Missouri.— Webster *v.* Blount, 39 Mo. 500; Judd *v.* Smoot, 93 Mo. App. 289.

Nebraska.— Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855.

North Carolina.— Stealman *v.* Greenwood, 113 N. C. 355, 18 S. E. 503.

Oregon.— Weaver *v.* Southern Oregon Co., 30 Oreg. 348, 48 Pac. 171.

Pennsylvania.— Burr *v.* Dougherty, 14 Phila. 6.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

South Carolina.— Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

Virginia.— Shenandoah Valley R. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

West Virginia.— Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251; Hopkins *v.* Baltimore, etc., R. Co., 42 W. Va. 535, 26 S. E. 187; State *v.* Martin, 38 W. Va. 568, 18 S. E. 748; Capehart *v.* Cunningham, 12 W. Va. 750.

United States.— Phœnix Ins. Co. *v.* Wulf, 1 Fed. 775, 6 Biss. 285; Cushing *v.* Laird, 8 Fed. Cas. No. 3,508, 4 Ben. 70.

See 40 Cent. Dig. tit. "Process," § 239.

Inquiry as to truth.— In the absence of any suspicious circumstance, the court will not inquire as to the truth of an amendment made by a sheriff to his return. World's Columbian Exposition *v.* Scala, 55 Ill. App. 207.

Service by private person.— Amendments of affidavits of service made by private persons may be made under the same rules that are applicable to amendments of sheriff's returns. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Wausau First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823; King *v.* Davis, 137 Fed. 198.

meanwhile accrued will not become adversely affected thereby;[47] but the matter is discretionary with the court,[48] and leave must always be first obtained.[49] This is a common-law right, in no way dependent upon statute;[50] but the right is frequently expressly declared by statute.[51] Only the court to which the return is made has jurisdiction to authorize an amendment of the same.[52] No other officer

Officer's affidavit— A return which does not show a good service cannot be cured by affidavit showing a good service. Gardner *v.* Small, 17 N. J. L. 162.

Proof of publication.— The rule allowing the amendment of a sheriff's return applies equally to the proof of service by publication. Ranch *v.* Werley, 152 Fed. 509.

Acknowledgment of service.— Under the Georgia statute authorizing an acknowledgment of service of declaration and waiver of process, an acknowledgment may be amended so as to include a waiver if defendant intended, but inadvertently failed, to include it. Scudder *v.* Massengill, 88 Ga. 245, 14 S. E. 571; Ross *v.* Jones, 52 Ga. 22; Ingram *v.* Little, 21 Ga. 420; Little *v.* Ingram, 16 Ga. 194.

47. *California.*— Newhall *v.* Provost, 6 Cal. 85.

Delaware.— Johnson *v.* Wilmington, etc., R. Co., 1 Pennew. 87, 39 Atl. 777.

Illinois.— Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13.

Kansas.— Smith *v.* Martin, 20 Kan. 572.

Maine.— Glidden *v.* Philbrick, 56 Me. 222; Fairfield *v.* Paine, 23 Me. 498.

North Carolina.— Davidson *v.* Cowan, 12 N. C. 304.

Ohio.— *In re* Worstall, 8 Ohio S. & C. Pl. Dec. 264, 6 Ohio N. P. 525.

United States.— King *v.* Davis, 137 Fed. 222 [*affirmed* in 157 Fed. 676]; Phœnix Ins. Co. *v.* Wulf, 1 Fed. 775, 9 Biss. 285; Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40.

See 40 Cent. Dig. tit. "Process," § 239.

48. *Kentucky.*— Miller *v.* Shackleford, 4 Dana 264.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106.

Mississippi.— Howard *v.* Priestly, 58 Miss. 21.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944; Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; Scruggs *v.* Scruggs, 46 Mo. 271; State *v.* Rayburn, 31 Mo. App. 385.

Nebraska.— Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456.

North Carolina.— Campbell *v.* Smith, 115 N. C. 498, 20 S. E. 723; Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573.

Texas.— Messner *v.* Lewis, 20 Tex. 221.

See 40 Cent. Dig. tit. "Process," § 242.

A referee to whom a case has been referred has the power to permit an amendment of the sheriff's return. Camp *v.* Ocala First Nat. Bank, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.

49. *Alabama.*— Wilson *v.* Strobach, 59 Ala. 488.

Delaware.— Johnson *v.* Wilmington, etc., R. Co., 1 Pennew. 87, 39 Atl. 777.

Georgia.— Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307.

Indiana.— Walker *v.* Shelbyville, etc., Turnpike Co., 80 Ind. 452.

Iowa.— Patterson *v.* Indiana, 2 Greene 492.

Kentucky.— Miller *v.* Shackleford, 4 Dana 264.

Massachusetts.— Thatcher *v.* Miller, 11 Mass. 413.

North Carolina.— Campbell *v.* Smith, 115 N. C. 498, 20 S. E. 723.

Oregon.— See Knapp *v.* Wallace, (1907) 92 Pac. 1054, holding that where plaintiff, four months after the entry of the decree, filed, as an amended return, an affidavit of the person making the original affidavit to the effect that the mailing was done on June 25, 1904, but it did not appear that leave of court was obtained to amend the return, nor that there was any showing made by affidavit on which to base the order, the amendment is ineffectual to aid the jurisdiction of the court.

Pennsylvania.— Deacle *v.* Deacle, 160 Pa. St. 206, 28 Atl. 839, 40 Am. St. Rep. 719; Whitman *v.* Higby, 24 Pa. Co. Ct. 236.

Texas.— Thomas *v.* Goodman, 25 Tex. Suppl. 446.

Virginia.— Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690; Bullitt *v.* Winston, 1 Munf. 269.

See 40 Cent. Dig. tit. "Process," § 241.

Motion may be informal.— A motion to permit an amendment of a sheriff's return requires no formal proceedings, such as an issue, trial, etc., but leave may be granted informally in a proper case. Wilcox *v.* Moudy, 89 Ind. 232.

Showing.— Leave will not be granted where there is no showing that an amendment could be made (Youngstown Bridge Co. *v.* White, 105 Ky. 273, 49 S. W. 36, 20 Ky. L. Rep. 1175), or where the evidence offered is conflicting and unsatisfactory) Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

After submission on appeal.— The return to a summons cannot be amended after submission of the case on appeal, and without leave granted or notice to the opposite party. Wealaka Mercantile, etc., Co. *v.* Lumber Mut. F. Ins. Co., (Mo. App. 1907) 106 S. W. 575; Wealaka Mercantile, etc., Co. *v.* Lumbermen's Mut. Ins. Co., 128 Mo. App. 129, 106 S. W. 573.

50. Main *v.* Lynch, 54 Md. 658; Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40.

51. See the statutes of the several states.

52. Barndollar *v.* Patton, 4 Colo. 474 (cannot be done in the supreme court); Ledford *v.* Weber, 7 Ill. App. 87; Pilkey *v.* Gleason, 1 Iowa 85 (cannot be done in supreme court).

After a cause has been removed to a federal court, the sheriff cannot amend his return on

than the one to whom the writ is committed can amend it,[53] and such officer is a necessary party to any proceedings had for the purpose of effecting an amendment.[54] If the return is defective the sheriff may be compelled to correct it; but if it is complete and perfect on its face the only remedy for its falsity, if the sheriff refused to amend, is an action against the officer.[55] It is usually held that notice must be given to the adverse party before an amendment will be allowed, particularly where an extrinsic showing is necessary;[56] but some cases hold that no notice need be given.[57] When the sheriff seeks to amend for his own protection, the court will not grant leave on doubtful and unsatisfactory evidence.[58]

2. Time For Making Amendment. There is no specific limitation upon the time within which the right of amendment must be exercised, and an amendment may be allowed at any time, and at any stage of the proceedings, in the court's discretion, even after the lapse of several years,[59] and after the sheriff has gone out of office.[60] Some cases hold that the right of amendment cannot be exercised after suit brought or motion made against the officer for official default,[61] but

the summons. Hawkins *v.* Peirce, 79 Fed. 452; Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156.

Where judgment is rendered upon a record which does not show legal service, the error is jurisdictional, and no amendment of the return so as to show due service can be made in the supreme court on appeal. Hall *v.* Graham, 49 Wis. 553, 5 N. W. 943.

Amendment of process on appeal: Generally see Appeal and Error, 2 Cyc. 977; On appeal from justice see Justices of the Peace, 24 Cyc. 734.

53. Holmes *v.* Hill, 19 Mo. 159; Carroll County Bank *v.* Goodell, 41 N. H. 81.

An ex-sheriff cannot amend a return of a service made by his deputy during his term of office. Knapp *v.* Wallace, (Oreg. 1907) 92 Pac. 1054.

54. Jefferson County Sav. Bank *v.* McDermott, 99 Ala. 79, 10 So. 154.

55. Sawyer *v.* Curtis, 2 Ashm. (Pa.) 127; Washington Mill Co. *v.* Kinnear, 1 Wash. Terr. 99.

56. *Illinois.*— Chicago Planing Mill Co. *v.* Merchant's Nat. Bank, 86 Ill. 587; Linder *v.* Crawford, 95 Ill. App. 183.

Michigan.— Haynes *v.* Knowles, 36 Mich. 407; Montgomery *v.* Merrill, 36 Mich. 97.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., Co., 195 Mo. 669, 93 S. W. 944.

Nebraska.—Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456; Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

Wisconsin.— Wausau First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823.

United States.— King *v.* Davis, 137 Fed. 222 [*affirmed* in 157 Fed. 676].

57. Lungren *v.* Harris, 6 Ark. 474; Brown *v.* Hill, 5 Ark. 78; El Paso, etc., R. Co. *v.* Kelley, 99 Tex. 87, 87 S. W. 660. "The true rule of practice, upon much and mature reflection, we think, should only permit such amendments as a matter of course, and without notice, during the term at which the cause is determined." O'Conner *v.* Wilson, 57 Ill. 226, 230.

58. Smith *v.* Moore, 17 N. H. 380.

59. *Alabama.*— Hefflin *v.* McMinn, 2 Stew. 402, 20 Am. Dec. 58; Moreland *v.* Ruffin, Minor 18.

Florida.— Butler *v.* Thompson, 2 Fla. 9.

Illinois.— Spellmeyer *v.* Gaff, 112 Ill. 29, 1 N. E. 170; Deutsch Roemisch Katholischer Central Verein *v.* Lartz, 94 Ill. App. 255 [*affirmed* in 192 Ill. 485, 61 N. E. 487].

Kansas.—Kirkwood *v.* Reedy, 10 Kan. 453.

Louisiana.— Nichol *v.* De Ende, 3 Mart. N. S. 310.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106; Thatcher *v.* Miller, 11 Mass. 413.

Missouri.— Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; Judd *v.* Smoot, 93 Mo. App. 289; State *v.* Staed, 64 Mo. App. 28.

Nebraska.— Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

North Carolina.— Davidson *v.* Cowan, 12 N. C. 304.

Tennessee.— Atkinson *v.* Rhea, 7 Humphr. 59.

Texas.— Thomason *v.* Bishop, 24 Tex. 302; Porter *v.* Miller, 7 Tex. 468.

Wisconsin.— Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44.

See 40 Cent. Dig. tit. "Process," § 244.

The sheriff cannot amend after judgment where the effect would be to render the judgment erroneous. McGehee *v.* McGehee, 8 Ala. 86; Watkins *v.* Gayle, 4 Ala. 153.

Parol evidence is admissible to show the propriety of allowing a sheriff's return to be amended several years after service of summons. Spellmyer *v.* Gaff, 112 Ill. 29.

60. Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105; Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371; Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481; Holmes *v.* Hill, 19 Mo. 159; Shenandoah Valley R. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

The old sheriff or his deputy must make the amendment. Holmes *v.* Hill, 19 Mo. 159.

61. Brinkley *v.* Mooney, 9 Ark. 445; State *v.* Case, 77 Mo. 247; Howard *v.* Union Bank, 7 Humphr. (Tenn.) 26; Mullins *v.* Johnson, 3 Humphr. (Tenn.) 396; King *v.* Breeden, 2 Coldw. (Tenn.) 455; Carr *v.* Meade, 77 Va. 142.

After notice of motion.— The sheriff may be permitted to amend his return upon a sum-

others hold that the officer may, by leave of court, amend his return during the pendency of such suit or motion.[62]

3. AMENDABLE DEFECTS. Amendments in endless variety have been permitted under the general rules stated. Thus returns have been amended by adding the signature of the officer,[63] by alleging that other acts required by the statute were done in making service,[64] by adding further specifications as to the copy delivered,[65] by correcting the name of defendant,[66] by stating additional facts as to the person with whom or the place at which a summons was left,[67] by showing that one of defendants, stated to have been served, was not found,[68] by designating or correcting the date of service,[69] by stating facts as to the non-residence of one of defendants,[70] by adding specifications of details required by the statute,[71] by correcting the date of the receipt of the summons,[72] by showing that the deputy who made the service had been duly appointed by the sheriff,[73] or by showing that affiant who made the service was over eighteen years of age.[74] The proof of service by publication may be amended so as to correct defects and show the actual facts, in the same manner and to the same extent as the sheriff's return.[75] The court will never permit an untruth to be stated by way of amendment,[76] and defendant may contest the truth of the facts sought to be so introduced into the return.[77] And jurisdictional defects cannot be cured by amendment, as where it is sought

mons at any time before a motion is made against him for a false return, even after service of the notice that it will be made. Hill *v.* Hinton, 2 Head (Tenn.) 124.

62. Wilson *v.* Strobach, 59 Ala. 488; People *v.* Ames, 35 N. Y. 482, 91 Am. Dec. 64; Swain *v.* Burden, 124 N. C. 16, 32 S. E. 310; Stealman *v.* Greenwood, 113 N. C. 355, 18 S. E. 503; Whitman *v.* Higby, 24 Pa. Co. Ct. 236.

63. *Ex p.* State Bank, 7 Ark. 9; Lies *v.* Klaner, 121 Ill. App. 332; Calendar *v.* Olcott, 1 Mich. 344; Dewar *v.* Spence, 2 Whart. (Pa.) 211, 30 Am. Dec. 241.

Necessity of actual amendment.— The failure of the coroner to sign the return to a summons officially, his individual name being merely affixed, is cured by a motion in court to permit the coroner, who is present, to amend his return, although the amendment is not in fact made. Russell *v.* Durham, 29 S. W. 16, 16 Ky. L. Rep. 516.

64. Golden Paper Co. *v.* Clark, 3 Colo. 321; Noleman *v.* Weil, 72 Ill. 502; Muldrow *v.* Bates, 5 Mo. 214; Powell *v.* Nolan, 27 Wash. 818, 67 Pac. 712, 68 Pac. 389.

65. Prescotts *v.* Reed, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258.

Amended petition.— In an action against a husband, where the petition is amended so as to make the wife a party, and she is served with the amended petition, the return of process by the sheriff, showing that the original petition was served on the wife, may be amended so as to show that the amended petition was served. Canadian, etc., Mortg., etc., Co. *v.* Kyser, 7 Tex. Civ. App. 475, 27 S. W. 280.

66. Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105; Phillips *v.* Evans, 64 Mo. 17; Grady *v.* Richmond, etc., R. Co., 116 N. C. 952, 21 S. E. 304; Lyons *v.* Donges, 1 Disn. (Ohio) 142, 12 Ohio Dec. (Reprint) 537.

67. O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533; Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615; Phillips *v.* Evans, 64 Mo. 17; King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676].

68. Watkins *v.* Cayle, 4 Ala. 153.

69. Linder *v.* Crawford, 95 Ill. App. 183; O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533; Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 524; Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

70. Boyce *v.* Watson, 3 J. J. Marsh. (Ky.) 498.

71. King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676].

72. White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515.

73. Manning *v.* Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963.

74. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

75. *Indiana.*— Barkley *v.* Tapp, 87 Ind. 25.

Kansas.— Hackett *v.* Lathrop, 36 Kan. 661, 14 Pac. 220.

Minnesota.— Burr *v.* Seymour, 43 Minn. 401, 45 N. W. 715, 19 Am. St. Rep. 245.

North Carolina.— Weaver *v.* Roberts, 84 N. C. 493.

West Virginia.— Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

See 40 Cent. Dig. tit. "Process," § 249.

76. Slatton *v.* Jonson, 4 Hayw. (Tenn.) 197.

77. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

Propriety of affidavits.— Where the question was whether an officer should be allowed to amend his return, opposing affidavits showing that the residence of the party sought to be served was not that stated in the return were properly considered as controverting the officer's ability to truthfully certify a competent service by amendment. Fisk *v.* Hunt, 33 Oreg. 424, 54 Pac. 660.

to add an indorsement on the writ authorizing a previously unauthorized person to serve it,[78] where service is made by an unauthorized person and an amendment is asked for showing service by such person as deputy sheriff,[79] or where a declaration as substitute for process is served before being filed.[80]

4. Operation and Effect. When a return has been amended it has relation to the time of the original return and the amended return takes the place of the original.[81]

V. Abuse of Process.

A. In General.[82] Courts will never permit the wrongful use of their process, and in case such use is attempted the party will not be permitted to gain an advantage by reason of such wrongful act.[83] But the law goes farther, and gives the person aggrieved by the wrongful act a cause of action against the offending party.[84] This action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.[85]

B. Elements. It has been said that two elements are necessary, an unlawful and ulterior purpose and also an act done in the use of the process not proper in the regular prosecution of the proceeding.[86] But it seems doubtful whether both of these elements must always be present.[87] It has been held that "a malicious abuse of legal process consists in the malicious misuse or misapplication of that

78. Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6, 358, 12 Ky. L. Rep. 604.

79. Jenssen *v.* Walther, 26 Fla. 448, 7 So. 854.

80. Ellis *v.* Fletcher, 40 Mich. 321.

81. *Alabama.*—Daniels *v.* Hamilton, 52 Ala. 105; Smith *v.* Leavitts, 10 Ala. 92.

Illinois.— Barlow *v.* Stanford, 82 Ill. 298.

Indiana.— Heaton *v.* Peterson, 6 Ind. App. 1, 31 N. E. 1133.

Maine.— Wilton Mfg. Co. *v.* Butler, 34 Me. 431.

Massachusetts.— Welsh *v.* Joy, 13 Pick. 477.

Missouri.— Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481; Webster *v.* Blount, 39 Mo. 500.

Texas.— El Paso, etc., R. Co. *v.* Kelley, 99 Tex. 87, 87 S. W. 660; Hill *v.* Cunningham, 25 Tex. 25.

Virginia.— Shenandoah Valley R. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

West Virginia.— Hoppes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251; Capehart *v.* Cunningham, 12 W. Va. 750.

See 40 Cent. Dig. tit. "Process," § 248.

Permission to amend is not equivalent to an actual amendment. Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456. Where no amendment is actually made pursuant to a leave granted to amend the return of a summons, the return remains unaffected. Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125. Where the return to a writ is defective, and it is returned to the lower court for correction, if it is amended to show that the summons and copy were in fact left at defendant's last and usual place of abode, a motion to dismiss must be overruled, but, if the return is not amended, the motion to dismiss must be sustained, unless further service of the writ shall be ordered. Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615.

82. **Damage without wrong** in abuse of legal process see Actions, 1 Cyc. 648.

Injunction against abuse of process see Injunctions, 22 Cyc. 789.

Larceny by taking under process see Larceny, 25 Cyc. 22.

Liability of clerk for wrongful issuance of process see Clerks of Court, 7 Cyc. 230.

Malicious prosecution see Malicious Prosecution, 26 Cyc. 1.

Wrongful use of particular writs see Attachment, 4 Cyc. 831; Garnishment, 20 Cyc. 1152; Injunctions, 22 Cyc. 1061; Sequestration.

83. Wanzer *v.* Bright, 52 Ill. 35; Stein *v.* Valkenhuysen, E. B. & E. 65, 96 E. C. L. 65.

84. Wanzer *v.* Bright, 52 Ill. 35; Page *v.* Cushing, 38 Me. 523; Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; Ancliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621.

85. *Illinois.*— Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Phœnix Mut. L. Ins. Co. *v.* Arbuckle, 52 Ill. App. 33.

Massachusetts.— Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. St. Rep. 95.

New York.— McClerg *v.* Vielee, 116 N. Y. App. Div. 731, 102 N. Y. Suppl. 45; Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335.

South Dakota.— Ingalls *v.* Christopherson, (1906) 114 N. W. 704.

England.— Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675.

86. Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Jeffery *v.* Robbins, 73 Ill. App. 353; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

87. Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434; Ancliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621; Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207.

process to accomplish some purpose not warranted or commanded by the writ." [88] And it has also been said that "whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the process of the court." [89] Similar expressions occur in many cases.[90] None of these statements include the second element above set forth. On the other hand, the second element alone has been held sufficient to impose liability, as where a writ is executed against property in an unreasonable and oppressive manner; [91] where, after arrest upon civil or criminal process, the party arrested is subjected to unwarrantable insult or indignities, is treated with cruelty, is deprived of proper food or shelter, or is otherwise treated with oppression and undue hardships; [92] or where a summons is served in an unreasonable, cruel, and oppressive manner.[93]

C. Malice. Although some cases hold that malice is a fact necessary to be shown in an action for abuse of process,[94] and while the action is often denominated one for the "malicious abuse of process," [95] it is probable that malice is not an essential element of the cause of action,[96] and becomes important only when exemplary damages are sought.[97] The act constituting the abuse must, however, be shown to have been wilful.[98] Under no circumstances will malice alone give a right of action.[99] Nor will the action lie against one who in good faith has sought to properly enforce a supposed right.[1]

D. Distinguished From Malicious Prosecution and False Imprisonment. The action is distinguished from one for malicious prosecution in that it is

88. Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518.

89. Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434 [*quoting* 2 Addison Torts, § 868].

90. Hendricks *v.* W. J. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835; White *v.* Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885; Johnson *v.* Reed, 136 Mass. 421; McClerg *v.* Vielee, 116 N. Y. App. Div. 731, 102 N. Y. Suppl. 45; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207.

Illustrations of such abuses.—There is abuse of process where a subpœna is issued, not for the purpose of procuring attendance, but to force defendant to settle a claim rather than submit to the expense and inconvenience of attending court at a great distance from his home. Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207. A party who procures an execution to issue upon a vacated judgment is liable for abuse of process. Farmer *v.* Crosby, 43 Minn. 459, 45 N. W. 866. So it is held that an action lies where a party is fraudulently induced to come within the jurisdiction of the court so as to render him or his property subject to its process. Wanzer *v.* Bright, 52 Ill. 35.

91. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Rogers *v.* Brewster, 5 Johns. (N. Y.) 125; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405.

92. Bradshaw *v.* Frazier, 113 Iowa 579, 85 N. W. 752, 86 Am. St. Rep. 394, 55 L. R. A. 258; Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084; Smith *v.* Weeks, 60 Wis. 94, 18 N. W. 778.

93. Foley *v.* Martin, (Cal. 1903) 71 Pac. 165, holding it an abuse of process for the officer to break into defendant's house and serve him while he was lying in bed sick with paralysis.

94. Mullins *v.* Matthews, 122 Ga. 286, 50 S. E. 101; Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434.

95. Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518; Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

96. Page *v.* Cushing, 38 Me. 523; Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369; Petry *v.* Childs, 43 Misc. (N. Y.) 108, 88 N. Y. Suppl. 286; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571, 143 N. C. 54, 55 S. E. 422.

97. Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

98. Weeks *v.* Van Ness, 104 N. Y. App. Div. 7, 93 N. Y. Suppl. 337; Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369; Petry *v.* Childs, 43 Misc. (N. Y.) 108, 88 N. Y. Suppl. 286; Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

99. Whitesell *v.* Study, 37 Ind. App. 429, 76 N. E. 1010; Kramer *v.* Stock, 10 Watts (Pa.) 115.

1. Mathews *v.* Baldwin, 101 Ga. 318, 28 S. E. 1015.

Where defendant honestly believed that plaintiff owed him an account, and assigned the account to another for the purpose of sending the same to another state for collection by garnishment in order to evade the exemption laws of Wisconsin, before the passage of Laws (1893), c. 57, prohibiting such transfers, and such garnishment was thereafter unsuccessfully attempted, such facts did not constitute actionable abuse of process. Leeman *v.* McGrath, 116 Wis. 49, 92 N. W. 425.

founded upon the use, not the issuance of the process;[2] it need not appear that the action was instituted without probable cause,[3] and it need not appear that the action has terminated,[4] but these distinctions are not always observed.[5] It differs from false imprisonment in that, among other things, a warrant valid on its face is no defense to the action.[6]

E. Parties Liable. All the persons who knowingly participate in the abuse of process are liable as joint tort-feasors,[7] and if a party directs or consents to the unlawful acts of an officer or subsequently adopts them, he becomes liable.[8] But a plaintiff who does not direct or participate in abuse of process by the officer, and does not ratify his acts, is not liable.[9] An officer who uses process placed in

2. Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Wood *v.* Graves, 144 Mass. 365, 368, 11 N. E. 567, 59 Am. Rep. 95 (where the court said: "In examining the instructions of the learned judge to the jury in the present case, no error is found. He made a careful discrimination between the remedy for a malicious prosecution and that for a malicious abuse of process in the manner of executing it. He instructed them explicitly that no damages should be given for anything which occurred before the process was used at all by the officer, but only for what occurred after it began to be used upon plaintiff, and after it began to be wrongfully used for the purpose of collecting defendants' debt"); Herman *v.* Brookerhoff, 8 Watts (Pa.) 240.

The distinction stated.— There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object not the purpose for which it was intended by the law to effect, in other words a perversion of it. On the other hand legal process, civil or criminal, may be maliciously used so as to give rights to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. Kline *v.* Hibbard, 80 Hun (N. Y.) 50, 29 N. Y. Suppl. 807 [*affirmed* in 155 N. Y. 679, 49 N. E. 1099]; Humphreys *v.* Sutcliffe, 192 Pa. St. 336, 43 Atl. 954, 73 Am. St. Rep. 819; Mayer *v.* Walter, 64 Pa. St. 283; King *v.* Johnston, 81 Wis. 578, 51 N. W. 1011; Whitten *v.* Bennett, 86 Fed. 405, 30 C. C. A. 140. See also Kramer *v.* Stock, 10 Watts (Pa.) 115. Or it may be otherwise stated that a malicious abuse of legal process exists in the malicious misuse or misapplication of process to accomplish a purpose not warranted or commanded by the writ. The malicious perversion of a regularly issued process whereby a result not lawfully or properly obtained on a writ is secured. Hence it does not include a case where the process was procured maliciously but in which there was no abuse or misuse after its issuance. Bartlett *v.* Christhill, 69 Md. 219, 14 Atl. 518 [*citing* Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19]; Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675. *Compare* Reams *v.* Pancoast, 111 Pa. St. 42, 2 Atl. 205. See also MALICIOUS PROSECUTION, 26 Cyc. 6 note 3.

3. Page *v.* Cushing, 38 Me. 523; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422 (*correcting* an inadvertent statement to the contrary in 138 N. C. 174, 50 S. E. 571); Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015; Herman *v.* Brookerhoff, 8 Watts (Pa.) 240.

4. *Maine.*— Page *v.* Cushing, 38 Me. 523.

Massachusetts.— White *v.* Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885.

New York.— Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207; Bebinger *v.* Sweet, 6 Hun 478.

North Carolina.—Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015; Sneeden *v.* Harris, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389.

Pennsylvania.— Prough *v.* Entriken, 11 Pa. St. 81.

5. See Hendricks *v.* W. G. Middlebrooks Co., 118 Ga. 131, 140, 44 S. E. 835 (where the court said: "The malicious use of legal process may give rise to an action, where no object is contemplated to be gained by it other than its proper effect and execution. In such a case it is necessary to show malice and want of probable cause"); Georgia L. & T. Co. *v.* Johnston, 116 Ga. 628, 43 S. E. 27 (where it was said that both malice and want of probable cause must be shown to sustain an action for the malicious abuse of process); Nix *v.* Goodhill, 95 Iowa 282, 285, 63 N. W. 701, 58 Am. St. Rep. 434 (where it was said: "The authorities are strong, if not quite uniform, that the unlawful use of process must be malicious, and without probable cause; the rule being akin, in that respect, to actions for malicious prosecution. In fact, the two actions are of the same general character, the one being the malicious prosecution of a suit and the other the malicious use of process issued in aid of a proceeding, either pending or determined").

6. Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015.

7. Bradshaw *v.* Frazier, 113 Iowa 579, 85 N. W. 752; Murray *v.* Mace, 41 Nebr. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

But one who participates without any knowledge of the wrongful purpose is not liable. Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335.

8. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381; Hyde *v.* Cooper, 26 Vt. 552. See also McLaughry *v.* Porter, 86 Hun (N. Y.) 316, 33 N. Y. Suppl. 464.

9. People's Bldg., etc., Assoc. *v.* McElroy,

his hands for service as a cover for illegal conduct becomes a trespasser *ab initio*.[10]

F. Actions. The action is either trespass or case, depending upon the means used.[11] Inasmuch as it need not be shown that the suit has terminated, the cause of action is complete as soon as the acts complained of are committed, and the statute of limitations begins to run from that time.[12]

VI. PROCESS AGAINST CORPORATIONS.[13]

A. Domestic Corporations — 1. In General. Where a court has jurisdiction of an action against a corporation, it has, in the absence of statutory provision, by necessary implication, the right to cause its process to be served on the proper officer of the corporation in person if resident in the state, or by publication if non-resident.[14] Where the corporate charter has been surrendered and the surrender has been accepted by the state, process can no longer be served upon the corporation.[15]

2. Waiver of Process. An attorney in fact of a corporation, unless he is a general managing agent thereof, has no power to waive service of summons.[16] Nor can stock-holders waive process upon the corporation by appearance as individuals.[17]

3. Statutory Provisions. The legislature has power to prescribe the method of service of process upon corporations doing business within the state,[18] subject only to the rule that the method provided must be one that with reasonable certainty will result in the actual reception by the corporation of the notice served.[19] Such statutes may be made to apply to existing corporations [20] and may operate as a repeal of provisions in existing special charters,[21] and subject to the rules governing statutes generally [22] may either expressly or by implication repeal existing statutes relating to the same subject.[23] Where a statute has been extended to

79 Ill. App. 266; Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993; Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580; Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296.

10. Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993.

11. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Marlatte *v.* Weickgenant, 147 Mich. 266, 110 N. W. 1061; Rogers *v.* Brewster, 5 Johns. (N. Y.) 125.

Sufficiency of pleading.— "In the action for abuse of process the gravamen of the complaint is the using of the process for a purpose not justified by law, and to effect an object not within its proper scope; and in such action the facts may appear from which is fairly deducible the inference of wrongful and malicious use, and the pleading is sufficient if it aver facts out of which the inference arises." Foy *v.* Barry, 87 N. Y. App. Div. 291, 294, 84 N. Y. Suppl. 335.

Right to maintain action on the case see Case, Action on, 6 Cyc. 687.

12. Montague *v.* Cummings, 119 Ga. 139, 45 S. E. 979.

13. **In actions upon insurance contracts** see Accident Insurance, 1 Cyc. 284; Fire Insurance, 19 Cyc. 916; Life Insurance, 25 Cyc. 915; Mutual Benefit Insurance, 29 Cyc. 220.

Necessity of process upon corporation in proceeding to enforce shareholder's remedy see Corporations, 10 Cyc. 997.

14. Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

15. Combes *v.* Keyes, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839, 27 L. R. A. 369.

16. Lamb *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 64.

17. Moore *v.* Schoppert, 22 W. Va. 282.

18. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146.

19. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146, holding that a provision for service upon the person having charge of a business office of a railroad company was reasonable.

20. Bay State Gas Co. *v.* State, 4 Pennew. (Del.) 238, 56 Atl. 1114.

21. Cairo, etc., R. Co. *v.* Hecht, 29 Ark. 661.

22. See Statutes.

23. *Colorado.*— Little Bobtail Gold Min. Co. *v.* Lightbourne, 10 Colo. 429, 15 Pac. 785, holding that the act of March 17, 1877, section 37, repealed by implication the act of March 14, 1877, section 30.

Indiana.— Toledo, etc., R. Co. *v.* Shively, 26 Ind. 181 (holding that Acts Special Sessions (1861), p. 78, was repealed by Acts (1863), p. 25); New Albany, etc., R. Co. *v.* Haskell, 11 Ind. 301 (holding that 2 Rev. St. p. 34, § 30, did not conflict with 2 Rev. St. p. 222, § 796).

Michigan.— Turner *v.* St. Claire Tunnel Co., 102 Mich. 574, 61 N. W. 72 (holding that 3 Howell Annot. St. § 8147, was not repealed by 3 Howell Annot. St. § 8137); Fowler *v.* Detroit, etc., R. Co., 7 Mich. 79 (holding the act of March 28, 1849, was not

cover service in equity as well as law actions, an amendment to such statute is equally so applicable.[24] A general statute has been held to apply to actions before justices of the peace.[25] But where there is a special statute particularly applicable to such proceedings it will prevail.[26]

4. County to Which Process May Issue. Process in an action against a corporation may issue to another county in accordance with statutes permitting such issuance in actions generally.[27] And it is specifically provided by statute in some states that, where a corporation is rightfully sued in one county, process may issue to any other county in the state,[28] or that, when the person designated by statute as the proper person to be served cannot be found within the county, process may be sent to any other county in the state where he may be found.[29] Under some statutes, however, no provision is made for the issuance of process to any county other than that in which the action is brought.[30]

5. Form and Requisites — a. In General. The form and requisites of process against a domestic corporation are, unless otherwise prescribed by statute,[31] substantially the same as of process against a private individual.[32]

repealed by the act of Feb. 15, 1855, section 47).

Mississippi.— Vicksburg, etc., R. Co. *v.* McCutcheon, 52 Miss. 645, holding that Code (1871), § 703, was not repealed by the act of March 28, 1872.

Montana.—Congdon *v.* Butte Consol. R. Co., 17 Mont. 481, 43 Pac. 629, holding that Comp. St. (1887) div. 1, § 75, did not repeal section 72.

Nevada.— Gillig *v.* Independent Gold, etc., Min. Co., 1 Nev. 247, holding that Pr. Act (1861), § 29, was not repealed by the law of 1862, directing the mode of service upon certain companies.

Ohio.— Fee *v.* Big Sand Iron Co., 13 Ohio St. 563, holding that Code Civ. Proc. § 66, in effect June 1, 1853, superseded the act of March 1, 1852, section 97.

Texas.— Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 37 Am. Rep. 756, holding that the act of March 21, 1874, section 2, and the act of April 17, 1874, did not repeal by implication, but were cumulative to the act of Feb. 7, 1854.

24. Bailey *v.* Mahleur, etc., Irr. Co., 36 Oreg. 54, 57 Pac. 910.

25. Katzenstein *v.* Raleigh, etc., R. Co., 78 N. C. 286.

26. Farmers' Loan, etc., Co. *v.* Warring, 20 Wis. 290. See also North *v.* Cleveland, etc., R. Co., 10 Ohio St. 548, holding that railroad companies sued before a justice must be summoned according to the provisions of Kirwin St. § 1858, and in accordance with section 2055 relating to service upon other corporations.

27. Cobbey *v.* State Journal Co., 77 Nebr. 619, 110 N. W. 643; Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742; Stanton *v.* Enquirer Co., 9 Ohio S. & C. Pl. Dec. 801, 7 Ohio N. P. 589; Baldwin *v.* Lorain Co., 9 Ohio S. & C. Pl. 620, 7 Ohio N. P. 506. See Campbell *v.* Woodsdale Island Park Co., 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Issuance of process to other counties generally see *supra*, I, C, 6.

28. See the statutes of the several states. And see Newberry *v.* Arkansas, etc., R. Co., 52 Kan. 613, 35 Pac. 210.

29. See the statutes of the several states. And see Peoria Ins. Co. *v.* Warner, 28 Ill. 429; Eminence Land, etc., Co. *v.* Current River Land, etc., Co., 187 Mo. 420, 86 S. W. 145; Bente *v.* Remington Typewriter Co., 116 Mo. App. 77, 91 S. W. 397; Story *v.* American Cent. Ins. Co., 61 Mo. App. 534.

Presumption.— It will be presumed that where summons is issued to the sheriff of another county it was done in accordance with the statute, unless a showing to the contrary is made. Rochester, etc., R. Co. *v.* Miller, 107 Ind. 598, 82 N. E. 217; Rochester, etc., R. Co. *v.* Jewell, 107 Ind. 332, 82 N. E. 215.

30. Winnesheik Ins. Co. *v.* Holzgrafe, 46 Ill. 422; Stephenson Ins. Co. *v.* Dunn, 45 Ill. 211 (both holding that under the Illinois act of 1853, providing that in a suit against a corporation process should be served on the president if a resident of the county where suit was brought, and if he was absent or a non-resident then on other officers or agents indicated residing in the county, a summons issued in one county and served on a corporation in another county was invalid whether the suit was in law or equity); Dewey *v.* Central Car, etc., Co., 42 Mich. 399, 4 N. W. 179 (holding that service of process should be made only within the county where the business office of the corporation was fixed).

31. See the statutes of the several states.

32. See *supra*, I, D.

An action of assumpsit against a corporation should be commenced by summons and not by attachment. New Brunswick State Bank *v.* Van Horne, 4 N. J. L. 382; Lynch *v.* Mechanics' Bank, 13 Johns. (N. Y.) 127.

A summons was the proper form of process under the earlier statutes. See Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Johnson *v.* Cayuga, etc., R. Co., 11 Barb. (N. Y.) 621; Wilde *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 302; Whitaker *v.* Buffalo Cotton Mfg. Co., 2 How. Pr. (N. Y.)

b. To Whom Process Should Issue and Direction. Jurisdiction of a corporation cannot be obtained by service upon its officers or members as individuals;[33] hence a process is insufficient which, instead of directing the officer to summon defendant corporation, merely requires its agent to be summoned,[34] although in some jurisdictions it has been held that process directed to the officers of the corporation may be sustained as against the corporation, in case the complaint is annexed to the summons and is regular, and the persons served have knowledge that the action is against the corporation.[35] Conversely, service of a summons upon a corporation will not authorize the members of the corporation being held as partners[36] or as individuals;[37] nor can jurisdiction be obtained of individuals under a statute governing the service of process upon corporations.[38] So where by amendment a corporation is made a party, it must be served with process, although its officers are alreadv before the court as individuals.[39] It is not necessary that the process state the name of the agent upon whom service is to be made.[40] Notice to a corporation may be regarded as notice to its directors, but it will not operate as notice to stockholders who are not directors.[41]

c. Description of Corporation. It is usually held sufficient that process issue against a corporation in its corporate name without other facts showing that it is a corporation.[42] Where the method of service to be employed is the same whether defendant is a corporation or a voluntary association, service properly made of the summons describing defendant as an unincorporated organization is good, although

97; Brown *v.* Syracuse, etc., R. Co., 5 Hill (N. Y.) 554; Rowley *v.* Chautauqua County Bank, 19 Wend. (N. Y.) 26.

Indorsement of writ.— In a suit by a corporation a writ indorsed "The . . . corporation by Royal Makepeace" was held sufficient under a statute requiring an indorsement by agent or attorney in his christian and surname. Middlesex Turnpike Corp. *v.* Tufts, 8 Mass. 266.

33. *Connecticut.*— Rand *v.* Proprietors Connecticut River Upper Locks, etc., 3 Day 441.

Indiana.— Kirkpatrick Constr. Co. *v.* Central Electric Co., 159 Ind. 639, 65 N. E. 913.

Maryland.— Binney's Case, 2 Bland 99.

Missouri.— Blodgett *v.* Schaffer, 94 Mo. 652, 7 S. W. 436.

New York.— Ziegler *v.* George Schleicher Co., 56 Misc. 582, 107 N. Y. Suppl. 85.

Virginia.— Virginia Bank *v.* Craig, 8 Leigh 399.

34. Gulf, etc., R. Co. *v.* Rawlins, 80 Tex. 579, 16 S. W. 430; Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; New York Mut. L. Ins. Co. *v.* Uecker, (Tex. Civ. App. 1907) 101 S. W. 872; Butler *v.* Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52; Texas-Mexican R. Co. *v.* Wright, (Tex. Civ. App. 1895) 29 S. W. 1134; Phœnix F. Ins. Co. *v.* Cain, (Tex. Civ. App. 1893) 21 S. W. 709; Texas, etc., R. Co. *v.* Florence, (Tex. App. 1889) 14 S. W. 1070; International, etc., R. Co. *v.* Sauls, 2 Tex. App. Civ. Cas. § 242. But see Galveston, etc., R. Co. *v.* Shepherd, 21 Tex. 274, holding that where a note is executed by "Paul Bremond, president of the Galveston Red River Railroad Co.," process may be issued against "Paul Bremond, president," etc., and served on him, in a suit on the note, and such service will authorize a judgment against the company.

A citation must be addressed to the corporation, and not to its president. State *v.* Voorhies, 50 La. Ann. 671, 23 So. 871; State *v.* Montegudo, 48 La. Ann. 1417, 20 So. 911.

35. Western, etc., R. Co. *v.* Kirkpatrick, 66 Ga. 86; Clark *v.* Southern Porcelain Mfg. Co., 8 S. C. 22. See also Grant *v.* Clinton Cotton Mills, 56 S. C. 554, 35 S. E. 193, holding that service of a magistrate's summons directed to "B, president," followed by the name of the corporation of which he was president, was sufficient to give the court jurisdiction of the corporation.

Members.— It has been held not a fatal objection to a writ that it is directed to the members of a corporation instead of to the corporation by its corporate name. Fuller *v.* Plainfield Academic School, 6 Conn. 532.

36. Bartram *v.* Collins Mfg. Co., 69 Ga. 751.

37. Macbean *v.* Irvine, 4 Bibb (Ky.) 17.

38. Wright *v.* Gossett, 15 Ind. 119, holding that service of process on the conductor of a train of cars, in an action for the killing of stock, would not authorize a judgment against individuals, although they might represent themselves to be the lessees of the railroad and to have charge of its rolling stock.

39. McRae *v.* Guion, 58 N. C. 129.

40. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Illinois Steel Co. *v.* San Antonio, etc., R. Co., 67 Fed. 561.

41. Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

42. Winner *v.* Weems, 77 Miss. 662, 27 So. 618; Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896.

the organization is in fact incorporated.[43] Trivial errors may be disregarded.[44] As a general rule a misnomer of the corporation is regarded as an amendable defect,[45] unless the misnomer has been such that there has been in fact no citation.[46] But where defendants are sued as a partnership there must be a new service or a voluntary appearance by the corporation in order to charge them as a corporation.[47]

6. Service — a. Mode in General. Where no express provision is made for the service of process upon corporations, it has been held that a statutory provision for service upon persons generally may warrant such service upon a corporation as would be tantamount to personal service on an individual.[48] In the absence of statute substituted service cannot be had upon a corporation.[49] Where the statute points out a particular method of serving process upon corporations such method must be followed,[50] the general rule being especially exacting with reference to corporations.[51] Hence a statutory requirement as to the leaving of a copy must be followed.[52] Under some statutes service may be made by delivery of a copy without reading the original.[53] Under some statutes service may be made by the leaving of a copy

43. Saunders *v.* Adams Express Co., 71 N. J. L. 270, 57 Atl. 899 [*affirmed* in 71 N. J. L. 520, 58 Atl. 1101].

44. Great Northern Hotel Co. *v.* Farrand, etc., Organ Co., 90 Ill. App. 419, where the abbreviation "Co." was written "Cy."

The use of "railway" for "railroad" has been held immaterial. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162.

45. Johnson *v.* Central R. Co., 74 Ga. 397; Sherman *v.* Connecticut River Bridge Co., 11 Mass. 338; Bullard *v.* Nantucket Bank, 5 Mass. 99; Burnham *v.* Stratford County Sav. Bank, 5 N. H. 573; Lane *v.* Seaboard, etc., R. Co., 50 N. C. 25.

Plaintiff.— The court may permit the amendment of a corporation plaintiff in case of mistake. Union Car Spring Co. *v.* Lebanon Mfg. Co., 2 Chest. Co. Rep. (Pa.) 331.

46. Southern Pac. R. Co. *v.* Block, 84 Tex. 21, 19 S. W. 300.

Service on common agent.— Issuance of a summons against one corporation does not begin a suit against another, although served on a person who was a common agent of both. Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364.

47. Thompson *v.* Allen, 86 Mo. 85.

48. Martin *v.* Atlas Estate Co., (N. J. 1907) 65 Atl. 881.

49. Bernhart *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

A corporation cannot conceal itself to avoid the service of process in the sense that such concealment will authorize an application for a substituted service of summons. Hahn *v.* Anchor Steamship Co., 2 N. Y. City Ct. 25.

50. *Indiana.*— Eel River R. Co. *v.* State, 143 Ind. 231, 42 N. E. 617.

Louisiana.— New Orleans First Municipality *v.* Christ Charter, 3 La. Ann. 453.

Missouri.— Cosgrove *v.* Tebo, etc., R. Co., 54 Mo. 495. Rev. St. (1889) § 2527, providing that when a corporation has no office in the county, or no person can be found in charge thereof, and the president or chief officer cannot be found in the county, a summons "shall" be issued, directed to the sheriff of any county in the state where such office or officer may be, prescribes the only mode of service of process on corporations in such cases; and a service in a forcible entry and detainer suit by posting notices as provided by section 5094, which is not applicable to corporations, gives no jurisdiction over defendant company. Missouri, etc., R. Co. *v.* Hoereth, 144 Mo. 136, 45 S. W. 1085.

New Hampshire.— Sleeper *v.* Free Baptist Assoc., 58 N. H. 27.

New Jersey.— Delaware, etc., R. Co. *v.* Ditton, 36 N. J. L. 361.

New York.— Kieley *v.* Central Complete Combustion Mfg. Co., 147 N. Y. 620, 42 N. E. 260 [*reversing* 13 Misc. 85, 34 N. Y. Suppl. 106].

Ohio.— State *v.* King Bridge Co., 28 Ohio Cir. Ct. 147; Parker *v.* Van Dorn Iron Works, 23 Ohio Cir. Ct. 444.

Oregon.— Willamette Falls Canal, etc., Co. *v.* Williams, 1 Oreg. 112.

Texas.— Waco Lodge No. 70 I. O. O. F. *v.* Wheeler, 59 Tex. 554.

Wisconsin.— Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403.

Service of process in federal courts should be made under a federal statute applicable thereto, and not under the state statute. Hume *v.* Pittsburgh, etc., R. Co., 12 Fed. Cas. No. 6,865, 6 Biss. 31.

Corporation falling within two branches of statute.— The fact that an insurance company is engaged in banking does not require it to be served in the manner prescribed for serving process on banks. Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

Where of two statutes relating to the service of process upon corporation, the later is merely cumulative, service in compliance with the earlier statute may be perfected in accordance with the later statute and the cause retained to allow plaintiff to do so. Connor *v.* Southern Express Co., 37 Ga. 397.

51. Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403.

52. Jordan *v.* Missouri, etc., R. Co., 61 Mo. 52; Aaron *v.* Pioneer Lumber Co., 112 N. C. 189, 16 S. E. 1010. See also Iron Clad Mfg. Co. *v.* Smith, 28 Misc. (N. Y.) 172, 59 N. Y. Suppl. 332.

53. Gillig *v.* Independent Gold, etc., Min. Co., 1 Nev. 247.

with a member of the family of the proper officer at his dwelling-house,[54] or by leaving a copy at the most notorious place of abode of such an officer.[55] In case several methods of service are provided by statute the officer on finding that he cannot serve it in one of such methods need not postpone service in case he is able to serve it in another method.[56] So any or all of the methods prescribed by statute may be adopted and service sustained if any of the methods are performed in compliance with the statute.[57]

b. Time. Process against a corporation, in the absence of statutory provision, may be served in the time prescribed for service upon other defendants.[58] By statute, however, special provision is made in some instances as to the service of process upon corporations, and in such case the provisions of the particular statute must be followed.[59] Where the statutes require that service shall be made during office hours, a service during business hours is sufficient.[60]

c. Place. The place at which service may be made upon a defendant corporation is usually specifically provided for by the statutes of the several states, which are widely variant.[61] Where it is provided that service shall be upon officers in the

54. Johnson *v.* American Bill Posting Co., 13 Pa. Co. Ct. 96.

55. Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685.

56. Cornwall *v.* Starr Bottling Co., 128 Mo. App. 163, 106 S. W. 591.

57. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

58. See *supra*, II, B, 9. See also Cavendish *v.* Weathersfield Turnpike Co., 2 Vt. 531, holding that citation could not be served after sunset on Saturday evening.

59. See the statutes of the several states. And see State *v.* Bay State Gas Co., (Del. 1901) 57 Atl. 291; Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440; Ohio, etc., R. Co. *v.* Boyd, 16 Ind. 438 (holding, however, that where service was made within the statutory period, before the term of court to which the process was returnable, the service was good, but that the case must be continued); Bullard *v.* Nantucket Bank, 5 Mass. 99; Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285.

60. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

61. See the statutes of the several states. And see the following cases:

Georgia.— Stuart Lumber Co. *v.* Perry, 117 Ga. 888, 45 S. E. 251.

Indiana.— Eel River, etc., R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388, holding that where a railroad company had no officer or agent in the state, except one appointed to receive service of process, service might be made on him in the county other than that in which the action was brought.

Kentucky.— Cincinnati, etc., Packet Co. *v.* Thomas, 92 S. W. 306, 29 Ky. L. Rep. 44, holding that, under provisions that in an action against a private corporation the summons may be served in any county on the defendant's chief officer or agent who may be found within the state, or that it may be served in the county wherein the action is brought on the defendant's chief officer or agent who may be found therein, and that in every action against a common carrier the summons may be served in any county on the defendant's chief officer or agent, or that it may be served in the county wherein the action is brought on the defendant's chief officer or agent who resides therein, a summons in an action against a common carrier operating a line of steamboats could not be served on defendant's chief officer or agent in a county other than that in which the action was brought, but must be served on defendant's chief officer or agent who may be found in the state, or upon such officer or agent found in the county where the action was instituted.

Michigan.— Potter *v.* Hutcheson Mfg. Co., 79 Mich. 207, 44 N. W. 595, holding that service might be made upon the officer of the corporation in the county where plaintiff resides, although the office of the corporation was not there located. *Compare* People *v.* Saginaw Cir. Judge, 23 Mich. 492.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944 (holding that the return must specify that service was had on the agent at the business office of the corporation); Dixon *v.* Hannibal, etc., R. Co., 31 Mo. 409 (holding that process might be served on a railroad company in any county where there is any office or place of business of the company); State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146 (holding that a switchman's shanty was not a "business office" of the corporation).

Oregon.— Bailey *v.* Malheur, etc., Irr. Co., 36 Oreg. 54, 57 Pac. 910, holding that service might be made in a county other than that in which the action was brought, on the president of the corporation.

Pennsylvania.— Hawn *v.* Pennsylvania Canal Co., 154 Pa. St. 455, 26 Atl. 544; Brobst *v.* Pennsylvania Bank, 5 Watts & S. 379; Zablocki *v.* Delaware, etc., R. Co., 10 Pa. Dist. 54; Samuel *v.* American Iron, etc., Mfg. Co., 10 Pa. Dist. 43; Com. *v.* New York, etc., R. Co., 7 Pa. Co. Ct. 407; Clever *v.* Carlisle Mfg. Co., 2 Dauph. Co. Rep. 399; Moore *v.* Fidelity Ins., etc., Co., 16 Montg.

county where they usually reside, service may be made either in the county of the officer's domicile or in the county in which he has his official residence and carries on the corporate business.[62] Where process may be served in the county where property of the corporation is located, the property may be either real or personal.[63] A requirement that service shall be made upon the registered agent of a domestic corporation does not require that it shall be made at the registered office.[64] It is held under some statutes that service of process upon a person appointed to receive service must be made in the county in which he resides.[65]

d. Persons Upon Whom Service May Be Made — (i) *In General.* By statute provision is usually made as to the persons upon whom service may be had,[66] and process must be served upon some one of the persons so designated.[67] The provision is usually for service upon certain general officers of the corporation, and in case such officers cannot be found within the jurisdiction then upon specified inferior officers or agents or employees.[68] In order to justify service upon

Co. Rep. 90. Under the act of June 13, 1836, service of summons upon the secretary of defendant corporation while temporarily in the county wherein the contract upon which the action is based was made and performed is valid. Dick *v.* Meadville St. R. Co., 7 Pa. Dist. 350.

Tennessee.— Mark Twain Lumber Co. *v.* Lieberman, 106 Tenn. 153, 61 S. W. 70.

Virginia.—Dillard *v.* Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124, holding that the corporation must be served at its domicile.

Wyoming.— Harrison *v.* Carbon Timber Co., 14 Wyo. 246, 83 Pac. 215, holding that the corporation must be served in the county of its residence, unless service is made upon an agent appointed to receive service of the process.

England.— Garton *v.* Great Western R. Co., E. B. & E. 837, 4 Jur. N. S. 1036, 27 L. J. Q. B. 375, 6 Wkly. Rep. 677, 96 E. C. L. 837, holding that service must be made at the principal office.

62. Governor *v.* Raleigh, etc., R. Co., 38 N. C. 471.

63. Grubb *v.* Lancaster Mfg. Co., 10 Phila. (Pa.) 316, holding, however, that personal property must be permanently placed or fixed.

64. Philadelphia, etc., Ferry Co. *v.* Intercity Link R. Co., 73 N. J. L. 86, 62 Atl. 184 [*affirmed* in 74 N. J. L. 594, 65 Atl. 1118].

65. Frazier *v.* Kanawha, etc., R. Co., 40 W. Va. 224, 21 S. E. 723.

66. See the statutes of the several states. And see Hinckley *v.* Bluehill Granite Co., 16 Me. 370.

67. *California.*—Aiken *v.* Quartz-Rock Mariposa Gold Min. Co., 6 Cal. 186.

Illinois.— Illinois Cent. R. Co. *v.* Pairpoint Mfg. Co., 55 Ill. App. 231.

Louisiana.— Collier *v.* Morgan's L., etc., Co., 41 La. Ann. 37, 5 So. 537.

Michigan.— Toledo Ice Co. *v.* Munger, 124 Mich. 4, 82 N. W. 663.

New Jersey.— State *v.* Bennett, 47 N. J. L. 275.

Pennsylvania.— Stark *v.* Lehigh Coal, etc., Co., 8 Pa. Dist. 720, 9 Kulp 467.

Texas.— Waco Lodge No. 70 I. O. O. F. *v.* Wheeler, 59 Tex. 554; El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Hamburg-Bremen F. Ins. Co. *v.* Moses, 2 Tex. Unrep. Cas. 438.

Transmission of copy to proper person.— Where in an action against a domestic corporation process was not served on a proper person service is not made valid by the fact that copies of the summons and petition served were promptly transmitted to the person on whom service should have been made. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146. See also Kieley *v.* Central Complete Combustion Mfg. Co., 147 N. Y. 620, 42 N. E. 260 [*reversing* 13 Misc. 85, 34 N. Y. Suppl. 106]. Service of summons on one as the agent of a corporation, when in fact he is not an agent, is not service on the corporation; and the fact that the alleged agent sends a copy of the summons to the corporation, and that plaintiff's attorney writes to the corporation that suit has been commenced against it, does not require the corporation to appear, and a judgment obtained on such service is a nullity. Kingman *v.* Mann, 36 Ill. App. 338.

Persons not connected with corporation.— Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of or connected with the corporation, a judgment founded thereon is void. Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573.

68. See the statutes of the several states. And see the following cases:

Colorado.— Golden Paper Co. *v.* Clark, 3 Colo. 321.

Florida.— Florida Cent., etc., R. Co. *v.* Luffman, 45 Fla. 282, 33 So. 710.

Illinois.— Peoria Ins. Co. *v.* Warner, 28 Ill. 429; Illinois, etc., Tel. Co. *v.* Kennedy, 24 Ill. 319; Crowley *v.* Sumner, 97 Ill. App. 301.

New York.— Tom *v.* Riga M. E. Church, 19 Wend. 25.

Ohio.— Campbell *v.* Woodsdale Island Park Co., 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Pennsylvania.— Grubb *v.* Lancaster Mfg. Co., 10 Phila. 316, 1 Wkly. Notes Cas. 201.

The temporary absence of the president of a domestic corporation will not warrant serv-

members of the inferior class it must be shown that service upon members of the superior class cannot be had.[69] Where there is no statutory provision as to the person upon whom service of process against a corporation is to be made service may be made upon any officer or agent of the corporation whose duty it is to communicate the fact of service to the governing body of the corporation.[70] Where a railroad has passed into the control and management of its bondholders, they and their agents represent the railroad company for the purpose of being served with notices directed by law to be served on the railroad company.[71] It would seem that service upon one who is merely a stock-holder is not sufficient.[72] A statute requiring a public record of an agent on whom process against the corporation may be served does not provide an exclusive method of acquiring jurisdiction but merely creates an additional agent upon whom service may be had.[73] In case service has been made upon the officer or agent designated by statute, it is immaterial that he does not communicate the fact of service to the corporation or its other officers [74] where no fraud or collusion is shown.[75] When service is made according to statute it is good, although the officers served appear and disclaim the right to answer officially.[76]

(II) *GENERAL OFFICERS.* As a general rule under the statutory provisions service of process may be made upon the president,[77] vice-president,[78] secretary,[79]

ice on a subordinate officer or agent. Steiner *v.* Central R. Co., 60 Ga. 552.

Officer present but not found.— Under Rev. St. c. 110, § 5, which provides that a corporation may be served with process by leaving a copy with its president if he can be found in the county, otherwise on certain other officers, service on such other officers is binding on the corporation, if the president cannot be found in the county, even though he is at the time actually in the county. Chicago Sectional Electric Underground Co. *v.* Congdon Brake Shoe-Mfg. Co., 111 Ill. 309.

Where name of president is not posted.— Ga. Code, § 3412, provides that when the president of an express company resides in the state, his name shall be posted in each office, and for service of summons on him; otherwise, service shall be made on any agent thereof, and under this provision it was held that, after judgment on a summons on garnishment, the service was sufficient when made on an agent, where it did not affirmatively appear that the president of the company resided in the state, although his name was posted in each office of the company. Southern Express Co. *v.* Skipper, 85 Ga. 565, 11 S. E. 871.

Necessity that cause of action arise in district.— In an action against a corporation in a federal circuit court in Oregon, where process is served pursuant to Oreg. Code Civ. Proc. § 54, subd. 1, as amended by Sess. Laws (1876), p. 37, requiring the summons to be served on the president, secretary, cashier, or managing agent, or, if none of these persons reside or have an office in the district where the cause of action arose, then that service may be made on any agent or clerk of the corporation residing or found there, if the service is on any other than the principal officers of the company, it must appear that the cause of action arose in that district. Lung Chung *v.* Northern Pac. R. Co., 19 Fed. 254, 10 Sawy. 17.

69. Drew Lumber Co. *v.* Walter, 45 Fla. 252, 34 So. 244; St. Louis, etc., R. Co. *v.* Dawson, 3 Ill. App. 118; Beattyville Coal Co. *v.* Bamberger, 53 S. W. 31, 21 Ky. L. Rep. 830; Merrill *v.* Montgomery, 25 Mich. 73.

70. Martin *v.* Atlas Estate Co., (N. J. 1907) 65 Atl. 881; Dock *v.* Elizabethtown Steam Mfg. Co., 34 N. J. L. 312. See also Heltzel *v.* Kansas City, etc., R. Co., 77 Mo. 482, holding that a notice is not sufficiently served on a corporation, when it is served on one who merely had desk room in the business office of the corporation, but who had no connection with its affairs.

71. Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323.

72. De Wolf *v.* Mallett, 3 Dana (Ky.) 214.

73. Martin *v.* Atlas Estate Co., (N. J. 1907) 65 Atl. 881.

74. Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646; Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

75. Danville, etc., R. Co. *v.* Brown, 99 Va. 340, 18 S. E. 278.

76. Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866.

77. Branham *v.* Ft. Wayne, etc., R. Co., 7 Ind. 524; Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96; Pipkin *v.* National Loan, etc., Assoc., 80 Mo. App. 1.

78. *Colorado.*— Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506.

Illinois.— Cook *v.* Imperial Bldg. Co., 152 Ill. 638, 38 N. E. 914, holding the vice-president an "agent."

Kansas.— Pond *v.* National Mortg., etc., Co., 6 Kan. App. 718, 50 Pac. 973.

New Jersey.— Martin *v.* Atlas Estate Co., (1907) 65 Atl. 881.

Virginia.— Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 123.

United States.—Ball *v.* Warrington, 87 Fed. 695.

79. *Alabama.*— Talladega Ins. Co. *v.* Woodward, 44 Ala. 287.

treasurer,[80] or cashier.[81] Under some statutes service upon the directors may be permitted.[82]

(III) *MANAGING AGENT.* In some statutes the provision is for service upon a managing agent.[83] The term "managing agent" has no strict legal definition, and it is not easy to form a general rule that will govern all cases.[84] The term is

Connecticut.— McCall *v.* Byram Mfg. Co., 6 Conn. 428.

Kansas.— Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270.

Missouri.— Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315.

Pennsylvania.— Whalen *v.* Aid Soc., 2 Leg. Rep. 370, holding that the secretary was to be regarded as a chief officer.

Where the statute requires personal service, service on the secretary of a corporate defendant is insufficient. Laufman *v.* Hope Mfg. Co., 54 N. J. L. 70, 23 Atl. 305.

Assistant secretary.— Personal service may be made on an "assistant secretary" of a domestic corporation, under Kan. Code Civ. Proc. § 65, enumerating the secretary as one of the officers of a domestic corporation on whom service may be made. Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373; Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346.

80. Facts Pub. Co. *v.* Felton, 52 N. J. L. 161, 19 Atl. 123.

81. Eisenhofer *v.* New Yorker Zeitung Pub., etc., Co., 91 N. Y. App. Div. 94, 86 N. Y. Suppl. 438 (holding that N. Y. Code Civ. Proc. § 431, authorizing service of summons on a domestic corporation by delivering a copy to the cashier, does not authorize such service by delivering a copy to one who has no interest in the corporation, except that he receives the price of papers sold by him in one of its departments); Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122.

A mere employee in the office of a local agent of an express company is not a cashier of the company, within the meaning of a statute authorizing service to be made on the "cashier or treasurer" of a corporation. Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388.

82. Silsbee *v.* Quincy Hotel Co., 30 Ill. App. 204 (holding that under Ill. Pr. Act, § 4, providing that service of process may be had on a corporation by leaving a copy with any director found in the county, service on a corporation cannot be had by service on one of the directors who is in the county where the suit is brought on his own private business, and not on that of the corporation); Webb *v.* Cape Fear Bank, 50 N. C. 288; Com. *v.* Wilmington, etc., R. Co., 2 Pearson (Pa.) 408; Grubb *v.* Lancaster Mfg. Co., 10 Phila. (Pa.) 316.

83. Coast Land Co. *v.* Oregon Colonization Co., 44 Oreg. 483, 73 Pac. 884.

84. Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490.

The term has been held to include.—A local superintendent of a life insurance company who has "general supervision of the business" of his district (Stubing *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 610, 28 N. Y. Suppl. 960; Mullins *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 297, 28 N. Y. Suppl. 959 [*affirmed* in 143 N. Y. 681, 39 N. E. 494]), an agent of an insurance company who has the entire superintendence of all the company's business within a certain district (Ives *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 32, 28 N. Y. Suppl. 1030), an agent of an insurance company who has full power to receive premiums and issue policies, and the entire management of the business of the company in a city other than the city of the home office (Bain *v.* Globe Ins. Co., 9 How. Pr. (N. Y.) 448), the superintendent of a division of a railroad (Brayton *v.* New York, etc., R. Co., 72 Hun (N. Y.) 602, 25 N. Y. Suppl. 264; Rochester, etc., R. Co. *v.* New York, etc., R. Co., 48 Hun (N. Y.) 190), a general superintendent of a telegraph and telephone company (Barrett *v.* American Tel., etc., Co., 138 N. Y. 491, 34 N. E. 289 [*affirming* 56 Hun 430, 10 N. Y. Suppl. 138, 18 N. Y. Civ. Proc. 363]), a person served, in an action against a bank (which was no longer doing a banking business, but was engaged in closing up its affairs), who was in the habit of making its semiannual reports to the bank controller, employed attorneys to attend to its business, and was the only person exercising a general supervision over its affairs (Carr *v.* Commercial Bank, 19 Wis. 272), one who is introduced by a director of a corporation as the superintendent of the corporate business, and is given charge thereof, without any apparent limitation of authority (Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713), a station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight, and collect for freight shipments (Brown *v.* Chicago, etc., R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564).

The term has been held not to include a director (Alabama, etc., R. Co. *v.* Burns, 43 Ala. 169), business manager (Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370), a baggage-master (Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308), a person employed to superintend the running of horse cars on a portion of the road of a railroad company (Emerson *v.* Auburn, etc., R. Co., 13 Hun (N. Y.) 150), an assistant treasurer (Winslow *v.* Staten Island Rapid Transit R. Co., 51 Hun (N. Y.) 298, 4 N. Y. Suppl. 169), a telegraph operator (Jepson *v.* Postal Tel. Cable Co., 20 N. Y. Suppl. 300, 22 N. Y. Civ. Proc. 434), an agent of an insurance company, whose duties are confined to superintending certain soliciting agents, whom he has no authority either to employ or discharge (Schryver *v.* Metropolitan L. Ins. Co.,

evidently intended to include only such an agent as has charge and management of the ordinary business of the corporation within the particular locality, and who is vested with general powers involving the exercise of judgment and discretion in the management of the ordinary business transacted, at least within that locality.[85] In order that a person shall be a managing agent within such provision it is not necessary that he shall have entire control or charge of defendant's business,[86] but he must be intrusted with the carrying on of the corporate business or some substantial part thereof.[87]

(IV) *AGENT OR EMPLOYEE.* Service upon a mere agent of the corporation is not sufficient unless specifically permitted by statute.[88] But in many jurisdictions, in default of the presence of a member of a superior class of officers as already noted,[89] it is expressly provided that service may be had upon an agent.[90] Under

29 N. Y. Suppl. 1092), an attorney in fact for a private corporation, authorized to apply for a patent to mining ground claimed by the corporation, and to execute such papers as might be necessary for that purpose (Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19), an agent in charge of a branch store belonging to a corporation (Osborne *v.* Columbia County Farmers' Alliance Corp., 9 Wash. 666, 38 Pac. 160), the teller of a bank (Kennedy *v.* Hibernia Sav., etc., Soc., 38 Cal. 151), a director of a railroad company (Alabama, etc., R. Co. *v.* Burns, 43 Ala. 169), an employee of a domestic corporation who attends to the publication of a periodical issued by it, and to its printing, binding, and mailing, under instructions received immediately from the officers of the company (Ruland *v.* Canfield Pub. Co., 10 N. Y. Suppl. 913, 18 N. Y. Civ. Proc. 282), the recording agent of an insurance company, whose business is merely to write policies and look after the interests of the company in connection with property insured by him (State Ins. Co. *v.* Waterhouse, 78 Iowa 674, 43 N. W. 611), a person appointed by a corporation to sell its goods at fixed prices, receiving a fixed commission, and having no authority outside of such sales (Atlas Glass Co. *v.* Ball Bros. Glass Mfg. Co., 87 Fed. 418).

The word "manager" in the Pennsylvania act of March 17, 1856, relating to service of process upon corporations, is equivalent to "director." Service upon an employee, acting as superintendent of the corporation and styled "manager," is insufficient. Johnson *v.* Carbon County Electric R. Co., 18 Pa. Co. Ct. 479.

85. Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19.

86. Taylor *v.* Granite State Provident Assoc., 20 N. Y. Suppl. 135.

Presumption from fact of sole agency.— Where a domestic corporation has only one agent residing in this state, he will be presumed to be its "managing agent," within Rev. St. § 2637, subd. 10, providing that in an action against a domestic corporation the summons may be served on its managing agent. Wickham *v.* South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287.

87. U. S. *v.* American Bell Tel. Co., 29 Fed. 17. See also Brun *v.* Northwestern Realty Co., 52 Misc. (N. Y.) 528, 102 N. Y. Suppl. 473; Boynton *v.* Keesevllle Electric Light, etc., Co., 5 Misc. (N. Y.) 118, 25 N. Y. Suppl. 741 [*affirmed* in 78 Hun 609, 28 N. Y. Suppl. 1117]; Bucket Pump Co. *v.* Eagle Iron, etc., Co., 21 Ohio Cir. Ct. 229, 11 Ohio Cir. Dec. 418.

88. Union Pac. R. Co. *v.* Pillsbury, 29 Kan. 652; Southern Express Co. *v.* Craft, 43 Miss. 508; Cochran *v.* Library Co., 6 Phila. (Pa.) 492.

Special agent.— Service on an agent employed for a special purpose is insufficient. Parke *v.* Commonwealth Ins. Co., 44 Pa. St. 422; Means *v.* Lycoming Ins. Co., 1 C. Pl. (Pa.) 6.

89. See *supra*, VI, A, 6, d, (I).

90. Gilchrist Transp. Co. *v.* Northern Grain Co., 204 Ill. 510, 68 N. E. 558 [*affirming* 107 Ill. App. 531]; Tennent-Stribbling Shoe Co. *v.* Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368 (holding that an assistant manager of a corporation is an agent); Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123 (holding that an independent contractor with the corporation is not an agent); Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333; Moinet *v.* Burnham, 143 Mich. 489, 106 N. W. 1126; Turner *v.* St. Claire Tunnel Co., 102 Mich. 574, 61 N. W. 72.

A traveling salesman has been held an agent for the purpose of service of process. Moinet *v.* Burnham, 143 Mich. 489, 106 N. W. 1126. But one who sells goods for a corporation upon commission, who pays his own expenses, is master of his own time and movements, and who is without authority to fix prices, collect accounts, or transact any other business for such corporation is not an agent upon whom process can be had. Temby *v.* William Brunt Pottery Co., 127 Ill. App. 441 [*affirmed* in 229 Ill. 540, 82 N. E. 336].

Termination of agency.—A corporation need not give notice of the termination of the relationship to those transacting business with its agent, so far as the service of process is concerned. If a person served with summons as the agent of a corporation is not at the time of service such agent, the service is bad. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460. See also Persons *v.* Buffalo City Mills, 29 N. Y. App. Div. 45, 51 N. Y. Suppl. 645.

Estoppel of corporation to deny agency.— When the corporation has suffered a person to hold himself out to the public as its agent so as to render it inequitable for the ap-

some statutes the nature of the agency is limited by the requirement that service be upon a chief agent,[91] general agent,[92] local agent,[93] or agent having charge of the agency out of which the transaction in question arose.[94] Service upon a mere employee or servant of the corporation is not as a general rule sufficient,[95] although under some statutes service may be made upon any officer, agent, or employee.[96] In any event service upon one who is employed by the officer of the corporation, and not the corporation, is insufficient.[97] Particular provisions are frequently made with regard to service upon railroad companies, authorizing service upon particular classes of agents, such as depot or ticket agents,[98] or freight

parent agency to be denied, service of process upon such agent will be sufficient. Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123.

A person not hired or paid by a corporation, and who is not subject to the orders of such corporation, who cannot be discharged by it, and who performs no function in its behalf, is not such an agent as represents it for the purposes of service of summons. Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125.

Service upon the agent of one corporation in an action against another corporation which he does not represent is insufficient. International Text-Book Co. *v.* Heartt, 136 Fed. 129, 69 C. C. A. 127.

Residence.— Under some statutes the agent must be a resident within the jurisdiction. Chicago, etc., R. Co. *v.* Walker, 9 Lea (Tenn.) 475, holding that service upon a traveling passenger agent of a railroad company was insufficient.

91. Louisville, etc., R. Co. *v.* Com., 5 Ky. L. Rep. 317, holding that where there are several agents of the corporation having similar powers in the county, any one of the class is a chief agent.

92. Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding that summons was properly served upon a foreman of a mine, who was under the orders of and made his reports to a general agent.

93. See the statutes of the several states. And see the following cases:

Indiana.— Globe Acc. Ins. Co. *v.* Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291.

Kentucky.— National Bldg., etc., Assoc. *v.* Gallagher, 54 S. W. 209, 21 Ky. L. Rep. 1140.

North Carolina.— Katzenstein *v.* Raleigh, etc., R. Co., 78 N. C. 286.

Oregon.— Hildebrand *v.* United Artisans, 46 Oreg. 134, 79 Pac. 347, 114 Am. St. Rep. 852.

Texas.— Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Choctaw, etc., R. Co. *v.* Locke, (Civ. App. 1906) 92 S. W. 258; El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

United States.— Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699.

94. Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653 (holding that an agency would not be regarded as terminated upon the last day of the agency agreement if it did not appear that the corporation finally settled with or discharged the agent after the determination of the agreed time); Centennial Mut. Life Assoc. *v.* Walker, 50 Iowa 75; Mark Twain Lumber Co. *v.* Lieberman, 106 Tenn. 153, 61 S. W. 70 (holding that such a statute did not authorize service upon an agent who operated in several counties, traveling from place to place and stopping whenever convenient, sometimes for three or four days at a time in the county where service was made).

95. See State Medical College *v.* Rushing, 124 Ga. 239, 52 S. E. 333, holding that an instructor in a college was not an officer or agent upon whom process could be served.

96. Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

97. Jones *v.* Manganese Iron Ore Co., (N. J. Ch. 1885) 3 Atl. 517.

98. *Michigan.*— Detroit *v.* Wabash, etc., R. Co., 63 Mich. 712, 30 N. W. 321, holding that service upon a commercial agent was not good under a statute permitting service upon any station agent or ticket agent.

Mississippi.—Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541.

Missouri.— Hudson *v.* St. Louis, etc., R. Co., 53 Mo. 525.

West Virginia.—Douglass *v.* Kanawha, etc., R. Co., 44 W. Va. 267, 28 S. E. 705.

Wisconsin.— Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344.

United States.— Woodcock *v.* Baltimore, etc., R. Co., 107 Fed. 767, holding that service upon a regular ticket agent was sufficient, although he was not employed upon the line of the road.

But *compare* Richardson *v.* Mine Hill, etc., R. Co., 1 Leg. Rec. (Pa.) 169.

Nearest station or freight agent.— Under some statutes the service may be made upon the nearest passenger or freight agent. See Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371; State *v.* Hannibal, etc., R. Co., 51 Mo. 532; Antonelli *v.* Basile, 93 Mo. App. 138; Horn *v.* Mississippi River, etc., R. Co., 88 Mo. App. 469; Werries *v.* Missouri Pac. R. Co., 19 Mo. App. 398; Farmer *v.* Medcap, 19 Mo. App. 250. Under such a statute the agent may be located in another county. Nashville, etc., R. Co. *v.* Mattingly, 101 Ky. 219, 40 S. W. 673, 19 Ky. L. Rep. 373, 374.

A union depot employee may be regarded as the ticket agent of a railroad company. Hillary *v.* Great Northern R. Co., 64 Minn.

agents.[99] A general passenger agent has been regarded as a chief agent for the service of process,[1] and service may be made upon a freight solicitor as an agent.[2] In some jurisdictions service upon a railroad conductor is sustained.[3] A section foreman may be regarded as a local superintendent;[4] but a track master is not a proper person to be served, where it appears that there are officers of the corporation upon whom service may be had.[5]

(v) *Officer De Facto.* Where service is made upon a person who is *de facto* one of the officers comprehended by the statute, it is as a general rule regarded as sufficient.[6] Where a corporation has not yet received its charter, service upon one as its officer is insufficient.[7]

(vi) *Persons Interested Adversely to Corporation.* Where service is made upon an officer or agent who, although within the terms of the statute, sustains such a relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorized.[8] So service will not be sustained where it is upon a person who is a party plaintiff,[9] or plaintiff's attorney in fact,[10] or who is plaintiff's assignor.[11]

(vii) *After Resignation of Officer or Failure to Elect.* An officer designated by statute may be served as such as long as he remains an officer *de jure*.[12] Service upon an officer who has effected a valid resignation is, however, inoperative.[13] But where the resignation of a corporate officer has never been acted upon and he continues to discharge his duties as officer, the corporation

361, 67 N. W. 80, 32 L. R. A. 448; Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629.

The ticket agent of another corporation who sells interchangeable tickets issued by defendant corporation, good over the roads of both defendant and the first corporation, cannot be regarded as an agent of defendant. Doster *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1908) 107 S. W. 579.

99. Toledo, etc., R. Co. *v.* Owen, 43 Ind. 405; Harrow *v.* Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926. See also cases cited *supra*, 98.

Where shipment is by connecting carriers, service upon the agent of the first carrier is insufficient in an action against the last of the several connecting carriers. Louisville, etc., R. Co. *v.* Chestnut, 72 S. W. 351, 24 Ky. L. Rep. 1846.

1. Chesapeake, etc., R. Co. *v.* Cowherd, 96 Ky. 113, 27 S. W. 990, 16 Ky. L. Rep. 373.

2. Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965.

3. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; New Albany, etc., R. Co. *v.* Tilton, 12 Ind. 3, 74 Am. Dec. 195; New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243. *Contra*, Chicago, etc., R. Co. *v.* Groves, 7 Okla. 315, 54 Pac. 484.

4. St. Louis, etc., R. Co. *v.* De Ford, 38 Kan. 299, 16 Pac. 442, so holding, where it appeared that the company had not taken advantage of a statute allowing it to designate an agent for the service of process.

5. Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260.

6. McCall *v.* Byram Mfg. Co., 6 Conn. 428; Perry Dist. Fair Soc. *v.* Zenor, 95 Iowa 515, 64 N. W. 598; Berrian *v.* Methodist Soc., 6 Duer (N. Y.) 682, 4 Abb. Pr. 424; Stillman *v.* Associated Lace Makers' Co., 14 Misc. (N. Y.) 503, 35 N. Y. Suppl. 1071.

7. Bartram *v.* Collins Mfg. Co., 69 Ga. 751.

8. Atwood *v.* Sault Ste. Marie Light, etc., Co., 148 Mich. 224, 111 N. W. 747.

9. St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32; St. Louis, etc., Coal, etc., Co. *v.* Edwards, 103 Ill. 472; Buck *v.* Ashuelot Mfg. Co., 4 Allen (Mass.) 357.

10. George *v.* American Ginning Co., 46 S. C. 1, 24 S. E. 41, 57 Am. St. Rep. 671, 32 L. R. A. 764. See Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763. But see U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342, holding that service of process upon the president of a defendant corporation who is attorney for plaintiff in the suit is not void but voidable upon proper exception thereto.

11. White House Mountain Gold Min. Co. *v.* Powell, 30 Colo. 397, 70 Pac. 679; Atwood *v.* Sault Ste. Marie Light, etc., Co., 148 Mich. 224, 111 N. W. 747; Swift *v.* Globe Varnish Co., 1 N. Y. City Ct. Suppl. 43.

12. Eel River Nav. Co. *v.* Struver, 41 Cal. 616, holding that the president of a corporation might be served as such, although he had ceased to take part in the management of the corporate affairs.

13. Yorkville Bank *v.* Henry Zeltner Brewing Co., 80 N. Y. App. Div. 578, 80 N. Y. Suppl. 839; Buchanan *v.* Prospect Park Hotel Co., 14 Misc. (N. Y.) 435, 35 N. Y. Suppl. 712.

Before acceptance.—It has been held that service of process upon one who has sent his resignation as director of the corporation to the president is not service on the corporation, although the resignation has not been accepted, and although such resignation reduced the number of directors below the minimum allowed by law. Wilson *v.* Brentwood Hotel Co., 16 Misc. (N. Y.) 48, 37 N. Y. Suppl. 655.

cannot, after he has been served by parties having no knowledge that his resignation has been tendered, assert that he has resigned prior to the service of process.[14] A fraudulent resignation to prevent service of process will not invalidate a service upon the officer who has attempted to resign.[15] Under some statutes it is provided that where a corporation has failed to elect officers upon whom process may be served it may be brought into court by publication,[16] or that service may be made upon the late proper officers.[17] Service upon the stock-holders as such, however, is not authorized, although no officers have been elected for many years.[18]

(VIII) *RECEIVER OR AGENT OF RECEIVER.* Where a corporation is being operated by a receiver, service of process upon the corporation cannot be made upon the agent of the receiver.[19] Service upon the receivers, however, may be made upon their local agents in accordance with statutory provisions referring primarily to corporations,[20] and it has been held that the receivers themselves may be served as principal officers.[21] After the appointment of a receiver service upon one who previously has had the custody of the corporate property, but who has at no time been a statutory agent for the service of process, is invalid.[22] The appointment of a receiver for a railroad does not bring it within the provisions of a statute providing for the service of process, where a railroad has permitted its road to be used by any other person or corporation.[23] Where the receivers of a foreign

14. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

Election of successor.— In case the by-laws or articles of association provide that an officer shall hold until his successor has been elected and qualified, service may be had on an officer who has resigned until the corporation has elected his successor. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373. See also Fridenberg *v.* Lee Constr. Co., 27 Misc. (N. Y.) 651, 58 N. Y. Suppl. 391; Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706.

Where there has been no formal resignation by the director, but the president declared at the close of a meeting of the board of directors that there were no longer any directors and stock-holders, and "we have here dissolved," process might still be served upon the directors in their official capacity. Carnaghan *v.* Exporters', etc., Oil Co., 11 N. Y. Suppl. 172.

15. Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447, holding further that where all of the officers of an insolvent corporation transferred their stock to its former president and resigned their offices for the purpose of preventing suit being brought against the corporation, personal service by leaving a copy with the president as the actual stockholder would be sufficient to confer jurisdiction of the corporation. See also J. L. Mott Iron Works *v.* West Coast Plumbing Supply Co., 113 Cal. 341, 45 Pac. 683.

16. United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261.

17. Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218.

18. Bache *v.* Nashville Horticultural Soc., 10 Lea (Tenn.) 436.

19. Cherry *v.* North, etc., R. Co., 59 Ga. 446 (holding that where the state has seized a railroad for non-payment of its bonds, and the receiver retains the employees of the company in office, such employees cannot be regarded as agents of the railroad company for purposes of service); Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Cincinnati, etc., R. Co. *v.* Orme, 1 Ohio Cir. Ct. 511, 1 Ohio Cir. Dec. 285; Collins *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 445, 7 Ohio N. P. 270. But *compare* Faltiska *v.* New York, etc., R. Co., 12 Misc. (N. Y.) 478, 33 N. Y. Suppl. 679 [*affirmed* in 151 N. Y. 650, 46 N. E. 1146] (holding that the appointment of a receiver for a railroad company did not affect the relation of a division superintendent as managing agent, upon whom process might be served, where he was never removed by the company but retained his position after the appointment of the receiver); Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735 (holding that where in an action against a railroad company there had been service of process on an agent duly appointed by defendant, who had never been discharged, it was no ground for plea in abatement by the railroad company that since the appointment of such agent the road had gone into the hands of a receiver).

But where the receiver is the statutory agent of a corporation in the sense that the corporation is charged with certain statutory liabilities for injuries resulting from its operation, whether in the hands of a receiver or not, service may be made upon the agent of the receiver. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 227.

20. Grady *v.* Richmond, etc., R. Co., 116 N. C. 952, 21 S. E. 304; Farris *v.* Richmond, etc., R. Co., 115 N. C. 600, 20 S. E. 167.

21. Wert *v.* Keim, 2 Pa. Co. Ct. 405.

22. Nickolson *v.* Wheeling, etc., Coal Co., 110 Fed. 105.

23. *Ex p.* Charles, 106 Ala. 203, 18 So. 73.

railroad corporation operate a domestic railroad corporation, using the rolling stock of the foreign corporation and dividing the earnings, service of process against the domestic corporation upon its local agents is sufficient.[24]

(IX) *CONSOLIDATED AND LESSOR OR LESSEE CORPORATIONS.* Where a domestic and a foreign corporation are consolidated under the laws of the state, it has been held that the resulting corporation is to be regarded as a domestic corporation within the meaning of a statute providing for the service of process upon domestic corporations.[25] A statutory provision continuing the right of the creditors of the constituent corporations against a corporation formed by their consolidation is not in itself sufficient to make the new corporation the agent of the old for the purpose of service of process,[26] although it has been held that under such a statute a petition in a pending action against one of the constituent corporations may be amended by substituting the consolidated company as a defendant, and the judgment may be entered without additional notice to the consolidated company.[27] Although under the provisions of a statute a lessor railroad company may be liable for the negligence of servants of a lessee railroad in operating it under the lease, the agents of the lessee are not thereby made agents of the lessor for the purpose of service of process.[28] Under a provision that service may be made upon the ticket agent of a corporation in any county in which its railroad is located, the line which passes through the county need not be absolutely owned, but may be leased by defendant.[29]

e. Acknowledgment of Service. An attorney retained by a corporation defendant to represent it in an action may by his acknowledgment of service of summons submit the corporation to the jurisdiction of the court.[30]

f. Service Procured by Fraud. Jurisdiction cannot be obtained where the officer served has been induced by fraud to come within the jurisdiction of the court.[31]

g. Evasion of Service. It has been held that where the officers of the company conceal themselves to prevent service, the service may be made upon one who has repeatedly appeared as an attorney of the company.[32] And where the officer knows that a person in his presence is desirous of serving him with summons he cannot evade service by flight.[33]

h. Service by Publication.[34] By statute provision is sometimes expressly made for the service of process against domestic corporations by publication in case personal service cannot be had.[35] And in some jurisdictions personal judgment is

24. Georgia Southern R. Co. *v.* Bigelow, 68 Ga. 219, holding that especially was such service good when supplemented by service on the sole resident director of the domestic corporation.

25. *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432.

26. Thompson *v.* McMorran Milling Co., 132 Mich. 591, 94 N. W. 188.

27. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574.

28. Perry *v.* Brunswick, etc., R. Co., 119 Ga. 819, 47 S. E. 172; Atlanta, etc., Air-Line R. Co. *v.* Harrison, 76 Ga. 757 (holding that under provision of the Georgia code requiring that in suits against railroad companies which have leased their line service shall be made by sending a letter to the president of the leasing company, the leasing company is the lessor and not the lessee); Chicago, etc., R. Co. *v.* Webber, 219 Ill. 372, 76 N. E. 489, 4 L. R. A. N. S. 272; Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125. See also Branan *v.* Nashville, etc., R. Co., 119 Ga. 738, 46 S. E. 882.

29. Cleveland, etc., R. Co. *v.* McLean, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67.

30. Beebe *v.* Geo. H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

31. Columbia Placer Co. *v.* Bucyrus Steam Shovel, etc., Co., 60 Minn. 142, 62 N. W. 115.

Service obtained by fraud generally see *supra*, II, B, 3.

32. Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628.

33. Boggs *v.* Inter-American Min., etc., Co., 105 Md. 371, 66 Atl. 259. See, generally, *supra*, II, B, 10, d.

34. **Publication** generally see supra, II, D.

35. See the statutes of the several states. And see Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Styles *v.* Laurel Fork Oil, etc., Co., 45 W. Va. 374, 32 S. E. 227, holding an order for publication insufficient to include a corporation defendant.

Place.— Under Ill. Pr. Act, c. 110, § 4, au-

authorized upon such service.[36] An affidavit for an order of publication must show that the statutory grounds therefor exist.[37]

7. RETURN — a. Sufficiency. In an action against a private corporation the return of the officer must affirmatively show that service was made upon an officer or an agent of the corporation specified in the statute as one upon whom service may be made.[38] The connection between the person served and defendant corporation must appear[39] together with the mode of service[40] and the facts author-

thorizing service on corporations by publication in certain cases, service cannot be made upon a corporation by publication except in the county where it has its residence. Mt. Olive Coal Co. *v.* Hughes, 45 Ill. App. 566.

Effect of delay.— Where a declaration was filed and process attached against a corporation, and a regular return was made by the sheriff that defendant was not to be found, and that the president of the corporation was dead, plaintiff was not entitled after the lapse of five terms of the court, without having taken any further action in showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term. Branch *v.* Mechanics' Bank, 50 Ga. 413.

36. Clearwater Mercantile Co. *v.* Roberts', etc., Shoe Co., 51 Fla. 176, 40 So. 436, 4 L. R. A. N. S. 117; Nelson *v.* Chicago, etc., R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. N. S. 1186.

Personal judgment upon constructive service generally see JUDGMENTS, 23 Cyc. 686.

37. Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346; Newton *v.* Pittston Coal Co., 7 Kulp (Pa.) 11. See, generally, *supra*, II, D, 5, d.

38. *Arkansas.*—Arkansas Constr. Co. *v.* Mullins, 69 Ark. 429, 64 S. W. 225.

California.— O'Brien *v.* Shaw's Flat, etc., Canal Co., 10 Cal. 343; Aiken *v.* Quartz Rock Mariposa Gold Min. Co., 6 Cal. 186.

Illinois.— Rock Valley Paper Co. *v.* Nixon, 84 Ill. 11.

Indiana.— New Albany, etc., R. Co. *v.* Powell, 13 Ind. 373.

Kansas.— Dickerson *v.* Burlington, etc., R. Co., 43 Kan. 702, 23 Pac. 936; Union Pac. R. Co. *v.* Pillsbury, 29 Kan. 652.

Kentucky.— Youngstown Bridge Co. *v.* White, 105 Ky. 273, 49 S. W. 36, 20 Ky. L. Rep. 1175.

Maryland.— Northern Cent. R. Co. *v.* Rider, 45 Md. 24.

Michigan.— American Express Co. *v.* Conant, 45 Mich. 642, 8 N. W. 574.

Missouri.— Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Haley *v.* Hannibal, etc., R. Co., 80 Mo. 112; Gate City Electric Co. *v.* Corby, 61 Mo. App. 630.

New York.— New York, etc., R. Co. *v.* Purdy, 18 Barb. 574.

Ohio.— Jones *v.* Toledo, etc., R. Co., 20 Ohio Cir. Ct. 63, 10 Ohio Cir. Dec. 789.

Pennsylvania.— Emmensite Gun, etc., Co. *v.* Pool, 6 Pa. Dist. 47; Dale *v.* Blue Mountain Mfg. Co., 3 Pa. Dist. 763, 15 Pa. Co. Ct. 513, 35 Wkly. Notes Cas. 509 [*affirmed* in 167 Pa. St. 402, 31 Atl. 633]; Powder Co. *v.* Oakdale Coal, etc., Co., 14 Phila. 166; Ohio, etc., R. Co. *v.* Brittain, 1 Pittsb. 271.

South Dakota.— Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19.

West Virginia.— Frazier *v.* Kanawha, etc., R. Co., 40 W. Va. 224, 21 S. E. 723.

United States.—Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156.

Compare Crawford *v.* Wilmington Bank, 61 N. C. 136 (holding that the failure to state the office held by the person served was cured by judgment); Wartrace *v.* Wartrace, etc., Turnpike Co., 2 Coldw. (Tenn.) 515 (holding that, to sustain a judgment of default against a corporation for non-appearance, the return of the summons need not show that the person on whom the process was served is the president, or other head cashier, treasurer, secretary, director, or chief agent, of the corporation in the county.

The affidavit of the secretary of state that two true duplicate copies of the summons against a domestic corporation, having no officers within the state upon whom service could be had, were deposited in his office, one of which he mailed to defendant at the place of his residence, as appeared from the records in his office, held to show service in accordance with the provisions of the statute. Hinckley *v.* Kettle River R. Co., 70 Minn. 105, 72 N. W. 835.

39. *Alabama.*— Oxford Iron Co. *v.* Spradley, 42 Ala. 24.

Colorado.— White House Mountain Gold Min. Co. *v.* Powell, 30 Colo. 397, 70 Pac. 679.

Illinois.— Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 86 Ill. 587; Illinois, etc., R. Co. *v.* Kennedy, 24 Ill. 319; Imperial Bldg. Co. *v.* Cook, 46 Ill. App. 279.

Michigan.— Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006. But see Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66, 45 N. W. 1113, holding that in an action against a railroad company for killing stock a return stating that the "within summons" was served "on the defendant by handing a copy to the station agent," is not objectionable on the ground that it does not show that the station agent was the agent of defendant.

Montana.— Mathias *v.* White Sulphur Springs Assoc., 17 Mont. 542, 43 Pac. 921.

New Jersey.— Den *v.* Fen, 10 N. J. L. 237.

Oregon.— Willamette Falls Canal, etc., Co. *v.* Williams, 1 Oreg. 112.

Wisconsin.— Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 61.

40. Hayden *v.* Atlanta Sav. Bank, 66 Ga. 150; Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713; Park *v.* Oil City Boiler Works, 204 Pa. St. 453, 54 Atl. 334.

izing the adoption of that particular method.[41] The return should show the place of service [42] and the name of the person served.[43] Where service upon a certain inferior class of officers or agents is permitted by statute only in case service cannot be had upon a superior class, the inability to serve any member of the superior class must appear from the return of a process served upon a member of the inferior class.[44]

Leaving copy.— Where two separate citations are issued against one person as the agent of two different corporations, and the return of the officer upon each citation is that he delivered a copy of "this writ," it is to be presumed, the writs being different in wording, that one was delivered for each of the corporations. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

41. Eel River R. Co. *v.* State, 143 Ind. 231, 42 N. E. 617; Hildebrand *v.* United Artisans, 46 Oreg. 134, 79 Pac. 347, 114 Am. St. Rep. 852; Caro *v.* Oregon, etc., R. Co., 10 Oreg. 510; Otto Gas Engine Co. *v.* McFarland, 8 Pa. Dist. 133, 21 Pa. Co. Ct. 622.

Sufficient if facts appear from record.— The return of service on an agent of a corporation need not show all the facts set out in the statute which authorizes and provides for such service, but it is sufficient if they are shown from the record. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

42. Richardson *v.* Mine Hill, etc., R. Co., 1 Leg. Rec. (Pa.) 169; Taylor *v.* Ohio River R. Co., 35 W. Va. 328, 13 S. E. 1009.

Statement that office is defendant's.— In an action against a railway company, a sheriff's return reciting the delivery of the summons to a person having charge of a business office on the line of the railway company, where the ordinary business of the company was regularly transacted, without stating that the office was the office of defendant company, and that he left a copy of the summons with a person in charge of such office, shows an insufficient service of the summons. Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1.

43. Grand Tower Min., etc., Co. *v.* Schirmer, 64 Ill. 106; Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65; Singer *v.* Singer Mfg. Co., 2 Pa. Co. Ct. 578. *Compare* Cincinnati, etc., R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571, holding that it is not essential to the validity of the service of a summons on a railroad company, under Ind. Rev. St. (1881) § 4027, that the return should set forth the full name of the conductor on whom it was served.

44. *Arkansas.*—Arkansas Coal, etc., Mfg. Co. *v.* Haley, 62 Ark. 144, 34 S. W. 545; Cairo, etc., R. Co. *v.* Rea, 32 Ark. 29; Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

Colorado.— Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061, want of such an averment cannot be cured by presumption.

Florida.— Drew Lumber Co. *v.* Walter, 45 Fla. 252, 34 So. 244.

Illinois.— Chicago Sectional Electric Underground Co. *v.* Congdon Brake Shoe Mfg. Co., 111 Ill. 309; Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 86 Ill. 587; Chicago, etc., R. Co. *v.* Kaehler, 79 Ill. 354; Cairo, etc., R. Co. *v.* Joiner, 72 Ill. 520; Reed *v.* Tyler, 56 Ill. 288; St. Louis, etc., R. Co. *v.* Dorsey, 47 Ill. 288; Peoria, etc., R. Co. *v.* Duggan, 32 Ill. App. 351.

Indiana.— Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65; Western Union Tel. Co. *v.* Lindley, 62 Ind. 371.

Kansas.— Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373; Palmetto Town Co. *v.* Rucker, McCahon 146.

Mississippi.— Southern Express Co. *v.* Hunt, 54 Miss. 664.

Missouri.— Hoen *v.* Atlantic, etc., R. Co., 64 Mo. 561; Thomasson *v.* Mercantile Town Mut. Ins. Co., (App. 1904) 81 S. W. 911; Rixke *v.* Western Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265.

Ohio.— Fee *v.* Big Sand Iron Co., 13 Ohio St. 563; Bucket Pump Co. *v.* Eagle Iron, etc., Co., 21 Ohio Cir. Ct. 229, 11 Ohio Cir. Dec. 418; Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

Oregon.— Weaver *v.* Southern Oregon Co., 30 Oreg. 348, 48 Pac. 171, holding, however, that service of summons on a corporation, by delivering a copy to its secretary at its principal office or place of business in the county where action is brought, is sufficient, although the return does not show that he resided or had an office in the county.

United States.—Collins *v.* American Spirit Mfg. Co., 96 Fed. 133; Miller *v.* Norfolk, etc., R. Co., 41 Fed. 431.

But see Congdon *v.* Butte Consol. R. Co., 17 Mont. 481, 43 Pac. 629, holding that since the provision of Comp. St. (1887) div. 1, § 75 (originally enacted in 1883), that service on any corporation doing business in the state may be made on the president or other officer, and, if they cannot be found, then by serving the same on certain subordinate employees, does not repeal section 72, reënacted from Rev. St. (1879), allowing service on the managing agent of a domestic corporation in the first instance, a return of service on such agent need not show that the president or other officer could not be found.

Returns held sufficient to show propriety of service upon inferior class see Crowley *v.* Sumner, 97 Ill. App. 301; Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817; New South Brewing, etc., Co. *v.* Price, 50 S. W. 963, 21 Ky. L. Rep. 11; Brassfield *v.* Quincy, etc., R. Co., 109 Mo. App. 710, 83 S. W. 1032; McMurtry *v.* Tuttle, 13 Nebr.

b. Construction and Conclusiveness. As a general rule the return of service is to be strictly construed.[45] In accordance with the rules already stated,[46] the sheriff's return is in some jurisdictions conclusive between the parties as to the facts stated,[47] while in other jurisdictions it may be controverted.[48] For example, while in any event the return is at least *prima facie* evidence that persons described in it as officers or agents of the corporation are in fact such,[49] in some jurisdictions it is conclusive as to such fact,[50] while in other jurisdictions it may be controverted.[51] It will be presumed in support of the return that the officer acted within the limits of his jurisdiction.[52] So where it is shown that a person was at one time a director it may be presumed that his character as director continued until the time of service of process.[53]

8. Defects, Objections, and Waiver.[54] As a general rule defects in the process or service thereof against a corporation are properly urged by a motion to quash the process or return[55] and cannot be urged after a general appearance to the

232, 13 N. W. 213; Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. ed. 963 [*affirming* 88 Tenn. 721, 13 S. W. 698].

45. Holtschneider *v.* Chicago, etc., R. Co., 107 Mo. App. 381, 81 N. W. 489; Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1, holding that where an officer's return of a summons on a certain railroad company showed service upon a person in charge of an office of a railway of identically the same name, the appellate court in order to sustain jurisdiction of the trial court could not hold that the railway and the railroad were identical. But *compare* Hill *v.* St. Louis Ore, etc., Co., 90 Mo. 103, 2 S. W. 289.

Delivery by and through agent.—A sheriff's return on a citation that he executed it by delivering it to defendant named in person "by and through" an officer named, is fatally defective as indicating that the officer and not the sheriff served the process. Galveston, etc., R. Co. *v.* Ware, 74 Tex. 47, 11 S. W. 918; Texas Home Mut. F. Ins. Co. *v.* Bowlin, (Tex. Civ. App. 1902) 70 S. W. 797.

46. See *supra*, III, D, 3, b.

47. Taussig *v.* St. Louis, etc., R. Co., 186 Mo. 269, 85 S. W. 378.

48. Perry *v.* Brunswick, etc., R. Co., 119 Ga. 819, 47 S. E. 172; Wheeler *v.* New York, etc., R. Co., 24 Barb. (N. Y.) 414.

49. Keener *v.* Eagle Lake Land, etc., Co., 110 Cal. 627, 43 Pac. 14; Rowe *v.* Table Mountain Water Co., 10 Cal. 441; San Antonio, etc., R. Co. *v.* Wells, 3 Tex. Civ. App. 307, 23 S. W. 31, holding that further proof than the return was not necessary to support a default in judgment. See *contra*, Southern Express Co. *v.* Carroll, 42 Ala. 437; Wetumpka, etc., R. Co. *v.* Coles, 6 Ala. 655; St. John *v.* Tombeckbee Bank, 3 Stew. 146, all holding that where process against a corporation is returned as served on one as being an officer, proof of his official character must be made to the court and so appear on the record to sustain a judgment by default.

50. State *v.* O'Neill, 4 Mo. App. 221; Stratton *v.* Lyons, 53 Vt. 130.

51. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833; Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568; El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Carr *v.* Commercial Bank, 16 Wis. 50.

Where an allegation that a railroad company has an agency within the state is denied in order to avoid the effect of a service on the alleged agent, the return of the officer serving the process as to the fact of the agency is not conclusive. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. See also Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14.

52. Baltimore, etc., R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440. See Missouri, etc., R. Co. *v.* Crowe, 9 Kan. 496.

53. Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

54. Process generally see *supra*, IV.

55. American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276 (holding that the objection that the person served was not in fact the agent of the corporation should be urged by motion to quash the return); American Bell Tel. Co. *v.* Pan Electric Tel. Co., 28 Fed. 625.

Plea in abatement.— The question whether a summons has been served on the proper person as agent of the corporation cannot be raised by plea in abatement. Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88.

Denial must be under oath.— Where a return shows that citation was served on the president, secretary, and local agent of a corporation, the citation will not be quashed on motion, upon the ground that the names of such officers were not in the petition and writ, where defendant does not deny under oath that the persons served were the officers or agents. Illinois Steel Co. *v.* San Antonio, etc., R. Co., 67 Fed. 561.

Burden of proof.— The burden is on defendant to disprove the fact of agency, where the denial of agency is ground for the motion to quash. Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88.

Remand to rules.— Where the return of a summons is quashed as having been served less than ten days before return-day, the case is properly remanded to rules. Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

merits,[56] although where the corporation is not correctly named the defect should be taken advantage of by a plea in abatement showing the correct name.[57] Defendant must inform plaintiff how better service may be had,[58] and the corporation may by its acts be estopped from asserting that the person served was not a proper one.[59] But a failure on the part of the person served to object at the time of service that he does not occupy the office as incumbent of which he is served will not overcome his positive oath that he is not such officer on a motion to set aside the service.[60] Where a corporation sues out a writ of error after default has been taken against it, employing the name under which it was served, it cannot assert a misnomer.[61]

B. Foreign Corporations[62]— **1. In General.** At common law foreign corporations could not be served with process by any of the courts of common law, nor could their property be attached to compel their appearance. The authority whenever it exists results from special custom or statutory provision.[63] Where a foreign corporation confines its operation to the state within which it is created, it cannot be sued in a state where it has no office and transacts no business, by serving process on its president or other officer or agent when accidentally or casually present within such state.[64] In order that jurisdiction may be obtained of a foreign corporation it must have entered the state in which it is served for the purpose of carrying on its business there,[65] and process must have been served upon an agent sustaining such a relation to it that notice to the agent might well be deemed notice

Service may be set aside on rule, and it is not necessary to file a plea in abatement. Park *v.* Oil City Boiler Works, 204 Pa. St. 453, 54 Atl. 334.

56. Burlington, etc., R. Co. *v.* Burch, 17 Colo. App. 491, 69 Pac. 6; Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Ireton *v.* Baltimore, 61 Md. 432; Fee *v.* Big Sand Iron Co., 13 Ohio St. 563.

Misnomer may then be cured by amendment.— Keech *v.* Baltimore, etc., R. Co., 17 Md. 32; Roberts *v.* National Ice Co., 6 Daly (N. Y.) 426.

Cured by judgment.—A return served on an officer of the corporation, without designating his office, is if thereby invalid cured by judgment. Crawford *v.* Wilmington Bank, 61 N. C. 136.

57. Wilhite *v.* Good Shepherd Convent, 117 Ky. 251, 78 S. W. 138, 25 Ky. L. Rep. 1375, holding that the objection could not be urged upon a motion to quash the return.

58. Hill *v.* Morgan, 9 Ida. 718, 76 Pac. 323 (holding that service of summons on a corporation is sufficient where it is served upon one who had theretofore been served with process and the corporation accepted such service by its appearance, where it is not shown that the corporation through its attorney or some one authorized to act for it did not inform the party in interest how better service could be had); Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706 (holding that a motion to quash the return should not only state the grounds of the motion, but should point out the person on whom service should be made).

Where knowledge on the part of plaintiff appears from the record such a showing need not be made. Youngstown Bridge Co. *v.* White, 105 Ky. 273, 49 S. W. 36, 20 Ky. L. Rep. 1175.

59. Wilson *v.* California Wine Co., 95 Mich. 117, 54 N. W. 643 (holding that where summons is served on a member of a corporation as its president, and he tells the officer there is another person president, as does also the treasurer of the corporation, and service is made on him, the corporation cannot for the purpose of showing that it was not properly summoned prove that such person was not its president); Taylor Provision Co. *v.* Adams Express Co., 71 N. J. L. 523, 59 Atl. 10 (holding that a corporation cannot question the sufficiency of service upon an agent whom the corporation's general counsel had stated to plaintiff's attorney was authorized to accept such service).

60. Scott *v.* Stockholders' Oil Co., 120 Fed. 698.

61. Brassfield *v.* Quincy, etc., R. Co., 109 Mo. App. 710, 83 S. W. 1032.

62. Appointment of agent for service of process see FOREIGN CORPORATIONS, 19 Cyc. 1255.

Jurisdiction of proceedings in rem against corporation see FOREIGN CORPORATIONS, 19 Cyc. 1330.

Process against foreign fire insurance company see FIRE INSURANCE, 19 Cyc. 916.

Process against foreign life insurance company see LIFE INSURANCE, 25 Cyc. 915.

Process against foreign mutual benefit insurance company see MUTUAL BENEFIT INSURANCE, 29 Cyc. 220.

Service on corporation after withdrawal from state see FOREIGN CORPORATIONS, 19 Cyc. 1346.

63. Clarke *v.* New Jersey Steam Nav. Co., 5 Fed. Cas. No. 2,859, 1 Story 531.

64. See FOREIGN CORPORATIONS, 19 Cyc. 1327.

65. What constitutes carrying on business see FOREIGN CORPORATIONS, 19 Cyc. 1267 *et seq.*

to the principal, without a violation of the principles of natural justice.[66] A corporation is held to have impliedly agreed that it may be served with process according to the statutes of the state in which it does business by the fact that it enters the state and transacts business therein.[67] Whether a corporation has subjected itself to the laws of a state other than that of its domicile, so as to be bound by service of process in such state, in a personal action, made in accordance with its laws, is a question of general and not of local law.[68] An agreement by a corporation as a condition of doing business within the state that service of process may be made upon an agent resident for that purpose does not authorize service of process against him within the state in a transitory action for personal injuries arising in another state.[69] Under some statutes it is provided that service may be made upon a corporation which has property within the state, although the cause of action has not arisen within the state.[70] Under such a statute no specific quantity of property or value thereof is necessary to confer jurisdiction, but it must be property of a kind and value to justify a reasonable probability that the creditor may acquire something from the sale thereof.[71]

2. Statutory Provisions. As a general rule specific provisions are made by statute for the service of process upon foreign corporations.[72] And such statutes may in a proper case be construed as cumulative to statutes making provision as to the service of process upon corporations generally;[73] but as a general rule statutes making no express provisions as to service upon foreign corporations will not be deemed to apply to them,[74] although in some cases a contrary rule has been applied.[75] In case specific provisions for a particular kind of process are made by statutes relating to foreign corporations they are exclusive.[76] The fact that a corporation is required by the statute to appoint an attorney or agent upon whom process may be served is not exclusive of other methods of service;[77] and

66. See Foreign Corporations, 19 Cyc. 1328.

67. See Foreign Corporations, 19 Cyc. 1329.

68. Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

69. Olson *v.* Buffalo Hump Min. Co., 130 Fed. 1017.

70. See the statutes of the several states. And see Strom *v.* Montana Cent. R. Co., 81 Minn. 346, 84 N. W. 46; Fontana *v.* Post Printing, etc., Co., 87 N. Y. App. Div. 233, 84 N. Y. Suppl. 308; Reilly *v.* Philadelphia, etc., R. Co., 109 Fed. 349; Fontana *v.* Chronicle-Tel. Co., 83 Fed. 824.

71. Strom *v.* Montana Cent. R. Co., 81 Minn. 346, 84 N. W. 46, holding that while in the case of a foreign railroad corporation railroad cars in transit through the state would not constitute such property, nor would unissued passenger tickets, nor a cash book, nor similar books, the credits due the corporation from persons or corporations within the state would be sufficient. See also Reilly *v.* Philadelphia, etc., R. Co., 109 Fed. 349 (holding that a leasehold interest in vessels within the state, under a lease for the term of forty-nine years, constituted property); Fontana *v.* Chronicle-Tel. Co., 83 Fed. 824 (holding that debts due a foreign corporation from solvent debtors residing in New York constituted property within the state).

72. See the statutes of the several states.

Repeal.—A statute requiring that service of process shall be made upon an agent found within the county where the suit is brought, and that the clerk shall mail a copy of the process to the home office of the corporation, does not by implication repeal a statute regulating the service of process on a foreign corporation having a resident local agent. Cumberland Tel., etc., Co. *v.* Turner, 88 Tenn. 265, 12 S. W. 544. A statute providing that where defendant is a foreign corporation having an agent in the state service of process may be made on such agent is not repealed by a statute providing that to entitle the foreign corporation to carry on business in the state it shall designate an agent on whom service of process may be made. Lesser Cotton Co. *v.* Yates, 69 Ark. 396, 63 S. W. 997.

73. Eagle Life Assoc. *v.* Redden, 121 Ala. 346, 25 So. 779.

74. Grand Trunk R. Co. *v.* Wayne Cir. Judge, 106 Mich. 248, 64 N. W. 17; People *v.* Judge Wayne Cir. Ct., 24 Mich. 38; Sullivan *v.* La Crosse, etc., Steam Packet Co., 10 Minn. 386; Combs *v.* Kentucky Bank, 3 Pa. L. J. 58; Hall *v.* Vermont, etc., R. Co., 28 Vt. 401. *Compare* Williams *v.* Iron Belt Bldg., etc., Assoc., 131 N. C. 267, 42 S. E. 607.

75. Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653; Chicago, etc., R. Co. *v.* Manning, 23 Nebr. 552, 37 N. W. 462.

76. Quade *v.* New York, etc., R. Co., 59 N. Y. Super. Ct. 479, 14 N. Y. Suppl. 875; Smith *v.* Hoover, 39 Ohio St. 249.

77. *Arkansas.*— Lesser Cotton Co. *v.* Yates, 69 Ark. 396, 63 S. W. 997.

the same is true where the corporation is required by the statute to designate a place for service.[78]

3. General Form and Requisites. Under the present statutes process against a foreign corporation may usually issue in the form required in other civil actions.[79] Under early statutes, however, it was sometimes held that an action against such a defendant must be begun by attachment.[80] The summons need not set forth the circumstances rendering the corporation liable to suit within the state,[81] and need not name the agent on whom it is to be served.[82] The petition need not pray for the issuance of citation.[83]

4. Place of Service. In case the statute fix the place at which process shall be served its provisions must be followed.[84] Where an agent has been designated to receive service of process, service may be made upon him in a county other than that in which suit is brought.[85] Where process may be served on the principal officer of a foreign corporation it may be served on him in the county where he resides.[86] Service must be made within the limits of the state in order to authorize a personal judgment.[87]

5. Persons Who May Be Served — a. In General. In the absence of statutory provisions, process, in an action against a corporation, is sufficient if served upon some person upon whom it may fairly be presumed the duty involves, by virtue of his official position or his employment, to communicate the fact of service to the governing power of the corporation.[88] In case the statute designates the officer or agent who may be served its provisions must be followed.[89] The statutory provi-

Colorado.— Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

Kansas.— See Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560, 4 L. R. A. N. S. 460.

Louisiana.— *In re* Curtis, 115 La. 918, 40 So. 334, 112 Am. St. Rep. 284.

New York.— Howard *v.* Prudential Ins. Co., 1 N. Y. App. Div. 135, 37 N. Y. Suppl. 832. *Contra*, Travis *v.* Railway Educational Assoc., 33 Misc. 577, 68 N. Y. Suppl. 893.

United States.— Henrietta Min., etc., Co. *v.* Johnson, 173 U. S. 221, 19 S. Ct. 402, 43 L. ed. 675 [*affirming* 5 Ariz. 222, 81 Pac. 1126]; Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

Contra.— Bes Line Constr. Co. *v.* Taylor, 16 Okla. 481, 85 Pac. 713; Bes Line Constr. Co. *v.* Schmidt, 16 Okla. 429, 85 Pac. 711; Hewes *v.* Machine Co., 2 Leg. Rec. (Pa.) 210.

78. Littlejohn *v.* Southern R. Co., 45 S. C. 96, 22 S. E. 761.

79. Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641; Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75; Gibbs *v.* Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513; Hulbert *v.* Hope Mut. Ins. Co., 4 How. Pr. (N. Y.) 275, 2 Code Rep. 148 [*affirmed* in 4 How. Pr. 415]. See also Middough *v.* St. Joseph, etc., R. Co., 51 Mo. 520.

80. Middlebrooks *v.* Springfield F. Ins. Co., 14 Conn. 301; Lawrence *v.* New Jersey R., etc., Co., 1 How. Pr. (N. Y.) 250.

81. Benwood Ironworks *v.* Hutchinson, 101 Pa. St. 359.

82. Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608; Missouri Pac. R. Co. *v.* Wise, 3 Tex. App. Civ. Cas. § 386. But *compare* Continental Ins. Co. *v.* Mansfield, 45 Miss. 311.

83. Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 443.

84. Wagner *v.* Shank, 59 Md. 313; American Surety Co. *v.* Holly Springs, 77 Miss. 428, 27 So. 612; Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398; Hammel *v.* Fidelity Mut Aid Assoc., 42 Wash. 448, 85 Pac. 35.

85. Sattler *v.* Aultman, etc., Mach. Co., 6 Pa. Dist. 419.

86. Augusta Nat. Bank *v.* Southern Porcelain Mfg. Co., 55 Ga. 36, holding that where the president of a foreign corporation doing business in this state, as well as a majority of the stock-holders, resided in this state, and all meetings of the stock-holders had been here held, and its books were in the hands of the president, service upon the president at his residence in this state, at which place the stock-holders were at the time under notice to meet, was sufficient service on the company.

87. Steele *v.* Schaffer, 107 Ill. App. 320; Louisville, etc., R. Co. *v.* Emerson, 43 Tex. Civ. App. 281, 94 S. W. 1105; Louisville, etc., R. Co. *v.* Missouri, etc., R. Co., 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276.

Right to sue in personam where corporation is not found see Foreign Corporations, 19 Cyc. 1325.

88. Georgia Cent. R. Co. *v.* Eichberg, (Md. 1908) 68 Atl. 690.

Curator ad hoc.—A private corporation, having no resident agent in Louisiana, may be cited through a curator *ad hoc*, in a suit for the annulment of an ordinance and an executory contract made thereunder between the foreign corporation and the police jury of a parish for the erection of bridges to be paid for in notes of the parish, which the police jury has no authority to issue. Snelling *v.* Joffrion, 42 La. Ann. 886, 8 So. 609.

89. See the statutes of the several states.

sions vary to a considerable degree.[90] Under some statutes the officers or agents who may be served are the same as in the case of actions against domestic corporations.[91] Where an officer or agent is appointed under a statutory requirement to receive service of process, service may be made upon him.[92] In the application of particular statutes it has been held that service may be properly made upon the president of a foreign corporation where he is a resident within the state,[93] or upon a director.[94] A locomotive engineer may by statute be made a proper person for service.[95]

b. Agents — (I) *IN GENERAL.* Under some statutes process may be served upon any agent.[96] Under other statutes the character of the agent is more specifically defined, he being required to be a local agent,[97] or resident agent.[98]

(II) *AUTHORITY.* Service of process upon an agent of a foreign corporation doing business within the state must be upon an agent representing the corporation with respect to such business.[99] The agent must be an agent in fact, not merely

And see Pennsylvania R. Co. *v.* Kreitzman, 57 N. J. L. 60, 29 Atl. 587; State *v.* King Bridge Co., 28 Ohio Cir. Ct. 147; Farmers' L. & T. Co. *v.* Warring, 20 Wis. 290; Sobrio *v.* Manhattan L. Ins. Co., 72 Fed. 566.

90. See the statutes of the several states. And see cases cited *infra*, this section.

91. Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660. See also Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

92. Eureka Lake, etc., Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 5 Pac. 490; Swallow *v.* Duncan, 18 Mo. App. 622.

93. Grant *v.* Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191 [*reversing* 117 N. Y. App. Div. 576, 102 N. Y. Suppl. 642]; Epstein *v.* S. Weisberger Co., 52 Misc. (N. Y.) 572, 102 N. Y. Suppl. 488; Revans *v.* Southern Missouri, etc., R. Co., 114 Fed. 982, having office and performing duties in state.

94. Meyer *v.* Pennsylvania Lumbermen's Mut. F. Ins. Co., 108 Fed. 169. See Childs *v.* Harris Mfg. Co., 104 N. Y. 477, 11 N. E. 50. *Contra*, Barney *v.* New Albany, etc., R. Co., 1 Handy (Ohio) 571, 12 Ohio Dec. (Reprint) 295.

Must be charged with business of the corporation.— Service upon a director who is found within the district, but who neither transacts any corporate business therein nor is charged with any business of the corporation, is not under the general law a sufficient service to give a federal court jurisdiction over the corporation. Reilly *v.* Philadelphia, etc., R. Co., 109 Fed. 349.

95. De Vere *v.* Delaware, etc., R. Co., 60 Fed. 886. But see Carroll *v.* New York, etc., R. Co., 65 N. J. L. 124, 46 Atl. 708.

96. *Kentucky.*— Nelson *v.* Rekhopf, 75 S. W. 203, 25 Ky. L. Rep. 352; Boyd Commission Co. *v.* Coates, 69 S. W. 1090, 24 Ky. L. Rep. 730; L. Dodge Lumber Co. *v.* Macquithy, 14 Ky. L. Rep. 142.

New Jersey.— Norton *v.* Berlin Iron Bridge Co., 51 N. J. L. 442, 17 Atl. 1079.

Pennsylvania.— Hagerman *v.* Empire Slate Co., 97 Pa. [illegible] 534.

South Carolina.—Sellers *v.* Home Fertilizer Chemical Works, 76 S. C. 343, 56 S. E. 978; Jenkins *v.* Penn Bridge Co., 73 S. C. 526, 53 S. E. 991.

Washington.— Sievers *v.* Dalles, etc., Nav. Co., 24 Wash. 302, 64 Pac. 539.

Wisconsin.— Burgess *v.* Aultman, 80 Wis. 292, 50 N. W. 175.

United States.— *In re* Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. ed. 1121.

Receiver.— Under Colo. Code, p. 13, § 37, providing that service of process against a corporation may be made upon the agent, cashier, or secretary, a service upon the receiver of a foreign corporation is sufficient. Ganebin *v.* Phelan, 5 Colo. 83.

97. People *v.* Tilden, 121 N. Y. App. Div. 352, 106 N. Y. Suppl. 247; Westinghouse Electric Mfg. Co. *v.* Trolle, 30 Tex. Civ. App. 200, 70 S. W. 324; Société Foncière et Agricole des Etats Unis *v.* Milliken, 135 U. S. 304, 10 S. Ct. 823, 34 L. ed. 208; Barnes *v.* Western Union Tel. Co., 120 Fed. 550.

Who are local agents.—A local agent is a representative of the corporation to transact its business and represent it in a particular locality; it does not embrace the idea of an agent who casually happens to be in the particular territory, or one who is temporarily sent to such territory to perform some particular purpose or specific act. Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608. In accordance with this rule it has been held that a person may be served as local agent who is the acting secretary (Cameron *v.* Jones, 41 Tex. Civ. App. 4, 90 S. W. 1129), or a local operator of defendant wireless telegraph company (Copland *v.* American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501). But service cannot be had upon an attorney having claims to collect for a foreign corporation (Moore *v.* Freeman's Nat. Bank, 92 N. C. 590), a state agent (Western Cottage Piano, etc., Co. *v.* Anderson, 97 Tex. 432, 79 S. W. 516), a traveling auditor (Sherwood Higgins Co. *v.* Sperry, etc., 139 N. C. 299, 51 S. E. 1020), one who merely hired a watchman for a foreign corporation's premises (Kelly *v.* Lefavier, 144 N. C. 4, 56 S. E. 510), or one who had charge of the warehouse jointly used by defendant and other corporations, but over whom defendant had no control (Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699).

98. Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

99. Georgia Cent. R. Co. *v.* Eichberg, (Md.

by construction of law, and must be one having in fact representative capacity and derivative authority.[1] But the fact that the parties, as between themselves especially, disclaim their relation to be that of principal and agent is not decisive as against an inference of law from the facts surrounding the relationship.[2] The name which the person assumes, even with the knowledge of his principal, will not be controlling when the real character of his employment appears.[3] In general the agent or employee should sustain such relation to the matter growing out of the character of his employment as will impose on him the duty to report the fact to his principal or employer.[4] One corporation may be served as the agent of another corporation.[5] The person served may also be the agent of other corporations.[6] Under some statutes the person may be carrying on the business as defendant, although not technically its agent.[7] Service upon an agent of an agent has been held insufficient.[8]

(III) *MANAGING AGENTS.* By statute provision is frequently made that the managing agent of a foreign corporation is a proper person to receive service of process.[9] It is difficult to formulate a general rule as to what will constitute a person a managing agent,[10] and it is necessary to determine each case upon its particular facts.[11] The later decisions are apparently more liberal in interpreting

1908) 68 Atl. 690; Texas, etc., R. Co. *v.* Neal, (Tex. 1895) 33 S. W. 693; Bay City Iron Works *v.* Reeves, 43 Tex. Civ. App. 254, 95 S. W. 739; Honerine Min., etc., Co. *v.* Tallerday Steel Pipe, etc., Co., 31 Utah 326, 88 Pac. 9; Peterson *v.* Chicago, etc., R. Co., 205 U. S. 364, 27 S. Ct. 513, 51 L. ed. 841; Boardman *v.* S. S. McClure Co., 123 Fed. 614; Evansville Currier Co. *v.* United Press Co., 74 Fed. 918.

1. Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125; Wold *v.* J. B. Colt Co., 102 Minn. 386, 114 N. W. 243; Mikolas *v.* Walker, 73 Minn. 305, 76 N. W. 36; Doe *v.* Springfield Boiler, etc., Co., 104 Fed. 684, 44 C. C. A. 128; U. S. *v.* American Bell Tel. Co., 29 Fed. 17.

2. Chicago Bd. of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 25 S. Ct. 740, 49 L. ed. 1111; Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569.

A person selling goods consigned to him on commission has been held an agent. American Gold Min. Co. *v.* Giant Powder Co., 1 Alaska 664; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653.

3. Boardman *v.* S. S. McClure Co., 123 Fed. 614.

4. Palmer *v.* Pennsylvania Co., 35 Hun (N. Y.) 369 [*affirmed* in 99 N. Y. 679]; Strain *v.* Chicago Portrait Co., 126 Fed. 821. See also FOREIGN CORPORATIONS, 19 Cyc. 1328.

5. Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069.

Lessee corporation.— Where a foreign corporation owning a railroad in the state leases the same to another company, without the authority or consent of the state, but continues its corporate existence and receives a revenue under the lease, its lessee must be considered as its agent to carry on the business, and in an action for a tort committed in operating the road, service of summons upon the agent of the lessee is service upon the lessor. Van Dresser *v.* Oregon, etc., Nav. Co., 48 Fed. 202.

6. *In re* La Bourgogne, [1899] P. 1, 8 Aspin. 462, 68 L. J. P. & Adm. 1, 79 L. T. Rep. N. S. 331, 15 T. L. R. 28 [*affirmed* in [1899] A. C. 431, 8 Aspin. 550, 68 L. J. P. D. & Adm. 104, 80 L. T. Rep. N. S. 845, 15 T. L. R. 424].

7. Ricketts *v.* Sun Printing, etc., Assoc., 27 App. Cas. (D. C.) 222.

8. Union Pac. R. Co. *v.* Miller, 87 Ill. 45.

9. *California.*— Lawrence *v.* Ballou, 50 Cal. 258.

Nebraska.— Ord Hardware Co. *v.* J. I. Case Threshing Mach. Co., 77 Nebr. 847, 110 N. W. 551, 8 L. R. A. N. S. 770; Council Bluffs Canning Co. *v.* Omaha Tinware Mfg. Co., 49 Nebr. 537, 68 N. W. 929.

New York.— Evans *v.* American Steel Foundry Co., 30 Misc. 806, 61 N. Y. Suppl. 922.

North Dakota.— Brown *v.* Chicago, etc., R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564.

Ohio.— Wheeling, etc., Transp. Co. *v.* Baltimore, etc., R. Co., 1 Cinc. Super. Ct. 311.

Evidence as to capacity.— Where a person stated on different occasions that he was a managing agent of a certain foreign corporation, such declarations, although in themselves insufficient to prove such agency, would nevertheless destroy the force of his statements and affidavits that he was not the managing agent of such corporation, and tend to show that service on him as such agent was proper. Perrine *v.* Ransom Gas Mach. Co., 60 N. Y. App. Div. 32, 69 N. Y. Suppl. 698.

10. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560, 4 L. R. A. N. S. 460;

11. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560, 5 L. R. A. N. S. 460; Cunningham *v.* Southern Express Co., 67 N. C. 425.

Persons held to be managing agents.— For persons held to be managing agents with regard to particular lines of business see as to manufacturing business (Hat-Sweat Mfg. Co. *v.* Davis Sewing Mach. Co., 31 Fed. 294), railroad company (Fremont, etc., R. Co. *v.*

the term "managing agent" than were the earlier ones;[12] and it would seem that the rule supported by the weight of authority is, that an agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business affairs of his principal, and who has charge of all the business of his principal in the territory covered by the contract, is a managing agent.[13] The agent may be under the general direction of the corporation, but in the management of his particular department he must have authority to manage and conduct it as his discretion and judgment direct;[14] although in some cases it is held that the managing agent is limited to one who has full and complete authority in all branches of the corporation's business.[15]

(IV) *SALESMEN AND SOLICITORS.* A foreign corporation may in some jurisdictions be served with process by service upon its traveling salesmen;[16] but in other jurisdictions such service is not regarded as sufficient,[17] particularly where

New York, etc., R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14; Tuchband *v.* Chicago, etc., R. Co., 115 N. Y. 437, 22 N. E. 360; Tuchband *v.* Chicago, etc., R. Co., 2 Silv. Sup. 352, 5 N. Y. Suppl. 493, 16 N. Y. Civ. Proc. 241; Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Norton *v.* Atchison, etc., R. Co., 61 Fed. 618 [*distinguishing* Stout *v.* Sioux City, etc., R. Co., 8 Fed. 794, 3 McCrary 1]), newspaper (Palmer *v.* Chicago Evening Post Co., 85 Hun (N. Y.) 403, 32 N. Y. Suppl. 992, 2 N. Y. Annot. Cas. 69; Brewer *v.* Knapp, 82 Fed. 694 [not *followed* in Union Associated Press *v.* Times-Star Co., 84 Fed. 419]; Palmer *v.* Chicago Herald Co., 70 Fed. 886), express company (American Express Co. *v.* Johnson, 17 Ohio St. 641), lumber company (Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490), construction company (Clinard *v.* White, 129 N. C. 250, 39 S. E. 960).

Persons not to be managing agents.—A director of a foreign corporation who was a subscriber to its lands and had collected payments from other subscribers in the vicinity (Foote *v.* Central American Commercial Co., 26 Ohio Cir. Ct. 378), an agent of a foreign newspaper company having authority only to contract for advertising (Fontana *v.* Post Printing, etc., Co., 87 N. Y. App. Div. 233, 84 N. Y. Suppl. 308; Vitola *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 278; Union Associated Press *v.* Times Star Co., 84 Fed. 419 [not *following* Brewer *v.* Knapp, 82 Fed. 694]), an assistant secretary of a foreign railroad (Sterett *v.* Denver, etc., R. Co., 17 Hun (N. Y.) 316), captain of a steamboat (Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220), attorney of a foreign corporation (Taylor *v.* Granite State Provident Assoc., 136 N. Y. 343, 32 N. E. 992, 32 Am. St. Rep. 749), licensee of a foreign telephone company (U. S. *v.* American Bell Tel. Co., 29 Fed. 17), one whose duty is merely to receive what is sent to him and remit back the proceeds (Gibbons *v.* Kanawha, etc., Coal Co., 2 Cinc. Super. Ct. 75), the "representative" in a city outside the state, whose name appeared in the directory of that city as "manager" of defendant (Coler *v.* Pittsburgh Bridge Co., 146 N. Y. 281, 40 N. E. 779 [*reversing* 84 Hun 285, 32 N. Y. Suppl. 439, 1 N. Y. Annot. Cas. 232]) have been held not to be managing agents.

Sales agent.—A person who chiefly represents a corporation as agent for the sale of its goods in a locality in the state, and who maintains an office or storeroom where such goods are kept, is a managing agent, although he is paid only by commissions on sales made within his district. Toledo Computing Scale Co. *v.* Computing Scale Co., 142 Fed. 919, 74 C. C. A. 89.

General counsel.— Where a foreign corporation has ceased to do business in the state, an attorney who as general counsel has charge of all the business of the company in this state, and who is its only general officer in the state, may be regarded as its managing agent. Newport News, etc., Co. *v.* McDonald Brick Co., 109 Ky. 408, 59 S. W. 332, 22 Ky. L. Rep. 934.

12. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560.

13. Ord Hardware Co. *v.* J. I. Case Threshing Mach. Co., 77 Nebr. 847, 110 N. W. 551; Shackleton *v.* Wainwright Mfg. Co., 7 N. Y. St. 872.

14. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560.

The term "managing agent" means one invested with general power involving the exercise of discretion as distinguished from one who acts under the control of a superior authority, both as to the extent of the work and the manner of executing it. Reddington *v.* Mariposa Land, etc., Co., 19 Hun (N. Y.) 405.

15. Wheeler, etc., Sewing Mach. Co. *v.* Lawson, 57 Wis. 400, 15 N. W. 398; Farmers' Loan, etc., Co. *v.* Warring, 20 Wis. 290; Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220. See also Brewster *v.* Michigan Cent. R. Co., 5 How. Pr. (N. Y.) 183, 3 Code Rep. 215.

16. Ryerson *v.* Steere, 114 Mich. 352, 72 N. W. 131; Abbeville Electric Light, etc., Co. *v.* Western Electrical Supply Co., 61 S. C. 361, 39 S. E. 559. See also Bragdon *v.* Perkins-Campbell Co., 19 Pa. Co. Ct. 305.

17. Hodge *v.* Acorn Brass Mfg. Co., 50 Misc. (N. Y.) 627, 98 N. Y. Suppl. 673; Frankel *v.* Dover Mfg. Co., 104 N. Y. Suppl. 459; Strain *v.* Chicago Portrait Co., 126 Fed. 831.

there is a resident agent.[18] In any event, to warrant service upon a traveling salesman, the corporation must be doing business within the state.[19] A mere solicitor for advertising is not to be regarded as the agent of a foreign newspaper or publishing corporation;[20] and the same rule is usually applied with regard to the freight and passenger solicitors of foreign railroad corporations.[21]

(v) *AGENTS CONNECTED WITH CAUSE OF ACTION.* Under some statutes where a corporation has an office or agency in any county other than that in which the principal resides, process may be made on any agent or clerk employed in such office or agency in all actions growing out of a connection with the business of that office or agency.[22]

c. Alternative Provisions. As a general rule the statutes provide that where certain principal officers or agents cannot be found service may be made upon officers or agents of less rank[23] or upon stock-holders.[24] Under other statutes where the corporation has no agent in the state upon whom service may be had process may be served on the secretary of state.[25] To support service in these alternative forms, however, the inability to make service in the preferred manner must appear.[26]

18. W. T. Adams Mach. Co. *v.* Castleberry, 84 Ark. 573, 106 S. W. 940.

19. See Boardman *v.* S. S. McClure Co., 123 Fed. 614.

What constitutes doing business see FOREIGN CORPORATIONS, 19 Cyc. 1267 *et seq.*

20. Mulhearn *v.* Press Pub. Co., 53 N. J. L. 150, 20 Atl. 760; Boardman *v.* S. S. McClure Co., 123 Fed. 614.

21. Wilson *v.* Northern Pac. R. Co., 9 Ohio Dec. (Reprint) 634, 16 Cinc. L. Bul. 6; McGuire *v.* Great Northern R. Co., 155 Fed. 230; Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129; Fairbanks *v.* Cincinnati, etc., R. Co., 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; Maxwell *v.* Atchison, etc., R. Co., 34 Fed. 286. *Contra*, Bell *v.* New Orleans, etc., R. Co., 2 Ga. App. 812, 59 S. E. 102; Georgia Cent. R. Co. *v.* Eichberg, (Md. 1908) 68 Atl. 690.

22. Ætna Ins. Co. *v.* Black, 80 Ind. 513; Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49.

After termination of agency.— In an action against a non-resident corporation on a contract made with an agent, if the agency for carrying on the business out of which the contract in question arose has been discontinued, and the agent's authority revoked, service cannot be made on an agent in the same place, employed by defendant to transact other business. Winney *v.* Sandwich Mfg. Co., (Iowa 1891) 50 N. W. 565. In an action against a non-resident corporation on the warranty of a harvesting machine made by an agent, the court properly charged that, if the agency for carrying on the business out of which the warranty arose was discontinued, and the agent's authority revoked, service could not be made on an agent in the same place, employed by defendant to "sell his repairs and other implements." Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524. But where a foreign corporation agreed to furnish A, as its agent, machines to be sold on commission; the agreement to be in force until a certain date, it was held in an action against the corporation for breach of warranty of a machine sold by the agent, that service on the agent bound the corporation, although the action was brought after the termination of the agreement between the agent and defendant, it further appearing that defendant had not finally settled with its agent. Brunson *v.* Nichols, 72 Iowa 763, 34 N. W. 289; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653.

Such a statute is not exclusive and merely fixes the county in which suit may be brought, but does not define the manner of acquiring jurisdiction. Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45.

23. See the statutes of the several states. And see Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236; American Bonding Co. *v.* Dickey, 74 Kan. 791, 88 Pac. 66; McCulloh *v.* Paillard Non-Magnetic Watch Co., 14 N. Y. Suppl. 491, 20 N. Y. Civ. Proc. 386; Saunders *v.* Sioux City Nursery, 6 Utah 431, 24 Pac. 532.

24. Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433, holding that one who gratuitously transfers his stock in a foreign corporation to trustees, whose names he does not know, for some unknown and undefined purpose, and at the same time contributes fifty dollars to cover the expense of the transfer, is still a stock-holder in such foreign corporation.

25. Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

26. Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061; Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Doherty *v.* Evening Journal Assoc., 98 N. Y. App. Div. 136, 90 N. Y. Suppl. 671; Vitolo *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273; Honeyman *v.* Colorado Fuel, etc., Co., 133 Fed. 96, holding that a plaintiff exercised due diligence to obtain service of summons and complaint on the officers of a foreign corporation defendant, so as to authorize service on a director under the laws of New York, where before making

d. After Termination of Office or Agency. After termination of the relationship the agent cannot be served as such,[27] and where an officer has effected a valid resignation, jurisdiction of the corporation cannot be obtained by service upon him.[28] An officer may be served as such, although appointed receiver of the corporation.[29]

e. Officer or Agent Temporarily Within Jurisdiction. Service may be made on an officer designated by the statute if found within the state, although he may be present on private business.[30] In case the officer or agent is sent into the state on the corporate business process may be served on him.[31] In any event the presence of the officer must not be secured by fraud or misrepresentation.[32] Under some statutes service may be made upon a managing agent, although he is only temporarily in the state upon the business of the corporation.[33]

6. Service Upon Corporation Failing to Comply With Statute. Where a corporation has failed to appoint an agent to receive service of process as required by statute it will be presumed to have assented to service upon one who acts as its agent within the state.[34] Under some statutes where there has been a failure to

service on the director he called at the office of the secretary, and was told by the clerk in charge that neither the secretary nor any other officer of the company was within the state, and was given by such clerk the names of resident directors on whom service might be made. See Perrine *v.* Ransome Gas Mach. Co., 60 N. Y. App. Div. 32, 69 N. Y. Suppl. 698.

27. Haas *v.* Security, etc., Co., 57 N. J. L. 388, 30 Atl. 430; Cooper *v.* Brazelton, 135 Fed. 476, 66 C. C. A. 188.

28. Sturgis *v.* Crescent Jute Mfg. Co., 57 Hun (N. Y.) 587, 10 N. Y. Suppl. 470; Ervin *v.* Oregon Steam Nav. Co., 22 Hun (N. Y.) 598 (holding that whether the resignation of the president of a foreign corporation was made and accepted with a view to prevent the service of summons and complaint upon the president as such is not a material question, if in fact the resignation was actually made and accepted, so that he ceased to be the president of such corporation); Continental Wall-Paper Co. *v.* Lewis Voight, etc., Co., 106 Fed. 550.

29. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

30. *Colorado.*— Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

Michigan.— Shickle, etc., Iron Co. *v.* S. L. Wiley Constr. Co., 61 Mich. 226, 28 N. W. 77 [*distinguishing* Newell *v.* Great Western R. Co., 19 Mich. 336, as decided prior to statutory provisions as to suits against foreign corporations].

New York.— Pope *v.* Terre Haute Car, etc., Co., 87 N. Y. 137 [*affirming* 24 Hun 238, 60 How. Pr. 419]. *Compare* Hulbert *v.* Hope Mut. Ins. Co., 4 How. Pr. 275, 2 Code Rep. 148 [*affirmed* in 4 How. Pr. 415].

North Carolina.—Jester *v.* Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447.

Texas.— Cameron *v.* Jones, 4 Tex. Civ. App. 4, 90 S. W. 1129.

Compare Moulin *v.* Trenton Mut. L., etc., Ins. Co., 25 N. J. L. 57.

Where corporation has not done business within the state see Foreign Corporations, 19 Cyc. 1327.

31. Rush *v.* Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143; Brush Creek Coal, etc., Co. *v.* Morgan-Gardner Electric Co., 136 Fed. 505; Houston *v.* Filer, etc., Co., 85 Fed. 757. But *compare* Ladd Metals Co. *v.* American Min. Co., 152 Fed. 1008, holding that the fact that the secretary of a corporation went into another state for the purpose of attending to the taking of depositions, in a suit to which the corporation was a party, does not render the corporation amenable to suit in a federal court therein by service upon such secretary while there.

Must act with reference to claim.— Under La. Act No. 149 (1890), p. 188, providing for service of citation in an action against a foreign corporation upon each person or persons, company, or firm thus transacting business for the corporation, process in an action against a non-resident corporation cannot be served upon the latter's secretary while temporarily within the state, where the transaction which gave rise to plaintiff's claim was not one brought about by the secretary. Southern Saw Mill Co. *v.* American Hard Wood Lumber Co., 115 La. 237, 38 So. 977, 112 Am. St. Rep. 267.

32. Olean St. R. Co. *v.* Fairmount Constr. Co., 55 N. Y. App. Div. 292, 67 N. Y. Suppl. 165, 8 N. Y. Annot. Cas. 404.

33. Guernsey *v.* American Ins. Co., 13 Minn. 278; Klopp *v.* Creston City Guarantee Water Works Co., 34 Nebr. 808, 52 N. W. 819, 33 Am. St. Rep. 666; Young, etc., Co. *v.* Welsbach Light Co., 55 N. Y. App. Div. 16, 66 N. Y. Suppl. 1024; Rudd *v.* McClean Arms, etc., Co., 54 Misc. (N. Y.) 49, 105 N. Y. Suppl. 387; Porter *v.* Sewall Safety Car Heating Co., 7 N. Y. Suppl. 166, 17 N. Y. Civ. Proc. 386, 23 Abb. N. Cas. 233; Estes *v.* Belford, 22 Fed. 275, 23 Blatchf. 1.

34. Grant *v.* Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191 [*reversing* 117 N. Y. App. Div. 576, 102 N. Y. Suppl. 642] (holding that under the express provisions of N. Y. Code Civ. Proc. § 432, subd. 1, service of summons upon a foreign corporation may be made within the state by delivering a copy to its president, etc., even if the foreign corporation has not designated or authorized any person to accept service upon it in the state);

appoint a resident agent service must be by delivery of a copy to the secretary of state.[35]

7. Acceptance of Service. The fact that a person is an agent or employee upon whom service of process may be legally made does not in the absence of any statutory provision authorizing him to accept service raise any presumption as to his authority to bind the company by accepting service.[36] An admission of service must identify the process served.[37]

8. Service by Publication. Service by publication is not authorized in the absence of statutory provision.[38] But under the statutes provision is usually expressly made for such service,[39] as where the corporation has property within the state,[40] or where no officer or agent may be found upon whom service may be made.[41] And in some cases service by publication has been held to be authorized by statutes authorizing such service generally.[42] Under some statutes where the corporation has designated no agent for the service of process, service of process upon the secretary of state is substituted for service by publication.[43] Failure to publish a notice in the newspaper designated by statute is not fatal to the jurisdiction of the court, unless the statute so provides.[44] The order for publication is usually required to be based upon affidavits showing the statutory prerequisites to exist.[45] Under some statutes personal service without the state is allowed in lieu of publication.[46]

Clews *v.* Rockford, etc., R. Co., 49 How. Pr. (N. Y.) 117 (holding that service of a summons on the general solicitor or counsel is good service); Hagerman *v.* Empire Slate Co., 97 Pa. St. 534; Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490; American Cotton Co. *v.* Beasley, 116 Fed. 256, 53 C. C. A. 446.

35. See Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Lonkey *v.* Keyes Silver-Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351, holding that service on the deputy secretary of state, where the secretary was out of the state, was unauthorized, and gave the court no jurisdiction. See also *infra*, text and note 43.

36. New River Mineral Co. *v.* Seeley, 120 Fed. 193, 56 C. C. A. 505.

37. McKeever *v.* Supreme Court I. O. F., 122 N. Y. App. Div. 465, 106 N. Y. Suppl. 1041.

38. Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300, holding that since the act of 5 Geo. II, authorizing service of notice of suit by publication is intended to apply only to citizens of foreign states, who having been in the state depart to avoid service of process, it does not authorize service by publication upon a foreign corporation.

39. See the statutes of the several states.

40. Broome *v.* Galena, etc., Packet Co., 9 Minn. 239.

Property may be in custodia legis.— Under Kan. Comp. Laws, c. 80, § 72, authorizing service by publication where defendant is a foreign corporation having property within the state, such service may be made where there is property in the hands of a receiver of the court in which the action is pending, which was delivered to him by the sheriff who seized the same in an action of replevin by defendant against a third person, which is still pending before the same court. U. S. Electric Lighting Co. *v.* Martin, 43 Kan. 526, 23 Pac. 586.

Necessity that corporation have property within the state see *supra*, VI, B, 1.

41. *Illinois.*— Price *v.* American Bible Soc., 29 Ill. App. 476.

Nevada.— Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

Ohio.— Foote *v.* Central American Commercial Co., 26 Ohio Cir. Ct. 378.

Pennsylvania.— Boyer *v.* Iron Co., 1 Leg. Rec. 89.

United States.— Ranch *v.* Werley, 152 Fed. 509.

42. Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304; Peoples' Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20; McLaren *v.* Byrnes, 80 Mich. 275, 45 N. W. 143. But *compare* Smith *v.* Hoover, 39 Ohio St. 249.

43. Olender *v.* Chrystaline Min. Co., 149 Cal. 482, 86 Pac. 1082. See also *supra*, text and note 35.

44. Lanier *v.* Houston City Bank, 9 N. Y. Civ. Proc. 161.

45. *Minnesota.*— Broome *v.* Galena, etc., Packet Co., 9 Minn. 239.

New York.— Coffin *v.* Chicago Northern Pacific Constr. Co., 67 Barb. 337.

Oregon.— Knapp *v.* Wallace, (1907) 92 Pac. 1054.

Wisconsin.— Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

United States.— Ranch *v.* Werley, 152 Fed. 509.

46. See the statutes of the several states. And see Morrison *v.* National Rubber Co., 13 N. Y. Civ. Proc. 233 (holding that the fact that an order for the service of summons on a foreign corporation without the state did not designate the officer on whom service was to be made did not vitiate the order or render the service void, where in fact the secretary of the corporation was duly served without the state; a substantial compliance with the

9. Mailing Process. A statutory provision requiring the mailing of notice of the suit to the home office of the corporation is not jurisdictional.[47] And where there has been no personal service such mailing is insufficient to confer jurisdiction,[48] unless consent to such a method of service is made a condition to the doing of business within the state by the corporation.[49]

10. Return — a. Sufficiency. The return must show affirmatively the facts constituting a valid service.[50] So the return must show that service was upon an officer or agent designated by statute.[51] A return of process served upon the agent appointed by a foreign corporation to accept service of process must show that the person served is such agent.[52] All the facts sustaining the jurisdiction need not appear from the return, however, if they otherwise are shown by the record.[53] The officer should confine himself to a statement of what he actually

provisions of the code being all that is required); Wood *v.* St. Louis Bolt, etc., Co., 1 N. Y. Civ. Proc. 220 (holding that an attachment is not necessary to confer jurisdiction on the court to grant an order for personal service without the state on a foreign corporation).

47. Emerson *v.* McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182, so holding where personal service of the writ was made on the proper officer. See Nashville, etc., R. Co. *v.* McMahon, 70 Ga. 585.

48. Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351.

49. Mohr, etc., Distilling Co. *v.* Firemen's Ins. Co., 10 Cinc. L. Bul. 82, 6 Ohio Dec. (Reprint) 1180, 12 Am. L. Rec. 168.

50. Southern Bldg., etc., Assoc. *v.* Hallum, 59 Ark. 583, 28 S. W. 420; Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Gamasche *v.* Smythe, 60 Mo. App. 161; Knapp *v.* Wallace, (Oreg. 1907) 92 Pac. 1054; Allen *v.* Yellowstone Park Transp. Co., 154 Fed. 504; Jackson *v.* Delaware River Amusement Co., 131 Fed. 134; U. S. *v.* American Bell Tel. Co., 29 Fed. 17.

Returns held sufficient under particular statutes.— For cases holding particular returns sufficient see Putnam Lumber Co. *v.* Ellis-Young Co., 50 Fla. 251, 39 So. 193; Farrel *v.* Oregon Gold-Min. Co., 31 Oreg. 463, 49 Pac. 876; Wintermute *v.* New Jersey Cent. R. Co., 5 Pa. Co. Ct. 648; Yeich *v.* Peterson, 2 Leg. Chron. (Pa.) 269; Patton *v.* American Mut. Ins. Co., 1 Phila. (Pa.) 396; Kennard *v.* New Jersey R., etc., Co., 1 Phila. (Pa.) 41.

51. *Arkansas.*— Southern Bldg., etc., Assoc. *v.* Hallum, 59 Ark. 583, 28 S. W. 420.

Michigan.— Toledo Ice Co. *v.* Munger, 124 Mich. 4, 82 N. W. 663.

Missouri.— Gamasche *v.* Smythe, 60 Mo. App. 161.

New Jersey.— Roake *v.* Pennsylvania R. Co., 70 N. J. L. 494, 57 Atl. 160.

Ohio.— Fleckmyer Wheel Co. *v.* Commercial Wheel Co., 8 Ohio S. & C. Pl. Dec. 686, 7 Ohio N. P. 613.

Texas.— National Cereal Co. *v.* Earnest, (Civ. App. 1905) 87 S. W. 734.

United States.— U. S. *v.* American Bell Tel. Co., 29 Fed. 17; Kiufeke *v.* Merchants' Dispatch Transp. Co., 11 Fed. 282, 3 McCrary 547.

But *compare* Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

52. Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194. But see Turner *v.* Franklin, (Ariz. 1906) 85 Pac. 1070; Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314, holding that a return of service on the "lawful attorney" of a foreign corporation is good, where the law authorizes service on a certain attorney.

In case no agent has been designated.— Under Cal. St. (1899) p. 111, c. 94, § 1, requiring foreign corporation to designate an agent for the service of process, and to file such designation with the secretary of state, in which case process may be served on the agent, or, if no person is designated, on the secretary of state, a return reciting service on the secretary of state, but failing to state that there was no designation of an agent on file, is insufficient to confer jurisdiction over the corporation, and cannot be aided and rendered sufficient by a certificate of the secretary of state, attached to the summons as returned, showing that the corporation had not made the required designation. Willey *v.* Benedict Co., 145 Cal. 601, 79 Pac. 270.

53. Nelson *v.* Rehkopf, 75 S. W. 203, 25 Ky. L. Rep. 352; Farrel *v.* Oregon Gold-Min. Co., 31 Oreg. 463, 49 Pac. 876. See Willey *v.* Benedict Co., 145 Cal. 601, 79 Pac. 270 (holding that under Cal. Code Civ. Proc. § 670, providing that in case of judgment by default the judgment-roll consists of the summons, with affidavit of proof of service, the complaint, with memorandum indorsed thereon of defendant's default, and a copy of the judgment, a certificate of the secretary of state, attached to a summons served on him for a foreign corporation, under St. (1899) p. 111, c. 94, § 1, providing for such service in case no person is designated by the foreign corporation as an agent for the service of process, is not a part of the record, and cannot be looked to, on a motion made on the record to quash the service and return, to supply an omission of the return to recite that the corporation had not designated an agent for the service of process); Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608.

does in serving the process and should not state conclusions of law and fact apart from what was done.[54]

b. Operation and Effect.[55] The sheriff's return is in any event *prima facie* evidence of good service,[56] while in some jurisdictions it is conclusive as between the parties.[57] But even where it is held that the return is conclusive the actual facts may be inquired into where the return itself is not full or explicit.[58]

11. Amendment. Where the facts warrant such procedure a return of service may be corrected by amendment so as to show conformity to the statute.[59] But in case it is permissible to allow an amendment upon affidavits of person not making service, which is doubtful,[60] an amendment will not be allowed upon affidavits which are merely hearsay.[61]

12. Defects, Objections, and Waiver. In some jurisdictions the sufficiency of the service of a summons may be tried upon motion to quash the return, supported by affidavits.[62] In other jurisdictions the question may be raised by a plea in abatement.[63] But a return will not be set aside upon motion for merely technical defects which do not appear upon its face.[64] Upon a motion to vacate the service of summons, the moving party must distinctly negative the existence of circumstances which would render the service valid under the statute,[65] and the burden is on defendant to establish the grounds of his motion.[66] An appearance for the purpose of quashing the service of summons will not be regarded as a waiver of jurisdiction.[67]

PROCESS.[*] A word which may be applied either to methods of action such as legal proceedings,[1] or to the treatment of substance in transforming and reducing

54. U. S. *v.* American Bell Tel. Co., 29 Fed. 17.

55. Return generally see *supra*, III.

56. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Bragdon *v.* Perkins-Campbell Co., 82 Fed. 338.

57. Lebanon Nat. Bank *v.* Mascoma Flannel Co., 70 N. H. 227, 46 Atl. 49; Wintermute *v.* New Jersey Cent. R. Co., 5 Pa. Co. Ct. 648; Kennard *v.* New Jersey R., etc., Co., 1 Phila. (Pa.) 41.

58. Jackson *v.* Delaware River Amusement Co., 131 Fed. 134, holding that while a marshal's return of service on a corporation is conclusive on the parties, and cannot be contradicted, yet, where the return did not show that the corporation was doing business in the state in which the court was sitting, and in fact the corporation transacted no business in such state, service being made on its president while he was engaged in private business therein, an application to set aside such service might be made by a rule to show cause, instead of by plea in abatement.

59. Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608, holding that an amendment might be permitted so as to give the proper name and description of the person served.

60. Brown *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 57.

61. Brown *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 57.

62. Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129, holding that the local practice might be followed in such regard.

63. Perry *v.* New Brunswick R. Co., 71 Me. 359 (holding that a plea in abatement should contain a direct and positive averment of what the service was and that no other service was in fact made); Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Youngblood *v.* Strahorn-Hutton-Evans Commission Co., (Tex. Civ. App. 1897) 40 S. W. 648 (holding that where process is served upon the wrong person a plea in abatement will be sustained).

64. Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629, so holding where a marshal returned that he had made personal service on the agent of a foreign corporation, where he had in fact left the summons with a person in charge of the agent's office who handed it to the agent on the following day, on which day the agent admitted service in a conversation with the marshal.

65. Wamsley *v.* Horton, 68 Hun (N. Y.) 549, 23 N. Y. Suppl. 85; Scherer *v.* Ground Hog Min., etc., Co., 55 N. Y. Suppl. 743, 28 N. Y. Civ. Proc. 231 [*affirmed* in 55 N. Y. Suppl. 1148].

66. Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 74, so holding where it was alleged that the agency of the person served had terminated.

67. Ladd Metals Co. *v.* American Min. Co. Lim., 152 Fed. 1008.

1. See Process.

Process of law.—"Due process of law" see Constitutional Law, 8 Cyc. 1080–1136. "Ordinary process of law" cannot mean ordinary personal judgment and execution, but such process as is adapted to enforce a lien or specific charge upon property specially assessed. Neenan *v.* Smith, 50 Mo. 525, 529 [*overruling* St. Louis *v.* Clemens, 36 Mo. 467],