Chapter 15

Commencement of Actions and Suits; Summons

15.010

NOTES OF DECISIONS

An amendment of any of the sections in regard to procedure in law actions here made applicable to suits in equity will also amend the procedure in suits in equity. Bailey v. Malheur & Harney Lake Irr. Co., (1899) 36 Or 54, 58, 57 P 910.

An injunction may issue before service of summons, if complaint is on file. Breese v. Bramwell, (1921) 102 Or 76, 201 P 729.

An assignee who acquired title to the subject matter of the litigation after the filing of the complaint took pendente lite, and was bound by the proceeding against his assignor. Posson v. Guar. Loan Assn. (1903) 44 Or 106, 108, 74 P 923.

FURTHER CITATIONS: Harker v. Fahie, (1863) 2 Or 89; Walker v. Goldsmith, (1886) 14 Or 125, 12 P 537; Burns v. White Swan Min. Co., (1899) 35 Or 305, 57 P 637; McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468; Waymire v. Shipley, (1908) 52 Or 464, 97 P 807; Matlock v. Matlock, (1918) 87 Or 307, 311, 170 P 528.

15.020

NOTES OF DECISIONS

1. Commencement of actions
2. Answer affecting statute of limitations
3. Issuance of summons
4. Pleading

1. Commencement of actions

Suits to foreclose liens are commenced under this section when the complaint is filed with the clerk. Coggan v. Reeves, (1871) 3 Or 275; Burns v. White Swan Min. Co., (1899) 35 Or 305, 312, 57 P 637.

There is no provision for dismissing an action because the summons has not been served. Belknap v. Charlton, (1893) 25 Or 41, 48, 34 P 758.

An assignee who acquires the subject matter of the litigation after the filing of complaint becomes a purchaser pendente lite, and is bound by proceedings against his assignor. Posson v. Guar. Loan Assn., (1903) 44 Or 106, 74 P 923.

The filing of a complaint is sufficient, and the summons may be filed thereafter, provided it be filed within the time limited. Dutro v. Ladd, (1907) 50 Or 120, 123, 91 P 459.

Defendant, desiring an adjudication of his claim against his co-defendants, may cause summons to be issued under the original title of the suit, and have the same served on his co-defendants, or he may serve a copy of the order requiring them to respond to the affirmative matter in the answer. Hough v. Porter, (1909) 51 Or 318, 377, 95 P 732, 98 P 1083, 102 P 728.

An action is commenced when the complaint is filed though summons has not been issued. Kelsay v. Taylor, (1910) 56 Or 13, 107 P 609.

An injunction may issue after commencement of suit even though summons has not been served. Breese v. Bramwell, (1921) 102 Or 76, 201 P 729.

This statute was not intended to apply to a proceeding on a claim against an estate. Clostermann v. Reynolds (1963) 236 Or 114, 386 P2d 468.

2. Answer affecting statute of limitations

The filing of an answer by the holder of a mechanic's lien in a suit to foreclose another lien is effectual to save the lien from the bar of the statute of limitations. Title Guar. Co. v. Wrenn, (1899) 35 Or 62, 69, 56 P 271, 76 Am St Rep 454; Brown v. Farrell, (1971) 258 Or 348, 483 P2d 453.

A voluntary appearance, in view of this section and other sections in para materia is equivalent to the commencement of an action in its effect on the running of the statute. Hawkins v. Donnerberg, (1901) 40 Or 97, 110, 66 P 691, 908.

3. Issuance of summons

Summons, as used in this section, is not "process," but a mere notice informing the defendant of the action and the need to answer the complaint within a specified time. Whitney v. Blackburn, (1889) 17 Or 564, 21 P 874, 11 Am St Rep 857; Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

Summons is not deemed issued until it is placed in the hands of the officer, with the intent that it be served upon the defendant; the only evidence of delivery is the indorsement he places thereon. Perry v. Gholson, (1901) 39 Or 438, 65 P 601.

If a defendant is sued in the county of his residence, but the plaintiff is uncertain as to whether the defendant is to be found in that county, the statute would seem to permit the issuance of more than one original summons and the delivery of them to sheriffs of the different counties so that the defendant might be served where found. Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

4. Pleading

The commencement of an action is sufficiently alleged in a pleading by an allegation therein that the complaint in such action was filed on specified date with the clerk of the circuit court of named county. Bankers' Discount Corp. v. Noe, (1926) 116 Or 570, 242 P 610.

FURTHER CITATIONS: Knapp, Burrell & Co. v. King, (1877) 6 Or 243; Walker v. Goldsmith, (1886) 14 Or 125, 155, 12 P 537; Oregon Lbr. Co. v. E. Fork Irr. Dist., (1916) 80 Or 568, 157 P 963; Matlock v. Matlock, (1918) 87 Or 307, 170 P 528; Harrison v. Beals, (1924) 111 Or 563, 222 P 728; Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Bell v. Quaker City Fire & Marine Ins. Co., (1962) 230 Or 615, 370 P2d 219; State ex rel. Kalich v. Bryson, (1969) 253 Or 418, 453 P2d 659.

ATTY GEN. OPINIONS: Service of summons by employe of corporate party, 1964-66, p 158.

LAW REVIEW CITATIONS: 36 OLR 52, 60; 46 OLR 188, 190, 192; 49 OLR 337-342.

15.030

NOTES OF DECISIONS
1. Acquisition of jurisdiction
2. Voluntary appearance
3. General appearance
4. Special appearance

1. Acquisition of jurisdiction

It is the fact of service that gives the court jurisdiction and all subsequent proceedings, however erroneous, are not void. Woodward v. Baker, (1883) 10 Or 491.

Upon completion of the period of publication of citation in a proceeding by an administrator to sell lands of decedent, jurisdiction of the county court attaches. Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 983.

Where a divorce suit is filed in one county, and before service of summons is perfected the defendant files suit in another, the court in the first county acquires jurisdiction to the exclusion of the latter. Matlock v. Matlock, (1918) 87 Or 307, 170 P 528.

The court acquires jurisdiction by personal service although venue be improperly laid. Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

If the court acquires jurisdiction by the filing and service then the nature and time of the defendant's appearance, whether special or general, affects only the character of relief which will be accorded him. Id.

Once having acquired jurisdiction the court possesses the power to make or modify an award of custody though the children may be physically without the state. Godfrey v. Godfrey, (1961) 228 Or 228, 364 P2d 620.

2. Voluntary appearance

A voluntary appearance waives service, or mere defects in service. Harker v. Fahie, (1863) 2 Or 89; Ankeny v. Blackiston, (1879) 7 Or 435; Kinkade v. Myers, (1889) 17 Or 470, 21 P 557; Brown v. Deschutes Bridge Co., (1885) 23 Or 7, 35 P 177.

An appearance will be presumed to be general where the record fails to show that such appearance is special. Godfrey v. Douglas County, (1896) 28 Or 446, 453, 43 P 171; Roethler v. Cummings, (1917) 84 Or 442, 165 P 355.

A voluntary appearance in a justice court gives the court jurisdiction to render judgment. McAnish v. Grant, (1903) 44 Or 57, 63, 74 P 396; Adams v. Kelly, (1903) 44 Or 66, 69, 74 P 399.

The time allowed to plead is not waived by a voluntary appearance. Harker v. Fahie, (1863) 2 Or 89.

The appearance of authorized attorneys for the defendant is a waiver of irregularities in the service. White v. Northwest Stage Co., (1873) 5 Or 99, 103.

A general guardian has authority to appear for his ward. Ankeny v. Blackiston, (1879) 7 Or 435.

An attorney is not required to give written notice of his appearance in a legal proceeding unless his adversary objects. Carter v. Koshland, (1885) 12 Or 492, 498, 8 P 556.

A general appearance by an attorney for a corporation waives service of the summons and is in legal effect the commencement of an action. Dunne v. Portland Street R. Co., (1901) 40 Or 295, 300, 65 P 1052.

3. General appearance

Defendant, by appearing and asking relief which can only be granted on the theory that the court has jurisdiction of the action and of his person, submits himself to its jurisdiction whether such appearance be in terms limited to a special appearance or not. Belknap v. Charlton, (1893) 25 Or 41, 34 P 758; Mayer v. Mayer, (1895) 27 Or 133, 39 P 1002; Anderson v. McClellan, (1909) 54 Or 206, 102 P 1015; Fildew v. Milner, (1910) 57 Or 16, 109 P 1092; Sit You Gune v. Hurd, (1912) 61 Or 182, 186, 120 P 737, 1135; Felts v. Boyer, (1914) 73 Or 83, 144 P 420.

A motion after judgment on published summons for permission to defend by filing an answer constitutes a waiver of all irregularities in the service of process. Osburn v. Maata, (1913) 66 Or 558, 561, 135 P 165; Felts v. Boyer, (1914) 73 Or 83, 92, 144 P 420.

A voluntary appearance may be made in other ways than by answering, demurring, or giving the plaintiff written notice. Belknap v. Charlton, (1893) 25 Or 41, 34 P 758.

Demurrer to the complaint constitutes a voluntary appearance. Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908.

A stipulation signed by attorneys authorized to represent the parties, filed in the court, is a general appearance. Multnomah Lbr. Co. v. Weston Basket Co., (1909) 54 Or 22, 99 P 1046, 102 P 1.

The assignment of insufficiency of the complaint as one of the grounds of defendant's motion to quash service of summons does not make his appearance a general one. Whittier v. Woods, (1910) 57 Or 432, 112 P 408.

Appearance to vacate an order for temporary alimony and to dismiss the suit on account of condonation, constitutes general appearance. Jones v. Jones, (1911) 59 Or 308, 310, 117 P 414.

Appearance, on motion to change the venue, is general, though purporting to be special. Id.

A motion to set aside an order of a probate court and requesting general relief constituted a general appearance. Woodburn Lodge v. Wilson, (1934) 148 Or 150, 34 P2d 611.

Defendant in a tax certificate foreclosure proceeding by challenging the validity of assessments and certificates made a general appearance, waiving any defects in the summons or its service. Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 285.

In both transitory actions and in local actions in which the subject of the action is located within the state, a general appearance by the defendant authorizes the court to try the case upon the merits though the action be filed in the wrong county. Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

An appearance and contest upon the merits of the proceeding to locate a public road was a waiver of any irregularity in the service of a copy of the order appointing viewers. Towns v. Klamath County, (1898) 33 Or 225, 230, 53 P 604.

Where attached property is released on defendant's bond, he makes a general appearance. Roethler v. Cummings, (1917) 84 Or 442, 165 P 355. **Contra,** Winter v. Union Packing Co., (1908) 51 Or 97, 93 P 930.

The execution of a redelivery bond in attachment did not constitute a general appearance. Winter v. Union Packing Co., (1908) 51 Or 97, 93 P 930.

Appearance was general at hearing of writ of review proceedings to set aside justice's judgment, the justice having voluntarily made a full return of the writ by prearrangement between counsel, who had filed brief and made argument. Roethler v. Cummings, (1917) 84 Or 442, 165 P 355.

4. Special appearance

Defendant may appear specially to set aside illegal service. Kinkade v. Myers, (1889) 17 Or 470, 21 P 557; Lung Chung v. No. Pac. R. Co., (1884) 19 Fed 254, 257.

An appearance for the purpose of having the service of summons and the order continuing the action set aside and vacated is a special appearance. White v. Johnson, (1895) 27 Or 282, 288, 40 P 511, 50 Am St Rep 726; Meyer v. Brooks, (1896) 29 Or 203, 209, 44 P 281, 54 Am St Rep 790; Whittier v. Woods, (1910) 57 Or 432, 435, 112 P 408.

An appearance for the sole purpose of objecting to the validity of attachment proceedings for irregularities is not

a waiver of service. Belknap v. Charlton, (1893) 25 Or 41, 48, 34 P 758.

A defendant may appear specially by motion, or where the jurisdiction does not appear on the face of the record, by plea in abatement. Winter v. Union Packing Co., (1908) 51 Or 97, 99, 93 P 930.

Mere oral request for allowance of costs and disbursements, in suit in equity, after granting of motion on special appearance, is not a general appearance. Spores v. Maude, (1916) 81 Or 11, 158 P 169.

FURTHER CITATIONS: Sealy v. Calif. Lbr. Co., (1890) 19 Or 94, 24 P 197; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072.

ATTY. GEN. OPINIONS: Service of summons by employe of corporate party, 1964-66, p 158.

LAW REVIEW CITATIONS: 36 OLR 171; 46 OLR 188, 191.

15.040

NOTES OF DECISIONS

1. In general
2. Summons shall require defendant to appear and answer
   (1) Under former similar statute
3. Time to appear and answer
4. Defects
5. Pleading

1. In general

A summons is not a process or writ issuing out of any court, but a mere notice to appear and answer. Bailey v. Williams, (1876) 6 Or 71, 73; Whitney v. Blackburn, (1889) 17 Or 564, 21 P 874, 11 Am St Rep 857; First Nat. Bank v. Rusk, (1913) 64 Or 35, 42, 127 P 780, 129 P 121, 44 LRA(NS) 138.

A summons need not run in the name of the state. Bailey v. Williams, (1876) 6 Or 71, 73.

The requirements of this section are mandatory. White v. Johnson, (1895) 27 Or 282, 294, 40 P 511, 50 Am St Rep 726.

Service upon the executrix substituted for decedent of the original summons, directed to the deceased and in which her name did not appear, was insufficient to give the court jurisdiction to render a judgment against the executrix. Id.

2. Summons shall require defendant to appear and answer

The summons must notify the defendant to appear in the court where the judgment is sought to be rendered against him. Smith v. Ellendale Mill Co., (1870) 4 Or 70, 71.

Summons not having been served on defendant personally and the return failing to indicate why, the court acquired no jurisdiction of defendant to render a default decree. Trullenger v. Todd, (1873) 5 Or 36.

When a court has jurisdiction, this section and OCLA 1-601 [ORS 15.020] authorize service in a county other than that in which the action was filed. Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

Where one of the statutory requisites of a summons was omitted and an illegal provision inserted, service of such writ had no binding force on defendant. Hunsaker v. Coffin, (1864) 2 Or 107. **Distinguished in** Strong v. Barnhart, (1876) 6 Or 93.

Judgment was not void on its face but service of summons merely defective. Strong v. Barnhart (1876) 6 Or 93.

(1) Under former similar statute. In a suit to foreclose a lien, the notice in the summons should have complied with the statutory requirements. Swift v. Meyers, (1888) 37 Fed 37, 39, 13 Sawy 583.

The summons did not need to contain any notice that plaintiff had or intended to attach defendant's property. Okanogan State Bank v. Thompson, (1923) 106 Or 447, 211 P 933.

Defects in the summons or service were waived where defendant made a general appearance. Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 285.

In a suit to foreclose a mortgage to which defendant had taken subject, the service of summons gave defendant notice of contents of the complaint, requesting a personal judgment, although defendant never received a copy thereof. Mattoon v. Cole, (1943) 172 Or 664, 143 P2d 679.

3. Time to appear and answer

The fact that defendant has not been given all the time allowed by law to answer, after proper service, does not make the consequent judgment a nullity. Woodward v. Baker, (1882) 10 Or 491.

An application to plead after the time allowed by law has expired, is addressed to the discretion of the trial court. Payne v. Savage, (1908) 51 Or 463, 94 P 750.

In computing the time within which defendant must answer, neither the date of service nor nonjudicial days are included. Steeves v. Steeves, (1932) 139 Or 261, 9 P2d 815.

4. Defects

The omission in the copy of the summons served to state the county, and its statement that on failure to answer judgment would be taken as prayed for in the complaint, were defects cured by the complaint served with the summons. First Nat. Bank v. Rusk, (1913) 64 Or 35, 42, 127 P 780, 129 P 121, 44 LRA(NS) 138.

A defect in the form or matter of a summons not absolutely destructive of its validity, although sufficient to cause a reversal of the judgment, does not expose the judgment to collateral impeachment. Lane v. Ball, (1917) 83 Or 404, 405, 160 P 144, 163 P 975.

A defect in the return of a summons is not reached by a motion to quash, but by an application to set aside the service. Id.

5. Pleading

Where the pleadings do not show when, where, nor how the summons was served on the defendant, the court has no means of determining whether the defendant was in default at the time when his suit was dismissed. Jacobson v. Lassas, (1907) 49 Or 470, 472, 90 P 904.

FURTHER CITATIONS: Harker v. Fahie, (1863) 2 Or 89; Perry v. Gholson (1901) 39 Or 438, 65 P 601; Jacobs v. Jacobs, (1916) 79 Or 143, 154 P 749; Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 983; Northwestern Ins. Co. v. Averill, (1935) 149 Or 672, 42 P2d 747; Swift v. Meyers, (1888) 37 Fed 37, 13 Sawy 583; Bramwell v. Owen, (1921) 276 Fed 36; State ex rel. Kalich v. Bryson, (1969) 253 Or 418, 453 P2d 659.

LAW REVIEW CITATIONS: 26 OLR 202; 36 OLR 59; 46 OLR 188, 189, 190.

15.060

NOTES OF DECISIONS

Strict compliance is necessary when a court seeks to acquire jurisdiction by a course specially pointed out by statute. Heatherly v. Hadley, (1869) 4 Or 1.

Proof of service must be made in the court where the process is returnable. Id.

An admission of service which does not state any time or place of service is insufficient. Id.

Absolute verity is imported by the indorsement of a sheriff, showing the date of delivery of a summons to him, while unimpeached and not set aside by any adequate

proceeding. White v. Johnson, (1895) 27 Or 282, 298, 40 P 511, 50 Am St Rep 726.

The return is prima facie evidence of the material matters stated therein, but it may be contradicted. Huntington v. Crouter, (1898) 33 Or 408, 410, 414, 54 P 208, 72 Am St Rep 726.

An officer may be permitted to amend his return so that it will conform to the truth. White v. Ladd, (1899) 34 Or 422, 425, 56 P 515.

This section has no application to service by publication. Bank of Colfax v. Richardson, (1899) 34 Or 518, 539, 54 P 359, 75 Am St Rep 664.

A return showing service upon the president of the corporation where the cause of action arose and was instituted, though not showing that he resided or had an office in such county, is valid. Bailey v. Malheur & Harney Lake Irr. Co., (1899) 36 Or 54, 60, 57 P 910.

Where the summons and complaint correctly named the defendant as Albert A., and he was actually served, a return of service on the "within named defendant, Alfred A.," was valid. Abraham v. Miller, (1908) 52 Or 8, 95 P 814.

The language that "the summons shall be served by the sheriff of the county where the defendant is found," does not refer to corporations; and service on the proper officer in an action properly brought where the corporation has its residence need not be made in that county or where the cause arose. Davies v. Ore. Placer & Power Co., (1909) 61 Or 594, 599, 123 P 906.

FURTHER CITATIONS: Hunsaker v. Coffin, (1864) 2 Or 107; Williams v. Schmidt, (1887) 14 Or 470, 13 P 305; Holgate v. Ore. Pac. R. Co., (1888) 16 Or 123, 17 P 859; Perry v. Gholson, (1901) 39 Or 438, 65 P 601; Willamette Coll. & Cred. Serv. v. Henry, (1932) 138 Or 460, 7 P2d 261; Semler v. Cook-Waite Lab., Inc., (1955) 203 Or 139, 278 P2d 150; Grabner v. Willys Motors, Inc., (1960) 282 F2d 644.

ATTY GEN. OPINIONS: Whether a notice of garnishment may be served upon the garnishee pursuant to this section, 1952-54, p 108; authority of corporation employe to serve summons in action brought by corporation, 1964-66, p 158.

LAW REVIEW CITATIONS: 46 OLR 190, 191.

15.070

NOTES OF DECISIONS

A plaintiff who failed to have copies of the complaint served upon defendants except one could, before the statute of limitations had run, issue another summons without a return of "not found," and cause proper service to be made. Lane v. Ball, (1917) 83 Or 404, 406, 160 P 144, 163 P 975.

FURTHER CITATIONS: Belknap v. Charlton, (1893) 25 Or 41, 34 P 758; Bank of Colfax v. Richardson, (1899) 34 Or 518, 54 P 359, 75 Am St Rep 664.

ATTY. GEN. OPINIONS: Necessary mileage if process cannot be served in one trip, 1940-42, p 381.

15.080

NOTES OF DECISIONS

1. In general

A copy of a complaint in the justice's court is sufficiently certified where certified by the justice himself. Marooney v. McKay, (1871) 3 Or 372.

Where the return does not show that a copy of the complaint, duly certified, was served on the defendant, the service is insufficient to warrant a judgment by default. Belfils v. Flint, (1887) 15 Or 158, 161, 14 P 295.

The provisions concerning a summons and its service are applicable to a suit to enforce the lien of a mortgage. Swift v. Meyers, (1888) 37 Fed 37, 39, 13 Sawy 583.

Omission of the attorney's name from the copy of the complaint is not fatal. Wilson v. Fine, (1889) 38 Fed 789.

Service, upon the executrix of an original party after an order of substitution, was not sufficient where the summons served is directed to the decedent and did not contain the name of the new party or mention her as a party litigant, either in her individual or representative capacity. White v. Johnson, (1895) 27 Or 282, 40 P 511, 50 Am St Rep 726.

An amendment of this section would apply to equity suits as well as to actions at law. Bailey v. Malheur & Harney Lake Irr. Co., (1899) 36 Or 54, 58, 57 P 910.

Where service of summons on joint defendants in a tort action is made on all, but a copy of complaint is delivered to only one, no jurisdiction is obtained over the others. Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975.

A return of service of summons in a justice's court was fatally defective where it did not show that the copy of the complaint served with the summons was certified. Spencer v. Small, (1918) 87 Or 662, 171 P 409.

2. "Against a private corporation"

A domestic corporation must be sued either in the county where the cause of action arose, or where it has its principal office or place of business where the action is transitory. Holgate v. Ore. Pac. R. Co., (1888) 16 Or 123, 17 P 859; State v. Almeda Consol. Mines Co., (1923) 107 Or 18, 212 P 789; State v. Updegraff, (1942) 172 Or 246, 141 P2d 251; Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110; State ex rel. Willamette Nat. Lbr. Co. v. Circuit Court, (1949) 187 Or 591, 211 P2d 994; State v. Goldstein, (1960) 221 Or 309, 351 P2d 39.

When a corporation is sued where it has its principal office, the service must be made on the president, secretary, cashier or managing agent. Holgate v. Ore. Pac. R. Co., (1888) 16 Or 123, 17 P 859; Farrell v. Ore. Gold Co., (1897) 31 Or 463, 49 P 876.

If any of the superior officers reside or have an office within the county where the cause arose and was instituted, service must be made upon him for the corporation, to the exclusion of any clerk or other agent. Bailey v. Malheur & Harney Lake Irr. Co., (1899) 36 Or 54, 57 P 910.

When service is made upon a principal officer at the principal office or place of business, it need not appear affirmatively from the returns of service that such officer resided or had an office in such county. Weaver v. So. Ore. Co., (1897) 30 Or 348, 48 P 171; Farrell v. Ore. Gold Co., (1897) 31 Or 463, 49 P 876; Bailey v. Malheur & Harney Lake Irr. Co., (1899) 36 Or 54, 57 P 910.

Service on the "vice-president and managing agent of a corporation," is sufficient where the person served was in fact the managing agent, although he had ceased to be vice-president. Coast Land Co. v. Ore. Colonization Co., (1904) 44 Or 483, 488, 75 P 884.

In case of service in the county where the cause arose rather than defendant's principal office or place of business, the return upon the process must show the reasons for making service in the manner pursued. Hildebrand v. United Artisans, (1905) 46 Or 134, 79 P 347, 114 Am St Rep 852.

Personal service upon secretary of domestic corporation in transitory action was sufficient regardless of county in which made where action was brought in county in which

corporation had principal place of business. Davies v. Ore. Placer & Power Co., (1912) 61 Or 594, 123 P 906.

(1) Foreign corporations. Service upon president of foreign corporation is prima facie sufficient, although return does not show that he was authorized to represent his company or that it was doing business in state. Farrell v. Ore. Gold Min. Co., (1897) 31 Or 463, 49 P 876; Brown v. Lewis, (1907) 50 Or 358, 92 P 1058.

Whether or not he resided or had an office in the county where the cause of action arose, service upon the president there is sufficient. Farrell v. Ore. Gold Min. Co., (1897) 31 Or 463, 49 P 876.

When service of summons is made on an officer of a foreign corporation, it must appear someplace in the record that the corporation was doing business in the state. Knapp v. Wallace, (1907) 50 Or 348, 92 P 1054, 126 Am St Rep 742.

If the company is doing business in the state, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation. Id.

Laws 1903, p. 39, requiring foreign corporations to appoint a resident attorney amends this section by implication only, and is not violative of constitutional inhibition. Cunningham v. Klamath Lake R. Co., (1909) 54 Or 13, 101 P 213, 1099.

Service or summons on a foreign corporation must be made as prescribed by this statute. State v. Norton, (1929) 131 Or 382, 283 P 12.

When venue is properly laid against a foreign corporation, personal service may be made upon the statutory agent for service at any place he may be found within the state. State v. Updegraff, (1943) 172 Or 246, 141 P2d 251. Overruling Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223.

(2) Clerk or agent. A return of service on a clerk or agent of a corporation is insufficient in the absence of a showing of facts authorizing such service. Caro v. Ore. & Calif. R. Co., (1883) 10 Or 510; Hildebrand v. United Artisans, (1905) 46 Or 134, 139, 79 P 347, 114 Am St Rep 852.

Service on a nonresident fraternal benefit corporation may be made by delivering the process to the secretary of the local branch, such person being an "agent." Hildebrand v. United Artisans, (1905) 46 Or 134, 138, 79 P 347, 114 Am St Rep 852; Riddle v. Order of Pendo, (1907) 49 Or 229, 89 P 640.

Service may be made upon the agent of a foreign corporation in a county where the cause of action did not arise. Lung Chung v. No. Pac. R. Co., (1884) 19 Fed 254; Semler v. Cook-Waite Lab. Inc., (1954) 203 Or 139, 278 P2d 150.

"County" must be construed as "district" in action brought in federal court. Lung Chung v. No. Pac. R. Co., (1884) 19 Fed 254.

Service upon a clerk or agent of a corporation must be made in the county where the cause of action arose. Davies v. Ore. Placer & Power Co., (1912) 61 Or 594, 123 P 906.

Service upon an agent of a foreign corporation doing business in the state, within the county in which the action was pending, conferred jurisdiction where neither president nor other officer or managing agent was within the state. Winslow Lbr. Co. v. Edward Hines Lbr. Co., (1928) 125 Or 63, 266 P 248.

3. "Against a county" etc.

A county boundary board not being a corporation, service had to be made on all members to confer jurisdiction. Williams v. Henry, (1914) 70 Or 466, 142 P 337.

A writ of review may be served upon the county by delivering the writ to the clerk. Holland-Wash. Mtg. Co. v. County Court, (1920) 95 Or 668, 188 P 199.

Quo warranto, being an action at law, copy of complaint and summons must be served on each defendant. State v. Kleckner, (1925) 116 Or 371, 239 P 817, 240 P 1115.

This section constitutes legislative recognition that an action may be maintained against a state commission or board as a legal entity. State v. Reid, (1960) 221 Or 558, 352 P2d 466.

Service in a death action on the secretary of the dock commission of a city, followed by appearance of the commission's attorney, did not constitute an appearance by the city. Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

4. Against a minor under the age of 14 years

A return of service not showing that summons was "personally" served by the party making the return failed to give jurisdiction. Harris v. Sargeant, (1900) 37 Or 41, 60 P 608.

This subdivision relates to personal service only, and is not to be read into or in conjunction with sections relating to service by publication. Cohen v. Portland Lodge, No. 142, B.P.O.E., (1906) 144 Fed 266, aff'd, 152 Fed 357, 81 CCA 483.

Service of a minor under the age of 14 years as though he were an adult is insufficient. Cobb v. Klosterman, (1911) 58 Or 211, 217, 114 P 96.

A service made upon the guardian and not also on the ward as required does not give the court jurisdiction. Benson v. Williams, (1944) 174 Or 404, 143 P2d 477, 149 P2d 549.

5. Against judicially declared incompetents

Failure to serve the guardian of a person adjudged insane is fatal. Lieblin v. Breyman Leather Co., (1916) 82 Or 22, 160 P 1167.

Prior adjudication of insanity of defendant and appointment of guardian is essential to invoke subsection (4). Bobell v. Wagenaar, (1923) 106 Or 232, 210 P 711.

6. Service if defendant be not found

That the party could not be found must appear to authorize the substituted service. Trullenger v. Todd, (1873) 5 Or 36; Hass v. Sedlak, (1881) 9 Or 462; Settlemier v. Sullivan, (1879) 97 US 444, 24 L Ed 1110; Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

A person "who resides with the family" is a person "of the family." Carland v. Heineborg, (1863) 2 Or 75.

Where only one copy of summons and complaint, naming both husband and wife as defendants, was left at the residence with the wife, it was not adequate service on husband. Heatherby v. Hadley, (1868) 2 Or 269.

A return showing service at the defendant's usual place of abode in the county is insufficient. Swift v. Meyers, (1888) 37 Fed 37, 39, 13 Sawy 583.

The terms "dwelling-house" and "usual place of abode" are synonymous, and mean domicile. McFarlane v. Cornelius, (1903) 43 Or 513, 521, 73 P 325, 74 P 468.

Neither party after a divorce suit is commenced is a "person of the family" where it appears that the family relationship was suspended. Id.

Personal service in a county other than that in which the action is filed is permitted in a transitory action, if the venue was properly laid in said county. Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110.

"A member of the family" does not include a non-domestic servant who lives with his employer and who was charged for his room and board. Kenner v. Schmidt, (1968) 252 Or 218, 448 P2d 537.

A return "I could not find said defendant on the day said summons was delivered to me" did not show a compliance. Whittier v. Woods, (1910) 57 Or 432, 112 P 408.

7. Defects and practice

A defect in return may be corrected by amendment at the discretion of the court without notice to the defendant. Richards v. Ladd, (1879) 6 Sawy 40, Fed Cas No. 11, 804.

If the party served by a wrong name fails to appear and make a defense or submits to a judgment by a wrong name, the judgment binds him. Foshier v. Narver, (1893) 24 Or 441, 34 P 21, 41 Am St Rep 874.

Appeal from an overruled motion to quash a service of summons will not be heard unless the objection is incorporated in a bill of exceptions accompanying the record. Sit You Gune v. Hurd, (1912) 61 Or 182, 120 P 737, 1135.

A defect in the return of a summons must be assailed by an application to set aside the service. Lane v. Ball, (1917) 83 Or 404, 405, 160 P 144, 163 P 975.

A return of service of summons on an individual that failed to disclose that he was president, secretary, cashier or managing agent of the corporate defendant was insufficient to sustain a default judgment. Willamette Falls Co. v. Williams, (1854) 1 Or 112.

Motion to set aside service, without any attempt to show meritorious defense, was denied where the person served was in fact an agent and the corporation did not deny the validity of the judgment nor take steps to set aside the service for four months. Coast Land Co. v. Ore. Colonization Co., (1904) 44 Or 483, 75 P 884.

FURTHER CITATIONS: Vedder v. Marion County, (1892) 22 Or 264, 29 P 619; Aldrich v. Anchor Coal Co., (1893) 24 Or 32, 32 P 756, 41 Am St Rep 831; Bank of Colfax v. Richardson, (1899) 34 Or 518, 54 P 359; Northwestern Nat. Ins. Co. v. Averill, (1935) 149 Or 672, 42 P2d 747; Matson v. Rhodes, (1944) 174 Or 550, 149 P2d 974; Grabner v. Willys Motors, Inc., (1960) 282 F2d 644; McCain v. State Tax Comm., (1961) 227 Or 486, 360 P2d 778, 363 P2d 775; Morris v. Fee, (1970) 255 Or 623, 469 P2d 788; Ter Har v. Backus, (1971) 259 Or 478, 487 P2d 660.

ATTY. GEN. OPINIONS: Service upon convicts in penitentiary, 1930-32, p 151; effect of failure to serve notice upon a director of a school district in a mortgage foreclosure, 1932-34, p 493; service upon incompetent, 1936-38, p 281; necessity for attempted personal service of tax warrants before publication may be resorted to, 1944-46, p 136.

LAW REVIEW CITATIONS: 8 OLR 3, 22; 13 OLR 371; 18 OLR 326; 36 OLR 51; 46 OLR 191, 192, 193; 49 OLR 337-342; 4 WLJ 22; 5 WLJ 4.

15.090

NOTES OF DECISIONS

This section is qualified by H 55 [ORS 15.080]. Harris v. Sargeant, (1900) 37 Or 41, 60 P 608; Cobb v. Klosterman, (1911) 58 Or 211, 114 P 96; Lieblin v. Breyman Leather Co., (1916) 82 Or 22, 160 P 1167.

If it does not appear in the return that the plaintiff directed in writing on the copy of the complaint served, on which defendant it should be served, service of summons on all and of complaint on only one, if defective, can only be taken advantage of by appeal. Ankeny v. Blackiston, (1879) 7 Or 435.

On a counterclaim in equity to an action at law, defendant may cause summons to issue against his co-defendants, under the original title of the suit, and have the same served on them with a copy of his answer, or he may have served a copy of the order of the court, requiring his co-defendants to appear and respond to the affirmative matter in the answer within the time therein specified. Hough v. Porter, (1909) 51 Or 318, 377, 95 P 732, 98 P 1083, 102 P 728.

FURTHER CITATIONS: Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975.

LAW REVIEW CITATIONS: 46 OLR 191; 4 WLJ 22.

15.100

NOTES OF DECISIONS

1. "Defendants jointly indebted"

In case of default entered against defendants jointly liable, judgment should be enforceable against joint property of all defendants and separate property of the defendant served. Graydon v. Thomas, (1870) 3 Or 250.

This section provides for a several judgment as to defendants served, in case there is a joint party over whom the court has not obtained jurisdiction. Stivers v. Byrkett, (1910) 56 Or 565, 571, 108 P 1014, 109 P 386.

Exhaustion of joint property of joint contractors before resorting to the separate estates of defendants is not required. Anderson v. Stayton State Bank, (1916) 82 Or 357, 159 P 1033.

Verdict and judgment may run against one surety only, although the verdict is in favor of, and the action dismissed as to, the principal defendant and the other surety. Bertin & Lepori v. Mattison, (1916) 80 Or 354, 157 P 153, 5 ALR 590.

Judgment against partners is valid, notwithstanding insufficiency of service on one, where the obligation was joint and several and the property involved was owned as partners. First Nat. Bank v. Manassa, (1916) 80 Or 53, 150 P 258.

To entitle a court to enter a judgment against a defendant not served, it must be established that the obligation sued on is a joint obligation of all defendants against whom the judgment is entered. Chagnot v. Labbe, (1937) 157 Or 280, 69 P2d 949.

2. "Defendants severally liable"

A plaintiff suing on a joint and several undertaking can proceed either against the principal or the surety, or both. Klamath County Sch. Dist. v. Amer. Sur. Co., (1929) 129 Or 248, 275 P 917.

3. "If all defendants have been served"

Where all defendants, joint obligors, have been served, plaintiff must recover against all or none. Fisk v. Henarie, (1886) 14 Or 29, 33, 13 P 193; North Pac. Lbr. Co. v. Spore, (1904) 44 Or 462, 476, 75 P 890.

If one of several alleged joint or joint and several obligors was not such, plaintiff may recover against those who were. Fisk v. Henarie (1886) 14 Or 29, 13 P 193; Tillamook Dairy Assn. v. Schermerhorn, (1897) 31 Or 308, 51 P 438; Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

In an action upon a contract, joint and several, a several judgment would be proper and might be rendered against one or more without waiting the final trial. Sears v. McGrew, (1881) 10 Or 48, 50; Cox v. Alexander, (1897) 30 Or 438, 444, 46 P 794.

Only against parties shown to be liable can plaintiff take judgment in an action against two or more defendants upon an alleged joint obligation. Ah Lep v. Gon Choy, (1886) 13 Or 205, 214, 9 P 483.

In an action against parties jointly and severally liable, a voluntary nonsuit may be taken as to one and a judgment recovered as to the other, and afterward an action may be maintained against the one as to whom the nonsuit was taken. Benbow v. The James Johns, (1910) 56 Or 554, 562, 108 P 634.

Court must proceed to trial against such defendants sued on joint liability as have answered and joined issue, before entering default and judgment against other defendants served but not appearing. Hewey v. Andrews, (1917) 82 Or 448, 159 P 1149, 161 P 108.

FURTHER CITATIONS: Coleman v. Elmore, (1887) 12 Sawy 463, 31 Fed 391.

LAW REVIEW CITATIONS: 12 OLR 105; 4 WLJ 22.

15.110

NOTES OF DECISIONS

Judgment of contempt against defendant cannot be sustained upon personal service of the defendant outside the state made under this section. State v. Stillwell, (1916) 80 Or 610, 157 P 970.

This Act is taken verbatim from the Illinois law and is committed to the same interpretation. Hiersche v. Seamless Rubber Co., (1963) 225 F Supp 682.

All rights of action are enforceable under this new procedure without regard to whether they accrued, or litigation was instituted, before or after the change. Id.

Although the summons served on defendant failed to inform him of the time within which he was required to answer, the court obtained jurisdiction to entertain a motion to amend. State ex rel. Kalich v. Bryson, (1969) 253 Or 418, 453 P2d 659.

FURTHER CITATIONS: Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; Dickenson v. Babich, (1958) 213 Or 472, 326 P2d 446; Hicks v. Crane Co., (1964) 235 F Supp 609.

ATTY. GEN. OPINIONS: Personal service outside the state as the equivalent of service by publication, 1932-34, p 400; applicability of section to justices' courts, 1942-44, p 268.

15.120

NOTES OF DECISIONS

1. Construction of statute
2. Acquisition of jurisdiction over property
3. Due diligence
4. Existence of cause of action
5. When defendant has departed from the state
6. Affidavit for publication
   (1) Contents
7. Order for publication
8. The summons as published

1. Construction of statute

Neither BC 55 [ORS 15.080] nor this section is to be read into the other. Cohen v. Portland Lodge, No. 142, B.P.O.E., (1906) 144 Fed 266, aff'd, 152 Fed 357, 81 CCA 483; Ranch v. Werley, (1907) 152 Fed 509.

2. Acquisition of jurisdiction over property

Where the suit is in personam, constructive service upon a nonresident is ineffectual for any purpose. Willamette Real Estate Co. v. Hendrix, (1896) 28 Or 485, 494, 42 P 514, 52 Am St Rep 800; Bank of Colfax v. Richardson, (1899) 34 Or 518, 524, 54 P 359, 75 Am St Rep 664; Knapp v. Wallace, (1907) 50 Or 348, 354, 92 P 1054, 126 Am St Rep 742; Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 166 P 965, 167 P 1167; Cooper v. Reynolds, (1870) 77 US 308, 319, 19 L Ed 931, 933; Galpin v. Page, (1874) 85 US 350, 351, 21 L Ed 959; Pennoyer v. Neff, (1878) 95 US 714, 24 L Ed 565.

Property of a nonresident defendant within the state must be subjected to the jurisdiction of the court by attachment or otherwise, to sustain jurisdiction of the court to act against it, where he does not appear in the action. Willamette Real Estate Co. v. Hendrix, (1896) 28 Or 485, 42 P 514, 52 Am St Rep 800; Pennoyer v. Neff, (1878) 95 US 714, L Ed 565.

The rule requiring property of a nonresident to be seized before any steps are taken for service by publication is wholly judicial. Bank of Colfax v. Richardson, (1899) 34 Or 518, 524, 54 P 359, 75 Am St Rep 664.

In case of a nonresident minor, service by publication is sufficient. Cohen v. Portland Lodge, No. 142, B.P.O.E., (1906) 144 Fed 266, aff'd, 152 Fed 357, 81 CCA 483.

The failure of the judgment to direct a sale of the attached property renders the judgment merely one in personam. Mertens v. No. State Bank, (1913) 68 Or 273, 135 P 885.

A chose in action is personal property and may be attached to found jurisdiction over a nonresident creditor defendant. Pierce v. Pierce, (1936) 153 Or 248, 56 P2d 336.

Defendant United States Commissioner temporarily residing at Honolulu was properly served by publication in a foreclosure suit. Collinson v. Teal, (1877) 4 Sawy 241, Fed Cas No. 3,020.

3. Due diligence

Where neither personal nor substituted service could be made, this section applied. McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468.

If personal service can be effected by exercise of reasonable diligence, substituted service is unauthorized. Dixie Meadows Independence Mines Co. v. Kight, (1935) 150 Or 395, 45 P2d 909.

This section and that authorizing service upon the corporation commissioner in case of a failure of a domestic corporation to designate an agent for service are cumulative, and the plaintiff may proceed under either. Id.

In a proceeding to foreclose a tax certificate against a resident defendant summons served by publication without assigning any reason would not uphold a decree. Bagley v. Bloch, (1917) 83 Or 607, 163 P 425.

It failing to appear that plaintiff used due diligence to determine defendant's place of residence, the court lacked jurisdiction of the action. Fishburn v. Londershausen, (1907) 50 Or 363, 92 P 1060, 15 Ann Cas 975, 14 LRA(NS) 1234.

4. Existence of cause of action

Existence of a cause of action against the defendant, together with other requisite facts specified in this section, authorize court or judge to order published service of summons. Pursel v. Deal, (1888) 16 Or 295, 18 P 461; McFarlane v. Cornelius, (1903) 43 Or 513, 521, 73 P 325, 74 P 468.

Judgment creditor's right to obtain leave of court to issue execution on a dormant judgment is a "cause of action." Pursel v. Deal, (1888) 16 Or 295, 18 P 461.

5. When defendant has departed from the state

Defendant in divorce who permanently resided in the state with plaintiff up to the day before such suit was commenced and thereupon left and established a temporary residence without the state is within this subsection. McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468.

This subsection is to be construed in conjunction with ORS 15.070. Lane v. Ball, (1916) 83 Or 404, 160 P 144, 163 P 975.

6. Affidavit for publication

Jurisdiction is based on the affidavit, and not on the recital of facts found in the order for publication. Goodale v. Coffee, (1893) 24 Or 346, 33 P 990; Dickenson v. Babich, (1958) 213 Or 472, 326 P2d 446.

It is the affidavit showing defendant cannot be found that is the basis for the order of publication, not the sheriff's return. Bank of Colfax v. Richardson, (1899) 34 Or 518, 54 P 359, 75 Am St Rep 664.

A decree cannot be impeached collaterally because of defects in affidavit. George v. Nowlan, (1901) 38 Or 537, 65 P 1; Ashford v. Ashford, (1954) 201 Or 206, 249 P2d 968, 268 P2d 382.

An affidavit made in a sister state before a notary public,

but not properly authenticated by the required certificate, is a nullity. North Star Lbr. Co. v. Johnson, (1912) 196 Fed 56, 59, aff'd, 206 Fed 624, 125 CCA 118.

The affidavit required is an essential prerequisite to a valid order for publication of summons. Id.

Affidavit for publication of summons on resident absent from state which made no reference to prerequisite statutory conditions was insufficient to confer jurisdiction to permit rendition of a personal judgment against the defendant. Dickenson v. Babich, (1958) 213 Or 472, 326 P2d 446.

Sufficient proof to justify publication was shown where the officer's return stated his inability, after due and diligent search, to find the defendants or any of them or their authorized agents, within the jurisdiction, and where there was evidence of such facts and that one defendant was a foreign corporation, without president, managing agent or other representative therein. Marx v. Ebner, (1900) 180 US 314, 21 S Ct 376, 45 L Ed 547.

Clerical error in omitting the word "not" did not vitiate an affidavit reciting that defendant "is without the state of Oregon and is now a resident of the state." Kieffer v. Victor Land Co., (1909) 53 Or 174, 90 P 582, 98 P 877.

(1) Contents. The affidavit should state facts showing due diligence, or proof of such facts as will show that diligence will be unavailing to effect a service within the state. Pike v. Kennedy, (1887) 15 Or 420, 425, 15 P 637; Cook v. Cook, (1941) 167 Or 474, 111 P2d 840, 118 P2d 1070; McDonald v. Cooper, (1887) 13 Sawy 86, 32 Fed 745; Ranch v. Werley, (1907) 152 Fed 509.

An affidavit must show that the defendants have property within the state, and specify the property. Colburn v. Barrett, (1891) 21 Or 27, 29, 26 P 1008; Leslie v. McNeil, (1916) 79 Or 364, 154 P 884; McDonald v. Cooper, (1887) 13 Sawy 86, 32 Fed 745; Cohen v. Portland Lodge No. 142, B.P.O.E., (1906) 144 Fed 266, aff'd, (1907) 152 Fed 357, 81 CCA 483.

Affidavit in the language of the statute is not alone sufficient to justify service by publication. Cohen v. Portland Lodge, No. 142, B.P.O.E., (1906) 144 Fed 266, aff'd, (1907) 152 Fed 357, 81 CCA 483.

A mere allegation that defendant resides in another state is not enough. McDonald v. Cooper, (1887) 13 Sawy 86, 32 Fed 745.

The statement of defendant's post office address is not jurisdictional. Moore Realty Co. v. Carr, (1912) 61 Or 34, 38, 120 P 742.

Affidavit showing residence in another state was sufficient. Cohen v. Portland Lodge No. 142, B.P.O.E., (1906) 144 Fed 266, 270, aff'd, (1907) 152 Fed 357, 81 CCA 483.

An affidavit, showing cessation of business and absence of officers or agents upon whom service could be made, was sufficient. Knapp v. Wallace, (1907) 50 Or 348, 92 P 1054, 126 Am St Rep 742.

Where the affidavit showed that the residence of a nonresident was unknown, court acquired jurisdiction though a copy of the complaint and summons were not mailed to the defendant. Felts v. Boyer, (1914) 73 Or 83, 144 P 420.

An affidavit for publication must show diligence was exercised by the plaintiff, or what inquiry was made to ascertain whether the party was then within the county of the forum or the state, or of whom inquiry in regard thereto was made. Dixie Meadows Independence Mines Co. v. Kight, (1935) 150 Or 395, 45 P2d 909.

7. Order for publication

A recital that "it appearing to the satisfaction of the court" that the defendant cannot be found within the state was not a compliance with the section. Galpin v. Page, (1874) 85 US 350, 21 L Ed 959.

Order for publication need not recite facts authorizing its issuance. Knapp, Burrell & Co. v. King, (1877) 6 Or 243; Goodale v. Coffee, (1893) 24 Or 346, 33 P 990.

An order for publication does not cure a defective affidavit for service by publication. Dixie Meadows Independence Mines Co. v. Kight, (1935) 150 Or 395, 45 P2d 909; Dickenson v. Babich, (1958) 213 Or 472, 326 P2d 446.

Order of publication was void where based on affidavits which failed to state the probative facts required. McDonald v. Cooper, (1887) 13 Sawy 86, 32 Fed 745; Dickenson v. Babich, (1958) 213 Or 472, 326 P2d 446.

Affidavit and complaint may be looked to to determine validity of order of publication. Knapp, Burrell & Co. v. King, (1877) 6 Or 243.

Affidavit and complaint will be presumed sufficient to support order for publication where they are not in the record. Id.

Unless the facts are sufficient to sustain the order for publication, as prescribed, and such facts are disclosed by the record, the court is without jurisdiction to render judgment. Neff v. Pennoyer, (1875) 3 Sawy 274, 278, Fed Cas No. 10,083, aff'd, 95 US 714, 24 L Ed 565.

8. The summons as published

The publication of summons must strictly follow the statute, and compliance must affirmatively appear from the record itself. Northcut v. Lemery, (1880) 8 Or 316, 320; Odell v. Campbell, (1881) 9 Or 298, 304; Bagley v. Bloch, (1917) 83 Or 607, 163 P 425; Dixie Meadows Independence Mines Co. v. Kight, (1935) 150 Or 395, 45 P2d 909; Galpin v. Page, (1874) 85 US 350, 21 L Ed 959.

That published summons does not mention intervenors in a suit is not fatal. Goodale v. Coffee, (1893) 24 Or 346, 355, 33 P 990.

"Succinct" means simply a concise or summary statement and does not require a full statement of the relief demanded. George v. Nowlan, (1901) 38 Or 537, 64 P 1.

Published summons must conform to that delivered to sheriff, and limits judgment accordingly. Klein v. Turner, (1913) 66 Or 369, 133 P 625.

That the published summons does not give notice that defendant's property has been attached and will be condemned in satisfaction of judgment is a denial of "due process of law." Okanogan State Bank v. Thompson, (1922) 106 Or 447, 211 P 933.

A succinct statement of the relief demanded was contained in published summons which referred to the demand for relief set forth in the complaint, and contained a statement of the relief demanded in the very words of the complaint. Id.

FURTHER CITATIONS: Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; State ex rel. Pratt v. Main, (1969) 253 Or 408, 454 P2d 643.

ATTY. GEN. OPINIONS: Service by publication in proceedings related to infested orchards, 1920-22, p 573; publication in foreclosure proceedings for delinquent tax certificates, 1920-22, p 657; sufficiency of affidavit and order for publication of summons, 1922-24, p 192; sufficiency of affidavit for publication, 1926-28, p 333; whether personal service of warrants for delinquent taxes must be attempted before publication may be resorted to, 1944-46, p 136.

LAW REVIEW CITATIONS: 3 OLR 346; 8 OLR 3, 22; 18 OLR 326; 36 OLR 171; 46 OLR 195.

15.130

NOTES OF DECISIONS

1. Realty or personalty in this state

Service by publication in a suit to quiet title is sufficient to confer jurisdiction. Kieffer v. Victor Land Co., (1909) 53 Or 174, 90 P 582, 98 P 877.

In a suit to specifically perform a contract to convey, service of summons by publication may be had. Hawkins v. Doe, (1912) 60 Or 437, 439, 119 P 754, Ann Cas 1914A, 765.

In escheat proceedings seizure is not essential to jurisdiction. State v. First Nat. Bank, (1912) 61 Or 551, 555, 123 P 712, Ann Cas 1914B, 153.

Stock in an Oregon corporation is subject to the jurisdiction of the Oregon courts, though the certificates are without the state and are owned by nonresidents. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 42, 166 P 965, 167 P 1167.

2. Divorce suits

LOL 59 [ORS 15.150] applies to suits for divorce, and an order that defendant be allowed to defend need not be preceded by establishment of the defense pleaded. Taylor v. Taylor, (1912) 61 Or 257, 261, 121 P 431, 964.

FURTHER CITATIONS: McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072.

15.140

NOTES OF DECISIONS

1. In general
2. Order for publication
3. Published summons
4. Mailing copy of summons and complaint

1. In general

Service of new summons upon defendants not previously properly served is authorized by this section in conjunction with LOL 56 and 60 [ORS 15.120, 52.150 and 15.070]. Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975.

The only requirements for service of nonresident minors are contained in this section and LOL 56 [ORS 15.120 and 52.150]. Cohen v. Portland Lodge No. 142, B.P.O.E., (1906) 144 Fed 266; aff'd (1907) 152 Fed 357, 81 CCA 483.

Where notwithstanding a divorce decree's recital of "publication as required by law," the record discloses that the statutory period could not possibly have elapsed between the filing of the petition and the rendition of decree, the court acquired no jurisdiction. Northcut v. Lemery, (1880) 8 Or 316, 320.

Affidavit for publication of summons on resident absent from state which made no reference to prerequisite statutory conditions was insufficient to confer jurisdiction to permit rendition of a personal judgment against the defendant. Dickenson v. Babich, (1958) 213 Or 472, 326 P2d 446.

2. Order for publication

Order for published service is sufficient without reciting all probative and jurisdictional facts necessary to sustain it. Goodale v. Coffee, (1893) 24 Or 346, 33 P 990.

The court is to make an order, properly dated, on presentation of the required affidavit, that the publication be made in a particular manner for a reasonable time, and that a copy of the summons and complaint be forthwith deposited in the post office, addressed to the defendant at his place of residence, if known. Id.

Time for publication of summons and for defendant to appear was sufficiently stated in order for publication where publication was ordered for six consecutive weeks. McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468.

Mere clerical error in order for publication did not invalidate it, where order itself refuted such error. Kieffer v. Victor Land Co., (1909) 53 Or 174, 90 P 582, 98 P 877.

3. Published summons

Failure of the published summons to contain the date of the first publication is fatal. Odell v. Campbell, (1881) 9 Or 298.

An order directing a summons to be printed for six consecutive weeks prescribed the time for publication, within the meaning of this section. McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468.

Failure of the summons to specify the time prescribed in the order for publication, is fatal to jurisdiction. Osburn v. Maata, (1913) 66 Or 558, 135 P 165.

Published summons reciting that publication was ordered for six weeks failed to comply with this section, where the order was for publication for eight weeks. Id.

4. Mailing copy of summons and complaint

Omission of statutory word "forthwith" from order is not, on collateral attack, fatal to proceedings when it appears that copies were actually mailed within reasonable time after date of order. Bank of Colfax v. Richardson, (1898) 34 Or 518, 54 P 359, 75 Am St Rep 664. **Contra**, Odell v. Campbell, (1881) 9 Or 298.

Annexation to or indorsement of proof of mailing summons to the summons itself is not essential as against collateral attack. Bank of Colfax v. Richardson, (1898) 34 Or 518, 54 P 359, 75 Am St Rep 664.

The deposit in the mails need not be made by any particular officer or person. Id.

A deposit in the post office on the day of first publication is sufficient. Bank of Colfax v. Richardson, (1899) 34 Or 518, 538, 54 P 359, 75 Am St Rep 664.

Temporary residence of absent defendant without the state, not permanent abode within the state, is contemplated by this section, and copy of summons and complaint should be mailed to former place. McFarlane v. Cornelius, (1903) 43 Or 513, 73 P 325, 74 P 468.

Order for publication directing mailing to foreign corporation defendant, rather than to president or other officer, is sufficient. Ranch v. Werley, (1907) 152 Fed 509.

Mailing on last day for appearance is insufficient to give court jurisdiction. Knapp v. Wallace, (1907) 50 Or 348, 92 P 1054, 126 Am St Rep 742.

It is jurisdictional that the summons and complaint be mailed to the defendant at his post office address. Moore Realty Co. v. Carr, (1912) 61 Or 34, 38, 120 P 742.

Mailing to place of residence stated in order is sufficient, as against collateral attack, although affidavit for publication recited a different place. Id.

Mailing to unknown defendant is not necessary to confer jurisdiction where defendant had never maintained a residence in the state and his address was unknown. Felts v. Boyer, (1914) 73 Or 83, 144 P 420.

It failing to appear that plaintiff used due diligence to determine defendant's place of residence, the court lacked jurisdiction of the action. Fishburn v. Londershausen, (1907) 50 Or 363, 92 P 1060, 15 Ann Cas 975, 14 LRA(NS) 1234.

Where plaintiff addressed the summons and complaint to defendant at Winnipeg, Canada, without giving street and number, he was not guilty of such fraud as would warrant setting aside the default decree, where defendant did in fact reside in Winnipeg, and plaintiff acted in good faith. Cook v. Cook, (1941) 167 Or 474, 111 P2d 840, 118 P2d 1070.

FURTHER CITATIONS: Re Willow Creek, (1915) 74 Or 592,

144 P 505, 146 P 475; McDonald v. Cooper, (1887) 32 Fed 745, 13 Sawy 86.

ATTY. GEN. OPINIONS: Sufficiency of affidavit and order for publication of summons, 1922-24, p 192; defining "published in the county," 1962-64, p 456; publication in weekly newspaper, (1970) Vol 35, p 247.

LAW REVIEW CITATIONS: 18 OLR 326; 46 OLR 195, 196.

15.150

NOTES OF DECISIONS

1. In general

Decree is included within the term "judgment." Waymire v. Shipley, (1908) 52 Or 464, 97 P 807; Osburn v. Maata, (1913) 66 Or 558, 562, 135 P 165.

Decree of divorce is a judgment within the meaning of this section. Taylor v. Taylor, (1912) 61 Or 257, 263, 121 P 431, 964; Hooper v. Hooper, (1913) 67 Or 187, 135 P 205, 525.

The word "representatives" includes not only the executor or administrator of a deceased person, but also the person who has succeeded to the right of the deceased, whether by purchase or descent, or by operation of law. Felts v. Boyer, (1914) 73 Or 83, 144 P 420.

The expression "personal representatives" and the word "representatives" refer to a like status. Id.

The result of opening a default under the section is to restore the cause to the control of the court so that it becomes lis pendens with all its incidents. Anderson v. Anderson, (1918) 89 Or 654, 175 P 287.

Decree attached to an abstract did not fulfill vendor's obligation to furnish abstract showing merchantable title, in view of section. Wurfel v. Bockler, (1923) 106 Or 579, 210 P 213.

2. On application and good cause shown

Answer to the merits must be tendered with application for relief. In re Marks' Estate, (1916) 81 Or 632, 160 P 540; Anderson v. Anderson, (1918) 89 Or 654, 175 P 287.

Defendant must show a meritorious defense to the action or suit and must show a sufficient excuse for his default unless the motion is based on a want of jurisdiction. Mayer v. Mayer, (1895) 27 Or 133, 39 P 1002.

As a matter of statutory right, defendant who brings himself within its provisions is given an opportunity to defend. Felts v. Boyer, (1914) 73 Or 83, 144 P 420.

Court can set aside order vacating default and allowing defendant to answer if improvidently made. Anderson v. Anderson, (1918) 89 Or 654, 175 P 287.

That the affidavit for an order for publication was not made by plaintiff, but by his attorney, and did not disclose diligence to ascertain the residence of the defendant, was considered on an application to open a divorce decree. Smith v. Smith, (1871) 3 Or 363, 366.

Mortgage foreclosure decree was properly vacated and defendant allowed to answer where order of publication was made before filing of complaint, which was filed long after order made, and default was entered within two days thereafter. Waymire v. Shipley, (1908) 52 Or 464, 97 P 807.

"Good cause" was shown where the defendant with his motion tendered an answer stating a good defense, and an affidavit that he had no knowledge or notice that the suit was pending until long after the decree had been entered. Felts v. Boyer, (1914) 73 Or 83, 144 P 420.

3. Effect of failure to resort to remedy

Judgment rendered on published service, though voidable, is conclusive and not open to collateral attack, in absence of relief sought under this section. Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 983.

Defendant was precluded from resorting to the federal court to obtain relief against a decree in view of his failure to resort to the remedy afforded by this section. Bower v. Stein, (1910) 177 Fed 673, 101 CCA 299.

FURTHER CITATIONS: Eggers v. Krueger, (1916) 236 Fed 852.

ATTY. GEN. OPINIONS: Applicability to decree rendered quieting title, 1926-1928, p 333.

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NOTES OF DECISIONS

1. Certificate of officer
2. Affidavit by other person
3. Affidavit of publication
4. Written admission of the defendant
5. Indorsement of proof on summons

1. Certificate of officer

Proof of service by a deputy sheriff must be in the name of his principal. Dennison v. Story, (1859) 1 Or 272.

Return of service by a deputy sheriff cannot be amended long afterward in essential matters of fact by the sheriff in person. Knapp v. Wallace, (1907) 50 Or 348, 92 P 1054, 126 Am St Rep 742.

2. Affidavit by other person

Party to action cannot make proof of service of summons. Williams v. Schmidt, (1887) 14 Or 470, 13 P 305.

A return by certificate by a person not an officer appointed to serve process, is not proof of service. Pickard v. Marsh, (1912) 62 Or 192, 195, 124 P 268.

On appeal by a garnishee, dispute as to whether interrogatories or allegations were served on him must be determined against service where the record is silent as to statutory proof of service. Fraley v. Hoban, (1914) 69 Or 180, 133 P 1190, 137 P 751.

3. Affidavit of publication

The affidavit must not only describe the affiant as one authorized to prove publication but also swear that he is such person. Odell v. Campbell, (1881) 9 Or 298, 306; Rafferty v. Davis, (1909) 54 Or 77, 102 P 305.

Affidavit of publication by "editor," without showing that he was, in fact, such editor or was otherwise one of the persons named in this subdivision, was insufficient. Odell v. Campbell, (1881) 9 Or 298.

As to notice of a street improvement, the same rigid rule is not exacted in proof of the publication. Clinton v. Portland, (1894) 26 Or 410, 418, 38 P 407.

Proof of service by publication may be amended, without notice, to correct a clerical error, where no prejudice results therefrom. Ranch v. Werley, (1907) 152 Fed 509.

Notary's official seal is essential to validity of affidavit of publication of notice of tax sale. Rafferty v. Davis, (1909) 54 Or 77, 102 P 305.

4. Written admission of the defendant

An admission of service that does not show the time or place of service, nor who certified the copies, is insufficient. Heatherly v. Hadley, (1869) 4 Or 1, 18.

Written admissions must be accompanied with some evidence of the genuineness of the signatures of the parties. Moffitt v. McGrath, (1894) 25 Or 478, 480, 36 P 578.

Time of service of notice of appeal must be stated in admission of service, though the place may be presumed. Bennett v. Minott, (1896) 28 Or 339, 39 P 997, 44 P 288.

5. Indorsement of proof on summons

A judgment is not invalid on collateral attack simply because the proof of service of the summons is not annexed to, or indorsed on the summons itself. Bank of Colfax v. Richardson, (1899) 34 Or 518, 539, 54 P 359, 75 Am St Rep 664.

FURTHER CITATIONS: La Grande Nat. Bank v. Blum, (1895) 27 Or 215, 41 P 659; Osburn v. Maata, (1913) 66 Or 558, 135 P 165; Hartley v. Rice, (1927) 123 Or 237, 261 P 689; Pennoyer v. Neff, (1878) 95 US 714, 24 L Ed 565.

ATTY. GEN. OPINIONS: Form of affidavit, 1926-28, p 250; proper method for making proof of mailing copy of summons and complaint by Insurance Commissioner to insurance society, 1928-30, p 625; sufficiency of affidavit executed by "business manager," 1936-38, p 349; defining "published in the county," 1962-64, p 456.

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NOTES OF DECISIONS

This section prevents tolling of statute of limitations against a defendant who has been absent from the state or concealed therein. Whittington v. Davis, (1960) 221 Or 209, 350 P2d 913; Winters v. Jacobson, (1960) 221 Or 214, 350 P2d 1078.

The affidavit must contain positive averments of probative or evidentiary facts. State ex rel. Carroll v. Redding, (1966) 245 Or 81, 418 P2d 846; Ter Har v. Backus, (1971) 259 Or 478, 487 P2d 660.

Prior to the 1969 amendment, the test of the sufficiency of showing due diligence was not whether all possible or conceivable means had been used but whether all reasonable means had been exhausted. State ex rel. Pratt v. Main, (1969) 253 Or 408, 454 P2d 643; Morris v. Fee, (1970) 255 Or 623, 469 P2d 788.

Strict compliance with the statutory requirements is necessary. State ex rel. Carroll v. Redding, (1966) 245 Or 81, 418 P2d 846; Hutson v. Martin, (1969) 254 Or 318, 459 P2d 999.

Mandamus is an appropriate remedy to test the validity of service of summons. State ex rel. Handly v. Hieber, (1970) 256 Or 93, 471 P2d 790; State ex rel. Knapp v. Sloper, (1970) 256 Or 299, 473 P2d 140.

Strict compliance with the statutory requirements is necessary to withstand a direct attack on the service of summons. State ex rel. Handly v. Hieber, (1970) 256 Or 93, 471 P2d 790.

The affidavit was defective because due diligence was not shown. State ex rel. Knapp v. Sloper, (1970) 256 Or 299, 473 P2d 140.

The test of "due diligence" is whether it reveals that all reasonable means have been exhausted in an effort to find defendant. Ter Har v. Backus, (1971) 259 Or 478, 487 P2d 660.

Jurisdiction of the trial court over the defendant, based on substituted service, depends upon the sufficiency of the original motion and affidavit, regardless of whether defendant has actual knowledge. Id.

The affidavit, to be sufficient, must indicate when inquiries were made. Id.

Substituted service is an exception justified only in the circumstances provided by statute. Id.

An affidavit that did not state the time of the inquiry was insufficient. State ex rel. Carroll v. Redding, (1966) 245 Or 81, 418 P2d 846; State ex rel. Handly v. Hieber (1970) 256 Or 93, 471 P2d 790.

FURTHER CITATIONS: Re Vilas' Estate, (1941) 166 Or 115, 110 P2d 940; State v. Latourette, (1942) 168 Or 584, 125 P2d 750; Hartley v. Utah Constr. Co., (1939) 106 F2d 953; Knoop v. Anderson (1947) 71 F Supp 832; Hammons v. Schrunk, (1956) 209 Or 127, 305 P2d 405; Koukal v. Coy, (1959) 219 Or 414, 347 P2d 602; Summers v. Skibs A/S Myken, (1960) 184 F Supp 745, 749.

ATTY. GEN. OPINIONS: Applicability of nonresident statute to resident who leaves state after accident, 1948-50, p 51.

LAW REVIEW CITATIONS: 39 OLR 114, 381; 44 OLR 322; 46 OLR 190, 193; 1 WLJ 462.