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Service by Publication - 1935 Code

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SERVICE BY PUBLICATION 1935 CODE

By MORTIMER STONE, ESQ., of the Colorado Bar

Sec. 36-7 *Contents of Summons*
Sec. 45 *Service by Publication*
Sec. 46-7 *Domestic Corporation Defendant*
Sec. 50 *Unknown Defendants*
*Supreme Court Rule 14 A. Service by Pub-
lication*
*'35 C. S. A. Chap. 56, Sec. 5, Service in
Divorce*

When Allowed: I

Only in cases of attachments, foreclosure, claim and delivery or other proceedings where specific property is to be affected or the procedure is such as is known as a proceeding in rem. Stock in a Colorado corporation has situs in Colorado wherever the certificates may be, so subject to proceeding in rem, 97 Colo. 485.

Return of Summons: II

Must be not less than 10 days after issuance.

Must show and set forth the efforts he (sheriff) has made to obtain service and the reasons for his failure (rule 14a).

Must show such real and bona fide efforts as shall satisfy the court or a judge thereof (rule 14a).

If defendant is a domestic corporation, sheriff shall make special affidavit that he has been unable to find the principal office of the corporation at the place designated in the Articles of Incorporation and can find no officer, stockholder or other person upon whom service can legally be made and shall set forth the efforts he has made to obtain service and the reason for his failure (1935 Code, Sec. 46).

Where Sheriff is a party to action, service and return must be by coroner.

Sheriff or person attempting to make service is not required to go outside the county in which the action is brought in search for a defendant (84 Colo. 459).

Date of Return is not the date of Sheriff's Certificate of Return but of its actual filing or return in the Court.

Affidavit for Publication: III

By Whom Made: By plaintiff or one of plaintiffs unless non-residents or absent from the county.

For resident corporation plaintiff must be by agent rather than by attorney (67 Colo. 555) and his authority should be stated.

If made by attorney, showing that plaintiff does not reside in the county or absence of plaintiff therefrom shall be made.

Before Whom Acknowledged: Cannot be acknowledged by attorney for plaintiff.

When Filed: The affidavit shall be made after the return and not more than ten days before the order (rule 14a). "After the return" means after its actual filing in Court.

Contents of Affidavit: That cause of action exists against the defendant. (Not so now—Code '77.)

That defendant resides out of the state—

Or has departed from the state without intention to return—

Or conceals himself to avoid the service or process—

Or cannot be found in the county where the case is pending—

And that his residence and whereabouts are to the plaintiff unknown. (Allegation in the alternative and in words of statute is sufficient, 67 Colo. 189.)

Must give the address (rule 14a, post office address) of the defendant if known—

Or state that the address (post office address) is not known to the affiant. This may be upon information and belief, provided the affiant not only states that he is informed and believes but adds that he so states. Probably the better form would be to state that the defendant's post office address is not known to the affiant but that he is informed and believes and so alleges that the post office address of defendant is (67 Colo. 548).

In case where the residence or post office address of any defendant is not stated, the affidavit shall show and set forth

in detail to the satisfaction of the court or judge the efforts that have been made to discover such residence or address (rule 14a) and the court may examine witnesses or the affiant or require further search.

In Case of Divorce: (Chap. 56, Sec. 5, Colo. Stat. Ann. '35 C. S. A.)

Apparently service by summons is only proper where it is impossible to obtain personal service, either within or without the state. Application should be made under oath and should show that:

Defendant's location is unknown to plaintiff—

Or the defendant conceals himself or herself in Colorado so that the summons cannot be personally served upon him or her—

Or that the plaintiff has no knowledge or notice, direct or indirect, of where the defendant can be found within or without the State of Colorado.

The application shall further state fully and in detail all of the efforts made by the plaintiff to procure personal service of the summons on the defendant—

And all of the knowledge of the plaintiff concerning the location of the defendant—

And shall state all the facts within the knowledge of the plaintiff which might assist in learning the address of the defendant.

In Case of Unknown Parties: 1. In Civil action known as an action in rem.

2. Entitle defendants as "all unknown persons who claim any interest in and to the subject matter of this action."

3. *Allege in Complaint:*

(a) That there are, or that he (any party) believes there are persons interested in the subject matter of the action, whose names are unknown to him.

(b) Describe the interest of such persons and

(c) How derived, so far as his knowledge extends.

Order for Publication: IV

Should find that the return of the sheriff properly sets forth the efforts he has made to obtain service and the reason

for his failure, and such real and bona fide efforts to obtain service as has satisfied the Court—

In case either the residence or post office address of any defendant is not stated in the affidavit, the order should find that the court is satisfied by clear and convincing proof that such defendants cannot be reached by mail or by personal service—

If defendant is a domestic corporation (Sec. 47), the court should further find that it satisfactorily appears that due diligence has been exercised by the sheriff to obtain service without avail, and order that service shall be had by publication in the manner provided by law for service upon non-residents in case of attachment.

Order should direct publication to be made in a public newspaper published in the county and should find the paper designated to be a public newspaper.

Should require publication at least once a week for four successive weeks.

Should provide that the clerk shall mail a copy of the summons duly stamped to each defendant whose address is given in the affidavit at such address forthwith.

In Case of Divorce: ('35 C. S. A. Chap. 56, Sec. 5).

The statute provides that the court *shall*, upon the hearing of the application (affidavit for publication) carefully examine the plaintiff and such other witnesses as shall be produced, in order to determine what steps shall be taken to notify such absent defendant of the pendency of the action. Accordingly, it would appear that the order for publication should recite the filing of the application under oath, the calling up of the same for hearing, that the court carefully examined the plaintiff and such other witnesses as were produced in order to determine what steps should be taken to notify the absent defendant of the pendency of the action—

The court should find that it is "satisfied of the good faith of the plaintiff" and should order what steps should be taken to notify the defendant, presumably by ordering the clerk to mail a copy of the summons duly stamped and addressed to him at his last known place of residence and post office address.

In Case of Unknown Parties: The court or judge in vacation shall make an order for publication of summons, as in case of non-residents.

(Quaere: Should not the order comply with rule 14A and find that the return and affidavit show such real and bona fide efforts of the sheriff to obtain service upon and of the plaintiff to discover the names, residences and postoffice addresses of the unknown defendants as to satisfy the court?)

Mailing Copy Summons: V

The clerk shall mail to each defendant whose address is given in the affidavit a copy of the summons duly stamped at such address forthwith.

Affidavit of Mailing: VI

Clerk should make affidavit showing the addressing, stamping and mailing of copy summons to each such defendant.

Time for Default: VII

Form of summons was changed in 1929 to recite 30 days instead of 40 days to appear in case of service by publication but the section preceding (1935 Code Sec. 36) has not been changed and still provides as before that the summons shall require the defendant to appear and answer within 30 days if served outside the county or by publication.

The Code provides that service shall be complete at the expiration of 10 days from the date of the last publication so that 40 days would appear to be sufficient unless the failure to serve a copy of the complaint would give another ten days under Sec. 36. Under the old form of summons, default was due at the end of 50 days, and it is safe practice to wait that period now.

In Case of Divorce: Time within which defendant shall plead not stated but statute provides for 50 days when served personally outside the state of Colorado and that the summons be published "in the same manner and with like effect as is now provided by law for publication of summons in cases of attachment" (1917). (Manner and effect of publication has not been changed by subsequent amendments.)