

CHAPTER 262.

COMMENCING CIVIL ACTIONS.

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262.01 Jurisdiction, how acquired. A civil action in a court of record shall be commenced by the service of a summons or an original writ. From the time of such service or the issuance of a provisional remedy the court shall have jurisdiction and have control of all subsequent proceedings. [1935 c. 541 s. 27]

Revisor's Note, 1935: An independent proceeding begun by an original writ is an action. State ex rel. Milwaukee Medical College v. Chittenden, 127 W 468, 494. (Bill No. 50 S. s. 27)

Jurisdiction of the court was not invoked by service of an order to show cause where no action had been commenced by service of summons or other authorized process. In re Citizens State Bank of Gillette, 207 W 434, 241 NW 339.

The entry of a judgment on cognovit is

not the commencement of an action. Guardianship of Kohl, 221 W 385, 266 NW 800. Under 62.23 (7) (e) 10, an action to review a decision of the zoning board of appeals is commenced when a petition is presented to the court, not when a writ of certiorari is issued, and hence if the petition is presented within the time limited therefor by the statute, the action is commenced in time. State ex rel. Robst v. Board of Appeals, 241 W 188, 5 NW (2d) 783.

262.02 Summons, contents of. The summons shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant.

(2) A direction to the defendants summoning them to appear within twenty days after service of the summons, exclusive of the day of service, and defend the action.

(3) A notice that in case of failure so to do judgment will be rendered against them according to the demand of the complaint. It shall be subscribed by the plaintiff or his attorney with the addition of his post-office address, at which papers in the action may be served on him by mail. There may, at the option of the plaintiff, be added at the foot, when the complaint is not served with the summons and the only relief sought is the recovery of money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint. [1935 c. 483 s. 8; 43.08 (2)]

262.03 Form. (1) Such summons shall be substantially in the following form:
.... Court, County.

A. B., Plaintiff,
vs.
C. D., Defendant.

THE STATE OF WISCONSIN, To said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

E. F.,
Plaintiff's Attorney.

P. O. Address, County, Wis.

If the complaint be not served with the summons the words "of which a copy is here-with served upon you" may be omitted or erased.

(2) In an action relating to real estate if any defendant is sued under a fictitious name or as an unknown owner, heir, grantee or persons whom it may concern or other similar designation, a description of the land affected shall be given in a note at the foot of the summons. [1935 c. 541 s. 28]

262.04 Filing summons; state tax. The summons must be filed with the clerk, and a state tax on the action of one dollar paid within ten days after the service of an answer or demurrer; or if no answer or demurrer be served at the time of applying for judgment. Otherwise the action shall be dismissed on motion of any defendant unless the plaintiff shall pay the tax and five dollars costs of motion.

Cross Reference: See 59.42 (40) as to advance clerk fees and suit tax, when paid.

Note: State tax of \$1 for commencing civil action is collectible in civil actions but not in special proceedings and is not collect-

ible from state or federal government or their instrumentalities. Civil actions and special proceedings are distinguished. 27 Atty. Gen. 84.

262.05 Demand of complaint. A copy of the complaint may or may not be served with the summons at the plaintiff's option. If not so served the defendant may, in person or by attorney, within twenty days after the service of the summons demand in writing a copy of the complaint, specifying a place, embracing a post-office address, within the state, where it may be served, and a copy of it shall be served within twenty days thereafter accordingly.

262.06 Notice of object of action. In the case of a defendant against whom no personal claim is made the plaintiff may deliver to such defendant with the summons a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of all the property affected by it, if it affect specific real or personal property and that no personal claim is made against such defendant; and that a copy of the complaint will be delivered personally or by mail to such defendant upon his request made within twenty days from receipt of summons. If a defendant on whom such notice is served unreasonably defend the action he shall pay costs to the plaintiff. [Supreme Court Order, effective Sept. 1, 1932]

262.07 Who may serve summons. The summons, together with the complaint or the notice aforesaid, may be served by the sheriff of the county where the defendant may be found or by any other person not a party to the action. The service shall be made and the summons, with the complaint or notice accompanying, if any, with proof of the service, returned to the person whose name is subscribed thereto with reasonable diligence. The person subscribing the summons may, at his option, by an indorsement thereon, fix a time for the service thereof, and the service shall then be made accordingly.

262.08 Service on individuals. The summons and the accompanying complaint or notice aforesaid shall be served by delivering a copy thereof as follows:

(1) If the action be against a minor under the age of fourteen years to such minor personally, and also to his father, mother or guardian, or if there be none within this state then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

(2) If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of excessive drinking or otherwise, and for whom a guardian has been appointed, to such guardian and to the defendant personally.

(4) In all other cases to the defendant personally; or, if not found, by leaving a copy thereof at his usual place of abode in presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof. [Supreme Court Order, effective July 1, 1942]

Cross Reference: See Cross References under 262.09 for list of scattered special provisions on service of summons.

Note: A substituted service cannot be more extensive or of greater scope than a personal service; hence the substituted service of a summons and complaint addressed to one person, correctly naming him, could not be considered as a service upon another bearing a different name, although both had a common place of abode and were members

of the same family. Baker v. Tormey, 209 W 627, 245 NW 652.

An attempted substituted service under (4) made on the father of an emancipated minor, who at the time was working on a farm away from his father's home, was ineffectual to confer jurisdiction of the person of the minor, since not made at the minor's "usual place of abode," which, on the record, was the farm home at which he was working. Caskey v. Peterson, 220 W 690, 268 NW 658.

262.09 Service of summons on corporations. (1) SAME AS ON INDIVIDUALS; MANNER CUMULATIVE. The summons may be served upon a corporation by delivering a copy thereof as provided in this section; and such service shall be of the same effect as personal service on a natural person. The methods of serving the summons authorized by this section are in addition to the methods authorized by other provisions of law. In lieu of delivering the copy to the officer specified, the copy may be left in his office with the person who is apparently in charge of the office.

(2) POLITICAL CORPORATIONS. If the action is against a county, to the chairman of the county board or to the county clerk; if against a town, to the chairman or clerk thereof; if against a city, to the mayor or clerk thereof; if against a village, to the president or clerk thereof; and if against a school district, school board or board of education, to the president, director, secretary or clerk thereof.

(3) DOMESTIC CORPORATIONS, GENERALLY. If against any other domestic corporation, to the president, vice president, superintendent, secretary, cashier, treasurer, director, trustee or managing agent. If such corporation has no officer or agent within the state upon whom service can be made (of which fact the certificate of the sheriff shall be

evidence) service of the summons and complaint may be made by mailing copies thereof to the corporation at the address given in its articles of incorporation.

(4) FOREIGN CORPORATIONS, GENERALLY. If against any foreign corporation (including corporations created by or under acts of Congress) to the president, vice president, superintendent, secretary, cashier, treasurer, director or managing agent in this state, or to any agent having charge of or conducting any business for it in this state, or any trustee or assignee of such corporation; or to its attorney or agent for that purpose whether appointed by the corporation or designated by statute. When service is on an authorized state officer it shall be by delivering to him two copies of the summons and the complaint or notice of object of action and paying him \$2. Such state officer shall file one copy and mail the other to the defendant. If its address is not known or readily ascertainable, mailing is dispensed. But service can be made upon a foreign corporation only when it has property in this state or the cause of action arose therein, or arose out of business transacted in this state, or the cause of action exists in favor of a resident of this state. The certificate of the state officer that he was served with a summons and complaint or notice of object of action and that he mailed the same as required by law shall be evidence of service.

(5) CONSTRUCTION OF (3) AND (4). Subsections (3) and (4) are general; and their application is not limited or restricted by the subsections which follow.

(6) RAILROADS. If against a railroad corporation, to any station, freight or ticket agent thereof within the state.

(7) SLEEPING CAR COMPANIES. If against a sleeping car company (as defined in section 76.02) to any person having charge of any of its cars or any agent found in the state.

(8) INSURANCE COMPANIES. If against any foreign insurance corporation, to any agent of such corporation as defined by the insurance laws of this state.

(9) FOREIGN CORPORATIONS WITH LOCAL BRANCHES. If against any foreign corporation having an aid or benefit department under its control or in connection therewith doing business here, either as such corporation or by means or in the form of local or of subordinate branches, lodges or divisions, and which has failed to appoint an agent or attorney in compliance with section 208.26, to any officer of any such local or subordinate branch, lodge or division.

(10) FOREIGN BUILDING AND LOAN ASSOCIATIONS. If against any foreign building and loan association, to any person who solicits upon its behalf, or who transmits to or from it an application for membership, or a share, certificate, bond or other evidence of indebtedness, or in any manner aids or assists in doing either, or in transacting any business for such association, or advertises to do either of such or any like thing.

(11) TELEGRAPH AND TELEPHONE COMPANIES. If against a telegraph or telephone company, to any operator while on duty or station manager thereof, who is stationed in the county in which the action is brought. [1931 c. 79 s. 27; Supreme Court Order, effective July 1, 1942]

Comment of Advisory Committee: (1) This revision of 262.09 (service of summons on corporations) was promulgated Feb. 13, 1942, effective July 1, 1942. The advisory committee felt that a revision of 262.09 was highly desirable. After long and careful study it recommended this revision.

(2) Old subsecs. (1) to (5) were consolidated and made new (2). The rule did require that service of summons be on two officers of cities, villages, towns and school districts; but service on only one county officer was required. If one is enough for the county it is enough in the other cases. That is the rule in many other states. It is also the rule as to other corporations. The requirement for service on two officers has had the effect of defeating actions to enforce bond issues. *Watertown v. Robinson*, 69 W 230; *Mariner v. Waterloo*, 75 W 438; *Amy v. Watertown*, 130 U. S. 301.

(3) Subsec. (3) is from old (10) and is left entirely general. The additional subsections for specified corporations or situations follow and are cumulative. The last clause of old (10) is retained in (1), i.e., that this service has the legal effect of personal service. Service on a domestic corporation when no officer or agent can be personally served in this state is cared for by 262.12 and 262.13 (service by publication.) They provide a clear and satisfactory method of procedure in such a contingency. It is to be noted that 262.12 (6) is limited to private corporations, whereas (3), as drawn, includes all domestic corporations which are

not enumerated in (2). There is no reason for serving on the secretary of state where the defendant is a domestic corporation. The secretary of state is in no better position than the plaintiff is to notify the defendant.

(4) Old (13) is numbered (4) and made general as to all foreign corporations. The validity of service on the agent of an unlicensed foreign corporation was sustained in *Tetley, Sletten & Dahl v. Rock Falls Mfg. Co.*, 176 W 400, and *Petition of Northfield Iron Co.*, 226 W 487. The \$2 fee which is required by 200.03 and 226.02 when service of summons is on the secretary of state or other state officer is preserved. Mailing is simplified and made clear by simply requiring that copies be mailed to the known or easily ascertainable address of a foreign corporation. Otherwise mailing is dispensed with. That eliminates the necessity of construing "location" or "location of principal office or place of business." Again, it is to be noted that service of summons may be made by publication upon a foreign corporation "when the summons cannot with due diligence be served within the state" (262.12).

(5) Subsec. (5) is new. Its obvious purpose is to forestall any claim that a plaintiff whose case literally falls within (3) and (4) and who is able to make service according thereto, must comply with later subsections. The purpose of the later subsections is to reach cases which are insufficiently covered or are not covered at all by (3) and (4).

(6) Old (6) and (7) are consolidated as new (6).

(7) Subsec. (7) is from old (8).

(8) Subsec. (8) is from old (9). The insurance commissioner is attorney for service of summons on foreign insurance corporations admitted to this state (200.03 (15), (16)) and on mutual benefit societies (foreign and domestic) (208.26). Attention is called to 209.05 which defines agent of insurance company.

(9) Subsec. (9) is from old (11).

(10) Subsec. (10) is from old (12). 215.41 (3) provides that the association shall appoint the "banking commission" its attorney for service of summons; but it may fail to make the appointment.

(11) Old (15) is covered by (3) and (4) except as to station managers and operators.

Revisor's Note, 1942: There are many special provisions for service of summons scattered through the statutes, but they may now be disregarded (see 262.09 (1)). Provisions of that kind are listed as follows (the list may be incomplete):

38.06 (2) Milwaukee school board.
85.05 (3) Auto accident actions.
110.10 Itinerant merchant truckers.
189.27 Securities dealers.
194.10 Motor carriers.
198.12 Municipal power districts.
200.03 (15), (16) Foreign insurance companies.
201.43 Service on insurance commissioner.
208.26 Service on mutual benefit societies.
215.41 (3) Foreign building and loan associations.
226.02, 226.025 Secretary of state as attorney for foreign corporations.

A sheriff's service of process upon the office manager and auditor of a corporation was good service upon the corporation, where the corporation had recognized as valid the service of other process upon

the same officer by the sheriff. The office manager and auditor of the corporation was a "managing agent" to whom process might be delivered as service upon the corporation, within (10), Stats. 1929. *Neitzke v. Kraft-Phenix Dairies, Inc.*, 214 W 441, 253 NW 579. See note to 85.05, citing *State ex rel. Sexauer Mfg. Co. v. Grimm*, 217 W 422, 259 NW 262.

Service of process under (13), Stats. 1937, on the soliciting agent of a foreign corporation is valid even though the agent merely takes and transmits orders to the corporation which accepts and fills the orders without the state by the instrumentalities of interstate commerce. *Petition of Northfield Iron Co.*, 226 W 487, 277 NW 168.

The property, located in this state, of a foreign corporation, which will warrant the commencement of an action by a nonresident plaintiff upon a cause of action that arose in another state by service of process on an officer or agent of the corporation found within this state, must be of a substantial nature; mere office supplies used by a soliciting agent are insufficient to give jurisdiction by such a service. *Petition of Inland Steel Co.*, 174 W 140, 182 NW 917.

The judgment entered in *State ex rel. Consolidated T. Corp. v. Gregory*, 209 W 476, 245 NW 194, was reversed by the United States supreme court. It was there held that a foreign corporation, not licensed in this state, is not suable here merely because its products are sold here by a subsidiary corporation; that in order to hold an unlicensed foreign corporation responsible under the process of a local court the corporation must be carrying on business here at the time of service of process. In this case the president of such a corporation had come into the state solely to confer with an attorney who represented bondholders of the corporation. *Consolidated T. Corp. v. Gregory*, 53 S. Ct. Rep. 529.

262.10 Service on state; judgment. The state may be made a party defendant in any action to quiet title under the provisions of section 281.01 or between other parties, when necessary to the proper determination of their rights, and the summons be served by delivering a copy to the attorney-general or leaving it at his office in the capitol with his assistant or clerk. But no judgment for the recovery of money or personal property or costs shall be rendered in any such action against the state.

Note: The state annuity and investment board holding a mortgage on the military company's premises was a proper party defendant in a suit to foreclose a mechanic's lien for construction of the armory thereon. *Fulton v. State A. and I. Board*, 204 W 355, 236 NW 120.

262.11 Date of service indorsed on summons. The officer or person who serves a summons shall, at the time of the service, indorse upon the copy served the date of service, sign his name thereto and add, if an officer, his official title. Failure to make the indorsement shall not invalidate a service but the server shall not collect fees for such service. [1935 c. 541 s. 30]

262.12 Publication or service outside state, when permitted. When the summons cannot with due diligence be served within the state, the service of the summons may be made without the state or by publication upon a defendant when it appears from the verified complaint that he is a necessary or proper party to an action or special proceeding as provided in Rule 262.13, in any of the following cases:

(1) When such defendant is a nonresident of this state or his residence is unknown, or is a foreign corporation, and the defendant has property within the state, or the cause of action arose therein, and the court has jurisdiction of the subject of the action, whether the action be founded on contract or tort.

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors or avoid the service of a summons, or keeps himself concealed therein with the like intent.

(3) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subsection shall apply when any such defendant is unknown.

(4) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate.

(5) When the action is for a divorce or for annulment of marriage.

(6) When the action is against any domestic private corporation and the proper officers on whom to make service do not exist or cannot be found. [Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective Jan. 1, 1936]

Note: Where the assignee of matured life insurance policy was nonresident and had possession of the policy, money which will contingently become due under policy to assignor-insured held not property in state as basis for service by publication. Beidel v. Preston, 211 W 149, 246 NW 569.

Under a Washington statute requiring that a complaint for divorce be under oath and be filed before further proceedings, including service of process, may be had, a judgment of a Washington court granting a divorce, where the complaint was not verified and the affidavit for service by publication was insufficient to cure this defect and service was had by publication only, was void for want of jurisdiction. Estate of Kronglaski, 222 W 634, 269 NW 528.

While 262.12 authorizes service by publication in actions to foreclose mortgages, it is beyond the power of the state to obtain jurisdiction of the person of a defendant domiciled beyond its borders. Riley v. State Bank of De Pere, 223 W 16, 269 NW 722.

The verified complaint must allege all necessary jurisdictional facts, or else the service by publication or by personal service without the state is void. Where a complaint showed that all the parties were nonresidents and that the cause of action did

not arise within the state, and there was no allegation that the defendants or either of them had any property within the state, service of the summons by publication and by personal service without the state was void, so that the circuit court was without jurisdiction and the defendants' motion on special appearance to vacate the alleged service should have been granted. State ex rel. Ralph Lumber Co. v. Kleczka, 234 W 7, 290 NW 142.

In action against nonresident and resident defendants an allegation that resident defendant assigned mortgage to nonresident defendant with intent to defraud creditors, did not state a cause of action against nonresident defendant so as to authorize substituted service, since the plaintiff was not seeking to hold the nonresident defendant as a garnishee within 267.17; no cause of action against the nonresident defendant was pleaded if the complaint be treated as an action at law to recover money and no cause was stated in equity to recover property transferred in fraud of creditors since such suit may be maintained only after judgment has been obtained against the principal debtor and execution returned unsatisfied. Frawley v. Chakos, 36 F (2d) 373.

262.13 Publication or service outside state; proof of grounds: mode of service.

(1) Before entering judgment against any defendant who has been served with summons by publication or personally without the state pursuant to Rule 262.12 and who has not appeared, the court shall require proof by affidavit or other evidence to be made and filed of the nonresidence of the defendant where not shown by the verified complaint and of the existence of any other fact not shown by the verified complaint and necessary to authorize service to be made by publication and that the service was in fact made as the rule requires. The court may require additional proof. Said proof shall be conclusive in all collateral actions and proceedings.

(2) Service of the summons by publication shall consist of its publication in a newspaper likely to give notice to the defendant to be published once a week for three weeks and in case the defendant's post-office address is known or can be ascertained, by mailing him a copy of the summons and complaint, or a notice of the object of the action, as the case may require. The mailing may be omitted if the post-office address cannot be ascertained.

(3) The summons and a verified complaint shall be filed prior to the first publication, and prior to the mailing.

(4) In the cases specified in Rule 262.12 the plaintiff may, at his option and in lieu of service by publication, cause to be delivered to any defendant personally without the state a copy of the summons and verified complaint or notice of object of action as the case may require, which delivery shall have the same effect as a completed publication and mailing. If such defendant be a corporation, delivery may be made to the president, vice president, secretary, treasurer or general manager thereof. [Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective Sept. 1, 1932; Supreme Court Order, effective July 1, 1941]

Note: Where service of summons is by publication the service is not complete and the time allowed for answer does not begin to run until six days after the last required publication. Section 2640, R. S. 1878, now 262.13, required the summons to be published "not less than once a week for six weeks". Under that requirement it was held that where the summons was published six times, the first time on October 5 and

the last time on November 9, the time to answer did not begin to run until November 16. Cox v. The North Wisconsin Lumber Co., 82 W 141, 146, 51 NW 1130; Johnson v. Hill, 90 W 19, 22, 62 NW 930.

Where the entire object of an action is to determine the personal rights and obligations of a defendant, constructive service upon a nonresident is ineffectual. State ex rel. Ledin v. Davison, 216 W 216, 256 NW 718.

262.14 Service by publication in special proceedings. Service by publication of any process or notice in any special proceeding, except probate proceedings, may be made when the plaintiff is unable with due diligence to make service of such process or notice upon the defendant or party upon whom service is required. Such publication and proof thereof shall be made as required by section 262.13. [Supreme Court Order, effective July 1, 1941]

Note: See 32.05 re publication of notice of hearing in condemnation proceedings.

262.15 [Repealed by Supreme Court Order, effective Sept. 1, 1932]

262.16 Proof of service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same shall be as follows:

(1) If served by the sheriff, his certificate showing place, time and manner of service.

(2) If by any other person, his affidavit thereof showing place, time and manner of service, that he knew the person served to be the defendant mentioned in the summons and left with, as well as delivered to, him a copy; and if the defendant was not personally served he shall state in such affidavit when, where and with whom such copy was left.

(3) The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) In case of publication, the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the summons, with the complaint or notice, as prescribed by law if such mailing shall be required, made by the person who mailed the same.
[*Supreme Court Order, effective Sept. 1, 1932*]

262.17 Voluntary appearance; waiver; guardian restricted. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him, but no guardian or guardian ad litem (for any person under disability) may enter a voluntary appearance or waive a personal service of the summons upon such person under disability.
[*Supreme Court Order, effective July 1, 1942*]

Comment of Advisory Committee: The amendment to 262.17 was called for by the additions made to 260.23 and 260.24 by the order of the court dated Feb. 13, 1942, effective July 1, 1942.

Note: As to what is a sufficient appearance to waive defects in service of process, see Schwantz v. Morris, 219 W 404, 263 NW 379.

Nonresident defendant, who purported to appear specially to object to jurisdiction of the court over his person, nevertheless made a general appearance by requesting that he recover his "costs and disbursements" from plaintiff, since request for "costs and dis-

bursements" implied full costs of action and was inconsistent with any but general appearance, although mere request for "costs," which would be construed as for costs of his motion only, would not have been inconsistent with special appearance. State ex rel. Nelson v. Grimm, 219 W 630, 263 NW 583.

Where party making special appearance to object to jurisdiction seeks also other consistent and merely incidental relief on same showing as that relied upon for special appearance, there is no waiver of special appearance or of right to rely upon lack of jurisdiction. Bitter v. Gold Creek Min. Co., 225 W 55, 273 NW 509.