

3. *Horbelt v Elliott* (1995) 184 LSJS 31, SC(SA).
4. *Re B* [1981] 2 NSWLR 372 at 405 per Helsham CJ, CA(NSW) (describing the McKenzie friend concept as 'an abhorrent forensic device permitted for a while to operate here in some criminal courts'); *R v Smith* [1982] 2 NSWLR 608 at 612-14 per Street CJ (rejected the existence of a right of accused persons to avail themselves of a McKenzie friend, citing abuses and complications associated with this procedure but recognising a judicial discretion to permit the practice).
5. *Smith v R* (1985) 159 CLR 532; 71 ALR 631. English courts have been more sympathetic and refer to the discretion to exclude a McKenzie friend: *R v Bow County Court*; *Ex parte Pelling* [1999] 4 All ER 751 at 757, 760; [1999] 1 WLR 1807 per Lord Woolf CJ, CA. Cases where Australian courts have allowed the use of McKenzie friends include *Scarce v Killalea* [2003] WASCA 81; BC200301777; *Scott v Northern Territory* (2005) 15 NTLR 158; [2005] NTCA 4; BC200504732; *SZDUE v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1262; BC200506621.
6. *R v Bow County Court*; *Ex parte Pelling* [1999] 4 All ER 751 at 754-9; [1999] 1 WLR 1807 per Lord Woolf CJ, CA; *Smith v R* (1985) 159 CLR 532 at 534; 71 ALR 631 per Gibbs CJ; *In the Marriage of MG* (2000) 26 Fam LR 497 at 503; (2000) FLC ¶93-034 per Kay J, Fam C of A, Full Court, *Damjanovic v Maley* (2002) 55 NSWLR 149; 195 ALR 256; [2002] NSWCA 250; BC200203991; *SZDUE v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1262; BC200506621 at [4] per Emmett J (who took account, inter alia, of the fact that the friend was acting gratis).
7. *Cristovao v Butcher Paull and Calder* [2006] WASCA 235; BC200609344 (struck-out and suspended legal practitioners not entitled to act as McKenzie friends).
8. *Scott v Northern Territory* (2005) 15 NTLR 158; [2005] NTCA 4; BC200504732

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(6) SERVICE

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(a) 1

[325-2000] Service is
 fundamental principle of our
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(a) PRELIMINARY ISSUES

[325-2000] **Service is a basic procedural requirement** It is a fundamental principle of our law and of natural justice that any person sought

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to be made liable by an order of any court or tribunal must first be given fair notice of the proceedings.¹ The common law required any person named as a defendant to litigation to be fully apprised of the proceedings and it insisted that all defendants were served personally to ensure that they knew of the proceedings against them.² Service goes to the root of proper procedure in litigation³ and it is the foundation of the court's jurisdiction.⁴ While it is one of the steps in a legal proceeding, it is also an essential preliminary requirement to the taking of any further steps in the process.⁵ Service is the process by which parties who are sought to be made liable or affected by the court's judgment or order are given notice of the claims against them so that they have the opportunity to appear and to answer those claims if they so desire.⁶

Notes

1. *R v County of London Quarter Sessions Appeals Committee; Ex parte Rossi* [1956] 1 QB 682 at 691; [1956] 1 All ER 670 at 674; [1956] 2 WLR 800 per Denning LJ. The basic rule which requires process to be served permits a court to infer that if a person who has been served does not respond, it is due to a conscious decision by the person served not to take issue with the claim: see, for example, *Re Busytoday Ltd* [1992] 4 All ER 61 at 65, 69; *City of Camberwell v Reed* [1954] VLR 653 at 658; [1955] ALR 204; *Ainsworth v Redd* (1990) 19 NSWLR 78 at 85 per Kirby ACJ. As to when there is no requirement for service see [325-2010].
2. The writ of *capias* directed the sheriff 'to take the body of the defendant and him safely to keep so that he may have him in court on the day of the return to answer to the plaintiff's claim': see, for example, *Hope v Hope* (1854) 4 De GM & G 328 at 342; 43 ER 534 per Cranworth LC; *Davidson v McCarten* [1953] VLR 697 at 701-2; [1954] ALR 42.
3. *Craig v Kanssen* [1943] KB 256 at 262; [1943] 1 All ER 108 at 113; (1943) 112 LJKB 228; 168 LT 38 per Lord Greene MR. For a historical analysis see *Davidson v McCarten* [1953] VLR 697 at 701-2; [1954] ALR 42. See also *Ainsworth v Redd* (1990) 19 NSWLR 78 at 83-4.
4. *Laurie v Carroll* (1958) 98 CLR 310 at 323, 324; 32 ALJ 7 per Dixon CJ, Williams and Webb JJ; *Colt Industries Inc v Sarlie* [1966] 1 All ER 673 at 676; [1966] 1 WLR 440. The general rule is that the court cannot exercise any jurisdiction or authority in relation to a matter unless notice of the process has been given to the party against whom a remedy or relief is sought: *Laurie v Carroll* (1958) 98 CLR 310; 32 ALJ 7; *Re Wykeham Terrace* [1971] 1 Ch 204.
5. See note 1 above. See also *Hope v Hope* (1854) 4 De GM & G 328 at 342; 43 ER 534 at 539 per Cranworth LC (the object of service is to give notice to the person to be served).
6. *Ainsworth v Redd* (1990) 19 NSWLR 78; *Hope v Hope* (1854) 4 De GM & G 328 at 342; 43 ER 534 at 539 per Cranworth LC; *Davidson v McCarten* [1953] VLR 697 at 702; [1954] ALR 42 per Sholl J.

[325-2005] Requirement for personal service The general rule is that any originating process must be served personally on the party against whom it is sought to claim a remedy or relief.¹ Where personal service is not required, ordinary service is sufficient compliance with the requirement to give notice to an opposing party.² The rules of court provide some exceptions to the general rule requiring personal service.³ In addition, applications for *ex parte* orders are generally not required to be served,⁴ nor are applications for orders that are specifically granted to one party only.⁵

Notes

1. For full discussion. For processes that [325-2030]-[325-2035].
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3. As to exceptions to be explicit legislation person may be de process against th: All ER 842. See *parte Rossi* [1956].
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1. For full discussion of the requirement and method of personal service see [325-2015]. For processes that are required by the rules of court to be served personally see [325-2030]-[325-2080].
2. For a full discussion of what amounts to ordinary service see [325-2120]-[325-2160].
3. As to exceptions to the requirement for personal service see [325-2010]. There must be explicit legislation or rules of court with statutory force in operation before a person may be deprived of the right to receive notice of the commencement of a process against that person: *White v Weston* [1968] 2 QB 647 at 658, 660; [1968] 2 All ER 842. See also *R v County of London Quarter Sessions Appeals Committee; Ex parte Rossi* [1956] 1 QB 682 at 691-2; [1956] 1 All ER 670; [1956] 2 WLR 800.
4. (CTH) Federal Court Rules O 25 r 1
 (ACT) Court Procedures Rules 2006 r 6016(c) (oral applications)
 (NT) Supreme Court Rules r 38.02
 (NSW) Uniform Civil Procedure Rules 2005 r 25.2
 (QLD) Uniform Civil Procedure Rules 1999 r 27(2)(b)
 (SA) Supreme Court Civil Rules 2006 rr 131(3), 246(2)
 (TAS) Supreme Court Rules 2000 rr 133, 142
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 38.02
 (WA) Rules of the Supreme Court O 52 r 1.
 There are no equivalent provisions in the High Court of Australia.
5. For example, freezing and search orders. As to these orders see further [325-2883] (preservation and inspection of property), [325-2830] (Anton Pillar orders).

[325-2010] Exceptions to personal service The rules of court in most jurisdictions¹ dispense with the requirement for personal service in cases where it would otherwise be required where:

- (1) the solicitor for the party to be served accepts service;²
- (2) the parties agree to an alternative method of service;³
- (3) the service is out of the jurisdiction and in compliance with the laws of the jurisdiction in which the process is to be served;⁴
- (4) the party to be served enters an appearance before the process is served;⁵
- (5) the court orders substituted service;⁶
- (6) the original process is for the recovery of land;⁷ or
- (7) the original process is an action in rem against a ship.⁸

Notes

1. (CTH) High Court Rules 2004 r 9.01
 (CTH) Federal Court Rules O 7 r 11
 (ACT) Court Procedures Rules 2006 rr 54(2), 61(3) (personal service required, subject to the rules)
 (NT) Supreme Court Rules r 6.11
 (NSW) Uniform Civil Procedure Rules 2005 r 10.20(2)
 (SA) Supreme Court Civil Rules 2006 rr 66 (requires personal service in specified circumstances except where court orders otherwise, but court may require personal service in some circumstances), 69 (presumptive service)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.12
 (WA) Rules of the Supreme Court O 72 r 8.
 There are no equivalent provisions in Queensland and Tasmania.
2. In some jurisdictions, there is a separate procedure whereby personal service of documents, including originating process, is not required where a party's solicitor undertakes in writing to accept service and enters an appearance:

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- (CTH) High Court Rules 2004 r 9.01.1
 (CTH) Federal Court Rules O 7 r 8
 (NSW) Uniform Civil Procedure Rules 2005 r 10.13
 (WA) Rules of the Supreme Court O 9 r 1(2).

In Tasmania, the rules provide for acceptance of service of originating process by a solicitor, but do not require that the solicitor agrees to enter an appearance (TAS) Supreme Court Rules 2000 r 134.

In the Australian Capital Territory, the Northern Territory, Queensland, South Australia and Victoria, the provisions do not deal with originating process specifically but provide for acceptance of service of documents generally by the defendant's solicitor:

- (ACT) Court Procedures Rules 2006 r 6464
 (NT) Supreme Court Rules r 6.08
 (QLD) Uniform Civil Procedure Rules 1999 r 115
 (SA) Supreme Court Civil Rules 2006 r 67(1)(c)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.09.

As to indorsement of acceptance of service on originating process by the defendant's solicitor see further [325-2020] note 2.

Otherwise, the undertaking may be implied (*Lee v Johnson Taylor & Co Pty Ltd* [1990] WAR 381; BC8800917), although it is not always implied: see [325-2020] note 2. As to service on solicitors generally see further [325-2035].

3. As to agreement between the parties to waive personal service requirements see [325-2015].
4. As to service outside the jurisdiction see [325-2185]-[325-2230].
5. As to time for appearance generally see [325-2520].
6. As to substituted service see [325-2090]-[325-2115].
7. As to service in actions against real property see [325-2235], [325-2240].
8. As to service on a ship in an action in rem in Admiralty see [325-2080]. As to service on ships see further CONFLICT OF LAWS [85-450]-[85-465], MARITIME LAW [270-2145]. As to actions in rem in Admiralty generally see MARITIME LAW [270-2145]-[270-2215].

[325-2015] Personal service of originating process Where the exceptions to the requirements for personal service do not apply, the general rule is that all originating process must be served personally on each defendant by the plaintiff or the plaintiff's agent.¹ Nevertheless, the court has the power to dispense with the requirement for personal service.² A party may, by conduct, be estopped from denying that there has been personal service, or may be treated as having waived the requirement.³ A party who participates in an application on its merits may also be treated as having been properly served, even where the party has not entered an unconditional appearance.⁴ In some jurisdictions, the rules of court provide that the personal service requirement may be waived by parties who agree on an alternate mode of service.⁵ In an action claiming possession of land, the court may, if satisfied on an ex parte application that no person appears to be in possession of the land and that service cannot otherwise be effected on any defendant, authorise service by affixing a copy of the originating process to the door of the dwelling house or some other conspicuous part of the land,⁶ and such service may be treated as good service in lieu of personal service. Personal service may be effected in the precincts of the court,⁷ although such service may amount to contempt in some circumstances.⁸

Notes

1. It is service on the jurisdiction on which 98 CLR 310; 32 ALJ to methods of persons; agents see [325-2050] service on solicitors.
2. As to substituted service.
3. *Disfort v Temby* (1990) is known as an appeal. As to estoppel by conduct.
4. *Boyle v Sacker* (1888) unconditional appearance.
5. (CTH) Federal Court (NT) Supreme Court (NSW) Uniform Civil Procedure Rules (SA) Supreme Court (VIC) Supreme Court (WA) Rules of the Supreme Court. There are no equivalents. See also *Samami v Insurance Co* (rule was held to apply to party insurer).
6. (ACT) Court Procedures Rules (NT) Supreme Court (NSW) Uniform Civil Procedure Rules (TAS) Supreme Court (VIC) Supreme Court (WA) Rules of the Supreme Court. There are no equivalents.
7. *Baldry v Jackson* [1921] 216; *R v Jones* [1921] 192.
8. For example, when a party's conduct interferes with the court's process. *Hawkins* (1738) Act of Contempt see CONTEMPT.

[325-2020] Proof of service A defendant may be properly served and substituted service may also be authorised. Neither of these acts of service.³ The usual rules apply where the jurisdiction is pursuant to 1992.⁵

Notes

1. As to unconditional appearance see [325-2015].

Notes

1. It is service on the person and the presence of the person served within the jurisdiction on which the jurisdiction of the court is based: *Laurie v Carroll* (1958) 98 CLR 310; 32 ALJ 7. As to the exceptions to personal service see [325-2010]. As to methods of personal service generally see [325-2030]-[325-2080]. As to service on agents see [325-2050]. As to substituted service see [325-2090]-[325-2115]. As to service on solicitors see [325-2035].
2. As to substituted service see [325-2090]-[325-2115].
3. *Ditfort v Tenby* (1990) 26 FCR 72 at 80; 97 ALR 409 per Beaumont J. In some jurisdictions, the filing of an appearance before an originating process has been served is known as an appearance *gratis*. As to time for appearance generally see [325-2520]. As to estoppel by conduct generally see ESTOPPEL.
4. *Boyle v Sacker* (1888) 39 Ch D 249 at 252; 58 LJ Ch 141 per Cotton LJ, CA. As to unconditional appearance generally see [325-2510].
5. (CTH) Federal Court Rules O 7 r 14
(NT) Supreme Court Rules r 6.13
(NSW) Uniform Civil Procedure Rules 2005 r 10.6
(SA) Supreme Court Civil Rules 2006 r 67(1)(d)
(VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.14
(WA) Rules of the Supreme Court O 9 r 3.
There are no equivalent provisions in the other jurisdictions.
See also *Samani v Williams* [1980] 2 NSWLR 389 (where the New South Wales rule was held to authorise service of a statement of claim on the defendant's third party insurer).
6. (ACT) Court Procedures Rules 2006 r 6439 (to recover unoccupied land)
(NT) Supreme Court Rules r 6.14
(NSW) Uniform Civil Procedure Rules 2005 r 10.15(2)
(TAS) Supreme Court Rules 2000 r 140
(VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.15
(WA) Rules of the Supreme Court O 9 r 4.
There are no equivalent provisions in the other jurisdictions.
7. *Baldry v Jackson* [1976] 1 NSWLR 19; *Re Tole; Ex parte Tole* (1933) 50 WN (NSW) 216; *R v Jones* [1931] 1 KB 664; [1931] All ER Rep 615.
8. For example, where the service tends to obscure the administration of justice or interfere with the ability of the party to conduct proceedings in the court: *Cole v Hawkins* (1738) Andr 275; 95 ER 396. For examples of conduct that amount to contempt see CONTEMPT [105-30].

[325-2020] Proof of service The service of an originating process on any defendant may be proved in several ways. When a defendant enters an unconditional appearance the originating process is deemed to have been properly served and strict proof of service is not necessary.¹ A defendant's solicitor may also indorse acceptance of service on the originating process.² If neither of these acts occur, the plaintiff must file an affidavit proving due service.³ The usual rules of court regulating affidavit evidence apply.⁴ Special rules apply where the originating process is served on a party in other jurisdictions pursuant to the (CTH) Service and Execution of Process Act 1992.⁵

Notes

1. As to unconditional appearance generally see [325-2510]. As to personal service of originating process generally see [325-2015].

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2. Where a defendant's solicitor indorses acceptance of service on the originating process it is deemed to have been duly served:

(CTH) Federal Court Rules O 7 r 8
 (ACT) Court Procedures Rules 2006 r 6462(2)
 (NT) Supreme Court Rules r 6.08
 (NSW) Uniform Civil Procedure Rules 2005 r 10.13
 (QLD) Uniform Civil Procedure Rules 1999 r 115
 (SA) Supreme Court Civil Rules 2006 r 67(1)(c)
 (TAS) Supreme Court Rules 2000 r 134
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.09
 (WA) Rules of the Supreme Court O 9 r 1(2).

There are no equivalent provisions in the High Court of Australia.

However, the indorsement may be deemed to be ineffective if the person to be served can prove that the solicitor had no instructions to accept service. As to undertakings to enter an appearance generally see *Re Kerly, Son & Verden* [1901] 1 Ch 467 at 476 per Rigby LJ, at 479 per Stirling LJ; [1900-3] All ER Rep 858; [1901] WN 8, CA.

If a solicitor accepts service by way of indorsement and gives an undertaking to accept service and file an appearance, the solicitor must file an unconditional appearance: *Lee v Johnson Taylor & Co Pty Ltd* [1990] WAR 381; BC8800917. See also *Cain v Cain* (1918) 18 SR (NSW) 26; 35 WN (NSW) 16 (if it is sought to preserve the right to object to the jurisdiction). The undertaking binds the solicitor to file an appearance: *The Crimdon* [1900] P 171 at 176; (1900) 82 LT 660; 48 WR 623; *Re Kerly, Son & Verden* [1901] 1 Ch 467; [1900-3] All ER Rep 858; [1901] WN 8; *Darby v Hyman* (1894) 15 LR (NSW) L 189; 10 WN (NSW) 212 (where undertaking is without authority). Compare *Simpson v Breerton* [1964] VR 332 (court may release the solicitor from the undertaking where good cause is shown).

3. The rules of court prescribe the matters that are required to prove service or that bear on proof of service:
- (CTH) High Court Rules 2004 r 22.02 (affidavit within seven days of service)
 (CTH) Federal Court Rules O 7 rr 2, 5
 (ACT) Court Procedures Rules 2006 r 6467
 (NT) Supreme Court Rules rr 6.07, 6.16
 (NSW) Uniform Civil Procedure Rules 2005 r 10.27 (evidence of a person's statement about their identity or office is evidence of that identity or office)
 (QLD) Uniform Civil Procedure Rules 1999 r 120
 (SA) Supreme Court Civil Rules 2006 r 72
 (TAS) Supreme Court Rules 2000 r 143
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.17
 (WA) Rules of the Supreme Court O 72 r 7.
4. An affidavit of service should not be sworn on information and belief: *Elders Finance Ltd v Inaway Pty Ltd* [1991] 2 Qd R 398. As to whether there is sufficient evidence of service see *Davidson v McCartin* [1953] VLR 697; [1954] ALR 42; *City of Camberwell v Reed* [1954] VLR 653 at 658-9; [1955] ALR 204. As to affidavit evidence generally see EVIDENCE.
5. As to the (CTH) Service and Execution of Process Act 1992 see [325-2190]. As to proof of service pursuant to the (CTH) Service and Execution of Process Act 1992 see [325-2195].

[325-2025] Time of service and Sunday service At common law Sunday was a *dies non juridicus*: a day on which no judicial act could lawfully be done. In all jurisdictions, except Tasmania, service on Sundays is generally permitted,¹ although some jurisdictions still prohibit service on Good Friday and Christmas Day.² In some jurisdictions, service other than on normal business days is deemed to have been effected on the following Monday or the next

working day.³ Apart from which service may be effected provided it is currently in

Notes

1. The (IMP) Sunday (on a Sunday, but it has as it prohibited Sunday longer any legislation see (TAS) Supreme Court Rules 2000 r 134. It appears that the procedure caused by *Michael Naim & Co* appearance see [325-2195].
2. (NT) Local Court Rules 1999 r 6.07 (Friday)
 (NSW) Uniform Civil Procedure Rules 2005 r 10.13 (on which Christmas Friday or Christmas Day)
 (QLD) Uniform Civil Procedure Rules 1999 r 115 (Friday or Christmas Day)
 (TAS) Supreme Court Rules 2000 r 143 (or Good Friday). There are no equivalent provisions in the other jurisdictions.
3. (CTH) High Court Rules 2004 r 22.02 (High Court) has been done on the (QLD) Uniform Civil Procedure Rules 1999 r 115 (deemed to have been served) (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 6.17 (document served) (WA) Rules of the Supreme Court O 72 r 7 (to have been served). There are no equivalent provisions in the other jurisdictions. See also *Upton v Upton* [1991] 19 QBD 60; 56 WLR 1000.
4. As to form and content of an affidavit of service see [325-2195].

(b) SERVICE OF

[325-2030] General The rules of court generally require originating process to be served on any party to any Act and any part of any Act and any part of any Act to be effected.² Ordinarily the person to be served with the plaintiff in person or by the plaintiff's solicitor will not take effect unless the contents are explained to the person to be served, in the possession of the process server, attempt to serve the defendant, it touches the defendant

working day.³ Apart from these restrictions on Sunday service and times at which service may be effected, an originating process may be served at any time provided it is currently in force.⁴

Notes

- 1. The (IMP) Sunday Observance Act 1677 operated to prohibit service of legal process on a Sunday, but it has now been repealed in all Australian jurisdictions (at least insofar as it prohibited Sunday service), and in all jurisdictions except Tasmania there is no longer any legislation prohibiting service on Sundays. For the prohibition in Tasmania see (TAS) Supreme Court Rules 2000 r 49.

It appears that the entry of an unconditional appearance cures any defect in procedure caused by service of legal process on a Sunday: see, for example, *Pike v Michael Naim & Co Ltd* [1960] Ch 553; [1960] 2 All ER 184. As to unconditional appearance see [325-2510].

- 2. (NT) Local Court Rules r 6.15 (service not permitted on Christmas Day or Good Friday)
 - (NSW) Sunday (Service of Process) Act 1984 s 3 (service not permitted on a Sunday on which Christmas Day falls)
 - (QLD) Uniform Civil Procedure Rules 1999 r 101 (service not permitted on Good Friday or Christmas Day unless the court otherwise orders)
 - (TAS) Supreme Court Rules 2000 r 49 (service not permitted on Christmas Day or Good Friday).
- There are no equivalent provisions in the other jurisdictions.

- 3. (CTH) High Court Rules 2004 r 4.01.6 (acts done after 4 pm to be taken to have been done on the next day that the Registry is open)
 - (QLD) Uniform Civil Procedure Rules 1999 r 103 (service effected after 4 pm deemed to have been effected the next day)
 - (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 3.05(2) (any document served after 4 pm or on any day the office of the court is closed is deemed to have been served on the next day that the office is open).
- There are no equivalent provisions in the other jurisdictions.

See also *Upton v Mackenzie* (1822) 1 Dow & Ry KB 172; *Murray v Stephenson* (1887) 19 QBD 60; 56 LT 720.

- 4. As to form and validity of originating process see [325-1000].

(b) SERVICE OF ORIGINATING PROCESS WITHIN THE JURISDICTION

(i) Personal Service

[325-2030] **General rule for service on individuals** The rules of court require originating processes to be served personally (subject to the provisions of any Act and any particular rules).¹ The rules also specify how personal service is to be effected.² Ordinarily, a copy of the originating documents must be left with the person to be served.³ The originating document may be served by the plaintiff in person or by anyone authorised by the plaintiff.⁴ If the person to be served will not take a copy of the document, service may be effected if its contents are explained to the person to be served and it is left, as nearly as possible, in the possession or control of that person.⁵ It is not an assault if a process server, attempting to serve a process on a person who is refusing to take it, touches the defendant with the document.⁶ Service has been held valid where

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