Revisers' Note, 1878: This section is designed to cover accidents and mistakes not known or taken advantage of until after a trial, embracing the idea of section 1, chapter 106, Laws 1870; and also to provide the effect of a reversal, the latter provision being borrowed from the work of the last New York revisers.

It is too late to object for the first time on the trial in the court to which a removal has been made that the application for removal was insufficient. Montgomery v. Scott, 32 W 249.

As consent gives jurisdiction of the person a general appearance in the court to which a venue is changed is a waiver of all defects in the affidavit. Carpenter v. Shepardson, 43 W 406, 412; Estate of Schaeffner, 45 W 614.

Objection that notice was not given of the motion for a change of venue is too late when first made on appeal from the judgment. Appearing and resisting a motion to change the place of trial is a waiver of such notice. Cartright v. Belmont, 58 W 370, 17 NW 237.

An objection to a change of venue cannot be made the first time in the supreme court on appeal. Allen v. Voje, 114 W 1, 89 NW 924.

CHAPTER 262.

Commencing Civil Actions.

Editor's Note: The following histories and notes are to ch. 262, Stats. 1959, as created by ch. 226, Laws 1959. The notes were prepared by Professor G. W. Foster, Jr., of the University of Wisconsin Law School, who served as reporter for the Judicial Council in preparing the revision.

General Objectives and Scope of Revised Chapter 262.

The primary objective sought in revising Chapter 262 is to expand the exercise of personal jurisdiction over nonresidents in cases having substantial contacts with Wisconsin. The new features found in Chapter 262 are largely additions to, rather than replacements for, old law. Thus, the old familiar means of acquiring personal jurisdiction have been retained. See new sections 262.05 (1) and (2); 262.06; and 262.07. And the language of old Chapter 262 has been employed as far as consistent with the new additions.

The scope of state jurisdiction over nonresidents has expanded enormously in recent years. The Nonresident Motorist Process Acts marked a beginning of this trend more than thirty years ago. And further legislative action in Florida, Illinois, Maryland, North Carolina, Texas, Washington and West Virginia provides for jurisdiction over nonresidents in numerous actions arising out of torts or contracts having substantial local connections. Other states—among them California, New Jersey, New Mexico, Oregon and Wisconsin—have by judicial decision redefined their "doing business" concepts so broadly that they now include much or perhaps all that is permitted to state judicial power over foreign corporations under the due process clause of the Fourteenth Amendment.

The Supreme Court of the United States has lent the states an important helping hand in these developments. The rigid rule of Pennoyer v. Neff, 95 U. S. 714 (1877), has not wholly disappeared, as the Court pointed out in Hanson v. Denckla, 357 U. S. 235 at 251 (1958). But the rigidity of Pennoyer has given way to the flexible standard of International Shoe Co. v. Washington, 326 U. S. 310 (1945), and McGee v. International Life Ins. Co., 355 US 220 (1958).

The new, flexible standard of International Shoe and McGee comes to this: A state may exercise personal jurisdiction whenever, in the context of our federal system, it is reasonable for the state to try the particular case against the particular defendant. In other words, the modern test depends upon the relation between the state and the particular litigation sued upon. Importance attaches to what, with respect to the action brought, the defendant has caused to be done in the forum state.

The International Shoe and the McGee cases lay down general applications of the new due process standard. State legislation and lower court decisions have applied this general standard to a wide variety of fact situations which have not yet reached the United States Supreme Court for decision. The new revision of Chapter 262 is based upon a comprehensive study of these legislative and judicial materials from other states. When collectively considered, these state materials form a broad and largely interconnected framework which supports the exercise of state jurisdiction over nonresidents in virtually every kind of personal action which has substantial connections with the forum state.

Revised Chapter 262, relying upon these legislative and judicial materials from other states, attempts to provide a means for trying in Wisconsin all personal actions which, in a due process sense, it is reasonable to try here against the named defendant.

Summary of Contents of Revised Chapter 262.

Title XXV of Wisconsin Statutes deals with the procedure in civil actions. Within Title XXV, Chapter 262 deals with commencing civil actions. Chapter 262 is to be "liberally construed to the end that actions be speedily and finally determined on their merits." See s. 262.01; and also see s. 262.03, which defines, for use in this chapter, the words "person", "plaintiff" and "defendant" in a manner which stresses the liberal scope intended for the operation of the chapter.

A civil action is commenced "by the service of a summons or an original writ." Sec. 262.02. Civil actions are of two general types. When directed against a person, they are spoken of as "personal actions" and require the exercise of "personal jurisdiction" over the parties. When directed against a status or thing (rather than against a person), they are spoken of as actions "in rem" or "quasi in rem" and require the exercise of "jurisdiction in rem" or "jurisdiction quasi in rem" with respect to the status or thing acted upon. Section 262.04 makes the distinction between

these two general types of civil actions and defines the elements which must be present for the valid exercise of jurisdiction in each.

The exercise of personal jurisdiction by a state court requires the presence of three elements:

(1) Subject matter jurisdiction. Now, as before, the court must be able to hear the kind of action brought. Sec. 262.04 (1).

(2) Grounds for personal jurisdiction. The court must have statutory authorization for subjecting the particular defendant to trial in the particular case. The inclusion of many additional grounds for exercising personal jurisdiction is a principal feature of revised Chapter 262. See s. 262.05.

(3) Notice to defendant and opportunity to be heard. The service of the summons is ordinarily the means employed to notify a defendant that an action has been commenced against him. Section 262.06 authorizes numerous means, some of them new, for notifying various kinds of defendants and expands the use of personal service of the summons without the state. If a defendant appears voluntarily in an action, or consents in advance to permit another to appear in his behalf, service of a summons may be dispensed with. See s. 262.07.

The exercise of jurisdiction in rem or quasi in rem involves the presence of essentially the same three elements just discussed. Subject matter jurisdiction is required in all cases. Sec. 262.04 (1). Grounds for the exercise of jurisdiction in rem or quasi in rem are specified in s. 262.08. And notice to the defendant and opportunity to be heard with respect to his interests in the thing or status proceeded against is dealt with in s. 262.09.

Sections 262.10 through 262.14 relate to details respecting service of the summons. The important thing to be noted is that the form of the summons has been changed. See ss. 262.10 and 262.11.

The next following sections—262.16, 262.17 and 262.18—deal with the manner in which the defendant may make objection to the jurisdiction of the court, and to the manner in which the plaintiff may prove the jurisdiction of the court in the event the defendant has either objected to jurisdiction or has defaulted in making an appearance.

Section 262.19 introduces a new provision which resembles the doctrine of forum non conveniens. Under this section a Wisconsin trial court may stay further proceedings in a pending case when it appears that the case should, as a matter of substantial justice, be tried in a court outside Wisconsin. This device introduces a degree of flexibility designed to avoid injustice which can result from compelling trial in Wisconsin of all cases which come within the literal scope of its jurisdiction statutes.

The final section of the revision, 262.20, is designed as a deterrent against abuse of the state's judicial power. Under it the trial court may order a plaintiff who asserts a frivolous claim of jurisdiction to pay the defendant up to the amount of $500, for his expenses incurred in appearing to contest the jurisdiction of the court.

Histories and Notes.

262.01 History: 1959 c. 226; Stats. 1959 s. 262.01.

Reporter's Notes: This section is new. It is patterned closely after s. 4 of the Illinois Civil Practice Act. Smith-Hurd Annotated Statutes, ch. 110, s. 4 (1956). The Supreme Court of Wisconsin has voiced a similar view as to the policy to be followed in applying statutes conferring personal jurisdiction: "This court is disposed to give statutes regulating procedure a liberal interpretation. (Citations omitted.) Another rule of statutory construction which we deem to be applicable here is that great consideration should be given to the object sought to be accomplished by a statute." Huck v. Chicago, St. P. M. & O. Ry. Co. 4 W (2d) 132, 137, 90 NW (2d) 154, 157 (1958).

262.02 History: 1959 c. 226; Stats. 1959 s. 262.02; 1969 c. 339 s. 27.

Reporter's Notes: Sub. (1) is patterned after old s. 262.01. The title is new; the old title reads JURISDICTION, HOW ACQUIRED. The first sentence of the proposed subsection is the same, except for a minor style change, as the first sentence of old s. 262.01. The second sentence of old s. 262.01 suggested that a civil action could be commenced by service of a provisional remedy by asserting that "From the time . . . of the issuance of a provisional remedy the court shall have jurisdiction and have control of all subsequent proceedings." While a provisional remedy may be issued prior to service of summons, the Wisconsin supreme court has adhered to the view that the action is not commenced until there has been service of the summons. Jarvis v. Barrett, 14 W 591 (1861); Closson v. Chase, 158 W 346, 149 NW 26 (1914); and see Schultz v. Schultz, 256 W 139, 40 NW (2d) 515 (1949). The second sentence of old s. 262.01 is for this reason omitted. The provision for service of original writs is new.

Subs. (2) and (3) follow closely old s. 262.14.

On civil actions, and parties thereto, see notes to various sections of ch. 260.

A summons is more in the nature of a notice from the plaintiff to the defendant than of a mandate issuing from the state through its judicial tribunals. Rahn v. Gunnison, 12 W 528. See also: Porter v. Vandercook, 11 W 70; Johnson v. Hamburger, 13 W 175; and Mezchen v. More, 54 W 214, 11 NW 534.

A writ of attachment is a provisional remedy, not a summons. Jarvis v. Barrett, 14 W 591; Bell v. Olmsted, 18 W 69; Maguire v. Bolem, 94 W 48, 68 NW 408.

For purposes of determining priority of attachment liens on realty it is presumed that the writ of attachment and the summons were issued on the same day and hence that the action commenced on the date the attachment issued. Barth v. Burnham, 105 W 548, 81 NW 809.

The entry of a judgment on cognovit is not the commencement of an action. Guardianship of Kohl, 221 W 385, 266 NW 800.

A summons is not a "process" as that term is generally used in Wisconsin. State ex rel. Walling v. Sullivan, 245 W 180, 13 NW (2d) 550.

Our summons, while part of the process system, is but a notice of a proposed action, and differs in nature and effect from a writ procured from a court. The primary purpose of the service of a summons is to give notice to the defendant that an action has been commenced against him. Burke v. Madison, 247 W 326, 19 NW (2d) 309.

Personal jurisdiction cannot be acquired by personally serving either a motion to make one a party or an order to show cause why one should not be made a party, since neither the motion nor the order is a summons. Madison v. Pierce, 266 W 303, 62 NW (2d) 910.

Jurisdiction of the person can only be acquired by service of a summons in the manner prescribed for personal service; this is plain and fundamental, even where a motion to make one a party or order to show cause why one should not be made a party is personally served. Estate of Von Wald, 24 W (2d) 256, 128 NW (2d) 398.

See note to 295.14, citing Novo Ind. Corp. v. Nissen, 30 W (2d) 123, 140 NW (2d) 280.

262.025 History: 1961 c. 331; Stats. 1961 s. 262.025.

262.03 History: 1959 c. 226; Stats. 1959 s. 262.03.

Reporter's Notes: This section is new. The definition of "person" adds "natural person" to the definition of "person" which appears in s. 990.01 (26).

262.04 History: 1959 c. 226; Stats. 1959 s. 262.04.

Reporter's Notes: This section defines in general terms the jurisdictional requirements for rendering judgments binding upon persons and things. It also makes appropriate cross reference to the sections in the chapter which control those required elements.

Sub. (1) codifies the definition of subject matter jurisdiction as that concept has evolved in the case decisions.

Sub. (2) emphasizes the distinction between the means of notice (i.e., service of the summons) and the grounds for exercising personal jurisdiction. These distinctions are not sharply drawn in existing statutes but case decisions make it plain that a personal judgment is effective only where the court has jurisdiction of the subject matter, has furnished the defendant an adequate means of notice and opportunity to be heard, and, finally, there are adequate statutory grounds for personal jurisdiction.

Sub. (3) draws comparable distinctions for the rendition of judgments in rem and quasi in rem.

A court can be said to lack subject-matter jurisdiction only where it lacks power to treat the subject matter, which is not the case where it may treat the subject matter generally but there has been a failure to comply with the conditions precedent necessary to acquire jurisdiction. Broadbent v. Hegge, 44 W (2d) 719, 172 NW (2d) 34.

262.05 History: 1959 c. 226; Stats. 1959 s. 262.05; 1963 c. 158; 1967 c. 198.

Reporter's Notes: This is the key section in the new statute since it defines the grounds upon which personal jurisdiction may be exercised in a particular case. Subs. (1) and (2) retain with little change the grounds for personal jurisdiction recognized under old law. Subs. (3) through (11) are new and incorporate grounds which expand the exercise of personal jurisdiction in cases having substantial contacts with Wisconsin. Sub. (12) makes explicit a requirement implicit throughout the section, viz., that for each claim or cause joined in the case against the defendant there must separately exist some ground for personal jurisdiction over the defendant.

Proof of the jurisdictional facts required by this section is not enough to furnish the court with a basis for a personal judgment against the defendant. The court must also have jurisdiction of the subject matter and a summons must be served upon the defendant. See generally new ss. 262.04 and 262.06.

The exercise of personal jurisdiction on the grounds stated in this section is further limited by a doctrine akin to forum non conveniens. Thus even where the court has acquired a basis for rendition of a personal judgment against the defendant, further proceedings in Wisconsin may be stayed pursuant to the terms of s. 262.19 upon a showing by the party seeking the stay that the interests of convenience and substantial justice require the case to be tried in some court outside the state. The operation of s. 262.19 is described in detail in the notes following that section.

The discussion which follows treats separately the various grounds for personal jurisdiction in terms of the jurisdictional facts required.

(1) *Local Presence or Status.*

The jurisdictional facts required by this subsection are a restatement of the familiar grounds for personal jurisdiction based on presence, domicil, and doing business in the state. Where jurisdiction is made to rest upon one of the grounds stated in this subsection, it is immaterial that the cause of action arose outside this state. Compare subs. (2) through (10) of this section, where the jurisdictional facts describe situations in which the state has a sufficient interest to require a particular defendant to stand trial in this state in the particular case defined.

At common law a state could, consistent with the demands of due process under the Fourteenth Amendment, exercise judicial jurisdiction over a person on grounds either of presence or consent. Pennoyer v. Neff, 95 US 714 (1877). Consent which is actual, or which is reasonably to be implied, furnishes the basis for personal jurisdiction under s. 262.07, infra. The grounds stated in this subsection have been said to rest either on a theory of consent or presence, but there are many cases to which the grounds have been applied for which neither theory furnishes a particularly satisfactory explanation. But each jurisdictional ground stated in the subsection is firmly established despite rather inadequate theoretical justification for some of the cases to which they have been applied.

(a) Presence within state. This ground relies upon the fact of presence of the defendant

within the state at the time of service. This ground has been held to furnish a basis for jurisdiction over a nonresident only temporarily in the state at the time of service, and jurisdiction thus acquired may be exercised even though the plaintiff is also a nonresident and the cause of action is wholly foreign to the forum state. Thus applied to the nonresident temporarily present in the state, the ground has been referred to as "transient" jurisdiction and has come in for occasional trenchant criticism. See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The Power "Myth" and Forum Conveniens, 65 Yale L. J. 289 (1956). But the transient rule is solidly established and was authorized under old s. 262.08 (3).

(b) Domicil. Personal jurisdiction which is based upon the fact of the defendant's domicil within the state developed as a kind of constructive presence of the defendant within the state. Thus, it is no bar to the exercise of personal jurisdiction over a domiciliary that he is temporarily out of the state when process is served at his usual place of abode in the state. See old s. 262.08 (3). And due process does not prohibit a state from exercising personal jurisdiction over a domiciliary who has been personally served outside the state. Milliken v. Meyer, 311 US 457 (1940).

(c) Domestic corporation. The jurisdictional fact required under this subsection is the creation of the defendant as a corporation under the laws of this state. The power of the state to create a corporation carries with it the incidental power to subject the corporation to suit in the state's courts. See old s. 262.09 (3).

(d) Engaging in substantial local activities. The jurisdictional fact required by this subsection is local activity which is "substantial and not isolated" whether "wholly interstate, intrastate or otherwise." This, although the phrase "doing business" is not used, corresponds with a widely used definition of that phrase, and is believed consistent with the existing "doing business" doctrine of the United States Supreme Court. See Perkins v. Benguet Consolidated Mining Corp. 342 US 437 (1952), where it was held that a state could exercise personal jurisdiction over an unlicensed foreign corporation on a cause of action unrelated to local activities upon a showing that the corporation was otherwise engaged in substantial activities which were "continuous and systematic" within the forum state. The "doing business" test had its origins with respect to corporate, rather than natural, persons but despite at least one earlier Supreme Court decision to the contrary, it is now believed that doing business furnishes a basis for personal jurisdiction over nonresident individuals as well as over foreign corporations. See Foster, Personal Jurisdiction Based on Local Causes of Action, 1956 Wisconsin Law Review 522 at 576-577. No old Wisconsin statute authorized personal jurisdiction over an individual based upon his "doing business" in the state, but various types of foreign corporations were made subject to personal jurisdiction on the basis of their "doing business" in the state. See, for example, old s. 262.09 (4).

(2) *Special Jurisdiction Statutes.*

The purpose of this subsection is to preserve special statutes which confer grounds for personal jurisdiction. An example is the provision in s. 345.09 for exercising personal jurisdiction over nonresident operators of motor vehicles in actions arising out of the operation of motor vehicles in the state. The provisions of subs. (3) through (11) of this section furnish additional alternative grounds for personal jurisdiction in many of the cases provided for in these old, special statutes.

(3) *Through* (12) *Generally: Jurisdiction Over Particular Persons in Particular Actions.*

The older concepts of personal jurisdiction grounded on the facts of consent, presence, and doing business within the state rested in part upon territorial ideas about the limits of state power that were expressed in the thought that judicial power extended only to property within the state or to persons who could be found within its borders. Pennoyer v. Neff, 95 US 714 (1877), is the classic statement of this view and the opinion in that case elevated these territorial views to constitutional requirements of due process under the Fourteenth Amendment.

These territorial limitations on state judicial jurisdiction failed in many ways to adjust comfortably to the requirements of smooth judicial administration by states within the federal system and there was, in the course of time, much experimentation with fictions, presumptions and other devices to iron out the rough spots. Territorial "presence" could be factually determined by objective standards where natural persons were concerned, but the criteria for factual determination of corporate "presence" were much disputed. Too, a jurisdictional test based on consent, presence, or doing business placed stress on facts which had little to do with the fairness or convenience of trying the particular case against the defendant in the forum state. Indeed, the doctrine of forum non conveniens almost surely evolved as a means of importing some flexibility into a system which, as between the several states, largely ignored the factors of convenience and fairness in fixing the place of trial. For further discussion of forum non conveniens and its application in statutory form to the present jurisdiction provisions, see discussion in notes following section 262.19, infra.

The principal modern developments in state judicial jurisdiction over persons (both individual and corporate) have veered sharply away from the grounds of presence and consent, and the new grounds depend importantly upon the relation between the state and the particular litigation sued upon. Importance attaches to what, with respect to the action brought, the defendant has caused to be done in the forum state.

The fundamental definition of the new due process standard came in 1945 in International Shoe Co. v. State of Washington, 326 US 310: a state may exercise personal jurisdiction whenever, in the context of our federal system, it is reasonable for the state to try the particular case against the particular defend-

ant. Or stated another way, due process requires only that the defendant "have certain minimum contacts with [the state] that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." 326 US 310 at 316.

International Shoe makes it clear that these "minimum contacts" are not to be measured by mechanical or quantitative standards. The contacts are tested by the quality, not the number, of activities conducted by or on behalf of the defendant. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 US 310 at 319.

From this it is evident that contacts of various kinds may have a quality sufficient to satisfy due process. Subs. (3) through (10) rely upon a wide variety of contacts in defining the grounds for the exercise of personal jurisdiction. These grounds are stated in terms of specific kinds of actions in which the defendant's contacts with the state make it reasonable to require him to stand trial within the state in the case described.

In general terms, the jurisdictional grounds defined in subs. (3) through (10) involve three distinguishable situations.

In the first, the defendant (or his agent for him) has done some act in the state out of which the plaintiff's claim arises. Thus in sub. (3) it is the occurrence within the state of the act out of which arose the claim of injury sued upon which furnishes the jurisdictional ground. Under sub. (6) the fact that the defendant has acted (or failed to act) with respect to property located within the state and has thus given rise to the action sued upon which is essential to the exercise of personal jurisdiction in cases of that sort. In sub. (8) the local acts are those of the defendant in his capacity as director of a domestic corporation which furnish the jurisdictional basis for actions arising out of the defendant's conduct as an officer of the corporation. In sub. (9) provision is made for the exercise of personal jurisdiction in actions to recover taxes which have accrued in the state as a result of the defendant's acts.

In the second situation there is some degree of consensual privity between the plaintiff and defendant with respect to the action brought. In these cases it is not necessary that the defendant have done any act within the state; the basis for personal jurisdiction is rather that the defendant has entered some consensual agreement with the plaintiff which contemplates a substantial contact in Wisconsin. The contemplated contact may include performance of services in the state by either party, the production, use or consumption of goods within the state, the payment of money secured by local property, the payment of money upon the happening of some insured event within the state, or the agreement to insure a resident of the state against the happening of an event which might occur anywhere. See subs. (5), (6), (7) and (10).

The third situation involves actions to recover for some injury to person or damage to property which has occurred within the state as the result of an act done elsewhere by the defendant; and there is no element of consensual privity present between the parties. The typical case here is a product liability case which involves a claim of injury sustained in Wisconsin as a result of an act done elsewhere by the defendant in the manufacture of a product which is distributed to the plaintiff, or some third party, by middlemen who are independent of the defendant manufacturer. Sub. (4) furnishes a basis for personal jurisdiction in these actions to recover for a local injury resulting from an act done outside the state by the defendant, provided the defendant is shown to have other substantial contacts with the state in addition to the facts of the case sued upon.

[In 1967 the original subs. (11) and (12) were renumbered (12) and (13).]

Sub. (11) involves actions against personal representatives of decedents. Since the actions under this subsection are brought against the defendant in his representative capacity, the contacts relied on for jurisdiction are those of the decedent, not the representative. The subsection provides for jurisdiction over the defendant in all cases where the decedent's contacts with the state would have supported jurisdiction under this section had he lived.

Sub. (12) makes it clear that for each claim or cause of action which a plaintiff is permitted by existing s. 263.04 to join in his complaint there must exist, independently, one or more grounds for personal jurisdiction over the defendant. The existence of grounds for personal jurisdiction as to one claim or cause of action under subs. (2) through (11) of this section will not suffice as grounds for some cause not within the subsection relied on for jurisdictional grounds.

This completes the summary of the various contacts relied on in subs. (3) through (12). One further general observation about these subsections is appropriate before proceeding to comment upon them individually: The application of each subsection to a particular case is further limited by the provisions of s. 262.19. S. 262.19 operates as a safety valve to relieve a defendant from standing trial in the state in a particular case coming within the terms of these subsections when the defendant can show that the interests of convenience and substantial justice require the case to be tried in some court outside the state. The operation of s. 262.19 is described in detail in the comment following that section.

Individual comment upon subs. (3) through (12) of s. 262.05 follows.

(3) *Local Act or Omission.*

Two jurisdictional facts are required by this subsection: (i) an act or omission within the state by the defendant or his agent; and (ii) a claim of injury to person or property alleged to arise out of the local act or omission. When these facts are shown to exist, the court has a basis for personal jurisdiction over the defendant. It is not material to jurisdiction under this subsection that the consequences of the defendant's act occurred outside the state; it is the occurrence of the act in the state, not the injury, which furnishes the contact relied

on for jurisdiction. Liability is not a jurisdictional fact; nor does the form of remedy affect the jurisdiction of the court. Once it is shown that the claim arises out of some local act or omission by the defendant the court acquires a basis for jurisdiction over the defendant, and any question as to the legal sufficiency of the plaintiff's claim goes to the merits of the case, not to the jurisdiction of the court over the defendant.

The doing of an act, or causing it to be done, is a substantial contact with the state. The power of the state to regulate conduct within its borders is not doubted. Due process allows the enactment of any measure not unreasonably related to a proper legislative or judicial objective. See Cardozo, The Reach of the Legislature and the Grasp of Jurisdiction, 43 Cornell L. Q. 210 (1957). Subjecting a defendant to personal jurisdiction at the place of his act to enforce suits arising out of the act would not seem unreasonably related to the regulation by the state of the act itself.

The Nonresident Motorist Process Acts are familiar illustrations that apply the basic principle of this subsection. In the automobile accident case both the defendant's negligent act and the resulting injury occur in the forum state, and in sustaining jurisdiction over nonresident motorists in 1927 the Supreme Court of the United States relied for contacts both on the act of the defendant and the resulting injury to persons and property. To require a nonresident to stand trial in the action to recover for the injury he caused "makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents." Hess v. Pawloski, 274 US 352 at 356 (1927). The statutory basis for jurisdiction over the nonresident motorist was early said to be the "consent" implied from the nonresident's use of the state's highways. But more realistic courts have rejected "consent" as the theoretical basis for the exercise of state judicial power in such circumstances. See Olberding. v. Illinois Central R. Co. 346 US 338 (1953), and Steffen v. Little, 2 W (2d) 350, 86 NW (2d) 622 (1957) where, in the latter case, the Supreme Court of Wisconsin explained that "jurisdiction over the nonresident tortfeasor in personam rests on his contact with the state through his use of the public highway and the injury he inflicts on others while so using it, and such jurisdiction may be asserted and exercised without intermediation of a fictitious agent."

The Nonresident Motorist Process Acts are in force today in every American jurisdiction. Other types of statutes have extended the principle to include generally any isolated act in the state as a basis for personal jurisdiction over a defendant in a suit to recover for injury resulting from the local act. The principal statutes and cases are indicated below.

Illinois. S. 17 (1) (b) of the Illinois Civil Practice Act (effective January 1, 1956) subjects a person, regardless of his residence, to personal jurisdiction as to any action arising out of the "commission of a tortious act within [Illinois]" by the defendant or his agent. The Illinois Supreme Court has held the provision constitutional when applied to a Wisconsin defendant whose agent had negligently injured the plaintiff in Illinois and thus given rise to the claim sued upon. Nelson v. Miller, 11 Ill. (2d) 378, 143 NE (2d) 673 (1957). In the Nelson case both the act and the consequent injury occurred in Illinois, but the court decided the case on a rule which makes the place of injury immaterial to jurisdiction: "An act or omission within the State, in person or by agents, is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or the omission give rise to liability in tort." Id., 11 Ill. (2d) 378 at 393-4. As drafted, however, s. 17 (1) (b) does not furnish a basis for jurisdiction over a defendant whose act outside Illinois results in injury to person or property in Illinois. Hellriegel v. Sears Roebuck and Co. 157 F. Supp. 718 (N. D. Ill., 1957). A dictum in the Hellriegel case suggests that there would have been no constitutional objection to providing statutory authority for jurisdiction based upon injury in Illinois resulting from an act outside the state by the defendant. Id., 157 F Supp. 718 at 721.

Maryland. Art. 23, s. 88 (d) of the Maryland Code provides a basis for jurisdiction over foreign corporations when sued by Maryland residents on actions "arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State." This has been sustained against a foreign corporation whose agent's misrepresentation made in Maryland gave rise there to the injury of which the plaintiff complained. Johns v. Bay State Abrasive Products Co. 89 F Supp. 654 (D. Md., 1950). But this statutory provision, like s. 17 (1) (b) of the Illinois Civil Practice Act, furnishes no basis for jurisdiction over a defendant whose act outside Maryland causes injury within that state. Arundel Crane Service v. Thew Shovel Co. 214 Md. 387, 135 A (2d) 428 (1957).

North Carolina. S. 55-145 (a) (4) of North Carolina General Statutes provides for personal jurisdiction over a foreign corporation on any cause of action which arises out of "tortious conduct in this State, whether arising out of misfeasance or nonfeasance." This provision has been sustained as applied to a foreign corporation whose agent, it was alleged, wrongfully repossessed the plaintiff's car in North Carolina. Painter v. Home Finance Co. 245 NC 576, 96 SE (2d) 731 (1957). Like the Illinois and Maryland statutes just discussed, this section furnishes no basis for jurisdiction over a nonresident whose act outside North Carolina results in injury within the state. Putnam v. Triangle Publications, 245 NC 432, 96 SE (2d) 445 (1957). But in some circumstances, at least, another provision of the same North Carolina statute, 55-145 (a) (3), does furnish a basis for personal jurisdiction over foreign corporations where suit is brought on a local injury resulting from a foreign act. See Shepard v. Rheem Manufacturing Company, 249 NC 454, 106 SE (2d) 704 (1959), discussed, infra, with the product liability cases under sub. (4) of this section.

Pennsylvania. Negligence of the nonresident owner of local property in permitting a defective condition in a public sidewalk ad-

joining the property, the defect giving rise to the injury sued on, has been held a sufficient basis for personal jurisdiction over the absent owner. Dubin v. City of Philadelphia, 34 Pa. D & C 61 (1938). A later decision in the Supreme Court of Pennsylvania applied the same statute to furnish a basis for personal jurisdiction over a foreign corporate owner of realty in an action to recover for personal injuries sustained by firemen when a false ceiling collapsed within a building during a fire. Rumig v. Ripley Mfg. Co. 366 Pa. 343, 77 A (2d) 360 (1951).

Texas. In 1959 Texas adopted a statute closely resembling the West Virginia statute discussed later in this note. See also Wilson, Jurisdiction over Non-residents, Texas Bar Bulletin for May 1959, p. 221.

Vermont. Ss. 1562-63 of Vermont Revised Statutes permit action by residents of the state against foreign corporations which commit a "tort in whole or in part in Vermont." This has been held to furnish a basis for personal jurisdiction over a foreign corporation in an action to recover for an isolated injury to property in Vermont resulting from an act of corporate negligence in the state. Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A (2d) 664 (1951). As this is written, no reported case has since dealt with the statute. Literally read, the statute appears to furnish a basis for jurisdiction if either the act or the injury occurs in Vermont.

Washington. In 1959 Washington enacted the provisions of the Illinois statute discussed above in this note.

West Virginia. In 1957 the West Virginia legislature amended its corporation code to add to it the provisions of the Vermont statute mentioned immediately above. See Acts of West Virginia, ch. 20 (1957), amending art. I, 71, ch. 31 of the code of West Virginia. The essential difference between the original Vermont statute and the West Virginia version is that West Virginia has not confined the use of the statute to plaintiffs who are residents of the state. No reported cases found at this writing deal with the West Virginia statute.

From the eight statutes just considered, certain conclusions may be drawn. Applying the statutes of Illinois, Maryland, North Carolina, Pennsylvania and Vermont the courts have in all cases reported held that an isolated act in the state furnishes a basis for personal jurisdiction in an action to recover for the injury resulting there from the act. The new Texas and West Virginia statute, patterned after the older Vermont act, appear to contemplate the same result. All eight statutes appear to require only that the act occur in the state and it appears immaterial that the resulting injury may have occurred elsewhere. No case found, however, passes on this question. The statutes in Illinois, Maryland and North Carolina have all been held not to furnish a basis for jurisdiction where an isolated injury occurred in the state as a result of an act which was done elsewhere. These decisions seem entirely correct in light of the language used in the three statutes involved. The Vermont, Texas and West Virginia statutes appear to furnish a basis for jurisdiction whenever either the act, or the resulting injury, occurs in the state. Jurisdiction in actions based upon injury that occurs in the state from an act done elsewhere is dealt with in the subsection which follows.

(4) *Local Injury, Foreign Act.*

Three jurisdictional facts are required by this subsection: (i) an act or omission outside the state by the defendant or his agent; (ii) an injury to person or property within the state which is claimed to arise out of the foreign act or omission; and (iii) some additional contact, not necessarily related to the injury sued on, which links the defendant to the state. As in sub. (3), liability is not a jurisdictional fact; nor is the form of remedy sought material to jurisdiction.

The jurisdictional facts required by this subsection call for proof of two contacts between the defendant and the state: (i) the occurrence in the state of the injury which the defendant is claimed to have caused; and (ii) some additional contact not necessarily related to that injury. The nature and quality of the additional contact required will be discussed later in this comment.

Perhaps the occurrence of the injury in the state is alone a sufficient "minimum contact" to sustain jurisdiction. Twice since International Shoe the Supreme Court has permitted states to base personal jurisdiction on the consequences in the state of acts done elsewhere by the defendant. Travelers Health Assn. v. Virginia, 339 US 643 (1950) and McGee v. International Life Insurance Co. 355 US 220 (1957); and compare Hanson v. Denckla, 357 US 235 (1958). And as appears in the comments on sub. (5) below, decisions in state courts have sustained jurisdiction in actions on bargaining transactions made with the defendant by or on behalf of the plaintiff where the defendant's only contacts with the state have been the things which the plaintiff did there in response to the agreement sued upon. In all these cases in which jurisdiction has been sustained over the defendant for the local consequences of acts done outside the forum state there has been some degree of consensual privity between the plaintiff and the defendant.

No case found has squarely held that personal jurisdiction may be exercised in a case arising out of an injury received in the state as a result of some act done elsewhere and no other facts are made to appear. As indicated in the comment on sub. (3) above, the jurisdiction statutes in Vermont, Texas and West Virginia are amenable to the construction that the occurrence of the injury within the state is alone sufficient, and a dictum in Hellriegel v. Sears Roebuck Corp. 157 F Supp. 718 (N. D. Ill., 1957), suggests that a statute so applied would raise no serious federal question.

If the occurrence in the state of the injury sued on is not a sufficient contact, very little more by way of additional contact is required for the exercise of personal jurisdiction in these cases. This concept that personal jurisdiction may be grounded on the contacts made up of the local injury plus something more (often very little more) has grown recently and rapidly out of the older "doing business" concept.

These recent changes in the content of the "doing business" concept owe much to the

doctrine of the International Shoe case. Courts in older cases applying the "doing business" test of jurisdiction rarely took cognizance of whether the cause of action arose in or had substantial connections with the forum state. By comparison, the analysis called for under the International Shoe doctrine examines the reasonableness of trying the particular case against the particular defendant in the state. Many state courts, subsequently adopting the International Shoe analysis, have made profound changes in the content and application of their pre-existing "doing business" statutes. Old case interpretations of "doing business" are no longer binding in these states and some of their courts are applying, or announcing that they will apply, the "doing business" test as broadly as they believe possible under the due process clause of the Fourteenth Amendment. Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. (2d) 855, 323 P (2d) 437 (1958); Huck v. Chicago, St. P., M. & O. Ry. Co. 4 W (2d) 132, 90 NW (2d) 154 (1958); New Jersey Rules of Civil Practice, Rule 4:4-4, as amended in 1958.

In recent cases involving injury sustained in the state as a result of an act done elsewhere, reliance has been placed on various types of added contacts to sustain jurisdiction. These contacts have included solicitation of business, servicing equipment within the state and, in some cases, little more than the fact that the defendant enjoyed pecuniary benefit from the efforts of others in the state who sold goods manufactured by the defendant. Sub. (4) relies on such added contacts as those just stated to furnish a basis for jurisdiction in cases where a local injury arises out of some foreign act. The language of sub. (4) will be restated here in order that it may be examined in connection with the cases to be discussed:

(4) Local injury, foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

Cases believed to support the subsection are discussed below.

California. Without waiting for legislative action, the California courts have substantially extended the application of the state's "doing business" statute in recent years. Four recent cases are illustrative. In an action to recover for injury sustained in California while using a ladder, parts of which were manufactured in New Jersey by defendant who sold the parts, unassembled, to an independent California concern under an exclusive franchise arrangement, the injury, plus this method of gaining economic benefit from California, constituted adequate contacts to justify exercise of personal jurisdiction over the defendant manufacturer of the parts. Duraladd Products Corp. v. Superior Court, 134 Cal. App. (2d) 226, 285 P (2d) 699 (1955). Jurisdiction has been sustained over an Oklahoma partnership in a wrongful death action arising in California out of a defective safety belt made by defendant where it appeared that a regular flow of defendant's goods came in to retailers and wholesalers in California as the result of solicitations there by a "manufacturers' representative" who also solicited orders for concerns which competed with defendant. Lewis Mfg. Co. v. Superior Court, 140 Cal. App. (2d) 245, 295 P (2d) 145 (1956). In deciding whether a defendant corporation is "doing business" in California, and may be held in a personal injury case resulting from the local explosion of a boiler manufactured outside California by the defendant, it is not "pivotally important" that the defendant's products flow into California as the result of efforts of an independent contractor rather than of an agent. Eclipse Fuel Engineer Co. v. Superior Court, 148 Cal. App. (2d) 736, 307 P (2d) 739 (1957). In an action to recover for burns sustained by an infant in California in an incubator manufactured in Ohio by defendant, jurisdiction was sustained over the defendant when it appeared that the defendant's equipment came into California almost exclusively as the result of advertisements placed by defendant in hospital trade journals and by direct mail solicitation. Where a steady flow of business resulted, the manner of soliciting it is immaterial. Gordon Armstrong Co. v. Superior Court, 160 Cal. App. (2d) 211, 325 P (2d) 21 (1958).

Kentucky. Jurisdiction sustained under a "doing business" statute in an action to recover for defamation of a Kentucky resident by broadcasts emanating from an out-of-state TV station twenty miles away. In addition to the injury, the court relied for contacts upon the fact that 1% of the defendant TV station's revenues for the preceding year had been solicited from Kentucky advertisers. The court further held that it was immaterial that the plaintiff's cause of action was unrelated to the defendant's solicitation activities in Kentucky. Gearhart v. WSAZ, Inc. 150 F Supp. 98 (E. D. Ky., 1957); affirmed sub. nom. WSAZ, Inc. v. Lyons, 254 F (2d) 242 (C. A. 6, 1958).

Maryland. Jurisdiction sustained over a national radio network under a "doing business" statute in an action brought by a nonresident to recover damages for an alleged defamation in a network broadcast over three independent stations located in the forum state. By its contracts under which the network had the use of locally owned stations for disseminating its network programs, the network was "doing business" within the meaning of the statute. Wanamaker v. Lewis, 153 F Supp. 195 (D., Md., 1957).

Massachusetts. Jurisdiction sustained where contacts were local injury resulting from use of defendant's product plus solicitation of orders and investigation of complaints by defendant. To the defendant's objection that the jurisdiction statute required that the cause of action arise out of business done in the state, the court answered: "No reason appears for construing 'arising out of business' so narrowly. The injury is alleged to have taken place in Massachusetts. If liability can be found without privity of contract, then such proximate consequences of Dobeckmun's business

here arise out of the business." Zucco v. Dobeckmun Company, 152 F Supp. 369 at 370 (D. Mass., 1957).

Michigan. Action for damages in Michigan resulting from use of tile manufactured by defendant in Ohio. Defendant's control over the independent dealer who marketed defendant's products in Michigan amounted to doing business in Michigan by the defendant for purposes of suit to recover for product liability losses sustained in that state. H. F. Campbell Constr. Co. v. Palombit, 347 Mich. 340, 79 NW (2d) 915 (1956).

Nebraska. Action to recover for personal injuries sustained in Nebraska when a bus crossed into the plaintiff's traffic lane and collided with plaintiff. The personal jurisdiction question arises with respect to the manufacturer of the bus, brought in as a third party defendant by the owner of the bus. The federal district court concluded that the bus manufacturer was "doing business" within the meaning of the Nebraska statute where it appeared that an officer of the manufacturer regularly visited the state to solicit orders, pass along complaints, and assist in servicing busses which the manufacturer sold to Nebraska concerns. Carter v. American Bus Lines, Inc. 169 F Supp. 460 (D., Nebr., 1959).

New Hampshire. Action for damages to property in New Hampshire resulting from use of paint to which had been added a chemical manufactured by defendant Nuodex, a New York corporation having its principal place of business in New Jersey. Nuodex, a specialty chemical concern, sold its chemicals to various paint makers including the Massachusetts paint company which had produced and sent into New Hampshire the paint used in this case. To the objection that Nuodex had not itself sent the offending chemical into New Hampshire, the court rejoined that, in marketing the chemical, Nuodex "no doubt hoped and expected" that the chemical would find its way into New Hampshire in someone else's product. In addition, Nuodex conducted systematic sales efforts in New Hampshire aimed at selling its chemicals to manufacturing concerns in that state, and had registered the chemical here involved in New Hampshire as a poisonous chemical. W. H. Elliott & Sons Co. v. Nuodex Co. 243 F (2d) 116 (C. A. 1, 1957).

New Mexico. Action for injury to person in New Mexico resulting from defective beam manufactured by defendant. Defendant's products were distributed in New Mexico through a licensed, wholly owned, sales subsidiary corporation having a name very similar to the parent manufacturing concern. For purposes of actions arising out of injury in the state resulting from use of products manufactured by the defendant, a parent corporation selling through a local sales subsidiary is doing business in the state. State v. McPherson, 62 N. Mex. 308, 309 P (2d) 981 (1957).

North Carolina. Action for personal injuries sustained from an explosion in North Carolina of a home water heater manufactured outside the state by the defendant. Defendant's products were distributed by sale outside North Carolina to independent distributors who later re-sold them to local consumers in North Carolina. Personal jurisdiction over the defendant was sustained under G.S. s. 55-145 (3), which permits residents of North Carolina to sue foreign corporations on any cause of action arising "out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used, or consumed regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers . . ." The statute here involved had twice earlier been declared unconstitutional—first in the Court of Appeals for the Fourth Circuit in Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F (2d) 502 (1957), and later in the North Carolina Supreme Court in Putnam v. Triangle Publications, 245 NC 432, 96 SE (2d) 445 (1957)—but in sustaining the statute in the water heater case, the North Carolina Supreme Court merely states that "It is sufficient to say these cases [Erlanger and Putnam] are distinguishable in factual situation from the case in hand." Shepard v. Rheem Manufacturing Company, 249 NC 454, 106 SE (2d) 704 (1959).

Oklahoma. Action on implied warranty of fitness for particular purpose to recover consequential damages for destruction of building in Oklahoma resulting from defective machine manufactured by defendant in New York. Court held that the isolated transaction sued upon constituted "doing business" in the state. The plaintiff had initiated negotiations for purchase of the equipment and these were conducted by mail between Oklahoma and New York. The machine had been sold by defendant f.o.b. its New York place of business. When preliminary difficulties of operation appeared soon after installation of the equipment, defendant sent a representative into the state to investigate the difficulties. These contacts, all arising out of the injury connected with the isolated transaction, were held constitutionally sufficient. S. Howes Co. v. W. P. Milling Co. 277 P (2d) 655 (Okla., 1954). The United States Supreme Court noted probable jurisdiction, 348 US 949 (1955), but the case was thereafter dismissed on stipulation of the parties, 348 US 983 (1955).

Pennsylvania. Action to recover for personal injuries sustained in Pennsylvania alleging negligent acts in Oregon respecting the design and manufacture of a power tool. Jurisdiction sustained under a Pennsylvania statute that was subsequently repealed (see, as to repeal, 248 F (2d) 367 at 370, footnote 5). The statute in question defined "doing business" to include the entry by a corporation into the state for doing a series of similar acts for pecuniary purposes, or the doing of a single act with the intent of initiating a series of such acts. This statute was satisfied, the court held, where the defendant executed outside the state contracts with Pennsylvania concerns giving them exclusive rights to sell defendant's products in Pennsylvania. The defendant further objected that the plaintiff's cause of action allegedly arose out of acts done by the defendant in Oregon, and not out of the defendant's acts in Pennsylvania, as required by the statute in question. The court turned

down this defense contention, although doing so involved giving the statute a somewhat strained construction. Florio v. Powder Power Tool Corp. 248 F (2d) 367 (C. A. 3, 1957).

Wisconsin. Action to recover for injury sustained in Wisconsin as a result of a defective hand brake on a railroad box car. Defendant Rock Island was interpleaded as the originating carrier which had selected the defective car in Illinois for use in shipping the cargo it contained into Wisconsin. The Rock Island, which operated over no track in Wisconsin, continuously solicited passenger and freight business to be routed over its lines outside Wisconsin and occasionally from an office in Wisconsin initiated, by teletype, inquiries tracing shipments to or from Wisconsin shippers. "We have no hesitancy in holding that the objective of the statute [Wis. Stat. 262.09 (4) (1957)] was to give citizens of Wisconsin the right to make use of the courts of this state in instituting causes of action against any foreign corporation which actually is carrying on business activities within the state, subject only to such limitations as are imposed by the United States constitution. We feel certain that neither the Judicial Council in proposing the changed wording of s. 262.09 (4), nor this court in promulgating the same, had any intention to hamstring such right by adopting into such subsection any definition of 'doing business' laid down in past decisions, which definitions contained limitations which mistakenly were assumed to be required by the United States constitution." Huck v. Chicago, St. P., M. & O. Ry. Co. 4 W (2d) 132 at 137, 90 NW (2d) 154 at 157-158 (1958). See also American Type Founders Co. v. Mueller Color Plate Co. 171 F Supp. 249 (E. D., W 1959).

From the cases just discussed certain conclusions may be drawn. Where the action is based upon an injury occurring in the state, the added contacts relied on to furnish jurisdiction have involved some form of pecuniary benefit which the defendant derives from the forum state. In some cases, the benefit is directly derived from interstate sales which the defendant makes to distributors or consumers in the state. In others the benefit is indirectly derived by the defendant from selling his goods outside the state to others who, in turn, distribute the goods in the forum state. The Shepard case in North Carolina, discussed above, is one in which the defendant's additional contacts consist of the indirect benefits derived from the local sales by others of goods the defendant has manufactured and sold outside the state. In the Nuodex case, the defendant's benefits from New Hampshire resulted from the sale there of paint containing chemicals which the defendant had furnished the paint manufacturer outside New Hampshire.

In the Howes case, above, the only benefit which the defendant was shown to have received from Oklahoma was the isolated sale of the very piece of equipment which had caused the property damage sued upon; indeed the defendant is not shown to have had any other contacts with Oklahoma except the isolated sale itself. A further comparison of the Howes case with the other cases considered under sub. (4) is in point. In the Howes case, what may be thought of as "privity" in a contractual sense existed between the plaintiff and the defendant; in fact, the action was upon the sales contract for breach of warranty. And Howes is the only case of those considered in which the defendant is not shown to have some other contacts with the state than those involved in the suit itself. By contrast, there is no privity shown or required between plaintiff and defendant in the other cases, e.g., the action against the manufacturer of the incubator to recover for burns sustained by an infant in a hospital incubator. See Gordon Armstrong Company v. Superior Court, 160 Cal. App. (2d) 211, 325 P (2d) 21 (1958), discussed above.

The comparison just made suggests two conclusions: First, where the action is upon a local injury caused by an act done elsewhere, and there is no element of consensual privity between the parties respecting the action, a basis exists for personal jurisdiction over the defendant only when he is shown to have some other contact with the state in addition to the facts involved in the particular action sued upon; this concept underlies proposed sub. (4). Second, where some degree of privity exists between the parties, personal jurisdiction may be exercised in an action upon an isolated bargaining arrangement with the defendant without requiring a showing of any other contacts between the defendant and the forum state. Sub. (5), which follows, is based on this second conclusion.

(5) *Local Services, Goods or Contracts.*

Three jurisdictional facts are required by this subsection: (i) a claim arising out of a bargaining arrangement made with the defendant by or on behalf of the plaintiff; (ii) a promise or other act of the defendant, made or performed anywhere, which evidences the bargaining arrangement sued upon; and (iii) a showing that the arrangement itself involves or contemplates some substantial connection with the state. The existence of a contract between the parties is not a jurisdictional fact, but a question to be decided on the merits if the jurisdictional facts are found to exist. No other contacts than those stated are required; an isolated bargaining arrangement giving rise to the action brought is a sufficient basis for jurisdiction. Nor, when jurisdiction is grounded on subs. (5) (a) or (c), is it material that the arrangement remains executory.

Various types of bargaining arrangements are dealt with in the subsection. Arrangements for the performance of services within the state by either party for the other are dealt with in subs. (5) (a) and (b). Arrangements under which either party is to deliver or receive possession of goods within the state are dealt with in sub. (5) (c). Actions arising out of defects in goods actually received in or shipped from the state by either party are the subject of subs. (5) (d) and (e).

Cases in a number of jurisdictions have passed on the power of states to exercise personal jurisdiction based on isolated consensual transactions.

U. S. Supreme Court. Two recent cases have dealt with the question. In the first, state

judicial jurisdiction was sustained 8-0. In the second, a 5-4 court struck down jurisdiction in a case which very probably will be confined to its precise facts.

(1) A California statute authorizes personal jurisdiction over unlicensed foreign insurers in actions brought on policies issued to residents of the state. The record of the case indicated no contact of the insurer with California other than the policy sued on. The defendant had solicited the policy by mail and had thereafter maintained it in response to premiums mailed from California by the insured, a resident of California. Thus, the defendant had done no acts in California; the California contacts resulted from things which the defendant had caused to be done there in response to solicitations mailed by it from Texas. These contacts were held sufficient to satisfy due process under the Fourteenth Amendment. McGee v. International Life Insurance Co., 355 US 220 (1957).

(2) The second case raised the question of personal jurisdiction in Florida over a Delaware bank which acted as trustee of an inter vivos trust, the assets of which were conceded to have their situs in Delaware. The Florida action drew in question the validity of a purported exercise in Florida by the donor of the power appointing the trust and, as a majority of the U. S. Supreme Court saw the case, the Florida action challenged ultimately the validity of the original trust agreement itself. These questions arose in connection with administering in Florida the estate of the trust donor who had died a resident of Florida. The original trust agreement had been executed in Delaware and at a time that the donor was a resident of Pennsylvania. Years later the donor became a Florida resident where she made some modifications in the original trust agreement and executed the challenged power of appointment. A majority of the court, seeing the question as one involving the validity of the original trust agreement, held that the bank's subsequent contacts with the donor in Florida were insufficient to subject the trustee bank to personal jurisdiction in a Florida action attacking the validity of the original trust. Had the court sustained the jurisdiction of the Florida court over the trustee, the judgment of the Florida court would have resulted in upsetting the distribution intended by the donor of her estate and would have produced a $400,000 windfall for beneficiaries who already were recipients of more than a million dollars under other, valid portions of the decedent's plan of distribution. Hanson v. Denckla, 357 US 235 (1958).

Florida. A Florida statute authorizing jurisdiction over all persons, individuals as well as corporations, in all actions arising out of "any transaction or operation" connected with a "business or business venture" in Florida has twice been sustained when applied to isolated transactions under which the plaintiff has performed services in Florida for the defendant. State ex rel. Weber v. Register, 67 So. (2d) 619 (Fla., 1953), applying Fla. Stat. ss. 47.16 and 47.30 to an action by a real estate broker for his commission resulting from having produced, pursuant to agreement, a purchaser ready and able to buy realty which the defendants had offered for sale in Florida. Similarly, where a contractor sought to recover for his services furnished in constructing an apartment on land owned in Florida by the defendants, the same statutes have been applied to furnish a basis for personal jurisdiction over the nonresident defendants. Wm. E. Strasser Constr. Co. v. Linn, 97 So. (2) 458 (Fla., 1957).

Illinois. S. 17 (1) (a) of the Illinois Civil Practice Act subjects a person, regardless of his residence, to personal jurisdiction as to any action arising out of the "transaction of any business within (Illinois)" by the defendant. The Act became effective January 1, 1956, and a number of cases reported since that time have involved the application of this section to suits arising out of isolated business transactions.

(1) Actions to recover for services performed by plaintiff in Illinois. An early case in a federal district court held that the performance in the state by the plaintiff of services for the defendant did not constitute the transaction of business in the state by the defendant within the meaning of s. 17 (1) (a). Bonan v. Leach, 22 F.R.D. 117 (E. D. Ill., 1957). Later cases in both federal and state courts have held that agreements to pay for services performed in Illinois for the defendant by the plaintiff constitute the transaction of business within the meaning of s. 17 (1) (a). Haas v. Fancher Furniture Co., 156 F Supp. 564 (N. D. Ill., 1957); Sunday v. Donovan, 16 Ill. App. (2d) 116, 147 NE (2d) 401 (1958). But unless performance of the services in Illinois is material to the agreement, the mere fact that the plaintiff did perform the services in Illinois does not constitute the transaction of business in Illinois by the defendant. Orton v. Woods Oil and Gas Co. 249 F (2d) 198 (C. A. 7, 1957).

(2) Action for breach of defendant's promise to perform services in Illinois. Where defendant breached its promise to find a location in an Illinois theater or elsewhere in which to place a popcorn vending machine sold by defendant to plaintiff in an interstate sale of the machine from defendant's plant in Colorado, these contacts arising out of the agreement sued upon constituted the transaction of business within the meaning of s. 17 (1) (a). Berlemann v. Superior Distributing Co. 17 Ill. App. (2d) 522, 151 NE (2d) 117 (1958).

(3) Action on contract solicited and negotiated in Illinois. Nonresident defendant sold plaintiff an interest in a Texas oil lease, the defendant having solicited and negotiated the agreement in Illinois. A personal default judgment rendered in Illinois was given faith and credit in a Texas federal court over the objection that Illinois was without a constitutional basis for personal jurisdiction over the nonresident defendant. Bluff Creek Oil Co. v. Green, 257 F (2d) 83 (C. A. 5, 1958).

Louisiana. The promise by an automobile liability insurer to defend actions commenced anywhere against its insured constitutes the basis for personal jurisdiction over the insurer in actions under the Louisiana direct action statute resulting from accidents occurring in Louisiana. No other contacts of the insurer

are asserted in the case and jurisdiction is supported on the bare promise of the insurer to perform services for, and indemnify, the insured in the event of an accident in the state of Louisiana caused by the insured. Pugh v. Oklahoma Farm Bureau Mutual Insurance Co., Inc. 159 F Supp. 155 (E. D., La., 1958).

Maryland. The Maryland statute, referred to in the comment on sub. (3) above, authorizes personal jurisdiction over foreign corporations in actions brought by residents of the state in "any cause of action arising out of a contract made within this state." This has been applied against a defendant corporation having no other contacts with Maryland than the contract sued on. The action involved the failure of the defendant to accept delivery of two vessels located in the Port of Baltimore which it had agreed to purchase from the plaintiffs. Compania de Astral, S. A. v. Boston Metals Co., 205 Md. 237, 107 A (2d) 357 (1954). But unless the agreement sued on is "made" in Maryland, the statute does not apply. Rosenberg v. Andrew Weir Ins. Company, 154 F Supp. 6 (D., Md., 1957).

North Carolina. A North Carolina statute, G. S. s. 55-145, authorizes jurisdiction over foreign corporations in actions by residents of the state on any cause of action arising:

"(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers."

The section of the statute quoted appears to cover much of the same ground that is dealt with in sub. (4) (b) above. But there are some differences. (4) (b) when read with the introductory part of the subsection emphasizes two contacts with the state: the fact that the injury sued upon occurred in this state and that the defendant had an additional contact with the state in the form of the benefit that was derived from the use or consumption of the defendant's products in the state. The North Carolina statute places stress upon the defendant's expectation of gain from the consumption of his goods in North Carolina and it must be shown that the defendant's goods are used and consumed there. But read literally, the injury sued on might take place outside North Carolina provided the defective goods causing the injury had been previously used in North Carolina. Nevertheless the statute seems open to interpretations and applications which would give it vitality as a basis for personal jurisdiction over foreign corporations. The statute at first took a good bit of punishment in the local courts, but the early cases have since been distinguished and the statute sustained in Shepard v. Rheem Mfg. Co. 249 NC 454, 106 SE (2d) 704 (1957), discussed above in the note dealing with sub. (4) of this section.

Oklahoma. The broad judicial view taken of the Oklahoma "doing business" statute has been discussed previously in connection with S. Howes v. W. P. Milling Co., 277 P (2d) 655 (Okla. 1954) in the comment on sub. (4). A later case follows Howes in Oklahoma, sustaining jurisdiction over a foreign corporate vendor in an action by a local purchaser to rescind on the grounds of defects in a popcorn vending machine furnished by the defendant. Superior Distributing Corp. v. Hargrove, 312 P (2d) 893 (Okla. 1957).

Oregon. Like the Oklahoma courts, the Oregon Supreme Court has apparently taken the view that an isolated transaction giving rise to the action brought may constitute "doing business" in the state. The defendant appeared to have had other contacts with Oregon but the court places jurisdiction on the much narrower ground that the defendant had made a contract in Oregon which it breached there by failing to deliver goods in Oregon to the plaintiff from the defendant's Ohio plant. Enco Incorp. v. F. C. Russell Co. 210 Ore. 324, 311 P (2d) 737 (1957).

Texas, Vermont, Washington and West Virginia. Vermont Revised Statutes, ss. 1562-63 (1947), provide that foreign corporations are "doing business" in the state and subject to personal jurisdiction there in actions arising out of contracts they make which are "to be performed in whole or in part, by any party thereto, in this state." Taken literally, the language employed visualizes actions arising out of isolated transactions as sufficient grounds for personal jurisdiction so long as some part of the agreement is to be performed in the state. And it would appear immaterial whether the agreement remained executory at the time the action was commenced. In 1957 West Virginia added similar provisions to its corporation code. See Acts of West Virginia, ch. 20 (1957), amending art. I, s. 71, ch. 31 of the code of West Virginia. And in 1959 Texas made similar amendments to its law. See Wilson, Jurisdiction over Non-Residents, Texas Bar Journal for May 1959, p. 221. Also in 1959 Washington adopted the provisions of ss. 16 and 17 of the Illinois Civil Practice Act discussed earlier in this note. No cases passing on these acts have been found as this is written.

In summary, actions arising out of isolated bargaining transactions have been regarded as supporting the exercise of personal jurisdiction in numerous situations where the transactions involved, or contemplated, some substantial contact with the forum state. Among the contacts thought sufficient are: agreements under which either party promised to perform services in the forum; agreements either to take delivery in the state of goods from the plaintiff, or to deliver goods to the plaintiff in the state; and agreements under which the plaintiff took delivery of goods f.o.b. the defendant's place of business outside the state, but under circumstances in which the defendant had reason to know the plaintiff would use or consume the goods in the forum state.

(6) *Local Property.*

(a) Bargaining arrangements respecting local realty. Three jurisdictional facts are required by sub. (6) (a): (i) a claim arising out of a bargaining arrangement made with the defendant by or on behalf of the plaintiff; (ii) a promise made anywhere which evidences

the bargaining arrangement sued on; and (iii) the fact that the arrangement respects real property situated in this state. This subsection is thus a specialized application of the principle upon which sub. (5) of this section rests. Under sub. (5) any kind of substantial contact may supply the affiliating circumstance between the state and the bargaining transaction sued on. Under sub. (6) (a), the affiliating circumstance consists of the local realty with which the bargaining arrangement deals.

(b) Restitution for use of local property. Two jurisdictional facts are required by sub. (6) (b): (i) a claim to recover a benefit derived by the defendant from the use (in a broad sense) of real or personal property; and (ii) the presence of the real or personal property in the state at the time the alleged benefit accrued or at the time the action is commenced.

(c) Restoration of or accounting for local property. Sub. (6) (c) is quite closely related to sub. (6) (b). Like that subsection, two jurisdictional facts are required: (i) a claim for the restoration of, or accounting for, property; and (ii) presence of the property within the state at the time the defendant acquired possession or control over it. The essential difference between sub. (6) (b) and sub. (6) (c) lies in the relief sought. In sub. (6) (b) relief is sought to recover the measure of some benefit derived by the defendant from the use of property in which the plaintiff claims an interest. In sub. (6) (c) it is immaterial whether the defendant has derived any benefit from the control or possession of the property; rather, the demand is that the plaintiff either restore or account for the property. Sub. (6) (c), likewise, is more narrow in scope than sub. (6) (b) in that a ground for jurisdiction exists under sub. (6) (c) only if the defendant acquired possession of the property in this state.

The statutes and cases below lend support to the provisions of this subsection.

Florida. The Florida cases, State ex rel. Weber v. Register and Wm. E. Strasser Constr. Co. v. Linn, discussed in the comments under sub. (5) involve jurisdiction over isolated transactions relating to local realty:

(1) Realty broker's action against a nonresident to recover a commission claimed on agreement to procure a purchaser for local property. State ex rel. Weber v. Register, 67 So. (2d) 619 (Fla. 1953).

(2) Action by building contractor to recover for services rendered and materials furnished nonresident defendant in building an apartment on local land owned by the defendant. Wm. E. Strasser Constr. Co. v. Linn, 97 So. (2d) 458 (Fla. 1957).

Sub. (6) pars. (a) and (b) furnish a basis for personal jurisdiction only for the value of the materials furnished to the defendant in the Strasser case. Note, however, that by treating both cases as involving arrangements under which the plaintiff agreed to furnish services in the state for the defendant, that aspect of both the cases comes within sub. (5) (b). And the Strasser claim for the value of materials furnished the defendants could probably be supported under sub. (5) (c) as a claim arising out of the defendant's promise to receive goods to be delivered to him in the state by the plaintiff.

Illinois. S. 17 (1) (c) of the Illinois Civil Practice Act provides a basis for personal jurisdiction in actions arising out of the "ownership, use or possession of any real estate situated in this State." This provision was the one apparently relied on for the jurisdiction in the somewhat unusual case of People v. Streeper, 12 Ill. (2d) 204, 145 NE 625 (1957). A Missouri county owned, in its corporate capacity, a highway bridge crossing the Mississippi River between the State of Missouri and the City of Alton, Illinois. In an Illinois trial court, the City of Alton obtained an injunction against the Missouri county and its officials, barring them from discontinuing bridge tolls until funds had been collected to improve the Alton streets approaching the bridge. In a separate proceeding in the Supreme Court of Illinois, a writ of mandamus to the trial court was denied. The Illinois Supreme Court held that the Illinois trial court had properly acquired personal jurisdiction over the Missouri county and its officials under ss. 16 and 17 of the Illinois Civil Practice Act, saying that "the county of St. Charles as proprietor of the property within Alton, Illinois, had sufficient minimum contacts with the City of Alton to make it amenable to process and had actual notice of the proceedings." 145 NE (2d) 625 at 630 (1957).

Louisiana. Application of the Louisiana Workmen's Compensation Act has been sustained, over objections that the Louisiana court lacked personal jurisdiction over the foreign corporate defendant, where the plaintiff's injuries had been sustained while working on real property which the defendant owned in Louisiana. On the question of the defendant's contacts with the state as they related to the suit, the Louisiana Court of Appeal said: ". . . [W]hen a nonresident or a foreign corporation comes into this state and buys a large tract of timber and engages a contractor to cut, peel and haul said timber to the railroad for shipment to the domicile of the foreign corporation, that foreign corporation is engaged in business activities in this state through its agents and should be amenable to our jurisdiction, particularly as a defendant in a workmen's compensation claim." Calcote v. Century Indemnity Co. 93 So. (2d) 271 (La. Ct. of Appeal, 1957).

Pennsylvania. The two personal injury cases, Dublin v. City of Philadelphia and Rumig v. Ripley Mfg. Co., discussed earlier in the comments under sub. (3), may also be cited for the proposition that nonresident owners of local property may be subjected to personal jurisdiction in actions which relate to or arise out of the property owned in the forum.

In addition to the statutes and cases just cited, Nevada has a vaguely drafted statute which authorizes service of process upon foreign corporations which own property within the state. Nev. Comp. Laws ss. 14.020, 14.030 and ss. 80.060 and 80.080 (1957). The statute makes no reference to the kinds of actions which may be brought against a foreign corporation under the statute but it

would seem doubtful that the statute could sustain a judgment for more than the value of the property itself if the underlying cause of action sued on had arisen outside of Nevada and was unrelated to any of the corporation's action in Nevada. Compare Perkins v. Benguet Consolidated Mining Corp. 342 US 437 (1952).

Finally, sub. (6) receives support in general terms from the Restatement, Conflict of Laws Second, S. 84A (Tentative Draft No. 3, 1956), which reads thus:

S. 84a. Ownership of Thing.

A state has judicial jurisdiction over an individual who owned a thing in the state for the purposes of any cause of action arising out of the thing within limitations of reasonableness appropriate to the relationship derived from the ownership of the thing.

In summary, then: an assertion by a nonresident of interests in property located in the state supplies the affiliating circumstances in a number of situations which the state courts have thought made it reasonable to require the nonresident to defend actions arising out of the property itself or out of actions relating to claims respecting the property. These include actions to recover for services performed in finding a willing buyer for the defendant's property, actions to recover for the value of improvements made on the property, actions which regulate the manner in which the property may be used (as in the instance of compelling collection of bridge tolls in order to improve property leading up to the bridge itself), and actions to recover damages for personal injuries resulting from the defective condition of the property.

(7) *Deficiency Judgment on Local Foreclosure or Resale.*

(a) Personal action for deficiency concurrent with mortgage foreclosure. The jurisdictional fact required by this provision is a claim for a deficiency judgment asserted concurrently in any proceeding to foreclosure on real property located in the state.

(b) Personal action for deficiency after foreclosure of mortgage by advertisement. The jurisdictional fact required here is a claim for deficiency after sale of Wisconsin real property pursuant to Chapter 297.

(c) Personal action for deficiency after resale by conditional seller. Two jurisdictional facts are required by this provision: (i) a claim for a deficiency judgment asserted after (ii) resale in this state of goods subject to the provisions of the Conditional Sales Act [Wis. Stat., Chapter 122] or to a chattel mortgage subject to Chapter 241.

No case or statute found gives direct support to the jurisdiction provisions stated in sub. (7), but the contacts required by sub. (7) appear to be within the general principles which underlie subs. (5) and (6), supra.

(8) *Director or Officer of a Domestic Corporation.*

Jurisdictional facts: (i) a claim against an officer or director of a domestic corporation (ii) arising out of corporate activities, or the defendant's conduct, during his tenure. A similar South Carolina statute has been sustained in Wegenberg v. Charleston Wood Prod. Inc., 122 F Supp. 745 (E. D., S. Car., 1954).

(9) *Taxes or Assessments.*

This subsection restates and expands s. 71.13 (6), which provides for the exercise of personal jurisdiction over any taxpayer who is or has become a nonresident of Wisconsin at the time suit is brought to recover income taxes imposed by Chapter 71 of Wisconsin Statutes. The jurisdictional facts required by sub. (9) consist of a claim for taxes or assessments imposed, levied or assessed against the defendant by any taxing authority of this state. California and West Virginia statutes support the subsection also.

California. S. 1018 of the Code of Civil Procedure authorizes personal jurisdiction over both individual and corporate taxpayers for state tax claims.

West Virginia. The Corporation Code of West Virginia authorizes personal jurisdiction in actions to recover from foreign corporations all license fees and any other debt or claim due the state. See Acts of West Virginia, ch. 20 (1957), amending art. I, sec. 71, ch. 31 of the Code of West Virginia.

(10) *Insurance or Insurers.*

(a) Insuring residents of the state. Two jurisdictional facts are required by this subsection: (i) A claim arising out of a promise by the defendant to insure the plaintiff or some third person; and (ii) residence of the insured in this state at the time the cause of action arose.

(b) Insuring against or upon the happening of an event in this state. Two jurisdictional facts are required by this provision: (i) A claim arising out of a promise by the defendant to insure the plaintiff or some third person against or upon the happening of an event in this state; and (ii) the happening in this state of the event insured upon or against.

Par. (a) of this subsection has found broad support in statutes and cases aimed at insurers who, without complying with requirements of state insurance regulations, sell mail order insurance to residents of the state. In numerous cases the issuance of the isolated policy sued upon has been regarded as a sufficient contact to satisfy the Due Process test laid down in the International Shoe case, supra.

Par. (b) of this subsection finds support in an explicit case and statute in Louisiana, support in general principle in a decision in California, and the same result obtains as an indirect effect in Wisconsin of the Financial Responsibility Act, ch. 344 of Wis. Stats. (1957).

Supporting statutes and cases follow.

United States. Two U. S. Supreme Court cases have passed on state statutes extending state judicial jurisdiction over unlicensed mail order insurers. The earlier case (Travelers Health Assn. v. Virginia, see below) sustained state jurisdiction 5-4. In the more recent McGee case [see below and the discussion in the notes following subsection (5) above], state jurisdiction was affirmed 8-0.

(1) In a proceeding brought by the Commonwealth of Virginia to compel an unlicensed foreign insurer to cease and desist

from further mail order sales of insurance to Virginia residents until the insurer complied with Virginia insurance regulations, personal jurisdiction (with notice supplied by registered mail sent to the insurer's home office outside the state) was affirmed in Travelers Health Assn. v. Virginia, 399 US 643 (1950).

(2) A California statute authorizes personal jurisdiction over unlicensed foreign insurers in actions brought on policies issued to residents of the state. The record in the case indicated no other contact of the insurer with California than the policy sued on. The defendant had solicited the policy by mail and had thereafter maintained it in response to premiums mailed from California by the insured. These contacts were held sufficient to satisfy due process under the Fourteenth Amendment. McGee v. International Life Insurance Co. 355 US 220 (1957).

California. As indicated in the note discussing sub. (4) of this section, California has by judicial decision substantially expanded the application of the state's "doing business" statute. Thus, an automobile liability insurer has been held to be "doing business" in California by retaining investigators, doctors and attorneys to defend an action brought against its insured, and personal jurisdiction has been exercised over the insurer to enforce a judgment which the plaintiff had recovered against an insured in a previous action defended for the insured by the insurer. McClanahan v. Trans-America Insurance Co. 307 P (2d) 1023, 149 Cal. App. (2d) 171 (1957). Observe also that in McGee, discussed under United States Supreme Court case immediately above, the California Unauthorized Insurers Process Act has been sustained in an action brought by a beneficiary on an isolated policy issued by the insurer to a California resident.

Connecticut. On facts somewhat comparable to those in McGee, supra, the Connecticut Unauthorized Insurers Process Act has been sustained in Flynn v. Physicians Casualty Assn. 20 Conn. Supp. 240, 131 A (2d) 336 (1957).

District of Columbia. As in Flynn and McGee, the Unauthorized Insurer's Process Act for the District of Columbia has been affirmed in Security Nat. Life Ins. Co. v. Washington (Mun. Ct. App., Dist. Col.), 113 A (2d) 749 (1955).

Florida. The Florida Unauthorized Insurers Process Act has been upheld when applied in an action by a beneficiary upon a policy issued and mailed to the insured while a Florida resident, Parmalee v. Iowa State Traveling Men's Assn., 206 F (2d) 518 (C. A. 5, 1953), but where the policy had been issued to the insured while a Kentucky resident, the Florida statute was construed not to apply, although the insured had kept the policy in force and continued to pay premiums upon it after becoming a Florida resident, Parmalee v. Commercial Travelers Mut. Acc. Ass'n., 206 F (2d) 523 (C. A. 5, 1953). The United States Supreme Court denied certiorari in the first Parmalee case referred to, 346 US 877 (1953) and the case is followed by an annotation at 44 ALR (2d) 416 (1955). With the second Parmalee case, compare the Tennessee case of Schutt v. Commercial Travelers, below.

Louisiana. The promise by an automobile liability insurer to defend actions commenced anywhere against its insured constitutes the basis for personal jurisdiction over the insurer in actions under the Louisiana direct action statute resulting from accidents occurring in Louisiana. No other contacts of the insurer are asserted in the case and jurisdiction is supported on the bare promise of the insurer to defend the insured plus the isolated accident caused in the state by the insured. Pugh v. Oklahoma Farm Bureau Mutual Insurance Company, Inc., 159 F Supp. 155 (E. D., La., 1958). An early decision applying the Louisiana Unauthorized Insurers Process Act read it to require both that the insurer have issued the policy sued on to a resident of Louisiana and that the insurer otherwise be engaged in "transacting business" in the state. White v. Indiana Travelers Assur. Co., 22 S. (2d) 137 (La. Ct. of App., 1945).

New York. In an action by an insured on a fire policy, a foreign insurer was held subject to personal jurisdiction in New York on the ground that it had issued the isolated policy sued on to a New York resident and notwithstanding the fact that the insured property was located in New Hampshire. Zacharakis v. Bunker Hill Mut. Ins. Co. 281 App. Div. 487, 120 NYS (2d) 418 (1953).

South Carolina. The application of the South Carolina Unauthorized Insurers Process Act has thus far been cautious. The Act has been held applicable to an action upon a policy delivered by mail to a South Carolina resident, Storey v. United Ins. Co., 64 F Supp. 896 (D. S. Car., 1946), but inapplicable to a policy received outside the state by a South Carolina resident, Sanders v. Columbian Protective Assn. of Binghamton, N. Y., 208 S. C. 152, 37 SE (2d) 533 (1946). And an action to recover damages for fraudulently inducing plaintiff to take out a policy does not "arise out of" the policy under the Act, Ross v. American Income Life Ins. Co. 232 S. C. 433, 102 SE (2d) 743 (1958).

Tennessee. The federal Court of Appeals for the Second Circuit has held enforceable a default judgment entered under the Tennessee Unauthorized Insurers Process Act where the policy had been issued to the insured while a resident of Kentucky and continued in force after the insured became a Tennessee resident. The Court of Appeals reasoned that the insurer's contacts were sufficient where it appeared that it had caused payments to be mailed to it from Tennessee and had engaged persons to investigate in Tennessee claims asserted there against the insurer. Schutt v. Commercial Travelers Mutual Accident Assn. 229 F (2d) 158 (C. A. 2, 1956), cert., den. 351 US 940 (1956).

Virginia. The Travelers Health case, discussed under the decisions of the United States Supreme Court earlier in this note sustains the exercise of personal jurisdiction over an unlicensed foreign insurer in an action brought by Virginia in its sovereign capacity.

In addition to the cases and statutes just referred to, Unauthorized Insurers Process Acts (differing somewhat among themselves in their details) have been adopted, but not yet authoritatively passed on, in these states: Alabama, Colorado, Indiana, Iowa, Massachu-

setts, Michigan, Nevada, North Carolina, Pennsylvania, Rhode Island, South Dakota and Vermont. See 9-C Uniform Laws Annotated 305 (Brooklyn, 1958).

The Wisconsin Financial Responsibility Act requires of unlicensed insurers who furnish security in event of an accident occurring in this state that the insurer execute "a power of attorney authorizing the commissioner to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident." Wis. Stat. 344.15 (1957).

In summary, the cases and statutes cited give general support to these conclusions: Personal jurisdiction has been sustained over foreign insurers in actions brought upon isolated policies issued to residents of the forum. Where the policy has been issued to the insured while he resides outside the forum and the insured continues the policy in force after becoming a resident of the forum, the statutes have presented some difficult construction questions but no recent decision found suggests any constitutional obstacle to exercising jurisdiction over an insurer who permits a policy to remain in force after the insured moves into a state having an unauthorized insurers process statute. The McGee decision does not go this far on its facts but suggests no such limitation likely to prevent the result reached in the Schutt case, supra, admitting that no significance can be drawn from the refusal of the Supreme Court to grant certiorari in the Schutt case. Finally, an insurer's promise to defend his insured against a liability incurred by the insured in the state has furnished a basis for personal jurisdiction over the insured in a direct action brought on the policy in the Pugh case, supra, and defense by the insurer of such actions has been held to constitute "doing business" in California by the insurer.

(12) *Personal Representative.*

[Renumbered from sub. (11) in 1967.]

Two jurisdictional facts are required by this subsection: (i) an action against a personal representative to enforce a claim or cause of action against a decedent; (ii) any jurisdictional ground under subs. (2) through (10) of this section which would have furnished a basis for personal jurisdiction over the deceased had he been living. It is immaterial whether the same action had been commenced against the deceased during his lifetime.

The basis for this provision is supported by the numerous motor vehicle process acts which authorize the exercise of personal jurisdiction over both the nonresident motorist and his personal representative. Court decisions have tended to sustain the validity of these provisions although much needs to be worked out as this is written on the effect to be given these judgments against foreign personal representatives with respect to the decedent's assets outside the forum state. An analysis of the cases and proposed solutions to some of the problems they leave unresolved may be found in the Comment, Conflict of Laws: Domestic and Foreign Effects of Judgment Against Foreign Administrator of a Nonresident Decedent, 1958 Wis. L. Rev. 425.

(13) *Joinder of Causes in the Same Action.*

[Renumbered from sub. (12) in 1967.]

Under sub. (1) of this section, the grounds for personal jurisdiction stated will support a cause of action regardless of where it arose. Accordingly, as many claims or causes as exist between the plaintiff and defendant may be joined in the action without raising any question as to personal jurisdiction over the defendant so long as some grounds provided for in sub. (1) exists.

All other grounds defined in this section—in subsections (2) through (11)—are in terms which confine the kinds of causes or claims which may be asserted against the defendant with respect to a particular subsection. Sub. (12) makes it clear that separate grounds for personal jurisdiction over the defendant must exist as to each cause or claim joined against him in the case unless the grounds for personal jurisdiction over the defendant are one or more of those stated in sub. (1) of the section.

See notes to 262.06, on domestic or foreign corporations, citing Petition of Inland Steel Co. 174 W 140, 182 NW 917; Huck v. Chicago, St. P., M. & O. Ry. Co. 4 W (2d) 132, 90 NW (2d) 154; and Dettman v. Nelson Tester Co. 7 W (2d) 6, 95 NW (2d) 804.

262.05 (5) (a) and (b) furnish ground for exercising jurisdiction over an Illinois corporation which contracted for goods to be manufactured and paid for in Wisconsin and to be delivered to a carrier f.o.b. a Wisconsin city. Flambeau Plastics Corp. v. King Bee Mfg. Co. 24 W (2d) 459, 129 NW (2d) 237. See also Quality Bev. Co. v. Sun-Drop Sales Corp. 291 F Supp. 92.

In an action by an insurer against a Wisconsin corporation, a dealer in hammocks, to secure reimbursement for the amount of a judgment obtained in another state by a nonresident who suffered injuries when a defective stand resold to her through the dealer's out-of-state customer (plaintiff's insured) collapsed, a cross complaint by the dealer for breach of warranty against the manufacturer of the stand, an unlicensed foreign corporation, which shipped the stand at the dealer's request from its factory directly to the dealer's customer, which pleading was silent as to where the dealer-manufacturer contract was entered into, was legally insufficient to set forth the prescribed statutory jurisdictional facts upon which personal jurisdiction over the manufacturer could be predicated. Travelers Ins. Co. v. George McArthur & Sons, 25 W (2d) 197, 130 NW (2d) 852.

Jurisdiction over a nonresident defendant under 262.05 (5) is predicated on some degree of consensual privity between plaintiff and defendant with respect to the action brought, but it is not necessary that the defendant have done any act within the state—the basis therefor being that the defendant has entered into some consensual agreement with the plaintiff which contemplates a substantial contact in Wisconsin. The preliminary determination of whether personal jurisdiction has been acquired over a nonresident defendant does not

turn on whether the latter may ultimately be held responsible, but is dependent on whether the requirements of 262.05 are satisfied. Pavalon v. Fishman, 30 W (2d) 228, 140 NW (2d) 263.

Undisputed evidence that on at least 2 occasions the nonresident by mail solicited large numbers of Wisconsin resident stockholders, together with proof of other personal solicitation activities and attempts to purchase shares, warranted the circuit court in concluding that the nonresident had subjected itself to the jurisdiction of the Wisconsin courts. Sivyer Steel C. Co. v. American Steel & P. Corp. 32 W (2d) 555, 146 NW (2d) 476.

Where a foreign corporation solicited a contract in Wisconsin, shipped equipment into the state, contracted and furnished supervisory help for its installation in the state, furnished instruction in the state on its operation, and filed a conditional sales contract pertaining to the equipment with a register of deeds at a time when its predecessor was licensed to do business in the state, it was amenable to process within Wisconsin. American Type Founders Co. v. Mueller Color Plate Co. 171 F Supp. 249.

Where a foreign corporation's representative solicited orders in Wisconsin and an order was filled, service of process in the foreign state was valid. Wisconsin M. & C. Corp. v. DeZurik Corp. 222 F Supp. 119.

A nonresident corporation which solicited and obtained distributorship contracts in Wisconsin which resulted in sales had sufficient contact to be amenable to service in actions by resident plaintiff-distributors, but nonresident distributors cannot join as plaintiffs where they and the defendant with respect to each other had no Wisconsin contacts. Sun-X Glass Tinting v. Sun-X Int. 227 F Supp. 365.

A foreign corporation's entry into 50 contracts with a Wisconsin corporation in the normal course of business during a 6-year period preceding service is sufficient to sustain jurisdiction. Beecher Corp. v. Anderson-Tully Co. 252 F Supp. 631.

In an action for damages for personal injuries allegedly sustained by a person while operating a carriage and saw unit, the foreign manufacturer of a carriage drive was not subject to in personam jurisdiction under 262.05 (4), since the carriage drive in question constituted the only product of defendant within the state and the statute is not satisfied if only a single item manufactured by defendant is used within the state. McPhee v. Simonds Saw and Steel Co. 294 F Supp. 779.

The mere fact that some of the contract negotiations between an Illinois corporation and an Indiana corporation were carried on in Wisconsin was insufficient to establish jurisdiction over the Indiana corporation under 262.05, Stats. 1967. Uni-Pak, Inc. v. Formex Corporation, 300 F Supp. 527.

Settlement negotiations being conducted by the Milwaukee office of the insurer of a nonresident defendant at the time action was commenced in federal district court in Wisconsin constituted "substantial and not isolated activities" within 262.05 (1), Stats. 1965. LaBonte v. Preyor, 300 F Supp. 1078.

Where an insurance policy which covered damage to plaintiff's aircraft, which was issued by a group of insurance companies managed by defendant corporation (a New York corporation), and which was solicited in Wisconsin by an insurance agent acting as agent of defendant corporation, and the defendant corporation also carried on other activities in that it employed adjusters in Wisconsin, a federal district court could obtain jurisdiction over defendant corporation under 262.05 (1). Falk Corp. v. United States Aviation Underwriters, Inc. 304 F Supp. 1401.

262.05 (1), Stats. 1969, was applicable to a corporation which sold one of its own security issues within the state, allegedly caused breaking of contractual relations between another corporation and bondholders (including Wisconsin residents), and entered into contractual relationships with Wisconsin residents. Broenon v. Beaunit Corporation, 305 F Supp. 688.

See note to 452.03, citing 48 Atty. Gen. 6.

In the light of U. S. supreme court rulings, proposed legislation relative to personal jurisdiction would, if adopted, give rise to constitutional attacks on judgments. 56 Atty. Gen. 76.

Jurisdiction by implied consent. O'Melia, 29 MLR 31.

Changing concepts of what constitutes "doing business" by foreign corporations. Keane and Collins, 42 MLR 151.

Expanding personal jurisdiction over nonresidents and foreign corporations. 42 MLR 537.

Products liability; the privity requirement in Wisconsin. Balistreri, 47 MLR 209.

An analysis of the constitutional guidelines provided by sec. 262.05 (3), (4) and (10). Podvin, 49 MLR 149.

The Erie rule and long-arm statutes. Kessler, 52 MLR 116.

Personal jurisdiction of nonresidents—examination of Wisconsin requirements. 1962 WLR 544.

Long-arm jurisdiction in federal courts. Foster, 1969 WLR 9.

262.06 History: 1959 c. 226; Stats. 1959 s. 262.06; 1961 c. 147; 1963 c. 6; 1965 c. 252; 1969 c. 181.

Reporter's Notes: This section deals with the manner in which a summons may be served. Where the action in question seeks a personal judgment against the defendant, there must exist also a ground for jurisdiction over the person of the defendant. The grounds for the exercise of personal jurisdiction are defined in s. 262.05.

The principal constitutional limitation relevant to the manner in which a summons is served is the due process requirement of notice. Due process does not guarantee that a person receive actual notice of a pending personal action. Many old provisions for service of a summons authorized notice which was often constructive rather than actual—e.g., service constructively upon the defendant at his "usual place of abode" under old s. 262.08 (3), or service by publication where a resident has left the state with intent to avoid service of summons under old s. 262.08 (4). "The reasonableness and hence the con-

stitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . ." Mullane v. Central Hanover Bank and Trust Company, 339 US 306, 315 (1950).

Older case authority laid down the rule that the range of process was limited to the territory of the state—e.g., Pennoyer v. Neff, 95 US 714 (1877). But the more modern view is that the function of process is notice, and territorial limitations upon the range of process have been abandoned as due process restrictions. Milliken v. Meyer, 311 US 457 (1940); Travelers Health Assn. v. Virginia, 339 US 643 (1950); McGee v. International Life Insurance Co. 355 US 220 (1957).

With the territorial restrictions removed from the service of a summons the need for service within the state upon a fictitious agent of the nonresident (as is commonly done in the motor vehicle process cases) is removed also. Two principal means of serving a summons outside the state have emerged: service personally; and service by mail. Both means of service have received approval from the U. S. Supreme Court. See cases cited in the paragraph immediately above. Ss. 16 and 17 of the new Illinois Civil Practice Act authorize personal service within or without the state in all cases on which grounds exist for the exercise of personal jurisdiction over the defendant. Personal service outside the state upon the defendant is also employed in proceedings to enforce the New York Arbitration Act. See Farr & Co. v. Cia Intercontinental de Navegacion, 243 F (2d) 342 (CA 2, 1957). The use of service by mail to nonresident defendants is more widespread. It is used universally in the motor vehicle cases to notify nonresident defendants (though the statutes also require service within the state upon some official named as an "agent" of the nonresident). Service by mail is widely used, too, in the Unauthorized Insurers Process Act.

This section adopts the use of personal service, within or without the state, as the preferred means of notifying the defendant in cases where jurisdiction is to be exercised on grounds stated in s. 262.05. If with reasonable diligence personal service cannot be made upon the defendant (or in the case of a corporation, upon some officer, director or managing agent), service may then be attempted at the defendant's usual place of abode in Wisconsin. If with reasonable diligence the defendant can neither be served personally within or without the state, nor by substituted service at a usual place of abode in Wisconsin, service of the summons may then be made by a combination of publication and mailing; and publication alone will suffice for the situation in which no address for the defendant can, with reasonable diligence, be found.

In summary, this section is designed to furnish notice to a defendant in cases in which personal jurisdiction is exercised over him on one or more of the grounds set forth in s. 262.05. The section states a series of preferences with respect to the particular manner in which service of the summons may be made. The preferences are designed to maximize the likelihood that the defendant will receive actual notice of the personal action commenced against him. Personal service, within or without the state, is given the first preference since it assures notice which is actual. The use of substituted service at the usual place of abode in the state or, where such service cannot be made, of service by publication and mailing are preferences believed under the circumstances where they are allowed to be most likely to give notice which is actual.

The use of personal service made outside the state was authorized under old law in several situations where personal jurisdiction was exercised. Old s. 262.09 (4) authorized personal service outside the state on officers of foreign corporations doing business in the state and the section has been held to afford a basis for personal jurisdiction over the corporation in such cases. Behling v. Wisconsin Hydro Electric Co., 275 W 569, 83 NW (2d) 162 (1957). And old s. 262.08 (4) authorized personal service outside the state in personal actions against a resident who departed from the state with intent to avoid service.

Brief comment on the several subsections follows.

(1) *Natural Person.*

This subsection provides for the manner in which a summons may be served upon natural persons not under disability. Persons under disability are dealt with in sub. (2). Sub. (1) (d) expressly preserves service of a summons in any manner provided by special statutes which authorize the exercise of personal jurisdiction—e.g., service upon nonresident motorists under s. 345.09 is preserved.

(2) *Natural Persons Under Disability.*

This subsection parallels closely the provisions of old s. 262.08 (1) and (2) insofar as provision was there made for the manner of serving a summons in cases where grounds exist for the exercise of personal jurisdiction over persons under disability. Two changes of significance are incorporated, however. First, actual knowledge on the part of the plaintiff that the defendant is under guardianship or that the defendant is incompetent to have charge of his affairs is required before a duty is imposed upon the plaintiff to serve a guardian in addition to the ward, provided the defendant is 14 years of age or older. Under the old law, service had to be made upon a guardian where one was appointed, regardless of whether the plaintiff knew or with reasonable diligence might have known of the guardianship. Second, a change introduced in 1957 extended the time for service upon a guardian for a period of 60 days after discovery by the plaintiff that a guardian did exist. This provision is not retained since the plaintiff is under a duty to serve the guardian under the proposed subsection only where the plaintiff has knowledge of the guardianship.

(3) *State.*

This subsection is based upon that part of old s. 262.10 which provided for service of the summons and complaint upon the state. The balance of old s. 262.10 has been renumbered and transferred to Chapter 285, Actions Against State.

(4) *Other Political Corporations or Bodies Politic.*

This subsection is patterned after old s. 262.09 (2) and no significant changes have been introduced.

(5) *Domestic or Foreign Corporations, Generally.*

This subsection consolidates and follows generally the manner of serving a summons upon corporate defendants which was authorized in old s. 262.09.

(6) *Partners and Partnerships.*

This subsection is a specialized application of the rules for serving a summons upon natural persons. Service of a summons, within or without the state, upon each partner in causes asserted against the partnership for which grounds of personal jurisdiction in Wisconsin exist, provides a means of obtaining personal jurisdiction over each partner individually in all cases in which a claim is asserted against the firm. Under the common law view, a suit may be brought against a partnership by joining all partners personally in the action. Service under this subsection permits the exercise of personal jurisdiction over each partner, provided the partnership activities in the state with respect to the action brought would furnish a basis or ground for personal jurisdiction over a defendant under subs. (2) through (10) of s. 262.05.

(7) *Other Unincorporated Associations and Their Officers.*

This subsection treats service upon unincorporated associations and their officers in a manner similar to that adopted for serving a summons upon a partnership and its partners.

1. Natural persons, including those under disability.
2. Political corporations or bodies corporate.
3. Domestic or foreign corporations.
4. Unincorporated associations and their officers.

1. Natural Persons, Including Those Under Disability.

For purposes of constructive service under the governing statute, the defendant's mother-in-law is a member of his family. Merritt v. Baldwin, 6 W 439.

The statute is not complied with by leaving a copy of the summons at defendant's workshop with an employe. Mayer v. Griffin, 7 W 82; McConkey v. McCraney, 71 W 576.

Service of a summons directed to 2 defendants by leaving a copy with the family of one of them, without designating which in the return, is void as to both. Rape v. Heaton, 9 W 328.

Statutes permitting constructive service are strictly construed. Mecklem v. Blake, 19 W 397; Weatherbee v. Weatherbee, 20 W 499; Sayles v. Davis, 20 W 302.

If the defendant cannot be found at his usual place of abode, constructive service may be made there without need of making further search for the defendant. Lewis v. Hartel, 24 W 504.

A stipulation which acknowledges service of notice and pendency of the action and provides for trying the cause at the next term of court is a submission to the jurisdiction. Keeler v. Keeler, 24 W 522.

A personal judgment, dependent upon constructive service, is void unless it appears of record that the defendant was not found, and hence making constructive service necessary. Matteson v. Smith, 37 W 333.

Sec. 9, ch. 124, R. S. 1858, regulating service of summons on minors must be strictly followed. It requires delivery of a copy to the minor in person and of another to the father, mother or guardian for the minor. Subsequent appointment of a guardian ad litem will not cure defect of jurisdiction. Helms v. Chadbourne, 45 W 60.

One who refuses to allow service to be made upon him by declining to receive and retain papers offered with that view may be served by informing him what the papers are, and by depositing them in some appropriate place, in his presence if possible, or where they will be most likely to come to his possession. Borden v. Borden, 63 W 374, 23 NW 573.

A return which shows that service was made by leaving a copy "at the last and usual place of abode of said defendant in C. County" shows that such copy was left at his usual place of abode. Healey v. Butler, 66 W 9, 27 NW 822.

A default judgment will not be sustained against a nonresident unless the proceedings taken are in strict conformity with the statute. Beaupre v. Brigham, 79 W 436, 48 NW 596.

Delivery to defendant's married daughter who resides in the same building with defendant but in separate apartments, with a separate household, was not good service. Heinemann v. Pier, 110 W 185, 85 NW 646.

Where the plaintiff decoyed the defendants into this state for the purpose of bringing them within the jurisdiction of its courts, the action may be dismissed; and it is immaterial that the plaintiff intended at first merely a criminal prosecution and not a civil action, or that, after service of process in a civil action, defendants entered appearances therein or otherwise submitted to the jurisdiction. Saveland v. Connors, 121 W 28, 98 NW 933.

Defects in the return of service of the summons have often been given jurisdictional effect with respect to personal jurisdiction over particular defendants. Thus affidavits or certificates returned where constructive service of the summons has been made should specify compliance with the material elements of the statute authorizing constructive service. An officer's return of service "by delivering to and leaving with the wife of the defendant a true copy thereof" was insufficient because it failed to show that such service was made at the usual place of abode. Smithers v. Brunkhorst, 178 W 530, 190 NW 349.

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 262.08 (3), Stats. 1933, 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, 263 NW 658.

262.08 (2), Stats. 1953, applies as to a minor who has a guardian of his property although not of his person. Dostal v. Magee, 272 W 509, 76 NW (2d) 349.

Service upon a nonresident defendant motorist made in the manner provided for by 262.08 (5) and 345.09, Stats. 1957, operates as a commencement of an action for purposes of 330.19 (5). Edwards v. Gross, 4 W (2d) 90, 90 NW (2d) 142.

In an action against a husband and wife where the wife was not served with the summons but the husband, at his office, signed a receipt for her by himself as husband, there was no valid service on her which conferred jurisdiction on the court. Howard v. Preston, 30 W (2d) 663, 142 NW (2d) 178.

262.06, Stats. 1965, requires that "reasonable diligence" be used to effect personal service upon the defendant, and such assiduity is a condition precedent to the use of substituted service. Beneficial Finance Co. v. Lee, 37 W (2d) 263, 155 NW (2d) 153.

2. Political Corporations or Bodies Politic.

Where city officers in an action against them and the city knowingly permit the case to proceed and to be conducted in their behalf by the city attorney they are estopped, after judgment, to assert that they were not served with the process. Gilbert-Arnold L. Co. v. O'Hare, 93 W 194, 67 NW 38.

262.09 (1) and (2), Stats. 1943, prescribing as to service of summons on the mayor or the city clerk in an action against the city, must be strictly complied with, and failure to serve the summons in the manner prescribed, as by leaving a copy at the residence of the absent mayor with a member of his family, leaves the summons unserved and the attempted service quashable. Burke v. Madison, 247 W 326, 19 NW (2d) 309.

Acknowledgment of service of notice of appeal from an administrative hearing order by attorneys "for" the party sought to be bound by the appeal gives rise to a prima facie case of agency by the attorneys under 262.06 (1) (d). Fontaine v. Milwaukee County Expressway Comm. 31 W (2d) 275, 143 NW (2d) 3.

3. Domestic or Foreign Corporations.

The term "managing agent" means an agent who has a general supervision of the affairs of the corporation. Upper Mississippi T. Co. v. Whittaker, 16 W 220.

One engaged in closing up the affairs of a bank, who made its reports to the proper officer, employed attorneys to attend to its business, and exercised general supervision over its affairs, is a managing agent. Carr v. Commercial Bank of Racine, 19 W 272.

Under a statute authorizing service upon the president, cashier, or other principal officer, service upon the principal agent in the management of a railroad held in trust by a foreign corporation is not service upon a principal officer. Farmers' L. & T. Co. v. Warring, 20 W 290.

If the managing agent does not actually reside in this state, and none of the general officers of the corporation are residents here, service may be made upon a person who has general supervision of the corporation's affairs, and who is its only agent here clothed with general powers. Wickham v. South Shore L. Co. 89 W 23, 61 NW 287.

The agent of a combination of several railway companies is not an agent of either of them separately. Service in an action against one of them can not be made upon him. Kingsley v. Great Northern R. Co. 91 W 380, 64 NW 1036.

A resident cannot maintain garnishment against a foreign insurance company by serving its agent here on account of a loss of his debtor's goods in another state, where the debtor resided. Morawetz v. Sun Ins. Office, 96 W 10, 71 NW 109.

A person who collected assessments for a mutual insurance company, and informed the company as to the death of the insured, was an agent for the service of process. Fey v. I. O. O. F. M. L. Ins. Society, 120 W 358, 98 NW 206.

Where service could be had upon a foreign corporation through the secretary of state, an affidavit of a constable that he was unable to find such corporation within the state or any agent upon whom to make service was insufficient to authorize service by publication. Rollins v. Maxwell Brothers Co. 127 W 142, 106 NW 677.

Service may be had upon the secretary of state in case of a suit arising out of contract for shipment of goods from another state into Wisconsin. The business upon which such service may be had covers interstate business as well as state business. Paulus v. Hart-Parr Co. 136 W 601, 118 NW 248.

Service may be had in an action against a foreign corporation operating a steamship line upon the captain of one of the defendant's steamers. Phillips v. Portage T. Co. 137 W 189, 118 NW 539.

The acquiring of jurisdiction over a foreign corporation by service on an agent in this state is due process of law. Minneapolis M. Co. v. Ashauer, 142 W 646, 126 NW 113.

Service may be made on a foreign corporation having property in this state by service on any officer thereof found in this state. American F. P. Co. v. American M. Co. 151 W 385, 138 NW 1123.

A railroad freight agent was a proper person upon whom to serve a summons, as directed by sec. 2637 (6), Stats. 1917, during the period of federal control of the company. Christian v. Great Northern R. Co. 171 W 266, 177 NW 29.

The property, located in this state, of a foreign corporation, which under sec. 2637, Stats. 1919, 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.

Service of process on a person who had been an officer of a private corporation, but who had resigned, conferred no jurisdiction, and a judgment against a corporation so served should be vacated without requiring of it an affidavit of merits. Western P. & M. Co. v. American M. S. Co. 175 W 493, 185 NW 535.

Within the meaning of sec. 2637 (7), Stats. 1921, a person having the title "district freight representative," who solicited business for a foreign railroad corporation, issued bills of lading to shippers, and signed bills as agent, was an "agent" of such corporation. State ex rel. Pennsylvania R. Co. v. Circuit Court, 178 W 648, 190 NW 366.

Service of process under 262.09 (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 mere fact that an officer of a foreign corporation was physically present in Wisconsin, or that there are agents or subsidiaries within the state who deal with its products or merchandise, does not establish its corporate presence within the state so that it was doing or conducting business within the state within the meaning of 262.09 (4), Stats. 1951, authorizing service of summons on a foreign corporation by serving on an officer or agent "having charge of or conducting any business for it in this state." Mitchell v. Airline Reservations, Inc. 265 W 313, 61 NW (2d) 496.

As used in 262.09 (3), Stats. 1951, the terms "managing agent" and "superintendent" relate to a person possessing and exercising the right of general control, authority, judgment, and discretion over the business or affairs of the corporation, either on an over-all or a part basis, i. e., everywhere or in a particular branch or district. Carroll v. Wisconsin P. & L. Co. 273 W 490, 78 NW (2d) 905.

In general, with reference to service of process on a foreign corporation, the solicitation of business aided by other manifestations of corporate presence will warrant the conclusion that a foreign corporation is doing business in the state notwithstanding none of such manifestations is singly capable of carrying the weight of such inference. Service on such corporation, by service on its president in Minnesota in the manner prescribed by 262.09 (4), Stats. 1955, was a sufficient and valid service. Behling v. Wisconsin Hydro Elec. Co. 275 W 569, 83 NW (2d) 162.

The activities of a foreign railroad corporation, which operated no railroad trackage in Wisconsin, but which solicited business in Wisconsin and maintained an office in Wisconsin to facilitate such solicitation, were of such substantial and extensive nature as to constitute "doing business in Wisconsin" under 262.09 (4), Stats. 1957, and thereby to subject such corporation, as a defendant in an action in a state court, to service by delivery of a copy of the summons to it outside the state, and to subject it to the jurisdiction of the state court. Huck v. Chicago, St. P., M. & O. Ry. Co. 4 W (2d) 132, 90 NW (2d) 154.

Constant or repeated solicitation of business by agents of a foreign corporation within the state is sufficient to constitute the "doing of business in Wisconsin," within the contemplation of 262.09 (4), Stats. 1957. The possible status of a dealer in this state as an independent contractor was not material. Where all the facts respecting his activities in Wisconsin spelled out control by the company, he was its agent, and it was "doing business in Wisconsin," so that it was subject, as a defendant in an action in a state court of Wisconsin, to service by delivery of a copy of the summons to it outside the state, and subject to the jurisdiction of the state court. Dettman v. Nelson Tester Co. 7 W (2d) 6, 95 NW (2d) 804.

While service of process upon an officer of a foreign corporation within or without the state is permissible under 262.06 (5), Stats. 1967, such service does not itself confer jurisdiction unless grounds for personal jurisdiction as provided and enumerated in 262.05 are present. Stroup v. Career Acad. of Dental Tech. 38 W (2d) 284, 156 NW (2d) 358.

Where a policyholder requests an insurance company which had no agent in the state to collect a premium through the cashier of a certain bank, intending thereby to make such cashier the agent of the company for the purpose of service of process, it was held that service on the cashier would be ineffectual both because he was an agent for a single purpose and because the service was obtained by trick. Frawley v. Pennsylvania C. Co. 124 F 259.

A Maryland corporation which, although maintaining no office or agency in Wisconsin, employed salesmen who traveled about the state contacting potential customers, who were available to give technical advice to customers, who carried parts for machines manufactured by the corporation, and who aided and instructed customer's vendor repairman had sufficient contacts with Wisconsin so as to be amenable to service of process by methods prescribed by Wisconsin statutes for foreign corporations. Heraly v. Victor Products Corp. 282 F Supp. 351.

4. Unincorporated Associations and Their Officers.

An express statutory provision is not indispensable to an unincorporated association's capacity to sue or be sued in its association name; such a suit may be maintained by virtue of a necessary implication arising from statutory provisions, as in cases where an unincorporated association is recognized as a legal entity by statutes which do not in terms authorize it to sue or be sued as such. Teubert v. Wisconsin Int. Athletic Asso. 8 W (2d) 373, 99 NW (2d) 100.

Where a special appearance and a motion to set aside the service of process on an unincorporated association did not raise the objection that service was not made on any individual on whom service was authorized by 262.09 (1) and (3), such objection, even if originally

meritorious, was waived. Teubert v. Wisconsin Int. Athletic Asso. 8 W (2d) 373, 99 NW (2d) 100.

Enforcing a contractual claim against an unincorporated association. Smith, 1960 WLR 444.

262.07 History: 1959 c. 226; Stats. 1959 s. 262.07.

Reporter's Notes: Consent is the basis which underlies the jurisdictional grounds stated in this section, and the conduct manifesting that consent is such as to make service of summons unnecessary.

Sub. (1) restates two established grounds for jurisdiction over a person. First, that a person who makes a general appearance in an action waives service of summons and consents to the exercise of jurisdiction over his person in the action. And second, that by warrant of attorney, or otherwise, a person may manifest his consent to subject his person to the jurisdiction of a court by authorizing another to appear in the action in his behalf. See s. 270.69, which outlines the procedure to be followed for obtaining a judgment by confession upon a promissory note or bond.

Sub. (2) assumes that a person as plaintiff subjects himself in any case to the jurisdiction of the court with respect to the action which he has commenced, and provides that the plaintiff, having commenced the action, will be held subject to the jurisdiction of the court with respect to any cross actions which the defendant wishes to assert against him. See Adam v. Saenger, 303 US 59 (1938).

A general appearance waives any defects in respect to jurisdiction over the person of the defendant. Gale v. Consolidated B. & E. Co. 251 W 642, 30 NW (2d) 84.

262.08 History: 1959 c. 226; 1959 c. 690 s. 22; Stats. 1959 s. 262.08; 1961 c. 33.

Reporter's Notes: Subs. (1), (2) and (4) are set forth in the language of old subs. 262.12 (1), (2) and (4). What had been old sub. 262.12 (3) was originally enacted in 1959 as new sub. (3) of this section, providing for the exercise of quasi in rem jurisdiction in actions for divorce or annulment of marriage of a resident of this state. This provision was repealed, however, by the amendments to the Family Code adopted in May, 1960, and the jurisdiction provisions for the Family Code are now found in Chapter 247 as part of the Family Code itself.

The introductory language of the present 262.08 has no earlier statutory counterpart. The principal changes from older law are two. First, the grounds for the exercise of jurisdiction in rem or quasi in rem have been separated from the means of serving notice to the defendant, just as has been done for the exercise of personal jurisdiction; see ss. 262.05 and 262.06. Second, while the grounds for the exercise of jurisdiction in rem and quasi in rem remain unchanged, the need for the exercise of jurisdiction on these grounds has been materially reduced by the extension of personal jurisdiction provided for in s. 262.05.

The provision in sec. 10, ch. 124, R. S. 1858, "a necessary or proper party to an action relating to real estate," relates to an absent or nonresident defendant who has or claims a lien or interest as described in the statute. Slocum v. Slocum, 17 W 150.

The courts of this state may acquire jurisdiction over a foreign corporation which has an agent in this state who holds property for it by attaching such property and serving summons on the company by publication, although the cause of action arose through the corporation's negligence in another state. Curtis v. Bradford, 33 W 190.

When the proof does not disclose that the defendant has property within the state the court cannot obtain jurisdiction of him so as to make the judgment of any effect. Witt v. Meyer, 69 W 595, 35 NW 25.

Debts owing by residents of this state to a nonresident, though evidenced by notes and mortgages, are property within the state. Bragg v. Gaynor, 85 W 468, 55 NW 919.

A trustee in possession of property located in this state may serve the summons by publication upon a nonresident who claims the right to appoint a cotrustee of the property and upon a nonresident who claims to be such cotrustee, in an action to fix the status of the property and the rights and duties of the parties, and to exclude such defendants from the interest they claim in the property. The nonresident cestui que trust may also be served in the same way. Laughlin v. Griswold, 169 W 50, 171 NW 755.

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

See note to 270.62, on default judgment in case of publication, citing Schultz v. Schultz, 256 W 139, 40 NW (2d) 515.

In an action for personal injuries wherein no relief is sought other than in personam, constructive service of process beyond the boundaries of the state is insufficient to give our courts jurisdiction over the person of the nonresident defendant, and a judgment rendered against him on the basis of such service would be void for lack of due process of law. Sheehan v. Matthew, 258 W 606, 46 NW (2d) 752.

See note to 281.01, citing Hart v. Sansom, 110 US 151.

In an action against nonresident and resident defendants, an allegation that the resident defendant assigned the mortgage to the nonresident defendant with intent to defraud creditors did not state a cause of action against the nonresident defendant so as to authorize substituted service. Frawley v. Chakos, 36 F (2d) 373.

Requirements for service by publication or mail. Werner, 6 MLR 97.

262.09 History: 1959 c. 226; Stats. 1959 s. 262.09; 1963 c. 6; 1965 c. 252.

Reporter's Notes: The rules stated in this section follow generally the pattern of the old law. Old s. 262.13 (2) provided for service by publication in the event either that the defendant's name is not known or that his address "cannot be ascertained with reasonable

diligence." And case law assumes that any means of service adequate to provide a means of notice for personal jurisdiction is also adequate as a means of notice for jurisdiction in rem or quasi in rem.

Where the court is proceeding quasi in rem against property found in the state the action has been said to commence against a nonresident upon his receipt of the copy of the summons and not upon the completion of the last required publication of the summons. Diedrichs v. Stronach, 9 W 548.

262.10 History: 1959 c. 226; Stats. 1959 s. 262.10.

Reporter's Notes: This section follows closely old s. 262.02. There are three principal changes.

First, the direction to the defendant is patterned after the form of summons employed under the Federal Rules. There has been much criticism of the instructions given to the defendant in the old form of summons.

Second, the draft cuts to 40 days the time within which answer must be made where service is by publication. Under old practice this period was 41 days—three weeks after first publication, plus 20 days.

Third, sub. (4) gives express approval to a practice followed by many attorneys of preparing more than one original summons to take care of situations in which it is unclear whether service may be made upon the defendant in one county or another. By authorizing preparation of more than one original summons as needed in such cases, simultaneous efforts may be made to serve the defendant in two or more places.

If the suit is by or against one who is acting in a representative capacity the word "as" must be inserted between the name and the descriptive title. Wheeler v. Smith, 18 W 651.

Actions by or against persons acting in a representative capacity should be indicated by the summons. Their rights are distinct from those which attach to them as individuals. If there is a variance between the summons and the complaint as to the capacity in which the defendant is sued the latter will be deemed irregular. Fond du Lac v. Bonesteel, 22 W 251.

Every person is presumed to have one Christian and one surname. Parties should sue and be sued by such names. The practice of using an initial instead of the Christian name is "loose and vicious." Kellum v. Toms, 38 W 592.

The summons in a suit by or against partners should be in their individual names; but if it is not it may be amended. Bushnell v. Allen, 48 W 460, 4 NW 599.

If there is a discrepancy in the name as given in the summons and the entitling part of the complaint and in the body of the latter the complaint will govern. McKinney v. Jones, 55 W 39, 11 NW 606, 12 NW 381.

If there are several parties, and the initials used to designate them correspond with their Christian names, it will be assumed that the former stood for the latter. Zwickey v. Haney, 63 W 464, 23 NW 577.

Defendant may be sued in 2 names when he is known by either. O. L. Packard M. Co. v. Laev, 100 W 644, 76 NW 596.

Where a complaint was served with the summons and the copy of the summons did not have the signature or post-office address of the plaintiff's attorney but the copy of the complaint was signed and the cover of the summons and complaint contained the attorney's name and address, the omission of the signature was a mere irregularity and judgment entered by default was good. Harvey v. Chicago & N. W. R. Co. 148 W 391, 134 NW 839.

A summons signed by nonresident attorneys is irregular, but the service thereof affords the court jurisdiction to allow it to be corrected by amendment. Hammond-Chandler L. Co. v. Industrial Commission, 163 W 596, 158 NW 292.

262.11 History: 1959 c. 226; Stats. 1959 s. 262.11.

Reporter's Notes: The form departs from the form authorized under old s. 262.03 and follows the form of summons employed under the Federal Rules. The several provisions set forth in brackets in sub. (1) are designed as alternatives to fit the manner in which the summons is served for personal jurisdiction or jurisdiction in rem or quasi in rem. See ss. 262.06, 262.09 and 262.12.

It is not a fatal defect that the style of a summons is "state of Wisconsin", instead of "the state of Wisconsin." Mabbett v. Vick, 53 W 158, 10 NW 84.

262.12 History: 1959 c. 226; Stats. 1959 s. 262.12.

Reporter's Notes: This section is largely a consolidation and restatement of old ss. 262.05, 262.06 and 262.13. This section continues the old practice of permitting service within the state in personal actions of a summons without a complaint, but requires in other cases that a copy of the verified complaint accompany the summons.

On verification of pleadings see notes to 263.24; and on form of verification see notes to 263.25.

See note to 262.16, citing Milwaukee County v. Schmidt, Garden & Erikson, 35 W (2d) 33, 150 NW (2d) 354.

The word "shall" as used in 262.12 (1), Stats. 1967, does not contemplate mandatory dismissal of an action under any and all circumstances where the complaint is not timely served pursuant to demand, but means that dismissal is warranted where there is no motion for extension of time or factual basis established for the exercise of judicial discretion. Ebert v. Kohl's Food Stores, 42 W (2d) 247, 166 NW (2d) 169.

262.13 History: 1959 c. 226; Stats. 1959 s. 262.13; Sup. Ct. Order, 20 W (2d) v; 1965 c. 252.

Reporter's Notes: Sub. (1) (a) follows closely the language of the first sentence of old s. 262.04. The change is primarily to clarify the application of the filing provisions to cases in which personal or substituted personal service could be made outside the state under the provisions of old s. 262.13 (4).

Sub. (1) (b) adopts the requirement of old s. 262.13 (3) which required that the summons and a verified complaint must be filed prior

to the first publication and prior to the mailing.

Sub. (2) restates the last sentence of old s. 262.04 except that it allows regular motion costs (now up to $10—see old s. 271.07) instead of the $5 provided in old s. 262.04.

Unless the plaintiff pays the state tax and costs the right of any defendant to a dismissal of the action is absolute under sec. 2632, R. S. 1878. Matthes v. Thompson, 83 W 565, 53 NW 843.

The enclosing of the original summons in the sealed envelope containing a discovery deposition which was filed with the clerk, but as to which no tax or fees were paid, does not constitute a filing under 262.13 (3). The notice of the hearing pursuant to which 262.13 (3) was adopted was sufficient. Mosing v. Hagen, 33 W (2d) 636, 148 NW (2d) 93.

Where plaintiff in an action for personal injuries served her summons and complaint a day before the statute of limitations had run, but failed to file the summons and pay the clerk's fee and suit tax within a year after such service, general appearance of the defendants within that time did not avoid the effect of 262.13 (3); hence the action was properly dismissed for noncompliance therewith. Fehrenbach v. Fehrenbach, 42 W (2d) 410, 167 NW (2d) 218.

262.14 History: 1959 c. 226; Stats. 1959 s. 262.14.

Reporter's Notes: This section largely restates old ss. 262.07 and 262.11.

262.15 History: 1959 c. 226; Stats. 1959 s. 262.15.

Reporter's Notes: This section codifies several matters of general law which have not previously been codified.

Sub. (1) restates earlier law.

Sub. (2) changes in theory but not substantially the practice under old law. Under old law it was assumed that service by publication did not commence the action until three weeks have passed since the date of first publication. The defendant had 20 days after the action was commenced in order to appear and defend. This meant that a total of 41 days had to elapse following the date of first publication before a default could be taken against a defendant served by publication. Under sub. (2) of this section, the action is commenced as of the day of first publication, and the court has control over the case from that point on. The defendant who has been served by publication has 40 days after the date of first publication in which to appear and defend under s. 262.10 (2) (b). This matter is discussed further in the notes following s. 262.10.

262.16 History: 1959 c. 226; Stats. 1959 s. 262.16.

Reporter's Notes: This section follows closely old s. 262.17 but does introduce one substantial change in the practice under that section. Under old s. 262.17, objections to personal jurisdiction were triable without a jury only where no issue of fact was raised in connection with the jurisdictional objection. The proposed section provides that all issues of fact and law raised by objection to the exercise of personal jurisdiction are triable to the court without a jury. Questions of fact going to the matter of the court's jurisdiction over the parties are matters which may be regarded as preliminary to the merits of the cause itself. Federal courts generally follow the rule that all fact issues preliminary to the merits of the action are tried without a jury even though the Seventh Amendment guarantees a jury trial on the merits of the common law cause sued upon. The facts found for jurisdiction purposes are not binding on the parties in the trial of the action upon the merits. The operation of this rule in the federal courts is discussed in 5 Moore's Federal Practice 290-295 (2d ed. 1951). A majority of the states in which the jury trial question as to matters preliminary to the merits has been raised have followed the federal practice. See 170 ALR 383 and subsequent ALR Blue Book cases related to the original annotation. Such a trial to the court of preliminary matters is almost certainly allowable under the language of the Wisconsin Constitution provided the parties are free in the trial of the action upon the merits to relitigate the same issue of fact for purposes of the merits.

A special appearance cannot be made general by adding conditions not asked for. Upper Mississippi T. Co. v. Whittaker, 16 W 220.

Appearance by an attorney will be deemed to be general unless it expressly appears that the intention was otherwise. Cron v. Krones, 17 W 401.

The same rules and presumptions apply to municipalities and corporations as to natural persons concerning the authority of those who represent them in the courts, and these representatives have the same authority to bind their principals by their acts as have the representatives of natural persons. Shroudenbeck v. Phoenix Ins. Co. 15 W 700; Congar v. Galena & C. U. R. Co. 17 W 477.

Appearance of a defendant as a witness for a garnishee in an action is not an appearance in the action by defendant. Beaupre v. Brigham, 79 W 436, 48 NW 596.

Jurisdiction over the person of the principal defendant in garnishment does not result from his appearance for the purpose of claiming that the money due him from the garnishee was exempt. State ex rel. Weber v. Cordes, 87 W 373, 58 NW 771.

A motion by a garnishee to set aside a judgment on the ground that he is not indebted to the defendant is a general appearance. Wickham v. South Shore L. Co. 89 W 23, 61 NW 287.

A notice by an attorney that he appeared specially for the purpose of moving that service of the summons be vacated and the action dismissed with costs was a special appearance. Kingsley v. Great Northern R. Co. 91 W 380, 64 NW 1036.

A general appearance after substituted service gives personal jurisdiction, changing the suit from one in rem to one in personam. Luetzke v. Roberts, 130 W 97, 109 NW 949.

When the authority of an attorney to act in the course of a lawsuit becomes an issue, the authority is presumed in the first instance, but the burden which is on the party denying

the authority, to overcome the presumption by evidence that is clear, satisfactory, and convincing, may be sustained by the submission of uncontradicted evidence that the action of the attorney was not authorized. Mullins v. LaBahn, 244 W 76, 11 NW (2d) 519.

In a garnishment action, the filing of a surety bond, entitled in the principal action, and stating that the summons had been duly served and a named third party summoned as garnishee, and that the principal defendant was offering to permit the plaintiff to take judgment in the principal action against him and the sureties not to exceed a designated sum (pursuant to which filing the garnishee was released), constituted a general appearance on behalf of the principal defendant and gave the court jurisdiction for all purposes, although such bond was not signed by the principal defendant but by an attorney in fact for a surety company not a party to the action, and the court subsequently held the document of no value and reinstated the garnishment action. Ashmus v. Donohoe, 272 W 234, 75 NW (2d) 303.

Where, after judgment against an individual, plaintiff brought order to show cause why title of action should not be amended to include a corporation under whose name defendant was doing business, the corporate president presented an affidavit that defendant had no interest in the corporation and that the corporation had not been served, this constituted a general appearance by the corporation. R. B. General Trucking v. Auto Parts & Service, 3 W (2d) 91, 87 NW (2d) 863.

Where the court, on the application of the defendant husband, reinstated an action for divorce after having previously dismissed it for want of prosecution, the plaintiff wife waived her objections to the jurisdiction of the court by her general appearance on the date ultimately set for trial, and by proceeding to trial. Vishnevsky v. Vishnevsky, 11 W (2d) 259, 105 NW (2d) 314.

After a defendant has joined in his answer his objection to jurisdiction and his defenses on the merits, any subsequent appearance by him to prepare for or to go to trial on the merits does not constitute waiver of his objection to jurisdiction over his person. Punke v. Brody, 17 W (2d) 9, 115 NW (2d) 601.

The permission afforded in 262.16 (2) to combine in an answer objection to the personal jurisdiction of the court with defenses to the merits does not prohibit or prevent a defendant from making a general appearance under 262.16 (1) prior to answering, demurring, or making a motion which presents an objection to the jurisdiction of the court, for an appearance and a pleading are distinct and separate. Service of a notice of retainer and appearance constituted a general appearance. McLaughlin v. Chicago, M., St. P. & P. R. Co. 23 W (2d) 592, 127 NW (2d) 813.

Where a defendant served outside the state wishes to object on the ground of lack of personal jurisdiction and also to demur to the complaint as failing to state a cause of action, he cannot raise the jurisdiction question by demurrer. He should serve a motion, with supporting affidavits, with the demurrer. Pavalon v. Thomas Holmes Corp. 25 W (2d) 540, 131 NW (2d) 331.

Where only a summons was served outside the state in violation of 262.12 (1) (b) but defendant by letter demanded a copy of the complaint, the defendant waived his right to object and could not do so after the complaint was served. Milwaukee County v. Schmidt, Garden & Erikson, 35 W (2d) 33, 150 NW (2d) 354.

Where personal jurisdiction over the secretary of state was obtained by a city but the former, in demurring to the complaint, made no objection to the personal jurisdiction of the court as provided by 262.16 (2), the failure to do so constituted waiver of the defense of sovereign immunity. Kenosha v. State, 35 W (2d) 317, 151 NW (2d) 36.

262.16 (2), which permits a pleader to combine a special appearance (contesting the court's jurisdiction over the person) with demurrer and defenses, was created so that a defendant could contest plaintiff's claim and at the same time object to the court's jurisdiction. Bottomley v. Bottomley, 38 W (2d) 150, 156 NW (2d) 447.

Consistent with the underlying intent of 262.16, Stats. 1967, where a foreign corporation is served within this state with a summons and affidavit of discovery in aid of pleading, and both personal jurisdiction and the propriety of discovery are challenged, it is proper to raise the jurisdictional issue by motion along with a motion to limit or quash discovery. Stroup v. Career Acad. of Dental Tech. 38 W (2d) 284, 156 NW (2d) 358.

Personal jurisdiction: waiver doctrine. 51 MLR 113.

262.17 History: 1959 c. 226; 1959 c. 660 s. 72; Stats. 1959 s. 262.17; 1965 c. 252.

Reporter's Notes: This section is patterned closely after old s. 262.16. The provision, added in 1957, c. 487, which permitted constables to prove by certificate rather than affidavit the service made by them, has been omitted for the reason that it appears difficult in theory to extend to constables, but withhold from city policemen, etc., the same authority. All such peace officers, to the extent that they have been deputized by a sheriff, are enabled to prove their service by certificate rather than by affidavit.

As between the parties the rule is that the return is conclusive. Frederick v. Clark, 5 W 191. See also Carr v. Commercial Bank, 16 W 50.

Under sec. 65, ch. 98, R. S. 1849, facts required must be stated in the affidavit, and also the connection of affiant with the newspaper. Hill v. Hoover, 5 W 354.

There must be a distinct statement as to the time of service. Wendell v. Durbin, 26 W 390.

The requirement that if the service is not personal it shall be stated with whom the copy was left is complied with by stating that it was left "in presence of" a proper specified person. Lewis v. Hartel, 24 W 504.

Evidence of proper service by publication may be filed by leave of court after an appeal has been taken as of the day judgment was entered. Sueterlee v. Sir, 25 W 357.

In an action against 2 defendants, an affidavit that service was had on one to the affiant "known as the defendant therein named" is insufficient. Grantier v. Rosecrance, 27 W 488.

The presumption is that one who makes an affidavit that he is the publisher and that the notice specified was published in his paper for the time required had knowledge of the facts. Hart v. Smith, 44 W 213.

Where the motion papers for an amended return were submitted after the decision of the case it was too late to make such an amendment of the record as would cure the error. The defect was jurisdictional and could not be cured. Hall v. Graham, 49 W 553, 5 NW 943.

The practice of permitting service of process by other than an officer of the court and the law is a relaxation of the common-law rule; and the presumption indulged in when it is made by such an officer is not permissible in other cases. Hall v. Graham, 49 W 553, 5 NW 943.

If the time of service is not given in the body of the affidavit it will be presumed that it was made on the date given in the jurat. It must appear that the person who made service knew that the person served was the defendant mentioned in the summons. Reed v. Catlin, 49 W 686, 6 NW 326.

Unless the place of service is named there is no jurisdiction. Weis v. Schoerner, 53 W 72, 9 NW 794. See also Zwickey v. Haney, 63 W 464, 23 NW 577.

Exactness is required in a return when service has been made by substitution. Rehmstedt v. Briscoe, 55 W 616, 13 NW 687.

An appellate court may permit an amendment of the record so that it will show good service. Rehmstedt v. Briscoe, 55 W 616, 13 NW 687. See also Moyer v. Cook, 12 W 335.

It must appear that the summons was left with as well as delivered to defendant. Wilkinson v. Bagley, 71 W 131, 36 NW 836.

If due personal service of a summons is admitted with knowledge that it was not signed by a licensed attorney the defendant cannot allege that there was no service because of the absence of such signature. Prentice v. Stefan, 72 W 151, 39 NW 364.

An affidavit which uses the words that the persons served are all "personally known to him" (the affiant who made the service) "and are the identical persons named in said summons as defendants therein" is good. German Mut. Farmer Fire Ins. Co. v. Decker, 74 W 556, 43 NW 500.

An affidavit which shows publication in the Eau Claire Daily Leader shows a compliance with an order directing the publication of the summons in the "Daily Leader." It was otherwise as to the proof of the time during which publication should be made, the statement being that the same was printed and published in such newspaper "6 weeks successively, commencing," etc. Frisk v. Reigelman, 75 W 499, 43 NW 1117, 44 NW 766.

The court takes judicial notice of the name of the sheriff of the county in which it sits. Hence, a return signed "M. B., by J. L. R., deputy sheriff," is in due form and is presumptively correct. Martin v. C. Aultman & Co. 80 W 150, 49 NW 749.

A statement that service was made upon M. May 1st, and upon N. May 2d, by delivering to and leaving with them a certified copy of the summons, shows that each of them was served. Keith Brothers & Co. v. Stiles, 92 W 15, 64 NW 860, 65 NW 860.

An affidavit of service of summons upon a defendant corporation, which stated that the summons was delivered to an officer of defendant and that the affiant knew that the person served was such officer of the company, does not show a service within the governing statute. Affidavit should state that the person served was known to be the defendant mentioned in the summons. Kernan v. Northern P. R. Co. 103 W 356, 79 NW 403.

Proof of service attached to a summons and containing a statement that the signer served the summons on the defendant, naming him, and that he knows the person so served to be the identical person named as defendant in such paper, complies with sec. 2642, Stats. 1898. Porath v. Reigh & Salentine Co. 112 W 433, 88 NW 315.

Where a sheriff's return shows a legal service upon the defendant, the showing made upon a motion to set aside the service must be most satisfactory. Illinois S. Co. v. Dettlaff, 116 W 319, 93 NW 14.

Where the affidavit states that the person making the service knew the persons so served to be the identical persons named as the defendants in the above action, the requirement that the affidavit state that the person knew the persons served to be the persons mentioned in the summons was complied with. Schmidt v. Hoffman, 126 W 55, 105 NW 44.

262.18 History: 1959 c. 226; Stats. 1959 s. 262.18.

Reporter's Notes: This section is largely new but is to be compared with old s. 262.13 (1) which called for detailed proofs as to grounds for service by publication or service personally outside the state upon a defendant who failed to appear in the action. The last sentence of old s. 262.13 (1) provided that such proofs made against nonappearing defendants "shall be conclusive in all collateral actions and procedures." So far as the sentence limits the defendant's remedies in Wisconsin to proceedings to reopen the default judgment in the court which entered the judgment, the provision probably offends nothing in the federal constitution. But it seems clear that a nonappearing defendant is free to attack collaterally a personal judgment on grounds that the court which rendered it lacked either jurisdiction of the subject matter or jurisdiction over the person of the defendant. See, for example, Pennoyer v. Neff, 95 US 714 (1877) and Baldwin v. Iowa State Travelling Men's Ass'n, 283 US 522 (1931). The new section takes no position on the effect owing proofs of jurisdictional questions against the parties who make no appearance in the action.

262.19 History: 1959 c. 226; Stats. 1959 s. 262.19.

Reporter's Notes: This section is new. Its purpose is to permit trial of a cause in an-

other state upon a convincing showing that trial of the cause in Wisconsin is so inconvenient that substantial injustice is likely to result. The section makes this relief available on motion to any party—to a defendant upon a cause brought by a plaintiff, or to a plaintiff on a defendant's counterclaim. Relief, if granted, is a stay of further proceedings on the cause upon a condition that the moving party will consent to suit upon that cause in a more convenient forum. If a stay is granted, the Wisconsin court retains jurisdiction over the cause and the parties in order that further action may be taken, if necessary, to do justice between the parties.

No statute or case decision has been found which is precise authority for this section. However, it borrows heavily from two well established judicial ideas—the doctrine of forum non conveniens, and from statutes authorizing transfer of a case from one venue to another within the same judicial system—and the validity of the section seems free from constitutional doubt.

Doctrine of Forum Non Conveniens.

The doctrine of forum non conveniens assumes that a plaintiff could have brought his action in any one of two or more states. In other words, the assumptions are (1) that the cause of action is transitory; (2) that the defendant is amenable to process in two or more states; and (3) that in each of those states venue can be laid in a court having jurisdiction over the subject matter.

The doctrine also assumes that any forum which the plaintiff might have selected has discretion to dismiss the action when it appears that the cause can be tried more conveniently and justly in another state. Much doubt has been expressed on the question whether a court has any inherent discretion to dismiss a case within its own venue and jurisdiction requirements. The remedy of dismissal is harsh, and in fact is no remedy on the merits of the case at all. The plaintiff is compelled to start over in another state, something he may not always be able to do, even though the dismissal was based upon that assumption.

Another limitation upon the power of a state to dismiss actions brought by citizens of other states flows from Art. IV, s. 2, of the Constitution of the United States, which provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The U.S. Supreme Court early held that corporations are not "citizens" within the meaning of the clause, Bank of Augusta v. Earle, 13 Peters 519 (US, 1839), and thereafter states were sustained in imposing severe restrictions upon the use of their courts by foreign corporations. See generally Henderson, The Position of Foreign Corporations in American Constitutional Law (1918), particularly pp. 178-187.

It was not until 1929 that the Supreme Court first passed upon the application of Privileges and Immunities clause to state restrictions on the use of state courts by natural persons. But prior to that time the belief had been pretty general that the Privileges and Immunities clause compelled a state to grant more or less free access to its courts to citizens of other states. The Supreme Court had occasionally said so in dicta and several state courts (Wisconsin included: see Eingartner v. Illinois Steel Co., 1896, 94 W 70, 68 NW 664; State ex rel. Smith v. Belden, 1931, 205 W 158, 236 NW 542) relied on these dicta and flatly held that citizens of other states enjoyed the same court privileges as local citizens. On the other hand, courts in New York and South Carolina had long given the Privileges and Immunities clause a more restrictive interpretation. These courts held that the clause merely prevented state discriminations based on citizenship—and that it did not prevent a state from denying privileges to nonresidents which it granted to its own residents. Robinson v. Oceanic Steam Nav. Co. 112 NY 315, 19 NE 625 (1889); Collard v. Beach, 81 App. Div. 582, 81 NYS 619 (1903); Central R. Co. v. Georgia Co. 32 So. Car. 319, 11 SE 192 (1890).

This distinction that a state could discriminate in favor of its "residents" (though not in favor of its "citizens") has been subjected for a long time to much criticism as a mere "verbalism" to get around the Privileges and Immunities clause. 17 Harv. L. Rev., 54, 55 (1903); see also Meyers, The Privileges and Immunities of the Several States, 1 Mich. L. Rev. 364, 382 (1903). But verbalism or not, the distinction has won acceptance in the Supreme Court. It was accepted first in La Tourette V. McMaster, 248 US 465 (1919), where a South Carolina statute excluding nonresidents from serving as insurance brokers in the state was sustained over the objection that the statute discriminated in favor of South Carolina citizens. The Court observed that the words "resident" and "citizen" had different legal meanings and that state discrimination in favor of its residents, using that word in its ordinary legal sense, did not violate the Privileges and Immunities clause. In 1929 the Court relied upon the La Tourette decision to affirm the power of New York to close its courts to suits on foreign causes of action brought by nonresidents against foreign corporations. Douglas v. N. Y. N. H. & H. R. Co., 279 US 377 (1929); and see Missouri ex rel. Southern R. Co. v. Mayfield, 340 US 1 (1950) for a more recent application of the doctrine that a state does not violate the Privileges and Immunities clause by discriminating against nonresidents in the exercise of its judicial jurisdiction. The present rule boils down to this: it is only when a state bases its discrimination on the citizenship of the parties that the Privileges and Immunities clause is involved.

Other federal constitutional limitations also influence the exercise of state discretion to decline hearing a case within the jurisdiction and venue of its courts. The Full Faith and Credit clause of Art. IV, s. 1, compels a state to exercise jurisdiction where the only reason for refusal is that the cause of action arose under the statutes of a sister state. Hughes v. Fetter, 341 US 609 (1951). And apparently the Full Faith and Credit clause requires a state to entertain an action arising under the statutes of a sister state whenever there is any substantial justification for bringing the action in the state. See First Nat'l Bank

v. United Air Lines, 342 US 396 (1952). The Fourteenth Amendment doubtless imposes limitations, too: Due process requires that the discretion to dismiss the action must be exercised according to some rational basis; and the Equal Protection clause may become involved, particularly if the discretion relies upon racial or religious classifications. Apparently the Commerce clause imposes some limitations, especially where the state tends to make access to its courts so easy that maintenance there of litigation imported by nonresidents operates as a burden on commerce among the states. Davis v. Farmers Co-op Equity Co. 262 US 312 (1923).

But even with all these constitutional limitations considered, there remains to a state today a considerable range of discretion to dismiss cases within the jurisdiction and venue of its courts upon the ground that trial in the state is inconvenient and unjust. The doctrine under which this discretion is exercised is generally known now as the doctrine of forum non conveniens, a name given the rule in a widely cited law review article in 1929. Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929). Blair's central thesis was that courts possessed an inherent discretion to dismiss cases within their jurisdiction when it appeared that local trial would be unjust and inconvenient; and he cited a number of cases in which that kind of discretion had been exercised, including even a few cases in which the term "forum non conveniens" had been used.

The term "forum non conveniens" appeared to stick. By 1934, the United States Supreme Court asserted in dicta that a state "may in appropriate cases apply the doctrine of forum non conveniens." Broderick v. Rosner, 294 US 629, 643 (1935). In a dissenting opinion written in 1941, Mr. Justice Frankfurter spoke of "the familiar doctrine of forum non conveniens" that had become "firmly imbedded in our law." Baltimore & Ohio R. Co. v. Kepner, 314 US 44, 55-56 (1941). But if familiar and firmly imbedded, the doctrine is even now not accepted in a numerical majority of the states. Professor Barrett concluded in 1947 that it had not even been considered in most states, had been rejected in some, and was then in general operation only in the federal courts and the courts of half a dozen states — Florida, Louisiana, Massachusetts, New Hampshire, New Jersey and New York. Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380, 388-89 (1947).

Since 1947 the doctrine has won general recognition in at least five more states: California, Illinois, Minnesota, Oklahoma and Utah—and a sixth state, Missouri, applies it for foreign, nonstatutory torts involving nonresident parties, but rejects it for cases brought under the Federal Employers Liability Act. California: Price v. Atchison, T. & S. F. R. Co., 42 Cal. (2d) 577, 268 P (2d) 457 (1954); Illinois: Whitney v. Madden, 400 Ill. 185, 79 NE (2d) 593 (1948); Minnesota: Johnson v. C. B. & Q. R. Co. 243 Minn. 58, 66 NW (2d) 763 (1954); Oklahoma: St. L. S. F. R. Co. v. Superior Ct., 276 P (2d) 773 (1954); Utah: doctrine recognized, but not applied in Mooney v. D. R. G. W. R. Co. 118 Utah 307, 221 P (2d) 628 (1950); and Missouri: Applied to foreign nonstatutory tort in Elliott v. Johnston, 365 Mo. 881, 292 SW (2d) 589 (1957) and held inapplicable to Federal Employers Liability Act cases in State v. Mayfield, 362 Mo. 101, 240 SW (2d) 106 (1951).

The doctrine of forum non conveniens has been applied in federal courts since 1947. Koster v. American Lumbermens Mutual Cas. Co., 330 US 518 (1947); Gulf Oil Corp. v. Gilbert, 330 US 501 (1947). Congress, the following year, removed the need to apply the doctrine to the bulk of cases arising in District Courts by providing for a transfer of venue from one district or division to another "for the convenience of parties and witnesses, in the interest of justice." 28 U. S. C. s. 1404 (a) (1948). This venue transfer statute differs from the doctrine of forum non conveniens both in theory and practice. Transfer to another venue will be allowed on a lesser showing of inconvenience than required to justify dismissal under forum non conveniens, Norwood v. Kirkpatrick, 349 US 29 (1955). And federal jurisdiction is retained over the transferred case and the parties, thus preserving the action against the running of the statute of limitations and removing the harshest effects of the forum non conveniens doctrine. But dismissal on grounds of forum non conveniens may still result where transfer is impossible because the appropriate forum is in a foreign country. See Harrison v. United Fruit Co. 141 F Supp. 35 (S.D., N. Y. 1956).

The criteria for dismissing a case under the doctrine of forum non conveniens have been the subject of considerable discussion and variance of view. Broadly, it is agreed that the doctrine applies only in exceptional circumstances and that its object is to promote the ends of convenience and justice. Within these broad terms, the trial court has much discretion in deciding whether to dismiss a case and, where the doctrine operates, appellate courts have shown some hesitation to interfere with the exercise of trial court discretion for fear that the doctrine might thereby be converted into a new ground for appeal, delay, and inconvenience.

But precise standards for applying the doctrine have not emerged from the cases to date. Indeed, the equitable nature of the doctrine makes exact formulation of standards difficult—and probably unwise—in view of the many factors which may be relevant to the decision. The idea that the doctrine applies only to exceptional cases seems to mean that the moving party carries the burden of persuading the court to dismiss the case. Apparently, too, both convenience and justice must be considered in deciding whether to apply the doctrine; where the question has arisen, it has been held that mere convenience of the parties and witnesses is not enough. Thistle v. Halstead, 95 N. H. 87 (1948).

Nor is it enough for the moving party to show that trial at the forum will be inconvenient and unjust; rather it must be shown that, all things considered, trial elsewhere is both more convenient and more just. "But

unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 US 501, 508 (1947). An interesting application of this is found in Bagarozy v. Meneghini, 8 Ill. App. (2d) 285, 131 NE (2d) 792 (1955). There the defendant, an opera singer domiciled in Italy, was served in Chicago while on tour, charged with breach of a contract made in and governed by the laws of New York. The defendant was not amenable to process in New York and argued that the Illinois court should dismiss the action to permit the case to be tried in Italy. The plaintiff was a resident of New York and it seems likely that the Illinois court would have allowed the dismissal had the defendant been willing to stand trial in New York. The defendant's insistence upon trial in Italy was another matter, and the Illinois court was not persuaded that she had demonstrated that the balance was strongly in her favor on the question of convenience and justice.

Many other factors are relevant to this process of balancing the interests affecting the convenience and justice of the place of trial. Residence of the parties is relevant but does not alone control the decision to dismiss unless that decision is otherwise in balance. "It is true that under the doctrine an action by or against a resident will ordinarily not be dismissed as being [in] an inconvenient forum, but it is also true that ordinarily an action by or against a nonresident will not be dismissed as such." Gore v. U. S. Steel Corp. 15 N. J. 301, 104 A. (2d) 670, 676 (1954).

The distance from the forum to the place where the cause of action arose is relevant, particularly when considered in terms of the cost, difficulty (and, occasionally, impossibility) of obtaining proof at the forum of material issues which might be readily obtainable in the court of another state. But distance from the forum will not justify a dismissal where the moving party fails to show that trial elsewhere will not be both more convenient and more just than at the forum. Thistle v. Halstead, 95 N. H. 87 (1948); Ramsey v. Chicago Great Western R. Co. 247 Minn. 217, 77 NW (2d) 176 (1956).

The fact that the result at the forum might be different from that obtained at a more convenient place of trial is a factor which seems to weigh heavily in favor of dismissal. So dismissal has been ordered where it appeared likely that the conflict of laws rule at the forum would produce a result different from the one obtainable in the more convenient court. Universal Adjustment Corporation v. Midland Bank, 281 Mass. 303, 184 NE 152 (1933). Dismissal has also been allowed to prevent forum shopping for higher jury verdicts, as in the case commenced against a Pennsylvania corporation by a Virginia resident who carried his Virginia tort action 400 miles to New York in the hope of a larger verdict than he would have obtained at the scene of his loss. Gulf Oil Corp. v. Gilbert, 330 US 501 (1947). And New Jersey has struck the balance of convenience and justice in favor of dismissing an action commenced against a New Jersey corporation by an Alabama Negro who imported a wrongful death action from Alabama to avoid a southern jury verdict which allegedly would discriminate against Negro plaintiffs. Gore v. United States Steel Corporation, 15 N. J. 301, 104 A. (2d) 670 (N. J. 1954).

There is considerable dispute about the handling of the cause imported to take advantage of less crowded dockets at the forum. As a matter of justice between the parties, the proper choice would be the court where the least delay occurred. But arguing from the proposition that it is not the duty of a state to relieve against court congestion in other states, it has been said that it is proper to consider, as a matter of public interest, the burden which imported litigation imposes upon local taxpayers, local jurors, and the dockets of local courts. This view has the support of the United States Supreme Court. Gulf Oil Corp. v. Gilbert, 330 US 501 (1947). Utah has said that the burden resulting from imported litigation should be considered only in the event that the burden "becomes such as to interfere seriously with the business of the courts." Mooney v. D. R. G. W. R. Co. 118 Utah 307, 343, 221 P. (2d) 628 (1950). California indicates that the "expense and burden resulting to local taxpayers, courts, and jurors, of providing a forum for the trial of imported cases also weighs against the plaintiffs," apparently in every case. Price v. Atchison, T. & S. F. R. Co. 42 Cal. (2d) 577, 586, 268 P. (2d) 457 (1954). But the Utah and California rules merely indicate when it is appropriate for the forum to consider the burden imposed by imported litigation—and in neither instance is there indication as to the weight this factor is to be given in comparison with others also relevant. Despite the apparent sharp doctrinal split just indicated, it is not clear that the doctrine of forum non conveniens will operate to produce more dismissals in one state than the other. As Justice Jackson has shrewdly observed, "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." Gulf Oil Corp. v. Gilbert, 330 US 501, 508 (1947).

Transfer of Venue Statutes.

Most of the factors which are relevant to the transfer of a cause from one venue to another in the same judicial system are relevant to the question of dismissing a cause on forum non conveniens grounds. A discussion of statutes authorizing transfer of venue follows.

Existing Wisconsin venue statutes provide numerous grounds for transferring a transitory civil action from one venue to another. One such ground enables the court to order transfer "when the convenience of witnesses and the ends of justice would be promoted." Wis. Stat. s. 261.04 (2) (1957). This provision merely authorizes transfer, and a court in which venue is not proper cannot retain the cause on the ground that doing so would best serve convenience and justice. Meiners v. Loeb, 64 W 343, 25 NW 216 (1885). But a court in which venue is proper may, on grounds of convenience and justice, transfer the cause to any county, whether that county would have been a proper venue for commencing the action or not. Maher v. The Davis &

Starr Lumber Co., 86 W 530, 57 NW 357 (1893). Orders granting or denying transfer of venue are not appealable under Wis. Stats. s. 274.33 (1957). See Evans v. Curtiss, 98 W 97, 73 NW 432 (1897), holding that an order changing venue for convenience of witnesses is not appealable; and Sanders v. German Fire Ins. Co. 126 W 172, 105 NW 787 (1905), holding that an order denying transfer is not appealable. The question whether to transfer on grounds of convenience and justice is a matter within the sound discretion of the trial court, but refusal of a court to exercise any discretion may be challenged on appeal from judgment, Sanders v. German Fire Ins. Co. 126 W 172, 105 NW 787 (1905) or, in extreme cases, by seeking a writ of mandamus or certiorari in the court exercising superintending control over the trial court. See generally Review of Non-Final Venue Rulings in Wisconsin—Certiorari or Mandamus, 1954 WLR 306 (1954).

As noted earlier, it has been possible since 1948 for federal district courts to transfer a cause to another district or division "for the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. s. 1404 (a) (1948). Orders allowing or denying transfer are not directly appealable in the federal system and —as is true in Wisconsin—are reviewable only on appeal from judgment or, in extraordinary cases, by writ of mandamus issued from a circuit court of appeals. See The Scope, Effect and Review of Orders Under Section 1404 (a), 8 Stanford L. Rev. 388 (1956). The language of s. 1404 (a) limits transfer "to any other district or division where [the action] might have been brought." But it has been held that even though the defendant is not amenable to process in the district of the transferee court, or even though the venue cannot be properly laid in the transferee court, transfer may be granted where the defendant consents. Paramount Pictures, Inc. v. Rodney, 186 F (2d) 111 (C. A. 3, 1951); Anthony v. Kaufman, 193 F (2d) 85 (C. A. 2, 1951); compare General Electric Co. v. Central Transit Warehouse Co. 127 F Supp. 817 (W. D. Mo. 1955).

In the transfer of venue cases, there is some basis for the view that a lesser showing of "inconvenience" at the forum may be needed to justify transfer than is required to justify dismissal under the doctrine of forum non conveniens. The United States Supreme Court has said this specifically in connection with s. 1404 (a) in Norwood v. Kirkpatrick, 349 US 29 (1955). Nonetheless, the view is general that the party seeking transfer has the burden of persuading the forum that the transfer is desirable. But it is true in the transfer of venue cases, as it is in the forum non conveniens situation, that standardized criteria for transfer have not emerged from the cases.

The fact that a refusal to transfer is reviewable only on appeal from the judgment probably produces the result that reversal will be ordered only upon a showing that substantial error resulted from failure to transfer. Thus, in Chicago R. I. & P. R. R. Co. v. Hugh Breeding, Inc., 232 F (2d) 854 (C. A. 10, 1956), a defendant, whose motion for transfer had been denied by the trial court, tried to upset a judgment against him on the grounds that additional witnesses could have been available elsewhere who were not subject to subpoena by the trial court. The judgment was affirmed, the court declaring that it was not enough that the party seeking transfer merely assert that he intends to offer elsewhere witnesses not subject to process of the transferor court; the affidavit supporting the motion for transfer must set out enough to permit a court to pass upon the materiality of the evidence the missing witnesses would offer, and whether it would tend to establish a material fact which would not otherwise come before the court, or whether their evidence would tend to contradict testimony of other witnesses.

In general, however, the factors relevant to transfer of venue are the same that would be relevant to the question of dismissing on grounds of forum non conveniens. The difference between the two situations is simply that in the forum non conveniens case, the forum lacks power to transfer the case to a different judicial system and must either retain the case or order its dismissal. Where the more convenient court is to be found in the same judicial system as the forum, transfer is the appropriate remedy since jurisdiction over the case and the parties can be preserved, and the action can be adjudicated upon its merits without compelling a new start in another jurisdiction.

The paragraphs which follow describe the operative details in the new Wisconsin statute:

262.19 *Generally: The Purpose Is to Achieve Substantial Justice in the Exercise of Judicial Jurisdiction.*

Normally a court having jurisdiction over the parties and the subject matter should adjudicate the litigation before it. A party objecting to jurisdiction over his person may raise that objection in an appearance pursuant to s. 262.16 or if he makes no appearance, by a collateral or equitable attack upon a default judgment entered against him. Jurisdiction over the subject matter cannot be conferred by the parties. See s. 262.04 (1).

Occasionally it is seriously inappropriate for a court to proceed with a case, within its jurisdiction, that is pending before it. The purpose of this section is to enable the parties to obtain a stay of further proceedings in such cases. The stay should be allowed only when required in the interests of doing substantial justice between the parties. Mere convenience to the court is not enough. Nor is inconvenience to the parties or witnesses enough unless that inconvenience appears likely to result in substantial injustice to one of the parties.

The interests of justice require settlement of disputes on their merits. Thus a party seeking a stay must consent to suit elsewhere as a condition to requesting a stay. When such consent is given, the stay may be allowed "although the action could not have been commenced in the alternative forum without consent of the moving party." See s. 262.19 (1).

(1) *Stay on Initiative of Parties.*

Any party to the action may seek a stay on a cause pending against him. Venue trans-

fer statutes commonly permit any party to seek a transfer to another court on the grounds of justice and convenience. The doctrine of forum non conveniens has generally been confined to cases in which a defendant resists the exercise of jurisdiction in a case brought against him. At least one court, however, has permitted a plaintiff to invoke something resembling the doctrine to dismiss a counterclaim asserted by the defendant. F & F Laboratories Inc. v. Chocolate Spraying Co., Inc. 6 Ill. App. (2d) 299, 127 NE (2d) 682 (1955). S. 262.19 permits a stay of further action on a counterclaim where in the discretion of the trial court this is required to do substantial justice between the parties. Such a case will not be usual, however, since justice is ordinarily served best by putting an end to all controversy between the parties in one proceeding.

(2) *Time for Filing and Hearing Motion.*

A stay of proceeding is sought by motion filed prior to or with the answer if objection is made to trying any cause raised in the complaint, or prior to or with the reply if objection is made to a cause raised by counterclaim. The ruling on the motion shall be made prior to trial of the case on its merits and the order entered on the motion shall be appealable.

(3) *Scope of Trial Court Discretion on Motion to Stay Proceedings.*

The decision to stay further proceedings is left to the sound discretion of the trial court and this subsection enumerates some factors material to the questions of convenience and justice which the trial court may properly consider. A corollary of the rule just stated is that appellate review is confined to abuse of discretion by the trial court in granting or denying the stay.

No precise definitions of convenience and justice are attempted. In deciding whether to grant a stay, the same factors are relevant in general as those considered in passing on a question arising under the doctrine of forum non conveniens, or a motion for transfer to a more convenient venue. The test is not a matter of showing the inconvenience of trial in this state. Rather it is one of showing that trial outside this state is required to do substantial justice in the case.

(4) *Subsequent Modification of Order to Stay Proceedings.*

Once a stay of proceedings has been ordered, jurisdiction of the court continues over both the parties and the subject matter for the time fixed in this subsection. This continuing jurisdiction is terminated by the lapse of 5 years after the last court order entered in this state on the stayed action. Within the period that jurisdiction of the court continues over the stayed action and the parties, any party may on notice move to re-open the proceedings here in order that the court may take such further action as the interests of justice require. Upon the termination of jurisdiction of the court over the parties and the action, it is the duty of the clerk of the court in which the stay was granted to enter an order dismissing the case.

Forum non conveniens plea and jurisdiction under 1957 statutes is discussed in Lau v. Chicago & N. W. R. Co. 14 W (2d) 329, 111 NW (2d) 158.

262.20 History: 1959 c. 226; Stats. 1959 s. 262.20.

Reporter's Notes: This section is new. Its purpose is primarily that of a deterrent against abuse of the state's judicial power. The power of the trial court to order the plaintiff to pay, up to a sum of $500, the total expense to the defendant of appearing and obtaining the order dismissing the action for want of jurisdiction is discretionary. At the discretion of the court, too, is the matter of ordering recovery of statutory costs for a party who successfully obtains an order staying further proceedings under s. 262.19. This degree of flexibility should deter the assertion of frivolous jurisdiction claims and permit the trial courts to do substantial justice by taking into account such factors as the good faith of the plaintiff's jurisdictional claim.

CHAPTER 263.

Pleadings.

263.01 History: 1856 c. 120 s. 45; R. S. 1858 c. 125 s. 1; R. S. 1878 s. 2644; Stats. 1898 s. 2644; 1925 c. 4; Stats. 1925 s. 263.01; 1935 c. 541 s. 31.

On civil actions, and parties thereto, see notes to various sections of ch. 260; on place of trial of civil actions see notes to various sections of ch. 261; and on commencing civil actions see notes to various sections of ch. 262.

Filing a claim against the estate of a deceased in a county court is not the commencement of a civil action and so, even though a county court is a court of record, chapter 263 is not applicable to such proceedings. Estate of Beyer, 185 W 23, 200 NW 772.

Outline of rules of common-law pleading. Umbreit, 4 MLR 130.

263.02 History: 1856 c. 120 s. 46; R. S. 1858 c. 125 s. 2; R. S. 1878 s. 2645; Stats. 1898 s. 2645; 1925 c. 4; Stats. 1925 s. 263.02.

263.03 History: R. S. 1849 c. 113 s. 6; 1856 c. 120 s. 47; R. S. 1858 c. 125 s. 3; R. S. 1858 c. 148 s. 4; R. S. 1878 s. 2646, 3205; Stats. 1898 s. 2646, 3205; 1925 c. 4; Stats. 1925 s. 263.03, 286.02; Sup. Ct. Order, 204 W vi; Sup. Ct. Order, 214 W v; Sup. Ct. Order, 215 W v; 1935 c. 483 s. 8; Stats. 1935 s. 262.02 (4), 263.03; Sup. Ct. Order, 221 W v; Stats. 1937 s. 263.03; 1961 c. 518.

Revisers' Note, 1878: Section 3, chapter 125, R. S. 1858, using words as to place of trial to conform to the chapters on that subject, changing the article before "cause of action" to "each," for obvious reasons; and changing "relief" to judgment, in order that it shall not be supposed necessary for the prayer to embrace a demand for provisional remedies, as it often is, and perhaps reasonably.

Revisers' Note, 1878: Embraces section 4, chapter 148, R. S. 1858, in part, and is substantially as the section in the new code of procedure in New York, and is intended to do