SPECIAL AND GENERAL APPEARANCES IN WISCONSIN COURTS

Assuming all jurisdictional prerequisites have been met, an action may be classified in one of three categories: (1) when against the property itself it is considered *in rem*,[1] (2) when against the property upon a claim against the owner it is denominated *quasi in rem*,[2] and (3) when against the person of the defendant it is *in personam*.[3] In this comment only the third class will be fully considered. It would be well to note, however, that when jurisdiction falls into class one or two, non-action by defendant will not usually permit the court to grant an *in personam* judgment,[4] while actions on his part may change the proceedings from one *in rem* to one *in personam*.[5]

When a party enters an appearance in an action only to object to the court's jurisdiction, he is making what is usually denominated a special appearance. The Supreme Court of Wisconsin has, over the years, been extremely particular as to the legal niceties of just what constitutes a special or general appearance in the court of first im-

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[1] Consider, *e.g.*, actions for registration of title to land and for forfeiture.

[2] Such actions are usually started by attachment or garnishment, and if the defendant does not appear the court cannot award judgment for more than the property seized. In such cases it might be noted that it is the attachment of the property and not the return of the officer that gives the court jurisdiction. Robertson v. Kinkhead, 26 Wis. 560 (1870).

[3] The court here must have personal jurisdiction over the defendant, either by valid service or by his waiver of such procedural requirements. It is usually advisable to gain an *in personam* judgment wherever possible since the judgment will follow the defendant and be entitled to recognition in the other states, rather than be limited to the territorial limits of the state where rendered.

[4] See Pennoyer v. Neff, 95 U.S. 714 (1877). Consider, however, the effect of the decision in Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 Fed. 214 (6th Cir. 1922). Plaintiff sued non-resident defendant by attachment of property worth $2,000 and recovered a personal judgment of $30,000. Defendant had appeared specially in the action and moved the court to limit the inquiry to the property attached and then, after its motion was ignored, fought the claim on the merits. The court of appeals held the trial should have been limited to the property attached and the court did not gain personal jurisdiction by defendant going to trial on the merits since the defendant had at all times indicated it was objecting to the claim merely to the extent of the property seized. The court limited recovery to the $2,000 attached.

If the doctrine of this case is followed to its logical conclusion, it would seem that upon a proceeding *in rem* or *quasi in rem* defendant could appear specially just to fight the claim within the limits of the property attached. A decision here would not stop plaintiff from seeking a personal judgment elsewhere for the balance due or prevent defendant from reasserting a defense unsuccessful in the first suit. The desirability of such a course of action is questionable. See Industrial Trust Co. v. Rabinowitz, 65 R.I. 20, 13 A.2d 259 (1940), RESTATEMENT, JUDGMENTS § 76 (1942) and Note, 129 A.L.R. 1240 (1940). The *Salmon Falls* case does not appear to reflect the rule in Wisconsin. See note 5 *infra*.

[5] Wisconsin has so held in Luetzke v. Roberts, 130 Wis. 97, 109 N.W. 949 (1906), and First National Bank of Madison v. Greenwood, 79 Wis. 269, 45 N.W. 810 (1890) (See opinion on rehearing, 79 Wis. at 278, 48 N.W. 421 (1891)).

pression.[6] In the case of a special appearance the court has been emphatic as to what it expects. A "little slip" may be interpreted as a general rather than a special appearance and certain actions by the defendant may change an appearance into one of general character. Justice Marshall stated the essence of a special appearance in his syllabus to *Corbett v. Physicians Casualty Ass'n:*

> A defendant in an action, to preserve his status as not having been properly served with the summons, must abstain from making any appearance in such action other than to raise the question of jurisdiction of his person.[7]

Although the special appearance is not frequently used,[8] many problems do surround its use not only as to practice but also from the standpoint of policy considerations. Can the use of the special appearance be justified at all? For what purposes is it or should it be used? What restrictions has the Wisconsin court placed on it? Should changes in its use and the procedure needed to raise the question of validity of jurisdiction be made? These are the main questions that will be considered in this comment.[9]

To be valid, a judgment must meet four general requirements:[10]

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[6] For a questionable decision considering the effect given to a special appearance in another state (raising the jurisdictional issue) and the requirements of the Full Faith and Credit clause see Davis v. Davis, 259 Wis. 1, 47 N.W.2d 338 (1951). Plaintiff attacked the validity of a Wyoming divorce in which her attorney had entered a special appearance to object to that court's jurisdiction. The Wyoming court had taken jurisdiction and rendered a decree of divorce; the Wisconsin Supreme Court decided Wyoming was without jurisdiction because both parties were domiciled in Wisconsin and the wife had made no "personal appearance" in the Wyoming action. Discussed in Note, 28 A.L.R.2d 1303, 1325 (1953). Consider this case in the light of the public policy surrounding foreign divorce decrees where neither party lost his local domicil. See Weatherbee v. Weatherbee, 20 Wis. 499 (1866), a divorce case where the court held defendant could waive service requirement only by her appearance in the action and not by stipulation of waiver. On the question of collateral attack see Christ v. Davidson, 116 Wis. 621, 93 N.W. 532 (1903).

Query: As a general rule, under the doctrine of res adjudicata, should not failure to directly appeal an adverse ruling as to jurisdiction where the question is raised and litigated, act to prevent defendant from collaterally attacking the judgment later on the same ground?

[7] 135 Wis. 505, 115 N.W. 365 (1908). See Note, *Asking relief in addition to vacation of service of process as waiver of special appearance or of right to rely upon lack of jurisdiction*, 111 A.L.R. 925 (1937).

[8] The tendency in most cases seems to be to waive minor defects in service by a general appearance, since most technical defects would usually not be too difficult to cure. Although the special appearance is usually made in cases involving jurisdiction *in personam*, it can also be used for *in rem* and *quasi in rem* proceedings. See note 4 *supra*. A number of cases involving a defective writ of attachment, for example, has been included. See notes 1 and 2 *supra*.

[9] Questions of range of process and venue, although important collateral issues, will not be fully discussed in this comment. As to venue, see note 76 *infra*, 28 U.S.C. § 1391 *et. seq.* (Supp. 1952) and WIS. STAT. § 261.01 (1951).

[10] See RESTATEMENT, JUDGMENTS §§ 4-8 (1942) for their discussion of these points.

(1) The state must have the power to subject the parties and subject matter to its control.[11]

(2) A reasonable method must be employed to notify the defendants, who then must be given their "day in court."[12]

(3) The statutes setting up the court must make it competent to render a valid judgment upon the subject matter presented.

(4) The technical requirements necessary to the court's valid exercise of its power must be met.

In the ordinary, run-of-the-mill case where a personal judgment is sought, the only two jurisdictional problems that need be considered by the attorney are whether the court has (1) jurisdiction over the party and (2) jurisdiction over the subject matter.[13] A defect in the latter, usually a matter primarily of statutory construction, can never be waived and may be brought to the court's attention at any time.[14] Lack of jurisdiction over the person can be, and frequently is, waived; as a result, a possible defense is lost forever.[15] It is basic that a court may acquire jurisdiction over a party by his general appearance in the action,[16] but, except where state statute makes

[11] Justice Holmes in McDonald v. Mabee, 243 U.S. 90, 91 (1917), indicated that "The foundation of jurisdiction is physical power. . . ."

[12] *See, e.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

[13] Jurisdiction over the subject matter is usually conferred by the complaint, over the person by the summons or appearance and waiver of notice. For the Wisconsin cases see note 23 *infra*.

The decision of Moulton v. Williams, 101 Wis. 236, 77 N.W. 918 (1898), overruled on another ground, Rhode v. Quinn Construction Co., 219 Wis. 452, 263 N.W. 200 (1935), may be considered by some an anomaly. The time sequence in that case was (1) invalid service of summons by one not properly authorized to serve it, (2) running of the statute of limitations on the claim sued upon, (3) valid service of summons and (4) general appearance by defendant to plead statute of limitations as a bar to the action. The trial court allowed the statute of limitations to bar the action. The Supreme Court held that if the *defective* service prompted defendant's appearance (it was not known which summons prompted defendant's appearance) such appearance did not waive his defense of the statute of limitations because his appearance only gave the court jurisdiction over his person!

[14] Chief Justice Dixon in Peck v. School District No. 4, 21 Wis. 516, 522 (1867) said that where jurisdiction over the subject matter is lacking "it is well known that no consent or waiver of objection by the parties will confer it. Such an objection is never waived, but may be taken at any time, either on appeal or when the question of jurisdiction is collaterally involved."

[15] Procedural defects are usually waived if the point is not raised and "seasonably insisted" upon in the trial court, and a defect in the pleading may be cured by the verdict or findings. Servi v. Draheim, 254 Wis. 356, 36 N.W.2d 273 (1949). Where there is no appearance, however, the court can only gain personal jurisdiction by full compliance with the statutory requirements as to service of process. Kernan v. Northern P. R.R., 103 Wis. 356, 79 N.W. 403 (1899). A general appearance waiving defects in service usually results in a speedier adjudication and a saving of money for plaintiff as he is not required to start his suit again. Although a defense is thus lost, *quaere* as to the practical significance and the worth of such a defense.

[16] RESTATEMENT, JUDGMENTS § 19 (1942).

every appearance a general appearance:[17] "A court does not acquire jurisdiction over an individual by his appearance in an action to object that the court has no jurisdiction over him."[18]

If a party wishes to raise the question of lack of personal jurisdiction, he must enter a special appearance to that effect; should the court rule against him, he cannot preserve an exception to that ruling if he in any way enters the case on the merits.[19] To gain review of that order he must either (1) allow a default judgment to be taken against him and take an appeal, or (2) ask a higher court for a writ of prohibition to prevent the judge from exceeding his jurisdiction. As the Wisconsin Supreme Court put it in *Petition of Inland Steel Co.*:[20]

> In cases involving the validity of the service of summons, extraordinary hardship is inherent when such service is held valid by the trial court, because the defendant has to suffer a default judgment in order to test the question of the validity of the service . . . or else apply for a writ of prohibition, there being no appeal from an order holding the service valid, and the rule of this state being that if appearance is made on the merits the question of jurisdiction is waived.

To allow a default judgment can be costly, for a good defense on the merits may be lost, and to obtain a writ of prohibition requires a new and special proceeding in the higher court. These procedural difficulties will be considered in the following discussion of the Wisconsin cases in this area.

Wisconsin Court Decisions

The Wisconsin Supreme Court has decided time after time that a general appearance in an action waives any defects either in the

[17] In York v. Texas, 137 U.S. 15 (1890), the Supreme Court considered a Texas statute which made every appearance a general appearance. Although the court felt that it would be more convenient to raise the jurisdictional question in the court where the action was pending, due process was not violated since the defendant could attack the judgment collaterally if he remained out of court. While Texas still adheres to this rule, the majority of states do allow special appearances.

[18] Restatement, Judgments § 20 (1942).

[19] See note 72 *infra*. The Wisconsin court has held in a number of cases that it is not possible to preserve an exception to an adverse ruling on a motion to dismiss for want of jurisdiction. If the defendant after such a ruling enters the case on the merits he still waives any objections to procedural defects. Corbett v. Physician's Casualty Ass'n, 135 Wis. 505, 115 N.W. 365 (1908); Blackwood v. Jones, 27 Wis. 498 (1871), *criticized in* Steen v. Norton, 45 Wis. 412 (1878); Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630 (1869) (going to trial); Baizer v. Lasch, 28 Wis. 268 (1871) (demanding bill of particulars); Upper Mississippi Transportation Co. v. Whittaker, 16 Wis. 220 (1862) (request for 10 days to answer).

[20] 174 Wis. 140, 143, 182 N.W. 917, 918 (1921).

complaint, service of summons, attachment, or notice of deposition, motion, etc. The broad rule might be stated: Any defects in the court's acquiring or retaining jurisdiction over the person of a party will be waived by a *subsequent* general appearance.[21] The court has also extended this to include administrative proceedings of a quasi-judicial nature.[22] As previously noted, jurisdiction over the subject matter can never be waived.[23] A general appearance may also have some additional effects. For example, it will give the clerk or court the power to enter a default judgment as if personal service had been had.[24] Since venue can be changed by stipulation in some cases, a general appearance will be equivalent to such stipulation giving to one court and thus divesting another of jurisdiction.[25] Also, an objection that another court has primary jurisdiction will be waived.[26]

[21] Although most of the cases cited in this note support this general proposition, the following will also support the waiver of the defect indicated and are not mentioned elsewhere:

Process: State *ex rel.* Walling v. Sullivan, 245 Wis. 180, 13 N.W.2d 550 (1944); State *ex rel.* Haeselich v. Schweitzer, 131 Wis. 138, 111 N.W. 219 (1907); Atkins v. Fraker, 32 Wis. 510 (1873); Bell v. Olmsted, 18 Wis. 69 (1864) (leaving open the question of defect in service of writ of attachment); Givans v. Searle, 136 Wis. 608, 118 N.W. 202 (1908), and Woodruff v. Sanders, 18 Wis. 161 (1864) (defects in affidavit for attachment).

Motion notice: Morris v. P. & D. General Contractors, Inc., 236 Wis. 513, 295 N.W. 720 (1941); Priest v. Varney, 64 Wis. 500, 25 N.W. 551 (1885); Cartright v. Town of Belmont, 58 Wis. 370, 17 N.W. 237 (1883); Ross v. Heathcock, 57 Wis. 89, 15 N.W. 9 (1883); Brooks v. Northey, 48 Wis. 455, 4 N.W. 589 (1880); Gorton v. Bailey, 46 Wis. 633, 1 N.W. 217 (1879).

Appeal: Manufacturers & M.I.B. v. Everwear, 152 Wis. 73, 138 N.W. 624 (1913); Kemp v. Hein, 48 Wis. 32, 3 N.W. 831 (1879); Kasson v. Estate of Brocker, 47 Wis. 79, 1 N.W. 418 (1879); Perkins Adm'x v. Shadbolt, 44 Wis. 574 (1878).

Summons-Complaint: Brauchle v. Nothhelfer, 107 Wis. 457, 83 N.W. 653 (1900); Pryce v. Security Ins. Co. of N.Y., 29 Wis. 270 (1871); Waterhouse v. Freeman, 13 Wis. 339 (1861); Anderson v. Morris, 12 Wis. 689 (1860). *Cf.* City of Fond du Lac v. Bonesteel, 22 Wis. 251 (1867), where the court held no waiver.

Other: State v. Wertzel, 84 Wis. 344, 54 N.W. 579 (1893) (venue); Everdell v. Sheboygan & F. L. R.R., 41 Wis. 395 (1877) (garnishee examination); Miller v. McDonald, 13 Wis. 673 (1861) (deposition); Caughey v. Vance, 3 Pin. 275 (Wis. 1851) (court losing jurisdiction).

[22] McKesson-Fuller-Morrisson Co. v. Industrial Comm., 212 Wis. 507, 250 N.W. 396 (1933). *See also,* Bogue v. Laughlin, 149 Wis. 271, 136 N.W. 606 (1912), and State *ex rel.* Smith v. Cooper, 59 Wis. 666, 18 N.W. 438 (1884) (board of review); Kane v. City of Fond du Lac, 40 Wis. 495 (1876) (arbitration).

[23] Damp v. Town of Dane, 29 Wis. 419 (1872). For cases not cited elsewhere in this note see: Vogel v. City of Antigo, 81 Wis. 642, 51 N.W. 1008 (1892); Winnebago Furniture Mfg. Co. v. Wisconsin M. R.R., 81 Wis. 389, 51 N.W. 576 (1892); Mathie v. McIntosh, 40 Wis. 120 (1876); State *ex rel.* McCurdy v. Tappan, 29 Wis. 664 (1872). See Note, *Objection before judgment to jurisdiction of court over subject matter as constituting general appearance,* 25 A.L.R.2d 833 (1952).

[24] Lindauer v. Clifford, 44 Wis. 597 (1878); Egan v. Sengpiel, 46 Wis. 703, 1 N.W. 467 (1879).

[25] Carpenter v. Shepardson, 43 Wis. 406 (1877).

[26] Neitge v. Severson, 256 Wis. 628, 42 N.W.2d 149 (1950). *But cf.* Damp v. Town of Dane, 29 Wis. 419 (1872), where the court held a general appearance

What *does* constitute a general as distinguished from a special appearance? It is interesting to note that whether defendant's counsel denotes his appearance special or general is not of great moment since the court will consider his actions and the relief requested rather than his words alone.[27] It is suggested that when entering a special appearance the better practice would be to inform the court that you are doing so to question that court's jurisdiction, rather than simply moving for dismissal on that ground. Then the record would show that you have entered a special appearance.[28]

Although the court from the first[29] has repeatedly held that where defendant desires to object to the jurisdiction of the court he must appear on that ground alone and keep out of court for every other purpose, requests for relief consistent with the theory that the court has no jurisdiction will be permitted. In *Bitter v. Gold Creek Mining Co.*,[30] defendant moved to set aside service of summons and to enjoin the adverse examination but requested no relief on the merits. The court held on rehearing that an order enjoining the adverse was incidental to and not inconsistent with the motion to vacate insufficient service, was based solely on the lack of jurisdiction to proceed, and was no waiver of the jurisdictional defect.[31]

Differences over words used can be very important at times. In *State* ex rel. *Nelson v. Grimm*[32] the defendant asked for his "costs and disbursements" in entering a special appearance. The court held

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was a waiver of irregularities in that tribunal but not a waiver of the objection that another tribunal (over which the justice had no control) did not have jurisdiction. One may object only before the court that has power to consider the objection.

[27] Rock County Savings & Trust Co. v. Hamilton, 257 Wis. 116, 42 N.W.2d 447 (1950); Northwestern Securities Co. v. Nelson, 191 Wis. 580, 211 N.W. 798 (1927); Driscoll v. Tillman, 165 Wis. 245, 161 N.W. 795 (1917).

[28] See Carpenter v. Shepardson, 43 Wis. 406 (1877). At times the court has held what amounts to a presumption or strong inference. Where the record shows that the parties appeared, it must be construed as a general appearance. Lowe v. Stringham, 14 Wis. 222 (1861); Fulton v. State *ex rel.* Meiners, 103 Wis. 238, 79 N.W. 234 (1899). *Cf.* Sanderson v. Ohio C.R.R. & Coal Co., 61 Wis. 609, 21 N.W. 818 (1884), holding that a declaration that one appeared specially is conclusive unless something else in the record shows a conflict with subsequent acts of the attorney. In Ely v. Tallman, 14 Wis. 28 (1861), the court found a presumption (in absence of any contrary evidence) that appearance by an attorney for some of defendants included all those defendants over whom the court had still to gain jurisdiction to authorize his judgment. In Cron v. Krones, 17 Wis. 401 (1863), the court held a justice of the peace return which stated the parties "appeared" without qualification must be taken to mean a general appearance.

[29] *See, e.g.*, O'Dell v. Rogers, 44 Wis. 136 (1878), and Blackburn v. Sweet, 38 Wis. 578 (1875).

[30] 225 Wis. 55, 273 N.W. 509 (1937).

[31] *Cf.* Simon v. de Gersdorff, 166 Wis. 170, 164 N.W. 818 (1917).

[32] 219 Wis. 630, 263 N.W. 583 (1935).

that one can only get costs of action when such is pending, and by asking for costs he admits that fact:

> But the request for "costs and disbursements" implies full costs of action, and imposition of full costs is inconsistent with any but a general appearance.[33]

On the other hand a request to dismiss "with costs" implies only costs of motion and is consistent with a special appearance.[34]

The court has been more lenient toward minors in its application of the general appearance doctrine as shown by *Caskey v. Peterson.*[35] In that case the attorney for a minor defendant, improperly served with summons, served notice of retainer on plaintiff's attorney (generally sufficient to constitute a general appearance). The court held that such did not waive any defects since defendant had no guardian ad litem and the statute required a minor to appear by such guardian.

Care must be observed not only in what one says or does but with whom one joins in making the motion to dismiss. In *Schwantz v. Morris*[36] several defendants joined in a motion to vacate a default judgment on the ground of invalid service of three of the defendants (other two admittedly had good service). The court held that for each defendant to ask for relief in his own behalf would have been all right, but when they joined with four others it acted as a waiver of prior defects.

Actions Consistent With a Special or General Appearance

The court has held the following to be consistent with a special appearance and thus no waiver of defective procedure:

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[33] 219 Wis. 630, 637, 263 N.W. 583, 586 (1935).

[34] Kingsley v. Great Northern R.R., 91 Wis. 380, 64 N.W. 1036 (1895); Milwaukee Elevator Co. v. Feuchtwanger, 141 Wis. 266, 124 N.W. 264 (1910). In the earlier case, the court said at page 385:

> It is not denied but that the defendant might have costs of the motion upon granting the relief prayed, and we think it would be going too far to construe the present notice as an application for relief which the court could grant only in case it had jurisdiction of the subject matter and of the defendant, and, therefore, by a refined and exceedingly technical construction, was a waiver of that want of jurisdiction upon which it was expressly and constantly insisting.

See Note, *Relief as to costs or disbursements as changing special appearance to general appearance*, 102 A.L.R. 224 (1936).

Historically in Wisconsin it was the uniform practice of the territorial courts to award full costs in attachment suits even where the court was without jurisdiction. See Lorrain v. Higgins, 2 Pin. 454 (Wis. 1850). *Cf.* Elderkin v. Spurbeck, 2 Pin. 129 (Wis. 1849).

[35] 220 Wis. 690, 263 N.W. 658 (1936).

[36] 219 Wis. 404, 263 N.W. 379 (1935).

A. Motion to remove cause to federal district court.[37]

B. Appearance before a master in chancery (court commissioner) in a foreign state in response to plaintiff's subpoena to take deposition.[38]

C. Prayer for order setting aside service, dismissing action for want of service, restraining further proceedings until summons served, further relief as court deems necessary.[39]

D. Presence as a witness for garnishee defendant.[40]

E. Motion to set aside execution and levy made upon defendant.[41]

The court has held the following to be a general appearance and as such a waiver of defective procedure:

I. A motion to—

A. Amend return of officer to conform to the facts.[42]

B. Adjourn and for leave to produce testimony to enable court to adjudge legal and equitable rights.[43]

C. Set aside the complaint.[44]

D. Traverse the affidavit of attachment and plead in abatement.[45]

E. Non-suit plaintiff.[46]

F. "Set aside the findings of fact, conclusions of law and the judgment" based on the record.[47]

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[37] State *ex rel.* Bergougnan R. Corp. v. Gregory, 179 Wis. 98, 190 N.W. 918 (1922). The United States Supreme Court has also held there is no waiver under such circumstances in Cain v. Commercial Publishing Co., 232 U.S. 124 (1914). See Note, *Appearance for purpose of making application for removal of cause to Federal court as a general appearance.* 81 A.L.R. 1219 (1932). It should be noted that this is obsolete under the 1948 revision of the code since removal is now had by filing proper paper in federal district court. 28 U.S.C. § 1446(a) (Supp. 1952).

[38] State *ex rel.* Cronkhite v. Belden, 193 Wis. 145, 214 N.W. 460 (1927), *overruled on another point in* Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (1947).

[39] Sanderson v. Ohio C.R.R. & Coal Co., 61 Wis. 609, 21 N.W. 818 (1884).

[40] Beaupre v. Brigham, 79 Wis. 436, 48 N.W. 596 (1891).

[41] Blackburn v. Sweet, 38 Wis. 578 (1875).

[42] Rix v. Sprague Canning Machinery Co., 157 Wis. 572, 147 N.W. 1001 (1914); Bestor v. Inter-County Fair, 135 Wis. 339, 115 N.W. 809 (1908).

[43] Evans v. Orgel, 221 Wis. 152, 266 N.W. 176 (1936). See Note, *Appearance to make application for extension of time or continuance, or order in that regard, as waiver of objection to jurisdiction for lack of personal service,* 81 A.L.R. 166 (1932).

[44] Northrup v. Shephard, 26 Wis. 220 (1870).

[45] Williams v. Stewart, 3 Wis. 773 (1854); Rose v. Barr, 2 Wis. 492 (1853). See Note, *Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction,* 55 A.L.R. 1121 (1928) and 129 A.L.R. 1240 (1940).

[46] Stonach v. Glessner, 4 Wis. 275 (1855).

[47] Gale v. Consolidated Bus & Equipment Co., 251 Wis. 642, 30 N.W.2d 84 (1947); Coad v. Coad, 41 Wis. 23 (1876).

G. Open judgment and for leave to file answer.[48]

H. Vacate default judgment.[49]

I. Vacate judgment against property with immaterial and non-litigated allegations.[50]

J. Set aside judgment because—

1. Complaint states no cause of action.[51]
2. Proof of pendency of action was not filed with register of deeds as required by statute.[52]
3. Garnishee defendant was not indebted to principal defendant.[53]
4. Judgment was illegal, taxation of costs was excessive and computation of amount due was erroneous.[54]
5. Excessive costs were taxed, no affirmative relief was asked, and the action was prosecuted under a champertous agreement.[55]
6. Proof was lacking and excess damages were awarded.[56]
7. Defendant was victim of excusable neglect (under statute).[57]

II. A stipulation as to—

A. Extension of time to answer.[58]

B. Cause, time and place of trial.[59]

C. Bill of exceptions.[60]

III. A petition or application to the court to or for—

A. Postponement of sale.[61]

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[48] Gray v. Gates, 37 Wis. 614 (1875), *overruled in part by* Kingsley v. Steiger, 141 Wis. 447, 123 N.W. 635 (1910). See discussion at page 303-304 *infra.*

[49] Spencer v. Osberg, 152 Wis. 399, 140 N.W. 67 (1913).

[50] Driscoll v. Tillman, 165 Wis. 245, 161 N.W. 795 (1917).

[51] Grantier v. Rosecrance, 27 Wis. 488 (1871).

[52] Alderson v. White, 32 Wis. 308 (1873).

[53] Wickham v. South Shore Lumber Co., 89 Wis. 23, 61 N.W. 287 (1894).

[54] Gale v. Consolidated Bus & Equipment Co., 251 Wis. 642, 30 N.W.2d 84 (1947); Alderson v. White, 32 Wis. 308 (1873).

[55] Gilbert-Arnold Land Co. v. O'Hare, 93 Wis. 194, 67 N.W. 38 (1896).

[56] Anderson v. Coburn, 27 Wis. 558 (1871).

[57] Pfister v. Smith, 95 Wis. 51, 69 N.W. 984 (1897); Farmington Mutual Fire Ins. Co. v. Gerhardt, 216 Wis. 457, 257 N.W. 595 (1934). See WIS. STAT. § 269.46 (1951).

[58] State *ex rel.* Attorney General v. Messmore, 14 Wis. 115 (1861). *But cf.* the effect given such a stipulation by the court in Dauphin v. Landrigan, 187 Wis. 633, 205 N.W. 557 (1925).

[59] Gale v. Consolidated Bus & Equipment Co., 251 Wis. 642, 30 N.W.2d 84 (1947); Keeler v. Keeler, 24 Wis. 522 (1869).

[60] Gale v. Consolidated Bus & Equipment Co., 251 Wis. 642, 30 N.W.2d 84 (1947).

[61] Tallman v. McCarty, 11 Wis. 401 (1860).

B. Order to be impleaded and for filing of cross complaint.[62]

C. Change of venue.[63]

D. Adjournment (waiving defects in prior adjournments).[64]

E. Allowance of homestead exemption on property foreclosure.[65]

IV. Action by a party to—

A. Give notice of retainer and file same with clerk.[66]

B. Demand bill of particulars.[67]

C. Demur to complaint.[68]

D. Submit defense on affidavits.[69]

E. File a counter-claim.[70]

F. Adjourn by mutual consent (returning jurisdiction that court lost by improper adjournment).[71]

G. Put in an answer and go to trial on the merits.[72]

H. Consent to adjournment and submit to judgment.[73]

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[62] Gale v. Consolidated Bus & Equipment Co., 251 Wis. 642, 30 N.W.2d 84 (1947).

[63] Rix v. Sprague Canning Machinery Co., 157 Wis. 572, 147 N.W. 1001 (1914); State *ex rel.* Engle v. Hilgendorf, 136 Wis. 21, 116 N.W. 848 (1908).

[64] Cron v. Krones, 17 Wis. 401 (1863).

[65] Northwestern Securities Co. v. Nelson, 191 Wis. 580, 211 N.W. 798 (1927).

[66] German Mutual Farmer Fire Ins. Co. v. Decker, 74 Wis. 556, 43 N.W. 500 (1889). *But cf.* Dikeman v. Struck, 76 Wis. 332, 45 N.W. 118 (1890), *overruled by* Zimmerman v. Gerdes, 106 Wis. 608, 82 N.W. 532 (1900). In the Dikeman case the court had held a filing of notice of retainer, special appearance to appeal and notice of appeal constituted a general appearance. *But see* Caskey v. Peterson, 220 Wis. 690, 263 N.W. 658 (1936), discussed at page 298 *supra.*

[67] Baizer v. Lasch, 28 Wis. 268 (1871).

[68] Coffee v. City of Chippewa Falls, 36 Wis. 121 (1874).

[69] Brown v. Sucher, 258 Wis. 123, 45 N.W.2d 73 (1950).

[70] Jones v. Citizens' Savings & Trust Co., 168 Wis. 646, 171 N.W. 648 (1919). Filing of counterclaim and general appearance waived objection that another court had primary jurisdiction. Is this a wise decision? *Cf.* with cases in note 26 *supra.*

[71] Fulton v. State *ex rel.* Meiners, 103 Wis. 238, 79 N.W. 234 (1899).

[72] Estate of Carl Schaeffner: Appeal of Wolff, 45 Wis. 614 (1878); Krueger v. Pierce, 37 Wis. 269 (1875); Congar v. Galena & C.U.R.R., 17 Wis. 477 (1863). In Lowe v. Stringham, 14 Wis. 222, 225 (1861) the court said:

> We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this, would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all.

See Notes, *Taking steps to contest a cause on the merits after a special appearance, as waiver of objections to jurisdiction over the person,* 16 L.R.A. (N.S.) 177 (1908), and *Participation by defendant in trial on merits after objection to jurisdiction, made under special appearance, has been overruled, as waiver of objection,* 93 A.L.R. 1302 (1934) and 107 A.L.R. 1102 (1937).

[73] State *ex rel.* Weisskopf v. Byrne Brothers Co., 185 Wis. 237, 201 N.W. 372 (1924).

I. Object to receiver's report.[74]

J. Appeal from justice to circuit court.[75]

VICTORY OF FORM OVER SUBSTANCE?

The most serious question that was posed earlier was whether the special appearance can be justified at all. Except where hardship exists, the answer would seem to be *No.* In most cases loss of the technical defense of improper service will work no hardship on the defendant. Where such defendant lives in Wisconsin or has property within the state subject to the jurisdiction of the court, there is little reason to permit him to come into court and object to that court's jurisdiction. If venue is improperly laid (except in a case where venue is considered jurisdictional), that can be changed upon motion or waived.[76] If defendant is from out of state and amount is over $3,000 he may be able to remove the case to the federal courts on grounds of diversity and then ask the federal court to change venue to his own state on the ground of forum non-conveniens. Any other objection will merely throw a procedural block into plaintiff's path. If the defendant has a good defense, let him enter the case and have it decided on the merits. If defendant has no defense and is or should be liable for the claim, what equitable reason can be given for his fighting (and perhaps defeating) the case on a small point of jurisdiction? There exists also the possibility that defendant could perpetrate fraud upon the court in making a special appearance.[77]

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[74] Rock County Savings & Trust Co. v. Hamilton, 257 Wis. 116, 42 N.W.2d 447 (1950).

[75] Fairfield v. Madison Manufacturing Co. 38 Wis. 346 (1875), *limited by* Steen v. Norton, 45 Wis. 412 (1878), as basis of earlier decision not entirely clear; Ruthe v. Green Bay & M. R.R., 37 Wis. 344 (1875); Barnum v. Fitzpatrick, 11 Wis. 81 (1860).

[76] In certain cases where realty is involved, venue is considered jurisdictional. See WIS. STAT. § 261.01(1) (1951).

Some attorneys start suits on out of state defendants purely for their nuisance value. If a valid claim exists, defendant has the same opportunity to change venue or remove to the federal courts and change venue as any other out of state defendant. If no basis for the claim exists, a complaint to the State Bar Association or a suit for abuse of judicial process might be sufficient to forestall further proceedings.

To what extent is a judgment against a non-resident upon a valid claim unfair to the interest of defendants? Suit will probably be brought either where the bulk of plaintiff's testimony can be found, or else where jurisdiction over defendant can be gained. The statutes provide generally for venue either where the cause of action arose or where defendant resides, the latter embodying the idea that a defendant should be sued at his home. *Quaere* as to whether this theory of suit at defendant's domicile is justified.

[77] In Plovey v. Vogele, 264 Wis. 416, 422, 59 N.W.2d 495, 498 (1953), the court suggests the problem of a defendant contending that he was not the operator of a motor vehicle which caused injury to the plaintiff:

> However, where the issue of jurisdiction is raised by special appearance, the trial court has the discretionary power to require the defendant, who

A frequent reason for raising a jurisdictional question is to allow the statute of limitations to run as to the claim before a new and valid action can be started. A strong argument could be made that if plaintiff waits until the statute of limitations has almost run before starting his action (plaintiff usually having to take the initiative in litigating a claim), he should not be heard to complain when thrown out of court on a technical ground, for such a time lapse may have effectively diminished defendant's opportunity to prove his defense. In any case, the modern trend being to pay more attention to substance than to form, only when defendant can show hardship in being called into court on defective process should he be allowed to defeat a case on mere procedural grounds.[78]

The primary example of hardship that could exist is where actual notice of a pending action fails. Wisconsin has by statute permitted a judgment based on notice by publication to be opened within one year of actual notice as long as it is within three years of entry of judgment.[79] A judgment can also be reopened in the discretion of the trial court on a showing of "mistake, inadvertence, surprise or excusable neglect."[80] As has been previously noted,[81] a motion to set

claims he was not the driver, to appear personally in court and confront witnesses to the accident. If questions of fact are raised, the trial court may require the taking of testimony in open court in lieu of relying entirely on affidavits and counteraffidavits. The trial courts, therefore, by employment of such means, can prevent fraud from being perpetrated in cases of this kind in which the jurisdiction of the court over the person of the defendant is challenged by special appearance.

[78] In Cole v. Mitchell, 77 Wis. 131, 134, 45 N.W. 948, 949 (1890), the court expressed its view on using a technical rule thus:

> The defendants appeared, however, not to ask for more time or longer notice [of motion], or for any postponement, or that the notice be set aside, or to claim that there was nothing due upon the judgment and therefore no merit in the application, but "specially for the purpose of objecting to the jurisdiction and authority of said court to grant said motion, and for no other purpose whatever." It does not appear that it was not convenient for the defendants to meet the motion at that time, or that there was any reason for its not being heard and disposed of at that time, except the purely technical one that the notice was shorter than the statute and rules require. There were therefore no merits in the motion to vacate the order. . . .
>
> The defendants had actual notice of the motion and the time of hearing it. This gave the court jurisdiction of their persons, and they were present when the order was made.

[79] WIS. STAT. § 269.47 (1951).

[80] WIS. STAT. § 269.46 (1951). Probate courts are in a different position in this matter than most courts. In addition to their statutory power to reopen (WIS. STAT. § 324.05 (1951)), and the general statute (§ 269.46), it was early held that "The county court, sitting as a court of probate, may, at any time, in furtherance of justice, revoke an order which has been *irregularly* made or procured by fraud." [Emphasis supplied] *In re* Fisher, 15 Wis. 511 (1862). This has been limited to the extent that rights confirmed by the statute of limitations cannot be disturbed. Betts v. Shotton, 27 Wis. 667 (1871). Judgment in these cases was apparently not reopened under the general statute which existed as early as 1858, and *quaere* as to what extent such decisons could be used to meet our current problem since fraud upon a probate court was a major factor in each.

[81] See notes 48 and 57 *supra*.

aside a judgment on this latter ground will act as a general appearance and waive any defects in procedure. In *Kingsley v. Steiger*[82] plaintiff published notice and set the matter for trial in such a way that defendant did not get any actual notice until three years after entry of judgment. The court decided he did not come within the statute allowing him to defend within three years and thus would be permitted to defend only if the trial court could find him qualified under its general discretionary power. Although the defendant had a meritorious defense, the court felt that mere lack of personal service or lack of notice is not enough to come within the statute. As a result of these decisions, it would appear that a trial court would be justified in sustaining a personal judgment where due notice had failed but where defendant had come into court later to ask relief from the judgment, thus appearing generally and waiving all defects. If the court denied his motion (a discretionary decision) there is little chance the Supreme Court would reverse. If the defendant had made a collateral attack upon the judgment on the ground of lack of jurisdiction, perhaps a different result would have occurred. Would it not be the better practice, however, to permit attack directly on a judgment granted without jurisdiction?

The Supreme Court has in a long line of cases held or indicated that an appeal from a default judgment will not waive defects.[83] This is usually sufficient for the person with notice, but what of our case where no *actual* notice exists and the time for appeal lapses? *Quaere* as to why under such hardship circumstances (assuredly there would be but few such cases) it would not be the better policy to allow defendant to enter court and move to set aside a judgment for lack of jurisdiction, with an appeal from such court order *without waiving the very defect of which he complains*. This setting aside of the judgment might be further conditioned on the necessity of defendant submitting to the court's jurisdiction to try the case on the merits and waiving a defense on the statute of limitations. This would accomplish the dual result of not allowing form to defeat substance either as to plaintiff or defendant. If we accept the argument that plaintiff should not be barred by defendant's technical defense, must we not also prevent

[82] 141 Wis. 447, 123 N.W. 635 (1910).

[83] Electric Appliance Co. v. Warren, 115 Wis. 477, 91 N.W. 970 (1902); Rockman v. Ackerman, 109 Wis. 639, 85 N.W. 491 (1901); Zimmerman v. Gerdes, 106 Wis. 608, 82 N.W. 532 (1900); Kernan v. Northern P. R.R., 103 Wis. 356, 79 N.W. 403 (1899); McConkey v. McCraney, 71 Wis. 576, 37 N.W. 822 (1888); Wilkinson v. Bayley, 71 Wis. 131, 36 N.W. 836 (1888); Rehmstedt v. Briscoe, 55 Wis. 616, 13 N.W. 687 (1882); Weis v. Schoerner, 53 Wis. 72, 9 N.W. 794 (1881); Hall v. Graham, 49 Wis. 553, 5 N.W. 943 (1880); Matteson v. Smith, 37 Wis. 333 (1875); Sayles v. Davis, 20 Wis. 302 (1866); Knox v. Miller, 18 Wis. 397 (1864).

defendant from being barred by plaintiff's technical argument of waiver?

If we assume that the need for a special appearance does exist, should there not be a better method of gaining review of a judge's ruling in a special appearance? From a practical standpoint, two solutions present themselves. First, the statutes could allow a direct appeal from a court order upholding jurisdiction as it does from an order dismissing the action for want of jurisdiction (a final order). Second, where timely objection has been made and the court has ruled that it has jurisdiction, the statute could preserve such defense should the case ever be appealed.[84] This latter is the better suggestion and is currently being used by the Federal Code of Civil Procedure.[85]

To summarize: (1) It would be no hardship (except possibly from the standpoint of preparation) to force defendant to try the case on the merits if he appears at a hearing date. (2) If the defendant is certain that no jurisdiction exists over his person, let him remain out of court and appeal from a default judgment (without waiving procedural defects). (3) If defendant is without actual notice, it would be less of a hardship on plaintiff to allow defendant to open the judgment for the purpose of presenting his defense to the merits, than it would be on defendant to foreclose him from further action.

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[84] The Wisconsin court suggested in Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630 (1869), that a trial on the merits after a denial of a motion to dismiss would give the party an unjust advantage. If he won on the merits, it would be a valid judgment, but if he lost he could still claim he never was in court at all. See also note 72 *supra*.

[85] See Rule 12(b). See also, RESTATEMENT, JUDGMENTS § 19 (1948 Supp.). A court may make an order permitting defendant to plead to merits without waiving his right to litigate the question of jurisdiction.