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Contemporary Problems in Conflict of Laws Jurisdiction by Statute

PART II

By EDWIN W. BRIGGS*

INTRODUCTION

This paper is the second half of a two part study of statutes broadening the grounds on which local courts may exercise personal jurisdiction by substitute service. Part I appears in a Conflicts Symposium published in the Ohio State Law Journal, Spring, 1963.

Part I compared the provisions of four "typical" statutes, including the recently approved Uniform Act,† dealing with this subject, which were drafted in the light of the greatly expanded constitutional authority spelled out in *Int'l Shoe Co. v. State of Wash.,* ‡ and *McGee v. Int'l Life Ins. Co.* § The Montana, † Illinois ‡ and Wisconsin § Acts were the other three statutes discussed there. However, Part I devoted the bulk of its analysis to the limitations on that expanded constitutional authority set for in *Hanson v. Denckla.* ‌ It found very well defined limits on the further broadening of the permissible basis for substituted service, determined by the subject matter out of which the issues arise. These limits have been stated in quite recent leading United States Supreme Court cases, some of which have restricted rather than broadened the constitutional power of courts to exercise jurisdiction.⁴

Part II considers the general question of whether some matters generally appearing in process statutes should be omitted in a completely rationalized code; it also points out that there are certain cognate subjects that should be examined carefully, either to include them in the "ideal" process statute, or at least to be sure that they are properly dealt with at

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‡232 U.S. 310 (1945).


†REVISED CODES OF MONTANA 1947, § 93-2702-2B (Rule 4) (Supp. 1963); MONT. LAWS 1961, ch. 208, § 4. Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.

‡ILL. ANN. STAT., ch. 110, § 17 (1956).


⁴E.g, *May v. Anderson, 345 U.S. 528 (1952),* apparently requiring compulsive personal service over defendant parent in a custody proceeding; *Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957),* denying any power in a divorcing court to render a binding decree on alimony without actual personal service over the defendant spouse; *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950),* strongly reaffirmed in *Schroeder v. City of N.Y., 83 S. Ct. 279,* ruling that notice by publication is not sufficient even in a *quasi in rem* proceeding if personal notice is possible.
other points in the Code. However, since Mr. Towe’s recent study* of the criteria for determining the constitutional limits of this legislation enlarging personal jurisdiction, as indicated in federal and state decisions, only touched on the actual scope of Montana’s provisions, it seems desirable to review here somewhat more fully than was possible in Part I the provisions of the Montana Code authorizing substitute service and to compare them with the other comprehensive Acts considered there.

**Montana’s Substitute Service Statute**

These enlarged bases supporting substitute service are enumerated in the Montana Code as follows:10

...[A]ny person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing . . . of any of the following acts:

(a) the transaction of any business within this state;
(b) the commission of any act which results in accrual within this state of a tort action;
(c) the ownership, use, or possession of any property, or of any interest therein, situated within this state;
(d) contracting to insure any person, property, or risk located within this state at the time of contracting;
(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state or as executor or administrator of any estate within this state.

Although modeled after the comparable Illinois statute,11 two clauses have been added, apparently suggested by somewhat similar provisions in the Wisconsin Act.12 These are clauses “(e)” and “(f)”. The Uniform Act includes “(e)”, but excludes “(f)”.

In its total context, Montana’s statute possibly is among the broadest of any coming to the attention of the writer in the areas covered, though Wisconsin’s Act states some additional grounds for authorizing substitute service. Clauses “(a)”, “(b)” and “(e)”, taken together, intend to assert personal jurisdiction on a “single act” basis, with respect to any such “act” which may affect the governmental interests of the forum, wherever that act occurs, in the transactional, the contractual or the tortious areas.

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10Supra note 4.

11Supra note 5.

12In its revision of its Judicature Act, enacted in 1961 (effective January 1, 1963), Michigan’s corresponding provisions more nearly parallel those of Montana’s than either Illinois’ or Wisconsin’s, and must be considered substantially as broad as Montana’s. Moreover, Michigan has seen fit to state the bases for exercising both general and limited personal jurisdiction for individuals and for associational defendants separately, though they are largely repetitious. MICH. STAT. ANN., §§ 27A.701—27A.735 (1962).
Hence, jurisdiction often may be asserted under more than one of the clauses.14 So, special jurisdiction with respect to product liability may arise under either (a), (b) or sometimes, perhaps, (e).

Scope of Clause "(a)"—Any Business

It now is clear that the phrase “any business” in “(a)” refers to a “single transaction” or “contract”; it is not necessary even that such “contract” or transaction be wholly executed in the forum.15 Though the phrase “any business” still must be construed by the courts, if a substantial enough part of a completed transaction takes place in the forum to make it “reasonable” to subject the defendant to personal jurisdiction, that suffices under current constitutional doctrine.16 In McGee, the United States Supreme Court made it clear that a “single transaction” or contract is enough to satisfy due process; the Illinois Supreme Court has construed its Act generally, including the phrase “transaction of any business,” as intending to exercise personal jurisdiction to the full limits of due process.17 A Maryland statute and decisions18 thereunder support this con-

14Supra note 1, at 6. In Note, Ownership, Possession, Or Use of Property As a Basis Of In Personam Jurisdiction, 44 Iowa L. Rev. 374 (1959) the author goes on his way to support the contention that “owing or possessing real property” in the forum should be a sufficiently substantial and enduring contact to justify the exercise of personal jurisdiction over such person in causes of action unrelated to such property, if they arose out of other acts within the state. Id. at 377-S, 383. The writer is unduly influenced by the German practice of subjecting a defendant to personal jurisdiction in any cause of action if he owns any interest of substance located in Germany. See, de Vries & Lowenfeld, Jurisdiction in Personal Actions—A Comparison of Civil Law Views, 44 Iowa L. Rev. 306, 330-334. (1959) The proposal may be doubted on a number of grounds. On statutory construction alone, there is no reason to suppose that a legislature will resort to the ownership of land, as the contact to support personal jurisdiction on an unrelated cause of action, when, the subject giving rise to such action, may itself be used directly as such basis.

15McGee v. Int’l Life Ins. Co., 355 U.S. 220 (1957), makes it clear that not only does a “single transaction” constitute “any business” under these statutes, but that it is not even necessary that every “act” in the transaction take place in the forum. Substituted service is constitutionally permissible if the transaction has a “substantial connection” with the forum under this ruling. Though some earlier decisions construed the Illinois statute restrictively, generally finding a mere lack of “substantial connection,” the leading decision affirms the proposition that section 17, “reflects a conscious purpose to assert jurisdiction over non-resident defendants to the extent permitted by the due-process clause.” Nelson v. Miller, 11 Ill. App. 3d 389, 143 N.E.2d 673, 679 (1957). Berlemann v. Superior Distributing Co., 17 Ill. App. 2d 522, 151 N.E.2d 116 (1958), applies this principle specifically to a business transaction involving the solicitation of an order within the state. Further, editorial comment to both the Illinois statute and the Uniform Act approve this construction. Supra note 5; Jenner and Tone, Historical and Practice Notes, 16 (Supp. 1963); Op. cit. supra note 1, at 6.

16Op. cit. supra note 14. For a decision dramatically supporting the thesis developed in Part I of this paper, (being published in 24 Orro Sr. L. J. 223 (1963) that, though a series of acts may occur in the forum, whether it will be reasonable to so subject the defendant to personal jurisdiction there, may often depend on the institutional affiliation of the principal subject matter of the “transaction(s),” see, Orton v. Woods Oil & Gas Co., 249 F.2d 198 (1957), construing the Illinois statute, supra note 5 at § 17(1)(a).


clusion and the editorial comment in the Uniform Act strongly affirms the same proposition. However, some "transactions" vitally affecting the forum's interests may be executed entirely outside the forum—or conduct in connection therewith may be such that there is doubt whether it should be characterized as "transacting business" in the forum. Here is where clause "(e)" steps in broadening the jurisdiction, so as to include in the sweep of Rule 4, as nearly as possible every transaction in which Montana has any governmental interest—even as to a wholly executory foreign contract—providing the subject matter substantially affects Montana.

Clause "(b)—Accruing Tort

Clause "(b)," providing for substitute service in the tort field, probably is the broadest single provision authorizing substitute service on a tort action. The similar Illinois provision is quite ambiguous as to whether it requires that both the harmful act and the injury occur in Illinois. Though that ambiguity has since been resolved in favor of a broad construction requiring only that the "injury" occur there (i.e., gets the same result by statutory construction), the Montana clause is worded so as clearly to require that construction—the negligent act causing the ultimate "accrual in this state of a tort action" may occur anywhere. In one respect, this section also is substantially broader in scope than either Wisconsin's or the Uniform Act's comparable provisions. Where the harmful conduct occurs abroad, both the latter two Acts limit substitute service to cases in which the defendant has an additional "substantial connection" with the forum, in the forum of business activities. On the other hand, the Montana provision includes any case of any foreign act causing tortious injury in Montana. However, Montana does not assert any jurisdiction over a foreign tort, merely on the ground that the tortious act originated in Montana, as do both Wisconsin and the Uniform Act, though Illinois asserts no such jurisdiction.

The Uniform Act, supra note 1, groups the "any business" and the "contracting to supply services or goods" clauses together, numbering them (a), and (b). Montana's Act would have done well to have followed the same pattern of drafting, because it reveals much more readily the functional relationship between the two clauses. It is highly significant that the Restatement (Second), Conflict of Laws § 3461 (1962), chooses the "local law of the state where the contract requires that the services . . . be rendered," as the proper choice of law to govern a contract to provide services. This further strongly supports the thesis advanced in Part I of this study, developed at notes 48-53, that in practically all of the enlarged bases for exercising personal jurisdiction by substituted service, conflicts doctrine would require that the forum likewise apply its own law as the properly governing one, further exemplifying the close relationship between "personal jurisdiction by substituted service" and "choice of law."

Supra note 5, § 17(1) (b).
Supra note 6 § 262.05 (4); supra note 1, § 1.03 (a) (4).
Supra note 6, § 262.05 (3).
Supra note 1, § 1.03 (a) (3).
Again, in clause (c), providing for substitute service in any action arising out of the ownership, use, or possession of local property, we find the Montana Act much broader than either Illinois’ or the Uniform Act, both of which limit such service strictly to the ownership, etc., of local real property. The Montana statute so provides as to any local property, real or personal, and may be construed to include even intangibles as well. This latter provision could have the fortunate consequence of causing our courts to apply the Act to the bundle of “rights, privileges, powers and immunities” going to make up “ownership,” i.e., to “property” in its abstract connotation of “ownership.”§ If this should occur, it would become possible to subject to Montana jurisdiction a foreign beneficiary of a local trust, for example, without having to decide whether his interest were “tangible” or “intangible.” Also, it would become much easier for a Montana Court to exercise jurisdiction over any subject matter which clearly is “affiliated” principally, or exclusively with Montana, regardless of its character under the traditional conceptions of “tangibles” and “intangibles.” Whether the legislature intended any such broad construction is problematical. Though Wisconsin’s Act is substantially broader than either the Illinois’ or the Uniform Act’s comparable provisions, it limits substitute service in such case to suits involving “tangible” property located in Wisconsin either at the original “transaction” or upon suit.

§Supra note 5, § 17(1) (c).

§Supra note 1, § 1.03 (a) (5). That the practical desirability of including movables, along with realty, as a basis for exercising such personal jurisdiction may not be entirely free from doubt is strongly suggested by an editorial comment in the Uniform Procedure Act, supra note 1, at 7, which observes that, “Although the Michigan and Wisconsin statutes . . . include the ownership, use or possession of personal property as a basis of jurisdiction, this basis has been excluded because of the difficulties that might be posed in situations such as those involving stolen property, conditional sales and chattel mortgages.” The note in 44 IOWA L. REV., supra note 13, at 382, declares that, “If a statute basing jurisdiction on relationships to personality never appears in print it will probably be mainly due to practical considerations.” Disregarding these “practical considerations,” a number of state legislatures already have authorized the exercise of personal jurisdiction based on the presence of personal property. Wisconsin’s statute was enacted in 1969; Montana’s in 1961 (effective January 1, 1962), and Michigan’s in 1961 (effective January 1, 1963). For Michigan’s provision, see MICH. STAT. ANN. § 27A.705(3). Neither Wisconsin nor Michigan includes “intangibles,” as does Montana.

§Such broad exercise of jurisdiction, both legislative and judicial, permits their exercise on the principle of “institutional affiliation,” as that term is described in Part I of this paper, supra note 15, in notes 63-67, thereof. Note 63 states that: In the phrase “institutional affiliation,” the word ‘affiliation’ tends to suggest a close, intimate connection and relationship between a state and the “subject matter” of . . . a cause of action, of a more or less enduring character. ‘Institutional,’ stresses the dynamic character of that subject matter—the social, economic and political interests that are tied up in and served by that “subject matter.” It also intends to stress the profound importance of dealing with the “subject matter” as an integrated unit. . . . It includes all that congeries of “intangibles”, including rules and regulations and “norms” for its inner order, which often go to make up institutional frameworks and processes.

§The question of what law governs the creation and administration of a trust provides a dramatic illustration of the validity of the principle of “institutional affiliation,” and of its value in resolving various supposed problems incidental to the selection of the proper choice of law, by making it clear that the supposed distinction between “tangibles” and “intangibles” produces no real difficulty. As
Perhaps the most provocative question raised by subdivision (c), if not by the entire section, arises from its ambiguity as to whether it applies to foreign transactions "affecting" ownership or title quickly illustrated by a case in which a non-resident buyer enters into a contract to purchase Montana land, executed at the buyer's residence. Can the Montana seller later sue in a Montana court for specific performance, based on substituted service on the non-resident buyer? Clearly, on basic common law doctrine, this would be impossible.\footnote{Note, Ownership, Possession, or Use of Property as a Basis of In Personam Jurisdiction, 44 Iowa L. Rev. 374 (1959). The author states that, "in reading the Pennsylvania decisions interpreting this statute one gets the impression that the...}

One of the earliest statutory antecedents, a Pennsylvania statute, authorizing the the local court to exercise personal jurisdiction because of the defendant's "affiliation" with local property, was drafted so as clearly to apply only to responsibilities and liabilities arising (generally in tort) from the use of the property, imposed normally on the owner or the possessor.\footnote{A modern South Carolina case, Prudential Ins. Co. v. Berry, 153 S.C. 496, 151 S.E. 63 (1950), nicely illustrates the impossibility of securing specific performance in such case, measured by traditional doctrine. Though it maintains that if one party is entitled to ask an equity court to exercise its jurisdiction in such case, the doctrine of "mutuality" requires that the other party likewise must be given the same access to equity, it points out that the remedy in such case necessarily is different. If the buyer is the plaintiff in the situs court, that court may grant him specific performance on substitute service. However, if the seller is the plaintiff, the only remedy available to him is to have the buyer's equitable interest removed as a "cloud" on the title. And, of course, equity could not award damages without personal jurisdiction over the buyer. Though, in Arndt v. Griggs, 134 U.S. 316 (1890), the United States Supreme Court long ago ruled that the situs could constitutionally decree specific performance on substituted service on the non-resident seller, until the adoption of the new rules in Montana our Supreme Court had adhered to the general common law rule that an action for specific performance is essentially "personal" in character. Hence, personal jurisdiction by personal service was held to be necessary. State ex rel. Miller v. Dist. Ct., 120 Mont. 423, 18% P.2d 506 (1947), and cases there cited. Cf., Tingle, Substituted Service on a Non-Resident Vendor of Montana Land, 13 MONT. L. Rev. 64 (1952). This rule seems clearly to be completely changed by the new rules under Rule 4, R.C.M. 1947, § 93-2702-2B (1) (c).}

stated in note 67 of Part I of this paper, supra note 16, in considering the ruling in Hanson v. Denckla, 357 U.S. 235 (1958), that the trust involved there was "affiliated" exclusively with Delaware:

The trust "res" was composed of corporate securities, equally susceptible of being characterized either as "tangible" or "intangible." Justice Warren says that, "such assets are intangibles that have no 'physical location.' But their embodiment in documents . . . makes them partake of the nature of tangible," ibid, at n. 16. These terms explain exactly nothing as to why they are considered located in Delaware. On other issues, they equally readily may be deemed "sitused" at the corporate domicil of each issuer. The real reason is that they form the "nexus" of the trust institution affiliated exclusively with the state of Delaware, out of which all the present legal issues arise. So, as in Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950), whether deemed "tangibles" or "intangibles"—it matters not one jot nor one tittle.
the same commentator concludes that, although it does not contain these expressed limitations, in authorizing substituted service on "any cause of action arising from . . . (c) the ownership, use or possession of any real estate," the Illinois Act reasonably implies the same limitations.

Read casually, clause (c) in Montana's Rule 4 B(1), seems to be essentially the same provision as Illinois'. If so, and if the above construction is accepted, a foreign buyer on a foreign contract would not be subjected to substituted service in Montana. The fact that both Acts describe the affiliating contact as an "act" arguably may support that conclusion.

However, the phrase "or of any interest therein," added to the Montana clause, plus the unlimited variety of actions covered thereunder, may require an opposite construction. Does this phrase include the holder of an equitable "estate", created by an enforceable contract to sell? If so, the non-resident buyer is covered.

Quite recent legislation tends to support that conclusion. For example, the extremely broad language of the Wisconsin Act seems clearly to intend to cover "transactions" relating to local property, as well as actions arising out of its "use." Editorial comment on subsection 6(a) strongly supports that construction by stating that.

Courts feel constrained to fit the defendant within one or more of the six categories listed in the second clause. They always seem to do so although the process is often laborious and the result sometimes questionable. In Id. at 379, the writer observes, "It is interesting to speculate whether there is a difference in scope between the Illinois and Pennsylvania acts... If the Pennsylvania statute's terminology contemplates coverage of one who maintains or controls realty, then the phraseology of the Illinois statute referring to "ownership, use, or possession," while not specifying the particular qualities of maintenance or control, may certainly be interpreted to include them." Actually, however, this author's discussion leading to the conclusion that the jurisdiction of the two Acts is the same in scope is not very helpful in deciding whether these sections cover transactions relating to or involving ownership, etc., because of its incompleteness. It seriously considers only the question of what classes of defendants are covered under each, apparently concluding that they are substantially the same. Though the author notes that, "Both statutes specifically limit the grant of in personam jurisdiction... to causes of action related to the real property," Id. at 376, he does not discuss the significance of the great difference in the scope of actions covered by each statute. The Pennsylvania Act authorizes substituted service only in a suit based on an "accident or injury...", supra note 31. The Illinois Act, however, subjects a nonresident to personal jurisdiction on "any cause of action arising from the... ownership, use, or possession of (local) real estate." The writer does not consider the possible significance of this greatly enlarged jurisdiction over "actions" under the latter Act, on the construction of the language in each describing the classes of persons subject thereto.

It may be thought that the statutory use of the word "act" to describe the affiliating contact connotes a liability based on possession and use. Notwithstanding the original common law rule that an action for "specific performance of a contract to convey land" was an in personam action requiring personal service on the defendant, supra note 30, it likewise is hornbook law that the buyer acquires an "interest" therein, not only constituting a cloud on the title, but often described as an "equitable estate." At the same time however, extensive polemics have been indulged in by modern specialists in equity jurisprudence, advancing opposing views as to how far, or for what purposes, such contracts create any kind of "equitable interest" in the land itself. See Falconbridge, Essay on the Conflict of Laws 594-611 (2d ed. 1954). However, at least today it generally is agreed that whether any transaction creates any interest in the land itself, legal or equitable, is determined solely by its situs. Ibid.

Wis. Stat. Ann. ch. 262, §262.05(6) (a) (Supp. 1963), authorizes the exercise of personal jurisdiction on substituted service, "In any action which arises out of:... A promise, made anywhere to the plaintiff... by the defendant to create in either party an interest in... real property situated in this state." (Emphasis added.)

WIS. STAT. ANN. ch. 262, §262.05(6) (Supp. 1963).
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 circumstances consists of the local realty with which the bargaining arrangement deals.

Hence, if clause (e) in Montana’s Act is constitutional, clause (c), on this construction, likewise will be. And the basic relief sought in each case tends to support that conclusion. A decree imposing a personal judgment for the full purchase price of local land under (c), is at least as “fair” as a personal judgment for damages on an executory foreign contract for failure to render services or deliver goods in Montana under (e).

The Uniform Act’s similar provision, ‘. . . having an interest in, using or possessing . . .’, is very similar in language to Montana’s clause. “Having an interest in,” includes all forms and degrees of “ownership.” It seems that they should be given the same construction. Unfortunately though, it almost seems that editorial comment in both the Wisconsin statute and the Uniform Act has studiously avoided all discussion of this precise question. To date there do not appear to be any cases adjudicating this question.

**Clause ‘‘(d)’’—Foreign Insurance Companies**

On careful examination, the provisions authorizing substitute service on “unauthorized” foreign insurance businesses, found in the Illinois, Montana and Uniform Acts, continue to provide a “study in contrasts” on substantial issues, when compared with the Wisconsin Act. The latter bases its jurisdiction either on the domiciliation of the insured when the action arises or when the event insured against occurs in Wisconsin. Contrastingly, the other three, including the Uniform Act, determine the forum’s interest as “of the time of the contracting.” That this is the common basis for asserting personal jurisdiction is exemplified by the fact that the “Uniform Unauthorized Insurers Act,” approved in 1938, also

**Supra note 36.**

Subdivision (5) in the Wisconsin Act generally corresponds to R.C.M. 1947, § 93-2702B(1)(e), in Montana’s Rules, which declares that the court acquires personal jurisdiction on any cause of action resulting from “entering into a contract for services to be rendered or for materials to be furnished in this state by such person.” The Uniform Act’s similar provision in § 1.03(a)(2), reads thus: “contracting to supply services or things in this state.” Supra note 1, § 1.03(a)(2).

**Supra note 1, § 1.03(a)(5): “having an interest in, using, or possessing real property in this state.”**

The editorial comment to subdivision (6), supra note 37, analyzing authority from other states which it says “lends support” to this provision, and summarizing what those cases are supposed to stand for, suggests the possibility that the commentators do not have in mind at any point this question of whether the section supports an action for specific performance against a foreign buyer.

**Supra note 5, at § 17(1)(d): “Contracting to insure any person, property or risk located within this State at the time of contracting.” (Emphasis added).**

**Supra note 4, at (B)(1)(d). Identical with Illinois, ibid.**

**Supra note 1, § 1.03(a)(6). Identical with Montana and Illinois, supra notes 42, 43.**

**Supra note 6, § 262.05(10).**

**Supra notes 41, 42 and 43.** To these three, Michigan now must also be added in selecting the “time of contracting”, rather than when the loss occurs, Mich. Stat. Ann. § 27A.706(4) (1962).
asserts "jurisdiction" on the basis of conditions existing at the time of the contracting rather than at the date of the "loss." This means that these statutes consider the execution of the insurance contract, as a transaction, and the relation thereof to the forum, at the moment of contracting, rather than the economic interests or the interests of personality being protected by that contract, as the "appropriate" subject matter, or "contact", on which to assert personal jurisdiction by substitute service. Language expressing this view hardly could be more explicit than that in clause (d), Rule 4B(1): "contracting to insure any person, property, or risk located within this state at the time of contracting;". In contrast, Wisconsin's Act clearly selects the relationships to the forum of the person or property insured, at the moment the event insured against occurs—regardless of where the contract may have been executed or of the "location" of its subject matter at that time."

In addition to the clearly stated limitation just described, Montana's statute contains an ambiguity which might become troublesome in certain cases. Both the differences between the two Acts and the ambiguity men-

"Uniform Unauthorized Insurers Act §§ 3-4, 9C ULA 306, 307 (1938). Actually, the various statutes considered here represent three varying positions on this question: 1. The above Uniform Act directs its attention primarily to the regulation of the insurance business, involving the execution of insurance contracts as such; 2. Illinois, Montana and the Uniform Procedure Act base jurisdiction on the relationship of the subject matter of the insurance to the forum at the time of contracting; 3. Wisconsin bases its jurisdiction on the same subject matter, but at the time of the loss insured against. All of these provisions simply are regulating and limiting the "judicial jurisdiction" of the "choice of law" rules governing such insurance contracts, the Restatement (Second), Conflict of Laws §§ 346h-346i, is in apparent accord with position number "2" above. And Professor Reese, Reporter for the Restatement, is strongly of the view that the proper choice of law to govern a life insurance contract is the insured's domicil at the time of contracting. In his Contracts and the Restatement of Conflict of Laws, Second, 9 INT'L & COMP. L. Q. 531, 539 (1960), Reese declares that, "It is possible . . . that the insured will have changed his domicile . . . Consideration should not be given to such a change of domicile, however, for it is obviously essential that the law governing the validity of an insurance contract should remain constant." But query whether this is not too broad a statement. In § 346h, comment h, the Restatement also limits the reference to the applicable law to the latter's "local law" which, as defined there, excludes its "choice of law" rule. Even if it be insisted that the necessities of insurance institutionally require that the governing choice of law establishing the legal status of insurance agreements be determined by the conditions existing on their execution rather than at the time of loss, the paramountcy of the state where the subject of the insurance is located when loss occurs, for exercising "judicial jurisdiction," remains clear. Moreover, even for "choice of law" purposes, it may be desirable to recognize a paramount legislative jurisdiction in the situs of the subject matter insured at the time of loss to measure "rights and duties" arising thereunder. Of course, that situs may choose to utilize the law of the situs at execution if that seems sufficiently desirable, contrary to Restatement (Second) § 346h, comment h. (This is not to be confused with the practice of "renvoi", so often decried.) For a recent United States Supreme Court case providing a fine example of the practice of recognizing an exclusive legislative power in one state, including its "conflicts" rules, see, Richards v. United States 369 U.S. 1 (1962), though whether appropriate for that particular case may be arguable.

"Supra notes 42, 43.
"Supra note 6 at § 262.05(10) (a) and (b): "... In any action which arises out of a promise made anywhere to the plaintiff . . . to insure upon or against the happening of an event and in addition either: (a) The person insured is a resident of this state when the . . . cause of action . . . occurs; or (b) . . . the cause of action . . . within the state, regardless of where the person insured resides." Note that the affiliating contact in subdivision (a) is "residence" of the plaintiff, while in (b), it is the "event" itself insured against.

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tioned may be pointed up by the following practical illustrations. Suppose that P, while living in Colorado, takes out with I insurance company a twenty-five thousand dollar policy on his own life, and another policy on his auto, insuring against its loss. If P then moves to Montana, it seems clear that, though he continues to pay his premiums from Montana and "I" accepts them without question, though not doing business in Montana, in a subsequent suit in Montana, on either policy, the court cannot exercise personal jurisdiction over I by substituted service under clause (d). However, if P had moved to Wisconsin instead, and a suit was filed there, such service would be effective. Or suppose P entered into the above contracts while resident in Montana, but then moved to Colorado and suffered loss. On its face, it would seem clear that he could sue "I" in Montana on substituted service, even though Montana now has no "substantive" interest whatever in the litigation. Also equally clearly, the Wisconsin Act would not provide for substituted service there if P took out insurance in Wisconsin and then moved to Colorado. So, without question, the Wisconsin legislation intends to assert its governmental interest as of the time of the injury, rather than of the contract.

That we are not conjuring up bogey men under this clause is established conclusively by contrasting federal decisions interpreting Florida and Tennessee law. Construing Florida's Unauthorized Insurers Process Act as being limited to actions based on contracts delivered in Florida, the Fifth Circuit has ruled that the defendant insurance company was not subject to substituted service in an action on a policy issued to the insured while a resident of Kentucky, though he was domiciled in Florida at his death and had paid premiums from that state. On the same day, in a companion case, the same court ruled that another insurance company was so subject, on a policy delivered to the same insured in Florida. In contrast, in a case putting in issue the validity of a Tennessee court judgment, the Second

Of course, any insurance contract entered into in Montana may be covered by clause (a), "the transaction of any business within this state;". But there are various situations in which, though the forum clearly has "personal jurisdiction" under the language of the statute, its interest in the litigation at the time of suit has become so negligible that it should refrain from exercising that jurisdiction. Therefore, these statutes should expressly vest the courts with a broad discretion as to whether to exercise its jurisdiction, thus giving effect to "forum non conveniens" on a broadened basis. See text at notes at 121-126 infra. The variety of situations to which the insurance contract and the interest insured are interrelated offers cogent support for this thesis. Suppose, for example, P enters into a life insurance contract with I in New York while resident in Montana. Two years later he moves to Florida. Five years thereafter, he dies. Under Rule 4, supra note 4, the Montana court could exercise personal jurisdiction probably under either of at least two alternate clauses, (a) or (d), and perhaps (e) as well. But, at this stage can the exercise of personal jurisdiction really be justified? Possibly, if it be assumed that Montana's law, as of the time of contracting, must delimit the issues involved in the suit; but query on this also, except as the domicil at death chooses to utilize that law. See, supra note 47.

Possibly the framers of the Wisconsin Act intentionally drafted it to leave the transactional aspects of the insurance contract to other subsections of the statute. As thus drafted, its subdivision (10) deals solely with the state's interest arising from the property loss itself, either because that loss occurred there or because the owner was a Wisconsin resident. Thus, it is Wisconsin's interest in a "property affiliation" rather than a "transactional affiliation" that is served by this section; so there is a minimum of overlapping with other provisions. See, supra note 49.

Circuit ruled that under that state's Unqualified Insurers Process Statute, the New York insurance company was subject to such suit in Tennessee on a policy issued in Kentucky. Tennessee's process statute was enacted after the insured had moved there. The court found that, differing from the Florida statute, the Tennessee act subjected all such foreign corporations to substituted service on the basis of doing any business, such as hiring an investigator in the state.⁶⁴

Editorial comment on this problem, under the Wisconsin Act observes that:⁶⁶

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.

Actually, since Montana has two different statutes providing for substitute service on a foreign insurance company, possibly this problem can be best resolved by relying on the provisions contained in its "Unauthorized Insurers Process Act" which is incorporated into its new Insurance Code—though even it is not altogether free from ambiguity on this point.

Under this Insurance Code,⁶⁷ the acts constituting the Insurance Commissioner the process agent for the foreign corporation include the "delivery . . . or solicitation of any insurance contract, by mail or otherwise" in Montana, but it also includes "any other service or transaction connected with such insurance within the state" as additional grounds for exercising personal jurisdiction. At this point, it appears that the bare act of contracting or soliciting, or servicing, without regard to the situs of the subject matter, brings the insurer under the Act. However, another section expressly prohibits a suit on such substituted service in Montana on any such action arising out of: "(2) Insurance on or with respect to subjects located, resident or to be performed wholly outside this state."⁶⁸

As stated above, the meaning of these sections are by no means free from

⁶⁴Schutt v. Commercial Travelers Mut. Acc. Ass'n., 229 F.2d 158 (2d Cir. 1956), cert. denied, 351 U.S. 940 (1956). In effect, this subjected the defendant to service on the basis of clause (a), in Montana's Rule 4, "doing any business within this state."

⁶⁶Supra note 6, at 31.

⁶⁷In distinguishing between subsection (d) of the Illinois Act, and the similar provisions found in its Unauthorized Insurance Act, ILL. ANN. STAT. ch. 73, § 735 (1965), editorial commentary thereto stresses the distinctions pointed out in note 47, supra, between position "1", and position "2", set forth there. In effect, it says that Illinois' Unauthorized Insurers Act expresses position "1", while (d) expresses position "2", concluding that the latter leaves unaffected the former. However, it also concludes that the Insurers Act is covered by Illinois' (a), "doing any business." Jenner and Tone, Historical and Practice Notes, ILL. ANN. STAT. ch. 110, § 17, at 169 (1956).


⁶⁹R.C.M. 1947, § 40-3403.

⁷⁰R.C.M. 1947, § 40-3406(2).
doubt. And they may appear to be in partial conflict with clause "(d)" of Rule 4B. However, they may reasonably be interpreted as limiting the right to sue in Montana on substitute service to cases in which the subject matter is located in Montana at the time the cause of action arose. Thus interpreted, it states an implied limitation on clause "(d)." Also it avoids permitting suit on substituted service in Montana under 4B, whenever the person, property or subject matter has been removed from the state, following delivery of the policy."

Wisconsin Act Recognizes Vital Principle

Whether intentional or not, subdivisions (a) and (b) of paragraph 10 of the Wisconsin Act contain a principle of great importance. They recognize that the person or thing insured is the vital element in insurance contracts rather than the commercial aspects of the "transaction" as such. As stated in Part I of this study, this "goes a long way in supporting a view advanced by the writer some years ago, that, to determine what law should govern the substantive rights of the parties:"

Should not the "subject matter" of the contract determine the "choice of law" rather than the highly formalized and conceptualized doctrines of contract law as such? Are not those doctrines, involving highly conceptualized abstractions altogether too insubstantial to support the highly developed conflicts doctrine expounded by the Restatement . . . the "de facto" subject matter, and the fact that it is almost as varied as life itself—at least economic life, has seemed to give no one concern. Few were inclined even to ask the question whether the essential nature of the policy considerations involved might not be greatly affected and might not vary greatly, for conflicts purposes according to the variety of that subject matter—for the purpose of determining that some one society and law has a controlling legislative interest in the contract.

Clause "(f)"—Corporate Office Holders

Although clause (f), along with (c), makes the grouping of the grounds for substitute service, under the generic descriptive of "acts" most inapt, in subjecting to substituted service all of those in managerial positions in local corporations, as well as executors and administrators of local estates, wherever domiciled, those sections provide for substitute service where it

R.C.M. 1947, § 40-2802(2), in stating a similar exception to the general requirement that foreign insurance companies secure a certificate of authority, limits it to "transactions" subsequent to a policy lawfully executed outside of Montana, on non-affiliated subjects.

To the extent that these sections appear to be in conflict, it may be objected that they both are equally specific, so no choice can be made under the rule that the specific controls over the general. However, it is not necessary here to decide whether one is more specific than the other, because R.C.M. 1947, §§ 93-2711-1 and 93-2711-7, expressly provide that the sections in the Insurance Code providing for service of process on unauthorized insurers shall prevail over Rule 4, to the extent they conflict.


is both most desirable and frequently critically needed." The Uniform Act's editorial contention\(^6\) that such provision should appear in the corporate code, rather than in this process statute because it so vitally affects shareholders' derivative suits, will be discussed infra.

**Suit—Unilateral or Mutual?**

A latent ambiguity present in three of the four acts compared in Part I of this study, deserves careful consideration. Each of those acts raises an apparent question as to who may qualify as plaintiff in suits thereunder. That this is not a *de minimis* question, is indicated by the fact that the extremely carefully drawn Wisconsin Act takes pains to spell out "mutuality of suits" at the forum, under its applicable sections,\(^6\) wherever it would be ambiguous otherwise. So, even though the practical difficulties from this ambiguity may be reduced greatly by the substantial overlapping of the clauses, discussion of the problem seems called for.

Presumably, it would be permissible to limit suits under these special "personal jurisdiction" statutes, strictly to those by resident plaintiffs. Some statutes do just that, particularly when the defendant is a foreign corporation.\(^6\) The present statutes, however, contain no such limitations. Nevertheless, Montana, Illinois and the Uniform Act, in terms, seem to provide only for "unilateral" suit in some cases where any person with an action should be allowed the benefit of substituted service.

Of course, under some of the relevant clauses, there is no ambiguity on this point. For example, under (a), either party engaged in the "trans-action" may be either plaintiff or defendant; further, in (b), only the person injured will qualify as "plaintiff." Clause (f) also seems to raise no question of who may be subjected to jurisdiction by it. It intends to subject only the occupants of the positions described there to such personal jurisdiction—the subject matter regulated calls for unilateral treatment. However, clauses (c), (d) and (e) pose questions on whether they provide for a "mutuality of suit." Presumably, clause (c) would permit an owner to sue a tenant, or a bailee; but would it authorize him to sue a bare trespasser? If not, he still might be able to sue under clause (b). But such overlapping jurisdiction is not always present.


\(^6\)For example, Wisconsin provides for such "duality" of action in Wis. Stat. Ann. § 232.05(5) (Supp. 1963): "... In any action which: (a) Arises out of a promise, made anywhere to the plaintiff ... by the defendant to perform services within this state or to pay for services to be performed ... *by the plaintiff,*" and again, in § 232.05(6): "In any action which arises out of: (a) A promise, made anywhere to the plaintiff ... by the defendant to create in either party an interest in, or ... *dispose of ... by either party real property ... " (Emphasis added.)

\(^6\)For example, Conn. Gen'l. Stat., § 33-411(c) (Supp. 1959): "Every foreign corporation shall be subject to suit in this state, *by a resident of this state* ... on any cause arising as follows: (1) Out of any contract made in this state or to be performed in this state; or ..." (Emphasis added.)
Under (d), can the insurer sue the insured? Its wording does not so provide. In nearly every insurance contract, however, either party could be sued under clause (a) if the clause should be interpreted as applicable only to suits arising from contracts delivered in Montana. But that raises the question of why (d) is needed at all, as an additional basis for exercising jurisdiction. The fact that the insurer rarely has reason for suing the insured does not foreclose raising this question. On occasion, it may want to sue in restitution for moneys improperly paid, or paid on a false claim, or on an integrated policy loan, et cetera.8

Clause "(e)"—Contract for Services or Materials

Probably clause (e) raises the most substantial question on whether the right to sue on substituted service runs both ways. Its language subjects only the person promising to render services or furnish materials in the forum. Generally, of course, he is the only person subject to such suit under an executory contract. However, if the promisor performs, can he sue the promisee under this clause, for the consideration he is entitled to? Had Montana provided for substituted service based on "legal residence" or domiciliation, as have Illinois6 and the Uniform Act,7 that provision would furnish an alternative basis for so subjecting the promisee in the large majority of cases—though in all three the question would become acute when the promisee is a non-resident. If the transaction also is covered by clause (a)—or by (c), then of course, there is no problem; but it must be assumed that some transactions covered by (e) will not be also covered by any of the others.5 So, whether "mutuality of substituted service" so as to provide equally for redress thereunder is available under (e) becomes a substantial question on certain fact situations.

COMPARISONS WITH IDEALLY COMPREHENSIVE STATUTE

With this comparative analysis of the bases for exercising personal jurisdiction on substituted service authorized by the Montana and similar acts, let us turn to the primary questions to be considered in Part II. This involves a comparison of the content of these four "comprehensive service statutes" with an "ideal process statute."

Such ideal statute should include all rules and provisions authorizing the exercise of judicial jurisdiction. Our four "typical" comprehensive acts generally agree with that proposition. For example, three7 of the four acts authorize service of process within the forum, and the fourth8 assumes it may be authorized elsewhere. Three also authorize substituted

8If a tort action accrues in Montana out of the contract then, presumably, (b) is applicable.
8ILL. ANN. STAT. ch. 110, § 16(1) (1956).
8Supra note 1, § 1.02.
1It appears that a wholly executory foreign contract obligating the foreign defendant either to perform services or to provide foreign materials in the forum would not be covered by any of the other sections.
7ILL. ANN. STAT. ch. 110, § 13.1 (2) (1956); WIS. STAT. ANN. ch. 282, § 262.06(1) (a) (Supp. 1963); R.C.M. 1947, § 93-2702-2B(1).
8Supra note 1, §§ 1.06, 6.01(a).
service on local residents, outside the forum;" although Montana’s statute does not. Moreover, any thoroughgoing examination of what an ideal comprehensive statute should include must consider a variety of closely related rules either for possible inclusion or to be certain that they are dealt with at other appropriate places in the Code.

TRADITIONAL PROCESS PROCEDURES WHICH MAY BE QUESTIONED

Service Within the Forum

Startling as it may seem to many, that method most nearly universally relied on for supporting personal jurisdiction, i.e., service of the summons on the defendant within the forum, recently has been vigorously attacked as being a quite improper basis for acquiring jurisdiction. Professor Ehrenzweig vigorously supports the thesis that the exercise of personal jurisdiction merely based on "personal service" of the summons on the defendant within the forum should be prohibited;5 that Pennoyer v. Neff6 is without historical foundation and is clearly erroneous; that the theory that local service is the exclusive method for subjecting foreign defendants to personal jurisdiction is a recently developed corollary to that decision’s spurious conclusions;7 and that in recent times, it has been erroneously explained by Holmes’ alleged "myth" that the foundation of personal jurisdiction is physical power.8 In view of current commentary9 on this most remarkable suggestion, some of it favorable,10 one might ask whether current trends in doctrine do not require the elimination of this provision now included in all of our modern statutes, and receiving unquestioned support of the strongest kind from traditional doctrine. Though advanced in 1956, and noted editorially in the comments to the Wisconsin "process" act to date, it has had no influence on any of the recent process statutes.

Almost certainly, every common law legal system has taken it for granted that the exercise of personal jurisdiction, based on compulsive service within the forum is the most incontestable basis of all possible ones

5Illinois, supra note 69; Wis. Stat. Ann. ch. 262, § 262.05(1)(b) and (c) (Supp. 1963); supra note 1, § 1.02.
7Id. at 292, 303-312. Pennoyer v. Neff, 95 U.S. 714 (1878).
8Supra note 75, at 312.
9Supra note 75, at 296-300.
10In a collection of four commentaries on Ehrenzweig’s thesis (in part) . . . appearing in Transient Jurisdiction—Remnant of Pennoyer v. Neff, 9 J. Pub. L. 281 (1960), the writers generally are critical of Ehrenzweig’s estimate of the existence of the rule both historically and currently, but they generally agree that the rule is unsatisfactory.
11Though disagreeing as to the present state of the rule, "Professor Schlesinger declares that, "Thanks to Professor Ehrenzweig’s searching analysis and to his talent for dramatizing the human problems which . . . have been buried under the dust of traditional rules, the legal profession has become increasingly aware of the scandalous anachronism of transient jurisdiction . . . he has convincingly demonstrated the need for reform and has given us the outline of a better and more modern approach.” Schlesinger, Methods of Progress in Conflict of Laws—Some Comments on Ehrenzweig’s Treatment of “Transient” Jurisdiction, 9 J. Pub. L. 313, 326 (1960).
for supporting that jurisdiction. All four of the recent "comprehensive process statutes" compared herein retain that form of service as a principal one,\textsuperscript{1} establishing "personal jurisdiction" generally. Moreover, although the full documentation and justification will have to be presented in another study, now under way, it is necessary to state here that, contrary to Professor Ehrenzweig's interpretation of legal history,\textsuperscript{2} Pennoyer v. Neff was based on a long line of decisions,\textsuperscript{3} culminating naturally and inevitably in that case; that these decisions expressed growing and developing doctrine, responding to the special needs of the expanding federation of states,\textsuperscript{4} and in its acute form, largely indigenous to that federation at the time—the problem of the satisfactory allocation and distribution of sovereign powers in a federation, on such a reasonable basis as would promote the peaceful, healthy growth of the nation,\textsuperscript{5} that, though rather crude in its formalized abstract expression, nevertheless it has served our country marvelously well ever since the beginning of the great "new experiment"; and that a basic aspect of that doctrine was that the most obvious and acceptable basis for the exercise of "personal jurisdiction" by a court was personal compulsive service on the defendant within the forum's own territory.\textsuperscript{6} It met the conditions for the exercise of sovereign power in a way that seemed most obviously based on a reasonable relationship between the individual person and the state—courts often state that it was fair, reasonable or just.\textsuperscript{7} These "due process terms" described the essential character of the doctrine of "transient jurisdiction" an Ehrenzweig describes it—"physical power" as its foundation was significant simply because it was recognized as a just and perfectly "legitimate" exercise of political-legal power, embodying a compulsion which people invariably submitted to as being one of the most normal expressions flowing from "sovereign-subject" relationships,\textsuperscript{8} and giving rise to no resentments, tensions, or "sense of injustice" tending to divide the peoples of the nation.

\textsuperscript{1}Supra notes 72-73.
\textsuperscript{2}Supra notes 76-78.
\textsuperscript{3}The Confederation was faced with this problem immediately after the Revolutionary War, illustrated in Kibbee v. Kibbee, 1 Kirby (119 Conn. 1786). It is sufficient that we begin with that period.
\textsuperscript{4}This whole series of cases wrestled with the question of the scope and limits of the full faith and credit clause. It was early ruled that a seizure of the defendant's property was not enough to support a personal judgment, as in Kibbee v. Kibbee, supra note 83, and that a personal judgment could not be rendered on "substituted" service, as in Bartlet v. Knight, 1 Mass. 296, 302 (1805), where Sedgwick, judge, says, "it is well known that many of the states, of which this (i.e., New Hampshire) is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him ... Shall he be bound by the judgment, conclusively? It would be monstrous."
\textsuperscript{5}Bissell v. Briggs, 9 Mass. 406 (1813).
\textsuperscript{6}Id.
\textsuperscript{7}Ehrenzweig himself recognizes that acquiring personal jurisdiction solely by local service, has been supported on other grounds than mere physical power, such as "psychological power," supra note 76, at 297; or "lack of notice" otherwise, id., at 307 n. 127.
\textsuperscript{8}Bissell v. Briggs, 9 Mass. 406, 412 (1813), states this proposition thus: "Now, an inhabitant of one state may, without changing his domicile, go into another; he may there contract a debt or commit a tort; and while there he owes temporary allegiance to that state, is bound by its laws, and is amenable to its courts." (Emphasis added.) Actually, in that case the alleged tort, sued on in New Hampshire, had occurred in Massachusetts where the conduct was "privileged." A Massachusetts resident, the defendant was served in New Hampshire while there casually.
Moreover, the modern development and modification of Pennoyer v. Neff, instead of effecting a basic change in traditional doctrine, in the "whole view" perspective which we try to achieve here, simply constitutes a "refinement" of that doctrine, so as to take into account the great physical-technical changes occurring between these states over the past one hundred years.\(^9\) The basic, underlying criteria limiting recognized constitutional power for this purpose continue to be essentially the same—the reasonableness of the exercise of such personal jurisdiction under currently existing conditions in the light of some socio-legally significant relationship between the defendant and the forum.\(^8\) The principal practical modification is derived from a judgment that, today, whenever one engages in a "purposeful act" whereby he expects to secure both economic gain from a state and benefit and protection under the laws of that state, he likewise reasonably may be charged with having submitted himself potentially to the "personal jurisdiction" of its courts—but only and strictly limited to suits arising from such "acts."\(^9\) That last qualification is of the utmost importance both to understand the relationship of current doctrine with the past and to compare American law with European. Such enlargement also restores the "balance of convenience" between plaintiff and defendant. Formerly, it often was the plaintiff trying to take advantage of a foreign defendant; today, more often, it is a transient defendant fleeing to avoid legal obligations.

\(^8\) The Supreme Court itself has stated this change neatly in McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223-4 (1957): "In part this [expansion] is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (Emphasis added.) Note the critical limitations of the last phrase.

\(^9\) Though the practice hardly got off the ground, in our early history some state legislatures authorized their courts to exercise personal jurisdiction to impose unlimited personal liability on an unrelated action when the defendant owned any kind of property interest locally. Had this practice been approved under the full faith and credit clause, or otherwise constitutionally, it not only would have opened the door to gross fraud, but also would have incensed the country's citizenry—it would have generated the "sense of injustice." Fortunately, this practice never received constitutional approval. So it must be stressed that the current broadening of "personal jurisdiction" still does not include this objectionable practice. And, whatever the practice in other countries, it is doubtful that such rule will be tolerated in the United States in the foreseeable future. Further, Pennoyer v. Neff, supra note 76, did not even involve this issue because, contrary to Ehrenzweig's suggestions, the Oregon statute in issue did not attempt to impose any liability on the defendant beyond the value of his property in Oregon, and limited satisfaction of the resulting judgment to execution on that property, in the following language, as stated in Pennoyer: "... or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." 95 U.S. 714, 720 (1878). And Hunt's summary of the law of other states, in his dissent in Pennoyer, id. at 736-7, is limited strictly to the exercise of that kind of jurisdiction, whether it be called "personal" or "quasi-in-rem." Cf., Ehrenzweig, supra note 75, at 306, in which he clearly gives the impression that Hunt "convincingly showed ... a long established practice" by other states of habitually exercising unlimited general personal jurisdiction, wherever the defendant had a local property interest.

\(^{10}\) All of our "comprehensive codes" examined here strictly limit the personal jurisdiction by substituted service to claims arising from the "acts" or the "relationships" specified.
Of course, this is not to say that to have the power is always to use it. It is of the utmost importance that the difference between recognizing the existence of such power generally, and determining when it should and should not be used, whatever the form of service, be kept clearly in mind. Actually, a variety of well developed rules recognizing a number of grounds on which the forum with admitted personal jurisdiction, even though based on local compulsive service, will refuse to exercise that jurisdiction, have been developed and frequently applied. These include the securing of the defendant’s presence either by fraud or force; exemption from service while present as a witness; and forum non conveniens. Very possibly compulsive service on a transient defendant should be used more sparingly yet, particularly in cases in which the forum has no substantial interest in the litigation other than as forum. Although Ehrenzweig’s position is not altogether clear on this point, in challenging as a “myth,” the proposition that the foundation of jurisdiction is physical power, he seems almost to deny the very validity of exercising personal jurisdiction on this basis. Further he seemingly denies the relevancy even of the fact that states are recognized generally to have the clearest power to “command” those found within their borders to submit to governmental action generally. His basic position seems to be reflected in European judicial practice, rejecting any form of service of process as a condition to acquiring personal jurisdiction there; process serves merely to give notice of a jurisdiction already acquired. Such jurisdiction or “competence” is derived either from some relationship of the defendant to the forum (as nationality or domicile) or because he claims an interest in some form of “property” within the forum. Hence, physical power over the defendant is deemed not relevant.

Recognized by the Restatement of 1934, these discretionary restrictions on the exercise of an admitted jurisdiction by the courts, are fully reaffirmed and greatly elaborated upon with a much more complete rationale in Restatement (Second) Conflict of Laws Sub-chapter 4a. Various interests are deemed to be best served by so refraining, thus more intelligently and comprehensively implementing the adjudicative process.

Restatement (Second), Conflict of Laws § 117C (1957).

Id. at § 117d, and comment b. This restriction best serve the interests of judicial administration.

Supra note 93, § 117c.

Of course, an intelligent use of an enlarged principle of forum non conveniens may be sufficient to care for most if not all cases which should be so dismissed. But, just how great should be the restrictions imposed on exercising jurisdiction over a defendant merely because he was served while present only very briefly may depend upon a reexamination of the utility of the principle of “transitoriness” applied to many causes of action. In many relatively recent articles it has been assumed that such characteristic states an ideal which should be continuously maximized, much as did “from status to contract” for a considerable period.

Ehrenzweig makes it clear in his discussion of the history of the rule vesting the court with personal jurisdiction based on local service alone that, in his view, the common law did not vest the courts with such jurisdiction at all. For example, he states that, “English legal history furnishes little support for the power doctrine.” Supra note 75, at 297. And again, “If physical power does not appear to have been alone sufficient to establish personal jurisdiction in English law, neither does it seem to have been required for the purpose.” Supra note 75, at 299.

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But this is exactly the practice attempted in our early history which was repudiated by our courts. And the later experience of the continental countries in this area has not been a happy or satisfactory one and certainly does not provide any kind of "model" for us any more today than through the nineteenth century. We rejected out of hand, over a one hundred and fifty year span, all attempts to support the practice of exercising a general personal jurisdiction over a foreign defendant simply because he might be found to have some kind of "property right" located in the forum, whether the suit related to that "property right" or was foreign to it. That principle is no more acceptable to us today than it was one hundred and fifty years ago. And heaven protect us from any kind of outrageous extension of that rule as is found to exist in Germany, for example. Certainly the exercise of "personal jurisdiction" as developed in Europe offers no generally acceptable example for us. The development in the United States continues to be reasonable and healthy, consistent with its common law "due process" origins, largely rooted in, or at least validated by American experience, adapted to current socio-political environmental conditions.

Warrant of Attorney to Confess Judgment

Another rule often relied on to support personal jurisdiction, and applied broadly, is that "consent" of the defendant always gives jurisdiction. Valid as a general proposition one form which "consent" takes, often has been rejected by American states although others approve it. That form is "personal jurisdiction" based on a warrant of attorney with a resulting "default judgment." A recent excellent study of business credit practices, and of cases based on such "warrant of attorney," demonstrates the need for clearly and definitely stated limits on the recognition of such judgments, so as to prevent the possibility of the defendant having to "pay twice." This anomaly arises in those cases in which the debtor has paid, but has not secured the return of the instrument containing the authority. The holder later secures a judgment based thereon. There are conflicting

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*Supra notes 83-88.
*deVries and Lowenfeld, Jurisdiction in Personal Actions—A Comparison of Civil Law Views, 44 IOWA L. REV. 306, 330-344, analyzing the current German law, reveals dramatically how utterly unsatisfactory is the exercise of "personal jurisdiction" based simply on some kind of local "property" owned by the defendant. Courts in the United States did indeed do well to reject the "monstrous" practice tolerated in Germany. Moreover, with "domicil" in France, and the "situs of personal jurisdiction in Switzerland, "nationality" in France, and the "situs of property"—carried to an outrageous extreme—in Germany, the authors assure us that, "differences among civil-law countries are as great as differences between given civil-law and common-law countries." Id. at 344.

*Ibid.
*Ibid.

In R.C.M. 1947, § 13-811 (enacted in 1935), Montana declares that any power of attorney to confess judgment, or similar agreement, shall be illegal and void and completely unenforceable in its courts against any party to the contract.


*Ibid. The author uses a hypothetical case as an illustration.
decisions on the point, with no clearly controlling decision by the United States Supreme Court.

All states would do well to enact legislation regulating the limits of the jurisdiction acquired under such "confession of judgment" provisions, which reasonably might be included in our "comprehensive process statutes." That it is not enough, in those states completely outlawing them, simply to include a prohibition in their statutes regulating contracts, is demonstrated by the experience of Indiana with such legislation. A "procedural" prohibition is equally important. And for those states permitting such clauses, a rule expressly conditioning the court's jurisdiction on non-payment still seems highly in order. This will greatly simplify the defendant's defense in F-2, in any case. But for those states without such statute, the United States Supreme Court would do well to consider making this a constitutional condition to the exercise of such personal jurisdiction.

CLOSELY RELATED IMPLEMENTING AND COLLATERAL RULES

If our purpose is to design a framework of rules most effectively serving the objectives of the adjudicative process, i.e., to ascertain "truth" to make possible a "just decision," then in addition to the several rules discussed above, dealing directly with the permissible scope of the court's "personal jurisdiction," there are certain general rules and principles which, though collateral and incidental to the administration of these categories broadening "personal jurisdiction," so directly and vitally af-

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106 Hazel v. Jacobs, 78 N.J.L. 459, 75 Atl. 903 (Ct. Err. App. 1910), ruled that prior payment was no defense to an action in F-2 (second forum) on an F-1 (first forum) judgment secured subsequent to payment; First Nat'l Bank v. Cunningham, 49 Fed. 510 (D. Ky. 1891), ruled the defense good because the subsequent judgment was fraudulent and void by reason of the fact that the warrant of attorney had expired by previous payment of the note.

107 First Nat'l Bank v. Cunningham, supra note 105, is the more reasonable decision—one that should receive approval from the United States Supreme Court on Constitutional grounds, especially reinforced as it is by that Court's insistence on the giving of notice in any and all events.

108 Montana's statute, supra note 102, is typical of this kind of prohibition.

109 Though the Indiana legislature passed two statutes in 1927—one prohibiting and declaring void, confession agreements in contracts to pay money, and the other imposing penalties on persons seeking to induce such agreements, or to enforce foreign judgments thereon in Indiana, in Barber Co. v. Hughes, 223 Ind. App. 570, 63 N.E.2d 417 (1945), the Indiana Court limited both statutes to Indiana contracts, and, construing the transaction as an Illinois transaction (though the notes were signed in Indiana), enforced an Illinois judgment given thereon.

110 Though, presumably, a state legislature could not prohibit its courts from entertaining actions on foreign judgments entitled to full faith and credit, it could prohibit its courts from entertaining any original suit based on a "cognovit" provision, regardless of what law governed the substantive rights under the contract. If its policy is strongly against the enforcement of such provisions, its prohibitory rules should extend to judicial action thereon as well as to a contract containing the proscribed provision.

111 Such express provision will make clear that by F-1's own law the judgment is void if there has been payment in fact; that the defense of payment raises a jurisdictional fact which can be inquired into in F-2, so long as it has not been litigated; thus obviating any difficulties thought to exist under the full faith and credit clause in the past.

112 See supra note 106.
fect that administration that their full statement and their inclusion at an appropriate place in the procedure code should be insured by reviewing them fully along with proposed changes in "substituted service." Though it may not be of critical importance that they be included in our "comprehensive" process code, it is particularly important that they be fully and clearly recognized in every legal system expanding "personal jurisdiction."

**Foreign Evidence**

The collateral rules mentioned will serve very diverse purposes. On the one hand, every procedure available for securing evidence abroad must be utilized to the fullest; and on the other, the court must be vested with a full discretion to refrain from exercising its "personal jurisdiction" when it appears either that the case can better be tried elsewhere, or that it would not be "just" for it to take jurisdiction over the defendant in the particular case. The first category should include not only all traditional common law methods for securing evidence abroad but it also should provide for the full use of "letters rogatory."  

Unfortunately, common law procedure and practice never had utilized "letters rogatory." Our courts invariably have looked on them with suspicion, even hostility. Even after the Federal Rules of Civil Procedure formally recognized their usefulness, Rule 28 quite generally has been interpreted as authorizing their use almost as a last resort, only. The traditional common law prejudice against them is demonstrated too tellingly by the fact that when Montana "adopted" the Federal Rules, Rule 28 was reworded so as to omit all mention of them. This happened at the same time that the Commission and Advisory Committee, created by Congressional Act was preparing to recommend amendments to the Federal Rules which would repudiate completely the traditional prejudice against letters rogatory and, instead would declare in effect that they should be used freely in every case where they might have utility. One of the most substantial changes in the amendments to the Federal Rules of Civil Pro-

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118A "letter rogatory" is simply a written communication from the court of one country to that of another country, requesting the latter to act on behalf of the former in the serving of process, papers, or other documents, or the taking of testimony or securing of documents and effecting other "discovery," thus making available to the requesting court the compulsive powers of the responding court on behalf of a judicial proceeding pending in the requesting court.

119This hostility is exemplified by Branyan v. Koninklijke Luchtvart Mattechaprij, 13 F.R.D. 425 (S.D.N.Y. 1951) : "Provision of this rule, that a commission or letters rogatory shall be issued only when necessary or convenient is a reinstatement of interdiction of long standing that letters rogatory should not issue if deposition may be had by notice or by commission, and applicant must show that notice or commission is inadequate or ineffective to obtain desired testimony." Id. at 425. Actually, Fed. R. Civ. P. § 28(b), subjects the commission to exactly the same limitation as letters rogatory, saying: "A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice . . . ."  

120R.C.M. 1947, § 93-2705-3 (Rule 28). Until the amendments to the Fed. R. Civ. P. adopted only this year, infra note 116, Rule 4 made no provision for using "letters rogatory" to effect service, so elimination of reference to letters rogatory in that Rule was unnecessary.
procedure, adopted by the United States Supreme Court on January 21, 1963, is found in the rewording of Rules 4, authorizing the use of letters rogatory for purposes of foreign service, and 28, to more effectively insure the securing of all forms of evidence abroad. And the Uniform Interstate and International Procedure Act contains exactly the same provisions, as one of several alternative methods for serving process and for securing evidence. These provisions make available to the local court the compulsive powers of the relevant foreign court, wherever such compulsion is necessary.

Similarly, the Uniform Act directs the local courts to stand ready at all times to use their compulsory powers in aid of the process of a foreign court in all foreign judicial proceedings.

The Uniform Act is the only one of the four considered here expressly authorizing and describing the procedures for using ‘letters rogatory’ within the one Act. Granted that there are special reasons for its inclusion of that subject, the enlargement of ‘personal jurisdiction’ by substituted service greatly increases the prospective utility of that device. The need for officially requesting the assistance of a foreign court either in serving


14Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore “sovereign,” acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country.” Report of the Judicial Conference of the United States, supra note 115 at 44. See also, United States v. Paraffin Wax, 2265 Bags, 23 F.R.D. 289, (D.O. 1959): “Where letter from the U. S. Department of State stated the testimony of witnesses residing in Switzerland, for use in another country, may only be taken by interrogatories forwarded Swiss Court through diplomatic channels, motion of third party plaintiff for issuance of letters rogatory, pursuant to this rule, directed to appropriate court in Switzerland, requesting examination of an associate and a former employee of the third party plaintiff, on written interrogatories and cross-interrogatories would be granted by district court.”

15Uniform Interstate and Int’l Procedure Act, §§ 2.02, 3.02 (1962). Of course, such express provisions directing the local courts to cooperate freely with foreign courts in aid of foreign actions will encourage reciprocal treatment by the foreign court.

16Though the Uniform Act is particularly conscious of international litigation as well as interstate, it is intended that it be adopted by our various states. It is drafted for interstate as well as international procedures, simply attempting to be comprehensive in its coverage, based on a rationale assuring the most effective judicial administration possible, within the area of its subject matter. The mere fact that the local court may need the compulsive assistance of the foreign court less frequently than in other jurisdictions is hardly sufficient reason for eliminating completely machinery implementing that need when it does arise.
process or in securing the evidence wanted may arise with increasing frequency in the future, precisely in the kinds of cases we are considering here—the foreign defendant, often in a suit involving foreign transactions and/or foreign acts as elements therein.

Forum Non Conveniens

The second category of rules mentioned above includes two diverse classes also. One class, dismissal of the suit, because it can better be tried elsewhere, is commonly described as "recognizing the doctrine of 'forum non conveniens'." The other class involves rules which, for various policy reasons, provide for the exemption from service of the particular defendant. Two of our four "comprehensive codes" spell out the doctrine of forum non conveniens in full detail; the third one, Illinois, now clearly recognizes it by judicial pronouncement. Only Montana fails to make provision for it, either by statute or decision; so it is seriously deficient in this respect.

Of course, as noted above, Montana and other states not recognizing forum non conveniens, nevertheless, will be constitutionally required to give some effect to the rationale underlying that principle by the requirement of "trial convenience" or possibly better, "relative convenience of the parties," as a constitutional factor under International Shoe and McGee. However, the criteria for the two are not exactly the same, and it would appear that in practically all cases arising under these substitute service statutes it will be constitutionally permissible to exercise jurisdiction in terms of "relative convenience." On careful analysis, the real limiting factor under these sections is much more likely to be a basic lack of "jurisdiction over the subject matter," as exemplified in Denckla. In any case, this constitutional limitation will be much narrower than tradi-

12 Even though today the problem of "foreign service" or notice may be largely cured by resort to the mails, such broadening of personal jurisdiction inescapably will increase substantially the proportion of local suits with important foreign elements, often calling for the taking of evidence abroad, or securing access to documents, etc.

13 Supra note 95.

14 Supra notes 93 and 94.

15 Supra note 118, § 1.05: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just." Wis. Stat. Ann. ch. 262, § 262.19 (Supp. 1963). Though based on the principle of forum non conveniens, the Wisconsin section provides only for a "stay" of proceedings for trial abroad, so jurisdiction continues. The grounds listed for staying also go beyond traditional forum non conveniens, illustrated in § 262.19(3)(c), which lists "differences in conflict of law rules" as a relevant consideration. Moreover, the listed causes are illustrative only.


17 The most recent of two decisions formally considering whether forum non conveniens is recognized in Montana offers a very unsatisfactory discussion of the problem, and leaves the question highly in doubt. State ex rel. Great No. Ry. Co. v. Dist. Court, 139 Mont. 453, 365 P.2d 512 (1961).
tional forum non conveniens," even though that doctrine traditionally requires a high degree of inconvenience to the defendant before dismissing.

Exemptions from Process

The second class, dismissal on policy grounds, may be based on a variety of reasons. Dismissal may result from a privilege extended to a particular "class" of defendants, of which the particular defendant is a member. This ranges from "office holders," exempted in some circumstances, to non-residents requested to testify in the forum. Or the court may be persuaded to dismiss the suit because of the "inequitable manner" in which the plaintiff has subjected the defendant to the forum's personal jurisdiction, as by using either fraud or force to bring him into the forum for the purpose of serving him there. Even a partial enumeration of the various grounds on which a personal exemption to service of process should be granted, for equally various policy reasons, raises this interesting question. Should not these grounds be thoroughly canvassed for inclusion in any "comprehensive process statute," or at least be thoroughly reviewed in the light of current practice in exercising personal jurisdiction, to insure their inclusion in the local procedure? The current touchstone for exercising that jurisdiction, that of "fairness and justice" to the parties under the circumstances, dictates that the courts be vested with a broad discretion.

A very fine analysis of state-court jurisdiction, Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 1011-17 (1960), rightly insists that though "relative convenience" has become a constitutional element in measuring judicial jurisdiction, the doctrine of forum non conveniens remains a vitally important tool in the effective allocation of law suits and must be fully provided for. It declares, "since 'due process may be compatible with situations of greater inconvenience ... than those inconveniences which would support the plea (of forum non conveniens) ...' courts considering the private-interest factors should weight them differently in determining constitutional validity than when merely deciding whether to dismiss as a matter of discretion." quoting Latimer v. S/A Industrias Reunidas F. Matarazzo, 175 F.2d 184, 186 (2d Cir. 1949), cert. denied, 338 U.S. 867 (1949). 73 Harv. L. Rev. 909, 1012 (1960). Again: "So long as states retain this rule (i.e., transient jurisdiction) as a basis of jurisdiction, forum non conveniens will be necessary to maintain the sensitive protective balance. Even when an action has been predicated upon a basis of jurisdiction constitutionally sanctioned by expanding jurisdictional concepts, there may be instances in which the factors considered on a plea of forum non conveniens indicate the desirability of a dismissal." Ibid. (A perfect example of this is found in the hypothetical, supra note 50.) It concludes thus: "... [A] state first ... (should) phrase its jurisdiction statutes so as to take full advantage of its constitutional power and then ... limit jurisdiction by a liberal use of forum non conveniens." 73 Harv. L. Rev. 909, 1016 (1960).

Whether the common law extends immunity to these groups, and if so, to what extent remains uncertain and vague. That even the express constitutional grant of immunity stating that members of Congress "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses ...", U. S. Const. art. I, § 6, is ambiguous in scope, is demonstrated by Long v. Ansell, 69 F.2d 356 (D.C. Cir. 1934). The state legislature might do well to review the adequacy and appropriateness of common law rules regulating exemptions from process in particular cases, with a view to enacting a fully articulated code on the subject. Any such statute would very appropriately be included in the "comprehensive" statute herein considered. See Mich. Stat. Ann. §§ 27A. 1821-27A. 1855.

Supra note 93.
as to whether their admitted jurisdiction should be exercised in the particular case.239

"Kinds of Service" Available

Of course, it is most important that our "comprehensive code" include adequate sections dealing with the various kinds of "process" which may be used as "substituted service" for differing purposes;240 but it is equally important that it require quite generally that that form of available substituted service be used which is most likely to provide actual notice in the particular case.241 Minimal constitutional limitations require this much today for every case of substituted service.

239This is not to say that sections exempting from service persons induced to enter the forum by fraud or force are relevant to the administration of the "special jurisdiction" sections; but they should be included in any code dealing comprehensively with the exercise of personal jurisdiction.

240Montana deals extensively with "service procedures" in R.C.M. 1947, §§ 93-2702-2D to 93-2702-4 (Rules 4, 5, and 6). Although it is not possible to examine these provisions in detail here, a brief comment on the language of § 93-2702-2D(3) (service outside the state) seems called for. R.C.M. 1947, § 93-2702-2B(1), first provides both for general personal jurisdiction on "All persons found within the state of Montana" (by serving them with summons therein as prescribed in D(2)), and a special personal jurisdiction, "as to any cause of action arising from the doing personally, . . . of the following acts: . . . Then § 93-2702-2D(3), read literally, seems to provide that, in all cases in which service within the forum is authorized, but is not possible because of the defendant's absence, service on him outside the state, "in the manner provided for service within this state," will have the same force and effect as if made within the state. But this includes all service on a defendant within the state on all suits generally, as well as in the cases of special jurisdiction, and to that extent is too broad. The phrase "with the same force and effect as though service had been made within this state," should be limited to the "acts" supporting special jurisdiction listed in R.C.M. 1947, § 93-2702-2B(1) (a-f), i.e., cases of special jurisdiction.

Foreign "service of process", standing alone, will not vest a court with personal jurisdiction, any more today, than in the past, while local service has exactly that consequence. Hence, codes generally still stress the fact that "foreign service of process" has two fundamentally different consequences, depending on whether it is based on either a "relationship" or an "act," which of itself supports the exercise of "personal jurisdiction", on the one hand, or is the sole basis for vesting the court with "personal jurisdiction" on the other. For example, compare the following illustrative provision in the Illinois Code. ILL. ANN. STAT. ch. 110, 16(1) (1856):

Personal service of summons may be made upon any party outside the State. If upon a . . . resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

In "special jurisdiction" cases, the defendant is deemed to have "submitted" to the jurisdiction of the Illinois courts, under this section. Presumably, the Montana Supreme Court will interpret the broad language in the Montana statute as impliedly restricted to cases of "special jurisdiction", so as to uphold its constitutionality. Though § 93-2702-2D(1) very sensibly authorizes the service in or out (provided in § 93-2702-2D(3)) of the forum by any person not a party, over 21 years of age, it is not as flexible as the Uniform Act, for example, in providing alternatives, such as "in the manner prescribed by the law of the place in which the service is made. . . ." Supra note 118, § 2.01(a)(2). Subdivision (a) lists five such alternatives.

241Though McDonald v. Mabee, 243 U.S. 90 (1917), reinforced by Milliken v. Meyer, 311 U.S. 457 (1940), gave full warning that the Supreme Court was prepared to constitutionally require that all reasonable efforts be made to give notice in fact, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950), authoritatively confirmed and extended the principle to all forms of action, personal and in rem. Schroeder v. City of New York, 83 S. Ct. 279 (1962), removes any possible doubt which may have lingered as to the last part of this requirement.
Tolling Statutes

The relation of "tolling statutes," i.e., those statutes providing that under certain circumstances the local statutes of limitations shall not run, or shall not "toll," suggests something of the variety of questions which may be raised by statutes authorizing the exercise of personal jurisdiction on substituted service. Hence, the question arises whether they should not be taken into account in preparing any comprehensive process statute, by a provision correlating those statutes with the "new procedural scheme."

Practically every state has enacted a "tolling statute," suspending the local statutes of limitations. Commonly, they provide broadly that, while the party to be charged is outside the state, the statute of limitations shall not run.

This statute is based on the old law that, to be sued locally, one must be served locally. An obvious practical effect of such statute is to make it impossible for a local resident to secure local immunity to suit by leaving the state until the statute has run.

Since, under the statutes expanding "personal jurisdiction" and providing for substituted service in connection therewith, the defendant will be amenable to local suit at all times, the reason for the tolling statutes no longer exists as to these suits. This suggests that perhaps a section should be included in our "comprehensive process statute" withdrawing the local tolling statutes from these actions. The inclusion of such provision is supported by the fact that there no longer is any reason for so protecting this particular action. If the law is modified in this respect, a reasonable effort should be made to call it to the attention of a prospective plaintiff by incorporating it into the same statute as liberalizes "personal jurisdiction."

Substantive or Procedural

The question concerning the application of a legal rule, which is most commonly answered by deciding whether it is "substantive or procedural," arises when the court must decide whether that rule should apply "retroactively" or only "prospectively." However, for historical reasons, whether these rules enlarging personal jurisdiction by substituted service

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127Montana's is found in R.C.M. 1947, § 93-2702 (Absence of defendant from state).
128A question also might be raised as to whether still another subject should be dealt with in our comprehensive code. For example, Michigan requires any plaintiff suing under the limited jurisdiction provisions to post a bond to guarantee payment to the defendant of his court costs and actual expenses (not including attorneys fees) in the event the judgment is in the latter's favor. Mich. Stat. Ann. § 27A.741 (1962). The Uniform Extra-Territorial Process Act, § 5 also imposed much the same condition on the plaintiff. Agenda, 1961 Annual Meeting, Nat'l. Conference of Commrs of Uniform State Laws, Index Tab. 13. But when it was merged with the Uniform Interstate and Int'l Procedure Act, becoming the basis for Art. I in the latter, that provision was omitted. Id., (1962) Index Tab 6, Commissioners' Prefatory Note. Though there is a question of policy here, the answer to which may depend on the underlying rationale which one adopts justifying the subjecting of defendants to "special jurisdiction", on balance there appears to be merit to the view that the plaintiff should be discouraged in this manner against bringing frivolous or spurious actions against a foreign defendant.
should be applied retroactively or prospectively only has been complicated by the fact that the rationale on which they originally were held constitutional has made the "substantive-procedural" characterization irrelevant for that purpose.

The genesis of these statutes is found in the "non-resident" motorist statutes, which were upheld on the theory that such motorist could properly be charged with "consenting" to substituted service for accidents on the highways, by virtue of his voluntarily coming into the state and using its highways. At the time, courts generally felt that the logic of this rationale compelled the conclusion that it is only such legislation as is in existence at the time he uses the highway, that the foreign resident can be held to have "consented" to—it would be stretching the fiction too much and thus would be unconstitutional, to charge him with "consenting" to be subjected to legislation which might be enacted "in the future." Ergo, these statutes quite generally were given only a "prospective" application, i.e., applicable only to causes of action arising after their passage. And generally the practice of applying them prospectively only, continued long after the standard explanation for the non-resident motorist statutes became simply "statutory subjection."

Moreover, the problem is complicated further by the fact that when legislatures revise substantial portions of their procedural codes, they may stipulate that such revisions apply prospectively only, i.e., only to causes of action accruing after the code's effective date. On the other hand, basing its "Rules" on the Federal Rules, Montana has included the former's express provision that those rules shall apply to all subsequent suits, thus giving them a "retroactive" effect.

These varying provisions are applied quite independently of the question as to the supposed "intrinsic" character of the rules, with little in the varying practices to suggest a common rationale. However, the Restatement of Conflicts 2d, may be thought to provide an explanation as to why the "substitute service provisions" in the past have generally been applied prospectively only. It adopts a rationale which, if accepted generally, would compel the conclusion that these provisions authorizing substitute service generally should be applied prospectively only. It enlarges the rule of the original Restatement, based primarily on non-resident motorist statutes, that the statute acts only prospectively, by stating that rule generally for substituted service statutes based on any "act," or "consequence" from a foreign act, taking effect in the forum. It places this rule on the ground of "fairness," in the following statement:

11 For extensive lists of state decisions so holding see: 82 A.L.R. 765, 769 (1933); 96 A.L.R. 594, 595 (1935); 125 A.L.R. 457, 460 (1940); 138 A.L.R. 1464, 1465 (1942).
12 Ibid.
14 Restatement, Conflict of Laws § 84 (1934), stipulates the existence of the statute when the "act" is committed as a condition to subjection: "... [I]f by the law of the state at the time when the act was done...."
15 Restatement (Second), Conflict of Laws § 84 (1956), does not so stipulate, but comment takes the position that it is necessary. See note 140, infra.
16 Id. at comment e.
It is essential that the statute be in existence when the cause of action arises. A contrary rule would be unfair to the defendant; he should be able to know beforehand whether his activities will be considered grounds by the state for the exercise of judicial jurisdiction over him.

It may be doubted, however, that this is a sufficient basis on which to prohibit retroactive application of these statutes. If all they do is to provide one more court which the plaintiff may ask to adjudicate existing rights, such statutes have been "justified" in the past, even held constitutional, primarily because they are thought simply to restore a "balance" between plaintiff and defendant by removing an unmerited advantage which the defendant acquires when he comes into the state, creates liabilities in favor of a resident, and then leaves quickly before he can be "brought to justice." Traditional conceptions of "trial fairness" do not generally require that windfalls or unmerited defenses or exemptions be preserved to the defendant. Business or commercial transactions in particular are usually entered into without reference to where such transitory actions based thereon may be triable. Furthermore, the "prevailing" recent decisions under the modern comprehensive codes, do use the "substantive-procedural" dichotomy to justify applying them retroactively, saying they are essentially procedural. It appears, therefore, that the substantive-procedural dichotomy, at least as defined and described below, may serve usefully to resolve this issue, for those codes not containing a section dealing expressly with the question, since characteristically, aided by constitutional doctrine, a substantive rule applies only prospectively, while a procedural one may apply retroactively.

One may challenge such suggestion, however, on the ground that long ago Cook demonstrated the fact that this dichotomy cannot be helpful even for internal law purposes, because most rules may be characterized as "procedural" for one purpose, and "substantive" for another; that, therefore, its "usefulness" as a guide is largely illusory. On this analysis, the dichotomy becomes merely descriptive of results reached on quite independent considerations—such as the "implied consent" or the "unfairness" rules of the Restatements. The fact is, however, that the basic distinction between "substance" and "procedure," in terms of institutional function, is a real though simple one, and highly significant institutionally. Simply stated, the distinction depends on the use to which the legal system involved puts the rule. If used to create, destroy or limit the "substantive rights" of the parties, that rule has a "substantive function"; on the other hand, if used by the forum simply to "order and regularize" the administration of the adjudicative process, whatever may be the "rights of the parties" in the particular case, it is procedural in character.

14The definitive decision on non-resident motorist statutes fully justifies this statement. Hess v. Pawloski, 274 U.S. 352 (1927).
14Ibid.
14Supra notes 138, 139.
The above described distinction is based on the premise that there is a fundamental institutional difference between rules implementing the “legislative process” on the one hand, acting institutionally, and the “judicial-adjudicative process” acting institutionally, on the other; that, institutionally, they represent two entirely different and independent patterns of norms, analytically; that many rules may be used equally readily in either process, so that, whether a rule is substantive or procedural depends on how the particular legal system intends to use it. Since a single rule, in formal statement, may be used in both processes, in any completely articulated legal system, it is necessary, not that we say that the one rule is characterized as “substantive for one purpose, and procedural” for another, but rather that they be separately stated as distinct rules for each purpose.\(^4\)

However, even though some rules may be “affiliated” equally readily either with the legislative or with the judicial process, others may be inescapably “affiliated” so exclusively with the adjudicative process as to require that they always be so characterized. Stated another way, are there not some legal norms so exclusively incidental to the adjudicative institution as to require always that they be characterized as procedural? Rules admitting or excluding evidence are one such possible illustration. And the question of when a court is competent to exercise personal jurisdiction over a defendant may be another, in spite of contrary intimations of some cases and authorities.

A 1916 New York decision by Cardozo\(^9\) may seem to refute the validity of this suggestion. Plaintiff sued defendant for a trespass to and a burning of his mill in Kansas in 1883. Suit was brought under a New York statute vesting its court with jurisdiction to entertain an action for trespass to foreign land—converting a local action to a transitory action, in effect. Cardozo ruled the statute substantive and thus prospective only in application, on the following grounds:\(^9\)

Out of the foreign tort there once grew a right of action territorial and local which our courts would not enforce. Out of the same tort there now grows a transitory right of action which our courts will enforce. The right of action has not merely been changed; so far as our law is concerned, it has been created. But the wrong, the violation of the primary right, which it redresses, is defined by the foreign law. (Emphasis added.)

\(^4\)Though there appears to be little, if any, judicial or other authoritative affirmation or recognition of this proposition, it is submitted that any fully articulated, policy centered legal system requires this conclusion. Though Holmes does not quite frame the rationale for his decision in the early case of Emerby v. Burbank, 163 Mass. 326, 39 N.E. 1026 (1895), in these terms, his analysis actually supports this proposition. This means that if a statute of limitations or a statute of frauds is used both “procedurally”, and “substantively”, that fact must be clearly indicated by stating them separately and independently in each character so as to show the distinct “institutional affiliation” of each—each becomes integrated into distinctive frameworks of rules. Just how each legal system uses a rule is of the utmost importance when a “choice of law” has to be made, because the answer often is highly relevant to the question of how much of the foreign law should be included in such “choice” or reference.


\(^9\)Id. at 840.
In this case, however, the kind of process necessary to subject the defendant to the personal jurisdiction of courts with general subject-matter competence was not involved at all. Rather, the New York statute,\textsuperscript{14} for the first time vested its courts with a competence over a particular “subject matter,” i.e., trespass to foreign land. It would appear that Cardozo considers this newly created New York action the essence of “substantiveness”—even though his language reasonably suggests that he would adopt a “choice of law” looking to Kansas’ law\textsuperscript{10} to measure the conditions for the defendant’s liability.

It is readily seen that there are three “levels” at which the question of “substance or procedure” may be raised: 1. A new statute making it easier for the forum to acquire personal jurisdiction over the defendant than in the past simply by subjecting him to substituted service, on a “subject matter” over which the court always has had a general “jurisdiction”; 2. A statute vesting the court with jurisdiction over the “subject matter” for the first time—which court, however, chooses to refer to and utilize the “substantive law” always governing the rights in the past; 3. A statute vesting its courts with new subject matter competence, and providing that its courts should look to its own “substantive” rules to measure both the existence and the character of the substantive rights involved.\textsuperscript{11} On this analysis, whether the statute making a trespass to foreign land transitory was substantive or procedural should depend upon whether the New York court uses the law of the situs to determine the defendant’s liability, or uses its own general tort law for this purpose—or possibly its own special rules as to what constitutes a trespass to New York land (questionable practice). Of course, choice of law for a tort generally would require it to refer to the foreign law—that law already regulating the substantive rights of the parties. It is submitted that a rule simply permitting the forum to treat the foreign action as “transitory” for the first time, considered institutionally, should be characterized as essentially procedural.

But, even if it was permissible for Cardozo to characterize the statute “creating a general jurisdiction” over foreign trespass in the New York Court for the first time, as substantive for that reason, it is clear that the case it not really relevant to our present issue, which involves only the first level of statutes described above. The statute in \textit{Jacobus} operates at the second level described there. So, the case does not refute our thesis that, at the first level, such statute is “intrinsically procedural.” If correct, then the only basis for applying them prospectively only would have to be in some such policies as are suggested by the Restate-

\textsuperscript{14}N. Y. Real Property Law § 538. Set forth in 111 N.E. at 838, as § 982a Code of Civ. Proc., Laws of N. Y. 1913, ch. 76, thus: “An action may be maintained in the courts of this state to recover damages for injuries to real estate situated without the state, ... whenever such an action could be maintained in relation to personal property....”

\textsuperscript{10}See text at note 148 \textit{supra}, at underscored portion of the quotation.

\textsuperscript{11}I.e., it proposes to create rights measured by its own law, not existing heretofore.

\textsuperscript{12}\textit{Supra} notes 138-140.
Legislative Purposes

Whether it will finally resolve this question or not, it may be helpful to review the various possible reasons a legislature may have for enlarging the local court's competence to exercise personal jurisdiction. Obviously, such legislation not only may have either substantive or procedural policies behind it—it may have both. For example: 1. It may wish to widen the area in which its courts can exercise personal jurisdiction by substituted service, to make more effective the competence of its courts with respect to all forms of strictly transitory causes of actions without regard to its interest as the forum in the subject matter of the suit. This expresses procedural policies for the more effective, expeditious and functional operation of its courts in their purely institutional form as adjudicative instruments of government. A prime example of this type of "enlarging" personal jurisdiction is found in the typical provision contained in a number of the recent "comprehensive codes" authorizing the local courts to exercise "personal jurisdiction" generally over the forum's own domiciliaries, by substituted service. Even though there is substantial common law authority for the exercise of this jurisdiction, and it has been over twenty years now since the Supreme Court approved it as constitutionally permissible, to the present, not nearly all states have authorized substituted service on this basis. 2. It may widen the area in which its courts can exercise personal jurisdiction by substituted service simply to provide a more convenient forum for its own residents. An example is found in a special Connecticut statute subjecting foreign corporations to substituted service on causes of action having a substantial connection with Connecticut, but only in favor of Connecticut resident plaintiffs or businesses. 3. But, most of the broadening of personal jurisdiction, involving modification of Pennoyer v. Neff, has taken place with respect to particular acts, or transactions which have a more or less substantial connection with the forum.

Both of the first two rules just discussed simply enlarge the court's right to exercise personal jurisdiction by substituted service with respect to "domiciliaries," enabling the adjudicative institution to deal with them more effectively, either as plaintiffs or as defendants, and seen clearly to deal exclusively with the internal processes of the "judicial function." Hence it is sufficient to explain the grounds for exercising
personal jurisdiction discussed above on purely "procedural grounds," i.e., rules or norms for the inner order of the social institution known as courts, the principal organs entrusted with the "adjudicative process." For the third area, it is obvious that the primary justification for such broadening of the court's competence is based in the forum's legislative interest in the litigation. This conclusion, however, does not warrant the further one that for this reason alone it must be assumed that the forum intends to create new "substantive rights" not existing heretofore, either by applying its own dispositive rules for the first time, to determine the rights of the parties, or by selecting a foreign law never chosen in the past. Quite to the contrary—at least in most cases coming within this third area, the forum may be expected to continue making the same "choice of law" as in the past, and that commonly will refer it to its own dispositive rules. So, we must conclude that by any correct standard for judging, these substitute service statutes must be characterized as "procedural."

Retroactive or Prospective?—Again

Of course, any court adopting the erroneous rationale that these substitute service statutes are based on an "implied consent" of the defendant, inevitably will reach the equally erroneous conclusion that they are not retroactive in their application. Such an erroneous rationale very plausibly may be extended to all cases in which "substitute service" is authorized for the reasons classified in the statutes, as the "doing of an act," as is true both in Illinois and in Montana. A "purposeful act" is the limiting criterion. This suggests a free, volitional, conscious "consenting" (even though a purely fictional one in fact).

Fortunately, however, this issue was authoritatively adjudicated by the United States Supreme Court early in the development of doctrine regulating expanding jurisdiction. In McGee the Court categorically rejected the defense that the California substitute service statute supplied by California's Insurance Code, could not apply to the defendant, because it was passed after defendant entered into the insurance contract with the California resident, on the following grounds:22

that contention is devoid of merit. The statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent... Under such circumstances it had no vested right not to be sued in California.

Also, in Nelson v. Miller, the Illinois Court reached exactly the same conclusion in very similar language:23 "There is no vested right in any particular remedy or method of procedure... the (statutory) change 'merely establishes a new mode of obtaining jurisdiction of the person of the defendant in order to secure existing rights, which are unaffected by this amendment.'"

Both of these cases reject the "non-retroactive" defense under statutes providing for substituted service strictly on a "single act" basis, thus rejecting it where most plausible. Moreover, the Supreme Court decision particularly is of special importance, both because, 1. It establishes once and for all, that it is not a lack of due process to apply these statutes retroactively, fully supporting the position taken above that traditional notions of "fairness" are not thus violated; 2. It (along with Nelson v. Miller) states most forcefully the common law rationale on which such statutes generally should be characterized as "procedural," rather than substantive. Though it will not be unconstitutional for a state to characterize these statutes as "substantive," operating prospectively only in that state, the reasoning for a contrary ruling is compelling.

Yet, even the most recent decisions have not uniformly applied these statutes retroactively. In a 1962 case, in a tort action based on product liability, the Connecticut Superior Court ruled that a statute authorizing substituted service on a foreign corporation manufacturing a commodity causing damage to a customer in Connecticut applied "prospectively" only, apparently on the ground that it is "substantive," even though it is limited strictly to "goods produced with a reasonable expectation that they be used in Connecticut"—this even though Connecticut law always would have been used to measure the remedy, and the process statute clearly makes no change in the measure of the "substantive rights" of the plaintiff. Though a most unsatisfactory decision in stating its rationale, relying heavily, though erroneously, on Cardozo's decision, discussed above, the apparent key to the court's thinking probably is found in the following statements:

Prior to January 1, 1961, this plaintiff, in order to sue this defendant under the herein situation, would have had to go to the Tennessee state courts. . . . Clearly, this statute opened the door to a remedy of suit in Connecticut against certain foreign corporations where, under prior law and under these circumstances, none existed . . . with the situation at hand we are not dealing with a procedural matter, . . . The right given under the statute is a fundamental one. It is a substantive right. It must be and is hereby construed as operating prospectively.

In practical effect this construction incorporates statutes providing for the acquiring of personal jurisdiction into the substantive rights created by the forum's own law. This makes any supposed distinction between "substance" and "procedure" meaningless.

Subjecting Foreign Corporation Officers: An Example

But the above case brings us again to the counsel of the Uniform Act's editorial comment suggesting that a rule subjecting the foreign directors and officers of local corporation to substituted service should be incorporated or at least considered "in the context of the state's policy" regulating the relative powers of the stockholders and the corporate manage-

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Supra note 147, cited and relied on, supra note 160, at 636.
Supra note 160, at 635, 636.
ment, because such rule constitutes a practical shift of corporate power toward shareholders. But substantially as much can be said of practically all of the substitute service statutes. The natural advantage of the hit and run non-resident motorist led to the “non-resident motorist statutes,” to cancel that “natural advantage” which clearly is an “unfair advantage” in the view of the forum state. Further, is it not at least permissible to consider whatever advantage the stockholder may gain, a purely incidental one to the primary justification for the statute, which may be to “equalize” the amenability to suit in the forum of all corporate officers, both resident and non-resident? (Often, their liability will be both joint and several.) Finally, any rule which makes it easier for a forum resident to sue at home by subjecting a foreign defendant to local jurisdiction effects a practical shift in power—but this makes the procedure utilized to that end no less procedural. And the fact that the “tug of war” in this particular case lies between classes of persons in an enduring institutional relationship, subject continuously to “regulation” in some degree, would seem hardly sufficient to support the conclusion that the clause authorizing substitute service should not be included in a comprehensive “substitute service” statute.

**Prospective Procedural Statutes?**

Though the matter is settled for Montana by its express “retroactive” provision, and even though all of the subdivisions in our statute be classified as procedural that does not automatically establish that all of them should apply retroactively. But the criteria for determining that issue is well stated in *Nelson v. Miller*, by Justice Schaeffer. “Retrospective application of such a statute creates a problem only if that application operates unfairly against a litigant who justifiably acted in reliance on some provision of the prior law. It is difficult to imagine such a case insofar as section 17(1)(b) is concerned.” Schaeffer then says that the only time this might be true is when “submission” is founded on a bargain whereby a real consent is exchanged for a privilege. Not so here. Paraphrasing: It is difficult to imagine a case in which a non-resident who purposefully elects to submit to the substantive law of the forum and gain advantage thereby, can be said to have “justifiably acted” in reliance on his “non-amenability to suit” in that forum, for the purpose of avoiding such suit. Surely this is quite as true of foreign directors and officers of a local corporation as of any other individual or group of defendants.

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180 Uniform Interstate and Int'l Procedural Act, Comment at page 8.

181 To incorporate such provision only in the corporation code would increase the chance of having it characterized as “substantive”, and thus only prospective in application.

182 As noted in previous notes.

183 Supra note 159, at 676.

184 Of course, corporate directors and other agents are especially chargeable with the prospect of the state of incorporation increasing its supervisory regulation of the corporation and its business.
SUMMARY AND CONCLUSION

Often, interpreters of International Shoe and McGee explain them as effecting a fundamental break with traditional doctrine—a repudiation of Pennoyer v. Neff, and some imply that Denckla is only a "limiting sport," which shouldn't last. Typical opinions as to how much these cases expand constitutionally permissible substituted service have varied all the way from Professor Leflar's suggestion that they permit any forum to exercise personal jurisdiction by substituted service in any case in which it can constitutionally "choose" its own law, and Douglas' and Black's insistence in Denckla that "any act is enough to so subject," on the one extreme, to the declaration by a federal court that the liberal rule of McGee is limited strictly to the regulation of the insurance business on the other.

Though this present study strongly indicates that neither extreme position is tenable, we do not try to pinpoint the constitutional limits of the various grounds for exercising personal jurisdiction on substitute service. We try rather to understand International Shoe and McGee in relation to the entire field of conflicts, and to put their rules in historical perspective, in the light of other current rules restricting, rather than enlarging the grounds for exercising "judicial jurisdiction." To this end we ask, and try to answer, "What should be included in a complete substitute service statute?" In this "whole view" the thesis is affirmed that the developments exemplified by International Shoe and McGee simply involve a modern adaptation to present day conditions of historically valid doctrine developed largely indigenously from American experience.

The further proposition is submitted that, to understand the constitutionally permissible scope of "doing of an act" as a ground for substituted service, it is of the utmost importance to realize that the "institutional affiliation" of such acts or transactions should be carefully examined, and that generally, the constitutional limits on the forum's exercise of "jurisdiction over the subject matter" should equally limit its power to exercise personal jurisdiction based on "acts" which are drawn to and affiliated with (i.e., controlled by) such subject matter.

And finally, on this "whole view" perspective, on balance, it may be said with confidence that Part I of this study justifies the conclusion that the number of restrictive rules which the Supreme Court recently has imposed, narrowing exercise of judicial jurisdiction, is almost as great as the number recently developed broadening that jurisdiction.

On the question of whether our four "comprehensive codes" measure up satisfactorily with the "ideal code", as might be expected, they fall

\(^{16}\) Leflar, The Converging Limits of State Jurisdictional Powers, 9 J. Pub. L. 282, 286 (1960): "Denckla, which reasserted due process limits for in rem cases as such, may seem to negative such a trend, but the evidence of other cases is too strong to deny."

\(^{17}\) Id. at 282, 284, 292.

\(^{18}\) This seemed to be the substance of Black's dissent in Hanson v. Denckla, 357 U.S. 235, 256-263 (1957), and of Douglas' dissent, 357 U.S. 235, 262-4 (1957).

\(^{19}\) Trippe Mfg. Co. v. Spencer Gifts, Inc., 270 F.2d 821 (7th Cir. 1965).

\(^{20}\) Supra note 16; Briggs, Contemporary Problems in Conflict of Laws—Jurisdiction by Statute, 24 Ohio St. L. J. 223, 237, particularly note 63 (1963).
short of the ideal in varying respects. We are forced to conclude that the personal jurisdiction sections in three of the four, Illinois, Montana, and the Uniform Act, raise substantial questions of statutory construction. Also, of the four, although Montana's "personal jurisdiction" section perhaps is the broadest of the three, its statute also is the least "comprehensive" of the four as a complete process statute, and some of its omissions are rather substantial. Three omissions in particular should be noted. 1. Its failure to provide for substituted service on its domiciliaries, limits its effectiveness as a complete process act; 2. Its refusal to consider and expressly provide for forum non conveniens on an intelligent, modern rationale is most unfortunate; and 3. Its failure to make any provision whatever for using letters rogatory, at a time when the federal rules are being amended to encourage their use and the Uniform Act recognizes them as extremely valuable adjuncts to interstate and international procedure, seems to continue a common law bias against an optional procedure proving most helpful to other courts. Granted even that Montana courts would have to resort to them infrequently, they are needed precisely in those cases where all the traditional common law techniques for serving process or securing evidence abroad have failed. Amendment of Montana's present Act so as to correct these three defects would more nearly modernize it.
Briggs: Contemporary Problems in Conflict of Laws Jurisdiction by Statute