

MINNESOTA STATUTES 1953 ANNOTATIONS

542.13 VENUE OF ACTIONS

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had been members and customers of the co-operative so that there was a strong possibility that fair and impartial trial might not be had in Pine county, denial of a motion for remand to Hennepin county was abuse of discretion. *Berry v North Pine Electric Co-operative*, 235 M 562, 50 NW(2d) 117.

An affidavit in support of a motion for a change of venue for convenience of witnesses shall merely state that affiant had the benefit of an investigation of the case and which listed eleven witnesses who resided in another county, was insufficient to support the motion. Affiant should have stated facts within affiant's personal knowledge sufficient to support such motion. *Schultz v Land O'Lakes Creameries*, M, 54 NW(2d) 781.

The matter of determining whether a change of venue should be granted on the ground that an impartial trial could not be had in the county in which the action was pending, rests upon the district court's decision, and will not be reversed by the appellate court in the absence of clear abuse. Inherently, an action against a municipality is a local one and in the instant case there was no abuse of discretion on the part of the trial judge. *Wolfe v City of Austin*, M, 60 NW(2d) 74.

542.13 Superseded by Rules of Civil Procedure, Rules 63.02 and 63.04.

542.16 Superseded by Rules of Civil Procedure, Rules 63.03 and 63.04.

Annotations relating to superseded section 542.16.

No judge, when other judges are available, ought ever to try the cause of any citizen, even though he be entirely free from bias in fact, if circumstances have arisen which give a bona fide appearance of bias to litigants. The preservation of the constitutional right to a fair and impartial trial is the positive duty of the lawyer, but with that duty goes an obligation, as an officer of the court, to assert such right in a timely manner. The statute or rule prescribing the manner of asserting such constitutional right is given a liberal construction. A rule of the district court which provides that proceedings to modify a decree of divorce shall be heard by the judge upon whose order the decree was entered has no application where such judge is disqualified by the filing of an affidavit of prejudice. *Wiedemann v Wiedemann*, 228 M 174, 36 NW(2d) 811.

Prohibition is the proper remedy to restrain a judge from acting in a matter where he is disqualified by an affidavit of prejudice, but there is no statute authorizing the disqualification of a judge of the municipal court of South St. Paul by the mere filing of an affidavit of prejudice. Section 488.16 has no application to a prosecution for a violation of a city ordinance and is applicable only to civil actions. *State ex rel v Beaudoin*, 230 M 186, 40 NW(2d) 885.

CHAPTER 543

CIVIL ACTIONS, COMMENCEMENT

543.01 Superseded by Rules of Civil Procedure, Rule 3.01.

Annotations relating to superseded section 543.01.

Venue; conclusiveness of statement in articles of incorporation as to residence. 32 MLR 823.

Tort actions against a receiver appointed under section 77 of the Bankruptcy Act. 32 MLR 829.

Violation of antitrust laws as a defense to a suit for patent royalties. 34 MLR 479.

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The contract Settlement Act of 1944, quoted as U.S.C.A., sections 101 to 125, means that subcontractors must file their claims against prime contractors upon forms prescribed by the regulations pertinent to the Act as the conditions precedent to the commencement of an action in a court of law. *Stevens v Federal Cartridge Corp.*, 226 M 148, 32 NW(2d) 312.

As a condition precedent to the maintenance of an action in behalf of a municipality by a taxpayer, such taxpayer must allege and establish that he has requested the proper officers of the municipality to bring such action and that they have refused, or, in the alternative, that it would be futile to make such a request. *Muirhead v Johnson*, 232 M 408, 45 NW(2d) 649.

As to contracts, an acceptance which qualifies the terms of the offer amounts in legal contemplation to a rejection of the offer and is regarded as merely a counter-offer. An acceptance must be co-extensive with the offer and may not introduce additional terms and conditions. Requested or suggested modifications of an offer will not preclude formation of a contract where it clearly appears that offer is positively accepted, regardless of whether requests are granted; but where acceptance of an offer is expressly conditioned on acquiescence in requested modification of offer, or such inference is contained in the language employed, no contract is formed. *Podany v Erickson*, 235 M 36, 49 NW(2d) 193.

The executor was personally served with summons and complaint on Sept. 25 and the sheriff on the same day filed a no found return as to nonresident defendants and an affidavit was then filed stating that the subject of the action was properly within the state in which the nonresidents claimed an interest and that a copy of the summons and complaint had been mailed to each at his place of residence and service by publication was commenced. Such proceedings constituted commencement of the action. *Flanagan v Marvel*, 94 F Supp 145.

543.02 Superseded by Rules of Civil Procedure, Rules 4.01 and 12.01.

Annotations relating to superseded section 543.02.

An attorney may waive the failure of his client's adversary to serve pleadings within the time limited for making such service. *Bentley v Kral*, 223 M 248, 26 NW(2d) 532.

Section 543.02 must be liberally construed to avoid defeating the action on account of technical and formal defects which could not reasonably mislead the defendant, though notice by which the court acquires jurisdiction of the defendant must, however, in substance comply with the statute and be sufficient to inform the defendant of essential matters which the statute requires to be stated. *Tharp v Tharp*, 228 M 23, 36 NW(2d) 1.

Where a summons and complaint were served on defendant on May 3, 1946 in an action to renew a judgment taken on May 8, 1936, and the summons was fatally defective in that the defendant was not charged to serve an answer at a specified place in the state, a motion to amend the summons after May 8, 1946 was properly denied. "Summons" is not a process but a mere notice to the defendant that an action has been commenced and that judgment will be taken against him if he fails to answer. Amendments may be granted where the rights of defendants are not prejudiced. In this case the failure of the summons to designate the place at which the answer should be left was fatally defective and the defect could not be relieved since the statute of limitations had run against the cause of action. *Tharp v Tharp*, 228 M 23, 36 NW(2d) 1.

543.03 Superseded by Rules of Civil Procedure, Rule 4.02.

Annotations relating to superseded section 543.03.

The service of a summons as authorized by section 543.03 and the making of proof thereof in compliance with section 543.14, by necessary statutory implication requires that the act of effecting such service upon a defendant be performed both knowingly and intentionally; and where a notice of motion fails to indicate whether an appearance is general or only special, the motion itself to which the notice of mo-

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tion is attached, may be examined to determine the nature of the appearance. In the instant action to foreclose mechanic's lien in which the defendant moved to vacate and set aside the service of summons, the evidence sustained the finding that the police officers gained admission to the defendant's home fraudulently through false representations made by the plaintiff. *Lee v Skrukud*, 231 M 203, 42 NW(2d) 544.

543.04 Superseded by Rules of Civil Procedure, Rules 3.02 and 4.042.

543.05 Superseded by Rules of Civil Procedure, Rule 4.03(a).

Annotations to superseded section 543.05.

Where in attempting to serve a summons in a civil action defendant's 17-year-old daughter refused to open the door and the plaintiff gained admission by summoning and accompanying two police officers who had been asked to investigate a complaint of alleged juvenile delinquency by such daughter, and the police officer without intending to serve the summons or knowing the nature of the paper handed it to the daughter, such attempted service was invalid. *Lee v Skrukud*, 231 M 203, 42 NW(2d) 544.

A person's house of usual abode is the place wherein he is usually found resident. It is his present place of abode, although a temporary sojourn away therefrom may not prevent its retention as his usual place of abode. An intent not to return thereto may be of importance in determining a question. It is presumed that the usual abode of a husband is the place where his wife and family reside, but this presumption may be overcome by facts showing the contrary. The determination of the issue is for the triers of fact, and the court functions to determine only whether the evidence reasonably supports the finding. *Holtberg v Bommersbach*, 236 M 335, 52 NW(2d) 766.

Where a promissory note shows on its face that it is more than six years past due, if the holder relies upon part payment to avoid the bar of the statute of limitations, the burden is on him to prove it. The trial court's finding against the plaintiff on this issue was justified by the evidence. The departure from the state which involves merely a temporary sojourn elsewhere, as distinguished from the acquirement of a new domicile, is insufficient to toll the statute of limitations. *Beckos v Hamre*, 236 M 494, 53 NW(2d) 234.

543.06 Superseded by Rules of Civil Procedure, Rule 4.03(e).

543.07 Superseded by Rules of Civil Procedure, Rule 4.03(d).

543.08 PRIVATE CORPORATIONS, SERVICE ON

NOTE: All except the second paragraph and the second sentence of the third paragraph superseded by the Rules of Civil Procedure, Rule 4.03(c).

In an appeal by the plaintiff from an order of the district court quashing the service of process on a foreign corporation evidence establishes that the Minnesota agent of the defendant, on whom the service was made, made a regular and systematic solicitation of orders for the defendant from customers in Minnesota; that such solicitation was followed by substantial volume of the principal's products flowing into the state in a continuous stream; that the agent compromised and adjusted disputes between defendant and the customers; and that he represented and managed the defendant's participation in a food show here, was sufficient to establish the principal's presence in Minnesota through such agent. The trial court was in error in quashing the service. *Continental Convention v American Broadcasting Co.*, 230 M 217, 41 NW(2d) 263.

An order denying a motion to set aside service of summons upon a domestic corporation upon the ground that service was not made on an officer or managing agent, is appealable. Where an employee of a corporation is entrusted with the management of the business of the corporation during the absence of one who is generally in charge, he is the "managing agent." As to whether the person served is a

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managing agent is a question of fact for the trial court to determine. *Dillon v Gunderson*, 235 M 208, 50 NW(2d) 275.

Service of process upon a soliciting agent of a nonresident corporation does not confer jurisdiction upon our courts. *Sitler*, the employee served, was only a soliciting agent. The order of the trial court in setting aside the service is affirmed. *Gustafson v Johnson*, 235 M 376, 51 NW(2d) 118.

Where a Wisconsin railroad corporation appointed an agent in Minnesota upon whom service of process could be made, it thereby consented that venue might be laid in the federal district court of the district of Minnesota, and service upon defendant's ticket agent in Minnesota was ample to give jurisdiction. *Wachtler v Chicago, Milwaukee Ry.*, 7 FRD 560.

543.09 Superseded by Rules of Civil Procedure, Rules 4.03(c) and 5.02.

543.10 Superseded by Rules of Civil Procedure, Rules 4.03(c) and 5.02.

543.11 Superseded by Rules of Civil Procedure, Rule 4.04.

Annotations relating to superseded sections 543.09, 543.10, and 543.11.

In a default divorce action, the district court acquires jurisdiction of the res, the marriage status, by the service of process upon defendant without the state. Where there is no personal service of process upon the defendant within the state and no appearance by him the trial court is without jurisdiction to enter a personal judgment against him for the payment of alimony, attorney's fees, or court costs. The trial court does not acquire jurisdiction over any interest of the defendant in real property where there is no showing in the pleadings relative to ownership. In a default case the court cannot go beyond the pleading. That part of the judgment which constitutes a judgment in personam against the defendant is reversed. *Allegrezza v Allegrezza*, 236 M 464, 53 NW(2d) 133.

Where an equitable action was brought by a wife for support of herself and minor child against a nonresident husband, jurisdiction could be acquired where the summons was served by publication on the husband and no order of court was made decreeing substituted service. *Donigan v Donigan*, 236 M 516, 53 NW(2d) 635.

543.12 Superseded by Rules of Civil Procedure, Rule 4.04.

Annotations to superseded section 543.12.

The statute authorizing service by publication in an action to foreclose a mortgage or to enforce a lien on realty does not authorize service by publication in an action to establish a lien. *Curran v Nash*, 224 M 571, 29 NW(2d) 436.

Where the venue of an action is in the district court of this state and a defendant in the action is a nonresident, personal service upon him without the state does not confer jurisdiction except in those cases enumerated in section 543.12 and as there provided. *Holtberg v Bommersbach*, 236 M 335, 52 NW(2d) 766.

Cases relative to obtaining jurisdiction by publication. *Flanagan v Marvel*, 94 F Supp 145; *Hughes v Lucker*, 233 M 207, 46 NW(2d) 497; *Holtberg v Bommersbach*, 236 M 335, 52 NW(2d) 766; *Donigan v Donigan*, 236 M 516, 53 NW(2d) 635; *Curran v Nash*, 224 M 571, 29 NW(2d) 436.

543.13 Superseded by Rules of Civil Procedure, Rule 4.043.

543.14 Superseded by Rules of Civil Procedure, Rule 4.06.

Annotations to superseded section 543.14.

To obtain a valid service of summons the act of affecting service upon a defendant must be performed knowingly and intentionally. *Lee v Skrukruud*, 231 M 203, 42 NW(2d) 544.

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543.15 Superseded by Rules of Civil Procedure, Rules 4.04, 12.01, and generally.

543.16 Superseded by Rules of Civil Procedure, Rule 5.01.

Annotations to superseded sections 543.15 and 543.16.

In proceedings commenced under MSA, Chapter 278, the trial court lost jurisdiction of the matter where it appeared that although petitioner paid 50 percent of the tax levied for the year involved prior to the filing of the petition, other conditions of the statute were not complied with before Nov. 1 next following the filing of the petition, and where it further appeared that the proceedings thereunder were not completed within the time limit provided for by statute. *Land O'Lakes Co. v County of Douglas*, 225 M 535, 31 NW(2d) 474.

Defendant against whom a default judgment has been rendered cannot raise for the first time on appeal the question whether he was entitled, under section 543.16, to notice of the proceedings in which the judgment was granted. *Duenow v Lindeman*, 223 M 505, 22 NW(2d) 421.

543.17 Superseded by Rules of Civil Procedure, Rule 5.02.

543.18 Superseded by Rules of Civil Procedure, Rules 5.02 and 6.05.

CHAPTER 544

PLEADINGS

544.01 Superseded by Rules of Civil Procedure, Rule 7.01.

544.02 Superseded by Rules of Civil Procedure, Rules 8.01 and 10.01.

Annotations relating to superseded section 544.02.

In an action for malicious prosecution, malice is a fact to be pleaded as such without reciting evidence to establish it; so likewise, want of probable cause, is a fact for the purpose of pleading and may be stated directly. The gist of an action for abuse of process is the misuse or misapplication of the process, after it has been issued. *Hoppe v Kopperich*, 224 M 224, 28 NW(2d) 780.

A complaint which sets forth a cause of action founded on nuisance or trespass is sufficient if it sets forth allegations of plaintiff's ownership, and possession, defendant's wrongful entry or acts of trespass, and damages resulting. Allegations as to force or intentional harm is not required. *Christianson v City of Duluth*, 225 M 486, 31 NW(2d) 270.

A complaint must state facts, and a general allegation of wrong doing based on undisclosed facts, does not state the cause of action. *Warner v Warner Co.*, 226 M 565, 33 NW(2d) 721.

A complaint alleging that after the performance of an abortion the woman became unconscious, that those responsible for her failed to provide proper care, and that as a result she died states a cause of action for wrongful death. *True v Older*, 227 M 154, 34 NW(2d) 700.

Amended pleadings are admissible against the party interposing them even though signed only by counsel and, though unverified, are admissible as an admission or for the purpose of impeachment. *Carlson v Fredsall*, 228 M 461, 37 NW(2d) 744.

An attorney commencing an action presumably has authority to prepare the pleadings, and to overcome that presumption when the pleadings are sought to be