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The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970

A recently enacted California Senate Bill,¹ taking effect July 1, 1970, will significantly change California's general provisions for serving process and acquiring jurisdiction in civil actions. Of particular importance is the repeal of Code of Civil Procedure sections 411, 412, 413, and 417.² In the past, these sections served two important func-

1. S.B. 503 (1969).

2. Portions of those sections pertinent to this article are set out as follows: Cal. Stat. 1968, ch. 132, §§ 1-2, at 343, CAL. CODE CIV. PROC. § 411 (effective until July 1, 1970): "The summons must be served by delivering a copy thereof as follows: "1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. . . . If no such officer or agent of the corporation can be found within the State after diligent search, then to the Secretary of State as provided in Sections 3301 to 3304, inclusive, of the Corporations Code

"2. If the suit is against a foreign corporation . . . doing business in this state: in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code.

. . . .
"8. In all other cases to the defendant personally." [The portions omitted pertain to unincorporated associations, foreign partnerships, minors, wards and conservatees, public agencies, dissolved corporations, and candidates for public office.]

Cal. Stat. 1968, ch. 132, § 3, at 346, CAL. CODE CIV. PROC. § 412 (effective until July 1, 1970): "Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a corporation or unincorporated association having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears . . . that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears . . . that it is an action which relates to or the subject of which is real or personal property in this state, in which such [defendant] has or claims a lien or interest . . . therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation or unincorporated association from any interest therein, such court or judge may make an order that the service be made by the publication of the summons."

Cal. Stat. 1957, ch. 1669, § 1, at 3048, CAL. CODE CIV. PROC. § 413 (effective

tions: First, they prescribed procedures insuring that parties likely to be affected by judgments of the courts were properly notified; and second, they delimited the bases on which a California court could acquire jurisdiction over a defendant.³ Whereas the delimitations were previously embodied inconspicuously within these service of process sections, they are now defined in a specifically designated code section.⁴ To appreciate the significance of the new law, specifically this new basis of jurisdiction section,⁵ it is essential to understand the historical development of the statutes it is replacing and the limitations imposed by those statutes upon California's judicial jurisdiction.⁶

The emphasis in this historical review is necessarily limited to specific aspects of a very broad term, jurisdiction.⁷ A brief review of

until July 1, 1970): "The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office."

Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970): "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service."

3. See Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 S. CAL. L. REV. 339, 346 (1958).

4. CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970) (basis of jurisdiction section); *id.* §§ 413.10, 415.10-.50, 416.10-.90 (operative July 1, 1970) (service of summons sections).

5. CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970): "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

6. See generally JUDICIAL COUNCIL OF CALIFORNIA, 1969 REPORT TO THE GOVERNOR AND THE LEGISLATIVE, app. II [hereinafter cited as 1969 JUDICIAL COUNCIL REPORT]. "Judicial jurisdiction in its broadest sense is the power of a state, through any of its courts or, on occasion, through its legislative, executive or administrative bodies, to create legal interests which will be recognized and enforced in all the states." *Id.* at 69.

7. "The term [jurisdiction] . . . has so many different meanings that no single statement can be entirely satisfactory as a definition. . . .

"Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." *Abelleira v. District Court*, 17 Cal. 2d 280, 287-88, 109 P.2d 942, 947 (1941). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92

the theoretical connotations suggested by this term seems appropriate in order to fit the discussion to follow into the overall picture.

Jurisdiction: A Theoretical Perspective

Jurisdiction is essential to a court's ability to render a judgment that will be recognized and enforced in the state of rendition and all other states.⁸ For purposes of discussion, jurisdiction is commonly divided into two segments: jurisdiction over the subject matter and jurisdiction over the person⁹ or thing.¹⁰

Jurisdiction Over the Subject Matter

Through its constitution and statutes, a state distributes among its courts the authority to decide the various types of cases that are likely to arise. A court that has been given the authority to decide a specific type of case has "subject matter jurisdiction"¹¹ over all cases of

(Proposed Official Draft, 1967) Pt. I, [hereinafter cited as SECOND RESTATEMENT OF CONFLICTS]; RESTATEMENT OF JUDGMENTS § 4, comment *b* at 21-22 (1942).

8. "A personal judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes. An attempt to execute it is without justification; a sheriff levying upon property of the defendant is liable for conversion, and a purchaser of the property on execution sale gets no title to it. A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment. No action lies upon it either in the state wherein it is rendered or in any other state. It cannot be set up as a bar in a suit upon the original cause of action.

"If these fundamental principles of the conflict of laws are disregarded by a state court, they may be vindicated in the federal courts, for they are protected by two provisions of the federal Constitution. If a judgment is rendered in one state and an action is brought thereon in another state, a federal question is involved under the provision of Article IV, section I, that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' The enforcement of a judgment against a defendant over whom the court has no jurisdiction involves a violation of the provision of the Fourteenth Amendment that no state shall 'deprive any person of life, liberty or property without due process of law.' The decisions of the Supreme Court of the United States upon the question of jurisdiction over the defendant are, therefore, under these two provisions, binding upon the states." Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 871-72 (1919).

9. In the following discussion, the word "person" is used to represent artificial persons (corporations, partnerships, and unincorporated associations) as well as natural persons. See SECOND RESTATEMENT OF CONFLICTS § 24, comment *a* at 133.

10. In the following discussion, the word "thing" is used to represent tangible and intangible property and such other matters in which a state might have an interest, such as the "status" of its domiciliaries. See CAL. CODE CIV. PROC. § 1917: "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the *thing*, when a specific *thing* is the subject of the judgment" (emphasis added).

11. Jurisdiction over the subject matter is referred to alternatively as the competency of the court. See SECOND RESTATEMENT OF CONFLICTS § 92, comment *i* at

that type. Article VI, section 10 of the California Constitution¹² and sections 89 and 112 of the Code of Civil Procedure are basic provisions prescribing original subject matter jurisdiction in civil cases for California's superior, municipal, and justice courts.¹³ These provisions, and others, base the distribution of subject matter jurisdiction among the California courts upon such criteria as the nature of the cause of action and the amount of the controversy.¹⁴

Jurisdiction Over the Person or Thing

A court acquires jurisdiction over the person or thing upon the satisfaction of three prerequisites:¹⁵ The first two prerequisites are federal and are satisfied by adherence to the demands, as set out by the United States Supreme Court, of the due process clause of the fourteenth amendment;¹⁶ the third prerequisite is satisfied by compliance with state-imposed jurisdictional statutes.¹⁷ The first federal prerequi-

§ 339; RESTATEMENT OF JUDGMENTS § 7 (1942); F. JAMES, CIVIL PROCEDURE 614 (1965).

12. "Superior courts have original jurisdiction in all causes except those given by statute to other trial courts." CAL. CONST. art. 6, § 10.

13. CAL. CODE CIV. PROC. § 89 prescribes subject matter jurisdiction of municipal courts; *id.* § 112 prescribes subject matter jurisdiction of justice courts. An additional subject matter limitation upon the courts of a state would exist in a case where a federal court has exclusive jurisdiction over a particular subject matter, since the state in such a case would have no power to confer upon its courts. See 1 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 38, at 310 (1954).

14. See generally 1969 JUDICIAL COUNCIL REPORT, *supra* note 6, at 70.

15. See 1 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 53, at 324-25 (1954).

16. See SECOND RESTATEMENT OF CONFLICTS ch. 3, Introductory Note, comments *a* & *b* at 125-26. Note that prior to the adoption of the fourteenth amendment, jurisdiction of the state courts was solely a matter of state law. "During the same period [prior to the adoption of the fourteenth amendment], however, it occasionally was intimated, if not held, by some of the state courts, that a personal judgment effective within the territory of the state could be rendered against a non-resident defendant who did not appear and submit himself to the jurisdiction, provided notice of the suit had been served upon him in the state of his residence, or had been published in the state within which the court was situated, pursuant to the provisions of a local statute. . . . As was said by Mr. Justice Field, speaking for the court in *Pennoyer v. Neff*, 95 U.S. 714, 732, it is difficult to see how such a judgment could legitimately have force even within the State. But until the adoption of the Fourteenth Amendment (1868) this remained a question of state law; the effect of the 'due process' clause of the Amendment being, as was held in the case just mentioned, to establish it as the law for all the States that a judgment rendered against a non-resident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the State whose court had rendered it, and to make the assertion of its invalidity a matter of federal right." *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 402-03 (1917).

17. SECOND RESTATEMENT OF CONFLICTS § 92, comment *j* at 339-40; RESTATEMENT OF JUDGMENTS § 8 (1942); see text accompanying notes 43-45 *infra*.

site¹⁸ requires some relationship between the state and the person or thing that makes the exercise of jurisdiction by the state reasonable.¹⁹ The second federal prerequisite requires that adequate notice, providing an opportunity to be heard, be given a person, or persons, with possible legal interests in the thing, who might be affected by the judgment.²⁰

Efforts by the state legislature to transform the two federal prerequisites into easily understandable terms and procedures have resulted in the embodiment of the federal prerequisites into some of the state jurisdictional statutes. Thus, satisfaction of the third prerequisite, through compliance with the state jurisdictional statutes, will generally satisfy the two federal prerequisites.²¹ Of course, state statutes purporting to provide for the acquisition of jurisdiction on standards less stringent than the federal requirements would be held unconstitutional.²² On the other hand, the legislature is free to impose more extensive requirements;²³ accordingly, some California jurisdictional statutes, as interpreted by the California courts, have imposed standards that are more stringent than the due process clause of the fourteenth amendment requires. The extent to which these requirements have limited the ability of a California court to acquire jurisdiction is a major concern of this article.

Bases of Jurisdiction

Classically, the presence of the person or thing within the territory of the state, in the absence of consent or voluntary appearance,²⁴ was the only relationship on which a state could base its jurisdiction.²⁵

18. This prerequisite shall be referred to hereinafter as a "basis of jurisdiction," following the terminology used in CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970); see note 5 *supra*.

19. SECOND RESTATEMENT OF CONFLICTS §§ 24, 56; RESTATEMENT OF JUDGMENTS §§ 14, 32-33 (1942); see text accompanying notes 24-30 *infra*.

20. SECOND RESTATEMENT OF CONFLICTS §§ 25, 57, 69; RESTATEMENT OF JUDGMENTS § 6 (1942); see text accompanying notes 31-42 *infra*.

21. The bases of jurisdiction are discussed in the text accompanying notes 24-30 *infra*; the requirement of adequate notice is discussed in the text accompanying notes 31-42 *infra*. A comprehensive discussion distinguishing these two federal due process requirements is found in Horowitz, *supra* note 3, at 341-42 n.6.

22. See, e.g., *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (despite actual receipt of notice by defendant, judgment against him held invalid since statute failed to provide a reasonable means of giving defendant notice); *Knapp v. Bullock Tractor Co.*, 242 F. 543 (S.D. Cal. 1917) (service upon state official not charged with duty to notify corporation did not satisfy federal due process requirements).

23. See Note, *Suing Foreign Corporations in California*, 5 STAN. L. REV. 503, 503-04 (1953).

24. See text accompanying notes 46-56 *infra*.

25. See generally RESTATEMENT OF JUDGMENTS §§ 14, 32 (1942); 1 J. BEALE, A

While this relationship continues to be a sound basis of jurisdiction, it is presently supplemented by other possible bases. For example, the ownership, use or possession of property within a state may be a relationship sufficient to give the state a basis of jurisdiction for causes of action arising from the defendant's ownership, use, or possession of property.²⁶ Other examples of possible bases of jurisdiction are residence in the state,²⁷ doing an act in a state,²⁸ and doing an act outside a state which causes an effect within the state.²⁹ Although the above bases of jurisdiction may satisfy the requirements of the United States Constitution, restrictive requirements in state jurisdictional statutes may circumscribe an area somewhere within the bounds of due process beyond which a court may not exercise the otherwise constitutional power of the state.³⁰

Adequate Notice

Adequate notice, providing an opportunity to be heard, is that notice which is "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."³¹ It is usually best given by personal service on the persons interested in the litigation, whether it is a proceeding in personam, in rem, or quasi in rem.³² In actions against persons, personal service within the state satisfies both the basis of jurisdiction requirement and the notice requirement "at one stroke."³³ Personal service outside the state usually fulfills the notice requirement,³⁴ but if a basis of jurisdiction is lacking³⁵ or if there is a failure to comply with a state jurisdictional statute,³⁶ a judgment rendered may be sub-

TREATISE ON THE CONFLICT OF LAWS 339-43, 435-36 (1935); 1 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 61, at 329-30 (1954).

26. SECOND RESTATEMENT OF CONFLICTS §§ 38, 51.

27. *Id.* § 30.

28. *Id.* §§ 36, 49.

29. *Id.* §§ 37, 50.

30. *See, e.g.*, Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970), which limits the court's power to render an in personam judgment based on service of process by publication to absent *residents* only if they are personally served outside the state. *See note 2 supra.*

31. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

32. *See* SECOND RESTATEMENT OF CONFLICTS § 25, comment *d* at 139.

33. F. JAMES, CIVIL PROCEDURE 613 (1965).

34. *See* SECOND RESTATEMENT OF CONFLICTS § 25. However, the Supreme Court has held that where a statute did not provide for personal service of a party, a state court lacked jurisdiction over a defendant even though he had received actual notice of the trial. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *see* SECOND RESTATEMENT OF CONFLICTS § 25, comment *f* at 140; RESTATEMENT OF JUDGMENTS § 6, comment *d* at 38 (1942).

35. *See* text accompanying notes 24-30 *supra.*

36. *See* text accompanying notes 43-45 *infra.*

ject to collateral attack.³⁷ In *in rem* and quasi *in rem* actions, service by publication and mailing of notice has long been recognized as an adequate method of giving notice when service within the state is not possible.³⁸ Under exceptional circumstances, such service may also be adequate in actions against persons.³⁹

Where a statute provides for substituted service by delivery of process to a person other than the defendant, the adequate notice requirement is satisfied if the provisions of the statute are reasonably calculated to give the defendant notice⁴⁰ and there has been strict compliance with the statute.⁴¹ A statute providing for substituted service on a public officer must also provide some reasonable manner of attempting to give notice to the defendant.⁴²

State Statutory Jurisdictional Requirements

In the absence of a state statute, a California court has the authority to use any suitable means to effectuate its jurisdiction.⁴³ It would be erroneous, however, to presume that a statute is never necessary. For instance, a court in a state without some type of "long-arm" statute would doubtless be held incapable of rendering a judgment over an individual served with process outside the state.⁴⁴ Even in the ordinary case, where an individual is served with process within the state, statutes perform a useful service by converting the frequently vague constitutional prerequisites into specific tests and procedures on which the plaintiff, defendant, and court may rely.⁴⁵

37. See SECOND RESTATEMENT OF CONFLICTS §§ 104-05; RESTATEMENT OF JUDGMENTS §§ 4-8, 11-13 (1942).

38. See RESTATEMENT OF JUDGMENTS § 6, comment *g* at 40 (1942).

39. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15 (1950); SECOND RESTATEMENT OF CONFLICTS § 25, comment *d* at 139.

40. RESTATEMENT OF JUDGMENTS § 16, comment *b* at 84 (1942).

41. See, e.g., *Weisfeld v. Superior Court*, 110 Cal. App. 2d 148, 151, 242 P.2d 29, 32 (1952).

42. See *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *Knapp v. Bullock Tractor Co.*, 242 F. 543 (S.D. Cal. 1917).

43. CAL. CODE CIV. PROC. § 187: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred upon a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." See *Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410 (1886); *McKendrick v. Western Zinc Mining Co.*, 165 Cal. 24, 29, 130 P. 865, 868 (1913); see note 194 *infra*.

44. See generally *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 998-1008 (1960).

45. See *id.* at 1014-17.

Waiver of Jurisdictional Prerequisites

Jurisdiction over the subject matter may be conferred on a court within a state only by the state's constitution or statutes,⁴⁶ and cannot be waived by concurrence of the parties to a suit.⁴⁷ On the other hand, the prerequisites for acquiring jurisdiction over a person⁴⁸ may be waived by that person in numerous ways. Actual consent by words,⁴⁹ conduct,⁵⁰ or contract⁵¹ may be expressed, before or after an action is commenced,⁵² so as to waive one or all of the prerequisites.⁵³ Bringing an action in the state acts as a waiver, and the plaintiff becomes vulnerable to any counterclaim or crosscomplaint that a defendant may bring against him under the local law of the state;⁵⁴ making a general appearance, however, subjects the defendant only to causes of action "pleaded in the original complaint, including any ancillary proceedings incidental thereto."⁵⁵ An acknowledgment of proper service has been construed as a waiver of compliance with the statutory service of process requirement.⁵⁶

Scope of This Article

The brief discussion of jurisdiction above provides the basis for delimiting the scope of this article. Jurisdiction over the person, not over the thing, is the primary concern of this article;⁵⁷ thus in rem and quasi in rem jurisdiction are discussed only as they indirectly relate to in personam jurisdiction. Further, this article will not deal with the

46. See text accompanying notes 11-14 *supra*.

47. See, e.g., *Summers v. Superior Court*, 53 Cal. 2d 295, 298, 347 P.2d 668, 670, 1 Cal. Rptr. 324, 326 (1959) (dictum); *Harrington v. Superior Court*, 194 Cal. 185, 188, 228 P. 15, 16 (1924). "Jurisdiction of the subject matter cannot be given, enlarged or waived by the parties. . . . However, if the court has jurisdiction of the subject matter, the rule is otherwise, and a party may voluntarily submit himself to the jurisdiction of the court" *Id.* at 188, 228 P. at 16 (dictum); see SECOND RESTATEMENT OF CONFLICTS § 32, comment *b* at 165; RESTATEMENT OF JUDGMENTS § 7, comment *d* at 45 (1942).

48. See text accompanying notes 15-45 *supra*.

49. SECOND RESTATEMENT OF CONFLICTS § 32, comment *a* at 164.

50. *Id.*

51. See *National Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311 (1964); *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P.2d 203 (1936).

52. SECOND RESTATEMENT OF CONFLICTS § 32, comments *d* & *e* at 168-69.

53. "To be effective, the consent must be given by a person who is under no legal incapacity, and jurisdiction must be exercised in strict conformity with the terms of the consent." *Id.* § 32, comment *a* at 164.

54. *Id.* § 34.

55. 1969 JUDICIAL COUNCIL REPORT, *supra* note 6, at 75; see RESTATEMENT OF JUDGMENTS § 5, comment *g* at 28 (1942).

56. See *Smith v. Moore Mill & Lumber Co.*, 101 Cal. App. 492, 281 P. 1049 (1929).

57. See text accompanying notes 11-14 *supra*.

subject matter jurisdiction of the California courts.⁵⁸ An attempt is made to focus the discussion on the extent to which California's legislature and judiciary, by the enactment and interpretation of statutory jurisdictional requirements,⁵⁹ have eliminated some bases on which a California court might otherwise exercise jurisdiction within the limits of the due process clause of the fourteenth amendment.⁶⁰

Since the purpose of this article is to afford the reader an appreciation of the significance of the new basis of jurisdiction statute,⁶¹ the relationship between the California statutory jurisdictional requirements⁶² and the federal constitutional requirement of adequate notice⁶³ is not discussed. Although jurisdiction over the person acquired by some forms of waiver⁶⁴ might properly be classified as additional bases of jurisdiction,⁶⁵ they are not bases limited by the statutory requirements under discussion and therefore are not within the scope of this article.

In summary, the scope of the discussion to follow includes a historical review of the development of the limiting effects of California's statutory jurisdictional requirements upon otherwise constitutional bases of in personam jurisdiction.⁶⁶

California's Basic Jurisdictional Statutes

The basic provisions for the service of process,⁶⁷ performing the

58. See notes 9 & 10 *supra*.

59. See text accompanying notes 21-23, 43-45 *supra*.

60. See text accompanying notes 18-19, 24-30 *supra*. The commerce clause of the Federal Constitution has also been relied upon in the past, to a limited extent, to disapprove the acquisition of jurisdiction over a foreign corporation. See, e.g., *Davis v. Farmers Co-op Equity Co.*, 262 U.S. 312 (1923). A discussion of its importance, however, is without the scope of this article. For a brief discussion of the historical impact of the commerce clause on state-court jurisdiction, and its potential use in limiting the ever-expanding jurisdictional facet of due process, see *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 983-87 (1960).

61. CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970); see note 5 *supra*.

62. See text accompanying notes 21-23, 43-45 *supra*.

63. See text accompanying notes 20, 31-42 *supra*.

64. See text accompanying notes 46-56 *supra*.

65. See SECOND RESTATEMENT OF CONFLICTS §§ 32-35, 45-46.

66. See generally Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958); Ehrenzweig & Mills, *Personal Service Outside the State: Pennoyer v. Neff in California*, 41 CALIF. L. REV. 383 (1953); Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 S. CAL. L. REV. 339 (1958); Comment, *State Jurisdiction Over Foreign Corporations*, 11 HASTINGS L.J. 460 (1960); Comment, *Suing Foreign Corporations in California*, 5 STAN. L. REV. 503 (1953).

67. Cal. Stat. 1968, ch. 132, §§ 1-2, at 343, CAL. CODE CIV. PROC. § 411 (effective until July 1, 1970); Cal. Stat. 1968, ch. 132, § 3, at 346, CAL. CODE CIV. PROC. § 412 (effective until July 1, 1970); Cal. Stat. 1957, ch. 1669, § 1, at 3048, CAL.

dual function noted above,⁶⁸ have retained a format similar to the provisions enacted by the first session of the California legislature in 1850.⁶⁹ The 1850 provisions were replaced by essentially similar provisions in 1851⁷⁰ when section 26 of the 1850 act was superseded by section 29 of the California Practice Act;⁷¹ and section 27 of the 1850 act was superseded by sections 30 and 31 of the California Practice Act.⁷²

CODE CIV. PROC. § 413 (effective until July 1, 1970); Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970); see note 2 *supra*.

68. See text accompanying note 3 *supra*.

69. Cal. Stat. 1849-50, ch. 142, §§ 26, 27, at 430: "§ 26. The summons shall be served by the sheriff of the county where the defendant may be found, and shall be served by delivering a copy thereof, together with the copy of the complaint as follows:

"1st. If the suit be against a corporation, to the president, or other head of the corporation, secretary, cashier, or managing agent thereof.

. . . .

"4th. In all other cases to the defendant personally. [The portions omitted pertain to minors and guardians of incompetents.]

"§ 27. When the person on whom service is to be made, cannot after due diligence be found within the State, and that fact shall be shown by the Sheriff's return upon the summons, and also be proved by affidavit to the satisfaction of the Court, or that he is a non-resident of the State, and it shall appear by affidavit that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a necessary or proper party to any action, the Court or Judge may grant an order that the same be made by publication of summons. The order shall direct the publication to be made in some one or more newspapers In the case of publication the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence, unless it appears by affidavit that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. If the summons shall not be personally served on a defendant, he or his representatives shall (except in actions for divorce) be allowed to defend after judgment, or at any time within one year after notice thereof, and within three years after its rendition, on such terms as be just When the defendant is out of the State, the publication shall be once a month, for not less than six months."

For a discussion of the background and basis of the 1850 Act, see Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 HASTINGS L.J. 701 (1966).

70. Cal. Stat. 1851, ch. 5, §§ 29-31, at 55. For a discussion of the influence of the Field Code of Civil Procedure on the 1851 Act, see Blume, *supra* note 69.

71. Cal. Stat. 1851, ch. 5, § 29, at 55: "§ 29. The Summons shall be served by delivering a copy thereof attached to the certified copy of the complaint, as follows:

"1st. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

. . . .

"4th. In all other cases, to the defendant personally." [The portions omitted pertain to minors and to guardians of incompetents.]

72. Cal. Stat. 1851, ch. 5, §§ 30-31, at 55: "§ 30. When the person on whom the service is to be made, resides out of the State, or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the

Section 411 and Its Statutory Predecessors

Section 29 of the Practice Act, the statutory predecessor to Code of Civil Procedure section 411,⁷³ provided for service within the state by delivery to specific officers and agents of corporations,⁷⁴ to representatives of special classes of individuals,⁷⁵ and to the defendant personally "in all other cases."⁷⁶ "In all other cases" covers the ordinary case of service upon an individual defendant within the state.

Service on an individual within the state, the classic "territorial theory" of jurisdiction, has raised no serious basis-of-jurisdiction questions.⁷⁷ Whether the individual served was a resident or nonresident, on business or just casually passing through, was not important so long as he was within the state when served.⁷⁸

In contrast to individuals, there has been considerable litigation under section 411 centering upon the problem of acquiring jurisdiction over a corporation with agents in California. Where corporations are

Court or Judge thereof, or a county Judge, and it shall in like manner appear, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may grant an order that the service be made by the publication of the summons.

"§ 31. The order shall direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week: *Provided*, that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. In case of publication where the residence of a non-resident or absent defendant is known, the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the Post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, shall be equivalent to publication and deposit in the Post office. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may after publication, appoint an Attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part."

Section 30 was partially influenced by the civil law. See Ehrenzweig & Mills, *Personal Service Outside the State: Penoyer v. Neff in California*, 41 CALIF. L. REV. 383, 384 n.111 (1953).

73. See note 2 *supra*.

74. See note 71 *supra*.

75. These classes concerned minors under the age of 14 and persons judicially declared to be of unsound mind, or incapable of conducting their own affairs.

76. See note 71 *supra*.

77. See generally 1 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 61, at 329-30 (1954).

78. See generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956). In the case of *Grace v. McArthur*, 170 F. Supp. 442 (E.D. Ark. 1959), jurisdiction was upheld where service was made upon the defendant in a plane passing over the state.

concerned, it becomes relevant whether the corporation is a "resident" or "nonresident,"⁷⁹ and whether the agent served with process is in the state casually or on business.⁸⁰ Also in contrast are the amendments to section 411 and section 29 of the Practice Act and the supplementary statutes, which, as they have been interpreted by the judiciary, have been generally responsible for the expansion of the bases on which California courts could exercise jurisdiction over foreign corporations. For example, an 1861 amendment⁸¹ to section 29 required that a foreign corporation be "doing business" within the state before its agents could be served with process;⁸² under this statute the California judiciary has been able to extend California's bases of jurisdiction over foreign corporations to the full extent permitted by the Federal Constitution.⁸³

Other statutes, enacted independently of section 411, but later incorporated into that section by reference, have also served to broaden the bases on which foreign corporations could be subjected to in personam jurisdiction in California courts.⁸⁴ These statutes first required foreign corporations transacting business within the state to appoint agents for service of process;⁸⁵ later statutes provided for substituted service on an officer of the state where agents had not been appointed or could not be found within the state.⁸⁶

Sections 412 and 413 and Their Statutory Predecessors

Sections 30 and 31 of the Practice Act,⁸⁷ the statutory predecessors of sections 412 and 413 of the Code of Civil Procedure,⁸⁸ provided for service of process by publication. Section 30, the predecessor of section 412, provided for such service pursuant to a court order where a potential defendant or necessary party was outside the state or could not be found within the state.⁸⁹ Section 31, the predecessor of section 413, set out the requirements for a valid service by publication, and

79. See text accompanying notes 165-78 *infra*.

80. See *Knapp v. Bullock Tractor Co.*, 242 F. 543 (S.D. Cal. 1917).

81. Cal. Stat. 1861, ch. 432, § 1, at 496.

82. See text accompanying notes 165-75 *infra*.

83. *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

84. See text accompanying notes 179-92 *infra*.

85. Cal. Stat. 1871-72, ch. 566, §§ 1-3, at 826; Cal. Stat. 1869-70, ch. 578, §§ 1-5, at 881. See also Cal. Pol. Code § 616 (1872) (requirements similar to Cal. Stat. 1869-70, ch. 578, § 1, at 881, applicable to insurance companies).

86. Cal. Stat. 1899, ch. 94, §§ 1-4, at 111, *amending* Cal. Stat. 1871-72, ch. 566, §§ 1-3, at 826 (providing for substituted service on Secretary of State). See also Cal. Code Amnds. 1877-78, ch. 604, § 6, at 17, *amending* Cal. Pol. Code § 616 (1872) (providing for substituted service on Insurance Commissioner).

87. See note 72 *supra*.

88. See note 2 *supra*.

89. Cal. Stat. 1851, ch. 5, § 30, at 55.

further provided that personal service outside the state pursuant to the court order would be equivalent to actual publication and mailing of notice.⁹⁰ The Act originally spoke only of the "person" on whom service was to be made,⁹¹ but an 1854 case⁹² and subsequent legislation⁹³ made it clear that the provisions applied both to individuals and corporations.

Litigation involving the attempted acquisition of in personam jurisdiction under these sections has been primarily limited to cases involving individuals. The scarcity of litigation involving the acquisition of in personam jurisdiction over corporations under sections 412 and 413 seems to reflect the adequacy of the provisions applicable to corporations under section 411 and the supporting statutes above noted.⁹⁴ In contrast, service of process on the defendant personally within the state, the only basis on which section 411 will allow the acquisition of jurisdiction over an individual, has not been completely satisfactory as a means of acquiring jurisdiction over individuals in this modern age; thus, sections 412 and 413 have received much more attention from parties seeking to sue individuals than from parties seeking to sue corporations.

Bases of Jurisdiction and the Service of Process Provisions: A California History

As indicated above, controversy over the bases of jurisdiction covering individuals has centered around sections 412 and 413, and the same controversy in the case of corporations has centered around section 411. The discussion that follows attempts to analyze the bases supporting the acquisition of in personam jurisdiction over individuals under sections 412 and 413, and under California's nonresident motorist statute,⁹⁵ up to the time the Supreme Court decided *Milliken v. Meyer*⁹⁶ in 1940. This is followed by a similar discussion concerning corporations under section 411, up to the time the Supreme Court decided *International Shoe Co. v. Washington*⁹⁷ in 1945. Each of these Supreme Court cases represents a turning point for California: *Milliken* inspired legislative action⁹⁸ in regard to sections 412 and 413, and *International Shoe* served as a basis for judicial legislation in re-

90. *Id.*

91. See note 72 *supra*.

92. *Douglas v. Pacific Mail S.S. Co.*, 4 Cal. 304, 306 (1854).

93. Cal. Stat. 1913, ch. 64, § 1, at 69; Cal. Stat. 1913, ch. 693, § 1, at 1422.

94. See text accompanying notes 84-86 *supra* & 179-206, 223-27 *infra*.

95. Cal. Stat. 1935, ch. 27, § 404, at 154, *as amended*, CAL. VEH. CODE § 17451.

96. 311 U.S. 457 (1940).

97. 326 U.S. 310 (1945).

98. Cal. Stat. 1951, ch. 935, § 1, at 2537, *as amended*, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970).

gard to the meaning of the "doing business" provision in section 411.⁹⁹ The period from *Milliken* and *International Shoe* to the present time is then discussed in two consecutive sections, again showing the development of the bases for acquiring jurisdiction over individuals and corporations separately. In the conclusion the diverse results obtained from these separate lines of development are contrasted, and the probable eradication of these differences by the new law is discussed.

Individuals: Statehood to *Milliken v. Meyer*, 1850 to 1940

Sections 30 and 31 of the Practice Act,¹⁰⁰ enacted in 1851, authorized a court to acquire personal jurisdiction over an absent resident or nonresident by publication.¹⁰¹ A judgment obtained where there was such publication, however, could be enforced only against the defendant's property in California,¹⁰² and was not entitled to be enforced in any other state, under the full faith and credit clause.

A personal judgment rendered in California could be enforced in other states only if the defendant was personally served within California.¹⁰³ Nonetheless, because service by publication could, in fact, support a personal judgment against an absent resident or nonresident, enforceable in California, the potential for abuse was great.¹⁰⁴

99. See *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

100. Cal. Stat. 1851, ch. 5, §§ 30-31, at 55.

101. See *Galpin v. Page*, 85 U.S. 350, 369 (1874) (dictum); *Hahn v. Kelly*, 34 Cal. 391, 403 (1868); see note 186 *infra*.

102. See *Pennoyer v. Neff*, 95 U.S. 714, 730-31 (1878); *Kane v. Cook*, 8 Cal. 449, 455 (1857). "[C]ourts have no right, when actual legal notice is not given, to assume jurisdiction to render a decree, which shall create personal obligations on a defendant who does not owe allegiance to the state, or who is not domiciled within its territory. Whatever effect the local law may give to such judgments, they will, beyond the territorial limits of that law, be regarded as nullities." Note, 8 *WESTERN L.J.* 365, 366 (1851). See generally *Ehrenzweig & Mills, Personal Service Outside the State: Pennoyer v. Neff in California*, 41 *CALIF. L. REV.* 383, 386-87 (1953).

103. See *Kane v. Cook*, 8 Cal. 449, 455 (1857), in which a New York action was held not to be personally binding on a California defendant, where publication in New York was the only means used to notify defendant of the proceeding. See *Pennoyer v. Neff*, 95 U.S. 714, 730-31 (1878).

104. As a result of this potential abuse, the courts interpreted literally the broad statutory language of the statute, without making any presumption of jurisdiction. *Galpin v. Page*, 85 U.S. 350 (1873); *Forbes v. Hyde*, 31 Cal. 342, 357 (1866); *McMinn v. Whelan*, 27 Cal. 300 (1865); *Ricketson v. Richardson*, 26 Cal. 149, 151 (1864); *Jordan v. Giblin*, 12 Cal. 100 (1859). See also *Ehrenzweig & Mills, Personal Service Outside the State: Pennoyer v. Neff in California*, 41 *CALIF. L. REV.* 383 (1953), where the authors feel that another reason for the court's strict interpretation was "[t]he less dependable conditions of the mails of that day and also by a general inclination to interpret narrowly statutes in derogation of the common law." *Id.* at 385-86.

Prior to the landmark case of *Pennoyer v. Neff*¹⁰⁵ in 1878, therefore, the apparent concern of both the California courts and the legislature was to provide a defendant susceptible to service by publication some measure of protection.¹⁰⁶

The California Code of Civil Procedure, enacted in 1872, replaced sections 30 and 31 of the Practice Act with substantially identical sections, numbered 412 and 413.¹⁰⁷ The new Code, however, eliminated one of the judiciary's primary justifications for its reluc-

The last provision of section 31 provided: "In actions upon contracts . . . the Court . . . may . . . appoint an Attorney to appear for the non-resident, absent, or concealed defendant . . ." This provision was upheld as constitutional in *Ware v. Robinson*, 9 Cal. 107 (1858) (defendant concealed within the state). In *Jordan v. Giblin*, 12 Cal. 100 (1859), the court held the appointment of an attorney invalid for an absent resident, on the ground that the affidavit for publication was insufficient. This exemplifies the restrictive approach the courts took in applying this section.

105. 95 U.S. 714 (1878).

106. *Jordan v. Giblin*, 12 Cal. 100 (1859) (literal observance of the statute required so as not to encourage fraud and lead to oppression). See *Ricketson v. Richardson*, 26 Cal. 149 (1864), where the court stated that strict compliance with the statute was required; "otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the enlightened judgment of a Court or Judge." *Id.* at 154. The legislature was so concerned with fraud that it authorized defendants to reopen suits within six months where judgments were entered pursuant to sections 30 and 31. Cal. Stat. 1851, ch. 5, § 68, at 60.

107. Cal. Code Civ. Proc. § 412 (1872). Section 412 originally read: "Where the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot after due diligence, be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, Cashier, or Secretary within the State, and the fact appears by affidavit to the satisfaction of the Court, or a Judge thereof, or a County Judge, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may make an order that the service be made by publication of the summons." *Id.*

Cal. Code Civ. Proc. § 413 (1872) read: "The order must direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In the case of publication, where the residence of a non-resident, or absent defendant is known, the Court or Judge must direct a copy of the summons and complaint to be forthwith deposited in the Post Office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of State, is equivalent to publication and deposit in the Post Office. In either case, the service of the summons is complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part." For a comparison to sections 30 and 31 of the Practice Act, see note 72 *supra*.

tance to apply sections 30 and 31 of the Practice Act—namely, the general rule that statutes deviating from the common law were to be strictly construed,¹⁰⁸ which was repudiated by sections 4¹⁰⁹ and 187¹¹⁰ of the new Code. In other words, while the courts were required to construe sections 30 and 31 of the Practice Act strictly, they were conversely required to construe the new sections 412 and 413 liberally.¹¹¹ Notwithstanding the above statutory change, however, the judicial insistence upon exact compliance with the provisions of sections 30 and 31 did not change with the adoption of sections 412 and 413 of the new Code.¹¹²

In 1872, the legislature adopted a "Register of Absent Defendants," which was designed to minimize the possibility of fraud upon an absent defendant.¹¹³ The act provided that in actions against nonresidents, the plaintiff must file a copy of the publication with the Secretary of State.¹¹⁴ The register was open to the public for inspection at all times. Because the act was repealed in 1874,¹¹⁵ only two years after its creation, and because no cases were litigated under it, an evaluation is impossible.

California's publication provisions were limited further when the legislature, in 1874, deleted the last sentence of section 413.¹¹⁶ This

108. *Forbes v. Hyde*, 31 Cal. 342, 357 (1866); *Ricketson v. Richardson*, 26 Cal. 149, 152 (1864). Strict construction of the statute was especially true regarding the required affidavits. *Braly v. Seaman*, 30 Cal. 610, 617 (1866); *Jordan v. Giblyn*, 12 Cal. 100, 102 (1859); *Grewell v. Henderson*, 5 Cal. 465 (1855). More recent cases have cited with approval the rule that statutes which deviate from the common law are to be strictly construed. *E.g.*, *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 446, 71 P. 498 (1903); *McPhail v. Nunes*, 38 Cal. App. 557, 560, 177 P. 193, 194 (1918); *Lima v. Lima*, 26 Cal. App. 1, 6, 147 P. 233, 234 (1914).

109. CAL. CODE CIV. PROC. § 4: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

A New York court in *Jackson v. Wiseburn*, 10 N.Y.C.L.R. 799 (1830), while discussing a provision specifying within what time an act must be done, commented about rules in derogation of the common law: "The rules and practice of the court being established by the court, may be made to yield to circumstances, to promote the ends of justice. Not so as to a statute; it is unbending, requiring implicit obedience as well from the court as from its suitors." The New York publication statute was similar to California's.

110. See note 43 *supra*.

111. See note 109 *supra*.

112. *Livermore v. Ratti*, 150 Cal. 458, 465, 89 P. 327, 328 (1907); *Gambert v. Hart*, 44 Cal. 542, 544 (1872).

113. Cal. Stat. 1872, ch. 290, § 3, at 392.

114. *Id.* § 1, at 392.

115. Cal. Stat. 1873-74, ch. 338, § 1, at 495.

116. Cal. Code Amnds. 1873-74, ch. 383, § 50, at 299, *amending* Cal. Stat. 1871-

sentence, which was also the last sentence of section 31 of the Practice Act, permitted the court to appoint an attorney for the absent defendant instead of ordering publication.¹¹⁷ Considerable litigation centered on this sentence prior to its deletion.¹¹⁸ In the same session, the legislature extended from six months to one year the time allowed under Code of Civil Procedure section 473 within which a defendant could come in and defend on the merits a decision resting upon service by publication.¹¹⁹ It was a famous United States Supreme Court decision, however, which led to the most significant changes in favor of such defendants.

Pennoyer v. Neff: The End of an Era

In *Pennoyer v. Neff*,¹²⁰ the Supreme Court was asked to determine the validity of a personal judgment rendered in 1866 by an Oregon court against a nonresident of Oregon. Jurisdiction over the nonresident had been originally obtained pursuant to an Oregon statute which, like California's Code of Civil Procedure sections 412 and 413, authorized service of process by publication on an absent nonresident defendant.¹²¹ The Court held that a personal judgment so obtained was void and unenforceable even in Oregon, the state in which it had been rendered.¹²² The due process clause of the fourteenth amendment,¹²³ although adopted after the Oregon judgment had been rendered, was held to constitute a ground on which the validity of such judgments could always be questioned.¹²⁴ Where the subject matter of the suit involved a determination of the personal liability of the defendant, the Court viewed due process of law as requiring "service of process [upon the defendant] within the State, or his voluntary appearance."¹²⁵ Thus, the validity of a judgment, even in the rendering state, was subject to attack in the absence of compliance with this strict "territorial theory" of jurisdiction.

72, ch. 171, § 1, at 190.

117. See note 107 *supra*.

118. *E.g.*, *Ware v. Robinson*, 9 Cal. 107 (1858); *Anderson v. Parker*, 6 Cal. 201 (1856).

119. Cal. Code Amnds. 1873-74, ch. 383, § 60, at 302: "When, from any cause, the summons in an action has not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." The above amendment was enacted at the same time the last sentence of section 413 was deleted.

120. 95 U.S. 714 (1878).

121. *Id.* at 738.

122. *Id.* at 733.

123. U.S. CONST. amend. XIV, § 1.

124. 95 U.S. at 733.

125. *Id.*

The Court in *Pennoyer* rejected the assumption made by many courts¹²⁶ that where a nonresident had property within the forum state, it was immaterial in determining the court's jurisdiction whether the property was brought under the control of the court by attachment at, or subsequent to, the commencement of the action. The practice of seizing a nonresident's property only after the absent nonresident's liability had been established in a personal action based on service by publication, was commented upon by the Court as follows:

[T]he jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it had tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it.¹²⁷

On the basis of the above reasoning, the Court limited the range of possible actions against an absent nonresident to those that were essentially in rem. By requiring the attachment of the defendant's property at the commencement of the action, the Court emphasized that the property of the absent nonresident was the only basis of the court's jurisdiction. This aspect of the *Pennoyer* decision terminated the established California practice of rendering personal judgments against a nonresident owning property in the state without either serving him personally within the state or attaching his property at the commencement of the action.¹²⁸

The Effect of *Pennoyer v. Neff* in California

Two years after the *Pennoyer* decision, it was followed by the California Supreme Court in *Belcher v. Chambers*,¹²⁹ in which the Court held that jurisdiction could not be acquired by publication where

126. *E.g.*, *Hahn v. Kelly*, 34 Cal. 391 (1868).

127. 95 U.S. at 728.

128. *See De la Montanya v. De la Montanya*, 112 Cal. 101, 121-22, 44 P. 345, 350 (1896) (dissenting opinion). *See* 1 PAC. COAST L.J. 21 (1878), where the author comments that the *Pennoyer* case "[w]ill prove to be all important as it seems to be a death stroke to the system of rendering personal judgments against non-residents upon default after publication" *Id.* at 23.

Pennoyer did not clarify whether its decision applied only to nonresidents, or whether it extended to absent residents as well. This caused many states, including California, to interpret *Pennoyer* as requiring personal service within the state in all personal actions. *See Dambach, Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958). "Because of this vagueness . . . many . . . state courts . . . interpreted the case as holding that due process required the traditional means of acquiring jurisdiction over the defendant in all in personam actions." *Id.* at 199.

129. 53 Cal. 635 (1879). This case specifically overruled *Hahn v. Kelly*, 34 Cal. 391 (1868). *See* text accompanying notes 101-02 *supra*.

the nonresident's property was not attached at the commencement of the action.¹³⁰ Later, in *Anderson v. Goff*,¹³¹ the court upheld a judgment in which service was made upon a nonresident defendant by publication pursuant to Code of Civil Procedure sections 412 and 413. The action was on a note, and property of the defendant was attached at the commencement of the action. The court recognized that a judgment on the note would be void as an in personam judgment, but stated that "where the debtor has property within the state, which is seized under a writ of attachment . . . a judgment therein . . . is so far in the nature of a proceeding *in rem*, as to uphold a sale of the attached property . . . and to that extent is not void."¹³²

Subsequent to the *Anderson v. Goff* decision, in an apparent effort to reconcile the wording of section 412 with the requirements of *Pennoyer*, the legislature amended the section and thus made it expressly applicable to actions involving real or personal property in which the defendant had an interest.¹³³

De la Montanya v. De la Montanya: Applying Pennoyer to Absent Domiciliaries

In *De la Montanya v. De la Montanya*,¹³⁴ the California Supreme Court refused to limit the "territorial theory" of jurisdiction enunciated in *Pennoyer v. Neff*, to a nonresident defendant. *De la Montanya* involved a divorce proceeding wherein the plaintiff, in addition to a divorce, sought to obtain alimony. The defendant was both a resident and domiciliary when the cause of action arose, but left the state before the suit was commenced. The defendant retained his status as a California domiciliary, however, until after constructive service of process by publication and mailing had been made. The Supreme Court of California held that although the state had jurisdiction to grant the divorce, it had no jurisdiction to render in personam alimony judgments against persons "not within its territory, and . . . to allow it to summon one from another state is an encroachment upon the independence of such state."¹³⁵

130. 53 Cal. at 640.

131. 72 Cal. 65, 13 P. 73 (1887).

132. *Id.* at 71-72, 13 P. at 76.

133. Cal. Stat. 1893, ch. 202, § 1, at 285: "Where the person on whom service is to be made resides out of the State, or has departed from the State . . . and . . . a cause of action exists against the defendant in respect to whom the service is to be made . . . or . . . it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest . . . such Court or Judge may make an order that the service be made by the publication of the summons."

134. 112 Cal. 101, 44 P. 345 (1896).

135. *Id.* at 112, 44 P. at 347.

The court attached no importance to the fact that the defendant was a resident process dodger, rather than—as in *Pennoyer v. Neff*—a nonresident. The plaintiff's attempt to distinguish the case as one involving a domiciliary was rejected by the court on the ground that “[d]omicile has never . . . been made the test of jurisdiction to render a personal judgment.”¹³⁶ The dissenting judges argued that California did have jurisdiction over its domiciliaries and that the court was entitled to enter a personal judgment against such domiciliaries, pursuant to sections 412 and 413, even though the domiciliaries were outside the state.¹³⁷ Although decided by the marginal vote of four to three, *De la Montanya* prevented, for nearly half a century, the acquisition of personal jurisdiction over absent domiciliaries.¹³⁸

Period of Stagnation: De la Montanya to the Nonresident Motorist Statute, 1896-1935

The *De la Montanya* decision in 1896 marked the beginning of a period—which was to last until 1935¹³⁹—during which there were no major changes in the jurisdictional policies or statutes affecting absent or nonresident individuals.¹⁴⁰ Nevertheless, several court decisions rendered during this period expanded the manner in which a court's jurisdiction could attach to an absent resident or nonresident

136. *Id.* at 109, 44 P. at 346.

137. *Id.* at 119, 44 P. at 349.

138. *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 404, 55 P.2d 203, 204 (1936) (dictum); *Britton v. Bryson*, 216 Cal. 362, 368, 14 P.2d 502, 504 (1932) (dictum); *Grinbaum v. Superior Court*, 192 Cal. 566, 221 P. 651 (1923); *Boring v. Penniman*, 134 Cal. 514, 66 P. 739 (1901); *Murray v. Murray*, 115 Cal. 266, 47 P. 37 (1896); *Shillock v. Shillock*, 24 Cal. App. 191, 140 P. 954 (1914); *Merchants Nat'l Union v. Buisseret*, 15 Cal. App. 444, 115 P. 58 (1911). For child custody cases adhering to *De la Montanya*, see *Titcomb v. Superior Court*, 220 Cal. 34, 29 P.2d 206 (1934); *In re Chandler*, 36 Cal. App. 2d 583, 97 P.2d 1048 (1940).

De la Montanya was followed in California until 1951, when the legislature enacted Cal. Stat. 1951, ch. 935, § 1, at 2537, as amended Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970). This was true even though *Milliken v. Meyer*, 311 U.S. 457 (1940), was decided in 1940. See *Pinon v. Pollard*, 69 Cal. App. 2d 129, 132, 158 P.2d 254, 256 (1945).

139. The California nonresident motorist statute was passed in 1935. See text accompanying notes 145-59 *infra*.

140. Cal. Code Civ. Proc. § 412 (1872) was amended by the following enactments: Cal. Stat. 1905, ch. 142, § 1, at 141; Cal. Stat. 1913, ch. 64, § 1, at 69; Cal. Stat. 1913, ch. 693, § 1, at 1422; Cal. Stat. 1919, ch. 201, § 1, at 293; Cal. Stat. 1933, ch. 744, § 19, at 1845; Cal. Stat. 1949, ch. 42, § 1, at 64; Cal. Stat. 1949, ch. 1124, § 1, at 2025; Cal. Stat. 1951, ch. 1737, § 48, at 4099.

Cal. Code Civ. Proc. § 413 (1872) was amended by the following enactments: Cal. Stat. 1931, ch. 884, § 1, at 1898; Cal. Stat. 1933, ch. 744, § 20, at 1846; Cal. Stat. 1937, ch. 548, § 1, at 1577; Cal. Stat. 1947, ch. 248, § 1, at 815; Cal. Stat. 1949, ch. 456, § 1, at 799; Cal. Stat. 1951, ch. 43, § 1, at 167; Cal. Stat. 1957, ch. 1669, § 1, at 3048.

defendant because of the defendant's own actions.

In 1909, it was held that the state acquires jurisdiction over a defendant who appears generally in an action within the state.¹⁴¹ It was further held in 1924 that by appearing generally, a competent defendant dispensed with the requirement that he be served with process.¹⁴² In 1929, a person was said to subject himself to the court's jurisdiction by acknowledging due service of process.¹⁴³ In addition, in 1931, a foreign national was subjected to a California court's jurisdiction for any counterclaim, or crosscomplaint that a defendant may bring against him within the subject matter jurisdiction of the state.¹⁴⁴

The Nonresident Motorist Statute

The increased use of automobiles as a means of interstate transportation created a need for statutory regulation over nonresident motorists. In 1923, California adopted a statute that required nonresidents to register their vehicles within 10 days after entering the state.¹⁴⁵ In some states, nonresident motorist statutes designated a state official who was to receive the process on behalf of nonresidents involved in accidents. Such provisions were held constitutional by the Supreme Court in *Hess v. Pawloski*.¹⁴⁶ Eight years later, in 1935, California adopted a similar provision,¹⁴⁷ which appears to have been molded from

141. *Olcese v. Justice's Court*, 156 Cal. 82, 87, 103 P. 317, 318 (1909).

142. *Harrington v. Superior Court*, 194 Cal. 185, 189, 228 P. 15, 16 (1924); see *Raps v. Raps*, 20 Cal. 2d 382, 125 P.2d 826 (1942).

143. *Smith v. Moore Mill & Lumber Co.*, 101 Cal. App. 492, 281 P. 1049 (1929).

144. *United States of Mexico v. Rask*, 118 Cal. App. 21, 49, 4 P.2d 981, 993 (1931).

145. Cal. Stat. 1923, ch. 266, § 4, at 518.

146. 274 U.S. 352 (1927). The first nonresident motorist statute was adopted in New Jersey. It required that nonresidents *express* consent to the appointment of an agent for service of process. The constitutionality of this statute was upheld in *Kane v. New Jersey*, 242 U.S. 160 (1916).

147. Cal. Stat. 1935, ch. 27, § 404, at 154: "(a) The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent.

"(b) The acceptance of such rights and privileges or use of said highways shall be a signification of the agreement of said nonresident that any such process against him which is served in the manner herein provided shall be of the same legal force and validity as if served on said nonresident personally in this State."

the Massachusetts provision¹⁴⁸ upheld in *Hess v. Pawloski*. The California statute provided that any nonresident owning or driving a vehicle in California impliedly consented to the appointment of the Director of Motor Vehicles as his attorney. The nonresident was therefore bound by any service of process delivered to the Director.¹⁴⁹ A copy of the summons and complaint was to be sent by registered mail to the defendant by the plaintiff. Personal service outside the state was also authorized.¹⁵⁰

The California nonresident motorist statute was first utilized in 1938. A California appellate court held personal service on a driver, employed as an independent contractor, not to be binding on the employer corporation.¹⁵¹ Three years later, it was held that jurisdiction could be acquired over a minor who at the time of service was in a foreign country. The court felt it was not the minor that delegated the power to the Director, but the law.¹⁵² In a later case, *McDonald v. Superior Court*,¹⁵³ it was held that loading and unloading a vehicle, as well as renting a vehicle, falls within the meaning of the term "opera-

Similar legislation granting the court personal jurisdiction over nonresident aircraft operators was passed in 1957. CAL. PUB. UTIL. CODE § 21414. As of January 1970, no cases had been litigated under the nonresident aircraft operators statute. An interesting question has been raised, however. "What of the case of a nonresident aircraft operator who flies into California and is involved in an accident without having used an airport in California?" Horowitz, *Bases of Jurisdiction of California Courts To Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 S. CAL. L. REV. 339, 364 n.111 (1958).

A California nonresident boatowners statute was adopted in 1963. Cal. Stat. 1963, ch. 1280, § 1, at 2805. Its primary purpose was to combat the problems created by the substantial increase in the number of nonresident vessels in California territorial waters. Cal. State Bar Ass'n, *Review of 1963 Code Legislation*, 38 CAL. ST. B.J. 715 (1963). These problems were similar to those caused by nonresident motorists, and nonresident aviators. It was virtually impossible to serve process on a foreign ship, or on a boat that caused injuries and left prior to receiving service of process. In response, the California legislature passed an act giving the courts personal jurisdiction over nonresident boatowners. CAL. HARB. & NAV. CODE §§ 600-09. A distinction between the nonresident boatowners act and its predecessors, the nonresident motorist and aviator acts is that the nonresident boatowner must appear within 60 days. *Id.* § 608. On the other hand, if served under the motorist or aviator acts, the defendant gets such continuances as the court deems proper. As of this writing, this provision has not been tested in the California courts. See also *Curry v. Fred Olsen Line*, 367 F.2d 921, 926 (9th Cir. 1966) (section 601 is discussed in passing).

148. Mass. Gen. Laws (1921), ch. 90, as amended, ch. 431, § 2, [1923] Mass. Stat.

149. Cal. Stat. 1935, ch. 27, § 404, at 154.

150. *Id.* § 404(c)-(d), at 155.

151. *Fuller v. Lindenbaum*, 29 Cal. App. 2d 227, 84 P.2d 155 (1938).

152. *Silver Swan Liquor Corp. v. Adams*, 43 Cal. App. 2d 851, 110 P.2d 1097 (1941).

153. 43 Cal. 2d 621, 275 P.2d 464 (1954).

tion." The statute is therefore not restricted to actual physical driving or control.¹⁵⁴

The nonresident motorist statute was amended in 1937,¹⁵⁵ and again in 1945.¹⁵⁶ The 1945 amendment provided that a person's status as a resident or nonresident is to be determined at the time of the collision or accident.¹⁵⁷ This was more helpful than the previous provision which defined a "nonresident" as "a person who is not a resident of this state."¹⁵⁸ The statute has again been amended and renumbered,¹⁵⁹ and is now found in the California Vehicle Code, sections 17450 to 17458.

Corporations: Statehood to International Shoe, 1849 to 1945

Section 29 of the California Practice Act,¹⁶⁰ like the 1850 service of process statute¹⁶¹ which it superseded, expanded the common law rule requiring service on the president or head of a corporation¹⁶² by also allowing service on the secretary, cashier, or managing agent.¹⁶³ These statutes made no reference to the distinction between domestic and foreign corporations, providing simply for service of process in suits "against a corporation."¹⁶⁴

Doing Business and the Implied Consent Theory

In 1861, a provision was added to section 29 specifying that service on a foreign corporation "doing business within the State must be made upon an Agent, Cashier, or Secretary thereof."¹⁶⁵ A few other states, as early as 1829, had enacted similar statutes providing for the acquisition of in personam jurisdiction over foreign corporations doing business within the state.¹⁶⁶ The prevailing opinion during the earlier

154. See also *Schefke v. Superior Court*, 136 Cal. App. 2d 715, 289 P.2d 542 (1955), where defendant backed into plaintiff in a private gas station; the court held that the private property was included in the term "public highway."

155. Cal. Stat. 1937, ch. 840, § 2, at 235.

156. Cal. Stat. 1945, ch. 1244, § 1, at 2356.

157. *Id.* § 1(h): "[N]onresident means a person who is not a resident of this State at the time the accident or collision occurs."

158. Cal. Stat. 1935, ch. 27, § 72, at 98.

159. Cal. Stat. 1967, ch. 720, § 1, at 2092; Cal. Stat. 1955, ch. 637, § 1, at 1134.

160. Cal. Stat. 1851, ch. 5, § 29, at 55; see note 71 *supra*.

161. Cal. Stat. 1849-50, ch. 142, § 26, at 430; see note 69 *supra*.

162. See SECOND RESTATEMENT OF CONFLICTS § 41, comment c at 212.

163. See Cal. Stat. 1851, ch. 5, § 29(1), at 55; Cal. Stat. 1849-50, ch. 142, § 26 (1), at 430.

164. See notes 69 & 71 *supra*.

165. Cal. Stat. 1861, ch. 432, § 1, at 496.

166. See generally 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 370 (1935). "In the earlier part of the nineteenth century . . . [t]here was held to be no method of acquiring jurisdiction to render personal judgment against a foreign corporation"

part of the nineteenth century, however, was that in the absence of consent or voluntary appearance, a corporation could not be sued outside the state of its incorporation.¹⁶⁷ Then, in 1856, the Supreme Court, in *Lafayette Insurance Co. v. French*,¹⁶⁸ sanctioned a fictional means of finding consent to be sued in another state. The Court held valid an Ohio statute that provided that a foreign corporation, by putting an agent in the state to transact business, has "impliedly consented" to service of process on that agent. The Court reasoned:

A corporation created by Indiana can contract business in Ohio only with the consent . . . of the latter State This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States . . . provided they are not repugnant to the constitution or laws of the United States

. . . . Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts¹⁶⁹

Although the Court explained that its opinion should be confined to the facts of this case, the theory of "implied consent" did provide rational support for the abovementioned "doing business" statutes.¹⁷⁰ Perhaps *Lafayette*, by lending an air of respectability to the "doing business" statutes and by indirectly calling attention to California's lack of such a statute, influenced the original adoption of the California "doing business" provision in 1861.¹⁷¹

The "implied consent" theory of suing foreign corporations con-

However, State legislatures began as early as 1829 to pass statutes providing for proceedings *in personam* against foreign corporations provided the foreign corporation was doing business within the State." *Id.*

167. *See id.*

168. 59 U.S. (18 How.) 404 (1855). This was an action brought in a United States court in Indiana to enforce an Ohio judgment, prior to the adoption of the fourteenth amendment. Without "implied consent," the Court indicates that the judgment could not be enforced outside Ohio. Note that after the adoption of the fourteenth amendment, the Ohio judgment could not even be enforced within Ohio. See note 16 *supra*. See *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); SECOND RESTATEMENT OF CONFLICTS § 24, comment *e* at 135-36.

169. 59 U.S. (18 How.) at 407-08.

170. See text accompanying note 165-66 *supra*.

171. Cal. Stat. 1861, ch. 432, § 1, at 496. Note that "[t]he condition that a foreign corporation, if it does business in the State, shall consent to be sued need not be expressed in the statute. It may as well be found from an interpretation of all the legislation of the State as from the express language of any particular statute." 1 J. BEALE, *supra* note 166, at 387.

tinued to develop in Supreme Court cases subsequent to *Lafayette*.¹⁷² As a matter of due process the Court required that the foreign corporation be "doing business" within the forum state before the fiction of "implied consent" could subject the corporation to suit in that state.¹⁷³

No significant California cases involving the definition of the California "doing business" statute were decided until the turn of the century. At that time, without mentioning California's prerogative of imposing a more stringent meaning, the courts adopted the then current Supreme Court criteria for determining when a foreign corporation was "doing business" within the state.¹⁷⁴ By adopting the federal "doing business" guidelines as its own, the California judiciary prevented the statutory "doing business" requirement from placing any greater restriction on the state's jurisdictional power than were placed upon it by the due process clause.¹⁷⁵

The fiction of "implied consent" was not necessary to subject a domestic corporation to the state's jurisdiction. The prevailing opinion at that time that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty"¹⁷⁶ led at least one California court to express its view that even if all the business of a domestic corporation was done outside California the corporation would still be a resident of the state.¹⁷⁷ The problem of serving process on a domestic corporation when all of its representatives are outside the state is discussed below.¹⁷⁸

Mandatory Designation of Agent for Service of Process: Foreign Corporations

As noted above, in *Lafayette Insurance Co. v. French*¹⁷⁹ the Supreme Court held that a state could require a foreign corporation to submit to certain conditions in order to transact business in the state.¹⁸⁰

172. See, e.g., *St. Clair v. Cox*, 106 U.S. 350 (1882); *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65 (1871).

173. "It [a foreign corporation] cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it consent to be sued there. If it *do business* [*sic*] there it will be presumed to have assented and will be bound accordingly." *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1871).

174. See, e.g., *Doe v. Springfield Boiler & Mfg. Co.*, 104 F. 684 (9th Cir. 1900); *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 P. 289 (1906).

175. See text accompanying notes 15-23, 43-45 *supra*.

176. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839), which is popularly quoted for its dictum to this effect.

177. See *McKendrick v. Western Zinc Mining Co.*, 165 Cal. 24, 29, 130 P. 865, 868 (1913); see note 194 *infra*.

178. See text accompanying notes 193-206 *infra*.

179. 59 U.S. (18 How.) 404 (1855).

180. See text accompanying notes 168-69 *supra*.

While that decision may have stimulated the enactment of the 1861 amendment to section 29 of the Practice Act,¹⁸¹ there were also later California statutes requiring, as a condition of transacting business in California, that the foreign corporation formally designate a resident¹⁸² or public officer¹⁸³ on whom process could be served. Similar requirements are found today in Corporations Code section 6403.¹⁸⁴

If the foreign corporation was "doing business" in the state, but did not formally designate an agent, service could still be made on a person specified by Code of Civil Procedure section 411.¹⁸⁵

Substituted Service on Public Officers: Foreign Corporations

Where a foreign corporation "doing business" in California had not formally designated a person to receive service of process, and had no person in the state to whom process could be delivered under section 411, service by publication or substituted service on a state officer would seem to have been the only possible means of acquiring in personam jurisdiction.¹⁸⁶ After the California Supreme Court decided *De la Montanya v. De la Montanya*¹⁸⁷ in 1896, chances of acquiring

181. Cal. Stat. 1861, ch. 432, § 1, at 496.

182. Cal. Stat. 1871-72, ch. 566, §§ 1-3, at 826; Cal. Stat. 1870, ch. 578, §§ 1-5, at 881.

183. Cal. Stat. 1899, ch. 94, §§ 1-4, at 111, *amending* Cal. Stat. 1871-72, ch. 566, §§ 1-3, at 826.

184. CAL. CORP. CODE § 6403: "A foreign corporation shall not transact intrastate business . . . without having first obtained from the Secretary of State a certificate of qualification. To obtain such certificate, the corporation shall file . . . a statement and designation . . . which shall set forth all of the following: . . . (e) The name of an agent upon whom process directed to the corporation may be served within this State. The agent may be a natural person residing within the State . . . or it may be a domestic corporation . . . or a foreign corporation (f) Its irrevocable consent to service of process directed to it upon the agent designated, and to service of process on the Secretary of State if the agent so designated . . . is no longer authorized to act or cannot be found at the address given."

185. "If it was a foreign corporation doing business in the state, then, under the act of 1870 [Cal. Stat. 1869-70, ch. 578, § 1, at 881], it would be required to have a designated agent in the state authorized to receive service of process and personal service could be made upon him. If no such agent had been designated, then, under the original section 411 of the Code, service could be made upon any managing or business agent, cashier, or secretary of such corporation within the state." *McKendrick v. Western Zinc Mining Co.*, 165 Cal. 24, 28, 130 P. 865, 867 (1913).

186. The acquisition of in personam jurisdiction by publication was evidently considered acceptable by California courts prior to the adoption of the fourteenth amendment and the *Pennoyer v. Neff* decision in 1878. *See* *Hahn v. Kelly*, 34 Cal. 391 (1868); *Douglas v. Pacific Mail S.S. Co.*, 4 Cal. 304 (1854). "There are two modes of obtaining jurisdiction over the person of a defendant: First, by personal service of the summons, with a copy of the complaint; second, by constructive service, or what is commonly designated publication of summons." *Hahn v. Kelly*, 34 Cal. at 403. *See* note 16 & text accompanying notes 100-02 *supra*.

187. 112 Cal. 101, 44 P. 345 (1896).

in personam jurisdiction by publication in accordance with sections 412 and 413¹⁸⁸ were quite slim,¹⁸⁹ and there was as yet no general provision for substituted service on a public officer.¹⁹⁰ In 1899, however, the legislature enacted a statute providing for substituted service on the Secretary of State in the event that a foreign corporation "doing business" in the state failed to designate an agent, or, if designated, that agent died or left the state.¹⁹¹ Essentially similar provisions are presently contained in Corporations Code section 6501.¹⁹²

Mandatory Designation of Agent for Service of Process and Substituted Service on Public Officers: Domestic Corporations

In California's early history, there were very few reported cases involving domestic corporations where all the officers or persons on whom process could be served under section 411 were outside the state. One case,¹⁹³ an in rem action, brought this problem before a California court in 1912. Stating that for purposes of Code of Civil Procedure section 412 a domestic corporation could depart from the state,¹⁹⁴ the court upheld jurisdiction based on service by publication

188. Cal. Code Civ. Proc. §§ 412-13 (1872); see note 107 *supra*.

189. See text accompanying notes 214-21 *infra* for a similar conclusion as to the use of sections 412 and 413 in acquiring jurisdiction over "absent" domestic corporations.

190. *But see* Cal. Pol. Code § 616 (1872), *as amended*, Cal. Code Amnds. 1877-78, ch. 604, § 6, at 17 (providing for substituted service on Insurance Commissioner).

191. Cal. Stat. 1899, ch. 94, §§ 1-2, at 111, *amending* Cal. Stat. 1871-72, ch. 566, § 1-3, at 826.

192. CAL. CORP. CODE § 6501: "If the agent designated for the service of process . . . cannot be found with due diligence . . . or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 [president or other head, vice president, secretary, assistant secretary, general manager in this state, etc.] can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by personal delivery to the Secretary of State"

193. *McKendrick v. Western Zinc Mining Co.*, 165 Cal. 24, 130 P. 865 (1913).

194. "It is true . . . that a domestic corporation is deemed to have a legal residence in this state, although it may do no business at all and all its officers, agents and stockholders may reside out of this state. Being a legal resident for many purposes, it seems anomalous to say that it may depart from the state, but we think under the provisions of the code, properly construed, it may be so held. Our courts have jurisdiction of civil actions and this includes power to bring before them . . . the parties whose rights and interests are to be determined. . . . Doubtless if there were no enabling statutes prescribing a process to be used, the courts, being vested by the constitution with jurisdiction of civil actions, could frame suitable writs and direct a reasonable mode of service. Section 187 of the Code of Civil Procedure, expressly declares that this may be done where necessary. The power . . . should not be resorted to in any case where the existing statute may reasonably be construed to provide for process.

made pursuant to that section. This decision encouraged discussion about whether sections 412 and 413 might also support jurisdiction in an in personam action against a domestic corporation where the persons specified in section 411 could not be found within the state.¹⁹⁵ In many other states,¹⁹⁶ extraterritorial service on officers of domestic corporations was not considered inconsistent with the rule of *Pennoyer v. Neff*.¹⁹⁷ Those states reasoned, first, that a domestic corporation could not leave the state of its creation, and second, that extraterritorial service met the adequate notice requirement.¹⁹⁸ California's position very likely would have been that a corporation, having departed from the state for purposes of section 412, must be treated the same as an absent domiciliary.¹⁹⁹ In other words, the *De la Montanya*²⁰⁰ decision, denying extraterritorial service as a means of acquiring in personam jurisdiction over an absent domiciliary, would probably have been extended to apply to an absent domestic corporation. There were, however, no reported cases on this point prior to the enactment of statutes disposing of the problem in 1931²⁰¹ and 1941.²⁰² The 1931 statute allowed domestic corporations to formally designate an agent for service of process, and provided for substituted service on the Secretary of State in the event no formal designation was made and none of the per-

For these reasons the provisions prescribing the process and mode of service upon persons who cannot be personally reached, should receive a most liberal construction In the case of a domestic corporation, all of whose agents and officers upon whom service can be made, its actual body, in point of fact, for this purpose, have departed from the state, we think is not too great a stretch of construction to hold that the corporation itself . . . has departed from the state, within the purview of section 412 of the Code of Civil Procedure." *McKendrick v. Western Zinc Mining Co.*, 165 Cal. 24, 29, 130 P. 865, 868 (1913).

195. See Note, *Conflict of Laws: Jurisdiction: Validity of Service On a Domestic Corporation Whose Officers Are Outside the Forum in an In Personam Action*, 18 CALIF. L. REV. 409 (1930).

196. See, e.g., *Bennett v. Chicago Lumber & Coal Co.*, 201 Iowa 770, 208 N.W. 519 (1926); *Straub v. Lyman Land & Inv. Co.*, 30 S.D. 310, 138 N.W. 957 (1912), *aff'd on rehearing*, 31 S.D. 571, 141 N.W. 979 (1913).

197. 95 U.S. 714 (1878) (holding in personam jurisdiction not acquired where defendant not personally served within the state).

198. See *Straub v. Lyman Land & Inv. Co.*, 30 S.D. 310, 138 N.W. 957 (1912), *aff'd on rehearing*, 31 S.D. 571, 141 N.W. 957 (1913); Note, *Conflict of Laws: Jurisdiction: Validity of Service on a Domestic Corporation Whose Officers Are Outside the Forum in an In Personam Action*, 18 CALIF. L. REV. 409 (1930); Annot., 126 A.L.R. 1474, 1494 (1940).

199. Note, *Conflict of Laws: Jurisdiction: Validity of Service on a Domestic Corporation Whose Officers Are Outside the Forum in an In Personam Action*, 18 CALIF. L. REV. 409 (1930).

200. 112 Cal. 101, 44 P. 345 (1896).

201. Cal. Stat. 1931, ch. 862, § 373, at 1820.

202. Cal. Stat. 1941, ch. 1230, § 1, at 3088.

sons specified in section 411 could be found within the state;²⁰³ the 1941 amendment provided for substituted service on the Secretary of State where, although an agent had been formally designated, neither the designated agent nor the persons specified in section 411 could be found within the state.²⁰⁴ Essentially similar provisions are found in the present Corporations Code sections 3301 and 3302,²⁰⁵ which are incorporated by reference into Code of Civil Procedure section 411, subdivision 1.²⁰⁶

Doing Business and the Presence Theory

As noted above,²⁰⁷ the Supreme Court was willing to find a foreign corporation's "implied consent" to suit in another state only where the corporation was found by the Court to be "doing business" within that state.²⁰⁸ The vagueness of the term "doing business" led to considerable litigation over its meaning, and quantitative tests came to be the main criteria in deciding when a corporation was "doing business" within the state.²⁰⁹ For example, in 1907, in *Green v. Chicago*,

203. Cal. Stat. 1931, ch. 862, § 373, at 1820; see Howell, *The Work of the 1941 California Legislature*, 15 S. CAL. L. REV. 1, 7 (1941).

204. Cal. Stat. 1941, ch. 1230, § 1, at 3088; see Howell, *supra* note 203, at 7.

205. CAL. CORP. CODE § 3301 (operative Jan. 1, 1971): "Every domestic corporation . . . shall file with the Secretary of State, . . . a statement of the names and complete business or residence addresses of its president, secretary, and treasurer, together with a statement of the location and address of its principal office. If desired, the statement may designate, as the agent of such corporation for the purpose of service of process, any natural person residing in this state or any corporation which has complied with [the pertinent section of the Corporation Code requiring that corporate agents for services of process file prescribed certificates with the Secretary of State] and whose capacity to act as such agent has not terminated."

CAL. CORP. CODE § 3302 (operative July 1, 1970): "If designation of an agent for the purpose of service of process has not been filed with the Secretary of State, or if the agent designated cannot with reasonable diligence be found at the address designated for delivery by hand of the process, and it is shown by affidavit to the satisfaction of a court or judge that process against a domestic corporation cannot be served with reasonable diligence upon the designated agent by hand or upon the domestic corporation in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of Section 415.20 of the Code of Civil Procedure, the court or judge may make an order that the service be made upon the corporation by delivering by hand to the Secretary of State . . . one copy of the process for each defendant to be served, together with a copy of the order authorizing such service. Service in this manner constitutes personal service upon the corporation." The above sections correspond to identically numbered sections now in effect.

206. See note 2 *supra*.

207. See text accompanying notes 168-73 *supra*.

208. *E.g.*, *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65 (1871).

209. Compare *West Publishing Co. v. Superior Court*, 20 Cal. 2d 720, 726-30, 128 P.2d 777, 780-82 (1942), *cert. denied*, 317 U.S. 700 (1943), with *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914). See *Green v. Chicago, B. & Q. Ry.*,

B. & Q. Ry.,²¹⁰ the Court said that *mere solicitation* of sales would not be "doing business."²¹¹ A further statement by the Court, however, portended the emergence of a new fiction on which courts were later to base their acquisition of jurisdiction:

[V]alidity [of jurisdiction] depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was *present* there.²¹²

The effort put into the search for the meaning of the term "doing business," itself a court-created term supporting the "implied consent" fiction, had a significant effect on the emergence of an additional fiction based on the amorphous concept of "presence."²¹³ A foreign corporation's constructive "presence" in the state was thus to become recognized as a new basis on which courts could justify their acquisition of jurisdiction.

Each fiction, however, was based upon, and consequently required, (as did Code of Civil Procedure section 411, subdivision 2,²¹⁴) a finding that the foreign corporation was "doing business" within the state.²¹⁵ Thus the shift of emphasis from "implied consent" to "presence," as a basis of jurisdiction over a foreign corporation, had no effect on California.

In *West Publishing Co. v. Superior Court*,²¹⁶ decided in 1942, the California Supreme Court gave full recognition to the "presence" theory and summarized the history of its development.²¹⁷ The court, expanding upon the criteria necessary to find the corporation "present," quoted a Cardozo opinion defining "presence" as doing business with a fair measure of permanence and continuity, so that it can be said the corporation is "here."²¹⁸ The *West Publishing Co.* decision typifies the California courts' past and present willingness to adopt as their own the

205 U.S. 530 (1907); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 922-23 (1960).

210. 205 U.S. 530 (1907).

211. *Id.* at 534.

212. *Id.* at 532 (emphasis added).

213. See, e.g., *Philadelphia & R. Ry. v. McKibbin*, 243 U.S. 264 (1916) (not sufficient "presence"); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914) (sufficient "presence"); *St. Louis Sw. Ry. v. Alexander*, 227 U.S. 218 (1913) (not sufficient "presence").

214. Cal. Stat. 1968, ch. 132, § 2, at 343, CAL. CODE CIV. PROC. § 411(2) (effective until July 1, 1970).

215. See generally, 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 382-88 (1935).

216. 20 Cal. 2d 720, 128 P.2d 777 (1942), *cert. denied*, 317 U.S. 700 (1943).

217. *Id.* at 726-30, 128 P.2d at 780-82.

218. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267-68, 115 N.E. 915, 917-18 (1917).

federal basis of jurisdiction guidelines.

Doing Business at the Time of Service of Process

Whether a particular California court made reference in its decision to the "implied consent" fiction²¹⁹ or to the "presence" fiction,²²⁰ a foreign corporation had to be "doing business" within the state,²²¹ and this was held to mean "doing business" at the time of service of process.²²² This rule meant that a foreign corporation was outside the reach of California courts where, after a cause of action had arisen, the corporation ceased "doing business" within the state prior to service of process. In 1933, in an attempt to resolve this problem, the legislature enacted the statutory predecessor²²³ to Corporations Code section 6504.²²⁴ The 1933 statute provided for service on the Secretary of State in such a situation, with two important limitations: First, some part²²⁵ of the business transacted²²⁶ in the past must have been intrastate; and second, the cause of action must have arisen out of that intrastate business.²²⁷

219. See text accompanying notes 168-73 *supra*.

220. See text accompanying notes 207-18 *supra*.

221. A corporation had to be "doing business" in the state in order to satisfy the due process requirement of the fourteenth amendment. See *International Harvester Co. v. Kentucky*, 234 U.S. 579, 583, 589 (1914). It was also a statutory jurisdictional requirement. Cal. Stat. 1968, ch. 132, § 2, at 343, CAL. CODE CIV. PROC. § 411(2) (effective until July, 1970).

222. See *Doe v. Springfield Boiler & Mfg. Co.*, 104 F. 684, 687 (9th Cir. 1900); *Davenport v. Superior Court*, 183 Cal. 506, 508, 191 P. 911, 911 (1920); *Thew Shovel Co. v. Superior Court*, 35 Cal. App. 2d 183, 189, 95 P.2d 149, 153 (1939); *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 584-85, 84 P. 289, 290 (1906).

223. Cal. Stat. 1933, ch. 533, § 91, at 1418. This type of statute was first approved by the United States Supreme Court in *Washington v. Superior Court*, 289 U.S. 361 (1933).

224. CAL. CORP. CODE § 6504: "A foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn from business in this State may be served with process in the manner provided by this chapter in any action brought in this State arising out of such business"

225. See *Oro Navigation Co. v. Superior Court*, 82 Cal. App. 2d 884, 187 P.2d 444 (1947).

226. See CAL. CORP. CODE § 6203: "'Transact intrastate business' means entering into repeated and successive transactions of its business in this State, other than intrastate or foreign commerce." The words "transact intrastate business," as defined above, are not the equivalent of "doing business in this State," as used in Cal. Stat. 1968, ch. 132, §§ 1-2, at 343, CAL. CODE CIV. PROC. § 411(2) (effective until July 1, 1970). See *Borgward v. Superior Court*, 51 Cal. 2d 72, 76, 330 P.2d 789, 791 (1958).

227. See *Oro Navigation Co. v. Superior Court*, 82 Cal. App. 2d 884, 187 P.2d 444 (1947), which involved a personal injury that occurred in Oregon. It was held, with no discussion whether the action arose out of activity involving intrastate business, that the California court could acquire jurisdiction. The case may indicate a tendency of the court toward a liberal application of the statute.

Causes of Action Arising Outside the State

A domestic corporation may be analogized to an individual found within a state.²²⁸ Once properly served,²²⁹ the state has always had the power to render an in personam judgment on transitory causes of action arising both inside and outside the state.²³⁰ Justification for such broad powers over a domestic corporation lies in the fact that the corporation originally chooses the state of incorporation and, thus, should not later be allowed to object to the inconvenience of defending a suit there;²³¹ also, a plaintiff in a suit against the corporation is guaranteed at least one forum in which he may bring any action.²³²

In contrast to the domestic corporation is the properly served²³³ foreign corporation doing business in the proposed forum state. Under the law prior to *International Shoe Co. v. Washington*²³⁴ and *Perkins v. Benguet Consolidated Mining Co.*,²³⁵ it was necessary to examine the type of statute under which such service was made in order to determine whether a suit could be maintained on a cause of action having no relation to the foreign corporation's activity in the forum state.²³⁶

Where service on a resident of the state or on a state official was based upon the *actual consent* of the foreign corporation, even though the consent was given in compliance with a statute, it was generally held to be voluntarily given;²³⁷ thus, it was consent to be sued on any cause of action, whether it arose out of activity in the forum state or not. There were only two notable California decisions on this point, and each was decided in a federal court. Both, contrary to the above mentioned general rule, held that in the absence of a ruling of the highest court of California, compliance with the statute requiring formal designation of an agent to receive service of process should not be interpreted as consent to jurisdiction over a cause of action arising from business done

228. See text accompanying notes 77-80.

229. The problem of serving process on an "absent" domestic corporation is discussed in the text accompanying notes 193-206 *supra*.

230. See SECOND RESTATEMENT OF CONFLICTS 41, comment *b* at 212.

231. See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 933-34 (1960).

232. See *id.*

233. The problem of serving process on "absent" foreign corporations is discussed in text accompanying notes 179-92 *supra*.

234. 326 U.S. 310 (1945).

235. 342 U.S. 437 (1952).

236. See *Developments in the Law—Conflict of Laws: 1935-1936*, 50 HARV. L. REV. 1119, 1134-35 (1937).

237. See *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432, 111 N.E. 1075 (1916). See generally Annot., 145 A.L.R. 630 (1943).

outside California.²³⁸ Later California decisions saw a reversal of position, indicating that the broad Supreme Court interpretation²³⁹ would in the future be applied.²⁴⁰

In contrast to the situation in which the foreign corporation has *actually* consented to service of process on a designated agent, is the situation in which a statute deems a foreign corporation "doing business" within the state to have "impliedly consented" to service upon one of its officers or agents, or upon a public officer of the state. Despite one early California case to the contrary,²⁴¹ the rule in such cases was that the "implied consent" of the foreign corporation extended only to causes of action arising from business done within the state.²⁴² Two Supreme Court cases, *Old Wayne Mutual Life Ass'n v. McDonough*²⁴³ and *Simon v. Southern Ry.*²⁴⁴ were commonly recognized as the authority for this view.²⁴⁵ In 1915, a California case decided in the Ninth

238. *Miner v. United Air Lines Transp. Corp.*, 16 F. Supp. 930, 931 (S.D. Cal. 1936); see *Dunn v. Cedar Rapids Eng'r Co.*, 152 F.2d 733, 734 (9th Cir. 1945).

239. See text accompanying note 237 *supra*.

240. See, e.g., *Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern California, Inc.*, 342 F.2d 393, 398 (9th Cir. 1965); *Koninklijke Luchtvaart Maatschappij v. Superior Court*, 107 Cal. App. 2d 495, 237 P.2d 297 (1951); Note, *Suing Foreign Corporations in California*, 5 STAN. L. REV. 503, 508-09 (1953).

241. *Denver & R.G.R.R. v. Roller*, 100 F. 738, 741 (9th Cir. 1900).

242. "When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it had been limited in [*Simon v. Southern Ry.*, 236 U.S. 115 (1915); *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907)]." *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915) (Learned Hand, J.).

243. 204 U.S. 8 (1907).

244. 236 U.S. 115 (1915).

245. See Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 882-83, 890 (1919). But cf. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.). "We hold, then, that the defendant corporation is engaged in business within this state. We hold further that the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted. That in principle was our ruling in [*Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432, 111 N.E. 1075 (1916)]. We applied it there to a case where service had been made on an agent designated by the corporation It applies, however, with equal force to a case where service has

Circuit, *Fry v. Denver & R.G. Ry.*,²⁴⁶ followed the *Old Wayne* and *Simon* decisions. In its decision the court summed up the problem, stating:

[I]t is not enough in such a case that the foreign corporation be doing business in the state where sued, but it must appear that the cause of action arose from the business there done.²⁴⁷

In *Fry*, the statute upon which the service of process was based provided for service upon an agent of the corporation, whereas, in *Old Wayne* and *Simon*, the pertinent statutes provided for service upon a public officer of the state. The court in *Fry*, however, refused to attach any importance to this factual distinction. It was the court's opinion that whether the statute provided for service upon an agent of the corporation or upon a public officer, the implied consent should extend only to causes of action arising from business done within the state.²⁴⁸

Then in 1951, the court of appeal in *Koninklijke Luchtvaart Maatschappij v. Superior Court*,²⁴⁹ in effect overruled *Fry*, holding that under the "presence" theory a California court could acquire jurisdiction over a cause of action arising in England which was completely unconnected with business done in California.²⁵⁰ The court implied that if *Old Wayne* and *Simon* applied at all, it would be in cases in which service was made on public officers, and not in this case (nor as in *Fry*) where an agent of the corporation was served.²⁵¹

The *Old Wayne* and *Simon* decisions, which, under the narrowest interpretation, denied jurisdiction over foreign cause of action when service was made on a state officer without the express consent of the foreign corporation, were finally discredited by the Supreme Court in *Perkins v. Benguet Consolidated Mining Co.*²⁵² Soon thereafter, the

been made upon an officer or managing agent The essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action." *Id.* at 268-69, 115 N.E. at 918.

246. 226 F. 893 (9th Cir. 1915).

247. *Id.* at 895.

248. *Id.*

249. 107 Cal. App. 2d 495, 237 P.2d 297 (1951).

250. *Id.* at 501, 237 P.2d at 301.

251. *Id.* at 498-99, 237 P.2d at 299-300.

252. 342 U.S. 437 (1952). In this case, the Supreme Court held that a foreign corporation carrying on continuous and systematic activity in Ohio could be subjected to the jurisdiction of an Ohio court on a cause of action arising outside Ohio and independent of the corporation's activities there. The Court determined that as a matter of due process the business done in Ohio by the defendant foreign corporation was sufficiently substantial and of such a nature as to allow the acquisition of jurisdiction by the Ohio court. The holding is expressly based on the realistic reasoning of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), rather than alluding to the fictions that had supported the acquisition of jurisdiction in the past. 342 U.S. at

California decision in *Jeter v. Austin Trailer Equipment Co.*²⁵³ indicated that in the future California would also consider *Old Wayne* and *Simon* to be relics of a bygone era. Thus, service of process on the Secretary of State, even where consent was merely implied and not express, was no longer a deterrent to the acquisition of jurisdiction over a cause of action arising outside California.

Milliken v. Meyer and International Shoe Co. v. Washington: A New Perspective for California

Between 1849 and the early 1940's the ability of a California court to acquire personal jurisdiction over a foreign corporation expanded as much as the decisions of the United States Supreme Court would allow. In contrast, the ability of a California court to acquire personal jurisdiction over an individual absent from the state experienced little change; in fact, the application of the *Pennoyer* "territorial" doctrine reduced the scope of the jurisdiction that the courts had enjoyed up to the adoption of the fourteenth amendment. No longer could a plaintiff obtain, by publication of summons, the type of ex parte personal judgment that was formerly recognized in California but was not, under the full faith and credit clause, required to be recognized in other states. Also, the California Supreme Court, in *De la Montanya v. De la Montanya*²⁵⁴ in 1896, interpreted the *Pennoyer* doctrine, as did many states at the time, to apply to absent residents as well as absent nonresidents. *Pennoyer* and *De la Montanya*, thus applied, were major factors contributing to the lack of growth in the ability of California courts to acquire personal jurisdiction over absent individuals.

California's only significant extension of its bases of jurisdiction over individuals during this period was the enactment in 1935 of the nonresident motorist statute which remains in force substantially unchanged to this day.²⁵⁵ That statute provides for substituted service on the Director of Motor Vehicles when a motorist commits certain acts within the state. Theoretically, the nonresident motorist

446-47. Commenting on the lower court's reliance upon *Old Wayne Life Ass'n v. McDonough* and *Simon v. Southern Railway*, the Court stated: "At the time of rendering the above decisions this Court was aided, in reaching its conclusion as to the limited scope of the statutory authority of the public officials, by this Court's conception that the Due Process Clause of the Fourteenth Amendment precluded a state from giving its public officials authority to accept service in terms broad enough to bind a foreign corporation in proceedings against it to enforce an obligation arising outside of the state of the forum. That conception now has been modified by the rationale adopted in later decisions and particularly in *International Shoe Co. v. Washington*." *Id.* at 444.

253. 122 Cal. App. 2d 376, 265 P.2d 130 (1953).

254. 112 Cal. 101, 44 P. 345 (1896).

255. Cal. Stat. 1935, ch. 27, § 404, at 154, as amended, CAL. VEH. CODE § 17451.

statute closely resembles the statutes that allow substituted service on the Secretary of State where a foreign corporation is otherwise "unservable" within the state.²⁵⁶ Each provides for substituted service on a public officer, and each was originally based upon the fiction of "implied consent." The state could require a foreign corporation to "impliedly consent" to service on the Secretary of State as a condition of doing business in the state since corporations were not protected by the privileges and immunities clause of the Federal Constitution.²⁵⁷ The state's authority to require an individual to "impliedly consent" to service on a public officer was based on its regulatory police power over persons operating dangerous equipment within the state.²⁵⁸

Two landmark Supreme Court cases²⁵⁹ in the 1940's provided California with the opportunity to further expand its present bases of jurisdiction over both corporations and individuals. In *Milliken v. Meyer*,²⁶⁰ the *Pennoyer* rule requiring service of process within the state was held to be inapplicable to absent domiciliaries. The Supreme Court held a Wyoming statute authorizing extraterritorial personal service upon a defendant domiciliary to be in compliance with the due process clause of the fourteenth amendment, and a decision rendered pursuant to that statute was entitled to full faith and credit. In *International Shoe Co. v. Washington*,²⁶¹ the Court upheld jurisdiction in an in personam action against a foreign corporation by abandoning the "presence" fiction and the "doing business" requirement in favor of a qualitative test to determine whether the corporation's relationship with the state was adequate to meet the due process requirement. The new theory adopted by the Court required only that there be such "minimum contacts" with the state that the maintenance of the suit would not offend "traditional notions of fair play and substantial justice."²⁶²

Millikin v. Meyer provided California courts with a new opportunity to overrule the 1896 *De la Montanya* decision and assert in personam jurisdiction over absent domiciliaries. *International Shoe Co. v. Washington*, however, by abandoning the quantitative "doing business" requirement for acquiring personal jurisdiction over a foreign corporation, created a dilemma for the California courts since California still had a statute requiring a finding of "doing business." On the one hand, California could continue to apply the old quantitative

256. See text accompanying notes 186-92, 219-27 *supra*.

257. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

258. See *Hess v. Pawloski*, 274 U.S. 352 (1927).

259. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1940).

260. 311 U.S. 457 (1940).

261. 326 U.S. 310 (1945).

262. *Id.* at 316.

tests²⁶³ used prior to *International Shoe*; on the other hand, the literal interpretation of "doing business" might be replaced with the qualitative tests set out in *International Shoe*. The former course would cause the California courts to fall behind the current trends; the latter course might be attacked as an encroachment upon the power of the legislature.²⁶⁴

As discussed below, the California courts were hesitant to overrule *De la Montanya*, in spite of *Milliken v. Meyer*. The California legislature, however, apparently concerned that the courts would eventually overrule *De la Montanya* and permit the acquisition of personal jurisdiction on terms less stringent than the actual facts of *Milliken v. Meyer*, enacted Code of Civil Procedure section 417.²⁶⁵ Section 417, when adopted, was more restrictive than the dictum in *Milliken v. Meyer* seemed to indicate was necessary. Much importance lies in the fact that its adoption precluded the potential use of sections 412 and 413 as a "long-arm" statute to obtain in personam jurisdiction over nonresidents. On the other hand, the abandonment of "doing business" within the state as a federal due process requirement for suing a foreign corporation generated no legislative action whatsoever. The California judiciary, left to its own devices, came up with a courageous bit of "judicial legislation"²⁶⁶ interpreting the statutory "doing business" requirement to be the equivalent of the due process requirements set out in *International Shoe*.

Individuals: *Milliken v. Meyer*, 1940 to 1970

Immediately following *Milliken v. Meyer*, the California courts had the opportunity to overrule *De la Montanya* by recognizing domicile as a basis for acquiring jurisdiction. Any hope that the *Milliken* rule might be adopted, however, was lost when the case of *Pinon v. Pollard* was decided.²⁶⁷ Dicta in *Pinon* indicated that a California court, despite the *Milliken* decision, could not render a personal judgment in a case where service was made upon a defendant domiciliary while he was absent from the state.²⁶⁸

A tendency toward conservatism best describes the *Pinon* opinion.

263. See text accompanying notes 207-12 *supra*.

264. Most states to some degree, faced this dilemma after the *International Shoe* decision. Through 1960, state courts "for the most part have sought a middle ground, requiring less activity than in the past, but not interpreting the statutes so as to extend them to the outer limits apparently permitted by *International Shoe*." *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1000 (1960).

265. Cal. Stat. 1951, ch. 935, § 1, at 2537.

266. See *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

267. 69 Cal. App. 2d 129, 158 P.2d 254 (1945).

268. *Id.* at 132, 158 P.2d at 256.

Like the *De la Montanya* court 62 years earlier, the *Pinon* court applied the *Pennoyer* rule to absent residents, even though *Pennoyer* involved only service of process upon a nonresident.

Enactment and Application of Section 417: 1951 to 1957

In 1946, the State Bar Committee on the Administration of Justice recommended the adoption of a new section to be numbered 417, which read as follows:

Where jurisdiction is acquired over a person who is outside of this state by publication of summons in accordance with Sections 412 and 413 of this Code, the Court shall have power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was domiciled in this state at the time of the commencement of the action, or at the time of service.²⁶⁹

Basically, the State Bar was attempting to bring the California statutes within the reasoning of *Milliken v. Meyer*,²⁷⁰ but it also expressed the fear that without the proposed section, the California courts might attempt to exercise their jurisdiction beyond a desirable limit:

[T]here is some danger that the courts of this state may disregard the opinion in the case of *Pinon v. Pollard* . . . and follow the decision of the United States Supreme Court in *Milliken v. Meyer* . . . and sustain a personal judgment on less than the requirements in the proposed Section 417.²⁷¹

The grounds for such apprehension were evidently twofold. First, dictum in *Milliken* indicated that the Court might approve the acquisition of personal jurisdiction over an absent domiciliary without requiring service of process on his person.²⁷² Second, the trend expanding the bases on which jurisdiction could be exercised was noted, and an

269. Committee on Administration of Justice 1945-46, Cal. State Bar Ass'n, *Service of Process*, 21 CAL. ST. B.J. 166, 169 (1946).

270. *Id.*

271. Committee on Administration of Justice, Cal. State Bar Ass'n, *Personal Service Outside the State*, 23 CAL. ST. B.J. 196 (1948).

272. The Court stated in *Milliken v. Meyer*, 311 U.S. 457 (1940), that "adequacy so far as due process is concerned is dependent on whether or not the form of substituted service . . . is reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . are satisfied." *Id.* at 463. The Court went on to say "one . . . incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him." *Id.* at 464. The California State Bar's apprehension may have been further justified by the Court's subsequent statement in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that "due process requires only that in order to subject defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice'." *Id.* at 316.

apparently defense-oriented legal and legislative community seemed concerned that the California courts might prematurely apply the recently propounded "minimum contacts" principles of *International Shoe Co. v. Washington*²⁷³ to cases involving nonresident individuals.²⁷⁴

For whatever the reason, section 417 was finally adopted with one variation in 1951.²⁷⁵ The legislature replaced the phrase "and was domiciled in this state" as originally recommended by the State Bar Association,²⁷⁶ with the phrase "was a resident of this state." Subsequent decisions equating residence with domicile, for purposes of section 417, rendered the change insignificant.²⁷⁷

Section 417, on its face, approved the exercise of personal jurisdiction in situations where, from the time of *De la Montanya*, it had been prohibited. Many instances arose, however, in which section 417 would be of no help to a person attempting to acquire jurisdiction over an absent resident. While discussing section 417 in *Craddock v. Financial Indemnity Co.*,²⁷⁸ the court commented upon one such instance as follows:

Obviously the section presupposes a defendant whose whereabouts outside the State of California are known—one who can be reached in another state for personal service of summons.²⁷⁹

It is important to note, however, that the principle laid down in *Craddock* was modified in the later case of *Hayes v. Risk*.²⁸⁰ In *Hayes*, the defendant was a resident at the time the action commenced, but left the jurisdiction prior to service. The court held that where the defendant has concealed himself within or without the jurisdiction, the personal service requirements of section 417 cannot prevent a judgment against the defendant and therefore must yield to the provisions of section 412 of the Code of Civil Procedure which permit service on the defendant by publication where he has concealed himself to avoid service of process.²⁸¹

As illustrated by *Craddock* (modified by *Hayes*) not only must

273. 326 U.S. 310 (1945).

274. See California Committee on Continuing Education of the Bar, *Selected 1957 Code Legislation*, 32 CAL. ST. B.J. 501, 531-32 (1957). Acquisition of personal jurisdiction over nonresident individuals had been allowed in special situations prior to *Milliken* and *International Shoe*. See *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927). The possibility of further expansion of this trend in the California courts, without prior legislative approval, may have provided additional impetus for the legislature to enact section 417.

275. 2 Cal. Stat. 1951 (3d Extra. Sess. 1950), ch. 935, § 1, at 2537-38.

276. See text accompanying note 269 *supra*.

277. See *Allen v. Superior Court*, 41 Cal. 2d 306, 259 P.2d 905 (1953).

278. 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (1966).

279. *Id.* at 854, 52 Cal. Rptr. at 92.

280. 255 Cal. App. 2d 613, 64 Cal. Rptr. 36 (1967).

281. *Id.* at 625-26, Cal. Rptr. at 44-45.

the defendant be located for personal service (at least in nonconcealment cases), but he must also have been a resident of California at one of the particular times specified in section 417. For example, in *Chesin v. Superior Court*,²⁸² the defendant allegedly committed a tort in California while a resident of California; but before the action could be commenced, he became domiciled in Arizona. Although the defendant was personally served in Arizona, the court could not acquire personal jurisdiction.

The case of *Allen v. Superior Court*,²⁸³ which first upheld the validity of section 417, well summarizes the positive effects of the new statute. The California court implied for the first time since *De la Montanya* that sections 412 and 413, even without the enactment of section 417, would have been sufficient statutory authority to render an in personam judgment against an absent resident.²⁸⁴ The court explained that section 417 imposed specific limitations on the power that California courts might otherwise exercise within the bounds of the due process clause.²⁸⁵

The actual holding in *Allen* was that the defendant, being a domiciliary when the action was commenced, was subjected to the jurisdiction of the court when personally served with process outside the state. The time lapse between the commencement of the action and the service of process was so great,²⁸⁶ however, that as a matter of due process, the court may have been extending its power beyond that allowed by *Milliken v. Meyer*.²⁸⁷ In *Milliken*, domicile was determined as of the

282. 142 Cal. App. 2d 360, 298 P.2d 593 (1965).

283. 41 Cal. 2d 306, 259 P.2d 905 (1953). Both plaintiff and defendant were California residents involved in an automobile accident. Defendant subsequently moved to Oregon, where he was personally served. It is important to note that the accident occurred on Nov. 1, 1947; complaint was filed July 12, 1948, while the defendant was a resident of California; thus the requirements of section 417 were met. The defendant's subsequent change of domicile to Oregon in September of 1951 was held not to vitiate the effectiveness of the publication in April of 1952 and the personal service in May of 1952. *Id.* at 313, 259 P.2d at 909; *accord*, *Myrick v. Superior Court*, 41 Cal. 2d 519, 261 P.2d 235 (1953).

284. "California at all times under sections 412 and 413 of the Code of Civil Procedure had the power to obtain in personam jurisdiction over petitioner for the purposes of this action by means of such service of process as would satisfy the requirements of due process." 41 Cal. 2d at 313, 259 P.2d at 909.

285. "[S]ection 417, as a clarifying statute, set forth the restrictive conditions under which this state would assert in personam jurisdiction, thereby leaving no doubt that this state was conforming in this regard with 'traditional notions of fair play and substantial justice . . . implicit in due process. . . .' As so construed, section 417 may reasonably apply to pending as well as future litigation." *Id.* (citations omitted).

286. See note 283 *supra*.

287. See Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958): "[I]n the *Allen* case the defendant did not move until nearly four years after the action was in fact commenced. In such a

time of service of process; but in *Allen*, domicile was determined as of the time of the commencement of the action—advancing “one step beyond the *Milliken* case.”²⁸⁸

Amendment to Section 417: A Limited Expansion

The 1957 amendment to section 417²⁸⁹ for the first time enabled the California courts to acquire personal jurisdiction over absent residents, where such persons were residents at the time the cause of action arose but not when the action was commenced.²⁹⁰ Thus, a defendant could no longer deprive a California court of personal jurisdiction by establishing a new domicile subsequent to the commission of the wrongful act.²⁹¹

At the time of its adoption it was well recognized that the 1957 amendment carried California's jurisdiction beyond that allowed in *Milliken v. Meyer*, and might therefore lead to questions regarding its constitutionality. Justice Traynor, in *Owens v. Superior Court*,²⁹² acknowledged this problem, stating:

Subdivision (b) of section 417 requires more than past domicile in the state. There must have been domicile here at the time the cause of action arose. Since jurisdiction so based rests neither on an existing relationship nor on the right of the plaintiff to rely on an existing relationship at the time he commences his action, it may be debatable whether such jurisdiction can constitutionally be assumed in the absence of some other relevant contacts with the state. If, for example, neither the plaintiff nor the defendant were presently domiciled here and the cause of action arose out of the defendant's activities elsewhere, the fact standing alone that the defendant was domiciled here at the time the cause of action arose might be too tenuous a basis for asserting jurisdiction over him.²⁹³

On the facts of the case, however, Traynor found additional contacts, which either by themselves, or in conjunction with defendant's prior domicile, fully supported jurisdiction:

In the present case the cause of action arose out of defendant's activities in this state This fact alone is sufficient

case, it may seriously be argued that domicile at the time of service should be required, at least in the absence of a showing that the defendant had gone into hiding to avoid service.” *Id.* at 231. See note 283 *supra*.

288. *Id.*

289. Cal. Stat. 1957, ch. 1674, § 1, at 3052.

290. *Id.* CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970): “[T]he court shall have the power to render a personal judgment . . . if he was . . . a resident of this state . . . (b) at the time that the cause of action arose.”

291. See *Chesin v. Superior Court*, 142 Cal. App. 2d 360, 363-64, 298 P.2d 593, 596 (1956).

292. 52 Cal. 2d 822, 345 P.2d 921 (1959); see 48 CALIF. L. REV. 295 (1960).

293. 52 Cal. 2d at 829, 345 P.2d at 923-24.

under the Due Process Clause to permit the courts of this state to assert personal jurisdiction over him.²⁹⁴

Traynor supported his position by first tracing the development of the "minimum contact" basis of in personam jurisdiction over foreign corporations from *International Shoe*. He went on to point out, however, that

[t]he rationale of the *International Shoe* case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over nonresident motorists make clear that the minimum contacts test for jurisdiction applies to individuals as well as foreign corporations. It is now settled that jurisdiction over nonresident motorists does not rest on consent but on their activity in the state.²⁹⁵

Nevertheless, even though, as Traynor's opinion illustrates, minimum contacts and "activity" might be relied upon to support in personam jurisdiction over absent domiciliaries, section 417 as amended was still inadequate to provide California with a means of acquiring jurisdiction over nonresident individuals. Section 417 applied only to absent residents and not to absent nonresidents, and served to put "absent" domestic corporations and absent residents on the same footing. Because section 417 imposed the requirements of residency (interpreted for the purposes of that section as the equivalent of domicile),²⁹⁶ and personal service outside the state, any reference to minimum contacts was futile in the case of an absent nonresident.²⁹⁷ The 1957 amendment did nothing to remedy this disparate treatment.

The case of *Atkinson v. Superior Court*²⁹⁸ illustrates the judicial dissatisfaction with and desire to overcome the limiting effects of section 417. In *Atkinson*, California musicians attempted to invalidate a trust agreement between their employers and the American Federation

294. *Id.* at 830, 345 P.2d at 924.

295. *Id.* at 831, 345 P.2d at 924-25.

296. It should be noted that *Allen*, for purposes of section 417, is usually interpreted as having abolished the distinction between residence and domicile. Compare *Allen v. Superior Court*, 41 Cal. 2d 306, 259 P.2d 905 (1953), with *Owens v. Superior Court*, 52 Cal. 2d 822, 827, 345 P.2d 921, 922 (1959), *Smith v. Smith*, 45 Cal. 2d 235, 240-43, 288 P.2d 497, 499-501 (1955); and *Soule v. Soule*, 193 Cal. App. 2d 443, 445, 14 Cal. Rptr. 417, 418 (1961). See generally Reese & Green, *That Elusive Word "Residence,"* 6 VAND. L. REV. 561 (1953): "[T]he distinction between the two concepts is often too shadowy to be capable of description." *Id.* at 580.

297. See Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1961): "California's statutes providing for extraterritorial service of process were not, and still are not, aptly designed to take advantage of the Supreme Court's relaxation in recent years of due process restrictions." *Id.* at 763. See also Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

298. 49 Cal. 2d 338, 316 P.2d 960 (1957).

of Musicians, whereby part of the musicians' royalties and wages were to be paid to a New York trustee. The musicians sought an injunction until the validity of the trust agreement could be determined. The trial court refused to issue the injunction because the out-of-state trustee, although personally served with process in accord with sections 412 and 413, failed to meet the residency requirements of section 417 and was therefore not personally subject to the court's jurisdiction.²⁹⁹ The California Supreme Court, in an opinion straining the bounds of established legal concepts, reversed, avoiding the section 417 problem by finding that the trial court had acquired quasi in rem jurisdiction and could therefore determine the nonresident trustee's interest in the Cali-

299. See *id.* at 346, 316 P.2d at 960. "[S]ince the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him, and it is therefore unnecessary to determine whether his activities as trustee have sufficient connection with this state constitutionally to justify an assumption of personal jurisdiction without service of process . . ." *Id.* See also *Comment on Muggill v. Reuben H. Donnelley Corp.*, 40 CAL. ST. B.J. 380 (1965). "But for section 417 the court in the *Atkinson* case would probably have held that the non resident trustee was subject to the jurisdiction of the California courts." *Id.* at 385.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), a trust was created in Delaware in which the settlor retained the power of appointment by inter vivos or testamentary instrument. The settlor then became domiciled in Florida for eight years, until her death, and was in constant communication with the trustee. While domiciled in Florida, she appointed certain beneficiaries by an intervivos instrument, and on her death her will devised all the remainder of her property. A Florida court held the trust and power of appointment ineffective. The Delaware trust company did not appear, even though it received notice by publication. A Delaware court sustained the trust in a separate proceeding and refused to accord "full faith and credit" to the Florida decision. The United States Supreme Court held that the Florida court had no jurisdiction over the trust or trustees and that the Florida court's decree was void due to the lack of sufficient contact with the trustees. The Supreme Court distinguished the case from *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), on the ground that the trustee in the principal case did not solicit business and performed no acts in Florida. "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253. In his dissent, Justice Black felt that "there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts. It chose to maintain business relations with [the settlor] in that state for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question." *Id.* at 259.

Hanson presents a strong analogue to *Atkinson*. The decree in *Hanson*, as in *Atkinson* would not have affected the personal rights of the nonresident trustee. One must distinguish the two cases by bearing in mind that the trust *res* in *Hanson* was not in the forum state of Florida, thus mitigating the state's interest in the proceeding, whereas in *Atkinson* it was in the forum state of California thus increasing the state's interest.

fornia property.³⁰⁰ *Atkinson* seems a clear illustration of the California judiciary's desire during this period to keep pace with the expanding concept of due process as conceptualized in the "minimum contacts" doctrine.

In *Crabtree v. Superior Court*,³⁰¹ the court again indicated its dissatisfaction with the restrictions imposed by section 417, by finding another means of avoiding its application. In *Crabtree*, the court resorted to section 416 in order to obtain personal jurisdiction because the facts would not permit it under section 417. Observing that although a court cannot acquire jurisdiction by publication over one who has never been a resident, the court held that such jurisdiction can be acquired by construing the nonresident's alleged special appearance as a voluntary appearance,³⁰² and therefore within the provisions of Code of Civil Procedure section 416.³⁰³

It is interesting to note that shortly after deciding *Atkinson*, and shortly before *Crabtree*, the California Supreme Court found a means of justifying a wholesale adoption of the "minimum contacts" doctrine in dealing with the acquisition of personal jurisdiction over foreign corporations.³⁰⁴ It seems probable that, had section 417 been drafted a bit more loosely, the court might have applied the doctrine of "minimum contacts" to nonresident individuals as well.

Corporations: International Shoe, 1945 to 1970

In *International Shoe Co. v. Washington*,³⁰⁵ the Supreme Court abandoned the quantitative and mechanical tests previously accompanying the "presence" theory.³⁰⁶ The State of Washington was suing to recover unpaid state unemployment contributions from the foreign corporation, International Shoe Company. The corporation, basing its argument in part on the "mere solicitation" rule,³⁰⁷ insisted that it was not amenable to suit in Washington since its activities in that state were not sufficient to manifest its "presence" there.³⁰⁸ The Court suggested

300. 49 Cal. 2d at 348, 316 P.2d at 966.

301. 197 Cal. App. 2d 821, 17 Cal. Rptr. 763 (1961).

302. *Id.* at 827, 17 Cal. Rptr. at 768; *accord, In re Lee*, 123 Cal. App. 2d 882, 888, 267 P.2d 847, 851 (1954); *Roberts v. Superior Court*, 30 Cal. App. 714, 720, 159 P. 465, 467 (1916).

303. Cal. Stat. 1933, ch. 744, § 22, at 1847, CAL. CODE CIV. PROC. § 416 (effective until July 1, 1970): "The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."

304. *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

305. 326 U.S. 310 (1945).

306. *See id.* at 319.

307. *See text accompanying notes 207-12 supra.*

308. 326 U.S. at 315.

that "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agents within the state which the courts will deem sufficient to satisfy the demands of due process."³⁰⁹ The Court, expressing its opinion on the demands of due process, stated:

[I]n order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."³¹⁰

International Shoe thus marks the beginning of a new era in which the qualitative test set out above superseded the quantitative and mechanical tests of the past.

Effect of *International Shoe* on "Doing Business" in California: A Period of Uncertainty

The Supreme Court, by abandoning the "presence" fiction as a basis of jurisdiction, had eliminated for the purposes of due process under the fourteenth amendment the necessity of finding that a foreign corporation was "doing business" within the state.³¹¹ The qualitative test, enunciated in *International Shoe*,³¹² was substituted by the Court as the due process requirement for the assumption of jurisdiction over a foreign corporation.³¹³ Code of Civil Procedure section 411,³¹⁴ nevertheless, continued to specify "doing business" as a California statutory prerequisite for the acquisition of jurisdiction, and California decisions continued to use the "presence" test in determining whether the corporation was "doing business" in the state.³¹⁵ Immediately after the *International Shoe* decision, however, it apparently became easier for some California courts to find the corporation "present"; the language in many cases indicates the adoption of qualitative, in addition to the old quantitative, considerations.³¹⁶

309. *Id.* at 316-17.

310. *Id.* at 316.

311. *See id.* at 318.

312. *See* text accompanying note 310 *supra*.

313. *See* text accompanying notes 18-19, 24-30 *supra*.

314. Cal. Stat. 1968, ch. 132, § 2, at 343, CAL. CODE CIV. PROC. § 411(2) (effective until July 1, 1970).

315. *See, e.g.,* Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal. App. 2d 495, 237 P.2d 297 (1951); Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 214 P.2d 541 (1950); Boote's Hatcheries & Packing Co. v. Superior Court, 91 Cal. App. 2d 526, 205 P.2d 31 (1949); Oro Navigation Co. v. Superior Court, 82 Cal. App. 2d 884, 187 P.2d 444 (1947).

316. *See, e.g.,* Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P.2d 968 (1952), where the court states: "The essence of doing business is that the corporation is present within the state sufficiently to constitute it *just and equitable* that it be amenable to process within the state." *Id.* at 494, 244 P.2d at 970 (emphasis added).

Similarly, in *Kneeland v. Ethicon Suture Labs., Inc.*, 118 Cal. App. 2d 211, 257

Eight years after the *International Shoe* decision, a California court summarized the then current state of the law in California:

[U]nder the evolving concept of the "doing business" requirement, it is deducible from the cases that the essentials of due process are fully met . . . if a foreign corporation maintains substantial contacts with a state through a course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions.³¹⁷

As this quotation indicates, the law in California had not, in eight years, progressed far from the "presence" theory. Strict adherence to the "presence" theory in some cases,³¹⁸ apparent adoption of the "minimum contacts" theory in others,³¹⁹ and a commingling of the two theories indicated from the language of others,³²⁰ reflected the uncertainty of the California appellate courts of the meaning of "doing business."

Adoption of "Minimum Contacts" as Test of "Doing Business" in California

The confusion generated by the *International Shoe* decision was finally resolved by the California Supreme Court in *Henry R. Jahn & Son v. Superior Court*.³²¹ In that case the court nullified the defendant's argument that it was not sufficiently active within the state to be deemed "present" and amenable to suit,³²² by declaring the "presence" test obsolete.³²³ California's statutory basis of jurisdiction requirement for foreign corporations—"doing business" within the state—was equated with the federal due process requirement set out in *International Shoe*. In other words, the term "doing business" in Code of Civil Pro-

P.2d 727 (1953), the court states: "[T]he expression 'doing business in this state,' as used in section 411 of our Code of Civil Procedure (a term not defined by the statute), reflects the changing concept of 'doing business' as it has evolved over the years, and as it continues to evolve, through the decisions of the federal courts interpreting the due process clause and applying it to new and developing situations from time to time." *Id.* at 222, 257 P.2d at 734.

317. *Jeter v. Austin Trailer Equip. Co.*, 122 Cal. App. 2d 376, 388, 265 P.2d 130, 137 (1953).

318. *See, e.g.*, cases cited note 315 *supra*.

319. *See, e.g.*, *Eclipse Fuel Eng'r Co. v. Superior Court*, 148 Cal. App. 2d 736, 307 P.2d 739 (1957); *Kneeland v. Ethicon Suture Labs., Inc.*, 118 Cal. App. 2d 211, 257 P.2d 727 (1953).

320. *See, e.g.*, *LeVecke v. Griesedieck W. Brewery Co.*, 233 F.2d 772 (9th Cir. 1956) (applying California law); *Iowa Mfg. Co. v. Superior Court*, 112 Cal. App. 2d 503, 246 P.2d 681 (1952); *Fielding v. Superior Court*, 111 Cal. App. 2d 490, 244 P.2d 968 (1952).

321. 49 Cal. 2d 855, 323 P.2d 437 (1958).

322. *See id.* at 858-60, 323 P.2d at 439-40.

323. *Id.* at 858-59, 323 P.2d at 439-40. "The Supreme Court has emphasized its departure from the presence test by the significance it now attaches to the fact that the cause of action arises out of the defendant's contacts with the state asserting jurisdiction." *Id.* at 860, 323 P.2d at 440.

cedure section 411, subdivision 2, was held to require only that the foreign corporation have "such minimum contacts with the state that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"³²⁴

Viewed in the light of California's past adoption of the federal due process requirements of "implied consent" and "presence,"³²⁵ the "judicial legislation"³²⁶ in *Jahn* seems to be quite a rational course; to have held that the statutory term "doing business" should suddenly become static until changed by the legislature would have been inconsistent with the flexibility already acquired by the term over almost a century of judicial expansion.

Subsequent to the adoption of the *International Shoe* test, the Supreme Court has taken the opportunity to interpret it in only four cases.³²⁷ From these cases many California courts developed a "check-list" approach to be used as an aid in determining when a foreign corporation had the necessary "minimum contacts" with the state.³²⁸ The approach was to be applied qualitatively, not mechanistically, with the aim of attaining "fair play and substantial justice";³²⁹ and, as many courts have noted, this involves practical considerations implicit in the doctrine of *forum non conveniens*.³³⁰

Effect of Equating "Doing Business" with "Minimum Contacts"

Of the four important cases³³¹ decided by the Supreme Court subsequent to *International Shoe*, *McGee v. International Life Insurance Co.*³³² made the greatest impact upon previous notions of California's jurisdictional prerequisites.³³³ In *McGee*, the Court held that service

324. *Id.* at 858, 323 P.2d at 439.

325. See text accompanying notes 165-75, 207-18 *supra*.

326. See *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App. 2d 211, 220, 325 P.2d 21, 26 (1958) (concurring opinion): "[J]udicial pronouncements have, in disregard of the legislative prerogative, overridden the terms of the local statute."

327. *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950).

328. See, e.g., *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 225-26, 347 P.2d 1, 3-4, 1 Cal. Rptr. 1, 3-4 (1959).

329. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); Comment, *Extending "Minimum Contacts" to Alimony: Mizner v. Mizner*, 20 HASTINGS L.J. 361, 366-67 (1969). But cf. *Buckeye Boiler Co. v. Superior Court*, 71 A.C. 933, 943, 458 P.2d 57, 65, 80 Cal. Rptr. 113, 121 (1969).

330. See, e.g., *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App. 2d 211, 219, 325 P.2d 21, 25-26 (1958).

331. See cases cited note 327 *supra*.

332. 355 U.S. 220 (1957).

333. See generally Note, *Constitutional Law: State Jurisdiction Over Foreign Corporations* 10 HASTINGS L.J. 206 (1959).

on the California Insurance Commissioner, pursuant to the provisions of the California Insurance Code,³³⁴ gave California jurisdiction of a cause of action arising out of a Texas insurance company's only contact—a single policy for a California domiciliary—with California. Thus, a California policyholder, whose business with the company was conducted exclusively by mail, was entitled to enforce the California judgment in Texas.

Two requirements consistently demanded by California courts prior to *Jahn* were rendered obsolete by *McGee*: first, that the corporation have some personal representative within the state;³³⁵ and second, that the activities carried on by these representatives be substantial and continuous.³³⁶

Personal representation within the state

*Florence Nightingale School of Nursing, Inc. v. Superior Court*³³⁷ was the first California case to hold that a foreign corporation could be subjected to the jurisdiction of the state even though it had no representatives of any sort within the state. The court upheld jurisdiction over a cause of action arising out of California activity where the only contact with persons in the state was by correspondence and through advertising in magazines circulated in the state.³³⁸ Other cases reached essentially similar results by finding as representatives of corporations persons of a more tenuous relationship to the corporation than had been found in the past. For example, in *Cosper v. Smith & Wesson Arms Co.*,³³⁹ an allegedly defective gun manufactured by the defendant corporation caused personal injury to the plaintiff in California. The California Supreme Court found the requisite "minimum contact" in sales made in the state through a nonexclusive manufacturer's representative.³⁴⁰

334. CAL. INS. CODE § 1610: "Any of the acts described in Section 1611 [issuance or delivery of contracts of insurance, solicitation of applications, collection of premiums, or any other transactions arising out of such contracts], when effected in this State, by mail or otherwise, by a foreign or alien insurer . . . shall constitute an appointment by such insurer of the commissioner . . . to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding . . . arising out of any such contracts of insurance . . ."

335. See text accompanying notes 337-42 *infra*.

336. See text accompanying notes 343-48 *infra*.

337. 168 Cal. App. 2d 74, 335 P.2d 240 (1959).

338. *Id.* at 75-76, 335 P.2d at 241-42. The California court stressed the similarity in facts between the case at hand and *Travelers Health Ass'n v. Virginia*, 399 U.S. 643 (1950) (Nebraska mail-order insurance corporation soliciting new Virginia customers through its old Virginia customers by mail was amenable to suit in Virginia).

339. 53 Cal. 2d 77, 346 P.2d 409 (1959).

340. *Id.* at 81-83, 346 P.2d at 412-13. The court further held that service on the

It has not been unusual for a California court to approve the acquisition of jurisdiction over a foreign corporation based upon the activity of an affiliate in California.³⁴¹ Nevertheless, in these cases, courts look for some relationship beyond the mere ownership of stock of one entity by the other or a third person.³⁴²

Act or Acts Within the State

For some time after *McGee* was decided, some courts questioned whether the Supreme Court intended to limit the *McGee* decision to insurance company cases.³⁴³ A 1961 federal district court, concluding that *McGee* was intended to be limited in its application to suits on insurance contracts under the special California statute,³⁴⁴ refused to up-

nonexclusive manufacturer's representative was authorized under CAL. CORP. CODE § 6500 which provides: "Delivery by hand of a copy of any process against a foreign corporation (a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State . . . shall constitute valid service on the corporation." The court, supporting its position that the nonexclusive manufacturer's representative qualified as the "general manager in this State," quoted from prior California decisions on this point: "[E]very object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made." *Id.* at 83, 346 P.2d at 413, quoting, *Eclipse Fuel Eng'r Co. v. Superior Court*, 148 Cal. App. 2d 736, 746, 307 P.2d 739, 745. Other cases where the agent served was found to be of sufficient character and rank are: *Bobrick Corp. v. American Dispenser Co.*, 377 F.2d 334 (9th Cir. 1967); *Overland Machined Prods., Inc. v. Swingline, Inc.*, 224 Cal. App. 2d 46, 36 Cal. Rptr. 330 (1964); *Eclipse Fuel Eng'r Co. v. Superior Court*, 148 Cal. App. 2d 736, 307 P.2d 739 (1957); *Millbank v. Standard Motor Constr. Co.*, 132 Cal. App. 67, 22 P.2d 271 (1933); *Roehl v. Texas Co.*, 107 Cal. App. 691, 291 P. 255 (1930). In one case the agent served was not of sufficient character and rank. *Nagel v. P & M. Distributions, Inc.*, 273 A.C.A. 191, 78 Cal. Rptr. 65 (1969).

Note that due to the uncertainty whether an independent contractor is of "sufficient character and rank" to meet the requirements as a "general manager" in CAL. CORP. CODE § 6500, the plaintiff evidently has the alternative of serving the Secretary of State under CAL. CORP. CODE § 6501. See note 192 *supra*. See *Regie Nationale Des Usines Renault v. Superior Court*, 208 Cal. App. 2d 702, 704, 25 Cal. Rptr. 530, 531 (1962) (where the court indirectly approves this alternative); *Detsch & Co. v. Calbar, Inc.*, 228 Cal. App. 2d 556, 39 Cal. Rptr. 626 (1964); *Brunzell Constr. Co. v. Harrah's Club*, 225 Cal. App. 2d 734, 37 Cal. Rptr. 659 (1964); *Waco-Porter Corp. v. Superior Court*, 211 Cal. App. 2d 559, 27 Cal. Rptr. 371 (1963).

341. See, e.g., *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 366 P.2d 502, 17 Cal. Rptr. 150 (1961); *Prince v. Sonnie Gay, Ltd.*, 228 Cal. App. 2d 541, 39 Cal. Rptr. 607 (1964); *Brunzell Constr. Co. v. Harrah's Club*, 225 Cal. App. 2d 734, 37 Cal. Rptr. 659 (1964); *Overland Machined Prods., Inc. v. Swingline, Inc.*, 224 Cal. App. 2d 46, 36 Cal. Rptr. 330 (1964); *Pope v. National Aero Fin. Co.*, 220 Cal. App. 2d 709, 33 Cal. Rptr. 889 (1963).

342. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 829-30, 366 P.2d 502, 505-06, 17 Cal. Rptr. 150, 153-54 (1961).

343. See, e.g., *Kesler v. Schetky Equip. Corp.*, 200 F. Supp. 678 (N.D. Cal. 1961).

344. CAL. INS. CODE § 1610.

hold jurisdiction based upon Code of Civil Procedure section 411, subdivision 2. The court recognized the adoption of the "minimum contacts" theory by *Jahn*, but it was unable to find the requisite degree of continuous activity within the state—a requirement it was not yet ready to admit was made obsolete by *McGee*.³⁴⁵ The language in *James R. Twiss, Ltd. v. Superior Court*³⁴⁶ in 1963, however, reflects the current attitude that *McGee* is applicable to all types of foreign corporations under section 411:

We construe the term [doing business] to mean any *act or acts* creating such contact with the state as to make it reasonable to require the foreign corporation to defend the particular suit which is brought, providing the maintenance of the suit does not offend traditional notions of fair play and substantial justice.³⁴⁷

Even if the relevant act was technically executed outside California, alleged consequences within California would be sufficient to sustain jurisdiction over the foreign corporation.³⁴⁸

"Doing Business" at Time of Service of Process

The requirement that a foreign corporation must be "doing business" in California *at the time of service of process*³⁴⁹ has become obsolete with the expanded meaning attributed to the term "doing business." Where the basis of jurisdiction over a foreign corporation is an act or acts creating a "contact" with the state, due process requirements are met even though the corporation is "absent" at the time of service of process.³⁵⁰ Consequently, although Corporations Code section 6504 provides for the acquisition of jurisdiction over "absent" foreign corporations in certain circumstances, it would never be necessary³⁵¹ to

345. 200 F. Supp. at 680-81.

346. 215 Cal. App. 2d 247, 30 Cal. Rptr. 98 (1963).

347. *Id.* at 254, 30 Cal. Rptr. at 102 (emphasis added); *accord*, *Buckeye Boiler Co. v. Superior Court*, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Beirut Universal Bank v. Superior Court*, 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969); *A.R. Indus., Inc. v. Superior Court*, 268 Cal. App. 2d 328, 73 Cal. Rptr. 920 (1968); *Long v. Mishicot Modern Dairy, Inc.*, 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967).

348. *See* *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 832-33, 366 P.2d 502, 507-08, 17 Cal. Rptr. 150, 155-56 (1961); *SECOND RESTATEMENT OF CONFLICTS* § 51.

349. *See* text accompanying notes 219-27 *supra*.

350. *See* *Beirut Universal Bank v. Superior Court*, 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969); *James R. Twiss, Ltd. v. Superior Court*, 215 Cal. App. 2d 247, 30 Cal. Rptr. 98 (1963); *Emsco Pavement Breaking Corp. v. City of Los Angeles*, 176 Cal. App. 2d 760, 1 Cal. Rptr. 814 (1959). *But see* *Detsch & Co. v. Calbar, Inc.*, 228 Cal. App. 2d 556, 39 Cal. Rptr. 626 (1964).

351. *See* *Beirut Universal Bank v. Superior Court*, 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969), criticizing the opinion in *Detsch & Co. v. Calbar, Inc.*, 228 Cal. App. 2d 556, 39 Cal. Rptr. 626 (1964). In *Detsch* the court had stated: "[S]ince California law provides for service only on withdrawn corporations which have trans-

resort to section 6504.³⁵² So long as the facts and circumstances meet the liberal "doing business" requirements of Code of Civil Procedure section 411,³⁵³ service of process on the Secretary of State is allowed by Corporations Code section 6501,³⁵⁴ which is incorporated by reference into section 411. Where the facts are not sufficient to meet the requirements of section 411, they certainly would not be sufficient to meet the requirements of section 6504.³⁵⁵

Buckeye Boiler Co. v. Superior Court: A Further Extension of "Doing Business"?

The term "doing business" was apparently extended by the California Supreme Court in a 1969 decision, *Buckeye Boiler Co. v. Superior Court*.³⁵⁶ The court suggested that jurisdiction could be ac-

acted intrastate business [CAL. CORP. CODE § 6504] a foreign corporation engaged solely in interstate commerce which ceases 'doing business' here before it is served with process, is thereby able to avoid suit in this state." *Id.* at 567, 39 Cal. Rptr. at 633 (citations omitted). In direct contradiction of *Detsch*, the *Beirut* court stated: "If the activity of the bank in California while [its president] was present constituted the doing of business for purposes of jurisdiction, it is not reasonable to hold that such jurisdictional effect lost all vitality with respect to the transaction involved in the activity which brought it into being as soon as [the bank's president] left California [T]he use of the words 'doing business in this state' in subdivision 2 of section 411 of the Code of Civil Procedure does not compel such a narrow interpretation." 268 Cal. App. 2d at 839-40, 74 Cal. Rptr. at 338-39.

352. CAL. CORP. CODE § 6504; see note 224 *supra*.

353. Cal. Stat. 1968, ch. 132, § 2, at 343, CAL. CODE CIV. PROC. § 411(2) (effective until July 1, 1970).

354. CAL. CORP. CODE § 6501; see note 192 *supra*.

355. CAL. CORP. CODE § 6504; see notes 224 & 226 *supra*.

356. 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). In arriving at its decision the court recognized that since its decision in *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958), CAL. CODE CIV. PROC. § 411(2) (effective until July 1, 1970) exerts the full power of the state, consistent with the due process clause of the fourteenth amendment, to subject a foreign corporation to the jurisdiction of a California court. Accordingly, the supreme court sees a court's job as determining whether jurisdiction may be constitutionally assumed. In setting out its view of the current constitutional guidelines, the court states: "A defendant not literally 'present' in the forum state may not be required to defend itself in that state's tribunals unless the 'quality and nature of the defendant's activity' in relation to the particular cause of action makes it fair to do so. Such a defendant's activity must consist of 'an act done or transaction consummated in the forum State' or 'some [other] act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' [Citing *Hanson v. Denckla*, 357 U.S. 235, 251, 253 (1958)]. Furthermore, unless the defendant's forum-related activity reaches such extensive or wide-ranging proportions as to make the defendant sufficiently 'present' in the forum state to support jurisdiction over it concerning causes of action which are unrelated to that activity, the particular cause of action must arise out of or be connected with the defendant's forum related activity. Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause

quired over the foreign manufacturer on either of two grounds: first, if the plaintiff's cause of action arose from the corporation's *economic activity*³⁵⁷ in California; and second, if, although arising independently of defendant's *economic activity*, the cause of action would be no more burdensome for the defendant to defend than a cause of action arising out of its *economic activity* within the state.³⁵⁸

Engaging in *economic activity* within the state is considered by the court to be the equivalent of the due process requirement of purposeful availment of the privilege of conducting activities within the state,³⁵⁹ implicit in the *McGee* holding and first specifically expressed by the Supreme Court in *Hanson v. Denckla*.³⁶⁰ The California court will find this *economic activity*

whenever the purchase or use of [the manufacturer's] product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negate the existence of an intent on the manufacturer's part to bring about this result.³⁶¹

The defendant's failure to allege that the use of its injury-causing product within California was fortuitous and unforeseeable was held, in itself, fatal to the defendant's petition for an order quashing service of process. Absent such an allegation, the court presumed that the cause of action arose from the corporation's *economic activity* in the state.³⁶²

The second ground on which the court based its denial of the defendant's petition seeking to quash the service of summons was the most novel. The court said it would uphold jurisdiction where the defendant failed to allege that defending the present action imposed a substantially greater burden than that of defending actions which might have arisen from the corporation's single direct source of gross income in California.³⁶³ In other words, the court appears to suggest that any cause of action arising from a product which has entered the state for-

of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends on the balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction." *Id.* at 938-39, 458 P.2d at 61-62, 80 Cal. Rptr. at 117-18 (citations omitted).

357. See text accompanying note 361 *infra*.

358. 71 A.C. at 945-47, 458 P.2d at 66-67, 80 Cal. Rptr. at 122-23.

359. *Buckeye Boiler Co. v. Superior Court*, 71 A.C. 933, 941-42, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969); see *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959).

360. 357 U.S. 235, 251, 253 (1958). This case is summarized in note 299 *supra*.

361. *Buckeye Boiler Co. v. Superior Court*, 71 A.C. 933, 942, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1960).

362. *Id.* at 945-46, 458 P.2d at 66, 80 Cal. Rptr. at 122.

363. *Id.*

tuitously is a sufficient "contact" to subject an out of state manufacturer to California's jurisdiction, so long as, first, other products of the manufacturer have entered the state nonfortuitously (creating *economic activity*) and, second, the burden of defending causes of action arising from fortuitously entering products would be no greater than the burden of defending causes of action arising from those products entering nonfortuitously.

Thus, it seems that California courts can now acquire jurisdiction in cases where heretofore they would have denied jurisdiction on grounds that the cause of action did not arise out of the corporation's "contact" with the state. This raises the question: Has the California court stretched the state's jurisdiction beyond that allowed by the due process clause of the fourteenth amendment? The considerations of fair play and substantial justice implicit in the formulation and application of the above rule would suggest a negative answer. The final answer to that question, however, can come only from the United States Supreme Court.³⁶⁴

Conclusion

The contrasting dissimilarity between the limited power of a California court to acquire personal jurisdiction over a nonresident individual³⁶⁵ and its relatively unlimited power to acquire personal jurisdiction over a foreign corporation³⁶⁶ is the most important characteristic of California's present jurisdictional system likely to be eradicated by the new law. Presently, in the absence of consent or voluntary appearance, the only bases for acquiring in personam jurisdiction over a nonresident individual are his presence in the state or his acts within the state which bring him within the scope of one of several special statutes.³⁶⁷ These special statutes—such as the nonresident motorist statute³⁶⁸—are, however, very limited in scope. In contrast, the bases for acquiring jurisdiction over foreign corporations in California have expanded over the years to such an extent that any basis allowed by the

364. The case was sent back to the trial court with instructions giving the defendant the opportunity to make the sort of evidentiary showing suggested above. The reason the court gave the defendant this opportunity is that the defendant's position in the trial court was significantly based on court of appeal decisions which the court criticizes for their emphasis on a mechanical "checklist" approach; that approach was criticized for its tendency to focus on the outward form of business transactions rather than on economic reality. *Id.* at 943-46, 458 P.2d at 65-66, 80 Cal. Rptr. at 121-22.

365. See text accompanying notes 267-304 *supra*.

366. See text accompanying notes 305-64 *supra*.

367. See text accompanying notes 145-59, 289-97 *supra*.

368. CAL. VEH. CODE § 17451.

Federal Constitution is allowed under the general California service of process statute.³⁶⁹

The main problem in regard to the acquisition of jurisdiction over individuals has centered around Code of Civil Procedure sections 412 and 413.³⁷⁰ These sections, prior to *Pennoyer v. Neff*, allowed California courts to render personal judgments³⁷¹—enforceable only against property within California since they were not entitled to full faith and credit—against absent residents or absent nonresidents after service by publication.³⁷² After *Pennoyer*, however, these service by publication provisions were restricted in use to the acquisition of in rem or quasi in rem jurisdiction.³⁷³ In 1953, a California decision³⁷⁴ finally approved the acquisition of personal jurisdiction under sections 412 and 413, but this did not mean that California law had reverted to its status prior to *Pennoyer*. In fact, rather strict limitations were placed upon the use of sections 412 and 413 in acquiring personal jurisdiction by the enactment of Code of Civil Procedure section 417.³⁷⁵ Under section 417, as amended, the party must be personally served, as provided in section 413, and the party must be a domiciliary of California either when the cause of action arises, the action is commenced or process is served. Consequently, California's jurisdiction over individuals outside the state has been limited to two classes of individuals: first, persons who meet the requirements of section 417; second, nonresidents whose acts within the state fall within the scope of a special statute.

The problems surrounding the development of the bases upon which a court could acquire jurisdiction over a foreign corporation are unique. This is attributable to the intangible nature of the corporate entity. Prior to the turn of the century, a corporation was deemed incapable of leaving its state of incorporation; and although a corporation could act in another state, it could do so only through the acts of its representatives in that state.³⁷⁶

369. Cal. Stat. 1968, ch. 132, § 2, at 343, CAL. CODE CIV. PROC. § 411(2) (effective until July 1, 1970); see text accompanying notes 321-64 *supra*.

370. Cal. Stat. 1968, ch. 132, § 3, at 346, CAL. CODE CIV. PROC. § 412 (effective until July 1, 1970); Cal. Stat. 1957, ch. 1669, § 1, at 3048, CAL. CODE CIV. PROC. § 413 (effective until July 1, 1970).

371. 95 U.S. 714 (1878).

372. See text accompanying notes 100-06 *supra*.

373. See text accompanying notes 120-38 *supra*.

374. *Allen v. Superior Court*, 41 Cal. 2d 306, 259 P.2d 905 (1953); see text accompanying notes 283-88 *supra*.

375. Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970).

376. See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839); see text accompanying notes 167-70 *supra*.

Domestic corporations caused few theoretical problems; like individuals within the state, they were always subject to the jurisdiction of the courts of the state on any transitory cause of action.³⁷⁷ The bases of jurisdiction over foreign corporations, in the absence of consent or voluntary appearance, however, were less clearly defined. First "implied consent,"³⁷⁸ and later, constructive "presence,"³⁷⁹ were the terms used by the Supreme Court to justify, as a matter of due process, the assertion of jurisdiction by the state. Each of these fictions required that the foreign corporation be "doing business"³⁸⁰ within the state. It was apparently no coincidence, therefore, that Code of Civil Procedure section 411, subdivision 2,³⁸¹ expressly required that a foreign corporation be "doing business" within the state; and California courts, when they found it necessary to interpret this "doing business" statute did not hesitate to adopt the Supreme Court's then current definition of the term.³⁸²

The abandonment of the "doing business" requirement by the Supreme Court in *International Shoe Co. v. Washington* left California courts without the leadership upon which they had consistently relied in defining the limits of the "doing business" statute. It was not surprising, therefore, when the California Supreme Court declared that the statutory "doing business" requirement was to be defined in terms of the federally developed "minimum contact" test.³⁸³ From that time, a California court has been able to exercise its jurisdiction over a foreign corporation on any basis that is not inconsistent with the federal due process requirement.³⁸⁴

In expressing its view of the current federal due process requirements, the California Supreme Court recently observed that two prerequisites are necessary to establish a valid basis of jurisdiction: The defendant must purposefully avail itself of the privilege of conducting activities within the state; and the circumstances must be such that the assertion of jurisdiction by the state is fair and just.³⁸⁵ The latter prerequisite takes into account considerations implicit in the doctrine of forum non conveniens: the inconvenience to the defendant in defending, the interest to the plaintiff in suing locally, and the interest of the

377. See text accompanying notes 176-78 *supra*.

378. See text accompanying notes 165-75 *supra*.

379. See text accompanying notes 207-18 *supra*.

380. See text accompanying notes 219-27 *supra*.

381. This statute becomes inoperative July 1, 1970.

382. See text accompanying notes 174-75 *supra*.

383. *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

384. See text accompanying notes 331-64 *supra*.

385. *Buckeye Boiler Co. v. Superior Court*, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

state generally are qualitative factors to be weighed by the court.³⁸⁶ Further, when the state-related activities of the corporation are not of sufficiently extensive or wide-ranging proportions to support jurisdiction over all causes of action,³⁸⁷ then the cause of action sued upon must arise out of or be connected with the state-related activity. This activity may arise from acts done within the state,³⁸⁸ acts done outside the state causing effects within the state,³⁸⁹ and from the ownership, use or possession of a thing in the state.³⁹⁰

While it has not been directly so held by the Supreme Court, it is commonly accepted that the due process requirements set out in *International Shoe*, and subsequent cases involving corporations, also apply to individuals;³⁹¹ this, of course, is the basis of the "long-arm" statutes adopted by other states in recent years.³⁹² The repeal of section 417,³⁹³ and the broad wording of the new basis of jurisdiction statute,³⁹⁴ give California courts the opportunity to exercise jurisdiction over nonresident individuals on the same bases as they now are able to exercise jurisdiction over foreign corporations.³⁹⁵

The problems of fraud and gross abuse which plagued the California courts in cases where personal jurisdiction was acquired by publication³⁹⁶ prior to *Pennoyer v. Neff*, are minimized under the new law for two reasons. First, under sections 412 and 413, and their predecessors in the Practice Act, there was little assurance in those times that the defendant would actually receive notice where it was given by publication or registered mail. The service of process requirements under the new law, presuming they meet the federal due process prerequisites for adequate notice,³⁹⁷ seem to obviate this potential problem. Second,

386. See generally Note, *Forum Non Conveniens in California: Code of Civil Procedure Section 410.30*, 21 HASTINGS L.J. 1245 (1970).

387. Compare *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

388. See SECOND RESTATEMENT OF CONFLICTS §§ 36, 49.

389. See *id.* §§ 37, 50.

390. See *id.* § 51.

391. See *Owens v. Superior Court*, 52 Cal. 2d 822, 831, 345 P.2d 921, 924-25 (1959), discussed in text accompanying notes 292-97 *supra*.

392. See, e.g., ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); N.Y. CIV. PROC. LAW § 302 (McKinney 1963).

393. Cal. Stat. 1969, ch. 1610, § 21, at 3373 (operative July 1, 1970).

394. CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970); see note 5 *supra*.

395. Note that CAL. CORP. CODE § 15700 allowed the "minimum contacts" doctrine to be applied to foreign partnerships, but not to the members of the partnership individually. See *Lewis Mfg. Co. v. Superior Court*, 140 Cal. App. 2d 245, 295 P.2d 145 (1956).

396. See text accompanying notes 103-19 *supra*.

397. See generally Note, *Substituted Service of Process on Individuals: Code of Civil Procedure Section 415.20(b)*, 21 HASTINGS L.J. 1257 (1970).

the old sections left very little to the courts' discretion; once the requirements of the sections were satisfied, the court had to take jurisdiction. The courts, often feeling obligated to deny jurisdiction in the interest of justice, interpreted these statutes very strictly and often appeared to be searching for technical grounds on which they could invalidate a judgment obtained under these sections. Under the new law, the elements of fair play and substantial justice which accompany the "minimum contacts" doctrine give a court broad discretionary power to accept or reject a case—thus, where fraud or abuse is present, reasons for denying jurisdiction can now be stated in realistic terms.

The new law would also seem to allow a court to base its reasons for acquiring in personam jurisdiction on realistic criteria. In *Atkinson v. Superior Court*,³⁹⁸ the California Supreme Court clearly expressed its desire to do so,³⁹⁹ but was hampered by the limitations of Code of Civil Procedure section 417. As an alternative, in order to reach the merits of the case, the court found it necessary to extend quasi in rem jurisdiction to its outer limits.⁴⁰⁰ Theoretically, such judicial juggling would not be necessary to acquire jurisdiction under the basis of jurisdiction section of the new law.

In adopting state and federal constitutional prerequisites as the only statutory jurisdictional requirement, it might be argued that the California legislature has opened the door to a great deal of litigation because of the uncertainties inherent in such a statute. Disadvantages arising from the statute, however, may be outweighed by the considerations of fair play and substantial justice implicit in its application. California's appellate courts, having decided a good many cases involving the acquisition of jurisdiction over foreign corporations "doing business" in the state,⁴⁰¹ have experienced and have evidently weathered the difficulties of applying the amorphous "minimum contacts" doctrine to concrete factual situations. Just how many additional problems will be created for the courts under the new law by expanding the opportunity to apply the "minimum contacts" doctrine to individuals is a matter of conjecture. Whatever the practical difficulties encountered, however, it is probable that the California courts will continue to challenge some of the old classifications and distinctions and will base

398. 49 Cal. 2d 338, 316 P.2d 960 (1957).

399. *Id.* at 345, 316 P.2d at 964.

400. *Id.* at 346, 316 P.2d at 965. See generally Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 306-07 (1962); Green, *Jurisdictional Reform in California*, 21 HASTINGS L.J. 1219 (1970).

401. See text accompanying notes 321-64 *supra*.

their acquisition of jurisdiction on modern realities.⁴⁰²

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402. See generally J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE CASES AND MATERIALS (1968), where the authors state: "Chief Justice Traynor plainly suggested [in *Atkinson v. Superior Court*] that . . . all jurisdictional problems be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation. Surely this is not difficult to conceive in the present posture of the law." *Id.* at 128. Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 S. CAL. L. REV. 339 (1958), where the author quoting Justice Frankfurter's dissenting opinion in *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 423 (1957), writes: "'Strictly speaking, all rights eventually are personal.' The categories of 'in personam,' 'in rem,' and 'quasi in rem' are then not particularly helpful, and . . . may indeed be hindrances in working out a solution to a particular basis-of-jurisdiction problem." *Id.* at 344. See also Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 660 (1959).

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