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Personal Service Outside the State

PENNOYER V. NEFF IN CALIFORNIA

Albert A. Ehrenzweig* and Charles K. Mills**

On May 3, 1952, a resident and domiciliary1 of Oregon was personally served in that state with summons and complaint in a personal action brought in the Superior Court of Los Angeles County. The action arose from an automobile collision which had taken place in California at a time when the defendant was a resident and domiciliary there. He sought a writ of prohibition against further proceedings on the ground that personal jurisdiction had not been obtained over him by the service of process outside the state. In the unanimous2 decision of Allen v. Superior Court3 the Supreme Court of California, on July 28, 1953, denied the writ.

Service had been made in accordance with sections 412 and 413 of the California Code of Civil Procedure4 which purport to permit out-of-state personal service upon any nonresident. These provisions, which have been in effect in substantially their present language for more than one hundred years, had never before been used to support such service in a personal action; and such use had been considered unconstitutional since the decision of the U. S. Supreme Court in Pennoyer v. Neff5 in 1877. By upholding service outside the state on a nonresident in the present case, the highest court of California has thus opened the door to a reformulation, in the light of a restated Pennoyer rule, of the constitutional limitations on the "juris-

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1 Concerning the interchangeable use of these terms for the present purpose, see infra text at notes 47 et seq.
2 The decision was unanimous regarding the issue discussed in this paper. Justice Schauer’s concurring opinion concerned another question.
3 41 A.C. 313, 259 P.2d 905 (1953).
4 Sections 412 and 413 provide in part that “Where the person on whom service is to be made resides out of the State; or has departed from the State; … and it also appears … that a cause of action exists … such court, or judge, may make an order that the service be made by the publication of the summons;” and that “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.”
5 95 U.S. 714 (1877).
diction” assumed by California in sections 412 and 413, and consequently to a re-evaluation of De la Montanya v. De la Montanya,6 the leading case in this state, whose continuing authority has been previously doubted.7

History

Contrary to the prevalent view8 that our expanding concept of jurisdiction in personal actions is entirely of modern origin, sections 412 and 413 of the California Code of Civil Procedure which on their face, at least, surpass in breadth any modern jurisdictional development,9 may be traced to the first sessions of the California legislature. These provisions are substantially identical with sections 30 and 31 of the 1851 Practice Act. This Act, while largely following the language of the New York Code of 1848, made its out-of-state service provisions applicable in any personal action.10 This change may have been due to the same civil law influence that expressed itself in that other addition in the 1851 Act, by which the court was authorized in certain actions to appoint an attorney to appear for an absent non-resident.11

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7 Cf. Justice Traynor, dissenting in Dimon v. Dimon, 40 A.C. 519, 543, 254 P.2d 528, 524 (1953): “... service outside the state by registered mail is apparently permissible under Connecticut statutes ... [A] judgment [obtained thereon] is not necessarily in violation of the United States Constitution ... but see De la Montanya ...” See also Sampsell v. Superior Court, 32 Cal. 2d 763, 775, 197 P.2d 739, 747 (1948); Myrick v. Superior Court, 117 A.C.A. 592, 596, 255 P.2d 348, 351 (1953) (“that case is no longer the law”).
9 See in general ibid. and Goodrich, Yielding Place to New: Rest versus Motion in the Conflict of Laws, 50 COL. L. REV. 881 (1950).
10 The 1851 Practice Act (Stats. 1851, c. 5, §§ 30, 31, p. 55) added to section 27 of the 1850 Practice Act (Stats. 1850, c. 142, p. 431), which had authorized service by publication and mail upon nonresidents in any action, the provision allowing out-of-state personal service. The 1851 amendments are patterned on the language of section 114 of the New York Code of 1848 which, however, applied only to absent defendants, resident or owning property in New York. Service by publication was explained as required by “the blending of legal and equitable jurisdictions,” equity having allowed publication “against absent defendants, when personal service could not be made.” First Report, Commissioners on Practice and Pleading, § 114, p. 134 (1848). For a similar explanation see Hahn v. Kelly, 34 Cal. 391, 418 (1868). While the New York Commissioners would have permitted personal service outside the state, they had, presumably, contemplated such service only upon absent residents who could not “after due diligence, be found within the state.”
11 Ware v. Robinson, 9 Cal. 107 (1858) upheld a judgment obtained pursuant to this provision where the defendant had concealed himself within the State to avoid service of process; Jordan v. Gible, 12 Cal. 100 (1859), held invalid a judgment thus obtained against an absent resident on the basis of an insufficient affidavit for publication. This provision was not deleted until 1874 (Amendments to the Code, c. 383). Its civil law origin appears conclusively from a similar enactment in Louisiana [Code Prac., Arts. 116, 195 (Dart 1942)]. See also Tex. Rules
Whatever the origin of the out-of-state service provision in personal actions, it has had little impact on the law in action. Neither such service nor, for that matter, service by publication seems to have been used in personal actions to any appreciable extent\textsuperscript{12} even prior to the decision in Pennoyer v. Neff\textsuperscript{13}, when the opinion prevailed in many states that personal judgments rendered upon service by publication, while ineffective outside the rendering state, might be valid locally\textsuperscript{14}. Indeed, early decisions indicate great reluctance to apply service by publication not only in personal actions\textsuperscript{5} but also in actions relating to property within the state\textsuperscript{15}. This judicial attitude contrasting with the broad statutory authority expressed itself in insistence on literal compliance with the statute particularly with regard to the required affidavit\textsuperscript{17}. It can perhaps be explained, apart from judicial concern for fairness\textsuperscript{18}, by the less dependable condition of the mails of that day and also by a general inclination to interpret narrowly statutes.

\textsuperscript{12} Ware v. Robinson, supra note 11 (defendant within the state); People v. Huber, 20 Cal. 81 (1862); Jordan v. Giblin, 12 Cal. 100 (1859) (service invalidated on technical grounds). Courts seem, however, to have been conscious of the fact that sections 412 and 413 are in terms applicable to personal actions. See Perkins v. Wakeham, 86 Cal. 580, 586, 25 Pac. 51, 52 (1890).

\textsuperscript{13} Pennoyer v. Neff, 95 U.S. 714 (1877).

\textsuperscript{14} "... courts 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), with authorities. Cf. Kane v. Cook, 8 Cal. 449, 455 (1857); McFarland, J., dissenting in De la Montanya v. De la Montanya, supra note 6 at 119, 121, 44 Pac. at 349, 350.

\textsuperscript{15} See People v. Huber, supra note 12.

\textsuperscript{16} Ricketson v. Richardson, 26 Cal. 149 (1864) (foreclosure); Braly v. Seaman, 30 Cal. 610 (1866) (testing validity of quiet title action); Forbes v. Hyde, 31 Cal. 342 (1866) (testing validity of foreclosure suit).

\textsuperscript{17} Grewell v. Henderson, 5 Cal. 465 (1855); Jordan v. Giblin, supra note 12; People v. Huber, supra note 12; Gray v. Larrimore, 10 Fed. Cas. 1025, No. 5,721 (D. Cal. 1865); and cases cited note 16 supra.

\textsuperscript{18} Jordan v. Giblin, 12 Cal. 100, 102 (1859) (literal observance of statute required so as not to "encourage fraud and lead to oppression"); Ricketson v. Richardson, supra note 16 at 154 (strict compliance required to prevent "gross abuse," making rights depend on "the elastic consciences of interested parties, rather than the enlightened judgment of a Court or Judge"). Prompted by this concern, the legislature has since 1851 (Cal. Stats. 1851, c. S, § 68, p. 60) authorized the re-opening of suits on the merits where judgments are based on the service provisions of sections 412 and 413, and for a period of time (Cal. Stats. 1872, c. 290, p. 392 (Rep'd Stats. 1874) c. 338, p. 495, even attempted to maintain administrative control by means of a "Register of Absent Defendants" in suits so instituted. See now Section 473(a) of the Code of Civil Procedure. In Tucker v. Tucker, 59 Cal. App. 2d 557, 139 P.2d 348 (1943) it was held that the requirement of "personal service" in this section did not include personal service outside the state under section 413.
in derogation of the common law.\textsuperscript{19} It is not surprising therefore, that the even less orthodox method of service outside the state apparently found little if any application,\textsuperscript{20} although the absence of appellate decisions as to such service might possibly be explained as a consequence of the then prevailing presumption of legality of service.\textsuperscript{21}

In 1877 Pennoyer \textit{v. Neff}\textsuperscript{22} was decided by the United States Supreme Court. Service by publication had been obtained on a nonresident in a personal action pursuant to an Oregon statute which, like California's, authorized such service on nonresidents. Although the defendant had property within the state, the personal judgment obtained was held invalid even locally, the property not having been brought under court control at the institution of the suit.\textsuperscript{23}

The \textit{Pennoyer} decision, held to "overthrow" a long established practice,\textsuperscript{24} was quickly adopted by the California supreme court\textsuperscript{25} as a constitutional rationale for already existing misgivings about the application of sections 412 and 413 in personal actions. The \textit{Pennoyer} theory of jurisdiction based on the concept of "power" over the person of the defendant reached its climax in California in 1896, in \textit{De la Montanya v. De la Montanya}.\textsuperscript{26} This case was clearly distinguishable from \textit{Pennoyer v. Neff} on the ground that the defendant was a resident and domiciliary of California at the time the cause of action arose and remained a domiciliary after his departure from the state to avoid service of process. Yet the California


\textsuperscript{20} No case involving out-of-state personal service has been found prior to First National Bank \textit{v. Eastman}, 144 Cal. 487, 490, 77 Pac. 1043, 1044 (1904). For a later case see, \textit{e.g.}, Davis-Heller-Pearce Co. \textit{v. Ramont}, 66 Cal. App. 778, 226 Pac. 972 (1924).


\textsuperscript{22} \textit{Pennoyer} theory of jurisdiction based on the concept of "power" over the person of the defendant reached its climax in California in 1896, in \textit{De la Montanya v. De la Montanya}.\textsuperscript{26} This case was clearly distinguishable from \textit{Pennoyer v. Neff} on the ground that the defendant was a resident and domiciliary of California at the time the cause of action arose and remained a domiciliary after his departure from the state to avoid service of process. Yet the California

\textsuperscript{23} Belcher \textit{v. Chambers}, 53 Cal. 635 (1879). See also Anderson \textit{v. Goff}, 72 Cal. 65, 13 Pac. 73 (1887).

\textsuperscript{24} While the \textit{Pennoyer} case was not rested on the due process clause of the 14th Amendment, not in force at the time of the original judgment, the Court stated that the result would be required by that clause. For a singular remainder of the pre-Pennoyer rule see Note, 63 \textit{Harv. L. Rev.} 657, 661 (1950).

\textsuperscript{25} McFarland, J., dissenting in \textit{De la Montanya v. De la Montanya}, \textit{supra} note 6 at 119, 121, 44 Pac. at 349, 350, quoting from Freeman on Judgments, section 567. See also 1 \textit{Pac. Coast L. J.} 21 (1878), concluding that the Pennoyer case "will 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 of summons."

\textsuperscript{26} The power concept is closely related to the ideas about sovereignty espoused by Story, following Continental theory.
court, relying on the broad language of Pennoyer v. Neff to the effect that process "cannot run into another State," invalidated service by publication and mailing because the state has no jurisdiction over persons "not within its territory, and that to allow it to summon one from another state is an encroachment upon the independence of such state." 27 Apparently no attempt was made by the plaintiff to serve the defendant personally outside of the state according to section 413 of the Code of Civil Procedure, but this would presumably not have altered the result, as the court based its decision solely on lack of "power" over persons not within the state, and did not reach any question of adequacy of the notice employed.

In restating the Pennoyer rule, the court expressly rejected the plaintiff's attempt to distinguish the case as one involving a domiciliary, because "domicile has never . . . been made the test of jurisdiction to render a personal judgment." 28 At least in this respect De la Montanya, after an uncontested sway of more than half a century, 29 no longer correctly states the law. In 1940, in Milliken v. Meyer 30 the Supreme Court of the United States upheld the validity of a personal judgment rendered against a Wyoming domiciliary who had been personally served with process in Colorado, pursuant to a Wyoming statute authorizing such service where a "resident . . . departed . . . to avoid . . . service," and held that "domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment . . .;" 31 and that personal service outside the state furnished adequate notice and opportunity to be heard.

Nevertheless, in 1945, a California district court of appeals, in Pinon v. Pollard, 32 intimated that the doctrine of the Milliken case did not apply in this state, 33 apparently on the assumption that De la Montanya had definitively made sections 412 and 413 inapplicable to personal actions even in the case of a domiciliary. 34 But this assumption has now been eliminated

27 Id. at 112, 44 Pac. at 347. But cf. Note, 8 Western L. J., supra note 14.
28 De la Montanya v. De la Montanya, supra note 6 at 109, 44 Pac. at 346.
29 Frey and Horgan Corp. v. Superior Court, 5 Cal. 2d 401, 55 Pac. 2d 203 (1936) (dictum); Britton v. Bryson, 216 Cal. 362, 368, 14 P. 2d 502, 504 (1932) (dictum); Grinbaum v. Superior Court, 192 Cal. 566, 221 Pac. 651 (1923); Boring v. Penniman, 134 Cal. 514, 66 Pac. 739 (1901); Murray v. Murray, 115 Cal. 256, 47 Pac. 37 (1896); Shillock v. Shillock, 24 Cal. App. 191, 140 Pac. 954 (1914); In re McMullen, 19 Cal. App. 481, 126 Pac. 368 (1912); Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58 (1911).
30 311 U.S. 457 (1940).
31 Id. at 462.
by the enactment of section 417 of the Code of Civil Procedure,\textsuperscript{35} originally proposed to correct the "unfortunate dictum" in the \textit{Pinon} case.\textsuperscript{36}

Even after the \textit{Milliken} case had thus been made "applicable" in this state, \textit{De la Montanya}, however, continued to prohibit the use of sections 412 and 413 in personal actions for (1) out-of-state personal service upon non-domiciliaries; and (2) service by publication and mail on persons outside the state.

There is no reason to assume that the second remaining rule of \textit{De la Montanya} concerning service other than personal service outside the state, has been in any way affected by the decision in the \textit{Allen} case. Not only may this rule be eminently desirable in its solicitude for the defendant, but section 417 of the California Code of Civil Procedure now expressly excludes rendition of a personal judgment against nonresidents, based solely on service by publication and mail\textsuperscript{37} under sections 412 and 413.

But whatever may be the ultimate constitutional fate of this rule, this much we know: \textit{Pennoyer v. Neff} and \textit{De la Montanya} can no longer be interpreted as generally prohibiting the use in personal actions of the procedure provided in sections 412 and 413 for personal service outside the state, the distinct treatment of which, contrary to earlier judicial views,\textsuperscript{38} has now "become of vital importance."\textsuperscript{39} Whether the interpretation of the domiciliary rule of \textit{Milliken v. Meyer} in the \textit{Allen} case to include former residents, will ultimately be approved by the U.S. Supreme Court remains to be seen. Assuming such approval, the implications of this new development will have to be examined by our highest court to ascertain the scope of section 417 of the Code of Civil Procedure as well as the outer confines set by the due process clause of the Constitution, for California courts may soon have to pass on the constitutionality of sister state judgments based on service statutes less stringent than section 417.

\textsuperscript{35}Cal. Stats. 1951, § 417, p. 2537. "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 at the time of the commencement of the action or at the time of service."

\textsuperscript{36}Note, 22 CALIF. B. J. 256, 261 (1947). See also note 33 \textit{supra}.

\textsuperscript{37}This section merely refers to the rendering of a personal judgment based on "jurisdiction acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413," and thus does not purport to describe the constitutional limits of this "potential" jurisdiction. For the distinction between this jurisdiction and that actually assumed by the state, not here pertinent in view of the broad language of sections 412 and 413, see Note, 40 CALIF. L. REV. 156 (1952).

\textsuperscript{38}Cf. First National Bank v. Eastman, 144 Cal. 487, 490, 77 Pac. 1043, 1044 (1904), involving land within the state, where the court noted that personal service out of the state "was only equivalent to publication and deposit in the post office . . . and did not give the court any greater jurisdiction . . . than service by publication in compliance with the order would have done."

\textsuperscript{39}Peters, P. J., in Myrick v. Super. Court, \textit{supra} note 7 at 596, 256 P.2d at 351.
The Scope of Allen

1. Conceivably our highest court could limit the Allen rule to motorists and thus declare itself satisfied with having filled the statutory gap created by the limitation of our “nonresident motorist statute” to persons not resident in this state at the time of the accident, a gap which otherwise would have put “such residents who subsequently leave the state... in a favored position as compared with nonresidents.” Justice Spence’s opinion in the Allen case does not, however, indicate any such limitation of its holding. Nor is there any reason to assume that the court will wish to restrict the Allen rule to torts, let alone to acts “dangerous to life or property.”

2. The Allen case involved acts done in California. It may be that the court might wish to limit this rule to acts committed within the state, using a rationale suggested by Professor McBaine for jurisdiction over foreign corporations, although recent developments in that law may induce the court to refrain from doing so. A New York statute providing, in tort actions arising out of aircraft accidents, without regard to the place of the accident, for cumulative substituted service and “personal service without the state” upon any nonresident operating the “aircraft from any airfield in this state” may yet be upheld as constitutional.

3. While maintaining general applicability of the Allen rule to all types of causes of action, the court might further limit it to persons previously domiciled in this state in contrast to former residents. The language would indicate that no such limitation is intended, since the court, apparently fol-

40 CAL. VEH. CODE § 404. Other states have avoided this gap. See N.Y. Laws 1941, c. 248, which upon the recommendation of the Judicial Council [7 REP. 41 (1941)] added section 52a to the Vehicle and Traffic Law, according to which nonresident motorist service is available upon “a resident who departs from the state subsequent to the accident.” See in general, Note, 37 CALIF. L. REV. 80, 90 (1949); Note, Constructive Service: How to Guard against the Possibility that a “Known” Non-Resident Might in Fact be a Resident, 32 N.Y. L. REV. 413 (1953).

41 Myrick v. Superior Court, supra note 7 at 597, 256 P.2d at 351.

42 See RESTATEMENT, JUDGMENTS § 23 (1942).


46 But see Peters v. Robins Airlines, 281 App. Div. 903, 120 N.Y.S.2d (2d Dep’t 1953), reversing on this ground 118 N.Y.S.2d 238 (Sup. Ct. Kings Co. 1952). While this case relates to a corporate defendant and relies on International Shoe Co. v. Washington, 326 U.S. 310 (1945), the statute involved is in terms applicable to individuals.
lowing the deliberately chosen language of section 417,\(^7\) consistently uses the term "residence," though relying in large part on the holding of the Milliken case based on the defendant's domicile. The court thus seems to follow a current trend (opposed to the Restatement of Judgments)\(^8\) to eliminate the distinction between the two concepts.

Several states have based their service provisions on "residence,"\(^49\) and there is no reason to doubt the constitutionality of such legislation. Although the majority of such statutes have been interpreted as requiring domicile\(^50\) and some have even been held to require both domicile and residence,\(^51\) "the distinction between the two concepts is often too shadowy to be capable of description"\(^52\) and sufficiency of "mere" residence is considered reasonable by eminent authority.\(^53\) "Certainly, if domicile is a basis for so acquiring jurisdiction, residence (at some time) can also be made a basis. Residence, in fact, is a much clearer and fairer basis than domicile. The latter depends largely upon the subjective and frequently undisclosed intent of the party involved, which he can put on or discard like a cloak at his uncontrolled whim or caprice, dependent upon whether it is or is not to his benefit to be domiciled in the jurisdiction. Residence is a much more objective concept and can be proved or disproved by the actual facts. If the duties, privileges and obligations of domicile are sufficient to confer jurisdiction, then certainly the somewhat similar duties, privileges and obligations of residence are also sufficient. Thus the only real question is when such residence must exist."\(^54\)

4. The court's future attitude will be particularly significant concerning the required period of domicile or residence. The opinion in the Allen case mentions "that both at the time that the accident occurred and at the time


\(^50\) Id. at 569, n. 49.

\(^51\) Id. at n. 52.

\(^52\) Id. at n. 580. See also Note, 63 HARV. L. REV. 1441 (1950).


\(^54\) Peters, P. J., in Myrick v. Superior Court, supra note 7 at 600, 256 P.2d at 353.
of the commencement of the action, petitioner [defendant] was a resident
of the state of California.\textsuperscript{55}

(a) We have yet to learn whether the court considers the defendant's
desire at the time the cause of action arose as constitutionally required.
Neither section 417 nor sections 412 and 413 referred to therein contain
such a requirement, the fate of which might well depend on whether or not
the cause of action will ultimately be required to have arisen within the
state.\textsuperscript{56}

(b) The court in the \textit{Allen} case found, and section 417 expressly re-
quires,\textsuperscript{57} residence at the time of the commencement of the action. Never-
theless, California courts will have to pass upon the constitutional char-
acter of this requirement when faced with cases involving the recognition
of foreign judgments based on statutes which either lack this element en-
tirely\textsuperscript{58} or have the action "commence" at a time other than that of filing
the complaint.\textsuperscript{59} They will then have to decide whether this requirement
constitutes an essential safeguard of due process.

\textit{The Future of Pennoyer}

From pony express to airplane, from \textit{Pennoyer} to \textit{Allen}—the King's
Sheriff may yet surrender to the Postmaster.\textsuperscript{60} "The increasingly artificial
nature of state boundaries, the expanding of metropolitan areas into two
or more states, and the multiplying transportation facilities"\textsuperscript{61} of our time,
make it more imperative than ever that California courts be enabled
to exercise their constitutional jurisdiction over both corporations and indi-
viduals within the broad statutory authority given to them by the lawgiv-
ers of 1851 and 1951.

\begin{footnotes}
\item[55] Allen v. Superior Court, \textit{supra} note 3.
\item[56] See text \textit{supra} at notes 45 and 46.
\item[57] In contrast to the position taken in 1946 (\textit{supra} note 33) the originators of section 417
saw the value of this provision in meeting "the danger that the courts of this state may dis-
and follow the decision in \textit{Milliken} v. Meyer, 311 U.S. 457 (1940) and sustain a personal judg-
ment on less than the requirements in the proposed Section 417." 23 \textit{Calif. St. B. J.} 196 (1948).
\item[58] See e.g., \textit{Boivin} v. \textit{Talcott}, 102 F. Supp. 979 (N.D. Ohio 1951) (Quebec judgment based
on personal service in Ohio denied recognition because Quebec statute did not require such
civil action is commenced by the service of the summons"). For further references, see \textit{Clark,
Code Pleading} 74 (2d ed. 1947).
\item[60] Increased significance in the law of service of process has been given to the use of the
mail by the U. S. Supreme Court in \textit{Mullane} v. Central Hanover Bank and Trust Co., 339 U.S.
306 (1950). See Fraser, \textit{Jurisdiction by Necessity—An Analysis of the Mullane Case}, 100 \textit{U. of
Pa. L. Rev.} 305 (1951). As to "necessity" as the essential element of any type of substituted
service, see \textit{Title and Document Restoration Co. v. Kerrigan}, 150 Cal. 289, 312, 88 Pac. 356, 361
(1906). For a case involving the California rules about service by mail, see \textit{Hubert v. Hubert},
\item[61] \textit{Spence, J.}, in Allen v. Superior Court, \textit{supra} note 3 at 318.
\end{footnotes}
Perhaps the revival in the *Allen* case of the out-of-state service provisions of sections 412 and 413 as applicable to personal actions, may induce our courts to re-examine fully the rationale of their personal jurisdiction over individuals. *Pennoyer v. Neff*, even in its present scope, attributes decisive importance to power acquired by the state over the defendant by some control of his property. *Milliken v. Meyer*, while retaining some of this ideology, also stresses that more realistic and appropriate concept of "fair play" which now so decisively governs our law of jurisdiction over corporations. If *Milliken*, based on continuing domicile, can perhaps still be interpreted as implying some reliance on the power concept of jurisdiction, this does not hold true for the *Allen* case which, while briefly referring to that concept, has in effect abandoned it by accepting past domicile as a sufficient basis for out-of-state service of process, and by placing decisive emphasis on the "fair play" reasoning of the *Milliken* case. 62

The fictions of "power" and its offspring "implied consent" having been discarded, "minimum contacts" between state, cause and parties, now emerging as the determinants of jurisdiction over corporations, 63 are likely to claim a similar function in the law of jurisdiction over individuals. But all too easily could this test, too, become as rigid and irrational as those it may replace. Location of act or event, domicile, residence, and, for that matter, former residence, are closely allied to the power ideology both in origin and effect and, being foreign to the litigated issue, hardly a "fair" test of jurisdiction. Nor will these or other "contacts" fall readily into a pattern easily defined. Slowly, from case to case, by trial and by error, our courts will have to mold into a new common law of jurisdiction that amorphous formula of "fair play and substantial justice." 64

63 Id. at 318, Justice Spence describes this rationale in nonresident motorist statutes as "largely fictional."
64 The doctrine of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1951) was recently restated in an even more general form by a California court in Fielding v. Superior Court, 111 Cal. App. 2d 490, 496, 244 P.2d 968, 972 (1952), *cert. denied*, 344 U.S. 897 (1952) to the effect that the question of jurisdiction over a corporation "is really not a question of the power of the state, but whether there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere." See also Smyth v. Twin State Improvement Corp., 116 VT. 569, 80 A.2d 664 (1951) ("trend from the court with immediate power over the defendant to the court where both parties may most conveniently settle their dispute"); Comment, *Suing Foreign Corporations in California*, 5 Stan. L. Rev. 503 (1953); Comment, *Expanding Jurisdiction over Foreign Corporations*, 37 Cornell L. Q. 458 (1952); Note, 100 U. Of Pa. L. Rev. 598, 599 (1952); Note, 25 A.L.R.2d 1202 (1952). Assimilation of jurisdiction over individuals to that over corporations has been repeatedly advocated. See, *e.g.*, STUMBERG, CONFLICT OF LAWS 99 (2d ed. 1951); McCarter, A New Statute for in Personam Jurisdiction over Nonresidents, 21 Kan. B.A. J. 269 (1953); Note, 16 U. Of Chi. L. Rev. 523, 534 (1949); Dodd, Jurisdiction in Personal Actions, 23 Ith. L. Rev. 427 (1929).
65 A theory of jurisdiction giving prominence to domicile or residence would approach the civil law doctrine of the defendant's "forum generale." See NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 193 (1943).