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Service of Process in Civil Actions in California

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Comments

SERVICE OF PROCESS IN CIVIL ACTIONS IN CALIFORNIA[1]

There are numerous stories concerning the tricks used by the process server in carrying out his mission. These stories are often humorous, but the state of the California law on service of process can hardly be said to give California attorneys cause for good humor. The pertinent law is not to be found in any one place and there are no general provisions that control. Furthermore, some of the code sections read literally in a manner in which they have not been, and could not be, applied because of Constitutional due process limitations.[2]

[1] The preparation of this comment has been greatly facilitated by reference to the report on service of process prepared by Professor John C. Peppin shortly before his untimely death.

[2] CAL. CODE CIV. PROC. § 412 is a good example.

At the present time the basic provisions are set forth in the Code of Civil Procedure,[3] obviously the proper location for such materials. Provisions relating to service of process, however, appear in nearly every California code.[4] Some of these provisions relate to special types of proceedings and probably should remain in their present location,[5] but the essential requirements should not differ from the basic requirements of the Code of Civil Procedure. Other provisions could easily be shifted in any revision of the present law.[6] It seems sensible that this be done.

A few states have already put their service of process houses in order by enacting modern civil practice acts and rules of civil procedure.[7] California, badly in need of a modern procedural code, should follow suit by revising and clarifying its law.

Constitutional doctrines divide service of process into two categories: first, service necessary to support a personal judgment and, second, service necessary to support a judgment in rem or quasi in rem. A judgment in rem or quasi in rem is founded upon a proceeding instituted against a particular thing or subject matter, or against a person with respect to a particular thing or subject matter, whose status or condition is to be determined.[8] Judgments are in personam when the proceedings are against the person, provided the adjudication be of such a nature as to be binding only upon the parties to the suit and their privies.[9] The scope of this comment is confined to the service necessary to support a personal judgment.

I. SERVICE ON INDIVIDUALS

a. *Residents.*

(1) *Residents Within the State.*

The requirements for a valid service of process are power and fair notice.[10] Persons within the State of California are subject to the control of the state, and, if they are personally served, the requirement of fair notice has been met. Accordingly, a personal judgment can be

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[3] CAL. CODE CIV. PROC. §§ 410-416.

[4] Among the more important are the following: CAL. CODE CIV. PROC. §§ 410-416; CAL. CORP. CODE §§ 3300-3306, 6500-6504; CAL. VEH. CODE § 404; CAL. INS. CODE §§ 1600-1607, 11090-11094; CAL. CORP. SEC. ACT §§ 3, 6, 9 (1917); CAL. BANK ACT § 7 (1909).

[5] CAL. PROB. CODE § 1102 is a good example of this type.

[6] All the provisions in note 4, *supra,* could easily be shifted to the Code of Civil Procedure.

[7] See, for example, the N. Y. CIV. PRAC. ACT §§ 218-235 (1939), the ILL. CIV. PRAC. ACT §§ 13-19 (1933), the COLO. R. CIV. PROC. 4 (1941). The Federal Rules of Civil Procedure are also an illustration of a modern code.

[8] Woodruff v. Taylor (1847) 20 Vt. 65.

[9] 1 FREEMAN, JUDGMENTS § 16 (5th ed. 1925).

[10] GOODRICH, CONFLICT OF LAWS § 69 (2d ed. 1938).

rendered against persons, resident or nonresident, who are personally served within this state.[11]

Section 410 of the Code of Civil Procedure, the starting point for any discussion of this subject, reads as follows:

> The summons may be served by the sheriff, a constable, or marshal, of the county where the defendant is found or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served, with the summons, upon each of the defendants. When the summons is served by the sheriff, a constable, or marshal, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to the office of the clerk or justice from which it issued. When it is served by any other person, it must be returned to the same place, with the affidavit of such person of its service, and of the service of a copy of the complaint.
>
> If the summons is lost subsequent to service and before it is returned, an affidavit of the official or other person making service, showiug the facts of service of the summons, may be returned in lieu of the summous and with the same effect as if the summons were itself returned.

Section 411 provides that the summons must be served by delivering a copy to the defendant personally.

It would seem that these two code sections are generally adequate, and that only a few changes need be suggested. The first concerns the wording of section 410. This section, literally read, suggests that the *original* summons must be served by the sheriff. Obviously, this is not necessary,[12] and the wording should be changed to provide for the service of a *copy* of the summons. Section 411 is correct in this respect, but should be revised to make it clear that a copy of the complaint shall be served in the same manner as the copy of the summons in each case.[13] The Federal Rules,[14] for example, provide that the summons and the complaint shall be served together. The Colorado Rules[15] provide that if the summons is served without a copy of the complaint, the summons must briefly state the sum of money or other relief demanded. This appears to be an excellent solution to the problem, but, in view of the wording of the California statute, the Federal Rule is probably more appropriate. The New York,[16] Wisconsin,[17] and Illi-

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[11] *Id.* § 70.

[12] Peck v. Strauss (1867) 33 Cal. 678.

[13] Southern Pacific R. R. Co. v. Superior Court (1881) 59 Cal. 471; McGinn v. Rees (1917) 33 Cal. App. 291, 165 Pac. 52.

[14] FED. R. CIV. P. 4(d).

[15] COLO. R. CIV. PROC. 4(c) (1941).

[16] N. Y. CIV. PRAC. ACT § 225 (1939).

[17] WIS. STAT. § 262.07 (1943).

nois[18] statutes do not require service of the complaint with the summons, and appear deficient for that reason.

A third possible change relates to the parties authorized to serve process. Section 410 of the Code of Civil Procedure allows service to be made by the sheriff, a constable, or marshal, or any other person over the age of 18, not a party to the suit.[19] The Federal Rules[20] provide that only a marshal, his deputy, or someone specially appointed by the court can serve process. It can be argued that a person receiving service expects it from some official and therefore will be more likely to pay attention to the summons. In addition, service by certain enumerated officers would seem to guarantee more trustworthy return. On the other hand, service is probably facilitated by the present California provision since a plaintiff may secure more diligent action from a non-official. Furthermore, it would seem that a defendant served with process should follow the command of the summons, without regard to who served it. New York, with a modern procedural code, has a section similar to section 410.[21]

Although many states[22] permit service by leaving a copy of the summons and complaint with an adult at the defendant's place of residence, California does not. Many state courts[23] have held such substituted service valid, and dicta in Supreme Court opinions[24] have approved it. Though not desirable as an alternative to personal service where that can be made, it seems highly desirable as applied to residents who conceal themselves within the state to avoid service of process, or who leave the state to avoid service or to defraud creditors. California, therefore, might well copy New York's model statute[25] on the subject, which permits a plaintiff, upon a showing that he has been or will be unable with due diligence to make personal service within the state, to obtain a court order authorizing service by leaving a copy of the summons at the defendant's residence. The New York Statute, in addition, solves the problem that exists when no one answers the doorbell by permitting a process server who is unable to gain admission to complete service by attaching one copy to the defendant's door and mailing another copy to him.

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[18] ILL. REV. STAT. c. 110 § 137 (Smith-Hurd 1943).

[19] See Hibernia Savings and Loan Society v. Clarke (1895) 110 Cal. 27, 42 Pac. 425.

[20] FED. R. CIV. P. 4(c).

[21] N. Y. CIV. PRAC. ACT § 220 (1939).

[22] N. Y. CIV. PRAC. ACT § 231 (1939); COLO. R. CIV. PROC. 4(e)(1) (1941); ILL. REV. STAT. c. 110 § 137 (Smith-Hurd 1943); WIS. STAT. § 262.08 (1943). See FED. R. CIV. P. 4(d) (1).

[23] Hurlbut v. Thomas (1887) 55 Conn. 181, 10 Atl. 556; Sturgis v. Fay (1861) 16 Ind. 429; Harriman v. Roberts (1879) 52 Md. 64; Huntly v. Baker (1884) 33 Hun. (N.Y.) 578; *cf.* Amsbaugh v. Exchange Bank (1885) 33 Kan. 100, 5 Pac. 384.

[24] Milliken v. Meyer (1940) 311 U. S. 457; McDonald v. Mabee (1917) 243 U. S. 90.

[25] N. Y. CIV. PRAC. ACT § 231 (1939).

(2) *Residents Outside the State.*

Section 412 of the Code of Civil Procedure provides:

> 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; . . . and it also appears . . . that a cause of action exists against the defendant . . . such court, judge, or justice, may make an order that the service be made by the publication of the summons . . . .

Section 413 provides:

> When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication . . . .

Read literally, these sections authorize, for the purpose of obtaining a personal judgment against a California resident outside the state, either service by publication or personal service outside the state. Under essentially the same provisions, the California Supreme Court in the famous case of *De La Montanya v. De La Montanya*[26] held by a 4-3 vote that service by publication upon a California resident outside the state was insufficient to support a personal judgment, even though the defendant had left the state to avoid service. The court held that the state courts lacked power to render such a judgment, although the exact reason is not made clear. The court did not discuss the statutes but relied heavily upon *Pennoyer v. Neff*[27] and stated: " . . . the state has no jurisdiction over either persons or property not within its territory."[28] On this theory, personal service outside the state would have made no difference.

Reliance on *Pennoyer v. Neff* indicates that the result was considered to be required by the due process clause of the Federal Constitution. The dissenting judges distinguished *Pennoyer v. Neff* as involving a nonresident defendant, and argued that California did have jurisdiction over its domiciliaries; hence it could render a personal judgment against them, founded on service by publication, though they were presently outside its territory. This view of jurisdiction would seem to have been partially vindicated in 1940 in *Milliken v. Meyer*,[29] where the United States Supreme Court held a Wyoming

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[26] (1896) 112 Cal. 101, 44 Pac. 345.

[27] (1877) 95 U.S. 714.

[28] De La Montanya v. De La Montanya, *supra* note 26 at 112, 44 Pac. at 347.

[29] *Supra* note 24. For material concerning the Milliken case see Notes, (1941) 41 COL. L. REV. 724, (1941) 29 GEO. L. J. 784, (1941) 25 MINN. L. REV. 798, (1941) 2 MONT. L. REV. 112, (1942) 21 NEB. L. BULL. 336, (1941) 13 ROCKY MT. L. REV. 253, (1941) 14 SO. CALIF. L. REV. 488, (1941) 20 TEX L. REV. 99, (1941) 8 U. OF CHI. L. REV. 596. The best justification for allowing unlimited service on residents outside the jurisdiction is found in the note last cited above: "The increasingly artificial nature of

personal judgment valid where service was made in compliance with a Wyoming statute[30] authorizing personal service outside the State upon Wyoming residents who had left the State to avoid service. In a dictum the Court stated: "One . . . incident 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."[31] While service by publication might not satisfy the Supreme Court's notice requirement, it seems clear that personal service outside the state on a California domiciliary both complies with the Supreme Court's test and falls wthin the literal terms of the California statute. It is problematical, however, whether the California courts would give literal effect to its terms,[32] when to do so would entail a sharp break with the law in effect for so many years under the *De La Montanya* decision; it might properly be felt that the initiative for such a change in the law should come from the legislature.

Such uncertainty, alone, requires clarification of the statute. An added reason for clarification is the fact that Section 412 purports to authorize both service by publication and personal service on nonresidents outside the state; as will be shown below, such service, for the purpose of supporting a personal judgment, is clearly invalid and void as a denial of due process.[33]

In clarifying the statute, the legislature may determine whether it wishes to sanction personal service on California residents outside the state. The California State Bar[34] has sponsored the following bill to authorize such service:

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

While the intent seems clear, the wording has the technical fault of building on the quagmire of section 412. There is no necessity for

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state boundaries, the spreading of metropolitan areas into 2 or more states, and the ever more universal and rapid methods of transportation all demand a modern approach to the problem of process."

[30] WYO. REV. STAT. ANN. § 89-817.

[31] 311 U.S. at 464.

[32] Pinon v. Pollard (1945) 69 Cal. App. (2d) 129, 158 P. (2d) 254 recently indicated by dictum that it is impossible to render a personal judgment against a resident of California served while be is absent from the state.

[33] Pennoyer v. Neff, *supra* note 27; Wilson v. Seligman (1892) 144 U.S. 41.

[34] (1947) 22 CALIF. S.B.J. 261.

predicating personal service outside the jurisdiction upon an order for publication. It would seem preferable to revise section 412 and incorporate the suggested change in the revision.[35]

This proposed bill goes beyond the Wyoming statute sustained in *Milliken v. Meyer,* which permitted such service only when the defendant had left the state either to defraud creditors or to avoid service. There are, obviously, strong arguments for permitting service in such circumstances. The harassment, however, of a defendant who has left the state innocently, *e.g.,* on a business trip, which is permitted by the proposed bill, may not be so readily justified. Though the Supreme Court, in laying down its test in the *Milliken* case, did not confine itself to the specific situation covered by the Wyoming statute, it is not at all certain that the same result would be reached where a defendant was innocently outside the state. Plausible grounds for distinction exist. It perhaps may prove desirable to limit changes in the California law to the situations covered in the Wyoming statute. The Colorado Rules of Civil Procedure furnish an excellent example of a rule drafted with the *Milliken* case in mind.[36]

b. *Nonresidents and Concealed Persons.*

In 1878 the Supreme Court, in *Pennoyer v. Neff,*[37] stated that due process required that if " . . . the subject-matter of the suit . . . involves merely a determination of the personal liability of the defendant, he must be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance."[38] This rule has been limited, as to residents, by *Milliken v. Meyer,*[39] but it still governs in suits against nonresidents. Section 411 of the Code of Civil Procedure validly authorizes personal service upon nonresidents within the state. Section 412, literally read, authorizes service by publication or personal service outside the state upon nonresidents, but under *Wilson v. Seligman* and *Pennoyer v. Neff*[40] it is clear that such an application of section 412 would be unconstitutional. This section should, therefore, be revised.

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[35] (1948) 23 CALIF. S. B. J. 196. A few words should be said about the latest amendment to section 413. Before 1947 § 413 provided that service was complete at the expiration of the time prescribed by the order for publication. Thus the defendant could be personally served immediately, but a default could not be entered until more than 30 days after the service was made outside the state. Section 413 was amended by Cal. Stats. 1947, p. 815 and now makes service complete upon personal service or at the expiration of the publication period, whichever is earlier. Note (1947) 21 So. CALIF. L. REV. 1, 5.

[36] COLO. R. CIV. PROC. 4(f) (1941).

[37] *Supra* note 27. See also Boring v. Penniman (1901) 134 Cal. 514, 66 Pac. 739; Merchant's National Union v. Buisseret (1911) 15 Cal. App. 444, 115 Pac. 58; Pinon v. Pollard, *supra* note 32.

[38] 95 U. S. at 733.

[39] *Supra* note 24.

[40] *Supra* note 33.

One solution would be to confine the applicability of section 412 to actions in rem,[41] assuming the suggested separate provision is enacted to cover personal service on residents who leave the state to avoid service of process or to defraud creditors. Or, section 412 might be amended to simply state that it should not be construed to support personal judgments against nonresidents or residents absent from the state. The first of these alternatives seems preferable.

In any amendment of section 412, the portion of the section permitting service on persons who conceal themselves within the state to avoid service of process should be retained. It seems entirely proper that service by publication should support a personal judgment against persons conducting themselves in this manner, and such is the present law of California.[42]

Both Illinois[43] and Colorado[44] have confined the application of their service by publication sections to actions in rem. The New York statute,[45] while using different and more extensive language, apparently does the same.[46]

There is nothing in the California law[47] sanctioning service on a nonresident individual doing business in this state by service upon his agent.[48] The Supreme Court, in *Doherty & Co. v. Goodman,*[49] upheld the constitutionality of this type of service. In that case a citizen of New York was served under the provisions of an Iowa statute[50] which authorized service of process by means of personal service on agents in actions arising out of business transacted in Iowa, and a personal judgment was rendered against him. The Court held such service to be no violation of the due process and privileges and immunities clauses of the Federal Constitution, and disposed of earlier cases thought to be contrary.

The *Doherty* decision is apparently based upon the theory that if a state may regulate or prohibit specified acts within its border by

[41] Perkins v. Wakeham (1890) 86 Cal. 580, 25 Pac. 51; Roberts v. Jacob (1908) 154 Cal. 307, 97 Pac. 671.

[42] Narum v. Cheatham (1932) 127 Cal. App. 505, 15 P. (2d) 1106; see Butler v. McKey (C. C. A. 9th 1943) 138 F. (2d) 373, *cert. denied,* 321 U. S. 780.

[43] ILL. REV. STAT. c. 110 § 138 (Smith-Hurd 1943).

[44] COLO. R. CIV. PROC. 4(g) (1941).

[45] N. Y. CIV. PRAC. ACT § 232 (1939).

[46] It is also not clear whether or not the section covers service on minors and mental incompetents by publication. The portion of the statute dealing with corporations will be discussed *infra.*

[47] For an excellent discussion of this subject, see McBaine, *Service Upon a Nonresident by Service Upon His Agent* (1935) 23 CALIF. L. REV. 482.

[48] Originally, the United States Supreme Court case of Flexner v. Farson (1919) 248 U. S. 289, was believed to hold that such service would be invalid, but that case involved a fact situation wherein the agent had ceased to be such before he was served. The various state court decisions are in conflict.

[49] (1935) 294 U. S. 623.

[50] IOWA CODE § 11079 (1931).

nonresidents, it may declare that such acts will subject the nonresident to the jurisdiction of the state courts. Such a rationale leaves a possible loophole as to occupations carried on within a state which the state cannot exclude, but the Supreme Court would probably find a means of justifying the service. Fair notice to the defendant seems no problem in this situation. The defendant has selected the agent for carrying on the business, and the principal-agent relationship makes it probable that no more suitable person can be found to carry out the duty of notifying the defendant.

Under conditions of business as they exist today, a statute similar to the Iowa statute upheld in the *Doherty* case should certainly be incorporated into the Code of Civil Procedure. In the absence of such a statute, the plaintiff is forced to go to defendant's state (unless the defendant consents to appear) to sue him on a cause of action arising in plaintiff's state. Such a hardship should not be imposed on the plaintiff. Of course, any new amendment to the California law along these lines should be limited to causes of action arising out of acts done within the state.[51]

c. *Nonresident Motorists.*

Nonresident motorist statutes now exist in all states,[52] varying in detail but intended to achieve the same end as section 404 of the Motor Vehicle Code. California's provision, enacted in 1935,[53] has had only minor changes since that date. Its provision for notice to the nonresident motorist closely follows the Massachusetts provisions which were held by the Supreme Court in *Hess v. Pawloski*[54] sufficient to meet the due process requirements of the Fourteenth Amendment.

In that case the Court closely scrutinized the adequacy of provisions for notice to the defendant. California's provisions[55] state that a nonresident's use of California highways by himself or through an agent constitutes appointment of the Director of Motor Vehicles as agent for receipt of service of process. One copy of the summons and complaint is to be left with the director; another copy is to be mailed to the defendant by the plaintiff via registered mail. As an alternative to this mailing, personal service outside the state is authorized. Proof of compliance with the mailing requirement is to be made by appending the registered mail return receipt to the papers filed with the court

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51 COLO. R. CIV. PROC. 4(e)(1) (1941) is faulty in this respect, the rule in point not being limited to actions arising out of business transacted in the state. In this situation the unfairness argument is reversed. Defendant should not be forced to come into California to defend actions arising out of business transacted elsewhere.

52 Note (1948) 15 U. OF CHI. L. REV. 451.

53 Cal. Stats. 1935, p. 154.

54 (1927) 274 U.S. 352.

55 CAL. VEH. CODE § 404(a), (c), (d), (e), (f).

to show service has been made. It appears that this fully meets the notice requirements of the *Hess* case. However, the requirement of submitting a return receipt signed by the defendant to whom process has been mailed[56] will be a difficult one for the plaintiff to meet if the defendant refuses to accept delivery of the letter. A Montana court, confronted with this situation[57] under a statute similar to that of California, held the defendant was "not in a position to complain that plaintiff failed to comply with the requirements of the statute when [defendant's] own willful act prevented plaintiff's literal compliance therewith."[58] This holding seems reasonable, but, to remove any possibility of question, the California statute should be modified to permit a return receipt with the post office notation that defendant refused receipt as an alternative to a return receipt signed by defendant. It seems inconceivable that this would be held invalid, especially as it is not clear that a return receipt requirement is necessary.[59]

Section 404 applies only to service on nonresidents. When is a motorist such a "nonresident?" The definition section of the code, defining "nonresident" as " . . . a person who is not a resident of this State,"[60] is of slight, if any, help. As the question has troubled the California courts,[61] a more precise statutory definition would be helpful.

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56 CAL. VEH. CODE § 404(e).

57 State v. District Court (1939) 107 Mont. 489, 86 P. (2d) 750.

58 *Id.* at 493, 86 P. (2d) at 753. *Accord:* Shushereba v. Ames (1931) 255 N.Y. 490, 175 N. E. 187.

59 Wuchter v. Pizzutti (1927) 276 U. S. 131 (held invalid a New Jersey statute requiring only service on a state official who had no duty to forward notice. The Court there said the test was reasonable probability of notice, but made no mention of return receipts).

Hartley v. Vitiello (1931) 113 Conn. 74, 154 Atl. 255 (statute simply requiring notification of defendant by registered mail sent to his last known address held adequate). Schilling v. Oldebak (1929) 177 Minn. 90, 224 N.W. 694 (upheld statute requiring only that plaintiff mail notice to defendant's last known address). Culp, *Process in Actions Against Nonresident Motorists* (1933) 32 MICH. L. REV. 325; Comment (1928) 16 CALIF. L. REV. 428.

60 CAL. VEH. CODE § 72.

61 Briggs v. Superior court (1947) 81 Cal. App. (2d) 240, 183 P. (2d) 758, *hearing den.* The court, discussing the meaning of the term, said: "While the Vehicle Code does not require that a person acquire a domiciliary residence in order not to be classified as a nonresident, it does require a stay here of such length coupled with an intent to remain long enough, so that the presence in the state cannot be classified as merely temporary." In Berger v. Superior Court (1947) 79 Cal. App. (2d) 425, 179 P. (2d) 600, the court resorted to CAL. GOV. CODE §§ 243, 244, which provide that a residence is where one remains when not called elsewhere temporarily, and that a person has but one residence, which is changed by a combination of act and intent. It seems that, in substance, this equates residence to domicil; *accord,* Northwestern Mortgage & Securities Co. v. Noel Construction Co. (1941) 71 N.D. 256, 300 N.W. 28. For the confusion existing in the definition of "residence" and "domicil" in California, see CAL. ANN., RESTATEMENT. CONFLICT OF LAWS § 9(e) (1939).

Section 404(h), added in 1945,[62] makes the residence status of defendant as of the time of the accident or collision control for the purpose of deciding whether the section's process provisions are available to plaintiff. The purpose of the statute is to give a means of recourse to California courts against persons who cannot be reached by usual service of process provisions. This purpose, it would seem, would be better carried out by making nonresidence at time of suit determinative.[63] Some states have taken this view by statute.[64]

The Vehicle Code defines "nonresident" as already indicated, and defines "person"[65] to include a natural person, firm, copartnership, association or corporation. Under these definitions a foreign corporation is subject to the provisions of section 404. Yet section 411 of the Code of Civil Procedure states how service *must* be made upon foreign corporations. The only cross reference there given is to the method of serving a foreign corporation provided in the Corporations Code.[66] While it seems probable that service in accord with the Vehicle Code provisions upon a foreign corporation would be valid, clarification of the code sections on this point seems desirable. This could be done by providing in section 404 of the Vehicle Code that where defendant is a foreign corporation the provisions of sections 6500-6504 of the Corporations Code shall apply rather than the Vehicle Code. This is considered preferable to the application of section 404 of the Vehicle Code because the Corporations Code provisions are believed to be entirely adequate and are drawn specifically to cover service on corporations.

The language of section 404 makes its provisions applicable to "any action or proceeding against [a] nonresident operator or nonresident owner growing out of any accident or collision . . . upon the highways of this state by himself or agent."[67] Thus it would seem that a nonresident as well as a resident plaintiff can take advantage of the statute.[68] However, a federal court in a diversity case,[69] relying upon a Pennsylvania trial court's construction of a similar Pennsylvania statute, held to the contrary. Such a restriction of the statute appears

[62] Cal. Stats. 1945, p. 2356.

[63] Note (1942) 30 GEO. L. J. 768; Note (1942) WIS. L. REV. 439.

[64] Massachusetts, Montana, New York, Ohio, Pennsylvania. It seems difficult to rationalize these statutes upon the same ground used to rationalize the usual nonresident motorist statutes, *i.e.*, the fiction of implied consent manifested by the nonresident's entering the state and using the highways. Hess v. Pawloski, *supra* note 54. However, this newer form of statute has been upheld. State *ex. rel.* Thompson v. District Court (1939) 198 Mont. 362, 91 P. (2d) 422.

[65] CAL. VEH. CODE § 65.

[66] CAL. CORP. CODE §§ 6500-6504.

[67] § 404(a).

[68] Note (1942) 30 GEO. L. J. 768.

[69] Lambert v. Doyle (E. D. Pa. 1947) 70 Fed. Supp. 990; Note (1948) 21 TEMP. L. Q. 270.

unwarranted but suggests that clarification of the code section to cover this point may be desirable.

In view of present highway accident death rates, it is apparent that in many cases any recovery will be from a deceased motorist's estate rather than from the motorist himself. Yet it has been uniformly held that, under statutes such as California now has, service upon a deceased motorist's personal representative is not authorized.[70] The statute being based upon the fiction of agency, it is recognized that the agency is terminated by death.[71] In an attempt to avoid this, six states have expressly made executors and administrators of deceased nonresident motorists subject to their nonresident motorist process statutes. The validity of such an express extension was upheld by the Arkansas court in *Oviatt v. Garretson,*[72] but a recent federal court decision[73] held the Iowa provision[74] covering executors and administrators invalid. The court there pointed out that once the motorist is dead his property is in the custody of the state of his residence, and it is the province of the legislature of that state to prescribe what courts have jurisdiction in regard thereto.

The personal representative being subject to jurisdiction only of the state appointing him, it has been pointed out that the only practical way to make the representative subject to statutes such as the Iowa provision is for the appointing state to consent to such jurisdiction.[75] As a matter of policy such extension of the nonresident motorist statutes seems desirable; the plaintiff's need for the aid of such a statute is just as great as if the nonresident motorist had survived. If a trend develops toward enacting statutes covering representatives of deceased nonresident motorists and consenting to sister states' statutes applying to personal representatives appointed by each state, it would appear desirable that California do likewise. However, in view of the present questionable status of any such extension of the nonresident motorist statute, it would seem undesirable to make any immediate change. The solution appears to be uniform action by the several states.

d. *Minors.*

Section 411 of the Code of Civil Procedure,[76] governing service of process on minors, reads as follows:

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[70] Note (1948) 61 HARV. L. REV. 355.

[71] Donnelly v. Carpenter (1936) 55 Ohio App. 463, 9 N. E. (2d) 888.

[72] (1943) 205 Ark. 792, 171 S.W. (2d) 287.

[73] Knoop v. Anderson (N. D. Iowa, 1947) 71 Fed. Supp. 832.

[74] IOWA CODE §§ 321.498-321.504 (1946).

[75] Note (1948) 61 HARV. L. REV. 355; Note (1948) 57 YALE L. J. 647.

[76] See Akley v. Bassett (1922) 189 Cal. 625, 209 Pac. 576; Pacific Coast Bank v. Clausen (1937) 8 Cal. (2d) 364, 65 P. (2d) 352.

> The summons must be served by delivering a copy thereof as follows: ... (3) If against a minor, under the age of 14 years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

The section contains several obvious defects. First, it does not seem necessary to serve the minor under the age of 14 at all. Service upon the mother, father, or guardian would satisfy the requirements of fair notice; dispensing with service upon the minor would be dispensing with a mere formality. It may be argued that service upon the minor is necessary to protect him where a substantial adverse interest exists in the parent or guardian, but it is believed that even in this situation the aid to the infant is largely illusory.

Secondly, why should the requirement of service on the mother, father, or guardian be dispensed with at the age of 14? It would be logical to continue the requirement at least until the minor reaches the age of 18. Since the importance and significance of the summons may not be realized by a child of high school age, a person of greater maturity should also be served.[77]

If no father, mother, or guardian is within the state, section 411 (3) permits service to be made on a person with whom the minor resides. Under this section it would seem that service could be accomplished by serving the minor himself plus another child with whom he resides. This is obviously inadequate; the section should be amended to permit such service only when the person with whom the minor resides is 18 years of age or over.[78]

e. *Mental Incompetents.*

Section 411 (4) of the Code of Civil Procedure is the major provision relating to service of process upon mental incompetents. The section provides for serving those judicially declared to be of unsound mind or incapable of carrying on their own affairs, and for whom a gnardian has been appointed, by serving them personally and also serving the guardian.

Originally, only service upon the appointed guardian was required.[79] This was inadequate, but the present section merely adds a formal requirement of dubious necessity. Service upon the incompetent may, to a degree, protect him from the depredations of a scheming guardian, but judicial supervision of the guardian rather than delivery

[77] N. Y. Civ. Prac. Act § 225 (1) (1939) remedies both of these defects.

[78] Fed. R. Civ. P. 4(d) (2) incorporates whatever defects the various state laws have on this point by providing for service on minors according to the law of the state in which service is to be made.

[79] Sacto. Savings Bank v. Spencer (1879) 53 Cal. 737.

of papers to the incompetent seems a more efficacious safeguard against this danger.

The defects of the original law and the present law are identical.[80] The law speaks of persons who have been *judicially declared* to be of unsound mind and for whom a guardian has been appointed. No provision is made for persons known to be of unsound mind who have not been judicially so declared, or for those who have been declared to be of unsound mind but for whom no guardian has been appointed. Furthermore, there is no provision in the California law for alcoholics and persons who, although not of unsound mind, are notoriously incompetent in fact.

Therefore, it would seem that section 411 (4) is adequate for the special group that it covers, but that a section similar to section 226 of the New York Civil Practice Act[81] should be enacted to cover the other groups not now included in the California statute.

II. SERVICE ON PARTNERSHIPS

Subject to statutory exceptions, partnerships are not considered entities and thus are not subject to service of process. By the general rule, to acquire jurisdiction over partners each must be served in the manner prescribed for service upon an individual. Statutory provisions, however, considerably cut into this general rule in California. By virtue of section 388 of the Code of Civil Procedure, business associations conducting an enterprise under a *common name* may be sued in that business name; service upon any one associate makes all the assets jointly held by the associates, and all the assets of the individual served, subject to any judgment in the action.

Partnerships domiciled outside California and having no regular place of business in the state, but which do business in the state, are required by Civil Code Section 2472 to file with the Secretary of State the name of an agent residing here for receipt of process against the partnership. In the absence of any such designation, the Secretary of State becomes agent for service of process. A 1947 amendment[82] to the section, requiring notification of the defendant by telegraph and mail in addition to service upon the Secretary of State, appears to make sufficient provision for notice to comply with due process.

Foreign partnerships issuing securities or acting as brokers or as investment counsel come within the special service of process pro-

[80] FED. R. CIV. P. 4(d) (2) incorporates these defects, since it adopts the law of the state of service in such matters.

[81] This section permits the court in its discretion to order the summons to be delivered to another person in addition to the defendant, where the court has grounds for belief that the defendant, for drunkenness or other cause, is incapable of adequately protecting his own rights, even though the defendant has not been judicially declared an incompetent. Even the New York statute fails to cover those defendants who have been judicially declared insane, but for whom no guardian has been appointed.

[82] Cal. Stats. 1947, p. 2581.

visions of the California Corporate Securities Act.[83] The Act requires such partnerships to designate the Commissioner of Corporations as agent for receipt of process in actions arising out of the issuance of securities, fraudulent sales of securities, or the conduct of its investment counsel business.

Virtually all partnerships may be served under section 388, as the only requirement is that the associates transact business under a common name. Since this substantially accepts the concept of a partnership as an entity, it may be desirable to eliminate even this condition and simply provide, as does New York,[84] that in a suit against a partnership service upon a partner authorizes a judgment binding all partnership assets and the separate property of the partner served. Business associations which are not partnerships but which do operate under a common name should remain subject to section 388 to facilitate service upon them.[85]

Colorado, in its Rules of Civil Procedure,[86] authorizes serving the partnership by serving a managing agent as an alternative to serving one of the partners. Such a provision seems desirable in that it facilitates service, especially where the organization served is a large one with dispersed offices and few partners. It is unlikely that there is any inadequacy of actual notice under such a provision; moreover, the procedure is analogous to the present California provisions regarding service upon the managing agent of a corporation.[87] For the simplification of our service system, it would be advantageous to have substantially the same procedure available to serve any business enterprise, regardless of the technical form it may take.

Regardless of substantive change, it would seem desirable to facilitate ready reference by incorporating section 2472 of the Civil Code and the process provisions of the Corporate Securities Act into the Code of Civil Procedure. As an alternative, cross reference to these other provisions might be made in the Code of Civil Procedure.

III. SERVICE ON CORPORATIONS

a. *Domestic Corporations.*

The basic provision governing service of process on domestic corporations is section 411 of the Code of Civil Procedure. As that sec-

[83] CAL. CORP. SEC. ACT §§ 3, 6, 9 (1917).

[84] N. Y. CIV. PRAC. ACT § 222(a) (1939).

[85] Jensen v. Hugh Evans and Co. (1941) 108 P. (2d) 93, *rev'd on other grounds*, 18 Cal. (2d) 290, 115 P. (2d) 471; Jardine v. Superior Court (1931) 213 Cal. 301, 2 P. (2d) 756 (Massachusetts or business trusts); Armstrong v. Superior Court (1916) 173 Cal. 341, 159 Pac. 1176 (labor unions).

[86] COLO. R. CIV. PROC. 4(e) (4) (1941).

[87] Foreign corporations: CAL. CORP. CODE § 6500; domestic corporations: CAL. CODE CIV. PROC. § 411.

tion existed prior to 1941 changes, it provided for service upon enumerated corporate officials.[88] As an alternative to serving one of these officials, it authorized service upon a corporation in accord with section 373 of the Civil Code. Under this latter section any domestic corporation[89] could, at its option, file a certificate with the Secretary of State designating an agent upon whom personal service could be made. Where a corporation had never filed a certificate and it appeared by affidavit that, after diligent search, personal service could not be made, section 373 authorized issuance of a court order for service upon the Secretary of State or upon an assistant or deputy in his office.[90]

One obvious defect in this system was the absence of provision for service upon the Secretary of State in case the corporation had filed a certificate and neither the agent therein designated nor the officials enumerated in section 411 of the Code of Civil Procedure could be found within the state.[91] The ouly method of service left to a plaintiff in this situation was the slow and expensive service by publication.[92]

Major changes in the statutes governing service upon corporations were made in 1941.[93] Personal service upon corporate officials without consent of the corporation was largely abolished. A corporation had the option of filing with the Secretary of State a certificate enumerating corporation officers and an agent, all of whom were then subject to personal service. If no certificate was filed or if the persons named in a certificate could not be found, service could be made only by serving the Secretary of State.

One aim of the changes, avoiding the need for service by publication,[94] was thereby accomplished. However, under these changes, where a certificate was not filed by a corporation the plaintiff could not serve its officials, who may have been just next door. An obvious disadvantage of this new system lay in the fact that after service upon

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88 CAL. CODE CIV. PROC. § 411(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 such corporation is a bank, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof."

89 The section expressly excluded, however, a bank, trust company, insurance company, or corporation subject to jurisdiction of the Railroad Commission.

90 Howell, *The Work of the 1941 California Legislature* (1941) 15 So. CALIF. L. REV. 1.

91 This difficulty existed only with respect to domestic corporations, as the phrasing of CAL. CIV. CODE § 406(a), covering foreign corporations, allowed service upon the Secretary of State if the agent named in the certificate could not be located. Howell, *The Work of the 1941 California Legislature, supra* note 90.

92 CAL. CODE CIV. PROC. § 412.

93 Cal. Stats. 1941, p. 3088.

94 Peek, *Important Changes in Law Regarding Serving of Process on Corporations* (1941) 16 CALIF. S. B. J. 255.

the Secretary of State, the defendant had 30 days in which to answer[95] instead of, in some cases, only 10 days.[96] Upon the grounds that they did not provide the notice to defendant required by due process and that they gave a foreign corporation greater rights than those enjoyed by a domestic corporation, the 1941 provisions were held to violate both the federal and state constitutions.[97]

In 1943 the legislature repealed the 1941 provisions and reenacted the pre-1941 provisions.[98] Since that date they have remained substantially unchanged. With the enactment of the Corporations Code in 1947,[99] the provisions of section 373 of the Civil Code were transferred to the Corporations Code, appearing as sections 3300-3304. One ambiguity in the old Civil Code provision was the manner of service required in serving the Secretary of State. In *Tunstock v. Estate Development Corporation*[100] the section was construed to require manual delivery. While this would seem unnecessarily inconvenient, and has led to practical circumvention,[101] this interpretation is confirmed by the Corporations Code,[102] where "delivery by hand" is specifically called for.

Thus the present law initially calls for personal service on corporate officials.[103] If this is impossible, service by delivery to the Secretary of State is authorized when serving corporations other than those enumerated in section 3304 of the Corporations Code.[104]

Without cross reference in the Code of Civil Procedure or in the Corporations Code, service of process provisions covering domestic corporations are also set forth in the Insurance Code[105] and the Business and Professions Code.[106] Some of these provisions, from their wording, appear to be merely alternative means of service upon certain types of corporations;[107] one provision, however, appears to give an exclusive means of serving one type of corporation.[108] No judicial con-

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95 CAL. CIV. CODE § 373.

96 CAL. CODE CIV. PROC. § 407.

97 Watts v. D. & B. Oil Co. (1944) 63 Cal. App. (2d) 742, 147 P. (2d) 666; Bruhnke v. Golden West Wineries (1942) 56 Cal. App. (2d) 943, 132 P. (2d) 102 (App. Dept. Sup. Ct.).

98 Cal. Stats. 1943, p. 1053.

99 Cal. Stats. 1947, p. 2309.

100 (1943) 22 Cal. (2d) 205, 138 P. (2d) 1; Note (1943) 31 CALIF. L. REV. 449.

101 *Ibid.* The circumvention is accomplished by mailing the summons to the Secretary of State's office where an employee would make the personal service.

102 CAL. CORP. CODE § 3302.

103 CAL. CODE CIV. PROC. § 411.

104 Banks, trust companies, insurance companies, and corporations subject to jurisdiction of the Public Utilities Commission.

105 CAL. INS. CODE §§ 11090-11094, 1323.

106 CAL. BUS. AND PROF. CODE § 16370.

107 CAL. INS. CODE § 1323, CAL. BUS. AND PROF. CODE § 16370.

108 CAL. INS. CODE § 11092 (mutual benefit societies).

struction of these provisions has been found, and legislative clarification regarding the applicability of these sections seems desirable.

With the 1943 amendments California appears to possess the usual provisions for service of process on domestic corporations. However, California allows service upon the Secretary of State only if personal service upon corporate officials cannot be made after diligent search,[109] while some states, such as New York, allow it initially as an alternative means of service.[110] The California provision on this point seems more desirable, as the method of service giving the most adequate notice should first be attempted before alternative methods are allowed.[111]

California's provisions regarding service upon domestic corporations appear adequate in substance. The major improvement to be suggested is one of draftsmanship—the consolidation of all provisions regarding service of process into the Code of Civil Procedure. As an alternative and minimum requirement, cross reference should be made in section 411 of the Code of Civil Procedure to sections in other codes which give exclusive or alternative provisions for service in special situations. The references in section 411 of the Code of Civil Procedure to the service of process provisions contained in the Corporations Code are a good example of cross reference as is here suggested.

b. *Foreign Corporations.*

If the foreign corporation consents to process by the appointment of an agent for service of process, there is no problem as to the jurisdiction of the California courts to render personal judgments against the corporation. Section 6403 of the Corporations Code provides for filing with the Secretary of State a statement designating an agent for service of process. Section 6502 provides for serving the corporation by serving the Secretary of State if the statement required by Section 6403 has not been filed. Under the latter section the problem of jurisdiction to render a personal judgment does arise.[112] Several successive bases for jurisdiction have been developed by the United States Supreme Court over the years. Originally, the theory was that

[109] CAL. CODE CIV. PROC. § 411(1).

[110] N. Y. CIV. PRAC. ACT § 228(8), (9), (1939); Midvale Paper Board Co. v. Cup Craft Paper Corp. (1940) 73 Misc. 786, 19 N. Y. S. (2d) 135.

[111] Provision is made in Delaware, by DEL. REV. CODE (1935) § 2080, for leaving copies of process at the abode of the president of a corporation as a means of service. Such a provision seems unnecessary in California, in view of the list of corporate officials upon whom service can be made under CAL. CODE CIV. PROC. § 411(1), and the fact that such a system is not presently allowed in actions against individuals in this state under CAL. CODE CIV. PROC. § 411(8).

[112] Eulette, *Service of Process Upon Foreign Corporations—Constitutional Limitations Imposed by Judicial Construction of the Due Process Clause* (1942) 20 CHI.-KENT L. REV. 287; McBaine, *Jurisdiction over Foreign Corporations: Actions Arising Out of Acts Done Within the State* (1946) 34 CALIF. L. REV. 331.

the foreign corporation could be sued only in the state which created it.[113] Later, jurisdiction could be based upon implied consent. For example, a statute could provide that a company, by putting an agent in the state, consented to service of process upon him.[114] Then the "presence" test came into being.[115] Under this test a personal judgment cannot be rendered against a foreign corporation, in the absence of consent, unless "it is doing business within the state in such manner and to such [an] extent as to warrant the inference that it is present there."[116] This test has been applied by the California Courts.[117] Recently, however, in the *International Shoe* case,[118] the Supreme Court apparently formulated a new basis for jurisdiction with its statement that the demands of due process are met "by such contacts of the corporation with the state of the Forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[119]

Admittedly, the "presence" test is unsatisfactory in view of the lack of predictability and certainty[120] that it entails. However, the new test is no improvement in that respect, since it has added an element of vagueness to confuse the problem further. A recently suggested test[121] seems preferable. Under this test, courts have jurisdiction in actions against foreign corporations where the suit is based upon acts done by the corporation within the state,[122] provided due notice is given. This test does not conflict with any past decisions of the United States Supreme Court. A recent decision[123] in California indicated, however, that the *International Shoe* case[124] is considered to be merely an example of the "presence" test, and that this test still controls in California.

California provides for different methods of service on domestic and foreign corporations, contrary to many states which have identical provisions for service on both types. The main provisions of our

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113 Bank of Augusta v. Earle (1839) 38 U. S. 517.

114 LaFayette Ins. Co. v. French (1855) 59 U. S. 404.

115 Philadelphia and Reading Railway Co. v. McKibbin (1916) 243 U. S. 264.

116 *Id.* at 265.

117 West Publishing Co. v. Superior Court (1942) 20 Cal. (2d) 720, 128 P. (2d) 777; Oro Navigation Co. v. Superior Court (1947) 82 Cal. App. (2d) 884, 187 P. (2d) 444.

118 International Shoe Co. v. State of Washington (1945) 326 U. S. 310.

119 *Id.* at 317.

120 Note (1943) 31 CALIF. L. REV. 337.

121 McBaine, *Jurisdiction over Foreign Corporations: Actions Arising Out of Acts Done Within the State, supra* note 112 at 336.

122 The International Shoe Co. rule apparently applies to actions arising out of acts done both within and without the state. Note that the California statutes, except for CAL. CORP. CODE § 6504, are not limited to actions arising out of acts done within the state.

123 Oro Navigation Co. v. Superior Court, *supra* note 117.

124 *Supra* note 118.

law are to be found in the Corporations Code, sections 6500-6504, with section 411 (2) of the Code of Civil Procedure serving as a cross reference only.

Section 6500[125] provides that process directed to any foreign corporation may be served on the person designated, as required by section 6403, as its agent for service of process or on certain officers of the corporation. Neither this section nor section 6403 is limited to actions arising out of business transacted in this state.[126] This provision appears to be adequate, and only one change is here suggested. The group of officers[127] who may receive service for the corporation should be broadened, as has been done in New York[128] and Colorado.[129]

Section 6501[130] provides that where neither the officers of the corporation nor the designated agent can be found after diligent search, service may be made by delivery of process to the Secretary of State. The last paragraph of this section, concerning proof of diligent search, allows the plaintiff the option of serving the Secretary of State either without an order of the court finding that due diligence has been exercised, or after obtaining such an order. If the plaintiff takes the former course, he runs the risk of later being unable to show diligence when the service is attacked. Furthermore, the defendant corporation is presented with an opportunity for a delaying action by an attack

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125 CAL. CORP. CODE § 6500: "Process directed to any foreign corporation may be served upon the corporation by delivering a copy to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or the cashier or assistant cashier of a bank.

A copy of the designation, certified by the Secretary of State, is sufficient evidence of the appointment of an agent for the service of process."

126 See WIS. STAT. § 262.09 (1943).

127 See Stevens v. Suburban Fruit Lands Co. (1930) 109 Cal. App. 120, 292 Pac. 699, stating that it is not necessary for the designated agent to be an employee or officer of the corporation.

128 N. Y. CIV. PRAC. ACT § 229 (1939).

129 COLO. R. CIV. PROC. 4(e) (5) (1941). The Colorado provision goes further than appears desirable by authorizing service on any stockholder if corporate officials cannot be found.

130 CAL. CORP. CODE § 6501: "If the agent for the service of process designated cannot be found with due diligence at the address given, or if the agent designated is no longer authorized to act, or if no person has been designated and if no one of the officers or agents of the corporation specified in section 6500 can be found after diligent search, then service shall be made by delivery to the Secretary of State or to an assistant or deputy Secretary of State.

The making and filing of an affidavit in the action or proceeding showing what effort was made or action taken to comply with the requirement of due diligence or diligent search, and the making of an order of the court in which the action or proceeding is pending finding that due diligence or diligent search has been exercised and directing service of summons as provided in this section, is sufficient proof of the fact of the exercise of due diligence or diligent search."

upon the thoroughness of plaintiff's search. Therefore it would be advisable for plaintiffs to file affidavits and obtain the court order.[131]

Section 6502[132] allows service on the corporation by delivery of the summons, the complaint, and the defendant's address to the Secretary of State when the corporation has not filed a statement designating an agent. Use of this section is, of course, limited by the due process clause. Section 6502 contains two defects which should be remedied. First, it is uncertain from the wording whether or not the plaintiff must, as a condition precedent to making service under this section, first attempt to serve the officers enumerated in section 6500. Second, while the section requires the Secretary of State to mail a copy of the process to the defendant, nothing is said about the correctness of the address which is to be furnished by the plaintiff, and there is no requirement of a return receipt.

Section 6504[133] deals with corporations which have transacted intra-state business in California and then have withdrawn. The statute is a desirable one and no change is recommended in the present wording. Section 6504 has been upheld by the California courts,[134] and a similar statute has been upheld by the United States Supreme Court.[135] It should be noted that the section is limited to actions arising out of business transacted in this state.[136]

The California law is further complicated by statutes concerning service of process on foreign corporations which appear in the Insurance Code,[137] the Bank Act,[138] the Corporate Securities Act, [139] the

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131 Note (1937) 11 So. CALIF. L. REV. 9.

132 CAL. CORP. CODE § 6502: "If the corporation to be served has not filed with the Secretary of State the statement required by Section 6403, the person desiring to make such service shall deliver to the Secretary of State a statement of the address of the corporation to which notice, and a copy of the process shall be sent. Upon receipt of the process and his fee therefor the Secretary of State forthwith shall give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the State, of the service of the process, and shall forward to each office by registered mail, a copy of the process. If he has no record of the corporation or its offices, then the notice shall be telegraphed and the copy shall be mailed to the corporation at the address given in the statement delivered to the Secretary of State at the time of service."

133 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 in this chapter in any action brought in this State arising out of such business, whether or not it has ever complied with the requirements of Chapter 3 of this part."

134 Oro Navigation Co. v. Superior Court, *supra* note 117.

135 Washington v. Superior Court (1933) 289 U. S. 361. The statute covers an action brought in the federal courts in this state. Giusti v. Pyrotechnic Industries Inc. (C. C. A. 9th 1946) 156 F. (2d) 351.

136 For a complete discussion of the point, see Evans, *Service on Foreign Corporations After Withdrawal From the State* (1944) 42 MICH. L. REV. 631.

137 CAL. INS. CODE §§ 1600, 1604, 1605.

138 CAL. BANK ACT § 7 (1909).

139 CAL. CORP. SEC. ACT §§ 3, 6, 9 (1917).

Vehicle Code[140] and the Business and Professions Code.[141] Most of these sections concern the appointment of a state official as agent for service of process. The question arises whether these provisions are intended to set up alternative or exclusive methods of service. In either event they should be moved to the proper place in the Corporations Code or placed in section 411 of the Code of Civil Procedure.[142]

Another complicating factor arises from language found in section 412 of the Code of Civil Procedure,[143] providing for constructive service on foreign and domestic corporations if the corporation "has no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State." Opposed to this, section 6501 of the Corporations Code[144] states that the Secretary of State can be served in all cases where the officers of the corporation cannot be found. It is very questionable, in view of the latter section, whether the constructive service authorized by section 412 would be permitted. If not, the misleading language of section 412 should be deleted.

c. *Municipal and Public Corporations.*

Section 411 of the Code of Civil Procedure contains what little statutory provision there is in California regarding service on municipal or public corporations. Subdivision 5[145] of this section provides for service upon a county, city or town, and subdivision 7[146] provides for service upon state boards or commissions, which are comparable organizations as far as service of process is concerned. Once again the California law is inadequate, and amendment is needed. *Gould v. Richmond School District*[147] illustrates the inadequacy; there the district court of appeal held that service of process on the president of a school board was not sufficient to give the lower court jurisdiction over the school district. In the absence of specific statutory provision, the court required all members of the board to be served, surely not a sensible result.

There does not seem to be any provision in the California statutes relating to service on such public corporations as school districts, irrigation districts, reclamation districts, and the like. The *Gould* case indicates the wisdom of making definite provision for them in the

140 CAL. VEH. CODE § 404 arguably applies to foreigu corporations.

141 CAL. BUS. AND PROF. CODE § 16370.

142 WIS. STAT. §262.09 (1943) is an example of a very complete statute.

143 *Supra* note 39.

144 *Supra* note 130.

145 CAL. CODE CIV. PROC. § 411 (5): "If against a county, city or town: To the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof."

146 CAL. CODE CIV. PROC. § 411 (7): "In an action or proceeding authorized by law against a state hoard or commission, to the president, chairman, or other head of or to the secretary of said board or commission."

147 (1943) 58 Cal. App. (2d) 497, 136 P. (2d) 864.