Personal Jurisdiction over Absent Natural Persons

W. P. Clancey Jr.
PERSONAL JURISDICTION OVER ABSENT
NATURAL PERSONS

This Comment will present an examination of the foundations of in personam
jurisdiction over absent natural persons as exemplified by sections 412, 413, and
417 of the California Code of Civil Procedure. Jurisdictional problems involving
absent residents and nonresidents in domestic and foreign causes of action, im-
plicitly covered by these code sections, will be discussed against a background of
policy considerations and constitutional limitations.

California Statutory Bases and Historical Development

Section 412 authorizes a court to order service of summons by publication upon,
inter alia:

(1) Persons residing outside the state.
(2) Persons who have departed from the state.
(3) Persons who cannot, after due diligence, be found within the state.
(4) Persons who conceal themselves to avoid service of summons.

This section, however, makes no distinction between domestic and foreign causes
of action; ostensibly, it is not limited to any particular type of cause of action,
e.g., in personam, in rem, or quasi in rem. Therefore it would seem to apply equally
to all of them. Furthermore, it contains no requirement that either plaintiff or
defendant have any connection whatsoever with California when the action is
brought therein.

Section 413 prescribes the place and time of publication with particular re-
quirements for those defendants who reside out of the state or are absent from it.

1 Jurisdiction attaches from the time of service of the summons and complaint, or of com-
pletion of publication when service by publication is ordered. CAL. CODE CIV. PROC. § 416. This,
however, does not necessarily convey the power to render a personal judgment. See Comment,
40 CALIF. L. REV. 156 (1952). For convenience, the term “personal jurisdiction” as hereinafter
used implies that power. Excluded from the scope of this inquiry are jurisdictional problems
involving corporations, partnerships, individuals where they have waived service of process,
appeared, or have been served within the state, and actions in rem and quasi in rem.

2 See, in general, Ehrenzweig & Mills, Personal Service Outside the State, 41 CALIF.
L. REV. 383 (1953); Comment, 37 CALIF. L. REV. 80 (1949).

3 The meanings attached to the terms “personal,” “constructive,” “published” and “sub-
stituted” service are so varied that individual statutes must be examined. For the purpose of
this inquiry, the terms will be used as follows: “Personal service” is actual service of process
upon the defendant in person wherever accomplished; “constructive service” is service by news-
paper publication; “substituted service” is service upon a member of the defendant’s family at
his abode. “Service by mail” will be referred to as such.

4 CAL. CODE CIV. PROC. § 412 also provides for service of process upon corporations having
no officer or person upon whom summons may be served. In general, to obtain the order of
publication, plaintiff must show by affidavit, and to the satisfaction of the court, the existence
of one of the above disjunctive categories. Further he must allege by the affidavit, or verified
complaint, that a cause of action exists against such defendant, or that the latter is a necessary
or proper party to the action, or that the action is related to or the subject of personal or real
property within the state to which the defendant has or claims a lien or interest. The statute

5 The details of the publication required differ depending upon the whereabouts of the
defendant. Thus if he is within the state, the procedure in section 413 is followed. For those
defendants who reside out of the state, or are absent from it, publication requirements are found
in CAL. GOV’T CODE §§ 6060-66 with the exception of actions of forcible entry and detainer
found in CAL. CODE CIV. PROC. § 350. Where the residence of a nonresident or absent defendant
is known, a copy of the summons and complaint must be mailed to that address.
Under this section personal service upon the defendant outside the state, after publication has been ordered, is deemed equivalent to such publication.\(^6\)

Sections 412 and 413, substantially similar in content to section 27 of the 1850 Practice Act\(^7\) and sections 30 and 31 of the 1851 Practice Act,\(^8\) were seldom used in personal actions against absent defendants prior to 1877.\(^9\) The impact of the leading case of *Pennoyer v. Neff*,\(^10\) decided in that year, virtually precluded such use of these code sections in California. In the *Pennoyer* case a personal judgment against an absent nonresident, served by publication, was held void. Personal jurisdiction, to the *Pennoyer* court, consisted of two distinct elements: (1) physical power over the defendant, and (2) fair notice to him. Unless the defendant were served with process within the state no personal jurisdiction could be obtained over him, fair notice notwithstanding.

Although it has been suggested that the physical power doctrine as propounded in *Pennoyer* was not in fact attributable to the common law background previously claimed, and that evasions have literally negated the rule,\(^11\) the effect of *Pennoyer* in California was substantial. Although first reflected in 1879,\(^12\) the physical power concept became firmly entrenched by the famous *De La Montanya*\(^13\) case, where the court, relying heavily on *Pennoyer v. Neff*, held invalid a personal judgment rendered against an absent domiciliary who had been served with process by publication.

A major departure from the physical power theory was signalled by two cases which involved state attempts to extend personal jurisdiction to nonresident motorists whose wrongful operation of motor vehicles within the state gave rise to a cause of action therein. In *Kane v. New Jersey*\(^14\) the United States Supreme Court upheld a statute which required the nonresident motorist’s express consent to the appointment of a statutory official as an agent for service of process emanating from such a cause of action. *Hess v. Pawloski*\(^15\) went one step further: the nonresident motorist impliedly consented to such an appointment merely by driving his vehicle within the state. The *Hess* court very nimbly hurdled the two *Pennoyer* requirements: fair notice was accomplished by registered mail service to the defendant, and the act of substituted service upon a statutory agent—a patently fictitious stratagem\(^16\)—represented a gesture of deference to the physical power doctrine.

---


\(^{7}\) Cal. Stat. 1849-1850, § 27.


\(^{10}\) 95 U.S. 714 (1877).


\(^{12}\) Belcher v. Chambers, 53 Cal. 635 (1879).

\(^{13}\) De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896). The case is readily distinguishable from *Pennoyer*. The defendant was domiciled in California, he purposely fled the state to avoid service of process, and he was notified by mail while abroad. The court, in a four to three decision, chose to reject these distinctions.

\(^{14}\) 242 U.S. 160 (1916).

\(^{15}\) 274 U.S. 352 (1927).

\(^{16}\) This is a most extraordinary form of agency. Most motorists are probably unaware that they have “consented” to the appointment of a statutory “agent,” and the latter does not know the identity of his “principal” until a cause of action arises and he receives process. Furthermore under many statutes the “agent” is not required to notify his “principal,” this duty devolving upon the plaintiff. For example, Cal. Veh. Code § 404 does not require the Director of Motor Vehicles, the statutory agent, to notify the defendant of the action. Presumably the Director can fashion paper dolls from the papers if he feels so inclined.
In 1935 California enacted a nonresident motorist statute. But even in this limited area, the distinction between the absent nonresident and the absent resident was ridiculous. The former was amenable to suit under the statute; the latter was not covered by the statute and enjoyed immunity from service of process upon departing the state. Fortunately this discrepancy has recently been corrected by legislation and in this situation absent residents and nonresidents now stand on a similar footing.

Nevertheless, the logical inconsistency posed by Pennoyer and Hess remained: the basis of personal jurisdiction over absent defendants was physical power, unless the defendant was a nonresident motorist, in which case the act done within the forum and not service of process therein was the basis.

Although not reconciling this theoretical conflict, the Supreme Court broke through the physical power barrier in Milliken v. Meyer. A personal judgment was upheld against an absent defendant domiciled in Wyoming both when the action was commenced there against him and when he was personally served in Colorado. The court also significantly stated in dictum that substituted service in such a situation would meet due process requirements if "reasonably calculated to give [the defendant] ... actual notice of the proceedings and an opportunity to be heard."

The premise of the so-called "yoyo" theory of jurisdiction enunciated in Milliken was that domicile evidenced a sufficiently substantial relationship with the state to justify its extra-territorial service of process. The Milliken case did not discuss whether the cause of action there involved was of domestic or foreign origin. Therefore, while it would not be unreasonable to infer that the cause of action arose in Colorado, the lack of attention to the point would render hazardous an attempt to use the case as authority for extra-territorial service of process upon an absent domiciliary in a foreign cause of action.

Notwithstanding the retreat from physical power in Milliken v. Meyer, a California district court of appeal intimated by dictum in 1945 that the vigor of De La Montanya had not been impaired by Milliken. At that time the nonresident motorist statute remained the principal exception to the De La Montanya rule. Section 417 of the California Code of Civil Procedure was enacted in 1951 for the purpose of correcting this dictum and to thus bring California law within the reasoning of the Milliken case. Under this section, the plaintiff can bring a personal action against an absent defendant by:

19 311 U.S. 457 (1940).
20 Id. at 463.
21 Pinon v. Pollard, 69 Cal. App. 2d 129, 131, 158 P.2d 254, 256 (1945): "It is appellant's contention that since the affidavits, etc., show that respondent was a resident of California although absent from the state, he could be served by the procedure adopted. [Personal service outside the state] Milliken [sic] v. Meyer [citations omitted] is cited as authority in support of this argument ... Assuming for a moment that plaintiff was correct in asserting that defendant was a resident of California, [the court in this case determined that defendant was not] he cannot prevail because of the case of De La Montanya v. De La Montanya ... ."
(1) obtaining an order of publication of summons in compliance with sections 412 and 413;
(2) effecting personal service upon the defendant; and
(3) establishing that the defendant was a resident of California either when the 
action was commenced or when the defendant was served with process.

There are four particular features of this section: it apparently applies to both 
domestic and foreign causes of action, it is not limited to any particular types of 
causes of action, it requires personal service, and the fact that the defendant is 
a resident of another state when personally served is immaterial if he was a resi-
dent of California when the action against him was commenced.

This latter problem, that of the former resident, is one of two which have been 
litigated under section 417. In Allen v. Superior Court the California supreme 
court unanimously upheld the constitutionality of section 417 when applied to a 
defendant who was residing in California when the action was commenced, but 
who was a resident of Oregon when personally served. The Allen case is thus distin-
guishable from Milliken v. Meyer, where the defendant was a resident of 
Wyoming both when personally served in Colorado and when the action in Wy-
oming was commenced against him. Hence, the ultimate constitutionality of that 
disjunctive portion of section 417 which bases jurisdiction upon residence at the 
time of commencement of the action, remains conjectural. Also completely un-
resolved is the constitutionality of that part of section 417 which predicates per-
sonal jurisdiction upon residence only at the time of service of process.

A third possible basis for jurisdiction was suggested by a recently proposed 
amendment to section 417. The amendment, which failed of enactment, at-
ttempted to add residence at the time when the cause of action arose as another 
basis for personal jurisdiction. Would such a provision have been constitutional?

A second problem under section 417 was raised in the case of Smith v. Smith: 
27 does residence as used in section 417 mean residence in fact, or domicile?28 The

23 There is no general statutory provision for substituted service in California. See note 32 infra. The following language from a report of the Committee on Administration of Justice, California State Bar Association suggests why section 417 contains the mandatory personal service requirement: "The Committee also feels there is some danger that the courts of this State [California] may disregard the opinion in the case of Pinon v. Pollard . . . and follow the decision of the United States Supreme Court in Milliken v. Meyer . . . and sustain a personal judgment on less than the requirements in the proposed section 417." Note, 23 CALIF. S.B.J. 196 (1948).
24 Though the only cases applying section 417 thus far have been general alimony and motor vehicle cases, neither the terms of the statute nor judicial interpretation have so limited the scope of section 417. See, e.g., Smith v. Smith, 45 Cal. 2d 235, 288 P.2d 497 (1955). The possible scope of section 417 is analyzed in Ehrenzweig & Mills, Personal Service Outside the State, 41 CALIF. L. REV. 383 (1953).
28 The weight of authority holds that domicile, as distinguished from residence, is a suf-
cient basis for personal jurisdiction over non-consenting, absent defendants when they are properly notified of the action. Milliken v. Meyer, 311 U.S. 457 (1940); RESTATEMENT, CON-
California supreme court unanimously decided that the term "resident" is to be interpreted as "domicile," thus following the language of *Milliken v. Meyer*.

**Absent Resident: Domestic Cause of Action**

Apart from limited statutory exceptions, in pursuing the absent resident on a domestic cause of action the plaintiff is presently required to obtain an order of publication, establish that the defendant was domiciled in California either when the action was commenced, or when served, and effect personal service upon the defendant. The requirements of the order of publication and personal service are not constitutionally mandatory. Therefore their modification entails primarily policy considerations. Essentially the policy problem involves striking a balance between the interests of the plaintiff with a legitimate claim and, within constitutional limits, assuring the absent resident that the most reasonable form of service will be employed to inform him of the action against him.

California does not have a general statute authorizing service of process upon a defendant by leaving a copy of the summons and complaint at his abode with a member of his family. With the exception of a form of substituted service provided by statute in particular circumstances, personal service of process is required. The reluctance to employ substituted service generally may be partially responsible for the personal service requirement of section 417; it was probably suspected that were substituted service permitted to infiltrate through section 417, it might spread to domestic use as well.

Undoubtedly personal service, either within or outside the state, affords the defendant the greatest degree of protection; therefore it should remain the preferable form of service. It is believed, however, that it should not be the exclusive method, especially in circumstances which would unduly penalize the plaintiff. The defendant who leaves the state temporarily and in good faith and is amenable, with reasonable effort, to personal service while absent certainly seems entitled to that protection as a matter of policy although he could not demand it constitutionally.

But what about the defendant who leaves the state intent upon avoiding service of process? Does he merit similar solicitude? It is believed that he does not.

---

**XIICT OF LAWS, §§ 47, 79 (1934); RESTATEMENT, JUDGMENTS § 16 (1942).** However, residence, when not used synonymously with domicile, is not generally regarded as sufficient. RESTATEMENT, JUDGMENTS § 16 (1942); BIALE, CONFLICT OF LAWS 102, 114 (1935); GOODRICH, CONFLICT OF LAWS 192-94, n.101 (3d ed. 1949); REESE & GREEN, THAT ELUSIVE WORD, "RESIDENCE," 6 VAND. L. REV. 561, 569 (1953); Note, 4 SYRACUSE L. REV. 339 (1952). But see Myrick v. Superior Court, 41 Cal. 2d 519, 261 P.2d 255 (1953); Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 87-89 (1942); Ehrenzweig and Mills, Personal Service Outside the State, 41 CALIF. L. REV. 383 (1953).

One of the principle objections to the term "residence" is its highly amphibolic character. Its meaning must be individually examined in the context of the statute in which it is used. One of the least helpful definitions of "residence" may be found in CAL. INS. CODE § 30: "Resident' means residing in this State, 'non-resident' means not residing in this State.

---

20 See, e.g., CAL. VEH. CODE § 404.1, discussed at note 18 supra; also statutory designation of agent for service of process provisions may be found in CAL. BUS. & PROF. CODE § 16570 (itinerant merchants); CAL. LABOR CODE § 1621 (registered mail service upon departed employment agency licensee).

21 See note 20 infra.

22 CAL. CODE CIV. PROC. § 411.

23 See note 21 supra.
He certainly does not have the advantage of either personal or substituted service if he hides himself within the state to avoid service of process; he can be effectively reached by publication of summons. Yet if the defendant makes his inaccessibility more effective by leaving the state, he gains the additional protection of personal service. A premium, therefore, is placed upon fraudulent flight. This distinction in the form of notice employed for the debtor concealed within the state and that for the absconding debtor seems most unconvincing.

It is suggested that upon an adequate showing of fact that the absent resident cannot be personally served after reasonable effort an alternative form of service of process be authorized; thus the plaintiff could employ the standard form of substituted service by leaving a copy of the summons and complaint at the defendant's abode with a member of his family. Whereas this procedure might resolve most problems pertaining to service of process on the absconding resident, the plaintiff might occasionally encounter members of his family who are no more inclined to accept service of process than the defendant. The New York Civil Practice Act handles this situation by permitting the posting of a copy of process at the abode, and then directing a copy to the defendant by registered mail.

In any event, if personal service is retained either as mandatory or preferable, the order of publication of summons under sections 412 and 413 seems superfluous and could be discarded. Through personal service the defendant obtains as much protection as the defendant within the state, to whom sections 412 and 413 are inapplicable. Were substituted service and registered mail service authorized—in the limited circumstances suggested—the order for publication could be eliminated also.

The use of the publication requirement might be retained as a basis for published summons upon the absconding resident who departs the state leaving no abode, family, or forwarding address. Personal, substituted, and registered mail service would probably be unavailing. This situation poses a major constitutional problem: can service of summons by publication upon an absent resident support a personal judgment? It has been suggested that it cannot. However, when the defendant has fled fraudulently and no other form of service of process is available, could publication, as a last resort, meet due process requirements? If not, it would seem that the plaintiff would be unduly burdened and the defendant permitted the advantage of a windfall gained through his own undesirable conduct. Moth-balling the plaintiff's claim by tolling the statute of limitations in his behalf might actually work to the defendant's advantage as the claim grows progressively stale through the years. Might it not be more equitable to authorize the action based upon the necessity of published summons and then permit the defendant a

---

85 N.Y. CIV. PRAC. ACT § 231.
30 Milliken v. Meyer, 311 U.S. 457, 463 (1940); McDonald v. Mabee, 243 U.S. 90, 92 (1917). However, in the latter case, substituted service at the defendant's abode was available but not employed. Therefore, it could not be said that publication was the only reasonable method of service.
87 See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Fraser, Jurisdiction by Necessity—An Analysis of the Mullane Case, 100 U. PA. L. Rev. 305 (1951). Skala v. Brockman, 109 Neb. 259, 190 N.W. 860 (1922) squarely upheld a personal judgment against an absent resident who had departed to avoid his obligations, and who had been served by published summons. See Spinnler v. Armstrong, 63 S.W.2d 1071 (Tex. Civ. App. 1933). See also RESTATEMENT, CONFLICTS OF LAWS § 75, comment e (1934); RESTATEMENT, JUDGMENTS § 16, comment b (1942).
reasonable period of time in which to move to set aside a default judgment upon a showing of good cause? If he has departed the state to avoid the claim, surely he cannot be heard to complain of surprise; and if he has a bona fide defense, he can be given an adequate period of time in which to assert it.

Absent Resident: Foreign Cause of Action

It has been noted that sections 412, 413 and 417 are not limited by their terms to the domestic cause of action. The California supreme court in the three cases arising under section 417 (all of which concerned domestic causes of action) has not mentioned any such restriction. Therefore, it is theoretically possible—after meeting the current domiciliary, order-of-publication, and personal service requirements—to bring a personal action against a departed resident when the cause of action arises in another state.

Assuming such an action constitutionally permissible, the order-of-publication and personal service requirements could be modified as previously suggested. But here the requirement that the defendant be domiciled in California when the action is commenced or when served is a salutary one. The "transient" rule of personal jurisdiction permits the plaintiff to play nationwide cops-and-robbers with the defendant, and often to the latter's distinct disadvantage. However, even the plaintiff may sustain some burdens in prosecuting his foreign cause of action in the foreign jurisdiction in which neither he nor the defendant is domiciled and which might not be best suited to determine the merits of the claim.

The oppressive burdens on the defendant would be aggravated even more were the plaintiff enabled to serve a nonresident defendant in a foreign jurisdiction on a foreign cause of action and compel the defendant to answer in California. It is precisely this which the present domiciliary requirement of section 417 prevents.

A substantial relationship between the defendant and the forum, if not domicile, is apparently required by due process. Indication of this is seen in recent cases wherein such a relationship with the jurisdiction was required before a foreign corporation could be compelled to respond in a personal action evolving from a foreign cause of action.

It is questionable that this objective was foremost in the legislative mind when section 417 was enacted; it might well be that the principal purpose of section 417 was to provide some access to the absconding resident, previously denied under the De La Montanya case. 42


40 If the plaintiff could not constitutionally litigate in California a foreign cause of action against an absent resident, it would seem a fortiori that he could not so litigate the foreign cause of action against the absent nonresident. If he could so proceed against the absent resident, it would not necessarily follow that he could likewise proceed against the absent nonresident.

41 Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) (The cause of action emanated outside Ohio where the action was brought by a nonresident plaintiff. Service of process was made on the corporation president. The court said that the defendant corporation had extensive activities in Ohio, and the courts of that state, therefore, could either accept or reject the action. The court placed emphasis on the fairness of bringing the action in Ohio.) Peters v. Robin Airlines, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953) (landing and departing from New York airfield was insufficient connection with that state to bring the action there for a cause of action arising in California). For comment, see Cleary and Seder, Extended Jurisdictional Bases for the Illinois Courts, 50 Nw. U.L. Rev. 599, 605 n.41 (1956); Peters v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 265 P.2d 130 (1953); Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal. App. 2d 495, 237 P.2d 397 (1951).
Absent Nonresident: Domestic Cause of Action

It has been suggested that the principal problem faced by California in extending personal jurisdiction over absent residents involved in domestic causes of action relates to policy considerations in employing various methods of service of process which are constitutionally approved. Other states which have already used these various methods have been free to concentrate their attention on another problem which has major constitutional implications and which California also has grappled with: expanding personal jurisdiction over the nonresident whose acts give rise to a cause of action within the state. The obstacle is the premise of Milliken v. Myers that domicile is the basis of jurisdiction over absent defendants. The two solutions that have evolved are the expansion of Hess v. Pawloski into non-automotive areas and the development of the "fair play and substantial justice" test in cases concerning personal jurisdiction over foreign corporations.

The foremost theoretical contradiction to the physical power and domicile premises has been found in Hess v. Pawloski, where an act done within the forum by a nonresident defendant was the basis of jurisdiction. Although originally adopted as a legitimate exercise of police power in the inherently dangerous situation of the motor vehicle, the Hess case has been considerably extended into other areas. Its theory is now applied to the sale of securities, insurance, the ownership of property within the state, and the operation of vessels and aircraft within the state. The fictitious nature of the implied consent theory of the Hess case was recognized in a recent United States Supreme Court dictum. This line of cases poses a fundamental question: can the theory of the Hess case be generalized to apply to any cause of action arising within the forum, making the doing of the act within the forum and not domicile the basis of jurisdiction?

In addition to numerous state legislative attempts to extend jurisdiction over nonresidents, the expansion of personal jurisdiction over foreign corporations has provided the second major attack on the domicile theory. Five years after the...
Milliken decision the United States Supreme Court was called upon to decide whether a foreign corporation could be sued on a domestic cause of action in a forum in which its activities were insufficient to meet the standard “corporate presence” or “doing business” test of jurisdiction. In International Shoe Co. v. Washington the Court explicitly discarded these old tests, analogous to the domicile requirement of Milliken, and formulated a new criterion of minimum contacts consonant with “fair play and substantial justice.”

The International Shoe case, involving a foreign corporation, suggests two principal questions: (1) Is its reasoning equally applicable to personal jurisdiction over nonresident natural persons? (2) Can a logical extension of International Shoe to a single act done within the forum meet the constitutional test of due process?

The first question might reasonably be answered affirmatively.

While the International Shoe case strictly involved a corporation, the whole tenor and philosophy of the opinion leaves no doubt of intent that its principles apply equally to nonresident individuals. The language concerning responsibility for obligations as a corollary to the acceptance of benefits represents exactly the reasoning which erased the power concept with regard to a state’s jurisdiction in personam over its citizens and domestic corporations.

In regard to the second question, there is language in the International Shoe opinion which suggests that a single act done within the forum might not be sufficient to justify the imposition of liability. The court went on, however, to recognize the existence of exceptions, citing both Kane v. New Jersey and Hess v. Pawloski.

Whereas minimal contacts with the forum might not justify the litigation of a foreign cause of action therein, several cases involving distinctly minimum contacts and domestic causes of action have subsequently relied on International Shoe and have been upheld under so-called “one transaction” statutes. These statutes subject the foreign corporation to personal jurisdiction when their conduct within the state gives rise to a cause of action in tort or contract. Perhaps the most dramatic example is offered by Smyth v. Twin State Improvement Co., where a foreign corporation was compelled to answer in Vermont when its only connection with that state was to negligently repair the plaintiff’s roof within the state.

These two lines of cases, represented by Hess v. Pawloski and International Shoe, involving the extension of personal jurisdiction over absent nonresidents, both natural and corporate, have converged to form the basis of a recent amendment to the Illinois Civil Practice Act. Section 17 of that act provides:

61 326 U.S. 310 (1945).
63 326 U.S. at 318.
64 Ibid.
66 116 Vt. 569, 80 A.2d 664 (1951). This case has been extensively discussed. See, e.g., Comment, 37 CORNELL L.Q. 458 (1952). See, in particular, McBahe, Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum, 34 CALIF. L. REV. 331 (1946). This article appears to have been influential in the Smyth decision.
1. Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
   a. The transaction of any business within this State;
   b. The commission of a tortious act within this State;
   c. The ownership, use or possession of any real estate situated in this State;
   d. Contracting to insure any person, property or risk located within this State at the time of contracting.

2. Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State ... with the same force and effect as though summons had been personally served within this State.

3. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

In the words of one of the draftsmen, "Under 'International Shoe Co. v. Washington' ... this section ... rests upon unassailable constitutional foundations." The Illinois amendment has, however, yet to be tested constitutionally. If this statute meets due process approval, its effect might be the elimination of domicile and the substitution of the cause of action within the forum as the basis of personal jurisdiction over the absent person, natural and corporate, resident and non-resident alike.

Conclusion

In order to litigate a personal cause of action, domestic or foreign, against an absent resident, the plaintiff is required by sections 412, 413 and 417 of the California Code of Civil Procedure to obtain an order of publication and establish that the defendant was domiciled in California either when the action was commenced or when personally served. The principal exception to this procedure is exemplified by a recently enacted statute permitting direct personal service upon an absent resident motorist.

Although personal service is not constitutionally essential, it is currently mandatory in section 417. It is suggested that substituted and registered mail service could and should be added as supplemental methods of notice when the plaintiff has been unable, after reasonable effort, to effect personal service upon the absent resident. In such cases the order of publication could be discarded as superfluous.

69 It is suggested that the most serious impediment to this purported jurisdictional tour de force might be the broad extension of the Hess doctrine, developed under the rationale of inherently dangerous activities, to the commission of any tortious act.
60 By adopting a similar "one transaction" statute, California should easily solve two difficult problems that presently exist. The defendant whose connection with the state is far more extensive than the nonresident motorist, but still insufficient to stamp him as a domiciliary, can obtain immunity from service of process in a personal action by departing the state. Similarly, the defendant who is domiciled in the state when the cause of action arises, can also escape amenability to suit if he is able to show a change of domicile before the action against him is commenced.
However, service of process by publication alone upon the absent resident might meet due process approval if the defendant had left the state to defraud creditors and no other form of service were available.

Both the order of publication and personal service requirements might well be modified in the litigation of a foreign cause of action against the absent defendant. However, the retention of the domiciliary requirement seems necessary to afford adequate protection to the defendant.

By virtue of section 417 California presently follows the domicile test of personal jurisdiction as enunciated in *Milliken v. Meyer*. Therefore, access to non-resident defendants whose acts have given rise to a cause of action within the state is limited largely to a few statutory exceptions, chiefly among which is the non-resident motorist statute. However, the recent expansion of the theory of *Hess v. Pawloski* and the formulation of the “fair play and substantial justice” criterion of jurisdiction in *International Shoe Co. v. Washington* have led to the enactment of statutes in many states whereby the act done within the forum, and not domicile, is the basis of jurisdiction.

It is believed that this type of statute, exemplified by recent amendments to the Illinois Civil Practice Act, represents a more rational solution to the problem of obtaining personal jurisdiction over the absent defendant, resident and non-resident alike, whose acts have given rise to a cause of action within the forum. The enactment of such a statute would afford justifiable protection to California citizens who are presently at the mercy of a patch-work of ineffective and inconsistent jurisdictional rules.

*W. P. Clancey, Jr.*

---

61 See note 50 supra.