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Jurisdiction and the Nomadic Resident

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COMMENTS

JURISDICTION AND THE NOMADIC RESIDENT

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It was once true that the power of a state to render a personal judgment was circumscribed by its territorial limits. This was thought to follow from the fact that common law procedures were geared to the actual physical presence of the defendant or the subject of the action.[1] As the static common law forms and notions slowly eroded, the territorial limits doctrine was gradually replaced with a patchwork of exceptions and substitute rules. Today, a state has power to confer on its courts personal jurisdiction over absent domiciliaries,[2] over nonresidents who have impliedly consented to service,[3] over nonresidents who have performed certain acts within the state[4] and finally, it was recently held in *Myrick* v. *Superior Court,*[5] and in *Allen* v. *Superior Court,*[6] over absent residents.

In the *Myrick* case two residents of California were involved in an automobile accident in California. The injured party filed an action against the other, Myrick, but before process was served on him, Myrick was arrested on a New York warrant, taken to New York and lodged in a penitentiary there. Under section 412 of the Code of Civil Procedure,[7] which provides for out-of-state service in limited situations,[8] plaintiff served Myrick in the New York penitentiary. Myrick made a special appearance in the California court contesting the validity of the service but it was sustained. He then petitioned for a writ of prohibition to restrain the trial court from proceeding further in the action. The District Court of Appeal denied the petition and in an extremely

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[1]McDonald v. Mabee, 243 U.S. 90 (1916); Wilson v. Seligman, 144 U.S. 41 (1892), Pennoyer v. Neff, 95 U.S. 714 (1877); De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896); Merchant's National Union v. Busserett, 15 Cal.App. 444, 115 Pac. 58 (1911); see also Dodd, *Jurisdiction In Personal Actions,* 23 ILL. L. REV. 427 (1928).

[2]Milliken v. Meyer, 311 U.S. 457 (1940); Fernandez v. Casey, 77 Tex. 452, 14 S.W 149 (1890).

[3]Wuchter v. Pizzutti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 352 (1926); Kane v. State of New Jersey, 242 U.S. 160 (1916); Frey and Horgan Corp. v. Superior Court, 5 Cal.2d 401, 55 P.2d 203 (1936); Briggs v. Superior Court, 81 Cal.App.2d 240, 183 P.2d 758 (1947); Berger v. Superior Court, 79 Cal.App.2d 425, 179 P.2d 600 (1947)

[4]International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

[5]117 A.C.A. 592, 256 P.2d 348 (1953) A subsequent petition for a writ of prohibition was discharged by the California Supreme Court in 41 A.C. 530, 261 P.2d 255 (1953)

[6]41 A.C. 313, 259 P.2d 905 (1953).

[7]CALIF. CODE CIV. PROC. § 412 (Deering, 1953) has been on the California statute books since 1872. It authorizes service by publication under limited conditions.

[8]Section 417 of the Code of Civil Procedure was added by Calif. Stats. 1951, c. 935, § 1. It limits personal jurisdiction of the courts, which is acquired by publication, to those cases in which the defendant is served personally and in which he was a resident at the time of the commencement of the action or the time of service. While apparently limiting personal jurisdiction this statute actually broadens it, for unless the Legislature meant to grant in personam jurisdiction over absent residents, which the California courts had never before had, the statute is meaningless.

This policy of legislating by incorporating a statute seventy-five years old in a new statute is highly undesirable. A great deal of litigation is concerned with interpretation and construction of statutes and this is certainly not avoided by adopting verbatim a statute written years ago.

lucid and well-reasoned opinion held: (1) that states have sufficient power to subject absent residents to their process; and (2) that sections 412 and 417 of the Code of Civil Procedure satisfied the due process requirement of the Federal Constitution.

Section 417 of the California Code of Civil Procedure reads as follows:

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

That portion of section 412[9] pertinent here provides that when a person has departed from the state, cannot be found, conceals himself or resides out of the state and a cause of action is stated against him, service may be made by publication. Section 413[10] outlines the procedure necessary to make this service acceptable. The form of language used in section 417 would seem to indicate that the Legislature intended to limit the operation of sections 412 and 413, but the court held that its actual effect was to grant jurisdiction in personal actions while at the same time limiting it by requiring personal service on the absent resident. The crucial questions for decision in the *Myrick* case were whether the state had power to exercise jurisdiction in personam over absent residents and whether the notice requirement of the statute satisfied due process.

Power

The common law jurisdictional limits were thought to be concurrent with the physical boundaries of the state. Theorists said that no court could make a judicial determination of rights it was powerless to enforce. In order to carry out a determination of rights adverse to the defendant, the court had to have power over the defendant's body or his property.[11] This view that physical power over the defendant is necessary has had many modern proponents. Justice Holmes stated it clearly in *McDonald* v. *Mabee*.

> "The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power through proceedings properly begun, and although submission to jurisdiction by appearance may take the place of service upon the person. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance but the foundation should be borne in mind."[12]

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[9]The remaining part of 412 provides for service by publication in an action which relates to real or personal property.

[10]Section 413 directs that publication be made in a newspaper except that where the residence of the defendant is known a copy of the summons and complaint must be deposited in the post office, directed to the person sought to be served.

[11]See note 1 *supra*.

[12]243 U.S. 90, 91 (1916)

The physical power theory of jurisdiction was the basis of many early American decisions, chief among them the oft-cited, oft-maligned case of *Pennoyer* v. *Neff*.[13] The *Pennoyer* case held that one state lacked power to acquire jurisdiction in personam over a defendant in another state by constructive service. California had *De la Montanya* v. *De la Montanya*[14] and the rule that the California courts could not secure in personam jurisdiction over absent domiciliaries despite a statute specifically authorizing it.[15] The physical presence rule was absolute and uncompromising. Either a defendant was present in the jurisdiction or the plaintiff was out of court.

(a) ***Implied Consent To Jurisdiction.***

Around the turn of the century courts began edging away from the physical power theory of jurisdiction. While stoutly continuing to maintain that physical power was the basis of jurisdiction they began to find physical power in strange fact combinations. Thus where defendant drove his automobile into[16] or through[17] a state he was held to have consented to service of process by a jurisdiction in which he was neither a resident nor a domiciliary. The Supreme Court of the United States sanctioned this doctrine of implied consent as a legitimate exercise of the police powers of the states.[18] The Court said that article IV, section 2 of the Constitution safeguarded to the citizens of one state the right to pass through or reside in any other state. It reasoned that although a state may not prevent nonresidents from using its highways, under the police power it may stipulate that by this use nonresidents impliedly consent to service of process.

Although this theory solves the problems connected with automobile accidents involving nonresidents, the consent implied is largely fictional.[19] However, statutes providing for implied consent have been held valid wherever they have contained a provision making it reasonably probable that notice of service would *actually* be communicated to the nonresident defendant.[20] To the extent that the consent is fictional it is an application of state power beyond the physical power theory.

(b) ***Jurisdiction Over Absent Domiciliaries.***

The second departure from the strict physical power rule was crystallized in *Milliken* v. *Meyer*.[21] Milliken obtained a judgment in Wyoming against

[13]95 U.S. 714 (1877).
[14]112 Cal. 101, 44 Pac. 345 (1896).
[15]At the time of the De la Montanya decision California had a code section which was substantially the same as the present 412 of the Code of Civil Procedure. However, its operation was limited to *in rem* actions by the De la Montanya decision.
[16]Kane v. State of New Jersey, *supra* note 3.
[17]Hess v. Pawloski, *supra* note 3.
[18]Wuchter v. Pizzutti, Hess v. Pawloski, Kane v. State of New Jersey, *supra* note 3.
[19]Allen v. Superior Court, *supra* note 6.
[20]Wuchter v. Pizzutti, *supra* note 3.
[21]311 U.S. 457 (1940).

Meyer, a domiciliary of Wyoming. Meyer was absent from Wyoming at that time, but he was served personally in Colorado. The court gave judgment against Meyer, but he sought an injunction in Colorado to prevent Milliken from enforcing it. The Supreme Court of the United States held that under the full faith and credit clause Colorado was required to recognize the Wyoming judgment. It said that domicile with its reciprocal rights and duties is sufficient to authorize a state to give a personal judgment against an absent domiciliary.

> "The authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicil may also exact reciprocal duties. . . The relationship is not dissolved by mere absence from the state. . One such incident of domicil 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 proceedings against him."[22]

That substituted service is wholly sufficient to meet the requirements of due process was decided by the Supreme Court in *McDonald* v. *Mabee*.[23] In that case it was held that the adequacy of service was dependent on whether or not the form employed was reasonably calculated to give the defendant notice and opportunity to be heard.

The domiciliary extension of jurisdiction was a logical development in a federation of states. "It would be very inconvenient if this were not the law. An individual may be concealing himself to prevent service of process; he may be absent in parts unknown. But every person has a domicile."[24] Domiciliary jurisdiction openly departs from the physical power theory of jurisdiction. Even though a defendant may be physically absent from the state, there is such a relation between him and his domicile that he may be subject to process therein.

(c) *Jurisdiction Based On Acts Done In The Forum.*

The case of *International Shoe Co.* v. *State of Washington*[25] added a further refinement to rules of jurisdiction. Here salesmen of an out-of-state shoe firm systematically and continuously exhibited samples and took orders in the state of Washington. By statute Washington required all employers to pay a specified percentage of wages into an unemployment fund. The International Shoe Company refused to pay into this fund and claimed that it was not subject to the jurisdiction of the Washington courts. The United States Supreme Court held that the corporation's activities in Washington had estab-

[22] *Id.* at 463.
[23] See note 12 *supra.*
[24] GOODRICH, CONFLICT OF LAWS 192 (3d ed. 1949)
[25] 326 U.S. 310 (1945).

lished sufficient contacts with that state to make it reasonable and just to subject the corporation to the power of Washington. Thus, even without a statute to supply an implied consent to jurisdiction a nonresident may subject himself to the jurisdiction of a state by doing certain acts. The decision speaks of "minimum contacts."

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[26]

Jurisdiction based on "acts done" by a nonresident within the boundaries of the state is a significant extension of state power. No longer is there any pretense that the basis of this power is physical power. The Supreme Court says instead that authority by physical arrest has now given way to authority by personal service and as a consequence only certain "minimum contacts" between the state and the individual are now necessary to give the state jurisdiction. However, these "minimum contacts" are sufficient to give the state in personam power over the individual only if it does not offend "traditional notions of fair play and substantial justice."

(d) *Jurisdiction Over Absent Residents.*

The holding that a court has power over absent *domiciliaries* is one step from holding that a court has power over absent *residents*. "Residence" as a legal status is acquired by physical presence as an inhabitant in a given place.[27] "Domicile" as a legal status is acquired by physical presence plus an intention to make that place one's domicile.[28] An existing domicile, whether of origin or selection, continues until a new one is acquired.[29] Often "residence" and "domicile" are used synonymously or one is used to mean the other.[30] When a Legislature uses one or the other there is a presumption that it uses the term in its natural sense, unless the context indicates otherwise.[31]

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[26] *Id.* at 316.

[27] Lowe v. Ruhlman, 67 Cal.App.2d 828, 155 P.2d 671 (1945).

[28] In re Glassford's Estate, 114 Cal.App.2d 181, 249 P.2d 908 (1953); Kopasz v. Kopasz, 107 Cal.App.2d 308, 237 P.2d 284 (1953).

[29] In re Glassford's Estate, *supra* note 28.

[30] 9 CAL. JUR., Domicile § 2.

[31] CALIF. CODE CIV. PROC. § 1858 (Deering, 1953) provides: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible to be adopted as will give effect to all."

There is nothing in section 417 to indicate that the California Legislature used the word "residence" to mean "domicile." Indeed, the context indicates certainly that "residence" is meant by the word "residence," for "absence" is indicated as its alternative.

In the *Myrick* case, petitioner argued that under the *De la Montanya* case California had established her policy against extra-territorial service under sections 412 and 413, the sections referred to by section 417 It had been held in the *De la Montanya* case that California could not secure jurisdiction over an absent domiciliary by publication under section 412 and 413 so as to render a valid judgment against him for alimony and support, child custody and support. In the *Myrick* case the District Court of Appeal held that if the *De la Montanya* case were still law in California, it would prevent the acquisition of personal jurisdiction by extra-territorial service. However, it said, since the *De la Montanya* case was predicated upon *Pennoyer* v. *Neff*, and since that portion of the *Pennoyer* case which held that one state lacked power to acquire jurisdiction in personam over a defendant in another state by substituted service had not been followed, the *De la Montanya* case was no longer law in California.[32] The court said:

> "In recent years there have been many limitations placed on the concept of lack of power in a state to thus acquire jurisdiction over an absent defendant, as well as a repudiation of the concept that due process is somehow involved in the problem."[33]

The court then relied on the *International Shoe* case and held that if a defendant is not present within the territory of the forum, the forum has power to render a judgment in personam against him if he has "minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[34] Residence, it said, is sufficient contact to give a state power over an absent resident within the confines of the traditional notion of fair play and substantial justice.

The Supreme Court of California passed on the constitutionality of section 417 in *Allen* v. *Superior Court*. The facts of the *Allen* case are essentially the same as those of the *Myrick* case. Quoting Goodrich *Conflict of Laws*, the court held that the "rendition of a valid personal judgment against a defendant requires that he be a member of a class subject to its power and that he have proper notification of the action with an opportunity to appear therein."[35] After a review of the *Pennoyer* case, the *De la Montanya* case and

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[32]A scant eight years previously in Pinon v. Pollard, 69 Cal.App.2d 129, 158 P.2d 254 (1945), the court had held that despite the Milliken case, in California the De la Montanya case controlled, and constructive service on a domiciliary did not give a California court jurisdiction over him. In the Myrick case the court skirted the edge of contradiction, but avoided it nicely by saying that in section 417 of the Code of Civil Procedure, California had changed its "policy" on this question.

[33]117 A.C.A. 592, 596, 256 P.2d 348, 351 (1953)

[34]*Ibid.*

[35]41 A.C. 313, 316, 259 P.2d 905, 907 (1953).

the *Milliken* case the court noted the trend of the decisions toward expanding the authority of a state. It said:

> "The decision in the Milliken case is entirely in keeping with present day needs affecting the power of a state to acquire jurisdiction over persons who have departed from its borders. The increasingly artificial nature of state boundaries, the expanding of metropolitan areas into two or more states, and the multiplying transportation facilities, especially through the widespread use of automobiles and trucks affecting the mobility of population, all bear significantly on the problem of process. The necessities of the situation are recognized in the nonresident motorist statutes. . . . "[36]

Due Process

Although a state may have power to bind absent residents or domiciliaries in personal actions, it must exercise that power within the limits of due process. In *McDonald* v. *Mabee,* McDonald, a domiciliary of Texas, left the state intending to make his home elsewhere. During his absence an action was begun against him in a Texas court. After returning and remaining for a short time, he departed finally and established his domicile in another state. The service in the action was by publication in a newspaper after his final departure from Texas. Based on this service a personal money judgment was rendered against him which was sustained by the Supreme Court of Texas. McDonald appealed to the Supreme Court of the United States claiming a violation of the Fourteenth Amendment. The Supreme Court held the judgment against him void. The point was not that Texas did not have power, for it was granted that a summons left "at the last and usual place of abode" would have been sufficient to give jurisdiction. However, "to dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." Here due process was held to require *substituted* service rather than service by publication.

In *Milliken* v. *Meyer,* the court held that the adequacy of a statute authorizing service on an absent domiciliary was dependent on whether it accorded the defendant due process. The test, it was held, is whether the form of the service provided by the statute was reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. If it did, the traditional notions of fair play and substantial justice were satisfied and the state had power to render a personal judgment.[37]

Since service of process is one of the preliminary procedures of a hearing, if fair notice of the pendency of the litigation is given a defendant there is usually an opportunity to be heard. The satisfaction of due process then

[36] *Id.* at 318, 259 P.2d at 908.
[37] 311 U.S. 457, 462 (1940).

becomes a question of whether the service required is reasonably calculated to give the defendant actual notice of the proceedings. In the *Allen* case the court held that section 417 satisfied the requirement of due process because "no more certain provision for defendant's receipt of actual notice of the institution of litigation against him could be made than through the specified personal service of process,"[38] even though made outside the territorial limits of the state.

Conclusion

The *Myrick* rule undoubtedly presages new developments in the field of Procedure and Conflict of Laws. With the adoption of section 417 California has spearheaded a trend toward liberalization of the basis of jurisdiction, long apparent in the American decisions. The previously accepted domiciliary rule was unsatisfactory because it put the onus of jurisdiction-guessing on one who sought to sue a nomadic defendant. If his guess was wrong, he had invested time and money for naught, while the statute of limitations of the "proper" jurisdiction continued to run.[39] As contrasted with "domicile" which may be based on "secret intent,"[40] "residence" is easy to ascertain and apply. The defendant is a resident of the state which he inhabits. Therefore, from the point of view of the plaintiff, residence is a more satisfactory criterion of jurisdiction than domicile.

From the defendant's point of view residence is also a more satisfactory criterion of jurisdiction than domicile. Presumably the defendant is in legal difficulties because of an unfortunate error and is anxious to have his liabilities ascertained. It seems elementary that he would rather be sued in the jurisdiction of his residence than in a foreign place the law calls his domicile.

[38]41 A.C. 313, 319, 259 P.2d 905, 909 (1953).

[39]In Pinon v. Pollard, *supra* note 32, plaintiff made the mistake of thinking that a jockey who had a house in California was also domiciled there. Actually, he had married a woman who lived in the east and had formed a secret intent of changing his domicile.

[40]De la Montanya v. De la Montanya, *supra*, note 1.