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SERVICE BY MAIL PROVISIONS OF CALIFORNIA'S NEW JURISDICTION STATUTE

July 1, 1970, the friendly neighborhood mailman unwittingly assumes a new role—quasi process server. Service of summons by mail is authorized by California's new statute, which revises the law related to jurisdiction and service of process. The provisions for service by mail are entirely new; formerly, a natural person could only be served personally,¹ or as a last resort, by publication.² Use of the mail, however, is by no means revolutionary—the law recognizes mail as a valid means of communication, other states allow limited service by mail, and California law has heretofore authorized use of the mail in various contexts. Nevertheless, California's law is unique. No other state has so sweepingly and absolutely authorized this mode of service. California has approached the problem of service in its modern context. Unhindered by antiquated formulations, the legislature has provided for a convenient and fair method of service, giving due regard to both the needs of the plaintiff and the interests of the defendant.

The New Mailing Provisions

The new law has two provisions for service by mail: section 415.30 of the Code of Civil Procedure, a general provision applicable both within and without the state; and section 415.40, applicable only outside of the state. Section 415.30 provides for delivery of summons by first-class mail or by airmail. In addition to the summons, the person being served must be sent a copy of the complaint, two copies of the notice,³ an acknowledgement of a receipt of summons, and a post-paid return envelope addressed to the sender. The acknowledgment is the form which the person served must sign and return within 20 days after the mailing of the summons. Service is deemed complete on the date the acknowledgment is executed, if it is later returned to the sender. The acknowledgment of receipt must be returned for service

1. Cal. Stat. 1968, ch. 132, § 2, at 345, CAL. CODE CIV. PROC. § 411(3), (4), (8) (effective until July 1, 1970).

2. Cal. Stat. 1968, ch. 132, § 3, at 346, CAL. CODE CIV. PROC. § 412 (effective until July 1, 1970).

3. Some terms of the notice are as follows: "This summons is served pursuant to Section 415.30 of the California Code of Civil Procedure. Failure to complete this form and return it to sender within 20 days may subject you . . . to liability for the payment of any expenses incurred in serving a summons upon you in any other manner permitted by law." CAL. CODE CIV. PROC. § 415.30(b) (operative July 1, 1970).

to be valid. If a person fails to answer a properly mailed summons within the 20 days "without good cause shown," he is liable for "reasonable expenses thereafter incurred in serving or attempting to serve the party by another method."

Under section 415.40 a summons may be served on a person outside the state⁴ by sending copies of the summons and complaint to the person being served by any form of airmail requiring a return receipt.⁵ Service is deemed complete on the 10th day after mailing.⁶

The Changes Made by the New Law

The new mailing provisions represent one of the substantial changes made by Senate Bill 503. The legislature entirely rewrote the sections pertaining to service. Under the new law five modes of service are authorized: personal service;⁷ substituted service to a specified person at the defendant's place of business or usual place of abode;⁸ service by first-class mail,⁹ service by registered or certified airmail;¹⁰ and service by publication.¹¹ Under the former law, personal service was the principal means of serving a summons,¹² and there was no general provision for service by mail. Despite the significant change, the Judicial Council points out that the new sections "do not represent a radical innovation."¹³

4. The Judicial Council points out: "This form of service may be used to deliver process only to a person who is outside this state [But] process may eventually be forwarded and in fact delivered to the addressee within this state" in certain cases. CAL. CODE CIV. PROC. § 410.40 Judicial Council Comment (operative July 1, 1970).

5. "Both registered and certified airmail, return receipt requested, meet this requirement." *Id.*

6. This determines the time when the 30 day period begins, in which the defendant must file responsive pleading, as prescribed by CAL. CODE CIV. PROC. § 412.20 (a)(3). However, it does not mean that service is necessarily good.

7. CAL. CODE CIV. PROC. § 415.10 (operative July 1, 1970).

8. *Id.* § 415.20. However, a copy of the complaint and the summons must thereafter be sent by first-class mail to the person being served at the place where the complaint and summons were left.

9. *Id.* § 415.30.

10. *Id.* § 415.40.

11. *Id.* § 415.50. This section applies only if the party cannot be served by one of the methods listed in the text accompanying notes 7-10 *supra*.

12. Cal. Stat. 1968, ch. 132, § 3, at 346, CAL. CODE CIV. PROC. § 411(8) (effective until July 1, 1970). If personal service could not be made with reasonable diligence, service by publication was authorized. Cal. Stat. 1968, ch. 132, § 2, at 345, CAL. CODE CIV. PROC. § 412 (effective until July 1, 1970).

13. JUDICIAL COUNCIL OF CALIFORNIA, 1969 REPORT TO THE GOVERNOR AND THE LEGISLATURE 29.

Use of the Mail in the Past

Using the mail as an authorized means of notice is not a new idea. Past California legislation has recognized the mail as an efficient means of communication.¹⁴ Any notice required by law, and not otherwise provided for in the codes, may be given by registered letter,¹⁵ and California specifically authorizes the use of mail for notices and court papers.¹⁶ California also has provisions for service of process by mail in certain limited situations. Such service is appropriate in the small claims court.¹⁷ Furthermore, under California's limited long-arm statutes, provision is made for service of summons on the fictitious agents within the state of foreign corporations, nonresident aviators and nonresident motorists, followed with notice to the defendant by mail.¹⁸

Under these various provisions, the efficacy of the mail as a means of notice has never been successfully disputed. However, California courts do recognize the possibility of abusing the convenience and thus have required strict compliance with the statutes.¹⁹ For example, in a recent case²⁰ construing a notice by mail provision,²¹ the court observed that "[i]n making service by mail there must be strict compliance [with the code sections]."²² Cases under the Vehicle Code also indicate the courts' disposition in favor of strict statutory compliance.²³ In *Weisfeld v. Superior Court*,²⁴ the copy of the summons was sent to the defendant's parents, and the defendant's mother received

14. CAL. EVID. CODE § 641: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."

15. CAL. CODE CIV. PROC. § 1020.

16. *Id.* §§ 1012-13a.

17. *Id.* § 117(c).

18. CAL. CODE CIV. PROC. § 411(2); CAL. CORP. CODE §§ 3301, 6501-02; CAL. PUB. UTIL. CODE § 21414; CAL. VEH. CODE § 17454-55. Although service under these statutes is on a fictitious agent, notice to the defendant by mail is the essential part of the process. Under the new law, California will have a general long-arm statute. CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970); see note 52 *infra*.

19. *E.g.*, *Valley Vista Land Co. v. Nipomo Water & Sewer Co.*, 255 Cal. App. 2d 172, 63 Cal. Rptr. 78 (1967).

20. *Forslund v. Forslund*, 225 Cal. App. 2d 476, 37 Cal. Rptr. 489 (1964) (involving notice of an application for modifying a prior custody order in a divorce proceeding).

21. CAL. CODE CIV. PROC. §§ 1011-13a; see note 16 & accompanying text *supra*.

22. 225 Cal. App. 2d at 485, 37 Cal. Rptr. at 495.

23. *Weisfeld v. Superior Court*, 110 Cal. App. 2d 148, 242 P.2d 29 (1952); *cf.* *Coulston v. Cooper*, 245 Cal. App. 2d 866, 54 Cal. Rptr. 302 (1966); *Varra v. Superior Court*, 181 Cal. App. 2d 12, 4 Cal. Rptr. 920 (1960). Mailing provisions were not at issue in the latter two cases, but they do illustrate the courts' reluctance to exercise jurisdiction in the absence of strict statutory compliance.

24. 110 Cal. App. 2d 148, 242 P.2d 29 (1952).

and signed for the registered letter. This was held not to be adequate service to give the court jurisdiction:

The general rule is that a court may not acquire jurisdiction *in personam* over a nonresident defendant in an action by service of notice or other process outside the territory or state in which the forum exists. . . . When jurisdiction is sought to be obtained by a prescribed form of constructive service the statutory conditions on which the service depends must be strictly observed. Unless the statute has been complied with, there is no power to render a judgment.²⁵

Judging by precedent, it is likely that the courts will be equally strict with the new mailing provisions.

Mailing Statutes in Other States

Several states provide for service of process by mail, but only in limited situations. In states where it is authorized, service by mail is frequently (1) authorized only for nonresidents or persons out of the state, either directly²⁶ or through an agent;²⁷ (2) limited to particular courts;²⁸ (3) limited to certain proceedings;²⁹ (4) authorized only when other service, after due diligence, has failed;³⁰ or (5) used in conjunction with other modes of service.³¹ Since no state has an unqualified provision comparable to California's,³² cases from other jurisdictions have limited relevance as aids in interpreting the California mailing provisions. An examination of some typical cases from other states, however, does indicate possible areas of litigation.

In a case³³ decided under the New York "nail and mail" statute,³⁴ a summons mailed to the "last known address" of a defendant who had moved from that address was held to be insufficient notice. The statute was held to require that the summons be delivered to the defendant's actual residence. The language of California's new law seemingly requires the same interpretation.³⁵ Since acknowledgment of re-

25. *Id.* at 151, 242 P.2d at 31-32.

26. ARIZ. REV. STAT. ANN. Rule 4(e)(2)(a) (Supp. 1969).

27. FLA. STAT. ANN. § 48.161 (1969); MICH. COMP. LAWS ANN. § 600.1913(1)(a) (1968).

28. OHIO REV. CODE ANN. § 2703.23 (Page 1954).

29. COLO. REV. STAT. Rule 4(g) (1963) (in rem proceedings).

30. N.J. COURT RULES, Rule 4:4-(4)(j) (1969).

31. N.Y. CIV. PRAC. LAW § 308(3) (McKinney 1963).

32. See text accompanying notes 43-46 *infra*.

33. *Entwistle v. Stone*, 53 Misc. 2d 227, 278 N.Y.S.2d 19 (Sup. Ct. Onodaga County 1967).

34. N.Y. CIV. PRAC. LAW § 308(3). The statute requires that the summons be affixed to the residence of the defendant and a copy be mailed to the same address.

35. Both section 415.30 and section 415.40 require that the summons be mailed "to the person to be served," not to his last known address.

ceipt of summons is required by the new law, the requirement of delivery to defendant's actual residence will probably be significant only in situations arising under section 415.30(d), where the defendant denies liability for the cost of a subsequent mode of service.³⁶ A showing by the defendant that the summons was sent to his "last known address" and that he did not reside at that address when the summons was sent would undoubtedly satisfy the requirement of showing good cause for failure to acknowledge the mailed summons.

In a New Jersey case,³⁷ service was attempted pursuant to New Jersey court rules³⁸ that authorize service by registered mail if other methods are ineffective. The plaintiff made several attempts to serve the defendant, who was in the military service at the time. He mailed copies of the summons to the defendant's father and to an address given by the defendant in an affidavit. This second letter was forwarded to defendant's wife, but the defendant was not then living with her. The court held that the plaintiff had not complied with the statute requiring that the summons be "addressed to his dwelling house or usual place of abode."³⁹ The court recognized that the plaintiff had made every possible effort to serve the defendant, and that the defendant was consciously avoiding service. Nevertheless, literal compliance with the statute was held to be a prerequisite to valid service. This case, admittedly extreme, is indicative of a general judicial disposition for strict compliance with mailing provisions.

In an Arizona case,⁴⁰ applying a mailing provision under a non-resident motorist statute,⁴¹ the court emphasized the necessity for complying with statutory requirements. Despite actual notice to the defendant, indicated by his appearance in court to quash summons, the court held that, in the absence of legal notice as required by the statute, the service was ineffective. Like section 415.40, the Arizona statute required the filing of a return receipt to insure actual service, but the registered letter of notice was returned, marked "moved, left no address." The court remarked:

[T]he weight of authority seems to be that the copy of the registered letter must be received before service is complete. In other words legal notice as opposed to actual knowledge is required in order to comply with the substituted service provisions⁴²

36. See text accompanying notes 3-4 *supra*.

37. *Carlin v. Schuler*, 89 N.J. Super. 366, 215 A.2d 56 (Law Div. 1965).

38. N.J. COURT RULES, Rule 4:4-(4)(j) (1969).

39. *Id.*

40. *Stinson v. Johnson*, 3 Ariz. App. 320, 414 P.2d 169 (1966).

41. ARIZ. REV. STAT. ANN. §§ 28-501 to -503 (1956).

42. 3 Ariz. App. at 322, 414 P.2d at 171.

Construction of California's Unique Provisions

Unlike statutes in other states,⁴³ California's mailing provisions are not designed for limited situations only. Essentially, service by mail is equivalent to personal service. Anyone subject to personal service is equally subject to service by mail in any civil action,⁴⁴ and proper service by mail is complete in itself. The most liberal feature of California's new law is that service by mail need not be preceded by an attempt to make a personal service. While an overwhelming majority of states require attempted personal service before they allow other means of service,⁴⁵ California disregards the traditional reliance on personal service and gives it no priority over service by mail. The language of the chapter on service of process, read as a whole, resolves any possible doubt about priorities. The provisions for personal service and the two mailing provisions have substantially the same wording and are formulated in the same permissive terms.⁴⁶ In addition, when the legislature in other sections of the act intended one means of service to be attempted before another was authorized, it specifically provided a priority.⁴⁷ It therefore seems that any limit on the use of service by mail would be extrinsic to the provisions themselves.

Due Process Considerations

A change in the law on service of summons as great as the change affected by new sections 415.30 and 415.40 naturally raises the question whether the new provisions satisfy the requirements of due process. In this regard, it is helpful to distinguish the dual purposes of a summons. One writer helpfully points out:

43. See text accompanying notes 26-32 *supra*.

44. Those who may be served with summons include corporations, defunct corporations, joint stock companies, unincorporated associations, public entities, minors, wards, candidates for public office, and persons not otherwise specified in the article. CAL. CODE CIV. PROC. §§ 416.10-90 (operative July 1, 1970).

45. *E.g.*, N.Y. CIV. PRAC. LAW § 308(3) (McKinney 1963).

46. CAL. CODE CIV. PROC. § 415.10 (operative July 1, 1970) reads: "A summons *may* be served by personal delivery . . ." (Emphasis added) New section 415.30 states: "A summons *may* be served by mail as provided in this section." (Emphasis added) And section 415.40 reads: "A summons *may* be served on a person outside this state in any manner provided by this article or by sending . . . the summons . . . air-mail." (Emphasis added).

47. The provision for substitute service on an individual, CAL. CODE CIV. PROC. § 415.20(b) (operative July 1, 1970), reads: "If a copy of the summons and the complaint *cannot with reasonable diligence be personally delivered* . . . a summons may be served by leaving a copy [at the] usual place of abode . . ." (Emphasis added). Service by publication is only available if it appears by affidavit "that the party to be served *cannot with reasonable diligence be served* in another manner specified in this article . . ." CAL. CODE CIV. PROC. § 415.50 (operative July 1, 1970) (emphasis added).

The function of service is two-fold:

- (1) Service of the summons is a ceremonial act symbolic of the court's assertion of *power* over the person of the defendant or over a *res*;
- (2) Service of the summons gives the defendant *notice* of the commencement of the suit.

Every statute authorizing a mode of service of the summons is drawn with these two functions in mind;

- (1) The type of service must rest upon a basis recognized in our jurisprudence justifying the court's assertion of power; and
- (2) The means of service must be reasonably calculated to afford the defendant notice of the suit.⁴⁸

Historically, a summons was akin to an arrest.⁴⁹ Hence, assertion of the power and notice were concurrent. Today, however, actual physical power over the defendant is no longer required. In fact, the physical power concept of a summons has been modified to the point where it is no longer particularly helpful in analyzing modern problems of jurisdiction. Granted, the court must exert power over the defendant by issuing a summons in order to acquire personal jurisdiction, but the foundation of its power over him lies not in the issuance of summons, but in the existence of a basis for jurisdiction before issuance of summons. After noting that the power concept has been attenuated beyond recognition, Professor James observes:

The question then arises whether the "power myth" should not be discarded altogether in favor of the recognition of other relationships or contacts with the state which make it fair and practically convenient to exercise jurisdiction over a defendant even though no power symbol is propitiated. This would mean that where there are such relationships or contacts, jurisdiction might be exercised provided only that the requirements of reasonable notice and opportunity to defend are met.⁵⁰

He continues in a later section:

[A]n over-all trend may perhaps be seen toward more careful scrutiny of notice as an insistence on power becomes more and more attenuated.⁵¹

In short, in analyzing whether service of summon satisfies due process, it must be determined preliminarily whether there is a basis for judicial jurisdiction.⁵² Once a proper basis has been established, compliance with due process requirements then depends on whether notice is adequate, and it is at this point that mailing provisions should

48. H. WACHTELL, *NEW YORK UNDER THE C.P.L.R.* 20 (1966).

49. W. BLUME, *AMERICAN CIVIL PROCEDURE* 275-76 (1955).

50. F. JAMES, *CIVIL PROCEDURE* 623 (1965).

51. *Id.* at 650.

52. *NEW CAL. CODE CIV. PROC.* § 410.10 (operative July 1, 1970) includes every basis of judicial jurisdiction within constitutional limits.

be scrutinized. Adequate provision for notice is absolutely essential before the court has the power to determine the rights of the parties. In *Mullane v. Central Hanover Bank & Trust Co.*,⁵³ the Supreme Court formulated the often quoted standard of notice required by due process:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.⁵⁴

The Supreme Court has recognized mail as a valid means of notice in cases involving nonresident motorist statutes⁵⁵ and foreign corporations.⁵⁶ In the landmark case of *International Shoe Co. v. Washington*,⁵⁷ the Court observed, for example, in discussing the provision for notice by mail to the defendants: "Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit."⁵⁸ The new California mailing statutes seem to satisfy the *Mullane* "due process" requirements, but the context of the Supreme Court's discussion should not be overlooked. In *Mullane* and *International Shoe*, the Court held service by mail to be adequate where personal service was impracticable.

California's new statutes go beyond this limited use and equate mail service with personal service. However, the statute is formulated to insure actual notice to the defendant, comparable to personal service. Section 415.30 requires the person served to return an acknowledgment. If he fails to execute the acknowledgment he is responsible for the cost of other service, but the service is ineffective. No judgment can be rendered against the defendant on the basis of mere mailing of a summons, for proof of service requires the receipt of the acknowledgment.⁵⁹ In the absence of forgery, mistake, or ignorance, then, actual notice is guaranteed by this provision.⁶⁰ Actual notice to the defendant is also virtually assured under section 415.40. The section provides for registered or certified airmail, and proof of service requires that there shall be "evidence satisfactory to the court establishing *actual*

53. 339 U.S. 306 (1950).

54. *Id.* at 315.

55. *E.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927).

56. *E.g.*, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

57. *Id.*

58. *Id.* at 320.

59. CAL. CODE CIV. PROC. § 417.10(a) (operative July 1, 1970).

60. See *id.* § 473.5, containing provisions for setting aside a judgment when notice was not received.

*delivery to the person to be served, by a signed return receipt or other evidence . . .*⁶¹

The due process requirement of notice to the defendant thus seems to be satisfied by the two mailing provisions. Undoubtedly, the defendant's interests will also be protected by the courts. Service by mail is a significant departure from former procedure, and it is likely that the courts will require strict compliance with the statutory requirements and convincing proof of actual service.

Mechanical Operation of the Statute

Apart from due process considerations, there are practical problems affecting the workability of the new provisions. Section 415.40, the out-of-state mailing provision, will probably function as smoothly as its "long-arm" prototypes.⁶² The future of section 415.30 is more difficult to anticipate. The success of this provision depends upon the cooperation and good faith of the person being served, for he must be willing to voluntarily return the acknowledgment. Without substantial cooperation, the new mailing provision will cause wasted court time in litigating the preliminary squabble over whether the defendant is liable for the cost of service.⁶³ The law's only sanction is economic, and it is doubtful that this minimal threat will intimidate a reluctant defendant. Nevertheless, even though service by mail may not be an effective means to serve an elusive defendant, it will provide a convenient and economical means of serving a willing defendant. It is impossible to evaluate the new provisions properly until they have been used. At the very least, the increased convenience to plaintiffs should outweigh any added burden on the courts.

Conclusion

California has boldly met contemporary needs without ignoring traditional concepts of fairness. Service by mail is obviously more convenient and economical than personal service; and in providing a less time consuming alternative to personal service, the legislature has not sacrificed the interests of the defendant. Typical of the changing character of society, the concept of jurisdiction is expanding, and as it expands the mechanics of procedure must be as flexible as the society itself. Only time will reveal the wisdom of the new mailing provisions;

61. *Id.* § 417.20(1) (emphasis added).

62. CAL. CORP. CODE §§ 3301, 6501-02; CAL. PUB. UTIL. CODE § 21414; CAL. VEH. CODE § 17454-55.

63. See text accompanying notes 3-4 *supra*.

but they seem to be a welcome and needed addition to the accepted modes of service.

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