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ANALYSIS OF STATUTORY CONSTRUCTION PROBLEMS RESULTING FROM SLIGHT CHANGES IN WORDING FROM FORMER STATUTES.

Senate Bill 503, which goes into effect July 1, 1970,¹ brings to the Code of Civil Procedure sweeping changes in the law on jurisdiction and service of process in California. It also leaves much of the former law relatively unchanged. No attempt will be made to discuss sections which make major substantive revisions or additions in the law.² Nor will any attempt be made to discuss sections which, despite slight rewording, clearly do not cause any substantive change in the effect of the law.³ This Note will focus on the slight—perhaps unnoticed—changes, additions or deletions in wording as introduced in various sections of Senate Bill 503 that may or may not cause alteration in the existing law.⁴

Section 410.50—Voluntary v. General

New section 410.50 governs the law concerning the acquisition of jurisdiction and the continuance of such jurisdiction throughout subsequent proceedings arising out of the original cause of action. The court acquires jurisdiction from the time summons is served, and a “*general appearance* by a party is equivalent to personal service of summons on such party.”⁵ Code of Civil Procedure sections 416 and 417, which will be superseded by the new provision, contain substantially the same provisions concerning the acquisition and retention of jurisdiction. However, in section 416, the appearance said to be equivalent to personal service of summons is termed a “voluntary appearance.”

1. Cal. Stat. 1969, ch. 1610, § 30(a), at 3375.

2. E.g., CAL. CODE CIV. PROC. §§ 410.10 (basis of jurisdiction), 410.30 (inconvenient forum), 412.10 (issuance of summons), 415.20 (substitute service of summons), 415.30 (mail delivery of summons), 416.10-90 (persons upon whom summons may be served) (operative July 1, 1970).

3. E.g., CAL. CODE CIV. PROC. §§ 410.60 (jurisdiction over a defunct corporation), 410.70 (jurisdiction over joint or several debtors on contract) (operative July 1, 1970).

4. Sections of S.B. 503 (1969) that will not be considered in this Note are: CAL. CODE CIV. PROC. §§ 410.10, 410.30, 410.60-70, 411.10, 412.10, 413.10-30, 415.10-40, 416.10-90, 417.20-30, 467, 473.5, 1029.5 (operative July 1, 1970); CAL. GOV'T CODE §§ 69846.5, 71613.5, 72051.5 (operative July 1, 1970); CAL. CORP. CODE § 3305.2 (operative July 1, 1970).

5. CAL. CODE CIV. PROC. § 410.50 (operative July 1, 1970) (emphasis added).

In applying section 416 of the Code of Civil Procedure, the California courts have said that when a person "voluntarily appears generally," he will be held to have waived the objection that there has been no personal service, and in personam jurisdiction will be acquired.⁶ A "voluntary appearance" has been defined in almost the same terms as a "general appearance." The California Supreme Court has said that a "voluntary appearance" is equivalent to personal service, and "[w]here the defendant appears and asks some relief which can be granted on the hypothesis that the court has jurisdiction, it is a submission to the jurisdiction as completely as if he had been regularly served with process."⁷

Moreover, the terms "voluntary appearance" and "general appearance" are often used by the courts interchangeably to characterize the defendant's act. For example, in *In re Strong's Estate*⁸ the court avers: "[W]here a party upon whom summons is required to be served, voluntarily appears and makes a defense, the service of summons is waived."⁹ In the same discussion the court goes on to say: "Process is waived by a *general appearance*, in person or by an attorney, entered in the action or by some act equivalent thereto . . . or by otherwise recognizing the authority of the court to proceed in the action."¹⁰ Similarly, in *Bayle-Lacoste & Co. v. Superior Court*,¹¹ the court declares: "A voluntary appearance generally of a defendant is a waiver of service of summons and of any defect therein. The filing of

6. *Lacey v. Bertone*, 33 Cal. 2d 649, 203 P.2d 755 (1949); *Pease v. City of San Diego*, 93 Cal. App. 2d 706, 710-11, 209 P.2d 843, 845 (1949); *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal. App. 2d 636, 116 P.2d 458 (1941).

"Voluntarily appears generally" should be distinguished from a special appearance. A special appearance occurs when the party appears only to challenge jurisdiction over his person and confines his appearance exclusively to that purpose. *Judson v. Superior Court*, 21 Cal. 2d 11, 129 P.2d 361 (1942); *Olcese v. Justice's Court*, 156 Cal. 82, 103 P. 317 (1909); *Zobel v. Zobel*, 151 Cal. 98, 101, 90 P. 191, 192 (1907); *Pease v. City of San Diego*, 93 Cal. App. 2d 706, 209 P.2d 843 (1949). "[I]f [the party] raises any other question, or asks any other relief which can only be granted upon the hypothesis that the court has jurisdiction over his person, then he [has] made a general appearance." *Judson v. Superior Court*, 21 Cal. 2d 11, 13, 129 P.2d 361, 362 (1942); *accord*, *Olcese v. Justice's Court*, 156 Cal. 82, 87, 103 P. 317, 319 (1909); *Zobel v. Zobel*, 151 Cal. 98, 101, 90 P. 191, 192 (1907); *Pease v. City of San Diego*, 93 Cal. App. 2d 706, 711, 209 P.2d 843, 845 (1949). For a good discussion of special appearance and acts of a party which will amount to a general appearance, see Note, *Special Appearance in California*, 10 STAN. L. REV. 711 (1958).

7. *In re Walden's Estate*, 168 Cal. 759, 761, 145 P. 100, 101 (1914).

8. 54 Cal. App. 2d 604, 129 P.2d 493 (1942).

9. *Id.* at 611, 129 P.2d at 497 (emphasis added).

10. *Id.*, quoting *Harrington v. Superior Court*, 194 Cal. 185, 189, 228 P. 15, 16 (1924) (emphasis added).

11. 46 Cal. App. 2d 636, 116 P.2d 458 (1941).

an answer is a *general appearance*.”¹² Then in the same context the court says: “His *voluntary appearance* must be deemed to be a waiver of any failure to name him as defendant.”¹³

Thus it can be seen that there is no distinction between voluntary or general appearance, and the change in wording in section 410.50, substituting “general” for “voluntary” appearance, does not result in any substantive change in the law. One accomplishment of the modification, however, is that now the Code of Civil Procedure uniformly defines the appearance that is sufficient to waive service of process. Prior to its amendment, section 416 was the only statutory provision that used the term “voluntary appearance”; consequently, with the amendment of that section the statutory use of the term “general appearance” will be uniform.¹⁴ In addition, the prior use of the term “voluntary appearance” implied that the defendant’s volition was an important factor in determining the character of his appearance and also whether the particular appearance was sufficient to waive service of process. However, the character of an appearance is determined, not by the volition or will of the defendant, but by the kind of relief sought by the appearance.¹⁵ Consequently the uniform use of “general appearance” will eliminate the ambiguity arising from the use of the term “voluntary.”

Section 411.20—“Rebuttable Presumption” (affecting the burden of producing evidence) v. “Prima Facie Evidence”

New section 411.20 is concerned with the filing of a complaint or other first paper and the payment of filing fees. The wording of this statute is basically the same as that of old section 405.5 of the Code of Civil Procedure. Both sections provide that if all the necessary filing fees have not been paid, the clerk shall mail a notification of the unpaid fees to the party filing the paper and execute a certificate of such mailing. However, the effect to be given the clerk’s certificate is worded differently in the two statutes. Under old section 405.5 the clerk’s certificate is treated as “*prima facie evidence* of the facts recited therein.”¹⁶

12. *Id.* at 644, 116 P.2d at 463 (emphasis added).

13. *Id.* (emphasis added). In addition, *Horney v. Superior Court*, 83 Cal. App. 2d 262, 188 P.2d 552 (1948), held that “a voluntary appearance for any purpose other than to question the jurisdiction of the court is general.” *Id.* at 271, 188 P.2d at 557.

14. *E.g.*, CAL. CODE CIV. PROC. §§ 418.10, 581a (operative July 1, 1970); Cal. Stat. 1963, ch. 878, § 1, at 2125, CAL. CODE CIV. PROC. § 416.1 (effective until July 1, 1970); Cal. Stat. 1955, ch. 1452, § 5, at 2640, CAL. CODE CIV. PROC. § 581a (effective until July 1, 1970).

15. See note 6 *supra*.

16. Emphasis added.

On the other hand, the clerk's certificate under new section 411.20 is said to establish "a *rebuttable presumption* that such fees were not paid."¹⁷

This change of statutory language, which may seem to be a significant modification of the law, is superficial, and results in no substantive alteration. Reference need only be made to the California Evidence Code, which specifies that "a statute providing that a fact or group of facts is *prima facie* evidence of another fact establishes a *rebuttable presumption*."¹⁸

"Every *rebuttable presumption* is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."¹⁹ There is no doubt that the *rebuttable presumption* created in new section 411.20 affects the burden of producing evidence because the statute itself declares it to be such a presumption.²⁰

Whether the *prima facie* evidence-*rebuttable presumption* created under the old section is one affecting the burden of proof or burden of producing evidence is uncertain, since the statute itself does not classify it, nor does any California decision interpret the statute.²¹ Apparently, this former section only created a *rebuttable presumption* affecting the burden of producing evidence, since the legislature manifested no intent to change the effect of the amended statute.

Furthermore, the subject matter of the statute does not involve a situation that calls for the application of a presumption affecting the burden of proof. A presumption affecting the burden of proof is designed to implement some public policy beyond the facilitation of the particular action in which it is applied.²² For example, such a presumption is applied in cases where the legitimacy of a marriage or a birth is called into question,²³ and it must be rebutted by the defendant by a preponderance of the evidence.²⁴

A *rebuttable presumption* affecting the burden of producing evidence, on the other hand, is only an expression of experience, designed to dispense with unnecessary facts that are likely to be true if not dis-

17. Emphasis added.

18. CAL. EVID. CODE § 602.

19. *Id.* § 601.

20. CAL. CODE CIV. PROC. § 411.20 (operative July 1, 1970).

21. *See* CAL. EVID. CODE § 602, Law Revision Comm'n Comment.

22. *Id.* § 605.

23. *Id.*

24. *Id.* § 115.

puted,²⁵ and merely evidence sufficient to support the nonexistence of the fact need be introduced for the presumption to be rebutted.²⁶ The effect to be given the clerk's certificate under old section 405.5 squarely fits this latter category and it is certain that the legislature, by creating the prima facie evidence-rebuttable presumption in the old statute, intended "to implement no public policy other than to facilitate the determination of the particular action"²⁷

Since there is no change in the law, the most probable explanation for the change in wording from "prima facie evidence" to a "rebuttable presumption" affecting the burden of producing evidence is that it was intended to clarify the ambiguity which existed under the former section and to avoid the necessity of judicial interpretation of the phrase "prima facie evidence."²⁸

Section 414.10—"Of the County Where the Defendant is Found"

Old Code of Civil Procedure section 410 provides: "The summons may be served by the sheriff, a constable, or marshal, of the county where the defendant is found, or any other person over the age of 18, not a party to the action." Hence, under the law until July 1, 1970, any person not a party to the action and over 18 years of age can serve summons anywhere in California, except that a sheriff, constable, or marshal can serve summons only within his own county.²⁹

New Section 414.10 will replace the portion of old section 410 that deals with the individuals who may serve summons and provides that "[a] summons may be served by any person who is at least 18 years of age and not a party to the action." The earlier provision dealing with the sheriff, constable, or marshal, has been omitted from the new section.³⁰ Thus a law enforcement officer is apparently placed on the same level as an ordinary individual for purposes of service of process, and since the individual is not confined to a specific service

25. See *id.* § 603, Law Revision Comm'n Comment.

26. See *id.* § 604.

27. CAL. EVID. CODE § 603. Compare *id.* §§ 603, 604 (presumptions affecting the burden of producing evidence) with *id.* §§ 605, 606 (presumptions affecting the burden of proof).

28. For a discussion of problems and interpretations of presumptions and prima facie evidence, see Comment, *The California Evidence Code: Presumptions*, 53 CALIF. L. REV. 1439 (1965).

29. See note 34 & text accompanying notes 34-36 *infra*.

30. Compare Cal. Stat. 1967, ch. 1324, § 3, at 3150, CAL. CODE CIV. PROC. § 410 (effective until July 1, 1970) with CAL. CODE CIV. PROC. § 414.10 (operative July 1, 1970).

range it would seem to follow that a law enforcement officer is not so confined either.

This argument falters in respect to constables and marshals. One of the functions of a marshal is to attend the municipal court of the district in which he is appointed or elected to act.³¹ A constable has the identical duty in respect to the justice courts of his district.³² Both are authorized to execute, serve, and return all writs and process delivered to them by their respective courts, but each, when serving such paper or otherwise acting as attendant of his court, is restricted by statute in the performance of those duties to the county of his judicial district.³³

There are no California cases interpreting the provision in section 410 that confines the sheriff to a particular county for service of process purposes.³⁴ However, the California rule on statutory interpretation and construction provides that except where clearly intended or indicated, words in a statute should be given their ordinary meaning and receive a sensible construction in accord with their commonly understood meaning.³⁵ Utilizing this precept, it is evident that under the old law, a summons cannot be served by either a sheriff, constable or marshal from a county other than the one where the defendant is found.³⁶

Although the statutory restriction still remains for a constable and marshal despite section 414.10,³⁷ the new law contains no similar limitation on the power of the sheriff to serve summons. The sheriff is authorized by statute to "serve all process and notices in the manner provided by law,"³⁸ and there is no express restriction of the power

31. CAL. GOV'T CODE § 71264.

32. *Id.* §§ 27820, 71264.

33. *Id.*; 49 OPS. CAL. ATT'Y GEN. 130 (1967).

34. CAL. CODE CIV. PROC. § 410 was originally enacted in 1872. Prior to this, *Hahn v. Kelly*, 34 Cal. 391 (1868), held that jurisdiction may be obtained by personal service of summons by the *sheriff of the county where the defendant is found*.

35. *Pasadena Univ. v. Los Angeles County*, 190 Cal. 786, 214 P. 868 (1923); *People ex rel. Hamilton v. City of Santa Barbara*, 205 Cal. App. 2d 501, 23 Cal. Rptr. 240 (1962); *People v. Kimbley*, 189 Cal. App. 2d 300, 11 Cal. Rptr. 519 (1961).

36. *See* Cal. Stat. 1967, ch. 1324, § 3, at 3150, CAL. CODE CIV. PROC. § 410 (effective until July 1, 1970).

37. CAL. GOV'T CODE §§ 27820, 71264.

38. *Id.* § 26608. In *Hibernia Sav. & Loan Soc'y v. Clarke*, 110 Cal. 27, 42 P. 425 (1895), "all" was construed to mean only such process as comes into sheriff's hands and does not exclude any other person from serving process where authorized by statute.

of the sheriff to be found in the sections authorizing him to serve summons.³⁹ Consequently, by the substitution of section 414.10 for section 410 of the Code of Civil Procedure, it appears that a sheriff of any particular county now might effectively serve summons upon a defendant regardless of where in the state the defendant is found.⁴⁰

The propriety of permitting statewide service by a sheriff is dubious. The most logical explanation for the unequal treatment of law enforcement officers under section 414.10 is that the legislature failed to realize that the California Government Code does not place a county-wide service limitation on sheriffs. The manifested change is probably unintentional since there is no reason to place a sheriff in a special class and allow him to serve process statewide while restricting other law enforcement officers. Presumably, it would take more than this questionable change in the service statute to alter a California practice that has existed for more than a hundred years.⁴¹

Section 415.50—Statutory Wording Changes in the Service by Publication Statute

New section 415.50 contains the rules dealing with service of process by publication. Basically, this section is identical in scope to the sections it will supersede,⁴² but several changes in wording in the new section raise the question whether the legal effect of the new and superseded sections are the same.

“Party” v. “Person” and “Corporation”

In stating the applicability of service by publication, new section 415.50 terms the one to receive such service “the party.” Old section 412, dealing with the same subject matter, denotes the defendant to be served as a “person, corporation or unincorporated association.” The older statute thus identifies more explicitly the person or organization on whom service by publication may be made.

The use of the word “party” in new section 415.50 makes no change in the law but only helps make it more concise and clear by eliminating unnecessary wording. The use of the words “corporation” and “unincorporated association” after “person” in the old statute is

39. See CAL. GOV'T CODE §§ 26608, 26665.

40. See *id.* § 26665.

41. See note 34 *supra*.

42. Cal. Stat. 1968, ch. 132, § 3, at 712, CAL. CODE CIV. PROC. § 412 (effective until July 1, 1970).

redundant, for these former two terms have been included under the definition California has given the term "person."⁴³

"Reasonable" v. "Due" Diligence

Before a summons may be served by publication pursuant to new section 415.50, it must appear to the satisfaction of the court in which the action is pending that the "party to be served cannot with *reasonable diligence* be served"⁴⁴ in any other manner provided by law. The old section has a similar requirement that "*due diligence*" must be used to personally serve the defendant before resort may be made to service by publication. From an examination of the statutes themselves and the acts required of a party before he may serve by publication,⁴⁵ it is obvious that the legislature intended no change in the existing law by this change in wording.⁴⁶

"Due" is defined in the dictionary as "requisite or appropriate in accordance with accepted notions of what is right, *reasonable*, fitting or necessary."⁴⁷ "Reasonable" means "being or remaining within the bounds of reason: not extreme: not excessive."⁴⁸ Thus, even the lay definitions show that no material difference exists between the two adjectives, one even being defined in terms of the other.

In any event, the modifiers in this case are not the important words. The controlling word is "diligence,"⁴⁹ and this remains unchanged in section 415.50. "Diligence" is a relative term and must be determined as a matter of fact from the affidavits in each particular case.⁵⁰

43. *Douglas v. Pacific Mail S.S. Co.*, 4 Cal. 304 (1854); CAL. CODE CIV. PROC. § 17; CAL. EVID. CODE § 175; CAL. GOV'T CODE § 17.

44. CAL. CODE CIV. PROC. § 415.50(a) (operative July 1, 1970) (emphasis added).

45. *E.g.*, *Vorburg v. Vorburg*, 18 Cal. 2d 794, 117 P.2d 875 (1941); *Roberts v. Jacob*, 154 Cal. 307, 97 P. 671 (1908), *aff'd*, 223 U.S. 261 (1912); *Rue v. Quinn*, 137 Cal. 651, 66 P. 216 (1901); *Narum v. Cheatham*, 127 Cal. App. 505, 15 P.2d 1106 (1932).

46. CAL. CODE CIV. PROC. § 415.50, Judicial Council Comment (operative July 1, 1970). The comment to this section also contains a discussion of the meaning of reasonable diligence with citations to cases construing the term.

47. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 699 (P. Grove ed. 1968) (emphasis added).

48. *Id.* at 1892.

49. *Vorburg v. Vorburg*, 18 Cal. 2d 794, 117 P.2d 875 (1941) (diligence used without any adjective).

50. *See id.*

"Published Within the State"

Under new section 415.50(b), the court is to order publication of the summons in a named newspaper that is published in California and also is most likely to give actual notice to the party to be served. Under the old section,⁵¹ there is no explicit requirement that the newspaper be published within California.⁵² However, the publication of notice, whether under the old or new law, has to be made in a newspaper of general circulation.⁵³

A newspaper of general circulation is defined by statute in part as one "published at regular intervals *in the state, county, or city* where the publication [or] notice by publication . . . is to be given or made"⁵⁴ A fortiori, the publication of summons has always had to be in a named newspaper published in the state, and so the new wording merely codifies existing law.

"Address" v. "Residence"

The final change in wording that the new law makes in the publication statute is in the substitution of "address" for "residence." Under the new law, if the "address" of the party to be served by publication is ascertained before expiration of the time prescribed for publication of summons, a copy of the summons and of the complaint is to be mailed to the party's "address"⁵⁵ rather than to his "residence", as the old statute requires.⁵⁶ However, California courts have held that there is no difference between "address" and "residence" for the purposes of the publication statute,⁵⁷ and consequently this change in statutory wording also has no substantive effect.

51. Cal. Stat. 1957, ch. 1669, § 1, at 3048, CAL. CODE CIV. PROC. § 413 (effective until July 1, 1970).

52. *See id.*

53. CAL. GOV'T CODE § 6060 states: "Whenever any law provides that publication shall be made in a designated section of this article, such notice shall be published in a newspaper of general circulation" Both CAL. CODE CIV. PROC. § 415.50(b) (operative July 1, 1970) and Cal. Stat. 1957, ch. 1669, § 1, at 3048, CAL. CODE CIV. PROC. § 413 (effective until July 1, 1970) provide that notice should be published for the time specified by section 6064 of the Government Code—a designated section of the above article.

54. CAL. GOV'T CODE § 6000 (emphasis added).

55. CAL. CODE CIV. PROC. § 415.50(b) (operative July 1, 1970).

56. Cal. Stat. 1957, ch. 1669, § 1, at 3048, CAL. CODE CIV. PROC. § 413 (effective until July 1, 1970).

57. *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 70 P. 299 (1902); *cf. Ridge v. Boulder Creek School Dist.*, 60 Cal. App. 2d 453, 140 P.2d 990 (1943), *construing* Cal. Stat. 1937, ch. 149, § 1, at 414.

**Section 417.10—Statutory Wording Changes
in the Proof of Service Statute.**

Construction of Section 417.10(a)

New section 417.10 governs proof that process has been served upon a person within the state. According to section 417.10(a), if the process is served personally on the defendant by hand,⁵⁸ proof of such service is made by the affidavit of the person making the service. The new section goes into great detail in specifying what the affidavit must contain: It must show the time, place, manner of service,⁵⁹ facts showing that service has been properly made, the name of the person who received a copy of the summons and the complaint, and if appropriate, the title or capacity in which the person is served.⁶⁰ If the process is served on a corporation or unincorporated association, the affidavit must also state that the proper notice requirements appeared on the copy of the summons served.⁶¹ These statutory details as to the contents of the affidavit are new to the law; the only information required to be in the affidavit under the old law is a statement of the time and place of service.⁶²

Again, as in the case of persons who may serve summons, the sheriff, constable and marshal are not mentioned in the new section as they are in the old.⁶³ However, since a sheriff, constable or marshal is authorized to make service⁶⁴ and to certify that such service was made,⁶⁵ his certificate of service may be used in lieu of the affidavit.⁶⁶

58. CAL. CODE CIV. PROC. § 415.10 (operative July 1, 1970). CAL. CODE CIV. PROC. § 417.10(a) (operative July 1, 1970) also includes proof of service by mail and by substituted service pursuant to CAL. CODE CIV. PROC. §§ 415.20, 415.30 (operative July 1, 1970). However, since service of process by mail or substituted service of process were unknown in the former law, a discussion of these sections is beyond the scope of this Note.

59. The manner of service must be shown because there are other methods of service than by mere personal delivery. See note 58 *supra*.

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

61. *Id.* Compare CAL. CODE CIV. PROC. § 412.30 (operative July 1, 1970) with Cal. Stat. 1967, ch. 1324, § 3, at 3150, CAL. CODE CIV. PROC. § 410 (effective until July 1, 1970).

62. Cal. Stat. 1933, ch. 744, § 21, at 1847, CAL. CODE CIV. PROC. § 415 (effective until July 1, 1970).

63. Compare CAL. CODE CIV. PROC. § 417.10(a) (operative July 1, 1970) with Cal. Stat. 1933, ch. 744, § 21, at 1847, CAL. CODE CIV. PROC. § 415(1) (effective until July 1, 1970). See the discussion of the omission of sheriff, constable and marshal as persons who may serve summons in notes 35-41 & accompanying text *supra*.

64. CAL. GOV'T CODE §§ 26608 (sheriffs), 27820, 71264 (constables and marshals).

65. *Id.* § 26609 (sheriffs), 71265 (constables and marshals); see Price v. Hibbs, 225 Cal. App. 2d 209, 37 Cal. Rptr. 270 (1964).

66. Harris v. Minnesota Inv. Co., 89 Cal. App. 396, 265 P. 306 (1928).

The most important problem of new section 417.10(a) stems from the fact that it deals solely with the affidavit as proof of service. Because of this emphasis, the section implies that the affidavit itself is sufficient proof of service to support a default judgment. Old section 410, however, states that when process is served the summons must be returned along with the affidavit or certificate of service.

Although "return" is not used in new section 417.10, the term appears in old section 581a of the Code of Civil Procedure and remains unchanged by the amendment.⁶⁷ Section 581a has been interpreted to mean that an action "must be dismissed unless the *summons* is served and filed with the clerk of the court *together* with the officer's certificate of service, if it was served by an officer, or the *affidavit* of the person who served it, if it was served by any other person"⁶⁸ As used in section 581a, "'return thereon made' [means] the filing of the summons in the office of the clerk together with a statement of what was done in connection with the service thereof."⁶⁹

The courts have been lenient with defective affidavits, if service is shown to have been actually made.⁷⁰ There need be no separate filing of the affidavit; the filing of the original summons with the affidavit attached or annexed to it is sufficient to support a default judgment.⁷¹ But the mere making of the affidavit or certificate without filing the original summons is insufficient for a return.⁷² Hence, the implication that arises from the emphasis on the affidavit of service in new section 417.10(a)—that the affidavit is sufficient proof of service in and of itself to support a default judgment—is clearly misleading. Care must be taken to read this section in light of how the term "return" is used in section 581a, as amended,⁷³ and how it has been interpreted by the cases.

67. For a discussion of wording changes in the amendment of section 581a by S.B. 503 (1969), see notes 88-98 & accompanying text *infra*.

68. *Frohman v. Bonelli*, 91 Cal. App. 2d 285, 291, 204 P.2d 890, 893 (1949) (emphasis added).

69. *Id.* at 288, 204 P.2d at 892.

70. *E.g.*, *Cardwell v. Sabichi*, 59 Cal. 490 (1881) (default judgment upheld where certificate showed time, place, and manner of service, although it did not mention the name of defendant); *Wheat v. McNeill*, 111 Cal. App. 72, 295 P. 102 (1931) (default judgment upheld where affidavit showed fact of service but was erroneous as to place of service).

71. *Hibernia Sav. & Loan Soc'y v. Clarke*, 110 Cal. 27, 42 P. 425 (1895).

72. *Frohman v. Bonelli*, 91 Cal. App. 2d 285, 204 P.2d 890 (1949).

73. Cal. Stat. 1969, ch. 1610, § 24, at 3373, *amending* CAL. CODE CIV. PROC. § 581a (operative July 1, 1970).

"Publisher"

The law governing proof of service by publication is set out in new section 417.10(b). In addition to stating exactly what must be in the affidavit and removing any ambiguity that may have existed on this point in the old law, section 417.10(b) adds the "publisher" to the group of persons, including the printer, his foreman or the principal clerk, who may make the affidavit. However, the addition of a "publisher" to those who may make the affidavit, although a change in the wording of the statute,⁷⁴ is not a substantive change in the law, for even under the old statute,⁷⁵ a publisher is allowed to make the affidavit since he is presumed to be the printer.⁷⁶

Section 418.10—"Cross-Defendant"

New section 418.10 does not change the old law dealing with motions to quash service of summons.⁷⁷ The new section provides: "A defendant . . . may serve and file a notice of motion (1) to quash service of summons on the ground of lack of jurisdiction of the court over him."⁷⁸ There is a conspicuous omission in this section, for the old law applies the provisions to both "defendants and cross-defendants."⁷⁹ The intention of the legislature, however, is that the new statute continue to encompass both defendants and cross-defendants.⁸⁰

One California statute that attempts to explain the term "cross-defendant" states that "[d]efendant' includes a person in the position of a defendant in a cross-action or counterclaim."⁸¹ A cross-action may arise whenever a defendant seeks affirmative relief against any party that relates to the transaction upon which the original cause of action

74. Compare CAL. CODE CIV. PROC. § 417.10(b) (operative July 1, 1970) with Cal. Stat. 1933, ch. 744, § 21, at 1847, CAL. CODE CIV. PROC. § 415(3) (effective until July 1, 1970).

75. Cal. Stat. 1933, ch. 744, § 21, at 1847, CAL. CODE CIV. PROC. § 415(3) (effective until July 1, 1970).

76. *People v. Thomas*, 101 Cal. 571, 36 P. 9 (1894).

77. Cal. Stat. 1963, ch. 878, § 1, at 2125, CAL. CODE CIV. PROC. § 416.1 (effective until July 1, 1970); Cal. Stat. 1955, ch. 1452, §§ 2-3, at 2639-40, CAL. CODE CIV. PROC. §§ 416.2-3 (effective until July 1, 1970).

78. CAL. CODE CIV. PROC. § 418.10(a)(1) (operative July 1, 1970).

79. Cal. Stat. 1963, ch. 878, § 1, at 2125, CAL. CODE CIV. PROC. § 416.1 (effective until July 1, 1970); Cal. Stat. 1955, ch. 1452, §§ 2-3, at 2639-40, CAL. CODE CIV. PROC. §§ 416.2-3 (effective until July 1, 1970). Compare *id.*, with CAL. CODE CIV. PROC. § 418.10 (operative July 1, 1970).

80. See CAL. CODE CIV. PROC. § 418.10, Judicial Council Comment (operative July 1, 1970).

81. CAL. COMM. CODE § 1201(13), Law Revision Comm'n Comment.

is based.⁸² The affirmative relief takes the form of a cross-complaint, which must be served upon the party or parties affected.⁸³ "If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued upon them in the same manner as upon the commencement of an original action."⁸⁴ If no summons is issued on parties affected by a cross-complaint, the court has no jurisdiction to determine the rights asserted in the cross-complaint seeking affirmative relief.⁸⁵ Thus, a party or parties affected by a cross-complaint are to be treated the same as an ordinary defendant for purposes of service of summons.

It is obvious that the party adverse to the one asserting the cross-complaint is the cross-defendant.⁸⁶ Therefore, it appears that the omission of the term "cross-defendant" from section 418.10 is not significant, and that a cross-defendant is included within the term "defendant."

Section 581a⁸⁷—"Must" v. "Shall"

Section 581a of the Code of Civil Procedure has also been amended by Senate Bill 503. This section contains the basic provisions for dismissal of actions for want of prosecution because of failure to serve summons. The old statute provides that all actions "must" be dismissed by the court in which it was commenced unless summons has been served within one year and return thereon made within three years after the commencement of the action.⁸⁸ It also provides that all actions "must" be dismissed by the court if summons has been served, but no answer has been filed, and the plaintiff fails to secure a judgment within three years.⁸⁹

The ostensible purpose of the amendment of section 581a was to delete the one year limitation on issuance of summons.⁹⁰ This purpose is accomplished, and the new statute otherwise reads exactly the same as the old one, except for the substitution of "shall" in the new provision in both of the places where "must" appears in the old sec-

82. CAL. CODE CIV. PROC. § 442.

83. *Id.*

84. *Id.*

85. *Bank of America v. Carr*, 138 Cal. App. 2d 727, 292 P.2d 587 (1956).

86. *See* CAL. CODE CIV. PROC. § 308.

87. *See* notes 67-73 & accompanying text *supra*, for a further discussion of the significance of section 581a.

88. Cal. Stat. 1955, ch. 1452, § 5, at 2640, CAL. CODE CIV. PROC. § 581a (effective until July 1, 1970).

89. *Id.*

90. CAL. CODE CIV. PROC. § 581a, Judicial Council Comment (operative July 1, 1970).

tion.⁹¹ This change raises the question whether, by the use of the word "shall" instead of "must,"⁹² it is now within a court's discretion to dismiss an action falling within the purview of section 581a.

The California courts have been rigid in their interpretation of section 581a, holding that its provisions call for mandatory dismissal.⁹³ But the cases giving this interpretation were decided under section 581a when it contained the term "must," and some of the decisions have emphasized the use of this word in the statute to reach their conclusions.⁹⁴

The solution to the problem is found in the original California statute concerned with dismissal for want of prosecution.⁹⁵ This statute, like the new amendment to 581a, also used "shall" rather than "must."⁹⁶ In construing this original statute, the California Supreme Court held that the section was prohibitory and mandatory saying: "To hold this statute directory would be . . . to repeal it."⁹⁷ "Must" was substituted for "shall" when this original statute was first amended to become section 581a of the Code of Civil Procedure.⁹⁸ Thus, since it has already been held that the similar use of the word "shall" in the original California statute imported compulsory dismissal, there is no reason for this word to have any other meaning under Senate Bill 503.

Section 1032b—Omission of "Subpoena"

The legislature, by repealing section 410.1 of the Code of Civil

91. Compare CAL. CODE CIV. PROC. § 581a (operative July 1, 1970) with Cal. Stat. 1955, ch. 1452, § 5, at 2640, CAL. CODE CIV. PROC. § 581a (effective until July 1, 1970).

92. New code section 412.20 also substitutes "shall" for "must," which was used in old section 407. However, the legislative intent is clear, and according to the comment of the Judicial Council following section 412.20, the new provision remains mandatory.

93. *E.g.*, *Gonsalves v. Bank of America*, 16 Cal. 2d 169, 172, 105 P.2d 118, 120 (1940); *Modoc Land & Livestock Co. v. Superior Court*, 128 Cal. 255, 256-57, 60 P. 848, 849 (1900); *Thompson & Sons v. Superior Court*, 215 Cal. App. 2d 719, 720, 30 Cal. Rptr. 471, 472 (1963); *Beckwith v. County of Los Angeles*, 132 Cal. App. 2d 377, 378-79, 282 P.2d 87, 88 (1955); *Frohman v. Bonelli*, 91 Cal. App. 2d 285, 287, 204 P.2d 890, 891 (1949); *Rio Del Mar Country Club v. Superior Court*, 84 Cal. App. 2d 214, 220, 190 P.2d 295, 299 (1948).

94. *Palmer v. Superior Court*, 192 Cal. App. 2d 302, 303, 13 Cal. Rptr. 301, 302 (1961); *Muller v. Coastside County Water Dist.*, 180 Cal. App. 2d 712, 713, 4 Cal. Rptr. 832, 833 (1960).

95. Cal. Stat. 1889, ch. 259, § 581(7), at 398.

96. Compare CAL. CODE CIV. PROC. § 581a (operative July 1, 1970) with Cal. Stat. 1889, ch. 259, § 581(7), at 398.

97. *Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 P. 470, 471 (1896).

98. Cal. Stat. 1907, ch. 376, § 581a, at 712.

Procedure⁹⁹ and substituting section 1032b therefor, appears to have made an unfortunate omission. Both sections deal with the cost of service of summons when served by someone other than a public officer or employee of the state. Whereas old section 410.1 provides that one serving either a summons or *subpoena* can recover no more than the statutory amount stipulated for a public officer,¹⁰⁰ section 1032b only retains a similar provision as to one who serves a summons but fails to cover the cost of serving a subpoena.¹⁰¹

As the definition of summons¹⁰² is different from that of a subpoena,¹⁰³ the latter should not be included in the word "summons" for the purposes of this section. Thus, the legislature by omission of the word "subpoena" in section 1032b, seems to have inadvertently failed to provide a statutory maximum cost recoverable for service of a subpoena by someone other than a public officer, and has left strictly to court's discretion the determination of cost when the problem arises.

An obvious answer to the problem would be for the legislature to amend the section and substitute "process" for "summons." By doing this, both summons and subpoena would be covered by the statute since "process" includes both.¹⁰⁴

Conclusion

This Note has been confined to analyzing statutory construction problems arising from slight changes, inclusions, and omissions of wording in Senate Bill 503. There was no apparent legislative intent to change the old law by the changes in wording which have been discussed, and the new wording has, by and large, left the former law unaffected.

The predominant effect of the changes, inclusions and omissions of wording is to streamline statutory language, aiding the conciseness and clarity of the amended sections. The legislative aim of eliminating ambiguity through succinctness is achieved in most but not all of the sections discussed.

Section 417.10, for example, by superseding section 410, fails to

99. Cal. Stat. 1969, ch. 1610, § 11, at 3372.

100. Fees recoverable by a public officer are governed by CAL. GOV'T CODE §§ 26721 (summons), 26743 (subpoena), 26746 (mileage).

101. Compare CAL. CODE CIV. PROC. § 1032b (operative July 1, 1970) with Cal. Stat. 1953, ch. 52, § 1, at 696, CAL. CODE CIV. PROC. § 410.1 (effective until July 1, 1970).

102. CAL. CODE CIV. PROC. § 412.20 (operative July 1, 1970).

103. CAL. CODE CIV. PROC. § 1885.

104. CAL. GOV'T CODE § 22.

state, as the earlier section does, that both the affidavit of service and the summons must be returned. Because of the sole focus on the affidavit, an incorrect implication arises that the affidavit of service is itself a sufficient return which could support a default judgment. Section 417.10 must be read with section 581a to make clear that an affidavit must be accompanied by the original summons and complaint before there can be an effective return.¹⁰⁵ Further ambiguity is caused by the omission of sheriff, constable and marshal in new section 414.10. While a constable and marshal are still restricted by other statutes, the effect of the new section appears to segregate a sheriff into a special class allowing him a statewide service range on a par with a private individual.¹⁰⁶ Finally, the legislature, by only providing for summons and omitting "subpoena" from section 1032b, has failed to provide a maximum cost recoverable for service of a subpoena by one other than a statutory officer.¹⁰⁷

These latter two omissions produce uncertainty about whether or not the legislature actually intended a substantive change in the law. The most probable explanation for the omissions and the resulting ambiguity is oversight on the part of the legislature—oversight that can only be remedied by legislative amendment or by judicial construction of the statutes involved.

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105. See discussion of the problem of a "return" in notes 67-73 & accompanying text *supra*.

106. See discussion of omission of sheriff, constable and marshal by section 414.10 in notes 29-41 & accompanying text *supra*.

107. See discussion of omission of "subpoena" by section 1032b in notes 99-103 & accompanying text *supra*.

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