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Severn v. Adidas Sportschuhfabriken: California's Long-Arm Powers and Immunity from Service of Process for Nonresidents

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SEVERN v. ADIDAS SPORTSCHUHFABRIKEN: CALIFORNIA'S LONG-ARM POWERS AND IMMUNITY FROM SERVICE OF PROCESS FOR NONRESIDENTS

California courts have joined with the great majority of states in accepting the common law immunity rule.[1] This rule protects nonresident witnesses, litigants, and others who are within a jurisdiction to attend court proceedings from the effects of any valid service of process which may be made upon them while they are present within the forum. Recently, in *Severn v. Adidas Sportschuhfabriken*,[2] the district court of appeal held that the doctrine is no longer the law in California. The court determined that the reasons for granting immunity to nonresidents had been eliminated by California's new long-arm statute, which became operative in 1970 and which greatly extended California's powers of judicial jurisdiction over nonresidents.[3]

The *Severn* decision has little value as precedent, both because it was decided by a district court of appeal[4] and because no hearing before the Supreme Court of California was requested.[5] The case is not without importance, however. The *Severn* court is the first California

1. *See generally* M. GREEN, BASIC CIVIL PROCEDURE 47 n.166 (1972) [hereinafter cited as BASIC CIVIL PROCEDURE]; 62 AM. JUR. *Process* §§ 136-56 (2d ed. 1972).

2. 33 Cal. App. 3d 754, 109 Cal. Rptr. 328 (1973).

3. CAL. CODE CIV. PROC. §§ 410.10, 413.10 (West 1973) (added by Cal. Stat. 1969, ch. 1610, § 3, operative July 1, 1970).

4. Until the *Severn* decision, the immunity rule was consistently upheld by California courts, including the supreme court. See notes 20-48 and accompanying text *infra*. "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction . . . . The decisions of [the state supreme court] are binding upon and must be followed by all the state courts of California. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 325-26 (1962). Also, propositions of law laid down in the district courts of appeal are never binding on the supreme court. Worthley v. Worthley, 44 Cal. 2d 465, 472, 283 P.2d 19, 24 (1955).

5. The authority of a decision by the district court of appeal in which there has been no petition for hearing in the supreme court is questionable. *See* Wogman v. Wells Fargo Bank, 123 Cal. App. 2d 657, 664, 267 P.2d 423, 428 (1954); Hunter v. Sparling, 87 Cal. App. 2d 711, 724, 197 P.2d 807, 815 (1948); 6 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* § 700 (2d ed. 1971).

court to examine the immunity rule in light of California's new jurisdictional laws; and it is likely that other courts, if not required to follow the *Severn* decision, will at least examine its reasoning in determining whether the immunity rule should still be applied in this state.

This note will analyze the *Severn* court's decision to assess its usefulness as a guide in future cases dealing with the immunity rule. Preliminary to this analysis, a discussion of the origins of the immunity rule and its development in California will be helpful. Since the court based its holding on the changes in judicial jurisdiction effected by California's new long-arm statute, these changes will also be reviewed.

Facts of the Case and the Court's Holding

Facts

The plaintiff, Clifford Severn, doing business as Clifford Severn Sporting Goods, brought an action in California state court against three European corporations and Horst Dassler, a resident of France. Defendant Dassler was personally served in the California action on behalf of himself and the defendant corporations pursuant to section 416.10 of the California Code of Civil Procedure.[6]

The service was made upon Dassler while he was in Florida, where he had gone for the sole purpose of giving his deposition in an action which one of the defendant corporations had commenced in the United States District Court in Florida.[7] The defendants moved to quash the service of summons made upon them in Florida, basing this motion on the "immunity rule."[8] The trial court granted the motion, and the plaintiff appealed. Neither side seemed to have questioned that the defendants would be subject to the jurisdiction of the California court if the service were allowed.[9]

The Holding: The Immunity Rule is No Longer the Law in California

On appeal, the conflict of laws problem raised in this case was resolved in favor of California,[10] the court looking to California law to

6. CAL. CODE CIV. PROC. § 416.10 (West 1973). Section 416.10(b) provides for summons to be served on a corporation by delivering a copy of the summons and complaint to the president or head of the corporation, a vice president, secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized to receive service by the corporation.

7. 33 Cal. App. 3d at 756, 109 Cal. Rptr. at 329.

8. *Id.* For a discussion of the immunity rule, see text accompanying notes 13-67 *infra.*

9. *Id.* See discussion of in personam jurisdiction and CAL. CODE CIV. PROC. § 410.10 in text accompanying notes 68-111 *infra.*

10. Since Horst Dassler had been served while participating in an action before the United States District Court in Florida, the court was required to determine which

determine whether the immunity rule supported the quashing of the service of process upon the defendants.[11] A majority of the court held that the rule itself was no longer valid in California, and denied the motion on that ground.[12] Since the immunity doctrine is applied at the court's discretion, the court could have reached the more limited deci-

immunity rule should be applied: the California rule, the Florida rule, or the federal rule. The majority opinion discussed the conflict of laws problem only briefly, and concluded that the doctrine of interstate comity did not require that the federal or Florida immunity rule be applied, since either would conflict with California's strong public policy of allowing suitors to serve process on their debtors wherever they may find them. 33 Cal. App. 3d at 762-63, 109 Cal. Rptr. at 333. *See* CAL. CODE CIV. PROC. § 413.10 (West 1973). See Horowitz, *Choice of Law: A Restatement*, 21 U.C.L.A. L. REV. 719, 736 n.49, for the conclusion that *Severn* presents a "false-conflicts" situation.

Justice Sims' lengthy dissent was generated by this finding of the court, and not by its decision to discard the California immunity rule. Sims strongly maintained that the question of the validity of the California rule should never have been reached, because California law should not have been applied in the first place. Since it was the federal district court in Florida whose proceedings would have been affected by service of process on the foreign witness, Justice Sims felt that the federal rule or the Florida rule should have been controlling. He also concluded that it would be unfair for California to deny Dassler immunity and retain jurisdiction when Dassler had entered Florida with the expectation of immunity from service of process in both the federal and state courts in Florida. 33 Cal. App. 3d at 776-77, 109 Cal. Rptr. at 343-44 (Sims, J., dissenting).

However, in his discussion of cases where two forums were involved so that the court had to decide whose immunity rule to apply, Justice Sims only introduced one case where the two courts involved were located in different states, rather than being a federal court and a state court in a single state. *See* Durst v. Tautges, Wilder & McDonald, 44 F.2d 507 (7th Cir. 1930) (removed to federal court on diversity grounds, where motion to quash summons was granted and affirmed), cited in *Severn*, 33 Cal. App. 3d at 772-73, 109 Cal. Rptr. at 340 (Sims, J., dissenting). The one California case which has dealt with the situation, *Hand v. Superior Court*, appears to hold that where no California policy is served by granting immunity to a nonresident involved in an action before the court of another state, then immunity should be denied. 42 Cal. App. 168, 183 P. 456 (1919). See 2 B. WITKIN, CAL. PROCEDURE *Actions* § 584 (2d ed. 1970) which also discusses the *Hand* decision. Considering the lack of authority, and the inconsistency of the authority which does exist, it does not appear that the defendant could have relied on receiving immunity from service of process from another state's court when he entered Florida, even if he could have expected such immunity to be granted by state and federal courts in Florida.

Justice Sims's major fear was that the implementation of a new California rule abolishing the immunity doctrine would leave any future judgment in the *Severn* case open to collateral attack in other jurisdictions which retain the rule. This fear seems unfounded since the general rule is that where the question of jurisdiction has been litigated and finally decided in the court rendering the original judgment, that judgment is not subject to collateral attack on jurisdictional grounds. *See, e.g.*, Durfee v. Duke, 375 U.S. 106 (1963); Tomkins v. Tomkins, 89 Cal. App. 2d 243, 200 P.2d 821 (1948); Perkins v. Benguet Consol. Mining Co., 55 Cal. App. 2d 720, 132 P.2d 70, *cert. denied*, 319 U.S. 774 (1942). *See also* 47 AM. JUR. *Judgments* § 1260 (2d ed. 1969); 11 CAL. JUR. *Conflicts of Law* § 13 (2d ed. 1953); Annot., 52 A.L.R. 740, 741 (1928).

11. 33 Cal. App. 3d at 762-63, 109 Cal. Rptr. at 333.

12. 33 Cal. App. 3d at 762, 109 Cal. Rptr. at 333.

sion that immunity from service was not warranted under the facts presented in the case. However, the wording used by the court indicates that it did not limit itself to the situation before it, choosing instead to consider the general question of the validity of the immunity rule and holding that it is no longer the law in California. In so holding, the court made a significant departure from previous California case law, which had consistently recognized the immunity doctrine as part of the common law of the state. A review of the origins of the immunity rule, its development in California, and the criticisms which have been directed against it is necessary to provide the background information against which the *Severn* decision may be analyzed.

The Immunity Rule

Origins

The immunity rule is a seldom codified common law doctrine[13] which developed in England at the time when service of civil process was normally effected by arresting the defendant.[14] Its original purpose was to prevent the court's own process from making suitors, witnesses, and other persons indispensable to a proceeding unavailable to attend court.[15] Another reason for the privilege was the desire to preserve the dignity of the court and to prevent the disruption which would occur if service by arrest were made during the court proceedings.[16]

Service of civil process is no longer effected by arrest, but the rule has continued as a means of encouraging nonresident witnesses and other nonresidents who are beyond the subpoena power of the court to enter the jurisdiction to aid in the complete and fair adjudication of controversies.[17] In the United States, the immunity rule has been part of the common law of every state. Although the doctrine differs slightly from jurisdiction to jurisdiction,[18] the general rule is that witnesses and parties entering a forum to attend court proceedings are immune from the effects of a valid service of civil process for a reasonable time while entering and leaving the jurisdiction, as well as while attending court.[19]

13. 2 B. WITKIN, CALIFORNIA PROCEDURE *Actions* § 581 (2d ed. 1970)

14. Note, *Privilege of Non-Residents Engaged in Public Duty from Service of Process*, 33 HARV. L. REV. 721, 722 (1920) [hereinafter cited as *Privilege of Non-Residents*]. "[H]istorically, seizure was the proper way to commence a civil action . . . . To find out whether the court had jurisdiction over the person of the defendant, one looked in the dungeon; if he was there, the court had jurisdiction." Green, *Jurisdictional Reform in California*, 21 HASTINGS L.J. 1219, 1227 (1970) [hereinafter cited as Green].

15. *Privilege of Non-Residents, supra* note 14, at 722.

16. Wangler v. Harvey, 41 N.J. 277, 284, 196 A.2d 513, 517 (1963).

17. *Privilege of Non-Residents, supra* note 14, at 723.

18. *See generally* 62 AM. JUR. *Process* §§ 136-56 (2d ed. 1972).

19. Stewart v. Ramsay, 242 U.S. 128 (1916); BASIC CIVIL PROCEDURE *supra* note 1, at 47 n.166; *see, e.g.*, Velkov v. Superior Court, 40 Cal. 2d 289, 253 P.2d 25 (1953).

Development of the Immunity Rule in California

In California, various classes of nonresidents may claim the benefits of the immunity rule. It has, of course, been invoked both by nonresident witnesses and by nonresident litigants.[20] In recognition of modern business practices, California courts have held that where a nonresident is personally protected by the immunity rule because he is within the state to attend judicial proceedings, his corporation will be similarly protected from service of process made upon him on its behalf in his capacity as an officer of the corporation.[21] Litigants and witnesses have not been the only court participants protected: nonresident attorneys involved in court actions in California have also been able to claim immunity from service of civil process under the rule. However, the courts have been more cautious in granting immunity to nonresident attorneys than to either nonresident witnesses or nonresident litigants.[22]

There are various decisions which have established the circumstances under which a nonresident may claim the immunity privilege. Initially, the immunity privilege could be extended to a nonresident only if he were within the jurisdiction solely to attend court proceedings.[23] However, California courts have gradually relaxed this limitation, granting immunity when the nonresident conducts other business or activities while within the jurisdiction, as long as his primary purpose remains his attendance in court.[24]

Whether a nonresident who is attending court in another state may claim immunity from service of process in a California action is unclear. In one early case, immunity from service of civil process was denied where the nonresident was within California to attend the taking of a deposition to be used in an action before the courts of *another* state. The court reasoned that the immunity rule did not apply, since no *California* court proceedings would be hampered by the service of process.[25] The recent importance of this case is questionable, however,

20. *See, e.g.*, Russell v. Landau, 127 Cal. App. 2d 682, 688, 274 P.2d 681, 685 (1954) (witness and party); Gerard v. Superior Court, 91 Cal. App. 2d 549, 205 P.2d 109 (1949) (witness and defendant); Hammons v. Superior Court, 63 Cal. App. 700, 219 P. 1037 (1923) (witness).

21. *See, e.g.*, Hammons v. Superior Court, 63 Cal. App. 700, 219 P. 1037 (1923).

22. Tadge v. Byrnes, 179 Cal. 275, 276, 176 P. 439, 440 (1918) (limiting privilege to attorney of record); Gaines v. Superior Court, 196 Cal. App. 2d 749, 752-53, 16 Cal. Rptr. 909, 911 (1961).

23. This strict rule was applied in Page v. Randall, 6 Cal. 32, 33 (1855).

24. *See, e.g.*, Russell v. Landau, 127 Cal. App. 2d 682, 695, 274 P.2d 681, 690 (1954); Franklin v. Superior Court, 98 Cal. App. 2d 292, 295, 220 P.2d 8, 10 (1950); Gerard v. Superior Court, 91 Cal. App. 2d 549, 554, 205 P.2d 109, 112-13 (1949); Hammons v. Superior Court, 63 Cal. App. 700, 708, 219 P. 1037, 1040 (1923).

25. Hand v. Superior Court, 42 Cal. App. 168, 169, 183 P. 456 (1919).

since it was decided before long-arm statutes began to make various nonresidents susceptible to service of process outside the state's boundaries.[26]

Within the last twenty-five years, the doctrine has been applied to proceedings within the state which are not before a court but are before an administrative body which is exercising a judicial function.[27] Dicta in two California cases would even support the extension of the immunity doctrine protection to nonresidents within the state to perform a public duty during a time of emergency,[28] although this seems a significant departure from the traditional application of the rule to protect judicial or quasi-judicial proceedings.

The major judicial exception to the application of the California immunity rule occurs when the second action for which the service is made arises out of, or involves, the same subject matter as the first action. When the two actions are related, California courts have denied immunity from service of civil process to witnesses,[29] attorneys,[30] and parties to the original action.[31] The federal courts have also recognized this exception to the immunity rule. In *Lamb v. Schmitt*,[32] the rationale behind the exception was discussed by the Supreme Court, which reasoned that where the two actions are interrelated, the cause pending before the court is not subjected to delay or hindrance by the service of process. On the contrary, the grant of immunity could actually impede the court's task of administering justice by preventing the court from making a final and successful adjudication of the matter.[33]

In *St. John v. Superior Court*,[34] a California appellate court expanded this exception to the immunity rule. The court examined all

26. The *Severn* court, for example, did not rely on that early decision to find that immunity should have been denied the defendants solely on the grounds that they were involved in an action in Florida, and not in California. Instead, the *Severn* court chose to consider the effect of the state's new long-arm provisions on the immunity doctrine itself.

27. *See, e.g.*, Velkov v. Superior Court, 40 Cal. 2d 289, 292, 253 P.2d 25, 26 (1953) (disciplinary proceeding before the State Bar); St. John v. Superior Court, 178 Cal. App. 2d 794, 797, 3 Cal. Rptr. 535, 537-38 (1960) (licensing revocation hearing).

28. *See* Murrey v. Murrey, 216 Cal. 707, 711-13, 16 P.2d 741, 742-43 (1932), *quoting* Filer v. McCormick, 260 F. 309 (N.D. Cal. 1919); Tulley v. Superior Court, 45 Cal. App. 2d 24, 26-31, 113 P.2d 477, 478-80 (1941).

29. *See* Velkov v. Superior Court, 40 Cal. 2d 289, 253 P.2d 25 (1953); Adler v. Superior Court, 187 Cal. App. 2d 207, 9 Cal. Rptr. 373 (1960).

30. *See* Gaines v. Superior Court, 196 Cal. App. 2d 749, 16 Cal. Rptr. 909 (1961).

31. Slosberg v. Municipal Court, 101 Cal. App. 2d 238, 225 P.2d 312 (1950); Von Kesler v. Superior Court, 109 Cal. App. 89, 292 P. 544 (1930).

32. 285 U.S. 222 (1932).

33. *Id.* at 227-28.

34. 178 Cal. App. 2d 794, 3 Cal. Rptr. 535 (1960).

the previous California cases in which immunity was denied a witness or nonlitigant because the two actions were related, and concluded that in each instance the petitioner had been either the instigator or the moving party in the first action.[35] However, it determined that a witness in the first proceeding could be denied immunity in a second, related action even if he did not fit in either category, as long as he had a "personal interest" in the outcome of the first proceeding.[36]

Rationale for the Rule in California

California courts have not been entirely consistent in their efforts to articulate a reason for the well-established common law doctrine of immunity. Most have recognized the rule as a privilege of the court,[37] a rationale which was adopted by the United States Supreme Court in *Lamb v. Schmitt*.[38] The reasoning of that case has been approvingly cited in several California decisions.[39] The *Lamb* court concluded that the due administration of justice required that a court not permit interference with the progress of a cause of action pending before it by allowing service of civil process to be made for other suits. The threat of possible service might discourage the voluntary attendance of those persons whose presence would be necessary or convenient to judicial administration in the pending action.[40] The court in *Lamb* not only stated that the immunity rule was for the convenience of the court; it stressed that it was not for the convenience of individuals before the court.[41] Only two California cases have followed the *Lamb* court's decision on this point and concluded that immunity is a privilege of the court but not of the individual.[42]

35. *Id.* at 798, 3 Cal. Rptr. at 538. *But cf.* Lamb v. Schmitt, 285 U.S. 222 (1932).

36. 178 Cal. App. 2d at 798, 3 Cal. Rptr. at 539. In *St. John*, the petitioner was served while testifying at the license revocation hearing of a brokerage firm which had handled a sale of his corporation's stock. He was not personally involved in the revocation matter and was clearly attending only as a witness. Nevertheless, the court found that he had a personal interest in the outcome of the hearing, because it could forestall criminal action against him and his corporation arising from the same sale of stock.

37. *See* Velkov v. Superior Court, 40 Cal. 2d 289, 292, 253 P.2d 25, 26 (1953); Murrey v. Murrey, 216 Cal. 707, 710, 16 P.2d 741, 742 (1932); Gaines v. Superior Court, 196 Cal. App. 2d 749, 753, 16 Cal. Rptr. 909, 911 (1961); St. John v. Superior Court, 178 Cal. App. 2d 794, 799, 3 Cal. Rptr. 535, 539 (1960); Mattison v. Lichlyter, 162 Cal. App. 2d 60, 63-64, 327 P.2d 599, 601 (1958); Hammons v. Superior Court, 63 Cal. App. 700, 708, 219 P. 1037, 1040 (1923); Hand v. Superior Court, 42 Cal. App. 168, 169, 183 P. 456 (1919).

38. 285 U.S. 222, 225 (1932).

39. *See* Velkov v. Superior Court, 40 Cal. 2d 289, 291-92, 253 P.2d 25, 26 (1953); Gaines v. Superior Court, 196 Cal. App. 2d 749, 753, 16 Cal. Rptr. 909, 911 (1961); St. John v. Superior Court, 178 Cal. App. 2d 794, 799-800, 3 Cal. Rptr. 535, 539 (1960).

40. 285 U.S. at 225.

41. *Id.*

42. *See* Gaines v. Superior Court, 196 Cal. App. 2d 749, 753, 16 Cal. Rptr. 909,

A rationale for the rule similar to that expressed by the *Lamb* court has been advanced by the California courts which have framed the reason for the immunity rule wholly or partially in terms of public policy. Two courts have stated that the rule may be supported on the ground that public policy disapproves of a court being hampered by having those in attendance upon it subject to suit in other actions.[43] More recently the California Supreme Court has concurred in this reasoning, stating that public policy supports the prevention of interruptions and delays in judicial proceedings which may be caused when necessary participants are required to defend in other actions.[44] The court also felt there was a public interest in fostering voluntary appearances by nonresidents who could not be forced to enter the jurisdiction to testify, an interest which was served by the immunity rule.[45]

At least two California courts have based the immunity rule upon the public policy that nonresident witnesses and parties should be able to attend trial in a foreign jurisdiction without the threat of being subjected to lawsuits.[46] This public policy consideration approaches the recognition of the immunity privilege as a substantive right of the individual. In fact, despite the Supreme Court's conclusion in *Lamb* that immunity is a privilege of the court but not of the individual,[47] several California decisions have clearly stated that the immunity privilege is an individual right as well.[48]

The *Severn* court followed the more recent California appellate cases of *St. John v. Superior Court*[49] and *Gaines v. Superior Court*[50] and adopted the rationale of *Lamb v. Schmitt* in its analysis of California's immunity rule. It is interesting to note that the *Severn* court discussed the "haphazard" development of the immunity rule in the United States,[51] but failed to acknowledge the existence of inconsistent

911 (1961); St. John v. Superior Court, 178 Cal. App. 2d 794, 799, 3 Cal. Rptr. 535, 539 (1960).

43. Hammons v. Superior Court, 63 Cal. App. 700, 708, 219 P. 1037, 1040 (1923); Hand v. Superior Court, 42 Cal. App. 168, 169, 183 P. 456 (1919).

44. Velkov v. Superior Court, 40 Cal. 2d 289, 292, 253 P.2d 25, 26 (1953), *cited with approval in* Mattison v. Lichlyter, 162 Cal. App. 2d 60, 63, 327 P.2d 599, 601 (1958).

45. *Id.*

46. *See* Muller v. Muller, 141 Cal. App. 2d 722, 729, 297 P.2d 789, 793 (1956); Russell v. Landau, 127 Cal. App. 2d 682, 687, 274 P.2d 681, 685 (1954).

47. 285 U.S. at 225. See note 42 & accompanying text *supra.*

48. *See* Velkov v. Superior Court, 40 Cal. 2d 289, 292, 253 P.2d 25, 26 (1953); Murrey v. Murrey, 216 Cal. 707, 710-11, 16 P.2d 741, 742 (1932); Mattison v. Lichlyter, 162 Cal. App. 2d 60, 64, 327 P.2d 599, 601 (1958); Hammons v. Superior Court, 63 Cal. App. 700, 708, 219 P. 1037, 1040 (1923); Hand v. Superior Court, 42 Cal. App. 168, 169, 183 P. 456 (1919) (mentioning both rationales but not supporting either).

49. 178 Cal. App. 2d 794, 3 Cal. Rptr. 535 (1960).

50. 196 Cal. App. 2d 749, 16 Cal. Rptr. 909 (1961).

51. 33 Cal. App. 3d at 757, 109 Cal. Rptr. at 329-30.

rationales supporting the immunity doctrine in California.

Two principles expressed in the *Lamb* decision received special attention from the *Severn* court and are important in the development of its analysis of the immunity rule in light of the new California long-arm statute. The first principle is that the immunity rule extends no rights to nonresident witnesses but exists only for the benefit of the court.[52] The second is that the witness immunity privilege "should not be enlarged beyond the reason upon which it is founded, and . . . should be extended or withheld only as judicial necessities require."[53] The *Severn* court's application of these two principles in its analysis of California's immunity doctrine will be discussed later in this note.[54]

Criticism of the Immunity Rule

Although the immunity rule has been followed by most courts in the United States, criticisms of the doctrine have been made. In dictum, a Pennsylvania court recently supported the total elimination of the rule, contending that the ease of modern transportation and communication, the availability of new procedural methods for obtaining trial evidence, and the expanding concepts of judicial jurisdiction may make the doctrine unnecessary today.[55]

The use of the immunity doctrine to induce nonresident witnesses to aid the court's proceedings seems to retain validity, because the conduct of lawsuits can, in a real sense, be obstructed if witnesses who cannot be compelled to attend refuse to do so.[56] In contrast, the application of the immunity rule to nonresident plaintiffs and defendants is not supported by such compelling reasons, and a New Jersey case, *Wangler v. Harvey*,[57] has held that the immunity rule no longer applies to parties litigant.

The *Wangler* court reasoned that plaintiffs enter the jurisdiction not to aid the court in its administration of justice, but to serve their own interest in obtaining a favorable judgment.[58] The authors of an article critical of the immunity rule have argued that the possibility of being served in another action while present to attend court will not often deter a plaintiff from entering a jurisdiction to assert his legal

52. 285 U.S. at 225, *discussed in* Severn v. Adidas Sportschuhfabriken, 33 Cal. App. 3d 754, 759, 109 Cal. Rptr. 328, 331 (1973).

53. 285 U.S. at 225, *cited in* Severn v. Adidas Sportschuhfabriken, 33 Cal. App. 3d 754, 760, 109 Cal. Rptr. 328, 331 (1973).

54. See text accompanying notes 121-24 *infra.*

55. Fahy v. Abattoir, 223 Pa. Super. 185, 189, 299 A.2d 323, 325 (1972).

56. Keeffe & Roscia, *Immunity and Sentimentality*, 32 CORNELL L.Q. 471, 479 (1947) [hereinafter cited as Keeffe & Roscia].

57. 41 N.J. 277, 196 A.2d 513 (1963).

58. *Id.* at 284, 196 A.2d at 517. *See also* Keeffe & Roscia, *supra* note 56, at 479.

rights.[59] Once present in the jurisdiction, the service of summons should not be so distracting to a suitor that the interests of justice will suffer.[60] These critics contend that the distraction which service in another action is likely to cause a nonresident litigant would be similarly distracting to a resident and that it has never been suggested that residents should be protected from service of civil process in additional suits while they are involved in litigation.[61]

Arguments opposing the extension of immunity from service of process to nonresident defendants are not as persuasive, but they have been asserted by critics of the doctrine and apparently convinced the *Wangler* court. In the *Wangler* decision, the court felt that the defendant, like the plaintiff, was motivated to come within the jurisdiction by a personal desire: his wish to defend the suit.[62] The court said that a defendant must decide "whether the pains of other litigation are more severe than the rigors of a default judgment in the first suit."[63] In an article critical of the immunity rule, the authors have said that no court interest or judicial necessity could be served by the defendant's presence, since the court could render a valid default judgment in the action if the defendant chose not to appear.[64] However, a court's interest in promoting justice and fairness for all parties to its proceedings suggests that it should encourage the attendance of the nonresident who wishes to defend the suit brought against him to the same extent that it encourages the attendance of voluntary witnesses, and that the immunity privilege should be made as available to the one as to the other.

Another criticism of the immunity rule has been that it operates in derogation of the common law right of the resident creditor to sue his debtor wherever he may find him.[65] The *Severn* court emphasized the importance of this right, which it felt was given expression in California through the enactment of the new long-arm statute allowing for greatly expanded judicial jurisdiction over nonresidents.[66] The other criticisms of the immunity rule were only briefly discussed by the *Sev-*

59. Keeffe & Roscia, *supra* note 56, at 480-81, *citing* Baldwin v. Emerson, 16 R.I. 304, 15 A. 83 (1888).

60. *Id.*

61. Keeffe & Roscia, *supra* note 56, at 475. "Litigants always and everywhere are subject to distraction. Courts do not usually take cognizance of them unless they interfere with the progress of the suit. The test should not be the sentimental one of distraction but the real one of obstruction." *Id.*

62. Wangler v. Harvey, 41 N.J. 277, 284-85, 196 A.2d 513, 517 (1963). *See also* Keeffe & Roscia, *supra* note 56, at 485.

63. 41 N.J. at 284-85, 196 A.2d at 517.

64. Keeffe & Roscia, *supra* note 56, at 485.

65. *See, e.g.*, Murrey v. Murrey, 216 Cal. 707, 710, 16 P.2d 741, 742 (1932); Wangler v. Harvey, 41 N.J. 277, 282, 196 A.2d 513, 515 (1963); Keeffe & Roscia, *supra* note 56, at 485.

66. 33 Cal. App. 3d at 760, 109 Cal. Rptr. at 331.

ern court[67] and were not relied upon by the court in reaching its decision; the court abolished the immunity rule almost wholly in response to the changes which have been made in California's judicial jurisdictional powers. The *Severn* decision can only be understood in light of these changes, which reflect a continuing process of development in the concept of jurisdiction over the person occurring in the United States with the impetus of several major Supreme Court decisions.

Development of the Concept of Jurisdiction over the Person

In personam jurisdiction—the power of a court to adjudicate the personal legal rights of parties properly brought before it—requires that the court not only have jurisdiction over the subject matter of the action, but also that it have jurisdiction over each party to the action.[68] Obtaining jurisdiction over the person of the plaintiff generally presents no problem in a civil action, since the plaintiff usually chooses the forum and actively seeks the court's assumption of jurisdiction over him. A defendant may also consent to the jurisdiction of the court, or by a voluntary general appearance before the court he may evidence his willingness that the cause of action should be tried before it. Both consent and a voluntary general appearance before the court have traditionally been valid bases upon which a court could assert its power over the person of the litigant, and bind him by its judgment.[69]

The immunity rule is obviously inapplicable to situations where a nonresident defendant, within the state to attend a judicial proceeding, consents to the court's assumption of jurisdiction over him in an unrelated action which is brought against him once he is within the state. Clearly, the act of challenging jurisdiction by asserting the immunity doctrine and the act of submitting to the court's jurisdiction are incompatible, one precluding the other.

However, where there has been no consent or general appearance by the nonresident, the immunity rule may shield him from the court's assertion of jurisdiction over his person under the "physical presence," or "territorial power," theory. Justice Field stated the physical presence doctrine in the famous Supreme Court decision of *Pennoyer v.*

67. *Id.* at 758, 109 Cal. Rptr. at 330.

68. Green, *supra* note 14, at 1220. There are two other traditional classifications of a court's jurisdictional powers. In rem jurisdiction is the power of a court to deal with a *thing* (for instance, a parcel of land) and to determine its status in relation to the legal rights of all persons known and unknown. Quasi in rem jurisdiction is the power to adjudicate the status of a thing against the rights of the named parties only. See the discussion in *id.* at 1221-22.

69. York v. Texas, 137 U.S. 15 (1890) (voluntary general appearance establishes jurisdiction); Green, *supra* note 14, at 1228-29; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 32 (consent) & § 33 (voluntary appearance) (1969).

Neff.[70] Briefly, the doctrine is based on the assumption that a state or nation has complete sovereign control over all persons and things within its boundaries.[71] This assumption leads to the conclusion that the physical presence of a person within a state's territory automatically provides sufficient grounds for the assertion of jurisdiction over him by a court of that state.[72] Although the state may exercise its control by arresting a person, the assertion of judicial power is usually made in a civil case by the service of process upon the person while he is within the state's territory.[73]

After the decision in *Pennoyer v. Neff*, the act of service of process upon a person physically present within the state has consistently been held sufficient to subject the person to the state's judicial jurisdiction, regardless of how temporary the presence may have been.[74] For many years, service of process made upon a person while he was present within the jurisdiction was the only means by which a person could be brought under the court's power if he neither consented to being sued in that forum nor made a general appearance before the court. Today, physical presence remains the most common and least frequently challenged basis of jurisdiction.[75]

The immunity rule developed as a means of providing some flexibility in the application of this physical presence doctrine, allowing the court the discretionary power to exempt from the doctrine those nonresidents who entered the jurisdiction for the purpose of attending court proceedings.[76] As previously discussed, the better rationale for the immunity rule is not to give the nonresident special protection against the power of the foreign court; rather, it is to aid the court proceedings by assuring that nonresidents will not avoid court appearances solely because of their fear of being brought under the judicial jurisdiction of the forum in other actions. Although the rule came into being when a nonresident could be forced to submit to the court's jurisdiction over

70. 95 U.S. 714 (1877). "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722.

71. Green, *supra* note 14, at 1227.

72. See note 70 *supra*.

73. Gorfinkel & Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1171 (1970) [hereinafter cited as Gorfinkel & Lavine].

74. *Id.* at 1171; *see, e.g.*, Grace v. McArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (upholding service made while defendant was in plane passing over the state); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 34 A. 714 (1895) (service on American temporarily stopping at a hotel in England gives English court jurisdiction).

75. JUDICIAL COUNCIL OF CALIFORNIA, 1969 JUDICIAL COUNCIL REPORT TO THE GOVERNOR AND THE LEGISLATURE, app. II, 72.

76. See text accompanying notes 13-19 *supra*.

his person only under the physical presence doctrine, it is still used today, when the means by which a defendant may be subjected to the personal jurisdiction of a court have expanded far beyond the limits set in *Pennoyer v. Neff.*

A major departure from the traditional theories of personal jurisdiction was made in a series of Supreme Court cases, beginning with *Hess v. Pawloski.*[77] In that case the Massachusetts nonresident motorist statute was upheld, and the principle was established that the performance of certain single acts within a state could be sufficient basis for asserting jurisdiction over a nonresident individual.[78] Jurisdiction over nonresidents for claims resulting from doing business within the state was recognized by the Court in *Henry L. Doherty & Co. v. Goodman;*[79] and in *Milliken v. Meyer,*[80] domicile was held to be another valid basis for the exercise of jurisdiction over a person by a state court. The effect of these decisions was that various statutory bases for the assertion of jurisdiction over the person were accepted, in addition to the common law basis of physical presence.

In *International Shoe Co. v. Washington*[81] the Supreme Court abandoned its situational approach to the question of judicial jurisdiction, and formulated a broad test to gauge whether the assertion of jurisdiction in any given case would be constitutionally permissible. Delivering the opinion of the Court, Chief Justice Stone stated:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of

77. 274 U.S. 352 (1927). The decision was based on the theory that a nonresident motorist by using a state's highways impliedly consents to the state's assertion of personal jurisdiction over him in tort cases arising from his operation of a vehicle on state roads. See the discussion in Green, *supra* note 14, at 1219-30.

78. *Developments in the Law: State-Court Jurisdiction,* 73 HARV. L. REV. 909, 945 (1960).

79. 294 U.S. 623 (1935). The court upheld an Iowa statute subjecting nonresident dealers in securities to the state's jurisdiction for claims related to local transactions.

80. 311 U.S. 457 (1940).

81. 326 U.S. 310 (1945). In *International Shoe,* the appellant, a Delaware corporation with its principal place of business in St. Louis, Missouri, had about a dozen salesmen in Washington exhibiting shoes and soliciting orders on a commission basis. The state of Washington had sued to collect an amount due the state unemployment compensation fund under a state statute and had recovered a judgment in a Washington State court. On appeal, the foreign corporation alleged that it was not doing business in Washington and was therefore not subject to suit in Washington courts. The United States Supreme Court affirmed the state court decision, holding that as long as a foreign corporation had minimum contacts with the forum, subjecting it to the state's judicial jurisdiction would not offend due process of law. *Id.* It is generally agreed that the minimum contacts doctrine of *International Shoe* applies to individuals and partnerships as well as to corporations. Arnesen v. Raymond Lee Organization, Inc., 31 Cal. App. 3d 991, 996, 107 Cal. Rptr. 744, 747 (1973); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 845 (1969); Gorfinkel & Lavine, *supra* note 73, at 1180.

> 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."[82]

The Court in *International Shoe* disapproved any mechanical or quantitative criteria for determining whether minimum contacts existed between a defendant and the forum.[83] Instead, the Court adopted a reasonableness test: Do the contacts of the defendant with the state make it reasonable to require him to defend that particular suit in the state?[84] In determining whether the assertion of in personam jurisdiction were reasonable, the Court considered relevant both an estimate of the inconveniences to each party[85] and an estimate of the quality and nature of the activity being conducted by the defendant within the forum.[86]

The vague "minimum contacts" theory of *International Shoe* was further defined in two later Supreme Court decisions, *McGee v. International Life Insurance Co.*[87] and *Hanson v. Denckla.*[88] Lower federal

82. 326 U.S. at 316.

83. *Id.* at 319.

84. *Id.* at 317.

85. *Id.*

86. *Id.* at 319.

87. 355 U.S. 220 (1957). In *McGee,* a foreign insurance company was sued in California for payment under a life insurance policy. It appeared that the insurance company had never solicited or done any insurance business in California apart from this one policy, which was transacted by mail. The Court held that the assumption of jurisdiction by California did not offend due process where the insurance contract was delivered in California, the premiums were mailed from there, the insured was a resident of the state and died there, and where there was a substantial state interest in protecting residents from insurers who refused to pay. *Id.*

McGee established that the minimum contacts necessary between the defendant and the forum before judicial jurisdiction could be asserted could consist of a single act or transaction. Since a transaction by mail was sufficient to bring the foreign corporation within the state court's jurisdiction in *McGee,* it was clear that neither the defendant nor his agent ever had to be physically present within the forum to satisfy the requirements of due process.

For a discussion of the effects of both *McGee* and *Hanson,* see Comment, *Jurisdiction Over Non-resident Corporations Based on a Single Act,* 47 GEO. L.J. 342 (1958).

88. 357 U.S. 235 (1958). In *Hanson,* decided the year after *McGee,* the primary issue was whether a Florida court could determine the validity of powers of appointment executed by the settlor in Florida but affecting a trust res located in Delaware, when the Delaware trustees did not appear at the proceeding. The Court held that the Florida court had no personal jurisdiction over the trustees when the only connection between the trustees and the state was some correspondence between the settlor and the trustees. *Id.*

Hanson restricted the principle established in *McGee* that a single act could constitute minimum contacts with the forum, holding that the act done or transaction consummated in the forum must be one "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. Under this test, a unilateral act by a resident or another person could not satisfy the requirement that there be contact between the

and state courts have continued to develop the theory,[89] still relying on the basic principles first established in this line of Supreme Court cases.

It is clear under the minimum contacts theory of *International Shoe* that once the extent of the defendant's activities within the forum has been assessed, the court must still decide whether the totality of the circumstances makes it fair and just to require the nonresident to enter and defend the cause of action in the forum.[90] This aspect of the minimum contacts theory reveals a different philosophy toward personal jurisdiction than that expressed in the physical presence theory of *Pennoyer v. Neff*. Under the older doctrine, considerations of fairness are not taken into account in determining if due process has been satisfied and jurisdiction established.[91] In any given cause of action, a nonresident who is not subject to out-of-state service because he does not have minimum contacts with a jurisdiction may still be forced to

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nonresident defendant and the forum. *Id.* Later lower court decisions have not established that *Hanson*'s requirement of a "purposeful availment" of the privilege of conducting business within the forum state requires an entry or activity *within* the forum; jurisdiction has been assumed when persons or property within the state have been affected by the defendant's acts *outside* the state. Gorfinkel & Lavine, *supra* note 73, at 1188; *see, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969) (economic benefit by defendant from sale or use of its product in the state sufficient contact to establish jurisdiction).

Hanson imposed a further limitation on the minimum contacts doctrine by requiring that the nonresident's activity within the state give rise to the cause of action in which the state is attempting to assert jurisdiction. 357 U.S. at 251. This rule has not been strictly followed by subsequent lower court decisions. For example, California courts have held that if the cause of action is not connected with the forum, the nonresident's contacts with the state must be more "substantial" in order to establish jurisdiction than the contacts which would be required if the cause of action was connected with the forum. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 898-99, 458 P.2d 57, 61-62, 80 Cal. Rptr. 113, 117-18 (1969) (forum-related activity must reach such extensive or wide-ranging proportions as to make the defendant "present"); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 225, 347 P.2d 1, 3, 1 Cal. Rptr. 1, 3 (1959) (more contacts required than sales or sales promotion); Vibration Isolation Products, Inc. v. American Nat'l Rubber Co., 23 Cal. App. 3d 480, 483-84, 100 Cal. Rptr. 269, 271 (1972) (more contacts required than sales or sales promotion).

89. See cases cited note 88 *supra.*

90. Comment, *Jurisdiction Over Nonresident Corporations Based on a Single Act*, 47 GEO. L.J. 342, 351-52 (1958). In *Fisher Governor Co. v. Superior Court*, the California Supreme Court listed several factors it felt were relevant to the assumption of jurisdiction. These included: (1) the interest of the state in providing a forum for residents; (2) the interest of the state in regulating the business involved; (3) the relative availability of the evidence and the burden of litigating in one locality compared to another; (4) the ease of access to an alternative forum; (5) the interest in avoiding multiplicity of suits and conflicting adjudications; (6) the extent to which the cause of action arose out of defendant's local activities. 53 Cal. 2d 222, 225-26, 347 P.2d 1, 3-4, 1 Cal. Rptr. 1, 3-4 (1959).

91. See notes 70-75 & accompanying text *supra.*

defend in the forum if he is served with process while physically present there.[92]

The trend expanding the scope of jurisdiction over the persons of nonresidents has continued as the minimum contacts theory has developed through court decisions.[93] However, the due process clause of the Fourteenth Amendment still presents a barrier to the unlimited extension of long-arm jurisdiction by state courts.[94] Noting the constitutional limitations, the Supreme Court in *Hanson v. Denckla* cautioned that the trend toward the expansion of state court jurisdiction did not portend the eventual disappearance of all restrictions. No matter how minimal the burdens on a nonresident served outside the forum of defending a cause of action in that forum, the state cannot force him to do so unless he has the requisite minimum contacts with it.[95]

California Long-Arm Jurisdiction

Many states have enacted long-arm statutes which take full advantage of the different theories upon which jurisdiction over nonresidents may be based. However, before the new long-arm provisions were enacted in California, the statutory law of this state imposed much stricter standards on jurisdiction over nonresident individuals than were required by the Supreme Court decisions to satisfy due process of law. Former section 417 of the California Code of Civil Procedure[96] limited assumption of jurisdiction over individuals personally served with process outside the state to those persons who were *residents* of California at the time of the commencement of the action, at the time the cause of action arose, or at the time of service.[97] Jurisdiction over *nonresidents* who were served with process outside the state was provided for only in the special cases of nonresident motorists,[98] nonresident boat-

92. The inconsistency of the traditional bases of jurisdiction with the recent emphasis on convenience and fairness has prompted at least one student note to suggest that these traditional bases be dropped completely, leaving minimum contacts as the only criteria for determining if due process is satisfied. *See Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960). *See also* Ehrenzweig, *The Transient Rule of Personal Jurisdiction*, 65 YALE L.J. 289 (1956).

93. Green, *supra* note 14, at 1230-33.

94. BASIC CIVIL PROCEDURE *supra* note 1, at 35 (1972). Besides the due process requirements, the First Amendment protections regarding free speech and free press reinforce the jurisdictional barrier in libel suits, and the commerce clause may offer another possible restriction on the exercise of jurisdiction. *Id.* at 35 & n.118.

95. Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

96. Cal. Stat. 1957, ch. 1674, § 1 at 3052 (repealed 1969).

97. Gorfinkel and Lavine comment that "resident" as used in section 417 was interpreted to mean "domiciliary." Gorfinkel & Lavine, *supra* note 73, at 1173 (citing Smith v. Smith, 45 Cal. 2d 235, 288 P.2d 497 (1955), as the origin of this interpretation).

98. CAL. VEH. CODE §§ 17450-58 (West 1971) (originally enacted by Cal. Stat. 1935, ch. 27, § 404 at 154, and subsequently amended and renumbered).

owners,[99] and nonresident aircraft operators.[100]

In contrast, the minimum contacts doctrine had been utilized as a means of establishing jurisdiction over nonresident corporations for many years before the new legislation was passed. This occurred because former section 411 of the code,[101] which defined the limits of jurisdiction over nonresident corporations in terms of a "doing business" test, was interpreted after *International Shoe* to allow jurisdiction over foreign corporations to the extent permissible under the due process clause.[102]

In 1969, the California legislature significantly expanded the limits of California state court jurisdiction by enacting a new title, "Jurisdiction and Service of Process," of the California Code of Civil Procedure.[103] This was the first comprehensive revision of the California jurisdiction statutes since their original enactment in 1872.[104] By this legislation, California Code of Civil Procedure sections 411 and 417 were superseded by new sections 410.10 and 413.10.

Section 410.10 defines the extent of California's long-arm jurisdiction quite succinctly:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.[105]

This new statute has had minimal effect on California's exercise of jurisdiction over foreign corporations, since former section 411 had already been interpreted to allow the broadest jurisdiction which was constitutionally possible.[106] Section 410.10 did make a significant change in California's jurisdiction over individuals, who are now subject to the

99. CAL. HARB. & NAV. CODE §§ 600-09 (West Supp. 1974) (added by Cal. Stat. 1963, ch. 1280, § 1 at 2805-06).

100. CAL. PUB. UTIL. CODE § 21414 (West 1965) (added by Cal. Stat. 1957, ch. 251, § 1 at 905). See Comment, *The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970*, 21 HASTINGS L.J. 1105 (1970), for a more detailed discussion of these statutes.

101. Most recently amended in Cal. Stat. 1968, ch. 132, § 2 at 345 (repealed 1969).

102. Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 898, 458 P.2d 57, 61, 80 Cal. Rptr. 113, 117 (1969); Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 82, 346 P.2d 409, 413 (1959), *cert. denied*, 362 U.S. 927 (1960); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 224, 347 P.2d 1, 2, 1 Cal. Rptr. 1, 2 (1959); Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 858, 323 P.2d 437, 439 (1958).

103. Cal. Stat. 1969, ch. 1610, § 3 at 3363, *adding* §§ 410.10-18.10 (operative July 1, 1970).

104. P. LI, ATTORNEY'S GUIDE TO CALIFORNIA JURISDICTION AND PROCESS 1 (1970) (C.E.B. guide).

105. CAL. CODE CIV. PROC. § 410.10 (West 1973).

106. See notes 101-02 & accompanying text *supra*; Comment, *In Personam Jurisdiction: New Horizons in California*, 1 PAC. L.J. 671, 694 (1970).

state's long-arm powers to the same extent as corporations.[107] By its broad wording, the statute has adopted the federal constitutional trends of the future, as well as the decisions of the past, as guidelines for the jurisdiction of California courts.[108]

California's broad approach has both advantages and disadvantages. Many problems of statutory construction which plague other states are avoided because section 410.10 does not enumerate specific circumstances under which jurisdiction may be assumed. This eliminates the need for a court to make a two-step analysis of jurisdictional questions by deciding first whether jurisdiction is possible within the wording of the statute, and then determining whether the due process requirements are met.[109] Also, section 410.10 allows California courts to take advantage of the minimum contacts doctrine to the fullest extent, as that doctrine continues to develop.[110]

Unfortunately, the broad wording of California's long-arm statute eliminates any language of definition or clarification as well as any language of restriction. The self-limiting provisions by which other states have avoided reaching the constitutional issues of due process are not present, so California courts must continually evaluate what the constitutional limitations are. This task is made more difficult because the United States Supreme Court has made no recent decision in this area, and the refining of the minimum contacts doctrine has been left to the lower courts.[111]

Section 413.10[112] supplements the long-arm powers given California courts in section 410.10 by allowing service of summons upon persons outside the state, and even outside the country.[113] Service of summons properly made upon the defendant is necessary in order to invoke the jurisdiction of the court and vest it with the authority to make an in personam adjudication. The act of service also gives the defendant notice of the suit so that he has an opportunity to defend.[114] The joint operation of sections 410.10 and 413.10 now allows out-of-

107. "Under the new law the California courts may now exercise long-arm jurisdiction over any type of absent defendant in any type of case in which the contacts of the defendant with the state are such that the exercise of jurisdiction 'does not offend "traditional notions of fair play and substantial justice."'" Green, *supra* note 14, at 1242.

108. *Id.* at 1242-43.

109. Gorfinkel & Lavine, *supra* note 73, at 1166-67.

110. *Id.* at 1167.

111. *Id.* at 1168. *See, e.g.*, cases cited note 88 *supra.*

112. CAL. CODE CIV. PROC. § 413.10 (West 1973) (operative July 1, 1970).

113. "Except as otherwise provided by statute, a summons shall be served on a person: (a) Within this state . . . (b) Outside this state but within the United States . . . (c) Outside the United States . . . ." *Id.*

114. BASIC CIVIL PROCEDURE, *supra* note 1, at 43.

state service upon nonresident individuals in any action where the minimum contacts standard is satisfied, whereas nonresidents were previously subject to California jurisdiction while outside the territorial limits of the state only under the nonresident motorist, boatowner, and aircraft operator statutes.[115]

As in the case of foreign corporations,[116] the liberal minimum contacts standard does not allow California courts to assume jurisdiction over *every* nonresident individual who is correctly served with out-of-state process. Although additional statutory restrictions have disappeared, those imposed by the due process clause still apply, and limit the state's judicial power over nonresidents. Several California cases dealing with the validity of long-arm jurisdiction over an individual, decided after section 410.10 was enacted, have held that minimum contacts did not exist between the state and the nonresident defendant.[117] Thus, recent California decisions involving both individual and cor-

115. See notes 98-100 & accompanying text *supra.*

116. *See, e.g.*, Kourkene v. American BBR, Inc., 313 F.2d 769 (9th Cir. 1963) (jurisdiction over foreign corporation denied where only a few isolated activities in California, none connected with the cause of action); L.D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768 (9th Cir. 1959) (no jurisdiction where the defendant foreign corporation shipped $1,000,000 of merchandise into the state annually but the merchandise was not connected with the contract sued upon, and no other contacts existed with California); Belmont Indus., Inc. v. Superior Court, 31 Cal. App. 3d 281, 107 Cal. Rptr. 237 (1973) (no jurisdiction where contract negotiated through interstate communications and consummated outside the state); Vibration Isolation Prods., Inc. v. American Nat'l Rubber Co., 23 Cal. App. 3d 480, 100 Cal. Rptr. 269 (1972) (no jurisdiction where foreign corporation sold only a small quantity of its products to California buyers and had not known the product would be sold and shipped there); daSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967) (no jurisdiction where outright sale to independent distributor in another state).

117. In Arnesen v. Raymond Lee Org. Inc., 31 Cal. App. 3d 991, 107 Cal. Rptr. 744 (1973), allegations in the complaint charging three individual nonresidents with making or disseminating misleading statements to the public were not supported by any affidavits or declarations of fact. The nonresidents admitted visits and correspondence to the state which were unconnected with the transactions upon which the complaint was based. The court held that the record failed to establish minimum contacts and affirmed the order to quash service. Titus v. Superior Court, 23 Cal. App. 3d 792, 100 Cal. Rptr. 477 (1972), was an action by a California resident against her nonresident former husband to establish a foreign divorce decree in California and get child custody and support. Since the children were present in the state, the court determined that it had jurisdiction to decide their status through a custody proceeding. However, there was no personal jurisdiction over the husband which would allow the court to adjudicate the child support issue. He had been served outside California, and his act of sending his children to the state to visit their mother pursuant to a written agreement sent there for her signature did not satisfy the minimum contacts standard. *Id.* at 802, 100 Cal. Rptr. at 485. *See also* Marra v. Shea, 321 F. Supp. 1140 (N.D. Cal. 1971) (§ 410.10 was applied, and it was held that no minimum contacts existed between either of the two nonresidents and California); Schoch v. Superior Court, 11 Cal. App. 3d 1200, 90

porate nonresidents serve as a reminder that limitations still exist upon the assertion of a state's judicial power beyond its own boundaries.

California Long-Arm Powers and the Immunity Rule: The Decision of the Severn Court

The effect of the immunity rule has been to shelter select nonresidents from the operation of the physical presence doctrine, which allows jurisdiction over a person to be based on his personal receipt of summons while physically present within the forum.[118] Until the passage of the jurisdictional reform legislation in 1969, a nonresident individual would usually be subject to California's judicial jurisdiction only under this physical presence doctrine. However, sections 410.10 and 413.10 now make nonresidents susceptible to out-of-state service of process and to the assertion of jurisdiction based upon the minimum contacts theory.[119] These recent changes in state court jurisdiction over nonresidents prompted the *Severn* court carefully to scrutinize the immunity rule, which had been developed and justified under the earlier jurisdictional laws.

After examining the expanding effect of the new code sections 410.10 and 413.10 on the exercise of jurisdiction over nonresidents,[120] the *Severn* court reconsidered the two principles for applying the immunity rule established by the Supreme Court in *Lamb v. Schmitt*.[121] Reasoning that no "judicial necessities" requiring the utilization of the immunity doctrine exist within this state any longer, the court declared:

> By virtue of these statutes, the reason for the immunity rule no longer exists in California, for nonresident witnesses and others may no longer remain in the state or country of their residence secure from the reach of this state's process. The rule no longer offers encouragement to nonresidents, who otherwise would be immune from service of its process, to enter this state in aid of its "judicial administration."[122]

Since the *Severn* court also followed the other principle approved by the *Lamb* decision—limiting the privilege to the court itself and not recognizing immunity as a substantive right of the individual[123]—it reached the conclusion that the immunity rule had outlived its purpose

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Cal. Rptr. 365 (1970) (under old § 417 no jurisdiction existed over nonresident father in suit for future failure to support, but no opinion as to whether minimum contacts would have been established under new § 410.10).

118. See note 76 & accompanying text *supra*.
119. See notes 103-17 & accompanying text *supra*.
120. 33 Cal. App. 3d at 760, 762, 109 Cal. Rptr. at 331, 333.
121. See notes 52-53 & accompanying text *supra*.
122. 33 Cal. App. 3d at 762, 109 Cal. Rptr. at 333.
123. See note 52 & accompanying text *supra*.

in this state, and accordingly held that it was no longer the law in California.[124]

Analysis of the Severn Decision

The *Severn* court accepted the viewpoint that the only valid reason for allowing the immunity rule in the first place was to aid judicial administration by encouraging nonresidents to enter the forum and attend court proceedings.[125] Theoretically, if a nonresident were guaranteed immunity from service of process, he would enter a jurisdiction that he might otherwise avoid because of his fear of being subjected to additional litigation while he was present there. Keeping this rationale for the immunity doctrine in mind, the *Severn* court reviewed California's jurisdictional powers to determine whether a nonresident really was more susceptible to the assertion of personal jurisdiction by the state while within its territory. It concluded that California's expanded long-arm powers had recently made the nonresident as vulnerable to the state's jurisdiction while he was outside its boundaries as he was while within them.[126] It was on the basis of this belief that the *Severn* court abolished the immunity rule, reasoning that a nonresident would no longer have any cause to avoid entering California if he could just as easily be served outside the state. A careful review of the various bases upon which jurisdiction over the person of a nonresident can be founded reveals that although the assumptions of the *Severn* court are valid for foreign *corporations*, they are not valid for nonresident *individuals*.

With respect to foreign corporations, it should be emphasized that although a corporation can be served by making the service of summons on one of its officers or agents, the corporation cannot be subjected to a court's jurisdiction solely on the basis of that officer or agent's presence or acts within the forum.[127] Under California Code of Civil Procedure section 410.10, the most liberal standard upon which jurisdiction over a foreign corporation can be based is currently the minimum contacts test.[128] Whether service of process is made within or without the state, the degree of contacts needed between the forum and the corporation to establish minimum contacts is identical. Therefore, an agent of the corporation would have no reason to fear that his entrance into the forum to attend court would subject his corporation to the jurisdiction of a state that would otherwise lack the power to adjudicate a specific cause of action.

124. 33 Cal. App. 3d at 762, 109 Cal. Rptr. at 333.
125. See notes 49-53 & accompanying text *supra*.
126. 33 Cal. App. 3d at 762, 109 Cal. Rptr. at 333.
127. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).
128. See discussion in notes 103-06 & accompanying text *supra*.

The nonresident individual's situation, however, is not analogous to that of the foreign corporation and its agent. A nonresident individual who is served while he is present within a forum may be brought within the judicial jurisdiction of that forum for *any* transitory cause of action[129] because of the physical presence theory of jurisdiction announced in *Pennoyer v. Neff*.[130] In contrast, if that nonresident individual is served under the long-arm provisions of sections 410.10 and 413.10 while outside California, he is subject to the state's in personam jurisdiction only if minimum contacts between him and the state can be established for a particular cause of action.[131] In the absence of minimum contacts, a nonresident will know he is safe from the exercise of California's long-arm powers, but he will still fear that entry into the state may subject him to its jurisdiction because of the possibility of service while he is present there.

In many instances, it may be impossible for a nonresident to decide with any certainty if he could be served in a particular cause of action under California's long-arm statute, since the minimum contacts doctrine is not a settled or strictly defined rule. In such a case, the nonresident would certainly be hesitant to enter the state to participate voluntarily in court proceedings and thereby give the plaintiff an opportunity to subject him to California's jurisdiction on the basis of presence. At least if he awaits service pursuant to the long-arm statute he has the option of making a special appearance to contest jurisdiction on the grounds that the minimum contacts test has not been met. If he enters and is served while present within the state, the court's jurisdiction is established; he may only urge that jurisdiction be declined under the doctrine of forum non conveniens.[132]

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129. Most actions brought in the United States are considered transitory, which means that they may be brought in any forum where a court otherwise competent to hear the particular type of controversy can get jurisdiction over the parties. *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 911 (1960). Some actions which are not transitory include actions concerning the penal or tax laws of another state; actions dealing with the internal affairs of a foreign corporation; actions to determine interests and rights in real property outside the territorial jurisdiction of the court (so-called "local actions") and divorce actions between two non-domiciliaries. *Id.* at 911-12.

This "transient rule" has been critized because it may force a defendant to litigate in a distant forum, or impose inconveniences upon a court which is called upon to hear an action substantially unrelated to the forum. *Id.* at 1009.

The doctrine of forum non conveniens operates to mitigate the harshness of this rule, since a court may decline jurisdiction where it feels that an exercise of jurisdiction would be unfair, or burdensome to the court. *Id.* at 1009. This doctrine has been codified in California. *See* CAL. CODE CIV. PROC. § 410.30 (West 1973).

130. See notes 70-75, 91-92 & accompanying text *supra*.

131. See cases cited notes 103-17 *supra*.

132. See note 129 *supra*.

Since the *Severn* court determined that defendant Dassler could have been served at his residence or place of business in Europe[133] and brought under California's jurisdiction through the minimum contacts theory,[134] it could rightly have concluded that "judicial necessities" did not warrant the utilization of the immunity rule in his case. However, the wording of the decision indicates that the court's ruling was much broader, holding that no judicial necessities could exist in California which would require the use of the immunity rule for *any* nonresident.[135] It is this generalization by the court which is incorrect. Clearly, nonresident individuals not subject to the state's long-arm power may still fear service of process and the assertion of jurisdiction by the state courts if they enter California. In such situations the immunity doctrine could still serve its purpose of inducing court attendance by the nonresident.

Conclusion

The *Severn* decision is wrong to the extent that it generalizes, finding the immunity rule totally inapplicable in California because of the state's new long-arm statute. However, its approach of analyzing the interaction between the state's jurisdictional power over nonresidents and the common law immunity rule is certainly one which future courts should follow. The Supreme Court in *Lamb v. Schmitt* had voiced the principle, approved by the *Severn* court, that the privilege "should be extended or withheld only as judicial necessities require."[136] Judicial necessities require the application of the immunity doctrine only when a nonresident might be discouraged from entering California because he fears the possibility of being served within the state when he would remain safe from service outside the state.

Immunity from service of process should therefore be granted a nonresident who is present within the state to attend judicial proceedings when he could not have been served in the particular action outside California.[137] In this way, protection from the harsh effects of the physical presence doctrine would be offered without extending unnecessary immunity to those nonresidents who would have been subject to the state's service of process regardless of their entrance into the jurisdiction. Such a limitation would be a more sound response to the changes in California's jurisdictional powers over nonresidents than

133. 33 Cal. App. 3d at 762, 109 Cal. Rptr. at 333.

134. *Id.* at 756, 109 Cal. Rptr. at 329.

135. *Id.* at 762, 109 Cal. Rptr. at 333.

136. 285 U.S. at 225.

137. See Note, *Pleading and Procedure: Immunity from Service of Civil Process*, 48 CALIF. L. REV. 867 (1960), for the suggestion that a nonresident be allowed to move for a protective order *before* entering the jurisdiction to attend court.

would complete elimination of the rule. Whether future California decisions will reaffirm the utility of the immunity rule in certain situations and continue to apply it, or will approve the drastic solution of the *Severn* court and discard the rule completely, remains to be seen.

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