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I. Introduction

" 'But,' quoth Trinquamelle, 'my friend, how come you to know, understand, and resolve, the obscurity of these various and seeming contrary passages in law, which are laid claim to by the suitors and pleading parties?' 'Even just,' quoth Bridlegoose, 'after the fashion of your other worships; to wit, when there are many bags on the one side, and on the other, I then use my little small dice . . . I have other large great dice, fair, and goodly ones, which I employ on the fashion that your other worships use to do when the matter is more plain, clear, and liquid; that is to say, when there are fewer bags.' 'But when you have done all those fine things,' quoth Trinquamelle, 'how do you, my friend, award your decrees, and pronounce judgment?' 'Even as your other worships,' answered Bridlegoose; 'for I give out sentence in his favour unto whom hath befallen the best chance by dice; judiciary, tribunian, pretorial, what comes first: so our laws command.' "

Francois Rabelais,
Gargantua and Pantagruel

I. Jurisdiction

One of the more important recent developments in California procedural law is the enactment of an entirely new set of provisions dealing with personal jurisdiction and service of process. The new procedure is effective July 1, 1970, and will alter substantially a number of current practices.

A. *Background of Increased Jurisdiction Over Nonresidents*

One important change is the new Code of Civil Procedure section 410.10, which reads:

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

Until now, California courts have had no general law directly defining the scope of their power over the person of defendants both within and without the state. Rather, the courts have utilized statutes ostensibly dealing with methods of serving process to determine such jurisdictional questions. For example, jurisdiction over foreign businesses has been defined under Code of Civil Procedure section 411, which is entitled "Summons; Method of Service. . ." and which states:

> The summons must be served by delivering a copy thereof as follows:
>
> * * *
>
> 2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this state: in the manner provided by Sections 6500 to 6504, inclusive of the Corporations Code.

The cited sections of the Corporations Code merely list the persons on whom service may be made. Nevertheless, by seizing on the words "doing business in this state," the California Supreme Court has converted section 411.2, into a provision that not only authorizes jurisdiction over foreign businesses, but also authorizes jurisdiction whenever such authorization would not be unconstitutional.[1] This position was reaffirmed recently by the supreme court in *Buckeye Boiler Co. v. Superior Court,*[2] which involved a foreign corporation, and in *International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn,*[3] which concerned a foreign partnership. Thus, insofar as such foreign business organizations are concerned, new section 410.10 will do no more than give direct formal approval to a practice that has already long been in existence.

1. Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal.2d 855, 858–59, 323 P.2d 437 (1958).

2. 71 Cal.2d —, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

3. 70 Cal.2d 400, 74 Cal. Rptr. 908, 450 P.2d 284 (1969).

With respect to individual defendants, however, section 410.10 will have a more substantial impact. There are now general provisions for service of process on individuals residing outside the state. However, such service can confer jurisdiction over persons only as permitted under section 417, as follows:

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

In addition to these general provisions, a number of statutes permit jurisdiction over nonresidents in specific types of cases and prescribe special methods of service in connection therewith. For example, jurisdiction can be obtained over any nonresident motorist who is involved in an automobile collision in this state,[4] or over a nonresident pilot whose plane crashes here,[5] primarily by service of process on the California Secretary of State. There remains outside of both of these general and special provisions, however, a substantial number of situations where jurisdiction over nonresident individuals is not permitted, although there would be no constitutional barriers to such jurisdiction.[6] This latter group of cases will soon be triable in California under new section 410.10.

The new statute is in line with modern jurisdictional provisions enacted in other states[7] in response to changing concepts regarding the constitutional scope of a state's judicial power. These major changes began to take shape after the landmark

4. Cal. Vehicle Code §§ 17451–17456.

5. Cal. Pub. Util. Code § 24254.

6. A case that might very well fall into this group is Sylvester v. King Mfg. Co., 256 Cal. App.2d 236, 64 Cal. Rptr. 4 (1967). See Friedenthal, CIVIL PROCEDURE, *Cal Law—Trends and Developments 1969*, 191 at 216–223.

7. See, e.g., N.Y.C.P.L.R. 302(a); R.I. Gen. Laws Ann. § 9-5-33.

Supreme Court decision in *International Shoe Co. v. Washington,*[8] in which the Court said:

> [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 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."

Prior to this decision, the major basis for personal jurisdiction was that of presence in the state at the time of service.[9] In earlier times, when commercial transactions were less complex and individuals less mobile, a plaintiff could usually find the defendant in the same or a neighboring community. But all this has changed and, frequently, one party now lives far distant from his opponent, a fact requiring a new accommodation among the interests of the parties and a state in which an attempt is made to institute a suit.

Initial concepts of jurisdiction were grounded on notions of state sovereignty. A state could not, under the Fourteenth Amendment, "invade" the sovereign environs of a second state by assuming jurisdiction over persons located in the second state.[10] When a person entered a state, he was considered to have automatically received benefits of protection offered by that state, and was obligated to obey the laws of that state and was subject to its controls, including the jurisdiction of its courts. A state's jurisdiction, however, was not limited solely to those present within its borders. It was permitted to exercise jurisdiction over those absentees who were domiciled in the state and over any person who consented to be bound.[11]

8. 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057 (1945).

9. *Developments in the Law—State-Court Jurisdiction,* 73 Harv. L. Rev. 909 at 915–17, 919–23, 936–39 (1960).

10. See Pennoyer v. Neff, 95 U.S. 714, 722–23, 24 L.Ed. 565, 568–69 (1877).

11. Kurland, *The Supreme Court, The Due Process Clause And The In Personam Jurisdiction of State Courts,* 25 U. Chi. L. Rev. 569–575 (1958); *Developments in the Law—State-Court Jurisdiction,* 73 Harv. L. Rev. 909 at 916–23, 941–45 (1960).

The ground of consent, or more appropriately a distortion thereof, was first utilized as a means of expanding state jurisdiction over nonresidents when the concept of jurisdiction by presence proved unsatisfactory and unjustified. Each state, as a prerequisite to permitting nonresidents to participate in certain activities within the state, simply required such persons to consent in advance to the jurisdiction of its courts over suits arising from those activities.[12] Eventually, such consent became completely fictionalized, for it was deemed that simply by engaging in these activities, the person had consented. This procedure was approved by the United States Supreme Court in *Hess v. Pawloski,* [13] where the court held valid a state nonresident motor vehicle statute providing that any person who drove a motor vehicle on the highways of the state automatically consented to the jurisdiction of that state's courts in any case arising from a vehicle accident in which he was involved. Although the Court paid lip service to the "consent" involved, the basis of the decision, in reality, was the strong interest that the state had in the subject of the action.

The stretching of the concept of consent was strictly limited, since there are many activities of nonresidents that a state has no power to prevent or control.[14] Thus, if jurisdiction was to be expanded, it was necessary to attack and break down the requirement of presence as the major source of state power, and to substitute instead the "minimum contacts" approach of *International Shoe.*

Once it became clear that increased judicial power was available, state legislatures came under pressure to rewrite their jurisdiction provisions. In California, the state supreme court in *Atkinson v. Superior Court*[15] made clear its dissatisfaction with the limited scope of jurisdiction under section 417, by avoiding its terms in a most artificial manner.[16] The

12. Kurland, *supra,* note 11, at 575–77, 578–82.

13. 274 U.S. 352, 71 L.Ed. 1091, 47 S.Ct. 632 (1927).

14. See Kurland, *supra,* note 11, at 578–81; Flexner v. Farson, 248 U.S. 289, 63 L.Ed. 250, 39 S.Ct. 97 (1919).

15. 49 Cal.2d 338, 316 P.2d 960, cert. den., app. dismd. 357 U.S. 569, 2 L.Ed.2d 1546, 78 S.Ct. 1381 (1957).

16. The out-of-state defendant could not be brought within the terms of § 417. The Court, therefore, resorted to the traditional method of obtaining

court "plainly suggested . . . that all jurisdictional problems be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation."[17]

In responding to pressures to enlarge jurisdictional provisions the legislature has two choices; it may either attempt to set out in detail a list of those situations where jurisdiction is permissible,[18] or it may simply state, as does California's new section 410.10, that its courts may exercise all the jurisdiction that the Constitution allows.

The former approach has one major advantage: it summarizes for the attorneys and the courts situations in which jurisdiction is appropriate, and, except for an occasional clause that may be alleged to go beyond constitutional boundaries, it tends to curtail jurisdictional battles. Under section 410.10, the limitations will appear only after a study of federal and state cases and will tend to encourage plaintiffs to attempt service whenever there is a chance that the jurisdiction is valid. Defendants, on the other hand, will be induced to fight ju-

jurisdiction over such a person by seizing property owned by him and located in the forum state. The problem in *Atkinson* was that the basic fact in issue was the ownership of the property seized; plaintiff claimed that it, not defendant, was the true owner. The Court held that this made no difference, accepting jurisdiction because of the close relationship between the cause of action and the state.

17. Hazard, *A General Theory of State-Court Jurisdiction,* 1965 S. Ct. Rev. 241 at 281.

18. E.g., N.Y.C.P.L.R. § 302(a) reads:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

risdiction more often. Parties may be tempted to litigate the question in order to delay and gain tactical advantages.

Of the two possible choices, the California approach seems superior. First, it has proved extremely difficult to draft clear, detailed statutes, with the result that such statutes have been the subject of numerous cases of interpretation, and the jurisdiction of the state courts has sometimes been limited beyond legislative intent, requiring the enactment of amendments.[19]

Second, the constitutional limitations on jurisdiction are still in a state of flux.[20] A detailed statute intended to allow courts the full measure of power over nonresidents may be out of date in one aspect or another soon after it is enacted. As courts develop greater sophistication in dealing with the minimum contacts notion, it may even be that certain traditionally accepted grounds for jurisdiction will be held invalid.[1] For example, the Supreme Court might well nullify a statute that permits a state to exercise jurisdiction over a defendant solely on the basis that he was served with process while an airplane in which he was a passenger was flying over state territory.[2]

Third, in California, as has already been noted, the courts have adopted and defined a standard for jurisdiction over nonresident business organizations identical with that of the new section 410.10. Thus, there already exists a substantial, well-known series of cases regarding the constitutional limitations of jurisdiction. These cases may minimize the number of situations that arise requiring interpretation.

Finally, California's new statute has come relatively late in time compared to other major jurisdictions, such as Illinois and New York.[3] Numerous cases and other materials interpreting the laws of these states will be of aid in California.

19. See 1 Weinstein, Korn & Miller, *New York Civil Practice*, pp. 3-26–3-27-.6 (N.Y. Judicial Conference comments on 1966 Amendments to N.Y.C.P.L.R. § 302).

20. See Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

1. See Von Mehren & Trautman, *supra*, note 20, at 1178–79.

2. See Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

3. The Illinois provision, Civil Prac-

B. *The "Minimum Contacts" Doctrine*

The broadening of state court jurisdiction pursuant to the *International Shoe* decision has been the focus of a vast number of law review articles,[4] model statutes,[5] and restatements of the law,[6] not to mention actual legislative enactments and judicial decisions. Much of the literature is directed toward future developments regarding both further increases and decreases in traditional judicial powers.[7] A glance at these materials is sufficient to demonstrate that no definitive statement is possible as to the precise constitutional limitations on personal jurisdiction or as to the scope of new section 410.10. It would not be prudent, even were it possible, to summarize here the many varied ideas that have been discussed. There is, however, one major area, that of business activities of nonresidents, where a review of recent literature, in particular the recent decision of the California supreme court, in *Buckeye Boiler Co. v. Superior Court*,[8] will be helpful in interpreting the new statute.

There seems little question that insofar as business activities are concerned, the new statute will apply equally to individ-

tice Act § 17, was enacted on July 19, 1955. The comparable New York Law, N.Y.C.P.L.R. § 302, took effect on September 1, 1963.

4. See, e.g.:

Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. Ill. L.F. 533; Hazard, *A General Theory of State-Court Jurisdiction,* 1965 S. Ct. Rev. 241; Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals,* 31 So. Cal. L. Rev. 339 (1958); Kurland, *The Supreme Court, The Due Process Clause, And The In Personam Jurisdiction of State Courts,* 25 U. Chi. L. Rev. 569 (1958); Scott, *Hanson v. Denckla,* 72 Harv. L. Rev. 695 (1959); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121 (1966); *Jurisdiction over Nonresident Manufacturers in Product Liability Actions,* 63 Mich. L. Rev. 1028 (1965); *Developments in the Law—State-Court Jurisdiction,* 73 Harv. L. Rev. 909 (1960).

5. See 9B, *Uniform Laws Ann.,* Uniform Interstate and International Procedure Act., pp. 305–37.

6. See *Restatement of the Law, Second,* Conflict of Laws, Proposed Official Draft, Part I, ch. 3, pp. 125–300 (1967).

7. See, e.g., Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121 (1966); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 Yale L.J. 289 (1956).

8. 71 Cal.2d —, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

uals, corporations, and associations. Nothing inherent in the type of business ownership structure should affect the constitutional limits on jurisdiction; rather, it is the nature of the contacts that any business has with the state that should be controlling. Thus, the *Buckeye* decision is not only important in respect to jurisdiction over foreign corporations, but the decision takes on added significance since the principles set out will, under the new statute, govern businesses owned by individuals as well.

Plaintiff in *Buckeye* alleged that he was injured while at work at a General Electric plant in California when a pressure tank manufactured by Buckeye exploded. There was no direct evidence as to when or from whom the tank had been purchased. Buckeye, which did not advertise its products, sold them through manufacturer's agents in a number of states, all located east of the Mississippi River. The company's only contact with California was the sale of tanks to the Cochin Manufacturing Company of Ohio, which has a plant in South San Francisco. For several years, Cochin had bought some $25,000 to $35,000 worth of tanks from Buckeye. Cochin did not resell any of these tanks, but used them exclusively in the manufacture of hydraulic automobile lifts for service stations. The lifts were sold both in and out of California. The tanks shipped to Cochin were larger in size than the one that exploded in the General Electric plant.

In holding that on these facts California courts could constitutionally (and hence statutorily) obtain jurisdiction over the Buckeye Corporation, the court made several important points. First, it noted that jurisdiction over a nonresident would lie only if he had purposely conducted some activity within the forum state. This was held to be a requirement established by the United States Supreme Court in *Hanson v. Denckla,*[9] one of the few recent decisions of the Court limiting jurisdiction by a state over a nonresident. Second, it held that to purposely conduct activities within a state, a nonresident need only engage "in economic activity within

9. 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958).

this state 'as a matter of commercial actuality.' "[10] If a manufacturer foresees or should reasonably have foreseen that his products will be sold or resold in the state, then he has met the "economic activity" requirement, even though the relationship between the manufacturer and the use of his product in the state is indirect. This is true whether his product reaches the forum in its original form or whether, along the way, it has been incorporated as a component of some larger product. Third, defendant's amenability to state process may be based either on the fact that he purposely conducts substantial business activity within the state or on the fact that the cause of action arose out of "purposely conducted" activity in the state, even though there may be only an isolated instance of such activity.

In *Buckeye,* the court relied on both grounds, although the factual basis for each is weak. Sale of tanks to a single California buyer, even for incorporation in a product to be widely distributed, is hardly a strong basis for assumption of jurisdiction in a case totally unrelated to those sales. In 1959, in *Fisher Governor Co. v. Superior Court,*[11] where plaintiff brought suit for injuries incurred in Idaho caused by an explosion allegedly due to defendant corporation's defective equipment, the California Supreme Court ordered service quashed on a defendant whose only contact with California was the promotion and sale of its products through independent manufacturer's agents. Although the case differed factually from *Buckeye* in several respects, the major point seems applicable: jurisdiction cannot be based on activities in the state totally unrelated to the cause of action unless those activities are direct, continuous, and systematic, and sufficiently extensive to make the exercise of jurisdiction fair and equitable.[12] The sale of one's products on a regional or nationwide basis cannot, by itself, justify general jurisdiction over the corporation in every state involved.[13]

10. 71 Cal.2d —, 80 Cal. Rptr. 113, 458 P.2d 57.

11. 53 Cal.2d 222, 1 Cal. Rptr. 1, 347 P.2d 1 (1959).

12. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 96 L. Ed. 485, 72 S.Ct. 413 (1952).

13. Fisher Governor Co. v. Superior Court, 53 Cal.2d 222, 225, 1 Cal. Rptr. 1, 347 P.2d 1 (1959).

On the other hand, the attempt of the court in *Buckeye* to justify jurisdiction on the ground that the injury was received as a result of defendant's economic activities in California is undercut by the paucity of evidence regarding the purchase of the tank and the means by which it entered the state. The court's conclusion that the "cause of action appears to arise from . . . sales of pressure tanks to California customers or to other customers for foreseeable resale or use in California"[14] is simply not supported by the facts.

The court sought to overcome the above factual weaknesses of its arguments in its fourth major point involving manipulation of the burden of proof. That it did so in a footnote[15] is somewhat surprising since the matter is not only of crucial significance in the case but is also a concept unique in the law in this area. Although recognizing that the initial burden of establishing jurisdiction is on plaintiff, the court held that at some point the burden shifted to defendant regarding both bases upon which jurisdiction was predicated. To avoid jurisdiction on the ground that defendant's total activities in the state did not warrant the assumption of power over it, defendant would have had to show that the burden of defending the present case would have differed substantially from the defense of suits that might possibly arise from defendant's sales to the Cochin Company. To avoid suit on the ground that the cause of action did not arise out of defendant's purposeful activities in the state, it would have had to show that the arrival of the exploded tank in California was unforeseen and unforeseeable.

These shifts in the burden of proof apparently occur whenever plaintiff shows merely that defendant sells products in interstate commerce without direct control over the destination or that defendant directly engages in some activity in the forum. Once the shift takes place, defendant cannot carry its burden by relying generally on a description of its business methods and activities; it must go further and deal specifically with the matter in question. For example, Buckeye, to avoid

14. 71 Cal.2d —, 80 Cal. Rptr. 122, 458 P.2d 66.

15. 71 Cal.2d —, n. 9, 80 Cal. Rptr. 122, n. 9, 458 P.2d 66, n. 9.

jurisdiction, would have had to trace the exploded tank so as to determine how and where General Electric, which itself had no records, obtained it. As a practical matter, the cost of such an inquiry, even if successful, would induce many nonresident defendants to forego jurisdictional challenges and to spend the time and money fighting their cases on the merits in the forum state. This will likely be more true when small, individually owned businesses are brought into the picture under new section 410.10.

From an analytical point of view, there is certainly no reason why the burden of proof on jurisdictional matters should fall on plaintiff rather than defendant. In an era of expanding state court powers over nonresidents, a shift of the burden will simply speed what seems to be the inevitable final result, that a state court will have the power to accept jurisdiction over all defendants who have any contact whatsoever with the state.

C. *The Balance of Conveniences—Constitutional Criterion or Basis of Discretion*

A fifth major point made in the *Buckeye* decision was that even if the defendant were found to have sufficient contacts with the forum, the power of the court to accept jurisdiction would still depend "upon a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction."[16] This raises two important questions. First, just what cases, if any, would meet the "minimum contacts" requirement and still fail the balancing test? Second, new section 410.30 provides:

> When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

16. 71 Cal.2d —, 80 Cal. Rptr. 118, 458 P.2d 62.

In light of the balancing test, will this new provision have any purpose?

In determining the question whether jurisdiction over a nonresident is permissible, California courts have given lip service to the idea of balancing conveniences by noting such factors as the general availability of evidence, the location of witnesses, the ease of access to an alternative forum, and the avoidance of a multiplicity of suits.[17] Normally, however, the inquiry has been made in the context of showing the nature of the contacts between the forum and the cause of action; there has not been a California decision in which the basic contacts have been held sufficient and yet where the court, on constitutional grounds, has refused, or even seriously considered refusal of, jurisdiction under the balancing test.

One can find[18] or hypothesize situations in which the "balancing of conveniences" would have utility, but this can be handled adequately under the so-called forum non conveniens rule, such as that set out in new section 410.30, by permitting the courts, in their discretion, to require the suit to be brought elsewhere. If the balancing test becomes a constitutional requirement, several unfortunate results could ensue. First, wealthy out-of-state defendants will be encouraged to run up the costs of litigation by challenging jurisdiction at appellate as well as at trial levels, even though their contacts with the forum are clearly sufficient to meet the "minimum contacts"

17. See Buckeye Boiler Co. v. Superior Court, 71 Cal.2d —, 80 Cal. Rptr. 113, 458 P.2d 57 (1969); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 225–26, 1 Cal. Rptr. 1, 3–4, 347 P.2d 1, 3–4 (1959); Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 861–62, 323 P.2d 437 (1958).

18. One such decision is Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959), decided by the Supreme Court of Utah, which refused to give full faith and credit to an Illinois judgment. The plaintiff, from his residence in Illinois, had mailed a list of horses he was offering for sale to defendant in Utah. Defendant, after having a friend in Illinois inspect the horses, sent a letter accepting plaintiff's offer and enclosing partial payment. He then sent an agent to Illinois to accept delivery. A dispute developed, defendant refused to pay the balance of the purchase price, and plaintiff sued. Although it seems clear that defendant's contacts with Illinois met a "minimum contacts" requirement, the implications of permitting a party doing nationwide business by mail to solve disputes regarding such business in its home forum induced the Utah Court to reject the Illinois court's jurisdiction.

requirement. Second, if a California court decides that the balance of conveniences requires suit in another state, it would have no choice but to dismiss the action, even though the forum to which plaintiff is directed subsequently disagrees, taking the position that on balance the action should have been brought in California. Plaintiff could be left without any forum whatever. Under a statutory, nonconstitutional forum non conveniens rule, however, the case need not be dismissed; it can be stayed until such time as the plaintiff has completed his action in the other forum, and if, for some reason, the other forum proves unavailable, the California action can simply be revived.

Why the court in *Buckeye* decided to treat the balancing test as an overriding constitutional requirement is a mystery. Although there has been much written on the doctrine of forum non conveniens[19] and the need for it in light of expanding constitutional state powers over nonresidents, it has not been suggested as a limitation on those powers.[20] The United States Supreme Court in its decisions on jurisdiction has not sought to limit jurisdiction to that one state where suit would be most convenient; rather, the emphasis has been on the expansion of the number of places where plaintiff might validly pursue his action.[1]

Certainly, the California legislature, in enacting section

19. See the authorities cited in *1969 Report of the Judicial Council of California,* pp. 92–96.

20. The court in *Buckeye* cited Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 Yale L.J. 289 at 312 (1956). The author, in discussing the possible demise of the doctrine permitting a transient defendant to be sued in any state he can be found, stated as follows: "Once this doctrine has been deprived of its vitality . . . the primary reason for the continued existence of the transient rule will have disappeared. Forum non conveniens, which now allows discretionary refusal to 'take' jurisditcion, may then assume the positive function of identifying the forum conveniens in terms of substantial contacts such as plaintiff's residence, the origin of the cause of action, or the presence of property." Read in proper context, this statement merely states that all jurisdiction should be based on a minimum contacts rule and not on an outmoded historical basis of presence. In no way does it indicate a separate balancing-of-conveniences test over and above the minimum contacts rule.

1. See International Shoe Co. v. Washington, 326 U.S. 310, 316–19, 90 L.Ed. 95, 101–104, 66 S.Ct. 154, 161 A.L.R. 1057, 1061–1064 (1945).

410.30, did not accept the notion of a constitutional balancing test, since there would have been little need for the provision had it done so. And the Judicial Council, in its analysis of section 410.30, reflected a similar view in the following terms:

> The various bases of judicial jurisdiction recognized under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution establish the outermost limits beyond which a state court may not exercise its judicial jurisdiction. Within these limits, the owner of a transitory cause of action will often have a wide choice of forums in which to bring his action. Some of these forums may have little relation either to the parties or the cause of action, and suit in them may increase greatly the burden to defendant of making a defense. Under the doctrine of inconvenient forum a court, even though it has jurisdiction will not entertain the suit if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action. . . . The doctrine of inconvenient forum is not jurisdictional. If a state chooses to exercise such judicial jurisdiction as it possesses despite the fact that it is an inappropriate forum, its action in this regard is valid and will be entitled to full faith and credit in other states.[2]

Even the California Supreme Court itself has taken a contrary position. In recent decisions on forum non conveniens, which the court has accepted as a matter of common law doctrine,[3] it has reversed and disapproved of discretionary dismissals by trial courts,[4] taking the stand that the sole fact that plaintiff is domiciled in California will ordinarily preclude forum non conveniens from applying. These decisions flatly contradict any notion that the balancing of conveniences test is constitutionally required in a case where defendant's con-

2. *1969 Report of the Judicial Council of California*, pp. 92, 96.

3. Price v. Atchison, T. & S. F. Ry., 42 Cal.2d 577, 268 P.2d 457 (1954).

4. Thomson v. Continental Ins. Co., 66 Cal.2d 738, 59 Cal. Rptr. 101, 427 P.2d 765 (1967); Goodwine v. Superior Court, 63 Cal.2d 481, 47 Cal. Rptr. 201, 407 P.2d 1 (1965).

tacts with the forum are otherwise sufficient to justify jurisdiction.

Hopefully, the supreme court will take the earliest opportunity to clarify the *Buckeye* decision by adhering solely to the minimum contacts requirement and eliminating the balancing of conveniences as a separate test.

D. *Statutory Forum Non Conveniens*

As already noted, California has for a number of years formally accepted the doctrine of forum non conveniens as a matter of common law.[5] In recent decisions, the doctrine has been discussed at considerable length and in great detail.[6] The question then arises as to why it was necessary to enact section 410.30 to deal with the same matter. One possibility is that the legislature felt that the doctrine had been applied in too restricted a fashion under past decisions. If so, the statute fails to accomplish the purpose, since it utilizes general language requiring court interpretation, and neither gives specific criteria to be followed in the future nor eliminates from consideration factors that have been considered important in the past. The major premises that have generally been recognized as controlling are: first, that dismissal is not proper unless all of the parties reside outside of the forum and the cause of action arose elsewhere,[7] and second, that even then dismissal is disfavored. Coupled with a general reluctance on the part of local judges to apply the doctrine when, as a practical matter, it will force local attorneys to turn cases over to counsel in other states, the number of actions transferred has been small. When new section 410.30 becomes effective, the Supreme Court will undoubtedly have an opportunity to review the past practice and broaden its scope. Hopefully, the court will urge trial judges to be more flexible and to order

5. Price v. Atchison, T. & S. F. Ry., 42 Cal.2d 577, 268 P.2d 457 (1954).

6. Thomson v. Continental Ins. Co., 66 Cal.2d 738, 59 Cal. Rptr. 101, 427 P.2d 765 (1967); Goodwine v. Superior Court, 63 Cal.2d 481, 47 Cal. Rptr. 201, 407 P.2d 1 (1965).

7. See *1969 Report of the Judicial Council of California,* pp. 92–95; Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 59 Cal. Rptr. 101, 427 P.2d 765 (1967).

the action moved where justice so demands, particularly in cases where the only major ground for retention of the suit is that plaintiff is a local resident.

Section 410.30 can have significance only if it is read together with new section 410.10 as establishing a whole new approach to jurisdiction in California. Retention of an inappropriate case solely because plaintiff resides in the forum is every bit as stultifying as the old laws that allowed plaintiff to bring suit only where defendant could be found.

E. *New Methods of Serving Process*

From a practical point of view, the new statutes involving methods of service of process will have a greater impact on most practicing attorneys than will the new jurisdictional statutes. The purpose of these new statutes is to remove technical, unrealistic requirements in favor of simpler, less expensive methods that will be at least as effective in providing actual notice of suit to defendants.

As one might expect, the statute retains the traditional service by personal delivery of the complaint and summons to the defendant.[8] In addition, the statute continues the practice regarding special statutes, such as the nonresident motor vehicle law that has its own built-in provisions for service.[9] However, there are several important innovations. Under new section 415.30, service may be made by mail on a form set out in the statute that requires the defendant to sign an "Acknowledgment of Receipt of Summons" and return it in a self-addressed, stamped envelope provided by plaintiff. If a party fails to sign the "Acknowledgment," he may be required to pay the reasonable costs incurred by plaintiff in making service by another method, regardless of who wins the case. Section 415.30 has a number of substantial advantages. In suits against those stable, responsible defendants who accept whatever process is sought to be served on them, the procedure will simply save plaintiffs the cost of a process

8. This is provided by new § 415.10.

9. This is accomplished by new § 413.10, which states: "Except as otherwise provided by statute, a summons shall be served (as follows) . . . ."

server. As to actions against certain oft-served defendants whose attitude is to make all aspects of the suit, including service, as difficult as possible, the usual harassing tactics will cost money and are likely to be avoided. As to those potential defendants who flee to avoid service, the new provision will make little difference except that if these defendants are eventually served, plaintiff will be able to recoup some of the expenses of the chase. The provision does have one potential drawback regarding the ignorant, but honest, individual defendant who is likely not to read such a legal form sent by unregistered mail, but simply to dispose of it. Service on such defendants by a process server underscores the importance of the documents and induces them to seek proper assistance. Under the new "Acknowledgment" provision, courts have discretion in the awarding of the costs of direct service.[10] This discretion will have to be exercised in favor of those whose unfamiliarity with the judicial system and judicial language has caused them to ignore the required action. Otherwise, the new procedure will become an instrument of oppression.

Another equally important provision is section 415.40, which not only permits service on persons outside the state by personal delivery of the summons and complaint to them, but also allows service by airmail so long as a return receipt is required. The only unfortunate aspect of this statute is that it was not drawn to apply to in-state defendants as well. There is no just reason why the mails cannot be utilized for all service, provided defendants are forced to sign receipts for the letters. Such service is superior to personal delivery, since there rarely will be a serious question whether or not service was in fact made when defendant's signature appears on a receipt. When service, or purported service, is evidenced only by the affidavit of the individual who claims he made the service, a difficult factual question may ensue. Sometimes defendants, particularly the poor and ignorant, are the victims of so-called "sewer service" whereby the process server fal-

10. Section 415.30(d) permits recovery of expenses unless defendant can show good cause for not signing the "Acknowledgment."

sifies an affidavit stating that he made service that he in fact never made.[11]

A third new provision in the code[12] further eases the method of serving corporations and associations. As in the past, service must be made on certain designated officers or agents. However, not only may such a person be served under the new provisions discussed above, but he may also be served simply by leaving one copy of the summons and complaint with the person who appears to be in charge of his office and mailing another copy to him at his office. Obviously, such a provision makes a great deal of sense. There is no need for the frustration that occurs when the person on whom service must be made is never present, at least according to his secretary, when the process server arrives. The only proper consideration is whether the individual is in fact notified of the action; the new provisions ensure that he is.

F. *A New Provision Regarding the Time To Answer*

Another new enactment worthy of note is section 412.20 (3), which requires an answer to be filed within 30 days of service, regardless of where defendant resides. Previously the law required an answer within 10 days if defendant resided in the county in which the action was brought; otherwise, the 30-day rule applied.[13] Practically speaking, 10 days is rarely sufficient time for the average citizen to hire an attorney, relate all the facts, and have an answer drafted, signed, and filed. If he does obtain counsel within the period, invariably the lawyers will agree to an extension. If defendant fails to obtain an attorney in time, and a quick default judgment is taken, a timely motion to set it aside will rarely be denied.

G. *Conclusion*

All in all, the new statutes are fair and reasonable and constitute a significant improvement over the provisions they re-

11. For an interesting discussion of the problem, see *Abuse of Process, Sewer Service,* 3 Colum. J. of L. & Soc. Probs. 17 (1967).

12. Code of Civ. Pro. § 415.20(a).

13. Code of Civ. Pro. § 407(3).

place. That there are a number of sections that require court interpretation is clear; it is to be hoped that, when the cases arise, the courts will take extreme care in writing their decisions in order that the general purposes of the new statutes will not be thwarted and that unnecessary technicalities and oppression will be avoided.

II. Creditors' Remedies

Developments made this last term in the California law of preliminary and post-judgment remedies are of great practical significance and are in line with recent changes in this field throughout the nation. Perhaps the most important changes are those regarding the constitutional validity of preliminary remedies heretofore granted on application of a plaintiff without a prior hearing either as to the necessity of the remedy or the merits of the case.

Preliminary relief is granted in order to preserve the status quo; so that by the time plaintiff wins his suit, if he does, his victory will not have been rendered meaningless through the actions of the defendant. Difficulty exists because such remedies may be unjust to the defendant, particularly if he is in the right. At the very least, defendant will have lost the temporary use of his property or his freedom to act, and this could cost him dearly if it interferes with his normal business or family life. Sometimes, the pressures that arise when one is subject to such remedies make it necessary for defendant to concede the lawsuit, even though he has a good defense. In essence, then, preliminary remedies can be an instrument of legalized blackmail.[14]

In a very recent opinion, *Sniadach v. Family Finance Corp.*,[15] the United States Supreme Court struck down as unconstitutional a Wisconsin statute permitting prejudgment garnishment of defendant's wages. The Wisconsin provision,

14. See Brunn, *Wage Garnishment in California: A Study and Recommendations,* 53 Calif. L. Rev. 1214 at 1229–31 (1965); Comment, 43 Wash. L. Rev. 743 at 753 (1968).

15. 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969).

like that of California[16] and other states, failed to provide for a hearing prior to seizure of the wages. Unlike California's wage attachment law,[17] the Wisconsin law did not even provide for pregarnishment notification to the alleged debtor. The Court noted the tremendous hardships that could obtain when a person was suddenly cut off from his wages, and held that for a court to do so without prior notice and hearing was a taking of property without due process as proscribed by the Fourteenth Amendment. Left open was the question as to what extent the decision applied to the attachment of other property or to other preliminary remedies, although it did note that there might be extraordinary circumstances where a summary preliminary remedy would be upheld. The court also failed to define the nature and purpose of a pregarnishment hearing. The court indicated that defendant should have an opportunity "to tender any defense he may have, whether it be fraud or otherwise,"[18] but gave no clue as to the result of such a tender. Must the court be convinced that plaintiff will ultimately prevail before permitting garnishment or is it merely enough that he has filed in good faith? Should it delve into the necessity for the wage garnishment as opposed to other methods by which plaintiff might ensure that he could ultimately collect on a judgment? These were questions left unanswered.

Largely because of its uncertainty, the *Sniadach* ruling has caused considerable confusion in the California trial courts regarding the validity of prejudgment attachments. Courts in different counties have taken varying positions on the matter.[19]

16. See Code of Civ. Pro. § 537.

17. Code of Civ. Pro. § 690.11. The California law does not, however, require notice to the debtor prior to attachment of property other than wages.

18. 395 U.S. 339, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969).

19. In McCallop v. Universal Acceptance Corp., No. 605038 (Super. Ct. S.F., July 11, 1969), aff'd, McCallop v. Carberry, 1 Cal.3d 903, 83 Cal. Rptr. 666, 464 P.2d 122 (1970), the Superior Court of San Francisco County enjoined the county sheriff from any further wage attachments and also ordered him to return all moneys held by virtue of such levies already served. In certain other counties, the writs of attachment have been issued, but upon objection by the debtor, they have been quashed immediately. Of course, if the debtor is not represented by counsel and has no notion of his rights, the attachments would continue in force. Compare Nebin v. West Coast Trailer Sales, No.

Recently, the State Attorney General filed an action in the supreme court to declare all prejudgment attachment proceedings invalid, arguing that the *Sniadach* case should not only be applied to wage attachment but to attachment of other property as well. Two related cases were joined for argument, and all three cases were decided on January 30, 1970.[20] Unfortunately, these decisions continued to leave open many important questions. The court did hold[1] that prejudgment wage attachment under the current California statute was invalid under *Sniadach,* but the Attorney General's case, which was the only one that dealt with other forms of attachment, was dismissed on procedural grounds with no discussion of the merits whatsoever.[2] As a result, the confusion as to prejudgment attachment continues to exist, not only to the discomfort of litigants and their attorneys, but also to the displeasure of county clerks and sheriff's personnel. And such uncertainty is not confined only to attachment. In a recent superior court decision in Los Angeles,[3] for example, the trial judge upset traditional practices by holding the preliminary remedy of claim and delivery unconstitutional, since it permitted a sheriff forcibly to seize property held by defendant upon a claim of ownership by plaintiff without affording a prior hearing to defendant. And in another case now pending in the court of appeal,[4] appellant has challenged the validity of Code of Civil Procedure section 1166a, which at the time the matter was heard below,[5] permitted a landlord in an un-

59, 184, North Orange Judicial District, Orange County, wherein an attachment was processed through the Santa Rosa County Sheriff's Department that placed a "keeper" in the defendant's place of business on November 12, 1969, two days *before* the summons and complaint were served.

20. People ex rel. Lynch v. Superior Court, No. L.A. 29661 (1970); McCallop v. Carberry, 1 Cal.3d 903, 83 Cal. Rptr. 66, 464 P.2d 122 (1970); Cline v Credit Bureau of Santa Clara Valley, 1 Cal.3d 908, 83 Cal. Rptr. 669, 464 P.2d 125 (1970).

1. McCallop v. Carberry, 1 Cal.3d 903, 83 Cal. Rptr. 66, 464 P.2d 122; Cline v. Credit Bureau of Santa Clara Valley, 1 Cal.3d 908, 83 Cal. Rptr. 669, 464 P.2d 125 (1970).

2. People ex rel. Lynch v. Superior Court, 1 Cal.3d 910, 83 Cal. Rptr. 670, 464 P.2d 126 (1970).

3. Blair v. Pitchess, No. 942,966, (Super. Ct. Los Angeles, October 21, 1969).

4. Vavrousek v. Bery, No. 26049, Dist. Ct. App., 1st App. Dist., June 21, 1968.

5. Section 1166a has since been amended to provide the defendant ten-

lawful detainer action to obtain immediate possession of the premises merely on *ex parte* showing that the tenant either was insolvent or did not have property subject to execution sufficient to satisfy plaintiff's alleged damages.[6] The final resolution of the problems involved in each of the above cases will be of immediate interest and significance to virtually all California attorneys.

Even prior to the *Sniadach* decision, the California supreme court, in *In re Harris*,[7] dealt with a similar problem involving the preliminary remedy of civil arrest. The decision does not have a substantial direct impact since civil arrest is rarely utilized, but the philosophy of the Court is in line with the *Sniadach* decision. The *Harris* case presented a particularly offensive example of injustice. The plaintiff creditor brought suit to recover a truck purchased by defendant under an instalment sales contract. Plaintiff attempted to obtain immediate possession of the truck by claim and delivery but the sheriff was unable to locate the vehicle. Plaintiff, acting pursuant to the civil arrest statutes, filed an affidavit stating that defendant had concealed the truck to prevent the sheriff from finding it. The court ordered the sheriff to arrest defendant and fixed bail at $16,000. In addition, the court saddled defendant with a $4,000 penalty assessment, which, as the supreme court noted, was required only in criminal cases and was totally inappropriate to civil arrest. Defendant did not have funds to meet the bail or to secure legal assistance and, as a result, spent five weeks in jail without ever having been brought before the trial court. Finally, he was able to secure representation from the Public Defender, who had the bail

ant with the right to both notice and a hearing before a writ of possession is granted. The scope of the hearing is not clearly delineated, but appears to be limited to the question of the defendant's ability to pay a judgment to plaintiff if one is awarded. Whether defendant must also be entitled to be heard on the merits of plaintiff's claim is a question clearly raised by the *Sniadach* opinion.

6. Appellant relied in part on a 1937 decision by a three-judge municipal court in San Francisco in Dillon v. Cockrell, No. 109588, (San Francisco Mun. Ct. 1937), which held C.C.P. § 1166a unconstitutional. See The Recorder p. 1, col. 5, and p. 8, col. 1, September 22, 1937.

7. 69 Cal.2d 486, 72 Cal. Rptr. 340, 446 P.2d 148 (1968).

and penalty assessment reduced to $1,250. Defendant was then able to secure a bond for that amount and obtain his release. The supreme court held that the civil arrest statutes were in violation of the due process clauses of the Fourteenth Amendment of the United States Constitution and Article 1, Section 13 of the California Constitution in that the statutes did not require notification to defendant of his right to apply to the trial court at any time for his release or for a reduction in bail, and, further, that they did not provide him with counsel, since he was indigent. As the supreme court quite properly noted, a person charged with a criminal offense is entitled to these basic rights and it would be absurd to hold that a person under civil arrest was entitled to less.

The ultimate result of the cases in both federal and state courts must be a total reappraisal by the California legislature of the procedural aspects of the preliminary remedy statutes. Hopefully, however, such a reappraisal will also involve the substantive aspects of these provisions; lately, much has been written regarding their efficacy and the justification for them,[8] and both Congress and the California Legislature have been active in the area. Primary concern has centered around the question of what property should be exempt from attachment (both before and after trial) and, in particular, the extent to which a debtor's wages should be immune. At present, the California statute provides that one-half of all amounts earned within the 30 days prior to attachment are automatically exempt.[9] The other half may be exempted to the extent that the debtor can show he requires such earnings to support his family in California.[10]

In 1968, the California Legislature passed a bill to exempt automatically all wages, only to have the bill vetoed by the

8. See, Patterson, *Forward: Wage Garnishment—An Extraordinary Remedy Run Amuck*, 43 Wash. L. Rev. 735 (1968); Seid, *Necessaries—Common or Otherwise*, 14 Hastings L.J. 28 (1962); Note, *Wage Garnishment in Kentucky*, 57 Ky. L.J. 92 (1968); Comment, *Wage Garnishment—The Contemporary Shylock's Pound of Flesh*, 40 Miss. L.J. 151 (1968); Note, *Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code*, 38 U. Cinn. L. Rev. 338 (1969).

9. Code of Civ. Pro. § 690.11.

10. Code of Civ. Pro. § 690.11.

Governor.[11] However, Congress has stepped in with a bill[12] that as of July 1, 1970, will limit wage attachments in every state to a maximum of 25 percent of net earnings. The impact of the federal law in California may be greater than one might expect in light of California's law permitting the exemption of even the second half of a debtor's wages. There are two reasons for this. First, a debtor in California must claim the extra exemption and if the plaintiff-creditor resists, the debtor must appear in court on the matter.[13] To many poor unsophisticated debtors, these procedures are unknown, and, even if known, appear so difficult that they will not be utilized. Second, there is an exception to the exemption that applies when the suit is to collect "debts (which) are . . . incurred by such debtor, his wife or family for the common necessaries of life."[14] This exclusion is often applicable, even though such "necessaries" are narrowly defined to include only food, clothing, shelter, and medical expenses.[15]

An interesting controversy has arisen in recent California superior court decisions as to the scope of the "common necessaries" exclusion, when a single suit is brought to collect for some items that are common necessaries and for some that are not. In *Retailers Credit Assn. v. Davis*,[16] a case brought in Mendocino County by a collection agency to which a number of defendant's debts had been assigned, the court held that since some of the debts were not for necessaries, the exclusion did not apply at all. The judge relied solely on a literal reading of the statute, and noted that the case was one of first impression. To the contrary is *Carpenter v. Trujillo*,[17] decided by the appellate department of the Santa Clara County Supe-

11. Assembly Bill 1208 was first introduced on March 26, 1968. The governor vetoed the bill on September 3, 1968. See *From the Governor's Office*, California Digest, p. 83, October, 1968.

12. Consumer Credit Protection Act, §§ 303–307, 82 Stat. 146; 15 U.S.C. § 1673–77 (1968).

13. Code of Civ. Pro. § 690.26.

14. Code of Civ. Pro. § 690.11. A similar exclusion applies to debts "incurred for personal services rendered by an employee, or former employee of such debtor."

15. See Los Angeles Finance Co. v. Flores, 110 Cal. App.2d Supp. 850, 243 P.2d 139 (1952).

16. No. 25884 (Super. Ct., Mendocino County, Feb. 14, 1968).

17. 275 Cal. App.2d —, 79 Cal. Rptr. 725 (1969).

rior Court, where, again, a collection agency brought a single suit to collect on a number of obligations incurred by defendant, some for necessaries and some not. The court noted that had separate suits been brought to collect for the necessaries, the exclusion would clearly have applied; thus, it seemed illogical to find the exclusion inapplicable merely because plaintiff consolidated claims for all debts into a single suit for purposes of convenience. The court also rejected defendant's alternative claim that the amount of the exclusion should be limited on an apportionment theory. It was argued that the court should figure what percentage of the claimed debts were for necessaries and exclude only that percentage of the second half of defendant's wages. Again, it was clear that such a formula would punish plaintiff for consolidating his claims in a single suit, since the full amount of the exclusion would be available if a separate action had been brought to recover for necessaries alone.

There is no doubt that the *Trujillo* decision is correct from the point of view of sensible statutory construction, but until the definitive word on the matter is received from the Supreme court or the court of appeal, it is likely that some trial judges will read the exclusion clause to favor the debtor whenever conceivable, since they, along with many others, believe that common sense requires all earnings to be exempt from pre- or post-trial attachment.[18]

The general attitude of the courts in interpreting exemption statutes in favor of debtors is not new and is not confined to wage attachments. This was recently illustrated somewhat dramatically in *Independence Bank v. Heller,*[19] in which the court was called upon to interpret Code of Civil Procedure section 690.2, which exempts from pre- or post-trial attachment the following possessions:

> Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one refrigerator, washing machine, sewing machine, stove, stovepipes and furniture; wearing apparel, beds, bedding and

18. See generally authorities cited *supra,* n. 8.

19. 275 Cal. App.2d —, 79 Cal Rptr. 868 (1969).

> bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions and fuel actually provided for individual or family use, sufficient for three months, and three cows and their suckling calves, four hogs and their suckling pigs, and food for such cows and hogs for one month; also one radio, one television receiver, one piano, one shotgun and one rifle.

Plaintiff had secured a judgment from defendant in excess of $80,000 and sought to levy on defendant's household goods, allegedly worth over $22,000. Defendant claimed such goods were exempt under section 690.2; plaintiff alleged that such valuable furniture was not "necessary" within the meaning of the law. The trial judge granted the exemption and the court of appeal affirmed. The court reaffirmed the rules that exemption statutes are to be construed favorably to the debtor and that what is necessary to a person is a function of the style of living to which he has become accustomed. Underlying the court's decision was also the practical consideration that the trial judge should not be required to make an item by item determination of what articles "meet the minimum requirements of an adequately furnished home." It was sufficient that the court simply determine that all items exempted were those that defendant had used to furnish his home in the manner to which he had long been accustomed.

The *Heller* decision points up an interesting dilemma. On the one hand, it is in the interest of sound economic and social policy, if not in the interest of humanity, to apply exemption laws broadly so that those in debt do not find their lives and the lives of the members of their families utterly destroyed. Without such protection, a harassed debtor is likely to run off, leaving his wife and children alone to face a wealth of economic and emotional problems, the financial burden of which will be borne ultimately by the state. On the other hand, it is most galling to find that some few persons can, by manipulation of the laws, maintain an extremely high standard of living, while at the same time they mock their fellow citi-

zens by ducking their obligations. One attempt to curb these abuses was contained in a bill introduced into the California Legislature on April 7, 1969.[20] It would have amended section 690.2, to allow exemption of the listed household items only to a total maximum cash value of $3,000. Although the proposal would effectively have barred the debtor in *Heller* from avoiding attachment, such a provision does pose many problems. For one thing, in a state as large and as varied as California, $3,000 may be quite adequate in some communities and totally deficient in others. Moreover, the legislature must constantly reconsider such a statute as the cost of living fluctuates. Perhaps what is needed is a more generous limit, e.g., $10,000, which few could claim was too low. Such a provision would effectively shut off the exemption to those few wealthy persons who would seek to preserve the bulk of their assets by investing in expensive household items, and would at the same time avoid placing on the courts an untenable burden of determining the value of household goods in a large number of cases.

III. Scope of Cross Actions

Confusion regarding the scope of counterclaims and cross-complaints under the California Code of Civil Procedure is hardly new. The trouble primarily stems from the fact that a cross-action by defendant can be either a counterclaim or a cross-complaint, depending on the circumstances, and each has different consequences. A cross-complaint[1] is any claim by defendant[2] that arises out of the same transaction or occurrence as does plaintiff's complaint. It is treated as a separate

20. Assembly Bill 1715 (1969).

1. Code of Civ. Pro. § 442 defines a cross complaint as follows: "Whenever the defendant seeks affirmative relief against any person, whether or not a party to the original action, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint."

2. Throughout the text, it is assumed that each cross-complaint is brought against the plaintiff in the action. In fact, a cross-complaint may be asserted against anyone, whether or not a party. Code of Civ. Pro. § 442.

action,[3] and defendant always has the option of asserting it as a cross-complaint or making it the basis of a separate suit.[4] A counterclaim,[5] on the other hand, is a claim by defendant that tends to diminish or defeat plaintiff's claim.[6] It is treated as a defense to plaintiff's claim;[7] while it does not need to arise out of the same transaction or occurrence as plaintiff's claim, if it does, it is a compulsory counterclaim.[8] Thus, defendant must assert it as a counterclaim; he will be held barred from asserting it later as a basis for an independent action.[9]

It is obvious, then, that the meaning of the phrase "diminish or defeat" is vital. On it may depend whether or not a former defendant who failed to countersue against plaintiff, is forever barred from asserting an otherwise valid claim. In the ordinary action, it is now clear that if plaintiff seeks a judgment that includes any money damages whatsoever, then any claim by defendant that also seeks judgment for damages, alone or

3. See Wettstein v. Cameto, 61 Cal. 2d 838, 40 Cal. Rptr. 705, 395 P.2d 665 (1964) (failure to answer cross-complaint results in judgment by default).

4. See Sawyer v. Sterling Realty Co., 41 Cal. App.2d 715, 721, 107 P.2d 449 (1940).

5. Code of Civ. Pro. § 438, reads as follows:

Counterclaim; elements; when authorized. The counterclaim mentioned in § 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; *provided,* that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security; *and provided further,* that the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff.

6. Note that there is an additional requirement that a several judgment must be available between plaintiff and defendant. See Code of Civ. Pro. § 438. This means that defendant's claims must be asserted by him in the same capacity in which it is alleged his obligations to plaintiff arose. See Carey v. Cusack, 245 Cal. App.2d 57, 67, 54 Cal. Rptr. 244 (1966).

7. See, e.g., Edgar Rice Burroughs, Inc. v. Commodore Productions and Artists Inc., 167 Cal. App.2d 463, 474, 334 P.2d 922 (1959) (counterclaim treated like affirmative defenses for pleading purposes).

8. Code of Civ. Pro. § 439 reads as follows:

Counterclaim; failure to assert; effect. If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

9. See, e.g., Saunders v. New Capital for Small Businesses, Inc., 231 Cal. App.2d 324, 41 Cal. Rptr. 703 (1964).

with other relief, will be held to "diminish or defeat" within the meaning of the statute.[10] Other than in cases involving mutual claims for damages, however, defendant's cross action will not normally satisfy the "diminish or defeat" requirement.[11] For example, if plaintiff seeks only an injunction or the cancellation of a contract, defendant's suit for damages will not suffice.[12]

Recent court of appeal opinions show there is one important type of case where a substantial question still exists as to whether even mutual claims for monetary relief can satisfy the "diminish or defeat" requirement. This situation arises where recovery by defendant on his countersuit would necessarily preclude recovery by plaintiff on his claim.

In *Olson v. County of Sacramento*,[13] plaintiff brought suit for damages incurred when defendant county cancelled plaintiff's exclusive garbage franchise. The county defended on the ground that plaintiff had obtained the franchise through fraud, and, on the same facts, sought to recover payments made to plaintiff under the franchise prior to the time of cancellation. In the court's opinion, citing no authorities, defendant's cross action did not satisfy the "diminish or defeat" requirement of the counterclaim statute because plaintiff and defendant could not both be successful.[14] Recovery by one necessarily precluded recovery by the other.

On the basis of this interpretation, it would seem clear that

10. See 2 Witkin, *California Procedure,* Pleading § 580 (1954), and cases cited therein.

11. Zainudin v. Meizel, 119 Cal. App.2d 265, 259 P.2d 460 (1953); *But see* Hill v. Snidow, 100 Cal. App.2d 37, 222 P.2d 962 (1950).

12. See Zainudin v. Meizel, *supra,* note 11.

13. 274 Cal. App.2d —, 79 Cal. Rptr. 140 (1969).

14. 274 Cal. App.2d —, 79 Cal. Rptr. 140, 144 (1969). It is interesting to speculate why the court felt it necessary to determine whether the claim qualified as a cross-complaint or as a counterclaim. The issue in question was whether the cross-action, on its face, was barred by the statute of limitations, and if so, whether defendant should have been given leave to amend to avoid the limitations problem. The court gives no clue as to what difference it would make if the cross-action were a counterclaim instead of a cross-complaint. Cases seem to afford them equal treatment in this area. *Compare* Stephans v. Herman, 225 Cal. App.2d 671, 675, 37 Cal. Rptr. 746 (1964), *with* Whittier v. Visscher, 189 Cal. 450, 456 (1922).

in a typical auto accident case in which plaintiff seeks damages based on defendant's negligence, defendant's own claim based on plaintiff's negligence could not qualify as a counterclaim. However, in *Manning v. Wymer*[15] and in a number of earlier cases that it cites,[16] the courts seem to have reached exactly the opposite conclusion. In each of these cases, the court assumed, without discussing the "diminish or defeat requirement," that such a claim by defendant would qualify as a counterclaim; the question actually determined was whether, on the particular facts of each case, the compulsory counterclaim rule applied. As a practical matter, it seems clear that in most cases where victory by one party on his claim necessarily precludes victory by his opponent on his, the two claims will involve the same transaction or occurrence; thus, the question whether defendant's claim is a counterclaim takes on added significance, for if the answer is "yes," it would be compulsory.

An analysis of the history of the California counterclaim statute does not solve the uncertainty over the meaning of the "diminish or defeat" requirement. At common law there was no counterclaim as such, although a defendant, in certain cases, was entitled to make claims against the plantiff.[17] Thus, if defendant had a claim arising from the same transaction as that of plaintiff, he could seek "recoupment"; otherwise, if both plaintiff and defendant had liquidated claims based on contract, defendant could plead "set-off." Under both recoupment and set-off, which were treated as defenses, defendant could not obtain affirmative recovery;[18] the best he could do

15. 273 Cal. App.2d —, 78 Cal. Rptr. 600 (1969) *(dictum)*. The court held that since a prior action brought by defendant was settled expressly without prejudice to plaintiff's maintaining the current suit, defendant could not claim that the current action was a compulsory counterclaim in that first action.

16. Schrader v. Neville, 34 Cal.2d 112, 207 P.2d 1057 (1949) (defendant's claim treated as compulsory in making award of costs of suit); Artucovich v. Arizmendiz, 256 Cal. App.2d 130, 134, 63 Cal. Rptr. 810 (1967), see Friedenthal, CIVIL PROCEDURE, *1969 Cal Law—Trends and Developments* 191 at 234; Datta v. Staab, 173 Cal App.2d 613, 343 P.2d 977 (1959).

17. See *N.Y. Judicial Council, Second Report,* pp. 124–126 (1936); Howell, *Counterclaims and Cross-Complaints in California,* 10 So. Cal. L. Rev. 415–418 (1937).

18. See Howell, *supra,* note 17 at 416; Loyd, *The Development of Set-*

was to reduce the amount that plaintiff would otherwise recover. It is obvious, then, that if the parties' respective claims were such that recovery by one would preclude recovery by the other, neither recoupment nor set-off was available.

California's original counterclaim statutes,[19] enacted in 1851, followed the common-law approach closely. Defendant was permitted to counterclaim only on the following:

> 1st. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;
>
> 2nd. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

In 1927, this section was amended to broaden the scope of counterclaims but preserved the flavor of the original provision by incorporating the "diminish or defeat" requirement.[20] The historical picture is complicated by the fact that in 1851, and ever since, California, by an entirely separate enactment,[1] has provided:

> If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

This provision could be construed in two ways. On the one hand, it could simply be held to mean that if a counterclaim is otherwise valid, that is, meets the common law requirements, defendant can obtain an affirmative judgment if the verdict on the counterclaim exceeds plaintiff's verdict.[2] On

Off, 64 U. Pa. L. Rev. 541 at 552–53 (1916).

19. Cal. Stats. 1851, Ch. 5, §§ 46–47.

20. Obviously, the "diminish or defeat" language could have no purpose other than to retain residual aspects of the common-law set-off rule incorporated in the second paragraph of the 1851 provision.

1. Code of Civ. Pro. § 666.

2. The California courts have never had difficulty with the situation where a mutual recovery is possible but where plaintiff simply fails to establish his claim at trial; in those circumstances, defendant is universally permitted to collect the full amount of his counterclaim without question. See Tomales

the other hand, the statute could be read to work a fundamental change from the common law by redefining the scope of a counterclaim to permit recovery by defendant even though such recovery is exclusive of victory by plaintiff. If the latter were the proper interpretation, it would strongly indicate that the "diminish or defeat" language, when subsequently enacted, was not intended as a reinstitution of old common law requirements. Unfortunately, there is no clue whatever as to which of the two possible interpretations was intended, either in 1851, at the time the statute was first enacted, or at any subsequent reenactment.

Analysis of the wording of the "diminish or defeat" clause itself also provides little assistance in determining its precise meaning. On the one hand, "defeat" could merely be considered the ultimate of "diminish"; both would thus refer only to the amount of plaintiff's recovery, not to his right to recover. On the other hand, "defeat" could be read to mean anything that precluded plaintiff's recovery, including any counterclaim, which, if successful, would necessarily mean that plaintiff's claim would fail. Although the language "diminish or defeat" appeared in the New York code revision of 1877 and was applied to various types of counterclaim statutes elsewhere even in the absence of specific statutory language,[3] there are few authorities that deal with the particular problem of interpretation before us. When they do, the answer is usually assumed rather than discussed. For example, in *Stevenson v. Devins,*[4] which on its facts is closely akin to *Olson v. County of Sacramento,*[5] plaintiff sued to cancel a contract and obtain moneys paid under it on the ground that he was fraudulently induced to enter into the contract. Defendants counterclaimed for moneys due them under the terms of the contract. The court upheld the counterclaim, but although it noted in passing the

Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 217 P.2d 968 (1950). See also Code of Civ. Pro. § 581(5) which provides that a counterclaim shall remain pending despite the fact that plaintiff's complaint is dismissed with prejudice.

3. Clark, *Code Pleading,* p. 650 (2d ed., 1947).

4. 158 App. Div. 616, 143 N.Y.S. 916 (1913).

5. 274 Cal. App.2d —, 79 Cal. Rptr. 140 (1969).

existence of the "diminish or defeat" requirement, the sole discussion was whether the defendant's claim was "connected with the subject of [plaintiff's] . . . action" so that it could qualify as a counterclaim under the New York code.

From a practical point of view, it is difficult to decide what interpretation of the "diminish or defeat" clause is more satisfactory. There is no need to read the provision broadly to permit defendant to assert all counteractions arising from the same transaction or occurrence as involved in plaintiff's complaint, since California's cross-complaint statute already encompasses all such counteractions. Thus, the only major question is to what extent such counteractions should be compulsory. The interest of the efficient administration of justice, requiring all parties to bring their related claims together in a single action, has substantial advantages. If special circumstances so direct, the trial court is always free to hold separate trials on the various claims.[6]

The California situation is unique, since the statutes do not require that defendant assert every cross-complaint he has against plaintiff, even though, by definition, a cross-complaint is related to plaintiff's complaint. The distinction between compulsory counterclaims and cross-complaints makes little sense. As long as there is confusion as to when defendant's claim is a counterclaim and when it is a cross-complaint, there is danger that a defendant or his counsel will be misled and will fail to assert a claim, believing it to be a cross-complaint, only to find subsequent action on it barred because it was in fact a counterclaim.

There is but one adequate solution. California must do as most other major jurisdictions have done;[7] it must completely rewrite its archaic counterclaim and cross-complaint laws to throw off all traces of the common law and to achieve a sensible, efficient, and just set of cross-action rules.

6. See Code of Civ. Pro. §§ 438, 1048.

7. For a comparison of the practice under California statutes with that under Rule 13 of the Federal Rules of Civil Procedure, which has been adopted in many states, see Comment, 1 U.C.L.A. L. Rev. 547 (1954). See also 3 Weinstein, Korn & Miller, *New York Civil Practice* §§ 3019.01–3019.02, for an analysis of the evolution of the Modern New York provisions.

IV. Discovery

A major policy question concerning pretrial procedure is the extent to which discovery should be available to a potential plaintiff prior to his initiation of suit. Pretrial discovery would aid a potential plaintiff in determining whether he has a valid cause of action. Modern rules generally do not permit any discovery until an action has actually been filed. An exception to the general rule, as embodied in Code of Civil Procedure section 2017,[8] is almost universally permitted in situations where it is necessary to preserve testimony for a potential action that cannot, for some reason, be immediately commenced.

To what extent can this exception be utilized to permit discovery other than that which is a normal by-product of the preservation of evidence for use in a future trial? In *Hunt-Wesson Foods, Inc. v. County of Stanislaus,*[9] the court faced this question directly and held that section 2017 could not be used for discovery purposes. The potential "case" was an administrative hearing before a county board of supervisors on a tax assessment.[10] It was conceded that the depositions sought to be taken would under no circumstances be admissible at the hearing; the sole purpose of discovery would be to enable the party seeking discovery to prepare for the cross-examination of the witnesses whose depositions were sought. The court held that such discovery would be beyond the "present intention of the Legislature and the viewpoint of the courts."

This interpretation seems correct in light of the language of section 2017, and the interpretations given to it and to

8. Code of Civ. Pro. § 2017 reads as follows: **Depositions before action or pending appeal.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this State may file a verified petition in the superior court in the county of the residence of any expected adverse party. . . .

9. 273 Cal. App.2d —, 77 Cal. Rptr. 832 (1969).

10. The decision of the board could later be challenged in the local Superior Court, but the hearing would be based solely on the record of the board's proceedings.

Federal Rule 27, with which it is nearly identical.[11] The requirements that petitioner show first that he cannot bring the suit for which perpetuation of testimony is sought and second that the evidence must be now obtained or it may be lost, are considered safeguards against an abuse of the provisions where a petitioner seeks merely to discover whether he has a valid cause of action.[12]

From time to time, litigants have attempted to use the ordinary rules of discovery to determine whether they have a valid cause of action. When brought prior to institution of an action, these attempts are thwarted by the language of the rules that typically permit their use only after an action has been commenced.[13] California goes even further by prohibiting discovery until summons has been served on the defendant or until he has appeared.[14]

A possible means of circumventing the normal rule against preaction discovery exists when plaintiff, who is able to state a legitimate cause of action against one person, seeks discovery in that action to determine whether he has another cause of action against that person or others. In *Los Angeles Cemetery Assn. v. Superior Court*,[15] plaintiff had purchased real estate after allegedly relying on false representations of defendant that the lessee occupying the premises was financially stable. After the lessee defaulted in the payment of rent and went out of business, plaintiff sued defendant on a fraud theory. Subsequently, plaintiff amended its complaint to add a cause of action alleging that the lessee was a mere alter ego of the defendant, and that defendant was, therefore, liable for the unpaid rent. Defendant's demurrer to the new cause of action was sustained with leave to amend. Plaintiff then served defendant with a set of interrogatories for the purpose

11. E.g., Block v. Superior Court, 219 Cal. App.2d 469, 477–78, 33 Cal. Rptr. 205, 98 A.L.R.2d 901, 907–908 (1963); In re Gurnsey, 223 F.Supp. 359 (D.D.C. 1963).

12. Martin v. Reynolds Metals Corp. 297 F.2d 49, 55 (9th Cir., 1961); Matter of Dallman, 1 Cal. Disc. Proc. 64 (S.Ct. 1959).

13. See F.R.C.P. 26(a); Application of the Royal Bank of Canada, 33 F.R.D. 296 (S.D.N.Y., 1963).

14. Code of Civ. Pro. §§ 2016(a), 2030(a), 2033.

15. 268 Cal. App.2d 492, 74 Cal. Rptr. 97 (1968).

of enabling plaintiff to plead its alter ego theory with particularity. Defendant's refusal to answer the interrogatories was upheld by the trial court on the ground that discovery cannot be utilized to secure data on which a pleading may be based. The reviewing court issued a writ of mandate requiring the trial court to order the defendant to answer the interrogatories. The opinion of the court of appeal did not directly discuss whether discovery should be available before a satisfactory cause of action is stated. The court simply relied on the following factors: (1) a simple conclusionary allegation that defendant had entered into the rental contract would have been sufficient under California law to raise the alter ego theory; (2) if plaintiff had elected to proceed on such a simple allegation, his complaint would have been satisfactory and the discovery in question would clearly have been permissible; (3) it was conceded that plaintiff intended to pursue the alter ego theory in good faith on the basis of some data that it had in its possession. What the court seems to be holding is that plaintiff in essence was seeking information not for purposes of determining whether he had a valid cause of action, but for purposes of trial preparation. The fact that plaintiff had not satisfactorily pleaded that cause of action was unimportant since he could easily do so in good faith.

The *Los Angeles Cemetery Assn.* case points out clearly a serious anomaly. A potential plaintiff is entitled to discovery only when he has some knowledge of the facts of his cause of action. When he merely suspects he has a cause but has no facts available and needs discovery the most, he cannot obtain it.

The proscriptions on preaction discovery have a firm practical footing. Obviously, it would be unfortunate if any individual, merely by filing an intention to bring suit against another, were permitted to discover at will in the hope that he might find some basis for an action. The potential for harassment would be substantial.[16] On the other hand,

16. See MacLeod v. Superior Court, 115 Cal. App.2d 180, 185, 251 P.2d 728 (1952) (concurring opinion).

it would seem not only feasible, but appropriate, that for those special cases where a need for preaction discovery does exist, a special provision be enacted with adequate safeguards. Only a few years ago, New York adopted a rule[17] providing:

> Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.

Under this provision, discovery may be allowed to determine the identity of defendants against whom a cause of action lies or to discover the precise facts upon which the cause of action is based.[18]

Unfortunately, the language of the New York rule is very broad, and no limitations are spelled out. As a result, the New York courts have run into a problem of interpretation. Some decisions,[19] for example, deny discovery unless plaintiff shows in his moving papers that he does in fact have a cause of action. This would seem to permit use of the rule only in rare cases where, though the existence of the cause is clear, plaintiff needs some specific facts to draft his complaint in proper form. Other courts[20] and commentators,[1] however, seem to accept a less rigid position, and require only that there be "some probability that he may have a good cause of action and that he is not merely making a stab in the dark." This latter view is the only justifiable interpretation if the rule is to have any practical meaning, and should be written into the regulation, were it to be adopted in California. Apart from this problem, however, the New York courts do not seem to be troubled by the application of the rule. Attempted

17. N.Y. C.P.L.R. § 3102(c).

18. See, generally, 3 Weinstein, Korn & Miller, *New York Civil Practice* §§ 3102.07–3102.14.

19. Application of Heller, 57 Misc. 2d 976, 293 N.Y.S.2d 869 (Ct. Cl., 1968); Application of Pelley, 43 Misc. 2d 1082, 252 N.Y.S.2d 944 (Nassau County Ct., 1964).

20. See Application of Schenley Industries, Inc., 25 App. Div.2d 742, 269 N.Y.S.2d 276 (1966); Cotler v. Retail Credit Co., 18 App. Div.2d 898, 237 N.Y.S.2d 781 (1963).

1. 3 Weinstein, Korn & Miller, *New York Civil Practice* § 3102.14.

abuses do appear in a few cases, but the courts easily control them merely by denying discovery.[2]

There are several reasons why California should adopt a modified form of the New York rule. First, the current limitations in California on preaction discovery can easily be circumvented by any member of the bar who in the face of the rules of ethics is willing to file a well-drafted, nondemurrable complaint based solely on hope and speculation, thus allowing him to engage in extensive discovery to determine whether his client does have a valid cause of action.[3] Second, the rules unnecessarily frustrate the ethical attorney whose client strongly suspects that he has a valid claim but who has no way to ascertain the pertinent facts before filing suit, because all the relevant information is in the custody of the potential defendant.

It is somewhat anomalous that California should not have a more flexible provision regarding preaction discovery, since, prior to the adoption of the current discovery package in 1958, the statutes regarding such preaction discovery[4] were quite liberal. The former provisions permitting discovery for the perpetuation of testimony contained neither a requirement that a party show that he could not presently institute the suit nor a requirement that he show that unless the discovery was permitted, the evidence was likely to be unavailable at trial.[5] As a result, in several cases, potential plaintiffs sought and were permitted to discover facts that would subsequently be the basis for their complaints.[6] Although these provisions for presuit discovery did not receive widespread use,[7] they were adversely criticized by courts[8] and commentators[9] for their

2. See, e.g., Application of St. Andrew Associates, 57 Misc.2d 1079, 294 N.Y.S.2d 188 (N.Y. Cty, 1968).

3. If he finds a cause somewhat different from that pleaded, he may then resort to California's liberal amendment rules. See Code of Civ. Pro. § 473.

4. Code of Civ. Pro. §§ 2083–2090, repealed Cal. Stats. 1957, Ch. 1904, § 1, p. 3321.

5. Comment, 44 Calif. L. Rev. 909 at 926–29 (1956); 3 Stan. L. Rev. 530 at 531 (1951).

6. See 3 Stan. L. Rev. 530 at 534–35, and cases cited therein.

7. See 3 Stan. L. Rev. at 534.

8. See, e.g., MacLeod v. Superior Court, 115 Cal. App.2d 180, 185, 251 P.2d 728 (1952) (concurring opinion).

9. See, e.g., Committee on Administration of Justice, Report to the Board

potential for abuse and harassment. Therefore, when the modern federal rules were adopted in California, the more restrictive presuit perpetuation rules were adopted along with the more liberal rules providing for discovery after suit is filed. The advantages of the liberal presuit discovery provisions evidently were ignored.

Although it is clear that only a statutory alteration can now loosen the rigid presuit discovery rule of section 2017, the question raised in *Los Angeles Cemetery Assn. v. Superior Court*[10] as to the scope of discovery once a complaint has been filed is still open.

The permissible limits are defined by Code of Civil Procedure section 2016(b), which is nearly identical to Federal Rule 26(b), as follows:

> . . . the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

The *Los Angeles Cemetery* case stands at least for the proposition that discovery can proceed under the above section when the cause of action to which it relates has been dismissed on demurrer subject to leave to amend, and a satisfactory amendment is clearly available. Could the statute have been read even more broadly, to give the plaintiff the right to discover even when the very purpose of the discovery would be to determine whether facts exist to permit the amendment? The case of *Rossbach v. Superior Court*,[11] decided in 1919, under the prior discovery rules, provides support for such an interpretation. There, as in the *Los Angeles Ceme-*

of Governors, *Discovery*, 31 St. B.J. 204 at 206–07 (1956).

10. 268 Cal. App.2d 492, 74 Cal. Rptr. 97 (1968).

11. 43 Cal. App. 729, 185 P. 879 (1919).

tery case, plaintiff sought to take depositions after a demurrer was sustained with leave to amend but before any amendment was filed. However, the court in *Rossbach,* unlike the *Los Angeles Cemetery* case, did not rely on the fact that a successful amendment could have been filed at any time. Instead, it took the position that plaintiff had a right to discovery as soon as defendant was served and so long as the case was pending. The court held that discovery was not barred merely because the facts to which it might pertain were facts not formally in issue in the pleadings.

> The filing of the complaint constituted the bringing of the action . . . , and plaintiff's right to have a deposition depends not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file.[12]

Several other decisions, including some by the California Supreme Court,[13] support this view. When the cases were decided, the pertinent statute simply provided that a deposition could be taken "at any time after the service of summons or the appearance of the defendant,"[14] and there were no *statutory* prohibitions on the scope of the inquiry. Nevertheless, since the basic purpose of the new discovery acts was to broaden the existing scope of discovery, it has been held inappropriate to interpret the new laws as eliminating that which was permitted under the prior laws, without express language compelling such a result.[15]

Very few cases dealing with the question have arisen under Federal Rule 26(b),[16] upon which section 2017(b) of the

12. 43 Cal. App. 729, 731, 185 P. 879, 880.

13. See McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 394–96, 159 P.2d 944 (1945), and cases cited therein.

14. Furthermore, the same statute provided that in a special proceeding, as opposed to an ordinary action, a deposition could not be taken until a question of fact had arisen. Code of Civ. Pro. § 2021, repealed Cal. Stats. 1957, Ch. 1904, § 1, p. 3321.

15. See Laddon v. Superior Court, 167 Cal. App.2d 391, 334 P.2d 638 (1959).

16. See 4 Moore, *Federal Practice* § 26.09.

California rules is based, and none deal with the question in any definitive way. Yet, in at least one case, *Joseph* v. *Farnsworth Radio & Television Corp.*,[17] there is support for the view that plaintiff may obtain discovery in order to amend his complaint, which has been dismissed for failure to state a claim. In this instance, the court, upon dismissal of the complaint, listed certain additional facts that, had they been pleaded, would have cured the defects in the complaint. The court granted plaintiff leave to amend, stating that he should take defendants' depositions in order to ascertain the existence of such facts. The reason there are few federal decisions may be that the problem is not acute in the federal courts, where the very liberal "notice" pleading rules[18] are easily satisfied. In California courts, where a plaintiff must allege "facts constituting the cause of action,"[19] there is a greater need for presuit information.

One cannot ignore the fact that serious abuses may develop if the courts permit broad discovery in cases where plaintiff's original complaint is dismissed with leave to amend. Trial judges frequently will be called upon to quash proposed interrogatories and depositions in such cases, and will be required to develop strict rules to keep the scope of the inquiry within bounds. At the very least, the courts would have to limit discovery to cases where plaintiff's original complaint was filed in good faith and where the information sought is directly relevant to a potential issue. Determination of these matters might be difficult and would pose an added burden for our judges.

On balance, interpretation of the current statutes to permit broad discovery after a complaint has been dismissed on demurrer is desirable, at least until enactment of a presuit discovery statute. Otherwise, attorneys who believe their clients have valid claims, but who are unable to get facts, will be pressed to plead on speculation, and the more unscrupulous an attorney is, the better the job he will do for his client.

17. 99 F. Supp. 701, 707 (S.D.N.Y. 1951), aff'd 198 F.2d 883 (2nd Cir. 1952).

18. F.R.C.P. 8(a).

19. Code of Civ. Pro. § 426.

V. Limitation on Amount of Recovery

May a party in a contested action be permitted to recover damages in excess of those in his prayer? The question is elementary and should have been clearly determined long ago. Unfortunately, recent court opinions have instead fostered a growing uncertainty as to this aspect of the law.

In *People ex rel. Department of Public Works v. Jarvis,*[20] a condemnation proceeding, defendant landowner originally prayed for severance damages in the amount of $100,000. At trial, the highest figure assigned severance damages by any of the expert witnesses was $107,100, whereas the jury awarded $124,230.

Defendant evidently was fearful that he would not be permitted to recover the jury award; he therefore sought to eliminate any basis for new trial by amending his prayer for relief to "conform to the proof" by demanding severance damages of $107,100, for which amount the trial court gave judgment. The state appealed on the ground that the jury award was not justified by the evidence and that the trial judge had no jurisdiction to lower the award without violating the state's right to a jury trial.[1]

The reviewing court held that the jury, by accepting those elements of each expert's testimony most favorable to the defendant landowner, could have legitimately found severance damages to be as high as $161,925,[2] and that the verdict was fully justified by the evidence. The court went on to hold, however, that the trial judge properly entered judgment for the $107,100 figure on the basis of the "elementary rule that a party entitled to damages can recover no more than he pleads."[3]

20. 274 Cal. App.2d —, 79 Cal. Rptr. 175 (1969).

1. The state's position involved an interesting gamble. If the reviewing court agreed that the trial judge had no jurisdiction to lower the jury award and at the same time held that the award was justified by the evidence, the court might well have felt impelled to order the trial judge to grant judgment on the verdict, thus costing the government an additional $17,130.

2. 274 Cal. App.2d —, n.6, 79 Cal. Rptr. 181, n. 6.

3. 274 Cal. App.2d —, 79 Cal. Rptr. 182.

This latter determination seems in direct conflict with the words and spirit of section 580 of the Code of Civil Procedure, which the court did not cite and which reads as follows:

> The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Section 580, is a typical provision having counterparts in virtually every jurisdiction following the Federal Rules of Civil Procedure[4] or code pleading[5] practices. Its major purpose is to aid a party who in his pleadings misconceives the theory or nature of his action and, as a result, does not request the relief to which the facts he pleads and proves entitle him. The section has its origin in the original equity practice wherein the chancellor was permitted to "do equity" by granting all the relief justified by the pleadings and the evidence.[6] Thus, even if plaintiff makes no demand for damages whatever, such damages may nevertheless be awarded if the case otherwise so warrants.[7] Following what would appear to be the clear mandate of this provision, the trial judge in *Jarvis* should have ignored defendant's prayer, in its original or amended form, and entered judgment on the verdict.[8] The obvious misunderstanding by the defendant, the trial judge, and the court of appeals in *Jarvis* as to the role of the prayer for relief in a contested

4. See F.R.C.P. 54(c).

5. See Clark, *Code Pleading*, pp. 265–71 (2d ed., 1947).

6. See Johnson v. Polhemus, 99 Cal. 240, 245, 33 P. 908 (1893); McKesson v. Hepp, 62 Cal. App. 619, 217 P. 802 (1923).

7. E.g., State v. Hansen, 189 Cal. App.2d 604, 11 Cal. Rptr. 335 (1961); Morgan v. Veach, 59 Cal. App.2d 682, 139 P.2d 976 (1943); Cf. Wright v. Rogers, 172 Cal. App.2d 349, 342 P.2d 447 (1959) (plaintiff, who prayed for damages only as alternative to cancellation of deed, awarded both damages and cancellation); Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432 (1948) (plaintiff prayed only for compensatory damages but awarded both compensatory and punitive damages).

8. Even if the verdict had not been justified by the evidence, the prayer for relief should not have governed the trial judge's rulings. If he felt that the jury had mishandled the entire case, he should have ordered a new trial; if he believed the jury had simply erred in its evaluation of damages, he could have given defendant the choice of a new trial of a remittitur.

matter can only be explained by a continuing failure of the California courts to distinguish cases where the verdict exceeds the formal prayer for relief, which is permissible under section 580, from cases where the verdict exceeds the amount of damages shown to have been suffered by plaintiff's specific factual allegations, which is not permissible under section 580. The latter cases involve a simple matter of variance, which prevents a finding of fact in favor of a party when the finding is totally inconsistent with that party's own factual allegations. Such a variance can be cured in proper circumstances by an amendment to conform to the proof.[9] Of course, such an amendment must be directed to the trial court's discretion and may be denied if unduly prejudicial or may be granted on condition that the case be reopened for further evidence.

The court in *Jarvis* clearly demonstrated its lack of understanding of the problem before it by its heavy reliance on *Kerry v. Pacific Marine Co.*,[10] a classic example of the variance situation. In *Kerry,* plaintiff alleged that certain goods had originally been worth 14 cents per foot, whereas after they had been damaged he had been forced to sell them at $9\frac{1}{2}$ cents per foot. The trial court awarded damages based on a 5 cent per foot loss, but the reviewing court modified the judgment to permit only $4\frac{1}{2}$ cents per foot, on the ground that plaintiff's recovery was limited by his factual allegations regarding damages. At no time was the prayer for relief discussed; it exceeded both of the amounts in question. The majority of other cases that have been cited from time to time as holding that a party cannot collect more than the amount for which he has prayed in his complaint are analogous to *Kerry* and have no involvement whatever with the formal prayer for relief.[11]

9. See Meisner v. McIntosh, 205 Cal. 11, 13, 269 P. 612, 613 (1928) (dictum); Crofoot v Blair Holdings Corp., 119 Cal. App.2d 156, 195–96, 260 P.2d 156, 177–78 (1953) (dictum).

10. 121 Cal. 564, 54 P. 89 (1898), modified 6 Cal. Unrptd Dec. 118, 54 P. 269 (1898).

11. See, e.g., Meisner v. McIntosh, 205 Cal. 11, 269 P. 612 (1928); Merced Irrigation Dist. v. San Joaquin Light and Power Corp. 220 Cal. 196, 29 P.2d 843 (1934). These decisions have been cited in such cases as Singleton v. Perry, 45 Cal.2d 489, 499, 289 P.2d 794, (1955), and Frost v. Mighetto, 22 Cal. App.2d 612, 616–17, 71 P.2d 932, (1937).

There are a few decisions, however, where, at least on the surface, the distinction between the prayer for relief and the factual allegations of damages is not so clear. For example, in *Frost v. Mighetto,*[12] four separate plaintiffs each sought small specific sums for their general and special damages arising from a single auto accident. Although the evidence apparently supported awards by the trial court in excess of those pleaded, the reviewing court modified the judgment to limit recovery to the specific amounts pleaded, noting that plaintiffs had not sought to amend their claims to conform to the proof. With respect to claims for special damages this position is sound. Special damages must be specifically pleaded under California law if they are to be recovered.[13] However, the question is more difficult when general damages are involved, especially in regard to one plaintiff, who sought only general damages in the amount of $500. The trial court awarded her general damages of $650 and special damages of $115; the reviewing court not only eliminated the latter, but cut the former to $500. Since the plaintiff did not plead any specific facts showing she was not entitled to more than $500, the $500 claim should, seemingly, have been considered as part of the prayer to which section 580 would be applicable. The reviewing court simply failed to make the subtle distinction required, and treated the claims for special damages and general damages alike. It relied solely on *Kerry v. Pacific Marine Co.* and similar cases where, as we have seen, damages were limited by factual allegations, not by the prayer for relief.[14] In several other cases where the courts appear to limit recovery to the amount of the prayer, the decision actually seems to turn on the fact that there was no evidence to justify a greater award[15] or that specific allegations in the

12. 22 Cal. App.2d 612, 71 P.2d 932 (1937).

13. See Chadbourn, Grossman & Van Alstyne, *California Pleading* §§ 932–34 (1961).

14. Compare Burke v. Koch, 75 Cal. 356, 17 P. 228 (1888).

15. E.g., Brown v. North Ventura Road Development Co., 216 Cal. App. 2d 227, 234, 30 Cal. Rptr. 568, (1963); Monterey Park Commercial & Savings Bank v. Bank of West Hollywood, 125 Cal. App. 402, 13 P.2d 976 (1932).

complaint limited the recovery to the amount sought in the prayer.[16]

Most disturbing is that the California courts, in spite of the growing confusion as to when the pleadings limit the amount of recovery, have refused to analyze and clarify the matter. In 1955, in *Singleton v. Perry,*[17] the supreme court discussed the cases at some length, pointing out that there appeared to be a conflict among the decisions, but actually took no position on the matter, since in the case before it, the award was in fact less than the demand in the prayer. Nevertheless, the manner in which the court discussed the issue was somewhat misleading and has led one recent court of appeal,[18] in dictum, to cite the case for the proposition that "even in contested cases the amount of recovery is limited generally by the prayer," a position that is totally unjustified. In addition, the supreme court itself, in the case of *Boyle v. Hawkins,*[19] has, through inadvertence, increased the uncertainty. The entire issue regarding the prayer for relief was dealt with at the end of the opinion as follows:

> Defendant argues that the judgment in this case was in excess of plaintiff's prayer for relief contained in his complaint; as such, the judgment would be erroneous as a matter of law. The judgment, however, did not exceed the prayer . . . .

This statement by the court contains an unfortunate ambiguity. It could mean simply that defendant argued that the judgment was erroneous as a matter of law, or it could mean that the Court itself was of the view that such a judgment would indeed be erroneous.

Hopefully, the supreme court will take time, when the next similar case arises, to make itself clear. There is no doubt that section 580 should be affirmed and supported. Miscon-

16. E.g., Burke v. Koch, 75 Cal. 356, 17 P. 228 (1888).

17. 45 Cal.2d 489, 289 P.2d 794 (1955).

18. Leo v. Dunlap, 260 Cal. App.2d 24, 28, 66 Cal. Rptr. 888, 890 (1968) (dictum).

19. 71 Cal.2d —, —, 78 Cal. Rptr. 161, 168, 455 P.2d 97, 104 (1969).

ceptions by a party as to his damages cannot and should not limit him to the amount claimed in the prayer, especially since he is able to recover damages even if he misconceived his remedy and did not demand them at all. Otherwise, it will behoove all parties claiming damages to inflate their claims to ensure full recovery. On the other hand, when a party's specific factual allegations show that damages should be limited, he should be bound by those allegations, at least until they are amended. The opposing party may well govern the level of his preparation for trial according to such specific factual pleadings, and he could seriously be prejudiced if such specific pleadings are ignored.

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