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I. Introduction

A. Background

Since 1878, when the United States Supreme Court rendered its classic decision in *Pennoyer v. Neff*,[1] it has been settled law that the due process clause of the fourteenth amendment imposes certain constitutional limitations upon the courts of a state in their exercise of jurisdiction over persons absent from the state. The perennial problem has been to determine precisely what those limitations are—to distill specific guidelines from the unspecific "due process" concept. This problem posed no serious difficulties for Justice Field, who wrote the majority opinion in *Pennoyer*. "[T]here *can be no doubt* of [the] meaning [of the due process clause] when applied to judicial proceedings," he asserted; in personal actions, due process required that the defendant "must be brought within the state's jurisdiction by service of process within the state, or his voluntary appearance."[2] Thus

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Technical Note: Sections of the California Code of Civil Procedure that have been repealed by S.B. 503, effective July 1, 1970, have been cited both to the Code and to the most recent Statutes and Amendments to the Codes of California in which the text of the particular section appears.

1. 95 U.S. 714 (1878).

2. *Id.* at 733. Technically, the decision in *Pennoyer v. Neff* was not based on the fourteenth amendment since the challenged judgment had been rendered prior to the adoption of that amendment; however, the case was quickly regarded as establishing a constitutional limitation on the jurisdiction of state courts.

the Court in *Pennoyer* drew a simple equation between due process limitations and traditional common law limitations on the acquisition of in personam jurisdiction: Only if the defendant is personally served with process while present in the forum state, or if—by general appearance in the action or by some other means—he voluntarily submits to the court's jurisdiction, does a state court obtain jurisdiction over an absent defendant's person.

It is common knowledge, however, that history has not vindicated Justice Field's certitude concerning due process limitations on the state courts' in personam jurisdiction over absent individuals. In a well-known series of subsequent decisions, the Supreme Court gradually liberalized its restrictive *Pennoyer* doctrine and lengthened the list of constitutionally permissible "bases of jurisdiction." In addition to "presence" and "actual consent," other circumstances—such as the defendant's domicile within the state,[3] a tort arising out of the defendant's operation of a motor vehicle on the state's highways,[4] or the doing of business by the defendant within the state[5]—were deemed sufficient to warrant a state court's exercise of personal jurisdiction over absent defendants.

Finally, in *International Shoe Co. v. Washington*,[6] the Court adopted a different technique for defining the constitutional boundaries of a state court's in personam jurisdiction. Rather than add to the list of specifically described situations held to constitute sufficient bases of extraterritorial jurisdiction, the Court announced a broad principle by which all concrete factual situations could be evaluated. State courts may exercise jurisdiction over nonresident defendants, it was held, whenever, under the facts of the particular case, the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[7]

Like all general principles, the "minimum contacts" doctrine has the merit of flexibility and the defect of vagueness. In several subsequent decisions to be discussed in the following pages, however, the Supreme Court has attempted some refinement and clarification.

Subject only to the limitations prescribed by the Federal Constitution, a state legislature has the power to determine the extent to which

3. Milliken v. Meyer, 311 U.S. 457 (1940).
4. Hess v. Pawloski, 274 U.S. 352 (1927).
5. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).
6. 326 U.S. 310 (1945).
7. *Id.* at 316.

courts of the state may exercise personal jurisdiction over absent defendants. The common law recognized only two bases of jurisdiction —presence within the state and actual consent.[8] The additional bases approved in this century by the Supreme Court may be utilized by state courts only to the extent that state statutes permit.[9] Hence, the states have enacted various types of long-arm statutes, all of which are designed to extend the in personam jurisdiction of state courts proportionately with the post-*Pennoyer* liberalization of federal due process requirements.

The early long-arm statutes were necessarily of a very limited and specific character. Nonresident motorist statutes, for instance, empowered the courts to take jurisdiction over nonresident defendants sued on causes of action arising out of their operation of motor vehicles within the forum state.[10] Other statutes conferred jurisdiction over absent "residents"[11] or over absent nonresident individuals and foreign corporations sued on causes of action arising out of business they had done within the forum state.[12] After *International Shoe* opened the door to a considerable expansion of the constitutional boundaries of state courts' long-arm jurisdiction, the state legislatures began enacting long-arm statutes considerably more comprehensive in scope.[13]

B. California's Long-Arm Statute: New Section 410.10

The California legislature has enacted a long-arm statute that in terms makes the long-arm jurisdiction of California courts coextensive with constitutional boundary lines.[14] New section 410.10 of the Code of Civil Procedure, which becomes effective July 1, 1970,[15] succinctly states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Thus California, after nearly 100 years of living with a patchwork quilt of jurisdictional provisions,[16] some archaic and others self-limiting,

8. Pennoyer v. Neff, 95 U.S. 714 (1878).

9. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 35, comment *f* at 184 (Proposed Official Draft 1967) [hereinafter cited as SECOND RESTATEMENT OF CONFLICTS].

10. *See* Scott, *Jurisdiction over Non-Resident Motorists,* 32 MICH. L. REV. 325 (1934).

11. *E.g.,* Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970); see note 44 and accompanying text *infra.*

12. *E.g.,* UTAH CODE ANN. § 78-27-20 to -21 (1953).

13. *E.g.,* ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968).

14. S.B. 503 (1969).

15. Cal. Stat. 1969, ch. 1610, § 30.

16. *See* Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments*

has adopted the most comprehensive long-arm statute of any state. The advantages of couching the statute in such sweeping language are obvious. By stating the governing rule solely in terms of constitutional power, without enumerating specific circumstances under which its courts may take jurisdiction, California has avoided many problems of statutory construction that have plagued courts in other states.[17]

Against Foreign Corporations and Non-Resident Individuals, 31 S. CAL. L. REV. 339 (1958).

For illustrations of the applicability of some of these statutes, see McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (involving CAL. INS. CODE §§ 1610-20); Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958) (construing "doing business" under the provisions of Cal. Stat. 1968, ch. 132, §§ 1, 2, at 343, 345, CAL. CODE CIV. PROC. § 411 (effective until July 1, 1970)); Turner v. Superior Court, 218 Cal. App. 2d 468, 32 Cal. Rptr. 717 (1963) (involving the "restrictive" provisions of Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970)).

There is an extensive amount of legal literature on the subject of long-arm jurisdiction; the following are the most comprehensive discussions of the subject: Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of the State Courts, from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

17. The problems of statutory construction are illustrated by a comparison of the Illinois decision in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), and the New York decision in Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). Both states had statutes authorizing jurisdiction over a defendant who "commits a tortious act" within the state. In both cases injury resulted in the forum from an act or omission of the defendant in another state. The Illinois court held that the tort was committed in Illinois, stating: "It is well established, however, that in law the place of a wrong is where the last event takes place which is necessary to render the actor liable. . . . We think it is clear that the alleged negligence in manufacturing the valve cannot be separated from the resulting injury; and that for present purposes, like those of liability and limitations, the tort was committed in Illinois." 22 Ill. 2d at 435-36, 176 N.E.2d at 762-63. The New York court held that no tort was committed in New York, stating: "The tortious act charged against the appellant—that it improperly designed and assembled the tank—indisputably occurred in the out-of-state manufacturing process in Kansas.

. . . .

". . . The mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording." 15 N.Y.2d at 459-60, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21. Following this decision, New York amended its statute, section 302 of the Civil Practice Act, to cover such cases. N.Y. CIV. PRAC. LAW § 302 (McKinney 1969).

It should also be noted, on the issue of statutory construction, that in the *Gray* case defendant suggested a distinction between "tort" and "tortious act," arguing that "instead of using the word 'tort,' the legislature employed the term 'tortious act,' and that the latter refers only to the act or conduct, separate and apart from any consequences thereof." 22 Ill. 2d at 436, 176 N.E.2d at 763. The Illinois court did not agree with that argument, treating "tort" and "tortious act" as synonymous, at least for the purposes of the jurisdictional statute. *Id.* at 436-37, 176 N.E.2d at 763.

There will be no need, under the new statute, for the two-step analysis of first determining whether the contemplated exercise of jurisdiction is within the legislative mandate, and then considering whether, if exercised, it is within the constitutional limits permitted by the due process clause of the fourteenth amendment. Moreover, section 410.10 will not have any of the unduly limiting effects of a long-arm statute that identifies specific factual situations as bases of jurisdiction. Henceforth, California will not find itself in the position of other states whose statutes[18] prevent their courts from taking advantage of the full sweep of the minimum contacts doctrine.

Although section 410.10 will solve some old problems, it will create some new ones. In order to omit all statutory restrictions, it was necessary to omit also any language of definition or clarification.[19] Since the legislature has extended California's long-arm jurisdiction to the outermost limits of the due process clause, California courts will constantly be called upon to confront problems of constitutional magnitude—problems that other states have avoided by inserting self-limiting provisions in their long-arm statutes.[20]

The principal problems under section 410.10 will arise in cases where jurisdiction is asserted over a defendant served with process outside California and is predicated on his status, his activities within the state, or his conduct outside the state causing an effect inside the state. This is a developing field in which the law is far from settled. Because the due process clause of the fourteenth amendment is involved, the United States Supreme Court is, of course, the final arbiter. Its decisions since *International Shoe* in 1945, however, have been few,[21] and the most recent of any significiance, *Hanson v. Denckla*,[22] was handed down in 1958. Since that date, the determination of what due process requires in jurisdictional matters—the task of applying and refining the minimum contacts principle—has been left to the state courts and the

Compare the similar problem in the application of the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (1964), which makes liability depend upon "the law of the place where the act or omission occurred." Richards v. United States, 369 U.S. 1 (1962); Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955).

18. *E.g.*, OHIO REV. CODE ANN. § 2307.382 (Page Supp. 1969); N.Y. CIV. PRAC. LAW § 302 (McKinney 1969).

19. Compare the detail in the Wisconsin statute, WIS. STAT. ANN. § 262.05 (Supp. 1969), and the Proposed Uniform Interstate and International Procedure Act, 9B UNIFORM L. ANN. (1966), in 11 AM. J. COMP. L. 415-36 (1962).

20. This is especially true of New York; see Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), discussed in note 17 *supra*.

21. See notes 76-82 *infra*.

22. 357 U.S. 255 (1958).

lower federal courts. From their decisions some suggested guidelines have emerged, but these are only tentative. For the time being, the only safe conclusion is that expressed by one commentator on the *International Shoe* case: "[A]lthough old dogma has been destroyed, new doctrine to replace it has not been firmly fashioned."[23]

In spite of this lack of any very definite guidance in the form of Supreme Court decisions, the California courts will not find themselves in a trackless wilderness when they begin construing and applying new section 410.10. In addition to the decisions from other states and from the lower federal courts, certain prior California decisions will prove helpful in some instances. Especially relevant is the line of cases, commencing in 1958 with *Henry R. Jahn & Son v. Superior Court*,[24] dealing with the permissible extent of jurisdiction over foreign corporations under old section 411 of the Code of Civil Procedure, which authorizes service of process on such corporations "doing business" in this state.[25] The Supreme Court of California held in the *Jahn* case that "whatever limitations [section 411] imposes are equivalent to those of the due process clause."[26] Accordingly, with respect to foreign corporations, section 410.10 merely continues the law established by the *Jahn* case. Thus, judicial interpretations of the minimum contacts rule in cases arising under old section 411 should serve as guideposts in deciding questions that will arise under new section 410.10. Nevertheless, a word of caution is in order. The appellate court decisions under section 411 have not been wholly consistent.[27] Some judicial determinations that jurisdiction did not exist in particular cases under section 411 may well have been predicated on an interpretation of the minimum contacts principle that was narrower than actually required by the due process clause.[28]

23. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts, From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 623 (1958).

24. 49 Cal. 2d 855, 323 P.2d 438 (1958).

25. Cal. Stat. 1968, ch. 132, §§ 1-2, at 343, CAL. CODE CIV. PROC. § 411 (effective until July 1, 1970).

26. *Id.* at 858, 323 P.2d at 439.

27. *Compare* A.R. Indus., Inc. v. Superior Court, 268 Cal. App. 2d 328, 335-36, 73 Cal. Rptr. 920, 924-25 (1968), *with* Leach Co. v. Superior Court, 266 Cal. App. 2d 493, 72 Cal. Rptr. 216 (1968), *and* Yeck Mfg. Corp. v. Superior Court, 202 Cal. App. 2d 645, 21 Cal. Rptr. 51 (1962). See note 123 and text accompanying notes 147-51 *infra*.

28. *E.g.*, Leach Co. v. Superior Court, 266 Cal. App. 2d 493, 72 Cal. Rptr. 216 (1968); Gill v. Surgitool Inc., 256 Cal. App. 2d 583, 64 Cal. Rptr. 207 (1967); Yeck Mfg. Corp. v. Superior Court, 202 Cal. App. 2d 645, 21 Cal. Rptr. 51 (1962). The mechanical approach used in *Gill* and *Yeck* for determining the existence of long-

Prior California cases holding that jurisdiction was not authorized under old section 417 of the Code of Civil Procedure[29] will for the most part be irrelevant to cases arising under the new statute. Section 417 limited long-arm jurisdiction over *individuals* to cases where the defendant was a domiciliary at the time the cause of action arose, or the action was commenced or the process served.[30] Section 410.10 repudiates the self-imposed restrictions of section 417 and authorizes an entirely new approach to the matter.[31]

In the hope of assisting in understanding the issues and furnishing some guide to an analysis, if not a solution, of the problems that will arise under section 410.10, this article, after a brief, selective review of the constitutional bases of jurisdiction, will consider in some detail the potential reach of the new statute in the main areas of civil litigation.

C. Matters Not Considered

In order to keep the discussion within reasonable bounds, it should be made clear at the outset that certain matters fall outside the scope of the paper and will thus be either assumed or omitted.

1. Only in personam jurisdiction will be considered, *i.e.*, the power of a court, consistent with the due process clause, to render a judgment that is final and binding on all the parties and those in privity with them and that is further entitled to full faith and credit if sued on in another state for the purpose of there enforcing it against the original defendant. The extent to which a court may reach property in the state, belonging to an absent defendant, and subject that property to the plaintiff's claims, will not be considered.[32]

2. The only jurisdiction issue that will be considered is whether the court has constitutional power to act; the subordinate issue of whether other considerations, such as forum non conveniens, may or should cause the court to decline to act will not be discussed.[33]

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arm jurisdiction was expressly disapproved in Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 943, 458 P.2d 57, 65, 80 Cal. Rptr. 113, 121 (1969).

29. Cal. Stat. 1957, ch. 1674, § 1, at 3052, CAL. CODE CIV. PROC. § 417 (effective until July 1, 1970).

30. See note 44 and accompanying text *infra*.

31. For a consideration of the background on section 417 and its role as limiting the jurisdiction of California courts, see 40 CALIF. L. REV. 156, 158 (1952); 23 CAL. ST. B.J. 196 (1948). *See also* Martens v. Winder, 341 F.2d 197 (9th Cir. 1965).

32. For a discussion of the effect of the new California long-arm statute on in rem and quasi in rem jurisdiction, see Green, *Jurisdictional Reform in California*, 21 HASTINGS L.J. — (1970).

33. California has codified the doctrine of forum non conveniens. CAL. CODE

3. It is assumed in all cases that the court is competent in the sense of having subject matter jurisdiction both under the division of judicial power between federal and state courts and under the provisions of the California Constitution and statutes apportioning judicial business within the California court system.

4. It is assumed that the statutory provisions for service of process have been complied with and the defendant has received reasonable notice and been given adequate opportunity to appear and defend.[34]

5. It is assumed that there is no distinction between the jurisdictional reach of a state court and of a federal court sitting in the state in a diversity case.[35] Accordingly, cases from federal courts involving long-arm statutes will be considered as fully relevant to a discussion of state court power under like circumstances.

II. Constitutional Bases of Jurisdiction

In considering the matter of the constitutional bases of jurisdiction, it is suggested that four general sources exist:[36] (1) personal service of process on a defendant while he is physically present within the forum; (2) defendant's voluntary submission to the courts of the forum, either by his consent in advance or his "general appearance" in the action; (3) the existence of a status relationship, as a citizen, national or resident of, or person owing allegiance to, the forum; (4) some activity of the defendant in, or affecting persons or property in, the forum.

CIV. PROC. § 410.30 (operative July 1, 1970). For a discussion of this new statute, see Note, Forum Non Conveniens in California, 21 HASTINGS L.J. — (1970).

34. See Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). For analysis of the new California statutory provisions on service of process, see Note, *Substituted Service of Process on Individuals: Code of Civil Procedure Section 415.20(b)*, 21 Hastings L.J. — (1970); Note, *Service by Mail Provisions of California's New Jurisdiction Statute*, 21 Hastings L.J. — (1970).

35. *See* Martens v. Winder, 341 F.2d 197 (9th Cir. 1965) (considering the interaction of old Code of Civil Procedure section 417 and Federal Rule 4(e)).

36. See CALIFORNIA JUDICIAL COUNCIL, 1969 ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE, app. II [hereinafter cited as 1969 JUDICIAL COUNCIL REPORT], which lists 11 bases: "(1) Presence; (2) Domicil; (3) Residence; (4) Nationality or citizenship; (5) Consent; (6) Appearance in an action; (7) Doing business in the state; (8) An act done in the state; (9) Causing an effect in the state by an act done elsewhere; (10) Ownership, use or possession of a thing in the state; (11) Other relationships to the state which make the exercise of judicial jurisdiction reasonable." *Id.* at 71. These eleven are, in this article, regrouped by including 2, 3 and 4 under the single heading of "status," 5 and 6 under the single heading of "consent" and the remainder, 7 through 11, under the single heading of "activity."

A. Physical Presence Within the Forum State

As stated previously, questions concerning the sufficiency of the service of process upon a defendant are outside the scope of this discussion, even though such questions are properly termed "jurisdictional" in the sense that the court cannot render a valid judgment against a defendant whenever service was so defective as to deprive him of adequate notice of the proceedings. But the physical act of delivering process personally to the defendant in the forum is not a *source* of the court's jurisdiction over him; and it is with the *sources* or bases of jurisdiction that this discussion is primarily concerned.

The general proposition that service of process is not a "source" or "basis" of in personam jurisdiction is subject to one important and long-established exception: The personal service of process on a defendant physically present in the state, no matter how transient or temporary that presence may be, has consistently been held sufficient as a basis for the exercise of in personam jurisdiction.[37] This particular basis of jurisdiction is frequently—and justly—criticized.[38] It rests on the untenable theory that "the foundation of jurisdiction is physical power."[39] Moreover, it often operates inequitably: a nonresident defendant served with process during a five minute sojourn in the forum state can be forced to return there to defend a suit having no relationship whatever to that state. Notwithstanding these grave difficulties, "service upon a defendant while physically present" continues to be a constitutionally acceptable basis of jurisdiction. Hence it will presumably remain acceptable in California under section 410.10, although application of forum non conveniens may be sought to diminish the harshness of an otherwise valid service of process.

B. Consent

As noted previously, consent—actual or implied—is one of the

37. When the defendant is truly a transient and the cause of action does not arise out of any act or activity in or affecting persons or property in the forum, adjudicatory power rests solely on the assertion of physical control over the person of the defendant. This is symbolized by the act of service, akin to the common law writ of *capias ad respondendum*. "A state has power to exercise judicial jurisdiction over an individual who is physically present within its territory, whether permanently or temporarily, *if at that time he is properly served with process*." 1969 JUDICIAL COUNCIL REPORT at 71 (emphasis added).

38. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 103-07 (1962); EHRENZWEIG, *The Transient Rule of Person Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Schlesinger, *Methods of Progress in Conflict of Laws—Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. PUB. L. 313, 317-18 (1960).

39. McDonald v. Mabee, 243 U.S. 90, 91 (1916).

traditional common law bases of jurisdiction. From *Pennoyer* to the present day it has been recognized as satisfying the requirements of the due process clause. A fortiori, "consent" will continue to be a sufficient basis of jurisdiction in California under section 410.10

In the great majority of tort cases, the only consent likely to be involved is the consent implied by a defendant's general appearance in the action. In contract cases, on the other hand, consent will from time to time be invoked as a basis of jurisdiction under circumstances that may raise considerable doubt as to the fairness and propriety of subjecting an absent defendant to the jurisdiction of a California court. The problem is best brought into focus by considering a concrete case. Assume that the parties to a contract have stipulated that disputes arising thereunder will be adjudicated by the appropriate California court. Pursuant to this stipulation, each party—assuming that both are nonresidents—appoints an agent in California to accept service of process in any action arising out of the contract. And assume in addition that there are no other contacts with the state of California—that neither party resides in California, and that the contract was made and was to be performed elsewhere. The United States Supreme Court's decision in *National Equipment Rental, Ltd. v. Szukhent*[40] appears to authorize the California court's exercise of jurisdiction over the nonresident defendant in such a case, provided that other due process requirements—such as that the defendant receive reasonable notice of the proceedings—are fulfilled. The only difference between the facts of *Szukhent* and the facts of the preceding hypothetical is that the plaintiff in *Szukhent* was a resident of New York, the forum state.

Cases of the *Szukhent* variety present two major difficulties. First of all, since the defendant has had no real contact with the forum state, the exercise of jurisdiction is seemingly questionable under the rule of *International Shoe*. Secondly, even if the defendant's "consent" is thought to obviate the need for any minimum contacts, the question often remains whether the defendant has really consented to the forum state's jurisdiction in any meaningful sense. This is because most contractual provisions appointing agents to accept service—or waiving service—are contained in "adhesion" contracts between parties possessed of greatly disparate bargaining power.[41] The provision for appointment or waiver invariably works to the disadvantage of the weaker party, who in the typical case is either ignorant of the provision's import

40. 375 U.S. 311 (1964).

41. It is apparent from one of the dissenting opinions in *Szukhent* that the contract involved in that case was of the "adhesion" variety. *Id.* at 326.

or forced to accept it. Accordingly, in contract cases where the sole basis of jurisdiction is "consent" inferred from a clause in the contract by which a nonresident defendant either appointed an agent in California or waived service in any action in California, it is suggested that the court should take the utmost care to ascertain whether the defendant fully understood the import of such a provision when he executed the contract.[42] A lack of full understanding on the defendant's part, together with the lack of any minimum contacts between the defendant and the state of California, should be held to preclude the California court's exercise of jurisdiction.

C. Status—Domicile and Residence

The defendant's *status* as a citizen, domiciliary, resident, or national of, or person owing allegiance to the forum, may furnish the basis for adjudicatory power over him.[43] Old section 417 provided for in personam jurisdiction if the defendant was a "resident" of California at certain specified times; "resident" as used therein was interpreted as "domiciliary."[44] Although neither the United States Supreme Court nor the Supreme Court of California has ever clearly ruled on the question, there is respectable authority that "residence," as distinguished from "domicile," may furnish a proper basis for the exercise of jurisdiction.[45]

Our concern at this point is to determine the conditions under which jurisdiction may be taken when the defendant's status is the *sole* basis for the assertion of jurisdiction. Throughout this subsection,

42. "Heretofore, judicial good common sense has, on one ground or another, disregarded contractual provisions like this one, not encouraged them. It is a long trip from San Francisco—or from Honolulu or Anchorage—to New York, Boston, or Wilmington. And the trip can be very expensive, often costing more than it would simply to pay what is demanded. The very threat of such a suit can be used to force payment of alleged claims, even though they be wholly without merit. This fact will not be news to companies exerting their economic power to wangle such contracts. No statute and no rule requires this Court to place its imprimatur upon them. I would not." *Id.* at 329 (Black, J., dissenting).

43. *See generally* 1969 JUDICIAL COUNCIL REPORT, app. II, at 72-74. On the matter of allegiance, as distinct from nationality or citizenship, see the historic English case of Joyce v. Director of Public Prosecutions, [1946] A.C. 347.

44. Allen v. Superior Court, 41 Cal. 2d 306, 259 P.2d 905 (1953), is frequently cited as the basis for this interpretation, but it appears that Smith v. Smith, 45 Cal. 2d 235, 288 P.2d 497 (1955), citing some ambiguous language in *Allen*, is the real origin. *See* 45 Cal. 2d at 242, 288 P.2d at 500-01; Owens v. Superior Court, 52 Cal. 2d 822, 827, 345 P.2d 921, 922 (1959); Soule v. Soule, 193 Cal. App. 2d 443, 445, 14 Cal. Rptr. 417, 418 (1961).

45. SECOND RESTATEMENT OF CONFLICTS § 30.

therefore, we must exclude from consideration any situations in which any element of the cause of action arises, or the defendant is served, within the state since, then, there is usually a sufficient basis of jurisdiction over the defendant regardless of his status. And, of course, we must assume that at some point during the period of time extending from immediately prior to the liability-creating tort or breach of contract until the moment of actual service of process, the defendant was linked to the forum by some tie of citizenship, domicile, residence or allegiance.

The United States Supreme Court has long recognized that citizenship is a proper basis for jurisdiction over an absent national when a federal claim is asserted in a federal tribunal.[46] In 1940, in *Milliken v. Meyer*,[47] the Court for the first time sustained a state court's assertion of jurisdiction over an absent citizen of the forum. Following the *Milliken* decision, in order to *restrict*[48] the jurisdiction of California courts over absent defendants, California adopted section 417 of the Code of Civil Procedure which, in substance, provided that personal jurisdiction could be assumed over an *individual* defendant only if he was personally served with process and was a "resident" of the state when the action was commenced or when process was served upon him.[49]

Most, if not all, of the cases in which jursidiction was found to exist under section 417 involved activity of the defendant while he was physically present within the state.[50] In these cases, jurisdiction is constitutionally supportable without regard to the residence or domicile of the defendant.[51] They cannot be used as authority to support a con-

46. Blackmer v. United States, 284 U.S. 421 (1932).

47. 311 U.S. 457 (1940).

48. See note 31 *supra*.

49. Cal. Stat. 1951, ch. 935, § 1, at 2537. Section 417 was amended in 1957 by adding that jurisdiction could be assumed if defendant was a "resident" at the time the cause of action arose. Cal. Stat. 1957, ch. 1674, § 1, at 3052.

50. In Allen v. Superior Court, 41 Cal. 2d 307, 259 P.2d 905 (1953), and Myrick v. Superior Court, 41 Cal. 2d 519, 261 P.2d 255 (1953), the actions were for injuries arising out of automobile collisions in California; this is stated in the report of the *Allen* case, 41 Cal. 2d at 308, 259 P.2d at 906, and in the opinion of the district court of appeal, subsequently vacated by the California Supreme Court's grant of hearing, in the *Myrick* case in 256 P.2d at 349. In Owens v. Superior Court, 52 Cal. 2d 822, 345 P.2d 921 (1959), the action was for injuries resulting from a dog bite. The tort was committed in California while the defendant, owner of the dog, was a resident of California.

51. Under the decision in Hess v. Pawloski, 274 U.S. 352 (1927), the California court could have taken jurisdiction in *Myrick* and *Allen* if the defendant motorists had been nonresidents; it would have been paradoxical if jurisdiction could not be obtained

stitutional basis for jurisdiction in a case in which the claim does not arise out of and is unrelated to the defendant's presence or activity in California.[52]

In determining the permissible scope of jurisdiction based on the defendant's status, two separate problems arise: exactly what status is required, and when must that status exist. For state purposes,[53] the first problem arises out of the distinction between citizenship or domicile[54] and residence.

All the authorities agree that, although factually domicile and residence are usually indistinguishable and a person's residence is normally also his domicile, legally they are separate and distinguishable concepts.[55] Domicile is the place where a person maintains his home.[56] He may, by virtue of a temporary assignment, reside in one state while retaining his former domicile.[57] Or he may maintain two or more abodes in different states, residing in each for part of the year; and while each such abode is, for the time being, his residence, only one will be his domicile.[58] However, different courts may reach different conclusions as to which abode is, in fact, his domicile.[59]

Under the *Milliken* decision, status as a domiciliary-citizen at the

merely because the defendant motorists were residents of the state.

52. *But see* 1969 JUDICIAL COUNCIL REPORT, app. II, at 73, *citing* Myrick v. Superior Court, 256 P.2d 348, 353 (Dist. Ct. App. 1953). Since the opinion in *Myrick* was vacated it cannot be cited as authority and the general statements in that portion of the Judicial Council Report must be taken with caution. See note 50 *supra.*

53. A person may be a citizen or national of the United States without residing or being domiciled therein. *See, e.g.*, Blackmer v. United States, 284 U.S. 421 (1932); Cook v. Tait, 265 U.S. 47 (1924). A person may owe allegiance to a national state without being a citizen, *see* 8 U.S.C. § 1408 (1964), or national, *see* Joyce v. Director of Public Prosecutions, [1946] A.C. 347, of that state. Since these distinctions do not apply to the states, they are not considered here.

54. A citizen of the United States is a citizen of the state wherein he is domiciled; except in the case of the domiciled alien, there is no distinction between state citizenship and state domicile. *See* SECOND RESTATEMENT OF CONFLICTS § 31, Reporters Notes.

55. *See generally* 1969 JUDICIAL COUNCIL REPORT, app. II, at 72-73; SECOND RESTATEMENT OF CONFLICTS § 11, comment *k* at 58-59.

56. "To acquire a domicil of choice in a place, a person must intend, for the time at least, to make that place his home." SECOND RESTATEMENT OF CONFLICTS § 18.

57. *See* District of Columbia v. Murphy, 314 U.S. 441 (1941).

58. Texas v. Florida, 306 U.S. 398 (1939). The classic illustration is the case of Dr. John T. Dorrance. *See In re* Estate of Dorrance, 115 N.J. Eq. 268, 170 A. 601 (Prerogative Ct. 1934), *aff'd*, 13 N.J. Misc. 168, 176 A. 902 (Sup. Ct. 1935), *aff'd*, 116 N.J.L. 362, 184 A. 743 (Ct. Err. & App. 1936), *cert. denied*, 298 U.S. 678 (1937); *In re* Dorrance's Estate, 309 Pa. 151, 163 A. 303, *cert. denied*, 288 U.S. 617 (1932).

59. *Compare In re* Estate of Dorrance, 115 N.J. Eq. 268, 170 A. 601 (Prerogative Ct. 1934), *with In re* Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932).

moment of service is clearly sufficient to support jurisdiction.[60] The question is whether status as "resident" will equally support jurisdiction.

Whether residence will be sufficient status to support jurisdiction may well depend upon what is meant by "residence." If it means a fixed or settled place of abode for a substantial period of time, as distinguished from the transient presence of a traveller passing through and only temporarily sojourning, it would seem that such residence should be a constitutionally permissible basis for jurisdiction.[61] Justification would lie in the fact that the benefits afforded by the state to such a "resident" are sufficiently substantial and long standing to justify a state in demanding the reciprocal obligation of responding to its judicial process. If the residence is merely temporary or transient, however, it should not suffice unless process is actually served on the defendant personally while he is within the state. If service is effected only after the defendant has departed from the state, his temporary residence at some past time seems too tenuous to support a claim of jurisdiction.

Section 417, as amended, made "residence" a basis for jurisdiction at any one of three points in time: when the cause of action arose, when the action was commenced, or when process was served.[62] Since most of the cases involved causes of action arising in California and defendants who were residents when the cause of action arose, little critical attention was paid to whether residence at the time the action was commenced or at the time process was served would properly support jurisdiction.

(1) *Status at the Time the Cause of Action Arose*

The defendant's status at the time the cause of action arose, without any other contact with the forum, would appear to be a doubtful basis for jurisdiction. Although old section 417 authorizes jurisdiction

60. Milliken v. Meyer, 311 U.S. 457 (1940). "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service." *Id.* at 462.

61. This is the view adopted by the Judicial Council Report. 1969 JUDICIAL COUNCIL REPORT, app. II, at 73. This position is not, however, supported by any California case. The reference in the Judicial Council Report to *Myrick v. Superior Court* is to an opinion in the district court of appeal which was vacated by grant of hearing by the California Supreme Court and therefore not good authority. See note 50 *supra*. The California Supreme Court has consistently held that "resident" as used in section 417, means "domicilliary." *See, e.g.*, cases cited note 44 *supra*.

62. See note 49 and accompanying text *supra*.

where the defendant was a resident when the cause of action arose, no California case has been found in which such a residence or domicile at that time was the *sole* basis for jurisdiction.[63] Indeed, a dictum in *Owens v. Superior Court*[64] suggests that it may not be a sufficient basis for jurisdiction.

In contract actions it is possible to argue that defendant's relationship to a particular state at the time the contract was made or performance thereunder was due gives that state the requisite interest and that therefore maintenance of the suit there will not offend "traditional notions of fair play."[65]

In tort actions, it seems less likely that such jurisdiction is justifiable where the cause of action arose outside the state and the defendant's conduct in no way impinged upon or affected persons or property within the forum.[66] To pose an extreme case, assume that the defendant, a domiciliary of California while en route to a new home in New York, injures plaintiff in Colorado. Since, at the time of injury, defendant had not reached his destination, his domicile was still in California.[67] But if, prior to the commencement of the action, he had reached New York and there established a new domicile, there would be no relationship linking him to California at the time the action was com-

63. "It has been held that a state under certain circumstances has jurisdiction over a defendant who is domiciled in the state at the time when the cause of action arose . . . ." 1969 JUDICIAL COUNCIL REPORT, app. II, at 72, *citing* Owens v. Superior Court, 52 Cal. 2d 822, 829, 345 P.2d 921, 923 (1959). The *Owens* decision does not support the statement. The defendant committed the tort in California; also, the court expressly questioned past domicile as a basis for jurisdiction, unless the cause of action was related to that domicile: "We agree with defendant, however, that the mere fact of past domicile in the state would not subject him to its jurisdiction indefinitely, *for a past domicile having no relationship to the litigation at hand would not afford a reasonable basis for an assertion of jurisdiction.*

". . . [I]t may be debatable whether [jurisdiction based on residence at the time the cause of action arose] can constitutionally be assumed in the absence of some other relevant contacts with the state. If, for example, neither the plaintiff nor the defendant were presently domiciled here and the cause of action arose out of the defendant's activities elsewhere, the fact standing alone that the defendant was domiciled here at the time the cause of action arose might be too tenuous a basis for asserting jurisdiction over him." 52 Cal. 2d at 829, 345 P.2d at 923-24 (emphasis added).

64. 52 Cal. 2d 822, 345 P.2d 921 (1959); see note 63 *supra.*

65. See text accompanying notes 200-214 *infra.*

66. *See* Skiriotes v. Florida, 313 U.S. 69 (1941), recognizing that there may be circumstances under which a state has sufficient interest or concern to punish one of its citizens for an act committed outside the state's territorial limits and not directly injuring a person or property within the state.

67. Alvord & Alvord v. Patenotre, 196 Misc. 524, 92 N.Y.S.2d 514 (Sup. Ct. 1949); SECOND RESTATEMENT OF CONFLICTS § 19, comment *a* at 99. "A domicile once established continues until it is superseded by a new domicile." *Id.* § 19.

menced and no reason why California should or should be permitted to, assume jurisdiction.[68]

(2) *Status at the Time the Action Was Commenced*

The defendant's status at the time the action was commenced should be a sound basis for the exercise of jurisdiction, both practically and theoretically. Practically, the traditional view has been that the plaintiff had to seek out the defendant and sue him on his own home ground. If the plaintiff does so and files suit in defendant's forum, defendant should not be permitted to render that act a nullity by shifting his base before he can be served with process.[69] Theoretically, the filing of the action is the invocation of the state's adjudicatory power; if, at that time, an appropriate relationship exists, the state's jurisdiction over the defendant should immediately attach, subject only to the requirement that he be given reasonable notice and an opportunity to be heard.

(3) *Status at the Time Process Was Served*

All the considerations that support jurisdiction if the requisite status existed at the time the action was commenced, apply with equal force if the status exists at the time process is served.

D. Activity

The greatest changes wrought by section 410.10, as well as the principal problems in its application, will become apparent in cases where the defendant at all relevant times was a nonresident, nondomiciliary of California, was served with process outside California, and has not appeared or otherwise voluntarily submitted to jurisdiction. It has long been recognized that a foreign *corporation* might subject itself to the jurisdiction of a state other than the state of its incorporation or principal place of business by engaging in activity therein.[70] As formulated after the turn of the century, this doctrine required that the ac-

68. *See* Owens v. Superior Court, 52 Cal. 2d 822, 829, 345 P.2d 921, 923-24, (1959); see note 63 *supra*.

69. "Defendant contends that since amenability to suit is a responsibility growing out of domicile in the state, it ceases when such domicile ceases. In the Allen case we held, however, that it did not cease if the action was commenced before the defendant changed his domicile to another state. . . . Such jurisdiction is justified by the plaintiff's interest in being able to conduct his litigation on the basis of the facts existing at the time he must act. He must file his action where jurisdiction over the defendant may be obtained." Owens v. Superior Court, 52 Cal. 2d 822, 829, 345 P.2d 921, 923 (1959).

70. *See, e.g.*, International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

tivity be regular, continuous and substantial so that the corporation could be regarded as "present" and "doing business" in the forum.[71]

The first recognition that certain types of activity might be sufficient to confer jurisdiction over individuals was in the case of *Hess v. Pawloski*, decided in 1927.[72] That decision sustained a state statute authorizing jurisdiction over a nonresident motorist served with process outside the forum, when the cause of action arose out of the motorist's use of the highway in the forum. The rationale first advanced for the doctrine was the fiction that the motorist, by using the highway, had either expressly or impliedly consented to such jurisdiction.[73] Eventually it was recognized that this purported rationale was a fiction[74] and the doctrine was placed on the sounder basis that a state had the power to hold a person amenable to the jurisdiction of its courts in an action arising out of his tortious conduct in the forum.[75]

In 1945, the United States Supreme Court decided *International Shoe Co. v. Washington*[76] and thereby laid the foundation for the current development of long-arm statutes, predicating jurisdiction on the defendant's activities or minimum "contacts" with the forum. The claim in *International Shoe* was by the State of Washington to recover contributions to the state unemployment compensation fund. It was conceded that the activities of the corporation in the state were not sufficient to constitute "presence" or "doing business" in the traditional sense. Nevertheless, the Court sustained the power of the Washington courts on the theory that the claim arose out of activities of International Shoe's salesmen in the state and that this was sufficient to confer jurisdiction for the purposes of the particular suit. The essence of the holding and the reasons therefor are summed up in the following extract from the opinion:

71. For the problems raised by attempts to define these terms, see Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930) (L. Hand, J.).

72. 274 U.S. 352 (1927).

73. *Id.* at 356.

74. Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953). "It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly' consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. See [Scott, *Jurisdiction over Non-resident Motorists*, 39 HARV. L. REV. 563 (1926)]. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests on the inroad which the automobile has made on the decision of [Pennoyer v. Neff, 95 U.S. 714 (1878)] as it has on so many aspects of our social scene." 346 U.S. at 340-41.

75. *See* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 96-98 (1962).

76. 326 U.S. 310 (1945).

> Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[77]

Later in the opinion, the Court stated that the demands of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.[78]

Since the *International Shoe* decision, the United States Supreme Court has rendered four decisions which shed some light on the scope and implications of the minimum contacts doctrine, *Travelers Health Ass'n v. Virginia*[79] in 1950, *Perkins v. Benguet Consolidated Mining Co.*[80] in 1952, *McGee v. International Life Insurance Co.*[81] in 1957 and *Hanson v. Denckla*[82] in 1958. From these decisions three propositions emerge as clearly settled and relevant in the application of the activity concept. The first of these propositions is that although the *International Shoe* case was concerned with and spoke of corporations, it is not limited to corporations. The minimum contacts doctrine applies to individuals and partnerships as well as corporations; no subsequent case has doubted this extension.[83] The second proposition is that when the minimum contacts doctrine is invoked as the *sole* basis for jurisdiction the claim sued on must arise out of those contacts of the defendant with the forum that are asserted as furnishing the jurisdictional basis.[84] The third proposition is that the minimum contacts doctrine has supplemented, not superseded, the earlier concepts of "presence" and "doing business' and the latter still possesses vitality, with the significant difference stated thus: If "presence" or "doing business" is the

77. *Id.* at 316 (citations omitted).
78. *Id.* at 317.
79. 339 U.S. 643 (1950).
80. 342 U.S. 437 (1952).
81. 355 U.S. 220 (1957).
82. 357 U.S. 235 (1958).
83. *See* SECOND RESTATEMENT OF CONFLICTS § 845.
84. *See* text accompanying notes 77-78 *supra*. *See also* Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959).

basis for jurisdiction, the claim sued on does not have to arise out of activities in the forum state but may, in fact, be wholly unrelated to those activities.[85]

Unfortunately, these areas of certainty are only a small part of the entire picture; large areas of uncertainty still exist in determining what activities constitute minimum contacts. *International Shoe* did no more than state a principle in general and vague language, and while it pointed out the direction in which the law should develop, it did not define the boundaries of that development. None of the subsequent Supreme Court decisions has been particularly helpful in furnishing guides; and in the main, the role of interpreting and exploring the minimum contacts doctrine has been left to the state courts.

Interpreting and exploring the vague contours of the minimum contacts doctrine will be the essential task of the California courts when they are called upon to apply section 410.10. Whatever uncertainties inhere in the minimum contacts concept inhere also in the new California statute. In order to minimize at least some of the uncertainty, and to predict in concrete terms the impact of section 410.10, the remaining portion of this essay is devoted to a discussion of specific factual situations likely to arise in the two main categories of civil litigation—torts and contracts. The central unifying purpose of the entire discussion is to provide answers to a single question that will recur in many different kinds of cases: What factual situations satisfy the minimum contacts requirement, and thus enable California courts to exercise long-arm jurisdiction under section 410.10?

III. Torts and Minimum Contacts

The scope of the minimum contacts doctrine—and hence the scope of section 410.10—in tort actions against absent defendants will be explored by treating separately the cases involving three distinct groups of torts. The first of the ensuing subsections concerns intentional tort and negligence cases in which both the defendant's tortious

85. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Brunzell Constr. Co. v. Harrah's Club, 225 Cal. App. 2d 734, 37 Cal. Rptr. 659 (1964). "[U]nless the defendant's forum-related activity reaches such extensive or wide-ranging proportions as to make the defendant sufficiently 'present' in the forum state to support jurisdiction over it concerning causes of action which are unrelated to that activity (Fisher Governor Co. v. Superior Court . . . 53 Cal. 2d 222, 225, 1 Cal. Rptr. 1, 347 P.2d 1, and authorities cited therein), the particular cause of action must arise out of or be connected with the defendants forum related activity." Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 938-39, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969).

conduct and the plaintiff's resulting injury occur in the forum state. Next come the cases—primarily products liability cases—in which the plaintiff is injured in the forum state by the defendant's conduct outside the state. The final subsection deals with other types of torts and calls particular attention to some special problems presented by actions for defamation and invasion of privacy.

A. Conduct and Harm in the Forum—Intentional Torts and Negligence

All the decisions seem to support the conclusion that a constitutional basis for jurisdiction exists when the defendant, personally, or by agent, commits an act in the forum giving rise to a tort claim, even though that act occurs during a single, isolated entry into the state.[86]

The historic situation is that of the nonresident motorist, and now that it is clearly recognized that the basis for jurisdiction transcends the the original "consent" fiction, the nonresident motorist decisions support the proposition stated above.[87] In addition to the nonresident motorist cases, there are several instances in which isolated activity in the forum has been held sufficient to support jurisdiction. The most significant case is *McGee v. International Life Insurance Co.*,[88] in which the United States Supreme Court sustained the jurisdiction of the California courts in an action on an insurance policy. The entire transaction had been handled by mail and, so far as appeared, was the only activity of the defendant company in California or with a California resident. The opinion succinctly states: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the State [citing, among other cases, *Hess v. Pawloski*].[89]

86. "In cases under these statutes in state and federal courts, jurisdiction on the basis of a single tort has been uniformly upheld: 'Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved.' " Opinion of Mr. Justice Goldberg, in chambers, denying stay pending appeal in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1, 3-4 (1965) *quoting* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 515, 540. *See also* A.R. Indus., Inc. v. Superior Court, 268 Cal. App. 2d 328, 73 Cal. Rptr. 920 (1968). "The making of a single contract or the commission of a single tort, within a jurisdiction may be a contact sufficient . . . ." *Id.* at 333, 73 Cal. Rptr. at 923, *quoting* Annot., 2 Law. Ed. 2d 1664, 1666 (1958). *Cf.* Bay Aviation Serv. Co. v. District Court, 149 Colo. 547, 370 P.2d 752 (1962) (denying jurisdiction).

87. *See* notes 72-75 & accompanying text *supra.*

88. 355 U.S. 220 (1957).

89. *Id.* at 223; see text accompanying note 72 *supra.*

One of the leading decisions on this subject is by the Illinois Supreme Court in *Nelson v. Miller*.[90] The defendant was a Wisconsin corporation; injury resulted from the alleged negligence of its employees in the course of delivering a stove in Illinois. From the report of the case, it appears that this might have been the only instance of defendant's conduct or activity in the forum. In concluding that jurisdiction existed, the court stated: "The rational basis of the decisions upholding the nonresident motorist statutes is broad enough to include the case in which the nonresident defendant causes injury without the intervention of any particular instrumentality."[91]

In California, the same result was reached under old Code of Civil Procedure section 411[92] in the case of *James R. Twiss, Ltd. v. Superior Court*.[93] A vessel owned by Twiss, while on an international voyage, put into port for fuel, where the claimant was injured as a result of an alleged defect in the vessel. Although this particular entry for fuel was the only contact of defendant Twiss with California, jurisdiction was sustained.

Similar cases involving assault, battery, and trespass to land or chattels or conversion of chattels located in the forum would seem to pose no problem. In all such cases, the defendant individually, or by authorized agent, must physically enter the forum and there commit the act which gives rise to the cause of action. Such cases are indistinguishable from the nonresident motorist cases, once the consent rationale is abandoned.[94] It is also clear that a state may assert jurisdiction over an absentee owner or occupier of real property when the cause of action is for injuries resulting from the condition of the premises.[95] Even before the *International Shoe* decision, states had applied the rationale of *Hess v. Pawloski* to this situation.[96]

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90. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

91. *Id.* at 389, 143 N.E.2d at 679.

92. Cal. Stat. 1968, ch. 132, §§ 1-2, at 343, CAL. CODE CIV. PROC. § 411 (effective until July 1, 1970).

93. 215 Cal. App. 2d 247, 30 Cal. Rptr. 98 (1963).

94. See notes 72-75 & accompanying text *supra*.

95. *See* SECOND RESTATEMENT OF CONFLICTS § 38; *cf.* Long v. Mishicot Modern Dairy, Inc., 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967); *Long* involved an action for breach of contract by defendant to sell 13 acres of land in California. Ownership of this land was defendant's sole contact with or activity in California. Jurisdiction was upheld, the court stating: "[A]lthough mere ownership of land may not be sufficient to subject a nonresident to personal jurisdiction in an unrelated cause of action, it may be sufficient, if the cause of action is related to such ownership." *Id.* at 428, 60 Cal. Rptr. at 435.

96. Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (Phila. County Ct. 1938).

B. Conduct or Activity Outside the Forum Resulting in Harm Within the Forum

There are numerous situations in which the defendant, acting outside the forum, may cause harm to a plaintiff in the forum. Within this general category, there are a number of variations. The defendant may act with full knowledge of the plaintiff and his locale and with the intent to affect the plaintiff by his action.[97] The defendant may act without knowledge of any particular plaintiff or any particular locale, but with the intent of marketing his product in the forum or affecting people in the forum by his activities, wherever carried on.[98] Or, the defendant may act without knowledge of any particular plaintiff or any particular locale, but in such a manner that it is at least probable that his activities will affect people in the forum.[99] Finally, the defendant may act with the intent and purpose of confining his product or his activities to his own locale so that an effect outside his home state will be fortuitous and unforeseeable.[100]

Each of these situations has arisen. Most of the cases have been in the field of products liability and the discussion that follows is primarily devoted to that subject. However, the problems that arise and the solutions suggested are not so limited but can extend to any tort liability not requiring direct physical confrontation between plaintiff and defendant.

C. Products Liability

(1) *Background*

The practical benefits accruing from the enlargement of a state's long-arm jurisdiction are perhaps nowhere better illustrated than in the products liability cases. Recognizing that large business concerns are best able to absorb and distribute the losses covered by an inevitable

97. This is particularly true of the defamation cases. See text accompanying notes 168-88 *infra*. Note also Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1 (1965), where the major part of the conspiracy was outside the United States but the primary defendant did make one trip to New York in connection with that conspiracy; the question arises whether jurisdiction could have been supported if he had not made that entry into New York.

98. *See, e.g.*, Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959); Waco-Porter Corp. v. Superior Court, 211 Cal. App. 2d 559, 27 Cal. Rptr. 371 (1963).

99. *E.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Feathers v. McLucas, 15 N.Y.2d 443, 458, 209 N.E.2d 68, 76, 261 N.Y.S.2d 8, 19 (1965).

100. *Cf.* Leach Co. v. Superior Court, 266 Cal. App. 2d 493, 72 Cal. Rptr. 216 (1968).

quantum of defects in today's enormous total output of manufactured goods, the California Supreme Court has imposed strict liability in tort upon manufacturers and sellers for injuries caused by defective products.[101] But this vital principle, with all the enhanced protection it affords to consumers in an industrial society, would remain a dead letter in practice unless complemented by procedural statutes enabling an injured plaintiff to bring suit in his home state and thereby escape the prohibitive expense of travelling across the country to maintain an action against an out-of-state manufacturer. In cases where the defendant is a foreign *corporation*, the law under old section 411 has developed to the extent of permitting a plaintiff injured by a defective product in California to sue in California whenever the defendant knowingly reaped economic benefits from the sale of the product there.[102] Section 411, however, applies only to corporations; the more restrictive provisions of section 417 govern jurisdiction over individuals. New section 410.10 continues the principles enunciated under section 411, but those principles will now apply with equal force to all defendants, individual as well as corporate.

Two jurisdictions normally claim principal interest in cases where damage results from the use or consumption of a defective product, whether the cause of action sounds in negligence, strict liability, or breach of warranty. One jurisdiction is the state where the defendant, by act or omission, breaches his duty of care or produces the defective product and puts it in the stream of commerce. The other jurisdiction is the state where the product is purchased and its use or consumption results in harm to plaintiff. A complication arises and a third jurisdiction must be considered when the product is purchased in one state and its use results in harm in another state.[103]

Where the state statute is couched in terms of jurisdiction over a defendant who "commits a tort within the state," a serious problem of statutory construction arises in determining whether the tort was committed in the state where the defendant acted or in the state where the results of the defendant's conduct were felt.[104] California, by the broad language of section 410.10, has avoided this preliminary problem, leaving for its own courts initially, and for the United States Su-

101. *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

102. Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

103. *See* Singer v. Walker, 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24 (1965).

104. *See* note 17 *supra.*

preme Court eventually, to determine the scope of the forum's jurisdiction in these cases.

In practice there is no problem of jurisdiction in the state where the defendant's act or omission occurred. Normally, and particularly when the defendant is the manufacturer or producer of goods, the place where the act or omission occurred will be a state in which the defendant is "present" and carrying on substantial business and thus subject to jurisdiction irrespective of the minimum contacts doctrine. The serious problems arise when the state where the product causes harm to the plaintiff seeks to assert its jurisdiction over the out-of-state producer.

There is a notable lack of consistency among the decisions that have considered the matter. In part this is due to variations in the wording of state statutes, so that some of the decisions denying jurisdiction may be predicated on the construction of statutory limitations on the exercise of jurisdiction rather than on a consideration of the underlying constitutional bases.[105] But many of the decisions do rest on the due process issue, and there is a basic uncertainty as to what the minimum contacts doctrine permits in these cases.

The principal cause for the uncertainty is the decision of the Supreme Court in *Hanson v. Denckla*,[106] a case decided by a bare five-to-four majority. The factual situation was complex; the following oversimplification must suffice for this discussion. The case involved the disposition of the estate of a decedent who had died domiciled in Florida. The controversy was between parties claiming under the Florida probate and those claiming under powers of appointment contained in trusts that had been created when decedent-trustor was domiciled in Pennsylvania. The trusts were being administered by Delaware corporate trustees. The other necessary parties either having been served in Florida or having appeared in the proceedings, Florida attempted to assert jurisdiction over the Delaware trustees by service on them in Delaware. The Delaware court refused to recognize the Florida judgment against the trustees and the United States Supreme Court sustained that refusal, holding that the trustees were not subject to the jurisdiction of the Florida court and its judgment was not entitled to full faith and

105. This is clearly the situation in Feathers v. McLucas, 15 N.Y.2d 443, 458, 209 N.E.2d 68, 76, 261 N.Y.S.2d 8, 19 (1965). *Feathers* appears to have influenced the California courts of appeal in two cases: Leach Co. v. Superior Court, 266 Cal. App. 2d 493, 72 Cal. Rptr. 216 (1968), and Gill v. Surgitool Inc., 256 Cal. App. 2d 583, 64 Cal. Rptr. 207 (1967).

106. 357 U.S. 235 (1958).

credit in Delaware.

Language in the opinion indicates at least the possibility of a return to the idea that subjection to jurisdiction is conditioned on a privilege afforded the defendant and that unless the defendant has somehow entered the forum and enjoyed a privilege, jurisdiction does not exist:

> [T]his suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. . . .
> . . . The application of that rule [minimum contacts] will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[107]

In other words, the "minimum contacts" with the forum state referred to in *International Shoe* must amount to "purposeful availment" of the privilege of conducting activities in the forum state. Otherwise there will be no sufficient basis of jurisdiction; the traditional standards of "fair play and substantial justice" will not be satisfied. This "purposeful availment" requirement represents the Supreme Court's first attempt to set a clear outer limit to the minimum contacts doctrine.

If the Court's language is to be taken literally—if "the defendant [must] purposefully avail itself of the privilege of conducting activities within the forum state"—then some entry, personally or by agent, representative, distributor or salesman, would seem to be a prerequisite. Under such an interpretation, a producer who sold his entire output to independent distributors f.o.b. the state of production would not be conducting activities outside his home state and would not be subject to the jurisdiction of any other state.[108]

It is submitted, however, that any such narrow, restricted approach to the minimum contacts doctrine is erroneous and should not be followed. To look to the formalities of the sales transactions would be to

107. *Id.* at 252-53. These passages were quoted with approval in the opinion of Mr. Justice Goldberg, in chambers, denying stay pending appeal, in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1 (1965). Note also the reference to "privilege" in *International Shoe*: "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

108. This was the situation in daSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967).

permit jurisdictional power to be governed by the defendant's mode of doing business and would enable a defendant to avoid the jurisdiction of a forum by billing, shipping, and marketing arrangements and devices. It would reintroduce the technicalities that plagued courts under the old concepts of "presence" and "doing business." And, finally, it would be inconsistent with the underlying rationale of the *International Shoe* decision, which stressed the reasonableness of subjecting the defendant to suit in the forum, in the specific case brought there, rather than the mechanics of defendant's way of doing business.

Most of the state court decisions have not accepted such a narrowly restrictive view of the minimum contacts doctrine but have taken jurisdiction, or assumed they could have done so but for a limiting forum statute, in cases where the defendant did not enter the state or engage in any activity in the forum but did affect persons or property within the forum.[109] The exact point at which defendant's activities justify such jurisdiction has not been clearly marked; where it should be marked depends upon the view that is taken of the meaning and purport of the minimum contacts doctrine. It is well established in California that when a corporate defendant is engaged in the direct introduction of its product into the forum as part of a regular or continuous or substantial distribution system,[110] or conducts its business under circumstances that it may reasonably expect that its products will be used or consumed in the forum in substantial quantities,[111] the assumption of jurisdiction is consistent with due process if the cause of action arises out of an injury caused by a product purchased and used in the forum. The decisions are extremely inconsistent and confusing, however, in cases where the cause of action is against a supplier who has supplied an article sporadically or only once which when used in the forum, injures person or property therein.

Several decisions from other jurisdictions are of particular signifi-

109. *See, e.g.*, Lotus Car Ltd. v. Municipal Court, 263 Cal. App. 2d 264, 69 Cal. Rptr. 384 (1968) (tort); Long v. Mishicot Modern Dairy, Inc., 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967) (contract).

110. "There are numerous 'flow of products in the stream of commerce' cases. One of them is Regie Nationale Des Usines Renault Billancourt (Seine), France v. Superior Court, [208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962)], a decision of this court. It holds that a corporation created and owned by the French government which manufactured Renault automobiles and sold them to a New York corporation, a wholly owned subsidiary, who sold to various American distributors who sold to dealers who sold to consumers in California, could not by marketing through a 'hierarchy' of agents insulate itself against assertion of California jurisdiction." A.R. Indus., Inc. v. Superior Court, 268 Cal. App. 2d 328, 333, 73 Cal. Rptr. 920, 923 (1968).

111. *Cf.* O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 194 A.2d 568 (1963).

cance in the interpretation of the minimum contacts doctrine as applied to out-of-state manufacturers and suppliers in products liability actions; they furnish a general background with which the state of California law may profitably be compared. Among these cases are *Singer v. Walker*,[112] decided by the New York Court of Appeals in 1965, *O'Brien v. Comstock Foods, Inc.*,[113] decided by the Vermont Supreme Court in 1963, and *Gray v. American Radiator & Standard Sanitary Corp.*,[114] decided by the Illinois Supreme Court in 1961.

In *Singer v. Walker*, the defendant had manufactured a geologist's hammer in Illinois which was shipped f.o.b. Illinois to a dealer in New York who sold it to the plaintiff, who was injured while using it in Connecticut. The New York court had difficulty with the "tortious act" provision of the long-arm statute[115] but sustained jurisdiction on the ground that "the cause of action asserted is clearly one 'arising from' the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market."[116] In *Singer*, New York seemed to take a liberal view of the jurisdictional issue. Purposeful sales to a New York dealer were held to constitute a sufficient contact, and no great importance was attached to the nature and extent of the defendant's in-state distribution system.

In *O'Brien*, the Vermont plaintiff claimed damages from the pres-

112. 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24 (1965).

113. 123 Vt. 461, 194 A.2d 568 (1963).

114. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

115. The New York long-arm statute in force at that time provided: "A court may exercise personal jurisdiction over any non-domiciliary . . . as to any cause of action arising from any of the acts enumerated in this section . . . if . . . he:

. . . .

"2. commits a tortious act within the state . . . ." N.Y. CIV. PRAC. LAW § 302 (a) (McKinney 1963).

In a companion case to *Singer v. Walker*, the New York Court of Appeals held that the defendant had not committed a "tortious act" in New York within the meaning of the statute and therefore denied jurisdiction on statutory grounds without reaching the constitutional issue. Feathers v. McLucas, 15 N.Y.2d 443, 458, 209 N.E.2d 68, 76, 261 N.Y.S.2d 8, 19 (1965). In *Feathers*, the defendant manufactured a steel tank in Kansas on order for a Missouri corporation "presumably with knowledge" that it would eventually be sold to an interstate carrier incorporated in Pennsylvania and would be used on the highways of several states, including New York. Plaintiffs sued for damages resulting from an explosion of the tank while being operated on a New York highway.

As a result of the *Feathers* decision, the New York legislature quickly amended section 302(a) by adding subsection 3, which provides: "[Personal jurisdiction may be obtained over any non-domiciliary who] commits a tortious act without the state causing injury to person or property within the state . . . ." N.Y. CIV. PRAC. LAW § 302(a)(3) (McKinney Supp. 1969-70).

116. 15 N.Y.2d at 467, 209 N.E.2d at 82, 261 N.Y.S.2d at 26-27.

ence of a deleterious substance in a can of beans which he had purchased in Vermont and which had allegedly been prepared, packed and "placed in the stream of commerce" by defendant in New York. This, the Vermont court held, was not sufficient to justify jurisdiction; but the opinion added that if the defendant had voluntarily or deliberately participated actively in the Vermont market "either by direct shipment or by way of transmittal through regular distributors presently serving the Vermont market area" its jurisdiction could be sustained.[117] *O'Brien* thus illustrates a more restrictive and mechanical method of deciding the minimum contacts question—minimum contacts exist if either the defendant or its agents conduct certain well-defined business activities in the forum state.

In *Gray* the situation was more complex. Plaintiff was injured in Illinois when a water heater exploded. The heater had been manufactured in Pennsylvania by defendant American Radiator and had been sold and installed in a home in Illinois. Jurisdiction over American Radiator was not questioned, but American Radiator cross-complained against a third party, Titan, who had manufactured a valve which had been incorporated in the heater and which was allegedly the cause of the explosion. Titan did business in Ohio where the valve had been manufactured and sold to American Radiator, but it did no business in Illinois. The Illinois court asserted jurisdiction over Titan, stating:

> With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other states. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.[118]

Gray is a particularly notable case, for it appears to carry the minimum contacts concept farther than any case to date, and perhaps as far as is possible within the limits set by *Hanson v. Denckla.* Under the *Gray* rule, an out-of-state manufacturer or supplier is amenable to long-arm jurisdiction in a products liability action whenever it is shown that he knowingly placed the defective product in the stream of interstate commerce. The Illinois court apparently did not require evidence that the defendant "purposefully" or foreseeably placed the product in the particular forum state; rather, it held that such particular place-

117. 123 Vt. at 464, 194 A.2d at 571.
118. 22 Ill. 2d at 442, 176 N.E.2d at 766.

ment is always a foreseeable result of a more general introduction of the product into interstate commerce.

Until very recently, the California courts appeared to be pursuing two separate approaches, with sometimes one and sometimes the other predominating. Some of the decisions emphasized a concept of fairness based on balancing the respective conveniences and inconveniences to the parties between suit in plaintiff's forum state and suit in defendant's home state. In other decisions, the nature of the sales and distribution system was regarded as decisive; jurisdiction was denied unless defendant, by sales agents, retail outlets, or some other readily identifiable distribution system, could be said to be actively entering into and participating in the California market.[119]

The most significant decision during this period was *Cosper v. Smith & Wesson Arms Co.*[120] In *Cosper*, defendant was held subject to the jurisdiction of the California courts in an action for injuries received in California, resulting from the explosion of a gun manufactured by defendant and purchased from a retailer in California. Defendant did not do business in California in the traditional sense; it was a Massachusetts corporation and distributed its products f.o.b. its plant in Massachusetts, through independent distributors and sales representatives. Sales promotion in California was by an independent company which represented various manufacturers on a nonexclusive basis. The court held that it had jurisdiction of the case, reasoning that the representative, by "servicing dealer accounts, investigating and recommending prospective dealers to Smith and Wesson, arranging publicity, distributing advertising, and handling and reporting complaints" was performing the same functions and rendering the same services that the defendant would have, if it had been operating through its own office or paid sales force. Also, "the gun which exploded was sold in this state, the accident occurred in this state, the plaintiff is a resident of this state, and many of the witnesses who will probably be called at the trial are present in this state."[121]

119. *Compare* Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959), *and* A.R. Indus., Inc. v. Superior Court, 268 Cal. App. 2d 328, 73 Cal. Rptr. 920 (1968), *with* daSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967), Twinco Sales, Inc. v. Superior Court, 230 Cal. App. 2d 321, 40 Cal. Rptr. 833 (1964), *and* Yeck Mfg. Corp. v. Superior Court, 202 Cal. App. 2d 645, 21 Cal. Rptr. 51 (1962). For further discussion of these two approaches see note 123 & text accompanying notes 147-51 *infra*.

120. 53 Cal. 2d 77, 346 P.2d 409 (1959).

121. *Id.* at 81, 83, 346 P.2d at 412-13.

(2) *Buckeye Boiler Co. v. Superior Court*

In the recent case of *Buckeye Boiler Co. v. Superior Court*,[122] the California Supreme Court expressly disapproved any jurisdictional test that depended on the mechanics of the defendant's distribution system[123] and postulated in its stead a three step analysis of the relationship between defendant's business activities and the forum state. In *Buckeye*, the defendant was an Ohio corporation with its principal place of business in that state. It had sales representatives in some states but not in others. It solicited sales directly in some states but not in others. It did not advertise its products. It maintained no sales agency, representation, outlet or any other means of solicitation of orders in California. Its only identifiable activity in California was

122. 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

123. In some of the pre-*Buckeye* court of appeal decisions, the nature of the sales distribution system was regarded as decisive of jurisdiction. This was particularly true in three decisions where jurisdiction was denied: Yeck Mfg. Corp. v. Superior Court, 202 Cal. App. 2d 645, 21 Cal. Rptr. 51 (1962); Twinco Sales, Inc. v. Superior Court, 230 Cal. App. 2d 321, 40 Cal. Rptr. 833 (1964); daSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967).

In *Yeck*, the defendant, a Michigan manufacturer, sold to a California distributor who in turn sold to a California retailer. In *Twinco*, the defendant sold to an out-of-state distributor who in turn sold to a California retailer. In *daSilveira*, the defendant, a German corporation, sold to a New York corporation that had exclusive distribution rights, and the distributor in turn sold to plaintiff. In all three cases, the courts found a lack of contact between the defendant and the forum to support jurisdiction. See the analysis in *Yeck*. 202 Cal. App. 2d at 651-53, 21 Cal. Rptr. at 54-56. In *daSilveira*, the court relied particularly on the decision in *Hanson v. Denckla*, pointing out that "there was no act by which [the defendant had] purposefully availed itself of [any] privilege of conducting business in California." 248 Cal. App. 2d at 793, 57 Cal. Rptr. at 65.

In Lotus Car Ltd. v. Municipal Court, 263 Cal. App. 2d 264, 69 Cal. Rptr. 384 (1968), the nature of the sales and distribution system was regarded as significant, the court stating: "[T]he real party in interest proved . . . that petitioner is listed in the telephone directory in three California counties; that a firm in one of these counties advertises sales, parts and accessories for petitioner's cars; and that four named distributors in this state are actively engaged in sales promotion and service of petitioner's cars. This evidence supports a finding that there were minimum contacts sufficient to sustain service of process upon petitioner." *Id.* at 271, 69 Cal. Rptr. at 389. *See also* Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 214 P.2d 541 (1950). "If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.

". . . Petitioner's methods . . . would appear to give it substantially the same commercial advantages that would be available to it through an office or a force of employees maintained in the state devoted exclusively to this phase of the business." *Id.* at 136-37, 214 P.2d at 542-43. The above language was quoted with approval in Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 82-83, 346 P.2d 409, 413 (1959).

some sales of pressure tanks to the Cochin Manufacturing Company, located in South San Francisco, which Cochin incorporated in a product it manufactured and sold. The cause of action in the specific suit before the court arose when a pressure tank manufactured by Buckeye exploded in a General Electric plant in California and injured the plaintiff. There was nothing to indicate how that particular tank came to be in California, or even how it came into the possession of General Electric. There was no connection between defendant's business with Cochin and the tank which caused plaintiff's injury.

On the basis of the record before it, the California Supreme Court held that a prima facie showing of jurisdiction had been established. The end result is sound; however, the process by which the court reached that result is not as clear as it might be, and the opinion raises several questions that are likely to cause difficulty in subsequent cases.

Initially it should be noted that in holding that a prima facie case had been established, the court stated that "[t]he plaintiff has the burden of showing that a defendant is doing business in California for purposes of section 411 of the Code of Civil Procedure."[124] However, when plaintiff establishes that a substantial amount of defendant's business is conducted through channels of interstate commerce and defendant does engage in some "substantial economic activity" in the state, the burden[125] passes to the defendant to show that the presence of the object which injured the plaintiff was fortuitous and unforeseeable and that the defense of the particular action would be unreasonably burdensome to defendant.[126]

Also preliminarily, it should be noted that the decision is not a final determination of Buckeye's amenability to jurisdiction in a California forum. The court noted that Buckeye's position in the trial court had been predicated largely upon state appellate decisions stressing the importance of a sales or distribution system in the forum state.[127] These decisions were disapproved,[128] and Buckeye was afforded the

124. 71 A.C. at 945 n.9, 458 P.2d at 66 n.9, 80 Cal. Rptr. at 122 n.9.

125. The court did not specify whether this "burden of proof" is the burden of producing evidence or the burden of persuading the trier of fact by a preponderance of the evidence. *See generally* CAL. EVID. CODE § 115.

126. 71 A.C. at 945 n.9, 458 P.2d at 66 n.9, 80 Cal. Rptr. at 122 n.9.

127. *E.g.*, Gill v. Surgitool, Inc., 256 Cal. App. 2d 583, 64 Cal. Rptr. 207 (1967); daSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967); Twinco Sales, Inc. v. Superior Court, 230 Cal. App. 2d 321, 40 Cal. Rptr. 833 (1964); Yeck Mfg. Corp. v. Superior Court, 202 Cal. App. 2d 645, 21 Cal. Rptr. 51 (1962). For a discussion of this mechanical "checklist" approach, see note 123 and text accompanying notes 119-23 *supra*.

128. 71 A.C. at 943, 458 P.2d at 65, 80 Cal. Rptr. at 121.

opportunity of making a further evidentiary showing before the trial court, in conformity with the legal principles announced in the supreme court opinion.[129]

(i) Obtaining Economic Benefit from Sales Within the State—Purposeful Availment As a Matter of Commercial Actuality

Turning to the main thrust of the opinion, the court stated three separate conditions that had to be met before jurisdiction could constitutionally be assumed. First, to comply with *Hanson v. Denckla*, there must be some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state."[130] Second, "the particular cause of action must arise out of or be connected with the defendant's forum-related activity."[131] Third, there must be a determination that it is fair to proceed based "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."[132]

The court attempted to satisfy the first of its three conditions and the rule of *Hanson v. Denckla* on the basis of defendant's transactions with Cochin Manufacturing Company by stating:

> In the present case, it is clear that defendant derives substantial economic benefit from the sale and use of its products in California; it currently derives about $30,000 annually in gross sales revenues from its direct sales of certain pressure tanks to the Cochin Manufacturing Company plant in South San Francisco. On the basis of these sales alone, defendant is purposefully engaging in economic activity within California as a matter of "commercial actuality."[133]

However, since the injury admittedly was not caused by any product that defendant sold to Cochin, the linkage between the first condition and the second condition was apparently lacking. To provide the connection, the court offered a two-span bridge. The first span was that somehow the use of the tank that injured plaintiff, together with the sales to Cochin, could be taken together as defendant's "total economic activity in California"[134] and therefore "plaintiff's cause of action appears to arise from Buckeye's economic activity in

129. *Id.* at 945-46, 458 P.2d at 66, 80 Cal. Rptr. at 122.

130. *Id.* at 938, 458 P.2d at 62, 80 Cal. Rptr. at 118, *quoting* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

131. 71 A.C. at 939, 458 P.2d at 62, 80 Cal. Rptr. at 118.

132. *Id.*

133. *Id.* at 944, 458 P.2d at 65, 80 Cal. Rptr. at 121.

134. *Id.*

California, to wit, the totality of its sales of pressure tanks to California customers or to other customers for foreseeable resale or use in California."[135] The other span was that for all that appeared in the record, Buckeye was engaged in the manufacture and distribution of pressure tanks in such a fashion that it was both reasonable and foreseeable that its products (apart from sales to Cochin) might well be used in California.[136]

However, the exact nature of this second span becomes confusing because of the court's lack of clarity in its exposition—was it concerned with the foreseeability of the presence of the particular tank which injured plaintiff, or merely with the foreseeability of the presence of pressure tanks in the ordinary course of business? This confusion is illustrated by two statements in the opinion. At one point the court states: "Buckeye did not allege before the trial court that the tank which allegedly injured plaintiff arrived in California in a manner so fortuitous and unforeseeable as to demonstrate that its placement here was not purposeful."[137] Here obviously the emphasis is on the particular tank. But later in the opinion the court states: "The plaintiff has made a sufficient prima facie showing that his injury arose from or is connected with purposeful activity in California—direct and indirect sales of pressure tanks—which produces economic benefit for Buckeye as a matter of 'commercial actuality.' "[138] Here, equally obviously, the emphasis is on the general nature of the business and not on the process which brought the offending tank to California.

It is submitted that in its statement and application of the first two conditions, the court has confused the jurisdictional issues and has failed satisfactorily to answer these basic questions: What is the real significance, *if any*, of the sales to Cochin; and is it essential that the presence of the particular offending tank be foreseeable?

With respect to the sales to Cochin, it is suggested that they are entirely irrelevant except as a makeweight. It is not even arguable that Buckeye's sales to Cochin constituted "doing business" under the traditional pre-*International Shoe* doctrine, and hence those sales could not support a finding of "presence" sufficient to support jurisdiction on an unrelated cause of action.[139] It is admitted that the cause of action sued upon did not arise out of Buckeye's sales to Cochin. Therefore,

135. *Id.* at 945, 458 P.2d at 66, 80 Cal. Rptr. at 122.
136. *Id.* at 944, 458 P.2d at 65-66, 80 Cal. Rptr. at 121-22.
137. *Id.* at 945, 458 P.2d at 66, 80 Cal. Rptr. at 122.
138. *Id.* at 947, 458 P.2d at 67, 80 Cal. Rptr. at 123.
139. *See id.* at 938-39, 458 P.2d at 61, 80 Cal. Rptr. at 117.

the right of plaintiff to maintain the action should depend upon the character of the activities that resulted in the offending product being present in California and not on the character of other activities having no relation to the offending product or its presence in California. In the setting of *Buckeye Boiler*, the Cochin sales helped plaintiff. But the critical question is whether, if there had been no sales to Cochin, jurisdiction over Buckeye would have been constitutionally permissible. The court's emphasis in parts of the opinion on the Cochin sales would seem to indicate its view that jurisdiction could not be taken. However, the court's position on the necessity of the Cochin sales was not perfectly clear. In another part of the opinion, the court seemed to recognize that the exploding tank, by itself, could have supported jurisdiction if its presence within the state was not so fortuitous and unforseeable as to "manifest lack of purposeful activity on the part of the manufacturer."[140]

(ii) A Foreseeability Test

It is submitted that the uncertainties in *Buckeye* should be resolved in favor of applying a foreseeability test in cases of this type. There should be no requirement of activity in the forum by agents or representatives or of sales to known purchasers in the forum. The proper basis is: The defendant should be subject to suit in the plaintiff's forum whenever, by the manner in which he conducts his business or carries on his activity, he might reasonably expect a harmful effect in the forum where harm does, in fact, ensue. Thus if the defendant corporation either engages in nationwide distribution of its product or knowingly introduces its product into a particular forum, it should be subject to suit there for harm resulting from a defect in that product.[141]

On this basis, the existence of a distribution system in the forum is relevant on the issue of whether the defendant could reasonably have anticipated the distribution and use of his product in the forum state. But an actual distribution system in that forum is not necessary, and *Buckeye*, by its repudiation of that rationale used by some of the earlier cases,[142] greatly assists in clarifying the doctrine. But that clarification is unfortunately offset by the suggestion that except in one situation, if the particular tank that injured plaintiff had arrived in Cali-

140. *Id.* at 944, 458 P.2d at 65, 80 Cal. Rptr. at 121.

141. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

142. These cases are cited in note 127 *supra.*

fornia in a fortuitous and unforeseeable manner, jurisdiction could not be taken.[143] This apparent emphasis on how the tank that exploded came to be in California, rather than an emphasis on the general nature of Buckeye's business and the foreseeability of Buckeye's tanks in general being put to use in California and elsewhere, seems misplaced. There is little doubt, from a reading of the opinion, that it was foreseeable that Buckeye tanks were likely to be in use everywhere in the United States.[144] And it is suggested that the correct rule—and the one apparently accepted by the New York[145] and Illinois[146] courts—is that it is not how the particular offending article came into the forum but whether it is foreseeable that any of defendant's products, but not necessarily any particular one, would be put to use in the forum.

Such an approach, it is submitted, is entirely consistent with the minimum contacts doctrine as originally expounded in *International Shoe* and as subsequently interpreted in *McGee* and *Hanson*. The crucial issue, as posited by *International Shoe*, was whether the defendant was linked to the forum by a contact sufficient to justify subjecting him to that forum's jurisdiction. *McGee* recognized that physical entry into the state was not necessary to effect such a contact, but that correspondence with an identified person in the forum sufficed. The limitation imposed by *Hanson*, under the facts of that case, may—and it is suggested should—mean no more than that any such contact must be attributable in some manner to the action or activity of the defendant and not to the action or activity of a third person. But when the manufacturer or producer proceeds to put his product into a stream of commerce that is designed, or is likely to, and in fact does, end in use, consumption, or effect in the forum, the contact is established and is at-

143. This exceptional situation arises where the out-of-state defendant has engaged, as did Buckeye, in some "substantial economic activity" (*e.g.*, sales to Cochin Mfg. Co.). The court in *Buckeye* held that in this situation, in order to defeat jurisdiction, the defendant must prove *both* that the tank entered California in so fortuitous and unforeseeable manner as to demonstrate that its placement there was not purposeful, *and* that the burden of defending the present action in California would be substantially different in its nature and extent than the burden of defending actions that might arise from the sale of pressure tanks to Cochin. 71 A.C. at 945, 458 P.2d at 66, 80 Cal. Rptr. at 122. See text accompanying notes 124-26 *supra*. Thus, there can be situations, according to *Buckeye*, where jurisdiction will be upheld even though the injury-producing product has arrived in the forum completely fortuitously and unforeseeably.

144. *See* 71 A.C. at 937, 458 P.2d at 60-61, 80 Cal. Rptr. at 116-17.

145. Singer v. Walker, 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24 (1965).

146. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

tributable to the action or activity of defendant. This, it seems, is the teaching of *McGee*; by a parity of reasoning, if the trust in *Hanson* had been executed after the trustor became domiciled in Florida, there seems no reason to doubt the ability of Florida to subject the trustee to its jurisdiction, even though all arrangements were made at the home office in Delaware and no agent or officer of the trustee ever set foot in Florida.

If this approach is correct, then direct sales to unrelated purchasers are not necessary if the introduction of the product into the forum was foreseeable. And this, by a sort of inverse logic, appears to be the necessary result of the repeated references by the court in *Buckeye* to the requirement that the presence of the defective tank not be fortuitous or unforeseeable. The injury admittedly arose from the explosion in California of a tank manufactured by the defendant. Whatever cause of action there might have been came to fruition in California. If the defendant's other activities were sufficient to satisfy the minimum contacts doctrine—the purposeful availment or the activity in the forum —then it should not matter how or in what manner the particular offending tank came to rest in the forum state. But if it is important to determine how, or in what manner that tank came to rest in California, it is only because that event, and no other, must provide the jurisdictional predicate under the minimum contacts doctrine.

(iii) Balance of Conveniences

Although the *Buckeye* decision disapproved one of the two major themes that ran through the prior California cases, it reemphasized without any substantial variation the second theme—the idea that "the propriety of an assumption of [long-arm] jurisdiction depend[ed] [in part] 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."[147] This balance of convenience concept—the third condition stated in *Buckeye*—is a theme first expounded by the California Supreme Court in *Fisher Governor Co. v. Superior Court*.[148] Among the matters there alluded to were:

> The interest of the state in providing a forum for its residents . . . the relative availability of evidence and the burden of defense and prosecution in one place rather than another, the ease of access to an alternate forum, the avoidance of multiplicity of suits and

147. 71 A.C. at 939, 458 P.2d at 62, 80 Cal. Rptr. at 118.
148. 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959).

> conflicting adjudications, and the extent to which the cause of action arose out of defendant's local activities.[149]

What was probably the fullest exposition of this view was in *A.R. Industries, Inc. v. Superior Court*:[150]

> [A.R.] Industries maintained no office, owned no property, sent no traveling salesmen, into California. But it did *advertise* in national media and the products described above had been sold and delivered by Industries into California for use (as distinct from resale). We do not deem the fact decisive but the infrequency of California transactions may be related to the fact that these machines were manufactured to specification and were of a size and nature calculated to supply a restricted market. "Minimum contacts" in California were established. We turn to "traditional notions of fair play and substantial justice." Industries has benefited by, and received the protection of, the laws of California. It thus owed corresponding obligations. The cause of action arose here. We balance the inconvenience to Industries in coming into California to defend this suit against the probability that indispensable witnesses probably reside here, and we consider the cost, the difficulty, and perhaps the impossibility of ascertainment of truth of the merits of Cervantes' [plaintiff's] claim should it have to prosecute its claim in an eastern jurisdiction.[151]

It is suggested that the supreme court, in *Buckeye*, passed up an opportunity to make clear whether it is concerned with this balance of convenience as a condition for the constitutional exercise of jurisdiction, or the discretionary exercise of jurisdiction by consideration of forum non conveniens.[152] These are two fundamentally different concepts, with distinctly different results for the plaintiff. For if the issue of reasonableness is part of the jurisdictional test in a constitutional sense and may result in a dismissal for want of jurisdiction, the application of the statute of limitations may leave plaintiff without a remedy. But if the issue of reasonableness is a discretionary one, under forum non conveniens, the court may condition a dismissal on defendant's waiver of any statute of limitations and thus preserve plaintiff's rights.[153]

149. *Id.* at 225-26, 347 P.2d at 3-4, 1 Cal. Rptr. at 3-4 (citations omitted).

150. 268 Cal. App. 2d 328, 73 Cal. Rptr. 920 (1968).

151. *Id.* at 336, 73 Cal. Rptr. at 925.

152. A companion provision of new section 410.10 codifies the doctrine of forum non conveniens. See CAL. CODE CIV. PROC. § 410.30 (operative July 1, 1970). For a more extended discussion of the doctrine as it relates to California and the relation it bears to constitutional jurisdiction questions, see Note, *Forum Non Conveniens in California: Code of Civil Procedure Section 410.30*, 21 HASTINGS L.J. 1245 (1970).

153. Vargas v. A.H. Bull S.S. Co., 25 N.J. 293, 135 A.2d 857 (1957), *cert. denied*, 355 U.S. 958 (1958); Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (1966); Wendel v. Hoffman, 259 App. Div. 732, 18 N.Y.S.2d 96 (1940).

This matter needs to be clarified, and it is to be hoped that the court will clarify it in the direction of the applicability of the doctrine of forum non conveniens and not as an independent jurisdictional ground. As first expounded in *International Shoe*, the reasonableness of suit in the forum was expressed in terms of a consequence flowing from the existence of minimum contacts and not as a separate standard. The language used was: "[S]uch contacts of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there."[154] This would seem to imply that if the contacts were adequate, the maintenance of the suit was per se reasonable.

As a practical matter, however, it is not likely that the balance, on the issue of reasonableness, will ever preponderate against the state in which the injury occurred. Four factors appear to enter into the determination of reasonableness: financial burden, possibility of a "home town" decision, availability of evidence and knowledge of applicable law, and finally avoidance of a multiplicity of actions.

With respect to financial burden, all factors favor the state of injury, particularly when that state is also the state of plaintiff's residence. Usually he will be without resources adequate to prosecute the case elsewhere, whereas the defendant can usually include the cost of defense as part of the cost of doing business and spread the risk of litigation over the entire commercial enterprise.

With respect to fairness in end result and the dangers of a "home town" decision, there would seem to be little danger of local prejudice in most tort cases (except for the defamation cases, which present a special problem),[155] and to the extent that there might be some such possibility, the plaintiff is as likely to be prejudiced by suit against the defendant in his home as the defendant is in the reverse situation. At the very best, in the ordinary tort case, the possibilities of prejudice for or against either party are no more likely to exist in the one state than in the other.

With respect to availability of evidence and familiarity with controlling law, the odds are heavily weighted in favor of the state where the injury occurred. Normally, that is where the eye witnesses to the event, the product itself, the medical testimony, in fact nearly every item of proof will be located. Only when there is a substantial issue of whether due care was exercised in the manufacture of the product—

154. 326 U.S. at 317.

155. See text accompanying notes 168-88 *infra*.

an issue that is rapidly disappearing as strict liability supersedes negligence in the field of products liability[156]—will there be material evidence in the defendant's home state. And under prevailing conflict of laws doctrine, the forum in which the injury occurred will also be the state whose law will govern, unless the introduction of the product therein and the ensuing injury in that locale were purely fortuitous.[157]

Finally, in the products liability cases there are usually two and often three defendants: the local retailer or distributor or user, the regional intermediate distributor, and the national manufacturer. Jurisdiction over the local defendant may be assumed in most of the cases from the fact that his place of business is in the forum; it may also be assumed that in most cases the retailer will seek relief from his supplier or from the ultimate manufacturer. Unless all issues of liability among all parties can be settled in one action, there is grave danger of injustice because of different courts reaching different results, either on different evidence or on different theories of liability. And even when the results in all actions coincide, there is still the advantage of avoiding a multiplicity of suits.

(3) *Additional Problems*

There are two aspects of the broad problem which do not fit precisely the pattern and analysis of the minimum contacts doctrine. One is the case of a retail merchant doing business in an area that extends over two states, with his outlet in one state and many of his customers in the other.[158] If, in such a case, the merchant conducts all operations, including sale or service and delivery, in his own state, he will never inject himself into—will never have a "contact" with—the other state. In the event of harm to person or property in the second state from a defective product, can jurisdiction be maintained in that second state? All of the arguments for convenience of parties and witnesses and reasonableness of forum would support such jurisdiction, but under *Hanson*, such convenience is not enough.[159] Because there is no activity

156. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

157. SECOND RESTATEMENT OF CONFLICTS § 145, comment *e* at 11.

158. The Stateline area of South Lake Tahoe might well present such problems.

159. *Hanson* warns that "restrictions on the personal jurisdiction of state courts . . . are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states." 357 U.S. at 251. It would seem that unless and until *Hanson* is expressly overruled on this point, the boundary line will govern. *But cf.* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

by the defendant in the second state, no credit extended to customers in that state, the argument could be made that the defendant has not purposefully availed himself of the privilege of conducting business in that state. This argument, however, is likely to fail in view of *Buckeye's* discussion of foreseeability and its equation of purposeful availment with economic benefit.

The other special problem arises where the manufacturer conducts his business in one state, the purchaser obtains the product from a retailer in a second state, and the injury results while the article is being used in still a third state. The New York case of *Singer v. Walker*[160] is a prototype of this situation, and it seems clear that the New York court was correct in taking jurisdiction because the sale was made there. But to pose a variation on *Singer*—what if Singer had chosen to sue in Connecticut, where the injury occurred? Or what if, in *Cosper*,[161] plaintiff had been injured by the defective gun while hunting in Montana and elected to sue there? We may assume in these hypothetical situations that the nature of defendant's business is such that it has "minimum contacts" with each state, but is the suit maintainable in both the state of purchase and the state of injury, or in only one, and if so in which one? Elements of convenience and reasonableness with respect to trial would favor jurisdiction only in the state where the injury occurred. But can it be said, consistent with *International Shoe*, that a suit in the state of injury arose out of defendant's contacts with that state? There is, as yet, no authoritative answer to these questions. It is suggested that since the connection between the cause of action and the contact is in the state where the article was purchased, and to avoid the possibility of a basic jurisdictional defect, suit in such cases should not be brought in the state of injury.

Thus far the discussion has been limited to the fields of products liability. To round out the discussion we need to consider, and, by analogy, apply the same doctrines to various miscellaneous torts.

"[T]he trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard: from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute." *Id.* at 440-41, 176 N.E.2d at 765.

160. 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24 (1965); see text accompanying notes 115-16 *supra*.

161. Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959); see text accompanying notes 119-21 *supra*.

D. Other Torts

(1) *False Imprisonment*

Normally confinement will be by act of the defendant personally, or by agent, within the forum and will be indistinguishable in its jurisdictional aspects from the intentional torts of battery and assault. However, if the imprisonment is accomplished by action in another state which sets in motion the force that confines the plaintiff, jurisdiction should be maintainable on the same basis as in the case of the supplier supplying a known user in the forum.[162]

(2) *Abuse of Process and Malicious Prosecution*

The appropriate forum here should be the state out of which the process issued. There is no doubt that an out-of-state defendant who procures the issuance of process by a forum court, for the purpose of harassing or interfering with person or property within the forum, is subject to jurisdiction under even the strictest and most limited interpretation of *Hanson v. Denckla.* What is not so clear is whether the state of plaintiff's residence may assume jurisdiction when the process was issued in another state with the intent of harassing the plaintiff or interfering directly or indirectly with his activities in the forum. So long as *Hanson* remains, with its emphasis on some act by which the defendant purposefully availed himself of a forum privilege, it would seem that jurisdiction could not be maintained by the plaintiff's state in the latter situation. But if *Hanson* is limited to permit a wider range to the plaintiff's choice of forum, the factors of reasonableness and fairness would seem to favor jurisdiction in the plaintiff's home state.[163]

(3) *Fraud*

There are several different factual situations which may furnish the basis for the exercise of jurisdiction in a fraud case. The most obvious situation is where the defendant, while personally present in California, makes the representations which are the gravamen of the action in a personal encounter with the plaintiff. Here both the wrongful act and the harm to plaintiff occur in California, and exercise of jurisdiction is clearly proper.[164]

Another situation is where the defendant, by mail or other means of

162. *See* Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement,* 36 MINN. L. REV. 1, 18-19 (1951).

163. *See generally* Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 533, 544-60.

164. *Cf.* Ehrenzweig, *supra* note 162.

communication from outside California addressed to the plaintiff in the forum, makes the representations which are the gravamen of the action. Here the wrongful act of the defendant occurs outside the forum; it may be that the defendant never entered the forum in connection with the transaction. It is submitted that this is a proper case for forum jurisdiction by analogy to *McGee v. International Life Insurance Co.*

The third situation is where the subject matter of the transaction, concerning which the representations are made, is physically located in California, but both parties are nonresidents of the state and all contacts between them take place outside the state. In this situation it is possible to support jurisdiction in the state. There is a contact with the state in that the subject matter is located here, and this should be sufficient for jurisdiction. But this contact seems insubstantial with respect to the matters of fairness to the parties and the opportunity for a trial in a jurisdiction bearing a reasonable relation to parties and issues. There is no indication that any interest of the state will suffer as a result of the conduct of the parties. There is nothing to indicate that a trial in California is fairer to the parties than a trial in the state of defendant's residence or plaintiff's residence. About the only justification that can be urged is the convenience of obtaining evidence and producing witnesses concerning the value of the local property.[165]

(4) *Interference with Business Relations—Unfair Competition and Inducing Breach of Contract*

It may be assumed that if the action is brought in California it will normally involve both a business carried on in California and acts by defendant in, or involving persons or property in, California. In such cases courts have sustained jurisdiction over the defendant served outside the state.[166]

However, a situation may be posited in which the defendant, for the purpose of injuring a competitor in California, engages in unfair competition wholly outside the state, either by inducing an out-of-state supplier to cut off the plaintiff's supply or by inducing out-of-state purchasers to cease doing business with the plaintiff. In such a case, if *Hanson* is strictly and literally followed, it would appear that no juris-

165. See the balancing test used by the courts in the cases cited in note 163 and in the text accompanying notes 148, 150 *supra.*

166. *See* Opinion of Mr. Justice Goldberg, in chambers, on denial of stay pending appeal in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1 (1965); Carl F.W. Borgward v. Superior Court, 51 Cal. 2d 72, 330 P.2d 790 (1958); Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 438 (1958).

diction exists in California, but it is suggested that the rationale that supports jurisdiction in the case of the producer who puts his goods in the stream of commerce, knowing they will be distributed in the forum, should equally support jurisdiction in the unfair competition situation.[167]

(5) *Defamation and Privacy*

Actions for defamation and invasion of privacy present special problems, and long-arm jurisdiction in these cases seems to be developing under special rules.[168] Thus far these rules have been applied on an ad hoc basis without any clear pattern emerging. The United States Supreme Court has not spoken on the issue, and the principal decisions are from the Federal Courts of Appeals in the Second and Fifth Circuits.

The unique problem in these cases is the obvious danger inherent in subjecting the media of public information and opinion to defamation or privacy actions in the plaintiff's home state when the publication concerns emotionally charged political issues or controversial public figures. What seems to have developed thus far is an attempt to arrive at a reasonable balance between the plaintiff's interest in bringing the action in his home state and the potential danger that defense in the plaintiff's state might subject the defendant to the risk of an unreasonable result in both liability and damages.

Under a normal analysis of the minimum contacts doctrine, a defamatory publication must be regarded as producing its harm in the state where the object of the publication resides or where his principal activities are centered. And one who publishes a defamatory article about a well-known public figure in a media having wide circulation can hardly contend that there was no regular and continuous distribution of the publication in the plaintiff's home state, or that substantial

167. *Cf.* Opinion of Mr. Justice Goldberg, in chambers, on denial of stay pending appeal in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1, 3 (1965).

168. The principal defamation cases are Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967), Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967), *and* New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966). In Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966), plaintiff, a resident of State *X*, brought suit in State *Y*, which had no relation to either plaintiff or defendant; this was done apparently because State *Y*'s laws were more favorable than State *X*'s. Process was quashed since the forum had no relation to or minimum contact with the claim. *See also* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts,* 66 MICH. L. REV. 227 (1967); Comment, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases,* 34 U. CHI. L. REV. 436 (1967); Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word,* 67 COLUM. L. REV. 342 (1967).

distribution of at least the issue or issues containing the alleged defamation could not be anticipated. By analogy to the products liability cases that have emphasized the known or anticipated distribution of the product in the forum, all the elements for jurisdiction are present.

But balancing these established considerations is the concern of the courts that excessive or unreasonable extension of jurisdiction in defamation cases may seriously interfere with the exercise of rights protected by the first amendment. Some states have avoided the issue by expressly excluding defamation suits from the scope of their long-arm statutes.[169] But since California does not provide any exclusions not required by the Constitution, the question must be faced whether there are special jurisdictional limitations on these actions because of the guarantees of either the due process clause or the first amendment.

The principal case denying jurisdiction is the Fifth Circuit holding in *New York Times Co. v. Connor*.[170] The action was brought in Alabama by a resident of Alabama against the *New York Times*. The alleged defamation was an advertisement in the *New York Times* protesting the activities of Alabama law enforcement officers, including Connor, in Alabama during certain civil rights demonstrations. The *Times* had a circulation in Alabama of 395 daily and 2455 on Sunday. The circulation was held to be too insubstantial to sustain jurisdiction, the court stating that a newspaper could not be sued for circulating a libel within a state "where the size of his circulation does not balance the danger of his liability."[171] In a subsequent case in the same circuit, *Curtis Publishing Co. v. Golino*,[172] jurisdiction was sustained when the defendant was a magazine of national circulation. The distinction stated in the *Golino* opinion was described as follows: "To argue that periodic lawsuits resulting from circulation of the Post will chill the desire of Curtis to actively encourage the widest possible circulation is clearly out of line with economic realities."[173]

In *Buckley v. New York Post Corp.*,[174] the Second Circuit sustained

169. "[A] court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:

. . . .

"2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . . ." N.Y. CIV. PRAC. LAW § 302 (McKinney 1966).

170. 365 F.2d 567 (5th Cir. 1966).

171. *Id.* at 572.

172. 383 F.2d 586 (5th Cir. 1967).

173. *Id.* at 592.

174. 373 F.2d 175 (2d Cir. 1967).

jurisdiction in Connecticut, the state of plaintiff's residence, in an action against a New York newspaper. The *Connor* decision was distinguished, in part, on grounds that the state court in which the *Buckley* action had been commenced was in a county that was "economically and intellectually one" with New York City, the center of defendant's activities and the place of publication.[175] But the court also alluded to the explosiveness of the issues and the relationship of the parties to the local scene in the *Connor* case as matters which created a serious possibility of a prejudicial outcome.[176]

There are several separate and distinct threads running through these decisions. The first is the nature and scope of the media, the distinction being clearly made in the *Connor* and *Golino* cases between newspapers and magazines.[177] A newspaper apparently is regarded as a local activity and therefore less subject to suit away from its state of publication than a national magazine, which not only seeks but must have a national circulation for its existence. But this distinction is hard to draw when the newspaper is one that enjoys a national reputation and seeks a national circulation.[178] Furthermore, the rationale for the distinction as stated in the *Golino* case[179] seems wrong. The vital consideration is not whether the suit will chill the desire of the publication to seek the widest possible circulation, but whether the suit will chill the desire of the publication to speak out on public issues.

The second thread, alluded to in the *Connor* case, is the size of the circulation in the forum state. On superficial analysis, consideration of this factor may seem to be justified by analogy to those products liability cases which have required a regular practice of substantial distribution and sale within the forum as a predicate to long-arm jurisdiction over the manufacturer. But it is submitted that this analysis is faulty, because the publisher of an article that is defamatory of a known, identified person, particularly a public figure, can be certain that the offending issue will have a substantial distribution in the home state of the individual, even if prior issues had little or no distribution in the area. If any analogy is to be drawn with the products liability cases, it should be drawn with the supplier who directly supplies a defective article to a known and identified purchaser in the forum state.[180] And in those

175. *Id.* at 184.
176. *Id.* at 182, 184.
177. *See* Curtis Publishing Co. v. Golino, 383 F.2d 586, 590-91 (5th Cir. 1967).
178. *See* Buckley v. New York Post Corp., 373 F.2d 175, 182 (2d Cir. 1967).
179. 383 F.2d at 590-91.
180. *See, e.g.*, Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959).

cases there seems little reason to doubt that jurisdiction will lie in the purchaser's state.

The third thread is the danger of prejudice in the handling or outcome of the case in the courts of the forum. This, in the Second Circuit's view, is the major implication of the *Connor* decision.[181] If this is the thrust of the decisions, another question emerges: Is the danger of prejudice, as a limitation on long-arm jurisdiction, peculiar to defamation cases or is it available in other tort actions when local influences may seriously tip the scales of justice in favor of the resident plaintiff?[182]

In the *International Shoe* case, the Supreme Court stated that in considering the reasonableness of requiring the defendant to defend in a particular forum, an " 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant . . . ."[183] Later in the same opinion, there is the statement that "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[184] It is arguable that this language is capable of being construed to require a consideration of all the factors that might affect the fairness of the outcome, that dangers of prejudice are included in the "estimate of the inconveniences" and that "fair and orderly administration of the laws" requires an appraisal of the dangers of prejudicial treatment. But it is submitted that this is a strained and far-fetched interpretation of the language of the decision and the meaning of the minimum contacts doctrine.[185] It is also submitted that to inject this issue into all cases of long-arm jurisdiction would create hopeless uncertainty that would be far worse than the uncertainty that resulted from the old concept of "doing business." It can only be concluded that the defamation and privacy cases are *sui*

181. *See* 365 F.2d at 572.

182. In *Connor*, the Court suggests that defamation, being peculiarly affected by the first amendment, requires a greater degree of contact "to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *Id.*

183. 326 U.S. at 317.

184. *Id.* at 319.

185. But compare the approach of the court of appeal in A.R. Indus., Inc. v. Superior Court, 268 Cal. App. 2d 328, 73 Cal. Rptr. 920 (1968), where the court uses a two-step analysis: First determining that minimum contacts were established in California, then proceeding to consider whether on a balance of conveniences, and a consideration of "fair play," defendant should be required to defend. *Cf.* Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959).

generis and that if special limitations on jurisdiction are imposed in these cases they are exceptions to the minimum contacts doctrine resulting from a greater concern for freedom of expression when national figures and national issues are involved. If this is to be the approach, then the defamation cases must develop their own special jurisdictional rules. To that end, the following suggestions are made.

If the distinction between the newspaper and the national magazine, or between the local publication and the national publication, is a valid one, then like distinctions should exist in the other media of public information, notably in radio and television, between the broadcast that is limited to the local station and the broadcast that is produced over a national network. However, it is believed that this distinction, as well as the distinction on the basis of circulation in the forum, is unsound and that the real problem is with the danger of prejudice. But it is also submitted that this is not a jurisdictional issue and the protection against a prejudiced court and jury should be sought in other legal doctrines.[186]

The Supreme Court, in *New York Times Co. v. Sullivan*,[187] has mitigated much of the danger by establishing a constitutional standard and has thus provided the foundation for Supreme Court review of any judgment that appears to apply that standard improperly. But there is another, more readily available, source of protection against local prejudice. It is almost certain that these cases will fall within the ambit of diversity jurisdiction of the federal courts. The amount involved ordinarily will be over the jurisdictional minimum and, by hypothesis, the plaintiff is a resident of the forum state and the defendant is a foreign corporation or an individual citizen and resident of another state. If the danger of prejudice from a local trial is serious, the district court has the statutory power to transfer the cause to any other district where the action might have originally been brought.[188] The utilization of this section will avoid hardship of dismissal, with attendant problems of the statute of limitations, will avoid engrafting peculiar exceptions on the jurisdictional rules and will place the solution where it properly belongs—in the discretionary power of a court to transfer a cause "in the interest of justice."

186. *See* Buckley v. New York Post Corp., 373 F.2d 175, 183 (2d Cir. 1967).

187. 376 U.S. 254 (1964).

188. 28 U.S.C. § 1404(a) (1964) provides in part: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

IV. Contract Cases

The preceding pages of this essay have focused primarily on the probable application of section 410.10 in tort cases of various sorts; products liability cases have claimed by far the greatest share of attention. Such an imbalanced treatment—as it may seem at first—is believed to be justified on the ground that products liability is the one class of cases where borderline questions as to the extent of California's long-arm jurisdiction are most likely to arise, and where an expanded jurisdiction over nonresidents is most imperatively necessary if important principles of substantive law are to be fully effective. But however important the tort cases may be, any forecast of the probable ramifications of section 410.10 would be incomplete without at least a brief consideration of the ways in which the new statute may extend California's long-arm jurisdiction in the other major category of civil litigation—the contract cases.

A. Fundamental Principles

For purposes of determining which "contractual contacts" justify long-arm jurisdiction, the leading post-*International Shoe* case is *McGee v. International Life Insurance Co.*[189] The defendant was a Texas life insurance company—not qualified to do business in California—which reinsured the life of a California resident. The only activities linking the insurance company with California were those undertaken pursuant to this one insurance policy: The company mailed a certificate of insurance to the insured in California; the insured mailed premium payments from California to the company in Texas. The company maintained no office or agents in California, and it is doubtful whether the company was doing sufficient business in California so that it could be regarded as "present" in California under the fictions which were utilized of necessity prior to *International Shoe.*[190] The Supreme Court in *McGee* enunciated the fundamental principle that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State,"[191] and upheld California's

189. 355 U.S. 220 (1957).

190. For an analysis of the old concept of "corporate presence" as a basis of jurisdiction over foreign corporations, see Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer* to *Denckla: A Review*, 25 U. CHI. L. REV. 569, 580-84 (1958); *The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970*, 21 HASTINGS L.J. ——, —— (1970).

191. 355 U.S. at 223.

power to exercise its "long-arm" jurisdiction under a 1949 statute[192] subjecting foreign corporations to suit in California based on insurance contracts with California residents.

Among the contacts with California which the Court found sufficient to support jurisdiction were the following:

(a) The contract was delivered in California.

(b) The premiums were mailed from California.

(c) The insured was a resident of California.

(d) California has a manifest interest in providing an effective means of collection of insurance policies insuring its residents—especially when claims are so small in amount as to make it scarcely worthwhile for a plaintiff to try to collect by suing in a distant state.[193] The fact that the California statute went into effect in 1949—after the contract had been executed—was held not to bar its applicability in this particular case.[194]

McGee is the only Supreme Court case to date in which contacts incident to a single contract[195] were adjudged sufficient as a basis of jurisdiction over a nonresident defendant. It might be argued that *McGee* is not a typical contract case since the subject matter was an insurance policy, which a state has an unusually strong interest in regulating. The Supreme Court's language was general, however, and not limited to insurance contracts. Moreover, the "manifest state interest" was only one of several factors identified as supporting the California court's jurisdiction.[196]

In searching for the outer boundaries of judicial jurisdiction, cases denying jurisdiction are more significant than cases granting jurisdiction. Since the *International Shoe* rule that requires *sufficient* contacts does not afford any precise measuring stick, a recent Supreme

192. CAL. INS. CODE §§ 1610-20.

193. 355 U.S. at 223.

194. *Id.* at 224.

195. The Court in *McGee* stated that "so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here." *Id.* at 222.

196. See text accompanying notes 192-93 *supra*. *See* SECOND RESTATEMENT OF CONFLICTS § 36, comment *e* at 190-91: "[A] state may exercise judicial jurisdiction over a foreign insurer which negotiates a single insurance contract in the state as to causes of action arising from this contract [citing *McGee*]. It is likewise reasonable that a state should exercise judicial jurisdiction over a non-resident individual as to causes of action arising from an act done, or caused to be done, by him in the state for pecuniary profit and having substantial consequences there even though the act is an isolated act not constituting the doing of business in the state."

Court case such as *McGee* can only tell us what combination of contacts is regarded as *sufficient*, but it cannot tell us what combination of contacts is *insufficient*. The facts in *Hanson v. Denckla*,[197] it will be recalled,[198] include execution of a trust in Delaware by a Pennsylvania resident, nominating a Delaware bank as the trustee. At a later time, the trustor became a Florida resident and exercised, in Florida, her power of appointment which had the effect of adding a portion of the first trust to two other trusts in which a Delaware resident was trustee. An action was brought in Florida concerning the exercise of the power of appointment, and the court's ability to reach defendants, including the Delaware trustee, by service outside of Florida was in question. The Supreme Court did not regard the later domicile of the trustor in Florida and her exercise of the power of appointment there as being significant in determining whether the Florida court could obtain jurisdiction over the Delaware trustee. The Court stated that "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[199]

Analyzing the facts of *Hanson* in terms of ordinary contractual activity, we find the following elements were absent or present:

1. Trustor, one of the parties to the trust "contract," was not a resident of Florida at the time of execution of the trust.

2. Trustee, the other party to the trust "contract," (considering for purpose of our analysis that a trust instrument which is accepted by a trustee is the legal equivalent to an ordinary contract), was never a Florida resident, and engaged in no activity there.

3. The trust contract was partly performed in Florida, but the trustee did not know and could not reasonably have contemplated that this would occur at the time it accepted the trust.

4. Trustor later became a Florida resident, but the trustee could not reasonably have contemplated this eventuality at the time the trust was created.

Contrast this with *McGee*, where the insurance company either knew or could reasonably have contemplated that upon the death of the insured the beneficiaries would be California residents who would logically be expected to sue in California on an unpaid claim.

197. 357 U.S. 235 (1958).

198. See text accompanying notes 106-07 *supra*.

199. 357 U.S. at 253. For a criticism of this decision, see Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 256-59, 413 P.2d 732, 735-37 (1966).

The fundamental Supreme Court cases yield the following general formula for deciding questions of a state's extraterritorial jurisdiction in contract actions: The minimum contacts requirement of *International Shoe* is satisfied (1) if the contract in suit has a "substantial connection" with the forum state (*McGee*), and (2) if the substantial connection was "purposeful" from the defendant's standpoint—that is, if the defendant could reasonably have foreseen the connection when the contract was made (*Hanson*). But this general formula is only a starting point. In order to resolve practical problems arising under section 410.10, practitioners need a concrete notion of the specific contractual activities which, when purposefully conducted in the forum state, will suffice to constitute the requisite connection. For present purposes, every ordinary contract may be roughly analyzed as involving three differentiable activities: Preliminary negotiation, formation and performance. Thus the essential issue to be resolved in this subsection may be stated as follows: In the case of any contract, which of the constitutent contractual activities must take place in California in order to satisfy the *McGee-Hanson* requirement of purposeful and substantial connection with the forum, and hence enable a California plaintiff to obtain jurisdiction over an out-of-state defendant in an action arising out of the contract? Particularly illuminating on this issue are certain decisions from other states—states that have long-arm statutes expressly conferring personal jurisdiction over nonresident defendants in contract actions where the contract in suit is "made" or is "to be performed" within the forum state.

B. Specific Factors

(1) *Preliminary Negotiations*

When preliminary negotiations are the sole connection between the defendant and the forum state, and when the contract is made and is to be performed outside the forum state, there is probably no sufficient basis of jurisdiction over a nonresident defendant in an action arising out of the contract.[200] The Maryland court so held in *Panamerican Consulting Co. v. Corbu Industrial, S.A.*,[201] a case decided in

200. "The extent of the defendant's relationship to the state is material. This is so because of considerations of fairness to the defendant. For the more closely the defendant is related to the state, the more convenient it will probably be for him to stand suit there. . . . [T]he more closely the defendant is related to the state, the greater is the interest of the state in him and consequently the more appropriate it will be that the state should be in a position to try the case against the defendant in its courts . . . ." SECOND RESTATEMENT OF CONFLICTS § 36, comment *e* at 191.

201. 219 Md. 478, 150 A.2d 250 (1959).

1959. Although some preliminary negotiations between the plaintiff, a Maryland corporation, and the defendant Mexican corporation had taken place in Maryland, the contract had been formally accepted in Mexico. The court's decision denying jurisdiction over the defendant may have been compelled by the terms of Maryland's long-arm statute, which conferred jurisdiction over foreign corporations sued by Maryland residents on contracts "made" within the state;[202] the court construed this to mean that the statute would not apply unless the acceptance had taken place in Maryland. It is not unlikely, however, that such a construction was adopted in order to obviate constitutional difficulties that might have arisen had the court tried to base jurisdiction on mere preliminary negotiations, without anything more in the way of a "substantial connection."

(2) *Making of a Contract within the State*

A contract is "made," in legal contemplation, in the state where the last act necessary to create a binding obligation is performed.[203] This means in essence that a contract is made in whichever state the acceptance occurs. Accordingly, the question that presents itself at this juncture is whether, under section 410.10, the mere "making" or acceptance of a contract in California will be sufficient to support jurisdiction over a nonresident defendant in an action arising out of the contract. Several states have enacted long-arm statutes expressly conferring jurisdiction in contract actions where the sole "connection" (to use the *McGee* terminology) between the contract in suit and the forum state is the making of the contract there.[204] Never has the constitutionality of such statutes been successfully challenged.[205] It should be noted, nevertheless, that in most of the cases where long-arm jurisdiction has been predicated solely on the making of a contract within the forum, the making of the contract was not *in fact* the defendant's sole contact with the forum.[206] For example, in *Compania de Astral, S.A. v.*

202. Ch. 504, § 118(d), [1937] Md. Laws (formerly Md. Code Ann. art. 23, § 92(d) (1957)).

203. *E.g.*, Ericksson v. Cartan Travel Bureau, Inc., 109 F. Supp. 315 (D. Md. 1953).

204. *E.g.*, CONN. GEN. STAT. ANN. § 33-411 (Supp. 1969); N.C. GEN. STAT. § 55-145 (1953).

205. Cases in which constitutional assaults have been fruitless are collected in Byham v. National Cibo House Corp., 265 N.C. 50, 58, 143 S.E.2d 225, 232 (1965).

206. *E.g.*, Kokomo Opalescent Glass Co. v. Arthur W. Schmid Int'l, Inc., 371 F.2d 208 (7th Cir. 1966); National Gas Appliance Corp. v. AB Electrolux, 270 F.2d 472 (7th Cir.), *cert. denied*, 361 U.S. 959 (1959); Michael Schiavone & Sons v. Galland-Henning Mfg. Co., 263 F. Supp. 261 (D. Conn. 1967); Electronic Mfg. Corp. v.

Boston Metals Co.,[207] another Maryland case, it was determined that the contract in suit had been "made" or accepted in Maryland, and that jurisdiction over the Panamanian defendant could properly be obtained. But the court carefully emphasized partial performance of the contract was also to take place in Maryland[208]—and this despite the fact that the applicable Maryland long-arm statute says nothing about performance.

In view of the absence of any case in which long-arm jurisdiction was predicated *solely* on acceptance of a contract within the state, a conservative forecast as to the operation of section 410.10 in such a situation should run something like this: If the *sole connection* between the contract in suit and the state of California is the fact that it was accepted there, then jurisdiction over the nonresident defendant may well prove unobtainable;[209] but if in addition to the acceptance in California, some part—however slight—of either party's performance was to be undertaken there, then the exercise of jurisdiction will probably be upheld.[210]

(3) *Performance within the State*

The cases leave little room for doubt that when the contract in suit is to be performed wholly or in part by either party within the forum state, the requisite substantial connection exists and long-arm jurisdiction over an absent defendant may properly be assumed.[211] The only apparent qualification to this broad statement is the one imposed by *Hanson*: The defendant must have been able to foresee, at the time the contract was executed, that performance would take place within the state.

The leading case in the contracts field lends some support to this proposition. In *McGee*, both the plaintiff's performance—mailing

Trion, Inc., 205 F. Supp. 842 (S.D. Ind. 1962); Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962); Esser v. Cantor, 55 Misc. 2d 235, 284 N.Y.S.2d 914 (New York City Civ. Ct.), *aff'd*, 55 Misc. 2d 720, 286 N.Y.S.2d 389 (Sup. Ct. App. T. 1967).

207. 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).

208. *Id.* at 261, 107 A.2d at 367-68.

209. *See* SECOND RESTATEMENT OF CONFLICTS § 36, comment *e* at 193: "While in state X where both are domiciled, A and B negotiate the terms of a contract which is to be performed in X. The contract is drawn up in X and B signs it there. A, however, is too hurried to sign the contract at that time. He signs it in State Y and from there mails it back to B in X. On these facts alone, Y may not exercise judicial jurisdiction over A as to causes of action arising from the contract."

210. *See* SECOND RESTATEMENT OF CONFLICTS § 36, comment *e* at 193, Illustration 3.

211. See cases cited note 206 *supra*.

premium payments—and the defendant's performance—paying the beneficiary upon the death of the policyholder—were to take place in California. There were, of course, additional connections with California: Some preliminary negotiations occurred here, the contract was accepted here, and—as the Court emphasized—California had a special interest in facilitating suits by residents against out-of-state insurers. The fact that both parties' performance was to be undertaken in California doubtless carried great weight, however, and may well have sufficed in itself to support California's exercise of long-arm jurisdiction. California's "manifest interest" would have been much less substantial if the contract were to have been performed elsewhere.[212]

The notion that mere performance of a contract in the forum state constitutes the requisite substantial connection is considerably reinforced by a recent North Carolina case, *Byham v. National Cibo House Corp.*[213] This was a suit brought against a Tennessee franchisor by a North Carolina franchisee who sought to rescind the franchise agreement and recover damages for the franchisor's alleged fraud. The applicable North Carolina long-arm statute subjected foreign corporations to the state's jurisdiction in any action arising out of a contract made or to be performed in North Carolina.[214] The contract involved in *Byham* had not been "made" in North Carolina; technically, it was accepted by the defendant in Tennessee. Nevertheless, jurisdiction of the North Carolina court was upheld on the ground that the contract was to be performed in that state.

The foregoing analysis of contractual contacts may appear overly mechanical and academic. Most of the reported decisions bear witness that as a practical matter, a contracts case will seldom arise where either preliminary negotiations, acceptance, or performance is the only substantial and purposeful connection with the forum state.[215] In the overwhelming majority of cases, more than one—and very likely all three—of these factors will be present. In many cases, there will be some basis other than the isolated contractual contact, such as status, "presence," etc., upon which long-arm jurisdiction can be based. In all of these situations, if they occur in California, jurisdiction over an absent defendant will almost certainly be obtainable under new section 410.10.

212. See note 200 *supra*.

213. 265 N.C. 50, 143 S.E.2d 225 (1965).

214. N.C. GEN. STAT. § 55-145 (1953).

215. *See, e.g.*, Panamerican Consulting Co. v. Corbu Industrial, S.A., 219 Md. 478, 150 A.2d 250 (1959); Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, *cert. denied*, 348 U.S. 943 (1955).

Conclusion

As stated at the outset, the overriding purpose of this essay has been to seek practical guidelines for the interpretation of California's new long-arm statute and to predict its probable application in various types of concrete cases. Such an enterprise is surely a necessary one; but in a certain sense, it can never be completed and will always fall short of perfection—if perfection be defined as a minutely detailed and permanently valid classification of all factual situations in which a state's exercise of jurisdiction over an absent defendant may be sustained. The mandate of section 410.10 is in terms coextensive with the mandate of constitutional due process, and due process issues are not susceptible of any such precise and definitive resolution. New developments in society at large will cause jurisdictional issues to be presented in the context of new and unforeseen factual situations. These in turn will call for innovative interpretations of the due process limits. As Mr. Justice Black observed in *McGee*:

> Looking back over this long history of litigation [from *Pennoyer* through *International Shoe*] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. . . . With [the] increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[216]

California courts, in their past decisions, have recognized that the "fundamental transformation" here referred to is a continuing process, and that the concomitant expansion of the permissible scope of state jurisdiction should continue at an equal pace. They have therefore demonstrated a willingness to place a broad and liberal construction upon the various long-arm provisions in effect prior to the enactment of section 410.10. The leading example is *Henry R. Jahn & Son v. Superior Court*,[217] in which the supreme court interpreted the "doing business" provisions of old section 411 to require only that a foreign corporate defendant have minimum contacts with the state. The courts, henceforth unhindered by statutory restrictions, will doubtless continue this process of liberal construction when they begin to apply section 410.10.

216. 355 U.S. at 222-23.
217. 49 Cal. 2d 855, 323 P.2d 438 (1958).