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Special Appearance in California - The Need for Reform

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ON JULY 1, 1970, the new Title 5 of the California Code of Civil Procedure, relating to Jurisdiction and Service of Process, became effective.[1] The key provision is section 410.10: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." California now has the broadest and most sweeping of "long-arm" statutes. This expansion of the jurisdiction of its courts over individuals and corporations served with process while outside the state[2] is certain to raise critical problems when defendants so served seek to challenge the jurisdiction of the California courts over them.[3] The traditional method for such challenge and the one long recognized in California is the so-called "special appearance"—in form a motion to quash service of process.

With only minor exceptions, the revision by Title 5 of the statutory provisions for jurisdiction and service of process, ignored the problems of the special appearance and continued the pre-existing law on the subject.[4] The basic provision for appearance, section 1014 of the Code of

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[1] For a comprehensive review of Title 5, *see "Symposium: California Jurisdiction,"* 21 HASTINGS L. J. 1105–1318 (May, 1970) and Part I, 1969 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA, 27 et seq.

[2] Since the decision in Henry R. Jahn & Son v. Superior Court, 49 C.2d 855, 323 P.2d 437 (1958) corporations were purportedly subject to such expanded jurisdiction under Code of Civil Procedure section 417, but the appellate courts did not always permit it; *see* discussion in Buckeye Boiler Co. v. Superior Court, 71 C.2d 933, 80 Cal.Rptr. 113 (1969).

[3] Buckeye Boiler Co. v. Superior Court, *supra* note 2, although decided prior to the effective date of TITLE 5, is indicative of the type of problem that the courts will have to face.

[4] Part I, 1969 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA, at page 61 comments on section 418.10 as follows: "Section 418.10 continues the law that permits a defendant . . . who desires to challenge the jurisdiction of the court and to raise certain defenses, to make a special appearance for such purposes, without submitting to the jurisdiction of the court. (Subdivision (a).) At the same time, Section 418.10 also permits him to object on inconvenient forum grounds to the court's exercising its jurisdiction over him if his challenge

Civil Procedure, is unchanged. It provides: "A defendant appears in an action when he answers, demurs, files a notice of motion to strike, or gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for him." Old section 416, in effect prior to July 1, 1970, provided: "The *voluntary* appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him." (Emphasis added.) This section has been replaced in Title 5 by the new section 410.50 which reads: "A *general* appearance by a party is equivalent to personal service of summons on such party." (Emphasis added.) There is nothing in the legislative history[5] to indicate that any substantive change was intended by the substitution of the term "general appearance" for "voluntary appearance." There may be some difficulty in the interpretation of the clause "is equivalent to personal service of summons" since Article 3 of Title 5, which deals with the manner of service, avoids the use of the word "service" and speaks instead of "personal delivery" of the summons.[6] It would seem that the intent of the legislature, and the only sound interpretation of section 410.50, is that a general appearance is equivalent to delivery of the summons personally to the defendant within the state of California and that whatever formerly constituted a "voluntary" appearance, unless expressly changed by statute, now constitutes a "general" appearance.

As further bearing on the view that no substantive changes were intended, section 418.10(d) continues the prior law[7] that a motion to quash, a stipulation or motion for extension of time and a request for relief from default, when coupled with a motion to quash, are not general appearances.[8] There is only one substantive addition. Under subsection 418.10(a)(2) a motion to dismiss for *forum non conveniens* is not a general appearance. As a matter of statutory construction, it may be assumed that the failure to amend constitutes an approval and confirmation of the existing case law. It is the thesis of this article that in so doing the legislature has continued an archaic body of law that was already re-

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to jurisdiction should be denied." This report has the status of offical legislative history; *see* ATTORNEY'S GUIDE TO CALIFORNIA JURISDICTION AND PROCESS, §1.1, CONTINUING EDUCATION OF THE BAR, 1970. *See also* Note: *Statutory Construction Problems,* 21 HAST. L.J. 1303 (1970).

[5] *Supra,* note 4.

[6] See section 415.10: "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served."

[7] For the prior law, *see* former sections 416.1—416.3 of the Code of Civil Procedure.

[8] Section 581a, which provided that a motion to dismiss under that section was not a general appearance, also remains unchanged.

plete with technical traps[9] and unfairly weighted in favor of plaintiffs and against defendants, that this law is unsuited to dealing with the problems that will be created by the provisions of Title 5 and therefore substantial changes are necessary to achieve a proper balance. To establish this thesis, this article will first state the current law, second briefly explore the historical circumstances that shaped it, and consider the differences between those circumstances and the effect of Title 5 and section 410.10, and finally propose a series of changes that it is believed will achieve a proper balance between the respective interests of plaintiffs and defendants.

I
SPECIAL APPEARANCE IN CALIFORNIA— THE CURRENT LAW

The purpose of a special appearance is easily stated. It is a motion by a defendant seeking a ruling that the court lacks jurisdiction over his person sufficient to enable the court to render a "personal judgment" against him.[10] It is to be distinguished from a general appearance which is, by its effect, a submission by the defendant personally to the jurisdiction of the court.

The form for making and the procedure for preserving a special appearance in California are technical matters. The statutory law on the subject is sparse and has just been referred to. Except for those specifically enumerated matters, the form in which the special appearance must

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[9] *See* 1954 *Report of the State Bar Committee on the Administration of Justice,* 29 STATE BAR J. 227 (1954); quoted *infra* text at note 31.

[10] A similar problem is presented by the so-called "limited appearance" in a proceeding based on "quasi-in-rem" jurisdiction. It arises when the plaintiff has no basis for asserting jurisdiction in the forum court other than that acquired over property belonging to defendant, located in the forum and subjected to the jurisdiction of the forum court by attachment, garnishment or similar process. In such a case, if defendant seeks to resist the claim against him, some courts allow him to limit his appearance to defending only to the extent of his interest in the attached property, while other courts hold he must enter a personal appearance, subjecting him to the possibility of an in personam judgment, entitled to full faith and credit anyplace. *See,* for discussion of the problem, Cheshire National Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916); Harnischfeger Sales Corporation v. Sternberg Dredging Co., 189 Miss. 73, 91 So. 94 (1939); Green, *Jurisdictional Reform in California,* 21 HAST. L. J. 1219, 1225 (1970). A discussion of the implications of allowing, or not allowing a "limited appearance" are outside the scope of this article, but it is observed that there seems little logic in the limited appearance; if the defendant has defended on the merits, why should not the adjudication conclude the matter? Is not the limited appearance merely an illogical way of dealing with the far more illogical situation—the unfairness inherent in permitting quasi-in-rem jurisdiction to be invoked in a wholly inappropriate and inconvenient forum? And is not the proper place to attack the problem at the source? Again, *see* the comments of Professor Green in the article previously cited in this footnote.

be made, the matters which may be raised, and the relief which may be requested without waiving the special appearance and converting it into a general appearance are the product of judicial decisions.[11] The tenor of those decisions has consistently been that the special appearance was not looked upon with favor, and in order to make and preserve such an appearance, the defendant had to proceed with precision and caution. If there was any deviation from the rules, there was a waiver of the jurisdictional issue and a general submission to the court's power.

The fundamental rule is that the substance of the motion, the character of the relief sought and the grounds urged in support thereof, and not the label affixed to the proceeding, control. Denominating the appearance as "special" is of no consequence whatsoever. That rule was thus stated in *Judson v. Superior Court:*

> Did the party appear and object only to consideration of the case or any procedure in it because the court had not acquired jurisdiction over the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in the pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, careful or directly the appearance may be denominated or characterized as special. The rule in this regard may be epitomized by saying that if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance to that purpose only, then he has made a special appearance, but if he raises any other question or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he has made a general appearance.[12]

In *Judson* the defendant had moved to quash service of process and had included in his moving papers a motion to dismiss upon the grounds that the court lacked subject-matter jurisdiction. In accord with the stated rule, the inclusion of the second motion vitiated the purported special appearance.[13]

Two groups of cases, one dealing with motions to dismiss for want of prosecution, the other with extensions of time, well illustrate the problems and technicalities that have abounded under the above-stated rule. In *Brock v. Fouchy*[14] a motion to dismiss the action because of the failure

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[11] The significant cases are cited *infra* in this article.

[12] 21 C.2d 11, 13, 129 P.2d 361 (1942).

[13] *Judson* has since been overruled on this precise point: see text *infra* at note 34.

[14] 76 Cal.App.2d 363, 172 P.2d 945 (1946); *see also* Sharpstein v. Eels, 132 Cal. 507, 64 Pac. 1080 (1901), and comment on the principal case in The 1880 Corporation v. Superior Court, 57 C.2d 840, 843, 366 P.2d 641, 644 (1961).

of plaintiff to comply with the *mandatory* provisions of section 581a of the Code of Civil Procedure was held not to be a general appearance because a "contrary result would emasculate the statute." However, in *Bank of America v. Harrah*,[15] a motion addressed to the *discretion* of the court and seeking dismissal for failure to prosecute with due diligence, was held to constitute a general appearance. The issues raised by these hair-line distinctions were eliminated by statutory amendments in 1955.[16]

Stipulations and court orders extending the time of a defendant to move, plead or answer the complaint were, in some cases, held to constitute a general appearance and at other times not to preclude a special appearance.[17] There was no basis for reconciliation among the decisions and this matter was finally resolved in 1955 by the enactment of section 416.1, continued in the new Title 5 as part of section 418.10.

Under a strict application of the *Judson* rule, the filing of a demurrer,[18] an allegation that the complaint did not state a cause of action,[19] a motion to dismiss,[20] or to tax costs[21] or a request for any relief[22] other than quash-

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[15] 113 Cal.App.2d 639, 248 P.2d 814 (1952). Although more than three years had elapsed since the commencement of the action, defendant's affidavit admitted residence outside the state during most of the period and this prevented the application of the mandatory provisions of section 581a. Defendant therefore was forced to rely on a claim of laches and detriment to him and this was held sufficient to constitute a general appearance.

[16] Stats. 1955, C. 1452, p. 2640, §5 amending CODE CIVIL PROC. §581a.

[17] The following cases are illustrative of the problem. Held to constitute a general appearance—stipulation and order extending time to answer: California Pine Box and Lumber Co. v. Superior Court, 13 Cal.App. 65, 108 Pac. 882 (1910); stipulation extending time to answer, Merner Lumber Co. v. Silvey, 29 Cal.App.2d 426, 84 P.2d 1062 (1938); stipulation extending time to plead, Roth v. Superior Court, 147 Cal. 604, 82 Pac. 246 (1905).

Held *not* to constitute a general appearance—order extending time to plead: Davenport v. Superior Court, 183 Cal. 506, 191 Pac. 911 (1920); stipulation and order extending time to plead, Chilcote v. Pacific Air Transport, 24 Cal.App.2d 32, 74 P.2d 300 (1937); stipulation extending time to answer coupled with agreement to grant successive extensions in consideration of defendant making regular payments on account, Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470 (1896).

[18] *See* Olcese v. Justice Court, 156 Cal. 82, 103 Pac. 317 (1909); McPherson v. Superior Court, 22 Cal.App.2d 425, 71 P.2d 91 (1937); Gulick v. Justice Court, 101 Cal.App. 619, 281 Pac. 1031 (1929).

[19] *See* Security Loan and Trust Co. v. Boston, etc. Fruit Co., 126 Cal. 418, 58 Pac. 941 (1899).

[20] Judson v. Superior Court, 21 C.2d 11, 129 P.2d 361 (1942); Roberts v. Superior Court, 30 Cal.App. 714, 159 Pac. 465 (1916).

[21] There are no clear decisions on this point *but see* Nisbet v. Cleo Mining Co., 2 Cal. App. 47, 83 Pac. 70 (1905). Logically a prayer for costs would be an appearance under the rationale of the *Judson* opinion.

[22] There were some minor exceptions; for example in Salmonson v. Streiffer, 13 Cal.App. 395, 110 Pac. 144 (1910) filing exceptions to the sureties on an attachment bond was held not to be a general appearance.

ing service of process might negate the purported special appearance and subject the defendant to the jurisdiction of the court. Although some decisions showed a tendency to relax slightly from the strict interpretation of *Judson,*[23] the issues considered and the fine lines of distinction that were drawn only served to emphasize how technical the rules were. The inclusion by defendant of a motion to dismiss coupled with a motion to quash became particularly troublesome to the courts. The difficulty was thus expressed in *Hernandez v. National Dairy Products:*

> While it is preferable procedurally for one appearing specially for the purpose of challenging the court's jurisdiction over his person to do so by motion to quash service of process rather than by motion to dismiss, there are no cases holding the latter method *per se* constitutes submission to the jurisdiction.[24]

There was only one clear exception. If the matter that was claimed to constitute the waiver related solely and exclusively to a ruling on the jurisdictional issue, its inclusion did not affect the special appearance.[25] Thus discovery proceedings, limited to the ascertainment of facts necessary to determine the jurisdictional question, did not constitute a request for relief beyond the scope of the special appearance.[26]

The technicalities and difficulties confronting the defendant are not limited to the form of the initial appearance. If the motion to quash is denied, the defendant may not thereafter plead to the merits or seek any

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[23] The principal relaxation has occurred in cases where a motion to quash either used language requesting a dismissal of the action or joined with the claim of defective process or service a claim of want of subject matter jurisdiction.

Inclusion of language requesting dismissal was held not to affect an otherwise valid special appearance in Holtkamp v. States Marine Corp., 165 Cal.App.2d 131, 331 P.2d 679 (1958); Hernandez v. National Dairy Products, 126 Cal.App.2d 490, 272 P.2d 799 (1954).

An opposite result was reached in Kallman v. Henderson, 234 Cal.App.2d 91, 44 Cal.Rptr. 108 (1965); Batchelor v. Finn, 169 Cal.App.2d 410, 337 P.2d 545 (1959).

The cases are distinguishable, but the fact remains that an excessive amount of time and energy was wasted on hair splitting distinctions before getting to the merits of the controversy.

On claims of want of subject matter jurisdiction, *see* text at note 34 *infra* and the earlier decision in Josephson v. Superior Court, 219 Cal.App.2d 354, 33 Cal.Rptr. 196 (1963).

[24] 126 Cal.App.2d 490, 494, 272 P.2d 799, 804 (1954).

[25] *See* for examples: The 1880 Corporation v. Superior Court, 57 C.2d 840, 371 P.2d 985 (1962); Varra v. Superior Court, 181 Cal.App.2d 12, 4 Cal.Rptr. 920 (1960); Braden Copper Co. v. Industrial Acc. Com., 147 Cal.App.2d 205, 305, P.2d 222 (1956); Armstrong v. Superior Court, 144 Cal.App.2d 420, 301 P.2d 51 (1956).

[26] The principal case is The 1880 Corporation v. Superior Court, 57 C.2d 840, 371 P.2d 985 (1962) holding that objections to interrogatories, limited to the issue of jurisdiction over a foreign corporation and the question of whether it was doing business in California, do not constitute a general appearance.

relief in the action without submitting to the jurisdiction.[27] Prior to 1931, his only recourse was to suffer a default and then seek to restrain enforcement of the judgment on the grounds that the court lacked jurisdiction.[28] This harsh rule was ameliorated in 1931 by the decision in *Jardine v. Superior Court*[29] which authorized recourse to the extraordinary writs to secure an immediate appellate court review of the trial court's decision and extended the defendant's time to plead until after determination by the appellate court. This right of review was subsequently incorporated in the Code of Civil Procedure[30] and is now section 418.10(c).

In 1954 the California State Bar Committee on the Administration of Justice reported: "It has long been recognized by this Committee and, we believe, by the entire bar that the practice in this state with reference to a litigant who desires to challenge the jurisdiction of the court over his person is antiquated and quite inadequate." [31] That report recommended certain changes and in 1955 several amendments became effective.[32] These are the amendments previously referred to,[33] concerning extensions of time to plead, motions to dismiss for want of prosecution, and availability of appellate review by extraordinary writ. However, these changes affected only the fringe of the problem. The heart of the matter remained untouched. And there has been only one significant change since 1955.

In 1965, *Goodwine v. Superior Court*[34] overruled *Judson* and held that a motion to dismiss for want of subject-matter jurisdiction, coupled with a motion to quash for want of personal jurisdicition, did not constitute a general appearance. The rationale invoked in *Goodwine* was that

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[27] Remsberg v. Hackney, 174 Cal. 799, 164 Pac. 792 (1917). *Cf.* the contrary rule early followed in the federal courts, Harkness v. Hyde, 98 U.S. 476 (1878) and now embodied in the Federal Rules of Civil Procedure, Rule 12, discussed in Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3rd Cir. 1944).

[28] Remsberg v. Hackney, 174 Cal. 799, 164 Pac. 792 (1917).

[29] 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291 (1931).

[30] Section 416.3 added by stats. 1955, c. 1452, p. 2640, §3.

[31] 29 STATE BAR. J. 227 (1954).

[32] Sections 416.1—416.3 were added to the Code of Civil Procedure and Section 581a was amended. These changes were analyzed in Froehlich, *Procedure: Motions to Quash, Strike and Dismiss,* 43 CAL. L. REV. 695 (1955).

[33] *See* text at note 16 et. seq.

[34] 63 C.2d 481, 484–485, 47 P.2d 201, 205–208 (1965): "We agree with plaintiff that defendant made a motion to dismiss. Even though the request for dismissal is found only in the title of defendant's motion, the motion rests on a theory that the court lacked subject-matter jurisdiction when neither party was domiciled in the state. Defendant thus challenged the subject-matter jurisdiction of the court as well as its personal jurisdiction over him. We disagree with plaintiff, however, that the motion to dismiss for lack of subject matter jurisdiction is a general appearance . . . Judson v. Superior Court . . . is to the contrary, but it has often been criticized . . . and is overruled."

the court should not be deprived of the opportunity to hear from the defendant and fully consider the issue of its subject-matter jurisdiction—a result that would otherwise flow from a strict adherence to the *Judson* rule. Whether *Goodwine* was intended to be limited to the particular case of joining a claim of want of subject-matter jurisdiction, or whether it portended a new attitude towards liberalizing the special appearance, was not clear. In the five years that have elapsed since the decision, there has been no Supreme Court decision clarifying the matter. It is, therefore, quite probable that *Goodwine's* overruling of *Judson* is limited to the specific issue of subject-matter jurisdiction, while all the other limitations on making and preserving the special appearance continue unchanged. Certainly, until the contrary appears more clearly, that is the only safe course for a defendant to follow.

II
SPECIAL APPEARANCE IN CALIFORNIA — A PAGE OF HISTORY.

It is apparent from the foregoing summary of the current law that the attitude of the California courts towards the special appearance has been one of openly avowed hostility. The reason is not hard to find. It lies in the circumstances that produced the early cases and thus shaped the present law.

The principal source for our law concerning the special appearance is the decision in *Olcese v. Justice Court,* which described such appearances in these terms:

> They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea.[35]

Under the peculiar facts of the *Olcese* case, this characterization was appropriate. The original action had been brought in a Justice Court in Contra Costa County, and the defendant had been served in San Francisco. Under the existing law,[36] such service was not valid in a suit on an oral contract and the complaint had not alleged a written contract. The opinion tells us that the defendant specially appeared for the purpose of objecting to the jurisdiction of the court over him and in addition "de-

[35] 156 Cal. 82, 87, 103 Pac. 317, 318 (1909).

[36] Code of Civil Procedure Sections 832 (7) and 848.

murred to the complaint in said action on the ground that the court has no jurisdiction of the person of this defendant or of the subject matter of said action" and therefore prayed "to be hence dismissed with his costs herein incurred." [37] While not a model of pleading, it seemed rather drastic for the court to hold that the demurrer on the grounds of want of subject-matter jurisdiction was a request for relief that could only be afforded a party before the court and hence a general appearance. The opinion did not allude to the effect of the request for costs.

However, it must be conceded that this was a poor case on which to build, or attempt to build, a sound law of special appearance. It was clear that Olcese was subject to the judicial power of the State of California (even if not to the Justice Court of Contra Costa County) and granting the motion to quash would only have meant a fresh service on defendant in Contra Costa County or a new action in San Francisco; hence the court's impatience with defendant's plea was justified.

Many of the special appearance cases,[38] particularly the earlier ones, are similar in tenor in that the defendant, by accepted standards of due process, was unquestionably subject to the jurisdiction of the California judicial system. He had either been personally served in California or was a resident, or else a corporation doing business in California. In these cases, the challenge to the court's jurisdiction was not based on the claim of lack of fundamental adjudicatory power but on some technical defect in the form of process, or the place or manner of service. In brief, the defendant's claim did not attack the existence of adjudicatory power. It attacked only the manner in which that power had been asserted.

This is an entirely different problem from that which will confront the courts of this State under section 410.10. That section extends the frontiers of *in personam* jurisdiction of California courts to the outer limits of the due process clause,[39] whatever those limits may be. Two consequences directly related to the special appearance problem will follow.

The first is that we may now anticipate numerous cases in which our courts will be called upon to resolve heretofore untested constitutional problems relating to the scope of a state's adjudicatory power.[40] The

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[37] 156 Cal. at 84, 103 Pac. at 320.

[38] Armstrong v. Superior Court, 144 Cal.App.2d 420, 301 P.2d 51 (1956) is a good example; motion to quash was based on the claim that the summons was defective in form for failure to bear the endorsement required by Code of Civil Procedure §474. The court held that the issue raised was jurisdictional and quashed service.

[39] See Part I, 1969 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA, at page 33.

[40] Buckeye Boiler Co. v. Superior Court, 71 C.2d 933, 937, 80 Cal.Rptr. 113 (1969) is one example of the scope of the problem.

second consequence is that such statutes afford an opportunity for the harassment of an out-of-state defendant who resides at a distance from the California forum and who will be faced with the serious problem of the economics of appearing versus the economics of a possibly valid default judgment against him.[41] If we are to provide the fullest possible opportunity for a hearing of the jurisdictional issues and are also going to provide reasonable protection for the out-of-state defendant, drastic changes in both the approach to and the rules governing the special appearance are essential.

III
SOME PROPOSED CHANGES

The first step in the revision of the current law of special appearance and its replacement by a more satisfactory doctrine is the recognition that there are two entirely distinct problems that have heretofore been treated under one label and as if they were the same problem. In one category are the cases such as *Olcese* in which the only claim was that the form of process or the mode or place of service did not strictly conform to statute. In the other category are the cases in which the claim was that the adjudicatory power of the state of California could not constitutionally be asserted against the protesting defendant, absent his voluntary appearance or consent.

The cases in the first category do not involve jurisdiction in any constitutional sense. At the most they involve the issue of adequacy of notice and at the worst they are, as characterized by *Olcese,* purely dilatory pleas. There is no need for a special appearance or a motion to quash in these cases. A motion to dismiss would be entirely unwarranted. The only appropriate procedure would be either to vacate a default, if one had been taken, or grant such relief as might be necessary to protect a party who had been misled to his detriment by an error in the form or mode of service of process, or to stay further proceedings until the defect was cured. The emphasis should not be on the form of the motion or the allegations in support thereof. The emphasis should be on determining what relief is nec-

[41] To pose a simple illustration: Plaintiff, a resident of San Francisco, sues defendant, a resident of Reno, in San Francisco, alleging a battery committed by defendant on plaintiff on the California side of the boundary line at Stateline, California. Defendant is served with process in Nevada. Under accepted doctrine, if the tort was committed in California, the California courts have jurisdiction, but if the tort was committed on the Nevada side of the state line, there is no jurisdiction in California. A special appearance in San Francisco to object to the jurisdiction of the court may require as much preparation as a trial on the merits and full litigation of the jurisdictional issue could result in fees and costs as high as those incurred solely in a defense on the merits.

essary to protect the right of a defendant, subject to the court's jurisdiction, to a fair hearing on the merits and then moving to that hearing as expeditiously as possible.

The cases in the other category do involve jurisdiction over the defendant in the constitutional sense and if such jurisdiction does not in fact exist, dismissal as to such a defendant is appropriate. In these cases the plea is not a dilatory one but rather goes to the fundamental question of state power in a federal system, for, as the United States Supreme Court has observed: "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." [42] These are the cases that will arise with increasing frequency under Section 410.10.[43] They are the cases with which we are primarily concerned. They deserve, indeed require, a new attitude and a new vocabulary. In the interest of fairness to defendants, they call for an abandonment of the prevailing hostile attitude and the substitution of a climate favorable to protecting and preserving the claim and affording it the fullest possible hearing *on the merits*.

To aid in this approach, the phrase "motion to quash service of process" should be entirely abandoned. It is particularly inappropriate in cases in which the constitutional basis for jurisdiction is challenged because it tends to over-emphasize the act of service as the determinative act. Under contemporary legal theory, the act of service is primarily for the purpose of assuring the defendant of reasonable notice of the proceedings.[44] The source of the court's adjudicatory power, in the constitutional sense, more properly depends upon the defendant's relation to the forum, as citizen or resident, or upon his conduct or activities in or affecting persons or property within the forum.[45] This is the real issue and the motion should clearly be denominated one to determine whether facts exist that constitutionally support the court's asserted jurisdiction.

A. Time of Motion

Normally such a motion should be made at the time the moving party files his first pleading, motion, or appearance in the action. This is the current law in California and is required by the Federal Rules.[46] However, there

[42] Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[43] A significant number of cases have already arisen under Section 417, involving foreign corporations; *see* Buckeye Boiler Co. v. Superior Court, 71 C.2d 933, 80 Cal.Rptr. 113 (1969) and cases cited therein for examples.

[44] See 1969 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA at page 69; Gorfinkel and Lavine, *Long-Arm Jurisdiction in California*, 21 HAST. L. J. 1163, 1171 (1970).

[45] Gorfinkel and Lavine, *op. cit.*, at page 1170 et seq.

[46] Rule 12.

may be cases in which the facts constituting the basis for the claimed want of jurisdiction were not and could not, with reasonable diligence, have been known to the moving party at the time of his first pleading. In such cases it should be within the trial court's discretion, assuming no undue delay of the eventual trial, to permit later filing.

B. Form of Motion and Requests for Other Relief

The most essential change here is to remove the maze of technicalities that now limit the form and substance of the special appearance and permit the defendant to join, with his objection to jurisdiction, any other pleading or any other request for relief, other than a prayer for affirmative relief against another party to the action, or an interpleaded third party. This is, of course a fundamental change from the present law. It would adopt substantially the present rule in the Federal courts[47] and in several of the states.[48] The justifications for such a change are many.

Firstly, it will avoid the traps and pitfalls of the present law by which an objection to the jurisdiction, no matter how sound in principle, may be lost by the inadvertent inclusion of some matter relating to other issues. Since there can be no sound justification for such technicalities, there can be no basis for continuing a practice that cannot be justified in their absence.

Secondly, it will enable the defendant, if he prevails, to recover his costs in the proceeding. At the present time, there does not appear to be a clear decision in California on the effect of a prayer for costs.[49] The logic of the *Judson* decision compels the conclusion that a request for costs is a request for relief that could only be granted a party before the court and therefore constitutes a waiver of any jurisdictional defect. Fairness to the defendant requires that this matter be clarified and that the clarification permit recovery of costs.

Thirdly, it would enable the defendant to proceed with his defense while the jurisdictional issue was being determined. Under the present state of the law, if the trial court rules against the defendant on the jurisdictional issue, he may seek appellate court review, but all proceedings are stayed pending such review and the defendant may not take any other steps without waiving his special appearance. There may well be occasions when the defendant, if he is adequately to protect his rights, should be per-

[47] Rule 12; Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d. Cir. 1944).

[48] *E.g.* R. B. General Trucking, Inc. v. Auto Parts and Service, Inc., 3 Wis.2d 91, 87 N.W.2d 863 (1958).

[49] *See* text *supra* at note 20 and note 21.

mitted to proceed. One obvious example would be discovery proceedings, to enable him to defend on the merits if the court's jurisdiction is sustained. Yet, under the present law, discovery proceedings, unless related solely to the jurisdictional issue,[50] will be regarded as constituting a general appearance.

Fourthly, it will eliminate the futile preliminary sparring that wastes the time of courts and litigants who must determine whether a misplaced or inadvertent phrase was technically sufficient to cause a defendant to become subject to the jurisdiction.

C. Waiver

There are three possible approaches to the issue of waiver of the jurisdictional issue after an adverse ruling by the trial court. One approach is that taken by the Federal Rules of Civil Procedure. A special appearance, once made, is preserved throughout the case regardless of subsequent proceedings and may be reviewed on appeal from a final judgment after trial on the merits.[51] This, it is submitted, goes too far. One purpose of a special appearance is to protect the defendant against the burden of defending in a court that is not a proper forum. But if the case has been fully and fairly tried, all detriment to the defendant has occurred and it would seem to serve no useful purpose to nullify the proceedings and compel the plaintiff to relitigate in another forum, assuming that the statute of limitations has not barred his claim.

A second approach is that taken by California. Any proceeding after the special appearance has been overruled, other than a petition for writ of mandate to review the trial court's order, is a waiver of the jurisdictional defect.[52] This, it is submitted, is equally difficult to justify. All proceedings in the principal case are at a standstill. The defendant may not take steps necessary to protect his rights in the event a trial is had, and the plaintiff is compelled to wait until the appellate court has ruled before he knows what the defense, if any, will be.

It is suggested that there is a middle ground between these two extremes which would better serve the ends of justice and the interests of all parties to the litigation. We start with the premise that if the defendant's challenge to the jurisdiction is not allowed by the trial court and intermediate appellate review, by writ of mandate, is then available to test the correctness of the ruling, the defendant should be required to accept the trial court

[50] The 1880 Corporation v. Superior Court, 57 C.2d 840, 371 P.2d 985 (1962).

[51] *Supra* note 47.

[52] See Remsberg v. Hackney, 174 Cal. 799, 164 Pac. 792 (1917) and Muller v. Reagh 148 Cal.App.2d 157, 306 P.2d 593 (1957).

ruling as *res judicata* or seek prompt appellate review. If this premise is accepted, then the controlling question is when must such review be sought.

At the present time, a defendant has a maximum of thirty days after his motion is denied to apply for writ of mandate. During that thirty day period, all proceedings are stayed and if he does petition, proceedings are further stayed until after final judgment in the mandate proceeding. This period of thirty days does not seem unreasonable. It is therefore proposed that the defendant be required to petition for writ of mandate within thirty days after an adverse ruling by the trial court or waive his claim of jurisdictional defect. But it is further proposed that if the defendant does so petition and prosecutes that petition with due diligence, then he should be allowed to proceed by pleading on the merits, make any other motions that might be appropriate and generally to prepare for trial without jeopardizing his claim of want of jurisdiction. The only matters that would then constitute a waiver would be either the filing of a pleading seeking affirmative relief or actually proceeding to trial.[53]

This approach it is submitted, would avoid the pitfalls of technical waivers through improper or inadvertent motions, would enable both parties to the litigation better to appraise their chances and thus facilitate settlements, protect the defendant against the danger of not making timely discovery and finally, in those cases in which the decision of the trial court was upheld, substantially shorten the time between final decision in the mandate proceedings and the commencement of trial on the merits.

IV
CONCLUSION

The foregoing should have amply demonstrated the thesis first stated: that the California law on special appearance is archaic, replete with technical traps and unfairly weighted against the defendant. Reform is long over due. We hope that this article may serve to speed up the process and to indicate the direction reform should take.

[53] It might be argued that the parties would be put to considerable waste effort if the final decision in the mandate proceeding were in favor of defendant. However, it must be assumed that if the plaintiff's claim has any substantial merit, it will be tried in some court and the information acquired should be relevant to such trial or to settlement without trial.