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Philip A. Trautman

University of Washington School of Law

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LONG-ARM AND QUASI IN REM JURISDICTION IN WASHINGTON

Philip A. Trautman*

During the past decade and a half considerable change has occurred on a national basis in the areas of choice of law and judicial jurisdiction. In Washington, while there has been some change in choice of law principles, it has been relatively modest. On the other hand, Washington has been in the forefront of the development of jurisdiction concepts.

There has been an unusual amount of significant litigation under the Washington long-arm statute. That litigation and its meaning will constitute the major topic of discussion in this article. In addition, recently there has been an important curtailment of quasi in rem jurisdiction in Washington, perhaps brought about because of the long-arm developments. The significance of this curtailment will likewise be explored.

I. WASHINGTON'S LONG-ARM STATUTE

A. Historical Background

The activity in the states in the nineteen-sixties and seventies with respect to jurisdiction has been against a background of well-known United States Supreme Court cases of the forties and fifties. Though there had been previous inroads, the basic decision on judicial juris-

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* Professor of Law, University of Washington; B.A., 1952, J.D., 1954, University of Washington.
diction prior to 1945 was Pennoyer v. Neff\textsuperscript{3} with its\textsuperscript{4} two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. \ldots One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. \ldots The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. \ldots

In 1945, International Shoe Co. v. Washington\textsuperscript{5} was decided. In place of the Pennoyer territorial power concept of jurisdiction there was substituted the requirement that the defendant have such "minimum contacts" that the maintenance of the suit not offend "traditional notions of fair play and substantial justice." International Shoe became the basis for legislative and judicial extensions of judicial jurisdiction.

Two insurance cases of the fifties suggested the minimal degree of contact required to meet the fairness test. In Travelers Health Association v. Virginia ex rel. State Corporation Commission,\textsuperscript{6} Virginia was held to have jurisdiction over a foreign corporation that had claim investigators in Virginia, paid claims there, and whose policy holders in Virginia were encouraged to recommend new prospects for insurance contracts. In McGee v. International Life Insurance Co.,\textsuperscript{7} California was held to have jurisdiction over a foreign corporation which had one reinsurance contract with a California domiciliary, the insurance contract having been delivered there and the premiums having been mailed from there.

That there still exist constitutional limits upon the exercise of judicial jurisdiction by the states was made clear by Hanson v. Denckla,\textsuperscript{8} wherein the Court said:\textsuperscript{9}

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case

\textsuperscript{3} 95 U.S. 714 (1878).
\textsuperscript{4} Id. at 722.
\textsuperscript{5} 326 U.S. 310 (1945).
\textsuperscript{6} 339 U.S. 643 (1950).
\textsuperscript{7} 355 U.S. 220 (1957).
\textsuperscript{8} 357 U.S. 235 (1958).
\textsuperscript{9} Id. at 253.
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 protection of its laws.

On the basis of these decisions, and particularly International Shoe, the states were encouraged to enact the modern-day long-arm statutes, whereby jurisdiction has been extended to certain causes of action arising out of designated activities or effects within the state. Washington in 1959 was one of the first to adopt a comprehensive long-arm statute, patterned after an earlier Illinois statute which had been enacted in 1955.

Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

Id. § 4.28.185 provides:
(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
(a) The transaction of any business within this state;
(b) The commission of a tortious act within this state;
(c) The ownership, use, or possession of any property whether real or personal situated in this state;
(d) Contracting to insure any person, property or risk located within this state at the time of contracting.
(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.
(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.
(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.
(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.
(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

B. General Considerations

The first case to reach the Washington court under the long-arm statute, *Tyee Construction Co. v. Dulien Steel Products, Inc.*,\(^{12}\) became the foundation for much jurisdictional development. Tyee sought to recover alleged extra labor costs incurred under a contract with Dulien Steel Products, Inc., a Washington corporation, whereby Tyee was to dismantle and load for shipment to National Carbon Company of New York three used electrical generators. The generators, located in the State of Washington, belonged to Dulien. Dulien had solicited Belyea Co., a New Jersey corporation, to buy or sell the generators and Belyea had negotiated the ultimate purchase of the generators by National Carbon. Dulien, alleging Belyea's responsibility for the added labor costs, sought to add Belyea as an additional party defendant and to cross-claim against Belyea. The trial court concluded there was no jurisdiction over Belyea and the supreme court affirmed. The asserted basis for jurisdiction was the "transaction of any business" section of the long-arm statute. The court's discussion presumably was directed particularly at that section, but its reasoning has since been applied more broadly.

The court stated that, considering the aforementioned United States Supreme Court cases and the framework of the long-arm statute, three basic factors must coincide if jurisdiction is to be entertained:\(^{13}\)

1. The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
2. the cause of action must arise from, or be connected with, such act or transaction; and
3. the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and the protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

On the basis of "pertinent facts" the court concluded that Belyea had purposefully performed some acts within the state of Washington and that the action arose, indirectly at least, from such acts. The court further concluded, however, upon a consideration and balancing of certain factors, that assumption of jurisdiction over Belyea would of-


\(^{13}\) Id. at 115-16, 381 P.2d at 251.
fend traditional notions of fair play and substantial justice within the contemplation of the due process clause. Although the court listed the factors, it did not discuss their individual significance or comparative importance, and thus there is some lack of clarity as to why the court reached its conclusion.

The Tyee opinion will require further comment throughout this article, but at this point a few general questions can be posed and an observation made. First, where did the court find the requirement for each of the three factors that it stated must coincide for jurisdiction? The court cited United States Supreme Court cases in conjunction with each factor, suggesting a constitutional basis. However, the court spoke "within the framework of our statute," thereby suggesting that at least some of the factors might have a statutory basis. This problem will be more fully developed later, but the question should be kept in mind.

Second, what is meant by the requirement that the defendant "purposefully do some act or consummate some transaction in the forum state" and, again, from what source does the requirement originate? The purposeful factor can be viewed as having a statutory basis since the long-arm statute speaks of a person who "does any of the acts" enumerated in the statute. However, it may also be viewed as constitutionally based inasmuch as the United States Supreme Court in Hanson spoke of the necessity of "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."

14. (a) Belyea's principal place of business was in New Jersey; (b) the generator transaction represented an isolated business excursion into this state by Belyea; (c) Belyea's participation in the transaction was solicited by Dulien; (d) the transaction involved no systematic or continuing service by Belyea; (e) the presence of any agents of Belyea in this state was incidental, rather than essential, to the transaction; (f) the primary action rested upon the Dulien-Tyee contract; and (g) there was a probability of inconvenience and expense incident to Belyea's defense in this state. Id. at 116, 381 P.2d at 252.

15. That others have had difficulty in understanding the court's reasoning, see Comment, A New Approach to Jurisdictional Analysis?, 43 WASH. L. REV. 833, 836-37 (1968). For a comment critical of the Tyee case and a conclusion that the court was unduly conservative in its treatment of the long-arm statute, see Note, Jurisdiction—The Long-Arm Statute Applied, 39 WASH. L. REV. 234 (1964).

16. See Part II infra.


Related to the above is the question: Why must the cause of action arise from, or be connected with, the act or transaction? It is not at all clear that Hanson requires the act that provides the nexus between the defendant and the forum to be the same act upon which the cause of action is based.\textsuperscript{19} Rather, the requirement seems to have a statutory base in the provision for jurisdiction as to "any cause of action arising from the doing of any of said acts."\textsuperscript{20}

The Tyee court quoted the Illinois Supreme Court favorably to the effect that the long-arm statute, except as might be limited by its terms, reflected on the part of the legislature "a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause."\textsuperscript{21} Although such an approach has been criticized as providing no guideline for counsel or the courts and as allowing for too many borderline cases to be resolved in favor of jurisdiction, it is an approach that has been adopted by a number of courts.\textsuperscript{22} Seemingly, the intent of the statement is to indicate a liberal application of the statute. One wonders, however, whether the Washington court actually implemented the approach in the Tyee case itself in its conclusion of no jurisdiction. With this general background in mind, it is now possible to turn to an examination of the individual sections of the statute.

\textbf{C. Commission of a Tortious Act}

The second case to reach the Washington Supreme Court under the long-arm statute was Nixon v. Cohn.\textsuperscript{23} Plaintiffs were injured in Washington when hurled out of their seats on an amusement ride which had been manufactured in Oregon. Among the defendants were the owners and operators of the ride, who were served personally in Washington, and the manufacturer, who was served in Oregon under the long-arm statute. The court concluded that there was jurisdiction

\begin{itemize}
\item \textsuperscript{19} Comment, Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness, 69 MICH. L. REV. 300, 308–09 (1970).
\item \textsuperscript{20} WASH. REV. CODE § 4.28.185(1) (1974).
\item \textsuperscript{21} Nelson v. Miller, 111 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957).
\item \textsuperscript{22} Leflar, Barely Fair, Not Grossly Unjust, 25 S.C.L. REV. 177. 184 (1973).
\item Professor Leflar concludes:
\begin{quote}
Even more important, clear limits placed somewhat short of the outer margins of due process would protect defendants against the extremes of fair play and substantial justice when exercise of jurisdiction based upon the service would be barely fair, not grossly unjust, but bordering on both unfair play and substantial injustice.
\end{quote}
\item \textsuperscript{23} 62 Wn. 2d 987, 385 P.2d 305 (1963).
\end{itemize}
over the manufacturer on the basis of several subsections of the statute—transaction of business within the state, ownership of property within the state, and commission of a tortious act within the state. As to the latter, the defendant manufacturer contended that it had committed no tortious act within the state since its acts, the manufacturing, occurred in Oregon. The court, relying upon the well-known Illinois case of *Gray v. American Radiator & Standard Sanitary Corp.*, held that occurrence of injury in Washington was sufficient to invoke the statute.

The conclusion that the causing of tortious injury in the state by means of an act done elsewhere is the "commission of a tortious act within this state" is of considerable consequence as representative of an expansive interpretation of the statute. Not all courts have interpreted comparable language in this liberal fashion.

The *Nixon* opinion was particularly noteworthy in that it came less than five months after the much more conservative approach of *Tyee*. Though the court found a "marked difference" in the two cases, the tenor of *Nixon* is more attuned to an expanded treatment of the long-arm statute and more representative of the court's post-1963 analysis.

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24. However, the court stated that the action of the defendant may not have been sufficient to base jurisdiction solely on the section of the statute authorizing jurisdiction over defendants who own property in the state. *Id.* at 994, 385 P.2d at 309.

25. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In *Gray* the defendant, an Ohio corporation, manufactured a radiator valve in Ohio and sold it to a radiator company in Pennsylvania, which installed the valve on a hot water heater in Pennsylvania. The Pennsylvania company sold the heater to a consumer in Illinois, who was injured in Illinois when the heater exploded. The defendant valve company did no business whatever in Illinois, had no agent there, and all the sales to the Pennsylvania company were made out of Illinois. The Illinois court concluded it had jurisdiction under its commission-of-a-tortious-act section.


27. *See Nixon v. Cohn*, 62 Wn. 2d 987, 993, 385 P.2d 305, 309 (1963), in which the court stated:

But there is a marked difference between the facts presented in that case and those in the *Tyee* case. Belyea had been brought into the case because of a contract between two other parties, not because of doing business or of any acts done in this state. The "contacts," if any, were very remote. In the case at bar, there were substantial business contacts, in addition to the commission of a "tortious act" within this state.

*See also* Note, *supra* note 15, questioning whether there was any factual distinction between the two cases.
In a later case the alleged negligence was the writing of a letter by the defendant, then in Chicago, to the plaintiff’s parent corporation whose office was in New York. In the letter the use of the chemical “heptachlor” was recommended upon hops of the plaintiff corporation. The recommendations were communicated from New York to the plaintiff corporation through internal corporate channels. The defendant’s recommendations were followed with the resultant damage to plaintiff’s hop yards in Washington.

The chemical was not sold directly to the plaintiff, but was sold by defendant to an intermediate manufacturer who incorporated the product in a preparation designed for widespread commercial distribution and which preparation the plaintiff ultimately used. The court noted that defendant engaged in nation-wide advertising, had sent a representative to the state to do “missionary” work for the product and had subsidized a research laboratory at Washington State College which conducted tests in the use of the chemical. The court further stated that it was unnecessary to decide whether defendant's activities constituted the transaction of business in the state, inasmuch as the fact that the injury occurred here was sufficient to bring the case within the “tortious act” classification.

An allegation of fraud and misrepresentation in the making of false representations with respect to real estate transactions likewise resulted in jurisdiction even though the acts were committed outside the state, since the injury was suffered within the state. And an action for libel against the Atlantic Monthly Co., a Massachusetts corporation whose magazine is printed in New Hampshire, was allowed for damages allegedly sustained by the plaintiff in Washington, the state of plaintiff’s residence and principal place of business. Again, the

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29. Id. at 471, 403 P.2d at 353.
30. Id. at 472, 403 P.2d at 354.
32. Thiry v. Atlantic Monthly Co., 74 Wn. 2d 679, 445 P.2d 1012 (1968). The opinion was rendered in response to a certified question from a federal district court inquiring whether the long-arm statute applied to an out-of-state publisher who had circulated an alleged libel in the state of Washington. Responding in the affirmative, the Washington court stated, “We believe that our holding in Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp. . . . is crystal clear—so clear in fact that we conclude that the certified question should not have been referred.” Id. at 682, 445 P.2d at 1013.

Libel actions have posed difficulties for the legislatures and the courts. For example, the New York legislature has exempted actions “for defamation of character” from its long-arm statute. N.Y. Civ. Prac. § 302(a)(2). (3) (McKinney 1972). See Comment.
court concluded that it need not determine whether the defendant was transacting business in Washington since an injury was sustained in the state and thus a “tortious act” had been committed in the state. There are apparently no Washington cases posing the question whether the long-arm statute would include a situation in which there was a tortious act or omission in Washington with injury outside the state. Literally read, the Washington statute would apply. However, since the Washington court in the series of cases discussed above has stated that injury is an inseparable part of the phrase “tortious act,” it might be contended that the injury must occur within the state.

The liberal construction that has occurred in the “tortious act without the state—injury within” cases should apply as well to the “tortious act within the state—injury without” situation. The statute would thus include both factual situations. The following language of the Illinois court, quoted favorably by the Washington court, supports such a construction:

We think the [legislative] intent should be determined less from technicalities of definition than from considerations of general purpose and effect. To adopt the criteria urged by defendant would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence of each, whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature. . . . the statute contemplates the exertion of jurisdiction over nonresident defendants to the extent permitted by the due-process clause.

Also arguably supportive of the suggested construction is Callahan v. Keystone Fireworks Co. That case involved defective fireworks


33. Some state statutes expressly cover both situations. See N.Y. CIV. PRAC. § 302(a)(2), (3) (McKinney 1972).


For the words no more require that the last necessary event occur here than that the defendant be present; the commission of a "tortious act" in Illinois ought to be construed, in the light of the statutory purpose and the requirement of due process, to embrace all tort actions in the outcome of which this state can assert a constitutional interest and in which it would not be unfair to subject the defendant to Illinois jurisdiction.

35. 72 Wn. 2d 823, 435 P.2d 626 (1967).
that had been manufactured by the defendant in Pennsylvania, sold to a distributor in Spokane, Washington as a part of the general interstate distribution of the defendant's products and resold in Spokane for use in Coeur d'Alene, Idaho, where the actual injury occurred. The court concluded there was jurisdiction under the transaction of business subsection. By analogy it seems that jurisdiction should exist under the commission of a tortious act subsection if the defective product were defectively manufactured in Washington.

The discussion to this point perhaps suggests that a tortious act outside the state followed by injury within the state results in jurisdiction without the need to consider other criteria. That this is not so is made clear by *Oliver v. American Motors Corp.*, in which the plaintiffs, residents of Oregon, purchased an automobile in Oregon from the defendant automobile dealer, also a resident of Oregon. The automobile was manufactured by another defendant, American Motors Company. Later, while driving in Washington, plaintiffs were overcome by carbon monoxide gas entering the automobile by reason of a defective exhaust system and a defectively sealed trunk. In a 4-1 decision the Washington court concluded there was no jurisdiction over the Oregon dealer. Jurisdiction was found to have been lacking despite the injury in Washington resulting from alleged negligence outside the state. The court noted that the out-of-state dealer had no other contacts with the state and had done nothing purposefully directed towards the state. The court was concerned with the constitutional implications of exercising jurisdiction lacking such purposefulness, and in particular was concerned with *Hanson v. Denckla*. However, the opinion seems to be written in the context of interpreting the long-arm statute itself, rather than in concluding that its application in this context would be unconstitutional.

36. 70 Wn. 2d 875, 425 P.2d 647 (1967).
37. It was held that certiorari was a proper method for obtaining review as an appeal provided an inadequate remedy. This was so since plaintiffs would otherwise be in the position of having to proceed against American Motors alone and then, if successful on their appeal from a dismissal of the dealer, having to endure another separate trial against the dealer. *Id.* at 878, 425 P.2d at 649.
39. The court noted that the long-arm statute provides that one submits to jurisdiction upon the doing of certain designated acts and concluded that the defendant had not so "submitted." The italics and quotation marks are those of the court. In Note, *Jurisdiction—Foreign Retailers: Due Process Limitations on the Tortious Act Provision of the Washington Long-Arm Statute*, 44 WASH. L. REV. 490 (1969) the author interprets the case in this manner.
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The court drew a general distinction between a manufacturer and a retailer. It was said to be appropriate to infer minimal contacts by a manufacturer who produces goods and puts them in the broad stream of interstate commerce. On the other hand, such inference is unwarranted where an out-of-state retailer sells to his local customer with nothing else by way of a purposeful act or possession of information which might charge the retailer with knowledge that his transaction might have consequences in other states. The opinion is thus noteworthy both for its discussion of purposefulness and its manufacturer-retailer distinction.

To be compared with the Oliver case is Smith v. York Food Machinery Co. One defendant, Motter, a printing press company, manufactured a food processing machine for another defendant, York, a wholly owned subsidiary of Motter. The manufacturing apparently was in Pennsylvania. In 1960 York sold the machine to a company in Idaho and several years later that company transferred the machine to a Washington company. In 1970, plaintiff, an employee of the Washington company, was injured in Washington while cleaning the machine. Plaintiff sued Motter and York, neither of whom knew the machine in question was being used in Washington. Jurisdiction was based on the commission-of-a-tortious-act section, plaintiff having alleged the machine was defectively manufactured.

In finding jurisdiction to be proper, the court first clarified the basis for the three criteria originally set forth in Tyee. The first two, namely, that the defendant purposefully do some act or consummate some transaction in the state and that the cause of action arise or be connected with such act or transaction, were stated to be statutory requirements. The third—that assumption of jurisdiction not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the state, the relative convenience of the parties, the benefits and protection of the laws of the forum afforded the respective parties, and the basic equities of the situation—was said not to be based upon the statute but rather to be an enumeration of several nonexclusive factual

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It is not absolutely clear, however, that the court reached its result based upon statutory interpretation since it phrased the question before it as whether the nonresident could constitutionally be said to have "submitted" to jurisdiction. Again, the quotation marks are those of the court.

40. 81 Wn. 2d 719, 504 P.2d 782 (1972).
considerations to aid in determining whether due process precluded the assumption of jurisdiction. 41

In applying these three criteria to the facts of the case, the Washington Supreme Court found that the first and second criteria were satisfied because the plaintiff alleged that his injury occurred in Washington and since such injury was an inseparable part of the "tortious act" as mentioned by the jurisdictional statute, the "tortious act" was deemed to have occurred within the state. 42

It was also found that the third criterion was fulfilled and could not be avoided by the defendants' reliance on the manufacturer-retailer distinction of Oliver for two reasons. First, the court concluded the defendants were manufacturers. Second, and more importantly, even if the defendants were

41. For the most recent statement and application of the three criteria by the Washington Supreme Court see Werner v. Werner, 84 Wn. 2d 360, 526 P.2d 370 (1974). The court stated:
The third factor relates both to standards and limitations of due process, or the power to adjudicate, and also, to the convenience of the forum. The latter consideration of forum appropriateness as a part of jurisdictional reach, no doubt, stems from this court's rejection of the doctrine of forum non conveniens in Landsverk v. Studebaker-Packard Corp., 54 Wn.2d 124, 338 P.2d 747 (1959). The above criteria have served as functional guideposts anterior to the exercise of adjudicatory power. They are not necessarily the constitutional limits of the forum's jurisdiction.


42. A question has sometimes been posed as to whether it is necessary to determine whether a "tortious act" has actually been committed before there is jurisdiction, i.e., whether the merits must be decided before jurisdiction can be decided, and whether a later determination that there was no "tortious act" means there was no jurisdiction to decide the issues. Both questions should be answered in the negative. The basis for the jurisdiction is the injury within the state or the defendant's acts within the state. Either of those being established there is then jurisdiction to determine whether the acts were "tortious" and if so, whether they resulted in the injury alleged.

In Smith, 81 Wn. 2d 719, 722, 504 P.2d 782, 785 (1972) the court stated:
Whether a 'tortious act' was actually committed in the instant case is not presently before us. That issue must be determined later by the trier of fact. Nevertheless, respondent's pleadings allege that injuries were suffered in this state as a result of petitioners' negligence in the design and manufacture of a machine in another state. Since respondent's injury is alleged to have occurred in this state and since it is an inseparable part of the "tortious act," the "tortious act" is deemed to have occurred here.


See also Bowen v. Bateman, 76 Wn. 2d 567, 458 P.2d 269 (1969). Plaintiff alleged that two brothers were involved in certain real estate ventures. One brother contended that he had terminated his association before the transactions in question occurred. The court stated that this might ultimately be determined at the trial, but the record contained enough prima facie evidence suggesting a partnership that for purposes of jurisdiction under the long-arm statute, it was proper not to dismiss the action.
regarded as retailers, the scope of their marketing activity was such as to permit the exercise of jurisdiction. Defendants were found to have advertised in trade magazines circulated in the state, mailed literature to potential customers in Washington and communicated by telephone and telegraph with food processors located in the state, all with the purpose of exploiting the potential market in Washington. Further, defendants sold other machines for use in Washington. This analysis indicates that mere categorization as manufacturer or retailer does not resolve the jurisdictional problem.

It should be emphasized that the particular machine was not sold directly to the Washington customer, but rather was sold to a company in Idaho for use there and then resold by the Idaho customer for use in Washington. This did not preclude the exercise of jurisdiction, however, since the defendants' general scope of marketing activity included Washington. Such activity was said to constitute a purposeful act and furnished defendants with constructive knowledge that their conduct might have consequences in Washington. This result illustrates the breadth of permissible jurisdiction under the Tyee criteria as viewed by the more recent cases.

Further illustrating the breadth of jurisdiction is a state court of appeals opinion in which it was said that either of two theories would satisfy Tyee's third criterion: courts might either look to find the sufficient minimum contacts of International Shoe, or they might determine that the defendant so placed its products in the broad stream of interstate commerce that assertion of jurisdiction over it would not offend traditional notions of fair play and substantial justice. Under the second theory, the minimum contacts of International

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43. In placing more emphasis upon marketing activity and less on the manufacturer—retailer distinction, the court modified somewhat its reasoning in the Oliver case. However, it retained the requirement of purposefulness. The court thus, in part, but not completely, adopted the analysis suggested in Note, Jurisdiction—Foreign Retailers: Due Process Limitations on the Tortious Act Provision of the Washington Long-Arm Statute, 44 Wash. L. Rev. 490, 497 (1969), which concluded:

The Oliver court correctly concluded that an assertion of Washington jurisdiction was not proper. However, the court's rationale does not wholly support its conclusion. Ultimately, the court seems to be concerned not with whether the defendant can be charged with knowledge that the product might be used in the forum, but rather with whether the defendant's marketing activities have reached the forum. Rather than focusing on the constructive knowledge of the defendant, the court should, in the future, undertake an analysis of the marketing activities of the defendant.

Shoe are inferred from the fact that the nonresident defendant knowingly places its product in the broad stream of interstate commerce. Citing the Smith case, the court said a manufacturer is charged with knowledge that such conduct might have consequences in another state.

In the particular case, a Virginia manufacturer of a paper product sold it to an Ohio manufacturer of insulation knowing the latter distributed its product nationally. The Ohio company supplied a builder in Washington. In a suit against the Ohio company, it in turn sought to join the Virginia manufacturer as a third-party defendant. The court concluded that the Virginia company was not shown to have sufficient minimum contacts with Washington to satisfy jurisdiction under the first theory. But, having voluntarily placed its product in the broad stream of interstate commerce, defendant was charged with knowledge that its product could appear in any state. The necessary minimum contacts were thus inferred and assertion of jurisdiction was not deemed to offend traditional notions of fair play and substantial justice.

What effect upon the exercise of long-arm jurisdiction occurs when the defendant is from a foreign country rather than another state of the United States? This particular problem was presented in Omstead v. Brader Heaters, Inc.,45 in which the Japanese manufacturer of pipe sold it to another Japanese company with the knowledge that the pipe was eventually destined for the United States, and particularly the state of Washington. Plaintiffs purchased the pipe for use in the heating systems of their orchards. Breaks occurred in the pipe causing damage to plaintiffs' crops and an action was instituted, the allegations against the manufacturer being negligence in manufacture and breach of warranty.

The appellate court stated the issue to be whether the courts had personal jurisdiction over Kubota Iron and Machinery Works, Ltd., a Japanese corporation, when a product of that corporation was placed in the channels of international commerce by sale to an intermediary in Japan with the knowledge that the product would be sold in the

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United States, and the product caused injury in the State of Washington. The issue was answered in the affirmative with the court relying upon the commission-of-a-tortious-act section of the long-arm statute.

The *Omstead* court reasoned that it is proper in tortious act cases to infer minimum state contacts to an American manufacturer who produces goods and places them in the broad stream of interstate commerce but, with respect to a foreign manufacturer, three additional factors should be considered. First, when a foreign manufacturer places a product in international trade, it must be foreseeable that the product is destined for the broad stream of commerce in the United States or sent to the forum state. Further, the injury must result from a use intended by the manufacturer. Second, the extent of multistate business engaged in by the foreign manufacturer and the benefits it receives must be considered. This should be balanced against the extent of multistate activity engaged in by the plaintiff. Third, the court should balance the relative convenience and burdens placed upon both the plaintiff and the defendant by reason of litigating in the state. Foreseeability that the product could be used in the forum state was stated to be the most important consideration. Only when the second and third factors strongly militate against the assertion of jurisdiction should it be declined when foreseeability is present. Once again a broad construction of the long-arm statute was indicated.

This broad construction was likewise present in a second important case involving a foreign manufacturer, *Deutsch v. West Coast Machinery Co.*\(^4\) The stated issue was similar to that in the *Omstead* case, namely, whether under the long-arm statute the courts of the state had jurisdiction over Kansai Iron Works, Ltd., a Japanese corporation, as a third-party defendant under a claim for indemnification, when a product of that corporation was sold through intermediaries to a Washington corporation, with the knowledge that the product was being sold ultimately to a Washington corporation, and, while being used for the purposes for which it was intended, the product caused injury in the state by reason of an asserted defective manufacture of the product.\(^5\)

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47. The court rejected an argument that the third-party action for indemnification was outside the scope of the long-arm statute as there were no contacts with Washing-
The Washington Supreme Court answered in the affirmative in an opinion which, while not as well drafted as that of the court of appeals in the Omstead case, apparently relied upon similar factors. The court was concerned with foreseeability of consequences in the forum and the relative convenience for the third-party defendant to appear in Washington as contrasted with requiring the third-party plaintiff and the necessary witnesses to appear in Japan. Further, the court noted that this was not an isolated transaction of Kansai in the United States and that it had had the benefit of the protection of the laws of this country and state in the prosecution of its business. The state supreme court did not delineate which factors were of greatest consequence. However, since the court adopted the court of appeals' opinion in Omstead as its own, presumably foreseeability was the most important factor.

Despite the extension of long-arm jurisdiction in interstate and international situations, there are, of course, still limits. In a more recent case construing the commission-of-a-tortious-act subsection, plaintiff, a Washington corporation, and defendant, a California partnership, negotiated a lease of California mining property. The negotiations were in California and defendant sent no representative into this state. The only activities in this state were telephone conversations between California and Washington, the bringing of a brochure from California by plaintiff, the act of approval and execution of the lease by plaintiff in Washington in reliance on the brochure, and the subsequent claimed losses by plaintiff in the operation of the mine which affected its bank accounts in this state. Relying upon Hanson v. Denckla and the Tyee case, the court concluded there was no jurisdiction under the commission-of-tortious-act section or the transaction...
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of business section. To find jurisdiction would have offended traditional notions of fair play and substantial justice.

D. Transaction of Business

Long before enactment of long-arm statutes, other statutes provided for the exercise of jurisdiction over defendants doing business in the forum state. Jurisdiction under such statutes generally depended on the doing of business on a more or less continuous basis such as maintaining offices or agents, or performing activities in a continuing course of conduct. Enactment of the long-arm statute with its provision for jurisdiction as to causes of action arising from the "transaction of any business" within the state provided an opportunity for an extension beyond the doing business concept and this opportunity has been seized upon. As noted previously, the first case under the Washington long-arm statute, Tyee Construction Co. v. Dulien Steel Products, Inc., involved the transaction of business subsection and resulted in a somewhat conservative application of the statute. The court observed that the concept of jurisdiction encompassed within the subsection did not readily lend itself to the promulgation of an infallible formula automatically determinative of every case. Each case must be decided on its own facts.

This case-by-case approach has continued, though with a broadened concept of jurisdiction. This was indicated by the second case, Nixon v. Cohn, also previously discussed. A party was held to have transacted business within the state where it had manufactured and sold a machine knowing it would be used in this state and had agreed to and did perform services in connection with the installation, operation and maintenance of the machine in the state.

52. Id.
54. In Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) the Court held that due process did not require that the cause of action arise in the forum state or out of the business conducted in the forum state.
56. Id. at 987, 385 P.2d 305 (1963).
57. See notes 23-27 and accompanying text supra.
The expanded jurisdiction possible under the long-arm statute was better indicated by the next case to reach the court, *Quigley v. Spano Crane Sales and Service, Inc.* 58 A California corporation which sold an allegedly defective crane to a Washington company by telephone was subject to jurisdiction because the defendant had sold other cranes in the state, had sent sales and service personnel into the state, had mailed advertising literature to prospective customers in Washington, and had delivered the particular crane involved and had passed title in the state. In reaching this result the court stated that the long-arm statute had changed the traditionally narrow concepts of doing business to a far broader and more widely-inclusive standard. Instead of a concept of continuously doing business, a solitary business deal, if transacted within the state, is sufficient.

The adequacy of a single business transaction was again indicated by *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.* 59 A California corporation, an insurance broker acting on behalf of a customer, requested a Washington corporation, also an insurance broker, to procure insurance for the customer. The Washington corporation obtained the insurance from underwriters in England. Upon the insolvency of the customer, the Washington corporation paid the premiums to the English firm and sought to recover the amount from the California corporation. The court held the ordering of the insurance by telephone and mail made the California corporation a participant in a business transaction in Washington and subject to the jurisdiction thereof. 60

A somewhat different perspective of the effect of the adoption of the long-arm statute is afforded by *Callahan v. Keystone Fireworks Manufacturing Co.* 61 Fireworks were manufactured in Pennsylvania by a Pennsylvania corporation. They were sold to a distributor in Spokane, Washington as a part of the general interstate distribution of the factory’s output and resold in Spokane for use in Coeur d’Alene, Idaho. Plaintiff, an Idaho resident, was injured as a result of the premature explosion of an aerial bomb during a fireworks display in the Idaho city and instituted an action against the Washington distributor and the Pennsylvania manufacturer. The jury found in favor of the

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58. 70 Wn. 2d 198, 422 P.2d 512 (1967).
59. 71 Wn. 2d 679, 430 P.2d 600 (1967).
60. The *Quigley* and *Griffiths* cases are discussed in Note, *A New Approach to Jurisdictional Analysis?*, 43 WASH. L. REV. 833 (1968).
61. 72 Wn. 2d 823, 435 P.2d 626 (1967).
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distributor but against the manufacturer. The state supreme court affirmed. Although the opinion is somewhat lacking in clarity as to the relative significance of certain factors, it is clear that the manufacturer was deemed to have been engaged in the transaction of business sufficient to justify jurisdiction despite the fact that the action involved Idaho and Pennsylvania residents and that the cause of action "arose" in Idaho.

In addition to the cases discussed above, the court has been confronted with the construction and application of the statute in several other instances and each time jurisdiction has been found to exist. In one instance the defendant was found to have been transacting business when he employed the plaintiff as his lawyer thereby giving rise to an action for compensation for professional services. In another case involving the promotion of land sales, defendant advertised in Washington newspapers, mailed brochures to, made a telephone presentation to, and arranged to sell land to a Washington resident for resale, supplied information and brochures for this purpose, agreed to deliver title directly to ultimate purchasers, and arranged for and received payment through a Washington bank. Where negotiations preceding execution of a contract took place partly in Washington, the contract was signed by plaintiffs in Washington after being sent from Oregon by defendant for such purpose, payments sought to be recovered were for the most part made by plaintiffs in or from Washington, and performance of the contract involved use of telephone and mail facilities between Oregon and Washington and entailed several trips to Washington by the defendant, jurisdiction again was found to

62. As in the Tyee case, the court listed certain "significant" factors without discussing their relative importance. These were: (1) the potentially dangerous nature of the product and the right of the courts of the state to provide a forum for the protection of any rights invaded as a result of defective manufacture of dangerous products so shipped into the state; (2) defendant had availed itself of the Washington market in order to obtain the greatest possible economic benefits; (3) the amounts received by defendant from the sale of its products; (4) the solicitation of sales through the distribution of catalogs and through the activities of local independent distributors for at least ten years; (5) defendant was the initiating party in bringing its products into the state; (6) defendant knowingly and purposefully established contacts and was charged with foreseeability of injury and of the necessity of defending itself within the state; (7) the other party, the distributor, was a resident of Washington and apparently witnesses and evidence were as available in Washington as in Idaho; (8) defendant had obtained a permit to sell its products in Washington and had otherwise sought to comply with administrative regulations of the state. Id. at 837-38, 435 P.2d at 635-36.


Finally, nonresident defendants were found to have been transacting business where they had entered into franchise agreements with a Washington resident, granted exclusive rights to represent defendants in a defined Washington area, approved assignment of rights in business of one Washington resident to another Washington resident, recited in new contracts entered into with plaintiffs that payment had been made to the Seattle office, promised in contracts to provide sales aids for continuation of business in Washington, advertised in regional and national publications to promote business in Washington for the benefit of themselves and plaintiff, based plaintiff's compensation on the volume of business performed in Washington, and were claimed to have misrepresented business to Washington residents, thereby causing injury.66

E. Other Bases of Jurisdiction

In addition to the "transaction of any business" and "commission of a tortious act" subsections, the Washington long-arm statute provides for jurisdiction on two other bases. The first is the ownership, use, or possession of any real or personal property situated in this state. Apparently the only appellate decision involving the subsection is Nixon v. Cohn,67 in which the defendant had manufactured and sold a machine in Oregon knowing it would be used in this state and had retained a vendor's interest therein. Plaintiff was injured as a result of a defect in the machine. The defendant had disposed of his vendor's interest prior to the institution of the action which led the court to express some doubt whether the retention of title under the circumstances would be sufficient for jurisdiction if it stood alone. Combined with activities in the nature of the transaction of business and the

commission of a tortious act, however, the court concluded the property interest was one more "stick in the fagot" justifying jurisdiction.

Despite the seeming lack of instances of reliance on the subsection to date, its wording suggests a broad base for jurisdiction. Most obvious would seem to be actions for injury sustained by a plaintiff resulting from the defendant's "ownership, use, or possession" of property in this state. In addition, contracts for the sale or lease of Washington property even if entered into outside the state between nonresidents of the state would seem to be within the scope of the statute as to causes of action arising from such contracts. With respect to real property, brokerage contracts as to land within the state would also seemingly be included, as would contracts for the construction and repair of homes.

It should be noted that, unlike some states, the section is not limited to realty but rather applies to "any property whether real or personal." Thus, with this one subsection, Washington has encompassed causes of action arising from a multitude of things, i.e., airplanes, boats, and firearms, which in other states have either not been included or else covered only through the enactment of several specific statutory provisions.

The other base for jurisdiction relates to a cause of action arising from the act of "contracting to insure any person, property or risk located within this state at the time of contracting." There are apparently no cases invoking the subsection, but there would seem to be no doubt about its validity. Some states have enacted long-arm provisions that extend jurisdiction to other activities and transactions. Thus, as an example, Illinois, from which the Washington statute was adopted, added another base in 1965, namely, "with respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile

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68. As an example, the Illinois statute, from which the Washington statute was adopted, applies only as to the "ownership, use or possession of any real estate." ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968).


70. See McGee v. International Life Insurance Co., 355 U.S. 220 (1957) which sustained the exercise of jurisdiction by California over a Texas insurance company which had insured a California resident, despite the fact that there was no showing of any other contact with California by the Texas defendant.
at the time the cause of action arose or the commission in this state of any act giving rise to the cause of action." 71 A few states have seemingly encompassed all possibilities by simply providing for jurisdiction to the extent permitted by the Constitution. 72

F. Procedural Considerations

In addition to enumerating the bases for jurisdiction, the long-arm statute sets forth certain procedural guidelines and limitations upon its use. It will be recalled that any person who does any of the acts therein described thereby submits himself to the jurisdiction of the courts of the state. Service of process upon such person may be made by personally serving the defendant outside the state with the same force and effect as though personally served within the state. 73 The summons upon a party out of the state is to contain the same matter and be served in the same manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after the personal service. 74

While the long-arm statute represents a considerable broadening of the state's power, as has been previously noted 75 it is limited in the causes of action that are included. Thus, in designating the acts which constitute a submission of the person to jurisdiction there is the limitation "as to any cause of action arising from the doing of any of said acts." 76 And, as if to emphasize the point, a separate subsection specifically provides that "[o]nly causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section." 77

As previously indicated, personal service outside the state is suffi-

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74. Id. § 4.28.180.
75. See notes 19-20 and accompanying text supra.
77. Id. § 4.28.185(3).
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cient under the statute, but is valid only when an affidavit is made and filed to the effect that service cannot be made within the state. The affidavit need not be filed before the summons and complaint are served. If filed thereafter, the service becomes valid when the affidavit is filed. The court has stated the rule to be that substantial and not strict compliance is sufficient where a proper affidavit is filed, although late, where it appears that no injury was done the defendant as a result of the late filing. Applying this principle, a court of appeals opinion held that where no prejudice was shown to have resulted to the defendant from the fact that the affidavit was filed nearly twelve months after the statute of limitations on the plaintiff's cause of action had run, timely personal service upon the defendant constituted substantial compliance with the long-arm statute.

Commonly, the prevailing party in litigation is awarded costs. The long-arm statute specifically provides that if the defendant prevails, there may be taxed and allowed to him as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees. The provision was sustained against a claim that it was unconstitutional as constituting a denial of equal protection of the law by unreasonable and arbitrary classification and has been applied in behalf of both principal defendants and third-party defendants. In determining whether to allow attorneys' fees the tests are whether the action was frivolous and brought only to harass the defendant, and, if not, whether in being forced to defend within the state

78. Id. § 4.28.185(4).

When no affidavit is filed, no jurisdiction is acquired under the long-arm statute, and any judgment entered is void. Hatch v. Princess Louise Corp., 13 Wn. App. 378, 534 P.2d 1036 (1975).
82. Mahnkey v. King, 5 Wn. App. 555, 489 P.2d 361 (1971). The constitutionality of the provision was upheld by the state supreme court in State v. O'Connell, 84 Wn. 2d 602, 528 P.2d 988 (1974), which also held that the statute authorized the allowance of costs incurred by a defendant on appeal as well as those at the trial court level.
the defendant has been subjected to burdens and inconveniences which would have been avoided had the trial been conducted at the place of his domicile, which are not balanced by conveniences to the defendant resulting from trial of the action in the state and which are of sufficient severity to warrant a conclusion that, without the award of attorneys' fees, traditional notions of fair play and substantial justice would be violated.\(^\text{85}\)

A few other points about the long-arm statute are noteworthy. The statute applies to both individual and corporate defendants and regardless of whether the defendant does any of the enumerated acts in person or through an agent. If an individual does any of the acts, the submission to jurisdiction also applies to his "personal representative." The court has not had occasion to define that term, particularly whether it includes the executor or administrator of a deceased defendant.\(^\text{86}\) The Illinois statute, from which the Washington statute was adopted, has been held to include such representatives.\(^\text{87}\) Also to be noted is that nothing contained in the statute limits or affects the right to serve process in any other manner provided by law, thereby allowing for the continuation of all previously existing bases for jurisdiction.\(^\text{88}\)

Though the Washington state courts apparently have not been presented with the problem, a federal district court has held the long-arm statute to be retroactive so as to be applicable to acts occurring before the passage of the statute.\(^\text{89}\) This apparently represents the interpretation given to such statutes by most states, though not all.\(^\text{90}\) With the passage of time and the running of statutes of limitations, the problem

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86. See National Bank v. Equity Investors, 81 Wn. 2d 886, 506 P.2d 20 (1973). Where the court had acquired jurisdiction over a defendant during his lifetime, plaintiff's motion to substitute defendant's Minnesota administrator as party defendant should have been granted.
88. Wash. Rev. Code § 4.28.185(6) (1974). For example, in Lee v. Barnes, 58 Wn. 2d 265, 362 P.2d 237 (1961), the court sustained jurisdiction when there was service of process upon the resident agent of a nonresident defendant in conformity with a contract wherein such agent was appointed by the defendant as his agent to receive personal service of process. This was so although agreements for substituted service upon a nonresident defendant were not expressly authorized by statute. Such an agreement did not violate public policy and when freely entered into was not subject to repudiation.
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probably has become moot. This is so despite the existence of a statute which tolls the running of a statute of limitations while a defendant is absent from the state or concealed therein.\textsuperscript{91} It has been held that a statute of limitations will continue to run against a plaintiff in such circumstances if it is possible to secure jurisdiction over the defendant through the use of the long-arm statute.\textsuperscript{92} In effect, then, the existence of the long-arm statute not only provides a means whereby jurisdiction can be obtained, but requires the plaintiff to act under it to avoid the loss of his claim in Washington and elsewhere.\textsuperscript{93}

With respect to venue, an action against a nonresident may be brought in any county in which service of process may be had, or in which an act was done which gave rise to service under the long-arm statute, or in which the plaintiff resides.\textsuperscript{94} Presumably, ordinary change of venue principles apply.\textsuperscript{95} Until recently the defendant has not had the protection of the forum non conveniens doctrine, at least labeled as such.\textsuperscript{96} Washington has now recognized the doctrine as an inherent discretionary power of the courts.\textsuperscript{97} The doctrine should have rather broad application in the long-arm context in view of the liberal extension of jurisdiction by the Washington courts under the statute.\textsuperscript{98}

II. QUASI IN REM JURISDICTION IN WASHINGTON

At a much earlier time, when the possibilities for obtaining personal jurisdiction over a defendant were severely limited by territorial concepts so that presence and consent were the only available bases for jurisdiction, there were pressures to create or justify other means for asserting judicial power. One method is that of quasi in rem jurisdic-

\begin{footnotes}
\item 93. It is likely that other states will have borrowing statutes, whereby they will borrow the Washington limitation period which will have run for the reasons stated in the text. See, e.g., Tublitz v. Hirschfeld, 118 F.2d 29 (2d Cir. 1941).
\item 94. WASH. CIV. R. SUPER. CT. 82.
\item 95. See L. ORLAND, 2 WASH. PRAC. § 27, at 42 (3d ed. 1972).
\end{footnotes}
tion whereby the presence of property within a state is deemed sufficient to allow the assertion of a personal claim against a defendant, limited insofar as recovery is concerned to the value of the property within the state. Due to the considerable expansion of personal jurisdiction allowed by such cases as *International Shoe Co. v. Washington*\(^{99}\) and implemented by such means as the long-arm statutes, there has been considerable argument and pressure for a curtailment of quasi in rem jurisdiction.\(^{100}\)

Although the Washington court did not state the long-arm developments to be a factor, the court recently restricted the usage of quasi in rem jurisdiction in *Ace Novelty Co. v. M.W. Kasch Co.*,\(^{101}\) a case which is noteworthy for several reasons. Plaintiff was a Washington corporation with its principal place of business in Washington and defendant was a Wisconsin corporation with its principal place of business in that state. Plaintiff solicited a sale of goods to the defendant by contacting the latter in Wisconsin and consummated the transaction through plaintiff's agent in Illinois. The defendant had no agents or offices in Washington, nor had it ever transacted business in the state. Plaintiff instituted an action in Washington claiming that defendant owed some twenty-four thousand dollars for the goods which had been sold and delivered. Plaintiff had writs of attachment and garnishment served upon several national corporations which did business in Washington and which allegedly were indebted to the defendant. Service was made upon the defendant in Wisconsin. The defendant's motion to dismiss the action for lack of jurisdiction was granted by the trial court, and on appeal the state supreme court affirmed.

The court said that the basic test for determining whether jurisdiction exists over a nonresident defendant is that stated in the first long-arm case, *Tyee Construction Co. v. Dulien Steel Products, Inc.*,\(^{102}\) with its three factors—a purposeful act in the state, a cause of action connected with the act, and no infringement of traditional notions of

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\(^{99}\) 326 U.S. 310 (1945).


\(^{101}\) 82 Wn. 2d 145, 508 P.2d 1365 (1973).

fair play and substantial justice. The court concluded that the first factor was lacking in that the defendant had neither performed an act nor consummated a transaction in Washington.

The plaintiff contended, however, that there was an adequate ground for quasi in rem jurisdiction in view of the old United States Supreme Court case of *Harris v. Balk.* The contention was that the situs of a debt follows the debtor, and therefore, since the corporations which were indebted to the defendant were doing business in Washington, the defendant had assets in Washington subject to attachment and garnishment, and, for that matter, in other states in which the corporations were doing business as well.

In rejecting the plaintiff's contention of jurisdiction, the court noted the changed business conditions since 1905 whereby corporations now commonly do business in all or most states. Additionally, the court construed the *Harris* case to hold that an action against a third-party debtor could be maintained only if the principal debtor could have sued on the indebtedness in the particular jurisdiction. This accurately states a limitation imposed by the highest court. However, the Washington court then stated, “It follows from the ancillary character of garnishment proceedings that, in order to sustain them, there must be jurisdiction over the proceeding against the principal defendant.” That was not a limitation imposed by the United States Supreme Court in the *Harris* case. Nor does the conclusion follow from the premise. To the contrary, whereas the United States Supreme Court sustained jurisdiction in the *Harris* case on a quasi in rem basis though personal jurisdiction was lacking, the Washington court seemed to be saying that if there were no personal jurisdiction over the principal defendant, quasi in rem jurisdiction could not serve as a basis for power either. But, of course, if there is personal jurisdic-

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103. 198 U.S. 215 (1905).
105. That the Washington court meant that personal jurisdiction is necessary was suggested by its next statement:

In the immediate case, the appellant, through the process of garnishment, has created an artificial relation between the state of Washington and the original transaction involving the respondent, thereby attempting to “bootstrap” its claim against the respondent into the jurisdiction of this forum by means of an ancillary proceeding.

*Id.* at 149, 508 P.2d at 1368 (emphasis in original). But that is precisely what the *Harris* case allows.

One difficulty in understanding what the court meant by its statement that, “there must be jurisdiction over the proceeding against the principal defendant,” *id.*, arises
dition, there is no need for garnishment or attachment as a jurisdictional substitute. The Washington court's conclusion may very well be a desirable result in view of the considerable expansion of personal jurisdiction through the long-arm statute, but if that is the reason the court should so state. If the court is in fact rejecting a quasi in rem analysis as a basis for jurisdiction for the future, it should not pretend that such a result follows from a case which clearly established such analysis as an adequate constitutional base.

Perhaps this criticism of the court is unduly severe, however, as it is not precisely clear what the court had in mind when it said that "there must be jurisdiction over the proceeding against the principal defendant." The court noted the particular circumstances in which quasi in rem jurisdiction was being asserted and also engaged in a more general consideration of constitutional limitations.

One potential constitutional problem was summarily disposed of by the court. In Sniadach v. Family Finance Corp. and Fuentes v. Shevin, the United States Supreme Court held certain prejudgment seizures of property without notice and an opportunity for a hearing to be violative of due process. The Washington court from the fact that the court cited four cases, none of which seems to be concerned with personal jurisdiction but rather with jurisdiction over the subject matter as prescribed by the particular state statute. Yet, that apparently was not a problem in the principal case insofar as compliance with the Washington attachment or garnishment statutes was concerned. The cases cited by the Washington court were Galindo v. Western States Collection Co., 82 N.M. 149, 477 P.2d 325 (1970); Mahrle v. Engle, 261 Wis. 485, 53 N.W.2d 176 (1952); Fraser v. Collier Const. Co., 297 Mich. 641, 298 N.W. 313 (1941); Missouri Pac. R. R. v. McLendon, 185 Ark. 204, 46 S.W.2d 626, 628 (1932).

Professor Orland's commentary on the principal case is as follows:

The Washington court has abolished jurisdiction quasi in rem which is based on the prejudgment seizure of a debt owed by the garnishee defendant to the principal defendant when no personal jurisdiction has been obtained over the principal defendant and the debt attempted to be seized did not arise out of a Washington transaction. It remains unclear whether the reach of the court's opinion precludes quasi in rem jurisdiction when the nonresident has tangible personal property within the state, or the debt owing to the nonresident arose out of transactions within the state.

L. ORLAND, 2 WASH. PRAC. 5 (Supp. 1974). The author further suggests that "the general tenor of the opinion may give some indication that the garnishment would be upheld if there were sufficient contacts with the state." Id. n.81.6.

106. 84 Wn. 2d at 149, 508 P.2d at 1368.
109. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), a 5–4 decision, the Court sustained a Louisiana sequestration procedure, which allowed a seizure of property without notice or an opportunity for a hearing. The majority found Fuentes to be distinguishable, whereas the dissent concluded that Fuentes was being overruled. That Fuentes still has vitality is indicated by North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). Sniadach seems clearly to be still authoritative.
avoided a consideration of the problem in the *Ace Novelty Co.* case by the following statement in a footnote: "Since our decision in this case concerns purely procedural matters of jurisdiction, we do not reach the issue whether prejudgment garnishment of a debt may result in an abridgement of due process." Since that time the Washington court has reached the issue and has declared a prejudgment garnishment without notice and a hearing to be unconstitutional. It is still an open question, however, whether the *Sniadach-Fuentes* doctrine applies to a situation where seizure of property is necessary to obtain jurisdiction.

On the jurisdictional issue of whether the debts sought to be seized in the *Ace Novelty Co.* case had a “situs” in Washington sufficient to allow an action under a quasi in rem theory, the court stressed three factors: (1) the original suit involving the principal parties was unrelated to the garnished indebtedness of the “third-party defendants,” (2) the debts garnished did not arise out of any activities carried on in the state, and (3) no connection existed between the original transac-

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112. In *Sniadach* the Court stated:

Such summary procedure may well meet the requirements of due process in extraordinary situations. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and in *personam* jurisdiction was readily obtainable.


In *Fuentes* the Court stated:

There are “extraordinary situations” that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing.

407 U.S. 67, 90–91 (1972). The Court also noted that “[i]n three cases, the Court has allowed the attachment of property without a prior hearing. [One] case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Id.* at 71 n.3.

Orland & Fischmaller, *Jurisdiction Salad: Washington Style*, 9 *GONZAGA L. REV.* 1, 29–30 (1973), express some doubt that the Washington court would sustain a seizure of property without opportunity for a hearing if the purpose of the seizure is to obtain quasi in rem jurisdiction in a case involving a nonresident.
tion of the principal parties and the state, with the exception of the plaintiff's presence in the state.\textsuperscript{113} 

In determining whether quasi in rem jurisdiction was appropriate in these circumstances, the Washington court applied constitutional guidelines established for in personam jurisdiction.\textsuperscript{114} Doing that, the court concluded that since the defendant had not performed any act nor consummated any transaction in the state and therefore had enjoyed no benefit or protection of Washington law, and since neither the original agreement nor the debt sought to be seized arose out of any transaction connected with the state, to assert jurisdiction would violate due process.

What conclusions may thus be drawn from the \textit{Ace Novelty Co.} case? Perhaps the effect of the decision will be relatively limited, namely to the seizure of intangibles and even then only when the three factors listed by the court are present. More likely, however, the case represents the opening wedge for the general application of \textit{International Shoe} (and its progeny) standards of due process to quasi in rem cases, with the eventual demise of \textit{Harris v. Balk} in particular and quasi in rem jurisdiction in general to be expected. Should this be so, then, while the opinion may be subject to some technical criticism in its construction of the \textit{Harris} case, on the more important plane of its impact on jurisdictional concepts, it is to be commended.\textsuperscript{115}

Certainly one reading of the opinion is that if a defendant is not subject to in personam jurisdiction, as through the long-arm statute, he may not be reached through a quasi in rem analysis. If that is the effect, the case is important nationally as well as locally,\textsuperscript{116} and represents a position advocated by many.\textsuperscript{117} 

\textsuperscript{113} 82 Wn. 2d at 149, 508 P.2d at 1358. None of these factors would seem to distinguish the \textit{Ace Novelty Co.} case from \textit{Harris v. Balk}, with the possible exception of the third factor. \textit{i.e.}, there possibly was a relation between the original transaction and the state of Maryland in the \textit{Harris} case. If this were so, however, the United States Supreme Court placed no stress upon it, nor for that matter, even mentioned it.


\textsuperscript{117} \textit{See} authorities cited in note 100 \textit{supra}. 

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III. CONCLUSION

The past decade and a half has witnessed an enormous expansion of personal jurisdiction in the country, which expansion has been mirrored in Washington under its long-arm statute and the judicial interpretation and application thereof. In several instances Washington has led the way in furthering such expansion. The same period has witnessed much critical commentary urging a curtailment of the usage of quasi in rem jurisdictional concepts. Recent developments in Washington have reflected such curtailment in a manner likely to be noted and followed on a national scale.