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Procedure

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process incorporates the concept of equal protection of the laws.[33] Again, the absence of legislative findings or a statement of legislative policy is harmful to the validity of the act. Without it, one may assume that the same considerations which led to exemptions under the federal act were considered controlling under the state act. But this gives no explanation for those exemptions in the state act which are not paralleled in the federal act. Also left for speculation is the effect of the proviso rendering compliance with the federal act compliance with certain crucial provisions of the state act. As mentioned above, the purpose may have been to relieve employers from the burdens of duplicate record keeping and duplicate pay computations. Or, it may have been to preserve the interstate competitive position of Washington employers. In either event, the substantial question remains whether such a consideration renders classification on that basis reasonable for the purposes of the test of equal protection of the laws.

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PROCEDURE

In Personam Jurisdiction Expanded—Force and Effect of Service of Process Outside of State. Within recent years several state legislatures have enacted legislation extending the bases for jurisdiction over nonresidents. The Washington legislature in Chapter 131 of the 1959 Session Laws has enacted a statute that is probably as comprehensive as any to be found in the country.[1]

Section 1 amends RCW 4.28.180 which relates to personal service out of state. Such service may be made upon any party. It is to be noted that the word "party" is used, thereby presumably including both individuals and corporations. Formerly, personal service outside the state was only equivalent to service by publication. As a result of the amendment, such service, if upon a citizen or resident of the state or upon a person who has submitted to the jurisdiction of the state, is to have the force and effect of personal service within the state.

[33] Bolling v. Sharpe, 347 U.S. 497 (1954).

[1] Chapter 131 is patterned after 110 ILL. ANN. STAT. 16 and 17. The Illinois statute is commented upon 50 NW. U. L. REV. 599, 31 NOTRE DAME LAW. 223 and 5 DE PAUL L. REV. 106.

Otherwise it shall have the force and effect of service by publication.[2] As in the past, the summons upon a party out of the state is to contain the same matter and is to be served in the same manner as personal service within the state, except that it is to require the party served to appear and answer within sixty days after such personal service.

The provision to the effect that personal service out of the state upon a citizen or resident of the state or upon a person who has submitted to the jurisdiction of the state is equivalent to personal service within the state, is new. Two major questions arise.

First, is adequate notice provided for? The due process clause of the fourteenth amendment requires that the method of service employed be reasonably calculated to give the adverse party notice of the proceedings and an opportunity to be heard.[3] There can be no better method of notice than that of personally serving the adverse party and, consequently, this should create no constitutional problem.

Secondly, in providing that personal service outside the state shall be equivalent to service within the state in the specified instances, the legislature has considerably extended the in personam jurisdiction of the Washington courts. The question of the constitutionality of the exercise of such jurisdiction arises. If "citizen or resident" is to be interpreted to mean a domiciliary of Washington, then this is clearly proper. In *Milliken v. Meyer*,[4] the Wyoming court was held to have personal jurisdiction over a domiciliary of Wyoming who was personally served in Colorado.

It is suggested that this is the proper interpretation, at least in the case of "citizen." While one may be a citizen of the United States and be domiciled elsewhere, to be a citizen of a state of the United States one must be domiciled in that state.[5] Thus, in the statute the term "citizen" should be interpreted to mean a domiciliary of Washington.

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[2] Chapter 131, section 1 provides, "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." At the time that House Bill No. 58 was enrolled the italicized words were omitted due to a clerical error. Since the legislature had actually enacted the law with the italicized words included and the omission was merely a clerical error, the bill was re-enrolled as it should have been in the first place and was then signed by the Speaker of the House, President of the Senate and the Governor. Letter from the Office of the Secretary of State, dated June 8, 1959.

[3] Milliken v. Meyer, 311 U.S. 457 (1940); Annot., 132 A.L.R. 1357 (1940), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 75 (Tent. Draft No. 3, 1956).

[4] 311 U.S. 457 (1940); Annot., 132 A.L.R. 1357 (1940). See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 79 (Tent. Draft No. 3, 1956).

[5] See RESTATEMENT (SECOND), CONFLICT OF LAWS § 80 (Tent. Draft No. 4, 1957) and 50 NW. U. L. REV. 599, 610 (and cases cited therein).

While domicile has a fairly settled meaning in the law, residence can mean many things depending on the circumstances wherein it is used and the purpose of the statute employing the term. Residence can mean the equivalent of domicile, something more than domicile, *i.e.*, actual physical presence, or something less than domicile, *i.e.*, a dwelling place adopted for the time being but not necessarily with such an intention of making a home there as to create a domicile. Commonly, the term "resident" when used in a statute relating to judicial jurisdiction is interpreted as requiring that the absent defendant be domiciled within the state.[6] This may well be the correct interpretation in the present statute.

Certainly, it would seem that since the purpose of the new law is to increase the bases of jurisdiction of the Washington courts, residence should not be interpreted to mean more than domicile. It either means the same or less. Assuming it means less, while the United States Supreme Court has not yet determined whether residence, as opposed to domicile, is an adequate basis for judicial jurisdiction, several courts have held that it is.[7] In either event then, whether residence means the same as or less than domicile, the statute should be constitutional.

The provision that service outside the state upon a person who has submitted to the jurisdiction of the courts of this state shall have the force and effect of service within the state can best be considered in connection with section 2 of the session law. Section 2 adds a new section to RCW chapter 4.28, and enumerates those instances in which a person is deemed to submit to the jurisdiction of the courts of Washington.

Subsection I of section 2 provides:

> 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:
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> (a) The transaction of any business within this state;
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> (b) The commission of a tortious act within this state;
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> (c) The ownership, use, or possession of any property whether real or personal situated in this state;

[6] For a discussion of the many meanings of residence see 6 VAND. L. REV. 561 and RESTATEMENT (SECOND), CONFLICT OF LAWS § 9, comment j, (Tent. Draft No. 2, 1954).

[7] Sampson v. Sapoznik, 256 P.2d 346 (Cal. D. Ct. App., 1953); State v. Heffernan, 142 Fla. 496, 195 So. 145 (1940); Camden Safe Deposit & Trust Co. v. Barbour, 66 N.J.L. 103, 48 Atl. 1008 (1901); Hetson v. Sommers, 44 N.Y.S.2d 31 (1943). See also other cases cited in Reporter's Note to RESTATEMENT (SECOND), CONFLICT OF LAWS § 79, comment d (Tent. Draft No. 3, 1956).

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

The controlling principle relating to the exercise of judicial jurisdiction is set forth in *International Shoe Co. v. Washington*[8] that, "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" In applying the rule requiring minimum contacts it is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[9] Operating under these guides, the statute should meet the tests of constitutionality.

It is to be noted that jurisdiction under the statute extends only to those causes of action arising from the acts enumerated therein. In other words, it precludes a plaintiff from asserting a cause of action not within the statute when jurisdiction is based upon the statute. This comports with the concept of *International Shoe Co. v. Washington, supra,* and *Hanson v. Denckla, supra,* that subjection of the defendant to in personam jurisdiction is consistent with due process when the action sued upon arises out of an activity carried on by the defendant within the state.

Turning to the activities specified in the statute which constitute submission to the jurisdiction of Washington, there is first the matter of transaction of business within the state. What constitutes doing business obviously will require statutory construction by the court in the many diverse factual situations which may arise. Perhaps the most that can be said generally is that the test is one of reasonableness, keeping in mind that the legislature has intended to expand the jurisdiction of the Washington courts to the extent allowed by the Constitution.[10]

Direct support may be found for the constitutionality of the provision that commission of a tort within the state subjects one to judicial jurisdiction. Similar statutory provisions in Vermont[11] and Mary-

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[8] 326 U.S. 310 (1945); Annot., 161 A.L.R. 1057 (1943).

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

[10] For a discussion of "doing business" as a basis for judicial jurisdiction see RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 85, 92 (Tent. Draft No. 3, 1956).

[11] Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664; Annot., 25 A.L.R.2d 1193 (1951).

land[12] have been sustained. More recently, the comparable provision in the Illinois statute upon which the Washington act is based was held constitutional.[13] The defendant, a resident of Wisconsin, was engaged in the business of selling appliances. He sent one of his employees to deliver a gas cooking stove to the plaintiff in Illinois. At the employee's request, the plaintiff assisted in unloading the stove from a truck. In the course of doing so, the defendant's employee negligently pushed the stove so as to sever one of the plaintiff's fingers. The defendant was served in Wisconsin in accordance with the Illinois statute. It was held that the Illinois statute met the requirements of due process in basing jurisdiction on the commission of the tort in Illinois.

It is next provided that the ownership, use, or possession of real or personal property is a basis for personal jurisdiction. Since one owning, using, or possessing property looks to the law of the situs for protection of his property, it is reasonable that he should be subject to that law for liabilities arising therefrom. A comparable Pennsylvania statute, relating to real property, has been sustained.[14] While there may be instances in which it would not be as reasonable to subject one to judicial jurisdiction in the case of personal property as in the case of real property because of the difficulty of control, *i.e.*, theft, the courts can maintain the proper balance, thereby upholding the constitutionality of the statute generally.

Reliance can be placed upon *McGee v. International Life Ins. Co.*[15] to sustain the provision that "contracting to insure any person, property or risk located within this state at the time of contracting" subjects one to the jurisdiction of this state. A Texas insurance company had insured a resident of California. The beneficiary brought an action on the policy in California, serving the defendant company in Texas. Though this was the only contact the company had with California, it was held that the requirements of due process had been met. The necessary "minimum contact" was present.

It is suggested that these new bases of jurisdiction should be applied to causes of action which have arisen prior to the adoption of the statute. This would seem to be in accord with the intent of the legislature to expand the jurisdiction of the courts. Moreover, the

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[12] Johns v. Bay State Abrasive Products Co., 89 F.Supp. 654 (D.C. Md., 1950).
[13] Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957).
[14] Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (1938).
[15] 355 U.S. 220 (1957).

statute affects a change in remedy or procedure rather than the substantive rights of the parties involved. It serves to provide a Washington forum for whatever substantive rights may exist. Comparable statutes have been so interpreted, and such application has been held constitutional.[16]

In other states with similar statutes the suggestion has been made that in those instances where a court has jurisdiction, but where the exercise of such jurisdiction would be unduly burdensome upon the defendant or the court, the doctrine of forum non conveniens is available. This, of course, is not possible in Washington in view of *Lansverk v. Studebaker-Packard Corp.*,[17] which rejects that doctrine. It is possible that the court, in the words of the *Lansverk* case, might dismiss an action under the statute because of a "manifest abuse of process" or because the action offends the public policy of the state. What the court had in mind by such language remains to be spelled out. It is possible also that dismissal might be had on the basis of the doctrine of comity.[18]

In addition, when jurisdiction is based upon the statute, the nonresident defendant will probably in many instances have the privilege of removal to a federal court.[19] In such instances, after removal, a motion will lie for transfer to a more convenient district.[20]

Section 2 of the session law further provides that service of process upon any person who has submitted to the jurisdiction of the state may be made by personal service outside the state with the same force and effect as though personally served within the state. This supplements section 1, previously discussed. There is the requirement, however, that in those instances wherein jurisdiction is based on section 2 of the session law, in order for service outside the state to be valid, there must be an affidavit made and filed to the effect that service cannot be had within the state. It is to be noted that this requirement does not apply to the more general amendment to RCW 4.28.180 in section 1 of the session law, allowing for service out of state.

In the event the defendant is personally served outside the state on the causes of action enumerated in section 2 and the defendant prevails, he may be allowed a reasonable amount as attorney's fees as

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[16] McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957).
[17] 154 Wash. Dec. 114, 338 P.2d 747 (1959).
[18] See Olympic Mining & Milling Co. v. Kerns, 64 Wash. 545, 117 Pac. 260 (1911).
[19] 62 STAT. 937 (1948), 28 U.S.C. § 1441 (1952).
[20] 62 STAT. 937 (1948), 28 U.S.C. § 1404(a) (1952).

part of the cost of defending the action. The final provision is that this new statute is no way limits or affects the right to serve process in any other manner provided by law.

By this act the Washington legislature has evidenced its intent to expand the in personam jurisdiction of its courts to the limits permitted under the due process clause of the fourteenth amendment. It is this concept which must be recognized by the attorneys and the courts of the state in interpreting and applying the statute.

Court Costs in Actions by and Against State or County. Chapter 62 of the 1959 Session Laws amends RCW 4.84.170 to read as follows: "In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, *and in any action brought against the state or any county, and on all appeals to the supreme court of the state in all actions brought by or against either the state or any county,* the state or county shall be liable for costs in the same case and to the same extent as private parties." The italicized phrases have been added to the original statute.

Perhaps the leading case interpreting RCW 4.28.170 is *Washington Recorder Pub. Co. v. Ernst.*[1] The state was defendant in the superior court. Following an adverse judgment, the state appealed to the supreme court, which affirmed. The private party sought to obtain costs against the state. The general doctrine was first stated that costs are purely statutory, and thus a sovereign state in actions in which it is a party is not liable for costs in the absence of an express statute creating such liability. Since the statute provided for costs against the state only in actions "prosecuted in the name and for the use of the state," there could be no recovery of costs where the state was a defendant in the superior court. The state did not become the plaintiff within the meaning of the statute by appealing. If costs were to be taxed against the state when it was a defendant, it was for the legislature to say so.

In *Lake & Co., Inc. v. King County*[2] actions were brought against a county. Judgment was for the plaintiff and the county appealed. The supreme court affirmed, and the plaintiff sought to obtain costs against the county. Relying upon the *Ernst* case the court concluded that just as RCW 4.84.170 did not allow the taxing of costs against the state

[1] 1 Wn.2d 545, 97 P.2d 116 (1939).
[2] 4 Wn.2d 651, 104 P.2d 599 (1940).

when the state was a defendant, likewise the same rule applied to counties.

It would appear that under the statute as amended costs would now be allowed the private party in both of these cases. By the amending clauses the state and counties are liable for costs when they are defendants as well as when they are plaintiffs. Furthermore, they are liable for costs on appeal to the supreme court regardless of whether they are plaintiff or defendant.

One word of caution might be appropriate. The statute does not purport to affect the doctrine of sovereign immunity. The statute does not constitute a general consent to be sued by the state. It is simply a provision that in those instances in which the state or counties are proper parties, they shall be liable for costs to the same extent as private parties.

Jurors' Fees. Chapter 73 of the 1959 Session Laws amends RCW 2.36.150 to provide that jurors' fees in the superior courts shall be ten dollars per day instead of five dollars. This is in recognition of the fact that the old rate of compensation worked a real hardship on conscientious citizens who were called for jury service and who made no objection. The old rate also undoubtedly resulted in requests for excuse from service by other equally conscientious citizens who simply could not afford the financial sacrifice. Though the increase will be welcomed, one may question whether it is adequate. The Judicial Council, for example, had recommended that the compensation of jurors be increased to fifteen dollars per day. The compensation for jury service before a justice of the peace court and upon a coroner's jury remains the same, four dollars per day. Likewise, there has been no change in the mileage rate of ten cents per mile.

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REAL PROPERTY

Rule Against Perpetuities in Trust Dispositions. By the enactment of chapter 146, labeled by the code reviser "Trusts—Rule against Perpetuities," Washington has joined the group of states deciding to "wait-and-see" whether the actually developed facts involve remote dispositions violating the Rule Against Perpetuities, rather than determining violations as the common law rule requires on the basis of possibilities, however unlikely to occur. This statute gives Washington only a limited membership, however, for it is restricted to trust dispo-