NOTES

CIVIL PROCEDURE—JURISDICTION—THE EXTENSION OF THE MINIMUM CONTACTS DOCTRINE TO IN REM AND QUASI IN REM JURISDICTION—*Shaffer v. Heitner*, 433 U.S. 186 (1977).

On May 22, 1974, Arnold Heitner brought a shareholder's derivative suit on behalf of Greyhound, a Delaware corporation, against twenty-eight of its past and present directors and officers.[1] The complaint was filed in the Chancery Court of Delaware, charging the individual defendants with a breach of their fiduciary duty to Greyhound.[2] Heitner alleged that the breach occurred when the defendants involved the company and its subsidiary in activities which led to a damage judgment in an antitrust suit and a fine in a criminal contempt action.[3] In order to compel the appearance of the defendants, who were nonresidents of Delaware, Heitner moved to attach their Greyhound stock under Delaware's sequestration statute, which required the defendants to either appear and subject themselves to the court's in personam jurisdiction or forfeit their property.[4] The motion was granted and a court appointed sequestrator

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[1] Shaffer v. Heitner, 433 U.S. 186, 189–90 (1977). The complaint also named Greyhound Corporation and its subsidiary Greyhound Lines as defendants. *Id.* Both Greyhound and its subsidiary, a California corporation, had their principal place of business in Phoenix, Arizona. *Id.* at 189, 189 n.1.

[2] Shaffer v. Heitner, 433 U.S. 186, 189–90 (1977).

[3] Shaffer v. Heitner, 433 U.S. 186, 189–90 (1977). Greyhound was found liable for damages in the sum of $13,146,090 for violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976). Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 688 n.1 (9th Cir. 1977). Greyhound and Greyhound Lines were convicted of criminal contempt for failure to comply with a court order with regard to treatment of another carrier. United States v. Greyhound Corp., 363 F. Supp. 525, 573 (N.D. Ill. 1973). The two companies were fined $100,000 and $500,000 respectively. United States v. Greyhound Corp., 370 F. Supp. 881, 883 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974); *see* Shaffer v. Heitner, 433 U.S. 186, 190 nn.2 & 3 (1977).

[4] Shaffer v. Heitner, 433 U.S. 186, 190 & n.4 (1977). The stock was amenable to sequestration because it had statutory situs in Delaware. The applicable statute provides:

> For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

DEL. CODE tit. 8, § 169 (1975). The motion for sequestration was filed pursuant to title 10, section 366 of the Delaware Code which provided for attachment of a nonresident's property within the State, by order of the court. 433 U.S. at 190. The express purpose of the statute was to compel a defendant's appearance at trial. DEL. CODE tit. 10, § 366 (1975).

In light of this purpose, nonresidents could not enter special or limited appearances to defend on the merits with liability limited to the value of the seized property. *See* Sands v.

seized the defendants' common stock and options by placing stop-transfer orders on the corporate books.[5] Notice of the pending action was then issued by certified mail.[6]

The defendants responded by moving to quash service of process and to set aside the sequestration order.[7] They argued that the court's exercise of jurisdiction violated the due process clause of the fourteenth amendment, since by compelling the defendants' submission to the court's in personam jurisdiction before allowing them to defend on the merits, Delaware was attempting to acquire personal jurisdiction over them without the existence of minimum contacts between the defendants and Delaware as required by *International Shoe Co. v. Washington*.[8] Furthermore, the appellants asserted that

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Lefcourt Realty Corp., 35 Del. Ch. 340, 344–45, 117 A.2d 365, 367–68 (Sup. Ct. 1955). When property of a nonresident was seized to compel his appearance, he either had to attack the jurisdiction of the court or enter a general appearance to avoid condemnation of the property. *Id.* at 345, 117 A.2d at 367. Thus in order to defend on the merits, the nonresident had to submit to the personal jurisdiction of the court, thereby exposing himself to full liability on an adverse judgment.

In most state actions involving attachment, in order to proceed judicially against a nonresident defendant, a nonresident may enter a special appearance to contest the validity of the court's jurisdiction. RESTATEMENT OF JUDGMENTS § 39 (1942). If his attack on the court's jurisdiction fails, the court cannot render a personal judgment against him. *Id.* If the defendant wishes to contest the validity of the plaintiff's claim in an action begun by attachment, he may do so, and limit his liability to the value of the *res*, by stating that he does not submit himself to the personal jurisdiction of the court. *Id.* § 40, Comment a. State law, however, may provide that a defendant who enters an appearance to contest the merits of the case submits himself to the court's jurisdiction in personam. *Id.*

Although this special appearance device for attacking jurisdiction was abolished in Delaware, *see* Schwartz v. Miner, 36 Del. Ch. 481, 483, 133 A.2d 599, 600 (Sup. Ct. 1957), a plaintiff could still contest the validity of the court's jurisdiction under the sequestration statute by filing a motion to dismiss for lack of jurisdiction as provided by DEL. CH. CT. CIV. P.R. 12(b). If his motion was denied, he did not submit himself to the court's jurisdiction, unless he elected to defend on the merits. Schwartz v. Miner, 36 Del. Ch. 481, 483, 133 A.2d 599, 600 (Sup. Ct. 1957). For a further discussion of Delaware's sequestration statute, see Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 749–56 (1973).

In any event, the sequestration statute permitted release of the property after a general appearance was entered, unless it appeared that continued seizure was necessary to guarantee the satisfaction of a judgment against the defendant. DEL. CODE tit. 10, § 366 (1975).

[5] Shaffer v. Heitner, 433 U.S. 186, 191–92 (1977). Sequestration was carried out by a "sequestrator" who filed a list of the sequestrated property with the court. *Id.* at 191–92 n.6. Some 82,000 shares of Greyhound common stock, with an approximate value of $1.2 million, were seized along with options, warrants, debentures and stock unit credits. *Id.* at 191–92, 192 nn.7 & 8.

[6] Shaffer v. Heitner, 433 U.S. 186, 192 (1977). The sequestration statute provided for notice by mail and publication. DEL. CODE tit. 10, § 366 (1975). In accordance with the statute, notification was given by mail and also by publication in a newspaper where the suit was brought. 433 U.S. at 192.

[7] Shaffer v. Heitner, 433 U.S. 186, 192–93 (1977).

[8] Appellants' Brief on the Merits at 85–86 app. A, Shaffer v. Heitner, 433 U.S. 186 (1977) (Letter Opinion of Judge Brown, Court of Chancery of the State of Delaware) [hereinafter cited

Delaware's prejudgment sequestration proceeding deprived them of their property without providing due process guarantees of notice and an opportunity for a prior hearing.[9]

The Delaware court of chancery dismissed the defendants' contentions, holding that the proceeding, at least when commenced under the sequestration statute, was quasi in rem and therefore properly supported by the statutory presence of their stock in Delaware.[10] The chancery court further held that, in light of the temporary nature of the seizure and its purpose, ex parte attachment under the statute provided sufficient procedural safeguards to meet the demands of due process.[11] The validity of the sequestration stat-

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as Letter Opinion]; *see* International Shoe Co. v. Washington, 326 U.S. 310 (1945). Speaking for the majority in *International Shoe*, Chief Justice Stone said that

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[9] Letter Opinion, *supra* note 8, at 79 app. A. On appeal to the United States Supreme Court, the defendants argued that recent Supreme Court decisions had confirmed "that a seizure of property without notice or hearing is unconstitutional except in extraordinary situations and unless there are sufficient other safeguards to satisfy due process." Appellants' Brief on the Merits at 7, Shaffer v. Heitner, 433 U.S. 186 (1977).

In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), the Court struck down a prejudgment garnishment procedure as violative of the due process clause. *Id.* at 342. The Court stated that due process of law affords one the opportunity to attack the propriety of a claim prior to a deprivation of property. *See id.* at 339–40. Similarly, in Fuentes v. Shevin, 407 U.S. 67 (1972), the Court found that prejudgment replevin writs issued by Florida and Pennsylvania constituted a deprivation of property without due process of law. *Id.* at 84–86.

The Court retreated somewhat from this position in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), when it held that seizure of personal goods under a writ of sequestration did not deny due process of law, where the procedure provides the debtor with adequate safeguards. *Id.* at 601–03, 618–19. Justice White emphasized that the sequestration statute in *Mitchell* did not work a final deprivation of private property, *id.* at 606–, and that the statute was "a constitutional accommodation of the conflicting interests of the parties." *Id.* at 607.

In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court returned to its *Sniadach-Fuentes* stance, holding that garnishment of the petitioner's bank account was unconstitutional since it amounted to seizure and deprivation of property "without notice and without opportunity for a hearing or other safeguard against mistaken repossession." *Id.* at 606. In his concurring opinion, Mr. Justice Powell read due process in attachment proceedings as requiring: (1) the submission of affidavits, stating the reasons for the writ to a "neutral officer"; (2) the posting of a bond by the plaintiff; and (3) the opportunity for an immediate "judicial hearing" following garnishment. *Id.* at 611.

[10] Letter Opinion, *supra* note 8, at 85–86 app. A. For a discussion of quasi in rem jurisdiction, see note 38 *infra* and accompanying text.

[11] Letter Opinion, *supra* 8, at 80 app. A. The Delaware Court of Chancery found that the due process requirements of notice and an opportunity to be heard, established by the *Sniadach* line of cases, *see* note 9 *supra*, were met in light of the purpose of the statute (*i.e.*, to compel the defendant's appearance at trial rather than permit the seizure of his property pending the resolution of the plaintiff's claim to it) and in light of the fact that the owner could petition for

ute was upheld by the Delaware supreme court,[12] which noted that the minimum contacts test relied upon by the defendants was inapplicable where quasi in rem jurisdiction was based upon the presence of property within the forum state.[13]

On appeal, the Supreme Court in *Shaffer v. Heitner*[14] found it necessary to address only the appellants' jurisdictional argument.[15] Striking down Delaware's sequestration procedure as unconstitutional, the Court ruled that due process demands that the exercise of in rem or quasi in rem jurisdiction, based solely on the presence of a nonresident's property within the state, must satisfy the same minimum contacts test as required by *International Shoe* for the exercise of in personam jurisdiction.[16] Fictional situs of property, therefore, may not be used to acquire jurisdiction over a defendant who has no minimum contacts with the forum state. Although the presence of property in certain instances may bear upon the question of jurisdiction by providing contacts among the parties, the forum, and the controversy, property alone may not provide the basis for jurisdiction where it is wholly unrelated to the cause of action.[17] When such is the case, as with *Shaffer*, a court must determine whether the presence of property indicates the existence of other contacts that would make the exercise of jurisdiction fair and reasonable.[18] The Court reasoned that quasi in rem jurisdiction affects a defendant personally by depriving him of his rights in the *res* and, therefore, should be subject to the same standard governing personal

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the prompt release of his property once he entered a general appearance. Letter Opinion, *supra* note 8, at 75–76, 80–81, 83–84 app. A; *see* DEL. CODE tit. 10, § 366 (1975). The purpose of the statute and the limitation on the time for which the property was seized also served to distinguish the *Sniadach* line of cases in that they did not involve an attachment proceeding which was aimed at compelling personal appearance. Letter Opinion, *supra* at 75–76, 80–81, 83–84 app. A.

[12] Greyhound Corp. v. Heitner, 361 A.2d 225, 227 (Del. 1976), *rev'd*, Shaffer v. Heitner, 433 U.S. 186 (1977). In upholding the procedural aspect of the sequestration statute, the chancery court noted that the prejudgment attachment procedure was necessary to assure jurisdiction over nonresidents. Characterizing the attachment as an "extraordinary situation" which was necessary to secure jurisdiction, the court declared that in light of the competing interests of the plaintiff and defendant, the statute provided sufficient procedural safeguards to satisfy constitutional requirements. 361 A.2d at 231, 235.

[13] Greyhound Corp. v. Heitner, 361 A.2d at 229. For a discussion of the court's source of power in a quasi in rem proceeding, see note 34 *infra*.

[14] 433 U.S. 186 (1977).

[15] *Id.* at 189.

[16] *See id.* at 213–17. As to whether the *Shaffer* Court found Delaware's sequestration statute itself unconstitutional or merely the exercise of jurisdiction under the statute in cases where minimum contacts between defendant and forum are absent, see Grynberg v. Burke, 388 A.2d 443, 445 (Del. Ch. 1978).

[17] 433 U.S. at 207–08.

[18] *See id.* at 207–09.

jurisdiction.[19] Finding the statutory presence of the appellants' stock to be the sole nexus between Delaware and the appellant shareholders,[20] the Court held that Delaware's assertion of adjudicatory power over the nonresidents violated due process of law, since the nonresidents lacked sufficient minimum contacts, relations, or ties with Delaware to warrant the exercise of jurisdiction.[21]

Due process was first used to restrict state court jurisdiction in *Pennoyer v. Neff*,[22] where an Oregon court attempted to use its jurisdiction over property within its borders to exercise in personam jurisdiction over a nonresident who owned such property.[23] The

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[19] *Id.* at 207–08, 212. For a line of cases developing *International Shoe's* minimum contacts doctrine, see Hanson v. Denckla, 357 U.S. 235, 253 (1958) (contact between defendant and forum must consist of bilateral activity whereby "the defendant purposefully avails itself of the privilege of conducting activities within the forum State"); McGee v. International Life Ins. Co., 355 U.S. 220, 222–23 (1957) (isolated insurance contract with resident of forum provided sufficient contact to sustain jurisdiction over nonresident insurance company in action arising out of "contract which had substantial connection with" forum); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952) (jurisdiction to enforce liabilities which arose out of activities outside forum upheld where foreign national carried on systematic and continuous business within forum); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 645–49 (1950) (focusing on forum's strong regulatory interest, Court upheld jurisdiction over nonresident corporation which conducted mail-order insurance business within forum state); Cornelison v. Chaney, 16 Cal. 3d 143, 149–50, 545 P.2d 264, 267–68, 127 Cal. Rptr. 352, 355–56 (1976) (an indirect nexus is sufficient to uphold jurisdiction where a tort arises out of a chain of events connected with the forum, even though the tort occurred outside the forum); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 438, 442, 176 N.E.2d 761, 764, 766 (1961) (production of defective safety valve, placed in stream of commerce outside the forum, but "in contemplation of use" in the forum constituted minimum contacts). For a discussion of New Jersey cases construing the minimum contacts doctrine, see note 134 *infra*.

[20] 433 U.S. at 213. The Court noted that the Delaware statute was directed at nonresident property owners in general, and did not assert a state interest in compelling the appearance at trial of nonresident fiduciaries of a Delaware corporation. *Id.*; *see* DEL. CODE tit. 10, § 366 (1975). Thus, the Court concluded that, in this case, the Delaware court grounded its adjudicatory power "solely on the statutory presence of [the defendant's] property in Delaware." 433 U.S. at 213.

[21] 433 U.S. at 216–17.

[22] 95 U.S. 714 (1877).

[23] *Id.* at 718–20, 733. The due process clause of the fourteenth amendment had been newly enacted when the *Pennoyer* Court made reference to it. *See* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 263. This reference made "due process the primary consideration in jurisdictional inquiries." Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 305 (1970).

Prior to *Pennoyer*, courts analyzed extraterritorial extensions of state adjudicatory power under the principles of the full faith and credit clause. *See* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174–76 (1850). Under a full faith and credit approach, the question involved was whether the federal government should lend its power "to assist the extraterritorial enforcement of a state's judicial decrees." Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 585 (1957). Quite significantly, however, the Court in *Pennoyer* "identified the test under the Full Faith and Credit Clause with the test under the Due Process Clause, making a

case involved an action in ejectment to recover possession of real property in Oregon.[24] The property had been sold to Pennoyer to enforce a personal judgment against the nonresident owner.[25] In his suit for ejectment, the owner, Neff, attacked the validity of this judgment.[26] Alleging that he had not been served with process within Oregon and that the property had not been attached prior to commencement of the suit, Neff contended that the court lacked jurisdiction, since neither he nor his property had been brought under the control of the court.[27] On appeal to the Supreme Court, the judgment against the nonresident Neff was deemed unsupportable under the lower court's in personam jurisdiction, since such power was limited by the boundaries of the state.[28] Moreover, failure to attach the property at the beginning of the suit was found to preclude the use of quasi in rem jurisdiction as a proper basis for rendering a valid judgment.[29] Interpreting the newly enacted due process clause to mean that a judgment is valid within a forum only when rendered by a court of competent jurisdiction, the Supreme Court concluded that the judgment was without force inside as well as outside the forum.[30]

Pennoyer's significance, however, lies not in its holding but in the Court's application of what were then the current principles of jurisdictional law governing independent states. Grounded upon the mutually exclusive sovereignty of the states, these principles prevailed as the basis for adjudicatory power for nearly a century.[31] The first principle stated "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[32]

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judgment which would not be enforceable beyond the borders of the state unenforceable within its boundaries." *Id.*; *see* Comment, *supra* at 305.

[24] 95 U.S. at 719.

[25] *Id.* at 719–21. Pennoyer allegedly "acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against" Neff by an attorney for unpaid legal services. *Id.* at 719.

[26] *Id.* at 721–22.

[27] *Id.* at 720, 727; *see id.* at 733–34.

[28] *Id.* at 720, 727, 733. Neff had received "constructive service of summons by publication," *id.* at 720, through a newspaper circulated in the county where the suit was commenced. *See id.* at 717–18.

[29] *See id.* at 733–34. For a discussion of quasi in rem jurisdiction, see notes 35–40 *infra* and accompanying text.

[30] 95 U.S. at 733–34; *see id.* at 722.

[31] *See id.* at 722–26. *See generally* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 19, 20, 21 (3d ed. 1846). The concepts of in rem and in personam jurisdiction were established well before *Pennoyer*. *See, e.g.*, Kibbe v. Kibbe, 1 Kirby 119, 125–26 (Conn. 1786); Phelps v. Holker, 1 Pa. (Dall.) 261, 264 (1788); Borden v. Fitch, 15 Johns. 121, 140–43 (N.Y. 1818).

[32] 95 U.S. at 722.

Following from this, the second principle was "that no State can exercise direct jurisdiction and authority over persons or property" outside its territorial boundaries.[33] Thus, service of process beyond the territorial boundaries of the state was ineffectual. Unless the individual voluntarily consented to jurisdiction, a state's power to adjudicate a claim against him depended upon whether that state could exercise physical power over him or his property.[34]

A categorical approach to jurisdiction, classifying actions as either in personam, in rem, or quasi in rem developed from these two "principles of public law."[35] If the defendant were present within the state and brought under the control of the court by service of process, the court could then adjudicate his personal liability by proceeding in personam.[36] On the other hand, if the court sought to

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[33] *Id.*

[34] *Id.* at 733; *see* 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 90.1 (1935); H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 73, at 189 (3d ed. 1949).

Professor Ehrenzweig has stated that there was no need for the *Pennoyer* Court to enunciate these broad territorial principles that long have plagued jurisdictional law. Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer*, 30 ROCKY MTN. L. REV. 285, 286 (1958) [hereinafter cited as *Pennoyer Is Dead*]. He further opined that "physical power fails completely as a rationale" for supporting jurisdiction. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 310 (1956) [hereinafter cited as *Transient Rule*]. The perpetuation of this "powermyth" conception of adjudicatory jurisdiction, grounded upon territorial sovereignty, was the source of unending problems in the resolution of jurisdictional disputes. *Pennoyer Is Dead*, *supra* at 286. According to Professor Ehrenzweig, principles of territorial sovereignty gave rise to what he termed the "transient rule," *i.e.*, that personal jurisdiction could be obtained "by mere physical service of process, even in a forum where neither plaintiff nor defendant resides and which has no connection with the cause of action." *Transient Rule*, *supra* at 289. *Cf.* Milliken v. Meyer, 311 U.S. 457, 462 (1940) (person domiciled in state, although absent, subject to that state court's in personam jurisdiction); Grace v. MacArthur, 170 F. Supp. 442, 444 (E.D. Ark. 1959) (in personam jurisdiction acquired by service of process upon defendant while in an airplane flying over the state in which the action was brought).

[35] 95 U.S. at 722. The Supreme Court has differentiated among the jurisdictional classifications by stating that

> [a] judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958).

The classification of jurisdiction as in rem or in personam has been criticized as a "logical impossibility," because any action against a *res* affects personal rights to the extent that they are related to the *res*. Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 670 (1975). *See also* note 38 *infra*.

[36] *See* 95 U.S. at 725–27; 1 J. BEALE, *supra* note 34, § 78.1; H. GOODRICH, *supra* note 34, § 73, at 109. Two requirements for the proper exercise of jurisdiction are power over the person

adjudicate a claim in property within its borders, it could render a judgment valid against all the world by seizing the property and proceeding in rem.[37] Seizure of the *res* also provided the means for adjudicating personal claims against particular nonresidents who owned property within the state.[38] When the court attached property for this purpose it proceeded quasi in rem. But unlike a personal judgment, a quasi in rem decree was limited to the value of the attached property and could not bind the defendant personally.[39] As the *Pennoyer* Court emphasized, attachment had to take place at the commencement of a quasi in rem proceeding in order to provide the owner with notice and assure the court of a basis for jurisdiction throughout the proceeding.[40]

The principles enunciated in *Pennoyer* laid a concrete basis for determining due process of law with regard to state court jurisdiction. The person or *res* within the territorial boundaries of the state was subject to that state's sovereign power and the concurrent jurisdiction of its courts. The scope of this sovereign power was therefore defined by the territorial boundaries of the state. It was this limiting aspect which made these principles useful and convenient in rendering an abstract concept of due process concrete. Above all, the concept of territoriality served as a limitation on state adjudicatory power and a guarantee of the integrity of independent states in a nine-

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or *res* and reasonable notice so as to provide the defendant with an opportunity to be heard. 70 HARV. L. REV. 1257, 1257 (1957).

[37] 95 U.S. at 722–28.

[38] *Id.* at 725–28.

The term quasi in rem applies to actions which cannot be narrowly defined as in rem since they are directed against persons. *See* Freeman v. Alderson, 119 U.S. 185, 187–88 (1886). Traditionally, a judgment quasi in rem had been limited to the value of the attached *res*, since the court was not proceeding against the person, but was theoretically proceeding against the *res*. *See* 1 J. BEALE, *supra* note 34, § 74.5; H. GOODRICH, *supra* note 34, § 71, at 176–77. *See also* Tyler v. Court of Registration, 175 Mass. 71, 76–77, 55 N.E. 812, 814 (1900) (in an in rem action property is nominal defendant). In reality, however, quasi in rem jurisdiction provided an alternative means for affecting the interest of a nonresident defendant, at least to the extent of his interest in the *res*. *See* Shaffer v. Heitner, 433 U.S. at 207; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, introductory note at 190 (1971). As noted in the *Restatement*, "every valid exercise of judicial jurisdiction affects the interests of persons." *Id.*

[39] 95 U.S. at 726.

[40] *See id.* at 720, 725–28. The rule that property must be attached, *i.e.*, brought under control of the court, before an in rem judgment could be rendered, seemed "wholly novel" at the time. Hazard, *supra* note 23, at 269. Service by publication and seizure of the *res* were originally accepted as sufficient to provide the owner with notice of the pending suit. 95 U.S. at 727; *see* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 272 (1917). The Court, however, later came to require a means of notification "reasonably certain to inform those affected." *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950); Schroeder v. City of New York, 371 U.S. 208, 211–13 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 115–16 (1956).

teenth-century federal system.[41] Accordingly, the propriety of all assertions of jurisdiction turned on a question of presence.[42]

With the passage of time, increased travel and commerce between the states gave rise to a greater number of legal actions involving nonresident defendants. In light of the *Pennoyer* rule, this situation tended to favor nonresident defendants by making it more difficult to acquire jurisdiction over them.[43] In an apparent attempt to reduce this imbalance, the Court developed several rationales which allowed certain extraterritorial extensions of jurisdiction while preserving the basic limitations espoused in *Pennoyer*.[44] One method, which allowed for the extraterritorial extension of jurisdiction, called for the application of quasi in rem concepts to intangible property. Of course, the recognition of intangible property as an attachable *res* required the Court to assign it fictional situs. Such was the case in *Harris v. Balk*,[45] where a Maryland resident had a claim against Balk, a resident of North Carolina.[46] In order to proceed on his claim he attached a debt, owed to Balk by Harris, while Harris was visiting Maryland.[47] Harris paid the debt after notifying Balk, who did not appear.[48] When Balk later sued Harris to recover the debt, the attachment and the Maryland judgment were ruled invalid by the North Carolina supreme court which held that the situs of the debt was in North Carolina, the debtor's place of domicile.[49]

The Supreme Court, however, upheld the validity of the Maryland judgment by ruling that a debt follows the debtor and may be attached wherever he is found.[50] Deciding that jurisdiction over the debtor had been obtained by service of process, the Court reasoned that the intangible debt was attached by acquiring personal jurisdic-

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[41] 95 U.S. at 733; *see* Zammit, *supra* note 35, at 668. *See generally* Hazard, *supra* note 23, at 262.

[42] *See generally* Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 600–02 (1977); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1132 (3d Cir. 1976) (Gibbons, J., concurring).

[43] Quasi in rem provided some relief from a strict territorial concept of jurisdiction by allowing extraterritorial jurisdiction through attachment. *See* Zammit, *supra* note 35, at 670.

[44] *See* Kurland, *supra* note 23, at 577–86; Smit, *supra* note 42, at 602–03.

[45] 198 U.S. 215 (1905).

[46] *Id.* at 216. Previous efforts to assign situs to a debt were limited to either the domicile of the debtor or creditor. *See* Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 114–15 (1913). But the more acceptable "doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere." *Id.* at 115.

[47] 198 U.S. at 216.

[48] *Id.* at 216–17.

[49] *Id.* at 217. For a discussion on assignment of situs, see note 46 *supra*.

[50] 198 U.S. at 222–23.

tion over the debtor-garnishee and that the plaintiff had then proceeded as the representative of the nonresident creditor.[51] As a consequence of *Harris*, state courts were given constitutional authority to adjudicate any claim against nonresidents who owned property in the forum, regardless of whether they were present or had contacts with the state, or whether the claim was related to the *res*. The judgment rendered was limited only by the value of the *res*.[52]

While the attachment of intangible property permitted greater use of quasi in rem power, a similar expansion of in personam jurisdiction was accomplished through the use of several fictional devices.[53] One device, the implied consent doctrine, rested upon the theory that a state could condition entry by nonresidents upon their consent to jurisdiction in the event of a suit against them.[54] Perhaps the most acceptable use of this theory was in support of nonresident motorist statutes. In the case of *Hess v. Pawloski*,[55] such a statute conditioned the use of state public highways by nonresidents upon their consent to the appointment of a state official as their agent for receipt of process in actions resulting from automobile accidents.[56] Despite arguments to the contrary, the Court accepted the proposition that a state had the power to exclude nonresident motorists from

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[51] *Id.* at 223–24, 226. Professor Beale proposed that "the court quite ignored the nature of the proceeding as *quasi in rem*, and held that a garnishee could be held in any jurisdiction where he may be served with process." Beale, *supra* note 46, at 119. This "conception of garnishment as a transitory personal action against the garnishee," has displaced the original view that garnishment was supported by the state's power over the *res*. *Id.* at 118; *see* Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 563 (1967).

[52] *See* 198 U.S. at 221, 223. On this point Professor Zammit has commented that when there are insufficient contacts with the forum state to sustain jurisdiction in personam, it would be unfair to subject a nonresident defendant to quasi in rem jurisdiction merely because he has property within the state. Zammit, *supra* note 35, at 676. For a discussion of this idea, see Camire v. Scieszka, 116 N.H. 281, 282–83, 358 A.2d 397, 399 (1976) (fictional situs of insurance policy as basis for jurisdiction rejected in favor of broad principles of jurisdiction over persons and property).

[53] For a discussion of the use of fictional devices to assert jurisdiction over nonresident corporations, see Kurland, *supra* note 23, at 577–86. *See generally Transient Rule, supra* note 34; von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1149 (1966); Zammit, *supra* note 35, at 672.

[54] For a discussion of the consent doctrine, see Kurland, *supra* note 23, at 578–82.

[55] 274 U.S. 352 (1927).

[56] *Id.* at 354, 356–57. Service of process was carried out pursuant to chapter 90 of the General Laws of Massachusetts, as amended by the passage of a 1923 statute, which provides that

> [t]he acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle . . . on a public way . . . shall be deemed equivalent to an appointment . . . of the registrar . . . to be his true and lawful attorney upon whom may be served all lawful process.

1923 Mass. Acts ch. 431, § 2.

its highways until they gave such consent. From this the Court readily concluded that the use of state highways constituted an implied consent.[57] The Court justified the use of this fiction by citing the dangers inherent in the operation of the automobile and the state's interest in maintaining safe highways.[58]

A second device, the presence doctrine, provided still another way to extend in personam jurisdiction. This theory, as stated in cases such as *International Harvester Co. v. Kentucky*,[59] allowed courts to define corporate presence in terms of the business activity carried on in the forum by foreign corporations.[60] The deciding question in *International Harvester* was whether the extent and manner of the business carried on in the forum warranted the inference that the corporation was present to receive service of process.[61] This rationale allowed for the exercise of jurisdiction over companies engaged

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[57] *See* 274 U.S. at 356. The Court found that the statute did not violate the privileges and immunities clause of the Constitution, since it did not discriminate against nonresidents, but only made them amenable to process for torts committed in the state. *See id.* at 355–56. Actual consent had already been recognized as constitutional when, in Kane v. New Jersey, 242 U.S. 160 (1916), the Court upheld a New Jersey statute which required nonresident motorists, as a condition to their use of its highways, to file a formal instrument appointing the Secretary of State as their personal representative for service of process in any legal action arising out of the operation of an automobile. *Id.* at 164, 166–69. The *Hess* Court stated, however, that any "difference between the formal and implied appointment [of an agent] is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment." 274 U.S. at 357.

[58] 274 U.S. at 356. While discussing the basis for nonresident motorists statutes, the Court, in Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953), remarked that "[i]n point of fact, however, jurisdiction in these cases does not rest on consent at all," rather "liability rests on the inroad which the automobile has made on the decision of *Pennoyer*." *Id.* at 341. *Cf.* Doherty & Co. v. Goodman, 294 U.S. 623, 625, 627–28 (1935) (under an implied consent statute, Court upheld jurisdiction over a foreign company by emphasizing the forum's "exceptional" interest in regulating corporate securities).

Because the doctrine was premised on the state's right to exclude, the state's inability to exclude interstate commerce undermined the implied consent doctrine as applied to foreign corporations. *See* Kurland, *supra* note 23, at 581–82. *Cf.* Castle v. Hayes Freight Lines, 348 U.S. 61, 63–65 (1954) (a state cannot exclude interstate motor carriers from its public highways, since Interstate Commerce Commission has exclusive power to revoke licenses for interstate travel); Flexner v. Farson, 248 U.S. 289, 293 (1919) (implied consent rationale not applied to partnership, since state cannot exclude natural persons); Tardiff v. Bank Line, 127 F. Supp. 945, 946, 948 (E.D. La. 1954) (implied consent, as condition to use of state's navigable waters, rejected as state interference with interstate commerce). *See generally* Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766–68 (1945); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 13 (1877).

[59] 234 U.S. 579 (1914).

[60] *Id.* at 589. This approach allowed courts to look beyond the evidence of mere physical presence in determining whether a foreign corporation was subject to their jurisdiction. *See id.* at 582–86; Kurland, *supra* note 23, at 582–84.

[61] 234 U.S. at 583.

solely in interstate commerce.[62] Both the consent theory, as applied to corporations, and the presence theory turned on whether the business carried on in the forum warranted an inference of implied consent or presence.[63] Consequently, a third theory, the "doing business" doctrine evolved.[64] Under this approach, courts looked to the quantity and quality of activity which might amount to "doing business" within the forum state.[65]

The need to formulate these theories in order to extend in personam jurisdiction beyond the boundaries of the state manifested the impracticability of strict territorial limitations on jurisdiction. The principles of public law espoused by *Pennoyer* equated adjudicatory jurisdiction with territorial sovereignty and did not recognize the validity of extraterritorial applications of state law. While these principles may have been applicable to independent sovereigns, they became less practicable given the economic and political realities of a growing federal system.[66] Once in personam jurisdiction was recognized outside the state, it was no longer dependent upon the physical power attendant upon territorial sovereignty. The question then to be answered was when should a national sovereign lend its power to the enforcement of judgments by state courts against nonresidents, that is, when would an extraterritorial exercise of jurisdiction comply with the requirements of due process.[67] *Pennoyer* could provide little help in resolving this issue because it did not recognize the legitimacy of extraterritorial jurisdiction. Judicial rationales based on fictional devices were likewise of little help, for they failed to provide a fixed standard.[68]

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[62] *See id.* at 587–89.

[63] *See* Kurland, *supra* note 23, at 584.

[64] *See* 234 U.S. at 583; Kurland, *supra* note 23, at 584–86; *Developments in the Law–State-Court Jurisdiction*, 73 HARV. L. REV. 909, 922–23 (1960) [hereinafter cited as *Developments in the Law*].

[65] *See* 234 U.S. at 582–86; *Developments in the Law*, *supra* note 64, at 922–23; Kurland, *supra* note 23, at 584–85. As Professor Kurland points out, "law reports became cluttered with decisions as to what constituted 'doing business'," and some of these "cases drew fine lines which made little sense in terms of either theory." *Id.* at 584; *see* Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141–42 (2d Cir. 1930). *See generally* Reynolds v. Missouri, Kan. & Tex. Ry., 224 Mass. 379, 385–86, 113 N.E. 413, 415 (1916), *aff'd on other grounds*, 228 Mass. 584, 117 N.E. 913 (1917), *aff'd per curiam*, 255 U.S. 565 (1921) (to determine presence, the state court considered defendant's business activities collectively, *viz.*, advertising, correspondence, solicitation and collection of monies); St. Louis S.W. Ry. v. Alexander, 227 U.S. 218, 228 (1913) (company is carrying on business to the extent that renders it amenable to service of process when it has an agent in the forum to settle claims against it).

[66] *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1129–30 (3d Cir. 1976).

[67] *See* Kurland, *supra* note 23, at 586–87.

[68] *See id.* at 585.

It was not until 1945, in *International Shoe Co. v. Washington*,[69] that the Court adopted a new constitutional limit on the exercise of in personam power.[70] In that case, International Shoe refused to pay an unemployment tax in the state of Washington on commissions received by salesmen in that state, arguing that it was not doing business within the state in such a continuous and systematic manner as would make it present within the state.[71] The Supreme Court rejected the "doing business" and "presence" formulations, holding that the requirements of due process "may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[72] Engaging in what may be termed a *quid pro quo* rationale, the Court reasoned that since a corporation enjoys "benefits and protection" from the laws of the state where it carries on its activities, it is only fair and reasonable that in return it must answer certain suits brought in the state to enforce obligations there.[73] Although the claim brought against International Shoe arose out of the company's activities within the state, the Court noted that an act or acts may be of such quality and so substantial as to warrant jurisdiction, even though the activity is unrelated to the suit or the contact amounts to a single act.[74] Given this broad standard, due process came to require "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.'"[75] This standard was broad enough to countenance the consideration of such factors as the interests and convenience of the parties and the state.[76]

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[69] 326 U.S. 310 (1945).

[70] The Court could have rendered the same judgment by employing the *International Harvester* rule, since the relevant facts of both cases were similar. *Compare* International Harvester Co. v. Kentucky, 234 U.S. at 584–87 *with* International Shoe Co. v. Washington, 326 U.S. at 313–15.

[71] 326 U.S. at 320.

[72] *Id.* at 317.

[73] *Id.* at 319.

[74] *Id.*

[75] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see* Smyth v. Twin State Improvement Corp., 116 Vt. 569, 575, 80 A.2d 664, 668 (1951)(*International Shoe* described as part of "a trend [away] from the court with immediate power over the defendant to the court where both parties may most conveniently settle their dispute").

[76] F. JAMES, CIVIL PROCEDURE 640–41 (1965); *see* Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 662–63 (1959).

Although the "minimum contacts" test was subsequently limited to in personam jurisdiction,[77] some courts recognized that the due process standard set forth in *International Shoe* might equally apply to the exercise of quasi in rem jurisdiction.[78] In the case of *Seider v. Roth*,[79] the plaintiff, a resident of New York, sought to attach the contractual obligations of an insurer doing business in the forum in order to adjudicate the liability of a nonresident policyholder in connection with an automobile accident which occurred outside the state.[80] Under the terms of the insurance contract, the insurer, which the court looked upon as a resident, was to be in full control of the litigation.[81] In a four to three decision, the Court of Appeals of New York held that the insurer's contractual obligation to defend and indemnify the defendant policyholder was a *res* subject to attachment, and furnished a sufficient basis for quasi in rem jurisdiction under New York law.[82]

Although the court's decision was based on a quasi in rem rationale, the outcome was influenced by the concept of fairness with

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[77] *See* 326 U.S. at 316.

[78] *See, e.g.*, Atkinson v. Superior Ct., 49 Cal. 2d 338, 316 P.2d 960 (1957); Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

One commentator has posited that because of the development of personal jurisdiction through the minimum contacts theory, "the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff." Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 305–06 (1962); *see* Smit, *supra* note 42, at 600–01. Professor Zammit theorized that concern over the defendant's relation to the state in the exercise of in personam jurisdiction, "as well as heightened concern over the requirements of procedural due process, . . . rendered the entire concept of jurisdictional attachment constitutionally suspect." Zammit, *supra* note 35, at 672.

[79] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[80] *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.

[81] *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

[82] *Id.* at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102. The majority read the insurance agreement to require the insurer "to defend Lemiux [the insured] in any automobile negligence action and, if judgment be rendered against Lemiux, to indemnify him therefor." *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. Furthermore, the court found that the policy required the insurer "upon receipt of notice of loss or damage to investigate and if expedient to negotiate or settle with the claimant. . . . [and] to pay necessary medical and similar expenses." *Id.* In his dissent, Judge Burke characterized the majority's opinion as an example of bootstrapping in that "[t]he existence of the policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy." *Id.* at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103.

The effect of the *Seider* holding was to judicially create a "direct action" against the insurer. *Id.* at 114–15, 216 N.E.2d at 315, 269 N.Y.S.2d at 102. For a discussion of the judicial creation of direct actions, see Comment, *supra* note 51, at 558–60.

In a later case, the Court of Appeals of New York limited the insurer's liability in a *Seider* situation to the face amount of the insurance policy, *i.e.*, the amount of the attached debt. Simpson v. Loehmann, 21 N.Y.2d 305, 310, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 636–37 (1967). The *Seider* rule was upheld in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *aff'd on rehearing*, 410 F.2d 117 (2d Cir. 1968) (en banc), *cert. denied*, 396 U.S. 844 (1969).

respect to the relative situations of the parties involved. As the court of appeals pointed out when it reaffirmed *Seider* in another insurance case, *Simpson v. Loehmann*,[83] the insurer's presence in the forum, its control of the litigation, and the state's interest in providing its residents with a forum formed a sufficient nexus between the state and the controversy to support a fair exercise of jurisdiction in *Seider*.[84]

Another application of the fairness standard to quasi in rem jurisdiction occurred in California when, in *Atkinson v. Superior Court*,[85] members of the Federation of Musicians sought to serve process upon a New York trustee who was an indispensible party in a suit to prevent contributions by their employers to a trust established by the Federation.[86] The Supreme Court of California found that the employer's obligation to contribute to the trust constituted personal property within the state under California law,[87] but it declined

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[83] 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

[84] *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637. In evaluating the insurer's role, the *Simpson* court remarked that "it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation." *Id.*; *see* 17 N.Y.2d at 313, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. Furthermore, one commentator has observed that those "cases that have construed the *Seider* doctrine, whether by requiring some connection between the forum and the underlying controversy or by analogizing to direct-action statutes, implicitly recognize that the due process limitations of *International Shoe* apply to such quasi in rem proceedings." Comment, *supra* note 23, at 337 (footnotes omitted).

Professor Zammit remarked that a state's interest in providing its citizens with a forum was "at the heart of the result in *Seider v. Roth*." Zammit, *supra* note 35, at 681. In fact, the *Seider* procedure was later deemed to be valid only when invoked by a resident of the forum state. Farrell v. Piedmont Aviation, Inc., 295 F. Supp. 228, 230–31 (S.D.N.Y. 1968), *aff'd*, 411 F.2d 812, 817 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969).

[85] 49 Cal. 2d 338, 316 P.2d 960 (1957).

[86] *Id.* at 340–41, 316 P.2d at 961–62. The trust was established between plaintiffs' union and their employers to fund performances by musicians given to the public without charge, in order "to contribute to the public knowledge and appreciation of music." *Id.* at 340, 316 P.2d at 962. The plaintiffs alleged "that the trust arrangement divert[ed] [their] wages . . . without corresponding benefit to plaintiffs." *Id.* at 341, 316 P.2d at 962.

[87] *Id.* at 342, 348, 316 P.2d at 963, 966. In fact, the court was attaching the very claim which plaintiffs sought to litigate. On this point the court said:

> We find no relevance in the distinction defendants seek to make between jurisdiction to take over a nonresident's claim to a chose in action admittedly his and jurisdiction to establish that it was never his. In both situations the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court. . . . [T]his distinction alone has no bearing on the fairness of making him appear.

Id. at 346, 316 P.2d at 965.

Discussing the case two years later, Justice Traynor wrote:

> [T]he court felt compelled to find a *quasi*-in-rem basis for jurisdiction, even though there were enough contacts with the state to justify full in personam jurisdiction over the nonresident defendant, because a statute authorized a personal judgment only if the defendant was a resident at the time of suit.

Traynor, *supra* note 76, at 662.

to justify the constitutionality of its jurisdiction upon quasi in rem concepts.[88] Instead, the court drew upon the "general principles governing jurisdiction," declaring that considerations of fundamental fairness were not limited to personal jurisdiction.[89] In concluding that a sufficient nexus existed between the trustee and the forum to warrant jurisdiction, the court pointed out that the employers were already before the court, that the employer's liability and the contested payments stemmed from the plaintiffs' employment in the forum, and that the conflicting claims to the *res* by the trustee and the plaintiffs should, in fairness to the parties involved, be litigated before the same court.[90]

The principles enunciated in *Pennoyer* were again re-examined by the Supreme Court when, in *Shaffer v. Heitner*, the Court addressed the issue of whether the minimum contacts standard of due process used for in personam jurisdiction in *International Shoe* was applicable to the exercise of in rem and quasi in rem power.[91] Speaking for the Court, Justice Marshall traced the history of territorial jurisdiction based on the "century-old case of *Pennoyer v. Neff*"[92] and found it inapplicable to a modern federal system of government.[93] More importantly, he declared that a proceeding against

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[88] 49 Cal.2d at 345, 316 P.2d at 964.

In explaining the court's decision not to rely on the assignment of fictional situs, Justice Traynor stated:

> It seemed as irrational to resolve the problem by assigning a fictional situs to intangibles as it would to pin a tail blindfolded to a non-existent donkey. Instead it was identified as a problem of jurisdiction over persons and property. It was resolved in terms of the interacting elements of the parties' contacts with the forum state, the interests of the states concerned in the outcome, and the pervading concept of fair play to all parties.

Traynor, *supra* note 76, at 662.

[89] 49 Cal.2d at 345, 316 P.2d at 964.

[90] *Id.* at 347–48, 316 P.2d at 966. In further support of its decision, the court noted that the defendant obligors, who were before the court, were also subject to "the conflicting claims of the trustee." *Id.* at 347, 316 P.2d at 966. The failure to acquire jurisdiction over the trustee would not have precluded the plaintiffs from proceeding against the defendant obligors. *Id. See generally* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916). Such a situation would have created the risk of double liability for the obligor. Citing federal interpleader legislation as a remedial measure to the problem of double liability in such situations, the court posited that it was "doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise." 49 Cal.2d at 348, 316 P.2d at 966.

[91] 433 U.S. at 211–12; *see, e.g.*, Smit, *supra* note 42, at 612.

[92] 433 U.S. at 196; *see* Smit, *supra* note 42, at 614; Zammit, *supra* note 35, at 675–76; Comment, *supra* note 23, at 338.

[93] 433 U.S. at 205–07; *see, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312–13 (1950) (state adjudicatory power viewed apart from in personam, in rem, and quasi in rem terminology); U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 154 (3d Cir. 1976) (whether

property is actually a proceeding against the owner of the property.[94] The Court concluded that the due process requirement of minimum contacts, which applies to the exercise of jurisdiction over persons, should therefore apply to the exercise of jurisdiction over the *res*.[95]

This rationale entailed a rejection of *Harris v. Balk* insofar as *Harris* permitted the attachment of property as a basis for a valid quasi in rem judgment against the owner, where the property was not related to the claim sued on, and the owner had no contact with the forum.[96] The Court declared, however, that in most cases where the action is brought to secure a claim in the property or to recover damages for injuries suffered on the property, the property alone would serve as the basis for jurisdiction without the existence of other contacts.[97] In cases where, the Court reasoned, a nonresident property owner "expected to benefit from the State's protection of his interest," it is fair and reasonable to require him to appear in a suit which directly involves the property or the rights and obligations that arise from the ownership of it.[98] Because Delaware's attempted exercise of jurisdiction under the sequestration statute failed to comply with this standard, it was declared unconstitutional.[99]

Applying its ruling on abstract principles to the facts before it, the Court first determined that the statutory presence of the stock could not provide a basis for jurisdiction because it was wholly unrelated to the claim sued on.[100] The Court further determined that the

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designation be in personam, in rem or quasi in rem, "ultimately the test of *International Shoe* is determinative"); Texas v. New Jersey, 379 U.S. 674, 677–79 (1965) (assignment of situs to intangibles for jurisdictional purposes proved unworkable in escheat case); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1132 (3d Cir. 1976) (Gibbons, J., concurring) (territorial basis of jurisdiction "stretched to improbable configurations" by use of fictions).

[94] 433 U.S. at 207; *see e.g.*, Tyler v. Court of Registration, 175 Mass. 71, 55 N.E. 812, *appeal dismissed*, 174 U.S. 405 (1900); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 139 (1971).

[95] 433 U.S. at 212.

[96] *Id.* at 208–12, 211 n.38, 212 n.39; *see* U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 154–55 (3d Cir. 1976). *Compare* Shaffer v. Heitner, 433 U.S. at 207–08 *with* Texas v. New Jersey, 379 U.S. 674, 678–79 (1965).

[97] 433 U.S. at 207; *see id.* at 199 n.17, 207 n.24. The Court also acknowledged these examples were not inclusive, but that other factors not mentioned by the court may be considered. *Id.* at 208 n.28. On this point Justice Powell said he would reserve judgment on whether certain kinds of property with fixed situs might alone provide a basis for jurisdiction. *Id.* at 217 (Powell, J., concurring).

[98] *Id.* at 207–08.

[99] *See id.* at 213–17. The Court of Chancery of Delaware has recognized the continued validity of Delaware's sequestration statute where minimum contacts exist. Grynberg v. Burke, 388 A.2d 443, 445 (Del. Ch. 1978).

[100] *Id.* at 213; *see* U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 155 (3d Cir. 1976).

presence of stock did not indicate other contacts sufficient to justify jurisdiction; the defendants had never entered the State of Delaware, as Greyhound had its principle place of business outside the state, and none of the acts relating to the cause of action had occurred within the state.[101] Heitner, however, argued that the defendants' positions as fiduciaries of a Delaware corporation provided minimum contacts by reason of the state's interest "in supervising the management of a Delaware corporation."[102] Moreover, he continued, the defendants had obtained the "benefits and protection" of Delaware law when they accepted their fiduciary roles in a Delaware corporation and, therefore, should be amenable to the state's jurisdiction.[103]

As to Heitner's first argument, the Court replied that it was undermined by Delaware's failure "to assert the state interest" in controlling the conduct of nonresident fiduciaries in its sequestration statute; this statute was premised upon the presence of property and could be used against a nonresident in any type of suit.[104] Although Delaware might have assured its jurisdiction over nonresident corporate fiduciaries by requiring them to purchase stock in their corporations if it had had an interest in controlling their conduct, the state failed to do so.[105] Nevertheless, the Court noted that even if such an interest had been articulated by the state and recognized by the Court, it would not have been a determinative factor.[106] Although

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[101] 433 U.S. at 213.

[102] *Id.* at 213–14. With respect to this argument, one commentator has remarked that "a substantial interest in regulating the underlying controversy under its own law" may support jurisdiction in the state. von Mehren & Trautman, *supra* note 53, at 1129–35. It has also been noted that "because of the expanding scope of jurisdiction, the state of incorporation need no longer be accepted blindly as a place where the corporation may be sued." *Developments in the Law*, *supra* note 64, at 933.

[103] 433 U.S. at 215–16; *see* 326 U.S. at 319.

[104] 433 U.S. at 214. The Court recognized, however, that the sequestration statute may have been used "most frequently" against nonresident fiduciaries of Delaware corporations. *Id.* In fact, the unchallenged availability of the statute for use in obtaining jurisdiction over nonresident fiduciaries may have obviated the need for the state's assertion of an interest in controlling nonresident fiduciaries of its corporations. *Id.* at 191 n.5 (Brennan, J., concurring in part and dissenting in part). *See generally* Hughes Tool Co. v. Fawcett Publications, Inc., 290 A.2d 693, 695 (Del. Ch. 1972).

[105] *See* 433 U.S. at 214–15.

[106] *Id.* Courts are looking more at the local contacts between a foreign corporation and the state in which it carries on business rather than focusing solely on the state of incorporation in order to determine which policy interest should govern. *See, e.g.*, Western Air Lines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961). For a discussion of *Western Air Lines* and the states' growing concern with the internal affairs of foreign corporations, see Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118 (1958).

The *Restatement of the Conflict of Laws* notes that the "court will exercise jurisdiction over an action involving the internal affairs of a foreign corporation unless it is an inappropriate or

the policy interest of the state would have been relevant to the choice of law question, without more it did not prove Delaware a "fair forum."[107]

In response to the plaintiff's second argument, the Court replied that Heitner had failed to show that the defendants, by accepting their fiduciary roles, had purposefully enjoyed the benefits from their affiliation with Delaware.[108] Nor had the defendants expected to be haled before a Delaware tribunal absent a statute equating the acceptance of a fiduciary position with an implied consent to jurisdiction.[109] This concern for putting a nonresident on notice of his amenability to a foreign jurisdiction was reiterated in Justice Steven's concurring opinion.[110]

Justice Brennan, while agreeing with the majority's reformulation of constitutional doctrine, disagreed vigorously with the outcome.[111] He maintained that as a general rule a state should have jurisdiction to hear a stockholder's derivative suit against nonresident fiduciaries of its corporations.[112] The critical factor in his mind was the defendants' affiliation with the forum, through their fiduciary relationship with Greyhound. In Justice Brennan's opinion, the defendants were accorded the benefit and protection of Delaware law as officers and directors of the corporation, and therefore, should have been respon-

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inconvenient forum for the trial of the action." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 (1971). Generally,

> when the corporation is only technically a foreign corporation, since all, or the great majority, of its contacts, other than the place of its incorporation, are in the state of the forum, the courts will even entertain actions which call for relief affecting the corporation's organic structure or internal administration.

Id. § 313, Comment c, at 348.

Arizona, Greyhound's principle place of business, may also have a legitimate state interest in hearing the dispute and in applying its own law. *See* Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955); State *ex rel.* Wurdman v. Reynolds, 275 Mo. 113, 204 S.W. 1093 (1918) (en banc); Latty, *Psuedo-Foreign Corporations*, 65 YALE L.J. 137 (1955). *See generally* R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS 26–70 (1976).

[107] 433 U.S. at 215; *see* Hanson v. Denckla, 357 U.S. 235, 254 (1958). *Compare* Babcock v. Jackson, 12 N.Y.2d 473, 479–82, 191 N.E.2d 279, 282–83, 240 N.Y.S.2d 743, 747–49 (1963) (the state having the most significant contacts with the controversy, *i.e.*, forming the "center of gravity" of the controversy should have its laws applied) *with* Hanson v. Denckla, 357 U.S. at 254 (contacts which may be sufficient to support application of the law of a particular state may be insufficient to support jurisdiction).

[108] 433 U.S. at 215–16. The majority indicated that the defendants "simply had nothing to do with the State of Delaware." *Id.* The Court's conclusion as to the absence of purposeful availment may be construed by lower courts as constituting dictum. *See generally* L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co., 109 F. 393, 400 (5th Cir. 1901).

[109] 433 U.S. at 216.

[110] *Id.* at 218.

[111] *See id.* at 219–22. *See generally* von Mehren & Trautman, *supra* note 53, at 1124–34.

[112] 433 U.S. at 222.

sible for answering suits arising out of their fiduciary capacity.[113] Furthermore, he believed that the defendants' breach of duty outside the state and the foreseeable effect of that act upon a Delaware corporation were sufficient acts to warrant jurisdiction even though the acts occurred outside the forum.[114]

Because a derivative suit is brought on behalf of the corporation, Justice Brennan contended that "the chartering State has an unusually powerful interest in insuring the availability of a convenient forum" in such a suit.[115] He pointed out three public policy interests involved, namely, the state's interest in: (1) vindicating the rights of its corporations; (2) providing a convenient tribunal to oversee their internal affairs; and (3) implementing state regulatory schemes.[116] Recognizing that the majority relegated these interests to choice of law issues, he advised not to "compartmentalize thinking in this area."[117] In fact, he advocated a closer relationship between jurisdictional and choice of law inquiries, noting that both inquiries often involve similar considerations such as the expectations of the parties and notions of fairness.[118] At the very least, he argued, decisions

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[113] *Id.* at 227–28. Justice Brennan found that the defendants had

> voluntarily associated themselves with the State of Delaware, "invoking the benefits and protections of its laws" by entering into a long term and fragile relationship with one of its domestic corporations. They thereby elected to assume powers and to undertake responsibilities wholly derived from that State's rules and regulations, and to become eligible for those benefits that Delaware law makes available to its corporations' officials.

Id. (citations omitted).

For an application of the purposeful availment doctrine, see Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[114] 433 U.S. at 226.

[115] *Id.* at 222.

[116] *Id.* at 223. *But see* Comment, *Law For Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 894–98 (1969) (Delaware prefers less restrictive statutory control over its corporations to ensure the state's continued attractiveness as a place of incorporation).

[117] 433 U.S. at 224–25.

[118] *Id.* Merging choice of law and jurisdictional considerations would allow the forum to apply its own laws in many instances. *Id. Compare* 433 U.S. at 223–26 (Brennan, J., concurring in part and dissenting in part) *with* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1140–42 (3d Cir. 1976) (Gibbons, J., concurring). As a result, a state with a competing interest would be excluded from either hearing the dispute or having its laws applied. Thus, if an analytical approach which attempts to synthesize jurisdictional and choice of law considerations is to be adopted, then it seems that one must ask whether Delaware's interest in hearing the dispute, and thereby excluding other states from doing the same, is sufficient to satisfy the demands of federalism and prevent encroachment upon the sovereignty of a sister state. Only by inquiring into another state's competing interest in hearing the dispute can this question be answered.

Judge Gibbons articulated this kind of an approach in *Jonnet*, 530 F.2d at 1140, and in Empire Abrasive Equip. Corp. v. H.H. Watson, Inc., 567 F.2d 554, 557–58 (3d Cir. 1977). In both these cases, Judge Gibbons suggested a dual inquiry for determining the proper scope of

about what law to apply are relevant to determining the fairness of utilizing a given jurisdiction, and a bridge between the two issues would "minimize conflicts, confusion, and uncertainty."[119]

Much of the majority's statement on the issue of whether minimum contacts existed between the chartering state and the nonresident fiduciaries of one of its corporations is less than clear and convincing. Yet it appears that the Court was primarily concerned with notice to the fiduciaries of their amenability to the jurisdiction of a foreign state.[120] This would seem to explain why the Court failed to find minimum contacts while at the same time it appeared to give tacit approval to implied consent statutes directed at nonresident fiduciaries, and hence, suggested that the existence of such a statute would then have made the exercise of jurisdiction fair even where, as here, it failed to find a sufficient nexus for jurisdiction.[121] Nevertheless, it is difficult to understand why the majority did not recognize a manifest interest on the part of a chartering state in controlling the conduct of nonresident fiduciaries of its corporations, and consider this interest as a significant factor in resolving a jurisdictional issue.[122] It is also hard to imagine how the defendants could not have purposefully availed themselves of the benefits accruing from Delaware law, as the Court suggests, by reason of their positions in a Delaware corporation.[123] Despite these ambiguities, however, the most significant questions raised by *Shaffer* concern subsequent judicial analysis and the continued viability of quasi in rem jurisdiction in light of the Court's articulation of new constitutional doctrine.

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jurisdiction. First, it would be necessary to determine whether there is sufficient state interest to justify the exercise of state sovereignty to the exclusion of another state. Second, if the forum has the requisite interest, then it must be determined whether it would be fair to the defendant to subject it to jurisdiction. This latter determination involves an examination of the legitimate expectations of the parties.

[119] 433 U.S. at 226.

[120] *Id.* at 214–16. *Cf.* Empire Abrasive Equip. Corp. v. H.H. Watson, Inc., 567 F.2d 554, 558 (3d Cir. 1977) (question of whether it is fair to compel a nonresident to defend a suit in a foreign state must be answered "by reference to the expectations of the parties to the transaction" that gives rise to the litigation).

[121] *See* 433 U.S. at 216. In response to the *Shaffer* decision the Delaware Legislature enacted an implied consent statute aimed at fiduciaries of Delaware corporations. The statute subjects them to the court's personal jurisdiction in derivative suits. *See* DEL. CODE tit. 10, § 3114 (1977). For a recent examination of this statute, see Jacobs & Stargatt, *The New Delaware Director-Consent-to-Service Statute*, 33 BUS. LAW. 701 (1978). The question then raised is whether an implied consent statute could be upheld where there are no minimum contacts. This issue, however, may be largely conceptualistic and easily resolved by a factual finding of minimum contacts.

[122] *See* 433 U.S. at 214–15.

[123] *See id.* at 227–28 (Brennan, J., concurring in part and dissenting in part).

Judicial inquiry into the propriety of an exercise of quasi in rem jurisdiction will, henceforth, be a two-fold process. Courts must first ask whether the attached property is related to the litigation in such a way as to provide a nexus for jurisdiction, and if not, whether the property considered along with all the other contacts that exist between defendant, forum, and litigation make the exercise of jurisdiction fair and reasonable.[124] The *Shaffer* Court enumerated several situations where property alone would serve as a basis for jurisdiction. For example, jurisdiction would exist where the suit was brought to secure a claim in the attached property or to recover damages for injury suffered on the attached land.[125] But the Court did not intend these illustrations to be exclusive or determinative of

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[124] *Id.* at 209; *see* Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017, 1022 (2d Cir. 1978).

Given the particular facts of *Shaffer*, however, the Court could have adopted an alternative analysis that would have comported with fairness and reasonableness. At the very heart of the *Shaffer* decision lies a constitutional prohibition against the use of quasi in rem power to acquire personal jurisdiction over a nonresident who has no minimum contacts with the forum. *See* O'Conner v. Lee-Hy Paving, 437 F. Supp. 994, 997 (E.D.N.Y. 1977). Accordingly, whenever a state attempts to adjudicate a personal claim against a nonresident and award a judgment against him personally, it must have minimum contacts with that party whether its judicial power is predicated on service of process or the situs of property. But whenever a state attempts to exercise adjudicatory power to litigate a claim or right in property itself, reliance on its sovereign power over property within its borders would appear, under a standard of fairness and reasonableness, to justify jurisdiction. Under this approach to the jurisdictional issue, a court would be required to determine whether the suit, apart from jurisdictional nomenclature, is directed primarily against the defendant. If so, then the minimum contacts test must be met. If, on the other hand, the claim were to the property or a right in the property, the court's sovereign power over the *res* and its interest in resolving disputes over conflicting claims to such property would allow it to adjudicate the claim, regardless of whether minimum contacts existed. In this way, truly quasi in rem actions—defined as suits to affect the interests of particular persons in designated property by attempting to secure a claim in the property and extinguish or establish the nonexistence of similar interests of particular parties, RESTATEMENT OF JUDGMENTS § 8 (1942)—are unaffected by *Shaffer*, while actions unrelated to attached property and brought primarily to satisfy a claim against the owner would be within the ambit of the minimum contacts test. Still, a third type of action would remain. Such an action would be brought to satisfy a claim against the defendant, but would be connected to the property within the forum state, as, for example, with a tort occurring upon land. Within this latter category, courts could view the action as personal, yet give greater weight to the existence of the related property as a connection between the defendant and the forum state which would justify the exercise of personal jurisdiction.

This type of analysis entails reading the *Shaffer* decision as a limitation upon a state's attempt to compel the personal appearance of nonresidents before its tribunals, but preserves the concept of sovereign control over property within the territorial borders of the state. *See* Shaffer v. Heitner, 433 U.S. at 217 (Powell, J., concurring). One advantage of this approach is that it redefines the scope of a court's quasi in rem jurisdiction, while it clearly and unambiguously articulates and recognizes the state's peculiar interest and control over property located within its boundaries.

[125] 433 U.S. at 207–08.

jurisdiction in all cases.[126] Thus, the issue ultimately turns upon whether the cause of action arises out of, or seeks to resolve an issue pertinent to, the rights and obligations of ownership over which the state extends a canopy of expected protection. For instance, the defendant's land within the forum may provide a basis for quasi in rem jurisdiction in litigating the owner's rights and obligations arising out of a tort which allegedly occurred on that land.[127] Given this rationale, it is the benefit which the owner receives from the state's protection of those rights incidental to ownership, and the state's interest in enforcing the obligations arising out of that ownership, which are the crucial factors governing the jurisdictional question. The nature of this relationship between the nonresident owner and the state, along with the presence of property in the forum, would appear to justify burdening the owner with defending in a foreign state, but only when the action involves rights and obligations incidental to the ownership of that property.

The second part of this two-fold inquiry into quasi in rem jurisdiction turns upon minimum contacts analysis. It raises the question of what kind of minimum contacts analysis will be undertaken, what factors will be considered, and how, if at all, will this inquiry differ from an in personam analysis.[128] Perhaps a wider or more expansive analysis may be required—one that will encompass a broader scope of factors in order to determine whether there are contacts which make the exercise of jurisdiction consonant with " 'traditional notions of fair play and substantial justice.' "[129] For instance, it would appear appropriate for the relative situation of all the parties to the suit and their respective interests to be considerations of growing importance.[130] The courts must also focus on the competing interests of the

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[126] *Id.* at 208 n.28.

[127] *Id.* at 208.

[128] *Developments in the Law*, *supra* note 64, at 956.

[129] *See* Cornelison v. Chaney, 16 Cal. 3d 143, 150–51, 545 P.2d 264, 268, 127 Cal. Rptr. 352, 356 (1976) (where the "justification for the exercise of jurisdiction is not obvious, the convenience of the parties is a factor to be considered"); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 440, 176 N.E.2d 761, 765 (1961) (the issue "cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable in the circumstances"); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 573–74, 80 A.2d 664, 666–67 (1951).

[130] *See, e.g.*, Simpson v. Loehmann, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637; O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 997–1004 (E.D.N.Y. 1977), *aff'd*, 47 U.S.L.W. 2007 (2d Cir. June 12, 1978). The court of appeals stated:

> The overriding teaching of Shaffer is that courts must look at realities and not be led astray by fictions. Viewed realistically, the insurer in a case such as this is in full control of the litigation: it selects the attorneys, it decides if and when to settle, and it makes all procedural decisions in connection with the litigation. Moreover, a

parties and the actual burden associated with defending in a foreign state.[131] This approach should give recognition to the interests of the forum state, although the forum's interest alone does not make the exercise of jurisdiction fair.[132] Thus, the question of whether the defendant's contacts with the forum subject him to its jurisdiction must be determined by weighing the competing interests involved and assessing the true burdens of litigation.[133]

More importantly, however, the *Shaffer* opinion raises a serious question about the continued use of quasi in rem attachment in those states which permit the exercise of personal jurisdiction to the full extent allowed under the constitution, that is, whenever there are minimum contacts.[134] Since due process will now require minimum

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judgment in a Seider type case does not deprive the defendant of money; the full force of the judgment rests on the insurer.

Id. at 2007. Moreover, Judge Friendly emphasized that the court was not aware of any instance of unfairness resulting from the application of the *Seider* rule since its inception in 1966. *Id.*

[131] *See Developments in the Law*, *supra* note 64, at 957–58, 965–66.

[132] *See* 433 U.S. at 215.

[133] *See* O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 997–1004 (E.D.N.Y. 1977) *aff'd*, 47 U.S.L.W. 2007 (2d Cir. June 12, 1978); Seider v. Roth, 17 N.Y.2d at 114–15, 216 N.E.2d at 314–15, 269 N.Y.S.2d at 102; Simpson v. Loehmann, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637; Atkinson v. Superior Court, 49 Cal. 2d at 347, 316 P.2d at 966.

[134] *E.g.*, N.J.R. 4:4-4(c)(1), -(4)(e); R.I. GEN. LAWS § 9-5-33. For cases construing the minimum contacts doctrine under New Jersey's long-arm statute, see Cooke v. Yarrington, 62 N.J. 123, 128-29, 299 A.2d 400, 403 (1973) (personal jurisdiction acquired over a former resident of New Jersey, who was involved in an automobile accident in Pennsylvania, at a time when he was a resident of New Jersey driving under a New Jersey license and in a car registered in New Jersey, and who, after leaving the forum state, occasionally visited parents residing there); Avdel Corp. v. Mecure, 58 N.J. 264, 272–73, 277 A.2d 207, 211–12 (1971) (court found sufficient contacts to support jurisdiction over New York defendant who purchased goods from New Jersey manufacturer, where defendant had been in New Jersey only once in connection with transaction and contacts had been by mail, telephone, and visits by plaintiffs' representatives to New York); Egan v. Fieldhouse, 139 N.J. Super. 220, 224–25, 353 A.2d 148, 150 (Law Div. 1976) (jurisdiction upheld in personal injury suit by purchasers of New Jersey residence alleging defective construction by the seller-builder after he had left the state); Blessing v. Prosser, 141 N.J. Super. 548, 550–51, 359 A.2d 493, 493–94 (App. Div. 1976) (advertising by hotel in AAA guide distributed in New Jersey constituted minimum contacts); Trustees Structural Steel v. Huber, 136 N.J. Super. 501, 506, 347 A.2d 10, 12-13 (App. Div. 1975), *certif. denied*, 70 N.J. 143, 358 A.2d 190 (1976) (minimum contacts found in embezzlement action against nonresident defendant based on agreements entered into between New Jersey labor unions and foreign corporation of which defendant was president); Sears, Roebuck & Co. v. Katzmann, 137 N.J. Super. 106, 107–09, 348 A.2d 193, 194 (App. Div. 1975) (minimum contacts found in action based upon a debt contracted by a nonresident in New Jersey while he was a New Jersey resident jointly with another New Jersey resident and involving New Jersey real estate which defendant owned); Govan v. Trade Bank & Trust Co., 109 N.J. Super. 271, 275, 263 A.2d 146, 148 (App. Div. 1970) (jurisdiction upheld in an action brought by nonresident plaintiff against nonresident defendant on a promissory note negotiated, executed, and payable in New Jersey, where New Jersey was only state having a substantial connection with the transaction); Knight v. San Jacinto Club, Inc., 96 N.J. Super. 81, 90, 232 A.2d 462, 467 (Law Div. 1967) (state has jurisdiction over nonresident with respect to an act committed by him while visiting this state).

contacts as a prerequisite to the exercise of jurisdiction, in personam jurisdiction will be available as an alternative to quasi in rem jurisdiction in these states.[135] In such a situation, the propriety of quasi in rem attachment will have to be determined on two levels—state and federal. On the first level, the courts must ask whether state policy permits the attachment of a nonresident's property to acquire jurisdiction when the owner is amenable to service of process. In some states where attachment is viewed as an extraordinary proceeding, the courts have held that the use of this proceeding to attach property of a nonresident who could have been served with process is inconsistent with the designs of the attachment statute.[136] Thus, a writ of attachment will not issue unless it can be justified upon other than jurisdictional grounds.[137]

For a further discussion of the leading United States Supreme Court decisions construing the minimum contacts doctrine, see note 19 *supra*.

In those jurisdictions where the state legislature has limited the personal jurisdiction of its court to specifically enumerated actions, quasi in rem jurisdiction, and hence attachment, will remain a necessary complement to the court's in personam power. *See, e.g.*, N.Y. CIV. PRAC. LAW § 302 (McKinney's Cum. Supp. 1977-1978).

[135] *See* 433 U.S. at 212.

[136] *See* N.J. STAT. ANN. § 2A:26-2 (West 1952); Lance Indus., Inc. v. Eastern Specialties Co., 107 N.J. Super. 296, 300–01, 258 A.2d 146, 148 (Ch. Div. 1969) (in most cases where there is an absence of fraud, attachment will lie only where the debtor's property is within the state but the debtor himself is beyond the court's in personam jurisdiction); Augustus Co. *ex. rel.* Bourgeois v. Manzella, 19 N.J. Misc. 29, 30, 17 A.2d 68, 69 (Atlantic County Ct. 1940) (writ of attachment is an extraordinary writ which should not be used when the debtor is subject to ordinary service of process).

[137] For example, under New Jersey's prejudgment attachment statute, attachment is available to both residents and nonresidents as a prejudgment security device upon several grounds. Where, for instance, the plaintiff would be entitled to an order of arrest before judgment in a civil action, the court may issue a writ of attachment. N.J. STAT. ANN. § 2A:26-2(a) (West 1952). The right to an order of arrest exists in tort actions where the suit is "founded upon (a) an outrageous battery or a mayhem, (b) a claim of damages for the misconduct or neglect of a public officer or (c) a willful or malicious act and the defendant is a nonresident or is about to remove from the state." *Id.* § 2A:15-41. In contract actions the writ of attachment will issue where the "defendant is about to remove any of his property out of the jurisdiction of the court. . .with intent to defraud his creditors;" or where the defendant "fraudulently conceals" any of his property; or where he has or is about to transfer property "with intent to defraud his creditors;" or where the debt or demand being sued on was "fraudulently contracted." *Id.* §§ 2A:15-42, :26-2. Secondly, attachment may lie where a plaintiff has a legal or equitable claim against a defendant who absconds with the intent of defeating the demands of his creditors. *Id.* § 2A:26-2(b),(d). Thirdly, property may be seized where the plaintiff seeks a judgment in rem against the property of a decedent. *Id.* § 2A:26-2(c). Lastly, where the defendant is a foreign corporation authorized to do business in New Jersey, and the state of incorporation permits attachment against New Jersey corporations authorized to do business there, attachment may issue. *Id.* § 2A:26-2(e). The legitimacy of this latter ground will depend on the particular circumstances of each case. *See, e.g.*, Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977). For a discussion of the New Jersey attachment statute, see 11 RUTGERS L. REV. 714 (1957).

If the writ of attachment is issued, however, it will have to be further justified on a constitutional level. Due process has been interpreted to demand notice and an opportunity for a hearing prior to the seizure of property. Although these procedural safeguards are not always possible, as for instance, prior to quasi in rem attachment, they may be suspended only under extraordinary circumstances.[138] Where in personam jurisdiction is an available alternative to quasi in rem jurisdiction, attachment may no longer be characterized as an extraordinary measure necessary for proceeding against nonresidents. Thus, the seizure of a nonresident's property may be unconstitutional unless it can be rationalized as an extraordinary measure and as a prejudgment security device. Moreover, since the full faith and credit clause demands the enforcement of valid personal judgments in all states, attachment of a nonresident's property without proper justification may constitute a discriminatory practice against nonresidents, and hence violate the equal protection clause.[139]

Thus, *Shaffer* marks the second major step, begun by *International Shoe,* in the movement away from a territorial concept of adjudicatory power to one of fundamental fairness. It heralds an important era in the judicial evolution of jurisdictional due process. In a very real sense it is the slow but direct response to the demands of a federal system, and hence the product of a dialectic development: the state's inclination to expand its jurisdiction versus the need for limitations to prevent unfairness and to protect the sovereign integrity common to all states. The synthesis of these two influences has resulted in a "minimum contacts" test based on fairness. Such a standard has provided reasonable expectations as to the outcome while complying with a sense of fairness and justice. This standard, however, is a flexible and evolving doctrine which may itself further develop as the Court attempts to fairly balance all the competing interests in our present judicial structure.

John G. Fellinger

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[138] For a discussion of the procedural guarantees of due process, see note 12 *supra*. However, the *Shaffer* court did not question the validity of attachment of property owned by an absconding debtor. 433 U.S.at 210; *see* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1047–48 (N.D. Cal. 1977).

[139] *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1142 (3d Cir. 1976) (Gibbons, J., concurring).