Commentaries on *Shaffer v. Heitner*

SHAFFER v. HEITNER: THE END OF AN ERA

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The word last year that Pennoyer v. Neff *had been overruled reverberated from the conference rooms of corporate headquarters to the halls of academe. The archetype of the "landmark" case,* Pennoyer *had for a century served as the principal, albeit not exclusive, enunciation of the theoretical underpinnings of state court jurisdiction. But when the Supreme Court decided last year in* Shaffer v. Heitner *that Delaware's sequestration statute was unconstitutional, the fiction linking territory and power disintegrated, leaving advocates, judges, and commentators to speculate on what, if anything, would take its place. After rehearsing the history that led to the* Shaffer *decision, Professor Silberman reports and then analyzes the different opinions in the case. Elaborating on Justice Brennan's partial dissent, she argues that a lower level of the minimum contacts test should be applied in quasi in rem actions and that plaintiff-oriented jurisdiction may be appropriate in some cases provided there are concomitant choice of law curbs.*

INTRODUCTION

Everybody seems to have a *Pennoyer v. Neff*[1] story. My own favorite occurred one autumn afternoon as I distractedly hurried home through Washington Square Park after teaching a class on the power theory of jurisdiction, my mind still fixed on the confused faces of 120 first-year law students. The park, which runs adjacent to the Law School's Vanderbilt Hall, was once memorialized by Henry James as a setting of elegance and style, but is now a place where senior citizens occupy their time on the benches, feeding the pigeons that strut by and watching the students toss frisbees through the air. It is also a popular territory for passing vagabonds who drift up from the Bowery in search of promising prey for their daily solicitations. One such idler, his appearance more appropriate to a Dickens novel than one by James, confronted me on my passage homeward. He asked for change for the proverbial cup of coffee, change which, one could safely surmise from his demeanor, would be quickly invested in

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[1] 95 U.S. 714 (1878), *discussed in* text accompanying notes 53-68 *infra*. There is some uncertainty as to the date *Pennoyer* was decided. Although usually cited as 1877, the *Supreme Court Reporter* gives the date as 1878; the official *United States Reports* does not mention a date at all.

a pint of fruit-tainted brandy. In New York City, an instinct for self-preservation generally overtakes charitable inclinations, and consequently I continued apace through the park, my eyes rather deliberately avoiding my tattered follower. If one characteristic distinguishes New York derelicts from their comrades elsewhere, however, it is their persistence, and thus my snub was to no avail. "Two bits?" he pleaded after me, adding, "I'm a lawyer!" I was somewhat impressed by the boldness of this addition, but convinced that it was prompted by his sighting of my own books, I kept moving, mumbling those cursory phrases one learns to ward off such intruders. "I matriculated at Harvard," he went on, now trotting alongside, "really I did." I remained unmoved. Apparently frustrated by my refusal to respond, he slowed, then stopped, and yelled, "*Pennoyer! Pennoyer v. Neff*, by God!" He then proceeded to shout, precisely, accurately, and in legalese that belied his condition, the facts and holding of the case. He even knew who won. This was too much for even the most hardened of civil procedure buffs. I succumbed, rewarding his recitation with a five dollar bill, and we departed friends: He, with a smile, doubtlessly off to the nearest vendor of the spirits; myself, still homeward, though with renewed faith that the faces of confusion would not last for long.

I recalled this incident during the middle weeks of last summer when, having just returned from a brief vacation, I was greeted by two former civil procedure students, their expressions a curious mixture of concern and delight, who asked, "Is it true—has *Pennoyer* been overruled?" As I guardedly confirmed their suspicion, it dawned on me that law school for future students will never be the same as it has been for a century of civil procedure students, most of whom were introduced to *Pennoyer* in their first days. The case has enjoyed a cult status for years, one regularly attested by its presence on T-shirts in law school bookstores and by its inclusion in the lyrics of songs in law school revues. But with the Supreme Court's decision last Term in *Shaffer v. Heitner*,[2] a whole citadel of precedent and tradition has fallen. The merits aside, I doubt that *Shaffer* will enjoy as rich a lore as its forebear.

The *Pennoyer* grave, of course, has been dug for years, but it has taken until now for the coffin to be closed, nailed shut, and interred forever. By applying to quasi in rem actions the standard of fairness and substantial justice used in *International Shoe Co. v. Washington*[3]

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[2] 433 U.S. 186 (1977), *discussed in* text accompanying notes 5-24, 151-256 *infra*.

[3] 326 U.S. 310 (1945), *discussed in* text accompanying notes 82-84 *infra*. Courts and commentators had previously advocated such an approach. *E.g.*, U.S. Indus., Inc. v. Gregg, 540

to determine the constitutionality of in personam jurisdiction, the *Shaffer* Court rejected a long line of precedent suggesting that no such test was necessary if a jurisdictional basis could be found in a state's power over property within its borders.[4] I want to use these pages to examine the background in which the *Shaffer* issue arose, to analyze the *Shaffer* opinions, and to offer some initial thoughts on the case's implications for quasi in rem jurisdiction and choice of law questions. My concern will be what, if anything, of *Pennoyer*'s ghost

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F.2d 142, 153-54 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1139 (3d Cir. 1976) (Gibbons, J., concurring); Steele v. G.D. Searle & Co., 483 F.2d 339, 347-48 (5th Cir. 1973), *cert. denied*, 415 U.S. 958 (1974); Barber-Greene Co. v. Walco Nat'l Corp., 428 F. Supp. 567, 570 (D. Del. 1977); Atkinson v. Superior Court, 49 Cal. 2d 338, 345-46, 316 P.2d 960, 964-65 (1957), *appeal dismissed & cert. denied sub nom.* Columbia Broadcasting Sys., Inc. v. Atkinson, 357 U.S. 569 (1958); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 145 (1971); Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 307-09 (1962); Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 777-89 (1973); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281-88; Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOKLYN L. REV. 600, 614-17 (1977); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1178 (1966); Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 672-77 (1975); *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 955-66 (1960) [hereinafter *Developments*]; Note, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725, 762-64 [hereinafter Note, *Erosion of the Power Theory*]; Note, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 325-38 (1970) [hereinafter Note, *Test of Fairness*].

[4] At least three courts expressly decided not to apply the *International Shoe* standard to quasi in rem jurisdiction. *See* U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1020 (D. Del. 1972), *rev'd*, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); Breech v. Hughes Tool Co., 41 Del. Ch. 128, 132-33, 189 A.2d 428, 431 (1963); Hibou, Inc. v. Ramsing, 324 A.2d 777, 780 (Del. Super. Ct. 1974). Courts have long upheld such jurisdiction, however, without discussing the applicability of the standard. *E.g.*, Great Am. Ins. Co. v. Louis Lesser Enterprises, Inc., 353 F.2d 997, 1006-08 (8th Cir. 1965); Western Urn Mfg. Co. v. American Pipe & Steel Corp., 284 F.2d 279, 283 (D.C. Cir. 1960), *modified*, 308 F.2d 333 (D.C. Cir. 1962); Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1352-54 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972); Jennings v. McCall Corp., 224 F. Supp. 919, 922 (W.D. Mo. 1963); First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 289, 486 P.2d 184, 187 (1971); Aero Spray, Inc. v. Ace Flying Serv., Inc., 139 Colo. 249, 253-54, 338 P.2d 275, 277 (1959); Dorr-Oliver, Inc. v. Willett Assocs., 153 Conn. 588, 594-95, 219 A.2d 718, 722-23 (1966); Standard Oil Co. v. Superior Court, 44 Del. 538, 553, 62 A.2d 454, 463-64 (1948), *appeal dismissed per curiam*, 336 U.S. 930 (1949); Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 345-46, 117 A.2d 365, 368 (1955); Payton v. Swanson, 175 So. 2d 48, 49 (Fla. Dist. Ct. App. 1965); Colomb v. Winfree, 290 So. 2d 914, 915 (La. Ct. App.), *writ of review or cert. denied*, 294 So. 2d 823 (La. 1974); Snipes v. Commercial & Indus. Bank, 225 Miss. 345, 354, 83 So. 2d 179, 182 (1955); Republic of China v. Pong-Tsu Mow, 15 N.J. 139, 148, 104 A.2d 322, 326 (1954); ABKCO Indus., Inc. v. Apple Films, Ltd., 39 N.Y.2d 670, 672-73, 350 N.E.2d 899, 900, 385 N.Y.S.2d 511, 512 (1976); Lenz v. Young, 262 P.2d 886, 888-89 (Okla. 1953). *See generally* J. BEALE, A TREATISE ON THE CONFLICTS OF LAW §§ 106.2, 107.3 (1935); H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 70 (4th ed. E. Scoles 1964).

still hovers over jurisdictional questions. My conclusion is that while five dollars would be excessive today, the case may still be worth a cup of coffee.

I

SHAFFER V. HEITNER: THE SUPREME COURT DECISION

Shaffer in its narrowest aspect concerned the constitutionality of Delaware's sequestration statute, which permits a Delaware court to assume jurisdiction over an action by sequestering a defendant's property located in Delaware.[5] Plaintiff Heitner, a nonresident of Delaware, owned one share of stock in the Greyhound Corporation, a Delaware corporation with its principal place of business in Arizona and the sole owner of Greyhound Lines, Inc., a California corporation that shared the corporate headquarters in Phoenix.[6] In 1974, Heitner filed a shareholder's derivative suit in Delaware chancery court against twenty-eight present or former officers and directors of one or both corporations, claiming a violation of fiduciary duties arising out of actions that were the basis for a multimillion dollar antitrust judgment and a criminal contempt fine against Greyhound and its subsidiary.[7] The events leading to the antitrust judgment occurred in Oregon,[8] and the criminal contempt fine was rendered in Illinois.[9]

Since none of the named defendants were residents of Delaware, Heitner had to look elsewhere for a source of jurisdiction. He did not have to look far. Alone among the states,[10] Delaware has never adopted the provision of the Uniform Commercial Code that places the situs of stock ownership with the physical location of the stock certificates,[11] and instead reserves the situs of stock in Delaware cor-

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[5] DEL. CODE ANN. tit. 10, § 366(a) (Michie 1974). This provision was declared unconstitutional as applied in Shaffer v. Heitner, 433 U.S. 186, 213-17 (1977).

[6] 433 U.S. at 189 & n.1.

[7] *Id.* at 190 & nn.2 & 3. The lower court's damage award for Greyhound's antitrust violations was affirmed in Mount Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977). The contempt citation was affirmed in United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974).

[8] 433 U.S. at 190.

[9] United States v. Greyhound Corp., 370 F. Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

[10] *See* U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 143 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *see* Folk & Moyer, *supra* note 3, at 749 n.4.

[11] *See* U.C.C. § 8-317.

porations in Delaware.[12] Twenty-one of the named defendants owned common stock, or options relating thereto, in the Greyhound Corporation.[13] Accordingly, along with the filing of his complaint, Heitner moved pursuant to Delaware procedure[14] for an order of sequestration[15] of the defendants' stock and options, an order which was granted the same day.[16] All twenty-eight defendants were

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[12] DEL. CODE ANN. tit. 8, § 169 (Michie 1974) 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.

[13] 433 U.S. at 191-92.

[14] DEL. CODE ANN. tit. 10, § 366 (Michie 1974). Section 366 provides:

> (a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.
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> (b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.
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> (c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law.

Id.

For an extensive discussion of the Delaware procedure, see E. FOLK, THE DELAWARE CORPORATION LAW: A COMMENTARY AND ANALYSIS 580-601 (1972); Folk & Moyer, *supra* note 3, at 754-55; *see* note 16 *infra*.

[15] Under the Delaware procedures, sequestration, the equitable counterpart of foreign attachment, permits the seized property to be sold to satisfy a judgment if the defendant fails to appear. DEL. CODE ANN. tit. 10, § 366(a) (Michie 1974). If the defendant does appear, and contests anything other than the sequestration order, an in personam judgment may be entered for greater than the value of the seized property. *See* Folk & Moyer, *supra* note 3, at 749, 756.

[16] 433 U.S. at 191. To sequester property, the plaintiff must initially file three papers: (1) a complaint alleging that the defendant is a nonresident, DEL. CODE ANN. tit. 10, § 366(a) (Michie

thereafter notified by certified mail and by publication in a Delaware newspaper.[17]

The twenty-one defendants who suffered the sequestration order appeared specially,[18] moving to dismiss the complaint and vacate the sequestration.[19] In the state court proceeding the defendants asserted that the seizure of the stock violated the due process clause on two principal grounds. First, they argued, their ownership of stock in a Delaware corporation did not provide a sufficient nexus with the forum state to satisfy the minimum contacts test of *International Shoe*.[20] Second, they contended, even if the court had jurisdiction, the sequestration was unconstitutional because it was accomplished without the prior notice and hearing required by the due process clause.[21] The court denied the motion, and the Delaware Supreme Court affirmed,[22] devoting most of its attention to the latter of the constitutional propositions. On the jurisdictional question, the Dela-

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1974); DEL. CT. CH. R. 4(db)(1), and a claim that is bona fide on its face, Folk & Moyer, *supra* note 3, at 755, (2) an affidavit stating the defendant's last address, if known, DEL. CT. CH. R. 4(db)(1)(a), and a description of the property and its value, *id.* 4(db)(1)(b); and, (3) a formal motion for an order requiring the defendant to appear by a specified date, authorizing the seizure of the property, and appointing a sequestrator, Folk & Moyer, *supra* note 3, at 754-55. If these procedural requirements are met, the court must grant the sequestration order. *Id.* at 755. The plaintiff and the sequestrator normally file bonds after the court signs the order. DEL. CT. CH. R. 4(db)(2),(3). The sequestrator then notifies the person holding the property to be sequestered by serving the notice of sequestration and a copy of the court's order. *Id.* 4(db)(3). If the property is stock in a Delaware corporation, the sequestration order is served upon the corporation's registered agent. Folk & Moyer, *supra* note 3, at 755. The corporation later must supply information concerning the stock held by the defendant. *Id.* The defendant is notified by the court register or clerk who mails a certified copy of the complaint and the order to the defendant. DEL. CT. CH. R. 4(db)(2). The order is also published in a newspaper. DEL. CODE ANN. tit. 10, § 366(a) (Michie 1974); DEL. CT. CH. R. 4(db)(2).

[17] 433 U.S. at 192; *see* note 16 *supra*.

[18] By appearing only to challenge the jurisdiction of the court and accompanying sequestration, the defendants did not become subject to the court's in personam jurisdiction. Had their constitutional challenge failed, they would have retained the option to default and thereby limit their liability to the value of the seized property. Greyhound Corp. v. Heitner, 361 A.2d 225, 233 n.8 (Del. 1976), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977).

[19] 433 U.S. at 191-92.

[20] 361 A.2d at 229.

[21] *Id.* at 230-35.

The defendants made two subsidiary arguments, as well. First, they claimed that "compelling them to make a general appearance before defending on the merits violate[d] their right to due process." *Id.* at 235. The court rejected this contention, noting that the general appearance rule promotes judicial economy and avoids the possibility of duplicate actions. *Id.* at 235-36. Second, Greyhound Corporation claimed that the sequestration order deprived it of property without due process of law because the stock might be transferred in violation of the order to a good faith purchaser entitled to a clear title to the certificates, making Greyhound liable for any losses resulting from its failure to transfer the stock. *Id.* at 236-37. The court declined to decide the issue on ripeness grounds. *Id.* at 237.

[22] *Id.* at 230-36.

ware court said merely that the state may constitutionally place the situs of stock in Delaware corporations in Delaware and that the presence of defendants' property in Delaware allowed the court to take quasi in rem jurisdiction, and summarily concluded that such jurisdiction was not subject to the minimum contacts standard of *International Shoe*.[23]

On appeal, Justice Marshall's opinion for the Court began by restating the constitutional issues, and tipped the Court's hand by noting that only the first, the jurisdictional, question had to be resolved.[24] The case provided the Court with its first opportunity to decide whether *International Shoe*'s standard of fairness and substantial justice, which had been used for over three decades to determine the constitutionality of in personam jurisdiction, ought also to be used to assess the validity of traditional quasi in rem actions. But before I discuss how the Court went about deciding that issue, I want to digress with some background material that, while perhaps not explaining what the Court did, at least sets the stage for the decision it rendered.

II

THE HISTORICAL BACKDROP

Justice Field's majority opinion in *Pennoyer* identified three categories of judicial action: in personam, whereby a court can impose a personal liability or obligation on the defendant; in rem, a proceeding that declares the rights of all persons to a thing; and quasi in rem, an action in which the judgment affects the interests of particular persons in a thing.[25] Quasi in rem actions can be further divided into two types. The first, commonly actions to partition land, quiet title, or foreclose mortgages, settles claims to the property on which jurisdiction is based.[26] The second, which was the type asserted in both *Pennoyer* and *Shaffer*, seeks to obtain a personal judgment on a claim unrelated to the property on which the jurisdiction is based.[27]

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[23] *Id.* at 229.

[24] 433 U.S. at 189.

[25] 95 U.S. at 727; *see* RESTATEMENT OF JUDGMENTS 5-7 (1942).

[26] RESTATEMENT OF JUDGMENTS 8 (1942).

[27] *Id.* at 8-9. The Restatement (Second) of Judgments refers to "attachment jurisdiction" in order to differentiate the cases where the property itself is the source of the underlying controversy from cases like *Shaffer*. RESTATEMENT (SECOND) OF JUDGMENTS § 11 (Tent. Draft No. 5, 1978).

A. Early English Attachment

The early English common law recognized two types of attachment jurisdiction[28] that influenced the evolution of quasi in rem jurisdiction in the United States. The first type, employed in the Court of Common Pleas, involved a writ of attachment directing the sheriff to seize and hold the defendant's goods.[29] If the defendant appeared, the goods were released;[30] if he did not, the goods escheated to the Crown.[31] During an era in England when a case could not proceed without the presence of the defendant,[32] the writ of attachment served to compel otherwise recalcitrant defendants to appear; the attachment had nothing to do with securing or enforcing an ultimate judgment.[33]

The second type emerged in the Lord Mayor's Court in London as early as the fifteenth century and it, too, was originally designed to secure the defendant's presence at trial.[34] If a defendant failed to

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[28] *See* Carrington, *supra* note 3, at 303-04. For a history of the development of the attachment jurisdiction, see Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 58-79 (1968) [hereinafter Levy, *The Power Doctrine*].

[29] R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 74 (1952).

[30] *Id.* at 74-75.

[31] Levy, *The Power Doctrine*, *supra* note 28, at 60. Later, the goods were sold to defray the plaintiff's costs, but not to satisfy his claims. 3 W. BLACKSTONE, COMMENTARIES * 280.

[32] On this point, Pollock and Maitland wrote:

> One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavor to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy. . . . Our law would not give judgment against one who had not appeared. . . . [T]he emergence and dominance of the semi-criminal action of Trespass prevents men from thinking of our personal actions as mere contests between two private persons. The contumacious defendant has broken the peace, is defying justice and must be crushed. Whether the plaintiff's claim will be satisfied is a secondary question.

2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 594-95 (2d ed. 1903) (footnotes omitted).

[33] R. MILLAR, *supra* note 29, at 75. Additional incentives were also used to obtain the defendant's appearance. For example, if he failed to appear after the first attachment, a writ of *distringas*, or "distress infinite," was issued, permitting the seizure of more of the defendant's goods, including profits from his land. The process continued until the defendant appeared or had nothing of value left. *Id.* at 74-75. In certain types of actions, a defendant's nonappearance could lead to his arrest, either in the forum county or in any other county in which he could be located. If he could not be found, he was declared an outlaw, with all his goods and chattels forfeited to the Crown. Only his appearance in court could reverse the declaration and prevent his arrest and committal. *See* 3 W. BLACKSTONE, *supra* note 31, at * 280-91.

[34] This attachment process, available only in actions for failure to pay a debt, is described in J. LOCKE, THE LAW AND PRACTICE OF FOREIGN ATTACHMENT IN THE LORD MAYOR'S COURT, UNDER THE NEW RULES OF PRACTICE 1-2, *reprinted in* 79 THE LAW LIBRARY (Philadelphia 1854), and R. MILLAR, *supra* note 29, at 482-83. *See also* Levy, *Attachment, Garnishment, and*

appear to answer a complaint brought against him, his property could be attached under the London custom, and rather than escheating to the Crown, could be used to satisfy all or part of the plaintiff's claim.[35] Eventually, the mandated "search of the city" for the defendant, once required before a writ of attachment could be issued,[36] crusted into disuse[37] and often the defendant never received notice of the action.[38]

The use of attachment in the Lord Mayor's Court in London has been characterized as an early application of quasi in rem jurisdiction,[39] a type of jurisdiction that has now been eliminated from English law.[40] Certain limitations on the London custom, however, dis-

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Garnishment Execution: Some American Problems Considered in the Light of the English Experience, 5 CONN. L. REV. 399, 405-23 (1972) [hereinafter Levy, *Attachment*].

The same attachment practice was also used in other cities—for example, Bristol, Exeter, Oxford, Ipswich, Lancaster, Hereford, Lincoln, Waterford, and Cinque Ports, *see* R. MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 15-16 (1935), but the London custom provided the model for the procedure adopted by the American colonies, Levy, *Attachment*, *supra* at 405-06; *see* text accompanying notes 44-49 *infra*.

[35] *See* C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES 1-2 (6th ed. 1885); R. MILLAR, *supra* note 29, at 482.

[36] Initially, after a complaint was entered, the defendant would be sought by the sheriff and not until after four such attempts could his garnishee be summoned or his property be attached and turned over to the plaintiff. J. LOCKE, *supra* note 34, at xxiv. *See also* Levy, *Attachment*, *supra* note 34, at 419-20. The defendant then would have one year and one day to appear thereafter to prove that the debt was invalid. Of course, if the defendant appeared in the action and posted bond, the attachment ended. *See* R. MILLAR, *supra* note 29, at 482-83.

[37] *See* J. LOCKE, *supra* note 34, at xxiv-xxv, 11-13.

[38] *Id.* at xxiv. "The very essence of the custom," Lord Mansfield explained, "is that the defendant shall not have notice; because it is a proceeding against an absent man, who cannot be found, and has nothing to be summoned by. It is a proceeding in rem, like confiscations in the Exchequer." Tamm v. Williams, 3 Doug. 281, 283, 99 Eng. Rep. 655, 656 (K.B. 1783).

[39] *See* Levy, *Attachment*, *supra* note 34, at 406; Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412, 1415-16 (1969). To the extent the procedure was used against defendants absent from city bounds but within the realm, foreign attachment did not expand territorial jurisdiction—a judgment could be obtained against a defendant outside of London but within the country without attaching his property, *see* Copeland v. Lewis, 2 Stark 33, 171 Eng. Rep. 563, 563-64 (K.B. 1817); Huxam v. Smith, 2 Camp. 19, 21, 170 Eng. Rep. 1067, 1067 (K.B. 1809), so long as the defendant appeared, *see* note 32 *supra*. When the procedure was used against defendants absent from the realm, *see* R. MORRIS, *supra* note 34, at 18, however, the court's jurisdiction was expanded—the defendants were otherwise beyond the reach of the court's process.

[40] *See* R. MILLAR, *supra* note 29, at 485; Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognitions of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 1009 (1967).

The most recent attempt to urge the English courts to assume jurisdiction and to issue process against a nonresident defendant based on the presence of assets in the realm was rejected by the House of Lords last year. *See* Siskina v. Distos Compania Naviera, S.A., [1977] 3 W.L.R. 818, 823-28 (H.L.). Not only do the English courts reject attachment as a basis for jurisdiction, but they also do not generally permit prejudgment security attachments. Indeed, it was only recently that the English Court of Appeal authorized an injunction against a nonresi-

tinguish it from the exercise of jurisdiction as it developed in the United States. For example, the subject matter jurisdiction of the Lord Mayor's Court was territorially restricted to the city of London: The plaintiff's cause of action had to arise within the city limits.[41] Attachment was thus appropriate only when the court had jurisdiction over the claim as a result of the claim's connection to the city where the court sat.[42] Such a contact with the forum exercising attachment powers was not ordinarily an attribute of quasi in rem jurisdiction in the United States; *Pennoyer*, for example, imposed no such requirement. Not until *Shaffer* was such a nexus reasserted as a necessary condition to the exercise of attachment jurisdiction.[43]

B. Early American Experience

The custom of foreign attachment, so useful to London merchants during the mercantile era, was adopted in part by American colonial legislatures.[44] Regional variations restricted the kinds of actions for which attachment was available,[45] and use of the device was

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dent defendant subject to personal jurisdiction in England restraining the defendant from disposing of assets within England. Mareva Compania Naviera, S.A. v. International Bulkcarriers, S.A., 2 Lloyd's List L.R. 509 (1975).

[41] J. LOCKE, *supra* note 34, at 23-24.

[42] *Id.* at 54 ("[T]he process of foreign attachment can only be resorted to where the cause of action arises within the jurisdiction of the court from which the attachment issues.") In the nineteenth century, abuses of the procedure often resulted in a failure to satisfy this requirement, R. MILLAR, *supra* note 29, at 483, but the House of Lords abruptly put an end to the abuses by declaring that a writ of attachment could not be issued unless the court had subject matter jurisdiction over the cause of action, *see* Mayor of London v. Cox, L.R. 2 E. & I. App. 289, 293 (H.L. 1867) ("the *City* Court has no jurisdiction to proceed by foreign attachment in a case where no one of the parties is a citizen or a resident in the City, and where neither the debt sued for, nor the debt alleged to be due from the garnishees to the Defendants, arose within the City").

[43] This is not surprising since in the United States the die had been cast; the earlier English authorities had already exerted their influence. *See* Levy, *Attachment*, *supra* note 34, at 421.

[44] *See* R. MILLAR, *supra* note 29, at 485-86. The author of an early treatise on the practice of foreign attachment in Pennsylvania observed: "It seems, indeed, to have been thought particularly proper for a provincial establishment, where many persons reside but a short time, and where much of the property of the country is likely to be owned by persons wholly resident abroad." T. SERGEANT, A TREATISE UPON THE LAW OF PENNSYLVANIA RELATIVE TO THE PROCEEDING BY FOREIGN ATTACHMENT 2-3 (Philadelphia 1811).

[45] *See* R. MILLAR, *supra* note 29, at 486-97. Some states, for example, did not permit use of the attachment writ against nonresident defendants in tort actions. *See, e.g.*, Hynson & Hynson v. Taylor & Cotheal, 3 Ark. 552, 556 (1840); Fellows & Co. v. Brown, 38 Miss. 541, 544 (1860); McDonald & Rew v. Forsyth, 13 Mo. 549, 551 (1850). The reason for this limitation was stated by the court in Marshall v. White, 8 Port. 551 (Ala. 1838):

> We think it might produce evil consequences of some magnitude, to decide, that a party suing out process of attachment to secure a money demand, is authorised to declare in any action which he deems expedient. Such a course would at all times leave an absent defendant entirely at the mercy of the plaintiff, as no other inquiry than the value of the

often limited to cases against nonresident defendants.[46] By the late seventeenth century, some form of attachment proceeding against absent or nonresident defendants was available throughout the colonies,[47] and, by the late nineteenth century, the same could be said of every state.[48] The case law, largely an outgrowth of collateral challenges to judgments obtained through attachment proceedings, invariably endorsed this type of jurisdiction.[49]

The widespread use and judicial endorsement of attachment, or quasi in rem, jurisdiction found support and encouragement in Joseph Story's noted *Commentaries on the Conflict of Laws*, which espoused a theory of exclusive state sovereignty over persons and property within its borders.[50] For Story, the acquisition of jurisdiction through attachment of an absent defendant's property was an appro-

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property named in the declaration would be before the jury, and as the default in all such cases admits the entire cause of action as stated.

Id. at 553.

[46] R. MILLAR, *supra* note 29, at 486, 489-90, 495. The device originally served in the colonies merely to coerce the defendant to appear, not to provide security for the plaintiff. *Id.* at 486-87. Later, by refusing to release the property upon the appearance of the defendant, or after judgment, the jurisdictional attachment served the additional purposes of security and enforcement. *Id.* at 487-88. Today, confusion surrounding the purposes of a particular attachment may permit plaintiffs to circumvent the due process requirements of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), for security attachment by casting the attachment as a jurisdictional one, rather than one for security. *See* text accompanying notes 131-142 *infra*.

[47] R. MILLAR, *supra* note 29, at 486.

[48] C. DRAKE, *supra* note 35, at 2.

[49] That endorsement, however, was always qualified by the reservation that the default judgment be limited to the value of the property. *See, e.g.*, Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318 (1870); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 350 (1850); Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. 1786); Chamberlain v. Faris, 1 Mo. 517, 518 (1825); Kilburn v. Woodworth, 5 Johns. 37, 41 (N.Y. Sup. Ct. 1809); Force v. Gower, 23 How. Pr. 294, 295-97 (N.Y.C.P. 1862); Phelps v. Holker, 1 Dall. 261, 264 (Pa. 1786).

Because federal courts could not exercise quasi in rem jurisdiction, and the due process clause of the fifth amendment did not apply to the states, a direct due process challenge to the procedure was not possible until the adoption of the fourteenth amendment. Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1133-34 (3d Cir. 1976), *discussed in* text accompanying notes 118-131, 140-143, 144-150 *infra*. The transaction in *Pennoyer* antedated adoption of the amendment, and the Court accordingly based its holding on the full faith and credit clause, although it made clear that its analysis would lie under the new amendment. 95 U.S. at 733; *see* Note, *The Requirement of Seizure in the Exercise of Quasi In Rem Jurisdiction:* Pennoyer v. Neff *Reexamined*, 63 HARV. L. REV. 657, 657 n.3 (1950) [hereinafter Note, *The Requirement of Seizure*].

[50] J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-21 (Boston 1834). For a discussion of Story's theory and influence, see Hazard, *supra* note 3, at 258-60.

Interestingly, several years earlier Justice Story had rendered an opinion indicating some hostility toward quasi in rem actions and limiting their application in federal courts. *See* Picquet v. Swan, 19 Fed. Cas. 609, 615 (C.C.D. Mass. 1828) (No. 11134), *discussed in* Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337, 342-49 (1961).

priate and logical corollary of this theory. A "common course, in many States," Story wrote,

> is, to proceed against non-residents, whether they are citizens or foreigners, by an arrest, or attachment of their property within the territory. . . . In such cases, for all the purposes of the suit, the existence of such property, within the territory, constitutes a just ground of proceeding, to enforce the rights of the plaintiff . . . .[51]

Story's words are important, for he was doing more than reporting and summarizing the legislative and judicial developments in the jurisdictional field; he was justifying those developments with a theory under which "the laws of every state affect, and bind directly" all persons, property, and acts within that state.[52]

C. *Jurisdictional Attachments:* Pennoyer v. Neff

That justification was echoed forty years later in *Pennoyer*,[53] in which Justice Field explained that the theoretical link connecting

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[51] J. STORY, *supra* note 50, at 461.

[52] *Id.* at 19.

[53] *Pennoyer* was a collateral attack on a previous judgment pursuant to which some land in Oregon had been sold at a sheriff's sale. 95 U.S. at 719. In the initial action, the plaintiff, an attorney named Mitchell, sued Neff in an Oregon court to recover an unpaid fee. *Id.* Neff, a nonresident, was served by publication and did not appear. *Id.* at 719-20. Mitchell satisfied the ensuing default judgment through the sale to Pennoyer of a tract of land Neff owned in Oregon, which Mitchell had attached following the judgment in his favor. *Id.* at 719. Neff thereupon sued Pennoyer in federal court to recover the land, claiming that the first judgment was invalid because the Oregon court lacked jurisdiction over him. *Id.* at 719-20.

To the dismay of *Pennoyer* cultists, the background of the lives and times of the protagonists in that famous case has remained unknown. Happily, the recent publication of *The Shaping of a City* has filled the void. Mitchell was a well-known Portland lawyer specializing in land litigation and railroad right-of-way cases. E. MACCOLL, THE SHAPING OF A CITY 201-02 (1976). In 1872, Mitchell was elected a United States senator. *Id.* at 202-03. Allegations of vote fraud were made against Mitchell, and indictments were sought but later dismissed. Interestingly, Judge Deady—who rendered the lower court decision in *Pennoyer*—actively supported the attempts to seek indictments for vote fraud. *Id.* at 203. It is somewhat surprising that Mitchell was ever elected to public office given his sordid past. At the age of 22, Mitchell was forced to marry a fifteen year old girl "he had seduced and made pregnant." *Id.* at 201. He soon abandoned his first wife and took up with a "schoolmarm." *Id.* Mitchell next entered a bigamous marriage, and eventually fell "in love with his wife's sister and carr[ied] on an open affair for many years." *Id.* at 202.

Pennoyer was also active in public life. Educated at Harvard, *id.* at 210, he was both Governor of Oregon, *id.* at 3 n.*, and Mayor of Portland, *id.* at 210. Something of a political maverick, Pennoyer proclaimed Oregon's Thanksgiving Day holiday one week later than the rest of the Nation. *Id.* at 210 n.*. Although Professor MacColl's book does not connect the Mitchell and Pennoyer of whom he was writing with the *Pennoyer* parties, he assures me that they are the relevant protagonists. Conversation with E. Kimbark MacColl (April 3, 1978).

jurisdictional categories was the "power" theory of jurisdiction, resting on two "principles of public law."[54] The first principle was that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[55] The second and complementary principle was that "no tribunal established by [a state] can extend process beyond [its] territory so as to subject either persons or property to its decisions."[56] As a result, the Oregon state court in *Pennoyer* could not obtain in personam jurisdiction over Neff, the absent nonresident defendant. The court could, however, assert jurisdiction over Neff's Oregon property:

> So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in the virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate.[57]

Justice Field's power theory, then, like Justice Story's, was essentially territorial: If the persons or property could be found within the state's boundaries, they could be reached by a court of that state; if not, they could not be reached.

The *Pennoyer* Court, of course, ultimately held that the Oregon court could not exercise jurisdiction over Neff's property because it had not been attached at the outset of the action against him.[58] It is difficult to reconcile that result with the theory underlying it.[59] From

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[54] 95 U.S. at 722.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 723-24.

[58] *Id.* at 727-28. At the time Mitchell's action against Neff began, Oregon law authorized service by publication in actions against nonresidents and, in suits for the recovery of money, attachment of a nonresident's property. If the nonresident did not appear, the court's jurisdiction was limited to the value of the property. *Id.* at 720.

[59] Commentators have questioned the necessity of attaching the defendant's property at the outset of the action. *See, e.g.*, Fraser, *Actions In Rem*, 34 CORNELL L.Q. 29, 38-40 (1948). Note, *The Requirement of Seizure*, *supra* note 49, at 657-59.

the standpoint of a territorially-based power theory, the *presence* of property in the state gives the court the power to proceed; attachment of the property does not bring it any more within the state's boundaries. Justice Field's opinion maintained that "the jurisdiction of the court to inquire into and determine [the defendant's] obligations at all is only incidental to its jurisdiction over the property."[60] But that statement was true even if jurisdiction were limited to cases in which the nonresident defendant simply owned property in the state without attachment at the commencement of the action.

Conceding as much, Justice Field then asserted that, were attachment at the outset not required, the validity of the proceedings would turn on whether the defendant disposed of the property before the levy of execution.[61] But this assertion is no more persuasive than that which prompted the concession. The power theory implies no inevitable connection between the power of a court to exercise jurisdiction and the ability of parties to enforce a judgment arising from that jurisdiction. Thus, a post-commencement sale of property, though it eliminates the basis for executing or enforcing the judgment, should not defeat the jurisdiction of the court. An analogy to the first of Justice Field's jurisdictional categories illustrates this point: In an in personam action, service of process on an individual transiently present in the state vests a court with the power to proceed against him regardless of whether he remains in that state or has any property there. However fleeting his visit, his presence in the state gives that state "power" over him.[62] Of course, without the continued presence of the defendant or any of his property within the state, enforcement of the personal judgment against him in that state

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[60] 95 U.S. at 728.

[61] *Id.*

[62] There are numerous cases in which in personam jurisdiction was based on the transient presence of the defendant within the territory of the court. Among the more extreme are Grace v. MacArthur, 170 F. Supp. 442, 443-44 (E.D. Ark. 1959) (defendant served while passing over the state in an airplane); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 104, 34 A. 714, 714-15 (1895) (defendant served in an English action while staying overnight in a British town en route to the United States); Darrah v. Watson, 36 Iowa 116, 119 (1873) (defendant served while in the state for a few hours); Peabody v. Hamilton, 106 Mass. 217, 222 (1870) (defendant served while on a British steamer that had not yet moored). For a criticism of these and similar cases, see Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens*, 65 YALE L.J. 289, 293 (1956) [hereinafter Ehrenzweig, *The Transient Rule*]. Ehrenzweig contends that this transient rule lacks historical support, *id.* at 295, but his contention has been frequently and effectively rebutted, *see, e.g.*, Cowen, *A British View*, 9 J. PUB. L. 303, 303-07 (1960); Levy, *The Power Doctrine*, *supra* note 28, at 94-97; Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. U.L. REV. 221, 236-37 (1968). The continued validity of the rule in the wake of *Shaffer* is discussed in text accompanying notes 233-237 *infra*.

is unlikely. Jurisdiction to proceed, however, still exists.[63] Similarly, under the power theory, the mere presence of property in the state should supply an adequate basis for quasi in rem jurisdiction irrespective of whether the property is subsequently sold or otherwise unavailable as security for enforcement.[64]

One other possible, although no more persuasive, explanation for Justice Field's requirement of attachment at the outset implicates a familiar due process concern. In an era when substituted service by publication in a newspaper was sufficient to provide notice of an in rem or quasi in rem action, perhaps the Court regarded attachment or seizure as crucial to providing the requisite notice to the defendant. The *Pennoyer* Court hinted as much when it wrote:

> The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.[65]

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[63] That a defendant is no longer in the state and is neither subject to a contempt citation, *see* N.Y. CIV. PRAC. LAW § 5251 (McKinney Supp. 1977-1978), nor has property within the state to permit local enforcement does not destroy a court's jurisdiction.

[64] Because a quasi in rem judgment cannot be satisfied beyond the value of the property attached, and attached property cannot be removed from the state, quasi in rem judgments have traditionally been denied enforcement outside the forum state. Attachment, as a result, has also been considered important to enforcement. Other enforcement devices, however, could be devised. If the property did not need to be attached at the outset of the action, and was removed before a judgment was entered, satisfaction of the judgment out of that property, even in another state, should be allowed. *See* text accompanying notes 254-256 *infra*.

Attaching the property at the outset of the action does avoid difficulties that might arise in determining whether the defendant owns property in the state, thereby adding a measure of certainty to the court's exercise of jurisdiction over an action. The facts set out in the preface of the *Pennoyer* opinion, for example, indicate that Neff did not acquire title to the contested property until four months *after* Mitchell commenced the action against him. *See* 95 U.S. at 715-16. Thus, even had the *Pennoyer* Court been satisfied by the simple presence of the defendant's property in the state, the Oregon court would have been without power to adjudicate Mitchell's claim against Neff. Perhaps this fact, coupled with a desire to avoid collateral attacks based on misconceived jurisdiction, prompted Justice Field's reasoning on the need for attachment. Yet Neff's ownership of property in the state was a question of fact capable of discovery by methods other than attachment of his property. It is always appropriate for a court to ascertain the existence of facts necessary to the invocation of its power, but ways to facilitate that factfinding process should not be confused with the legal requirements of jurisdiction itself.

[65] 95 U.S. at 727.

Service by publication and similar forms of notice are now insufficient when another means is available and more likely to inform the defendant. *See* Schroeder v. City of New York, 371 U.S. 208, 211 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956), Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-20 (1950), *discussed in* text accompanying notes 143-145 *infra*; Hazard, *supra* note 3, at 275-77; Note, *Requirement of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1263-64 (1957); Note, *In Rem Actions–Adequacy of Notice*, 25 TENN. L. REV. 495, 496-97 (1958).

Despite the ambiguities in its reasoning, *Pennoyer* served for years as the Supreme Court's exposition of the theoretical underpinnings of state court jurisdiction.[66] Actually, attachment jurisdiction occasionally operated as a moderating force in an era when jurisdiction was exclusively tied to territory. For example, because a plaintiff could only bring an in personam action in a state where the defendant was present or domiciled, the plaintiff was constantly forced to seek out the defendant, even when the aggravating conduct took place in the plaintiff's home state.[67] Thus, in many instances, quasi in rem jurisdiction made it possible for plaintiffs to bring suit against absconding tortfeasors or fleeing debtors when those potential defendants owned property within the state.[68]

But of course quasi in rem jurisdiction was not confined to those situations; the same practice could be used whenever defendants owned property in the state, without regard to whether the defendant had any other contact with the forum.[69] This consequence of the

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[66] One notable challenge to the *Pennoyer* model prior to *Shaffer* was U.S. Indus., Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), *cited in* Shaffer v. Heitner, 433 U.S. 186, 195 n.11 (1977). In *Gregg*, the defendant, a Florida resident, agreed to sell three Florida construction companies to U.S. Industries (USI), a Delaware corporation with its principal place of business in New York. 540 F.2d at 144. In exchange, Gregg received shares of USI voting common and special preferred stock and an employment contract to serve as president of the transferred companies, and was to receive additional stock if the companies achieved specified profit levels. *Id.* After a dispute over the sale arose, USI sued Gregg in Delaware chancery court, asking over $20 million in damages and obtaining jurisdiction by attaching the USI stock that had been transferred to the defendant during the transaction. *Id.* at 145. Gregg removed the action to federal court and challenged the sequestration but, owing to Delaware's failure to provide for limited jurisdiction, did not answer the complaint. *Id.* The district court rejected the jurisdictional challenge and thereafter entered a default judgment against Gregg, with the attached stock later being sold to satisfy the judgment debt. *Id.* The Third Circuit reversed the jurisdictional holding, reasoning that the situs of the stock in Delaware did not provide a sufficient nexus to justify the exercise of jurisdiction. *Id.* at 155-56. The case is discussed in Comment, 42 MO. L. REV. 435 (1977).

Other courts, though willing to abandon the *Pennoyer* rule, felt constrained by the principle of stare decisis. *E.g.*, Lebowitz v. Forbes Leasing & Fin. Co., 326 F. Supp. 1335, 1352 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972); Bekins v. Huish, 1 Ariz. App. 258, 260, 401 P.2d 743, 745 (1965).

[67] *See* 1 J. BEALE, *supra* note 4, at 358.

[68] *See* Zammit, *supra* note 3, at 670. Quasi in rem jurisdiction was also used when a state long arm statute fell short of reaching certain defendants even though their activities took place in the plaintiff's state. *Compare* Wilcox v. Pennsylvania R.R., 269 F. Supp. 326, 328 (S.D.N.Y. 1967) (no personal jurisdiction under New York long arm statute despite sale of ticket in New York) *with* Wilcox v. Fredericksburg & P.R.R. Co., 270 F. Supp. 454, 458 (S.D.N.Y. 1967) (quasi in rem jurisdiction upheld based upon attachment of property notwithstanding lack of personal jurisdiction).

[69] *See, e.g.*, Hughes Tool Co. v. Fawcett Publications, Inc., 290 A.2d 693, 695-96 (Del. Ch. 1972); State Bank of Eldorado v. Maxson, 123 Mich. 250, 253, 82 N.W. 31, 32 (1900); Morrison v. Illinois Cent. R.R., 101 Neb. 49, 51-53, 161 N.W. 1032, 1033-34 (1917); Pan Am. Sec. Corp. v. Fried Krupp Aktiengesellschaft, 16 N.J. Misc. 225, 229, 198 A. 770, 773 (Hudson County

power theory reached its zenith in the 1905 Supreme Court decision in *Harris v. Balk*.[70] In *Harris*, a Maryland court obtained quasi in rem jurisdiction over absent defendant Balk when Harris, a North Carolina resident who was indebted to Balk and was passing through Maryland, was served with a writ of attachment by Epstein, a creditor of Balk's.[71] The case did not involve a challenge to the constitutional propriety of the jurisdiction; rather, the critical question was whether the situs of the property—the intangible debt—was in North Carolina, the residence of the garnishee, or in Maryland, where Harris was physically present at the time he was served.[72] The Court's holding that the debt followed the debtor fixed the situs of the defendant's property in Maryland,[73] and thereby considerably expanded the number of forums in which plaintiffs might sue absent

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Ct. 1938); Bridges v. Wade, 110 App. Div. 106, 107, 97 N.Y.S. 156, 156 (1905), Fairchild Engine & Airplane Corp. v. Bellanca Corp., 391 Pa. 177, 179-80, 137 A.2d 248, 250 (1958) (dictum).

[70] 198 U.S. 215 (1905). Early discussions of *Harris* appear in Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913) [hereinafter Beale, *The Exercise of Jurisdiction*]; Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation*, 31 HARV. L. REV. 905 (1918).

[71] After Epstein, a Maryland resident, garnished the debt owed by Harris to Balk, Harris returned to North Carolina without contesting the garnishment. Balk then sued Harris in North Carolina to collect the debt owed to him. Harris defended with the payment made pursuant to the Maryland default judgment. 198 U.S. at 216-17. The North Carolina court, believing that the situs of the debt was North Carolina rather than Maryland, held that the judgment in the latter state was invalid. *Id.* at 217. It was this judgment that the Supreme Court reversed. *See id.* at 226. My colleague, Professor Lowenfeld, provides a more complete discussion of *Harris*'s factual setting in Lowenfeld, *In Search of the Intangible: A Comment on* Shaffer v. Heitner, 53 N.Y.U.L. REV. 102, 104-07 (1978).

[72] 198 U.S. at 221-22.

[73] Justice Peckham's opinion for the Court reasoned that if the debtor were temporarily in the state, he could be served with process and sued there. *Id.* at 226. In an attachment proceeding, "the plaintiff is really . . . a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right." *Id.* Consequently, "[t]he obligation of the debtor to pay his debt clings to and accompanies him wherever he goes." *Id.* at 222.

The attempt to locate the situs of intangible property for jurisdictional purposes has received extensive commentary. Among the more noteworthy are Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1939); Carpenter, *supra* note 70; Hine, *Situs of Shares Issued Under the Uniform Stock Transfer Act*, 87 U. PA. L. REV. 700 (1939); Peters, *Conflict of Law Problems Concerning the Uniform Stock Transfer Act*, 41 IOWA L. REV. 414 (1956); Pomerance, *The "Situs" of Stock*, 17 CORNELL L.Q. 43 (1931); Simmons, *Conflict of Laws and Constitutional Law in Respect to Intangibles*, 26 CALIF. L. REV. 91 (1937); Note, *Attachment of Corporate Stock: The Conflicting Approaches of Delaware and the Uniform Stock Transfer Act*, 73 HARV. L. REV. 1579 (1960); Note, *Situs of Shares of Stock*, 39 HARV. L. REV. 485 (1926); Note, *The Situs of Stock for the Purpose of Attachment*, 85 U. PA. L. REV. 522 (1937). A discussion of the issue in the wake of *Shaffer* appears in Lowenfeld, *supra* note 71, at 110-24.

defendants.[74] Logical, though to some lamentable,[75] results like those in *Seider v. Roth*,[76] *Simpson v. Loehmann*,[77] and *Minichiello v. Rosenberg*,[78] each of which permitted suits against absent defendants in New York if their insurance companies happened to be doing business there, followed in *Harris*'s wake.[79] Ironically, the *Seider* line of

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[74] *See, e.g.*, Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment of stock in the state of incorporation); Siro v. American Express Co., 99 Conn. 95, 121 A. 280 (1923) (plaintiff's attorney purchased travellers' checks from the defendant's agent in order to create a debt that could be attached).

[75] *Harris*'s progeny are criticized in Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075 (1968); Note, *Attachment of Liability Insurance Policies*, 53 CORNELL L. REV. 1108 (1968); Note, *Erosion of the Power Theory*, *supra* note 3; Note, Minichiello v. Rosenberg: *Garnishment of Intangibles–In Search of a Rationale*, 64 NW. U.L. REV. 407 (1969).

[76] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, two New York residents filed an action in a New York court against a resident of Quebec to recover for injuries allegedly sustained in an automobile accident that occurred in Vermont. The plaintiffs attached the obligation of the defendant's liability insurer, which did business in New York, to defend and indemnify the defendant. *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100. A closely divided New York Court of Appeals upheld jurisdiction, reasoning that as soon as the accident occurred the insurer had contractual obligations that could be considered a debt owed to the defendant and thus could be subject to a writ of attachment. *Id.* at 114, 216 N.E.2d at 314, 269 N.Y.S.2d at 102. Judge Burke argued in dissent that such reasoning meant that "the promise to defend the insured is assumed to furnish jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue." *Id.* at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103. Implications of *Shaffer* for the *Seider* line of cases is discussed at text accompanying notes 294-332 *supra*.

For discussion of *Seider*'s effect as a judicially created direct action rule, see Stein, *supra* note 75, at 1100-04; Note, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 558-60 (1967) [hereinafter Note, *Garnishment of Intangibles*]; Note, *Jurisdiction: Quasi In Rem Jurisdiction Obtained by Attaching Obligations Under an Automobile Liability Policy*, 51 MINN. L. REV. 158, 163-65 (1966) [hereinafter Note, *Jurisdiction*]; Note, *Attachment of Liability Insurance Policies: What Remains of the* Seider *Doctrine After Seven Years of Conflict*, 34 OHIO ST. L.J. 818, 834-36 (1973) [hereinafter Note, *Seven Years of Conflict*]; Note, Seider v. Roth: *The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58, 68-72 (1968) [hereinafter Note, *The Constitutional Phase*].

[77] 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). *Simpson* was a constitutional challenge to the *Seider* approach, which the court rejected in an analysis resembling the "minimum contacts" test. *See id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637. The court also observed that recovery was limited to the value of the insurance policy. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 637.

[78] 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). In *Minichiello*, the *Seider* practice again withstood constitutional challenge, but its availability was restricted in dictum to resident plaintiffs, *id.* at 120 (concurring opinion). The court held that New York could constitutionally enact a direct action statute, *id.* at 110, and that the approach did not offend due process because the judgment was limited to the value of the property and thus had no collateral estoppel effect on a second action to recover an amount in excess of the value of the property, *id.* at 111-12. The resident plaintiff requirement was officially sanctioned by the New York Court of Appeals in the latest chapter of the *Seider* saga. *See* Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

[79] A number of courts have refused to adopt the *Seider* practice. *E.g.*, Robinson v. Shearer & Sons, Inc., 429 F.2d 83, 87 (3d Cir. 1970); Sykes v. Beal, 392 F. Supp. 1089, 1096 (D. Conn.

cases bears a closer relationship to modern notions of jurisdiction than does *Harris*, the case that prompted it.[80]

Those modern notions began with the Supreme Court's decisions in *Hess v. Pawloski*[81] and *International Shoe*,[82] both of which concerned the exercise of in personam jurisdiction over nonresident defendants. To a certain extent, the two cases supplemented rather than supplanted the power theory, for traditional power remained a basis for assertions of jurisdiction.[83] Now, however, a state could exercise jurisdiction over a nonresident defendant whenever there were "such contacts . . . with the state of the forum as to make it reasonable, in the context of our federal system of government, to require [the defendant] to defend the particular suit which is brought there."[84] Ac-

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1975); Ricker v. LaJoie, 314 F. Supp. 401, 403 (D. Vt. 1970); Javorek v. Superior Court, 17 Cal. 3d 629, 644, 552 P.2d 728, 739-40, 131 Cal. Rptr. 768, 779-80 (1976); Kirchman v. Mikula, 258 So. 2d 701, 703 (La. App. 1972); State *ex rel.* Gov't Employees Ins. Co. v. Lasky, 454 S.W.2d 942, 950 (Mo. Ct. App. 1970); Johnson v. Farmers Alliance Mut. Ins. Co., 499 P.2d 1387, 1390 (Okla. 1972); De Rentiis v. Lewis, 106 R.I. 240, 244-47, 258 A.2d 464, 466-67 (1969); Howard v. Allen, 254 S.C. 455, 462, 176 S.E.2d 127, 130 (1970); Housley v. Anaconda Co., 19 Utah 2d 124, 126-27, 427 P.2d 390, 392 (1967). *But see* Rintala v. Shoemaker, 362 F. Supp. 1044, 1057 (D. Minn. 1973); Savchuk v. Rush, 245 N.W.2d 624, 629 (Minn. 1976), *vacated and remanded for reconsideration in light of Shaffer v. Heitner, 433 U.S. 186 (1977)*, 433 U.S. 902 (1977); Forbes v. Boynton, 113 N.H. 617, 624, 313 A.2d 129, 133 (1973). For more recent developments in this area, see text accompanying notes 294-332 *infra*.

[80] *See* Smit, *supra* note 3, at 622-24; Note, *Jurisdiction*, *supra* note 76, at 165; Note, *Seven Years of Conflict*, *supra* note 76, at 850-52; text accompanying notes 294-298 *infra*.

[81] 274 U.S. 352 (1927). The *Hess* Court, describing a theory of implied consent to jurisdiction, upheld a Massachusetts statute providing that the operation of a motor vehicle by a nonresident in that state was equivalent to appointing the state registrar as an agent to accept service of process for any action arising out of the operation of the vehicle in the state. *Id.* at 354-57.

[82] In *International Shoe*, the State of Washington sought to collect unpaid unemployment compensation taxes from the defendant, a Delaware corporation with its principal place of business in Missouri. 326 U.S. at 311. The corporation did nothing in Washington except employ eleven to thirteen salesmen there and fill orders received from the salesmen. *Id.* at 313-14. Eschewing an implied consent analysis, *id.* at 318, the Court adopted a "minimum contacts" test in upholding the exercise of jurisdiction by the Washington court. *Id.* at 319-20.

[83] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (1971) (including presence, domicile, and residence among jurisdictional bases).

The analogue to individual presence or domicile for corporations is state of incorporation and wherever the corporation is "doing business." Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 577 (1958).

[84] International Shoe Co. v. Washington, 326 U.S. at 317. In *International Shoe*, the cause of action arose out of the defendant's contacts with Washington. *Id.* at 320. Where the cause of action sued upon is unrelated to the defendant's contacts with the forum, the minimum contacts test is also used to test the fairness of asserting jurisdiction. The affiliating contacts, however, must be of a more substantial kind, or a compelling reason for taking jurisdiction—for example, lack of an alternative forum—must exist. *See* Perkins v. Benguet Mining Co., 342 U.S. 437, 446-47 (1952) (citing International Shoe Co. v. Washington, 326 U.S. 310, 318-19 (1945)); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 430-32, 208 N.E.2d 439, 440-41, 260 N.Y.S.2d 625, 627-29 (1965).

cordingly, "minimum contacts" with the forum state could supply the needed nexus for the purposes of due process.

In the wake of *International Shoe*, most states proceeded to enact long arm statutes providing for the exercise of jurisdiction over claims resulting from tortious acts that occurred within the state's boundaries,[85] or from activities arising out of business transacted in the state.[86] The minimum contacts test served as the constitutional yardstick against which these statutes and their application to particular factual situations were measured.[87] Judicial inquiry thus shifted

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[85] *E.g.*, Civil Practice Act, § 17(1)(b), ILL. REV. STAT. ch. 110, § 17(1)(b) (1973); N.Y. CIV. PRAC. LAW § 302(a)(2)-(3) (McKinney 1972).

The Illinois statute was upheld in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 444, 176 N.E.2d 761, 767 (1961). The statute provides for jurisdiction over a nonresident who "commits a tortious act within this State." Civil Practice Act, § 17(1)(b), ILL. REV. STAT. ch. 110, § 17(1)(b) (1973). In *Gray*, the Illinois plaintiff sued an out-of-state corporation for injuries caused when a water heater containing a valve manufactured by the defendant exploded in Illinois. 22 Ill. 2d at 434, 176 N.E.2d at 762. As a matter of statutory construction, the *Gray* court held that if the *effect* of the tortious conduct—that is, the injury—occurred within the state, the statute applied. *Id.* at 435-36, 176 N.E.2d at 762-63. The court then went on to sustain the constitutionality of the statute as construed. *Id.* at 436-44, 176 N.E.2d at 763-67.

Despite language similar to the Illinois scheme, the New York statute met a different fate in Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 1, *cert. denied*, 382 U.S. 905 (1965). The *Feathers* court held that the statute applied only to acts committed within the state. *Id.* at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21. The following year, the New York legislature amended § 302 to permit jurisdiction over cases in which the injury occurs in the state. But by its terms the New York enactment may still be narrower than its Illinois counterpart, for the amendment limited jurisdiction to situations in which the nonresident defendant, who commits a tortious act outside the state before the injury occurs within the state,

> (i) regularly does or solicits business, or engages in any other *persistent* course of conduct, or derives *substantial* revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

N.Y. CIV. PRAC. LAW § 302(a)(3) (McKinney 1972) (emphasis added).

[86] *E.g.*, Civil Practice Act, § 17(1)(a), ILL. REV. STAT. ch. 110, § 17(1)(a) (1973); N.Y. CIV. PRAC. LAW § 302(a)(1) (McKinney 1972).

The Supreme Court sanctioned this type of jurisdiction in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). Before *International Shoe*, the Court employed *Hess's* implied consent theory to uphold jurisdiction over a corporation engaged in business subject to special state regulations. *See* Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935) (sale of securities).

[87] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 251-54 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).

Lower courts have sometimes considered other constitutional values in the due process jurisdiction balance. *See, e.g.*, Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956) (commerce clause); New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966) (first amendment implications of permitting long-arm jurisdiction over a newspaper in a libel action may require a greater showing of contacts with the forum). *See generally* Note, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967); Note, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967).

from territorial considerations to a qualitative evaluation of the relationships among the plaintiff, the defendant, the forum state, and the events occasioning the litigation.[88] As the *Shaffer* Court observed, these factors, "rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern" of analysis into personal jurisdiction.[89]

D. Security Attachments: From Sniadach *to* Di-Chem

Despite the impact of *International Shoe* in the in personam area, no such bold advances were made on the in rem and quasi in rem fronts.[90] Although the traditional publication notice that had sufficed in *Pennoyer* was no longer constitutionally adequate,[91] there were relatively few direct challenges to the *Pennoyer* tradition in the century following Justice Field's decision.[92] A more significant de-

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[88] *Developments, supra* note 3, at 924. When jurisdiction is asserted pursuant to a specific long-arm statute, it has been sustained even though jurisdiction is based on a single, isolated contact with the forum state when that contact bears a substantial connection to the asserted claim. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 438, 176 N.E.2d 761, 764 (1961), *discussed in* note 85 *supra*; Smyth v. Twin State Improvement Corp., 116 Vt. 569, 574-76, 80 A.2d 664, 667-68 (1951). Some additional interest-balancing is acknowledged in some long-arm statutes by limiting their availability to state residents. *See, e.g.*, MINN. STAT. ANN. § 303.13, subd. 1(3) (West 1969); TEX. STAT. ANN. art. 2031b, § 4 (Vernon 1964). The quality and extent of the nonresident's activity is relevant, and courts have often found some activities insufficient to confer jurisdiction. *See, e.g.*, McBreen v. Beech Aircraft Corp., 543 F.2d 26, 30-32 (7th Cir. 1976) (telephone conversation with nonresident defendant initiated by representative of Illinois magazine not sufficient to confer jurisdiction in action for libel by Illinois plaintiff), Missouri *ex rel.* Bank of Gering v. Schoenlaub, 540 S.W.2d 31, 35 (Mo. 1976) (en banc) (normal banking operations by out-of-state bank did not provide sufficient due process ties to justify jurisdiction), U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 764 (Tex. 1977) (single but fortuitous contact of contract payments in Texas not sufficient to confer jurisdiction as a matter of due process); Kocha v. Gibson Prod. Co., 535 P.2d 680, 681 (Utah 1975) (injury in state not sufficient for jurisdiction where defendant did not sell to buyers in state).

If jurisdiction is not asserted pursuant to a specific statute conferring jurisdiction over a nonresident defendant for a claim unrelated to the defendant's contacts with the state, the contacts must usually be more substantial and the courts often weigh additional considerations. *Compare* Perkins v. Banguet Consol. Mining Co., 342 U.S. 437, 445-48 (1952) (jurisdiction permitted; alternative forum unavailable) *and* Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 428, 208 N.E.2d 439, 439, 260 N.Y.S.2d 625, 626 (1965) (jurisdiction permitted; plaintiff a resident of the forum state) *with* Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 224-26, 347 P.2d 1, 2-4, 1 Cal. Rptr. 1, 2-4 (1959) (jurisdiction declined; plaintiff a nonresident and alternative forum apparently available).

[89] 433 U.S. at 204. Justice Marshall, however, did not mention the interests of the plaintiff in the jurisdictional inquiry. *Id.*

[90] *See generally* Smit, *supra* note 3.

[91] *See* note 65 *supra*.

[92] *See* text accompanying note 66 *supra*.

velopment, and one perhaps partly responsible for the demise of quasi in rem jurisdiction in *Shaffer*, was the successful due process attack launched against a variety of procedural devices—among them, prejudgment attachment—used to secure enforcement in civil actions.

Security attachments are not used to acquire jurisdiction over nonresident or absent defendants; in the typical case, the attaching court has in personam jurisdiction over the defendant whose property it is seizing. The device instead serves as a means of obtaining security prior to and, ultimately, for enforcing any judgment of the court.[93] In the past, a plaintiff could usually obtain a writ of attachment for security purposes in an ex parte proceeding, often before an officer acting ministerially, without providing the defendant with an opportunity to attack the validity of the attachment.[94] The procedure was a useful tool for creditors seeking to satisfy the claims of fleeing or unreliable debtors, but its value was somewhat diminished following a series of Supreme Court decisions beginning with *Sniadach v. Family Finance Corp.*[95]

Sniadach involved wage garnishment by a creditor who, pursuant to the Wisconsin garnishment statute, served the debtor's employer, thereby freezing the defendant's wages before trial without any opportunity on the part of the wage earner to offer a defense or contest the garnishment.[96] The Court, through Justice Douglas, reversed the state court decision upholding the statute.[97] Stating the issue to be "whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment,"[98] Justice Douglas emphasized the practical difficulties of the procedure upon a wage-earning family:

> A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support.
>
> . . . .

[93] For a description of the development of attachment as a prejudgment security device, see R. MILLAR, *supra* note 29, at 481-97. Execution, of course, is the traditional method of enforcing a money judgment.

[94] *See* McKay v. McInnes, 279 U.S. 820 (1929) (per curiam); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928); Ownbey v. Morgan, 256 U.S. 94, 109 (1921).

Some form of post-seizure remedy was usually available to the defendant, however. The statute struck down in Fuentes v. Shevin, 407 U.S. 67 (1972), for example, permitted the defendant to post a counterbond to recover possession of the seized property, *Id.* at 73 n.6 (citing FLA. STAT. ANN. § 78.13 (West Supp. 1972-1973)).

[95] 395 U.S. 337 (1969).

[96] *Id.* at 337-39.

[97] *Id.* at 342.

[98] *Id.* at 339.

> The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process.[99]

As a consequence of this language, a number of lower federal and state courts confined *Sniadach* to cases of wage garnishment,[100] but the Court soon extended the right to a prior hearing to reach all kinds of property rights. In *Fuentes v. Shevin*,[101] a four-man majority of the Court held unconstitutional the Florida and Pennsylvania replevin statutes,[102] both of which permitted a clerk of the court to issue a writ of replevin without notifying the defendant or providing an opportunity for him to defend against the seizure.[103] Although both the Florida and Pennsylvania defendants held the property under a conditional sales contract permitting the seller to repossess,[104] and although both states' statutes allowed the defendants to post bond and reclaim the property, the *Fuentes* Court held that the requirements of due process mandated a preattachment hearing.[105]

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[99] *Id.* at 340-42 (footnote and citation omitted).

[100] *See, e.g.*, Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); Reeves v. Motor Contract, 324 F. Supp. 1011, 1016 (N.D. Ga. 1971) (three-judge court) (per curiam) (dictum); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971); McCormick v. First Nat'l Bank, 322 F. Supp. 604, 607 (S.D. Fla. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150, 152 (D. Hawaii 1970); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 272, 463 P.2d 68, 70 (1969); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154, 159 (Fla. Dist. Ct. App. 1970); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 68, 280 A.2d 862, 863 (Dist. Ct. 1971); 300 W. 154th St. Realty Co. v. Department of Bldgs., 26 N.Y.2d 538, 544, 260 N.E.2d 534, 537, 311 N.Y.S.2d 899, 903 (1970). *But see* Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 547-52, 488 P.2d 13, 19, 20-23, 96 Cal. Rptr. 709, 715, 716-19 (1971), *cert. denied*, 407 U.S. 924 (1972).

Commentary on the *Sniadach* decision may be found in Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on* Sniadach v. Family Finance Corp., 19 AM. U.L. REV. 158 (1970); Note, *Some Implications of* Sniadach, 70 COLUM. L. REV. 942 (1970) [hereinafter Note, *Some Implications*]; Note, *Garnishment of Wages Prior to Judgment is a Denial of Due Process: The* Sniadach *Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970) [hereinafter Note, *Garnishment of Wages*].

[101] 407 U.S. 67 (1972). The companion case decided with *Fuentes* was Parham v. Cortese, *id.*

[102] *Id.* at 96.

[103] *Id.* at 73-78.

[104] *Id.* at 94.

[105] *Id.* at 81. Among the more noteworthy comments on *Fuentes* are Folk & Moyer, *supra* note 3, at 757-77; Gardner, Fuentes v. Shevin: *The New York Creditor and Replevin*, 22 BUFFALO L. REV. 17 (1973); Levy, *Attachment*, *supra* note 34, at 427-57; Zammit, *supra* note 3, at 677-81; Note, Fuentes v. Shevin: *Due Process for Debtors*, 51 N.C. L. REV. 111 (1972); Note, *Quasi In Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973) [hereinafter Note, *Quasi In Rem and Due Process*].

That holding appeared to augur a per se rule banning the prejudgment attachment of property without notice and a prior hearing, but within two years of the decision, a reconstituted but still deeply divided Court effected a slight retreat from *Fuentes* by upholding a Louisiana sequestration procedure in *Mitchell v. W.T. Grant Co.*[106] The *Mitchell* majority believed that certain of Louisiana's procedural safeguards—among them, that a judge issue the summons, that the creditor submit an affidavit setting forth his claim to the goods, and that a post-seizure hearing be held—adequately protected the debtor's interest in the property.[107]

In its most elastic state, *Mitchell* overruled *Fuentes*;[108] in its narrowest construction, it abandoned the per se approach in favor of a more ad hoc course that considered a state's interest in providing ex parte preliminary relief to creditors.[109] The narrower route seems to have prevailed. In its next decision in the area, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[110] a more solid majority of the Court struck down a Georgia garnishment statute that resembled the procedures invalidated in *Fuentes*.[111] The Court once again emphasized the importance of a preattachment hearing,[112] and did so in a context arguably less compelling than that of *Mitchell*.[113]

The line of cases from *Sniadach* to *Di-Chem* did not technically affect the use of attachment as a basis for quasi in rem jurisdiction. In each of those cases, the debtor was already subject to the personal

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[106] 416 U.S. 600 (1974). Justices Powell and Rehnquist, who took no part in the *Fuentes* decision, 407 U.S. at 97, joined the three *Fuentes* dissenters to constitute the *Mitchell* majority. 416 U.S. at 601.

[107] 416 U.S. at 615-18.

[108] Justice Powell, in concurrence, said as much, *id.* at 623, and Justice Stewart, in dissent, *id.* at 629-36, feared the same.

[109] *See* Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond*, 28 RUTGERS L. REV. 541, 556-62 (1975); Scott, *Constitutional Regulation of Provisional Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 824-30 (1975).

[110] 419 U.S. 601 (1975).

[111] *Id.* at 608. The latest case to reach the Supreme Court involved a challenge to the Illinois Attachment Act. A federal district court had found the statute unconstitutional, Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975), but the Supreme Court, never reaching the constitutional issue, reversed on the ground that federal intervention was improper in light of a pending state court proceeding, Trainor v. Hernandez, 431 U.S. 434, 444-47 (1977). *See also* Carey v. Sugar, 425 U.S. 73 (1976).

[112] 419 U.S. at 605-07.

[113] In both *Fuentes* and *Mitchell*, the contested action was an attachment of consumer goods; *Di-Chem*, on the other hand, involved two corporations and the recovery of a money debt. I say only "arguably" less compelling, however, because whereas the debtors in *Fuentes* and *Mitchell* were under conditional sales contracts, the *Di-Chem* debtor had undisputed full title to the attached property. *See id.* at 606.

jurisdiction of the attaching court. The *Fuentes* Court, citing with approval the 1921 case of *Ownbey v. Morgan*,[114] expressly reserved jurisdictional attachments as extraordinary situations warranting postponement of the hearing requirement, reasoning that such attachments were "clearly a most basic and important public interest."[115] It is not surprising, then, that most courts declined to apply the *Sniadach/Di-Chem* line of cases due process challenges to quasi in rem jurisdictional attachments.[116] Nevertheless, because the security cases implied that *some* procedural safeguards were necessary before a party could be deprived of property, commentators began to question the continued validity of jurisdictional attachment procedures.[117]

Those views were recognized by the Third Circuit in *Jonnet v. Dollar Savings Bank*.[118] In an elaborate opinion by Judge Rosenn, the court held that the safeguards pertinent to the attachment of property in the security cases were equally applicable to an attachment for jurisdiction.[119] *Jonnet* was a diversity action filed in Pennsylvania federal district court against a New York corporation that allegedly reneged on a million-dollar mortgage commitment.[120] Because the corporation was not registered to do business in Pennsylvania, and that state's long arm statute excepted the acquisition of mortgages from its definition of "doing business," attachment was the plaintiff's only recourse for jurisdiction in a Pennsylvania

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[114] 256 U.S. 94 (1921).

[115] 407 U.S. at 91 n.23.

[116] *See, e.g.*, Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 981-82 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972); Hutchinson v. Bank of N.C., 392 F. Supp. 888, 894-95 (M.D.N.C. 1975) (three-judge court); Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171, 1174 (S.D.N.Y. 1975); Long v. Levinson, 374 F. Supp. 615, 618 (S.D. Iowa 1974); U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1021-22 (D. Del. 1972), *rev'd*, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), *discussed in* note 66 *supra*; Tucker v. Burton, 319 F. Supp. 567, 569 (D.D.C. 1970); Allen Trucking Co. v. Adams, 323 So. 2d 367, 372 (Ala. Civ. App.), *cert. denied*, 323 So. 2d 373 (Ala. 1975); Gordon v. Michel, 297 A.2d 420, 423 (Del. Ch. Ct. 1972).

[117] *See, e.g.*, Anderson & L'Enfant, Fuentes v. Shevin: *Procedural Due Process and Louisiana Creditor's Remedies*, 33 LA. L. REV. 63, 75-77 (1972); Countryman, *The Bill of Rights and the Debt Collector*, 15 ARIZ. L. REV. 521, 555-57 (1973); Folk & Moyer, *supra* note 3, at 757-77; Kennedy, *supra* note 100, at 160-63; Levy, *Attachment*, *supra* note 34, at 427-57; Zammit, *supra* note 3, at 679-81; Note, *Some Implications*, *supra* note 100, at 950-54; Note, *Garnishment of Wages*, *supra* note 100, at 1003-04; Note, *Quasi in Rem and Due Process*, *supra* note 105, at 1023.

[118] 530 F.2d 1123 (3d Cir. 1976). The *Jonnet* case is discussed in Note, *Foreign Attachment Power Constrained–An End to Quasi in Rem Jurisdiction*, 31 U. MIAMI L. REV. 419 (1977) [hereinafter Note, *Foreign Attachment Power*]; Comment, 15 DUQ. L. REV. 145 (1977).

[119] 530 F.2d at 1129-30.

[120] *Id.* at 1125.

court.[121] Consequently, pursuant to the state procedure, the plaintiffs sought and received a writ of attachment from the clerk of the federal court against two in-state corporations that owed the defendant an amount in excess of the disputed mortgage commitment.[122] The defendants thereafter coupled a motion to dissolve the writ and substitute bonds with a motion challenging the constitutionality of the procedures.[123] The district court granted both,[124] and the court of appeals affirmed.[125]

Tracing the Supreme Court's recent decisions in the *Sniadach/Di-Chem* line, Judge Rosenn saw the issue as pivoting on the continued vitality of *Ownbey v. Morgan*,[126] the case that the *Fuentes* Court had cited in discussing its extraordinary situations doctrine[127] and that had, in broad dicta, approved of jurisdictional attachments without any procedural safeguards.[128] He concluded that the security cases confined *Ownbey* to the narrow proposition that a preattachment hearing was not essential, but that they required some procedural safeguards to take its place.[129] Accordingly, the court held that, in lieu of prior notice and hearing, the Pennsylvania statute had to provide for the plaintiff's submission of a sworn document detailing the allegations of the claim and averring that the defendant was a nonresident with property in the state; for that document to be considered, and the writ issued, by a judicial rather than a clerical officer; for indemnification in the event of a wrongful attachment; for a forum in which the defendant could promptly contest the attachment; and for some means by which the defendant could dissolve the attachment.[130]

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[121] *Id.* at 1125 n.4; *see* text accompanying note 131 *infra*.

Plaintiff Jonnet, a Pennsylvania resident, brought suit against Dollar, a New York corporation, for failing to honor a mortgage commitment which was to be secured by a mortgage on a Pennsylvania shopping center. Note, *Foreign Attachment Power*, *supra* note 118, at 419. The loan commitment had been entered into in New York, 530 F.2d at 1131, and Dollar did not do business or transact business in Pennsylvania, *id.* at 1140.

[122] 530 F.2d at 1125.

[123] *Id.*

[124] 392 F. Supp. 1385, 1391-93 (W.D. Pa. 1975), *aff'd*, 530 F.2d 1123 (3d Cir. 1976).

[125] 530 F.2d at 1130.

[126] 256 U.S. 94 (1921).

[127] 407 U.S. at 91 n.23; *see* text accompanying note 115 *supra*.

[128] 256 U.S. at 110-12.

[129] 530 F.2d at 1128-29.

[130] *Id.* at 1129-30; *see* Note, *Foreign Attachment Power*, *supra* note 118, at 430-31.

A very recent admiralty decision by Judge Beeks in Grand Bahama Petroleum Co., Ltd. v. Canadian Transp. Agencies, Ltd., No. C77-573 B (W.D. Wash. Apr. 6, 1978), upheld the admiralty remedy of maritime attachment justifying seizure of defendants' bank account under Admiralty Rule B(1) as a jurisdictional basis despite *Shaffer*, but found the procedure prescribed by the rule unconstitutional under the *Fuentes* and *Di-Chem* principles. Slip op. at 16-25.

In undertaking to decide the applicability of the *Sniadach/Di-Chem* cases to the Pennsylvania procedure, Judge Rosenn failed to distinguish between jurisdictional and security attachments. Indeed, a footnote in the opinion confuses the authorization in the federal rules for use by federal courts of state attachment procedures for the respective purposes of jurisdiction and security.[131] The failure to distinguish between the two types of attachments is unfortunate considering the different purposes they serve. A jurisdictional attachment, unlike one for security, is a device of last resort for many plaintiffs—usually employed only when no other basis of jurisdiction exists.[132] This situation is very different from one in which a plaintiff who obtains in personam jurisdiction over the defendant seeks to ensure the preservation of assets from which an ultimate judgment could be satisfied. The party's goal in that case is not obtaining a judgment, but enforcing one. Indeed, in a security attachment, the plaintiff must usually allege as a threshold matter that the defendant is likely to remove the assets from the state or otherwise hinder the enforcement proceedings,[133] an allegation irrelevant in the jurisdictional setting.

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[131] 530 F.2d at 1125 n.4; *see* text accompanying note 121 *supra*. The court asserted that Rule 64 of the Federal Rules of Civil Procedure authorized use of state attachment procedures for the purposes of jurisdiction. In fact, the rule permits the use of state attachment procedures "for the purpose of securing satisfaction of the judgment ultimately entered," FED. R. CIV. P. 64, whereas Rule 4(e)(2) allows the use of state attachment procedures for jurisdictional purposes, *see* FED. R. CIV. P. 4(e)(2). Rule 4(e)(2) is a comparatively recent addition; jurisdictional attachment was unavailable to the federal courts before 1963. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1119, at 491 (1969); Carrington, *supra* note 3, at 303.

[132] *See* Zammit, *supra* note 3, at 676.

Of course, the advantage of tying up the defendant's property may make attachment an attractive alternative for a plaintiff, and a "jurisdictional attachment" may permit a plaintiff to avoid the hearing requirements or statutory limitations of some security statutes. At least one court has winked at this subterfuge. *See* Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 981-82 (3d Cir. 1972), *cert. denied*, 409 U.S. 845 (1972). *But see* Welsh v. Kinchla, 386 F. Supp. 913, 914 (D. Mass. 1975).

[133] *See, e.g.*, ALA. CODE tit. 6, § 6-42 (1975); ARIZ. REV. STAT. § 12-1521(2) (Supp. Pamph. 1957-1977); ARK. STAT. ANN. § 31-101 (1962); D.C. Code Encycl. § 16-501(d) (West 1966); FLA. STAT. ANN. § 76.04-05 (West Cum. Supp. 1977); GA. CODE ANN. § 8-101 (1973); Civil Practice Act, § 1, ILL. REV. STAT. ch. 11, § 1 (1973); IND. CODE ANN. § 34-1-11-1 (Burns 1973); IOWA CODE ANN. § 639.3 (West 1950); KAN. CIV. PRO. STAT. ANN. § 60-701 (Vernon Supp. 1977); KY. REV. STAT. § 425.185 (1977); LA. CODE CIV. PRO. ANN. art. 3541 (West 1961); MD. ANN. CODE art. 9, §§ 1, 30 (Michie 1968); MISS. CODE ANN. § 11-33-9 (1972); MO. ANN. STAT. § 521.010 (Vernon 1953); NEB. REV. STAT. § 25-1001 (1975); N.J. STAT. ANN. § 2A-26-2 (West 1952); N.Y. CIV. PRAC. LAW § 6201 (McKinney Supp. Pamph. 1964-1977); N.D. CENT. CODE § 32-08.1-03 (Supp. 1977); OHIO REV. CODE ANN. § 2716.01 (Page 1971); OKLA. STAT. ANN. tit. 12, § 1151 (West 1971); S.C. CODE § 15-19-10 (1977); VA. CODE ANN. § 8-520 (Michie 1957); WASH. REV. CODE ANN. § 7.12.020 (Supp. 1977).

One of the difficulties that clouds these distinctions is that the Court has never made clear precisely what must be shown in a security attachment hearing. *Mitchell* suggested that the plaintiff must show "probable cause,"[134] but neither it nor any of the cases in its line clarifies whether the cause that must be probable is the need for continued attachment or the merits of the case itself or both.[135] If the hearing is intended to be a preliminary probe into the merits, then perhaps the preseizure hearing requirement would make sense in the jurisdictional setting. At least nothing in the purposes underlying the two types of attachment militates against application of this kind of due process hearing to each. If, on the other hand, the probable cause requirement relates to the need for continued attachment in order to satisfy a judgment, then the hearing would have little use in the jurisdictional context for, in the quasi in rem attachment, the plaintiff seeks to acquire a forum, not to secure a judgment.[136]

Another area of confusion stems from varying views of the appropriate interests in a jurisdictional attachment. Judge Rosenn, for example, asserted that a "prospective plaintiff has two interests in utilizing foreign attachment procedures: establishing jurisdiction in a desired forum and restraining a res within the control of the court for the eventual payment of a successfully established claim."[137] But as I have noted,[138] only the first is a legitimate interest in a bona fide jurisdictional attachment; once the second interest becomes paramount, the plaintiff is seeking to achieve the benefits of a security attachment and should, accordingly, be held to the constitutional requirements of *Sniadach* and *Di-Chem*. For instance, if the defendant is otherwise subject to the personal jurisdiction of the court, perhaps the attachment should no longer be viewed as jurisdictional; at that point, the court should identify the existence of personal jurisdiction, permit a judgment greater than the amount of the

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[134] 416 U.S. at 612 (citing Ewing v. Mytinger & Casselberry, 339 U.S. 594, 595-96 (1950)).

[135] New York recently amended its civil practice law to provide that upon a motion of the defendant to vacate an order of attachment the plaintiff bears the burden of establishing not only the grounds for the attachment and the need for its continuance, but also the probability of success on the merits. N.Y. CIV. PRAC. LAW § 6223(b) (McKinney Supp. Pamph. 1964-1977).

[136] A hearing which required a showing that there is no alternative basis for jurisdiction over the defendant, *i.e.*, the need for quasi in rem jurisdiction, would have the benefit of limiting the use of jurisdictional attachments to cases in which they were actually needed. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.4001 (jurisdictional attachments), § 600.4011 (security attachments) (MICH. STAT. ANN. §§ 27A.4001, .4011 (Callaghan Cum. Supp. 1978-1979)).

[137] 530 F.2d at 1129 (footnote omitted).

[138] *See* text accompanying note 93 *supra; cf.* text accompanying notes 61-64 *supra* (relationship between jurisdiction and enforcement under the power theory).

attached property, and recognize the attachment as one to secure the judgment, with all the constitutional requirements that that entails. Similarly, if the defendant consents to the personal jurisdiction of the court in a quasi in rem action, the attachment should no longer be viewed as a jurisdictional one, and if it is to continue, the *Sniadach/Di-Chem* tests should be met.[139]

Judge Rosenn's opinion, then, erred at the outset by not exploring the differences between jurisdictional and security attachments. But as the *Shaffer* Court was to show, the security cases do not provide the sole constitutional framework for analyzing the continued vitality of quasi in rem jurisdiction. Another approach, one that foreshadowed *Shaffer*'s, was urged by Judge Gibbons' concurring opinion in *Jonnet*. Although he offered no quarrel with the majority's reasoning, Judge Gibbons regarded the *Sniadach/Di-Chem* cases as too "precarious" a foundation on which to rest due process analysis of quasi in rem jurisdiction.[140] Opting instead to consider the jurisdictional question, he challenged the fundamental fairness of vesting jurisdiction solely on the basis of the defendant's ownership of property in the state.[141] The fundamental fairness inquiry was appropriate, Judge Gibbons maintained, because the Supreme Court's post-*Pennoyer* decisions indicated that "due process limits the exercise of state judicial power even when the state purports to act upon property rather than persons."[142] For him, therefore, the only question was what kind of contacts would satisfy the constitutional requirements. But first, Judge Gibbons considered whether due process still meant different things in different jurisdictional contexts.

Relying on *Mullane v. Central Hanover Bank & Trust Co.*,[143] Judge Gibbons argued that "the same limitations of fundamental fairness apply to any exercise by the state of judicial power, whether that exercise be denominated in rem, quasi-in-rem, or in personam. One of those limitations . . . is the *International Shoe* rule."[144] The old notions of sovereignty, he observed, no longer confined state process to state borders; in an era when significant contacts with a state are

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[139] This is not a novel view. *See* Welsh v. Kinchla, 386 F. Supp. 913, 914 (D. Mass. 1975). Folk & Moyers, *supra* note 3, at 764; Levy, *Attachment*, *supra* note 34, at 454. Scott, *supra* note 109, at 820 n.53; Note, *Quasi in Rem and Due Process*, *supra* note 105, at 1032. *But see* Jacobs v. Tenney, 316 F. Supp. 151, 161-62 (D. Del. 1970).

[140] 530 F.2d at 1130 (Gibbons, J., concurring).

[141] *Id.* at 1132-36.

[142] *Id.* at 1136.

[143] 339 U.S. 306 (1950).

[144] 530 F.2d at 1137.

the common basis for a court's exercise of adjudicatory jurisdiction, he maintained, judicial power based on the fictional situs of assets like stock certificates and mortgages had no place.[145]

Just what kinds of contacts were necessary for jurisdiction Judge Gibbons was not prepared to say.[146] He acknowledged that the physical presence of the defendant—the *Pennoyer* paradigm of power—was still a sufficient basis for jurisdiction, but he did so not only with reference to the common law sovereignty theories, but also on the practical ground that it "remains necessary to assure that each person within the country can be sued in at least one place."[147] He also reasserted the basic balance that bars the physical presence, residence, or domicile of the *plaintiff* from serving as the sole basis for jurisdiction.[148] But on the issue at bar, Judge Gibbons made it clear that the presence of the defendant's property in the state—in and of itself—would no longer suffice as a basis for jurisdiction over the defendant.[149] And it was this proposition that was applauded as "well-reasoned" by the *Shaffer* majority.[150]

III

THE *SHAFFER* OPINIONS: AN ANALYSIS

Justice Marshall's opinion for the *Shaffer* Court traced the history of the power theory of jurisdiction from *Pennoyer* to *International Shoe*.[151] The case for now applying the in personam test of "fair play and substantial justice" to an in rem action, which, fictions aside, controlled the " 'interests of persons in a thing,' " was straightforward.[152] Notwithstanding a difference in the potential

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[145] *Id.* at 1139.

[146] The *Jonnet* facts are set out in text accompanying notes 120-125 *supra*. Judge Gibbons characterized the case as one in which the only contact was that of a resident plaintiff, insufficient to satisfy the requirements of *International Shoe*. 530 F.2d at 1142. The presence of the secured property in Pennsylvania and its relationship to the asserted claim, however, may have supplied some additional contacts which Judge Gibbons overlooked.

[147] 530 F.2d at 1141. Of course, this practical consideration could be met, and more consistently with fundamental fairness, by confining jurisdiction to the state of the defendant's domicile rather than allowing it anywhere he happens to be transiently present. *See* text accompanying notes 233-237 *infra*.

[148] 530 F.2d at 1140-42.

[149] *Id.* at 1141-42.

[150] 433 U.S. at 205 (citing Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons, J., concurring)).

[151] 433 U.S. at 195-205.

[152] *Id.* at 207 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

stakes between in rem and in personam actions, he argued that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."[153] To be sure, he explained, there were situations in which the existence of property in the state, coupled with other factors, provided a nexus sufficient to comply with the minimum contacts test,[154] but in cases such as *Harris* and *Shaffer* (that is, quasi in rem type II actions), "the property which now serves as a basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action."[155] It was time, he declared, to reexamine the arguments for allowing jurisdiction in those situations.[156]

Justice Marshall was not impressed with the proferred arguments. He rejected, for example, the rationale of the *Restatement (Second) of Conflict of Laws* that quasi in rem type II jurisdiction was necessary so that a wrongdoer " 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.' "[157] According to Justice Marshall, this rationale was defective for two reasons. First, he asserted, the rationale at most explained a court's power to ensure enforcement of a judgment by attachment of property as security for a controversy being litigated in an appropriate forum, that is, one which satisfied the minimum contacts test of *International Shoe*.[158] Second, he observed, the debtor's removal of assets to a state that cannot invoke personal jurisdiction over him does not preclude recovery, for "[t]he Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States."[159] Justice Marshall thus untangled *Pennoyer*'s flawed association of jurisdiction and enforcement.[160] He seemed to suggest, in other words, that although the existence of property in a state might not support jurisdiction over the cause of action itself, it could suffice to assert jurisdiction not only to enforce a judgment, but to secure a

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[153] 433 U.S. at 209.

[154] *Id.* at 207-08. Traditional in rem and quasi in rem type-I actions would be such examples. *See* Smit, *supra* note 3, at 616-22. *But see* Arden-Mayfair, Inc. v. Louart Corp., 385 A.2d 3 (Del. Ch. 1978).

[155] 433 U.S. at 209.

[156] *Id.* at 206.

[157] *Id.* at 210 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66, Comment a (1971)); *see Developments*, *supra* note 3, at 955.

[158] 433 U.S. at 210. For earlier endorsements of this view, see Hazard, *supra* note 3, at 284-86; von Mehren & Trautman, *supra* note 3, at 1178.

[159] 433 U.S. at 210.

[160] *See* text accompanying notes 61-64 *supra*.

prospective one—even for an action pending in another forum. He contended, moreover, that the power theory was no longer necessary to assure the plaintiff of *some* forum in which to litigate his claims.[161] Thus unpersuaded that either logic or history warranted maintenance of *Pennoyer*'s reasoning, Justice Marshall concluded that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[162] relegating to a footnote the by now anticlimactic news that *Pennoyer* and *Harris* were overruled.[163]

One might have hoped for a grander stage for the final curtain call of such a long-running legal drama,[164] but the Court had another and more pressing care, namely, the identification of those contacts that would satisfy *International Shoe*'s test in the quasi in rem setting. Assuming that the post-sequestration mailing satisfied the notice arm of the jurisdictional question,[165] Justice Marshall turned to an examination of those contacts connecting the defendants, the forum state, and the cause of action. He found them inadequate. Heitner had argued in effect that the defendants' positions as directors and officers of a corporation chartered in Delaware gave the courts of that state a sufficient tie to a shareholders' derivative suit to render jurisdiction constitutional.[166] But although Justice Marshall conceded that a state might have a valid interest in securing jurisdiction over those holding fiduciary roles in corporations chartered in that state, he pointed out that Delaware had no statute asserting such an interest.[167] "Delaware law," Justice Marshall wrote, "bases jurisdiction not on [the defendants'] status as corporate fiduciaries, but rather on the presence of their property in the State."[168] Nor had the state

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[161] 433 U.S. at 211. At this juncture, the Court left open the question whether the existence of property in a state would justify jurisdiction when no other forum is available. *Id.* at 211 n.37.

[162] *Id.* at 212 (footnote omitted).

[163] *Id.* at 212 n.39. The Court did not explicitly overrule either *Pennoyer* or *Harris*. Rather, the Court enigmatically stated that these and other cases were overruled to the extent that they were inconsistent with *Shaffer*. *Id.*

[164] The fact pattern in *Shaffer* was not nearly as egregious as the possibilities created by Delaware's sequestration statute. That statute would allow a plaintiff to sue a mere stockholder in a Delaware corporation for a cause of action totally unrelated to the ownership of the stock. *See* Hughes Tool Co. v. Fawcett Publications, Inc., 290 A.2d 693 (Del. Ch. 1972). The actual facts of *Shaffer*, however, presented a group of defendants who were directors or officers of a Delaware corporation, 433 U.S. at 189-92, a fact insufficiently considered by the majority—a fact, moreover, that should have allowed the Delaware courts to take in personam jurisdiction. *Id.* at 223-24 (Brennan, J., concurring in part and dissenting in part).

[165] 433 U.S. at 213 n.40.

[166] *See id.* at 215-16.

[167] *See id.* at 216.

[168] *Id.* at 214.

"enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State."[169] The absence of any state acknowledgement of that interest, Justice Marshall believed, meant that the defendants "had no reason to expect to be haled before a Delaware court."[170] Apparently, without such expectations, the fairness ingredient of the *International Shoe* test would be frustrated.

Even an acceptance of the importance of Delaware's interests, however, would apparently not have convinced the court that jurisdiction was proper. The benefits received by the corporation and its officers and directors as a result of the Delaware charter, Justice Marshall added, "establishes only that it is appropriate for Delaware law to govern the obligations of [the defendants] to Greyhound and its stockholders."[171] In other words, Justice Marshall believed that if the forum state was the state of incorporation, that fact created a sufficient contact in a derivative suit for choice of law purposes, but not for jurisdictional ones. The tie necessary to identify the law that determines *what* the respective rights and liabilities of the parties would be was apparently weaker than the tie required to determine *where* those rights would be adjudicated. And on that note, the Court entered its order reversing the ruling of the Delaware court.[172]

I shall reserve a more extended discussion of the Court's reasoning for the following sections,[173] but several points of Justice Marshall's opinion are worth noting here. Perhaps the least controversial portion of the opinion was the burial of *Pennoyer*: Commentators had been urging it for years,[174] and none of the Justices who concurred or dissented separately disputed the basic logic put forth by the majority on this point.[175] Things became a little less clear, however, once the burial was completed. For example, Justice Marshall seemed to rest the absence of the requisite contacts on Delaware's failure to pass a statute specifically articulating an interest in securing jurisdiction over

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[169] *Id.* at 216.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 216-17.

[173] *See* text accompanying notes 210-256 *infra*.

[174] *See, e.g.*, R. WEINTRAUB, *supra* note 3, at 145 (1971); Carrington, *supra* note 3, at 306-09; Hazard, *supra* note 3, at 285-86; Smit, *supra* note 3, at 620-27; Stein, *supra* note 75, at 1114; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 663 (1959); von Mehren & Trautman, *supra* note 3, at 1178; Zammit, *supra* note 3, at 676; *Developments*, *supra* note 3, at 955-56; Note, *Garnishment of Intangibles*, *supra* note 76, at 569-71; Note, *Erosion of the Power Theory*, *supra* note 3, at 764-65; Note, *Test of Fairness*, *supra* note 3, at 325-38; Note, *The Constitutional Phase*, *supra* note 76, at 81-82.

[175] *See* 433 U.S. at 217 (Powell, J., concurring); *id.* at 218 (Stevens, J., concurring in the judgment); *id.* at 219 (Brennan, J., concurring in part and dissenting in part).

officers and directors of corporations chartered in Delaware and justifying a presumption of expectations.[176] That the existence of the necessary contacts somehow rests on the existence of a particular state statute is not an obvious proposition,[177] although the Court has made this intimation in the past.[178] First, the Court did not make any real attempt to explain why the existence of the statute placing the situs of the stock in Delaware corporations in Delaware, coupled with the sequestration statute and a long history of the use thereof, was not an adequate expression of Delaware's interest in hearing suits of this type.[179] Second, although the reasonable expectations of the parties have always been an element of the *International Shoe* test,[180] they have never been made to turn solely on the existence of a particularly worded statute but rather on whether adequate contacts are shown.[181] Finally, under the Court's analysis, a curious situation arises in those states that provide for jurisdiction over nonresidents whenever it is consistent with due process: The state has expressed an interest in extending the jurisdiction of its courts to constitutional

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[176] *Id.* at 214-16.

[177] For example, certain bases for jurisdiction over individuals have been recognized at common law without the need for a statute authorizing use of those bases. *See* R. WEINTRAUB, *supra* note 3, at 93.

[178] In both *International Shoe*, 326 U.S. at 320, and McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957), the Court affirmed state assertions of jurisdiction premised on state long-arm statutes; in Hanson v. Denckla, 357 U.S. 235 (1958), the Court reversed the assertion of jurisdiction, distinguishing *McGee* on the ground that a statute had been present in that case, 357 U.S. at 251-52. But the holdings in each of these cases depended more obviously on the relationship of the defendant and the cause of action to the forum state than the existence of the statute.

[179] Justice Brennan made this point in his partial concurrence. 433 U.S. at 227 & n.6. Delaware has since passed a long-arm statute permitting jurisdiction over nonresident corporate directors in actions relating to their duties as directors. Act of July 7, 1977, ch. 119, 61 Del. Laws __ (codified at DEL. CODE ANN. tit. 10, § 3114 (Michie Cum. Supp. 1977)). *See also* CONN. GEN. STAT. ANN. § 33-322 (West Cum. Supp. 1977); S.C. CODE § 33-5-70 (1976). For a discussion of the constitutionality of these statutes, see Note, *Measuring the Long Arm After* Shaffer v. Heitner, 53 N.Y.U.L. REV. 126 (1978) [hereinafter Note, *Measuring*].

[180] *See, e.g.*, Deveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 900-02, 458 P.2d 57, 63-64, 80 Cal. Rptr. 113, 119-20 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 440, 176 N.E.2d 761, 765 (1961); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971). Connecticut provides for the exercise of jurisdiction over any cause of action arising out of the production, manufacture, or distribution of goods "with the reasonable expectation that such goods are to be used or consumed in [the] state and are so used or consumed." CONN. GEN. STAT. ANN. § 33-411(c) (West Cum. Supp. 1978).

[181] This gap in *Shaffer* might be owing to the absence of "a proper factual record" with which to conduct the minimum contacts test. 433 U.S. at 223 (Brennan, J., concurring in part and dissenting in part).

limits, but such an expression would hardly seem to satisfy *Shaffer*'s expectations requirement.[182]

The greater flaw in Justice Marshall's opinion, however, lies not so much in what it said but in what it did not say—namely, what remains, if anything, of a meaningful distinction between in personam and quasi in rem jurisdiction. The Court did not enunciate a minimum contacts test that is peculiarly appropriate to quasi in rem actions and thus, if the test were satisfied for one type of action, it would presumably also be satisfied for another.[183] Because most states limit a judgment recovery in a quasi in rem action to the value of the seized property[184] even if the parties litigate the merits,[185] an in personam action would, quite obviously, be more attractive to prospective plaintiffs; the plaintiff who would intentionally restrict the amount of his recovery given an in personam option would be un-

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[182] For example, the Rhode Island statute provides that nonresidents who "shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island" and that such nonresidents shall be "amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States." R.I. GEN. LAWS § 9-5-33 (1969). Similarly, the California law states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). Although neither statute makes specific reference to interests in certain types of actions, they both certainly indicate an interest in extending the jurisdiction of their courts to constitutional limits. *But see* Kulko v. Superior Court, 46 U.S.L.W. 4421 (U.S. May 15, 1978).

[183] The Court did not offer an example of a quasi in rem type-II action that would pass constitutional analysis, and indeed deliberately avoided doing so. In the footnote in which it "overruled" *Pennoyer* and *Harris*, the Court said that "[i]t would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today." 433 U.S. at 212 n.39.

[184] *See* Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318 (1870); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66, Comment c (1971). *See generally* Carrington, *supra* note 3.

[185] The limited appearance rule permits parties subject to quasi in rem jurisdiction to defend on the merits without submitting to in personam jurisdiction. *See* Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 17-18, 112 N.E. 500, 502 (1916) (quoting Bissell v. Briggs, 9 Mass. 462, 468 (1813)); Carrington, *supra* note 3, at 313-14; *Developments*, *supra* note 3, at 991-97. The rule has never been constitutionally mandated, however, and some jurisdictions, including Delaware, permit a defense on the merits only at the expense of submitting to in personam jurisdiction. *See, e.g.*, United States v. Balanovski, 236 F.2d 298, 302 (2d Cir. 1956), *cert. denied*, 352 U.S. 968 (1957); Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 346, 117 A.2d 365, 368 (1955); State *ex rel.* Methodist Old People's Home v. Crawford, 159 Or. 377, 396-97, 80 P.2d 873, 881 (1938). Hints at a constitutional requirement, however, have been made in certain contexts by at least one court. Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967). The majority opinion in *Shaffer* did not address Delaware's failure to provide for a limited appearance. Justice Stevens, concurring only in the judgment, did call attention to the fact that the Delaware procedure denied the defendants the opportunity to defend on the merits unless they submitted to the unlimited jurisdiction of the court. 443 U.S. at 218-19.

usual indeed.[186] And yet there are instances when quasi in rem jurisdiction is the only alternative available to the plaintiff. Thus the question—one that determines whether *Shaffer* has made or will engender any genuinely meaningful contribution to jurisdictional concepts—is whether a distinction exists between the type of contacts necessary for in personam jurisdiction on the one hand and for quasi in rem jurisdiction on the other.

Three other Justices wrote opinions in *Shaffer*, none of which obviate the foregoing difficulties; if anything, they introduce new complexities about *Shaffer's* import and the viability of quasi in rem jurisdiction. Justice Powell, for example, concurred in the opinion of the Court, subject to one reservation. When the attached property "is indisputably and permanently located within a State," he suggested, a court of that state might, without more, constitutionally invoke quasi in rem jurisdiction.[187] He did not make clear whether he felt that *Pennoyer's* power rationale survived to that extent or merely whether the indisputable presence of property such as real property within the state satisfied the test of *International Shoe*. Of course, if Justice Powell's problem with the Delaware statute is only with the attachment of the intangible corporate stock, his quarrel is with *Harris v. Balk* rather than *Pennoyer* itself.[188] But his short opinion never spoke to the precise issue of the attachment of intangibles, nor did it seek to ascertain a fixed situs for them. Instead, he referred to an apparently limited set of circumstances in which the traditional quasi in rem jurisdiction based on real estate within the state "would avoid the uncertainty of the *International Shoe* standard" without significant constitutional cost.[189]

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[186] Unless there is a different level of contacts sufficient for quasi in rem jurisdiction, it would make little sense to opt for quasi in rem instead of personal jurisdiction, since the quasi in rem judgment would be limited by the value of the property. One might prefer quasi in rem jurisdiction as a mechanism for avoiding the procedural hearing requirements of the *Sniadach/Di-Chem* line of cases if the purpose of the attachment is for security as well but, in such a case, a court certainly should not permit the procedures to be avoided. *See* text accompanying notes 137-139 *supra*. Of course, one could argue that the sacrifice of less than a full judgment in a quasi in rem action is a tradeoff for the *Di-Chem* prerequisites in a jurisdictional attachment, thus making quasi in rem jurisdiction more attractive than in personam jurisdiction in such a situation. An additional benefit a plaintiff seeks in any attachment is the pressure placed on the defendant to settle, resulting from the tying up of his property by the attachment. *See* text accompanying notes 132-133 *supra*.

[187] 433 U.S. at 217 (Powell, J., concurring).

[188] On this view, *Shaffer* could have been decided on the more limited rationale that there are certain restrictions on locating the situs of particular forms of property. *Cf.* Texas v. New Jersey, 379 U.S. 674, 675 (1965) (action by state against other states for declaration of rights to determine power to escheat intangible personal property). Indeed, it is possible that its import is limited to striking down the Delaware statute establishing the situs of all stock owned in Delaware corporations in that state. *See* text accompanying note 12 *supra*.

[189] 433 U.S. at 217 (Powell, J., concurring).

Justice Stevens also seemed hesitant at the sweep of the majority's reasoning and appeared uncertain of its possible reach; he consequently concurred only in the judgment of the Court.[190] Like Justice Powell, his concern was with the nature of the property seized in *Shaffer*, but he emphasized the connection between the type of property at issue and the expectations of its owner.[191] He argued that a person who acquired real estate or opened a bank account, for instance, might well assume the risk that the state would assert adjudicatory power over him.[192] But a purchaser of securities in the domestic market, he contended, could not be expected to know that he is subject to suit in a remote forum on an unrelated claim simply because the stock was in a corporation chartered in a particular state.[193] Such an exercise of jurisdiction, according to Justice Stevens, when coupled with Delaware's refusal to permit a limited appearance,[194] made the state's sequestration statute unconstitutional on its face.[195] Thus, while he would not invalidate quasi in rem jurisdiction when real property or "other long accepted methods of acquiring jurisdiction over persons"[196] were involved, Justice Stevens held that the Delaware scheme failed because it did not provide adequate notice to the defendants "that their activities might subject them to suit."[197] Unfortunately, along with leaving unresolved the question raised by Justice Powell's concurrence, Justice Stevens neglected to adequately explain how the expectations of parties could be identified. The *Shaffer* defendants, after all, were not merely purchasers on the open market; they were officers and directors of the corporation, at least some of whom must have been aware of the "risks" of a Delaware charter.[198]

The longest and most enlightened of the separate opinions came from Justice Brennan, who concurred in the majority's holding on the constitutional question, but dissented from its application of the *International Shoe* test to the facts at bar.[199] He began by criticizing

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[190] Id. at 217 (Stevens, J., concurring in the judgment).

[191] *Id.* at 218-19.

[192] *Id.* at 218.

[193] *Id.*

[194] *See* note 185 *supra*.

[195] 433 U.S. at 219 (Stevens, J., concurring in the judgment).

[196] *Id.* Again, like Justice Powell, Justice Stevens did not clarify whether *Pennoyer* survived to that extent or whether the existence of such facts would satisfy the test of *International Shoe*. Although he used language like "long accepted methods," he also, in the context of his real estate and bank account examples, suggested that those activities and accompanying expectations provided the necessary minimum contacts. *Id.*

[197] *Id.*

[198] This question of contacts is discussed in Note, *Measuring*, *supra* note 179, at 132-35.

[199] 433 U.S. at 219-20 (Brennan, J., concurring in part and dissenting in part).

the majority for even indulging in the latter inquiry. According to Justice Brennan, quasi in rem jurisdiction was, under the Court's principal holding, "no longer constitutionally viable."[200] Consequently, because the Delaware statute under review only authorized quasi in rem jurisdiction, analysis of minimum contacts was inappropriate.[201] But having reproved the majority for writing an advisory opinion, Justice Brennan leaped headlong into the same undertaking.

In contrast to his brother Justices, Justice Brennan believed that "as a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State."[202] Three public policies, he said, supported Delaware's assertion of jurisdiction. First, "the state has a substantial interest in providing restitution for its local corporations that allegedly have been victimized by fiduciary misconduct."[203] Second, when the cause of action touches an area in which the forum state "possesses a manifest regulatory interest," a state court may constitutionally expand its jurisdiction.[204] Finally, a state has an interest in providing a forum for overseeing the affairs of a state-created institution.[205] These three factors, Justice Brennan urged, provided the requisite contacts for Delaware's adjudicatory authority.

Justice Brennan also differed from his colleagues in the sensitivity he showed to the interplay between jurisdictional and choice of law questions. Without reducing the tests for each to one and the same, he nonetheless indicated that the relationship between the two could not be ignored.[206] He acknowledged the difficulties in relying on the state of incorporation as the reference point for both questions,[207] but he asserted that, "[a]t the minimum, the decision that it

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[200] *Id.* at 220.

[201] *Id.* at 220-21. He noted, moreover, the danger of deciding the minimum contacts issue on an inadequate record and of pronouncing rules that would affect the jurisdiction of the courts of all 50 states. *Id.* at 221-22.

[202] *Id.* at 222.

[203] *Id.* at 223 (citing Hess v. Pawloski, 274 U.S. 352 (1927) (statute providing for jurisdiction over nonresident motorists causing injury within the state); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (statute providing for jurisdiction over defendants who cause tortious injuries within the state)).

[204] 433 U.S. (citing McGee v. International Life Ins. Co., 355 U.S. 22 (1957) (insurance regulation); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) (blue sky laws)).

[205] 433 U.S. (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (litigation involving common trust funds established under state law)).

[206] 433 U.S at 224-26.

[207] *Id.* at 226 n.4. Discussions of this question appear in Baraf, *The Foreign Corporation—A Problem in Choice-of-Law Doctrine*, 33 BROOKLYN L. REV. 219 (1966); Cary, *Federalism and*

is unfair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting the same State to accept jurisdiction for adjudicating the controversy."[208]

IV

IMPLICATIONS OF THE DECISION

A. Jurisdiction

Perhaps even in its most limited aspects, the *Shaffer* decision can be deemed revolutionary.[209] Not only does it erect a new test against which all assertions of state court jurisdiction must be measured, but it also raises new questions about such issues as the situs of intangibles for jurisdictional purposes and the appropriate role of long arm statutes in determining minimum contacts for an in personam action. I want to focus here on *Shaffer*'s impact on the continuing vitality of quasi in rem jurisdiction.

As Justice Marshall's opinion observed, the application of the *International Shoe* test to in rem and quasi in rem type-I actions is not likely to produce any dramatic changes.[210] The Court contemplated serious consequences, however, for the second type of quasi in rem action, in which the attached property is unrelated to the plaintiff's cause of action. This has raised the possibility that a quasi in rem type-II attachment is no longer a basis for asserting state court jurisdiction. But I believe there are at least three ways in which such an attachment can remain a valid source of state adjudicatory power.

The first depends on whether a double standard emerges with which to test minimum contacts in quasi in rem type-II actions. If the minimum contacts test for quasi in rem actions is equivalent to the

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Corporate Law, 83 YALE L.J. 663 (1974); Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433 (1968).

[208] 433 U.S. at 225 (Brennan, J., concurring in part and dissenting in part).

[209] The first wave of commentary on the case has already hit. *See, e.g.*, Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdictional Theory?*, 26 U. KAN. L. REV. 61 (1977); Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 KY. L.J. 1 (1977); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 152 (1977); Note, *Quasi in Rem on the Heels of* Shaffer v. Heitner: *If* International Shoe *Fits . . .*, 46 FORDHAM L. REV. 459 (1977) [hereinafter Note, *If* International Shoe *Fits*]; Note, *The Expanded Scope of the Sufficient Minimum Contacts Standard:* Shaffer v. Heitner, 63 IOWA L. REV. 504 (1977); Comment, *"Traditional Notions of Fair Play and Substantial Justice" Extended:* Shaffer v. Heitner, 1977 UTAH L. REV. 361.

[210] 433 U.S. at 208-09; *see In re* Rinderknecht, ___ Ind. App. ___, 367 N.E.2d 1128 (1977) (jurisdiction to determine marital status in *ex parte* proceeding in plaintiff's domicile not affected by *Shaffer*). *But cf.* Arden-Mayfair, Inc. v. Louart Corp., 385 A.2d 3 (1978) (in rem jurisdiction over stockholders to determine voting rights in corporate stock with statutory situs in Delaware denied).

one used for in personam jurisdiction, then the *Shaffer* Court probably eliminated quasi in rem jurisdiction as we have known it. It is quite possible, however, that certain minimum contacts that are insufficient when standing alone in an in personam action might pass the constitutional threshold in a quasi in rem action when coupled with the attachment of the defendant's property in the state.[211] For example, in this country the citizenship or residence of the plaintiff, without more, has never been adequate to confer jurisdiction over a nonresident defendant not present in the state.[212] Yet perhaps the plaintiff's residence together with some other contact like the physical presence of the defendant's property in the state[213] or a connection between the claim and the property might be enough to trigger the lower (or quasi in rem) level of a newly fashioned *International Shoe* inquiry. Certainly nothing explicit in *Shaffer* precludes these possibilities.[214]

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[211] Such a course was suggested by the Second Circuit in its recent post-*Shaffer* decision, Intermeat, Inc. v. American Poultry, Inc., No. 77-7481 (2d Cir. Apr. 14, 1978). In a contract damage suit brought by a New York corporation, quasi in rem jurisdiction was sustained based on attachment of an unrelated debt owed by the Great Atlantic & Pacific Tea Co. (A & P) to the defendant American Poultry. *Id.*, slip op. at 2520. Without deciding whether or not the defendant's other contacts with New York—the sale of large quantities of meat there as well as several other contacts between the plaintiff and defendant—would provide sufficient contacts for personal jurisdiction under New York Civil Practice Rules 301 or 302, the court held that the

> constitutional standard of due process may be met by fewer contacts.
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> . . . .
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> And while we need not decide whether *in personam* jurisdiction could have attached in this case, it seems evident that the "substantial connection" of the contract with New York must be considered along with the added factor of the attachment of an intangible within the jurisdiction of the state in weighing the "minimum contacts" required for Fourteenth Amendment due process, particularly since the debtor was doing business in New York.

Id., slip op. at 2528-30.

[212] Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1140-41 (3d Cir. 1976) (Gibbons, J., concurring).

[213] Actually, *Pennoyer* specifically referred to quasi in rem jurisdiction as a basis aimed at securing "payment of the demand of [the forum state's] *own citizens* against [nonresidents]." 95 U.S. at 723 (emphasis added). Traditionally, however, quasi in rem jurisdiction has never been so limited, though the doctrine of forum non conveniens has often restricted the ability of nonresidents to bring such actions. *See* S.D. Sales Corp. v. Doltex Fabrics Corp., 96 N.J. Super. 345, 350, 233 A.2d 70, 72 (1967); Plum v. Tampax, Inc., 402 Pa. 616, 619, 168 A.2d 315, 317, *cert. denied*, 368 U.S. 826 (1961); *cf.* Farrell v. Piedmont Aviation, Inc., 411 F.2d 812, 817 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969) (attachment of insurer's obligation limited to residents); Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969) (same). In addition, some state statutes in certain circumstances limit attachment to resident plaintiffs. *E.g.*, NEB. REV. STAT. § 25-1001 (1975); NEV. REV. STAT. § 31.017(1), (4) (1977).

[214] The majority opinion in *Shaffer* failed to consider the corporation as a resident plaintiff despite its posture as the beneficiary in a derivative suit. *Cf.* Smith v. Sperling, 354 U.S. 91,

The applicability of a double standard is suggested by the facts of a recent federal case, *Omni Aircraft Sales, Inc. v. Actividades Aereas Aragonesas.*[215] In *Omni Aircraft,* various purchase agreements were entered into between the buyer, Omni Aircraft, a Delaware corporation with its principal place of business in Washington, D.C., and the seller, Actividades, a Spanish corporation.[216] The agreements were executed in France and Spain and contemplated performance—the sale of three Lear jets—in Switzerland.[217] Prior to these agreements, Actividades had sent the engine from one of the designated Lear jets to a repair station in Arizona.[218] When a dispute between the parties arose, Omni Aircraft sought and obtained a writ of attachment against the engine, seeking to invoke the Arizona federal district court's quasi in rem jurisdiction for a judgment in partial satisfaction of a breach of contract claim against the seller.[219] Actividades moved to dismiss on the ground that *Shaffer* invalidated the exercise of such jurisdiction.[220] Although the defendant's undisputed title to the engine meant that the jurisdiction sought was quasi in rem of the second type, the plaintiff argued that the forum state's relationship to the defendant and to the cause of action nonetheless satisfied the minimum contacts test for quasi in rem jurisdiction; the fact that the defendant had deliberately forwarded the engine to Arizona, when coupled with the attached property's relationship to the subject matter of the contract alleged to have been breached, provided the minimum contacts necessary to establish quasi in rem jurisdiction.[221] The court rejected that argument, declaring that "Actividades' sole contact with the forum is the temporary placement of a jet engine in Arizona for repairs,"[222] and thus that "[p]laintiff's cause of action has no relation whatsoever to Actividades' forum activities."[223] The court made no effort to distinguish between the type of contacts necessary for in personam and quasi in rem jurisdiction; its analysis relied ex-

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97-98 (1957) (corporation aligned as defendant for diversity purposes if management is opposed to the plaintiff's claim).

Justice Brennan, on the other hand, who urged that minimum contacts had been satisfied, considered the action to be one in which a resident plaintiff—the Delaware corporation as beneficiary of the derivative action—sought relief. 433 U.S. at 222.

[215] No. 77-669 (D. Ariz. Nov. 15, 1977).

[216] *Id.*, slip op. at 1.

[217] *Id.* at 1-2.

[218] *Id.* at 2.

[219] *Id.*

[220] *Id.* at 1.

[221] *Id.* at 3.

[222] *Id.*

[223] *Id.*

clusively on the minimum contacts reasoning employed in in personam cases. But here, although the contacts were clearly insufficient for the exercise of in personam jurisdiction, the attachment of property specified in the contract under dispute might very possibly satisfy an *International Shoe* inquiry that applies a double standard for quasi in rem cases.

The classic civil procedure casebook favorite, *Pennington v. Fourth National Bank*,[224] provides another illustration. There, the plaintiff wife attached the bank account of her nonresident husband in order to sue him for alimony.[225] The husband claimed that the attachment violated the due process clause,[226] but a unanimous Supreme Court disagreed.[227] The decision antedated *International Shoe*, and thus the Court rested its reasoning on *Pennoyer*.[228] A prochronistic application of the in personam minimum contacts analysis would likely have yielded a different result.[229] But it is quite plausible to argue that quasi in rem jurisdiction, limiting the plaintiff's recovery to the value of the attached property, is still possible under *Shaffer* because of the plaintiff's residence and the defendant's property in the state.

Actually, the facts of *Pennington* suggest a second possible reservoir of quasi in rem adjudicatory power—namely, that the presence and attachment of more traditional kinds of property such as bank accounts, real estate, and the like, provides the requisite contacts. This approach, suggested by the concurring opinions of Justices Powell and Stevens, was adopted in a recent federal district court decision, *Feder v. Turkish Airlines*.[230] The *Feder* court upheld an assertion of quasi in rem jurisdiction based on the attachment of a Turkish defendant's New York bank account in a wrongful death diversity suit growing out of an airplane crash in Istanbul.[231] Relying on Justice Stevens' expectations notion, the court rejected the defendants' argument that the simple presence of the bank account in New York was inadequate to supply the requisite contacts:

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[224] 243 U.S. 269 (1917).

[225] *Id.* at 270.

[226] *Id.* at 271.

[227] *Id.* at 271-72.

[228] *See id.*

[229] *See* Siegel, *In Rem and Quasi In Rem Jurisdiction, printed in* 400 N.Y.S.2d 25, 39 (1978). It is possible that if the forum state is the state of matrimonial domicile or if the obligations of the nonresident to pay alimony accrued under the laws of such state, the broader in personam jurisdiction could be asserted. *See, e.g.*, N.Y. CIV. PRAC. LAW § 302(b) (McKinney Cum. Supp. 1977-1978); KAN. CIV. PRO. STAT. ANN. § 60-308(b)(8) (Vernon Supp. 1977). *See generally* Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289 (1973).

[230] 441 F. Supp. 1273 (S.D.N.Y. 1977).

[231] *Id.* at 1274.

> The case at bar cannot be compared to either *Harris* or *Shaffer*. The attachment in this case arises neither from the unpredictable visitations of [defendant's] debtor, nor from the statutory scheme of a state into which [the defendant] never set foot. The attachment arises from a commercial bank account which [the defendant] voluntarily opened in New York for the furtherance of its business. It is not necessary that the property attached be related to the underlying cause of action; jurisdiction *quasi in rem*, at least in [type II actions], requires no such showing.[232]

It is unclear from either *Feder* or the concurring opinions of Justices Powell and Stevens whether the exercise of jurisdiction based upon the attachment of this kind of property is an exception to *Shaffer* and thus indicates some remaining vitality for the traditional power theory or whether it is an application of a minimum contacts approach.[233] Resolution of this theoretical question may have practical consequences. If the power theory is rejected altogether as contrary to due process and *Feder* is justified on a fairness rationale, then the traditional basis of physical "tag" for serving a defendant within a state[234]—a basis grounded on notions of territorial sovereignty and one that permits the exercise of jurisdiction no matter how transient the defendant's presence in the state or how unrelated the cause of action[235]—would be constitutionally suspect.[236] If, on the other

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[232] Id. at 1279 (footnote omitted). The defendant's motion for certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970) was denied on the ground that there was no "substantial ground for difference of opinion" as to the proposition that *Shaffer* did not apply to attachment of a bank account. 441 F. Supp. at 1280.

[233] *Feder* did involve a resident plaintiff, 440 F. Supp. at 1274, a factor that may have influenced the court. *Feder* could be read as an example of a lower threshhold of minimum contacts for quasi in rem actions which is satisfied by the presence of property and a resident plaintiff. Such an analysis, however, was eschewed by the *Feder* court, *id.* at 1279 n.5, and the emphasis placed upon the minimal contacts between the defendant and the forum relative to the property attached since "that interpretation best comports with the foreseeability language of the [*Shaffer*] decision." *Id.* Nonetheless, it is possible to argue that the attachment of such traditional assets would satisfy the constitutional test.

Several recent admiralty decisions have also permitted attachment of a shipowner's right to charter hire where the defendant shipowner's vessel calls in American ports under charter parties with American companies. *See* Engineering Equip. Co. v. S.S. "Selene," No. 77-C-211 (S.D.N.Y. Mar. 14, 1978). *See also* Grand Bahama Petroleum Co., Ltd. v. Canadian Transp. Agencies, Ltd., No. C77-573 B (W.D. Wash. Apr. 6, 1978), *discussed in* note 130 *supra*.

[234] *See, e.g.*, Smith v. Gibson, 83 Ala. 284, 285, 3 So. 321, 321 (1888); Peabody v. Hamilton, 106 Mass. 217, 220 (1870). *See generally* 1 J. BEALE, *supra* note 4, at 339-40.

[235] *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917) (Holmes, J.) ("The foundation of jurisdiction is physical power"); Levy, *The Power Doctrine*, *supra* note 28, at 53. *But see* Ehrenzweig, *The Transient Rule*, *supra* note 62, at 312.

[236] Assuming the pre-*Shaffer* viability of the transient presence rule, *see* note 62 *supra*, if the minimum contacts rule now applies to all types of jurisdiction, the transient presence of an

hand, the *Feder*-type case is explained as an exception to *Shaffer*'s holding and justified by the traditional power over tangible property, the transient presence rule might survive in the in personam area.[237]

Of course, *Shaffer* did not purport to cover every conceivable situation in which quasi in rem type-II actions are attempted. Justice Marshall specifically excepted from the Court's holding, for example, "the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[238] This exception suggests the third possible way in which quasi in rem type-II actions will remain a viable source of state court jurisdiction—when no alternative forum is available. Here again, it is unclear whether the Court's exception is based on an imprecise "fairness" standard authorizing a court to exert jurisdiction in certain limited situations or whether it simply creates an exception to *Shaffer* in the no-alternative-forum cases.

In either event, this third possibility leads to the additional question of when a court will consider the plaintiff to have no alternative forum.[239] Most likely, the Court would not require an alternative forum to be available in the same state; if another state's forum is available to the plaintiff, it would probably suffice despite the inconvenience.[240] An alternative forum in another country, by contrast,

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individual would presumably fail to satisfy that standard. The rationale for jurisdiction based on the presence of the defendant—that there be some place where the defendant is amenable to process—is not persuasive if the domicile of the defendant remains a basis for jurisdiction over any cause of action. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940); text accompanying note 83 *supra*. On that rationale, of course, the domicile rule itself should survive. The doctrine of corporate presence, which relies on systematic and continuous activities of a nonresident defendant, however, is more likely to fall within the ambit of the *International Shoe* doctrine. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446-48 (1952); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 428, 430-32, 208 N.E.2d 439, 441-42, 260 N.Y.S.2d 625, 627-28 (1965); *cf.* ABKCO Indus., Inc. v. Lennon, 52 App. Div. 2d 435, 439-40, 384 N.Y.S.2d 781, 783-84 (1976) (doing business as to individuals).

[237] *See* note 62 *supra*.

[238] 433 U.S. at 211 n.37. The unavailability of an alternate forum has always been considered a relevant, albeit not dispositive, factor in determining whether jurisdiction based on doing business in the forum state satisfied the *International Shoe* test. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 440-41, 260 N.Y.S.2d 625, 628-29 (1965).

[239] Some jurisdictional or venue defects are not cured by a lack of an available alternative forum. *See* Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745, 746 (7th Cir.), *cert. denied*, 404 U.S. 948 (1971); Livingston v. Jefferson, 15 Fed. Cas. 660, 662-63 (C.C.D. Va. 1811) (No. 8,411).

[240] The same result can be reached by application of the doctrine of *forum non conveniens*. *Compare* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947) *with* Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 226, 347 P.2d 1, 4, 1 Cal. Rptr. 1, 4 (1959). The doctrine is governed by similar considerations relevant to the minimum contacts inquiry. *See generally*

might not offer sufficient protection and might thus justify an assertion of quasi in rem jurisdiction.[241] In *Omni Aircraft*, for example, the plaintiff attempted to attach the property of a Spanish corporate defendant in Arizona. If the plaintiffs did not have an alternative forum in the United States, remitting them to a Spanish forum would seem to work a peculiar hardship.

B. Enforcement

Another issue opened in *Shaffer* but left unexplored is whether a plaintiff may attach the defendant's property for security pending the outcome of litigation in *another* forum. Although holding that the defendants' contacts with Delaware were insufficient to vest the courts of that state with adjudicatory power, Justice Marshall's majority opinion implied that the Court would still permit attachment for post-judgment enforcement purposes, and also suggested that it would sanction prejudgment attachment to secure a judgment arising from litigation in a foreign forum.[242] An argument based on this latter suggestion was used by the plaintiffs in *Omni Aircraft*. A forum selection clause in one of the disputed contracts provided for a District of Columbia forum;[243] the Spanish defendant apparently had no assets in the United States other than the attached engine. As an alternative to the exercise of quasi in rem jurisdiction over the breach of contract claims, the plaintiffs urged the Arizona federal court to sustain the attachment as necessary to protect any potential judgment obtained in

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Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103 (1971); Foster, *Place of Trial—Interstate Application of Interstate Methods of Adjustment*, 44 HARV. L. REV. 41 (1930); Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930); Note, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234 (1947). The doctrine appears to have originated in Scotland. In early cases, the first action was stayed "pending proceedings in the more convenient forum." Braucher, *supra* at 910. Under modern practice, however, a successful plea of *forum non conveniens* results in dismissal of the action. *Id.*

[241] *See, e.g.*, Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 697-98 (1950); Wall St. Traders, Inc. v. Sociedad Espanola de Construccion Naval, 245 F. Supp. 344, 351 (S.D.N.Y. 1964); Thistle v. Halstead, 95 N.H. 87, 91, 58 A.2d 503, 507 (1948); Life Assurance Co. v. Associated Investors Int'l Corp., 312 A.2d 337, 341 (Del. Ch. 1973). *But cf.* Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 636 (2d Cir. 1956) (in personam jurisdiction); Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 318-20, 184 N.E. 152, 160-61 (1933) (same).

[242] *See* 433 U.S. at 210.

[243] Brief for Plaintiff at 9-10, Omni Aircraft Sales, Inc. v. Actividades Aereas Aragonesas, No. 77-669 (D. Ariz. Nov. 15, 1977).

the District of Columbia.[244] The Arizona court acknowledged that *Shaffer* had mentioned this possibility, but it held that such an attachment was simply not permitted by the Arizona attachment statutes.[245]

A similar argument fared better in a California federal district court. In *Carolina Power & Light Co. v. Uranex*,[246] the plaintiff, a North Carolina utility company, had a contract with the French defendant for the delivery of uranium concentrates.[247] When the price of uranium accelerated on the world market, the defendant sought, and the plaintiff refused, renegotiation of the contract.[248] The purchase agreement provided for arbitration of all disputes in New York but, before any proceedings began, the plaintiffs obtained a writ of attachment on certain funds owed the defendant by a California corporation as security.[249] In upholding the attachment, the California court explicitly held that the contacts were insufficient to sustain the usual in personam or quasi in rem jurisdiction permitting adjudication of the underlying claim,[250] but reasoned that *Shaffer* permitted an attachment for security even as to litigation in another forum.[251] The *Carolina Power* court emphasized that it was applying still another standard of minimum contacts or fairness to allow the attachment, stating that

> where the facts show that the presence of defendant's property within the state is not merely fortuitous, and that the attaching jurisdiction is not an inconvenient arena for defendant to litigate *the limited issues arising from the attachment*, assumption of *limited jurisdiction to issue the attachment* pending litigation in another forum would be constitutionally permissible.[252]

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[244] *Id.* at 11. The plaintiffs anticipated problems in enforcing an American judgment against the defendant's assets in Spain due to the lack of a treaty between Spain and the United States providing for recognition of judgments, *id.* at 19, and the defendant's precarious financial status, *id.* at 20-21. *See generally* Clare, *Enforcement of Foreign Judgments in Spain*, 9 INT'L LAW 509, 510 (1975).

[245] No. 77-669, slip op. at 4 (D. Ariz. Nov. 15, 1977).

[246] No. C-77-0123 (N.D. Cal. Sept. 26, 1977).

[247] *Id.*, slip op. at 1.

[248] *Id.*

[249] *Id.* at 1-2.

[250] *Id.* at 5-6.

[251] *Id.* at 6-7. The English House of Lords recently struggled with a similar problem. In addition to rejecting the presence of assets in the realm as a basis for jurisdiction, *see* note 40 *supra*, the House of Lords refused to order the provisional attachment of the English assets of a foreign defendant pending adjudication of the claim in a foreign court. *See* Siskina v. Distos Compania Naviera, S.A., [1977] 3 W.L.R. 818, 828 (H.L.).

[252] No. C-77-0123 (N.D. Cal. Sept. 26, 1977), slip op. at 7-8 (emphasis added).

In applying the fairness standard, the *Carolina Power* court also included

> consideration of both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought, that is, jurisdiction merely to order the attachment and not to

That the California forum was not inconvenient and the French defendant had voluntarily dealt with a California corporation, then, were sufficient to satisfy the fairness test for the limited purpose of taking jurisdiction to attach for security.[253]

One final enforcement possibility should be mentioned in this context, for if its use became widespread, it would eliminate the difficulties attending attempts to secure or enforce judgments in forums other than the state where the cause of action is being litigated. In *Inter-Regional Financial Group, Inc. v. Hashemi*,[254] the Second Circuit affirmed a lower court order granting the plaintiff's prejudgment motion directing the defendant to bring property into the forum state for the purposes of attachment.[255] This apparently unique approach places the plaintiff in a better position than if he had already obtained a judgment, for after a judgment he can only enforce against assets in the state and must then seek additional satisfaction for the judgment in another jurisdiction.[256] It also means that the forum court is the one with control over security, obviating the need for a plaintiff to seek out prejudgment attachments in a variety of forums.

V

JURISDICTION AND CHOICE OF LAW

In suggesting that the plaintiff's residence coupled with the attachment of the defendant's property in the state might well comport with a "lower level" minimum contacts test for quasi in rem actions, I

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adjudicate the underlying merits of the controversies. In some circumstances, even limited jurisdiction to attach property would nonetheless violate standards of "fair play and substantial justice," for example, where the attached property was merely moving through the state in transit to another country.

Id. at 7.

[253] *Id.* at 8. The court in *Carolina Power* noted that only an arbitration proceeding was pending in the other forum, and that attachment could not ordinarily be predicated on an informal proceeding. *Id.* at 9. The attachment was nevertheless allowed because of "the exceptional circumstances of this litigation." *Id.* First, the action was filed six months before *Shaffer* was decided, when "few attorneys would have doubted that [the] court would have *quasi in rem* jurisdiction to adjudicate the underlying controversy." *Id.* Second, dismissal of the action would in any event be stayed pending plaintiff's appeal. *Id.*

The court's approach is analogous to the French *saisie-arrêt*, in which the garnishee is enjoined from paying the debt to any principal defendant until resolution of the principal controversy litigated in a proper forum. If judgment issues in that suit, it may be enforced out of the garnished debt. *See* Beale, *supra* note 70, at 123-24; Hazard, *supra* note 3, at 285-86.

[254] 562 F.2d 152 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 892 (1978).

[255] *Id.* at 154-55.

[256] *See generally* Paulsen, *Enforcing the Money Judgment of a Sister State*, 42 IOWA L. REV 202 (1957).

want to emphasize that I do not necessarily endorse a concomitant impact on choice of law decisions. The interplay between jurisdiction and choice of law has to this point, I believe, not received the appropriate attention and accurate analysis of the Supreme Court, which has spoken only rarely—and often cryptically—on choice of law issues.[257] In fact, *Shaffer* is one of the few cases in which the Supreme Court has commented on the relationship between jurisdiction and choice of law at all.[258]

In assessing Delaware's interest in supervising the management of a corporation chartered in that state as the basis for jurisdiction in a Delaware court, Justice Marshall acknowledged that such an interest might exist, but claimed that it established only the basis for applying Delaware law, not that Delaware was a "fair forum for this litigation."[259] He relied for this proposition on *Hanson v.*

[257] *See generally* Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U.L. REV. 419 (1960); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958) [hereinafter Currie, *Governmental Interests*]; Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959).

[258] The other significant cases are Kulko v. Superior Court, 46 U.S.L.W. 4421, 4425 (U.S. May 15, 1978); Hanson v. Denckla, 357 U.S. 235, 253 (1958); Williams v. North Carolina, 317 U.S. 287, 297-302 (1942). The relationship between jurisdiction and choice of law is discussed in Ehrenzweig, *The Transient Rule*, *supra* note 62, at 290-92; von Mehren & Trautman, *supra* note 3, at 1128-33.

[259] 433 U.S. at 215. An assessment of the various interests of the states whose laws are in conflict has become the dominant mode of analysis in modern choice of law theory. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 63-64 (1965); Cavers, *Contemporary Conflicts Law, printed in American Perspective*, III RECUEIL DES COURS 77, 146-49 (1970); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 244-68 (1958) [hereinafter Currie, *Married Women*]; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 928-41 (1975). A similar mode of analysis has been adopted in the Restatement, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comments c & l (1971), which was the subject of commentary in Reese, *Conflict of Laws and the Restatement Second*, 28 L. & CONTEMP. PROB. 679 (1963), and *Symposium—On the Restatement (Second) of Conflict of Laws*, 72 COLUM. L. REV. 219 (1972).

That Delaware had an interest in applying its own law to regulate the corporations chartered in that state is clear. *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 309 (1971). Another state might also have an interest in applying *its* rules in litigation involving a Delaware corporation. *See* Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317, 321 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); Western Airlines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 406, 12 Cal. Rptr. 719, 723-24 (1961). Delaware has often been parochial in using its own law to further its promanagement policies, but it has recently shown a less chauvinistic attitude when the issue involved the protection of shareholders in a Delaware corporation. *See* Singer v. Magnavox Co., 380 A.2d 969, 981 (Del. 1977). *See generally* Baraf, *supra* note 207; Cary, *supra* note 207; Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1; Kaplan, *supra* note 207; Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955); Oldham, *California Regulates Pseudo-Foreign Corporations—Trampling Upon the Tramp?*, 17 SANTA CLARA L. REV. 85 (1977); Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118 (1958).

Denckla,[260] in which the Court had also drawn a distinction between the interests permitting the invocation of jurisdiction and those that would sustain the application of a particular state's law.[261] The *Hanson* Court believed that the issue of the validity of Florida's acquisition of jurisdiction over a trustee of an inter vivos trust was different from the issue whether Florida, which was the domicile of the decedent who had exercised the challenged appointment power as well as the domicile of the vying beneficiaries, could apply its own law.[262]

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[260] 357 U.S. 235 (1958). *Hanson* involved the right to part of the corpus of a trust established in Delaware by a Pennsylvania settlor who later became domiciled in Florida. The trust instrument named a Delaware trust company as trustee and reserved certain powers to the settlor, among them an inter vivos power of appointment. *Id.* at 238. Fourteen years after the trust was created, the settlor executed in the amount of $400,000 an inter vivos power of appointment in favor of two trusts previously established with another Delaware trustee. *Id.* at 239. In the residuary clause of her will, the settlor created two additional trusts for the benefit of her daughters, and also provided that any previous appointments not "effectively exercised" were to pass through the clause to her daughters' trusts. *Id.* at 240. Following the settlor's death and probate in a Florida court, the daughters challenged the appointment of the $400,000 in Florida chancery court. *Id.* The beneficiaries of the Delaware trust challenged the court's power to proceed on the ground that the court could not exercise jurisdiction over the nonresident and indispensable parties to the action, the Delaware trustees. *Id.* at 241-42. The Florida Supreme Court sustained jurisdiction and, applying Florida law, went on to hold that the settlor's reservation of powers under the original trust agreement rendered the trust illusory. Hanson v. Denckla, 100 So. 2d 378, 381, 383-85 (Fla. 1956). Meanwhile, the executrix of the estate had instituted a declaratory judgment action in Delaware court, which held that the trust and power of appointment were valid under applicable Delaware law. Hanson v. Wilmington Trust Co., 35 Del. Ch. 411, 424-26, 119 A.2d 901, 909-10 (1955). The United States Supreme Court reversed the Florida judgment on the ground that the court had lacked jurisdiction over the action. 357 U.S. at 254-55.

The *Hanson* decision met mixed reviews among the commentators. *Compare* Scott, Hanson v. Denckla, 72 HARV. L. REV. 695, 697-702 (1959) (approving) *with* Hazard, *supra* note 3, at 243-45 *and* Kurland, *supra* note 83, at 610-13 (criticizing).

The Court recently restated its view on the interaction between choice of law and jurisdiction in Kulko v. Superior Court, 46 U.S.L.W. 4421, 4425 (U.S. May 15, 1978). Relying on *Hanson*, the Court noted that California law may apply in a New York action for child support, but that the California courts did not have jurisdiction to hear the case. *Id.*

[261] At one point, the Court indicated that the exercise of the power of appointment might have amounted to a "republication" of the original trust instrument in Florida for choice of law purposes. 357 U.S. at 253. It also noted, however, that it was unnecessary to consider the appellants' contention that the contacts of the trust agreement with Florida were so light as to constitute a denial of due process if Florida law were applied to determine its validity. *Id.* at 254 n.27.

[262] *Id.* at 253-54. Justice Black's dissenting opinion urged that the jurisdiction and choice of law questions were more closely related and that both were satisfied on the *Hanson* facts:

> True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations. It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial

The Court never reached the choice of law issue because its holding that the Florida court lacked jurisdiction over the nonresident trustee, together with a finding that the trustee was an indispensable party, eliminated the need to do so.[263] Chief Justice Warren's opinion for the Court observed, however, that the state

> does not acquire . . . jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.[264]

The *Hanson* Court's implication, one apparently reasserted in *Shaffer*, is that more contacts with the forum state are needed for jurisdiction than for choice of law. I suggest that this implication is counterintuitive. The impact of a conflict of laws decision more seriously affects the rights of the parties than a decision on jurisdiction,[265] which merely directs the parties to an appropriate forum in

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> justice." . . . So far as the nonresident defendants here are concerned I can see nothing which approaches that degree of unfairness. Florida, the home of the principal contenders for Mrs. Donner's largess, was a reasonably convenient forum for all. Certainly there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts. It chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question.

Id. at 258-59 (footnote and citations omitted).

[263] In dissent, Justice Black criticized the majority for deciding the indispensability question, which necessarily precluded the Florida court from reaching a decision. 357 U.S. at 261. *See generally* Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957). *See also* note 267 *infra*.

[264] 357 U.S. at 254 (footnote omitted). *Compare* Ehrenzweig, *The Transient Rule*, *supra* note 62, at 292 (choice of forum should be limited to situations where the contacts of the case justify the application of the chosen forum's own law) *with* von Mehren & Trautman, *supra* note 3, at 1128-33 (jurisdictional issues concern convenience for litigation and feasibility in enforcement of judgments and choice of law relates to the degree of community concern about the merits of the controversy, although choice of law often has an effect upon jurisdiction and vice versa).

[265] A decision to litigate in a particular jurisdiction may inconvenience the defendant, but in the classic era of Restatement I conflicts rules, the choice of applicable law was not necessarily affected—divorce and workmen's compensation cases constituting the exception, *see* von Mehren & Trautman, *supra* note 3, at 1129. To the extent that modern choice of law analysis takes into account the fact that a particular state is the forum, however, the choice of forum takes on enhanced importance for the parties. Professor Currie's suggested analysis, for example, mandates an inquiry into whether a state's policy would be furthered by application of its own law. If more than one state has such an interest, the true conflict, on Currie's view, should be resolved in favor of the forum state's law. *See* Currie, *Married Women*, *supra* note 259, at 261-62. In several cases, courts have applied forum law even though another jurisdiction may have had more contacts with the subject matter of the suit. *See* Rosenthal v. Warren, 475 F.2d 438, 439-40 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); Foster v. Leggett, 484 S.W.2d 827, 827-29 (Ky. Ct. App. 1972); Lilienthal v. Kaufman, 239 Or. 1, 7-11, 395 P.2d 543, 545-47 (1964).

which to litigate their case. In *Hanson*, for example, two different state courts, one in Delaware and one in Florida, adjudicated an issue concerning the disposition of $400,000. Each court applied the law of its own state and each arrived at a different result, with the victorious Florida plaintiffs losing in the opposite posture in Delaware.[266] I am confident that, given the choice, the Florida plaintiffs would rather have litigated in a Delaware court applying Florida law than in a Florida court applying Delaware law.

In *Hanson*, of course, the contacts that were relevant to the choice of law question had relatively little to do with the considerations the Court articulated in determining the jurisdictional issue; it was the multiparty nature of the litigation that rendered the otherwise weighty contacts with Florida immaterial for jurisdictional purposes.[267] The defendant trustee, according to Chief Justice Warren, had not engaged in any "act by which [it] purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of [Florida's] laws."[268] But although the *Shaffer* majority quoted that language (leaving out, interestingly enough, the final clause),[269] it was not confronted with a similar situation. The *Shaffer* Court implied that Delaware's interest in regulating the activities of its own corporations and their officers

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Even under the more traditional choice of law rules, a court could use various devices to avoid application of another state's law if it were so inclined. *See, e.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 865-67, 264 P.2d 944, 948-49 (1953) (survival statute held to be procedural); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 140, 95 N.W.2d 814, 819 (1959) (interspousal immunity question characterized by forum as "status" issue). *See generally* Traynor, *supra* note 174, at 669-72.

[266] *See* note 262 *supra*.

[267] The contacts with the Florida forum were sufficient to obtain jurisdiction over the challenged beneficiaries, *see* 357 U.S. at 254, but the Court's holding that the Delaware trustees, whose only contact with the state involved certain incidents of trust administration, *id.* at 252, were indispensable parties made obtaining jurisdiction over them critical. *Id.* at 254-55. In an attempt to cure such difficulties, doctrines of indispensability have been severely limited. *See* FED. R. CIV. P. 19. It has also been suggested that parties who must be present to prevent dismissal of an action should be subject to nationwide service of process. *See* Note, *Attacking the Party Problem*, 38 S. CAL. L. REV. 80, 89 (1965). Some courts faced with the multiparty problem have resorted to a fictional res in an attempt to acquire jurisdiction over all defendants. *See* Atkinson v. Superior Court, 49 Cal. 2d 338, 342, 316 P.2d 960, 963 (1957), *cert. denied*, 357 U.S. 569 (1958); Traynor, *supra* note 174, at 659-61; *cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (common trust fund). Justice Douglas' dissenting opinion in *Hanson* argued that the absent trustee, as a mere stakeholder in the action, was an agent so close to the settlor-decedent as to be in privity with her, eliminating the need for independent jurisdiction over the trust company. 357 U.S. at 263-64.

[268] 357 U.S. at 253.

[269] 433 U.S. at 216.

and directors was pertinent only to the choice of law inquiry.[270] But neither the facts of *Hanson* nor logic supports that reasoning.

If there is an explanation for the curious implications of *Hanson* and *Shaffer*, it lies in the differing role of domiciliary interests in the jurisdictional and choice of law contexts.[271] A state's "interest" in the plaintiff, without more, has never been a sufficient justification for exercising jurisdiction over a defendant.[272] The reason for this partly rests with the historical vestiges of territorialism, but the rule itself has survived and indeed guided the jurisdictional theories of power,[273] consent,[274] and minimum contacts.[275] The state interest in providing a forum for its own citizens has only counted as an additional, reinforcing element.[276]

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[270] *Id.* at 215. The law of the state of incorporation is usually applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors, and its shareholders. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971). Where, however, another state has a more significant relationship to the parties and the transaction within the meaning of § 6 of the Restatement, that state's law should be applied. *See id.* § 6; note 259 *supra*.

[271] Justice Brennan argued in dissent that the Delaware contacts were relevant to both the jurisdiction and choice of law issues: that similar considerations—the expectations of the parties and the fairness of applying a particular state's law—affect both determinations. 433 U.S. at 224-25.

[272] The Roman law maxim was *actor forum rei sequitur* (the plaintiff must pursue the defendant in the defendant's forum). *See* von Mehren & Trautman, *supra* note 3, at 1127 n.13.

[273] McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("[t]he foundation of jurisdiction is physical power"); Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"). The power theory of jurisdiction has been characterized as a myth in Ehrenzweig, *The Transient Rule*, *supra* note 62, at 293-95. *But see* Levy, *The Power Doctrine*, *supra* note 28, at 94-97.

[274] The consent rationale has been used in various contexts. *E.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938) (plaintiff consents to jurisdiction over a cross-action (counterclaim) by defendant); Hess v. Pawloski, 274 U.S. 352, 356 (1927) (nonresident motorist impliedly consents to use of state registrar as his agent for service of process); St. Clair v. Cox, 106 U.S. 350, 356 (1882) (state may require special designation of agent for service on corporation doing business within state); *cf.* Kane v. New Jersey, 242 U.S. 160, 166-69 (1916) (nonresident motorist penalized for failing to file a formal instrument appointing Secretary of State as his attorney for service).

Express consent to jurisdiction via a choice of forum clause was given a recent boost in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17-18 (1972) (requiring dismissal of action brought in contravention of an express contractual choice of forum clause). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

[275] Later cases emphasized the importance of the contacts of the defendant with the state rather than any type of implied consent. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); International Shoe Co. v. Washington, 326 U.S. 310, 318-20 (1945). *Compare* Hess v. Pawloski, 274 U.S. 352, 356 (1927) *with* Tardiff v. Bank Line, Ltd., 127 F. Supp. 945, 948 (E.D. La. 1954).

[276] In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the nonresident defendant insurance company offered to reinsure a California resident, who had carried insurance with the company's predecessor. *Id.* at 221. Although the defendant did not have any office or agent in California and had done no insurance business in California apart from the policy involved, *id.*

In choice of law theory, however, once an analysis of interests replaced the first Restatement's territorial rules,[277] the domiciliary interests of the plaintiff came to mean far more, at least expressly, than they ever had in a jurisdictional account.[278] In *Hanson*, the Court could thus term Florida the "center of gravity" for choice of law because the settlor and plaintiff beneficiaries had lived or were living in that state.[279] But the import of an observation regarding an emphasis on plaintiff's domicile must be tempered by an understanding of why and in what context such emphasis occurs. It would be a rare case indeed for a particular state's law to be applied *only* because it is the state of the plaintiff's domicile. In fact, the typical court emphasizing the plaintiff's domiciliary interest—often at the expense of other interests—is a court of the plaintiff's home state.[280] And

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at 222, the Supreme Court sustained the California court's assertion of jurisdiction. *Id.* at 224. The Court stressed California's interest in "providing effective means of redress for its residents when their insurers refuse to pay claims," but primarily relied on the fact that the contract had a "substantial connection with that State." *Id.* at 223. That the plaintiff's residence is a reinforcing element is further shown by statutes that specify the residency or domicile of the plaintiff as a condition for the exercise of long-arm jurisdiction. *E.g.*, MINN. STAT. ANN. § 303.13, subd. 1(3) (West 1969); TEX. CIV. CODE ANN. art. 2031b, § 4 (Vernon 1964).

Similarly, when general jurisdiction over a nonresident defendant is based on his "substantial" or "systematic and continuous activities" in the state, the residence of the plaintiff is often an important consideration. *Compare* Ratliff v. Cooper Laboratories, 444 F.2d 745, 746 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971) (no jurisdiction) *with* Lee v. Walworth Valve Co., 482 F.2d 297, 300 (4th Cir. 1973) (jurisdiction) *and* Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 225-26, 347 P.2d 1, 3-4, 1 Cal. Rptr. 1, 3-4 (1959) (no jurisdiction) *with* Bryant v. Finnish Nat'l Airlines, 15 N.Y.2d 426, 428, 208 N.E.2d 439, 439, 260 N.Y.S.2d 625, 626 (1965) (jurisdiction).

[277] *See* RESTATEMENT OF CONFLICT OF LAWS (1934); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 363-70 (1945). Professor Currie's work was particularly influential in effecting this shift. *See generally* Currie, *Married Women*, *supra* note 259.

[278] *See, e.g.*, Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 23-24 (3d Cir. 1975), Turcotte v. Ford Motor Co., 494 F.2d 173, 177-80 (1st Cir. 1974); Rosenthal v. Warren, 475 F.2d 438, 444-46 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 318, 323, 546 P.2d 719, 722, 725-26, 128 Cal. Rptr. 215, 218, 221-22, *cert. denied*, 429 U.S. 859 (1976); Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 731-39, 101 Cal. Rptr. 314, 327-34 (1972); Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972); Tooker v. Lopez, 24 N.Y.2d 569, 576-77, 249 N.E.2d 394, 398, 301 N.Y.S.2d 519, 525 (1969); Miller v. Miller, 22 N.Y.2d 12, 18, 237 N.E.2d 877, 880, 290 N.Y.S.2d 734, 739 (1968); Cipolla v. Shaposka, 439 Pa. 563, 571-78, 267 A.2d 854, 859-62 (1970) (dissenting opinion).

[279] 357 U.S. at 254. The *Shaffer* Court's discussion of the state interest in regulating Delaware corporations, 433 U.S. at 214-15, made the same point. Although plaintiff Heitner was a nonresident, *id.* at 189, the true plaintiff in a derivative suit, as Justice Brennan pointed out in dissent, *id.* at 222, is the corporation.

[280] In Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976), for example, a California plaintiff sought to hold liable a Nevada tavern that had allegedly permitted one of its customers to become intoxicated and to leave its establishment, resulting in an automobile accident in California. In opting for the California law, which imposed liability, over Nevada's, which barred recovery, the court balanced California's

because that court could not properly make any choice of law decision without the constitutionally valid jurisdiction to do so, there are almost always some other defendant-affiliating factors at play.[281] The consequence is that the plaintiff's domicile takes on deceptive weight in the choice of law balancing: Although courts often *speak* of the state's interest in its citizen plaintiffs, additional factors justifying the imposition of that state's law on the defendant are usually present.[282] In a few cases in which jurisdiction over the defendant was based more on territorial concerns than minimum contacts, the courts have imported fairness considerations into the choice of law ruling,[283]

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interest in compensating its injured citizens through a dram shop statute against Nevada's interest in protecting its tavern keepers from vicarious liability.

In Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972), the Kentucky court, applying Kentucky law, allowed a Kentucky plaintiff to recover for injuries sustained in an Ohio accident upon proof of ordinary negligence despite an Ohio guest statute that would have required willful and wanton conduct by the Ohio driver. *Id.* at 827-29.

[281] The citizenship or residence of the plaintiff is not a sufficient basis for exercising jurisdiction over a nonresident defendant. Thus, in Turcotte v. Ford Motor Co , 494 F.2d 173 (1st Cir. 1974), Ford's substantial activities in Rhode Island were undoubtedly the basis for the exercise of jurisdiction in Rhode Island. In Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972), a California plaintiff, who was injured in Mexico by defective ammunition purchased in Mexico, sued Remington Arms in California based on its general conduct of business there. *See id.* at 717, 721, 101 Cal. Rptr. at 317, 320. Jurisdiction was taken and liability imposed. *Id.* at 722-40, 101 Cal. Rptr. at 321-34. In Miller v. Miller, 22 N.Y.2d 12, 14, 237 N.E.2d 877, 878, 290 N.Y.S.2d 734, 736 (1968), the defendant's change of domicile from Maine to New York provided a basis for the exercise of New York jurisdiction.

There are also situations in which the defendant may want the plaintiff to recover and thus consents to jurisdiction in the plaintiff's home state, a fairly common occurrence when guest statutes are involved. *See* Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 400-01 (1971).

[282] In Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972), the court noted that Kentucky had numerous and significant contacts with the case justifying application of Kentucky law rather than Ohio's guest statute. *Id.* at 829. The decedent was a lifelong resident of Kentucky, and the defendant, although a resident of Ohio, kept a rented room in Kentucky. *Id.* His employment and most of his social relationships were also in Kentucky. *Id.* And in Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976), the court, in extending its dram shop statute to cover a nonresident defendant, observed that "[d]efendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest [so as] to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state." *Id.* at 322-23, 546 P.2d at 725, 128 Cal. Rptr. at 221.

[283] For example, in Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973), a federal court in a diversity action obtained jurisdiction over a Massachusetts doctor through attachment of a malpractice insurance policy. *Id.* at 440. The court rejected the defendants' claim that because the injury occurred in Massachusetts, that state's law governed, and instead noted New York's interest in protecting its domiciliaries against damage limitations in wrongful death actions. *Id.* at 444. The court observed, in addition, that the doctor "has a world-wide following," *id.* at 444, thereby adding an element of foreseeability to the selection of other than Massachusetts law.

Rosenthal also involved a second claim by the widow against the Massachusetts hospital. Apart from the damage issue, which was also resolved in favor of the New York plaintiff, 342 F.

considerations that have long brought similarly based assertions of personal jurisdiction their due process redemption.

The emphasis on the plaintiff's domiciliary interest, then, emerges only because other previously determined factors permit it to be important. The majority opinions in *Hanson* and *Shaffer* examined that interest but deemed it appropriate only to choice of law; by denying jurisdiction to hear the case, however, the significance of asserting such a choice of law interest is dissipated. The result is a misplaced emphasis on plaintiff's interests in choice of law and a depreciated role for that factor in jurisdictional questions. Yet if the comparative importance of the two issues were truly evaluated, one might be inclined to reshape the rules of adjudicatory jurisdiction to require the defendant to litigate in the plaintiff's home forum,[284]

Supp. 246, 247 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973), a second choice of law issue was raised when the hospital asserted a defense of charitable immunity under Massachusetts law. The district court's decision to apply New York law was also based on the national activities of the hospital "in terms of its patients, its staff, its reputation and its efforts to obtain out-of-state contributions." 374 F. Supp. 522, 526 (S.D.N.Y. 1974).

In Home Ins. Co. v. Dick, 281 U.S. 397 (1930), the Texas plaintiff, attempting to recover on a Mexican contract of insurance covering property located in Mexico, was held barred by the contractual limitation clause in the contract despite a Texas statute invalidating such clauses. *Id.* at 408. The Texas court's application of Texas law was held a violation of due process. *Id.* at 408-09. The case does not necessarily stand for the proposition that a state may not apply its own law if the sole contact of the cause of action with the forum state is the plaintiff's residence there, because in *Dick*, the Texas plaintiff was only the assignee of the contract. *Id.* at 403-04. Although one is tempted to characterize *Dick* as a "lack of foreseeability" case, there are additional facts in the record of the case—the written consent of the insurance company was required before the policy could be assigned—that undermine any claim that there would have been unfair surprise to the defendant. *See* R. WEINTRAUB, *supra* note 3, at 384-85. *cf.* Clay v. Sun Ins. Office Ltd., 377 U.S. 179, 180, 182 (1964) (state may apply its own law to invalidate contractual limitations period in an insurance policy executed outside the state where insured moved to state and suffered loss, and defendant did business in the state). Similar arguments have been advanced by conflict of law theorists. *See, e.g.*, Sedler, *supra* note 281, at 402-03.

[284] In France, for example, jurisdiction can be based solely on the plaintiff's nationality. Article 14 of the French Civil Code provides: "An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen." C. CIV. art. 14. *See generally* deVries & Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 316-30 (1959). Of course, other countries do not always recognize a judgment entered on this basis. *See* Nadelmann, *Jurisdictionally Improper Fora*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 329 (1969).

A trend towards plaintiff-based jurisdictional rules was resisted by Judge Gibbons, concurring in Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1142 (3d Cir. 1976). *See also* Hanson v. Denckla, 357 U.S. 235, 250-55 (1965). But even Judge Gibbons indicated that there might be some circumstances in which such an assertion of jurisdiction would be justified. 530 F.2d at 1142; *cf.* Minichiello v. Rosenberg, 410 F.2d 117 (2d Cir. 1969) (en banc), *cert. denied*, 396 U.S. 844 (1969) (attachment of insurance policy assets); O'Connor v. Lee-Hy Paving, 437 F. Supp. 994 (E.D.N.Y. 1977) *aff'd*, Nos. 78-7050, 78-7051 (2d Cir. June 12, 1978) (same). *discussed in* text accompanying notes 299-331 *infra*.

while resolutely resisting a plaintiff-oriented choice of law analysis.[285] The former, after all, concerns matters of convenience—of where the defendant must appear; the latter crucially and dispositively affects the rights and liabilities of the parties before the court. To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.

My point is that if, in *Shaffer*, the contacts were truly sufficient for Delaware law to apply, *a fortiori* they should justify the exercise of jurisdiction by a Delaware court.[286] This analysis echoes Justice Black's view in *International Shoe*. He concurred in the Court's judgment in that case, but dissented from what he believed was an unworkable standard enunciated by the majority. Because Washington's power to tax was unchallenged, Justice Black argued its power to enforce its tax laws in its own courts was a necessary concomitant:

> For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. To read this into the due process clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation. Nothing could be more irrational or more designed to defeat the function of our federative system of government. Certainly a State, at the very least, *has the power to tax and sue* those dealing with its citizens within its boundaries . . . .[287]

Thus, if a court *has the power to apply its own law,* it should have the power to exercise jurisdiction over the action.

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[285] *See, e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397, 402, 407-08 (1930); Alton v. Alton, 207 F.2d 667, 682-83 (3d Cir. 1953) (Hastie, J., dissenting), *judgment vacated as moot*, 347 U.S. 610 (1954); People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 598-99, 311 P.2d 480, 482-83 (1957). *But see* Rosenthal v. Warren, 475 F.2d 438, 446 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); Steele v. G.D. Searle & Co., 422 F. Supp. 560, 562-63 (S.D. Miss. 1976).

[286] In fact, I do not advocate an expansive role for the plaintiff's interests in choice of law. I merely note that if such interests do suffice, they should really be accounted for at the jurisdictional level. I am prepared to move to a more expansive model of jurisdiction, but the necessary corollary is a control on choice of law. Unfortunately, the latter has been advocated but not forthcoming. *See* text accompanying notes 320-332 *infra*.

[287] 326 U.S. at 323 (Black, J.) (emphasis added).

The implications of premising the constitutionality of jurisdiction on the court's right to apply the law of its state would not be dramatic.[288] Although not articulated as such, the correlation between the choice of law and the forum in which to apply that law usually exists in those cases in which the jurisdictional nexus arises from the defendant's domicile or his undertaking of certain activities.[289] Perhaps the only troublesome consequence of permitting the jurisdictional analysis to follow from the conflicts analysis would occur in cases in which a state applies its own law solely because it is interested in compensating resident plaintiffs.[290] But if I am correct in suggesting that the theoretical emphasis on a plaintiff's domicile in choice of law doctrine is more apparent than real, then perhaps that interest, standing alone, should receive more telling constitutional scrutiny than it has heretofore.[291]

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[288] The hookup between choice of law and jurisdiction is expressly recognized under the English equivalent of state long-arm statutes—Order 11 of the Rules of the Supreme Court. In addition to other bases for extraterritorial jurisdiction, service outside the jurisdiction is permitted in a contract action that "by its terms,or by implication, [is] governed by English law." Rules of the Supreme Court, Order 11, 1(1)(f)(iii) *in* 1965 STAT. INST. 5017, *see* Coast Lines Ltd. v. Hudig & Veder Chartering N.V., [1972] All E.R. 451, 451 (C.A.). To the extent there is criticism of such jurisdiction, it is largely because the English courts will apply English law to a contract where, although it has no relationship to England, the parties have chosen English law. In the United States, closer constitutional scrutiny of the applicable law could prevent such choice of law abuses. Unfortunately, the Supreme Court has failed to provide meaningful guidelines. Constitutional limitations on choice of law are discussed in Currie, *Governmental Interests*, *supra* note 257. *See also* Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Weintraub, *supra* note 257.

[289] In Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), *discussed in* note 85 *supra*, for example, the fact that the injury occurred in Illinois served as the basis for both jurisdiction and choice of law. Indeed, the existence of long-arm statutes like the one in *Gray* exhibit a sensitivity to bringing jurisdictional and choice of law issues together: Before enactment of such statutes, the *Gray* case would have been tried in a forum other than Illinois—usually the place where the defendant was domiciled—despite the application of Illinois law.

[290] *See* Tooker v. Lopez, 24 N.Y.2d 569, 592-97, 249 N.E.2d 394, 408-12, 301 N.Y.S.2d 519, 539-43 (1969) (Breitel, J., dissenting) (criticizing majority for erecting a "personal law of torts"). In fact, *Tooker* is a much stronger case for furthering New York's interest in compensating the plaintiff since *both* plaintiff and defendant were New York domiciliaries. Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973), *discussed in* note 283 *supra*, and Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972), *discussed in* note 281 *supra*, present more difficult cases.

The constitutional propriety of predicating the choice of forum on the choice of law might also be questioned in situations in which the state applies its law in order to protect a resident defendant, *see* Lilienthal v. Kaufman, 239 Or. 1, 13-16, 395 P.2d 543, 548-49 (1964), but the question has never been presented, *see* Sedler, *supra* note 281, at 403.

[291] The most serious tests of the constitutionality of an applicable regime of law have arisen in cases in which the forum attempted to apply its own law to further a domiciliary interest in the forum. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936) (in suit by Georgia widow, Georgia courts required to apply New York law to question of insurance company's right to invalidate policy issued in New York covering New York resident); Home Ins.

The *Shaffer* facts are far less troubling. The state's interest in regulating its corporations, and in protecting shareholders from the wrongful acts of officers and directors of Delaware corporations was unchallenged. Furtherance of those interests was concededly a basis for the application of Delaware law, and notions of fairness and expectations in the choice of law process were also satisfied. Defendants had already received, as Justice Brennan pointed out, the benefits and protections of Delaware law—Delaware provided indemnification of and interest-free loans for officers and directors, and extended a pro-management bias to Delaware corporations and officers in its statutes and case decisions.[292] These acknowledged choice of law considerations, in short, also made it "fair and reasonable" to require the defendants to appear and defend in a Delaware court. To use *Hanson*'s jurisdictional language, the defendants "purposely avail[ed]" themselves of "the privilege" of engaging in the activities of a Delaware corporation, "thus invoking the benefits and protections of its laws."[293] These acknowledged choice of law considerations, in short, made it "fair and reasonable" to require the defendants to appear and defend in a Delaware court.

VI

THE *SEIDER V. ROTH* PROBLEM

The foregoing analyses of jurisdiction and choice of law in light of *Shaffer* suggest that the plaintiff's domiciliary interest, when coupled with some other factor indicating a nexus between the defendant or his conduct and the forum state, ought to satisfy at least the proposed quasi in rem wing of the minimum contacts test. This view has obvious ramifications for *Seider v. Roth*[294] and its progeny,[295] which

Co. v. Dick, 281 U.S. 397, 402-05 (1930) (validity of contractual limitations clause of insurance policy must be governed by law of place where contract was made and loss occurred rather than that of plaintiff's residence and forum). Of course, in both *Yates* and *Dick*, the states' interests in the plaintiffs were the result of post-transaction events. But in both Rosenthal v. Warren, 475 F.2d 438, 446 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973), *discussed in* note 283 *supra*, and Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 721, 101 Cal. Rptr. 314, 320 (1972), *discussed in* note 281 *supra*, furthering plaintiffs' interests was justified in terms of the defendants' foreseeability and expectations. *See generally* Sedler, *supra* note 281, at 403.

[292] 433 U.S. at 228.

[293] 357 U S. at 253.

[294] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); *see* text accompanying note 76 *supra*. The recent judgment of the Minnesota Supreme Court upholding the constitutionality of that state's *Seider* statute was vacated by the United States Supreme Court shortly after the *Shaffer* decision was rendered. Savchuk v. Rush, 245 N.W.2d 624 (Minn. 1976), *judgment vacated*, 433 U.S. 902 (1977).

[295] Prior to *Shaffer*, the *Seider* practice was reaffirmed in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969);

sanction the acquisition of jurisdiction over insured nonresidents through the attachment of the obligations of their insurance companies. In view of the *Shaffer* Court's "overruling" of *Harris v. Balk*,[296] it is not surprising that some courts and commentators have

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Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). In *Simpson*, the court rejected a constitutional challenge to a *Seider* attachment. Addressing the claim that the procedure violated the due process clause, Chief Judge Fuld noted that

> [t]he historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy.

Id. at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637 (citations omitted). Judge Fuld also noted that recovery was limited to the value of the insurance policy. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636. This last point was clarified in a per curiam dismissal of the defendant's motion for reargument. 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). "This . . . means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits." *Id.* at 991, 238 N.E.2d at 320, 290 N.Y.S.2d at 916.

Judge Keating, in his concurring opinion in *Simpson*, reasoned that since New York could validly pass a direct action statute, the real party defendant—the insurer—could be compelled to defend in the state, provided it was doing business there. 21 N.Y.2d at 313, 234 N.E.2d at 673, 287 N.Y.S.2d at 639. Thus, he asserted, the *Seider* and *Simpson* decisions "represent a recognition of realities and not fictions." *Id.* at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 640.

In *Minichiello*, the practice again withstood constitutional challenge, but its availability was restricted in dictum to resident plaintiffs. The court held first that New York could constitutionally enact a direct action statute. 410 F.2d at 110. Second, the defendant would not be denied due process, *id.* at 113, because the judgment was limited to value of the policy, and should have no collateral estoppel effect in a second action to collect the amount of the claim in excess of the policy value. *Id.* at 111-12.

Finally, ten days prior to *Shaffer*, the New York Court of Appeals was asked to extend *Seider* to a case involving a nonresident plaintiff. Judge Wachtler, speaking for the majority, refused to extend the doctrine. Donawitz v. Danek, 42 N.Y.2d 138, 142, 366 N.E.2d 253, 256, 397 N.Y.S.2d 592, 595 (1977). In his concurring opinion, Judge Jasen expressed the view that the time had come to reevaluate *Seider* and that it should be overruled. *Id.* at 151, 366 N.E.2d at 261, 397 N.Y.S.2d at 601.

Most other courts have rejected the *Seider* doctrine. *See* note 79 *supra*. New Hampshire has adopted *Seider* with certain limitations. *Compare* Forbes v. Boynton, 113 N.H. 617, 621-24, 313 A.2d 129, 132-33 (1973) *with* Camire v. Scieszka, 116 N.H. 281, 283-84, 358 A.2d 397, 399 (1976). Minnesota has accepted the doctrine by statute. MINN. STAT. ANN. § 571.41, subd. 2 (West Cum. Supp. 1978). *But see* Rush v. Savchuk, 433 U.S. 902 (1977), *vacating* 245 N.W.2d 624 (Minn. 1976) (for reconsideration of statute's constitutionality in light of *Shaffer*). In *Rush*, the plaintiff did not reside in Minnesota at the time of the accident, and only moved there subsequently.

[296] 433 U.S. at 212 n.39.

intimated that *Seider* is unconstitutional.[297] But to assert that position is to misconstrue *Seider* as merely another confusing—and, for plaintiffs, fortuitous—intangibles case;[298] it is decidedly something more.

A better view is suggested by Judge Dooling's recent analysis in *O'Connor v. Lee-Hy Paving Corp.*,[299] a wrongful death diversity ac-

[297] *E.g.*, Torres v. Towmotor Div. of Caterpillar, Inc., No. 77-C-1810, slip op. at 34-37 (E.D.N.Y. Nov. 18, 1977); Chrapa v. Johncox, 60 App. Div. 2d 55, 61-62, 401 N.Y.S.2d 332, 336 (1977); Wallace v. Target Store, Inc., 92 Misc. 2d 454, 455-56, 400 N.Y.S.2d 478, 479 (Sup. Ct. 1977); Katz v. Umansky, 92 Misc. 2d 285, 289-91, 399 N.Y.S.2d 412, 415-17 (Sup. Ct. 1977); Kennedy v. Deroker, 91 Misc. 2d 648, 650, 398 N.Y.S.2d 628, 630 (Sup. Ct. 1977); McLaughlin, Seider v. Roth—*Dead or Alive?*, N.Y.L.J., Dec. 9, 1977, at 24, cols. 1-3; Siegel, *supra* note 229; Note, *If* International Shoe *Fits*, *supra* note 209.

In some of the cases cited above, the defendants presumably were allowed to assert their *Seider* jurisdictional objections even though they had not raised the defense in their original motion or answer. Ordinarily, such a failure would amount to a waiver of the objection, but in these cases the subsequent assertion of the defense was undoubtedly premised on an intervening change in the law resulting from the decision in *Shaffer*. Of course, the plaintiffs in these cases may face difficulty bringing the suit in any forum if the *Seider*-jurisdiction base falls, due to statute of limitations difficulties. Any material change in the *Seider* doctrine should therefore be prospective in application; alternatively, dismissals should be conditioned upon the defendant's stipulation to waive the defense of prescription in an alternative forum.

[298] Judge Bramwell's opinion in Torres v. Towmotor Div. of Caterpillar, Inc., No. 77-C-1810 (E.D.N.Y. Nov. 18, 1977) relies on *Shaffer*'s impact on *Harris*:

> This Court finds that quasi in rem jurisdiction predicated on a *Seider* attachment is but a smoke screen of the ancient form of *Harris*-based jurisdiction whose "continued acceptance would serve only to allow [the assertion of] state court jurisdiction that is fundamentally unfair to the defendant." . . . *Harris* was the seed from which *Seider* evolved and it provided the roots through which *Seider* was nourished. Thus, since this seed has been pulled and its roots have been severed from the fertile field of legal precedent by *Shaffer*, *Seider*'s viability has been likewise quashed. The continued existence and use of the *Seider* procedure after the *Shaffer* decision would be diametrically opposed to the fundamental guarantee of due process.

Id., slip op. at 36 (quoting Shaffer v. Heitner, 433 U.S. at 212).

[299] 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd*, Nos. 78-7050, 78-7051 (2d Cir. June 12, 1978). The Second Circuit handed down its opinion in *O'Connor* after the bulk of this Article went to press. A short discussion of the affirmance is found in the Postscript and Conclusion. Other recent cases sustaining the constitutionality of *Seider* in the wake of *Shaffer* include Feruzzo v. Bright Trucking, Inc., No. 77-C-999 (E.D.N.Y. Dec. 22, 1977); Kotsonis v. Superior Motor Express, No. 76-C-1916 (E.D.N.Y. Dec. 8, 1977); Schwartz v. Boston Hosp. for Women, No. 71-C-1562 (S.D.N.Y. Oct. 21, 1977); Alford v. McGaw, 61 App. Div. 2d 504, 507-09, 402 N.Y.S.2d 499, 501-02 (1978); Rodriguez v. Wolfe, 401 N.Y.S.2d 442 (Sup. Ct. 1978); Nelson v. Warner Bros. Jungle Habitat, N.Y.L.J., Mar. 17, 1978, at 7, col. 1 (Sup. Ct.).

The *O'Connor* case, consolidated with *Kotsonis*, *Schwartz*, and *Feruzzo*, was argued before a Second Circuit panel consisting of Judges Friendly, Gurfein, and Meskill on April 12, 1978. Federal jurisdiction was predicated on diversity, and the defendants' arguments were twofold: first, that the New York Court of Appeals would, after *Shaffer*, reject *Seider*; and second, that *Shaffer* had rendered the *Seider* doctrine unconstitutional.

The panel in Intermeat, Inc. v. American Poultry, Inc., No. 77-7481 (2d Cir. Apr. 14, 1978) (Judges Lumbard, Timbers, and Gurfein) (sustaining attachment of an unrelated debt based on additional contacts by defendant with New York), *discussed at* note 211 *supra*, may have hinted at its view of *Seider* when it cited the district court decision in *O'Connor*, *id.* at 2528 n.4, though it did so without expressing an opinion on the merits of that case, *id.*

tion against a Virginia corporation and one of its employees arising out of a grading accident that occurred in Virginia.[300] The plaintiff, the New York widow of a New York decedent, obtained jurisdiction through a *Seider*-type attachment of the contractual obligations of the defendant Virginia corporation's two insurance companies; both insurance companies maintained offices in New York.[301] The defendants urged that *Shaffer* required the application of the minimum contacts test, and, consequently, that the exercise of jurisdiction by a New York court was constitutionally inappropriate.[302] The judge agreed with the first proposition, but not its proferred consequences.

Judge Dooling believed that the circumstances occasioning the attachment of the insurance obligation in New York—namely, the insurer's amenability to suit in that state, the plaintiff's residence there, and the limitation on recovery to the amount of the policy—were sufficient to satisfy the test enunciated in *Shaffer*.[303] He recognized that the case differed from the archetypal *International Shoe* in personam cases. *Seider* and its offspring, he wrote, are

> *sui generis* in the field of jurisdiction. They cannot be pigeon-holed as *in rem* or *in personam*. They are in real terms *in personam* so far as the insurer is concerned. For the named defendant the suit is only an occasion of cooperation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant; his role as a party is hardly more real than that of the casual ejector Richard Roe in common law ejectment actions. What is at stake in the suit is the plaintiff's claim for the payment of his alleged damages by the insurer.
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> . . . .
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> The emphasis in many cases on the supposedly contingent nature of the insurer's obligation appears to be misplaced. The occurrence of the accident, the plaintiff's injuries, and the insured's connection with the accident are determinative events.[304]

Judge Dooling's emphasis on the attachment of the insurance obligation is appropriate, an emphasis which, it should be noted, echoes the *Seider* court's.[305] That the obligation is contingent is far less important in any realistic balancing than the facts that the plaintiff is a

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[300] 437 F. Supp. at 995.
[301] *Id.*
[302] *Id.*
[303] *Id.* at 1004.
[304] *Id.* at 1002-03.
[305] 17 N.Y.2d at 113-14, 216 N.E.2d at 314-15, 269 N.Y.S.2d at 101-02.

resident of the forum state and that the attached property relates directly to the claim being asserted. These two factors are crucial, for they bring *Seider* within the parameters of the minimum contacts required by *Shaffer*.[306]

Judge Dooling's analysis, moreover, underscores the limited implications of a *Seider* attachment, and thus places the impact of its continued vitality in context. As others have noted, the procedure is analogous to a direct action statute,[307] and the Supreme Court's

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[306] Plaintiff's brief to the Second Circuit in *O'Connor* argued that the Supreme Court in *Shaffer* established such a minimum contacts standard for the assertion of state court jurisdiction. Brief for Plaintiff at 16-19, O'Connor v. Lee-Hy Paving Corp., No. 78-7051 (2d Cir. 1977). Relying on the *Shaffer* language that called attention to the fact that "the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation," 433 U.S. at 207, plaintiff continued:

> *Therefore, and of paramount importance, is the fact that the* Shaffer *Court clearly recognized that in determining the minimum contacts required by* International Shoe, *the property attached could provide such contacts with the forum State, the defendant and the litigation.* Accordingly, the *Shaffer* Court placed significant emphasis on the relationship, contacts and role of the attached property to the particular controversy and reiterated that theme on at least six occasions.

Id. at 18-19 (emphasis in original).

Alternatively, perhaps the *Seider* cases should be characterized as quasi in rem I actions which the Supreme Court in *Shaffer* indicated survived its decision. 433 U.S. at 207-08. The attachment of an insurance policy could be viewed as resulting in litigation of claims to the property itself, and thus as the source of the underlying controversy. As articulated in the recent decision in Rodriguez v. Wolfe, 401 N.Y.S.2d 442, 444 (Sup. Ct. 1978), "[t]he insurance policy *is* at the heart of plaintiff's cause of action."

[307] *See* Minichiello v. Rosenberg, 410 F.2d 106, 109 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969); Donawitz v. Danek, 42 N.Y.2d 138, 142, 366 N.E.2d 253, 255, 397 N.Y.S.2d 592, 595 (1977). *But see* Torres v. Towmotor Div. of Caterpillar, Inc., No. 77-C-1810, slip op. at 20-25 (E.D.N.Y. Nov. 18, 1977).

In *Torres*, Judge Bramwell argued that *Seider* did not purport to create a direct assertion of jurisdiction over the insurer and to that extent could not be viewed as a direct action statute. *Id.*, slip op. at 22-25. He relied on *Seider*'s assertion that there was a direct action *only* to the extent that "affirmance will put jurisdiction in New York State and require the insurer to defend here," 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 114, and called attention to express disclaimers by three New York Court of Appeals judges in the recent *Donawitz* case that *Seider* did not create a direct action statute. *Id.*, slip op. at 23 (citing Donawitz v. Danek, 42 N.Y.2d 138, 142, 366 N.E.2d 253, 255, 397 N.Y.S.2d 592, 595 (1977) (Jasen, J., concurring)).

Judge Cooke, dissenting in a separate opinion in *Donawitz* in which Judge Fuchsberg concurred, stated that "*Seider* does not constitute a judicially created direct action statute since it is based on traditional quasi in rem jurisdictional analysis emanating from *Harris v. Balk*." Donawitz v. Danek, 42 N.Y.2d 138, 152-153, 366 N.E.2d 253, 262, 397 N.Y.S.2d 592, 602 (1977).

The formal distinctions between *Seider* and a direct action statute upon which Judge Bramwell relies are obviously accurate, but it is not clear why they are relevant to the ultimate question whether it is "fair" for New York to assert jurisdiction over a nonresident defendant who carries insurance with a company doing business in New York and who bears the burden of the litigation. Perhaps the strongest point in Judge Bramwell's favor is the reliance in *Shaffer* upon the necessity of a statute for the exercise of particular types of jurisdiction. 433 U.S. at 214-15.

analysis of such statutes in *Watson v. Employers Liability Assurance Corp.*[308] provides a useful framework within which to test the constitutionality of the contacts existing in a *Seider*-type situation. *Watson* involved a constitutional challenge to the use of Louisiana's direct action statute against a nonresident insurance company that had entered into the insurance contract outside the state.[309] In rejecting that challenge, the Court stressed that the accident giving rise to the litigation took place in Louisiana and that Louisiana residents were likely to have been the insured parties:

> Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. *It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages.*[310]

Judge Friendly relied on these same considerations in upholding a *Seider*-type attachment in *Minichiello v. Rosenberg.*[311] In *Minichiello*, a New York resident brought a diversity action in federal court for the wrongful death of her husband in an automobile accident allegedly caused by a Pennsylvania resident in Pennsylvania. Jurisdiction was predicated on the attachment of the defendant's insurance contract with a company having offices in New York.[312] Re-

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That point may be particularly salient in light of New York's failure to adopt the direct action statute proposed by the Judicial Conference, *see* Rosenberg, *Proposed Direct Action Statute.* REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 264, 281 (1971). The proposal was actually passed by the Legislature, but was vetoed by then-Governor Rockefeller "because of a serious drafting deficiency." Governor's Veto Message, 1973 N.Y. LEGIS. ANN. 349. The proposed direct action statute was actually a more limited remedy than the present *Seider* jurisdiction. The statute was restricted to actions resulting from tortious acts committed in connection with the operation of a vehicle of transportation where there was no personal jurisdiction over the insured and required the plaintiff to elect to sue the insurance company or the tortfeasor. *See generally* Rosenberg, *One Procedural Genie Too Many or Putting* Seider *Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971).

[308] 348 U.S. 66 (1954).

[309] *Id.* at 67.

[310] *Id.* at 72 (emphasis added).

[311] 410 F.2d 106, *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

[312] *Id.* at 107.

jecting the argument that the attachment violated the due process clause, the district court denied a motion to dismiss and, on interlocutory appeal, the Second Circuit, first in a panel[313] and then en banc,[314] affirmed. Judge Friendly stated the issue in the first hearing as whether New York could constitutionally pass a direct action statute against an insurer doing business in New York in aid of a New York resident injured outside the state.[315] Placing principal reliance on *Watson*, he reasoned that the "state's interest in protecting its residents is as great [on the *Minichiello* facts] as in the case of nonresidents injured within the state."[316]

The *Minichiello* court pierced the formalisms of direct action statutes and attachments of insurance policies and recognized their purpose which is stressed in the *Seider* dress: to provide a convenient and local forum for resident plaintiffs. Because in a *Seider*-type situation, the real question is the right to insurance proceeds[317] that are

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[313] *Id.* at 113.

[314] *Id.* at 119.

[315] *Id.* at 109. In the en banc opinion, Judge Friendly focused on another problem raised by the *Seider* procedure—the burden placed on a nonresident defendant in defending an action in a forum with which he has had no contact. *Id.* at 117-18. Judge Friendly noted that the defendant would be reimbursed for his expenses by his insurance company and, by virtue of a court-created limited appearance, *see* note 294 *supra*, could not be held liable for any amount above the value of the insurance policy. *Id.* at 118.

[316] *Id.* at 110. Of course, the contacts and interests on the *Watson* facts were much stronger than the minimal fact of plaintiff's residence in *Minichiello*. Whether or not a state's direct action statute would apply when the only contact is the residence of plaintiff is not altogether clear. Where a state's direct action statute is used in actions involving out-of-state accidents, plaintiff's domicile is often coupled with the fact that the insurance contract was made in the state. *See, e.g.*, Webb v. Zurich Ins. Co., 251 La. 558, 563, 205 So. 2d 398, 400 (1967). A direct action statute in the state of injury, if one exists, has been used by other courts—those of the plaintiff's domicile—to permit a right of action against the insurer in plaintiff's home court. *See, e.g.*, Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 116-17, 204 N.E.2d 622, 625, 256 N.Y.S.2d 577, 581 (1965). Other courts have used their own state's direct action statutes to assert claims against insurance companies when the only "interest" was compensation of resident plaintiffs, but those decisions are often articulated as "procedural" applications of the direct action statute. *See, e.g.*, Davidson v. Garden Properties, Inc., 386 F. Supp. 900, 901 (N.D. Fla. 1975). For the scope of application of direct action statutes, see Speidel, *Extraterritorial Assertion of the Direct Action Statute: Due Process, Full Faith and Credit and the Search for Governmental Interest*, 53 NW. U.L. REV. 179 (1958); Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357 (1960).

[317] Some of the concerns expressed both by the Second Circuit in *Minichiello* and by the appellate argument in *O'Connor* related to the res judicata and collateral estoppel effects of a *Seider*-type judgment.

It has now been made explicit in New York that the judgment against the insured based on attachment jurisdiction is limited to the amount of the policy itself. N.Y. CIV. PRAC. LAW § 320(c) (McKinney 1972). Judge Gurfein, during the course of the *O'Connor* argument, suggested that the existence of such a limited appearance distinguished the case from *Shaffer*, where Delaware did not provide this opportunity to defend on the merits without risking more than the attached property.

present in the forum state, one may not be reluctant to join, with Judge Friendly, the "'movement away from the bias favoring the defendant' in matters of personal jurisdiction 'toward permitting the plaintiff to insist that the defendant come to him when there is a sufficient basis for doing so.'"[318] That is, though one might resist placing excessive emphasis on the plaintiff's domicile in some contexts, it seems eminently just to litigate the proper disposition of insurance proceeds in a forum of the state where the aggrieved party lives and the insurance company does business.[319] To that end, *Shaffer* confirms rather than undermines the viability of *Seider v. Roth.*

I have, however, a last cautionary word. I am prepared, I think, to provide for local forums for injured plaintiffs when insurance companies with local offices actually bear the burden of defending the lawsuit. But I am not willing to concede the appropriateness of such forums if this implies a decision to apply local substantive law in the absence of more substantial contacts than that of a resident plaintiff. Imposing broad liability on defendants (even when covered by insurance) runs counter to planning, expectations, and fairness. The movement toward providing a local forum, therefore, should not be permitted to skew the choice of law process. Given the less than significiant intervention by the Supreme Court in the choice of law arena,[320] I would condition the expansion of jurisdiction for the ben-

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More interesting, however, was the question of a potential second action against the insured. Many direct action statutes expressly require an election by the injured party. In the *Seider* attachment, on the other hand, the insured may be subject to a second action in his home state. *Minichiello* suggests some relief for the defendant insured—Judge Friendly indicated that no collateral estoppel should attach to a *Seider* judgment, at least in situations where liability was determined against the insured. Interestingly, in the oral argument in *O'Connor*, the plaintiff's lawyer was willing to concede that a second action against the insured should be precluded altogether.

For the effects flowing from judgments quasi in rem, see *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 833-35, 840-42 (1952); Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 384-85, 390-91 (1963).

[318] 410 F.2d at 110 (quoting Buckley v. New York Post Corp., 373 F.2d 175, 181 (2d Cir. 1967) and von Mehren & Trautman, *supra* note 3, at 1128).

[319] The disparate treatment of the factor of plaintiff's residence in jurisdiction and choice of law inquiries is, in this context, particularly confusing. Most choice of law decisions impose either a standard of conduct or a degree of financial protection, and the plaintiff's residence is at least articulated as a critical interest. The direct action statute, on the other hand, is forum-conferring, based largely on the plaintiff's residence: It is true that the insurance company is already amenable to jurisdiction in the forum state, but the direct action statute, by giving a cause of action directly against the insurance company prior to a judgment against the insured, often makes it possible for the plaintiff to have a local forum against a defendant. If the plaintiff's interest is not a sufficient basis for asserting jurisdiction, then it should not be the primary factor in deciding the choice of law questions flowing from application of direct action statutes.

[320] *See* text accompanying note 258 *supra*.

efit of local plaintiffs on some meaningful curbs on choice of law—whether by the Supreme Court or by state and federal appellate courts.[321]

O'Connor v. Lee-Hy Paving[322] itself highlights this interplay of jurisdiction and choice of law. A second issue in the *O'Connor* case concerned the question whether New York or Virginia law applied to the issue of the liability of a third-party Virginia contractor in the face of a workmen's compensation award. The plaintiff, widow of the New York decedent, who had been killed in Virginia in the course of his employment for his New York employer, had already received New York workmen's compensation benefits and additionally sought damages against the Virginia contractor who was responsible for the grading accident.[323] Apparently, Virginia law would have barred this action against the third-party contractor, restricting plaintiff to compensation benefits,[324] whereas New York law would have permitted the action in addition to the award of compensation benefits. Judge Dooling struck the defendant's defense, which relied on an interpretation of the Virginia compensation law, and held that New York law was applicable.[325] This order was appealed and the issue of the applicable law argued before the Second Circuit on the same day as the *O'Connor* jurisdictional appeal. It may be that the activities of the Virginia defendant were such that it was appropriate to further New York's interest in compensating its plaintiffs,[326] or that no Virginia interests were really at stake since compensation benefits were awarded from New York's fund.[327] But as a general rule—and I believe in this case—jurisdiction by attachment implies attenuated

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[321] In diversity cases, of course, the federal courts are bound to apply state choice of law rules. Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). The result in *Klaxon* has been criticized as limiting the freedom of federal judges to solve conflict of laws problems in a rational and just manner. *See* R. WEINTRAUB, *supra* note 3, at 447-49. It is interesting that many of the federal courts appear more amenable to applying local state law than the state courts themselves. *Compare* Tooker v. Lopez, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532-33 (1969) *and* Neumeier v. Kuehner, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972) *with* Rosenthal v. Warren, 475 F.2d 438, 446 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

[322] *See* text accompanying notes 299-310 *supra*.

[323] Brief for Plaintiff at 3-5, O'Connor v. Lee-Hy Paving Corp., No. 78-7050 (2d Cir. 1978); Brief for Defendant at 3-6, *id.*

[324] The interpretation of Virginia law on this point was unclear and was argued by the parties on appeal. Brief for Plaintiff at 25-33, *id.*; Brief for Defendant at 8-23, *id.*

[325] Brief for Plaintiff at 2, *id.*; Brief for Defendant at 2, *id.*

[326] In fact, however, defendants alleged that Lee-Hy was a local Virginia concern and did no work in any state other than Virginia. Brief for Defendant at 3, *id.*

[327] Brief for Plaintiff at 33-34, *id.* Defendants maintained that this third-party action would undercut Virginia's policy of wider compensation coverage in return for immunity for local business. Brief for Defendant at 33-34, *id.*

contacts with the state, insufficient to invoke that state's applicable law.[328] I also note that the New York Court of Appeals' latest word on choice of law[329]—markedly in step with modern notions of conflicts justice[330]—indicates a preference for Virginia law on these facts.[331]

I am not here prepared to dissect the choice of law result in *O'Connor* or to quarrel with prior choice of law decisions like *Rosenthal v. Warren*;[332] both cases come dangerously close to the constitutional fairness line and were probably decided erroneously. Rather, the point is to ensure that some clarity of thinking emerges on these jurisdictional and choice of law questions, and that meaningful consideration be brought to the fact that (1) choice of law and jurisdiction questions are separate; and (2) they are linked in ways that have been inadequately thought through.

POSTSCRIPT AND CONCLUSION

Two recent decisions rendered as this article went to press—one by the Supreme Court and one by the Second Circuit—bear out the concerns I have expressed.

The first, *Kulko v. Superior Court*,[333] involved the application of California's general "due process" long-arm statute[334] to a California woman's attempt to sue her New York ex-husband for child support in California based on his voluntary sending of the child to her in California. The Supreme Court of California had upheld jurisdiction in that state,[335] concluding that the defendant had "purposely availed himself of the full protection and benefit of California laws for the care and protection of [his child] on a permanent basis."[336] Rejecting that characterization, the United States Supreme Court re-

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[328] *See* Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930).

[329] *See* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

[330] Explicit principles of preference were enunciated in D. CAVERS, *supra* note 259, at 139-224. *See also* Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROB. 10, 21 (1977); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 330 (1972); von Mehren, *supra* note 259, at 961-63; Weintraub, *The Future of Choice of Law For Torts: What Principles Should Be Preferred?*, 41 L. & CONTEMP. PROB. 146, 162-63 (1977).

[331] *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 184 (1971); 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 88.10, at 16-132 to 16-135 (1978).

[332] 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

[333] 46 U.S.L.W. 4421 (U.S. May 15, 1978).

[334] CAL. CIV. PROC. CODE § 410.10 (West 1973); *see* text accompanying note 182 *supra*.

[335] Kulko v. Superior Court, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977) (en banc).

[336] *Id.* at 524, 564 P.2d at 358, 138 Cal. Rptr. at 591.

versed[337] and proclaimed it a violation of due process for California to assert jurisdiction over the New York defendant for doing no more than to "acquiesce in the stated preference of one of his children to live with her mother in California."[338] Particularly disturbing, however, were the statements in Justice Marshall's majority opinion regarding choice of law and jurisdictional relationships.[339] As he did in *Shaffer*, Justice Marshall again emphasized that the interests of the forum state—this time, California's interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the state are to be raised—might justify California's attempt to apply California law but would not support California's assertion of jurisdiction over the New York defendant.[340] As I noted earlier,[341] one would have thought precisely the reverse.

A second disturbing reference was the assertion by Justice Marshall shall that "California has not attempted to assert any particularized interest in trying such cases in its courts."[342] Apparently Justice Marshall believed that California's statute conferring jurisdiction "on any basis not inconsistent with the Constitution of this state or the United States"[343] was not such an expression of interest. Even if one is sympathetic to a legislative rather than a judicial determination of jurisdictional authority, this constitutional requirement of specificity seems unwarranted.[344]

The other important decision is the Second Circuit's affirmance in *O'Connor v. Lee-Hy Paving Corp.*,[345] in which Judge Friendly held that the decision in *Shaffer* and the "fall of *Harris v. Balk* . . . does not necessarily topple *Seider* . . . ."[346] Relying on Judge Dooling's characterization of *Seider* attachments as "sui generis,"[347] Judge Friendly pointed to the location of its office and business in New York as making that state a fair forum,[348] especially in light of the large proportion of such actions that are eventually settled.[349]

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[337] 46 U.S.L.W. at 4423. Justices Brennan, White, and Powell dissented.

[338] *Id.* at 4425.

[339] *Id.* at 4426.

[340] *Id.* at 4425.

[341] *See* text accompanying notes 271-291 *supra*.

[342] 46 U.S.L.W. at 4425.

[343] CAL. CIV. PROC. CODE § 410.10 (West 1973).

[344] *See* text accompanying notes 176-182 *supra*.

[345] Nos. 78-7050, 78-7051 (2d Cir. June 12, 1978).

[346] *Id.*, slip op. at 3434.

[347] *Id.*, slip op. at 3436. Judge Dooling's opinion is discussed at text accompanying notes 299-306 *supra*

[348] O'Connor v. Lee-Hy Paving Corp., slip op. at 3436-38.

[349] *Id.*, slip op. at 3438.

With regard to the insured, Judge Friendly emphatically reiterated his conclusion in *Minichiello* that no collateral estoppel effect should attach to issues litigated in the attachment litigation.[350] Additionally, he noted that other anticipated horribles of attachment jurisdiction had not materialized.[351] The holding that the application of *Seider* did not offend *Shaffer* was not unexpected in light of the movement towards plaintiff-oriented jurisdiction.[352]

More troubling, I believe, is the Second Circuit's opinion on choice of law. Rejecting the arguments that the New York choice of law trend marked a return to the *lex loci delictus*, the court of appeals relied on such cases as *Rosenthal v. Warren*[353] and *Kilberg v. Northeast Airlines*[354] to support its conclusion that the New York courts would afford New York tort plaintiffs the benefit of favorable New York law "whenever there is a fair basis for doing so."[355]

The dismaying aspect of the opinion is the failure to focus on the jurisdiction and choice of law interplay. In a brief footnote, Judge Friendly did acknowledge that *Seider* could impose a choice of law hardship on the insurer, but proceeded to dismiss the problem by noting that the same consequences would ensue if New York had authorized a direct action on behalf of New York residents against insurers doing business in New York.[356] As I noted earlier, the dangers that I perceive apply equally to *Seider* and to the use of a direct action statute.[357] Unfortunately, the Second Circuit again failed to analyze the choice of law application in both contexts, and its approach reinforces my earlier observations that inadequate attention has been given by the courts in superintending choice of law.[358]

Shaffer v. Heitner marks the end of an era. Let us hope that in ushering in a new one, it will sharpen our vision of the balances to be struck within the federal system.

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[350] *Id.*, slip op. at 3439.

[351] *Id.*, slip op. at 3439-40.

[352] Other courts have reached similar results. *See* text accompanying notes 294-306 *supra*.

[353] 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973), *discussed in* text accompanying note 283 *supra*.

[354] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (refusal to give effect to Massachusetts ceiling on recovery for wrongful death of New York resident in Massachusetts airplane crash).

[355] O'Connor v. Lee-Hy Paving Corp., slip op. at 3446. The court's opinion also relied heavily on a New York lower court decision, MacKendrick v. Newport News Shipbuilding & Dry Dock Co., 59 Misc. 2d 994, 302 N.Y.S.2d (Sup. Ct. 1969), in which, on similar facts, New York law regarding wrongful death limitations was applied.

[356] O'Connor v. Lee-Hy Paving Corp., slip op. at 3448 n.18.

[357] *See* text accompanying notes 307-319 *supra*.

[358] *See* text accompanying notes 320-332 *supra*.