

ValpoScholar

Valparaiso University Law Review

Volume 12
Number 1 Fall 1977

pp.25-54

Fall 1977

"Minimum Contacts": Shaffer's Unified Jurisdictional Test

James Fisher

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Law Commons](#)

Recommended Citation

James Fisher, "*Minimum Contacts*": *Shaffer's Unified Jurisdictional Test*, 12 Val. U. L. Rev. 25 (1977).
Available at: <https://scholar.valpo.edu/vulr/vol12/iss1/2>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



“MINIMUM CONTACTS”: SHAFFER’S UNIFIED JURISDICTIONAL TEST

JAMES FISCHER*

INTRODUCTION

Pennoyer is dead¹ however, its interment should hardly come as a surprise. Commentators have long argued that *quasi in rem* jurisdiction² was unconstitutional and had outlived its usefulness.³ The juridical/constitutional climate that once required *Pennoyer*'s

*Member of the New York Bar.

1. *Pennoyer v. Neff*, 95 U.S. 714 (1877). This epitaph was foreshadowed some nineteen years ago, but with certain sober respect. See Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer*, 30 ROCKY MTN. L. REV. 285 (1958).

2. Jurisdiction *quasi in rem* has been given inconsistent definition. Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. . . . American courts have sometimes classified certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not required because the action was *in rem*. . . .

Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more indefinitely *quasi in rem*, or more vaguely still, "in the nature of a proceeding *in rem*." It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*.

The RESTATEMENT OF JUDGEMENTS § 32, *Comment a* at 128-129 (1942) *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950) *Compare* the discussion of "in personam," "in rem," and "quasi in rem" jurisdiction in *Hanson v. Denckla*, 357 U.S. 235, 246-247 (1958), with RESTATEMENT (SECOND) OF CONFLICT OF LAWS Ch. 3, Topic 2 Introductory Note at 191-192 (1971), describe *quasi in rem* jurisdiction as including both the plaintiff's assertion of a claim to or in specific property, such as in actions to quiet title or to foreclose a mortgage, and plaintiff's assertion of a personal claim against the defendant which must be satisfied solely from property attached for jurisdictional purposes. The Supreme Court in *Shaffer* adopted this binary definition of *quasi in rem* jurisdiction, ___ U.S. at ___, 97 S. Ct. at 2577-2578 n.17, drawing from *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

For purposes of this article, however, only the later of the two forms of *quasi in rem* jurisdiction described above will be considered. See F. JAMES, JR., CIVIL PROCEDURE, at 630-633 (2d ed. 1965).

3. See, e.g., von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?* 49 ST. JOHN'S L. REV. 668 (1975); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970); Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L. J. 1023 (1973).

holding has shifted.⁴ Long-arm *in personam* jurisdiction, exercised within the confines of fourteenth amendment due process limitations, now provides plaintiffs with a forum more reasonably related to a given controversy than the fortuitous location of the defendant's property.⁵ Gone are the days when one could recite with certainty that "[t]he foundation of jurisdiction is physical power. . .,"⁶ and we find ourselves in the enlightened age of "fair play" and "substantial justice."

A landmark decision, recently announced by the Supreme Court of the United States, broadly articulates the single standard whereby jurisdictional determinations should be made. *Shaffer v. Heitner*⁷ specifically presented for review Delaware's statutory exercise of jurisdiction *quasi in rem* over any record owner of shares of capital stock in a Delaware corporation.⁸ Mr. Justice Marshall, writing for a divided court,⁹ undercut the venerable cornerstone of *quasi in rem* jurisdiction, *Pennoyer v. Neff*,¹⁰ in its centennial year. Marshall's majority opinion lays new groundwork for adoption of the *International Shoe Co. v. Washington*¹¹ "minimum contacts" test as

4. See Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 670-671 (1975); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 305-306 (1970).

5. Judge Carodozo's comments on the situs of intangibles at note 27, *infra*, are particularly illustrative of the contrived rationalization which developed with respect to the situs of intangible personal property.

6. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (Holmes, J.).

7. ___ U.S. ___, 97 S. Ct. 2569 (1977).

8. Delaware provides for "sequestration" of a non-resident's property located in the state in order to compel the defendant's general appearance. DEL. CODE ANN. tit. 10, § 366. For jurisdictional purposes, Delaware has neatly denominated the situs of shares of capital stock in corporations existing under the laws of Delaware, DEL. CODE ANN. tit. 8, § 169, and "sequestration" of such shares is frankly recognized by the Delaware courts as a device to coerce a defendant's personal appearance. *Hughes Tool Co. v. Fawcett Publications, Inc.*, 290 A.2d 693 (Del. Chan. 1972); *Winitz v. Kliue*, 288 A.2d 456 (Del. Chan. 1971); *Wife v. Husband*, 271 A.2d 51 (Del. Chan. 1970); *TransWorld Airlines v. Hughes Tool Co.*, 41 Del. Chan. 11, 187 A.2d 350 (1962); *Sands v. Lefcourt Realty Corp.*, 35 Del. Chan. 340, 117 A.2d 365 (1955); *E.M. Fleischmann Lumber Corp. v. Resources Corp. Int'l.*, 33 Del. Chan. 587, 98 A.2d 506 (1953); *Weinress v. Bland*, 31 Del. Chan. 269, 71 A.2d 59 (1950). For an analysis of the constitutional infirmities in Delaware's use of these statutes for the purpose of obtaining personal jurisdiction, see Folk and Meyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973).

9. J. Brennan was the sole dissenter. He could not accept the apparent advisory opinion of the majority in its broad holding. ___ U.S. at ___, 97 S. Ct. at 2588-2593.

10. 95 U.S. 714 (1877).

11. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

the uniform benchmark by which the constitutionality of the states' exercise of jurisdictional powers will be measured.¹²

Although *Shaffer's* holding appears to extend boldly beyond its facts,¹³ it is the author's position that *Shaffer* finally states the ground rules by which our courts ought to recognize the invalidity of jurisdiction *quasi in rem*. From the holding in *Shaffer*, a single unified jurisdictional test should develop.

Both the historical bases of jurisdiction and the modern decisional trends have been discussed extensively in legal literature.¹⁴

12. The opinion in *Shaffer* recognized *International Shoe's* "minimum contacts" test, 326 U.S. at 316, as the judicial refinement of Fourteenth Amendment Due Process.

13. See ___ U.S. at ___, 97 S. Ct. at 2588 (J. Brennan, concurring and dissenting). Mr. Justice Brennan attacks the majority opinion as unnecessarily expansive of the facts: "[i]n my view, a purer example of an advisory opinion is not to be found." *Id.*

14. The most scholarly and broadly informative paper in this area is over fifteen years old. *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960). See also Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 300-303 n.3 (1970), for a compilation of recent publication regarding long-arm and quasi in rem jurisdiction indicating the exhaustive attention which has been afforded the subject of the jurisdiction of courts.

For commentary after 1970, see, e.g., Brown and Scott, *In Personam Jurisdiction Under Mississippi's Long-Arm Statute*, 43 MISS. L. REV. 1 (1972); Carpenter, *New York's Expanding Empire in Tort Jurisdiction: Quo Vadis?*, 22 HASTINGS L. J. 1173 (1971); Gentry, *In Personam Jurisdiction—Due Process and Florida's Short "Long-Arm"*, 23 U. OF FLA. L. REV. 336 (1971); Meyers, *At the Intersection of Jurisdiction and Choice of Law*, 59 CAL. L. REV. 1514 (1971); Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U.L. REV. 24 (1973); Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977); Trautman, *Long-Arm and Quasi In Rem Jurisdiction In Washington*, 51 WASH. L. REV. 1 (1975); Comment, *Long-Arm Wrestling With Pennsylvania's Jurisdiction Over Nonresident Individuals: The Reach of Section 8305*, 21 VILL. L. REV. 410 (1975); Comment, *Quasi In Rem Jurisdiction Based on an Insurer's Duty to Defend: The Adoption of the Seider Rule in California*, 5 PAC. L.J. 115 (1974); Comment, *Jurisdiction—Quasi In Rem: Seider v. Roth to Turner v. Evers—Wrong Means to the Right End*, 11 SAN DIEGO L. REV. 504 (1974); Comment, *The Pennsylvania Long-Arm: An Analytical Justification*, 17 VILL. L. REV. 73 (1971); Comment, *Judicially Refining the Missouri Long-Arm Statute: A Tort as the "Minimum Contact"*, 16 ST. LOUIS U.L.J. 315 (1971); Comment, *International Shoe and Long-Arm Jurisdiction—How About Pennsylvania?*, 8 DUQ. L. REV. 319 (1970); Commentary, *Conflict of Laws—Long-Arm Jurisdiction—Mailing of Prescriptions into Forum State Does Not Confer In Personam Jurisdiction over Doctor in Another State*, 24 ALA. L. REV. 634 (1972); Note, *In Personam Jurisdiction over Nonresident Buyers: Louisiana Lengthens its Long-Arm*, 34 LA. L. REV. 691 (1974); Note, *Territorial Fairness: A Due Process Standard for Quasi In Rem Jurisdiction*, 28 U. OF MIAMI L. REV. 439 (1974); Note, *The Iowa "Long-Arm" Statute—Ten Years Later*, 23 DRAKE L. REV. 423 (1974); Note, *Attachment of Liability Insurance Policies: What Remains of the Seider Doctrine After Seven Years of Conflict*, 34 OHIO ST. L.J. 818 (1973); Note, *Conflicts of Law—In Personam Jurisdiction—A*

However, a brief overview of the pre-*Shaffer* jurisdictional framework will be helpful. This overview will focus on *quasi in rem* jurisdiction, the injustices which were perpetrated by strict adherence to the "power" concept of jurisdiction, and the constitutional and practical sufficiency of long-arm personal jurisdiction in situations where *quasi in rem* jurisdiction had previously been needed. In addition, the unified jurisdictional contacts approach of *Shaffer* will be discussed in relation to its likely effect on *in personam* and *in rem* jurisdiction. Most significantly, it will be shown that *Shaffer* has effectively eliminated jurisdiction *quasi in rem* as a necessary device. Finally, the *Shaffer* test will be applied to the case of a plaintiff's attachment of defendant's interest in a liability insurance policy as espoused in New York's notorious *Seider v. Roth*¹⁵ decision. Absent defendant contact with the forum state other than his insurer's qualification to do business, a plaintiff asserting *quasi in rem* jurisdiction under *Seider* will quickly find that he has lost his grasp on both the defendant and defendant's insurance carrier. Before considering *Shaffer's* impact on *Seider*, it is appropriate to discuss the juridical climate existing before the *Shaffer* decision.

THE TRADITIONAL JURISDICTIONAL FRAMEWORK

Prior to the *Shaffer* decision, jurisdiction was obtained by a court with respect to a person, property, or a person's interest in

Futher Liberalization of the "Minimum Contacts" Requirement, 5 ST. MARY'S L.J. 373 (1973); Note, *Long-Arm Wrestling in Pennsylvania: In Search of a Satisfying Answer to In Personam Jurisdiction in Products Liability Cases*, 33 U. OF PITT. L. REV. 839 (1972); Note, *Civil Procedure—Long-Arm Statutes—Jurisdiction over Alien Manufacturers in Product Liability Actions*, 18 WAYNE L. REV. 1585 (1972); Note, *Louisiana Civil Procedure—Jurisdiction In Personam over Nonresidents—Some Observations on the Louisiana Long-Arm Statute*, 45 TUL. L. REV. 1081 (1971); Note, *Civil Procedure—Long-Arm Statute—In Personam Jurisdiction Enlarged*, 22 MERCER L. REV. 451 (1971); Note, *Jurisdiction—Long-Arm Statute—Participation in New York Auction via Interstate Telephone Call by Non-domicilliary Held to Constitute "Transaction of Business" Within Meaning of CPLR Section 302(a)*, 39 FORDHAM L. REV. 325 (1970); Recent Case, *Civil Procedure—In Rem Jurisdiction Over Nonresident Defendant Cannot be Obtained by Attaching Resident Insurer's Obligation to Defend and Indemnify Defendant—Javorek v. Superior Court*, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976), 17 SANTA CLARA L. REV. 189 (1977); Recent Case, *Civil Procedure—Service of Process—California Long-Arm Statutes Abrogate State's Immunity Doctrine*, 27 VAND. L. REV. 357 (1974); Recent Decision, *Jurisdiction—Forum Selection—Attachment Suit Based on Foreign Cause of Action by Nonresident Against Foreign Corporation Sufficient to Confer Quasi In Rem Jurisdiction on Mississippi Court*, 45 MISS. L.J. 267 (1974); Recent Developments, *Civil Procedure—The Extension of Personal Jurisdiction Over Nonresident Corporations*, 16 ST. LOUIS U.L. REV. 131 (1971).

15. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

property.¹⁶ Jurisdiction of a state court was, indeed, a matter of physical power.¹⁷ The state's physical power over an individual within its borders gave general *in personam* jurisdiction whenever a defendant was served with process within the state;¹⁸ the state's physical power over property within its borders provided jurisdiction to adjudicate *in rem* with respect to that property or otherwise affect the property *qua* property; and the state's physical power over property within its borders developed into jurisdiction *quasi in rem* to adjudicate the personal liabilities of property owners to the extent of the value of any such property brought before the court.¹⁹

Quasi in rem has been the least acceptable form of jurisdiction in terms of procedural due process.²⁰ The judicial system's simplistic physical power approach to jurisdiction did not often strain due process in adjudicating *in personam* or *in rem* actions. *Quasi in rem* jurisdiction, on the other hand, quickly advanced to constitutionally

16. See, e.g., *McDonald v. Mabee*, 243 U.S. 90 (1917) regarding personal jurisdiction; *Arndt v. Griggs*, 134 U.S. 316 (1890) as respects jurisdiction over a thing (real property); and *Pennoyer v. Neff*, 95 U.S. 714 (1877) for an early discussion of jurisdiction over a person's interest in a thing.

17. "As we have noted under *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgements." ____ U.S. at ____, 97 S. Ct. at 2579.

18. Jurisdiction *in personam* has even been sustained following service of process in an airplane while present in the forum's airspace. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959). Long before *Grace*, a foreign defendant was personally served with process in Boston harbor while on a mail steamer en route from Nova Scotia to New York; the defendant's physical presence was determinative. *Peabody v. Hamilton*, 106 Mass. 217 (1870).

19. *Pennoyer* expressed it this way:

[T]he 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 citizens. . . . It is in 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 be carried only to the extent necessary to control the disposition of the property.

95 U.S. at 723. Although *Pennoyer* acknowledges existence of the United States Constitution and the then-new fourteenth amendment due process clause, it is interesting to note the reverent recognition paid in the foregoing language to states' sovereignty and the due respect owed a sister state as opposed to the due process owed her citizens.

20. See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

questionable extremes.²¹ Jurisdiction *quasi in rem* was most likely perpetuated, in the absence of an alternative procedure for bringing foreign defendants before the local courts, as a necessary evil;²² but its initial usefulness has developed into a powerful tool of the unscrupulous.²³

The Use of Jurisdiction Quasi in Rem

Jurisdiction *quasi in rem* was once a necessary and helpful tool available to plaintiffs whose defendants were either intentionally elusive or otherwise absent from the state.²⁴ Exercise of jurisdiction *quasi in rem* permitted a state to reach beyond its territorial borders to provide redress for harm done to its citizens. The extra-territorial effect of a state's exercise of *quasi in rem* jurisdiction was not directly addressed by the courts because any property attached for jurisdictional purposes was within the state and subject to the state's physical power.

Penneyer v. Neff developed the concept of *quasi in rem* jurisdiction;²⁵ *Penneyer* was the watchword of *quasi in rem* jurisdic-

21. See *Harris v. Balk*, 198 U.S. 215 (1905) and discussion at notes 34 through 36 *infra* and accompanying text. Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913), strongly disapproved of the *Harris* case quite soon after the Court's decision was announced, but the Court entrenched its position. "The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness [as in *Harris*] or a contested claim." *Pennington v. Fourth National Bank*, 243 U.S. 269, 271 (1917). See generally *Louisville and N.R. Co. v. Deer*, 200 U.S. 176 (1906).

22. "Every State owes protection to its citizens . . ." *Penneyer v. Neff*, 95 U.S. at 723. See also Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 670 (1975).

23. Whenever a foreign defendant who owns property within the forum state is otherwise subject to personal jurisdiction within the forum, for example through transactional contacts or frequent regular visits to a known place of employment, *quasi in rem* attachment is generally still available and enables the plaintiff to win a tactical advantage through its exercise. See *Tucker v. Burton*, 319 F. Supp. 567 (D.D.C. 1970) (Wright, J., dissenting). *Tucker* is an outrageous example of such an election of jurisdiction *quasi in rem*. Mrs. Tucker was a Maryland resident who worked in Washington, D.C., and guaranteed a contract with a D.C. corporation. Household Finance Corporation took an assignment of the corporation's rights and upon her default proceeded *quasi in rem* against Mrs. Tucker in Washington, D.C. by garnishing her wages. Even though personal jurisdiction over Mrs. Tucker was available, either by service of process at her place of employment or by long arm service in Maryland, *quasi in rem* garnishment was still permitted against the "foreign" defendant.

24. See note 4 *supra*.

25. Mitchell, an attorney, obtained a \$300.00 judgment against Neff in an Oregon action for attorneys fees. Service of process in Mitchell's action was merely by

tion for precisely one century, in spite of its logical fallacies and historical frailty.²⁶ The rule in *Pennoyer* occasionally proved difficult to apply and led, for instance, to artificial treatment of intangible property in order to determine the property's situs for the purpose of pre-litigation jurisdictional attachment.²⁷ Nonetheless, *Pennoyer* remained a necessary device at least until *International Shoe* was decided in 1945.

Although the significance of *International Shoe* has taken decades to develop, its rationale is the foundation for virtually all progressive thought concerning jurisdiction.²⁸ *International Shoe* naturally derived its pervasive power from the simplicity of its concepts of "minimum contacts" and "fair play and substantial justice." When courts and legislatures recognized the practical usefulness of *International Shoe's* "minimum contacts" approach to due process, not only with respect to corporate presence but to personal jurisdiction as well, *Pennoyer's* days were numbered.²⁹ It appears that only the vast inertia of our federal system, along with its conservative adherence to *stare decisis*, has preserved *Pennoyer's* fate until its centennial anniversary.

publication to the non-resident Neff who never appeared, and certain real property which Neff owned was transferred to Pennoyer by sheriff's deed at a sale to satisfy the judgment. The Supreme Court found that personal jurisdiction was never obtained over Neff in the original action by Mitchell and held the Oregon court's judgment, which resulted in the sale to Pennoyer, invalid. The Supreme Court went on to state by way of example that Neff's property should have been seized by the court prior to the first action thus making the suit in the nature of a proceeding *in rem*.

26. See Zammit, *supra* note 22.

27. Judge Cardozo described the flexibility assumed by the courts in locating intangibles:

The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.

Severne Securities Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123-124, 174 N.E. 299, 300 (1931).

28. Even Professors von Mehren and Trautman in their comprehensive synthesis of "general" and "specific" jurisdiction as a replacement for our presently less precise jurisdictional forms draw heavily on the revolution in jurisdiction concepts brought about by *International Shoe*. von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

29. See *Shaffer v. Heitner*, ___ U.S. ___, 97 S. Ct. 2569, 2577 n.19.

International Shoe makes possible the exercise of long-arm jurisdiction *in personam*. With the rapid growth of the long-arm statute came a lesser need for the state's reliance on jurisdiction *quasi in rem*. Proper application of *International Shoe's* philosophy comports with an overall extension of due process to a broader spectrum of situations, certainly, than earlier power concepts permitted.³⁰ This extension is most desirable in light of the way in which *quasi in rem* jurisdiction has been expanded to limits which apparently ignore the existence of any constitutional restraints whatsoever; and which work to stifle consideration of due process during *quasi in rem* jurisdictional determinations.³¹

The Limits of Quasi in Rem Jurisdiction

The only constitutional requirement for obtaining *quasi in rem* jurisdiction, until *Shaffer*, was the court's prior attachment of defendant's property within the forum state.³² Moreover, the defendant

30. Long-arm jurisdiction provides a local forum to many plaintiffs who would, under earlier "power" considerations, have been forced into the defendant's state and who would have often been deprived of their day in court by the cost of such an undertaking. Before *International Shoe*, the plaintiff had to locate either the defendant or a substantial amount of his property within the forum's territorial limits in order to bring his suit at home; but now extra-territorial service is possible in a host of situations which provide sufficient jurisdictional contacts. See notes 57 through 59 *infra* and accompanying text.

31. See, e.g., *Ownby v. Morgan*, 256 U.S. 94 (1921); *Harris v. Balk*, 198 U.S. 215 (1905); *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *Ownby* affirmed the Delaware sequestration procedure, ultimately rejected by *Shaffer*, and did so with recognition that Delaware was "adhering logically to the ancient distinction between a proceeding *quasi in rem* and an action *in personam*." 256 U.S. at 108. The Supreme Court went on to state that:

[*Ownby's*] appeal in effect was to the summary and equitable jurisdiction of a court of law so to control its own process and proceedings as not to produce a hardship. This is a recognized extraordinary jurisdiction of common-law courts, distinguishable from their ordinary or formal jurisdiction. . . . [W]here the proceedings have been regular, it is exercised as a matter of grace or discretion not as of right. . . . A liberal exercise of this summary and equitable jurisdiction, in the interest of substantial justice and in relaxation of the rigors of strict legal practice, is to be commended; but it cannot be said to be essential to due process of law, in the constitutional sense.

256 U.S. at 110 (emphasis added).

32. Once the defendant's property was before the court by pre-litigation attachment the state had power over the *res* sufficient to divest its owner whether he actually knew of the proceedings or not.

Substituted services by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where

was not additionally entitled to actual notice of the proceedings since he was presumed to know all things directly affecting his property.³³ Service by publication after attachment merely added to the proceeding an official gloss which had the substantive value of a forensic wig. The exercise of jurisdiction *quasi in rem* has from time to time fostered quite creative inequities. Three examples are worthy of note.

*Harris v. Balk*³⁴ held that a simple debt obligation "clings to the debtor and accompanies him wherever he goes."³⁵ This decision made creditors generally insecure since the unsatisfied debt was subject to attachment in any state where the debtor happened to wander. The injustice of thus subjecting the creditor to *quasi in rem* jurisdiction wherever his debtor is found certainly meets strong intuitive opposition.³⁶ In *Shaffer*, we now find authority to challenge *Harris'* meager measure of due process.

property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds on the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

Pennoyer v. Neff, 95 U.S. 714, 727 (1877).

33. *Id.*

34. 198 U.S. 215 (1905).

35. *Id.* at 222. Harris owed Balk \$180.00. Balk owed \$400.00 to Epstein. Both Harris and Balk were residents of North Carolina, but Epstein lived in Maryland. When Harris visited Epstein in Baltimore he was personally served with a writ attaching his debt to Balk which he paid to Epstein without contest. Later, Balk sued Harris on the \$180.00 debt obligation and the North Carolina Supreme Court affirmed Balk's judgment for the full amount, holding that Maryland had no jurisdiction to garnish a debt owed by Harris during such a sojourn and that Balk's payment of \$180.00 to Epstein, therefore, did not discharge Balk's obligation to Harris. *Balk v. Harris*, 130 N.C. 381, 41 S.E. 940 (1902). The United States Supreme Court reversed in logical form with disastrous results. The Court held that the debt was located with Harris and that "[p]ower over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. . . ." 198 U.S. at 222. Since the debt cannot itself be captured, it was effectively caught upon notice to the debtor, and so Harris' obligation to Balk was effectively and properly taken by Epstein's Maryland proceeding.

36. "The rule of *Harris*, which in effect sanctions the mere presence of the garnishee as a sufficient jurisdictional base, 'cannot be justified in terms of fairness.' " Anderson, J. quoting *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 960 (1960). *Minichiello v. Rosenberg*, 410 F.2d 106, 122, *aff'd on reh. en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969) (dissenting opinion). See also note 120 *infra* regarding the fact that the creditor and not his property is actually subjected to jurisdiction.

The Delaware "sequestration" procedure worked a hardship upon persons holding stock in Delaware corporations.³⁷ By statute, Delaware was the situs of all shares of every corporation incorporated in Delaware.³⁸ Under another statute, Delaware permitted sequestration of any property owned by the defendant and situated in Delaware as a basis for *quasi in rem* jurisdiction;³⁹ the defendant's

37. See Folk & Meyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973) for an incisive review of Delaware's sequestration process.

38. Delaware's situs statute states:

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 the State, whether organized under this chapter or otherwise, shall be regarded as in this State.

DEL. CODE ANN. tit. 8, § 169.

39. DEL. CODE ANN. tit. 10, § 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.

(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.

(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, ti-

shares in Delaware corporations were an easy target. Sequestration was frankly recognized by Delaware courts as a device to bring defendants to the bench whether or not the litigation had any relation to the defendant shareholder's corporate or securities matters.⁴⁰ Moreover, under the Delaware procedure, no limited appearance was permitted.⁴¹ Thus, the foreign defendant-shareholder was forced to elect between an unlimited personal appearance and forfeiture of any property attached. Even after an unlimited personal appearance, the defendant's property might remain security for a potential judgement.⁴²

The final example of an inequity created by exercise of *quasi in rem* jurisdiction is *Seider v. Roth*,⁴³ where the New York Court of Appeals permitted the plaintiffs to proceed by jurisdiction *quasi in rem* through attachment of defendant's tenuous property interest in his liability insurer's obligations to defend and indemnify him. The *Harris* decision weighed heavily in the courts' later rationalization of the *Seider* rule;⁴⁴ however, a most recent review of *Seider* frankly admitted that *stare decisis* was the sole preventive of a prompt reversal of the *Seider* case.⁴⁵ Just ten days after the New York

tle 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.

40. The *Shaffer* Court noted that:

The primary purpose of 'sequestration' as authorized by 10 Del. C. § 366 is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, "sequestration" is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity. *Sands v. Lefcourt Realty Corp.*, Del. Supr., 35 Del. Ch. 340, 117 A.2d 365 (1955). It is accomplished by the appointment of a sequestrator by this Court to seize and hold property of the nonresident located in this State subject to further Court order. If the defendant enters a general appearance, the sequestered property is routinely released, unless the plaintiff makes special application to continue its seizure, in which event the plaintiff has the burden of proof and persuasion.

Shaffer v. Heitner, ___ U.S. at ___, 197 S. Ct. at 2574. See note 8 *supra*.

41. See DEL. CODE ANN. tit. 10, § 366 (a), requiring a general appearance by the defendant before his property might be released either with or without security. The court, however, was not bound to release his property.

42. See note 39 *supra*.

43. 17 N.Y. 2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

44. See *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1969); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

45. See *Donawitz v. Danek*, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

Court of Appeals reaffirmed *Seider* on its facts,⁴⁶ the United States Supreme Court effectively overruled *Seider* with its decision in *Shaffer*.

Although *quasi in rem* jurisdiction led to egregious results in certain cases, it was an understandable device, prior to the decision in *International Shoe*, to bring foreign defendants before the local courts. State courts were not anxious to usurp personal jurisdiction without their borders only to face a sister state's refusal, under the full faith and credit clause,⁴⁷ to enforce the judgment thus obtained. This arguably unconstitutional exercise of jurisdiction was most vulnerable to collateral attack.⁴⁸ No state, however, could easily challenge the sovereign's right and power to control property within its borders, and so, states looked inward for what became the slightest indicia of property which might be subject to attachment. Now, with *International Shoe* and its progeny so firmly entrenched in our present jurisdictional framework, it is difficult to imagine how a court in a constitutionally contacted forum could find itself helpless to issue process without the state in order to bring a wrongdoer to justice.⁴⁹

46. *Id.*

47. U.S. Const. art IV, § 1.

48. A frightening example of one state's refusal to give full faith and credit to a sister state's judgment is found in *Williams v. North Carolina*, 317 U.S. 287 (1942), where the Supreme Court reversed North Carolina's bigamy convictions of petitioners, who had obtained Nevada divorces and who then returned to North Carolina, remarried, to live with new spouses. However, after remand to the North Carolina courts, the issue of domicil as the jurisdictional basis of Nevada's divorce decrees was precisely framed. Thus, upon the Supreme Court's review of North Carolina's new convictions, the Court affirmed that state's disagreement with Nevada's jurisdictional determinations and, with it, affirmed the defendants' prison terms. *Williams v. North Carolina*, 325 U.S. 226 (1945).

49. The original "power" concept was unequivocal:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum*, 11 How., 165.

Pennoyer v. Neff, 95 U.S. 714, 720 (1877). An exception to the general rule that extra-territorial service is void without attachment is found in the states' exercise of personal jurisdiction over nonresident automobile drivers who are involved in accidents within the forum's territorial jurisdiction. Use of the fiction that a driver would be deemed to appoint the state's registrar or Secretary of State as agent for service of process in suits arising out of operation of a motor vehicle within the state was upheld. See *Hess v. Pawloski*, 274 U.S. 352 (1927).

The painful result of overreaching the bounds of jurisdictional propriety, both in terms of the litigation's ultimate outcome and in terms of the effort needed to reach that outcome, is documented in *Hanson v. Denckla*, 357 U.S. 235 (1958).

Thus, *Harris* was an understandable outgrowth of *Pennoyer*; however, *Seider* has always been an extremely difficult decision because it came so long after *International Shoe*.⁵⁰ Fortunately, long-arm jurisdiction has now grown to the point where it will provide *in personam* jurisdiction in all constitutionally permissible situations.⁵¹ The once-strong need for *quasi in rem* jurisdiction as a necessary device to bring foreign defendants to justice has been abrogated. Surely, the availability of a device so subject to misuse and overextension as *quasi in rem* jurisdiction should be eliminated now that it is no longer needed. Its redundancy should be recognized, and the sufficiency of long-arm jurisdiction finally acclaimed.

The Sufficiency of Long-Arm Jurisdiction

Long-arm jurisdiction, as the decisional and legislative extension of *International Shoe*, typically provides a local forum in an action against a foreign defendant where there exist certain "minimum contacts."⁵² Minimum contacts are required in order to ensure that exercise of jurisdiction will not be arbitrary and overbearing, but will compliment "traditional notions of fair play and substantial justice"⁵³ by guaranteeing the defendant due process of law. Thus, long-arm jurisdiction is exercised according to a flexible standard,⁵⁴ one which "cannot be simply mechanical or quantitative"⁵⁵ and one which presently reaches all constitutionally permissible bounds.⁵⁶

Long-arm statutes express the states' new-found permissiveness in various ways.⁵⁷ A number of states, however, see fit to avoid

50. *But see* Seidelson, *Seider v. Roth, et seq.: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42 (1970). Seidelson's complaint with *Seider* is that the New York court failed to assume full personal jurisdiction over the defendants. *See also* Note, *Attachment of Liability Insurance Policies: What Remains of the Seider Doctrine After Seven Years of Conflict*, 34 OHIO ST. L.J. 818 (1973).

51. *See* notes 57 through 59 *infra* and accompanying text.

52. *See generally* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 2577 (1963).

53. *International Shoe Co. v. Washington*, 326 U.S. at 316 *quoting* *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

54. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

55. *International Shoe Co. v. Washington*, 326 U.S. at 319.

56. *Shaffer v. Heitner*, ___ U.S. ___, 97 S. Ct. 2569, 2584-5 (1977).

57. Two representative long-arm statutes are found in Illinois and New York: (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal represen-

confining limitations of language and merely make statutory statements such as "[jurisdiction over foreign corporations and nonresident individuals shall be exercised] in every case not contrary to the provisions of the constitution or laws of the United States"⁵⁸ or "on any basis not inconsistent with the Constitution of this state or of the United States."⁵⁹ Because long-arm jurisdiction has been so neatly extended to its constitutionally permissible limits, the argument had been advanced, years before the *Shaffer* decision, that *quasi in rem* jurisdiction was anachronistic and, at best, qualified by the decisions in *Sniadach v. Family Finance Corp.*⁶⁰ and *Fuentes v. Shevin*.⁶¹

tative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this State;
- (b) The commission of tortious act within this State;
- (c) The ownership, use or possession of any real estate situated in this state;
- (d) Contracting to insure any person, property or risk located within this state. . . .

ILL. LAWS 1955, pp. 2238, 2245-6, ILL. REV.STAT., ch. 110, § 17 (1963).

(a) Acts which are the basis of jurisdiction. As to be cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

- 1. transacts any business within the state; or
- 2. commits a tortious act within the state. . . ; or
- 3. commits a tortious act without the state causing injury to person or property within the state, . . . if he
 - (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; or
- 4. owns, uses or possesses any real property situated within the state.

N.Y. CIV. PRAC. LAW § 302 (McKinney).

58. R.I. GEN. LAWS § 9-5-33 (1969).

59. CAL. CIV. PRAC. CODE § 410.10 (West) (1970).

60. 395 U.S. 337 (1969). In *Sniadach*, the Court held that Wisconsin's garnishment of wages, with neither prior notice nor hearing, violated due process, although "[s]uch summary procedure may well meet the requirements of due process in extraordinary situations." 395 U.S. at 339.

61. 407 U.S. 67 (1972). *Fuentes* struck down Florida and Pennsylvania statutes that permitted prejudgment replevin of consumer goods purchased under installment sales contracts. Replevin was permitted upon ex parte application by creditors, but recognized by the Court as a deprivation of property without due process of law. Generally, the broad holdings of *Sniadach* and *Fuentes* state that seizure of property will no longer be constitutionally tolerable without notice and an opportunity to be heard except, perhaps, in narrow "exceptional circumstances" as found in the cases cited by *Sniadach*, 395 U.S. at 337, and *Fuentes*, 407 U.S. at 91-92 nn. 23-28.

One line of reasoning proceeds as follows:⁶² since a seizure of property necessary to obtain *quasi in rem* jurisdiction reaches no farther than a fully extended long-arm statute, such seizure is unnecessary to effect jurisdiction over nonresidents, and is possibly violative of equal protection. The only remaining purpose in seizing a nonresident's property is to obtain security for the plaintiff's prospective judgment. Seizure of a nonresident's property, however, should be subject to the same constitutional safeguards of notice and a hearing,⁶³ as is seizure of a resident's property, and the *Sniadach* and *Fuentes* strictures should govern.

The logic of the foregoing argument is inescapable in the light of *Shaffer*. It can no longer be argued that *quasi in rem* jurisdiction somehow provides a greater jurisdictional reach than the constitutional "long arm." Both devices are now explicitly tied to those jurisdictional propositions first laid out by *International Shoe*, the result of which is to render *quasi in rem* jurisdiction finally and totally unnecessary and improper. The list of injustices flowing from exercise of jurisdiction *quasi in rem* is almost as long as the list of commentators who decry its perpetuation. However, the *Shaffer* Court has given the states the impetus and the tool to deal *quasi in rem* jurisdiction a well-deserved death blow.

Shaffer's new unified jurisdictional test need not revoke the validity of the bulk of prior law. *Shaffer* merely subjects each case to a new analysis upon its facts. The beauty of *Shaffer's* rule is its simplicity and its long overdue integration of all jurisdictional determinations into a single resolution of *International Shoe* "contacts." The elimination of *quasi in rem* jurisdiction as duplicative, and as violative of due process of law, should be recognized as a corollary of the *Shaffer* rule.

SHAFFER'S UNIFIED JURISDICTIONAL CONTACTS TEST

*Shaffer v. Heitner*⁶⁴ provides a single test by which courts are to make jurisdictional determinations based upon the "minimum contacts" considerations of *International Shoe*.⁶⁵ "Minimum contacts" is a simple, straightforward, workable rule that, although it will not

62. Comment, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1004 (1973).

63. *Fuentes* and *Shevin* recognize only a narrow group of "extraordinary situations" which justify a lowering of the safeguards imposed by those cases.

64. ___ U.S. ___, 97 S. Ct. 2569 (1977).

65. *Id.* at 2584-5.

greatly change jurisdictional determinations *in personam*⁶⁶ or *in rem*,⁶⁷ should curtail the exercise of *quasi in rem* jurisdiction and arguably render *quasi in rem* jurisdiction unconstitutional.

The Court's Holding in Shaffer

Heitner brought a shareholder's derivative action in Delaware against Greyhound Corporation, Greyhound Lines, Inc., and twenty-eight present and former officers and directors of the corporation seeking money damages.⁶⁸ Greyhound Corporation was incorporated in Delaware and had its principal place of business in Phoenix, Arizona.⁶⁹ Heitner's action alleged that certain officers and directors caused Greyhound Corporation and Greyhound Lines, a subsidiary incorporated in California and having its principal place of business in Phoenix, Arizona, to perform certain improper activities in Oregon. The Oregon Federal District Court entered judgment for \$13,146,090.00 plus attorneys' fees⁷⁰ in a civil antitrust suit against Greyhound Corp., and \$600,000.00 in fines against both corporations in a criminal contempt action.⁷¹

In accordance with Delaware law, Heitner proceeded against the individual defendants by moving for an order of sequestration of Delaware property owned by those individuals.⁷² Since the situs of Delaware stock is Delaware by edict,⁷³ Heitner sequestered the individual defendants' shares in the Delaware corporation—approximately 82,000 shares of common stock—simply by placing “stop transfer” orders on Greyhound's corporate books. Heitner and the sequestrator were each required to post a \$1,000.00 bond to assure their compliance with the terms of the court ordered sequestration,⁷⁴ but they otherwise provided no security for the financial impact of

66. *International Shoe* has already worked its magic *in personam* through development of long-arm jurisdiction.

67. For jurisdiction purely *in rem*, the tangible *res* should prove an irresistible contact.

68. *Id.* at 2572.

69. *Id.*

70. *Id.* at n.2.

71. *Id.* at 2573 n.3.

72. ___ U.S. at ___, 97 S. Ct. at 2573.

73. See note 38 *supra*. DEL. CODE tit. 8, § 1691 establishes Delaware as the situs of shares of stock in Delaware corporations for the purpose of, *inter alia*, attachment and jurisdiction.

74. ___ U.S. at ___, 97 S. Ct. at 2573 n.5. Apparently, the amount of the required security is discretionary with the court and is in no way reflective of the value of property attached.

their \$1.2 million attachment.⁷⁵ The sequestered property was Delaware's basis for assertion of jurisdiction *quasi in rem* over the individual defendants; if the defendants ever wanted to see their shares again, they were forced to enter an unlimited personal appearance in the suit.⁷⁶

After the Delaware courts upheld the sequestration procedure in the face of constitutional attack, the United States Supreme Court reversed, basing its decision on a broad application of the "minimum contacts" standard of *International Shoe*. The Court applied this standard to "actions *in rem* as well as *in personam*."⁷⁷ *Pennoyer v. Neff*⁷⁸ was rejected,⁷⁹ and the *ratio decidendi* of those cases which followed the power mentality of *Pennoyer* and *McDonald v. Mabee*⁸⁰ was seriously thrown in doubt. Mr. Justice Marshall made the majority's point succinctly: "We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."⁸¹ We shall see that this test is most workable on a practical level.

The "Minimum Contacts" Test

As applied to future jurisdictional determinations under *Shaffer*, the *International Shoe* test will not ignore the presence of property within the forum state but will more properly weigh the presence of defendant's property, along with all other significant contacts which the forum has with the defendant and the litigation, in determining the existence of jurisdiction.⁸² The Court in *International Shoe* observed that,

75. ___ U.S. at ___, 97 S. Ct. at 2574, n.7. Conceivably, by the Delaware procedure, judgment could be entered by default, then assets liquidated and wasted, with no recourse against the ultimately judgment-proof plaintiff who had fraudulently or otherwise improperly procured the original sequestration.

76. The Delaware Chancery Court unabashedly outlined the need for a general appearance in its letter opinion in *Shaffer*, ___ U.S. at ___, 97 S. Ct. at 2574. Apparently, the Court of Chancery was of the opinion that the due process guarantees expressed in *Sniadach* and *Fuentes* were inapplicable to violations of constitutional rights which were limited in purpose and time.

77. "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*." ___ U.S. at ___, 97 S. Ct. at 2581.

78. 95 U.S. 714 (1877).

79. "It is clear, therefore, that the law of state court jurisdiction no longer stands securely on the foundation established in *Pennoyer*." ___ U.S. at ___, 97 S. Ct. at 2581.

80. See note 6 *supra*.

81. ___ U.S. at ___, 97 S. Ct. at 2584-5.

82. "This argument, [for applying *International Shoe* minimum contacts to all jurisdictional determinations] of course, does not ignore the fact that the presence of

[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgement in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

* * *

[the due process clause] does not contemplate that a state may make binding a judgement *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relation.⁸³

Shaffer's interpretation of *International Shoe* will not permit the mere presence of property to be jurisdictionally determinative of *quasi in rem*.

The *Shaffer* Court alluded to the reasons property might be found within the state's borders and the relationship which those reasons might have to the weight given the situs contact.⁸⁴ If in retaining property within the state the defendants had "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State,"⁸⁵ the situs contact ought to be enhanced significantly and even become jurisdictionally determinative.⁸⁶ If, on the other hand, the property's situs were fortuitous or transient,⁸⁷

property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant and the litigation." ___ U.S. at ___, 79 S. Ct. at 2582.

83. 326 U.S. at 316.

84. "[W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." ___ U.S. at ___, 97 S. Ct. at 2582. See note 109 *infra* and accompanying text.

85. *Hansen v. Denkla*, 357 U.S. at 253.

86. See note 80 *supra*.

87. See *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); see also, *Harris v. Balk*, 198 U.S. 215 (1905) and notes 98 through 101 *infra* and accompanying text.

situs must be buttressed with other, presumably personal, contacts.⁸⁸

In this regard the particular outcome of *Shaffer* is somewhat confusing. The individual directors and officers of Greyhound Corporation had every reason to expect the assertion of Delaware's *quasi in rem* procedure against them in the event of a shareholder's derivative suit.⁸⁹ These officers and directors were presumably knowledgeable in corporate matters and such an exercise of jurisdiction was long established under Delaware law and was one of the express purposes of the legislation which denominated Delaware situs to Delaware shares.⁹⁰ Mr. Justice Brennan's reaction to the Court's apparently advisory opinion must find some sympathy⁹¹—the Court clearly reached far beyond the case or controversy presented in order to state its new jurisdictional policy.

An understanding of the simplicity of the Court's ruling in *Shaffer* makes immediately apparent the ease with which its new test can be integrated with the existing framework of decisions flowing from *International Shoe*.⁹² *International Shoe* requires certain "minimum contacts" between the defendant, the forum and the litigation's subject matter. In this regard, *Shaffer* now explains that the existence of property within the forum will no longer be

88. The Court noted that:

[A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.

— U.S. at _____, 97 S. Ct. at 2582-2583.

89. The majority apparently failed to consider all defendant contacts. Certainly nothing said by the Court persuades me that it would be unfair to subject appellants to suit in Delaware. The fact that the record does not reveal whether they "set foot" or committed "act related to [the] cause of action" in Delaware . . . is not decisive, for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state.

— U.S. at _____, 97 S. Ct. at 2591 (Brennan, J., concurring and dissenting).

90. See note 40 *supra*.

91. See note 13 *supra*.

92. The variety of rules, standards and procedures previously applied individually to *in personam*, *in rem* and *quasi in rem* jurisdiction are now merged by *Seider's* unified jurisdictional test thereby simplifying jurisdictional determinations in terms of the variety of applicable law. "Minimum contacts" is certainly an imprecise standard, however, it has been somewhat refined through thirty-two years of judicial scrutiny since the decision in *International Shoe*.

dispositive of the jurisdictional issue,⁹³ not even for jurisdiction limited to the value of an attached *res*.⁹⁴ Rather, the presence of property will be but one contact, occasionally significant⁹⁵ and occasionally not,⁹⁶ which must be considered along with all other contacts in regard to jurisdiction. The effect of *Shaffer's* test can be analyzed in terms of the continued vitality of certain well-known decisions which extend *quasi in rem* jurisdiction to, and ultimately beyond, what are now known to be its constitutional limits. Our three prior examples⁹⁷ serve this purpose well.

The *quasi in rem* attachment which gave jurisdiction in *Harris v. Balk*⁹⁸ was apparently the only contact which the defendant had with the forum state.⁹⁹ The presence of Mitchell in Maryland was apparently fortuitous in terms of the debt situs and, from the Supreme Court's sparse account of the facts, there was no other relationship between the transaction, the litigants, and the forum. Mitchell could as properly have been sued in Tobago;¹⁰⁰ constitutional contact was equally lacking in Maryland. Although the *Shaffer* Court declined to expressly overrule *Harris*,¹⁰¹ its continued vitality cannot seriously be argued.

Obviously, the Delaware sequestration procedure specifically challenged in *Shaffer* can no longer stand without serious

93. See note 88 *supra*.

94. "The value of the property seized does serve to limit the extent of possible liability, but that limitation does not provide support for the assertion of jurisdiction." ___ U.S. at ___, 97 S. Ct. at 2583 n.32.

95. See note 84 *supra*.

96. See note 88 *supra* and notes 127 through 142 *infra* and the accompanying text.

97. See notes 34 through 45 *infra* and accompanying text.

98. 198 U.S. 215 (1905).

99. Although further contacts could very well have existed, the Court gave them no express consideration. See note 101 *infra*.

100. "Can the island of Tobago pass a law to bind the rights of the whole world?" *Buchanan v. Rucker*, 9 East 192 (King's Bench, 1808). Tobago entered judgment after jurisdiction was obtained by posting process on the courthouse door. The defendant had never been on Tobago, and the Court at King's Bench refused to enforce Tobago's default judgment. It is possible, however, that by modern tests, the defendant was sufficiently commercially contacted to support jurisdiction.

101. The Court left little doubt of its intention:

For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis [in terms of *International Shoe* "minimum contacts"] would result in a significant change. These are cases where the property which now serves as the basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action.

___ U.S. at ___, 97 S. Ct. at 2582.

refinement.¹⁰² Those cases previously sustaining *quasi in rem* jurisdiction merely upon the basis of such an attachment must fall with the statute.¹⁰³ The *Shaffer* holding suggests that Delaware sequestration might be permissible if the procedure is limited to situations involving the misconduct of corporate officers and directors.¹⁰⁴ Unfortunately, this suggestion fails to come to grips with the issue of jurisdictional attachment or sequestration as a valid tool.

Finally, the effect which *Shaffer* will have upon *Seider v. Roth*¹⁰⁵ is treated below as an example of the good result which *Shaffer* can achieve at the frontier of *quasi in rem* jurisdictional rationalization. Before a discussion of *Seider*, however, it is appropriate to note the ease with which *Shaffer* may be applied.

The Practical Application of Shaffer

Shaffer lends itself immediately to accurate judicial interpretation because it applies a jurisdictional concept which has been developed and refined for years and which the courts have dealt with repeatedly. "Minimum contacts" and "fair play and substantial justice" are familiar phrases in the trial courts after years of contention with *International Shoe*.¹⁰⁶ The only hurdle which must be overcome in applying *Shaffer's* mandate will be the tendency of courts, in light of the earlier *quasi in rem* mentality, to attach too great a significance upon the presence of defendant's property within the state. A danger exists that the defendant's attached property might,

102. Appellants, who were not required to acquire interests in Greyhound in order to hold their position, did not by acquiring those interests surrender their right to be brought to judgment only in States with which they had "minimum contacts." . . . Delaware's assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on state power.

— U.S. at ___, 97 S. Ct. at 2586-2587.

103. See, e.g., *Ownbey v. Morgan*, 256 U.S. 94 (1921).

104. "Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." — U.S. at ___, 97 S. Ct. at 2586.

105. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

106. See, e.g., *Rosen v. Solomon*, 374 F. Supp. 915, 919 (E.D. Pa. 1974); *Edwards v. Assoc. Press*, 371 F. Supp. 333, 337 (N.D. Miss. 1974); *Odom v. Thomas*, 338 F. Supp. 877, 878 (S.D. Texas 1971); *Abrams v. U.S.*, 333 F. Supp. 1134, 1145 (S.D. W. Va. 1971); *Casano v. WDSU-TV, Inc.*, 313 F. Supp. 1130, 1144 (S.D. Miss. 1970); *AMCO Transworld, Inc. v. M/V Bambi*, 257 F. Supp. 215, 218 (S.D. Texas 1966); *Rodrique v. Yale & Towne, Inc.*, 251 F. Supp. 73, 76 (D.S.C. 1966); *Waukesha Bldg. Corp. v. Jameson*, 246 F. Supp. 183, 188 (W.D. Ark. 1965); *Ewing v. Lockheed Acft. Corp.*, 202 F. Supp. 216, 217 (D.C. Minn. 1962).

more often than may be justified, become the clearly decisive consideration upon which the court will hang its jurisdictional hat.¹⁰⁷ The conceptions of *in rem*, *in personam* and *quasi in rem* may linger as the courts find it impossible to speak without reliance upon these familiar terms.¹⁰⁸ Gradually, the courts should find that an intelligent use of *Shaffer's* doctrine leads to results not unlike those achieved in the past, but those results should achieve new validity in the light of *International Shoe's* "contacts" test.

In rem jurisdiction should remain virtually unchanged. The *Shaffer* Court clearly states that the contacts which the property has with an *in rem* litigation should alone be sufficient to meet the demands of *International Shoe* since the location of such litigation's subject matter is seldom incidental.¹⁰⁹

In personam jurisdiction should continue to be subject to the *International Shoe* standards. The *Shaffer* holding apparently does nothing to alter the effect which a range of possible contacts will have upon state courts' personal jurisdictional determinations.¹¹⁰

107. This is the problem, which courts often have, of fitting strained reasoning to the apparently predetermined result in a given case. In this regard, the second *Williams* result is most interesting. See *Williams v. North Carolina*, 325 U.S. 226 (1945); see note 48 *supra*.

108. Similarly, in states where law and equity are said to have "merged," the old forms remain and return repeatedly to make their continuing presence felt.

109. The Court recognized that:

[W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The state's strong interest in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the state. The presence of property may also favor jurisdiction in cases such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.

____ U.S. at ____ , 97 S. Ct. at 2582.

110. A liberal reading of *Shaffer* would suggest that *in personam* jurisdiction has possibly been expanded by providing an additional unrelated property situs contact for the court's consideration of a defendant's amenability to suit in the forum. Such a tack would, however, be a departure from traditional long-arm "contacts" determinations that, for the limited determination of jurisdiction in regard of a single transaction or occurrence, have concerned themselves not with the defendant's total contacts with the forum, but rather queried the contacts which the defendant's litigation-related activities had with the forum.

Quasi in rem jurisdiction, however, has been shaken to its very roots. *Shaffer's* application of *International Shoe* no longer permits a state to seize upon the defendant's property as a sole jurisdictional contact;¹¹¹ and this result takes into consideration the fact that *quasi in rem* jurisdiction, so obtained, applies only to the extent of the asset attached.¹¹² What does this leave of *quasi in rem* jurisdiction? Not a great deal. The argument advanced periodically over the years that *quasi in rem* jurisdiction is outmoded and unconstitutional¹¹³ has never been stronger, and the *Shaffer* Court appears to have acceded to the reasonable demands of those seeking a rejection of the *quasi in rem* jurisdictional basis.

In expressing its rejection of *quasi in rem* jurisdiction, the Supreme Court recognized that years of contrary decision should not be lightly disregarded. Thus, the statement that "[t]his history [of supporting jurisdiction based solely on the presence or property in a State] must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demand of due process, but it is not decisive,"¹¹⁴ merely recognizes an argument which the Court rejects. The Court refused to "[perpetuate] ancient forms that are no longer justified,"¹¹⁵ recognizing that the only significance which assertion of jurisdiction over property has is the effect upon its owner.¹¹⁶

111. The majority opinion noted that:

For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis would result in a significant change. These are cases where the property, which now serves as the basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction.

— U.S. at —, 97 S. Ct. at 2582-3.

112. See note 94 *supra*.

113. See Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975); see note 3 *supra*.

114. — U.S. at —, 97 S. Ct. at 2584.

115. *Id.*

116. The Court stated:

[T]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant.

We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.

— U.S. at —, 97 S. Ct. at 2584-5.

The Supreme Court's language could be used to support continued application of *quasi in rem* jurisdiction but with attempted procedural safeguards intended to enforce the spirit of *International Shoe*; however, jurisdiction *quasi in rem* is inherently unfair and is often used to obtain a tactical advantage where otherwise unnecessary in a practical sense.¹¹⁷ In light of *Shaffer*, the mere presence of the defendant's property within the forum state should be insufficient contact to justify that state's exercise of jurisdiction under the *Shaffer* test, particularly since jurisdiction should be otherwise obtainable *in personam* under *International Shoe* long-arm procedures. The most telling statement of the *Shaffer* Court in this regard is found at the conclusion of the majority opinion: "Appellants, who were not required to acquire interests in Greyhound in order to hold their positions, did not by acquiring those interests surrender their right to be brought to judgment only in States with which they had had 'minimum contacts'."¹¹⁸ The situs of property within the forum may be considered by the court, but situs will not be controlling. *Shaffer* now provides that the same "contacts" test applies toward obtaining long-arm *in personam* jurisdiction as toward obtaining *quasi in rem* jurisdiction. A sufficiently drafted long-arm statute precludes the practical jurisdictional necessity of pre-litigation attachment.

This being the case, legal authorities can only question the purpose of permitting such pre-litigation attachment under any circumstances. Surely it should not be permitted in order that local plaintiffs might have the option of harassing foreign defendants when the opportunity presents itself. That would be a meager offering of equal protection. If the purpose for such attachment were to secure the plaintiff's prospective judgment, *Sniadach* and *Fuentes* guidelines state the requisite procedural safeguards. Such attachment, however, is not, *inter se*, jurisdictional. In fact, the *Shaffer* Court suggested that, perhaps, "a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*."¹¹⁹ The suggested feasibility of such foreign state attachment makes a procedure immediately apparent by which one of the most troublesome outgrowths of *quasi in rem* jurisdiction can be tamed. If, in a given case, long-arm jurisdiction was fully available to

117. See note 23 *supra*.

118. ____ U.S. at ____, 97 S. Ct. at 2586.

119. *Id.* at 2583.

bring defendants before the court, and if extra-territorial attachment through the cooperation¹²⁰ of foreign state courts and their process could be availed in those instances where security were required, then there would be no excuse for allowing pre-litigation jurisdictional attachment. The practice of using such permissive procedure to harass defendants could be stopped short. Unfortunately, it may prove difficult for the states to relinquish the procedural "rights" of their citizens, and it may be necessary for any further limitations upon the exercise of *quasi in rem* jurisdiction to come from the Supreme Court.¹²¹

In applying *Shaffer*, our state courts should take the initiative to eliminate jurisdiction *quasi in rem* by using all due creativity and by recognizing it as a vestige of our unenlightened past. They should, for instance, encourage the liberal exercise of long-arm jurisdiction within constitutional limitations but discourage unnecessary attachment of property. This approach can be promptly implemented simply through refusal to grant *ex parte* orders of attachment or sequestration on which *quasi in rem* jurisdiction is based.

Once the attachment procedure is permitted only upon notice in an action, the irony of adherence to *quasi in rem* jurisdiction becomes apparent. By *Shaffer*, the contacts required to give jurisdiction *quasi in rem* and permit attachment/sequestration of the defendant's property are the same as those required to permit full exercise of *in personam* jurisdiction over the defendant. Thus, plaintiff's election of limited *quasi in rem* jurisdiction in lieu of unlimited personal jurisdiction is incongruous.¹²² If the states insist upon permitting their plaintiffs to proceed with attachment in order to secure a potential judgment, even though they have obtained full personal jurisdiction with the aid of the state's long arm, they may apparently still permit attachment to secure a potential judgment within the guidelines of *Fuentes* and *Sniadach*. The end result, though, is a procedure which removes a bit of the sting from the sharp practice of ruthless plaintiffs, but which allows the substance of our familiar

120. This procedure would work mechanically much like the present day open commission or letters rogatory for invocation of the process of a sister state's court to aid the taking of extraterritorial depositions.

121. See *Sarchuck v. Rush*, 97 S. Ct. 2964 (1977) which vacated the Minnesota Supreme Court's approval of *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), and remanded for further action in light of *Shaffer*.

122. Of course, a great many *quasi in rem* attachments reach property of substantially greater value than plaintiff's *ad damnum* and the "limited" jurisdiction thus obtained is, for practical matters, unlimited.

provisional remedies to remain for use by those who will genuinely and honestly benefit from their availability.

The potential for reform which *Shaffer* portends runs generally against the exercise of *quasi in rem* jurisdiction, and one final example of the absurd extreme to which *quasi in rem* jurisdiction has gone must be discussed. *Seider v. Roth*¹²³ gave the residents of New York State tremendous power over foreigners whose insurers do business in New York. *Shaffer* now gives New York the opportunity it recently requested¹²⁴ to retreat from the *Seider* doctrine. This doctrine, upon wise reflection by New York's highest court, is now recognized as having been ill advised.

SEIDER V. ROTH: THE FINAL DAYS

A closing example of *Shaffer's* impact need not be hypothetical.¹²⁵ For years the decision in *Seider v. Roth* has been derided by scholars and jurists both within New York and without,¹²⁶ and the list of serious *Seider* critics now includes the very court which decided the case.¹²⁷ When the Court concluded that the liability insurer is the real party in interest who defends a *Seider* litigation, New York's highest court ignored the realities of a foreign defendant's inconvenience in being forced to travel to participate in his defense and the haunting possibility that his appearance might be later held "unlimited." Even more serious, the

123. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

124. See notes 127 and 135 *infra* and accompanying text.

125. New York has given us, in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), a decision which a few years ago only the most perceptive seer could have divined.

126. See notes 132 and 133 *infra* and accompanying text.

127. From its inception the *Seider-Simpson* rule, allowing the attachment of a defendant's liability insurer's contractual obligation to defend and indemnify, has met with criticism and rejection. See, e.g., Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. 5201 (Cumulative Annual Pocket Part 1976-1977); Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968) (esp. writings collected at p. 108), *affd. on reh. en banc*, 410 F.2d 117 (1969), *cert. denied*, 396 U.S. 844, Javorek v. Superior Court of Monterey County, 17 Cal. 3d 629, 131 Cal. Rptr. 768, 552 P.2d 728 (1976); DeRentiis v. Lewis, 106 R.I. 240, 258 A.2d 464 (1969); Ricker v. Lajoie, 314 F. Supp. 401 (D.Vt. 1970).

We are not unmindful of the continued criticism of our holdings in *Seider v. Roth* and *Simpson v. Loehman*. Donawitz v. Danek 42 N.Y.2d 138, 140, 366 N.E.2d 253, 255, 397 N.Y.S.2d 592, 594 (1977). But see Seidelson, *Seider v. Roth, et seq: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42 (1970), and Note, *Attachment of Liability Insurance Policies: What Remains of the Seider Doctrine After Seven Years of Conflict*, 34 OHIO ST. L.J. 818 (1973).

court ignored those basic tenets articulated by *International Shoe* and reaffirmed in *Shaffer*.

Seider arose out of an automobile accident in Vermont between residents of New York and Quebec. Defendant Lemieux was insured with the Hartford Accident and Indemnity Company (Hartford) and because Hartford was an insurer doing business in New York, the New York Court of Appeals permitted Seider to attach Hartford's obligation to defend and indemnify Lemieux as an intangible, locatable *res*. Hartford's contractual duty was likened to a debt, and, applying the reasoning in *Harris v. Balk*, the debt's situs was located with the debtor.¹²⁸ Conveniently, the Hartford Insurance Company could be found just about anywhere.

The New York Court reaffirmed *Seider's* holding when it was questioned in *Simpson v. Loehmann*.¹²⁹ The Second Circuit specifically found that *Seider* did not violate due process, at least not in light of the then-recent "miraculous per curiam opinion."¹³⁰ The "miracle" referred to by the Second Circuit denied reargument of *Simpson* on the grounds that any recovery against the defendant was limited to the fact value of the attached insurance policy, even though the defendant should enter an appearance and defend on the merits.¹³¹ Other states were quick to reject *Seider's* boldness,¹³² and the reaction to *Seider* from scholars and commentators was generally disharmonious.¹³³

128. Precise reliance upon the *Harris* debt situs did not occur until *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

129. *Id.*

130. *Minichiello v. Rosenberg*, 410 F.2d 106, 111 (2d Cir. 1969) quoting Professor Siegel's Commentary on the C.P.L.R. & 5201, at 15 (McKinney Supp. 1968).

131. The "miracle" was given in New York's denial of reargument in *Simpson v. Loehmann*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

132. See, e.g., *Tessler v. State Farm Mutual Ins. Co.*, 458 F.2d 1299 (1st Cir. 1972) (applying Massachusetts law); *Robinson v. O.F. Shearer & Sons, Inc.*, 429 F.2d 83 (3d Cir. 1970) (applying Federal Maritime and Pennsylvania law); *Sykes v. Beal*, 392 F. Supp. 1089 (D. Conn. 1975) (applying Connecticut law); *Ricker v. Lajoie*, 314 F. Supp. 401 (D. Vt. 1970) (applying Vermont law); *Kirchman v. Mikula*, 258 So. 2d 701 (La. App. 1972); *State ex rel. Gov't. Employees Ins. Co. v. Lasky*, 454 S.W.2d 942 (Mo. App. 1970); *Johnson v. Farmers Alliance Mutual Ins. Co.*, 299 P.2d 1387 (Okla. 1972); *DeRentiis v. Lewis*, 106 R.I. 240, 258 A.2d 464 (1969); *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970); *Honsley v. Anaconda Co.*, 19 Utah 2d 124, 427 P.2d 390 (1967).

133. See, e.g., Rosenberg, *One Procedural Genie Too Many or Putting Seider Back into its Bottle*, 71 COLUM. L. REV. 660 (1971); Stein, *Jurisdiction By Attachment of Liability Insurance*, 43 N.Y. U.L. REV. 1075 (1968); Comment, *Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction*, 16 BUFFALO L. REV. 769 (1967); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Note, *Minichiello v. Rosenberg: Garnishment of*

The *Seider* doctrine has been recently reviewed, by the New York Court of Appeals in *Donawitz v. Danek*,¹³⁴ and affirmed with regret. The Court of Appeals, however, limited *Seider* jurisdiction to New York plaintiffs.¹³⁵ The Court also left the caveat that, given sufficient authority such as that now found in *Shaffer*, it was inclined to dispose of the unpopular *Seider* experiment.¹³⁶ *Donawitz* was reported a mere ten days prior to *Shaffer* and, for want of fresh authority, *Seider's* demise was delayed—most likely until its next New York review.

Shortly after its decision in *Shaffer*, the United States Supreme Court vacated a Minnesota Supreme Court judgment which had permitted *Seider* jurisdiction, and remanded the case for a determination in light of *Shaffer*.¹³⁷ Nonetheless, an early Federal trial court review of *Seider* in view of *Shaffer* held that *Seider* is still good law.¹³⁸ The rambling verbiage of *O'Connor v. Lee-Hy Paving Corp.*, grounded firmly in neither law nor logic, presents no persuasive obstacle to proper rejection of the *Seider* technique by any court which must face it.¹³⁹ A New York state trial court, however,

Intangibles—In Search of a Rationale, 64 NW. U. L. REV. 407 (1969); Note, *Quasi In Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654 (1967); Note, *Seider v. Roth: Attachment of an Insurer's Obligation to Defend*, 71 DICK. L. REV. 653 (1967); Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

134. 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

135. The limitation is found in the court's refusal to permit a foreign plaintiff to proceed by *Seider*:

Although *stare decisis* dictates that we refrain from unnecessarily reaching out to overrule the precedents established by *Seider* and *Simpson*, it does not require that we expand the scope of the doctrine. While the insurer's "duty to defend and indemnify" has been found to be an attachable debt where the plaintiff is a resident, this special type of contract duty, however it may be classified or denominated, is not of sufficient substance to support *quasi in rem* jurisdiction where the plaintiff is a nonresident.

397 N.Y.S.2d at 595.

136. See note 128 *supra*.

137. *Savchuck v. Rush*, ___ U.S. ___, 97 S. Ct. at 2964 (1977).

138. *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977).

139. *O'Connor* reached its determination that *Seider* jurisdiction exists after *Shaffer* even though

[i]t [was] not argued, nor could it be, that [defendants had] even a minimum of contacts with New York, the forum state, or that, if, instead of contract rights against two insurers, tangible property transiently in New York were the property attached, it would be easy to claim that jurisdiction would exist in a New York court.

437 F. Supp. 994, 997. The Court simply reasoned that:

[a]n analysis of jurisdictional property in the ultimate terms implied by

has recently rejected *Seider* squarely on the holding in *Shaffer*, and, in review, the United States District Court for the Eastern District of New York concurred.¹⁴⁰

Seider quasi in rem attachment was permitted in New York in order to broaden the jurisdictional reach of the forum. Long-arm jurisdiction was unable to provide *in personam* jurisdiction over foreign defendants who injured New Yorkers outside of the state because, as apparently recognized by the legislature when drafting New York's long-arm statute, the *International Shoe* contacts test could not be met. There were simply insufficient contacts between the defendant, the forum and the litigation to permit such an attempted jurisdictional extension.

The New York Court of Appeals apparently noticed this deficiency and so, in deciding *Seider*, the Court of Appeals judicially created a "direct action" remedy.¹⁴¹ Since direct action statutes are constitutional,¹⁴² New York's direct action decision should arguably be no less proper. The necessary contacts are, however, obtained with the insurer and not the insured.¹⁴³

If the insurer could be named and sued directly in a forum with minimum contacts there might be less difficulty with *Shaffer*. However, under *Shaffer* the mere fortuitous presence of a defendant's insurer in the plaintiff's home state should be recognized as an isolated contact which cannot of itself support jurisdiction to adjudicate extraterritorial events.

CONCLUSION

*Shaffer v. Heitner*¹⁴⁴ has finally brought all personal jurisdictional determinations within a single comprehensive test. Those

Shaffer cannot ignore the claimants' circumstances and her interest in litigating in the forum of her residence.

Id.

140. See *Katz v. Umansky*, *New York Law Journal*, Monday, November 28, 1977, p. 13, col. 5. See also *Torres v. Towmotor Division of Caterpillar, Inc.*, 77 Civ. 1810 (E.D.N.Y. November 18, 1977).

141. See *Simpson v. Loehman*, 21 N.Y.2d 305, 287 N.Y.S.2d 633, 234 N.E.2d 669 (1967) (Burke, J., dissenting).

142. *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954).

143. One aspect of *Seider* jurisdiction must save New York substantial embarrassment. Since the defendant's liability insurers are doing business in New York, enforcement of eventual judgments takes place where the defendant's assets, indeed the only assets against which the judgment may be applied, can be found. It is fortunate that New York has never been forced to contend with refusals of her sister states to enforce a *Seider* judgment in accordance with full faith and credit.

144. ___ U.S. ___, 97 S. Ct. at 2569 (1977).

cases previously segregated as *in personam*, *in rem* or *quasi in rem* will all be adjudged to be properly or improperly before a court by application of the well-known *International Shoe* criteria of "minimum contacts" and "fair play and substantial justice".

Of greatest significance, *Shaffer* gives the states an opportunity to eliminate exercise of *quasi in rem* jurisdiction. Such a result would be the logical corollary to *Shaffer's* holding inasmuch as long-arm *in personam* jurisdiction may now be exercised precisely in those situations where *International Shoe* contacts would otherwise provide an arguable basis for *quasi in rem* attachment.

Shaffer should mandate few changes to the states' exercise of jurisdiction in areas other than *quasi in rem* jurisdiction, but *quasi in rem* jurisdiction can now be recognized as but the shadow of what it once was. At the very least, a defendant's fleeting contacts with the forum state, such as were present in *Harris v. Balk*¹⁴⁵ and *Seider v. Roth*¹⁴⁶ should no longer control. *Shaffer's* measure of due process has surely been long overdue.

145. 198 U.S. 215 (1905).

146. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

Fisher: "Minimum Contacts": Shaffer's Unified Jurisdictional Test

Valparaiso University Law Review

Volume 12

Fall 1977

Number 1

EXECUTIVE BOARD

STANLEY J. STEK
Editor-in-Chief

EDWARD A. GRAFTON
Articles Editor

MARK J. MAHONEY
Executive Editor

RHONDA P. LEVIN
KENT R. SCHNACK
Note Editors

RICHARD A. BROWNE
STEPHEN F. FISCHER
RALPH R. HUFF
STEVEN E. KING

PAMELA P. KOSENKA
DAVID H. MYERS
JOSEPH V. SIMANSKI
GLEN S. VICIAN

Associate Editors

GREGORY A. KAHRE
Managing Editor

ROBERT J. EHRENBURG
Business Editor

STAFF

DENNIS R. CARLSON
GALE L. GARRIOT
CYNTHIA A. HEDGE
DAVID A. HERITER

JEFFREY R. HOLMSTROM
CHRISTOPHER HUNT
DEBRA L. LUZIETTI
STEPHEN H. SPROULL

FACULTY ADVISOR

JACK A. HILLER

CANDIDATES

DIERDRA A. BURGMAN
ROBERT R. CLARK
RICHARD P. COFFEE
JOHN C. DENNISON
GLEN T. DOBOSZ
FREDERICK DUDDERAR JR.
LINDA D. FEGINS
LOUIS D. FISHER

JOSEPH JASKOWIAK
JOHN A. JOHNSON
DANIEL A. LANE
ERIC C. LEWIS
THOMAS F. MACKE
MICHAEL A. MEYER
JAMES L. TODD
BRUCE VANHEUKELEM