

1977

Constitutional Law - Due Process - State Court Jurisdiction - Quasi in Rem Proceedings

Ted Tishman

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Ted Tishman, *Constitutional Law - Due Process - State Court Jurisdiction - Quasi in Rem Proceedings*, 16 Duq. L. Rev. 237 (1977).

Available at: <https://dsc.duq.edu/dlr/vol16/iss2/9>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

CONSTITUTIONAL LAW — DUE PROCESS — STATE COURT JURISDICTION — QUASI IN REM PROCEEDINGS — The United States Supreme Court has held that all assertions of state court jurisdiction, in personam, in rem, and quasi in rem, must comply with the minimum contacts standards of *International Shoe Co. v. Washington*.

Shaffer v. Heitner, 97 S. Ct. 2569 (1977).

Heitner, a nonresident of Delaware and a shareholder in Greyhound, a business incorporated in Delaware, filed a shareholder's derivative suit¹ in the Court of Chancery for New Castle County, Delaware, against Greyhound, its subsidiary, and twenty-eight present and former officers and directors. Heitner alleged a breach of the officers' and directors' fiduciary duties to Greyhound in causing the corporation to incur civil liability for damages in a private antitrust action and a fine in a criminal contempt suit.² To acquire jurisdiction over the individual defendants, all nonresidents of Delaware, Heitner filed a motion to sequester their Delaware property pursuant to state law.³ Since Delaware had statutorily declared itself to be the situs of ownership of stock in Delaware corporations,⁴

1. In a derivative suit, the plaintiff stockholder sues as guardian ad litem for the corporation which is made part of the litigation by being named a nominal party defendant although it is the real party plaintiff. The derivative action is an equitable proceeding frequently involving issues like breach of fiduciary responsibilities. H. HENN, *LAW OF CORPORATIONS* § 358, at 749 (2d ed. 1970).

2. In the antitrust action, a judgment of \$13,146,090 plus attorneys fees was entered against Greyhound. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, [1973-2] *TRADE CAS. (CCH)* ¶ 74,824 (D. Ore.), *aff'd*, 555 F.2d 687 (9th Cir. 1977). In the criminal action, Greyhound was fined \$100,000, and Greyhound Lines \$500,000. *United States v. Greyhound Corp.*, 363 F. Supp. 525 (N.D. Ill. 1973), 370 F. Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

3. DEL. CODE tit. 10, § 366 (1974) provides:

(a) If it appears in any complaint filed in the Court of Chancery that the defendant . . . is a nonresident of the State, the Court may make an order directing such nonresident defendant . . . to appear Such order shall be served on such nonresident defendant . . . by mail or otherwise, if practicable, and shall be published in such manner as the Court directs 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 . . . 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.

4. DEL. CODE tit. 8, § 169 (1974) provides:

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts

the court granted the motion and had a court-appointed sequestrator "seize" Greyhound stock and options owned by the individual defendants, thereby obtaining the requisite jurisdiction over twenty-one of the defendants.⁵

Defendants appeared specially to quash service of process and vacate the sequestration order, arguing first that the sequestration statute, as applied, violated their procedural due process rights. Defendants also asserted that Delaware's exercise of jurisdiction in the absence of the minimum contacts required by *International Shoe Co. v. Washington*⁶ deprived them of property in violation of the due process clause of the fourteenth amendment. The court of chancery, however, justified the sequestration statute and procedure as merely compelling the nonresident defendant to enter a personal appearance and defend a suit brought against him, whereupon the property was released. The statute making Delaware the situs of stock sufficed as a basis for the exercise of this quasi in rem

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.

In contrast to the other 48 states that enacted the Uniform Commercial Code, Delaware did not adopt U.C.C. § 8-317(1) which requires actual physical seizure of stock certificates to effect an attachment or levy upon an interest in corporate securities. Although none of the certificates associated with defendants' securities were physically located in Delaware, the stock was regarded as present in the state and thus subject to seizure by virtue of DEL. CODE tit. 8, § 169 (1974).

Prior to *Shaffer*, the Court of Appeals for the Third Circuit ruled that the Delaware situs statute, as applied in sequestration proceedings, failed to comply with constitutional requirements that jurisdiction be predicated on minimum contacts with the forum state. *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976) (lone fact of statutory situs of stock was not a sufficient contact with Delaware to support jurisdiction over a nonresident defendant in a suit evolving out of a transaction unrelated to the forum state), *cert. denied*, 97 S. Ct. 2972 (1977).

5. Since the property seized was stock and options in a Delaware corporation, the sequestration order was served on Greyhound's registered agent in Delaware. Seizure was accomplished by a stop-transfer order which prohibited the company from recognizing any transfer of the securities of record pending further notice from the sequestrator or the court. For a further discussion of the Delaware sequestration procedure see Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 755 (1973) [hereinafter cited as Folk & Moyer].

6. 326 U.S. 310 (1945). In *International Shoe*, the Supreme Court upheld the state of Washington's right to exercise in personam jurisdiction over a foreign corporation engaged in limited sales activities in Washington for the collection of the state's unemployment tax. The Court held that due process only requires a defendant have such minimum contacts with the forum that maintenance of the suit against him does not offend traditional notions of fair play and substantial justice. *Id.* at 316.

jurisdiction by a Delaware court.⁷

Affirming the judgment of the chancery court, the Delaware Supreme Court found no breach of the defendants' due process rights. The state of Delaware was held to have a legitimate interest in protecting shareholders by allowing adjudication of claims of mismanagement involving Delaware corporations; adequate procedural safeguards of notice and hearing were provided in the sequestration statute itself.⁸ Although extensively addressing the procedural due process issue, the Delaware Supreme Court gave cursory treatment to the minimum contacts aspect of the appellants' argument. The court held that *International Shoe* only governed assertions of in personam jurisdiction and was inapplicable where quasi in rem jurisdiction was exercised.⁹ The defendants appealed to the United States Supreme Court. Probable jurisdiction was noted and the judgment of the Delaware Court was reversed.¹⁰

7. *Heitner v. Greyhound Corp.*, No. 4514 (Ch. New Castle Co., Del. May 12, 1975). Under DEL. CODE tit. 10, § 366(a) (1974), if the plaintiff demonstrates that there is a substantial possibility he may be unable to get satisfaction of any judgment rendered, the court will refuse to release the sequestered property. See note 3 *supra*.

The constitutionality of the Delaware sequestration procedure was upheld in *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A.2d 428 (Sup. Ct. 1963). The court held that the state of incorporation may constitutionally provide that the situs of the company's stock is in the home state. Thus, stock of a domestic corporation whose certificates are physically located elsewhere could be brought before the court by using the situs and sequestration statutes, providing an adequate foundation for the court's assertion of quasi in rem jurisdiction.

8. *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976), *rev'd*, 97 S. Ct. 2569 (1977). See text accompanying note 7 *supra*.

9. 361 A.2d at 229. A judgment in rem affects the interests of all persons in particular property. A judgment in personam imposes personal liability or obligations on one person in favor of another. A quasi in rem judgment determines interests of specific persons in designated property. RESTATEMENT OF JUDGMENTS §§ 45, 46, 73-76 (1942). This casenote will use "in rem" rather than distinguishing between "in rem" and "quasi in rem" unless otherwise noted.

10. *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977). The following facts led to a finding of probable jurisdiction: defendants, whose Delaware property had been sequestered, were required to enter a general appearance to release their property, thus submitting to full in personam jurisdiction on the underlying cause of action. See *Folk & Moyer*, *supra* note 5, at 778. No limited appearance in response to sequestration is permitted. *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A.2d 365 (Sup. Ct. 1955) (sequestration statute compelling nonresident defendant's appearance by seizure of his property allows no special appearance by the defendant without subjecting himself to full in personam liability). If the decision of the Delaware court was not regarded as an appealable final judgment under 28 U.S.C. § 1257(2), appellants would have to either suffer default judgments or enter a general appearance and defend on the merits. Consequently, the Court found the judgment final for all practical purposes and probable jurisdiction was noted. *Shaffer v. Heitner*, 97 S. Ct. at 2576 & n.12. See also Brief for Appellant at 6, *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977) [hereinafter cited as Brief for Appellant].

Although the appellants raised the same two issues argued in the Delaware courts, Justice Marshall, speaking for the majority, found it necessary to consider only the question of minimum contacts and did not explore appellants' procedural due process contentions.¹¹ The Delaware Supreme Court's conclusion that the minimum contacts test was irrelevant where jurisdiction was based on the attachment of property located within a state's borders rather than on the contacts between a state and the defendant was founded on the continued vitality of *Pennoyer v. Neff*.¹² In holding that the power of each court was necessarily restricted by the territorial boundaries of the state in which it was established, *Pennoyer* curtailed the availability of in personam jurisdiction over nonresident defendants. A nonresident defendant could not be sued in the forum state unless he could be found there. However, by virtue of the same territorial jurisdiction concept, the state where property was situated had exclusive sovereignty over that property; thus, in rem suits could be brought regardless of the owner's location. Since the owner was held to be only indirectly affected by in rem judgments adverse to his interest in the property, the courts did not view this exercise of jurisdiction as in personam.¹³ The Court in *Shaffer*, however, refused to acknowledge a practical difference between the rights affected by in rem and in personam actions.

11. *Shaffer v. Heitner*, 97 S. Ct. at 2572 (1977). See also text accompanying note 7 *supra*.

12. 97 S. Ct. at 2576 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)). Neff was a nonresident of Oregon and owned no property in that state when Mitchell brought suit against him there for collection of attorney's fees. When Neff later acquired property in the state, Mitchell did not attempt to attach it, but simply used it to assert jurisdiction over Neff as a property owner, and notified him of the suit by publication, all in accordance with Oregon law. Neff never appeared to defend and a default judgment was entered against him. *Pennoyer* bought the land at a sheriff's sale held to satisfy the judgment. Neff then brought a suit in ejectment against *Pennoyer* to contest the validity of the original assertion of jurisdiction. In awarding the land to Neff, the U.S. Circuit Court for the District of Oregon held that it could not recognize the judgment Mitchell had obtained against Neff as valid. The decision was affirmed by the Supreme Court.

13. See *Pennoyer v. Neff*, 95 U.S. at 720, 731. The *Shaffer* Court stated:

By concluding that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," . . . *Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there. On the other hand, since the State in which property was located was considered to have exclusive sovereignty over that property, *in rem* actions could proceed regardless of the owner's location.

97 S. Ct. at 2578.

Marshall cited *Schroeder v. City of New York*,¹⁴ where a decree in an in rem condemnation proceeding had resulted in the loss of individual property, as support for the proposition that persons are directly affected by adverse in rem judgments. *Mullane v. Central Hanover Bank & Trust Co.*,¹⁵ another of the Supreme Court's landmark jurisdiction decisions, was found by the *Shaffer* Court to have further weakened the in rem wing of *Pennoyer*. In *Mullane*, the Court recognized that the hazy distinctions between in rem and in personam actions are not dispositive of fourteenth amendment due process rights. In light of *Schroeder* and *Mullane*, the majority concluded that *Pennoyer* was no longer the foundation of the law of state court jurisdiction and that the guidelines of "fair play and substantial justice" announced in *International Shoe* should regulate all assertions of state court jurisdiction, in rem as well as in personam.

With *Pennoyer* eradicated as the linchpin of jurisdiction, the Court proceeded to explain why *International Shoe* was a fitting replacement.¹⁶ Marshall reasoned that jurisdiction over property is simply a concise way of referring to jurisdiction over the interests of persons in property. Therefore, the foundations of any exercise of in rem jurisdiction had to be sufficient to justify asserting jurisdiction over the interests of persons. The minimum contacts rule of *International Shoe*, having served as an adequate guide to determine if assertions of jurisdiction over persons met due process requirements, was held by *Shaffer* to be the appropriate test to govern jurisdiction over the interests of persons in property.¹⁷

Delaware's assertion of jurisdiction was held unconstitutional by the *Shaffer* Court because the minimum contacts required by *International Shoe* were nonexistent. In the majority's opinion, the statutory presence of appellants' Greyhound stock in Delaware pro-

14. 371 U.S. 208 (1962). The Court found that notice by newspaper publication and posted signs failed to satisfy due process requirements with respect to a nonresident plaintiff whose name and address were readily ascertainable from public records and whose property interests were directly affected by the condemnation proceedings in question. According to the Court, property is immune from judgment unless reasonable and appropriate efforts are made to give the owners actual notice of the action.

15. 339 U.S. 306 (1950) (due process of law does not depend on the distinctions between in rem and in personam for this is an ambiguous and confusing classification which, being primarily for state tribunals to define, varies from state to state).

16. 97 S. Ct. at 2581. See *Folk & Moyer*, *supra* note 5, at 773.

17. 97 S. Ct. at 2581-82. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971).

vided insufficient contacts to support jurisdiction, since the property was unrelated to the cause of action for breach of fiduciary duties. Heitner's contention that appellants' positions as directors and officers of a Delaware corporation furnished the requisite contacts was also rejected by the Court because jurisdiction obtained through the sequestration statute was based on the presence of property in Delaware and not on appellants' positions in Greyhound.¹⁸

Justices Powell and Stevens, in concurring with the majority's holding that minimum contacts should govern all exercises of state court jurisdiction and that they were lacking here, argued the *Shaffer* decision was needlessly sweeping. Both Justices reserved judgment on the question of whether the case should be read to invalidate in rem jurisdiction where the attached property, although unrelated to the cause of action, is real estate located in the forum.¹⁹ According to Powell, in these situations the suit may, absent more contacts, comport with due process without need to resort to *International Shoe's* uncertain "sufficient contacts" standard.²⁰ In his concurrence, Justice Stevens also found Delaware's sequestration procedure unconstitutional on procedural due process grounds since it did not provide for an opportunity to defend on the merits unless and until the defendants submitted to full in personam jurisdiction.²¹

Justice Brennan, concurring and dissenting, conceded that minimum contacts should govern all assertions of state court jurisdiction but sharply disagreed with both the way the majority reached the contacts issue and the decision that sufficient contacts did not exist here. Brennan contended that jurisdiction obtained using Delaware

18. Marshall saw the failure of Delaware to assert its alleged interest in policing corporations when enacting the sequestration statute as a fatal flaw in this argument. The absence of any state concern to govern the affairs of Delaware corporations when the sequestration statute is used to gain jurisdiction is exemplified by Heitner's inability to bring before the court seven of the 28 defendants named in his complaint who did not own Delaware stock or property. 97 S. Ct. at 2585-86.

19. *Id.* at 2587 (Powell, J., concurring), 2587-88 (Stevens, J., concurring). Although the entire Court was in accord with Marshall's holding that "minimum contacts" should regulate all efforts to obtain state court jurisdiction, some Justices disagreed as to whether *Shaffer* was the appropriate case to decide the issue.

20. *Id.* at 2587 (Powell, J., concurring).

21. *Id.* at 2588 (Stevens, J., concurring). In equating fair warning with fair notice, Stevens saw Delaware's failure to warn purchasers of stock in Delaware corporations that as purchasers they would be subject to in rem jurisdiction of Delaware as violative of due process.

sequestration was quasi in rem in nature and not based on the relationship among the parties, the litigation, or the state. Since jurisdiction was premised upon stock ownership rather than upon contacts between corporate fiduciaries and the state, the minimum contacts question was not an issue.²² Brennan believed, however, that if the contacts issue had been properly before the Court, sufficient contacts existed between Delaware, the defendants, and the litigation to justify asserting jurisdiction. A corporation and its officers and directors, Brennan argued, generally have sufficient minimum contacts with the chartering state to fairly require them to litigate a stockholder derivative suit involving the activities of the officers and directors. Brennan reasoned that in resolving the minimum contacts issue, Delaware's strong interest in adjudicating the controversy must be accorded great weight.²³ The appellants, as fiduciaries in a Delaware corporation, and Delaware, the chartering state, had a voluntary association; the appellants enjoyed the benefits and protections of Delaware's laws, and should be required in return to respond to suits in the State of Delaware and to subject themselves to general jurisdiction.²⁴ Although the state's interests would not provide minimum contacts in every case, such interests were certainly present in derivative suits where, as in *Shaffer*, mismanagement was alleged.²⁵

The sequestration procedure at issue in *Shaffer* clearly illustrates the unfairness of a *Pennoyer* approach to jurisdiction. Through a *Pennoyer* creation, the quasi in rem proceeding, Delaware was able

22. *Id.* at 2588 (Brennan, J., concurring and dissenting). Brennan perceived the Court's decision as the deathknell for quasi in rem jurisdiction, since now all statutes authorizing state court jurisdiction would have to comply with the minimum contacts standard. *Id.* at 2589. *But see* notes 19 & 20 and accompanying text *supra*.

23. 97 S. Ct. at 2589-90 (Brennan, J., concurring and dissenting). The interests of Delaware in providing restitution to residents injured by corporate misbehavior, the manifest regulatory interest of the chartering state in a stockholder's derivative suit, and the state's interest in providing a convenient forum for policing the activities of an entity spawned solely on the basis of its laws were the major reasons why Brennan felt that Delaware should hear this suit. *Id.* at 2590.

24. *Id.* at 2592 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In *Hanson*, Florida attempted to exercise jurisdiction over trust assets in Delaware based on the settlor decedent's establishment of a Florida domicile after executing the trust. The Supreme Court ruled that the Florida courts lacked in rem jurisdiction over the action involving the trust because the trust situs was in Delaware. Florida also lacked in personam jurisdiction over the trustee since minimum contacts between the trustee and the state were nonexistent.

25. 97 S. Ct. at 2590 (Brennan, J., concurring and dissenting). Brennan admitted that it may have been better to allow another forum to hear the suit. Yet the issue, he retorted, was "minimum" and not "best" contacts. *Id.* at 2592-93.

to compel the defendants' general appearance with only one link between the controversy and the forum: the ownership of securities issued by a Delaware corporation.²⁶ The result was that only the twenty-one defendants unfortunate enough to own Greyhound stock had to bear the risk and burden of the litigation.²⁷ Such an assertion of jurisdiction where there were few, if any, additional contacts between the defendant and the forum was not uncommon in quasi in rem proceedings. But neither was it inevitable, for the legislatures were usually silent on the question of whether they desired to subject these defendants to the decisions of their courts.²⁸ Moreover, the extension of in personam jurisdiction in *International Shoe* made quasi in rem proceedings necessary only where minimum contacts were lacking, precisely where due process should have commanded that the defendants not be asked to defend.²⁹ The holding in *Shaffer* was designed to eliminate this use of quasi in rem jurisdiction where the property was unrelated to the cause of action.³⁰

Customarily, an assertion of quasi in rem jurisdiction was justified by a state's interest in furnishing its citizens with convenient legal recourse for wrongs committed against them by nonresidents. Invoking quasi in rem jurisdiction was said to prevent the potentially liable nonresident defendant from absconding with property which could ultimately be used to satisfy a judgment against him. However, no proof has ever been offered to support this rationale. On the contrary, defendants *could not* circumvent payment of judg-

26. Folk and Moyer offered the extreme example of an Alaskan plaintiff suing a fellow Alaskan, who owned stock in a Delaware corporation, in the Delaware courts, through a Delaware attorney, for personal injuries that occurred in Alaska. Folk & Moyer, *supra* note 5, at 785.

Using an *International Shoe* standard in lieu of the problem-ridden sequestration statute will usually require that the controversy arise out of the contacts between the parties, the forum state, and the litigation. Assertions of quasi in rem jurisdiction based on the Delaware sequestration procedure suffer no such limitation. Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 676 (1975) [hereinafter cited as Zammit]. *But see* note 39 and accompanying text *infra*.

27. *See* note 18 *supra*. *See also* Brief for Appellant, *supra* note 10, at 5.

28. *See* Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 307 (1962) [hereinafter cited as Carrington].

29. *Id.* at 306. *See also* Folk & Moyer, *supra* note 5, at 780.

30. *See, e.g.*, *Harris v. Balk*, 198 U.S. 215 (1905) (debt may be attached wherever the defendant's debtor can be found even if the defendant is not subject to jurisdiction in the forum state). The majority impliedly struck down both *Harris* and *Pennoyer* when it declared that prior decisions inconsistent with the minimum contacts standard were overruled. 97 S. Ct. at 2585 n.39.

ments rendered against them by removing assets from the forum state; all valid in personam judgments are enforceable in sister states under the full faith and credit clause.³¹ The state where the defendant absconded with the assets also has the power to attach that property as security for a judgment rendered in the forum state where the suit was heard in harmony with the rules of *International Shoe*.³² In view of these existing safeguards, the claimed virtues of quasi in rem jurisdiction are totally unsubstantiated.³³

Though the Court stopped short of directly overruling *Pennoyer*, *Shaffer* effectively emasculated *Pennoyer's* in rem aspect, replacing it with a more realistic and reasonable minimum contacts test that considers the due process rights of the parties and the state in terms of fairness.³⁴ The switch to minimum contacts will be an improve-

31. 97 S. Ct. at 2583. U.S. CONST. art. IV, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." This constitutional provision means a valid final judgment is to be given the same force and effect in other states, with respect to the issues litigated in the forum state. Recognition and enforcement by sister states is not required, however, if judgment was entered by a court of the forum state without jurisdiction. C. MURPHY, JR., INTRODUCTION TO LAW, LEGAL PROCESS, AND PROCEDURE 45 (1977).

32. 97 S. Ct. at 2583. See also *Carolina Power and Light Co. v. Uranex*, 46 U.S.L.W. 2194 (N.D. Cal. 1977) (California may attach debt owed to defendant as security for suit properly brought in North Carolina; *Shaffer* cited).

33. See also *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1142-43 (3d Cir. 1976) (Gibbons, J., concurring). In *Jonnet*, the court of appeals affirmed a district court ruling dissolving a foreign attachment served in Pennsylvania on a New York bank, holding Pennsylvania's foreign attachment statutes an unconstitutional breach of the defendant's procedural due process rights. See generally Note, *Foreign Attachment Power Constrained—An End to Quasi In Rem Jurisdiction?*, 31 U. MIAMI L. REV. 419, 421 (1977).

It is of no importance that quasi in rem jurisdiction has traditionally been acquired using property unrelated to the underlying controversy. The Supreme Court has declared that the ancient lineage of a procedural rule cannot insure its constitutionality under the due process clause. 97 S. Ct. at 2584 (citing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969) (invalidating statute authorizing garnishment of wages without allowing debtor an opportunity to be heard or to defend before trial)).

34. Cf. *Simpson v. Loehmann*, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967) (lower court's exercise of quasi in rem jurisdiction upheld on basis of fairness and minimum contacts); *Bekins v. Huish*, 1 Ariz. App. 258, 262, 401 P.2d 743, 745 (1965) ("*Pennoyer v. Neff*, though never expressly overruled, is no longer in the mainstream of the constitutional law of this country"). See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 248 [hereinafter cited as Hazard].

Although *Shaffer* deals a staggering blow to the usual distinctions drawn between jurisdiction over the person and over property, these concepts may be too solidly entrenched in jurisprudence for quasi in rem jurisdiction to be completely eliminated. See generally Folk & Moyer, *supra* note 5, at 782. Yet, as shown in *Shaffer*, injustices may result where courts draw mechanical distinctions between in rem and in personam and use separate tests to regulate these two types of procedures. See Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 663 (1959). This classification system is ineffective where the case cannot

ment, for it will take into consideration numerous factors *Pennoyer* overlooked. Factors like the state's interest in hearing a suit (which Brennan viewed as crucial to determining if jurisdiction exists) and the convenience of the parties were irrelevant under *Pennoyer*, for its central concept was that jurisdiction depends solely on a court's physical power over the person or the property.³⁵ This traditional approach to jurisdiction cannot assure the plaintiff an appropriate forum and fails to shield the defendant from a capricious choice of forum. A minimum contacts inquiry, however, compels courts to analyze and balance the conflicting interests involved in order to reach a fair result in each case. The plaintiff is guaranteed an appropriate forum in which to bring his action while the defendant is protected against an unreasonable choice of forum.³⁶ Moreover, the judicial extension of the minimum contacts test to all exercises of state jurisdictional power will eliminate the "patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer*"³⁷ because its rigid categories proved unsuitable for certain types of litigation.³⁸

be easily pigeonholed within the standard in rem and in personam categories. See *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909, 955 (1960) [hereinafter cited as *Developments*]. It is more practical to apply one standard to all kinds of actions — in rem, in personam, and quasi in rem — and the flexible minimum contacts rule of *International Shoe* is unquestionably the most plausible standard.

35. 97 S. Ct. at 2579-80. Justice Holmes viewed physical power as the foundation of jurisdiction. *McDonald v. Mabee*, 243 U.S. 90, 91 (1915). Physical power is control over a person or thing actually present within the territorial limits of the state. Johnston, *The Fallacy of Physical Power*, 1 J. MAR. J. OF PRAC. AND PROC. 37, 47 (1967) [hereinafter cited as Johnston]. Under *Pennoyer*, a court's ability to render a judgment personally binding upon the defendant hinged on its power over the defendant's person. Thus in personam judgments were only valid where the defendant was physically within the territorial jurisdiction of the court. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). See *Folk & Moyer*, *supra* note 5, at 778. See also Johnston, *supra*, at 58. See generally *Developments*, *supra* note 34, at 956.

36. Although minimum contacts is preferable to sequestration as the test of state court jurisdiction, it is difficult to apply such a vague standard. Hazard, *supra* note 34, at 283. Quasi in rem jurisdiction, based purely and simply on the presence of property within the forum, avoids the uncertainty frequently associated with a contacts analysis. 97 S. Ct. at 2584. *But cf.* Carrington, *supra* note 27, at 309 (often proceedings based on quasi in rem jurisdiction produce significant amounts of uneconomical litigation unrelated to the merits). Procedural due process, however, is not meant to advance the interests of efficiency and simplicity by sacrificing fair play and substantial justice. 97 S. Ct. at 2584. See *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) (prejudgment replevin statutes that denied opportunity to be heard before seizure of property invalidated).

37. 97 S. Ct. at 2588 (Brennan, J., concurring and dissenting).

38. In *Hess v. Pawloski*, 274 U.S. 352 (1927), the Supreme Court stretched the territorial limitations of jurisdictional power imposed by *Pennoyer* to the breaking point. The increase

International Shoe, which enunciated the minimum contacts standard, requires only such contacts with the forum state as will make it reasonable to compel a person to defend in that jurisdiction.³⁹ Thus, the act or thing providing the nexus between the defendant and the forum need not always be the same as the one underlying the controversy, and minimum contacts requirements can be satisfied if some reasonable relationship exists between the out-of-state defendants, the suit, and the forum state.⁴⁰ Since *Shaffer* declared that *International Shoe's* minimum contacts rule applies to any attempt to secure jurisdiction over nonresidents or their interests in property, the question is whether quasi in rem remains a viable form of jurisdiction or has become meaningless in light of the minimum contacts inquiry.⁴¹ *Shaffer* effectively requires that courts

of interstate highway travel gave rise to more accidents involving nonresident drivers. The state courts were powerless to acquire in personam jurisdiction under *Pennoyer* once the nonresident left the state. To alleviate this problem the Court allowed the creation of a fiction referred to as the "motorists' consent theory." In using a state's roads, the motorist impliedly consented to the appointment of a particular state official as his agent to accept process. Because the agent could be personally served within the forum, the state courts gained in personam jurisdiction over the out-of-state traveller. *But see* note 52 *infra*.

39. 326 U.S. 310, 317. Often the property within the state, in and of itself, can furnish the minimum contacts needed for jurisdiction where it is related to the underlying controversy. The best example of such a situation is where disputed claims to the property generate the action. 97 S. Ct. at 2582.

40. *See, e.g.,* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (minimum contacts rule requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State . . ."). *See generally* *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930) (imposing a standard of reasonableness in determining whether nonresident defendant must submit to jurisdiction). *See also* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 309 (1970) [hereinafter cited as Comment].

41. Because there must now be minimum contacts between the forum, the property, and the defendant, quasi in rem may be a hollow concept. Given the minimum contacts between the forum and the defendant, it would appear that the forum could assert in personam jurisdiction over the defendant. Although the Court impliedly overruled *Harris v. Balk* (*see* note 30 *supra*), it is unclear whether the *Seider v. Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966), attachment device has also been invalidated. *Seider v. Roth* involved a suit by New York residents against a Quebec resident arising out of an accident in Vermont. The court found the automobile liability insurance policy, which a casualty insurance company had issued to the defendant, a "debt" owed to the defendant that could be seized in attachment.

In *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), the court applied *Shaffer* to a typical *Seider* situation. It interpreted *Seider* as judicially establishing a direct action statute, thus making the insurance company the defendant in *Seider*-type attachments. Therefore, the necessary "minimum contacts" need only be found between the suit, the forum, and the insurance company. Thus, if the insurance company was doing business in the forum, the requisite contact between the defendant and the forum was present, and the nonresident policyholder's contacts with the forum need not be considered. *Id.* at 1004.

have in personam jurisdiction before adjudicating any interests in property.

Having decided that minimum contacts is the proper test, the Court held that Delaware's assertion of quasi in rem jurisdiction, founded on the "presence" in the state of defendants' Greyhound stock, an intangible form of property,⁴² presented too few contacts with the controversy to meet due process requirements.⁴³ The majority could find no reasonable relationship in *Shaffer* to justify asserting jurisdiction; the record failed to show that any of the defendants had ever set foot in Delaware or that any act related to the plaintiff's complaint had occurred in Delaware.⁴⁴ But such a mechanical and quantitative analysis of the defendants' acts in the forum violates the spirit of *International Shoe*. The minimum contacts test requires a more searching evaluation of the facts and circumstances of each case to determine if it is fair to subject the defendants to suit in the forum state.⁴⁵

In his dissent, Justice Brennan attempted this sort of evaluation. He looked beyond the record and noted that the nonresident defendants, in voluntarily associating themselves with Delaware, received pecuniary benefits in return for assuming fiduciary responsibilities. Because of the defendants' alleged improprieties in per-

42. Arguably, Delaware's sovereign power to determine the situs of intangibles issued by a corporation totally dependent for its existence on Delaware law was judicially curtailed. However, this interference with the powers of the chartering state is justified, for Delaware, by allowing Greyhound to venture far from its borders and issue intangibles like common stock certificates outside its own jurisdiction, has relinquished its exclusive control over Greyhound. See also *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1139 (3d Cir. 1976) (Gibbons, J., concurring). More importantly, due process rules, as expressed in cases like *International Shoe*, limit the power of the state of incorporation to insist upon the fiction of a local situs for its intangibles. *Id.* at 1131 (Gibbons, J., concurring). See also *Atkinson v. Superior Ct.*, 49 Cal. 2d 338, 316 P.2d 960 (1957) (quasi in rem action justified on basis of fairness and minimum contacts), *appeal dismissed and cert. denied sub nom.* *Columbia Broadcasting Sys. v. Atkinson*, 357 U.S. 569 (1958).

43. Even prior to *Shaffer*, the courts refused to accept the idea that intangible property is always present within the territorial boundaries of the forum state for the purpose of acquiring in rem jurisdiction. See *Hanson v. Denckla*, 357 U.S. 235, 246-47 (1958); *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977). *Cf.* *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1137 (3d Cir. 1976) (Gibbons, J., concurring) (the use of a fictional situs for intangibles cannot justify an assertion of quasi in rem jurisdiction where there are admittedly insufficient contacts with the forum to support in personam jurisdiction). See also Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 *YALE L.J.* 241 (1939).

44. 97 S. Ct. at 2585.

45. *Id.* at 2580, 2591 (Brennan, J., concurring and dissenting). See note 36 and accompanying text *supra*.

forming these duties, the resident corporation suffered a serious financial setback.⁴⁶ Thus, there was nothing unreasonable in imposing the burden of defending in Delaware on the appellants. Moreover, it would be manifestly unfair to allow the appellants to escape prosecution in Delaware for their misdeeds, while acting on behalf of a Delaware corporation.

Assuming some contact between the forum and the defendant, the interest of Delaware in hearing the controversy offers further support for the position that minimum contacts were present here. The chartering state always has some recognizable interest in the litigation of controversies involving acts of its corporations since its law creates and regulates them. This state interest in overseeing the activities of resident companies is even greater where the suit is a derivative action brought for the benefit of local corporations.⁴⁷ If such an action must be brought in another state and conflict of laws principles should dictate the application of Delaware law, there is a danger that the courts of the foreign forums will tend to confuse Delaware corporation law and frustrate its interests. Permitting Delaware to adjudicate these suits helps insure uniform interpretation and application of that state's corporate laws which affect thousands of corporations operating throughout the United States. Moreover, if Delaware is unable to hear such derivative actions, many claims involving allegations of wrongdoings will never be heard since acquiring jurisdiction in foreign forums over corporate fiduciaries living thousands of miles away will become too expensive for all but a few wealthy shareholders.⁴⁸

In the final analysis, courts must evaluate assertions of jurisdiction by determining if it is fair to subject a nonresident to local suit.

46. 97 S. Ct. at 2591-92 (Brennan, J., concurring and dissenting).

47. See *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1139 (3d Cir. 1976) (Gibbons, J., concurring). See also *Gordon v. Michel*, 297 A.2d 420, 422 (Del. Ch. 1972) (Delaware has a valid interest in requiring defendant's appearance in derivative suits since the corporation is organized in Delaware and its activities are regulated by Delaware law). The majority did not evaluate the state's interests in hearing derivative suits because the sequestration statute was not specifically enacted to govern this type of action. See note 18 *supra*.

48. See 97 S. Ct. at 2591 & n.3 (Brennan, J., concurring and dissenting) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971)). See generally *Folk & Moyer, supra* note 5, at 795-96. The importance of Delaware corporation law is exemplified by the sheer number of American corporations it governs. One-half of the companies listed on the New York Stock Exchange and over one-third of those on the American Stock Exchange are incorporated in Delaware. National Division of the Wilmington Trust Co., *Why Delaware* (1973-74).

Thus, even if another state has a superior interest in hearing the controversy, as long as the forum's interest in permitting its courts to hear the controversy comports with "traditional notions of fair play and substantial justice," the constitutional rights of other states are not breached.⁴⁹ As Brennan declared, courts should be only concerned with "minimum" and not "best" contacts.⁵⁰

Although there is nothing unfair in Delaware's requiring officers and directors in a domestic corporation to submit to the chartering state's jurisdiction in derivative suits involving corporate affairs, the particular device used here to accomplish this worthwhile objective, sequestration, is cumbersome and inefficient and contravenes due process. After *Shaffer*, Delaware must devise a method of acquiring jurisdiction over nonresident corporate officials that involves little effort, cost, and delay, and is within constitutional limitations.⁵¹ The Court impliedly suggested that Delaware resolve this dilemma by using a consent statute, a method of gaining jurisdiction popular in other states. These statutes make acceptance of directorship the equivalent of consent to the chartering state's jurisdiction and have been held constitutionally sound.⁵²

Another possible solution is for Delaware to enact a special long-arm statute granting its courts in personam jurisdiction over nonresident directors and officers. The scope of the statute should limit jurisdictional power to litigation in which Delaware has a clear interest in furthering the uniform application and interpretation of its corporate laws, as in shareholder derivative suits involving local corporations.⁵³ This long-arm statute would undoubtedly meet with

49. See *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1140-41 (3d Cir. 1976) (Gibbons, J., concurring); *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930); Comment, *supra* note 40, at 338.

50. 97 S. Ct. at 2593 (Brennan, J., concurring and dissenting).

51. See generally *Folk & Moyer*, *supra* note 5, at 796-800.

52. See 97 S. Ct. at 2586 & n.47, citing as examples of consent statutes enacted in other jurisdictions: CONN. GEN. STAT. ANN. § 33-322 (West Supp. 1971); S.C. CODE § 33-5-70 (1976). The constitutionality of both consent statutes was upheld. *Weil v. Beresth*, 26 Conn. 428, 225 A. 2d 826 (1966); *Wagenberg v. Charleston Wood Prods.*, 122 F. Supp. 745 (E.D.S.C. 1954). Brennan objected to the use of consent statutes as possible foundations for jurisdiction for he saw them as a fictional outgrowth of *Pennoyer's* territorial limitations on a court's in personam jurisdiction. These laws should be cast aside now that the objectionable jurisdictional framework developed in *Pennoyer* has been eliminated. 97 S. Ct. at 2592 (Brennan, J., concurring and dissenting).

53. Long arm jurisdiction is the personal jurisdiction courts exert over nonresident defendants without obtaining personal service of process within the state and must be grounded on a constitutional long-arm statute. See ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN

constitutional approval. The Supreme Court has ruled that where a nonresident's activities are of special concern to the forum state, the nonresident may be subject to personal service of process.⁵⁴

Consent statutes and long-arm laws may not be perfect methods of securing jurisdiction over nonresident corporate fiduciaries. Unlike sequestration, however, both have been held a constitutional exercise of state power and thus are superior jurisdictional devices. It is important that a proper perspective be maintained with jurisdictional issues, for courts and lawyers must be reminded that jurisdiction is merely preliminary and should be resolved with minimal fanfare so that the merits of the case can be litigated without unnecessary delay.⁵⁵

Ted Tishman

STATE AND FEDERAL COURTS 375-79 (Official Draft 1969). See Folk & Moyer, *supra* note 5, at 798.

54. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (issuance by mail of a single life insurance policy was a sufficient contact for California to exercise jurisdiction over the nonresident insurer since California had a significant interest in overseeing insurance transactions negotiated with its residents).

55. See Comment, *supra* note 40, at 317.

