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## Shaffer V. Heitner: The Supreme Court Establishes A Uniform Approach To State Court Jurisdiction

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# NOTES & COMMENTS

## SHAFFER v. HEITNER: THE SUPREME COURT ESTABLISHES A UNIFORM APPROACH TO STATE COURT JURISDICTION

For a century, assertions of state court jurisdiction over persons and property have been governed by different standards.<sup>1</sup> The bifurcated approach to jurisdiction<sup>2</sup> has been most apparent subsequent to *International Shoe Co. v. Washington*<sup>3</sup> which required that the defendant have "minimum contacts"<sup>4</sup> with the forum as a prerequisite for in personam jurisdiction without overturning the notions of state sovereignty that had historically governed in rem and quasi in rem jurisdiction.<sup>5</sup> Recently, however, in *Shaffer v. Heitner*,<sup>6</sup> the Supreme Court rejected state sovereignty as a basis of in rem and quasi in rem jurisdiction<sup>7</sup> and declared that in rem and quasi in rem actions must meet the test of minimum contacts which applies to in personam jurisdiction.<sup>8</sup> *Shaffer* arose on appeal from a Dela-

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<sup>1</sup> The due process requirements of establishing jurisdiction over persons and property were first declared in *Pennoyer v. Neff*, 95 U.S. 714 (1877). For a discussion of the different tests for establishing jurisdiction over persons and property see text accompanying notes 18-32 *infra*.

<sup>2</sup> See *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1132-33 (3rd Cir. 1976) (Gibbons, J., concurring).

<sup>3</sup> 326 U.S. 310 (1945).

<sup>4</sup> The "minimum contacts" test rejected the rule that a person had to be "present" within a state to be subject to its jurisdiction. *Id.* at 316. After *International Shoe*, in personam jurisdiction was permissible if the defendant had contacts with the forum state such that maintenance of the suit was reasonable within the context of our federal system of government and did not offend "traditional notions of fair play and substantial justice." *Id.*

<sup>5</sup> *Id.* An in rem proceeding determines the rights and duties of *all* persons with respect to specific property within the court's jurisdiction. *Developments in the Law-State-Court Jurisdiction*, 73 HARV. L. REV. 909, 916 (1960) [hereinafter cited as *Developments-Jurisdiction*]. Quasi in rem jurisdiction also involves property and may be divided into two categories. The first classification encompasses actions which resolve the rights and duties of *particular* persons with respect to property under the court's jurisdiction. See, e.g., *Arndt v. Griggs*, 134 U.S. 316 (1890) (action to remove cloud on title to real property). In the second type of quasi in rem jurisdiction, the plaintiff asserts a claim unrelated to property against the nonresident owner by garnishing or attaching the property. The nonresident is thereby compelled either to enter the jurisdiction in question to defend or suffer a default judgment in the amount of the property which has been brought under the control of the court. *Developments-Jurisdiction*, *supra* at 949. Finally, in personam actions settle controversies between individuals amenable to personal jurisdiction. The presence of property within the forum state is not an issue in such actions. *Id.* at 916; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note at 190-92 (1971); text accompanying notes 18-32 *infra*.

<sup>6</sup> 433 U.S. 186 (1977).

<sup>7</sup> The theory that each state had exclusive jurisdiction and sovereignty over persons and property within its borders was enunciated in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); see note 18 *infra*.

<sup>8</sup> 433 U.S. at 212.

ware Supreme Court decision<sup>9</sup> which upheld the constitutionality of the Delaware sequestration statute.<sup>10</sup> The United States Supreme Court held that Delaware could not obtain quasi in rem jurisdiction over corporate fiduciaries in a shareholder derivative action solely by means of sequestering corporate stock which was owned by the defendants<sup>11</sup> and present in Delaware.<sup>12</sup> Applying the minimum contacts test to the facts of *Shaffer*, the Court further held that there were inadequate contacts between the defendants and the forum to satisfy the jurisdictional requirements of *International Shoe*.<sup>13</sup> By holding that quasi in rem jurisdiction can no longer be sustained solely on the basis of property present in the forum state,<sup>14</sup> *Shaffer* casts doubt on the future of quasi in rem jurisdiction<sup>15</sup> and on the utility of sequestration as a method of centering corporate litigation in Delaware.<sup>16</sup> By restricting the ability of states to exercise jurisdiction over nonresidents, *Shaffer* significantly modifies the Supreme Court's established trend of expanding the bases of state court jurisdiction.<sup>17</sup>

The seminal case concerning the parameters of state court jurisdiction is *Pennoyer v. Neff*.<sup>18</sup> *Pennoyer* declared that jurisdiction rested on the

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<sup>9</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976).

<sup>10</sup> DEL. CODE tit. 10, § 366 (1974). The sequestration statute grants the Delaware Court of Chancery the authority to compel the appearance of a nonresident after the filing of a complaint by seizing all or any part of the defendant's property present within the state. *Id.* Should the defendant fail to appear, or otherwise default, the property may be sold to satisfy the plaintiff's claim. *Id.* If the defendant enters a general appearance and moves to release the property, his request will be granted unless the plaintiff proves that there is a reasonable possibility that the release will substantially reduce the likelihood that he will obtain satisfaction of any judgment rendered in his favor. *Id.*; see note 37 *infra*.

<sup>11</sup> The defendants were shareholders in the Greyhound Corporation, a Delaware corporation which maintained its principal place of business in Phoenix, Arizona. 433 U.S. at 189.

<sup>12</sup> DEL. CODE tit. 8, § 169 (1974) states that "[f]or all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this state . . . the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." (emphasis added).

<sup>13</sup> 433 U.S. at 213-16.

<sup>14</sup> *Id.* at 212.

<sup>15</sup> See text accompanying notes 73-77 *infra*.

<sup>16</sup> In response to *Shaffer*, the Delaware legislature promptly enacted a long-arm statute affording jurisdiction over nonresident directors on the basis of implied consent. Jacobs & Stargatt, *The New Delaware Director Consent-to-Service Statute*, 33 *Bus. Law* 701 (1978) [hereinafter cited as Jacobs & Stargatt]. Since the sequestration statute remains as an alternative means of obtaining jurisdiction over corporate directors, *id.* at 707-08, it is still worthwhile to discuss the drawbacks of its use. See text accompanying notes 107-18 *infra*.

<sup>17</sup> See text accompanying notes 18-32 *infra*.

<sup>18</sup> 95 U.S. 714 (1877). *Pennoyer* held that states had mutually exclusive sovereignty to adjudicate controversies regarding persons and property physically present within their respective borders. *Id.* at 722. Therefore, under the "presence" theory of jurisdiction, a state was powerless to exercise in personam jurisdiction over an individual absent from the state by means of extraterritorial service of process. Similarly, *Pennoyer* held that in the case of in rem or quasi in rem actions, a state court could obtain jurisdiction over the property in question only by means of attachment at the commencement of the action. *Id.* at 733. The *Pennoyer* Court reasoned that attachment was necessary to bring property within the control of the court and also performed the function of notifying the nonresident property owner of

basis of a state's sovereignty over persons and property within its borders.<sup>19</sup> The *Pennoyer* rule was both simple and uniform since it applied to persons and property alike and recognized the presence of either in the forum state as the sole criterion for jurisdiction.<sup>20</sup> Although the "presence" or "territorial" theory of jurisdiction remained valid until *Shaffer*,<sup>21</sup> courts soon after *Pennoyer* recognized that "presence" was an inadequate basis for making jurisdictional decisions in some cases.<sup>22</sup> Consequently, exceptions to the "presence" theory were developed for nonresident motorists who caused tortious injury within the forum state<sup>23</sup> and with respect to

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the action involving his property. *Id.* at 727. After *Pennoyer*, actual notice to nonresidents was no longer required in quasi in rem or in rem actions since seizure of property or its equivalent was considered adequate to satisfy due process notice requirements. See *Ballard v. Hunter*, 204 U.S. 241, 262 (1907). See generally *Hazard, A General Theory of State-Court Jurisdiction*, 1965 SUP. CR. REV. 241, 262-72 (1965) [hereinafter cited as *Hazard*]. But see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (actual notice or notice reasonably calculated to inform nonresident of action required in *all* actions); see note 32 *infra*.

<sup>19</sup> 95 U.S. at 722.

<sup>20</sup> *Green, Jurisdictional Reform in California*, 21 HARV. L.J. 1219, 1227 (1970) [hereinafter cited as *Green*].

<sup>21</sup> See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Security Sav. Bank v. California*, 263 U.S. 282, 285-87 (1923); *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269, 271-72 (1917).

<sup>22</sup> Under the "presence" theory, a plaintiff could not acquire personal jurisdiction in his home state over a nonresident tortfeasor unless the nonresident could be personally served in that state. Consequently, tortious injuries inflicted by nonresidents often went unredressed unless the plaintiff was able to bear the cost of bringing suit in a foreign forum. See text accompanying notes 23-27 *infra*. The rule that the presence of an individual's property in the forum state justified jurisdiction over the individual's interest in the property was particularly useful, however, as a means of acquiring quasi in rem jurisdiction over a nonresident through jurisdictional attachment. *Zammit, Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHNS L. REV. 668, 670 (1975) [hereinafter cited as *Zammit*]; see note 5 *supra*.

The landmark case involving quasi in rem jurisdiction is *Harris v. Balk*, 198 U.S. 215 (1905). *Harris* held that the obligation of a debtor to pay his debt was property of his creditor which accompanied the debtor at all times and could be garnished for purposes of acquiring quasi in rem jurisdiction over the creditor in any state in which the debtor could be served. *Id.* at 222-23. See generally *Green, supra* note 20, at 1222-26. The *Shaffer* Court stated that *Harris* did not comport with modern notions of fair play and substantial justice since, if a direct assertion of jurisdiction over the defendant by means of personal service was unconstitutional, an indirect assertion of jurisdiction over the defendant by means of attachment of his property was equally impermissible. *Shaffer v. Heitner*, 433 U.S. at 209; see note 88 *infra*. See also *Zammit, supra* at 671.

<sup>23</sup> *Hess v. Pawloski*, 274 U.S. 352 (1927) marked the first break with *Pennoyer's* territorial power notions by upholding the constitutionality of a Massachusetts statute which provided that nonresident motorists impliedly designated the Massachusetts Secretary of State as agent to accept service of process for actions arising out of the nonresident's use of Massachusetts highways. Although the Court rationalized this assertion of jurisdiction on the theory of the motorist's implied consent, the real basis of jurisdiction was the power of a state to regulate potentially dangerous activities. *Green, supra* note 20, at 1230, citing *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 341 (1953). After *Hess*, the Court held service on the motorist's agent alone unconstitutional and required actual notice to the nonresident. *Wucher v. Pizzutti*, 276 U.S. 13, 19 (1928).

corporations whose business activities reached beyond the borders of their state of incorporation.<sup>24</sup> Jurisdiction was also permitted over nonresidents not present within the forum who were engaged in certain exceptional activities such as the sale of insurance<sup>25</sup> and securities.<sup>26</sup> The territorial restrictions of *Pennoyer* were dispensed with for purposes of acquiring personal jurisdiction in *International Shoe v. Washington*.<sup>27</sup> *International Shoe* rejected the rule of mutually exclusive state sovereignty and introduced a radically different approach<sup>28</sup> which focused not on state power but on the quality and nature of the defendant's relationship with the forum.<sup>29</sup>

The inconsistency between the criteria for in personam and in rem jurisdiction has been most evident subsequent to *International Shoe* because *International Shoe* did not repudiate the notion of state sovereignty altogether.<sup>30</sup> Consequently, a state could continue to assert quasi in rem jurisdiction over a nonresident property owner and thereby enter a binding judgment against him in the amount of his property interest notwithstanding the fact that the nonresident did not have sufficient contacts with the state to be subject to in personam jurisdiction.<sup>31</sup> Although there were alter-

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<sup>24</sup> Actual physical presence of a corporation in the forum was not required in order to render the corporation amenable to personal jurisdiction. Instead, the nonresident corporation was deemed subject to jurisdiction if the corporation was "doing business" in the forum state. See *International Harvester Co. v. Kentucky*, 234 U.S. 579, 583, 589 (1914); *St. Clair v. Cox*, 106 U.S. 350 (1882). See generally *Developments-Jurisdiction*, *supra* note 5, at 916-48.

<sup>25</sup> *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957) ("doing business" test applied expansively where defendant was engaged in the sale of insurance, an activity in which the state had a strong regulatory interest); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647-49 (1950) (recognizing the legitimate state interest in regulating insurance companies doing business in the state and in protecting resident policyholders); *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U.S. 147, 158 (1903) ("implied consent" and "doing business" rationales utilized in acquiring jurisdiction over a nonresident insurance company).

<sup>26</sup> See, e.g., *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935) (state's interest in providing a forum for its citizens with respect to actions arising out of the sales of securities recognized); see note 96 *infra*.

<sup>27</sup> 326 U.S. 310 (1945).

<sup>28</sup> *Zammit*, *supra* note 22, at 673. The *International Shoe* rule was a substantial departure from *Pennoyer* since it placed emphasis on the reasonableness of jurisdiction with respect to the parties and not solely on the presence of the defendant within the forum. *Id.*

<sup>29</sup> *International Shoe* adopted the rule of minimum contacts as a basis of in personam jurisdiction. See note 4 *supra*. *International Shoe* required that jurisdiction be determined by balancing the quality and nature of the defendant's contacts with the forum with the plaintiff's desire to maintain the cause of action in a convenient forum and the state's interests in adjudicating the controversy. See *Shaffer v. Heitner*, 433 U.S. at 203-04. Although *International Shoe* emphasized fairness and the qualitative nature of the defendant's relationship with the forum, the lack of a more definitive test for making jurisdictional decisions has created confusion regarding the limitations of in personam jurisdiction. Comment, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 311 (1970) [hereinafter cited as *Long-Arm and Quasi In Rem Jurisdiction*].

<sup>30</sup> 326 U.S. at 316 (rejection of "presence" theory restricted to in personam jurisdiction); cf. *Hanson v. Denckla*, 357 U.S. 235, 246 (1958) (in rem jurisdiction of a state court limited only by the extent of the state's power and the coordinate power of other states). See note 32 *infra* discussing *Hanson*.

<sup>31</sup> An action, whether classified as in rem or in personam, ultimately resolves the rights

ations in some aspects of the jurisprudential framework defining the proper exercise of state court jurisdiction subsequent to *International Shoe*,<sup>32</sup> the inconsistency among the tests of in personam, in rem, and quasi in rem jurisdiction was not eliminated until *Shaffer*.

*Shaffer* arose as a shareholder's derivative suit brought by a nonresident in the Delaware Court of Chancery.<sup>33</sup> Named as defendants were the Greyhound Corporation, its wholly owned subsidiary Greyhound Lines, and twenty-eight present and former officers and directors of the two corporations.<sup>34</sup> The plaintiff alleged that the individual defendants had violated their fiduciary duties to Greyhound by causing the company to engage in actions that resulted in substantial corporate liability in a private

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and duties of individuals. *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814, *appeal dismissed*, 179 U.S. 405 (1900). Although a quasi in rem judgment is limited to the value of the defendant's property in the forum, the judgment is binding on the defendant's interest in the property and is just as effective as an in personam judgment in situations where the value of the defendant's property is equal to or in excess of the plaintiff's claim. Therefore, compelling a nonresident to submit to the jurisdiction of a court by means of attachment is unjust if there is insufficient justification for adjudicating the interests of the nonresident through in personam jurisdiction. See 433 U.S. at 207; *Cheshire Nat'l Bank v. Jaynes*, 224 Mass. 14, 112 N.E. 500 (1916); *Hook v. Hoffman*, 16 Ariz. 540, 554, 147 P. 722, 728 (1915); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135 (1966) [hereinafter cited as von Mehren & Trautman]; Zammit, *supra* note 22, at 670; *Developments-Jurisdiction*, *supra* note 5, at 948.

<sup>32</sup> In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), an action to settle the account of a trustee in a common trust fund, the Court held that service by publication was an unconstitutional means of notifying nonresident trust beneficiaries. By requiring that notice reasonably calculated to inform the defendant of an action must be afforded regardless of whether the action be classified as in rem or in personam, *Mullane* rejected the *Pennoyer* rule that the seizure of property necessarily provided adequate notice to a nonresident of an action in rem or quasi in rem. *Id.* at 315; see note 18 *supra*.

The Court cast further doubt on the efficacy of categorizing actions as in rem, quasi in rem, or in personam for purposes of resolving jurisdictional questions and foreshadowed an entirely new approach to quasi in rem jurisdiction in *Hanson v. Denckla*, 357 U.S. 235 (1958). *Hanson* considered the issue of whether a Florida court had jurisdiction to resolve disputed ownership claims to a Delaware trust fund established by a Florida resident, despite the absence of the nonresident trustee. After stating that Florida had neither personal jurisdiction over the trustee nor in rem jurisdiction over the trust fund, the Court held that "a [s]tate may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or *quasi in rem*) . . . [absent] affiliating circumstances." *Id.* at 245-46. The Court further held that in order to exercise jurisdiction over a nonresident "it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Id.* at 253; see, e.g., *Atkinson v. Superior Court*, 49 Cal.2d 338, 316 P.2d 960 (1957), *appeal dismissed*, 357 U.S. 569 (1958). *Atkinson* also involved claims to a trust fund. The California court, however, dispensed with the task of trying to establish the fictional situs of an intangible res, 316 P.2d at 964, and resolved the jurisdictional issue by examining the "totality of contacts" among the parties, the trust fund, and the state. *Id.* at 965; see Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

<sup>33</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225, 228 (Del. 1976).

<sup>34</sup> 433 U.S. at 189-90.

antitrust suit<sup>35</sup> and a large fine in a criminal contempt action.<sup>36</sup> In order to compel the appearance of the individual defendants, plaintiff moved to sequester shares of Greyhound stock owned by the defendants.<sup>37</sup> Subsequently, the defendants moved to vacate the sequestration order on the grounds that the *ex parte* sequestration procedure<sup>38</sup> did not accord them due process of law<sup>39</sup> and that the property seized was not capable of attachment in Delaware.<sup>40</sup> The defendants also maintained that under the rule

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<sup>35</sup> See *Mt. Hood Stages, Inc. v. Greyhound Corp.*, No. 68-374 (D. Ore., filed Nov. 29, 1973), *aff'd*, 555 F.2d 687 (9th Cir. 1977) (judgment of \$13,146,090 plus attorneys fees entered against Greyhound).

<sup>36</sup> See *United States v. Greyhound Corp.*, 363 F. Supp. 525 (N.D. Ill. 1973), 370 F. Supp. 881 (N.D. Ill. 1973), *aff'd*, 508 F.2d 529 (7th Cir. 1974) (Greyhound fined \$100,000 and Greyhound Lines \$500,000).

<sup>37</sup> Sequestration is the equitable counterpart of foreign attachment, *Garretson v. Garretson*, 306 A.2d 737 (Del. 1973); *Canta v. Sachs*, 18 Del. Ch. 359, 162 A. 73 (1932), and is accomplished pursuant to DEL. CODE tit. 10, § 366 (1974). See note 10 *supra*. The sole purpose of sequestration is to compel the general appearance of a nonresident in order that the Court of Chancery may exercise personal jurisdiction. *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A.2d 428, 431 (1963).

A sequestration order is not entered unless the complaint indicates that the defendant is a nonresident of Delaware. The complaint must also be accompanied by an affidavit stating, *inter alia*, the defendant's last known address, a description of the nature and value of the property sought to be seized, the nature of the defendant's title or interest in the property, and the source of the affiant's information. DEL. CH. CT. R. 4(db)(1974). If the conditions of the sequestration procedure are satisfied and the plaintiff properly files any bonds that are required, *id.* at (db)(2), the Chancellor grants the sequestration order as a matter of right. *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A.2d, 428, 431-32 (1963). *Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 754-55 (1973) [hereinafter cited as *Folk & Moyer*]. Although any property may be sequestered under the statute, usually the procedure is utilized with respect to stock in a Delaware corporation. *Gordon v. Michel*, 297 A.2d 420, 421 (Del. Ch. 1972); *Folk & Moyer, supra* at 749. Seizure is accomplished by issuing "stop transfer" notices to the corporations whose stock is involved and placing notations on corporate records indicating that the shares are being held pursuant to court order. DEL. CH. CT. R. 4(db)(3)(a),(b)(1974). The corporation is directed to recognize no transfer of the seized shares. *Id.* Subsequently, the defendant, having been notified of the sequestration by mail, may move to dismiss the sequestration order for lack of jurisdiction or noncompliance with the procedural requirements for sequestration. *Canaday v. Superior Court*, 49 Del. 456, 119 A.2d 347 (1955). The defendant may also enter a general appearance. Otherwise, the defendant is held in default. *Schwartz v. Miner*, 36 Del. Ch. 481, 133 A.2d 599 (1957).

<sup>38</sup> The sequestration procedure is characterized as *ex parte* because prior to the issuance of the sequestration order the nonresident is not afforded notice or an opportunity to be heard. *Gordon v. Michel*, 297 A.2d 420 (Del. Ch. 1972); DEL. CODE tit. 10, § 366(a) (1974).

<sup>39</sup> The defendants alleged that the requirements of pre-seizure notice and hearing dictated by *North Georgia 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); and *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969) were applicable to jurisdictional attachment. See text accompanying note 54 *infra*.

<sup>40</sup> The defendants contended that since the certificates representing their shares in the Greyhound Corporation were not physically present in Delaware, the shares could not be constitutionally attached by a Delaware court. Therefore, the defendants argued, DEL. CODE tit. 8, § 169 (1974), which declared Delaware the situs of shares in Delaware corporations for purposes of attachment, was unconstitutional. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 236 (Del. 1976); see note 12 *supra*.

of *International Shoe*,<sup>41</sup> they did not have adequate contacts with Delaware to support the jurisdiction of that state's courts.<sup>42</sup>

The Court of Chancery rejected all of the above defenses,<sup>43</sup> and was later affirmed by the Delaware Supreme Court.<sup>44</sup> In addressing the defendants' due process challenge, the Delaware Supreme Court stated that sequestration qualified as an "extraordinary" use of attachment<sup>45</sup> since the procedure was designed to acquire jurisdiction over a nonresident and not to provide security for the plaintiff.<sup>46</sup> The court further reasoned that the procedure did not violate due process requirements of preseizure notice and hearing.<sup>47</sup> In addition, the court held that the defendants owned property subject to attachment since Delaware law declared Delaware the situs of stock in Delaware corporations.<sup>48</sup> On the basis of the defendants' owner-

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<sup>41</sup> See notes 4 & 29 *supra*.

<sup>42</sup> *Shaffer v. Heitner*, 433 U.S. at 193. The defendants contended that the situs of the shares alone did not constitute sufficient contacts with Delaware.

<sup>43</sup> *Heitner v. Greyhound Corp.*, No. 4514 (Del. Ch. filed May 12, 1975).

<sup>44</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976).

<sup>45</sup> The court relied on *Ownbey v. Morgan*, 256 U.S. 94 (1921) which upheld the constitutionality of a provision of a former Delaware sequestration statute requiring a defendant whose property had been sequestered to post bail for the discharge of the seized property prior to appearing to defend on the merits. *Id.* at 112. In addition, the Delaware court relied on a reference to *Ownbey* in *Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972). The Supreme Court in *Fuentes* held that all deprivations of property must be preceded by adequate notice and hearing, but noted an exception to this rule in the case of jurisdictional attachment. See note 54 *infra*. Since *Fuentes* stated that securing jurisdiction over a nonresident by means of attachment was "clearly a most basic and important public interest," *id.*, and therefore an "extraordinary situation," the Delaware court upheld the validity of sequestration. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229-32 (Del. 1976).

The implication of the reference in *Fuentes* to *Ownbey* is not clear since *Ownbey* specifically addressed *only* the bail requirement of sequestration and not the constitutionality of jurisdictional attachment. See *In re Law Research Serv., Inc.*, 386 F. Supp. 749, 752-54 (S.D.N.Y. 1974). In broad dictum, however, *Ownbey* approved of jurisdictional attachment without prior notice and hearing. *Ownbey v. Morgan*, 256 U.S. 94, 102-12 (1921); see *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1127 (3rd Cir. 1976); *Folk & Moyer*, *supra* note 37, at 344. Commentators urge that the *Fuentes* Court cited *Ownbey* merely as an historical example in which an assertion of jurisdiction by attachment was necessary to satisfy a special state interest and did not intend to endorse jurisdictional attachment per se. Comment, *Quasi In Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023, 1029-31 (1973). See generally *Shaffer v. Heitner*, 433 U.S. at 194 n.10. Furthermore, jurisdictional attachment seldom satisfies a special state interest since long-arm statutes are now available as an alternative means of acquiring jurisdiction over nonresidents. Comment, *Foreign Attachment After Sniadach and Fuentes*, 73 COLUM. L. REV. 342, 352 (1973) [hereinafter cited as *Foreign Attachment*]; see note 54 *infra*.

<sup>46</sup> See note 37 *supra*.

<sup>47</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225, 231-32 (Del. 1976). The Delaware court held that the safeguards against a mistaken deprivation of property dictated by *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975) and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 608-10 (1974) were satisfied under the sequestration statute. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 232-35 (1976); see note 54 *infra*.

<sup>48</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976), citing DEL. CODE tit. 8, § 169 (1974). The Delaware court upheld the constitutionality of the stock situs statute on the basis of two Supreme Court cases recognizing the authority of a state to establish situs of



ship of property in Delaware, the court deemed the defendants amenable to quasi in rem jurisdiction.<sup>49</sup> Finally, the court rejected the argument that the defendants lacked sufficient contacts with Delaware to support jurisdiction by declaring that quasi in rem jurisdiction was founded on the presence of the stock alone, not on prior contacts of the defendants with the state.<sup>50</sup>

The Supreme Court reversed the Delaware decision on the grounds that quasi in rem jurisdiction based solely on the presence of property in the forum state is inherently unfair to nonresident defendants and fails to comport with modern jurisdictional standards established by *International Shoe* and subsequent cases.<sup>51</sup> After announcing that all assertions of state court jurisdiction must satisfy the minimum contacts guidelines of *International Shoe*,<sup>52</sup> the Court concluded that quasi in rem jurisdiction could not be obtained in conjunction with sequestration of the facts of *Shaffer* since the only contact between the defendants and the forum was their ownership of stock in a Delaware corporation.<sup>53</sup> The Court, in resting its holding on the minimum contacts issue, did not resolve the question of whether sequestration necessarily results in an unconstitutional deprivation of property.<sup>54</sup>

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shares, *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) and *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1 (1900).

<sup>49</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976).

<sup>50</sup> *Id.*

<sup>51</sup> 433 U.S. at 212.

<sup>52</sup> In light of the *Shaffer* holding that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," *id.*, (emphasis supplied), personal jurisdiction obtained by serving a nonresident while he is making a brief or fortuitous appearance in the forum may be unconstitutional if the state has no interest in adjudicating the controversy and "minimum contacts" are otherwise lacking. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

<sup>53</sup> 433 U.S. at 213.

<sup>54</sup> The Court deemed a resolution of the due process issue unnecessary since the case could be disposed of solely on jurisdictional grounds. See *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Since *Shaffer* does not hold sequestration unconstitutional per se, the sequestration statute is still subject to challenge on due process grounds. See generally *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142, 156 (3rd Cir. 1976), cert. denied, 97 S. Ct. 2972 (1977) (dismissed action initiated by sequestration on grounds of lack of minimum contacts to support jurisdiction without addressing due process argument), noted at 8 RUT.-CAM. L.J. 692 (1977); *Barber-Greene Co. v. Walco Nat'l Corp.*, 428 F. Supp. 567 (D. Del. 1977) (noted probable constitutionality of sequestration but held quasi in rem jurisdiction improper because of insufficient contacts of the defendant with the forum; due process issue, however, not resolved).

Sequestration has been upheld against due process arguments many times. See, e.g., *Gordon v. Michel*, 297 A.2d 420 (Del. Ch. 1972); *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A.2d 365 (1955); see note 45 *supra*. Recent Supreme Court cases, however, which have restricted the use of attachment as a pre-judgment security device for creditors, call into question the constitutionality of jurisdictional attachment. *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1127 (3rd Cir. 1976). In *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), the Court held unconstitutional a pre-judgment wage garnishment statute on the grounds that

The *Shaffer* Court premised its holding on the proposition that jurisdictional principles no longer rested securely on the foundations of *Pennoyer*.<sup>55</sup> Although the *Pennoyer* "presence" rule had been rejected with respect to in personam actions,<sup>56</sup> the rule continued to permit quasi in rem actions which adjudicated the interests of persons in property in situations where nonresident property owners were often not amenable to personal jurisdiction.<sup>57</sup> The *Shaffer* court reasoned that since the standard for determining

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it violated the due process requirement of notice and hearing prior to the seizure of property. Later, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), due process protection was expanded to prohibit any temporary deprivation of a possessory property interest absent notice and hearing. More recently, however, the Court has permitted seizure of property for purposes of protecting a creditor's security interest prior to hearing and notice provided there are other adequate safeguards against a mistaken seizure. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) (procedural safeguards test requires that absent notice and hearing, a writ of attachment may issue as a security device only at the discretion of a judicial officer; the complaint requesting the writ must be accompanied by an affidavit containing facts indicating that the plaintiff is entitled to the writ; and the defendant must have an immediate opportunity for a post-seizure hearing); see, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (garnishment statute held unconstitutional for lack of compliance with procedural safeguards required by *Mitchell*). See generally Newton, *Procedural Due Process and Prejudgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 WASH. & LEE L. REV. 65 (1977); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

Of particular importance with respect to the sequestration procedure is language in *Fuentes* that jurisdictional attachment is permissible provided the attachment satisfies an important state or general public interest. Furthermore, there must be strict state supervision of the attachment process coupled with a need for prompt action. *Fuentes v. Shevin*, 407 U.S. at 90-92; see note 45 *supra*. Although the *Fuentes* Court did not clearly define "strict state supervision" of the attachment process, other courts indicate that this requirement is co-extensive with the procedural safeguards test developed by *Mitchell* and *Di-Chem*. *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1129 (3rd Cir. 1976); *Aaron Ferer & Sons Co. v. Berman*, 431 F. Supp. 847, 852 (D. Neb. 1977); see *In re Law Research Serv., Inc.*, 386 F. Supp. 749, 754-55 (S.D.N.Y. 1974). One court in upholding the sequestration statute against due process challenge, has applied the *Mitchell* guidelines. *U.S. Indus., Inc. v. Gregg*, 348 F. Supp. 1004, 1016-23 (D. Del. 1972), *rev'd on other grounds*, 540 F.2d 142 (3rd Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977). Decisions prior to *Shaffer* upholding sequestration, however, assume that jurisdictional attachment satisfies the "extraordinary situation" requirement of *Fuentes*. See note 45 *supra*.

*Shaffer* appears to nullify the "extraordinary situation" rule of *Fuentes* since the *Shaffer* Court declared quasi in rem jurisdiction subject to the same test of minimum contacts applied to in personam jurisdiction. See *Schreiber v. Republic Intermodal Corp.*, 375 A.2d 1285, 1290 n.7 (Pa. 1977). After *Shaffer*, if a state has a long-arm statute sufficiently broad in scope to acquire jurisdiction over a nonresident, quasi in rem jurisdiction becomes superfluous. See *Zammit*, *supra* note 22, at 681. Therefore, no special governmental or general public interest is satisfied by obtaining jurisdiction by means of attachment. *Id.* Nevertheless, it is arguable that quasi in rem jurisdiction obtained under attachment statutes, such as the sequestration statute, may still be necessary, assuming minimum contacts are present, if a state's long-arm statute is not broad enough to afford in personam jurisdiction over the nonresident. See text accompanying notes 73-77 & 93 *infra*. Alternatively, sequestration may be used as a security device so long as the procedural safeguards required by *Fuentes* and *Mitchell* are met. See text accompanying notes 111-18 *infra*.

<sup>55</sup> *Shaffer v. Heitner*, 433 U.S. at 206.

<sup>56</sup> *International Shoe Co. v. Washington*, 326 U.S. at 316; see note 29 *supra*.

<sup>57</sup> 433 U.S. at 204-05.

jurisdiction to adjudicate personal interests was the minimum contacts test of *International Shoe*, this test should be applied uniformly and without regard to the classification of the action.<sup>58</sup> Therefore, the Court rejected the *Pennoyer* rationale and held that the presence of property in the forum does not automatically confer jurisdiction over the owner's interest in the property.<sup>59</sup> Nevertheless, *Shaffer* acknowledged that property may contribute to the existence of jurisdiction by providing contacts among the defendant, the forum, and the litigation.<sup>60</sup>

Consequently, under the uniform approach to state court jurisdiction established by *Shaffer*, jurisdiction will exist with respect to in rem actions since property is the source of the underlying controversy, except in unusual situations.<sup>61</sup> Furthermore, in in rem actions, jurisdiction is fair to the parties involved since the forum state has strong interests in regulating the ownership of property and the defendant's claim to the property indicates that he intended to benefit from the state's protection of his property interests.<sup>62</sup> For identical reasons, minimum contacts generally exist in quasi in rem actions if the property in question is the source of the underly-

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<sup>58</sup> *Id.* at 207; see note 31 *supra*.

<sup>59</sup> 433 U.S. at 212. The Court's reasoning is questionable, however, when the property involved is realty or tangible personalty. See text accompanying notes 80-89 *infra*.

<sup>60</sup> 433 U.S. at 207; see Hazard, *supra* note 18, at 282. See generally Note, *Ownership, Possession or Use of Property as a Basis of In Personam Jurisdiction*, 44 IOWA L. REV. 374, 375-82 (1959) [hereinafter cited as *Property as a Basis of In Personam Jurisdiction*].

<sup>61</sup> 433 U.S. at 207. For example, a state is powerless under the Constitution to exercise jurisdiction over a chattel engaged in interstate commerce absent a pressing public safety need. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, comment a, at 192; § 60 (1971). In addition, if a chattel is brought into a state by fraud, for use in a judicial proceeding, or without the owner's consent, a state cannot adjudicate ownership rights because of the danger that the nonresident owner might be unjustly divested of his ownership rights without a hearing or opportunity to defend. *Id.* See generally Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 672-73 (1959); Note, *The Power of a State to Affect Title in a Chattel Atypically Removed to It*, 47 COLUM. L. REV. 767 (1947).

<sup>62</sup> *Id.* When interests in property are adjudicated, the presence of the res is of substantial jurisdictional significance because the res is the subject of the controversy. Moreover, in cases dealing with realty or immovable personalty, the state where the property lies is not only the most rational forum to hear the case but the only forum with the power to resolve title disputes. *Taylor v. Taylor*, 192 Cal. 71, 76, 218 P. 788 (1923); see Note, *Jurisdiction Quasi In Rem: A New Basis for Jurisdiction Over Intangibles in California*, 46 CAL. L. REV. 637, 639 n.14 (1958) (in actions dealing directly with land, the location of the res is the only contact with the forum necessary to justify jurisdiction). Therefore, actions to register title to land, see e.g., *American Land Co. v. Zeiss*, 219 U.S. 47 (1911); *Tyler v. Court of Registration*, 175 Mass. 71, 55 N.E. 812, appeal dismissed, 179 U.S. 405 (1900); to bring an ejectment, see, e.g., *Green*, *supra* note 20, at 1222 n.8, citing RESTATEMENT OF JUDGMENTS § 32, comment a, at 128 (1942); to condemn, see, e.g., *Huling v. Karn Valley Ry. & Improvement Co.*, 130 U.S. 559 (1889), to confiscate, see e.g., *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1873); or to escheat real property, see, e.g., *Christianson v. King County*, 239 U.S. 356 (1915); *Hamilton v. Brown*, 161 U.S. 256 (1896), will likely be unaffected by *Shaffer*. In escheat cases dealing with intangible property, however, the minimum contacts test may be inapplicable since more than one state may assert claims to the property sufficient to satisfy the minimum contacts test. *Texas v. New Jersey*, 379 U.S. 674 (1965); see Hazard, *supra* note 18 at 283-84.

ing dispute.<sup>63</sup> As the Court suggested, *Shaffer* will primarily affect quasi in rem actions in which the controversy adjudicated bears no relation to the defendant's property in the forum.<sup>64</sup> In this situation, since property alone does not establish jurisdiction, there must be other contacts upon which jurisdiction can be based.<sup>65</sup>

In *Shaffer*, since the sequestered stock was not the source of the underlying controversy, the Court made an independent minimum contacts analysis.<sup>66</sup> Thus, the Court examined the contacts of the defendants with Delaware, the relationship of the cause of action with the forum, and the asserted interest of Delaware in resolving the dispute.<sup>67</sup> Reversing the judgment of the Delaware Supreme Court, the majority noted that the actions upon which the derivative suit was based did not occur in Delaware,<sup>68</sup> the

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<sup>63</sup> 433 U.S. at 208. The only distinction between in rem actions and quasi in rem actions in which property is the subject of the controversy is that the former settles the issue of ownership with respect to all persons whether parties to the action or not while a judgment in the latter only binds the parties to the action. See note 5 *supra*. In in rem and quasi in rem actions where the property is the subject of the litigation, the quality and nature of the contacts with the forum and the interests of the parties are basically the same for jurisdictional purposes. Therefore, actions to remove a cloud to the title of realty, see, e.g., *Arndt v. Griggs*, 134 U.S. 316 (1890), or to resolve disputed ownership claims to tangible personalty, see, e.g., *Educational Studios, Inc. v. Consolidated Pictures Indus.*, 112 N.J. Eq. 352, 164 A. 24 (1933); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, Introductory Note at 191-92; §§ 56 & 59 (1971), should satisfy the minimum contacts test.

If the property involved is intangible and the res is not indisputably located in the forum, the minimum contacts inquiry must focus on the nature of the dispute and the relationship between the parties and the forum. Emphasis should not be placed on the location of the intangible since establishing the situs of an intangible is often an exercise in futility. Moreover the transitory nature of intangible property suggests that the owner has insignificant contacts with the forum. See Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075, 1111-16 (1968). In the case of trust funds, the forum where the trust is located usually has a particular interest in protecting the rights of the claimants and in supervising the conduct of trustees. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Cocke v. Duke Univ.*, 260 N.C. 1, 131 S.E.2d 909, 914-15 (1963). Furthermore, the receipt of royalties or income by trust beneficiaries suggests that they have benefited from the protection of the laws of the forum in which the trust is located and have purposefully availed themselves of the privilege of conducting activities in the state. *Gurley v. Lindsey*, 459 F.2d 268, 278-79 (5th Cir. 1972).

<sup>64</sup> 433 U.S. at 208-09. The Court rejected the ancient rationale that the need for preventing an absconding debtor from removing his assets justified the use of jurisdictional attachment. *Id.* at 210. *Shaffer* stated that due to the liberalization of the rules governing in personam jurisdiction, there is no modern justification for the assumption that a nonresident can avoid his obligations by removing his property to a forum where he is not amenable to in personam jurisdiction. *Id.* In support of this position, the Court noted that creditors are provided adequate security by the full faith and credit clause of the Constitution, U.S. CONST. art. IV, § 1, which makes valid in personam judgments enforceable in any state. 433 U.S. at 210. Additionally, a plaintiff's interest in security for the satisfaction of a judgment may be protected by an attachment process which comports with the due process requirements of *Snidach*, *Fuentes*, *Mitchell*, and *Di-Chem*. See note 54 *supra*; see text accompanying note 71 *infra*.

<sup>65</sup> 433 U.S. at 209; see text accompanying notes 79-89 *infra*.

<sup>66</sup> 433 U.S. at 213-16.

<sup>67</sup> The activities in question took place in Oregon. *Id.* at 190.

Delaware legislature had not clearly expressed an interest in supervising the management of Delaware corporations,<sup>69</sup> and, most importantly, the individual defendants had insufficient contacts with Delaware to demonstrate that they had "purposefully availed themselves of the privilege of conducting activities within the forum."<sup>70</sup>

Since the jurisdictional issue in *Shaffer* was resolved by means of a minimum contacts analysis rather than on the ground that quasi in rem jurisdiction is unconstitutional per se, the ramifications of *Shaffer* with respect to the future of foreign attachment are not clear.<sup>71</sup> *Shaffer* clearly endorses attachment of a nonresident's property for security purposes.<sup>72</sup> Additionally, under the *Shaffer* holding, jurisdictional attachment is not unconstitutional in situations where the defendant's property is unrelated to the cause of action provided minimum contacts are present.<sup>73</sup> *Shaffer*, therefore, leaves intact jurisdictional attachment statutes such as the sequestration statute but incorporates *International Shoe* requirements into those statutes.<sup>74</sup> By applying the minimum contacts test to quasi in rem

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<sup>69</sup> *Id.* at 214. The Court conceded that sequestration was used most commonly in conjunction with shareholder derivative actions against corporate officers and directors but noted that the sequestration statute indicated no specific concern with respect to supervising fiduciary behavior. *Id.* The conclusion of the majority that the Delaware legislature failed to assert an interest in regulating fiduciary conduct is not compelling. *Cf. Gordon v. Michel*, 397 A.2d 420, 422 (Del. Ch. 1972) (recognizing a clear state interest in providing a forum for the adjudication of a derivative action involving a Delaware corporation). The unique Delaware stock situs statute, DEL. CODE tit. 8, § 169 (1974), permits the attachment of corporate stock without actual physical seizure of stock certificates. Comment, *Providing an Effective Remedy in Shareholder Suits*, 9 U. MICH. J. L. REF. 115, 121-22 (1975) [hereinafter cited as *Remedy in Shareholder Suits*]. Consequently, most corporate directors and officers are amenable to quasi in rem jurisdiction in Delaware since they own shares of their corporations which, under the stock situs statute, are Delaware property subject to sequestration. Folk & Moyer, *supra* note 37, at 749. The intent and effect, therefore, of the stock sequestration procedure is to center litigation involving Delaware corporations in Delaware courts. *Id.* When considered together, the sequestration and stock situs statutes strongly imply a desire on the part of the Delaware legislature to entertain actions such as *Shaffer*. The interest of Delaware in regulating fiduciary behavior was, however, only one factor in the Court's jurisdictional analysis and was not crucial to the disposition of *Shaffer*. 433 U.S. at 215-16.

<sup>70</sup> 433 U.S. at 216. Mr. Justice Brennan, in his concurring and dissenting opinion, contended that the issue of minimum contacts was not thoroughly examined by the Delaware Courts. Consequently, he advocated a remand of the case in order that this issue be fully adjudicated. 433 U.S. at 219-28 (Brennan, J., concurring and dissenting).

<sup>71</sup> *Id.* at 213. The ambiguity of *Shaffer* in regard to the status of quasi in rem jurisdiction is evident if a comparison is made between the majority's application of minimum contacts analysis to Delaware's assertion of quasi in rem jurisdiction, *id.* at 213-16, and Mr. Justice Brennan's statement that quasi in rem jurisdiction is ipso facto "no longer constitutionally viable." *Id.* at 220 (Brennan, J., concurring and dissenting). Furthermore, Mr. Justice Stevens in his concurring opinion endorsed the holding of the majority insofar as it applied to the facts of *Shaffer*, but stated that it was not clear to him how the opinion may be applied in other contexts. *Id.* at 219 (Stevens, J., concurring). See note 84 *infra*.

<sup>72</sup> *Id.* at 210; see note 64 *supra*.

<sup>73</sup> 433 U.S. at 213 n.40.

<sup>74</sup> *Cf. DeMateos v. Texaco, Inc.*, No. 76-2313 (3rd Cir., filed Aug. 12, 1977) (*Shaffer* interpreted as rendering quasi in rem jurisdiction subject to the same due process limitations

jurisdiction, however, *Shaffer* in effect renders jurisdictional attachment obsolete since if minimum contacts are present, a state may assert in personam jurisdiction over the nonresident by means of a long-arm statute.<sup>75</sup> Presumably, if minimum contacts exist, jurisdictional attachment may still be useful if a state's long-arm statute is not sufficiently broad to afford jurisdiction.<sup>76</sup> Whether quasi in rem jurisdiction be permitted despite the possibility of long-arm jurisdiction or in lieu of such jurisdiction, it is arguable that foreign attachment statutes remain vulnerable to due process challenge. Since *Shaffer* renders all forms of jurisdiction subject to minimum contacts requirements, the attachment of property is no longer determinative of jurisdiction and therefore cannot be justified as necessary to satisfy any special governmental or general public interest.<sup>77</sup>

Notwithstanding the ambiguities of *Shaffer*, certain types of actions previously categorized as quasi in rem may survive *Shaffer* if initiated by

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as in personam jurisdiction); *Barber-Greene Co. v. Walco Nat'l Corp.*, 428 F. Supp. 567 (D. Del. 1977) (probable constitutionality of sequestration statute noted despite application of minimum contacts test to jurisdictional inquiry).

<sup>75</sup> See Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 309 (1963); Green, *supra* note 20, at 1242. Quasi in rem actions should after *Shaffer* be absorbed under long-arm statutes, assuming minimum contacts exist, otherwise such actions will disappear altogether. Several states presently have long-arm statutes sufficiently broad to absorb those quasi in rem actions which satisfy the test of *International Shoe*. See, e.g., CAL. CIV. PRO. CODE § 410.10 (West 1970) (jurisdiction maintainable on any basis not inconsistent with the Constitution of California or the United States).

<sup>76</sup> See, e.g., *Steele v. G. D. Searle & Co.*, 483 F.2d 339 (5th Cir.), *cert. denied*, 415 U.S. 958 (1973). In *Steele*, the plaintiff, a Kansas resident, sought jurisdiction over a Delaware drug company in a Mississippi court under the Mississippi long-arm statute and alternatively by means of attaching the debts owed the defendant by two Mississippi companies. The "doing business" language of the Mississippi long-arm statute, MISS. CODE §§ 1437, 5309-230 & 5346 (1942), was not broad enough to sustain in personam jurisdiction over the defendants since the cause of action did not arise out of the company's dealings in Mississippi, however, the court upheld quasi in rem jurisdiction. *Id.* at 349. The court did not make a rigorous application of the minimum contacts test in *Steele*, but did hold that jurisdiction was fair to the defendant since the corporation had sales agents in the state and received substantial revenues from Mississippi. *Id.* In addition, the court reasoned that the presence of a "res tangible or otherwise represents a crucial point of contact," and goes far towards satisfying the minimum contacts test. *Id.* at 348; see *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917) (abandoned wife obtained quasi in rem jurisdiction by attaching absconding husband's bank account). *Pennington* undoubtedly comports with contemporary due process requirements because of the state's interest in adjudicating marital disputes and in protecting a wife's right to alimony. See *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1135-36 (3d Cir. 1976) (Gibbons, J., concurring).

*Shaffer* does not indicate that quasi in rem jurisdiction may be used only when long-arm jurisdiction is unavailable, therefore, courts will likely permit jurisdictional attachment in any situation where adequate contacts are present subject, however, to due process challenge. Cf. *Merrill Lynch Gov't Sec., Inc. v. Fidelity Mut. Sav. Bank*, 396 F. Supp. 318, 320 (S.D.N.Y. 1975) (inquiry into possibility of in personam jurisdiction dispensed with since quasi in rem jurisdiction was available); *Tucker v. Burton*, 319 F. Supp. 567 (D.D.C. 1970) (quasi in rem jurisdiction permitted despite coexisting possibility of in personam jurisdiction).

<sup>77</sup> See notes 45 & 54 *supra*.

means of attachment statutes<sup>78</sup> or under long-arm statutes. The *Shaffer* Court indicates by way of dictum that the ownership or use of property strongly suggests that a nonresident is amenable to jurisdiction if the cause of action relates to the rights and duties arising out of ownership or use of the property.<sup>79</sup> The presence of property may also indicate sufficient contacts with the forum when the cause of action is unrelated to the property if the property is in the form of realty<sup>80</sup> or tangible personalty.<sup>81</sup> The crucial consideration in terms of ascertaining the jurisdictional importance of ownership of tangible property<sup>82</sup> is whether ownership should be treated as a single or isolated act of association with the forum or as manifestation of a continuous relationship.<sup>83</sup> If property ownership is treated as a continu-

<sup>78</sup> See notes 45 & 54 *supra*.

<sup>79</sup> 433 U.S. at 208; *see, e.g.,* *Bekins v. Huish*, 1 Ariz. App. 288, 401 P.2d 743 (1965). *Bekins* sustained jurisdiction in an in rem action for specific performance of a contract to convey a deed to Arizona realty. *Shaffer's* indication that minimum contacts exist with respect to tort cases involving realty supports the constitutionality of long-arm statutes which provide for in personam jurisdiction under such circumstances. 433 U.S. at 208.

Pennsylvania was the first state to declare ownership of realty a basis of personal jurisdiction over nonresidents in actions relating to the property. *See* *Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (Phila. County Ct. 1938) (upholding the constitutionality of 2741 PA. CONS. STAT. § 1 (1937) (current version at PA. STAT. ANN. tit. 12, § 331 (Purdon 1972)). Illinois also provides long-arm jurisdiction over nonresident property owners in actions arising out of the ownership, use, or possession of real estate. *Porter v. Nahas*, 35 Ill. App.2d 360, 182 N.E.2d 915 (1962) (upholding constitutionality of ILL. ANN. STAT. ch. 110, § 17(1)(c) (Smith-Hurd 1968)). Minnesota's long-arm statute is even broader in that it permits jurisdiction in any action arising out of the ownership, use, or possession of real or *personal property*. MINN. STAT. ANN. § 543.19(1)(a) (West Cum. Supp. 1977); *see, e.g.,* *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1951) (non-resident owner of motor vehicle who entrusted vehicle to another held subject to in personam jurisdiction in state where vehicle was involved in accident). Finally, Montana permits jurisdiction over all persons with respect to claims arising out of the ownership, use, or possession of *any* property. MONT. R. CIV. PRO. 4(b)(1)(c) (Cum. Supp. 1975). *See generally* *Developments-Jurisdiction*, *supra* note 5, at 948.

<sup>80</sup> *Developments-Jurisdiction*, *supra* note 5, at 941 (relationship between the owner of realty and the state may be sufficient to support in personam jurisdiction with regard to actions not related to the property); *see* *Property as a Basis of In Personam Jurisdiction*, *supra* note 60, at 378.

<sup>81</sup> Tangible personalty is a more tenuous basis of jurisdiction than realty. *Developments-Jurisdiction*, *supra* note 5, at 948. Personalty generally lacks the permanence of realty and can be removed from a state with relative ease. *But see* *Property as a Basis of In Personam Jurisdiction*, *supra* note 60, at 382 (tangible personalty may be of great physical volume and value, thus ownership of this form of property may result in as substantial a contact with the forum as the ownership of realty). Of course, if the nonresident owner derives income from the local realty or personalty he may be amenable to jurisdiction under the "transacting business" language of long-arm statutes. *E.g.,* VA. CODE § 8.01-328.1 (1977).

<sup>82</sup> Intangible property such as bank accounts also may be of jurisdictional significance in certain instances since the property may be of substantial value and is often entitled to protection under state law. *Cf. Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J., concurring) (individual opening bank account knowingly assumes risk state will exercise its power over the property); *Leeper v. Leeper*, 114 N.H. 294, 319 A.2d 626 (1974) (act of depositing money in local bank account held to satisfy jurisdictional requirement that nonresident purposefully avail himself of the privilege of conducting activities in the forum).

<sup>83</sup> *See* *Property as a Basis of In Personam Jurisdiction*, *supra* note 60, at 377 (ownership or possession of realty is a more substantial contact with the forum than "single acts").

ous and substantial association with the forum state, the property will provide minimum contacts in situations where the cause of action is not related to the property.<sup>84</sup> The better view would seem to be that the ownership of tangible property results in a lasting rather than fleeting relationship with the state since the individual has purposefully acquired property in the forum or transferred property thereto with the expectation that throughout the period of ownership he is entitled to the state's protection of his property rights.<sup>85</sup> The state in return for its protection imposes certain obligations upon the owner.<sup>86</sup> The view that property ownership is a continuous act of association with the forum is called into question, however, by the language in *Shaffer* that property alone does not provide minimum contacts.<sup>87</sup> Nevertheless, if the Court's holding is restricted to the attachment of intangible property,<sup>88</sup> the holding should not prohibit

<sup>84</sup> Cf. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (defendant who conducted continuous and systematic business relations with the forum state subject to personal jurisdiction regardless of whether the cause of action is related to the defendant's business activities in the forum). In *Shaffer*, Justice Powell reserved judgment on whether certain forms of permanent property located in the forum without more would provide requisite contacts to subject a nonresident to quasi in rem jurisdiction to the extent of his property. 433 U.S. at 217 (Powell, J., concurring). Justice Stevens also indicated that *Shaffer* should not be read to invalidate quasi in rem jurisdiction in situations where the cause of action is unrelated to the attached real estate. 433 U.S. at 219 (Stevens, J., concurring).

<sup>85</sup> *Property as a Basis of In Personam Jurisdiction*, *supra* note 60, at 375-77.

<sup>86</sup> *Id.* at 378; see 433 U.S. at 218 (Stevens, J., concurring) (individual in visiting a foreign forum or acquiring real estate there assumes the risk that the state will exercise its power over him or his property).

<sup>87</sup> 433 U.S. at 209.

<sup>88</sup> In denouncing the rule of *Harris v. Balk*, 198 U.S. 215 (1905), *Shaffer* clearly indicates that the presence of a debt alone will not support jurisdiction over a nonresident. *Id.* *Shaffer*, therefore, questions the practice of attaching an insurer's obligation to defend as a basis of acquiring jurisdiction over a nonresident motorist. See, e.g., *Rintala v. Shoemaker*, 362 F. Supp. 1044 (D. Minn. 1973); *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973); *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, a New York plaintiff injured in an automobile accident in Vermont brought suit against a Canadian motorist insured by a company doing business in New York. The New York court held that the obligation of the insurance company to defend the insured was an attachable debt for purposes of obtaining quasi in rem jurisdiction over the nonresident motorist. 269 N.Y.S.2d at 101. The *Seider* court acknowledged that it was permitting a "direct action" against the insurer but only because the insurer agreed under the insurance policy to defend in any state where jurisdiction could be obtained against the insured. *Id.* at 102. *Seider* has been criticized extensively on the ground that an insurer's obligation to defend and indemnify is not attachable since no debt actually accrues until a judgment is entered against the defendant. See, e.g., *Podolski v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968); *Javorek v. Superior Court*, 17 Cal.3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976); *Long-Arm and Quasi In Rem Jurisdiction*, *supra* note 29, at 327; Comment, *Jurisdiction Quasi In Rem: Seider v. Roth to Turner v. Evers—Wrong Means to the Right End*, 11 SAN DIEGO L. REV. 504, 508 (1974) [hereinafter cited as *Jurisdiction Quasi In Rem*]; Comment, *Quasi In Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 655 (1967).

Criticism of *Seider* has resulted in some restrictions on its use. See, e.g., *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633, 637 (1967) (recovery limited to face amount of policy); *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969) (attachment only permitted if plaintiff is New York resident).



jurisdiction when realty or tangible personalty is involved, provided the forum is otherwise convenient and the state has an interest in the outcome of the controversy.<sup>89</sup>

In addition to altering the framework of quasi in rem jurisdiction, *Shaffer* has substantial implications with respect to the Delaware sequestration procedure and the future of shareholder derivative actions in Delaware.<sup>90</sup> Unless Delaware courts demonstrate that jurisdiction over corporate fiduciaries acquired by means of the sequestration statute comports with "fair play and substantial justice," the procedure will be useless as a jurisdictional device.<sup>91</sup> In response to *Shaffer*, however, the Delaware legislature immediately adopted a director long-arm statute based on implied consent.<sup>92</sup> The newly adopted long-arm statute will not render sequestration obsolete, however, since it does not provide for jurisdiction over corporate officers who are not directors or over property owners in non-derivative actions.<sup>93</sup> Although the effect of the long-arm statute on sequestration is

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Furthermore, the *Seider* doctrine has been rationalized as a direct action procedure on the grounds that the insurance company is the real party in interest. *Minichiello v. Rosenberg*, 410 F.2d 106, 109-10 (2d Cir. 1968), *aff'd on rehearing en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969). Nevertheless, the doctrine has remained viable primarily in accordance with the rule of *Harris* that quasi in rem jurisdiction may be obtained over a nonresident by attaching a debt owing to the nonresident. *See Simpson v. Loehmann*, 287 N.Y.S.2d at 636.

*Shaffer* undermines the foundation of *Seider* by overruling *Harris* and by declaring that the presence of a debt in a forum does not justify jurisdiction over the person to whom the debt is owing unless there exist other contacts with the state to support jurisdiction. 433 U.S. at 212. In *Seider*-type actions, there are other contacts with the forum in that the plaintiff must reside in the state and the insurance company does business there. *Shaffer* makes clear such contacts alone are insufficient to establish jurisdiction. 433 U.S. at 215-16. The key jurisdictional consideration under *Shaffer* is the defendant's contacts with the forum. *Id.* Since in *Seider* and subsequent cases there is no suggestion that the nonresident motorist involved in an accident outside of New York has purposefully availed himself of the privilege of conducting activities in New York, minimum contacts do not exist. Therefore, under *Shaffer*, there is no basis for quasi in rem jurisdiction over the nonresident and the insurer cannot be compelled to defend. *See Katz v. Umansky*, 46 U.S.L.W. 2302, 2303 (N.Y. Sup. Ct. 1977) (*Shaffer* interpreted as prohibiting quasi in rem jurisdiction over New Jersey physician by means of attaching physician's malpractice insurance policy issued by insurance company with New York office). *But see O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977) (*Seider* procedure upheld notwithstanding *Shaffer* on the grounds that the plaintiff's contact with New York and the fact that the insurance company was the real party in interest justified jurisdiction over the insured).

<sup>89</sup> *See Property as a Basis of In Personam Jurisdiction*, *supra* note 60, at 378.

<sup>90</sup> *See* text accompanying notes 95-118 *infra*.

<sup>91</sup> *See* text accompanying notes 95-105 *infra*.

<sup>92</sup> *Del. Code* tit. 10, § 3114 (1977), *appearing in Jacobs & Stargatt*, *supra* note 16, at 706-07. The statute, adopted July 7, 1977, provides that "[e]very non-resident of . . . [Delaware] who after September 1, 1977 accepts election or appointment as a director, trustee or member of the governing body of a [Delaware] corporation . . . or who after June 30, 1978 serves in such capacity . . . shall, by such acceptance or by each service, be deemed thereby to have consented to the appointment of the registered agent of such corporation . . . as his agent upon whom service of process may be made . . . in any action or proceeding against such director, trustee, or member for violation of his duty in such capacity. . . ."

<sup>93</sup> *Jacobs & Stargatt*, *supra* note 16, at 708.

not clear, sequestration will remain available for jurisdictional or security purposes. If sequestration is retained as a security device, certain modifications may be necessary in order for the statute to withstand a due process challenge.<sup>94</sup>

In order for Delaware to utilize the sequestration procedure as a jurisdictional device in conjunction with shareholder derivative actions, the state must assert sufficient interests in regulating fiduciary conduct and must show that officers and directors of Delaware corporations have purposefully availed themselves of the privilege of conducting activities in the state.<sup>95</sup> Delaware arguably has a valid governmental interest in compelling the appearance of nonresident corporate fiduciaries in a derivative suit when the corporation involved is organized under and exists by the grace of Delaware law.<sup>96</sup> In addition, Delaware is justified in providing restitution for local corporations that have been victimized by fiduciary misconduct<sup>97</sup> and in regulating the issuance of corporate stock.<sup>98</sup> By centering litigation involving Delaware corporations in its courts, the state can assure a uniform application and interpretation of its laws.<sup>99</sup> Absent a litigation centering device such as sequestration, non-director officers of Delaware corporations will only be amenable to jurisdiction where they reside or can be served personally,<sup>100</sup> although directors may now be served under the con-

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<sup>94</sup> See text accompanying notes 111-18.

<sup>95</sup> See *Shaffer v. Heitner*, 433 U.S. at 213-16.

<sup>96</sup> Delaware's interest in regulating the conduct of nonresident corporate fiduciaries was not discussed in *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976), and was generally not acknowledged in other Delaware sequestration cases since, under traditional notions of quasi in rem jurisdiction, see note 22 *supra*, the presence of property alone was sufficient to assert jurisdiction over the owner at least up to the value of his property. Nevertheless, Delaware courts have recognized an interest in regulating the conduct of corporate directors. *Gordon v. Michel*, 297 A.2d 420, 422 (Del. Ch. 1972); see 433 U.S. at 223-24 (Brennan, J., concurring and dissenting); *Folk & Moyer, supra* note 37, at 795, Comment, *Attachment of Corporate Stock: The Conflicting Approaches of Delaware and the Uniform Stock Transfer Act*, 73 HARV. L. REV. 1579, 1591-95 (1960) [hereinafter cited as *Attachment of Corporate Stock*]; Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 888-90 (1969). The interest of Delaware in regulating the conduct of officers and directors of Delaware corporations manifests Delaware's desire to sustain the health of its corporations and to attract other businesses to the state. These factors along with Delaware's interest in protecting resident creditors and shareholders of its corporations, see, e.g., *Koster v. Lumberman Mutual Co.*, 330 U.S. 518, 522, 524 (1947), are analogous to other state interests that have been held to support jurisdiction over nonresidents. See, e.g., *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (regulating out-of-state insurance companies which deal with residents); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935) (providing residents a forum with respect to actions against nonresidents dealers in securities); *Hess v. Pawloski*, 274 U.S. 352 (1927) (protecting residents from nonresident motorists). Finally, the Supreme Court has recognized the state's interest in controlling the conduct of corporate fiduciaries. *Cort v. Ash*, 422 U.S. 66, 84-85 (1975).

<sup>97</sup> *Attachment of Corporate Stock, supra* note 96, at 1591-94.

<sup>98</sup> See, e.g., *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 132 (1933); *Barber-Greene Co. v. Walco Nat'l Corp.*, 428 F. Supp. 567, 571 (D. Del. 1977).

<sup>99</sup> *Folk & Moyer, supra* note 37, at 795.

<sup>100</sup> *Id.* at 795-96; R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE § 12-10 (2d ed. 1974); *Remedy in Shareholder Suits, supra* note 69, at 115.

sent statute. Consequently, acts of fiduciary misconduct may go unredressed because of the difficulty and expense of obtaining jurisdiction and litigating shareholder derivative actions in multiple jurisdictions.<sup>101</sup>

In addition to demonstrating an interest in adjudicating shareholder derivative actions, Delaware courts must establish that nonresident corporate officers and directors have adequate contacts with the state upon which jurisdiction may rest.<sup>102</sup> Although *Shaffer* contains no definitive statement as to the existence of such contacts,<sup>103</sup> it is clear that, in general, officers and directors of Delaware corporations have some contacts with the state. Under Delaware law, corporations are empowered to grant officers and directors certain loan privileges.<sup>104</sup> In addition, Delaware law affords officers and directors of Delaware corporations generous indemnification protection should they be subjected to civil or criminal liability arising out of their conduct as corporate fiduciaries.<sup>105</sup> Finally, when directors and officers assume the powers and responsibilities of their positions in accordance with the laws of Delaware, they have voluntarily and knowingly associated themselves with Delaware and have purposefully availed themselves of the privileges conferred upon them by Delaware law.<sup>106</sup>

Assuming that sufficient contacts exist such that jurisdiction over a corporate fiduciary would not offend traditional notions of "fair play and substantial justice," the sequestration statute still must withstand a due process challenge to remain effective.<sup>107</sup> Delaware courts have upheld the sequestration procedure on the ground that the seizure of property for jurisdictional purposes is an "extraordinary situation" justifying some abridgement of the full panoply of due process safeguards.<sup>108</sup> *Shaffer*, however, impliedly invalidates the rule that jurisdictional attachment is necessary to secure an important governmental interest since *Shaffer* rejects the attachment of property as the sole criterion of quasi in rem jurisdiction in favor of the minimum contacts approach.<sup>109</sup> If *Shaffer* is interpreted as

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<sup>101</sup> Folk & Moyer, *supra* note 37, at 795.

<sup>102</sup> 433 U.S. at 215-16. The interests of Delaware in providing a forum for shareholder derivative actions is pertinent for choice of law purposes, but this interest alone does not satisfy jurisdictional requirements. See von Mehren & Trautman, *supra* note 31, at 1129.

<sup>103</sup> 433 U.S. at 215-16.

<sup>104</sup> DEL. CODE tit. 8, § 143 (1974).

<sup>105</sup> DEL. CODE tit. 8, § 145 (1974); see *Merritt-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358 (Del. Super. Ct. 1970).

<sup>106</sup> Folk & Moyer, *supra* note 37, at 799; see *Wagenberg v. Charleston Wood Prod., Inc.*, 122 F. Supp. 745 (E.D.S.C. 1954); cf. *McLouth Steel Corp. v. Jewell Coal & Coke Co.*, 432 F. Supp. 10, 12 (E.D. Tenn. 1976) (holding of directorships by virtue of Virginia corporate charters deemed a relevant factor in determining if the individuals were amenable to Virginia's long-arm jurisdiction).

<sup>107</sup> See note 54 *supra*.

<sup>108</sup> See, e.g., *U.S. Indus. Inc. v. Gregg*, 348 F. Supp. 1004 (D. Del. 1972), *rev'd on other grounds*, 540 F.2d 142 (3rd Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977); *Gordon v. Michel*, 297 A.2d 420 (Del. Ch. 1972); *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A.2d 365 (1955).

<sup>109</sup> See notes 45 & 54 *supra*.

eliminating jurisdictional considerations as a basis for the seizure of property, the only justification for sequestration would be to satisfy a plaintiff's need for security.<sup>110</sup>

If sequestration is used in conjunction with the new long-arm statute only as a security device, the sequestration statute must be revised to provide proper safeguards against a mistaken deprivation of property.<sup>111</sup> The sequestration statute as previously applied has not been characterized as a security device but as a jurisdictional device.<sup>112</sup> Consequently, a plaintiff complying with the procedural requirements of sequestration was granted the privilege of seizure without having to show that he was pursuing a valid claim or was entitled to security to satisfy any judgment that might be rendered in his favor.<sup>113</sup> The sole inquiry by the Court of Chancery into the need for security previously came after the defendant had entered a general appearance.<sup>114</sup> If the plaintiff proved that there was a reasonable possibility<sup>115</sup> that he would not obtain satisfaction on a future judgment, his petition to continue sequestration was granted despite the general appearance of the defendant. Otherwise the sequestered property was routinely released.<sup>116</sup> Thus, the security feature of sequestration previously has been utilized after the deprivation of property has occurred.<sup>117</sup> If sequestration is to be retained as a security device, the statute should be modified to require a clear and convincing showing by the plaintiff, at the time he applies for the sequestration order, that there is an immediately danger that the defendant will dispose of the property and thereby prevent the plaintiff from recovering any judgment entered against the defendant.<sup>118</sup> If

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<sup>110</sup> See 433 U.S. at 210. *Shaffer* states that a plaintiff's security interest no longer justifies jurisdiction to attach a nonresident's property and to adjudicate the underlying claim. *Id.* After *Shaffer*, a state has jurisdiction to attach property only as security for a judgment which is being sought in a forum where the litigation can be maintained consistently with *International Shoe. Id.*; see *Carolina Light & Power Co. v. Uranex, No. C-77-0123* (N.D. Cal., filed Sept. 26, 1977) (recalled due to motion for reconsideration).

<sup>111</sup> See text accompanying notes 112-18 *infra*.

<sup>112</sup> See note 54 *supra*.

<sup>113</sup> DEL. CH. CT. R. 4(db)(1974); see *Trans World Airlines, Inc. v. Hughes*, 40 Del. Ch. 528, 185 A.2d 762, 765 (1962), *aff'd sub nom*, *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A.2d 128 (1962). In *Greyhound Corp.*, the Delaware Chancellor interpreted *Breech* as preventing the Court of Chancery from exercising any discretion to deny a writ of sequestration if the plaintiff had satisfied the procedural requirements of the statute. *Greyhound Corp. v. Heitner*, No. 4514 (Del. Ch., filed May 12, 1975).

<sup>114</sup> DEL. CODE tit. 10, § 366 (1974); *Folk & Moyer, supra* note 37, at 776-77.

<sup>115</sup> The requirement that a plaintiff show a "reasonable possibility" of a need for security in order to obtain an extension of sequestration after a general appearance has been entered by the defendant is in conflict with the rule of *Fuentes v. Shevin*, 407 U.S. 67 (1972). *Fuentes* requires that a creditor demonstrate an "immediate danger" that the debtor will "destroy or conceal disputed goods." *Id.* at 93. Therefore, *Fuentes* suggests that a more stringent standard is necessary to justify sequestration for security purposes. *Folk & Moyer, supra* note 37, at 777.

<sup>116</sup> DEL. CODE tit. 10, § 366 (1974); *Folk & Moyer, supra* note 37, at 756.

<sup>117</sup> *Folk & Moyer, supra* note 37, at 756.

<sup>118</sup> See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 608-10 (1974); *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1125-30 (3d Cir. 1976); see note 54 *supra*.

the sequestration statute is modified to function solely as a security device and not as a jurisdictional device, plaintiffs initiating derivative actions in Delaware must use the long-arm statute for the purpose of obtaining jurisdiction over nonresident corporate directors.

The recently enacted long-arm statute will likely provide jurisdiction in cases similar to *Shaffer* since the statute clearly evinces a concern on the part of the Delaware legislature with adjudicating matters of fiduciary misconduct involving Delaware corporations.<sup>119</sup> The enactment of a long-arm statute also insures that directors of Delaware corporations know that Delaware characterizes the acceptance of their positions as consent to personal jurisdiction in Delaware courts.<sup>120</sup> Moreover, *Shaffer* implies that

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<sup>119</sup> See text accompanying notes 69, 92 & 95-106 *supra*.

<sup>120</sup> See *Shaffer v. Heitner*, 433 U.S. at 216. Actually, the long use of sequestration as a means of acquiring jurisdiction over directors who own stock in Delaware corporations has amply informed corporate fiduciaries of their susceptibility to jurisdiction in the Court of Chancery. Cf. *Folk & Moyer*, *supra* note 37, at 796-97 (some directors either do not own shares in Delaware corporations or place their shares in the name of an out-of-state brokerage house or foreign bank to avoid sequestration).

States without director consent statutes may be able to obtain jurisdiction over corporate fiduciaries under a long-arm statute which provides that any person who transacts business or commits a tortious act in the state is subject to the personal jurisdiction. Alternatively, a statute permitting a state to exercise jurisdiction consistent with the Constitution would also probably permit the assertion of jurisdiction over a nonresident corporate fiduciary.

Most state long-arm statutes afford jurisdiction over a nonresident who transacts business in the state provided the cause of action arises out of the particular transaction. See, e.g., VA. CODE § 8.01-328.1 (1977). See generally *McGee v. v. International Life Ins. Co.*, 355 U.S. 220 (1957). If, however, a nonresident conducts continuous and systematic business transactions with the forum he is termed to be "doing business" in the state and thereby subject to in personam jurisdiction with respect to causes of action not arising out of his business dealings. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

A nonresident director may engage in sufficient transactions with his company's state of incorporation to satisfy the "doing business" test. *McLouth Steel Corp. v. Jewell Coal & Coke Co.*, 432 F. Supp. 10, 12 (E.D. Tenn. 1976). In *McLouth Steel*, a Tennessee district court denied a change of venue to Virginia in a shareholder derivative action initiated by McLouth Steel to compel payment of dividends by the defendant corporations. The court noted, however, that the directors of the defendant corporations were amenable to personal jurisdiction in Virginia. The defendant corporations were incorporated in Virginia and had substantial operating facilities in that state but maintained their offices in Knoxville, Tennessee. The claims of breach of trust on the part of the directors arose out of the directors' activities in Tennessee. *Id.* The court found that since the directors held their positions by virtue of Virginia corporate charters and controlled corporate activities carried out in Virginia they were "doing business" in that state and subject to jurisdiction of Virginia's courts in accordance with Virginia's long-arm statute. Jurisdiction on this basis was considered consistent with the due process clause of the fourteenth amendment. *Id.* at 12. The remark *Shaffer* that the defendants had not set foot in Delaware, 433 U.S. at 213, does not cast doubt on the "doing business" approach since physical presence in the forum state is not a requirement of personal jurisdiction. *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1175 (7th Cir. 1971); see note 4 *supra*. The "doing business" approach, however, would not be as effective as a consent statute for purposes of subjecting directors to jurisdiction since the corporation in question may not conduct sufficient business within the state.

The tortious conspiracy theory is premised on the notion that a fiduciary who engages in tortious activities with foreseeable harmful effects to the corporation and the corporation's

the long-arm statute is constitutional by reference to states which have enacted such statutes.<sup>121</sup> Under the consent statute, jurisdiction is not as

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state of incorporation should be held to account for his conduct in the state of incorporation. The tortious conspiracy theory was inspired by *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969), *cert. denied*, 397 U.S. 1010 (1970). In *Hunt*, long-arm jurisdiction was upheld over nonresident corporations in connection with a cause of action that involved an alleged out-of-state conspiracy on the part of the corporations. The Minnesota court held that if participation in a tortious conspiracy which had in-state effects is established, jurisdiction can be asserted over the nonresident conspirators not physically present in Minnesota. *Id.* at 311. Fiduciary misconduct is analogous to corporate wrongdoing and could, therefore, be a basis of jurisdiction in derivative suits under long-arm statutes that declare the committing of a tort in the forum state to be a constructive act of "doing business" in the state for jurisdictional purposes. See Folk, *Corporation Law Developments—1969*, 56 VA. L. REV. 755, 764-66 (1970).

In order to apply the tortious conspiracy approach to cases of fiduciary misconduct, physical presence on the part of the director or officer in the state of incorporation is not required. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761, 763 (1961) ("tortious act" language in long-arm statute encompasses both the out-of-state act of constructing a defective product and the consequences of the act manifested by injury to local plaintiff). Compare *Roche v. Floral Rental Corp.*, 95 N.J. Super. 555, 232 A.2d 162 (1967), *aff'd*, 51 N.J. 26, 237 A.2d 265 (1968) (negligent act of nonresident need not take place within forum in order for tortious injury to occur within state) with *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. Colo. 1966) (negligent act and resulting injury must both occur within forum state). The dilemma of whether "tortious act" encompasses out-of-state conduct with in-state effects can be solved by drafting a long-arm statute specifically covering out-of-state activities with harmful local effects. See, e.g., N.Y. CIV. PRAC. LAW § 320(a)(2), (3) (McKinney, 1972).

Further support for long-arm jurisdiction over fiduciaries in cases of tortious conspiracy is derived from the general rule that officers of a corporation are personally responsible for the tortious conduct of the corporation if they personally take part in the commission of the tort or direct others to commit the act. *Zubik v. Zubik*, 384 F.2d 267, 275 (3rd Cir. 1967), *cert. denied*, 390 U.S. 988 (1968); W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137 (rev. perm. ed. 1975). Therefore, officers taking part in such actions are potentially subject to in personam jurisdiction pursuant to a long-arm statute. *Vespe Contract Co. v. Anvan Corp.*, 433 F. Supp. 1226 (E.D. Pa. 1977). The tortious conspiracy approach, however, is more restrictive in scope than a consent statute since not all fiduciary misconduct can necessarily be classified as tortious nor will such acts always have foreseeable effects in the state of incorporation.

Finally, jurisdiction over corporate fiduciaries might be obtainable under a statute similar to R.I. GEN. LAWS § 9-5-33 (1970) which permits jurisdiction "not contrary to . . . the constitution" [*sic*] over a nonresident who has minimum contacts with Rhode Island. This statute and cases interpreting it provide no readily discernible guidelines for determining when jurisdiction satisfies "fair play and substantial justice." *Conn v. ITT Aetna Fin. Co.*, 105 R.I. 397, 252 A.2d 184, 187 (1969). Broad statutory language, however, grants a court great flexibility in making jurisdictional decisions and requires a court to concentrate on minimum contacts and fairness to the parties rather than on specific statutorily enumerated acts. Note, *In Personam Jurisdiction over Foreign Corporations: An Interest Balancing Test*, 20 U. FLA. L. REV. 33, 48 (1967); see *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440-45 (1952) (state courts may exercise jurisdiction up to limits of constitution, subject, however, to restrictions imposed by state's long-arm statute). *But see St. Clair v. Righter*, 250 F. Supp. 148, 152 (W.D. Va. 1966) (state court may exercise jurisdiction to limits of constitution notwithstanding restrictions of state long-arm statute on jurisdictional authority of state courts).

<sup>121</sup> *Shaffer* cites, with apparent approval, implied consent director long-arm statutes as

broad as in the case of sequestration since the use of the long-arm statute is limited to causes of action involving violations of the director's duties in relation to that corporation's affairs.<sup>122</sup> The consent statute does not obviate the necessity of an independent judicial inquiry in each case to determine if jurisdiction comports with the requirement of "fair play and substantial justice,"<sup>123</sup> but the statute does avoid much of the constitutional uncertainty cast by *Shaffer* on the use of sequestration.<sup>124</sup> Under the consent statute, a defendant director will satisfy the minimum contacts requirement by accepting his position with the corporation.<sup>125</sup> The court's constitutional inquiry is therefore restricted to the nature of the dispute and the interests of the state in applying its laws to the controversy in question.<sup>126</sup>

By providing in personam jurisdiction over corporate fiduciaries, the director consent statute enables Delaware to remain a forum for shareholder derivative actions involving Delaware corporations. Other types of actions traditionally based on quasi in rem jurisdiction may not survive the rule of *Shaffer* that all assertions of state court jurisdiction satisfy the test of minimum contacts dictated by *International Shoe*.<sup>127</sup> Under *Shaffer's* uniform approach, quasi in rem jurisdiction is restricted in such a manner as to render it coextensive with in personam jurisdiction.<sup>128</sup> By casting doubt on the usefulness and propriety of jurisdictional attachment, *Shaffer* marks the demise of quasi in rem jurisdictions and introduces a new era of state court jurisdiction in which all assertions of jurisdiction must rest on principles of fair play and substantial justice.

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adequate for purposes of showing that a director availed himself of the privileges of conducting affairs in the forum state and thereby had notice that he was amenable to suit in that jurisdiction. 433 U.S. at 216, n.47, *citing*, CONN. GEN. STAT. § 33-322 (Cum. Supp. 1977); N.C. GEN. STAT. § 55-33 (1975); S.C. CODE § 33-5-70 (1976). *See generally* Wagenberg v. Charleston Wood Prod., Inc., 122 F. Supp. 745 (E.D.S.C. 1954) (upholding the South Carolina director consent statute); Goldfeld v. Wood Park Estates, Inc., 29 Conn. Supp. 237, 281 A.2d 326 (1971) (Connecticut director consent statute only available for use against directors in actions involving alleged violations of trust in their capacity as corporate fiduciaries); Weil v. Beresth, 26 Conn. Supp. 428, 225 A.2d 826 (1966) (upholding the Connecticut director long-arm statute).

<sup>122</sup> *See* text accompanying notes 92 & 93 *supra*. Director consent statutes in effect in other states also limit jurisdiction to causes of action involving corporate activities. *See, e.g.*, CONN. GEN. STAT. § 33-322 (Cum. Supp. 1977); IND. CODE ANN. §§ 34-2-2-1, 34-2-2-2 (Burns 1973); N.C. GEN. STAT. § 55-33 (1975); S.C. CODE § 33-5-70 (1976).

<sup>123</sup> *See* note 4 *supra*. Jurisdiction under a long-arm statute must withstand a two-prong inquiry. First, the defendant's conduct must have fallen within the scope of one of the relevant provisions of the statute. Second, the plaintiff must establish that the application of the statutory provisions to the particular defendant comports with due process. *Vespe Contrac. Co. v. Anvan Corp.*, 433 F. Supp. 1226 (E.D. Pa. 1977); *see* note 120 *supra*.

<sup>124</sup> *See* text accompanying notes 71-77 *supra*.

<sup>125</sup> *See* note 92 *supra*.

<sup>126</sup> *See* text accompanying notes 95-99 *supra*.

<sup>127</sup> *See* text accompanying notes 55-59 *supra*.

<sup>128</sup> *See* text accompanying notes 71-76 *supra*.