Procedural Due Process in Quasi in Rem Actions After Shaffer v. Heitner

Karen Nelson Moore
PROCEDURAL DUE PROCESS IN QUASI IN REM ACTIONS AFTER SHAFFER V. HEITNER

KAREN NELSON MOORE*

Quasi in rem jurisdiction,¹ long a static alternative to the evolving and dynamic doctrine of in personam jurisdiction, has been modified dramatically by the Supreme Court's opinion in Shaffer v. Heitner.² By applying a minimum contacts test, historically a part of the law of in personam jurisdiction, the Court recognized the applicability of certain due process considerations in determining the validity of an assertion of quasi in rem jurisdiction, thereby limiting the usefulness of quasi in rem as an alternative to in personam jurisdiction. Although the Court in Shaffer expressly declined to decide whether procedural due process³ considerations of the type enunciated in Fuentes v. Shevin⁴ should be applied to seizures of property to obtain quasi in rem jurisdiction, that issue remains critical as long as quasi in rem jurisdiction retains any vitality.

This Article concludes that procedural due process protections must be accorded defendants whose property is seized for jurisdictional purposes, although the precise nature of the protections that are necessary and appropriate will differ from those suitable for the

* A.B., J.D., Harvard University. Assistant Professor of Law, Case Western Reserve University.

1. Throughout this Article, "quasi in rem" is used to express the concept of jurisdiction based on the presence of property in a state. Although two types of quasi in rem jurisdiction may be distinguished, in addition to the pure in rem jurisdiction, see note 5 infra & accompanying text, the term will be used in reference to the concept generally unless otherwise indicated.


3. "Procedural due process," although implicating many other rights, is used in this Article to refer to the requirements of notice and an opportunity for a hearing prior to a deprivation of property.

traditional creditor attachment of property involved in Fuentes. Despite dicta in Supreme Court opinions and a conflict among lower courts, this Article argues that seizure of property for jurisdictional purposes does not constitute an extraordinary situation which warrants an exception from the basic principles of Fuentes that notice and an opportunity for a hearing must be afforded prior to seizure of property.

Part I explores the doctrine of quasi in rem jurisdiction by reviewing the early cases and discussing the impact of Shaffer on the availability and attributes of quasi in rem jurisdiction. Although Shaffer may reduce the availability of quasi in rem jurisdiction by imposing the additional and important requirement of minimum contacts with the forum state, this jurisdictional mechanism still retains usefulness and continues to be asserted. Thus, the scope of the procedural due process protections necessary remains a significant issue which courts, including the Supreme Court, will have to address. Part II reviews the indications from the Supreme Court concerning the applicability of procedural due process protections to seizures of property for jurisdictional purposes and notes the approaches taken by lower courts. Finally, Part III presents a rationale appropriate for resolving the issue and concludes that procedural due process protections must be applied to seizures of property, even for jurisdictional purposes, but that the notice and hearing opportunities must be shaped to accommodate the various and conflicting interests involved.

PART I. QUASI IN REM JURISDICTION IN ITS HISTORICAL AND MODERN FORMS

Quasi in Rem Jurisdiction Prior to Shaffer v. Heitner.

For at least a century, jurisdiction over a defendant has been divided generically into two concepts: in personam jurisdiction, predicated on power over the person of the defendant, and in rem and quasi in rem jurisdiction, based on power over property of the defendant, whether tangible or intangible property. This dichotomy in the form and characteristics of jurisdiction was articulated

---

5. In rem jurisdiction involves a determination of all persons' interests in particular property. Quasi in rem jurisdiction takes two forms, either requiring a determination of particular persons' interests in property, or involving property conceded to be the defendant's but which the plaintiff wishes to apply to a personal claim made against the defendant. See text accom-
fully by the Court in *Pennoyer v. Neff* and has been reiterated and elaborated frequently thereafter.

Under the bipolar analysis applied in *Pennoyer*, jurisdiction over a defendant must satisfy certain elemental requirements deriving from the restriction of a court’s powers to the territorial limits of the state in which it sits. According to “two well established principles of public law,” stemming from the doctrine of state sovereignty, every state and its judiciary has exclusive jurisdiction over both persons and property within its boundaries; corrollarily, this jurisdiction may not be exercised directly over persons and property beyond the state. Accordingly, in personam jurisdiction may be asserted only if the defendant is personally within the territory of the state and is there served with process. Quasi in rem jurisdiction, however, exists if property of the defendant is located within the state regardless of the defendant’s personal location. The power of

panying notes 47-48 *infra*. See also Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958); *Restatement of Judgments*, Introductory Note §§ 1-3; *id.* § 32, Comment a (1942).

6. 95 U.S. 714 (1878). *Pennoyer* provides the most complete early articulation of the characteristics of jurisdiction and forms the point of departure for later Supreme Court opinions. Justice Field suggested that the views expressed in his majority opinion in *Pennoyer*, demarcating the two basic forms of jurisdiction, were not new but rather had been stated previously by other judges, including Justice Story. See, e.g., Picquet v. Swan, 19 F. Cas. 609 (C.C. Mass. 1828) (No. 11,134). Particular emphasis was placed on Justice Miller’s opinion for the Court in *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308 (1870), in which the Court had differentiated between jurisdiction over the person, obtained through service of process or voluntary appearance, and jurisdiction over the res, obtained through seizure of the res. Although Justice Field dissented from the judgment in *Cooper*, apparently he embraced its philosophy.

In *Pennoyer*, the plaintiff, Mitchell, brought an action against Neff, a nonresident, to recover payment for legal services furnished by Mitchell. Although Neff was not served personally with process, judgment was entered against him upon his default after constructive service by publication. After this personal judgment was rendered, property owned by Neff, which had not been attached or brought within the control of the court, was sold under an execution issued upon the judgment. Neff then filed an action to recover the land from Pennoyer, the purchaser at the sheriff’s sale. The Supreme Court concluded that, because the initial judgment amounted to a personal judgment against a nonresident defendant not personally served with process within the state and because the nonresident defendant’s property within the state had not been seized before the initial judgment was rendered, the judgment was invalid.

7. 95 U.S. at 722. These principles pertain to “independent” states. Recognizing that the states of the Union were not fully independent in the manner that nations are independent, Justice Field nonetheless concluded that the states of the Union have the powers and authority of independent states except as limited by the Constitution and that, therefore, the principles applied. Commentators have questioned the wisdom of the application of principles of international law of independent states to the intra-national states. See, e.g., Hazard, *A General Theory of State Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 262-68.
the court, even in this simple model, is both established and limited by the nature of the jurisdiction: in personam jurisdiction permits a personal judgment against the defendant; quasi in rem jurisdiction restricts the power of the court to the property that provides the basis for jurisdiction, thus limiting the amount of the potential judgment.

Although this simple model is useful, the Court in Pennoyer further elaborated the characteristics necessary for a valid exercise of jurisdiction. The Court determined that, to obtain valid in personam jurisdiction, the defendant must receive personal service of process within the state;\(^8\) constructive service, whether by publication within the state or otherwise, would be inadequate to establish such jurisdiction. In contrast, sufficient notice to confer quasi in rem jurisdiction could be given through substituted service by publication or other authorized form if the property upon which the jurisdiction was founded had been seized or otherwise brought within the control of the court.\(^9\) Although notice by publication, without more, was unlikely to reach the defendant, he was more likely to become aware of a seizure of his property, which was assumed to be in the defendant's possession.\(^{10}\)

---

8. 95 U.S. at 726-27. Excepted from the general rule requiring personal service within the state were such situations as actions brought by a resident to determine his status relative to a nonresident, as in actions for divorce; actions concerning partnerships, associations, or contracts entered into by nonresidents within the state and that require the appointment of an agent for service of process under state law; actions involving state-created corporations; and actions in which the defendants previously had consented to be bound without personal service. Id. at 734-36.

9. Pennoyer did not use the term "quasi in rem" but relied instead on "in rem" to describe all actions in which jurisdiction was based on property. Strictly used, the term "in rem" referred only to a proceeding directly against the property with no reference to individual claimants. More generally, however, Justice Field suggested that "in rem" also pertains if the action is brought by individuals to affect property, or interests in property, owned by them. Id. at 734.

Substituted service without seizure of the property seems to be permitted by the Pennoyer opinion in purely in rem cases, in which the claims raised pertain directly to the property that forms the basis for the exercise of jurisdiction. Service by publication or other authorized form also may be adequate under Pennoyer for the first of the two basic types of quasi in rem actions, involving conflicting claims to the property. Quasi in rem actions involving personal claims unrelated to the property, however, required seizure of the property as well as notice by publication. Id. at 727. In view of the Court's emphasis in Pennoyer on seizure of the property, this language, seemingly permitting substituted service without seizure, is best interpreted as concerning the notice, rather than the jurisdictional, requirements.

10. Id. at 726-27. This presumption that the defendant is in possession of the property and thereby will receive notice, of course, is not always accurate and will not necessarily assure actual notice.
Critical to the Court's analysis in *Pennoyer* was the requirement that valid quasi in rem jurisdiction could be obtained only if the court first determined that the property upon which its jurisdiction was to be based was within the state and was brought within the control of the court at the outset of the case.11 The Court concluded that the presence of jurisdiction must be ascertained before a judgment could be reached. Grave uncertainty would result if courts could decide the merits of a case before determining whether the defendant had property within the state. Similarly untenable was the possibility of void judgments becoming valid if property suddenly were found in the state, or, conversely, the possibility of valid judgments becoming void if property were removed from the state. Under these circumstances, jurisdiction could be obtained only by bringing the property under the control of the court at the commencement of the case.12

The theoretical basis for this conclusion that seizure or other control of the property was necessary before the exercise of jurisdiction remains unclear. One theory, urged by Justice Field, emphasized the responsibilities of the states under the full faith and credit clause to respect judgments rendered by sister states. This constitutional requirement, however, was irrelevant to the threshold question of jurisdiction, which was governed instead by the doctrine of state sovereignty and by a "principle of natural justice" requiring notice to the defendant before he may be subjected to a binding judgment.13 Operating under these principles, uniformly applied in previous cases, Justice Field concluded that judgments were void unless the property that was the object of the action was brought

11. *Id.* at 726. This requirement was drawn from Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870), in which the Court, without citation, set forth seizure or equivalent acts of court control over the property as necessary to establish jurisdiction based on the existence of property within the state. The requirement of seizure enunciated in *Pennoyer* has been termed "wholly novel" and inappropriate. Hazard, *supra* note 7, at 269-71; cf. C. Drake, *A Treatise on the Law of Suits by Attachment* § 236 (7th ed. 1891) (indicating seizure is required only when the state statute so mandates). Justice Hunt's dissenting opinion urged that only notice and an opportunity to defend, not seizure, were necessary constitutionally. 95 U.S. at 748.


13. 95 U.S. at 729-30 (quoting Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856)). The two public law principles limit the power of a state to property or persons within the state. Seizure of property clearly insures the presence of the property within the state throughout the litigation. *See* text accompanying note 7 *supra*. 
under the control of the court in connection with the process against the defendant.\textsuperscript{14}

Rather than explaining why seizure or other court control is necessary to obtain quasi in rem jurisdiction, Justice Field's full faith and credit argument simply justifies the reexamination in another court of the initial state court's exercise of jurisdiction over a defendant. No reasoned analysis is provided to support the conclusion that seizure of the property was required by the "principle of natural justice" of notice upon which the Court in \textit{Pennoyer} and previous courts relied.

The alternative theoretical basis suggested by Justice Field, essentially a rudimentary due process argument drawn from the then recently ratified fourteenth amendment, suffers from the related problems of being highly conclusory and minimally analytical. According to Justice Field, due process required that judicial proceedings follow the "rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."\textsuperscript{15} In particular, these rules included the requirement that a defendant be served personally with process within the state or appear voluntarily. Otherwise, the court would be unable to determine the personal liability of the defendant. Only if property within the state was brought under the control of the court or if the action itself concerned the property or some interest therein would substituted service be effective. The language of the opinion thus appeared to require seizure of the property serving as the basis for in rem jurisdiction only if the judgment was not sought directly to reach the property itself or some interest in the property.\textsuperscript{16} Justice Field again adduced little analytical support for this conclusion—an

\begin{itemize}
\item \textsuperscript{14} 95 U.S. at 733.
\item \textsuperscript{15} \textit{Id.} at 733. Justice Field failed to discuss whether, since the fourteenth amendment's ratification in 1868 followed by more than two years the judgment questioned in the case, there might be an issue concerning the retroactive application of the due process clause.
\item \textsuperscript{16} Justice Field wrote in connection with his due process analysis: \\
\[\text{(S)ubstituted service of process by publication . . . is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem.}\]
\textit{Id.} The meaning of this comment, however, is not entirely clear. It may relate more to the adequacy of substituted service than to the question of seizure of the property forming the basis of quasi in rem jurisdiction. \textit{See} note 9 \textit{supra.}
\end{itemize}
omission especially noticeable in view of the relatively recent adoption of the fourteenth amendment.

Despite its analytical deficiencies, the conclusion reached in *Pennoyer* that property must be brought within the court’s control if it forms the basis for asserting jurisdiction, except perhaps if the judgment is sought to affect directly an existing interest in the subject property, received widespread support in subsequent cases. Just as personal service of process is intended to assure notice to the defendant of a pending suit, the requirement of seizure of property also tends to protect the defendant from the possibility of lack of notice inherent in the concept of substituted service. Success in achieving this end, actual notice to the defendant, depends largely upon the method by which notice of seizure is communicated to the defendant. This aspect was ignored by the Court in *Pennoyer*, which assumed the defendant-owner or his agent to be in possession of the property and thereby automatically to be aware of its seizure. Moreover, this goal of securing actual notice can be achieved through measures other than the seizure of property.

A less compelling rationale for the conclusion in *Pennoyer* is that seizure of property is necessary to prevent either a valid judgment from becoming void through the transfer of property to another person or out of the state before execution of the judgment, or a void judgment from becoming valid through a conveyance of property to the defendant within the state. The problems of subsequent validity or voidness, however, could be judged simply on the basis of the presence of the property in the state at the commencement of the action: if the property is present when the action is commenced, jurisdiction thereafter exists to render a judgment based on the property; if no property is present when suit is filed, the action should be dismissed notwithstanding the possibility of a subsequent conveyance of property into the state. This rule could be applied easily to avoid uncertainty, despite the possibility that a valid judgment might become unenforceable because of a later transfer of the property. Thus, *Pennoyer* restricted the concept of quasi in rem

---

19. This problem of enforceability is magnified somewhat by the doctrine adopted in cases such as *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 318 (1870), which prevented subsequent
jurisdiction by limiting the judgment to the property involved, by requiring that the property be brought under the court's control at an early stage in the proceedings, and by limiting the collateral estoppel effects of such judgments. Subsequent cases followed this framework enunciated in Pennoyer.

Ensuing decisions by the Court perpetuated and expanded the concept of quasi in rem jurisdiction. In Harris v. Balk, the Court held that a debt followed the debtor wherever he went; hence, quasi in rem jurisdiction over the defendant-creditor could be established by attaching the debt when the debtor was in the forum state. The Court in Harris noted at the outset that attachment was created actions based on a judgment in which the foundation for jurisdiction was quasi in rem. In Cooper, the Court also prohibited the collateral attack of a judgment in a quasi in rem proceeding on such ground as insufficient publication of notice. Recent cases, such as Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950), make this conclusion dubious. Mullane involved a successful collateral attack on a judicial settlement of a common trust fund on the ground that statutory notice by publication was constitutionally inadequate.

No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. See, e.g., Harris v. Balk, 198 U.S. 215 (1905).

See also Restatement of Judgments §§ 73, 75, 76 (1942) (limiting the collateral estoppel effect to only those facts on which the quasi in rem judgment is based and which actually were litigated by the defendant); Restatement (Second) of Judgments § 73, comment d at 195; id. § 75, comment d, at 213-14 (Tent. Draft No. 1, 1973) (indicating possibility of issue preclusion regarding issues actually litigated in quasi in rem action). Other sources, however, indicate that such judgments have no collateral estoppel effect whatsoever, even regarding issues actually litigated. See 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1070 (1969 & Supp. 1978).

Harris, a North Carolina resident, was indebted to another North Carolina resident, Balk. This debt was attached by a Maryland resident by having a Maryland sheriff serve Harris with a writ of attachment and a summons to appear in court while Harris was visiting Maryland on business. Harris, however, left Maryland and subsequently consented to an order of condemnation against him as garnishee in the amount of his debt to Balk. The Maryland court entered judgment, which was paid by Harris. Meanwhile, Balk sued Harris in North Carolina for recovery of the debt. Harris' defense that payment of the Maryland judgment was satisfaction of a valid judgment, entitled to full faith and credit in North Carolina courts, was rejected by the North Carolina court on the ground that the Maryland court had no jurisdiction to attach or garnish the debt because the situs of the debt was in North Carolina. In reviewing the North Carolina judgment, the Supreme Court concluded that the Maryland court had in fact obtained valid jurisdiction, on the theory that the situs of a debt followed the debtor and the debt could be attached wherever the debtor was found.

Attachment and garnishment are used interchangeably in some courts' opinions. A writ
and governed by state law. If a state provided for the attachment of a debt, then jurisdiction over that debt would be acquired if the debtor were served personally with process of attachment within the state and if the creditor could have sued the debtor in the state.24 The original situs of the debt, therefore, was immaterial; rather, the obligation could be attached wherever the debtor could be served with process.25

For purposes of the development of quasi in rem jurisdiction, Harris is significant in several respects. It is renowned for its conclusion that the obligation to pay a debt can be attached and thereby provide the basis for quasi in rem jurisdiction wherever process can be served on the debtor. Underlying this conclusion, however, was the requirement that a writ be issued for the attachment of the debt. Although the court’s power over the person of the debtor confers jurisdiction on the court to issue the writ of attachment, mere personal service of a complaint on the debtor is insufficient to establish jurisdiction.26

Unlike the attachment of tangible property, attachment of intangible property, such as a debt, cannot proceed by physical possession; the debtor’s obligation to pay the defendant must be arrested, and a lien must be placed on the debt. To accomplish this, the debtor must have received notice of the suit and of

of attachment refers to the writ by which property of a defendant is seized and brought into the custody of the court, either to furnish jurisdiction over the property seized, to compel an appearance, to furnish security for a judgment, or to satisfy a judgment. If property within the state of a nonresident defendant is seized, the term “foreign attachment” frequently is used in contrast to a “domestic attachment” issuing against a resident. Garnishment pertains to the seizure of a person’s property owed by, or in the possession or control of a third party. The writ of garnishment warns the third party not to provide the defendant with his property, but to appear and answer the claims filed by the plaintiff. See generally Black’s Law Dictionary 161, 810 (4th ed. rev. 1968). See also C. Drake, A Treatise on the Law of Suits by Attachment §§ 450-467 (7th ed. 1891). This Article generally will use the term attachment, except to describe actions labeled otherwise by the courts in question.

24. The Court stressed that the plaintiff, in effect, stood in place of the creditor, seeking to collect the debt. As representative of the creditor, therefore, the plaintiff could sue only if the creditor could have attached the debt within the state. 198 U.S. at 226. As the Court recognized in Shaffer v. Heitner, 433 U.S. 186, 201 n.18 (1977), however, this rationale is flawed; unless the plaintiff already has obtained a judgment against the creditor, the plaintiff’s right to sue on behalf of the creditor is an issue to be litigated. See also Beale, The Exercise of Jurisdiction in Rem to Compel Payment of a Debt, 27 Harv. L. Rev. 107, 118-20 (1913).

25. 198 U.S. at 221-23.

26. Id. at 222.
his obligation to refrain from paying the debt through service of process, whether the debtor was temporarily or permanently in the state. 27

Harris thus continued the procedure established by Pennoyer, whereby quasi in rem jurisdiction could be acquired only by attachment or seizure of property within the state. It also extended this concept to include intangible as well as tangible property, property that accompanies the debtor regardless of his intent. The duration of the property's presence in the state, as measured by the length of the debtor's stay, is immaterial. That an intangible cannot be attached in the traditional physical manner did not preclude the application of the attachment concept. Instead, the attachment could be achieved by service of a writ of attachment on the debtor, effectively warning him not to pay his obligation to the defendant-creditor. Perhaps because the debtor in the usual case has no contact with the plaintiff, other than the obligation running to the defendant-creditor, the requirement of attachment serves to tie the debtor to the subject of the suit between the plaintiff and the defendant-creditor. Despite the in personam aspect of the debtor's presence, however, the action essentially is quasi in rem, based on the presence in the state of property belonging to the defendant—the debt owed to the defendant.

For decades after Harris, quasi in rem jurisdiction remained quiescent despite substantial alterations in in personam jurisdiction. Foremost among the developments affecting in personam jurisdiction was the adoption of the minimum contacts test, articulated in International Shoe Co. v. Washington, 28 by which in personam jurisdiction could be asserted over a defendant only if he had at least minimum contacts with the forum state. In a seminal opinion written by Chief Justice Stone, the Court in International Shoe concluded that:

27. To protect the defendant-creditor, Harris required that notice be given by the debtor-garnishee to his own creditor of the pending suit and that the garnishee must afford his creditor an opportunity to defend. The absence of notice would not affect the validity of the judgment against the debtor, but would prevent the debtor from asserting payment of the judgment as a defense to a subsequent proceeding by the creditor. Id. at 227.

28. 326 U.S. 310 (1945). Prior to International Shoe, in personam jurisdiction had been expanded in several respects: for example, jurisdiction over corporations based on "presence;" jurisdiction over nonresident motorists based on automobile accidents within the state. This expansion is canvassed thoroughly in Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909 (1960).
Now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

These minimum contacts must be sufficient to make it “reasonable” to require the defendant to defend an action against him in the forum state. Relevant factors to be considered in making this determination include whether the defendant is inconvenienced by defending an action far from home, whether the contacts are continuous and systematic rather than single or isolated acts or the casual presence of an agent, and the connection of the lawsuit to the defendant’s activities in the state. These factors cannot be assessed in a mechanical or quantitative fashion: “Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”

International Shoe was a purely in personam case, in which jurisdiction was based on the defendant-corporation’s continuous and systematic activities within the state, resulting in a large volume of business. The State of Washington’s claim that the defendant had failed to contribute to a state unemployment compensation fund for employee services within the state arose out of these intrastate activities. Service of process upon an agent of the corporation within the state was adequate, and the mailing of notice by registered mail to the defendant’s home office was “reasonably calculated to apprise” the defendant of suit.

The Court’s opinion in International Shoe contained no discussion of quasi in rem jurisdiction; however, it did not expressly limit the minimum contacts test to in personam jurisdiction. The Court’s omission of any discussion of the implications of this test for the concept of quasi in rem jurisdiction is understandable; the question simply was not raised by the facts of that case because the defendant had no substantial property within the State of Washington. Nevertheless, in subsequent cases courts, including

29. 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
30. Id. at 319.
31. Id. at 320.
32. Id. at 313-14.
the Supreme Court, limited application of the minimum contacts test to cases involving in personam jurisdiction. Notwithstanding substantial criticism in the academic community urging that due process required application of a minimum contacts test to quasi in rem as well as in personam jurisdiction, the courts distinguished sharply between the two jurisdictional concepts and did not apply a minimum contacts due process requirement to cases predicated on quasi in rem jurisdiction.

After International Shoe, many state legislatures enacted "long-arm statutes," pursuant to which various activities or contacts by a person within a state would subject him to suit concerning those activities. The jurisdictional basis under these long-arm statutes was in personam, not only if the statute provided for suits based on the transaction of business or commission of an act within a state, but also if the statute permitted suits on claims arising from the ownership or use of real property within the state. In the latter

33. See, e.g., Carrington, The Modern Utility of Quasi in Rem Jurisdiction, 76 Harv. L. Rev. 303, 305-09, 317 (1962) (arguing that exposure of a defendant to quasi in rem jurisdiction absent a showing of voluntary contact with the forum is "manifestly unsatisfactory"); Hazard, supra note 7, at 281 (advocating that "all jurisdictional problems be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation"); Traynor, Is This Conflict Really Necessary?, 37 Tex. L. Rev. 657, 662-63 (1959) (urging abolition of "mechanical distinctions between in rem and in personam jurisdiction"); Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1135-36 (1966) (contending that, because adjudication necessarily involves rights and duties of individuals, distinctions drawn between in rem and in personam jurisdiction are artificial and should be viewed as "general jurisdiction"); Note, Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory, 1968 Duke L.J. 725, 734-44 (concluding that "the same notions of fundamental fairness to the defendant espoused in International Shoe would seem to apply equally to jurisdiction in rem as well as in personam").


35. See, e.g., Ill. Ann. Stat. ch. 110, § 17(1)(c) (Smith-Hurd Supp. 1977); Ohio Rev. Code Ann. § 2307.382(A)(8) (Page Supp. 1978). See generally Uniform Interstate and International Procedure Act § 1.03(a)(5), and statutes cited in the Commissioners' Comment. These statutes limit in personam jurisdiction to causes of action arising from the enumerated acts or activities, such as ownership of real property. The Commissioners' Comment states that personal property was excluded because of potential difficulties in cases involving stolen
cases, the minimum contacts test necessarily would be applied, although the claim, arising from the ownership of property, could have been founded on quasi in rem jurisdiction. Thus, defendants in some suits based on the ownership of property but brought in personam were entitled to the safeguards enunciated in *International Shoe*, while others, in cases brought quasi in rem, were not. The logical explanation for this application of the minimum contacts test only to in personam suits based on property ownership and not to quasi in rem suits based on the same property, and the judgment had limited res judicata effects. Until the Court’s decision in *Shaffer v. Heitner*, this implicit explanation was challenged only by some commentators and a few courts.37

The sharp distinction between quasi in rem and in personam jurisdiction was ameliorated somewhat in *Mullane v. Central Hanover Bank and Trust Co.*38 The action in *Mullane*, involving the judicial settlement of accounts of the trustee of a common trust fund established pursuant to state law, was brought as an in personam action; no property was seized or otherwise secured to acquire quasi in rem jurisdiction. The proceedings in *Mullane*, however, included attributes of both quasi in rem and in personam jurisdiction: judicial settlement of accounts had been considered by some courts to be in rem, by others to be quasi in rem, and by still others to be “in the nature of a proceeding in rem.”39

The Court in *Mullane* held that notice given to beneficiaries only through statutorily approved publication in a local newspaper, without naming the beneficiaries or attempting to provide personal notice to known beneficiaries, violated due process. The Court expressed concern that the distinctions between quasi in rem and in personam jurisdiction were not always useful or suitable analytically. Although believing that the jurisdictional distinction expressed in procedural terms a concept that was fundamentally and historically associated with substantive property law, the Court noted that the development of new forms of proceedings and the

property, conditional sales, or chattel mortgages. See also *Restatement (Second) of Conflict of Laws* § 38 (1971).
37. See notes 33-34 supra.
39. Id. at 312.
growing significance of intangible property caused the old forms to be less appropriate. The Court therefore concluded:

[T]he requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.\footnote{40. \textit{Id.} at 312-13.}

Therefore, whether the action was nominally in rem or in personam, certain fundamental due process requirements would apply, mandating at a minimum that deprivation of property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case."\footnote{41. \textit{Id.} at 313.} The jurisdictional label thus was rejected as a rigid guide to the type of notice required.

In \textit{Mullane}, the Court condemned the mechanism of notice sanctioned by the state statute, publication in a local paper without identification of persons known to be affected, as unlikely to inform beneficiaries of the pendency of the lawsuit. While personal service would not be required in all circumstances, especially in cases involving nonresidents, notice must be given that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."\footnote{42. \textit{Id.} at 314 (citations omitted).} The Court emphasized that the method of notice must be such as reasonably would be chosen by one genuinely seeking to notify the recipients.

Although concluding that publication alone as permitted under the state statute would be insufficient to notify the beneficiaries of their right to participate in the litigation,\footnote{43. The Court distinguished among different types of beneficiaries. Beneficiaries whose identity or location could not be discovered with due diligence could be notified pursuant to the statutory provision, as could those beneficiaries whose interests were conjectural or future. Known beneficiaries with known residences, however, were entitled to notice reasonably calculated to reach them. Notice was not required to reach every beneficiary because of the} the Court also stated

\begin{itemize}
\item[40.] \textit{Id.} at 312-13.
\item[41.] \textit{Id.} at 313.
\item[42.] \textit{Id.} at 314 (citations omitted).
\item[43.] The Court distinguished among different types of beneficiaries. Beneficiaries whose identity or location could not be discovered with due diligence could be notified pursuant to the statutory provision, as could those beneficiaries whose interests were conjectural or future. Known beneficiaries with known residences, however, were entitled to notice reasonably calculated to reach them. Notice was not required to reach every beneficiary because of the
\end{itemize}
explicitly that publication might be sufficient if combined with another means. For example, attachment or seizure of property by the state could afford adequate notice to satisfy due process when accompanied by publication or posting. Indeed, the Court permitted a state to assume that property within that state either is in the owner's care or in the care of an agent, thereby assuring notice to the owner, or has been abandoned by the owner, thereby making notice meaningless. In effect, this aspect of the Mullane opinion retracts part of the Court's earlier rejection of the distinction between quasi in rem and in personam actions: the pure quasi in rem action involves seizure of property and therefore, if accompanied by publication, would satisfy the Court's criteria for notice, whereas for an in personam action such notice would be insufficient.

Despite Mullane's apparent retrenchment with respect to jurisdictional distinctions, within the decade the Court reconsidered the concepts and in Hanson v. Denckla attempted to set forth a reasoned approach for analyzing the "affiliating circumstances" without which courts may not exercise jurisdiction over a defendant or his property. The Court's analysis in Hanson began by adopting the definitions of jurisdiction found in the Restatement of Judgments. First, an in personam judgment "imposes a personal liability or obligation on one person in favor of another." Second, an in rem judgment "affects the interests of all persons in designated property." An in rem judgment then is contrasted with a quasi in rem judgment, which "affects the interests of particular persons in designated property." Quasi in rem jurisdiction may be separated into two forms: quasi in rem jurisdiction may be used by a plaintiff

reasonable expectation that those participating in the proceedings would safeguard the interests of all members of the class. Id. at 318, 319.
44. Id. at 316.
45. Id.
46. 357 U.S. 235 (1958). Hanson involved claims to part of the corpus of a trust created in Delaware by a settlor who later became a resident of Florida. After the settlor's will was admitted to probate in Florida, certain interested parties sought a declaratory judgment from a Florida court concerning the effect of a residuary clause in the will on a portion of the Delaware trust. Various defendants, including potential beneficiaries and the Delaware trustee, were not residents of Florida and could not be served personally there. The possibilities of quasi in rem and in personam jurisdiction over nonresidents, thus, became significant.
47. Id. at 246.
“seeking to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons;” or, alternatively, quasi in rem jurisdiction may involve property unrelated to the claims of the plaintiff if “the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.”

In Hanson, the Court relied substantially on historical precedent for its analysis of the availability of quasi in rem or in personam jurisdiction. Indeed, the basic description of quasi in rem jurisdiction as founded on physical power over property located within the state was derived largely from Pennoyer. Because the parties in Hanson assumed that the property, which consisted of trust assets, was located out of the forum state, the state court’s quasi in rem jurisdiction could exist only by virtue of the state’s power over the probate and construction of the residuary clause of the will of a state resident. The Court, however, firmly rejected the theory that quasi in rem jurisdiction to adjudicate the validity of the trust could rest on the effect that such a decision might have on the size of the estate passing under the will; otherwise, probate courts could have limitless power. Similarly, the Court rejected the suggestion that the residence of the decedent could provide a jurisdictional basis over interests of nonresidents in property outside the forum state. Thus, the Court adhered to the traditional notions of quasi in rem jurisdiction and refused to permit expansion of the underlying requirements of property in state.

In its treatment of in personam jurisdiction, the Court in Hanson applied the International Shoe minimum contacts test, again deriving jurisdictional restrictions from the territorial limits of a state’s power. Despite a trend toward expanding in personam jurisdiction

---

48. Id. at 246 n.12.
49. Id. at 246 & n.14.
50. Id. at 248-49. The Court stated:
   Whatever the efficacy of a so-called “in rem” jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation.
51. Id. at 249-50.
52. Id. at 250-55.
over nonresidents, the Court noted that the contacts of the defendants with the forum state were insufficient to satisfy the minimum contacts test. Several factors contributed significantly to this conclusion, including the lack of business or assets in the forum state, the absence of any act or transaction in the state, and the want of special legislation reflecting a strong state interest. The unilateral activity of the resident defendants was insufficient; some act must have occurred by which the nonresident defendants purposefully availed themselves of some benefits from the forum state. Finally, whether a state is the most convenient forum or is the center of gravity of a dispute may be relevant in deciding choice-of-law questions, but it is insignificant in determining the validity of personal jurisdiction.

The status of quasi in rem jurisdiction remained remarkably static for almost a century. The framework and rationale set forth in Pennoyer were adopted with little revision in subsequent cases. In contrast to the development of in personam jurisdiction, the quasi in rem cases reaffirmed the principle of Pennoyer that state court jurisdiction based on the presence of property within the

54. 357 U.S. at 251-53.
55. Id. at 253. Although some question persists as to the emphasis to be placed on the language in Hanson requiring that the defendant purposefully avail himself of the privilege of conducting activities in the forum state, this factor was influential in the Supreme Court's recent decision in Kulko v. Superior Court, 436 U.S. 84, 94 (1978). Applying the purposeful act test of Hanson, the Court in Kulko concluded that a defendant had not purposefully availed himself of the benefits and protections of California law simply by acquiescing in his daughter's wish that she be permitted to live there with her mother. If, as in Hanson, the case involved litigation of an agreement having no connection with the forum, and if no other contacts with the forum state were present, the Court concluded that reasonableness and fairness precluded in personam jurisdiction.
56. 357 U.S. at 254. This position has been reaffirmed in Shaffer, 433 U.S. at 215-16, and in Kulko v. Superior Court, 436 U.S. at 98.
57. Civil actions based on quasi in rem jurisdiction could not be commenced by attachment in original actions in the federal courts until the 1963 amendments to rule 4 of the Federal Rules of Civil Procedure. The Advisory Committee notes indicate that the amendment was intended to permit use in the federal courts of state procedures by which property of the defendant is brought within the court's custody and appropriate service upon the defendant is made. Federal jurisdiction and venue requirements, however, were expected to limit the actual use of this method of service. See Fed. R. Civ. P. 4(e), Advisory Comm. Notes (1963). This amendment of rule 4 was viewed on the one hand as a correction of an historical anomaly, see, e.g., Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337, 338, 380 (1961), and, on the other hand, as a preservation of an anachronistic device, see, e.g., Carrington, supra note 33, at 303-09.
state could be asserted by arranging for the seizure of the property or otherwise bringing it under the court's control, accompanied by some effort to notify the defendant. Although limited to the property seized, quasi in rem jurisdiction was an important means of obtaining a hearing in the forum of the plaintiff's choice.

The Effects of Shaffer v. Heitner on Quasi in Rem Jurisdiction

The Scope of the Decision

After the long period during which quasi in rem jurisdiction underwent little change, the Supreme Court in 1977 considered whether quasi in rem jurisdiction should be subjected to a minimum contacts test similar to that applicable to personal jurisdiction. In Shaffer v. Heitner, the Court unanimously concluded that a minimum contacts analysis is necessary to quasi in rem jurisdiction. The Court, however, expressly found it unnecessary to decide the other significant issue presented by the case: whether the seizure of property to obtain quasi in rem jurisdiction may be undertaken only with adequate procedural safeguards.

In Shaffer, a Delaware statute permitted the state's courts to obtain jurisdiction by sequestering or seizing the in-state property of a nonresident defendant. Upon the filing of a shareholder's derivative suit against a Delaware corporation and its officers and directors, the state court granted a motion for an order to sequester certain stock, options, warrants to purchase stock, and other intangibles belonging to nonresident past and present officers and directors of the Delaware corporation. This seizure of property was

58. In an exception to this quiescent period, the California Supreme Court foreshadowed the future developments in Shaffer when, in 1957, it applied a contacts and fairness analysis to determine the validity of an exercise of quasi in rem jurisdiction. Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), appeal dismissed and cert. denied sub nom. Columbia Broadcasting Sys., Inc. v. Atkinson, 357 U.S. 569 (1958).

59. 433 U.S. 186 (1977). Justice Rehnquist did not participate in the consideration or decision of the case. Although Justice Brennan dissented in part, he concurred in the portion of the opinion holding the minimum contacts test applicable to quasi in rem jurisdiction.

60. Id. at 209-10.


62. DEL. CODE ANN. tit. 8, § 169 (1975), provided that, for attachment and jurisdictional purposes, the situs of stock issued by a Delaware corporation was Delaware. This provision is unique to Delaware; other states generally follow U.C.C. § 8-317(1), and require seizure of the stock certificates for an attachment to be valid.
thought necessary to provide the court with quasi in rem jurisdiction over the nonresident defendants because the physical absence of the defendants from the state and the lack of activities within the state giving rise to the cause of action precluded in personam jurisdiction. The statute required that the defendant appear personally after seizure of the property; if he failed to appear or otherwise defaulted, the property would be sold to satisfy the plaintiff’s claim. If, however, the defendant entered a general appearance, then he could petition the court for release of the property. The seizure of the property, thus, was a device not only to obtain quasi in rem jurisdiction but also to compel a nonresident to submit to in personam jurisdiction.

Notwithstanding the Delaware Supreme Court’s conclusion in Shaffer that the minimum contacts approach was inapplicable to quasi in rem jurisdiction, the United States Supreme Court determined that all assertions of state court jurisdiction must be subjected to a minimum contacts analysis. The Court reached this conclusion after a review of precedent, beginning with Pennoyer. Although Pennoyer limited the assertion of in personam jurisdiction over nonresidents, it continued to permit the exercise of quasi in rem jurisdiction over nonresidents based on the seizure of their property within the state. Subsequent modifications of in personam jurisdiction culminated in the minimum contacts test adopted in

---

63. The complaint alleged that certain activities of the defendants in Oregon resulted in civil damages for antitrust violations and criminal fines for contempt convictions in other proceedings. The antitrust case reached the Supreme Court and has been remanded for further proceedings. Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978). For opinions in the contempt adjudication, see United States v. Greyhound Corp., 370 F. Supp. 881 (N.D. Ill.), aff’d, 508 F.2d 529 (7th Cir. 1974).

64. 361 A.2d 225, 229 (Del. 1976). Other courts recently had considered applying a minimum contacts test to quasi in rem jurisdiction. See, e.g., Steele v. G.D. Searle & Co., 483 F.2d 339, 347 (5th Cir. 1973), cert. denied, 415 U.S. 958 (1974) (refusing to apply full International Shoe minimum contacts test although recognizing that all types of jurisdiction must satisfy requirements of justice and fair play; presence of defendant’s debtor within state where debtor regularly did business was sufficient to establish quasi in rem jurisdiction over debt).

65. See, e.g., Hess v. Pawloski, 274 U.S. 352 (1927) (nonresident motorist statutorily assumed to consent to appointment of agent for service of process). The Court in Shaffer also noted that corporations doing business within a state were assumed to consent to the appointment of an agent. 433 U.S. at 201-03. This transformation of in personam jurisdiction was achieved through the use of the legal fiction “that the out-of-state motorist [or foreign corporation], which it was assumed could be excluded altogether from the State’s highways [or commerce], had by using those highways [or engaging in business] appointed a desig-
International Shoe, which the Court in Shaffer viewed as focusing on "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest." This relaxation of the prerequisites of in personam jurisdiction, however, was not accompanied by an alteration of the concepts of quasi in rem jurisdiction.

Despite the appearance of continuity in the quasi in rem cases, the Court in Shaffer observed that Pennoyer had been modified indirectly. Through the requirement that, aside from the warning provided by the seizure itself, property owners be notified before disposition of property pursuant to a court’s judgment, the Court had recognized that a quasi in rem judgment affected not only the property but the property owner as well. Moreover, in Mullane, the Court had declined to rely on the distinction between in rem and in personam concepts because of the "elusive" nature of the standards to be imposed. These qualifications foreshadowed the Court’s inquiry in Shaffer into the applicability of International Shoe’s standard of fairness and substantial justice to quasi in rem actions.

Recognizing that quasi in rem jurisdiction is premised not merely upon jurisdiction over property but upon jurisdiction over the interests of persons in the property, the Court determined that the minimum contacts standard of International Shoe was applicable to quasi in rem actions. The Court further observed that, because all proceedings are actually against persons, and not against things, the terms "in rem" and "quasi in rem" are only shorthand expressions for the interests of persons in property. The due process considerations, embodied in the minimum contacts test, apply to the interests of persons whether the action is in personam or quasi in rem. That quasi in rem jurisdiction limits the liability of the defendant

nated state official as his agent to accept process." Id. at 202. Use of this fiction permitted the courts to accommodate the "advent of automobiles" and the "realities of interstate corporate activities" within the theory of Pennoyer. Id.

66. 433 U.S. at 204. One commentator has suggested that the phrasing of the minimum contacts test in Shaffer departs from prior cases, which had focused on the relationship between the defendant and the forum but had not mentioned the litigation. Fyr, Shaffer v. Heitner: The Supreme Court’s Latest Last Words On State Court Jurisdiction, 26 EMORY L.J. 739, 763-64 (1977).

67. 433 U.S. at 206 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950)).

68. Id.

69. Id. at 207 & n.22.
to the value of the property involved does not render moot the necessity of determining whether the exercise of jurisdiction is consistent with the minimum contacts test of due process.\textsuperscript{70}

Although the Court concluded that the minimum contacts test applies to all assertions of jurisdiction,\textsuperscript{71} it left unclear whether the test as applied to quasi in rem actions is identical to the test employed in analyzing in personam actions. The Court stated explicitly that the presence of property in the state provides a connection among the defendant, the forum, and the litigation. Indeed, if the controversy involves a claim to the property forming the basis of the jurisdiction, the Court stated that for the state to lack jurisdiction would be "unusual."\textsuperscript{72} This conclusion was explained partly by the defendant's expectation of benefiting from state protection of the property, by the state's interest in assuring the marketability of property and the peaceful resolution of disputes, and by the likelihood that relevant records and witnesses would be found within the state. Similarly, if the claim concerns duties and rights arising out of ownership of the property, the presence of the property may be a contact favoring jurisdiction. The Court therefore observed that many quasi in rem or purely in rem actions will be unaffected by application of the minimum contacts test.

According to the Court in \textit{Shaffer}, the minimum contacts test will have its most significant effect if no relationship exists between the jurisdictional property and the claim. In such cases, the property alone will be inadequate to provide minimum contacts with the state;\textsuperscript{73} rather, other ties must be ascertained and evaluated. These cases, exemplified by \textit{Harris} and \textit{Shaffer}, involve the use of property simply as a jurisdictional expedient in the absence of minimum contacts sufficient to permit in personam jurisdiction. If, as in \textit{Shaffer}, the express purpose of the quasi in rem jurisdictional device

\begin{itemize}
  \item \textsuperscript{70} Id. at 207 n.23 (citing Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972)).
  \item \textsuperscript{71} Id. at 212. Some commentators have questioned whether the Court meant to apply both the minimum contacts and the fundamental fairness aspects of \textit{International Shoe}. E.g., Cassady, \textit{Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?}, 26 U. Kan. L. Rev. 61 (1977). Because the Court in \textit{Shaffer} referred to both concepts, however, it probably intended to incorporate both. Of course, \textit{Shaffer} itself may shape the test applied to in personam jurisdiction in the future.
  \item \textsuperscript{72} 433 U.S. at 207.
  \item \textsuperscript{73} Id. at 209. If the presence of property indicates sufficient contacts within the state, "there is no need to rely on the property as justifying jurisdiction regardless of the existence of those contacts." Id. at 209 n.31.
\end{itemize}
is to compel the defendant's personal appearance, the Court thought it necessary to apply a uniform due process standard.

The Court was unpersuaded by the purported justifications for allowing quasi in rem jurisdiction absent minimum contacts. The danger that a defendant could remove his assets to a state in which he could not be sued personally was generally inapplicable and could be eliminated satisfactorily either by enforcing a judgment in another state under the full faith and credit clause or by allowing a foreign attachment procedure to secure the property for a judgment in a proper forum. Moreover, application of the minimum contacts test to quasi in rem jurisdiction added no uncertainty because, the Court believed, the test could be applied easily in most cases. Nor did the history of jurisdiction founded simply upon the presence of property within the state justify violations of the evolving constitutional requirements of due process; quasi in rem jurisdiction being essentially jurisdiction based on persons' interests in things, the conclusion that constitutional protections apply followed logically.

The rationale by which the Court supported its conclusion that the minimum contacts test applies to all jurisdictional assertions preserves the possibility that this test as applied to quasi in rem jurisdiction may differ somewhat from that used in examining in personam jurisdiction. The test may be viewed as unitary, with the presence of property simply an additional contact to be weighed in the balance. Alternatively, the presence of property may be more than just another factor; instead, it may create a near presumption of adequate contacts except when the property bears no relationship to the litigation. The Court was "not entirely clear" with respect to which view it adopted.

Applying *International Shoe* to the quasi in rem jurisdiction obtained pursuant to the Delaware statute, the Court concluded that minimum contacts did not exist. The only connection with Delaware was the presence of the stock in that state; this circumstance was the result of a unique state law establishing the situs of stock

---

74. *See id.* at 210.
76. 433 U.S. at 219 (Stevens, J., concurring in the judgment).
of a domestic corporation as Delaware. No Delaware statute purported to protect the state interest in regulating conduct of corporate fiduciaries by establishing jurisdiction over them. Moreover, with respect to that goal, the sequestration statute was overinclusive by reaching any nonresident owning stock and underinclusive by reaching only those directors who owned stock or other property in the state. Finally, no demonstration was made that Delaware was a fair forum for the litigation; the defendants had no contacts with the state to justify jurisdiction over them. Absent sufficient contacts, the majority concluded, due process required a determination that the state court lacked jurisdiction over the action.

Although concurring in the judgment, Justice Powell and Justice Stevens would have reserved decision on whether ownership of certain property, such as real estate, by itself might provide minimum contacts with the state, thereby avoiding uncertainties within the International Shoe standard, while preserving the due process requirements. Justice Stevens also questioned the scope of the majority's opinion. Moreover, he would not invalidate other exercises of quasi in rem jurisdiction if the property owner had adequate notice of the controversy and of the possibility of suit based on local activities. Justice Stevens viewed due process protection as essentially a requirement of notice: notice of the particular claim and notice that certain activities could result in jurisdiction arising in a foreign state. Applying this formula to the Delaware case, Justice Stevens agreed with the majority's judgment that due process was not satisfied.

Although Justice Brennan joined the Court's opinion insofar as it held that the International Shoe test applied to all types of state court jurisdiction, he objected sharply to the application of the test to the Delaware case. He believed that because the issue of the existence of minimum contacts was not litigated in the state courts, it should not have been decided by the Supreme Court. Forced to
express his view on the existence of minimum contacts, Justice Brennan concluded that in a shareholders' derivative action the state court had jurisdiction over the directors and officers of a corporation incorporated in the state. The state interests in providing restitution to local corporations whose fiduciaries have acted improperly, in regulating corporate fiduciaries, and in providing a forum for supervising state-chartered entities were the strong reasons cited by Justice Brennan for allowing jurisdiction over a shareholders' derivative suit.\(^8\) By accepting their positions with a corporation chartered by the state, the directors not only enjoyed the protections afforded by state laws, but correspondingly subjected themselves to the state's jurisdiction over suits concerning their fiduciary status. Thus, according to Justice Brennan, the minimum contacts test was satisfied.\(^4\)

The differing views of the Justices—all of whom agree that the principles of *International Shoe* apply to quasi in rem jurisdiction but who disagree as to these concepts' application to categories of cases or to particular circumstances—indicate that *Shaffer* cannot be expected to answer all questions regarding jurisdiction. The determination that a principle governs is significant; the articulation of that principle and its bearing on particular cases, however, requires more intensive consideration than one case can provide. Future cases undoubtedly will require a reworking of the basic *Shaffer* principle.

**The Future of Quasi In Rem Jurisdiction After Shaffer v. Heitner**

Although *Shaffer* altered markedly the nature and availability of quasi in rem jurisdiction by requiring the application of the minimum contacts test, it nonetheless preserved this form of jurisdiction as a possible alternative to in personam jurisdiction. The rationale for sustaining quasi in rem jurisdiction, and the reasons that would induce a plaintiff to use this jurisdictional device, therefore, become important.

The *Shaffer* opinion contains no explicit suggestion that quasi in rem jurisdiction is no longer available. Rather, the Court enumerated the criteria that must be met before quasi in rem jurisdiction can be exercised, and thus strongly implied that this jurisdictional

---

83. *Id.* at 223-24.
84. *Id.* at 228.
device remains viable. The minimum contacts test is simply a standard that must be satisfied much as any other procedural requirement must be fulfilled. Outright abolition in quasi in rem jurisdiction was not only unnecessary in Shaffer, but also would have been particularly inappropriate unless all the various functions of quasi in rem jurisdiction were evaluated and rejected.\footnote{85}

Imposition of the requirement that quasi in rem jurisdiction satisfy the minimum contacts test, however, may reduce substantially any necessity for or advantage in invoking quasi in rem jurisdiction. Assuming that the test for minimum contacts is the same for both quasi in rem and in personam jurisdiction, contacts sufficient to qualify for one jurisdictional form will satisfy the other; the plaintiff could base his action on either. No longer does a primary rationale for quasi in rem jurisdiction—the absence of a requirement that connections exist between the defendant, the forum, and the claim—remain an incentive to use that jurisdictional form. Because in personam jurisdiction does not limit damages to the value of the property seized but permits unlimited personal liability, in personam jurisdiction appears superior, at least from a plaintiff’s perspective. Moreover, from the viewpoint of judicial economy and efficiency, in personam jurisdiction is preferable because it permits

\footnote{85. One commentator has suggested that no substantial reason exists to retain the concept of quasi in rem jurisdiction. Fyr, supra note 66, at 762-63. Fyr observed that the terms quasi in rem and in rem developed as a means of describing the “extent of jurisdiction which could be exercised under the presence formula.” Id. at 762 (emphasis in original). Based on this observation, he stated that “[t]he contacts formula does not require these classifications. Whatever the nature of the contact, jurisdiction under the International Shoe-based formula is always in personam.” Id. Questioning the utility of quasi in rem after Shaffer, Fyr concluded that “[s]ince henceforth all jurisdiction must be based on minimum contacts, it is hard to see why a state having access to the broadest form of jurisdiction would elect to require its courts to proceed under a theory that would limit the scope of recovery.” Id. at 762-63. This view is premature, as is the proposition that quasi in rem jurisdiction has been eradicated. See, e.g., Olsen, Shaffer v. Heitner: A Survey of Its Effects on Washington Jurisdiction, 13 Gonz. L. Rev. 72, 80 (1977) (“The immediate effect of Shaffer is, of course, to eradicate the concept of quasi in rem jurisdiction.”). Although quasi in rem jurisdiction possibly may become an anachronism, some substantial functions for quasi in rem jurisdiction to perform may well remain; to eliminate quasi in rem jurisdiction simply because of the requirement that all forms of jurisdiction satisfy minimum contacts analysis would be to ignore all other aspects of the differentiation of jurisdiction. The RESTATEMENT (SECOND) OF JUDGMENTS § 8, Comment b at 65 (Tent. Draft No. 5, 1978) indicates that the traditional terminology remains helpful, at least to show the types of relationships upon which jurisdiction is based. Finally, even if quasi in rem jurisdiction becomes unnecessary, well-established principles of federal jurisdiction and federalism may deter the Supreme Court from abolishing it in state proceedings.}
binding resolution of the entire claim in one case. Unless counter-
vailing advantages for quasi in rem jurisdiction exist, the applica-
tion of a uniform minimum contacts test may have the practical
effect of undermining the usefulness of quasi in rem jurisdiction.

One countervailing advantage of quasi in rem jurisdiction is the
security it provides for a plaintiff. The required seizure or other
judicial control of the property benefits the plaintiff by insuring the
safety of the property pending suit by preventing its removal or
other disposition, thereby preserving the plaintiff's ability to collect
damages should he be awarded judgment. Although quasi in rem
jurisdiction limits the amount of the potential judgment to the
value of the property seized, if that value exceeds the claim or if the
defendant is judgment-proof but for the assets seized, this limita-
tion may be insignificant.

Moreover, the added security afforded by the seizure of property
which accompanies quasi in rem jurisdiction may be a sufficiently
compelling reason for a plaintiff to prefer quasi in rem jurisdiction
if the plaintiff believes that the defendant may squander his assets
pending suit and thereby become unable to satisfy the judgment.
Alternative security devices, however, are available to a plaintiff
even if jurisdiction is in personam: the plaintiff can request that the
court order the defendant not to remove assets from the state; alter-
natively, after judgment is rendered, the plaintiff can enforce the
judgment in another state in which the defendant's assets can be
found. These alternatives, however, may not be as effective in some
circumstances as a seizure of assets at the initiation of the litigation.

Another far less significant rationale for invoking quasi in rem,
rather than in personam, jurisdiction concerns the limited res judi-
cata effect of a quasi in rem judgment. A plaintiff with a weak case
conceivably might prefer to bring several quasi in rem suits, hoping
to prevail in one. Judgments against him in other suits could not
be used to bar further suits if the defendant failed to make a general
appearance. This approach is implausible, however, because re-
peated litigation involves significant costs for a plaintiff. Moreover,
this rationale would not promote judicial efficiency and economy.

Although the minimum contacts test constitutionally may permit

86. See Restatement (Second) of Judgments § 75, Comment c at 210-11 (Tent. Draft No. 1, 1973) (criticizing the absence of a bar to subsequent actions by the plaintiff). See also Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 954-55 (1960).
the states to exercise in personam jurisdiction over certain claims against nonresidents arising from their activities within the state, a particular state may have chosen not to exercise its jurisdiction statutorily to the full extent constitutionally possible. Under such circumstances, quasi in rem jurisdiction over in-state property related to the claim may be the only form of jurisdiction available to the plaintiff in that state. Moreover, even if a state's long-arm statute arguably permits in personam jurisdiction, a plaintiff may choose to use quasi in rem jurisdiction to avoid potential problems of interpreting the scope of the long-arm statute. Assuming a completely uniform minimum contacts test for all forms of jurisdiction, a plaintiff thus conceivably might prefer, or be required by state-imposed limitations, to assert quasi in rem jurisdiction.

The fundamental question, assumed in the foregoing arguments, is whether Shaffer requires the application of a uniform minimum contacts test to the two forms of jurisdiction, or whether it allows differences either in the test itself or in its application. The opinion does not purport to delineate any difference in the test; indeed, language in the opinion suggests that the test is the same. If the court intended to vary the form of the test, the distinctions should have been enunciated clearly. Furthermore, the Court's reasoning in applying the minimum contacts test to quasi in rem jurisdiction seems to compel the conclusion that the same test is to be used in both quasi in rem and in personam actions. Any difference, therefore, would seem to arise from the application of the test to the two forms of jurisdiction and not from the nature of the test itself.

In addition to the viability of quasi in rem jurisdiction as an

---

87. See note 35 supra.

88. See Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir.), cert. denied, 409 U.S. 843 (1972) (suggesting that a plaintiff may choose quasi in rem jurisdiction rather than use a state long-arm statute if the potential existed for lengthy litigation concerning the applicability of the statute to the defendant).

89. See 433 U.S. at 206, 207, 209, 211, 212. Because "jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing," the Court concluded that "[t]he standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in International Shoe." Id. at 207. Observing that application of International Shoe to both in rem and in personam jurisdiction would affect the quasi in rem category of litigation most significantly, the Court nonetheless declared that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." Id. at 209. See also text accompanying note 76 supra.
alternative to in personam jurisdiction, *Shaffer* preserves the possibility that quasi in rem jurisdiction, otherwise inadequate under the minimum contacts theory, might be constitutionally permissible if no other forum is available.\(^9\) In at least one case after the Court's decision in *Shaffer*, property unrelated to the plaintiff's claims was held to be a sufficient basis for quasi in rem jurisdiction. In *Louring v. Kuwait Boulder Shipping Co.*,\(^{91}\) the court permitted garnishment of a debt owed by the plaintiff, a Connecticut corporation, to the defendant, a Kuwait corporation, to establish quasi in rem jurisdiction over the plaintiff's claim for an unrelated sum, without applying the minimum contacts test. The absence of a state in which in personam jurisdiction over the defendant could be obtained was important to the court's decision. Moreover, the court believed that minimum contacts adequate to support quasi in rem jurisdiction probably were established, even if they were inadequate under *International Shoe*.\(^{92}\) The court thus apparently interpreted *Shaffer* to allow a two-tier minimum contacts analysis, reserving a less demanding test for quasi in rem jurisdiction.

Similarly, if the plaintiff's claim relates to title or other incidents of ownership of property within the state owned by the defendant, the Court indicated that the minimum contacts test would almost always be satisfied. Arguably, such cases involve a presumption of minimum contacts adequate to support the exercise of quasi in rem jurisdiction. These contacts, moreover, also may be sufficient to justify the assertion of in personam jurisdiction under many state long-arm statutes.\(^{93}\)

The existence within a state of property owned by a defendant may give rise to sufficient expectations or duties of the defendant to justify requiring him to defend a suit, at least to the extent of the value of the property. These expectations may be adequate minimum contacts to satisfy the test adopted in *Shaffer*. Principles of fairness may not be offended if the judgment is limited to the value

---

\(^{90}\) 433 U.S. at 211 n.37.

\(^{91}\) 455 F. Supp. 630 (D. Conn. 1977).

\(^{92}\) *Id.* at 633. That the garnishee had acted as the agent for the defendant within the state and that the defendant's chief executive officer had met with the garnishee several times in the garnishee's Connecticut offices constituted contacts adequate for quasi in rem jurisdiction. The court suggested parenthetically that these contacts also might satisfy *International Shoe*.

\(^{93}\) See note 35 supra.
of the property, though the contacts may be insufficient to justify the imposition of general liability.\footnote{94} Thus, even if the defendant's only connection with the forum state is the ownership of property, instances may occur in which the defendant may reasonably be required to defend a quasi in rem action grounded solely upon that contact.

Such a situation may arise in cases, typified by Seider v. Roth,\footnote{95} in which the defendant's only property within the state is an insurance policy, located in that state merely by virtue of the insurer's residence. This contact arguably is sufficient to support quasi in rem jurisdiction but inadequate to justify the exercise of in personam jurisdiction. The underlying question, however, is how this link with the state can qualify under the minimum contacts test for quasi in rem jurisdiction, but cannot under the same test for in personam jurisdiction. Perhaps the language of the "reasonableness" test adopted in International Shoe provides an answer. That test requires that a particular exercise of jurisdiction not offend "traditional notions of fair play and substantial justice," and that the asserted jurisdiction be "reasonable" under the circumstances. If liability is limited to the value of the property involved, a particular jurisdictional claim may be more "reasonable" and acceptable than if liability were not limited. The limitation on liability required under quasi in rem jurisdiction therefore may be a factor to be considered in applying the International Shoe test. In a situation such as that presented in Seider, for example, a defendant reasonably may be expected to defend a lawsuit based on the ownership of an insurance policy issued by an insurer doing business within the forum state, but only if his liability is limited to the value of the policy. The defendant's expectations with regard to that property and the limitation on his liability together may justify subject-

\footnote{94} One commentator has suggested that Shaffer implies that the limitation of liability to the value of property seized should not cause the requirement of substantive due process, the minimum contacts test, to vary. The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 158 (1977). The passage in Shaffer to which the article refers, 433 U.S. at 207 n.23, however, simply indicates that minimum contacts analysis is essential regardless of the value of property; that passage should not be read necessarily to mean that the limitation on liability cannot be considered as a factor within the minimum contacts analysis. See 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1123 (1969 & Supp. 1978) (outlining advantages of a limited appearance in quasi in rem actions); Smit, The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff, 43 Brooklyn L. Rev. 600, 620-22, 627-29 (1977) (supporting the proposition that fairness is affected by limited liability).

ing him to quasi in rem jurisdiction, even though these interests
would be insufficient to warrant in personam jurisdiction.

The validity of obtaining jurisdiction over a nonresident de-
defendant by attaching a liability insurance policy issued to
him by an insurer doing business in the forum state has been
litigated frequently after the Court's decision in Shaffer.5 In O'Connor v. Lee-
Hy Paving Co.,97 the Second Circuit reaffirmed the Seider doctrine
after examining it under the minimum contacts test adopted in
Shaffer. Writing for the court, Judge Friendly reiterated the dis-
tinction he had made in Minichiello v. Rosenberg98 between jurisdic-
tion based on the attachment of an insurance policy and jurisdiction
arising from the attachment of property wholly unrelated to the
claim, typified by Harris v. Balk.99 Although Shaffer clearly rejected
the jurisdictional seizure of a Harris-type debt, Judge Friendly con-
cluded that in the usual Seider case a "judgment would mean sim-
ply that liability policies, on which appellants could not have real-
ized for any purpose other than to protect themselves against losses
to others, will be applied to the very objective for which they were
procured."100 Thus, while Shaffer required a deeper inquiry into
the attachment of the insurance policy, it did not mandate automatic
rejection of Seider; instead, it prompted a shift in focus from that
adopted in Minichiello, which had relied heavily on Harris, to more
fundamental issues of due process.101

96. See, e.g., the cases cited in Savchuk v. Rush, 272 N.W.2d 888, 891 (Minn. 1978).
98. 410 F.2d 106, 118 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969). Construing Seider,
the Second Circuit in Minichiello upheld as constitutional a New York statute that permitted
jurisdiction based on the attachment of a nonresident defendant's interest in an insurance
policy issued by an insurer doing business in the forum state. The plaintiff, a New York
resident, brought suit in New York to recover for injuries suffered in an accident in Pennsyl-
vania. The defendant, Rosenberg, a resident of Pennsylvania, was insured by a company
doing business in New York.
99. 198 U.S. 215 (1905); see note 22 supra & accompanying text.
100. 579 F.2d at 199 (quoting Minichiello v. Rosenberg, 410 F.2d at 118).
101. Earlier in the same paragraph from which the court in O'Connor quoted, the state-
ment was made that the argument concerning the burden on a nonresident to defend a foreign
cause of action in a state simply because of the insurer's business was "unpersuasive so long
as Harris v. Balk . . . stands." 410 F.2d at 118. The dissent in Minichiello characterized
the majority as relying strongly on Harris. Id. at 120. In cases subsequent to Seider, the New York
state courts also have relied on Harris. See, e.g., Simpson v. Loehmann, 21 N.Y.2d 305, 234
N.E.2d 669, 287 N.Y.S. 2d 633 (1967). In Simpson, however, the court also focused on the
overall fairness and on the interests of the parties and the state.
Applying *Shaffer*, the Second Circuit in *O'Connor* concluded that sustaining the *Seider* jurisdictional device would not be unfair or violative of the due process owing to either the insurer or the insured, the nominal defendant. In personam jurisdiction over the insurer validly could be based on its regular conduct of business within the state. The court thus concluded that *Shaffer* did not affect the prior decision in *Minichiello*, which had upheld an assertion of jurisdiction over a nonresident insured motorist whose insurer did business in the forum state.\(^{102}\) With respect to the insured, who was only a nominal defendant in view of the insurer's obligation under the policy to defend and to pay any judgment,\(^ {103}\) the limitation of the judgment to the amount of the policy and the preclusion of any collateral estoppel effect afforded adequate protection.\(^ {104}\)

Results similar to those obtained in *O'Connor* have been reached in two other recent cases. In *Savchuk v. Rush*,\(^ {105}\) on remand from the United States Supreme Court, the Minnesota Supreme Court concluded that attachment of an insurance company's obligation to defend and indemnify a nonresident insured satisfied the due process standards of *Shaffer* and *International Shoe*. The judgment imposed in that case was limited to the policy's face amount; moreover, the plaintiffs were residents of the forum state, and adequate notice was provided the defendant-insured. The court enumerated several factors significant in sustaining the validity of the attachment statute. The asset attached—the insurer's obligation to defend and indemnify the insured—was related directly to the claim. Indeed, the asset had no independent significance or value apart from the litigation. Because it determined the rights and obligations of the insurer, the insured, and, practically speaking, the victim, the policy itself was the focus of the litigation.\(^ {106}\) The state, moreover,

---

102. 579 F.2d at 200-01.
103. The court continued to analogize the situation to that of a direct action statute. *Id.* at 201, 199 nn.5 & 7, 206 n.18.
104. *Id.* at 201-02. The court relied on the *Restatement (Second) of Judgments* § 68.1 (Tent. Draft No. 4, 1977), § 88 (Tent. Draft No. 2, 1975), and § 75(c) (Tent. Draft No. 1, 1973), and on the emphasis given fair play in *Shaffer* for its conclusions as to the preclusion of collateral estoppel effects.
106. *Id.* at 892. This comment appears rather overstated, because much of the focus is liability for the accident, apart from duties under the policy.
had an interest in enabling resident plaintiffs to recover in a local forum. Finally, the balance of interests between the insurer and the nominal defendant, and the limitation of liability to the amount of the policy, minimized "the traditional 'jurisdictional bias' in favor of the nominal defendant." Considering the relationship between the defending parties, the litigation, and the forum state, the court concluded that the minimum contacts test was satisfied.

Applying a Shaffer analysis, the New York Court of Appeals, in a recent per curiam opinion in Baden v. Staples, also has reaffirmed Seider. Citing O'Connor, the court in Baden overruled judgments of several lower courts in New York, which had held that Shaffer overturned Seider. Those lower court decisions had construed Seider as a traditional quasi in rem case similar to Harris and, while ignoring the contacts of the insurance company, the real party in interest, had found inadequate contacts between the non-resident insured and the forum state, thereby defeating jurisdiction under Shaffer.

The already prolific debate over the validity of Seider in light of Shaffer doubtless will continue. The recent decision by the Supreme Court to review this issue in Savchuk will produce perhaps in the next year not only a resolution of the continued viability of

107. Id. at 891-93.
108. Id. at 893.
109. This conclusion assertedly conformed to the court's policy of extending its jurisdiction to "the maximum limits consistent with due process." Id.
113. Shaffer did not refer to the Seider cases, leaving the issue open for lower courts to consider. A footnote to Shaffer indicated that to the extent older cases were inconsistent with the opinion they were overruled. 433 U.S. at 212 n.39. Whether Seider and its progeny may be characterized as "inconsistent" is subject to differing interpretation.
Seider but also a further elaboration of the elements of quasi in rem jurisdiction. For purposes of this Article, the issue is important because several appellate courts have sustained this very peculiar type of quasi in rem jurisdiction. Some courts and commentators have suggested that Seider could survive through consideration of the direct action and the in personam aspects of the insurer's relationship to the cause of action, but not as a true quasi in rem action.114 The apparent survival of Seider nonetheless supports one type of jurisdiction, based on the attachment of an asset, that is sustainable under a minimum contacts analysis if liability is limited to the value of the property seized.

Authority after Shaffer other than the liability insurance cases also supports the conclusion that, because the minimum contacts test may be applied differently to quasi in rem jurisdiction than to in personam jurisdiction, the former will continue to be exercised. Two recent cases, decided by courts in the Second Circuit, have upheld quasi in rem jurisdiction based on the attachment of an unrelated debt owed to a nonresident defendant by a corporation doing business in the forum state.

In Intermeat, Inc. v. American Poultry, Inc.,115 the Second Circuit applied the minimum contacts analysis to an assertion of quasi in rem jurisdiction. Noting that the state's test for in personam jurisdiction was more stringent than that of International Shoe test because it required the defendant to be transacting business in the state, the court defined the constitutional test as whether the relationships between the plaintiff, the defendant, and the forum make it fair, reasonable, and just to require the defendant to defend the quasi in rem action.116 Minimum contacts with New York sufficient to permit quasi in rem jurisdiction in an action arising out of the defendant's commerce in that state were established by several factors.117 The contract at issue in the suit had substantial connections

115. 575 F.2d 1017 (2d Cir. 1978). The lower court held that, although no in personam jurisdiction existed, quasi in rem jurisdiction could be asserted. The Second Circuit did not decide whether in personam jurisdiction could be asserted in the circumstances of the case.
116. Id. at 1022-23.
117. Id. at 1023.
with New York and had been mailed from that state by the plaintiff. The debtor, whose obligation to the defendant was attached, was doing business in New York. Moreover, the defendant made frequent purchases through New York companies, and his contracts often provided that the arbitration of disputes take place in New York.

In *Feder v. Turkish Airlines*, 118 a District Court for the Southern District of New York concluded that attachment of a bank account in New York provided valid quasi in rem jurisdiction satisfying the minimum contacts test, although the defendant’s connection with the forum was insufficient to permit in personam jurisdiction. The case involved a wrongful death action, brought by the decedent’s New York executors, that arose from a crash of the defendant’s plane in Turkey. The court evaluated the defendant’s ties with New York, consisting of a New York bank account used for out-of-state purchases of airplane parts and a freight forwarding contract with a New York corporation. These contacts would have been insufficient to establish in personam jurisdiction; the court, however, concluded that they were sufficient to justify quasi in rem jurisdiction. Although the property attached had no connection with the plaintiff’s claim, the New York bank account was voluntarily and knowingly established by the defendant to facilitate its business. After placing the burden on the defendant to show why the attachment should be vacated, the court concluded that the establishment of the bank account was a contact sufficient for quasi in rem jurisdiction, as suggested in Justice Stevens’ concurring opinion in *Shaffer*. The defendant had taken affirmative action with respect to its property consistent with requiring it to defend a suit against the property in New York; thus, the case was distinguishable from both *Shaffer* and *Harris*.

These cases demonstrate the survival of quasi in rem jurisdiction and indicate that quasi in rem jurisdiction may be constitutionally permissible in certain circumstances in which in personam jurisdict-

119. Id. at 1278-79. In a footnote, the court suggested that *Shaffer* should be read as requiring that the minimum contacts between the defendant and the forum relate to the property attached; otherwise, transitory unrelated contacts unforeseeably might result in quasi in rem jurisdiction. Id. at 1279 n.5. See also *Lime Int’l Corp. v. Bank in Liechtenstein Aktiengesellschaft*, ___ F. Supp. ___, 77 (Civ. 5499-CSH (S.D.N.Y., filed June 29, 1978) (upholding attachment of bank account after application of minimum contacts test).
tion is not. They show, moreover, that in some situations a state may have chosen to restrict the scope of in personam jurisdiction but not that of quasi in rem jurisdiction. For the foreseeable future, therefore, quasi in rem jurisdiction will remain a viable jurisdictional alternative.

Because the minimum contacts test of International Shoe is not a carefully delineated test, but rather depends on case-by-case development, the application of the test to quasi in rem jurisdiction also will benefit from further judicial construction. Although Shaffer leaves unanswered important questions about the nature of quasi in rem jurisdiction, it does not eliminate the need to inquire into the procedural due process limitations on this device, which will be explored in the following sections in the context of property seizures to acquire jurisdiction.

PART II. PROCEDURAL DUE PROCESS IN PREJUDGMENT PROPERTY SEIZURE CASES

Prejudgment attachment and garnishment procedures have been required to comport with the due process clause of the fourteenth amendment for a decade. Although substantial questions exist both as to the nature of the procedural protections necessary and as to the extent to which the due process clause is applicable to these cases, notice and an opportunity for a hearing clearly must be afforded to a defendant at some early stage in most cases of prejudgment seizure of property.

In applying procedural due process protections to prejudgment seizures of property in attachment and garnishment cases, the Supreme Court has not defined clearly the circumstances under which the protections would pertain to seizures of property for jurisdictional purposes. Several cases discussed below have indicated that different considerations are relevant if property is seized to acquire jurisdiction than if property is seized merely as a security device. These differences, however, have not been articulated well. Nor did

120. Shaffer also may have significant effects on in personam jurisdiction, such as requiring that minimum contacts analysis be applied to cases in which jurisdiction is based on the defendant's transient presence. See Restatement (Second) of Judgments § 7, Comment a at 50-51 (Tent. Draft No. 5, 1978); id. § 8, comment a at 63-64. The implications of Shaffer for in rem proceedings in admiralty are discussed in Note, Maritime Attachment and Arrest: Facing a Jurisdictional and Procedural Due Process Attack, 35 Wash. & Lee L. Rev. 153 (1978); Note, Due Process in Admiralty Arrest and Attachment, 56 Tex. L. Rev. 1091 (1978).
the Court resolve this issue in *Shaffer*; rather, it explicitly refused to provide an answer. So long as quasi in rem jurisdiction remains viable, however, this important question must be considered.

*The Recent Background: Sniadach to Calero-Toledo.*

Procedural due process guarantees were first applied to prejudgment seizures of assets in *Sniadach v. Family Finance Corp.*, 121 which concerned a prejudgment garnishment of wages in partial satisfaction of a debt evidenced by a promissory note. A Wisconsin statute permitted seizure of wages upon the issuance of a summons by the clerk of the court at the request of the creditor, service by the creditor on the garnishee, and subsequent service of a summons and complaint on the debtor. Although the debtor could recover his withheld wages after a successful trial on the merits, during the pendency of suit he was deprived of the wages without prior notice or any opportunity to be heard. 122 The Supreme Court held that this deprivation of property violated the fourteenth amendment's due process clause because the debtor was a state resident subject to in personam jurisdiction and because special protection of state or creditor interests was unnecessary. 123

Writing for the Court, Justice Douglas carefully distinguished the circumstances in *Sniadach* from cases involving "extraordinary situations" in which a summary procedure, like the one provided by the Wisconsin statute, might satisfy due process. Unfortunately, Justice Douglas described these "extraordinary situations" simply by citing to a series of cases without further elaboration. 124 This elliptical reference has remained the fountainhead of the "extraordinary situation" exception to the requirements of procedural due process.

Addressing the question whether a temporary withholding of wages without notice and an opportunity for a hearing violates due process, Justice Douglas noted the principle of *Mullane v. Central*

122. *Id.* at 338-39.
123. *Id.* at 340.
Hanover Bank & Trust Co.,\(^{125}\) that the right to be heard is meaningful only if one is informed both of the pendency of a proceeding and the right to appear. Because the retention of wages imposed a tremendous hardship on wage earners and possibly could deprive them of essentials, it constituted a taking of property that must be accompanied by the procedural protections of prior notice and a hearing. Justice Douglas, however, did not delineate the particular characteristics required of the hearing, nor did he discuss the precise issues which must be heard.

The Court's emphasis on the significance of wages to a family led some courts and commentators to conclude that Sniadach's procedural due process protections pertained only to wage garnishment cases and were inapplicable to the attachment or seizure of other forms of property.\(^{126}\) Indeed, the Court's opinion itself indicated that a particular procedural rule might be acceptable for attachments generally, but not in certain cases, and referred to wages as presenting "distinct problems in our economic system."\(^{127}\) Moreover, Justice Douglas noted that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms."\(^{128}\)

The Court's 1972 decision in Fuentes v. Shevin\(^{129}\) made clear that the scope of Sniadach's procedural protection extended beyond garnishment of wages to other types of property seizures. In a close decision by what Justice Blackmun later termed a "bobtailed Court,"\(^{130}\) the Court in Fuentes held that the due process protections

---

125. 339 U.S. 306, 314 (1950); see text accompanying notes 38-45 supra.
127. 385 U.S. at 340 (citing McKay v. McInnes, 279 U.S. 820 (1929)).
128. Id. In a concurring opinion, Justice Harlan characterized the deprivation of the use of wages during the time between the garnishment and the termination of the suit as more than "de minimis" and, therefore, as requiring the normal procedural protections of prior notice and a hearing. Excep in special situations, such as the cases cited by Justice Douglas, these protections could be afforded only by notice and a hearing "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." Id. at 343. Justice Harlan thus viewed the hearing as an opportunity for the debtor to contest the validity of the debt before the property was seized. Justice Harlan also distinguished the Sniadach circumstances from cases in which summary seizure of property before a hearing was justified as "essential to protect a vital governmental interest," noting that no such justification had been suggested. Id.
129. 407 U.S. 67 (1972) (4-3 decision).
of notice and an opportunity for a prior hearing apply to seizures of chattels to protect creditor interests absent “extraordinary” or “truly unusual” situations.\(^{131}\)

In *Fuentes*, the Court reviewed statutes from Florida and Pennsylvania which permitted summary seizure of goods under a writ of replevin issued by a court clerk upon the ex parte application of a person claiming a right to the property and posting a security bond double the value of the property seized. No notice or prior hearing was afforded the defendant under either statute before the property was seized.\(^{132}\) With only one exception, the cases reviewed in *Fuentes* generally concerned the repossession by creditors of personal property purchased pursuant to installment sales contracts.

The Court concluded that these statutes did not satisfy the constitutional requirements of a right to notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.”\(^ {133}\) Because of the danger inherent in a seizure of property on the ex parte application of a creditor, a right to a hearing prior to seizure was considered necessary to prevent an arbitrary deprivation of property. The statutory requirements of a bond, an allegation of entitlement to the goods, and the possibility of recovering damages were found to be an inadequate substitute for a prior hearing in which the defendant could present his position before a neutral official.\(^ {134}\) Although the precise form of the hearing might vary with the nature of the case,\(^ {135}\) a hearing prior to seizure was required.

In reaching this conclusion, the Court reiterated the principle expressed in *Sniadach* that a temporary deprivation of property is

\(^{131}\) 407 U.S. at 90.

\(^{132}\) The Florida statute required that a complaint be filed alleging the right to possession of the property and requesting a court authorization of repossession. The complaint was served on the defendant only at the time of seizure of the property; no opportunity for a hearing was afforded until the action for repossession reached trial. The property seized was transferred to the plaintiff pending judgment on the merits unless the defendant-debtor within three days posted a security bond of double the value of the property. In contrast, the Pennsylvania law did not require that the party seeking the writ of replevin ever file a complaint requesting court-ordered repossession; thus the “temporary” seizure of property could last for the life of the property. Moreover, the repleving party in Pennsylvania was not required to allege a right to possession but merely had to file an affidavit of the value of the property seized. In Pennsylvania, therefore, judicial review of the seizure of property might occur in some cases only after the party losing the property had initiated his own judicial action. *Id.* at 69-78.

\(^{133}\) 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

\(^{134}\) *Id.* at 83.

\(^{135}\) *Id.* at 82-84, 96-97. See also text accompanying notes 144-47 *infra.*
protected by the fourteenth amendment. The length and severity of a deprivation were not determinative of the right to a hearing, although these factors may influence the nature of the hearing. Moreover, the lack of complete legal title to the property because of the remaining obligation of installment payments did not remove the necessity of due process protections. Nor was the requirement of a hearing limited to cases involving the deprivation of absolute necessities of life. Sniadach and Goldberg v. Kelly were not viewed as so limited; rather, they affirmed the broadly applicable and longstanding principle that due process requires a hearing before, rather than after, the defendant is deprived of his property.

As in Sniadach, the Court in Fuentes was careful to distinguish "extraordinary situations" which could justify delaying notice and a hearing. Writing for the Court, Justice Stewart confined the extraordinary situations permitting seizure or deprivation of property without a prior hearing to "truly unusual" situations. Indeed, precedent had limited seizure without prior hearing to cases in which three factors were present:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

---

137. 407 U.S. at 86, 90 n.21.
138. Id. at 86-87.
139. 397 U.S. 254 (1970) (requiring that a hearing be provided before welfare benefits could be terminated).
140. 407 U.S. at 88-90.
141. Id. at 90-93, 82. The phrase "extraordinary situations" was used first in Sniadach, 395 U.S. at 339, and has since been used in many procedural due process cases. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971). Writing for the Court in Boddie, Justice Harlan stated that due process requires "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Id. at 379 (footnotes omitted) (emphasis in original). Boddie held that due process requires that persons cannot be denied an opportunity for a hearing on a petition for divorce simply because they cannot pay a court filing fee.
142. 407 U.S. at 91.
These attributes can be summarized as the necessity to secure a significant governmental or public interest, the need for prompt action, and the presence of adequate control by state officials. Examples cited by the Court included certain seizures to collect taxes, to meet war requirements, and to protect against bank failure, misbranded drugs, or contaminated foods.  

In *Fuentes*, the Court determined that the state statutes failed all three aspects of the test. The statutes plainly served no important governmental or public interest; rather, they benefited private creditors. Furthermore, the statutes failed to make available a prior hearing not only in cases of emergency requiring swift response but also in more general cases. Finally, the statutes provided no effective state control over the proceedings; the creditor was virtually without any state supervision and unilaterally could obtain the writ of replevin. In contrast, the Court noted by way of illustration, seizures authorized by a search warrant involve a strong governmental interest, a need for prompt action, and close state control over the issuance of the warrant.  

Although holding that a hearing before seizure of the goods was required by the due process clause, the Court expressly declined to provide standards to guide the nature or form of the hearing, stating that many possibilities remained which should be reviewed in the first instance by legislatures. Seizures to protect the security of creditors would be permitted if accompanied by a prior hearing "aimed at establishing the validity or at least the probable validity of the underlying claim against the alleged debtor. . . ." Indeed,

---

143. *Id.* at 91-92. In a now controversial footnote, the Court discussed the three cases in which it had permitted attachment of property without a prior hearing. *Id.* at 91 n.23. One of these, Coffin Bros. v. Bennett, 277 U.S. 29 (1928), was described by the Court as a case in which attachment was required to protect against immediate bank failure. The second and most important example in this footnote was Ownbey v. Morgan, 256 U.S. 94 (1921), described in *Fuentes* as involving "attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest." 407 U.S. at 91 n.23. The third example involved an "unexplicated" per curiam opinion that cited the two previous cases and that the Court deemed to be a reiteration of these two cases, "[a]s far as essential procedural due process doctrine goes." *Id.* (citing McKay v. McInnes, 279 U.S. 820 (1929)). Finally, the Court noted that deprivations other than attachments generally had been required to be accompanied by a prior hearing, unless an "unusually important governmental need" was involved. *Id.*

144. *Id.* at 93 n.30.

145. *Id.* at 96-97.

146. *Id.* at 97 (quoting *Sniadach*, 395 U.S. at 343).
the Court expressed the view that a form of hearing might be developed which will accommodate both the creditor’s interest in minimizing cost and delay and the defendant’s due process interests in preserving the fairness and effectiveness of the hearing. The issues and facts involved in many repossession cases, the Court suggested, might be so simple and the results so clear that defendant-debtors may choose not to exercise their right to a hearing.\textsuperscript{147}

Two years later, in \textit{Mitchell v. W.T. Grant Co.},\textsuperscript{148} the Court upheld a state sequestration procedure which involved seizure without a prior hearing. Writing for a narrow majority, Justice White distinguished the procedures from those involved in \textit{Fuentes} on several grounds, including the requirements of a verified petition or affidavit by the plaintiff-creditor, an application to a judge for the writ of sequestration, and judicial control of the process throughout.\textsuperscript{149}

Reiterating points made in his \textit{Fuentes} dissent,\textsuperscript{150} Justice White stressed that both the creditor and the debtor had substantial interests in the property and that accommodation of these interests was

\textsuperscript{147} \textit{Id.} at 92 n.29 & 97 n.33. Writing for the three dissenting Justices, Justice White focused in part on practical considerations. In his view, the normal reason for repossession was default by the debtor, and the possibility of mistaken claims of default was insufficient to warrant protections beyond those provided by the state statutes. \textit{Id.} at 100. Citing previous cases in which the Court had stated that procedures required by the due process clause must be sufficiently flexible to reflect different circumstances, Justice White deemed adequate the procedural protections in the state statutes, especially in view of the creditors’ interest in securing property in which they too have substantial property interests. \textit{Id.} at 101-02. Finally, Justice White questioned the impact of the majority’s decision, terming it an “ideological tinkering with state law.” \textit{Id.} at 102. The prior notice and hearing requirements could be satisfied by a few days notice, seizure of the property when the defendant waived or failed to appear at the hearing, and provision for a prior hearing limited to the existence of probable cause to believe a default in payments had occurred. To reject procedures used in many states and sanctioned by article nine of the Uniform Commercial Code in favor of such illusory reforms actually might harm consumers, by diminishing the availability of credit or otherwise, rather than help them. \textit{Id.} at 102-03.

\textsuperscript{148} 416 U.S. 600 (1974) (5-4 decision).

\textsuperscript{149} \textit{Id.} at 605-08. \textit{Mitchell} again involved repossession of personal property sold under an installment agreement with the creditor retaining a vendor’s lien on the property. A writ of sequestration was sought concurrent with the filing of a complaint seeking payment of the overdue balance to secure the property pending judgment. An affidavit of the creditor attested to the facts in the complaint and to the need for sequestration to prevent disposal of the property. Based on this information, the judge issued the writ conditioned on creditor’s filing of a bond double the value of the property. The defendant-debtor moved one month later to dissolve the writ, contending, among other things, that the absence of notice and prior hearing denied him due process. These claims were rejected by the courts, including the Supreme Court.

\textsuperscript{150} \textit{See} note 147 supra.
necessary in determining the due process rights applicable. Indeed, sequestration historically had aimed at preserving the property pending resolution of the merits of a dispute. The state statutes permitting sequestration were acceptable constitutionally despite the absence of prior notice or an opportunity for a hearing. Adequate protections against improvident seizures were provided by the requirements of an affidavit disclosing clearly the basis of the claim to the judge, an adequate bond, and the availability of an opportunity for the debtor to regain the property immediately if the creditor failed to substantiate his claim or, alternatively, if the debtor posted a counterbond. This statutory scheme reflected the state's need to protect the creditor; notice and prior hearing might alert the debtor to act quickly to conceal, transfer, or damage the property.\textsuperscript{151} Thus, the majority of the Court believed that sequestration pending final determination was permissible constitutionally as long as the creditor established "the probability that his case will succeed."\textsuperscript{152} Issues such as the existence of the debt, the lien, and the delinquency in payment could be reviewed immediately after the execution of the writ upon the request of the debtor, thereby minimizing the length of property deprivation. In the majority's view, the statutory scheme questioned in \textit{Mitchell} adequately accommodated the defendant's constitutional rights, in view of the due process requirements' inherent flexibility.

The Court found in the cases prior to \textit{Sniadach} and \textit{Fuentes} a long-standing principle that a hearing is required before a final deprivation of property, but not necessarily before any interference with property.\textsuperscript{153} It distinguished, however, the facts of \textit{Mitchell} from those found in \textit{Sniadach} and \textit{Fuentes}. \textit{Sniadach} involved a garnishment of wages, a specialized type of property subject to

\begin{footnotesize}
\begin{enumerate}
\item[151.] 416 U.S. at 605-09.
\item[152.] Id. at 609.
\item[153.] Sharply departing from \textit{Fuentes}, the Court in \textit{Mitchell} cited \textit{Ewing v. Mytinger \& Casselberry}, 339 U.S. 594 (1950), \textit{Coffin Bros. v. Bennett}, 277 U.S. 29 (1928), \textit{Ownbey v. Morgan}, 256 U.S. 94 (1921), and \textit{McKay v. McInnes}, 279 U.S. 820 (1929), not as examples of extraordinary situations meriting prejudgment seizure without a prior hearing but as typical and unexceptional examples of seizures that are permissible constitutionally despite provision for only a post-seizure hearing. 416 U.S. at 612-14. The \textit{Ewing} case, involving misbranded foods, was described by Justice White as involving a health threat and as espousing the proposition that no preliminary hearing is necessary as long as a final hearing on property rights is afforded. \textit{Id.} at 612. Similarly, \textit{Coffin Bros.}, \textit{Ownbey}, and \textit{McKay} were cited for the general view that prejudgment attachment without prior notice and hearing is unobjectionable constitutionally.
\end{enumerate}
\end{footnotesize}
abuse by creditors with invalid claims. Moreover, the property seized in that case was property in which the creditor had no prior claims or interests. Furthermore, *Sniadach* involved no danger of destruction of the property, and the statute failed to provide the debtor with a right to an immediate post-seizure hearing. Similarly, although *Fuentes* involved a typical creditor's attempt to repossess property in which a security interest had been retained under an installment sales contract, the circumstances differed significantly from those in *Mitchell*. The statutes in *Fuentes* lacked the protections afforded by judicial supervision or control of the proceedings, a strict affidavit requirement, and an immediate opportunity for a hearing after seizure. Additionally, replevin was allowed in *Fuentes* whenever property was "wrongfully detained," thus incorporating a fault standard inappropriate for ex parte determination. In contrast, the sequestration in *Mitchell* was limited to narrow factual issues of the existence of a vendor's lien and default by the debtor.\(^5\) Thus the statute in *Mitchell* provided adequate protections for the debtor, whereas the *Fuentes* statutes did not.\(^5\)

\(^5\) 416 U.S. at 614-18.

155. The concurring opinion of Justice Powell and the dissenting opinion of Justice Stewart both viewed the distinctions between the *Mitchell* and *Fuentes* situations as unimportant and suggested that, in effect, *Fuentes* had been overruled. That view seems to be the majority view in *Mitchell*, because Justices Douglas and Marshall joined Justice Stewart's opinion and because Justice Brennan agreed that *Fuentes* required rejection of the state statute in *Mitchell*.

Justice Powell objected to the "broad and inflexible" scope of *Fuentes*, suggesting that had he voted in *Fuentes* he might have agreed to invalidate the statutes but on narrower grounds. 416 U.S. at 624. Agreeing with Justice White about the need to consider property interests of both debtor and creditor and the inherent flexibility of due process procedures dependent on the circumstances, *id.* at 624,628 & n.3, Justice Powell concluded that due process requirements were satisfied by a sequestration provision mandating that

the creditor furnish adequate security and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.

*id.* at 625. Application of these requirements to the statutes involved in *Mitchell* and *Fuentes* revealed that the former afforded sufficient protections, whereas the latter did not.

Dissenting, Justice Stewart stressed the similarities in the situations in *Mitchell* and *Fuentes*, in which he had written the majority opinion. He rejected the distinctions drawn by the majority in *Mitchell* as immaterial for constitutional purposes and urged that in *Fuentes* the Court had rejected them as well. *Id.* at 631. He thus emphasized that the affidavit requirement still could be satisfied easily by ex parte allegations, that the issuance of the writ by a judge rather than a clerk did not alter the ministerial character of the action, and that the factual issues of security interest and default were essentially identical in the two cases.
A year later, in a majority opinion written by Justice White, the Court invalidated another state garnishment statute, relying heavily on *Fuentes*. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, a state statute permitted a plaintiff to garnish property of the defendant by filing with a court officer an affidavit stating the amount claimed and a belief of the possibility of loss absent garnishment. The deprivation of property pending litigation, simply on the basis of the creditor's ex parte application for a writ issued by a court clerk, without an opportunity for an early hearing or other safeguards against mistaken seizure, the Court concluded, constituted an impermissible denial of due process. Although some protection for the defendant was afforded by the requirement that the plaintiff post a bond for double the amount claimed and by the defendant's opportunity to dissolve the garnishment by filing a counterbond, these protections were found to be inadequate. According to Justice White, the statute upheld in *Mitchell* differed significantly by providing for a writ issued by a judge on the filing of an affidavit clearly establishing the basis for the writ and by permitting the debtor an immediate post-seizure hearing. Three aspects thus were important to the majority: the nature of the officer issuing the writ, the quality of information required in the ex parte affidavit, and the explicit provision of an opportunity for an immediate post-seizure hearing at which the creditor would bear the burden of establishing at least probable cause for the garnishment.

Although Justice Powell concurred in the judgment, he criticized the revival of *Fuentes* for the reasons expressed in his concurring

---

Thus, he criticized the majority for rejecting *Fuentes* and for following the dissent in that case and argued that *Fuentes* accurately reflected a line of precedent holding that due process requires an opportunity for a hearing before any deprivation of property.

156. 419 U.S. 601 (1975). Unlike the previous cases, which involved consumer goods or wages, the garnishment in *North Ga. Finishing* pertained to a large debt between two corporations. The property garnished consisted of bank assets, although the garnishment was discharged upon the filing of a bond by the defendant. The Court nevertheless concluded that the nature of the assets seized and the debtor involved was constitutionally insignificant and expressed its long-standing reluctance to “distinguish among different kinds of property in applying the Due Process Clause.” *Id.* at 608 (citation omitted).

157. *Id.* at 606. Quoting *Fuentes*, the Court concluded that the Georgia statute suffered from the same due process infirmities as did the replevin statutes in *Fuentes*, noting specifically the absence of notice or an opportunity for a hearing. That the deprivation of property was merely temporary, although relevant to a determination of the appropriate form for a hearing, was not “determinative of the right to a hearing of some sort.” *Id.*

158. *Id.* at 607.
opinion in *Mitchell*. He relied upon *McKay*, 159 *Coffin Brothers*, 160 and *Ownbey* 161 for the general rule that prejudgment attachment without a prior hearing was traditionally acceptable, but he believed that the recent expansion of due process in cases such as *Goldberg v. Kelly* 162 required rejection of the statutes in *North Georgia Finishing*. 163

Justice Powell noted the dual function of prejudgment garnishment: the protection or security afforded to a creditor by preventing the debtor from disposing of the asset prior to final judgment; and the use of the garnishment to insure that the state retains jurisdiction to adjudicate the controversy. He believed the latter function to be diminished in importance by the expansion of in personam jurisdiction through the doctrine of *International Shoe*. 164 The interest in securing the creditor, however, warranted protection and would be undermined by a rule requiring pre-garnishment notice and hearing. Thus, in Justice Powell’s view, procedural due process required several protections for the debtor, including a security or bond provided by the creditor, establishment before a neutral officer of the need to seize the assets to prevent their disposition pending trial, an opportunity for a prompt hearing after garnishment at which the creditor must show probable cause to continue the garnishment, and an opportunity for the debtor to post a redemption bond. The key feature for Justice Powell appeared to be the provision of a prompt opportunity for a judicial hearing after garnishment. 165

163. 419 U.S. at 610.
164. *Id.* at 610 n.1 (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).
165. Justice Powell dismissed the majority’s idea that the writ authorizing seizure be issued only by a judicial officer as opposed to any neutral officer of the court. Specific problems of the Georgia statute in his view were the conclusory nature of the affidavit and, most significantly, the absence of a prompt post-garnishment hearing in which the debtor could challenge the garnishment, and in which the creditor would bear the burden of proof. *Id.* at 611-13.

In his dissent, Justice Blackmun criticized the sudden turns taken by the Court in this area over a short period, making it difficult to predict with certainty whether a particular state statute would satisfy due process requirements. He concluded that the Georgia statute afforded ample protection, embodied in the requirements that the creditor file a complaint
These four cases—Sniadach, Fuentes, Mitchell, and North Georgia Finishing—provide the framework for consideration of the question of procedural due process with respect to seizures of property for jurisdictional purposes. Although none directly involved jurisdictional seizures, and despite the varying emphasis in their identification of procedural due process requirements, these cases are of critical importance. They suggest, through dicta, that in some extraordinary cases procedural due process protections of prior notice and hearing are unnecessary. Such special situations may include jurisdictional seizures. Moreover, they indicate that the purpose of the procedural protections of notice and a hearing is to give the person whose property is seized an early opportunity to test the merits of the claim against him. These four cases, however, make no substantial attempt to explain the nature of the early hearing, apparently preferring to leave the refinements of this question to further cases and to permit flexibility among the states.

Although none of these four cases involved seizures for jurisdictional purposes, one case prior to Shaffer provided the Court with an opportunity to resolve the requirements of procedural due process in that context. In Calero-Toledo v. Pearson Yacht Leasing Co., the Court analyzed, at least partially, the relationship between procedural due process protections and quasi in rem jurisdiction. The Court concluded that notice and opportunity for a hearing could be postponed until after seizure of property if the seizure was intended to provide in rem jurisdiction over the property in forfeiture proceedings, if notice would permit destruction or concealment of the property, and if the seizure was initiated by government officials.

The statute and other facts of Calero-Toledo were quite different from those typical of Fuentes and similar cases. A Puerto Rican statute provided that vessels used to transport controlled substances such as marihuana were subject to seizure and forfeiture by the Puerto Rican government. Another section of the statute provided that the proceedings were to begin with seizure of the vessel before issuance of the writ, that he post a bond, that an affidavit of apprehension of loss be supplied by the creditor, and by the opportunity of the defendant to dissolve the garnishment by filing a bond. Given the commercial context, involving no hints of adhesion or unfairness, the statute satisfied due process. Id. at 614-20.

167. Id. at 676-80.
by a government official, who was then to serve notice within ten days upon the owner or any person known to have a right to the property. The owner or interested party could challenge the seizure by filing a complaint within fifteen days in the superior court which would decide "all questions that may arise . . . as in an ordinary civil action." The filing of the complaint within fifteen days was a jurisdictional prerequisite, and the only review of the judgment was by writ of certiorari to the Puerto Rico Supreme Court. Within ten days of the filing of the complaint, the owner was entitled to give bond equal to the assessed value of the vessel in order to obtain release of the seized property pending trial. If no bond was given, the property could be sold immediately or be put to official governmental use.168

Although the three-judge district court169 had held that under Fuentes the absence of notice and a prior hearing unconstitutionally denied due process, the Supreme Court disagreed, finding that the seizure for purposes of forfeiture fell within the category of "extraordinary situations" exempted by Fuentes from normal procedural due process requirements of notice and hearing. Writing for the majority, Justice Brennan viewed the situation in Calero-Toledo as analogous to the cases in which notice and hearing can be postponed because such delay is necessary to protect the public from contaminated food, a bank failure, or misbranded drugs, to aid in collecting taxes, or to aid the war effort.170

168. Id. at 665-67 n.2. In Calero-Toledo, Puerto Rican authorities found marihuana on a vessel owned by a company but leased to two individuals. The vessel was seized without prior notice or hearing to either the owner or lessees, although the lessees were later given notice as required by statute. Having no knowledge of the controlled substance on the vessel and no official notice of the seizure or subsequent forfeiture for official governmental use, the owner discovered these developments when it attempted to repossess the vessel because of the lessees' failure to pay rent. The owner then sued in federal court, seeking injunctive relief and a declaration that the statutes violated due process by authorizing seizure of property without notice or an opportunity for a prior hearing.


According to Justice Brennan, three primary factors justified denying notice and prior hearing. The first factor was the use of property seizure for the purpose of obtaining jurisdiction. Justice Brennan explained that "seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." This factor, thus, apparently includes two aspects: the jurisdictional purpose of the seizure, plus the purpose of protecting the public against illegal activities. The opinion does not indicate clearly what importance should be given to protecting the public against criminal activity. The absence of this public interest in the usual private quasi in rem action may result in different due process requirements.

The second factor relied upon by the majority was the possibility that the interests served by the statutes would or could be defeated by prior notice because the property easily could be moved, concealed, or destroyed. This factor, of course, is present in any case involving prejudgment seizure of movable or transferable property. A defendant can always try to remove or sell his property prior to the conclusion of a lawsuit. This factor, therefore, pertains more to the security aspects of the prejudgment seizure mechanism than to jurisdictional considerations.

The third factor indicating that these circumstances may be characterized "as the extraordinary situation" justifying postponement of notice and hearing was that no private, self-interested party sought the seizure; rather, government officials determined to seize the property pursuant to the statutes. In this connection, Justice Brennan referred to the exception noted in Fuentes for seizures under a search warrant and implied that the same governmental interest requiring prompt action and state control operated in Calero-Toledo. This third factor appears related to the first in that the public, as distinct from the private, interests involved provide a significant rationale for permitting seizure without prior notice and hearing. In the absence of a strong governmental interest, a

171. 416 U.S. at 679 (footnote omitted).
172. Id.
173. Id. at 679 n.14.
contrary conclusion may result.174

Calero-Toledo thus provides the only real discussion of the applicability of procedural due process protections to jurisdictional seizures of property prior to Shaffer.175 Calero-Toledo, however, is of

174. Concurring with Justice Brennan's opinion, Justice White sought to broaden the exceptions from the usual notice and opportunity for prior hearing requirements under Fuentes. Joined by Justice Powell, Justice White stated that "the presence of important public interests which permits dispensing with a preseizure hearing in the instant case, is only one of the situations in which no prior hearing is required." Id. at 691. As other examples, Justice White cited Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and Arnett v. Kennedy, 416 U.S. 134 (1974), but provided no further elaboration.

Justice Douglas alone dissented concerning the lack of notice and a prior hearing. Pointing out that the seizure of the vessel occurred two months after the discovery by the government of the marihuana, Justice Douglas urged that the circumstances clearly created no special need for prompt action. The lack of notice therefore deprived the owner of procedural due process. 416 U.S. at 691-92.

175. Several recent cases have dealt with other problems pertaining to statutes permitting seizure of property without an opportunity for a prior hearing. In Carey v. Sugar, 425 U.S. 73 (1976), the Court held that federal courts should abstain from deciding the constitutionality of a New York prejudgment attachment statute which provided only a limited opportunity for the defendant to vacate the attachment pending judgment. The state courts thus were afforded the opportunity to construe the state law to avoid constitutional difficulty. This abstention question had not been discussed in Fuentes, Mitchell, or North Ga. Finishing.

Still more recently, in Flagg Bros. v. Brooks, 436 U.S. 149 (1978), the Court upheld another New York statute permitting a warehouseman to sell goods entrusted to him for storage, upon notice to the persons claiming interests in the goods, in satisfaction of the warehouseman's lien. Distinguishing this state statute from those in North Ga. Finishing, Fuentes, and Sniadach on the basis of the "total absence of overt official involvement," id. at 157, the Court concluded that the state's statutory refusal to interfere with the settlement of a dispute between debtors and creditors did not constitute state action violative of fourteenth amendment rights. Id. at 166. Although in Fuentes and similar cases a government official had participated in the deprivation of property, in Flagg Bros. the state had not ordered the surrender of property. The state merely had enacted a statute allowing the warehouseman to convert his lien into cash, thereby authorizing or acquiescing in a self-help remedy.

Justice Stevens sharply criticized this approach as inconsistent with Fuentes and as disregarding the state's role in delegating power to a private party. The Flagg Bros. decision, in Justice Stevens' view, resulted in a fundamental incongruity:

the very defect that made the statutes in Shevin and North Georgia Finishing unconstitutional—lack of state control—is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional scrutiny by removing even the mechanical supervision.

Id. at 175 (emphasis in original).

The jurisdictional seizure cases, in contrast, involve state action; they typically concern a private person invoking the aid of the state courts to issue a writ of attachment, frequently
limited value. It involved a government seizure sought solely to
initiate forfeiture proceedings. These special governmental interests
were emphasized by the Court in deciding that procedural due pro-
cess guarantees were inapplicable. The opinion also failed to provide
any reasons for excepting jurisdictional seizures generally from pro-
cedural due process protections, substituting instead citations to
the cases previously cited in *Fuentes*. Thus, the general issue of
procedural due process in jurisdictional seizures remained an open
question when the Court considered *Shaffer*.

**Shaffer and Procedural Due Process**

The Supreme Court in *Shaffer* did not confront directly the issue
of applying procedural due process to seizures to obtain quasi in
rem jurisdiction, although the issue was presented to, and decided
by, the Delaware Supreme Court. Having concluded that the mini-
mum contacts test applied to quasi in rem jurisdiction, the Court
regarded consideration of the procedural due process issue unneces-
sary. Nonetheless, certain dicta in the opinion appear significant
in resolving the issue.

The Court briefly discussed the opinions of the Delaware Court
of Chancery and the Delaware Supreme Court with respect to the
issue of procedural due process. These courts had noted that the
sequestration procedure was used in Delaware to compel the per-
sonal appearance of a nonresident defendant, not to provide security
for a creditor pending judgment against a debtor; both courts there-
fore had concluded that *Sniadach* and similar cases were inapplica-
able. In addition, the Delaware Supreme Court had relied on that
state's interest in having jurisdiction over the mismanagement of its
domestic corporations and in safeguarding defendants whose prop-
erty had been sequestered. That court also emphasized the his-
toric purpose of sequestration, which it believed had been approved
by the United States Supreme Court in *Ownbey v. Morgan* and,
through their favorable citations to that case, in *North Georgia*

---

176. 433 U.S. at 189.
178. 433 U.S. at 194 & n.10.
179. 361 A.2d at 235.
180. 256 U.S. 94 (1921).
**Finishing, Calero-Toledo, Mitchell, Fuentes, and Sniadach.**

After reciting the views of the Delaware courts, the majority opinion of Justice Marshall observed in a footnote:

> The only question before the Court in Ownbey was the constitutionality of a requirement that a defendant whose property has been attached file a bond before entering an appearance. We do not read the recent references to Ownbey as necessarily suggesting that Ownbey is consistent with more recent decisions interpreting the Due Process Clause.

This seems to suggest at least that Ownbey should be reconsidered and should not be applied blindly.

References to Sniadach and similar cases also appear later in the Court's opinion. The Court rejected the suggestion that a wrongdoer's removal of his assets to avoid in personam jurisdiction justified quasi in rem jurisdiction based solely on the presence of the property. In the Court's view, this rationale suggests at most "that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with International Shoe." Thus, some procedural protections constitutionally may be required in seizures to obtain quasi in rem jurisdiction, although the exceptions mentioned in Sniadach and related cases may not be excluded from the Court's general reference to those cases. Because the purpose of the seizure in this context is for security in addition to jurisdiction, however, the procedural due process guarantees from the creditor-debtor situation arguably are more appropriate than if the seizure is made only to obtain jurisdiction.

Examining the long history of quasi in rem jurisdiction based solely on the existence of property within the state, the Court noted that precedent supporting the conclusion that this procedure "satisfies the demands of due process . . . is not decisive."

Continuation of ancient practices can violate "traditional notions of fair play and substantial justice" as readily as can initiation of new

---

181. 361 A.2d at 228, 230-31.
182. 433 U.S. at 194 n.10.
183. Id. at 210 (citing Mitchell, Sniadach, Fuentes, and North Ga. Finishing).
184. Id. at 211-12 (citations omitted). The Court made particular reference to Ownbey, discussed in the text at note 186 infra.
procedures, the Court declared, and concluded that the minimum contacts test should apply to all assertions of state-court jurisdiction.\textsuperscript{185} Thus, a review of the history of the application of procedural due process to seizures to obtain quasi in rem jurisdiction appears warranted to determine whether exempting jurisdictional seizures of property from the due process requirements is supported by precedent.

\textbf{A Reappraisal of the Historic Background of Jurisdictional Seizures}

In \textit{Shaffer}, the Court correctly suggested that a reappraisal of the cases relied on in \textit{Fuentes} and in subsequent decisions is appropriate. Significantly, these cases were decided well before the modern proliferation of due process considerations and the expansion of the scope of their applicability. Moreover, if these cases do not support the propositions for which they are cited, or contain insufficient analysis or support, then reliance on them in \textit{Fuentes} and in later cases was misplaced entirely.

In the earliest and most significant of these cases, \textit{Ownbey v. Morgan},\textsuperscript{186} the Court upheld against a due process challenge an attachment of property of a nonresident and enforced a Delaware rule conditioning the nonresident's ability to challenge the attachment and underlying debt upon the payment of security. Pursuant to the Delaware law, the plaintiff began the proceedings by filing an affidavit stating that the defendant was a nonresident and was indebted to the plaintiff. A writ of foreign attachment then was issued, resulting in attachment of the defendant's shares of stock in a Delaware corporation. Although notified that a special bail or security equal to the value of the property attached was required, the defendant attempted to enter a general appearance. The Delaware courts upheld the requirement that security be given before a general appearance would be permitted, despite the defendant's claim that such a requirement was unconstitutional. Judgment was entered for the plaintiff upon a finding of default by the defendant, and the shares of stock were ordered to be sold to satisfy the debt.\textsuperscript{187}

The 1921 Supreme Court similarly upheld the Delaware scheme.

\textsuperscript{185} \textit{Id}.

\textsuperscript{186} 256 U.S. 94 (1921). This Delaware rule was inapplicable to residents of the state.

\textsuperscript{187} \textit{Id} at 98-102. Although Delaware had abandoned the special bail requirement in its foreign attachment procedure prior to the Supreme Court's decision in \textit{Ownbey}, the Court disregarded this change. \textit{Id} at 107.
Responding to the defendant's argument that the scheme denied the essential due process right to appear and defend a judicial action, the Court held that the statute provided the defendant the opportunity to appear and defend, conditioned simply upon the defendant's giving security. The condition of security was not considered arbitrary or unreasonable, nor inconsistent with established procedures. Indeed, foreign attachment procedures like Delaware's had been used in the United States since the colonial period and in England well before that time. Viewing foreign attachments as similar to quasi in rem proceedings, in that the judgment would affect only the property attached, the Court referred to the historic practice of depriving a defendant in a quasi in rem action of the right to appear unless he furnished a special bond. Interpreting the defendant's argument essentially to be that the Delaware scheme acted with undue harshness as applied to a defendant unable to post the requisite security, the Court believed that relief properly lay in the equitable jurisdiction of the court, not in a claim under the due process clause.

Although conceding that the due process clause protects the right to be heard in judicial proceedings affecting property or liberty, the Court in Ownbey believed that by leaving property in a state a nonresident consented to subject his property to judicial action concerning demands against him, "according to any practicable method that reasonably may be adopted." The ancient method of foreign attachment was not inconsistent with due process, and the requirement that a defendant provide security before entering an appearance, having "a reasonable relation to the conversion of a proceeding quasi in rem into an action in personam," also was within constitutional bounds. The condition was not so arbitrary as to violate due process, especially if the defendant acquired the property after the statute was enacted and, according to the Court, thereby was given notice of these procedures.

Ownbey, therefore, focused primarily upon the validity under the due process clause of imposing financial conditions upon a defendant's right to appear personally to respond to a foreign attachment.

188. Id. at 104-07.
189. Id. at 108-10.
190. Id. at 111.
191. Id.
192. Id. at 111-12.
The underlying question of whether the defendant had a right to notice or to an opportunity to be heard was neither presented to nor discussed by the Court in that case. Moreover, the Court’s reliance in Ownbey upon the long-standing state practice of conditioning defendant’s rights has been undermined by subsequent decisions that such conditions may infringe impermissibly upon the defendant’s rights. The case’s significance to the notice and hearing issues, therefore, is limited.

In Coffin Brothers v. Bennett, a state statute permitted the state superintendent of banks to require the stockholders of an insolvent bank to contribute as necessary to reimburse the bank’s depositors. A stockholder’s failure to pay the assessment resulted in the issuance of an execution for the amount assessed, thereby creating a lien on the stockholder’s property. The execution was enforced “like other executions”, provided, however, that the stockholder could contest by affidavit of illegality his liability for the assessment and its amount and necessity. The Court, through Justice Holmes, determined that this opportunity to raise all defenses by an affidavit of illegality, which initiated trial proceedings, afforded the defendant a reasonable opportunity to be heard. Because the stockholder was granted a reasonable opportunity for a hearing after the attachment, the Court found no violation of the fourteenth amendment in the statutory scheme.

Recent cases often cite Coffin Brothers as involving an extraordinary situation rendering unnecessary certain otherwise applicable procedural due process protections. Justice Holmes’ opinion, however, was not limited expressly to extraordinary situations implicating public interests. “As to the lien,” he wrote, “nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect

---

193. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that a filing fee requirement for divorce actions effectively barred an indigent from a meaningful opportunity to be heard in violation of due process). See also Smit, supra note 94, at 619-22 (concluding that requiring a defendant to make a general appearance, thereby exposing him to the personal jurisdiction of a foreign state, as a condition to defending property is unconstitutional unless the judgment binds only the property located in the forum state); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 953-55 (1960) (stating that conditioning the exercise of the right to protect property upon a willingness to sacrifice the right to remain immune from personal jurisdiction through a general appearance procedure constitutes a violation of due process).

194. 277 U.S. 29 (1928).

195. Id. at 30.
upon the result of the suit.” Subsequent cases, such as *Fuentes* and *North Georgia Finishing*, which have held that a hearing after attachment may not satisfy due process in the creditor-debtor situation, directly contradict Justice Holmes' statement. Thus, while construing the attachment of stockholder property in *Coffin Brothers* as another extraordinary situation in which compelling public interests outweighed the defendant-debtor's need for prior notice and a hearing may bring the decision in line with current due process doctrine, this interpretation cannot be reconciled with the text and tenor of Justice Holmes' majority opinion.

Relying upon *Ownbey* and *Coffin Brothers* in a per curiam opinion, the Supreme Court summarily affirmed the Maine Supreme Court's decision in *McKay v. McInnes*. In *McKay*, the Maine Supreme Court had upheld against a due process challenge a state attachment statute which authorized the plaintiff to obtain a writ of attachment against the defendant's property without showing, by affidavit or other prima facie proof, either the basis of his claim or his good faith, and which did not require a bond. The defendant in *McKay* made a special appearance to challenge the jurisdiction of the court, contending that the attachment in advance of judgment deprived him of property without due process. According to the Maine court, however, this procedure was established practice well before the Constitution was adopted and never previously had been challenged. The purpose of the attachment, to secure property that a creditor claimed was owed by a debtor pending judgment, was simply part of the remedial process for collection of a debt. Any due process requirements of notice and an opportunity for a hearing were satisfied by the collection proceeding itself.

The impact of *McKay* is limited significantly in that the Supreme Court's per curiam opinion affirms only the result reached by the lower court, not necessarily its rationale or language. Indeed, the

---

196. Id. at 31.
197. 279 U.S. 820 (1929).
199. According to the Maine court, the temporary interference with the debtor’s property was not “the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without ‘due process of law’ for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal.” Id. at 116, 141 A. at 702-03.
recent Supreme Court opinion in *Fuentes* stated in a footnote that "[a]s far as essential procedural due process goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely." Moreover, because it involved the typical debtor-creditor attachment for security purposes, which *Fuentes* and *North Georgia Finishing* later held must involve either a prior hearing or at least an immediate post-seizure hearing, *McKay* retains little discernable validity.

Another case referred to in *Fuentes* and in later cases in explaining the extraordinary situations is *Ewing v. Mytinger & Casselberry, Inc.* The statute in *Ewing* permitted government seizure of misbranded articles if the Food and Drug Administrator had probable cause from facts found by him without a hearing to believe that the misbranded article was dangerous to health, that the labeling was fraudulent, or that the labeling would mislead the consumer and result in injury or damage. Pursuant to that statute, a food supplement was seized. Although no claim was made that the ingredients were harmful or dangerous, the material was seized because the labeling was "misleading to the injury or damage of the purchaser or consumer" and therefore misbranded within the statutory language. The seizure accompanied the initiation of libel proceedings, during which the owner of the property had an opportunity for a full judicial hearing.

In an opinion by Justice Douglas, the Court held that the denial of a hearing at the preliminary stage, at which the Administrator determined probable cause and initiated seizure, did not violate due process because a hearing was afforded prior to final judgment. Although acknowledging that the Administrator's decision could cause harm to property, the Court found that the harm was similar to that involved when a prosecutor filed suit charging violations of law. In neither case does due process require more than an opportunity for a hearing and a judicial determination at some stage in the proceedings. Moreover, according to the Court, if the protection of public health or the prevention of other damage to the public

203. Id. at 596.
204. Id. at 598.
205. Id. at 599.
is involved, as Congress had determined in the food and drug legis-
lation, summary action concerning the relevant property historically was permitted.

That the danger was less apparent in the circumstances in *Ewing*
was deemed insignificant; a "requirement for a hearing, as a matter
of constitutional right, does not arise merely because the danger of
injury may be more apparent or immediate in the one case than in
the other." The Court thus appeared to recognize that the facts
in *Ewing* did not present a typical emergency situation. It at-
ttempted nonetheless to bring the case in line with cases protecting
public health, thereby offering a special justification for delaying
the opportunity for a hearing. *Ewing*, however, also set forth the
general rule that "[i]t is sufficient, where only property rights are
concerned, that there is at some stage an opportunity for a hearing
and a judicial determination." This view, however, has been lim-
ited in subsequent due process cases holding that in many circum-
stances either a pre-seizure hearing or an immediate post-seizure
hearing may be required constitutionally.

In a case more typical of the decisions justifying emergency sei-
zures of property necessitated by the threat of injury to the public,
*North American Cold Storage Co. v. City of Chicago*, the Court
upheld a statute authorizing the immediate seizure and destruction
without prior hearing of food found by a government inspector to be
decayed or infected. Summary seizure and destruction of the
tainted food was based on the state's police power to protect the
health of citizens. A hearing, in which all issues could be litigated,
could be delayed until after the seizure. The burden of proof was
placed on the seizing party to show that the food was in fact decayed
or infected. The Court in *North American* held that the legislature's
judgment, that denial of a preliminary hearing before seizure was
necessary to protect the public, was within its legislative powers and
was not to be reexamined by the courts.

In *Fahey v. Mallonee*, the Court upheld a provision in the Home
Owners' Loan Act of 1933 permitting a federal official to appoint a
conservator to take immediate possession of bank property, without

206. Id. at 600.
207. Id. at 599 (citations omitted).
208. 211 U.S. 306 (1908).
209. Id. at 320.
prior notice or hearing, if the federal official determined that the
bank was acting in an unlawful, unauthorized, or unsafe manner. The Court recognized that:

This is a drastic procedure. But the delicate nature of the institu-
tion and the impossibility of preserving credit during an investi-
gation has made it an almost invariable custom to apply supervi-
sory authority in this summary manner. It is a heavy responsibil-
ity to be exercised with disinterestedness and restraint, but in
light of the history and customs of banking we cannot say it is
unconstitutional.211

The statute provided for a right to a prompt post-seizure hearing,
which was adequate to satisfy due process.

These emergency cases are characterized by several factors simi-
lar to those relied on by Justice Brennan in Calero-Toledo212 to sup-
port the seizure of property prior to any notice or opportunity for a
hearing. Each of these cases involved a governmental body seeking
to seize property for public, as opposed to private, interests. In each,
substantial public harm was threatened. Speedy action was neces-
sary to insure protection of the public. Moreover, in many, but not
all, of these cases, an opportunity for an early hearing after seizure
was provided. The involvement of a peculiarly public interest in
each of these cases constitutes a significant difference from the typi-
cal seizure of property to obtain quasi in rem jurisdiction, in which
a private party invokes the aid of the courts to resolve an essentially
private dispute.

Thus, these emergency cases, including Coffin Bros.,213 offer no
guide to the appropriate application of procedural due process to
jurisdictional seizures. Only Ownbey214 is not substantially distin-
guishable factually from modern jurisdictional attachments. Yet
Ownbey is distinguishable legally; the particular question of prior
notice and opportunity for a hearing was neither raised nor dis-
cussed in that case. Ownbey further reflected now-discarded notions
concerning the scope and substance of the due process clause. Little
meaningful precedent exists, therefore, to guide modern courts in

211. Id. at 253-54 (footnote omitted).
212. See text accompanying notes 166-75 supra.
213. 277 U.S. 29 (1928).
214. 256 U.S. 94 (1921).
deciding to what extent procedural due process applies to jurisdictional seizures. These courts must be directed by the current understanding of the meaning of the 'due process clause and of the nature of jurisdictional seizures.

Modern Application of Procedural Due Process to Jurisdictional Seizures

With only dicta from the Supreme Court to guide courts in applying the requirements of procedural due process to jurisdictional seizures, several lower courts, both state and federal, have addressed the issue directly and have reached conflicting resolutions. Although many of these cases lack thoughtful analysis, a few provide some insight into the proper framework for deciding the question.

Consideration of these opinions properly begins with the Delaware Supreme Court's decision in *Greyhound Corp. v. Heitner.* The court commenced its analysis of the procedural due process issue with a discussion of *Ownbey,* in which the Supreme Court upheld the Delaware foreign attachment statute. Because the sequestration statute challenged in *Greyhound* provided an equitable remedy, analogous to that upheld in *Ownbey,* an inference could be drawn that the latter also was constitutional. Recognizing, however, developments in procedural due process beginning with *Sniadach,* the Delaware Supreme Court proceeded to reexamine the historic practice of seizure of property as a basis of jurisdiction without notice or prior hearing. Reviewing the language in *Sniadach, Fuentes, Calero-Toledo, Mitchell and North Georgia Finishing,* the Delaware court concluded that the Supreme Court majority in the first three cases explicitly had approved *Ownbey,* that *Ownbey* had been cited favorably in *Mitchell,* and that, although not cited by the majority in *North Georgia Finishing,* *Ownbey* had been approved by Justice Powell in his concurrence. The Delaware court then drew two inferences: that an attachment necessary to secure jurisdiction was an "extraordinary situation"; and that in such an extraordinary situation, notice and an opportunity for a hearing before seizure were not required constitutionally.

216. See text accompanying notes 186-93 supra.
217. 419 U.S. at 610 (Powell, J., concurring in the judgment).
218. 361 A.2d at 231.
The court failed, however, apart from the discussion of the cited Supreme Court cases, to explain precisely its conclusion that jurisdictional seizure constituted an extraordinary situation. A practical justification for this conclusion is that notice prior to seizure would permit a potential defendant to remove his property, and thereby defeat jurisdiction and deprive the plaintiff of his right to sue. Noting that a plaintiff would use the foreign attachment procedures to obtain jurisdiction and to keep property in the court’s control as security until judgment, the court found the jurisdictional purpose to be “the principal and under most circumstances the exclusive basis for sequestration.” Moreover, the court distinguished Sniadach and related cases as involving attachment to secure the claims of creditors, but did not rely expressly on this distinguishing feature as the basis for its conclusion.

The Delaware Supreme Court nonetheless construed language in North Georgia Finishing, requiring “notice and . . . opportunity for a hearing or other safeguard,” to apply to seizures for jurisdictional purposes. Because the sequestration procedure failed to provide for notice or an opportunity for a hearing, other safeguards were necessary to satisfy the due process requirements. The Delaware court noted numerous significant safeguards in the statute. Prompt notice was required to be given to the defendant after seizure. Although he could obtain the release of the property seized only after entering a general appearance, the defendant could make a limited appearance solely to attack compliance with the sequestration process. The defendant’s option to enter a general appearance and obtain release of the property required the plaintiff to demonstrate a reasonable possibility that release would substantially lessen the likelihood that the defendant could satisfy any judgment. Moreover, a defendant who appeared generally was required to litigate only those causes of action asserted in the original complaint. Finally, during sequestration the defendant could en-

219. Id. at 232.

220. Id.


222. Id. at 232-35. Other safeguards mentioned by the court included that the sequestration process could be initiated only with a court order, and the requirement that the order reasonably identify the property to be seized and that the value of the seized property approximate the amount of the claim. Id.
gage in certain transactions affecting the property with proceeds to be given to the sequestrator. Although some of these safeguards were found in the statutory language itself, others appeared simply to be practices of the courts. The court devoted special attention to the defendant's ability, after entering a general appearance, to obtain a preliminary inquiry into the value of the property and the merits of the plaintiff's claim by petitioning for release of the property.\textsuperscript{223} Although not expressly provided by the statute, the requirement of a preliminary hearing was inferred by the court from the statutory language requiring release of the property unless the court was satisfied by the plaintiff that the property should be retained as security.\textsuperscript{224} Thus, a reasonable balancing of the parties' interests and safeguards adequate to satisfy due process were believed to be provided by the statute.

The Delaware Supreme Court also upheld the requirement that the defendant make a general appearance before defending on the merits. This requirement served a legitimate public interest: "it promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action."\textsuperscript{225} Because the controversy in \textit{Greyhound} had a substantial relationship to Delaware, the court supported litigation in Delaware to eliminate the possibility of actions in other forums with contradictory results.\textsuperscript{226}

\textsuperscript{223} \textit{Id.} at 234-35.  
\textsuperscript{224} \textit{Id.}  
\textsuperscript{225} \textit{Id.} at 235.  
\textsuperscript{226} No elaboration of this rationale was provided beyond a reference to United States Indus. v. Gregg, 58 F.R.D. 469 (D. Del. 1973). In \textit{Gregg}, Judge Stapleton suggested that the key issue with respect to a general appearance rule was whether the defendant's constitutional right to defend had been "unreasonably conditioned." \textit{Id.} at 479. The district judge concluded that a strong public interest in avoiding subsequent duplicative litigation supported the general appearance requirement. The application of this requirement when the only contact of the defendant with the forum was the property seized to provide quasi in rem jurisdiction was viewed as constitutionally permissible. Judge Stapleton believed that because the defendant would defend on the merits even under a limited appearance, no additional burden was imposed by a general appearance rule. The general appearance rule simply deprived the defendant of the opportunity to litigate twice. If the value of property seized was small compared to the claim, the potential unfairness of this rule was not of constitutional significance. \textit{Id.} at 480 & n.49. Furthermore, Judge Stapleton contended that the defendant's defense on the merits provided an additional contact with the forum sufficient to permit the court finally to adjudicate that claim. The Third Circuit, in its discussion of the applicability of the minimum contacts test to quasi in rem jurisdiction, noted that the requirement of a general appearance realistically might alter the jurisdictional basis to in personam jurisdiction. United States Indus. v. Gregg, 540 F.2d 142, 156 (3d Cir. 1976), \textit{cert. denied}, 433 U.S. 908 (1977).
The Delaware Supreme Court essentially adopted without independent analysis dicta found in Sniadach and similar cases that jurisdictional seizures constitute an extraordinary situation exempt from the normal procedural due process protections of pre-seizure notice and a hearing. Believing that some protections were still necessary, however, the court found sufficient the opportunity for a preliminary hearing on the merits of the underlying claim after the defendant entered a general appearance. The Delaware court, however, failed to analyze the due process implications of requiring a general appearance before allowing defense on the merits.\textsuperscript{227}

A more thoughtful and thorough analysis of the due process problems in foreign attachments was undertaken by the Third Circuit in Jonnet v. Dollar Savings Bank.\textsuperscript{228} Despite a prior decision by another panel of that court upholding the constitutionality of the Pennsylvania foreign attachment procedures in Lebowitz v. Forbes Leasing & Finance Corp.,\textsuperscript{229} the court in Jonnet concluded that Lebowitz was "no longer viable" in light of refinements in due process principles and therefore declared the procedures unconstitutional.\textsuperscript{230}

\begin{footnotes}
\begin{enumerate}
\item[227.] See Developments in the Law—State-Court Jurisdiction, 73 HARV. L. REV. 909, 953-55 (1960):

[T]he most compelling defense of the limited appearance, [is] based upon the fact that the nonresident property-owner may not be deprived of his property without due process of law, and that due process necessarily involves the opportunity to appear and defend that property against the plaintiff's claim. While states which forbid the limited appearance have not deprived the defendant altogether of his right to protect the property, they have conditioned the exercise of that constitutional right upon his willingness to sacrifice an equally inviolable right, that of remaining immune from the personal jurisdiction of a state with which he had no substantial relationship.

\textit{Id.} at 954 (footnote omitted).

\item[228.] 530 F.2d 1123 (3d Cir. 1976).

\item[229.] 456 F.2d 979 (3d Cir.), \textit{cert. denied}, 409 U.S. 843 (1972). \textit{Lebowitz} was decided prior to the Supreme Court's opinion in \textit{Fuentes}. The court in \textit{Lebowitz} was concerned that notice prior to seizure would defeat the primary purpose for an attachment, compelling the defendant to appear, because the defendant could remove the property from the forum. Viewing the due process issue as whether the attachment procedures "critically impair[ed] the resolution of disputes without serving to preserve any compensating governmental interest," the court concluded that the statute did not violate due process. \textit{Id.} at 981. This analysis, however, reverses the usual pattern of due process review; the question is not whether the state procedures impair the resolution of disputes but, rather, whether they adequately protect the interests of the owner against even temporary arbitrary deprivation of his property.

\item[230.] 530 F.2d at 1124. The Pennsylvania foreign attachment statute, applied only against nonresidents of the state, permitted issuance of a writ of attachment by the prothonotary (clerk) without notice or an opportunity for a hearing, without intervention of a judicial
\end{enumerate}
\end{footnotes}
In an opinion by Judge Rosenn, the Third Circuit in *Jonnet* reviewed the *Sniadach-Fuentes* line of cases, particularly emphasizing their implications for foreign attachments. Noting the frequent references to *Ownbey* in the Supreme Court's opinions, the court determined that whether *Ownbey* continued as a viable precedent was a critical issue. The court concluded that "the holdings, if not the language, of *Fuentes, Mitchell* and . . . [North Georgia Finishing] cast serious doubt on *Ownbey*’s current strength." The modern cases reflected a concern that protection against wrongful deprivation of property be provided even for a temporary period, a concern absent in *Ownbey*. Moreover, the historical acceptance of *Ownbey*’s procedures did not make them sacrosanct; rather, the "growing sensitivity" in interpreting due process must be applied. Thus, the court concluded, "[t]he rationale of *Ownbey* is no longer in harmony with the principles of *Fuentes* and its progeny. A balance must be struck between providing effective creditor remedies and the risk to the debtor of wrongful deprivation."231

The court also questioned the tenor of the Supreme Court’s references to *Ownbey*, suggesting that these citations did not indicate approval of the entire case. Nonetheless, the court concluded that "*Ownbey* today must be limited to the proposition for which it was cited in *Fuentes* and *Mitchell*—that due process does not require that foreign attachments be preceded by notice and a hearing."232 Thus, despite its critical analysis of the failure of *Ownbey* to reflect officer, and without requiring the plaintiff to post a bond or submit an affidavit. The defendant could obtain dissolution only by posting an adequate bond, or by the plaintiff’s failure to prosecute the action. This procedure was used in *Jonnet* to attach third-party debts owed to the defendant, whom the plaintiff charged with failing to honor a mortgage commitment. Because the Pennsylvania long-arm statute excluded from the definition of "doing business within the state" the acquisition of mortgages, the foreign attachment was necessary in order to provide jurisdiction.

231. *Id.* at 1128.
232. *Id.* Judge Gibbons’ concurring opinion was even more explicit, stating that "[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921." *Id.* at 1136. Judge Gibbons believed that the cases from *Pennoyer to Ownbey* reflected a belief that due process applied to quasi in rem actions but simply differed from modern cases in their view of the content of due process. A proper modern reading was that due process means the same for in personam as for in rem actions and that the minimum contacts test of *International Shoe* should provide limits for both types of judicial power. Under that analysis, Judge Gibbons concluded that the defendant maintained insufficient contacts with Pennsylvania to support quasi in rem jurisdiction. Judge Gibbons thus foreshadowed the developments in *Shaffer*.
233. *Id.* at 1128 (emphasis supplied).
modern due process concerns, the court endorsed that decision's implications regarding the need for a hearing prior to seizure. Despite its adherence to Ownbey, the Third Circuit invalidated the Pennsylvania statute because of its failure to provide other safeguards which the court found to be required by North Georgia Finishing.234 The court viewed Mitchell and North Georgia Finishing as requiring a balance-of-interests approach, even if the seizure of property was for jurisdictional purposes. It declined, therefore, to follow the district court's approach of evaluating the procedures under the test for examining extraordinary situation seizures articulated in Fuentes.235 According to the Third Circuit, the plaintiff's interests in establishing jurisdiction in a particular forum and in securing property pending resolution of the suit were to be weighed against the defendant's interests in continuing to control his property and in defending the suit in a convenient forum. The Pennsylvania statute violated due process because it failed to protect adequately the defendant's interests. No affidavit was required of the plaintiff, nor was he required to post a bond. No procedure was provided by which the defendant could be indemnified for damages due to wrongful attachment. Generally, the procedure was ministerial in character and failed to provide any measure by which defendant could dissolve the attachment.236

Jonnet is noteworthy for its conclusion that certain aspects of procedural due process must be applied to seizures of property for jurisdictional purposes. Despite its determination that such seizures need not be preceded by notice and an opportunity for a hearing, the court concluded that other adequate safeguards must be afforded. This marks a major departure from the view that in an "extraordinary situation" no safeguards need be provided other than a right to a hearing in a later trial on the merits after a general appearance by the defendant.237

234. The Third Circuit, like the Delaware Supreme Court in Greyhound, interpreted the requirement announced in North Georgia Finishing that there be either "notice and . . . opportunity for a hearing or other safeguard" to apply to jurisdictional seizures. See text accompanying note 221 supra.

235. 530 F.2d at 1129 & n.13 (construing Fuentes v. Shevin, 407 U.S. at 91). In Fuentes, the Supreme Court indicated that the cases permitting seizure before an opportunity for a hearing all involved a significant governmental interest, a need for prompt action, and strict state supervision of the process. See text accompanying notes 142-43 supra. The court in Jonnet indicated that the Fuentes analysis resembled the balancing approach it adopted.

236. 530 F.2d at 1129-30.

Shortly after the decision in *Jonnet*, another panel in the Third Circuit reviewed the Delaware sequestration statute later invalidated in *Shaffer*. In *United States Industries, Inc. v. Gregg*, the Third Circuit, foreshadowing the minimum contacts analysis of the Supreme Court in *Shaffer*, also reviewed the precedential value of *Ownbey*. The court in *Gregg* observed that *Ownbey*’s emphasis on historical practice ignored the absence of due process guarantees before the adoption of the fourteenth amendment in 1868 and that *Ownbey*’s reliance on past practices failed to acknowledge that due process was an evolving concept, changing as the times and forms of property changed. Although *Fuentes, Mitchell, Calero-Toledo,* and *North Georgia Finishing* had cited *Ownbey*, these citations were made “at the most . . . to illustrate the few limited situations in which the Court historically has permitted seizure of property without opportunity for a prior hearing.” Moreover, *Ownbey* was decided long before *International Shoe* stimulated the expansion of in personam jurisdiction through long-arm statutes; seizure of property until then had been necessary to secure jurisdiction over a nonresident defendant. The developments of in personam jurisdiction arguably reduced the need to secure quasi in rem jurisdiction, thereby removing that rationale for the “harsh result” in *Ownbey*. Because the Third Circuit invalidated the statute upon the minimum contacts grounds, however, the court did not decide the procedural due process issue.

Other cases decided prior to *Shaffer* adopted varying approaches to the applicability of procedural due process to seizures of property

---

238. 540 F.2d 142 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977). The Third Circuit reversed the judgment of the district court, which had upheld the statute against a procedural due process challenge. 348 F. Supp. 1004 (D. Del. 1972). District Court Judge Stapleton believed that seizures of property for jurisdictional purposes were permitted under the three-part test for extraordinary situations articulated in *Fuentes*. According to Judge Stapleton, the state had a “legitimate interest” in exercising jurisdiction with respect to property within the state, thus satisfying the significant governmental interest aspect of the test. *Id.* at 1021. Prompt action was necessary to prevent the defendant from transferring the property beyond the forum state, thus depriving the state of jurisdiction. Moreover, strict state control was maintained over the procedure; the seizure order was issued by a judge after reviewing an affidavit establishing that seizure would further the public interest in establishing jurisdiction. Stressing the public purpose of “the ordered system of conflict resolution which includes the exercise of judicial power over property located within the state,” the district judge had upheld the statute. *Id.* at 1023.

239. 540 F.2d at 152.

240. *Id.* at 153 n.6.
for jurisdictional purposes. Many cases relied primarily on the statement in *Fuentes* that attachments without prior notice and hearing are constitutional when “necessary to secure jurisdiction”241 and upheld ex parte jurisdictional seizures.242 In some cases, this rationale was adopted despite the availability of in personam jurisdiction.243 In other cases, however, courts refused to permit an attachment if in personam jurisdiction was possible, absent a showing that quasi in rem jurisdiction was necessary for security purposes.244

Several courts have gone beyond *Fuentes*, which identified jurisdictional seizures as extraordinary situations not requiring prior notice and hearing, and have applied the test articulated in *Fuentes* for determining when seizure is appropriate without notice or a hearing. The conclusion frequently reached by these courts has been that the seizure for jurisdictional purposes satisfied the requirements: a significant state interest permitted jurisdiction to be asserted; speedy action was necessary to prevent removal of assets; and the court exercised strict control over the attachment.245 Occasionally, however, a state jurisdictional attachment provision has...

---

241. 407 U.S. at 91 n.23.
243. See, e.g., Lebowitz v. Forbes Leasing & Fin. Co., 456 F.2d 979 (3d Cir. 1972) (concluding that, although a state long-arm statute eliminates need for quasi in rem jurisdiction in many instances, seizure prior to a nonresident's general appearance is more likely to assure defendant's appearance and is constitutionally valid); FDIC v. Interbanca-banca per Finanziamenti a Medio Termine, S.P.A., 405 F. Supp. 1118 (S.D.N.Y. 1975) (observing that, although personal jurisdiction was established by sufficient contacts with the forum state, the statute providing for ex parte attachments to secure jurisdiction nevertheless was constitutional).
244. See, e.g., Incontrade, Inc. v. Oilborn Int'l., S.A., 407 F. Supp. 1359 (S.D.N.Y. 1976). The district court vacated the order of attachment of a defendant shipowner's bank account based on the following rationale:

Attachment cannot be justified in this case as necessary to obtain jurisdiction, for it appears that defendant ... does business in New York ... and is, therefore, subject to personal jurisdiction in New York state. When jurisdiction already exists, attachment should issue only upon a showing that drastic action is required for security purposes, and plaintiff has not established that security is necessary with respect to this defendant. We find, therefore, as a matter of discretion, that attachment here, with all of its harsh consequences, is unnecessary and inappropriate.

Id. at 1361.
been invalidated for failure to satisfy one or more elements of the Fuentes test such as the requirement of close governmental supervision, or the requirement that the attachment be necessary to secure a public or governmental purpose. Other courts have not restricted their review to the application of the Fuentes test. After independently reviewing the cases, both historical and recent, several courts have concluded that the procedural due process protections available in the typical creditor-debtor context likewise should apply to private jurisdictional seizures. The failure of jurisdictional seizure statutes to provide meaningful affidavit and bond requirements, adequate judicial supervision, and an opportunity for a hearing at least immediately after seizure has led these courts to invalidate those statutes on due process grounds.

The diversity of opinion among the lower courts demonstrates the need for the Supreme Court to confront the issue of procedural due process in the context of seizures of property to establish quasi in rem jurisdiction. Absent clear guidance from the Supreme Court, the lower courts will continue to reach conflicting results in similar circumstances.

PART III. PROCEDURAL DUE PROCESS IN QUASI IN REM ACTIONS: A SUGGESTED RESOLUTION

Despite the changes wrought by Shaffer v. Heitner, use of quasi in rem jurisdiction will continue. In some circumstances, as where states have limited the scope of in personam jurisdiction under their long-arm statutes, quasi in rem jurisdiction may be the only juris-

---


dictional alternative available by which a plaintiff may reach a nonresident defendant. Even if in personam jurisdiction is available, a plaintiff may receive advantages in invoking a court's quasi in rem jurisdiction in some situations. For example, the minimum contacts test may be less severe for quasi in rem jurisdiction than for in personam jurisdiction; or a plaintiff may choose to invoke quasi in rem jurisdiction because of the security aspects of seizing the property. The continued viability of quasi in rem jurisdiction mandates that the question of the applicability of procedural due process to jurisdictional seizures be answered definitively.

As a threshold matter, the question of procedural due process for seizures of property to establish quasi in rem jurisdiction could be eliminated entirely if the requirement of seizure were rejected. If quasi in rem jurisdiction could be established without requiring seizure or other control of the defendant's assets, clearly there would be no deprivation of property prior to judgment. The procedural due process mechanisms mandated by the Court in *Fuentes* would not be implicated. Merely the usual notice and hearing requirements applicable in all litigation would be necessary.

Although the seizure requirement in quasi in rem jurisdiction has been asserted for more than a century, this condition never has been justified convincingly. Moreover, because *Sniadach* and *Shaffer* command that historic rules be reexamined in light of current constitutional theory, reconsideration of the necessity of seizure to establish quasi in rem jurisdiction is appropriate.

Seizure performs two primary functions in the jurisdictional context. It serves initially as a clear test of the validity of jurisdiction applied at the commencement of the action: quasi in rem jurisdiction can be exercised only if the property is in the forum state at the commencement of the action and continues only so long as the property remains in that state. This function, however, could be accomplished less onerously by requiring only that the property be present in the state when the action is commenced. A rule that permits quasi in rem jurisdiction to continue once the plaintiff has

250. See text accompanying note 14 supra.

251. Moreover, even requiring the presence of property in the state at the commencement of the action is unnecessary. The application of the minimum contacts test to quasi in rem jurisdiction assures that there has been an adequate connection between the property and the forum, and the subsequent removal of the property should not destroy the basis for this jurisdiction.
established the presence of property at the initiation of the action parallels the rule currently applicable to in personam litigation: in personam jurisdiction is determined by the presence of the defendant at the commencement of the action. His subsequent departure from the state is immaterial for jurisdictional purposes. Thus, although this alternative procedure could provoke disputes concerning whether particular property was present in a state at a precise time, these questions are analogous to and no more demanding than those involved in determining the presence of the defendant in the state to obtain in personam jurisdiction.

The second function served by seizure in the jurisdictional context is that of notice: by seizing the property, notice is said to be more likely to reach the nonresident defendant. The practical validity of this assumption is questionable, however, because a nonresident often is not presently aware of the seizure of his property in a distant state. Moreover, in light of *Mullane v. Central Hanover Bank and Trust Co.*, notice clearly is required constitutionally to be that most reasonably likely to reach those affected. Surely alternatives such as service by registered mail to the defendant at his last known address, combined possibly with publication or posting, can provide reasonable notice and would be more adequate than simple seizure of property.

Although seizure also affords security to the plaintiff, this attribute is unrelated to the purely jurisdictional function of seizure. To the extent that it can be justified by this security function, seizure should be subjected to the usual due process requirements typified by *Fuentes*; that the plaintiff has accomplished the seizure by invoking quasi in rem jurisdiction does not alter the basic character of the seizure as a means by which the plaintiff may assure the defendant's ability to pay an ultimate judgment.

---

252. 339 U.S. 306 (1950); see text accompanying notes 38-45 supra.
253. See generally *Restatement (Second) of Conflict of Laws* §§ 57, 66 Comment d (1971).
254. When seizure of an asset is undertaken pending judgment in another forum in which in personam jurisdiction can be established, a possibility left open by *Shaffer*, 433 U.S. at 210, and adopted in Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1046-49 (N.D. Cal. 1977), the seizure is unnecessary to establish jurisdiction, and procedural due process protections also should pertain. Because the basic purpose of such a seizure is security to the plaintiff, typical of the *Fuentes* situation, the usual due process analysis should apply. In *Uranex*, the district court did not consider procedural due process issues but did apply a more limited minimum contacts test to this exercise of jurisdiction for security purposes only.
The seizure of property, therefore, is not necessary to establish quasi in rem jurisdiction, nor is it constitutionally mandated. The easiest way to solve the procedural due process problem would be to abolish the seizure requirement. This alteration could be accomplished by the states themselves, either by legislatively amending statutes that provide for attachments for quasi in rem jurisdiction or by judicially modifying the jurisdictional requirements. Absent such state action, however, especially if seizure is specifically required by statute, the procedural due process question must be faced directly by the courts.

After Shaffer, a statement that seizures are necessary to obtain quasi in rem jurisdiction, coupled with a citation to Ownbey, no longer is adequate to exempt such seizures from the procedures required by due process. Instead, seizures to establish quasi in rem jurisdiction must satisfy at least the test set forth in Fuentes for ascertaining whether the circumstances constitute an extraordinary situation meriting exemption from prior notice and opportunity for a hearing requirements. That a seizure to establish quasi in rem jurisdiction can satisfy the first part of the Fuentes test, requiring that seizure be necessary to satisfy some important governmental or public interest, is doubtful. The interests involved in the typical quasi in rem action are purely private. The only governmental or

255. See generally 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1070 at 271-72 (1969) (indicating that seizure or attachment is not constitutionally necessary, but does promote enforceability of an ultimate judgment). TheRestatement (Second) of Conflict of Laws § 66, Comment c (1971) indicates that quasi in rem jurisdiction may not be exercised “except by a proceeding in which the thing is seized or the claim is otherwise directed against the thing.” The latter half of this statement permits alternatives to seizure, such as notice in the complaint that the action is directed toward property in the state. Further support for this view is found in § 58 and Comment a of the Restatement.

256. To some extent, the seizure requirement is inapplicable to quasi in rem jurisdiction based on real property because in many states a lis pendens is filed at the commencement of suit restraining disposition, but not other use of the property. See Note, Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L.J. 1023, 1023 n.4 (1973). Even this limited restriction on disposition, however, may constitute a deprivation of property sufficient to invoke procedural due process protections. See, e.g., MPI, Inc. v. McCullough, 463 F. Supp. 887 (N.D. Miss. 1978).

257. Attachment and garnishment generally are provided by statute, because such proceedings were unavailable at common law. See Restatement (Second) of Conflict of Laws § 66 Comment a (1971); § 67 Comment b; § 68 Comment b. Many of these statutes are collected in Note, Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits, 46 Fordham L. Rev. 459, 488 (1977).

258. See text accompanying notes 148-49 supra.
public concern consists of the state's general interest in providing a forum for litigation that satisfies the minimum contacts test. This alleged state interest lacks the urgency of the usual "extraordinary situation," which involves an imminent threat to public safety.

Indeed, whether a state has a recognizable interest in extending its jurisdiction is debatable. Only if no other state has jurisdiction is such a state interest justified; otherwise, the state's citizens may be protected by bringing suit in another forum and having the state's law applied in that other forum under appropriate choice of law rules. Obviously, a state may wish to provide its resident plaintiffs with a convenient forum. But just as this desire is inadequate to establish personal jurisdiction over a defendant absent minimum contacts, it likewise is insufficient by itself to constitute a governmental or public interest under the *Fuentes* test.

That seizure is necessary to secure the asserted governmental interest also is dubious. The state may choose whatever scheme of jurisdiction it deems appropriate so long as the scheme is constitutional. If the state's in personam jurisdiction is extended to its constitutional limits through the enactment of appropriate long-arm statutes, quasi in rem jurisdiction may be eliminated, or may remain only as a specialized alternative. If a state chooses to limit its in personam jurisdiction, however, the state should not be permitted to argue that the seizure to establish quasi in rem jurisdiction is necessary to satisfy the state's interest in affording a forum to its citizens. Thus, the requirement of seizure to secure jurisdiction, though desirable from a private plaintiff's perspective, is simply the result of the state's choice of jurisdictional scheme. The state may eliminate the need for seizure either by expanding its in personam jurisdiction to the extent constitutionally permissible or by replacing the requirement of seizure with some other procedural device. Only if the minimum contacts test is less exacting as applied to quasi in rem than to in personam jurisdiction would the state's interest in providing as broad a forum as possible for its citizens be implicated. Even in this instance, however, alternatives to seizure

---


260. See *Restatement (Second) of Judgments* § 11, comment c at 83-84 (Tent. Draft No. 5, 1978).
are available to the state to protect its asserted interest in the continued exercise of quasi in rem jurisdiction, and which are less intrusive than the ex parte seizure of the defendant's property. Thus, the Fuentes requirement of an extraordinary situation involving an important state interest is not satisfied by routine private litigation brought by means of the quasi in rem jurisdictional device.

The Fuentes opinion established a second test for extraordinary situations: the necessity for speedy action to safeguard important public interests. A requirement for prompt action in quasi in rem actions has been found in the need to prevent potential defendants from concealing or removing their assets from the state before jurisdiction can be asserted. Seizure without prior notice eliminates the possibility that a defendant will remove or sell his assets either in anticipation of litigation or after suit is filed. Again, however, less intrusive means of attaining the objective are available. Quasi in rem jurisdiction is defeated by the removal of assets from the state only if the state so chooses. Nothing in the nature of that theory of jurisdiction requires that result. As previously suggested, the state could provide that quasi in rem jurisdiction continues notwithstanding later disposition of the property if such property were present when the suit was initiated. With such continuing jurisdiction provided by the statutory scheme, and not by the presence of property, the need for seizure would be eliminated. The defendant would receive proper notice after filing of the suit through service of the summons and complaint, before he had an opportunity to remove property from the state to defeat jurisdiction based on presence of that property at the initiation of litigation. Hence, the need for quick action arises simply from state law requirements concerning seizure, rather than from any independent source.

Assuming, however, that states continue to require seizure or other control of an asset to establish quasi in rem jurisdiction, ex parte seizure should be permitted only if the plaintiff can demonstrate that in fact a danger does exist that the defendant would dispose of his assets. In many cases no such danger will be present, and seizure therefore could not be justified by a need for speedy action.\footnote{Fuentes} Moreover, in many cases a defendant can be deterred

\footnote{Fuentes} indicates that a statute narrowly drawn to permit seizure without a hearing if a creditor can show immediate danger that a debtor would dispose of his assets might satisfy due process. 407 U.S. at 93. Such a limited statute would be permissible if seizure were followed by an immediate opportunity for a hearing.
effectively from disposing of assets if he is informed through a court order of a court-imposed prohibition on transfer pending resolution of the litigation.\textsuperscript{262} This court order could be accompanied by tagging or otherwise identifying the assets, or in the case of real estate, by recording the restriction on transfer.\textsuperscript{263} Violation of the order would constitute contempt of court which could be punished in another state if necessary.

The third aspect of the \textit{Fuentés} test for extraordinary situations requires strict governmental control and supervision over the seizure of property. This aspect also is not satisfied by seizures to establish quasi in rem jurisdiction. The typical provision simply permits seizure of property upon the application of the plaintiff, accompanied by his declaration that the nonresident defendant has certain property within the state over which the plaintiff, by means of a complaint, seeks to invoke the court's quasi in rem jurisdiction. These unverified ex parte allegations automatically result in a court order seizing the property pending a decision on the merits.\textsuperscript{264} Thus, the initiation of seizure, and the determination of which assets are to be seized, rest almost entirely with the private party.

All three aspects of the \textit{Fuentés} test, the requirement of a legitimate state interest, the need for immediate action, and governmental control of the seized property, must be satisfied in order to constitute an extraordinary situation exception.\textsuperscript{265} Serious doubts ex-

\begin{itemize}
\item \textsuperscript{262} Of course, in many circumstances a restraint on transfer will constitute just as great an interference with property as seizure. \textit{See}, \textit{e.g.}, Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 272 (1917) (observing that an order issued at the start of divorce proceedings enjoining bank to pay out on a deposit was as effective as seizure of the account). In such cases, procedural due process protections would be required.

An alternative to seizure even under these circumstances also has been suggested: if the defendant has disposed of property during the pendency of the suit, the defendant could be held personally liable for the value of the property. \textit{See Folk & Moyer, supra} note 61, at 773-75; \textit{Note, Foreign Attachment After Sniadach and Fuentés}, 73 COLUM. L. REV. 342, 356-58 (1973).

\item \textsuperscript{263} Of similar effect is the \textit{lis pendens} restraining disposition of real property. \textit{Cf.} \textit{2 Moore's Federal Practice} $\|$ 3.05(2) (2d ed. 1978) (summarizing state doctrines of \textit{lis pendens}).

\item \textsuperscript{264} The situation in \textit{Shaffer} exemplifies the limited nature of court involvement. The court order of seizure was issued simply upon the plaintiff's affidavit that the defendants were nonresidents with property within the state. \textit{See} Brief for Appellant at 7, 14-19, Brief for Appellee at 7-11, \textit{Shaffer v. Heitner}, 433 U.S. 186 (1977).

\item \textsuperscript{265} \textit{See} Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974). \textit{But see} Kay & Lubin, \textit{Making Sense of the Prejudgment Seizure Cases}, 64 KY. L.J. 705, 709-11 (1976) (suggesting that the presence of one of the three characteristics will satisfy the \textit{Fuentés} test for extraordinary situations).}


pressed above concerning each of these elements of the test indicate that seizures to establish quasi in rem jurisdiction do not fall within the exception. Assuming that such seizures occasionally do satisfy the extraordinary situation criteria, some procedural due process protections still should apply, as they must in all cases of deprivation of property. Even in cases involving truly extraordinary situations, an opportunity for a hearing, prior to final deprivation, that provides the defendant a meaningful opportunity to be heard at a meaningful time has been required. Jurisdictional seizures must satisfy these same basic due process requirements. If, as suggested above, jurisdictional seizures are not considered extraordinary, then the procedural due process protections enunciated in *Fuentes* and *North Georgia Finishing* should apply.

The crucial issue, therefore, is to delineate the proper procedural due process requirements applicable to the seizure of property to secure quasi in rem jurisdiction. Procedural due process traditionally consists of the right to notice and an opportunity for a hearing, or other safeguards prior to the deprivation of property. In creditor-debtor cases, such as *Fuentes*, this requirement has been interpreted to demand either notice and a hearing before seizure or an immediate post-seizure hearing in which the probable validity of the creditor's claim against the debtor can be determined. The seizure of assets can continue only if a judicial officer is satisfied of the probability of the plaintiff's success on the merits. In the usual seizure of property by a creditor as security for a future judgment against the debtor, this type of a hearing is sensible; the detention of property cannot be justified unless the plaintiff can make some preliminary showing of probable success on the merits.

In the context of a seizure for jurisdictional purposes, a preliminary hearing appropriately could address threshold questions directed at testing the validity of quasi in rem jurisdiction based on

---

266. Indeed, *Fuentes* indicates that the presence of an extraordinary situation simply delays the need for a hearing and does not eliminate that requirement. 407 U.S. at 90.


268. This type of showing is analogous to the showing required for preliminary injunctive relief, in which the party seeking the injunction must demonstrate a probability of success on the merits as well as irreparable harm if the injunction is not granted. See generally 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2948 (1973). In a sense, the irreparable harm component of the test for an injunction finds its counterpart in the showing of need requirement in seizure cases.
the seizure. At an initial hearing, the plaintiff could be required to identify the basis of jurisdiction, to demonstrate the adequacy of the defendant's contacts with the state under the *Shaffer* analysis, and also to show that the seizure was necessary to obtain jurisdiction. Absent such a showing, seizure would be impermissible. This hearing is analogous to the special appearance permitted to contest the validity of an attachment or garnishment, revised so as to be consistent with the requirements of *Shaffer*. Such a hearing normally should occur prior to the seizure to comport fully with due process guarantees. If, however, the plaintiff properly demonstrates a valid concern that the defendant will act to destroy jurisdiction, the hearing could be delayed until immediately after the seizure. Seizure pending judgment would be justified, therefore, only if the plaintiff is able to demonstrate in the preliminary hearing that quasi in rem jurisdiction is appropriate in the particular case. If the plaintiff sustains this initial burden, the defendant's property would remain under the court's control, and the litigation would continue. Because the initial determination was solely one of probable validity, however, the jurisdictional issue could be raised later in the litigation.

But this proposal for an initial jurisdictional hearing presents difficulties for both the potential plaintiffs and defendants. A plaintiff may have difficulty in quickly obtaining evidence to prove minimum contacts sufficient to support quasi in rem jurisdiction. Traditionally, when the minimum contacts test has been applied to in

269. *See* Restatement of Judgments § 39 (1942); Restatement (Second) of Conflict of Laws § 81 (1971). By making a special appearance, the defendant does not submit to in personam jurisdiction. According to Restatement (Second) of Judgments § 13, comments b & c at 102-06 (Tent. Draft. No. 5, 1978), all states now provide for a special appearance to challenge the validity of jurisdiction. Thus, the questionable validity of York v. Texas, 137 U.S. 15 (1890), upholding the denial of a right to appear solely to challenge personal jurisdiction, is of no practical importance. *See also* Restatement (Second) of Judgments § 11 & comment f at 88-89 (Tent. Draft No. 5, 1978); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 991-97 (1960).

270. This proposal arguably involves a preliminary hearing on jurisdiction before the court has jurisdiction to consider the issue. A hearing on jurisdiction normally occurs only after a case is filed in which jurisdiction has been asserted by the plaintiff. The proposed procedure suggests that the hearing occur prior to seizure and yet assumes that seizure is necessary to effectuate quasi in rem jurisdiction. This problem can be eliminated by requiring that the plaintiff file a complaint asserting quasi in rem jurisdiction based on property within the state and requesting a preliminary hearing in which the defendant can participate, and after which the court could order seizure to effectuate the asserted jurisdiction.
personam jurisdiction, the parties have used discovery and other investigatory techniques to marshal the facts necessary to support or defeat allegations concerning the adequacy of contacts. Although the inadequacy of contacts frequently is raised in a motion to dismiss for lack of jurisdiction over the person,271 sufficient time still is allotted for both sides to prepare. If, however, the preliminary jurisdictional hearing is held at an even earlier state of the proceedings, as it must be if it is to provide any new protection for the defendant, new difficulties may confront the parties in amassing their evidence. To resolve this problem of time constraints, the preliminary jurisdictional hearing could be considered a hearing on whether probable cause exists to believe that there is valid quasi in rem jurisdiction, similar to that provided in Fuentes on the probable validity of the claim on the merits.

For the defendant, this proposed initial jurisdictional hearing arguably offers inadequate protection against arbitrary seizure of property. He is deprived of his property pending final judgment merely because the plaintiff can demonstrate the probability that quasi in rem jurisdiction is appropriate. None of the due process protections provided by Fuentes and related cases, requiring an initial hearing on the probability of the plaintiff's success on the merits, will have been afforded to him.

Such a procedure can be sustained only if it is permissible constitutionally to except jurisdictional seizures from the Fuentes requirements for non-extraordinary situations. As previously indicated,272 the usual jurisdictional seizure would not satisfy the three-part test set forth in Fuentes for determining whether an extraordinary situation exists. Moreover, application of a balancing approach, as recommended in Mitchell v. W.T. Grant,273 suggests that the harm to the defendant in being deprived of property prior to judgment outweighs the interests of the government in protecting plaintiffs by avoiding any preliminary hearing on the merits.

A second type of preliminary hearing therefore is appropriate in the quasi in rem seizure cases in addition to a preliminary jurisdictional hearing. This proposed hearing would consider not only the jurisdictional elements outlined in the first alternative, but also

272. See text accompanying notes 256-63 supra.
would require, as in *Fuentes*, a hearing as to the probable validity of the merits of the plaintiff's claim. The preliminary hearing thus would consist of probable cause determinations both as to jurisdiction and as to the merits. Only if a plaintiff satisfies both aspects could the seizure of the property be continued pending final resolution of the case. If the plaintiff fails to show probable success on the merits, the seizure should be dismissed. Similarly, if the plaintiff fails to show probable validity of jurisdiction, the seizure also should be discontinued; the defendant then could move for a dismissal for lack of jurisdiction.

Use of this proposed procedure may have the practical effect of eviscerating quasi in rem jurisdiction, for the required showings by the plaintiff either prior to or immediately after seizure of the assets might be difficult to satisfy. This might result in still more reliance on in personam jurisdiction. If a plaintiff cannot demonstrate at an early stage the probable existence of quasi in rem jurisdiction and the probable validity of the claim on the merits, however, the defendant should not be deprived of his property pending a possibly lengthy trial on the merits. The protections of *Fuentes* should be applicable to seizures for quasi in rem jurisdiction; such seizures essentially are similar to creditor attachments in that they are initiated by private parties. The only significant difference in jurisdictional seizures is the state's alleged interest in affording to its citizens a forum for the resolution of disputes. That state interest could be achieved by dispensing with the requirements of continued seizure, thus protecting both plaintiffs and defendants.

The protections proposed here clearly will involve administrative costs, added by the requirement of a preliminary hearing. Just as in the typical *Fuentes* situation, however, these costs are outweighed by the necessary protection they afford to a citizen deprived of his property. Moreover, the protections may save costs if a preliminary hearing indicates either a lack of jurisdiction or that success on the merits is unlikely, thereby terminating the suit at an early stage.

Finally, under the *Fuentes* doctrine, a prior hearing is not always necessary; in some instances the flexible due process concept permits an immediate post-seizure hearing or other safeguards. Such other protections, if narrowly drawn, could apply equally in the case of jurisdictional seizures. Thus, when a plaintiff files an ex parte affidavit with the court indicating the specific grounds for his
belief that the defendant is likely to remove his property to defeat jurisdiction, accompanied by a bond, the court could permit seizure consistent with the *Fuentes* doctrine prior to notice and a hearing, if procedural due process protections follow immediately.

**Conclusion**

*Shaffer v. Heitner* indeed markedly altered the scope and character of quasi in rem jurisdiction; quasi in rem jurisdiction based upon seizure of property, however, will remain as a common method of obtaining jurisdiction for the foreseeable future. When seizures of property are undertaken for such jurisdictional purposes, they must meet the procedural due process requirements established in *Fuentes* and similar cases for non-extraordinary situations. These protections include notice and an opportunity for a hearing prior to seizure on the probable validity of the exercise of jurisdiction and on the likelihood of success on the merits. Only if a plaintiff demonstrates to a court a special need for swift action to secure jurisdiction can the notice and hearing be delayed until immediately after the seizure has occurred.