Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?

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INTRODUCTION

As every first year procedure student learns, Pennoyer v. Neff is the fountainhead case in the study of that mysterious subject known as "jurisdiction over the parties." Although the law of jurisdiction has changed radically since 1878, Pennoyer remains, at least nominally, the basis of our conceptual framework in matters of jurisdiction, especially quasi-in-rem jurisdiction. While Justice Field did not invent the dichotomy of jurisdiction in rem and jurisdiction in personam, he raised them to a level of constitutional significance which they neither previously enjoyed nor, perhaps, deserved.

It is evident that Field's opinion in Pennoyer drew heavily upon Joseph Story's classic treatise on the conflict of laws for its notions of...
exclusive sovereignty and the territorial limits of judicial jurisdiction. It is also clear that Story in turn borrowed from the continental jurist Huber. In the process of borrowing, however, Story subtly but significantly changed and expanded upon Huber's principles. The net result was a theory of jurisdiction predicated upon the sanctity of geographic boundaries and the assumption that judicial "power" could be exercised separately over persons and things. Moreover, Story transformed what was merely continental political theory into constitutionally mandated rules for the operation of a federal system of "sovereign" states.

The Story theory of jurisdiction, adopted in Pennoyer, has been severely criticized for its logical fallacies and its lack of support in the

4 Story's first maxim of jurisprudence was that within its own territory every nation possesses an exclusive sovereignty and jurisdiction, and, as a result, the laws of every state affect and directly bind all property and all persons within its territory. Id. at 19. Conversely, his second maxim was that no state or nation could by its laws affect or bind either property or persons not within its territory. Id. at 21.


6 Huber had posited the following maxims:
   (1) The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
   (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
   (3) Sovereigns will so act by way of comity . . .

Story expanded Huber's maxims and proposed that:
[Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it . . . .

. . . . no state or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects, or others. This is a natural consequence of the first proposition . . . .

J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (1834).

One commentator has noted how Story changed Huber's statement about territorial sovereignty of states into a rule limiting their jurisdiction, broadened the concept that persons within a territory are subject to its jurisdiction to include property within the territory, and suggested that a state's jurisdiction over persons and property within the state is exclusive. Hazard, supra note 5, at 259-60.

7 See W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 51-52 (1942) [hereinafter cited as W. Cook].

8 For a discussion of how Story, through his erudition and forceful prose, effected the adoption of a theory of jurisdiction based on his and Huber's propositions see Hazard, supra note 5, at 260-62.
reported decisions. It has been noted that Story's implicit assumption that judicial authority could be exercised over things without at the same time exercising it over persons is a logical impossibility, since a sovereign cannot "create rights which 'affect' or 'bind' a thing without at the same time also creating rights which 'affect' or 'bind' the person who has rights relating to the thing." Nonetheless, it is not the intention here to dwell upon the problems of Pennoyer as an intellectual construct. Suffice it to ask whether there was ever any constitutional justification for adopting the Story-Huber theory of jurisdiction as an inherent component of federalism.

Be that as it may, if one accepts the world view advocated by Story, as the Court obviously did in Pennoyer, that decision's approval of the possibility of quasi-in-rem jurisdiction has a certain pragmatic appeal. Under Story's territorial theory, a court could not exercise jurisdiction over persons physically beyond the state's boundaries. Hence, whatever the nature of a defendant's conduct or his relationship with the forum state, if he was outside its territory at the commencement of the action, he could not be reached with process. On the other hand, if the defendant owned property within the state, Story's principle dictated that a state could exercise its exclusive authority over things within its borders and condemn such property to satisfy a plaintiff's claim.

Thus, quasi-in-rem attachment constituted a partial escape from the strictures of the territorial theory of jurisdiction. When the device provided a plaintiff with a remedy against an absconding tortfeasor or the like, the result did not seem unfair. To use the terminology of a later period, the defendant's conduct in such cases had a sufficient contact with the forum state so that the exercise of jurisdiction appeared justified. When the defendant's ownership of property in the forum, however, is purely fortuitous and unrelated to the cause of action, the

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9 See W. Cook, supra note 7, at 48-70; Hazard, supra note 5, at 260-62.
10 W. Cook, supra note 7, at 60.
12 For purposes of this article, an action in rem is one in which the disposition of property, either real or personal, is the subject matter of the suit, whether the resulting judgment purports to bind the whole world (strictly in rem) or only those served with notice (in the nature of an in rem proceeding); an action quasi-in-rem is one brought to enforce a personal liability of the defendant, where the property seized serves merely as a predicate for jurisdiction and where any judgment obtained must be limited to the value of such property.
13 See note 6 supra.
propriety of exercising jurisdiction over the defendant indirectly through his property becomes more doubtful.

Moreover, the nature of the property attached as a predicate for quasi-in-rem jurisdiction began to present difficulties. Thus *Harris v. Balk*\(^{16}\) raised the question of what situs should be assigned to intangibles. The simplistic conclusion reached in *Harris*, namely, that the debt follows the debtor, returned in nightmarish form in *Seider v. Roth*.\(^{16}\) In *Seider* the New York Court of Appeals, in complete defiance of both logic and statutory directive,\(^{17}\) held that an insurance policy issued to a nonresident defendant by a foreign insurance company pursuant to a contract entered into in a foreign state could be attached for jurisdictional purposes by a New York plaintiff as long as the insurance company did business in New York.\(^{18}\)

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\(^{16}\) 190 U.S. 215 (1905). Harris was a North Carolina resident who owed Balk, also a North Carolina resident, $180. Balk was indebted to a third party, Epstein. While Harris was temporarily in Maryland, Epstein served him with a writ of attachment garnishing his debt to Balk. A default judgment was then entered against Balk, and Harris, pursuant to the judgment, paid the money to Epstein. When Balk later sued Harris in North Carolina to recover the $180, Harris pleaded in defense his payment to Epstein under the garnishment in Maryland. The North Carolina court held the Maryland judgment invalid, finding that the debt had been improperly attached because the situs of the debt Harris owed to Balk was in North Carolina where Harris resided, and not in Maryland where he was garnished. The Supreme Court reversed the North Carolina judgment and held that the debt had been properly impounded. *Id.* at 226.


\(^{18}\) The court disregarded N.Y. INS. LAW §§ 167(1)(b), (7) (McKinney 1966). The cumulative effect of these two provisions is to preclude direct actions against insurers.

In *Simpson v. Lochmann*, 21 N.Y.2d 390, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), the court, in an apparent attempt to avoid constitutional problems, created a right of limited appearance in such cases. The New York infant plaintiff, injured in Connecticut waters by a propeller on a Connecticut defendant's boat, attached the defendant's liability policy issued by a company doing business in New York. The court noted that "there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though [the defendant appears and] proceeds with the defense on the merits." *Id.* at 991, 238 N.E.2d at 320, 290 N.Y.S.2d at 916. This position completely ignored the statutory prohibition of such appearances as it existed in 1968. *See* ch. 308, § 320(c), [1962] N.Y. Laws 1319, as amended, N.Y. CIV. PROAC. LAW § 320(c) (McKinney 1972).

\(^{18}\) In 1973, a lower California court in *Turner v. Evers*, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (Sacramento Super. Ct. App. Dept '73), adopted the *Seider* approach. Plaintiffs were California residents whose car, which subsequently became inoperable, had been serviced by the defendant while plaintiffs were in Washington. Defendant's insurance carrier did business in California. The plaintiffs brought an action there to recover damages for loss of use of the car and for the additional repairs required. The court upheld jurisdiction based on the attachment of the defendant's insurance policy despite the absence of a personal injury claim as had been present in *Seider*. For a discussion of *Turner v. Evers* see Comment, *Quasi in Rem Jurisdiction Based on an Insurer's Duty to Defend: The Adoption of the Seider Rule in California*, 5 PACIFIC L.J. 115 (1974);
Nonetheless, such problems might have remained the subject of mere public policy debate had the territorial view of jurisdiction persisted intact. Developments in the area of in personam jurisdiction, however, as well as heightened concern over the requirements of procedural due process, have now rendered the entire concept of jurisdictional attachment constitutionally suspect.

**Substantive Due Process Problems**

The movement away from territoriality began with the nonresident motorist statutes, which received Supreme Court approval in *Hess v. Pawloski.* While *Hess* and the other motor vehicle cases relied upon the fiction of consent to jurisdiction, previous decisions gradually had come to recognize the power of the states to exercise jurisdiction over nonresidents with respect to such “exceptional” activities as the sale

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Another state which has followed the Seider rule is New Hampshire. In *Forbes v. Boynton,* 113 N.H. 617, 313 A.2d 129 (1973), where a New Hampshire resident sued a New York resident for damages as a result of injuries sustained in an automobile accident in Maine, the Supreme Court of New Hampshire held that quasi-in-rem jurisdiction could be exercised over the defendant by attaching a liability insurance policy issued to him by a company which had an office in New Hampshire. It is uncertain, however, whether the court has definitely adopted the Seider rule: “We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the Seider rule prevails the trial court properly denied the defendant’s motion to dismiss the plaintiff’s action.” *Id.* at __, 313 A.2d at 133.

**Seider v. Roth** has been questioned and criticized at length in the federal courts. See, e.g., *Robinson v. Shearer & Sons,* 429 F.2d 83, 86 (3d Cir. 1970) (The court refused to allow injured seaman to attach the obligation of defendant boat owner’s insurer to indemnify; “we do not believe [the Seider v. Roth] concept of expanding quasi-in-rem jurisdiction based on bootstrap logic is appropriate.”); *Podolsky v. Devinney,* 281 F. Supp. 488, 500 (S.D.N.Y. 1968) (The court held that the Seider approach constituted a violation of due process and noted “[w]e do not lightly determine to put aside [the Seider] procedure . . . .”); *Ricker v. Lajoie,* 314 F. Supp. 401, 403 (D. Vt. 1970) (The court held that an automobile insurance policy was not “known property” subject to attachment; “[w]e find the dissent in Seider v. Roth more persuasive than the majority . . . .”). None of these decisions mentioned the potential problem of multiple attachment of the same policy in different states.

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1927, *U.S.* 352 (1927). In *Hess,* the Court upheld the constitutionality of a Massachusetts statute requiring nonresident motorists to appoint an agent to accept service of process in proceedings arising out of use of Massachusetts highways. Subsequent decisions followed the *Hess* precedent. See, e.g., *Young v. Masci,* 289 U.S. 253 (1933) (New York statute making automobile owner liable for the negligence of an operator using vehicle with the owner’s permission held not unconstitutional as applied to a nonresident owner who was outside the State at the time of the accident); *Boss v. Irvine,* 28 F. Supp. 983 (W.D. Wash. 1939) (Washington statute providing for service to be made on the Secretary of State and notice to be sent to an out-of-State defendant in actions arising out of accidents on state highway held to be constitutional.); *Duncan v. Ashwander,* 16 F. Supp. 829 (W.D. La. 1936) (Driver son of nonresident owner held to be “authorized agent” within the meaning of a statute providing for the exercise of jurisdiction over nonresidents in actions arising out of the operation of a motor vehicle on state highways).
of insurance and securities. Since a state could prohibit such activity altogether, it could impose conditions upon its continuance—including subjection to jurisdiction.

A new era really dawned, however, with the landmark decision in *International Shoe Co. v. Washington.* The Court brushed away the territorial demands of *Pennoyer* and proclaimed that "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.'" "Minimum contacts" represented a radically different way of looking at problems of jurisdiction. Rather than focusing upon a state's physical power over the person of the defendant, the Court indicated that the relevant questions involved the nature of the defendant's relationship to the forum.

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20 In *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U.S. 147, 158 (1903), an action alleging breach of contract was brought against defendant insurance company. While noting that the defendant, pursuant to a Kentucky statute, had consented to service of process upon the state insurance commissioner, the Court also observed that state courts had jurisdiction over foreign corporations engaging in business within the state in any cause of action growing out of that business. In *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), the Court similarly upheld the constitutionality of a Missouri statute allowing service of process upon the Superintendent of the State Insurance Department. The defendant had consented to such service, but the Court noted: "Of course, as stated by Learned Hand ..., this consent is a mere fiction ...." *Id.* at 96 (citation omitted). The Court was referring to *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915), where Judge Hand had observed:

> When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all ... but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

*Id.* at 151 (emphasis added).

In *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), the Court held that in an action arising out of the sale of securities, Iowa could exercise jurisdiction over a nonresident defendant who maintained a securities business in Iowa by serving notice on the manager of one of the defendant's Iowa offices. The Court noted that "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation." *Id.* at 627.

21 Such activities typically require licensing by the state. In the absence of such licensing, the activity may not be legally conducted within the state.

22 326 U.S. 310 (1945). In *International Shoe* a Delaware corporation was sued in a Washington state court for unpaid contributions to the state unemployment compensation fund. From 1937 to 1940, the corporation had salesmen in Washington who were only authorized to exhibit samples and solicit orders. The orders were filled by mail directly from the home office. The corporation, however, maintained no office in the state.

23 *Id.* at 316 (citation omitted).
The exercise of [the privilege of conducting activities within a state] may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.24

*McGee v. International Life Insurance Co.*25 demonstrated how minimal "minimum contacts" could be when an action against a foreign insurer was permitted, despite the inability to serve process within the forum. As far as appeared from the record, the insurer had transacted no business within California other than the single sale by mail of the insurance policy in issue. The policy had been delivered in California; the premiums were mailed from there; and the insured was a resident of that State. Finding such activity a proper predicate for the exercise of jurisdiction by California over the Texas company, the Court noted that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state."26

The states soon availed themselves of the "minimum contacts" approach by enacting "long-arm" statutes27 which enabled the states to acquire in personam jurisdiction over nonresident tortfeasors, contractors, and manufacturers. While some state courts have been quite liberal in applying these statutes,28 their extended concept of "mini-

24 Id. at 319.
26 Id. at 223. See *Storey v. United Ins. Co.*, 64 F. Supp. 896 (E.D.S.C. 1946) (A South Carolina court had jurisdiction over an Illinois insurance company that did not have an office in South Carolina but had contracted by mail to insure a South Carolina resident); *Compania De Astral v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 857 (1954) (A Panamanian corporation that had no office in the United States but had, through an agent, entered into a contract within the State of Maryland had sufficient "minimum contacts" to subject it to a suit on a cause of action arising out of said contract); *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953) (Jurisdiction could be exercised over a foreign insurance company which had mailed a contract of insurance to a New York resident and had collected premiums by mail from him).
28 See, e.g., *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (Ohio manufacturer of safety valve used by Pennsylvania assembler in heater sold to an Illinois customer was subject to jurisdiction in Illinois in an action
mum contacts” seems to be within the broad due process limits set forth in *International Shoe* and *McGee*. Despite this relaxation of the once severely circumscribed in personam jurisdiction, quasi-in-rem jurisdiction continues to flourish under modern procedural codes.\(^{29}\)

It is certainly the prerogative of each state to exercise something less than the full breadth of in personam jurisdiction permitted by due process.\(^{30}\) Conversely, it may be argued that the “minimum contacts” test of *International Shoe*, broadly construed in the spirit of *McGee*, exhausts the legitimate interest of a state in any given litigation. Hence, arising out of the explosion of the valve); *McCormick v. Haley*, 29 Ohio Misc. 97, 279 N.E.2d 642 (Franklin County C.P. 1971) (jurisdiction was exercised over foreign corporation which derived substantial revenue from Ohio sales and whose tortious act outside the State caused injury within Ohio); *Zerbel v. H.L. Felderman & Co.*, 48 Wis. 2d 54, 179 N.W.2d 872 (1970), appeal dismissed, 402 U.S. 902 (1971) (In an action for the value of warrants due under a contract, jurisdiction was exercised over a foreign defendant who contracted for services which he knew would be performed in Wisconsin.). *Contra*, Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). In *Feathers*, a negligence action involving the explosion of a tank manufactured in Kansas, jurisdiction over the foreign manufacturer was disallowed. The court reasoned that the defendant did not commit a tortious act in New York. In reaction to *Feathers*, the New York legislature amended its long-arm statute to provide that an act committed outside the State may, under certain conditions, give rise to jurisdiction within the State. *See* N.Y. CIV. PRAC. LAW § 302(a)(3) (McKinney 1972).

In some instances the courts themselves took the initiative and, pursuant to *International Shoe* and its progeny, broadened the interpretation of “doing business” as used in jurisdictional statutes. In *Wanamaker v. Lewis*, 153 F. Supp. 195 (D. Md. 1957), plaintiffs sued a national radio network for defamation. The court allowed jurisdiction on the grounds that the network’s purchase of the right to use, and use of, locally owned facilities of affiliated Maryland stations for local advertising constituted “doing business” within the meaning of the Maryland long-arm statute. In *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958), an action to enjoin defendants from inducing breach of contracts, and for an accounting, the court held that a foreign defendant who regularly purchased goods in California from the plaintiff as its exclusive agent, took title to the goods there, directed the shipment of the goods, and later entered into a similar course of dealing with a partnership in California was “doing business” in that State and thus was subject to its jurisdiction. In *S. Howes Co. v. W.P. Milling Co.*, 277 P.2d 655 (Okla. 1954), plaintiff brought a breach of warranty action against a foreign corporation seller. An independent broker had received an order for a machine on behalf of the defendant, supervised the shipping of the machine, and suggested the manner of its installation. When notified that the machine was not performing properly, the defendant had subsequently dispatched a salesman to investigate. The court held that the defendant had “done business” within the state.

29 See, e.g., CAL. CIV. PRO. CODE § 537 (West 1954); N.Y. CIV. PRAC. LAW § 6201 (McKinney 1953); N.C. GEN. STAT. § 1-75.8 (1969).

30 See, e.g., *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 94 (1967). The *McKee* court refused to sustain jurisdiction over a foreign corporation, noting that “[o]nly in a rare case should [foreign corporations] be compelled to answer a suit in a jurisdiction with which they have the barest of contact . . . .” *Id.* at 383, 299 N.E.2d at 607-08, 283 N.Y.S.2d at 38 (citation omitted). In *Feathers* v. *McLucas*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), the court, refusing to exercise jurisdiction over a nonresident corporation, observed that the question presented was not “whether the Legislature could constitutionally have enacted legislation expanding [personal] jurisdiction . . . but whether the Legislature did, in fact, do so.” *Id.* at 459-60, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21 (emphasis in original).
if a controversy has insufficient contacts with a particular forum to justify the exercise of in personam jurisdiction, it may be improper to predicate a more "limited" form of jurisdiction, i.e., quasi-in-rem, upon the happenstance that the defendant owns property within the forum. With the exception of domicile and "doing business," "minimum contacts" has generally been understood to require that the cause of action arise out of the contacts. Thus, the commission of a tortious act within the state is an insufficient predicate upon which to base a breach of contract action. The ownership of property within the forum and the imposition of quasi-in-rem jurisdiction on that basis, however, is not subject to such a limitation.

When a sufficient predicate for in personam jurisdiction exists, the coexisting possibility of quasi-in-rem jurisdiction is at best superfluous. But when such an in personam predicate does not exist, does the exercise of quasi-in-rem jurisdiction comport with "fair play and substantial justice?" After all, if that phrase is to be the measure of due process, it may restrict, as well as expand, the limits of jurisdiction. While it is true that the Supreme Court spoke of "traditional notions," the day when ancient process is necessarily due process is long past.

The conclusion that quasi-in-rem jurisdiction violates substantive due process because it depends upon a defective jurisdictional predicate would be a happy one. It would rid us of such anomalies as Harris and Seider, and it would permit the resolution of all jurisdictional problems by a rational weighing of contacts between the forum and the transaction in litigation, as suggested by Chief Justice Traynor.

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31 From the plaintiff's point of view, quasi-in-rem jurisdiction may not be "limited" at all if the value of the property equals or exceeds his claim.
34 See Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969), wherein the Court observed 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."
35 In Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), cert. denied, 357 U.S. 569 (1958), plaintiff musicians sought to invalidate a collective bargaining agreement which provided for the payment of royalties to a New York trustee. Plaintiffs argued that the agreement illegally diverted funds earned by them. Here, although there were sufficient contacts with California to justify in personam jurisdiction, such jurisdiction seemed to be precluded by a statutory requirement that a defendant in an in personam action be a state resident at the time of the suit. The court concluded, however, that the payments owed by the employer, either to the defendant or to the plaintiffs, constituted property within the state and allowed the exercise of jurisdiction over the defendant. Chief Justice Traynor, in determining that jurisdiction should be exercised over the nonresident defendant, evaluated the various litigants' contacts with the State, the interest of California in the outcome of the litigation, and the concept of fair play to all the parties. In Is This Conflict Really Necessary?, 37 Tex. L. Rev. 657, 662-64 (1959), Chief Justice Traynor discusses the case and suggests that "[i]t is time we had done with mechanical distinctions between [proceedings] in rem and in personam . . . ." Id. at 663.
Unfortunately, the Court has refused to abandon completely the theory of territoriosity. In *Hanson v. Denckla*, the majority observed:

> [T]he requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

Hence, it might be argued that the states may continue to exercise quasi-in-rem jurisdiction as they always have, since state sovereignty is still bottomed on physical power over persons and things within its geographic boundaries. The result in *Hanson*, however, is explicable as a means of avoiding an unpalatable Florida choice of law rule. Unable to see its way clear to achieving that end under full faith and credit, the Court accomplished its purpose by denying the Florida court's jurisdiction. Consequently, the decision need not represent an insurmountable obstacle to the elimination of quasi-in-rem jurisdiction as violative of substantive due process. Moreover, recent developments in the area of procedural due process have rendered the demands for the elimination of jurisdictional attachment even more compelling.

**Procedural Due Process Problems**

Since 1969, in a series of four decisions, the Supreme Court has severely restricted the use of attachment devices intended to provide security for plaintiff creditors. Although none of the decisions involved

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*357 U.S. 235 (1958).* The action involved the settlement in a Florida court of an estate which included a trust fund established in Delaware. The decedent was a Pennsylvania domiciliary at the time she created the trust and named a Delaware corporation as trustee. She later moved to Florida, where she resided at her death. The Supreme Court concluded that the Florida court settling the estate had not obtained personal jurisdiction over the trustee because the trustee did not have sufficient "minimum contacts" with Florida to make the trustee amenable to personal jurisdiction.

*Id.* at 251 (emphasis added) (citations omitted).

*88* The decedent had executed an inter vivos power of appointment on the same day she drew up her will. Under Florida law, this power of appointment was testamentary and therefore void. The Florida court applied its own State law and decided that the $400,000 involved in the trust passed to the residuary legatees of the will rather than to the decedent's grandchildren, to whom the power of appointment over the trust had been given. The Supreme Court, apparently in an effort to permit the application of the more relevant Delaware law, concluded that the Florida court had been without jurisdiction to determine the validity of the trust and sustained the decision of the Delaware court awarding it to the grandchildren under a valid power of appointment.

jurisdictional attachment, the due process concerns expressed therein cannot be ignored in evaluating the continued legitimacy of quasi-in-rem jurisdiction.

In *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin*, the Court invalidated wage garnishment and replevin statutes, respectively, on the ground that such statutes violated the procedural due process requirements of notice and hearing before seizure of property. By effectively defining property as any "possessory interest," *Fuentes* ostensibly outlawed virtually all prejudgment taking of property. In *Mitchell v. W. T. Grant Co.*, however, the Court appeared to withdraw from its demanding position in *Fuentes* by holding that a Louisiana sequestration statute passed constitutional muster, purporting to find several factual distinctions rendering *Fuentes* inapposite. It soon became clear that the *Mitchell* retreat was at least not a complete rout. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, the majority re-affirmed the continued vitality of *Fuentes* and held a Georgia garnish-

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40 395 U.S. 337 (1969). Plaintiff finance company sued defendant for a debt in a Wisconsin court and garnisheed defendant's salary pursuant to a statute allowing a garnishment summons to be issued at the request of plaintiff's lawyer. The defendant moved for dismissal on the grounds that the failure to give notice and an opportunity to be heard before the seizure of the wages constituted a denial of due process.

41 407 U.S. 67 (1972). The Court reviewed decisions of Florida and Pennsylvania courts upholding the constitutionality of statutes authorizing, under a writ of replevin, the seizure of goods in a person's possession. Both statutes provided for such writs simply on *ex parte* application of any person who claimed the goods and posted a security bond.

42 *Id.* at 86-87. The plaintiffs in *Fuentes* had signed conditional sales contracts and thus lacked full title to the replevied goods. In return for their agreement to pay a substantial finance charge, they had, however, obtained immediate possession and use of the goods. The Court observed that "their possessory interest in the goods . . . was sufficient to invoke the protection of the Due Process Clause." *Id.*

43 416 U.S. 600 (1974). Petitioner had purchased items of personal property on an installment sales contract. Respondent seller had a vendor's lien on the goods and filed suit for the overdue balance of the price. Pursuant to a Louisiana statute, the property, on application of the respondent, was sequestered without prior notice or opportunity to be heard.

44 The reasons the Court offered to justify the conclusion that this is a different case from *Fuentes* are: (1) the statute requires that the plaintiff state "specific facts" and not mere conclusions; (2) the writ of sequestration is issued by a judge rather than a court clerk; and (3) the facts relevant to obtaining the writ are narrowly confined to the questions of the existence of a vendor's lien and default and do not extend to the question of wrongful detention. *Id.* at 615-18.

The sudden shift in attitude is explained by the addition of Justices Powell and Rehnquist to the Court. They did not participate in the *Fuentes* decision, in which there was a four to three majority in favor of invalidating the replevin statute. They did participate in *Mitchell* and, by adding their votes to those of Justices Burger, White, and Blackmun, transformed the *Fuentes* minority into the *Mitchell* majority.

45 419 U.S. 601 (1975). Respondent brought suit on an indebtedness for goods sold and delivered to plaintiff corporation. At the same time the complaint was filed, the respondent garnisheed the plaintiff's bank account pursuant to a Georgia statute allowing a writ of garnishment to be issued in pending suits.
ment provision unconstitutional because it had none of the saving characteristics of the Louisiana statute.\footnote{\textsuperscript{46}}

Since jurisdictional attachment entails physical seizure of the defendant's property without notice or an opportunity to be heard, it would similarly appear to be violative of due process within the meaning of \textit{Fuentes}. Regardless of the exact scope of the \textit{Fuentes} decision at the present time, the exception carved out in \textit{Mitchell} is inapplicable since the "constitutional accommodation"\footnote{\textsuperscript{47}} achieved therein was necessitated by the conflicting interests of the parties in the property sequestered.\footnote{\textsuperscript{48}} In the typical case of jurisdictional attachment, the attaching plaintiff has no preexisting interest in the seized property similar to the vendor's lien in \textit{Mitchell} and denial of notice and a preseizure hearing cannot be justified on that basis.

Nonetheless, \textit{Sniadach} and \textit{Fuentes} do recognize an exception to the notice and opportunity to be heard requirements for "extraordinary situations."\footnote{\textsuperscript{49}} \textit{Fuentes} describes the nature of such extraordinary situations as follows:

\begin{quote}
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 very 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.\footnote{\textsuperscript{50}}
\end{quote}

The question, of course, is whether jurisdictional attachment constitutes an "extraordinary situation." \textit{Fuentes} itself, as well as other

\footnote{\textsuperscript{46} The Georgia statute allowed a writ of garnishment to be issued on the affidavit of a creditor or his attorney. The attorney was not required to have personal knowledge of the facts; rather, mere conclusory allegations were sufficient. The participation of a judge was not required; a court clerk could issue the writ. Once the writ was served, the debtor was deprived of his property, and the only way to dissolve the writ was by the debtor's filing a bond. No provision was made for an early hearing where the creditor would be required to show cause for the garnishment. \textit{Id.} at 607.}

\footnote{\textsuperscript{47} 416 U.S. at 607.}

\footnote{\textsuperscript{48} In \textit{Mitchell}, the sequestered property was not exclusively the property of the defendant since the plaintiff had a vendor's lien on the property. The Court concluded that [t]he reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well. \textit{Id.} at 604.}

\footnote{\textsuperscript{49} 395 U.S. at 339; 407 U.S. at 90.}

\footnote{\textsuperscript{50} 407 U.S. at 91.}
decisions, indicates that at least in certain situations it does. But this affirmative answer is traceable to the Sniadach citation of Ownbey v. Morgan, a case involving jurisdictional attachment, as presenting an example of an extraordinary situation. Such reliance on Ownbey is misplaced, however, since the issue of the constitutionality of attachment for jurisdictional purposes was not raised.

51 See, e.g., Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171 (S.D.N.Y. 1975) (New York statute allowing jurisdictional attachment is not unconstitutional despite the absence of a requirement for an immediate postseizure hearing); Long v. Levinson, 374 F. Supp. 615, 618 (S.D. Iowa 1974) (Jurisdictional attachment without a hearing did not violate the defendant's due process rights); Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1340 (E.D. Pa.), aff'd, 456 F.2d 979 (3d Cir. 1971), cert. denied, 409 U.S. 843 (1972) (In upholding the constitutionality of Pennsylvania foreign attachment rules, the court noted that attachment serves the dual purposes of securing jurisdiction and rendering the property subject to the demands of creditors); Tucker v. Burton, 319 F. Supp. 567, 577 (D.D.C. 1970) (Wright, J. dissenting) (In an action wherein the court upheld the constitutionality of a statute allowing attachment of a nonresident wage earner's salary, Judge Wright argued that "[t]he reality which creates an 'extraordinary situation' and which justifies the summary procedure of prejudgment garnishment is the unavailability of the debtor for personal service . . . ."); Blair v. Pitchess, 5 Cal. 3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971) (In an action wherein a California claim and delivery law was held unconstitutional, the court observed that "the interest of the creditor in preserving the claimed property and the interest of the state in preserving its jurisdiction [are] viewed as justifying the special protection afforded by a summary remedy."); Gordon v. Michel, 297 A.2d 420, 423 (Del. Ch. 1972) (In a stockholders' derivative suit the court determined that seizure of a nonresident defendant's property for jurisdictional purposes constituted an "extraordinary situation" and was not violative of due process); cf. Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 646-47 n.5 (S.D.N.Y. 1974) (The court, which held unconstitutional a New York statute permitting ex parte prejudgment attachment of a defendant's property, observed that a limited exception to the due process requirement of a hearing prior to the deprivation of property would be in a situation where attachment was necessary to acquire jurisdiction over the defendant).

52 256 U.S. 94 (1921). The respondent in Ownbey had brought suit for a debt and had secured attachment of the nonresident petitioner's assets within the State. The petitioner wanted to enter a general appearance, but a Delaware statute required that he first give security. He contended that because of the attachment he was unable to post the security and that such security was unnecessary in a suit commenced by attachment. The petitioner was not challenging the constitutionality of attachment for jurisdictional purposes, but rather was contending that a statute requiring the posting of security in an action commenced by attachment was unconstitutional. The Court held that requiring a nonresident defendant whose property had been attached to give security as a condition to his right to appear and defend was not a deprivation of property without due process.

53 For a discussion of the misconception involved in relying on Ownbey for a justification of seizures for jurisdictional purposes see Note, Quasi in Rem Jurisdiction and Due Process Requirements, 82 YALE L.J. 1023 (1973). The author observed that "[t]he constitutionality of the jurisdictional attachment in Ownbey was never challenged; indeed, the plaintiff argued for its continuation. Hence, it is unclear on what basis the courts can now use the citation of that case in Sniadach to justify quasi-in-rem seizure in all situations." Id. at 1026.

54 407 U.S. at 91.
the Court, citing Ownbey, stated that jurisdictional attachment is "clearly a most basic and important public interest." But is it so clear? In those cases involving minimum contacts with the forum, any public interest in adjudicating a particular controversy can be fully secured through the exercise of in personam jurisdiction. Thus, quasi-in-rem jurisdiction is at best superfluous in such situations, and there exists no justification for ignoring or modifying the requirements of procedural due process. In those cases lacking minimum contacts with the forum, does the state have a sufficient interest in the controversy to warrant the exercise of any form of jurisdiction? Surely a state which lacks even minimum contacts with a particular controversy does not suddenly acquire a vital interest in it merely because of the fortuitous presence of property belonging to the defendant within its borders.

The only conceivable argument is that in actions against foreigners, a state has an interest in providing a forum to its residents. It is this purported interest which is at the heart of the result in Seider v. Roth. Indeed, it has been held that a Seider attachment is constitutional only if the plaintiff is a resident of the state, thereby automatically foreclosing its utilization by foreign plaintiffs.

If provision of a forum to resident plaintiffs is indeed a legitimate state concern, then perhaps residence in the proposed forum should always be deemed an overriding contact sufficient to meet the minimum contacts requirement for the exercise of in personam jurisdiction. While the present author does not subscribe to such a suggestion, it does seem that securing "an important governmental or general public interest" should not turn upon the adventitious circumstance that the defendant owns property within the state. The better approach would appear to be to deny the existence of a state interest sufficient

55 Id. at 91 n.28.
57 In Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir.), cert. denied, 396 U.S. 840 (1969), the court held that allowing the attachment of an insurance policy to obtain quasi-in-rem jurisdiction over a nonresident defendant would be limited to actions brought by a New York resident or arising out of accidents occurring in New York.
58 See Seidelson, Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes, 6 DUQUESNE U.L. REV. 221, 236-37 (1968). Professor Seidelson argues that when a plaintiff brings suit on a transitory cause of action against a nonresident defendant in the plaintiff's home state, the exercise of in personam jurisdiction over the defendant does not violate due process. He believes that the "minimum contacts" test promulgated by the Supreme Court in International Shoe is not sufficiently broad, and that an "overriding 'contact'—if one requires that word to be used—exists in the mere assertion of resident plaintiff's claim." Id. at 236.
to overcome the defendant's procedural due process rights as long as there is an alternative forum in which the plaintiff may acquire in personam jurisdiction. Where there is no such alternative forum, it is submitted that the plaintiff's residence should then, and only then, be deemed an overriding minimum contact sufficient to justify the exercise of in personam jurisdiction.

CONCLUSION

The continued recognition by the courts of quasi-in-rem jurisdiction, ostensibly based on the "extraordinary situations" exception, has resulted in procedural monstrosities like Seider and circumvention of the dictates of Sniadach and Fuentes. Even where seizure has not been strictly necessary for the acquisition or continuation of jurisdiction in a given forum, it has been permitted under the guise of jurisdictional attachment when, in reality, its only purpose has been as a security device—a purpose specifically rejected by Sniadach and Fuentes as a justification for denying a defendant his procedural due process rights.60

Not only do such abuses themselves argue in favor of the elimination of quasi-in-rem jurisdiction, but even those decisions61 which purport to limit its use to situations satisfying the tripartite test of Fuentes fail to justify its continuance. While such decisions are laudable

60 In Mills v. Bartlett, 265 A.2d 39 (Del. Super. Ct. 1970), a Delaware resident attempted to sue in Delaware a Massachusetts defendant on a cause of action which arose in Massachusetts. The defendant was employed by a Delaware corporation, and the plaintiff sought to obtain jurisdiction by attaching the defendant's wages. The court refused to allow the prejudgment garnishment of the nonresident defendant's wages in order to secure jurisdiction, thus implicitly suggesting that the suit should be brought in Massachusetts.


62 In In re Law Research Serv., Inc., 386 F. Supp. 749 (S.D.N.Y. 1974), an action involving a bankruptcy claim, the court held that "the fact that a garnishment is made in order to secure quasi-in-rem jurisdiction [does not insulate] it from the due process requirements established by the Supreme Court in Fuentes v. Shevin." Id. at 752. The court refused to sustain a garnishment made to secure jurisdiction because the writ was issued automatically, without review, on the plaintiff's unsubstantiated assertion of a claim against the defendant. In U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1021-22 (D. Del. 1972), the court in an action involving fraud and breach of contract, determined that the exercise of quasi-in-rem jurisdiction over a nonresident defendant was not unconstitutional. The court observed that in the instant case seizure for jurisdiction served an important state interest, that there was need for prompt action, and that Delaware kept strict control over its monopoly of legitimate force. In Roscoe v. Butler, 367 F. Supp. 574 (D. Md. 1973), an action to declare unconstitutional the Maryland jurisdictional attachment procedure, the court noted that while the procedure satisfied the Fuentes requirements of the existence of an important general public interest and need for prompt action, it did not fulfill the third requirement of strict control by the state over its monopoly of legitimate force and was thus unconstitutional.
in that they at least seek to keep jurisdictional attachment within some broad due process limits, they merely serve to invite prolonged pre-
liminary litigation over the question of whether Fuentes' tripartite test has been met. There need be no such middle ground. In light of the availability of in personam jurisdiction in all instances of legiti-
mate concern to a state, both substantive and procedural due process require the elimination of quasi-in-rem jurisdiction.

The institution of quasi-in-rem jurisdiction has outlived its use-
fulness. Its value as an escape from the strictures of a discarded terri-
torial theory is gone. Its continued survival only beclouds jurisdictional thinking and conflicts with significant due process concerns. The time has come to abolish jurisdictional attachment and to approach all juris-
dictional problems in terms of "minimum contacts." By so doing, we may hope to achieve results that are predicated upon a rational process of weighing relevant interests and not upon purely fortuitous circum-
stances.