

Reflections on *Shaffer v. Heitner*

By JOSEPH P. ZAMMIT*

The institution of quasi-in-rem jurisdiction has outlived its usefulness. Its value as an escape from the strictures of a discarded territorial 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 jurisdictional 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 circumstances.¹

The law of in personam jurisdiction² has evolved dramatically since the enunciation of purely territorial criteria more than a century ago in *Pennoyer v. Neff*.³ As the states broadened their jurisdiction over nonresident defendants, the Supreme Court decreed in *International Shoe Co. v. Washington*⁴ that "due process requires . . . that in order to subject a defendant to a judgment *in personam*, if he be not present within 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.'"⁵ Until the Court decided *Shaffer v. Heitner*⁶ in 1977, however, no similar trails were blazed in the law of actions quasi-in-rem.⁷ Such actions have been utilized in the past both for the purpose of securing satisfaction of a judgment and of compelling the presence of a nonresident defendant in the forum.

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1. Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 683 (1975), cited in *Shaffer v. Heitner*, 433 U.S. 186, 200 (1977).

2. In personam jurisdiction empowers a court to render judgments that are personally binding on the parties involved. F. JAMES & G. HAZARD, CIVIL PROCEDURE 23-4 (2d ed. 1977).

3. 95 U.S. 714 (1877). "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Id.* at 720.

4. 326 U.S. 310 (1945).

5. *Id.* at 316.

6. 433 U.S. 186 (1977).

7. An action quasi-in-rem is one brought to enforce a personal liability of the defendant, where the property attached served as the basis of jurisdiction; any judgment obtained must be limited to the value of such property. F. JAMES & G. HAZARD, CIVIL PROCEDURE 629 (2d ed. 1977).

The *Shaffer* appellants brought suit in the Delaware courts challenging the constitutionality of a Delaware statute that permitted courts to compel the appearance of a nonresident defendant by the seizure and sequestration of any or all of his Delaware property.⁸ The statute further provided that if the defendant failed to enter a general appearance in the action, or otherwise defaulted, his property could be sold to satisfy the plaintiff's demand.⁹ Availing himself of another Delaware statute, which fixed that state as the situs of ownership for capital stock of all Delaware corporations regardless of the physical location of the certificates,¹⁰ the plaintiff obtained jurisdiction over twenty-one nonresident defendants in a derivative action by placing "stop-transfer" orders on the books of Greyhound Corporation. The defendants made a special appearance to attack jurisdiction, but their motion to quash was denied.¹¹ Upholding the constitutionality of the statute, the Delaware Supreme Court rejected appellants' argument that such sequestration offended the "minimum contacts" criterion for jurisdiction. "There are significant constitutional question at issue here," the court agreed, "but we say at once that we do not deem the rule of *International Shoe* to be one of them."¹²

The court focused instead on appellants' contention that the sequestra-

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

If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

See generally Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973).

9. DEL. CODE tit. 10, § 366(a) (1974).

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

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

11. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976).

12. *Id.*

tion statute violated the procedural due process requirements established by *Sniadach v. Family Finance Corp.*,¹³ *Fuentes v. Shevin*,¹⁴ *Mitchell v. W.T. Grant Co.*¹⁵ and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,¹⁶ because it did not provide defendants with notice or an opportunity for a hearing prior to the seizure of their stock. The Delaware Supreme Court distinguished these cases, however, on the ground that they involved creditor-debtor attachments rather than attachments designed to secure the court's jurisdiction over a nonresident defendant.¹⁷ Observing that notice would give the defendant an opportunity to defeat jurisdiction by transferring title or removing his property from the state, the court concluded that seizure under this statute was an "extraordinary situation" that was exempted from the *Fuentes* requirements.¹⁸

The United States Supreme Court reversed, bringing all actions in rem within the "minimum contacts" strictures of *International Shoe* and effectively abrogating quasi-in-rem jurisdiction as a separate conceptual category. The Court held:

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

13. 395 U.S. 337 (1969) (invalidating Wisconsin statute that authorized garnishment of wages at the request of a creditor's lawyer before trial without any opportunity for the wage earner to be heard or to offer a defense).

14. 407 U.S. 67 (1972) (invalidating Florida and Pennsylvania prejudgment replevin statutes).

15. 416 U.S. 600 (1974) (upholding Louisiana prejudgment writ allowing sequestration of property to forestall waste or alienation upon plaintiff's affidavit and posting of bond). *Sniadach* was distinguished in *Mitchell* because the Louisiana writ was issued by a judge and there was an immediate procedure for a post-seizure hearing, whereas the Wisconsin statute gave no notice, no opportunity for a hearing and required no judicial participation in garnishment of the debtor's wages. *Id.* at 614-16.

16. 419 U.S. 601 (1975) (invalidating a Georgia garnishment statute that permitted prejudgment seizure of property upon the affidavit of plaintiff or his lawyer, without notice or a hearing).

17. 361 A.2d at 232.

18. *Id.* at 231-32. "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing," the *Fuentes* court acknowledged; it cautioned, however, that "[t]hese situations . . . must be truly unusual." 407 U.S. at 90. Such "extraordinary" circumstances have historically included approval of the summary seizure of property to collect the internal revenue of the United States, *Phillips v. Commissioner*, 283 U.S. 589 (1931), to meet the needs of a national war effort, *United States v. Pfitsch*, 256 U.S. 547, 549-50 (1921); *Stoehr v. Wallace*, 255 U.S. 239, 245 (1921); *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566 (1921), to protect against the economic disaster of a bank failure, *Fahey v. Mallonee*, 332 U.S. 245 (1947), to protect the public from misbranded drugs, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), and to protect the public from contaminated food, *North American Storage Co. v. Chicago*, 211 U.S. 306 (1908).

We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.¹⁹

While representing an overdue reevaluation of the basic fairness of a court's assertion of jurisdiction over a nonresident defendant,²⁰ *Shaffer* leaves several related jurisdictional questions unanswered. This commentary will discuss some of the implications of *Shaffer* with respect to the uses of quasi-in-rem jurisdiction. First, the article examines the use of quasi-in-rem rather than in personam actions to secure satisfaction of judgment, even when minimum contacts are present. Second, the use of quasi-in-rem provisions to bring nonresident defendants within the jurisdictional reach of the state when minimum contacts are not present, as in *Shaffer*, is discussed. In this regard, the commentary will examine the continuing validity of attachments under the New York high court case of *Seider v. Roth*,²¹ which involved attachment of an insurance company's obligation to defend a nonresident defendant in a local action.

I. Quasi-in-Rem Jurisdiction to Obtain Security for Satisfaction of Judgment

Even in states that have broad long-arm statutes, the plaintiff might prefer to act by a quasi-in-rem action to guarantee the satisfaction of any judgment rendered against the defendant. In the wake of *Sniadach*, and prior to *Shaffer*, the constitutionality of such statutes came under scrutiny in a number of lower federal court cases. For example, in 1971, the district court in *Lebowitz v. Forbes Leasing & Finance Corp.*²² upheld Delaware's foreign attachment²³ procedure. Although the due process standards of notice and a hearing established by *Sniadach* and its progeny had not been met, the court refused to quash the jurisdictional attachment because it constituted an "extraordinary situation."²⁴ Whatever validity this distinc-

19. 433 U.S. at 212.

20. See Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 683 (1975), cited in *Shaffer v. Heitner*, 433 U.S. 186, 200 (1977).

21. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

22. 326 F. Supp. 1335 (E.D. Pa. 1971). See also *Tucker v. Burton*, 319 F. Supp. 567 (D.D.C. 1970).

23. Foreign attachment originated near the end of the 13th century in the Law Merchant, which designated the rules and customs used by merchants and traders. At that time foreign attachment was the remedy employed by London merchants to collect debts from foreign merchants.

This is a writ, not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find *safe pledges* or sureties who shall be amerced in case of his non-appearance.

3 W. BLACKSTONE, COMMENTARIES 280 (1765) (footnote omitted).

24. 326 F. Supp. at 1348-54. See also *Ownbey v. Morgan*, 256 U.S. 94, 110 (1921).

tion may have had formerly, it is indefensible in light of *Shaffer*. Because minimum contacts are now required for quasi-in-rem actions, the only purpose served by such jurisdictional attachments is that of obtaining security. Thus, to refuse to apply the *Sniadach* standards to a quasi-in-rem action brought to secure a judgment would be to recognize a sham.²⁵

The Supreme Court in *Shaffer*, however, accepted the proposition that when *Sniadach* standards are met, a state may exercise jurisdiction over property for the limited purpose of securing a judgment in another forum in which minimum contacts are present, even if the former state lacks such contacts.²⁶ This exception is illustrated by the recent holding in *Carolina Power & Light Co. v. Uranex*.²⁷ The plaintiff in that action, a North Carolina company, was involved in a contract dispute with a French defendant. The contract provided for New York arbitration; while such arbitration was in progress the plaintiff proceeded ex parte to attach an eighty-five million dollar debt owed to the defendant by a California-based corporation. The debt had no relationship to the litigation except as a potential source of satisfaction of the judgment. The French defendant's limited contacts with California would not have supported the assertion of in personam jurisdiction there. Nevertheless, the court in *Carolina Power & Light Co.* relied on *Shaffer* to find that " 'fair play and substantial justice' include consideration of both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought" ²⁸ Thus, when this form of judicial escrow is available, old line security attachment is merely preserved in an alternate form.

25. The Delaware Supreme Court in *Heitner* and the courts in *Lebowitz* and *Tucker* relied on citations in the *Sniadach* case to an older decision, *Ownbey v. Morgan*, 256 U.S. 94 (1921). In *Ownbey*, the Supreme Court upheld a Delaware foreign attachment statute that required a defendant whose property had been attached to file a bond before entering an appearance. The *Shaffer* Court commented: "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." 433 U.S. at 194 n.10.

26. 433 U.S. at 210.

27. *Carolina Power & Light Co. v. Uranex*, reported in 46 U.S.L.W. 2195 (N.D. Cal., Sept. 26, 1977).

28. *Id.* As the Court in *Shaffer* explained:

The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." . . . This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the underlying claim. At most, it suggests 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*.

433 U.S. at 210.

II. Quasi-in-Rem Jurisdiction as a "Judicial Long-Arm Statute"

A nonresident defendant may have sufficient "minimum contacts" with a state to satisfy the due process standard of *International Shoe*,²⁹ but unless the state's own threshold criteria for jurisdiction are met, an action cannot be maintained. Long-arm statutes that provide for jurisdiction on grounds other than physical presence have been enacted in many states. Typically, these statutes permit jurisdiction when the defendant has (1) transacted any business within the state; (2) committed any tortious act within the state; (3) contracted to insure interests or risks within the state; or when he (4) owns real estate within the state.³⁰ California permits "jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."³¹

Lacking a sufficiently broad long-arm provision, a state court might attempt to utilize a quasi-in-rem statute to obtain personal jurisdiction over a nonresident defendant where minimum contacts are otherwise present. This situation must be distinguished from those cases in which a quasi-in-rem statute is employed for a similar purpose but in which claims to the property itself are at issue. In the former situation, the quasi-in-rem provision is utilized solely to compel the defendant's appearance in the forum in order to defend against a cause of action unrelated to the property. Thus, the only distinction between this type of quasi-in-rem action and the one presented in *Shaffer* is that because minimum contacts are present, due process standards are met: the defendant has ties with the forum other than the mere presence of property, and maintenance of the action does not offend constitutional safeguards.³² *Shaffer* therefore has not tolled the death knell for actions in which quasi-in-rem statutes are utilized to compel personal jurisdiction, except where the nonresident defendant's only link with the forum state is the fortuitous presence of his property within its borders.

As a result, attachments of an insurer's contractual obligation to defend, approved by the New York Court of Appeals in *Seider v. Roth*,³³ may now be invalid. The plaintiffs in *Seider*, who were injured in an automobile accident in Vermont, gained New York jurisdiction over the Canadian defendant by attaching his automobile liability insurance policy. Upholding the constitutionality of the attachment, the New York Court of Appeals

29. 326 U.S. 310, 316 (1945).

30. *E.g.*, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); N.Y. CIV. PROC. LAW § 302 (McKinney 1972); MONT. R. CIV. PROC. 4(b) (Smith 1965).

31. CAL. CIV. PROC. CODE § 410.10 (West 1973).

32. The same constitutional guarantees would measure the compatibility of an action with "traditional notions of fair play and substantial justice," whether jurisdiction is quasi-in-rem or in personam. 326 U.S. at 316.

33. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

stated: "Jurisdiction is properly acquired . . . since the policy obligation is a debt owed to the defendant by the insurer, the latter being regarded as a resident of this State [by virtue of doing business in New York]." ³⁴ The New York high court reviewed the soundness of its holding in *Seider* and the constitutionality of such attachments the following year in *Simpson v. Loehmann*. ³⁵ In that case, the court adhered to its position in *Seider*:

[W]e perceive no denial of due process since the presence of that debt in this State . . . —contingent or inchoate though it may be— represents sufficient of a property [*sic*] right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him. ³⁶

Such disregard of the defendant's own contacts with the forum state should make jurisdiction untenable under *Shaffer*, because attaching an insurer's "debt" ³⁷ to a policyholder is merely an application of quasi-in-rem principles to intangibles. The fact that more recent New York cases have restricted the use of *Seider* attachments to resident plaintiffs ³⁸ does not alter the conclusion compelled by *Shaffer*: jurisdiction should be predicated on the "minimum contacts" of the defendant, not on the residence of the plaintiff.

A different result might be reached, however, if New York's *Seider* attachments are viewed as a judicially created direct action statute against the insurance company. For instance, in *Minichiello v. Rosenberg*, ³⁹ motions to dismiss two separate actions based on *Seider* attachments for lack of

34. *Id.* at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

35. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

36. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636 (citations omitted).

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. . . . Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power.

Id. at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637 (citations omitted).

37. In *Simpson*, Judge Burke dissented on grounds that no debt arose until a suit was filed because the insurer's promise to defend was contingent thereon. Burke felt that plaintiffs should not be able to bootstrap jurisdiction by the attachment of an inchoate contractual obligation. *Id.* at 316-21, 234 N.E.2d at 675-79, 287 N.Y.S.2d at 642-47 (Burke, J., dissenting).

38. See *Donawitz v. Danek*, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977) (New Jersey plaintiff barred from attaching New Jersey physician's medical malpractice liability insurance in New York to gain New York jurisdiction). See also *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969), in which New York resident administrators of the estates of thirteen nonresidents who were killed in an airplane collision over North Carolina were barred from using *Seider* attachments of defendant airlines' liability insurance. "[W]here there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants." *Id.* at 816.

39. 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

jurisdiction were denied. Reasoning that New York could validly enact a direct action statute, the circuit court concluded that the judiciary can achieve the same result by entertaining suits in which jurisdiction is based on the attachment of defendant's liability insurance. As in *Seider*, the insurance company in *Minichiello* was considered the real party in interest. In the 1977 case of *Donawitz v. Danek*,⁴⁰ however, concurring Judge Jasen questioned the use of the *Seider* rationale in lieu of a direct action statute. "Judicial creation of a direct action statute is a contradiction in terms. Courts do not, or at least should not, legislate."⁴¹ Jasen's concurrence also rebutted the majority's contention that the legislature's failure to enact a direct action statute signified its approval of *Seider*. The legislature had enacted such a statute, he noted, only to have it vetoed by the governor because of a drafting deficiency.⁴² Moreover, recent New York cases take the position that *Seider* is incompatible with *Shaffer*. In *Torres v. Towmotor Div. of Caterpillar Inc.*,⁴³ for example, the district court held that "quasi in rem jurisdiction predicated on a *Seider* attachment is but a smoke screen for the ancient form of *Harris* based jurisdiction whose 'continued acceptance would serve only to allow [the assertion of] state court jurisdiction that is fundamentally unfair to the defendant.'"⁴⁴ Plaintiff's motion for an attachment order, which was solely for the purpose of gaining quasi-in-rem jurisdiction over a New Jersey defendant who had no contacts with New York, was accordingly denied.⁴⁵ It should be noted that *Torres* was a diversity action in which the court sought to apply New York law.⁴⁶ Rejecting routine application of *stare decisis*, as the New York courts had done in the past,⁴⁷ the court expressed the opinion that "the New York Courts would perceive the momentous *Shaffer* decision as supplying the 'reason and sense of justice' for effecting a change of the Court's perfunctory affirmance of *Seider*."⁴⁸

Other New York courts have approved the district court's point of view in part. In *Kennedy v. Deroker*,⁴⁹ the New York Supreme Court dismissed

40. 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

41. *Id.* at 147, 366 N.E.2d at 259, 397 N.Y.S.2d at 598.

42. *Id.* at 149, 366 N.E.2d at 260, 397 N.Y.S.2d at 600.

43. No. 77 C 1810 (E.D.N.Y., filed Nov. 18, 1977).

44. *Id.*, memorandum and order at 36.

45. The court refused to impute the minimum contacts of the defendant's insurance company to the defendant. "[I]t cannot be reasonably argued that by entering into a contract of insurance with a company doing business in New York, a nonresident defendant thereby explicitly or impliedly consents to have the insurance company's New York contacts imputed to him." *Id.* at 32.

46. *Id.* at 5.

47. *Id.* at 34.

48. *Id.* at 45-46 n.17, citing *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363, 278 N.E.2d 619, 623, 328 N.Y.S.2d 398, 404 (1972).

49. 398 N.Y.S.2d 628 (Sup. Ct. 1977).

an action based on a *Seider* attachment,⁵⁰ reasoning that:

The act of the Massachusetts resident in purchasing a contract of liability insurance in Massachusetts to cover his Massachusetts based automobile establishes in and of itself no minimum contact with New York even though the insurance company is itself in New York and subject to its process for jurisdictional purposes.⁵¹

The court used the same rationale to grant a motion for dismissal of another action in which jurisdiction was based on the attachment of a medical malpractice insurance policy that had been issued to a nonresident third party defendant. In *Katz v. Umansky*,⁵² the court observed: "Jurisprudentially, the Supreme Court in *Shaffer* extended the criterion of the minimum contacts 'concept of in personam jurisdiction to quasi in rem jurisdiction . . . ' so that the fortuitous presence of defendant's property in New York will no longer justify its seizure in order to create quasi rem [sic] jurisdiction" ⁵³ The New York Court of Appeals' reluctant adherence to *Seider*, the New York legislature's unfruitful attempt to overrule the case by statute, and the recent New York decisions that abandon *Seider's* controversial method of asserting jurisdiction, foretell the death of the *Seider* concept of quasi-in-rem jurisdiction.⁵⁴

Conclusion

The final question left unanswered by the *Shaffer* decision brings us full circle. In the area of in personam jurisdiction, *International Shoe* undermined the conceptual structure of territoriality created by *Pennoyer v. Neff*.⁵⁵ In *Shaffer*, the mere presence of property within the jurisdiction was

50. The court could have dismissed the action on the ground that the plaintiff, an Alaska resident, was not entitled to invoke the *Seider* doctrine, which has been limited to resident plaintiffs. See note 38 and accompanying text *supra*. But because the plaintiff asserted that she maintained both New York and Alaska residences, the court felt compelled to treat her as a New York resident. 398 N.Y.S.2d at 629.

51. 398 N.Y.S.2d at 630. The court did not, however, consider the court of appeals' recent interpretation of its holding in *Seider* to establish a judicial direct action "statute." "Since this motion is directed only to the status of the Massachusetts owner and driver as defendants in the action, the court has not considered the recent declaration of the Court of Appeals that its holding in *Seider v. Roth* established by judicial fiat a direct action against the insurance company in a case such as this." *Id.* See notes 39-42 and accompanying text *supra*.

52. 399 N.Y.S.2d 412 (Sup. Ct. 1977).

53. *Id.* at 416 (citations omitted). The court specifically rejected plaintiff's assertion that *Seider* and its progeny are predicated on a direct action theory, concluding to the contrary that that line of cases employed traditional quasi-in-rem jurisdiction analysis. *Id.* See notes 39-42 and accompanying text *supra*.

54. See notes 49-53 and accompanying text *supra*. Such an opportunity was also presented by *O'Connor v. Lee-Hy Paving Co.*, No. 76 C 1853 (E.D.N.Y. Oct. 14, 1977), a wrongful death action certified to the Court of Appeals for the Second Circuit for guidance in applying *Shaffer*.

55. 95 U.S. 714 (1877).

rejected as an appropriate basis for personal jurisdiction in favor of the minimum contacts approach of *International Shoe*. What remains then is the question of whether the presence of the person in the forum is in itself a sufficient basis for the exercise of jurisdiction. That it is sufficient is suggested by the minimum contacts requirement articulated in *International Shoe* for defendants "not present within . . . the forum."⁵⁶

The absurdity of the presence of property or the person alone as a predicate for jurisdiction is illustrated by cases like *Grace v. MacArthur*.⁵⁷ In that case, the Arkansas plaintiffs gained Arkansas jurisdiction over an Illinois corporation by having its controlling stockholder, chairman of the board and president, and also a defendant, personally served with a copy of the summons and complaint "on the Braniff Airplane, Flight No. 337, nonstop flight from Memphis, Tenn. to Dallas, Texas, . . . at 5:16 P.M. at which time the said airplane was in the Eastern District of Arkansas and directly above Pine Bluff, Arkansas. . . ."⁵⁸ The service of a summons on a nonresident defendant during such a fleeting stay in the state may be even more fortuitous than his ownership of property there. While such cases are rare and the problem may be obviated by the application of the doctrine of forum non conveniens,⁵⁹ this is not always true, particularly if the plaintiff is a resident of the forum.⁶⁰

Logic and consistency would seem to require that minimum contacts accompany physical presence as a predicate for the exercise of jurisdiction. Whether the final step will be taken, abandonment of this most ancient base for the exercise of jurisdiction, indeed the only one recognized by the common law in the absence of statute,⁶¹ remains to be seen. The Supreme Court in *Shaffer* has, however, hinted at the answer: "'[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."⁶²

56. 326 U.S. at 316.

57. 170 F. Supp. 442 (E.D. Ark. 1959). *But see* F. JAMES & G. HAZARD, CIVIL PROCEDURE 628 n.7 (2d ed. 1977), in which it is suggested that the transaction sued on in *Grace* occurred in Arkansas.

58. 170 F. Supp. at 443.

59. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 628 (2d ed. 1977).

60. *Cf.* *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972) (Application of the doctrine of forum non conveniens "should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties." *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402).

61. *Cf.* *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

62. 433 U.S. at 212.