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## The New Quasi in Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed

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## ARTICLES

### THE NEW QUASI IN REM JURISDICTION: NEW YORK'S REVIVAL OF A DOCTRINE WHOSE TIME HAS PASSED

*Michael B. Mushlin\**

#### INTRODUCTION

In 1977, the United States Supreme Court in *Shaffer v. Heitner*<sup>1</sup> “reshaped the landscape of personal jurisdiction.”<sup>2</sup> The news that the Court had rejected the centuries-old doctrine that quasi in rem jurisdiction could be based on the mere presence of property within a state “reverberated from the conference rooms of corporate headquarters to the halls of academe.”<sup>3</sup> Prior to *Shaffer*, every jurisdiction in the United States had employed

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<sup>1</sup> 433 U.S. 186 (1977).

<sup>2</sup> Note, *Has Shaffer v. Heitner Been Lost at Sea?*, 46 LA. L. REV. 141 (1985).

<sup>3</sup> Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

quasi in rem jurisdiction without serious question.<sup>4</sup>

Quasi in rem jurisdiction is a device by which a party uses a defendant's property to obtain judicial power to adjudicate a claim.<sup>5</sup> Unlike in personam jurisdiction,<sup>6</sup> quasi in rem jurisdiction depends upon pre-judgment attachment of the property,<sup>7</sup> and has only limited res judicata effect.<sup>8</sup> However, before *Shaf-*

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<sup>4</sup> R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 489 (1952). Prior to *Shaffer*, according to Professor Millar, attachment jurisdiction had "blossomed and flourished, to become an almost indispensable constituent of our procedural systems." *Id.* at 481. See also C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES 37 (7th ed. 1891) (citing *Pyrolusite M. Co. v. Ward*, 73 Ga. 491, 492 (1884), for the proposition that "[n]o one ever dreamed that the attachment laws of the several States authorizing attachments against non-resident defendants, were violative of the Constitution of the United States. Argument is unnecessary.").

<sup>5</sup> Silberman, *supra* note 3, at 39.

There are two types of quasi in rem jurisdiction. The first, specific property dispute jurisdiction, determines the ownership of the property in a dispute between two or more defined parties. RESTATEMENT (SECOND) OF JUDGMENTS § 6 comment a (1982). Quasi in rem jurisdiction of the first type is used most frequently "in actions to partition land, quiet title, or foreclose mortgages." Silberman, *supra* note 3, at 39. What distinguishes quasi in rem jurisdiction of the first type from in rem jurisdiction is that in rem jurisdiction determines ownership of property as against the whole world, while a quasi in rem jurisdiction judgment applies only to defined parties. *Shaffer*, 433 U.S. at 199 n.17.

The second, and by far the more controversial type, general dispute jurisdiction, involves the use of property not to determine its ownership, but rather to serve as the basis for the litigation of some other dispute between the parties. RESTATEMENT (SECOND) OF JUDGMENTS § 8(1)(d) (1982). A distinguishing characteristic of quasi in rem jurisdiction of the second type is that with it the plaintiff concedes the defendant's ownership of the attached property, and uses that ownership as the basis for the assertion of jurisdiction. *Shaffer*, 433 U.S. at 199 n.17.

<sup>6</sup> In personam jurisdiction refers to obtaining judicial power over a person such that the judgment is fully binding and enforceable against him or her. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 5 Comment b (1982).

<sup>7</sup> See note 198 and accompanying text *infra*. Attachment serves two purposes. First, it provides a means of assuring that the defendant is given notice of the action. Second, since jurisdiction is based on the presence of the property within the state, attachment provides a safeguard to the court in that it retains jurisdiction over the action throughout its adjudication. *Shaffer*, 433 U.S. at 198 n.16. For a discussion of the significance of this requirement, see notes 198-222 and accompanying text *infra*.

<sup>8</sup> If the defendant defaults, the final judgment rendered in a quasi in rem action does not "bind the defendant to any personal liability," but only determines his liability to the value of the thing attached. RESTATEMENT (SECOND) OF JUDGMENTS § 32(2) (1982). If, however, the defendant enters a limited appearance, the judgment may have an issue preclusion or collateral estoppel, although not a res judicata effect. *Id.* at § 32(3); see also *Cheshire National Bank v. Jaynes*, 224 Mass. 14, 17-18, 112 N.E. 500, 502 (1916). For a discussion of the differing approaches to this problem, see notes 225, 227, 231 and accompanying text *infra*.

The term "limited appearance" refers to a procedure in which the defendant is given the option to appear to defend the action without exposure to full in personam liability

fer quasi in rem jurisdiction was easier to obtain because it did not require the minimum contacts, fair play and substantial justice due process standard of *International Shoe Co. v. Washington*<sup>9</sup> necessary for in personam jurisdiction. *Shaffer* held that any assertion of quasi in rem jurisdiction must conform to the *International Shoe* standard.<sup>10</sup> While this holding may not have been unexpected,<sup>11</sup> with it "a whole citadel of precedent and tradition had fallen."<sup>12</sup> No longer could state jurisdiction be exercised simply because a defendant's property is located within the state.

Although the old "presence of property" theory for quasi in rem jurisdiction was rejected, little else could be determined with certainty from the *Shaffer* opinion. In the immediate aftermath, commentators pondered *Shaffer's* tea leaves with great intensity.<sup>13</sup> Some argued that *Shaffer* meant that quasi in rem ju-

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in the event that the plaintiff prevails. In other words, with a limited appearance, the defendant can litigate the claim, but exposure is confined to the value of the property. Whether or not to grant a limited appearance has varied with state practice. Aside from an occasional suggestion to the contrary, *Simpson v. Loehmann*, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967), limited appearances have not been considered a constitutional prerequisite for the use of quasi in rem jurisdiction. Silberman, *supra* note 3, at 67 n.185.

In those jurisdictions that do not recognize a limited appearance, the defendant faces an unpleasant choice. He can default in which case the judgment would be satisfied out of the property, but the judgment would not extend beyond that even if the claim exceeded its value. Or, the defendant could appear, but if he did his potential liability increased beyond the value of the property to the full extent of the proven claim.

Thus, with or without a limited appearance, a quasi in rem action, by definition, presents the possibility of multiple litigation on the same claim, an exception to the otherwise firm rule against it. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980) (The doctrine of res judicata preventing relitigation of the same claim serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and by preventing inconsistent decisions, encourage[s] reliance on adjudication."). For a discussion of the significance of this facet of quasi in rem jurisdiction, see text accompanying notes 223-31 *infra*.

<sup>9</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). For a discussion of *International Shoe*, see notes 40-44 and accompanying text *infra*.

<sup>10</sup> *Shaffer*, 433 U.S. at 212. For a discussion of this standard, see notes 40, 44, 235 and accompanying text *infra*.

<sup>11</sup> The demise of quasi in rem jurisdiction, at least as it had been traditionally used, had been predicted for some time. Silberman, *supra* note 3, at 65.

<sup>12</sup> *Id.* at 34.

<sup>13</sup> The outpouring of scholarly treatment of *Shaffer* in the first years after its publication is truly remarkable. Three publications, the Brooklyn Law Review, the Iowa Law Review, and the Washington University Law Quarterly made *Shaffer* the subject of symposia. *Symposium: Shaffer v. Heitner*, 45 BROOKLYN L. REV. 493 (1979); *Symposium: State-Court Judicial Jurisdiction After Shaffer v. Heitner*, 63 IOWA L. REV. 991 (1978);

jurisdiction was effectively dead.<sup>14</sup> Others claimed that quasi in rem jurisdiction could continue, but in an altered state.<sup>15</sup> Still others, relying on the concurring opinions of Justices Powell and Stevens,<sup>16</sup> saw *Shaffer* as a very limited holding that would not destroy the traditional use of quasi in rem jurisdiction so long as the property attached was concrete and physically located in a particular state, unlike the rather ephemeral stock certificates that were the basis for jurisdiction in *Shaffer*.<sup>17</sup>

The great outpouring of commentary on *Shaffer* occurred before there was time for its effect to be truly assessed in the courts.<sup>18</sup> However, the past thirteen years have allowed the dust

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*Symposium: The Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273. A partial listing of the Articles that appeared in the first three years after *Shaffer* include the following: Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61 (1977); Chase, *Quasi in Rem Jurisdiction in Social Context: Some Thoughts on a New Statute*, 45 BROOKLYN L. REV. 617 (1979); Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. REV. 102 (1978); Moore, *Procedural Due Process in Quasi in Rem Actions After Shaffer v. Heitner*, 20 WM. & MARY L. REV. 157 (1978); Olsen, *Shaffer v. Heitner: A Survey of its Effects on Washington Jurisdiction*, 13 GONZ. L. REV. 72 (1977); Reese, *Shaffer v. Heitner: Implications for the Doctrine of Seider v. Roth*, 63 IOWA L. REV. 1023 (1978); Riesenfeld, *Shaffer v. Heitner: Holding, Implications, Forebodings*, 30 HASTINGS L.J. 1183 (1979); Slomanson, *Real Property Unrelated to Claim: Due Process for Quasi in Rem Jurisdiction*, 83 DICK. L. REV. 51 (1978/79); Smit, *The Importance of Shaffer v. Heitner: Seminal or Minimal*, 45 BROOKLYN L. REV. 519 (1979); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997 (1978); Younger, *Quasi in Rem Defaults After Shaffer v. Heitner: Some Unanswered Questions*, 45 BROOKLYN L. REV. 675 (1979); Zammit, *Reflections on Shaffer v. Heitner*, 5 HASTINGS CONST. L.Q. 15 (1978); Note, *Minimum Contacts and Jurisdictional Theory in New York: The Effect of Shaffer v. Heitner*, 42 ALB. L. REV. 294 (1978) [hereinafter Note, *Minimum Contacts and Jurisdictional Theory*]; Comment, *Shaffer v. Heitner's Effect on Pre-Judgment Attachment, Jurisdiction Based on Property and New York's Seider Doctrine: Have We Finally Given Up the Ghost of the Res?*, 27 BUFFALO L. REV. 323 (1978); Comment, *Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . .*, 46 FORDHAM L. REV. 459 (1977); Comment, *The Assertion of Jurisdiction Based Upon Attachment After Shaffer v. Heitner: A Model Statute*, 16 WAKE FOREST L. REV. 377 (1980); Comment, *State Court Jurisdiction After Shaffer v. Heitner: The Lingering Problems*, 15 WILLAMETTE L. REV. 281 (1979).

There also has been commentary on whether or not *Shaffer* upset federal admiralty jurisdiction, a debate that remains unresolved. See, e.g., Note, *supra* note 3.

<sup>14</sup> Casad, *supra* note 13, at 78; Farrell, *Civil Practice*, 1977 Survey of New York Law, 29 SYRACUSE L. REV. 449, 450-61 (1978).

<sup>15</sup> Chase, *supra* note 13, at 627-32; Silberman, *supra* note 3, at 71-76; Note, *Minimum Contacts and Jurisdictional Theory*, *supra* note 13, at 305-07.

<sup>16</sup> *Shaffer*, 433 U.S. at 217 (Powell, J., concurring); *id.* (Stevens, J., concurring).

<sup>17</sup> See, e.g., Smit, *supra* note 13, at 523-24.

<sup>18</sup> While *Shaffer* was primarily directed to assertions of state court jurisdiction, federal courts also play a role in this area since often these issues arise in diversity jurisdic-

from *Shaffer* to settle. Therefore, this is a good time to take a fresh look at quasi in rem jurisdiction to assess the real impact of *Shaffer* and to determine whether its continued use makes sense. This Article contains the first national survey of the post-*Shaffer* use of quasi in rem jurisdiction.<sup>19</sup> The survey reveals that a new theory for the use of quasi in rem jurisdiction is developing.<sup>20</sup> New York courts, followed so far by a small number of other states, have used this new theory to justify the continued use of quasi in rem jurisdiction in a wide variety of large commercial and tort cases.<sup>21</sup> The new approach stands in sharp contrast to that of the majority of states where quasi in rem jurisdiction is no longer in use, notwithstanding enabling legislation.<sup>22</sup> A danger inherent in the emerging minority doctrine is that it will be accepted uncritically in states that have neither repealed the enabling legislation, nor affirmatively rejected it by appellate decision.

This Article closely examines the rationale offered for the new quasi in rem jurisdiction, and concludes that it cannot withstand careful analysis.<sup>23</sup> Courts have explained that the new theory of quasi in rem jurisdiction is necessary to fill gaps in the state's long arm statute. However, gaps in a long arm statute can be filled by legislative amendments which can provide in personam jurisdiction up to the full extent permitted by due process. In fact, long arm statutes have steadily expanded over the last decade to take up the slack left by *Shaffer*. In personam

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tion cases using state law. See notes 146-47 and accompanying text *infra*.

<sup>19</sup> Even though information as to the real impact of *Shaffer* on state jurisdictional practices has been available for several years, it has not been reported or analyzed. If nothing else, the great deluge of *Shaffer* Articles immediately after the case was decided, but not since, proves that legal scholarship, like any other human endeavor, "is responsive to fashions." Crampton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 14 (1986). For civil procedure buffs in the period from 1978 to 1980 the "current fad" was *Shaffer*. Since then the fad has moved elsewhere. See, e.g., R. MARCUS, M. REDISH & E. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 96 (1989) ("[I]n the last decade there has been much enthusiasm for finding alternatives to in-court resolution of disputes. [T]he literature on ADR has mushroomed to substantial proportions, and there are several legal periodicals devoted entirely to this subject."); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (critically evaluating the trend away from the traditional role of judicial decision making by using judges to aggressively manage and control dockets).

<sup>20</sup> See text accompanying notes 134-74 *infra*.

<sup>21</sup> See notes 134-57 and accompanying text *infra*.

<sup>22</sup> See notes 104-32 and accompanying text *infra*.

<sup>23</sup> See notes 198-274 and accompanying text *infra*.

jurisdiction under a long arm statute is far preferable to the new quasi in rem jurisdiction. Indeed, given its reliance on attachment, its limited res judicata effect, and its vague and uncertain standards,<sup>24</sup> the new quasi in rem jurisdiction may very well be unconstitutional and is surely bad policy. Moreover, the manner in which the new quasi in rem jurisdiction has been unilaterally forged by courts violates separation of powers.<sup>25</sup> This Article argues, therefore, that state courts should not succumb to the temptation to embrace the new quasi in rem jurisdiction, and that it should be repudiated in New York and the other states that follow it.

This Article is divided into three parts. Part I discusses the development of quasi in rem jurisdiction, and examines the Supreme Court's decision in *Shaffer*. Part II surveys the use of quasi in rem jurisdiction in the states since *Shaffer*. It traces and analyzes the growth of the new quasi in rem jurisdiction doctrine, considers the causes of this development, and contrasts the new doctrine with the developments in the large majority of states that have not used quasi in rem jurisdiction since *Shaffer*. Part III considers the contemporary validity of quasi in rem jurisdiction, and demonstrates that it is no longer a valid jurisdictional device. The Article concludes that the new quasi in rem jurisdiction threatens to resuscitate a doctrine that, after honorable service, deserves retirement.

## I. A BRIEF HISTORY OF QUASI IN REM JURISDICTION AND *Shaffer v. Heitner*

Quasi in rem jurisdiction in America is often traced to the Supreme Court's 1877 opinion in *Pennoyer v. Neff*,<sup>26</sup> but its

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<sup>24</sup> See notes 198-239 and accompanying text *infra*.

<sup>25</sup> See text accompanying notes 240-74 *infra*.

<sup>26</sup> *Pennoyer v. Neff*, 95 U.S. 714, 724 (1878), is "often credited as being the basis of our conceptual framework of . . . quasi in rem jurisdiction." Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 688 (1975). Its real significance, however, lies in the fact that *Pennoyer* raised the tripartite distinctions between in rem, quasi in rem and in personam jurisdiction to "a level of constitutional significance which they neither previously enjoyed nor, perhaps, deserved." *Id.*

*Pennoyer* itself dealt with an in personam claim that arose while the decedent was a resident of the forum state. *Pennoyer*, 95 U.S. at 715-16. However, in the Supreme Court quasi in rem jurisdiction was relied upon since the defendant, who was no longer a resident of the state when the action was brought, owned property in the state. The difficulty with the assertion of quasi in rem jurisdiction was twofold: first, at the time the

roots can be found in far earlier times. To understand what has happened with quasi in rem jurisdiction in the decade since *Shaffer*, it is important first to know why it developed, how it was used, and what its practical and doctrinal underpinnings were. It is also important to review criticisms of the doctrine that emerged in the period prior to *Shaffer*, as well as the facts and holding of the *Shaffer* opinion itself. This section briefly considers these questions.

### A. *Quasi in Rem Jurisdiction in America*

#### 1. The Practical and Doctrinal Need

Quasi in rem jurisdiction was well established in Great Britain when the first English settlers arrived in America.<sup>27</sup> During the first decade of the Massachusetts Bay Colony, however, it was not used. Colonists who financed their beginnings in the

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action was commenced the defendant did not own the property, *Perdue, Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 485 n.45 (1987), and second, the property was never attached. *Pennoyer*, 95 U.S. at 728. Thus, the Court's endorsement of quasi in rem jurisdiction was, to some extent, backhanded since the Court disapproved the manner of its use in the case before it.

<sup>27</sup> At common law, quasi in rem jurisdiction was not used in quite the same way as it developed in America. Jurisdiction in England required both service of process on the defendant within the confines of the jurisdiction, and an actual appearance by the defendant. Default judgments were not recognized until 1725, and then only tentatively. It was not until 1845 that default judgments were "unqualifiedly" permitted in the modern manner. Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 79, 92 (1968) [hereinafter Levy, *Mesne Process*]. Attachment, therefore, in the early common law was used primarily to compel a defendant to appear. If he did not, the property reverted to the Crown. *Id.* at 60.

A closer corollary to the American use of quasi in rem jurisdiction was the practice of attachment that developed in the Lord Mayor's Court in London in the fifteenth century. There, beginning as early as 1419, attachment was used to obtain jurisdiction over a debtor who incurred the debt within the jurisdiction, but who did not respond to attempts at personal service of process. Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 406-10 (1972-73) [hereinafter Levy, *Attachment*]. See also R. MILLAR, *supra* note 4, at 482.

Although close in form to the quasi in rem jurisdiction that developed in the United States, the London practice varied in that the London device did not grant extra territorial jurisdiction — it was limited to claim that arose within the boundaries of the City of London. *Id.* at 481 n.1. In addition, it was a substitute for in personam jurisdiction. That is to say, it could only be obtained when in personam jurisdiction was not possible because the defendant could not be located for service of process. *Id.* Curiously, therefore, *Shaffer*, which moves quasi in rem jurisdiction closer to in personam jurisdiction, is more true to the spirit of the common law history than was *Pennoyer*.



new world through credit were considered good risks. This was primarily because of the relative prosperity of the times. Additionally, the colonial community was homogeneous, and the colonists assumed that those few settlers who fell behind in their payments would respond voluntarily to proceedings brought by their creditors.<sup>28</sup>

These halcyon days quickly ended, however, as rapid changes swept the colonies. Within the first decade of settlement, population grew in size and diversity, the frontier was pushed further into the interior, and the first economic depression hit.<sup>29</sup> Because credit had been abundant, this depression had a devastating impact. Scores of pioneer debtors defected to new settlements in the vast wilderness, leaving their property behind. Poor transportation and communication among the colonies made it virtually impossible to find the fleeing debtors.<sup>30</sup> When creditors began calling in the debts, the debtors did not respond. Since there was no way to compel a debtor's appearance, creditors needed a remedy. Quasi in rem jurisdiction, which was part of the English legal tradition from which the colonists had come, fit the bill.<sup>31</sup> Quasi in rem jurisdiction gave creditors a forum for the adjudication of their claims, and a means to obtain at least partial satisfaction of their judgments. Thus, in 1641, the first American quasi in rem jurisdiction law

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<sup>28</sup> During the first decade of the settlement of the Massachusetts Bay Colony there were only a thousand settlers. The Colony was made up of a series of "small self-contained agricultural communities whose inhabitants were united in purpose by a mixture of religious and political philosophy and by the common need to survive in a new and hostile environment." Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1150. In this close knit setting with people bound together "by a strong sense of community, common religious beliefs and the mutual need to survive" a summons "was all that was reasonably required to make the system work adequately." *Id.* at 1153.

<sup>29</sup> *Id.* at 1155. The depression was made worse for creditors by the fifteen fold increase in population in one decade bringing in people "with differing attitudes and beliefs." *Id.* at 1156. As a result, the "economic and social cohesiveness" of the earlier time was gone. This increased the risk of default. *Id.*

<sup>30</sup> In early colonial America, communication flowed directly from each colony to the mother country. Because the transportation network was undeveloped, there was little inter-colonial intercourse. *Id.* "Overland transportation was not only difficult, expensive and time consuming, but also dangerous." Sea travel was "unpredictable." *Id.* at 1156-57.

<sup>31</sup> See note 27 *supra*. It is no mystery why the colonists borrowed from English law. They had, of course, come from there, and equally as important "[o]nly England had a supply of law that American lawyers could use without translation." L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 34 (2d ed. 1985).

was passed.<sup>32</sup> The practical need for quasi in rem jurisdiction continued well into the nineteenth century. As long as huge sections of the continent were underdeveloped, and transportation and communication among its far flung parts remained primitive, quasi in rem jurisdiction provided an important and practical procedural recourse for creditors who otherwise would have been unable to find a forum for their claims. These conditions were so common that every state passed a law providing for quasi in rem jurisdiction.<sup>33</sup>

In its heyday, there was another reason why quasi in rem jurisdiction was so appealing. Until the middle of the twentieth century, jurisdiction over defendants in state court actions was rigidly controlled by the "power" doctrine enunciated by the United States Supreme Court in *Pennoyer v. Neff*.<sup>34</sup> Under that doctrine, a state lacked authority to enter an in personam judgment against a defendant who was not present in the jurisdiction at the time of service, unless the defendant was a citizen of the state, or had consented to suit.<sup>35</sup> The *Pennoyer* doctrine se-

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<sup>32</sup> Kalo, *supra* note 28, at 1158-59. The Colony at first tried the old common law system of attachment to compel the defendant's appearance, but it was not suited to the conditions then prevailing. *Id.* at 1160.

It is hardly surprising that attachment jurisdiction of the London variety was developed in these conditions. As Professor Levy has opined:

In every society in which credit transactions have existed — and that includes virtually every civilized society — creditors have been troubled by the departure for parts unknown of persons to whom they have made loans or to whom they have sold goods on credit . . . . Thus, it is only natural that such societies should develop the means whereby local creditors can reach with dispatch any assets their departed debtors may have left behind. Such was the case of the early Law Merchant, and such was the case in London . . . .

Levy, *Attachment*, *supra* note 27, at 405.

<sup>33</sup> R. MILLAR, *supra* note 4, at 486; Kalo, *supra* note 28, at 1161; Silberman, *supra* note 3, at 43. Indeed, quasi in rem jurisdiction became so established in the United States that one observer could report that "attachments became part of the general pattern of business practices." R. MILLAR, *supra* note 4, at 486 (quoting R. MORRIS, INTRODUCTION TO SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1780 19-20 (1915)).

Although quasi in rem jurisdiction was universally available, there were variations in the states. Some states, for example, did not allow attachment against nonresidents in tort cases; others required that the defendant be a nonresident in all situations in which it could be used. For a discussion of the variations in usage of quasi in rem jurisdiction, see R. MILLAR, *supra* note 4, at 486-97.

<sup>34</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>35</sup> Justice Field derived the power theory of jurisdiction which so long ruled jurisdictional theory in the United States from Justice Story's famous *Commentaries on the Conflict of Law*. Silberman, *supra* note 3, at 45. It, in turn, was borrowed from continen-

verely restricted the jurisdiction of state courts to hear claims by citizens aggrieved by the actions of nonresidents, even if the activities that gave rise to suit took place in the state, and even if the defendant could be found elsewhere and served. However, at the same time that it announced constitutional limitations on the use of in personam jurisdiction, the *Pennoyer* Court permitted the open-ended use of quasi in rem jurisdiction. If the non-resident defendant's property in the state was attached at the commencement of the action, *Pennoyer* held that quasi in rem jurisdiction was proper, even if in personam jurisdiction was not. This use of quasi in rem jurisdiction spared many plaintiffs the burden of a difficult and costly, if not impossible, trip to commence the action in the nonresident's state. Thus, quasi in rem jurisdiction played an important doctrinal role. By loosening the artificial straightjacket of the *Pennoyer* doctrine, quasi in rem jurisdiction provided at least a "partial escape from the strictures of the territorial theory of [in personam] jurisdiction."<sup>36</sup>

*Pennoyer's* restriction on in personam jurisdiction was clearly out of step with the changing times.<sup>37</sup> Rapidly improving transportation and communications systems of the late nineteenth and twentieth centuries cast serious doubt on the wisdom of the decision. These changes meant that it was becoming more difficult for defendants to escape service of process. At the same time, improvements in transportation made it less burdensome for defendants to respond to litigation brought against them in another jurisdiction. *Pennoyer* perhaps worked the greatest unfairness in cases involving multi-state, corporate defendants which conducted business on a national scale, but were able to use the *Pennoyer* doctrine to avoid suit.<sup>38</sup> In the 1945 case of

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tal theories designed to regulate relationships between sovereign states in Europe. Zammit, *supra* note 26, at 669. The basic idea was expressed by Justice Field in two maxims. First, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer*, 95 U.S. at 722. Second, "no tribunal established by [a state] can extend its process beyond that territory." *Id.* For a complete description of the doctrine and its conceptual underpinnings, see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241. For a fascinating history of this seminal case, see Perdue, *supra* note 26, at 479-90.

<sup>36</sup> Zammit, *supra* note 26, at 670.

<sup>37</sup> See, e.g., J. LANDERS, J. MARTIN & S. YEAZELL, *CIVIL PROCEDURE* 73 (2d ed. 1988) ("Pennyroyer [was attacked because it] had its feet planted in a preindustrial world.").

<sup>38</sup> See generally Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of the State Courts — From Pennyroyer to Denckla*, 25 U. CHI. L.

*International Shoe Co. v. Washington*,<sup>39</sup> the Supreme Court sought to bring jurisdictional theory more in line with the times. The resulting opinion ultimately served as the basis for a challenge to quasi in rem jurisdiction itself.

2. *International Shoe Co. v. Washington* and the Transformation of American Jurisdictional Law

In *International Shoe*, the Court held that physical presence of the defendant was no longer required for the assertion of in personam jurisdiction. Rather, due process is satisfied so long as the nonresident had "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>40</sup> *International Shoe* had a profound effect on jurisdictional law. The most immediate effect was that it unleashed a movement to expand in personam jurisdiction well beyond that which was possible under the *Pennoyer* doctrine. By the early 1960s this movement culminated in every state having a long arm statute.<sup>41</sup>

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REV. 569, 577-86 (1958).

<sup>39</sup> 326 U.S. 310 (1945).

<sup>40</sup> *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In a subsequent opinion, the Court made clear that the expansion of notions of in personam jurisdiction was a consequence of the "increasing nationalization of commerce" and of "modern transportation and communications systems [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

However, replacing the simple-to-apply presence test of *Pennoyer* with the more free floating minimum contacts due process standard of *International Shoe* also had the effect of launching the Court and commentators on a journey into the mysteries of personal jurisdiction over nonresident defendants from which no one has yet returned. It was much easier for the Court to reject the rigid application of the *Pennoyer* doctrine than it has been to find a comprehensible replacement theory. The Court has struggled mightily with the problem and has returned to the issue continually in recent years. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Insurance Corp. of Ireland v. Compagnie Des Bauxities de Guinee*, 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). "Yet despite this growing body of case law, the doctrinal underpinnings remain elusive." *Perdue*, *supra* note 26, at 479. For a comprehensive treatment of the theoretical debate unleashed by the minimum contacts test of *International Shoe*, see, e.g., *Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; *Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law, State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

<sup>41</sup> For discussions of this significant development, see *Currie, The Growth of the*

Although *International Shoe* had an immediate effect on in personam jurisdiction, until *Shaffer* courts did not view *International Shoe* as disturbing the *Pennoyer* Court's endorsement of quasi in rem jurisdiction. Indeed, the *International Shoe* opinion did not even mention quasi in rem jurisdiction. One reason for this was that *International Shoe* dealt with a different question. It raised the issue of whether a state could constitutionally assert in personam jurisdiction over a nonresident defendant when the defendant was not present in the state at the time of service.<sup>42</sup> Put another way, *International Shoe* dealt with whether a use of in personam jurisdiction *prohibited* by *Pennoyer* should be permitted. By contrast, quasi in rem jurisdiction shifts the focus to whether forms of jurisdiction *permitted* by *Pennoyer*, such as quasi in rem jurisdiction, should be prohibited. Although this is a related question, *International Shoe* did not deal with it directly. Thus, it was possible to interpret the *International Shoe* decision in a way that continued to authorize quasi in rem jurisdiction without change,<sup>43</sup> which is exactly what courts did for years after the *International Shoe* decision was handed down. Courts continued to make use of quasi in rem jurisdiction in the old way without serious question as to whether a minimum contacts analysis was required.<sup>44</sup> Although courts did not see *International Shoe* as disturbing the authority for quasi in rem jurisdiction, commentators did.

### 3. The Pre-*Shaffer* Critique of Quasi in Rem Jurisdiction

The major line of argument by commentators was that the

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*Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Homburger, *The Reach of New York's Long Arm Statute: Today and Tomorrow*, 15 BUFFALO L. REV. 61 (1965). For a comprehensive description of the current long arm statutes used by the states, see R. CASAD, *JURISDICTION IN CIVIL ACTIONS* (1983).

<sup>42</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 311-12 (1945).

<sup>43</sup> Silberman, *supra* note 3, at 51.

<sup>44</sup> *Id.* at 35 n.4 (collecting cases). Prior to *Shaffer*, state courts almost routinely upheld quasi in rem jurisdiction "without discussing the applicability" of the minimum contacts standard. *Id.* Only three courts had considered the question, and all three had "expressly decided not to apply the *International Shoe* standard to quasi in rem jurisdiction." *Id.*

Prior to 1963 when Rule 4(e) of the Federal Rules of Civil Procedure was amended to permit the use of attachment actions in federal courts, a quasi in rem jurisdiction action could not be brought originally in these courts even in a diversity action. C. WRIGHT, *FEDERAL COURTS* 424-25 (4th ed. 1983).

unbridled use of quasi in rem jurisdiction allowed plaintiffs to secure jurisdiction over nonresident defendants even when it was unfair.<sup>45</sup> As Dean Carrington noted: "In the light of the emerging concept of personal jurisdiction, the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff."<sup>46</sup> This argument was fortified by the extremes to which courts had pushed quasi in rem jurisdiction.<sup>47</sup> For example, in *Harris v. Balk*,<sup>48</sup> the Supreme Court upheld the use of quasi in rem jurisdiction over a nonresident whose only contact with the state was a visit there by his debtor. There was no indication that litigation in the defendant's home state would have been onerous, or that the presence of such intangible property as the defendant's debtor in the forum state was anything more than happenstance.<sup>49</sup> Some courts had taken the *Harris* doctrine even further in the 1960s, when they held quasi in rem jurisdiction could be used to permit a plaintiff to attach a nonresident's insurance policy to litigate a personal injury action even though the claim arose outside the state, and the defendant had no contacts with the forum state other than ownership of the policy.<sup>50</sup>

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<sup>45</sup> The major critics were: Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Von Mehren & Trautman, *supra* note 40; Zammit, *supra* note 26; Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970); Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412 (1969). Supporters were few and far between. For one see Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977).

<sup>46</sup> Carrington, *supra* note 45, at 306. Professor Carrington for this reason called quasi in rem jurisdiction an "antique device." *Id.* at 303. In the words of another commentator, quasi in rem jurisdiction was a "jurisdictional mystique." Comment, *supra* note 45, at 325. Still another referred to quasi in rem jurisdiction as a "vestigial concept." Note, *supra* note 45, at 1422.

<sup>47</sup> See notes 48-52 and accompanying text *infra*.

<sup>48</sup> 198 U.S. 215 (1905).

<sup>49</sup> In *Harris*, both Harris and Balk were residents of North Carolina. Harris owed Balk \$180. Balk was indebted to Jacob Epstein, a Maryland resident, for \$300. While Harris was temporarily visiting Maryland, Epstein brought a quasi in rem jurisdiction action against Balk by obtaining a writ of attachment against Harris. *Id.* at 216. His theory was that Harris physically carried his indebtedness to Balk wherever he traveled. *Id.* at 218. Harris, after he paid his debt to Balk over to Epstein, claimed that he had satisfied his debt, and it was this rather extreme contention that was upheld by the United States Supreme Court. *Id.* at 222. For an intriguing history of this saga of "the power theory [at] its zenith," see Silberman, *supra* note 3, at 49; Lowenfeld, *supra* note 13, at 104-07.

<sup>50</sup> *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*,

The critique of these cases was heated. Critics complained that the property that formed the predicate for quasi in rem jurisdiction had no relationship to the dispute. First, they argued that the property attached, a debt in *Harris* for example, was intangible; and only in the most metaphysical sense could it be said that this property had been brought into the state intentionally.<sup>51</sup> Second, even if one could surmount that problem, there was still the difficulty of attributing the *debtor's* intention to the *creditor* over whom jurisdiction is sought.<sup>52</sup>

Critics also contended that the unfairness was compounded by ex parte attachment used to obtain quasi in rem jurisdiction.<sup>53</sup> Attachment gave plaintiffs an added procedural weapon by tying up the defendant's property while litigation was pending.<sup>54</sup> This criticism took on added significance with the Supreme Court's 1972 opinion in *Fuentes v. Shevin*.<sup>55</sup> In *Fuentes*, the Court held that pre-judgment seizure of the personal property of a debtor in a replevin action must be accompanied by procedural due process protections. Although the *Fuentes* Court did not deal with the use of attachment for jurisdictional purposes,<sup>56</sup> its holding, and that of its progeny, cast doubt on whether the ex parte attachment procedure for quasi in rem ju-

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the plaintiffs, who were New York residents, sued a Quebec defendant in New York state court for injuries arising out of an automobile accident in Vermont. Although there was no basis on these facts for in personam jurisdiction, the plaintiff sought to obtain quasi in rem jurisdiction by attaching the defendant's auto insurance policy, which was with a company that was located in New York. The New York Court of Appeals upheld the attachment on the ground that the insurance company's obligation to the defendant was a debt that could form the basis for jurisdiction. The court's ruling that the situs of a debt is the physical location of the debtor followed logically from *Harris v. Balk*, but the extreme result that it yielded in that case was harshly criticized by commentators. See, e.g., Reese, *The Expanding Scope of Jurisdiction over Non-Residents — New York Goes Wild*, 35 INS. COUNS. L.J. 118 (1968); Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971); Comment, *supra* note 45, at 325-38; Note, *supra* note 45, at 1422-25.

<sup>51</sup> The criticisms of *Seider* were particularly extensive and severe. See generally Reese, *supra* note 13; Rosenberg, *supra* note 50.

<sup>52</sup> Indeed, with the birth of the *Seider* doctrine in 1966, some state courts took the doctrine of quasi in rem jurisdiction to new heights notwithstanding *International Shoe*.

<sup>53</sup> Attachment has long been assumed to be a *sine qua non* of quasi in rem jurisdiction. See note 198 and accompanying text *infra*. Prior to *Fuentes*, it was almost always granted ex parte. *Fuentes* changed that. See notes 131-32, 200 and accompanying text *infra*.

<sup>54</sup> Zammit, *supra* note 26, at 679.

<sup>55</sup> 407 U.S. 67 (1972).

<sup>56</sup> See note 206 and accompanying text *infra*.

risdiction could continue.<sup>57</sup> Finally, critics pointed out that the use of quasi in rem jurisdiction was "at odds with the modern concept of res judicata."<sup>58</sup> Whenever the device was used to lay claim to property of less value than the plaintiff's total damages, there was an ever present possibility of repeated litigation in several jurisdictions over the same claim.<sup>59</sup>

To be sure, there were defenders of quasi in rem jurisdiction. They pointed out that quasi in rem jurisdiction could aid the judgment creditor who was seeking to enforce an out-of-state judgment against a recalcitrant defendant who has property in the enforcing state.<sup>60</sup> They also argued that it provided security for a plaintiff suing a defendant who might secrete or dissipate assets.<sup>61</sup> Finally, proponents of quasi in rem jurisdiction contrasted *International Shoe's* vague "minimum contacts," "fair play," and "substantial justice" standards with the much clearer standard needed for quasi in rem jurisdiction. Under the old standards, quasi in rem jurisdiction was proper so long as the property was present in the state.<sup>62</sup> This clear standard, proponents argued, avoided wasteful preliminary litigation on jurisdictional issues.<sup>63</sup> In *Shaffer v. Heitner*, the Court finally confronted some of the arguments for and against quasi in rem jurisdiction, and in the process shook the foundations on which

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<sup>57</sup> For a more complete discussion of the *Fuentes* line of cases, see notes 206-22 and accompanying text *infra*.

<sup>58</sup> Carrington, *supra* note 45, at 314.

<sup>59</sup> See notes 224-31 and accompanying text *infra*.

<sup>60</sup> The foremost advocate of this point of view was the American Law Institute. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 comment a (1971) (quoted in *Shaffer*, 433 U.S. at 210).

<sup>61</sup> Protecting a plaintiff against the demonstrated possibility that the defendant by stealth will depreciate the plaintiff's ability to realistically recover the judgment, is one of the original purposes of quasi in rem jurisdiction. See notes 27-32 and accompanying text *supra*. But as a justification for the broad use of quasi in rem jurisdiction based simply on the presence of the defendant's property it sweeps too broadly. One commentator, seeing the "possible injustice" of this justification for quasi in rem jurisdiction, wrote: "The difficulty with such a rationale is that the defendant may not be attempting to evade his creditors by owning property in another state. Unless proof of such conduct is required, the rationale actually means that evasion is presumed in order to assert jurisdiction." *Developments in the Law*, *supra* note 40, at 955; see also Carrington, *supra* note 45, at 307-08.

<sup>62</sup> See notes 35-36 and accompanying text *supra*.

<sup>63</sup> Carrington, *supra* note 45, at 309. See also Smit, *supra* note 45, at 612 ("[T]he essential inquiry necessary to determine whether there is judicial [quasi in rem] jurisdiction is relatively simple.").



the doctrine had stood for centuries.

### B. *Shaffer v. Heitner*

*Shaffer v. Heitner* was a shareholders' derivative action filed in Delaware state court by Arnold Heitner, the owner of one share of the Greyhound Corporation, a Delaware corporation. Heitner alleged that mismanagement of the corporation by its officers led to two legal proceedings, a civil antitrust action, and a criminal contempt proceeding, which cost the company over thirteen and one half million dollars in fines and damages.<sup>64</sup> Heitner brought suit in Delaware even though the corporation's headquarters were in Arizona, the activities of the directors occurred in Oregon, and none of the defendant directors resided or did business in Delaware.

The action was brought under a Delaware sequestration statute that allowed a plaintiff to obtain quasi in rem jurisdiction over a defendant without prior notice by obtaining a court order to attach the defendant's property. Plaintiff was able to obtain the order because Delaware law mandated that the state of Delaware would be deemed the situs of all of the stock of Delaware corporations, even if the stock certificates were not physically located in the state.<sup>65</sup> The defendants moved to dismiss the action, arguing that the sequestration law violated procedural due process, and that under *International Shoe* the state court lacked jurisdiction because there were no minimum contacts between defendants and Delaware. However, the Delaware courts upheld jurisdiction, focusing on the procedural due process issue.<sup>66</sup>

The Supreme Court reversed. Writing for the five member majority,<sup>67</sup> Justice Marshall dealt only with the defendants' con-

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<sup>64</sup> *Shaffer*, 433 U.S. at 189-90. One action was an anti-trust proceeding in Oregon in which a judgment of \$13,146,090 plus attorney fees was assessed; the other was a criminal contempt proceeding in Illinois that led to a fine of \$100,000 to Greyhound and \$500,000 to Greyhound Lines. *Id.* at 190 nn.2-3.

<sup>65</sup> *Id.* at 192. Apparently, Delaware is the only state with such a statute. Note, *Minimum Contacts and Jurisdictional Theory*, *supra* note 13, at 297 n.30 (citing Appellant's Brief on the Merits, at 27 n.14).

<sup>66</sup> *Shaffer*, 433 U.S. at 193-95. The state court dealt with defendant's basis argument in just two paragraphs. The court relied on the long history of quasi in rem jurisdiction to render the argument not "significant." *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976).

<sup>67</sup> Justice Marshall's opinion was joined in by Chief Justice Burger, and Justices

tention that the plaintiff's use of quasi in rem jurisdiction could not be reconciled with the fairness standard of *International Shoe*.<sup>68</sup> The Court acknowledged that although *International Shoe* had dramatically changed the law regarding in personam jurisdiction, "[n]o equally dramatic change has occurred in the law governing jurisdiction *in rem*."<sup>69</sup> Undertaking a long postponed examination of quasi in rem jurisdiction, the Court concluded that it is "an ancient form without substantial modern justification."<sup>70</sup> Since jurisdiction over a thing is no different than "jurisdiction over the interests of persons in a thing,"<sup>71</sup> the standard of *International Shoe* must be used to determine whether jurisdiction is appropriate regardless of the type of jurisdiction invoked.<sup>72</sup>

The *Shaffer* Court also addressed the arguments of those who supported the old method of quasi in rem jurisdiction. In response to the argument that the old standard is necessary to allow for enforcement of judgments, Justice Marshall stated:

[W]e know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one state enforceable in all other states.<sup>73</sup>

Addressing the argument that the old quasi in rem jurisdiction was necessary to prevent a defendant from removing assets from the state, Marshall responded that subjecting quasi in rem jurisdiction to a minimum contacts analysis did not mean that a state would be deprived of authority to attach property "as security for a judgment being sought in a forum where the litiga-

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Blackmun, Stewart, and White. *Shaffer*, 433 U.S. at 188. Justices Powell and Stevens filed concurring opinions, *id.* at 217 (Powell, J., concurring); *id.* (Stevens, J., concurring), and Justice Brennan concurred in part and dissented in part. *Id.* at 219 (Brennan, J., concurring in part and dissenting in part). Justice Rehnquist did not participate in the decision. *Id.* at 217. Thus, it took four opinions for the eight justices who participated to explain the result.

<sup>68</sup> The Court specifically reserved the procedural due process issue. *Id.* at 189.

<sup>69</sup> *Id.* at 205.

<sup>70</sup> *Id.* at 212.

<sup>71</sup> *Id.* at 207.

<sup>72</sup> The Court noted that the lines separating quasi in rem jurisdiction, in personam jurisdiction, and in rem jurisdiction were not always clear. *Id.* at 201.

<sup>73</sup> *Id.* at 210.

tion can be maintained consistently with *International Shoe*.<sup>74</sup> The Court was also unpersuaded that history confirmed the constitutionality of quasi in rem jurisdiction.<sup>75</sup> Finally, Justice Marshall disposed of the argument that whatever its sins, quasi in rem jurisdiction had the benefit of being governed by clear standards:

[T]he fairness standard of *International Shoe* can be easily applied in the vast majority of cases. Moreover, when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." That cost is too high.<sup>76</sup>

The Court indicated that evaluating all forms of jurisdiction according to minimum contacts analysis would not change the result of many cases.<sup>77</sup> It is primarily when quasi in rem jurisdiction was used in situations like *Harris v. Balk* that the Court thought "significant" changes would occur.<sup>78</sup> The *Shaffer* Court acknowledged that the presence of the defendant's property in a particular state might suggest "other ties among the defendant, the state and the litigation."<sup>79</sup> However, the Court ruled that when "the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action,"<sup>80</sup> the mere presence of the defendant's property within a particular state would not be

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<sup>74</sup> *Id.*

<sup>75</sup> To this argument the Court replied that constitutional rights "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." *Id.* at 212.

<sup>76</sup> *Id.* at 211.

<sup>77</sup> In rem jurisdiction, for example, in which the plaintiff seeks to establish his title to property located within the state as against the entire world, would still be permissible, since almost by definition in such cases the requisite minimum contacts would be present. *Id.* at 207-08. This is so because in an in rem proceeding the state has a weighty interest in ensuring the marketability of title and in providing a procedure for "peaceful resolution of disputes about the possession of that property." *Id.* at 208. In addition, the defendant's claim to the property reveals that he expects to benefit from the state's protection of his interest which provides the required purposeful availment that is necessary for minimum contacts to be present. *Id.* at 207-08. Moreover, in quasi in rem cases of the first type the same result would almost invariably be reached since the proceeding would involve a disputed claim to property, and both claimants by definition would have established voluntary contacts with the forum state. *Id.* at 208.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 209.

<sup>80</sup> *Id.*

enough, by itself, to support jurisdiction.<sup>81</sup> In such cases, the defendants' property is being used to coerce defendants' presence in the state, and such an "indirect assertion" of jurisdiction violates due process "if a direct assertion of jurisdiction over the defendant would violate the Constitution."<sup>82</sup> Because it did not find minimum contacts in the case before it, the *Shaffer* Court reversed the decision of the Delaware Superior Court.<sup>83</sup>

Justices Powell and Stevens wrote separate concurrences qualifying the majority's more sweeping view of the effect of applying minimum contacts analysis to quasi in rem jurisdiction. Both justices concluded that simple ownership of tangible property was sufficient to constitutionally confer jurisdiction, although each reached that result by a different route.<sup>84</sup> Justice Brennan, concurring in part, and dissenting in part, added a fourth opinion to the cacophony.<sup>85</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The significance of this statement is not readily apparent since there is no provision in Delaware law for a limited appearance. *Id.* at 195 n.12.

<sup>83</sup> The Court held that the facts in the case were not sufficient to justify jurisdiction under the constitutional standard of *International Shoe* since the property attached was not the subject matter of the litigation, and the claim did not relate to the property or arise out of it. *Id.* at 213. The Court further relied on the fact that the defendants had never set foot in Delaware, nor could they reasonably have been aware that by accepting the position of director of the corporation that they were subjecting themselves to the jurisdiction of that state's courts. *Id.* at 213-16.

<sup>84</sup> Justice Powell stressed the importance of avoiding the "uncertainty of the general *International Shoe* standard" that would result from subjecting all claims for quasi in rem jurisdiction to an open-ended minimum contacts analysis. *Id.* at 217 (Powell, J., concurring). He indicated that it might be appropriate to base quasi in rem jurisdiction on the simple "ownership of some forms of property whose situs is indisputably and permanently located within a state . . . without more." *Id.*

Justice Stevens reached the same result via a different route. Relying upon Justice Black's opinion in *International Shoe*, *International Shoe v. Washington*, 326 U.S. 310, 324 (1945) (opinion of Black, J.), he posited that the essential purpose of the minimum contacts test is to give "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign." *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring). While ownership of intangible property such as shares of stock in a corporation was not sufficient to provide such notice, ownership of more tangible property, whose situs could be easily located, is: "If I visit another State or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks." *Id.*

<sup>85</sup> *Id.* at 219 (Brennan, J., concurring in part and dissenting in part). Justice Brennan's opinion applauded the majority's substitution of minimum contacts analysis for the old presence test as "a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that have been generated from the decision in *Pennoyer v. Neff*." *Id.* But Justice Brennan was willing on the facts

### C. *Whither Quasi in Rem Jurisdiction After Shaffer?*

*Shaffer* confirmed the demise of the old rationales for quasi in rem jurisdiction, and raised important questions about its future. Historically, quasi in rem jurisdiction had rested on two pillars — one practical and the other theoretical — both of which had crumbled by the time of *Shaffer*. In a developing country settled on the edge of a vast wilderness, possessing a limited transportation network, and poor means of establishing contact with persons who did not reside in the local community, quasi in rem jurisdiction served the important practical purpose of allowing creditors to obtain some redress for their losses.<sup>86</sup> Without it, plaintiffs would often have been unable to litigate claims because they could not locate defendants. Nineteenth century jurisdiction doctrine also encouraged the development of quasi in rem jurisdiction to counteract the rigors of *Pennoyer v. Neff*.<sup>87</sup>

By the time of *Shaffer*, both supports had eroded. No longer did transportation and communication seriously limit plaintiffs' ability to seek out and serve nonresident defendants.<sup>88</sup> Similarly, thirty-two years after *International Shoe* had "released state courts from the territorial power concept of jurisdiction"<sup>89</sup> imposed by *Pennoyer*, and permitted them to assert full in personam power over any nonresident who has established minimum contacts with the forum, it was difficult to contend that quasi in rem jurisdiction played an important doctrinal role. By cutting quasi in rem jurisdiction loose from its old moorings, *Shaffer* confirmed that too much had changed since *Pennoyer* to justify continuing to think about quasi in rem jurisdiction in the same way. At the very least, *Shaffer* forced a rethinking of the basis for the continued use of the doctrine.<sup>90</sup>

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presented to find that the defendants had established minimum contacts with the forum state. *Id.* at 222-28.

<sup>86</sup> For a discussion of the historic antecedents of quasi in rem jurisdiction, see notes 26-33 and accompanying text *supra*.

<sup>87</sup> For a discussion of these limitations, see notes 34-36 and accompanying text *supra*.

<sup>88</sup> See notes 37-40, 44 and accompanying text *supra*.

<sup>89</sup> Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959).

<sup>90</sup> After *Shaffer*, if quasi in rem jurisdiction is to occupy a legitimate niche in the current legal landscape, it is incumbent on its supporters to propose a modern rationale for its continued use. As Oliver Wendell Holmes said over eighty years ago:

It is revolting to have no better reason for a rule of law than that so it was laid

The *Shaffer* Court's fractured opinion "bristle[d] with perplexities,"<sup>91</sup> however, and left few clear guideposts for establishing a new theory for quasi in rem jurisdiction. The opinion itself led some to wonder whether quasi in rem jurisdiction was still constitutional.<sup>92</sup> The *Shaffer* Court clearly had not mandated, in so many words, the abolition of quasi in rem jurisdiction. Nevertheless, it was quite possible to discern a death knell for quasi in rem jurisdiction resonating from the tone of the majority opinion.<sup>93</sup> The demise of quasi in rem jurisdiction was evinced as much by what the Court did not say, as by what it did say. For example, while the Court addressed the argument that the standards traditionally used for application of the doctrine were no longer constitutionally justifiable, it did not confront, much less answer, other major arguments of the critics of quasi in rem jurisdiction. Among the arguments that went unaddressed were contentions that quasi in rem jurisdiction violated procedural due process,<sup>94</sup> and that it was at variance with developing notions of res judicata requiring that a single claim be litigated once in a single forum.<sup>95</sup> In addition, the Court did not deal with the claim that the expansion of in personam jurisdiction made possible by *International Shoe* left quasi in rem jurisdiction constitutionally superfluous.

However, the concurrences of Justices Powell and Stevens signaled that the opinion was susceptible of a much narrower

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down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). It is not enough to say that quasi in rem jurisdiction can be used constitutionally so long as its use conforms to minimum contacts standards. As Chief Justice Burger reminded us not long ago, "all that is good is not commanded by the Constitution and all that is bad is not forbidden by it." *Palmer v. Thompson*, 403 U.S. 217, 228 (1971).

<sup>91</sup> *Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30 (describing *Cox v. Louisiana*, 379 U.S. 536 (1965)).

<sup>92</sup> Professor Casad, for example, wrote that *Shaffer* "ring[s] the death knell for the use of provisional remedies [attachment] as devices for obtaining jurisdiction. The limited form of jurisdiction available through the quasi in rem jurisdiction procedure now can rarely, if ever, be obtained through those measures except under circumstances that would justify broader in personam jurisdiction." R. CASAD, *supra* note 41, at 2-51 (1983).

<sup>93</sup> See, e.g., *id.*; Farrell, *supra* note 14, at 450; but see Smit, *supra* note 13, at 531 ("*Shaffer* is of most limited significance . . .").

<sup>94</sup> Indeed, the Court expressly reserved this issue. See note 206 and accompanying text *infra*.

<sup>95</sup> See notes 223-231 and accompanying text *infra*.

interpretation that would preserve quasi in rem jurisdiction in much the way it had been used in the past. This approach would prohibit the use of quasi in rem jurisdiction only in cases like *Shaffer*, in which the attached property was intangible and was subject to attachment in the state only because state law arbitrarily placed the property within the state's jurisdiction.<sup>96</sup> Additionally, some commentators argued for the continued vitality of quasi in rem jurisdiction when there was no alternative forum,<sup>97</sup> or when there were contacts, but not enough to justify full in personam jurisdiction.<sup>98</sup> Nevertheless, the clear majority of commentators predicted that the opinion would probably lead to a drastic curtailment, if not elimination, of quasi in rem jurisdiction.<sup>99</sup>

In the thirteen years since *Shaffer*, the Supreme Court has not helped solve the mystery.<sup>100</sup> Aside from *Rush v. Savchuk*,<sup>101</sup> a single opinion dealing with one of the more extreme uses of quasi in rem jurisdiction from the days prior to *Shaffer*, the Court has not returned to this topic. However, the issue has percolated for a sufficient time in the state courts and the legislatures for states to have considered for themselves whether, and

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<sup>96</sup> See Riesenfeld, *supra* note 13, at 1189; Silberman, *supra* note 3, at 74-75; Smit, *supra* note 13, at 524-29.

<sup>97</sup> Silberman, *supra* note 3, at 76-77; Riesenfeld, *supra* note 13, at 1197.

<sup>98</sup> See, e.g., Silberman, *supra* note 3, at 71-72.

<sup>99</sup> See, e.g., R. CASAD, *supra* note 41; Chase, *supra* note 13; Silberman, *supra* note 3; Zammit, *supra* note 13.

<sup>100</sup> Other mysteries unresolved by *Shaffer* included the following questions: did the opinion mean that the property that is attached must be related in some way to the underlying claim? J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 153-54 (1985). Would *Shaffer* apply to property brought into the state voluntarily and left for substantial periods of time? Smit, *supra* note 13, at 529-31. What about attachment of property to enforce a judgment entered in another state, or to secure property from removal pending the outcome of litigation? Riesenfeld, *supra* note 13, at 1196-97; Silberman, *supra* note 3, at 77-79; Zammit, *supra* note 13, at 18-19. Did the opinion mean that the limited appearance which permitted a person to appear and defend an action without subjecting himself to full in personam jurisdiction was now abolished? Silberman, *supra* note 3, at 67 n.185.

<sup>101</sup> 444 U.S. 320 (1980). In *Rush*, the Court invalidated the *Seider* doctrine under which quasi in rem jurisdiction was used to compel a nonresident to defend a personal injury action in the forum state solely because his insurance company was located there. The Court held that this "ingenious jurisdictional theory," *id.* at 328, was unconstitutional because: "[T]he fictitious presence of the insurer's obligation in Minnesota [the forum state] does not, without more, provide a basis for concluding that there is any contact in the *International Shoe* sense between Minnesota and the insured." *Id.* at 329-30.

to what extent, they wish to reject, or to retain quasi in rem jurisdiction. Until now, there has not been a report of how the states have responded to *Shaffer*. The following section considers the current status of quasi in rem jurisdiction in the United States.

## II. QUASI IN REM JURISDICTION IN THE STATES AFTER *Shaffer*

A post-*Shaffer* survey of quasi in rem jurisdiction law in the states reveals that the widely predicted retirement of quasi in rem jurisdiction has, for the most part, come to pass. However, there also has been an unexpected and opposing development. New York, followed in varying degrees by nine other jurisdictions, has created a new rationale and reinvigorated life for quasi in rem jurisdiction.<sup>102</sup> The forty remaining states have not yet endorsed this theory. Indeed, in most of these states the use of quasi in rem jurisdiction since *Shaffer* has simply faded. The diminished use of quasi in rem jurisdiction coincides with a steady expansion of in personam jurisdiction, and a contraction of attachment jurisdiction due to procedural due process defenses.<sup>103</sup> However, in the future these states may be influenced by the new quasi in rem jurisdiction since only three of the forty states that do not use quasi in rem jurisdiction have explicitly rejected the doctrine through legislation or case law. It is thus possible that this survey has detected the emergence of a new national doctrine of quasi in rem jurisdiction. The serious constitutional and public policy questions that this new form of quasi in rem jurisdiction presents will be explored in the final section of this Article. First, however, this section reports the results of the survey.

### A. States That Have Rejected Quasi in Rem Jurisdiction

Since *Shaffer* only three states have rejected quasi in rem jurisdiction. In 1979, the Vermont state legislature amended its attachment law to eliminate quasi in rem jurisdiction. The change was made:

to take account of the decision in *Shaffer v. Heitner* . . . that attachment of assets at the commencement of an action is no longer a con-

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<sup>102</sup> See notes 134-74 and accompanying text *infra*.

<sup>103</sup> See notes 129-32 and accompanying text *infra*.



stitutionally valid way of obtaining jurisdiction over a nonresident in the absence of any other contacts with the state . . . . Since Vermont's long-arm statute . . . stretches to the limits of due process, the defendant's person will be subject to the jurisdiction of the court in any case in which the contacts are sufficient for personal jurisdiction . . . . Only if one of the other grounds for an ex parte attachment, which involve the danger that the defendant will abscond with or imperil the security, is present will an ex parte hearing be in order.<sup>104</sup>

In Michigan, a state court declared unconstitutional the quasi in rem law, which permitted quasi in rem jurisdiction only when personal jurisdiction could not be obtained.<sup>105</sup> Since Michigan's long arm statute reached "to the farthest extent permitted by due process,"<sup>106</sup> the court held that the law was unconstitutional because it would allow "jurisdiction over defendants in derogation of the minimum contacts standard."<sup>107</sup> Finally, in Nebraska, the state attachment statute<sup>108</sup> was amended to eliminate quasi in rem jurisdiction after a federal court held the attachment law unconstitutional on procedural due process grounds.<sup>109</sup>

#### B. *States That Have Not Used Quasi in Rem Jurisdiction Since Shaffer*

Thirty-seven states, the great "silent majority," retain stat-

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<sup>104</sup> V.R.C.P. 4.1 at 21 (amended 1979) (see Reporter's notes at 20).

<sup>105</sup> MICH. COMP. LAWS ANN. § 600.401 (West 1987).

<sup>106</sup> *City Suburban Agency v. Dade Helicopter Serv.*, 141 Mich. App. 241, 242, 366 N.W.2d 259, 260 (1985).

<sup>107</sup> *Id.*, 366 N.W.2d at 261.

<sup>108</sup> NEB. REV. STAT. § 25-1001 (1985).

<sup>109</sup> The case was *Arron Ferer & Sons Co. v. Berman*, 431 F. Supp. 847, 849 (D. Neb. 1977). In *Berman*, the plaintiff sought to obtain quasi in rem jurisdiction under the Nebraska attachment statute on the sole ground that the defendant was a nonresident of the state. The plaintiff argued that attachment without a prior hearing or opportunity to be heard was permissible notwithstanding the Supreme Court's opinion in *Fuentes v. Shevin*, 407 U.S. 67 (1972). The district court disagreed, holding that "[p]laintiff has not asserted an argument founded in reason or logic as to why procedural safeguards should be less stringent in foreign attachment situations." *Berman*, 431 F. Supp. at 852.

While the opinion required no more than a change in the statute to provide procedural safeguards should quasi in rem jurisdiction be sought, the amended attachment statute eliminated nonresidency alone as a proper basis for attachment. The effect of the new statute, therefore, was to render quasi in rem jurisdiction unavailable in Nebraska unless the plaintiff is able to show additional facts that make seizure necessary to preserve the property, such as an intent to defraud creditors, or an effort to avoid service of process. See NEB. REV. STAT. § 25-1001(1), (2) and (3) (1980).

utory authorization for pre-judgment attachment when the defendant is a nonresident or a foreign corporation.<sup>110</sup> In these states, however, there are no opinions since *Shaffer* which explicitly approve quasi in rem jurisdiction.<sup>111</sup> The absence of reported cases does not necessarily mean that quasi in rem jurisdiction is not being used in these states since the statutory authority for it has not been repealed, and most cases are not officially reported. However, there are two reasons why it is unlikely that quasi in rem jurisdiction is enjoying continued vitality in these states.

First, in a number of states the only references found after

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<sup>110</sup> ALA. CODE § 6-6-41 to 53 (1975); ALASKA STAT. § 09.40.010 (1983); ARIZ. REV. STAT. ANN. § 12-1570.01 (1986); ARK. STAT. ANN. § 16-110-402 (1987) (garnishment) and § 16-110-101 (Mich. 1987) (attachment); CAL. [CIV. PROC.] CODE § 494.010 (West 1979 & Supp. 1989); COLO. REV. STAT. § 102 (West 1973) and § 103 (1973 & Supp. 1988); CONN. GEN. STAT. ANN. § 52-284 (West 1953); DEL. CODE ANN. tit. 10, § 3506 (1974); GA. CODE ANN. § 18-3-1 (Harrison 1982 & Supp. 1988); HAW. REV. STAT. § 651-1 to -21 (1985 & Supp. 1987); IDAHO CODE § 8-501 to -505 (1979); ILL. ANN. STAT. ch. 110 § 4-101 (Smith-Hurd 1981) (attachment); IND. CODE ANN. § 34-1-11-1 (West 1986); IOWA CODE ANN. § 639.3 (West 1946 & Supp. 1988); KAN. CIV. PROC. CODE ANN. § 60-701 (Vernon 1983) (attachment); KY. REV. STAT. ANN. § 425.301 (Michie/Bobbs-Merrill 1988); ME. REV. STAT. ANN. tit. 14, § 1451 (West 1989); MASS. R. CIV. P. 4.1, MASS. GEN. LAWS ANN. ch. 223, § 42 (West 1985); MO. ANN. STAT. § 521.010 (Vernon 1949); MONT. CODE ANN. § 27-18-101 (1987); NEV. REV. STAT. ANN. § 31.017 (Michie 1953 & 1988); N.J. STAT. ANN. § 2A:26-2 (West 1987); N.M. STAT. ANN. § 39-4-2 (1978); N.D. CENT. CODE § 32-08-03 (Supp. 1987); OHIO REV. CODE ANN. § 2715.01 (Anderson 1970); OKLA. STAT. ANN. tit. 12, § 1151 (West 1988); OR. REV. STAT. § 29.115 (1985), OR. R. CIV. P. 84 A(2)(b) and (c); R.I. GEN. LAWS § 10-5-2 (1985); S.C. CODE ANN. 15-19-10 (Law. Co-op. 1983); S.D. CODIFIED LAWS ANN. § 21-17A-3 (1987); TENN. CODE ANN. § 29-6-101 (1980); TEX. [CIV. PROC. & REM.] CODE ANN. § 16.002 (Vernon 1986); VA. CODE ANN. § 8.01-534 (1985); WASH. REV. CODE ANN. § 6.25.030 (Supp. 1988); W. VA. CODE § 38-7-2 (1985); WIS. STAT. ANN. § 801.07 (West 1977 & Supp. 1988); WYO. STAT. § 1-15-201 (1988).

<sup>111</sup> There are opinions in these jurisdictions approving the use of attachment for the purpose of obtaining security or to enforce a judgment, or to determine ownership of property, but there is no indication of the use of quasi in rem jurisdiction to obtain jurisdiction to adjudicate the type of disputes dealt with in this Article. See, e.g., *Huggins v. Deinhard*, 134 Ariz. 98, 102, 654 P.2d 32, 36 (1982) ("[t]he present case is distinguishable from *Shaffer* in that a California court, with *in personam* jurisdiction over appellant, has entered a judgment . . ."); *Levi Strauss v. Crocket Motor Sales, Inc.*, 293 Ark. 502, 507, 739 S.W.2d 157, 159 (1987) (Quasi in rem jurisdiction sought not "as a means by which to adjudicate a claim . . . it [the plaintiff] had already obtained a judgment against [the defendant who] lived and worked in Arkansas."); *Williamson v. Williamson*, 247 Ga. 260, 263, 275 S.E.2d 42, 45 (1981) ("[I]f it can be shown that the defendant has property in this state, there would be no difficulty in enforcing the Arizona judgment against him here."); *Rodrigues v. Rodrigues*, 747 P.2d 1281 (Haw. App. 1987) (quasi in rem jurisdiction for purpose of determining ownership between spouses of property located in the state); *Black v. Black*, 119 R.I. 127, 377 A.2d 1308 (1977) (upholding the attachment of a non-resident's property to secure quasi in rem jurisdiction).

*Shaffer* to quasi in rem jurisdiction show a newly found reluctance to make use of the doctrine. This indicates that *Shaffer* has had a sobering impact on the use of quasi in rem jurisdiction in these states. New Jersey is a good example. In *McQueeney v. J.W. Fergusson & Sons Inc.*,<sup>112</sup> the federal district court for New Jersey declared that, given *Shaffer*, "[t]he status of the remedy of attachment in New Jersey is in considerable doubt."<sup>113</sup> The New Jersey statute at issue in *McQueeney* allowed quasi in rem jurisdiction when a summons could not be served in the State of New Jersey.<sup>114</sup> To avoid constitutional problems, the court construed this statute to mean that pre-judgment attachment of property would only be permitted when the defendant seeks to "frustrate effective service by concealment or in absconding from the state."<sup>115</sup>

Delaware, the site of the *Shaffer* litigation, has exhibited a similar hesitancy about quasi in rem jurisdiction. In *Instituto Bancario Italiano v. Hunter*,<sup>116</sup> the plaintiff commenced a stock fraud case using quasi in rem jurisdiction against a Dutch corporation and a Dutch citizen. Jurisdiction was based upon pre-judgment attachment of the stock.<sup>117</sup> In this case, unlike *Shaffer*, plaintiff argued, not without reason,<sup>118</sup> that quasi in rem jurisdiction was proper because the property attached was directly related to the litigation.<sup>119</sup> The Delaware court, however, rejected the attempted use of quasi in rem jurisdiction.<sup>120</sup> A num-

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<sup>112</sup> 527 F. Supp. 728 (D.N.J. 1981).

<sup>113</sup> *Id.* at 730.

<sup>114</sup> *Id.* at 730-31 (citing N.J. REV. STAT. § 2A:26-2 (1948)).

<sup>115</sup> *Id.* at 732.

<sup>116</sup> 449 A.2d 210 (Del. Super. Ct. 1982).

<sup>117</sup> The plaintiff relied upon DEL. CODE ANN. tit. 10, § 365 (1974), the Delaware sequestration statute that was invoked by plaintiff in *Shaffer*. See note 65 and accompanying text *supra*.

<sup>118</sup> *Hunter*, 449 A.2d at 217. In *Hunter*, the property attached was the very subject of the controversy since the question raised was whether the shares issued by the corporation were fraudulent. This is in contrast with *Shaffer* where the stock attached had no connection to the litigation. See notes 64, 79, 83 and accompanying text *supra*.

<sup>119</sup> Plaintiff also argued that the state had a strong interest in the litigation because it dealt with whether the stock issuances of a Delaware corporation were fraudulent or not. The jurisdictional argument was buttressed by the observation that there was no alternative forum, at least in the United States, that could hear the case. *Hunter*, 449 A.2d at 216.

<sup>120</sup> The court rejected the attempt to use quasi in rem jurisdiction notwithstanding the fact that the stock was the subject matter of the lawsuit, that the Delaware Court of Chancery would be best able to tailor an efficient and speedy remedy, that the case in-

ber of other states have given strong indications that quasi in rem jurisdiction after *Shaffer* is difficult to obtain, including Alaska,<sup>121</sup> California,<sup>122</sup> Connecticut,<sup>123</sup> Kentucky,<sup>124</sup> Massachu-

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volved international, and not merely interstate, parties and activity, and that Delaware had a vital interest in the prevention of abuse in the administration of its corporate law. *Id.* at 222. The court relied on the fact that the property attached was fictional in the sense that it was only by dint of state law that the "situs" of the stock was placed in Delaware even though the physical location of the stock was elsewhere. *Id.* at 221. The court's holding on the quasi in rem jurisdiction question was dicta because the court upheld in personam jurisdiction based on a "conspiracy" theory. *Id.* at 225.

<sup>121</sup> *Alyeska Pipeline Service Co. v. Bay Ridge*, 509 F. Supp. 1115, 1121 (D. Alaska 1981) ("*Shaffer* invalidated the use of quasi in rem jurisdiction as an intrinsically adequate basis of jurisdiction.>").

<sup>122</sup> In California, the state courts before *Shaffer* gave a clear statement of support for quasi in rem jurisdiction. A California court confronting a due process challenge to the state's pre-judgment attachment law upheld the law on the grounds that:

The creditor's need to safeguard the collectibility of a judgment is substantially greater when the debtor is a nonresident than when he is a resident, for a nonresident has contacts and roots outside the state which make it far more likely he will be willing and able to transfer assets outside the state to defeat his creditor's recovery than is true in the case of a resident debtor.

*Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 419, 100 Cal. Rptr. 233, 237 (1972). The court adhered to this view despite its recognition that "modern long arm statutes have substantially reduced the need for foreign attachment." *Id.* Despite the strong support for jurisdictional pre-judgment attachment, however, there are no reported post-*Shaffer* opinions in California in which quasi in rem jurisdiction has been successfully obtained even though the California law continues to authorize pre-judgment attachment based solely on the nonresidence of the defendant. Indeed, what indications there are point to the conclusion that currently quasi in rem jurisdiction is not favored in California.

*Nakasone v. Randall*, 129 Cal. App. 3d 757, 181 Cal. Rptr. 324 (1982), is the only reported California opinion in which a party sought quasi in rem jurisdiction of the second type. The attempt was unsuccessful. In *Nakasone*, the plaintiff sued an 86-year-old nonresident for breach of contract for the sale of a parcel of real property located in Mexico by attaching the defendant's property in California. The court held that "[n]onresident attachment is designed to operate where personal jurisdiction of a defendant cannot be obtained, but quasi in rem jurisdiction can be obtained by seizure of the nonresident's property in the state." *Id.* at 760, 181 Cal. Rptr. at 326. However, the court vacated the writ of attachment because the 1977 amendments to the attachment laws limiting attachment to situations in which the claim arose out of an individual's "trade, business or profession," CAL. [Civ. Proc.] CODE § 483.010 (West 1977), was not satisfied. The only California cases that have granted quasi in rem jurisdiction after *Shaffer* are limited to enforcement of judgments. *Gingold v. Gingold*, 161 Cal. App. 3d 1177, 208 Cal. Rptr. 123 (1984) (enforcement of child support order). For a critical evaluation of the California attachment law, although not on this basis, see Comment, *Abuse of Process and Attachment: Toward a Balance of Power*, 30 UCLA L. REV. 1218 (1983).

<sup>123</sup> *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 459 A.2d 503 (1983) (placing the burden of proof on plaintiff to establish the minimum contacts necessary for quasi in rem jurisdiction, and remanding for a hearing).

<sup>124</sup> A recent decision of the Kentucky Supreme Court, *Citizens Bank and Trust Co.*

setts,<sup>125</sup> Oregon,<sup>126</sup> Washington,<sup>127</sup> and West Virginia.<sup>128</sup>

Second, the remaining states cannot be counted as continuing to approve quasi in rem jurisdiction absent a reported opinion stating as much. Given the serious questions raised about

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of *Peduech v. Collins*, 762 S.W.2d 411 (Ky. 1988), casts doubt on the realistic possibility of quasi in rem jurisdiction in that state. In *Citizens Bank*, the plaintiff sued to recover on a promissory note by attaching the nonresident defendant's property in the state. The court interpreted *Shaffer* as standing for the proposition that when the "state could not constitutionally exercise in personam jurisdiction over the defendants, the state was also barred from exercising quasi in rem jurisdiction over them." *Id.* at 412. The dissenting judge protested that the majority's decision was "premised on a fundamental misunderstanding of the nature of quasi in rem jurisdiction." *Id.* at 413 (Leibson, J., dissenting). In the dissent's opinion, *Shaffer* was limited to the use of property that is no more than a "tenuous legal fiction." *Id.* at 414. In the instant case, the dissent argued that the real property attached was not fictional, and that minimum contacts were established by the defendant's borrowing of money from a Kentucky bank and by the presence of the property in the state. The majority's failure to uphold jurisdiction on these facts, the dissent claimed, "will unduly interfere with commercial transactions within this state . . ." *Id.* at 414.

<sup>125</sup> *Morrill v. Tong*, 390 Mass. 120, 127-28, 453 N.E.2d 1221, 1226-27 (1983) (acknowledges that constitutional issues that have not been resolved by state courts are posed by the assertion of quasi in rem jurisdiction after *Shaffer*).

<sup>126</sup> *Paulson Inv. Co., Inc. v. Norbay Securities, Inc.*, 603 F. Supp. 615, 619 (D. Or. 1984). ("Although the quasi in rem doctrine has not been formally abrogated, the mere presence of stock in Oregon is not sufficient given the Supreme Court's opinion in *Shaffer v. Heitner*").

<sup>127</sup> Even before *Shaffer*, Washington courts were skeptical about quasi in rem jurisdiction. In *Ace Novelty Co. v. M.W. Kasch Co.*, 82 Wash. 2d 145, 508 P.2d 1365 (1973), four years prior to *Shaffer*, the Washington Supreme Court observed that "conditions of doing business in this country have changed remarkably" since the days of *Pennoyer*. *Id.* at 148, 508 P.2d at 1368. These changes, as well as a recognition of the "grave injustices" possible when attachment is obtained, led the court to reject pre-judgment attachment unless there is "jurisdiction over the proceeding against the principal defendant." *Id.* at 149, 508 P.2d at 1368. This cryptic holding led one commentator to wonder whether the court was "in fact rejecting a quasi in rem analysis as a basis for jurisdiction in the future." Trautman, *Long-Arm and Quasi in Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1, 28 (1975). Professor Trautman concluded that the *Ace Novelty* opinion might well mean that in Washington, "if a defendant is not subject to in personam jurisdiction, as through the long-arm statute, he may not be reached through a quasi in rem analysis." *Id.* at 30. The absence of any reported opinions in Washington making use of quasi in rem jurisdiction confirms Professor Trautman's observations.

<sup>128</sup> In *Gee v. Gibbs*, 162 W. Va. 821, 253 S.E.2d 140 (1979), the West Virginia Supreme Court expressed serious doubts about the constitutionality of quasi in rem jurisdiction in light of *Shaffer* and amendments to the state's long-arm statute extending in personam jurisdiction to the limits of due process. The court, in remanding the case to the trial court for consideration of the constitutional question, suggested that attachment jurisdiction might well be unconstitutional. *Id.* at n.3, 253 S.E.2d 140 at n.3 (citing with approval *Clark & Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973) (arguing that pre-judgment attachment is unconstitutional whenever personal jurisdiction can be obtained)).

quasi in rem jurisdiction, it is reasonable to expect that if it was used in a particular jurisdiction, there would be, in the thirteen years since *Shaffer*, at least one reported opinion examining or commenting on its use, or at least acknowledging its existence. However, there is not the slightest suggestion in the reported opinions of these states that the concept has any remaining life.

If, then, these states do not actually use quasi in rem jurisdiction, what accounts for this rather dramatic fall from popularity? Two explanations come to mind. First, in the decade since *Shaffer* there has been a steady expansion of long arm jurisdiction.<sup>129</sup> This expansion significantly lessens the need for

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<sup>129</sup> In some states in the post-*Shaffer* decade, courts have issued broad interpretations of the state long arm statute. See, e.g., *Helitzer v. Helitzer*, 761 F.2d 582 (10th Cir. 1985); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir.), cert. denied, 449 U.S. 841 (1980); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303 (8th Cir. 1977); *R.I. Hosp. Trust Nat'l Bank v. San Gabriel Hydroelectric Partnership*, 667 F. Supp. 66 (D.R.I. 1987); *Beh v. Ostergard*, 657 F. Supp. 173 (D.N.M. 1987); *Horizons Inc. v. Avco Corp.*, 551 F. Supp. 771 (D.S.D. 1982); *Harman v. Pauley*, 522 F. Supp. 1130 (S.D. W. Va. 1981); *Monetary Corp. v. Chesney*, 514 F. Supp. 649 (E.D. Mich. 1980); *HiFi Corner Inc. v. Inflight Cinema Intern. Inc.*, 505 F. Supp. 12 (M.D. Tenn. 1980); *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 459 A.2d 503 (1983); *Tyson v. Whitaker & Son Inc.*, 407 A.2d 1 (Me. 1979); *Curtis v. State*, 284 Md. 132, 395 A.2d 464 (1978); *State v. Continental Forms Inc.*, 356 N.W.2d 442 (Minn. Ct. App. 1984); *Chittenden Trust Co. v. Bianchi*, 530 A.2d 569 (Vt. 1987).

In addition, a number of state long arm statutes have been interpreted as extending to the limits of due process. See, e.g., ALA. R. CIV. P. 4.2; ALASKA STAT. § 09.05.015 (1983); ARIZ. REV. STAT. ANN. § 10-106 (amended 1984); ARK. STAT. ANN. § 16-4-101 (1975); CAL. [CIV.] CODE § 410.10 (West 1970); COLO. REV. STAT. § 13-1-124 (1963); CONN. GEN. STAT. ANN. § 52-57a (West 1985); IND. CODE ANN., TRIAL R. 4.4; KAN. CIV. PROC. CODE ANN. § 60-308 (Vernon 1986); KY. REV. STAT. ANN. § 454.210 (Michie/Bobbs-Merrill Supp. 1988); ME. REV. STAT. ANN. tit. 14, § 704a (1964 & Supp. 1988); MD. [CTS. & JUD. PROC.] CODE ANN. § 6103 (1957 & Supp. 1988); MICH. COMP. LAWS ANN. § 600.705 (West 1975); MINN. STAT. ANN. § 543.19 (West 1982); NEB. REV. STAT. § 25-536(2) (1967); N.H. REV. STAT. ANN. § 510.4 (1969); N.M. STAT. ANN. § 38-1-16 (1989); OHIO REV. CODE ANN. § 2307.38.2 (Anderson 1965); OKLA. STAT. ANN. tit. 12, § 2004 (West 1984); PA. STAT. ANN. tit. 42, § 5308 (Purdon 1978); R.I. GEN. LAWS § 9-5-33 (reenacted 1985); S.C. CODE ANN. § 36-2-803 (Law. Co-op. 1962); S.D. CODIFIED LAWS ANN. § 15-7-2 (1965); TENN. CODE ANN. § 20-2-214 (Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1959); UTAH CODE ANN. § 78-27-22 (1969); VT. STAT. ANN. tit. 12, § 855 (1947); WASH. REV. CODE § 4.28.185 (1959); W. VA. CODE § 56-3-33 (Supp. 1988); WIS. STAT. ANN. § 801.05 (West 1976); WYO. STAT. § 5-1-107 (1967, amended 1977). In all of these states there are court decisions that have interpreted the long arm statute to extend to the full limits of the due process clause. However, these decisions are subject to a caveat. It is possible that the courts do not mean that the statute covers all the situations in which jurisdiction under *International Shoe* would be possible, only that for the topics covered, the statute exerts the full power permitted under the Constitution. See generally R. CASAD, *supra* note 41, at 4-4. In any event, it is clear that in these states the long arm statute "should be construed very liberally." *Id.* at 4-5.

quasi in rem jurisdiction, which was developed in large part because of limitations on state courts' ability to obtain jurisdiction over nonresidents.<sup>130</sup> The expansion also suggests that many states have opted to respond to *Shaffer* by amending long arm acts, rather than searching for a new rationale to support quasi in rem jurisdiction.

Second, in a number of states there has been litigation challenging the state's attachment laws on procedural due process grounds.<sup>131</sup> As a result of these attacks, the requirements for obtaining pre-judgment attachment have stiffened significantly.<sup>132</sup> The increased difficulty of obtaining an order of attachment in these jurisdictions may have dampened the enthusiasm of counsel and courts for quasi in rem jurisdiction.

The absence of any reported opinions, the expansion of long arm jurisdiction, and the tightening of procedural requirements for pre-judgment attachment support the conclusion that, at present, quasi in rem jurisdiction has no meaningful role to play in many states. However, this conclusion must be tempered by the recognition that a new approach to quasi in rem jurisdiction is emerging. This new approach might begin to influence those states that have not used quasi in rem jurisdiction since *Shaffer*,

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<sup>130</sup> See notes 30-36 and accompanying text *supra*.

<sup>131</sup> See, e.g., *Jones v. Preuit & Maudlin*, 851 F.2d 1321 (11th Cir. 1988); *Watertown Equipment Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487 (8th Cir. 1987); *Traugher v. Beauchane*, 760 F.2d 673 (6th Cir. 1985); *Lugar v. Edmonson Oil Co. Inc.*, 639 F.2d 1058 (4th Cir. 1981); *Sugar v. Curtis Circulation*, 383 F. Supp. 643 (S.D.N.Y. 1974) (three judge court), *remanded*, 425 U.S. 73 (1976); *Stoller Fisheries Inc. v. American Title Ins. Co.*, 258 N.W.2d 336 (Iowa 1977); *Hillhouse v. Kansas City*, 221 Kan. 369, 559 P.2d 1148 (1977); *Penrod Drilling Co. v. Bounds*, 433 So. 2d 916 (Miss. 1983); *Williams v. Matovich*, 172 Mont. 109, 560 P.2d 1338 (1977); *First Nat'l Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.*, 101 N.M. 431, 684 P.2d 517 (1984); *Peebles v. Clement*, 63 Ohio St. 2d 314, 408 N.E.2d 689 (1980); *Guy H. James Const. Co. v. Department of Transp.*, 655 P.2d 553 (Okla. 1982); *Rocky B. Fisheries Inc. v. North Bend Fabrication & Mach. Inc.*, 66 Or. App. 625, 676 P.2d 319 (1984); *Yanero v. Fox*, 163 W. Va. 222, 256 S.E.2d 751 (1979).

<sup>132</sup> For a description of the tightening of the procedural requirements that have taken place in one state as a result of this kind of litigation, see note 200 *infra*.

Other changes to the attachment laws evidence at least an implicit legislative rejection of the concept of quasi in rem jurisdiction. Illinois, for example, revised its law to provide a specific section authorizing the courts of that state to make use of quasi in rem jurisdiction. ILL. ANN. STAT. ch. 110, § 12-611 (Smith-Hurd 1982). However, the statute is limited to enforcement of judgments. This limited statute gives rise to a reasonable presumption that the legislature did not intend for its courts to continue to make use of quasi in rem jurisdiction of the second type. The absence of a single reported case in which the plaintiff sought this type of pre-judgment attachment buttresses this opinion.

but have not yet rejected it either. Thus, it is premature to proclaim the death of quasi in rem jurisdiction in America. We turn now to examine the development of the new quasi in rem jurisdiction.

### C. *The New Quasi in Rem Jurisdiction*

In contrast to the trend away from the use of quasi in rem jurisdiction in many parts of the country, in some states, most notably New York, the doctrine has been revived despite *Shaffer*.<sup>133</sup> This dramatic development has taken place, for the most part, without legislative authorization. This section describes the new doctrine of quasi in rem jurisdiction and considers its causes.

#### 1. The Development and Rationale for the New Quasi in Rem Jurisdiction in New York

The most influential case in the development of the new doctrine of quasi in rem jurisdiction is the New York Court of Appeals' 1984 decision in *Banco Ambrosiano v. Artoc Bank and Trust Co.*<sup>134</sup> In that case Banco Ambrosiano, an Italian bank, sued to recover a fifteen million dollar loan to Artoc, a Bahamian bank. The loan was negotiated in Italy, the Bahamas and Peru; the proceeds were to be used in South America. The sole New York connection with the transaction was that the loan was to be made in United States dollars to a New York account that Artoc maintained, and was to be repaid to another New York account established by Banco Ambrosiano. The reason for this was "that the transaction was to be in United States dollars and therefore had to be handled through such clearing accounts."<sup>135</sup>

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<sup>133</sup> This development has been little noticed by commentators. Indeed, they predicted early in the game that *Shaffer* would virtually eliminate quasi in rem jurisdiction in New York. A leading commentator on New York practice voiced this sentiment by declaring that the *Shaffer* holding had "drastically restricted" the use of quasi in rem jurisdiction in the state. D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE § 104, at 122 (1978). Another claimed that *Shaffer* had abolished quasi in rem jurisdiction. Farrell, *supra* note 14, at 449 ("In June, 1977, the Court decided unanimously in *Shaffer v. Heitner* that the states may not exercise quasi in rem jurisdiction."). Nevertheless, the cases prove otherwise; quasi in rem jurisdiction is alive and well in New York. See notes 134-70 and accompanying text *infra*.

<sup>134</sup> 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984).

<sup>135</sup> *Id.* at 69-70, 464 N.E.2d at 434, 476 N.Y.S.2d at 66.



Banco Ambrosiano attached Artoc's bank account, its "sole contact" with New York State.<sup>136</sup> In the ensuing jurisdictional challenge, Banco Ambrosiano conceded that the New York long arm statute did not provide grounds for the assertion of in personam jurisdiction over Artoc.<sup>137</sup> However, Banco Ambrosiano argued that the attachment of Artoc's New York bank account was sufficient to provide quasi in rem jurisdiction.

The Court of Appeals unanimously upheld jurisdiction. Chief Judge Wachtler, writing for the court, began by noting that "at first blush, the usefulness of quasi in rem jurisdiction has been eliminated by *Shaffer*."<sup>138</sup> This was so because the New York state legislature had authorized quasi in rem jurisdiction when its conceptual foundation derived solely from the presence of property within the state.<sup>139</sup> With *Shaffer* and *International Shoe*, however, the common law structure that had supported the use of quasi in rem jurisdiction fell.<sup>140</sup> Thereafter, a state, if it wished, could obtain jurisdiction over nonresidents to the full extent permitted by due process even if the nonresidents had no physical presence or property in the state.

Nevertheless, the *Banco Ambrosiano* court held that the limited reach of New York's long arm statute provided a rationale for the continued use of quasi in rem jurisdiction. The court found it "important" that "CPLR 302 [New York's long arm statute] does not go as far as is constitutionally permissible."<sup>141</sup> Without further elaboration, the Court deemed the statutory constraints of the long arm statute created a "gap" that quasi in rem jurisdiction could fill. The court reasoned as follows:

CPLR 302 does not provide for in personam jurisdiction in every case in which due process would permit it. Thus, a "gap" exists in which the necessary minimum contacts, including the presence of defendant's property within the State, are present, but personal jurisdiction is not authorized by CPLR 302. It is appropriate, in such case, to fill that gap utilizing quasi in rem principles.<sup>142</sup>

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<sup>136</sup> *Id.* at 70, 464 N.E.2d at 434, 476 N.Y.S.2d at 66.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> The court pointed to CPLR 301 which, when it took effect in 1963, fourteen years prior to *Shaffer*, was intended to preserve "all previously existing jurisdictional bases." *Id.* at 71, 464 N.E.2d at 434, 476 N.Y.S.2d at 66.

<sup>140</sup> *Id.* at 70-71, 464 N.E.2d at 434-35, 476 N.Y.S.2d at 66-67.

<sup>141</sup> *Id.* at 71, 464 N.E.2d at 435, 476 N.Y.S.2d at 67.

<sup>142</sup> *Id.* at 71-72, 464 N.E.2d at 435, 476 N.Y.S.2d at 67. The court relied upon an

The court interpreted *Shaffer* in a way that did not constitutionally prohibit the court from using quasi in rem jurisdiction to fill the gap in New York's long arm statute. Chief Judge Wachtler stated that *Shaffer* stood for the proposition that quasi in rem jurisdiction was unconstitutional only when the "property has no relationship to the cause of action, and there are no other ties among the defendant, the forum and the litigation."<sup>143</sup> The court held that Artoc's bank account was "closely related to plaintiff's claim," because it was into this account that the proceeds of the loan were to be paid,<sup>144</sup> Artoc regularly used the account for other transactions, and Artoc had agreed to repay the loan to Banco Ambrosiano's New York account.<sup>145</sup> Therefore, the court held quasi in rem jurisdiction was constitutional in the *Banco Ambrosiano* case.

Even before *Banco Ambrosiano*, New York courts<sup>146</sup> had made free use of quasi in rem jurisdiction, without much discussion of its theoretical basis beyond an attempt to demonstrate that it was constitutional under *Shaffer*.<sup>147</sup> Since *Banco Ambro-*

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Albany Law Review Note for its authority for this proposition. Note, *Minimum Contacts and Jurisdictional Theory*, *supra* note 13, at 306.

In developing its rationale for this post-*Shaffer* use of quasi in rem jurisdiction, the *Banco* court did not deal with the argument that absent substantial justification, pre-judgment attachment may violate defendant's right to full use of property prior to judgment, or that quasi in rem jurisdiction is inconsistent with res judicata principles. For a discussion of the significance of these factors, see notes 198-231 and accompanying text *infra*.

<sup>143</sup> *Banco Ambrosiano*, 62 N.Y.2d at 71, 464 N.E.2d at 435, 476 N.Y.S.2d at 67.

<sup>144</sup> *Id.* at 72, 464 N.E.2d at 435, 476 N.Y.S.2d at 67.

<sup>145</sup> *Id.* at 73, 464 N.E.2d at 436, 476 N.Y.S.2d at 68.

<sup>146</sup> The term "New York courts" encompasses federal as well as state courts since, as will be shown, the federal courts, exercising diversity jurisdiction, have made liberal use of quasi in rem jurisdiction in New York. Interestingly, however, the federal courts have not contributed to the articulation of the rationale for the new quasi in rem jurisdiction. While there are many reported federal cases making use of quasi in rem jurisdiction under New York state law, see notes 154-57 and accompanying text *supra*, none address this question at all. They proceed rather on the assumption that quasi in rem jurisdiction is authorized in the state so long as in the circumstances of the case it can be constitutionally invoked.

<sup>147</sup> Two pre-*Banco* cases stand out. The first, *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977), a federal district court opinion, is the more dramatic. In *Feder*, plaintiff brought a wrongful death action arising out of an airplane crash near Istanbul, Turkey. The defendant airline company did not have an office or any employees in New York, nor did it solicit business in the state. The only connection between the defendant and New York was a \$100,000 New York bank account. This was the property which plaintiff attached. It was unclear whether the account was related to the plaintiff's cause of action. The court stated that "the circumstances surrounding the opening and

siano, a host of New York cases have upheld the use of quasi in rem jurisdiction.<sup>148</sup> From these additional cases, one gains a fuller appreciation of the new theory of quasi in rem jurisdiction.<sup>149</sup> The new quasi in rem jurisdiction is used primarily to

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operation of THY's bank account here are not revealed." *Id.* at 1278. However, the court did not delve further since it held that this fact was unnecessary to its decision. *See id.* at 1277.

The court upheld the assertion of quasi in rem jurisdiction notwithstanding the absence of any other contacts between the defendant, the forum and the cause of action. The court chose to view the voluntary act of opening a bank account as supplying minimum contacts necessary to sustain jurisdiction. The court rejected the defendant's argument that *Shaffer* prohibited jurisdiction premised on the mere presence, without more, of unrelated property in the state. The court instead focused on Justice Stevens's concurring opinion for the proposition that *Shaffer* was limited to intangible property brought into the state unintentionally. Thus, *Shaffer* did not prohibit attachment of tangible property like a bank account which is purposefully opened in the state. *Id.* at 1278-79.

So certain was the court of the correctness of its holding that it refused to certify the defendant's request for an interlocutory appeal. In doing so, the court recorded its belief that there is no substantial ground for a difference of opinion on the proposition that *Shaffer* "does not apply to an attachment of . . . a bank account." *Id.* at 1280. Justice Marshall might have been surprised.

The second major federal case in the development of quasi in rem jurisdiction in New York is the Second Circuit's opinion in *Intermeat v. American Poultry*, 575 F.2d 1017 (2d Cir. 1978). The plaintiff seller sued an Ohio corporation for breach of contract regarding the shipment of poultry to New York. Quasi in rem jurisdiction was sought based upon the attachment of a debt owed to defendant by the A&P grocery chain, another New York corporation. *Id.* at 1018.

Although the debt was unrelated to plaintiff's cause of action, the court sustained the use of quasi in rem jurisdiction. The court read *Shaffer* to mean that:

[P]roceedings begun by attachment now means that the presence of defendant's property within New York must be viewed as only one contact of the defendant with the state, to be considered along with other contacts in deciding whether the assertion of jurisdiction is consistent with "traditional notions of fair play and substantial justice."

*Id.* at 1022 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Since the defendant did a substantial amount of business in New York, and since the contract was negotiated with a New York plaintiff, the court found that minimum contacts were present in the case, although it acknowledged that the contacts were insufficient to satisfy New York's statutory requirements for the assertion of in personam jurisdiction. *Id.* at 1018-19.

The federal courts in both *Intermeat v. American Poultry*, 575 F.2d 1017 (2d Cir. 1978), and *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977), recognized that the theoretical underpinnings for quasi in rem jurisdiction as expressed in *Pennoyer* were abrogated by *Shaffer*. Although the doctrinal bases for quasi in rem jurisdiction were shaken, these courts proceeded to exercise jurisdiction by simply grafting the *Shaffer* decision upon the New York attachment statutes, presuming that the exercise of quasi in rem jurisdiction was still authorized.

<sup>148</sup> See notes 149-68 and accompanying text *infra*.

<sup>149</sup> See notes 150-70 *infra*.

provide a New York forum for a plaintiff who otherwise would not be able to sue in New York because the defendant's relationship to the state does not fall within the long arm statute.<sup>150</sup> New York courts have made deep inroads into the limitations otherwise imposed by the long arm statute on the state's assertion of adjudicative power over nonresidents. Several cases illustrate this trend.

In *Majique Fashions v. Warwick*,<sup>151</sup> for example, a Korean corporation's New York bank account was attached to adjudicate a claim arising out of the corporation's alleged tortious failure to perform a contractual obligation in Hong Kong. The defendant had no offices or employees in New York, was not licensed to do business there, and owned no real estate or other property in the state, other than the single bank account which the plaintiff attached. On these facts, the plaintiffs chose to "forego any attempt at personal jurisdiction under the 'long arm' statute."<sup>152</sup> The New York court, nevertheless, upheld quasi in rem jurisdiction based on attachment of the defendant's bank account.<sup>153</sup>

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<sup>150</sup> See notes 151-56 and accompanying text *infra*.

<sup>151</sup> 67 A.D.2d 321, 414 N.Y.S.2d 916 (1st Dep't 1979).

<sup>152</sup> *Id.* at 325, 414 N.Y.S.2d at 919. This apparently was a correct decision. On the facts alleged, N.Y. CIV. PRAC. L. & R. 302(a)(1) (McKinney 1972 & Supp. 1989) [hereinafter CPLR], was not satisfied since the defendant had not physically negotiated or performed the contract in New York, which are two factors important in establishing the defendant's purposeful activities in New York, a necessary condition for jurisdiction under that provision. *Trafalgar Capital Corp. v. Oil Producers Equip. Corp.*, 555 F. Supp. 305 (S.D.N.Y. 1983); *J.E.T. Advertising Associates, Inc. v. Lawn King, Inc.*, 84 A.D.2d 744, 443 N.Y.S.2d 744 (2d Dep't 1981); O'Connor, *Long Arm Jurisdiction in New York Contract Cases*, N.Y.L.J., May 25, 1982, at 1, col. 2. The provision of CPLR § 302(a)(3) that permits jurisdiction over a nonresident who commits a tort outside the state having consequences in the state might have been more promising. That provision, however, requires that defendant either regularly solicit business in New York, or derive substantial revenue from interstate or international commerce, CPLR 302(a)(3)(i) and (ii). It is conceivable that the plaintiff might have been able to satisfy the latter condition, but since he failed to allege facts about it the more reasonable assumption is that he could not.

<sup>153</sup> The court found that minimum contacts were present in this situation since it noted that on these facts the defendant "expected or should reasonably expect its act[s] to have consequences in New York." *Majique*, 67 A.D.2d at 325, 414 N.Y.S.2d at 919. In discussing this case, Professor Siegel points out that using a foreseeability element to determine the constitutionality of quasi in rem jurisdiction is risky. His reservation is based upon the Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), decided after *Majique*, which seems to dismiss foreseeability as a major factor in long arm jurisdiction. But Professor Siegel distinguishes *Majique* from

*Drexel Burnham Lambert v. D'Angelo*<sup>154</sup> is "another illustration of where activities insufficient to support personal jurisdiction (under the long arm statute) may nonetheless satisfy the apparently less demanding quasi in rem jurisdiction."<sup>155</sup> The plaintiff claimed that its own acts in New York concerning security transfers were imputable to the defendant. Although at the time New York courts had refused to interpret the long arm statute in this way,<sup>156</sup> the court permitted quasi in rem jurisdiction based upon the attachment of defendant's New York accounts.<sup>157</sup>

The new quasi in rem jurisdiction is most commonly used in situations such as *Drexel Burnham* and *Banco Ambrosiano*, in which the defendant has engaged in business deals with New Yorkers without performing activities that fit within the fairly rigid limitations applicable to the "transacting business" provision of the long arm statute.<sup>158</sup> However, not all the cases are so limited. Some courts have allowed the new quasi in rem jurisdiction to be applied in situations that come squarely within the long arm statute.<sup>159</sup> For these courts, quasi in rem jurisdiction is almost second nature, to be used whenever a New Yorker wants to sue a nonresident who has property here.<sup>160</sup> While these

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*World-Wide Volkswagen*, since *Majique* involved intentional conduct in a contract case while *World-Wide Volkswagen* was a tort action for personal injuries. D. SIEGEL, *supra* note 133, at § 104. Professor Siegel's distinction between tort and contract cases seems borne out by subsequent Supreme Court opinions. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

<sup>154</sup> 453 F. Supp. 1294 (S.D.N.Y. 1978).

<sup>155</sup> D. SIEGEL, *supra* note 133, at § 104 (1987 Supp.).

<sup>156</sup> In actions by an agent against his foreign principal, New York courts have refused to attribute the acts of the agent to the principal for jurisdictional purposes under CPLR 302. The courts have required the defendant to engage in independent activity towards New York and actions of the agent cannot be deemed the defendant's independent activities. *Drexel*, 453 F. Supp. at 1297. Recent developments indicate that this view may be changing. See *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988).

<sup>157</sup> *Drexel*, 453 F. Supp. at 1298.

<sup>158</sup> See, e.g., *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017 (2d Cir. 1978); *Republic Nat'l Bank of New York v. Ahmad Ladjevardi*, No. 79-5203, slip op. (S.D.N.Y. Nov. 26, 1980).

<sup>159</sup> See, e.g., *Unitech USA, Inc. v. Ponsoldt*, 91 A.D.2d 903, 457 N.Y.S.2d 526 (1st Dep't 1983).

<sup>160</sup> As one court put it: "[s]ince the nonresident defendant in most cases will not be subject to in personam jurisdiction in New York, attachment is necessary . . ." *ACLI Int'l Commodity Servs., Inc. v. Grey*, No. 80-7227, slip op. (S.D.N.Y. Jan. 22, 1981).

courts have sometimes recognized that there is an inherent "harshness" that flows from the forceful attachment of an individual's property prior to a determination of liability, this has apparently not been a deterrent.<sup>161</sup>

Despite a clear receptivity to quasi in rem jurisdiction by New York courts, and some attempt at developing a theory for it, New York courts have failed to articulate clearly the parameters of the doctrine. For example, as some New York courts have interpreted the new quasi in rem jurisdiction, there must be a direct relationship between the property attached and the claim.<sup>162</sup> However, other courts have not required this connection.<sup>163</sup> The latter group have split on whether or not other contacts with the jurisdiction are required; some hold that it is not necessary,<sup>164</sup> while others appear to say that it is essential.<sup>165</sup> Some opinions stress the lack of any other forum for the plaintiff as a key determinant,<sup>166</sup> others do not.<sup>167</sup> Those courts that

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<sup>161</sup> *Standard Steel and Tinplate Corp. v. Manuel Int'l D.I.S.C., Inc.*, No. 81-5118, slip op. (S.D.N.Y. Nov. 10, 1981).

<sup>162</sup> See, e.g., *First Palm Beach Int'l Bank v. Banco De Descuento, S.A.*, No. 85-3656 (S.D.N.Y. Apr. 7, 1989) (LEXIS, Genfed Library, Dist file); *Republic Nat'l Bank of New York v. Ahmad Ladjevardi*, No. 79-5203, slip op. (S.D.N.Y. Nov. 26, 1980) (funds in attached bank account directly related to cause of action); *Banco Ambrosiano v. Artoc Bank & Trust*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984) (cause of action directly related to bank account attached); *Unitech USA, Inc. v. Ponsoldt*, 91 A.D.2d 903, 457 N.Y.S.2d 526 (1st Dep't 1983) (funds in escrow account that were attached were directly related to plaintiff's cause of action).

<sup>163</sup> See, e.g., *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. 1978) (attached bank account unrelated to plaintiff's claim); *Excel Shipping Corp. v. Seatrain Int'l*, 584 F. Supp. 734 (E.D.N.Y. 1984); *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977).

<sup>164</sup> *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977) (voluntary act of opening unrelated bank account sufficient in itself to supply basis for quasi in rem jurisdiction).

<sup>165</sup> *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. 1978) (lack of connection between cause of action and attached property does not preclude quasi in rem jurisdiction so long as there are other contacts between the defendant and the forum state); *Excel Shipping Corp. v. Seatrain Int'l*, 584 F. Supp. 734 (S.D.N.Y. 1984); *Drexel Burnham Lambert, Inc. v. D'Angelo*, 453 F. Supp. 1294 (S.D.N.Y. 1978).

<sup>166</sup> *Shaffer* left open the possibility that in quasi in rem jurisdiction cases the exercise of jurisdiction based solely on the presence of property might be constitutional if there is no other forum that could hear the suit available. *Shaffer*, 433 U.S. at 211 n.37. This theme has been suggested in some New York quasi in rem cases, see *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne De Navigation*, 605 F.2d 648, 655 (2d Cir. 1979); *Excel Shipping Corp.*, 584 F. Supp. at 741; *Republic National Bank of New York v. Ahmad Ladjevardi*, No. 79-5203, slip op. (S.D.N.Y. Nov. 26, 1980) (where there is no alternative forum lesser standard of minimum contacts may be applied); *J.S. Service*

do emphasize the lack of an alternate forum are not clear about whether the unavailable forum concept means the lack of another United States forum or the lack of any forum.<sup>168</sup> Moreover, we still do not know whether the new quasi in rem jurisdiction is subject to a lower-level minimum contacts analysis.<sup>169</sup> Nor have we yet been told whether the doctrine only affects tangible property intentionally brought into the state, or whether it can be invoked on the basis of intangible property, which is fortuitously within the jurisdiction.<sup>170</sup> Thus, the contours of the new quasi in rem jurisdiction are not apparent.

## 2. The Justification for the New Quasi in Rem Jurisdiction in New York

Despite its vagueness, there can be little doubt that the new judge-created quasi in rem jurisdiction gives New York courts greater power to regulate the reach of New York's extraterritorial jurisdiction than that which is provided under the state's long arm statute.<sup>171</sup> Since the new quasi in rem jurisdiction is

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Center Corp. v. Banco Continental, 103 Misc. 2d 325, 425 N.Y.S.2d 945 (Sup. Ct. Westchester County 1980) (no alternative forum is a factor in quasi in rem jurisdiction analysis).

<sup>167</sup> See, e.g., Banco Ambrosiano v. Artoc Bank & Trust, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984) (lack of alternative forum not explicitly considered).

<sup>168</sup> See, e.g., J.S. Service Center Corp., 103 Misc. 2d at 328, 425 N.Y.S.2d at 947 ("The troublesome issue . . . is whether the Supreme Court [in *Shaffer*] meant no other forum in the United States or no other forum at all.").

<sup>169</sup> Several scholars identified this as a major post-*Shaffer* question. See, e.g., Silberman, *supra* note 3, at 68, 71-73; Riesenfeld, *supra* note 13, at 1198. However, the New York cases do not explicitly address this question.

Although New York courts have not articulated a lesser constitutional standard for quasi in rem jurisdiction as compared to in personam jurisdiction, they have certainly permitted quasi in rem jurisdiction in situations where in personam is not available under the long arm statute.

<sup>170</sup> The case law on this topic is at best confused. Compare *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977) (quasi in rem jurisdiction upheld because property was tangible bank account with funds intentionally brought into the state) with *Fine v. Spierer*, 109 A.D.2d 611, 486 N.Y.S.2d 9 (1st Dep't 1985) (quasi in rem jurisdiction upheld when property attached was the nonresident defendant's unrealized interest in his mother's estate).

<sup>171</sup> In 1979 Professor Silberman saw three areas left open by *Shaffer* for a state to use quasi in rem jurisdiction should it choose to do so: (1) where the facts standing alone are insufficient to support in personam jurisdiction; (2) where the property attached is traditional property such as real estate or bank accounts; and (3) where there is no other available forum. Silberman, *supra* note 3, at 71-77. New York's vigorous use of the doctrine overlaps with each of these categories.

based on the judicial power to "fill gaps" in the statute, even if not authorized by a long arm statute, it enables New York courts to have jurisdiction over cases in which a significant amount of property is located in the state. One might ask why the New York courts have articulated such an apparently inconsistent approach to in personam as opposed to quasi in rem jurisdiction.

A possible answer may be found in the New York courts' historic desire to remain open for the resolution of large commercial disputes. The New York Court of Appeals has consistently recognized this strong policy interest of the state. In Chief Judge Wachtler's words, New York has a "recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world."<sup>172</sup> The new quasi in rem jurisdiction serves that interest. Since it will be used primarily when the amount of property is substantial, as a practical matter, the new quasi in rem jurisdiction will usually be invoked in commercial litigation involving large sums of money. *Banco Ambrosiano* is the archetype of this sort of case.<sup>173</sup> Most of the other new quasi in rem jurisdiction cases follow this pattern; they involve attachments of large accounts in major commercial litigation totaling millions of dollars.<sup>174</sup>

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<sup>172</sup> *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 581, 404 N.E.2d 726, 730, 427 N.Y.S.2d 604, 608 (1980) (citing cases); see also *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227, 333 N.E.2d 168, 174, 371 N.Y.S.2d 892, 898 (1975) (describing New York as the "financial capital of the world, serving as an international clearinghouse and marketplace for a plethora of international transactions . . .").

<sup>173</sup> Indeed, the plaintiff in *Banco* in its brief to the Court of Appeals made precisely this argument. Brief for Plaintiff-Respondent at 42-43, *Banco Ambrosiano*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984) ("The burden on the defendant seeking dismissal is particularly heavy in commercial cases such as this, because the availability of a convenient forum which administers a stable, and commercially sophisticated body of law which plays an important role in encouraging foreign entities to transact their financial dealing in New York.") (emphasis supplied); see also 38 *The Record of the Association of the Bar of the City of New York* 537, 549 (1983) (discussing the advantages of commercial litigation to the economy of New York including "[i]ncreased business activity . . . employment opportunities and tax revenues . . .").

<sup>174</sup> See note 201 and accompanying text *infra*. The legislature as well has identified the preservation of a New York forum for large commercial interests as an important policy of the state. In 1984, it amended CPLR 327, the *forum non conveniens* statute, to provide parties to large commercial contracts of one million dollars or more with the opportunity to choose a New York forum for any dispute arising out of that contract. Ch.



New York is not totally alone in its use of the new quasi in rem jurisdiction. The next section considers the growing number of states that continue to use quasi in rem jurisdiction after *Shaffer*, and suggests that the New York approach provides a potential allure to that "silent majority" of states that have neither rejected quasi in rem jurisdiction nor currently use it.

### 3. Other States that Use Quasi in Rem Jurisdiction After *Shaffer*

In addition to New York, a number of other states use quasi in rem jurisdiction to obtain jurisdiction over nonresidents even after *Shaffer*. This use, although limited, might be an indication that the New York approach is beginning to have national influence. Mississippi comes closest to following the path laid by New York. In *Administrators of the Tulane Educational Fund v. Cooley*,<sup>175</sup> for example, the Mississippi Supreme Court, in a sweeping opinion, upheld quasi in rem jurisdiction. *Cooley* involved a medical malpractice claim that arose in Louisiana. Jurisdiction rested solely on the presence of the attached property in the state, much of it unrelated to the plaintiffs' underlying claim.<sup>176</sup> The property attached was the medical debt owed by plaintiff to the defendant, and the gate receipts due the defendant from a football game played in Mississippi by the defendant's team.<sup>177</sup>

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421, [1984] N.Y. Laws 377 (McKinney Supp. 1990) (effective July 19, 1984). The purpose of this law was "enhancing New York's position as a major financial and commercial center by enabling it to develop a sophisticated system of commercial jurisprudence." J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK PRACTICE § 327.04 (Supp. 1988). The bill's sponsors urged its passage to preserve "the standing of New York as a commercial and financial center." *Id.* (quoting Sponsor's Memorandum in Support of Legislation (A.7303-A) (1984) at 2).

<sup>175</sup> *Administrators of The Tulane Educ. Fund v. Cooley*, 462 So. 2d 696 (Miss. 1984).

<sup>176</sup> *Id.* at 698.

<sup>177</sup> The court held that the presence of this property, plus the defendant's substantial activities in the state were enough to subject it to jurisdiction over unrelated claims. The court's opinion was grounded in its awareness that the defendant, Tulane University, was located "[a]s the crow flies, . . . less than a hundred miles from parts of . . . Mississippi . . . . Although the nerve center of Tulane's educational and service programs is in Louisiana, the university has a variety of contacts with Mississippi and engages in a plethora of activities in and related to Mississippi." *Id.* at 699. This judgment was aided by the personal experience of the author who noted that on a day off from judicial duties he "personally witnessed the Tulane football team doing substantial 'business' in Oxford Mississippi as it defeated Ole Miss 26-24 in a miserable, drizzling rain."

Other Mississippi cases reveal that *Cooley* is not atypical. *Estate of Portnoy v. Cessna Aircraft Co.*,<sup>178</sup> for example, allowed quasi in rem jurisdiction over a wrongful death claim arising out of a plane crash in Mississippi even though the property attached was completely unrelated to plaintiff's claim.<sup>179</sup> Because the state's long arm statute did not apply, plaintiff would have been unable to sue in the state without attachment jurisdiction.<sup>180</sup> Thus, the court used quasi in rem jurisdiction to fill a gap in the state's long arm statute.<sup>181</sup>

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*Id.* at 699 n.2.

With these substantial activities, the court had little difficulty in concluding that the minimum contacts standard of *International Shoe* and *Shaffer* was satisfied. *Id.* at 701-05.

<sup>178</sup> 603 F. Supp. 285 (S.D. Miss. 1985).

<sup>179</sup> Plaintiff attached debts owed Cessna by Mississippi aircraft dealers and flight schools for the sale or use of their products in the state. *Id.* at 288.

<sup>180</sup> Mississippi's long-arm statute may only be invoked by plaintiffs who are residents of the state. MISS. CODE ANN. § 13-3-57 (1972). In *Estate of Portnoy*, the plaintiff's husband was a resident of Pennsylvania who died while on a training mission to Mississippi as a member of the Pennsylvania Air National Guard. See *Estate of Portnoy*, 603 F. Supp. at 288. Accordingly, the state's long-arm statute was not available to plaintiff in that case. The court did not consider the constitutional issue posed by a long arm statute that provides benefits to residents over nonresidents. See *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988) (holding unconstitutional a state statute of limitations law that discriminated against nonresidents).

<sup>181</sup> The *Portnoy* court cited one New York quasi in rem jurisdiction case, *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. 1978), that pioneered the use of this theory. See note 146 and accompanying text *supra*.

Like New York, the Mississippi use of quasi in rem jurisdiction may not be limited to filling gaps in the long-arm statutes. In *Universal Computer Servs., Inc. v. Lyall*, 464 So. 2d 69 (Miss. 1985), the Mississippi Supreme Court upheld the seizure of an automobile as a means of adjudicating a suit for back wages in circumstances where in personam jurisdiction seemed clearly available. In *Lyall*, the plaintiff, who was a resident of Mississippi, sued his employer, a foreign corporation, for back pay. The plaintiff's wages were allegedly earned in Mississippi so presumably suit could have been brought under the long-arm statute which provides in personam jurisdiction over nonresidents who are sued for breach of "a contract with a resident of this state to be performed in whole or in part in this state." MISS. CODE ANN. § 13-3-57 (1972).

Subsequent cases, however, cloud this picture. In *Anderson v. Sonat Exploration Corp.*, 523 So. 2d 1024 (Miss. 1988), the state supreme court indicated that attachment may not be authorized when in personam jurisdiction can also be obtained. This shift in attitude may have been influenced by changes to the state's attachment law which was declared unconstitutional on procedural due process grounds in two opinions. *MPI Inc. v. McCullough*, 463 F. Supp. 887 (N.D. Miss. 1978); *Mississippi Chem. Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977). There are strong indications in the *MPI* holding that attachment for jurisdictional purposes without a showing of necessity would violate due process. See *MPI*, 463 F. Supp. at 895.

When the law was amended in 1982 in response to these opinions, a requirement was

Utah also makes use of quasi in rem jurisdiction, although in a much different and more limited way. *Rhoades v. Wright*<sup>182</sup> was a wrongful death action filed by the family of a Utah farmer from the Utah-Colorado border area. The farmer had been murdered by a Colorado neighbor, on the Colorado side of the border. The Utah Supreme Court permitted quasi in rem jurisdiction to be used after nine years of litigation and several unsuccessful attempts to obtain in personam jurisdiction.<sup>183</sup> The court justified quasi in rem jurisdiction based on the defendant's ownership and use of "decidedly tangible and immovable" property in Utah, the fact that "the prime issue" in the case was the defendant's continued right to use the property, and, most importantly, the fact that there was no other forum available to the plaintiff.<sup>184</sup> The court stressed the lack of any other forum and the fact that quasi in rem jurisdiction was a "last resort" for the plaintiff.<sup>185</sup>

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added that the person seeking attachment specify in a pre-attachment affidavit why "the complainants [sic] ability to recover the amount of his claim may be endangered or impeded if the order of attachment is not issued." MISS. CODE ANN. § 11-31-2(1)(a) (1982). If in personam jurisdiction is available, and if security attachment is not sought, but rather pure quasi in rem jurisdiction of the second type, it is difficult to see how this requirement can be met.

<sup>182</sup> *Rhoades v. Wright*, 552 P.2d 131 (Utah 1976) (*Rhoades I*); *Rhoades v. Wright*, 622 P.2d 343 (Utah 1980), *cert. denied*, 454 U.S. 897 (1981) (*Rhoades II*). See note 183 and accompanying text *infra*.

<sup>183</sup> The first case, a diversity action under the Utah long arm statute, was dismissed by the Tenth Circuit. The grounds for this decision are not given; the dismissal is contained in an unpublished *per curiam* opinion. See 622 P.2d at 344 n.2. However, it can be surmised that in personam jurisdiction under the long-arm statute was not available since the killing took place in Colorado, and the wrong did not arise out of the defendant's ownership of property in the state. See generally UTAH CODE ANN. § 78-27-24 to -28 (1953).

The plaintiff then filed state actions simultaneously in Utah and Colorado. The Colorado action was dismissed on the ground that the state's statute of limitations had run. 622 P.2d at 344. In this procedural posture, the Utah Supreme Court upheld the use of quasi in rem jurisdiction as the only means of providing the plaintiff with a forum for her claim. In the first opinion decided a year prior to *Shaffer*, the court upheld the use of attachment jurisdiction on *Pennoyer* grounds. *Rhoades I*, 552 P.2d at 133-35. After *Shaffer*, the defendant moved for reconsideration, which triggered the court's second opinion. See 662 P.2d at 344-45.

<sup>184</sup> *Id.* at 346-47.

<sup>185</sup> *Id.* at 347. As the court explained:

We are mindful that plaintiff has attempted to litigate her claim both in the United States District Court for Utah and the Colorado District Court. However, in neither instance was plaintiff permitted to reach the merits of her claim. It cannot be denied that so far as this case is concerned, plaintiff has no

In addition to Mississippi and Utah, seven other states appear willing to use quasi in rem jurisdiction. Florida,<sup>186</sup> Louisiana,<sup>187</sup> North Carolina,<sup>188</sup> and New Hampshire<sup>189</sup> all have in-

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other available forum.

*Id.*

<sup>186</sup> FLA. STAT. ANN. § 77.01 (West 1967). In *Wiggins v. Dojcsan*, 411 So. 2d 894 (Fla. Dist. Ct. App. 1982), a Florida intermediate appellate court, over strong dissent, upheld the use of quasi in rem jurisdiction to adjudicate a claim on a promissory note against a nonresident defendant. The court permitted the use of quasi in rem jurisdiction notwithstanding the failure of the plaintiff to attach the property. Although the court recognized that pre-judgment attachment has long been considered an indispensable attribute of quasi in rem jurisdiction, it dispensed with the requirement because it was fraught with procedural due process problems. *Id.* at 895-96.

The dissenting judge disagreed that attachment could be so easily dispensed with. Moreover, the dissent read *Shaffer* as rendering "jurisdictional attachment largely obsolete in states such as Florida which have comprehensive long-arm statutes that encompass most types of minimum contacts." *Id.* at 896 (Grimes, J., dissenting). The dissent objected to the use of quasi in rem jurisdiction in this case when in personam jurisdiction under the long arm statute was possible. To permit quasi in rem jurisdiction the dissent wrote: "puts [the defendants] in a better position than they would have been if they had obtained personal jurisdiction." *Id.* at 897.

<sup>187</sup> LA. CODE CIV. PROC. ANN. art. 4850 (West 1986). In *John v. Brahma Petroleum Corp.*, 699 F. Supp. 1220 (W.D. La. 1988), a federal district court upheld the use of quasi in rem jurisdiction against a nonresident whose only contact with the state was the presence of the attached property. The defendant challenged the attachment on both procedural and substantive due process grounds. The court rejected both contentions. First, it found that the procedural attack was foreclosed by the Supreme Court's 1915 opinion in *Ownbey v. Morgan*, 256 U.S. 94 (1921), which it held was "untarnished" by *Fuentes v. Shevin*, 407 U.S. 67 (1972). *John*, 699 F. Supp. at 1221. This conclusion is subject to serious question. For a discussion of *Ownbey*, and why it may not stand for the proposition for which it was cited, see note 206 *infra*. Second, the *John* court held that the defendant's reliance on *Shaffer* was misplaced because the property attached was related to the claim. This far reaching opinion may presage the ushering in of a broad use of the new quasi in rem jurisdiction in Louisiana.

<sup>188</sup> The North Carolina case is *Canterbury v. Monroe Lange Hardwood Imports Corp.*, 48 N.C. App. 90, 268 S.E.2d 868 (1980). In that case, both the plaintiff and defendant were nonresidents. The plaintiff sold a quantity of lumber to the defendant, and at the defendant's request shipped it to North Carolina for processing. When a dispute arose about whether the plaintiff had delivered a sufficient amount of lumber, the defendant defaulted on the contract and the plaintiff sued attaching the property. Significantly, the plaintiff alleged that attachment was needed not only to obtain jurisdiction, but also to prevent the defendant from removing the property to "points unknown." *Id.* at 91, 268 S.E.2d at 869. The court affirmed dismissal of the complaint on the ground that service of process was improper, but in dicta it indicated that quasi in rem jurisdiction would have been proper in the case. The court grounded this conclusion on the close relationship of the property to the underlying controversy, the defendant's explicit direction that the property be sent to the state, and the tangible nature of the property. *Id.* at 93-95, 268 S.E.2d at 870-71.

The case may very well be atypical. N.C. GEN. STAT. § 1-75.8(5) (1967) provides that a trial court has jurisdiction over any action "in which in rem or quasi in rem jurisdiction

voked quasi in rem jurisdiction in the post-*Shaffer* period. However, courts in those states have stressed that the doctrine

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may be constitutionally exercised." The same statute, in addition, provides for quasi in rem jurisdiction based solely on the presence of the defendant's property within the state or the attachment of a debt owed the defendant in the state. *Id.* § 1-75.8(4). But that provision, which sanctioned quasi in rem jurisdiction in the old fashion of *Harris v. Balk*, was held unconstitutional by the North Carolina Supreme Court immediately after *Shaffer*. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 327, 244 S.E.2d 164, 167 (1978). In *Balcon*, which was the first post-*Shaffer* case decided by the North Carolina Supreme Court, the court went out of its way to disparage the use of quasi in rem jurisdiction despite the legislative authorization for it. Indeed, the court applied *Shaffer* retroactively because in its opinion the free wheeling previous use of quasi in rem jurisdiction was "offensive." *Id.* The court also held that, under *Shaffer*, jurisdiction was not proper in the case before it since the controversy "had no relation to the realty" attached. *Id.*

After *Balcon*, North Carolina courts have continued to be chary in their approval of quasi in rem jurisdiction. While they have authorized it for the determination of disputes in which the title or ownership of property is at issue, *Lessard v. Lessard*, 68 N.C. App. 760, 316 S.E.2d 96 (1984) (entitlement to estate), or where it is used to adjudicate the status of persons in the state, *Chamberlin v. Chamberlin*, 70 N.C. App. 474, 319 S.E.2d 670 (1984) (divorce proceeding), aside from *Canterbury*, quasi in rem jurisdiction usually has been denied. See *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988) (mere presence of property in the state in which the defendant may have an interest is insufficient to support quasi in rem jurisdiction in an equitable distribution action in the absence of evidence that it was intentionally brought into the state); *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 350 S.E.2d 111 (1986) (quasi in rem jurisdiction disapproved because the attachment of three checks owed to the defendant was not related to the claim); *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 470, 472, 265 S.E.2d 637, 640, 642 (1980) (jurisdiction based upon the attachment of a "substantial amount of real property" insufficient to support quasi in rem jurisdiction because the property was "too attenuated" to the underlying claim). But see *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989) (upholding quasi in rem jurisdiction when contacts with the state are numerous).

<sup>189</sup> In New Hampshire, the case is *Hall, Morse, Gallagher & Anderson v. Koch & Koch*, 119 N.H. 639, 406 A.2d 962 (1979). *Hall* was a claim by a law firm for the recovery of a fee from a New Hampshire executor to prosecute a wrongful death action. When the client hired other counsel who obtained a \$250,000 settlement, the plaintiff's law firm attached the proceeds of the settlement. The court affirmed the use of quasi in rem jurisdiction to adjudicate the dispute, and held that the attachment of the settlement was "an added factor" in the minimum contacts analysis. *Id.* at 644, 406 A.2d at 965 (citing *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017 (2d Cir. 1978)). Indeed, the attachment provided the boost necessary to obtain jurisdiction since an earlier action by the plaintiffs for in personam jurisdiction had been dismissed for failure to satisfy the long-arm statute.

Subsequent New Hampshire opinions do not reflect as expansive a view of the potential of quasi in rem jurisdiction. See *Altshuler Genealogical Service v. Farris*, 128 N.H. 98, 508 A.2d 1091 (1986) (rejecting quasi in rem jurisdiction sought by attaching the proceeds of an estate to adjudicate plaintiff's contractual claim for remuneration for locating heirs); *Travelers Indemnity Co. v. Abreem Corp.*, 122 N.H. 583, 449 A.2d 1200 (1982) (no quasi in rem jurisdiction in dispute over a performance bond based upon attachment of real property in the state unrelated to the cause of action).

should be used sparingly.<sup>190</sup> The remaining three states, Maryland, Minnesota,<sup>191</sup> and Pennsylvania,<sup>192</sup> each have laws which provide clear support for a post-*Shaffer* use of quasi in rem jurisdiction. However, in none of these three states is quasi in rem jurisdiction actually in use.<sup>193</sup>

#### D. Overview

In the decade since the landmark opinion in *Shaffer*, there have been two competing trends. On the one hand, the majority of states have either directly abolished quasi in rem jurisdiction,

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<sup>190</sup> See notes 186-89 *supra*.

<sup>191</sup> In both Maryland and Minnesota there is explicit post-*Shaffer* legislation authorizing quasi in rem jurisdiction whenever it is constitutional. In Maryland, attachment jurisdiction is authorized by statute whenever the debtor is a "nonresident individual, or a corporation which has no resident agent in the state, and . . . (3) [t]he action is any other in which the attachment is constitutionally permitted." MD. [CRS. & JUD. PROC.] CODE ANN. § 3-303(b)(3) (1957). Minnesota in 1981, apparently in response to the United States Supreme Court decision in *Rush v. Savchuk*, 444 U.S. 320 (1980), amended its attachment law to provide simply that "[a]ttachment may be used to obtain quasi-in-rem jurisdiction over a party to the extent consistent with due process of law." MINN. STAT. ANN. § 570.02 (West 1988).

Nevertheless, despite the broad grant of authority, neither state has reported opinions in which a plaintiff has successfully sought quasi in rem jurisdiction to obtain jurisdiction, probably because both states have broad long-arm statutes making quasi in rem jurisdiction unnecessary. Both states, unlike New York, have long-arm statutes that purport to reach as far as due process permits. See, e.g., MD. [CRS. & JUD. PROC.] CODE ANN. § 6-103 (1967, amended 1978); MINN. STAT. ANN. § 543.19 (West 1957). See also *Geelhoed v. Jensen*, 277 Md. 220, 352 A.2d 818 (1976); *State v. Continental Form, Inc.*, 356 N.W.2d 442 (Minn. Ct. App. 1984). Not surprisingly, therefore, in both states, there is authority for the proposition that quasi in rem jurisdiction is reserved for situations in which in personam jurisdiction cannot be obtained because the defendant cannot be located. *Belcher v. Government Employees Ins. Co.*, 282 Md. 718, 720, 387 A.2d 770, 771 (1978) (Attachment proceedings "serve the purpose . . . of affording creditors the opportunity to seize the property of a debtor who cannot be reached by service of process because of nonresidence or flight."); *Rice, Inc. v. Intrex, Inc.*, 257 N.W.2d 370 (Minn. 1977) (attachment used to gain in personam jurisdiction over an out-of-state corporation).

<sup>192</sup> In Pennsylvania, a series of jurisdictional provisions passed in 1978, grant Pennsylvania courts the power to adjudicate disputes even when there is no in personam jurisdiction if the defendant has land, chattels, documents or stock certificates in the state. 42 PA. CONS. STAT. ANN. § 5302-5305 (Purdon 1978). There is some doubt as to the constitutionality of these laws. The Reviser's notes to these statutes indicate that they are patterned after a similar set of laws in Michigan. The Michigan laws, however, were struck down as violative of due process. See notes 105-07 and accompanying text *supra*. In addition, here, as in Maryland and Minnesota, the act promises more than it apparently gives. There is only one reported case in which the statute was invoked. *Sterling Box Co. v. Touretz*, 585 F. Supp. 1230 (W.D. Pa. 1984).

<sup>193</sup> See notes 192 and 193 *supra*.

or while retaining the formal authority to use it, have allowed it to wither on the vine. This development has been accompanied by an expansion of state long-arm statutes, and a tightening of the procedural requirements for pre-judgment attachment. On the other hand, a minority of states, led by New York, continue to use quasi in rem jurisdiction, and have been vigorously exploring a new and expansive role for the doctrine in the post-*Shaffer* period. Were it not for the latter development, one might conclude that quasi in rem jurisdiction is effectively a relic. However, the new quasi in rem jurisdiction offers an alternative vision of the role of the doctrine after *Shaffer*. Given the energy and enthusiasm for the new quasi in rem jurisdiction exhibited by New York courts, it may capture the attention and support of the majority of states that have not yet formally abolished quasi in rem jurisdiction. The final section of this Article examines which of the two competing visions of quasi in rem jurisdiction is most appropriate for our time.

### III. A CALL FOR THE ABOLITION OF QUASI IN REM JURISDICTION

Since the new quasi in rem jurisdiction appears to be winning adherents,<sup>194</sup> it may represent the jurisdictional wave of the future. This is an important juncture, therefore, to examine the doctrine to determine whether it legitimately charts an appropriate role for quasi in rem jurisdiction after *Shaffer*. This section undertakes that examination. The new quasi in rem jurisdiction is premised on the notion that attachment jurisdiction can and should be used to judicially "fill gaps" left by state long arm statutes that do not extend as far as due process permits.<sup>195</sup> When this condition exists, the new theory opts for the use of quasi in rem jurisdiction rather than in personam jurisdiction,<sup>196</sup>

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<sup>194</sup> See notes 175-92 and accompanying text *supra*.

<sup>195</sup> See notes 142, 150-58 and accompanying text *supra*. Of course, New York courts themselves have not consistently adhered to this theory. Some courts have authorized quasi in rem jurisdiction when in personam jurisdiction existed under the long arm statute. See notes 159-60 and accompanying text *supra*. To the extent that these cases authorize quasi in rem jurisdiction when there is no "gap" to fill, they lack any theoretical justification and may indeed be unconstitutional. See notes 206-22 and accompanying text *infra*.

<sup>196</sup> The choice of quasi in rem over in personam jurisdiction is not obvious. This is so because it is no longer possible, as it was before *Shaffer*, to avoid the minimum contacts analysis of *International Shoe* by resort to quasi in rem jurisdiction. See notes 68-83 and accompanying text *supra*. Therefore, if quasi in rem jurisdiction is sought, it

provided only that the use of quasi in rem jurisdiction occurs in situations in which minimum contacts exist between the forum, the defendant and the claim.<sup>197</sup> The new quasi in rem jurisdiction accepts the power of the courts to create new rationales for the doctrine without direct legislative action.

This section demonstrates that there is no longer any valid theory for quasi in rem jurisdiction, and that it should be abolished. The new theory cannot withstand analysis for three reasons: (1) it is probably unconstitutional, (2) it represents bad policy and is wasteful, and (3) it violates the doctrine of separation of powers because the question of whether there is a "gap" in a state's long arm jurisdiction is to be determined by the state legislature, not the courts.

A. *Quasi in Rem Jurisdiction is Unconstitutional Because It Deprives the Defendant of the Use of Property Prior to Judgment*

Quasi in rem jurisdiction requires the use of attachment of the defendant's property.<sup>198</sup> In personam jurisdiction does not.

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must be in circumstances in which in personam jurisdiction also would be constitutionally permissible. After *Shaffer*, both in personam and quasi in rem jurisdiction must comport with this constitutional standard. See notes 67-83 and accompanying text *supra*.

The one exception to this would be if there were a lesser due process minimum contacts standard for quasi in rem jurisdiction than for in personam jurisdiction. While the possibility of such a standard developing after *Shaffer* was suggested by several commentators, see, e.g., Riesenfeld, *supra* note 13, at 1203-04; Silberman, *supra* note 3, at 71-77, in the decade or more afterward, no court has indicated any willingness whatever to develop the thought.

<sup>197</sup> See notes 134-61 and accompanying text *supra*.

<sup>198</sup> Professor Silberman has questioned this requirement. Silberman, *supra* note 3, at 46-47. She argues that it is the *presence* of the property within the state that should provide the predicate for quasi in rem jurisdiction not its *seizure*. It is true that without attachment the property may be disposed of prior to judgment. However, the same possibility of obtaining a worthless judgment exists with in personam jurisdiction. After all, there is no guarantee that the defendant will not disappear after service of process. Since this possibility has never been considered sufficient to defeat in personam jurisdiction, Professor Silberman argues that it not defeat quasi in rem jurisdiction either. As she puts it: "The mere presence of property in the state should supply an adequate basis for quasi in rem jurisdiction irrespective of whether the property is subsequently sold or otherwise unavailable as security for enforcement." *Id.* at 47. At the time of *Pennoyer*, attachment was also thought necessary to provide notice to the defendant of the pendency of the action particularly since it was thought at the time that process could not be lawfully served outside of the state. See *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878). But this rationale no longer holds true as process after *International Shoe* can be served



Attachment is a powerful remedy.<sup>199</sup> It is difficult to overestimate the disruption and mischief that an order of attachment can entail:

Attachment not only restricts a defendant's use of property; it also can cause a devastating impact on a defendant . . . Attachment of a bank account may cause checks to bounce, enrage employees who cannot be paid or otherwise disrupt ongoing business relations . . . The disruption of business and acceleration of debts exert powerful pressure on the defendant to settle prior to any adjudication of the dispute.<sup>200</sup>

When quasi in rem jurisdiction is used to fill a gap in a state's long arm statute, it allows the plaintiff not only to bring suit in

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extraterritorially.

Nevertheless, attachment remains a firmly rooted, indispensable attribute of quasi in rem jurisdiction. See F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 76-77 n.8 (3d ed. 1985). But see the one reported exception to this rule, *Wiggins v. Dojcsan*, 411 So. 2d 894 (Fla. Dist. Ct. App. 1982), discussed at note 186 *supra*.

<sup>199</sup> Kheel, *New York's Amended Attachment Statute: A Pre-judgment Remedy in Need of Further Revision*, 44 BROOKLYN L. REV. 199, 202 (1978).

<sup>200</sup> *Id.* Following *Fuentes*, many states amended their attachment laws to provide greater due process protections to defendants. In New York, for example, a three-judge federal court declared New York's attachment statute unconstitutional. *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974), *remanded*, 425 U.S. 73 (1976). Thereafter, in 1977, the legislature amended the statute to provide greater procedural protections. The amendment provided for attachment without notice, but the plaintiff must move within ten days after the levy, with notice as directed by the court, to the defendant and garnishee, for an order confirming the order of attachment. CPLR 6211(b). The plaintiff, in addition, must give an undertaking in an amount fixed by the court and not less than five hundred dollars, which will be paid to the defendant if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to attach the defendant's property. The defendant in such a case can recover all costs and damages, including reasonable attorney fees. CPLR 6212(b) & (d). Upon a motion to vacate or modify an order of attachment, CPLR 6223(b) places the burden of proof on the plaintiff to establish the grounds for the attachment, the need for continuing the levy, and the probability that he will succeed on the merits. These provisions, which apply to quasi in rem jurisdiction attachments, were inserted to ensure that New York was in compliance with these procedural due process requirements.

In 1984, the legislature amended the attachment act to provide additional protections to defendants in quasi in rem cases. CPLR 6211(b), as amended, shortens the time for service on the defendant of notice of the attachment from ten to five days. The order of attachment is to be vacated if the plaintiff fails to move to confirm, or to apply for the one extension permitted. The legislative intent in enacting these amendments was to bring New York's quasi in rem laws into compliance with *Shaffer*. See N.Y. CIV. PRAC. L. & R. 6211 (McKinney 1985 & Supp. 1989) (Commentary). However, even with these safeguards, some have questioned whether the amendments to the New York State attachment law fully remedies the due process procedural problems identified in the previous law. See, e.g., Kheel, *supra* note 199.

the forum, but also to tie up the defendant's property throughout the litigation. In modern commercial or tort litigation this can result in seizure of substantial property.<sup>201</sup> The availability of jurisdictional attachment can easily entice the most honorable plaintiff to use it as a security device, or to coerce the defendant into a settlement that could not be obtained without attachment.<sup>202</sup> Given these problems, it is difficult to justify quasi in rem jurisdiction when the sole rationale for its use is to obtain jurisdiction to adjudicate a claim.<sup>203</sup> This is particularly so when one considers that in personam jurisdiction could just as easily be used to accomplish the same objective without any of these painful side effects.<sup>204</sup>

Because of its dependency on pre-judgment attachment, there are serious,<sup>205</sup> and as yet not fully explored,<sup>200</sup> constitu-

<sup>201</sup> In New York, for example, the values of attached property are often in the millions of dollars. See, e.g., *Cargill, Inc. v. Sabine Trading & Shipping Co.*, 756 F.2d 224 (2d Cir. 1985) (two and one-half million dollar bank account); *Tampimex Oil Limited v. Latina Trading Corp.*, 558 F. Supp. 1201 (S.D.N.Y. 1983) (one and one-half million dollar bank account); *Banco Ambrosiano v. Artoc Bank and Trust Co.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984) (eight million dollar bank account).

<sup>202</sup> Silberman, *supra* note 3, at 59 n.132 ("[T]he advantage of tying up the defendant's property may make attachment an attractive alternative for a plaintiff, and a 'jurisdictional attachment' may permit a plaintiff to avoid the hearing requirements or statutory limitations of some security statutes. At least one court has winked at this subterfuge."); Zammit, *Quasi in Rem Jurisdiction*, *supra* note 26, at 682 ("[Quasi in rem attachment] has been permitted under the guise of jurisdictional attachment when, in reality, its only purpose has been as a security device . . .").

<sup>203</sup> With appropriate procedural safeguards it is not a due process violation to use attachment for purposes other than obtaining jurisdiction. These purposes can include, for example, attachment to prevent destruction or secretion of property. See notes 203-21 and accompanying text *infra*.

<sup>204</sup> As one commentator pointed out, attachment is not needed for jurisdiction "when in personam jurisdiction is available through the minimum contacts approach and service of process by the use of a long arm statute." Comment, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023, 1032 (1973).

<sup>205</sup> The New York State Judicial Conference in its review of that state's attachment law observed that the due process issues involving attachment are "especially acute" because:

The property of the defendant subject to seizure in attachment unquestionably belongs to the defendant, not the plaintiff. It is not the subject of the action, and is related only peripherally to the plaintiff's claim insofar as it may provide a basis for exercising jurisdiction and secure the enforcement of plaintiff's claim.

N.Y. STATE JUD. CONF. REP. TO THE 1977 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES, in N.Y. LEGIS. DOC. NO. 90, at 250 (1977).

<sup>206</sup> Indeed, the *Shaffer* court itself carefully reserved this issue, *Shaffer*, 433 U.S. at 189, but curiously it seems to have been largely overlooked by litigants and courts in the

tional problems that arise from the use of the new quasi in rem jurisdiction. There is little doubt that pre-judgment attachment implicates constitutionally protected property interests of the defendant.<sup>207</sup> A spate of 1970s decisions by the Supreme Court teach that any state statute which permits the pre-judgment attachment of a defendant's property must serve some rational purpose, and even then, the statute must provide procedural safeguards that precede the seizure.<sup>208</sup> This is so because of the

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post-*Shaffer* era. It is difficult to understand why courts and commentators have not spent more time on this question. Perhaps they have been stymied by the Supreme Court's dicta in *Fuentes* that no pre-hearing requirement exists when attachment is sought for jurisdictional purposes since this use of attachment "serve[s] a most basic and important public interest." *Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972) (citing *Owenby v. Morgan*, 256 U.S. 94 (1921)). See also *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1968).

There are two reasons why the *Fuentes* dicta does not "rest . . . on a reasoned extension of . . . fundamental analysis." Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 366 (1973). First, *Owenby*, the case relied on by *Fuentes*, was decided over two decades prior to *International Shoe* at a time when quasi in rem jurisdiction still served an important role in alleviating the artificial strictures of the *Pennoyer* doctrine. As Professors Clark and Landers point out, "*Owenby* might well have been justified in the *Pennoyer v. Neff* 'jurisdiction-is-power' milieu, but that time has long since passed." *Id.* at 367.

Second, *Owenby* itself does not stand for the proposition for which it is cited by the *Fuentes* and *Sniadach* courts. *Owenby* involved a 1915 Delaware attachment law which not only permitted quasi in rem jurisdiction by attachment, but also required the defendant to post a bond before being allowed to defend the action on the merits. It was this latter provision that the defendant in *Owenby* challenged, not the unquestioned power, at that time, to obtain quasi in rem jurisdiction through attachment. See *Shaffer*, 433 U.S. at 194 n.10.

Nevertheless, the apparent approval of *Owenby* by the *Fuentes* Court has immunized the issue from sustained critical analysis. Even those commentators and courts that have examined the issue have not confronted the question head on, but have instead limited their focus to the far more narrow proposition of what kind of hearing is constitutionally required prior to the use of attachment for jurisdictional purposes. They have thereby lost sight of the larger question of whether in the age of full minimum contacts in in personam jurisdiction there is any need, with or without a hearing, for quasi in rem jurisdiction. See, e.g., Moore, *Procedural Due Process in Quasi in Rem Actions After Shaffer v. Heitner*, 20 WM. & MARY L. REV. 157 (1978). But see Bourne, *The Demise of Foreign Attachment*, 21 CREIGHTON L. REV. 141 (1987).

<sup>207</sup> See, e.g., *North Georgia Finishing Corp. v. Di-Chem Inc.* 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

<sup>208</sup> In *Fuentes v. Shevin*, the Supreme Court held that pre-judgment attachment as part of a replevin action was unconstitutional in the absence of procedural safeguards. The Court, in imposing on the state the obligation to provide some pre-deprivation procedure, made clear that the purpose of the inquiry is to "protect against arbitrary deprivations of property." *Fuentes*, 407 U.S. at 81. The Court in its subsequent opinions "effected a slight retreat" on the precise procedural protections that must accompany the seizure. Silberman, *supra* note 3, at 56. However, it has continued to adhere to the fun-

basic due process principle that forbids the state from arbitrary deprivations of property.<sup>209</sup> This right is broad enough to cover the temporary deprivations of property involved in pre-judgment attachment to obtain quasi in rem jurisdiction. As the Supreme Court held in *Fuentes v. Shevin*, "[t]he Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the state is within the purview of the due process clause."<sup>210</sup>

Although the state obviously has a legitimate interest in providing a means of obtaining jurisdiction in its courts,<sup>211</sup> quasi in rem jurisdiction is not a rational method for serving that interest, especially when in personam jurisdiction can be used for the same purposes. It is no answer to say, as New York courts have, that quasi in rem jurisdiction is needed to fill the gaps of in personam long arm statutes. These "gaps" represent voluntary choices of the legislature. The gaps are not the result of constitutional limitations on the legislature that passed the acts.<sup>212</sup> This justification for the constitutionality of quasi in rem jurisdiction, therefore, bootstraps the decision of the legislature to limit its long arm statute into a finding of constitutional necessity for an alternative form of jurisdiction.<sup>213</sup> One commentator has bluntly characterized the argument for quasi in rem jurisdiction when in personam jurisdiction is available as a "sham which should not be tolerated."<sup>214</sup>

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damental notion, underlying all of its opinions in this field, that the state may not authorize arbitrary deprivations of property even if the taking is limited in time and scope. See generally *North Georgia Finishing Corp. v. Di-Chem Inc.*, 419 U.S. 601 (1975) (due process is needed to guard against erroneous deprivations of property); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (procedures that minimize the possibility that property will be taken without justification are constitutional).

<sup>209</sup> See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7 (2d ed. 1989) (The due process clause protects life, liberty, and property from "arbitrary government action.").

<sup>210</sup> *Fuentes*, 407 U.S. at 86.

<sup>211</sup> *Id.* at 91 n.23.

<sup>212</sup> See notes 40-44 and accompanying text *supra*.

<sup>213</sup> As Professor Bourne has remarked, "[a] state which deliberately forgoes this solution [providing full in personam jurisdiction in its long arm statute] is hardly in a position to say that summary deprivations are 'necessary to secure' jurisdiction because it could easily get jurisdiction without imposing such deprivations." Bourne, *supra* note 206, at 168-69.

<sup>214</sup> Zammit, *supra* note 13, at 18-19. See also Bourne, *supra* note 206, at 163-65. Interestingly, one New York court in effect supported this point when it invalidated an order of attachment to obtain quasi in rem jurisdiction over a foreign corporation after

It is also no answer to say that quasi in rem jurisdiction is necessary to prevent the out-of-state defendant from fleeing, from removing property from the jurisdiction, or from secreting assets. If any of these factors can be established in a particular case, they justify attachment, not for the purpose of jurisdiction, but rather for security.<sup>215</sup> These possibilities do not make quasi in rem attachment automatically necessary unless one is prepared to accept that these dangers are present in every case against an out-of-state resident who has property in the state. Plainly such presumptions are not accurate. The common sense observation that "[m]any defendants are simply too heavily involved in local affairs to pull up stakes and run"<sup>216</sup> makes it ludicrous to argue that quasi in rem jurisdiction is necessary in every case to prevent a defendant from fleeing or removing assets.<sup>217</sup> The Constitution forbids such irrebuttable and discriminatory presumptions.<sup>218</sup>

Finally, it is no answer to say that attachment is needed to enable the plaintiff to obtain an enforceable judgment against a nonresident defendant. For one thing, as the *Shaffer* court pointed out, the full faith and credit clause means that a judgment obtained in one jurisdiction where there are no assets to satisfy the claim must be enforced by other jurisdictions where assets exist.<sup>219</sup> Thus, even if all nonresident defendants were tempted to remove their assets from the forum jurisdiction, the resulting judgments would still be enforceable. Furthermore, this argument suffers from the same impediments as the earlier argument that assumed nonresidents would always remove their

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the corporation qualified itself to do business in New York, and therefore became subject to in personam jurisdiction. *Brastex Corp. v. Allen Int'l, Inc.*, 702 F.2d 326 (2d Cir. 1983).

<sup>215</sup> The Supreme Court held as much in *Shaffer*. See notes 73-74 and accompanying text *supra*. See also *Fuentes*, 407 U.S. at 92 (Statutes providing protections against destruction or concealment of property must be "narrowly drawn to meet any such unusual condition.").

<sup>216</sup> *Bourne*, *supra* note 206, at 166 n.164.

<sup>217</sup> In *Intermeat Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. 1978), for example, "it was unlikely that the poultry company was going to abandon the New York market to avoid suit in New York." *Bourne*, *supra* note 206, at 166 n.164. Moreover, even if this were not true, the argument for quasi in rem jurisdiction erroneously assumes that "such removal of property would necessarily eliminate jurisdiction based on the earlier presence of property in the state, an assumption which is clearly illogical." *Id.* at 167.

<sup>218</sup> See, e.g., *id.* at 185-91, 206-10.

<sup>219</sup> See note 73 and accompanying text *supra*.

property to avoid jurisdiction. It simply does not accord with real world facts to treat "all nonresidents sued in a state's courts as presumptive absconders . . . ." <sup>220</sup>

Thus, there is no legitimate governmental purpose supporting the use of pre-judgment attachment solely for jurisdictional purposes. While there is contrary authority,<sup>221</sup> careful analysis demonstrates that "both substantive and procedural due process require the elimination of quasi in rem jurisdiction."<sup>222</sup>

*B. Quasi in Rem Jurisdiction Represents Bad Policy and Is Wasteful Because It Invites Multiple Litigation on a Single Claim and Causes Unnecessary Satellite Litigation*

Because it has limited res judicata effect,<sup>223</sup> a quasi in rem judgment constitutes a wasteful use of scarce judicial resources. When quasi in rem jurisdiction is used, if the claim exceeds the value of the property attached, a successful plaintiff is not prohibited from filing a second action on the same claim to collect the difference. Moreover, a plaintiff who was unsuccessful in the first action, may try to establish liability in a new forum.<sup>224</sup> For the same reason, quasi in rem jurisdiction often allows a defendant to file a limited appearance in the first action, and yet remain free to relitigate liability in a second forum after losing the case in the first state.<sup>225</sup> With an in personam action, by con-

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<sup>220</sup> Bourne, *supra* note 206, at 170.

<sup>221</sup> *Id.* at 158 n.122 (citing cases).

<sup>222</sup> Zammit, *supra* note 26, at 683. For these reasons, several commentators have suggested that the legislature can no longer constitutionally authorize quasi in rem jurisdiction pre-judgment attachment. See, e.g., Clark & Landers, *supra* note 206, at 367; Zammit, *supra* note 26, at 682-83.

<sup>223</sup> A quasi in rem judgment is limited to the value of the property attached. See note 8 and accompanying text *supra*. See also Comment, *supra* note 204, at 1032 n.65.

<sup>224</sup> This fact may encourage a plaintiff with a weak claim to deliberately choose to "bring several quasi in rem suits, hoping to prevail in one." Moore, *supra* note 206, at 182.

<sup>225</sup> If the defendant chooses to appear without reservation, the resulting judgment is binding for the entire amount of the claim. F. JAMES & G. HAZARD, *supra* note 198, at 628. If, however, the defendant makes a limited appearance in the first action, the resulting judgment is not res judicata for the reason that: "the court's authority is the property itself, the court cannot purport to determine the claim itself; the judgment determines only whether the defendant retains the property [if defendant wins] or plaintiff takes it [if plaintiff wins] . . . ." *Id.* Accord RESTATEMENT (SECOND) OF JUDGMENTS § 32(2) (1982).

The more difficult question is determining whether issues litigated in a quasi in rem judgment should be precluded in a subsequent action. The danger of doing so is that it

trast, there can only be one action since the assertion of jurisdiction makes the defendant subject to liability for the entire claim.<sup>226</sup>

Multiple litigation on a single claim might have been acceptable before the expansion of in personam jurisdiction, but it is no longer tolerable because it is inherently unfair to both the plaintiff and defendant. The risk that a jury in a second action may return an inconsistent verdict renders the process unfair to a successful plaintiff. The unfairness to a defendant is similar, but also includes the burden of having to defend two actions not of the defendant's own choosing. It is precisely these twin disadvantages that the res judicata rules are designed to prevent.<sup>227</sup>

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gives the quasi in rem judgment "an added 'bootstrap' effectiveness in subsequent litigation" that can be unfair when the defendant was granted a limited appearance. F. JAMES & G. HAZARD, *supra* note 198, at 628. On the other hand, "if the determinations are not given conclusive effect then the issues involved will have to be tried twice." *Id.* at 629. As Professors James and Hazard state, "there is no good solution to the problem which arises from the anomalous nature of attachment jurisdiction itself." *Id.*

The position of the drafters of the Restatement of Judgments is that issue preclusion will be invoked if the defendant made a limited appearance and contested the quasi in rem actions. RESTATEMENT (SECOND) OF JUDGMENTS § 32(3) (1982). Others, however, disagree. *See, e.g.,* Minichiello v. Rosenberg, 410 F.2d 106, 112 (2d Cir. 1968) (no issue preclusion when the first action was a quasi in rem case under the *Seider* doctrine); J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 100, at 600 ("It has been suggested that it is improper to permit such a judgment to have even collateral estoppel effect since that is inconsistent with the notion of a limited appearance and may be unfair."); Developments in the Law, *supra* note 40, at 954-55 ("[I]t seems fair that a plaintiff who has elected to take advantage of the quasi in rem procedure in a particular forum should thereafter be precluded by an adverse judgment, although a judgment in his favor would not bind the defendant beyond the value of his property.").

In New York, the evident intent of the legislature in providing the right to make a limited appearance to a defendant in a quasi in rem action was that the judgment would have no issue preclusion effect. As Dean (now Judge) McLaughlin wrote:

[I]t would be anomalous to hold that while the defendant may make a limited appearance, if he loses, that judgment may nevertheless be used offensively against him in a subsequent action. To give the first judgment such sweeping effect would allow the defendant in the second action to litigate only the question of damages, his liability having been conclusively established. In practical effect, the first judgment would be virtually in personam.

McLaughlin, *Practice Commentary to CPLR 320(c)(1)*, CONSOLIDATED LAWS OF NEW YORK 381 (McKinney 1972).

<sup>226</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

<sup>227</sup> The purpose of the res judicata doctrine is to "bring an end to controversy" after the parties have been given an opportunity with full due process protections to try the action once. F. JAMES & G. HAZARD, *supra* note 198, at 590. The reason for this is that: "a judgment would be of little use in resolving disputes if the parties were free to ignore it and to litigate the same claims again and again." J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 100, at 615. It is true that according a quasi in rem judgment issue preclusion

The heavy burden placed on the judicial system is another reason why the escape from normal *res judicata* principles permitted by quasi in rem jurisdiction fails to advance any legitimate state objective. In a time that is characterized by burgeoning caseloads<sup>228</sup> and shrinking resources, the *res judicata* doctrine limiting litigants to one bite at the apple is of "critical importance."<sup>229</sup> Dean Carrington's observation that quasi in rem jurisdiction allows "a result very much at odds with the modern concept of *res judicata*"<sup>230</sup> is more painfully true today than it was when it was first made over a quarter of a century ago. In light of the free availability of in personam jurisdiction, quasi in rem jurisdiction should be rejected because it is at war with this fundamental principle of finality that undergirds modern civil procedure.<sup>231</sup>

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effect would mitigate the problem of multiple litigation somewhat. However, at least for persons who file limited appearances, this is not a fair solution to the problem. The basis of a quasi in rem judgment, after all, is the presence of the property in the jurisdiction. If, however, full issue preclusion is given to quasi in rem judgments, this rule would make a quasi in rem action into an in personam action with the added benefit of attachment. In effect, this would permit that which the state by labeling the proceeding quasi in rem, purports to prohibit. As others have written, this is simply unfair. See note 202 *supra*.

<sup>228</sup> By some accounts, almost twelve million lawsuits are filed each year in the United States. COUNCIL ON THE ROLE OF COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* 2 (1982) (11.7 million civil cases were filed in general jurisdiction state courts in 1976). In New York alone in 1987, over 3.5 million actions were filed in state court. Carlisle, *Simplified Procedure for Court Determination of Disputes Under New York's Civil Practice Law and Rules*, 54 BROOKLYN L. REV. 95, 96 n.5 (1988).

<sup>229</sup> J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 100, at 615.

<sup>230</sup> Carrington, *supra* note 45, at 314.

<sup>231</sup> This conclusion remains true whether or not a limited appearance is permitted in quasi in rem actions. As previously noted, a limited appearance is a provision that allows a defendant in a quasi in rem action to defend the action on the merits without exposure to full in personam jurisdiction. See notes 225-27 and accompanying text *supra*.

There has been much debate among scholars and courts as to whether a "limited appearance" should be allowed in quasi in rem actions. Compare Note, "Special" Appearances to Contest the Merits in Attachment Suits, 97 U. PA. L. REV. 403 (1943) (arguing that limited appearances should be permitted) with Blume, *Actions Quasi in Rem Under Section 1655, Title 28 U.S.C.*, 50 MICH. L. REV. 1, 22-24 (1951) (arguing that limited appearances should not be allowed because a trial of the claim should fully determine the contentions between the parties). However, no matter how this debate is resolved the irrationality of quasi in rem jurisdiction remains.

If, on the one hand, a limited appearance is allowed, as is the case in most jurisdictions that have used quasi in rem jurisdiction, Developments in the Law, *supra* note 40, at 955, then the *res judicata* problems already identified remain. See note 8 and accompanying text *supra*. Since it means that the judgment will probably have no claim or issue preclusion consequences, it "becomes a bonus to the defendant," that can be used



In addition to the limited res judicata effect of quasi in rem jurisdiction, these "antique categorizations also lack utility"<sup>232</sup> and efficiency because they "invite prolonged preliminary litigation"<sup>233</sup> on matters that are unnecessary to the just resolution of the claim. Before *Shaffer*, when quasi in rem jurisdiction could be invoked without minimum contacts analysis based solely on the presence of property in the state, even critics of the doctrine were forced to concede that quasi in rem jurisdiction had the virtue of simplicity of application.<sup>234</sup> However, the new quasi in rem jurisdiction, which of necessity must be based upon a minimum contacts analysis, clearly lacks this certainty. In fact, as it has been developed by New York courts, and by those few states that have passed quasi in rem jurisdiction statutes since *Shaffer*, every quasi in rem case is automatically turned into a constitutional case, forcing the court and the parties to engage in a complex search through the vagaries of that doctrine to determine whether or not jurisdiction is present.<sup>235</sup> The search is even more

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as "an archaic shield" against liability for the entire amount of the claim. Comment, *Shaffer v. Heitner's Effect on Pre-Judgment Attachment Jurisdiction Based on Property, and New York's Seider Doctrine: Have We Finally Given Up The Ghost of the Res?*, 27 BUFFALO L. REV. 323, 339 (1978).

If, on the other hand, a limited appearance is prohibited, as some jurisdictions have done, Developments in the Law, *supra* note 40, at 953, then the res judicata difficulty is eliminated, but at an extremely heavy price. In this scenario, the state has effectively coerced the defendant into acquiescing to the assertion of full in personam jurisdiction over him because if he declines the chance to defend, he forfeits his interest in the property that has been attached. And, at the same time, it has provided the plaintiff with the unfair bonus of pre-judgment attachment which would not have been permitted had the state forthrightly authorized in personam jurisdiction in the first place.

<sup>232</sup> Note, *supra* note 45, at 1412.

<sup>233</sup> Zammit, *supra* note 26, at 682.

<sup>234</sup> Professor Carrington made note of this point when he wrote:

The most forceful argument for the preservation of . . . quasi in rem jurisdiction is [its] simplicity. Future lawmakers may conclude that our present effort to rationalize the choice of forum has failed: that the time and energy devoted to resolving disputes about fairness and accessibility are excessive costs for the benefits derived.

Carrington, *supra* note 45, at 309. In *Shaffer*, Justice Marshall acknowledged this argument, but rejected it because "the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high." *Shaffer*, 433 U.S. at 211.

<sup>235</sup> This is so because New York courts have developed the new quasi in rem jurisdiction without any legislative direction. See notes 134-70 and accompanying text *supra*. Moreover, those states that have passed quasi in rem jurisdiction statutes since *Shaffer* have not specified any standards for its use other than a declaration that it is available whenever it is constitutional. See notes 191-93 and accompanying text *supra*.

difficult and wasteful here than when it is undertaken in an in personam case because if intangible property is the basis of the attachment, a court is also forced into the necessity of resolving questions that would never arise in an in personam case. These include such inquiries as determining the situs of the property,<sup>236</sup> and whether it has been brought into the forum intentionally.<sup>237</sup> Arcane questions such as this, which can be avoided by in personam jurisdiction under a carefully defined long arm statute, produce a "substantial amount of uneconomic dispute not pertaining to the merits."<sup>238</sup>

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The determination of whether or not minimum contacts are present in any given case is no easy task, as any first year law student who has struggled with the predictable question on this topic in a Civil Procedure exam can attest. The Supreme Court has not helped make the task any easier. The Court in its post-*International Shoe* cases has sent "mixed signals about how fairness and justice [are] to be determined." Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 856 (1987). The decisions have been called "arbitrary." Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 464 (1981), "muddled", Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47, 53 (1986), and "grounded in faulty logic." *Id.* at 57. One commentator has even compared the Supreme Court's minimum contacts jurisprudence to Macduff's lament in *Macbeth* that "[c]onfusion now hath made its masterpiece." Perdue, *supra* note 26, at 479 (quoting W. SHAKESPEARE, *MACBETH*, Act II, scene iii). Courts, too, have criticized an approach that makes every jurisdictional case into a constitutional minimum contacts case. See, e.g., *Taylor v. Paramount Corp.*, 383 F.2d 634, 640 (9th Cir. 1967). Nevertheless, some states, California being the best known, have drafted long arm statutes that provide for in personam jurisdiction to the full limits of due process. See R. CASAD, *supra* note 41, at 4-4 n.13. These statutes are subject to the same criticism that is now leveled against the new quasi in rem jurisdiction.

<sup>236</sup> When intangible property, such as was involved in *Shaffer*, forms the property that is attached for quasi in rem jurisdiction, then the inquiry inevitably becomes an assessment of whether there can be a seizure "of something that can be seized only metaphorically." Lowenfeld, *supra* note 13, at 122. Determinations of the situs of these intangibles "are even harder than the problems that [the *Shaffer* Court] addressed in undertaking its new look at quasi in rem actions." *Id.* See also *Developments in the Law*, *supra* note 40, at 955-56 (pointing out "the difficulty of determining where property is situated" for jurisdictional purposes).

<sup>237</sup> This is obviously an important question given the "purposeful availment" branch of the minimum contacts test. See generally Smit, *supra* note 13, at 525 ("When a creditor does not control the movements of his debtor, he cannot fairly be regarded as having exposed to suit . . . the debt owed by the debtor. Therefore, in cases of transient intangibles the exercise of quasi in rem jurisdiction becomes particularly hard to defend.").

<sup>238</sup> Carrington, *supra* note 45, at 309. See also Younger, *Quasi in Rem Defaults After Shaffer v. Heitner: Some Unanswered Questions*, 45 BROOKLYN L. REV. 675, 677 (1979) (pointing out that the minimum contacts standard of *Shaffer* "lacks predictability. In cases of quasi in rem jurisdiction, lawyers henceforth will need to worry about questions the mere asking of which would have been regarded as excessively imaginative

Thus, the new quasi in rem jurisdiction doctrine lacks support in wise public policy because it wastefully encourages multiple litigation and preliminary litigation over unnecessary issues. For these reasons many thoughtful commentators have proposed its elimination even when authorized by the legislature.<sup>239</sup> An additional oddity of the new quasi in rem jurisdiction, however, is that it has developed almost entirely without any legislative approval. The next section examines the significance of this fact.

### C. *Judge-Made Quasi in Rem Jurisdiction Is Improper Judicial Lawmaking and Violates Separation of Powers*

The pathway for the new quasi in rem jurisdiction has been cleared largely through judicial decision-making by New York courts acting on their own without any legislative authorization.<sup>240</sup> Even if there were a continuing need for quasi in rem jurisdiction,<sup>241</sup> it should not be judicially imposed. The funda-

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before Shaffer.”).

<sup>239</sup> See, e.g., Carrington, *supra* note 45, at 321 (Quasi in rem jurisdiction is “out of step . . . with the modern quest for a fair forum . . .”); Von Mehren & Trautman, *supra* note 40, at 1178 (“Ultimately, all that should remain of *Pennoyer v. Neff*, *Harris v. Balk*, and their progeny is specific jurisdiction to secure assets against dissipation and concealment while a controversy is being litigated in an appropriate forum.”); Zammit, *supra* note 26, at 683 (“The institution of quasi in rem jurisdiction has outlived its usefulness.”); Note, *supra* note 45, at 1424 (“The abolition of quasi in rem jurisdiction . . . would go far toward eliminating the unreasonable hardship imposed on the defendant by this rule.”); Developments in the Law, *supra* note 40, at 955-56 (calling for a unification of jurisdictional concepts because quasi in rem jurisdiction is “unrealistic and inadequate . . .”).

This is not to say that quasi in rem jurisdiction does not have any important role to play in the jurisdictional scheme when it is put to uses other than general dispute purposes. When quasi in rem jurisdiction is used for specific property purposes such as the determination of title to a piece of property, or for attachment to enforce a judgment, or as security for a judgment to be obtained when there are legitimate grounds for apprehension that the defendant is about to abscond or secrete the property attached, there is not the same reason for concern. Indeed, the *Shaffer* court itself took pains to make clear that its opinion was not disturbing these uses of quasi in rem jurisdiction. *Shaffer*, 433 U.S. at 208-09.

<sup>240</sup> See notes 133-93 and accompanying text *supra*. Although after *Shaffer* quasi in rem jurisdiction has been authorized by the legislatures of three other states, Minnesota, North Carolina and Pennsylvania, it has not been utilized in those states. See notes 188, 191-92 and accompanying text *supra*.

<sup>241</sup> For the reasons advanced earlier in this section, quasi in rem jurisdiction no longer has a legitimate role to play in the determination of state court jurisdiction. See notes 198-239 and accompanying text *supra*. Assuming, however, for the purposes of analysis that it does retain contemporary validity, this portion of the Article maintains

mental policy determination involved in jurisdictional matters ought to be, and historically has been, in the province of state legislatures, not the courts.

There is a long-standing tradition in this country to leave the task to defining the contours of each state's extraterritorial jurisdiction of the legislature. After *International Shoe* created additional possibilities for in personam jurisdiction over nonresidents, it was the state legislatures, not state courts, that decided what portion, if any, of that jurisdiction each of the states would claim.<sup>242</sup> While this proposition has largely been assumed with little discussion,<sup>243</sup> the decision to assign the task to the legislative process rests on sound principles. There are two reasons why courts should not be permitted to act alone in this field.

First, the legislature has a greater ability to formulate relatively precise standards. Rather than being forced to formulate concepts on a case-by-case basis, the legislature has the ability to specify in advance the specific criteria that will lead to a proper assertion of quasi in rem jurisdiction.<sup>244</sup> Without legislative guidance, the courts are left with only the vague outlines of the minimum contacts, substantial justice and fair play standards of the Supreme Court's decisions. Courts forced to rely entirely on such criteria are unable to give clear definition to the boundaries of a state's jurisdiction to potential litigants.<sup>245</sup>

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that this determination ought to be made by the legislatures not the courts. See notes 242-74 and accompanying text *infra*.

<sup>242</sup> The legislative response to *International Shoe* is revealed in long arm statutes which are now found in every state in the union. For a description of these laws, see R. CASAD, *supra* note 41, at §§ 7.01-9.12.

<sup>243</sup> This point is so obvious that it is often made almost without any consideration that it would be otherwise. An example is found in an exhaustive treatment of state court jurisdiction by the editors of the Harvard Law Review in 1960. Developments in the Law, *supra* note 40, at 909. In that review, the authors write: "Within the limits imposed by the due-process and commerce clauses of the Constitution and by federal statutes the states are free to regulate the business of their courts. *The state legislature* must therefore define those situations in which its courts have the power to render a judgment." *Id.* at 998 (emphasis added) (footnotes omitted).

A similar hesitancy to impose judge-made jurisdictional rules prevails in the federal system. See, e.g., *Omni Capital Int'l v. Rudolf Wolf & Co.*, 484 U.S. 97, 109 (1987) (pointing out that "a legislative grant of authority is necessary" for rules concerning jurisdiction over non-resident defendants).

<sup>244</sup> Chase, *supra* note 13, at 635 n.90.

<sup>245</sup> See note 235 and accompanying text *supra*. When courts are left to themselves "to develop rules on the basis of only the most generalized standards," court-imposed solutions mean that the essential element of predictability is largely lost. Chase, *supra*

The inevitable unpredictability that results when courts are forced to decide cases on the basis of vague standards is troubling on two counts. First, unpredictability increases the already high cost of litigation by encouraging court challenges to jurisdiction. This is "especially unpleasant . . . when [these disputes] arise from a procedural rule; procedure is, after all, supposed to advance the goals of efficiency and fairness in litigation, not stand in their way."<sup>246</sup> Second, vague standards impose an unfair and artificial barrier to business planning, which must inevitably take into account the impact of jurisdictional rules on where a potential dispute might be resolved.<sup>247</sup>

The New York development of the new quasi in rem jurisdiction is a case study of the disutility of permitting the judiciary to unilaterally develop this doctrine. The standards that have emerged from the cases are imprecise and confused.<sup>248</sup> While legislation might not cure these uncertainties entirely, a carefully crafted statute could go a long way toward bringing greater certitude to the topic.<sup>249</sup>

There are situations, to be sure, in which courts have developed bodies of law based upon open-ended standards.<sup>250</sup> In those situations, unpredictability is simply the price that our system pays for the benefits that flow from the judicial process. In addition, even when the legislature does act, absolute predictability obviously cannot be achieved. Thus, unpredictability of judicially developed standards for the new quasi in rem jurisdiction is by no means a fatal criticism in itself. However, there is a second, and in some ways even more important, reason that courts should not blaze new trails with quasi in rem jurisdiction: the choices that are involved in forging the new doctrine are decisions that in a democracy should be determined in a representative body rather than the courts.

Procedural choices may seem "neutral," but they clearly are

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note 13, at 634.

<sup>246</sup> *Id.* at 635.

<sup>247</sup> *Id.* at 634.

<sup>248</sup> See notes 162-70 and accompanying text *supra*.

<sup>249</sup> This, of course, assumes that the legislature would choose after *Shaffer* to enact such a statute, and that it would be constitutional for it to do so. As discussed earlier, these are unlikely assumptions. See notes 198-239 and accompanying text *supra*.

<sup>250</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Due process cannot be defined with "exactness.").

not. "[M]ore is involved in a change in jurisdictional reach than a reflection of changing technology."<sup>251</sup> Such decisions involve considerations of sophisticated social, economic and political issues. Does a state want to provide wide access to suits against nonresidents? Will doing so provide a benefit that it wishes to bestow on important commercial interests in the state?<sup>252</sup> What will be the economic impact on the judicial system for the state's taxpayers if one course rather than another is taken? The legislature can better "assemble and evaluate data that should bear on these issues, such as the questions about impact on commercial activity within the state."<sup>253</sup>

With quasi in rem jurisdiction, these questions take on an added dimension. Since, as a practical matter, quasi in rem jurisdiction is only invoked when the defendant has substantial assets in the jurisdiction, the decision to permit its use, for the most part, benefits creditors.<sup>254</sup> Providing these creditors with another means, and possibly an additional forum, for pursuing their debtors puts a powerful added weapon in their arsenal. Quasi in rem jurisdiction offers creditors a greater choice of where to sue their out-of-state debtors, and a means of tying up their debtors' property, even if it is not related to the claim.

This is not to say that the choice involved in whether or not to provide quasi in rem jurisdiction involves pitting the economically advantaged against the economically deprived. In the normal quasi in rem jurisdiction case both participants have substantial resources.<sup>255</sup> The plaintiff cannot mount such a suit unless the plaintiff has the funds to hire an attorney who can find the defendant's assets and obtain an order of attachment.

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<sup>251</sup> Chase, *supra* note 13, at 618.

<sup>252</sup> This is apparently the policy choice that has been made by New York courts that have used the new quasi in rem jurisdiction. See notes 175-85 and accompanying text *supra*. While this policy choice may be legitimate, it is one for the legislature, not the courts, to make.

<sup>253</sup> Chase, *supra* note 13, at 634.

<sup>254</sup> This normally occurs in commercial litigation, although occasionally the new quasi in rem jurisdiction has been used in tort cases. See notes 175-85 and accompanying text *supra*. In a tort case, the plaintiff is a creditor only when seeking to obtain a judgment against the defendant.

<sup>255</sup> In *Banco Ambrosiano v. Artoc Bank and Trust Co.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984), both the plaintiff and the defendant were large commercial banks. The loan that precipitated the lawsuit totalled fifteen million dollars. This case is typical of the kind of litigation involved in quasi in rem jurisdiction disputes. See note 201 and accompanying text *supra*.

Moreover, the effort is not worth the candle unless the defendant has resources worth attaching. Furthermore, since both sides need substantial funds, and since the claims involved are usually commercial, either side is as capable of becoming a creditor as a debtor. One can expect a certain amount of role-switching between plaintiffs and defendants in quasi in rem jurisdiction cases.<sup>256</sup> Thus, "attachment jurisdiction has been essentially a matter of intra-class, rather than inter-class, politics."<sup>257</sup> These policy questions are best resolved in the halls of a state legislature rather than in the courtroom. A cardinal tenet of the American political system is that political battles among equals, either of whom have access to political power, are best resolved in the political arena.<sup>258</sup> Unless legislation intrudes on fundamental entitlements or politically disadvantaged people, it is normally for the legislatures to set the agenda, not the courts.<sup>259</sup>

Some might argue that the pre-*Shaffer* legislative authorization for quasi in rem jurisdiction negates this point. However, this argument is misplaced since those statutes were based on the old understanding of state court jurisdiction developed when in personam jurisdiction was severely limited by the *Pennoyer* doctrine and when quasi in rem jurisdiction could be based on the mere presence of property in the state. The legislatures that passed these laws chose quasi in rem jurisdiction because it was a sorely needed method of providing a forum for plaintiffs who otherwise could not sue.<sup>260</sup> The new quasi in rem jurisdiction, however, was created by the judiciary after all the ground rules had changed. Thus, the argument that these statutes represent the legislature's conscious preference for the new quasi in rem

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<sup>256</sup> "Within the commercial establishment the same people who are sometimes creditors are often debtors in other transactions and, in general, are likely to hold property subject to attachment." Chase, *supra* note 13, at 620.

<sup>257</sup> *Id.*

<sup>258</sup> There is a respectable body of authority for the proposition that the judicial power ought to be reserved for the protection of those who lack access to political power. As one commentator pointed out: "[t]his judicial obligation to enforce the rights of the politically powerless is at the heart of the American political system." Comment, *Confronting the Conditions of Confinement: An Expanded Rule for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 385-86 (1977). See also *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); J. ELY, *DEMOCRACY AND DISTRUST* 73-179 (1980); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439, 443 (1982).

<sup>259</sup> See note 258 and accompanying text *supra*.

<sup>260</sup> See notes 29-33 and accompanying text *supra*.

jurisdiction over in personam jurisdiction cannot be taken seriously.<sup>261</sup>

The New York judicial development of the new quasi in rem jurisdiction exemplifies this unjustifiable abrogation of the legislative process. The only laws on New York books authorizing quasi in rem jurisdiction were passed almost fifteen years prior to *Shaffer*.<sup>262</sup> After *Shaffer*, the Law Revision Commission, the body charged with keeping New York statutes current, decided that fresh authorization for quasi in rem jurisdiction was needed.<sup>263</sup> A bill providing for this was proposed to the legisla-

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<sup>261</sup> A statute has been called obsolete when the legislative intent that led to its passage is no longer responsive to existing constitutional conditions. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). This condition can occur when, as is the case with old quasi in rem jurisdiction laws, the laws are "inconsistent with new constitutional developments." *Id.* at 6.

<sup>262</sup> Ch. 308, [1962] N.Y. Laws (eff. Sept. 1, 1963). This law, codified in CPLR 301, provides that: "A court may exercise such jurisdiction over person, property, or status as might have been exercised heretofore." CPLR 301. The legislative intent for this provision was to permit state courts to exercise jurisdiction in the manner permitted prior to passage of the act. At that time, of course, quasi in rem jurisdiction was utilized with the *Pennoyer* principles that were rejected in *Shaffer*. See notes 34-40, 43 and accompanying text *supra*. It is possible to read the words "as might have been exercised heretofore" to authorize the courts to use quasi in rem jurisdiction on a minimum contacts rather than presence theory, but this was clearly not the legislature's intention because:

Were this the intent, it would not have been necessary to draft CPLR 302 . . . . The Court of Appeals has expressly rejected the suggestion that the contacts theory now embodied in CPLR 302 could have been applied by the courts even before the enactment of the CPLR; major changes in the bases of jurisdiction are, it has declared, legislative matters.

J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* § 301.10 (1989).

<sup>263</sup> In 1978, after the *Shaffer* decision, the New York Law Revision Commission recommended to the legislature that the CPLR be amended to permit the continued use of quasi in rem jurisdiction in conformity with that decision. The Commission, in its report to the legislature that year, stated that *Shaffer* "has deeply affected attachment jurisdiction." Recommendation of the Law Revision Commission to the 1978 Legislature Relating to Revision of Quasi in Rem Jurisdiction and Related Provisions in Article 3 of the Civil Practice Law and Rules, [1978] N.Y. LAW REV. COMM'N REP. 10.

The Commission recognized that *Shaffer* upset "[a] cornerstone of the law of jurisdiction . . . that a plaintiff could obtain quasi in rem jurisdiction by attachment in an action involving a cause of action having nothing to do with the object attached." *Id.* at 12. The Commission stated that even before *Shaffer* it "was convinced . . . that attachment . . . effected a denial of due process . . ." *Id.* at 13. However, the Commission read *Shaffer* to provide some continued role for quasi in rem jurisdiction if it were based on a minimum contacts analysis. To establish this new use of attachment jurisdiction, the Commission recommended that the legislature provide "guidance as to appropriate criteria" for the use of quasi in rem jurisdiction. *Id.* at 17.

The bill would have authorized quasi in rem jurisdiction in conformity with the minimum contacts analysis of *Shaffer* and *International Shoe*. The bill listed the following



ture in 1979, but it failed to gain passage.<sup>264</sup> The courts fash-

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seven factors for the court to consider in determining whether to issue a writ of prejudgment attachment for this purpose:

- [1.] the plaintiff's relationship to the state,
- [2.] the relationship of [plaintiff's] cause of action to the state,
- [3.] defendant's relationship to the state, and
- [4.] any benefit accruing to [defendant] because of the relationship of his property to the state,
- [5.] the relationship of a garnishee, if any, to the state,
- [6.] whether the property is tangible or intangible and if tangible, whether it is permanently or temporarily located in this state, and
- [7.] whether there is another forum in which the plaintiff could reasonably pursue his remedy.

*Id.* at 17-18. For an in-depth analysis of the bill, see Chase, *supra* note 13, at 627-37. See also Office of Court Administration, *Legislative Memorandum* S.2469, A.5836 (May 28, 1980) (reviewing the bill and expressing the opposition of the CPLR Advisory Committee on the ground that codification in the area is unwise "[u]ntil the constitutional issues have been further clarified" by the United States Supreme Court).

<sup>264</sup> The bill, Assembly No. 5836, passed the New York State Assembly on January 3, 1979, but was referred by the Senate, Senate No. 2469, to its Codes Committee from which it failed to emerge. REPORT OF THE LAW REVISION COMMISSION TO THE LEGISLATURE OF THE STATE OF NEW YORK, 34 (Jan. 31, 1980). The bill was reintroduced in both the Assembly and the Senate in the following term. See NEW YORK LEGISLATIVE RECORD AND INDEX, S.154, A.355 (1980). This time it failed to pass in either house. *Id.* While it was reintroduced in the Assembly the next year, it was not again considered by the Senate. See NEW YORK LEGISLATIVE RECORD AND INDEX, A.8 (1981).

The rejection of this statute belies the argument that the old New York quasi in rem jurisdiction statute provided authority for the courts to fashion a new theory for the doctrine after *Shaffer*. Although CPLR 301, which provides that New York courts "may exercise such jurisdiction over persons, property or status as might have been exercised heretofore," and CPLR 314(3) which allows service of process outside of the state when property has been attached, remain on the books, the clear intent of the 1963 legislature that enacted these laws was to limit courts to using quasi in rem jurisdiction based on *Pennoyer* principles. See note 262 and accompanying text *supra*.

The argument to the contrary is misplaced. That argument reads CPLR 301 and 314 together for the proposition that the legislature condones any use of quasi in rem jurisdiction that is constitutional. These statutes were initially passed in 1963 at a time when quasi in rem jurisdiction could be obtained constitutionally whenever there was property in the jurisdiction that was attached. See notes 27-63 and accompanying text *supra*. Nevertheless, the argument asserts that constitutional changes since that time do not affect the meaning of the statute. All that has changed in the intervening years, the argument runs, is that the constitutional basis for assessing the validity of quasi in rem jurisdiction has changed; legislative permission for its use remains.

Despite the superficial appeal of this argument it is seriously flawed. CPLR 301 was specifically designed to permit courts to assert jurisdiction in the ways that they had in the past before *International Shoe* made possible the use of long arm jurisdiction. See notes 40-42, 44 and accompanying text *supra*. It is specifically limited to that use. Under this arrangement the legislature used CPLR 302 to express its views about the use of the state's new powers to extend its judicial power to include persons who establish "minimum contacts" with the state while at the same time codifying the older *Pennoyer* "presence" basis of jurisdiction in CPLR 301. A key purpose of this limitation is to make

ioned the new quasi in rem jurisdiction despite this legislative rejection of a bill providing for a post-*Shaffer* use of the doctrine.<sup>265</sup> Thus, the effect of the New York court decisions creating the new quasi in rem jurisdiction is not only to embrace a concept that the legislature has rejected, but to amend the state's long arm statute. The practical consequence of these decisions is to expand the state's long arm jurisdiction to areas that were deliberately left uncovered by the state legislature.<sup>266</sup>

This might be tolerable if the legislature had defaulted by not making any effort to keep the long arm statute current in light of changing technology and constitutional developments, or if the legislature had explicitly delegated responsibility for maintaining the currency of its long arm statute to its courts.<sup>267</sup> In New York neither condition is true. The legislature has taken seriously its responsibility for keeping the long arm statute current. In the quarter century since the long arm statute was first passed in 1963, the New York State legislature has amended it

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clear that it is the legislature's province to decide how much of the new possibilities for extraterritorial jurisdiction it wished to take, while at the same time preserving what the judiciary alone has done before.

The scheme set up in CPLR 301 and 302, therefore, foreclosed the possibility that courts acting alone would create uses for the minimum contacts analysis that were not covered by CPLR 302. J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 262, at § 301.10 ("Were the [contrary the] intent [of CPLR 301], it would not have been necessary to draft CPLR 302 . . ."). Thus, the only plausible meaning of the words "as might have been exercised heretofore" as applied to quasi in rem jurisdiction is that it refers to the old, and now discredited, pre-*Shaffer* method of obtaining quasi in rem jurisdiction. The only way to obtain quasi in rem jurisdiction after *Shaffer*, however, is through minimum contacts analysis. It is precisely this new way of using the state's power that the legislature reserved to itself. CPLR 301, thus, cannot be understood as giving carte blanche to the judiciary to create the new quasi in rem jurisdiction. Under the scheme established by the legislature twenty-five years ago, if New York is to have a new quasi in rem jurisdiction it should be a legislative, not a judicial, creation.

<sup>265</sup> See note 264 and accompanying text *supra*.

<sup>266</sup> Examples include *Intermeat v. American Poultry*, 575 F.2d 1017 (2d Cir. 1978); *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977); and *Banco Ambrosiano v. Artoc Bank and Trust Co.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984). See notes 134-46 and accompanying text *supra*.

<sup>267</sup> The California long arm statute is a model of this type of statute. It provides for long arm jurisdiction to the limit of the due process clause. While a statute of that nature has all the difficulty described in the discussion of the unpredictability that results when courts are left at sea to adjudicate in a standardless field, see note 235 and accompanying text *supra*, it at least legitimizes judicial activity in the development of the law. The New York legislature, however, has not opted for the California approach. See notes 134-58 and accompanying text *supra*.

five times.<sup>268</sup> Each amendment was preceded by careful study by the New York State Judicial Conference or by the Law Revision Commission.<sup>269</sup> While these amendments are certainly subject to criticism,<sup>270</sup> one cannot plausibly argue that the legislature has defaulted in its oversight of that law. Moreover, in not one of its amendments to the law has the legislature delegated sole responsibility to the courts to fashion the contours of the law.

The New York courts' boldness in inventing a new role for quasi in rem jurisdiction in the face of legislative occupation of the field is particularly perplexing when one contrasts it with the courts' approach to in personam jurisdiction. In that area New York courts have expressly deferred to the legislature, noting its superior ability to fix precise jurisdictional rules. In *Simonson v. International Bank*,<sup>271</sup> for example, the New York Court of Appeals, after *International Shoe*, refused to permit jurisdiction over a foreign corporation under circumstances not authorized by statute for the following reasons:

There can be no doubt that *International Shoe Co.* . . . opened a broad, largely undefined area for state exercise of jurisdiction over foreign corporations. (citing authority) The standard declared in those cases, of "traditional notions of fair play and substantial justice", is itself, at best, rather vague and nebulous. The formulation of specific rules to implement such a standard seems more appropriately the function of the Legislature than of the courts. There is the added consideration that legislation, as distinguished from judicial revision, is the more suitable vehicle for fixing precise jurisdictional guidelines for the future; only through such legislation may foreign corporations be put on notice that they run the risk of being exposed to suit here

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<sup>268</sup> Ch. 590, § 1, [1966] N.Y. Laws 1347 (adding a new provision to CPLR 302(a) to cover tortious acts outside the state that cause injury within the state); Ch. 859, § 1, [1974] N.Y. Laws 2121 (adding a new subdivision to CPLR 302(b) to cover matrimonial actions); Ch. 252, §§ 1, 2, [1979] N.Y. Laws 482 (enlarging the transaction of business test of CPLR 302(a)(1) to cover persons who contract out of state to provide goods or services in the state); Ch. 281, § 22, [1980] N.Y. Laws 444 (amending the matrimonial provision of CPLR 302(b) to conform to divorce reform legislation); Ch. 505, § 1, [1982] N.Y. Laws 1428 (amending the matrimonial section of CPLR 302(b)).

<sup>269</sup> See, e.g., Reese, *A Study of CPLR 302 in Light of Recent Judicial Decision*, ELEVENTH ANN. REP. N.Y. JUD. CONFERENCE (1966); Note, *supra* note 45.

<sup>270</sup> See, e.g., Homburger, *The Reach of New York's Long Arm Statute: Today and Tomorrow*, 15 BUFFALO L. REV. 61 (1965); Note, *New York's Long-Arm Jurisdiction: The Case for the Agent Plaintiff*, 11 BROOKLYN L. REV. 625 (1975); Comment, *The Long Arm and Multiple Defendants: The Conspiracy Theory of in Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984).

<sup>271</sup> 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964).

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For over twenty-five years, New York courts have continued to adhere to the view that the reach of that state's long arm jurisdiction is a matter for the State House, not the courthouse. Just two years ago, for example, in *Talbot v. Johnson Newspaper Corp.*,<sup>273</sup> the court rejected an attempt to assert long arm jurisdiction over a California defendant in a defamation case even though it might have been constitutional to do so, because jurisdiction was not provided in the state's long arm statute.<sup>274</sup>

This long-standing, and quite appropriate deference to the legislature, makes the New York courts' invention of the new quasi in rem jurisdiction incongruous, considering that it is based on a "gap" in the state's long arm statute. The incongruity is especially alarming since the "gap" is created by the legislature's considered judgment to limit the reach of its jurisdiction, a judgment that the New York courts have professed to adhere to conscientiously.

## CONCLUSION

Thirteen years after *Shaffer v. Heitner*, a new brand of quasi in rem jurisdiction is emerging. Invented by the New York courts, the concept has so far attracted the approval of only a few states. However, given the prestige and influence of the New York Court of Appeals<sup>275</sup> and the United States Court of Ap-

<sup>272</sup> *Id.* at 287-88, 200 N.E.2d at 430, 251 N.Y.S.2d at 438 (citations omitted).

<sup>273</sup> 71 N.Y.2d 827, 522 N.E.2d 1027, 527 N.Y.S.2d 729 (1988).

<sup>274</sup> *Id.* at 829-30, 522 N.E.2d at 1028-29, 527 N.Y.S.2d at 730-31.

Deference to the legislature has been a consistent theme in civil procedure matters in New York, except for the curious exception carved out for the new quasi in rem jurisdiction. With statutes of limitations, for example, the New York Court of Appeals has held that the legislature is "better suited to change the rule" even though old legislation mandated that a plaintiff's cause of action in a toxic tort case was destroyed because the statute applied from the date of last exposure, not the date of discovery. Farrell, *Civil Practice*, 33 SYRACUSE L. REV. 31, 33 (1982). In 1981, the legislature after prodding by the court, see, e.g., *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), responded by amending the law. See CPLR 214-b (McKinney Supp. 1981).

<sup>275</sup> See, e.g., F. BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932* 248 (1985) (referring to the "prestige of the New York Court of Appeals as a common law tribunal"); R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 54 (1955) (describing the New York Court of Appeals as a "great common law court").

peals for the Second Circuit,<sup>276</sup> it cannot be ignored and could in the near future win the acceptance of other states.

While a few states have explicitly rejected the concept, most states have not. In these jurisdictions, quasi in rem jurisdiction is not actively used, but it has not been officially buried. These states may be influenced by the new approach. Other states have passed legislation providing for quasi in rem jurisdiction but have not made use of it; these states may also come into the orbit of the new quasi in rem jurisdiction. In the aftermath of *Shaffer v. Heitner*, which put the doctrine of quasi in rem jurisdiction on an equal footing with in personam jurisdiction, this development is both surprising and troubling. After *Shaffer*, there is no longer any sound reason for continuing to use quasi in rem jurisdiction.

Quasi in rem jurisdiction is an idea whose time has gone; it should fade from the jurisdictional landscape. The rationales offered for the new quasi in rem jurisdiction cannot withstand serious scrutiny. The new quasi in rem jurisdiction is based on the fallacious notion that attachment jurisdiction can usefully fill "gaps" in state long arm statutes. But any gaps that exist can easily be plugged by the simple expedient of amending the long arm statute itself. By doing so, rather than relying on quasi in rem jurisdiction which requires the attachment of property prior to any judicial determination of liability, a state can legitimately advance the interests associated with extraterritorial jurisdiction without intruding on the property interests of nonresident defendants. The new quasi in rem jurisdiction also unnecessarily complicates litigation by creating a ground for pretrial motions and hearings directed at the propriety of the attachment and by opening up possibilities of multiple litigation of the same claim. In addition, it adds an unneeded club for plaintiffs who might be tempted to use attachment not to obtain jurisdiction otherwise denied them, but to coerce settlements from nonresident defendants. Finally, the new quasi in rem jurisdiction developed by New York courts seriously intrudes on the legitimate preroga-

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<sup>276</sup> See, e.g., Gould, Book Review, N.Y.L.J., Mar. 20, 1989, at 2, col. 3 (reviewing J. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT* (1989)) ("[N]o one can deny that the quality of its judges, the richness of its contributions to American Jurisprudence, the historical significance of its decisions, have elevated the Second Circuit far above parochial significance into a tribunal that enjoys an awesome respect throughout that land.").

tives of the legislature and fosters the uncertainties that often accompany judge-made law.

While these costs might have been worth the benefits of providing quasi in rem jurisdiction in an earlier day when there were serious practical and doctrinal impediments to the use of in personam jurisdiction over nonresidents, such conditions no longer exist. The use of quasi in rem jurisdiction in our time, whether new or old, is irrational, and very possibly unconstitutional. The overture of the New York courts to develop a new role for quasi in rem jurisdiction should be regarded for what it is: a siren call to return to the past.