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Shaffer v. Heitner—The Demise of Quasi In Rem Jurisdiction?

In a recent decision, the Supreme Court extended the requirement of minimum contacts for assertions of in personam jurisdiction to assertions of in rem and quasi in rem jurisdiction. The Court recognized that historical justifications for basing jurisdiction on the mere presence of property within the jurisdiction were no longer viable. The author argues that although the case was properly decided, the decision may prove difficult to apply and casts serious doubt on previously settled areas of law.

In 1974, a nonresident shareholder in Greyhound Corporation, a business incorporated in Delaware, filed a shareholder's derivative suit in Delaware chancery court. The suit alleged that the corporation, its wholly owned subsidiary—Greyhound Lines, Inc.—and twenty-eight present and former officers had violated their duties to the corporation through conduct rendering the corporation liable for substantial damages in a private antitrust suit and a large fine in a criminal contempt action.[1] The misconduct which resulted in the penalties took place in Oregon. None of the individual defendants were Delaware residents. In order to compel the general appearance of the nonresident defendants, plaintiff moved to sequester property of the individual defendants in Delaware, pursuant to Delaware Code title 10, section 366.[2] Accompanying the motion was an affidavit stating that the individual defendants were nonresidents of Delaware, and identifying the property to be sequestered as stocks, options, warrants, and certain corporate rights of defendants. The court issued the sequestration order the same day the motion was filed, and pursuant to that order, stop transfer orders were placed on approximately 82,000 shares of Greyhound common stock belonging to nineteen defendants and options belonging to two other

1. The judgment in the antitrust suit was for $13,146,090 plus attorney's fees. Mt. Hood Stages, Inc. v. Greyhound Corp., No. 68-374 (D. Ore. 1973), *aff'd*, 555 F.2d 687 (9th Cir. 1977). The judgment in the contempt action was for a total of $600,000. United States v. Greyhound Corp., 363 F. Supp. 525 (N.D. Ill.), 370 F. Supp. 881 (N.D. Ill. 1973), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

2. DEL. CODE tit. 10, § 366 permits the court to compel the appearance of the defendant by the seizure of all or part of his property and to order a sale of such property to pay the demand of the plaintiff where the defendant does not appear, or otherwise defaults. Any defendant whose property has been seized and subsequently enters a general appearance can petition for a release of the property. The burden is then on the plaintiff opposing release to satisfy the court that such a release will make it substantially less likely that he will obtain satisfaction of any judgment secured. The court may release the seized property at any time if sufficient security is posted. DEL. CODE tit. 10, § 366.

defendants.[3] The property "seized" was considered to be in Delaware only by virtue of Delaware Code title 8, section 169, which makes Delaware the statutory situs of the ownership of all stock in Delaware corporations.[4] None of the certificates representing the seized property were physically present in Delaware. The defendants whose property was seized entered a special appearance to quash service of process[5] and vacate the sequestration order. They contended that the ex parte sequestration procedure denied them due process of law, that the property seized was not capable of attachment in Delaware, and that the basis of the Delaware court's jurisdiction, the statutory situs of the stock, failed to meet the minimum contacts standard postulated in *International Shoe Co. v. Washington.*[6] The chancery court rejected defendants' procedural due process arguments[7] and held that the Delaware statute establishing Delaware as the situs of ownership of all stock in Delaware corporations was constitutional. Furthermore, the court held that the jurisdiction exercised in the case was quasi in rem,[8] founded upon the presence of the stock, and that consequently the minimum contacts test for in personam jurisdiction established by *International Shoe* was irrelevant. The Delaware Supreme Court affirmed the judgment of the chancery court.[9] On appeal,[10] the

3. The value of the stock seized was approximately $1.2 million. Shaffer v. Heitner, 97 S. Ct. 2569, 2574 n.7 (1977).

4. DEL. CODE tit. 8, § 169 provides:

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

5. All 28 defendants were notified of the initiation of the suit by certified mail directed to their last known addresses and by publication in a Delaware newspaper. 97 S. Ct. at 2574.

6. 326 U.S. 310 (1945).

7. The United States Supreme Court declined to address the procedural due process claim raised below. Shaffer v. Heitner, 97 S. Ct. at 2572. The seizure of property to secure quasi in rem jurisdiction without notice and a prior hearing raises serious constitutional questions. Jonnet v. Dollar Savings Bank, 530 F.2d 1123 (3d Cir. 1976). For a discussion of those problems, see Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); 31 U. MIAMI L. REV. 419 (1977).

8. In Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958), the Court defined in rem and quasi in rem jurisdiction, stating:

> A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a preexisting claim in the subject property and to extinquish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

9. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976).

10. The Court concluded that the judgment below was final within the meaning of

United States Supreme Court *held*, reversed: The statutory presence in Delaware of intangible property which was unrelated to the underlying cause of action provided insufficient minimum contacts between the litigants, the cause of action, and the forum state for the exercise of quasi in rem jurisdiction by the Delaware court and thus violated the due process clause of the fourteenth amendment to the United States Constitution.[11] *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977).

At common law, jurisdiction was based upon physical presence, and required that either the person being sued or the thing being attached be within the territory.[12] If a defendant disobeyed a verbal monition to appear, the sheriff was commanded either to attach certain of his goods which defendant would forfeit if he failed to appear, or to force the defendant to make certain pledges. If the defendant failed to appear after his goods were attached or if he had no goods which could be attached, a writ of capias ad respondendum was issued. This writ commanded the sheriff to arrest the defendant if found within the territory and imprison him to answer the plaintiff's plea. If the defendant was not within the territory, the action would proceed against the goods which had been seized.[13]

The presence theory of jurisdiction ensured that a judgment could be satisfied through the sale of attached goods without reliance upon its recognition by other territories. Furthermore, if the defendant were imprisoned within the territory, his release would be conditioned upon payment of the judgment. The injured party was therefore assured of financial redress if he prevailed, and the indi-

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section 1257(2) of title 28 of the United States Code (1970), since if it were not considered an appealable final judgment, appellants would have had the choice of suffering a default judgment or entering a general appearance and defending on the merits. 97 S. Ct. at 2576 n.12. In so ruling, the Court employed a flexible and pragmatic view in determining the finality of judgment, noting that the ruling below of the Delaware Supreme Court was surely final on the underlying constitutional claim. Since requiring appellants to suffer a default or undergo a trial on the merits would not further illuminate their constitutional claim, the Court's ruling was appropriate.

11. Jurisdiction in its constitutional dimensions depends upon both the power of the court to adjudicate the controversy before it and the notice of the proceedings given to the adverse party. If there are insufficient contacts between the forum state, the controversy and the parties, the court lacks the power to adjudicate the controversy. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Even if the contacts are sufficient to confer the power to adjudicate, in the absence of adequate notice to an adverse party, the court is constitutionally unable to exercise its power to adjudicate the controversy before it. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *Shaffer* dealt only with the power to adjudicate as measured by the minimum contacts test. The Court assumed, without deciding, that the notice given of the proceedings (service by certified mail) was constitutionally sufficient. 97 S. Ct. at 2585 n.40.

12. J. STORY, CONFLICT OF LAWS § 539 (5th ed. 1857).

13. 3 W. BLACKSTONE, COMMENTARIES *281.

vidual territories were fully capable of collecting judgments rendered in their courts.[14]

American jurisprudence absorbed the rule that physical presence was the sole basis of jurisdiction.[15] In 1877, the rule achieved constitutional dimensions in *Pennoyer v. Neff.*[16] Neff brought an action of ejectment in federal district court based on diversity of citizenship. He challenged the title of Pennoyer to certain real property which he had acquired in a sheriff's sale. The sale had been instituted to satisfy a default judgment obtained in a suit brought in an Oregon court by a resident creditor against the nonresident Neff. Service upon Neff was accomplished pursuant to an Oregon statute which provided for service by publication. The Supreme Court in *Pennoyer* refused to honor the Oregon default judgment against Neff on the basis of defective service. In so holding, Justice Field's opinion stressed the territorial boundaries of a state's power to adjudicate and enunciated two principles governing the relationships of the states. Firstly, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"[17] and secondly, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[18] The authority of every tribunal was "necessarily restricted by the territorial limits of the state in which it is established."[19] It therefore followed that although a nonresident defendant could not be sued in a state unless he was physically present, an in rem action against property within the state could proceed in the owner's absence.[20]

By 1927, the United States Supreme Court began to move away from territoriality and physical presence as the only bases for in personam jurisdiction. In *Hess v. Pawlowski*[21] the Court upheld a Massachusetts statute under which anyone who used the state's highways impliedly consented to personal jurisdiction in an action arising out of an accident which took place within the state.[22] Although *Hess* marked a departure from the *Pennoyer* concepts of territoriality, the holding was narrow as it rested upon the dangers

14. *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 915-16 (1960).

15. Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (Johnson, J., dissenting).

16. 95 U.S. 714 (1877).

17. *Id.* at 722.

18. *Id.*

19. *Id.* at 720.

20. In Ownbey v. Morgan, 256 U.S. 94 (1921) the Court upheld the exercise of quasi in rem jurisdiction against a challenge to its constitutionality under the due process clause.

21. 274 U.S. 352 (1927).

22. The consent was accomplished through the fiction that a nonresident motorist appointed a state official as his agent for service of process. *Id.*

attendant to the use of automobiles and the state's police power to provide for the safety of its residents. The United States Supreme Court had earlier recognized the state's power to premise jurisdiction over nonresidents on certain activities which the state regulated.[23]

The landmark decision of *International Shoe Co. v. Washington*[24] marked the significant erosion of the "magical and medieval"[25] concepts of territoriality and presence. The Court held that the systematic and continuous activities of a foreign corporation within the forum state rendered the corporation amenable to an in personam action to recover payments due to the state unemployment compensation fund. The new standard was one based upon fundamental fairness. An analysis of relevant, competing interests would determine whether the exercise of jurisdiction comported with the requirements of the due process clause of the fourteenth amendment to the United States Constitution.[26] The relationship between the defendant, the forum, and the litigation, in light of all the circumstances of the particular case would determine the propriety of in personam jurisdiction.[27] The plaintiff's interest in securing relief from a particular forum must bear a reasonable relation to the burden placed upon a nonresident defendant forced

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23. Pennsylvania Fire Ins. Co. v. Gulf Issue Mining & Milling Co., 243 U.S. 93 (1917); Mutual Reserve Fund Life Ass'n v. Phelps, 190 U.S. 147, 158 (1903).

24. 326 U.S. 310 (1945).

25. Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967).

26. Chief Justice Stone, writing for the Court, noted:

> [N]ow that the *capias ad respondendum* has given way to personal service in summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

International Shoe Co. v. Washington, 326 U.S. at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

27. The Court described the defendant corporation's interests as follows: "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." *Id.* at 317 (citing Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)). However, a state in which the corporation was doing business has certain interests which could outweigh the corporation's interests in convenience of litigation:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319.

to defend in a distant forum; if the contacts with the forum state are negligible or arise by chance, the burden on the defendant will be too great to meet the requirements of the due process clause.[28]

Subsequent to *International Shoe*, the Supreme Court held that an insurance contract solicited by a nonresident defendant from a resident of the forum state was sufficient to confer personal jurisdiction in a suit on the contract.[29] However, the minimum contacts requirement of *International Shoe* were not met where a trust company had no office in the state, transacted no business in the state, none of its trust assets had ever been held or administered in the state, and no manner of solicitation had been conducted there.[30]

Despite the revision of the law concerning in personam jurisdiction, the law governing quasi in rem jurisdiction remained substantially consistent with the standard provided by *Pennoyer v. Neff.* A state retained jurisdiction over all property within its boundaries, regardless of the relationship among the disputants, the property owner, and the forum state. Indicative of this analysis was the Supreme Court's decision in *Harris v. Balk.*[31] Harris, a North Carolina resident, was indebted to Balk, another North Carolina resident. Balk was indebted to a Maryland resident. When Harris traveled to Baltimore, the Maryland resident garnished Harris' obligation to Balk in satisfaction of Balk's debt to him, all pursuant to a Maryland statute. The Court decided that this procedure was constitutional. The Court reasoned that the debt was the subject of the garnishment proceeding, that the debt followed the debtor, and that the physical presence of the debtor was sufficient to confer jurisdiction to adjudicate the claimant's interest in the debt.

The *Pennoyer* rationale was again applied to a quasi in rem action in *Seider v. Roth.*[32] The New York Court of Appeals held that an insurance company's contractual obligation to defend and indemnify its insured driver was a debt owing to the driver subject to attachment under state law. Accordingly, *Seider* allowed a New York resident to bring suit against a nonresident defendant for damages arising from an accident in a foreign jurisdiction so long as the defendant's insurance company did business in New York.

Although *Seider* was widely criticized,[33] the Court of Appeals

28. *Developments, supra* note 14, at 924 n.12.

29. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

30. Hanson v. Denckla, 357 U.S. 235 (1958). Florida had attempted to exercise jurisdiction over trust assets in Delaware based upon the fact that the settlor-decedent had established a Florida domicile.

31. 198 U.S. 215 (1905).

32. 17 N.Y.2d 111, 234 N.E.2d 669, 269 N.Y.S.2d 633 (1967).

33. *See* Reese, *The Expanding Scope of Jurisdiction Over Non-Residents — New York*

reaffirmed the *Seider* rule against a challenge to its constitutionality in *Simpson v. Loehman.*[34] In denying reargument in *Simpson,* the court in a per curiam opinion announced a significant qualification to the *Seider* rule, holding that recovery against the defendant driver could not exceed the policy limits even if he appeared to defend on the merits.

Reviewing *Seider* and *Simpson,* the Second Circuit Court of Appeals held in *Minichiello v. Rosenberg*[35] that the *Seider* rule did not offend due process. Writing for the panel, Judge Friendly drew an analogy between the *Seider* rule and the Louisiana direct action statute sustained by the United States Supreme Court in *Watson v. Employers Liability Assurance Corp.*[36] Although the Louisiana direct action statute applied only to accidents in Louisiana, he reasoned that New York's interest in providing a convenient forum for its residents was sufficient to confer jurisdiction to adjudicate.[37] Following a rehearing en banc, Judge Friendly, again writing for the majority, reaffirmed the court's holding and rested the decision squarely upon *Harris v. Balk,* reasoning that while *Harris v. Balk* stood firm, *Seider* was immune from constitutional attack.

Since *Minichiello,* some lower courts have held that mere presence of property is constitutionally insufficient to confer quasi in rem jurisdiction. In *United States Industries v. Gregg,*[38] the Third Circuit Court of Appeals held, in response to a constitutional challenge to the Delaware sequestration statute, that *International Shoe* provided the determinative test for jurisdiction, whether the jurisdiction be in personam, in rem, or quasi in rem.[39] Judge Gibbons expressed the same view in a concurring opinion in *Jonnet v. Dollar Savings Bank.*[40]

In *Shaffer v. Heitner,* the United States Supreme Court finally held that all claims of jurisdiction must be founded upon the mimimum contacts test articulated in *International Shoe.* The holding was based upon the premise that a court cannot exercise judicial

Goes Wild, 35 INS. COUNSEL J. 118 (1968); Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligations,* 19 STAN. L. REV. 654 (1967).

34. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *motion for reargument denied,* 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

35. 410 F.2d 106 (2d Cir. 1968).

36. 348 U.S. 66 (1954).

37. 410 F.2d at 110.

38. 540 F.2d 142 (3d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3840 (U.S. June 28, 1977).

39. *Gregg* reversed the decision of the district court, 348 F. Supp. 1004 (D. Del. 1972). In Greyhound Corp. v. Heitner, 361 A.2d. 225 (Del. 1976), *rev'd sub nom.* Shaffer v. Heitner, 97 S. Ct. 2569 (1977), the Delaware Supreme Court relied heavily upon the district court decision in *Gregg.*

40. 530 F.2d 1123, 1136-37 (3d Cir. 1976) (Gibbons, J., concurring).

authority over property without affecting the interests of the owner in that property, thereby effectively asserting jurisdiction over the person.[41] Since in this case the only purpose of the sequestration statute was to compel the appearance of the nonresident defendants,[42] the Court concluded that if a direct assertion of personal jurisdiction were unconstitutional, then an indirect assertion of jurisdiction by attachment of property would be equally impermissible. The Court recognized that the traditional justifications for treating the presence of property as a basis for jurisdiction no longer held true.[43] The full faith and credit clause of the United States Constitution had obviated the "self reliance" territorial justification. Moreover, the tremendous mobility of modern society along with the national character of corporate transactions could no longer support the presence theory. The *International Shoe* standard must govern actions in rem and quasi in rem as well as in personam; the bases for jurisdiction in rem and quasi in rem must be sufficient to justify exercising jurisdiction over the interests of persons in the res. After postulating the proper test, the Court held that the contacts which the nonresident defendants had with the state (statutory presence of stock) were insufficient to support the exercise of jurisdiction.

In their concurring opinions, Justices Powell and Stevens questioned the scope of the decision. Justice Powell suggested that the ownership of some forms of property could, without more, subject a nonresident defendant to in rem jurisdiction.[44]

Justice Brennan agreed with the basic minimum contact principle enunciated by the majority. In his dissent, however, Justice Brennan forcefully argued that the defendants' status as corporate directors was a sufficient contact under the newly articulated standard to render them amenable to the jurisdiction of the state of incorporation.[45] Stressing that this was a shareholder's derivative action, brought on behalf of a corporation chartered by Delaware, he contended that Delaware had strong interests in providing a convenient forum for litigating claims involving many defendant fiduciaries and in "vindicating the state's substantive policies regarding the management of its domestic corporations."[46]

Justice Brennan articulated three interrelated public policies to

41. 97 S. Ct. at 2581.
42. *Id.* at 2583.
43. *See* text accompanying notes 12-13 *supra.*
44. 97 S. Ct. at 2587 (Powell, J., concurring).
45. *Id.* at 2589-93 (Brennan, J., concurring and dissenting).
46. *Id.* at 2590.

enforce his contentions: 1) Delaware had a substantial interest in vindicating the rights of corporations which had been victimized by fiduciary misconduct;[47] 2) Delaware had a strong regulatory interest in overseeing its local corporations;[48] and, 3) since the corporation was purely the creation of Delaware law, a shareholder's derivative action would necessarily implicate the state's public policy.[49] The crucial factor, however, was that the corporate directors had voluntarily associated themselves with the state of Delaware. By "invoking the benefits and protections of its laws,"[50] they had become responsible for compliance with those laws. Voluntary assumption of responsibility by the directors provided the necessary minimum contacts for the state successfully to assert jurisdiction over the matter.

Justice Brennan addressed the sufficiency of the contacts only after labelling the majority's examination of defendants' contacts with Delaware an advisory opinion.[51] The inquiry appears to have been necessary, however, since the Delaware sequestration statute was not declared unconstitutional on its face, but only as applied in this case in light of the articulated standard.[52] Since the courts below never attempted to determine whether there were sufficient contacts to support the exercise of jurisdiction, perhaps the Court should have remanded the case to the trial court for discovery proceedings concerning the sufficiency of the contacts, with directions to apply the *International Shoe* standard.

In rejecting *Pennoyer, Shaffer* implicitly overruled *Harris v. Balk.* The Court expressly criticized the assumption in *Harris* that an attachment plaintiff could "represent" a nonresident creditor in proceeding against a debt,[53] and suggested that *Harris v. Balk* "might be thought inconsistent with the basic principle of reasonableness."[54] The Court then observed that the minimum contacts analysis would significantly affect the quasi in rem action typified by *Harris v. Balk,* since under *Shaffer* "the presence of the property alone would not support the state's jurisdiction."[55] However, the Court declined to re-examine *Harris v. Balk* so as to determine whether jurisdiction might have been sustained under the minimum

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 2592 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
51. *Id.* at 2588.
52. *Id.* at 2587.
53. *Id.* at 2579 n.18.
54. *Id.* at 2581 n.21.
55. *Id.* at 2583.

contacts analysis, holding instead that to the extent *Harris* was inconsistent with that analysis, it was overruled.[56]

While the Court in *Shaffer* repeatedly criticized *Harris v. Balk,* it made no reference whatsoever to *Seider, Simpson,* or *Minichiello.* The conspicuous absence of those decisions from the majority as well as the concurring opinions suggests that the Court chose to defer consideration of the impact of its decision upon situations typified by *Seider.* It would seem, however, that the Court must inevitably conclude that there exist no significant contacts between the forum state, the resident plaintiff, and the nonresident driver defendant. When the question is posed in terms of the relationship among the forum state, its resident plaintiff, and an insurance company doing business within the forum state, *Shaffer* provides no easy answer. While an analysis concluding that the insurance company is the real party in interest suggests that *Seider* may survive *Shaffer,*[57] such an analysis fails to account for the very real impact of the *Seider* rule upon the nonresident driver defendant.[58] Since the lawsuit cannot proceed in his absence, he is more than a nominal party. It then follows that the minimum contacts analysis should acknowledge the nonresident driver's interest in the litigation; if it does, the *Seider* rule appears doomed.[59]

The general rule which may be ascribed to *Shaffer* is this: if in personam jurisdiction cannot be asserted in a given controversy, actions in rem or quasi in rem will fail as well. The Court is thereby recognizing the pre-eminence of the "minimum contacts" test, clearly establishing this standard as the constitutionally compelled touchstone for jurisdiction. By omission, however, the Court has rendered uncertain the fate of some in rem or quasi in rem actions. As the sole contact in a state, property may, even after *Shaffer,* support an action against a nonresident if an alternative forum is unavailable. Additionally, the Court may have allowed an escape route from the rigid application of *Shaffer,* which was recognized in both the majority opinion and in Justice Brennan's dissent. That loophole would apparently allow a state to enact statutes expressly for the purpose of exercising jurisdiction over the suits and activities affecting state-created entities in order to further a compelling state

56. *Id.* at 2585 n.39.

57. *See* O'Connor v. Lee-Hy Paving Corp., 46 U.S.L.W. 2184 (E.D.N.Y. Sept. 27, 1977).

58. By the terms of his contract, the nonresident defendant must cooperate in the defense and may later be subject to a suit for a judgment in excess of the policy limits in which he may be collaterally estopped from denying liability.

59. Should the Court overrule *Seider,* the question that will then arise is whether a *Seider* action tolls the statute of limitations for the period during which it was pending.

interest in the regulation of its corporations and the uniform application of its laws.[60]

The concurring justices expressed concern over the uncertainty of the *International Shoe* standard.[61] While the decision makes more sense than the "patchwork of legal and factual fictions generated from *Pennoyer v. Neff*,"[62] disputes over fairness and reasonableness as articulated in *International Shoe* will prove time consuming and difficult. Questions surrounding the vitality of the *Seider* line of decisions are evidence of the problems posed. Nevertheless, interests in expediency, simplicity, and uniformity cannot outweigh the constitutional mandate of due process of law.

MARIA MASINTER

The Eighth Amendment, Rape, and Sexual Battery: A Study in Methods of Judicial Review

A recent United States Supreme Court decision established a new eighth amendment test for the constitutionality of punishment which may be out of proportion with the severity of a crime. After examining the Court's statement and use of this test for the rape of an adult the author concludes that the Court's test is not entirely satisfactory. Finally, the author applies the new test of constitutionality of capital punishment to the crime of sexual battery as defined in the Florida Statutes.

I. THE DEVELOPING EIGHTH AMENDMENT STANDARD

While serving three consecutive life terms and two twenty-year terms for rape and murder convictions, the defendant escaped from a Georgia correctional facility. Several hours later the defendant unlawfully entered the victim's home. Brandishing a board and a knife the defendant forced the victim to bind her husband, raped her and escaped in the family automobile holding the victim as his hostage. The defendant was apprehended shortly thereafter, having caused no further harm to the victim. A jury found the defendant

60. For a general discussion of *Shaffer v. Heitner*, see *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 152 (1977). *See generally In Personam Jurisdiction — Due Process and Florida's Short "Long Arm"*, 23 U. FLA. L. REV. 336 (1971).

61. 97 S. Ct. at 2587 (Powell, J. and Stevens J., concurring).

62. *Id.* at 2588 (Brennan, J., concurring and dissenting).