DELAWARE'S SEQUESTRATION STATUTE: ANOTHER LOOK*

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THE PROVISIONAL REMEDY of attachment has provided a means by which creditors have gained both security and the ability to obtain access to particular forums. Delaware's sequestration statute[1] serves such functions in a case at equity. Its primary

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1. 10 DEL. C. § 366, which provides:

Compelling appearance of nonresident defendant.

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

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law.

purpose is to coerce a prospective non-resident to submit to the *in personam* jurisdiction of the Delaware courts,[2] hence the statute is foremost a jurisdictional mechanism. The courts, in determining the constitutionality of various foreign attachment procedures, including Delaware's, have been forced to reconcile due process requirements with basic jurisdictional categories as set forth below.

A judgment *in personam* imposes a personal liability or obligation on one person in favor of another, as contrasted to a judgment *in rem* which affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property[3] and is of two types. In the first, the plaintiff seeks to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the second, the plaintiff seeks to apply what he contends to be the property of the defendant to the satisfaction of a claim against him.

The dispute between the plaintiff and defendant might pertain to the property itself or there might be an "affiliating circumstance" with the forum state.[4] The Delaware sequestration statute at issue in *U.S. Industries, Inc. v. Gregg*[5] permits jurisdiction where, allegedly, there is no particular state interest to be vindicated, the dispute is not related to the property attached or sequestered, and the purpose of the sequestration is to achieve *in personam* jurisdiction.

In *Gregg* the constitutionality of the Delaware sequestration statute was decided on a statement of the pertinent issue as follows:

> Whether the seizure of Gregg's stock to compel his personal appearance to answer damage claims, unrelated to Delaware and unrelated to his rights in the stock, deprived him of due process because of the absence of minimum contacts with Delaware to sustain jurisdiction?[6]

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2. *See, e.g.,* Weinress v. Bland, 71 A.2d 59 (Del. Ch. 1950); Lefcourt Realty Corp. v. Sands, 113 A.2d 428 (Del. Ch. 1955), *aff'd,* 117 A.2d 365 (Del. 1955); Trans World Airlines, Inc. v. Hughes Tool Co., 187 A.2d 350 (Del. Ch. 1962), *aff'd sub nom.,* Breech v. Hughes Tool Co., 189 A.2d 428 (Del. 1963).

3. RESTATEMENT OF JUDGMENTS §§ 5-9 (1942).

4. Hanson v. Denckla, 357 U.S. 235 (1958). *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), where the court dealt with the settlement of disputes involving a trust existing under New York law.

5. 540 F.2d 142 (3d Cir. 1976), *rev'g* 348 F. Supp. 1004 (D. Del. 1972).

6. U.S. Industries, Inc. (USI), was a Delaware corporation having its principal place of business in New York, and its wholly-owned subsidiary, Diversacon Industries, Inc., a Florida corporation, having its principal place of business in Florida. The sole defendant was F. Browne Gregg, a Florida citizen and resident. In 1969 Gregg and USI entered into an agreement in Florida for the sale of three Florida construction companies controlled by Gregg. In essence, USI agreed to exchange USI voting common and special preference stock for the outstanding stock of the Gregg companies, the business of those companies to be transferred to USI's subsidiary, Diversa-

While the court recognized Delaware's statute declaring the situs of stock in a domiciliary corporation to be in Delaware, it found that such situs of stock did ". . . not pass constitutional muster as a predicate for jurisdiction in an action admittedly seeking to obtain personal liability of a nonresident in connection with transactions unrelated to the forum."[7] It thereby concluded that the *International Shoe Co. v. Washington*[8] decision, based on *in personam* jurisdiction, also applies to *quasi in rem jurisdiction.*

Nevertheless, *International Shoe* should be viewed as a jurisdiction expanding decision[9] freeing state courts from necessary adherence to the common law categories of presence, domicile, or consent when deciding the issue of whether a court has *in personam* jurisdiction, while subjecting a state to due process requirements of the Fourteenth Amendment as required by *Pennoyer v. Neff.*[10] In Chief Justice Stone's dictum, wherein he stated that with respect to jurisdiction in personam, the demands of due process "may be met by such contacts . . . with the state of the forum as make it reasonable, in the context of our federal system of government, to require [defense of] the particular suit which is brought [here],"[11] the phrase "context of our federal system" means one thing with respect to *in personam* jurisdiction and something else with respect to jurisdiction based upon the presence of property. In fact, it must mean something different if the federal courts' maintain any respect for federal system values.

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con. In addition to transferring the stock and business of his corporation, Gregg and his wife contributed to the capital of the transferred corporations. In return, Gregg received 100,962 shares of USI common stock and 8,750 shares of USI special preference stock; he was to receive additional common stock if Diversacon achieved a level of profitability in the future. Gregg also received an employment contract to serve as president following disagreements about the operations and profitability of the acquired companies. In 1972, USI (and Diversacon as a nominal plaintiff) filed an eight-count complaint against Gregg in Delaware Chancery Court claiming damages in excess of $20 million in connection with the sale.

7. 540 F.2d at 155. *See* Breech v. Hughes Tool Co., 189 A.2d 428 (Del. 1963), wherein the court held that the principal purpose of the Delaware sequestration statute is to obtain in personam jurisdiction over non-resident defendants.

8. 326 U.S. 310 (1945).

9. *See generally* Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis,* 73 COLUM. L. REV. 749. Prof. Folk states at 778:

> The practical effect of these later cases (referring to International Shoe) has been a substantial expansion of the states direct jurisdictional power over non-resident persons; the old territorial boundaries have been crumbling. The Supreme Court, however, has not explicitly used the new jurisdictional principles to *restrict* jurisdictional power derived from the older theory (referring to Pennoyer v. Neff), and it could be argued that the *new* theories are merely extended to complement the old. (Footnotes omitted; emphasis in original.)

10. 95 U.S. 714 (1877).

11. 326 U.S. at 317.

The foundation of *in rem* and *quasi in rem* jurisdiction continues to be the physical power of the state.[12] The use of such power may or may not be in conjunction with the state's interest in the application and interpretation of its laws. Expanded use of the doctrine of minimal contacts to cover such situations would lead to its demise as a meaningful tool, just as in the case of the fiction of implied consent where used in regard to *in personam* jurisdiction.

In neither *Mullane v. Central Hanover Bank and Trust Co.*[13] nor *Hanson v. Denckla*[14] did the Supreme Court apply a minimal contacts theory. In fact, the non-resident beneficiaries of the trust in *Mullane* were characterized by an absence of contacts in the usual long-arm jurisdictional sense[15] yet were bound *in personam* to the judgment of the New York Court. The trust *res* and the trustee were both in New York. Additionally, the trust was created under New York law and the claims adjudicated related to the trust.

In *Hanson,* the Supreme Court of Florida held that certain trust assets subject to an appointment void under Florida law passed instead under a will made in Florida by a Florida domiciliary. The will primarily benefited Florida residents although neither the trust nor the trustee were in Florida. The obvious interest of Florida in the litigation and the fact that Florida was ". . . the most convenient location for the litigation"[16] were found to be insufficient since neither jurisdiction *in personam* over the trustee nor jurisdiction *in rem* had been acquired. The Delaware court which had jurisdiction over the *res* was permitted to decide the trust distribution based on Delaware's choice of law. The *Hanson* court thus indicated the continuing vitality of traditional categories of jurisdiction.

INTERNAL AFFAIRS DOCTRINE

There is a well established rule as to the power of a state to regulate and control the internal affairs of its domestic corporations.[17] A corporation is considered "domestic" when it maintains a domicile within a given state. It was once said that every person has at one time, one and only one domicile,[18] and that a corporation is domiciled

12. McDonald v. Mabee, 243 U.S. 90 (1915); Hanson v. Denckla, 357 U.S. 235 (1958).
13. 339 U.S. 306 (1950).
14. 357 U.S. 235 (1958).
15. Mullane v. Central Hanover Bank and Trust Co., 330 U.S. 306 (1950).
16. Hanson v. Denckla, 357 U.S. 235 (1958).
17. The corporation laws of Delaware control the extent of corporate power of a Delaware corporation. Ellis v. Emhart Mfg. Co., 150 Conn. 501, 191 A.2d 546 (Conn. 1963); Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950).
18. RESTATEMENT OF CONFLICT OF LAWS § 11 (1934).

within the jurisdiction of its incorporation.[19] The "one domicile" rule was later changed as to corporations, with the adoption of the "commercial" domicile doctrine which established a second corporate domicile where the corporation had its principal place of business.[20]

Some courts have recognized that while a corporation cannot have a residence in the sense of a natural person, it has a definite, fixed and certain location where its legal representatives may be found.[21] This, being another facet of domicile, becomes important when foreign courts consider whether to accept jurisdiction in diversity cases, nonetheless recognizing such domicile to be within the state of incorporation.[22]

Domestic corporations are given the right to sue or be sued in their home state. This is considered analogous to a forum's *in personam* jurisdiction over natural persons found to be within its territorial borders.[23] In this connection, one writer has noted that state's jurisdictional authority over its domestic corporations could be "rationalized" on the presence of the artificial person within the charter state, or upon its consent to suit, since the limited liability concept underlying corporate existence embraces an implicit consent to be sued.[24]

In an early case,[25] the Supreme Court of the United States held that corporations exist only within the territory of the domiciliary state. "[W]here the law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."[26] This position lead to the rule that only the parent state could exercise jurisdiction over its chartered enterprises. Modification of this rule occurred over the years taking into account modern transportation, communication and the national flow of commerce along with the transitory nature of doing business.[27] Given recent changing business circumstances, most courts today allow multi-jurisdictional actions to be heard away from the home state, with certain exceptions, provided the forum state has

19. *Id.* § 41. For a discussion on "domiciliary" corporations, *see* HENN, LAW OF CORPORATIONS § 81 (1970); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, comment *l* (1971).

20. For a discussion of the "commercial domicile" theory as applied to multiple taxation problems, *see* HENN, *supra* note 19.

21. State *ex rel.* Bowden v. Jensen, 359 S.W.2d (Mo. 1962).

22. Doctor v. Harrington, 196 U.S. 579 (1905); U.S. v. Webster Record Corp., 208 F. Supp. 412 (S.D.N.Y. 1962).

23. Pennoyer v. Neff, 95 U.S. 714 (1878).

24. Note, *Development in the Law — State Court Jurisdiction,* 73 HARV. L. REV. 909, 919 (1960).

25. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

26. *Id.* at 588.

27. Hardy v. Pioneer Parachute Co., 531 F.2d 193 (4th Cir. 1976). *See also* Currie, *The Constitution and the "Transitory" Cause of Action,* 73 HARV. L. REV. 268, 286-90 (1959).

jurisdiction over the person of the defendant.[28] Nothing more than this principle is involved in the escheat cases,[29] the issue being whether the state of incorporation or the creditors' state had a better right to an abandoned debt.

As recently as 1972, the Supreme Court reaffirmed that property interests are created by state law, hence state law must control the various incidents involving such property.[30] The fact that property is of an incorporeal or intangible nature does not affect the jurisdictional power of a state.[31] Despite Judge Gibbons,[32] quoted with approval in *Gregg,* the Fourteenth Amendment has not been read by the Supreme Court as invalidating state definitions of property for purposes of jurisdiction. In fact, the court has recognized Delaware's constitutional right to establish the situs of domiciliary corporations in the state.[33] Delaware, recognizing that intangible property interests are difficult to locate for purposes of attachment and litigation, provides that all stock in its domiciliary corporations has a situs within the state for attachment purposes, regardless of the actual physical location of the certificate.[34] This right of attachment without seizure of certificates has existed since at least 1852.[35] The courts of Delaware have declared that no stockholder owning stock in a Delaware corporation can deny the stocks situs for purposes of sequestration.[36] Professor Ernest Folk, commenting on this Delaware provision, has analyzed such treatment of stock as domestic property as based on two factors: first, the power to adjudicate various incidents of stock owner-

28. St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 224 Ala. 152, 138 So. 834 (1932).

29. Texas v. New Jersey, 379 U.S. 674 (1965). Justice Black, in answering New Jersey's contention that the state of incorporation should have the power to escheat an abandoned debt said, at 680: "[I]t seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself."

30. Board of Regents v. Roth, 408 U.S. 564 (1972).

31. *See* Hanson v. Denckla, 357 U.S. 235 (1958).

32. Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1139 (3d Cir. 1976) (Gibbons, J., concurring).

33. Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933); Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900).

34. Pomerance, *The 'Situs' of Stock,* 17 CORNELL L.Q. 43 (1931); 8 DEL. C. § 169, provides:

Situs of Ownership of Stock.

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 ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this Chapter or otherwise, shall be regarded as in this State.

35. 10 DEL. C. § 1253 (1852).

36. Bouree v. Trust Francais, 127 A. 56 (Del. Ch. 1924); *see also* Krizanek v. Smith, 87 A.2d 871 (Del. 1952).

ship, and second, a jurisdictional basis for attachment.[37] The mere removal of the certificate from the state has no effect whatsoever on the legal situs.[38] Sequestration, thus, involves management of the internal affairs of the state, to wit: of its domestic corporations, an obligation which must be protected and which does not conflict or infringe upon Federal law. The Tenth Amendment to the U.S. Constitution guarantees that states are repositories of all power of sovereignty not committed to the federal government.[39] It has, further, been held that unless a state, county or municipal government runs afoul of a federally protected right, it has reasonable leeway in the management of its internal affairs.[40] Moreover, a state regulation, otherwise valid, cannot be attacked merely because it incidentally affects business activities carried on outside the state.[41]

FOREIGN ATTACHMENT AND SEQUESTRATION

In 1971, the Third Circuit considered the constitutionality of using foreign attachment to secure jurisdiction over the owner of attached property, normally not subject to *in personam* jurisdiction, and held such to be constitutionally valid procedure.[42] The relevance of this decision lies in the fact that cases cited therein preceded the Supreme Court decision of *International Shoe*.[43]

Under Delaware law,[44] the Court of Chancery may attach the property of a non-resident, located within the state for the purpose of compelling his appearance in response to pending litigation.[45] Under this grant, the Court of Chancery may sequester shares of stock owned by a non-resident defendant if such stock is in a Delaware corporation,[46] since all stock in Delaware corporations is statutorily determined to

37. E. FOLK, THE DELAWARE GENERAL CORPORATION LAW 493-94 (1972).
38. Yancey v. National Trust Co., 251 A.2d 561 (Del. 1969).
39. Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968).
40. Sailors v. Board of Education, 387 U.S. 105 (1967).
41. Travelers Health Assoc. v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1949).
42. Lebowitz v. Forbes Leasing & Financing Corp., 456 F.2d 979 (3d Cir. 1971), *cert. denied,* 409 U.S. 843 (1972), *rehearing denied,* 409 U.S. 1049 (1973). The court held the Pennsylvania long-arm statute did not so adequately effectuate the state's purpose of providing residents with broad access to its courts in actions against non-resident defendants as to deprive the states' foreign attachment procedures of justification in the face of due process requirements. *Cf.* Jonnet v. Dollar Savings Bank, 530 F.2d 1123 (3d Cir. 1976). The court found the Pennsylvania foreign attachment procedures unconstitutional because providing insubstantial protection to a prospective defendant against wrongful attachment and in that respect only concluded that *Lebowitz* was no longer viable.
43. 326 U.S. 310 (1945).
44. 10 DEL. C. § 366, *supra* note 1.
45. Haas v. Haas, 119 A.2d 358, 362 (Del. Ch. 1955).
46. Greene v. Johnson, 99 A.2d 627 (Del. 1953).

have a situs in Delaware for purposes of attachment.[47] Thus, jurisdiction in such situations is based solely on the presence of capital stock, the presence or absence of other substantial contacts with Delaware being irrelevant.[48]

Various arguments have been propounded as justification for the situs provision under Delaware law. It was held in *Ownbey v. Morgan*,[49] a Supreme Court case in which foreign attachment was employed to secure *quasi in rem* jurisdiction, that:

> [A] property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed *ex necessitate* to consent that the state may subject such property to judicial process to answer demands made against him, according to any practicable method that reasonably may be adopted.

Delaware gives all stock in Delaware corporation a *res* located in the state[50] in order to give its courts the power to adjudicate incidents of stock ownership such as title, validity of issue and voting rights.[51] Secondarily, this method supplies the jurisdictional basis for attachment and sequestration of stock in domiciliary corporations.[52]

The state's power to determine the situs of capital stock in its domiciliary corporations, has been established as a constitutional state right.[53] Delaware, in adopting the Uniform Commercial Code, specifically omitted the enactment of § 8-317(1)[54] which required actual seizure of stock certificates to effect a valid attachment on an interest in corporate stock. Giving substantial consideration to arguments that

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47. 8 DEL. C. § 169.

48. McDonald v. Mabee, 243 U.S. 90 (1917); GOODRICH, CONFLICT OF LAWS § 73 (1965). *See generally* Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

49. 256 U.S. 94 (1921). The case deals with a non-resident plaintiff bringing suit against a non-resident defendant for actions arising out of the defendant's activities in Colorado and New Mexico. The facts are important in that it becomes obvious that no other contacts existed with the forum state.

50. 8 DEL. C. § 169.

51. E. FOLK, *supra* note 37, at 176-80; Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900).

52. Krizanek v. Smith, 87 A.2d 871 (Del. 1952). In fact, once a shareholder has accepted stock in a Delaware corporation he is estopped to deny its Delaware situs. Bouree v. Trust Francais, 127 A. 56 (Del. Ch. 1924).

53. Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933); Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900).

54. 6 DEL. C. § 8-317, which provides:

Effect on Attachment and Sequestration Laws: Attachment or Levy Upon Security.

(1) Nothing contained in this subtitle shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling.

Delaware did not possess sufficient "control" over the stock itself, that the acquisition of *in personam* jurisdiction by use of the sequestration statute violates due process requirements, and that 52 jurisdictions had adopted the Uniform Commercial Code, the Delaware Court of Chancery decided that the sequestration procedure was nonetheless both reasonable, constitutionally proper, and within the powers of the state to so provide.[55] The Court decided that the sequestration procedure would not be considered invalid simply because the stock certificates themselves may be beyond the court's jurisdiction. Furthermore, the court determined that there was compliance with the requirements of *Fuentes v. Shevin*[56] and *Mitchell v. W. T. Grant Company*[57] for justifying pre-judgment seizure in that there was (1) a sufficient state interest, (2) a need for prompt action, and (3) sufficiently strident judicial control.

Compliance with requirements (2) and (3) is not at issue here. The court used as a foundation a 1963 decision of the Supreme Court of Delaware[58] wherein the court determined that where the "limited procedural requirements" of the statute are met, the applicant would be entitled to the issuance of a sequestration order as a "matter of right."

Concededly, the purpose of the sequestration order is to compel the non-residents' appearance to defend his property. A primary burden is thereby placed upon the plaintiff to show that (1) the defendant is a non-resident of the forum state, and (2) that the non-resident defendant owns property in the state that can be reached by sequestration. It was noted, in the *Heitner* opinion rendered by Vice Chancellor Brown that:

> [Sequestration] [b]eing a jurisdictional tool only, its usage is not dependent upon the merits of the complaint, as was true in *Fuentes* and *Mitchell.* The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the non-resident defendant in an effort to get the merits of his case before the court. The *Breech* case, as I construe it, holds that the Court has no discretion to deny this statutory right to process once it is satisfied that a plaintiff has shown factors justifying the need to use it. In effect this seems consistent with the instruction of *Mitchell.*[59]

55. Heitner v. Greyhound Corp., 1 DEL. J. CORP. L. 188 (Del. Ch. May 12, 1975), *aff'd,* 361 A.2d 225 (Del. 1976), *prob. juris. noted, sub. nom.,* Shaffer v. Heitner, 97 S. Ct. 52 (1976).
56. 407 U.S. 67 (1971).
57. 416 U.S. 600 (1974).
58. Breech v. Hughes Tool Co., 189 A.2d 428 (Del. 1963).
59. 1 DEL. J. CORP. L. at 197.

Furthermore, Vice Chancellor Brown distinguished the purpose of Delaware sequestration from that of foreign attachment by noting that the latter enables the seizure of property held by another pending a trial on the issue of who has a right to keep it.[60]

To understand the distinction between Delaware's sequestration and foreign attachment laws one must closely examine the effect of the sequestration order itself on a defendant's interest in his sequestered property. As indicated, the sequestered property is released upon defendant's appearance. Where the defendant decides against entering an appearance he is given the alternative of limiting the amount of judgment against him through default. This alternative, it might be noted, is not available where the defendant is personally served with a summons and has thus become subject to *in personam* jurisdiction.

The only restraints imposed by the sequestration order are the (1) inability to dissipate cash proceeds of sales, and (2) the requirement to hold any reinvestment of proceeds subject to the order. The right of defendant to receive stock dividends and to sell is virtually unaffected. Defendant is left relatively free to deal with his property including having it released from a sequestration order by entering an appearance.[61] Although a property interest is affected, not every interference with property rights is a taking to be protected by the full panoply of the Fourteenth Amendment.[62]

Analyzing the procedure from a negative viewpoint, the procedure is nonetheless commensurate with constitutional safeguards. The negative aspects, of course, arise where a default sale is ordered. The argument, quite understandably, is made that the effect of a default sale permanently deprives a defendant of his property. The proximate cause of the loss, however, is not the sequestration but the defendant's voluntary decision to default rather than appear and defend.

After the sequestration order is issued, a defendant has several procedural safeguards at his disposal. Inititally the defendant may make a prompt "motion to quash" whereby the actual validity of the sequestration order is tested. Court rule provides a bonding requirement for the distinct purpose of providing indemnification to a defendant who suffers damages due to a wrongful attachment. Of fundamental importance when viewing the bonding requirement is the fact that where an attachment has been deemed "wrongful," a cause of action against

60. 1 DEL. J. CORP. L. at 196.

61. Trans World Airlines, Inc. v. Hughes Tool Co., 187 A.2d 350, 352 (Del. Ch. 1962), *aff'd sub. nom.*, Breech v. Hughes Tool Co., 189 A.2d 428 (Del. 1963).

62. Speilman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973).

the plaintiff arises for abuse of process. Another safeguard is found in the default judgment proceedings themselves. Before a default judgment is awarded, the common practice is to hold an inquest at which the plaintiff must prove in open court by sworn testimony that it has a valid cause of action.[63]

USE OF QUASI IN REM JURISDICTION TO GAIN IN PERSONAM JURISDICTION

The major difference between *in personam* and *quasi in rem* jurisdiction lies in the necessity of a party defending a suit by entering an appearance or having his property subjected to a judgment which can be up to the limits of the plaintiffs demand (*in personam*), as contrasted to the situation where a defendant may either enter an appearance or simply default, by choice, and limit the judgment to the amount of the sequestered property (*quasi in rem*). Where defendant may limit the courts power to the property *in custodia legis,* (*quasi in rem*) a standard other than that applied for *in personam* actions is justified.

The major problem in distinguishing the two arises in cases which contain a jurisdictional assertion of *quasi in rem* to gain *in personam* jurisdiction, such as in Delaware where the sequestration statute is relied upon. It is usually contended that such purpose changes the elements enough to make the action one not purely *quasi in rem.* In consequence, it is contended that the principles of *International Shoe* should be applied. It was determined by District Judge Stapleton that:

> While the statute [referring to the sequestration law] is concededly designed to produce this result [that being the acquisition of *in personam* jurisdiction], it does not follow that the action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the non-resident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiff's claim.[64]

The court analyzed the situs jurisdiction as purely *quasi in rem,* being based on the presence of capital stock in the state, not on prior contact by defendant, as would be required were there *in personam* jurisdiction. The alternative argument that the situs of the property (here stock) establishes a minimum contact is rejected because such situs is considered a fiction where applied to stocks, which are intangible property.

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63. U.S. Industries, Inc. v. Gregg, 348 F. Supp. 1004, 1013–16 (D. Del. 1972), *rev'd on other grounds,* 540 F.2d 142 (3d Cir. 1976).

64. 348 F. Supp. at 1020.

However, the Delaware situs rule[65] only applies to securities that must be transferred on the corporation's books.[66] Negotiable securities such a bearer bonds are excluded from the situs rule.

Question has been raised as to the potential for jurisdictional conflicts created by Delaware's situs rule where the intangible (stock certificate) is located in a foreign jurisdiction. Interestingly enough, there has been rather even-handed acceptance of the "situs rule" and most jurisdictions consider the Delaware rule controlling.[67] Dealing, at the time, with the Uniform Stock Transfer Act and its conflict with the "situs rule", the Supreme Court of Pennsylvania held:

> . . . by the Uniform Stock Transfer Act the attachment of foreign shares is expressly limited to shares in states whose laws recognize the transfer of the share, and hence the applicability of the act depends on whether a similar law is in force at the domicile of the corporation.[68]

Considering that corporate stock, although an intangible, is nonetheless a form of personal property, no court to date has placed such intangible beyond the arm of foreign attachment.[69] Furthermore, the major decisions interpreting sequestration stand for the affirmative proposition that intangibles are within the purview of the attachment process where the procedure itself meets constitutional demands and standards.[70] The courts have seen fit to specifically uphold the seizure of various forms of intangible property, to include bank accounts[71] and contingent benefits under liability insurance policies.[72] It seems appropriate to consider, therefore, that the Delaware statute declaring intangible interests in stock of domiciliary corporations to have a Delaware situs is clearly within constitutional standards, unless one as-

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65. 8 DEL. C. § 169.

66. Landau v. Best, 187 A.2d 75, 76 (Del. 1962).

67. Mills v. Jacobs, 333 Pa. 231, 4 A.2d 152 (1939).

68. 4 A.2d at 155. It is important to realize that the Uniform Stock Transfer Act was supplanted by Article 8 of the Uniform Commercial Code which adopted its situs theory, *supra* note 54; *see also* Note, *Attachment of Corporate Stock: The Conflicting Approaches of Delaware and the Uniform Stock Transfer Act*, 73 HARV. L. REV. 1579 (1960).

69. Harris v. Balk, 198 U.S. 215 (1905); Ownbey v. Morgan, 256 U.S. 94 (1921); *see* 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1071 (1969).

70. North Georgia Finishing, Inc. 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); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

71. Lebowitz v. Forbes Leasing and Finance Corp., 456 F.2d 979 (3d Cir. 1972), *cert. denied*, 409 U.S. 843 (1972), *reh. denied*, 409 U.S. 1049 (1972).

72. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966); Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969), *reh. denied*, 396 U.S. 949 (1969).

sumes that Article 8 of the Uniform Commercial Code constitutes a federal constitutional amendment precluding Delaware from adopting a contrary policy.

CONCLUSION

The issues involved in deciding the constitutionality of the Delaware Sequestration statute may be stated as follows:

· First, may Delaware define the situs of stock in a domiciliary corporation to be in Delaware?

· Second, if it may, can such intangible property be subject to attachment or sequestration?

· Third, if so, must the assertion of *quasi in rem* jurisdiction be accompanied by minimum contacts or affiliating circumstances?

· Fourth, does Delaware's procedure deprive a prospective defendant of his due process rights?

The first, second and third issues are clearly related and will be considered together.

Delaware may define the situs of intangible property as long as such definition embodies a common sense appraisal of the requirements of justice.[73] The mere fact that intangibles may have a situs in more than one jurisdiction is evidence not of a weakness in Delaware's assertion of jurisdiction based on the presence of property but rather on the difficulty of locating intangibles. Fundamental fairness would seem to demand a device whereby creditors could reach assets of their debtors which otherwise might be unreachable.[74] *International Shoe* was a jurisdiction expanding decision. Nowhere is it suggested that the Fourteenth Amendment imposes federal definitions of property upon the states.

Judge Friendly in *Farrell v. Piedmont Airlines*,[75] observed the doubtful nature of New York's contact with a claim, yet affirmed the constitutionality of New York's judically created direct action statute against liability insurance carriers[76] on the basis that it was limited to New York residents. The intangible nature of the property claims asserted, the defendant's right to a defense and the insurance company's contingent liability were not fatal. Of course, the restriction to New

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73. Severnoe Securities Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 174 N.E. 299 (1931).

74. Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969), *reh. denied*, 396 U.S. 949 (1969).

75. 411 F.2d 812 (2d Cir. 1969).

76. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966); Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969), *reh. denied*, 396 U.S. 949 (1969).

York plaintiffs would distinguish the New York procedure from Delaware's which is available to non-resident plaintiffs as well. This limitation might be considered an affiliating circumstance based on New York's interest in the well being of his own residents. It would seem that Judge Friendly would impose mandatory discrimination between New York and foreign residents. Delaware's sequestration statute would, at a minimum, be constitutionally valid if used by residents under the *Farrell* decision.

However, a careful reading of *Mullane*[77] would not indicate such limitation. The court said:

> It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interests of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interest of all claimants, resident or non-resident, provided its procedure accords full opportunity to appear and be heard.[78]

Is a trust asset any less intangible than a corporate asset? Jurisdiction here, as in *Hanson v. Denckla,*[79] was based upon traditional jurisdictional classification, *dicta* to the contrary notwithstanding.[80]

The fourth issue may be resolved by considering several recent Supreme Court decisions.

The Supreme Court answered the question regarding *Mitchell's* effect on *Fuentes,* which had created numerous controversies in *North Georgia Finishing v. Di-Chem.*[81] The court, in reviewing *Fuentes,* stated that the invalidation of the Pennsylvania and Florida prejudgment replevin statutes was based on allowance of secured installment sellers to repossess goods sold without judicial order or supervision.[82]

In answering the *Fuentes-Mitchell* conflict, the court noted that the Louisiana sequestration statute upheld in *Mitchell* was issuable only by a judge on the filing of supporting affidavit. The difference between the procedures in *Fuentes* and *Mitchell* and the lack of judicial supervision in *Fuentes* explains the result.

The court in *Di-Chem* was saying that, in the absence of the "saving characteristics" found in *Mitchell, Fuentes* was properly de-

77. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).
78. 339 U.S. at 313.
79. 357 U.S. 235 (1958).
80. 339 U.S. at 312.
81. 419 U.S. 601 (1975).
82. 419 U.S. at 607-08.

cided. The primary saving characteristic involved is that of judicial supervision over the procedure. On these grounds it is apparent that the Delaware sequestration statute meets the *Di-Chem* test, satisfies *Mitchell* and can be distinguished from *Fuentes.*

Absent the infirmities of the statutes considered in *Di-Chem* and *Jonnet v. Dollar Savings Bank,*[83] it would seem that the exercise of quasi in rem jurisdiction is permissible. The infirmities are readily noticeable being the impoundment of property, during the pendency of litigation, without judicial supervision, said impoundment causing a high risk of loss to the defendant.[84]

There seems no reason based on Supreme Court decisions to add a requirement of minimum contacts to the exercise of quasi in rem jurisdiction.[85] The national nature of commerce, the broadness of long-arm jurisdiction, and the multiplication in forms of intangibles being made subject to seizure as personal property would make a decision restricting jurisdiction anomalous.

Considering the difficulty of locating intangible interests, it seems that the Delaware situs rule provides for a fundamentally just way for creditors to collect from their debtors. However, the exercise of such jurisdiction by the Delaware courts must be subject to the doctrine of *forum non conveniens.*

Delaware's use of this doctrine[86] comports with *Gulf Oil Corp. v. Gilbert,*[87] where the Supreme Court stated:

> Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.
>
> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

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83. 530 F.2d 1123 (3d Cir. 1976).

84. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 607.

85. *See* Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir. 1969).

86. *See, e.g.,* Life Assurance Co. of Pa. v. Associated Investors Int'l Corp., 312 A.2d 337 (Del. Ch. 1973); Jacobs v. Tenny, 316 F. Supp. 151 (D. Del. 1970); Firmani v. Clarke, 325 F. Supp. 686 (D. Del. 1971).

87. 330 U.S. 501 (1947).

> possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.[88]

The problem in Delaware is that a defendant cannot make a special appearance in order to argue *forum non conveniens*. Rather, any appearance he makes is a general appearance. Perhaps a change in the law to allow a special appearance to a prospective defendant would be appropriate. Upon losing, the prospective defendant could then decide to appear and defend or to default. He would have had a judicial determination of exactly those objections to the exercise of *quasi in rem* jurisdiction which were found so compelling in *Gregg*. Even if *forum non conveniens* is successfully invoked, the plaintiff might still, in certain circumstances, be permitted to continue the sequestration pending the outcome of the litigation. The taking by the Delaware court is minimal, and balanced by a creditor's right to payment of his just debt. No more than a *lis pendens* would ultimately be involved after a successful invoking of *forum non conveniens* if the Delaware court continued the sequestration.

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88. 330 U.S. at 508.