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ATTACHMENT OF "OBLIGATIONS"—A NEW CHAPTER  
IN LONG-ARM JURISDICTION

Recently, the Court of Appeals "enacted" a substantial change in the law of attachments by allowing the attachment of the obligations in an insurance policy owned by a non-resident defendant. The Court allowed the attachment even though the defendant's only contact with New York was that the policy was issued by an insurer doing business in New York. This Comment will summarize the law of attachments prior to this change, explain its rationale and demonstrate several possible extensions to other areas of the law.

Plaintiff, a resident of New York, was involved in an automobile accident in Vermont with defendant,<sup>1</sup> a resident of Canada. Defendant owned an insurance policy which was issued in Canada by an insurance company doing business in New York for purposes of jurisdiction under New York Civil Practice Law and Rules section 301. The policy contained clauses stating that the insurer would defend and indemnify the insured for an action brought against him. Although the defendant (insured) was not subject to in personam jurisdiction pursuant to the New York long-arm statute,<sup>2</sup> the Supreme Court of Nassau County denied defendant's motion to vacate an order of attachment issued against the obligations in his insurance policy.<sup>3</sup> The court considered the obligations in the policy an attachable debt<sup>4</sup> within the state for purposes of the attachment statute.<sup>5</sup> The Appellate Division and the Court of Appeals affirmed, *held*, although owned by a non-resident who is not subject to in personam jurisdiction, the obligations to defend and indemnify in an insurance policy are an attachable debt when the policy is issued by an insurer doing business in New York. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), *affirming* 23 A.D.2d 787, 258 N.Y.S.2d 795 (1st Dep't).

INTRODUCTION

For a court to exercise jurisdiction it must have subject-matter jurisdiction,<sup>6</sup> give proper notice to the parties<sup>7</sup> and have a sufficient jurisdictional basis over the person or res. Traditionally, basis was couched in terms of a state's power or control over a person or res at the time of service of process.<sup>8</sup> However, this concept of physical power has suffered so much change that the exceptions have become the rules. If a corporation is present or "doing business" within a state,

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1. The accident was a three-car collision. Roth, a resident of New York, was a co-defendant with Lemieux, a resident of Canada, on whom the immediate litigation is focused.  
 2. New York Civil Practice Law and Rules [hereinafter cited N.Y. CPLR] § 302.  
 3. *Seider v. Roth*, 152 N.Y.L.J., Oct. 21, 1964, p. 19, col. 2 (Sup. Ct. 1963).  
 4. N.Y. CPLR § 5201.  
 5. N.Y. CPLR § 6202.  
 6. See *Elliot v. Peirsol*, 26 U.S. (1 Pet.) 328 (1828).  
 7. See *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).  
 8. See *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Harris v. Balk*, 198 U.S. 215 (1905); *McDonald v. Mabee*, 243 U.S. 90 (1917).

the state can exercise in personam jurisdiction over the corporation.<sup>9</sup> A state can also assert in personam jurisdiction over a non-resident or a corporation in special situations, *e.g.*, where a person is involved in an accident while operating a motor vehicle in the state,<sup>10</sup> or where an insurance company has a policy-holder within the the state.<sup>11</sup> In addition, if a person or corporation has certain "minimum contacts"<sup>12</sup> with the forum state, the state is considered to have sufficient power over the defendant to exercise in personam jurisdiction, thus satisfying "traditional notions of fair play and substantial justice."<sup>13</sup> The "minimum contacts" doctrine has engendered the growth of long-arm statutes which are used to assert in personam jurisdiction over a non-resident defendant based on his tenuous contacts with the state—restricted or specific in personam jurisdiction.<sup>14</sup>

A state having sufficient power over a particular res is traditionally considered to have in rem or quasi-in-rem jurisdiction. Attachment and garnishment of real or personal property is a statutory<sup>15</sup> proceeding which confers in rem or quasi-in-rem jurisdiction on the attaching court.<sup>16</sup> Garnishment is a form of attachment: a process by which a res is seized from the possession of a third person (garnishee) because it is presently or certain to become due to the defendant and may become directly payable to the plaintiff, depending on the outcome of their litigation.<sup>17</sup>

Quasi-in-rem jurisdiction differs from in rem and in personam jurisdiction. An in rem judgment determines the status of a particular res as "against the whole world" irrespective of the parties involved in the litigation.<sup>18</sup> An in personam judgment decides particular personal rights between the adversary parties. In a quasi-in-rem proceeding adversary parties litigate personal claims, but, unlike an in personam judgment, the satisfaction of the quasi-in-rem judgment is limited to the value of the attached res.<sup>19</sup>

The state must have power over the res, or more laconically, the res must be

9. See *Barrow S.S. v. Kane*, 170 U.S. 100 (1898); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917); *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); Note, 15 Buffalo L. Rev. 431 (1966).

10. See N.Y. Veh. and Traf. Law § 253(1); *Hess v. Pawloski*, 274 U.S. 352 (1927).

11. See N.Y. Ins. Law § 59-a; *McGee v. International Life Ins. Co.*, 335 U.S. 220 (1957).

12. *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241.

13. *Id.* at 316.

14. See, *e.g.*, Uniform Interstate & International Procedure Act, 9B Uniform Laws Ann. 310 (1966); N.Y. CPLR § 302 (as amended N.Y. Sess. Laws 1966, ch. 590). For a comprehensive study of New York's long-arm statute, see Homburger & Laufer, *Expanding Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 Buffalo L. Rev. 67 (1966); Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61 (1965); Comment, *Transacting Business as Jurisdictional Basis—A Survey of New York Case Law*, 14 Buffalo L. Rev. 525 (1965); Note, 15 Buffalo L. Rev. 181 (1965).

15. See 7 Weinstein, Korn & Miller, *New York Civil Practice*, ¶¶ 6201-26 (1964).

16. See generally Beale, *The Exercise of Jurisdiction In Rem To Compel Payment of a Debt*, 27 Harv. L. Rev. 107 (1913).

17. See Goodrich, *Conflicts of Law* § 71 (4th ed. Scoles 1964).

18. See *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 948-49 (1960).

19. *Ibid.*

located within the attaching state.<sup>20</sup> A res can be realty or tangible or intangible personalty. If the res is realty, its situs within the forum is a readily ascertainable fact.<sup>21</sup> But if it is personalty, the problem of situs becomes more difficult.<sup>22</sup> Although tangible personalty is generally mobile, a state is considered to have a sufficient power basis if at the time of attachment, it is found within its borders.<sup>23</sup> On the other hand, with intangible personalty it is often difficult to discover or even conceptualize a situs which will enable a state to exert jurisdictional power.<sup>24</sup>

Many intangibles, such as stocks, bonds, warehouse receipts and other negotiable instruments and securities, are evidenced by a document, thus allowing jurisdiction to be asserted where the document is located.<sup>25</sup> However, if it is a "pure" intangible, such as a debt, an assignable cause of action or a court judgment, the state has jurisdiction over the intangible property if it has jurisdiction over the debtor.<sup>26</sup>

To be attachable under the statute, a debt must be "past due or which is yet to become due, *certainly or upon demand*. . ."<sup>27</sup> Whether the obligations in an insurance policy are a debt or a contingency not subject to attachment is a difficult question. The majority of states that have passed on this question have held that the obligations in an insurance policy are an attachable debt in the state where the policy is issued.<sup>28</sup> New York follows this rule,<sup>29</sup> reasoning that if they are to be attachable, at least one of the obligations in the policy must not be conditional.<sup>30</sup>

RATIONALE AND CRITICISM OF SEIDER

*Pre-Seider Attachment of Obligations in an Insurance Policy*

*Seider v. Roth*<sup>31</sup> has caused a substantial change in the law of New York. There were several cases prior to *Seider* in which New York courts allowed at-

20. See *supra* note 8 and accompanying text.

21. For causes of action arising from the use, possession or ownership of real property in New York a court can exercise in personam jurisdiction. See N.Y. CPLR § 302(a)(4) (as amended 1966).

22. See *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, at 951.

23. See 1 Beale, Conflict of Laws § 102 (1935).

24. See generally Andrews, *Situs of Intangibles in Suits Against Non-Resident Claimants*, 49 Yale L.J. 241 (1939).

25. See Beale, *supra* note 16; Andrews, *supra* note 24.

26. *Harris v. Balk*, 198 U.S. 215 (1905) (In a garnishment action, a court has jurisdiction over the debt if it has jurisdiction over the garnishee.). *But compare* *Morris Plan Indus. Bank v. Gunning*, 295 N.Y. 324, 67 N.E.2d 510 (1946), *with* *Brown v. Arabian Am. Oil Co.*, 53 Misc. 2d 182, 278 N.Y.S.2d 256 (Sup. Ct. 1967).

27. N.Y. CPLR § 5201(a) (Emphasis added.).

28. Note, U. Cinc. L. Rev. 691, 693 (1966).

29. *Matter of Riggle*, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962), 14 Syracuse L. Rev. 130 (1962); see also *Baumgold Bros. v. Schwarzschild Bros.*, 276 App. Div. 158, 93 N.Y.S.2d 658 (1st Dep't), *aff'd*, 302 N.Y. 628, 97 N.E.2d 357 (1949) (obligation accrues upon proof of loss).

30. *Cf. Sheehy v. Madison Square Garden Corp.*, 266 N.Y. 44, 193 N.E. 633 (1934); *Dutch-American Merchantile Corp. v. Safticraft Corp.*, 17 A.D.2d 421, 234 N.Y.S.2d 683 (1st Dep't 1962).

31. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), 8 B.C. Indus. & Comm.

tachment of the obligations in an insurance policy as a debt within the purview of the statute, but they are easily distinguishable. In *Baumgold Bros., Inc., v. Schwarzschild Bros.*,<sup>32</sup> plaintiff, a New York corporation, had jewels delivered to defendant, a Virginia corporation, pursuant to a contract. The jewels were stolen from defendant's Virginia office. Plaintiff attached the proceeds of defendant's insurance policy issued by an insurer authorized to do business in New York. In this case the court had in personam jurisdiction over the insurer and, although not expressly stated, over the defendant based on his business contacts.<sup>33</sup>

In *Matter of Riggle*,<sup>34</sup> plaintiff, a resident of New York, was injured in Wyoming in an automobile accident with a resident of Illinois. The defendant died after a New York court had exercised in personam jurisdiction over him. The insurance policy was issued in New York by an insurer doing business in New York. In the present proceeding plaintiff attempted to have the Surrogate's Court appoint an administrator in New York by claiming that the obligations in defendant's insurance policy were an asset within the state. The Court of Appeals held that the obligations in the insurance policy are a sufficient debt within the meaning of section 47 of New York Surrogate's Court Act<sup>35</sup> to confer jurisdiction upon a Surrogate's Court, thus enabling it to appoint an administrator in New York for the non-resident's estate. Thus, unlike *Seider*, New York had in personam jurisdiction over both the insured and the insurer. In addition, this proceeding was one of limited subject-matter jurisdiction, rather than one of general jurisdiction as in *Seider*. In *Fishman v. Sanders*,<sup>36</sup> plaintiff and defendant, both residents of New York, were involved in an auto accident in New York. Plaintiff was unable to personally serve defendant, so he attached the obligations of defendant's insurance policy issued by an insurer doing business in New York. However, plaintiff had in personam jurisdiction over both the insurer and the insured, because the Court held that substituted service and attachment gave the attaching court in personam jurisdiction over an absconding resident.<sup>37</sup> Finally, in *Stines v. Hertz Corp.*,<sup>38</sup> plaintiff, a resident of New York, was involved in an

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L. Rev. 147 (1966), 51 Minn. L. Rev. 158 (1966), 19 Stan. L. Rev. 654 (1967), U. Cinc. L. Rev. 691 (1966).

32. 267 App. Div. 158, 93 N.Y.S.2d 658 (1st Dep't), *aff'd*, 302 N.Y. 628, 97 N.E.2d 357 (1949).

33. In any case, a New York court could probably now assert in personam jurisdiction over the defendant under N.Y. CPLR § 302(a)(1) ("transacts any business"), if defendant was not subject to in personam jurisdiction in this case.

34. 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

35. N.Y. Surr. Ct. Act § 47 provides in part that "for the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state . . . is regarded as personal property." See New York Surrogate's Court Procedure Act § 208 (N.Y. Sess. Laws 1966, ch. 953, effective Sept. 1, 1967) which continues the old provision and apparently codifies *Riggle*.

36. 20 A.D.2d 905, 248 N.Y.S.2d 1013 (2d Dep't 1964), *rev'd on other grounds*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965), 15 Buffalo L. Rev. 425 (1965).

37. *Fishman v. Sanders*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965) (Defendant defaulted and the Court held that the judgment rendered against the defendant, after service by publication and attachment of personalty, was an in personam judgment and not limited to the value of the res.).

38. 42 Misc. 2d 443, 248 N.Y.S.2d 242 (Sup. Ct.), *rev'd on other grounds*, 22 A.D.2d

auto accident in Iowa. The car was rented from an Iowa office of the Hertz Corporation<sup>39</sup> which was also doing business in New York. Plaintiff attached the obligations in defendant's insurance policy. As in previous cases, the court had in personam jurisdiction over the defendant (insured) who in this case also appeared to be the insurer.

*Criticism of Seider*

Maintaining in the instant case that *Riggie* "cannot be distinguished away,"<sup>40</sup> the Court of Appeals in a 4-3 decision stated that "as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered [an attachable] 'debt'."<sup>41</sup> Although the general rule is that where an obligation is a service to be performed instead of money or its equivalent, it is not attachable,<sup>42</sup> the Court failed to comment on this distinction.

In addition, it is not clear whether the Court read the obligation to defend and indemnify as one attachable debt or whether the obligation to defend by itself constituted the attachable debt.<sup>43</sup> If the former is the correct interpretation, it would seem that the obligation is contingent until reduced to judgment, which in turn means that in personam jurisdiction is needed over the defendant.<sup>44</sup> On the other hand, if the latter interpretation is what the Court intended, more problems are seen. As stated, the obligation to defend is a service which is difficult, if not impossible, to measure in terms of a monetary value because of the nature of the variables involved in defending a suit, *e.g.*, the length of the trial, the amount of pre-trial investigation needed and the cost to procure attendance of parties and witnesses at the litigation proceedings.

As Professor Siegel has suggested, if the defendant defaults the obligation to defend will have to be sold by the sheriff at public auction or be measured in a special proceeding to compel the garnishee (insurer) to transfer the property or its value.<sup>45</sup> Indeed, attempting to measure the obligation to defend will possibly create the most difficult situation to resolve.

It is in the insurer's interest to defend and, for all practical purposes, he

823, 254 N.Y.S.2d 903 (3d Dep't 1964), *aff'd*, 16 N.Y.2d 605, 201 N.E.2d 59, 261 N.Y.S.2d 59 (1965).

39. It is not clear whether plaintiff was a passenger in a car rented from Hertz or a passenger in a car involved in an accident with a Hertz car.

40. *Seider v. Roth*, 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101 (1966).

41. *Ibid.*

42. See, *e.g.*, *Willard v. Butler*, 31 Mass. (14 Pick.) 550 (1834).

43. See generally Siegel, *Practice Commentary to § 5201*, 7B McKinney's Consol. Laws 15-20 (Supp. 1966).

44. *Seider v. Roth*, 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (1966) (dissenting opinion); *cf.* Quebec Auto Ins. Policy, Form No. Q.P.F.I., Hartford Fire Ins. Co.—Hartford Acc. and Indem. Co., Part I § A, Additional Agreements (3) which provides that "the Insurer further agrees to defend in the name and on the behalf of any person insured by this policy any civil action which may at any time be brought against such person on account of . . . loss or damages to persons or property." Record on Appeal, *Seider v. Roth*, 23 A.D.2d 787, 258 N.Y.S.2d 795 (1st Dep't 1966) (Emphasis added.). *But see* *Sheehy v. Madison Square Garden Corp.*, 266 N.Y. 44, 193 N.E. 633 (1934) (at least part of the obligations must be unconditional).

45. Siegel, *supra* note 43.

will probably do so in all cases. Nevertheless, if he does permit a default judgment to be entered against the defendant, enforcement problems may arise where the defendant is a resident of a foreign nation or the insurer is a foreign corporation. Should the foreign insurer decide to terminate his business activities in New York,<sup>46</sup> the plaintiff may have a difficult time levying on the intangible. This is especially true where the plaintiff has to travel to the foreign country and attempt to enforce his default judgment.<sup>47</sup>

Finally, there is a question of what would happen where the insurer was only obligated to indemnify the defendant (insured) for all losses incurred.<sup>48</sup> If an insurer should choose to delete the clause to defend from the policy, it is probable that the obligation to indemnify, by itself, is a contingent non-attachable debt until reduced to judgment.<sup>49</sup>

*Seider v. Roth*<sup>50</sup> can be criticized on several other grounds. One result of *Seider* is that it has by judicial decision created a "direct action" against the insurer,<sup>51</sup> although the legislature had not previously acted on this matter. Although the defendant can default and lose the value of the res, this will not happen because it is in the interests of the insurer to defend him and perhaps minimize its damages.<sup>52</sup> Thus, the insurer will undoubtedly defend in most cases—in effect a direct action. This result is not warranted, based on judicial precedent and the lack of legislative action.

The majority in *Seider* stated<sup>53</sup> that *Oltarsh v. Aetna Ins. Co.*<sup>54</sup> had in effect already established a direct action in New York. However, this case is easily distinguished from *Seider*. Plaintiff, a New York resident, was injured in Puerto Rico by a Puerto Rican corporation's negligence. Plaintiff commenced an action in New York against the corporation's insurer who was doing business in both Puerto Rico and New York. Puerto Rico has a direct action statute.<sup>55</sup> In a circular manner,<sup>56</sup> the Court held that the direct action statute was substantive and not procedural, thus compelling the application of Puerto Rican law. In

46. See *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965), 15 Buffalo L. Rev. 431 (1965) (demonstrates that doing business is not much different from "transacting any business").

47. See generally Kulzer, *Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary*, 16 Buffalo L. Rev. 84 (1966); Nadelman, *Non-Recognition of American Money Judgments Abroad and What To Do About It*, 42 Iowa L. Rev. 236, 246-49 (1957) (specific problems of enforcing American judgments in Canada).

48. This situation will probably not occur because it is in the insurer's interest to see that expenses are minimized. This is best furthered by defending its insured's lawsuits covered by the policy, since its expertise in negligence cases will ensure that defendant is provided with a good defense.

49. See *supra* notes 43-44 and accompanying text.

50. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

51. See Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 Harv. L. Rev. 357 (1960); Comment, *The Insurer's Duty To Defend Under a Liability Insurance Policy*, 114 U. Pa. L. Rev. 734 (1966).

52. See *supra* note 48 and accompanying text.

53. 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

54. 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

55. P.R. Laws Ann., tit. 26, §§ 2001, 2003 (1963).

56. Although it is beyond the scope of this paper, the "bootstrap" manner in which the Court exercised jurisdiction by employing conflicts-of-law doctrine is questionable.

*Seider*, however, Vermont did not have a direct action statute. Moreover, most direct action statutes provide that in order to be applicable, the insurance policy must have been issued in the forum state, the accident have occurred in the forum state or the forum have in personam jurisdiction over the defendant.<sup>57</sup>

Finally, section 167(1)(b) of the New York Insurance Law can be read to imply a legislative disapproval of a direct action. Section 167(1)(b) provides that if a judgment is rendered against the insured, he can maintain an action against the insurer if, thirty days *after notice of the judgment*, any amount remains unpaid for which the insurer is obligated under the policy.<sup>58</sup> If the legislature does not allow a defendant to proceed against his insurer until after judgment, it is difficult to rationalize *Seider's* result of permitting a direct action by a plaintiff against a defendant's insurer before judgment, without legislative leadership.

Traditionally, quasi-in-rem jurisdiction based on attachment has been directed at the absconding resident who cannot be found for personal service of process<sup>59</sup> and the non-resident who uses or owns property in the forum state. Although attachment "deprives the defendant of the use and enjoyment of his property at an extremely embryonic stage of the litigation and long before the defendant's liability to the plaintiff is established,"<sup>60</sup> it is defended on the grounds that it provides security by giving the plaintiff something from which he can satisfy a subsequent judgment and by helping to ensure that the resident defendant will appear in the litigation.<sup>61</sup> However, *Seider* cannot be rationalized on these grounds. Instead, plaintiff has in personam jurisdiction over the non-resident defendant for all practical purposes since it is not in the insurer's interests to allow the defendant to default. This result will occur even though the defendant's only contact with the forum is that he fortuitously owns an insurance policy issued by an insurer doing business in New York. In addition, a default judgment will in effect be in personam with respect to recoverable damages. Although satisfaction of a quasi-in-rem judgment is limited to the value of the res or the value of the obligations in the policy, this will in most cases cover plain-

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57. See Note, *supra* note 51. Arguably, the type of direct action *Seider* establishes contravenes due process limitations applicable to direct action statutes. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

58. *Cf. Ross v. Pawtucket Mut. Ins. Co.* 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963) (*X* (insured) was involved in a car accident with *Y*. *X* sued *Z* (insurer) for indemnification under the policy, and *Z* attempted to implead *Y* on the ground that *Y* may be liable to *Z*. The court, disallowing the impleader, held that *Z* was not entitled to any rights of subrogation until a judgement is entered against *Y*.). See *Quebec Auto Ins. Policy*, *supra* note 44, Part I, Conditions ¶ 12(2) which provides that "the Insured may not bring an action to recover the amount of a claim under this policy . . . until the amount of the loss has been ascertained . . . by a judgement against the Insured after trial of the issue, or by agreement between the parties with the written consent of the Insurer." Thus the Court in *Seider* has rewritten the typical insurance contract. *Cf. Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954).

59. *Cf. supra* note 37 and accompanying text.

60. 7 Weinstein, Korn & Miller, *op. cit. supra* note 15, ¶ 6201.02.

61. See Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 Harv. L. Rev. 303 (1962).

tiff's damages or come close to the amount he could recover if the judgment were in personam.<sup>62</sup>

In a situation like *Seider* plaintiff enjoys the benefits of in personam jurisdiction, but he does not suffer any of its corresponding detriments, such as *res judicata*. Modern jurisdictional concepts are based on *res judicata* considerations of litigational expediency, efficiency and finality.<sup>63</sup> *Seider* does not appear to further these considerations. "While a valid *quasi-in-rem* judgment begun by attachment or garnishment is conclusive as to interests in the property or obligation involved, it is not conclusive without jurisdiction over the defendant, as to the personal cause of action."<sup>64</sup> Nor is there a merger of the claim and judgment when the property is sufficient to satisfy the judgment.<sup>65</sup> Thus, the defendant is possibly subject to further harassment if plaintiff can later assert in personam jurisdiction over him. This is another questionable result which the majority in *Seider* failed to consider.

*Seider* raises some possible constitutional problems, for it is not clear that the defendant has sufficient "minimum contacts" with the forum state to satisfy the due process requirements of "fair play and substantial justice."<sup>66</sup> Although for all practical purposes plaintiff has in personam jurisdiction, the defendant has had no consensual or purposive contacts which have resulted in consequences with the forum state. The same argument can tangentially apply to the insurer. Even though the insurer is clearly subject to in personam jurisdiction for doing business here, New York's interest to adjudicate plaintiff's cause of action is questionable and will probably subject the insurer to added inconvenience and expense.<sup>67</sup> An illustration will help to clarify this point. Suppose plaintiff, a

62. Generally a person owns insurance proportionate to the size of his estate. Thus, an indigent defendant's estate will probably not consist of more than the extent of his coverage under the policy. The converse will be true where the defendant is wealthy, *i.e.*, a wealthy person will usually own enough insurance so that his estate will not have to be touched except in unusual cases.

63. See generally *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

64. *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 834 (1952).

65. *Ibid.* However, New York is probably an exception to this general rule; *i.e.*, New York courts consider a default judgment to be a judgment on the merits. See, *e.g.*, *Goebel v. Iffla*, 111 N.Y. 170, 18 N.E. 649 (1888). Thus in New York, the default judgment will merge with plaintiff's claim and act as a bar, in a future action, to all issues pleaded in the original complaint. See *Gates v. Preston*, 41 N.Y. 113 (1869). Weinstein, Korn & Miller, *New York Practice Manual* 29-2, at nn. 12-14 (1967). Nonetheless, other states may not recognize the New York default judgment as a judgment on the merits for purposes of *res judicata* in their respective states.

66. *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); *cf.* *Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 549 ("[T]he defendant must have taken voluntary action calculated to have an effect in the forum state.").

67. *Seider* is a borderline case, for New York arguably has a fairly strong claim to adjudicate plaintiff's cause of action, *viz.*, plaintiff was a resident of New York, one of the co-defendants was a resident of New York and plaintiff was treated for injuries in New York. See Brief for Plaintiff-Appellee pp. 7-12, *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Although *Seider* may be correctly decided, the danger of its rationale is that jurisdiction is based merely on an insurer's doing business in New York. The Court did not consider other probative matters giving New York its interest to adjudi-

resident of New York is involved in an automobile accident in California with a resident of California.<sup>68</sup> Plaintiff owns an insurance policy issued by a California insurer, who has sufficient contacts to be doing business in New York for jurisdictional purposes. Plaintiff attaches the obligations in New York. Thus, the insurer will be forced to defend in New York because a default judgment as to the interests in the property is entitled to "full faith and credit" in California if he cannot be served in New York.<sup>69</sup> Surely, this approaches, if not violates, the limits of those "traditional notions of fair play and substantial justice."<sup>70</sup>

Another due process argument is that both the insured and the insurer for all practical purposes are deprived of a rational choice of alternative modes of action. As stated,<sup>71</sup> attachment and quasi-in-rem jurisdiction are intended to give the defendant a choice between defending the suit or losing the res. This is especially true in a state such as New York which does not recognize a limited appearance to defend the res.<sup>72</sup> But in a situation like *Seider*, both the insured and the insurer are in effect subjected to in personam jurisdiction without this rational choice even though they have few interests in the forum state with respect to the immediate cause of action.

Finally, an argument can be maintained that *Seider* contains the seeds of an unconstitutional burden on interstate commerce by unduly burdening insurance companies with unwarranted inconvenience and expense, which in turn will be passed on to the insureds as premiums.<sup>73</sup> It also contravenes the basis purpose of the commerce clause because it establishes a form of state chauvinism placing its questionable interests above the interests of other states. Thus, *Seider* arguably imposes a form of regulation on interstate commerce where there is little justification to do so.<sup>74</sup>

#### POSSIBLE EXTENSIONS OF THE *Seider* RATIONALE

The majority in *Seider* carefully limited the holding to the obligations to defend and indemnify in an insurance policy as an attachable debt where the

cate, and in turn set guidelines for the lower courts to follow. This is evidenced by the example in the text. See *infra* note 68 and accompanying text.

68. *Cf. Jones v. McNeill*, 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. 1966) (Plaintiff, a resident of New York and defendant, a resident of California were involved in an automobile accident in New Mexico. Plaintiff attached the obligations in defendant's insurance policy issued by an insurer doing business in New York.).

69. See *supra* notes 64-65 and accompanying text.

70. *International Shoe Co. v. Washington*, 326 U.S. at 317 (1945).

71. See *supra* notes 18-19 and accompanying text.

72. N.Y. CPLR 320(c); see Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 Buffalo L. Rev. 374 (1965).

73. See Developments, *supra* note 63, at 963; Homburger & Laufer, *Expanding Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 Buffalo L. Rev. 67, 79-80 (1966); see also *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556, 559 n.3 (S.D.N.Y. 1967) (The court also denied injunctive relief to prevent sheriffs from levying on insurance policies issued outside New York to non-resident plaintiffs.); *Jones v. McNeill*, 51 Misc. 2d at 533, 273 N.Y.S.2d at 522 (Sup. Ct. 1966) (The court rejected this contention, reasoning that attaching the obligations in defendant's insurance policy presented no "undue interference" with interstate commerce.).

74. *But see supra* notes 67-68 and accompanying text. *Cf. infra* notes 91-95 and accompanying text.

only contact with the forum is that the insurer is doing business there. However, this same rationale can be extended to other areas with less legerdemain than was used in *Seider*.

It will be difficult to extend the *Seider* rationale to tangible personalty and intangible personalty evidenced by a document, because the situs is where the document is found.<sup>75</sup> In addition, New York provides by statute that a security is not validly attached until it is seized by proper process.<sup>76</sup> Thus, the mere presence of a corporation doing business in New York will not guarantee the attachment of intangible personalty unless the evidence of the intangible is physically seizable within the state's borders.

However, if the personalty is a "pure" intangible, the rationale of *Seider* is easily extended merely by varying the nature of the attachable "debt." The most obvious are those with a fact situation like *Seider*, viz., where the defendant is a non-resident and defendant's obligor is doing business within the forum. For example, although plaintiff could not attach defendant's stock issued by a company doing business in New York unless it is physically seizable within the forum,<sup>77</sup> plaintiff could logically attach the dividends accruing to the stock any time after the declaration date as long as they remain unpaid to the defendant. Thus, regardless of whether plaintiff's cause of action is based on a tort or contract or whether the cause of action has any relation with the forum, plaintiff can logically attach any non-secured obligation payable to the non-resident defendant by a company doing business in New York.

Another possible extension of *Seider* is in the area of trusts and estates. It has already been demonstrated that for purposes of jurisdiction pursuant to New York Surrogate's Court Act section 47, the insurer's obligation to defend and indemnify is an asset in the state facilitating the appointment of an administrator in New York.<sup>78</sup> Query: is it possible for plaintiff to have an administrator appointed in New York where he has a cause of action based on tort or contract against a deceased non-resident defendant, whose only contact with the forum is that his estate is the beneficiary of a trust whose trustee is doing business in New York? The answer is yes. Although for purposes of jurisdiction the general rule is that the trustee must be a resident of the state or the trust be funded and located within the state,<sup>79</sup> plaintiff can logically claim the trust and/or the income accrued and payable to the beneficiary is an asset in the forum for purposes of appointing an administrator in New York.<sup>80</sup> Also, the trust and

75. See Andrews, *Situs of Intangibles in Suits Against Non-Resident Claimants*, 49 Yale L.J. 241 (1939).

76. Uniform Commercial Code § 8-317(1) provides:  
No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

See also, to same effect, N.Y. CPLR § 5201(c)(4).

77. Uniform Commercial Code § 8-317(1).

78. See *supra* notes 34-35 and accompanying text.

79. See Andrews, *supra* note 75, at 253.

80. Of course, this assumes that the laws of the attaching state and the laws of the

especially the trust's accrued income held by a company doing business in New York is logically attachable as a debt pursuant to sections 5201 and 6202 of the New York Civil Practice Law and Rules for purposes of general subject-matter jurisdiction. Thus, large corporations, trust companies and particularly mutual funds are vulnerable to an extension of *Seider*.

Another extension of the *Seider* rationale is one concerning a simple contract debt. New York courts have shown a reluctance to assert in personam jurisdiction over a non-resident defendant pursuant to the long-arm statute's "transacting any business" clause<sup>81</sup> unless he has had several business contacts in New York.<sup>82</sup> Thus, a contract, which is to be performed in New York and which has been breached, is not a sufficient contact for which a New York court will exercise in personam jurisdiction over a defendant who has no other contacts with the forum, such as solicitations, negotiations or the signing of the contract.<sup>83</sup> *Query*: is this contract debt an attachable debt within the state for purposes of quasi-in-rem jurisdiction? The author believes it is, if one uses the same questionable logic as the majority in *Seider*. Thus, if a company doing business in New York holds, in escrow, a contract or the proceeds of a contract between plaintiff or a third party and non-resident defendant, and if the performance of the contract is past due, the contract debt is logically an attachable debt within the state. A similar result is possible where there is no company doing business in New York holding the contract in escrow, but where there is solely a contract between the plaintiff and non-resident defendant or resident defendant and again, the performance of the contract is past due. Moreover, it is important to remember that defendant will either have to defend on the merits or default the value of the res, which for all practical purposes is equivalent to an in personam judgment.

As stated,<sup>84</sup> *Seider* establishes a direct action when defendant is a non-resident. *Query*: is a direct action now possible where both defendant and his insurer are subject to in personam jurisdiction? Again, the answer is logically yes. If the Court of Appeals can in effect establish a direct action as in *Seider*,

state in which the trust is funded do not contain provisions which would forbid the attachment of the trust or the income accruing to the trust. See N.Y. CPLR §§ 5201(b) (no attachment of right to income until accrued), 5231(b) (at least 10%), 5226 (possibly more than 10% but in discretion of court).

This possible extension of *Seider* demonstrates two more potentially undesirable results which the majority failed to consider, *i.e.*, *Seider* creates the possibility of forum-shopping plaintiffs. Forum shopping can in turn cause friction between states where one state subjects the residents of another state to needless inconvenience and expense. See *supra* notes 67-68 and accompanying text. *Cf.* *Hanson v. Denckla*, 357 U.S. 235 (1958); *Kurland*, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958).

81. N.Y. CPLR § 302(a)(1).

82. See, *e.g.*, *Kramer v. Vogl*, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966); *A. Millner Co. v. Noudar, Lda.*, 24 A.D.2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966); see generally Comment, *Transacting Business as Jurisdictional Basis—A Survey of New York Case Law*, 14 Buffalo L. Rev. 525 (1965).

83. *Cf.* *Cleary, The Length of the Long Arm*, 9 J. Pub. L. 293, 300 (1960).

84. See *supra* notes 53-58 and accompanying text.

it is not conceptually difficult to do so in the hypothetical. The Court has already intimated such a result.<sup>85</sup>

## CONCLUSION

*Seider* has extended long-arm jurisdiction and the "minimum contacts" doctrine far beyond the original intention of the legislature.<sup>86</sup> The New York long-arm statute permits a court to exercise in personam jurisdiction for causes of action arising from certain enumerated acts within the state or resulting in consequences within the state. In *Seider* and the hypothetical extensions, there are no acts for which a court can assert in personam jurisdiction over the non-resident defendant. More important, although plaintiff in *Seider* has in personam jurisdiction for all practical purposes, the defendant is not provided with the safeguards of the long-arm statute. That is to say, plaintiff can maintain an action for any possible cause of action falling within the scope of the insurance policy. Thus, plaintiff has general jurisdiction over the defendant (up to the value of the attached property) in *Seider* and the hypothetical extensions, rather than the restricted or specific jurisdiction obtainable under the long-arm statute.

If the same or a similar issue again comes before the Court of Appeals, it should consider the demonstrated criticisms and ramifications it originally neglected to consider.

Although a state has a strong interest in protecting its residents, it should not do so when the situation is unwarranted. Whether the equities in a particular litigation are with the plaintiff<sup>87</sup> or the defendant<sup>88</sup> is debatable, but nonetheless, a court should not merely apply mechanical rules of logic and "confine its analysis solely to its own ideas of what is just, appropriate, and convenient. To a degree it must take into account the views of other communities concerned."<sup>89</sup>

Although New York presently does not recognize the doctrine of forum non conveniens when applied to a resident plaintiff and a non-resident defendant,<sup>90</sup> it should re-consider this question, and in addition consider more probative factors before extending jurisdiction in a situation like *Seider*, viz., "the defendant's ownership of tangible property in the state, the domicile of the plaintiff in the state, the unavailability of another forum in which the controversy can be adjudicated, and the risk of multiple liability if jurisdiction is denied."<sup>91</sup>

85. See *Fishman v. Sanders*, 20 A.D.2d 905, 248 N.Y.S.2d 1013 (2d Dep't 1964), *rev'd on other grounds*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965), 15 Buffalo L. Rev. 425 (1965); see *supra* notes 36-37 and accompanying text.

86. See Homburger & Laufer, *supra* note 73, at 67-76; Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61-66, 72-84 (1965).

87. See Cleary, *supra* note 83, at 299.

88. See von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1127 (1966).

89. *Ibid.*

90. See Homburger & Laufer, *supra* note 72, at 374 n.4; but see 28 U.S.C. § 1404(a) (1964) which provides that: "For the convenience of parties and witnesses, in the interest of justice, a court may transfer any civil action to any other district or division where it might have been brought."

91. See Note, *supra* note 63, at 965.

## COMMENTS

Other relevant factors are the law applicable to a suit, "the availability of evidence in the state, . . . the relationship between the state or the defendant's property in the state and (1) the transaction or occurrence which gave rise to the suit, or (2) the objective of the action."<sup>92</sup> In other words, it is possible that the present categories of in personam, in rem and quasi-in-rem jurisdiction are too arbitrary and self-limiting.<sup>93</sup> Traditional notions of jurisdiction couched in terms of power do not provide proper fairness to all parties involved. It would perhaps be better to base jurisdiction on a more flexible concept, such as "forum conveniens" or "competency to adjudicate" which would be more in tune with modern jurisdictional needs.<sup>94</sup> In any case, it has been suggested that with the advent of long-arm statutes used to assert in personam jurisdiction over a non-resident defendant, quasi-in-rem jurisdiction is an outmoded and unfair procedure.<sup>95</sup>

MICHAEL NELSON

### AN APPRAISAL OF SECURITY LEGISLATION IN EDUCATION IN LIGHT OF KEYISHIAN: A PROPOSED SOLUTION

*Give us the child for 8 years, and it will be a Bolshevik forever. . . .  
He who has the youth, has the future.*

—V. I. Lenin

*Absolute security is achieved only in a graveyard.*

—Justice Holmes

On January 23, 1967, the Supreme Court announced the decision in *Keyishian v. Board of Regents*.<sup>1</sup> The subject of the decision is loyalty legislation; the conflicting interests evidence a balancing of academic and constitutional freedoms against public demand for legitimate state control of "subversive" activity in a state educational system. Initial reactions to this decision are both vehement and varied. Protagonists acclaim the decision a landmark for personal

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92. *Ibid.*

93. See generally von Mehren & Trautman, *supra* note 88.

94. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956); Homburger & Laufer, *supra* note 73, at 78 (The authors suggest a "functional approach to the problem of jurisdiction, broadly rooted in reasonableness, fair play and substantial justice."). *Cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub. nom.* Columbia Broadcasting System v. Atkinson, 357 U.S. 569 (1958), 46 Calif. L. Rev. 637 (1958); see 28 U.S.C. § 1397 (1964) (federal interpleader statute).

95. See Carrington, *supra* note 61; *contra*, Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337 (1961); *cf. supra* notes 36-37 and accompanying text. See also Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. (1959).

However quasi-in-rem jurisdiction may have continuing viability where it is used to prevent an absconding resident from selling or taking his property with him, thus avoiding his creditors. Here it is used as a security device over a resident, rather than as a means to exercise jurisdiction over a non-resident as in *Seider*.

1. 385 U.S. 589 (1967) [hereinafter cited *Keyishian*].