

In the  
**Supreme Court of the United States**

R. F. Shaffer, Et Al.,  
Appellants,

v.

Arnold Heitner, As Custodian For  
Mark Andrew Heitner,  
Appellee.

No. 75-1812

Washington, D. C.  
February 22, 1977

Pages 1 thru 56

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IN THE SUPREME COURT OF THE UNITED STATES

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Appellants, :
   
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v. : No. 75-1812
   
:
   
ARNOLD HEITNER, AS CUSTODIAN FOR :
   
MARK ANDREW HEITNER, :
   
:
   
Appellee. :
   
:
   
-----:

Washington, D. C.,
   
  
Tuesday, February 22, 1977.

The above-entitled matter came on for argument at
   
  
1:12 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

- JOHN R. REESE, ESQ., McCutchen, Doyle, Brown & Emersen, Three Embarcadero Center, San Francisco, California 94111; on behalf of the Appellants.
- MICHAEL F. MASCHIO, ESQ., Cowan, Liebowitz & Latman, P.C., 200 East 42nd Street, New York, New York 10017; on behalf of the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1812, Shaffer v. Heitner.

Mr. Reese, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN R. REESE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. REESE: Mr. Chief Justice, and may it please the Court:

The issue before the Court in this case today concerns the constitutionality of the Delaware sequestration statute as it was applied to seize the property of some 21 non-resident defendants in an action having no substantial relationship to the State of Delaware. This is an appeal from a decision of the Delaware Supreme Court upholding that application of the statute.

This is a shareholder's derivative suit brought by the holder of one share of stock of the Greyhound Corporation against some 28 individual defendants. The action is alleged to be brought on behalf of Greyhound and its subsidiary Greyhound Lines, Inc., both of which have their principal places of business in Phoenix, Arizona.

The Greyhound Corporation is a Delaware corporation. Greyhound Lines, Inc. is incorporated in California.

Now, the individual defendants are 28 present or former officers or directors or in some cases employees of

either one or the other of those companies.

QUESTION: Do each one of the 28 fulfill what you have just stated, either an officer or director or a key employee?

MR. REESE: No, Mr. Justice Blackmun. That is why I tried to put it in the conjunctive. Some are officers, some are directors, some are both --

QUESTION: But all are one or the other?

MR. REESE: That's right. Some of them hold no position with the Delaware corporation. It is worth noting that at this point. Some of the individual defendants have only held positions with the California corporation.

Now, as I said, none of the defendants is a resident of the State of Delaware. Neither is the plaintiff, incidentally. So far as the record in this case shows, no defendant has ever even been in Delaware or done any act in that state. The conduct charged against them in the complaint occurred far from Delaware.

The essence of those charges is that the individual defendants ought to be held liable for the reason that the companies are found to have violated a court order and because the companies suffered an adverse verdict in an antitrust case that is still on appeal and not yet final. But those charges aren't before the Court.

Today the issue is whether the Delaware sequestration

statute can constitutionally be applied to sequester the defendants' stock as a means for coercing their general appearance in the action.

Delaware has no long-arm statute applicable to individuals. None of these defendants was personally served with process. Instead, the plaintiff obtained an ex parte order from the Court of Chancery in Delaware seizing any property that the defendants had in the state. In this case, the property seized consisted primarily of capital stock issued by a Delaware corporation.

The seizure was effected by an order to the corporation directing it not to effect any transfers of those shares on its books. The certificates themselves were not seized and they couldn't be seized because they are not in Delaware either. Delaware accomplishes the seizure then --

QUESTION: Under the uniform commercial code, am I incorrect in my memory that the situs of the certificates is the situs of the stock?

MR. REESE: Well, under the uniform commercial code as applied in every state except Delaware, Mr. Justice Stewart, the certificate itself must be seized in order to effect an attachment.

QUESTION: That is what I thought.

MR. REESE: Delaware alone adopted the contrary rule, namely that the situs of the stock is deemed to be in the state

of incorporation of the issuing corporation.

QUESTION: That has always been the Delaware law, hasn't it?

MR. REESE: As far as I know, that has always been the Delaware rule.

QUESTION: And that is very much the minority rule, you say, just as a matter of situs of property?

MR. REESE: At this point, Delaware is unique in holding that rule. Every other jurisdiction has adopted those provisions of the commercial code that embody the stock in the certificate.

QUESTION: Yes.

QUESTION: Mr. Reese, you don't challenge the constitutional power of the State of Delaware to so locate the situs of the stock, or do you?

MR. REESE: It depends on the purpose for which the state uses that legal fiction, Mr. Justice Stevens. We do challenge the power of the state to use that fiction for the purpose of asserting jurisdiction over nonresident defendants or to adjudicate their rights in that stock.

QUESTION: You mean even to the value of the stock?

MR. REESE: It is not necessary to reach that question in this case.

QUESTION: Well, you just reached it.

MR. REESE: Our position is that a fictional situs

for an intangible property is an insufficient basis for adjudication of personal rights.

QUESTION: Well, even if Delaware could subject a property to a judgment, your point is they can't compel -- use that property to compel personal jurisdiction?

MR. REESE: Correct.

QUESTION: That's all you need to decide in this case?

MR. REESE: That's all we need to decide in this case.

QUESTION: May I ask you this, the other side of the same coin: If the certificates were in fact in the State of Delaware, wouldn't you be making the same argument?

MR. REESE: Well, we might be making some of our same argument, Your Honor.

QUESTION: Well, wouldn't you be making the same basic argument that my Brother White has just identified, that you can't use that in order to obtain personal jurisdiction?

MR. REESE: We would still be objecting to the coercive purpose and effect --

QUESTION: Wouldn't your argument be the same?

MR. REESE: Yes, Your Honor.

QUESTION: It is fiction in any event, because the certificate is only a certificate. It isn't the property; it is just the certificate of ownership -- any more than the situs of the issuing corporation is the property, wherever you are going to locate the situs, it is going to be something of a



fiction, isn't it?

MR. REESE: That's correct, Your Honor.

QUESTION: And even though Delaware followed the majority rule and said that the situs of the certificate is the situs of the personal property, and if the certificates of the defendants in this case all happened to be locked up in the corporation's safe deposit box in Delaware, you would still be making the same basic constitutional argument, would you not?

MR. REESE: Yes, Your Honor, we would. I think that it is worth noting in that connection that if those certificates were there, the odds are very much greater than the defendants would have had some substantial relationship with the state.

QUESTION: Well, they might be residents, but I am assuming they are not.

MR. REESE: Okay. That's fine.

QUESTION: Mr. Reese, would you be making the same argument if, instead of stock certificates, one of the defendants had his brother-in-law drive his car through the state and the car was seized?

MR. REESE: Well, the same constitutional problems would exist to some extent in the case of tangible property. In the case of tangible property that is in the jurisdiction through no fault, if you will, or without the knowledge or consent of the defendant, I think the arguments would apply with

the same force.

QUESTION: So it doesn't really turn on the situs of the stock then? Your position is basically the same, it is unfair to seize the property and use it for this purpose of forcing someone to enter a general appearance?

MR. REESE: That's correct. And our arguments goes to the sufficiency of the relationship between a defendant and a jurisdiction before that jurisdiction may assert its power over the defendant.

Now, we should note that the State of Delaware could not use its sequestration procedure in this case to reach all of the defendants that the plaintiff sued, only those which had something that Delaware considered to be property in the state. As a result, seven of the named defendants are not before the court, were not brought into the case, and are not really parties to this appeal.

Now, there is no real dispute about how the Delaware procedure works. It has been interpreted and applied by the Delaware courts for many years, and the procedure is well established.

First of all, it is an ex part procedure. The order seizing the property is issued without notice or prior opportunity for hearing. Second, that order issues automatically if only two facts are alleged. And the first fact is that the defendant is a nonresident, and the second fact is that he owns

property in the State of Delaware. And if only those two facts are alleged, the order must issue and there is no discretion to deny it.

QUESTION: That resulted in a nominal bond. \$1,000, wasn't it?

MR. REESE: In this case, Your Honor, bond of \$1,000 was posted.

QUESTION: Mr. Reese, on that point, suppose Delaware amended its statute to require that before the order issued there be a probable cause hearing, it would be ex parte, maybe service notice, but the defendant might not come, would that cure the defect in the statute, probable cause to show there is merit to the complaint?

MR. REESE: That would certainly alleviate the first problem of lack of prior notice and opportunity for hearing.

QUESTION: Would it make the statute any less unfair?

MR. REESE: It would make it less unfair. I'm not prepared to say that that would cure the other deficiencies that exist in the statute

QUESTION: Well, if Delaware still insisted that he submit to personal jurisdiction in order to defend the case, you would have the same argument in that respect?

MR. REESE: Yes, we would.

QUESTION: In effect, the statute eliminates the whole range of special appearance on the part of the defendant to

contest the jurisdiction of the court or for any other purpose?

MR. REESE: That's right, Mr. Chief Justice. It eliminates the ability of the defendant to enter a special appearance to contest the jurisdiction of the court or even to enter a limited appearance to defendant to the extent of his property.

QUESTION: On the merits?

MR. REESE: On the merits.

To get this order issued then, it doesn't matter who the plaintiff is or where the plaintiff lives, and it doesn't matter what the claim is about or where the claim arose or whether the claim is sound or spurious.

Mr. Justice Stevens, there is no determination whatever whether that claim has any merit at all before that order issues.

QUESTION: In this case, nobody was a resident of Delaware?

MR. REESE: That's correct.

QUESTION: Nobody?

MR. REESE: Well, the only connection that Delaware has with any party or anything else in this case is that one of the two corporate defendants happens to have been incorporated in Delaware. None of the individual defendants nor the plaintiff who filed the lawsuit is a resident of Delaware.

QUESTION: Is this statute applicable to any and all

kinds of lawsuits?

MR. REESE: Any claim brought by any plaintiff.

QUESTION: It has to be in the Court of Chancery though, doesn't it?

MR. REESE: An equitable claim for the recovery of money is the way the statute is described.

QUESTION: It has to be an equitable claim, so it is not any claim? It is any equitable claim, is that it?

MR. REESE: That's correct.

QUESTION: It is not applicable therefore to an ordinary tort suit, is that correct, for damages?

MR. REESE: This particular statute is not, Your Honor. Delaware still has a foreign attachment statute which has some of the same characteristics as the sequestration statute.

QUESTION: But this one is only in the Court of Chancery and Delaware still has the division between chancery and law, does it?

MR. REESE: Yes.

QUESTION: Do you suggest that before a state may get jurisdiction by attaching property that there must be a prior hearing? You don't suggest that, do you?

MR. REESE: Well, Mr. Justice White, I think that that depends on whether *Fuentes v. Shevin* really continue to be viable.

QUESTION: Well, I know, but getting jurisdiction is a -- a state being able to get jurisdiction puts a considerable different interest in the picture than is in Fuentes.

MR. REESE: The question then, as I see it, would be whether the purpose to obtain jurisdiction is by itself such a significant state of interest as to justify postponing notice and a prior opportunity for hearing.

QUESTION: Because the state may never ever -- they give up the chance automatically by giving notice, people will move their property?

MR. REESE: That is correct. That is a possibility.

QUESTION: But in any event, you would say the state must give, afford the opportunity for a timely hearing to show probable cause on the merits?

MR. REESE: Yes, or at the very minimum the state must provide some kind of procedural safeguard to protect the defendant.

QUESTION: Against a mistake or for what?

MR. REESE: Against the seizure of property on the basis of a frivolous or baseless claim or whatever. If there is not prior notice or opportunity for hearing, then there certainly must be some kind of protective mechanism.

QUESTION: So you think you have two independent grounds for winning here?

MR. REESE: At least, Your Honor.

QUESTION: At least two then. One is that if there is no opportunity for a hearing at all at any time, the property must be released, even if it was seized to get jurisdiction. And the second is that even if there was probable -- even if there was a hearing and even if probable cause was shown, the state may not condition his right to defend up to the value of the property on his submitting to personal jurisdiction.

MR. REESE: Yes, sir.

QUESTION: What would the hearing be directed to? To what would the hearing be directed?

MR. REESE: Are we talking now about a pre-seizure hearing or a post-seizure hearing?

QUESTION: Any hearing.

MR. REESE: It would be directed to whether the claim had any basis or merit.

QUESTION: You mean the underlying claim?

MR. REESE: The underlying claim.

QUESTION: It wouldn't be directed to the question of whether or not this is the property of the defendants, would it? That was conceded. Under Delaware law, it is, isn't it?

MR. REESE: Under Delaware law, this is conceded to be property --

QUESTION: Property of the defendants within the jurisdiction of Delaware.

MR. REESE: Under Delaware law, that is conceded.

QUESTION: The hearing therefore -- in other words, there is no dispute about that, so the hearing would not be directed to that issue, is that correct?

MR. REESE: In this case, it would not.

QUESTION: And so to what would it be directed?

MR. REESE: It would be directed to the question of whether the underlying claim had sufficient merit to justify the use of the state's seizure powers in the first instance.

QUESTION: Well, that is the lawsuit. That is the basic lawsuit, which is going to follow.

QUESTION: That is the probable cause hearing?

MR. REESE: I would agree, to establish the validity or probable validity in the language used in Guentes and North Georgia.

QUESTION: But that, as my brother pointed out, involves different state interests, different interests and persons and other interests. In that case, the question was who was entitled to the property.

MR. REESE: That interest is not entirely divorced from the Delaware statute either, Mr. Justice Stewart, because under Delaware law the property may be retained to satisfy an eventual judgment, if the court determines that that should be so. So that the statute does serve a dual purpose. It is both to obtain jurisdiction and to secure judgment. So it has that



aspect. It is common to the creditor cases.

QUESTION: But it also has, in your submission, an additional vice, this system?

MR. REESE: It has the coercive vice.

QUESTION: That even if there is a hearing, it has the coercive vice.

MR. REESE: If a defendant in Delaware who has been subjected to the procedure declines to submit to that coercion and just stays away --

QUESTION: He forfeits the property?

MR. REESE: -- he forfeits the property, without any adversary hearing whatever. It is just gone. Now, that is a statute that has potentially enormous impact because, as the appellee has pointed out, over one-half of the most important companies in the United States have chosen Delaware as the place to incorporate, and all of their shareholders are vulnerable to the use of this procedure on any claim that any plaintiff might choose to assert against him.

QUESTION: Any equitable claim?

MR. REESE: Any equitable claim that any plaintiff might choose to assert against him.

QUESTION: Equitable claim for money?

MR. REESE: Equitable claim for money. Now, we submit that that procedure is not only unfair but that it is unnecessary and it is obsolete. It has a whole catalog of

defects. I think most of them we have touched on already. There is no prior notice or opportunity for hearing. There is no consideration of the merit either before or after the seizure takes place. The defendant is not permitted any right to defend unless he submits himself to unlimited personal jurisdiction in the state. There is no adequate provision for indemnifying the defendant against wrongful seizure. The purpose of the state is to assert personal jurisdiction over the defendant. But in this case none of the defendants nor the controversy has a substantial relationship with the State of Delaware, and even the property that Delaware has purported to use as a basis for the proceeding is located there by reason of a legal fiction that no other state continues to accept.

QUESTION: But I thought that, as to that last point, you didn't question the power of Delaware to say that in this state the personal property, when it comes to -- we are talking about shares of stock -- shall be the situs of the issuing corporation? And if the issuing corporation is in Pennsylvania, even though the certificates are in Delaware, I gather that under Delaware law the property is in Pennsylvania, is that correct?

MR. REESE: It is my understanding, that is correct.

QUESTION: And did I misunderstand when I thought I heard you say that you were not questioning the power of Delaware to identify the situs of the personal property as

depending upon the situs of the issuing corporation?

MR. REESE: I think in answer to Mr. Justice Stevens' question on that point earlier, I indicated that it depends on what the state then does with its legal fiction. And I think the case does raise a serious question as to whether the state is not exercising jurisdiction over property that is not truly within its borders.

QUESTION: But your argument, I think you said -- and tell me if I have misunderstood you, because it is some importance -- wouldn't your argument be the same if this were a single defendant who lived in Arizona but whose automobile was in Delaware?

MR. REESE: Our argument would be weaker, but it would basically follow the same constitutional lines.

QUESTION: Why would it?

MR. REESE: I think --

QUESTION: If it is a constitutional matter, why would it?

MR. REESE: I think that the Court has previously recognized limits on the ability of a state through the use of fictions to deem property to be within its borders for the purpose of asserting jurisdiction. The case of an intangible fiction is surely a more questionable one than the case of a tangible.

QUESTION: Well, what if the claim though had nothing

to do with the car? What if it was this claim, it had nothing to do with the car? The cause of action didn't arise out of the car being there or --

MR. REESE: We would certainly be here making the same arguments.

QUESTION: Yes.

MR. REESE: The State of Delaware considers the defendants contacts or the relationship of the controversy to the state to be irrelevant.

QUESTION: Well, there is nothing new about that. In fact, what's new is International Shoe, if you are as old as I am, because back in my law school days there was no such thing as the International Shoe doctrine and it was quite a usual thing for every state to provide that if a lawsuit involved real property then jurisdiction of the court existed wherever the real property was situated. If it involved any other kind of a lawsuit, if there were personal property within the jurisdiction, you could acquire personal jurisdiction to the extent of the value of the property by quasi in rem jurisdiction. There is nothing new about this basic system, is there?

MR. REESE: No. The development of intangible properties, however, calls into serious question whether you ought to follow that same analysis for jurisdictional purpose.

QUESTION: I thought that one of your claims was that now that we are in the regime of International Shoe, that

we should forget all those previous devices to acquire personal jurisdiction.

MR. REESE: Well, that certainly is our position.

QUESTION: That is what I thought.

QUESTION: Mr. Reese, even in the times to which my Brother Stewart refers, was it permissible to get jurisdiction by quasi in rem method and attain a judgment for more than the value of the property?

MR. REESE: I'm not aware of a case that holds --

QUESTION: You couldn't if he didn't show up in court.

QUESTION: But could he not come in and enter an appearance and be permitted to defend without risking a judgment in excess of the value of the property?

MR. REESE: Certainly in many jurisdictions.

QUESTION: Well, were there any where that was not the case other than Delaware?

MR. REESE: I'm not able to answer that question, Your Honor.

QUESTION: That was the function of a special appearance, was it not, to guard against that possibility?

MR. REESE: Yes, Mr. Chief Justice.

QUESTION: But your position is now and I take it always would have been that a state may not insist that the defendant submit himself generally to the jurisdiction of the

court as a price for defending his property in the state?

MR. REESE: In the absence of a relationship between the defendant and the state.

QUESTION: Other than just having property?

MR. REESE: That's right.

The court below sought to defend this procedure largely on the basis of two cases. One was the District Court's opinion in U.S. Industries v. Gregg; and the second was the District Court's decision in 1921 in Ownbey v. Morgan. Since that time, the Third Circuit reversed the District Court decision in that case, so rather than being support for the decision below, that case is now another reason for reversal.

We submit that the case of Ownbey v. Morgan does not support the decision below either, as for several reasons. First, Ownbey really didn't address the question that is presented to this Court. The validity of the attachment of the defendant's property was not really in issue in Ownbey. To the extent there that the court assumed that that attachment was valid, the appellants submit that the assumption is out of touch with the procedural due process concepts that this Court has developed and articulated in the approximately sixty years since Ownbey was decided.

At the time Ownbey was decided, it may well have been that an attachment to secure jurisdiction over a nonresident defendant was the only way you could get jurisdiction over him.

But as Mr. Justice Stewart pointed out, since International Shoe was decided about thirty years ago, that has no longer been a valid assumption. And to put it simply, we think that Ownbey reflects a time and a stage of analysis of the Constitution that has been superseded.

I would like to reserve the rest of my time for rebuttal, Mr. Chief Justice.

QUESTION: In other words, International Shoe didn't provide an alternative criterion of due process constitutionality but provided a new one that implicitly overruled the old one?

MR. REESE: Yes.

QUESTION: Right?

MR. REESE: Yes, Mr. Justice Stewart.

MR. CHIEF JUSTICE BURGER: Mr. Maschio -- did I pronounce your name correctly?

MR. MASCHIO: Yes, you did.

ORAL ARGUMENT OF MICHAEL F. MASCHIO, ESQ.,

ON BEHALF OF THE APPELLEES

MR. MASCHIO: Mr. Chief Justice, and may it please the Court:

The issue before this Court is whether the present use of the Delaware sequestration statute in the case at bar has deprived these appellants of their Fourteenth Amendment rights under the United States Constitution. The appellee

Arnold Heitner is attempting to secure access to a forum so that this case may proceed on the merits. Jurisdiction is the appellee's sole concern, and that is all that this case is about. In this respect, the seizure in the case at bar is quite different from the seizures involved in recent attachment cases decided by this Court. I am, of course, referring to Sniadach and Fuentes and the cases which have followed those very important decisions.

In those cases, in personam jurisdiction over the defendant already existed. Here the Delaware statute can only be used if the defendants are nonresidents of the State of Delaware. In addition, in those attachment cases, the purpose of the attachment was to secure or to obtain property as security for the underlying judgment. In the case at bar, the appellee has no interest in the property. As soon as the appellants appear, the property will be released.

Now, throughout the appellants' argument, they have maintained that the procedures used in this case are fundamentally unfair and that traditional notions of fair play and substantial justice have been violated.

QUESTION: May I ask you this before you proceed: What if, contrary to the facts in this case, what if there were a bona fide issue as to whether or not this was property of the defendants?

MR. MASCHIO: I'm not sure I understand your question.



Issue as to who owned the stock?

QUESTION: As to whose property -- contrary to the facts in this case, in Delaware and under Delaware law, if there is a serious question or if a question is raised or potentially being raised as to whose property it really is, is there any provision in Delaware law for the defendant to come in and make a special appearance and say, sorry, this is not my property?

MR. MASCHIO: I could answer that question by saying that there are procedures in Delaware, bills in equity exist in Delaware. That could only take place in the hypothetical situation which is not before this Court where there has been a transfer of the stock --

QUESTION: Well, let's say it is not even stock. Let's say it is an automobile.

MR. MASCHIO: I know the answer with respect to stock. I'm not sure with respect to an automobile. As far as stock is concerned, it seems to me that the Delaware courts have recognized that a suit in equity is the appropriate procedure whereby all of the claimants who claim that they have interest in the stock can be brought before the court in one particular proceeding so that the ownership interests of all the parties can be resolved.

In addition, it should be pointed out that where stock is involved, the transfer is really transferring stock in

violation of a court order and cannot warrant title to that stock to the transferee. The federal courts have recognized the bill in interpleader which also serves the function of bringing all parties before the court. This is an equitable proceeding and I think that it gives sufficient safeguards to the possible danger that may exist if there is dual situs to the stock certificate, as exists in the case at bar.

QUESTION: Well what if in this case one of the defendants had in fact validly transferred his shares of stock to his nephew who is not a defendant --

MR. MASCHIO: Right.

QUESTION: -- and had validly done so before this attachment or sequestration or whatever it is called?

MR. MASCHIO: Before the attachment?

QUESTION: Yes.

MR. MASCHIO: Well, at that point there would be no stock --

QUESTION: But on the books of the transfer agent it still showed the defendant as the owner, would he be given any opportunity under Delaware law to come in and say you can't bring me into this lawsuit because this isn't my stock?

MR. MASCHIO: I think he could. I think he could bring an equitable suit in Delaware.

QUESTION: As one reads the statute, there is no opportunity for a hearing on that sort of an issue.

MR. MASCHIO: No, there isn't, but I am referring to case law in the State of Delaware which does provide for equitable proceedings to basically resolve the question of ownership --

QUESTION: He would have to come to Delaware?

MR. MASCHIO: Pardon?

QUESTION: He could have to come to Delaware.

MR. MASCHIO: Yes, he would.

QUESTION: Which is just what you want and is what he doesn't want.

MR. MASCHIO: Well, it --

QUESTION: Is there any way that he could protect his interests without coming to Delaware?

MR. MASCHIO: In this hypothetical situation, I can't think of any way.

QUESTION: So he still would have to come to Delaware?

MR. MASCHIO: He would have to come to Delaware.

Now, I would like to turn back to the fairness argument because I think that that is very important in this case. It should be pointed out, and I will point out, that this is a derivative action and it is brought against officers and directors of a Delaware corporation.

The number of shares that the plaintiff owns is meaningless because he is bringing this suit in a representative capacity. The appellants in this case have willfully

violated an order of the District Court and have been found to be in contempt of court. Civil and criminal sanctions have been imposed upon the corporation and the corporation has been required to pay a fine of \$600,000 as the result of the activities of certain of these appellants.

It is alleged that these appellants have engaged in a continuous course of legal conduct. They have been in violation of orders of the Interstate Commerce Commission, the District Court, and have indicated the fines and sanctions that have been imposed upon them. Certainly these losses should be recovered by the Delaware corporation. The corporation shareholders and the public at-large have the right to rely upon the performance of fiduciary duties by officers and directors of a corporation. In this sense, this is not a private suit. It is a public suit. It is a derivative action. There is a policing function involved.

QUESTION: Mr. Maschio, as I understand the facts, there are 28 individual defendants who are responsible for all of this, and this wrongdoing took place, wasn't it in the Northern District of Illinois or --

MR. MASCHIO: No, the wrongdoing took place probably -- most probably out on the coast. It had to do with discriminatory buslines in the area.

QUESTION: Couldn't that jurisdiction have been obtained over the entire group of 28 instead of just 21 if the

action had been brought where the wrongdoing took place?

MR. MASCHIO: That could have been the possibility, yes. It is --

QUESTION: Wouldn't that have been a better procedure?

MR. MASCHIO: I'm not sure it is a better procedure. First of all, as you know, a hearing on minimal contacts is a very difficult situation. I mean you have to take the ties and connections with the additional procedures in the courts and I think for all practical purposes jurisdiction would have been much, much more difficult to obtain under that type of a situation.

Moreover, there is nothing inherently wrong with the fact that under our system of federalism that two jurisdictions could have sufficient contacts with the proceedings so that the case could go forward in both jurisdictions. We feel that --

QUESTION: Delaware cannot go forward as to seven of the defendants at all?

MR. MASCHIO: At this point, but I think that we have gotten most of the defendants before the court who were involved in this situation.

QUESTION: Well not in this case, have you?

MR. MASCHIO: Yes, we believe that we have. The four --

QUESTION: Well, if the statute is valid, you have, but if it is not, you haven't.

MR. MASCHIO: Of course. I understand. That is why we are here.

QUESTION: You have been addressing the merits of this case. How many shares of stock does your client own?

MR. MASCHIO: Again, my client owned one share of stock, but I did point out the fact that this is a derivative action and is brought on behalf of not only himself but all other shareholders similarly situated.

QUESTION: I understand that.

MR. MASCHIO: So it may well be that there are shareholders --

QUESTION: How long has your client owned that one share of stock?

MR. MASCHIO: For several years, Your Honor.

QUESTION: How many other stockholders of this corporation have asserted the same claims that you assert in your complaint?

MR. MASCHIO: I think this is the only suit of this nature.

QUESTION: How many stockholders does the Greyhound Corporation have?

MR. MASCHIO: They have many shareholders. I don't know --

QUESTION: How many?

MR. MASCHIO: Thousands of shareholders.

QUESTION: Hundreds of thousands?

MR. MASCHIO: Hundreds of thousands.

QUESTION: The merits are really totally irrelevant to what you are arguing though, aren't they?

MR. MASCHIO: I don't think so. I think the merits are very important --

QUESTION: I thought you had a constitutional issue here?

MR. MASCHIO: Well, I am arguing the merits to demonstrate to the Court that this is a public lawsuit, it is not a private lawsuit. You can talk about the fact that Mr. Heitner has one share of stock until now until doomsday, it is not going to change the fact that it is a derivative action and it is brought on behalf of all shareholders similarly situated.

Now, either the Court believes in the theory of a public suit of this nature or it doesn't. But the point is that this is a derivative action and that there is a public function involved here, and there is a policing function involved here, and I think that that is an important distinction.

QUESTION: Does the record shed any light on whether this one share of stock was acquired as a prelude to this litigation?

MR. MASCHIO: It wasn't, Your Honor, that I know. But the record doesn't shed any light on it.

I would like to continue on the fairness argument and I would like to point out that the appellants' authorities in this case are regulated, of course, by Delaware law. It is certainly appropriate for Delaware to construe its own corporate laws. I feel that this is an important public function which we must concern ourselves with.

In addition, several states, in particular the States of South Carolina and Connecticut, have enacted special statutes subjecting nonresident directors to suit within the state of incorporation as a result of activities which they have engaged in in the course of their performance of their duties as directors of the corporation.

QUESTION: Could I ask you a question: Suppose in Delaware there is a suit on a contract and --

MR. MASCHIO: I didn't hear you. Could you repeat the question? I didn't hear you. I'm sorry, Your Honor.

QUESTION: Suppose in the State of Delaware there is an action on a contract and the plaintiff attaches property pursuant to the Delaware attachment statute. Do you think Delaware has to afford that defendant an early hearing, sort of a probable cause hearing to avoid a mistake?

MR. MASCHIO: I really don't think it is required in that type of a situation.



QUESTION: You don't think the cases in this Court indicate that there is some procedural due process protections available to a defendant whose property is attached?

MR. MASCHIO: Oh, I didn't say that. I certainly do feel --

QUESTION: Well, I asked you a question of must Delaware law afford the defendant an early hearing as to whether the plaintiff has probable cause basis for his claims?

MR. MASCHIO: I don't think so under these circumstances.

QUESTION: I didn't say "these circumstances." How about --

MR. MASCHIO: In that circumstance, no. I feel that the purpose of the Delaware statute is to acquire jurisdiction. It is not to hold the property. It is not attempting to reverse the --

QUESTION: Well, let me put it to you again. Let's suppose that both plaintiff and defendant are residents of Delaware in my example.

MR. MASCHIO: All right.

QUESTION: Now, must there be a hearing or not?

MR. MASCHIO: If both the plaintiff and defendant are residents of Delaware, the statute doesn't apply because the statute can only apply --

QUESTION: This statute doesn't, but the attachment

statute does. Some attachment statute does.

MR. MASCHIO: Well, it is very hard to speculate on facts that are not before -- the nature of the claim --

QUESTION: Well, at any rate, I take it your claim is that as long as Delaware is purporting to get jurisdiction, you can just put aside all procedural due process protection?

MR. MASCHIO: Oh, no, we're not saying that at all. We feel that there is a provision for a hearing in this case. In point of fact --

QUESTION: When?

MR. MASCHIO: -- the trial is a hearing of this case. The trial is a hearing in this case.

QUESTION: You don't have to give a hearing prior to trial?

MR. MASCHIO: No -- well, yes, maybe in some circumstances we do. It is not a hearing in the sense that there are live people before the court and witnesses are being -- testimony is being taken. First of all, the appellants can come into this court, into the Delaware courts and challenge the procedures involved in connection with the seizure of the property. They can say that too much property was seized and therefore a review would have to be made of the allegations of a complaint to see whether, based on the merits of the complaint, sufficient property has been seized in order for the sequestration statute to be validly used.

QUESTION: Mr. Maschio, what interest does the State of Delaware have in this statute?

MR. MASCHIO: Well, Delaware has a --

QUESTION: I think I should preface it. Do you from New York, and the other side from San Francisco, and nobody is here from Delaware -- now, how do we know what interests the State of Delaware have in this statute?

MR. MASCHIO: Well, we know what interests the State of Delaware have because the Delaware Supreme Court has felt that it did have an interest in this proceeding and so stated in its opinion.

QUESTION: There is no brief from the State of Delaware, is there?

MR. MASCHIO: No, there isn't. There is not.

QUESTION: So what is Delaware -- you tell me what Delaware's interest is, since Delaware is not interested?

MR. MASCHIO: Well, one of the interests of Delaware is that it is in a unique position to decide issues concerning its own corporate law. I feel that it is perfectly appropriate for Delaware to construe its own corporate law, particularly where allegations of wrongdoings of officers and directors of a corporation incorporated within Delaware are being called to task for their activities. That is one interest which Delaware has in this proceeding.

In addition, I think that --

QUESTION: That would be true if there wasn't a single stockholder in Delaware?

MR. MASCHIO: Pardon?

QUESTION: That would be true if there were not a single stockholder living in Delaware?

MR. MASCHIO: That is true.

QUESTION: Delaware still would have an interest?

MR. MASCHIO: Yes. The fact is -- well, yes, that would be the case.

QUESTION: It is just like they would say the stock belongs to them in Delaware, the same thing?

MR. MASCHIO: Well, I --

QUESTION: It is one fiction on top of another one.

MR. MASCHIO: It is no more fictitious than some of the other statutes, some of the other decisions which indulge in the fiction of implied consent or implied presence within the jurisdiction for the purposes of jurisdiction. I don't think it is any less fair for the court to assume jurisdiction based on the fact that there is property within the jurisdiction.

Delaware has other ties with --

QUESTION: I think that goes back as long as you had common law.

MR. MASCHIO: Right.

QUESTION: But this doesn't.

MR. MASCHIO: Well, this goes back quite a ways. I mean --

QUESTION: But not that far.

MR. MASCHIO: Not that far, no.

I think it is important to point out that under our system of federalism the State of Delaware has enacted corporate laws which contain numerous advantages for incorporating within that jurisdiction. These advantages include generous indemnification and insurance provisions which have been enacted by the State of Delaware to induce capable and responsible businessmen to assume the duties and hardships of corporate directorship of a Delaware corporation.

Also consistent with our system of federalism, Delaware has sought to counterbalance these liberal corporate provisions in its corporate law by enacting a sequestration statute which serves the function of in many cases calling corporate officers to account for their activities in connection with the operation of and the performance of their duties in a Delaware corporation.

These defendants, keenly as they are aware of the benefits of incorporating in Delaware, must be deemed to have knowledge of the existence of the sequestration statute and in effect I am suggesting that they have impliedly waived any objection to the operation of the statute in the case at bar.

I think that the Court must concern itself with the

facts which are before this Court. The appellants have constantly made reference to where in other situations the operation of the statute may possibly have proved a hardship. Those facts and those circumstances are not before the Court.

Here we review the question of fairness and the contacts which these appellants have with the State of Delaware. I do not feel that the traditional notions of fair play and substantial justice have been violated. There may be other situations where the application of the statute is more onerous, but these appellants lack standing to raise issues and constitutionality of the statute based upon facts which are not before this Court.

I would like to turn to --

QUESTION: Mr. Maschio, before you get on another subject: Do you have any precedents other than from the Delaware State courts for quasi in rem jurisdiction where the defendant must subject himself to liability above the value of the property which has been attached in any other state?

MR. MASCHIO: I do not have that in my brief. I would like to point out, in response to that, that it is my understanding -- and I may be mistaken here -- that only the State of New York has a provision and in certain federal court decisions where the special appearance is permitted. I know for a fact that the State of New York has a provision for special appearance. I have not made a survey of the laws of

all the jurisdictions.

QUESTION: Well, I am not so much interested in statutory provisions. Has there been any decision by this Court or any other court that you are aware of that has sustained quasi in rem jurisdiction for an amount in excess of the value of the property?

MR. MASCHIO: Not that I know of, but that doesn't mean that it doesn't exist.

I would like to --

QUESTION: The defendant can limit their liability to the value of the property simply by not appearing, isn't that right?

MR. MASCHIO: Yes, that's right.

QUESTION: They can't both do that and defend the action on the merits?

MR. MASCHIO: That is a standard procedure. It is a quasi in rem proceeding.

QUESTION: Right.

MR. MASCHIO: It doesn't change the character of the proceeding.

QUESTION: All the way back to --

MR. MASCHIO: That's right.

QUESTION: But in any of those cases, by defending the action, has he been required to take the risk of the judgment in excess of the value of the property might be

entered against him?

MR. MASCHIO: I believe there are cases, but I do not have those authorities. I'm sorry, I apologize.

QUESTION: You have a special appearance to contest the procedures under which the quasi in rem attachment had taken place or to contest his ownership of the property, and so on, and if he were ruled against in that, then his option was to go back to his home state and forfeit the property or to remain there and enter a general appearance and defend the lawsuit?

MR. MASCHIO: And that is the procedure in Delaware.

QUESTION: That was standard operating procedure back, as I said, in the old days.

MR. MASCHIO: Right, and that is the procedure in Delaware.

QUESTION: Can you cite any case sustaining that procedure?

MR. MASCHIO: I have good counsel.

QUESTION: You need good counsel.

MR. MASCHIO: With respect to the issue of special appearance, I would just like to point one thing out. There are some benefits in the procedure which has been enacted by Delaware. By requiring a general appearance in order to defend, you do eliminate the possibility of multiple lawsuits, and I think that that is something to be considered. Also,



Delaware has enacted in its statute in its case law safeguards in the sense that if there is a general appearance, the claims which can be asserted against the appellant cannot go beyond the four corners of the complaint. In other words, no new causes of action can be interjected into the action by virtue of the fact of the general appearance. So these are two factors which I think the Court should be aware of with respect to this particular type of procedure.

I would like to turn briefly to the recent Supreme Court cases dealing with requirements of a hearing. I think we touched upon some of this in earlier discussions. We maintain in this case that the procedures involved are consistent with the Fuentes criteria, and that postponing notice in a hearing is justified. We base that position basically on the case of Ownbey v. Morgan and the citation of those cases, Fuentes, Sniadach and the Calero-Toledo cases before this Court, in which was -- those cases were cited for the proposition that attachment for the purposes of attaining jurisdiction in state court has always been a basic and important public interest justifying seizure without prior notice in a hearing. That is also another interest which the State of Delaware has in this proceeding.

We feel that the Delaware statute serves this very important function. Public interest is also served because of the sequestration --

QUESTION: Mr. Maschio, what do you understand the holding of the Ownbey case to be?

MR. MASCHIO: I understand that the basic thrust of the Ownbey case is as I have just quoted it, the attachment for the purposes of attaining jurisdiction in a state court has always been a basic and important public interest justifying seizure without the benefit of prior notice in a hearing. That is all that I limit the holding in the Ownbey case. I do not condone the requirements of special bond before --

QUESTION: The Ownbey case was whether the defendant had to post a special bond in order to enter a general appearance in ORDER to release a security.

MR. MASCHIO: That was the issue in the Ownbey case, and I don't think that that issue would be decided the same way today. However, the Ownbey case has been cited by this Court. Now, I don't know what the Court had in mind when it was citing the Ownbey case in Fuentes, Sniadach and Calero-Toledo.

QUESTION: Did I understand you -- did I hear you correctly to say you don't think we would decide the Ownbey case the same way today?

MR. MASCHIO: On that narrow issue of the special bond requirement.

QUESTION: Which is what the issue was in the Ownbey case.

MR. MASCHIO: Which is the issue in that case. However --

QUESTION: But yet you rely on Ownbey?

MR. MASCHIO: No, I am not relying -- I rely upon the pronouncement in the Ownbey case that attachment is for the purpose of attaining jurisdiction and the state court has been recognized as a basic and important public interest justifying seizure without prior notice and hearing. Now, I am not really relying on Ownbey. I am really relying upon the reaffirmation of that principle in Fuentes, in the Sniadach case, in the Calero-Toledo case.

QUESTION: They are all different.

MR. MASCHIO: Your Honor, I think we all need guidance on this point.

QUESTION: Okay.

MR. MASCHIO: I really think that we all need guidance on this point. And I can't tell this Court what it meant when it cited those cases in its decision, but it has been interpreted as being a reaffirmation of the Ownbey case.

QUESTION: None of those deal with a judgment in excess of the value of the property seized either?

MR. MASCHIO: No, I don't believe so.

QUESTION: In this case, you are not interested in property at all, you are interested in getting them into court.

MR. MASCHIO: That is all we are interested in, Your

Honor, and that is the reason why --

QUESTION: Well, doesn't that differentiate your case from any other case?

MR. MASCHIO: Yes, it does. It is a completely different situation.

QUESTION: Good or bad?

MR. MASCHIO: I think it is good. I think it is good because it goes to the issue of -- it goes to many of the issues.

QUESTION: You mean that a man can be brought in and get a judgment against him of \$100,000 is better than if it is limited to \$1,000?

MR. MASCHIO: We can't --

QUESTION: It is better for the plaintiff.

MR. MASCHIO: The plaintiff can get a judgment in this case only on two methods: One, if it prevails on the merits of the case, and that would imply a general appearance; two, there is a default. There the judgment would be limited to the amount of the property sequestered, but it is not an absolute default judgment. We have to go through the procedures of an inquest. We have to prove that our case has prima facie merit and we have to show that there have been damages, which is not unusual in our system of jurisprudence.

QUESTION: And settlement, too, the possibility of settlement?

MR. MASCHIO: Possibility of settlement.

QUESTION: I think you have said two or three times that once a general appearance is made, the stock that has been sequestered is released?

MR. MASCHIO: That is correct.

QUESTION: Does that follow automatically without regard to the circumstances?

MR. MASCHIO: Well, it follows automatically unless the party who has seized the stock can show a special need for the withholding of the stock until the judgment has been rendered. Automatically the stock would be released unless a special application is brought by the party who has sequestered the stock asking for it to be withheld during the continuation of the lawsuit.

QUESTION: Would that inquire into whether or not the party who has made a general appearance may be judgment-proof if the stock is released?

MR. MASCHIO: I would rather suspect that that would be one of the considerations that the court would have --

QUESTION: So that there is no automatic release, really. It turns on whether or not you can satisfy the --

MR. MASCHIO: No, it is an automatic release unless a special application is brought. A new proceeding has to be brought by the party who has sequestered the stock. Now, a sufficient showing has to be made that there is reason for

withholding the stock further. But the basic thrust of the statute is for jurisdictional purposes. It has been construed that way. It has been utilized that way in the State of Delaware, and I really think that is the basic thrust of the statute.

Now, we talked briefly about the question of a hearing. I think that again it is important to distinguish this case from the recent attachment cases. Of course, again, Mr. Heitner, the appellee, has no claim to the sequestered property. There is no danger that this property will be depreciated or wasted. There is no wages or consumer goods at issue. There are no vendor's liens on the property, all of which were involved in the attachment cases.

I think that this goes to the question of what type of a hearing is required and what is the purpose of an immediate post-seizure hearing or a hearing. What will be determined at that hearing? The only point that has to be established under the terms of the Delaware statute is the fact that the appellants are nonresidents of the State of Delaware and that they have property within the State of Delaware.

Now, the hearing on the merits is not eliminated. The hearing on the merits, I have touched upon that, how the merits can be discussed by the court in the event that the Delaware sequestration procedure itself was contested on the grounds that too much property had been withheld, and also

there is the trial of the action, which is a hearing.

I think that under the circumstances you have to look at what the property interest is and what the function of a hearing would be, and under these circumstances I think that the sufficient safeguards exist within the Delaware statute to cover this point.

QUESTION: Well, going over to the personal jurisdiction side of the case, suppose there was no property in Delaware but nevertheless the suit was brought there and suppose that Delaware could not get personal jurisdiction over these nonresident defendants under International Shoe or cases following International Shoe, they just weren't minimum contacts that Delaware would just exceed its authority to attempt to serve these people and get personal jurisdiction out of them. Suppose that were the case, then your position is, I take it, that if you had one single fact in addition, namely that one of those defendants does have property in the State, you may get personal jurisdiction over them?

MR. MASCHIO: You are asking me to --

QUESTION: Well, the argument in the case that except for this property Delaware could not get jurisdiction.

MR. MASCHIO: I don't believe that that is -- yes, that's true, but that is the long-arm statute.

QUESTION: But the argument is that without the property Delaware could not exercise jurisdiction over these

defendants.

MR. MASCHIO: That is the --

QUESTION: But with the property, your position is you may not only exercise jurisdiction over the property but personal jurisdiction over them?

MR. MASCHIO: We are arguing -- our argument is that there is property within the jurisdiction --

QUESTION: Yes.

MR. MASCHIO: -- and that is a valid basis for the exercise of quasi in rem jurisdiction.

QUESTION: Yes.

MR. MASCHIO: Our further argument is that if the doctrine of International Shoe and Hanson v. Denckla is said to apply in this case, we meet those qualifications.

QUESTION: Just by the fact of owning property?

MR. MASCHIO: Oh, no, not just by the fact of owning property, by the fact of owning property and by the fact that Delaware has a substantial interest in this controversy, by the fact that this is a derivative action, by the fact that the appellants have ties with this jurisdiction, and that is why I structured my presentation that way.

QUESTION: Yes, but only ties with the jurisdiction as through the corporation.

MR. MASCHIO: Yes, it has ties through the corporation.



QUESTION: That's all. That's all, isn't it?

MR. MASCHIO: It is a very important tie. Our position is that it is a very important tie.

QUESTION: However important it is, you say yes, that's all?

MR. MASCHIO: Yes, that and the property.

QUESTION: Well, that is the property.

MR. MASCHIO: No. The corporation exists in the State of Delaware, it has --

QUESTION: I know, but the defendants just own stock, own stock in the corporation.

QUESTION: Directors and officers and employees.

MR. MASCHIO: Yes, all of those things we are trying to marshal to show that the exercise of jurisdiction, whether or not you say the International Shoe doctrine applies or not, or whether or not you say that this is strictly a quasi in rem proceeding, we meet the qualifications. This is not the case of --

QUESTION: Counsel, if that is a valid argument, you have jurisdiction over the seven non-stockholder defendants as well and Delaware doesn't sustain that jurisdiction. That argument applies equally to the non-stockholder defendants unless you rely on the stockholder, stock ownership.

MR. MASCHIO: Well, Delaware does not have a long-arm statute and --

QUESTION: So you don't have a statutory basis for this other kind of jurisdiction?

MR. MASCHIO: That is correct. We do not have a statutory basis for the interest on the jurisdiction argument based upon a minimum contact.

QUESTION: But if your argument, your submission to my Brother White was that if Delaware did have a long-arm statute, its application to all the defendants in this case would be constitutionally permissible because of their relationship with the Delaware corporation, quite apart from their stock ownership, is that right?

MR. MASCHIO: Yes, probably, if the breadth of the statute was as broad as the --

QUESTION: Well, you just don't need your attachment statute then to extend the jurisdiction?

MR. MASCHIO: I am not sure --

QUESTION: Are you saying that or not?

MR. MASCHIO: No, I am not saying that.

QUESTION: So you really do need the attachment statute?

MR. MASCHIO: Well, I don't know --

QUESTION: Since Delaware does not have a long-arm statute?

MR. MASCHIO: Delaware does not have a long-arm statute, and I think that this statute is more conducive to

securing access to a forum. And as long as that provision situation is not unfair, then I think that no due process violation has occurred.

Now, it may well be that the imposing of the minimum contact theory in a quasi in rem proceeding will be more restrictive than that which exists at the present time, and I don't know if the Court wants to go that far.

QUESTION: You haven't raised any question here about the jurisdiction of this Court over the appeal brought by your colleague. Was this a final order? This was a lawsuit, a derivative lawsuit brought by you and this is just an interlocutory order in the course of that lawsuit, isn't it, in a state case?

MR. MASCHIO: Maybe I didn't think it through all the way. Maybe the case doesn't belong here, but I thought because of the constitutional arguments that it was appropriate that this case be --

QUESTION: I know, but if we don't have any jurisdiction, we don't have any jurisdiction, no matter how important or interesting the constitutional question may seem. If it is prematurely here, we don't have jurisdiction to consider it. Wasn't this just an interlocutory order in an on-going state lawsuit or state action, a bill of inequity?

MR. MASCHIO: Quite frankly, I am not sure of the answer to that?

QUESTION: Well, isn't that correct, as a matter of fact?

MR. MASCHIO: Probably

QUESTION: Except, counsel, if you lose here, the lawsuit is all over, isn't it?

MR. MASCHIO: That is correct.

QUESTION: Yes, but you still might lose. You might not get a judgment on the merits and then we would have made a premature constitutional decision.

QUESTION: And if we have no jurisdiction, you couldn't lose, could you, as respondent?

MR. MASCHIO: That is very interesting.

QUESTION: That, of course, is a matter that we could consider sua sponte.

MR. MASCHIO: Yes, I would appreciate that. I think I have covered all the points that I want to cover. I thank you for your time.

MR. CHIEF JUSTICE BURGER: Mr. Reese.

ORAL ARGUMENT OF JOHN R. REESE, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. REESE: May it please the Court --

QUESTION: How about this finality business, Mr. Reese, before you --

MR. REESE: Well, Mr. Justice Stewart, we know that an order has been entered by the highest court in the State of

Delaware.

QUESTION: Interlocutory order? I mean, this is an on-going lawsuit, particularly because of the way it decided the case on the merits. If nothing had happened, this case would go back for trial in the state court, wouldn't it, and the plaintiff might lose and that would be the end of it and might that not indicate that this is not a final judgment?

MR. REESE: Presumably defaults would be taken and the property of the defendants sold, at which point we could start back up.

QUESTION: Well, that is one presumption. The other presumption is that you would go in and defend the lawsuit unless you thought that you were -- that the plaintiff had a great deal of force in his claim. And under that presumption, if you defended the lawsuit and did so successfully, this case would be over, wouldn't it, and decided in your favor on the merits?

MR. REESE: If we successfully defended on the merits, the lawsuit would be over.

QUESTION: And therefore why is this a final order? And if it isn't, as you know, we don't have any jurisdiction over it.

MR. REESE: It is a question that I haven't considered previously, Mr. Justice Stewart.

QUESTION: It just occurred to me also.

QUESTION: Do you need counsel?

MR. REESE: Pardon?

QUESTION: Do you need counsel?

MR. REESE: I will take it if I can get it.

[Laughter]

I wanted to correct one --

QUESTION: Is it your position that you are entitled to have this issue resolved at the outset, that you have a right to due process to have this issue resolved?

MR. REESE: Mr. Chief Justice, the property of these defendants has been tied up for two and a half years. No responsible official of the State of Delaware has ever during that period considered whether there is a baseless or a sound or any other kind of claim against them to justify that deprivation of their property. We think that that is more than long enough for that condition to be allowed to continue and that it is time for it to be ended.

QUESTION: And do you suggest there is no mandamus remedy available to you to bring that to a head?

MR. REESE: We have pursued the matter through the state court system to the end point. The Delaware Supreme Court has rendered its final judgment on the matter.

QUESTION: Well, on this basically interlocutory matter.

MR. REESE: To the extent that a two and a half year

deprivation is interlocutory.

QUESTION: Under the Delaware judgment, all that it has decided is that you are properly in the lawsuit, and the lawsuit now can go on on the merits. That is all the Delaware judgment holds.

QUESTION: Doesn't the judgment hold that your property has been seized and if you don't submit to their jurisdiction your property is gone?

MR. REESE: Certainly, Mr. Justice Marshall, that is what that judgment holds.

QUESTION: Well, is that interlocutory?

MR. REESE: I'm sorry, I missed your question, Mr. Justice --

QUESTION: I just wonder how that can be interlocutory. If you don't submit to their jurisdiction, which you say they don't have, then you lose your property. That has been decided.

MR. REESE: That is clear.

QUESTION: That's clear.

MR. REESE: The only step remaining is to conduct the final hearing and the sale of the property.

QUESTION: That is if you are going to default in the lawsuit?

MR. REESE: Yes.

QUESTION: Now, let's say this were a case in Delaware

in which there was personal service upon a resident defendant of Delaware, and his claim was there was something defective about that service, that as a constitutional matter there was something defective about the personal service of him in Delaware. You brought that up all the way to the Delaware Supreme Court and the Delaware Supreme Court said no, as a constitutional matter this -- as well as statutory, this is a perfectly valid service. Then this Court wouldn't have jurisdiction in that, would it? That would be interlocutory, wouldn't it?

MR. REESE: My understanding --

QUESTION: All that would have decided was that you, Mr. Defendant, have to go in and defend the lawsuit.

MR. REESE: In this case, the Delaware Supreme Court has issued a final judgment as to the validity of the taking of the defendants' property. The defendants now have only one choice, which you pointed out, to forfeit --

QUESTION: Defaulting on the lawsuit or defending it?

MR. REESE: -- or to enter a general appearance and giving up at that point their rights under the Fourteenth Amendment to having a trial in a proper forum.

QUESTION: No, because you might win on the merits, and if you lose on the merits you would not have given up your Fourteenth Amendment claim because there would then be a final judgment that you could bring to this Court.



QUESTION: I understood your position to be that you would lose your constitutional right to have the case tried in a proper forum, and that Delaware is not the proper forum. Is that your position?

MR. REESE: It is our position, Mr. Chief Justice.

QUESTION: And you are saying that this Hobson's choice is one that the provisions of due process should guarantee that you should not have to make?

MR. REESE: Yes, the defendants stand to lose a lot by just being forced to the trial on the merits at this point. That is part of the point of it.

QUESTION: And that is one of the prices of not allowing interlocutory appeals, too.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:16 o'clock p.m., the case in the above-entitled matter was submitted.]

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