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Daniel O. Bernstine

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SHAFFER v. HEITNER:
A DEATH WARRANT FOR THE TRANSIENT RULE OF
IN PERSONAM JURISDICTION?

DANIEL O. BERNSTINE†

I. INTRODUCTION

SERVICE OF PROCESS ON AN INDIVIDUAL while he is physically present in the forum has long been deemed a sufficient basis for the exercise of in personam jurisdiction.¹ This rule, denominated by one commentator the “transient rule” of personal jurisdiction,² is based on a territorial conception of judicial power (territorial power theory) that a state has authority over all persons and property within its borders.³ The transient rule has become so firmly entrenched in

† Assistant Professor of Law, University of Wisconsin Law School. A.B., University of California (Berkeley), 1969; J.D., Northwestern University School of Law, 1972; LL.M. University of Wisconsin School of Law, 1975. The author wishes to thank Maureen S. Komisar, a third-year student at the University of Wisconsin Law School, and Loretta Y. Copeland, a third-year student at Howard University School of Law, for their research and assistance in the preparation of this article.

1. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971). Section 28 of the *Restatement* provides that “[a] state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily.” *Id.*

2. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289, 289 (1956).

3. See *McDonald v. Mabee*, 243 U.S. 90, 91 (1917); *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877). The *Pennoyer* Court enunciated this territorial power theory in the following passage:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Id. at 722 (citations omitted) (emphasis supplied by the Court). The latter principle stated by the Court, that no state can exercise jurisdiction over persons outside its territory, was supplanted by the minimum contacts analysis introduced in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). For a discussion of *International Shoe*, see notes 12-25 and accompanying text *infra*. This article queries the status of the former principle, that a State has exclusive jurisdiction over persons within its boundaries.

American law that no lawyer has, as yet, been successful in risking his client's money in a frontal assault upon the rule.⁴

Traditionally, presence of property within the boundaries of a state, no matter how temporary, was also considered to be a sufficient foundation for a state's exercise of in rem or quasi in rem jurisdiction.⁵ In the landmark case of *Shaffer v. Heitner*,⁶ however, the United States Supreme Court altered the concept that the presence of property within the forum is a sufficient jurisdictional basis for in rem and quasi in rem actions.⁷

Although the Court's decision in *Shaffer* specifically discussed only the due process limitations on the exercise of in rem and quasi in rem jurisdiction,⁸ subsequent state and lower federal court decisions have relied, in part, on *Shaffer* to determine whether they could fairly exercise in personam jurisdiction over out-of-state defendants.⁹ This article will consider whether the standards applied in

Forty years after *Pennoyer*, the *McDonald* case reflected the settled territorial theory of judicial power. The Court stated that "[t]he foundation of jurisdiction is physical power," and added somewhat prophetically: "No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance [within the forum], but the foundation should be borne in mind." 243 U.S. at 91. For a discussion of how these means of acquiring jurisdiction were indeed extended, see notes 12-35 and accompanying text *infra*.

4. See Schlesinger, *Methods of Progress in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. PUB. L. 313, 316 (1960). Only three reported cases have been discovered involving a direct challenge to the transient rule based on the minimum contacts approach of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and in all three cases the challenge failed. See *Donald Manter Co. v. Davis*, 543 F.2d 419 (1st Cir. 1976); *Nielsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963); *Oxman's Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979). For a discussion of *International Shoe*, see notes 12-25 and accompanying text *infra*. For a discussion of *Davis* and *Nielsen*, see note 37 *infra*. For a discussion of *Blacketer*, see notes 141-49 and accompanying text *infra*.

5. See, e.g., *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917); *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916); *Harris v. Balk*, 198 U.S. 215 (1905); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60 (1971). For a discussion of actions in rem and in personam, see Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931). For a discussion of jurisdiction in rem, see Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1939); Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913).

6. 433 U.S. 186 (1977).

7. See *id.* at 205-06.

8. See *id.* at 196-98.

9. See, e.g., *Telco Leasing, Inc. v. Marshall County Hosp.*, 586 F.2d 49 (7th Cir. 1978); *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978); *Hutson v. Fehr Bros.*, 584 F.2d 833 (8th Cir.), *cert. denied sub nom. Fehr Bros. v. Acciaierie Weissenfels*, 439 U.S. 983 (1978); *Toro Co. v. Ballas Liquidating Co.*, 572 F.2d 1267 (8th Cir. 1978); *Empire Abrasive Equip. Co. v. H.H. Watson, Inc.*, 567 F.2d 554 (3d Cir. 1977); *Bethany Auto Sales, Inc. v. Apto Auto Auction, Inc.*, 564 F.2d 895 (9th Cir. 1977); *Schoeneck v. Passante*, Civ. No. 77-2160 (S.D.N.Y. Nov. 18, 1977); *Humid-Aire Corp. v. Levitt, Inc.*, [1978] 1 Trade Cas. ¶ 61,846 (N.D. Ill. 1977); *Miller Brewing Co. v. Acme Process Equip. Co.*, 441 F. Supp. 520 (E.D. Wis. 1977); *Pavlo v. James*, 437 F. Supp. 125 (S.D.N.Y. 1977); *Merkel Assoc., Inc. v. Bellofram Corp.*, 437 F. Supp. 612 (W.D.N.Y. 1977); *Braband v. Beech Aircraft Corp.*, 72 Ill. 2d 548, 382 N.E.2d 252 (1978); *Glading v. Furman*, 282 Md. 200, 383 A.2d 398 (1978); *Droukas v. Divers Training Academy, Inc.*, 376 N.E.2d 548 (Mass. 1978); *Town of Haverhill v. City Bank & Trust Co.*, 402 A.2d 185 (N.H. 1979); *Moon Carrier v. Reliance Ins. Co.*, 153 N.J. Super. 312, 379 A.2d 517

Shaffer to in rem and quasi in rem actions must now be extended to in personam jurisdiction based on the transient rule, so that an individual's temporary physical presence in the state will no longer be a sufficient basis for asserting in personam jurisdiction. This discussion will also examine the post-*Shaffer* decisions to determine whether a trend exists towards abolition of the transient rule.

A. Territorial Power Theory: Some Background

The classic case of *Pennoyer v. Neff*¹⁰ sets out two traditional jurisdictional principles: first, every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory; and second, no state can exercise direct jurisdiction over persons or property outside its boundaries.¹¹

The force of the latter principle has been drastically diminished by the minimum contacts standard established by *International Shoe Co. v. Washington*¹² and its progeny.¹³ In *International Shoe*, a Delaware corporation, with its principal place of business in St. Louis, was engaged in the manufacture and sale of shoes and other footwear.¹⁴ Although the corporation manufactured its products in several states and distributed them interstate, it had no place of business in the state of Washington.¹⁵ The corporation did employ residents of Washington as salesmen, but the salesmen merely displayed samples and solicited orders for the corporation¹⁶ without entering into contracts or making collections.¹⁷

Washington had set up an unemployment compensation plan, the cost of which was defrayed by mandatory contributions from employers to a state unemployment compensation fund.¹⁸ When the corporation failed to make these contributions, a notice of assessment was personally served on one of the corporation's Washington sales agents.¹⁹ The corporation contested service on the grounds that it

(Law Div. 1977). For further discussion of the exercise of personal jurisdiction beyond the borders of the forum, see text accompanying notes 12-35 *infra*.

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

11. *Id.* at 722. See note 3 *supra*.

12. 326 U.S. 310 (1945).

13. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); notes 26-35 and accompanying text *infra*.

14. 326 U.S. at 313.

15. *Id.*

16. *Id.* at 313-14. The authority of the salesmen was limited to these activities. *Id.* at 314.

17. *Id.* at 314.

18. *Id.* at 311-12.

19. *Id.* at 312.

was not a Washington corporation and was not doing business within that state.²⁰

The United States Supreme Court acknowledged that "presence within the territorial jurisdiction of a court was [historically] prerequisite to its rendition of a judgment personally binding" a defendant.²¹ Nevertheless, the Court declared that a defendant need no longer be physically present within the forum state, since due process requires only that the defendant have sufficient contacts with the forum so that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."²² The Court noted that the corporation's activities in Washington were neither irregular nor casual and, in fact, resulted in a large volume of interstate business.²³ Moreover, the corporation was receiving the benefits and protection of the laws of Washington.²⁴ The Court held that these contacts with the forum were sufficient to permit the state to exercise in personam jurisdiction over the corporation.²⁵

Several years later in *McGee v. International Life Insurance Co.*,²⁶ the Court again addressed the question of whether jurisdiction could be asserted over a corporation not present within the forum state. In *McGee*, the plaintiff filed suit in California to recover on an insurance contract against a company which had never had an office or an agent in California.²⁷ Indeed, except for the single policy in question, the company had done no business in California whatsoever.²⁸ Nonetheless, the Court found a "substantial connection" between the contract of insurance and the forum state for the following reasons: 1) the solicitation to reinsure had been mailed to the insured in California; 2) the contract was delivered there; 3) the premiums were mailed from that state; and 4) the insured was a resident

20. *Id.*

21. *Id.* at 316, citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

22. 326 U.S. at 316. The Court stated that no quantitative test was possible; rather, whether due process was satisfied must depend "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319. The Court suggested two extremes where sufficient minimum contacts might be found: 1) where "the continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against [a defendant] on causes of action arising from dealings entirely distinct from those activities"; and 2) where "the commission of some single or occasional acts of the corporate agent in a state . . . , because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." *Id.* at 318 (citation omitted).

23. *Id.* at 320.

24. *Id.*

25. *Id.*

26. 355 U.S. 220 (1957).

27. *Id.* at 221-22.

28. *Id.* at 222.

of California when he died.²⁹ Furthermore, the Court acknowledged that California had an interest in providing its residents with effective means of redress.³⁰ Thus, the Court held that the California court's assertion of jurisdiction did not violate due process.³¹

In *Hanson v. Denckla*,³² however, the Court limited the expanding reach of the minimum contacts analysis by holding that minimum contacts cannot be found to exist unless "there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."³³

In short, as a result of this series of cases, the minimum contacts rule has come to require a sufficient relationship between the defendant, the litigation, and the forum state, before that state's exercise of jurisdiction will be found constitutional. Territorial boundaries are no longer the foremost consideration when the defendant is outside of the forum. The philosophy of *International Shoe* and its progeny has been widely effected through state long-arm statutes;³⁴ these stat-

29. *Id.* at 223. The Court conceded that it might be inconvenient for this defendant to defend itself in California but added that such inconvenience did not amount to a denial of due process. *Id.* at 224.

30. *Id.* at 223.

31. *Id.* One court has suggested that in personam jurisdiction over an outside defendant as upheld in *McGee* may no longer be valid under *Shaffer*. See *Smith v. Lloyd's of London*, 568 F.2d 1115 (5th Cir. 1978). The *Smith* court noted that, as a result of *Shaffer*, "the liberal construction placed on the words 'traditional notions of fair play' in a due process context may be evolving into a more conservative one, requiring perhaps even more contacts than those present in *McGee*." *Id.* at 1118 n.7. See also *Kulko v. Superior Court*, 436 U.S. 84 (1978). In *Kulko*, the Supreme Court held that, in an action for child support, the exercise by a state court of in personam jurisdiction over a nonresident, nondomiciliary parent, whose minor children are domiciled within that state, violated the due process clause of the fourteenth amendment. *Id.* at 86.

32. 357 U.S. 235 (1958).

33. *Id.* at 253, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (emphasis added). In *Hanson*, a settlor, while a domiciliary of Pennsylvania, had established a trust in Delaware with a Delaware trustee. 357 U.S. at 328. The settlor later became domiciled in Florida, where she died. *Id.* at 238-39. In an action regarding the trust assets after the settlor's death, the Florida court had found that service by mail upon the Delaware trustee was sufficient to give it in personam jurisdiction because adequate minimum contacts existed between the State of Florida and the trustee. *Id.* at 241-43. Holding that the Florida court did not have jurisdiction over the trustee, the United States Supreme Court distinguished *McGee* by noting the following factors: 1) unlike the insurance policy in *McGee*, the trust in *Hanson* had no relation to the forum state at the time it was executed; and 2) the "bits of trust administration" carried on by the settlor after she became domiciled in Florida did not bear upon the validity of the trust agreement, whereas in *McGee*, the insurance policy would not have existed but for the solicitation to reinsure which the insurance company had sent to the insured in California. *Id.* at 251-52.

34. Long-arm statutes vary in their manner of permitting jurisdiction over defendants outside the state. New York, for example, permits its courts to exercise jurisdiction over any non-domiciliary where the cause of action arises out of any of four enumerated and defined classes of acts. N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1972 & Supp. 1978-1979). In contrast, California's long-arm statute simply provides that "[a] court of this state may exercise jurisdiction of

utes, together with state nonresident motorist laws,³⁵ have allowed state courts to go beyond their borders to exercise in personam jurisdiction over out-of-state defendants.

Prior to *Shaffer*, the *International Shoe* minimum contacts standard had not been applied to support or defeat in personam jurisdiction in cases where the defendant was physically present within the state;³⁶ indeed, its application in such cases had twice been rejected.³⁷ Thus, a plaintiff could sue a defendant personally in any

any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.01 (West 1973).

For examples of how such different statutes are implemented, compare *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976) (broad statute) with *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (specific statute).

35. See, e.g., N.Y. VEH. & TRAF. LAW § 253 (McKinney 1970 & Supp. 1978-1979); 75 PA. CONS. STAT. ANN. § 6701 (Purdon 1977). The validity of nonresident motorist statutes was upheld by the Supreme Court in *Hess v. Pawloski*, 274 U.S. 352 (1927). This decision, which preceded *International Shoe* by over 18 years, was not based on a minimum contacts analysis; instead, the Court held that a state could validly invoke its police power to declare that "use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served." *Id.* at 356-57.

36. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). It is important to note how the *International Shoe* Court formulated its rule:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316, citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Hess v. Pawloski*, 274 U.S. 352 (1927); *McDonald v. Mabee*, 243 U.S. 90 (1917) (emphasis added). See also *McGee v. International Life Ins. Co.*, 355 U.S. at 222. The statement arguably assumes that where the defendant is present, no minimum contacts will be required. See *Nielsen v. Braland*, 264 Minn. 481, 483, 119 N.W.2d 737, 738 (1963).

Since *Shaffer*, the minimum contacts standard has been explicitly applied to defeat in personam jurisdiction based on corporate presence. See *Schreiber v. Allis Chalmers Corp.*, 448 F. Supp. 1079 (D. Kan. 1978) (alternative holding). See also *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978) (dictum). But see *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979) (dictum) (suggesting that the minimum contacts requirement does not apply to a natural person served within the forum state). For a discussion of these cases, see notes 113-49 and accompanying text *infra*.

37. See *Donald Manter Co. v. Davis*, 543 F.2d 419 (1st Cir. 1976); *Nielsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963). In *Davis*, the defendant, who was a citizen and resident of Vermont, had formed a partnership with another citizen and resident of Vermont. 543 F.2d at 419. The partnership entered into a contract with the plaintiff, a New Hampshire corporation. *Id.* The contract was to be performed in Vermont, but performance was never completed. *Id.* Plaintiff filed a complaint in the United States District Court for the District of New Hampshire and service was made on the defendant while he was in New Hampshire on business unrelated to the partnership. *Id.* Citing *Hanson* and *International Shoe*, the defendant moved to dismiss, claiming that "mere presence within the jurisdiction [was] not enough to subject him to the court's process." *Id.* at 420. The First Circuit rejected the defendant's argument, stating that this reliance on cases such as *International Shoe* was misplaced since those cases dealt with "expanding jurisdiction beyond traditional limits, not with contracting it." *Id.* The court declined to overturn what it described as "black letter law that personal service within its geographical area established a court's personal jurisdiction over the defendant." *Id.*

In *Nielsen*, the defendant, a resident of Iowa, was involved in a traffic accident in Iowa with the plaintiff, a resident of Minnesota. 264 Minn. at 482, 119 N.W.2d at 738. While the defendant was in Minnesota performing his job (defendant was a meter-reader in a village lo-

state where the defendant was physically present.³⁸ In fact, the transient rule of jurisdiction has so permeated judicial reasoning that it has rarely been challenged. This is illustrated by the paucity of cases, both before and after *International Shoe*, contesting in personam jurisdiction based solely on the defendant's physical presence within the territorial boundaries of the forum.³⁹ It seems that the only cases testing this principle are those which raise the novel factual situations so ideally suited for hypothetical problems in Civil Procedure and Jurisdiction courses.

In the early case of *Peabody v. Hamilton*,⁴⁰ for example, a Massachusetts court asserted in personam jurisdiction over a New York resident in a suit brought against him by a citizen and resident of England on a cause of action arising outside of Massachusetts.⁴¹ The defendant was served with process while on board a steamer docked in Boston harbor.⁴² The Supreme Judicial Court of Massachusetts upheld the validity of the service, declaring that "[w]hen the party is in the state, however transiently, and the summons is actually served upon him there, the jurisdiction of the court is complete, as to the person of the defendant."⁴³ The territorial power theory has also been upheld where the defendant was served while on vacation in the forum state,⁴⁴ while in the forum state for a few hours on busi-

cated partly in Iowa and partly in Minnesota), he was served with a summons. *Id.* The defendant's argument paralleled the one later made by the defendant in *Davis*. The Minnesota court also found that *International Shoe* was inapposite, holding that a minimum contacts analysis is not proper when the defendant was served while physically present in the forum. *Id.* at 483, 119 N.W.2d at 738.

38. See *International Shoe Co. v. Washington*, 326 U.S. at 316; note 36 *supra*; notes 1-4 and accompanying text *supra*. Exceptions to this rule exist, however, when the defendant is present in the state solely to defend or appear as a witness in another suit, see *Lamb v. Schmitt*, 285 U.S. 222, 225, 227-28 (1932); *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916); *Cooper v. Wyman*, 122 N.C. 784, 785, 29 S.E. 947, 947 (1898), or where the defendant is fraudulently induced to enter the jurisdiction. See *Wyman v. Newhouse*, 93 F.2d 313, 315 (2d Cir. 1937). Immunity also exists in certain circumstances for some diplomatic officers and their servants. 22 U.S.C. §§ 252-254, 288(d) (1976).

39. See cases discussed notes 40-47 and accompanying text *infra*.

40. 106 Mass. 217 (1870). See also *Louisville & N.R.R. v. Meredith*, 194 Ga. 106, 21 S.E.2d 101 (1942); *Alley v. Caspar*, 80 Me. 234, 14 A. 12 (1888); *Barrell v. Benjamin*, 15 Mass. 354 (1819).

41. 106 Mass. at 217-18, 220.

42. *Id.* at 222.

43. *Id.* at 220.

44. *Fitzhugh v. Reid*, 252 F. 234 (E.D. Ark. 1918). In *Fitzhugh*, a Colorado resident was sued in an Arkansas state court by a California resident on a cause of action arising out of a contract made and executed in Colorado. *Id.* at 238-39. The Colorado resident was served with process while vacationing at Hot Springs. *Id.* at 235. Upon removal to a federal court, the Colorado resident contended, *inter alia*, that on these facts the service constituted an abuse of process for the following reasons: 1) the witnesses for both parties resided in Colorado, California, and Wyoming, and none were residents of Arkansas; and 2) all the written evidence was in Colorado. *Id.* at 239. The district court nevertheless upheld the service, stating:

ness,⁴⁵ while on board a commercial airplane flying over the forum state,⁴⁶ and while just passing through the forum in travelling to an adjoining state.⁴⁷

In sum, prior to *Shaffer*, in personam jurisdiction could be had over a defendant not present in the forum so long as the defendant had sufficient contacts with that state. On the other hand, when the defendant was present in the forum state, in personam jurisdiction was properly based on the territorial power theory of *Pennoyer*, without considering whether the defendant had sufficient contacts with the forum.

B. The Shaffer Decision

In *Shaffer*, a nonresident shareholder filed a shareholder's derivative suit in a county court of chancery in Delaware.⁴⁸ The suit was filed against twenty-eight present and former corporate officers and directors of Greyhound, a Delaware corporation, based on corporate action in Oregon.⁴⁹ Pursuant to a Delaware statute,⁵⁰ plaintiff simultaneously filed a motion for sequestration of the nonresident defendants' shares, options, warrants and corporate rights which were pres-

[A] party has, ordinarily, the right to institute and maintain an action against a defendant in any court of competent jurisdiction where personal service can be had on him, whereby the court obtains jurisdiction of his person. The fact that it may be inconvenient for the defendant to make his defense in that tribunal . . . is no cause for abatement of the action, or quashing the service of the summons.

Id.

45. *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 A. 714 (1895); *Darrah v. Watson*, 36 Iowa 116 (1872). In *Fisher*, a Connecticut resident, while in England on business, was served with process from an English court. 67 Conn. at 104, 34 A. at 714. The Connecticut court, called upon by the English plaintiff to execute upon the default judgment rendered in the English action, held that the service was valid under the transient rule. *Id.* at 105-06, 34 A. at 715.

In *Darrah*, a Pennsylvania resident was served while he was on business for two or three hours in Virginia. 36 Iowa at 119. The Iowa court, executing on the judgment of the Virginia court, upheld service under the transient rule. *Id.* at 120-21. See also cases discussed note 37 *supra*.

46. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959). In *Grace*, citizens of Arkansas brought an action against, *inter alios*, a citizen of Illinois upon a cause of action arising out of a contract made and executed in Illinois. *Id.* at 443, 447. The Illinois citizen was served in an airplane when the plane passed over Arkansas en route from Memphis, Tennessee, to Dallas, Texas. *Id.* at 443. The court held that such service constituted service within the territorial limits of Arkansas, and declined to grant the Illinois citizen's motion to quash service on the ground that he was never within the forum state. *Id.* at 447-48.

47. *Lee v. Baird*, 139 Ala. 526, 36 So. 720 (1903). In *Lee*, Alabama citizens served a citizen of Mississippi while he was driving from Mississippi to North Carolina. *Id.* at 527, 36 So. at 720. The cause of action did not arise in Alabama. *Id.* The court nevertheless held that the service was valid. *Id.* at 529, 36 So. at 720.

48. 433 U.S. at 189.

49. *Id.* at 189-90.

50. DEL. CODE ANN. tit. 10, § 366 (1975). In response to the *Shaffer* decision, Delaware has amended its sequestration statute. See DEL. CODE ANN. tit. 10, § 3114 (Supp. 1978).

ent in Delaware.⁵¹ Defendants entered a special appearance for the purpose of moving to quash service of process and to vacate the ex parte sequestration order,⁵² contending that the sequestration procedure did not accord them due process and that their contacts with Delaware were insufficient to sustain the court's exercise of jurisdiction under the minimum contacts standard of *International Shoe*.⁵³ The trial court rejected these arguments⁵⁴ and the Delaware Supreme Court affirmed, holding that since jurisdiction was quasi in rem, *International Shoe* was inapplicable.⁵⁵

On appeal, Justice Marshall, writing for the United States Supreme Court, noted that the lower court's "cursory treatment" of the applicability of minimum contacts was based on an erroneous assumption that *Pennoyer* was still the appropriate standard for in rem jurisdiction.⁵⁶ Reversing the state-court decision, the Court held that *International Shoe* and its progeny should now be used to determine the propriety of asserting in rem jurisdiction as well as in personam jurisdiction over out-of-state defendants.⁵⁷ Justice Marshall stated this holding, however, with tantalizing breadth:

The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the prop-

51. 433 U.S. at 190-92. For purposes of attachment, Delaware law provided that Delaware was the situs of stock in a Delaware corporation, even though none of the stock certificates seized was physically present in Delaware. *Id.* at 192 & n.9; DEL. CODE ANN. tit. 8, § 69 (1975). The stocks were seized by placing "stop transfer" orders on the books of Greyhound. 433 U.S. at 192.

52. 433 U.S. at 192-93. Generally, if a defendant "appears in response to a summons and makes no objection to his being brought before the court," then he is "deemed to have submitted to the authority of the court and consented to its exercise of jurisdiction." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.22, at 647 (2d ed. 1977). In this situation, the defendant will be deemed to have made a "general appearance." *Id.* To challenge the jurisdiction of the court, the defendant may elect to refuse to appear at all, permit a default judgment to be entered against him, and then raise the jurisdictional challenge by collateral attack when the plaintiff brings an action to enforce the judgment. *Id.* In so doing, however, the defendant runs the risk of losing on the jurisdictional issue in the enforcement proceeding, and thereby becoming subject to the default judgment without having had any opportunity to contest the action on its merits. *Id.* As "[a]n escape from this dilemma," the entry of a special appearance at the outset of the plaintiff's original action permits "the presentation, at the threshold of the proceedings, of the contention that the court lacks jurisdiction over the person making the objection." *Id.* For further discussion of the "special appearance," see *id.* § 12.22, at 645-49.

53. 433 U.S. at 192-93. In support of their contention that the sequestration procedure violated due process requirements, the defendants relied upon *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). 433 U.S. at 193. The Delaware Supreme Court found that the issues raised in the *Sniadach* line of cases were inapplicable to the sequestration procedure involved in *Shaffer*. *Id.* at 194. The United States Supreme Court did not reach this contention, since it decided for the defendants on their jurisdictional arguments. See notes 56-58 and accompanying text *infra*.

54. 433 U.S. at 193-94.

55. *Id.* at 194-95.

56. *Id.* at 195-96.

57. *Id.* at 212.

erty supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

We therefore conclude that *all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.⁵⁸

II. THE IMPACT OF *SHAFFER* ON THE TRANSIENT RULE OF IN PERSONAM JURISDICTION: AN UNANSWERED QUESTION

At the time of this writing, two years after the Court's decision in *Shaffer*, and after a plethora of legal commentary has been written,⁵⁹ the scope of Justice Marshall's opinion has yet to be determined. Although several commentators have suggested that transient presence is no longer a valid basis for the assertion of in personam jurisdiction after *Shaffer*,⁶⁰ only two lower federal courts have been willing to take such a strong position against the continued validity of transient presence as a jurisdictional basis.⁶¹ Indeed, a few cases

58. *Id.* (emphasis added) (footnote omitted).

59. See, e.g., Casad, *Shaffer v. Heitner An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61 (1977); Fischer, "Minimum Contacts": *Shaffer's Unified Jurisdictional Test*, 12 VAL. L. REV. 25 (1977); Karst, *The Supreme Court 1976 Term*, 91 HARV. L. REV. 1 (1977); Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 KY. L.J. 1 (1977); Olsen, *Shaffer v. Heitner: A Survey of its Effects on Washington Jurisdiction*, 13 GONZ. L. REV. 72 (1977); Sedler, *Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 329; Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273 [hereinafter cited as *Single-Factor Bases*]; Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA. L. REV. 997 (1978); Zammit, *Reflections on Shaffer v. Heitner*, 5 HASTINGS CONST. L.Q. 15 (1978); Note, *Shaffer v. Heitner: The Conceptual and Practical Effects*, 30 BAYLOR L. REV. 183 (1978); Comment, *Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . .*, 46 FORDHAM L. REV. 459 (1978); Note, *Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth*, 6 HOFSTRA L. REV. 393 (1978) [hereinafter cited as *New Constitutional Questions*]; Note, *New Standards for the Use of Quasi in Rem Jurisdiction*, 24 LOY. L. REV. 171 (1978); Note, "Minimum Contacts" Concept of In Personam Jurisdiction Extended to Domestic Relations Litigation, 29 MERCER L. REV. 341 (1977); Note, *Shaffer v. Heitner: A New Attitude Toward State Court Jurisdiction*, 13 TULSA L.J. 82 (1977); Note, *A State's Assertion of Jurisdiction over a Nonresident Defendant Based Solely on the Statutory Presence of the Defendant's Property Within the State Violates the Due Process Clause of the United States Constitution*, 46 U. CINN. L. REV. 1063 (1977); Note, *The Application of Minimum Contacts Analysis to All Assertions of State Court Jurisdiction—Shaffer v. Heitner*, 9 U. TOL. L. REV. 333 (1978); Note, *Jurisdiction—A Methodological Analysis: Implications for Presence and Domicile as Jurisdictional Bases—Shaffer v. Heitner*, 53 WASH. L. REV. 537 (1978) [hereinafter cited as *Presence and Domicile*].

60. See, e.g., Karst, *supra* note 59, at 162 n.62; *Single-Factor Bases*, *supra* note 59, at 302-05; Zammit, *supra* note 59, at 20-23; *Presence and Domicile*, *supra* note 59, at 550 & n.64.

61. See *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978) (dictum); *Schreiber v. Allis Chalmers Corp.*, 448 F. Supp. 1079 (D. Kan. 1978) (alternative holding). For a discussion of these cases, see notes 113-37 and accompanying text *infra*.

have stated in dicta that transient presence continues to be a valid basis for the exercise of personal jurisdiction.⁶²

The disagreement among these later cases may be due in part to the differences found in the separate opinions filed by the Justices in *Shaffer*. Two concurring members of the Court, Justices Powell and Stevens, were concerned that Justice Marshall's opinion might be read too broadly.⁶³ Justice Stevens stated his fear that other well-accepted methods of acquiring jurisdiction over persons who have adequate notice of the suit might be invalidated.⁶⁴ Justice Powell expressly reserved judgment on whether certain types of property, especially real property, provide the contacts necessary to subject a defendant to jurisdiction.⁶⁵ Justice Brennan, while agreeing that minimum contacts is the appropriate standard to apply to in rem and quasi in rem actions, disagreed with Justice Marshall's analysis of the contacts involved under the facts of *Shaffer*.⁶⁶

A. Impact on the Rule of *Seider v. Roth*

The uncertainty regarding the reach of the *Shaffer* decision is reflected in the confusion surrounding its effect on the doctrine of *Seider v. Roth*.⁶⁷ In *Seider*, the Court of Appeals of New York held that a New York plaintiff, injured in an automobile collision in Vermont, could obtain quasi in rem jurisdiction by attaching a debt situated in New York and owed to the Canadian defendant.⁶⁸ The debt attached by the plaintiff was the obligation owed to the defendant by his New York insurer under an automobile collision insurance policy.⁶⁹ This manner of asserting quasi in rem jurisdiction, although often criticized,⁷⁰ was followed in subsequent cases.⁷¹

62. See, e.g., *Driver v. Helms*, 577 F.2d 147, 156 & n.25 (1st Cir. 1978), cert. denied, 99 S. Ct. 1016 (1979) (dictum); *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 687-89, 273 N.W.2d 285, 286-87 (1979) (dictum). For a discussion of *Blacketer*, see notes 141-49 and accompanying text *infra*.

63. See 433 U.S. at 217 (Powell, J., concurring); *id.* at 217-19 (Stevens, J., concurring).

64. *Id.* at 219 (Stevens, J., concurring). According to Justice Stevens, the principal evil in the Delaware scheme was that purchasers on the national securities market would not be aware of the peculiarities of Delaware law which, unlike the law in the 49 other states, made Delaware the situs of all stock in a Delaware corporation. *Id.* See note 51 *supra*.

65. 433 U.S. at 217 (Powell, J., concurring).

66. *Id.* at 222-28 (Brennan, J., concurring in part and dissenting in part).

67. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

68. *Id.* at 112, 114-15, 216 N.E.2d at 313, 315, 269 N.Y.S.2d at 100, 102.

69. *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.

70. See, e.g., Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U. L. REV. 1075 (1968). For a list of other commentaries criticizing *Seider*, see *Minichiello v. Rosenberg*, 410 F.2d 106, 108 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969).

71. *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969); *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973), overruled in *Rocca v. Kenney*,

The *Seider* doctrine has its roots in the 1905 case of *Harris v. Balk*,⁷² where the United States Supreme Court held that a person could proceed on a claim against a nonresident by garnishing a debt owed to the nonresident by a third person.⁷³ Because the situs of a debt moves with the debtor,⁷⁴ jurisdiction over the debt could be achieved by serving the debtor within the forum, even though he was only transitorily present in the jurisdiction.⁷⁵

The *Shaffer* decision appears to have sounded the deathknell for those cases in which the presence of the property was the sole basis for asserting jurisdiction. The Court strongly implied that cases such as *Harris* should no longer be followed:

It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.⁷⁶

Indeed, the post-*Shaffer* cases reveal that the lower courts are no longer willing to sustain jurisdiction based solely on the attachment of a debt or other property located in a forum state which is otherwise unrelated to the plaintiff's cause of action.⁷⁷ At the same

381 A.2d 330 (N.H. 1977); *Savchuk v. Rush*, 245 N.W.2d 624 (Minn. 1976), *vacated*, 433 U.S. 902 (1977). For discussion of the treatment of the *Seider* doctrine after *Shaffer*, see notes 79-97 and accompanying text *infra*.

72. 198 U.S. 215 (1905).

73. *Id.* at 226.

74. *Id.* at 222-23.

75. *Id.* at 224-26. The United States Supreme Court has also upheld the seizure of an absent husband's bank account as sufficient to enforce his obligation to pay alimony. See *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917).

76. 433 U.S. at 208-09 (footnote omitted). The Court refused, however, to explicitly define the extent to which its decision in *Shaffer* overruled prior cases. *Id.* at 212 n.39.

77. See, e.g., *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017 (2d Cir. 1978); *Mississippi Chem. Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977).

In admiralty cases the courts have continued to sustain personal jurisdiction under admiralty rule B(1) of the Federal Rules of Civil Procedure, based solely upon the presence of property within the forum. See *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de*

time, there is still quite a bit of disagreement among the courts⁷⁸ and commentators as to whether or not *Seider* was overruled by the Court's decision in *Shaffer*.⁷⁹ Some courts have suggested that the Supreme Court in *Shaffer* did, in effect, overrule *Seider*.⁸⁰ One court, for example, reasoned that since *Seider* attachments of insurance obligations have their roots in *Harris*,⁸¹ and since *Shaffer* held that an assertion of jurisdiction like that in *Harris* is now subject to scrutiny under the minimum contacts test,⁸² an attachment under *Seider* would similarly be insufficient to establish jurisdiction.⁸³

In *O'Connor v. Lee-Hy Paving Corp.*,⁸⁴ however, the Court of Appeals for the Second Circuit held that an assertion of jurisdiction under *Seider* does not violate the principles of *Shaffer*, at least where the plaintiff is a resident of the forum state.⁸⁵ The court first distinguished the attachment of an insurance policy from that of an ordinary debt as in *Harris*.⁸⁶ Noting that it was the insurance company

Navigation, 459 F. Supp. 1242 (S.D.N.Y. 1978); *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978); *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706 (S.D.N.Y. 1978); *FED. R. CIV. P. Supp. R. B(1)*. These cases do not affect the present discussion, however, because they have been distinguished from *Shaffer* on both constitutional and analytical grounds: "[t]he recognized autonomy of admiralty jurisprudence, although not absolute, and the long constitutional viability of maritime attachment compel . . . [the conclusion] that *Shaffer* does not reach Rule B(1) attachment." *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. at 455 (footnotes omitted). For further discussion, see Bohman, *Applicability of Shaffer to Admiralty in Rem Jurisdiction*, 53 TUL. L. REV. 135 (1978).

78. See cases discussed notes 80-97 and accompanying text *infra*.

79. See, e.g., Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 KY. L. REV. 1 (1978) (predicting that the *Seider* doctrine will survive *Shaffer*); Note, *Quasi in Rem Jurisdiction: The Constitutionality of Seider v. Roth after Shaffer v. Heitner*, 78 COLUM. L. REV. 409 (1978) (also predicting that the *Seider* doctrine will survive *Shaffer*); Note, *New Standards for the Use of Quasi in Rem Jurisdiction*, 24 LOY. L. REV. 171, 180 (1978) (predicting the demise of *Seider*).

80. See, e.g., *Andrade v. Central Contracting Co.*, No. 76-5140 (S.D.N.Y. Apr. 28, 1978); *Torres v. Towmotor Div. of Caterpillar, Inc.*, 457 F. Supp. 460, 471-75 (E.D.N.Y. 1977); *Belcher v. Government Employees Ins. Co.*, 282 Md. 718, 387 A.2d 770 (1978); *Rocca v. Kenney*, 381 A.2d 330 (N.H. 1977) (overruling *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973)).

81. *Torres v. Towmotor Div. of Caterpillar, Inc.*, 457 F. Supp. 460, 464 (E.D.N.Y. 1977).

82. *Id.* at 469, citing *Shaffer v. Heitner*, 433 U.S. at 208-09.

83. 457 F. Supp. at 474. The *Torres* court also considered whether the existence of a contract of insurance with an insurer in the forum state might itself provide the necessary minimum contacts, but concluded that it did not. *Id.* at 472-74.

84. 579 F.2d 194 (2d Cir.), *cert denied*, 439 U.S. 1034 (1978).

85. 579 F.2d at 199-200. In so holding, the court relied heavily on the opinion of the district court. See *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd*, 579 F.2d 194 (2d Cir.), *cert denied*, 439 U.S. 1034 (1978).

86. 579 F.2d at 198-99. The court noted that the obligation attached in *Harris* could have been applied by the creditor to purposes other than payment of the claim under which it was attached. *Id.* at 199. The court distinguished *Seider* from *Harris* on the ground that the "utility [of the obligations under the insurance policy] is . . . to protect [the defendant] from liability and in an appropriate case to allow the plaintiff to recover from the insurer . . ." The defendant in *Seider* could not "recover, sell or hypothecate" this obligation; thus a judgment for the

which, in fact, would conduct the defense as obligated under the policy, the court analyzed the fairness of the *Seider* doctrine by focusing on the impact of its application on the insurer.⁸⁷ The court concluded that where the insurer is doing business in the forum state, the *Seider*-type procedure does not violate due process because the insurer has no justifiable ground for complaint about the forum's exercise of jurisdiction over it.⁸⁸ The New York Court of Appeals subsequently cited *O'Connor* with approval in a per curiam decision which again upheld the *Seider* rule.⁸⁹

Whether the United States Supreme Court would apply *Shaffer* to assertions of jurisdiction under *Seider* remains a speculative area of the law of jurisdiction, and the disagreement among the lower courts highlights the need for a definitive pronouncement on the subject. Shortly after its decision in *Shaffer*, the Court vacated a Minnesota Supreme Court judgment which had permitted jurisdiction based on a *Seider* attachment, and remanded the case for a determination in light of *Shaffer*.⁹⁰ This action, however, was interpreted by the Second Circuit to be "[a]t most, . . . an affirmation of the Court's declared unwillingness to determine at that time the extent to which jurisdictional doctrines other than those before it in *Shaffer* were affected by the decision."⁹¹

The Supreme Court recently declined to grant certiorari in *O'Connor* and, thus, refused to determine the extent to which *Seider* and other jurisdictional doctrines were affected by *Shaffer*.⁹² Justice Powell dissented from this denial, and indicated his position in an opinion in which he was joined by Justice Blackmun.⁹³ In his dis-

plaintiff would not "deprive a defendant of anything substantial that would have been otherwise useful to him." *Id.* at 199 (footnote and citation omitted).

87. *Id.* at 200-02. The court also briefly examined whether there was any unfairness to the "nominal" defendant, the insured, but again found no constitutional violation. *Id.* at 201-02.

88. *Id.* at 200-01. The court pointed out that "[d]oing business within the state continues to be a recognized basis for the existence of *in personam* jurisdiction, over a corporation." *Id.* at 201.

89. See *Baden v. Staples*, 45 N.Y.2d 889, 891, 383 N.E.2d 110, 111, 410 N.Y.S.2d 808, 810 (1978) (per curiam).

90. See *Rush v. Savchuk*, 433 U.S. 902 (1977) (mem.) (vacating *Savchuk v. Rush*, 245 N.W.2d 624 (Minn. 1976)). On remand, however, the Minnesota Supreme Court again upheld the assertion of jurisdiction under the *Seider* doctrine, distinguishing *Shaffer* on the same grounds relied upon in *O'Connor*. See *Savchuk v. Rush*, 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted*, 440 U.S. 905 (1979); note 97 *infra*. For a discussion of *O'Connor*, see notes 84-89 and accompanying text *supra*; notes 91-96 and accompanying text *infra*.

91. *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d at 199 n.6, *citing Shaffer v. Heitner*, 433 U.S. at 208 n.30, 219 n.39.

92. See *Lee-Hy Paving Corp. v. O'Connor*, 439 U.S. 1034 (1978). *But see Savchuk v. Rush*, 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted*, 440 U.S. 905 (1979); note 90 and accompanying text *supra*; note 97 *infra*. A second appeal of *Savchuk* has been docketed and oral argument set. 440 U.S. 905 (1979). Thus, the Court may have no choice but to decide the issue.

93. *Id.* at 1034-38 (Powell, J., dissenting).

sent, Justice Powell objected to the finding of the court of appeals that there was no unfairness in subjecting the insurance company and the insured defendant to the jurisdiction of the courts under the *Seider* doctrine.⁹⁴ After detailing the hardships which he thought the *Seider* doctrine imposed upon defendants,⁹⁵ Justice Powell concluded that “the judicially created *Seider* doctrine raises serious questions of due process” and “does not appear consonant with the standards of fairness enunciated in [*International Shoe*] and strongly reiterated in [*Shaffer*].”⁹⁶

The fate of *Seider*-type jurisdiction cannot be adequately predicted. It is clear, however, that since the Supreme Court’s decision in *Shaffer* was announced, lower courts which have considered an assertion of jurisdiction under *Seider* have examined the contacts involved under the facts of each case much more closely.⁹⁷

B. Impact on the Transient Rule

Shaffer held that physical power over property is no longer a sufficient basis for exercising jurisdiction; rather, what is required is a

94. *Id.* at 1036-37 (Powell, J., dissenting).

95. *Id.* at 1037-38 (Powell, J., dissenting). Justice Powell found that the *Seider* doctrine was unfair to the insurers in the following respects: 1) judge and jury may be unable to view the scene of the accident; and 2) “[j]urors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions and geography.” *Id.* at 1037 (Powell, J., dissenting). In addition, Justice Powell found unfairness to the insured defendant since the assertion of jurisdiction by a remote forum could require that he travel long distances and be away for long periods of time. *Id.*

96. *Id.* at 1038 (Powell, J., dissenting) (citations omitted). Justice Powell also noted his unwillingness to view the *Seider* doctrine as a judicially created direct action statute. *Id.* at 1035-36 (Powell, J., dissenting). A direct action statute permits an injured plaintiff to bring suit directly against the insurer of the tortfeasor, and such a procedure has been held constitutional. *See Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 67-68, 72-73 (1954). For a discussion of the difference between jurisdiction under *Seider* and jurisdiction under a direct action statute, *see* Comment, *supra* note 59, at 483-87. For commentary viewing jurisdiction under *Seider* as similar to jurisdiction under direct action statutes, *see* Note, *The Constitutionality of Seider v. Roth after Shaffer v. Heitner*, 78 COLUM. L. REV. 409, 413-17 (1978).

97. *See, e.g., Savchuk v. Rush*, 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted*, 440 U.S. 905 (1979). On remand from the United States Supreme Court for reconsideration in light of *Shaffer*, *see Rush v. Savchuk*, 433 U.S. 902 (1977) (mem.), the *Savchuk* court upheld the validity of jurisdiction under the *Seider* rule, basing its holding on the following grounds: 1) the attachment procedure could only be used against claims directly involved in the underlying action; 2) Minnesota has a legitimate interest in facilitating recoveries for resident plaintiffs; and 3) the “practical relationship” of the insurer to the nominal defendant usually results in the insurer conducting the defense anyway. 272 N.W.2d at 891-93. In concluding its analysis, the court stated:

We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite “contacts, ties or relations” to those defending parties as to offend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision.

Id. at 893.

nexus between the defendant, the controversy, and the forum.⁹⁸ By rejecting the idea that a state may exercise jurisdiction over property solely on the basis of its presence within the state, *Shaffer* cuts sharply into the first principle of *Pennoyer*—that every state possesses exclusive jurisdiction over property within its borders—and potentially abolishes the traditional distinctions between in personam, in rem, and quasi in rem jurisdiction in favor of the minimum contacts approach.⁹⁹

In rem jurisdiction has generally been distinguishable from in personam jurisdiction in that a judgment rendered by a court with in rem jurisdiction does not bind the defendant personally; rather, it determines the rights of all persons to the property subject to the court's jurisdiction.¹⁰⁰ Quasi in rem jurisdiction generally determines the rights of particular persons to the property or applies a defendant's property to the satisfaction of a claim against him.¹⁰¹ *Shaffer*, however, strongly implies that there is no distinction between any of the forms of jurisdiction, because, in the Court's view, the assertion of jurisdiction over property is nothing more than an assertion of jurisdiction over the owner of the property.¹⁰²

Long before *Shaffer*, Justice Traynor of the Supreme Court of California criticized the distinctions between the various forms of jurisdiction:

It is time we had done with mechanical distinctions between in rem and in personam, high time now in a mobile society where property increasingly becomes intangible and the fictional res becomes stranger and stranger. Insofar as courts remain given to asking "Res, res—who's got the res?," they cripple their evaluation of the real factors that should determine jurisdiction. They cannot evaluate the real factors squarely until they give up the ghost of the res. As they do so, the gap will narrow between the tests of jurisdiction and the tests of *forum non conveniens*.¹⁰³

The Court in *Shaffer* similarly reasoned that because in rem and quasi in rem cases result in the adjudication of personal rights, the

98. 433 U.S. at 209.

99. See *Pennoyer v. Neff*, 95 U.S. at 720; notes 3 & 10-11 and accompanying text *supra*.

100. See *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

101. *Id.*

102. 433 U.S. at 207-09.

103. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 663 (1959). In this article, Justice Traynor was commenting upon his opinion in *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957). In *Atkinson*, the California Supreme Court applied the minimum contacts standard to an assertion of quasi in rem jurisdiction in order to obtain jurisdiction over all interested parties in an action challenging the validity of a trust fund. *Id.* at 340-41, 345-47, 316 P.2d at 961-62, 964-66.

minimum contacts standard is therefore applicable.¹⁰⁴ The broad language of the Court that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"¹⁰⁵ arguably mandates that the same standards should be applied to an assertion of state-court jurisdiction under the transient rule.¹⁰⁶ *International Shoe* clearly requires minimum contacts analysis where the defendant is not present in the forum;¹⁰⁷ and *Shaffer* now clearly requires minimum contacts analysis in most, if not all, in rem and quasi in rem actions regardless of whether the property is present in the state.¹⁰⁸

As the debate over the *Seider* doctrine¹⁰⁹ suggests, however, the scope of the *Shaffer* decision with respect to the transient rule remains uncertain. If *Shaffer* is read broadly, the transient rule, like *Harris* and possibly *Seider*, may already be dead.¹¹⁰ On the other hand, if *Shaffer* is limited to in rem and quasi in rem cases, *Pennoyer* may still have some life where jurisdiction is based solely on a defendant's presence in the state and where his presence has no nexus with the plaintiff, the litigation, or the forum—as would be required by the minimum contacts approach.¹¹¹ The post-*Shaffer* cases have yet to formally announce the demise of the transient rule by declaring invalid the assertion of personal jurisdiction based solely on the presence of the defendant in the forum state.¹¹² Two recent federal district court decisions, however, illustrate that the doctrine may be enjoying its final days of vitality.

In *Schreiber v. Allis Chalmers Corp.*,¹¹³ a Kansas resident brought a products liability action in Mississippi against a Delaware corporation having its principal place of business in Wisconsin based on an accident which occurred in Kansas.¹¹⁴ Apparently because the

104. 433 U.S. at 207-09, 211-12.

105. *Id.* at 212 (footnote omitted).

106. See notes 150-62 and accompanying text *infra*.

107. See 326 U.S. at 316. For a discussion of *International Shoe*, see notes 12-25 and accompanying text *supra*.

108. See 433 U.S. at 212; notes 48-58 and accompanying text *supra*. Later decisions have stated *Shaffer's* holding to be that "quasi-in-rem jurisdiction to adjudicate is subject to the same due process limitations as is in personam jurisdiction." *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 898 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). See also *Inland Credit Corp. v. M/T Bow Egret*, 556 F.2d 756, 757 (5th Cir. 1977).

109. See notes 67-97 and accompanying text *supra*.

110. See notes 150-81 and accompanying text *infra*. For a discussion of cases which have so concluded, see notes 113-37 and accompanying text *infra*.

111. For a discussion of *Pennoyer*, see notes 10 & 11 and accompanying text *supra*. For a discussion of the minimum contacts approach, see notes 12-35 and accompanying text *supra*.

112. See *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979) (stating that the transient rule had not been overruled by *Shaffer*). For a discussion of *Blacketer*, see notes 141-49 and accompanying text *infra*.

113. 448 F. Supp. 1079 (D. Kan. 1978).

114. *Id.* at 1081.

claim would have been barred by the Kansas statute of limitations,¹¹⁵ the plaintiff chose to file suit in Mississippi which had a longer limitations period.¹¹⁶ Personal jurisdiction over the defendant was obtained on the theory that the corporation was "present" in the jurisdiction since it was licensed by the state to do business there,¹¹⁷ even though the business it conducted in Mississippi was unrelated to its manufacture of farm machinery, the source of the plaintiff's claim.¹¹⁸ The defendant successfully argued that for the convenience of the parties and witnesses,¹¹⁹ the action should be transferred to the district court in Kansas because there was no connection between Mississippi and the cause of action or any party thereto.¹²⁰ The defendant acknowledged that the effect of the transfer was that the case would be heard by a district court in Kansas, sitting as a district court in Mississippi, applying Mississippi law.¹²¹

Once the suit had been moved to the District of Kansas, however, the defendant challenged the jurisdiction of the Mississippi court.¹²² The gravamen of the defendant's charge was that the plaintiff's claim was barred by the Kansas statute of limitations.¹²³ The defendant argued that, although the transferee court must generally apply the statute of limitations which would have been applied had there been no transfer, where the transferor court lacked personal jurisdiction over the defendant, the transferee court must apply the statute of limitations of the transferee forum.¹²⁴ In other words, if Mississippi could not have asserted personal jurisdiction over the defendant, it could not have applied its statute of limitations to the plaintiff's claim. Alternatively, the defendant contended that even if jurisdiction could have been properly assumed by Mississippi, that

115. *Id.* The claim would have been barred by the applicable statutes of limitations had the action been brought in Kansas—the district in which the claim arose—and in *any* venue or residence other than Mississippi. *Id.*

116. *Id.* The action was filed in Mississippi six days before the six-year Mississippi statute of limitations governing tort and warranty actions would have run. *Id.*

117. *Id.* Mississippi law provides for service upon any corporation found doing business in Mississippi, "whether the cause of action accrued in this state or not." *Id.* See MISS. CODE ANN. § 79-1-27, 29 (1972).

118. 448 F. Supp. at 1085.

119. See 28 U.S.C. § 1404(a) (1976).

120. 448 F. Supp. at 1081-82. The court found that Mississippi had no particular interest in providing a forum to adjudicate the claim of a Kansas resident because 1) none of the evidence or witnesses was connected with Mississippi; 2) Mississippi had no regulatory interest in the corporate defendant's activities; and 3) the cause of action did not arise out of the defendant's activities in Mississippi. *Id.* at 1090-91.

121. *Id.* at 1082.

122. *Id.*

123. *Id.*

124. *Id.*

state, under its conflict of laws principles, would have applied the shorter Kansas statute of limitations and, thus, would have dismissed the action.¹²⁵

The *Schreiber* court seemed to accept the plaintiff's argument that the corporation was "present" in the jurisdiction for purposes of service.¹²⁶ Even so, the court stated that "[t]here can be no question that a 'power' theory of jurisdiction, relying on outmoded notions of 'presence' and 'consent,' has no place in a discussion of power to effect personal jurisdiction over a non-resident *individual* who did not act and caused no injury within the forum state."¹²⁷ Applying the standards of *International Shoe*, therefore, the court held that "a Mississippi court could not assume jurisdiction of this case in accordance with due process."¹²⁸ In so holding, the *Schreiber* court stated:

After *Shaffer*, plaintiff cannot rely solely on the asserted fact of "presence" to sustain an exercise of jurisdiction in Mississippi, for "physical presence is no longer either necessary or sufficient for in personam actions." . . . Rather, the nature and quality of that "presence" must be evaluated, with an eye toward the interest of Mississippi in assuming jurisdiction and providing a forum for this particular action.¹²⁹

The *Schreiber* court further declared that *Shaffer* requires that "any assumption of jurisdiction must meet the 'contacts' test of *International Shoe*, and . . . that obsolete exceptions to this test (such as 'corporate presence') which may have survived *International Shoe* should [not] be preserved."¹³⁰

Although *Schreiber* concerned corporate presence, the language employed by the court indicates that it might have been equally willing to find that transient presence was no longer a sufficient basis for the exercise of in personam jurisdiction over individuals.¹³¹ However, several facts concerning *Schreiber* caution against extending the case beyond its facts.

The court's opinion represents a premature and imperfect obituary for the transient rule of personal jurisdiction for several reasons: 1) as indicated, the case involved corporate rather than indi-

125. *Id.*

126. *Id.* at 1086, citing MISS. CODE ANN. § 79-3-213 (1972) (subjecting foreign corporations licensed to do business in Mississippi to the same "duties, restrictions, penalties and liabilities" as domestic corporations).

127. 448 F. Supp. at 1087 (dictum) (emphasis supplied by the court).

128. *Id.* at 1090-91 (alternative holding).

129. *Id.* at 1089, quoting Casad, *supra* note 59, at 77 (emphasis supplied by the court).

130. 448 F. Supp. at 1089.

131. See text accompanying note 127 *supra*.

vidual presence; 2) after holding that the Mississippi court could not assert jurisdiction over the case without violating due process rights, the court went on to consider the defendant's alternative conflict of laws argument—an action which undermines the court's assertion that its jurisdictional holding “commands dismissal of the case in accordance with [the] defendant's motion”;¹³² and 3) there are indications that the court was perturbed with the plaintiff's attorney for engaging in the evils of forum-shopping on other occasions and, therefore, may have subconsciously or unintentionally imposed more stringent jurisdictional standards on this plaintiff.¹³³

A subsequent case, *Energy Reserves Group, Inc. v. Superior Oil Co.*,¹³⁴ cited *Schreiber* as authority for the proposition that *Shaffer's* rejection of the territorial power theory of state-court jurisdiction indicates that presence within the forum is no longer a sufficient basis to support the exercise of in personam jurisdiction.¹³⁵ Thus, the *Energy Reserves* court stated, “[w]hether established by ‘doing business,’ ‘express or implied consent,’ or by physical fact, presence is . . . neither necessary nor always sufficient as a basis to support the exercise of jurisdiction.”¹³⁶

Schreiber and *Energy Reserves* appear to be the only two cases to date which have indicated that presence within the forum may no longer be a sufficient basis for the exercise of in personam jurisdiction.¹³⁷ It should be noted that the *Shaffer* opinion indicated that

132. *Id.* at 1091. With regard to the defendant's choice of law argument, see text accompanying note 125 *supra*. The court held that, at least in this case, a Mississippi court would apply the Kansas statute of limitations rather than its own. 448 F. Supp. at 1101. Thus, even if jurisdiction would have been proper in Mississippi, the plaintiff would not have escaped the effect of the Kansas statute. *Id.*

133. *Id.* at 1082. The court stated: “We must preface our analysis . . . with a frank admission of our antipathy for plaintiff's position. . . . [W]e are cognizant that plaintiff's counsel has employed similar arguments, and has succeeded in resurrecting a claim ‘stale’ in Kansas, in at least one other case” *Id.*

134. 460 F. Supp. 483 (D. Kan. 1978). In *Energy Reserves*, the plaintiff corporation, with its principal place of business in Kansas, brought an action on a contract against two corporations: a Nevada corporation doing business in Kansas, and its Nevada subsidiary which did not do business in Kansas. *Id.* at 491. After an extensive review of case law and authorities, the court applied the standards of *International Shoe* to uphold the assertion of in personam jurisdiction over the nonresident subsidiary. *Id.* at 515.

135. *Id.* at 504.

136. *Id.* (citations omitted).

137. Numerous post-*Shaffer* cases have stated that corporate presence may serve as a basis for the exercise of personal jurisdiction over a defendant, but only if two conditions are met: 1) the corporate defendant has some contact with the forum by an act which actually transpired in the forum state; and 2) the corporation has purposefully availed itself of the privilege of conducting business in the forum. See, e.g., *Marketing & Distribution Resources, Inc. v. Paccar, Inc.*, 460 F. Supp. 990 (D. Mass. 1978); *Western Desert, Inc. v. Chase Resources Corp.*, 460 F. Supp. 63 (N.D. Tex. 1978); *Darden v. Heck's, Inc.*, 459 F. Supp. 727 (W.D. Va. 1978); *Metropa Co. v. Choi*, 458 F. Supp. 1052 (S.D.N.Y. 1978); *Drexel Burnham Lambert, Inc. v. D'Angelo*, 453 F. Supp. 1294 (S.D.N.Y. 1978); *A.A. Importing Co. v. Karavias U.S.A. Inc.*, No.

corporations, by their nature, may be subject to jurisdiction in cases where individuals are not.¹³⁸ Nevertheless, the contention in *Schreiber* and *Energy Reserves* that courts should apply the minimum contacts analysis even when a corporation is present in the forum to determine if in personam jurisdiction exists would seem to support the imposition of the identical requirement on an individual who is present in the forum state.¹³⁹ Arguably, these cases suggest that the demise of the transient rule is the next logical step in the development of a jurisdictional theory which is consistent with due process.¹⁴⁰

Nonetheless, in the only post-*Shaffer* case which presented the opportunity to decide on the merits whether an individual is still subject to the transient rule, the court declined to overturn this "solidly established" basis of jurisdiction.¹⁴¹ In that case, *Oxmans' Erwin Meat Co. v. Blacketer*,¹⁴² the plaintiff, a Wisconsin corporation, sought to recover the amount of a debt allegedly owed to it by the defendant Oklahoma corporation and by an individual defendant, an agent of the corporation.¹⁴³ The plaintiff served the individual defendant, who was not a resident of Wisconsin, while he was physically present in that state.¹⁴⁴ The defendant agent challenged the court's

76-2430 (S.D.N.Y. May 1, 1978); *Droukas v. Divers Training Academy*, 376 N.E.2d 548 (Mass. 1978); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977).

138. 433 U.S. at 204 n.19.

139. One court, however, has suggested in dictum that anyone found within a particular forum would have sufficient contacts with that forum to meet the minimum contacts standard anyway. *See Driver v. Helms*, 577 F.2d 147, 156 & n.25 (1st Cir. 1978), cert. denied, 99 S. Ct. 1016 (1979) (dictum); cf. notes 152-54 and accompanying text *infra*. But see notes 179-80 and accompanying text *infra*.

140. One commentator has observed:

The [*Shaffer*] decision proves beyond question that old jurisdictional dogma is not sacred. If century-old law on in rem jurisdiction can be changed, so can other rules that are believed to operate unfairly. Professor Ehrenzweig long urged that personal jurisdiction based on service on a defendant who was only temporarily within the state ought not to be allowed.

R. LEFLAR, *AMERICAN CONFLICTS LAW* § 24A, at 43 (3d ed. 1977). *See Ehrenzweig, supra* note 2.

141. *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979), quoting Foster, *Expanding Jurisdiction Over Nonresidents*, 32 WIS. B. BULL. Oct. 1959 (Supp.), at 11.

142. 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

143. *Id.* at 688, 273 N.W.2d at 286. The debt arose when the plaintiff agreed to supply meat on credit to six restaurants, two of which were in Wisconsin. *Id.* at 689, 273 N.W.2d at 288. The plaintiff alleged that the individual defendant had misrepresented himself to be a general partner in the restaurants and, therefore, should be personally liable for the amount of the debt. *Id.* at 689-90, 273 N.W.2d at 288. In fact, the individual defendant was merely acting as agent for the defendant corporation, which was the true general partner of the restaurants. *Id.* at 690, 273 N.W.2d at 288. Hence, the plaintiff sought to recover for the individual defendant's fraudulent misrepresentation that he was personally liable as a partner. *Id.* at 692-93, 273 N.W.2d at 289-90.

144. *Id.* at 686, 273 N.W.2d at 286. Although the individual defendant's place of residence was not indicated, it is implicit in the opinion that he was not a resident or domiciliary of Wisconsin. *Id.* at 689-92, 273 N.W.2d at 287-89.

jurisdiction on the ground that his mere physical presence was no longer sufficient to permit personal jurisdiction; rather, he maintained, the individual must also have certain minimum contacts with the forum state.¹⁴⁵

After noting that “[p]hysical presence is the traditional basis of judicial jurisdiction,”¹⁴⁶ the *Blacketer* court stated:

In our view the United States Supreme Court has not imposed a “minimum contacts” requirement on a state’s assertion of jurisdiction over a natural person upon whom personal service within the state has been achieved. Neither *International Shoe* nor its progeny, including the recent case of *Shaffer v. Heitner* . . . , addresses the issue of the constitutionality of the state’s exercising jurisdiction based solely on the service of process upon an individual within state borders.¹⁴⁷

Nevertheless, the court found that the facts of the case did not require a holding on this issue since, even if the minimum contacts approach were applicable to an assertion of jurisdiction based on physical presence, the defendant agent’s activities in Wisconsin “fulfilled the ‘minimum contacts’ requirements.”¹⁴⁸ Therefore, the *Blacketer* court concluded that it was “reasonable, just and consistent with traditional notions of fair play” to subject the individual defendant to suit in Wisconsin.¹⁴⁹

145. *Id.* at 687, 273 N.W.2d at 287, citing *International Shoe v. Washington*, 326 U.S. at 316.

146. 86 Wis. 2d at 687, 273 N.W.2d at 286.

147. *Id.* at 687-88, 273 N.W.2d at 287 (footnote and citation omitted). In reaching this conclusion, the *Blacketer* court cited *Donald Manter Co. v. Davis*, 543 F.2d 419 (1st Cir. 1976) and *Nielsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963). See 86 Wis. 2d at 687 n.3, 273 N.W.2d at 287 n.3. Both of these pre-*Shaffer* cases involved attacks on the transient rule based on *International Shoe* which were rejected by the respective courts. See 543 F.2d at 420; 264 Minn. at 483, 119 N.W.2d at 738. For a discussion of *Davis* and *Nielsen*, see note 37 *supra*.

The *Blacketer* court also quoted extensively from a comment on *Shaffer* which appears in a tentative draft of the RESTATEMENT (SECOND) OF JUDGMENTS. See 86 Wis. 2d at 688 n.4, 273 N.W.2d at 287 n.4. This comment states:

In light of [*Shaffer*], it may well be doubted whether . . . defendant’s “presence in the state, even for an instant, gives the state judicial jurisdiction over him,” in the absence of some connection between the state and the transaction or the parties involved in the litigation. *Shaffer v. Heitner* seems to undercut that proposition, but the effect on territorial jurisdiction is modest. Given the doctrine of *forum non conveniens*, few if any states would exercise jurisdiction in such circumstances As a theoretical matter, however, the effect of *Shaffer v. Heitner* is considerable. It would establish “minimum contacts” in place of presence as the principal basis for territorial jurisdiction.

RESTATEMENT (SECOND) OF JUDGMENTS § 8, Comment *a*, at 63-64 (Tent. Draft No. 5, 1978), quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28, Comment *a* (1971), quoted in 86 Wis. 2d 688 n.4, 273 N.W. 2d 287 n.4. (citations omitted).

148. 86 Wis. 2d at 688, 273 N.W.2d at 287.

149. *Id.* at 693, 273 N.W.2d at 289. The *Blacketer* court relied on the facts found by the trial court to demonstrate the presence of sufficient contacts, which included the following: 1) the

In sum, although the *Blacketer* court insisted that the transient rule of in personam jurisdiction survives *Shaffer*, it apparently felt compelled to fully analyze the defendant's contacts with the state and to demonstrate that the state's assertion of personal jurisdiction over this defendant satisfied both standards. As a result, the *Blacketer* decision only adds to the confusion surrounding the transient rule after *Shaffer*.

III. THE DEMISE OF THE TRANSIENT RULE OF IN PERSONAM JURISDICTION: THE NEXT LOGICAL STEP?

In the past when personal mobility was limited, causes of action usually arose between persons residing in the same state; thus, the transient rule of in personam jurisdiction was considered to be fair since normally the defendant was not put in the harsh position of having to defend an action in a place with which he had no contacts other than his mere presence.¹⁵⁰ Today, by contrast, the enormous amount of interstate activity makes it more likely that cases will arise in which the forum state has little or no connection with the litigation other than the defendant's fortuitous physical presence in the state at the time of service.¹⁵¹

Typically, however, the defendant's presence will coincide with other factors which might form a nexus sufficient to support jurisdiction.¹⁵² For example, the forum may also be the plaintiff's place of residence or domicile; witnesses or evidence may be located in the forum; or the events which gave rise to the cause of action may have

individual defendant started doing business with the plaintiff in order to supply a new restaurant being opened in Milwaukee, Wisconsin; 2) 44 of 50 business meetings between the parties were held in the individual defendant's offices in Milwaukee; and 3) the cause of action arose out of a meeting held in Milwaukee at which the individual defendant allegedly misrepresented that he would be personally liable on the debt as a general partner. *Id.* at 689-90, 273 N.W.2d at 288.

150. See *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 938 (1960).

151. See *id.* Another commentator has stated that "the mere presence of the defendant . . . is probably insufficient to support jurisdiction over claims unrelated to his activities within the forum." Karst, *supra* note 59, at 160.

152. See note 139 *supra*. One commentator suggests that

[t]he consequences of *Shaffer*, in subjecting the *Pennoyer* categories to the *International Shoe* rule, may be more doctrinal than practical. Although the mere presence of the defendant, like the mere presence of his property, is probably insufficient to support jurisdiction over claims unrelated to his activities within the forum, the presence of either the defendant's person or his property will often signal other relationships with the forum and the controversy that are adequate to support jurisdiction. Further, a defendant who is domiciled or who resides within the forum is likely to have an extensive network of contacts sufficient to support jurisdiction over *any* claim asserted against him.

Karst, *supra* note 59, at 160 (footnotes omitted) (emphasis in original).

occurred in the forum.¹⁵³ If, on the other hand, the defendant's presence is not joined with factors such as these, the question becomes whether, in light of *Shaffer's* apparent abolition of the jurisdictional distinctions,¹⁵⁴ a defendant should be forced to defend in a completely unrelated forum simply because service was made there.

With the advent of the long-arm and nonresident motorists statutes,¹⁵⁵ and with physical presence no longer a prerequisite to the exercise of in personam jurisdiction, there is little need for the "catch-as-catch-can"¹⁵⁶ attitude which justifies the transient rule.¹⁵⁷ More importantly, the standards of *International Shoe* and its progeny, when read in conjunction with *Shaffer* and subsequent cases,¹⁵⁸ do not support the exercise of personal jurisdiction over a defendant whose only connection with the forum is physical presence.¹⁵⁹

A critical distinction between jurisdiction based on long-arm and nonresident motorist statutes versus jurisdiction based solely on presence is that with respect to the statutory bases, there exists some relationship between the litigation and the forum.¹⁶⁰ Under the transient rule, however, where a defendant's mere presence is the basis of jurisdiction, the forum may otherwise have no connection with the cause of action.¹⁶¹ If the mere physical presence of prop-

153. See Von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1134 (1966).

154. See text accompanying notes 102 & 105-06 *supra*; notes 126-31 & 134-49 and accompanying text *supra*.

155. For a discussion of long-arm and nonresident motorist statutes, see notes 34 & 35 *supra*.

156. See Ehrenzweig, *supra* note 2, at 306.

157. See *id.* at 306-12.

158. See *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 504 (D. Kan. 1978) (dictum); *Schreiber v. Allis Chalmers Corp.*, 448 F. Supp. 1079, 1090-91 (D. Kan. 1978) (alternative holding).

159. For a discussion of the impact of *Shaffer*, see notes 59-149 and accompanying text *supra*. Other traditional bases of jurisdiction may be targeted for challenge as well. In *Milliken v. Meyer*, 311 U.S. 457 (1940), the Supreme Court upheld domicile as a basis for asserting jurisdiction over a person who was not present within the forum when served, reasoning that the defendant, as a domiciliary, enjoyed the incidences of residence and the protection of the state's laws. *Id.* at 463-64. It may be difficult to reconcile cases such as *Milliken* with the pronouncement of *Shaffer*. In actions in rem, the owner of the property presumably enjoys the protection of his property under the laws of the state in which the property is located, yet *Shaffer* apparently now requires that the minimum contacts standard be applied in such cases. See notes 45-55 and accompanying text *supra*. Moreover, it can be argued that if it is unfair for a state to assert jurisdiction over one who is only transiently present in the forum state, it is similarly unfair to allow the assertion of jurisdiction in the state where the defendant is merely domiciled. As one commentator has noted, jurisdiction based solely upon technical domicile is as offensive to traditional notions of due process as is transient presence since "the reciprocal rights and duties associated with domicile are unrelated to the domicile's interest in the outcome of the litigation, the convenience of that state as a place to litigate, or the likelihood that a defendant would anticipate being sued there." *Single-Factor Bases*, *supra* note 59, at 301 (footnote omitted).

160. For a discussion of long-arm and nonresident motorist statutes, see notes 34 & 35 *supra*.

161. See note 151 and accompanying text *supra*.

erty is now insufficient to establish jurisdiction in actions in rem,¹⁶² then mere physical presence of the individual should be equally suspect, unless there is also some nexus between the presence and the pending litigation as required by the minimum contacts approach.

Nonetheless, it has been argued that the transient rule of in personam jurisdiction should be maintained for three reasons: 1) it is a predictable rule upon which parties can rely;¹⁶³ 2) as Justice Stevens suggests in *Shaffer*, being served with process is a justifiable risk that people assume upon entering a state;¹⁶⁴ and 3) as mentioned previously,¹⁶⁵ the exercise of jurisdiction in most cases will comply with the due process requirements of *International Shoe* anyway, since a defendant will normally have had some other contacts with the forum.

While predictability is a laudable objective, it must necessarily give way in the face of potential violations of due process rights. As already suggested in this article, it is reasonable to argue that the transient rule is unfair to defendants in light of the holdings of *International Shoe* and *Shaffer*.¹⁶⁶ The rule's unfairness should not be tolerated because of considerations such as predictability.

With respect to the "justifiable risk" argument,¹⁶⁷ Justice Stevens maintained that the Court's decision in *Shaffer* should not be used to invalidate accepted jurisdictional principles, particularly when the defendant has adequate notice that a particular activity may subject him to the jurisdiction of a foreign sovereign, in addition to actual notice of the litigation.¹⁶⁸ In his concurring opinion in *Shaffer*, Justice Stevens listed some voluntary acts, including transient presence, which he apparently believes continue to represent sufficient bases for asserting personal jurisdiction over a defendant.¹⁶⁹ Justice Stevens reasoned that by consciously performing one of the acts listed, the defendant should have been placed on notice of the possibility of his having to defend a suit in the forum.¹⁷⁰ Thus, Justice

162. See note 98 and accompanying text *supra*.

163. See *Presence and Domicile*, *supra* note 59, at 554. In reserving judgment on whether ownership of property located within the forum should permit state-court jurisdiction in certain in rem actions, Justice Powell similarly argued in *Shaffer* that a rule permitting jurisdiction in such cases "would avoid the uncertainty of the general *International Shoe* standard." 433 U.S. at 217 (Powell, J., concurring) (citations omitted).

164. 433 U.S. at 218 (Stevens, J., concurring).

165. See note 139 *supra*; notes 152-53 and accompanying text *supra*.

166. See notes 150-62 and accompanying text *supra*.

167. See text accompanying note 164 *supra*.

168. 433 U.S. at 218-19 (Stevens, J., concurring).

169. See *id.* at 218 (Stevens, J., concurring). For a list of the other acts which Justice Stevens considers to be sufficient contacts to permit the exercise of in personam jurisdiction, see text accompanying note 171 *infra*.

170. 433 U.S. at 218 (Stevens, J., concurring).

Stevens apparently intended to indicate that transient presence continues to provide a valid basis for the exercise of in personam jurisdiction, for he stated: "If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks."¹⁷¹

In two later cases, the District Court for the Southern District of New York cited this passage as support for holding that a nonresident defendant's maintenance of a bank account in the forum state established sufficient contacts to justify the court's assertion of quasi in rem jurisdiction.¹⁷² The court reasoned that the nonresident defendant's conscious placement of property in the forum state should have put him on notice that he might later have to defend a claim involving that property in the foreign jurisdiction.¹⁷³ These cases have been criticized for failing to enforce the requirement set forth by the majority in *Shaffer* that there be a relationship between the property attached and the underlying cause of action.¹⁷⁴ Nevertheless, it is possible that courts in the future could use reasoning similar to the rationale of these two cases to sustain transient presence as an adequate basis for the assertion of in personam jurisdiction. In short, relying upon Justice Stevens' concurrence, a court could find that transient presence represents a conscious act that puts the defendant on notice of the possibility of his having to defend suit in the state he is visiting should he be served with a complaint while transiently within that state.

There is no doubt that service on a defendant who is physically present in the forum is sufficient notice under any standard.¹⁷⁵ Nevertheless, while notice has always been a critical element in determining fundamental fairness, it should not be dispositive. Actual notice, without more, has not been a basis for sustaining the assertion of state-court jurisdiction.¹⁷⁶ Thus, even though a transient defendant may have sufficient notice, jurisdiction based solely on such

171. *Id.* (Stevens, J., concurring) (emphasis added).

172. See *Lime Int'l Corp. v. Bank in Liechtenstein Aktiengesellschaft*, No. 77-5499-CSH (S.D.N.Y. June 29, 1978); *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1278 (S.D.N.Y. 1977).

173. *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1278-79 (S.D.N.Y. 1977).

174. See Note, *If the (International) Shoe Fits . . . Subsequent Interpretation of Shaffer v. Heitner*, 10 RUT.-CAM. L.J. 175, 193-95 (1978).

175. The relationship between notice and due process was defined by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In that case, the Court noted that a fundamental requirement of due process in any proceeding is that notice be reasonably calculated to reach all interested parties. *Id.* at 314.

176. See *Hanson v. Denckla*, 357 U.S. 235, 241 (1958); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 309 (1950).

notice without the existence of other factors would still be insufficient.¹⁷⁷ Presence has heretofore been the other factor triggering transient jurisdiction.¹⁷⁸ If the factor of presence is held to be no longer sufficient in light of the fundamental fairness requirement, then the fact of actual notice to the defendant should not be substituted as a bootstrap to jurisdiction.

Finally, while it may be true that, normally, minimum contacts will exist when a defendant is present within the forum,¹⁷⁹ the fact that more often than not a correct result will be reached under the transient rule cannot justify the process by which that result is achieved. This is particularly true today, since methods for reaching the proper result are now available which were not available when the territorial power theory was announced.¹⁸⁰ The minimum contacts analysis of *International Shoe*, implemented by state long-arm statutes, is presently a sufficient means for assuring jurisdiction in those cases where the defendant's transient presence is tied to other contacts with the forum state. Moreover, in cases where it appears that the plaintiff has no other forum available, jurisdiction would probably be upheld, even after *Shaffer*, under an exception to the minimum contacts rule.¹⁸¹

In sum, of the three arguments offered to support the continued viability of the transient rule of in personam jurisdiction,¹⁸² none has proven to be compelling. As the following discussion will indicate,

177. See cases cited note 176 *supra*.

178. See *Pennoyer v. Neff*, 95 U.S. at 721-23.

179. See note 139 *supra*; notes 152-53 and accompanying text *supra*.

180. The territorial power theory was announced in 1877 in *Pennoyer v. Neff*, 95 U.S. at 722. See note 3 and accompanying text *supra*.

181. See Ehrenzweig, *supra* note 2, at 309-12. The *Shaffer* Court explicitly declined to consider the situation in which the only available forum is the forum where the property is located. 433 U.S. at 211 n.37. However, the Court's rejection of the procedure used in *Shaffer* included a recitation of other methods available to plaintiffs to obtain jurisdiction in a manner consistent with *International Shoe*. *Id.* at 202-05. It is submitted that if these other methods were unavailable so that no forum would be open to the plaintiffs unless jurisdiction could be predicated on the presence of property within the state, a court could presumably distinguish *Shaffer* and exercise quasi in rem jurisdiction. See Note, *Power, Fundamental Fairness, and Jurisdiction: Shaffer v. Heitner*, 32 ARK. L. REV. 101, 119 (1978). In *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630 (D. Conn. 1977), a federal district court used this rationale to uphold the validity of an assertion of jurisdiction based upon the attachment of a debt unrelated to the plaintiff's cause of action, where the foreign defendant could not be subjected to jurisdiction in any other forum in the United States. *Id.* at 631, 633. While acknowledging that the defendant did not have sufficient contacts with the forum, the court reasoned that by transacting business with United States corporations, the foreign defendant had taken the risk that debts owed to it by these corporations would be used as the basis for jurisdiction in a United States court. *Id.* at 633. For further discussion of the fairness of allowing suit in the only available forum, see *Single-Factor Bases*, *supra* note 59.

182. See notes 163-65 and accompanying text *supra*.

however, if the transient rule is not abrogated, cases where the defendant's presence is the only contact with the forum state will continue to produce troublesome results.

In *Grace v. MacArthur*,¹⁸³ for example, it appears that the only basis for asserting in personam jurisdiction over one of the defendants was that he was served while flying over the state of Arkansas.¹⁸⁴ The defendant's "presence" in Arkansas, though apparently unrelated to the subject matter of the litigation, was deemed a sufficient basis to deny his motion to quash service of process.¹⁸⁵ If the transient rule were to be abolished, cases such as *Grace* would probably be resolved differently. The defendant's presence would not, ipso facto, have given rise to potential personal liability unless there was, in addition, some nexus between his presence in Arkansas and the pending litigation. *Grace* is precisely the type of factual situation which points out the unfairness and absurdity of a blind application of the physical power theory supporting the transient rule. The right of the individual to travel interstate should no longer carry with it any greater risk of being sued in any jurisdiction crossed over in flight for events occurring elsewhere, than the risk incurred by owners of property which is located in another state.

Consider also the anomalous situation which may result if the transient rule remains intact after *Shaffer*. In personam jurisdiction might be regarded as the form of jurisdiction least protective of a defendant in that it subjects all of the defendant's assets to a judgment secured by a plaintiff. An in rem judgment, on the other hand, affords a defendant greater protection by limiting any judgment to the value of the property which is subject to the court's jurisdiction.¹⁸⁶ *Shaffer* makes it clear that mere presence of property is no longer a sufficient basis to support the exercise of a court's power to decide a controversy, absent minimum contacts.¹⁸⁷ Consequently, if *Shaffer's* devaluation of presence in the jurisdictional equation does not eliminate the transient rule in actions in personam, a peculiar situation would result: the more limited in rem actions would be evaluated by the due process yardstick of minimum contacts, whereas the broader and more generally used in personam actions would not be so tested where the defendant was, for whatever reason, present in the state. As one commentator has noted:

183. 170 F. Supp. 442 (E.D. Ark. 1959); see note 46 *supra*.

184. 170 F. Supp. at 443.

185. *Id.* at 447-48.

186. See note 100 and accompanying text *supra*.

187. For a discussion of the holding of *Shaffer*, see notes 48-58 and accompanying text *supra*.

The single factor of the defendant's transient presence in the forum contributes nothing more than the presence of the defendant's property in the forum contributes to the existence of a forum as a place to litigate, or a reason for defendant to anticipate suit there. Because it is unfair to assert jurisdiction in *Shaffer*, it is unfair to assert jurisdiction in the transient defendant case.¹⁸⁸

Likewise, it would be somewhat odd that a nonresident defendant, whose property is located in the forum, would not be subject to jurisdiction there because his property does not give rise to sufficient minimum contacts, while another nonresident defendant, who owns no property in the forum, does no business in the state, and does not otherwise avail himself of the state's benefits and protection, will nevertheless be subject to the court's jurisdiction merely because of his transient presence. But if due process means fairness based on the existence of minimum contacts between the defendant, the litigation, and the forum, then it would appear that in personam jurisdiction, grounded solely upon mere physical presence, is inconsistent with the holding of *Shaffer* and should, therefore, be laid to rest. In future cases, presence should be but one factor in determining whether a court may exercise in personam jurisdiction.

Regardless of whether or not the transient rule survives *Shaffer*, the doctrine of forum non conveniens should be used by courts to avoid the aforementioned inequities.¹⁸⁹ The doctrine was, in fact, initially formulated as a reaction to the transient rule of in personam jurisdiction, and was designed to limit the plaintiff's choice of forum without permitting the defendant to escape or minimize his obligations.¹⁹⁰

One commentator, who predicted the eventual demise of the transient rule, further predicted that forum non conveniens would then become a key consideration in such cases.¹⁹¹ Another author, Justice Traynor, also suggested that the abolition of the traditional distinctions between in rem, quasi in rem, and in personam jurisdiction would correspondingly increase the importance of forum non conveniens.¹⁹² Forum non conveniens allows a court, within its discretion, to refuse to exercise existing jurisdiction when it believes

188. *Single-Factor Bases*, *supra* note 59, at 303.

189. "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

190. *See Ehrenzweig*, *supra* note 2, at 301-02.

191. *Id.* at 310-14.

192. *See Traynor*, *supra* note 103, at 663-64. For a discussion of how *Shaffer* may have lessened the distinctions between the traditional types of jurisdiction, *see* notes 98-149 and accompanying text *supra*.

that it would be inappropriate to do so.¹⁹³ Policy considerations of fairness to litigants, similar to those taken into account in determining jurisdiction under *International Shoe* and *Shaffer*, are also considered when applying forum non conveniens.¹⁹⁴ One aspect of the fairness requirement is to avoid the inconvenience of having to defend a suit away from home.¹⁹⁵ Forum non conveniens could, therefore, be employed as a fail-safe measure to protect a defendant from defending in a forum when his only contact with it is his transient presence there.¹⁹⁶

One factor favoring either the abolition of the transient rule, or the court's use of forum non conveniens to decline to exercise its jurisdiction, is that, if transient jurisdiction is exercised, choice-of-law principles will frequently result in the application of another forum's law:

With . . . [the distinctions between the tests of jurisdiction and the tests of forum non conveniens] converging, we can expect them to absorb choice-of-law tests. This is eminently sound, for the state whose law controls is the one whose courts are best qualified to interpret and apply it. There would be no better way of decreasing choice-of-law problems and hence conflict than thus to channel the litigation of transactions to that state.¹⁹⁷

193. See note 189 *supra*; note 194 *infra*.

194. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). As the *Gulf Oil* Court stated: An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [*sic*] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harrass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.

Id. A few post-*Shaffer* cases have distinguished between the considerations of fairness applied in the doctrine of forum non conveniens and those applied in the minimum contacts analysis. See *Fitzsimmons v. Barton*, 589 F.2d 330, 334 (7th Cir. 1979); *Driver v. Helms*, 577 F.2d 147, 156 n.25 (1st Cir. 1978), *cert. denied*, 99 S. Ct. 1016 (1979); *Briggs v. Goodwin*, 569 F.2d 1, 8-10 (D.C. Cir. 1977). In *Fitzsimmons*, for example, the court declined to include forum non conveniens considerations in its determination of the constitutionality of an exercise of personal jurisdiction under a federal statute providing for national service of process. See 589 F.2d at 334. The court reasoned that the central concern of *Shaffer* and its predecessors was the fairness of the exercise of power by a particular sovereign, rather than the fairness of imposing the burdens of litigation in a particular forum. *Id.*

195. See *International Shoe Co. v. Washington*, 326 U.S. at 317.

196. It should be remembered, however, that a court's use of the forum non conveniens doctrine is discretionary. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). If a court refuses to declare itself an inconvenient forum, the defendant will be forced to defend the suit with little recourse for challenging jurisdiction. *Id.* As the *Gulf Oil* Court stated, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

197. Traynor, *supra* note 103, at 663-64.

A forum which initially acquires jurisdiction under the transient rule has little, if any, reason to apply its own substantive law to the litigation. Even those courts which have asserted jurisdiction over transients have recognized that such an assertion merely provides a forum, and does not dictate the use of the forum's substantive law to resolve the dispute.¹⁹⁸ When a forum exercises transient jurisdiction, the only circumstances which would favor using its laws would be when the plaintiff is a resident of the forum and the litigation involves an interest of the state in protecting its residents. In cases where these circumstances are not present, the doctrine of forum non conveniens is available to justify the forum's refusal to hear the case since the state whose substantive law will govern the litigation is presumably best able to interpret and apply that law.

Nevertheless, it must be noted that since the policies behind forum non conveniens and minimum contacts are substantially similar,¹⁹⁹ whether the forum is convenient may not be an issue in many cases. The court, in making the initial determination of whether it may hear the case, might determine that it lacks jurisdiction *ab initio* due to the absence of minimum contacts and, as a result, would not even have to reach the forum non conveniens issue.²⁰⁰ Under the fundamental fairness standard of *International Shoe* and *Shaffer*,²⁰¹ a forum whose only contact with the suit is the physical presence of the defendant should more appropriately rule that it has no jurisdiction, instead of deciding that jurisdiction exists but that the forum is inconvenient.

IV. CONCLUSION

The long accepted transient rule of in personam jurisdiction has outlived its usefulness in light of modern methods of obtaining jurisdiction over defendants such as long-arm and nonresident motorist statutes. *Shaffer's* pronouncement of new standards for quasi in rem jurisdiction and the existing *International Shoe* standards which apply to defendants not physically present in the state, also render continued application of the transient rule unfair and unnecessary. Although the post-*Shaffer* decisions have yet to formally declare an end to transient in personam jurisdiction, a client's money might be well spent in challenging the rule based on the broad holding of *Shaffer*.

198. See, e.g., *Barnell v. Benjamin*, 15 Mass. 354, 356 (1819).

199. See note 194 and accompanying text *supra*.

200. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

201. See note 22 and accompanying text *supra*.