August 2015

In Rem Jurisdiction; Due Process; Minimum Contacts; State Statutes; Shaffer v. Heitner

Richard S. Milligan

CIVIL PROCEDURE

In Rem Jurisdiction • Due Process • Minimum Contacts • State Statutes

Shaffer v. Heitner, 97 S. Ct. 2569 (1977).

THE DECISION OF *Shaffer v. Heitner* marks a significant departure from established principles concerning in rem jurisdiction. No longer may a court take jurisdiction of a lawsuit merely by sequestering any property of the defendant that happens to be located in that state.

Appellee Heitner is a nonresident of Delaware and an owner of one share of stock in Greyhound Corporation, a company incorporated under the laws of Delaware but with its principal place of business in Phoenix, Arizona. Heitner filed a stockholder's derivative action in a chancery court of Delaware against the Greyhound Corporation, its subsidiary, Greyhound Lines, Inc., and twenty-eight present or former officers and directors of the corporation. He alleged that the independent defendants violated their duty to stockholders by engaging in actions which caused the corporation to be liable for a substantial amount in a private antitrust suit[1] and to be subjected to a large fine for criminal contempt.[2] Jurisdiction over the defendants was predicated on the court's order, upon Heitner's motion, for the sequestration of the Delaware property of the individual defendants pursuant to DEL. CODE tit. 10, § 366 (1974).[3] Simultaneously, a supporting affidavit was filed stating that individual defendants were nonresidents and that the property consisted of stock, options, warrants, and various corporate rights. The stock of nineteen defendants and the options of two others were seized by means of "stop transfer" orders on the books of Greyhound. Although the

[1] A judgment of $13,146,090 plus attorneys fees was entered against Greyhound in Mt. Hood Stages, Inc. v. Greyhound Corp., No. 68-874, (D. Ore., filed Nov. 29, 1973), *aff'd* 555 F.2d 687 (9th Cir. 1977).

[2] *See* United States v. Greyhound Corp., 363 F. Supp. 525 (N.D. Ill.), 370 F. Supp. 881 (N.D. Ill. 1973), *aff'd* 508 F.2d 529 (7th Cir. 1974). Greyhound was fined $100,000 and Greyhound Lines $500,000.

[3] DEL. CODE tit. 10, § 366 (1974) provides in relevant part that if it appears that "any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear.... Such an order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure."

stock and options were not physically located in Delaware, their presence for the purposes of a sequestration order was noted by virtue of DEL. CODE tit. 8, § 169 (1974), which provides that Delaware is the situs of ownership of all stock in Delaware corporations. All defendants were notified of the action by certified mail to their last known address and by publication in the county paper where the action was brought.

The defendants whose property was seized entered a special appearance and moved to quash service and vacate the sequestration order. They contended that the *ex parte* seizure of their property did not afford them due process of law and that they had insufficient contacts with Delaware to sustain that state's exercise of jurisdiction. The chancery court denied the motion and found that the limited purpose of the Delaware sequestration statute - to obtain jurisdiction over the defendant[4] - put it within the exception to the constitutional due process prohibition of pre-hearing attachment enunciated in *Fuentes v. Shevin*.[5] The court also found that the Delaware situs of the stock was a sufficient basis upon which quasi in rem jurisdiction could be exercised. The Delaware Supreme Court affirmed,[6] lending only cursory attention to appellants' contention that jurisdiction was not present due to the absence of minimum contacts with the state of Delaware.[7]

On appeal, the United States Supreme Court noted probable jurisdiction.[8] Writing for the Court,[9] Justice Marshall reversed, holding that the fourteenth amendment's Due Process Clause prohibits the exercise of adjudicatory authority by the states over nonresident defendants in the absence of minimum contacts between the state, the defendant, and the litigation in order that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."[10] Thus the Delaware statute

[4] That is, to hold in-state property only until the defendant makes a general appearance and then routinely release the property to him unless the plaintiff satisfies the Court that the retention of the property is necessary to insure the satisfaction of any judgment obtained. DEL. CODE tit. 10, § 366.

[5] 407 U.S. 67, 91 n.23. (1969).

[6] Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976).

[7] *Id.* at 229.

[8] 97 S. Ct. 2569, 2576. The Court considered the decision of the Delaware Supreme Court to be an appealable final judgment within 28 U.S.C. § 1257 (2) inasmuch as the contested Delaware statute required the defendant either to enter a general appearance or suffer default. 97 S. Ct. at 2576 n.12 (1977).

[9] Chief Justice Burger and Justices Stewart, White, and Blackmun joined in Justice Marshall's opinion. Justice Powell filed a concurring opinion. Justice Stevens filed an opinion concurring in the judgment. Justice Brennan filed an opinion concurring in part and dissenting in part. Justice Rehnquist took no part in the consideration or decision of the case.

[10] 97 S. Ct. at 2584. The Court chose not to examine the constitutionality of the pre-hearing attachment exercised by the Chancery Court of Delaware. The constitutionality of pre-hearing attachment and garnishment statutes has been increasingly called into question. *See* North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975) (garnishment of

providing for seizure of property as a means of obtaining jurisdiction is unconstitutional inasmuch as it allows for the exercise of adjudicatory authority when minimum contacts between the nonresident defendant and the state are absent.[11]

Although the summons procedure used would have been adequate to bring the defendants within the court's jurisdiction had minimum contacts existed,[12] the Court found an absence of minimum contacts within the circumstances presented by this case.[13] The thrust of the appellee's argument was that the state had a very strong interest in providing a forum for suits by its citizens against directors and officers of a corporation created by Delaware law. The Court, in rejecting this contention, relied heavily on the fact that Delaware's jurisdictional statutes did not specifically refer to such an interest.[14] If the interest were so strong, the Court reasoned, the Delaware law would certainly have recognized it. The emphasis which the Court placed on the absence of this interest within the state statute suggests that they might have reached a different decision had the jurisdictional statutes contained it. Thus, although the strength of the state interest was found not to be the determinative factor on which to base a finding of minimum contacts, the Court left open the possibility that it may allow this type of jurisdiction where a state enacts a proper statute. The main obstacle that such a statute would have to overcome is the Court's reluctance to base a minimum contacts analysis on a choice of law criterion.

Necessary in addition to the strong state interest in having the litigation subject to its laws are acts by the defendants voluntarily associating them-

corporation's bank account); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (sequestration of debtor's property on which seller held vendor's lien); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin); Sniadich v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages). Attachment or garnishment for the purpose of obtaining jurisdiction has remained free from constitutional bar by being considered an "extraordinary situation" within the meaning of *Sniadich*, 395 U.S. at 339; *Fuentes*, 407 U.S. at 90. *See Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975).

[11] 97 S. Ct. at 2585.

[12] *Id.* at 2585 n.40. The validity of this assumption was sharply criticized by Justice Brennan in his separate opinion. *Id.* at 2588-89. The Delaware Supreme Court found the sequestration statute to be solely for the purpose of obtaining quasi in rem jurisdiction. Greyhound Corp. v. Heitner, 361 A.2d at 229. To decide further that a "minimum contacts law that Delaware expressly denies having enacted also could not be constitutionally applied in this case" is for Justice Brennan a "pur[e] example of an advisory opinion." 97 S. Ct. at 2588. Its inappropriateness, in Justice Brennan's view, was highlighted by the failure of counsel for both sides to create an adequate factual record since they did not concern themselves with the question of whether minimum contacts were present. *Id.* at 2589. Furthermore, he argued, the Court should exercise constraint where it is making a constitutional pronouncement since its decision will reach all fifty states. *Id.*

[13] 97 S. Ct. at 2585-87.

[14] *Id.* at 2585-86.

selves with Delaware and "purposely avail[ing themselves] of the privilege of conducting activities within the forum state," as the Court had required in *Hanson v. Denckla.*[15] Again, however, the Court noted that Delaware, unlike some states,[16] had failed to enact a statute whereby the act of accepting a directorship of a domestic corporation constitutes consent to the state's jurisdiction, so that directors of domestic corporations could be aware of the possibility of being sued in the state of incorporation. In so doing, the Court suggested that a consent type of statute, given the strong state interest, might satisfy the minimum contacts standard. In its absence, however, the defendants' contact with Delaware and Delaware's interest in maintaining the litigation were held insufficient to meet the standard required by the Due Process Clause.[17]

The cornerstone of state court adjudicatory authority during the past one hundred years has been *Pennoyer v. Neff.*[18] As the *Shaffer* Court noted, *Pennoyer* set out the conceptual framework which has guided American courts in their determination of jurisdictional questions.[19] The two great jurisdictional principles of *Pennoyer* were that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and that "no state can exercise direct jurisdiction and authority over persons without its territory."[20] Thus, state power could be exercised over those persons who could be personally served within its borders and over such property as was present within the state. Actions against the person

---

[15] 357 U.S. 235, 253 (1958).

[16] *See, e.g.*, CONN. GEN. STAT. § 33-322, *upheld in* Weil v. Beresth, 26 Conn. Supp. 428, 225 A.2d 826 (Super. Ct. 1966); N.C. GEN. STAT. § 55-33; S.C. CODE § 33-5-70, *upheld in* Wagenberg v. Charleston Wood Products, 122 F. Supp. 745 (E.D. S.C. 1954).

[17] Justice Brennan's dissent, primarily relying upon the strong state interest he perceived, found minimum contacts to be present. 97 S. Ct. at 2589-93. The strong state interest consists of providing a forum for stockholder derivative suits against officers and directors of Delaware corporations, since they inure primarily to the benefit of the corporation, many of whose stockholders will be residents of Delaware. Although choice of law inquiries and jurisdictional ones are not the same, Brennan argues that they are of valid import since they both depend upon the expectancies of the parties and the fairness of binding the defendants by the law of a given jurisdiction. *See, e.g.*, Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 664 (1959). In addition, the defendants did avail themselves of the benefits of Delaware law by entering a relationship with a Delaware corporation. Hanson v. Denckla, 357 U.S. at 253. In so doing they undertook responsibilities and assumed powers solely derivative from state law. Therefore, according to the minimum contacts standard, Delaware is a suitable forum. 97 S. Ct. at 2593.

[18] 95 U.S. 714 (1877). Neff brought an ejectment action in federal court against Pennoyer. Pennoyer held the land under a claim of right based upon a sheriff's sale of Neff's land to satisfy a judgment. The judgment was a result of a suit initiated by one Mitchell, then a resident of Oregon, against Neff, a resident of Pennsylvania, for lawyer fees owing Mitchell. Jurisdiction over Neff was predicated on an Oregon statute allowing for service by publication on nonresidents. The circuit court refused to recognize the Oregon judgment and awarded the land to Neff. The Supreme Court affirmed.

[19] 97 S. Ct. at 2576.

[20] 95 U.S. at 722.

were characterized as in personam and required personal service; actions "against property" were characterized as in rem[21] and required no personal service or notice to the owner but only the pre-hearing seizure of the local property.

The continuing validity of in rem and quasi in rem jurisdiction is predicated on the maintenance of two central concepts of *Pennoyer*: that state territorial sovereignty is the constitutional basis of claims of adjudicatory authority,[22] and that an action against property in the state is not a direct action against the person of the out-of-state owner.[23] Both these premises of in rem jurisdiction have been called into question by historical developments since *Pennoyer*.

The revolution which has occurred in the area of in personam jurisdiction[24] has undermined the foundation upon which *Pennoyer* and, hence, in rem jurisdiction,[25] stand. The limitations placed on the state exercise of personal jurisdiction by *Pennoyer* were rigid and severe. From the beginning, *Pennoyer's* rigidity made necessary the resort to legal fictions to bring within its structure many classes of cases in which the state had a strong interest in acquiring jurisdiction. *Pennoyer* itself recognized two exceptions to its hard and fast rule of personal jurisdiction. It allowed for jurisdiction over divorce actions where the plaintiff was domiciled in the state even though the defendant could not be served with process within the state,[26] and for

---

[21] As used here, in rem refers to those classes of cases in which jurisdiction is founded on the presence of property within the state. As such, it encompasses three types of "in rem" actions: a strict action in rem which affects the interests of all persons in the property; an action quasi in rem in which the plaintiff is seeking to establish a claim to certain property and extinguish the interests of other persons; and an action quasi in rem in which the plaintiff seeks to apply the property of a defendant to satisfy a claim against him. 357 U.S. at 246 n.12. The instant case is based on quasi in rem jurisdiction of the latter type.

[22] 97 S. Ct. at 2580.

[23] *Id.* at 2580-81.

[24] For a history of the developments in the area of in personam jurisdiction, see, *e.g.*, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 919-48 (1960); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From "Pennoyer" to "Denckla"; A Review*, 25 U. CHI. L. REV. 569 (1958).

[25] *See, e.g.*, U.S. Industries v. Gregg, 540 F.2d 142 (3rd Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977) (sequestration of nonresident defendants' stock in local corporation); Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1130-43 (3rd Cir. 1976) (Gibbons, J., concurring) (attachment of local debtor's obligations to foreign corporation); Bekins v. Huish, 1 Ariz. App. 288, 401 P.2d 743 (1965) (suit for specific performance of a contract for the sale of in-state real estate owned by a nonresident); Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1955), *appeal dismissed* and *cert. denied sub nom.*, Columbia Broadcasting Sys. v. Atkinson, 357 U.S. 569 (1958) (suit by employees attacking collective bargaining agreement entered into in the state where funds were being diverted to nonresident trustee); Camire v. Scieszka, 358 A.2d 397 (N.H. 1976) (attachment of nonresident defendant's liability insurance policy for auto accident which occurred in another state).

[26] 95 U.S. at 733-35.

jurisdiction over corporations doing business in the state by using the concept of implied consent.[27] The invention of the automobile and the injuries which sprang from its widespread use made necessary the extension of jurisdiction to include out-of-state motorists. Thus the Court allowed states to imply the motorist's consent to the appointment of an agent in the state for the service of process.[28] The amenability of out-of-state corporations to local suit was extended by considering their doing of business within the state as a presence in the state upon which the courts could found jurisdiction.[29] The difficulty of applying quantitative tests of doing business in the state led one court to the conclusion that it was less state sovereignty which was serving as the basis of jurisdictional determinations than it was a question of fairness to the defendant.[30]

The breakthrough in the area of personal jurisdiction came in *International Shoe Co. v. Washington.*[31] In *International Shoe* the Court discarded the rationale of *Pennoyer* and established a new standard with which to guide the states' exercise of adjudicatory authority. Since *International Shoe,* the exercise of in personam jurisdiction has depended upon the presence of minimum contacts[32] between the defendant, the litigation, and the state in such

[27] *Id.* at 735-36.

[28] Hess v. Pawloski, 274 U.S. 352 (1927).

[29] Philadelphia & Reading R.R. Co. v. McKibbin, 243 U.S. 264 (1917); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

[30] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.).

[31] 326 U.S. 310 (1945). International Shoe Co. had salesmen in Washington who were authorized to exhibit samples and take orders but not to enter into contracts. They had no permanent offices but often rented space for exhibits. Washington tried to exercise jurisdiction over International Shoe to enforce payments to the state's unemployment fund. The Court upheld Washington's exercise of jurisdiction, but on a new theory.

[32] The definition of the minimum contacts standard has received much attention from the Court since *International Shoe. International Shoe* suggested that the minimum contacts sufficient to allow personal jurisdiction are to be measured in terms of the quantity of contacts in light of the fair and orderly administration of the laws. 326 U.S. at 319. *Perkins v. Benguet Consolidated Mining Co.* allowed the Ohio courts to exercise jurisdiction over a foreign corporation even though the cause of action arose in another forum, emphasizing general fairness as a key factor in subjecting foreign corporations to local suit. 342 U.S. 437, 440 (1952). In *McGee v. International Life Insurance Co.,* a Texas insurance company was found amenable to a suit concerning a life insurance policy in California despite the fact that the only contacts were the issuance of the insurance policy to a citizen of California and the insured's mailing of the premium from the state. 355 U.S. 220 (1957). Even in the absence of a great number of contacts, the Court upheld California's exercise of jurisdiction due to the strong state interest in regulating insurance, and the fact that the witnesses, the deceased and the plaintiff were all in California. In addition, the defendant initiated the contact with the state of California and the cause of action arose from the contacts therein. One year later, in *Hanson v. Denckla,* minimum contacts were found to be absent where a Florida court was attempting to assert personal jurisdiction over a Delaware trustee administering a trust created by the Florida testatrix while domiciled in Pennsylvania, despite the fact that a considerable amount of correspondence concerning the trust flowed between Delaware and Florida. 357 U.S. 235 (1958). The distinction with McGee seemed to have been in the fact that the Delaware trustee, unlike the Texas insurance company, had not initiated any contacts with the forum state. *See* note 24 *supra.*

a way that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."[33] The Court thus rejected the *Pennoyer* concept that the constitutional exercise of in personam jurisdiction is based upon mutually exclusive state sovereignty.[34] The immediate effect of this rule was to expand the ability of the states to maintain personal jurisdiction against those outside the state.[35]

International Shoe, in espousing a minimum contacts standard, refuted the underlying rationale of *Pennoyer* that it is state territorial power which provides the constitutional framework of adjudicatory authority.[36] Since it is from this notion - that the state has power to effect the legal relations of people and property within its borders - that in rem jurisdiction has developed, the rejection of the *Pennoyer* concept in *International Shoe* served to call into question the continued hardiness of in rem jurisdiction itself.[37] As the *Shaffer* Court pointed out, a distinction between actions in personam and actions in rem which rest solely upon state power over property within its borders is rendered unstable by the *International Shoe* decision. The Court reasoned that if actions in personam are to be judged by the minimum contacts standard of *International Shoe* but actions in rem are not, there must be a significant and clear difference between them to justify the distinction. The maintenance of two different standards for essentially similar classes of cases does not mesh with logic nor with the Due Process Clause.[38]

This distinction between actions against persons and actions in rem stemmed from the proposition of *Pennoyer* that an action against property does not constitute a direct action against the personal rights of the out-of-state owner. Thus, an action in rem did not amount to an exercise of "direct jurisdiction and authority over persons or property without its territory."[39] It is the failure of this distinction to withstand the new developments in jurisdictional concepts that caused the Supreme Court to find that all assertions of jurisdiction must be founded on the same standard.[40]

It is clear that an action disposing of an owner's property will prejudice

[33] International Shoe Co. v. Washington, 326 U.S. at 316, quoting from Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[34] 97 S. Ct. at 2580.

[35] *Id. See, e.g., Developments, supra* note 24, at 1000-1008.

[36] 326 U.S. at 316.

[37] *See* note 25 *supra.*

[38] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) (requiring best notice possible to beneficiaries of a common trust upon judicial settlement of accounts by trustee).

[39] 95 U.S. at 722.

[40] 97 S. Ct. at 2582.

his personal property rights.[41] *Pennoyer* recognized this,[42] but insisted that since the property was within its borders and the judgment was limited to the property before the court,[43] the action was not directly against the person of the owner.[44] This proposition has been strongly and uniformly attacked by critical commentators[45] and has been undercut by the Court's requirement that actual notice be given to an out-of-state owner whose property rights are being adjudicated.[46] This notice requirement was grafted onto in rem jurisdiction in recognition that an owner's personal property rights are so substantially and directly impaired by an adverse ruling that his right to due process is violated in the absence of such notice. It developed as a somewhat incongruous notion that in rem jurisdiction affected the personal rights of an owner to a sufficient degree to require that actual notice be given, while at the same time an action against the property of a person was not considered a direct action against the personal property rights of the owner for jurisdictional purposes. *Shaffer* puts an end to this incongruity.

Shaffer v. Heitner marks the last step in the abandonment of the conceptual structure of state jurisdiction set out by Justice Field in *Pennoyer v. Neff*. It also puts an end to the much criticized practice of obtaining jurisdiction over a nonresident defendant by the pre-hearing "seizure" of a res within the state unrelated to the underlying basis of the claim. *Shaffer* has served to establish firmly the principles enunciated in *International Shoe* as the foundation for the constitutional exercise of state adjudicatory authority. As such, it has profound practical effects on the everyday assertion of jurisdiction over nonresident defendants in actions previously characterized as in rem.

In those instances where strict in rem jurisdiction could previously be invoked, *Shaffer v. Heitner* will have little effect since, as the Court noted, there will normally be contacts between the state, the defendant, and the litigation sufficient to bring jurisdiction within the minimum contacts standard

---

[41] Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814, *appeal dismissed*, 179 U.S. 405 (1900) (Holmes, C.J.) (registration of land titles under a Torrens system).

[42] 95 U.S. at 722.

[43] The Supreme Court specifically rejected the notion that the limitation placed upon the judgment by the property before the Court could act as a justification for the exercise of jurisdiction. 97 U.S. at 2582, n.23. *Cf.* Fuentes v. Shevin, 407 U.S. at 88-90.

[44] 95 U.S. at 722.

[45] *See, e.g., Developments, supra* note 24; Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956); Hazard, *supra* note 24; Traynor, *supra* note 17; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

[46] Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

of *International Shoe*.[47] It is clear that the state has a very strong interest in settling disputes concerning the marketability of property within its territorial boundaries. This interest often rises to a necessity where real property is involved.[48] The situs of the property will also more than likely be the most convenient forum. Additionally, the defendant will often have sufficient contacts with the state by claiming an interest in property and accepting the benefits of the protection of it by state law.[49] In short, his contacts with the state would usually be sufficient under the *International Shoe* standard of minimum contacts.

An action previously characterized as quasi in rem where the plaintiff seeks to establish an interest in property within the state and extinguish the right of another would likewise normally fall within the purview of a minimum contacts analysis.[50] The contacts between the state, the defendant, and the litigation are similar to a strict in rem action except that it is no longer necessary that the state be able to adjudicate the status of real property in the state, regardless of the potential absence of a party, since the rights of only the person before the court are at issue.[51]

The effect of *Shaffer* on actions quasi in rem where the property in the state is unrelated to the underlying claim being asserted is immediate and pervasive.[52] Henceforth, the existence of the res within the state is not alone sufficient to justify the maintenance of jurisdiction. Thus, while there may be other circumstances present which bring this type of action within the minimum contacts standard,[53] the presence of the res in the state is no longer alone sufficient.

The effect of this ruling on state courts' exercise of jurisdiction will

---

[47] 97 S. Ct. at 2582.

[48] *See, e.g.*, Tyler v. Judges of the Court of Registration, note 41 *supra*; Pennoyer v. Neff, 95 U.S. at 722.

[49] *Cf.* Hanson v. Denckla, 357 U.S. at 253. *See, Developments, supra* note 24, at 956.

[50] 97 S. Ct. at 2582.

[51] *Developments, supra* note 24, at 957 n.302.

[52] 97 S. Ct. at 2582-83.

[53] *See* note 32 *supra*. Since *Shaffer*, a New York district court has upheld the constitutionality of jurisdiction acquired by a New York resident's attachment of the contractural obligation of an insurance company doing business in New York to defend and indemnify a Virginia resident for his negligent actions. The court found that the type of jurisdiction being exercised is a relevant consideration in determining whether the exercise of that jurisdiction meets the due process requirements of fundamental fairness. Since here the stake in the controversy was the plaintiff's claim for the payment of alleged damages by the New York insurer, the nonresident was recognized by the court as only a nominal defendant, the real defendant being his New York insurer who undertook the investigation, defense and settlement of the claim. Because this type of jurisdiction runs solely in favor of New York residents and is available only against insurers suable in the state, the court found that the strictures of the fundamental fairness requirement were met. O'Connor v. Lee-Hy Paving Corp., 46 U.S.L.W. 2184 (E.D. N.Y. 1977).

depend upon how each state interprets its jurisdictional statutes in light of *Shaffer*. If the sole purpose of a state statute is to allow the courts to exercise quasi in rem jurisdiction where the underlying claim is unrelated to the property, that statute will be found unconstitutional and void. Such a statute is too broad to allow the courts to infer reasonably the power to assert personal jurisdiction over a specific type of defendant in a certain action according to the minimum contacts standard. Since courts derive their jurisdiction from constitutional and statutory grant, the finding that a particular jurisdictional statute is unconstitutional and void will prevent the exercise of jurisdiction over all those defendants toward which the statute is directed, regardless of whether or not they may have minimum contacts with the forum. The Due Process Clause merely serves to limit the extent of the power which may be exercised. States are under no compulsion to exercise jurisdiction to the limits of the Due Process Clause.[54]

More than likely, however, state courts will interpret their statutes to comply with a minimum contacts analysis so as to give effect to the legislative intent to allow personal jurisdiction over nonresident defendants. The courts will generally construe a statute so as to bring it within the constitution.[55] The courts may demonstrate a willingness to find implied jurisdiction where the statute in question was addressed to a specific class of defendants and a particular type of action in which minimum contacts will normally be present.[56] The determination will depend upon the clarity with which the statute manifested an intention by the legislature to grant the courts jurisdiction over more specific instances than merely those in which a res exists within the state.[57]

Whether Ohio's service of process statute will survive constitutional scrutiny after *Shaffer* is unclear. The statute provides for constructive service on nonresident defendants in a number of situations which are not specifically conditioned upon the presence of minimum contacts.[58]

---

[54] Perkins v. Benguet Consol. Mining Co., 342 U.S. at 440. *See, e.g.*, Traynor, *supra* note 17, at 659.

[55] *See, e.g.*, Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944); United States v. Carolene Products Co., 304 U.S. 144 (1937).

[56] Traynor, *supra* note 17, at 659.

[57] This was exactly one of the disagreements Justice Brennan had in his dissent. The Court was willing to infer an intention by the Delaware legislature to grant the courts jurisdiction over actions such as the one herein; Justice Brennan was not. 97 S. Ct. at 2588-89 (Brennan, J., dissenting). *See* note 12 *supra*.

[58] OHIO REV. CODE ANN. § 2703.14 (Page 1954) states:

Service may be made by publication in any of the following cases;

(A) In an action for the recovery of real property or of an estate or interest therein, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(B) In an action for the partition of real property, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(C) In an action to foreclose a mortgage or to enforce a lien or other encumbrance or charge on real property, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(D) In an action to compel the specific performance of a contract for the sale of real property, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(E) In an action to establish or set aside a will, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(F) In an action by an executor, administrator, guardian, or trustee seeking the direction of the court respecting the trust or property to be administered and the rights of the parties in interest, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(G) In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence cannot be ascertained;

(H) In an action against a corporation organized under the laws of this state, which has failed to elect officers or to appoint an agent upon whom service of summons can be made, and which has no place of doing business in this state;

(I) In an action which relates to or the subject of which is real or personal property in this state, when the defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is not a resident of this state or is a foreign corporation or his place of residence cannot be ascertained;

(J) In an action against an executor, administrator, or guardian who has given bond as such in this state, but at the time of the commencement of the action is not a resident of this state or his place of residence cannot be ascertained;

(K) In an action or proceeding for a new trial or other relief after judgment, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when the defendant is not a resident of this state or his place of residence cannot be ascertained;

(L) In an action where the defendant, being a resident of this state, has departed from the country of his residence with intent to delay or defraud his creditors or to avoid the service of a summons, or keeps himself concealed with like intent.

One extreme possibility as a result of *Shaffer* is that Ohio's service of process statute will be invalidated since on its face it allows the courts to exercise adjudicatory authority over nonresidents even though minimum contacts may be absent. This would create a jurisdictional vacuum in which Ohio's long-arm statute, OHIO REV. CODE ANN. § 2307.382 (Page Supp. 1976); OHIO CIV. R. 4.3 (A), which is constructed within the minimum contacts standard, would serve as the sole statutory basis for Ohio state courts to exercise jurisdiction over nonresident defendants.

Such an interpretation is, however, highly unlikely due to the presumption of constitutionality that inheres in legislative enactments and the strong state interest involved. Much more likely is that the court will graft the minimum contacts onto the service of process statute on the basis of perceived legislative intent to obtain jurisdiction over nonresident defendants. The willingness of the court to imply within the service of process statute the minimum contacts test, may turn on the extent to which the grants contained therein apply to circumstances where minimum contacts are likely to be present. Under this analysis, § 2703.14 (A), which allows service of process on nonresident defendants "[i]n an action for the recovery of real property or of an estate or interest therein" would be upheld since it contains two of the core features of a minimum contacts analysis: the contacts created by an interest in real property in the state, *see* text accompanying notes 47-49 *supra*, and a relationship between the cause of action and the real property. While these two aspects are not the only minimum contacts considerations, they do provide a solid basis for the court to proceed to find a legislative intent to allow jurisdiction where minimum contacts are present.

One virtue of *Pennoyer* that will now be missing is the simplicity and certainty of the test it offered for in rem jurisdiction. While previously jurisdiction was established merely upon the determination that property was within the state, now the court must look to a number of criteria,[59] all of which are capable of multiple interpretations.[60] The history of in personam jurisdiction since *International Shoe* serves as a testimony to the difficulty in applying the minimum contacts standard.[61] If, as the Supreme Court argues, there remains a substantial core of situations in which there will be no question as to the presence of jurisdiction,[62] the periphery that will be subject to much litigation is nevertheless in itself substantial.

In an action characterized as strictly in rem, there usually will be little question as to the presence of minimum contacts.[63] It is conceivable, however, that difficulties could sometimes arise where personal and not real property is concerned. For example, the fact that most of the claimants to the property are nonresidents, and that the contract governing the ownership of the property was executed in another state, may be sufficient to cause the court to deny jurisdiction.[64] The same types of problems will also arise in that segment of quasi in rem jurisdiction where the action is related to the property. Furthermore, the strength of the state's interest in maintaining jurisdiction where real property is involved is somewhat weaker since the rights of all persons in a res need not be adjudicated. Therefore, considerations such as which state's law is applicable, where the evidence is primarily located, and how great the nonresident defendant's contacts are, will assume greater significance and make the determination more difficult. That segment of quasi in rem jurisdiction in which the property is unrelated to the cause of action will be subject to all the uncertainties of the minimum

---

In contrast is § 2703.14 (G) which allows service of process on nonresident defendants "[i]n an action in which it is sought by a provisional remedy to take or appropriate in any way property of the defendant," the provisional remedy being, in most instances, attachment, OHIO REV. CODE ANN. § 2715.01 (Page Supp. 1976), or garnishment, OHIO REV. CODE ANN. § 2715.11 (Page Supp. 1976). Since the statute allows attachment regardless of the relationship between the property attached, the claim giving rise to the action, and any contacts with Ohio, the *Shaffer* Court's declaration that in-state property is alone insufficient to establish jurisdiction may compel the Ohio courts to hold such a provision invalid.

[59] *See* note 32 *supra.*

[60] In this respect, the Court, as Justices Powell and Stevens suggest, may have decided more than is necessary. *Id.* at 2587-88. Powell and Stevens have argued that some structures of in rem jurisdiction could be retained without a sacrifice of "fair play and substantial justice," and thereby a measure of simplicity and certainty could be gained.

[61] 97 S. Ct. at 2584. *See* note 32 *supra.*

[62] *See Developments, supra* note 24, at 956.

[63] *See* text accompanying notes 47-49 *supra.*

[64] *See Developments, supra* note 24, at 956.

contacts test.[65] The existence of the property within the state will be of little assistance to the court in finding whether minimum contacts are present. The consequence for all three types of in rem actions[66] is that what was once simple and certain has become complicated and tenuous.

Nevertheless, despite the uncertainties and confusion *Shaffer* portends, it is a decision which is long overdue. The concept of in rem jurisdiction has proved over time to be an inadequate means to insure the fairness which the Due Process Clause seeks to protect. *Shaffer v. Heitner* corrects this defect.

RICHARD S. MILLIGAN

[65] *See* text accompanying notes 52-57 *supra.*
[66] *See* note 21 *supra.*

CONSTITUTIONAL LAW

State Funding of Nontherapeutic Abortions • Medicaid Plans • Equal Protection • Right to Choose an Abortion

Beal v. Doe, 97 S. Ct. 2366 (1977).
Maher v. Roe, 97 S. Ct. 2376 (1977).
Poelker v. Doe, 97 S. Ct. 2391 (1977).

In *Beal v. Doe*[1] the United States Supreme Court held that Title XIX of the Social Security Act[2] permits but does not require states participating in the Medicaid program established by that Act to fund nontherapeutic abortions. In the companion cases of *Maher v. Roe*[3] and *Poelker v. Doe,*[4] the same majority[5] held in *Maher* that the Equal Protection Clause does not require a state that funds childbirth and therapeutic abortions to also fund the costs of nontherapeutic abortions, and in *Poelker,* that the Constitution does not prohibit a state or city from forbidding the performance of elective abortions in public hospitals while providing hospital services for child-

[1] 97 S. Ct. 2366 (1977).
[2] 42 U.S.C. § 1396 (1970).
[3] 97 S. Ct. 2376 (1977).
[4] 97 S. Ct. 2391 (1977).
[5] Justices Brennan, Marshall, and Blackmun joined in dissents in all three cases.