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### Recommended Citation

John A. Rupp, *State Court Jurisdiction Founded on Territorial Power Denies Due Process to Non-Resident Defendants - Shaffer v. Heitner*, 27 DePaul L. Rev. 447 (1978)

Available at: <https://via.library.depaul.edu/law-review/vol27/iss2/7>

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## NOTES

### STATE COURT JURISDICTION FOUNDED ON TERRITORIAL POWER DENIES DUE PROCESS TO NON-RESIDENT DEFENDANTS— *SHAFFER V. HEITNER*

In rem<sup>1</sup> and quasi-in rem<sup>2</sup> jurisdiction traditionally were founded upon the state's physical power over property located within its territorial boundaries.<sup>3</sup> Even when a state court was unable to obtain personal jurisdiction over a non-resident defendant, it could acquire the power to adjudicate his interests in property found within the forum merely by attaching it,<sup>4</sup> with liability extending only to the value of such property.<sup>5</sup> In *Shaffer v. Heitner*,<sup>6</sup> the United States Supreme Court held that jurisdiction based solely upon a state's territorial power over property violated the Due Process Clause of the Fourteenth Amendment.<sup>7</sup> The Court concluded that such jurisdiction is not "'judicial jurisdiction over a thing';"<sup>8</sup> it is "jurisdiction

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1. In the strict sense of the term, a proceeding in rem is one which is taken directly against property or one which is brought to enforce a right in the thing itself. In the more general sense, however, the term is applied to actions between parties where the direct object of the litigation is to resolve the conflicting interests of the parties in the property. See BLACK'S LAW DICTIONARY 900 (rev. 4th ed. 1968).

2. In a quasi-in rem proceeding, only the interest of the defendant in the property is affected. The plaintiff does not claim any interest in the property. Instead, he seeks to enforce a claim against the defendant personally by applying the property of the defendant to the satisfaction of his claim, through attachment or garnishment of such property. To sustain quasi-in rem jurisdiction, the defendant's property need only be located within the forum, and it does not have to be related to the plaintiff's cause of action. A. SCOTT & R. KENT, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 417-18 (1967). See BLACK'S LAW DICTIONARY 900-01 (rev. 4th ed. 1968).

3. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

4. Notice must conform to the due process requirements set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See note 16 *infra*.

5. RESTATEMENT OF JUDGMENTS § 32 (1942) provides: "A court by proper service of process may acquire jurisdiction to determine interests in things within the State, even though the persons affected thereby are not subject to the power of the State." See *generally* RESTATEMENT OF JUDGMENTS §§ 33-37, 73-76 (1942).

6. 97 S. Ct. 2569 (1977).

7. U.S. CONST. amend. XIV. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8. 97 S. Ct. at 2581. See *Introductory Note* to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971).

over the interests of persons in a thing.”<sup>9</sup> The standard to be applied when determining whether an exercise of jurisdiction over the interests of persons was consistent with due process requirements, the Court held, is the “minimum contacts” rule developed in *International Shoe Co. v. Washington*.<sup>10</sup>

This Note will explore the impact of the *Shaffer* decision on the law of jurisdiction. It will trace and discuss the development of the concept of territorial jurisdiction and examine the changes made by the *Shaffer* holding in the existing law. The Note will then explore the effect of the decision on the ability of state courts to secure jurisdiction over non-resident defendants. Finally, it will analyze weaknesses in the opinion which may present interpretive problems for the lower courts.

### THE FACTS OF *Shaffer*

*Shaffer v. Heitner* was a shareholder's derivative suit.<sup>11</sup> Heitner, a non-resident of Delaware, owned one share of stock in the Greyhound Corporation, a business incorporated in Delaware with its principal place of business in Arizona. He filed the action in Delaware, naming Greyhound and twenty eight of its officers and directors as defendants, and alleging mismanagement on the part of the individual defendants.<sup>12</sup> The Delaware trial court asserted jurisdiction over twenty-one of the individual defendants, all non-residents, by sequestering their property in the state in accordance with a Del-

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9. 97 S. Ct. at 2582.

10. 326 U.S. 310 (1945). In *International Shoe*, a Delaware corporation was sued in a Washington state court for unpaid contributions to the state unemployment compensation fund. From 1937 to 1940, the corporation had salesmen in Washington who were only authorized to exhibit samples and solicit orders. The orders were filled by mail directly from the home office. The corporation, however, maintained no office in the state. The Supreme Court did away with the physical presence requirements of *Pennoyer*, holding that “due 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 must 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.

11. A derivative suit is an action by a shareholder to enforce a corporate cause of action. The corporation is a necessary party, and the relief sought is a judgment against third parties (in *Shaffer*, the defendant officers and directors) in favor of the corporation. BLACK'S LAW DICTIONARY 530 (rev. 4th ed. 1968).

12. The Greyhound Corporation was found to be liable in a private antitrust suit, and a judgment of \$13,146,090 plus attorneys fees had been entered against it. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977). The corporation and its subsidiary, Greyhound Lines, Inc., were also fined a total of \$600,000 in a criminal contempt action. *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). Heitner alleged that these losses were the result of mismanagement by the corporate officers and directors named as defendants.

aware statute.<sup>13</sup> Under this statute, Delaware courts could compel the appearance of a non-resident defendant by seizing his property and, if the defendant did not appear, his property could be sold to satisfy the demands of the plaintiff.<sup>14</sup> The property sequestered consisted of 82,000 shares of Greyhound common stock belonging to nineteen of the defendants, and stock options owned by two other defendants. Although none of the stock certificates representing the sequestered property were physically located in Delaware, they were considered to be in the state under a Delaware statute<sup>15</sup> which makes Delaware the situs of ownership of all stock in Delaware corporations.

The non-resident defendants were properly notified of the action,<sup>16</sup> and each entered a special appearance, moving to quash service of

13. To acquire jurisdiction, Heitner was required under DEL. CODE tit. 10, § 366 (1974) to file a motion, simultaneously with the filing of his complaint, for the sequestration of the Delaware property of the individual non-resident defendants. He complied with the statutory requirements, and a sequestration order was issued by the Court of Chancery. 97 S. Ct. at 2573.

The pertinent parts of the statute at issue, section 366, provide:

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

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

DEL. CODE tit. 10, § 366 (a),(b) (1974).

14. *Id.* § 366 (a).

15. DEL. CODE tit. 8, § 169 (1974). The statute provides:

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

16. In actions involving property, where in rem or quasi-in rem jurisdiction is being exercised, the method of service used must, if due process is to be satisfied, conform to the standards set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Notice

process. They contended that the sequestration procedure did not afford them due process and that they did not have sufficient contacts with Delaware to sustain state court jurisdiction under the minimum contacts rule of *International Shoe*.<sup>17</sup> The Court of Chancery dismissed the appellants' arguments, holding that the purpose of the sequestration procedure was "to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him . . . ." <sup>18</sup> The court further noted that due process was not offended because, "if the defendant enters a general appearance, the sequestered property is routinely released."<sup>19</sup> Additionally, it held that the statutory situs of the stock in Delaware provided a sufficient basis for the exercise of quasi-in rem jurisdiction.<sup>20</sup>

The Delaware Supreme Court affirmed the judgment,<sup>21</sup> holding that the appellants' contention that the minimum contacts rule of *International Shoe* should have been applied was erroneous. The court reasoned that jurisdiction in this case was "quasi-in rem founded on the presence of capital stock here, not on prior contact by defendants with this forum."<sup>22</sup>

The United States Supreme Court reversed.<sup>23</sup> It noted that the categorical analysis of the jurisdiction issue by the Delaware Supreme Court assumed "the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*."<sup>24</sup> This concept of jurisdiction based entirely on territorial power, the Court concluded, is offensive to "traditional notions of fair play and substantial

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must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. In the present case, the defendants were notified of the initiation of the suit and the sequestration of their property by certified mail directed to their last known addresses and by publication in a New Castle County (Delaware) newspaper. 97 S. Ct. at 2574.

17. 97 S. Ct. at 2574.

18. *Id.* This holding was made in an unreported Delaware Court of Chancery letter opinion.

19. *Id.*

20. *Id.* at 2575.

21. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976).

22. *Id.* at 229. It should be noted that U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972), a case that the Delaware Supreme Court cited as one strongly in support of its affirmation of jurisdiction, was subsequently reversed in U.S. Indus., Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976).

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

24. *Id.* at 2576. The conceptual structure of *Pennoyer v. Neff*, 95 U.S. 714 (1877), consisted of two premises. First, a state court could not exercise jurisdiction over a party physically beyond its territorial boundaries, a premise that was altered substantially by the holding of *International Shoe*. Second, if a defendant owned property within the forum, the state could exercise its exclusive authority over things within its borders to condemn such property to satisfy a plaintiff's claim. 95 U.S. at 719-36. See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 51-52 (1942); Zammit, *Quasi-In Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 670-71 (1975).

justice,"<sup>25</sup> and "its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant."<sup>26</sup>

### THE EFFECT OF *Shaffer* ON PRIOR CASE LAW

The theory that judicial authority could be exercised over property without being exercised over the property owner became part of the law of jurisdiction in *Pennoyer v. Neff*,<sup>27</sup> where the Court held that a state's authority to adjudicate controversies could be based on its power over either persons or property found within its borders.<sup>28</sup> Although the property supporting the exercise of jurisdiction in an in rem or quasi-in rem proceeding could be condemned to satisfy a judgment for the plaintiff,<sup>29</sup> the non-resident property owner was thought to be only indirectly affected.<sup>30</sup> Furthermore, the Court held that, in a quasi-in rem action, the property attached to secure jurisdiction did not have to be related to the cause of action. Jurisdiction could be based solely on the fortuitous circumstance that the defendant owned unrelated property in the forum.<sup>31</sup>

The concept of quasi-in rem jurisdiction was expanded significantly by the decision in *Harris v. Balk*.<sup>32</sup> In that case, the Court held that

25. 97 S. Ct. at 2584, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

26. 97 S. Ct. at 2584.

27. 95 U.S. 714 (1877). Neff, a non-resident of Oregon, was sued in that state by one Mitchell to recover attorney's fees. Notice of the suit had been given by newspaper publication rather than personal service and, after a default judgment was entered, Neff's Oregon property was sold to satisfy the judgment. The issue before the Supreme Court was the validity of the execution sale to Pennoyer and of the judgment it sought to enforce.

The Court found that the personal judgment entered by the Oregon court against Neff on the fees was invalid and, hence, did not authorize the sale of his property. *Id.* at 734. The first action was an in personam suit, yet the Oregon court had never obtained jurisdiction over Neff. The Court held that Mitchell should have first secured the attachment of non-resident Neff's Oregon property, thus effecting a proceeding in the nature of in rem rather than in personam. Had the in rem action been perfected, service by publication would have been adequate. *Id.* at 727.

28. When jurisdiction was founded on property, the effect of the judgment was limited to the property that supported jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). See Zammit, *supra* note 24, at 669, 670 n.12. See also Cook, *supra* note 24, at 51-52.

29. Zammit, *supra* note 24, at 670.

30. 97 S. Ct. at 2577-78. See *Pennoyer v. Neff*, 95 U.S. 714, 733-34 (1877).

31. It is in this context that jurisdiction based on property can be particularly unreasonable. The defendant, who may have had no related contact with the forum, can be forced to choose between making a general appearance (exposing himself to possible personal liability) or risking the loss of his property in a default judgment. See Note, *Quasi-In Rem Jurisdiction & Due Process Requirements*, 82 YALE L.J. 1023, 1024-25 (1973). See also Zammit, *supra* note 24, at 670-71, 677.

32. 198 U.S. 215 (1905). Harris was a North Carolina resident who owed Balk, also a North Carolina resident, \$180. Balk was indebted to a third party, Epstein. While Harris was tem-

the presence of intangible property owned by the defendant in the forum provided a sufficient basis for the exercise of quasi-in rem jurisdiction.<sup>33</sup> Under the reasoning of *Harris*, a defendant, although he had no physical contact with the forum state, could lose his interest in his intangible property if the situs of such property was determined to be in the forum. Difficulties in ascertaining the situs of such intangible property led to the development of complex legal fictions<sup>34</sup> and illogical statutory declarations.<sup>35</sup>

Subsequent decisions continued to recognize that in personam jurisdiction differed from jurisdiction founded on territorial power. In *Pennington v. Fourth National Bank*,<sup>36</sup> jurisdiction based on the at-

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porarily in Maryland, Epstein served him with a writ of attachment garnishing his debt to Balk. A default judgment was then entered against Balk, and Harris, pursuant to the judgment, paid the money to Epstein. When Balk later sued Harris in North Carolina to recover the \$180, Harris pleaded in defense his payment to Epstein under the garnishment in Maryland. The North Carolina court held the Maryland judgment invalid, finding that the debt had been improperly attached because the situs of the debt Harris owed to Balk was in North Carolina where Harris resided, and not in Maryland where he was garnished. The Supreme Court reversed the North Carolina judgment and held that the debt had been properly impounded. *Id.* at 226.

33. In *Shaffer*, the Delaware Court of Chancery held that the statutory situs of the defendants' stock in Delaware provided the basis for quasi-in rem jurisdiction. 97 S. Ct. at 2575.

34. See *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917) (proceeds of a bank account construed to be a debt owed by the resident bank to the non-resident defendant); *Atkinson v. Superior Court*, 49 Cal.2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958) (in a suit by plaintiff musicians to invalidate a collective bargaining agreement which provided for the payment by employers of royalties to a non-resident defendant trustee, the court held that payments owed by the employer, either to the defendant or the plaintiffs, constituted property within the state sufficient to permit the exercise of jurisdiction); *Seider v. Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966) (insurance policy issued to a non-resident defendant by a foreign insurance company, pursuant to a contract entered into in another state, could be attached for jurisdictional purposes by a New York plaintiff because the insurance company did business in New York). See also Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 655 (1959).

35. DEL. CODE tit. 8, § 169 (1974) is a good example. The situs of ownership of all stock in Delaware corporations is declared to be in Delaware, although the physical presence of the stock certificates may be known to be outside of the state, and the incidences of ownership over the stock have been exercised elsewhere. See also CONN. GEN. STAT. § 33-322 (Supp. 1971); S.C. CODE § 12-13.7 (Supp. 1970). But see U.C.C. § 8-317(1) (1972 ed.) (situs governed by the location of the stock certificate).

36. 243 U.S. 269 (1917). Mrs. Pennington obtained a divorce in an Ohio court from the plaintiff, who was not an Ohio resident. Mr. Pennington was served by publication only. In the same proceeding, Mrs. Pennington sought and was granted alimony. To insure its payment, she joined the Fourth National Bank of Cincinnati, where the plaintiff had a deposit account, as a defendant. The bank was eventually ordered by the court to pay the balance of the account to her. When the plaintiff later presented a check to the bank for the amount of his deposit, the bank refused payment. He then brought an action against the bank, claiming that because he was a non-resident and had been served only by publication, the Ohio court's order deprived him of his property without due process of law. The Supreme Court upheld the Ohio court's action, holding that the bank deposit was seized in a quasi-in rem proceeding: "Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property

tachment of a non-resident defendant's bank account was sustained. "The Fourteenth Amendment," the Court held, "did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner."<sup>37</sup> The New York Court of Appeals, in *Seider v. Roth*,<sup>38</sup> upheld a quasi-in rem judgment against a Canadian defendant where jurisdiction was based solely on the fact that the defendant was contractually entitled to be defended by his insurer, a company that did business in New York. This contractual obligation was construed to be a debt located within the forum which had been properly attached.<sup>39</sup> Thus, the court concluded, the judgment was valid up to the limits of the policy coverage.<sup>40</sup>

The *Shaffer* decision substantially overruled *Pennoyer v. Neff*, *Harris v. Balk*, and their progeny.<sup>41</sup> The Supreme Court rejected the theory that jurisdiction based solely on the existence of property is consistent with due process, concluding that it would be a fiction to hold that an assertion of jurisdiction over property was anything but an assertion of jurisdiction over the owner of that property.<sup>42</sup> "Judicial jurisdiction over a thing," it stated, is an "elliptical way of referring to jurisdiction over the interests of persons in a thing."<sup>43</sup> The basis for the exercise of jurisdiction over property must, therefore, be sufficient to justify the exercise of jurisdiction over personal interests.

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within the State." *Id.* at 271. Since the plaintiff's property was properly attached, the Court concluded, and the method of service used provided him with an opportunity to be heard, the order of the Ohio court was valid. *Id.* at 272.

37. *Id.* at 271. The Court held that such jurisdiction extended to both tangible and intangible property. The only essentials to the exercise of the State's power, it concluded, were the presence of the res within its borders, its seizure at the commencement of proceedings, and some provision for an opportunity for the property owner to be heard. *Id.* at 272.

38. 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). The Seiders were residents of New York. While in Vermont, they were injured in an automobile accident involving one Lemieux, a Canadian citizen and resident. Lemieux was insured under an automobile liability policy, issued by a company that did business in New York, which required the insurer to defend its insured in any automobile negligence actions. Although personal jurisdiction could not be obtained over Lemieux, quasi-in rem jurisdiction was exercised by the New York court through the attachment of the insurer's obligation to defend him.

39. As soon as the accident occurred, the court held, there was imposed upon the insurer a contractual obligation that must be considered a debt owing to the insured, which was subject to attachment. *Id.* at 113, 269 N.Y.S.2d at 101, 216 N.E.2d at 315.

40. *Id.* at 114, 269 N.Y.S.2d at 102, 216 N.E.2d at 315.

41. It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.

97 S. Ct. at 2585 n.39.

42. *Id.* at 2584.

43. *Id.* at 2581.



The standard for ascertaining whether an assertion of jurisdiction over the interests of persons is consistent with the Due Process Clause must be the "minimum contacts" test set forth in *International Shoe*.<sup>44</sup>

The position adopted by the Court has been urged by commentators and lower court decisions for some time.<sup>45</sup> Justice Traynor believed that realistic tests were needed to determine jurisdiction, stressing that "justice is ill served by mechanical ones."<sup>46</sup> He felt courts could not evaluate the real factors that determine jurisdiction until they gave up "the ghost of the res."<sup>47</sup> In *Simpson v. Loehmann*,<sup>48</sup> the New York Court of Appeals noted:

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power.<sup>49</sup>

In *Minichiello v. Rosenberg*,<sup>50</sup> the Second Circuit held that the selection of a situs for intangibles must embody a common sense appraisal of the requirements of justice and convenience to the parties.<sup>51</sup> Commentators, the court noted, have considered *Harris v. Balk*<sup>52</sup> to be an "anachronism."<sup>53</sup>

44. *Id.* at 2581-82. *International Shoe* stands for the proposition that, to be consistent with due process, a non-resident defendant cannot be subjected to a judgment unless he has had certain minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." 326 U.S. at 316. Whether it is reasonable to subject a non-resident defendant to jurisdiction cannot be resolved by mechanical or quantitative evaluations of his activities in the forum. Instead, "whether due process is 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.

45. *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976); *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123 (3d Cir. 1976); *COOK*, *supra* note 24; Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *YALE L.J.* 289 (1956); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 *S. CT. REV.* 241, 281-88 (1965); Traynor, *supra* note 34; Zammit, *supra* note 24; *Developments in the Law—State-Court Jurisdiction*, 73 *HARV. L. REV.* 909, 955-66 (1960).

46. Traynor, *supra* note 34, at 663.

47. *Id.*

48. 21 N.Y.2d 305, 287 N.Y.S.2d 633, 234 N.E.2d 669 (1967).

49. *Id.* at 311, 287 N.Y.S.2d at 637, 234 N.E.2d at 672.

50. 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

51. *Id.* at 110-11.

52. 198 U.S. 215 (1905). See notes 31-32 and accompanying text *supra*.

53. *Minichiello v. Rosenberg*, 410 F.2d 106, 120 n.1 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). See also Note, *Seider v. Roth: The Constitutional Phase*, 43 *ST. JOHN'S L. REV.* 58, 65, 66 (1968).

The fact that the concept of state court jurisdiction based on territorial power had long been supported by established case law, the Court recognized, could not be decisive. "Traditional notions of fair play and substantial justice," it stated, "can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."<sup>54</sup> Continued acceptance of the proposition that jurisdiction based solely on the presence of property is consistent with due process, it was felt, would only perpetuate state court jurisdiction which has proved to be unfair to the defendant.<sup>55</sup>

The Court also took the opportunity to clarify the meaning of *Hanson v. Denckla*.<sup>56</sup> Because of certain language in that case,<sup>57</sup> commentators considered the decision to be a modern, although limited, reaffirmation of the concept of territorial jurisdiction expressed in *Pennoyer*.<sup>58</sup> Reading *Hanson* broadly, the Court concluded that nothing in the opinion was contrary to *International Shoe*,<sup>59</sup> and that the holding contained no "sweeping endorsements of jurisdiction based on property:"

In *Hanson v. Denckla*, . . . we noted that a State court's in rem jurisdiction is '(f)ounded on physical power' and that '(t)he basis of the jurisdiction is the presence of the subject property within the

54. 97 S. Ct. at 2584, citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969).

55. 97 S. Ct. at 2584.

56. 357 U.S. 235 (1958). The action involved the settlement in a Florida court of an estate which included a trust fund established in Delaware. The decedent was a Pennsylvania domiciliary at the time she created the trust and named a Delaware corporation as trustee. She later moved to Florida, where she resided at her death. The Supreme Court concluded that the Florida court settling the estate had not obtained personal jurisdiction over the trustee because the trustee did not have sufficient "minimum contacts" with Florida to be amenable to personal jurisdiction.

57. While discussing *International Shoe*, the Court in *Hanson* noted:

But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

*Id.* at 251.

58. See *Zammit*, *supra* note 24, at 677. Citing *Hanson*, the author states "unfortunately, the court has refused to abandon completely the theory of territoriality." *Id.* See also *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142, 149 (3d Cir. 1976), where the court cites *Hanson* as supporting the theory of state court jurisdiction over property within its control, regardless of the presence or absence of other contacts with the forum. *Id.* n.20.

59. The Court, referring to *International Shoe*, commented:

Nothing in *Hanson v. Denckla* is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction 'are a consequence of territorial limitations on the power of the respective States,' . . . simply makes the point that the States are defined by their geographical territory.

97 S. Ct. at 2580 n.20.

territorial jurisdiction of the forum State.' We found in that case, however, that the property which was the basis for the assertion of in rem jurisdiction was not present in the State. We therefore did not have to consider whether the presence of property in the State was sufficient to justify jurisdiction. We also held that the defendant did not have sufficient contact with the State to justify *in personam* jurisdiction.<sup>60</sup>

#### THE APPLICABILITY OF THE "MINIMUM CONTACTS" STANDARD

Prior to *Shaffer*, the Supreme Court had never considered the due process issues raised by the appellants. The principal cases in which the Court had sustained the use of attachment procedures by state courts to acquire jurisdiction<sup>61</sup> had been decided prior to *International Shoe*, where due process limitations on jurisdiction over non-residents were significantly redefined.<sup>62</sup> When presented with an opportunity to correct what had become an anomaly in the area of jurisdictional law, the Court acted. It rejected the theory of jurisdiction based on property or territorial power and adopted the minimum contacts rule of *International Shoe* as the only standard for determining the validity of state court jurisdiction over non-residents.

The *International Shoe* standard places two limitations on the scope of state judicial power.<sup>63</sup> First, the state's interest in permitting the initiation of the suit must be adequate to satisfy the demands of federalism.<sup>64</sup> Because due process prohibits a state from exercising its judicial authority in a manner that would infringe on the sovereignty of a sister state,<sup>65</sup> any state, before it can properly adjudicate a suit involving non-resident defendants, must have a recognizable interest that is rationally connected to its public policy.<sup>66</sup> The second limitation is concerned with the parties to the litigation, focusing on the burdens involved with litigating in a particular forum.<sup>67</sup> To satisfy due process, "traditional notions of fair play and substantial justice" must be considered by the court seeking to exer-

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60. *Id.* at 2584 n.38.

61. *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917); *Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

62. See *Zammit*, *supra* note 24, at 673-74; Note, *Quasi-In Rem Jurisdiction & Due Process Requirements*, *supra* note 31, at 1031-32.

63. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945); *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1140 (3d Cir. 1976) (Gibbons, J., concurring).

64. *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1140 (3d Cir. 1976) (Gibbons, J., concurring).

65. *Id.*

66. *Id.*

67. *Id.*

cise jurisdiction.<sup>68</sup> When such an exercise of jurisdiction would be exceedingly unfair or burdensome to a defendant, due process requires that it not be sustained, regardless of the substantiality of the state's interest in the litigation.

When applied, these restrictions work in conjunction with one another, interacting to form a balanced standard for ascertaining the validity of state court jurisdiction.<sup>69</sup> The court attempting to assert jurisdiction must consider the relationship between the defendant, the forum, and the litigation.<sup>70</sup> The contacts of the parties to the controversy are to be analyzed qualitatively.<sup>71</sup> Ordinarily, the nature of the defendant's relationship to the forum will become the relevant inquiry.<sup>72</sup> If the state's interests in the outcome of the litigation are very strong, however, jurisdiction can be sustained even when the defendant's contacts with the forum are slight.<sup>73</sup> In such situations, it would be unusual for another state to have a significant interest in the litigation. Under these circumstances, subjecting a non-resident defendant who has had minimal contacts with the forum to jurisdiction would not be unreasonable.

The minimum contacts test has as its goal a result that is reasonable and fair to the parties involved.<sup>74</sup> Unlike the territorial approach to jurisdiction, the minimum contacts rule does not require the development of legal fictions or the creation of illogical statutory au-

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68. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

69. *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1140 (3d Cir. 1976) (Gibbons, J., concurring). See also Traynor, *supra* note 34, at 661.

70. 97 S. Ct. at 2580.

71. "Whether due process is satisfied must depend rather upon the quality and nature of the activity. . . ." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). See *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1140, 1142 (3d Cir. 1976) (Gibbons, J., concurring).

72. 97 S. Ct. at 2580. See *Zammit*, *supra* note 24, at 673-74; see generally Hazard, *supra* note 45, at 275-81.

73. The term "minimum contacts" is somewhat ambiguous. A non-resident defendant is not required to have had a certain number of contacts with the forum before jurisdiction can be validly exercised over him. In *International Shoe*, the Court specifically noted that quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness. 326 U.S. 310, 319 (1945).

The Court held in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), that a single act within the state seeking jurisdiction would be sufficient contact if it gave rise to the cause of action. In that case, the only contact the defendant had with the forum was the mailing of one insurance policy to the resident plaintiff. The Court commented that a state has a substantial interest in providing an adequate means of redress for its citizens who were injured, and very often the place where the wrong occurs is the most convenient place of litigation. 355 U.S. at 223. Accord, *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

74. See Traynor, *supra* note 34, at 661; see also Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 614-29 (1977).

thority<sup>75</sup> to justify its application. In rem jurisdiction is based solely on the existence of property within the state, without regard to the relationship of the defendant to the forum. Quasi-in rem jurisdiction must rely on standards which, because they are often left to the courts of the individual states to define, can vary significantly.<sup>76</sup> Only a minimum contacts analysis can reasonably insure that due process will be satisfied when jurisdiction is asserted over non-resident defendants.<sup>77</sup>

#### WEAKNESSES IN THE *Shaffer* OPINION

As Justice Brennan indicates in his separate opinion, the *Shaffer* holding "fundamentally alters the relevant jurisdictional ground rules."<sup>78</sup> Each assertion of state court jurisdiction must now be evaluated in accordance with the standards developed in *International Shoe* and its progeny.<sup>79</sup> This does not mean, however, that jurisdiction cannot be sustained when property located within the forum is the non-resident's only contact with the forum. The Court pointed out 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,"<sup>80</sup> noting that when claims to the property itself are the basis for the controversy between the parties, "it would be unusual for the state where the property is located not to have jurisdiction."<sup>81</sup> In such situations, the dual limitations of *Inter-*

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

76. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950).

77. Justice Traynor recognized this fact, noting that as long as courts continue to ask "res—who's got the res?, they cripple their evaluation of the real factors that should determine jurisdiction." Traynor, *supra* note 34, at 663. See also Zammit, *supra* note 24, at 673-74; *Developments*, *supra* note 45, at 960-66.

78. 97 S. Ct. at 2589 (Brennan, J., concurring and dissenting).

79. *Id.* at 2584-85.

80. *Id.* at 2582. See Smit, *supra* note 74, at 614-26; Traynor, *supra* note 34, at 660-61.

81. 97 S. Ct. at 2582. The Court illustrates this contention by noting the factors that would be likely to sustain jurisdiction under the *International Shoe* standard:

In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor jurisdiction in cases such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.

*Id.*

*national Shoe* would apparently be satisfied. The state would clearly have a significant interest, based on public policy considerations, to adjudicate the controversy. In addition, since the interests of the parties in the property are the source of the litigation, it would not ordinarily be palpably unfair to require the defendant to appear in the forum where that property is located.

Although the majority opinion implies that in rem jurisdiction will continue to exist in reality, it is not completely clear on the subject. In their concurring opinions, Justice Powell and Justice Stevens show concern for this question. Both urge that this decision should not be read as invalidating traditional in rem jurisdiction, at least where real property is involved.<sup>82</sup>

The *Shaffer* opinion is very definite as to the future applicability of quasi-in rem jurisdiction. In cases where the property that currently serves as the basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action, those cases cannot be brought in that forum if other ties do not exist.<sup>83</sup> In these situations, the "minimum contacts" test of *International Shoe* is to be applied by the state court,<sup>84</sup> and the "quality and nature" of the non-resident defendant's contacts with his property in the forum must be evaluated.<sup>85</sup> The *Shaffer* opinion, however, does not specify the criteria that the lower courts are to apply when making this qualitative analysis. Previously, jurisdiction in cases of this nature was based on the concept of territorial power, so there was no need to evaluate the defendant's contacts with the forum. Consequently, standards for determining the "quality and nature" of these contacts have not been developed.

Although in their separate opinions Justice Powell<sup>86</sup> and Justice Stevens<sup>87</sup> both express concern over this lack of standards, Justice Brennan goes into the problem in more depth.<sup>88</sup> A comparison of his opinion and that of the majority clearly illustrates this problem

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82. *Id.* at 2587 (Powell, J., concurring), 2587-88 (Stevens, J., concurring). See Zammit, *supra* note 24, at 673-75.

83. 97 S. Ct. at 2582-83.

84. *Id.* at 2584-85.

85. *Id.* at 2582, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

86. Justice Powell contends that "in the case of real property, in particular, preservation of the common law concept of quasi-in rem jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard. . . ." 97 S. Ct. at 2587 (Powell, J., concurring).

87. Justice Stevens concurred in the decision as it was applied to the particular facts of the case, but he noted that "how the Court's opinion may be applied in other contexts is not entirely clear." *Id.* at 2588 (Stevens, J., concurring).

88. *Id.* (Brennan, J., concurring and dissenting). He also notes that the lower courts based jurisdiction on a jurisdictional predicate (quasi-in rem) presumed to be constitutionally valid at the time the case was decided, and that the issue of minimum contacts "was never pleaded by the appellee, made the subject of discovery, or ruled upon by the Delaware Courts." *Id.*

with the lack of firm criteria. In reaching the conclusion that the appellants did not have the requisite minimum contacts to sustain the exercise of jurisdiction by the Delaware courts, the majority relied primarily on two factors. First, the appellants had never been in Delaware and no act related to the cause of action was alleged to have taken place in the forum.<sup>89</sup> Second, although the sequestration statute under review may have been used most frequently in derivative suits, it could be applied in any suit against a non-resident.<sup>90</sup> Thus, the majority concluded, the sequestration statute was not designed to protect Delaware's interest in securing jurisdiction over corporate fiduciaries.<sup>91</sup> The Court did not consider the state's interest to be strong enough to justify the exercise of jurisdiction over non-resident defendants having such minimal contacts with the forum. It did not, however, discuss the factors which led it to conclude that Delaware's interest in the litigation was not substantial.

Contrary to the decision of the majority, Justice Brennan concluded that Delaware could assert jurisdiction over the appellants on the basis of the state's strong interest in controlling the activities of corporate fiduciaries.<sup>92</sup> From this perspective, the contacts of the defendants with the forum were more than minimal; they were both purposeful and direct. The contacts he considered included Delaware's significant interest in overseeing the affairs of an entity created under its laws,<sup>93</sup> the appellants' voluntary association with the forum as a result of their entering into a long term relationship with one of its domestic corporations,<sup>94</sup> their voluntary assumption of powers wholly derived from Delaware's rules and regulations,<sup>95</sup> their willingness to receive those benefits that Delaware law makes available to its corporations' officials,<sup>96</sup> and the probability that Delaware law would

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89. *Id.* at 2585.

90. *Id.*; *see, e.g.*, *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976) (breach of contract); *Hughes Tool Co. v. Fawcett Publications, Inc.*, 290 A.2d 693 (Del. Ch. 1972) (breach of contract).

91. 97 S. Ct. at 2585-86.

92. *Id.* at 2589.

93. *Id.* at 2590. *See Gordon v. Michel*, 297 A.2d 420 (Del. Ch. 1972) where the court held:

There is, indeed, a particular valid governmental interest in compelling appearance in a derivative suit in this jurisdiction because the corporation is organized here, an action can always be brought here for its benefit and the regulation of its internal affairs is governed by Delaware law.

297 A.2d at 422.

94. 97 S. Ct. at 2592.

95. *Id.*

96. *Id.* These benefits include interest-free loans, DEL. CODE tit. 8, § 143 (1974), and indemnification, DEL. CODE tit. 8, § 145 (1974).

govern in a conflict of laws situation.<sup>97</sup> Jurisdiction could not be denied, Justice Brennan felt, merely because the defendants were never in Delaware and no act related to the cause of action was committed in the forum because jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state.<sup>98</sup>

The factors Justice Brennan deems crucial to a minimum contacts analysis differ noticeably from those held to be important by the majority. These differences are indicative of the problems that may arise because of the majority's failure to indicate the criteria to be used in other situations. Under different circumstances, lower courts are likely to consider different factors to be controlling when determining whether they can properly exercise jurisdiction over non-residents. Two recent cases, decided subsequently to *Shaffer*, illustrate this point.

*In re Rinderknecht*<sup>99</sup> was a marital dissolution action brought in Indiana. The plaintiff was a resident of Indiana, and the defendant was a domiciliary of Nebraska.<sup>100</sup> The marital dissolution proceeding consisted of two different actions: the changing of the marital status of the parties; and the adjudication of the incidences of marriage.<sup>101</sup> Actions to change the status of the parties had traditionally been in rem proceedings,<sup>102</sup> the res being the marital status itself.<sup>103</sup> Jurisdiction was founded solely on the State's power to determine the marital status of its domiciliaries.<sup>104</sup> To adjudicate the incidences of a marriage, however, the court needed to secure personal jurisdiction over both parties, because it was their personal rights that were being litigated.<sup>105</sup>

Under *Shaffer*, the *Rinderknecht* court noted, the minimum contacts test is to be applied to all proceedings, whether in personam or

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97. 97 S. Ct. at 2591 n.3. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (important considerations include the expectations of the parties and the fairness of governing the acts and behavior of the parties by rules of conduct created by the specified jurisdiction). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971).

98. 97 S. Ct. at 2591. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

99. 367 N.E.2d 1128 (Ind. Ct. App. 1977).

100. The terms resident and domiciliary were used interchangeably by the court. *Id.* at 1133.

101. *Id.*

102. *Lister v. Lister*, 86 N.J. Eq. 30, 35, 97 A. 170, 173 (1915).

103. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

104. The residency of the plaintiff, without anything more, had consistently been held to be sufficient to enable a state court to change the marital status of the parties, the court noted. 367 N.E.2d 1128, 1133 (Ind. Ct. App. 1977). See also *Estin v. Estin*, 334 U.S. 541, 547 (1948); *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942).

105. *Estin v. Estin*, 334 U.S. 541, 548 (1948).



in rem, to determine if jurisdiction was asserted properly.<sup>106</sup> It reasoned, however, that since two different types of actions were involved in the dissolution proceedings, two levels of minimum contacts could be used to satisfy the requirements of the *International Shoe* standard.<sup>107</sup> In the action to change the status of the parties, the court held that jurisdiction could be sustained when one party to the marriage was a resident of the forum. It believed that this contact was sufficient to satisfy the minimum contacts standard because of the great interest each state has in regulating the marital status of its residents.<sup>108</sup> To obtain jurisdiction to adjudicate the incidences of marriage, however, required "something more," because the state's interests in this area were not nearly as strong. In order to sustain jurisdiction over the defendant in the second action, the court concluded, the requirements of the Indiana long-arm statute must be met.<sup>109</sup> These requirements were held not to have been satisfied, and jurisdiction to adjudicate the incidences of the marriage was denied.

The parties in *Carolina Power & Light Co. v. Uranex*<sup>110</sup> were involved in a breach of contract suit in New York. The plaintiff, a North Carolina company, initiated an attachment action in California. It sought to attach a debt owed by a California company to the defendant, a French corporation, as security for the judgment being sought in the contract action. Uranex had no other assets in the United States, and without the attachment, would have transferred the California funds out of the country. Attachment actions, when used in this manner, ordinarily had been quasi-in rem proceedings.<sup>111</sup> The court recognized, though, that *Shaffer* "has abrogated quasi in rem jurisdiction as a separate and insular conceptual category."<sup>112</sup> The

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106. 367 N.E.2d 1128, 1135 (Ind. Ct. App. 1977).

107. *Id.* at 1135-36.

108. The court reasoned that:

In light of the great interest which each state has in the marital status of its own residents and domiciliaries we hold that, although the test for obtaining jurisdiction to change the status of married persons is now the minimum contacts test, the residency of one of the parties to the marriage is sufficient to meet that test. The changing of marital status in a dissolution proceeding is one of those in rem actions which, according to *Shaffer* at page 2582, 'would not be affected by a holding that any assertion of state court jurisdiction must satisfy the *International Shoe* standard.'

*Id.* at 1135.

109. *Id.*

110. 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977).

111. Attachment actions and other garnishment-type procedures can be used as a jurisdictional device, *Ownbey v. Morgan*, 256 U.S. 94 (1921), or as a provisional remedy, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

112. 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977).

limited contacts of the defendant with the forum, the court noted, were not sufficient to sustain the exercise of in personam jurisdiction.<sup>113</sup> Nevertheless, it held that jurisdiction for the purpose of issuing a writ of attachment could be validly asserted. In reaching its conclusion, the court considered "both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought."<sup>114</sup> It reasoned that standards of "fair play and substantial justice" would not be violated because jurisdiction was solely "to order the attachment and not to adjudicate the underlying merits of the controversies."<sup>115</sup> The court found that the presence of the defendant's property in California was not fortuitous, and that the attaching jurisdiction was not an inconvenient forum for litigation of the limited issues involved in an attachment action.<sup>116</sup> Thus, the court concluded, jurisdiction could be sustained in accordance with *Shaffer v. Heitner*.<sup>117</sup>

Jurisdiction was held to be proper in both *Carolina Power & Light Co. v. Uranex* and *In Re Rinderknecht* in what were formerly in rem or quasi-in rem actions. Although neither defendant had significant contacts with the forum, each court concluded that the state's interest was strong enough to allow jurisdiction to be asserted. The holdings in these cases correspond more closely to the opinion of Justice Brennan than to the majority decision. The problems are apparent. If the lower courts are to be able to act with confidence when performing an analysis of contacts in quasi-in rem and in rem situations, the Supreme Court must set out in further decisions what it feels are the pertinent criteria for evaluating such contacts.

#### CONCLUSION

Clearly, the view of Justice Holmes in *McDonald v. Mabee*<sup>118</sup> that the "foundation of jurisdiction is physical power"<sup>119</sup> is no longer viable. The Supreme Court no longer accepts the fiction that an assertion of jurisdiction over property is something other than an assertion of jurisdiction over the owner of that property. Continued acceptance

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113. *Id.*

114. *Id.*

115. *Id.*

116. In holding that California would not be an inconvenient forum for Uranex to litigate the attachment action, the court found it important that "the French defendant had agreed to litigate in California any disputes that might arise in its dealings with the California corporation."  
*Id.*

117. *Id.*

118. 243 U.S. 90 (1917).

119. *Id.* at 91.

of this fiction, it concluded, would be "without substantial modern justification."<sup>120</sup>

There can be no doubt that *Shaffer v. Heitner* signifies the end of quasi-in rem jurisdiction. While the traditional concept of in rem jurisdiction appears in theory to have been made obsolete by this decision, state court jurisdiction based primarily on property located within the forum, when interests in the property itself are the bases for the litigation, may be permitted. Jurisdiction will be based on the contacts of the parties with that property, though, and not on the actual presence of the property in the state. The Court, however, did not determine with any certainty the criteria the lower courts should apply when evaluating the nature and quality of a non-resident defendant's contacts with his property in the forum. Because these contacts were not evaluated when jurisdiction was based on an in rem or quasi-in rem theory, the appropriate criteria for evaluating them must be established in future decisions.

Despite these uncertainties, the *Shaffer* holding is a necessary and long overdue change in the law of jurisdiction. When an individual does not have sufficient contacts with a forum to sustain an exercise of in personam jurisdiction, he should not be compelled to subject his interests in property located in that state to litigation simply because he owned property there. When jurisdiction is based solely on fortuitous circumstances, and an individual must either subject himself to the general jurisdiction of the court or face loss of his property within the forum, "traditional notions of fair play and substantial justice"<sup>121</sup> are offended. The use of in rem and quasi-in rem jurisdiction in situations where in personam jurisdiction could not be justified circumvented the meaning and intent of *International Shoe* that fairness to the parties is essential to any jurisdictional analysis if due process is to be satisfied.<sup>122</sup> The *Shaffer* decision recognizes that personal rights are really being adjudicated in these situations. It concludes that if the spirit of *International Shoe* is to be preserved, the standard required to sustain jurisdiction to decide personal rights must be the same, regardless of whether the action is in personam, in rem or quasi-in rem.

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120. 97 S. Ct. at 2584.

121. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

122. See *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1132, 1135 (3d Cir. 1976) (Gibbons, J., concurring); Traynor, *supra* note 34, at 661.