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SHAFFER v. HEITNER: RESHAPING THE CONTOURS OF STATE COURT JURISDICTION

Due process of law, as applied to the states by the fourteenth amendment,¹ requires that for a judgment to be binding, a court must first obtain jurisdiction over the parties to the suit.² Traditionally, plaintiffs who were unable to obtain “in personam” jurisdiction over defendants were not completely without remedy. If a defendant owned property within the forum state, a plaintiff could attempt to satisfy his claim by bringing an action directly against that property.³ Such “in rem” proceedings were held not to violate due process since, technically, it was the property, and not its owner, which was the party to the suit.⁴

In *Shaffer v. Heitner*,⁵ the United States Supreme Court repudiated the traditional distinction between in rem and in personam jurisdiction and held that an action against property is, in reality, an action against the interests of the owner of that property. Under this rationale, “in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interest of persons in a thing.”⁶ In other words, if a court’s exercise of in personam jurisdiction over the owner of the property would violate due process guarantees, his rights may not be circumvented by an in rem proceeding against his property. Thus, the Court has recognized that there is but one standard for determining whether a state may exercise jurisdiction consistent with the fourteenth amendment:⁷ the standard established in *International Shoe Co. v. Washington*⁸ requiring the owner-defendant to have such minimum contacts with the forum state that “the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁹

1. U.S. CONST. amend. XIV, § 5.

2. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). As a practical matter, a court need only obtain jurisdiction over the defendant since the plaintiff, by filing the suit, has submitted himself to the jurisdiction of the court.

3. *See, e.g., id.* at 723-24.

4. *Id.*

5. 97 S. Ct. 2569 (1977).

6. *Id.* at 2582.

7. *Id.* at 2584-85.

8. 326 U.S. 310 (1945).

9. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *See* note 7 *supra* and accompanying text.

The *Shaffer* opinion is significant in two respects. First, *Shaffer* establishes that the mere presence of property within the state will not, without more, support jurisdiction.¹⁰ Second, it is the first Supreme Court decision in nineteen years to deal directly with the question of minimum contacts.¹¹ In addressing these two issues, *Shaffer v. Heitner* firmly establishes that principles of fundamental fairness shall govern the exercise of jurisdiction. In addition, *Shaffer* provides a new perspective upon the relationship between state interest and jurisdiction, and raises interesting questions regarding the degree of forum-related activity needed to confer jurisdiction over nonresident defendants.

I. THE OPINION

*Shaffer v. Heitner*¹² involved a shareholder's derivative suit, filed in Delaware court, charging various corporate officers of Greyhound Corporation and Greyhound Lines Incorporated with violating their corporate responsibilities. The complaint alleged that the corporate officer defendants had violated their duties to the corporations by engaging in acts in Oregon which subjected the corporations to substantial antitrust liability.¹³

At the time of the suit, Greyhound was incorporated under the laws of Delaware, while Greyhound Lines, its wholly-owned subsidiary, was a California corporation. Both corporations had their principal place of business in Arizona.¹⁴ The individual corporate defendants, none of whom were residents or domiciliaries of Delaware, were not alleged to have had any connection with that state other than their status as officers of a Delaware corporation and their ownership of stock in that corporation.

Simultaneously with filing the complaint, the plaintiff filed a motion under Delaware's sequestration statute¹⁵ requesting an order sequestering

10. 97 S. Ct. at 2582-83.

11. The last major Supreme Court decision interpreting the requirements of minimum contacts was *Hanson v. Denckla*, 357 U.S. 235 (1958).

12. 97 S. Ct. 2569 (1977).

13. *Id.* at 2572-73.

14. *Id.* at 2572.

15. DEL. CODE tit. 10, § 366 (1974) provides in part:

(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.

property located in Delaware belonging to the corporate officer defendants. Pursuant to the issuance of the order, intangible property, consisting primarily of common stock in Greyhound, was seized and brought within the jurisdiction of the court.¹⁶ This property was deemed to be located in Delaware under a statute which establishes that state as the "situs" of all stock in Delaware corporations regardless of where the actual certificates may be located.¹⁷

The individual defendants were notified by publication and by certified mail and those whose property had been seized responded by entering a special appearance.¹⁸ The defendants contended that Delaware's ex parte sequestration procedure did not accord them due process of law, that the property seized was not capable of attachment, and that they did not have sufficient contacts with the State of Delaware to satisfy the standard of *International Shoe Co. v. Washington*.¹⁹ Delaware's lower court rejected these arguments,²⁰ and the Delaware Supreme Court affirmed,²¹ quickly dismissing the defendants' contention that *International Shoe's* standard of minimum contacts governed in rem proceedings.²²

16. 97 S. Ct. at 2573-74. Also sequestered were stock unit credits, options, warrants and contractual rights belonging to the individual defendants. *Id.* at 2574 n.8. The value of the sequestered stock alone was approximately \$1,200,000. *Id.* at n.7.

17. DEL. CODE tit. 8, § 169 (1974) 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.

18. 97 S. Ct. at 2574. While under Delaware law, a defendant can appear solely for the purpose of attacking compliance with the sequestration statute, *see* note 15 *supra*, a defendant who wishes to defend on the merits must enter a general appearance. In so doing, he subjects himself to the full in personam jurisdiction of the court. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 233 & n.8, 235-36 (Del. 1976).

19. *Shaffer v. Heitner*, 97 S. Ct. at 2574. For a discussion of the requirements of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *see* notes 41-46 *infra* and accompanying text.

20. Delaware's lower court, the Court of Chancery, stated that the avowed purpose of the Delaware sequestration law is not to secure possession of property, but rather, to compel the personal appearance of nonresident defendants. Delaware Court of Chancery letter opinion, *cited in Shaffer v. Heitner*, 97 S. Ct. at 2574. *See also* *Sands v. Lefcourt Realty Corp.*, 117 A.2d 365 (Del. 1955). The Delaware court further found that Delaware's sequestration procedures were consistent with the due process requirements established in *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and its progeny, *see* notes 80-82 *infra* and accompanying text; that Delaware's situs of stock rule was constitutionally permissible, *see* note 17 *supra*; and that the stock's statutory situs in Delaware was sufficient for the exercise of in rem jurisdiction. Delaware Court of Chancery letter opinion, *cited in Shaffer v. Heitner*, 97 S. Ct. at 2574-75.

21. *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976). The court's opinion was centered largely upon a rejection of the argument that Delaware's sequestration procedure was violative of due process of law under the *Sniadach v. Family Fin. Corp.* line of cases. *See* notes 80-82 *infra* and accompanying text.

22. 361 A.2d at 229.

The United States Supreme Court, after reviewing the historical development of modern theories of jurisdiction,²³ devoted the remainder of its opinion to the question of whether in rem proceedings are governed by the minimum contacts rationale of *International Shoe*.²⁴

The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*.²⁵

Applying the *International Shoe* test to the facts in *Shaffer*, the Court found that the cause of action was not related to the sequestered property and that the property itself did not, therefore, provide sufficient contacts with Delaware to warrant assertion of jurisdiction.²⁶ The Court also found that other possible "contacts" with Delaware did not justify jurisdiction since, under the standard of *Hanson v. Denckla*,²⁷ the defendants had not "purposefully avail[ed themselves] of the privilege of conducting activities within the forum state."²⁸ The fact that the defend-

23. 97 S. Ct. at 2576-81.

24. *Id.* at 2572. The Court expressly excluded any consideration of whether the Delaware sequestration procedure was violative of due process notice requirements, *id.*, such as those established in *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). See notes 80-82 *infra* and accompanying text.

25. 97 S. Ct. at 2581-82 (quoting from RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

26. *Id.* at 2585-87. While not directly addressed by the Court in the *Shaffer* opinion, the constitutionality of Delaware's situs of stock rule has been openly questioned. See, e.g., *United States Indus. Inc. v. Gregg*, 540 F.2d 143, 154-55 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977).

27. 357 U.S. 235 (1958).

28. 97 S. Ct. at 2586 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

Mr. Justice Powell's concurring opinion indicated his desire to retain a presumption that the presence of property "indisputably and permanently located within a state" would, without more, provide the contacts necessary for an exercise of jurisdiction. *Id.* at 2587. Since the majority addressed the question of property permanently located in the state and stated that its presence would normally indicate the existence of sufficient minimum contacts, Mr. Justice Powell's concern regarding jurisdiction over such property seems unfounded.

Mr. Justice Stevens expressed his opinion that a state law which forces a defendant who appears on the merits to be subjected to full in personam jurisdiction is unconstitutional. *Id.* at 2588.

ants were officers of a Delaware corporation was not enough, in and of itself, to constitute minimum contacts and, absent a state statute construing acceptance of a corporate directorship as tantamount to consent to suit, the state's interest in the litigation was not sufficient to justify in personam jurisdiction.²⁹ Further, the Delaware statute establishing that state as the situs of the stock was neither a sufficient indication of contact with the state, nor a reasonable indication of consent to suit, to confer jurisdiction.³⁰

II. HARBINGERS OF SHAFFER V. HEITNER

In holding that jurisdiction in in rem proceedings requires that the property's owner have minimum contacts with the state, the Court in *Shaffer v. Heitner* overruled one hundred year old precedents. The seeds of *Shaffer*, however, can be detected in the very cases it overturns, as well as in the cases it follows. From the beginning, the Court has been concerned with the protection of the due process rights of the individual.³¹ Yet the Court for many years resisted the recognition that jurisdiction over property is, in reality, jurisdiction over persons.³² The result was an illogically bifurcated system of jurisdiction³³ which emphasized due process for some and ignored due process for others. *Shaffer* has consolidated the systems of in rem and in personam jurisdiction into a single theory designed to provide due process for all. To fully understand the significance of the *Shaffer* opinion, it is essential to understand the cases from which it evolved.

The evolution of modern theories of state court jurisdiction can be traced to a dispute between an attorney and his client. The case of *Pennoyer v. Neff*³⁴ began when Mitchell, an attorney, sought a judgment in an Oregon court against his client, Neff. Neff, although a nonresident of the State of Oregon, owned land within that state. Oregon law permitted service of process on nonresident property owners to be effected by publication. Neff was so served and, upon his default, Mitchell obtained

29. *Id.* at 2586.

30. *Id.* See note 17 *supra* and accompanying text.

31. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877) (explaining that judgments which presume to determine the personal rights of defendants over whom personal jurisdiction has not been obtained violate due process of law).

32. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (implicitly limiting its new minimum contacts rule to in personam jurisdiction, seemingly without regard for the due process needs of the owners of property attached in in rem proceedings).

33. See generally Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 244 [hereinafter cited as Hazard].

34. 95 U.S. 714 (1877).

a judgment against him. Neff's land was then sold to Pennoyer in satisfaction of the judgment. Following the sale, Neff brought an action of ejectment against Pennoyer.³⁵

On a writ of error, the Supreme Court held that judgments which determine the personal rights of parties are invalid in the absence of personal jurisdiction over those parties.³⁶ Each state, according to the Court, was said to have exclusive jurisdiction over all persons and property within its boundaries.³⁷ Thus, one state's process could not extend into the territory of another.³⁸ Since Neff had been outside the state at the time of the purported service, the Oregon court did not obtain personal jurisdiction over him. Furthermore, although the court could have obtained jurisdiction over the local property, it failed to attach the property prior to judgment, thereby failing to invoke jurisdiction.

Pennoyer's territorial concept of jurisdiction was based upon the notion that the state's physical power extended only to persons and property within its boundaries.³⁹ The *Pennoyer* Court did not differentiate between power over land and power over persons. Yet, as society became more mobile, a need developed for a means to reach persons outside of the state's physical boundaries.⁴⁰ In *International Shoe Co. v. Washington*,⁴¹ the Court acted unequivocally to fulfill this need. *International Shoe* involved a suit brought in the State of Washington against a Delaware corporation for the recovery of unpaid contributions to Washington's unemployment compensation fund. The corporation had no offices in Washington and made no contracts there; it did, however, solicit sales within the state. Although these solicitations were the only contact between the defendant and the state, the Court held that the solicitations provided sufficient grounds for Washington to exercise jurisdiction over the corporation. In so holding, the Court could have relied upon previously developed fictions of presence⁴² or consent to suit,⁴³ but instead it rejected both the territorial concept of *Pennoyer* and

35. *Id.* at 715-18.

36. *Id.* at 732-33.

37. *Id.* at 722.

38. *Id.*

39. *Shaffer v. Heitner*, 97 S. Ct. 2569, 2578 (1977).

40. *Id.* at 2579 (ascribing the need largely to the advent of the automobile).

41. 326 U.S. 310 (1945).

42. *See, e.g.*, *International Harvester v. Kentucky*, 234 U.S. 579 (1914) (holding that a corporation's purely interstate business, conducted within the state, established its presence within that state and justified service of process upon the corporation).

43. *See, e.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927) (upholding a Massachusetts statute providing that a nonresident motorist's use of Massachusetts highways constituted appointment of state official for service of process in any suit arising out of an automobile accident).

its attendant fictions:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁴⁴

International Shoe, however, referred specifically to in personam jurisdiction over parties not present in the state. It was not applied to in rem jurisdiction or to persons present within the state. Thus, the exercise of in rem jurisdiction was effectively exempted from the due process requirements of "fair play and substantial justice."⁴⁵ As a result, the rules of in personam and in rem jurisdiction developed separately.⁴⁶

As the rules of in personam jurisdiction evolved, the Court indicated a readiness to permit exercises of jurisdiction based upon increasingly minimal contacts, provided that the exercise of such jurisdiction was consistent with "fair play and substantial justice." In *McGee v. International Life Insurance Co.*,⁴⁷ a Texas insurer, who did no business in California and had no other contacts with the state, took over the policies of another insurance company. The new insurer solicited a reinsurance agreement with a California resident who had been insured with the previous company. When a claim arose, the insurer refused payment. Based upon a California statute subjecting foreign insurance companies to suit in California in causes of action arising from policies held by California residents,⁴⁸ the California courts exercised jurisdiction over the company. The case reached the United States Supreme Court after a Texas court refused full faith and credit to the California judgment. The Texas court found the California judgment to be invalid since California had not obtained personal jurisdiction over the insurance company. The Supreme Court reversed, finding minimum contacts between California and the defendant insurer. The Court noted, in particular, that the insurance company had substantial connection with California as a result of the transaction, that the state of California had a legitimate interest in

44. 326 U.S. at 316 (citation omitted).

45. *Id.*

46. See generally *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1132-33 (3d Cir. 1976) (Gibbons, J., concurring) (observing that the rule of *International Shoe* did not unequivocally mandate its limitation to cases of in personam jurisdiction, and that it would not have been inconsistent for courts to read *International Shoe* as applicable to in rem jurisdiction).

47. 355 U.S. 220 (1957).

48. CAL. INS. CODE §§ 1610-1620 (West 1972).

regulating insurers who solicited business in the state, and that it was not a violation of due process to exercise personal jurisdiction in this case.⁴⁹

In 1958, less than one year after *McGee*, the Supreme Court decided *Hanson v. Denckla*.⁵⁰ In *Hanson*, a settlor had established a trust in Delaware before becoming a Florida resident. Once in Florida, however, she continued to exercise control over the trust by sending specific instructions to the trustee. Upon the settlor's death, her estate was probated in Florida.⁵¹ Florida attempted to obtain jurisdiction over all indispensable parties including the Delaware trustee. The question before the Supreme Court was whether Florida, consistent with the requirements of due process, could exercise jurisdiction over the trustee. Other than the trustee's correspondence with the settlor in Florida, there were no alleged contacts between the trustee and the state. For the first time, the Court emphasized the limitations of state court jurisdiction. It held that to fulfill the minimum contacts test prescribed in *International Shoe*, "it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."⁵²

While in personam jurisdiction was developing under the test of *International Shoe*, in rem jurisdiction⁵³ was evolving along completely

49. 355 U.S. at 223.

50. 357 U.S. 235 (1958).

51. *Hanson* involved a heated family dispute over the proceeds of the settlor's estate. The settlor, while a resident of Pennsylvania, purported to create a trust in favor of some of her grandchildren. She named a Delaware corporation as trustee and then moved to Florida where she made certain adjustments in the trust. While in Florida, she made a will by which she bequeathed all assets not then properly distributed to two of her three daughters. After her death, the two daughters claimed that the trust she had established in Delaware was invalid, and that consequently, the trust assets should pass under her will to them. The daughters brought suit in Florida and the trust beneficiaries moved to dismiss on the ground that the Delaware trustee was an indispensable party under Florida law who could not be joined for lack of personal jurisdiction. The Florida Supreme Court held that the Delaware trustee was subject to the Florida court's jurisdiction and that the trust assets should pass to the heirs under the will. In the meantime, however, the trust beneficiaries had filed suit in Delaware. The suit reached the Delaware Supreme Court whose ruling directly contradicted that of Florida. The actions were consolidated by the United States Supreme Court, which held, *inter alia*, that the Delaware trustee had not been properly subjected to the jurisdiction of the Florida court. In order to establish the presence of adequate minimum contacts, the Court held that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." 357 U.S. at 253.

52. *Id.*

53. For convenience, the term "in rem" will be used to refer to the general category of jurisdiction encompassing true in rem, quasi in rem type I and quasi in rem type II. See notes 58-64 *infra* and accompanying text for explanation of the individual terms.

independent lines. In *Pennoyer v. Neff*, Mr. Justice Field observed that a court could not directly affect the personal interests of the defendant without jurisdiction over him.⁵⁴ However, proceedings against property were viewed as not *directly* affecting the personal interests of the owner.⁵⁵ The court's jurisdiction in these cases was deemed to be over the property rather than the person.⁵⁶ Consequently, the judgment in an in rem proceeding was to be limited to the value of the property over which the court had obtained jurisdiction.⁵⁷

As the Court observed in *Hanson v. Denckla*⁵⁸ and again in *Shaffer*,⁵⁹ in rem jurisdiction developed into three separate categories. These categories are generally known as "true in rem," "quasi in rem type I" and "quasi in rem type II."⁶⁰ True in rem jurisdiction purports to adjudicate the rights of "all the world" in a designated property. All the claims that any person may have to that specific piece of property are decided in a single true in rem proceeding.⁶¹

Quasi in rem I also deals with direct claims to specific property. But unlike a true in rem proceeding, a quasi in rem I proceeding does not purport to decide the claims of all the world in the subject property. It decides only the claims of the specific parties.⁶²

Quasi in rem II is similar to quasi in rem I in that it only decides the rights of specific parties. But unlike quasi in rem I cases, quasi in rem II cases involve claims to the property which are derivative, rather than direct.⁶³ The claimant seeks to obtain a judgment against the property in order to satisfy a *different* claim against the property's owner. The original claim out of which the suit arises ordinarily has nothing at all to do with the property which is attached.⁶⁴

54. 95 U.S. at 723.

55. The Court held that the permissible exercise of the state's power over property within its borders would often have some effect upon persons outside the territory, but that such effect was not tantamount to the "direct" effect which the decision rejected as an unconstitutional deprivation of due process of law. *Id.*

56. *Id.*

57. *Id.* at 725.

58. 357 U.S. at 246 n.12.

59. 97 S. Ct. at 2577-78 n.17.

60. See generally Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 948-66 (1960) [hereinafter cited as *Developments*] (extensively discussing the categories of in rem jurisdiction).

61. 97 S. Ct. at 2577-78 n.17.

62. *Id.*

63. *Id.*

64. *Id.* at 2582. See note 103 *infra* and accompanying text.

The most famous of the quasi in rem II cases is the case of *Harris v. Balk*⁶⁵ which was overruled by *Shaffer v. Heitner*.⁶⁶ Harris and Balk were North Carolina residents. Harris owed Balk \$180. When Harris visited Maryland, a creditor of Balk's served Harris with a writ of attachment, garnishing his debt to Balk. The creditor obtained a default judgment against Balk and the \$180 was paid to the creditor by Harris. Later, Balk sued Harris to collect the debt. Harris pleaded the prior Maryland judgment. Although the North Carolina court held the attachment invalid, the Supreme Court reversed, holding that the debt had traveled with Harris to Maryland where it had been properly attached. *Harris* thus established that even intangible "property" present within a state through no act of the property's owner could be attached in satisfaction of an unrelated claim against the owner. Without significant change, *Harris* remained an essentially accurate reflection of the scope of in rem jurisdiction until *Shaffer v. Heitner*.⁶⁷

The end result of the independent evolutions of in rem and in personam jurisdictions was an illogically bifurcated system of state jurisdictional power.⁶⁸ As the two systems developed, the inherent unfairness of proceedings typified by *Harris v. Balk* became increasingly difficult to reconcile with the Court's growing emphasis upon "fair play and substantial justice"⁶⁹ in the area of in personam jurisdiction. As the Court observed in *Shaffer*, the vast majority of commentators had long urged abandonment of the traditional in rem rules and suggested the adoption of a universal standard of "fair play and substantial justice" to determine all types of jurisdiction.⁷⁰

65. 198 U.S. 215 (1905).

66. 97 S. Ct. at 2585 n.39.

67. *Id.* Although *Harris* dates from 1905, its vitality was recognized in New York in 1966 when that state's courts decided *Seider v. Roth*, 17 N.Y. 2d 111, 216 N.E.2d 312, 269 N.Y.S. 2d 99 (1966). In *Seider*, an insured's right to be indemnified and defended under an automobile insurance policy issued by an insurer doing business in New York was deemed to be a "debt" within the state. A tort plaintiff was permitted to attach this "debt" in a quasi in rem II proceeding arising out of an automobile accident which occurred outside of the state. Since *Seider* was decided without reference to any contacts between the forum state and the defendant, *Seider* appears to be implicitly overruled in *Shaffer*. See 97 S. Ct. at 2585 n.39. However, if *Seider* is viewed not as a quasi in rem action against the insured, but instead as a form of direct action against the insurer, *Seider* may remain valid. See generally Note, *Minichiello v. Rosenberg: Garnishment of Intangibles—In Search of a Rationale*, 64 Nw. U.L. REV. 407 (1969). But see *Javorek v. Superior Court*, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976) (the California Supreme Court holding that an insurer's contingent liabilities to defend and indemnify the insured were not attachable as "property" within the state under California's attachment statute).

68. See Hazard, *supra* note 33, at 244.

69. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

70. 97 S. Ct. at 2581. See generally Ehrenzweig, *The Transient Rule of Personal*

The very basis of the *Pennoyer* Court's reasoning that mere presence of property within a state confers jurisdiction over that property had been seriously questioned,⁷¹ and the two separate systems of in rem and in personam jurisdiction had been characterized as being so inconsistent as to defy the logical application of either.⁷² Of all of the forms of in rem jurisdiction, quasi in rem II had been the subject of the greatest critical outrage.⁷³

Jurisdiction: The "Power" Myth and Forum Conveniens, 65 YALE L.J. 289 (1956); Hazard, *supra* note 33; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959) [hereinafter cited as Traynor]; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) [hereinafter cited as von Mehren]; *Developments*, *supra* note 60. *But see* Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977) [hereinafter cited as Smit].

71. See Hazard, *supra* note 33; Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975) [hereinafter cited as Zammit].

72. See Hazard, *supra* note 33, at 244, 278. Commentators have also been quick to observe that the elements of *Pennoyer* have suffered steady erosion throughout the twentieth century. See, e.g., *id.* at 272-81.

73. See Hazard, *supra* note 33; von Mehren, *supra* note 70; Zammit, *supra* note 71.

Even commentators who endorse the continuing utility of the in rem rules reject the concept of quasi in rem II jurisdiction. See, e.g., Smit, *supra* note 70, at 620-22.

The critical disapproval of quasi in rem II has been mirrored in the courts as well. See, e.g., *United States Indus. Inc. v. Gregg*, 540 F.2d 142, 154 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977) (holding that the traditional "labels" of in rem, quasi in rem, and in personam should not be determinative of constitutional rights, and that the standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), should be applied to all exercises of state court jurisdiction); *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1137 (3d Cir. 1976) (Gibbons, J., concurring) (suggesting that the same standards of fundamental fairness as have been established for in personam jurisdiction should also be applied to cases of in rem jurisdiction); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 345, 316 P.2d 960, 965 (1955), *appeal dismissed and cert. denied*, 357 U.S. 569 (1958) (holding that "the emphasis is no longer placed on actual physical presence [of property within the state] but on the bearing that local contacts have to the question of over-all fair play and substantial justice").

Despite the lack of guidance by the Supreme Court prior to *Shaffer*, state courts had increasingly utilized a minimum contacts analysis in determining the propriety of the exercise of quasi in rem II jurisdiction. See *Camire v. Scieszka*, 116 N.H. 302, 358 A.2d 397 (1976). Cf. *Bekins v. Huish*, 1 Ariz. App. 288, 401 P.2d 743 (1965) (finding establishment of jurisdiction through utilization of in rem, quasi in rem, and minimum contacts theories).

Other courts read portions of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Hanson v. Denckla*, 357 U.S. 235 (1958), together as indicating that the Supreme Court would require minimum contacts in in rem actions. See *United States Indus. Inc. v. Gregg*, 540 F.2d 142 154 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977); *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1137 (3d Cir. 1976) (Gibbons, J., concurring) (also observing that all Supreme Court endorsements of quasi in rem II jurisdiction preceded the establishment of the minimum contacts rule of *International Shoe*). Cf. *Durfee v. Duke*, 375 U.S. 106, 115 (1963) (rejecting the argument that cases involving real property should be treated differently from cases involving adjudications of personal rights for res judicata purposes).

The criticisms of in rem jurisdiction take on added significance when coupled with the fact that in rem proceedings are no longer utilized as a means of obtaining jurisdiction over nonresident defendants to the extent they were in the years immediately following *Pennoyer*. One of the primary factors leading to the erosion of the utility of in rem proceedings as a means of acquiring jurisdiction has been the development of state "long arm" statutes. *Pennoyer v. Neff* had held that a state could not "extend its process beyond that [state's] territory so as to subject either persons or property to its decisions."⁷⁴ In the years immediately following, plaintiffs could not directly reach persons or property located outside the forum state. In this context, the exercise of in rem forms of jurisdiction was the only means by which a resident of a state could obtain a local judgment in satisfaction of his claim against an out-of-state defendant.

By the time that the Supreme Court decided *McGee v. International Life Insurance Co.*,⁷⁵ the concept of long arm jurisdiction had become so thoroughly accepted that the Court was able to condone its further expansion to meet the needs of modern multi-state commerce. Since *McGee*, state long arm statutes have continued to grow, and an increasing number of states now permit an exercise of jurisdiction over non-residents circumscribed only by the outer limits of the due process clause of the fourteenth amendment.⁷⁶ Therefore, while in rem proceedings may have been useful as a jurisdictional device in the days of *Pennoyer v. Neff*, many commentators feel that with the advent of extra-territorial service of process, as typified by the long arm statutes, this aspect of in rem proceedings has outlived its usefulness.⁷⁷

Traditionally, courts had favored the defendant in determining the state in which personal jurisdiction over him would be proper, "on the theory, . . . that since the plaintiff controls the institution of suit he might behave oppressively toward the defendant unless restricted."⁷⁸ In recent years, however, the same factors of increased multi-state activity that created the need for state long arm statutes have, in many circumstances, removed or reduced the defendant's need for special jurisdictional protection. With individuals and corporations now taking advantage of modern interstate mobility, the traditional notion of fairness to

74. 95 U.S. at 722.

75. 355 U.S. 220 (1957).

76. *E.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973); R.I. GEN. LAWS § 9-5-33 (1970).

77. *See* von Mehren, *supra* note 70, at 1178-79.

78. Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 192 (1933).

the defendant has been largely counterbalanced by notions of fairness to local plaintiffs injured by interstate activities. It seems no longer possible to say that fairness requires preference for one party over the other, but rather, what seems required is an examination of the facts of the individual case.⁷⁹

Finally, the Supreme Court's decisions involving notice and hearing requirements in attachment proceedings have reduced the advantages of in rem proceedings. Beginning with *Sniadach v. Family Finance Corp.*,⁸⁰ the Supreme Court, in a series of cases, redefined the notice requirements of fourteenth amendment due process as they relate to local attachment actions. State attachment procedures, which for years had gone unquestioned, were found to deny the defendant the notice and opportunity to be heard required by due process of law.⁸¹ The Court's position indicates an ever-increasing emphasis upon expansive notions of due process, based to a large extent upon concepts of fairness "derived not alone . . . from the specifics of the Constitution, but also . . . from concepts which are part of the Anglo-American legal heritage . . ."⁸² It is also these cases, perhaps more than any factor, which signaled the eventual demise of in rem jurisdiction. By emphasizing that an attachment of property affected the rights of its owner,⁸³ the Court set the stage for the decision that in rem proceedings were, in reality, personal actions against the owner.

79. See generally von Mehren, *supra* note 70, at 1166-67.

80. 395 U.S. 337 (1969) (holding that a pre-judgment garnishment procedure which permitted one half of the debtor's wages to be frozen in the interim between the garnishment and the main suit, without providing the defendant with notice and opportunity to be heard, deprived the defendant of due process of law).

81. See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (holding that a state statute which permitted garnishment of a corporation's bank account based upon mere conclusory allegations by plaintiff, without the participation of a judge or prior notice and opportunity to be heard, violated due process of law); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding that state provisions for the replevin of chattels which did not provide the possessor with prior notice and opportunity to be heard and which did not afford judicial supervision violated due process of law, regardless of the availability of procedures for post-seizure hearings and regardless of the fact that the chattels were not "necessities of life"). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (holding that a state's sequestration procedure did not violate due process of law when it sufficiently protected the interests of the possessor of chattels, although the procedure did not provide for notice or opportunity to be heard prior to the property's sequestration).

82. *Sniadach v. Family Fin. Corp.*, 395 U.S. at 342-43 (Harland, J., concurring). Compare *id.* at 344-51 (Black, J., dissenting).

83. See generally authorities cited notes 80-81 *supra*.

III. PRACTICAL EFFECTS UPON AREAS OF ADJUDICATION TRADITIONALLY SUBJECT TO IN REM JURISDICTION

In holding that actions against property⁸⁴ require a showing of the owner's minimum contacts with the state, *Shaffer v. Heitner* discards the concept advanced in *Pennoyer v. Neff* that a state's power over property confers jurisdiction over causes of action concerning that property. As a practical matter, the pertinent inquiry now concerns *Shaffer's* effect upon the ability of states to adjudicate causes of action which had traditionally been brought as true in rem, quasi in rem I or quasi in rem II proceedings. An analysis of these proceedings reveals that, while the basis of jurisdiction has been changed, the states' power to adjudicate these matters, with one exception, has not been significantly curtailed.

A. True In Rem and Quasi In Rem I Actions

While for most purposes *Shaffer's* effect on true in rem and quasi in rem I will be negligible, it is in the area of true in rem proceedings that the *Shaffer* opinion creates the most conceptual difficulties. In true in rem proceedings, the power to adjudicate has been based upon bringing the property within the jurisdiction of the court. Since such proceedings have been traditionally utilized to determine all possible claims to the subject property,⁸⁵ any parallel to a true in rem action will, by necessity, involve the possible existence of unknown claimants whose rights to the property will be determined in the litigation. Now that jurisdiction can no longer be based upon the presence of property alone, but must instead be based upon minimum contacts on the part of the individuals whose rights are to be adjudicated, the possibility of unknown claimants presents several problems. How is a court to establish that an unknown claimant has minimum contacts with the state? The *Shaffer* Court provided the answer:

[T]he presence of property in a State may bear on the existence of jurisdiction, by providing contacts among the forum State, the defendant and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the

84. While in rem jurisdiction has been utilized most extensively in the adjudication of rights to real or personal property it is also used in the so called "status" cases. Adjudications of status include divorce, separation, actions to nullify a marriage, adoption, custody, and guardianship. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 69-79 (1971). Like the Court in *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877), the Court in *Shaffer* expressly excluded "adjudications of status" from its holding. 97 S. Ct. at 2582 n.30. Since these cases are excluded from the *Shaffer* ruling, *Shaffer* will not interfere with precedent in this area.

85. *Shaffer v. Heitner*, 97 S. Ct. at 2577-78 n.17.

plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. 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.⁸⁶

Despite the fact that the identity of the claimant is unknown, he can be said to have minimum contacts with the state as a result of the very fact that he has a claim to property in the state and expects "to benefit from the State's protection of his interest."⁸⁷ Although this reasoning is not completely satisfactory, it seems no more attenuated than the reasoning in traditional true in rem cases which based jurisdiction to adjudicate the rights of all parties upon the state's power over the property.⁸⁸ In fact, the new form of reasoning advocated in *Shaffer* is very similar to the older form. In the past, true in rem jurisdiction was based upon the state's territorial power; now it is based in large part upon the state's interest in property within its boundaries.⁸⁹

86. *Id.* at 2582 (footnotes omitted). As expressly stated by the Court, this discussion is as applicable to quasi in rem proceedings as to true in rem proceedings. *Id.* at 2582 n.24. The Court indirectly recognized that when the property which is the source of controversy is brought into the state without the knowledge or consent of the owner, the presence of the property will not support an inference of minimum contacts.

The Court stated that "[i]n some circumstances the presence of property in the forum State will not support the inference [of minimum contacts]." *Id.* at 2582 n.24. The Court then cited to a particular portion of an article by then California Supreme Court Justice Roger B. Traynor in which he discussed the case of *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957). That case involved an automobile which was seized in accordance with a California statute providing for the seizure and forfeiture of automobiles used to transport narcotics. The automobile had come to California from Texas in contravention of a sales agreement between the transporting party, one Willie Smith, and the party who sold him the car and who had retained a chattel mortgage to secure Willie's debt. While under California law the mortgagee would have lost his security, the court found that he was entitled to the return of the automobile. *See* Traynor, *supra* note 70, at 672-73. The inference of the Supreme Court's citation to this factual situation is that such circumstances would not provide minimum contacts. Compare the concept of chattels improperly or illegally brought into the state with the circumstances of *Harris v. Balk*, 198 U.S. 215 (1905), where the "debt" was brought into Maryland without Balk's knowledge or consent.

87. 97 S. Ct. at 2852.

88. Mr. Justice Powell's concurring opinion in *Shaffer* may reflect his discomfort with the attenuated analysis required to achieve this result. *See* note 28 *supra*.

89. State interest and the problems associated with it are discussed at notes 160-82 *infra* and accompanying text.

Once the obstacle of the claimant's minimum contacts with the forum state has been surmounted, it becomes relatively simple to satisfy the unknown claimant's due process rights to notice and opportunity to be heard. In *Mullane v. Central Hanover Bank*,⁹⁰ the Court held that the due process rights of unknown potential claimants to a trust would be satisfied by "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action"⁹¹ But the Court did approve of notice by publication in cases where other forms of notice were not possible or practical.⁹² Thus, while *Shaffer* provides a formula for finding minimum contacts between the unknown claimant and forum state, *Mullane* provides an acceptable means of fulfilling the requirements of notice and opportunity to be heard. The end result is that under *Shaffer v. Heitner* the old form of true in rem adjudication has been replaced by a substitute which, although based upon jurisdiction over the person rather than the property, will yield almost identical results.⁹³

This new analysis is equally applicable to the old quasi in rem I actions⁹⁴ with the added simplification that there will be fewer problems with unidentified claimants.⁹⁵

B. *Quasi In Rem II*

The practical impact of *Shaffer* will be felt most in the area of quasi in rem II jurisdiction.⁹⁶ *International Shoe* requires that when the contacts between the defendant and the forum are minimal, the cause of action must arise from or relate to those contacts.⁹⁷ Since by their very defini-

90. 339 U.S. 306 (1950).

91. *Id.* at 314.

92. *Id.* at 317.

93. One commentator has observed that it is much more reasonable to subject an owner to the decisions of a court in in rem actions when the property is permanently located within the state. Smit, *supra* note 70, at 617-23. This analysis seems consistent with the examination of minimum contacts prescribed in *Shaffer*. The same commentator has also suggested that the fact property is tangible rather than intangible will also have an impact upon the analysis. *Id.* at 622-23. Although the *Shaffer* opinion does not clearly suggest whether or not this would be a factor, its emphasis upon the fictional nature of Delaware's situs of stock rule may imply that the tangibility of the property would also provide some guidelines when fictional situs rules create unfair or arbitrary situations.

94. The *Shaffer* Court applied the same basic analysis to true in rem and quasi in rem I cases. See 97 S. Ct. at 2582 n.24.

95. By definition, quasi in rem I includes only specific claimants to property. See notes 58-62 *supra* and accompanying text.

96. 97 S. Ct. at 2582.

97. [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, *so far as those obligations*

tions⁹⁸ true in rem and quasi in rem I actions arise from or relate to the property claimed by the parties, the test will be satisfied in most cases.⁹⁹ However, in quasi in rem II actions, typified by *Harris v. Balk*,¹⁰⁰ the cause of action rarely arises from or relates to the property which is the subject matter of the suit:¹⁰¹ the plaintiff's claim to the subject property is almost always asserted to satisfy a different claim against the property's owner.¹⁰²

In *Shaffer* the Court noted that the presence of property within the state might support jurisdiction in quasi in rem II actions where the cause of action was in some way related to the property.¹⁰³ However, the Court distinguished cases such as *Harris* and *Shaffer* as cases in which the cause of action was "*completely unrelated*" to the property.¹⁰⁴ In such causes of action, it held that the presence of the property alone would not

arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (emphasis added) (citations omitted).

98. See notes 58-62 *supra* and accompanying text.

99. A probable exception to this rule would be property brought into the state without the consent of its owner and claimed by another party. See note 86 *supra*.

100. 198 U.S. 215 (1905).

101. See *Shaffer's* discussion of causes of action typified by *Harris v. Balk*, 198 U.S. 215 (1905) and the principal case, where the basis for state court jurisdiction was "completely unrelated" to the plaintiff's cause of action. 97 S. Ct. at 2582-83. See also *Steele v. G.D. Searle & Co.*, 483 F.2d 339, 348 (5th Cir. 1973), *cert. denied*, 415 U.S. 958 (1974), where the cause of action did not arise from the attached property, and where the court recognized that minimum contacts might be significant in in rem jurisdiction, but then found that the mere presence of creditors within the state represented "a crucial point of contact" which "goes far toward providing the essential 'minimum' necessary" for jurisdiction.

102. See notes 63-64 *supra* and accompanying text.

103. While a quasi in rem II proceeding *could* involve a cause of action related to the attached property, see, e.g., *Shaffer*, 97 S. Ct. at 2582 n.29, as a practical matter it would be rare under modern long arm statutes to have such a cause of action litigated as a quasi in rem II proceeding. It is not unusual for state long arm statutes to provide for an exercise of full in personam jurisdiction over nonresident defendants when the defendants own property within the state and the cause of action arises from or relates to that property. See CAL. CIV. PROC. CODE § 410.10, *Approved Judicial Council Comment* 459, 474 (West 1973).

Note also that the Court did not cite a single case of quasi in rem II jurisdiction where the cause of action arose from or related to the subject property, but rather proposed a hypothetical. 97 S. Ct. at 2582. The Court's failure to cite an actual example of such a case may well indicate the rarity of quasi in rem II actions where the cause of action relates to the subject property. Thus, the kind of quasi in rem II action that does not relate to the subject property is disallowed in *Shaffer*, and the kind of quasi in rem II situation which does relate to the subject property, while it may be a permissible exercise of jurisdiction, will rarely occur.

104. 97 S. Ct. at 2582 (emphasis added).

be sufficient to provide the requisite minimum contacts for an exercise of personal jurisdiction.¹⁰⁵

The Court's objection to in rem jurisdiction is clearly focused upon the narrow area of quasi in rem II cases in which the cause of action is completely unrelated¹⁰⁶ to the defendant's contacts with the state.¹⁰⁷ In cases formerly adjudicated as true in rem and quasi in rem I actions, the courts will experience little or no difficulty in finding that the required minimum contacts exist. In these types of proceedings the change has been one more of form than of substance.¹⁰⁸ It is only in cases like *Harris v. Balk*, where the cause of action is unrelated to contacts with the state, that jurisdiction will be denied.¹⁰⁹ *Shaffer v. Heitner* is not the death knell for in rem jurisdiction. The bell tolls only for quasi in rem II.

C. Questions Left Unanswered

What is clear from *Shaffer v. Heitner* is that the due process clause of the fourteenth amendment requires that, in order to adjudicate a person's interests in property, it must first be shown that that person had minimum

105. *Id.* at 2582-83.

106. *Id.* at 2582.

107. The Court noted that in cases where the cause of action is related to the defendant's property within the state, "jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected . . ." *Id.*

108. Although judgments in in rem proceedings were limited to the value of the property attached, *see* notes 55-57 *supra* and accompanying text, this had little or no effect in true in rem and quasi in rem I actions. The claim was to the property itself, and therefore the value of the claim did not exceed the value of the property that could be attached in satisfaction of the judgment.

109. 198 U.S. 215 (1905). In *Carolina Power & Light Co. v. Uranex* (N.D. Cal. Sept. 26, 1977), summarized in 46 U.S.L.W. 2195 (Oct. 18, 1977), the Northern District of California recognized an exception to this general rule. In that case, the *ex parte* attachment of a debt owed by a California corporation to a French corporation was permitted despite the fact that the French corporation did not have sufficient minimum contacts to justify an exercise of personal jurisdiction. The action was brought by a North Carolina plaintiff who sought the attachment solely as a means of protecting an award that the plaintiff could receive as a result of a New York action it was pursuing against the defendant French corporation. While the California property was not related to the plaintiff's New York action, the court noted that it was apparently the defendant's only asset in the United States and, but for the attachment, would be removed from the country.

In permitting the attachment, the court relied on the following language from *Shaffer*: "[A] State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *Interational Shoe*." 97 S. Ct. at 2583. It would therefore appear that a court may attach the property of a nonresident over whom it may not exercise personal jurisdiction if that nonresident is properly within the personal jurisdiction of another state. Such attachment would not be permissible in all circumstances and would not confer upon the court the jurisdiction to adjudicate the merits of the plaintiff's claim. 46 U.S.L.W. at 2196.

contacts with the forum state. What is unclear from *Shaffer* is whether a state must actually acquire personal jurisdiction over that party before adjudicating those rights. The Court's ultimate conclusion in this area will have significant impact upon present state jurisdictional statutes.

While *Shaffer* determines the permissible bases for jurisdiction under the Constitution, it is the states which confer jurisdiction upon their courts. Although state legislatures have the option of delegating power to their courts up to the outer limits of due process, many state legislatures have declined to delegate all of the power they possess.¹¹⁰ It is not uncommon for state long arm statutes to explicitly or implicitly prohibit jurisdiction in areas in which an exercise of jurisdiction would be constitutionally permissible.¹¹¹ In such states, in rem statutes were an alternative means of compelling a defendant's appearance in state courts. If a nonresident could not be reached under the state's personal jurisdiction statutes, a plaintiff could attach that party's property within the state and proceed in rem. If the owner refused to appear, a default judgment would be entered.

If *Shaffer* requires actual personal jurisdiction, *all* such statutes are unconstitutional and state statutes defining personal jurisdiction provide the only means of reaching nonresident defendants. If, on the other hand, actual personal jurisdiction is not required, plaintiffs may still proceed under these statutes with the added due process requirement that they show that the nonresident had minimum contacts with the forum state.

Another related question unanswered by *Shaffer* concerns its effects on present attachment proceedings designed to be utilized against the property of nonresidents. Under *Pennoyer v. Neff*,¹¹² it was established that the in rem jurisdiction of the court must be invoked by the attachment of the subject property. There is no doubt that attachment is still available to plaintiffs who have acquired personal jurisdiction over de-

110. See *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1211 (5th Cir. 1975) (observing that the determination of whether a state may properly assert in personam jurisdiction over a nonresident defendant involves an inquiry into the scope of the state's long arm provisions as well as an evaluation of the constitutional permissibility of jurisdiction); *Barrett v. Browning Arms Co.*, 433 F.2d 141, 142 (5th Cir. 1970) (holding that although there was no constitutional barrier to an exercise of jurisdiction in this case, jurisdiction over a nonresident defendant could extend no further than permitted under the state's long arm statute).

111. See, e.g., N.Y. CIV. PRAC. CODE § 302(a)(2)-(3) (McKinney 1872) (excluding defamation actions from the state's long arm provisions which allow jurisdiction over parties who commit tortious acts within the state or who commit tortious acts outside of the state, causing an injury to persons or property within the state).

112. 95 U.S. 714, 733 (1877).

pendants, but, if personal jurisdiction is ultimately required, can a plaintiff attach prior to obtaining jurisdiction? In other words, since attachment no longer confers jurisdiction, will the courts be willing to sanction the attachment of property prior to the establishment of jurisdiction through other means?¹¹³

Even if personal jurisdiction is not ultimately required prior to attachment, courts will be unlikely to attach property without some showing by the plaintiff that the non-resident has minimum contacts with the forum state. This, however, could be easily achieved by simply requiring that the plaintiff state facts supporting an allegation of minimum contacts in his affidavit supporting the motion for attachment.¹¹⁴

D. Conclusion—*In Rem* Jurisdiction

Shaffer v. Heitner, while raising many questions, has retained almost intact the elements of *in rem* jurisdiction which are useful and consistent with "traditional notions of fair play and substantial justice."¹¹⁵ It has discarded only those elements which were unfair or illogical. But *Shaffer* has significant effect in an entirely separate area: it is the Supreme Court's first major discussion of the minimum contacts test of *International Shoe Co. v. Washington*¹¹⁶ in nineteen years. The importance of what is said regarding minimum contacts may, in the long run, far outweigh anything the Court has expressed regarding *in rem* jurisdiction.

IV. EFFECTS UPON PERSONAL JURISDICTION

The final portion of the *Shaffer* opinion was devoted to the application of *International Shoe's* minimum contacts test to the facts of the case. It

113. See note 119 *infra*. *Shaffer* did state that a court which could not obtain personal jurisdiction over a debtor could, nevertheless, maintain an action against that debtor's property where his indebtedness to the plaintiff had previously been determined by a court of competent jurisdiction. 97 S. Ct. at 2583 n.36. See *Carolina Power & Light Co. v. Uranex* (N.D. Cal. Sept. 26, 1977), summarized in 46 U.S.L.W. 2195 (Oct. 18, 1977), discussed note 109 *supra*.

114. In California, for example, a plaintiff wishing to attach the property of a non-resident must submit an affidavit with his application showing the following:

(1) The action is one described in Section 492.010 and is brought against a defendant described in Section 492.010.

(2) The plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based.

(3) The property sought to be attached is subject to attachment pursuant to Section 492.040.

CAL. CIV. PROC. CODE § 492.020(b) (West Supp. 1977). It would not unduly burden the plaintiff to add to this, based upon his information and belief, facts constituting minimum contacts. *Id.* § 492.020(c).

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

116. *Id.*

is highly significant that the Court chose to address this issue rather than remand it to the state courts since, as alleged by Justice Brennan,¹¹⁷ the record of the case did not supply an adequate factual background to allow the Court to properly decide the issue.¹¹⁸ It is also interesting to note that the Court ignored the particular limitations of Delaware's jurisdictional statutes and decided the issue as if Delaware possessed a long arm statute coextensive with the outer limits of constitutional due process.¹¹⁹ Since it was not based upon the particular facts of the case, but rather dealt in more general terms, this portion of the Court's decision more closely resembles an advisory opinion than a holding.¹²⁰ The advisory nature of the *Shaffer* opinion indicates that the method of analysis employed by the Court is designed to serve as a model for future adjudications of state court jurisdiction.

A. *The Requirement of an Act by Which the Defendant Purposefully Avails Himself of Forum Benefits*

Since *Hanson v. Denckla*,¹²¹ lower courts have struggled to formulate a test for personal jurisdiction which is consistent with the varying standards prescribed by the Supreme Court in *International Shoe*,¹²² *McGee*¹²³ and *Hanson*. Until the decision in *Hanson*, the rule of

117. 97 S. Ct. at 2588 (Brennan, J., concurring and dissenting).

118. Mr. Justice Brennan observed that a determination of minimum contacts is highly dependent on creating a proper factual foundation detailing the contacts between the forum state and the controversy in question. Because neither the plaintiff-appellee nor the state courts viewed such an inquiry as germane in this instance, the Court today is unable to draw upon a proper factual record in reaching its conclusion; moreover, its disposition denies appellee the normal opportunity to seek discovery on the contacts issue.

Id. at 2589.

119. The Court apparently recognized that Delaware has no long arm statute under which jurisdiction could be exercised in this case, but "assumed" that with proper notice and minimum contacts the defendants could be brought before the Delaware courts. *Id.* at 2585 n.40. The Court's treatment of the issue ignores a state's ability to legislatively delegate less authority to its courts than the Constitution allows. *See* notes 110-11 *supra* and accompanying text.

This may suggest that the Court envisions that, in states such as Delaware which do not have extensive long arm statutes, attachment proceedings may be commenced when the defendant has sufficient minimum contacts with the forum, despite the state court's inability to establish actual personal jurisdiction over him by use of a state personal jurisdiction statute.

Such an interpretation of the Court's position might also suggest that attachment would be allowed to occur prior to the establishment of personal jurisdiction over the defendant. *See* notes 112-14 *supra* and accompanying text.

120. It is not unusual for the Court to utilize this "advisory opinion" form when dealing with issues of the utmost significance. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

121. 357 U.S. 235 (1958).

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

123. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

minimum contacts was applied time after time to increase the jurisdictional reach of state courts.¹²⁴ In *Hanson*, however, a new control was placed upon the growing application of the minimum contacts test. Emphasizing an aspect of *International Shoe* which had previously received little or no attention, the *Hanson* Court held that in order for an exercise of jurisdiction to be permissible "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹²⁵ The Court emphasized that considerations of forum convenience were irrelevant in the absence of purposeful availment: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."¹²⁶

In emphasizing "purposeful availment," *Hanson* demonstrated a shift in emphasis from earlier decisions; in particular, *McGee v. International Life Insurance Co.*¹²⁷ In *McGee*, the Court supplemented its analysis of minimum contacts by emphasizing that it would be fair to subject the defendant to the jurisdiction of the state. Fairness to the defendant was equated to some degree with convenience. The Court noted that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."¹²⁸ The *McGee* Court said nothing about an act by which the defendant had availed himself of forum benefits, and required only that the defendant "have certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ¹²⁹

124. See, e.g., *id.*; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The *McGee* Court recognized this phenomenon, noting that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents." 355 U.S. at 222. Cf. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (holding that state courts could exercise jurisdiction in causes of action not arising from contacts within the state when the defendant's contacts with the state were so continuous and substantial that it would be fair to subject him to its jurisdiction).

125. 357 U.S. at 253 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). In *International Shoe* the Court stated:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319.

126. 357 U.S. at 251.

127. 355 U.S. 220 (1957).

128. *Id.* at 223.

129. *Id.* at 222 (citation omitted).

Hanson thus differed from *McGee* in two significant respects. First, it required an act of purposeful availment on the part of the defendant to establish minimum contacts. Second, it held that forum convenience was irrelevant to a finding of minimum contacts. However, while *Hanson* seemingly established a new, stricter test of minimum contacts, it also approved the continued viability of *McGee*.¹³⁰ In reconciling the two decisions, the *Hanson* Court characterized the *McGee* facts as showing "an act done or a transaction consummated in the forum state."¹³¹ The Court emphasized that in *McGee* the non-resident defendant had solicited a reinsurance agreement with a California resident, that the offer was accepted in that state, and that the insurance premiums were mailed from there.¹³² Yet, the acceptance of the offer and the payment of premiums were not acts of the defendant, but acts of the plaintiff's decedent. The only positive act of the defendant was the mailing of the offer from Texas to California. Under a strict reading of *Hanson*, then, the first two "acts" referred to in discussing *McGee* do not appear to fulfill the requirements of a purposeful act by the defendant. Instead, they more closely resemble the kind of "unilateral activity of those who claim some relationship with a nonresident" which the Court in *Hanson* held to be insufficient to satisfy the requirement of a purposeful act by the defendant.¹³³

Thus, by recognizing and approving *McGee*, the Court diminished the probability that the *Hanson* test would be strictly applied. *Hanson* clearly established the requirement of some kind of availment of forum benefits, but allowed the requirement of an act within the state to be beclouded by the Court's references to the acts in *McGee*. It was predictable, then, that courts interpreting *Hanson* might react by emphasizing availment of forum benefits and de-emphasizing the requirement of an act within the state.¹³⁴ Some courts focused upon the fairness

130. 357 U.S. at 251-52.

131. *Id.* at 251.

132. *Id.* at 251-52.

133. *Id.* at 253. *See also* note 51 *supra*. Although two of the three acts in *McGee* do not strictly fulfill the requirement of purposeful availment set out in *Hanson*, the insurer's solicitation of the reinsurance agreement was clearly a purposeful act by the defendant and fulfills the *Hanson* test. The Court in *Hanson* made it clear that the *McGee* decision is still valid law under *Hanson*. *See* 357 U.S. at 251-52.

134. *See, e.g.*, *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969) (finding that a manufacturer who could have foreseen that his products would be resold to California businesses had "engaged in economic activity" within the state, and thus fulfilled the *Hanson* requirement of an act); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (establishing that in products liability cases, an act within the state occurs when the injury occurs within the state). *But see* *Sibley v. Superior Court*, 16 Cal. 3d 442, 546 P.2d 322, 128 Cal. Rptr. 34, *cert. denied*, 429 U.S. 826 (1976) (finding that a guaranty by a nonresident of an obligation

of exercising jurisdiction over nonresident defendants if their acts outside the state had foreseeable effects within the forum.¹³⁵ In this way, these courts created fictions to circumvent a literal reading of *Hanson's* requirement of an act within the state.¹³⁶

In *Kulko v. Superior Court*,¹³⁷ the California Supreme Court demonstrated how easily the requirement of an act within the state could be fulfilled prior to *Shaffer*. Pursuant to a foreign judgment of divorce, a husband and wife agreed that the husband, a New York domiciliary, would have custody of the couple's two children during the school year. The children were to be allowed to visit the wife in California during certain vacations. The couple's teen-aged daughter, however, decided that she would prefer to live with her mother during the school year and visit her father during vacation periods. The father provided his daughter with a one-way plane ticket to California. The daughter moved to California, but returned to spend a vacation with her father in New York. After this vacation, the father again purchased a one-way plane ticket for the daughter's return to California. The wife then brought an action in the California courts to obtain increased child support.¹³⁸

The California Supreme Court held that the state could exercise personal jurisdiction over the father because he had purposefully availed himself of the benefits of the forum in allowing his daughter to live

to a California partnership was not an act within the state and the guarantor could not be subjected to the California courts' jurisdiction in an action for breach of contract and breach of guaranty).

135. See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

136. *Id.* Mr. Justice Brennan's position in *Shaffer* is representative of this point of view. He would emphasize that the *Shaffer* defendants "voluntarily associated themselves with the State of Delaware, 'invoking the benefits and protections of its laws.'" 97 S. Ct. at 2592 (Brennan, J., concurring and dissenting). He would not require an actual, physical act by the defendants within the state, but rather would be satisfied to base jurisdiction upon the effect caused in the state by their actions outside the state. *Id.*

137. 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977).

138. *Id.* at 519-20, 564 P.2d at 354-55, 138 Cal. Rptr. at 587-88. The wife also sought to obtain custody of the children and to establish the couple's Haitian divorce in California. *Id.* at 520, 564 P.2d at 355, 138 Cal. Rptr. at 588. Although divorce and child custody cases are determinations of status, which were excluded from the *Shaffer* Court's ruling, see note 84 *supra*, actions for child support have traditionally required in personam jurisdiction over the defendant or in rem jurisdiction over his property. See, e.g., *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). It should be noted at the outset, however, that the problem of obtaining child support from nonresident parents has long been a problem area in law. Considerations of fairness and judicial efficiency may have motivated the court in *Kulko* to develop a theory of in personam jurisdiction over the father.

The couple's son eventually joined his mother in California, but his departure from New York was without the father's consent or assistance. Nevertheless, once the court found that it could exercise personal jurisdiction over the father in connection with the daughter's support, it also exercised jurisdiction over the father in the matter of the son's support. 19 Cal. 3d at 525, 564 P.2d at 358, 138 Cal. Rptr. at 591.

there.¹³⁹ The availment was considered purposeful because the father had allowed his daughter to leave and had provided her plane fare.¹⁴⁰ The requirement of an act within the state was viewed as having been fulfilled because the father's act in New York caused an effect in California.¹⁴¹

In light of *Shaffer v. Heitner*, the validity of decisions such as *Kulko* becomes questionable.¹⁴² *Shaffer* indicates that the rules of *Hanson v. Denckla* are alive and well¹⁴³ and may be interpreted more strictly than previously. The Court in *Shaffer* emphasized the necessity of an act within the state, and refused to fabricate complicated fictions to establish such an act.¹⁴⁴ Although the defendants were fiduciaries of a Delaware corporation who were being sued in Delaware on behalf of that corporation, the Court insisted that their affiliation with Delaware was inadequate: "Appellee Heitner did not allege and does not now claim that appellants *have ever set foot in Delaware*. Nor does he identify any *act* related to his cause of action *as having taken place in Delaware*."¹⁴⁵

139. By allowing his child to live within the state, a parent was said to avail himself "of the total panoply of the state's laws, institutions and resources—its police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums" 19 Cal. 3d at 522, 564 P.2d at 356, 138 Cal. Rptr. at 589.

140. *Id.* at 524, 564 P.2d at 357-58, 138 Cal. Rptr. at 590-91. In his dissent Judge Richardson argued there was no purposeful availment by the father, but rather, he merely "passively acquiesced in his teen-aged daughter's unilateral decision" *Id.* at 527, 564 P.2d at 360, 138 Cal. Rptr. at 593.

141. *Id.* at 521, 564 P.2d at 356, 138 Cal. Rptr. at 589. The court limited its decision by stating that jurisdiction based upon causing an effect within the state could be expanded to unreasonable proportions. The court therefore held that jurisdiction in such cases could only be applied when "reasonable." *Id.*

Reasonableness in such cases is determined by examining whether "the nonresident 'purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California laws . . . or anticipated that he would derive any economic benefit as a result of his' act outside of California." *Id.* at 521-22, 564 P.2d at 356, 138 Cal. Rptr. at 589 (quoting *Sibley v. Superior Court*, 116 Cal. 3d 442, 447, 546 P.2d 322, 325, 128 Cal. Rptr. 34, 37, *cert. denied*, 429 U.S. 826 (1976)).

142. Note that the Court in *Shaffer* did not find that the acceptance of a corporate directorship was an act within the state. If the Court had been so inclined, it could have theorized that acceptance of a corporate directorship is an act which causes effects within the state. The corporation's profits go up or down depending upon the performance of the corporate directors and the state's taxation of the corporation may therefore be affected. Clearly, not all activities which cause effects within the state will constitute acts within the state. A factual evaluation of *Shaffer* indicates that *Shaffer* requires a greater or more direct effect within the state than the California courts found necessary in *Kulko*.

143. Some commentators have denigrated the importance of the *Hanson* rules, maintaining that *Hanson* was merely an attempt by the Court to avoid giving full faith and credit to an unfair decision by declaring that the decision was rendered without jurisdiction. *See, e.g., Zammit, supra* note 71, at 677.

144. For an example of such a fiction, see text accompanying note 141 *supra*.

145. 97 S. Ct. at 2585 (emphasis added). Mr. Justice Brennan took exception to the Court's literal reading of the requirement of an act within the state. He noted that "[t]he fact that the record does not reveal whether they 'set foot' or committed 'act [sic] related to [the] cause of action' in Delaware . . . is not decisive, for jurisdiction can be based

Despite the fact that the benefits of Delaware corporate law might have been an incentive to the defendants in accepting directorships in the corporation, and despite the fact that it might have been fair and just to require defendants to respond to suit in Delaware, the Court refused to consider these facts until a showing had been made that the defendants had done some purposeful act within the state.¹⁴⁶

In emphasizing this point, the Court dispelled some of the uncertainty created by *Hanson's* approval of *McGee*. The notion that the defendant has somehow enjoyed the benefits of the forum is insufficient to justify an exercise of jurisdiction without a clear showing of an act within the state.¹⁴⁷ Considerations of fairness and forum convenience are similarly irrelevant when an act has not been established.¹⁴⁸ However, it is not clear in *Shaffer* what types of behavior will constitute an "act" within the state. *Shaffer's* emphasis upon the fact that the defendants had never "set foot" in Delaware may indicate that the Court will require a more physical, tangible act within the state than has been required by some state courts.¹⁴⁹ On the other hand, the *Shaffer* Court's requirement of an act within the state may simply utilize the word "act" as a term of art encompassing the state courts' definitions of that term.¹⁵⁰ All in all, the tone of *Shaffer* indicates that the requirement of an act within the state will receive greater emphasis in the future, and that the most attenuated state court definitions of what constitutes an act will be rejected.¹⁵¹

B. Foreseeability

The concept of foreseeability has been utilized by courts to support the exercise of jurisdiction over defendants whose acts outside the state have caused effects within the state.¹⁵² In *Shaffer*, the Court

strictly on out-of-state acts having foreseeable effects in the forum state." *Id.* at 2591 (Brennan, J., concurring and dissenting) (citations omitted).

146. *Id.* at 2586.

147. Compare *Shaffer with* *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). *Buckeye* relied heavily upon the defendant's enjoyment of the state's benefits, but created a complicated fiction to establish an act within the state. *Shaffer* indicates that such emphasis upon availment will be unproductive without a clear showing of an act within the state.

148. The *Shaffer* Court ignored the argument that it would be "only fair and just" to bring the defendants before the Delaware court. 97 S. Ct. at 2586.

149. See, e.g., *Kulko v. Superior Court*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

150. See notes 134-40 *supra* and accompanying text.

151. *Id.*

152. See, e.g., *Jones Enterprises, Inc. v. Atlas Serv. Corp.*, 442 F.2d 1136 (9th Cir. 1971) (architect who placed his design in the stream of commerce, knowing or having

indicated that foreseeability of suit may be a factor in determining jurisdiction.¹⁵³ However, the Court abruptly ended its discussion of foreseeability by finding that, under the circumstances of this case, it was not foreseeable to corporate directors that they would be held amenable to suit within the state of incorporation.¹⁵⁴ Although this passing reference to the expectations of the directors in *Shaffer* constitutes the Court's first recognition of the foreseeability doctrine, it leaves many questions unanswered.

At the state level, foreseeability has been utilized as a bootstrapping device to aid in establishing an act within the state. In *Buckeye Boiler v. Superior Court*¹⁵⁵ for instance, the California Supreme Court found that it would be foreseeable to an out-of-state manufacturer that his products could be resold as used goods and subsequently find their way into California.¹⁵⁶ The foreseeable availability of these secondary markets was said to establish that the manufacturer had engaged in economic activity within the state and thereby had purposefully availed himself of its benefits.¹⁵⁷ Thus, the fact the defendant could foresee that its products might enter the forum state and cause injury there was held to fulfill the *Hanson* test for jurisdiction.¹⁵⁸

Shaffer's positive reference to foreseeability, coupled with its emphasis upon an act within the state, creates confusion as to the extent of the Court's endorsement of the foreseeability criterion. If an act within the state is to be required, foreseeability can relate to that act in one of two ways. First, foreseeability of an effect within the state can be utilized, as in *Buckeye*, to establish the very existence of the act within the state. As noted above, however,¹⁵⁹ *Shaffer* implies the Court will now require

reason to know that it would reach the forum state, could be subjected to that state's jurisdiction in a tort action); *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315 (5th Cir. 1970) (manufacturer who sold products to a retailer, knowing that the retailer would ship the products into Texas, could be subjected to the jurisdiction of the Texas courts); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968) (defendant who set business operations in motion, and who could reasonably have foreseen consequences within Tennessee, was subject to the jurisdiction of that state's courts); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969) (manufacturer who placed products in the stream of commerce, knowing they might be resold to California businesses, was amenable to the jurisdiction of the California courts).

153. The Court remarked: "Moreover, appellants had no reason to expect to be haled before a Delaware court." 97 S. Ct. at 2586.

154. *Id.*

155. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). See note 134 *supra*.

156. *Id.* at 905, 458 P.2d at 66, 80 Cal. Rptr. at 122.

157. *Id.*

158. *Id.* at 907, 458 P.2d at 67, 80 Cal. Rptr. at 123.

159. See notes 142-51 *supra* and accompanying text.

stronger evidence of an act. This makes *Buckeye's* bootstrapping technique for finding an act within the state highly questionable.

A second and more likely interpretation of *Shaffer's* endorsement of the foreseeability criterion is that foreseeability can help to establish purposefulness once an act has been revealed. When a defendant acts for his own benefit, knowing that the consequences of his act may be felt within the forum state, the defendant's awareness of the consequences of his act constitutes a purposeful choice by which he avails himself of the forum's benefits. Once the purposeful act has been thus established, the foreseeability criterion will also aid in establishing that an exercise of jurisdiction over the defendant is fundamentally fair.

C. State Interest

In *Shaffer v. Heitner* the Court made two inconsistent statements regarding state interest as a criterion in determining jurisdiction to adjudicate. In one part of the *Shaffer* opinion, the Court noted that the state's interest in assuring the marketability of property within the state, and in providing a means for the peaceful resolution of disputes concerning such property, would support the exercise of state court jurisdiction.¹⁶⁰ Yet later the Court implied that state interest is merely a choice of law criterion, and has only a marginal impact upon determinations of state court jurisdiction. The Court stated:

[E]ven if Heitner's assessment of the importance of Delaware's interest is accepted, his argument fails to demonstrate that Delaware is a fair forum for this litigation. The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors. But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.¹⁶¹

In determining the fairness of subjecting a nonresident defendant to a state's jurisdiction, the Court has rarely given so little weight to a state's interest. Although since *International Shoe* fairness has been a prerequisite to the exercise of state court jurisdiction, it had largely been assumed when the state had a substantial interest in the litigation.¹⁶² In *Mullane v.*

160. 97 S. Ct. at 2582.

161. *Id.* at 2586 (footnote omitted).

162. In the dissenting portion of his opinion, Mr. Justice Brennan stated that the Supreme Court's earlier decisions in this area "establish that the State's valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction over a given cause of action." *Id.* at 2590. He went on to recognize, however, that state interest alone would not justify an exercise of jurisdiction in all cases. *Id.*

Central Hanover Bank,¹⁶³ a case involving jurisdiction over unknown, nonresident trust beneficiaries, the Court relied heavily upon the state's interest in the litigation. Fairness to the nonresident parties was not emphasized, but rather, the state interest factor seemed all but sufficient in itself to justify an exercise of jurisdiction. The Court stated:

[T]he interest of each State in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.¹⁶⁴

Again in *McGee v. International Life Insurance Co.*,¹⁶⁵ the Court placed considerable weight upon the interests of the state: "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."¹⁶⁶

Yet in *Hanson v. Denckla*,¹⁶⁷ the Court was not responsive to the argument that Florida's interest in the case was a viable jurisdictional criterion. In *Hanson*, the state interest which the Florida parties urged created jurisdiction was that the laws of Florida would be applicable to the controversy and that most of the parties were domiciled in Florida.¹⁶⁸ These considerations, however, are traditionally equated with determining the application of law rather than involving a state interest in providing a forum. Recognizing this, the Court held that a state "does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law."¹⁶⁹

This same language is used in *Shaffer* to de-emphasize state interest as a jurisdictional criterion.¹⁷⁰ In *Hanson*, however, the Court was referring

163. 339 U.S. 306 (1950). See notes 90-92 *supra* and accompanying text.

164. *Id.* at 313.

165. 355 U.S. 220 (1957).

166. *Id.* at 223. For early cases stressing state interest, see *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927).

167. 357 U.S. 235 (1958).

168. *Id.* at 254.

169. *Id.*, cited in *Shaffer v. Heitner*, 97 S. Ct. at 2586. *But see* Mr. Justice Black's dissent in *Hanson*, 357 U.S. at 256, and note that Mr. Justice Brennan joined with Mr. Justice Black in recognizing that choice of law issues and jurisdictional criteria are not identical, but that in the *Hanson* case, state interest would have been a sufficient *jurisdictional* consideration to justify an exercise of state jurisdiction. *Id.* at 258-61. See also *Shaffer*, 97 S. Ct. at 2591 (Brennan, J., concurring and dissenting).

170. 97 S. Ct. at 2586.

to what was clearly a choice of law question. The Florida parties' contentions that convenience and applicability of state law were sufficient to justify jurisdiction¹⁷¹ failed to establish any *substantive* state interest in exercising that jurisdiction. In *Shaffer*, the state interest urged by the plaintiff was not based on choice of law, but rather concerned the substantive interest of the state in regulating the conduct of officers of its own corporations.¹⁷² Such state interests have previously been viewed by the Court as legitimate considerations in determining local jurisdiction.¹⁷³ Therefore, *Shaffer's* reliance upon the *Hanson* language was not entirely accurate. The *Hanson* language did, however, provide a convenient source of authority for the proposition that state interest is primarily a choice of law criterion, and is of limited importance in determinations of jurisdiction. This proposition completely ignores the discussions of state interest in *Mullane* and *McGee*.

The *Shaffer* Court's reliance upon *Hanson* in declaring that state interest is merely relevant to choice of law is little more than a judicial smokescreen designed to disguise a change in policy. The Court's decision that traditional notions of fair play and substantial justice require that the defendant commit some act within the forum state¹⁷⁴ necessitated a reevaluation of the Court's stance on state interest. If state interest alone were jurisdictional, it would be possible for state courts to exercise jurisdiction over nonresidents who had not committed acts within that state. State interest then, while a viable consideration in the days of *McGee* and *Mullane*, will not be a substitute for the required act under *Shaffer*.¹⁷⁵

It is *Mullane* which provides a key to the apparent contradiction in *Shaffer* regarding state interest. *Mullane* was a case of "jurisdiction by necessity."¹⁷⁶ Because the subject property was located within the state and the unknown claimants were scattered throughout the country, it appeared that there was no other forum in which the case could be litigated. The concept of state interest was pressed into service to insure

171. 357 U.S. at 254.

172. 97 S. Ct. at 2586.

173. *Id.* at 2590 (Brennan, J., concurring and dissenting). See also *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927).

174. 97 S. Ct. at 2585-86.

175. *Id.* at 2586.

176. "Jurisdiction by necessity" refers to cases where no adequate alternative forum is available. In *Mullane*, the unknown beneficiaries could have been dispersed among the forty-eight states, with no single state court having the ability to subject all of the parties to its jurisdiction.

that the controversy could be litigated somewhere.¹⁷⁷ The same strategy is apparent in *Shaffer*. The state's interest in the marketability of property located within the state¹⁷⁸ was utilized to augment the concept that anyone claiming property within the state purposefully avails himself of the state's benefits.¹⁷⁹

In disallowing the old forms of in rem jurisdiction, the Court had created a practical problem in the adjudication of traditional true in rem and quasi in rem I proceedings.¹⁸⁰ The fiction that anyone claiming property within a state availed himself of state benefits was too fragile, standing alone, to unequivocally support jurisdiction in many true in rem and quasi in rem I cases. Therefore, the Court provided additional support for an exercise of jurisdiction in the form of the state interest doctrine. The two theories, taken together, are designed to provide justification for the exercise of jurisdiction in most true in rem and quasi in rem I cases where it would be difficult to find another appropriate forum. Finally, the Court further endeavored to assure a state court's ability to hear true in rem and quasi in rem I cases concerning property located within the state by holding that the rule of *Shaffer* does not necessarily apply to cases where property is located within the state and no other forum is available.¹⁸¹

Under *Shaffer*, the state interest doctrine plays a limited role in the exercise of jurisdiction. It will be used to justify personal jurisdiction in cases traditionally adjudicated as true in rem and quasi in rem I actions. In other actions, however, where the doctrine is not essential to support "jurisdiction by necessity," state interest will be significantly reduced in importance and will not, by itself, be determinative of the "fairness" of a particular forum.¹⁸²

D. *The Defendant, the Forum, and the Litigation*

Throughout its opinion in *Shaffer*, the Court repeatedly stressed the

177. *Mullane's* reference to the interest of the state in "providing means to close trusts," 339 U.S. at 313, implies that there would be no "means" to close the trust in *Mullane* if the New York forum were not available. With regard to due process notice requirements, the *Mullane* Court again indicated its desire to provide at least one forum for the litigation, stating that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Id.* at 313-14.

178. 97 S. Ct. at 2582.

179. *Id.*

180. See notes 85-86 *supra* and accompanying text.

181. 97 S. Ct. at 2584 n.37. Despite these safeguards, Mr. Justice Powell did not appear to be convinced that the Court had effectively assured the availability of a forum for all true in rem and quasi in rem I actions. *Id.* at 2586. See note 28 *supra*.

182. See, e.g., 97 S. Ct. at 2586.

relationship between "the defendant, the forum, and the litigation."¹⁸³ This terminology, although new, is totally consistent with earlier expressions of the minimum contacts test relating to nonresident defendants. An examination of the relationship among the defendant, the forum, and the litigation involves an inquiry into three basic component relationships: (1) the relationship between the defendant and the litigation; (2) the relationship between the defendant and the forum; and (3) the relationship between the forum and the litigation.

Since the defendant and the litigation will invariably be alleged to be related, the emphasis of this new terminology cannot be meant to highlight the first component relationship. The second component relationship—between the defendant and the forum—has been so emphasized in *International Shoe* and *Hanson* that the new terminology can hardly add to the importance already attributed to that relationship. The third component relationship—between the forum and the litigation—has also been recognized for many years.¹⁸⁴ It has been embodied in the requirement that the litigation arise from or relate to the defendant's minimum contacts with the forum state. A cause of action arising from an act in Maine cannot ordinarily be litigated in California, even if the defendant has other contacts with California.¹⁸⁵ The litigation must be related to the California contacts thus creating a relationship between the forum and the litigation.

The new phraseology, then, seems only to combine the traditional tests of *International Shoe* and *Hanson* with the test of "arising from or relating to," in a single, concise formulation. The lesson to be learned from this newest formulation of the traditional rules is that all of the essential relationships must be present and examined in their totality to properly determine jurisdiction over nonresident defendants. A relationship between the defendants and the forum will not be sufficient in itself

183. *Id.* at 2580. See generally *id.* at 2571-82.

184. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). See note 97 *supra*. The requirement that the cause of action the plaintiff seeks to litigate in state court arise from or relate to the defendant's minimum contacts with that state implies that the litigation must be related to the forum. *But see Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (holding that state courts could exercise jurisdiction on causes of action not arising from contacts within the state when the defendant's contacts with the state were continuous and substantial, rather than minimal).

185. See *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298 (9th Cir.), *cert. denied*, 419 U.S. 998 (1974) (holding that when an aircraft manufacturer had contacts with the State of California, but the cause of action did not arise from those contacts, the manufacturer was not subject to the jurisdiction of the California courts); *L.D. Reeder Contractors of Ariz. v. Higgins Indus., Inc.*, 265 F.2d 768 (9th Cir. 1959) (holding that when a flooring company had contacts with the State of California, but the cause of action did not arise from those contacts, the manufacturer was not subject to the jurisdiction of the California courts).

if there is no relationship between the forum and the litigation so that the cause of action does not relate to forum contacts. Nor will a relationship between the forum and the litigation be sufficient in itself, as it might have been under the *McGee-Mullane* state interest doctrine. State interest will not apply unless there are also sufficient contacts between the defendant and the forum. In *Shaffer*, although there was an alleged relationship between the forum and the litigation, there was not a sufficient connection between the defendant and the forum. Only one of the tests was satisfied and jurisdiction was denied.¹⁸⁶

E. Consent

The Court implicitly recognized the rule that in the absence of minimum contacts, states may exercise jurisdiction over nonresident defendants if it can be ascertained that they have consented to the jurisdiction of the state.¹⁸⁷ The Court indicated that a state statute "that treats the acceptance of a directorship as consent to jurisdiction in the State" would have provided a proper basis for jurisdiction in *Shaffer*.¹⁸⁸ *Shaffer* therefore allows states to protect significant state interests in areas where minimum contacts might not be found by passing statutes which establish that certain acts by the defendant constitute consent to state court jurisdiction. In light of *Shaffer's* refusal to recognize the implied consent of the directors in this case, states which are insecure about their ability to exercise jurisdiction over such defendants would be well advised to enact express statutes to protect their interests.¹⁸⁹

186. Under this analysis of the meaning of the phrase "the defendant, the forum, and the litigation," the reason for the Court's de-emphasis of the state interest criterion gains still another dimension. While state interest may show that one of the required relationships is present—the relationship between the forum and the litigation—a showing of state interest alone has no bearing whatsoever upon the other necessary part of the equation. There must also be a relationship between the defendant and the forum. Therefore, state interest will never be completely determinative of jurisdiction.

187. 97 S. Ct. at 2586. The Court has long recognized the validity of jurisdiction based upon the consent of the defendant. See generally *Developments, supra* note 60, at 943-45.

188. 97 S. Ct. at 2586. The existence of other such statutes was recognized by the Court without criticism. *Id.* at 2586 n.47. The Court has historically upheld a state's ability to exact the consent of nonresidents to suit within that state through the use of such statutes. See, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927). See note 43 *supra*.

189. Presumably in response to *Shaffer*, Delaware has recently passed a statute which equates the acceptance of a directorship in a Delaware corporation with consent to suit in Delaware. DEL. CODE tit. 10, § 3114 (1978).

Shaffer does not, however, preclude findings of implied consent to justify jurisdiction under the proper circumstances. It is arguable that the Court could have found implied consent under the facts presented.

F. Presence

Presence was one of the earliest devices used by the courts to secure jurisdiction over the person.¹⁹⁰ Jurisdiction based upon presence was a corollary to the state's power over all persons and property located within its boundaries.¹⁹¹ Although in *International Shoe*, the Court recognized that corporate presence was a legal fiction of limited utility,¹⁹² it did not question the practice of states exercising jurisdiction over any individual present within the state.¹⁹³ In fact, by its very language, *International Shoe* encouraged the continuation of jurisdiction based upon the mere presence of the individual.¹⁹⁴

In predicating its ruling upon *International Shoe*, the Court in *Shaffer*¹⁹⁵ perpetuated the rule that the presence of persons within the state would, without more, provide a sufficient basis for an exercise of jurisdiction. However, in stating that the mere presence of property within the state would no longer be sufficient to support jurisdiction,¹⁹⁶ the Court repudiated the conceptual underpinnings upon which the presence doctrine was based.¹⁹⁷ If the state court's inherent territorial power is no longer sufficient to establish jurisdiction over property within the state, it would be only logical to find that the mere presence of persons would also be insufficient.¹⁹⁸

The presence doctrine has occasionally been invoked to justify exercises of jurisdiction which seem fundamentally unfair.¹⁹⁹ Parties have

190. See generally *Developments, supra* note 60, at 937-39.

191. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (holding that as a consequence of the state's exclusive sovereignty over persons and property located within the state, that state's courts have the power to adjudicate matters concerning activities that occur within the state). See notes 34-39 *supra* and accompanying text.

192. 326 U.S. at 316-17.

193. *Id.* at 316.

194. See notes 44-46 *supra* and accompanying text.

195. 97 S. Ct. at 2587.

196. *Id.* at 2582-83.

197. Under *Pennoyer v. Neff*, 95 U.S. 714 (1877), the state's ability to exercise jurisdiction was based upon its territorial power over all persons and property located within its boundaries. *Shaffer*, 97 S. Ct. at 2577. If the power doctrine can no longer support absolute jurisdiction over all property within the state, it theoretically should not be able to support absolute jurisdiction over all persons present within the state.

198. It could be argued, however, that every person who voluntarily enters the state does an act by which he avails himself of the state's benefits and thus subjects himself to the state's jurisdiction.

199. See, e.g., *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (a defendant was served in an airplane passing over Arkansas, and was successfully subjected to the jurisdiction of that state's courts because he was served while "present" in the state); *Nielsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963) (where a nonresident defendant was passing through Minnesota and was served in relation to a cause of action that

been served in airplanes flying over states with which they have no contacts and subjected to state court jurisdiction because they were served while "present" within the state.²⁰⁰ *Shaffer's* concern for the rights and expectations²⁰¹ of the defendant indicates that the Court would disapprove of such exercises of jurisdiction. However, in recognizing the viability of consent to justify jurisdiction over a party who has no minimum contacts with the state,²⁰² the Court has implicitly held that not *all* traditional forms of jurisdiction must be based upon minimum contacts. Until the Court is prepared to apply the minimum contacts standard to jurisdiction based upon presence, domicile and consent, it may fairly be assumed that defendants subjected to jurisdiction under these three theories are still not entitled to the "fair play and substantial justice" accorded to other defendants.²⁰³

V. CONCLUSION

Although *Shaffer v. Heitner* will become known as the case which radically altered in rem jurisdiction, it will have little practical effect upon cases traditionally litigated under the in rem rules. *Shaffer's* real impact will be felt in the area of personal jurisdiction. For those who were not convinced by the language of *Hanson v. Denckla*, *Shaffer* serves as a forceful reminder that the jurisdiction of state courts cannot be expanded beyond certain limits. However, under *Shaffer*, the extent of

arose in another state, the court characterized the defendant's objection to service based upon presence alone as frivolous).

200. See, e.g., *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

201. See 97 S. Ct. at 2585-87.

202. In *Shaffer* the Court found that no minimum contacts existed, but implied that, despite the lack of minimum contacts, consent to suit would have rendered jurisdiction permissible. *Id.* at 2586.

203. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). See notes 44-46 *supra* and accompanying text.

The argument relating to presence can also be related to domicile in some unusual cases. When a party has left his domicile and has not established a new domicile in which he plans to reside indefinitely, he remains a domiciliary of the state he has left behind. *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974). Domicile alone is sufficient to justify the exercise of jurisdiction over an absent domiciliary. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Yet a career soldier, born in Maine, who leaves his home at age eighteen to join the army, could well be considered a domiciliary of Maine thirty years after his departure if he has failed to establish a new domicile. Thus, despite the fact that the soldier may be stationed in Hawaii and may never have returned to Maine, he may still be subjected to suit in Maine if the present domicile rules continue in force.

It seems necessary to have the ability to sue every individual in at least one place. But if minimum contacts cannot be established, and if it does not comport with "traditional notions of fair play and substantial justice" to sue an individual in his technical domicile, perhaps the rule of domicile, like the rules of in rem jurisdiction and presence, should be discarded in unusual and unfair circumstances.

those limits remains unclear. A literal reading of the Court's language would suggest that a physical act within the state is a prerequisite to jurisdiction. Yet, it is doubtful that such an interpretation will prevail in light of the widespread judicial acceptance of fictions adopted by the state courts to fulfill the requirement of an act within the state. The opinion provides no guidelines as to which of these fictions will constitute a sufficient "act." *Shaffer* leaves behind only a vague sensation that an "act" is something more than a foreseeable effect.

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