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Shaffer v. Heitner: A Single Test for State Court Jurisdiction

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Shaffer v. Heitner: A SINGLE TEST FOR STATE COURT JURISDICTION

INTRODUCTION

In the recent decision of *Shaffer v. Heitner,*[1] the United States Supreme Court significantly changed the test for state court jurisdiction. The Court ended the traditional distinction between actions against persons and actions against property. It asserted that all state court jurisdiction must be based on the test of fairness to the defendant, as delineated in *International Shoe Co. v. Washington.*[2]

Prior to the ruling in *Shaffer,* a foreign defendant who did not have sufficient contacts with the forum state was not subject to *in personam* jurisdiction in that state.[3] However, the plaintiff was not without recourse. If the defendant owned property in the forum state, that property could be attached in a *quasi in rem* action, giving the state jurisdiction over that property in answering any claims against the unavailable property owner.[4] The defendant's property was the basis for jurisdiction and the means to satisfy any adverse judgment. There was no concern for the defendant's contacts with the forum state.

The effect of the ruling in *Shaffer* is to prohibit *quasi in rem* actions against property if, after an examination, there are no ties between the defendant property owner, the forum state, and the nature of the litigation. A state no longer has automatic jurisdiction over property within its borders. Instead, it must have jurisdiction over the property owner, and that determination rests in *International Shoe.*[5]

This new focus on the property owner does not preclude the possibility that the presence of the defendant's property in the forum state may have a bearing on the existence of jurisdiction over him. But, the property has significance only in evidencing ties and contacts between the defendant and the forum state.[6] Also, the presence of the defendant's property may have no bear-

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[1] 433 U.S. 186 (1977).

[2] 326 U.S. 310 (1945).

[3] *See* text accompanying notes 24-28 *infra.*

[4] Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

[5] *Id.* at 207-08.

[6] *Id.*

ing on the existence of jurisdiction if that property is unrelated to the cause of action.

In applying this new test to the facts in *Shaffer*, the Supreme Court determined that nonresidents of Delaware were not subject to that state's jurisdiction, even though they owned property within the state. This lack of jurisdiction reflected the absence of any tie between the owners' property contact with the state and the nature of the litigation.[7] Furthermore, the attachment statute, which brought the property before the Delaware court, did not comport with the *International Shoe* test.[8]

I. TRADITIONAL BASIS FOR JURISDICTION

A. Pennoyer v. Neff[9]

Of major significance in *Shaffer* was the demise of the traditional justifications for state jurisdiction to adjudicate. Much of the traditional theory was enumerated by Justice Field in the 100 year old decision of *Pennoyer v. Neff*. Under *Pennoyer* each state had jurisdiction over all persons and all property within its borders. Conversely, no state had jurisdiction over persons and property outside of its borders.[10] However, if a person outside of the state's borders left property within the state, the state had jurisdiction over the property in determining any claims against the unavailable property owner.[11] Such *quasi in rem* actions were direct against the property and indirect against the property owner.[12] Jurisdiction over the property was automatic as long as the property was brought before the court by attachment or sequestration.[13]

One important characteristic of *quasi in rem* actions was that the satisfaction of an adverse judgment was limited to the value

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[7] *Id.* at 213-16.

[8] *Id.* at 213-14.

[9] 95 U.S. 714 (1877). The Court in *Shaffer* overruled *Pennoyer* to the extent that it was inconsistent with its new holding. 433 U.S. at 212 n.39.

[10] 95 U.S. at 722 (1877).

[11] *Id.* at 723.

[12] Shaffer v. Heitner, 433 U.S. 186, 199-200 (1977). As a result, courts did not require personal service on the property owner.

[13] In *Pennoyer* the property was not properly attached. Thus, the court could not proceed *quasi in rem* against the land because it was not before the court. 95 U.S. at 727. Since the ruling in *Pennoyer*, the Supreme Court has made it necessary to augment attachment with the most reasonably available method of personal notice. *See*, Schroeder v. City of New York, 371 U.S. 208 (1962).

of the jurisdictional property.[14] The property owner could appear specially to defend the property, without incurring personal liability, because the action remained against the property.[15]

Of additional significance in *Shaffer* was the divisibility of *quasi in rem* actions into two categories, depending on the relationship the property had to the nature of the litigation.[16] In the first category were actions where the attached property provided the basis for jurisdiction and also was specifically related to the underlying claim. One example of this first category was attachment of mortgaged property in a foreclosure action.[17] The second category embodied situations where the attached property provided only the basis for jurisdiction. The underlying claim had no relation to the attached property.[18] The *quasi in rem* action in *Shaffer* fell within this second category.[19] There the underlying claim was the supposed breach of fiduciary duties by the directors and officers of Greyhound Corp.[20] The sequestered personal stock property of the defendants, the basis of Delaware's assertion of jurisdiction, was wholly unrelated to a determination of any breach of their corporate responsibilities.[21]

B. *From* Pennoyer *to* International Shoe

The history of state court jurisdiction following the *Pennoyer* concepts of power over persons and property was marked by oblique attempts to expand these jurisdictional confines to meet the needs of an increasingly mobile society. As the country developed, it was no longer practical to restrict state jurisdiction to

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[14] Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

[15] Because the action is against the property, *res judicata* does not apply if the plaintiff seeks to bring the suit in another jurisdiction where the owner is subject to *in personam* liability. *See* Bruns Bros. v. Central R.R., 202 F.2d 910 (2d Cir. 1953). Partly due to this reason, some states allow the owner to appear only *in personam* in defense of his property. This prevents a bifurcation of the suit and potential double liability. *See*, DEL. CODE tit. 10, § 366 (1974).

[16] Folk & Moyer, *Sequestration in Delaware, a Constitutional Analysis*, 73 COLUM. L. REV. 749, 782-89 (1973) [hereinafter cited as Folk & Moyer].

[17] Other typical *quasi in rem* actions falling within this first category include clouds on title, enforcement of judicial liens, and establishment and determination of rights in a trust. *Id.* at 782.

[18] *Id.* at 784.

[19] 433 U.S. at 208-09.

[20] *See* text accompanying note 40 *infra*.

[21] 433 U.S. at 213. The Court wrote that the "property is not the subject matter of this litigation, nor is the underlying cause of action related to the property."

persons and property within state boundaries. As a consequence, the courts developed encompassing legal fictions of implied consent and implied presence, thus creating jurisdiction compatible with *Pennoyer*.[22] Similarly, the state legislatures enacted long arm statutes to obtain jurisdictions over nonresident auto drivers who caused damage in the state.[23] In these situations, the state had no real physical power over the foreign defendants, as required under *Pennoyer*, but it was necessary that such defendants be subject to suit for their wrongs.

In response, the Supreme Court in *International Shoe Co. v. Washington*[24] expanded and redefined the conceptual basis for state court jurisdiction. No longer was the focus on physical power over persons within the state's boundaries. Instead, the Court ruled that the jurisdictional test for *in personam* jurisdiction rested on a finding of minimum contacts between the defendant and the forum state.[25] Thus, no state had the power to make "binding a judgment *in personam* against any individual or corporate defendant with which the state ha[d] no contacts ties or relations."[26] Foreign defendants were subject to suit only if they had sufficient contacts with the forum.[27] The Court had little concern for the *Pennoyer* concept of the power of the state.[28] The rationale for this new ruling was based on expanded notions of due process fairness.[29]

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[22] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930). *See*, Kurtland, *The Supreme Court, The Due Process Clause and In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958).

[23] "The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in states where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of territorial limits on jurisdictional power." Shaffer v. Heitner, 433 U.S. 186, 202 (1977). *See*, Hess v. Pawloski, 274 U.S. 352 (1927).

[24] 326 U.S. 310 (1945).

[25] *Id.* at 316.

[26] *Id.* at 319.

[27] *See generally*, McGee v. International Life Ins. Co., 255 U.S. 220, 223 (1957) (Texas life insurance company subject to suit in California even though its only contact with the state was a policy with a California resident); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969) (The Court said that jurisdiction reflected a balancing of inconveniences to the nonresident defendant versus the interests of the state and the local plaintiff); Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (Parts manufacturer was liable in Illinois because it was inferrable that products which incorporated its parts were used in Illinois).

[28] 326 U.S. at 316.

[29] The Court in *International Shoe* wrote:

Historically the jurisdiction of courts to render judgment *in personam* is

One major aspect of the old *Pennoyer* rationale which remained untouched by the *International Shoe* ruling was the state's jurisdictional power over property within its borders. The Court retained the old premise that *quasi in rem* actions were against property and not the property owner. If the property law lay within the state it was subject to attachment and sale to answer any claim against the property owner. There was no concern for the property owner's minimum contacts with the forum state, even though he may have lacked such contacts. One judge recently referred to this situation as an "irrational bifurcation of *International Shoe.*"[30]

The continued validity of *quasi in rem* actions against property often resulted in great unfairness to the property owner. The injustice was most visible in two situations. First, if the property was intangible, its situs was often arbitrarily attached to the forum state through the use of legal fictions. Such fictions usually operated without the knowledge or control of the property owner. An illustrative fiction was the *Harris v. Balk* doctrine[31] which allowed a creditor's debt to be attached wherever the debtor could be served. A similarly fetching situation occurred in *Shaffer v. Heitner.* There a Delaware statute placed the situs of all stock in Delaware corporations in Delaware,[32] regardless of the location of the stock certificate or stockholder's domicile. The remaining states place situs where the stock certificate lies.[33] These varying

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> grounded on their de facto power over the defendant's person . . . . But now that the *capis ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts . . . .

326 U.S. at 315.

[30] Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1130, 1132-33 (3d Cir. 1976) (Gibbons, J., concurring).

[31] 198 U.S. 215 (1905). In *Harris,* Harris and Balk were residents of North Carolina. Epstein was a resident of Maryland. Epstein had a claim against Balk but had no way to serve Balk in Maryland. However, Epstein was able to obtain jurisdiction by attaching an unrelated debt which Harris owed to Balk. The attachment occurred when Harris was present in Maryland (debt attaches to the debtor). Later, Balk was prevented from collecting the debt owed to him by Harris because it had already been used to satisfy Epstein's claim against Balk. Such a ruling is unlikely under *Shaffer* because the focus of jurisdiction in Maryland would be on Balk, not the location of the debt (Balk's property), and Balk had no other contacts with the forum state. *See,* 433 U.S. at 212 n.39.

[32] *See* text accompanying notes 62-64 *infra.*

[33] *Id.*

rules could have resulted in attachment of the stock in two jurisdictions at once.[34]

The other injustice occurred in the use of *quasi in rem* actions of the second category, where the attached property was not the subject of the controversy. Fairness to the property owner was often subverted because of the lack of any meaningful nexus between the basis for jurisdiction (the presence of property) and the controversy. If the property was attachable in the state, the owner was subject to suit to the extent of the value of the property.[35] The nature of the suit was not restricted to obligations arising out of the property. Thus, if Jones lived in state B and owned property in state C, another resident of state B conceivably could sue Jones in state C on a matter unrelated to the attached property.

II. *Shaffer v. Heitner*

Heitner, a nonresident of Delaware, owned one share of stock in Greyhound Corporation.[36] Greyhound was incorporated in Delaware but had its principal place of business in Arizona.[37] In 1974 Heitner filed a stockholder's derivative suit in Delaware[38] against Greyhound,[39] a subsidiary, and twenty-eight present and former directors and officers of Greyhound. The complaint alleged, in part, that the directors and officers were liable individually for breaching their fiduciary duties. The breach occurred when they directed the corporation in activities which caused the corporation to become subject to criminal fines and civil damages.[40]

None of the directors or officers was a resident of Delaware, nor were any of them at any time physically within Delaware.[41]

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[34] Note, *U.S. Industries Inc. v. Gregg*, 38 U. PITT. L. REV. 789, 806-07 (1977).

[35] *See* text accompanying notes 11-15 *supra*.

[36] Shaffer v. Heitner, 433 U.S. 186, 189 (1977).

[37] *Id.*

[38] *Id.* The action was brought in the Court of Chancery, New Castle County, Delaware on May 22, 1974.

[39] In a stockholder's derivative suit, the corporation is a named defendant, resulting from its failure to assert the claim on its own behalf. This failure makes the corporation an indispensable party. *See*, Geer v. Mathieson Alkali Works, 190 U.S. 428 (1903).

[40] Greyhound was found guilty in a criminal suit of a violation of the Sherman Antitrust Act. The court levied fines totalling $600,000 against Greyhound and a subsidiary, Greyhound Lines. United States v. Greyhound Corp., 363 F. Supp. 525 (N.D. Ill. 1973), *aff'd*, 508 F.2d 529 (7th Cir. 1974). In a related civil suit, a judgment of $13,146,090, plus attorneys' fees, was entered against Greyhound. Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977).

[41] The majority wrote that Heitner "did not allege and does not now claim that the appellants have ever set foot in Delaware." 433 U.S. at 213.

However, twenty-one of them did own stock in Greyhound Corporation, and, under Delaware law, all stock issued by a Delaware corporation had its ownership situs in that state.[42] Based on this presence of property in Delaware, Heitner successfully moved to have the Greyhound stock of these twenty-one defendants sequestered.[43] Under the statute, if the defendants had wished to defend their property they could have done so only by making a general appearance in Delaware.[44]

The twenty-one defendants did not attempt to defend on the merits of the controversy.[45] Instead, they appeared specially in a Delaware Court of Chancery and moved to vacate the sequestration of their stock. They contended that Delaware did not have jurisdiction to adjudicate the controversy because they, the defendants, did not have personal contacts with the state, as required under the test of *International Shoe Co. v. Washington.*[46]

Both the Court of Chancery and the Delaware Supreme Court[47] rejected the defendants' jurisdictional attack. Each court ruled that Heitner had instituted a *quasi in rem* action against the sequestered stock property.[48] Thus, the fact that Delaware did not have jurisdiction over the defendants individually was irrelevant because the state had proper jurisdiction over their property.[49]

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[42] DEL. CODE tit. 8, § 169 (1974). *See,* text accompanying notes 62-66 *infra.*

[43] DEL. CODE tit. 10 § 366 (1974). Sequestration in Delaware is the equitable counterpart to attachment at law. Both may be used to obtain *quasi in rem* or *in rem* jurisdiction. *See,* Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 344, 117 A.2d 365, 367 (1955).

[44] Section 366 provided if the defendant did not appear *in personam* the court had power to use the sequestered property in satisfaction of a default judgment. If the defendant did appear, then the judgment was personal and not limited to the value of the sequestered property. *See generally,* Folk and Moyer, *supra* note 16, at 789-94.

[45] Since the remaining seven directors and officers owned no property in Delaware the actions against them were apparently dismissed for failure to secure jurisdiction. 433 U.S. at 214.

[46] They also contended that the sequestration was *ex parte,* denying them procedural due process. *See,* Fuentes v. Shevin, 407 U.S. 67 (1972) (the defendant had to receive notice and a right to be heard prior to any taking of her property). Here, however, the Delaware Supreme Court held that the sequestration was an extraordinary situation which justified the *ex parte* taking. Greyhound v. Heitner, 361 A.2d 225, 231 (Del. 1977). *See,* Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969) (extraordinary situations may justify a taking prior to notice and hearing).

[47] *See,* Greyhound v. Heitner, 361 A.2d 225, 229 (Del. 1977).

[48] 361 A.2d at 229.

[49] The Delaware Supreme Court wrote:

There are significant constitutional questions at issue here but we say at once

On appeal, the United States Supreme Court reversed. The Court applied the jurisdictional test of *International Shoe Co. v. Washington,* as the defendants had urged. It rationalized its ruling on the newly adopted premise that all actions *quasi in rem* were really actions to determine *persons'* interests in property.[50] Such actions were against the property owners not the property. Since the action in *Shaffer* was against the officers and directors and not the stock, jurisdiction existed only if Delaware could have exerted jurisdiction over them personally. The effect of this holding shifted the focus away from the state's power over the nonresident's property in the state to a determination of sufficient ties among the defendant, the state, and the litigation.[51] The Court in *Shaffer* emphasized, contrary to traditional theory, that the property owner was the real party in interest, and jurisdiction over his interests in property within the state was permissible only when he could be brought properly before the court.

Since Delaware had been concerned only with the presence of the defendants' property when it took jurisdiction,[52] it had acted, said the Court, contrary to the *International Shoe* test. Furthermore, in re-examining the facts in light of *International Shoe,* the Court did not find sufficient ties among the defendants, the state, and the litigation to permit the controversy to be tried in Delaware.[53]

III. ANALYSIS OF THE HOLDING IN *Shaffer v. Heitner*

A. *Narrow Approaches Under Delaware Law*

Considering the long case history which the decision in

> that we do not deem the rule in *International Shoe* to be one . . . . The reason of course, is that the jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of the capital stock here, not on prior contacts by the defendants with the forum.

Id.

[50] 433 U.S. at 207. The Court did not rule on the constitutionality of the defendants' claim that the sequestration was a violation of procedural due process. *See* note 46 *supra.* For an analysis of potential procedural due process issues in attachment to gain jurisdiction, see Note, *Quasi In Rem Jurisdiction and Due Process Requirements,* 82 YALE L. REV. 1023 (1973).

[51] 433 U.S. at 204. This decision followed several recent lower court opinions. *See,* U.S. Indus. v. Gregg, 540 F.2d 142 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1130 (3d Cir. 1976) (Gibbons, J., concurring).

[52] 433 U.S. at 213. "The Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants' property in Delaware."

[53] *Id.* at 213-16. *But see,* text accompanying notes 94-95 *infra.*

Shaffer overturned, a serious question arises as to whether the Court needed to take such pervasive action. It is maintainable that narrower avenues could have brought equal results.[54]

1. The Nature of Delaware's Sequestration Statute

In the first instance, the Delaware courts rejected the defendants' jurisdictional challenge because the action was *quasi in rem*, due to the sequestration of the defendants' stock under title 10, section 366 of the Delaware Code.[55] The Supreme Court in *Shaffer* accepted the *quasi in rem* label and went on to attack the general soundness of such actions.[56] However, section 366 resulted in litigation which lacked fundamental characteristics of traditional *quasi in rem* actions.

In describing the general nature of *quasi in rem* actions, Justice Marshall in *Shaffer* wrote that the judgment in such suits was "limited to the property that supports jurisdiction and does not impose a personal liability on the property owner since he is not before the court."[57] Section 366 had a quite different effect. The statute did not limit judgments to the value of the property because the owner could defend his property only by submitting to full *in personam* liability.[58] It is significant that in its earlier Jurisdictional Statement the Court emphasized that section 366 was an assertion of *in personam* jurisdiction, causing *International Shoe* to control.[59] Furthermore, the Court suggested that the Delaware statute was not a legitimate exercise of *quasi in rem* jurisdiction because it did not afford the owner of the property an unconditional opportunity to defend the property.[60]

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[54] Because jurisdiction involves substantive due process issues the Supreme Court normally refrained from making broad rulings when narrower avenues existed. *See*, Ashwander v. Valley Authority, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

[55] DEL. CODE tit. 10, § 366 (1974).

[56] 433 U.S. at 196.

[57] *Id.* at 199.

[58] It is true that in the initial sense section 366 is *quasi in rem* because jurisdiction rests on the sequestration of the property, not control over the defendant. But any defense of the property is not *quasi in rem*.

[59] Shaffer v. Heitner, 429 U.S. 813, Jurisdictional Statement, No. 75 1812, at 13 (October term, 1976) (not for general publication) [hereinafter cited as Jurisdictional Statement]. Even in the Court's full opinion it recognized Delaware's motive by writing, "the express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance." 433 U.S. at 209.

[60] The Court wrote that "if Delaware were to exercise legitimate *quasi in rem* jurisdiction it would necessarily afford the owner of the property an unconditional opportunity

Thus, the Court could have decided *Shaffer* by simply ruling section 366 unconstitutional because it would force the defendants to submit to *in personam* jurisdiction in contravention to the *International Shoe* due process test.

Perhaps one reason the Court did not base its final holding in *Shaffer* on section 366 was an attempt to avoid a labeling process. The Court had ruled previously that labeling an action *in personam* or *in rem* was an elusive and confused undertaking.[61] But, if this reason were true, the Court was inconsistent in its approach when it ventured in its Jurisdictional Statement to label section 366 as fundamentally *in personam*.

2. Delaware's Situs of Corporate Stock Statute

If the Court had wished to avoid labeling the action *in personam*, it still had one other narrow avenue which it might have used. Under the traditional concept of *quasi in rem* actions, Delaware gained jurisdiction by sequestering stock property which was located within its borders. However, the stock property, an intangible asset,[62] had its situs in Delaware only by virtue of title 8, section 169 of the Delaware Code.[63] Section 169 provided that Delaware was the situs of all stock in corporations formed in Delaware. This provision was contrary to U.C.C. 8-317(1)[64] which provided that the stock certificate was the actual evidence of the stock, and attachment occurred only when the certificate actually was seized. Thus, the defendants were subject to suit in Delaware and also in whatever state the certificates were located.

Because of this inconsistency, section 169 may have denied the defendants due process of law.[65] If section 169 were unconstitutional, Delaware would have had no basis for jurisdiction because the property would not have been within its borders either

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to be heard and would limit any judgment in the proceedings to the property involved." Jurisdictional Statement, *supra* note 59, at 16.

[61] In Mullane v. Central Hanover Bank and Trust Co., the Court would not permit due process to depend on classifications of the action as *in personam* or *in rem*. 338 U.S. 306, 312 (1950).

[62] Folk & Moyer, *supra* note 16, at 788.

[63] DEL. CODE tit. 8, § 169 (1974). The stock certificates were physically located outside of Delaware. Shaffer v. Heitner, 433 U.S. 186, 192 (1977).

[64] "No attachment or levy upon a security or any share or other interest . . . shall be valid until the security is actually seized . . . ." *See*, Folk & Moyer, *supra* note 16, at 788 n.221.

[65] Jurisdictional Statement, *supra* note 59, at 16.

physically or by statutory fiction. Again, the Court recognized this potential avenue in its Jurisdictional Statement.[66]

B. *Contrasting Views of the* International Shoe *Elements of Fairness in Actions Involving Property*

1. The Majority Opinion in *Shaffer v. Heitner*

Of major significance in the majority opinion was the conclusion that *quasi in rem* actions could no longer be maintained by a simple attachment of property within the forum state. The Court refused to accept the traditional premise that the action was against the land and not the landowner.[67] Since the property owner was the real party in interest, jurisdiction over him could result only if he were sued on matters which related directly to his contacts, if any, with the forum state.[68] Such a view was realistic and fair under the *International Shoe* test.

The majority did recognize that in some situations the litigation might concern the defendant's property in the forum state. In that case the property would be significant in evidencing a tie between the defendant's contacts with the state and the nature of the litigation. However, the presence of the property would be only *one* factor supporting jurisdiction,[69] making the action unlike traditional *quasi in rem* actions where the presence of the property was the *sole* factor.

Since the presence of the defendant's property was only one factor, the majority suggested other factors relating to property which might have a bearing on the existence of jurisdiction. Among these considerations were the defendant's reasonable expectancy, the state's interest in the marketability of its property, the location of property records and witnesses, and the interest of the state in resolving disputes concerning its citizens.[70] By raising these factors, the Court demonstrated the many variables that might go into a determination of jurisdiction.

However, the Court did note that the presence of the defen-

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[66] *Id.*

[67] "We think the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as in personam." 433 U.S. at 206.

[68] *Id.* at 207.

[69] *Id.* at 208.

[70] *Id.*

dant's property in the forum state would be an overwhelming factor supporting jurisdiction over the defendant where the litigation involved that property.[71] Conversely, the property would have little significance in evidencing ties where that property was unrelated to the underlying claim.[72] The majority test for jurisdiction over the defendant included not only the defendant's contacts with the forum state, but how, if at all, those contacts related to the litigation.[73] Thus, the Court effectively reshaped the *International Shoe* test by emphasizing a three-cornered evaluation; the defendant, the forum, and the underlying claim must all interrelate. Once such a potentially lengthy determination is made, the forum state has full *in personam* jurisdiction over the defendant.[74]

2. The Concurring Opinions

In contrast to the majority approach were the concurring opinions of Justices Stevens and Powell. Justice Stevens hypothesized that fairness did not necessarily result from a showing of ties between the defendant, the forum, and the litigation.[75] In exemplary cases where the defendant drives through the forum state, opens a bank account, or purchases real estate,[76] Justice Stevens believed it was fair to maintain jurisdiction over the defendant because the defendant could be charged with *expecting* that his activities would subject him to potential liability.[77] If a nonresident accepted the benefits of the forum state he would be charged with assuming concomitant obligations.

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[71] *Id.*

[72] *Id.* at 213.

[73] *Id.* at 208-09.

[74] *Id.* at 203-04.

[75] *Id.* at 217 (Steven, J., concurring).

[76] *Id.*

[77] In some respects Justice Stevens' opinion followed a theory of implied consent expressed in dicta in Ownbey v. Morgan, 256 U.S. 94 (1921). There the Court theorized that if the defendant left property in a state and then absented himself from that state, the state then had jurisdiction over such property in answering all claims against the absent defendant. It was said that the defendant gave his consent *ex necessitate* to such potential liability against his property.

The majority in *Shaffer* did make negative reference to *Ownbey* but it is unclear whether the Court was referring to this aspect of the decision or the procedural question on which the case turned. 433 U.S. at 194 n.10. In U.S. Indus. v. Gregg, 540 F.2d 142, 153 (3d Cir. 1976) the court refused to support the consent *ex necessitate* concept as the sole basis for jurisdiction because it was only dicta.

Expectancy was also an important consideration in the majority opinion. But the majority did not limit the jurisdictional test solely to a finding of expectancy. It went on to suggest other factors which might have a bearing on the sufficiency of ties between the defendant, the forum state, and the litigation.[78] For Stevens, however, a finding of expectancy embodied due process fairness to the property owner.[79] Since expectancy can be attributed to anyone who knowingly leaves property in another state, there was very little difference between this approach and traditional *quasi in rem* jurisdiction. In *quasi in rem* actions, if the property was located within the state, the nonresident was subject to suit.[80] Under Stevens' hypothesis, if the property was in the state, the nonresident property owner could be charged with an expectancy and was therefore subject to its jurisdiction. The only exception would be where intangible property was located arbitrarily in the forum state.

The concurrence was also contrary to the majority opinion in that Stevens did not limit the imputed expectancy of the defendant to obligations arising out of the defendant's contacts with the forum state.[81] Since knowingly possessing property in another state *always* creates contacts between the defendant and that state, it is essential under the *International Shoe* test that potential liability be limited to obligations arising out of the ownership of the property. This factor the majority repeatedly stressed. If not limited, the charge of expectancy would foster the same abuses that existed under *quasi in rem* actions of the second category; the property owner could be held liable on matters unrelated to his contacts with the forum state.

It is noteworthy that under both the majority and Stevens' views no property owner could be charged with expecting suit in another state if he did not know that his property was within that state. Thus, Stevens was able to concur in the judgment because the defendants' stock property was present in Delaware only by

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[78] *See* text accompanying note 70 *supra*.

[79] "I would also not read it [the majority opinion] as invalidating other long accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and also that their local activities might subject them to suit." 433 U.S. at 217, 218-19 (Stevens, J., concurring).

[80] *See* text accompanying note 11 *supra*.

[81] Stevens made no mention of any requirement other than a tie between the state and the defendant which created the expectancy. 433 U.S. at 217 (Stevens, J., concurring).

the arbitrary workings of section 169. The defendants could not be charged with knowledge of the quirks of Delaware situs fictions when they purchased stock on the open market.[82]

However, if the facts in *Shaffer* had been changed slightly it is unlikely that Stevens would have concurred. If the defendants had left the stock certificates in Delaware, under Stevens' approach the defendants could have been charged with expecting suit because they knowingly left their property in the state. Thus, the stock could have been applied to satisfy any adverse judgment for breach of their unrelated fiduciary duties. Under the majority view, the location of the stock certificates would not have changed the results. There still would have been no tie between the defendants' stock (their only contact with Delaware) and the controversy. The fact that there was no connection between the defendants' contacts with Delaware and the underlying claim was a controlling fact for the majority.

Justice Powell's concurrence[83] was similar in effect to Justice Stevens' approach. Powell reserved judgment on the necessity of meeting the *International Shoe* test for a nonresident, if that person owned property which was indisputably and permanently located in the forum state.[84] Powell specifically supported the majority shift in focus to a determination of fairness over the property owner.[85] But, Powell, like Stevens, did not view a finding of ties between the defendant, the forum state, and the litigation as the only method for achieving that fairness.[86] Powell asserted

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[82] *Id.* Lack of expectancy also would flaw jurisdiction under the *Harris v. Balk* doctrine. *See* note 31 *supra.*

[83] *Id.* at 217 (Powell, J., concurring).

[84] Powell wrote:

> I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property.

Id.

[85] "I agree that the principles of *International Shoe Co. v. Washington* . . . should be extended to govern assertions of *in rem* as well as *in personam* jurisdiction . . . ." 433 U.S. at 217 (Powell, J., concurring).

[86] One commentator has suggested recently that not only are *quasi in rem* actions involving real property fair but, in many instances, such actions are fairer than the *International Shoe* standard. He reasoned that a nonresident property owner had only a casual interest in the forum state arising from his property there. Thus, under the traditional rules of actions against property he was only subject to liability up to the value of

that his test, based on the permanence of the property, was sufficiently fair to the property owner.[87]

3. Which Standard to Use

Because both the majority and concurring views often would achieve the same results,[88] it is essential to examine their methods of determining jurisdiction. The majority directed the jurisdictional determination toward a fluid process involving a potentially large number of considerations. The concurrences were more mechanical, resulting in a simpler approach to the jurisdictional question. Simplicity is particularly beneficial because the determination of jurisdiction is, after all, a threshold issue.[89] It is also true that the reservations expressed in the concurrences concerned fact situations which were not before the Court in *Shaffer*.[90]

However, both concurrences, in their simplicity, failed to consider restrictions on the jurisdictional test which the majority found central. The jurisdictional test, under the majority view, centered on a weighing of significant factors, as they related to ties among the defendant, the forum state, and the litigation. A finding of such ties necessarily resulted in a limitation on jurisdiction to obligations arising out of the defendant's contacts with the forum state.[91] The concurrences failed to make any such limitations. Since the Court held that the *International Shoe* test is the only test for state court jurisdiction, and since the majority

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his property contact. Because he did have some contact with the state, it was fair to hold him accountable. But it was not fair to make him liable personally. *See*, Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 627-28 (1977).

[87] "In the case of real property, in particular, preservation of the common law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without a significant cost to 'traditional notions of fair play and substantial justice.'" 433 U.S. at 217 (Powell, J., concurring).

However, Powell, like Stevens, made no mention of restrictions on liability to obligations arising out of the owner's contacts with the state. *See* text accompanying note 81 *supra*.

[88] 433 U.S. at 207. The majority wrote that "it would be unusual for the state where the property is located not to have jurisdiction."

[89] Adjudication of the merits cannot proceed if the state has no jurisdiction over the parties. *E.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 314 (1945).

[90] Powell specifically reserved judgment on types of property other than that involved in *Shaffer*. 433 U.S. at 127 (Powell, J., concurring). Stevens was unsure as to the potentially broad reach of the holding. 433 U.S. at 217 (Stevens, J., concurring).

[91] *See* text accompanying notes 71-74 *supra*.

stressed that the defendant's contacts must relate to the litigation, not considering these limitations would result in an incomplete jurisdictional test.[92] Furthermore, the Court held previously that it will not consider simplifying the jurisdictional test for the sake of judicial convenience.[93] Consequently, a finding of ties between the defendant, the forum state, and the nature of the litigation is the definitive test for all assertions of state court jurisdiction.

C. *Application of the* International Shoe *Test to the Facts in* Shaffer

Under *International Shoe,* the majority established that the defendants' sequestered stock property did not evidence sufficient contacts between the defendants and Delaware in regard to the fiduciary breach (the underlying claim). The stock was unrelated. However, Justice Brennan, concurring in part and dissenting in part,[94] strongly disagreed with the majority's failure to find, on reexamination, other ties between the defendants and Delaware concerning these fiduciary duties owed to Greyhound. Brennan viewed as a sufficient contact the directors' association with a corporation which existed solely by the grace of Delaware law.[95]

In contrast, the majority found determinative the failure of Delaware to assert, through statutory enactment, its power to regulate corporate fiduciary responsibilities.[96] This argument infers that since Delaware did not take the initiative to assert legislatively the full degree of state jurisdiction compatible with the Constitution,[97] it is unconstitutional for it to assume otherwise

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[92] 433 U.S. at 207, 212.

[93] *Id.* at 207 n.23. *See also,* Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1130 (3d Cir. 1976) (Gibbons, J., concurring). Judge Gibbons wrote, "[a]lthough it can be argued that the content of constitutional process due a litigant defending title to property will vary from that due a litigant defending himself from liability *in personam,* there is no reason to believe the Supreme Court presently recognizes such a distinction." 530 F.2d at 1133. *But see,* O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 997 (E.D.N.Y. 1977). Then the Court, in a decision following *Shaffer,* held that the kind of jurisdiction sought (*in rem, quasi in rem,* or *in personam*) was a significant factor in the determination of jurisdiction. This decision wrongly implied that the test of fairness varies in intensity whether the action is brought against property or person. The action always must be fair to the property owner, as delineated in *International Shoe.*

[94] 433 U.S. at 219. (Brennan, J., concurring in part and dissenting in part).

[95] *Id.*

[96] 433 U.S. at 214.

[97] States need not assert jurisdiction to the full extent permissible under the Constitution. 433 U.S. at 219, 226-27 (Brennan, J., concurring in part and dissenting in part).

constitutional jurisdiction beyond the scope of its jurisdictional statutes.

IV. Effects of the Court's Holding

A. *Actions Against Property*

Even though *International Shoe* is now the basis for all assertions of state court jurisdiction, actions may still be brought under the traditional *quasi in rem* terminology. However, an action against property must be examined anew under the *International Shoe* test.[98] Thus, one may bring an action *quasi in rem* against property, provided there is jurisdiction over the property owner.[99]

Despite this possibility, a serious question arises as to the utility, in most instances, of bringing the action against the property. If the state must base jurisdiction on the *International Shoe* test, it ordinarily would have *in personam* jurisdiction over the defendant.[100] There would be no restrictions on the extent of the remedy. If one brought an action *quasi in rem* against the property, the state would still have to have full *in personam* jurisdiction over the owner. But, because the action was *quasi in rem,* this could result in a judgment limited to the attached property because the plaintiff elected a limited remedy.

One noteworthy exception to this analysis would be a divorce proceeding where the court is adjudicating status. In a recent state court decision following *Shaffer,* the court held that a divorce action, where the wife was not subject to *in personam* jurisdiction, was still maintainable *in rem.*[101] Whether the state had jurisdiction depended solely on *International Shoe.* But, the state met the test because it had a vested interest in protecting its citizens (the husband) and adjudicating the marriage status created therein.[102] If the action had been brought *in personam*

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[98] O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 997 (E.D.N.Y. 1977).

[99] 443 U.S. at 208. In dicta the Court said: "It appears, therefore, that jurisdiction over many types of actions which now are *or might be* brought *in rem* would not be affected by a holding that any assertion of state court jurisdiction must satisfy the *International Shoe* standard." (emphasis added). *See,* O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 997 (E.D.N.Y. 1977); In re Rinderknecht, 367 N.W.2d 1128 (Ind. App. 1977).

[100] Shaffer v. Heitner, 433 U.S. 186, 203, 213 (1977).

[101] In re Rinderknecht, 367 N.W.2d 1128, 1134 (Ind. App. 1977).

[102] Under the *International Shoe* test there are situations where the vested interest of the state in protecting its citizens is the dominant factor. This is an example of adjudica-

against the wife the state would have lacked jurisdiction because she had no contacts with the state.[103]

B. *Intangible Property as a Factor in the Jurisdictional Test*

The problems with attaching situs to intangible property have not been solved completely by the ruling in *Shaffer*. The attachment of situs to intangible property will continue to be important simply because the defendant's property within the forum may be a significant factor in the jurisdictional test. One example is the role the intangible stock property played in *Shaffer*. The defendants' stock was still located in Delaware due to section 169,[104] and since the stock was unrelated to the underlying claim, it was not a significant factor in the jurisdictional determination.[105] But, there are conceivable situations where section 169 could be a crucial factor in the determination of jurisdiction. One example might be where a dispute arose over control of stock in a Delaware corporation. If Delaware could exert a strong interest in regulating its corporate securities,[106] jurisdiction might lie in that state because all the defendants had contacts with Delaware concerning the nature of the controversy.

C. *Colorado's Long Arm Statute*

One very real consequence of *Shaffer* is its effect on state attachment and long arm statutes. In *Shaffer*, section 366 was unconstitutional because it provided for jurisdiction over prop-

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tion of status. In such situations the state must provide a forum because one would not exist otherwise. 433 U.S. at 208 n.30. *But see*, Traynor, *Is This Conflict Really Necessary*, 37 TEX. L. REV. 657, 661 (1959).

[103] In re Rincderknecht, 367 N.W.2d, 1128, 1135 (Ind. App. 1977).

[104] Nowhere does the majority specifically state that section 169 is unconstitutional. Under similar facts in U.S. Indus. v. Gregg, 540 F.2d 143, 155 (3d Cir. 1976) the court did not find section 169 unconstitutional. In fact, it used section 169 as a potential factor in the *International Shoe* test.

[105] The Court in *Shaffer* wrote:

> The Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence [§ 169] of appellants' property in Delaware. Yet that property is not the subject matter of this litigation, nor is the underlying cause of action related to the property. Appellants' holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants. If it exists the jurisdiction must have some other foundation.

433 U.S. at 213.

[106] At 219 (Brennan, J., concurring in part and dissenting in part).

[107] At the beginning of the opinion the majority wrote that the controversy "concerns

erty in disregard of any test of fairness to the property owner.[107] Since the lack of fairness in section 366 was a constitutional issue, the holding necessarily affects similar statutes in the remaining forty-nine states.[108]

Colorado's long arm statute provides that the ownership of real property in the state subjects the owner, without further consideration, to the *in personam* jurisdiction of the state.[109] Under *Shaffer* this provision lacks constitutional muster because, like section 366, it makes no provision for a weighing of other factors. As the majority in *Shaffer* noted, there may be significant factors beyond the mere physical presence of the defendants' property which have a direct bearing on the existence of jurisdiction.[110] Even though the Colorado provision often may achieve the same results, its conceptual framework is contrary to the spirit of *Shaffer*.[111] It is traditionally *quasi in rem* because the presence of property and not the defendant's contacts determine jurisdiction.

D. *Jurisdiction to Attach as Security: An Exception*

One recent decision following *Shaffer* has made a significant exception to the applicability of the *International Shoe* test in the attachment of property. Applying dicta in *Shaffer*, a federal district court in *Carolina Power & Light Co. v. Uranet*[112] permitted the attachment of property in California even though that state did not have jurisdiction over the property owners. However, the property was attached only as security for suit in another state. The property was not used as the basis for jurisdiction to adjudi-

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the constitutionality of a Delaware statute [section 366] that allows a court of that State to take property of the defendant that happens to be located in Delaware." 433 U.S. at 189. The Court did not specifically state that section 366 was unconstitutional but this language combined with the broad ruling in *Shaffer* makes this conclusion unavoidable. If it were not unconstitutional, Delaware could continue to sequester property within its borders without regard for the *International Shoe* test.

[108] 433 U.S. at 219 (Brennan, J., concurring in part and dissenting in part).

[109] COLO. REV. STAT. § 13-1-124(c) (1973). "Engaging in any act enumerated in this statute, whether or not a resident of the state of Colorado . . . submits such person . . . to the jurisdiction of the courts of this state concerning any cause of action arising from . . . (c) The ownership, use or possession of any real estate situated in the state . . . ."

It is noteworthy that the statute restricts actions to obligations arising out of the property owner's contact. In this sense the statute is in keeping with the majority in *Shaffer*. *See* text accompanying notes 71-74 *supra*.

[110] *See* text accompanying note 70 *supra*.

[111] *See* text accompanying notes 71-74 *supra*.

[112] ___ F. Supp. ___, (N.D. Cal. 1977) (46 U.S.L.W. 2194).

cate the merits of a controversy in California and therefore the *International Shoe* test did not apply.

The majority in *Shaffer* wrote: "A state in which the property is located should have jurisdiction to attach the property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe.*"[113] The effect of this proviso was to recognize a distinction between jurisdiction to adjudicate the merits and jurisdiction to attach property as security for a judgment in another state on the merits. The requirements of this jurisdiction to attach property as security were, according to the decision in *Carolina Light,* (1) The presence of the property in the security state should not be fortuitous, (2) the attachment comport with due process procedure, and (3) the Full Faith and Credit Clause could not otherwise achieve the same results.[114]

The potential value of this attachment device is significant because it assures at least some satisfaction of judgment, like traditional *quasi in rem* actions, while still requiring a fair forum to adjudicate the merits. The only negative aspect in the use of such an attachment procedure would be the bifurcation of the suit.

PROSPECTIVE

With the demise of *Pennoyer v. Neff,* all assertions of state court jurisdiction are now based on fairness to the defendant. However, within the concepts of due process fairness remain many of the vestiges of the old power of the state theory. For example, domicile, residence, and presence, which automatically create jurisdiction over the defendant and which are based on the power of the state, are incorporated into the *International Shoe* test. Several commentators have suggested that these automatic determinations are harmful to the spirit of the fairness because fairness should not be so mechanical.[115] It follows from *Shaffer*

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[113] 433 U.S. at 210.

[114] ___ F. Supp. ___, (N.D. Cal. 1977) (46 U.S.L.W. 2194). In *Carolina Light* the suit was in arbitration and the Full Faith and Credit Clause would not apply to any award.

[115] *See generally,* Folk & Moyer, *supra* note 16.

[116] Presence of the defendant has always been sufficient in itself to create jurisdiction. Although presence does promote "an orderly administration of the laws", International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945), there are situations where presence alone is not fair to the defendant. The situation in Grace v. MacArthur, 170 F. Supp. 442

that if jurisdiction is no longer fair when it is based on a sole determination of the presence of property, then perhaps it is unfair to base jurisdiction automatically on the presence of the defendant. Of course, under the *Shaffer* rationale, residence, domicile, and presence should be significant factors in evidencing ties between the defendant, the state, and the litigation; but, they should not be the sole, determinative factors.[116] If fairness involves any sort of weighing process, other factors besides presence, domicile, or residence should be considered, when applicable, in the jurisdictional test.

Even without these suggested changes, the substantive changes arising out of *Shaffer v. Heitner* will do much to disrupt any assurances where jurisdiction rests. The practicing attorney can no longer bank on mechanical determinations of jurisdiction. These changes also will tend to prolong and confuse litigation, particularly as jurisdiction is a threshold issue. However, the shift in orientation to the defendant property owner and his contacts with the forum state is the only fair approach in an assertion of state court jurisdiction.

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(E.D. Ark. 1959) illustrates this possibility. There the defendant was present in Arkansas, for jurisdictional purposes, when he was served notice on a nonstop plane flying over the state. His simple physical presence was so fortuitous that it should not have been enough to subject him to jurisdiction in the state.

The mechanical use of residence or domiciliary is also objectionable as the sole basis for jurisdiction. This is particularly true with corporations. Since a corporation is a resident of that state where it is incorporated, MODEL BUSINESS CORPORATIONS ACT § 11, it is subject to all suits brought against it in that state regardless of such factors as where the cause of action arose, the nature of the suit, or the corporation's business in the incorporating state. In *Shaffer v. Heitner* it may have been unfair to automatically subject Greyhound to suit in Delaware without at least considering some of these other factors. *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 933 (1960).