January 1978

Civil Procedure–Concepts of Personal Jurisdiction before and after Shaffer v. Heitner

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CIVIL PROCEDURE—CONCEPTS OF PERSONAL JURISDICTION BEFORE AND AFTER SHAFFER V. HEITNER

I. INTRODUCTION

The United State Supreme Court’s decision in Shaffer v. Heitner1 marked the most important development in personal jurisdiction analysis since 1877 when Pennoyer v. Neff2 established the conceptual foundation which has dominated the law of state court jurisdiction for the past hundred years.3 The central concern of the Pennoyer approach was the power of the court over persons and things present within its territory; due process was to be assured by allowing the court to assert jurisdiction only if the defendant or his property were present in the state. A major adjustment in jurisdictional analysis occurred with International Shoe Co. v. Washington,4 and the factors of fairness to the defendant and reasonableness of the forum became significant to assertions of jurisdiction in personam. Only with Shaffer, however, was the Pennoyer “power” framework abandoned. All assertions of state court jurisdiction must now be based on the relationship among the forum, the defendant, and the controversy.

II. HISTORY OF JURISDICTIONAL CONCEPTS: THE LEGACY OF PENNOYER

A discussion of personal jurisdiction must inevitably begin by reference to Pennoyer v. Neff.5 In Pennoyer, Justice Field presented a conceptual system of jurisdiction, the goal of which was to satisfy due process requirements by providing notice to the defendant and by restricting state courts’ power to matters of terri-

2 95 U.S. 714 (1877).
4 326 U.S. 310 (1945).
5 95 U.S. 714 (1877).
torial concern. Essentially, *Pennoyer*'s holding was that an attempt by a state court to render a judgment affecting the rights of a nonresident who had not been personally served within the state, or whose property within the state had not been brought before the court by attachment, would constitute a violation of the due process clause of the fourteenth amendment. The basic premise of the opinion, and the premise upon which the jurisdictional system subsequently was structured, was that every state had the power to exercise jurisdiction only over persons and property within its territory. Due process for the defendant would be insured by allowing action against him only (1) *in personam*, where he was

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6 Id. at 733; see Hazard, supra note 3, at 245; Note, Jurisdiction: Power Theory, supra note 3, at 726. In *Shaffer*, the Court provided a synopsis of *Pennoyer:* *Pennoyer* was the first case to apply the due process clause to personal jurisdiction. The test arrived at, however, and the language used, was virtually identical to that of *D'Arcy* v. Ketchum, 52 U.S. (11 How.) 165 (1850), cited in *Pennoyer*, 95 U.S. at 720, 729. The *D'Arcy* decision was prior to passage of the fourteenth amendment; there the Court found the concept of reciprocal restraints on the states' sovereignty to be embodied in the full faith and credit clause. 52 U.S. (11 How.) at 174-76. See Comment, Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness, 69 Mich. L. Rev. 300, 303-05 (1970) [hereinafter cited as Comment, Long-Arm and Fairness].

7 95 U.S. at 733. The due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law ..." U.S. Const. amend. XIV, § 1. *Pennoyer* was the first case to apply the due process clause to personal jurisdiction. The test arrived at, however, and the language used, was virtually identical to that of *D'Arcy* v. Ketchum, 52 U.S. (11 How.) 165 (1850), cited in *Pennoyer*, 95 U.S. at 720, 729. The *D'Arcy* decision was prior to passage of the fourteenth amendment; there the Court found the concept of reciprocal restraints on the states' sovereignty to be embodied in the full faith and credit clause. 52 U.S. (11 How.) at 174-76. See Comment, Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness, 69 Mich. L. Rev. 300, 303-05 (1970) [hereinafter cited as Comment, Long-Arm and Fairness].

8 95 U.S. at 722. The principles of sovereignty upon which Justice Field premised his theories in *Pennoyer* were primarily those developed in J. Story, Commentaries on the Conflict of Laws (1834). Hazard, supra note 3, at 262-72; Zammit, supra note 3, at 668-70. See generally Lorenzen, Story's Commentaries on the Conflict of Laws—One Hundred Years After, 48 Harv. L. Rev. at 24-25 (1934). Story's theories, in turn, were adopted to a large extent from the works of the 17th century Dutch jurist Huber. Hazard at 258-62; Zammit at 669; see Nadelmann, Joseph Story's Contribution to American Conflicts Law: A Comment, 5 Am. J. Legal Hist. 230, 230-34 (1961).
present, or (2) *in rem*, where his property was located. Notice would be provided by personal service in the case of *in personam* jurisdiction, or by seizure of the property in the case of *in rem* jurisdiction.

The *in personam-in rem* distinction had been established at common law, with the practice under the law of default judgments of adjudicating claims against absent defendants after attaching their property. The *Pennoyer* decision added to common law use of the *in personam-in rem* distinction a conceptual approach, in that the Court found the rationale behind *in rem* jurisdiction to be the doctrine of power of state courts over property within their territory, rather than an equitable evasion of creditors doctrine. Though the *Pennoyer* Court intended the decision as a restriction on state courts' jurisdiction, the power theory became instead the conceptual basis for a hundred years of expanding jurisdiction.

The dichotomy between *in personam* jurisdiction and *in rem* jurisdiction became more marked, as each developed with regard to different considerations and criteria. The chronology of *in personam* jurisdiction has often been referred to as an "erosion" of

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9 95 U.S. at 724. In *Shaffer* the Court distinguishes *in personam* from *in rem* as follows:

If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "*in personam*" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "*in rem*" or "quasi *in rem*." The effect of a judgment in such a case is 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.


10 95 U.S. at 726-27. "If, without personal service, judgments *in personam* . . . could be upheld and enforced, they would be the constant instruments of fraud and oppression." But, "[s]ubstituted services by publication . . . may be sufficient to inform parties . . . where property is once brought under the control of the court . . . . The law assumes that property is always in the possession of its owner . . . and it proceeds upon the theory that its seizure will inform him [of the proceedings]." *Id.* For a history of the notice problem prior to *Pennoyer*, see *Hazard*, *supra* note 3, at 248-52.


12 95 U.S. at 723.

13 See materials cited note 3 *supra*. 
Pennoyer, a development away from its basic premises. Increases in development and activities of multi-state corporations, as well as increases in interstate travel by the public in general, made adherence to the strict presence theory for in personam jurisdiction impractical as well as unduly restrictive on plaintiffs. The Pennoyer framework stood long intact, however, with jurisdiction being extended in such situations by use of the fictional rationales of “implied consent,” “constructive presence,” and “doing business.”

14 Note, Jurisdiction: Power Theory, supra note 3, at 734; see Ehrenzweig, Pennoyer Is Dead—Long Live Pennoyer, 30 Rocky Mt. L. Rev. 285 (1958); Hazard, supra note 3, at 272-81; Smit, supra note 3, at 601-06; Developments—Jurisdiction, supra note 3, at 919-48. The “erosion” perhaps began within Pennoyer itself, where Justice Field recognized that some necessary litigation would not fit into his rigid categories. He noted, for example, that cases such as divorce actions affecting the plaintiff’s personal status could be brought in the plaintiff’s home state even though the defendant could not be served there. He also recognized the doctrine of “consent” of foreign corporations to be sued in states where they do business. 95 U.S. at 733-36; 433 U.S. at 201.

15 By strict application of the territorial limitation of Pennoyer, jurisdiction could not be obtained, for example, over a nonresident motorist who committed a tort and then left before he could be served in the state. See Developments—Jurisdiction, supra note 3, at 919-23; Note, Jurisdiction: Power Theory, supra note 3, at 734-35.


[In order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state’s jurisdiction is that the non-resident has “impliedly” consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all . . . . The liability rests on the inroad which the automobile has made on the decision of Pennoyer v. Neff . . . .]

Id. at 340-41.

17 E.g., Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2nd Cir. 1930) (L. Hand, J.); see Kurland, supra note 16, at 582-84.

18 E.g., Philadelphia & R. R. R. v. McKibbin, 243 U.S. 264 (1917); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913). “A foreign corporation is amenable to process . . . only if it is
The decision in International Shoe Co. v. Washington\(^9\) made the most dramatic adjustment in the determination of when \textit{in personam} jurisdiction could be exercised.\(^{20}\) The mechanical or quantitative criteria of the presence theories were abandoned in favor of basing the determination upon "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."\(^{21}\) To subject a defendant to a judgment \textit{in personam}, "due process require[d] only that . . . 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 [would] not offend 'traditional notions of fair play and substantial justice.'"\(^{22}\)

Although \textit{International Shoe} marked a departure from the conceptual apparatus of \textit{Pennoyer}, it was not an abandonment of it in the realm of \textit{in personam} jurisdiction. It was never doubted that actual presence satisfied due process, regardless of the "quality and nature of the activity in relation to the fair and orderly administration of the laws . . . ."\(^{23}\) And, subsequent to \textit{International Shoe}, courts continued to recognize service within the forum state as sufficient basis for \textit{in personam} jurisdiction even if the state had no connection with the controversy.\(^{24}\) \textit{International Shoe}, however, was limited to cases in which the defendant did business within the State in such manner and to such extent as to warrant the inference that it is present there."\(^{25}\) See Kurland, \textit{supra} note 16, at 584-86.

\(^{9}\) 326 U.S. 310 (1946).


The issue in \textit{International Shoe} was whether the state of Washington could assert jurisdiction based on the company's activities in the state, to recover unpaid contributions to the state unemployment compensation fund. 326 U.S. at 311.

\(^{11}\) 326 U.S. at 319.

\(^{12}\) Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

\(^{13}\) 326 U.S. at 319. The minimum contacts test came into play only if the defendant was "not present within the territory of the forum . . . ." \textit{Id.} at 316.

\(^{14}\) "Physical presence in the state gives the state a basis for the exercise of personal jurisdiction over the individual in any action that may be there brought against him." \textit{Restatement (Second) of Conflict of Laws} § 28 Comment b (1971).

The "transient rule" embodying the \textit{pre-Pennoyer} concept of "catching" the defendant (see, e.g., Peabody v. Hamilton, 106 Mass. 217 (1870)) was unaffected by \textit{International Shoe}, and allowed jurisdiction in a state with no relationship to the defendant or the controversy. See, e.g., Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), where service of process upon the defendant was effected in an airplane over the state. See generally Ehrenzweig, \textit{The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens}, 65 \textit{Yale L.J.} 289 (1956); Ross, \textit{The Shifting Basis of Jurisdiction}, 17 \textit{Minn. L. Rev.} 146 (1932).
Shoe augmented the power theory; it did not replace it. Chief Justice Stone could not completely break out of the Pennoyer framework; to him "minimum contacts" established presence for the purposes of suit. In other words, it was because the minimum contacts of a corporation made it "present" in the jurisdictional sense that the court could exercise "power" over that corporation.

Pennoyer's conceptual framework based on territorial power stood more firmly in the area of in rem jurisdiction. Soon after Pennoyer, it was apparent that the theory was best suited for courts to use as a basis for expansion of jurisdiction rather than as a limitation to assure due process fairness. The well known case of Harris v. Balk extended the power theory to allow quasi in rem jurisdiction to be based upon "presence" of the defendant's intangible property within the forum. The arguments addressed by the
court in *Harris* were within the conceptual power framework, with the case turning on a decision of where the property could be said to be located. Functional considerations of fairness to the defendant or appropriateness of the forum were overlooked. Once the defendant's property was found to be located in the forum, due process required only actual notice to the defendant.

*Harris* provided the pattern for expansion of *quasi in rem* jurisdiction. Those arguments against assertions of *quasi in rem* jurisdiction which were dealt with by the courts subsequent to *Harris* did not involve challenges to the states' absolute sovereignty over property within the territory, but were instead addressed to issues such as whether the property (a debt or other intangible obligation) was attachable, and where its situs was located. The case most noted as an example of extreme *quasi in rem*

North Carolina. Harris, another North Carolina resident, owed money to Balk. When Harris happened to visit Maryland, Epstein garnished his debt to Balk. Harris did not contest the debt to Balk and paid it to Epstein's North Carolina attorney. When Balk later sued Harris in North Carolina, [the Supreme Court] held that the Full Faith and Credit Clause . . . required that Harris' payment to Epstein be treated as a discharge of his debt to Balk. [The] Court reasoned that the debt Harris owed Balk was an intangible form of property belonging to Balk, and that the location of that property traveled with the debtor. By obtaining personal jurisdiction over Harris, Epstein had "arrested" his debt to Balk, 198 U.S., at 223, and brought it into the Maryland court. Under the structure established by *Pennoyer*, Epstein was then entitled to proceed against that debt to vindicate his claim against Balk, even though Balk himself was not subject to the jurisdiction of a Maryland tribunal.

433 U.S. at 200-01.

31 198 U.S. at 221-22; see Hazard, supra note 3, at 278-79; Note, Jurisdiction: *Power Theory*, supra note 3, at 732-33.
32 See Note, Jurisdiction: *Power Theory*, supra note 3, at 733.
[Under the *Harris* approach] any consideration of fairness to the defendant and appropriateness of Maryland as a forum . . . was irrelevant, because under the *Pennoyer* system of concepts Maryland was exercising power over the debt which was fictionally within its borders, not over the absent defendant who was beyond the "power" of that state.

33 The Court in *Harris* put the burden of notification upon the garnishee (the holder of the "attached" debt). "[W]ant of notification . . . has . . . an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. . . . [N]otification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim. . . . Fair dealing requires this . . . ." 198 U.S. at 227.
jurisdiction was *Seider v. Roth*, in which the New York Court of Appeals allowed jurisdiction to be based on attachment of a debt owed to the defendant in the form of a contingent contractual obligation of his insurance company to defend and indemnify him. Again the arguments addressed were within the *Pennoyer-Harris* power framework; the basic concern in *Seider* was whether the purported intangible property did in fact exist. Such assertions of *quasi in rem* jurisdiction were much criticized for their failure to consider the relationship among the forum, the defendant, and the controversy—those factors deemed by *International Shoe* and subsequent *in personam* decisions to be essential to due process in forums where the defendant was absent.

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The whole question . . . is whether Hartford's contractual obligation to defendant is a debt or cause of action such as may be attached. The Hartford policy . . . requires Hartford . . . to defend [co-defendant] Lemiux in any automobile negligence action and, if judgment be rendered against Lemiux, to indemnify him therefor. Thus, as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a "debt" . . .

17 N.Y.2d at 113, 216 N.E.2d at 314. Judge Burke, dissenting, argued that the so-called 'debt' . . . is a mere promise made to the nonresident insured [Lemiux] by the foreign insurance carrier to defend and indemnify . . . if a suit is commenced and damages are awarded against the insured. . . . It is exactly this type of contingent undertaking which does not fall within the definition of attachable debt . . .


In *Hanson v. Denckla*, the Supreme Court analyzed the possibility of both *in rem* and *in personam* jurisdiction. The *in personam* analysis became a refinement upon *International Shoe* with the additional requirement that the defendant had purposely availed himself of privileges in the state where jurisdiction was being sought. But the *in rem* analysis remained consistent with previously discussed decisions and the issue was where the property could be said to be located. There have, on the other hand, been "[w]ell-reasoned lower court opinions" which have questioned the proposition that presence of property in a state gives that state jurisdiction regardless of the relationship of the property owner and the dispute to the forum. In *Atkinson v. Superior Court*, for example, the California Supreme Court founded jurisdiction upon the attachment of intangible obligations only after deciding that due process as defined by *International Shoe* had been satisfied. Although some states had thus narrowed the permissible scope of *quasi in rem* jurisdiction, the Constitutional limits as defined by the Supreme Court prior to *Shaffer v. Heitner* permitted state court jurisdiction to be asserted anywhere the defendant was actually present or had "minimum contacts," and anywhere that any of his property including intangible obligations, could be said to be located.

III. *Shaffer v. Heitner*

*Shaffer v. Heitner* presented the Supreme Court with a situation which amplly revealed the possible extent of the unfairness

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34 Id. at 253.
40 Id. at 246-49.
42 "The relevant contacts with this state are significant . . . in deciding whether due process permits exercising . . . quasi in rem jurisdiction . . . ." Id. at 346, 316 F.2d at 965 (Traynor, J.). In *Atkinson*, the action arose out of the defendant's contact with the state, and the attached intangible was the subject matter of the litigation. See *Traynor*, supra note 25, at 662-63; Note, *Jurisdiction: Power Theory*, supra note 3, at 741-42, 763.
45 Id.
inherent in asserting quasi in rem jurisdiction as it had developed within the Pennoyer-Harris framework. The action was a shareholder's derivative suit filed in the Court of Chancery for New Castle County, Delaware, by appellee Heitner, a nonresident of Delaware who owned one share of stock in the Greyhound Corporation, a Delaware corporation with its principal place of business in Arizona. Named as defendants were Greyhound, its wholly owned subsidiary Greyhound Lines, Inc., and twenty-eight officers or directors of the corporations. The allegation was essentially that the individual defendants had violated their duties to Greyhound by causing it to engage in unlawful activities in Oregon which resulted in liability for substantial damages in a private anti-trust suit and a fine in a criminal contempt action. Heitner filed with his complaint a motion for an order of sequestration of Delaware property of the individual defendants. The sequestration procedure was to compel the appearance of the individual defendants, who were not residents of Delaware. The motion was granted and the sequestrator seized approximately 82,000 shares of common stock in Greyhound owned by nineteen of the defendants, and stock options belonging to two others. Although no certificates

46 Id. at 189-90.
47 Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977), resulted in a judgment of $13,146,090, plus attorneys' fees of $1,250,000, plus costs, against Greyhound.
49 Del. Code Ann. tit. 10, § 368 (1975). This statute provides in part as follows: If it appears in any complaint . . . that the defendant . . . is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear . . . . The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property . . . . The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured.
51 "These seizures were accomplished by placing 'stop transfer' orders or their equivalents on the books of the Greyhound Corp." 433 U.S. at 192.
representing the property were physically present, the stock was found to be located in Delaware by virtue of a Delaware statute providing that "the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." The twenty-one defendants (the appellants) entered a special appearance to move that service of process be quashed and the sequestration order be vacated. They contended that the property was not capable of attachment in Delaware, that the procedure did not provide due process of law, and that personal jurisdiction could not be sustained because of lack of sufficient contacts to satisfy the rule of International Shoe. The Court of Chancery rejected these arguments, stating that sequestration was a proper procedure to compel the personal appearance of a nonresident defendant, that due process was not violated since the property would be held only until the defendants entered a general appearance, and that the statutory situs of the stock provided a sufficient basis for quasi in rem jurisdiction.

On appeal, the Delaware Supreme Court affirmed this judgment. Their opinion dealt primarily with their rejection of the appellants' contention that the sequestration procedure was inconsistent with the due process requirements of notice and hearing prior to taking. The court bluntly rejected the argument that jurisdiction should not be maintained because of lack of minimum contacts:

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81 Del. Code Ann. tit. 8, § 169 (1975). This section is only for the purposes of "title, action, attachment, garnishment and jurisdiction . . . not for the purpose of taxation." Id.

The Third Circuit Court of Appeals held that this section did not supply the minimum contacts necessary to support jurisdiction in a sequestration proceeding. Request for certiorari was pending at the time the Shaffer decision was decided, and was subsequently denied. U.S. Indus., Inc. v. Gregg, 540 F.2d 142 (3rd Cir. 1976), cert. denied, 433 U.S. 908 (1977).

The Court of Chancery issued a letter opinion. 433 U.S. at 193.


There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. . . . The reason, of course, is that jurisdiction under [the Delaware sequestration statute] remains *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. . . . Delaware may constitutionally establish *situs* of such shares here . . . .

The United States Supreme Court reversed. After stating the facts, Justice Marshall began the majority opinion by noting that the Delaware Supreme Court's analysis assumed "the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff.*" Justice Marshall followed with a history of jurisdictional analysis, with emphasis on the major conceptual developments. The conclusion reached was that "the law of state court jurisdiction no longer stands securely on the foundation established in *Pennoyer,*" and that "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.*"

Justice Marshall presented what he termed the "simple and straightforward" case for applying the fair play and substantial justice test to jurisdiction *in rem.* The argument's basic premise was not a new idea, but simply a recognition that all jurisdictional approaches, regardless of their labels, are ultimately assertions of jurisdiction over the interests and rights of persons. Since the

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53 361 A.2d at 229.
54 433 U.S. at 195.
55 Id. at 196.
56 Id. at 196-206. Justice Marshall discussed mainly the doctrines and principles of *Pennoyer, Harris v. Balk,* and *International Shoe.*
57 Id. at 206.
58 Id. at 207.
59 "All proceedings, like all rights, are really against persons." *Tyler v. Court of Registration,* 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C.J.), appeal dismissed 179 U.S. 405 (1900). Previous Supreme Court decisions holding that property could not be subjected to a court's judgment unless reasonable efforts had been made to give the owners actual notice recognized that an adverse judgment *in rem* directly affected the property owner's rights. 433 U.S. at 206. See, e.g., Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The premise was impliedly recognized within *Pennoyer* itself, with the requirement of notice and the fictional equation of "seizure" with "notice." 95 U.S. at 726-27. See Note, Jurisdiction: Power Theory, supra note 3, at 731. See also von Mehren &

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minimum contacts standard of International Shoe is the proper one for the determination of whether an assertion of jurisdiction over the interests of persons satisfies the due process clause, it followed that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."  

Justice Marshall pointed out that many types of actions typically brought in rem will still be allowed under the new test, since the presence of property can provide the sufficient "contacts among the forum State, the defendant, and the litigation" to satisfy the International Shoe standard. Examples of such actions are controversies concerning ownership of property located in the forum, and also those concerning rights and obligations of such ownership. What will be different about such exercises of jurisdiction is the analytical approach. Jurisdiction will be permissible in such cases not because of the state's power over property within its territory, but only because the forum, the defendant, and the controversy are related. What will make such assertions of jurisdiction reasonable is not presence of property, but the typical minimum contacts factors: the defendant's expectation of benefit from the state, the state's interest in assuring marketability of property, and the likelihood that important records and witnesses can be found in the state.


43 433 U.S. at 207-08.

44 Thus, jurisdiction will still be permissible in most of those cases which have typically been considered true in rem actions, and quasi in rem actions of the first type (see note 29, supra). Id. at 207-08 & n.24.

45 Id. at 208. In most such cases there has been no real need to rely on the property to justify jurisdiction, as the presence of the property would typically
What will not be acceptable under the new analysis will be the type of *quasi in rem* jurisdiction asserted in *Harris v. Balk* and the present case, where the property was completely unrelated to the cause of action and served only to provide the basis for bringing the defendant into court. "In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."\(^{65}\)

The new approach will not allow a potential defendant to avoid his obligations by removing his assets to a place where he is not subject to an *in personam* suit. The full faith and credit clause\(^ {67}\) makes valid *in personam* judgments enforceable in all states.\(^ {68}\) Also, as Justice Marshall pointed out, "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 *International Shoe.*"\(^ {69}\) Justice Marshall also addressed the argument that to allow *in rem* jurisdiction would avoid "the uncertainty inherent in the *International Shoe* standard. . . ."\(^ {70}\) He stated the Court's belief that the standard could be easily applied in most cases, and in any case, "the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high."\(^ {71}\)

Finally, Justice Marshall dealt with the argument that jurisdiction over the appellants should have been maintained on the basis of minimum contacts.\(^ {72}\) He rejected this argument, finding that the appellants "simply had nothing to do with the State of

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indicate the existence of sufficient contacts under *International Shoe.* Id. at 209, n.31. *See generally* Carrington, *supra* note 11.

\(^ {14}\) 433 U.S. at 209.

\(^ {17}\) "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

\(^ {15}\) 433 U.S. at 210. *See note, Jurisdiction: Power Theory, supra* note 3, at 734 n.35. "Enforcement of foreign judgments was often difficult during the infant years of the full faith and credit clause. Thus, the litigational convenience of proceeding in the state where the assets were located . . . promoted the practice of commencing suits by attaching the defendant's property." *Id.* *See* 433 U.S. at 210 n.35; von Mehren & Trautman, *supra* note 61, at 1178.

\(^ {25}\) 433 U.S. at 210.

\(^ {70}\) *Id.* at 211.

\(^ {71}\) *Id.* This argument, in essence, has been made previously by commentators. *See note 37 supra; Carrington, supra* note 11, at 307-09; *Developments—Jurisdiction, supra* note 3, at 938-39.

\(^ {72}\) 433 U.S. at 213-16.
Delaware," nor any "reason to expect to be haled before a Delaware court." Justices Powell and Stevens each concurred separately in short opinions. Justice Brennan also concurred in the majority opinion, except for the ruling that the appellants did not have the necessary minimum contacts with Delaware. He believed this ruling to be a pure advisory opinion since jurisdiction had been based solely on the quasi in rem concept, and the existence of minimum contacts had not been pleaded by the appellee nor ruled on by the Delaware courts. Justice Brennan nevertheless expressed his view that jurisdiction could be maintained in this case by application of the International Shoe standard. He emphasized the state's interest in providing a forum for litigating claims involving management of its domestic corporations, and the fact that the appellants voluntarily associated themselves with the state by entering into a relationship with one of its corporations, thus invoking the benefits of the state's laws.

IV. THE IMPACT OF Shaffer ON JURISDICTIONAL ANALYSIS

Although only time will tell what impact the Shaffer opinion will have on jurisdictional concepts, something of its intended scope can be discerned from the opinion's analytical approach. The decision was unanimous in holding that the statutory presence of a nonresident's shares of stock within the forum state cannot, consistent with the due process, serve as a basis for jurisdiction to adjudicate claims against him, with judgment enforceable against any of his assets. The statutory presence of a nonresident's shares of stock, in combination with Delaware's refusal to allow the defendant to defend on the merits without subjecting himself to unlimited liability, presented a situation where quasi in rem jurisdiction appeared particularly harsh and extreme. Thus, a very limited interpretation could be given to the Shaffer holding, that is, that due process was denied only if the assets attached were intangibles unknowingly located in the forum, or only if the defendant was denied a limited appearance. Such an interpretation was suggested

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7 Id. at 216.
8 Id. at 217-19.
9 Id. at 219-20.
10 Id. at 220.
11 Id. at 222-23.
in the concurring opinions of Justices Powell and Stevens, and would involve little or no disruption of the basic conceptual framework of Pennoyer and Harris.\(^7\)

Such an interpretation would be untenable, however, in light of the theoretical approach and reasoning of the majority opinion. The opinion marked the complete abandonment of Pennoyer and could serve as the new conceptual foundation of personal jurisdiction. Pennoyer required that jurisdiction be based on the court’s territorial power; International Shoe allowed satisfaction of this requirement for in personam jurisdiction to be based on “minimum contacts.” Now, Shaffer requires that all assertions of state court jurisdiction, in personam or in rem, be based on the International Shoe standards, that is, the relationship among the forum, the defendant, and the controversy.\(^8\) Territorial power is now not only non-essential for the exercise of personal jurisdiction, but it is also not sufficient. In other words, territorial power is irrelevant to assertions of jurisdiction under this theory. The mere presence of the defendant or his property in the forum, with no further connection between his activities or property in that forum and the controversy, would be insufficient to support jurisdiction.

To support this theory, Shaffer must be analyzed as follows:

1. Shaffer holds that presence of property in a state does not automatically confer to that state’s courts jurisdiction over the owner’s interest in that property.\(^9\)

\(^7\) Justice Powell reserved judgment in the case of real property, where “preservation of the common-law concept of quasi in rem jurisdiction arguably would avoid the uncertainty of the general International Shoe standard . . . .” 433 U.S. at 217. Justice Stevens agreed on this point, and concurred primarily because of the “risk of judgment without notice” aspect of the Delaware sequestration procedure. Id. at 217-19.

\(^8\) Id. at 204, 212.

\(^9\) Id. at 211-12.

Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner’s interest in that property. This history [of jurisdiction] must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process . . . . but it is not decisive. “[T]raditional notions of fair play and substantial justice” can be . . . offended by the perpetuation of ancient forms . . . . The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction
2. By implication this rejects the most basic principle of Pennoyer—the exclusive sovereignty of a state over persons and property within its territory.

3. Without this principle of "exclusive sovereignty," there is no more "power theory," and presence alone, of person or property, can never be enough to confer jurisdiction.62

This analysis is supported by Justice Marshall’s statement in Shaffer that the decision is not confined to assertions of jurisdiction quasi in rem based on intangible property, but includes "all assertions of state-court jurisdiction. . . ."63 It is also supported by the fact that one of the Court’s main objections to the type of quasi in rem action typified by Harris v. Balk and the Shaffer situation is that the property serving as the jurisdictional basis was completely unrelated to the cause of action.64 This objection would apply equally to any jurisdiction based on presence alone.65

The ultimate conclusion of this analysis could be stated in terms of "general" and "specific" jurisdiction.66 "General" jurisdiction would no longer be a valid concept. All assertions of jurisdiction must be based on the relationship of the forum, the defendant, and the cause of action, that is, "specific" jurisdiction.

The analysis could also mark a step, although not necessarily an inevitable or desired step, toward convergence of the test of jurisdiction and the tests of forum non conveniens,67 and absor-

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that is fundamentally unfair to the defendant.

Id. See 91 HARV. L. REV. at 158-59.

Thus, the deep-rooted "transient rule," supra note 24, can be presumed dead.

433 U.S. at 212.

Id. at 208-09.

91 HARV. L. REV. at 159.

For a complete discussion of the "general-specific" jurisdictional analysis, see von Mehren & Trautman, supra note 61, at 1136-79.

In American thinking, affiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.

Id. at 1136.

The doctrine of forum non conveniens "is patterned upon the right of the court . . . to refuse the imposition upon its jurisdiction . . . if it appears that for
tion of the choice of law tests.\(^8\) In his dissent, Justice Brennan expressed his view that the jurisdictional and choice of law inquir-
ies are often closely related and dependent on similar consider-
ations.\(^9\) The majority opinion, however, rejects the argument that conflicts of law issues are appropriate to jurisdictional analysis, and quotes from Hanson v. Denckla: "The issue is personal juris-
diction, not choice of law."\(^{10}\)

Conceptually, the Shaffer decision does require a major adjust-
ment in how one must approach jurisdiction. Most courts, however, will undoubtedly approach the problem of application of the Shaffer principles in a much less theoretical manner. To begin with, in most cases where the defendant and his property will be present, the relationship among him, the forum, and the controversy will be obvious to the extent that jurisdictional analysis will not likely be contemplated. The notion of power over whatever and whoever is present could thus be perpetuated.

More important, however, is the question as to the ultimate invalidity of the "general" jurisdiction concept. What would be unfair about allowing a defendant to be sued where his contacts are extensive—in his domicile or state of citizenship—on any claim against him? If the defendant consented, there would be no due process argument raised.\(^{11}\) If he objected, however, on the grounds

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the convenience of litigants and witnesses and in the interest of justice the action should be instituted in another forum where the action might have been brought."


\(^8\) See Traynor, supra note 25, at 663-64.

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

This is eminently sound, for the state whose law controls is the one whose courts are best qualified to interpret and apply it.

Id. See also Carrington, supra note 11, at 311; von Mehren & Trautman, supra note 61, at 1128-34; Note, Jurisdiction: Power Theory, supra note 3, at 764-65.

\(^9\) 433 U.S. at 224-25.

\(^{10}\) Id. at 215 (quoting 357 U.S. at 254). The same dispute split the Court in Hanson, 357 U.S. at 258 (Black, J., joined by Brennan and Burton, JJ., dissenting).

\(^{11}\) If jurisdiction is consented to by the defendant, it presumably still can be exercised by a forum with no real relationship to the defendant or the controversy.
that the controversy was totally elsewhere and it would be unfair in some way to subject him to suit in his own state (for example, he may have problems of evidence, witnesses), then by strict application of the Shaffer theory the factor of the relationship between the forum and the controversy would have to be taken into consideration. Justice Marshall did reiterate in Shaffer the language from Hanson v. Denckla that the state would "not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation."92 This would be a proper argument for a defendant to make when the asserted jurisdiction seems unfair in light of the relationship among the forum, himself, and the controversy. It would not, however, be a logical argument for a plaintiff to make in attempting to gain jurisdiction elsewhere than the "center of gravity," because the due process issue in personal jurisdiction is one of fairness to the defendant.93

Another problem could be the possibility of unavailability to the plaintiff of a proper (by the Shaffer evaluation) forum. Justice Marshall specified that Shaffer "did not raise, and we therefore have not considered, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."94 From the conceptual viewpoint, an allowance of such jurisdiction based on presence would best be termed a "necessary exception" to the rule of Shaffer. The overriding consideration of fairness to the defendant must necessarily be tempered by the consideration of necessity of some forum for the plaintiff.95

Courts may also find it desirable in some situations to allow jurisdiction based upon some strong interest in providing a particular citizen with a forum, such as the state's interest in providing a convenient forum for tort victims who otherwise might become public wards.96 Such considerations could perhaps be fit into the Shaffer formula as stated by Justice Brennan; his statement of the rule would allow consideration of the contacts of the parties.97 To

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This necessarily results from the fact that the jurisdictional determination continues to be considered to be embodied in the due process clause. See 433 U.S. at 216.

92 Id. at 215 (citing Hanson, 357 U.S. at 254).
94 433 U.S. at 211 n.37.
97 433 U.S. at 220 (Brennan, J., concurring and dissenting). "The primary
allow such jurisdiction, however, would also best be termed an exception of the rule as stated and discussed in the majority opinion, with its overriding emphasis on contacts of the defendant.

V. CONCLUSION

With the decision in Shaffer v. Heitner, the Supreme Court established a method of jurisdictional analysis embodying as its central premise the long recognized fact that all judicial proceedings are ultimately concerned with interests of persons. Abandoned was the categorical analysis established by Pennoyer v. Neff, along with its concern with state courts' "power," a concept which had become "embodied in the very vocabulary" used to describe courts' actions and judgments. Those terms—in personam, in rem, quasi in rem—are now meaningless, except in an historical context, as methods of asserting jurisdiction. There remains only one proper method for state courts to assert jurisdiction over persons. That method involves an evaluation according to the standards of International Shoe and its progeny, with a goal of "fair play and substantial justice."99

James E. Showen

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99 James E. Showen, teaching of . . . today's decision is that a State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum state." Id. at 199.