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## Shaffer v. Heitner: A New Attitude toward State Court Jurisdiction

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# NOTES AND COMMENTS

## SHAFFER *v.* HEITNER: A NEW ATTITUDE TOWARD STATE COURT JURISDICTION

*In overruling Swift v. Tyson, 16 Pet. 1, Erie R. Co. v. Tompkins did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare.*

*Justice Felix Frankfurter in Guaranty Trust v. York*<sup>1</sup>

### INTRODUCTION

Mr. Justice Frankfurter's observation is equally suited to the overruling of the century-old case, *Pennoyer v. Neff*,<sup>2</sup> by the recent decision in *Shaffer v. Heitner*.<sup>3</sup> *Shaffer* ended not only *Pennoyer's* reign, but also a jurisdictional perspective which rested on the distinction between in personam and in rem jurisdiction and the concept of a state's sovereignty over property within its borders. The basis of the *Pennoyer* doctrine was the concept that a state had authority over all persons and property within its territory, and no authority whatsoever outside its territorial limits.<sup>4</sup> Modifying previous theory slightly,<sup>5</sup> *Pennoyer* be-

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1. 326 U.S. 99, 101 (1945).

2. 95 U.S. 714 (1877).

3. 97 S. Ct. 2569 (1977).

4. The concepts of in personam and in rem jurisdiction are found in the earliest American decisions; their basis before that is unknown. Other notions basic to *Pennoyer*, such as the exclusivity of each state's jurisdiction, are taken from the work of Justice Story and his application of European concepts of *national* sovereignty. These principles were popular in the early years of the United States because of sharp conflict between states and their intention to remain distinct legal and political entities. See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 [hereinafter cited as Hazard].

5. In the *Pennoyer* opinion, Justice Field noted the necessity for a state to determine certain status questions involving its own citizens. For example, a state has the authority to determine the validity of the marriage of one of its citizens, regardless of

came the standard, prescribing all state jurisdictional procedures until, in 1945, *International Shoe v. Washington*<sup>6</sup> delineated a new test for in personam actions. Since that time, *Pennoyer* has continued to serve as the paradigm for in rem proceedings.<sup>7</sup>

The variety of litigants and the diverse situations naturally found in a civil system created a complex framework around the basic doctrine. The most oblique of these developments was the evolution of quasi in rem theory, which allowed the seizure of a nonresident's property in order to satisfy a claim unrelated to that property.<sup>8</sup> In certain applications, the theory is valid; for example, where a party goes into seclusion or moves out of state to avoid creditors and the jurisdiction of the courts, seizure of any property remaining in the state is a fair method of satisfying valid claims against him. A state has the right and duty to provide its residents with a remedy for debts where the debtor is conspicuously absent and refuses to submit himself to the forum for a court determination of his liability.<sup>9</sup>

Nevertheless, the commercial complexities of the twentieth century provided an opportunity for severe abuse of the procedure. Intangible obligations,<sup>10</sup> contingent debts,<sup>11</sup> even non-transferable interests<sup>12</sup>

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the residence of the spouse. The decision also permitted the exercise of jurisdiction over any person or corporation doing business in the state. 95 U.S. at 734-36.

6. 326 U.S. 310 (1945).

7. See generally Hazard, *supra* note 4. The Supreme Court's generic use of the term, "in rem" includes quasi in rem proceedings. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 97 S. Ct. at 2577-78 n.17.

8. See *Ownby v. Morgan*, 256 U.S. 94 (1921); *Harris v. Balk*, 198 U.S. 215 (1905). See generally Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973) [hereinafter cited as Folk & Moyer].

9. The *Shaffer* Court indicated that evasive debtors could be policed adequately through current in personam theories. The Court noted first that the state could attach the property while awaiting judgment in the proper forum, citing *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 663 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). The Court proposed that the debtor who seeks to avoid judgment by removing his property to another jurisdiction could be thwarted by the full faith and credit clause of the Constitution, art. IV, §1, which allows enforcement in other states of any valid judgment obtained in the forum state. 97 S. Ct. at 2583 nn.35 & 36. See note 55 *infra*. See also Hazard, *supra* note 4, at 266-67.

10. Intangibles are those holdings which have no intrinsic value, but which represent a property interest. Examples are stock certificates, bonds, promissory notes, and insurance policies. See Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1156-59 (1966) [hereinafter cited as Von Mehren & Trautman]. See also *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916); *Harris v. Balk*, 198 U.S. 215 (1905).

11. Contingent debts are those conditioned on the occurrence of some future event which is not certain to occur. See note 42 *infra* and accompanying text.

12. See note 42 *infra* and accompanying text.

became a valid basis for quasi in rem jurisdiction in cases where the defendant's relation to the forum state was nil. The abuse reached its critical point in the facts of *Shaffer*, and resulted in the abandonment of the *Pennoyer* theory for the more viable "minimum contacts" standard of *International Shoe*.<sup>13</sup> As indicated in the opening quote, this change signifies more than the mere replacement of *Pennoyer* with a more modern standard, or a single enlargement of minimum contacts' application. It expresses the adoption of a new attitude toward state court jurisdiction; the Court has de-emphasized the importance of the res in the realization that no matter what the object of the litigation, the subject is always the determination of personal rights.<sup>14</sup>

After analyzing the *Shaffer* decision, this note will discuss its effect on in rem and quasi in rem actions, and the possible backlash by state courts reacting to a limitation on their jurisdiction. It will conclude with an examination of the minimum contacts test and the possibility of its modification in light of the recent decision.

## I. THE SHAFFER V. HEITNER DECISION

### A. *The Facts*

On May 22, 1974, Mark Heitner<sup>15</sup> filed a shareholder's derivative

13. The best expression of and authority for that standard is found in the Court's opinion:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463. See *Holmes, J. in McDonald v. Mabee*, 243 U.S. 90, 91. Compare *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316, 319. See *Blackmer v. United States*, 248 U.S. 421; *Hess v. Pawloski*, 274 U.S. 352; *Young v. Masci*, 289 U.S. 253.

*International Shoe v. Washington*, 326 U.S. 310, 316 (1945). See also *Kurland, The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958) [hereinafter cited as *Kurland*]; Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960) [hereinafter cited as *Developments*].

14. See 97 S. Ct. at 2581-82, and nn.22 & 23 *infra*. In *Lynch v. Household Finance*, 405 U.S. 538 (1972), the Court decreed that "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Id.* at 552. See also *Atkinson v. Superior Court*, 49 Cal. 2d 338, 345, 316 P.2d 960, 964-65 (1957), *cert. denied sub nom. American Federation of Musicians v. Atkinson*, 357 U.S. 569 (1958); *Folk & Moyer*, *supra* note 8, at 795-800; *Hazard*, *supra* note 4, at 281-88; *Traynor, Is This Conflict Really Necessary?*, 37 TEX. L. REV. 655, 663-64 (1959) [hereinafter cited as *Traynor*]; *Von Mehren & Trautman*, *supra* note 10, at 1164-79.

15. The plaintiff was a minor and was represented in the action by his father, Arnold Heitner. Both were citizens of New York State.

suit in the Court of Chancery for New Castle County, Delaware, naming as defendants Greyhound Corporation, its wholly owned subsidiary, Greyhound Lines, Inc., and twenty-eight present or former officers or directors of the corporations. The parent company, Greyhound, was incorporated under the laws of Delaware with its principal place of business in Arizona. Greyhound Lines, Inc., was incorporated in California and also had Arizona as its principal place of business. The complaint alleged that the individual defendants had conducted operations in Oregon that resulted in successful civil antitrust<sup>16</sup> and criminal contempt<sup>17</sup> actions against the parent and the subsidiary. The plaintiff's standing was based on his ownership of one share of Greyhound stock.<sup>18</sup>

Plaintiff Heitner was not a citizen of Delaware.<sup>19</sup> He apparently chose his forum on the basis of Greyhound's incorporation there, and on the availability of Delaware's sequestration statute which would compel defendants' appearance in that state.<sup>20</sup> In accordance with Delaware procedure,<sup>21</sup> plaintiff filed a motion for an order of sequestration, designating the res as all shares of Greyhound stock and options thereon belonging to any of the individual defendants. The sequestrator<sup>22</sup> then seized approximately 82,000 shares of Greyhound common

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16. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977). Plaintiffs were awarded \$13,146,090 plus attorneys' fees in the treble damage antitrust action.

17. *United States v. Greyhound Corp.*, 363 F. Supp. 525 (N.D. Ill. 1973) (finding of contempt), 370 F. Supp. 881 (N.D. Ill. 1974) (fines imposed), *aff'd*, 508 F.2d 529 (7th Cir. 1974). Fines of \$100,000 and \$500,000 respectively, were levied against Greyhound Corp. and its wholly-owned subsidiary Greyhound Lines.

18. 97 S. Ct. at 2572.

19. See note 15 *supra*.

20. DEL. CODE tit. 10, § 366(a) (1974) which provides:

If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. . . . The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure.

21. After the sequestration petition is filed, the plaintiff must offer an affidavit stating that the individual defendants are nonresidents of Delaware. Both the plaintiff and the sequestrator, see note 22 *infra*, must then file \$1,000 bonds to assure their compliance with court orders. See *Folk & Moyer*, *supra* note 8, at 754-57.

22. The court-appointed sequestrator serves the notice of sequestration and a copy of the court's order on the resident agent of the corporation. In *Shaffer*, as in most

stock belonging to nineteen of the defendants and options belonging to two others, the total value of which was over \$1.2 million.<sup>23</sup> Apparently, none of the certificates representing the stock was physically present in Delaware;<sup>24</sup> nonetheless it was deemed situated there by state statute.<sup>25</sup>

The twenty-one defendants whose property was seized made a special appearance to challenge jurisdiction, maintaining that the ex parte sequestration procedure denied them the procedural safeguards required under *Sniadach v. Family Finance Corp.*,<sup>26</sup> and related cases.<sup>27</sup> Defendants also disputed jurisdiction on the basis that the minimum contacts requirement of *International Shoe* was applicable. These arguments failed to sway the Court of Chancery,<sup>28</sup> or, on appeal, the Delaware Supreme Court.<sup>29</sup> The trial court emphasized the quasi in rem nature of the proceeding and the inapplicability of defendants' procedural safeguards argument. Moreover, the Delaware Supreme Court specifically noted at the outset that although the constitutional issues raised in *Sniadach* were involved, *International Shoe* and the minimum contacts test were not relevant because the proceeding was quasi in rem.<sup>30</sup> Ironically, the United States Supreme Court utilized a reciprocal analysis in its reversal of the Delaware decision: Since Delaware jurisdiction failed to meet the minimum contacts standard, it was unnecessary to consider the *Sniadach*-procedural safeguards problem.

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cases, the notice is accompanied by a stop-transfer order which prohibits the corporation from recognizing any transfer of the shares of record pending further notification from the sequestrator or the court. See *Folk & Moyer*, *supra* note 8, at 755.

23. 97 S. Ct. at 2574 n.7.

24. *Id.* at 2574. That seven of the named defendants escaped Delaware's jurisdiction was an important factor in the Court's conclusion. See note 71 *infra* and accompanying text.

25. DEL. CODE tit. 8, § 169 (1974) provides:

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

26. 395 U.S. 337 (1969).

27. Defendants' due process arguments were founded on Supreme Court pronouncements that invalidated the garnishment of wages without notice and an opportunity to be heard, *Id.*, and the repossession of chattels without a hearing, *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

28. *Heitner v. Greyhound Corp.*, No. 4514 (Del. Ch. filed May 22, 1974).

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

30. *Id.* at 229.

## B. The Decision

Mr. Justice Marshall delivered the 7-1 opinion for the court.<sup>31</sup> Before addressing the questions at bar, the Court examined the history and development of state court jurisdiction and noted the dissimilarity of the two theories upon which such jurisdiction could be based. As set forth in *Pennoyer*, all jurisdiction arises from the notion of state sovereignty over property and persons within the state.<sup>32</sup> But in personam jurisdiction broke away from *Pennoyer* in a series of decisions<sup>33</sup> that responded to increased individual mobility and to the growth of interstate corporate activity in twentieth century United States. Culminating in the rule announced in *International Shoe*, the concept of personal jurisdiction was to rest on the relationship between the defendant, the forum, and the litigation, rather than on the mutually exclusive sovereignty of each state.<sup>34</sup> The new in personam concepts matured and,

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31. Chief Justice Burger and Justices Stewart, White, and Blackmun joined Justice Marshall in the opinion. Justice Powell filed a concurring opinion, agreeing both that *International Shoe* should govern in rem as well as in personam actions, and that Delaware lacked sufficient contacts to exercise in personam jurisdiction in the case at bar. He differed from the majority, however, in his opinion that quasi in rem theory should be preserved to allow certain jurisdiction over nonresident owners of real property in actions unrelated to the property. 97 S. Ct. at 2587. Justice Stevens concurred in the judgment, but agreed with Justice Powell that the decision should stop short of discarding in rem jurisdiction where real property was concerned. He stated further that the decision answered far more than necessary to resolve the issues presented in *Shaffer*, *Id.* Justice Brennan approved the total application of *International Shoe* to state court jurisdiction, but dissented both from the majority's consideration of the issue of Delaware's minimum contacts, and from the finding that none existed. *Id.* (Brennan, J., concurring and dissenting). Mr. Justice Rehnquist took no part in the decision.

32. 95 U.S. 714, 722 (1877). See *Shaffer v. Heitner*, 97 S. Ct. at 2576-77; *International Shoe v. Washington*, 326 U.S. 310, 316 (1945); Hazard, *supra* note 4, at 245-48.

33. The first of these was *Hess v. Pawloski*, 274 U.S. 352 (1927), which formulated the fiction of a nonresident motorist "appointing" a state official, usually the Secretary of State, to act as his agent to receive service of process for any action resulting from the nonresident's use of the highways. Judge Learned Hand further limited the *Pennoyer* doctrine, and provided the groundwork for *International Shoe*, in *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930). In that decision, Judge Hand coined the "minimum contacts" term later employed in *International Shoe*, and now in *Shaffer*. See references cited in note 13, *supra*, for further discussion of these and other related decisions.

34. The formula which looks to the relationship between the defendant, the forum, and the litigation is derived from the following passages in *International Shoe*:

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have been not only continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with activities there. . . . To require the corporation

with developments such as long arm statutes,<sup>35</sup> state courts were able to extend their jurisdictional reach.

Meanwhile, in rem concepts were also expanding. *Harris v. Balk*<sup>36</sup> had set forth the rule to be applied where the res was intangible;<sup>37</sup> that the situs of the debt moved with the person of the debtor. Thus, if jurisdiction were obtained over the debtor, the debt could be seized and applied to a claim against the nonresident creditor. In spite of fair results on occasion,<sup>38</sup> the *Harris* rule has been the target of much criticism,<sup>39</sup> and has been applied only rarely in some jurisdictions.<sup>40</sup> But the rule still survived until the *Shaffer* decision, and provided the groundwork for the series of cases initiated by *Seider v. Roth*.<sup>41</sup> These cases, which reach what may be the extreme limits of quasi in rem application, approved the attachment of nonresident motorists' liability policies to adjudicate claims arising from an out-of-state accident.<sup>42</sup>

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in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make a binding judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

326 U.S. at 317, 319 (citations omitted).

35. See notes 92-99 *infra* and accompanying text.

36. 198 U.S. 215 (1905).

37. See note 10 *supra* for definition of intangibles.

38. See *Folk & Moyer*, *supra* note 8, at 779-95.

39. See, e.g., *Minichiello v. Rosenberg*, 410 F.2d 106, 120 n.1 (2d Cir. 1968). See generally *Currie, The Growth of the Long Arm : Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 583-85, [hereinafter cited as *Currie*]; *Folk & Moyer* *supra* note 8, at 787-88; *Hazard*, *supra* note 4, at 278-81, 285; *Von Mehren & Trautman*, *supra* note 10, at 1177-78.

40. Oklahoma, for example, has invoked *Harris v. Balk* only once. See *St. Louis & S.F.R. Co. v. Crews*, 51 Okla. 144, 149, 151 P. 879, 881 (1915).

41. 17 N.Y.2d 111, 216 N.E.2d 312 (1966).

42. Citing the need to provide a local forum for its citizens, New York courts would "seize" the obligations of the insurance policies, disregarding the fact that they had not yet matured. The duty to defend the insured arose only when a lawsuit, including a valid assertion of jurisdiction, had been filed against the policy-holder. Furthermore, the defense fund was nontransferable, and thus could not be used to satisfy any award to the plaintiff. The duty to indemnify arose only after a judgment had been entered against the insured. In that neither of these "debts" existed before the suit commenced, basing jurisdiction on them has been labeled "an exercise in bootstrapping" by many commentators. See *Seider v. Roth*, 17 N.Y.2d 211, —, 216 N.E.2d 312, 315-17 (Burke, J., dissenting); *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir. 1969); *Min-*

Typified by *Seider*-like situations, the development and continued use of the two distinct jurisdictional theories subjected defendants to extreme exposure in remote forums.<sup>43</sup> Moreover, old in rem theories produced results inconsistent with the due process notions embodied in the newer in personam theory.<sup>44</sup> Refuting the contention that a proceeding "against" property is distinct from a proceeding against the property's owner, commentators have long suggested that in personam jurisdiction was sophisticated enough for states to rely on it entirely and abandon the concept of the res.<sup>45</sup> But, in spite of voluminous disparagement of *Pennoyer* and its corollaries, in rem procedure was still popular in state courts,<sup>46</sup> although exceptions had become more com-

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ichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968); Rintala v. Shoemaker, 362 F. Supp. 1044 (1973); Javorek v. Larson, 131 Cal. Rptr. 768, 552 P.2d 728 (1976); Turner v. Evers, 31 Cal. App. 3d 11, 107 Cal. Rptr. 390 (1973); Simpson v. Loehman, 21 N.Y.2d 305, 238 N.E.2d 319 (1967); Matter of Riggle, 11 N.Y.2d 73, 181 N.E.2d 436 (1962). See also Siegel, *Jurisdiction Ad Infinitum: New York's "Rem" Seizure of the Insurance Policy For Jurisdiction in Accident Cases*, 20 INT. & COMP. L. Q. 99 (1971); Note, *Javorek v. Larson: Automobile Insurer's Obligations to Defend and Indemnify Insufficient to Establish Jurisdiction—Sieder Sours in California*, 12 TULSA L.J. — (1977). Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

43. Not only were people subject to lawsuits in states they had never entered, as in *Seider*, but they were also subject to the plaintiff's forum shopping; that is, finding a state with laws favorable to his case regardless of the citizenship of the parties. See *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934); Ehrenzweig, *CONFLICTS OF LAWS* 100 n.9 (1962).

44. These notions include adequate notice to the defendant in the form of personal service of process, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and a pre-seizure hearing where property is to be attached, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 387 (1969). See also *Folk & Moyer*, *supra* note 8, at 756-57; *Hazard*, *supra* note 4, at 252-53.

In spite of the above decisions, few courts have expressed the due process shortcomings of the *Pennoyer* theory directly. Several courts, however, have felt the need to support quasi in rem actions in terms of fairness and minimum contacts. See, e.g., *Minichiello v. Rosenberg*, 410 F.2d 106, 110-11 (2d Cir. 1969) (en banc), *cert. denied*, 396 U.S. 844 (1969); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 346, 316 P.2d 960, 965 (1957), *cert. denied sub nom.* *American Federation of Musicians v. Atkinson*, 357 U.S. 569 (1958). See also *Folk & Moyer*, *supra* note 8, at 781 and n.186.

45. See note 14 *supra*. See also note 55 *infra* for discussion of in personam counterparts to in rem actions.

46. *Traynor*, *supra* note 14, cites *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied sub nom.* *American Federation of Musicians v. Atkinson*, 357 U.S. 569 (1958), to illustrate state courts' continued reliance on in rem theory. In *Atkinson*, the trial court relied on a statute that deemed California to be the fictional situs of a New York trust in order to obtain quasi in rem jurisdiction, although in personam jurisdiction would have been more logical. All parties had substantial contacts with California, plaintiffs were residents of California, the trust consisted of payment for work done in California, and the major elements of the transaction occurred in California. Jurisdiction was upheld on appeal, but on an in personam basis. Professor Traynor noted: "It seemed as irrational to resolve the problem by assigning a fictional

mon recently.<sup>47</sup>

Citing this increasing polarity between legal theorists and state court practices, and noting its own decisions questioning in rem procedure,<sup>48</sup> the Court concluded it must reconsider the theory of state court jurisdiction to determine the propriety of Delaware's assertion of jurisdiction over Shaffer and his co-defendants. Accordingly, the Court resolved the questions at bar in a two-step analysis: First, an examination of the proposition that all jurisdiction should henceforth be governed by the standard of *International Shoe*. Second, an application of the new standard to the facts of *Shaffer*.

### C. *International Shoe* as Governing Standard

The Court's acceptance of *International Shoe* as the test for in rem proceedings rested on its recognition that jurisdiction over a thing is nothing more than jurisdiction over the interests of persons in that thing.<sup>49</sup> Once that premise is accepted, it follows that any action in rem must also satisfy the standard for jurisdiction over the persons who are interested in the res, and this standard is the minimum contacts test as set forth in *International Shoe*.

The Court was quick to note that most of the actions currently brought in rem would remain viable under the *International Shoe* standard. The presence of property in a state probably will be a sufficient link between a nonresident owner and the forum, especially where the property is itself the object of the controversy.<sup>50</sup> Moreover,

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situs to intangibles as it would to pin a tail blindfolded to a nonexistent donkey." Traynor, *supra* note 14, at 662-63.

47. See *U.S. Industries v. Gregg*, 540 F.2d 142 (3d Cir. 1976), *petition for cert. docketed*, No. 76-359; *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons, J., concurring); *Camire v. Scieszka*, 116 N.H. 281, 358 A.2d 397 (1976); *Bekins v. Huish*, 1 Ariz. App. 288, 401 P.2d 743 (1965); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied sub nom. American Federation of Musicians v. Atkinson*, 357 U.S. 569 (1958).

48. See *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).

49. 97 S. Ct. at 2582. The phrase is borrowed from RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971), which in turn borrowed it from *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814, *appeal dismissed*, 179 U.S. 405 (1900). See also note 45 *supra*.

50. 97 S. Ct. at 2581-82. Five justices stated that where the property was totally unrelated to the litigation, minimum contacts would be lacking. Justices Powell and Stevens disagreed. See note 31 *supra*. Also note that while in rem concepts ignore the distinction between real and personal property, the minimum contacts standard will yield jurisdiction much more readily over real property than over chattels.

the litigation need not concern ownership; it may relate to negligence claims,<sup>51</sup> tax assessments,<sup>52</sup> or other rights and duties arising from ownership.<sup>53</sup> But, where the property is completely unrelated to the plaintiff's cause of action, jurisdiction would probably be denied under the minimum contacts test. Thus, the mere presence of property would no longer necessarily result in jurisdiction if *International Shoe* were to be applied.

The Court then turned to consider four arguments against the termination of in rem jurisdiction. First, in rem jurisdiction prevents a property owner from evading liability by placing his assets in a jurisdiction where he is not subject to an in personam action.<sup>54</sup> The weakness of this argument is its failure to distinguish those who actually attempt to avoid their legal obligations from those who are nonresidents for other legitimate reasons. The Court pointed out that alternate procedures such as those available under the full faith and credit clause of the Constitution<sup>55</sup> should provide sufficient control over the evasive landowner or debtor. Where a direct assertion of personal jurisdiction is constitutionally objectionable, an indirect assertion through the use of in rem concepts should be equally impermissible.

A second argument in favor of in rem jurisdiction is the security inherent in it as compared to the uncertainty of the minimum contacts test;<sup>56</sup> a plaintiff can rely on the availability of a local forum if the defendant owns property within the state. The Court answered this ar-

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51. See, e.g., *Junior Spice, Inc. v. Turbotville Dress, Inc.*, 339 F. Supp. 1189 (E.D. Pa. 1972).

52. See *Davenport v. Ralph N. Peters & Co.*, 386 F.2d 199 (4th Cir. 1967); *United States v. Balanovski*, 236 F.2d 298 (2d Cir. 1956).

53. These other rights and duties include the enforcement of judicial liens, removal of clouds upon title, mortgages, establishments of trusts, and determination of rights to trust property or income. See *Folk & Moyer*, *supra* note 8, at 782-83.

54. 97 S. Ct. at 2583. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 66, Comment a (1971).

55. U.S. CONST. art. IV, § 1, provides in part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." From this, state *B* must honor any valid judgment in state *A* by reducing it to local judgment and enforcing it. See *CONSTITUTION OF THE UNITED STATES OF AMERICA: AN ANALYSIS AND INTERPRETATION*, S. Doc. No. 92-82, 92d Cong., 2d Sess. 793-829 (1972).

Another alternative to quasi in rem seizure is federal interpleader under 28 U.S.C. § 1335 (1970), with nationwide service of process available under 28 U.S.C. § 2361 (1970), or interstate interpleader in state courts. See *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 348, 316 P.2d 960, 966 (1957), *cert. denied sub nom. American Federation of Musicians v. Atkinson*, 357 U.S. 569 (1958); *von Mehren & Trautman*, *supra* note 10, at 1157-59.

56. 97 S. Ct. at 2584. Because minimum contacts is a qualitative standard, see note 34 *supra*, litigants cannot be certain jurisdiction exists until the court so determines. See

gument by pointing out that the fairness standard of *International Shoe* would overcome this problem in most cases,<sup>57</sup> and that if the certainty of in rem jurisdiction was gained at the price of "fair play and substantial justice," the cost was too great.<sup>58</sup>

A third argument favoring retention of in rem jurisdiction was dispensed with in footnote.<sup>59</sup> Conceding the fact that in rem jurisdiction had the advantage of limiting a defendant's potential liability to the value of the property seized, the Court countered that the size of the claim was unrelated to the question of fairness in subjecting a defendant to a state court's jurisdiction.<sup>60</sup>

Finally, the Court addressed what may have been the biggest hurdle—the long history of jurisdiction based solely on the presence of property—the tradition itself.<sup>61</sup> To the degree that the concept of the state as a quasi-sovereign polity is now further eroded, the *Shaffer* decision may prove a bitter pill for state courts to swallow. Nevertheless, the mandate is unmistakable.<sup>62</sup> The Court concluded that in rem jurisdiction has outlived its usefulness. It is an "ancient form" which fails to recognize that an assertion of jurisdiction over property is

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Folk & Moyer, *supra* note 8, at 767. In the instant case, Mr. Justice Powell argued for the retention of quasi in rem theory for some actions to insure a local forum. 97 S. Ct. at 2587.

57. 97 S. Ct. at 2584. See generally note 31 *supra*.

58. *Id.* But see 97 S. Ct. at 2587 (Powell, J., concurring).

59. *Id.* at 2582 n.23.

60. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 88-90 (1971), in which the Court disallowed a claim that the defendants were not entitled to a hearing prior to the seizure of their stove, stereo, and other household goods because those items were not absolute necessities of life.

Also note that while in rem theory does limit recovery to the value of the res, the plaintiff is not thereafter barred from prosecuting another action based upon the same claim, if he can obtain in personam jurisdiction over the defendant. See *Strand v. Halverson*, 220 Iowa 1276, 264 N.W. 266 (1935); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 834 (1952).

61. 97 S. Ct. at 2584. See note 4 *supra*.

62. There may be some disagreement as to just how far the *Shaffer* decision goes in eliminating old notions of in rem jurisdiction. Six of the eight justices participating agreed that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 97 S. Ct. at 2584-85. See *id.* at 2588 for Justice Brennan's concurrence on this point. The Court, in footnote, then overruled inconsistent portions of *Pennoyer*, *Harris v. Balk* and any other prior decisions. *Id.* at 2585 n.39. Only Justices Powell and Stevens believed that quasi in rem concepts should be partially retained, and they so expressed in concurring opinions. *Id.* at 2587-88; thus there were no dissents to the future application in toto of *International Shoe*. Moreover, the Court made thirteen references to noted critics of in rem theory. *Id.* at 2581 (*passim*). Five of the seven sources noted favor *International Shoe* as the single standard. See notes 4, 8 & 14 *supra*. The voting, the language of the decision, and the commentaries cited all ordain *International Shoe* as the single jurisdictional standard. But see note 114 *infra*.

essentially an assertion of jurisdiction over the owner,<sup>63</sup> and allows a practice that is fundamentally unfair to the defendant. As such, the Court reasoned, it must give way to a more modern concept consistent with current notions of fair play and substantial justice.

#### D. *The New Test Applied*

Now satisfied that the standard of *International Shoe* would be appropriate for in rem proceedings, the Court shifted its focus to Delaware and the facts of *Shaffer*. Delaware's jurisdiction had been based solely on the fiction that defendants' shareholdings in Greyhound Corporation constituted property holdings in the state, even though the certificates representing the shares were located elsewhere.<sup>64</sup> Furthermore, the shares were neither the subject of the litigation nor related to the underlying cause of action.<sup>65</sup> It was clear, therefore, that Delaware had only attempted to exert quasi in rem jurisdiction, which was now insufficient under *International Shoe*.

The majority then considered an arguably extraneous question: whether Delaware had jurisdiction under the newly imposed minimum contacts standard of *International Shoe*. They concluded that minimum contacts were lacking—an opinion labeled as “purely advisory” by the dissent.<sup>66</sup> The majority justified its accessory decision by noting that in spite of the quasi in rem nature of the original action, the Delaware notice procedures would be sufficient to compel defendants' appearance if minimum contacts existed.<sup>67</sup> Hence, the Court would now decide if they did, in fact, exist.

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63. 97 S. Ct. at 2581. See also note 49 *supra* and accompanying text.

64. 97 S. Ct. at 2574. See notes 24 & 25 *supra* and accompanying text.

65. The initial lawsuit was an action for damages against the defendants for causing Greyhound to be involved in antitrust actions. See notes 16 & 17 *supra* and accompanying text. Most actions brought under DEL. CODE tit. 10, § 366 (1974) were unrelated to the sequestered property. See Folk & Moyer, *supra* note 8, at 784-89.

66. 97 S. Ct. at 2588. (Brennan, J., concurring and dissenting). Advisory opinions have been held unconstitutional under the “cases and controversies” limitation on the federal courts. U.S. CONST. art. III. See GUNTHER, CASES AND MATERIALS ON LAW, 1535-44 (9th ed. 1975). See also Frankfurter, *Advisory Opinion*, 1 ENCYCLOPEDIA OF THE SOC. SCI. 475 (1930); Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949); Note, *Judicial Determinations in Non-Adversary Proceedings*, 72 HARV. L. REV. 723 (1959); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302 (1956).

67. In accordance with DEL. CODE tit. 10, § 366 (1974), the court clerk sent each of the defendants a copy of the summons and complaint by certified mail; return receipts were received for at least 19 of the 28 defendants. This is sufficient notice for in personam jurisdiction under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See 97 S. Ct. at 2585 n.40.

In his appellee brief, Heitner contended that minimum contacts were present because appellants had availed themselves of the benefits and protection of the Delaware forum by incorporating there.<sup>68</sup> He argued that this gave Delaware a strong interest in being able to exert jurisdiction to oversee the management of local corporations and to define the obligations of corporate officers and directors. However, the Court, looking to Delaware statutes, found no such interest expressed. The sequestration statute<sup>69</sup> which was employed to assert jurisdiction could be used against any nonresident owning property in Delaware. Moreover, Delaware law<sup>70</sup> failed to secure jurisdiction over corporate fiduciaries who did not own property in Delaware; in the instant case, seven of the defendants named in the original complaint escaped the Delaware court's authority because they owned no stock in Greyhound.<sup>71</sup> The statutes' inability to reach all fiduciaries, and their lack of specific language revealing any such intent, indicated that the Delaware legislature perceived no strong interest in obtaining jurisdiction over corporations registered there.<sup>72</sup>

Even if that interest were present, the Court continued, it must be determined that Delaware is a fair forum for the litigation. Heitner's reasoning proved at best that Delaware law should apply to any controversy over the actions of fiduciaries in their corporate capacities.<sup>73</sup> The fact that a state's law is applicable is not a grant of jurisdiction; rather, jurisdiction must be predicated upon the acts of the defendants.<sup>74</sup> To that end, appellee Heitner argued that the appellants

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68. 97 S. Ct. at 2585.

69. DEL. CODE tit. 10, § 366 (1974). See note 20 *supra*. See also 97 S. Ct. at 2575-76.

70. DEL. CODE tit. 8, § 141(b) (Supp. 1976).

71. See 97 S. Ct. at 2585-86 & n.43.

72. See *Folk & Moyer supra* note 8, at 751-54 for a discussion of the statute's history. Note that DEL. CODE tit. 10, § 1341, see note 108 *infra*, replacing DEL. CODE tit. 10, § 366 (1974) specifically refers to the legislative intent to exercise jurisdiction over Delaware corporations and their officers and directors.

73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971) generally requires that the law of the state of incorporation be applied to actions concerning the liabilities of officers and directors to the corporation and its stockholders. Some states, however, are at variance. New York has held that its law governs corporations doing business in New York. See *Schwarz v. Artcraft Silk Hosiery Mills*, 110 F.2d 465 (2d Cir. 1940); *In re Burnett-Clarke, Ltd.*, 56 F.2d 744 (2d Cir. 1932). See also CAL. CORP. CODE § 2115 (West 1977).

74. *Hanson v. Denckla*, 357 U.S. 235 (1958), set forth the rule: "[I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Id.* at 253. See also *International Shoe v. Washington*, 326 U.S. 310, 319 (1945).

had acted affirmatively in accepting positions as officers and directors of a Delaware corporation, and had received substantial advantages under that state's law.<sup>75</sup>

The Court disagreed. Again, this factor indicated only the applicability of Delaware law, not the suitability of Delaware as a forum. Appellants had done nothing to "purposely avail themselves of the privilege of conducting activities within the forum State."<sup>76</sup> Because Delaware had not enacted a statute that treated acceptance of a directorship as consent to jurisdiction,<sup>77</sup> defendants had no reason to expect the imposition of Delaware's authority by virtue of their relation to Greyhound Corporation. As to the ownership of Greyhound securities, the Court observed: "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's . . . jurisdiction on any cause of action."<sup>78</sup> And as appellants were not required to purchase securities in order to hold their jobs<sup>79</sup>—seven did not—the purchase of securities should not deprive them of the right to be subjected only to the jurisdiction of those states with which they had minimum contacts.

Thus, the Court concluded that Delaware had no jurisdiction over Shaffer and his co-defendants under either quasi in rem or in personam theories. The statute that provided quasi in rem jurisdiction had been declared unconstitutional, and the ties between appellants, the litigation, and the forum were insufficient to establish the minimum contacts now necessary for jurisdiction.

## II. SHAFFER'S EFFECT

The full extent of the *Shaffer* decision is, as yet, unclear. Nevertheless, several immediate points may be derived from the Court's language. Most actions formerly pursued in rem should still be viable under a minimum contacts standard. Surely, when the lawsuit con-

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75. DEL. CODE tit. 8, § 143 (1974) provides that employees and officers may receive interest-free, unsecured loans when, in the judgment of the directors, the loan may be reasonably expected to benefit the corporation. DEL. CODE tit. 8, § 145 (1974 & Supp. 1976) allows for the indemnification, including legal expenses, of officers, directors, employees, or agents acting in a corporate capacity, and for insurance for any acts arising out of the relationship with the corporation which are not covered by the indemnity provisions.

76. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

77. See, e.g., CONN. GEN. STAT. § 33-322 (1960); N.C. GEN. STAT. § 55-33 (1975); S.C. CODE § 12-361 (1962).

78. 97 S. Ct. at 2586 (quoting *Folk & Moyer*, *supra* note 8, at 785).

79. 97 S. Ct. at 2585-86; DEL. CODE tit. 8, § 141(b) (Supp. 1976).

cerns the actual ownership or control of local property, this will be true.<sup>80</sup> Quasi in rem actions, however, will meet a divided fate. Where the plaintiff is attempting to enforce a duty or incident based upon the ownership of the property, but not the title itself, the court will no doubt have jurisdiction to resolve the dispute,<sup>81</sup> even in the absence of the defendant, assuming that proper notice is provided.<sup>82</sup>

On the other hand, those quasi in rem actions involving the attachment of local property of, or obligations owed to, a nonresident claimant appear to be invalid under *Shaffer*.<sup>83</sup> Certainly those actions where local property is seized *merely* as the basis of jurisdiction are now impermissible.<sup>84</sup> So, too, should the attachment of contingent liabilities<sup>85</sup> and unattachable obligations<sup>86</sup> now be defunct, although the Court did not specifically address these points in *Shaffer*.

The territorial aspect of quasi in rem theory will no doubt remain. Although the presence of property is no longer in itself a basis for jurisdiction, it may indicate that the defendant has availed himself of the benefit and protection of the laws of the forum sufficiently to justify the exercise of in personam jurisdiction.<sup>87</sup> A second remnant of the theory may persist where the plaintiff can demonstrate the probable necessity of pre-judgment attachment of a nonresident's local property as surety for a judgment in plaintiff's favor.<sup>88</sup> Although sufficient contacts may be lacking to submit the nonresident defendant to the state's jurisdiction, his local property could be sequestered or attached while the case is heard in the proper forum. This would retain some measure of the security formerly provided by quasi in rem seizures.<sup>89</sup>

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80. See notes 50-53 *supra* and accompanying text. See also 97 S. Ct. at 2582.

81. *Id.*

82. See notes 44, 67 *supra*.

83. But see Justice Stevens's concurring opinion, in which he expresses uncertainty as to the reach of the *Shaffer* decision. 97 S. Ct. at 2588.

84. *Id.* at 2582-85. But see note 114 *infra*.

85. As in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966), where New York compelled the appearance of a defendant, to face a claim arising from an accident there by attaching his insurance company's contingent obligation to indemnify him. The court was not swayed by the fact that the obligation arose only when a valid judgment had been levied. See notes 41 & 42 *supra* and accompanying text. But see note 114 *infra*.

86. See note 42 *supra*.

87. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1957). See also 97 S. Ct. at 2582.

88. See *Carolina Power & Light Co. v. Uranex*, 46 U.S.L.W. 2194 (N.D. Cal. 1977). See also Hazard, *supra* note 4, at 282-83.

89. For the same reason that the qualitative minimum contacts test is uncertain (see note 56 *supra*), quasi in rem jurisdiction is reliable: if the res is within the territory of the court, jurisdiction exists. See *Shaffer v. Heitner*, 97 S. Ct. at 2587-88 (Powell, J. and Stevens, J., concurring). But see Hazard, *supra* note 4, at 252-62.

The fact that many of the actions formerly pursued under in rem or quasi in rem theories may still be brought upon alternative bases of jurisdiction, and the fact that certain types of attachment proceedings and other quasi in rem notions have been retained, might permit the conclusion that *Shaffer* has only partially replaced *Pennoyer*, leaving in rem and quasi in rem as valid, though somewhat diminished, jurisdictional concepts. This view, however, mistakes the correlation in results for equivalence of the theoretical components of each form of jurisdiction. It is simply that, in the Court's view, in personam "does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation."<sup>90</sup> Thus, although the situs of property remains a factor, it is applied from a different perspective. Further, the Court leaves no doubt as to what this perspective is, or when it must be applied: "We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."<sup>91</sup>

### III. STATE COURT BACKLASH

States will no doubt attempt to regain the jurisdictional ground lost in *Shaffer*, and a variety of approaches will be available to that end. Most obvious are the "long arm statutes" now in force in several states.<sup>92</sup> Originally enacted to subject nonresidents to local jurisdiction

90. 97 S. Ct. at 2582.

91. *Id.* at 2584. The Court added in a footnote that—to the extent they were inconsistent with *Shaffer—Pennoyer*, *Harris v. Balk*, and ensuing cases were now overruled. 97 S. Ct. at 2584 n.39.

92. State long arm or single-act statutes include: ALA. CODE tit. 7, § 199 (1974); ARK. STAT. ANN. § 27-2502 (1967); CAL. CIV. PROC. CODE § 417.20 (West 1969); CONN. GEN. STAT. ANN. § 52-59b (West 1976); FLA. STAT. ANN. § 48.071 (West 1969); GA. CODE ANN. § 24-113.1 (1971); IDAHO CODE § 5-514 (1977); ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1969); IOWA CODE ANN. § 617.3 (West 1976); KEN. REV. STAT. § 188.020 (1971); LA. REV. STAT. § 13:3201 (West 1963); MAINE REV. STAT. tit. 14, § 704-A (1976); MD. CTS. & JUD. PROC. CODE ANN. § 6-304 (1974); MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1977); MINN. STAT. ANN. § 543.19 (West 1976); MISS. CODE ANN. §§ 13-3-57, 13-3-63 (1974); MO. ANN. STAT. § 506.200 (Vernon 1976); MONT. REV. CODES ANN. § 4(D)(2) (1975); NEB. REV. STAT. § 25-535 (1975); NEV. REV. STAT. § 14.065 (1975); N.H. REV. STAT. ANN. § 510:4 (1975); N.M. STAT. ANN. § 21-3-16 (1970); N.Y. CIV. PRAC. LAW § 302 (McKinney 1972); N.C. GEN. STAT. § 1A-1 (1975); OHIO REV. CODE ANN. § 2703.20 (Baldwin 1971); OKLA. STAT. tit. 12, § 187 (1971); OR. REV. STAT. § 15.190 (1975); PA. STAT. ANN. tit. 42, § 8301 (Purdon 1976); S.C. CODE §§ 10-431, 12-13.7 (1974); S.D. COMPILED LAWS ANN. § 15-7-1 (1977); TENN. CODE ANN. § 20-235 (1974); TEX. CIV. CODE ANN. tit. 42, § 2031b (Vernon 1964); UTAH CODE ANN. § 78-27-74 (1975); VA. CODE § 8-81.2

for contracts made or acts done within the state,<sup>93</sup> the statutes have been enlarged to encompass contract and tort claims against defendants who have never entered the state.<sup>94</sup>

Illinois, the first state to enact a comprehensive long arm statute,<sup>95</sup> included a provision which limited jurisdiction to causes of action growing out of the same acts upon which jurisdiction is based.<sup>96</sup> Other states,<sup>97</sup> including Oklahoma,<sup>98</sup> have adopted similar limitations. Repeal of these sections would be the most obvious means of attempting to increase a state's jurisdictional power. While such revision might render the statutes unconstitutional,<sup>99</sup> the argument can be made that minimum contacts arise from the defendant's activities in the forum, as enumerated in the statute, and once these are shown to exist, jurisdiction would exist over the nonresident defendant in relation to other, out of state, activities.<sup>100</sup>

As with all legislation, long arm statutes are subject to judicial interpretation. One broad basis for exercising in personam jurisdiction which is found in several long arm statutes is that of "doing business

(1976); WASH. REV. CODE ANN. § 4.28.185 (1976); W. VA. CODE § 56-3-31 (1977); WIS. STAT. ANN. § 345.09 (West 1971); WYO. STAT. §§ 5.41-5.43 (1975).

93. See Currie, *supra* note 39, at 537.

94. Contract claims generally involve an out of state corporation soliciting within the forum. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 233 (1957). Products liability actions are usually the substance of interstate tort claims. See, e.g., *Gray v. American Raditor & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); *Metal-Matic, Inc. v. Eighth Judicial District Court*, 82 Nev. 263, 415 P.2d 617 (Nev. 1966); *Crescent Corp. v. Martin*, 443 P.2d 111 (Okla. 1968). See also Currie, *supra* note 39, at 544-66.

95. 1955 Ill. Laws pp. 2238, 2245-46 (codified at ILL. REV. STAT. ch. 110, § 17 (1968)). See Currie, *supra* note 39, for the history of Illinois' long arm jurisdiction.

96. The statute provides that: "Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based on this Section." ILL. REV. STAT. ch. 110, § 17(3) (1968).

97. See, e.g., ARK. STAT. ANN. § 27-2501 (1967); MINN. STAT. ANN. § 543.19 (West 1976); N.Y. CIV. PRAC. LAW § 302.2 (McKinney 1972). See also Comment, *Long-Arm and Quasi in Rem Jurisdiction and The Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 309 n.50 (1970); *Developments In The Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 998-1017 (1960).

98. OKLA. STAT. tit. 12, § 1701.03 (1971). See Comment, *Jurisdiction: "Long-Arm" Expansion*, 19 OKLA. L. REV. 443 (1966).

99. In keeping with *International Shoe* and its progeny, *Shaffer* requires that a relationship exist among the defendant, the forum, and the litigation. 97 S. Ct. at 2580. Repeal of sections limiting jurisdiction to causes enumerated in the statute would remove the requirement of a relationship to the litigation, leaving the long arm statute arguably in violation of due process under *International Shoe* and *Shaffer*.

100. See Hazard, *supra* note 4, at 282, where the author suggests that ownership of tangibles would subject the nonresident owner to such an action.

within the state.”<sup>101</sup> “What is “doing business”?<sup>102</sup> How much business must be conducted? When will those acts be “within the state”? As post-*Shaffer* courts wrestle with these terms, they are likely to apply more liberal standards to nonresident defendants. Another provision of many long arm statutes is that jurisdiction may be asserted over the principal through the acts of his agent.<sup>103</sup> Herein lies great potential for abuse in asserting jurisdiction over out-of-state deep pockets.<sup>104</sup> Another possibility for creative judicial interpretation was noted in the *Shaffer* dissent: Delaware courts could decide that the legislative intent was to exert jurisdiction over defendants such as Shaffer, and this intent would best be served by the reinterpretation of its statute<sup>105</sup> to permit jurisdiction based upon the quality of the contacts with the forum rather than upon quasi in rem seizure of stock.<sup>106</sup> If not, Delaware may find it necessary to follow the crowd and adopt a long arm statute.<sup>107</sup>

101. E.g., CAL. CIV. PROC. CODE § 416.10 (West 1973); ILL. REV. STAT. ch. 110, § 17(1)(a) (1968); KY. REV. STAT. § 271.610(2) (1972); MICH. COMP. LAWS § 660-711 (1968); N.M. STAT. ANN. § 21-3-6(b) (1970); OKLA. STAT. tit. 18, § 471 (1971); PA. STAT. ANN. tit. 15, § 2011(c) (Purdon Supp. 1971); WIS. STAT. § 262.06(1)(d) (1971).

102. See Comment, *Long Arm Wrestling in Pennsylvania: In Search of a Satisfying Answer to In Personam Jurisdiction in Products Liability Cases*, 33 U. PITT. L. REV. 839, 842 (1972) [hereinafter cited as *Long Arm Wrestling*]; Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028, 1035-40 (1965).

103. See Currie, *supra* note 39, at 561-63.

104. That is, the existence of a principal-agent relationship may be found on tenuous grounds, in cases such as those involving independent insurance agents or self-employed truck drivers, in order to exercise jurisdiction over the assets of the insurance company or the party contracting with the independent driver.

105. DEL. CODE. tit. 10, § 366(a) (1974). See note 20 *supra* for the text.

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

107. As noted in Justice Brennan's dissent in *Shaffer*, Delaware used DEL. CODE tit. 10, § 366 instead of a long arm statute. 97 S. Ct. at 2588-89. To replace the now unconstitutional § 366, the Delaware legislature recently enacted DEL. CODE tit. 10, § 3114, reproduced in part below:

Service of Process on Non-resident Directors, Trustees or  
Members of the Governing Body of Delaware Corporations

(a) Every non-resident of this State who after September 1, 1977 accepts election or appointment as a director, trustee or member of the governing body of a corporation organized under the laws of this State or who after June 30, 1978 serves in such capacity and every resident of this State who so accepts election or appointment or serves in such capacity and thereafter removes his residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as his agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director, trustee or member is a necessary or proper party, or in any action or proceeding against such director, trustee or member for violation of his duty in such capacity, whether or not he continues to serve as such director, trustee or member at the time the suit is commenced. Such acceptance or ser-

In addition to long arm statutes, states will probably adopt other legislation designed to extend their jurisdiction.<sup>108</sup> The Supreme Court noted the non-existence of two such statutes in the *Shaffer* case which could have authorized jurisdiction: the first would require directors of state-registered corporations to own stock,<sup>109</sup> and the second would equate acceptance of a directorship with consent to jurisdiction.<sup>110</sup> In addition, garnishment and sequestration statutes may need refinement to fill any jurisdictional voids created by *Shaffer*.

### *Expansion of Minimum Contracts*

The minimum contacts test of *International Shoe* is now the sole standard for jurisdiction in state courts. By design, the test is inexact. Quality of contacts, rather than quantity, is the gauge,<sup>111</sup> and this is the most likely area for post-*Shaffer* abuse by state courts reacting to a federal limitation on their power.<sup>112</sup> Examples were already evident of

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vice as such director, trustee or member shall be a signification of the consent of such director, trustee or member that any process when so served shall be of the same legal force and validity as if served upon such director, trustee or member within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

...

### SYNOPSIS

The purpose and intent of this legislation is to fill a void in enforcement and interpretation of Delaware corporation laws created by the decision of the United States Supreme Court on June 24, 1977 in *Schaffer v. Heitner* [sic]. In that case the Court struck down 10 Del. C. § 366 which until now has frequently been the only means whereby nonresident corporate directors of Delaware Corporations could be brought before the courts of this State to answer for their conduct in managing the affairs of the corporation. Indeed, under 10 Del. C. § 366, the Courts of this State often provided the only forum where nonresident corporate directors of Delaware corporations from different states could be joined in the same lawsuit for such purposes. The Supreme Court did note that Delaware's interest in regulating the affairs of corporations governed by Delaware law could be promoted by enactment of a statute subjecting non-resident corporate directors to the jurisdiction of the Delaware courts.

Delaware has a substantial interest in defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them. In promoting that interest it is essential that Delaware afford a convenient and available forum for supervising the affairs of Delaware corporations and the conduct of the directors of Delaware corporations. This legislation is designed to accomplish that objective. The legislation is modeled after similar statutes in Connecticut, North Carolina and South Carolina, which were cited as examples by the Supreme Court in the *Heitner* case and in Michigan.

108. See generally *Long Arm Wrestling*, *supra* note 103.

109. 97 S. Ct. at 2586 n.43; DEL. CODE tit. 8, § 141(b) (Supp. 1976) does not require directors to be stockholders unless the corporation's articles of incorporation so require.

110. 97 S. Ct. at 2586-87. But see note 107, *supra*.

111. See notes 34 & 56 *supra*.

112. However, the vague principles of "quality of contacts" and "traditional notions of fair play and justice" may be a necessary evil. The courts have frequently had to

state courts overreaching their jurisdiction in the application of minimum contacts.<sup>113</sup> Given the provocation of *Shaffer*, it is likely that the limits of due process will be tested even further.<sup>114</sup>

If such excesses and abuses of state court jurisdiction materialize and remain unchecked, the Supreme Court will have to redefine in personam jurisdiction, setting tighter limits and possibly imposing a more objective test than that now employed. On the other hand, the fact that a single standard now exists may homogenize our courts' perspectives on jurisdiction. A few postscripts to *Shaffer* may be required, but now that the due process aberrations brought about by *Pennoyer* and the concept of territorial jurisdiction are gone, a just and consistent jurisdictional standard should be attainable.

### CONCLUSION

Property remains an important factor in determining whether jurisdiction may be properly asserted. Its presence will furnish a substantial component in ascertaining the extent of the defendant's relationship to the forum. But jurisdiction is now admittedly over the person, not over the property; consequently, some cases will fail to meet the minimum contacts test even where property is physically present. It is important, therefore, to view the results of *Shaffer v. Heitner* in the proper perspective—the inference that quasi in rem actions survive in their old form may lead to unconstitutional assertions of jurisdiction.

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examine the merits of the controversy, even in deciding the preliminary question of jurisdiction.

113. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1957). See also *The Fundamental Test of Fairness*, *supra* note 98, at 311-18.

114. Due Process as applied in state courts may already be stretched to its limits. In *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), the court rendered a post-*Shaffer* endorsement of the much criticized procedure used in *Seider v. Roth*, 17 N.Y. 111, 216 N.E.2d 312 (1966). With the dubious distinction that *Seider*-type actions are sui generis, and therefore not subject to the in personam-in rem classification, the court held that the attachment of insurance obligations remained viable. This was in spite of the language in *Shaffer* that "all assertions of state court jurisdiction must be evaluated according to *International Shoe* and its progeny." 97 S. Ct. at 2584-85. Moreover, *Shaffer* appears to have overruled *Harris v. Balk*, 198 U.S. 215 (1905), on which *Seider* relied. *Id.* at n.39.

In addition, the Oklahoma Supreme Court recently decided minimum contacts with foreign corporations were necessary only on contractual claims, and upheld the assertion of jurisdiction in a products liability case. *Winston Ind. Inc. v. Oklahoma*, 540 P.2d 572 (Okla. 1977).