SHAFFER v. HEITNER: AN END TO AMBIVALENCE IN JURISDICTION THEORY?

Robert C. Casad*

On June 24, 1977, the Supreme Court of the United States ruled in Shaffer v. Heitner¹ that a defendant could not constitutionally be subjected to quasi in rem jurisdiction in a state that lacked the “minimum contacts” with the parties or issues International Shoe Co. v. State of Washington² had prescribed as the standard of due process for in personam actions. In stating its conclusion, the majority opinion of Justice Marshall went so far as to declare that “all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.”³ The decision is an important one that at first glance seems to resolve some of the uncertainties left by the Supreme Court’s last major decision dealing with the constitutional bases for state court jurisdiction: Hanson v. Denckla,⁴ decided nineteen years ago. This Article will consider whether those uncertainties really are resolved and, if so, in what way. It will also examine some of the other implications of this very recent decision. To place the Shaffer case in its proper setting it is necessary first to show what went before, with special emphasis on International Shoe. This is familiar material to most readers, but it is subject to varying interpretations, and so the view of it that underlies the present analysis must be stated.

I. THE BACKGROUND: PENNOYER TO INTERNATIONAL SHOE TO HANSON

Before International Shoe, American thinking about trial court jurisdiction was dominated by the “territorial power” theory. Under that theory, a court would have personal jurisdiction to adjudicate a claim against a nonconsenting, nonresident defendant if and only if the defendant could be reached by the court’s process while physically present within the territory of the forum state. Personal service in the state was seen as both a necessary and sufficient condition for the exercise of personal jurisdiction. Pennoyer v. Neff⁵ gave constitutional stature to this theory by declaring it to rest upon “a principle of general, if not universal, law,”⁶ and thus to be an element of the due process of law protected by the fifth and fourteenth amendments.

In reality, the principle was not so universal as the Pennoyer Court thought. In civil law countries, such as France, a court’s authority to adjudicate has not been thought to depend upon the service of process on the defendant within the territory of the forum state, and such service is not normally sufficient in the absence of other connecting factors.⁷ Moreover, it is doubtful that even English and American com-

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*Professor of Law, University of Kansas. B.A. 1950, M.A. 1952, University of Kansas; J.D. 1957, University of Michigan.

² 326 U.S. 310 (1945).
³ 97 S. Ct. at 2584-85.
⁵ 95 U.S. 714 (1877).
⁶ Id. at 720.
mon law authorities before 1877 actually supported the territorial power theory as expounded in Pennoyer v. Neff. The theory was accepted, nevertheless, almost as though it were inherent in the nature of things. Justice Holmes lent his considerable prestige to the power theory, and contributed the often-quoted phrase "the foundation of jurisdiction is physical power" to American legal folklore. Professor Joseph Beale, the architect of the first Restatement of Conflict of Laws, implied that the territorial power principle was so fundamental that it was "unlike other principles of the common law . . . incapable of change by statute."  

Although the idea that jurisdiction depended on the power of the state to physically compel the defendant to respond to the court's orders was an attractive one, it had serious weaknesses as a basis for a general theory of jurisdiction. In the Pennoyer case itself, the majority opinion of Justice Field recognized that there were several situations in which personal service within the state would not be necessary. Personal service within the state was not required if the defendant was a domiciliary of the forum state or a corporation chartered there. Likewise, it was not required if the defendant consented to jurisdiction. Domicile and consent were thus viewed as alternatives to physical presence as bases for personal jurisdiction. The power theory did not preclude actions brought to determine the civil status of a domiciliary of the forum state, even though the judgment would also inevitably determine the civil status of a nonconsenting nonresident not physically present. The Pennoyer Court even suggested that the forum state could require a nonresident individual "entering into a partnership or association within its limits, or making contracts enforceable there" to appoint an agent or designate some other manner by which jurisdiction could be acquired with respect to such transactions, and to provide an alternative means of subjecting the nonresident to jurisdiction if he or she should fail to comply with the requirement.  

The Pennoyer case also recognized that a state in which some property of the defendant was located could—by virtue of its power over the property—force a nonconsenting, nonresident defendant to adjudicate in its courts a claim unrelated to the property or to the forum state. This kind of proceeding, commonly referred to as quasi in rem, was squared with the territorial power theory by treating the action as one to determine interests in the local property, which implicated the merits of the plaintiff's claim only indirectly. If the plaintiff's personal claim against the defendant was valid, plaintiff could be said to have a potential interest in the defendant's local property, for if the defendant failed to pay the claim, and if the plaintiff got a judgment on it, and if the defendant failed to satisfy the judgment, the plaintiff could seek satisfaction from the defendant's local property. Accordingly, a court that could exercise jurisdiction over the defendant's property could examine the merits of the plaintiff's claim in order to see if the plaintiff really did have such an interest. Theoretically, only the property was at stake in the action, but if the

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8 Professor Ehrenzweig has declared that "English legal history furnishes little support for the power doctrine." Ehrenzweig, The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens, 65 Yale L.J. 289, 297 (1956). Ehrenzweig examined numerous English and American cases predating Pennoyer and concluded that the transient rule—i.e., the principle that personal service within the territory of the forum is sufficient for jurisdiction—had "often been mouthed by the courts" but had "rarely been applied." Id. at 295.
9 McDonald v. Mateo, 243 U.S. 90, 91 (1917).
10 J. Beale, A Treatise on the Conflict of Laws § 42.1, at 275 (1935).
11 98 U.S. at 735 (emphasis added).
defendant did not appear to defend against the plaintiff's claim, the plaintiff would almost always succeed. And if the defendant did appear and defend, he would probably be held to have made a "general appearance" (and thus to have empowered the court to exercise jurisdiction on the basis of consent), which would then enable the court to exercise personal, not just in rem, jurisdiction. The defendant, then, was clearly under a form of legal compulsion to appear and defend even though, in theory, the court had no personal jurisdiction. The fictitious quality of all this was clear, but it was rationalized as a desirable measure to provide justice to local creditors who could not reach the debtor personally.

The quasi in rem proceeding was not normally limited to use by local creditors, however, and it was not limited to cases in which the defendant's property in the forum state was tangible real or personal property. It could be predicated on intangibles—corporate stock, bank accounts, and even personal debts owing by a private individual to the defendant. The Supreme Court recognized the propriety of this use of the theory in Harris v. Balk. If the defendant's debtor could be subjected to personal jurisdiction in the forum state, the debt could be used as the basis of a quasi in rem proceeding by one of the defendant's own creditors. Since personal service within the state was sufficient for personal jurisdiction over the debtor, a defendant could thus be compelled to defend not only in any state in which he might be found by the process server or in which he owned tangible property, but also in any state in which one of his debtors might be found. The potential for abuse in this quasi in rem device was ameliorated to some extent in some states by allowing the defendant to appear and defend on the merits without submitting to personal jurisdiction: the so-called "limited appearance." Other states, however, refused to permit a defendant to present any defense going to the merits without submitting to personal jurisdiction.

The great expansion of multistate enterprise and the development of the automobile and airplane in the twentieth century put additional strain on that aspect of the territorial power theory that treats physical presence within the state at the time of process service as necessary for jurisdiction over a nonconsenting nonresident. The courts had to and did develop rationales to permit the exercise of personal jurisdiction over foreign corporations and nonresident motorists within the framework of the power theory. Foreign corporations were required to submit to jurisdiction and to appoint a local agent to receive service of process as a condition of being permitted to do business in the state. Jurisdiction thus could be theoretically based on consent and the power theory was not jeopardized. The fact that the consent was extracted by legal compulsion did not seem particularly important. And if the corporation doing business in the state did not in fact consent and appoint a local agent to receive service, that did not particularly matter. The act of doing business was deemed to constitute implied consent, or, sometimes, to constitute "presence" in the state so as to fit the demands of the power theory. The implied
consent rationale was also used to justify jurisdiction over nonresident motorists for claims arising from their operation of vehicles within the state.\textsuperscript{38}

The necessity for resort to such patent fictions as implied consent in order to square particular rulings with basic theory usually means the theory needs to be overhauled. The Supreme Court undertook this in 1945 in the \textit{International Shoe} case.\textsuperscript{19} At issue in the case was whether Washington could impose an employment tax on a Missouri-based Delaware corporation and subject it to suit in Washington courts to collect the tax. The corporation employed several salesmen who resided in Washington but whose only activity on behalf of the corporation was the solicitation of orders; that activity by itself had been held in prior cases not to constitute such doing business as would amount to presence that would expose the corporation to personal jurisdiction.\textsuperscript{20} In holding that due process was not violated by subjecting the corporation to jurisdiction, the Court, in an opinion written by Chief Justice Stone, departing from the pattern of earlier cases, made no attempt to square its conclusion with the territorial power theory. In fact, the opinion came close to declaring that theory obsolete, at least insofar as presence of the defendant within the state was regarded as \textit{necessary}, and at least in relation to corporations. The Court said:

Historically the jurisdiction of courts to render judgment \textit{in personam} was grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. \textit{Pennoyer v. Neff} . . . . But now that the \textit{capias ad respondentum} has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment \textit{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."\textsuperscript{21}

The last sentence in this passage is the one most commonly quoted as the rule of the \textit{International Shoe} case, and the jurisdiction theory that it rests on is commonly referred to as the "minimum contact" theory, or as the "fundamental fairness" theory. The fact that two different terms are in common usage to describe what must be but one theory bears witness to one continuing source of uncertainty about the true meaning of \textit{International Shoe}. The use of the term "minimum contact" suggests that attention should focus on an assessment of the defendant's physical connections with the state, and some courts apparently have understood the \textit{International Shoe} standard in that way.\textsuperscript{22} Others, however, have not regarded the defendant's contacts as being of overriding importance. Rather, the appropriate inquiry involves a complex process of weighing and balancing a variety of interests that are relevant

\textsuperscript{19} 326 U.S. 310 (1945).
\textsuperscript{20} Several Supreme Court cases endorsing the proposition that mere solicitation would not justify subjecting a foreign corporation to jurisdiction in the state were cited in the \textit{International Shoe} majority opinion. \textit{Id.} at 315-16.
\textsuperscript{21} \textit{Id.} at 316.
to the overall question of fairness: expectations of both parties, regulatory concerns of the various states, procedural convenience, etc.\(^{28}\)

This is not to say that courts have consciously followed two different theories in applying the *International Shoe* standard. Virtually all have tended to quote the same passage, to speak of both minimum contacts and fair play and substantial justice. The difference is subtle: a difference in the manner of interpreting what those words mean. There are plausible explanations for both approaches.

It seems likely that the term “minimum contacts” has encouraged many courts, consciously or unconsciously, to employ the “physical contact” interpretation. There are two other factors, however, that probably have contributed to the use of that approach. One is the practical and understandable desire of trial courts for jurisdictional tests that can be applied easily, without the necessity of an extensive fact inquiry at the preliminary stage of litigation when jurisdiction questions usually are raised. If no act or event having a demonstrable physical location in the forum state can be traced to the defendant, then the court can conclude that the defendant lacks even minimum contact, and the case can be dismissed without further inquiry into the relative inconveniences, the state’s regulatory concerns, etc. The other factor tending to enforce the physical contact approach is the persistence of territorial power thinking. Many lawyers and judges still find it difficult or impossible to conceive that an exercise of sovereign authority can operate on anything that has no physical location within the territory of the forum. Many still believe, with Justice Holmes, that the foundation of jurisdiction is physical power, and so the only contacts that can support jurisdiction must have some physical content. If not presence at the time of service, then there must at least have been presence of the defendant or the physical product of his actions at some time to bring him within the range of the state’s power.

The other approach looks broadly to the fairness of requiring this defendant to defend this suit brought by this plaintiff in this forum. The defendant must have some contact, tie or relation to the forum state, but it need not be a physical act or even an event immediately caused by the defendant, as the first approach would require. There may be cases in which jurisdiction may be proper even though the defendant has only a very remote connection to the forum state if the factors favoring that forum are strong enough. Under this approach the relative inconvenience to the defendant must be weighed against the relative inconvenience to the plaintiff if the suit could not be brought in the chosen forum. The *International Shoe* opinion contains some memorable passages that lend support to this broader fairness interpretation, and which strongly suggest that the Court was concerned not so much with the contacts as with fair play and substantial justice. For instance:

\[T]\he terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands are met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An “estimate of the inconveniences”

which would result to the corporation from a trial away from its “home” or principal place of business is relevant in this connection.24

And again:

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. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . 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 the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.25

This last sentence seems to say that physical contacts are not required: ties or relations will satisfy due process.

In 1957, the Supreme Court decided a case that seemed to endorse this latter, fairness, view and to reject the notion that due process requires some sort of physical contact to justify jurisdiction. In McGee v. International Life Insurance Co.26 the Court upheld a California state court’s jurisdiction over an insurance company whose only physical contacts with the state were an undertaking by mail to insure a California resident and the acceptance of premium payments from him over a two year period. The defendant had no office or agent in California and (so far as the record showed) solicited no insurance business in California, except the policy in suit. The Court recognized that the defendant had virtually no physical connection with California, but held that “[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.”27

Those who saw the McGee case as a resolution of the question of whether the International Shoe test required physical contacts or a general balance of fairness were disappointed the following year by the case of Hanson v. Denckla,28 discussed below, which seemed to support the contact emphasis. Thus the question of which approach was proper remained unresolved at the time Shaffer v. Heitner was decided.

An even more fundamental problem, however, was whether the International Shoe doctrine displaced the territorial power theory or supplemented it. The Court did not purport to overrule Pennoyer v. Neff, so perhaps International Shoe merely meant that jurisdiction could now be recognized anywhere Pennoyer would permit it and also in other cases. The Court did say that all due process required was such contact by the defendant with the forum state as will satisfy traditional notions of fair play and substantial justice “if he be not present within the territory of the forum.”29 This indicated that the power theory in one of its phases survived. Physical presence might no longer be necessary, but it could still be sufficient for due process. The Court also said, however, that due process must depend on “the quality

24 326 U.S. at 316-17.
25 Id. at 319.
27 Id. at 223.
and nature of the activity in relation to the fair and orderly administration of the laws.\textsuperscript{30} Can this standard be satisfied in a case where a transient individual is subjected to jurisdiction in the courts of a state that has no connection to the parties or issues in the case except the plaintiff's choice of that forum and the defendant's temporary physical presence there at the time of service? \textit{International Shoe} was curiously ambivalent on this point. Most courts continued to recognize jurisdiction over transients caught and served within the territory of the forum,\textsuperscript{31} but several prominent authorities argued vigorously that that practice was improper and probably unconstitutional if there were no other factors relating the forum to the case.\textsuperscript{32}

Another problem relating to the scope of the \textit{International Shoe} doctrine concerned the relevance of its standards to cases invoking the kind of quasi in rem jurisdiction that \textit{Pennoyer v. Neff} and \textit{Harris v. Balk} had recognized. Such proceedings were justifiable mainly as a means of circumventing the limitations on the exercise of personal jurisdiction stemming from the power theory's insistence on personal service and physical presence. If these were no longer necessary, was there any further justification for that kind of quasi in rem action? If personal jurisdiction could be exercised in any case in which it would be fair and reasonable to require the defendant to defend the particular suit there, the only situation in which there would be a need to resort to quasi in rem jurisdiction would be in a case in which it would \textit{not} be fair and reasonable.\textsuperscript{33} If fundamental fairness rather than territorial power is the determinant of due process in the exercise of jurisdiction, the historic distinction between proceedings in personam and proceedings in rem may simply be obsolete. The Court almost said as much in the 1950 case of \textit{Mullane v. Central Hanover Bank and Trust Co.}\textsuperscript{34}

The \textit{Mullane} case concerned the sufficiency of publication service in an action to determine the accounting of the trustee of a common trust fund. Under traditional theory, if the proceeding were regarded as in rem, publication service might be adequate, but if it were viewed as in personam, it would not be, at least as to nonresidents. The majority opinion of Justice Jackson belittled the significance of the in rem-in personam distinction, and declared:

\begin{quote}
\textit{in any event we think that the requirements of the Fourteenth Amendment ... do not depend upon a classification for which the standards are so elusive and confused generally ... \textit{[W]}e do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.}\textsuperscript{35}
\end{quote}

Such clarification as the \textit{Mullane} case provided was short-lived. In 1958 the matter

\textsuperscript{30} Id. at 319.

\textsuperscript{31} \textit{Post-International Shoe} reported decisions involving personal jurisdiction based on personal service alone, when both parties are nonresidents and the cause of action is unrelated to the forum, are hard to find. None are listed in the Decennial Digests. The few cases resting on personal service, however, assume that that alone is a sufficient basis. See, e.g., \textit{Nielsen v. Braland}, 264 Minn. 481, 119 N.W.2d 737 (1963) (Iowa defendant held subject to jurisdiction in Minnesota for tort that occurred in Iowa on basis of personal service while temporarily in Minnesota. Plaintiff was a Minnesotan.). \textit{See also Grace v. MacArthur}, 170 F. Supp. 442 (E.D. Ark. 1959) (Nonresident served in airplane flying over Arkansas. Plaintiffs were Arkansans and the claim arose in Arkansas.).


\textsuperscript{34} 339 U.S. 306, 312-13 (1950).

\textsuperscript{35} Id.
became obscure again. The majority (five to four) opinion in *Hanson v. Denckla*\(^\text{36}\) revived the in rem-in personam distinction which *Mullane* had all but discarded, giving support to the physical contact interpretation of *International Shoe* which *McGee* had apparently rejected, and gave the territorial power theory a new lease on life. The case concerned the exercise of a power of appointment over the assets of a trust. The trustee was a foreign corporation whose only connection with the forum state was its relationship with the beneficiary of the trust who resided there, having moved to the state sometime after the establishment of the trust. The trustee was regarded as an indispensable party by local law, and so had to be subjected to the court's jurisdiction somehow. The majority opinion of Chief Justice Warren, following the model of *Pennoyer v. Neff*, analyzed the action both as an in rem and as an in personam proceeding. Referring to in rem jurisdiction, the majority opinion declared: "Founded on physical power . . . the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State."\(^\text{37}\)

Finding that Florida was not the situs of the intangible assets that made up the trust res, the Court concluded that Florida had no in rem jurisdiction. The Court then looked to see if Florida could exercise in personam jurisdiction over the Delaware trustee and found that it could not:

> [T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe Co. v. Washington* . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.\(^\text{38}\)

Such contacts cannot exist, the Court said, unless "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."\(^\text{39}\)

The phrase just quoted is the passage that is customarily referred to as the rule of *Hanson v. Denckla*. It identifies an essential element of due process in the exercise of personal jurisdiction that had not been articulated before. But, like the rule of *International Shoe*, it is susceptible to more than one interpretation. To those courts that adhere to the physical contact interpretation of *International Shoe*, the *Hanson* rule will be satisfied only if the defendant voluntarily did some specific act in the forum state, or at least, did some act with awareness that it could produce some sort of physical impact in the forum state.\(^\text{40}\) Other courts, however, have viewed the *Hanson* rule differently. To them, the *Hanson* rule recognizes that in determining the overall fairness of subjecting the defendant to jurisdiction in the forum state,
it is essential that the connection to the state be the foreseeable result of the defendant's own conduct, not simply that of some intervening third party. Voluntariness and foreseeability, not physical impact, are the important considerations for due process purposes, under this view.\(^{41}\)

The Hanzon majority seemed clearly to be strongly influenced by the power theory, and its opinion seemed to support the physical contact interpretation of International Shoe. The four dissenting judges, on the other hand, saw fundamental fairness as the basic due process limitation on state jurisdiction, and endorsed the McGee view that the contact between the defendant and the forum state need not be a physical act or event in order to satisfy due process.

Since the Hanzon decision was such a close one, and since the majority opinion seemed strangely inconsistent with other post-International Shoe cases, such as Mullane and McGee, much ink was shed in the attempt to assess its significance.\(^{42}\) The Supreme Court left matters in this ambivalent condition for nearly twenty years.\(^{43}\) Shaffer v. Heitner was the Court's next significant decision on the subject.

II. Shaffer v. Heitner

Like many states, Delaware has statutes permitting the kind of quasi in rem jurisdiction over nonresidents owning property within the state that the Supreme Court held proper in Pennoyer v. Neff and Harris v. Balk.\(^{44}\) Unlike most other states, however, Delaware law also provides that for attachment, garnishment and jurisdiction purposes, the situs of the ownership of all stock in Delaware corporations is in Delaware. This is true regardless of where the certificates may be, or the stockholders may reside, or the corporate offices may be.\(^{45}\) The Delaware Supreme Court long ago ruled that the quasi in rem proceeding authorized by Delaware law was available even in an action by a nonresident plaintiff against a nonresident defendant on a foreign cause of action.\(^{46}\) Proceedings of this kind under the Delaware sequestration statute (the equity counterpart of attachment) became commonplace in connection with shareholder's derivative suits.\(^{47}\)

\(^{41}\) Cf. cases cited note 23 supra.
\(^{42}\) See, e.g., Foster, Expanding Jurisdiction Over Nonresidents, Ws. Bar Bull. 3, 20 (Supp. Oct. 1959), where the author predicts that Hanzon "will be confined to its precise facts." Cf. Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 244: "Justice Warren reached the fair result . . . but by a line of analysis that in all charity and after mature reflection is impossible to follow . . . ." The Florida court in Hanzon upheld a judgment that had been based upon very questionable application of substantive principles. It upset Mrs. Donner's plan for the distribution of a gift of four hundred thousand dollars to some of her grandchildren, and gave that amount to two of her daughters who were going to receive one million dollars from the Donner estate anyway. But cf., F. James, Civil Procedure 644 (1965): "[T]he actual holdings [in the Supreme Court's post-International Shoe decisions] could all be narrowly construed so that each of them (with the possible exception of McGee) fits within an old familiar mold." The Mullane case is described in von Mehren & Trautman, supra note 32, at 1174, as the prototype of "jurisdiction by necessity," i.e., a case where there was no other appropriate forum so that a denial of jurisdiction would in effect prevent an adjudication of the matter altogether.


\(^{44}\) Del. Code Ann. tit. 8, § 169 (Michie 1975). The Uniform Commercial Code § 8-317 provides that stock may be attached only by seizing the document, but Delaware did not adopt § 8-317 when it enacted the U.C.C.


Heitner, a nonresident of Delaware, was owner of one share of stock in the Greyhound Corporation, a Delaware corporation with its principal place of business in Arizona. He filed a shareholder's derivative suit in a Delaware chancery court against Greyhound Corporation, Greyhound Lines, Inc. (a wholly owned subsidiary of Greyhound Corp., incorporated in California with its principal place of business in Arizona), and twenty-eight past and present officers and directors of one or both corporations. The officers and directors, all nonresidents of Delaware, were charged with breach of their duties in causing the corporations to engage in arrangements that resulted in Greyhound being held liable for over thirteen million dollars in damages, plus attorneys' fees, in a private antitrust suit, and also for some heavy fines in a criminal contempt action, all stemming from conduct that mainly took place in Oregon. To obtain jurisdiction of the officers and directors, Heitner got an order of sequestration, seizing their stock or options in Greyhound Corporation. All defendants were notified of the action by mail directed to their last known addresses and by publication. All those whose stock or options were seized appeared specially to quash the sequestration on due process grounds.

In Ownbey v. Morgan the Supreme Court had upheld, over due process objections, the use of the Delaware attachment statute (counterpart of the chancery sequestration statute involved in Heitner's case) to acquire quasi in rem jurisdiction. But that decision was long before International Shoe and before Sniadach v. Family Finance Corp., Fuentes v. Shevin, and Mitchell v. W. T. Grant Co. The defendants in Shaffer claimed the sequestration could not be valid without the prior hearing prescribed by Fuentes and Sniadach, and also that its use to acquire jurisdiction in this case contravened the principles of International Shoe since the defendants and the underlying claim lacked sufficient connection to Delaware. The chancery court rejected these arguments and affirmed its jurisdiction quasi in rem. The Supreme Court of Delaware agreed.

The Delaware Supreme Court summarily rejected the argument based on International Shoe with the simple explanation that that doctrine had no application in quasi in rem actions. The situs (presence) of the stock in Delaware was a sufficient basis for the exercise of quasi in rem jurisdiction, even for claims unrelated to the property or to Delaware. The Sniadach-Fuentes argument was rejected on the ground that attachment for purposes of acquiring jurisdiction was an exceptional case, not requiring the pre-seizure hearing.

On appeal, the Supreme Court reversed the decision on the strength of the International Shoe argument. The majority opinion of Justice Marshall, accordingly, did not discuss the Sniadach-Fuentes problem.

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48 256 U.S. 94 (1921).
53 Id. at 229.
54 In the Fuentes case, the majority opinion of Justice Stewart had recognized that there were "extraordinary situations" that justify postponing the opportunity for a hearing. In a footnote he cited some cases in which the Court had previously upheld attachments without a prior hearing. One of those was Ownbey v. Morgan, 256 U.S. 94 (1921), involving Delaware's attachment law. The footnote referred to it approvingly as a "case [that] involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest." 407 U.S. at 91 n.23. The Kansas Supreme Court recently held an attempt to exercise quasi in rem jurisdiction under the Kansas attachment statutes to be unconstitutional on the Sniadach-Fuentes-Mitchell grounds the Shaffer Court refused to consider. Hillhouse v. City of Kansas City, 221 Kan. 369, 559 P.2d 1148 (1977).
In rejecting the Delaware court's conclusion that *International Shoe* had no application because the action was quasi in rem, Justice Marshall said: "This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff* . . . ."55 The Court then set about proving that assumption wrong by tracing the erosion of the power theory down to the *International Shoe* case. After quoting the passages from *International Shoe* set out in the prior section,66 the Court concluded as follows: "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."67

How does this proposition square with the majority opinion in *Hanson v. Denckla* quoted above?68 Very simply, the Court said in a footnote: "Nothing in *Hanson v. Denckla* . . . is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction 'are a consequence of territorial limitations on the power of the respective States' . . . simply makes the point that the States are defined by their geographical territory."69 This explanation of what the *Hanson* majority had in mind is questionable, for the language of the majority opinion in that case, quoted above, does seem to be chosen with an eye to emphasizing the importance of the territorial limitations on state power. By interpreting it the way it did, the *Shafer* majority was able to reject the power theory as a theory without having to declare that *Hanson* was wrong.

The Court next treated the question of whether the shift away from the power theory reflected in the in personam cases should apply as well to actions quasi in rem: "There have . . . been intimations that the collapse of the in personam wing of *Pennoyer* has not left that decision unweakened as a foundation for in rem jurisdiction. . . . We think 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."70

The answer to that question is simple, the Court said, if it is recognized that in rem jurisdiction is not, as *Pennoyer* seemed to regard it, jurisdiction over a thing, but rather over the interests of persons in the thing. The conditions that must exist to justify jurisdiction in rem, then, must be such as would be sufficient to justify exercising jurisdiction over interests of persons in the thing. To adjudicate the interests of persons the standard to be applied is "the minimum contacts standard elucidated in *International Shoe*."71

In some kinds of cases, the presence of property in the state may be sufficient to support jurisdiction over a nonconsenting nonresident—where the property is a significant factor in the litigation. But, the Court said, "[t]he type of quasi in rem action typified by *Harris v. Balk* and the present case, . . . accepting the proposed analysis [i.e., rejecting the power theory and following *International Shoe*] would result in significant change. These are cases where the property which now serves as the basis for state court jurisdiction is completely unrelated to the plain-
tiff's cause of action." In such cases, where the role of the property is only to provide a basis for bringing defendant into court, "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." This proposition is especially appropriate in Delaware, where the officially declared purpose of the proceeding is to compel the defendant to make a general appearance.

The Court, however, had to deal with prior cases inconsistent with this proposition:

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 the property. . . . [Nevertheless] "[t]raditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with our basic constitutional heritage. . . . 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 that is fundamentally unfair to the defendant.

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.

The Court did not have to draw any sweeping conclusions about "all assertions of state court jurisdiction" in this case, of course. Nevertheless, this magnificent dictum will almost certainly come to be known as the rule of Shaffer v. Heitner.

In a footnote to this broad conclusion, the Court declines to re-examine the facts of Pennoyer, Harris v. Balk, Ownbey, and similar cases, to see if their holdings could be supported by this new principle. Instead the Court simply declared that "[t]o the extent that prior decisions are inconsistent with this standard, they are overruled."

The majority opinion would have been more helpful if the Court had been more specific in stating just what the "standard" was. "The standards set forth in International Shoe and its progeny," as we have seen, left several matters open for argument. The progeny of International Shoe presumably includes such disparate decisions as Mullane and McGee, on the one hand, and Hanson v. Denckla, on the other. What are the standards set forth by such progeny? What, indeed, are the standards of International Shoe itself? In one passage the Shaffer majority refers to the "minimum contacts standard elucidated in International Shoe." In another, reference is to "the standard of fairness and substantial justice set forth in International Shoe." As noted previously, two different views of what the standard requires can be seen in the many cases, and these views are distinguished by the relative emphasis they place upon contacts and fairness. The Court described the standards in terms suggestive of both views.

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62 Id.
63 Id. at 2583.
64 Id. at 2584-85.
65 Id. at 2585 n.39.
66 Id. at 2582.
67 Id. at 2581.
Another ambiguity in the sweeping conclusion concerns its relevance, if any, to transient jurisdiction. "All assertions of state court jurisdiction" presumably includes assertions of in personam jurisdiction on the basis of personal service. Does the Shaffer majority mean that the assertion of personal jurisdiction solely on the basis of the physical presence of an individual defendant is no longer sufficient for due process? The International Shoe opinion, it will be remembered, contained language apparently recognizing the legitimacy of in personam jurisdiction based on physical presence, and most cases assumed the continuing validity of that means of acquiring personal jurisdiction. Do the "standards of International Shoe and its progeny," then, support or oppose personal jurisdiction over transients whose only connection with the forum is physical presence?

It is tempting to say that to raise such questions about the meaning of this landmark decision is to quibble. The Shaffer majority surely meant to reject the power theory both with respect to necessary conditions and to sufficient conditions, both as to in personam and as to in rem proceedings. The Court surely meant to endorse the principle of “International Shoe and its progeny” as the sole foundation of jurisdiction. But if so, it should have stated that proposition in a less ambiguous fashion. The confusion about the thrust of “International Shoe and its progeny” had been amply demonstrated in the cases and journals during the nearly two decades that had elapsed since Hanson v. Denckla. Unfortunately, some of that confusion probably will remain, even after Shaffer.68

After announcing the sweeping conclusion quoted above, the majority then turned its attention to the question of whether the exercise of jurisdiction by Delaware in this case satisfied the new constitutional standard. The propriety of going further was questionable, as Justice Brennan (dissenting on the point) noted.69 The Delaware Court, thinking the International Shoe standard was inapplicable, had not considered the question of whether or not sufficient contacts for due process in fact were present. The majority, then, was really approaching the question as an original matter on the basis of facts contained in an appellate record, and without benefit of discovery. Whether or not it may have acted improperly in doing so, its discussion of the issue could perhaps be justified as helping to clarify the thrust of the decision. Unfortunately, the opinion does not clarify.

The majority's analysis starts with the proposition that since "the property is not the subject matter of litigation, nor is the underlying cause of action related to the property," the presence of the stock in Delaware cannot, without more, supply the contact necessary to satisfy due process. Casting about for other possible contacts, the Court noted that "appellee Heitner does not allege and does not now claim that appellants have ever set foot in Delaware. Nor does he identify any act

68 It should be noted that at least one member of the Court, Justice Stevens, apparently holds a completely different view about the due process limitation on state court jurisdiction. He does not analyze it in terms of the traditional two-element (basis and notice) scheme, but in terms of one element, notice, which includes not only the procedural notification of the action but also a notion of foreseeability, or fair warning that particular activity may expose the defendant to suit in a given state. The fairness of the warning presumably is dependent on the kinds of contacts the defendant has with the state, but knowingly purchasing property located in a state—or knowingly going there—is apparently sufficient to warn the defendant of potential suit there. It is not clear from Justice Stevens' concurring opinion whether the fair warning he speaks of must relate to the particular suit or kind of suit brought against the defendant, or whether it is enough that he could have foreseen any possibility of his person or property being subjected to jurisdiction. 97 S. Ct. at 2587-88.

69 Id. at 2588-89.
related to his cause of action as having taken place in Delaware." The fact that the Court would mention the absence of any physical contact or connection as though that were particularly relevant is suggestive of what we have referred to as the "physical contacts" interpretation of the International Shoe standard. The fact that the Court did not stop its inquiry with that finding, however, indicates that physical connections may not be the only relevant considerations in the majority's view.

Although the majority opinion does not unequivocally accept the physical contact approach, there are indications that the majority's understanding of what International Shoe means is more like that of the Hanson majority than that of McGee. This may be seen in its rejection of the argument that the fact of being an officer or a director of a Delaware corporation should be sufficient in itself to justify jurisdiction for a shareholder's derivative suit. Under McGee's approach this might well have been regarded as sufficient. The officers and directors became parties to a transaction having a substantial connection with Delaware when they accepted their positions in the Delaware corporation, and the cause of action arises out of the relationship formed by that transaction. Moreover, Delaware might well be viewed as having a particularly strong regulatory interest in that transaction—as California did in the insurance contract in McGee. The majority rejected this argument, however, on two grounds. First, the Delaware legislature had never asserted any interest in subjecting corporate directors and officers to personal jurisdiction in its courts merely because of their status as such, and so Delaware's interest cannot be very strong. Delaware's process will reach them if they own stock, but officers and directors of corporations are not required by Delaware to own any. Secondly, even if "the importance of Delaware's interest is accepted," that does not show that "Delaware is a fair forum for this litigation."

The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors. But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.

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99 Id. at 2585.
100 Id. at 2585-86.
101 Id.
102 Id. at 2586.
103 Id. (footnote omitted). The Court then quoted from the Hanson v. Denckla majority opinion: "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]." Id. (emphasis added), quoting 357 U.S. at 254.

With this statement, the Court has touched upon another question that has puzzled some courts and commentators. Territorial power thinking once dictated American choice of law, just as it did the field of jurisdiction. The past two decades have seen the rise of new choice of law methodologies, parallel in many respects to the new theories about jurisdiction, resting on an analysis of the interests of the states and the expectations of the parties. An admirable summary of those developments may be found in Cavers, Contemporary Conflicts Law in American Perspective, 131 Académie de Droit International Recueil des Cours 143 (1970). In any given litigation, many of the same factors that would be relevant in deciding whether the courts of a particular state could exercise jurisdiction under the International Shoe fairness standard, would also be relevant in deciding whether or not that state's substantive law should be applied. Because of this parallelism it has from time to time been suggested that the two questions—personal jurisdiction and choice of law—may be answered simultaneously; that is, "that the fact that the law of the place is applicable provides the minimum contact necessary to permit the state to exercise in personam jurisdiction . . . ." St. Clair v. Righter, 250 F. Supp. 148, 155 (W.D. Va. 1966). The Shafer majority apparently does not accept that idea as a general proposition. Justice Brennan, however, sees
The fact that the state's interest in providing a forum for shareholders' suits against directors of domestic corporations was discussed rather than passed off as irrelevant indicates, again, that the majority is not absolutely committed to the physical contact approach. But the fact that it found the interest insignificant, especially reasoning as it did, causes one to wonder. The Delaware legislature could well have decided not to enact a law specifically subjecting officers and directors of Delaware corporations to in personam jurisdiction in Delaware courts for shareholders' suits because of the assumed availability of its sequestration procedure which, after all, had received Supreme Court approval in *Ownbey v. Morgan.*\(^7\)

The majority did acknowledge that the sequestration procedure challenged in *Shafer* "may be most frequently used in derivative suits against officers and directors,"\(^7\) The fact that Delaware failed to provide additionally for in personam jurisdiction may simply demonstrate that "Delaware did not elect to assert jurisdiction to the extent the Constitution would allow,"\(^7\) according to the dissenting opinion of Justice Brennan. The fact that the Delaware legislature had not previously provided for in personam jurisdiction over officers and directors, then, seems at best a neutral factor, especially when considered, as it was in this case, in the absence of a fully developed factual record.

The other point urged by the majority is even less persuasive. The point was, apparently, that while the Delaware interest would support application of Delaware law,\(^7\) that fact does not automatically mean the interest will support jurisdiction over the defendants. But what does that prove? That fact alone does not automatically mean Delaware *cannot* exercise jurisdiction either. But this factor is not neutral. It does tend to show that Delaware would be a "fair forum." If all other factors were in balance, this would surely tip the scales in favor of the Delaware forum, unless the Court is strongly committed to the physical contact notion. The interest of "fair and orderly administration of the laws," which *International Shoe* expressly recognized, would normally be advanced by litigation in a court of the state whose law will have to be applied rather than in some court to which the applicable law might be foreign. The fact that Delaware law applies to the substantive issues, then, seems to be a point favoring Delaware jurisdiction. This anomaly, again, makes one wonder whether the Court will recognize anything short of some physical contact as a satisfaction of the *International Shoe* standard.

The majority and Justice Brennan disagree on another point that is critical to the choice of law and jurisdiction issues as being much more closely related than does the majority. "In either case," he said, "an important linchpin is the extent of contacts between the controversy, the parties, and the forum state. . . . At the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy." To Brennan, "practical considerations argue in favor of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries." He believes that "when a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question . . . [the Court should adopt] a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction." 97 S. Ct. at 2591. In the *Shafer* case, Justice Brennan felt this preference for jurisdiction was not adequately answered, so that Delaware's jurisdiction should have been upheld.

\(^7\) 256 U.S. 94 (1921).

\(^7\) 97 S. Ct. at 2585.

\(^7\) *Id.* at 2592.

\(^7\) The general rule, according to the *Restatement (Second) of Conflict of Laws* § 309 (1971), is that the law of the state of incorporation governs the liability of officers and directors to the corporation and its stockholders.
the jurisdiction question: the application of the rule of \textit{Hanson v. Denckla}, i.e., the requirement that the defendant must have done something that could be characterized as "purposefully availing itself of the privilege of conducting activities within the forum state." The differing approaches to the meaning of this rule were discussed above.\textsuperscript{79} The \textit{Shaffer} majority in one breath seems to emphasize physical contact: "Appellants have simply had nothing to do with the State of Delaware."\textsuperscript{80} (Is it plausible to maintain that one who becomes an officer or a director of a Delaware corporation has nothing to do with the State of Delaware unless the concern is only with physical impact?) In the next breath, however, the Court seems to emphasize foreseeability, noting that "appellants had no reason to expect to be haled before a Delaware court,"\textsuperscript{81} since Delaware did not require officers and directors of Delaware corporations to consent to jurisdiction as some states do. The Court here seems to be saying that the \textit{Hanson} test will not be met by foreseeability considerations unless the defendant's conduct (on which foreseeability is sought to be predicated) is something that the law of the forum expressly treats as the occasion for exercising jurisdiction. But Delaware did expressly treat stock ownership as the occasion for exercising jurisdiction. Did not that give the defendants reason to foresee being "haled before a Delaware Court?" Perhaps, but to the \textit{Shaffer} majority, that did not make litigation over the director's fiduciary duties foreseeable; it could only provide foreseeability for litigation over their stock ownership. Still, the quasi in rem proceeding based on sequestration of stock was the basic device provided by Delaware law to extend its jurisdiction over such directors, as the Delaware Supreme Court had expressly observed.\textsuperscript{82} If the existence of official measures designed to extend jurisdiction to the defendant for the particular case is the criterion of foreseeability for purposes of the \textit{Hanson} rule, as the \textit{Shaffer} Court indicated, that criterion should be met in the case of all those officers and directors who owned stock. Litigation in Delaware courts over the performance of their fiduciary duties would seem clearly foreseeable; foreseeability as such should be no obstacle to extending jurisdiction over them. Again, the Court may in fact be looking for physical contacts as essential to the \textit{Hanson} rule.

The failure of the majority opinion to address certain issues that one would expect a court following the broader fairness standard to deal with is another indication that the \textit{Shaffer} majority is, basically, following the physical contact approach. If overall fairness is the standard in deciding whether Delaware should be permitted to exercise jurisdiction it would seem appropriate to ask whether some other tribunal exists in which all, or at least as many, of the defendant parties could be subjected to jurisdiction. If in personam jurisdiction could be exercised over all the defendant officers and directors in, say, Arizona, but only twenty-one could be subjected to quasi in rem jurisdiction in Delaware, that would be a factor opposing jurisdiction in Delaware. The interests of orderly and fair administration of justice would ordinarily be served by concentrating the litigation in one action if possible. On the other hand, if there is no other state in which as many defendants can be reached, that is a factor that would normally favor Delaware jurisdiction. That may have been the case in \textit{Shaffer}, although the opinion does not say so. The Court did say,

\textsuperscript{79} See text at notes 40 & 41 supra.
\textsuperscript{80} 97 S. Ct. at 2586.
\textsuperscript{81} \textit{Id}.
\textsuperscript{82} \textit{Hughes Tool Co. v. Fawcett Publications, Inc.}, 290 A.2d 693, 695 (Del. Ch. 1972).
in a footnote, that it was not considering, because not presented, the question of 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. In saying this, the Court apparently was reserving its opinion on the so-called jurisdiction by necessity principle. In the context of the Shaffer case the comment may mean only that the plaintiff was free to sue each defendant severally in that defendant’s home state, so that other fora were available. Whether that alternative is adequate to offset the advantage of permitting suit against twenty-one of the defendants in Delaware, the state whose law will probably be applied wherever the suit is brought, would depend on factual considerations requiring evidence apparently not adduced in the Shaffer case.

III. Recapitulation

The holding of Shaffer v. Heitner could be stated very narrowly: Quasi in rem jurisdiction, without the right of limited appearance, predicated on corporate stock, cannot be exercised in the state of incorporation if the stock certificates are elsewhere, unless the International Shoe standard would permit an in personam action in the same forum on the same claim. All the Justices (except possibly Justice Rehnquist, who did not take part) would subscribe to that proposition. But the meaning of the decision is surely broader. There is no reason to think any of the Justices would take a different position if the forum state were one, unlike Delaware, where the limited appearance is permitted.

A majority would apply the same principle in any quasi in rem action—even one in which the property attached is tangible, real property. Justices Powell and Stevens, however, believe that the traditional quasi in rem action should remain operative where it can be based on real property in the state.

A majority (all but Justices Powell and Stevens) apparently are willing to declare the territorial power theory completely obsolete. Physical presence is no longer either necessary or sufficient for in personam actions or for in rem actions. Presence in the state and personal service, then, apparently are no longer sufficient bases for the exercise of personal jurisdiction over a nonconsenting, transient nonresident. Justice Stevens is the only one of the justices who expressed a different view.

But an attempt to draw from the case a more precise understanding of just what standards are now to be applied to “all assertions of state court jurisdiction” is likely to be frustrated. The phrase “standards set forth in International Shoe and its progeny” is not self-explanatory, since there are ambiguities and conflicting views as to what those standards are. The majority did not align itself with any particular approach, but the way the majority opinion analyzed the contacts, ties or relations between Delaware and the issues and parties in this shareholders’ derivative suit strongly suggests that the majority is taking the physical contact approach of the Hanson majority rather than the broader fairness approach of McGee. The majority found the Delaware contacts in Shaffer constitutionally insufficient, in spite of the fact that the defendants in accepting leadership positions in a Delaware corporation

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83 97 S. Ct. at 2584 n.37 (emphasis added).
84 See note 42 supra.
85 97 S. Ct. at 2587-88.
86 Id.
had voluntarily become parties to a transaction having substantial connection with Delaware out of which the cause of action arose, and in spite of the fact that Delaware law probably would be applied to the legal issues in the case, and in spite of the absence of any indication that all defendants could have been subjected to jurisdiction in any other court or that another court might have been a more convenient forum for other reasons. Whatever the majority opinion said in ruling on the sufficiency of Delaware's contacts, however, is questionable as authority. Since the issue had not been ruled on below, the appellate record probably was not complete enough to support the conclusion reached. The question was whether the facts showed enough connection to satisfy minimal requirements. A conclusion by an appellate court that minimal conditions are met can be adequately supported by a scanty record of an untried issue if undisputed facts positively show that the conditions exist. The absence of facts positively showing those conditions, however, does not prove their nonexistence. The Court should have remanded the case if there was a possibility that additional facts might supply the minimal conditions.

IV. Other Implications of the Decision

A. Provisional Remedies Generally

The Shaffer decision does not purport to affect the use of attachment, garnishment, and other provisional remedies for their original purpose of providing security for the judgment sought in an action. It does, however, probably ring the death knell for the use of such provisional remedies as devices for obtaining jurisdiction. The limited form of jurisdiction available through the quasi in rem procedure cannot now be obtained through those measures except under circumstances that would justify broader in personam jurisdiction. True, the Shaffer case does not say that states must now provide in personam jurisdiction in those cases. States do not have to extend jurisdiction to the full extent permitted by the Constitution. It is difficult to think of any situations in which a state might want to provide only the more limited form of jurisdiction in preference to the broader, however. Accordingly, states will surely start eliminating from their statute books those laws similar to the Delaware law at issue in the Shaffer case. At the same time, consideration probably will be given to extending long arm statutes to provide for personal jurisdiction in some of the kinds of cases where formerly only quasi in rem jurisdiction may have been available.

The Court in Shaffer did speak in apparent approval of a use of the attachment procedure that has heretofore found little currency in the United States. The Court suggested that 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 litigation can be maintained consistently with International Shoe."96 This sort of interstate cooperation is common in some other parts of the world—even among states that are independent nations.98 There is no reason why it should not be practiced by the states of our federal union, but most states do not

96 Id. at 2583.
98 In Central America, for instance, courts of one country will attach local property of one who is a defendant in an action pending in another country. This is a recognized form of international judicial assistance available through rogatory letters. This practice will be discussed and documented in a forthcoming monograph, R. Casad, Intra-Regional Recognition of Civil Judgments in Central America. Pending publication, references will be supplied on request to those interested in pursuing this subject.
presently have laws to implement it. Such legislation should be considered by legislatures.

B. Stability of Property Rights Deriving from Quasi In Rem Judgments

1. The Effect of Defendant's Failure to Raise the Shaffer Challenge Directly in Quasi In Rem Actions.

Although the states will probably start abandoning statutes that permit traditional quasi in rem actions, that process undoubtedly will take some time. In the meantime, attempts may be made to use the existing statutes in circumstances that do not meet the International Shoe standard. Presumably the defendant in such a case is under no more compulsion to appear and raise the jurisdictional challenge than he would be if it were an in personam proceeding. He can remain aloof from the action and challenge the resulting default judgment collaterally if he chooses to do so. The judgment against him, rendered without jurisdiction, is void, according to basic doctrine.

If, however, the defendant is permitted to wait till after judgment to challenge the jurisdiction in a quasi in rem suit, some complications will be present that do not necessarily attend a typical in personam suit. In the quasi in rem case, there will always be property of the defendant in the forum state, and that property will normally be sold to satisfy the judgment. If the International Shoe standard was not met, the defendant will have been deprived of property without due process and, theoretically, should be able to recover it in a collateral action. This would operate harshly on a third party purchaser. Moreover, the very existence of this possibility will tend to depress the price at which property can be sold at judicial sales in these kinds of cases, even when the jurisdiction of the court is entirely proper. Nevertheless, the basic doctrine in America, in the absence of statutes, is that both a judgment and a judicial sale of property based upon it, can be collaterally attacked for want of jurisdiction, and the property can be recovered, even from innocent third parties.\(^8\)

Caveat emptor is said to apply to all judicial sales. Lack of subject matter jurisdiction or jurisdiction of the person of the defendant are risks that the buyer must take. Heretofore these risks have usually related to matters that would appear in the record of the case, so the purchaser at the execution sale has had some chance to protect himself.

The Shaffer decision, however, brings a new source of title uncertainty into existence, if this basic doctrine is to be applied in these cases. Notice has always been relevant, but never before has a court at the situs of property had to be concerned about the basis for the exercise of quasi in rem jurisdiction. In every case, now, the International Shoe standard is a potential issue. There may or may not be reliable indicators in the record of a judgment to guide a purchaser of property at the judicial sale.

If Shaffer really means that exactly the same jurisdictional implications apply to quasi in rem actions as to in personam actions, judicial sale purchasers' risks have increased considerably. Unless state legislatures act promptly to abolish quasi in rem jurisdiction as it has heretofore been exercised, courts will probably have to wrestle

with this problem. One possible solution might lie in distinguishing between the contacts or connections necessary to require a defendant to litigate a claim and those necessary to impose upon a defendant the burden of raising a jurisdictional issue if he ever intends to do so. While presence of property in the state may be insufficient to force a defendant to adjudicate a claim unrelated to that property, it may provide a sufficient basis for forcing a defendant to present any objection he may have on International Shoe grounds in that forum. A court in a state where property is located may well have sufficient connection with litigation initiated by attachment—even if the merits of the claim are unrelated to the forum—to impose on a defendant property owner the burden of making his jurisdictional challenge directly if at all.

2. Retroactivity of the Shaffer Rule.

The problem just discussed—i.e., the implications of the Shaffer rule for property rights deriving from future quasi in rem actions—could be less troublesome than the related question of its possible effect on titles deriving from actions already completed. Within the Anglo-American judicial system, the general rule has been that judicial decisions announcing new doctrine are applied retroactively. This proposition rests in the main on our notions about the nature of the judicial function, and thus applies to constitutional interpretations as well as to common law rulings. If the Shaffer doctrine is given full retroactive application, judgments rendered in quasi in rem actions in the past when the underlying claim or the parties lacked sufficient connections to the forum state to satisfy the International Shoe standard may now be void, and the defendant's property thus may have been taken without due process. Can the defendant in such cases now seek a return of the property by self-help or legal action? If so, many land titles may suddenly become precarious, and many stock transfers traceable to proceedings like the one ruled unconstitutional in Shaffer may be subject to re-examination in a collateral action.

Retroactive force is not always given to new rulings, however. One long-recognized exception is the case in which "vested rights" were acquired under the prior doctrine. That exception would seem at first glance to cover the situation presented by retroactive application of the Shaffer rule. Few, if any, of the cases applying that exception, however, involve the kind of situation we are considering; i.e., one in which the new ruling announces a specific constitutional prohibition in the name of due process of the very procedure through which the vested rights were acquired. Whether this is to be regarded as a critical distinction, only the Supreme Court can say.

In recent years the Court has had occasion to consider the problem of retroactive application of new due process interpretations in several cases involving collateral attacks on prior criminal convictions, and has developed some standards for such

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81 The Supreme Court's position in recent years has been that "an all-inclusive statement of a principle of absolute retroactivity cannot be justified," Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940), and that "the Constitution neither prohibits nor requires retrospective effect," Linkletter v. Walker, 381 U.S. 618, 629 (1965). State cases are collected in Annot., 10 A.L.R.3d 1371 (1966).
cases. The Court has recognized, however, that these standards are not necessarily appropriate in other contexts. In view of the Court's experience in the context of collateral attacks on criminal convictions, one would think the Court would have foreseen and commented on the problem of the retroactivity of the Shaffer ruling and its potential effect on prior judgments and titles deriving from them. If the vested rights idea can be invoked to limit the retroactive effects of Shaffer, it would have been helpful if the Court had specifically said so. Of course, there may be only a few of such previously decided cases in which the International Shoe standard in fact was not met. The vagueness of that standard, however, coupled with the uncertainty about retroactivity will surely invite challenges.

Even if the Shaffer ruling is retroactively applicable, there are, to be sure, some established doctrines that serve to foreclose jurisdictional challenges through collateral attack. A defendant who appeared specially to challenge personal jurisdiction cannot relitigate that question in a collateral action. Likewise, a defendant who challenged subject matter jurisdiction may be estopped from relitigating the issue. A defendant who was subject to personal jurisdiction and thus had an opportunity to litigate the issue of subject matter jurisdiction in the rendering court but did not, may even be estopped from raising the issue in a collateral action. These doctrines can probably be invoked against a defendant who actually appeared in the quasi in rem action, either to challenge jurisdiction or to make a limited appearance, even if the issue of the absence of International Shoe connections was not raised. But what of the defendant who made no appearance at all? Should not such a defendant now have a day in court to challenge the taking of property on jurisdictional due process grounds? If the Shaffer decision has retroactive application, he should.

C. Issue-Preclusion Effects of Litigation Undertaken by Limited Appearance

Another potentially troublesome problem posed by the retroactive application of the Shaffer decision relates to the issue-precluding effects of judgments rendered in quasi in rem actions in which the defendant made a limited appearance and issues going to the merits of the underlying claim were actively litigated. Cases have taken differing views on the application of direct and collateral estoppel principles to such judgments.

The Shaffer Court did not specifically declare its decision applicable to quasi in rem proceedings in which the defendant could and did exercise the right of limited appearance. It seems most likely that the rule does apply to such cases, however. If the rendering court lacked the connections with the parties or cause of action that Shaffer says must be present to authorize even quasi in rem jurisdiction, then that

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95 In Stovall v. Denno, 388 U.S. 293, 297 (1967), the Court said: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."


97 See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).


court could not constitutionally take the defendant's property, even if the right of limited appearance were allowed him. Such limited consent to jurisdiction is exacted under compulsion, so jurisdiction must be supported by the law imposing that compulsion, not by the defendant's will. If the defendant did make a limited appearance—not voluntarily submitting to jurisdiction, but believing such action was necessary to protect the attached property—should issue-precluding effect be given to determinations of fact unfavorable to the defendant? Under traditional theory, a quasi in rem judgment has no merger or bar (claim preclusion) effect even when the merits are litigated through a limited appearance.\(^9\) Thus, a later suit can be brought on the same claim. But if issue-preclusion effect is given to a quasi in rem judgment against the defendant, the result in the later suit will be a foregone conclusion.

Those authorities that have argued in favor of according collateral estoppel effect to judgments rendered on limited appearance have usually recognized as a condition to such effect that there must have been a full, fair opportunity and incentive to litigate the issues.\(^10\) If the connections between the case and the forum were too slight to meet the International Shoe standard, then that full fair opportunity may have been lacking. If the defendant had a constitutional right not to litigate those issues in that forum, but failed to realize it (since Shaffer had not yet been decided), it would seem unfair to bind him in later litigation on a different cause of action to unfavorable rulings deriving from the limited appearance in the earlier action.

D. Choice of Law Implications

The Shaffer majority denied that the connections that would justify a state's application of its own law in a case would also justify the exercise of judicial jurisdiction.\(^1\) This might be interpreted as an indication that the Shaffer case will have no impact in the choice of law field.

It is interesting to consider, however, the possible fall-out effects of the Shaffer decision in that related field. If the territorial power theory is dead for judicial jurisdiction, can it remain a vital force in the area of choice of law? If physical presence in the state will not by itself, justify jurisdiction, can the occurrence of an event within the territory of a state, by itself, support the application of that state's law, in total disregard of the interests of other states and the expectations of the parties? Is it possible that the application of the traditional choice of law rule of lex loci delicti, for instance, may be unconstitutional in cases in which no governmental interest of the state in which the tort occurred would be served by applying its rule in preference to that of a state more significantly related to the parties or the issues of the action?\(^2\) Of course, choice of law is in such a chaotic state at this

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\(^9\) See Restatement of Judgments § 34 (1942). But cf., Restatement (Second) of Judgments § 73, Comment b (Tent. Draft No. 1, 1973) (suggesting that claim preclusion might be proper if personal jurisdiction might have been but was not obtained in the quasi in rem proceeding).

\(^10\) See Restatement (Second) of Judgments § 72(c) (Tent. Draft No. 1, 1973).

\(^1\) See note 74 supra.

\(^2\) Although the states have been left largely free to choose their own rules of choice of law, the Constitution does impose some restraints. See Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9 (1958); Leflar, Constitutional Limitations on the Choice of Law, 28 Law & Contemp. Prob. 706 (1963); Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449 (1959). The due process clause limitation expressed in Home Insurance Co. v. Dick, 281 U.S. 397 (1930) is generally understood as
point in our history that any speculation about the directions in which it will develop is hazardous.

The Shaffer decision's elimination of the power theory in the realm of jurisdiction, however, may portend a similar fate for the territorialist approach to choice of law. It may be a step toward the development of a coherent national theory of choice of law based upon the interests of states and parties rather than the mere location of physical events.

requiring some significant connection between the state whose law is to be applied and the incidents to which application is to be made. If physical presence is not to be regarded as a significant connection then the lex loci rule may no longer be proper in all the situations in which traditional conflicts theory would apply it. Professor Brainerd Currie argued forcefully that it would have been a denial of due process to apply the law of the place of an accident (Arizona) to abate a negligence action brought in California by Californians against the California estate of a California decedent, even though the Restatement of Conflict of Laws § 390 (1934) would have prescribed that choice. See Currie, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, 10 Stan. L. Rev. 205, 237-39 (1958).