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JURISDICTION BEFORE AND AFTER SHAFFER V. HEITNER

INTRODUCTION

The power of a state court to entertain a lawsuit is a long-standing subject of judicial analysis in the history of American jurisprudence. The problems involved in the analysis emanate from the nature of the framework of the United States, which places territorial limitations on the power of the respective states. Over the years the courts have formulated tests to determine whether a state court has jurisdiction over the parties to a lawsuit. The last major word on jurisdiction was articulated by the United States Supreme Court in June of 1977 in the case of Shaffer v. Heitner.¹

For the first time,² the United States Supreme Court applied the jurisdictional rules governing in personam³ proceedings to a quasi in rem case.⁴ Before Shaffer, a state court had power to render judgment against a party-defendant not subject to the in personam jurisdiction of the court if that defendant's assets, located within the territorial limits of the forum state, were before the court.⁵ Usually, such assets were unrelated to the action before the court, except to the extent that the presence of such property conferred power on the court to entertain the litigation. The Shaffer court, however, would not allow a Delaware court to assert jurisdiction over a proceeding brought before it on such a basis.⁶ The Court held that quasi in rem proceedings should be governed by the jurisdictional rules applicable to in personam actions.⁷

The Shaffer Court required that there must be minimum contacts between the state and the party-defendant such that jurisdictional assertion on the part of the state would be consistent with fairness and due process requirements regardless of

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¹ 1979 by Susan Norman.


3. An action for proceeding in personam is one directed against a specific person or persons. "If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated 'in personam' and it can impose a personal obligation in favor of the plaintiff." 433 U.S. at 199.

4. An action or proceeding in rem is one directed against specific property. "A judgment in rem affects the interest of all persons in designated property." Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958).

5. See note 20 and accompanying text infra.

6. 433 U.S. at 209.

7. Id. at 207.
whether the case is brought on an in personam or in rem basis. The test articulated in *Shaffer* was adopted from the rule of *International Shoe Co. v. Washington.* *International Shoe* was, before *Shaffer*, used only as a guideline to determine if a court can exercise its in personam jurisdictional powers. *Shaffer* extended the rule of *International Shoe* to cases brought in rem. *Shaffer* thus represents the proposition that no distinction will be drawn between in rem and in personam actions in terms of ascertaining whether a court has constitutional power to hear and decide a case brought before it.

Equally important, the *Shaffer* decision reflects an attitude that quantitative, mechanical jurisdictional tests, which can no longer be considered adequate in determining if a court has in personam jurisdiction, are also inadequate in determining jurisdictional issues in in rem proceedings. The focus in *Shaffer* is on the quality of the relationship between the defendant, the litigation, and the forum state, and on the fairness or reasonableness of asserting jurisdiction under the circumstances presented. In addition to the specific holding, that the mere presence of a non-resident's property in a state cannot justify an assertion of quasi in rem jurisdiction if the property has nothing to do with the subject matter of the litigation, *Shaffer* provides a new standard of reasonableness by which all jurisdictional issues will be resolved. That standard gives increased importance to the peculiar facts of each case, resulting in more cases which can be plausibly argued either way, and fewer situations which fall neatly within pre-*Shaffer* jurisdictional tests.

This comment will trace the development of pre-*Shaffer* jurisdictional rules, as well as analyze and critique the *Shaffer* decision in light of these rules. The focus of this comment will be on the test enunciated in *Shaffer*, how that test can be interpreted, and the likely effect of *Shaffer v. Heitner* on the outcome of litigation over different types of jurisdictional issues.

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8. *Id.*
10. 433 U.S. at 207.
13. *Id.* at 209.
14. *See* notes 74, 118-121 and accompanying text *infra.*
Introduction

Jurisdiction is the underlying basis of a court’s power to render a valid judgment. In order for jurisdiction to lie, three prerequisites must be met. First, the parties to the lawsuit must be given adequate notice and an opportunity to be heard. This is often termed procedural due process. Second, the court must have authority, from statute, both to decide the type of case brought before it and to affect the rights, liabilities, or status of the persons or property before it. This is known as subject matter jurisdiction. Third, assuming power has been conferred by statute on the court, the exercise of such power must be consistent with constitutional standards. That is, there must be a constitutionally sufficient “contact” between the forum, the litigation, and the person or res involved. This is known as substantive due process. The focus here is on substantive due process in the jurisdictional context.

The traditional common law notion of jurisdiction over parties or property was grounded on a theory of physical power; that is, a court can exercise jurisdiction only over persons and property within the territorial limits of the state in which the court sits. While the rules governing in personam jurisdiction have departed drastically from the physical power theory, the rules affecting in rem and quasi in rem jurisdiction have remained theoretically unchanged. With a few exceptions, a state cannot exercise jurisdiction over property located outside its territorial limits.

In Rem and Quasi In Rem Jurisdiction

Jurisdiction over property is either in rem or quasi in rem. While the terms in rem and quasi in rem are often used interchangeably, each term has distinct characteristics. An in rem proceeding is one in which the state court’s jurisdiction is grounded on the presence of the property which is the subject

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16. The court derives this power from the state in which it sits. A state has primary authority over persons and property within its territorial limits. A state confers this power on its courts by statute. F. JAMES & G. HAZARD, supra note 15, at 623, 628.
17. See notes 40-65 and accompanying text infra.
18. See, e.g., F. JAMES & G. HAZARD, supra note 15, at 627-29. “It is widely held that a court having personal jurisdiction over parties may adjudicate the equities between them with respect to land outside the state. . . .” Id. at 628.
matter of the litigation within the territorial boundaries of the state. The defendant does not have to be subject to the in personam jurisdiction of the court. An in rem judgment fixing the status of such property is binding on the whole world.\textsuperscript{19} In a quasi in rem proceeding the plaintiff brings the local assets of the non-resident defendant before the court, usually through statutory proceedings such as writ of attachment, garnishment, or sequestration.\textsuperscript{20} The court may then take jurisdiction over such assets and treat the action as in rem to the extent of the assets before the court. A quasi in rem judgment determines the status of the property as between the named parties to the suit.

The major conceptual difference between a purely in rem action and a quasi in rem action is that in an in rem action the claim arises directly out of the presence of the property within the forum state, and the property itself is the subject of the action, while in a quasi in rem action the claim is unrelated to the property brought before the court\textsuperscript{21} except to the extent that the presence of such property confers power on the court to entertain the litigation.

The historical basis of in rem jurisdiction is the power of the state to determine title to all property, tangible and intangible, lying within its borders.\textsuperscript{22} The most common forms of pure in rem cases are admiralty proceedings, actions to register title to land,\textsuperscript{23} actions to condemn or confiscate real or personal property,\textsuperscript{24} and the administration of a decedent’s estate.\textsuperscript{25} While the result of these actions will affect the personal rights of certain parties, the essential function of such suits is to determine the title or the status of property subject to the

\begin{itemize}
\item \textsuperscript{19} See M. Green, Basic Civil Procedure 36-37 (1972).
\item \textsuperscript{20} A writ of attachment is a writ used to seize property for the purpose of acquiring jurisdiction over that property. Garnishment is a proceeding in which a person’s property in the possession of another is attached in order to pay the former’s debt to a third party. Sequestration empowers the sheriff, while a lawsuit is pending, to seize property until the suit has been decided in order that it might be delivered to the party adjudged to be entitled to possession.
\item \textsuperscript{21} In certain situations, a claim might arise out of the presence of a non-resident’s land in the forum state. Such a non-resident may not be subject to the in personam jurisdiction of the forum court. See notes 101-103 and accompanying text infra. Jurisdiction could be asserted here on a quasi in rem basis by attaching the defendant’s land and thereby forcing him to answer a claim arising out of such land. See notes 104-105 and accompanying text infra.
\item \textsuperscript{22} Arndt v. Griggs, 134 U.S. 316 (1890).
\item \textsuperscript{23} Tyler v. Judges of the Ct. of Registration, 175 Mass. 71, 55 N.E. 812 (1900).
\item \textsuperscript{24} Walker v. City of Hutchinson, 352 U.S. 112 (1956).
\item \textsuperscript{25} See M. Green, supra note 19, at 37.
\end{itemize}
court's in rem jurisdiction.

Most quasi in rem proceedings, whether brought before the court by means of attachment, garnishment, or sequestration, have one common thread: the property brought before the court is not the subject matter of the litigation as in the pure in rem examples mentioned above. Rather, quasi in rem jurisdiction is a technique developed whereby an action that is essentially in personam can be converted into an in rem action in order for the court to proceed. Illustrative of this type of litigation are the well known cases of *Harris v. Balk* and *Seider v. Roth*.

In *Harris v. Balk*, Epstein, a Maryland resident, in order to satisfy a claim he had against Balk, garnished a debt Harris owed to Balk while Harris was in Maryland. When Balk later sued Harris for the debt in North Carolina, the United States Supreme Court held that the full faith and credit clause required that the money Harris paid to Epstein vindicated the debt Harris owed to Balk. The *Harris* court considered the debt tantamount to a res, having its situs wherever the debtor could be found. Maryland's statute authorizing garnishment of such a debt as a means of asserting quasi in rem jurisdiction was upheld as constitutional.

*Seider v. Roth* held that the obligation of an insurance company to defend and indemnify an insured may be attached. The plaintiff in *Seider*, by attaching the insured's rights in an insurance policy issued by a company doing business in New York, was able to obtain a quasi in rem judgment against the insured for injuries sustained in an automobile accident. The insured was a non-resident who would not have been subject to the in personam jurisdiction of the New York courts.

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26. See note 21 supra. Quasi in rem cases which do not exemplify this characteristic are cases involving the status rights of the parties. See note 114 and accompanying test infra.

27. See notes 30-39 and accompanying text infra.


30. 198 U.S. 215 (1905).


33. *Id.* at 223.

34. 198 U.S. at 224.

35. *Id.* at 226.


37. *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.
As a practical matter, what cases such as Seider and Harris did was allow a plaintiff, in a situation where he or she could not acquire in personam jurisdiction over a non-resident defendant, to circumvent this obstacle by attaching, through available statutory means, the property of the defendant located within the forum state in order to satisfy the claim. Under Harris and Seider, the respective plaintiffs' inability to acquire in personam jurisdiction did not preclude recovery. The rule established in Shaffer v. Heitner will no longer permit a party-plaintiff to utilize this tool.39

In Personam Jurisdiction

The Pennoyer Rule. The modern rules governing in personam jurisdiction have evolved from the century-old case of Pennoyer v. Neff. Consistent with the power theory of jurisdiction, Pennoyer held that the personal rights and liabilities of a party-defendant could not be determined by a court unless the defendant was personally served within the forum state. In so holding, the Pennoyer Court overruled an Oregon judgment rendered against a non-resident defendant who was given only constructive notice of the suit. In order to satisfy the judgment, the Oregon court ordered a sheriff's sale of the non-resident's Oregon property. The opinion suggested that, had the property been brought before the court by attachment prior to judgment, the Oregon court would have had jurisdiction to proceed on a quasi in rem jurisdictional basis. But Justice Field pointed out in his opinion in Pennoyer:

[the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgement.]

Pennoyer not only articulated the power rule for in personam jurisdiction, but also laid out the foundation for quasi in rem jurisdiction. According to the Shaffer Court, the Court in Pennoyer assumed that a proceeding against property is not

39. See notes 96-99 and accompanying text infra.
40. 95 U.S. 714 (1877).
41. See note 17 and accompanying text supra.
42. 95 U.S. at 727.
43. Id. at 728.
44. Id.
the same as a proceeding against the owners of that property because a personal liability may not be imposed on the property owner.\textsuperscript{45} The property owner is liable only to the extent of the value of the property brought before the court. "In Pennoyer's terms, the owner is affected only 'indirectly' by an in rem judgment adverse to his interest in the property subject to the court's disposition."\textsuperscript{46}

Modification of Pennoyer. A strict reading of Pennoyer provided a rigid conceptual framework.\textsuperscript{47} Recognizing that its ruling could not accommodate some necessary litigation,\textsuperscript{48} the Pennoyer Court noted that cases, such as divorce actions, involving the personal status of the plaintiff, could be adjudicated in the plaintiff's home state even though the defendant was not subject to service of process in the forum.\textsuperscript{49} The Court also gave its approval to the concept whereby a foreign corporation doing business in a state could be said to have consented to be sued in that state.\textsuperscript{50}

The Pennoyer rule was softened in subsequent cases where the Supreme Court validated methods other than personal service of process within the state for obtaining in personam jurisdiction. In Adam v. Saenger,\textsuperscript{51} the Court held that filing a suit in a state may constitutionally subject the plaintiff to jurisdiction of the court. Service could be made on the attorney of record of the person filing the suit. In Milliken v. Meyer,\textsuperscript{52} domicile was held to be a sufficient contact to permit a court to exercise in personam jurisdiction. Blackmer v. United States\textsuperscript{53} held that citizenship is a constitutionally sufficient contact with the state in order for its courts to render a personal judgment.

In order to accommodate litigation that a strict application of Pennoyer would not allow, the Court developed various legal fictions. One fiction was to consider a corporation who was doing business in a state as actually "present" in the state.\textsuperscript{54} Another was developed to accommodate auto accident

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{45} 433 U.S. at 197.
\item\textsuperscript{46} Id. at 199.
\item\textsuperscript{47} Id. at 201.
\item\textsuperscript{48} 95 U.S. at 734-35.
\item\textsuperscript{49} Id. at 735.
\item\textsuperscript{50} Id.
\item\textsuperscript{51} 303 U.S. 59 (1938).
\item\textsuperscript{52} 311 U.S. 457 (1940).
\item\textsuperscript{53} 284 U.S. 421 (1932).
\item\textsuperscript{54} See, e.g., Philadelphia & Reading Ry. Co. v. McKibbon, 243 U.S. 264 (1917); Int'l Harvester Co. v. Kentucky, 234 U.S. 579 (1914).
\end{enumerate}
\end{footnotesize}
litigation where the defendant was a non-resident of the forum state. For example, in Hess v. Pawloski a motorist, by using a state’s highways, was held to have appointed as his agent a designated state official to accept service of process.

*International Shoe.* It was against this backgound that the case of *International Shoe Co. v. Washington* was decided. *International Shoe* evidenced a recognition that the Court, by expanding *Pennoyer* and creating judicial fictions, was trying to formulate a means for determining what activities of a defendant in the forum state would make it just to subject that defendant to suit in that state. *International Shoe* marked a sweeping change in the rules governing in personam jurisdiction. It cast aside the theory that a defendant must be physically present within the forum in order to justify an assertion of in personam jurisdiction, and instead focused on the relationship between the defendant, the litigation, and the forum state, establishing the rule that:

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

In *McGee v. International Life Insurance Co.*, assertion of jurisdiction over a non-resident defendant by a California court was upheld, although his contacts with the state were very “minimum.” The defendant was an insurance company which had no office or agent in California. The only contact the company had with California was its sale of a life insurance policy to a California resident. The company received insurance premiums in Texas from the California resident. *McGee* held that such contact was sufficient under *International Shoe* for California to assert in personam jurisdiction over the defendant insurance company.

After *McGee*, it seemed that a state could assert jurisdiction over a defendant whose contact with the forum state was very minimal. This notion was restricted somewhat in *Hanson*

55. *See* 433 U.S. at 202.
56. 274 U.S. 352 (1927).
57. 326 U.S. 310 (1945).
58. *Id.* at 319.
59. *Id.* at 316.
60. 355 U.S. 220 (1957).
61. *Id.* at 223-34.
v. Denckla, where the Court emphasized that the flexible standard of International Shoe did not eliminate all restrictions on the jurisdiction of state courts. Although minimum contacts of International Shoe remained the test, the Hanson Court added the requirement that "there must 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."

International Shoe was once again relied upon as authority in Shaffer v. Heitner. There, however, International Shoe was not only reaffirmed, it was reinterpreted and extended for the first time to a case that was quasi in rem.

**Shaffer Decision: Issues and Critique**

**Shaffer v. Heitner**

*Shaffer v. Heitner* originated as a shareholder's derivative suit in the state of Delaware. Suit was brought against defendants Greyhound Corporation, its subsidiary Greyhound Lines, Inc., and twenty-eight present or former officers and directors of one or both of the corporations. Greyhound Corporation is incorporated under Delaware law with its principal place of business in Phoenix, Arizona.

Since the individual defendants were not subject to the in personam jurisdiction of the Delaware courts, the suit was brought on a quasi in rem basis. The plaintiff attached and brought before the court Delaware property of the non-resident defendant, pursuant to a Delaware sequestration statute. The Delaware court asserted jurisdiction and rendered a quasi in rem judgment against the defendants. This decision was affirmed by the Delaware Supreme Court. The individual defendants [hereinafter referred to as appellants] petitioned the

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63. Id. at 251.
64. Id. at 253.
66. The individual defendants were non-residents of Delaware. According to Delaware law, non-resident defendants are not subject to the in personam jurisdiction of Delaware courts. See note 67 infra.
   (a) If it appears that in any complaint filed in the Court of Chancery that the defendant . . . is a non-resident of the state, the Court may make an order directing such non-resident defendant . . . to appear by a day certain to be designated . . . The Court may compel the appearance of the defendant by seizure of all or any part of his property . . .
United States Supreme Court, alleging that the Delaware sequestration statute violated the due process clause of the fourteenth amendment both because it allowed state courts to exercise jurisdiction in cases where there were no minimum contacts between the defendants, the litigation, and the state of Delaware, and because the statute operated to deprive the appellants of their property without providing sufficient procedural safeguards. Certiorari was granted. 69

In assessing the validity of the appellants' jurisdictional contentions, Mr. Justice Marshall, in his opinion for the Court, first noted that there had been no sweeping changes in the rules governing in rem jurisdiction analogous to those set forth in International Shoe. 70 He pointed out that many of the critics of the Pennoyer rule had urged that the same standards governing in personam jurisdiction be used for in rem actions. 71 Marshall emphasized the Court's recognition, contrary to Pennoyer, that an adverse judgment in rem directly affects a property owner, 72 and the Court's requirement that all efforts must be made to give property owners actual notice of actions against their property. 73 Mr. Justice Marshall, recognizing that jurisdiction over a thing is essentially the same as jurisdiction over the interests of a person in a thing, concluded that the same standards used to determine whether jurisdiction may be asserted over a person must be used to determine whether jurisdiction may be asserted over property. 74 The standards to be used are those set forth in International Shoe. 75

The Shaffer Court recognized that there were strong arguments against using the International Shoe rule in a situation such as the one being considered. 76 For example, the Court noted that treating the mere presence of property as a sufficient basis for asserting jurisdiction may prevent a defendant from avoiding his obligations by keeping his assets in a place where he is not subject to in personam jurisdiction. 77 Marshall concluded that there is nothing to justify that argument, pointing out that all the plaintiff has to do is get an in personam judg-

70. 433 U.S. at 205.
71. Id.
72. Id. at 206. See notes 45-46 and accompanying text supra.
74. 433 U.S. at 207.
75. Id. at 209.
76. Id. at 210.
ment in a state where jurisdiction could be asserted consistent with *International Shoe*, and then institute a quasi in rem suit on such judgment where the judgment debtor has property.\(^7^7\)

Another criticism of applying *International Shoe* to quasi in rem actions noted in the *Shaffer* opinion was that by allowing an assertion of such jurisdiction, the uncertainty of the *International Shoe* test could be avoided, and the plaintiff would be assured of a forum.\(^7^8\) Marshall, however, did not see uncertainty as one of the factors inherent in *International Shoe*\(^7^9\) and stated that the cost of assuring the plaintiff a forum would be the "sacrifice of fair play and substantial justice"—a price too high to pay.\(^8^0\)

Using the standards set forth in *International Shoe*, the *Shaffer* court found that the presence of appellants' property in Delaware could not, in and of itself, support Delaware's assertion of jurisdiction over the appellants because "that property is not the subject matter of the litigation, nor is the underlying cause of action related to the property."\(^8^1\) Marshall justified the overturning of extensive precedent, allowing jurisdiction based solely on the presence of property within a state, by stating that the Court cannot and should not support an "ancient form" that has no substantial modern justification.\(^8^2\)

Appellee claimed that the individual defendants, as officers and directors of a corporation chartered in Delaware, did have sufficient minimum contacts with the state of Delaware such that jurisdiction could be asserted consistent with *International Shoe*. They also claimed that Delaware had a strong interest in supervising the management of a Delaware corporation. The *Shaffer* Court answered appellee's arguments by pointing out that the Delaware law basing jurisdiction on the presence of property in the state, rather than on appellants' status as corporate fiduciaries, failed to exhibit such a strong state interest.\(^8^3\) Marshall pointed out that while for choice of law purposes, the contacts might make it proper to apply Delaware law to the case, jurisdiction over the parties did not follow. The Court concluded that by simply accepting positions as officers or directors of a corporation incorporated in Dela-

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

\(^7^8\) *Id.* at 211.

\(^7^9\) *Id.*

\(^8^0\) *Id.*

\(^8^1\) *Id.*

\(^8^2\) *Id.* at 212.

\(^8^3\) *Id.* at 213.
ware, appellants had not "purposefully availed themselves of the privilege of conducting activities within the forum state in a way that would justify bringing them before a Delaware tribunal."  

The Shaffer Court's ability to ascertain the existence or nonexistence of minimum contacts between the appellants and the state of Delaware is interesting in light of the fact that the issue was never raised nor seriously considered by the Delaware state courts. Thus, the Court was never given a proper factual foundation detailing the contacts between the appellants, the litigation, and the state of Delaware.

Moreover, this decision was partially based on the finding that the Delaware legislature had made no provision for jurisdiction over corporate fiduciaries of a Delaware corporation unless they owned stock or options in that corporation. This seems inconsistent with the Court's rejection of Pennoyer's jurisdictional framework, for the Shaffer Court, in rejecting Pennoyer, also rejected the legal fictions, embodied in consent statutes, that had been the inevitable consequence of the Pennoyer rule. Yet, in Shaffer the Court looked for such a statute in the course of making its determination that there were no minimum contacts. Justice Brennan pointed out in his dissent that the Court, in determining there were no minimum contacts, was in fact trying to rest jurisdiction on a fictional outgrowth of a system the Court rejected.

The ambiguity in Shaffer can be resolved by looking at its decision as an articulation of a fairness test. Instead of emphasizing minimum contacts as the primary aspect of the

84. Id. at 215.
85. Id. at 221.
86. Id.
87. Id. at 213. See note 83 and accompanying text supra.
88. Id. at 197-204.
89. Id. at 221-228. Justice Brennan felt that on the facts of this case minimum contacts did exist between the appellants and Delaware. He asserted "that as a general rule a state forum had jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that state." Id. at 222. He said this is so because such an action is entertained on behalf of the entire corporation, not just the individual plaintiff. Brennan also pointed out that Delaware has a strong interest in asserting jurisdiction for three principal reasons. First, Delaware should be allowed to provide restitution for local corporations that have been victimized by fiduciary mismanagement. Second, Delaware has a manifest regulatory interest. Finally, Delaware is a convenient forum for supervising and overseeing a corporation that exists by the virtue of its laws. Id.
90. The Shaffer decision might be viewed as ambiguous for it seems that there were in fact minimum contacts here, yet an assertion of jurisdiction was denied. See note 89 and accompanying text supra.
International Shoe rule, and the nexus between the defendant, the litigation, and the forum state, Shaffer seems to be saying that, assuming minimum contacts do exist between the defendant, the litigation, and the state, a state may nevertheless be foreclosed from asserting jurisdiction over a party-defendant if it is unreasonable to do so. Viewed in this light, Shaffer may restrict the basis of jurisdiction as set out in International Shoe. While the minimum contacts of International Shoe will be required as a prerequisite to a state court's exercise of jurisdiction, Shaffer imposes an additional requirement of fairness. If fairness is, in fact, the standard Shaffer is enunciating, then the decision will certainly have a strong impact, not only on quasi in rem jurisdiction to which it spoke, but also on in personam jurisdiction.

**Impact on Quasi In Rem Jurisdiction**

While Shaffer held that the mere presence of a non-resident defendant's property within the forum state does not of itself confer jurisdiction upon that state's courts, the presence of the defendant's property within the forum state may indicate the existence of minimum contacts between the defendant, the litigation, and the forum state sufficient to support the state's assertion of jurisdiction under the rule of International Shoe. For example, if the litigation directly concerns the property located within the forum state, or if the claim arises out of the property, the minimum contacts requirements would be fulfilled.

By holding that use of property in a state solely to establish a basis for the exercise of that state's jurisdiction does not fulfill the contacts requirements of International Shoe, Shaffer clearly overrules Harris v. Balk. In fact, Shaffer held the kind of jurisdiction typified by Harris v. Balk unconstitutional:

In cases such as Harris and this one, the only role played by the property is to provide a basis for bringing the defendant into court. In such cases if a direct assertion of per-

91. 433 U.S. at 211; see notes 118-121 and accompanying text infra.
92. 433 U.S. at 211.
93. See notes 118-121 and accompanying text infra.
94. 433 U.S. at 207.
95. Id. at 207-08. Quasi in rem jurisdiction is also valid in cases where a resident creditor brings suit to collect on a valid judgment rendered in another state, by attaching property of the non-resident located in the forum state.
96. 198 U.S. 215 (1905).
97. 433 U.S. at 209.
sonal jurisdiction over the defendant would violate the
Constitution, it would seem that an indirect assertion
would be equally impermissible.\textsuperscript{94}

\textit{Shaffer} should also be read to overrule \textit{Seider v. Roth},\textsuperscript{99} already disapproved in California.\textsuperscript{100} The methods used to ob-
tain jurisdiction in \textit{Seider} and \textit{Harris} are somewhat analogous.
By attaching the defendant's interests in property in the forum
state, the plaintiff in \textit{Seider} was able to recover against a defen-
dant over whom the court had no personal jurisdiction. The
thrust of \textit{Shaffer} will not uphold the type of direct action stat-
ute against an insurance company created by the \textit{Seider} court
(at least if the insured is deemed the real party in interest) if
the insured has no connection with the forum state such that
it would be \textit{fair} to confer jurisdiction under the minimum con-
tacts test of \textit{International Shoe}.

One might wonder if there is anything left of quasi in rem
jurisdiction after \textit{Shaffer}. In a state such as California, which
allows its courts to exercise in personam jurisdiction on any
basis as long as it does not contravene state or federal constitu-
tional requirements,\textsuperscript{101} quasi in rem jurisdiction may never be
needed, except in very limited actions.\textsuperscript{102} If the requirements of
\textit{International Shoe} must be satisfied for all types of actions,
then in personam jurisdiction can be conferred on the court.
States with more restrictive long-arm statutes may still use
quasi in rem jurisdiction in cases where a California court could
exercise its in personam jurisdictional powers.\textsuperscript{103}

Ex parte divorce proceedings, which are conceptually
quasi in rem proceedings,\textsuperscript{104} will probably be unaffected by
\textit{Shaffer}. Although in an ex parte divorce the absent defendant-
spouse usually has no contact and has caused no effect in the
forum state, the \textit{Shaffer} rule will probably be read not to ex-
tend to ex parte divorce proceedings.\textsuperscript{105} \textit{Shaffer} will most likely

\begin{footnotes}
\item[98] Id.
\item[100] Javorek v. Superior Ct., 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768
(1976).
"may exercise jurisdiction on any basis not inconsistent with the Constitution of this
state or of the United States."
\item[102] See notes 104-105 and accompanying text infra.
\item[103] See note 108 and accompanying text infra.
\item[104] In an ex parte divorce proceeding, the resident spouse brings the marriage
status, the res, before the court, and by virtue of attachment of that status the court
can dissolve the marriage, even though the absent spouse is not subject to the jurisdic-
tion of the forum court.
\item[105] It would be against public policy to make it difficult for persons to receive
\end{footnotes}
be limited to cases affecting property rights. Ex parte divorce is not directly concerned with property rights. Its function is merely to sever a status.

As a practical matter, certain in rem proceedings will be unaffected by Shaffer. Disputes between parties over their rights in specific property located within the state, such as actions in ejectment, proceedings to quiet title, and proceedings to remove a cloud on title, will in most instances fulfill the in personam jurisdictional requirements of International Shoe and Shaffer since a state has a manifest interest in adjudicating disputes over property within its territorial limits.

Impact on In Personam Jurisdiction

Although Shaffer v. Heitner involved a quasi in rem case, the constitutional standard it articulated may shed new light on the rules governing in personam jurisdiction. Most cases concerning in personam jurisdiction, however, will probably remain unchanged.

Hess v. Pawloski, for example, upheld as constitutional a statute that provided a motorist using Massachusetts’ highways consents to having the registrar of motor vehicles receive service of process for him in suits arising out of his use of the state’s highways. Though Shaffer implied that resort to such legal fictions should be rejected as an antiquated means of obtaining jurisdiction, under a minimum contacts and fairness analysis, Shaffer would certainly uphold Hess. The minimum contacts requirement would be met as a motorist using a state’s highways can certainly be said to have “purposely availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” It would not be unfair to hold such a defendant amenable to suit in the forum for a claim arising out of his use of the state’s highways. In fact, it would be unfair not to allow the plaintiff to proceed against such a defendant.

In cases presenting facts not as clear-cut as the Hess situa-
tion, the impact of Shaffer is uncertain. A post-Shaffer jurisdictional battle will focus on the facts. Its reasonableness test will more often create a "could go either way" situation. The facts in Kulko v. Superior Court\textsuperscript{113} and Hartford v. Superior Court\textsuperscript{114} illustrate this proposition.

In Kulko, the plaintiff, a California domiciliary, commenced an action to establish a Haitian divorce as a judgment of California, and to receive custody of her children and increased child support from the defendant father, a non-resident of California.\textsuperscript{115} Years before the action was commenced, plaintiff and defendant had entered into a separation agreement pursuant to which their two children were to live with their father in New York during the school year and to spend vacations and the summer with the plaintiff in California. The defendant agreed to support the children while they were with the plaintiff in California. Three years before this action was commenced, defendant's daughter, Ilsa, informed her father that she wished to live with her mother in California, whereupon he bought her a plane ticket to California. Thereafter, plaintiff sent her son money so he could join her and Ilsa in California.\textsuperscript{116}

The California Supreme Court held that the defendant's act of sending his daughter to California formed a basis to exercise jurisdiction over him, not only to determine his obligation to support his daughter, but also to support his son since the support of both was presented as a single issue in the underlying action.\textsuperscript{117}

The United States Supreme Court granted certiorari and reversed the California Supreme Court, holding that its application of the minimum contacts test of International Shoe would sanction an unfair\textsuperscript{118} result. The Supreme Court impliedly admitted that contacts did exist between the defendant, the litigation, and the State of California,\textsuperscript{119} but nevertheless found, citing Shaffer, that California would be an unfair forum in which to require the defendant to maintain a suit.\textsuperscript{120}

\begin{flushleft}
\textsuperscript{113} 98 S. Ct. 1690 (1978).
\textsuperscript{114} 47 Cal. 2d 447, 304 P.2d 1 (1956).
\textsuperscript{115} 98 S. Ct. 1690 (1978).
\textsuperscript{116} Id.
\textsuperscript{118} Id. at 1697.
\textsuperscript{119} Id. at 1691-1701.
\textsuperscript{120} Id. at 1701.
\end{flushleft}
Kulko is illustrative of the type of case where the facts are susceptible to two interpretations in determining if, where minimum contacts do exist, it would still be fair and reasonable to require a party-defendant to defend in a particular forum. Justice Brennan, dissenting in Kulko, stated that, although he felt that the majority's determination was not implausible:

[An] independent weighing of the facts leads me to conclude, in agreement with the analysis and determination of the California Supreme Court, that appellant's connection with the State of California was not too attenuated, under the standards of reasonableness and fairness implicit in the due process clause, to require him to conduct his defense in the California courts.121

In Hartford v. Superior Court,122 the plaintiff brought suit in California to secure a declaration that the defendant, a non-resident of California, was his father. The Hartford court held that they could not assert jurisdiction over the defendant because he was not subject to personal service within the state.123 The court could not treat the action as in rem because the relief prayed for would amount to a personal judgment against the defendant as it would bind him in subsequent litigation.124

If Hartford was decided now under the Shaffer criteria, the California court would probably assert jurisdiction over the defendant. The facts in Hartford demonstrated that the defendant maintained businesses in California which brought him to the state periodically.125 This would provide systematic and continuous activities and contacts subjecting the defendant to local suit on any and all transitory causes of action. The fairness requirements of Shaffer would be satisfied. It would not have been a burden for the defendant in Hartford to defend a suit in California. The type of suit that was brought was certainly foreseeable. The defendant could be deemed to have been doing business in California, thus invoking the benefits and protections of its laws. Since Hartford would satisfy minimum contacts and fairness requirements, Shaffer would uphold jurisdiction.

121. Id. at 1702.
123. Id. at 453, 304 P.2d at 4.
124. Id. at 450, 304 P.2d at 2.
CONCLUSION

The importance of Shaffer lies in its recognition that a proceeding against property is essentially the same as a proceeding against owners of the property. Shaffer articulated a fairness test that emphasizes the quality and nature of the defendant's acts within the forum state as a prerequisite to a state court's assertion of jurisdiction in all types of litigation affecting the property rights of the defendant. The longstanding rules of Pennoyer and its progeny have been toppled. The quantitative and mechanical tests to determine whether a court has jurisdiction, cast aside by International Shoe for in personam cases, may no longer be relied on in any cases after Shaffer v. Heitner.

Every case decided under Shaffer will have to be evaluated according to its own peculiar facts. The results will depend on the discretion of the judge hearing the case, as well as on the competency of the litigants' counsel. The Shaffer test will lead to uncertainty and litigation over jurisdictional issues will increase. However, the outcome of such cases will be more just than under pre-Shaffer jurisdictional rules, for Shaffer dictates that fairness be the primary criteria in determining whether a state court may assert jurisdiction.

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