1977

Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . .

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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol46/iss3/4
COMMENT

QUASI IN REM ON THE HEELS OF SHAFFER v. HEITNER: IF INTERNATIONAL SHOE FITS . . .

I. INTRODUCTION

The law of state court personal jurisdiction has remained relatively stable in the three decades since the Supreme Court handed down its decision in International Shoe Co. v. Washington, which created the due process standard for a state court's exercise of in personam jurisdiction over nonresident defendants. That standard required that the defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The decision, however, did not reach other bases of jurisdiction such as in rem, quasi in rem, or physical presence. The defendant's physical presence within a state still subjected him to in personam jurisdiction, even when he had no other contacts with the state. The due process standard for the exercise of in rem or quasi in rem jurisdiction continued to require merely that the court obtain power over the subject property by prior attachment and that the nonresident defendant be notified of the proceeding by publication or, if available, by means better calculated to give notice. In the case of in rem jurisdiction, since the court's authority was based on its power over the defendant's property, it could adjudicate only claims to that property. No personal judgment could be rendered against the defendant himself. Quasi in rem jurisdiction was a hybrid basis of personal jurisdiction which gave the court authority to adjudicate personal claims although the court initially had

1. 326 U.S. 310 (1945).
2. For the purposes of this Comment, a distinction is made between the terms "personal jurisdiction" and "in personam jurisdiction." The latter is a species of the former. Personal jurisdiction, as distinct from subject matter jurisdiction, refers to a court's power to adjudicate the interests of a particular defendant, whether those interests be personal or related to some property. In personam jurisdiction, as distinct from in rem or quasi in rem jurisdiction, refers to the authority to adjudicate personal claims based on the court's power over the defendant's person. See Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958); Restatement of Judgments ch. 1, Introductory Note (1942). See also notes 7-13 infra and accompanying text.
3. 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
4. Id. The Court's holding was limited to the standard for in personam jurisdiction, and seemingly excepted the application of the doctrine if the defendant were "present within the territory of the forum." Id. at 316.
8. Id. § 73(b).
power only over the defendant's property. Lacking initial power over the defendant's person, the court could enforce the personal claim only by application of the property attached to the satisfaction of the resulting personal judgment. Consequently, in both quasi in rem and in rem jurisdiction, the defendant's liability was limited to the value of the property. This limitation has traditionally justified grounding the court's jurisdiction on less than the in personam due process standard set forth in *International Shoe*.

Since *International Shoe*, many commentators have urged that its jurisdictional principles be applied to those doctrines that it did not touch. A fundamental criticism of the lesser due process standard for in rem and quasi in rem jurisdiction arose from the idea that "[a]ll proceedings . . . are really against persons." In the case of quasi in rem jurisdiction, particularly, the value of the property applied to satisfy the personal claim could be high enough to effectively nullify the distinction between in personam and quasi in rem as to the extent of the defendant's liability. Therefore, the commentators reasoned, if judgments resulting from quasi in rem or in rem jurisdiction are essentially in personam, the in personam due process standard should be applied to all bases of personal jurisdiction. Nevertheless, the courts, with few exceptions, have consistently imposed the traditional classification of actions as in personam, in rem or quasi in rem to determine the due process standard in any given case.

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9. *Id.* §§ 73(a), 75. In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court succinctly outlined the classification of actions for jurisdictional purposes as follows: "A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him." 357 U.S. at 246 n.12.


11. Restatement (Second) of Judgments §§ 73(b), 75(b) (Tent. Draft No. 1, 1973).

12. *See, e.g.*, Freeman v. Alderson, 119 U.S. 185, 188 (1886). *See also* notes 2, 9 supra.

13. *See, e.g.*, Freeman v. Alderson, 119 U.S. at 188.


16. *See* note 106 infra.

17. Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657, 663 (1959); Zammit, *supra* note 10, at 676; *Developments, supra* note 6, at 954.


Aside from further elaboration and expansion of the minimum contacts test, the traditional jurisdictional classification remained intact until the Supreme Court handed down its sweeping decision in Shaffer v. Heitner. In that shareholder's derivative action brought originally in the Delaware Court of Chancery, the plaintiff obtained "quasi in rem" jurisdiction over individual corporate fiduciaries by sequestering their capital stock in the defendant corporations. By statute, that stock was deemed to be located in Delaware for purposes of attachment or sequestration.

In reversing the Delaware Supreme Court, which had sustained jurisdiction as a proper exercise of the quasi in rem procedure, the Court held that the minimum contacts standard of International Shoe is henceforth to be applied to all assertions of state court personal jurisdiction made on the basis of the traditional in rem or quasi in rem doctrines. The Court found further that


22. Id. at 2572.

23. Id. at 2573. Del. Code tit. 8, § 169 (1974) provides: "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

24. 97 S. Ct. at 2584-85. Justice Powell and Justice Stevens each concurred separately in the judgment, id. at 2587, and Justice Brennan concurred in part and dissented in part, id. at 2588.

Interestingly, the Court chose to consider only the contention that the exercise of jurisdiction in the absence of minimum contacts among the forum, the defendants, and the controversy was a violation of the due process clause. Id. at 2572. This choice on the part of the Court is noteworthy because the case might have been decided on the notice and hearing issue if the Court had chosen to settle the controversies raised by Ownbey v. Morgan, 256 U.S. 94 (1921), and later decisions. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court, in dictum, cited Ownbey for the proposition that an "attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest," id. at 91 n.23, is an "extraordinary situation" that justifies the postponement of notice and hearing, id. at 90 (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). Accord, Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). The Delaware Supreme Court, in Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. Sup. Ct. 1976), upheld its sequestration statute on the basis of this line of cases despite the statute's failure to provide for notice and immediate postseizure hearing.

In Ownbey, the only issue raised was the constitutionality of requiring a defendant whose property had been seized pursuant to a jurisdictional attachment statute to post a security bond as a precondition to entering an appearance. Personal jurisdiction was never questioned. 256 U.S. at 102-03. The defendant contended that he had been deprived of his opportunity to be heard when his appearance and pleadings were stricken for failure to file the bond. The Court found no denial of due process. It refused to overturn the attachment statute's bond requirement simply because the defendant could not pay. Id. at 110. This one-time situation was deemed by later cases to be extraordinary so as to permit the court to dispense with the hearing. Ownbey should not be read, however, to hold that attachment as used to obtain quasi in rem jurisdiction is always an "extraordinary situation" such that notice and hearing may always be postponed. Note, Quasi in
neither the statutory situs of the stock nor the defendants' positions as corporate fiduciaries constituted sufficient contacts to support the jurisdiction of the Delaware courts.\textsuperscript{25}

Now that the same due process standard must apply to all types of actions,\textsuperscript{26} the classification of personal jurisdiction is no longer necessary to determine which due process standard to use. If the minimum contacts standard is not otherwise satisfied, the presence of a nonresident's property within the forum state, in and of itself, no longer supports the exercise of valid jurisdiction over him.\textsuperscript{27} However, Justice Marshall, writing for the Court, conceded that "the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation . . . ."\textsuperscript{28} This means that the location of property within the forum state, although the defendant's only manifest and identifiable contact there, will, even under the \textit{Shaffer} analysis, support the exercise of jurisdiction over him in certain circumstances.\textsuperscript{29} Furthermore, since the in personam due process standard is now the test for all types of personal jurisdiction, there appears to be no basis for limiting the resulting judgment to the value of the res that forms the requisite nexus with the state,\textsuperscript{30} except perhaps in unique factual situations.\textsuperscript{31}

The primary question then becomes: under what circumstances may a nonresident defendant be compelled to defend an action in a state where, before \textit{Shaffer}, he was subject only to quasi in rem jurisdiction, with its attendant limited liability, because his only relationship with the state arose from the ownership of assets? This Comment will attempt to answer this question by applying tests analogous to those heretofore viewed as determinative of in personam jurisdiction to assess the defendant's contacts with a particular state in actions that previously would have been classified as quasi in rem. The \textit{Shaffer} opinion, unfortunately, leaves much unsaid in this context.

\textit{Rem Jurisdiction and Due Process Requirements}, 82 Yale L.J. 1023, 1026, 1028-32 (1973) [hereinafter cited as \textit{Quasi in Rem}]. Moreover, the Court in \textit{Shaffer} questioned \textit{Owney}'s continuing consistency with more recent interpretations of the due process clause. 97 S. Ct. at 2575 n.10. Thus, the Court might have limited \textit{Owney} to its facts and overturned the Delaware sequestration statute for its failure to provide adequate notice and hearing. In this way the Court might have avoided a complete restructuring of jurisdictional thinking. Apparently, however, a total overhaul of jurisdictional concepts was precisely what the Court had in mind.

\textsuperscript{25} 97 S. Ct. at 2585-87.
\textsuperscript{26} \textit{Id.} at 2584-85.
\textsuperscript{27} \textit{Id.} at 2582-83.
\textsuperscript{28} \textit{Id.} at 2582.
\textsuperscript{29} \textit{Id.} at 2587 (Powell, J., concurring), 2588 (Stevens, J., concurring); \textit{O'Connor v. Lee-Hy Paving Corp.}, No. 75 C 1853, slip op. at 7 (E.D.N.Y. Sept. 27, 1977).
\textsuperscript{30} \textit{See} notes 12-13 & 15-17 \textit{supra} and accompanying text. There is a school of thought that would maintain quasi in rem jurisdiction with the judgment limited to the value of the res attached, but with the added requirement of minimum contacts. However, when jurisdiction is based on minimum contacts, a limited appearance is not logically required.
\textsuperscript{31} \textit{See} notes 250-54 \textit{infra} and accompanying text.
regard. To aid in the understanding of these tests, Shaffer and the developments leading to it will first be examined. Second, the factors to be considered in determining personal jurisdiction based on the ownership of tangible property will be developed. These factors will then be applied to three types of intangible personalty that were often the subject of quasi in rem attachment: simple debts, capital stock, and insurance policies. Finally, further implications suggested by the Shaffer opinion will be discussed.

II. THE SHAFFER BASIS FOR JURISDICTION

A. Prior Developments

Constitutional limitations on state court jurisdiction prior to Shaffer derived initially from Pennoyer v. Neff, which established a territorial basis of jurisdiction resting on two principles of public law: “One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.” In an action in ejectment brought by Neff, a nonresident of Oregon, to recover property which he owned there and which had been sold to satisfy a judgment in a prior action against him, the Court held the prior judgment invalid and restored Neff to the possession of his property. The basis for the Court’s decision was that the Oregon court in the prior action had neither in personam jurisdiction over Neff, since he was not present in the state at the time, nor jurisdiction over his property, since it had not been brought before the court by prior attachment.

The effects of Pennoyer were twofold. First, it required personal service upon a defendant within the state in order to obtain in personam jurisdiction over him. Second, nonresident defendants thereafter could be subjected to jurisdiction only if the forum had power over some property of the defendant that was situated within the state. Jurisdiction obtained by this latter method rendered the action either in rem or quasi in rem, depending on the nature of the claims adjudicated, and, in any event, resulting judgments could not exceed the value of the property that provided the basis for jurisdiction. In one sense, Pennoyer afforded some protection to nonresident defendants; on the other hand, it made available to plaintiffs any forum in

32. See 97 S. Ct. at 2582 n.28.
33. See part II infra.
34. See part III infra.
35. See part IV infra.
36. See part V infra.
37. 95 U.S. 714 (1878).
38. Id. at 722.
39. Id. at 734.
40. Id. at 721-22.
41. Id. at 723-24.
42. See notes 2, 6-13, 19 supra and accompanying text.
whose territory the defendant's property was located. Although Pennoyer made the situs of property and the physical presence of the defendant critical factors in finding state court jurisdiction, the decision failed to establish any criteria for their determination. Later cases therefore created certain legal fictions to deal with this problem.

The first question to be resolved by the court in any quasi in rem proceeding is whether, in fact, the subject property is located, or has its situs, within the boundaries of the forum state. This determination presents no problem in the case of real property or tangibles, but locating the situs of intangible personalty (a debt, for example), especially when it is not embodied in any sort of writing, is more difficult. The Supreme Court resolved the problem of a debt's situs in Harris v. Balk, when it held that a debt owed to a defendant could be attached for the purposes of quasi in rem jurisdiction in any forum in which in personam jurisdiction could be exercised over the defendant's debtor. Hence, a major fiction in the realm of quasi in rem proceedings was constructed in order to accommodate Pennoyer's two principles of public law and at the same time expand the plaintiff's ability to bring nonresident defendants into court.

With respect to in personam jurisdiction over foreign corporations, similar fictions had been developed even before the advent of Pennoyer and were perpetuated thereafter. As early as 1856, the Court, in Lafayette Insurance Co. v. French, had deemed a foreign corporation doing business in a state to have "consented" to being sued there. After Pennoyer, the doing business-consent doctrine was transformed into a fictional notion of presence. Eventually, the law developed on the basis of this fiction to a point where a corporation could be sued without violation of the due process clause in any

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44. 97 S. Ct. at 2578; Zammit, supra note 10, at 670.
47. 198 U.S. 215 (1905).
49. See text accompanying note 38 supra.
50. E.g., 97 S. Ct. at 2578; Ehrenzweig, supra note 14, at 290; Zammit, supra note 10, at 670.
51. 59 U.S. (18 How.) 404 (1856).
state where it was incorporated, was qualified to do business, or was actually transacting business.\textsuperscript{53}

As society became increasingly mobile,\textsuperscript{54} courts also applied these presence and consent fictions to nonresident individuals.\textsuperscript{55} The most notable case in this development was \textit{Hess v. Pawloski},\textsuperscript{56} where the Court approved a Massachusetts nonresident motor vehicle statute that deemed any nonresident to have "impliedly consented" to the appointment of the secretary of state as agent for service of process in connection with any suit arising out of the nonresident's use of Massachusetts highways. This substituted service was held sufficient to confer in personam jurisdiction over the defendant.\textsuperscript{57} Another major outgrowth of the \textit{Pennoyer} rules became settled in 1940 with the decision in \textit{Milliken v. Meyer},\textsuperscript{58} where the Court held that "[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."\textsuperscript{59}

\textbf{B. International Shoe Co. v. Washington}

By the time this extensive fictional framework for personal jurisdiction was fully developed, \textit{Pennoyer} had outgrown much of its usefulness in protecting defendants from suit in a distant forum.\textsuperscript{60} The numerous theories developed by courts to establish their power over the defendant—presence, actual consent, domicile, and implied consent—led in some cases to outlandish results.\textsuperscript{61} In most instances, however, courts made quantitative evaluations of defendants' activities within the state to determine whether the doing business-presence fictions applied,\textsuperscript{62} but in so doing, the courts expended an inordinate amount of "judicial energy."\textsuperscript{63}

\begin{footnotes}
\footnote[53]{See Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); \textit{Developments}, supra note 6, at 919-23; cases cited note 52 supra.}
\footnote[54]{McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957), cites the "fundamental transformation of our national economy" as the reason for the relaxation of jurisdictional restrictions.}
\footnote[55]{\textit{See id.; \textit{Developments}, supra note 6, at 917-18.}}
\footnote[56]{274 U.S. 352 (1927).}
\footnote[57]{\textit{Id.; cf. Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953) (approving the implied consent theory of Hess v. Pawloski as applied to nonresident motorists but affirming dismissal on forum non conveniens grounds).}}
\footnote[58]{311 U.S. 457 (1940).}
\footnote[59]{\textit{Id.} at 462.}
\footnote[60]{97 S. Ct. at 2580; Ehrenzweig, supra note 14, at 309-12.}
\footnote[61]{In Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), for example, the court used the presence fiction to sustain jurisdiction over a nonresident defendant who was served with process while he was a passenger on an aircraft flying over Arkansas. See Ehrenzweig, supra note 14, at 289-90.}
\footnote[63]{Shaffer v. Heitner, 97 S. Ct. at 2579. See generally 326 U.S. at 317-19.}
\end{footnotes}
In *International Shoe*, the Court attempted, *inter alia*, to simplify these matters as it recognized that

to say that the corporation is so far "present" [in the state] as to satisfy due process requirements . . . is to beg the question to be decided. For the 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 may be met by such contacts of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there.64

Although these words of Chief Justice Stone appear on their face to be merely new terminology for practices already developed by the courts,65 the tests for determining minimum contacts were altered as well. Rather than inquiring into the number of activities in the forum state, the courts were to focus instead on "the quality and nature of the [defendant's] activity in relation to the fair and orderly administration" of the state's laws.66 Thus, *International Shoe* recognized that the fictions used to support in personam jurisdiction were simply legal conclusions that the exercise of jurisdiction was reasonable,67 and replaced the several fictions with a single standard of reasonableness.68 The Court did not enumerate the factors for determining whether the assumption of jurisdiction was reasonable under the circumstances,69 but instead set forth the broad minimum contacts standard—a standard providing sufficient latitude to encompass a number of factual situations without the need to count the defendant's activities within the state or to pigeon-hole them under one of the prior fictions.70 One effect of *International Shoe*, then, was to reduce substantially Pennoyer's vitality with respect to in personam jurisdiction.71 Territorial boundaries were no longer the foremost consideration; rather, the test focused on the relationship among the defendant, the controversy, and the forum.72 The physical presence doctrine was the only major basis derived from Pennoyer for in personam jurisdiction to remain.73

64. 326 U.S. at 316-17 (citing Judge Learned Hand in Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (1930)).

65. *Developments*, *supra* note 6, at 923.

66. 326 U.S. at 319.

67. *Id.* at 316-17.

68. *Id.*

69. *Developments*, *supra* note 6, at 924.

70. In *International Shoe*, the reasonableness test was satisfied because the defendant corporation's activities in Washington were continuous and were a source of great revenue and because the underlying controversy arose out of those activities. 326 U.S. at 320.

71. 97 S. Ct. at 2580; Ehrenzweig, *supra* note 14, at 309-12.

72. 97 S. Ct. at 2580; *International Shoe Co.* v. Washington, 326 U.S. at 316. In *Shaffer* the Court noted that territorial boundaries continue to have significance, but only to the extent that "States are defined by their geographical territory." 97 S. Ct. at 2580 n.20. The boundaries are useful only in determining whether a defendant has contacts with one state as opposed to another. *Id.*; see Smit, *The Enduring Utility of in Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 Brooklyn L. Rev. 600, 600 n.5 (1977) [hereinafter cited as Smit].

73. *See* notes 4, 5, 61 *supra* and accompanying text.
Subsequent developments regarding in personam jurisdiction did not depart significantly from the International Shoe test. In later cases, jurisdiction was upheld in suits where a corporation’s out-of-state activities had consequences within the forum state, or where the controversy arose out of obligations created by a single act in the state, or where the cause of action was unrelated to the corporation’s activities in the state so long as they were of such a “substantial and continuing” nature that compelling the nonresident defendant to defend in that forum was fair and reasonable. Although some courts continued to rely on quantitative measures, other later decisions turned on the existence of “some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”

As Justice Marshall pointed out in Shaffer, no change as “dramatic” as that brought by International Shoe occurred in the areas of in rem and quasi in rem jurisdiction. However, one subsequent Supreme Court decision and a few lower court decisions set the stage for Shaffer’s reevaluation of the in rem rules derived from Pennoyer and Harris.

The lower court decisions, in dealing with the problems associated with the situs of intangibles, found that a departure from the territoriality concept was unavoidable and that balancing the interests of the defendant, the plaintiff, and the state was a more effective tool for deciding modern jurisdictional questions. In Atkinson v. Superior Court, for example, Justice Traynor discarded the situs theory derived from Harris and held that the solution to

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78. Hanson v. Denckla, 357 U.S. at 253.


81. See, e.g., von Mehren & Trautman, supra note 14, at 1164; Developments, supra note 6, at 956.

the question of jurisdiction over a New York trustee of certain royalties and other payments claimed by the California plaintiffs "must be sought in the general principles governing jurisdiction over persons and property . . ."83 These general principles entailed an evaluation of the "bearing that local contacts have to the question of over-all fair play and substantial justice."84 Justice Traynor's reasoning put into question the proposition that a state may adjudicate rights to property solely on the basis of its location in the state despite the absence of any relationship between the forum and the controversy or the property's owner.85

In Mullane v. Central Hanover Bank & Trust Co.,86 the Supreme Court found the classification of actions as in personam or in rem "so elusive and confused" that it could not form a dependable basis on which to decide cases involving fourteenth amendment rights.87 Mullane involved an accounting by the trustee of a common trust and the type of notice required to be given to all interested beneficiaries. The Court held that, regardless of whether the action were classified as in rem or in personam, the same criterion for notice had to be met; that is, the Court required the best notice possible under the circumstances.88 Part of the Court's rationale grew out of the recognition that, despite the technical classification, the proceeding was one in which persons "may be deprived of property rights."89 This possibility required that such persons be given the same kind of notice required in in personam actions, if feasible, to comport with due process standards.

C. The Arguments for Maintaining Quasi in Rem Jurisdiction

The basic premise of the Shaffer Court's decision, as well as the commentaries to which the court alluded,90 was that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."91 Reasoning from this premise, the

83. Id. at 345, 316 P.2d at 964.
84. Id., 316 P.2d at 965.
85. See 97 S. Ct. at 2580-81.
87. Id. at 312.
88. Id. at 318-20. The Court's premise in Mullane was reminiscent of the statement by Chief Justice Holmes of the Supreme Judicial Court of Massachusetts in Tyler v. Court of Registration, 175 Mass. 71, 55 N.E. 812, appeal dismissed, 179 U.S. 405 (1900): "All proceedings, like all rights, are really against persons." Id. at 76, 55 N.E. at 814. See also Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960) ("Although the action . . . was technically brought against the barge itself as well as its owner, the obvious fact is that, whatever other advantages may result, this is an alternative way of bringing the owner into court.").
89. 339 U.S. at 313.
Court concluded that "the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'"92 It held that "[t]he standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in International Shoe."93 Once the basic premise is accepted, the argument is unquestionably "simple and straightforward."94

If the minimum contacts standard is now the test for all assertions of state-court jurisdiction, attachment and its analogous procedures are no longer necessary for obtaining jurisdiction over nonresident defendants, since the equivalent of in personam jurisdiction exists once the defendant passes the International Shoe test.95 However, as Justice Marshall noted in his opinion, there are arguments in favor of maintaining the quasi in rem procedure.96 He considered each of these arguments seriatim, but he found none of them compelling.97

The primary argument is that attachment should continue to be available as a means of preventing a defendant from escaping a state's jurisdiction by removing his assets to another forum where he is not subject to an in personam judgment.98 But, as Justice Marshall explained, because this argument looks to the reason for the property's location in a particular state, it does not support the use of attachment to obtain jurisdiction in cases where the debtor had not removed his property to that location to escape the court's jurisdiction.99 Moreover, two procedures are still available under Shaffer to protect against the defendant's removal or concealment of his assets to avoid liability. First, once the debtor's obligations have been adjudicated in a forum that has in personam jurisdiction over him, attachment procedures remain available in any other forum where the defendant owns property for the purpose of executing the judgment by virtue of the full faith and credit clause.100 Second, state courts continue to have jurisdiction to use the provisional remedy of attachment "as security for a judgment being sought in a forum where the litigation can be maintained consistently with International Shoe."101 A recent federal district court case, in fact, construed Shaffer

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92. 97 S. Ct. at 2582 (quoting Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971)).
93. Id.
94. Id. at 2581.
95. Id. at 2583 n.31.
96. Id. at 2583-84.
97. Id.
98. Restatement (Second) of Conflict of Laws § 66, Comment a (1971), quoted in Shaffer v. Heitner, 97 S. Ct. at 2583; cf. Ehrenzweig, supra note 14, at 302 ("[T]hose cases in which English courts in fact assumed jurisdiction had substantial domestic contacts or . . . plaintiff could not expect justice elsewhere.").
99. 97 S. Ct. at 2583, see Note, The Power of a State To Affect Title in a Chattel Atypically Removed to It, 47 Colum. L. Rev. 767, 785 (1947).
100. 97 S. Ct. at 2583 & n.36; see Beale, supra note 45, at 123.
101. 97 S. Ct. at 2583; see, e.g., Beale, supra note 45, at 123-24; Hazard, supra note 90, at 284-85; von Mehren & Trautman, supra note 14, at 1178. This use of attachment procedures is
to allow a California court to attach a French corporation's assets, pending a final adjudication in an action brought elsewhere, when it was clear that the French corporation did not have sufficient contacts with California to satisfy the International Shoe standard for in personam jurisdiction.

A second argument discussed by Justice Marshall for maintaining the quasi in rem procedure is that since the potential liability in such actions is limited to the value of the property seized, compelling the defendant to enter a limited appearance does not offend traditional notions of fair play and substantial justice. But, the Court noted in Shaffer, this "limitation does not affect the argument." The size of plaintiff's claim will affect the nature of the hearing required to comport with due process limitations in attachment proceedings, but it has no effect on the fairness of compelling a defendant's appearance in a foreign forum.

Another argument considered by Justice Marshall was that the International Shoe standard is so uncertain and difficult to apply that the plaintiff may not always be assured a forum in which to sue. In answer, it should be noted that application of the traditional quasi in rem test appears just as difficult in many cases, as evidenced by the problems encountered in locating the situs of the chose in action in Atkinson v. Superior Court. Moreover, a

more like the original common law use in Great Britain to prevent the flight of absconding debtors who, were the analysis applied at the time, had already met the International Shoe test. See Ehrenzweig, supra note 14, at 302.

102. Carolina Power & Light Co. v. Uranex, No. C-77-0123, slip op. at 7-8 (N.D. Cal. Sept. 26, 1977). The asset was a debt owed to the corporate defendant by a California corporation, and it arose from business done in other states. Id. at 3-4.

103. 97 S. Ct. at 2582 n.23, 2583 n.32; see Smit, supra note 72, at 625.


106. 97 S. Ct. at 2582 n.23, 2583 n.32; Carrington, The Modern Utility of Quasi in Rem Jurisdiction, 76 Harv. L. Rev. 303, 317 (1962). Indeed, requiring a defendant to travel great distances to defend a small property claim seems highly unfair. Conversely, some seizures may not result effectively in a limited appearance when the property attached has a value as high or higher than the amount claimed. This, in fact, was the situation in Shaffer, where the total value of the stock on the date of seizure was approximately $1.2 million. 97 S. Ct. at 2574 nn.7 & 8. It should also be noted that the Delaware sequestration statute provided for no limited appearance, but rather, sought to compel a general appearance subjecting the defendants to full in personam liability. Id. at 2583; U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 156 (3d Cir. 1976), cert. denied, 97 S. Ct. 2972 (1977); see Hughes Tool Co. v. Fawcett Publications, Inc., 290 A.2d 693, 695 (Del. Ch. 1972). The subject sequestration statute, Del. Code tit. 10, § 366 (1975), provides in pertinent part: "The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults."

107. 97 S. Ct. at 2584; see, e.g., Hazard, supra note 90, at 283; Smit, supra note 72, at 607-08; Developments, supra note 6, at 950 & n.260. Justice Powell, in his concurring opinion in Shaffer, urged the "preservation of the common law concept of quasi in rem jurisdiction" in limited circumstances because it "arguably would avoid the uncertainty of the general International Shoe standard ...." 97 S. Ct. at 2587 (Powell, J., concurring).

108. 49 Cal. 2d 338, 316 P.2d 960 (1957), appeal dismissed and cert. denied sub nom.
plaintiff is rarely limited to the forum of his residence for purposes of bringing suit. He can almost always bring suit in the state of the defendant's residence or in a forum of the state where the cause of action arose. In those limited cases in which no other forum is available, the presence of a defendant's property within the state may nevertheless support a finding of jurisdiction. In sum, none of the arguments in favor of continuing the quasi in rem procedure were found strong enough to outweigh the Shaffer rationale.

III. TANGIBLE PROPERTY AS A BASIS FOR JURISDICTION

Although Shaffer does not expressly overrule Pennoyer and Harris, the two principal cases in the development of quasi in rem theories, it casts grave doubt upon their continued validity. In a footnote, the Court stated its reluctance to reconsider the two cases directly: "It would not be fruitful for us to re-examine the facts of cases decided on the rationales of Pennoyer and Harris to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled." The obvious inference to be drawn from this statement is that the doctrines of territoriality and the fictional location of intangible obligations are no longer relevant factors in evaluating the constitutionality of state-court jurisdiction.

The Shaffer Court did not enumerate the factors to be considered in deciding whether the presence of property suggests other ties with the forum; the elucidation of these factors and additional ties remains for a case-by-case determination. At the same time, the Court's statement evidences its reluctance to rule out entirely a finding of jurisdiction in all actions that, prior to Shaffer, fit under the quasi in rem label. On the contrary,
jurisdiction will be sustained if those actions which are completely unrelated to “the property which now serves as the basis for state court jurisdiction” otherwise pass the International Shoe test.  

In fact, the majority opinion agreed that the presence of certain types of property, without more, would justify a court’s authority to adjudicate in certain circumstances. It stated, for example, that when the underlying controversy arises from claims to the property itself, the state where the property is located would certainly have jurisdiction over the defendant-owner on all but a very few occasions. Furthermore, jurisdiction in the state where the property is located may also be sustained when other types of controversies, such as personal injury or nuisance claims, arise out of the ownership, use, or possession of the property. In fact, many long-arm statutes encompass both of these situations. Thus, it appears that jurisdiction will be upheld with but a few exceptions when the plaintiff’s cause of action is in some way connected to the property. The remaining question, left unanswered by Shaffer, is under what circumstances a court may obtain jurisdiction over a nonresident defendant on the basis of the location of his property in the state when the controversy has no relationship to the defendant’s interest in that property, but when that property suggests more in the way of ties with the state.

To suggest guidelines for answering this question, the following discussion will combine tests analogous to the “doing business” tests derived from International Shoe with the interest balancing approach urged by many commentators. The interests to be examined in every case are three: those of the defendant, those of the state, and those of the plaintiff. The defendant’s primary interest is in not having to defend in a forum away from home. The primary interests of the state are providing its resident plaintiffs with a forum for redress and applying its law to the adjudication of the controversy. The plaintiff’s interests are ordinarily coincident with those of the state. The fairness of asserting the state’s and plaintiff’s interests over those of the defendant, according to Shaffer and International Shoe, must be measured by the relationships between the defendant and the state and

118. 97 S. Ct. at 2582.
119. Id.
120. Id. These rare occasions would exist, for example, where personality is removed to a particular state without the owner’s consent, where the removal is only temporary, or where the owner is fraudulently induced to locate his personality within the reach of a certain forum. See Note, The Power of a State To Affect Title in a Chattel Atypically Removed to It, 47 Colum. L. Rev. 767 (1947), cited in Shaffer v. Heitner, 97 S. Ct. at 2582 n.25. Circumstances such as these do not “indicate that [the defendant] expected to benefit from the State’s protection of his interest.” 97 S. Ct. at 2582 (footnote omitted).
121. 97 S. Ct. at 2582.
123. See notes 14, 18, 81-85 supra and accompanying text.
124. See, e.g., Smits, supra note 72, at 608-10.
125. See notes 148-62 infra and accompanying text.
between the state and the controversy. Where the only relationship between the defendant and the state is an interest in property, factors which may justify asserting jurisdiction over him include: the purposefulness and the substantial and continuing nature of his ties with the state and his expectations as to the likely forum for suit.126

This discussion will attempt to examine each of these factors and interests in concrete terms, and to analyze the fairness of asserting jurisdiction according to the type of property involved.127 Tangibles and intangibles as bases for jurisdiction will be treated separately.128 This discussion will also show that, despite elimination of state court jurisdiction over many traditional quasi in rem type actions, long-arm jurisdiction based on minimum contacts may fairly be expanded to cover more actions in which tangible property forms the basis for jurisdiction.129

A. The Defendant-State Contacts

The purposefulness with which the defendant has placed his property in a state has had on many occasions a significant bearing upon the fairness of bringing the defendant into that state's courts.130 Whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,"131 has been the critical factor on which many decisions have turned since International Shoe.132 This factor is not necessarily determinative,133 however, because varying degrees of purposefulness may be found in different situations. Considerations going to the weight of this factor are: the value of the property, the income, if any, produced by it, the nature of the property itself, and the duration of its location in the state.134

When the defendant owns real property within a state, the purposefulness of its location there cannot be doubted. Real property is ordinarily an asset of great value. Its ownership or possession provides a substantial and continuing relationship between the defendant and the state,135 and "would normally indicate that [the defendant] expected to benefit from the State's protection of his interest."136

126. See notes 130-47 infra and accompanying text.
127. See notes 163-67 infra and accompanying text.
128. See part IV infra.
129. See part V infra.
130. Smit, supra note 72, at 621; see note 78 supra and accompanying text.
133. 97 S. Ct. at 2582 n.28.
134. Smit, supra note 72, at 620; Developments, supra note 6, at 955 n.342.
135. Smit, supra note 72, at 617-18; Note, Ownership, Possession, or Use of Property as a Basis of in Personam Jurisdiction, 44 Iowa L. Rev. 374, 377-78 (1959) [hereinafter cited as Ownership].
136. 97 S. Ct. at 2582 (footnotes omitted). Justice Marshall made this statement in discussing
With respect to personality, a great deal depends on the value of the property and the permanence with which it is situated in the forum state. If, for example, a nonresident continually stored products of high value in a warehouse within the state in order to benefit from low ad valorem property taxes, his purposeful activity within the state should support a finding of jurisdiction in any cause of action, whether related or unrelated to the property itself. The same might hold true if the defendant maintained a sizable bank account in the state for the purpose of gaining substantial interest revenues. Situations such as these indicate not only that the defendant intends to avail himself of the protection of the state's laws, but also that he is reaping significant revenues from the state as a result of his purposeful choice for the situs of his property. Where this is so, the defendant would have established a substantial and continuing relationship with the state of the kind that should support jurisdiction if coupled with a substantial connection between the state and the litigation.

Another major factor to be considered in evaluating the defendant's interests is whether he expects to be subject to the jurisdiction of the state where actions involving claims to the defendant's property itself. However, the fact that a cause of action is or is not related to the property should have no bearing on whether the defendant expects to derive any benefit from the state's laws with regard to that property.

The nature of the defendant's interest in his property may also be a factor in determining the fairness of exercising jurisdiction over him. Many state long-arm statutes provide for jurisdiction over a nonresident if he "owns, uses or possesses any real property situated within the state." N.Y. Civ. Prac. Law § 302(a)(4) (McKinney 1972). See also statutes cited note 276 infra. It has been questioned, however, whether a nonresident mortgagee or trustee has a sufficient interest in the property to constitute a strong enough tie with the state. See Ownership, supra note 135, 380-81. Several Pennsylvania state court decisions have held that interests such as these are great enough to constitute ownership or use. See, e.g., Chong v. Faull, 88 Pa. D. & C. 557 (Philadelphia County Ct. 1954); Jamison v. United Cigar Whelan Stores, 68 Pa. D. & C. 121 (Philadelphia County Ct. 1949); Dubin v. Philadelphia, 34 Pa. D. & C. 61 (Philadelphia County Ct. 1938). But unless these interests carry with them some other acts of dominion or control of the property, 68 Pa. D. & C. at 128, the strength of the defendant's tie with the state would be considerably less. See Dubin v. Philadelphia, 34 Pa. D. & C. at 70; Eisenbrey v. Pennsylvania Co. for Ins., 141 Pa. 566, 573, 21 A. 639, 640 (1891).

137. See generally Hanson v. Denckla, 357 U.S. at 253; notes 130-34 supra and accompanying text.

138. See note 136 supra and accompanying text.

139. See note 134 supra and accompanying text.


141. Substantial defendant-state contacts ordinarily should not support jurisdiction if the state has no interest in the controversy. See notes 148-62 infra and accompanying text. Other considerations to be taken into account in assessing the nature and quality of the defendant's ties with the forum state include the inconvenience and hardship of defending in that forum and the availability of the defendant's evidence and witnesses. International Shoe Co. v. Washington, 326 U.S. at 317; Smit, supra note 72, at 611; Developments, supra note 6, at 965.
his property is located. In the case of certain types of property, a finding of purposefulness may imply that the defendant has this expectation. As Justice Stevens argued in his concurring opinion in Shaffer, the ownership of some types of property "gives rise to predictable risks" of suit in another state. In addition, Justice Marshall and Justice Brennan both mentioned the expectations of the parties as to the likely forum for suit as a relevant consideration. When the title of real estate or a personal injury on it is the source of the underlying controversy, the defendant would very likely expect to be subject to suit in the state where the real estate is located. However, it should make no difference whether the cause of action is connected or unconnected to the property in terms of the defendant's convenience and his expectations as to the possibility of having to defend a suit in that state. No constitutional distinction between actions related to the property and actions unrelated to it appears to render jurisdiction fair in one case and unfair in another. The fact that an action is unrelated to the property in no way reduces the connection between the defendant and the state that the property itself suggests, although it may have a bearing on the strength of the connection between the state and the litigation.

B. The State's Interests and Plaintiff's Need for a Forum

In evaluating the propriety of conducting the litigation in a particular state, the tie between the state and the controversy must also be considered. Certainly, when the cause of action arises in the forum state, this relationship is great. Analogy to the traditional common law standard for obtaining jurisdiction over a defendant who does business within the state suggests that jurisdiction may stand, despite the lack of connection between the cause of action and the property, provided that the defendant's ownership of property is of a substantial and continuing nature and that the contact between the state and the controversy is strong. Jurisdiction has been sustained in cases where the defendant's business transactions in a state were of such a substantial and continuing nature that compelling the defendant to appear in that state did not offend traditional notions of fair play and

142. See Smit, supra note 72, at 621, 623; Developments, supra note 6, at 965.
143. 97 S. Ct. at 2587 (Stevens, J., concurring).
144. "Appellants had no reason to expect to be haled before a Delaware court." Id. at 2586.
145. Id. at 2592 n.6 (Brennan, J., concurring in part and dissenting in part).
146. Id. at 2582.
147. Provided that the extent to which a defendant's property ties him to the forum state is substantial and continuing, the defendant may be subject to the jurisdiction of that state in any cause of action, whether related or unrelated to the property. See notes 140-45 supra and accompanying text.
148. 97 S. Ct. at 2580.
In the constitutional analysis, there is no logical reason for distinguishing between business transactions and ownership of property as state-defendant contacts.

The fact that the controversy originates in a particular state may, in and of itself, suggest that the state has an important interest in the litigation.

Justice Brennan argued in Shaffer that the applicability of the state's law is a consideration supporting jurisdiction, although Justice Marshall sharply disagreed, emphasizing the distinction made in Hanson v. Denckla between choice of law and jurisdiction. Some commentators, however, believe that the applicability of the forum's law provides a legitimate state interest in the litigation that, when combined with other factors, buttresses a finding of jurisdiction. This is particularly true when the controversy involves legal relationships in which a unity of administration is essential. Choice of law may not be as determinative a factor as Justice Brennan suggests, but once the distinct question of whose law governs is answered, it can provide some basis for determining the extent of the contact between the forum and the litigation in the jurisdictional analysis.

The unavailability of another forum also strengthens the state's interest in
conducting the litigation in its courts.\textsuperscript{158} This becomes an important factor where the plaintiff is a resident of the forum who would probably require public assistance if not provided with a forum for redress.\textsuperscript{159} Similarly, jurisdiction should be sustained in cases like\textit{Mullane}\textsuperscript{160} and\textit{Hanson}\textsuperscript{161} where, insofar as unity of administration is essential, that forum is usually the only one available, and little or no unfairness would result to the defendant.\textsuperscript{162}

C. \textit{Striking the Balance}

The factors discussed above lead to a jurisdictional analysis by the type of property involved. The ownership of real property and most tangibles should normally support jurisdiction unless the state-controversy ties are too weak. Intangibles and some movable tangibles, on the other hand, may not provide a sufficient basis for jurisdiction even when the state's interest in the litigation is strong. The type of property involved, then, is a useful analytical tool, but it is by no means a determinative factor and should not be overemphasized. Nor is the state's interest in the controversy a critical factor. The primary considerations appear to be the purposefulness with which the defendant makes contact with the state and the substantial and continuing nature of that contact.

Thus, in a jurisdictional analysis with respect to real property, the necessary tie between the defendant and the state almost always exists.\textsuperscript{163} However, the court must still balance the state's connection with the litigation against the inconvenience to the nonresident in defending the suit in that state. When the cause of action arises in the state, and the state's law applies, it appears that sufficient contacts would exist among the defendant, the controversy, and the forum.\textsuperscript{164} A like result should be reached even if the state-controversy tie is weak but no other forum is available to the plaintiff.\textsuperscript{165} On the other hand, if none of these circumstances exists—that is, if the cause of action arose out of state, and another state's law should apply, and another forum is available to the plaintiff—jurisdiction should be denied.\textsuperscript{166}

\textsuperscript{158} Zammit,\textit{ supra} note 10, at 682;\textit{Developments, supra} note 6, at 965. The Shaffer Court explicitly refused to address this question. 97 S. Ct. at 2584 n.37.


\textsuperscript{160} 339 U.S. 306 (1950).

\textsuperscript{161} 357 U.S. 235 (1958). In\textit{Hanson}, although Florida was the "center of gravity" in terms of defendant-state contacts, the appropriate forum was Delaware where the trust res was located and where the acts of the defendant trustee occurred.\textit{Id.} at 254.

\textsuperscript{162} See von Mehren & Trautman,\textit{ supra} note 14, at 1159-60, 1162-63.

\textsuperscript{163} See notes 135-36\textit{ supra} and accompanying text.

\textsuperscript{164}\textit{Ownership, supra} note 135, at 377-78.

\textsuperscript{165} Zammit,\textit{ supra} note 10, at 682.

\textsuperscript{166}\textit{Id.; Ownership, supra} note 135, at 378; see Mills v. Bartlett, 265 A.2d 39 (Del. Super. Ct. 1970). It should be noted, however, that the procedure created by Seider v. Roth, 17 N.Y.2d
even if the plaintiff is a state resident and a potential welfare recipient. In the case of personalty, the state interest analysis would follow similar reasoning, but the result would differ in the case of movable tangibles only temporarily located in the state. Intangibles, too, lack the kind of substantial and continuing relationship with the state that would support jurisdiction, even if contacts between the state and the controversy are relatively strong.

The state's relationship with the controversy should not be overemphasized at the expense of the state's relationship with the defendant. Since the underlying goal of the Shaffer-International Shoe limitations on state court jurisdiction is to achieve fair play and substantial justice for the defendant, his ties with the state arising from his ownership of property and his expectations as to the possibility of suit in that state should weigh more heavily than the interests of the forum or the plaintiff in carrying on the litigation there. Furthermore, jurisdiction should be declined if the inconvenience to the defendant outweighs the interests of both the state and the plaintiff.

In sum, the most important factor appears to be the purposefulness with which, and the extent to which, the defendant connects himself with the state through his ownership of property there. If this connection is not present to a certain degree, the forum should not accept jurisdiction over the defendant. However, if this connection is the only one favoring jurisdiction, even if it exists to a sufficient degree, jurisdiction should also be denied. Thus, no single factor by itself seems sufficient to support a state court's assertion of jurisdiction over the defendant by virtue of his interest in property within the state.

IV. Specific Types of Intangibles

Different problems for analysis arise in the case of intangibles, because they normally do not suggest a substantial and continuing contact between the defendant and the state. Therefore, the interests of the state and the plaintiff and the inconvenience to the defendant of litigating in a distant forum take on added importance. Three kinds of intangibles that often had been the basis for quasi in rem jurisdiction were capital stock, simple debts, and insurance policies. Each of these will be discussed in light of the new analysis mandated by Shaffer. It will be shown that capital stock, as in Shaffer, and simple debts, as in Harris, do not provide sufficient contacts

111. 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), may permit jurisdiction when these state-controversy contacts are missing. See notes 240-66 infra and accompanying text.

167. See Smit, supra note 72, at 611-12.

168. Cf. Ownership, supra note 135, at 382 ("lack of permanence of the personalty" is an objection to basing jurisdiction on the ownership of intangibles); Smit, supra note 72, at 618, 621.

169. Smit, supra note 72, at 612; see discussion of specific types of intangibles in part IV infra.


171. See generally Smit, supra note 72, at 612.

172. Id.

173. See notes 135-36 supra and accompanying text.
among the defendant and the controversy and the state to withstand the *International Shoe* analysis.\(^{174}\) The continued viability of the *Seider* doctrine, which bases jurisdiction on the attachment of insurance policies, remains problematic,\(^ {175}\) especially in view of *O'Connor v. Lee-Hy Paving Corp.*,\(^{176}\) a post-*Shaffer* federal court decision which has upheld the doctrine.

**A. Ownership of Capital Stock**

The *Shaffer* case involved the application of the minimum contacts test to the ownership of capital stock as a basis for personal jurisdiction. In order to obtain jurisdiction over the individual defendants, the plaintiff Heitner availed himself of Delaware's sequestration procedure\(^{177}\) whereby approximately 82,000 shares of Greyhound common stock belonging to nineteen of the individual defendants, along with stock options belonging to two other defendants, were "seized."\(^{178}\) Although the stock certificates were not actually present in Delaware,\(^{179}\) they were subject to seizure pursuant to that state's corporation law\(^{180}\) which provides that the ownership of all capital stock in Delaware corporations has its "situs" there.\(^{181}\) The effect of Delaware's sequestration procedure is to compel the absent defendant's general appearance before the court, thereby subjecting him to full in personam liability.\(^{182}\)

Commenting on this effect, Justice Marshall said that "if a direct assertion of personal jurisdiction . . . would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."\(^{183}\) He then considered whether the defendant's ownership of stock in Delaware would support a direct assertion of jurisdiction, assuming arguendo that the stock's location was there.\(^ {184}\) As to purposefulness, he found that the individ-

\(^{174}\) See parts IV (A), (B) infra.

\(^{175}\) See part IV (C) infra.


\(^{178}\) Id.

\(^{179}\) Del. Code tit. 8, § 169 (1975), see note 23 supra.

\(^{180}\) The Delaware stock situs statute is unique in that it overrides Uniform Commercial Code § 8-317 which requires actual seizure of the stock certificates for any attachment thereof to be valid.

The Delaware legislature inserted the following language in adopting U.C.C. § 8-317: "(1) Nothing contained in this subtitle shall repeal, amend or in any way effect [sic] the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling." Del. Code tit. 6, § 8-317 (1975).


\(^{183}\) 97 S. Ct. at 2583.

\(^{184}\) Id. at 2585.
ual defendants did not purposefully situate their stock in Delaware in order to benefit from that state's laws. On the contrary, they had no choice. Nor could the defendants have had a reasonable expectation of suit in a Delaware forum. "It strains reason... to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's... jurisdiction on any cause of action." In short, the ownership of capital stock does not evidence a purposeful activity; nor is there a substantial and continuing relationship with the forum state because, like all intangibles, corporate securities cannot be said to be "indisputably and permanently located within a State." Thus, an extension of the Shaffer reasoning would lead to the conclusion that where the cause of action and the state have no connection, there is no basis whatever for bringing the nonresident stockholder into court.

In his separate opinion, Justice Brennan conceded that the individual defendants had no substantial connection with Delaware, but argued that Delaware had a "substantial interest in providing restitution for its local corporations that allegedly have been victimized by fiduciary misconduct," especially when the "cause of action centers in an area in which the forum state possesses a manifest regulatory interest." He therefore concluded that fiduciaries of a corporation formed in the state whose law applies to those fiduciaries' conduct should fairly be subject to that state's jurisdiction.

185. Id. (referring to the "statutory presence" of the stock).
186. Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis, 73 Colum. L. Rev. 749, 785 (1973), quoted in Shaffer v. Heitner, 97 S. Ct. at 2586. Justice Stevens noted in his concurring opinion that "[o]ne who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. As a practical matter, the Delaware Sequestration Statute creates an unacceptable risk of judgment without notice." 97 S. Ct. at 2587-88 (Stevens, J., concurring).
187. 97 S. Ct. at 2587 (Powell, J., concurring).
188. See notes 148-62 supra and accompanying text.
189. 97 S. Ct. at 2590 (Brennan, J., concurring in part and dissenting in part). He argued instead that their relationship with Delaware arose from their positions as corporate fiduciaries of a Delaware-created corporation. Id. at 2591. Using this relationship as a starting point, he then applied the principle that "jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state." Id. Justice Brennan had "little difficulty in applying this principle to nonresident fiduciaries whose alleged breaches of trust are said to have substantial damaging effect on the financial posture of a resident corporation." Id. (footnote omitted). Although a corporation is deemed a resident of the state only for specific practical purposes, such as diversity jurisdiction, see 28 U.S.C. § 1332(c) (1970), Justice Brennan argued that it should also be deemed a resident in a shareholder's derivative action because of the state's "direct interest in guaranteeing the enforcement of its corporate laws, in assuring the solvency and fair management of its domestic corporations, and in protecting from fraud its shareholders who placed their faith in that state-created institution." 97 S. Ct. at 2591 n.4. Here, Justice Brennan would have the defendants' relationship with the state arise out of the state's application of its laws and public policy to this particular type of controversy. Id. at 2592-93.
190. 97 S. Ct. at 2590 (Brennan, J., concurring in part and dissenting in part). Thus, he found choice of law to be the primary factor in evaluating jurisdiction.
191. Id. (Brennan, J., concurring in part and dissenting in part).
Justice Marshall countered these arguments by pointing out that Delaware could have enacted a statute to protect its "interest in securing jurisdiction over corporate fiduciaries," had it found that interest to be so compelling. Furthermore, he stated, the question of personal jurisdiction is distinct from choice of law and should be evaluated on the basis of the defendant's acts rather than the applicability of a particular state's laws.

Thus, although two factors in favor of jurisdiction—substantial state-controversy ties stemming from the state's regulatory interest in the proceedings and the defendant shareholders' relationship as corporate fiduciaries—existed in Shaffer, the ownership of capital stock did not constitute a strong enough basis for jurisdiction. Clearly, where neither of these two factors exists, ownership of such assets forms yet a weaker basis for jurisdiction.

B. Harris v. Balk and Simple Debts

The majority opinion in Shaffer makes the following statements with respect to Harris v. Balk:

For the type of quasi in rem action typified by Harris v. Balk . . . , accepting the proposed analysis would result in significant change.

. . . . . For in cases such as Harris . . . the only role played by the property is to provide the basis for bringing the defendant into court. . . . In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible.

The factual pattern exemplified by Harris is highly unlikely to tip the scale in favor of International Shoe jurisdiction. In Harris, the plaintiff-in-error was indebted to Balk who in turn was indebted to Epstein, a resident of Maryland. Harris and Balk both were North Carolina residents. While Harris was on a short business trip to Baltimore, Epstein attached Harris' debt to Balk as a means of obtaining quasi in rem jurisdiction over Balk. In the Maryland action, Harris paid the claim to Epstein. In Balk's subsequent suit against Harris to collect the debt Harris owed him but had already paid to Epstein, the Court upheld the jurisdictional validity of the Maryland judgment in favor of Epstein.

The facts reported in Harris indicate that Epstein's claim against Balk had no connection whatever to Balk's claim against Harris. Furthermore, Harris did not venture into Maryland at Balk's command, nor is there any

192. Id. at 2586.
193. See notes 153-57 supra and accompanying text. Choice of law is only one factor in determining whether the requisite connection between the state and the controversy exists. See part III supra. The defendants' alleged acts which gave rise to the controversy in Shaffer took place primarily in Oregon. 97 S. Ct. at 2573.
194. 198 U.S. 215 (1905).
195. 97 S. Ct. at 2582-83 (footnote omitted).
197. 198 U.S. at 224, 226.
198. Id. at 216-17.
evidence that Balk engaged in any other purposeful activity within the state of Maryland sufficient to establish any ties with that state.199 Undoubtedly, Shaffer's logic should overrule Harris both on its facts and its rationale. The debt, even if it rode on Harris' back into the state of Maryland, did not ride there purposefully.200 Nor did the debt give rise to any other contacts between the defendant, Balk, and the state.201 The fact that Epstein was a resident of Maryland, in and of itself, is insufficient to show a strong enough interest on the part of the state to justify subjecting Balk to its jurisdiction.202

C. Seider v. Roth and the Attachment of Insurance Policies

The quasi in rem procedure typified by Seider v. Roth203 is peculiar to New York, Minnesota, and New Hampshire.204 In Seider, New York resident plaintiffs were injured in an automobile accident in Vermont. One of the defendants, who was a Canadian resident, was insured by the Hartford Accident Indemnity Company, an insurer doing business in New York. Plaintiffs obtained quasi in rem jurisdiction over the Canadian defendant by attaching his insurer's obligation to defend and indemnify him. The principal issue in the case was whether the obligation was an attachable debt205 under New York law.206 Once the court found the obligation sufficiently noncontingent to fall under the attachment statutes, jurisdiction was upheld.207

The Seider doctrine has had a tenuous existence since its inception. One of the problems recognized early in the doctrine's development was the possibility of increased forum shopping. This problem was addressed in Vaage v. Lewis,208 where Norwegian plaintiffs had attempted to bring North Carolina residents into a New York court in an action arising out of a North Carolina automobile accident. The court resolved the problem by limiting the availability of the procedure to New York resident plaintiffs on forum non conveniens grounds.209 This limitation was reaffirmed in subsequent decisions.210

199. Id. See also, Homburger & Laufer, Appearance and Jurisdictional Motions in New York, 14 Buffalo L. Rev. 374 (1964-65).
200. See notes 130-41 supra and accompanying text.
201. See notes 115-18 supra and accompanying text.
205. 17 N.Y.2d at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.
206. See N.Y. Civ. Prac. Law § 5201 (McKinney 1972). The Seider doctrine has been rejected in many states on the ground that the insurance obligations are too contingent to be attachable. See, e.g., Javorek v. Superior Court, 17 Cal 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976) (overruling Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973)). See also Comment, Javorek v. Superior Court: California Puts Another Nail in the Seider Coffin, 4 W. St. U.L. Rev. 63 (1976) [hereinafter cited as Another Nail].
207. 17 N.Y.2d at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.
209. Id. at 318, 288 N.Y.S.2d at 524-25.
addition, a federal district court, in *Podolsky v. Devinney*, 211 found in dictum that the doctrine as originally used would be unconstitutional for its failure to limit any appearance by the defendant to liability for the face amount of the policy. This challenge was subsequently resolved by *Simpson v. Loehmann*, 212 where the New York Court of Appeals, on reargument, 213 reaffirmed its earlier holding that the plaintiff's recovery had to be limited to the face amount of the policy. 214 This limitation was designed to preclude subjecting the defendant to in personam liability if he appeared to defend on the merits. 215

Another complaint about *Seider* was that the courts were impermissibly creating a direct action by judicial fiat when the New York legislature had failed to enact one. 216 The New York courts, however, have consistently refused to label the *Seider* procedure a direct action. 217 The court in *Simpson* addressed this complaint as follows:

The argument that our decision sanctions a "direct action" against the insurer is sufficiently answered by what we wrote in *Seider v. Roth* . . . : "It is said that by affirmance here we would be setting up a 'direct action' against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place *where jurisdiction is obtained against its insured." 218

It is true that direct actions have survived constitutional scrutiny, 219 but there is a significant difference between the *Seider* doctrine and the typical direct action. The Louisiana direct action statute 220 is typical of the majority in that it is available only when the accident happened in Louisiana. In fact, an insurer may be sued directly in Louisiana, even if it has no contacts there other than "its presence on the risk at the time of the accident," and even if the insured motorist is a nonresident, provided that the accident took place within the state. 221 The Rhode Island statute, 222 moreover, applies only when

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214. 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636-37.
215. Id.
218. 21 N.Y.2d at 311, 234 N.E.2d at 671-72, 287 N.Y.S.2d at 637 (emphasis added).
the insured cannot be served and the policy had been issued in Rhode Island. In the usual

Seider fact pattern, on the other hand, the accident occurs out of state; the forum state's law usually does not apply; and the forum is not the only one available to the plaintiff. Thus, Seider clearly cannot be called a direct action of the kind upheld in Watson v. Employers Liability Assurance Corp. In fact, the New York courts have consistently justified Seider as an action in which quasi in rem jurisdiction is obtained over the insured. If the doctrine is to be viewed in this way, it is necessary to examine the contacts between the defendant-insured and the state.

One argument for finding sufficient contacts between the named defendant and the state is that the insurance obligation is so bound up with the controversy that the action becomes a quasi in rem action of the first type described in Hanson, in which the cause of action arises out of the property attached. The problem with this argument is that it plays too heavily on the "bootstrap" technique used by the Seider court to find the obligation noncontingent and therefore attachable. The obligation to defend and indemnify does not become "property" until an action has been commenced, but no valid action can be commenced without adequate jurisdiction. Another serious problem with this argument is the fact that the "location" of the "property" is wholly adventitious; the nonresident defendant-insured is not interested in where his insurer does business, nor should he have to inquire when purchasing the policy. This certainly does not constitute purposeful activity on the part of the defendant sufficient to tie him to the state for jurisdictional purposes. Thus, in light of the principles set forth in

224. See statutes cited note 276 infra.
225. See notes 203-07 supra and accompanying text.
227. See notes 158-62 supra and accompanying text.
229. See notes 217-18 supra and accompanying text.
234. Torres v. Towmotor, No. 77 C 1810 (E.D.N.Y. Nov. 18, 1977), slip op. at 34; Kennedy v. Deroker, 398 N.Y.S.2d 628, 630 (Sup. Ct. N.Y. County 1977); Another Nail, supra note 206, at 82.
235. See notes 142-47 supra and accompanying text.
236. See notes 130-41 supra and accompanying text.
Shafer, jurisdiction under the Seider doctrine cannot be upheld if it is analyzed as an action based on quasi in rem jurisdiction over the defendant insured.

It appears that the doctrine can be sustained, if at all, only when the plaintiff is a New York resident and the procedure is regarded as sui generis, albeit akin to a direct action.237 As such, only the plaintiff and the insurer are considered to be the real parties in interest, and the insurance proceeds are recognized as the real object of the litigation.238 This is precisely the view of Seider taken in O'Connor v. Lee-Hy Paving Corp.239 Under this view of the doctrine—that is, as neither a true direct action nor a true quasi in rem action241—the insurer's role as the real defendant in interest and the plaintiff's interest in conducting the litigation in his home forum become the important factors in the due process analysis. The role of the insured is minimized since the procedure may protect him from prejudice to the extent that he has an interest in the litigation beyond his participation as a mere witness.242

However, as will be shown, the state-controversy ties, even under this view, are ordinarily too tenuous to support jurisdiction in a Seider based-action.243 Although the Seider doctrine has never expressly been called a direct action,244 this view of it does coincide with the New York Court of Appeals' recognition in Simpson245 that the insurer is the real defendant in interest:

Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. . . . Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.246

In O'Connor, this language was interpreted to mean that the court in Simpson found the International Shoe standard to have been met.247 In addition, as the Simpson court noted, the fact that the insurer does business in the state and that it has "'agreed to defend in any place where jurisdiction is obtained against its insured,'"248 lends substantial support to the fairness of

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238. Id. at 23.
239. Id. However, this view was rejected in Torres v. Towmotor, No. 77 C 1810 (E.D.N.Y. Nov. 18, 1977), slip op. at 20.
240. See notes 220-27 supra and accompanying text.
241. No. 75 C 1853, slip op. at 22-23.
242. Id. at 23.
243. See notes 258-66 infra and accompanying text.
244. See notes 216-18 supra and accompanying text.
246. Id. at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637 (citation omitted).
247. No. 75 C 1853, slip op. at 13-14.
248. 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637 (quoting Seider v. Roth, 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102).
requiring the insurer to appear on the named defendant's behalf. Insofar as the insurer is concerned, were it the named defendant, in personam jurisdiction over it would undoubtedly be consistent with the *International Shoe* test.

To the extent that the named-defendant insured has an interest in the litigation, under the non-quasi in rem analysis, he may be deemed to be protected such that the traditional notions of fair play and substantial justice are not offended. Because the plaintiff's recovery presumably will continue to be limited to the face amount of the policy, the named-defendant runs no risk of being subject to in personam liability for damages in excess of those paid by the insurer. In addition, "the *Seider* procedure may not be used as the means of obtaining a preference in the distribution of inadequate coverage in cases involving multiple claims and claimants" so as to exhaust the defendant's coverage upon adjudication of the first claim and subject him to personal liability in a subsequent suit. Should any such danger arise, the various actions should be consolidated in a forum that has sufficient contacts with the insured since, in all likelihood, he will incur a personal obligation beyond the amount of insurance indemnification, if he is found liable at all. Thus, if all of the interests of the insured are protected, an evaluation of his contacts with the state may be "beside the point," because his only role in the litigation is that of a witness.

If *Shaffer* requires the removal of all labels, including those relating to the parties, and an assessment and balancing of the relative interests of the real parties, this evaluation of the state-defendant contacts weighs heavily in favor of finding jurisdiction. It is not entirely clear that *Shaffer* does require this approach, however, for it never expressly adopted the interest-balancing test proposed by many of the commentators. Still, the fact that *Shaffer* cited those commentators, as well as decisions like *Atkinson v. Superior Court*, with approval suggests that this type of analysis is what the Court had in mind.

On the other hand, the state-controversy connection in *O'Connor* and all other *Seider* actions appears to be insufficient to meet the *Shaffer* test. One argument for finding a sufficient state-controversy contact relies on the injured resident plaintiff's or, if a wrongful death action, the surviving...

249. *Id.*; *O'Connor v. Lee-Hy Paving Corp.*, No. 75 C 1853, slip op. at 23-27.

250. *See* No. 75 C 1853, slip op. at 26-27.

251. *See* notes 213-15 supra and accompanying text.

252. No. 75 C 1853, slip op. at 26.

253. *Id.* at 23.

254. *Id.* One possible criticism of this analysis is that the insurer may disclaim liability and expose the insured to personal liability if, for example, the insured fails to cooperate. *Torres v. Towmotor*, No. 77 C 1810 (E.D.N.Y. Nov. 18, 1977). slip op. at 31, 44 n.14.

255. *See* Smit, supra note 72, at 614; von Mehren & Trautman, supra note 14, at 1165; *Developments*, supra note 6, at 956.


257. 97 S. Ct. at 2580-81.
spouse's interest in conducting the litigation in his home court. This argument finds support both in Simpson and in Watson, where the state's interest in providing redress to its injured residents was found to be a sufficient state-controversy contact. However, if Seider is to be analyzed anew as a judicially created quasi direct action, it should be noted that "no direct action statute presently in existence permits a direct action against the insurer based on the minimum contacts suggested [in Simpson]." As noted above, the direct action statutes that have been upheld require either that the tort occur within the forum state or that the insurance policy be issued in the state. As such, these statutes guarantee a substantial connection between the state and the controversy because the state's law normally applies either to the issue of tort liability or to the construction of the insurance contract. Seider actions, on the other hand, ordinarily lack these features.

The weakness of the state-controversy contact existing in Seider-based actions is a thorny problem that will disappear only if one of two alternatives occurs—if Seider is overruled as a constitutionally defective remnant of quasi in rem jurisdiction, or if Seider is replaced by a legislatively created direct action statute that limits availability of the action to cases in which the accident occurred, or the insurance policy was issued, within the state.

V. FURTHER IMPLICATIONS

A. Shaffer's Effect on State Statutes

Some states have codified the pre-Shaffer quasi in rem attachment procedure to confer jurisdiction over the defendant's interest in property in the

258. No. 75 C 1853, slip op. at 8.
259. 21 N.Y.2d at 312-13, 234 N.E.2d at 673, 287 N.Y.S.2d at 638-39 (Keating, J., concurring).
260. 348 U.S. at 72.
262. See notes 220-21 supra and accompanying text.
263. See notes 222-23 supra and accompanying text.
264. See notes 225-27 supra and accompanying text. Despite the absence of these contacts between the forum and the controversy, however, the New York Court of Appeals found that "the State has a substantial and continuing relation with the controversy." Simpson v. Loehmann, 21 N.Y.2d at 311, 234 N.E.2d at 677, 287 N.Y.S.2d at 637.
265. See notes 230-36 supra and accompanying text.
266. See notes 220-23 supra and accompanying text. Here it should be noted that Judge Friendly, in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), aff'd, 410 F.2d 117 (2d Cir.) (en banc), cert. denied, 398 U.S. 844 (1969), read Watson to mean that "the Supreme Court would sustain the validity of a state statute permitting direct actions against insurers doing business in the state in favor of residents as well as on behalf of persons injured within it." Id. at 110.
state to the extent of that interest. Like the Delaware sequestration statute these statutes appear to be unconstitutional on their face because they base jurisdiction solely on the presence of property in the state without requiring more in the way of contacts among the defendant, the litigation and the forum. As such they “allow state court jurisdiction that is fundamentally unfair to the defendant.” Other state quasi in rem procedures are tacitly embodied in state attachment statutes which permit attachment on a number of enumerated grounds, including the nonresidence of a defendant. Such statutes are not necessarily unconstitutional. First, they do not expressly provide for jurisdiction on the basis of attachment. Second, they may be judicially construed to apply only when attachment is sought for purposes of securing a potential judgment.

Despite the apparent unconstitutionality of many current state quasi in rem procedures, the considerations set forth in Shaffer and in part III of this Comment provide a justification for extending the reach of the state long-arm statutes on the basis of property present within the forum state. Under the line of cases beginning with International Shoe and ending with Shaffer and O'Connor, purposeful, substantial, and continuing contacts between the defendant and the state and a valid state interest in the controversy will substantiate jurisdiction even when the cause of action is unrelated to the defendant's contacts.

For the few states whose long-arm statutes are phrased in the most general terms, providing for “jurisdiction on any basis not inconsistent with the Constitution of [the] state or of the United States,” no drafting changes are necessary to encompass the ramifications of the Shaffer holding. The majority


269. See note 106 supra.
270. 97 S. Ct. at 2582.
271. Id. at 2584.
273. See notes 101-02 supra and accompanying text.
274. See part III supra.
of state long-arm statutes, however, impose the requirement that the cause of action arise out of the contacts enumerated in the statute. Under Shaffer's reasoning, this requirement is not always necessary. The argument may be raised that the Shaffer standard is too uncertain to be translated into codified form. However, the broad language of a statute like California's seems to provide both the reach and the flexibility to meet post-Shaffer requirements. The California courts, moreover, seem to have had little trouble in applying the International Shoe-Shaffer standard. Perhaps, as case law develops on the heels of Shaffer to show that jurisdiction can, and in some cases must, be evaluated without strict enumeration of the necessary contacts, other states will follow California's lead.

B. Surviving Doctrines of Jurisdiction

Despite the fact that Shaffer has mandated that the minimum contacts standard be applied to "all assertions of state court jurisdiction," certain jurisdictional doctrines not discussed in the case are likely to survive. Among those "the particularized rules governing adjudications of status," which the Court apparently considers not "inconsistent with the standard of fairness," the Court does not intend to restrict the ability to obtain a foreign *ex parte* divorce. Nevertheless, the continuation of the *Williams v.*
North Carolina rule, that an *ex parte* foreign divorce is valid if the plaintiff spouse has established a bona fide domicile in the forum state, seems to defy the logic of *Shaffer*.

"[I]t seems extremely unfair and unjust . . . to impose upon the defendant spouse the unpalatable option either of appearing in the action to contest the merits, very likely at great expense and inconvenience, or of suffering an uncontested default judgment destroying completely the marital relation." It appears, however, that for practical reasons, this rule will go unscathed.

Another traditional doctrine that may survive *Shaffer* is the rule that personal service upon a defendant within the state confers personal jurisdiction consistent with *International Shoe*. Again, it seems entirely unfair that a defendant who has no contacts whatever with a state may be subjected to full personal liability in one of that state's courts merely because he happens to be vacationing there.

This question is one which the *Shaffer* Court did not address. Whether state courts will deny jurisdiction based only on personal service within the state, without additional contacts between the defendant and the state, remains for future determination. However, it seems that physical presence within the state which suggests no other contacts, such as residence or the transaction of business, should not support jurisdiction when the controversy has no relation to the defendant's presence.

Since the *Shaffer* Court declined to address these problems, they are unlikely to be brought into line soon with traditional notions of fair play and substantial justice. However, the Court has taken at least a significant step in that direction by recognizing that other jurisdictional doctrines may work fundamental unfairness to the nonresident defendant.

VI. CONCLUSION

The Court's decision in *Shaffer* has been long awaited. Some may question whether the Court needed to go as far as it did. Although the

284. 317 U.S. 287 (1942) ("Williams I").
285. *Id.* at 303. But the divorce judgment may still be open to attack elsewhere, to the extent that the judgment is open to direct or collateral attack in the rendering state, if that state lacked personal jurisdiction over the defendant spouse. See *Johnson v. Muelberger*, 340 U.S. 581, 587, 589 (1951); *Sherrer v. Sherrer*, 334 U.S. 343, 351-52 (1948); *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) ("Williams II").
286. *Developments*, supra note 6, at 973.
287. 97 S. Ct. at 2582 n.30. Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657, 661 (1959) ("In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom.")
288. *International Shoe Co. v. Washington*, 326 U.S. at 316. The Court expressly excepted the defendant's presence "within the territory of the forum" from the minimum contacts test. *Id.*
289. See Ehrenzweig, supra note 14, at 312.
290. See *Developments*, supra note 6, at 939.
291. *Id.* at 2582 n.30.
292. *Id.* at 2584.
293. In 1957, Justice Traynor presaged the wider application of the *International Shoe* rule in
Delaware sequestration statute is "unconstitutional on its face" for allowing the imposition of full personal liability on a nonresident defendant solely on the basis of his ownership of some property located in the state, the Court might have cured the statute's defects by requiring that it be accompanied by limited appearance and preseizure notice and hearing. Such a holding, however, would have served only to continue the stretching and pulling at Pennoyer v. Neff that has occurred for nearly one hundred years. The Shaffer decision quite correctly decided to reverse this direction in the realization that "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 the basic values of our 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.

No longer can the nonresident be compelled to defend an action in a foreign and inconvenient state where he happens to own some property, unless that ownership has a purposeful, substantial, and continuing character.

Those commentators who have espoused the unconstitutionality of quasi in rem jurisdiction for many years may find great comfort in Shaffer. And for those who find some utility in the old rules, all is not lost, for the presence of some types of property within a particular state may constitutionally provide the plaintiff with the ability to subject nonresident defendants to full personal liability in the plaintiff's home court.

Suzanne T. Marquard

294. "My uncertainty as to the reach of the opinion, and my fear that it purports to decide a great deal more than is necessary . . . persuade me merely to concur in the judgment." 97 S. Ct. at 2588 (Stevens, J., concurring).
295. Id.
296. See note 24 supra.
297. 97 S. Ct. at 2584 (citations omitted).