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Quasi In Rem Jurisdiction: A New Era: *Shaffer v. Heitner*, 433 U.S. 186 (1977)

Sharon Raun Kresha

University of Nebraska College of Law, skresha@bairdholm.com

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Quasi In Rem Jurisdiction: A New Era

Shaffer v. Heitner, 433 U.S. 186 (1977).

I. INTRODUCTION

For one hundred years *Pennoyer v. Neff*¹ has been recognized as the cornerstone of American concepts of state court jurisdiction.² The *Pennoyer* territorial power doctrine limiting a state court's in personam jurisdiction over persons outside its boundaries was abandoned in *International Shoe Co. v. Washington*³ in favor of a minimum contacts test.⁴ Until *Shaffer v. Heitner*,⁵ however, the *Pennoyer* territorial power doctrine giving a state court unquestionable jurisdiction over persons and property within its borders remained unchanged.⁶ In *Shaffer* the United States Supreme Court held that

1. 95 U.S. 714 (1877).

2. See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts. From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975); Comment, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L. J. 725.

3. 326 U.S. 310 (1945).

4. *Id.* at 316.

5. 433 U.S. 186 (1977).

6. Several lower courts, however, had in essence abandoned *Pennoyer* in favor of a minimum contacts test. See, e.g., *U.S. Industries v. Gregg*, 540 F.2d 142 (3d Cir. 1976); *Camire v. Scieszka*, — N.H. —, 358 A.2d 397 (1976); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), appeal dismissed and cert. denied sub nom. *Columbia Broadcasting Sys. v. Atkinson*, 357 U.S. 569 (1958). Many commentators had also questioned the *Pennoyer* doctrine as applied to in rem and quasi in rem jurisdiction. See, e.g., Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Hazard, *supra* note 2; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Zammit, *supra* note 2; *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960) [hereinafter cited as *Develop-*

all assertions of state court jurisdiction must meet the due process standard of *International Shoe*.⁷ This holding implicitly overruled *Pennoyer*.⁸ In *Shaffer* the Supreme Court abandoned the *Pennoyer* doctrines of territoriality and state sovereignty, as they apply within the states' boundaries. Instead of using the *Pennoyer* doctrine to obtain jurisdiction over nonresidents by asserting jurisdiction over their property located within the state's boundaries, the Court used a minimum contacts test to restrict the state's power over nonresidents.⁹

The *Shaffer* decision has a broad and hard-hitting impact on state court jurisdiction. Although the actual effect of the decision as it applies to in rem and certain quasi in rem cases may be less than first appearances indicate,¹⁰ the decision seems to make certain quasi in rem actions obsolete in states with broad long arm statutes.¹¹ The following note will discuss the substantive due process implications of *Shaffer*¹² on quasi in rem, in rem, and in personam jurisdiction.

II. FACTS

Appellee Heitner, a nonresident of Delaware, filed a shareholder's derivative suit in the Delaware Court of Chancery against

ments]; Comment, *Long-Arm Jurisdiction and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970); Comment, *supra* note 2.

7. 433 U.S. at 212.

8. *Id.* at 212 n.39. For other interpretations of *Shaffer*, see Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61 (1977), and Comment, *Quasi In Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . .*, 46 FORDHAM L. REV. 459 (1977).

9. The application of the minimum contacts test in *Shaffer* significantly differs from the traditional application of the test. In this instance the test was used to restrict a state's jurisdictional power whereas, traditionally, minimum contacts have been used to extend the reach of state court jurisdiction. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957) *appeal dismissed and cert. denied sub nom. Columbia Broadcasting Sys. v. Atkinson*, 357 U.S. 569 (1958). But see *Hanson v. Denckla*, 357 U.S. 235 (1958). See also Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUMB. L. REV. 749, 781-82 & n.191 (1973); Zammit, *supra* note 2, at 676.

10. See text accompanying notes 122-24 *infra*.

11. But see *Carolina Power & Light Co. v. Uranex*, 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977). California is generally recognized as having a broad long arm statute.

12. Although the Delaware courts dealt with procedural due process issues in *Shaffer*, see *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976), the Supreme Court addressed itself only to the substantive due process issue.

Greyhound Corporation, Greyhound Lines, Inc., and twenty-eight present or former officers or directors of one or both corporations. Greyhound Corporation is a Delaware corporation with its principal place of business in Arizona, and its wholly-owned subsidiary, Greyhound Lines, Inc., is a California corporation with its principal place of business in Arizona.¹³ All of the individual defendants were nonresidents of Delaware. Heitner alleged in essence that the individual defendants had violated their duties to the corporations.¹⁴ The activities that caused the alleged violations took place in Oregon.

In order to obtain jurisdiction over the individual defendants, Heitner filed a motion in Delaware for an order of sequestration of the Delaware property of the individual defendants.¹⁵ The de-

13. 433 U.S. at 189 & n.1.

14. Heitner alleged that the defendants' violations of duties resulted in the corporations' liability for damages in a private anti-trust suit and for a large fine in a criminal contempt action. *Id.* at 190.

15. *Id.* DEL. CODE tit. 10, § 366 (1970) provides:

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized

fendants' property sequestered under the order consisted of Greyhound stock and options.¹⁶ The certificates representing the stock and options were not physically present in Delaware, but under Delaware law the stock's fictional situs was in the state and this rendered the stock subject to seizure.¹⁷

The twenty-one defendants whose property was seized entered a special appearance for the purpose of moving to quash service of process and to vacate the sequestration order. These defendants (appellants), claimed there were insufficient contacts under *International Shoe* to sustain jurisdiction.¹⁸ Both the court of chancery and the Delaware Supreme Court held that the statutory situs of the stock in Delaware was a sufficient basis for the exertion of quasi in rem jurisdiction.¹⁹

after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized, and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law.

16. The property was seized by placing "stop transfer" orders on the books of Greyhound Corporation. 433 U.S. at 192.

17. DEL. CODE tit. 8, § 169 (1953) 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.

18. 433 U.S. at 189-93. The appellants also contended that the ex parte sequestration procedure violated procedural due process guarantees and that the property seized was not capable of attachment in Delaware. The Supreme Court, however, did not address these issues.

19. Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976). The Delaware Supreme Court disposed of the issue with the following language:

There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them The reason, of course, is that jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 Del. C. § 1693 the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here. . . . [I]t has done so and the presence thereof provides the foundation for § 366 in this case.

We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe*.

Id. at 229.

III. BACKGROUND

A. *Pennoyer v. Neff*

To understand the impact of *Shaffer* on state court jurisdiction it must be placed in historical perspective. In 1877 Justice Field, author of the *Pennoyer* opinion, was looking for a solution to two problems. First, there was a need for some kind of notice procedure in order to inform defendants of actions filed against them, and second, he believed judicial remedial power of the states should be restricted to matters of local concern.²⁰ The notice problem had its origins in England with the recognition of default judgments. Before default judgments were recognized,²¹ the courts would not proceed without presence of the defendant.²² The procedures of attachment and garnishment were employed to compel the defendant to attend court.²³ With the advent of default judgments the principles of justice demanded that the defendant be notified of the pending action against him, even though his presence was not necessary for entering a valid judgment.²⁴ The notice problem was especially acute because process could only be personally served within the jurisdiction, and if the defendant could not be personally served, either the judgment was invalid or the plaintiff was unable to obtain a judgment and was left without a remedy.²⁵ In order to avoid this dilemma, a degree of qualification of the personal service of notice rule was needed. The nature of these necessary qualifications remained unclear until *Pennoyer*.²⁶

The problem of limiting jurisdiction to matters of local concern is solved by the concept of territorial jurisdiction. This concept does not have an English history but instead originated in continental countries.²⁷ In *Pennoyer* Justice Field adopted this concept by announcing the following two principles: (1) "every state possesses exclusive jurisdiction and sovereignty over persons and property

20. Hazard, *supra* note 2, at 245.

21. Default judgments were unknown "as recently as 250 years ago." Carington, *supra* note 6, at 303.

22. The reason for requiring the defendant's presence may have been the necessity that the defendant be present for trial by ordeal. *Id.*

23. When default judgments came to be recognized, the procedures of attachment and garnishment were adopted for the purpose of assuring a successful plaintiff satisfaction of his claim. *Id.* at 304.

24. Hazard, *supra* note 2, at 249.

25. *Id.* at 250.

26. *Id.* at 250-52.

27. *Id.* at 258.

within its territory,"²⁸ and (2) "no State can exercise direct jurisdiction and authority over persons or property without its territory."²⁹

The annunciation of these two principles underscored the notice problem. Under these principles it was clear the state had no power to go outside its boundaries to serve process. To solve the notice problem, *Pennoyer* held that personal notice was needed for all actions, except that service by publication was effective where property was in the state and under the court's control.³⁰ Seizure of the property was considered automatic notice to the owner based on the legal assumption that the property was always in the possession of the owner.³¹

Both facets of the *Pennoyer* holding revolved around the concept that state sovereignty is limited by territorial boundaries. This limitation of sovereignty was originally founded on a respect for mutual states' rights. The full faith and credit clause³² makes this state issue a constitutional issue since under the clause a state must only give effect to a judgment entered in a sister state when the court rendering the judgment had valid jurisdiction.³³ The fourteenth amendment³⁴ also makes this a constitutional issue by subjecting the validity of state court jurisdiction to direct constitutional question under the guarantee of due process.³⁵

The *Pennoyer* holding had a harsh effect on in personam jurisdiction. Under *Pennoyer*, if a nonresident could not be personally served within the state, there could be no in personam jurisdiction over him. Another aspect of the *Pennoyer* decision, however, softened this harshness. If the nonresident had property located within the state and the property was brought into the court, the nonresi-

28. 95 U.S. at 722.

29. *Id.* Justice Field's language in *Pennoyer* is adopted from Justice Story who is credited with the earliest American rhetoric of exclusive jurisdiction. Justice Story, in turn, adopted his principles from the theories of a Dutch jurist, Huber. Hazard, *supra* note 2, at 258-59, 262.

30. 95 U.S. at 726-27.

31. *Id.* This holding could be interpreted as the subconscious recognition by the Court that the adjudication of interests in property is in essence the adjudication of interests of persons. Comment, *supra* note 2, at 731.

32. U.S. CONST. art. IV, § 1.

33. 95 U.S. at 729. See also F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.13 (2d ed. 1977).

34. U.S. CONST. amend. XIV.

35. 95 U.S. at 733. For the due process implications of the *Pennoyer* holding, see *Jonet v. Dollar Savings Bank*, 530 F.2d 1123, 1135 (3d Cir. 1976) (Gibbons, J., concurring).

dent could be subject to state court jurisdiction³⁶ through in rem or quasi in rem jurisdiction.³⁷

B. *Harris v. Balk*

Twenty-eight years after *Pennoyer*, *Harris v. Balk*³⁸ held that jurisdiction could be obtained over a creditor when a debt owed him was located within the jurisdiction.³⁹ The debt, an intangible, was held to be located wherever the debtor was located.⁴⁰ *Harris* applied the in rem and quasi in rem doctrine of *Pennoyer* to intangible and moveable property. *Harris* made state court jurisdiction over nonresidents easier to obtain and at the same time created the possibility that nonresidents would be forced to litigate in forums substantially inconvenient to them because the "situs" of the intangible property was in a forum, the location of which they could not control.⁴¹

C. *International Shoe Co. v. Washington*

In 1945, *International Shoe* completely abandoned the *Pennoyer* territorial doctrine as it applied to in personam jurisdiction over persons outside the jurisdiction.⁴² The court noted that historically

36. *Shaffer v. Heitner*, 433 U.S. at 200. See also *Zammit*, *supra* note 2, at 670. *Pennoyer* required that the defendant be served notice by publication. 95 U.S. at 726-27.

37. In rem and quasi in rem actions can be defined as follows: Pure in rem actions are judgments which only affect the title or status of the res which is the object of the proceeding. Such judgments are good against the world. Quasi in rem actions determine all interests of certain known defendants rather than of all persons who might claim interests in the property. Quasi in rem actions fall into two classes. Class one quasi in rem actions [hereinafter referred to as quasi in rem I] have as their principle objective determination of interests in the specific subject property. Class two quasi in rem actions [hereinafter referred to as quasi in rem II] involve situations in which a plaintiff has a personal claim against one nonresident defendant and, in order to get jurisdiction over the nonresident, property owned by him and located within the jurisdiction is brought into the court by attachment, garnishment, or the equitable proceeding of sequestration. Either a trial or default judgment follows and if the plaintiff is successful his claim against the defendant is satisfied out of the property. *Developments*, *supra* note 6, at 949.

38. 198 U.S. 215 (1905).

39. *Id.* at 222.

40. *Id.*

41. See text accompanying notes 102-03 *infra*.

42. The language of *International Shoe* did not require the holding be limited to in personam jurisdiction. See *Jonet v. Dollar Savings Bank*, 530 F.2d 1123, 1132 (3d Cir. 1976) (Gibbons, J., concurring). However, *International Shoe* on its facts was an in personam case and until *Shaffer* the Supreme Court and most other courts limited the holding to in personam cases. Cf. *Steele v. Searle & Co.*, 483 F.2d 339, 347 (5th

in personam jurisdiction was based on the court's de facto power over the defendant's person⁴³ and then stated:

But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend "traditional notions of fair play or substantial justice."⁴⁴

The Court also called for an "estimate of inconveniences" on the part of the defendant subject to trial away from his home state.⁴⁵ The Court indicated that to correctly measure sufficient minimum contacts, emphasis should be on the quality and nature of the activity in relation to the fair and orderly administration of laws.⁴⁶

Although *International Shoe* dealt with in personam jurisdiction and *Harris* dealt with quasi in rem jurisdiction, both cases in effect expanded the jurisdictional reach of state courts over nonresidents. *International Shoe* set a standard based on the "quality and nature" of contacts. This standard was subjectively applied in each in personam case to determine if the minimum standard allowed under due process had been met. The courts continued a trend of expanding state court jurisdiction until the standard of sufficient minimum contacts found in *McGee v. International Life Insurance Co.*⁴⁷ was very minimum indeed. In *McGee* the only contacts of the nonresident defendant with the forum state were an insurance certificate that the defendant had mailed to the plaintiff in the forum and premium payments mailed by the plaintiff from the forum and accepted by the defendant.⁴⁸

One year later, the Supreme Court in *Hanson v. Denckla*⁴⁹ drew the line on expanding state court jurisdiction and held that there were insufficient contacts for in personam jurisdiction.⁵⁰ *Hanson*

Cir. 1973) (*International Shoe* standard should apply regardless of the particular type of jurisdiction, but the legal technicality of the type of jurisdiction bears on the constitutional issue).

43. 326 U.S. at 316.

44. *Id.*

45. *Id.* at 317.

46. *Id.* at 319.

47. 355 U.S. 220 (1957).

48. *Id.* at 223. State courts have found even fewer contacts sufficient to satisfy the minimum contacts standard. See, e.g., *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

49. 357 U.S. 235 (1958).

50. The Court found the trustee in question had no office in the forum and had transacted no business there. Further, the trust assets were not

added another element to the minimum contacts test and required that it was "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."⁵¹

D. In Rem and Quasi In Rem Cases

The abandonment of the *Pennoyer* doctrine that took place in in personam cases did not occur in in rem and quasi in rem cases until *Shaffer*. Traditional in rem and quasi in rem cases did not use the same standard of due process that had been applied in in personam cases.⁵² Jurisdiction was proper if it was reasonable, and it was reasonable if the "presence" or "situs" of the property was within the jurisdiction.⁵³ Locating moveable or intangible property caused considerable problems under this test and involved the fictional process of assigning a "situs" to the property.⁵⁴

In 1950, *Mullane v. Central Hanover Bank & Trust Co.*⁵⁵ indicated that the *Pennoyer* doctrine of territoriality as it applied to in rem and quasi in rem actions was beginning to erode.⁵⁶ *Mullane* held that constructive service was not sufficient to guarantee due process regardless of the fact that the action could have been

held or administered in the forum and there had been no solicitation of business there in person or by mail. The only relation between the trust agreement, which the trustee was administering, and the forum was the fact that it was the most recent domicile of the settlor. *Id.* at 251-52. See also *Kurland*, *supra* note 2, at 622.

51. 357 U.S. at 253.

52. "The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and intangible property." *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269, 271 (1917). Cf. *Steele v. Searle & Co.*, 483 F.2d 339, 347 (5th Cir. 1973) (*International Shoe* standard should apply regardless of the particular type of jurisdiction, but the legal technicality of the type of jurisdiction bears on the constitutional issue). See also *Owenby v. Morgan*, 256 U.S. 94, 111 (1921).

53. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 140 (1971). See also *Folk & Moyer*, *supra* note 9, at 779. In some instances, however, a state would not exercise jurisdiction when it was against public policy. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60, Comments c, d (1971).

54. F. JAMES & G. HAZARD, *supra* note 33, § 12.3; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Comment a (1971).

55. 339 U.S. 306 (1950).

56. *Shaffer* noted this. 433 U.S. at 206. See also *Hazard*, *supra* note 2, at 277.

classified as an in rem action. The power to use constructive service did not depend on how the court classified the action.⁵⁷ "[T]he requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state."⁵⁸ *Mullane* suggested that the Court was beginning to realize that due process standards should be the same for jurisdictional matters whether the case involves in personam, in rem, or quasi in rem jurisdiction.

In *Hanson*, the most recent major opinion on the subject by the Supreme Court prior to *Shaffer*, the Court seemed to retreat from its forward progress. The opinion clearly illustrated the Court's belief that in personam and in rem classifications were still viable⁵⁹ and the "presence" or "situs" test was still the appropriate due process standard for in rem jurisdiction.⁶⁰

IV. THE *SHAFFER* DECISION

Traditionally the factual situation presented in *Shaffer* would be categorized as a quasi in rem action based on an intangible.⁶¹ The language of the opinion, however, is much broader and deals with in rem as well as classes I and II of quasi in rem jurisdiction.⁶²

57. 339 U.S. at 313.

58. *Id.* at 312.

59. See notes 49-51 and accompanying text *supra* (discussion of *Hanson's* effect on in personam jurisdiction).

60. The text of the *Hanson* opinion was clearly split into in rem and in personam issues. 357 U.S. at 246, 250. The in rem discussion dealt with the situs test while the in personam discussion dealt with minimum contacts.

Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub nom. Columbia Broadcasting Sys. v. Atkinson*, 357 U.S. 569 (1958), was decided shortly before *Hanson*. The decision was evidence of the willingness of Justice Traynor and the California Supreme Court to use a minimum contacts test rather than the situs test to determine whether an intangible was present in the jurisdiction for the purposes of quasi in rem jurisdiction. The decision was a distorted application of the *International Shoe* test since minimum contacts were used to fix the location of the property rather than to decide the basic issue of jurisdiction. See also *Simpson v. Loehmann*, 21 N.Y.2d 305, 321, 234 N.E.2d 669, 678, 287 N.Y.S.2d 633, 646 (1967) (Burke, J., dissenting) (discusses use of minimum contacts to determine if a situs is fair and just). Nevertheless the *Atkinson* decision was clearly a move toward recognition that the same due process test must be applied to all cases regardless of the class of jurisdiction. See Traynor, *supra* note 6, at 663.

61. See notes 79-80 and accompanying text *infra*.

62. See note 37 *supra*.

The Court first noted that the lower decisions in the Delaware courts were founded on the traditional "situs" test for quasi in rem jurisdiction.⁶³ The Court gave three basic reasons in support of its action which held that all assertions of state court jurisdiction must be evaluated with the *International Shoe* standard.⁶⁴ First, jurisdiction over property is in essence jurisdiction over the interests of persons in the property.⁶⁵ Consequently, it is only logical that the same due process standard be used in both instances to determine if the exercise of jurisdiction is proper.⁶⁶ Second, the *International Shoe* standard will often times be met in in rem and quasi in rem I⁶⁷ actions by virtue of the fact that the claims to the property itself are the source of the underlying controversy.⁶⁸ Third, the three arguments for maintaining quasi in rem II⁶⁹ actions are easily refuted. The primary rationale behind quasi in rem II jurisdiction is that a wrongdoer should not be able to escape his obligations by removing his assets to a jurisdiction where he is not subject to in personam jurisdiction. This rationale is not sound, however, because it does not explain why quasi in rem II jurisdiction is recognized even though the wrongdoer is not trying to escape and has not removed his assets. It also does not support jurisdiction to decide the merits of the claim. Finally, the rationale's assumption that a debtor can escape payment on his obligations by removing his assets would not seem to be valid under the full faith and credit clause that makes valid in personam judgments enforceable in all states.⁷⁰ A second argument for quasi in rem II jurisdiction is that it provides more

63. 433 U.S. at 196.

64. *Id.* at 212.

65. *Id.* at 207. This principle lies at the root of the impossible dichotomy of *Pennoyer*. Zammit, *supra* note 2, at 670. See also Hazard, *supra* note 2, at 268.

66. 433 U.S. at 207.

67. For a definition of quasi in rem I, see note 37 *supra*.

68. 433 U.S. at 207. For further analysis, see notes 122-24 and accompanying text *infra*.

69. For a definition of quasi in rem II, see note 37 *supra*.

70. 433 U.S. at 210. The Court also said at most this rationale "suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*." *Id.* (footnote omitted). *Carolina Power & Light Co. v. Uranex*, 46 U.S.L.W. 2194, 2195 (N.D. Cal. Sept. 26, 1977), held that this language creates an exception to the *Shaffer* rule. This interpretation is subject to question. The Court in *Shaffer* at this point in the opinion was stating the rationale behind quasi in rem II jurisdiction. The Court recognized that one aspect of the rationale made sense but that does not necessarily mean that in that situation the general holding of *Shaffer* will not apply.

certainly than the *International Shoe* test on the question of jurisdiction. The sacrifice of "fair play and substantial justice," however, for the purpose of simplifying jurisdictional questions must not be allowed.⁷¹ The third argument for quasi in rem II jurisdiction is its long history. Due process can be offended as easily by ancient practices as by modern ones, however, and the mere fact of history adds nothing to the constitutional argument.⁷²

After adopting the *International Shoe* standard for all assertions of state court jurisdiction, the Court in *Shaffer* went on to hold that Delaware did not have sufficient contacts to meet that due process standard. This conclusion was based on several factors: (1) the cause of action was not related to the property;⁷³ (2) there was not a sufficient interest of the forum in the litigation;⁷⁴ (3) the shareholder failed to demonstrate that Delaware was a fair forum;⁷⁵ (4) there was no availment by the directors and officers of the privilege of conducting activities in the state as required by *Hanson*;⁷⁶ and (5) there was no contact between the directors and officers and the forum.⁷⁷

Justice Brennan, in his concurring and dissenting opinion, agreed that the *International Shoe* standard should apply to all assertions of jurisdiction. He disagreed, however, with the majority's application of the test in *Shaffer* and found the evidence in the case supported a sufficient standard of minimum contacts. "[A]s a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that state."⁷⁸

71. 433 U.S. at 211.

72. *Id.* at 211-12.

73. *Id.* at 213. This will always be the case in quasi in rem II jurisdiction by definition. In this case Heitner's action was not based on the directors' and officers' ownership of stock.

74. *Id.* at 214-15. The majority found there was no compelling state interest in the management of Delaware corporations by the fact that the Delaware statutes did not base jurisdiction on status as a corporate fiduciary but instead based jurisdiction on the presence of property. Justice Brennan disagreed and stated this statutory failure did not affect the existence of minimum contacts. *Id.* at 226-27 (Brennan, J., concurring and dissenting).

75. 433 U.S. at 215.

76. *Id.* at 216. The majority found the acceptance of the corporate fiduciary positions was not sufficient under *Hanson*. Justice Brennan disagreed. *Id.* at 227-28 (Brennan, J., concurring and dissenting).

77. "Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be hauled before a Delaware court." *Id.* at 216.

78. *Id.* at 222 (Brennan, J., concurring and dissenting). Cf. *Jonet v. Dol-*

V. ANALYSIS

A. Quasi In Rem II Jurisdiction without a Limited Appearance

On its facts, *Shaffer* involved quasi in rem II jurisdiction under the Delaware sequestration statute.⁷⁹ The statute's main purpose is to compel nonresidents to appear in Delaware courts and be subject to in personam jurisdiction.⁸⁰ Delaware's failure to provide for a limited appearance, an appearance in which the defendant can raise defenses on the merits of the litigation and only be subject to liability equal to the value of property attached, makes this goal attainable. In this type of quasi in rem II case, *Shaffer* clearly held that the minimum contacts standard must be met in order to satisfy due process.⁸¹ The minimum contacts due process standard is now the same for in personam and quasi in rem II jurisdiction. Exposure to liability is also the same in both in personam and quasi in rem II jurisdiction without a limited appearance. Consequently, in states with broad long arm statutes, under which in personam jurisdiction is only limited by the due process standard, there will no longer be a need or use for this type of quasi in rem II jurisdiction. States with narrow long arm statutes, on the other hand, may still need to resort to quasi in rem II jurisdiction. In a situation in which there are sufficient contacts for in personam jurisdiction but in personam jurisdiction is not allowed under the state's statutes, the plaintiff will be forced to look for property owned by the defendant and located within the state in order to assert jurisdiction over the nonresident through in rem or quasi in rem jurisdiction.⁸²

Nebraska's long arm statute⁸³ limits jurisdiction over a person to causes of action that arise from activities in the state. This seemingly narrow statute has been interpreted very broadly by the Ne-

lar Savings Bank, 530 F.2d 1123, 1139 (3d Cir. 1976) (Gibbons, J., concurring) (issue of maintaining the situs of corporate intangibles in the home state of the corporation because of the state's interest in the corporation).

79. See note 15 *supra*.

80. Folk & Moyer, *supra* note 9, at 750. The Court noted that this type of case was the clearest illustration of the argument for applying the same standard of due process to all types of jurisdiction. 433 U.S. 209 & n.33.

81. The Court did not decide whether the mere presence of property would be a sufficient basis of jurisdiction where no other forum is available to the plaintiff. *Id.* at 211 n.37.

82. Justice Traynor of the California Supreme Court has explained that this was the situation in *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub nom. Columbia Broadcasting Sys. v. Atkinson*, 357 U.S. 569 (1958). Traynor, *supra* note 6, at 662.

83. NEB. REV. STAT. § 25-536 (Reissue 1975).

braska Supreme Court in *Stuckey v. Stuckey*.⁸⁴ In *Stuckey* the court held that if the assertion of jurisdiction met the minimum contacts standard of *International Shoe* then the jurisdiction would be allowed under the Nebraska long arm statute.⁸⁵ To the extent that Nebraska's long arm statute continues to be interpreted broadly in all jurisdictional situations, Nebraska's long arm statute and lack of authorization for limited appearances suggest that under *Shaffer* quasi in rem II jurisdiction will no longer be of use in Nebraska.

However, in California, a state generally recognized as having a broad long arm statute,⁸⁶ a federal court recently held that a type of quasi in rem jurisdiction tested by a different standard of contacts than in personam jurisdiction still exists after *Shaffer*. In *Carolina Power & Light Co. v. Uranex*⁸⁷ the court found an acknowledgment in the *Shaffer* decision of a distinction between jurisdiction for a judgment on the merits and jurisdiction to attach property as security for a judgment in another forum.⁸⁸ The *Uranex* facts encompassed the latter situation and the court held that although contacts between the defendant and the forum would not support in personam jurisdiction there nevertheless was a constitutional exercise of quasi in rem II jurisdiction where the jurisdiction was limited, the property's presence in the state was not fortuitous, the forum was convenient, and the defendant had no other assets in the United States.⁸⁹ Although it is questionable whether the language of *Shaffer* seized upon by the *Uranex* court was meant to create an exception to the *Shaffer* holding,⁹⁰ the *Uranex* decision seems equitable because jurisdiction was limited to attaching the property as security for a judgment being sought in another forum and California was the only jurisdiction in the United States in which the defendant had property.

B. Quasi In Rem II Jurisdiction with a Limited Appearance

Lower courts and commentators have for some time called for an end to quasi in rem II jurisdiction because its fictional nature

84. 186 Neb. 636, 185 N.W.2d 656 (1971).

85. *Id.* at 642, 185 N.W.2d at 660. The court found support for its holding in both § 25-536 and § 25-539 of the Nebraska statutes.

86. CAL. CIV. PROC. CODE § 410.10 (West 1973) provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

87. 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977).

88. *Id.* at 2195.

89. *Id.* In a sense *Uranex* could be considered a case of jurisdiction by necessity for satisfaction of the judgment.

90. See note 70 *supra*.

permits jurisdiction over many nonresidents over whom the *International Shoe* standard of due process would not allow jurisdiction.⁹¹ Despite these criticisms there have been arguments made in favor of retaining this type of jurisdiction.⁹² One such argument is that quasi in rem jurisdiction provides a proper rationale for limited jurisdiction where in personam jurisdiction would not be justified.⁹³ This argument speaks of limited jurisdiction in the sense of limited liability and consequently the argument would only apply in jurisdictions in which limited appearances are allowed. The argument proceeds on the ground that when property is permanently located within the jurisdiction, or in the case of intangibles when the debtor is domiciled in the forum, then quasi in rem jurisdiction is reasonable as a form of limited jurisdiction.⁹⁴

In states with broad long arm statutes and no limited appearances, quasi in rem II jurisdiction under *Shaffer* may be all but useless. The language of *Shaffer* is sufficiently broad to warrant the applicability of the minimum contacts standard of *International Shoe* even though a limited appearance is allowed.⁹⁵ Whether a different quality and nature of contacts would satisfy the standard where a limited appearance is allowed is an arguable proposition.⁹⁶ Regardless of whether the same quality and nature of contacts would be required, quasi in rem II jurisdiction with a limited appearance and in personam jurisdiction will remain separate and dis-

91. See *Shaffer v. Heitner*, 433 U.S. at 205-06.

92. See text accompanying notes 70-72 *supra* (three arguments listed by the *Shaffer* Court).

93. See Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy* of Pennoyer v. Neff, 43 BROOKLYN L. REV. 600, 614 (1977).

94. *Id.* at 621, 624. *Uranex*, in effect, upheld quasi in rem II jurisdiction on the basis that the debt and debtor, a California corporation, were permanently located in the forum. However, *Uranex* spoke of limited jurisdiction as limited to the extent of the decision on the merits of the claim, not as limited liability. 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977).

95. 433 U.S. at 207 n.23, 209 n.32.

96. See Folk & Moyer, *supra* note 9, at 779. *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968), held the attachment procedure authorized by *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), without a limited appearance was unconstitutional as a denial of due process. This suggests that where the amount of the judgment is limited, the due process criteria change. See also *Munichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *rehearing in banc*, 410 F.2d 117 (1969). Also, *Uranex*, although dealing with limited issues rather than limited liability, found a lesser standard of contact was needed in that situation for a constitutional exercise of jurisdiction. 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977).

tinct because the degree of liability will be different under each. The need to resort to quasi in rem II jurisdiction will depend, however, on the breadth of the jurisdiction's long arm statute.⁹⁷

The effect of *Shaffer* on *Seider v. Roth*,⁹⁸ a limited appearance, quasi in rem II case, is unclear. *Seider* originally arose as a quasi in rem action questioning the attachability of an insurance company's obligation to its insured client.⁹⁹ Subsequently *Seider* was considered as judicially creating a direct action statute against insurance companies doing business in the forum. The insurance companies' insured clients were merely considered conduits to jurisdiction.¹⁰⁰ If *Seider* is viewed as a true quasi in rem action then the *International Shoe* standard must now be met for all "Seider-type" assertions of jurisdiction. Quite clearly in instances in which the defendant-insured has had no contact with the forum the standard would not be met. If, on the other hand, *Seider* is viewed as a judicially created direct action statute, the presence of the defendant-insurance company doing business in the forum would seem to remain a sufficient basis of jurisdiction under *International Shoe*.¹⁰¹

C. Tangible Property

The stock sequestered in *Shaffer* is characterized as an intangible form of property.¹⁰² Intangibles pose a special problem for in rem jurisdiction because of their ability to be physically located anywhere and the possibility of multiple liability when state courts fail to recognize a uniform situs of the property.¹⁰³ *Shaffer* may

97. See text accompanying note 82 *supra*.

98. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

99. *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 101-02. See *Simpson v. Loehmann*, 21 N.Y.2d 305, 308, 234 N.E.2d 669, 670, 287 N.Y.S.2d 633, 635 (1967).

100. *Munichiello v. Rosenberg*, 410 F.2d 106, 115 (2d Cir. 1968), *rehearing in banc*, 410 F.2d 117 (2d Cir. 1969).

101. *Savchuk v. Rush*, — Minn. —, 245 N.W.2d 624 (1976), *remanded*, 97 S. Ct. 2964 (1977), recently upheld jurisdiction obtained under a Minnesota statute similar to the *Seider* procedure. This decision has been remanded by the Supreme Court for reconsideration in the light of *Shaffer*.

102. The interest attached is the shareholder's property interest or ownership interest in the corporation. This interest could have its situs anywhere. Two probable locations, however, are the place where the stock certificates are present or the place of the domicile of the corporation. See *Developments, supra* note 6, at 952, 955-56.

103. See, e.g., *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961); F. JAMES & G. HAZARD, *supra* note 33, § 12.15.

have presented the most urgent case for changing the due process standard to the *International Shoe* standard. Cases such as *Shaffer* and *Harris*, which involved an intangible debt, present the most obvious instances of jurisdiction that appear unfair. When intangibles are involved, the process of assigning a situs to the property is pure fiction and often the defendant has no idea or expectation of being subject to suit in the forum of the situs.

Although the majority opinion in *Shaffer* gave no indication that the *International Shoe* test would be any different for tangible property, Mr. Justice Powell indicated that, in his opinion the question remains open, as to whether forms of property with a permanent and indisputable situs would provide sufficient contacts by their presence alone.¹⁰⁴ Mr. Justice Stevens in his concurring opinion agreed that the majority opinion should not be read to invalidate in rem actions where real estate is involved.¹⁰⁵ Justice Powell's characterization of property, which is indisputably and permanently located, meant more than real property. This is clear as the next sentence of his opinion singles out real property in particular.¹⁰⁶ All tangible property would seem to have an indisputable location, but not all tangibles will be permanently located in one jurisdiction. Exactly what forms of property fit into Justice Powell's characterization seems to be a fertile area for litigation.

The concept of property with a permanent location or, in other words, property with a domicile can be analogized to the domicile of a person. For in personam jurisdiction the domicile of the person traditionally has been a sufficient basis in and of itself for a constitutional exercise of jurisdiction.¹⁰⁷ Likewise, the domicile of the property should in and of itself be a sufficient basis for jurisdiction.¹⁰⁸

D. The Transient Rule

The domicile of a person as a sufficient basis of jurisdiction can be easily justified under the *International Shoe* standard because of the state's interest, the defendant's use of the state's benefits, the quality and nature of contacts, and the fairness of the forum. Another traditional basis of in personam jurisdiction, however, is impossible to justify under *International Shoe*. In personam jurisdic-

104. 433 U.S. at 217 (Powell, J., concurring).

105. *Id.* at 219.

106. *Id.* at 217.

107. See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

108. See *Smit*, *supra* note 93, at 616, 621, 624; text accompanying note 94 *supra*.

tion based on the mere presence, whether permanent or temporary, of a person within the jurisdiction was a development of the *Pennoyer* holding that personal service within the jurisdiction¹⁰⁹ was required for a valid exercise of jurisdiction. Only when *Pennoyer* required service of notice for in personam jurisdiction did such service also become sufficient for in personam jurisdiction.¹¹⁰ This rule of jurisdiction, commonly known as the transient rule, is based on the *Pennoyer* notion that "[t]he foundation of jurisdiction is physical power."¹¹¹ Until *Shaffer* there had been no curtailment of the state's jurisdictional power over persons or property located within its boundaries. *Shaffer* broke that power by holding that all assertions of state court jurisdiction must comply with the *International Shoe* standard. It is clear that neither in personam nor in rem jurisdiction can, by the mere fleeting presence of the person or property within the jurisdiction in and of itself, meet the minimum contacts standard.¹¹² Consequently, *Shaffer* has laid to rest the transient rule of in personam jurisdiction.

E. In Personam Jurisdiction

A further implication of *Shaffer* for in personam jurisdiction is its reemphasis of the necessary considerations involved in determining the sufficiency of minimum contacts. The last major Supreme Court case dealing with in personam jurisdiction and the minimum contacts standard was *Hanson v. Denckla*.¹¹³ *Hanson* emphasized the *International Shoe* factors¹¹⁴ and added the requirement that there must be a purposeful availment by the defendant of the privilege of conducting activities within the state.¹¹⁵ In *Shaffer* the

109. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971).

110. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289, 292 (1956).

111. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

112. In rem and quasi in rem I jurisdiction may, however, by the transient presence of property along with the other probable factors involved in those cases, noted by *Shaffer*, 433 U.S. at 207-08, satisfy the *International Shoe* standard.

113. 357 U.S. 235 (1958).

114. These factors include the nature and quality of defendant's contacts with the forum and whether the cause of action arose from an act done or transaction in the forum. 357 U.S. at 251, 252.

115. *Id.* at 253. There has been some disagreement among courts on whether the *Hanson* requirement is necessary in all cases or whether it is a balancing element in cases in which the cause of action does not arise out of the defendant's acts in the forum. See Comment, *Long-Arm Jurisdiction and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, *supra* note 6, at 308.

Court applied the same basic test used in *Hanson*,¹¹⁶ including the *Hanson* element of purposeful availment of the privileges of the state.¹¹⁷ Although the Court's application of the test seemed logically weak when it failed to find a state interest in the management of a Delaware corporation¹¹⁸ and failed to find a sufficient purposeful availment of the privilege of conducting activities within the state when the defendants became directors and officers of a Delaware corporation,¹¹⁹ the general test criteria remained identical to those used nineteen years earlier in *Hanson*. Whether *Shaffer's* failure to find sufficient minimum contacts, where quite clearly there was *some* state interest in the proceedings and *some* availment of Delaware privileges by the defendants, will reprimand and remind state courts to look for a sufficient due process standard of contacts and not just any contact¹²⁰ remains to be seen.¹²¹

F. In Rem and Quasi In Rem I Jurisdiction

Under *Shaffer* in rem jurisdiction and quasi in rem I jurisdiction will, like all other assertions of state court jurisdiction, be required to meet the *International Shoe* standard. The *Shaffer* opinion suggests, however, that in these types of cases, where the claims to the property itself are the underlying controversy, the presence of the property itself may meet the *International Shoe* standard by providing contacts between the forum, the defendant, and the litigation.¹²² In these cases the Court pointed out the following usual circumstances: (1) by definition, the cause of action arises from the property, (2) there is an availment of the benefits of the State,¹²³ and (3) the state has a strong interest in the marketable title of the property and in settling disputes concerning the property.¹²⁴ By

116. See text accompanying notes 73-77 *supra*.

117. The use of the *Hanson* criteria did not clear up the confusion about when it is to be applied, see note 115 *supra*, because in *Shaffer* as in *Hanson*, the cause of action did not arise from the property or contact with the forum.

118. See note 74 *supra*. Cf. *Jonet v. Dollar Savings Bank*, 530 F.2d 1123, 1139 (3d Cir. 1976) (Gibbons, J., concurring) (weakness of a state's interest in the situs of its corporations' intangibles).

119. See note 76 *supra*.

120. There is also a distinction between "minimum" contacts and the "best" contacts. 433 U.S. at 228 (Brennan, J., concurring and dissenting).

121. *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976), illustrates a recent state court finding of minimum contacts where the quality and nature of the contacts were suspiciously low.

122. 433 U.S. at 207.

123. The Court noted that this will not be a circumstance in all cases. *Id.* at 208 n.25.

124. *Id.* at 208.

pointing out these factors the Court clearly did not say that by definition in rem and quasi in rem I jurisdiction will provide sufficient contacts. Rather, each assertion of jurisdiction must be individually tested under *International Shoe*. The Court merely indicated the standard may be relatively easy to meet in the usual situation. The standard will not be met in all situations. Where jurisdiction is obtained over a defendant by virtue of the defendant's property in the jurisdiction and the property was placed in the jurisdiction without the consent of the owner, the factors enumerated by the Court will not be found.¹²⁵

VI. CONCLUSION

Shaffer clearly marks the beginning of a new era in state court jurisdiction just as *International Shoe* began a new era some thirty-two years ago. *Shaffer's* true significance may be even more revolutionary than *International Shoe* because it is much easier to expand state power as *International Shoe* did than to take away powers historically exercised by the state as *Shaffer* does. The new era of *International Shoe* can be explained by the mobility of citizens and the need for personal service beyond a state's territorial boundaries.¹²⁶ The new era of *Shaffer*, and the transition from the "presence of property" test to the "minimum contacts" test, can only be explained as the recognition by the Court of the need for "fair" treatment of defendants and the specific curtailment of a state's sovereign powers within its borders. The revolutionary nature of *Shaffer* explains the century that passed between *Pennoyer* and this monumental decision.

Sharon Raun Kresha '78

125. *Id.* n.25.

126. See Hazard, *supra* note 2, at 272.