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The Story of Shaffer: Allocating Jurisdictional Authority Among the States

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Wendy Collins Perdue

The Story of *Shaffer*: Allocating Jurisdictional Authority Among the States

*Shaffer v. Heitner*¹ is one of a long series of Supreme Court cases addressing the scope of state-court territorial authority. Indeed, *Shaffer* is the first of a dozen modern cases that delineated the Court's current conception of the constitutional limits on state-court jurisdictional authority.

Determining whether a court has jurisdiction to hear a dispute is an important preliminary step in any litigation. But the constitutional doctrine the Court has developed in this area is also an interesting window on the Court's more general understanding of the allocation of power among the states.

Social and Legal Background

The jurisdictional authority of a court is determined in the first instance by the law of the sovereign that establishes the court. The sovereign may choose to limit its courts' authority or it may take an expansive approach. France, for example, has adopted an expansive approach—French law gives French courts jurisdiction over all cases in which the plaintiff is French, regardless of whether the defendant or the events in question have any connection with France.² Jurisdictional authority is also delineated in part by what other sovereigns are willing to recognize. France may issue a judgment but if neither the defendant nor the defendant's property is located in France, then a successful

¹ 433 U.S. 186 (1977).

² See Code civil art. 14 (Fr.).

French plaintiff will have to rely on the willingness of other sovereigns to enforce the judgment. If other sovereigns conclude that France has exceeded the scope of its legitimate authority, they will not enforce the judgment. Countries can, of course, enter into treaties whereby they agree on the scope of their respective courts' jurisdiction and obligations to enforce judgments, but, absent a treaty, the primary external limitation on one country's jurisdictional authority is the pragmatic concern of whether other countries will enforce its judgments.

Within the United States, the states can also delineate the scope of their courts' jurisdictional authority. However, unlike the relationship among countries, the limits of jurisdictional authority (as well as the obligation to enforce sister-state judgments) is ultimately controlled by the U.S. Constitution. The foundational case that both solidified jurisdiction as a constitutional issue and delineated the framework for analyzing this issue is *Pennoyer v. Neff*.³

That case involved a claim for nonpayment of fees brought by an Oregon attorney against his former client, and the Court held that Oregon lacked jurisdiction. According to the Court, there were only two ways that Oregon could have gotten jurisdiction. First, if the defendant had property in Oregon, that property could have been attached at the outset of the litigation. This would have permitted a form of in rem jurisdiction. Such jurisdiction is only "over the thing" and not over the defendant, and is therefore limited to the value of the property. Second, the other form of jurisdiction is jurisdiction in personam, or jurisdiction "over the person." In personam jurisdiction potentially subjects a defendant to unlimited liability, but the Court held that it was available only if this defendant had been served with process in the state, which had not happened in *Pennoyer*.

The Court based its analysis on "two well established principles of public law," that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and that "no State can exercise direct jurisdiction and authority over persons or property without its territory."⁴ The result of *Pennoyer* was a relatively straightforward jurisdictional framework: in the absence of the defendant's consent, states could constitutionally assert judicial jurisdiction only by attaching property located in the state or by serving the defendant with process in the state. The Court also introduced an important doctrinal innovation—it grounded the limitations on state-court jurisdictional

³ 95 U.S. 714 (1878). For a fuller discussion of the facts of the case, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev. 479 (1987).

⁴ 95 U.S. at 722.

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⁵ See Joseph J. Kalo, *J Quasi In Rem and In Person*

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authority in the newly adopted Due Process Clause of the Fourteenth Amendment.

The realities of a modernizing society put increasing pressure on this framework. To begin, there was the problem of corporations. The traditional rule had been that corporations exist only in their state of incorporation and hence could only be served with process there. This was not a problem so long as corporate enterprises were essentially local. But with the growth of the interstate corporate enterprise, corporations could inflict harm far from their state of incorporation. Yet the burden remained on the victim to travel to the defendant in order to seek redress. The courts responded not by changing the *Pennoyer* formulation, but by finding that corporations were "present" wherever they conducted significant activities.⁵ This judicial technique came under increasing ridicule from legal realists. In the words of one commentator, it was "transcendental nonsense" to try to determine where a corporation was "present"—corporations were not "things" and ought not be analyzed as if they were.⁶

Modern transportation added to the pressure on the *Pennoyer* approach. With the advent of the automobile, people could drive into a state, cause harm, and leave. Once again, a victim who had never left home could find himself or herself saddled with the burden of traveling far from home to seek redress. States addressed this issue by passing "consent" statutes under which people who drove into the state were deemed to have implicitly consented to the appointment of a state official to be their agent for service of process for any suit involving an automobile accident.⁷ Consistent with *Pennoyer*, that official could then be served in-state—with notice of the suit mailed to the defendant at his or her out-of-state home. Of course, this supposed "consent" was no more real than the "presence" of an out-of-state corporation.

A final way that the courts dealt with the problems of distant defendants was through in rem jurisdiction. Attaching the property of out-of-state debtors was a technique that dated back to the seventeenth century.⁸ As noted earlier, in this country such jurisdiction was deemed to be limited to the value of the property. However, even with this limitation, it was a valuable device for asserting jurisdiction. When the

⁵ See Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Jurisdiction*, 1978 Duke L.J. 1147, 1176-80.

⁶ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 810 (1935).

⁷ See *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

⁸ See Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Jurisdiction*, 1978 Duke L.J. 1147, 1161.

underlying lawsuit had nothing to do with the property, this technique was called quasi in rem or "attachment jurisdiction"; when the dispute concerned ownership of the property itself, as in a condemnation procedure, the technique was sometimes called a true in rem procedure. Whether in rem or quasi in rem, *Pennoyer* had reinforced the validity of attaching property as a basis for acquiring jurisdiction. In *Harris v. Balk*,⁹ the Court reaffirmed the validity of quasi in rem jurisdiction. There the Court held that a plaintiff could assert jurisdiction by attaching the defendant's property held by another person in the forum state. In *Harris*, the property that was attached was a debt owed to the defendant, and the debt was attached by serving the defendant's debtor while the debtor was passing through the forum state. Thus, the case not only reaffirmed the continued validity of quasi in rem jurisdiction, but also upheld it even as applied to intangible property.

In 1945, in the landmark decision of *International Shoe Co. v. Washington*, the Court embarked on a new approach to analyzing jurisdiction, at least with respect to in personam cases. The Court rejected continued reliance on fictions such as "presence" for corporations, explaining that "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." The Court then announced a new approach:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."¹⁰

But this new test for jurisdiction was remarkably vague. Indeed, Justice Black in his concurrence expressed concern that the "elastic standards" set forth by the majority might be used to deprive states of "the right to afford judicial protection to its citizens on the ground that it would be more 'convenient' for the corporation to be sued somewhere else."¹¹

During the 1950s the Court decided a series of cases that explored the meaning of this test, but the holdings and language of these cases left uncertainty.¹² Some cases, like *McGee v. International Life Insurance*

⁹ 198 U.S. 215 (1905).

¹⁰ 326 U.S. 310, 316-17 (1945) (quoting "traditional notions of fair play and substantial justice" from *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹¹ *Id.* at 325 (Black, J., concurring).

¹² See Philip Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 593-623 (1958).

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¹³ 355 U.S. 220 (1957).

¹⁴ 357 U.S. 235, 253 (1958).

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¹⁸ 395 U.S. 337 (1969); Grant Co., 416 U.S. 600 (1975). This line of cases is v. Doehr: *Balancing Costs a*

¹⁹ See *Sniadach v. Fami* U.S. 67, 91 n.23 (1972); *Ca* (1974).

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Co.,¹³ suggested that it was sufficient for jurisdiction that the litigation have some nexus with the forum. Other cases, like *Hanson v. Denckla*,¹⁴ emphasized that the defendant must have purposefully connected himself with the forum.

Whatever the precise contours of the rule set out by *International Shoe*, the holding of that case had undermined one of the core premises of *Pennoyer*—that states could assert no direct jurisdiction over people outside the state. Though it did not directly address the other premise—that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"—some commentators saw that this principle was vulnerable as well.¹⁵ In addition, courts and commentators had begun to question the continuing coherence of the in rem, quasi in rem, and in personam distinction.¹⁶ "The phrase 'judicial jurisdiction over a thing,' is a customarily elliptical way of referring to jurisdiction over the interests of a person in a thing," observed the Restatement (Second) of Conflict of Laws.¹⁷

International Shoe was not the only source of a potential due process challenge to attachment jurisdiction. Beginning in 1969 with *Sniadach v. Family Finance Corp.*,¹⁸ the Supreme Court decided a series of cases concerning the right of a property owner to notice and hearing before his or her property was attached. These cases recognized that prior notice and hearing were not required in "exceptional situations" and suggested that attachment for purposes of acquiring jurisdiction might be such an exceptional situation.¹⁹ Nonetheless, these references to attachment jurisdiction had been dicta, and the Court had not fully explored what the contours of the exception might be. These two lines of due process case law—the substantive *International Shoe* thread and the procedural *Snia-*

¹³ 355 U.S. 220 (1957).

¹⁴ 357 U.S. 235, 253 (1958).

¹⁵ See, e.g., Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956).

¹⁶ See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950); Philip Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 617 (1958).

¹⁷ Restatement (Second) of Conflict of Laws § 56 introductory note (1971).

¹⁸ 395 U.S. 337 (1969); see *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). This line of cases is discussed *infra* ch. 4: Robert G. Bone, *The Story of Connecticut v. Doeher: Balancing Costs and Benefits in Defining Procedural Rights*.

¹⁹ See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

dach thread—coalesced to lay the foundation for the constitutional challenges in *Shaffer v. Heitner*.

Factual Background

The underlying facts of *Shaffer* date back at least twenty years before the suit was filed. Between 1947 and 1956, the Greyhound Corporation, the largest bus company in the country, had acquired a number of regional bus companies in the western United States. Mt. Hood Stages, another regional carrier, had objected to several of these acquisitions out of fear that Greyhound would use its new market power to drive Mt. Hood out of business. In response to these objections and in order to get approval from the Interstate Commerce Commission (ICC) for the acquisitions, Greyhound made representations and gave assurances that it would not discriminate against or otherwise disadvantage Mt. Hood. By the mid-1960s it became clear that Mt. Hood's fears had been well-founded. Although Greyhound brochures included information about connections with other bus lines, they omitted references to Mt. Hood. In addition, Greyhound changed some of its routes and schedules so that transfers between Greyhound and Mt. Hood buses would be inconvenient. Mt. Hood's ridership began to drop significantly.

In 1968, the ICC ordered Greyhound to cease and desist from engaging in these practices.²⁰ That same year, Mt. Hood filed a civil antitrust action against Greyhound. The year 1973 proved to be another bad one for Greyhound. It lost the antitrust action by jury verdict, and the court awarded Mt. Hood close to \$15 million in damages and attorneys' fees.²¹ A month later, a different federal district court found Greyhound (and its wholly owned California subsidiary, Greyhound Lines, along with three of their officers, including R.F. Shaffer, Greyhound's president) guilty of both criminal and civil contempt of court for violating the 1968 cease-and-desist order; the court then found that the corporation had engaged in "willful and deliberate defiance" and assessed a fine of \$600,000.²²

A corporation is a legal entity but can act only through its officers, directors, and employees. The officers and directors of Greyhound had

²⁰ *In re Mt. Hood Stages, Inc.*, 104 M.C.C. 449 (1968), *aff'd sub nom.* Greyhound Lines, Inc. v. United States, 308 F.Supp. 1033 (N.D. Ill. 1970).

²¹ The loss in the United States District Court for the District of Oregon was eventually affirmed. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated*, 437 U.S. 322, *remanded*, 583 F.2d 469 (9th Cir. 1978), *re-entered*, 1979 WL 1583 (D. Or. Jan. 26, 1979), *aff'd*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980).

²² *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973), *enforced*, 370 F.Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

allowed the company to pay out these awards made by the officers to bring suit on Gre

In order to protect alternative mechanisms ultimately shareholder corporation, one of "derivative action" shareholders' derivative individual shareholder-corporation is a necessary beneficiary and t as a defendant because it is usually not supplied

Accordingly, *Shaffer* brought on behalf of directors of Greyhound corporations. The shareholder of New York one share of Greyhound as a custodian for his son have different recollections. According to Heitner, the lawyer was looking for someone willing to be a plaintiff of stock and became aware that Heitner had provided after reading about contact. Maschio was Heitner or any other

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allowed the company to engage in a course of conduct with respect to Mt. Hood that had cost the company over \$15 million in damages and penalties. The value of the company to its shareholders had thus been diminished. In theory, the corporation could bring suit against its own officers and directors whose decisions had caused the company to have to pay out these awards. However, since the decision to bring suit has to be made by the officers and directors, it is not surprising they did not see fit to bring suit on Greyhound's behalf against themselves.

In order to protect the interests of shareholders, the law provides an alternative mechanism by which such suits can be initiated. Since it is ultimately shareholders who suffer from a diminution in the assets of a corporation, one or more shareholders can initiate a "shareholders' derivative action" on behalf of the corporation. Any recovery in a shareholders' derivative action goes to the corporation, not to the individual shareholder-plaintiff who initiated the suit. In such suits, the corporation is a necessary party. Although the corporation is the intended beneficiary and therefore might be considered a plaintiff, it is joined as a defendant because, having not initiated litigation in its own behalf, it is usually not supportive of the plaintiff's claim.

Accordingly, *Shaffer v. Heitner* was a shareholders' derivative suit brought on behalf of the Greyhound Corporation against the officers and directors of Greyhound and its California subsidiary and against the two corporations. The shareholder-plaintiff in *Shaffer* was Arnold Heitner, a citizen of New York. Heitner's six-year-old son, Mark, had been given one share of Greyhound stock when he was born, and Arnold was custodian for his son. Arnold Heitner and his lawyer, Michael Maschio, have different recollections of how Heitner came to be the plaintiff. According to Heitner, a lawyer acquaintance had mentioned that another lawyer was looking for someone who owned Greyhound stock and was willing to be a plaintiff in a suit.²³ Arnold mentioned his son's one share of stock and became the plaintiff. Maschio, on the other hand, recalled that Heitner had previously been a client of the firm and that Heitner, after reading about Greyhound and the contempt citation, initiated the contact. Maschio was quite adamant that the firm had not sought out Heitner or any other Greyhound stockholders.²⁴

To those who brought the suit, this undoubtedly looked like a promising claim. Three Greyhound officers had been found guilty of contempt of court, and the conduct that was the basis for that finding was essentially the same conduct that resulted in the large antitrust verdict. Although officers and directors are generally protected from judicial second-guessing of their decisions by a doctrine known as the

²³ Telephone Interview with Arnold Heitner (Aug. 1, 2003).

²⁴ Telephone Interview with Michael Maschio (Oct. 13, 2003).

business judgment rule, the rule might not protect willful and deliberate conduct that was itself a violation of a court order.

Prior Proceedings

Complaint. In May 1974, five months after the United States District Court for the Northern District of Illinois announced the amount of the penalty for the criminal contempt, Heitner filed the shareholders' derivative action in the Court of Chancery of Delaware against twenty-eight present and former officers and directors of the defendant Greyhound Corporation and of the defendant subsidiary corporation, Greyhound Lines. The Greyhound Corporation was incorporated in Delaware; at the time of the ICC order, its headquarters had been located in Chicago (which is why the litigation about the cease-and-desist order was in the Northern District of Illinois), but in 1971 it had moved its headquarters to Phoenix, Arizona. Greyhound Lines was incorporated in California with its headquarters in Phoenix. None of the officers and directors named were citizens of Delaware.

The complaint described the contempt finding and the antitrust verdict, along with the conduct of Greyhound that resulted in these setbacks. It alleged that each of the individual defendants "engaged in or acquiesced in the transactions referred to above and acted recklessly, negligently and in disregard of his obligations as director or officer of Greyhound."²⁵ It further alleged that the deferred compensation plan for officers, directors, and employees of Greyhound was "excessive, unlawful, improvident and wasteful resulting in large damages to Greyhound and its stockholders."²⁶ The complaint sought both unspecified damages from the defendants and termination of payments to the defendants under the deferred compensation plan.

Jurisdiction. Delaware law deems the stock of a Delaware corporation to be located in Delaware.²⁷ Under its so-called sequestration procedure, the stock is attached by delivering notice, usually accompanied by a stop-transfer order, to the corporation's registered agent in Delaware.²⁸ The owner of the stock is sent a copy of the complaint and is offered the choice either to enter an appearance thereby bestowing in personam jurisdiction or to forfeit the stock.

The sequestration procedure had been available in Delaware since 1927. Although it was not limited to corporate cases, its primary use was

²⁵ Complaint ¶ 16.

²⁶ *Id.* at ¶ 23.

²⁷ Del. Code Ann. tit. 8, § 169 (1975).

²⁸ Del. Code Ann. tit. 10, § 366 (1975).

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for litigation involving officers and directors of Delaware corporations.²⁹ This use was an important one. Without some mechanism for assuring that the directors of a corporation are subject to suit in one place, it could be difficult for a shareholder to enforce directors' obligations. Outside directors might have no connection either with the state of incorporation or with the headquarters state. Where the allegation is that a board failed to take action, it might be particularly difficult to determine where that failure to act occurred. Thus, there might be no single place with which all the directors have contacts or connections.³⁰ Of course, the sequestration procedure was only available against those officers and directors who owned stock, but this limitation had apparently not proved problematic.

This unavailability of an alternative forum may have existed in *Shaffer*. The individual defendants resided in nine different states. The contempt finding was in Illinois but concerned conduct the effects of which were primarily felt in Oregon. The record does not reflect where the board of directors physically met for critical meetings or which directors might have been present at those meetings. However, since the basic allegation was that the board failed to take necessary compliance steps, it would be difficult to determine where that failure to act occurred. As noted earlier, Greyhound's headquarters moved from Chicago to Phoenix in 1971. Although the lack of an alternative forum might have been an argument to support jurisdiction in Delaware, the plaintiff's lawyer never raised this argument. On the contrary, when asked at oral argument in the U.S. Supreme Court whether an alternative forum was available where all the parties could be joined, Maschio indicated that "the wrongdoing took place probably—most probably out on the coast" and that jurisdiction over the defendants in the place of the wrongdoing was a "possibility."³¹ At no time did he indicate that there could be difficulties securing in personam jurisdiction outside Delaware, nor was there any discussion of what the alternative forum might be for challenging the lawfulness of the deferred compensation plan.

Regardless of whether an alternative forum was available in *Shaffer v. Heitner*, the plaintiff's attorney decided to sue in Delaware by using its sequestration provision. He followed all the necessary steps to sequester the stock owned by most of the individual defendants, over \$1 million in value. In response, those defendants filed a motion to quash and vacate

²⁹ See *Hughes Tool Co. v. Fawcett Publ'ns, Inc.*, 290 A.2d 693, 695 (Del. Ch. 1972).

³⁰ See Sue Ann Dillport, *Jurisdiction over Nonresident Directors, Officers, and Shareholders: "Director" Consent Statutes After Shaffer v. Heitner*, 32 Rutgers L. Rev. 255, 262-63 (1979).

³¹ Transcript of Oral Argument at 27-28.

the sequestration order. The stage was now set for this piece of corporate litigation to become an important civil procedure case.

State-Court Decisions. Both the Delaware Court of Chancery³² and the Delaware Supreme Court³³ rejected the defendants' challenge to the sequestration statute. The opinions of these courts are revealing because they highlight that the defendants did not raise a frontal assault on quasi in rem jurisdiction. On the contrary, according to the Chancery Court, the defendants "recogniz[ed] that a state can obtain jurisdiction over nonresidents by an in rem attachment of their property within the state,"³⁴ but raised a number of issues concerning attachment under the sequestration statute. These arguments, which are clearly set forth in the opinion of the vice chancellor, were more narrow in scope than the grounds that the U.S. Supreme Court would ultimately face in deciding the case.

First, the defendants contended that the stock could not be attached in Delaware because it was not actually located in Delaware. They noted that Delaware was the only state that considered stock to be located in the state of incorporation, whereas all the other states deem stock to be located where the stock certificates are held. The vice chancellor rejected this argument noting that a "shareholder owns a proportionate interest in his corporation which is represented by a stock certificate," and that sequestration "seeks to seize his ownership interest in the corporation, not merely his documentary indicia of ownership." He further noted that if the location of the certificate is treated as the critical situs, then "a stockholder who lost his certificate could not have his stock interest attached by any court, any where in the event he chose not to seek a new one."³⁵

Second, the defendants argued that sequestration was an unconstitutional seizure of their property without prior notice and hearing. This argument was the primary constitutional challenge both in the Delaware courts and in the U.S. Supreme Court. Both Delaware courts rejected this argument, noting that the U.S. Supreme Court had indicated that attachment without prior notice and hearing was permissible in "extraordinary situations" and had specifically mentioned "attachment necessary to secure jurisdiction in state court" as one of these extraordinary situations.³⁶ Indeed, in this context, several recent times the U.S.

³² Heitner v. Greyhound Corp., 1975 WL 417 (Del. Ch. May 12, 1975).

³³ Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976).

³⁴ 1975 WL at *7.

³⁵ *Id.* at *3 [sic].

³⁶ Fuentes v. Shevin, 407 U.S. 67, 91 n.23 (1972).

Supreme Court had an older U.S. Supreme Court requiring a defendant's attachment suit.³⁸

Third, the defendants' in rem proceeding became a quasi in rem proceeding and defend the property. The procedure gave only a judgment or forfeiting the property. The courts assumed that the defendant's appearance was required. The analysis focused on the exercise of quasi in rem jurisdiction. Both courts concluded

Neither Delaware nor the U.S. Supreme Court in *Shoe* and its significance. The court said that there were "significant reasons to say at once that we are not of them."³⁹

U.S. Supreme Court. The U.S. Supreme Court to frame the issue narrow. The merits and of the case. The notice and hearing was required for the appellants, and the court raised for the first time. Second, the personal jurisdiction not make any broad statement. Instead argued that the personam jurisdiction standard. The due process standard. In other words, the quasi in rem should be subject to the same standard. This statute resulted

³⁷ 256 U.S. 94 (1921).

³⁸ *Sniadach v. Family Shoe Store*, 395 U.S. 67, 91 n.23 (1972); *Calder v. Jones*, 451 U.S. 135 (1974).

³⁹ 361 A.2d at 229.

⁴⁰ Transcript of Oral Argument.

⁴¹ Appellants' Reply Brief.

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Supreme Court had cited with apparent approval *Ownbey v. Morgan*,³⁷ an older U.S. Supreme Court case that had upheld a Delaware statute requiring a defendant to post bond in order to appear and defend an attachment suit.³⁸

Third, the defendants asserted that this was not really a quasi in rem proceeding because they were not given the opportunity to appear and defend the property attached. Instead, the Delaware sequestration procedure gave only the choice of submitting to in personam jurisdiction or forfeiting the property. In rejecting this argument, both the Delaware courts assumed that the state could constitutionally compel a defendant's appearance to the extent of the value of the property. The analysis focused on whether the state could, in essence, leverage a valid exercise of quasi in rem jurisdiction into in personam jurisdiction, and both courts concluded that this was permissible.

Neither Delaware court devoted much of its analysis to *International Shoe* and its significance. Indeed, the Delaware Supreme Court observed that there were "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."³⁹

U.S. Supreme Court. In the Supreme Court, the parties continued to frame the issue narrowly. First, the primary focus of the briefs on the merits and of the oral arguments was on whether a pre-attachment notice and hearing were required. At oral argument, John Reese, arguing for the appellants, did not even cite *International Shoe*. That case was raised for the first time by one of the Justices late in Reese's argument.⁴⁰ Second, the personal jurisdiction argument that appellants did raise did not make any broad attack on in rem or quasi in rem jurisdiction. Reese instead argued that in this case, the statute was used to coerce in personam jurisdiction and that it should therefore be subject to the same due process standard as any other exercise of in personam jurisdiction. In other words, the defendants did not argue that actions in rem and quasi in rem should be treated like actions in personam, only that "all assertions of in personam jurisdiction, under any guise or label, are subject to the same due process requirements."⁴¹ Reese emphasized that this statute resulted in defendants' being subject to in personam jurisdic-

³⁷ 256 U.S. 94 (1921).

³⁸ *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 n.13 (1974).

³⁹ 361 A.2d at 229.

⁴⁰ Transcript of Oral Argument at 22.

⁴¹ Appellants' Reply Brief on the Merits at 8.

tion. "Today the issue is whether the Delaware sequestration statute can constitutionally be applied to sequester the defendants' stock as a means for coercing their general appearance in the action," he explained in his opening statement to the Court.⁴²

Heitner's brief similarly focused on whether pre-attachment notice and hearing were required. His brief argued that attaching property for the purpose of securing jurisdiction was an "extraordinary situation" and hence pre-attachment notice and hearing were not required.⁴³ In response to the argument that the sequestration statute improperly coerced in personam jurisdiction, the appellee countered that the defendants had sufficient contacts to be subject to in personam jurisdiction and noted that some states had enacted statutes that specifically conferred jurisdiction over out-of-state directors.⁴⁴ But this response created something of a box for Heitner's lawyer, as one of the Justices pointed out at the end of the argument. In explaining why there was no right to pre-seizure notice and hearing, Heitner's lawyer had relied on the language suggesting that attachment for the purpose of securing jurisdiction was an "extraordinary situation" that warranted an exception to the notice and hearing requirements. However, if the defendants were constitutionally subject to in personam jurisdiction, then there was no "extraordinary situation," because all Delaware would have to do to obtain jurisdiction was enact a long-arm or consent statute.⁴⁵

Interestingly, neither Heitner's brief nor Maschio's argument on Heitner's behalf offered much of a defense of quasi in rem jurisdiction. The brief does not even cite *Harris v. Balk*, which had upheld the use of quasi in rem jurisdiction with respect to intangible property. Nor does it rely on *Ownbey v. Morgan*. Indeed, at oral argument, Maschio conceded that he did not think that *Ownbey* would be decided the same way today.⁴⁶ According to Maschio, the decision not to defend quasi in rem jurisdiction was a conscious strategy.⁴⁷ He explained that as soon as the Court agreed to hear this case, he and the other lawyers in his firm concluded that the Court did so in order to "overrule *Pennoyer v. Neff*." Rather than weigh in on this issue, they thought it better to try to win

⁴² Transcript of Oral Argument at 4-5.

⁴³ See Appellee's Answering Brief at 4.

⁴⁴ See *id.* at 13-14; Transcript of Oral Argument at 36-37, 47-48.

⁴⁵ See Transcript of Oral Argument at 49; see also Ernest Folk & Peter Morgan, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749, 766-67 (1973).

⁴⁶ Transcript of Oral Argument at 41.

⁴⁷ Telephone Interview with Michael Maschio (Oct. 13, 2003).

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Neither party raised or was prepared to address another critical issue—whether the judgment of the Delaware Supreme Court was a "final judgment." The Chancery Court had denied a motion to quash and vacate the sequestration order. The Delaware Supreme Court had affirmed the denial of the motion. Thus, there was no final judgment on the merits of the case. However, the Supreme Court's appellate jurisdiction, pursuant to 28 U.S.C. § 1257(a), requires a "[f]inal judgment[] or decree[] rendered by the highest court of the State." Ordinarily, a final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."⁴⁹ Obviously, this was not the case here. At the end of Maschio's presentation, the Court raised this issue and then pursued it with Reese in his rebuttal. This was an issue that neither Maschio nor Reese had considered.⁵⁰

The Supreme Court Decision

The Majority Opinion. The U.S. Supreme Court reversed. Unlike the Delaware courts, the Supreme Court did see a serious constitutional question with respect to *International Shoe*. "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam," wrote Justice Marshall for the Court.⁵¹ The Court concluded in the affirmative, and it held that Delaware's assertion of jurisdiction violated that standard. It declined to decide whether pre-attachment notice and hearing were required.

Thus, the Court's opinion focused little on the arguments advanced by the parties. Instead, the Court appears to have relied on the analysis set forth in several lower court opinions.⁵² William Schwarzer, who had argued the case for the defendants in the Delaware Supreme Court, observed that as he worked on the case, he "had no idea that the case would result in the Court overruling *Pennoyer v. Neff*," and he charac-

⁴⁸ Transcript of Oral Argument at 47.

⁴⁹ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

⁵⁰ Transcript of Oral Argument at 50, 52.

⁵¹ 433 U.S. at 206. Note that the Court used "in rem" as shorthand for in rem and quasi in rem. *Id.* at 199 n.17. Incidentally, Justice Marshall wrote for Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell. Justice Rehnquist did not participate.

⁵² See *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons, J., concurring).

terized the U.S. Supreme Court's opinion as an example of "the Court running away with the case."⁵³

The Court first addressed the issue of its own appellate jurisdiction in a footnote and held that the Delaware decision was a final judgment within the meaning of 28 U.S.C. § 1257(a). The Court explained that the decision was "not subject to further review in the state courts" and that although the defendants might ultimately prevail on the merits following a trial, "there should be no trial at all." The Court stressed that its conclusion was "consistent with the pragmatic approach that we have followed in the past in determining finality."⁵⁴

The Court then turned to a historical survey of personal jurisdiction doctrine from *Pennoyer* through *International Shoe* and its progeny. Noting that suits "against" property are really suits against the owner, the Court asserted that "Fourteenth Amendment rights cannot depend on the classification of an action as in rem or in personam." The Court next, in Part III of its opinion, considered and rejected several arguments in favor of retaining the traditional rule with respect to the presence of property—that it facilitates enforcement of judgments, that it provides jurisdictional certainty, and that it is constitutional because it has been historically accepted. After rejecting all of these arguments, the Court concluded that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." Notwithstanding this language, the Court did not prohibit the use of in rem or quasi in rem jurisdiction. Moreover, the Court suggested that when "claims to the property itself are the source of the underlying controversy . . . , it would be unusual for the State where the property is located not to have jurisdiction."⁵⁵ But in this case, attachment jurisdiction was not reasonable.

In Part IV, the final section of the opinion, the Court applied the "standards set forth in *International Shoe*" to the facts of *Shaffer* considered as an in personam case. The Court concluded that the officers and directors of this Delaware corporation had insufficient contacts with Delaware to be subject to personal jurisdiction in Delaware. The Court stressed that there was no allegation that the defendants had "ever set foot in Delaware,"⁵⁶ a type of physical contact that *International Shoe*

⁵³ Telephone Interview with William W Schwarzer, Senior United States District Judge for the Northern District of California (Oct. 27, 2003). Schwarzer had planned to argue the case in the U.S. Supreme Court, but was appointed to the federal bench before he could do so.

⁵⁴ 433 U.S. at 195 n.12 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485–86 (1975)).

⁵⁵ *Id.* at 206, 212, 207.

⁵⁶ 433 U.S. at 213.

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⁵⁷ See *McGee v. Internat*
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⁵⁸ Linda J. Silberman, *SH*
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⁵⁹ See Letter of Justice W
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and its progeny seemed to disavow as a necessary condition for power.⁵⁷ The Court also discounted Delaware's interest in asserting jurisdiction over officers and directors of Delaware corporations on the ground that Delaware had not enacted legislation designed for this purpose. The Court did not explain why the decision of the Delaware Supreme Court was not sufficient to establish Delaware's interest. Finally, the Court responded to Heitner's argument that Delaware law provides substantial benefits to the officers and directors of Delaware corporations and that it was therefore fair to expect them to answer in Delaware when they were accused of abusing their power. According to the Court, this argument simply established that it was fair to apply Delaware law, but not that it was fair to litigate in Delaware. The Court never explained why if these directors could be subjected to the sovereign power of Delaware as reflected in Delaware's substantive law, they could not be subjected to Delaware's judicial authority. As Professor Silberman has memorably observed, it is as if the Court thought "an accused is more concerned with where he will be hanged than whether."⁵⁸

The Court had been divided on whether to reach the issue of Part IV. There was no factual record concerning the defendants' contacts with Delaware, although Heitner had argued that the defendants had sufficient contacts by virtue of being officers and directors of a Delaware corporation. At Justice Brennan's request, Justice Marshall circulated an alternative draft in which the Court simply ordered a remand. While Justices Brennan and Stewart favored a remand,⁵⁹ the rest of the Court preferred to reach this issue. Justice Powell in a memo to Justice Marshall offered his rationale:

I agree with Byron [White] that the issue of minimum contacts was addressed by the parties and the entire thrust of your opinion—as I read it—supports the view that fairness requires more than the minimal contacts present in this case. In short, I would reverse.

There is also a "make weight" reason that supports reversal. This has all the earmarks of a lawyer-made case. There are thousands of shares of Greyhound stock outstanding. Only one share-

⁵⁷ See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (upholding jurisdiction despite fact that defendant had never visited the state).

⁵⁸ Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 88 (1978).

⁵⁹ See Letter of Justice William Brennan to Justice Thurgood Marshall, May 18, 1977; Letter from Justice Potter Stewart to Justice Thurgood Marshall, May 18, 1977. All of the letters between the Justices cited herein are from the Thurgood Marshall papers in the Library of Congress, and they appear on the website collecting materials related to this book.

holder, owning one share . . . , instituted and is pressing this expensive litigation. While a single shareholder has standing to maintain a derivative shareholder suit, there are lawyers who make a plush living using tame clients who acquire one share of stock in numerous corporations for the purpose of setting the stage for "strike" suits. The objective usually is to force a settlement and claim a generous fee to be paid by court order often from corporate funds.

Even if this is not such an "arranged" litigation, fairness to the defendants—who already must have been put to considerable expense by the holder of a single share [one share of Greyhound common was quoted Friday on the NYSE at \$14.25; the high for the year to date is less than \$16.00]—suggests that we dispose of the case here on the basis of your opinion.⁶⁰

The Separate Opinions. Although Justice Powell was in agreement with the analysis in Part IV, he had some reservations about the discussion of in rem jurisdiction, and he and Justice Stevens wrote separate concurrences. Justice Powell concurred in the majority opinion, while Justice Stevens concurred only in the judgment. Both concurrences expressed complete support for the holding that "the principles of *International Shoe Co. v. Washington* should be extended to govern assertions of in rem as well as in personam jurisdiction in a state court."⁶¹ However, they both also suggested that ownership of certain kinds of property located in a state "may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property."⁶² Justice Stevens argued that the presence of property in the state is sufficient for jurisdiction; Justice Powell suggested that the Court should at least reserve the question. Their opinions highlight an important ambiguity in the majority opinion. Although the majority opinion stated that the "standards" of *International Shoe* apply in all cases, the Court never explicitly held that those standards would be applied in the same way to an in rem case as they would to an in personam case.

In a typical in rem or quasi in rem case, unlike an in personam case, the judgment is limited to the value of the property.⁶³ This is not a mere

⁶⁰ Letter from Justice Lewis Powell, Jr., to Justice Thurgood Marshall, May 31, 1977; see Richard A. Matasar, *Teaching Ethics in Civil Procedure Courses*, 39 J. Legal Educ. 587, 603-05 (1989).

⁶¹ 433 U.S. at 217 (Powell, J., concurring) (citation omitted); see *id.* at 217 (Stevens, J., concurring).

⁶² *Id.* at 217 (Powell, J., concurring); see *id.* at 218 (Stevens, J., concurring).

⁶³ Of course, the Delaware sequestration statute was not, as a practical matter, so limited, because the defendant was required either to enter a general appearance or forfeit the property.

formal difference; it quences. It therefore what is "fair." Also, State, or acquire real assume some risk tha or my person while t this important point. in rem judgment is lin the "fairness of subj not depend on the s course, not entirely r not that small claims the value of one's pr in a state, one creat jurisdiction fair.

Justice Brennan should be evaluated r argued that in applyin and directors of Dela suits growing out of th interest in the litigati appropriate to apply p appropriate to give Delaw irrelevant the fact tha Delaware corporations mum contacts in a co failure statutorily to e ries," he observed.⁶⁶

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⁶⁴ *Id.* at 218 (Stevens, J.

⁶⁵ *Id.* at 207 n.23; see *al*

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 what is "fair." Also, as Justice Stevens observed, "If I visit another
 State, or acquire real estate or open a bank account in it, I knowingly
 assume some risk that the State will exercise its power over my property
 or my person while there."⁶⁴ The majority never clearly weighed in on
 this important point. Its opinion acknowledged that an in rem or quasi
 in rem judgment is limited to the value of the property, but asserted that
 the "fairness of subjecting a defendant to state-court jurisdiction does
 not depend on the size of the claim being litigated."⁶⁵ This was, of
 course, not entirely responsive to Justice Stevens' point. His point was
 not that small claims are entitled to small protection but that whatever
 the value of one's property, when one knowingly locates one's property
 in a state, one creates an affiliation with that state that might make
 jurisdiction fair.

Justice Brennan filed a dissent. He too agreed that all jurisdiction
 should be evaluated under the standards of *International Shoe*, but he
 argued that in applying those standards, it was fair to subject the officers
 and directors of Delaware corporations to jurisdiction in Delaware for
 suits growing out of their fiduciary duties. He stressed Delaware's strong
 interest in the litigation and argued that the same factors that make it
 appropriate to apply Delaware law to such disputes also made it appro-
 priate to give Delaware's courts jurisdiction. Finally, he dismissed as
 irrelevant the fact that Delaware lacked a statute targeting directors of
 Delaware corporations. "I cannot understand how the existence of mini-
 mum contacts in a constitutional sense is at all affected by Delaware's
 failure statutorily to express an interest in controlling corporate fiducia-
 ries," he observed.⁶⁶

The Perfect Storm. *Shaffer v. Heitner* was a "perfect storm" with
 respect to quasi in rem jurisdiction. Not only did it involve intangible
 property, but also Delaware used a different situs for that property than
 did every other state. It was not even a traditional application of quasi in
 rem because the defendants were not permitted to enter a limited
 appearance; instead, the property was being used to extort in personam
 jurisdiction. The plaintiff argued that there were sufficient contacts for
 in personam jurisdiction, but this argument further complicated the
 issue of the need for notice and hearing before attachment; the justifica-
 tion for the attachment was the need to get jurisdiction, but if there
 were sufficient contacts for in personam jurisdiction, there did not seem
 to be much need for the attachment. Finally, the case was a sharehold-

⁶⁴ *Id.* at 218 (Stevens, J., concurring).

⁶⁵ *Id.* at 207 n.23; see also *id.* at 209 n.32.

⁶⁶ *Id.* at 226 (Brennan, J., concurring in part and dissenting in part).

ers' derivative action brought by a single shareholder. It is interesting to speculate whether the opinion would have been written differently if the property attached had been in-state tangible property, if the state had allowed a limited appearance, or if the case had involved a tort injuring a local plaintiff in the forum state who could not get in personam jurisdiction because the defendant did not have purposeful contacts with the forum state.

Likewise, one might wonder whether the opinion might have been written differently if the case had been argued with a more spirited defense of quasi in rem jurisdiction. It is worth remembering, however, that Heitner's goal was to allow this case to proceed in Delaware. He had no interest in a more nuanced examination of quasi in rem jurisdiction unless that resulted in a win. According to Maschio, he did not argue for a remand because he did not want one.⁶⁷ A shareholders' derivative suit is a complex and expensive type of litigation. Maschio and the other lawyers in his firm did not want to return to the Delaware courts for more procedural wrangling over jurisdiction. They preferred either to win with certainty that they could proceed or to cut their losses by an end to the litigation. The defendants' lawyer, on the other hand, indicated that a remand was one of the things that most worried him, because he thought it likely that Delaware would uphold jurisdiction.⁶⁸ Since the plaintiff did not argue for a remand, this was not an issue that the defendants' lawyers ever had to address directly.

The Immediate Impact of Shaffer

As a result of the U.S. Supreme Court's decision, the shareholders' derivative suit brought by Heitner in Delaware was dismissed and never refiled.

A mere thirteen days after *Shaffer* was handed down, Delaware signed into law a new director-consent statute.⁶⁹ That statute provided that henceforth by being a director of a Delaware corporation, a director consents to be sued in Delaware in any suit against the corporation in which he is a necessary party or in any suit alleging violation of his duty as a director. The synopsis of the law explained that:

Delaware has a substantial interest in defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and shareholders who elected

⁶⁷ Telephone Interview with Michael Maschio (Oct. 13, 2003).

⁶⁸ Telephone Interview with John Reese (Oct. 28, 2003).

⁶⁹ Del. Code Ann. tit. 10, § 3114 (signed July 7, 1977, and amended as of Jan. 1, 2004, to cover officers as well).

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⁷⁰ Synopsis, Del. Sen. *Nonresident Directors, Of fer v. Heitner*, 32 Rutgers

⁷¹ Telephone Interview

⁷² *Armstrong v. Pom Antitrust Litig.*, 525 F.S. another state); *Stearn v. I*

⁷³ Quoted in David L. *on the Substantive Law of*

⁷⁴ See *Burnham v. S Superior Court*, 480 U.S.

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The legislative history does not reveal why Delaware responded so quickly. Edmund Carpenter, who represented the defendants in the Delaware Chancery Court, offered a theory.⁷¹ He explained that the sequestration statute was very popular with the Delaware bar, presumably because it increased the pool of cases in Delaware for which Delaware lawyers could provide representation. Indeed, he mused that he was probably not very popular among his colleagues for having raised his challenge to the statute. He speculated that the bar followed *Shaffer* very closely and had probably been thinking of a response in the event the U.S. Supreme Court decided as it did. In any event, the constitutionality of this statute was later upheld by the Delaware Supreme Court.⁷² *International Shoe* had disavowed reliance on "fictions of implied consent," but it would appear that such fictions remain useful.

The Greyhound Corporation responded to this change in Delaware law by moving its state of incorporation to Arizona. Greyhound's management explained that "it would be an unreasonable burden upon directors not resident in Delaware, several of whom reside in Arizona and California, to be required to journey to Delaware to defend a case there when they have no contact with that state."⁷³

The Continuing Importance of Shaffer Today

Shaffer marked the beginning of a period of intense exploration by the U.S. Supreme Court of the limits on state jurisdictional authority. Prior to *Shaffer*, it had been nearly twenty years since the Court had decided a significant jurisdiction case, that being *Hanson*. In just under thirteen years following *Shaffer*, the Court would decide another eleven cases.⁷⁴ Those cases fleshed out the theory implicit in *Shaffer*.

⁷⁰ Synopsis, Del. Sen. Bill No. 341 (1977), quoted in Sue Ann Dillport, *Jurisdiction over Nonresident Directors, Officers, and Shareholders: "Director" Consent Statutes After Shaffer v. Heitner*, 32 Rutgers L. Rev. 255, 267 n.75 (1979).

⁷¹ Telephone Interview with Edmund Carpenter, II (Oct. 20, 2003).

⁷² *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980); see *In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F.Supp. 1265, 1271 (D. Md. 1981) (upholding similar statute in another state); *Stearn v. Malloy*, 89 F.R.D. 421, 424 (E.D. Wis. 1981) (same).

⁷³ Quoted in David L. Ratner & Donald E. Schwartz, *The Impact of Shaffer v. Heitner on the Substantive Law of Corporations*, 45 Brook. L. Rev. 641, 653-54 (1979).

⁷⁴ See *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985);

Shaffer also marked the Court's endorsement of *Hanson's* emphasis for personal jurisdiction on purposeful availment by the defendant, rather than *McGee's* focus on reasonableness that would include the interests of the plaintiff and the state in assuring a remedy. In holding that Delaware lacked jurisdiction over the officers and directors of a Delaware corporation sued for breach of their fiduciary obligations in violation of Delaware law, the Court stressed that the defendants never "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State."⁷⁵ Subsequent cases would reiterate this language and build on the requirement of "purposeful availment" by the defendant.⁷⁶

Although *Shaffer* is significant for its endorsement of the purposeful-availment test, the Court's actual application of that test to the facts of *Shaffer* has not proved influential. Eight years after *Shaffer*, in *Burger King Corp. v. Rudzewicz*,⁷⁷ the Court upheld personal jurisdiction in a situation that had many similarities with *Shaffer*. Justice Brennan, who had dissented from Part IV of *Shaffer*, wrote *Burger King* and made no effort to distinguish *Shaffer*; instead, he just ignored it. *Burger King* involved a suit by a huge Florida-based franchisor against its Michigan franchisee. The Court upheld Florida jurisdiction over the Michigan franchisee although there was no evidence that the defendant had "ever set foot" in Florida. The Court stressed that the franchisee had entered into a long-term contractual relationship with the Florida company and derived benefits from that relationship. One might have said the same about the directors in *Shaffer*. The *Burger King* Court also thought it significant that the franchise contract included a choice-of-law clause selecting Florida law. Again, one might have said the same about the application of Delaware law in *Shaffer*. Of course, there are differences between *Shaffer* and *Burger King*. What is striking, however, is that even though the lower court had relied in part on *Shaffer* to dismiss,⁷⁸ the *Burger King* majority did not feel the need to distinguish *Shaffer*,

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

⁷⁵ 433 U.S. at 216 (quoting, with brackets, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

⁷⁶ See, e.g., *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

⁷⁷ 471 U.S. 462 (1985).

⁷⁸ *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1509 (11th Cir. 1984), *rev'd*, 471 U.S. 462 (1985).

and even the dissent for their conclusion to uphold jurisdictional statutes.⁷⁹ Beyond th

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⁸⁰ See Michael B. Mus a *Doctrine Whose Time Ha Shaffer, Burnham, and Ne of the Power Theory*, 45 En

⁸¹ 15 U.S.C. § 1125(d)

⁸² *Caesars World, Inc.* The court also rejected the of thing to serve as a res: property. Even if a domain and assign its place of regis

⁸³ See, e.g., *FleetBoston* 121 (D. Mass. 2001); *Cat CyberSpace: Problems with Tech. L.J.* 989, 1006-18 (20

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and even the dissenters in *Burger King* did not rely on *Shaffer* as a basis for their conclusion against jurisdiction. Today, Part IV is primarily cited to *uphold* jurisdiction over corporate directors based on state consent statutes.⁷⁹ Beyond this, it is largely ignored.

Likewise, the impact of the opinion's Part III on attachment jurisdiction remains uncertain. Several states, including notably New York, continue to exercise quasi in rem jurisdiction, attaching bank accounts as the basis for jurisdiction.⁸⁰ These states in essence rely on the theory suggested by the Powell and Stevens concurrences. Moreover, Congress has turned to in rem jurisdiction as a technique to secure jurisdiction in certain Internet cases. The Anticybersquatting Consumer Protection Act of 1999 provides that if an Internet domain name violates the rights of a registered trademark and if the trademark owner is not able to obtain in personam jurisdiction over the offending domain name owner, the trademark owner may bring an in rem action against the domain name.⁸¹ For purposes of such an action, the "situs" of the domain name is deemed to be the place where the domain name "registrar, registry, or other domain name authority" is located. In upholding the constitutionality of the statute, a district court in Virginia has explained, "under *Shaffer*, there must be minimum contacts to support personal jurisdiction only in those in rem proceedings where the underlying cause of action is unrelated to the property which is located in the forum state. Here the property, that is, the domain name, is not only related to the cause of action but is its entire subject matter."⁸² Other courts and commentators have questioned this interpretation of *Shaffer*.⁸³ Eventually, the Supreme Court may need to reenter this arena and clarify the law.

Even aspects of *Shaffer's* core analysis with respect to attachment jurisdiction have been called into question by *Burnham v. Superior*

⁷⁹ See, e.g., *In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F.Supp. 1265, 1271 (D. Md. 1981); *Stearn v. Malloy*, 89 F.R.D. 421, 424 (E.D. Wis. 1981).

⁸⁰ See Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 *Brook. L. Rev.* 1059, 1089-99 (1990); Holly Haskew, *Shaffer, Burnham, and New York's Continuing Use of QIR-2 Jurisdiction: A Resurrection of the Power Theory*, 45 *Emory L.J.* 239, 258-66 (1996).

⁸¹ 15 U.S.C. § 1125(d)(2)(A).

⁸² *Caesars World, Inc. v. Caesars-Palace.com*, 112 F.Supp.2d 502, 504 (E.D. Va. 2000). The court also rejected the argument that a domain name registration is not a proper kind of thing to serve as a res: "There is no prohibition on a legislative body making something property. Even if a domain name is no more than data, Congress can make data property and assign its place of registration as its situs." *Id.*

⁸³ See, e.g., *FleetBoston Financial Corp. v. FleetBostonFinancial.com*, 138 F.Supp.2d 121 (D. Mass. 2001); Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 *Berkeley Tech. L.J.* 989, 1006-18 (2002).

Court,⁸⁴ the last of the Supreme Court's set of jurisdiction cases. *Burnham* involved jurisdiction based solely on the transient presence of the defendant who was served with process while in the forum state. Many observers and a few lower courts had concluded that after *Shaffer* such "tag" jurisdiction was unconstitutional.⁸⁵ They reasoned that *Shaffer* had cracked the remaining bedrock principle of *Pennoyer*—that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."⁸⁶ *Shaffer* had undermined the "property" portion of this principle, and therefore the "persons" portion seemed equally vulnerable.

The predictions proved wrong. In *Burnham*, the Court unanimously, though without a majority opinion, upheld the constitutionality of tag jurisdiction. Justice Scalia, writing for at most a plurality, offered a narrow reading of *Shaffer*. According to him, *Shaffer* simply dealt with suits "against" property. *International Shoe* dealt with suits against people, but that case had explicitly stated that its "fair play and substantial justice" analysis applied only where the defendant "be not present within the territory of the forum."⁸⁷ Thus, neither *Shaffer* nor *International Shoe* had anything to say about situations in which the defendant was physically present within the forum state. After reviewing the historical record, Justice Scalia concluded that tag jurisdiction was considered acceptable at the time of the adoption of the Fourteenth Amendment and that therefore it could not violate the Due Process Clause.

Justice Scalia admitted that the broader approach of the *Shaffer* Court presented something of a problem for his analysis. *Shaffer* had conducted an independent inquiry into the desirability and fairness of attachment jurisdiction, explaining that "'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."⁸⁸ Justice Scalia has repeatedly rejected this type of

⁸⁴ 495 U.S. 604 (1990).

⁸⁵ See, e.g., Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F.Supp. 305, 312 (N.D. Ill. 1986); Hans Smit, *The Implications of Shaffer v. Heitner: Seminal or Minimal*, 45 Brook. L. Rev. 519, 523 (1979); David Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 Wash. U. L.Q. 273, 303; Jack Friedenthal, *A Comment on the Impact of Shaffer v. Heitner in the Classroom*, 1978 Wash. U. L.Q. 319, 320.

⁸⁶ 95 U.S. at 722.

⁸⁷ 326 U.S. at 316.

⁸⁸ 433 U.S. at 212.

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⁹⁰ 495 U.S. at 627 n.3

⁹¹ *Id.* at 622.

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open-ended fairness analysis of the Due Process Clause,⁸⁹ calling it “imperious”: “‘Due process’ . . . does not mean that process which shifting majorities of this Court feel to be ‘due,’” he argued in *Burnham*.⁹⁰ He reconciled the approach in *Shaffer* with his historical approach by observing that perhaps *Shaffer*’s approach “can be sustained when the ‘perpetuation of ancient forms’ is engaged in by only a very small minority of the States” and by noting that Delaware was alone in treating the state of incorporation as the situs of stock.⁹¹ Thus, Justice Scalia’s opinion suggests that *Shaffer* should be read narrowly to apply only to cases involving “intangible property that has no reasonable nexus with the forum.”⁹² Interestingly, Justice Scalia has continued to suggest that *Shaffer* should be read narrowly, if not outright overruled, arguing that the case, “at least in [its] broad pronouncements if not with respect to the particular provisions at issue, [was] wrongly decided” and that because the *Shaffer* “rationale has no basis in constitutional text and itself contradicts opinions never explicitly overruled [it] has no valid stare decisis claim upon me.”⁹³

In some respects, the aspect of *Shaffer* that was most influential in shaping the future of jurisdiction law is the issue that neither party even noticed—whether the state-court determination was immediately appealable. Over the next few years, many of the Court’s most important jurisdiction decisions would arise on appeals from state courts that had upheld jurisdiction but where no final judgment on the merits had been entered.⁹⁴ Interestingly, eleven years after *Shaffer*, in *Van Cauwenberghe v. Biard*,⁹⁵ the Supreme Court would undermine this aspect of *Shaffer*, suggesting that a decision upholding jurisdiction is not a final judgment at least for purposes of reviewing federal-court decisions pursuant to 28 U.S.C. § 1291. However, by then the Court had decided most of its significant jurisdiction cases.

Conclusion

Notwithstanding the erosion of the applicational aspects of its holding, *Shaffer* remains a staple of first-year civil procedure courses

⁸⁹ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁹⁰ 495 U.S. at 627 n.5.

⁹¹ *Id.* at 622.

⁹² Russell Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 Rutgers L.J. 611, 623 (1991).

⁹³ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36, 38 (1991) (Scalia, J., concurring).

⁹⁴ See *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Calder v. Jones*, 465 U.S. 783 (1984); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

⁹⁵ 486 U.S. 517, 525 (1988).

because it laid the important theoretical foundation for the Court's subsequent jurisdiction cases. Justice Stewart had predicted as much. A month before the case was handed down, Justice Stewart commended Justice Marshall on his draft opinion, writing:

This seems to me one of the most interesting cases we have had here in a long time. I think you have written an excellent opinion, and if, as I hope, it becomes the opinion of the Court, it will surely be immortalized as required reading for every first year law student in the country for years to come.⁹⁶

Similarly, Justice Powell called Justice Marshall's opinion "a 'must' for the textbooks."⁹⁷

Shaffer—and indeed the entire set of Supreme Court cases on territorial jurisdiction—will likely retain their preeminence as part of the first-year curriculum in law schools. The reason is that jurisdiction is a topic that implicates both the identity of states as sovereigns and also the core questions about when governments can legitimately exercise power over individuals. As one commentator has observed, "Jurisdiction is power."⁹⁸ *Shaffer v. Heitner* helps establish the modern framework for analyzing when that power can reasonably be exercised.

⁹⁶ Letter from Justice Potter Stewart to Justice Thurgood Marshall, May 18, 1977.

⁹⁷ Letter from Justice Lewis Powell, Jr., to Justice Thurgood Marshall, May 31, 1977.

⁹⁸ Donald Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 Brook. L. Rev. 565, 568 (1979).

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¹ 501 U.S. 1 (1991).