Shaffer v. Heitner: Holding, Implications, Forebodings

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By Stefan A. Riesenberg*

Issues, Decision and the Court's Opinions

On June 24, 1977, the Supreme Court of the United States decided Shaffer v. Heitner,1 which spelled out important constitutional limitations on the exercise of quasi-in-rem jurisdiction by the courts of the United States based on the due process clauses of the fifth and fourteenth amendments. Because of the sweeping statements in the majority opinion of Mr. Justice Marshall, and the reservations contained in the separate concurring opinions of Mr. Justice Powell and Mr. Justice Stevens, as well as in the partly concurring and partly dissenting opinion of Mr. Justice Brennan, the decision was bound to create doubts and perplexity in the lower courts. The cases decided in the wake of Shaffer v. Heitner2 fully confirm the early prognostication. Although an attempt to delineate the contours of what remains of quasi-in-rem jurisdiction, like an attempt to trace the permissible scope of in personam jurisdiction, might be premature if not futile, the time does seem ripe to have a searching look at Shaffer v. Heitner in the mirror of its judicial aftermath.

The case as considered by the Highest Bench presented a narrow issue: the constitutionality of Delaware’s sequestration statute,3 as applied in the instant case. The litigation consisted of a shareholder’s derivative suit, against a Delaware corporation and a number of present and former directors or officers thereof, brought in the Court of Chancery for New Castle County, Delaware by Heitner, a nonresident owner of one share of stock in the corporation. All of the individual defendants were nonresidents, but the majority of them did own stock or options in the defendant corporation. At the time he filed his com-

* Dr. Jur., 1932, Breslau; Dr. Jur., 1934, Milan; LL.B., 1937, University of California; S.J.D., 1939, Harvard. Professor, University of California, Berkeley.
2. The cases are discussed at text accompanying notes 23-43 infra.

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plaint, plaintiff obtained a court order for the sequestration of defendants’ stock rights, which under the law of Delaware have their situs in that state regardless of the location of the certificates. The sequestration was executed by service on the Delaware corporation, and the individual defendants were notified of the commencement of the suit by certified mail and by publication. The defendants appeared specially, moving to quash the service of process and vacate the sequestration order on two grounds: first, that the ex parte sequestration, having been executed without prior notice and hearing, violated due process, and, second, that Delaware’s exercise of jurisdiction likewise violated due process because of the lack of sufficient contacts of the defendants with Delaware.

The Court of Chancery held that the Delaware sequestration act did not entail a deprivation of such severity as to require prior notice and hearing, and that the presence of the stock rights in Delaware constituted a constitutionally sufficient basis for the exercise of quasi-in-rem jurisdiction. The Delaware Supreme Court affirmed, holding that Delaware’s sequestration procedure provided due process and that the exercise of quasi-in-rem jurisdiction by Delaware in the instant case did not violate constitutional restrictions on the exercise of jurisdiction by a state. On appeal, the United States Supreme Court reversed on the ground that “Delaware’s assertion of jurisdiction over appellants in this case is inconsistent with [the] constitutional limitation on state power,” as enunciated by the Court.

Mr. Justice Marshall, writing for the majority composed of himself, Chief Justice Burger and Justices Blackmun, Stewart, and White, held applicable to quasi-in-rem jurisdiction as well as to in personam jurisdiction the requirement that the defendant have sufficient contacts with the forum to satisfy the traditional notions of fair play and substantial justice, as laid down in the seminal International Shoe Co. case. Therefore, the opinion continued, ordinarily the mere presence of assets in a state fails to provide a proper jurisdictional basis for actions not arising out of disputes relating to such assets, even where the jurisdiction over such actions is limited to the quasi-in-rem type. Broadly speaking, the majority’s opinion rejects the notion that on principle quasi-in-rem jurisdiction can constitutionally rest on contacts, such as the mere presence of property, that would not support in personam ju-
risdiction in the same action, and mandates the application of the same tests for both forms of jurisdiction. The concurring opinions of Justices Powell and Stevens sharply criticized the majority's superimposition of the standards governing in personam jurisdiction upon quasi-in-rem jurisdiction. The former expressly reserved judgment "on whether ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within a State to the extent of the value of the property." In other words, Justice Powell did not wish to foreclose the retention of quasi-in-rem jurisdiction based solely upon the presence of property permanently located in the state (prompting, necessarily, a question as to the degree of permanency required). Justice Stevens concurred with this suggested exception, and emphasized further that the disposition of the case before the Court did not call for the "invalidating of other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit."10

Even the broad language of the majority opinion, however, calls for caution not to overestimate the effects of the changes in the law wrought by the judgment:

1. Shaffer v. Heitner does not abolish quasi-in-rem jurisdiction; the opinion holds only that quasi-in-rem jurisdiction must be predicated on constitutionally adequate minimum contacts consisting of more than the mere presence of property, except where the action relates to such property.

2. The Court overruled Pennoyer v. Neff11, Harris v. Balk12, and their progeny only "to [the] extent that the prior decisions are inconsistent with [the] standard [of minimum contacts elucidated by International Shoe]."13

3. The opinion expressly reserved the question of "whether the presence of a defendant's property in a state is a sufficient basis for jurisdiction when no other forum is available to the plaintiff,"14 without, however, explaining the meaning of that caveat.

4. The opinion conceded that the presence of assets may constitute

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8. "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." 433 U.S. at 212.
9. Id. at 217.
10. Id. at 219.
11. 95 U.S. 714 (1878).
14. Id. at 211 n.37.
a sufficient basis for the exercise of jurisdiction in any one of several possible situations:

(a) the property is present because of an effort to avoid the owner's obligation;

(b) its purpose is merely the attachment of the property "as security for a judgment being sought in a forum where the litigation can be maintained consistently with International Shoe";¹⁵

(c) the action is based on a sister state judgment and is brought to collect it out of local assets;¹⁶

(d) or, finally, the presence of the property demonstrates that the owners located it in the forum State for the express purpose of invoking the benefits and protection of its laws.¹⁷

Accommodation of these special situations could greatly limit the extent to which the new rule effects a change in the prior law, especially if they are broadly construed.¹⁸ Moreover, other factors may possibly call for additional qualifications. Perhaps one of the most important problems left open is the effect of the plaintiff's residence in the forum. Both Pennoyer v. Neff and Harris v. Balk dealt with the exercise of quasi-in-rem jurisdiction for the benefit of a resident plaintiff, a circumstance noted but not specifically assessed by the majority opinion.

Undoubtedly, the crucial rationale for the Court's decision is the conclusion that the limited scope of a quasi-in-rem money judgment, which precludes its collectibility from assets not seized as basis of jurisdiction,²⁰ is in itself an inadequate ground for considering the presence of the seized assets to be a sufficient minimum contact to support exercise of quasi-in-rem jurisdiction. Unhappily, the Court obscures this rationale by confusing the limited effect of a quasi-in-rem judgment

¹⁵ Id. at 210.
¹⁶ Id. at 210 n.36.
¹⁷ Id. at 216 (quoting from Hanson v. Denckla, 357 U.S. 235, 253 (1958)). Justice Brennan refers to the same statement in his opinion. 433 U.S. at 228.
¹⁸ The Court expressly refused to examine the facts of the cases decided on the rationales of Pennoyer and Harris in order to determine whether jurisdiction might have been sustained under the new standard. 433 U.S. at 212 n.39. The Court, however, intimated that the new analysis might "result in significant changes" in cases where the property, which until Heitner served as basis for state-court jurisdiction, is completely unrelated to the plaintiff's cause of action and the presence of the defendant's property does not suggest the existence of other ties. Id. at 208-09.
¹⁹ Id. at 197 (quoting from Pennoyer); id. at 200 (discussing the status of Epstein in Harris v. Balk).
²⁰ A quasi-in-rem judgment, being a judgment with the execution permanently stayed except against assets attached at the time of the commencement of the action, is not entitled to full faith and credit in a sister state with respect to personal liability. S. Riesenfeld, Creditors' Remedies and Debtors' Protection 395 (2d ed. 1975).
with a limitation on the size of the claim being litigated.\(^{21}\)

In view of the Court’s amorphous recognition of special factors that may render the presence of assets not the sole basis of jurisdiction,\(^{22}\) as well as the inherent difficulties in the application of the minimum contacts test, *Shaffer v. Heitner* has already produced a rich harvest of cases illustrating the uncertainties caused by the new approach to the standards of fair play and substantial justice.

## Subsequent Developments in the Case Law

The significance of *Heitner*, beyond its operation as a potential irritant, can best be judged on the basis of the judicial labors prompted by its new gospel. The presentation will follow the points raised in connection with the discussion of the opinion above.

### Is Quasi-In-Rem Jurisdiction “Scuttled”?\(^{23}\)

The survival of quasi-in-rem jurisdiction (subject to the minimum contacts test of *International Shoe Co.*) was discussed and affirmed in *Intermeat, Inc. v. American Poultry, Inc.*\(^{23}\) In that case the United States Court of Appeals for the Second Circuit held that quasi-in-rem jurisdiction over a nonresident obtained under the New York attachment provisions\(^{24}\) was not vitiated by *Shaffer v. Heitner*, so long as the constitutionally required minimum contacts existed. This was so even though these contacts might not suffice to provide in personam jurisdiction under the local long-arm statute.\(^{25}\) In *Intermeat* a New York corporation brought an action against an Ohio corporation for wrongful rejection of a shipment of meat, delivered to defendant in Philadelphia under a contract entered through the mediation of a Philadelphia broker. The contract had been confirmed by plaintiff’s contract forms sent from its New York headquarters; defendant did not return one of the two copies received.

The action was commenced in the Supreme Court of New York and removed to the United States District Court for the Eastern District of New York. Plaintiff then attached a debt owed to defendant by one of the latter’s customers doing business in New York. The district court ruled that it lacked in personam jurisdiction, but held that it had

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\(^{21}\) 433 U.S. at 207 n.23.

\(^{22}\) “We do not suggest that these illustrations include all the factors that may affect the decision, nor that the factors we have mentioned are necessarily decisive.” *Id.* at 208 n.28.

\(^{23}\) 575 F.2d 1017 (2d Cir. 1978).


quasi-in-rem jurisdiction based on the attachment because defendant had sufficient commercial contacts with New York flowing from prior activities as well as the transaction at issue to sustain jurisdiction. The court of appeals affirmed, holding that "[t]he constitutional standard of due process may be met by fewer contacts . . . than those required under the more restrictive statutory test of 'doing business,' N.Y.C.P.L.R. § 301, . . . or the (possibly) more restrictive test of 'transacting business,' N.Y.C.P.L.R. § 302, since neither of these statutes governs jurisdiction based on attachment."\textsuperscript{26}

In its opinion, the appellate court recognized clearly that in personam jurisdiction in New York had to satisfy the statutory tests as well as the constitutional test, while jurisdiction based on an attachment merely had to meet the constraints of \textit{International Shoe}. In determining whether the requisite minimum contacts were present, the court thought it decisive that the contract in issue possessed a "substantial connection" with New York "along with the added factor of the attachment of an intangible within the jurisdiction of the state."\textsuperscript{27} The court thus read \textit{Heitner} as including the presence of assets as an item in the aggregate of necessary minimum contacts. The panel was neither troubled by nor felt a need to discuss the problem of whether the limited scope of a quasi-in-rem judgment would expose the defendant to the possibly unconstitutional burden of further litigation on the same cause of action.\textsuperscript{28} The court apparently was satisfied that nothing in

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\item \textsuperscript{26} 575 F.2d at 1022.
\item \textsuperscript{27} Id. at 1023.
\item \textsuperscript{28} Until \textit{Shaffer v. Heitner} resort to quasi-in-rem jurisdiction where in personam jurisdiction was not available did not constitute an impermissible or unconstitutional splitting of plaintiff's cause of action. The defendant could protect himself against such splitting by making either a general appearance or a special appearance to ask for the disposition of the action in a more appropriate forum and a stay of further proceedings until such disposition. Moreover the majority of jurisdictions permitted limited appearance restricting maximum liability to the value of the attached property. \textit{See} Turner v. Evers, 31 Cal. App. 3d Supp. 11, 16, 107 Cal. Rptr. 390, 393 (1973); \textit{Restatement (Second) of Judgments} § 11, comment g & Reporter's Note (Tent. Draft No. 5, 1978); \textit{Restatement of Judgments} § 40 (1942). Such limited appearance did not necessarily result in issue preclusion against defendant. \textit{Restatement (Second) of Judgments} § 68.1(e) (Tent. Draft No. 4, 1977); O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 202 (2d Cir. 1978). If the local long-arm statute permitted in personam jurisdiction but plaintiff restricted the relief sought to a quasi-in-rem judgment, defendant apparently could resist a subsequent action on the ground of impermissible splitting of the cause of action. \textit{Restatement (Second) of Judgments} §§ 61-61.2 (Tent. Draft No. 5, 1978). Although, following the holding of \textit{Intermeat}, quasi-in-rem jurisdiction is still available where the requisite minimum contacts are present but the local long-arm statute does not provide in personam jurisdiction, it could be argued that due process should protect the defendant against a subsequent in personam action in an-
Heitner militated against its sustaining quasi-in-rem jurisdiction in the case before it.

United States district courts likewise have upheld quasi-in-rem jurisdiction after Shaffer v. Heitner in cases where jurisdiction in personam could not be exercised for other than constitutional reasons. An illustration in point is Feder v. Turkish Airlines. In that case, plaintiffs, residents of New York and executors of a decedent killed in the crash in Turkey of one of defendant airline's aircraft, commenced an action in personam against the defendant based on the allegation that defendant maintained a sales agent in New York and thus was doing business in that state within the meaning of New York Civil Practice Law & Rules section 301. Defendants moved for dismissal for lack of jurisdiction. Discovery proceedings failed to show the existence of any such agent but did disclose that defendant maintained an account with a New York bank for the purpose of paying for out-of-state purchases of replacement parts. Plaintiffs thereupon attached the account and invoked quasi-in-rem jurisdiction based on the attachment. The court held that the voluntary maintenance of the New York account, while not amounting to doing business within the state, furnished a constitutionally sufficient basis for the exercise of jurisdiction based on attachment and the rendition of a quasi-in-rem judgment. According to the court, it was unnecessary for quasi-in-rem jurisdiction that the property attached be related to the underlying cause of action.

Another recent instance where quasi-in-rem jurisdiction was exercised despite and because of the absence of statutory in personam jurisdiction is National American Corp. v. Federal Republic of Nigeria. Without recounting all the facts of this bizarre litigation, suffice it to state that it involved an action for damages claimed by plaintiff, a Delaware corporation having its principal place of business in New York, against the Federal Republic of Nigeria as the result of Nigeria's breach of a contract for the purchase of 240,000 tons of Portland cement at a price of $14,400,000. The contract provided for issuance of an irrevocable letter of credit by the Morgan Guaranty Trust Co. of New York in the amount of the purchase price, and the Central Bank of Nigeria deposited sufficient funds with the Morgan Guaranty Trust

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Co. to cover the amount of the letter of credit. The Government of Nigeria maintained, in addition, an account of $15,000,000 in United States treasury bills with the Federal Reserve Bank of New York from which Morgan Guaranty could transfer amounts needed whenever the level of the funds held at Morgan fell too low. Enormous port congestion in Nigeria made delivery of the cement impossible and plaintiff was unable to perform the contract. Because of this situation, and other events, plaintiff claimed to be entitled to damages in excess of $14,000,000 plus interest and costs based on repudiation and other breaches of the contract by Nigeria. Having instituted its action, plaintiff obtained an attachment of the accounts maintained by Nigeria at the two New York banks mentioned. Nigeria challenged the quasi-in-rem jurisdiction of the court on several grounds, viz. lapse of the attachments under New York law, absence of the constitutionally mandated minimum contacts for maintaining the action, and failure to comply with the Foreign Sovereign Immunities Act of 1976\footnote{31} which took effect after the institution of the present action.

The district court ruled that the attachments of defendant's bank accounts could still be perfected and that the intervening abolition of quasi-in-rem jurisdiction over foreign states did not affect the procedural posture of the litigation at hand. With respect to the attack of the attachments on the basis of \textit{Shaffer v. Heitner}, the court held that the action of plaintiff was sufficiently related to the accounts to justify the exercise of quasi-in-rem jurisdiction. This applied to the funds held by Morgan Guaranty to cover its letter of credit, issued to plaintiff and claimed to have been unlawfully repudiated, and also to the funds held by the Federal Reserve Bank, because Morgan Guaranty could withdraw them to obtain reimbursement for honoring the letter of credit. Again, quasi-in-rem jurisdiction was held to be open to a plaintiff who could not invoke long-arm jurisdiction because of nonconstitutional barriers.\footnote{32}

\textit{Intermeat, Inc. v. American Poultry, Inc.}\footnote{33} was relied upon and followed in \textit{Drexel Burnham Lambert, Inc. v. D'Angelo}.\footnote{34} In that case plaintiff, a New York corporation doing business as a broker-dealer in securities and commodities brought a quasi-in-rem action against two

\footnote{32. These barriers were discussed in the instant case, 448 F. Supp. at 635, and in the related case, 425 F. Supp. at 1368-72. For a British comparison, see Trendex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356.}
\footnote{33. 575 F.2d 1017 (2d Cir. 1978).}
\footnote{34. 453 F. Supp. 1294 (S.D.N.Y. 1978).}
residents of New Jersey to recover a debit balance in defendants’ joint commodity account with plaintiff. Jurisdiction was obtained by attachment of two other commodity accounts maintained by defendants at the New York City office of a Missouri broker. The court held that absence of jurisdiction under New York’s long-arm statute did not deprive it of quasi-in-rem jurisdiction based on defendants’ maintenance of commodity accounts and activities relating thereto. “Defendants’ activities here exceeded opening a bank account; by maintaining commodities accounts and regularly directing the transaction of business in New York on their behalf, defendants knowingly assumed a predictable risk that they might be compelled to litigate disputes concerning those accounts in New York.”  

A third decision of United States district courts sustaining quasi-in-rem jurisdiction is *Engineering Equipment Co. v. S.S. Selene*, 36 The case involved a suit in admiralty against foreign shipowners seeking recovery of damages for misdelivery of and injury to cargo. Pursuant to Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Cases, 37 plaintiffs in their complaint prayed for a writ of attachment in order to garnish the obligations of certain United States corporations to pay charter hire to the defendants. The court diagnosed the procedure as one for obtaining quasi-in-rem jurisdiction and, as mandated by *Shaffer v. Heitner*, inquired into the existence of sufficient minimum contacts with the forum. The court concluded that, in admiralty cases, the constitutional requirement of minimum contacts derived from the fifth and not the fourteenth amendment, and that therefore in the case of foreign defendants their contacts with the United States as a whole had to be considered. In the case before the court, the requisite minimum contacts were found to exist since defendants’ vessels called at the ports of the United States, and both the claims of the plaintiffs and the obligations of the garnishees arose from the defendants’ activities in the United States. No doubt was expressed as to the continued vitality of the jurisdiction under Supplemental Rule B(1), so long as the requisite minimum contacts exist. 38

Subsequent decisions, likewise, have upheld Supplemental Rule

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35. *Id.* at 1298.
38. 446 F. Supp. at 709-10. Actually, there seems to be no longer any need to characterize jurisdiction based on Supplemental Admiralty Rule B(1) as quasi-in-rem. If sufficient minimum contacts with the forum are present, why should the judgment not be enforceable also against assets found or arising after the original levy?
B(1) against attacks based on *Shaffer v. Heitner*. In *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.* the U.S. District Court for the Western District of Washington held in a carefully researched opinion that maritime attachment was constitutionally permissible although in the instant case its execution without prior notice and hearing violated due process. The same position was taken in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*. In that case, however, due process was observed in that the attachment followed New York procedure, as authorized by Supplemental Rule B(1).

In contrast to this line of cases a totally different assessment of *Shaffer v. Heitner*’s impact on the survival of quasi-in-rem jurisdiction was voiced by Judge Tenney in *Marketing Showcase Inc. v. Alberto Culver Co.* This litigation was commenced in a New York state court as a quasi-in-rem action prior to the U.S. Supreme Court’s decision in *Shaffer v. Heitner*. Before out-of-state service was completed pursuant to New York law, defendant, a Delaware corporation with headquarters in Illinois, removed the suit to the U.S. District Court for the Southern District of New York. Upon the handing down of *Shaffer v. Heitner* defendant moved for dismissal of the action on the grounds of lack of proper service and lack of jurisdiction. The court denied the motion and held that the proceedings could be continued as an in personam action, provided jurisdiction could be rested on New York’s long-arm provisions. Finding that plaintiff had made out a prima facie case for jurisdiction based on defendant’s doing business in New York within the meaning of New York Civil Practice Law and Rules section 301, the court, invoking Federal Rule of Civil Procedure 4(c), validated nunc pro tunc the service made by the Deputy Sheriff of Illinois pursuant to N.Y.C.P.L.R. sections 311, 313 and 314.

While the actual result of the case appears to be sound, Judge Tenney’s opinion is startling in that the continuation of the action was made to depend not on the existence of minimum contacts as required by due process but on the fulfillment of the more stringent requisites of the local long-arm statute. The reason for this novel approach was Judge Tenney’s conclusion that in diversity cases there is no longer any room for quasi-in-rem jurisdiction based upon state law, but that any exercise of jurisdiction in such cases must rest on the long-arm statute of the forum. He read *Shaffer v. Heitner* as having “scuttled the juris-

diction base" of quasi-in-rem proceedings and found "the entire branch of that jurisdiction" to be violative of due process. Judge Tenney subsequently dissolved the attachment.

What is Left of Pennoyer and Harris?

As has been noted, the majority in Heitner expressly declined to rule on the continued validity, if any, of Pennoyer v. Neff and Harris v. Balk were the new test to be applied to the facts of those cases. While the statements of fact included in the official reports of the Pennoyer and Harris decisions are not sufficiently detailed to assess conclusively the forum contacts of the causes of action asserted in these quasi-in-rem suits, the printed records contain additional details that throw more light on the underlying circumstances.

In Pennoyer, the judgment collaterally attacked in the action that eventually reached the Supreme Court was rendered in an action instituted by Mitchell against Neff, the plaintiff in the suit against Pennoyer. Mitchell, an attorney in Portland, Oregon, who had practiced law in that state for more than five years at the time of the commencement of his action on November 3, 1865, brought the action to recover attorney's fees for services rendered, at the request of Neff, between January 24, 1863, and May 15, 1863. Neff had paid $6.50 on January 24, 1863, but more than $200 remained unpaid. Whether Neff lived in Oregon at that time is not disclosed. At any rate, he was not in Oregon at the time of the suit, but reputedly was in California; his whereabouts were not known to Mitchell. The Oregon court rendered judgment on February 19, 1866, which Mitchell enforced by executing against a tract of land to which Neff had obtained a United States patent a month after Mitchell's judgment. Pennoyer claimed title under the execution sale when Neff, surfacing almost nine years later, instituted proceedings in ejectment and contested the validity of Mitchell's judgment. It would certainly seem that the requisite minimum contacts did in fact exist with respect to Mitchell's cause of action. The compensation claimed was for services rendered in the forum, under a contract with a resident of the forum, which was concluded in the forum even if

42. Id. at 758, 760.
44. 95 U.S. 714 (1878).
45. 198 U.S. 215 (1905).
46. Record at 26. While most of the relevant facts are set out in the report of the Supreme Court decision, the verified allegation that Neff specifically requested the particular services and made a small payment therefor is not repeated in that report.
Neff did not request the services in person but by letter from California.

Similarly, the facts in *Harris v. Balk* as culled from the record\(^4\) support the conclusion that Maryland might have exercised jurisdiction over Balk without constitutional defects even if Harris had never made his historic trip to Baltimore. Epstein, a resident of Maryland, was an importer of general merchandise, doing business as the Baltimore Bargain House. Harris and Balk, both retailers in North Carolina, were his customers. Balk was indebted to Epstein in the amount of $344 for shipments of merchandise to him in North Carolina during the fall of 1895. Balk was on friendly terms with Harris and had repeatedly lent money to him, of which $180 remained unpaid and constituted the debt later garnished by Epstein. When Harris went to Baltimore to purchase merchandise from Epstein he carried a message to Epstein from Balk regarding the settlement of Balk’s debt. Thus, unless Balk had ordered the merchandise from Epstein during visits of Epstein or his sales force in North Carolina, Maryland’s exercise of jurisdiction over Balk would not have raised constitutional difficulties.

*The Role of the Plaintiff's Residence*

Both *Pennoyer v. Neff* and *Harris v. Balk* involved actions by plaintiffs who were residents of the forum state against out-of-state defendants. But it is highly problematic whether residency of the plaintiff constitutes a legitimate item in the computation of the relevant minimum contacts. Certainly it would appear that residence of the plaintiff coupled only with a mere fortuitous and transient presence of assets of defendant standing alone would not immunize jurisdiction based thereon against constitutional attack.

The role of plaintiff’s residence as one of the relevant minimum contacts is not easily quantified. Although there is judicial as well as statutory authority for differentiating in the exercise of jurisdiction between resident and nonresident plaintiffs,\(^4\) a distinction invoked in *Pennoyer v. Neff*—a policy of that type must at some point run afoul of the privileges and immunities clause of article IV, section 2 of the

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Constitution.49

Jurisdiction via Garnishment

Nothing in Shaffer v. Heitner impairs the teachings of Harris v. Balk with respect to jurisdiction over the garnishee. Provided there is jurisdiction over the absent defendant, jurisdiction over the garnishee may be exercised whenever there is in personam jurisdiction over him. Since transient presence of the defendant and service during such presence has not yet been overturned as a constitutionally acceptable basis for jurisdiction over individuals,50 such jurisdiction also can be invoked by the garnishor as statutory representative of the garnishee's creditor.51 Yet, despite the silence of Shaffer on that aspect of Harris v. Balk, it would seem that a reexamination of these principles may be expected.

Equally open to question is the constitutionally permissible scope of garnishment when the garnishee is an out-of-state corporation.52 If the doctrinal basis of garnishment is still the notion that the garnishing creditor steps into the jurisdictional shoes of his alleged debtor, it would follow that a foreign corporation can be garnished with respect to all debts owing to the principal defendant or judgment debtor over which the state could have exercised jurisdiction in an action by such defendant or judgment debtor. While older cases base the garnishability of foreign corporations on their acceptance of jurisdiction or presence in the state of garnishment,53 the more recent analysis of the foundations of an in personam jurisdiction over foreign corporations54 would also apply to garnishment proceedings against such corporations. In other words, long-arm statutes could be invoked by garnishors if the local garnishment statutes permit out-of-state service


50. This jurisdictional basis has survived Heitner according to the lower courts. See Driver v. Helms, 577 F.2d 147, 156 n.25 (1st Cir. 1978).


52. Attachment of a debt of a domestic corporation owed to an out-of-state corporation was involved and upheld in Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941).


of garnishment notices.\textsuperscript{55} It has been suggested in a recent case that garnishment must be restricted to forum-connected debts of the garnishee,\textsuperscript{56} but this limitation seems to be narrower than constitutionally required.

**The Blurred Contours of Asset-Based Jurisdiction**

The majority opinion in *Shaffer* suggested the survival of certain categories of asset-based jurisdiction, that is, cases where the presence of assets is in itself a dominant factor for the exercise of some type of jurisdiction. The Court distinguished between those situations in which jurisdiction is based on the purposeful presence of assets to which the cause of action relates, and those cases where the purpose behind the presence of assets is immaterial and the suit is therefore not asset related. The latter category includes three special settings: absence of another forum, enforcement of a judgment already obtained, and those cases in which attachment in one forum must be followed by the institution and successful completion of an in personam action in another forum. The lower courts were quick to resort to these escape hatches.

Even prior to *Shaffer v. Heitner*, some jurisdictions permitted the defendant in a quasi-in-rem action to make a special appearance for the purpose of pleading forum non conveniens. The best practice following a granting of that motion was not dismissal of the action and release of the attachment, but a stay of all future proceedings until a disposition of the controversy in the proper forum.\textsuperscript{57} Justice Marshall's opinion in *Heitner* gave this solution a constitutional underpinning which was relied upon in *Carolina Power & Light Co. v. Uranex*.\textsuperscript{58} In that case, plaintiff, a North Carolina public utility company, instituted

\textsuperscript{55} Ordinarily garnishment notices must be served by a sheriff of the forum state, but a state may permit out-of-state service. *See* dictum in Glenn v. Ferrell, 5 Utah 2d 439, 304 P.2d 380 (1956), and comment thereon in Riesenfeld, *Creditors' Remedies and the Conflict of Laws—Part One: Individual Collection of Claims*, 60 COLUM. L. REV. 659, 679 (1960).

\textsuperscript{56} *Mississippi Chem. Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977). The decision was based on an observation in *Steele v. G.D. Searle & Co.*, 483 F.2d 339, 348 n.24 (5th Cir. 1973): "Even under the most restricted notions of situs, however, attachment jurisdiction would be permissible here, since a portion [sic] of the monies owed to appellee by residents of Mississippi does relate to transactions conducted in Mississippi." Actually, the principal garnishee in *Steele* was a Maryland corporation owing the debt to a Delaware corporation with its principal place of business in Illinois. *Id.* at 341 n.5. The *Steele* court did not intimate that the garnishment was invalid to the extent that the indebtedness resulted from out-of-state transactions.

\textsuperscript{57} *See* S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 248 n.30, 396 (2d ed. 1975).

\textsuperscript{58} 451 F. Supp. 1044 (N.D. Cal. 1977).
a quasi-in-rem action against a French business enterprise for the breach of a contract to deliver uranium. Jurisdiction was based on the attachment of a debt owed by a California-based corporation under a contract with Uranex to ship uranium to two states other than California. Except for these funds in California, Uranex had no contacts with the forum. The contract between plaintiff and Uranex provided for arbitration in New York and the parties initiated such proceedings subsequent to the attachment. Some time after the service of the garnishment notice, *Shaffer v. Heitner* was decided; defendant thereupon moved for dismissal on the grounds that the forum lacked sufficient contacts for the exercise of jurisdiction, and that no attachment could be maintained pending arbitration proceedings. The court rejected both contentions and held that while it was without jurisdiction to adjudicate the merits of the controversy, it did have the power to order an attachment of defendant's property as security for a recovery by plaintiff. The court rationalized that such property was likely to be the only source for the collection of a sister state judgment and its presence in the forum was not merely fortuitous.\(^{59}\)

The absence of any forum with in personam jurisdiction and the previous recovery of a judgment in another forum by plaintiff were invoked as grounds for jurisdiction based on the mere presence of assets in *Louring v. Kuwait Boulder Shipping Co.*\(^{60}\) and in *Rich v. Rich.*\(^{61}\) In the former case the court held that absence of another forum within the United States permitted it to exercise jurisdiction in an action against a Kuwait corporation commenced by garnishment of a debt owed to defendant by a corporation incorporated and maintaining an office in the forum state. In *Rich* defendant allegedly owed plaintiff unpaid alimony under a Mexican divorce decree. Defendant was a resident of France, but had inherited an estate in New York. The New York Supreme Court held that under these circumstances it could attach the property and exercise jurisdiction based on that attachment. Of course, in the case of the enforcement of a sister-state judgment, the arguments for asset-based jurisdiction are even stronger in view of the full faith and credit clause.\(^{62}\)

Undoubtedly, the most troublesome cases of asset-based jurisdic-

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\(^{59}\) The court maintained the attachment for 30 days, during which time plaintiff was to file an action in a forum having in personam jurisdiction over Uranex. Apparently the attachment was to be extended if such action was filed during that interval.

\(^{60}\) 455 F. Supp. 630 (D. Conn. 1977).


tion will be those where the presence of the property provides the dom-
inant contact with the forum because defendant sought the benefits of
protection by the forum of his interest, and the cause of action in some
fashion relates to the property. Unfortunately, the outer limits of ju-
risdiction based on the purposeful presence of property remains
shrouded in mystery, especially since the Supreme Court, as dis-
cussed above, in Heitner never clearly stated whether the standards of
International Shoe require identical contacts for those adjudications not
limited as to their recognition and enforceability, and those adjudica-
tions binding or enforceable only with respect to specific property inter-
ests. From the illustrations given by the majority opinion, it seems to
follow that a state has jurisdiction to enforce consensual security inter-
ests in realty as well as in chattels located within its boundaries at the
time the action is commenced. This conceptualization would include
situations where the secured party intended the chattels to be present in
that state, and perhaps even cases where the chattels were brought by
the debtor to that state per nefas. There would, however, be no juris-
diction to render an in personam judgment for the deficiency, unless
the secured debt itself arose out of a transaction furnishing the requisite
contacts.

A special problem is presented by the jurisdictional effects of
opening a bank account in a particular state, a manifest source of ag-
ony for the lower courts. Justice Stevens clearly anticipated further
difficulties with that issue in his concurring opinion criticizing the
majority opinion for the uncertainty of its reach: "If I . . . open a bank
account in [another state], I knowingly assume some risk that the state
jurisdiction to collect a sister-state judgment, see David M. Rice, Inc. v. Intrex, Inc., 257
N.W.2d 370 (Minn. 1977).

64. Although the majority opinion, in analyzing the significance of a purposeful pres-
ence of property, invoked the rationale of Hanson v. Denckla, id. at 208 n.26, it warned
immediately that its catalogue of factors determining jurisdiction was neither inclusive nor
conclusive, id. at 208 n.28.
65. The enforcement of security interests in chattels is governed by U.C.C. § 9-501(1) &
(5), permitting either foreclosure or action on the secured debt and levy on the collateral. In
view of § 9-501(5) it should be immaterial that the secured creditor proceeds by quasi-in-
rem action on the underlying debt and levy of execution rather than by foreclosure. It is
clear that the state where the chattel is located should have jurisdiction to enforce rights in
the chattel and that such determination is entitled to full faith and credit. This applies even
if the presence in the forum is in violation of the security agreement. See Curry v. McCan-
less, 307 U.S. 357, 363 (1939); Green v. Van Buskirk, 74 U.S. (7 Wall.) 139 (1868); Green v.
Van Buskirk, 72 U.S. (5 Wall.) 307 (1866); Restatement (Second) of Conflict of Laws §§ 60, 247 (1971).
with the state, though minimal, gives rise to predictable risks. While the opening of a bank account by a foreign corporation, standing alone, does not constitute "doing business" within the meaning of statutes governing long-arm jurisdiction, it has been held even after Shaffer v. Heitner that such an action will support quasi-in-rem jurisdiction, at least with respect to any transactions sought to be facilitated by the opening of the account. Some courts have indicated a willingness to be satisfied with a rather loose nexus between the establishment of the account and the transaction underlying the suit. Thus, it has been held that maintenance of a checking account, established in Colorado by a New York publisher to receive subscription fees paid for a magazine printed in and mailed from Florida, furnished a sufficient jurisdictional basis for an in personam action by the Florida printer against the New York publisher to recover a balance remaining on the printing bill already paid in part by a check on the Colorado account. Similarly, in the aforementioned Feder case, the presence of a bank account established to facilitate purchase of aircraft parts or components was held to furnish a sufficient basis for quasi-in-rem jurisdiction in an action by New York residents for wrongful death caused by an airplane crash abroad. It is worth noting that the absence of another forum could in all probability have been invoked as an equally or perhaps even more appropriate ground for jurisdiction.

The Fate of Seider v. Roth

Three days after its decision in Shaffer v. Heitner, the Supreme Court vacated a judgment of the Minnesota Supreme Court that had adopted as Minnesota law New York's controversial Seider v. Roth doctrine. The case was remanded for further consideration in the light

66. 433 U.S. at 218.
68. "The funds held by Morgan were the source of payments... which would have been made but for the disputes which subsequently arose. Therefore, these funds would appear to have a sufficient nexus to plaintiff's cause of action to justify their attachment as a basis for quasi-in-rem jurisdiction." National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 635 (S.D.N.Y. 1978).
70. 441 F. Supp. 1273 (S.D.N.Y. 1977); see text accompanying note 29 supra.
71. In O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 198 (2d Cir.), cert. denied, 99 S. Ct. 639 (1978), Judge Friendly intimated that a tortfeasor's maintaining bank accounts, without other contacts with the forum, would not be a sufficient contact for attachment jurisdiction in an action for personal injuries suffered outside the forum.
of *Shaffer v. Heitner*. The Supreme Court of Minnesota adhered to its former holding.

*Seider v. Roth* permits the victim of an accident outside the forum state causing personal injury to obtain jurisdiction over the alleged nonresident tortfeasor by garnishing the latter's liability insurer, provided the insurer does business within the forum. Under New York law the liability of the insurer to defend and indemnify the insured constitutes a garnishable debt which in the case of drivers of motor vehicles cannot be rendered nongarnishable by the wording of the policy. *Seider v. Roth* had been reaffirmed repeatedly by the New York Court of Appeals including a decision handed down only a few weeks before the *Shaffer* decision. Under New York law only resident plaintiffs can invoke the benefits of the rule.

As a result of the Supreme Court's holding in *Shaffer v. Heitner* state and federal lower courts quickly reached conflicting results with respect to the survival of *Seider*. Finally, however, the New York Court of Appeals as well as the Court of Appeals for the Second Circuit held that the *Seider* doctrine was in conformity with the Supreme Court's new jurisdictional standards. As he had done over nine years earlier, Judge Friendly, in a carefully considered opinion again concluded that the New York practice could not be toppled on due process grounds. The principal rationale for this holding was "that a judgment for the plaintiff will not deprive a defendant of anything substantial that would have otherwise been useful to him," and that such judgment would not possibly have an adverse effect upon him since "neither New York nor any other state could constitutionally give col-

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75. Savchuck v. Rush, 272 N.W.2d 888 (Minn. 1978).
lateral estoppel effect to a Seider judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense.\footnote{Id. at 201 (quoting Minichiello v. Rosenberg, 410 F.2d 106, 111-12 (2d Cir. 1968)).}

Unfortunately neither Judge Friendly nor the New York Court of Appeals discussed the problems created by the privileges and immunities clause of article IV, section 2 of the Constitution and by the equal protection clause of the fourteenth amendment. This issue had been left undecided by the New York Court of Appeals' most recent affirmation of Seider prior to Shaffer v. Heitner because it had not been raised by the parties in the lower courts.\footnote{Donawitz v. Danek, 42 N.Y.2d 138, 216 N.E.2d 253, 397 N.Y.S.2d 592 (1977).} Thus the possible survival of Seider v. Roth again poses the question of the role of plaintiff's residence among the permissible relevant contacts supporting jurisdiction in personam or quasi-in-rem.\footnote{See text accompanying note 48 supra.} While both constitutional clauses prohibit discriminatory exclusion of citizens of sister states from judicial remedies available to citizens of the forum,\footnote{See note 49 & accompanying text supra with respect to the privileges and immunities clause.} they do leave room for reasonable preferential protection of local residents. Of course, the dividing line is not easy to draw. For example, wholesale denial of the protection of the local long-arm statute to non-residents might overshoot the mark of reasonable differentiation.\footnote{Contra, Breeland v. Hide-A-Way Lake, Inc., 585 F.2d 716 (5th Cir. 1978). Breeland holds that the privileges and immunities clause is not violated by Mississippi's denial to citizens of sister states the benefits of the local long-arm statute which subjects nonresidents doing business within the state to in personam jurisdiction. The court seemed to overlook that the precedents cited involved corporations, which are not protected by art. IV, § 2 of the Constitution, while the case at bar involved individuals.} Similarly in the specific context of the Seider doctrine a better case can be made for reserving its protection to local residents who were such when the out-of-state injury occurred rather than to plaintiffs who moved into the forum only after the accident. The first alternative seems to represent the law of New York,\footnote{Fish v. Bamby Bakers, Inc., 76 F.R.D. 511 (N.D.N.Y. 1977).} while the second one applies in Minnesota.\footnote{Savchuk v. Rush, 272 N.W.2d 888 (Minn. 1978).}

**Parallel Developments Abroad**

It is worth noting that the renewed concern for fair and just grounds of jurisdiction is by no means confined to the United States. The most important foreign example of parallel development is the
Convention among the members of the European Communities on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, as amended by the Convention on Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to that Convention. Although the national laws of the member states—varying in that respect from state to state—establish nationality or residence of the plaintiff, or presence or presence and seizure of property of the defendant, or service of process on the defendant during a transient presence as a valid foundation of jurisdiction, the Convention proscribes such bases of jurisdiction as "exorbitant" and inapplicable to persons domiciled in one of the other member states. Hence these grounds of jurisdiction remain applicable only with respect to defendants domiciled outside the Communities. While judgments against debtors domiciled in a non-Community country resting on one of the proscribed grounds must be recognized and enforced in the other Community countries, a member state may be freed from that obligation if it has concluded a convention with a third country not to recognize and enforce such judgments.

The new trend was alluded to by the House of Lords in the case of The Siskiwa. In its judgment their Lordships refused to affirm a decision of the Court of Appeal which held that English courts possessed jurisdiction to enjoin the disposition by Panamanian shipowners of insurance moneys payable in England on the application of foreign cargo owners to secure the payment of damage claims not within the jurisdiction of the English courts. The judgment of the House of Lords held that without specific action to that effect by the Rules Committee, Eng-

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90. The text of the so-called Brussels Convention of 1968, which went into effect among the original six members of the European Communities on February 1, 1973 is reprinted in 8 INTERNATIONAL LEGAL MATERIALS 229 (1969). In its original form the Convention declared certain jurisdictional provisions found in the laws of Belgium, Luxembourg, France, Germany, Italy and the Netherlands to be inapplicable to defendants domiciled in the Communities. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 3, discussed by Droz, Entrée en vigueur de la Convention de Bruxelles concernant la compétence judiciaire et l'exécution des décisions en matière civil et commercial, 62 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 21, 29 (1973). Similar provisions are included in the Supplementary Protocol to the Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments, § 4 (1966), reprinted in 6 INTERNATIONAL LEGAL MATERIALS 1083 (1967).

91. COMMON MARKET REP. (CCH) ¶ 6003. The Convention of Accession, which added additional instances of proscribed exorbitant jurisdiction found in the laws of the three new entrants, was signed in October 1978, but is as yet not ratified by all parties thereto.

92. Brussels Convention of 1968, art. 3 (as amended).


lish courts were not authorized to grant protective measures in cases which on their merits are not subject to the jurisdiction, including long-arm jurisdiction, of the High Court. Lord Diplock noted expressly that other Community countries claimed such jurisdiction and that this power was expressly recognized by Article 24 of the Brussels Convention.

The approach alluded to by Lord Diplock corresponds to that followed by the U.S. District Court for the Northern District of California in the Uranex case mentioned above. That approach is standard practice in France and has been applied recently by a German Appellate Court in a case within the jurisdiction of another Community nation.

Conclusions

Shaffer v. Heitner appears at first blush as a decision of revolutionary character, effecting a radical change in the doctrinal bases of jurisdiction. Unfortunately, its implications and ramifications remain quite nebulous and are bound to necessitate further clarification. Its repercussions in the case law of the lower courts amply demonstrates this assessment. In particular, three fundamental questions are prompted by the majority and separate opinions of the Justices.

The first of these queries concerns the ultimate survival of quasi-in-rem jurisdiction as a separate branch of jurisdiction. As noted in the majority opinion, the two essential attributes of a quasi-in-rem judgment for the payment of money are its limited enforceability against assets of the judgment debtor, excluding property not seized at the commencement of the action, and its limited res judicata effects and lack of entitlement to full faith and credit in sister states. Shaffer v. Heitner postulates that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." The opinion recognizes that this holding will con-
tract the traditional scope of jurisdiction so that “cases over which the State is now thought to have jurisdiction could not be brought in that forum.”

But applicability of a common, minimum-contacts test which cannot be satisfied by the mere presence of property does not automatically mandate identical contacts for in personam and quasi-in-rem jurisdiction, especially in view of the more limited effect of a quasi-in-rem adjudication. Thus, even if all states were to extend their long-arm statutes to the constitutional limits of in personam jurisdiction, it might still be conceivable that situations would remain where only quasi-in-rem jurisdiction would be constitutionally permissible.

A second problem prompted by the reorientation of the constitutional basis of jurisdiction pertains to the relevance of the residence of plaintiff to the minimum-contacts test used to determine the propriety of exercising adjudicatory power. May residence of the plaintiff be considered in balancing the demands of fairness and substantial justice, or would such concession violate the privileges and immunities clause of article IV, section 2 of the Constitution?

The third of the conceivable major implications of Shaffer v. Heitner is the demise of jurisdiction based on temporary presence within the state. If territorial limitations are no longer of “central concern” for personal jurisdiction, it would seem that “mere” personal presence would lose its significance in the same way as “mere” presence of property.

Actually the decision leaves so many escape hatches that it is doubtful whether in the end a dramatic change in actual practice will result. Certainly the holding will prompt the States to extend their long-arm statutes to the constitutional limits. The flood of new cases construing the local long-arm provisions shows already that resort to quasi-in-rem jurisdiction is no longer favored by plaintiffs. If approved

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99. Id. at 209.
100. While Shaffer v. Heitner is very specific on the proposition that “the same test applies to jurisdiction in rem as governs jurisdiction in personam,” id. at 207, it is not equally specific on the issue whether that text mandates the same contacts for both types of adjudication. Only if the same test requires the same contacts is separate quasi-in-rem jurisdiction really scuttled.
101. Id. at 204.
102. The implications of Shaffer v. Heitner on the permissible scope of long-arm jurisdiction is not discussed in this Article. For an appraisal, see Note, Measuring the Long Arm After Shaffer v. Heitner, 53 N.Y.U.L. REV. 126 (1978). One example might illustrate the difficulties: D, a resident of California, executed a deed with a covenant of quiet enjoyment to Oregon land. P, a successor in interest to the original grantee, is ousted by the holder of a superior title. P's action on the covenant is “local” and can only be brought in Oregon. Does Oregon have jurisdiction? Would it be relevant, if D has other assets in Oregon?
by the U.S. Supreme Court, properly advised creditors will follow the path pursued in the *Uranex* case and try to attach local assets, subject to a stay until the controversy can be litigated in an appropriate jurisdiction. Thus in the long run the main effect of *Shaffer v. Heitner* may consist in attributing a constitutional and mandatory dimension to the classical doctrine of the more convenient forum.