CIVIL PROCEDURE—JURISDICTION—MINIMUM CONTACTS

INTRODUCTION

For over one hundred years the "physical presence" theory of jurisdiction has governed a state court's assertion of in rem jurisdiction.\(^1\) In Shaffer v. Heitner,\(^2\) the United States Supreme Court reassessed the validity of this theory and held that the "minimum contacts" analysis is the appropriate due process standard for evaluating a state's assertion of in rem jurisdiction.\(^3\) The use of the Shaffer analysis will preclude a state court from asserting in rem jurisdiction based on the presence of property having no relation to the cause of action. The impact of this ruling on in rem actions in which the cause of action is related to the property is uncertain; however, the Court indicated some circumstances in which the physical presence theory and the minimum contacts analysis would render the same result. A close examination of these different analytical approaches reveals that in other circumstances the results may vary widely depending upon the extent of the property's pres-

\(^1\) Green, Jurisdictional Reform in California, 21 HASTINGS L.J. 1219, 1233 (1970). The physical presence theory of jurisdiction restricts a state's judicial power to persons and property located within the forum's borders. Pennoyer v. Neff, 95 U.S. 714, 722 (1877). See Hanson v. Denckla, 357 U.S. 235, 246 (1958) (reaffirmed the concept that a state court's power over property is limited to the property's presence within the forum state).

A judgment in rem is an adjudication of the interests of all persons in a designated property. A quasi in rem judgment, however, only affects the interests of particular persons in that property. There are two types of quasi in rem actions:

In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

Id. at 246 n. 12 (relying on Restatement of Judgments, Introduction at 5-9 (1942)). The Shaffer Court used "in rem" to signify both "in rem" and "quasi in rem," and this practice will be followed in this casenote. Shaffer v. Heitner, 97 S. Ct. 2569, 2577 n. 17 (1977).


\(^3\) Id. at 2570-71. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court held that a court can exercise jurisdiction as long as a defendant has "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice." Id. at 320.
ence within the forum. In addition, Shaffer may have an impact on a state's assertion of in personam jurisdiction based on the physical presence theory.

BACKGROUND

A review of the historical development of state court jurisdiction illustrates the jurisdictional theories facing the Shaffer Court. This historical process has resulted in two inconsistent jurisdictional theories: the minimum contacts analysis and the physical presence theory. However, throughout this history, the Supreme Court has consistently moved away from the restrictions of the strict physical presence theory of Pennoyer v. Neff.

In Pennoyer, the United States Supreme Court analyzed Oregon's assumption of jurisdiction over a nonresident defendant. The Court's opinion relied on two "principles of public law" which regulate the international relationships of nations: first, "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; and second, "that no State can exercise direct jurisdiction over persons and property without its territory." Under this analysis, "the authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established" and any exercise of jurisdiction beyond the state's territorial bor-


6. In Pennoyer, a resident of Washington state who owned property in Oregon asked the federal court to invalidate a prior default judgment rendered against him by an Oregon state court. The Oregon jurisdictional statute permitted service by publication on nonresidents who owned property within the state; therefore, under the statute the state court was empowered to assert jurisdiction over Neff, the nonresident defendant, without personal service within the state. 95 U.S. at 715-19.

7. Id. at 722.
8. Id.
9. Id.
10. Id. at 720.
ders is an illegitimate intrusion on the exclusive sovereignty of a sister state.11

Under the traditional notions of in personam jurisdiction considered by Pennoyer, a tribunal can render a valid judgment against a defendant either if he was served while present in the state or if he had consented to jurisdiction.12 Since neither condition was satisfied in Pennoyer, the Court concluded that Oregon's exercise of judicial power was improper and that the state's judgment was therefore invalid.13

The Supreme Court found, however, that Neff's ownership of property within the state provided an alternate means of asserting jurisdiction. By exercising its judicial power over property within its borders, the state could inquire into a nonresident property owner's obligations to its citizens. To accomplish this, the state must make a prejudgment attachment of the property.14 The territorial restriction on the state's power prevented the judgment from binding the nonresident owner personally since he was not within the state's judicial power, and it limited the plaintiff's recovery to the value of the property attached within the state.15 Moreover, since in rem actions are considered actions against property, and not personally binding against the defendant, the in rem judgment is not res judicata in any subsequent action based on the same cause of action.16

*Pennoyer* established the jurisdictional requirements that in personam jurisdiction could be obtained only by personal service within the forum,17 and that in rem jurisdiction could be asserted only by prejudgment attachment of the property within the forum.18 These prerequisites served two functions. First, the defendant was provided with notice of the pending litiga-

11. *Id.* See *Erosion of the Power Theory*, supra note 5, at 727.
12. *See* 95 U.S. at 733; *Developments in the Law—State Court Jurisdiction*, 73 Harv. L. Rev. 911, 917 (1960) [hereinafter cited as *Developments—Jurisdiction*].
13. Such a judgment would be invalid under the due process clause of the fourteenth amendment of the United States Constitution. 95 U.S. at 733. *See also* Hazard, *supra* note 4, at 270.
14. In the Court's view, the state's power "to inquire into and determine ... [the nonresident's] ... obligations at all (without personal service) is only incidental to ... [the state's] ... jurisdiction over the property" within its borders. 95 U.S. at 728.
15. *Id.* at 723-24.
16. *Developments—Jurisdiction*, *supra* note 12, 949-50. In this type of action, the cause of action may be totally unrelated to the property on which jurisdiction is founded. *See* note 38 and accompanying text *infra*.
17. 95 U.S. at 730-31.
18. *Id.* at 727-28.
tion; second, the presence of the person or property within the reach of the state's power was clearly established to the court. The demonstration of presence by attachment or service of process is the basis of the physical presence theory. Under this theory, the power of the state could not reach beyond the physical limits of the state's borders, but persons or property present within these territorial borders could be seized by the state and forced to submit to the state's judicial power.

The physical presence theory prevented the accommodation of certain necessary litigation by restricting the state's ability to assert in personam jurisdiction. Therefore, the Supreme Court indicated certain exceptions to the strict physical presence theory. These exceptions permitted the state to exercise personal jurisdiction with neither personal service nor the defendant's actual consent. In *Lafayette Insurance Co. v. French*, the Supreme Court held that a corporation doing business within a state has thereby consented to suit in that state. This exception was later supplemented by the theory that a corporation doing business within a state is deemed to be present in the state and therefore is subject to the state's in personam jurisdiction.

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22. See notes 14-16 and accompanying text supra.

23. For example, the states needed a means to assert jurisdiction over nonresident corporations in a society increasingly dominated by nationwide corporations. Also, protection of legitimate state interests required jurisdiction over nonresident motorists driving within the state. *Developments—Jurisdiction*, supra note 12, at 917-21.


26. *Id.* at 408. See generally *Kurland, supra* note 5, at 578-82; *Developments—Jurisdiction, supra* note 12, at 919-23.


these fictions to natural persons, thus further expanding jurisdiction. This decision upheld a state jurisdictional statute which treated a nonresident's use of the state's highways as an appointment of the Secretary of State as an agent to accept service of process.\textsuperscript{29} The defendant constructively consented to the state's personal jurisdiction by the mere use of its highways. The use of these fictional concepts allowed state courts to extend their power beyond the limits established by the physical presence theory without destroying the conceptual framework outlined in \textit{Pennoyer}.\textsuperscript{30}

Through this process, the Court gradually expanded state judicial power over nonresidents beyond \textit{Pennoyer's} strict limits. This jurisdictional expansion, however, was not limited to cases involving nonresidents. \textit{Milliken v. Meyer}\textsuperscript{31} considered a state's assertion of jurisdiction over a defendant who had fled the state before being personally served. The Court upheld a judgment against the defendant because his domicile within the forum had been served. Thus a defendant, whose domicile is within the forum state, cannot terminate the state's power over him by the mere fact of his absence from the state.\textsuperscript{32} Although not articulated, the physical location of the defendant's person was not a concern of the \textit{Milliken} Court. Instead, the Court relied on the defendant's domicile as establishing the basis of jurisdiction.\textsuperscript{33}

This trend of expanding \textit{Pennoyer's} restrictive in personam theory finally culminated in \textit{International Shoe Co. v. Washington}.\textsuperscript{34} In analyzing a state's assertion of jurisdiction over the nonresident defendant, the Court rejected the fictional concepts developed after \textit{Pennoyer} and relied instead on the \textit{Milliken} decision.\textsuperscript{35} The Court held that due process requires only that in order to subject a defendant to a judgment \textit{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

\begin{thebibliography}{99}
\item 29. Id. at 356-57.
\item 30. See Kurland, supra note 5, at 573-74, 577; \textit{Erosion of the Power Theory}, supra note 5, at 735; \textit{Jurisdiction In New York}, supra note 24, at 1414.
\item 31. 311 U.S. 457 (1940).
\item 32. Id. at 463; \textit{Jurisdiction in New York}, supra note 24, at 1413-14.  
\item 33. 311 U.S. at 462-63; \textit{Developments—Jurisdiction}, supra note 12, at 941.  
\textit{See also} International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
\item 34. 326 U.S. 310 (1945).
\item 35. See id. at 316-17. See also Currie, supra note 5, at 536; Green, supra note 1, at 1231; \textit{Developments—Jurisdiction}, supra note 12, at 923.
\end{thebibliography}
the suit does not offend "traditional notions of fair play and substantial justice." This fairness test represented a significant analytical departure from the physical presence theory since this new test focused on the defendant's relationship with the forum. Under the authority of *International Shoe*, a nonresident defendant's physical presence within the forum is not a theoretical precondition to a state's assertion of in personam jurisdiction. Ultimately, *International Shoe* resulted in a tremendous expansion of the state's judicial power over nonresident defendants.

Unlike the developments in personal jurisdiction after *Pennsylvania v. Union[*38], the physical presence theory continued to dominate in rem jurisdiction. Under this theory, a state court could assert in rem jurisdiction when the cause of action was unrelated to the property. Although in in rem actions the defendant's potential liability was limited to the value of the property seized, these actions enabled a state court to assert jurisdiction over a defendant who would not be subject to the state's in personam jurisdiction under the strict physical presence theory. In *Har-
ris v. Balk, the Court expanded in rem jurisdiction to include intangibles by holding that a debt is property subject to a state's in rem jurisdiction. The situs of the debt followed the debtor and could be attached in any state where the creditor could have collected the debt in court. The Court, applying the physical presence theory in Harris, found no significance in the temporary nature of the debt's presence within the state.

Pennoyer's continued dominance of in rem actions has caused many authorities to criticize the Court's failure to apply minimum contacts analysis to in rem actions. The tremendous expansion of personal jurisdiction following International Shoe permitted the accommodation of certain necessary litigation by allowing a state to assert in personam jurisdiction based on minimum contacts analysis. It is argued that because of this expansion, jurisdiction based on property has become an unnecessary device. Further, it is contended that jurisdiction based merely on presence of property having no relation to the cause of action often imposes undue hardship on a nonresident defendant. This nonresident may be forced to litigate a suit in a foreign forum with which his only contact is his property.

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42. 198 U.S. 215 (1905).
43. Id. at 222. See Smit, The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff, 43 BrooklyN L. Rev. 600, 603 (1977); Garnishment of Intangibles, supra note 41 at 1442; Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550, 563 (1967) [hereinafter cited as Contingent Obligations]; Long-Arm and Quasi in Rem, supra note 24, at 337.
44. 198 U.S. at 222.
45. Id. at 226.
46. See Carrington, supra note 24, at 309; Hazard, supra note 4, at 281; Traynor, Is This Conflict Really Necessary?, 37 Tex. L. Rev. 657, 663 (1959); Von Mehren and Trautman, supra note 40, at 1166; Zammit, supra note 5, at 676; Developments—Jurisdiction, supra note 12, at 956-57; Erosion of the Power Theory, supra note 7, at 726; Garnishment of Intangibles, supra note 41 at 1442; Jurisdiction in New York, supra note 24, at 1442; Long-Arm and Quasi In Rem, supra note 24, at 338; Article, Attachment of Liability Insurance Policies, 53 Cornell L. Rev. 1108, 1116 (1968). See also cases cited in note 40 supra. Jurisdiction based on the attachment of property has also been attacked on the grounds that it violates the Court's ruling in Fuentes v. Shevin, 407 U.S. 67 (1972). Folk & Moyer, supra note 5, at 796; Zammit, supra note 5, at 680-82.
47. See note 23 supra.
48. Carrington, supra note 24, at 306; Folk & Moyer, supra note 5, at 780-81; Von Mehren and Trautman, supra note 40, at 1178; Zammit, supra note 5, at 683; Contingent Obligations, supra note 43, at 563; Garnishment of Intangibles, supra note 41, at 1442; Jurisdiction in New York, supra note 221, at 1424; Long-Arm and Quasi in Rem Jurisdiction, supra note 221, at 337.
49. F. James, supra note 20, § 12.1, at 620, 631; Comment, Attachment of Liability Insurance Policies, 53 Cornell L. Rev. 1108, 1116 (1968); Development—Jurisdiction, supra note 12, at 860; Garnishment of Intangibles, supra note 41, at 1442-43.
Although this hardship is mitigated somewhat when a state permits a limited appearance, the defendant must still defend on the merits in a forum with which he has insufficient contacts to satisfy "traditional notions of fair play and substantial justice." Finally, this type of in rem jurisdiction is attacked because the United States Supreme Court cases which have affirmed its assertion are of weak precedential value. These decisions are considered poor precedents because they were decided before International Shoe redefined the constitutional limits on a state's assertion of jurisdiction. On the basis of these arguments, many commentators have concluded that International Shoe's fairness test should govern in rem actions.

Despite these criticisms, the United States Supreme Court, prior to Shaffer, has never used minimum contacts analysis in its evaluation of a state court's assertion of in rem jurisdiction. In addition, the Court has never used this expansive analysis to limit any assertion of jurisdiction based on traditional theories. Some commentators argue that the Supreme Court's decision in Mullane v. Central Hanover Bank has drawn into question the continued validity of maintaining different due process standards for in rem actions and in personam actions.

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50. Smith, supra note 43, at 614. The procedure allowing a limited appearance permits the defendant to defend the action on the merits and yet limit his liability to the value of the property attached. See, e.g., N.Y. CIV. PRAC. LAW § 320(c) (McKinney 1970).

51. Erosion of the Power Theory, supra note 5, at 741.

52. U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 150-53 (3d Cir. 1976); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1131-36 (3d Cir. 1976) (Gibbons, J., concurring); Long-Arm and Quasi In Rem, supra note 24, at 334. In Jonnet, Judge Gibbons stated:

The analytical point of departure for those cases which have sustained against jurisdictional challenge foreign attachment procedures has traditionally been a quartet of Supreme Court cases reviewing judgments of state courts. All of these cases were decided before the Supreme Court in International Shoe redefined the due process limitation upon the exercise of judicial power over disputes foreign to the forum.

530 F.2d at 1131.

The Supreme Court cases referred to by Judge Gibbons are: Ownbey v. Morgan, 256 U.S. 94 (1921); Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917); Harris v. Balk, 198 U.S. 215 (1905); Pennoyer v. Neff, 95 U.S. 714 (1877).

53. See note 46 supra, for a list of articles espousing these arguments.


55. Folk & Moyer, supra note 5, at 781.


57. U.S. Indus., Inc. v. Gregg, 540 F.2d 142, 153 (3d Cir. 1976); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1136-37 (3d Cir. 1976) (Gibbons, J., concurring); Folk & Moyer, supra note 5, at 78-81; Hazard, supra note 4, at 276-77; Developments—Jurisdiction, supra note 12, at 960-61.
Mullane involved the judicial settlement of the accounts held by a trustee of a common trust fund. The state statute creating the common trust fund provided for notice by publication to the beneficiaries of this fund. The issue before the Court was whether this notice was constitutionally sufficient. In deciding the issue, the Court first considered whether this was an action in rem or in personam. This initial question was crucial since attachment of the property and publication alone were sufficient notice under Pennoyer for an in rem action. Writing for the Court in Mullane, Mr. Justice Jackson refused to classify this as an in rem or an in personam action and held that the notice requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a jurisdictional classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. The Mullane Court therefore concluded that the beneficiaries' right to notice sufficient under the due process clause was not dependent on the jurisdictional label given to the action.

The Supreme Court further deemphasized the constitutional importance of the in rem-in personam distinction in Schroeder v. City of New York. This case dealt with a condemnation proceeding brought by the city of New York pursuant to state statute. Relying on Mullane, the Court held that, despite the in rem nature of this action, notice by publication on the property was not constitutionally sufficient notice because the name and address of the owner were readily available. Under Schroeder and Mullane, the constitutional adequacy of the notice did not depend on the in rem or in personam nature of the action.

The Schroeder and Mullane decisions suggest a tendency by the Supreme Court to disregard jurisdictional labels when notice issues are concerned. These decisions, however, did not consider whether the due process standard, used to evaluate a state's assertion of jurisdiction, should vary with the type of jurisdiction asserted. The Court's opinion in Hanson v. Denck-

60. 339 U.S. at 312.
61. Id. at 312-13.
63. Id. at 211-12.
64. See Hazard, supra note 4, at 276-77. See also Erosion of Power Theory, supra note 5, at 737-39.
however, did consider this issue. In *Hanson*, the Court appeared to reaffirm that the physical presence theory was the standard by which in rem actions were to be evaluated. The Court stated:

-founded on physical power, the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.

This emphasis on the importance of the physical presence theory to in rem jurisdiction demonstrates the continued validity of the in rem-in personam jurisdictional labels when evaluating the due process limits on a state’s jurisdiction.

This review of the historical development of state court jurisdiction illustrates the inconsistent theories on which state jurisdiction has been founded; nevertheless, this review also shows the clear trend away from the restrictions of Pennoyer’s physical presence theory. This tendency has been judicially manifested by the use of fictions to accommodate necessary

65. 357 U.S. 235 (1958). In *Hanson*, the state of Florida sought to assert jurisdiction over a nonresident trustee in order to adjudicate the validity of an appointment of a trust beneficiary. This adjudication was to occur in the probate proceeding settling the estate of the Florida resident who had made the appointment. *Id.* at 239-41.
66. *Id.* at 246. See Kurland, supra note 5, at 623.
67. 357 U.S. at 246.
68. *Id.* at 246-50, 254. Some commentators suggest that *Hanson* by implication rejects the “center of gravity” theory of Atkinson v. Superior Court, 49 Cal.2d 338, 316 P.2d 960 (1957). Under this theory, a state is permitted to exercise jurisdiction if it is the center of the controversy and if it satisfies “overall fairplay and substantial justice.” *Id.* at —, 316 P.2d at 965. See Contingent Obligations, supra note 43, at 568-69. See also *Hanson* v. *Denckla*, 357 U.S. 235, 263-64 (1958) (Douglas, J., dissenting); Developments—Jurisdiction, supra note 12, at 963-64; Erosion of the Power Theory, supra note 5, 742-44. Others, however, have suggested that *Hanson* was at most a “moderate retreat” from the expansion of the reasonableness test. F. James, supra note 20, § 12.8, at 642. See also Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, —, 413 P.2d 732, 735 (1966); Hazard, supra note 4, at 274. It is suggested that
69. Hazard, supra note 4, at 144; Johnston, supra note 4, at 56.
70. See notes 23-30 and accompanying text supra.

litigation excluded under _Pennoyer_\textsuperscript{71} and by the development of _International Shoe's_ minimum contacts analysis as a supplement to the physical presence theory.\textsuperscript{72} The _Shaffer_ opinion may be viewed as a continuation of this well-established trend away from Pennoyer.

**FACTS AND HOLDINGS**

In _Shaffer v. Heitner_,\textsuperscript{73} Arnold Heitner, a nonresident of Delaware, filed a stockholder's derivative action suit\textsuperscript{74} in Delaware against the Greyhound Corporation and twenty-eight present and former officers and directors of Greyhound for activities which had occurred in Oregon. The petition alleged that the defendants violated their corporate duties by involving the corporation in activities which made Greyhound liable for substantial damages.\textsuperscript{75}

To obtain jurisdiction over these nonresident corporate officials, the Delaware court seized their property located within the forum.\textsuperscript{76} Since the Delaware jurisdictional statute did not permit the defendants to appear solely to defend their interests in the seized property, they were forced to appear either generally or to forfeit their property.\textsuperscript{77} The defendants, appearing specially to contest the Delaware court's jurisdiction, argued that their lack of contact with the forum made any assertion of jurisdiction a violation of due process.\textsuperscript{78} The Delaware Supreme Court, adopting the traditional physical presence analysis of quasi in rem jurisdiction, rejected this contention.\textsuperscript{79} The Su-

\textsuperscript{71} Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1132 (3d Cir. 1976) (Gibbons, J., concurring); Kurland, _supra_ note 5, at 273. See discussion at notes 23-30 _supra_.

\textsuperscript{72} Folk & Moyer, _supra_ note 5, at 779.

\textsuperscript{73} 95 S. Ct. 2569 (1977).

\textsuperscript{74} H. HENN, LAW OF CORPORATIONS §§ 356-60, at 749-61 (1971).

\textsuperscript{75} 95 S. Ct. at 2572. Greyhound, a Delaware corporation, had its principal place of business in Arizona. The petition also named as defendants a California corporation, Greyhound Lines, Inc., a wholly owned subsidiary of Greyhound. _Id._

\textsuperscript{76} _Id._ at 2573-74. The property was seized under DEL. CODE ANN. tit. 8, § 169 (Revised 1974). This statute makes Delaware the situs for all stock issued by a Delaware corporation.

\textsuperscript{77} DEL. CODE ANN. tit. 10, § 366 (Revised 1974). See Folk & Moyer, _supra_ note 5, at 756. Following the Court's ruling in _Shaffer_, the Delaware legislature has enacted a jurisdictional long-arm statute which permits jurisdiction based on minimum contacts over all officers of Delaware corporations. DEL. CODE ANN. tit. 10, § 3114 (Supp. 1978).

\textsuperscript{78} See 95 S. Ct. at 2574-75; Greyhound Corp. v. Heitner, — DEL. —, 361 A.2d 225, 229 (1975).

\textsuperscript{79} — DEL. at —, 361 A.2d at 229. Relying on the in rem—in personam dichotomy, the Delaware court recognized two alternate theories by which a
The Supreme Court of Delaware held that its sequestration statute provided for quasi in rem jurisdiction, and therefore concluded that its jurisdiction "[was] founded on the presence of capital stock . . . [in Delaware], . . . not on the prior contacts by the defendants with this forum." 80 Under this traditional analysis, Delaware's assertion of quasi in rem jurisdiction was proper. 81

Rejecting this jurisdictional analysis, the United State Supreme Court refused to allow a state's assertion of jurisdiction based solely on the presence of the defendant's property within the forum. The Supreme Court, in Shaffer, ruled that the constitutionality of Delaware's assertion of in rem jurisdiction must be based on the defendant's contacts with the forum. 82 In the Court's opinion, if this prerequisite is not satisfied, then the exercise of jurisdiction is unconstitutional even though the defendant owns property within the forum. 83

COURT'S OPINION

The Shaffer Court focused on the issue of "whether the standard of fairness and substantial justice set forth in International Shoe should be held to govern actions in rem . . . ." 84 Mr. Justice Marshall, writing for the majority, summarized the Court's analysis of this issue in one observation: "[T]he phrase, judicial jurisdiction over a thing, is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." 85 This comment, by removing the traditional jurisdictional labels, made clear that persons, not things, have rights subject to adjudication. Therefore, the fiction of an assertion of jurisdiction against property no longer obscured the similarity between in rem and in personam jurisdiction. 86 As a result of

80. Id.
81. Id.
82. 97 S. Ct. at 2584-85.
83. Id. at 2585-87.
84. Id. at 2581. Mr. Justice Marshall began the Court's opinion with a review of the development of state court jurisdiction since Pennoyer. By focusing on the numerous exceptions to the theory, he concluded that "the law of state court jurisdiction no longer stands firmly on the foundation established by Pennoyer." Id. This conclusion prompted the Court to reassess Pennoyer's applicability to in rem actions.
85. Id.
86. See von Mehren & Trautman, supra note 40, at 1135-36; Kurland, supra note 5, at 617-18. See also Johnston, supra note 4, at 48; Erosion of the Power Theory, supra note 5, at 762.
this new jurisdictional perspective, the Court concluded that the minimum contacts analysis established in International Shoe for in personam actions was also applicable to actions based on jurisdiction over property.\(^7\)

In support of this conclusion, the Court maintained that the limited potential liability of traditional in rem actions did not justify applying different jurisdictional standards to in rem and in personam actions.\(^8\) Moreover, the Court held that under the minimum contacts analysis, limiting potential liability has no impact on the constitutionality of an assertion of jurisdiction.\(^9\)

Despite this change of the jurisdictional standard, the Court held that property is a relevant factor in assessing jurisdiction under International Shoe because it is evidence of the defendant's contacts with the forum.\(^9\) Moreover, Mr. Justice Marshall indicated that many former in rem actions would still be permitted under the fairness test.\(^9\) For example, when the underlying controversy involves a claimed interest in the property, the situs state, in the Court's opinion, would normally have jurisdiction.\(^9\) The Court listed various factors supporting jurisdiction in this situation: 1) the state's interests in title to property within its jurisdiction;\(^9\) 2) the litigational convenience of a forum where the evidence is located;\(^9\) and 3) the defendant's expectation of benefit from the situs state's protection of his property interest.\(^9\) Mr. Justice Marshall also found that the presence of the defendant's property supported jurisdiction when the cause of action relates "to the rights and duties growing out" of the defendant's ownership of the property.\(^9\) An example of this last situation is a suit by a plaintiff injured on the land of an absentee owner.\(^9\) In the Court's opinion, there-

\(^{87}\) 97 S. Ct. at 2582-83.
\(^{88}\) Id. at 2582 n. 23.
\(^{89}\) Id. at 2583 n. 32. But see notes 127-29 and accompanying text infra.
\(^{90}\) 97 S. Ct. at 2582.
\(^{91}\) Id. at 2582. See also Developments—Jurisdiction, supra note 12, at 956-57.
\(^{92}\) 97 S. Ct. at 2582. F. JAMES, supra note 20, § 12.7, at 627; Folk & Moyer, supra note 5, at 782-83; Developments—Jurisdiction, supra note 12, at 956-57.
\(^{93}\) 97 S. Ct. at 2582. See also Developments—Jurisdiction, supra note 12, at 956.
\(^{94}\) 97 S. Ct. at 2582. See also Developments—Jurisdiction, supra note 12, at 956; von Mehren & Trautman, supra note 40, at 1167.
\(^{95}\) 97 S. Ct. at 2582. See also Developments—Jurisdiction, supra note 12, at 956.
\(^{96}\) 97 S. Ct. at 2582. See also F. JAMES, supra note 20, § 12.10, at 649; Developments—Jurisdiction, supra note 12, at 947-48.

fore, the presence of property is generally only relevant to the minimum contacts analysis when the property is related to the cause of action.98

Without providing specific examples, Mr. Justice Marshall noted that presence of property within the forum does not always support the inference that the defendant expects to benefit from the state's laws.99 However, the authorities cited by the Court indicate that the presence of property would not support jurisdiction if: the defendant was unaware of the property's situs; he had not consented to its location; or its presence was obtained by fraud.100

In the Court's opinion, the most significant jurisdictional change resulting from the application of International Shoe to in rem actions is the elimination of jurisdiction based solely on the presence of property unrelated to the cause of action. Consequently, Mr. Justice Marshall reviewed the justifications for continuing this type of jurisdiction.101

A justification often given for jurisdiction based on property having no relation to the cause of action is the need to protect plaintiffs from defendants who move their assets to states having no personal jurisdiction over the defendants.102 Mr. Justice Marshall recognized, however, that under the physical presence analysis, a court does not consider the circumstances which brought the defendant's property into the forum state. Thus, the Court concluded that the protection of plaintiffs is not an adequate justification for this type of in rem jurisdiction since this consideration was not actually part of this jurisdictional analysis.103 In addition, the Court found "nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him."104 The plaintiff's need

98. 97 S. Ct. at 2585. See generally Erosion of the Power Theory, supra note 5, at 736. Cf. note 148 and accompanying text infra.
99. 97 S. Ct. at 2582 n. 25.
100. Id. See Restatement (Second) of Conflict of Laws § 60, Comments c, d (1971). See generally Traynor, supra note 46, at 672-73; Note, The Power of a State to Affect Title in a Chattel Atypically Removed to It, 47 COLUM. L. REV. 767, 768-69 (1947).
101. 97 S. Ct. at 2583.
102. See J. Beale, Conflicts of Law § 106.1, at 449 (1935); Restatement (Second) of Conflict of Laws § 66, Comment a (1971); Developments—Jurisdiction, supra note 12, at 955.
103. 97 S. Ct. at 2583. See also Erosion of the Power Theory, supra note 5, at 734.
104. 97 S. Ct. at 2583. The Court further stated: "The Full Faith and Credit Clause, after all, makes the valid in personam judgment of one State enforceable in all other States." Id.
for protection may have been more significant in earlier times when "enforcement of a foreign judgment was often difficult if not impossible;"\textsuperscript{105} however, the full faith and credit clause now provides adequate protection for the plaintiff.\textsuperscript{106} Mr. Justice Marshall suggested that attachment of property pending an adjudication in an appropriate forum would protect the plaintiff's interest, and he concluded that any in personam judgment might then be executed against the property wherever it had been attached.\textsuperscript{107}

- A further justification given for jurisdiction based on property unrelated to the cause of action is the desire to avoid the uncertainty of minimum contacts analysis.\textsuperscript{108} The Court responded to this argument by ruling that any resulting simplification of the litigation did not justify the sacrifice of fair play and substantial justice caused by this approach.\textsuperscript{109} Similarly, the Court rejected the idea that the long history of jurisdiction based solely on the presence of property provides a constitutionally viable justification for jurisdiction. The Court stated:

"[T]raditional 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... The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.\textsuperscript{110}

Having found no adequate justification for jurisdiction based solely on the presence of property, the Court concluded "that all assertions of state court jurisdiction must be evaluated ac-
cording to the standards set forth in *International Shoe* and its progeny."

When the Court applied the minimum contacts analysis to the facts in *Shaffer*, the defendant was found to have insufficient contacts with Delaware to support jurisdiction. Under the Court's analysis, the defendant's ownership of stock did not provide an adequate contact because the property had no relation to the cause of action.\textsuperscript{112} The plaintiff, however, also argued that the defendants' positions as directors and officers provided the contacts necessary to make jurisdiction fair. Delaware's special interest in regulating a domestic corporation provided further support for the state's assertion of jurisdiction.\textsuperscript{113} The Court rejected these arguments, holding that the state's interest in the litigation was relevant only to the choice of laws issue and not to the fairness of the forum's assertion of jurisdiction.\textsuperscript{114} The Court concluded that the defendants, based on their limited contacts with the forum, had no expectation of suit there and that the state therefore could not assert jurisdiction.\textsuperscript{115}

Mr. Justice Brennan dissented from the Court's application of minimum contacts analysis to the fact situation in *Shaffer*. Jurisdiction, in Mr. Justice Brennan's opinion, was proper because Delaware had a substantial interest in regulating the affairs of a domestic corporation, and because the defendant had voluntarily associated with the forum by accepting a corporate position.\textsuperscript{116}

\begin{footnotesize}
\begin{itemize}
\item[111.] Id. at 2584-85 (emphasis added).
\item[112.] Id. at 2585.
\item[113.] Id.
\item[114.] Id. at 2586.
\item[115.] Id.
\item[116.] Id. at 2589-93 (Brennan, J., concurring). Mr. Justice Brennan concurred in the Court's holding that the minimum contacts analysis should govern in rem actions. However, in Mr. Justice Brennan's opinion, this holding made it unnecessary for the Court to determine whether minimum contacts existed in this case. Before a state may exercise jurisdiction, the legislature must enact a statute authorizing such jurisdiction. Delaware had no statute providing for jurisdiction based on minimum contacts. Therefore, it was unnecessary for the Court to determine whether minimum contacts existed because the state could not exercise jurisdiction without statutory authorization even though jurisdiction may have been constitutionally permissible. Mr. Justice Brennan summarized his argument by stating:

\begin{quote}
[O]nce having properly and persuasively decided that the \textit{quasi-in-rem} statute that Delaware admits to having enacted is invalid, the Court then proceeds to find that a minimum-contacts law that Delaware expressly\textit{ denies} having enacted also could not be constitutionally applied in this case.

In my view, a purer example of an advisory opinion is not to be found.
\end{quote}

Id. at 2588. Despite this criticism, Mr. Justice Brennan felt impelled to express his views because the Court ruled on the minimum contacts question.
\end{itemize}
\end{footnotesize}
The majority's application of the minimum contacts analysis to in rem jurisdiction did not receive the unqualified support of the entire Court. Concurring in a separate opinion, Mr. Justice Powell expressed a fear of the jurisdictional uncertainty caused by minimum contacts analysis. As a result, he reserved judgment on the abolition of in rem actions based on property unrelated to the cause of action.\textsuperscript{117} In Mr. Justice Powell's view, jurisdiction based on property unrelated to the cause of action does not jeopardize traditional notions of fair play and substantial justice when the property is permanently and indisputably located within the forum. Under these circumstances, Mr. Justice Powell would permit jurisdiction founded solely on the property's presence.\textsuperscript{118}

Mr. Justice Stevens' concurring opinion questioned the application of \textit{Shaffer} to factual contexts other than those before the court.\textsuperscript{119} Due process, in Mr. Justice Stevens' opinion, requires only that a person has reasonable notice that his activities will expose him to a predictable risk of suit within a state. Mr. Justice Stevens thus argued that ownership of stock in a Delaware corporation did not provide adequate notice of the risk of suit in Delaware on a cause of action unrelated to the stock. In this situation, therefore, jurisdiction based on the stock violated the due process clause.\textsuperscript{120} Although he concurred with the Court, Mr. Justice Stevens was concerned with the Court's broad language, and would not read the Court's opinion "as invalidating other long accepted methods of acquiring jurisdiction over persons with adequate notice . . . that their local activities might subject them to suit."\textsuperscript{121}

\begin{center}
\textbf{ANALYSIS}
\end{center}

In \textit{Shaffer}, the Court applied the minimum contacts analysis developed in \textit{International Shoe} to an area of jurisdiction to which few courts had applied it before.\textsuperscript{122} Since \textit{Shaffer} is the first Supreme Court decision to apply minimum contacts analysis to in rem jurisdiction, the Court's opinion provided an assessment of this decision's impact on a state's assertion of jurisdiction. In addition, the Court also provided some guidance on

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 2587 (Powell, J., concurring).
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at 2588 (Stevens, J., concurring).
\item \textsuperscript{120} \textit{Id.} at 2587-88.
\item \textsuperscript{121} \textit{Id.} at 2588.
\item \textsuperscript{122} See cases listed in note 40 supra.
\end{itemize}
the appropriate manner of applying minimum contacts analysis to former in rem actions.

A characteristic of in rem actions under the physical presence theory is the limitation of potential liability to the value of the property subject to the court's jurisdiction. However, the Shaffer Court indicated that under minimum contacts analysis limiting potential judgment had no effect on the constitutionality of subjecting the defendant to a state's judicial power. Under Pennoyer, in rem liability was limited because the state's power could not extend beyond the property attached within the forum. In contrast, jurisdiction under Shaffer's minimum contacts analysis is founded on the defendant's relationship with the forum. The concept of limited potential liability loses its theoretical purpose since jurisdiction, under this analysis, is no longer limited by the state's physical borders.

Some authorities, however, still consider limited potential liability a reasonable element in assessing the fairness of a state court's assertion of jurisdiction under minimum contacts analysis. When the defendant's property alone provides insufficient contact for an assertion of unlimited jurisdiction, limiting liability to the value of the property confines the state's power over the defendant to the extent of his contact with the state. In this situation, the state's assertion of jurisdiction is fair not only because the defendant expects the state to have jurisdiction over his property within the state, but also because the state's power is closely tailored to the extent of the defendant's relationship with the forum.

Despite such an argument, the defendant's burden of litigating a case's merits in a forum with which he has few contacts is not affected by the size of the potential judgment. Whether the potential liability is limited or unlimited, the burden of preparing a defense is the same. The fairness of forcing the defendant to litigate in a foreign forum, therefore, should not depend

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123. 95 U.S. at 730-31; Developments—Jurisdiction, supra note 12, at 950.
124. 97 S. Ct. at 2583 n. 32.
125. 95 U.S. at 731.
126. Erosion of the Power Theory, supra note 5, at 741.
128. Id.
129. Id. at 614, 619-20. See also Garnishment of Intangibles, supra note 41, at 1433.
130. Folk & Moyer, supra note 5, at 794; Erosion of the Power Theory, supra note 5, at 741.
on the size of the claim in issue. Moreover, this limitation serves no function when the value of the property exceeds the plaintiff's claim. In those cases in which the property's value is less than the plaintiff's claim, limiting liability hinders judicial efficiency by increasing the risks of multiple suits and inconsistent verdicts. Finally, if the defendant has entered a limited appearance to defend on the merits, the risk remains that a foreign forum may treat the limited judgment as res judicata in a subsequent deficiency action. In light of these practical consequences, Shaffer's denial of any constitutional significance to limiting potential liability is appropriate.

Mr. Justice Marshall's assessment of the impact of International Shoe on in rem actions reveals factual situations in which the presence of the property alone satisfied the minimum contacts analysis. Although Pennoyer and International Shoe would reach the same result in these situations, the analytical approach of each is significantly different. Applying International Shoe's minimum contacts analysis, the court bases its assertion of jurisdiction on the defendant's relationship with the forum. The presence of the defendant's property within the forum is merely used as evidence of this relationship. However, under Pennoyer's physical presence theory, jurisdiction is based solely on the property's presence, and the defendant's relationship with the forum is not relevant to the jurisdictional issue.

By shifting the focus of the jurisdictional analysis, Shaffer will have practical repercussions on assertions of in rem jurisdiction. For example, the nature of the property's presence within the forum may become a significant factor in evaluating the state's jurisdiction since, under minimum contacts analy-

131. See Developments—Jurisdiction, supra note 12, at 950. See also Jurisdiction in New York, supra note 24, at 1422-23.
133. Folk & Moyer, supra note 5, at 794. See generally Developments—Jurisdiction, supra note 12, at 953-54.
134. See notes 91-98 and accompanying text supra, for a discussion of the circumstances.
135. 97 S. Ct. at 2582-83. See also Jurisdiction in New York, supra note 24, at 1424.
136. See notes 40-45 and accompanying text supra.
137. See Smit, supra note 43, at 617; Developments—Jurisdiction, supra note 12, at 947-48. See also 97 S. Ct. at 2582.
sis, the defendant's contacts with the forum must be purposeful. Therefore, property located within the forum without the defendant's knowledge or control should not provide a contact relevant to the issue of fairness.

Recognizing the importance of the defendant's expectations, the Court in *Shaffer* suggested that the mere presence of property did not always support the inference that the defendant expected suit within the forum. In contrast, under *Pennoyer*'s physical presence analysis, the presence of the property alone affords a sufficient basis for jurisdiction regardless of the defendant's knowledge or control.

Another factor the courts may consider in assessing the fairness of an assertion of jurisdiction is the duration of the property's presence within the forum. For example, if the defendant habitually or permanently places his property within the forum, he has surely "purposefully availed himself" of the benefits of the forum. In addition, the forum has a great interest in property which, by the passage of time, has become closely connected with its social and community life. The state in these situations can reasonably assert jurisdiction over the defendant in a cause of action related to the property, even though the property is the defendant's only contact with the forum. This assertion of jurisdiction would still be reasonable even though the property was temporarily removed from the state, since jurisdiction under minimum contacts analysis is based on the defendant's relationship with the forum. In this latter situation, the defendant's relationship with the forum would be the same whether or not the property was present.

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138. Hanson v. Denckla, 357 U.S. 235, 253 (1958). This limitation imposed by Hanson is "based on the premise that a defendant should be able to control his exposure to litigation in foreign forums and be subject to jurisdiction only in states where he should anticipate that suit might be properly maintained." *Erosion of the Power Theory*, supra note 5, at 736 n. 51. But cf. Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, —, 413 P.2d 732, 735 (1966) (the real issue is fairness, not whether the defendant purposefully avails himself of the forum).

139. See 97 S. Ct. at 2582 n. 25; Smit, supra note 43, at 617 n. 64; *Erosion of the Power Theory*, supra note 5, at 740. See generally *Long-Arm and Quasi in Rem Jurisdiction*, supra note 24, at 333.

140. See 97 S. Ct. at 2582 n. 25, and articles cited therein. See also F. JAMES, supra note 20, § 12.1, at 613.


142. Smit, supra note 43, at 617.


144. Smit, supra note 43, at 617.
occur under Pennoyer's physical presence theory since Pennoyer requires prejudgment attachment of the property within the forum. However, once the property is attached, Pennoyer permits jurisdiction without consideration of the duration of the property's presence.145

Another feature unique to minimum contacts analysis is the requirement of a connection between the cause of action and the defendant's contacts with the forum.146 Although some authorities have questioned the validity of this requirement,147 the Court adopted it in applying the minimum contacts analysis to Shaffer. In the Court's view, the presence of the property alone was not a sufficient basis for jurisdiction when the cause of action is unrelated to the property.148 This relationship, however, was not relevant to the jurisdictional analysis of the physical presence theory.149 The Supreme Court's decision in Harris v. Balk150 demonstrated that under Pennoyer the property can be totally unrelated to the cause of action and yet be an adequate basis for asserting jurisdiction. By requiring this relationship, the Shaffer Court has in effect overruled Harris v. Balk.151

The Shaffer Court's discussion of the significance of property under the minimum contacts analysis does not distinguish between tangible and intangible property. Intangibles unlike

145. Harris v. Balk, 198 U.S. 215, 226 (1905); Note, The Power of the State to Affect Title in a Chattel Atypically Removed to It, 47 COLUM. L. REV. 767, 773-74 (1947) (the state has jurisdiction over chattel removed to it even though it was without the defendant's consent).

146. Von Mehren & Trautman, supra note 40, at 1142; Zammit, supra note 5, at 676; Erosion of the Power Theory, supra note 5, at 736. Cf. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (Court permitted assertion of jurisdiction based on continuous and systematic business when the cause of action was unrelated to the defendant's contacts with the forum). It has been suggested that "the unavailability of an alternative forum weakens the authority of Perkins as support for the general proposition that so long as a corporation is carrying on substantial activities within the state it may be sued on unrelated cause of action." Developments—Jurisdiction, supra note 12, at 932.

147. A. EHRENZWEIG, CONFLICT OF LAWS § 33, at 113 (1962); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47, Comment e (1971); Foster, Personal Jurisdiction Based on Local Causes of Action, 1956 Wisc. L. Rev. 522, 581; Kurland, supra note 5, at 601-02; von Mehren and Trautman, supra note 40, at 1142-44; Jurisdiction in New York, supra note 24, at 1418-19; Long-Arm and Quasi in Rem, supra note 24.

148. 97 S. Ct. at 2582. The state is unlikely to have any interest in a cause of action which did not arise within its borders or which did not involve its residents. Developments—Jurisdiction, supra note 12, at 931.

149. See notes 40-45 supra. See also Foster, supra note 147, at 538.

150. 198 U.S. 215 (1905).

151. 97 S. Ct. at 2582. See Developments—Jurisdiction, supra note 12, at 960 for analysis of Harris under the fairness test. See also Jurisdiction in New York, supra note 24, at 1424.
tangibles, have no actual situs, and many states may be able to establish a fictional situs for this property within their borders. Consequently, the defendants can have no control over this property's location. The ownership of the intangible therefore does not create a purposeful contact with the forum and is therefore not relevant to the minimum contacts analysis. However, the defendant's claim to an intangible may create a purposeful contact if the defendant voluntarily creates a relationship between the intangible and the forum which makes a suit related to the intangible reasonable. An example of this situation is a defendant who creates a debt owed to him by a resident of the forum. Since the debtor is a resident of the forum, the defendant relies on the forum's laws to protect his interest in the debt by aiding in its collection. In this situation, the defendant has purposefully availed himself of the laws of the forum and as such has an expectation of suit within the forum. The state court, therefore, can reasonably subject the defendant to its jurisdiction in a suit related to the intangible property.

One final problem, raised by Mr. Justice Marshall's discussion of the application of minimum contacts analysis to jurisdiction based on the presence of property, is whether the plaintiff's interests should be a factor in assessing the state's assertion of jurisdiction. *International Shoe* did not specifically recognize any jurisdictional role for the plaintiff's interest, and with one exception, the *Shaffer* Court follows this approach. The exception was Mr. Justice Marshall's reservation of judg-
ment on the jurisdictional relevance of the plaintiff's interests in those special circumstances when the plaintiff has no alternate forum. Two approaches have been suggested to deal with this problem. One authority contends that the state of the plaintiff's residence should assert jurisdiction because this would be more reasonable than an assertion of jurisdiction based on the fortuitous location of the defendant's property within the forum. However, others have argued that the state in which the defendant's property is located may exercise jurisdiction of necessity when the defendant cannot be found. The Shaffer opinion gives no indication of how the Supreme Court will resolve this issue, yet the plaintiff's interest is not usually considered a sufficient justification for requiring the defendant to appear when the state does not have some other connection with the litigation.

Although Shaffer signals the end of the physical presence theory as a basis of in rem jurisdiction, this ruling does not necessarily mean the end of in personam jurisdiction based solely on the defendant's personal presence within the forum. However, the Court's treatment of the physical presence theory in in rem actions may draw into question in personam jurisdiction based on transitory physical presence.

The Court's analysis in Shaffer included consideration of the justifications for the continuation of in rem actions based on the physical presence theory. Many of these justifications also operate in the application of the physical presence theory to in

158. 97 S. Ct. at 2584 n. 37. Developments—Jurisdiction, supra note 12, at 942 (defendant's domicile alone should be a sufficient contact under International Shoe when plaintiff has no alternate forum). This holding is consistent with the necessity arguments made in Mullane and Atkinson. See Developments—Jurisdiction, supra note 12, at 963.
159. Zammit, supra note 5, at 681-82.
163. See Hazard, supra note 4, at 242. In personam jurisdiction based solely on the defendant's transitory physical presence has come under considerable criticism. A. Ehrenzweig, supra note 147, at 289-90; Currie, supra note 5, at 583; Kurland, supra note 5, at 574; Schlesinger, Methods of Progress in Conflict of Laws Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction, 9 J. Pub. L. 313, 316 (1960); Sobeloff, Jurisdiction of State Courts over Non-Residents in Our Federal System, 43 Cornell L. Q. 196, 208 (1957); Developments—Jurisdiction, supra note 12, at 939; Jurisdiction in New York, supra note 24, at 1429-30.
personam actions. By rejecting these rationalizations in in rem jurisdiction, the Court weakens their significance as support for assertions of in personam jurisdiction based on the physical presence theory.\textsuperscript{164}

The use of the physical presence theory in both in rem and in personam actions is often justified as a means of providing the plaintiff with a certain forum.\textsuperscript{165} In Shaffer, the Court held that when minimum contacts are not present, the cost of providing the plaintiff with a certain forum is the sacrifice of fair play and substantial justice. This cost, in the Court's opinion, is too high.\textsuperscript{166} In addition, the Shaffer Court noted that in rem jurisdiction based solely on the property's presence is no longer necessary to provide the plaintiff with a certain forum.\textsuperscript{167} Similarly, in personam jurisdiction based solely on the physical presence of the defendant is no longer necessary to provide a forum since International Shoe not satisfies the plaintiff's need.\textsuperscript{168}

The Shaffer Court concluded that in most cases the application of minimum contacts analysis to in rem actions would provide the same results as the physical presence theory, without undue complications.\textsuperscript{169} The application of International Shoe to all in personam actions would likewise not affect the plaintiff's need for a certain forum since usually the defendant's presence within the forum is accompanied by a host of other contacts which make the jurisdictional issue simple even under minimum contacts analysis.\textsuperscript{170}

The Court concluded its analysis of the appropriate standard to apply to in rem actions with the statement: "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."\textsuperscript{171} Through this broad holding the Court overruled those

\begin{itemize}
  \item \textsuperscript{164} This occurs because the theoretical basis of jurisdiction is based on the mere physical presence of person or property regardless of the defendant's or the property's contacts with the forum. U.S. Indus., Inc. v. Gregg, 384 F. Supp. 1004, 1020 (D. Del. 1972).
  \item \textsuperscript{165} See note 108 supra.
  \item \textsuperscript{166} 97 S. Ct. at 2584. See Developments—Jurisdiction, supra note 12, at 938-39 (cost of minimum contacts analysis is justified when compared to unfairness of rigidly applied physical presence rule).
  \item \textsuperscript{167} 97 S. Ct. at 2582-84.
  \item \textsuperscript{168} Schlesinger, Methods of Progress in Conflict of Laws Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction, 9 J. PUB. L. 313, 318 (1960); von Mehren & Trautman, supra note 40, at 1177-78.
  \item \textsuperscript{169} 97 S. Ct. at 2584.
  \item \textsuperscript{170} Currie, supra note 5, at 583; von Mehren & Trautman, supra note 40, at 1137-38; Developments—Jurisdiction, supra note 12, at 939.
  \item \textsuperscript{171} 97 S. Ct. at 2584-85 (emphasis added).
\end{itemize}
prior cases decided on the rationale of *Pennoyer* and *Harris* which are inconsistent with the standard adopted in *Shaffer*\(^{172}\). Based on this language and the Court's analysis, the future of in personam jurisdiction founded on the physical presence theory is uncertain\(^{173}\). Whether *Shaffer* will bring to an end *Pennoyer*’s remaining influence over in personam jurisdiction will only be determined in light of the Court's future treatment of the *Shaffer* decision.

**CONCLUSION**

The development of jurisdiction since *Pennoyer* has been characterized by a trend away from the jurisdictional limits which the physical presence theory imposed. The *Shaffer* Court's application of minimum contacts analysis to in rem actions can be viewed as a continuation of this trend, despite *Shaffer*’s apparent restriction of the state's judicial power. Although many former in rem actions under *Pennoyer* will be permitted under *Shaffer*’s analysis, the use of minimum contacts analysis does end jurisdiction based solely on the presence of property having no relation with the cause of action. This new jurisdictional approach will also result in judicial scrutiny into the nature of the property's presence thus possibly permitting assertions of jurisdiction in situations not permitted under *Pennoyer*.

The impact of *Shaffer* beyond the area of in rem jurisdiction is difficult to foresee. The broad language used by the Court suggests that all assertions of jurisdiction must now be judged by *International Shoe*. In view of the concurring opinions which warn that *Shaffer* should not be broadly interpreted, this conclusion is premature; the determination of the ultimate reach of *Shaffer* must wait further Supreme Court action.

*Joseph Dunbeck, Jr.—’79*

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172. *Id* at 2585 n. 39.
173. Mr. Justice Stevens and Mr. Justice Powell in their concurring opinion refused to give the *Shaffer* holding such a broad application. *97 S. Ct.* at 2587-88 (Powell, J., concurring; Stevens, J., concurring). In addition, Mr. Justice Marshall reserved judgment on the issue of whether other jurisdictional doctrines are consistent with the standard of fairness. *97 S. Ct.* at 2582 n. 30. This note, however, suggests that the fairness standard may be used to judge other traditional bases of jurisdiction when appropriately raised.