Washington University Law Review

Volume 1978
Issue 2 *Symposium: The Impact of Shaffer v. Heitner*

January 1978

Comment on the Impact of Shaffer v. Heitner in the Classroom

Jack H. Friedenthal
Stanford Law School

A COMMENT ON THE IMPACT OF *SHAFFER V. HEITNER* IN THE CLASSROOM

JACK H. FRIEDENTHAL*

The Supreme Court's recent decision in *Shaffer v. Heitner*[1] presents a substantial challenge to law school professors who teach the fundamentals of jurisdiction over persons and property in civil procedure or conflicts of law courses; it is a source of both confusion and delight. The confusion stems from the fact that the opinions[2] are so encompassing and affect so many aspects of the subject that one does not know where or how to introduce the case. But this broad scope is what makes the case so interesting; at the same time that it settles some of the old questions concerning the appropriate constitutional boundaries of a state's powers, it raises new inquiries that will occupy those in the field for a long time.

Most,[3] though not all,[4] civil procedure casebooks introduce the concepts of personal jurisdiction through discussion of *Pennoyer v. Neff*,[5] that old and venerable "friend" to generations of law students and attorneys. In *Pennoyer*, the Supreme Court defined the scope of a state's power under the fourteenth amendment to reach all persons or property found within the state, but not to reach beyond the state's borders. The case has been valuable as a pedagogical tool as well as a means of providing a base for the study of the subsequent expansion of state power under the federal Constitution and new state statutory schemes. The majority opinion in *Shaffer*, however, casts considerable doubt on

* Professor of Law, Stanford University School of Law. A.B., 1953, Stanford University; LL.B., 1958, Harvard Law School.

1. 433 U.S. 186 (1977).

2. The case consists of four opinions. *Id.* at 186 (opinion of the Court); *id.* at 217 (Powell, J., concurring); *id.* (Stevens, J., concurring); *id.* at 219 (Brennan, J., concurring).

3. P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 861-70 (2d ed. 1977); J. COUND, J. FRIEDENTHAL, & A. MILLER, CIVIL PROCEDURE 65-71 (2d ed. 1974); R. FIELD & B. KAPLAN, CIVIL PROCEDURE 657-64 (3d ed. 1973); J. MCCOID, CIVIL PROCEDURE 498-510 (1974); M. ROSENBERG, J. WEINSTEIN, H. SMIT, & H. KORN, ELEMENTS OF CIVIL PROCEDURE 251-54 (3d ed. 1976); A. SCOTT & R. KENT, CIVIL PROCEDURE 338-43 (1967).

4. *E.g.*, J. CHADBOURN, A. LEVIN, & P. SHUCHMAN, CIVIL PROCEDURE 20, 55-59 (2d ed. 1974).

5. 95 U.S. 714 (1877).

Pennoyer's continuing validity. *Shaffer* not only eliminates the mere presence of property as a basis for quasi in rem jurisdiction, but appears also to undermine, if not destroy, the notion that the mere presence of a transient individual in the forum state at the time of service of process justifies the court's assumption of jurisdiction.[6] Arguably, then, *Pennoyer* should be relegated to a short paragraph of "historical background."

On the other hand, because so many law teachers have found the analysis of *Pennoyer* useful, especially in first year courses, a large majority are likely to continue discussing the case. They will rely on the Court's reference to the fact that plaintiff "did not allege and does not now claim that . . . [defendants] have ever set foot in Delaware,"[7] to justify an argument that jurisdiction based on mere presence is not yet dead. Nevertheless, students should be warned that *Shaffer* raises serious questions regarding the continuing vitality of *Pennoyer*.

Assuming that law professors will retain *Pennoyer* as the lead case, it might seem logical to turn to *Shaffer* immediately thereafter. This would have two advantages. First, the unease of dealing with *Pennoyer* at the outset would be short lived. Second, the artificiality of discussing before *Shaffer* numerous other cases in which jurisdiction is based on the defendant's mere presence would be eliminated.[8] Such cases include old favorites in which defendant's presence in the forum was procured by fraud,[9] force,[10] or trickery,[11] or in which defendant's

6. The Court's basic decision was that the minimum contacts standard, already applicable to in personam jurisdiction, must now apply to quasi in rem jurisdiction as well. As the Court recognized, the effect of applying the standard to in personam cases has been to increase the scope of the states' powers over nonresidents. 433 U.S. at 204. The *Shaffer* decision is the first to apply the standards to decrease jurisdiction as it had traditionally been allowed. If the same standards are applicable to persons and to property, the elimination of jurisdiction based on the mere presence of property would logically dictate the elimination of jurisdiction based solely on the transient presence of the defendant.

7. *Id.* at 213.

8. This problem is, of course, eliminated if the cases are discussed as a unit after the cases dealing with state power. *See* J. COUND, J. FRIEDENTHAL, & A. MILLER, *supra* note 3, at 160-78. But sometimes these cases are handled almost immediately after *Pennoyer*. *See, e.g.*, P. CARRINGTON & B. BABCOCK, *supra* note 3, at 876-84; M. ROSENBERG, J. WEINSTEIN, H. SMIT, & H. KORN, *supra* note 3, at 254-59.

9. *E.g.*, Wyman v. Newhouse, 93 F.2d 313 (2d Cir.), *cert. denied*, 303 U.S. 664 (1937); Willametz v. Susi, 54 F.R.D. 463 (D. Mass. 1972).

10. *E.g.*, United States v. Toscanino, 500 F.2d 287 (2d Cir. 1974); State *ex rel.* Sivnksty v. Duffield, 137 W. Va. 112, 71 S.E.2d 113 (1952).

11. *E.g.*, Nowell v. Nowell, 24 Conn. Supp. 314, 190 A.2d 233 (1963); Tickle v. Barton, 142 W. Va. 188, 95 S.E.2d 427 (1956). *Cf.* Siro v. American Express Co., 99 Conn. 95, 121 A. 280

voluntary entry into the forum state arguably was so within the public interest that he or she should be immune from service of process.[12]

Despite these advantages, however, full consideration of *Shaffer* immediately after *Pennoyer* would be premature. The *Shaffer* Court based its decision on the "minimum contacts" standard for testing the validity of in personam jurisdiction over nonresidents. That standard cannot be understood without a substantial explanation of its meaning and development. This could be accomplished, of course, merely by reading several long notes following *Pennoyer*. Although this approach may be sufficient for second and third year students, it would be unfortunate in a first year course for several reasons. First, to appreciate *Shaffer* fully a student must be familiar with the struggle to develop a rational standard illustrated by the line of cases leading to,[13] and past, *International Shoe Co. v. Washington*,[14] which first formally adopted the "minimum contacts" standard. Second, and even more important, *Shaffer* presents to first year students an opportunity to study the way in which common law techniques result in the development of new principles of law, even in the interpretation of the federal Constitution. Starting with a series of principles born of logic and necessity, courts struggled to make the existing law responsive to a set of radically changing circumstances by relying on such twists, turns, and legal fictions as they could muster. Thus, through artificial interpretations of "presence" and "consent,"[15] courts substantially expanded their powers over nonresidents until, as a pragmatic matter, a new set of principles emerged. Once these new tenets were sufficiently established, the Supreme Court, with the confidence exhibited in *International Shoe* in 1945, swept away the fictions and formally recognized the newly developed law. Following a thirty-two year period during which these principles matured through the process of legislative[16] and

(1923) (attachment of defendant's property by purchasing it from an agent, *held*: not fraud or trickery).

12. *E.g.*, St. John v. Superior Court, 178 Cal. App.2d 794, 3 Cal. Rptr. 535 (1960); Mattison v. Lichyter, 162 Cal. App. 2d 60, 327 P.2d 599 (1958).

13. The most popular cases are Hess v. Pawloski, 274 U.S. 352 (1927) (nonresident motor vehicle statute), and Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (action against nonresident stockbroker involving sale of securities in forum state).

14. 326 U.S. 310 (1945).

15. *See* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569 (1958).

16. *See* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909

judicial[17] tinkering, the Supreme Court in *Shaffer* once again made a major alteration; it now relied on its newly developed principles to challenge the continuing validity of the original ground of presence as a basis for personal jurisdiction. This is the poetry of law development, a part of fundamental legal education that should not be eliminated, even in the face of pressure to review an ever expanding number of cases and issues.

Even though *Shaffer* should not be studied at the outset of the personal jurisdiction material, it must be examined in detail during the discussion of quasi in rem jurisdiction. This is the area upon which it has the greatest and most direct impact. Undoubtedly *Shaffer* will be substituted for the leading quasi in rem case, *Harris v. Balk*,[18] which *Shaffer* directly overruled.[19] Although *Harris* should not be eliminated entirely because it provides the straw man by which the full significance of *Shaffer* can be appreciated, its facts can be presented in a brief note preceding *Shaffer*.

The *Shaffer* opinions could command substantial classroom analysis, especially in attempting to decide what is or is not left of quasi in rem jurisdiction. There are many avenues of interest: Should it make a difference if real rather than personal property is involved?[20] What if the property seized had been the stock certificates themselves rather than the abstract value of that portion of the corporation attributed to the defendants, and said to be situated in Delaware solely because that was the state of incorporation?[21] Would it make a difference, as the majority opinion seems to suggest,[22] if Delaware had enacted a set of jurisdictional statutes indicating a felt need to protect state interests? What activities constitute sufficient contacts with the forum to justify quasi in rem jurisdiction?[23] These questions are, of course, more than

(1960); Note, *The Development of In Personam Jurisdiction Over Individuals and Corporations in California: 1849-1970*, 21 HASTINGS L.J. 1105 (1970).

17. *See* authorities cited in notes 15-16 *supra*. *See also* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967).

18. 198 U.S. 215 (1905).

19. 433 U.S. at 208-12. Those who do not teach *Harris* immediately after *Pennoyer*, *see* P. CARRINGTON & B. BABCOCK, *supra* note 3, at 864-73, will probably find it necessary to reorganize their materials. *Harris*, like *Pennoyer*, dealt only with situs of the property as a basis for jurisdiction, whereas *Shaffer*, as we have seen, relies on the development of entirely different criteria. *See* text accompanying notes 13-17 *supra*.

20. *See* 433 U.S. at 217 (Powell, J., concurring).

21. *See id.* at 218-19 (Stevens, J., concurring).

22. *See id.* at 208-09.

23. *See id.* at 214-15.

of mere academic interest. Every lecturer on the subject will be required to monitor the advance sheets to determine the directions the courts will be taking. Already some fascinating cases have arisen.

One such case, *Omni Aircraft Sales, Inc. v. Actividades Aereas Aragonesas, S.A.*,[24] is currently on appeal in the Ninth Circuit. In that action, plaintiff, a United States corporation, had entered into a contract in France and Spain to purchase several jet aircraft from defendants, all foreign nationals. Defendants subsequently notified plaintiff that they would not make delivery. Thereafter the parties entered into a second, compromise contract that contained a clause conferring exclusive jurisdiction on the federal district court for the District of Columbia over any disputes arising out of the contract. Defendants failed to make delivery once again and plaintiff sued for breach of the second contract in the District of Columbia. Except for one jet engine brought to Arizona for repair, defendants owned no property in the United States. Therefore, primarily to protect its ability to enforce a judgment in this country, plaintiff filed a quasi in rem action in the Arizona federal court, attaching the engine. The district court dismissed the suit holding that *Shaffer* controlled.[25] Plaintiff argues on appeal that as to the initial contract, the Arizona court should have the power to accept quasi in rem jurisdiction "by necessity;"[26] otherwise, suit could only be brought in a court of a foreign country, in which enforcement of the contract would be uncertain. Although plaintiff concedes it has no specific authority for its position, it notes that the majority opinion in *Shaffer* specifically left open the question whether presence of property is a sufficient contact "where no other forum is available to plaintiff."[27] Even if such jurisdiction by necessity would be proper, it is questionable whether courts of foreign nations should be treated as "no other forum" for this purpose.

In addition, plaintiff argues that the Arizona federal court should be able to accept quasi in rem jurisdiction in an action brought to secure enforcement of the District of Columbia in personam action.[28] Of course, the Arizona court would have to require an appropriate preat-

24. No. 77-4012 (9th Cir., filed Dec. 27, 1977).

25. No. 77-4012 (D. Ariz., Nov. 15, 1977).

26. Brief for Appellant, Omni Aircraft Sales, Inc. v. Actividades Aereas Aragonesas, S.A., No. 77-4012 (9th Cir., filed Dec. 27, 1977), at 29-32.

27. 433 U.S. at 211 n. 37.

28. Brief for Appellant, Omni Aircraft Sales, Inc. v. Actividades Aereas Aragonesas, S.A., No. 77-4012 (9th Cir., filed Dec. 27, 1977), at 18-29.

tachment hearing to determine the need for such protection. This aspect of the case would normally fit into the discussion of prejudgment remedies and the Supreme Court's struggle to determine the safeguards necessary to protect a defendant's rights before his property interests are subject to interference.[29] At least one federal district court determined that such an attachment was necessary to secure a possible judgment being sought in another forum and that *Shaffer* did not prevent assertion of quasi in rem jurisdiction for that purpose.[30] These "remedial" problems are extremely important. If resolved to permit jurisdiction "by necessity" in a broad range of cases, then quasi in rem jurisdiction is far from moribund, even in a *Harris v. Balk* situation.

One of the most intriguing questions is whether *Shaffer* will affect cases such as *Seider v. Roth*,[31] which have used a fictionalized version of quasi in rem jurisdiction to allow suit in any state where defendant's insurer can be found by attaching the insurance policy covering the loss which is the subject of plaintiff's action. Theoretically, these are not quasi in rem situations at all because the "property" allegedly attached does not exist until after liability is assessed against defendant.[32] Before that time the policy has no intrinsic value. In *Seider* and similar cases, courts twisted the quasi in rem device to create "direct actions" against insurers in the absence of legislation.[33] It is not at all clear that assertion of jurisdiction—at least in the state where the insurer has its principal place of business—would not meet the minimum standard, provided that an appropriate state statute would so permit.[34]

It is important to recognize that *Shaffer's* impact extends beyond the issue of a state's power to assert jurisdiction over nonresidents and their property. The case will undoubtedly have an impact on the problems of notice and the right to be heard, both for what the opinions say and for what they omit. The Delaware court, from whose decision the ap-

29. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

30. Carolina Power & Light Co. v. Uranex, No. 77-0123 (N.D. Cal., Sept. 26, 1977).

31. 17 N.Y. 2d 111, 216 N.E. 2d 312, 269 N.Y.S. 2d 99 (1966). *See* Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075 (1968).

32. *Cf.* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 520-21 (1916) (interpleader of claimants to an insurance contract).

33. *See, e.g.*, Minichiello v. Rosenberg, 410 F.2d 106, 110, 112 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969).

34. *Cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957) (California jurisdiction over a New York trustee based on the trustee's significant contacts with California), *cert. denied*, 357 U.S. 569 (1958).

peal was taken, barely touched on the issues which the Supreme Court decided;[35] instead it focused on whether the standards of notice and right to a hearing attending a pretrial attachment to secure a potential judgment[36] also applied to an attachment to obtain quasi in rem jurisdiction. In addition, the lower court discussed at length whether the specific Delaware statutory procedure met the due process requirements established in other attachment cases.[37] Although the Supreme Court did not resolve these issues, the majority opinion raises doubts as to the validity of the Delaware procedure.[38]

A similar problem exists with respect to the absence in Delaware of a limited appearance provision, whereby an owner, whose property has been seized to provide the court with jurisdiction, may fight the action on the merits without being subjected to in personam jurisdiction. The implications of the *Shaffer* case in the Delaware courts prior to Supreme Court reversal were alarming. Any person who owned stock of any Delaware corporation could be sued in the Delaware courts.[39] If the owner failed to appear, the stock was lost by default; if the owner appeared to fight the case, he or she automatically submitted to in personam jurisdiction even though Delaware had no other relationship to the defendant or the cause of action.[40] This state of affairs may have prompted the Supreme Court's interest in the case. The decision leaves open the question whether any kinds of quasi in rem jurisdiction still allowable after *Shaffer* will be valid in the absence of defendant's right to make a limited appearance.

Finally, *Shaffer* lends itself to consideration of several jurisprudential questions not directly involved with the Court's reasoning. The first concerns the majority's conclusion that sufficient minimum contacts with Delaware did not exist to permit jurisdiction, even though that issue had not been considered by the Delaware courts and there

35. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977).

36. *Id.* at 230-32. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

37. *See* the discussion of the Delaware state court opinions in 433 U.S. at 193-95.

38. *See id.* at 194 n.10.

39. Delaware is the only state which "treats the place of incorporation as the situs of the stock, even though both the owner and the custodian of the shares are elsewhere." *Id.* at 218 (Stevens, J., concurring).

40. *Id.* at 218-19.

was no record or opportunity for plaintiff to discover and present evidence on the matter. As noted by Justice Brennan in dissent:

> [T]he Court's ruling is a constitutional one and necessarily will affect the reach of the jurisdictional laws of all 50 states. Ordinarily this would counsel restraint in constitutional pronouncements . . . . Certainly it should have cautioned the Court against reaching out to decide a question that, as here, has yet to emerge from the state courts ripened for review on the federal issue.[41]

It is interesting to speculate why the Court did not return the case to the Delaware state courts for a hearing on the matter. It is also interesting to speculate why, having made his point, Justice Brennan went on to find that the available evidence established sufficient minimum contacts to permit jurisdiction. By doing so, he may have given more force to the majority's position than if he had joined Justice Stevens, who, concurring, simply noted his "uncertainty as to the reach of the [majority] opinion."[42]

A related matter of interest is the Court's failure to discuss the case's impact on anyone other than the named defendants. As noted above, the Court did not dwell on problems plaintiff might have had in finding an alternative forum, or on problems that could arise in future cases that might result in a serious imbalance between the interests of plaintiffs and defendants. Suppose, for example, that defendants were all residents of a foreign country and had committed the alleged acts outside the borders of the United States. Should the operation of jurisdictional standards be unaffected by this or other factors such as the nature of the substantive claim? By ignoring these issues and deciding the case without benefit of a full development of the facts, the Supreme Court adopted a mechanical approach itself worthy of classroom exploration.

When one assesses the broad reach of *Shaffer*—the issues it handles and those it merely raises—it is clear that the case will be the focus of extended classroom discussion for a long period. Inevitably, perhaps in another twenty or thirty years, the Supreme Court will take another dramatic turn. Spurred on by the installation of an economical and speedy intracontinental transportation system, or advanced technology in the telecommunications industry, the Court will finally decide that state or even national boundaries no longer serve a useful purpose in

41. *Id.* at 221-22.
42. *Id.* at 217-19.

limiting jurisdiction, and *Shaffer* will, like those cases it replaces, be relegated to a mere footnote of history.