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# The Applicability of Shaffer to the Quasi-in-Rem Attachment of Foreigners' Assets

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# THE APPLICABILITY OF *SHAFFER* TO THE *QUASI-IN-REM* ATTACHMENT OF FOREIGNERS' ASSETS

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## I. INTRODUCTION TO SHAFFER V. HEITNER AND ITS DUE PROCESS IMPLICATIONS

In this age of low tariffs and efficient transportation, it is not unusual to find even the most common businessman engaging in contracts for goods and services with foreign companies. Many times services are performed overseas, or goods are shipped to the United States without any need for the foreign concern to establish an office or agency within United States borders.

While recognizing no need for the creation of business offices, many foreign companies and individuals take advantage of the political and economic stability of the United States by holding land, establishing bank accounts, extending credit, or investing in securities. Bank accounts, in particular, serve a dual purpose—as a safe depository for the accummulation of wealth, and as a convenient source of funds for the transaction of business with United States concerns.

Until *Shaffer v. Heitner*,[1] the United States businessman could be sure that, in the event of a dispute with a foreign company or individual, he could establish jurisdiction over the foreign defendant merely by effecting a *quasi-in-rem* attachment of the for-

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

eigner's land, securities, debts or bank holdings. Although potential judgment was limited to the value of the attached property, the simplicity and ease in which *quasi-in-rem* jurisdiction was obtained outweighed the benefits of securing a judgment *in personam*. Whereas *International Shoe v. Washington*[2] demanded, for *in personam* jurisdiction, an uncertain degree of defendant-forum contacts such that "fair play and substantial justice"[3] prevailed, *in rem* cases since *Pennoyer v. Neff*[4] allowed jurisdiction based solely upon the forum's power over property. *Shaffer v. Heitner* suddenly changed this jurisdictional scheme by holding that due process required a consideration of defendant's forum contacts under the *International Shoe* standard before jurisdiction could be obtained over defendant's property.[5] Indeed, no longer can the prospective plaintiff attach property merely because it is present in the jurisdiction—he must show that defendant's contacts with the forum are sufficient to justify the court's jurisdiction over defendant's interest in the attached property.[6]

The plaintiff anticipating suit against a foreign defendant must study the implications of *Shaffer* before attempting to secure *quasi-in-rem* jurisdiction through the attachment of defendant's assets. No longer can an American businessman be sure that an attachment of the foreigner's property will provide jurisdiction. The presence of a foreigner's assets in this country may be transitory and fortuitous; plaintiff's cause of action will not likely be related to the property attached. The American plaintiff must ascertain whether the strict guidelines of *Shaffer,* intended to protect American defendants, should apply to the *quasi-in-rem* attachment of a foreign defendant's property.

*Shaffer* was based upon a very narrow fact situation—the defendants' contact with the forum was limited to the local registration of corporate stock. The defendants were all American citizens, and their contact with the jurisdictional forum was of an intangible nature.

This Note proposes to examine the nature of United States contacts availed of by foreign defendants,[7] and to determine the impact of *Shaffer* on the potential assertion of *quasi-in-rem* jurisdiction based on those contacts. It is instructive to consider *quasi-*

2. 326 U.S. 310 (1945).
3. *Id.* at 316.
4. 95 U.S. 714 (1877).
5. 433 U.S. at 207.
6. *Id.*
7. For the purposes of this Note, a foreign defendant is a nonresident alien from whom the plaintiff has suffered breach of contract or tort damage.

*in-rem* jurisdiction's relation to four possible scenarios involving a foreign defendant: (1) the foreign defendant who owns real estate in this country; or (2) maintains deposits in United States banks; or (3) invests in securities that are registered locally; or (4) extends credit to United States companies or individuals on a regular basis. This Note ultimately concludes that in light of the narrow fact situation litigated in *Shaffer,* the high degree of contacts required for jurisdiction over an American defendant will necessarily be lower when determining the due process limitations of *quasi-in-rem* jurisdiction over foreign defendants characterized by the aforementioned hypothetical scenarios.

## II. QUASI-IN-REM ATTACHMENT AND THE DUE PROCESS SHADOW

### A. *Legal Background*

The doctrine of *in rem* jurisdiction evolved from the landmark decision in *Pennoyer v. Neff,*[8] which held that the state had exclusive jurisdiction over all persons and property within its boundaries. While *Pennoyer* appeared, on its face, to be a *tour de force* with respect to jurisdiction over local real estate, the inadequacy of its precedent with respect to personal jurisdiction became increasingly apparent as Americans became more mobile and interstate commerce bloomed. Since *Pennoyer* did not distinguish between jurisdiction over property and jurisdiction over persons, a void developed in that the state courts could assert no power over persons who were beyond state borders.

Finally, in *International Shoe v. Washington,*[9] the Supreme Court filled in this jurisdictional void by holding that due process allowed *in personam* jurisdiction over an out-of-state defendant if he has certain "minimum contacts" with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[10] By referring only to *in personam* jurisdiction, the Court effectively exempted *in rem* jurisdiction from *International Shoe's* newly announced due process requirements.

In the years following *International Shoe,* the Supreme Court regarded due process as requiring a decreasing degree of minimal contacts in the exercise of *in personam* jurisdiction, provided "fair play and substantial justice" was served. In two major decisions, *McGee v. International Life Insurance Co.,*[11] and *Mullane v. Cen-*

8. 95 U.S. 714 (1877).
9. 326 U.S. 310 (1945).
10. *Id.* at 316.
11. 355 U.S. 220 (1957).

*tral Hanover Bank,*[12] the Court satisfied itself that jurisdiction was fair and just without requiring much more than an ephemeral degree of defendant-forum contacts. *Mullane* involved jurisdiction over unknown, nonresident trust beneficiaries. The Court sustained jurisdiction over these defendants, arguing that New York State's interest in providing means to close trusts was "so rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident . . . ."[13] Later, in *McGee,* the Court allowed jurisdiction in California over a Texas insurer who did no business within the state except to the extent that he took over the policies of another insurance company. The Court found that the insurance company had substantial connection with the California forum, and that the state had a legitimate interest in regulating insurers who solicited business in California.[14] Here the Court recognized the importance of some degree of defendant-forum contacts, yet continued to rely on state interest as a jurisdictional criterion.

Finally, one year after *McGee,* the Supreme Court decided *Hanson v. Denckla.*[15] In *Hanson,* a Pennsylvania resident established a trust in Delaware and continued, after settling in Florida, to transmit instructions regarding the trust to the Delaware trustee. Upon the settlor's death, her estate was probated in Florida, and the local court attempted to obtain jurisdiction over all indispensable parties, including the Delaware trustee. The Supreme Court refused to allow jurisdiction over the defendant trustee, holding that in order to fulfill the due process prescription of *International Shoe,* there must be "some *act* by which the defendant *purposefully avails* himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."[16]

As the law of *in personam* jurisdiction evolved under the guidelines of *International Shoe, in rem* jurisdiction thrived under the somewhat anachronistic blessing of *Pennoyer v. Neff.* Ever since Justice Field observed that a court could not directly affect the personal interests of the defendant without jurisdiction over his person,[17] proceedings *in rem* were viewed as not *directly* affecting the personal interests of the owner. It is in this respect that an *in*

12. 339 U.S. 306 (1950).
13. *Id.* at 313.
14. 355 U.S. at 223.
15. 357 U.S. at 235 (1958).
16. *Id.* at 253.
17. 95 U.S. at 723.

*rem* proceeding was to be limited to the value of the property over which the court had obtained jurisdiction.[18]

The continuing reluctance of the courts to equate a defendant's property interests with his personal interests produced a dichotomous precedent whereby the growing reverence for fair play and substantial justice toward an *in personam* defendant was abandoned completely when the action was against property *in rem*.

Nowhere was this dichotomy more threatening than in *quasi-in-rem* actions where the action against property is not direct, but derivative—the claimant seeks to obtain a judgment against the property in satisfaction of a different, unrelated claim against the property's owner.[19] In *Harris v. Balk*,[20] ultimately overruled by *Shaffer*,[21] the defendant owed the plaintiff a sum of money. Both parties were North Carolina residents. Yet when the defendant traveled to Maryland, a creditor of the plaintiff served the defendant with a writ of attachment, garnishing his debt to the plaintiff. When later sued on his debt to the plaintiff, defendant pleaded the prior Maryland judgment. The Supreme Court ultimately ruled that the debt had followed the defendant to Maryland where it had been properly attached. Thus, *Harris* stood for the proposition that even intangible property which was present within a state through no act of the owner was subject to *quasi-in-rem* attachment in satisfaction of an unrelated claim against the owner.

By the time the Supreme Court decided *Shaffer*, the independent evolution of *in rem* and *in personam* jurisdictions had resulted in an illogically disjunctive system of state jurisdictional power. On one hand, the fair play and substantial justice of *International Shoe* stood sentinel over assertions of personal jurisdiction. Yet *in rem* proceedings, typified by *Harris v. Balk*, were permitted without any measure of contacts between the defendant,

18. *Id.* at 725.

19. *In rem* jurisdiction has developed into three separate categories, generally known as "true *in rem*," "*quasi-in-rem* type I" and "*quasi-in-rem* type II." True *in rem* jurisdiction purports to adjudicate the rights of "all the world" in a designated property, and all claims are decided in a single proceeding. *Quasi-in-rem* I also deals with direct claims to specific property, but decides only the claims of specific parties. *Quasi-in-rem* II cases involve claims of specific parties to property which are derivative—judgment is sought against property in satisfaction of a different, unrelated claim against the property's owner. This Note is primarily concerned with jurisdiction of this nature. 11 LOY. L.A.L. REV. 87, 95 (1977); *see generally* Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 945-66 (1960) (extensively discussing the categories of in rem jurisdiction).

20. 198 U.S. 215 (1905).

21. 433 U.S. at 212 n.39.

forum and litigation. The *Shaffer* Court moved decisively to incorporate in *in rem* jurisdiction the due process requirement of minimal contacts. An examination of *Shaffer,* though, reveals that it was based on a fact situation with much potential for differentiation; due process may well require a lower degree of minimal contacts in cases where jurisdiction is maintained for lack of an alternative forum.

### B. *Shaffer v. Heitner*

*Shaffer* was based upon a very narrow fact situation. Appellee Heitner owned one share of stock in Greyhound Corporation, which was incorporated in Delaware with its principal place of business in Arizona. He filed a shareholder's derivative suit in Delaware against Greyhound, alleging that defendants, twenty-eight present or former corporate officers or directors, had breached their duties by conducting unlawful activities in the State of Oregon.[22] Pursuant to Delaware's sequestration statute, Heitner had 82,000 shares of defendants' Greyhound stock sequestered in order to obtain *quasi-in-rem* jurisdiction.[23] While the liability of the defendants under *quasi-in-rem* jurisdiction was limited to the value of the attached stock, the great value of the property compelled defendants to answer and defend the suit in Delaware. Defendants challenged the validity of the sequestration statute on constitutional grounds, claiming that defendants lacked sufficient contacts with the state.[24] The Delaware courts upheld the validity of the sequestration statute and permitted jurisdiction, noting that the suit was brought as a *quasi-in-rem* proceeding and therefore could be based on the traditional attachment of property, independent of any possible contacts between the defendant and the forum state.[25]

The United States Supreme Court reversed, holding that Delaware could not assert jurisdiction over property merely because it is located within the state; rather, the basis for jurisdiction over property must be sufficient to justify exercising jurisdiction over the *interests* of the defendant in that property.[26] Due process requires that in order to assume jurisdiction over these interests, the court must evaluate the sufficiency of the nonresident defendant's contacts with the forum, and determine that they meet the

22. *Id.* at 189-90.
23. *Id.* at 192.
24. *Id.* at 193.
25. *Id.* at 193-95.
26. *Id.* at 207.

minimum contacts standard of *International Shoe*.[27] Traditional notions of fair play and substantial justice no longer justify jurisdiction based solely on the presence of property within the sovereignty of the state, unless that presence is indicative of a relationship between the defendant, the forum and the litigation.[28] Justice Marshall found the *Shaffer* attachment unconstitutional because the tenuous relationship between defendant and forum was supported only by local registration of stock, and because the lack of a forum-litigation relationship was highlighted by the absence of a cause of action related to the attached property.[29] The Court further supported its denial of jurisdiction by refuting the argument that treating the presence of property alone as a basis for jurisdiction would prevent a wrongdoer from removing his property to a forum like Delaware where he is not subject to an *in personam* suit.[30] Since there was no inquiry as to whether the defendants actually held property in Delaware for that purpose, and since judgment *in personam* could be maintained elsewhere and enforced under the full faith and credit clause, the Court saw no reason to allow jurisdiction over the defendants' interest solely on the basis of the property's presence in Delaware.[31] The Court did note that *Shaffer* did not raise nor consider the question "whether the presence of a defendant's property in a state is sufficient basis for jurisdiction when no other forum is available to the plaintiff."[32]

Two concurring opinions in *Shaffer* suggested the possibility that certain types of property may provide the contacts necessary to subject a defendant to jurisdiction within the state to the extent

27. *Id.*

28. *Id.* at 207-09. The Court noted "It would not be fruitful for us to reexamine the facts of cases decided on the rationalities of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled." *Id.* at 212 n.39.

29. *Id. See* text discussing unrelated causes of action, *infra* notes 70-72.

30. *Id.* at 210.

31. *Id.*

32. *Id.* at 211 n.37.

The applicability of this reservation should be limited to suits against defendants whose home countries are too far away and/or whose domestic court system offers slim prospect of a fair, unbiased adjudication. Lack of alternative forum cannot be pleaded when the defendant's home is, for instance, Canada. *See* text accompanying note 104 *infra* citing a recent New York state court decision holding courts in Hong Kong and Korea to be acceptable alternate forums. It is not choice of national law that will determine acceptable forum, rather it is the practicality of suit and the possibility of a fair trial in a foreign country. *See* text

of the value of the property. Justice Powell regarded the ownership of property of "indisputable" and "permanent" situs as sufficient to support *quasi-in-rem* jurisdiction.[33] Justice Stevens read into the Due Process Clause a protection against "judgments without notice."[34] The requirement of fair notice would include a fair warning that "a particular activity may subject a person to the jurisdiction of a foreign sovereign."[35] Justice Stevens opined that the purchase of real estate or the opening of a bank account are contacts, though minimal, that gave rise to predictable risks; even the purchase of intangible property, like stock, may represent a calculated risk to a *foreign* investor, since a foreign investment "[a]s a matter of international law . . . is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision."[36]

## III. Analysis of Shaffer in Foreign Business Assets Context

### A. *Defendant-Forum Relationship*

#### 1. Purposeful Acts

In the realm of defendant-forum contacts, the narrow fact situation considered in *Shaffer* renders the case highly suitable for future differentiation. Jurisdiction over the defendant was based merely on the registration of his Greyhound stock in the state of Delaware.[37] Surely, the Court recognized that, in *Shaffer,* it was addressing the most tenuous of defendant-forum contacts.[38] Given the possibility that our prospective plaintiff seeks to attach real estate, bank deposits, stock or credit, belonging to a foreign defendant, the question arises whether such defendant-forum contacts are sufficient to support the acquisition of jurisdiction under the due process guidelines of *Shaffer.*

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accompanying note 103 *infra,* citing a Connecticut Federal District Court holding that a trial under Islamic law in Kuwait would not provide the plaintiff with a reasonably alternative forum. Equally important in the due process analysis is the historical ability of the plaintiff to pursue claims in foreign lands. A large American multinational ought to consider many western-style countries as readily accessable fora, whereas a denial of local jurisdiction would prejudice the more common businessman who lacked an international presence.

33. *Id.* at 217.

34. *Id.*

35. *Id.* at 218.

36. *Id.*

37. *Id.* at 191-92.

38. "Appellee Heitner did not allege and does not now claim that appellants have ever set foot in Delaware. Nor does he identify any act related to his cause of action as having taken place in Delaware." *Id.* at 213.

The Supreme Court now requires the suitor to look beyond the early guidelines of *International Shoe,* which simply required "minimum contacts"[39] with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[40] Justice Marshall had *Hanson v. Denckla* in mind when he noted that, in *Shaffer,* the defendant had never been in the forum state. The *Hanson* Court required that in order for jurisdiction to be permissible "it is essential in each case that there be some *act* by which the defendant purposefully *avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[41] By emphasizing "an act of purposeful availment," *Hanson* manifested a shift in emphasis from the earlier decision of *McGee v. International Life Insurance Co.,* in which the Court reasoned that it would be fair to subject a party to jurisdiction when it was convenient for him to appear[42] and when there exists the requisite *International Shoe* standard of contacts.[43] The *Shaffer* Court rejects the notion of convenience as a basis for jurisdiction,[44] and reaffirms the requirement of purposeful acts which avail the defendant of the benefits of the forum state.[45] Recently, the Supreme Court reversed the holding of the California Supreme Court in *Kulko v. Superior Court of California,*[46] which had allowed California jurisdiction over a New York father who allowed his daughter to go live in California with her recently divorced mother. The Court held that the test of measuring the "effects" in California caused by a nonresident defendant was insufficient to determine jurisdiction without the requirement of a purposeful *act* by a defendant intending to avail himself of the state's benefits.[47]

Of the four proposed scenarios, it is likely that a purchase of land or an opening of a bank account by a foreign, or even domestic, defendant will constitute actual *acts* committed within the state. The purchase of American securities, though, may not lend itself well to the definition of an act. Certainly the *Shaffer* Court saw

39. 326 U.S. at 316.
40. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463).
41. 357 U.S. at 253 (emphasis added) (cited in *Shaffer,* 433 U.S. at 216).
42. 355 U.S. at 223.
43. *Id.* at 222.
44. 433 U.S. at 215.
45. *Id.* at 216.
46. 436 U.S. 84 (1978).
47. *Id.* at 96-97. *But cf.* Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969), which relied heavily upon the defendant's enjoyment of the state's benefits to show purposeful availment, but drew upon

no act inherent in the purchase of stock registered in Delaware. In view of the recognition given by Justice Stevens to foreign investment in American securities,[48] however, such purchases by foreign defendants could at least qualify as constructive acts committed within American jurisdiction.

Finally, a foreign defendant's extension of credit to domestic parties may demand the most liberal recognition as a constructive act within our jurisdiction. To avoid the unfairness of attaching transitory *Haris v. Balk* type debts, courts may permit attachment of debt only when it is extended to an entity permanently located within United States jurisdiction. Similarly, a loan to the home office of a United States multinational corporation may qualify for attachment, while a loan to its foreign subsidiary may not.

Particular attention must be paid to Justice Marshall's footnoted caveat that plaintiff's lack of alternative forum may render a due process equilibrium requiring less than the *International Shoe* degree of contacts.[49] Since this Note's scenarios involve foreign defendants who are not easily sued overseas, it follows that the *Shaffer* footnote would sanction a lower actual degree of defendant-forum or forum-litigation contacts in the due process analysis of jurisdiction.[50] This approach provides further support in the foregoing analysis for the generous recognition of constructive acts as a basis for finding a defendant-forum relationship.

### 2. Purposeful Availment of Forum Benefits

In addition to proving an act committed within the forum state, plaintiff must show that the defendant purposely availed himself of the benefits of the forum.[51] The concept of foreseeability may be used to establish purposefulness once an act has been revealed. Justice Marshall alluded to this concept in *Shaffer,* when he pointed out that the defendant "had no reason to expect to be hauled before a Delaware court."[52] Later, in *Kulko,* Justice Marshall dismissed the "effects" doctrine not only as an inadequate substitute for an in-state act, but also inadequate to show a pur-

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the "effects" fiction as a substitute for an *act* within the state. *Shaffer* and *Kulko* imply that they will require stronger evidence of an act within the state.

48. 433 U.S. at 218.

49. *Id.* at 211 n.37.

50. *See* text accompanying notes 65-67 *infra,* concerning the continued vitality of *quasi-in-rem* jurisdiction and an allowance of a lower requisite degree of contacts in the assertion of jurisdiction over the foreign defendant.

51. 433 U.S. at 216.

52. *Id.*

poseful availment of benefits.[53] The California effects doctrine must be distinguished from the "foreseeability" doctrine, however, in that "effects" within a forum are objective foregone conclusions, whereas foreseeability of forum benefits signals that a conscious choice has been made by the defendant before he acted. Thus, the Court in *Kulko* would agree with *Shaffer's* implied recognition of foreseeability as a basis for finding a purposeful availment of forum benefits.

Our prospective plaintiff must consider whether the foreign defendant has availed himself of the forum state's benefits by purchasing land, holding bank accounts, investing in stock registered in the state, or extending credit. In his concurring opinion in *Shaffer*, Justice Stevens implicitly equated assumption of risk of suit with purposeful availment of forum benefits: "If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the state will exercise its power over my property or my person while there. My contact with the state, though minimal, gives rise to predictable risks."[54] Therefore, the question arises as to whether our prospective defendant would have assumed the risk of being sued in a particular forum state only by virtue of land or bank holdings, or whether the same consequence can flow from the purchase of stock or the extension of a loan to a corporation organized under the laws of the forum state. Justice Stevens distinguishes the attachment of securities owned by a foreign defendant "because a foreign investment is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision . . . . [A] purchase of securities in the domestic market is an entirely different matter."[55]

Lower courts have justified the finding of defendant-forum contacts through the concept of foreseeability suggested in *Shaffer*. In *Engineering Equipment Co. v. S.S. "Selene,"*[56] a case of maritime attachment, the court stated:

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53. 436 U.S. at 93-96.

54. 433 U.S. at 218. Justice Powell's concurring opinion suggests the same result:

> I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputedly and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property.

*Id.* at 217.

55. *Id.* at 218.

56. 446 F. Supp. 706 (S.D.N.Y. 1978).

> [E]ven after *Shaffer,* the presence of the defendants' property can provide a basis for jurisdiction. The presence of the debt in the U.S. is by no means fortuitous. It arises out of charter parties that the defendants executed with American companies and that contemplated at least partial performance within the U.S. The defendants could reasonably have *foreseen* that litigation relating to these contacts could take place in the U.S.[57]

In an earlier decision, *Feder v. Turkish Airlines,*[58] the court interpreted the foreseeability language of *Shaffer* "as requiring minimal contacts between the defendant and the forum relative to the property attached . . . transitory contacts unrelated to the property simply would not put a nonresident defendant on notice of the possibility of his having to defend certain property in the forum."[59] One year later, the Second Circuit, in *Intermeat v. American Poultry, Inc.,*[60] effectively dismissed *Feder's* limitation that only property-related contacts could be considered when evaluating the sufficiency of defendant-forum contacts. Circuit Judge Gurfein found that *Shaffer's* requirement of minimum contacts "means that the presence of the defendant's property within [the state] must be viewed as only one contact of the defendant with the state, to be considered along with other contacts in deciding whether the assertion of jurisdiction is consistent with 'traditional notions of fair play and substantial justice.'"[61]

It is likely that the foreign defendant would be found to have committed purposeful acts to avail himself of forum benefits by purchasing real estate or holding bank accounts. Although Justice Stevens has suggested that foreign investment be deemed purposeful availment of forum benefits, the essential *Hanson* requirement of an "act" within the forum may be lacking in the case of locally registered stock. A possible solution to this dilemma would be the *Intermeat* analysis, which would allow the consideration of other forum contacts, if they exist, in addition to the contact through the stock registration.[62] The sum of these defendant-forum contacts may be held, in the case of a foreign investor, to be sufficient to permit the acquisition of jurisdiction over the foreign defendant's interest in the property. A consideration of other forum contacts

57. *Id.* at 710 (emphasis added).
58. 441 F. Supp. 1273 (S.D.N.Y. 1977).
59. *Id.* at 1279 n.5.
60. 575 F.2d 1017 (2nd Cir. 1978).
61. *Id.* at 1022 (citing 326 U.S. at 316).
62. *See* text accompanying note 119 *infra.*

may well support the attachment of debt, also. A showing that the foreign defendant regularly extended credit to a domestic party signifies an availment of the benefits of the jurisdiction where the party is located. In *Louring v. Kuwait Boulder Shipping Co.*,[63] the court relied on Justice Stevens' reasoning in *Shaffer* that the activity of the defendant had given it "fair warning" that it may be subject to suit somewhere in the United States. The court found that "[b]y transacting business with the garnishee, defendant plainly took the risk that debts owed the defendant by the garnishee might provide the basis for the assertion of jurisdiction."[64]

*Shaffer's* insistence upon using the same test of fair play and substantial justice in *in rem* actions as governs assertions of jurisdiction *in personam* does not preclude the possibility of requiring a lower degree of forum contacts in a *quasi-in-rem* attachment of a foreigner's property.[65] The vitality of the *quasi-in-rem* action should be preserved for those instances where the foreigner's only contacts with the United States are through his investment and risk in holding property within our jurisdiction. This extension of the foreigner's risk should not necessarily be indicative of contacts sufficient to warrant *in personam* jurisdiction. *Shaffer* denigrated the argument that the potential liability of a defendant in *quasi-in-rem* actions is limited by the size of the claim being litigated.[66] This scorn, however, should be confined and directed at the attempted assertion of jurisdiction over property solely because the value of the property is relatively small. Such an attempt at attachment should be rebuffed because it disregards the possibility of *in personam* jurisdiction in another forum.[67] The real merit in *quasi-in-rem* jurisdiction appears when the defendant-forum contacts in the property, albeit tenuous, represent the total risk taken by a foreign defendant within this country. What should be stressed about *quasi-in-rem* jurisdiction in this situation is that it contemplates jurisdiction only to the extent of the foreigner's risk, not merely to the extent of his property value. By focusing on the defendant's contacts with the forum, and by regarding property

63. 455 F. Supp. 630 (D. Conn. 1977).

64. *Id.* at 633.

65. *See* 433 U.S. at 211 n.37; *see also* Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33, 74-77 (1978) for a discussion of the possibility of a lower degree of contacts in *quasi-in-rem* jurisdiction than in in personam jurisdiction.

66. 433 U.S. at 207 n.23.

67. *Id.* at 209 n.32.

holdings as calculated risks, the unfairness in trying to justify jurisdiction over property solely because that property is not of great value, disappears.

### B. *Forum Litigation Relationship*

#### 1. Introduction

*Shaffer's* insistence upon "ties among the defendant, the State, and the litigation,"[68] dictates that jurisdiction must be supported by not only defendant-forum contacts, but contacts between the forum and the litigation as well. Justice Marshall referred explicitly to the fact that *Shaffer* will profoundly affect cases "where the property which now serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action."[69] It should be recognized, however, that in light of *Shaffer's* consideration of a minimum defendant-forum contacts fact situation, and in light of its adherence to the formula outlined in the minimum contacts holding of *International Shoe,*[70] the requirement that a cause of action be related to defendant-forum contacts should be limited to cases in which the defendant-forum contacts are indeed minimal. While it is unlikely that our foreign defendant's contacts with the forum will amount to anything more than minimal, the plaintiff should note that in *Perkins v. Benguet Consol. Mining Co.,*[71] the Court held that state courts could exercise jurisdiction on causes of action not arising from contacts within the state when the defendant's contacts within the state were "continuous and systematic,"[72] rather than minimal. "Continuous and systematic," though, evidences a level of contacts which would certainly entitle the plaintiff to *in personam* jurisdiction over the foreign defendant, thus obviating the need for jurisdiction through attachment.

In its refusal to require that property attached be related to the plaintiff's cause of action, the court in *Feder v. Turkish Airlines*[73] ignored the fact that *Perkins* was limited to situations where the defendant-forum contacts were substantial. In finding that there was "no express 'holding'" in *Shaffer* that required a cause of action related to defendant-forum contacts, the *Feder* court relied

68. *Id.* at 209.
69. *Id.*
70. 326 U.S. at 319.
71. 342 U.S. 437 (1952).
72. *Id.* at 438.
73. 441 F. Supp. 1273 (S.D.N.Y. 1977).

on the fact that *Shaffer* had not ruled on bank accounts as potential forum contacts.[74] While it may be found, for instance, that holding bank accounts represents a more purposeful availment of forum benefits than buying stock registered in the forum state, both acts will be ranked, at most, as *minimal* defendant-forum contacts. *Perkins'* allowance of a cause of action unrelated to those defendant-forum contacts should be of no avail when the contacts are minimal, as opposed to continuous and systematic.

### 2. State Interest Doctrine

Since it seems relatively easy for the plaintiff to show that the foreign defendant has assumed some degree of minimum contacts with the forum, the most pressing question surfacing in *Shaffer's* wake is how to prove a relationship between the forum and the litigation.

In the past, considerable weight has been placed upon the interests of the state as a criterion for determining jurisdiction to adjudicate. Recent decisions support the proposition that state interest can, in the quest for jurisdiction over a foreign defendant, be substituted for the related cause of action in order to provide the forum-litigation relationship.

An analysis of the state interest doctrine reveals that *Shaffer* does indeed indicate a shift in emphasis away from the importance of state interest as a basis for jurisdiction. In the early decision of *Mullane v. Central Hanover Bank,*[75] the Court relied most heavily on New York's interest in closing trusts, and allowed jurisdiction without emphasizing the consideration of fairness to the parties.[76] Later, in *McGee v. International Life Insurance Co.,*[77] the Court again placed considerable weight upon the interests of the state in providing jurisdiction over insurers: "It cannot be denied that California has a manifest interest in providing effective means of re-

74. *Id.* at 1278.

75. 339 U.S. 306 (1950).

76. The Court stated:

> [T]he interest of each State in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish *beyond doubt* the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

*Id.* at 313 (emphasis added).

77. 355 U.S. 220 (1957).

dress for its residents when their insurers refuse to pay claims."[78]

In 1958, the Supreme Court was faced with the argument that application of state law was a state interest sufficiently important to require state court jurisdiction. The Court in *Hanson v. Denckla,*[79] found that choice of law or choice of convenient location were not state interests worthy of consideration as jurisdictional criteria.[80]

*Shaffer's* approach to the state interest doctrine as a criterion in determining jurisdiction to adjudicate appears contradictory on its face. In an early part of the opinion, Justice Marshall notes that the "[s]tate's strong interest in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property"[81] would support the exercise of state court jurisdiction. Yet later, the Court became influenced by its *Hanson* opinion and went so far as to treat state interest solely as a choice of law criterion:

> [E]ven if Heitner's assessment of the importance of Delaware's interest is accepted, his argument fails to demonstrate that Delaware is a fair forum for this litigation. The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors. But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.[82]

*Shaffer* went on to cite directly from *Hanson* with regard to state interest as a jurisdictional criterion:

> [The State] does not acquire . . . jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants].[83]

Never before has the Court given so little weight to a state's interest in assuming jurisdiction.[84] In light of *Shaffer's* brief recog-

78. *Id.* at 223. For earlier cases stressing state interest, see Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawloski, 274 U.S. 352 (1927).

79. 355 U.S. at 223.

80. *Id.* at 254.

81. 433 U.S. at 208.

82. 433 U.S. at 215.

83. *Id.* (citing Hanson v. Denckla, 357 U.S. at 254).

84. Justice Brennan stated in the dissenting portion of his opinion that the

nition of state interest as a jurisdictional criterion, however, it should not be interpreted as a complete abdication of the state interest doctrine. Rather, this opinion holds that state interest is of *limited* importance in determining the fairness of jurisdiction.

The plaintiff must ascertain the newly determined applicability of state interest as a basis for jurisdiction. *Shaffer's* reliance on *Hanson's* language to categorize state interest as a choice of law question is merely an awkward vehicle for holding that state interest alone will no longer be sufficient to render jurisdiction over a defendant who has not purposefully availed himself of the privilege of conducting affairs within the forum state.[85] Since it is likely that the foreign defendant will be considered to have purposefully availed himself of the benefits of the forum state through the four hypothetical scenarios, state interest might ultimately be used by the plaintiff as a valid basis for the assumption of jurisdiction. As the plaintiff would be asserting a cause of action unrelated to the forum contacts of the defendant, the state interest claimed by the plaintiff must provide the essential link in the *International Shoe* requirement of a forum-litigation relationship.

*Shaffer* provides a hint of this special state interest in its reference to the "[s]tate's strong interest in assuring the marketability of property within its borders."[86] Realizing that it was frequently inadequate to base *in rem* and *quasi-in-rem* jurisdiction upon the fiction that anyone claiming property within a state availed himself of forum benefits,[87] the Court utilized the concept of state's interest in marketability of land as additional justification for the exercise of jurisdiction in cases where the defendant held property within the state, and was not amenable to suit in other forums.[88] *Shaffer's* approval of the state interest doctrine is thus limited to cases of "jurisdiction by necessity,"[89] in which the ultimate consideration is to provide the plaintiff with at least one possible forum

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Court's earlier decisions in this area, i.e. *Mullane* and *McGee*, "establish that the State's valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction over a given cause of action." *Id.* at 222-23. He went on to recognize, however, "that Delaware's varied interests would [not] justify its acceptance of jurisdiction over *any* transaction touching upon the affairs of its domestic corporations." *Id.* at 224 (emphasis added).

85. *Id.* at 214-16.

86. *See* note 81 *supra.*

87. Such is the case in the event of fraud, or improper removal of property.

88. 433 U.S. at 211 n.37. *See also* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1173-74 (1966).

89. 11 LOY. L.A.L. REV. 116 n.176.

for his litigation. The same policy was at work in *Mullane v. Central Hanover Bank,* in which there would have been no means to close a New York trust if the New York forum had not been available to the plaintiffs.[90] Indicating its desire to provide at least one forum for the litigation, the Court stated that: "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."[91]

A plaintiff suing the alien defendant will probably find that the only contacts between the alien and a U.S. forum are property holdings. Since Justice Marshall had contemplated the possibility of the plaintiff obtaining personal jurisdiction over the defendant in an alternate forum,[92] the plaintiff's inability to do so will place his case beyond the usual applicability of *Shaffer.* Citing the forbidding cost and inevitable prejudice encountered in filing suit in a foreign land, the plaintiff may rightly move for the assumption of "jurisdiction by necessity."

It must be noted, however, that both *Shaffer* and *Mullane* recognize state interests enhanced by the fact that the cause of action is related to the contacts of the defendant with the forum.[93] Therefore the question of whether "jurisdiction by necessity" should only be allowed when there is a cause of action related to the defendant's forum contacts must be addressed. The answer is clearly negative. *Shaffer,* in dealing with true *in rem* cases, had the opportunity to rely on the fact that these traditional forms of jurisdiction satisfied the forum-litigation relationship requirement since they already contemplated a cause of action based on defendant-forum contacts. In a decision that spared no effort to deprecate state interest as a jurisdictional criterion, however, the Court went ahead and asserted that the state's interest in marketability of land would help satisfy the requirement of a defendant-forum relationship. This reference should signal the reader that the

90. 339 U.S. at 313.

91. 339 U.S. at 313-14. It should be noted that while *Mullane* dealt with procedural due process notice requirements, the controversy in *Shaffer* was whether the ultimate assumption of *quasi-in-rem* jurisdiction violated substantive due process. Since both cases address the issue of due process standards for jurisdiction, however, extenuating circumstances like "necessity" should support jurisdiction in *Shaffer* as well as *Mullane.*

92. In reference to enforcing judgment against defendant's assets, the Court stated: "The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States." 433 U.S. at 210, 97 S. Ct. at 2583.

93. This is *quasi-in-rem* type I. *See* note 19 *supra.*

Court was contemplating exigencies when, in order to secure for the plaintiff the *only* available forum for jurisdiction, it would allow state interest to play a role. If this interest in "jurisdiction by necessity" can fill the gap left by possibly inadequate defendant-forum contacts,[94] there is no reason why state interest alone can't suffice as a forum-litigation relationship, without the aid of a cause of action related to defendant-forum contacts, when no alternative forum is available to the plaintiff.

Only eight years before *Shaffer,* the Supreme Court, in *Sniadach v. Family Finance Corp.,*[95] recognized the importance of according the "creditor interest" "special protection" in "extraordinary situations."[96] Although this decision dealt with the due process limitation of prehearing attachment, the same due process construction ought to prevail where the creditor seeks to establish jurisdiction by attachment. By reading *Shaffer* together with *Sniadach's* noted protection of creditors, future courts should recognize that "jurisdiction by necessity" must apply to all creditors, not merely to those who seek to attach property that is related to the underlying cause of action. If *Sniadach's* protection of creditors is to be extended fairly to those plaintiffs who lack alternative forums, then *Shaffer* should allow the attachment of property unrelated to the underlying cause of action, as long as the property indicates sufficient contacts between the defendant and the forum.[97]

Recent decisions indicate that jurisdiction after *Shaffer* will be predicated upon defendant's contacts with "the State of the forum as make it reasonable, in the context of our *federal system* of

94. *See* note 87 *supra.*

95. 395 U.S. 337 (1969).

96. 395 U.S. at 339.

97. The Court left open the question whether the presence of defendant's property would support jurisdiction if no other forum were available. 433 U.S. at 211 n.37. If "jurisdiction by necessity" were substituted entirely for a cause of action related to defendant-forum contacts, we might expect that due process would require that the property represent some degree of contact between the defendant and the forum. Land holdings or bank accounts may be considered purposeful risks by the foreign defendant; perhaps future courts will heed Justice Stevens' suggestion that foreign owned securities also represent calculated risks in a particular forum.

In the event that certain property is not considered representative of minimum defendant-forum contacts, it is suggested 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. Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 681-82 (1975).

government, to require the [defendant] to defend the particular suit which is brought there."[98] In *Kulko,* Justice Marshall was careful to point out that the plaintiff was not at a "severe disadvantage," because, after all, she could secure *in personam* jurisdiction over the defendant in another forum, and, if necessary, bring execution proceedings through the uniform enforcement acts.[99]

In a case involving the garnishment of a debt owed to a Kuwaiti defendant, the District Court of Connecticut ruled that jurisdiction by necessity was indeed necessary where the defendant was outside the territorial jurisdiction of the fifty states. *Louring v. Kuwait Boulder Shipping Co.*[100] involved a plaintiff who was a Connecticut citizen and a defendant corporation organized and existing under the laws of Kuwait. The court noted that "*Shaffer* explicitly left open the question 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.'"[101] It further recognized that *Shaffer's* rationale supported only application of the *International Shoe* minimum contacts test to *quasi-in-rem* jurisdiction because an *in personam* judgment could be secured "in a forum where the litigation can be maintained consistently with *International Shoe.*"[102] The state in which the property was located would then be obliged to honor such a judgment under the full faith and credit clause.

In *Louring,* however, the defendant made no claim that it was subject to jurisdiction in some state other than Connecticut. There would be no possibility for the plaintiff to secure an *in personam* judgment in any state of the union. The court found that the *International Shoe* minimum contacts test in *Shaffer* could not be demanded of a plaintiff if the only possibility of an *in personam* judgment was in a foreign land. Plaintiffs simply would not be able to obtain suitable legal redress in Kuwait under Islamic law there in force,[103] nor be able to conduct a fair proceeding due to the overwhelming costs of a foreign trial.[104]

98. 326 U.S. at 317 (emphasis added) (cited in *Shaffer,* 433 U.S. at 203).

99. 436 U.S. at 100, 100 n.15.

100. 455 F. Supp. 630 (D. Conn. 1977).

101. *Id.* at 633 (citing *Shaffer,* 433 U.S. at 211 n.37).

102. 433 U.S. at 210.

103. Plaintiff's reply letter to Judge Newman, July 19, 1977, Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630 (D. Conn. 1977).

104. *But see* Majique Fashions Ltd. v. Warwick & Company, Ltd., New York County, Supreme Court, New York Law Journal, p. 1-2, Aug. 1, 1978, where the court addressed the plaintiff's claim that no other forum was available for its

The *Louring* case is a classic example of a foreign defendant being called into a state to defend to the extent that it willingly exposed itself to suit. *Shaffer* requires minimal defendant-forum contacts and minimum forum-litigation contacts—*Louring* clearly satisfied the former.[105] It was the need to provide plaintiff with a practical forum for suit that provided the relationship between the forum and the litigation. The court impliedly recognized that there was no need for the attached property to be related to the underlying cause of action in the event that plaintiff had no alternative forum to sue the defendant.

The conclusion to be reached from the foregoing analysis is that state interest should be used to support the assertion of jurisdiction by necessity. *Shaffer's* express recognition of state interest was unfortunately directed to the sufficiency of real estate holding as a suitable defendant-forum relationship. Such unique edification by state judicial fiat of land-holding as evidence of a higher degree of defendant-forum contacts may face constitutional challenge as a denial of equal protection to landowners.[106]

The use of state interest should be restricted to its real qualification in *Mullane* and *Shaffer*—an interest of the state in providing jurisdiction when no alternative exists. This interest evinces the forum-litigation relationship, and it should apply to all types of property, not just real estate. As is evidenced by the *Shaffer* footnote, state interest in "jurisdiction by necessity" may bear on the fairness of an assertion of jurisdiction—yet not, of itself, create contacts between the defendant and forum.[107]

While state interest does not create defendant-forum contacts, it does, however, provide the relationship between the forum and the litigation—jurisdiction by necessity should be allowed within the state after judicial determination that no alternative forum is open to the plaintiff.

### C. *Advantageous Aspects of Federal Court Jurisdiction*

There is considerable support for the proposition that a plaintiff suing a foreign defendant would fare better in federal, rather than

complaint by pointing out that "the courts of Hong Kong and Korea can provide redress for the claims asserted."

105. *See* text accompanying note 64 *supra.*

106. *See* Slomanson, *Real Property Unrelated to the Claim: Due Process for Quasi-in-rem Jurisdiction?*, 83 Dick. 60, 60 n.73 (1978).

107. *See* Note, *The Expanded Scope of the Sufficient Minimum Contacts Standard: Shaffer v. Heitner*, 63 Iowa L. Rev. 504, 521 (1977).

state, court. Indeed, in applying or distinguishing the *Shaffer* case, it is both instructive and necessary to translate its treatment of the state jurisdiction question into federal terms.

It is apparent that the strict guidelines for minimum contacts analysis found in *Shaffer* apply only in the context of an *International Shoe* exercise of state court jurisdiction. Justice Stewart made repeated references to the *International Shoe* standard, but only in terms directed towards the potential assertion of state jurisdictional power. "[A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the *State's jurisdiction.*"[108]

*International Shoe* and its progeny were concerned with the constitutional limitations, under the fourteenth amendment, on the exercise of the power inherent in the sovereignty of the several states. The plaintiff will benefit from the fact that assertions of federal jurisdiction must be analyzed under the fifth amendment.

Before distinguishing a fifth amendment analysis of minimum contacts with that of the fourteenth amendment, it is important for the plaintiff to recognize that since he is suing a foreign defendant on the basis of property attached in the United States, the constitutional grant of foreign commerce power[109] to the federal government may serve to distinguish the due process limitations of attaching a foreigner's property as opposed to attaching the property of a resident who can be sued in another United States forum.

While Congress has not given exclusive jurisdiction over foreign commerce actions to the federal courts as it has done over admiralty suits,[110] plaintiff could be faced with a reluctance on the part of a state court judge to rule in favor of attachment for fear that the state would be intruding on or misconstruing the federal foreign commerce power. A ruling in federal court may be more favorable to the plaintiff because the judge would not feel that he is asserting the power of a jurisdiction that did not have foreign commerce power.

Plaintiff should also draw analogy to the arguments made in admiralty suits[111] concerning the inapplicability of *Shaffer* stan-

108. 433 U.S. at 209, 97 S. Ct. at 2582-83 (emphasis added).

109. U.S. CONST. art. I, § 8.

110. Judiciary Act of 1789, § 9, 1 Stat. 76.

111. *See* Grand Bahama Pet. Co. v. Canadian Transp., 450 F. Supp. 447, 453 (W.D. Wash. 1978).

dards in areas of law that require special protection for the injured party. Although admiralty suits are distinguished by special constitutional recognition of the exigencies of maritime law, the same allowances should inure to the plaintiff who must sue a foreign defendant and can practically reach only the property attachable in the United States. Future decisions may hold, as did *Re Louisville Underwriters,*[112] in admiralty, that "[t]o compel suitors . . . to resort to the home of the defendant, and to prevent them from suing him in any district in which . . . his goods or credits [may be] attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice."[113]

The considerations involved in attaching the property of a foreign defendant are indeed more far-reaching than those inherent in the fourteenth amendment analysis of *Shaffer.* The greatest benefit accruing to a plaintiff who proceeds in federal court will ultimately be the fact that his proposed attachment of the foreigner's property will be limited by the due process guidelines of the fifth, rather than the fourteenth amendment.

Several courts have accepted the argument that when a foreign defendant is being sued in federal court on the basis of federal law, the fifth amendment will allow the aggregation of defendant's contacts with the United States as a whole in determining the constitutional propriety of jurisdiction.[114] In *Edward J. Moriarty & Co. v. General Tire & Rubber Co.,*[115] a seminal case, the court commented that measuring national contacts was particularly appropriate when enforcing federal law, since uniformity in enforcing federal rights should be the true guideline. The benefits to the plaintiff of obtaining a fifth amendment aggregation analysis are obvious. It increases the total number of defendant-forum contacts to be considered as a basis for the required defendant-forum relationship. Also, there is a greater possibility of having the plaintiff's cause of action arise from those defendant-forum contacts, thus

112. 134 U.S. 488 (1890).

113. *Id.* at 493.

114. *See* Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406 (9th Cir. 1977); Honeywell v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Alco Standard Corp. v. Benalal, 345 F. Supp. 14, 24-25 (E.D. Pa. 1972); Cryomedics v. Spembly, 397 F. Supp. 287, 290-92 (D. Conn. 1975); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967).

115. 289 F. Supp. 381 (S.D. Ohio 1967).

providing the traditional type of forum-litigation relationship most desired by courts adhering to the strict guidelines of *Shaffer*. Indeed, the possibility of aggregation of defendant's United States contacts conforms best with the nature of a suit against a foreign defendant whose contacts with the various states may be at most transient, but no doubt beneficial and effective.[116] In *Cryomedics v. Spembly*,[117] the court held that it would be inappropriate not to consider the foreigner's contacts with the entire nation: "Due process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product."[118]

In applying the aggregation concept to the *quasi-in-rem* method of acquiring jurisdiction, plaintiff should be able to attach the foreign defendant's property and assert that it is merely one of his many contacts with the United States as a whole. Since *Intermeat*[119] allowed attached property to represent the remainder of a resident defendant's contacts with a state forum, it follows that the same reasoning would allow attached property to provide jurisdiction as representative of a foreign defendant's total contact with the United States. If the defendant's contacts with the United States are sufficient to satisfy the fairness standard of the fifth amendment, then the only limitation on place of trial would be the doctrine of *forum non conveniens*.[120]

Plaintiff may very likely face a situation in which he is attempting to sue the alien defendant in federal court, but must maintain diversity jurisdiction instead of jurisdiction based upon a federal cause of action. Without jurisdiction based upon a federal question, the argument for a uniform application of federal law disappears. It could be argued that since state law will ultimately be

116. Once jurisdiction in a United States court is deemed fair and just, the alien can rarely prefer one district court over another. Since it is not fundamentally unfair to ask a Kuwaiti defendant to defend in Illinois as opposed to New York, any such preference on the part of the alien "will seldom rise to the level of a constitutional objection to jurisdiction and is more properly vindicated by a transfer pursuant to 28 U.S.C. § 1404(a), rather than by a dismissal for want of jurisdiction." 446 F. Supp. at 710.

117. 397 F. Supp. 287, 290 (D. Conn. 1975).

118. *Id.* at 291 (citing Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 728 (D. Utah 1973)).

119. *See* note 60 *supra*.

120. *Cf.* Engineering Equipment Co. v. S.S. Selene, *supra* note 92, at 710; Holf v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973).

applied, there will no longer be any justification for the court to measure defendant's contacts with the nation as a whole.

There is, however, a stronger argument for the application of the fifth amendment aggregation theory even to diversity cases in federal court. In *Moriarty,*[121] the court argued that it is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of government of which the court is a part. Therefore, it follows that since it is a federal court that is asserting its power over a foreign defendant, contacts with the geographical limits of the federal government should be measured as a basis for allowing jurisdiction. Even in *Shaffer,* the Court noted that restrictions on state court jurisdiction are a consequence of territorial limitations on the power of the state.[122] The Court's reference to the power of the state implies that jurisdiction based upon the power of the federal court should be limited by the constitutional amendment designed to check federal power.[123]

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121. 381 F. Supp. at 390.

122. 433 U.S. at 204 n.20. *See also* Green, *Federal Jurisdiction In Personam of Corporations and Due Process,* 14 VAND. L. REV. 967, 986 (1961).

123. The application of the fifth, as opposed to the fourteenth, amendment standards to establish due process limitations on jurisdiction should be distinguished from the choice between state and federal law in interpreting the applicability of the *quasi-in-rem* statute. It is accepted that the Federal Rules of Civil Procedure require, in Rule 4(e), that attachment be effected in the manner provided by state law in both diversity and federal law jurisdiction cases. Wright & Miller, *Federal Practice and Procedure,* § 1075.

Of course, *quasi-in-rem* attachment may be provided for in a special manner or prohibited entirely under certain federal or state statutes. For instance, the recent Foreign Sovereign Immunities Act specifically prohibits the use of *quasi-in-rem* attachment as a means of obtaining jurisdiction over a foreign state. 28 U.S.C. § 1610(d) (2) (1976).

Plaintiff will find this Note's discussion of the due process limitations on *quasi-in-rem* jurisdiction irrelevant if and when it is ascertained that neither federal nor state law has provided statutory authority for *quasi-in-rem* jurisdiction. This unfortunate possibility will not support a plea for jurisdiction by necessity; the *Shaffer* footnote only suggested that due process would allow *quasi-in-rem* jurisdiction, if necessary, but not in absence of or in contravention of applicable state statutes. A recent critic of jurisdiction by necessity misleadingly erected a straw-man argument suggesting that an absence of statutory authority for *quasi-in-rem* attachment or long-arm service evidences "the determination of the forum state that the defendant should not be subject to such process." *See* Slomanson, *supra* note 106, at 62-63. Such reasoning is pedestrian, and ought not to militate against the due process criteria for allowing jurisdiction by necessity, *i.e.,* obstacles precluding pursuit of an overseas adjudication and/or a biased foreign court. *See* note 32 *supra.*

### D. *Equal Protection Challenge*

Although *Shaffer* deals directly with the due process clause of the fourteenth amendment, an assertion of *quasi-in-rem* jurisdiction based upon the classification of the defendant as an alien will necessarily raise the question of equal protection.[124]

In *Graham v. Richardson,*[125] the Supreme Court declared the classification of aliens a suspect category, and held that lawfully admitted resident aliens, as well as citizens of the United States, are entitled to equal protection of the laws of the state [a fourteenth amendment context] in which they reside.[126] Under our hypothetical, however, the plaintiff would be suing a nonresident alien against whom jurisdiction must be asserted *quasi-in-rem* instead of *in personam.*[127]

With regard to nonresident aliens, some courts have ruled that when such persons are beyond the jurisdiction of the United States, the fourteenth amendment, by its own terms, does not protect them.[128] This reasoning seems to be limited to cases in which the nonresident alien is being excluded from the United States or prevented from acquiring land therein.[129] There appears to be an allowance of equal protection to those nonresident aliens

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124. Even in federal court, the concept of equal protection should prevail, in spite of the fact that the fifth amendment lacks an equal protection clause. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court recognized that:

> [t]he Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment, which applied only to the states. But the concepts of equal protection and due process both stemming from our American ideal of fairness are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But . . . discrimination may be so unjustified as to be violative of due process.

*Id.* at 499.

125. 403 U.S. 365 (1971).

126. *Id.* at 371.

127. *See* text accompanying notes 65-67 *supra* concerning the continued vitality of the *quasi-in-rem* jurisdiction.

128. Johnson v. Eisentrager, 339 U.S. 763, 771 (1950); De Tenorio v. McGowan, 510 F.2d 92, 101 (5th Cir. 1975). *Contra,* United States v. Pink, 317 U.S. 203 (1942); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Sardino v. Federal Reserve Bank, 361 F.2d 106, 111 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966).

129. *See* Johnson v. Eisentrager, 339 U.S. 763, 771 (1950); Bridges v. Wixon, 326 U.S. 135, 161 (1945); San Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972).

who have already obtained property and are making an appearance on American territory in order to defend their investment rights.[130]

While it appears that nonresident aliens whose property is attached in the United States will be accorded equal protection, it is unlikely that this protection will arise to the strict scrutiny demanded by *Graham* for resident aliens. In light of the resident-nonresident alien dichotomy in applying equal protection to aliens,[131] plaintiff may only be required to show a reasonable basis for allowing the attachment of an alien's property in the assertion of "jurisdiction by necessity." The impossibility or impracticability of acquiring jurisdiction over a distant and unreachable alien should easily provide the reasonable basis for such classifications.

## IV. CONCLUSION

The holding in *Shaffer v. Heitner* should have only limited practical implications for the American plaintiff attempting to obtain *quasi-in-rem* jurisdiction over a foreign defendant. While *Shaffer* does demand relationships between defendant and forum, and between forum and litigation, the threshold degree of contacts required to achieve those relationships is lower when dealing with the property of a foreign defendant. As Justice Stevens noted in his concurrence, the presence of property, even the registration of securities, in the United States may be considered a level of calculated risk undertaken by a foreigner that would indicate a sufficient relationship between the defendant and the forum.[132]

The relationship between the forum and the litigation need not be supported by the fact that the attached property is related to the underlying cause of action. *Shaffer* leaves sufficient margin for state interest to play a role in supporting a forum-litigation relationship when the plaintiff is attempting to attach property of a foreigner who cannot be sued *in personam* in any other practical forum.[133]

The prospective plaintiff should note that a suit in federal court may be more auspicious since it would be possible to consider the aggregate of the foreigner's total United States contacts when de-

130. *See* Shames v. Nebraska, 408 U.S. 901 (1971); Terrace v. Thompson, 263 U.S. 197 (1923).

131. *See* 28 U. FLA. L. REV. 491, 513 (1976).

132. *See* text accompanying note 55 *supra.*

133. *See* text accompanying notes 75-107 *supra.*

termining the fairness of federal jurisdiction.[134]

Future interpretations of *Shaffer* will have considerable bearing on the course of international business and foreign direct investment. Foreigners may decelerate their investments in the United States if they fear expensive litigation unrelated to their investment interest. On the other hand, business transactions and relationships with foreign concerns may suffer if the American plaintiff cannot obtain a convenient and practical forum in which to maintain suit. *Shaffer's* recognition of the need to provide the plaintiff with a forum coupled with the calculated relationship of a foreign investor with the American forum, will support future assertions of *quasi-in-rem* jurisdiction over the foreigner's interest in local property.

*Steven Harlan Becker*

134. *See* text accompanying notes 108-23 *supra.*