The Burger Court Opinion Writing Database

Shaffer v. Heitner

433 U.S. 186 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1977

Re: 75-1812 - Shaffer v. Heitner

Dear Thurgood:

I voted with you to reverse in this case and tentatively I think your first draft comes closer to my views than the second.

Lewis indicates he may wish to focus on the tangible - intangible dichotomy, and I will wait on that before I give you a final "join."

The change you make is a large one, but sound, and your first draft deals with it very well.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

P.S. With others I regard this as an excellent piece of work!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1977

Re: 75-1812 Shaffer v. Heitner

Dear Thurgood:

I join in Shaffer I.

Regards,

WEB

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 18, 1977

RE: No. 75-1812 Shaffer v. Heitner

Dear Thurgood:

Although I am recorded in dissent, I believe that I can join Parts I, II, and III of your fine opinion for the Court. Part IV, however, continues to give me pause, and I wonder if you would be willing to consider the following suggested revision:

As I read Part IV, you hold that minimum contacts as required by International Shoe are not established by the fact that one holds a position as director or officer in a corporation chartered by a given state and governed by state law. I seriously question this conclusion. I do not believe that the existence or nonexistence of minimum contacts in a constitutional sense is at all affected by Delaware's failure expressly to assert an interest in controlling corporate fiduciaries (p. 26), or in exacting from them an explicit consent to be sued (p. 28). Moreover, the Delaware Court never had occasion to pass on this question since it viewed such an inquiry as irrelevant under Pennoyer v. Neff. Thus I think we ought not decide

an important constitutional issue like this in a manner that effectively forecloses the assertion of state court jurisdiction in Delaware - or, for that matter, in other states that may expressly seek to make their corporate directors amenable to suit in the local forum.

I thus believe that the Court would do well to consider a remand in this case. My preferred disposition is (1) to state that the constitutional requirement of minimum contacts is established when an individual serves as a director or officer in a state chartered corporation, but (2) to remand to the state court for an interpretation of whether Delaware law authorizes action based upon this proper jurisdictional predicate. I recognize that Delaware's sequestration statute, as previously construed, acts on the mere presence of property within the state, and not on minimum contacts. Nonetheless, personal service was made in this instance (p. 25 n. 40) and, in view of the fact that we greatly change the jurisdictional ground rules today, the state courts might well decide that the legislature's overarching purpose of securing personal appearance of defendants in state courts is best served by reading the property attachment aspect of the statute as severable and expendable, and permitting jurisdiction based upon minimum contacts plus adequate service (e.g., International Shoe). As an alternative, I might join a Part IV that remands both the minimum contacts question and the inquiry under (2) to the state courts for initial determination - although I would still want to reserve the option of writing on the minimum contacts issue.

I realize that as the lone dissenter I may lack standing to suggest such a modification but hope it may appeal to you and other Brethren.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1977

RE: No. 75-1812 Shaffer v. Heitner

Dear Thurgood:

I agree with your recirculation of May 19 and am probably going to add a few words addressing the minimum contacts issue of Part IV.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1977

RE: No. 75-1812 Shaffer v. Heitner

Dear Thurgood:

In light of your change I'll be dissenting from Part IV. I'll get after it right away but it's going to be a week or more. I assume your recirculation will follow your first draft.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 12/11/77

Recirculated: _____

No. 75-1812

SHAFFER v. HEITNER

MR. JUSTICE BRENNAN, concurring and dissenting.

I join Parts I-III of the Court's opinion. I fully agree that the minimum-contacts analysis developed in International Shoe Co. v. Washington, 326 U.S. 310 (1945), represents a far more sensible construct for the exercise of state court jurisdiction than the patchwork of legal and factual fictions that have germinated from the seeds planted in Pennoyer v. Neff, 95 U.S. 714 (1877). It is precisely because the inquiry into minimum contacts is now of such overriding importance, however, that I dissent from Part IV of the Court's opinion.

I.

The primary teaching of Parts I-III of today's decision is that a State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum state. The Delaware

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Circulated: 6/20/77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.
On Appeal from the Supreme Court of Delaware.

[June —, 1977]

MR. JUSTICE BRENNAN, concurring and dissenting.

I join Parts I–III of the Court's opinion. I fully agree that the minimum-contacts analysis developed in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), represents a far more sensible construct for the exercise of state court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer* v. *Neff,* 95 U. S. 714 (1877). It is precisely because the inquiry into minimum contacts is now of such overriding importance, however, that I must respectfully dissent from Part IV of the Court's opinion.

I

The primary teaching of Parts I–III of today's decision is that a State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum state. The Delaware Supreme Court could not have made plainer, however, that its sequestration statute, 10 Del. C. § 366, does not operate on this basis, but instead is strictly an embodiment of *quasi-in-rem* jurisdiction, a jurisdictional predicate no longer constitutionally viable:

> "[J]urisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 18, 1977

75-1812 - Shaffer v. Heitner

Dear Thurgood,

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

I join Parts I, II, and III of your opinion with enthusiasm. While I could probably also join Part IV, I think I would prefer the second alternative suggested in Bill Brennan's letter to you of today, i.e., remanding the International Shoe issue for decision in the Delaware Supreme Court rather than deciding it here.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1977

No. 75-1812 - Shaffer v. Heitner

Dear Thurgood,

I am content to acquiesce in your reversion to your original Part IV.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 18, 1977

Re: No. 75-1812 - Shaffer v. Heitner

Dear Thurgood:

As Potter says, your opinion is a very important one. It is also very well done, and I am happy to join. The issue of minimum contacts was addressed by the parties, and I prefer to decide it although if you are persuaded to remand, I would not dissent.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

1st circulation.
corrections to be marked on
pp. 8, 25

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.

On Appeal from the Supreme Court of Delaware.

[May —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware. Appellants contend that the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.

I

Appellee Heitner, a nonresident of Delaware, is the owner of one share of stock in the Greyhound Corporation, a business incorporated under the laws of Delaware with its principal place of business in Phoenix, Ariz. On May 22, 1974, he filed a shareholder's derivative suit in the Court of Chancery for New Castle County, Del., in which he named as defendants Greyhound, its wholly owned subsidiary Greyhound Lines,

NEW PART IV

MAY 19 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.
On Appeal from the Supreme Court of Delaware.

[May —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware. Appellants contend that the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.

I

Appellee Heitner, a nonresident of Delaware, is the owner of one share of stock in the Greyhound Corporation, a business incorporated under the laws of Delaware with its principal place of business in Phoenix, Ariz. On May 22, 1974, he filed a shareholder's derivative suit in the Court of Chancery for New Castle County, Del., in which he named as defendants Greyhound, its wholly owned subsidiary Greyhound Lines,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1812 - Shaffer v. Heitner

In view of the strong preference for resolving the minimum contacts question in favor of appellants, I will revert to the Part IV contained in the first draft of my opinion in the above.

T. M.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.

On Appeal from the Supreme Court of Delaware.

[May —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware. Appellants contend that the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.

I

Appellee Heitner, a nonresident of Delaware, is the owner of one share of stock in the Greyhound Corporation, a business incorporated under the laws of Delaware with its principal place of business in Phoenix, Ariz. On May 22, 1974, he filed a shareholder's derivative suit in the Court of Chancery for New Castle County, Del., in which he named as defendants Greyhound, its wholly owned subsidiary Greyhound Lines,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1977

MEMORANDUM FOR THE CONFERENCE

Cases Held for No. 75-1812, Shaffer v. Heitner:

(1) No. 76-359, Gregg v. U.S. Industries, Inc.

This case, here on a petition for certiorari to CA 3, involves a dispute resulting from the sale of three Florida construction companies to a Delaware corporation with its principal place of business in New York and its subsidiary, which is incorporated and has its principal place of business in Florida. The contract was entered into in Florida. The suit was brought in Delaware by use of the sequestration procedure to attach stock owned by the vendor. It is in the federal courts by removal under the diversity provisions.

CA 3, in an opinion by Judge Aldisert, reversed the default judgment entered on behalf of the plaintiff and ordered the case dismissed for want of jurisdiction over the person. Judge Aldisert's opinion correctly anticipates our holding in Shaffer, and there is no other issue in the case. I will vote to deny.

(2) No. 76-846, Rush v. Savchuck

This is an appeal from the Supreme Court of Minnesota, which sustained the constitutionality of a prejudgment garnishment law against the claim, made on a motion to dismiss, that the law violates the due process clause. The law, Minn. Stat. §571.41, as construed by the Minnesota court, allows a state resident to establish jurisdiction

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1977

Re: No. 75-1812 - Shaffer v. Heitner

Dear Thurgood:

Like Byron, I prefer to decide the issue of minimum contacts. I therefore could join your first draft circulated ~~June~~ May 16.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 3, 1977

Re: No. 75-1812 - Shaffer v. Heitner

Dear Thurgood:

In light of your note of June 2, I am glad to join your opinion as originally circulated on May 16.

Sincerely,

HAB.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 31, 1977

No. 75-1812 Shaffer v. Heitner

Dear Thurgood:

First, let me say that I share the admiration expressed by others as to the excellence of your opinion. It will be a "must" for the textbooks.

I do have two reservations. First, I cannot join Part IV as it is now written. I agree with Byron that the issue of minimum contacts was addressed by the parties and the entire thrust of your opinion - as I read it - supports the view that fairness requires more than the minimal contacts present in this case. In short, I would reverse.

There is also a "make weight" reason that supports reversal. This has all the earmarks of a lawyer-made case. There are thousands of shares of Greyhound stock outstanding. Only one shareholder, owning one share (Tr. of Arg. 29), instituted and is pressing this expensive litigation. While a single shareholder has standing to maintain a derivative shareholder suit, there are lawyers who make a plush living using tame clients who acquire one share of stock in numerous corporations for the purpose of setting the stage for "strike" suits. The objective usually is to force a settlement and claim a generous fee to be paid by court order often from corporate funds.

Even if this is not such an "arranged" litigation, fairness to the defendants - who already must have been put to considerable expense by the holder of a single share -* suggests that we dispose of the case here on the basis of your opinion.

My second reservation concerns what seems to me to be at least an arguably sound distinction between intangibles

*One share of Greyhound common was quoted Friday on the NYSE at $14.25. The high for the year to date is less than $16.00.

(such as stock and bank accounts) and property which has an identifiable and immovable situs within a state. I have not come to rest on this point, but may write briefly in support of this distinction.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

P.S. My docket sheet shows the Conference vote on this case was six to Reverse, one to Affirm, and one Pass. Your first circulation was in accord with the vote.

6/6/77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 6 1977

Recirculated: _____

No. 75-1812 SHAFFER v. HEITNER

MR. JUSTICE POWELL, concurring:

I agree that the principles of International Shoe Co. v. Washington, 326 U.S. 310 (1945), should be extended to govern assertions of in rem as well as in personman jurisdiction in state court. I also agree that neither the statutory presence of appellants' stock in Delaware nor their positions as directors and officers of a Delaware corporation can provide sufficient contacts to support the Delaware courts' assertion of jurisdiction in this case.

I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common law concept of quasi in rem jurisdiction arguably would

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

1st PRINTED DRAFT

Recirculated: JUN 7 1977

SUPREME COURT OF THE UNITED STATES

No. 75-1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.

On Appeal from the Supreme Court of Delaware.

[June —, 1977]

MR. JUSTICE POWELL, concurring.

I agree that the principles of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), should be extended to govern assertions of *in rem* as well as *in personam* jurisdiction in state court. I also agree that neither the statutory presence of appellants' stock in Delaware nor their positions as directors and officers of a Delaware corporation can provide sufficient contacts to support the Delaware courts' assertion of jurisdiction in this case.

I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to "'traditional notions of fair play and substantial justice.'" *Id.,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940).

Subject to that reservation, I join the opinion of the Court.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 21 1977

Recirculated: _____

75-1812 - Shaffer v. Heitner

MR. JUSTICE STEVENS, concurring.

The Due Process Clause affords protection against "judgments without notice." International Shoe Co. v. Washington, 326 U.S. 310, 324 (opinion of Black, J.). Throughout our history the acceptable exercise of in rem and quasi in rem jurisdiction has included a procedure giving reasonable assurance that actual notice of the particular claim will be conveyed to the defendant.*/ Thus, publication, notice by registered mail, or extra-territorial personal service has been an essential ingredient of any procedure that serves as a substitute for personal service within the jurisdiction.

The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign.

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*/ "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." McDonald v. Mabee, 243 U.S. 90, 92.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 23 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.

On Appeal from the Supreme Court of Delaware.

[June —, 1977]

MR. JUSTICE STEVENS, concurring.

The Due Process Clause affords protection against "judgments without notice." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 324 (opinion of Black, J.). Throughout our history the acceptable exercise of *in rem* and *quasi in rem* jurisdiction has included a procedure giving reasonable assurance that actual notice of the particular claim will be conveyed to the defendant.* Thus, publication, notice by registered mail, or extraterritorial personal service has been an essential ingredient of any procedure that serves as a substitute for personal service within the jurisdiction.

The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. 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.

Perhaps the same consequences should flow from the purchase of stock of a corporation organized under the laws of a foreign state, because to some limited extent one's property and affairs then become subject to the laws of the state of domicile of the corporation. As a matter of international

*"To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald* v. *Mabee,* 243 U. S. 90, 92.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 24 1977

SUPREME COURT OF THE UNITED STATES

No. 75-1812

R. F. Shaffer et al., Appellants,
v.
Arnold Heitner, as Custodian for Mark Andrew Heitner.

On Appeal from the Supreme Court of Delaware.

[June 24, 1977]

MR. JUSTICE STEVENS, concurring in the judgment.

The Due Process Clause affords protection against "judgments without notice." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 324 (opinion of Black, J.). Throughout our history the acceptable exercise of *in rem* and *quasi in rem* jurisdiction has included a procedure giving reasonable assurance that actual notice of the particular claim will be conveyed to the defendant.* Thus, publication, notice by registered mail, or extraterritorial personal service has been an essential ingredient of any procedure that serves as a substitute for personal service within the jurisdiction.

The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. 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.

Perhaps the same consequences should flow from the purchase of stock of a corporation organized under the laws of a foreign state, because to some limited extent one's property and affairs then become subject to the laws of the state of domicile of the corporation. As a matter of international

*"To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald* v. *Mabee,* 243 U. S. 90, 92.