UIC Law Review

Volume 15 | Issue 1 Article 8

Winter 1982

# Humphrey v. Langford - Transient Jurisdiction Reaffirmed, 15 J. Marshall L. Rev. 237 (1982)

Margaret Mary Drewko

# *HUMPHREY v. LANGFORD** TRANSIENT JURISDICTION REAFFIRMED

## INTRODUCTION

Bowling is now a contact sport. A facetious statement, of course, but a proper categorization of a recent Georgia Supreme Court decision, *Humphrey v. Langford*.[1] The "contact" is the mere physical presence of the defendant in a state, which traditionally has been sufficient to confer *in personam* jurisdiction.[2] This rule—"the power theory" of jurisdiction—was first enunciated in *Pennoyer v. Neff*.[3]

In *Pennoyer*, Justice Field limited state court jurisdiction to persons and property physically present in the state.[4] Field established three categories of judicial action: *in personam*, which imposes personal liability upon the defendant; *in rem*, which declares the rights of all persons to a thing; and *quasi in rem*, which declares the rights of particular persons to a thing.[5] As a result of *Pennoyer, in personam* jurisdiction could be based upon the defendant's mere presence in the state. Jurisdiction based upon mere presence, or transient jurisdiction,[6] is con-

---

* Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

1. 246 Ga. 732, 273 S.E.2d 22 (1980).

2. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971). "[A] state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." *Id.*

3. 95 U.S. 714 (1877).

*Pennoyer* was an ejectment action brought in federal court under the diversity jurisdiction. Pennoyer, the defendant in that action, held the land under a deed purchased in a sheriff's sale conducted to realize on a judgment for attorney's fees obtained against Neff in a previous action by one Mitchell. At the time of Mitchell's suit in an Oregon State court, Neff was a nonresident of Oregon. An Oregon statute allowed service by publication on nonresidents who had property in the State, and Mitchell had used that procedure to bring Neff before the court. The United States Circuit Court for the District of Oregon, in which Neff brought his ejectment action, refused to recognize the validity of the judgment against Neff in Mitchell's suit, and accordingly awarded the land to Neff.

Shaffer v. Heitner, 433 U.S. 186, 196-97 (1977).

4. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

5. *Id.* at 727.

6. According to the transient rule, anyone present in the state is subject to its jurisdiction whether he is permanently or only temporarily there. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 30 at 103 (1959).

ferred upon the state in transitory actions[7] without regard to the contacts of that state with either the subject of the case or the parties. Once the defendant is found in the state, personal service is sufficient notice of the suit to satisfy due process requirements.[8]

Though *Pennoyer* was intended to restrict state court jurisdiction, it became the rationale supporting jurisdiction over defendants not present in the forum state.[9] Increasing interstate travel and the growth of multistate corporations left many defendants outside the reach of *Pennoyer*'s grasp. Consequently, the courts created concepts of fictional presence to obtain jurisdiction over defendants who had physically left the forum state.[10] During this period of expanding jurisdiction, courts never questioned the power of a state court over an individual who was physically present and properly served within the state.[11]

Corporations, however, posed a unique problem. The prevailing legal thinking held that a corporation existed only as a fictional entity in the state of its incorporation.[12] This view provided unsatisfactory results, as it allowed corporations to escape jurisdiction when doing business outside the state of its incorporation.[13] *International Shoe Co. v. Washington*[14] addressed this

---

7. "Transitory actions are those founded upon a cause of action not necessarily referring to or arising in any particular locality. Their characteristic feature is that the right of action follows the person of the defendant." BLACK'S LAW DICTIONARY 1343 (5th ed. 1979).

8. Pennoyer v. Neff, 95 U.S. 714, 726-27 (1877).

9. Note, *Civil Procedure—Concepts of Personal Jurisdiction Before & After Shaffer v. Heitner*, 80 W. VA. L. REV. 285, 287 (1978) [hereinafter cited as *Civil Procedure—Concepts*].

10. *See generally* Note, *Developments in the Law State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960). *See, e.g.*, Hess v. Pawlowski, 274 U.S. 352 (1927). Under a theory of implied consent, the Court upheld a state statute conferring jurisdiction over nonresident motorists for claims related to their use of the state's highways. *But see* Wuchter v. Pizzutti, 276 U.S. 13 (1928), which held unconstitutional a statute similar to the one in *Hess*, but which did not expressly require the state official to forward process to the defendant.

11. C. WRIGHT & A. MILLER, 4 FEDERAL PRACTICE & PROCEDURE § 1065 at 217 (1969) [hereinafter cited as C. WRIGHT & A. MILLER].

12. Bank of Augusta v. Earle, 38 U.S. 519 (1839).

> [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence.

*Id.* at 588.

13. C. WRIGHT & A. MILLER, *supra* note 11, § 1066 at 219.

14. 326 U.S. 310 (1945). The Supreme Court allowed the State of Washington to exert jurisdiction over a company incorporated in Delaware with its principal place of business in Missouri. The company conducted no business in Washington except for the activities of its salesmen, who solicited orders there.

problem and extended state court jurisdiction to individuals and corporations having certain "minimum contacts" with the forum state. The contact was sufficient if jurisdiction based upon it would comport with notions of "fair play and substantial justice."[15] State legislatures codified the *International Shoe* holding, thereby establishing statutory categories of minimum contacts.[16] *International Shoe* departed from, but did not abandon, *Pennoyer*'s conceptual basis. The minimum contacts analysis was intended to augment the power theory, not replace it. Actual presence continued to satisfy due process regardless of the quality and nature of the activity.[17] Courts continued to recognize service of process within the state as sufficient for jurisdiction even if the state had no connection with the controversy.[18]

An extension of *Pennoyer*'s power theory allowed *quasi in rem* jurisdiction to be based upon the presence of the defendant's intangible property within the forum.[19] This rationale

---

15. 326 U.S. at 316.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

*Id.*

16. *See* Sorg, *World-Wide Volkswagen: Has the United States Supreme Court taken the Illinois Civil Practice Act Section 17-1(b) Out of the Gray Zone?*, 80 S. ILL. U.L.J. 137, 139 (1980) [hereinafter cited as Sorg]. Illinois enacted one of the first "long arm" statutes. The Illinois Civil Practice Act § 1-1(b) states:

> Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
> (a) The transaction of any business within this State;
> (b) The commission of a tortious act within this State;
> (c) The ownership, use, or possession of any real estate situated in this State;
> (d) Contracting to insure any person, property, or risk located within this State at the time of contracting;
> (e) With respect to actions of dissolution of marriage and legal separation the maintenance in this State of matrimonial domicile.

ILL. REV. STAT. ch. 100, § 17.1 (1979).

17. International Shoe v. Washington, 326 U.S. 310, 319 (1945).

18. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), where service of process upon the defendant was effected in an airplane over the state. *See generally* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) [hereinafter cited as Ehrenzweig]; Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146 (1932).

19. Harris v. Balk, 198 U.S. 215 (1905). Epstein, a Maryland resident, had an alleged claim against Balk, a North Carolina resident. Harris, also a North Carolina resident, owed Balk a small sum of money. When Harris

granted jurisdiction over the attachment of a debt owed to the defendant in the form of an insurance policy. Even in the wake of *International Shoe*, an insurer's contingent contractual obligation to defend and indemnify the insured was held capable of attachment.[20] Commentators criticized such assertions of *quasi in rem* jurisdiction for failing to evaluate the relationship between the forum, the defendant, and the controversy—factors *International Shoe* deemed essential to due process when the defendant was not personally served in the forum.[21] The U.S. Supreme Court addressed the validity of *quasi in rem* jurisdiction in *Shaffer v. Heitner*.[22]

Until *Shaffer*, the U.S. Supreme Court permitted state court jurisdiction to be asserted anywhere the defendant was physically present or had sufficient minimum contacts and anywhere his property could be said to be located. In *Shaffer*, the Court was faced with a situation where *quasi in rem* jurisdiction appeared particularly harsh.[23] The trial and appellate courts rejected the defendant's argument that the attachment violated their due process rights because of their lack of sufficient minimum contacts to satisfy *International Shoe* requirements.[24] The Supreme Court reversed, holding that jurisdiction based upon the statutory presence of a nonresident's stock was unconstitutional. The Court stated that an assertion of jurisdiction over property is essentially an assertion of jurisdiction over the owner of the property. Consequently, the minimum contacts test is crucial to any due process evaluation.[25]

---

was temporarily in Maryland, Epstein attached the debt to Balk through Harris. The Court held that the debt was Balk's intangible property and that the situs of that property traveled with Harris, the debtor. By obtaining jurisdiction over Harris, Epstein gained jurisdiction over Balk even though Balk himself was not present in Maryland.

20. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 232 N.Y.S.2d 993 (1966). A New York resident sued a Canadian for injuries sustained in Vermont. Jurisdiction was based upon the attachment in New York of an insurance policy issued to the defendant in Canada by an insurance company doing business in New York.

21. Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 671-77 (1975).

22. 433 U.S. 186 (1977). Plaintiff Heitner brought a shareholders derivative suit in Delaware against 28 nonresident corporate directors. None of the alleged misconduct took place in Delaware, nor did the defendants have any other contacts with Delaware. Jurisdiction was based on a Delaware statute which provided that any stock in a Delaware corporation could be attached to allow *quasi in rem* jurisdiction against its owner.

23. 433 U.S. at 193. The primary purpose of the statute was to force the defendant to make a general appearance. No limited appearance was permitted. No relationship of any kind was required between the property and the cause of action.

24. *Id.* at 193, 194.

25. *Id.* at 207.

The precise holding in *Shaffer* and the narrow interpretation espoused by the concurring judges should involve little or no disruption of *in personam* jurisdiction.[26] However, Justice Marshall stated: "We therefore concluded that *all* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[27] Although dicta, this language has been broadly interpreted by legions of commentators who consequently regard *Shaffer* as the obituary for transient jurisdiction.[28] Scholars argue that since the mere presence of property is insufficient for jurisdiction, an individual's mere presence must also be insufficient absent an *International Shoe* minimum contacts analysis.[29] *Humphrey v. Langford*[30] indicates that state courts have not been swayed by this analogy and that they will require a Supreme Court mandate before denying jurisdiction based on physical presence.

## STATEMENT OF FACTS

Edwin and Faye Humphrey owned a business incorporated and operated in South Carolina. In August, 1973, the Humphreys contracted with Ervin Langford to sell Langford the business.[31] At the time of sale, all parties were South Carolina residents.[32] After the sale was completed a dispute arose with regard to some of the contract terms and the Humphreys left the business' employ.[33] Subsequently, they moved to Bryan

26. *Civil Procedure—Concepts, supra* note 9, at 299. The Court was unanimous in holding that jurisdiction based on the statutory presence of stock within the state is unconstitutional. Narrowly interpreted, this means due process is denied only if the assets are intangibles unknowingly located in the forum or if the defendant is denied a limited appearance.

27. Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (emphasis added).

28. *See* Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?* 25 VILL. L. REV. 38 (1979-80) [hereinafter cited as Bernstine]; Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587 (1979) [hereinafter cited as Nordenberg]. *Contra*, Zammit, *Reflections on Shaffer v. Heitner*, 5 HASTINGS CONST. L.Q. 15, 24 (1978).

29. Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 865 (1978) [hereinafter cited as Woods]; *see* Ehrenzweig, *supra* note 19. *See also* Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U. L. Q. 273 (suggesting the inadequacy of the Pennoyer principles of exclusive sovereignty as the basis for a system of jurisdiction in a mobile society).

30. 246 Ga. 732, 273 S.E.2d 22 (1980).

31. Brief for Appellant at 6, Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

32. Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

33. Brief for Appellee at 2, Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980). A full statement of facts was not perfected in the trial record.

County, Georgia and brought an action concerning the contract.[34]

In March 1979, Langford was in Georgia to bowl at one of Savannah's bowling alleys. While bowling he was personally served with the complaint and summons in this action.[35] Langford was a resident of South Carolina and the Humphreys lived in Georgia when the suit was brought.[36]

## THE COURTS' OPINIONS

Relying on *Shaffer*, the trial court held that the Georgia statute conferring jurisdiction over Langford was unconstitutional and dismissed the action.[37] The trial court stated that jurisdiction based solely on temporary presence was inconsistent with the due process clause of the fourteenth amendment.[38] Since the constitutionality of a state statute was involved, the case was appealed directly to the Georgia Supreme Court.[39]

The Georgia Supreme Court reversed the trial court's decision, rejecting *Shaffer* based analogies equating the presence of property and individuals.[40] The court stated that absent a U.S. Supreme Court mandate, there are compelling reasons to uphold transient jurisdiction. First, the elimination of transient jurisdiction would deny plaintiffs equal protection of their rights.[41] Second, some defendants have no identifiable place of residence where they may be served, and therefore they may avoid justice if they cannot be sued where they are found.[42] Third, since states provide some services for all persons, such as fire and police protection, fairness requires those persons also be amenable to that state's judicial system.[43]

## ANALYSIS

*Humphrey v. Langford*[44] is the most recent decision in a line of Georgia cases which have upheld the transient rule.[45] Com-

34. *Id.* at 3.

35. Brief for Appellant at 6, Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

36. *Id.*

37. GA. CODE ANN. § 15-202 (1971). "The jurisdiction of this state and its laws extend to all persons while within its limits, whether as citizens, denizens, or temporary sojourners." *Id.*

38. Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

39. Brief for Appellant at 5, Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

40. Humphrey v. Langford, 246 Ga. 732, 733, 273 S.E.2d 22, 23 (1980).

41. *Id.* at 734, 273 S.E.2d at 24.

42. *Id.*

43. *Id.* at 735, 273 S.E.2d at 24.

44. 246 Ga. 732, 273 S.E.2d 22 (1980).

45. McPherson v. McPherson, 238 Ga. 271, 232 S.E.2d 552 (1977) (defend-

mon law notwithstanding, the Georgia law is clear. By statute, a nonresident, by his mere presence in the state, is subject to the state's jurisdiction.[46] Even after *Shaffer*, the Georgia Supreme Court has upheld transient jurisdiction without questioning the sufficiency of due process for the defendant.[47] The *Humphrey* court evaluated the due process issue, and, nevertheless, upheld the transient rule.

Initially the court based its reasoning on *International Shoe v. Washington*.[48] Since *International Shoe* does not question the assertion of jurisdiction based on mere presence, it supports the *Humphrey* decision. *International Shoe* mandates a minimum contacts analysis only as an alternative to actual presence.[49] The minimum contacts test supplements the presence test by implying a fictional presence when sufficient minimum contacts are established.[50]

The post-*International Shoe* viability of the transient rule is evidenced by its application even in some unusual situations. The rule has been applied to grant state court jurisdiction over a person aboard an aircraft flying through navigable air space[51] and over a nonresident lunching in the forum state.[52] Another court simply upheld the rule as "black letter law"—arguments

---

ant served in a Georgia airport where he had stopped to change planes and meet his wife); Ward v. Ward, 223 Ga. 868, 159 S.E.2d 81 (1968) (jurisdiction over an Alabama citizen personally served while sojourning in Georgia); Miller v. Miller, 216 Ga. 535, 118 S.E.2d 85 (1961) (jurisdiction over a nonresident personally served while temporarily in Georgia).

46. GA. CODE ANN. § 15-202 (1971). *See* note 37 *supra*.

47. Chalfant v. Rains, 244 Ga. 747, 262 S.E.2d 63 (1979). Service was upheld on a Colorado resident in an alimony action filed by an Illinois resident. The defendant objected to jurisdiction on the basis that he was in Georgia on business unrelated to the suit. Alternatively, he argued that Georgia had no jurisdiction over a claim of alimony filed by a nonresident against a nonresident. The court rejected both arguments, stating that the latter related to subject matter jurisdiction, not personal jurisdiction. *Id.* at 748, 262 S.E.2d at 63.

48. 326 U.S. 310 (1945). *See* notes 14-15 and accompanying text *supra*.

49. 326 U.S. at 316.

50. Nordenberg, *supra* note 28, at 595. "Rather than superceding what had gone before, the minimum contacts test was created as a tool for further expansion of state court jurisdiction . . . based upon 'power over property,' and distinctions between in personam, in rem, and quasi in rem retained their vitality." *Id.*

51. Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959). *See* note 18 and accompanying text *supra*. In *Grace*, the court stated that a person moving in interstate commerce was present in the state regardless of the mode of transportation. While the court conceded that the defendant's presence in the state may be of a lesser duration in some cases, it was held to be a difference without a distinction. *Id.* at 447.

52. Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963). An Iowa resident employed by a village located partly in Iowa and partly in Minne-

that the rule violated the defendant's due process rights were dismissed as being unsupported by judicial authority.[53]

While the *Humphrey* decision fits comfortably within these post-*International Shoe* cases, it is significant for its construction of *Shaffer*. The *Humphrey* court limited the application of the *Shaffer* holding to intangible property therefore sustaining personal presence as a valid jurisdictional basis.[54] The Georgia court was not receptive to extending the *Shaffer* minimum contacts analysis to *in personam* jurisdiction.[55] Since jurisdiction based upon physical presence was not an issue in *Shaffer*, the *Humphrey* court simply saw no implication for transient jurisdiction resulting from *Shaffer*. However, given the strictures *Shaffer* placed on *quasi in rem* jurisdiction, an in depth analysis is required to support any decision favoring transient jurisdiction.

The *Humphrey* court provided little analysis, ignoring the support for the transient rule discussed in *Shaffer*. In part four of the *Shaffer* opinion, Justice Marshall refers to physical presence in evaluating the defendants' minimum contacts.[56] He suggests that actual presence is still the best contact and that if the defendants had been present in Delaware no minimum contacts analysis would be necessary. This language exempts transient jurisdiction from the opinion's earlier mandate for a minimum contacts analysis in every assertion of jurisdiction.[57]

More to the point, Justice Stevens' concurrence in *Shaffer* supported transient jurisdiction with his expectation argument.[58] He stated that by visiting a state a defendant knowingly

---

sota was served when he stopped for lunch on the side of the village located in Minnesota. The Minnesota Supreme Court upheld jurisdiction.

53. Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976). The defendant, a Vermont citizen, was served in New Hampshire while on business unconnected to the cause of action. The trial court held for the defendant but the Court of Appeals reversed, upholding jurisdiction.

54. *Civil Procedure—Concepts, supra* note 9, at 299.

55. Humphrey v. Langford, 246 Ga. 732, 733, 273 S.E.2d 22, 23 (1980).

56. Shaffer v. Heitner, 433 U.S. 186, 213 (1977).

> Appellants' holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants. If it exists, that jurisdiction must have some other foundation.
>
> *Appellee Heitner did not allege and does not now claim that appellants have ever set foot in Delaware* . . . . Nevertheless, he contends that appellants' positions as directors . . . provide sufficient contacts. . . .

*Id.* (emphasis added).

57. Nordenberg, *supra* note 28, at 630. The author suggests that the Court is indicating a preference for "traditional" contacts by restricting the application of the minimum contacts analysis. *Id.*

58. Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

assumes the risk that the state will exercise power over him. Hence, Stevens concluded, the due process requirement of fair notice is satisfied.

*Shaffer* insists upon a relationship, or nexus, between the forum, the subject matter and the parties, to insure the defendant sufficient notice.[59] It is questionable whether the nexus is required when there is actual presence. *Shaffer* poses no constitutional bar to the exercise of full *in personam* jurisdiction over corporations which meet the *International Shoe* formula of continuous activity in the forum.[60] In order to measure continuous activity, the "doing business" test has been used almost exclusively since *International Shoe* to establish jurisdiction when the cause of action is unrelated to the defendant's activity in the forum.[61] By statute, a foreign corporation is "doing business" in the forum state if it does such business as to render itself "present" in the state.[62] The doing business test has continued to be sufficient for *in personam* jurisdiction even after *Shaffer*.[63] Thus, the *Humphrey* court could have concluded that if the

---

> 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.

*Id.* (emphasis added).

59. Shaffer v. Heitner, 433 U.S. 186, 208 (1977). *See* Del. Code Ann., Tit. 10 § 366 (1975). Pursuant to this statute, plaintiff Heitner filed a motion for an order of sequestration of the defendant's Delaware stock. The defendants were notified of the pending action by both registered mail and by publication. Pursuant to the sequestration order approximately 82,000 shares of Greyhound stock having a value of $1.2 million were seized. No relationship of any kind was required between the property and the cause of action before jurisdiction was conferred. Probably because of this type of statute, Justice Marshall found the attachment of intangible property unconstitutional since the defendants would have no expectation of being haled into court. 433 U.S. at 216 (1977). *See* notes 22-25 and accompanying text *supra*.

60. Glen, *An Analysis of Mere Presence and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 610 (1978-79) [hereinafter cited as Glen]. *Contra*, Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 595 (1978-79). The author states that after *Shaffer* there is no longer any single link between the defendant and the forum state which will support jurisdiction without considering its significance to the cause of action.

61. GLEN, *supra* note 60, at 610.

62. R. LEFLAR, AMERICAN CONFLICTS LAW 58-59 (1968). *See* MISS. CODE ANN. §§ 79-1-27, 79-1-29 (1972). Mississippi law provides for service upon any corporation found doing business in Mississippi, whether the cause of action occurred in the state or not.

63. O'Connor v. Lee-Hy, 579 F.2d 194, 200-01 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978). In *O'Connor* the court held *quasi in rem* jurisdiction over a non-resident defendant's insurer in New York. *Shaffer* was distinguished by asserting that the action at bar was really against the insurer, not the insured. *Contra*, Rush v. Savchuk, 444 U.S. 320 (1980); *see* note 81 and accompanying text *infra*.

"nexus" is not required once a corporation has established its fictional presence via minimum contacts, then it should follow that a "nexus" is not required for an individual once actual presence is established.

The *Humphrey* court failed to note that the "nexus" requirement has been rejected even for *quasi in rem* jurisdiction. In *Feder v. Turkish Airlines*,[64] *quasi in rem* jurisdiction was allowed over a bank account established by the defendant although it was unrelated to the cause of action. Relying on Justice Stevens' expectation argument,[65] the *Feder* court rejected the defendant's claim that the mere presence of the account did not constitute the requisite contact mandated by *Shaffer*.[66]

It is unclear from either *Feder* or Justice Stevens whether the attachment of intangibles knowingly located in the forum state is an exception to *Shaffer* and thus indicates remaining vitality for the presence theory, or whether it is an application of a minimum contacts approach. The *Humphrey* court completely overlooked both of these arguments. If *Feder* is explained as an exception to *Shaffer* and justified by the state's power over property, the transient rule might survive in the *in personam* area.[67]

The *Humphrey* court could have cited some recent cases in support of transient jurisdiction.[68] Post-*Shaffer* support for the

---

64. 441 F. Supp. 1273 (S.D.N.Y. 1977). In *Feder*, a federal district court acquired *quasi in rem* jurisdiction in a wrongful death action against a foreign airline for a death which occurred in Turkey by plaintiff's attachment of the airline's New York bank account.

65. *See* note 61 and accompanying text *supra*.

66. Feder v. Turkish Airlines, 441 F. Supp. 1273, 1279 (S.D.N.Y. 1977).

> The case at bar cannot be compared to either *Harris* or *Shaffer*. The attachment in this case arises neither from the unpredictable visitations of [defendant's] debtor, nor from the statutory scheme of a state into which [the defendant] never set foot. The attachment arises from a commercial bank account which [the defendant] voluntarily opened in New York for the furtherance of its business. It is not necessary that the property attached be related to the underlying cause of action; jurisdiction *quasi in rem*, at least in [type II actions], requires no such showing.

*Id. Contra*, Majique Fashions Ltd. v. Warwick & Co., 96 Misc. 2d 808, 409 N.Y.S.2d 581 (1978). Relying on *Shaffer*, the court stated that the mere presence of property is insufficient for jurisdiction without a relationship with the litigation.

67. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 76 (1978).

68. Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 273 N.W.2d 285 (1979). Plaintiff, a Wisconsin corporation, sought to recover the amount of a debt owed by an Oklahoma corporation and an individual defendant, an agent of the corporation. Plaintiff served defendant, a nonresident, while defendant was temporarily in Wisconsin. *See also* Aluminal Indus., Inc. v. Newtown Commercial Assoc., No. 80 Civ. 1118 (S.D.N.Y. Nov. 20, 1980). The defendant was charged with negligently installing a sprinkler in Connecti-

transient rule is found in *Oxman's Erwin Meat Co. v. Blacketer*.[69] In dicta, the court stated that physical presence was not controlled by a minimum contacts analysis.[70] The facts of the case did not require a decision on the constitutionality of transient jurisdiction since the defendant was an agent whose activities fulfilled the minimum contacts requirements. The court analyzed jurisdiction under both mere presence and minimum contacts and found each standard satisfied.

Consistent with their treatment of *Shaffer*, the *Humphrey* court refused to consider the possible implications of other post-*Shaffer* cases relied upon by defendant Langford. The U.S. Supreme Court has emphasized a substantial shift from a mechanical application of minimum contacts towards a consideration of fairness to the defendant.[71] In another case, the U.S. Supreme Court has cautioned against the assertion of jurisdiction over a nonresident corporation when there is no expectation that the goods will enter the forum state.[72] It is argued that these cases evidence a trend of requiring substantial contact with the state and, therefore, transient jurisdiction fails because the contact is not substantial.[73]

Since none of these cases involved a defendant served in the forum, the *Humphrey* court quickly distinguished them. The court ignored the fact that these cases, nevertheless, place

---

cut. Plaintiffs are residents of Connecticut. Newtown is a limited partnership organized under New York law with its principle place of business in Florida. The court upheld service of process as the New York airport stating that the demise of the transient rule is unsupported by judicial authority.

69. 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

70. *Id.* at 687-88, 273 N.W.2d at 287. The court stated that *Shaffer* did not mandate a minimum contacts requirement for jurisdiction over a natural person personally served within the state.

71. Kulko v. Superior Court of Cal., 436 U.S. 84 (1978). The Court held that a nonresident does not acquire minimum contacts with California merely by permitting his minor daughter to go there to live with his estranged wife. Therefore, the wife, a California resident, could not assert *in personam* jurisdiction over the father who was in New York.

72. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). The Court denied Oklahoma state court jurisdiction over a New York corporation which did not do any business in Oklahoma. It was stated that the defendant's contacts with Oklahoma were not such that it could anticipate being haled into court there. The possibility that the defendant might derive revenue from a car ultimately used in Oklahoma was insufficient to confer jurisdiction.

*See* Sorg, *supra* note 16 at 144.

73. Brief for Appellee at 18. Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980). *See* Rush v. Savchuk, 444 U.S. 320 (1980). In *Rush*, the Court struck down *quasi in rem* jurisdiction obtained by attaching a nonresident's insurance proceeds. *Rush* belongs to the *Shaffer*-based line of decisions quashing jurisdiction obtained by the attachment of intangibles. It may be viewed as support for a required relationship between intangible property and the cause of action.

visible limitations upon the application of the minimum contacts test. In doing so, the court failed to intelligently rebut the arguments for requiring a relationship with the forum in addition to mere presence. The *Humphrey* court should have reasoned that while these cases signal a retrenchment from expanding jurisdiction via minimum contacts, their application to transient jurisdiction is tenuous.[74] If minimum contacts are used to construct a fictional presence, actual presence would seem to be outside the purview of its analysis.

The *Humphrey* opinion is inadequate, no matter how technically correct, to justify itself. In distinguishing *Shaffer*, the *Humphrey* decision rests on mere factual differences rather than analysis. The Georgia court made no attempt to ferret out the Supreme Court's attitude regarding *in personam* jurisdiction. Consequently, the decision never evaluates the transient rule *vis a vis* due process requirements.

## EFFECT AND POSSIBLE IMPACT

The *Humphrey* decision represents how firmly traditional power concepts are entrenched into American law. To date, no frontal attack on the transient rule has been successful. The *Humphrey* court's attitude is a good indication that states will not relinquish power over personal presence without a Supreme Court mandate.[75] Apparently, the state courts are psychologically unable to limit their own authority in civil actions while their criminal jurisdiction remains unquestioned. Additionally, there is a common sense appeal to the argument that even a mere visitor cannot accept a state's protection and services without accepting reciprocal responsibilities.[76]

Courts which continue to apply presence based jurisdiction will point to, as did *Humphrey*, its efficiency. As Powell suggested in *Shaffer*, the risk of an incorrect decision is small and outweighed by the reduced burden on the courts to examine an additional jurisdictional test.[77] Ultimately, it is difficult to distinguish between the constant and the occasional visitor.[78]

The *Humphrey* opinion ignored the possible inequities of maintaining transient jurisdiction after *Shaffer*. One commentator states the more limited *in rem* action will be measured by a

74. *See* note 57 and accompanying text *supra*.

75. Humphrey v. Langford, 246 Ga. 732, 734, 273 S.E.2d 22, 24 (1980).

76. 246 Ga. at 735, 273 S.E.2d at 24.

77. Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Powell, J., concurring). *See* Note, *Jurisdiction a Methodological Analysis: Implications for Presence and Domicile as Jurisdictional Bases*, 53 WASH. L. REV. 537, 553-54 (1978).

78. Humphrey v. Langford, 246 Ga. 732, 734, 273 S.E.2d 22, 24 (1980).

stricter due process standard than the broader *in personam* action.[79] Admittedly, if the transient rule is not abrogated, cases where presence is the only contact may produce some troublesome results. *Grace v. MacArthur*[80] is precisely the type of factual situation that reflects the rule's unforgiving nature. However, if the dearth of actual cases challenging the rule is indicative of the infrequency with which such cases arise, perhaps the critics have little to fear. If such assertions are rare, elimination of the rule would have little practical effect. Yet, by maintaining the rule, justice may be possible for certain difficult cases.[81]

Regardless of whether or not the transient rule survives *Shaffer*, the doctrine of *forum non conveniens* should continue to be used to promote fairness. The doctrine was initially formulated as an antidote to the transient rule and designed to limit the plaintiff's choice of forum without permitting the defendant to escape his obligations.[82] It should be remembered, however, that the court's use of the doctrine is discretionary, and unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum will rarely be disturbed.[83]

The *Humphrey* decision shows that the transient rule is alive and well in Georgia. As Mark Twain would say, the reports of its death have been greatly exaggerated. Until the Supreme Court mandates otherwise, it seems clear that a due process attack on transient jurisdiction will be unsuccessful. *Humphrey* is a warning to all would be defendants to watch where they are going.

*Margaret Mary Drewko*

---

79. Bernstine, *supra* note 28, at 65. The author suggests the continuance of transient jurisdiction will create an anomaly. An *in personam* action, which subjects the defendant to unlimited liability, will be applied with fewer contact requirements that an *in rem* action, which limits the defendant's laibility to the value of the property under the court's jurisdiction.

80. 170 F. Supp. 442 (E.D. Ark., 1959). *See* note 51 and accompanying text *supra*.

81. Humphrey v. Langford, 246 Ga. 732, 734, 273 S.E.2d 22, 24 (1980).

82. *See* Ehrenzweig, *supra* note 18, at 292. The author considers *forum non conveniens* as necessary to protect the defendant from the harshness of the transient rule.

83. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).