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Lockert v. Breedlove: The North Carolina Supreme Court Rejects the Minimum Contacts Analysis under the Transient Rule of Jurisdiction

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Lockert v. Breedlove: The North Carolina Supreme Court Rejects the Minimum Contacts Analysis Under the "Transient Rule" of Jurisdiction

If *Pennoyer v. Neff*[1] is a first-year law student's nightmare, it is no less challenging to practicing attorneys who must still contend with the decision's broad assertions of state sovereignty and its far-reaching effect on personal jurisdiction. The *Pennoyer* Court deemed service of process on nonresident defendants in the forum state sufficient to establish personal jurisidiction.[2] Although one commentator has since labeled this "transient rule" of jurisdiction a "pseudo-medieval" formula,[3] it is alive and well in North Carolina. In *Lockert v. Breedlove*[4] the North Carolina Supreme Court addressed whether the transient rule of jurisidiction was abolished or at least subject to the minimum contacts analysis after two post-*Pennoyer* decisions, *International Shoe Co. v. Washington*[5] and *Shaffer v. Heitner*.[6] The *Lockert* court held that the rule was neither abolished nor subject to the minimum contacts test in cases in which "the defendant is personally served while present within the forum state."[7]

This Note examines the *Lockert* decision in light of the history of the transient rule of jurisdiction, judicial interpretations of the purpose and scope of the rule, and recent challenges to its validity. The Note considers the probable impact of the decision and concludes that *Lockert* represents a misreading of the constitutional requirement of minimum contacts introduced in *International Shoe* and extended in *Shaffer*. As such, the *Lockert* decision undermines the due process rights of nonresident defendants.

Plaintiff Charles R. Lockert, a resident of Rowan County, North Carolina, brought suit in North Carolina to recover the balance due on a promissory note signed by nonresident defendants Billie E. Breedlove and Abed Zakaria.[8] Zakaria was never located or served for purposes of this action. On January 31, 1986, Breedlove was served with a copy of the summons and complaint while in Salisbury, North Carolina.[9] Breedlove filed a motion to dismiss pursuant to

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1. 95 U.S. 714 (1877).

2. The *Pennoyer* Court stated " '[w]here a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.' " *Id.* at 724 (quoting Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134)); *see also* 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.").

3. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 314 (1956). Ehrenzweig argues, "The American transient rule must . . . be said to lack precedent in the English tradition of the common law as to both of its alleged sources—the doctrine of physical power and the concept of the transitory action." *Id.* at 303.

4. 321 N.C. 66, 361 S.E.2d 581 (1987).

5. 326 U.S. 310 (1945).

6. 433 U.S. 186 (1977).

7. *Lockert*, 321 N.C. at 69, 361 S.E.2d at 583.

8. *Id.* at 67, 361 S.E.2d at 582.

9. *Id.* Defendant Breedlove was served pursuant to N.C. R. CIV. P. 4(j1).

Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and the due process clause of the fourteenth amendment.[10] She alleged lack of in personam jurisdiction "because she did not have sufficient minimum contacts with the State of North Carolina."[11] The trial court denied Breedlove's motion to dismiss, and the North Carolina Court of Appeals, without a written opinion, affirmed the trial court's order.[12] Breedlove appealed to the North Carolina Supreme Court and maintained that a state's exercise of in personam jurisdiction over a nonresident is subject to the *International Shoe* requirement that "certain 'minimum contacts' . . . exist between the nonresident defendant and the forum state."[13] Breedlove argued that "mere service of process within the forum state neither complies with nor supplants the constitutional requirement of minimum contacts."[14]

Breedlove's contention that "presence of a person in the forum state is not sufficient to confer jurisdiction upon its courts" presented the North Carolina Supreme Court with an issue of first impression.[15] The court noted that Breedlove was duly served pursuant to the North Carolina long-arm statute.[16] The court acknowledged, but rejected, decisions of other jurisdictions that made "sweeping pronouncements to the effect that minimum contacts analysis is required in all cases in which the defendant is a nonresident of the forum state."[17] Instead, the court relied on decisions which have held "the minimum contacts

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10. *Lockert*, 321 N.C. at 67, 361 S.E.2d at 582; N.C. R. CIV. P. 12(b)(2). The fourteenth amendment reads in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

11. *Lockert*, 321 N.C. at 67, 361 S.E.2d at 582. Breedlove did not argue that "process or manner of service was insufficient or that her presence in the state was procured by trick, fraud or deceit." *Id.*

12. Lockert v. Breedlove, 84 N.C. App. 701, 354 S.E.2d 34 (1987). The decision by the North Carolina Court of Appeals was reported without published opinion.

13. *Lockert*, 321 N.C. at 68, 361 S.E.2d at 583. Breedlove appealed pursuant to N.C. GEN. STAT. § 7A-30(1) (1986).

14. *Lockert*, 321 N.C. at 68, 361 S.E.2d at 583.

15. *Id.* The supreme court distinguished *Lockert* from cases in which it "has consistently applied the minimum contacts analysis articulated in *International Shoe* to cases in which nonresident defendants were served with process outside the forum state." *Id.*; *see, e.g.*, Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (requiring minimum contacts between non-resident defendant, served outside state, and forum); United Buying Group, Inc. v. Coleman, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979) (applying minimum contacts to determine validity of in personam jurisdiction over non-resident defendant served with process outside of forum).

16. N.C. GEN. STAT. § 1-75.4(1)(a) (1983). The North Carolina long-arm statute grants in personam jurisdiction over persons served in an action pursuant to Rule 4(j) or 4(j1) of the North Carolina Rule of Civil Procedure and "[i]n any action . . . in which a claim is asserted against a party who when service of process is made upon such party [i]s a natural person present within this State . . . ." *Id.*

17. *Lockert*, 321 N.C. at 68, 361 S.E.2d at 583; *see* Nehemiah v. Athletics Congress, 765 F.2d 42, 46 (3d Cir. 1985); Waffenschmidt v. Mackay, 763 F.2d 711, 721 (5th Cir. 1985), *cert. denied sub nom.* Waffenschmidt v. First Nat'l Bank, 474 U.S. 1056 (1986); Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 312 (N.D. Ill. 1986); Mohler v. Dorado Wings, Inc., 675 S.W.2d 404, 405 (Ky. Ct. App. 1984). For a discussion of these cases, see *infra* notes 47-60 and accompanying text.

test is inapplicable to cases in which the defendant is personally served within the forum state."[18] The court affirmed the lower courts' decisions and held that "the rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party."[19] The court defended its conclusion on two grounds.

First, the court noted the United States Supreme Court's recognition in *Pennoyer* that "eminent jurists long had agreed that personal jurisdiction could be acquired solely by service of process on the defendant in the forum state."[20] The Supreme Court's decisions in *International Shoe* and *Shaffer*, the court asserted, did not change the transient rule of jurisdiction.[21] The court acknowledged doubts expressed by some commentators subsequent to these decisions "as to whether the assertion of personal jurisdiction over nonresidents based solely on service of process upon them within the forum state was still proper."[22] The court, however, contended that *International Shoe* and its progeny "did not sound the death knell for the transient rule of jurisdiction; rather, these cases set out an *alternative means* of establishing personal jurisdiction when the defendant is 'not present within the territory of the forum.' "[23] The court concluded:

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18. *Lockert*, 321 N.C. at 69, 361 S.E.2d at 583; *see* Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264, 270 (5th Cir. 1985); Opert v. Schmid, 535 F. Supp. 591, 593-94 (S.D.N.Y. 1982); Aluminal Indus. v. Newtown Commercial Assocs., 89 F.R.D. 326, 329 (S.D.N.Y. 1980); Hutto v. Plagens 254 Ga. 512, 513, 330 S.E.2d 341, 342-43 (1985); Humphrey v. Langford, 246 Ga. 732, 733, 273 S.E.2d 22, 23 (1980); *In re* Marriage of Pridemore, 146 Ill. App. 3d 990, 992, 497 N.E.2d 818, 820 (1986). For a discussion of this approach, see *infra* notes 61-79 and accompanying text.

19. *Lockert*, 321 N.C. at 72, 361 S.E.2d at 585.

20. *Id.* at 69, 361 S.E.2d at 583. In *Pennoyer* the Court stated:

> [I]t is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Pennoyer, 95 U.S. at 722. For a discussion of *Pennoyer*, see *infra* notes 29-33 and accompanying text.

21. *Lockert*, 321 N.C. at 70, 361 S.E.2d at 584.

22. *Id.* at 69, 361 S.E.2d at 584; *see* Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 40 (1979-80); Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 613-14 (1979); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997, 1021 (1978); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1178-79 (1966). For discussions of the evolution of territorial jurisdiction, see Abrams & Dimond, *Toward a Constitutional Framework for the Control of State Jurisdiction*, 69 MINN. L. REV. 75, 77-83 (1984); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 413-429 (1981); Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1019-33, 1065-66 (1983); Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 103-107 (1971); Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282, 282-92 (1960); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1115-20 (1981); Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377, 377-83 (1985).

23. *Lockert*, 321 N.C. at 70, 361 S.E.2d at 584 (quoting *International Shoe*, 326 U.S. at 316) (emphasis added). The court referred to language in *International Shoe*: " '[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 . . . .' " *Lockert*, 321 N.C. at 70, 361 S.E.2d at 584 (quoting *International Shoe*, 326 U.S. at 316).

> Our research reveals no instance in which the Supreme Court has applied the "minimum contacts" requirement of *International Shoe* in a case in which the defendant was personally served while in the forum state . . . [and neither] *International Shoe* nor its progeny have questioned the constitutionality of a state's exercise of personal jurisdiction based solely on personal service within its borders.[24]

As a second rationale for upholding the transient rule, the *Lockert* court asserted that due process requirements—the defendant must have adequate notice of the suit and maintenance of the suit must be fair and just[25]—are met under the transient rule of jurisdiction. The court suggested adequate notice is met by actual service, and concluded that maintenance of the suit in the state in which the defendant is served "is entirely fair and just."[26] The court reasoned that a nonresident visiting another state " 'assume[s] some risk that the State will exercise its power over [her].' "[27] Emphasizing that "the venue is where the nonresident defendant is of [her] own volition and is served," the court held that jurisdiction over defendant was proper.[28]

Although the United States Supreme Court has not specifically addressed whether a minimum contacts analysis applies when nonresidents are personally served in the forum state, three significant Supreme Court decisions involving personal jurisdiction provide the conceptual framework for this debate. In *Pennoyer v. Neff*[29] the Court addressed whether in rem jurisdiction could be acquired by the attachment of defendant's property in the forum state.[30] The Court's holding—that such a procedure was sufficient to obtain jurisdiction—relied on Justice McLean's statement that " '[j]urisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within

24. *Lockert*, 321 N.C. at 71, 361 S.E.2d at 584-85. The court noted "the Supreme Court cases applying the *International Shoe* minimum contacts analysis have involved substituted process within the state, service of process outside of the state, or both." *Id.* at 70, 361 S.E.2d at 584; *see, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469 (1985) (service outside state; defendants appeared specially); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 412 (1984) (nonresident defendants served outside state and appeared specially); Calder v. Jones, 465 U.S. 783, 784 (1984) (service by mail outside state; defendants appeared specially); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980) (service outside state—defendants appeared specially); Hanson v. Denckla, 357 U.S. 235, 242 (1958) (nonresident defendants served by mail); McGee v. International Life Ins. Co., 355 U.S. 220, 221 (1957) (process served by mail at defendant's out-of-state place of business).

25. *Lockert*, 321 N.C. at 71, 361 S.E.2d at 585; *see International Shoe*, 326 U.S. at 316; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950).

26. *Lockert*, 321 N.C. at 71, 361 S.E.2d at 585.

27. *Id.* at 71, 361 S.E.2d at 585 (quoting *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring)). Justice Stevens, in his concurring opinion in *Shaffer*, argued that a nonresident assumes certain risks in entering a state: "If I visit another State . . . 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." 433 U.S. at 218 (Stevens, J. concurring). Thus, Stevens implied that a defendant's single visit to the forum state can establish the requisite minimum contacts for the exercise of personal jurisdiction.

28. *Lockert*, 321 N.C. at 71-72, 361 S.E.2d at 585.

29. 95 U.S. 714 (1877).

30. *Id.* at 720.

the jurisdiction of the court.' "[31] The *Pennoyer* Court found further support for this view of jurisdiction under the de facto powers of the states: "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[32] Thus, despite the Court's focus in *Pennoyer* on in rem jurisdiction, the Court approved the transient rule of jurisdiction that service on a nonresident defendant present within the forum state was sufficient for in personam jurisdiction.[33]

In 1945 the Supreme Court addressed whether personal jurisdiction could be exercised over persons outside the forum state. *International Shoe v. Washington*[34] involved service of process on a Delaware corporation employing salesmen in the State of Washington.[35] The Court announced that "due process requires . . . [that the non-resident defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[36] Because the corporation's activities in the forum state were regular and the corporation received the benefits and protection of the laws of the forum state, the Court found sufficient minimum contacts for the exercise of personal jurisdiction over the corporation.[37] Hence, the Court in *International Shoe* moved beyond *Pennoyer*'s traditional sovereignty approach to personal jurisidiction and focused, in its minimum contacts test, on the due process requirements necessary for a state's exercise of in personam jurisdiction.

Subsequently, in *Shaffer v. Heitner*[38] the Court extended the minimum contacts analysis to quasi in rem actions.[39] In *Shaffer* plaintiff filed a shareholders' derivative suit in Delaware and moved for sequestration of the nonresident defendants' stock.[40] The Court rejected the *Pennoyer* rule for in rem jurisdiction applied by the lower courts in this case and addressed the nonresident defendants' argument that their contacts with the forum state were insufficient to subject them to the state court's jurisidiction.[41] The Court held *International Shoe* controlled in rem, quasi in rem, and in personam jurisdiction over nonresident defendants: "[The] continued acceptance [of the *Pennoyer* rule] would serve only to allow state-court jurisdiction that is fundamentally unfair to the defend-

31. *Id.* at 724 (quoting Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850)).

32. *Id.* at 722.

33. *Id.* at 724. One commentator noted the *Pennoyer* "territorial power theory" allowed exercise of jurisdiction over transient nonresident defendants in a variety of situations. *See* Bernstine, *supra* note 22, at 44; *see, e.g.*, Grace v. MacArthur, 170 F. Supp. 442, 443 (E.D. Ark. 1959) (service of defendant in plane over forum state valid); Fitzhugh v. Reid, 252 F. 234, 235 (E.D. Ark. 1918) (defendant served while in forum state for medical treatment); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 105-06, 34 A. 714, 715 (1895) (service of defendant in forum state for a few hours on business valid under transient rule of jurisidiction); Peabody v. Hamilton, 106 Mass. 217, 217-18 (1870) (service of process on defendant on board steamer in Boston harbor sufficient).

34. 326 U.S. 310 (1945).

35. *Id.* at 313-14.

36. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

37. *Id.* at 320.

38. 433 U.S. 186 (1977).

39. *Id.* at 212.

40. *Id.* at 189.

41. *Id.* at 195-96.

ant. We therefore conclude that *all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[42] Whether *Shaffer* should be read broadly as a mandate for minimum contacts in *all* exercises of state jurisdiction remains unclear,[43] but it at least "potentially abolishes the traditional [*Pennoyer*] distinctions between in personam, in rem, and quasi in rem jurisdiction in favor of the minimum contacts approach."[44]

Although the Supreme Court has not commented on the status of the transient rule of jurisdiction after *International Shoe* and *Shaffer*, federal and state courts have grappled with the issue and relied largely on their respective interpretations of the *Pennoyer-International Shoe-Shaffer* trilogy.[45] Several jurisdictions require the minimum contacts test in all state exercises of jurisdiction.[46] In *Waffenschmidt v. Mackay*,[47] for example, the United States Court of Appeals for the Fifth Circuit announced a two-part test for determining the validity of in personam jurisdiction exercised by the forum state over nonresidents who had aided and abetted defendant's violation of a court injunction, but who were not parties to the suit. Validity of jurisdiction was to be determined, "first, through an examination of the inherent powers of a court, and second, through traditional in personam jurisdiction analysis under *International Shoe*."[48] Applying the first prong of the test, the court determined that the "traditional notions of due process [were] not offended" because foreseeability, relative convenience of the parties, and special interest of the forum court were met.[49] Without debate, the court assumed that *International Shoe* and its progeny mandated a second inquiry: a minimum contacts analysis to determine the propriety of jurisdiction in this instance.[50] In the court's view, *International Shoe* "expanded [the *Pen-*

42. *Id.* at 212 (emphasis added).

43. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 n.15 (1987) ("The Supreme Court's emphasis on minimum contacts in [*Shaffer v. Heitner*] can be read to cast doubt on the continuing validity of the transient rule.").

44. Bernstine, *supra* note 22, at 53.

45. *See* cases cited *supra* notes 17-18. Pre-*Shaffer* cases generally upheld the transient rule of jurisdiction without applying a minimum contacts analysis. *See, e.g.*, Donald Manter Co. v. Davis, 543 F.2d 419, 420 (1st Cir. 1976). In *Manter* the United States Court of Appeals for the First Circuit held that service on nonresident defendant in the forum state on unrelated business was sufficient. The court stated that *International Shoe* and its progeny dealt with "expanding jurisdiction beyond traditional limits, not with contracting it." *Id.*

46. *See* cases cited *supra* note 17. In Mohler v. Dorado Wings, Inc., 675 S.W.2d 404 (Ky. Ct. App. 1984), the Court of Appeals of Kentucky presumed, without even addressing the issue, that minimum contacts were required for the exercise of long-arm jurisdiction. *Id.* at 405. An agent of defendant, an airline company with neither assets nor employees in the forum state, was served with process in the forum state. *Id.* The court acknowledged that the long-arm statute "reach[ed] to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants," but added that the determination of the limits of due process is made by applying the minimum contacts test of *International Shoe*. *Id.*

47. 763 F.2d 711 (5th Cir. 1985), *cert. denied sub nom.* Waffenschmidt v. First Nat'l Bank of Vernon, 474 U.S. 1056 (1986).

48. *Id.* at 721.

49. *Id.* at 722. That the jurisdictional question in this case involved nonparties did not change the nature of the minimum contacts analysis applied by the appellate court from the analysis applied to nonresident parties to a suit.

50. *Id.* at 717.

noyer 'presence' requirement] by permitting jurisdiction if the person had sufficient minimum contacts . . . ."[51] The court found authority for the service of process on nonresidents in the forum state in the state's long-arm statute.[52] After finding the requisite grant of power, the court examined the nature and extent of the nonresidents' acts in the forum state and held the conduct of aiding and abetting established sufficient minimum contacts to satisfy due process requirements.[53]

The United States District Court for the Northern District of Illinois looked to *Shaffer* for authority that "[p]ersonal service within the jurisdiction is not the litmus test for proper in personam jurisdiction."[54] The court in *Harold M. Pitman Co. v. Typecraft Software Ltd.*[55] construed the *Shaffer* Court's "preference for 'assessing assertions of jurisdiction by a single standard' " as requiring "unequivocally" a minimum contacts test for "all assertions of state-court jurisdiction."[56] The nonresident defendant in *Pitman* was served in the forum state at a trade exhibition which, he argued, was his only connection with the forum state and did not constitute sufficient minimum contacts for the exercise of personal jurisdiction over him.[57] The court stated that plaintiff had the burden to "establish the existence of jurisdiction under [state] law, and . . . that exercise of jurisdiction over the defendant [would] not offend the due process clause of the fourteenth amendment."[58] Noting that *Shaffer* announced " 'the collapse of the in personam wing of *Pennoyer*,' "[59] the *Pitman* court held defendant's "transient presence . . . fail[ed] to amount to the minimum contacts required under the due process clause."[60]

In contrast, other jurisdictions have steadfastly adhered to the notion that "[p]hysical presence is the traditional basis of judicial jurisdiction" and by itself justifies the transient jurisdiction theory.[61] One of the earliest decisions discussed the rule of transient jurisdiction shortly after *Shaffer* had imposed a

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51. *Id.* at 722.

52. *Id.*

53. *Id.* at 722-23.

54. Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 312 (N.D. Ill. 1986).

55. 626 F. Supp. 305 (N.D. Ill. 1986).

56. *Id.* at 312 (quoting *Shaffer*, 433 U.S. at 212).

57. *Id.* at 307. The *Pitman* court relied on two cases. In Nehemiah v. Athletics Congress of the U.S.A., 765 F.2d 42 (3rd Cir. 1985), the Court of Appeals for the Third Circuit held that "due process considerations preclude effecting personal jurisdiction over an unincorporated association merely by in-state service on its agent." *Id.* at 46. The court in *Nehemiah* noted, but did not hold, that *Shaffer* probably extends to individuals served with process in the forum state as well. *Id.* at 46-47. *Pitman* also discussed Amusement Equip., Inc. v. Mordelt, 595 F. Supp. 125 (E.D. La. 1984), *rev'd*, 779 F.2d 264 (5th Cir. 1985), in which the U.S. District Court for the Eastern District of Louisiana held that "[t]he due process clause limits the state's jurisdictional reach" under both long-arm and transient jurisdiction. *Id.* at 128. However, this ruling was subsequently overturned by Amusement Equip., Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985), discussed *infra* notes 68-74 and accompanying text.

58. *Id.* at 308.

59. *Id.* at 312 (quoting *Shaffer*, 433 U.S. at 205).

60. *Id.* at 314. The court further held that "under *Shaffer*, mere service of process upon a defendant transiently present in the jurisdiction does not vest a state with personal jurisdiction over the defendant." *Id.* at 312.

61. Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 687, 273 N.W.2d 285, 286 (1979); *see supra* note 18.

"minimum contacts" requirement on personal service of a nonresident in the forum state.[62] In *Oxmans' Erwin Meat Co. v. Blacketer*[63] the Supreme Court of Wisconsin upheld jurisdiction over a nonresident officer of a corporation who was personally served in Wisconsin.[64] The court relied on pre-*Shaffer* cases[65] in support of its application of transient jurisdiction and added, "[n]either *International Shoe* nor its progeny, including the recent case of *Shaffer* . . . addresses the issue of the constitutionality of [the transient rule of jurisdiction]."[66] Significantly, however, the court continued, "[a]lthough we do not today hold the 'minimum contacts' rule . . . to be applicable . . . , we conclude that [defendant's] activities within [the forum state] fulfilled the 'minimum contacts' requirement."[67]

Similarly, in *Amusement Equipment, Inc. v. Mordelt*[68] the United States Court of Appeals for the Fifth Circuit held "the rule of transient jurisdiction has life left in it yet."[69] Plaintiff in *Mordelt* served the nonresident defendant at a business convention both were attending in the forum state.[70] The court of appeals noted these facts "plunged . . . [the court] into the purgatory of transient jurisdiction" but nevertheless held it was "unwilling . . . to ferry this rule across the river Styx."[71] The court observed the cases in which the Supreme Court required the minimum contacts analysis involved either substituted process within the forum state or service of process outside the state.[72] By negative implication, the court concluded that minimum contacts was not required in cases involving service on nonresident defendants within the forum state and added, "When the defendant is present within the forum state, notice of the suit through proper service of process is all the process to which he is due."[73] Further, the court attempted to define the competing roles of state sovereignty and due process limitations on that power:

> That the requirement of personal jurisdiction rests in all cases on the due process clause does not weaken the proposition that the exercise of jurisdiction, as distinguished from its limitation, is a sovereign act. If there is anything that characterizes sovereignty, it is the state's domin-

62. *Blacketer*, 86 Wis. 2d at 687-88, 273 N.W.2d at 287.

63. 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

64. *Id.* at 686, 273 N.W.2d at 286.

65. *See id.* at 687 n.3, 273 N.W.2d at 287 n.3. The court said, "[w]e have found only two cases in which this issue is directly addressed. In both the validity of 'transient' jurisdiction was upheld." *Id.* The court then cited two pre-*Shaffer* cases. *See* Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976); Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963).

66. *Blacketer*, 86 Wis. 2d at 688, 273 N.W.2d at 287.

67. *Id.* at 688, 273 N.W.2d at 287.

68. 779 F.2d 264 (5th Cir. 1985).

69. *Id.* at 271.

70. *Id.* at 265.

71. *Id.* The district court found that "the rule of transient jurisdiction has suffered a fate akin to that of . . . dinosaurs" and dismissed the action. *Id.* (citing Amusement Equip., Inc. v. Mordelt, 595 F. Supp. 125, 125 (E.D. La. 1984), *rev'd*, 779 F.2d 264 (5th Cir. 1985)). The Court of Appeals for the Fifth Circuit countered, "While *Shaffer* may have rendered the black letter gray, we do not think the letter of the law has become so pale that it can be read only with conjurer's glasses." *Id.* at 268.

72. *Mordelt*, 779 F.2d at 268.

73. *Id.* at 270.

> ion over its territory and those within it. Fairness does not operate in a vacuum. To abstract it from context and elevate it blindly over sovereign prerogatives is ultimately to free the individual from the obligations inherent in a statist system.[74]

The transient rule of jurisdiction has also been justified by the voluntary nature of the nonresident defendant's entry into the forum state. In *In Re Marriage of Pridemore*[75] the Appellate Court for the Fourth District of Illinois held jurisdiction proper over defendant personally served when he visited the forum state to attend his parent's fiftieth wedding anniversary celebration.[76] The court noted that defendant was not "induced by artifice, trick or fraud to enter the State for the sole purpose of being served with process."[77] Hence the court reaffirmed the "long-standing principle that service of process on a nonresident person who is physically present in the State, albeit briefly, is a sufficient basis for *in personam* jurisdiction."[78]

In *Lockert* the North Carolina Supreme Court relied on this latter line of cases recognizing the transient rule of jurisdiction and opposing application of a minimum contacts analysis to nonresident defendants served with process in the forum state.[79] Similarly, the court relied on several arguments including the inherent fairness of serving process on a defendant who appears in the forum state of his own volition,[80] the traditional state sovereignty argument approved in *Pennoyer*,[81] and the absence of any explicit mandate by the United States Supreme Court on the validity of the transient jurisdiction rule.[82] Further, the court cited *Humphrey v. Langford*,[83] in which the Georgia Supreme Court provided additional "compelling reasons to uphold [transient] jurisdiction":[84]

> We believe that it is not practical to have classifications of sojourners in the state. Where does a court draw the line . . . ? Some individuals are constant or perennial sojourners. Some have no identifiable place of residence. Still others are able to avoid personal service by remaining away from an otherwise identifiable place of abode. Others to avoid a responsibility can terminate on a moment's notice a legal residence and otherwise disrupt the judicial process. Others can terminate residence in a forum favorable to the plaintiff and establish residence in a forum considered favorable to the defendant. . . . If they cannot be sued where they are found, they may not be sued at all.[85]

This justification, coupled with the North Carolina Supreme Court's effort

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74. *Id.*
75. 146 Ill. App. 3d 990, 497 N.E.2d 818 (1986).
76. *Id.* at 991, 497 N.E.2d at 819.
77. *Id.* at 993, 497 N.E.2d at 820.
78. *Id.* at 992, 497 N.E.2d at 820.
79. *Lockert*, 321 N.C. at 69, 361 S.E.2d at 583.
80. *Id.* at 71, 361 S.E.2d at 585.
81. *Id.* at 69, 361 S.E.2d at 583.
82. *Id.* at 70-71, 361 S.E.2d at 584.
83. 246 Ga. 732, 273 S.E.2d 22 (1980). Defendant, a resident of South Carolina, went bowling in Georgia and while there, was served with a summons and complaint. *Id.*
84. *Id.* at 734, 273 S.E.2d at 24.
85. *Id.*

to read *International Shoe* and *Shaffer* as distinguishable alternatives for other kinds of jurisdiction,[86] allowed the court in *Lockert* to fashion narrowly a literal interpretation of due process and widely miss the mark of fairness.

The court neither erred in its interpretation of *Pennoyer* nor misapplied the law in the cases on which it relied. The validity of these cases, however, is questionable. Three decisions cited pre-*Shaffer* cases and either did not address *Shaffer* or summarily dismissed the case in a cursory review.[87] In *Mordelt*,[88] for example, the district court had argued that "[i]nsofar as the transient jurisdiction doctrine runs afoul of the minimum contacts test . . . the doctrine, and its obsolete theoretical underpinnings, must give way."[89] The best argument the United States Court of Appeals for the Fifth Circuit could muster against this ruling was that neither *International Shoe* nor *Shaffer* involved service of process within the state.[90] Both *Mordelt* and *Lockert* further relied on *Aluminal Industries, Inc. v. Newtown Commercial Assocs.*[91] as post-*Shaffer* evidence "of continuing validity of transient jurisdiction;"[92] Yet *Aluminal* relied largely on the pre-*Shaffer* case *Donald Manter Co. v. Davis*.[93] Subsequently, the Third Circuit disapproved of *Aluminal* because of its lack of analysis.[94] *Lockert* also referred to *Opert v. Schmid*,[95] in which the United States District Court for the Southern District of New York similarly, and without analysis, found that *Shaffer* was inapplicable because it was not a case in which defendant was personally served within the jurisdiction.[96] Arguably such authority falls short of strong, well-reasoned support for transient jurisdiction.

Apart from claims that *Shaffer* must be read broadly and that United States Supreme Court silence could as easily be construed as approval of an all-inclusive minimum contacts test after *Shaffer*, the most persuasive argument for applying a minimum contacts analysis to transient jurisdiction situations is the inequitable result of *not* applying the analysis. The court in *Pitman v. Typecraft Software Ltd.* highlighted the illogic of a transient jurisdiction rule without minimum contacts limitation.[97] The court convincingly identified the inconsistency of requiring minimum contacts for in rem and quasi in rem jurisdiction, but not for in personam jurisdiction:

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86. *Lockert*, 321 N.C. at 70, 361 S.E.2d at 584. The court stated that "[*International Shoe*] set out an alternative means of establishing personal jurisdiction . . . ." *Id.*

87. *See* Amusement Equip., Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985); Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982); Aluminal Indus. v. Newtown Commercial Assocs., 89 F.R.D. 326 (S.D.N.Y. 1980).

88. 779 F.2d 264 (5th Cir. 1985). For a discussion of *Mordelt*, see *supra* notes 68-74 and accompanying text.

89. *Mordelt*, 595 F. Supp. 125, 128 n.3 (E.D. La. 1984), *rev'd*, 779 F.2d 264 (5th Cir. 1985).

90. *Mordelt*, 779 F.2d at 268.

91. 89 F.R.D. 326 (S.D.N.Y. 1980).

92. *Mordelt*, 779 F.2d at 268 n.8.

93. 543 F.2d 419 (1st Cir. 1976). For a discussion of *Manter*, see *supra* note 45.

94. *See* Nehemiah v. Athletics Congress of the U.S.A., 765 F.2d 42, 46 (3d Cir. 1985). For a discussion of *Nehemiah*, see *supra* note 57.

95. 535 F. Supp. 591 (S.D.N.Y. 1982).

96. *Id.* at 594.

97. 626 F. Supp. 305, 313 (N.D. Ill. 1986).

> Under *Shaffer*, a court may not sequester a defendant's property and assert in rem or quasi in rem jurisdiction unless there are minimum contacts between the defendant, the litigation and the forum. Were the court to hold that minimum contacts need not be present in the jurisdiction when served, the court would thereby accord less protection to an individual defendant than to his or her property within the state. Surely the *Shaffer* Court did not intend such an illogical and unfair result.[98]

One commentator has argued that a nonresident defendant's presence in the forum state should be only one factor in determining whether a court may exercise in personam jurisdiction: "[I]f due process means fairness based on the existence of minimum contacts . . . it would appear that in personam jurisdiction, grounded solely upon mere physical presence, is inconsistent with the holding in *Shaffer* . . . ."[99]

The result of such inherent unfairness is obvious. The recurrent charge is that the transient rule of jurisdiction subjects defendants to suits in jurisdictions where "no part of the operative facts occurred and in which neither of the parties lives."[100] While plaintiffs' rights should be protected as well, the minimum contacts test is uniquely concerned with a defendant's connection to the forum state such that the maintenance of the suit does not violate those rights afforded her under the due process clause.[101] Mere presence in a state does not answer the *International Shoe* requirements of " 'fair play and substantial justice' "[102] under the minimum contacts test and, without more, would often subject a defendant to the burdens due process rights were specifically designed to guard against.

Choice of law problems may further complicate litigation in a forum state in which defendant's presence is the only connection. If the litigation results in the application of a nonforum state's law, "the forum may not be 'in a favorable position to deal intelligently either with the facts or with the law.' "[103] This

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98. *Id.* The court added, "[T]ransient jurisdiction may [also] constitute an unwarranted and undesirable burden on commerce." *Id.*; *see infra* note 105 and accompanying text.

99. Bernstine, *supra* note 22, at 66. Bernstine offers the following example:

> [I]t would be somewhat odd that a nonresident defendant, whose property is located in the forum, would not be subject to jurisdiction there because his property does not give rise to sufficient minimum contacts, while another nonresident defendant, who owns no property in the forum, does no business in the state, and does not otherwise avail himself of the state's benefits and protection, will nevertheless be subject to the court's jurisdiction merely because of his transient presence.

Id.

100. W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 100 (1942).

101. In *International Shoe* the Supreme Court stated:

> [N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due 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."

326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

102. *Id.*

103. Ehrenzweig, *supra* note 3, at 290 (quoting Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 438 (1929)).

argument prompted one commentator to suggest that the transient rule of jurisdiction, if not abolished, should at least be replaced by the doctrine of forum non conveniens as a way of dealing with the inequities.[104] Absent such a bold move, *Shaffer* must be read broadly, as it was intended, to ensure the fairness requirement is met in all exercises of state court jurisdiction.

In addition to the immediate impact of the rule of transient jurisdiction on defendant's due process rights, *Pitman* suggested one further ramification of the rule's use: it may "constitute an unwarranted and undesirable burden on commerce."[105] Ironically, this burden would affect not only individuals who fear becoming defendants in an inconvenient forum with which they have relatively little contact, but also individuals or corporations seeking to do business with residents outside their forum state. That a tangential relationship of mere presence in a state can serve as the basis for jurisdiction may produce a chilling effect that far outweighs any "protection" the rule ostensibly affords to potential plaintiffs.

A clear mandate from the United States Supreme Court on the status of the transient rule of jurisdiction would be welcome. Barring such a ruling, however, the Court's silence should not necessarily be construed as approval for a *Pennoyer*-based approach to jurisdiction, because the intervening years have produced numerous decisions casting doubt on the sovereignty justification for personal service within the forum state without more. Legislative reform of the statutes governing jurisdiction would likewise "minimize the problem by limiting the choice of the forum on rational grounds to one having such contacts with the case as will justify the application of the chosen forum's own law."[106] However, the probability of such action is unlikely as long as courts uphold the erroneous assumption that transient jurisdiction is a valid exercise of state power. Perhaps, as one commentator noted, the rule will be subsumed by its exceptions.[107] A more workable solution is for state courts to look beyond *Pennoyer* and pre-*Shaffer* cases to the recent changes in and justifications for jurisdictional basis. Courts should recognize that the rule's role has been limited to a factor in determining the proper scope of in personam jurisdiction, and acknowledge the applicability of the minimum contacts test so that the purpose of due process—fairness to the parties—may be achieved.

The transient rule of jurisdiction, which arose out of *Pennoyer*, has never

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104. *See* Bernstine, *supra* note 22, at 66. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the Supreme Court stated the principle of forum non conveniens that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* at 507.

105. 626 F. Supp. at 313.

106. Ehrenzweig, *supra* note 3, at 292.

107. *Id.* at 312. Ehrenzweig prophesied,

> [T]he transient rule . . . is most easily explainable as a relic of the *Pennoyer* rule which declares [personal service within the state] to be *required* for the establishment of personal jurisdiction. Once this requirement, breaking down under an increasing number of "exceptions," ceases to be valid, its creature the transient rule may have reached the end of its course and left the way open for a new approach, satisfying new needs.

Id.

been affirmed explicitly by the Supreme Court. Arguably, the rule is no more than a remnant of our historical and legal past, and the trend since *International Shoe* and *Shaffer* away from the *Pennoyer* emphasis on state sovereignty, should undermine support for continued application of the rule. If it is not obsolete, the rule is at least contrary to due process; those courts that recognize transient jurisdiction severely erode due process rights to which defendants are entitled. The North Carolina Supreme Court in *Lockert* has chosen to perpetuate this anomaly. In doing so, it has contravened directly the due process mandate of *International Shoe* and *Shaffer*.

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