INTERNATIONAL SHOE CO. v. WASHINGTON

Supreme Court of the United States, 1945.
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.

Appeal from the Supreme Court of the State of Washington.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, * * * and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. The contributions are a specified percentage of the wages payable

annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by respondents. Section 14(c) of the Act, Wash.Rev.Stat.1941 Supp., § 9998–114c, authorizes respondent Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice. * * *

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion and ruled that respondent Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. * * * Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce.

* * * Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On

occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. * * * The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. * * *

Appellant * * * insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. * * * And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff * * *. But now 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." Milliken v. Meyer * * *. See Holmes, J., in McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458. * * *

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact * * *, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in Hutchinson v. Chase & Gilbert * * *. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. * * *

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. * * * Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. * * * To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity * * *, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. * * *

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372, other such acts, because of their nature and

quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Cf. Kane v. New Jersey * * *; Hess v. Pawloski * * *. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. * * * But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. * * *

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. * * * Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. * * *

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. * * *

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of

substituted service adopted there gives reasonable assurance that the notice will be actual. * * *

Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit in personam to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax. * * *

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

BURNHAM v. SUPERIOR COURT

Supreme Court of the United States, 1990.
495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631.

Certiorari to the Court of Appeal of California, First Appellate District.

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE KENNEDY join, and in which JUSTICE WHITE joins with respect to Parts I, II–A, II–B, and II–C.

The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.

I

Petitioner Dennis Burnham married Francie Burnham in 1976 in West Virginia. In 1977 the couple moved to New Jersey, where their two children were born. In July 1987 the Burnhams decided to separate. They agreed that Mrs. Burnham, who intended to move to California, would take custody of the children. Shortly before Mrs. Burnham departed for

California that same month, she and petitioner agreed that she would file for divorce on grounds of "irreconcilable differences."

In October 1987, petitioner filed for divorce in New Jersey state court on grounds of "desertion." Petitioner did not, however, obtain an issuance of summons against his wife and did not attempt to serve her with process. Mrs. Burnham, after unsuccessfully demanding that petitioner adhere to their prior agreement to submit to an "irreconcilable differences" divorce, brought suit for divorce in California state court in early January 1988.

In late January, petitioner visited southern California on business, after which he went north to visit his children in the San Francisco Bay area, where his wife resided. He took the older child to San Francisco for the weekend. Upon returning the child to Mrs. Burnham's home on January 24, 1988, petitioner was served with a California court summons and a copy of Mrs. Burnham's divorce petition. He then returned to New Jersey.

Later that year, petitioner made a special appearance in the California Superior Court, moving to quash the service of process on the ground that the court lacked personal jurisdiction over him because his only contacts with California were a few short visits to the State for the purposes of conducting business and visiting his children. The Superior Court denied the motion, and the California Court of Appeal denied mandamus relief, rejecting petitioner's contention that the Due Process Clause prohibited California courts from asserting jurisdiction over him because he lacked "minimum contacts" with the State. The court held it to be "a valid jurisdictional predicate for *in personam* jurisdiction" that the "defendant [was] present in the forum state and personally served with process." * * * We granted certiorari. * * *

II

A

The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, * * * and was made settled law by Lord Coke * * * [in 1612]. Traditionally that proposition was embodied in the phrase *coram non judice*, "before a person not a judge"—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. * * * In Pennoyer v. Neff, * * * we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each

State's authority. * * * In what has become the classic expression of the criterion, we said in International Shoe Co. v. Washington, * * * that a state court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate " 'traditional notions of fair play and substantial justice.' " * * * Since *International Shoe,* we have only been called upon to decide whether these "traditional notions" permit States to exercise jurisdiction over absent defendants in a manner that deviates from the rules of jurisdiction applied in the 19th century. We have held such deviations permissible, but only with respect to suits arising out of the absent defendant's contacts with the State. * * * The question we must decide today is whether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him.

B

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit. * * * That view had antecedents in English common-law practice, which sometimes allowed "transitory" actions, arising out of events outside the country, to be maintained against seemingly nonresident defendants who were present in England. * * * Justice Story believed the principle, which he traced to Roman origins, to be firmly grounded in English tradition * * *.

Recent scholarship has suggested that English tradition was not as clear as Story thought * * *. Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted. * * *

Decisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there. * * * Although research has not revealed a case deciding the issue in every State's courts, that appears to be because the issue was so well settled that it went unlitigated. * * * Particularly striking is the fact that, as far as we have been able to determine, *not one* American case from the period (or, for that matter, not one American case until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction. Commentators were also seemingly unanimous on the rule. * * *

This American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government—if one disregards (as one must for this purpose) the few opinions since 1978 that have erroneously said, on grounds similar to those that petitioner presses here, that this Court's due process decisions render the practice unconstitutional. * * * We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction. Many recent cases reaffirm it. * * *

C

Despite this formidable body of precedent, petitioner contends, in reliance on our decisions applying the *International Shoe* standard, that in the absence of "continuous and systematic" contacts with the forum, * * * a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum. This argument rests on a thorough misunderstanding of our cases.

The view of most courts in the 19th century was that a court simply could not exercise *in personam* jurisdiction over a nonresident who had not been personally served with process in the forum. * * *

* * * In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresident individuals and corporations. * * * States required, for example, that nonresident corporations appoint an in-state agent upon whom process could be served as a condition of transacting business within their borders, * * * and provided in-state "substituted service" for nonresident motorists who caused injury in the State and left before personal service could be accomplished * * *. We initially upheld these laws under the Due Process Clause on grounds that they complied with *Pennoyer*'s rigid requirement of either "consent," * * * or "presence" * * * As many observed, however, the consent and presence were purely fictional. * * * Our opinion in *International Shoe* cast those fictions aside and made explicit the underlying basis of these decisions: Due process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*. The validity of assertion of jurisdiction over a nonconsenting defendant who is not present in the forum depends upon whether "the quality and nature of [his] activity" in relation to the forum * * * renders such jurisdiction consistent with " 'traditional notions of fair play and substantial justice.' " * * * Subsequent cases have derived from the *International Shoe* standard the general rule that a State may dispense with in-forum personal service on nonresident defendants in suits arising out of their activities in the State. * * *

Nothing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks

to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. That proposition is unfaithful to both elementary logic and the foundations of our due process jurisprudence. The distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental * * *. The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by *analogy* to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

D

Petitioner's strongest argument, though we ultimately reject it, relies upon our decision in Shaffer v. Heitner * * *.

It goes too far to say, as petitioner contends, that *Shaffer* compels the conclusion that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the State. *Shaffer*, like *International Shoe*, involved jurisdiction over an *absent defendant*, and it stands for nothing more than the proposition that when the "minimum contact" that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation. Petitioner wrenches out of its context our statement in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" * * *. When read together with the two sentences that preceded it, the meaning of this statement becomes clear * * *. *Shaffer* was saying * * * not that all bases for the assertion of *in personam* jurisdiction (including, presumably, in-state service) must be treated alike and subjected to the "minimum contacts" analysis of *International Shoe;* but rather that *quasi in rem* jurisdiction, that fictional "ancient form," and *in personam* jurisdiction, are really one and the same and must be treated alike—leading to the conclusion that *quasi in rem* jurisdiction, *i.e.*, that form of *in personam* jurisdiction based upon a "property ownership" contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of *International Shoe*. The logic of *Shaffer*'s holding—which places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact—does not compel the conclusion that physically present defendants must be treated identically to absent ones. As we have demonstrated at length, our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction. *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum," * * * and nothing in *Shaffer* expands that requirement beyond that.

It is fair to say, however, that while our holding today does not contradict *Shaffer*, our basic approach to the due process question is different. We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase "*traditional notions* of fair play and substantial justice" makes clear. *Shaffer* did conduct such an independent inquiry, asserting that " 'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." * * * Perhaps that assertion can be sustained when the "perpetuation of ancient forms" is engaged in by only a very small minority of the States. Where, however, as in the present case, a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is "no longer justified." * * * For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. * * * But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

III

A few words in response to Justice Brennan's opinion concurring in the judgment: It insists that we apply "contemporary notions of due process" to determine the constitutionality of California's assertion of jurisdiction. * * * The "contemporary notions of due process" applicable to personal jurisdiction are the enduring "*traditional* notions of fair play and substantial justice" established as the test by *International Shoe*. By its very language, that test is satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied in the United States.

But the concurrence's proposed standard of "contemporary notions of due process" requires more: It measures state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just. Authority for that seductive standard is not to be found in any of our personal jurisdiction cases. It is, indeed, an outright break with the test of "traditional notions of fair play and substantial justice," which would have to be reformulated "*our* notions of fair play and substantial justice."

The subjectivity, and hence inadequacy, of this approach becomes apparent when the concurrence tries to explain *why* the assertion of jurisdiction in the present case meets its standard of continuing-American-tradition-*plus*-innate-fairness. Justice Brennan lists the "benefits" Mr. Burnham derived from the State of California—the fact that, during the few days he was there, "[h]is health and safety [were] guaranteed by the

State's police, fire, and emergency medical services; he [was] free to travel on the State's roads and waterways; he likely enjoy[ed] [in original] the fruits of the State's economy." * * * Three days' worth of these benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is "fair" for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody over his children. * * * It would create "an asymmetry," we are told, if Burnham were *permitted* (as he is) to appear in California courts as a plaintiff, but were not *compelled* to appear in California courts as defendant; and travel being as easy as it is nowadays, and modern procedural devices being so convenient, it is no great hardship to appear in California courts. * * * The problem with these assertions is that they justify the exercise of jurisdiction over *everyone, whether or not* he ever comes to California. The only "fairness" elements setting Mr. Burnham apart from the rest of the world are the three days' "benefits" referred to above—and even those do not set him apart from many other people who have enjoyed three days in the Golden State * * * but who were fortunate enough not to be served with process while they were there and thus are not (simply by reason of that savoring) subject to the general jurisdiction of California's courts. * * * In other words, even if one agreed with Justice Brennan's conception of an equitable bargain, the "benefits" we have been discussing would explain why it is "fair" to assert general jurisdiction over Burnham-returned-to-New-Jersey-after-service only at the expense of proving that it is also "fair" to assert general jurisdiction over Burnham-returned-to-New-Jersey-*without*-service—which we *know* does not conform with "contemporary notions of due process."

There is, we must acknowledge, one factor mentioned by Justice Brennan that *both* relates distinctively to the assertion of jurisdiction on the basis of personal in-state service *and* is fully persuasive—namely, the fact that a defendant voluntarily present in a particular State has a "reasonable expectatio[n]" that he is subject to suit there. * * * By formulating it as a "reasonable expectation" Justice Brennan makes that seem like a "fairness" factor; but in reality, of course, it is just tradition masquerading as "fairness." The only reason for charging Mr. Burnham with the reasonable expectation of being subject to suit is that the States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory. That continuing tradition, which anyone entering California should have known about, renders it "fair" for Mr. Burnham, who voluntarily entered California, to be sued there for divorce—at least "fair" in the limited sense that he has no one but himself to blame. Justice Brennan's long journey is a circular one, leaving him, at the end of the day, in complete reliance upon the very factor he sought to avoid: The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition.

* * * Suppose, for example, that a defendant in Mr. Burnham's situation enjoys not three days' worth of California's "benefits," but 15 minutes' worth. Or suppose we remove one of those "benefits"—"enjoy[ment of] the fruits of the State's economy"—by positing that Mr. Burnham had not come to California on business, but only to visit his children. Or suppose that Mr. Burnham were demonstrably so impecunious as to be unable to take advantage of the modern means of transportation and communication that Justice Brennan finds so relevant. Or suppose, finally, that the California courts lacked the "variety of procedural devices" * * * that Justice Brennan says can reduce the burden upon out-of-state litigants. One may also make additional suppositions, relating not to the absence of the factors that Justice Brennan discusses, but to the presence of additional factors bearing upon the ultimate criterion of "fairness." What if, for example, Mr. Burnham were visiting a sick child? Or a dying child? * * * Since, so far as one can tell, Justice Brennan's approval of applying the in-state service rule in the present case rests on the presence of *all* the factors he lists, and on the absence of any others, every different case will present a different litigable issue. Thus, despite the fact that he manages to work the word "rule" into his formulation, Justice Brennan's approach does not establish a rule of law at all, but only a "totality of the circumstances" test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence. It may be that those evils, necessarily accompanying a freestanding "reasonableness" inquiry, must be accepted at the margins, when we evaluate *non*traditional forms of jurisdiction newly adopted by the States * * *. But that is no reason for injecting them into the core of our American practice, exposing to such a "reasonableness" inquiry the ground of jurisdiction that has hitherto been considered the very *baseline* of reasonableness, physical presence.

The difference between us and Justice Brennan has nothing to do with whether "further progress [is] to be made" in the "evolution of our legal system." * * * It has to do with whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court. Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the "traditional notions of fairness" that this Court applies may change. But the States have overwhelmingly declined to adopt such limitation or abandonment, evidently not considering it to be progress. The question is whether, armed with no authority other than individual Justices' perceptions of fairness that conflict with both past and current practice, this Court can compel the States to make such a change on the ground that "due process" requires it. We hold that it cannot.

Because the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process, the judgment is

Affirmed.

JUSTICE WHITE, concurring in part and concurring in the judgment.

I join Parts I, II–A, II–B, and II–C of Justice Scalia's opinion and concur in the judgment of affirmance. The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment. * * *

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, concurring in the judgment.

I agree with Justice Scalia that the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State. I do not perceive the need, however, to decide that a jurisdictional rule that " 'has been immemorially the actual law of the land,' " * * * automatically comports with due process simply by virtue of its "pedigree." * * * Unlike Justice Scalia, I would undertake an "independent inquiry into the * * * fairness of the prevailing in-state service rule." * * * I therefore concur only in the judgment.

I

I believe that the approach adopted by Justice Scalia's opinion today—reliance solely on historical pedigree—is foreclosed by our decisions in International Shoe Co. v. Washington * * * and Shaffer v. Heitner * * *. * * * The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. * * * I agree with this approach and continue to believe that "the minimum-contacts analysis developed in *International Shoe* ... [in original] 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," * * * [Shaffer v. Heitner, p. 169, supra].

While our *holding* in *Shaffer* may have been limited to *quasi in rem* jurisdiction, our mode of analysis was not. Indeed, that we were willing in *Shaffer* to examine anew the appropriateness of the *quasi in rem* rule—until that time dutifully accepted by American courts for at least a century—demonstrates that we did not believe that the "pedigree" of a jurisdictional practice was dispositive in deciding whether it was consistent with due process. * * * If we could discard an "ancient form without substantial modern justification" in *Shaffer*, * * * we can do so again. Lower courts, commentators, and the American Law Institute all have interpreted *International Shoe* and *Shaffer* to mean that *every* assertion of state-court jurisdiction, even one pursuant to a "traditional" rule such as transient jurisdiction, must comport with contemporary notions of due

process. Notwithstanding the nimble gymnastics of JUSTICE SCALIA's opinion today, it is not faithful to our decision in *Shaffer*.

II

Tradition, though alone not dispositive, is of course *relevant* to the question whether the rule of transient jurisdiction is consistent with due process. * * * Tradition is salient not in the sense that practices of the past are automatically reasonable today; indeed, under such a standard, the legitimacy of transient jurisdiction would be called into question because the rule's historical "pedigree" is a matter of intense debate. The rule was a stranger to the common law and was rather weakly implanted in American jurisprudence "at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted." * * * For much of the 19th century, American courts did not uniformly recognize the concept of transient jurisdiction, and it appears that the transient rule did not receive wide currency until well after our decision in Pennoyer v. Neff * * *.

Rather, I find the historical background relevant because, however murky the jurisprudential origins of transient jurisdiction, the fact that American courts have announced the rule for perhaps a century * * * provides a defendant voluntarily present in a particular State *today* "clear notice that [he] is subject to suit" in the forum. * * * [Thus, t]he transient rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process. * * *

By visiting the forum State, a transient defendant actually "avail[s]" himself * * * of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access to its courts. * * * Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant. * * *

The potential burdens on a transient defendant are slight. " '[M]odern transportation and communications have made it much less burdensome for a party sued to defend himself' " in a State outside his place of residence. * * * That the defendant has already journeyed at least once before to the forum—as evidenced by the fact that he was served with process there—is an indication that suit in the forum likely would not be prohibitively inconvenient. Finally, any burdens that do arise can be ameliorated by a variety of procedural devices. For these reasons, as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process. * * *

In this case, it is undisputed that petitioner was served with process while voluntarily and knowingly in the State of California. I therefore concur in the judgment.

JUSTICE STEVENS, concurring in the judgment.

As I explained in my separate writing, I did not join the Court's opinion in Shaffer v. Heitner * * * because I was concerned by its unnecessarily broad reach. * * * The same concern prevents me from joining either Justice Scalia's or Justice Brennan's opinion in this case. For me, it is sufficient to note that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case.* Accordingly, I agree that the judgment should be affirmed.

* Perhaps the adage about hard cases making bad law should be revised to cover easy cases.

ALDERMAN v. BALTIMORE & OHIO R. CO.

United States District Court, Southern District of West Virginia, 1953.
113 F.Supp. 881.

MOORE, CHIEF JUDGE. Plaintiff * * * brings this action against defendant, * * * to recover for personal injuries sustained by her as a result of the derailment of one of defendant's trains near Adrian, West Virginia, on February 14, 1952.

Plaintiff was not a fare-paying passenger. She was traveling on a trip pass, which afforded her free transportation * * *. The following conditions were printed on the pass: "In consideration of the issuance of this free pass, I hereby assume all risk of personal injury and loss of or of damage to property from whatever causes arising, and release the company from liability therefore, and I hereby declare that I am not prohibited by law from receiving free transportation and that this pass will be lawfully used."

Plaintiff in her original complaint charged defendant with negligence in the maintenance of its tracks and the operation of its train. After a pretrial conference, at which the legal effect of the release from liability contained in the pass was discussed, plaintiff filed an amended complaint charging defendant with wilful or wanton conduct.

On the basis of the amended pleadings and supporting affidavits filed by defendant, defendant moved for summary judgment under Rule 56 * * *.

It is undisputed that the derailment was caused by a break in one of the rails as the train was passing over the track. It is also shown by defendant's affidavits, and not denied, that the break in the rail was due to a transverse fissure inside the cap of the rail, which broke vertically under the weight of the train; that such a fissure is not visible upon inspection; that such defects occur in both new and old rails; and that a visual inspection was in fact made of this particular rail the day preceding the accident and the defect was not discovered.

Since plaintiff was an intrastate passenger, and since the accident occurred in West Virginia, the law of West Virginia governs both the effect to be given to the release and the degree of care which defendant owed plaintiff. * * *

However, counsel have been unable to direct the Court's attention to, and the Court has not found, any West Virginia decision which has determined the effect which a release from liability contained in a pass has upon the carrier's duty to the holder of such a pass. * * *

Since the Federal statute and the West Virginia statute authorizing the issuance of free passes are similar, 49 U.S.C.A. § 1(7), and W.Va.Code, Ch. 24, Art. 3, § 4, it is pertinent to examine the United States Supreme Court decisions construing the Federal statute. The Supreme Court has held that a carrier may contract against liability for negligent injury to

one who accepts a free pass * * *; but that for reasons of public policy it cannot relieve itself of liability for wilful or wanton acts. * * *

I am therefore of [the] opinion that the sole duty imposed upon defendant under the facts of this case was to refrain from wilfully or wantonly injuring plaintiff.

In Kelly v. Checker White Cab, Inc., 131 W.Va. 816 at page 822; 50 S.E.2d 888 at page 892, the West Virginia court, quoting from 29 Cyc. 510 said:

"In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. * * *"

The substance of plaintiff's contention that defendant wilfully injured her is that defendant used old and obsolescent rails in its tracks, knowing that the use of these rails made derailments reasonably probable. It is charged that defendant used old rails because the cost of derailments was less than the cost of replacing the old rails, and that for this reason defendant was willing to take the risk of derailments.

I am of opinion that the complaint fails to state sufficient facts to substantiate a charge of wilfulness, as that term is defined by the West Virginia court. It is clear that plaintiff has stated a charge of negligence; but that is not the test in this case. To establish wilfulness it would be necessary to charge that defendant knew of this particular defect in the rail; that the defect would probably result in a break in the rail if the train were run over it, causing a derailment of the train; and that defendant, with this knowledge of existing conditions, and the likelihood or probability of an injury resulting from its conduct, intentionally drove its train over the defective rail with an indifference to the consequences. The undenied affidavits of defendant show clearly that plaintiff cannot establish these facts.

At the hearing of this motion, counsel for plaintiff moved for a continuance of the hearing to enable him to substantiate a newspaper report to the effect that defendant was using old and obsolescent rails in its tracks because the cost of derailments was cheaper than the cost of replacing the rails. The motion was denied since this contention, even if it were true, merely has a bearing on an issue of negligence, and not upon the question of wilful conduct. Plaintiff does not contend that she can establish that defendant knew of the particular defect in the rail that caused the derailment.

For the reasons stated above, defendant's motion for summary judgment will be sustained. * * *

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.